



Hogan  
Lovells

# Public Takeovers in Germany

Newsletter 2024

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# 1. Introduction

Welcome to the seventh edition of our newsletter “Public Takeovers in Germany”. It provides a market overview of public takeovers carried out in Germany in 2023 in accordance with the German Securities Acquisition and Takeover Act (“**WpÜG**”) and of recent developments in German public takeover law.

As a globally 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 2023 under the WpÜG. This overview is based on the data-base 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 third section of this newsletter, we showcase in more detail what we consider the most noteworthy public takeover bids of the past calendar year in Germany. In 2023, this undoubtedly were (i) the takeover offer and the subsequent delisting purchase offer regarding va-Q-tec AG by Fahrenheit AcquiCo GmbH and (ii) the largest takeover in terms of offer volume in 2023, i.e. the takeover of Vitesco Technologies Group AG by Schaeffler AG.

Finally, we discuss current legal developments which are relevant for the German public takeover market. This newsletter first discusses the judgement issued by the German High Court of Justice (*Bundesgerichtshof*, hereinafter “**BGH**”) on 13 December 2022 (Case No. II ZR 9/21; II ZR 14/21 – “Postbank II”) on the attribution of voting rights in the case of protection of interest clauses in the context of the takeover of Deutsche Postbank AG by Deutsche Bank AG. Furthermore, we discuss the judgment of the BGH of 23 May 2023 (Case No. II ZR 219/21), in which the BGH classified a compensation agreement concluded by the bidder with a shareholder of STADA in connection with the STADA Arzneimittel AG takeover in 2017 as a price-relevant subsequent acquisition within the meaning of sec. 31 para. 5 and 6 WpÜG. We also discuss the fact that BaFin has changed its administrative practice and now also publishes non-consideration decisions pursuant to sec. 36 WpÜG prior to the acquisition of control. Finally, we summarize the most important takeover law implications of the German Financing for the Future Act (*Zukunftsfinanzierungsgesetz*) (in force since 11 December 2023, Federal Law Gazette 2023 I No. 354).



## 2. Statistics

### 2.1 Overview – Market trends

In 2023, the public takeover market in Germany showed the following trends:

- Last year saw the second-lowest level of activity in the German takeover market in the comparative period of the last eight years, with 20 public takeover bids – same as for the years 2017 and 2022.
- The offer volume of EUR 15.41 billion fell to the lowest level in the comparative period of the last eight years.
- The average offer premium of 16.95% in relation to the weighted three-month average price prior to the offer announcement has decreased by almost half compared to the previous year. Most bidders offered an offer premium of between 0.1% and 10%.
- This year, the industrial sector has reached its highest level of activity in the comparative period of the last eight years and, together with the technology sector, recorded the highest number of takeover bids in 2023.
- In two thirds of all takeover bids, the management board and supervisory board recommended accepting the offer, which corresponds to the average trend in recent years. In contrast, the proportion of neutral statements has risen again to the comparatively high figure of around a quarter.
- Almost two thirds of public takeovers were carried out by foreign investors who made public offers directly or via a German transaction vehicle.

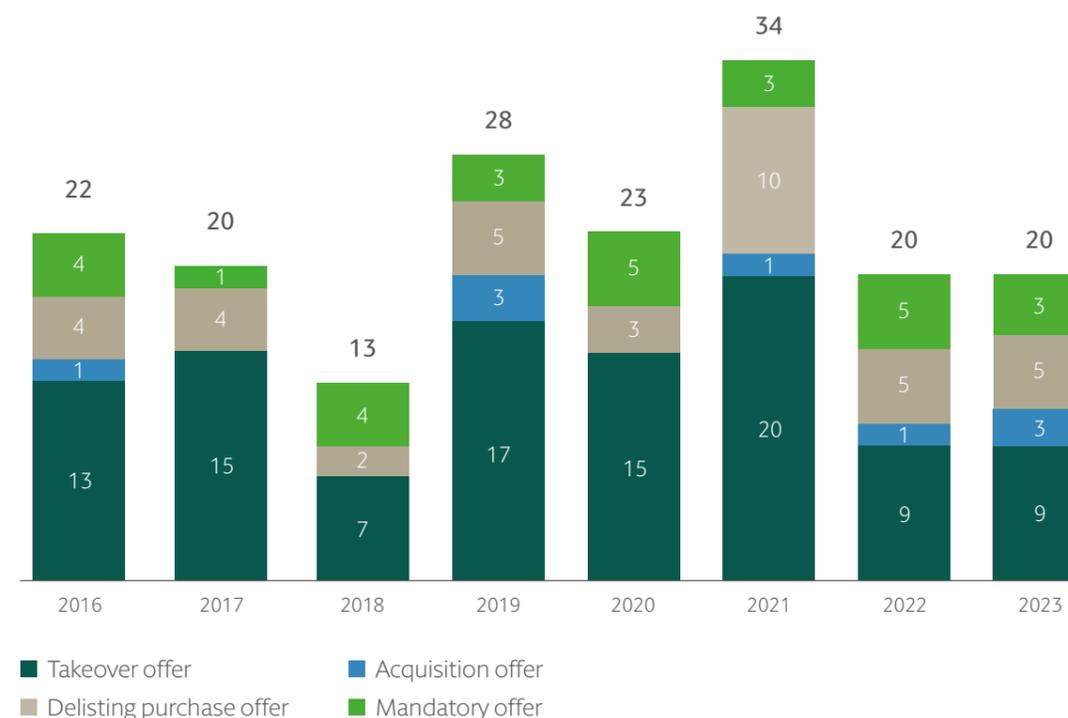
### 2.2 Public takeovers and offer types

By the end of 2023, there were a total of 20 public offers in Germany. Within the period of the last eight years, last year (together with 2017 and 2022) marked the second lowest level of activity in the German public takeover market.

Once again, most of the offers made in 2023 were takeover offers. The number of mandatory offers slightly decreased compared to the previous year with three offers, while the number of acquisition offers slightly increased. As in the previous year, a quarter of the offers (quantity of 5) were delisting purchase offers. In 2023, not only were five independent delisting purchase offers published, but of the nine takeover offers and three mandatory offers, respectively one was

combined with a delisting purchase offer (for statistical purposes, the combinations with delisting purchase offers were qualified as takeover offers or mandatory offers).

All public offers in 2023 were made by way of a cash offer.



## 2.3 Offer volume

The total volume of offers in 2023 amounted to EUR 15.41 billion, the lowest level in the comparative period of the last 8 years.

At EUR 3.76 billion, the acquisition offer by Schaeffler AG to the shareholders of Vitesco Technologies Group AG accounted for by far the largest share of the offer volume. The two offers made by Fahrenheit AcquiCo GmbH to the shareholders of va-Q-tec AG were included twice in the statistics for 2023 (first a successful takeover offer with a volume of EUR 0.35 billion and then an equally successful delisting purchase offer with a volume of EUR 0.1 billion). Following its takeover offer to the shareholders of Vantage Towers AG in 2022, Oak Holdings GmbH subsequently submitted a further offer in 2023 in the form of a delisting tender offer with an offer volume of EUR 1.74 billion.

Furthermore six other public offers in the large cap segment (determined on the basis of market capitalization, see section 2.4) with the following offer volumes are worth being highlighted in 2023:

- the takeover offer by Mosel BidCo GmbH to the shareholders of Software AG (EUR 2.6 billion);
- the takeover offer by Port of Hamburg Beteiligungsgesellschaft AG to the shareholders of Hamburger Hafen Logistik AG (EUR 1.32 billion);
- the acquisition offer in the form of a partial offer by Telefónica Local Services GmbH to the shareholders of Telefónica Deutschland Holding AG (EUR 1.29 billion);
- the acquisition offer by Ephios Luxembourg S.à r.l. to the shareholders of SYNLAB AG (EUR 1.27 billion);
- the takeover offer by SWOCTEM GmbH to the shareholders of Klöckner & Co. SE (EUR 0.68 billion); and
- the delisting purchase offer by Atlantic BidCo GmbH to the shareholders of Aareal Bank AG (EUR 0.2 billion).



## 2.4 Developments in the market segments

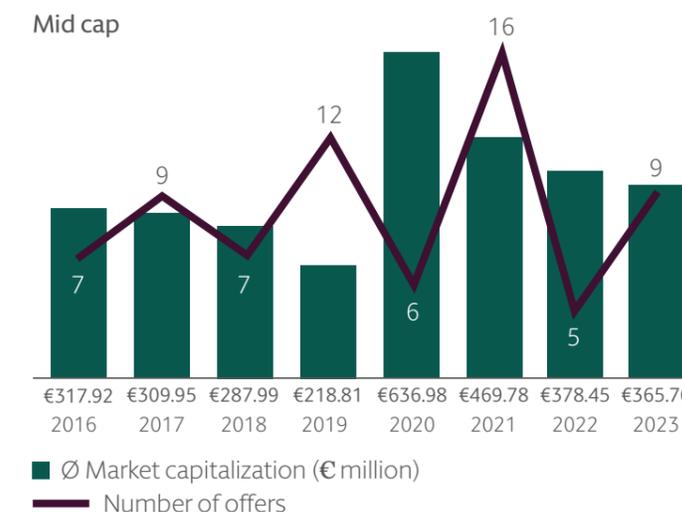
The market segments are defined as follows based on the respective market capitalization of the target company:

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

With eight takeovers in the large cap sector, the number of offers has slightly increased compared to the previous year. In contrast, the average market capitalization in the large cap sector in 2023 at EUR 4.56 billion remains roughly at the previous year's level (EUR 4.72 billion).

With nine takeover offers in the mid cap segment, the amount has almost doubled compared to the previous year, but without approaching the highest values from 2020 and 2021. On the contrary, the average market capitalization has fallen steadily since 2020 to EUR 365.7 million. However, it still remains above the levels of the years 2016 to 2019.

The small cap segment was unable to keep up with the increased takeover activity in the large and mid cap segment compared to the previous year. Only three takeover offers took place in this market segment, which represents the lowest value in the comparative period together, along with the year 2018. Despite the low number, the average market capitalization is significantly high at EUR 30.71 million.

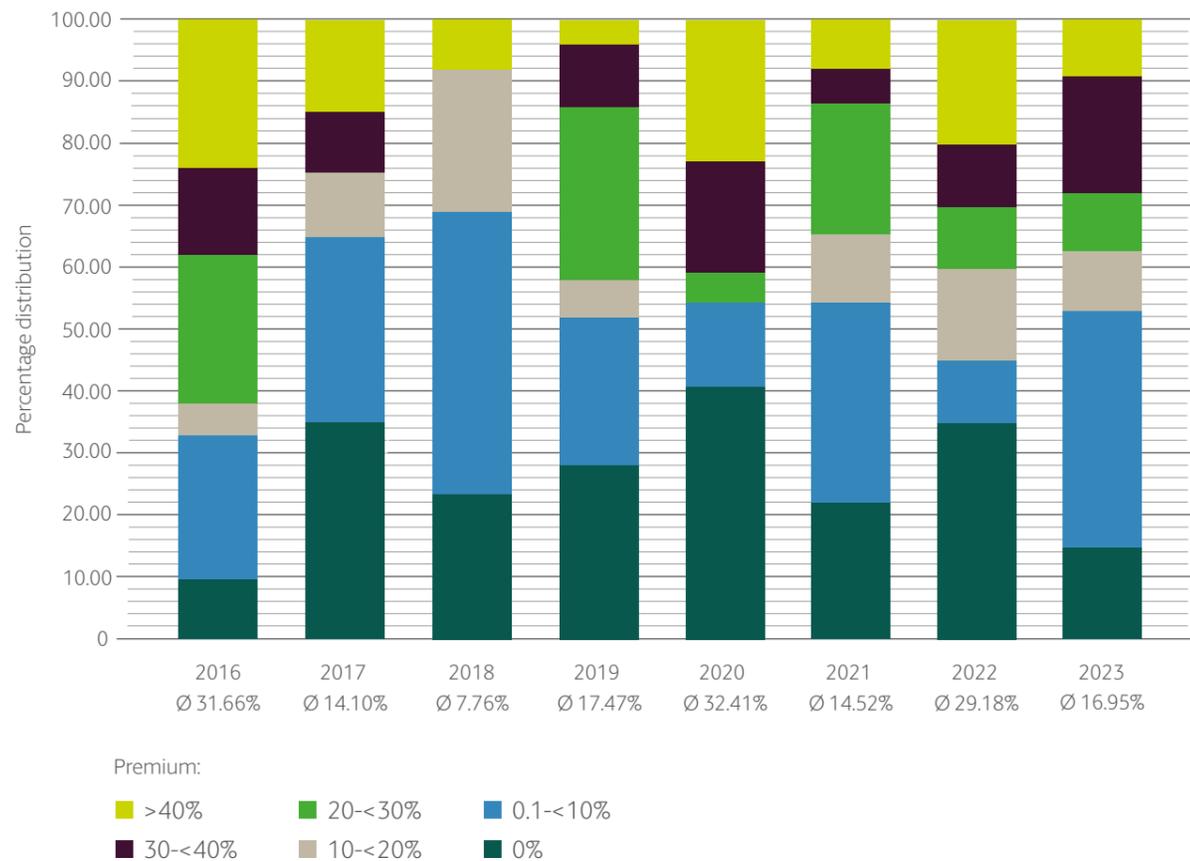


## 2.5 Offer premiums

The chart below shows the offer premium in relation to the mandatory 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 2023 amounted to 16.95%. This represents a significant decrease compared to the previous year (29.18%). It is also worth mentioning in this context that the percentage of offer premiums between 0.1% and 10% has risen sharply compared to the previous year. With the exception of the further significant increase in premiums between 30% and 40%, all other areas decreased compared to the previous year.

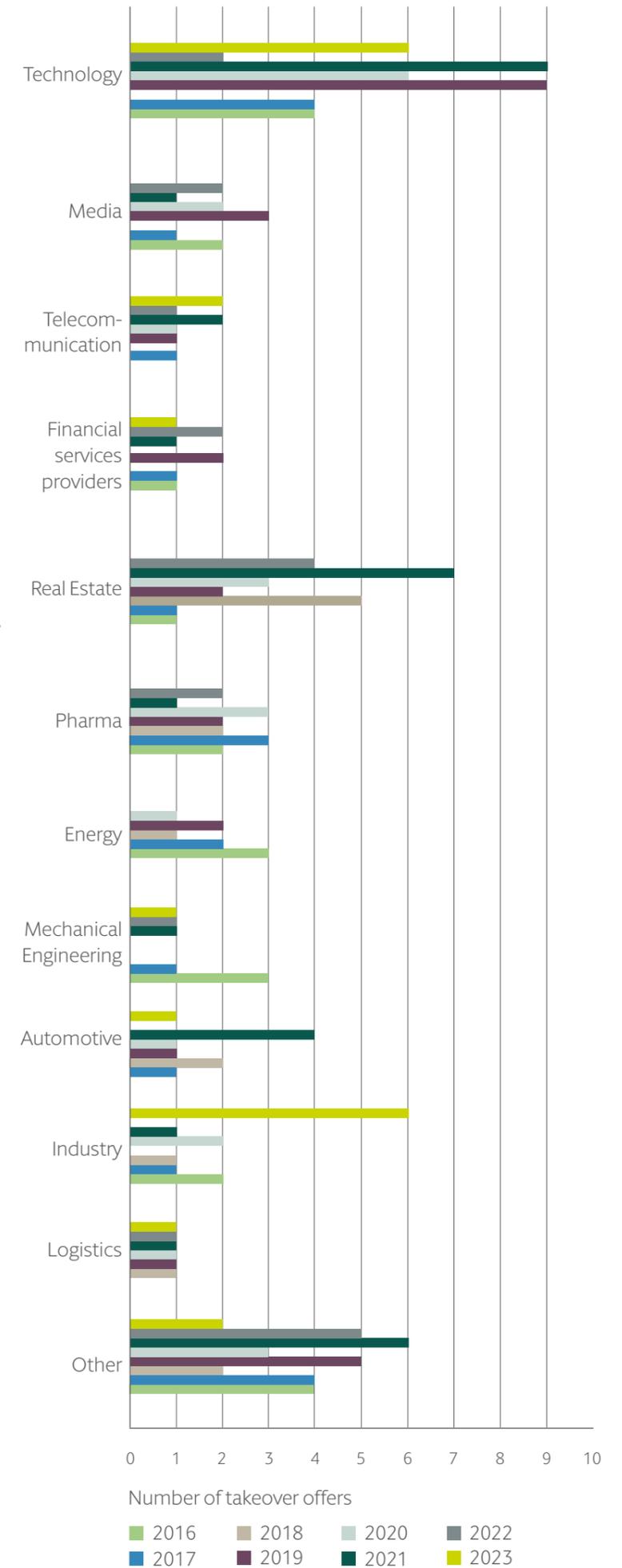
Last year, around 52% of offers included a premium of up to 10%, which is roughly equivalent to the level of the past four years. About 19% of bids included a premium of between 10% and 30%. The percentage of premiums of more than 30% has remained almost the same compared to the previous year, whereas the percentage of premiums of more than 40% has decreased significantly.



## 2.6 Takeovers by sector

The low level of activity in the takeover market in 2023 hit the real estate sector the hardest. While this sector previously recorded the highest level of activity in the entire comparative period in 2022, there were no public takeovers in the real estate sector this year. In contrast, the industrial sector with six offers reached its highest value in the entire comparative period. The technology sector, which has been hit hardest by the crises of 2022 in the previous year, has now recovered and, along with the industrial sector, recorded the most takeover offers in 2023.

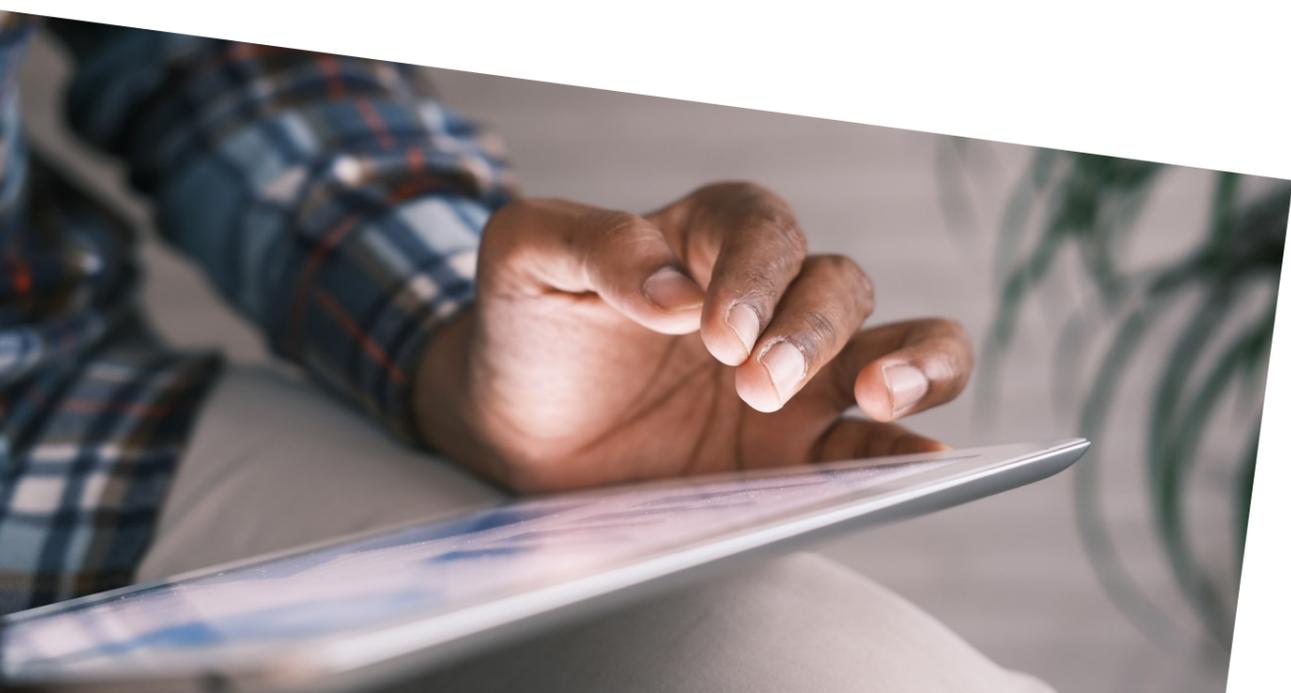
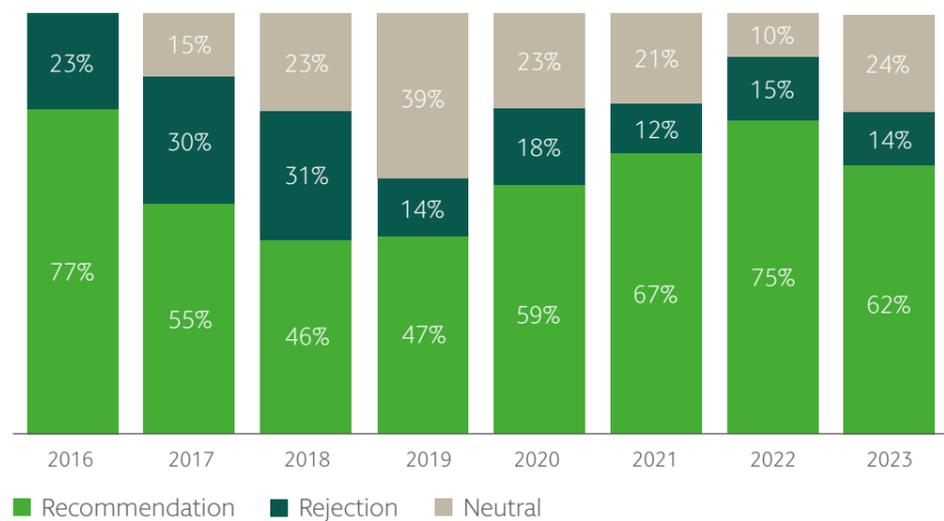
The telecommunications sector with only two public takeovers follows far behind. The remaining sectors are barely or not at all represented. No public takeovers were recorded in the media, pharmaceutical and energy sectors.



## 2.7 Management board and supervisory board statements

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

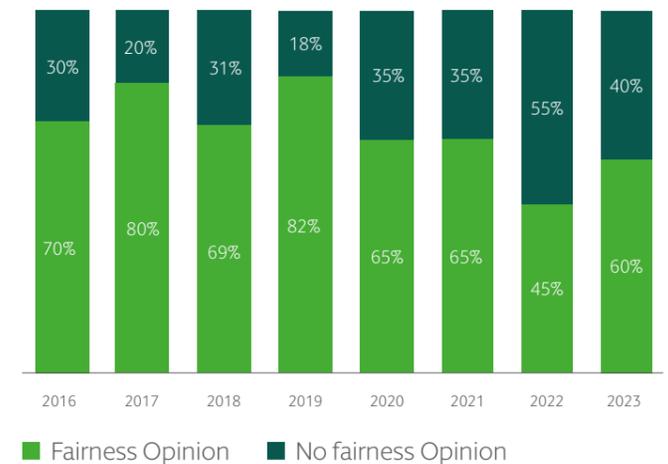
In 2023, 62% of the statements recommended accepting the offer, whereas 14% recommended rejecting it. Therefore, the trend observed since 2018 of a steady increase in the proportion of recommendations has not been confirmed; instead, a decrease has been recorded for the first time since 2018. Meanwhile, the proportion of neutral opinions reached its second-highest level in the entire comparative period at 24%. However, it is particularly noteworthy that in three cases, despite the fairness of the offer price being verified, a neutral opinion was issued. The management board and supervisory board had mainly addressed long-term investors and were neither able to recommend nor advise against accepting the offer.



## 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.

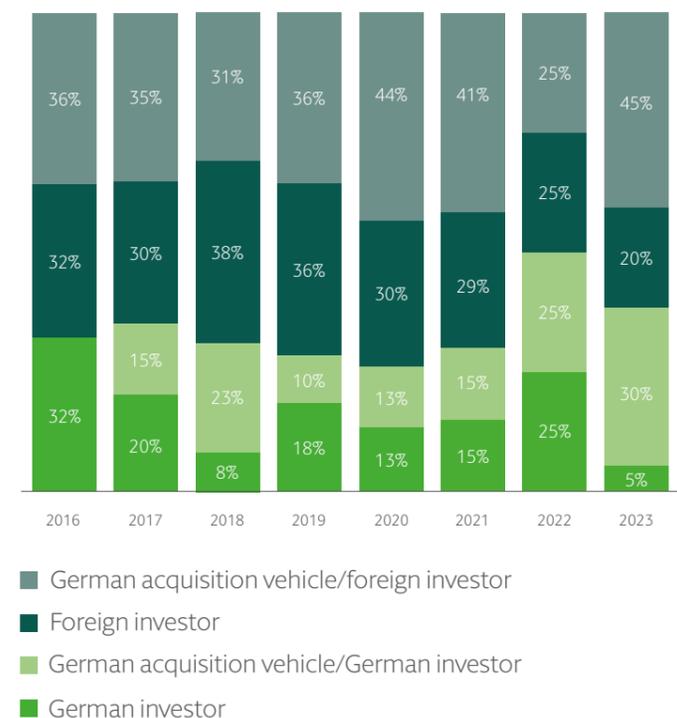
In 2023, management boards and supervisory boards obtained an external fairness opinion for 60% of the offers. This is a significant increase compared to the previous year, but the second-lowest figure within the period of the last eight years. The statistics also contain two instances in which the management board and supervisory board refrained from obtaining a (current) fairness opinion due to a lack of any significant financial changes, as an offer had previously been submitted by the same bidder for which a fairness opinion had already been obtained. This was the case with the delisting purchase offers (i) made by Fujitsu ND Solutions AG to the shareholders of GK Software SE in May 2023 and (ii) made by Atlantic Bidco GmbH to the shareholders of Aareal Bank AG in October 2023.



## 2.9 Origin of the investors

In 2023, there was a significant increase in foreign investors: 65% of offers were issued by foreign investors who published an offer either directly or via a German transaction vehicle. German investors, on the other hand, predominantly used a German transaction vehicle. With only one offer from an operating bidder, which is the acquisition offer by Schaeffler AG to the shareholders of Vitesco Technologies Group AG, the proportion of German investors who did not use a transaction vehicle has reached its lowest level in the entire comparative period.

In contrast to the previous year, there is once again a recognizable trend for the majority of published offers to come from foreign investors. The trend of the previous year, in which the proportion of domestic investors reached its maximum level for the first time in the entire comparative period, was therefore not confirmed in 2023.



## 3. Profile

### 3.1 Acquisition offer by Schaeffler AG to shareholders of Vitesco Technologies Group AG

On 15 November 2023, Schaeffler AG (hereinafter “**Schaeffler**”) published a voluntary public acquisition offer by way of a cash offer to the shareholders of Vitesco Technologies Group AG (hereinafter “**Vitesco**”) at a price of EUR 91.00 per Vitesco share.

Prior to the publication of the offer document, Schaeffler did not hold any Vitesco shares. However, a total of 49.94% of the share capital and voting rights of Vitesco were attributed Schaeffler through persons acting in concert. Schaeffler had access to a further approx. 9% as holder of certain instruments. In the context of this takeover, it should also be noted that BaFin, by decision dated 4 October 2023, approved the non-consideration of Schaeffler’s voting rights from an acting in concert agreement pursuant to sec. 36 no. 3 WpÜG. Since last year, such decisions by BaFin are now being published for the first time (for more information on this change in the administrative practice of BaFin, see section 4.3).

The context behind the acquisition offer is the planned integration of the Vitesco Group into the Schaeffler Group. For this purpose, following the successful execution of the offer, Vitesco, as the transferring entity, is to be merged into Schaeffler, as the acquiring entity, which will then continue to operate as “Schaeffler AG”. Schaeffler also intends to have its non-voting shares converted into voting shares at a ratio of 1:1 and to have them admitted to trading on the regulated market (*Prime Standard*) of the Frankfurt Stock Exchange. However, the effectiveness of the change in the class of shares is conditioned on

the consummation of the merger. The primary strategic advantages of the merger is to create a leading motion technology company with various divisions, to offer a complete product range in the field of electrification and thus to utilize the accelerated growth potential of electromobility.

On 27 November 2023 – and thus before the acceptance period expired – a business combination agreement (“**BCA**”) was then signed. On the same day, Schaeffler amended its offer, increasing the offer price from EUR 91.00 to EUR 94.00 per Vitesco share. However, this did not extend the acceptance period pursuant to sec. 21 para. 5 WpÜG, as the amendment to the offer was made before the beginning of the last two weeks prior to the expiry of the acceptance period.

By the end of the acceptance period, the acquisition offer had been accepted for a total of 11,957,629 Vitesco shares, representing 29.88% of Vitesco’s share capital and voting rights. Including the Vitesco shares held by IHO Holding GmbH, a strategic investment holding company of the Schaeffler family, which are attributable to Schaeffler, Schaeffler holds more than 79.82% of the shares and voting rights in Vitesco.

Schaeffler recently announced an extraordinary general meeting taking place in February 2024. It is intended to convert the non-voting shares into voting shares. Further general meetings of Schaeffler and Vitesco are to be held in April 2024 with the aim of bringing about the merger of the two companies. Overall, the process is expected to be essentially completed by the end of 2024.



Overview	
<b>Bidder</b>	Schaeffler AG
<b>Target company</b>	Vitesco Technologies Group AG
<b>Sector</b>	Automotive
<b>Acceptance period</b>	<p><i>Offer from 15 November 2023</i> 15 November 2023 to 15 December 2023, 24:00 (local time Frankfurt /Main) / 18:00 (local time New York)</p> <p><i>Amended offer dated 27 November 2023</i> The acceptance period was not extended pursuant to sec. 21 para. 5 WpÜG, as the offer was amended before the beginning of the last two weeks before the expiry of the acceptance period.</p>
<b>Acceptance rate</b>	<i>Acquisition offer dated 15 November 2023 and amended offer dated 27 November 2023:</i> approx. 29.88% (15 December 2023, 24:00)
<b>Minimum acceptance threshold</b>	None
<b>Status</b>	Successful
<b>Over volume (max.)</b>	EUR 3,761 billion
<b>Type of offer</b>	Voluntary public acquisition offer (cash offer)
<b>Offer price</b>	<p><i>Offer dated 15 November 2023:</i> EUR 91.00 per share of Vitesco Technologies Group AG.</p> <p><i>Amended offer dated 27 November 2023:</i> Increase of the offer price from EUR 91.00 by EUR 3.00 to EUR 94.00 per share of Vitesco Technologies Group AG.</p>
<b>Structure of participation</b>	<p>Prior to the publication of the offer document, Schaeffler did not hold any Vitesco Shares. IHO Beteiligungs GmbH (4,002,506 Vitesco shares (corresponding to approx. 10.00% of the share capital and voting rights of the target company)) and IHO Verwaltungs GmbH (15,984,093 Vitesco shares (corresponding to approx. 39.94% of the share capital and voting rights of the target company)) directly held a total of 19,986,599 Vitesco shares (corresponding to approx. 49.94% of the share capital and voting rights of the target company) as persons acting jointly with Schaeffler.</p> <p>On 9 October 2023, Schaeffler entered into an acting in concert agreement with IHO Beteiligungs GmbH and IHO Verwaltungs GmbH, the subject of which is an agreement on all significant decisions concerning the target company, in particular with regard to the exercise of voting rights from the Vitesco shares currently and in the future held by the parties of the agreement. Following the conclusion of the acting in concert agreement, BaFin approved the non-consideration of the voting rights covered by aforementioned agreement pursuant to sec. 36 no. 3 WpÜG on 4 October 2023 as requested by Schaeffler.</p> <p>In addition, Schaeffler holds instruments from which it had to report 3,600,000 voting rights (corresponding to approx. 9.00% of the share capital and voting rights of the target company) pursuant to sec. 38 para. 1 sentence 1 no. 2 WpHG. On 9 October 2023, Schaeffler entered into a total return swap with BofA Securities Europe S.A. in relation to Vitesco shares by means of cash settlement. According to the total return swap, Schaeffler cannot acquire any Vitesco Shares and has no right or claim to Vitesco shares or their transfer towards BofA SE.</p> <p>Furthermore, neither Schaeffler nor persons acting jointly with Schaeffler or their subsidiaries held any Vitesco shares nor were any voting rights in Vitesco attributed to them pursuant to sec. 30 WpÜG. Furthermore, neither Schaeffler nor persons acting jointly with Schaeffler or their subsidiaries directly or indirectly held any instruments or voting rights that would have to be reported pursuant to secs. 38 and 39 WpHG.</p>

Overview	
<b>Agreements with major shareholders</b>	In the period beginning six months prior to the Schaeffler's decision to make an offer pursuant to sec. 10 para. 1 sentence 1 and para. 3 WpÜG of 9 October 2023 and ending with the publication of the offer document, neither Schaeffler nor the persons acting in concert with Schaeffler or their subsidiaries have acquired Vitesco shares or entered into contractual agreements regarding the acquisition of Vitesco shares.
<b>Business combination agreement</b>	On 27 November 2023, Schaeffler and Vitesco entered into a Business Combination Agreement ("BCA"). In the BCA, Schaeffler has set out its intention to complete the business combination between Schaeffler and Vitesco by merging Vitesco as the transferring entity into Schaeffler as the acquiring entity. Vitesco has declared its intention to constructively support the business combination in accordance with the BCA. The parties have further agreed to take all necessary and appropriate steps to prepare, convene and hold general meetings of Schaeffler and Vitesco in order to resolve on the merger, if approved by both general meetings, as soon as possible after the execution of the amended offer on the basis of Vitesco's annual financial statements as of 31 December 2023.
<b>Statement by the management board and supervisory board</b>	<p>Schaeffler has also agreed in the BCA to provide Vitesco with sufficient debt financing facilities to refinance Vitesco's indebtedness under the existing promissory notes, an existing European Investment Bank credit facility and an existing revolving credit facility, if required as a result of or in connection with the execution of the amended offer.</p> <p>The management board and supervisory board of the target company do not consider the offer price to be appropriate from a financial point of view. As it depends on the individual situation and preferences of each shareholder whether the offer should be accepted or not, the management board and supervisory board can neither recommend that shareholders accept nor reject the offer. As a result, the management board and supervisory board have issued a neutral opinion.</p>
<b>Financing</b>	Schaeffler concluded a loan agreement with various banks with two facilities for a total amount of EUR 3 billion.
<b>Friendly/hostile</b>	Friendly
<b>Closing conditions</b>	<ul style="list-style-type: none"> <li>• Merger control clearance of the transaction: In Japan, merger control clearance of the transaction is obtained in the period from the publication of the offer document until 25 July 2024 (inclusive);</li> <li>• Foreign trade clearance of the transaction: In Germany, the transaction is cleared under foreign trade law in the period from publication of the offer document until 25 July 2024 (inclusive);</li> <li>• No significant deterioration in the market environment between the publication of the offer document and the expiry of the acceptance period;</li> <li>• No material deterioration at Vitesco between the publication of the offer document and the expiry of the acceptance period;</li> <li>• No obligation to enter into or effect any essential transaction at Vitesco or any subsidiary of Vitesco between the publication of the offer document and the expiry of the acceptance period;</li> <li>• No material compliance breach at Vitesco or any subsidiary of Vitesco between the publication of the offer document and the expiry of the acceptance period;</li> <li>• No loss at Vitesco amounting to at least half of the share capital and no application for or opening of insolvency proceedings against the assets of Vitesco between the publication of the offer document and the expiry of the acceptance period.</li> </ul> <p>All of the aforementioned closing conditions have been met.</p>
<b>Links</b>	<p><a href="#">Offer document dated 15 November 2023</a></p> <p><a href="#">Amended offer dated 27 November 2023</a></p> <p><a href="#">Joint reasoned statement by the management board and the supervisory board dated 27 November 2023</a></p>

## 3.2 Takeover offer and delisting purchase offer of Fahrenheit AcquiCo GmbH to the shareholders of va-Q-tec AG

### (a) Takeover offer dated 16 January 2023

On 16 January 2023, Fahrenheit AcquiCo GmbH (hereinafter “**Fahrenheit**”) published a voluntary public takeover offer by way of a cash offer to the shareholders of va-Q-tec AG (hereinafter “**va-Q-tec**”) at a price of EUR 26.00 per va-Q-tec share.

Prior to the publication of the takeover offer, the founders of va-Q-tec and their family members (“**Family Shareholders**”) held a total of 3,464,635 va-Q-tec shares (approximately 25.02% of the share capital and voting rights of va-Q-tec). Fahrenheit (backed by the EQT Group with EQT Treasury AB as parent company) and the Family Shareholders, with the exception of one under-age Family Shareholder (who held 400,000 va-Q-tec shares, approximately 2.98% of the share capital and voting rights of va-Q-tec), (“**Participating Family Shareholders**”), entered into a partnership agreement on 13 December 2022, modified by an amendment agreement on 6 July 2023 (“**Partnership Agreement**”). On the basis of the Partnership Agreement, (i) Fahrenheit as bidder has entered into a pooling agreement amongst the Family Shareholders, which, in addition to other provisions, regulates a joint exercise of voting rights in relation to certain va-Q-tec shares, and (ii) after completion of the takeover, the Participating Family Shareholders have acquired a total of 1,588,984 va-Q-tec shares (approximately 10.77% of the share capital and voting rights of va-Q-tec), with the exception of (partly permanently) retained shares of the Family Shareholders, with immediate effect, partly for a consideration in cash and partly for a consideration in the form of newly issued bidder shares, to the bidder and transferred them to the bidder (so-called roll-over).

The structure of the roll-over is particularly noteworthy. While such a roll-over was previously usually carried out in two steps to avoid valuation issues with regard to sec. 31 WpÜG (first an off-market acquisition of shares or the acceptance of the takeover offer, followed by the acquisition of a stake in the bidder through the liquidity obtained from the first step), the roll-over in the context of the takeover of va-Q-tec was carried out in one step by contributing shares in va-Q-tec by way of a contribution in kind in return for the issue of new shares in Fahrenheit. This particular arrangement could possibly develop into the new market practice. In the context of the public acquisition offer made by Ephios Luxembourg S.à r.l. to the shareholders of SYNLAB AG just a short time later, such a one-step roll-over was also carried out.

Fahrenheit has conditioned the execution of the offer on a minimum acceptance threshold being reached. Accordingly, at least 62.5% of all va-Q-tec shares had to be held by or attributable to Fahrenheit or persons acting jointly with Fahrenheit, including the va-Q-tec shares held by the Family Shareholders. By the end of the acceptance period, the takeover offer had been accepted for a total of 8,039,185 va-Q-tec shares (approximately 54.48% of the share capital and voting rights of va-Q-tec). Including the va-Q-tec shares held by the Family Shareholders and the voting rights attributable to each, the minimum acceptance threshold has consequently been reached. On 7 July 2023, Fahrenheit also acquired a total of 1,341,500 new va-Q-tec shares (around 9.09% of the share capital and voting rights of va-Q-tec) in return for a cash contribution of EUR 26.00 per new va-Q-tec share on the basis of a business combination agreement concluded with Fahrenheit HoldCo S.à r.l. and va-Q-tec on 13 December 2022.

### (b) Delisting purchase offer dated 2 August 2023

On 2 August 2023, Fahrenheit then published a public delisting purchase offer by way of a cash offer to the shareholders of va-Q-tec at a price of EUR 26.00 per va-Q-tec share.

By the beginning of the offer period, the total number of voting rights held by or attributable to Fahrenheit amounted to 12,845,320 va-Q-tec shares (approximately 87.05% of the share capital and voting rights of va-Q-tec).

Through the previous transactions as well as the delisting offer and the subsequent delisting, EQT is pursuing the goal of facilitating a carve-out of va-Q-tec’s business activities in the area of thermal energy efficiency and thermal boxes. For this purpose, these business operations are to be further developed in an independent new group company, which is intended to merge with the Swedish company Envirotainer, to which EQT AB is the main shareholder.

With an acceptance rate of approximately 1.80% by the end of 30 August 2023 (24:00 (local time Frankfurt/Main) / 18:00 (local time New York)), the delisting purchase offer was successfully completed. The revocation of the admission of va-Q-tec’s shares to trading on the regulated market of the Frankfurt Stock Exchange then became effective by the end of 30 August 2023.



Overview	
<b>Bidder</b>	Fahrenheit AcquiCo GmbH (backed by EQT Group with EQT Treasury AB as the parent company)
<b>Target company</b>	va-Q-tec AG
<b>Sector</b>	Industry
<b>Acceptance deadlines</b>	<p>a) Takeover offer From 16 January 2023 to 16 February 2023, 24:00 (local time Frankfurt/Main) / 18:00 (local time New York); further acceptance period until 7 March 2023, 24:00 (local time Frankfurt/Main) / 18:00 (local time New York).</p> <p>b) Delisting purchase offer From 2 August 2023 to 30 August 2023, 24:00 (local time Frankfurt/Main) / 18:00 (local time New York).</p>
<b>Acceptance rates</b>	<p>a) Takeover offer Approx. 48.07% (as at the end of 16 February 2023, 24:00 (local time Frankfurt/Main) / 18:00 (local time New York))</p> <p>b) Delisting purchase offer Approx. 1.80% (at the end of 30 August 2023, 24:00 (local time Frankfurt/Main) / 18:00 (local time New York)).</p>
<b>Minimum acceptance threshold</b>	<p>a) Takeover offer At least 62.5% of all va-Q-tec shares are held by or attributable to the bidder or a person acting jointly with the bidder.</p> <p>b) Delisting purchase offer None</p>
<b>Status</b>	Successful (both offers)
<b>Offer volume (max.)</b>	<p>a) Takeover offer EUR 348.79 million</p> <p>b) Delisting purchase offer EUR 98.48 million</p>
<b>Type of offer</b>	<p>a) Voluntary public takeover offer (cash offer)</p> <p>b) Public delisting purchase offer (cash offer)</p>
<b>Offer price</b>	For both offers EUR 26.00 per share of va-Q-tec
<b>Participation structure</b>	<p>a) Takeover offer Prior to the publication of the takeover offer, Fahrenheit itself held no va-Q-tec shares. Due to the conclusion of the Partnership Agreement with the Participating Family Shareholders of va-Q-tec, Fahrenheit held a financial instrument (sec. 38 para. 1 sentence 1 no. 2 WpHG) relating to a total of 3,064,634 va-Q-tec shares (approx. 22.84% of the share capital and voting rights in va-Q-tec).</p> <p>b) Delisting purchase offer At the time of publication of the delisting purchase offer, the total number of voting rights in va-Q-tec held by the Fahrenheit or attributed to it amounted to 12,845,320 (approx. 87.05% of the share capital and voting rights of va-Q-tec). These include: 10,969,669 va-Q-tec Shares (approx. 74.34% of the share capital and voting rights of va-Q-tec, see below) are held directly by the bidder; of these, 1,814,109 va-Q-tec Shares (approx. 12.29% of the share capital and voting rights of va-Q-tec) are pooled shares; 1,875,651 va-Q-tec shares (approx. 12.71% of the share capital and voting rights of va-Q-tec, see below), which are held by the Family Shareholders, are attributed to the bidder pursuant to sec. 30 para. 2 WpÜG, partly due to the obligation to exercise the voting rights uniformly under the pooling agreement.</p> <p>At the time of publication of the offer document, va-Q-tec holds 13,566 va-Q-tec shares (approx. 0.09% of the share capital and voting rights of va-Q-tec), to which no voting or dividend rights are attached pursuant to sec. 71b AktG.</p>

Overview	
<b>Capital increase</b>	On 7 July 2023, Fahrenheit acquired a total of 1,341,500 new va-Q-tec shares (approx. 9.09% of the share capital and voting rights of va-Q-tec) in return for a cash contribution of EUR 26.00 per new va-Q-tec share based on a business combination agreement concluded with Fahrenheit HoldCo S.à r.l. and va-Q-tec on 13 December 2022.
<b>Roll-over</b>	<p>In accordance with the Partnership Agreement dated 13 December 2022, as modified by the amendment agreement dated 6 July 2023, the Family Shareholders have undertaken to contribute and transfer a total of 1,588,984 va-Q-tec shares (approx. 10.77% of the share capital and voting rights of va-Q-tec) to the Fahrenheit as follows</p> <ul style="list-style-type: none"> <li>538,462 va-Q-tec shares (approx. 3.65% of the share capital and voting rights of va-Q-tec) were to be contributed to Fahrenheit for a cash consideration of EUR 26.00 per va-Q-tec share;</li> <li>1,050,522,462 va-Q-tec shares (approx. 7.12% of the share capital and voting rights of va-Q-tec) were to be contributed to Fahrenheit in exchange for newly issued shares of Fahrenheit.</li> </ul>
<b>Agreements with Family Shareholders</b>	<p>In accordance with the Partnership Agreement, the Family Shareholders are obliged to contribute and transfer their remaining family shares to Fahrenheit apart from the delisting purchase offer at the Fahrenheit's request and, under certain conditions, are entitled to request such contribution and transfer themselves. For Fahrenheit, this constitutes a financial instrument within the meaning of sec. 38 para. 1 sentence 1 no. 1 WpHG due to Fahrenheit's acquisition right, and constitutes a financial instrument within the meaning of sec. 38 para. 1 sentence 1 no. 2 WpHG due to the Fahrenheit's acquisition obligation, each of which relates to (the same) 1,475,650 va-Q-tec shares (approx. 10.00% of the share capital and voting rights of va-Q-tec).</p> <p>The Fahrenheit's acquisition right and acquisition obligation also extend to any further family shares acquired by the Family Shareholders from a family member who is not yet legally competent. For Fahrenheit, this also constitutes a financial instrument within the meaning of sec. 38 para. 1 sentence 1 no. 1 WpHG due to the Fahrenheit's acquisition right, and constitutes a financial instrument within the meaning of sec. 38 para. 1 sentence 1 no. 2 WpHG due to Fahrenheit's acquisition obligation, each of which relates to (the same) 400,000 va-Q-tec shares (approx. 2.71% of the share capital and voting rights of va-Q-tec).</p>
<b>Statement by the management board and the supervisory board</b>	The management board and the supervisory board have recommended both the acceptance of the takeover offer dated 16 January 2023 and the acceptance of the delisting purchase offer dated 2 August 2023.
<b>Financing</b>	<p>a) Takeover offer Equity – on 13 December 2022, EQT X EUR SCSp and EQT X USD ECSp undertook to Fahrenheit to provide, either directly or indirectly, in the form of equity or similar instruments an aggregate amount of up to EUR 320 million.</p> <p>b) Delisting purchase offer Equity – on 30 June 2023, EQT X EUR SCSp and EQT X USD ECSp undertook to Fahrenheit to provide, either directly or indirectly, in the form of equity or similar instruments an aggregate amount of up to EUR 62,090,680.00.</p>
<b>Friendly/hostile</b>	Friendly (both offers)
<b>Closing conditions</b>	<p>a) Takeover offer The offer and the contracts resulting from the acceptance were subject to the following conditions: merger control clearances; achievement of the minimum acceptance threshold (see above); no capital, financial or structural measures at va-Q-tec; no rescission of the capital increase resolutions; no insolvency proceedings over the assets of va-Q-tec. All of the aforementioned closing conditions have been met.</p> <p>b) Delisting purchase offer The execution of the delisting purchase offer and the contracts resulting from the acceptance of the delisting purchase offer were not subject to any closing conditions.</p>
<b>Links</b>	<p><a href="#">Takeover offer dated 16 January 2023</a></p> <p><a href="#">Statement of the management board and the supervisory board dated 25 January 2023 on the takeover offer</a></p> <p><a href="#">Delisting purchase offer dated 2 August 2023</a></p> <p><a href="#">Statement of the management board and the supervisory board dated 11 August 2023 on the delisting purchase offer</a></p>

## 4. Recent legal developments in the German public takeover law

### 4.1 Attribution of voting rights in the case of interest protection clauses – Postbank takeover, judgment of the BGH of 13 December 2022 – II ZR 14/21; II ZR 9/21 (“Postbank II”)

#### (a) Introduction

With its decisions of 13 December 2022, the BGH added another chapter to the legal dispute surrounding the takeover of Deutsche Postbank AG (hereinafter “**Target Company**”) by Deutsche Bank AG (hereinafter “**Bidder**”) (Case No. II ZR 14/21 and II ZR 9/21). At the root of the proceedings, which have now been ongoing for years, is the accusation by former Postbank shareholders who accepted the Bidder’s voluntary takeover offer in 2010 that the Bidder had made them a voluntary takeover offer that was too low.

#### (b) Facts

On 12 September 2008, the Bidder and the then majority shareholder of the Target Company, Deutsche Post AG (hereinafter “**Deutsche Post**”), entered into a purchase agreement on the acquisition of a minority stake in the Target Company of 29.75% of the share capital at a price of EUR 57.25 per Postbank share (hereinafter “**SPA**”). According to the SPA, the Bidder was entitled to a purchase option in the amount of 18% at EUR 55.00 per Postbank share and a sale option in the amount of 20.25% at EUR 42.80 per Postbank share, which would be exercised after the completion of the acquisition of the minority stake in the Target Company. The SPA also contained provisions on the exercise of voting rights by Deutsche Post (hereinafter referred to as the “**Approval Reservations**”). These provisions stipulated that Deutsche Post was not permitted to adopt or approve any shareholder resolutions that relate to an amendment of the articles of association of the Target Company or the distribution of cash or non-cash dividends or that could prevent or significantly delay the agreed transaction until completion without the consent of the Bidder.

On 14 January 2009, in response to changed market conditions, the Bidder and Deutsche Post concluded such a supplementary agreement. A three-step acquisition process was agreed.

The first step was to acquire a minority stake of 22.9% from Deutsche Post at a price of EUR 23.92 per Postbank share. Subsequently, the Bidder was to acquire 27.4% of the share capital at a price of EUR 45.45 per Postbank share via a mandatory exchangeable bond maturing on 25 February 2012. For the final step, reciprocal purchase and sale options, exercisable between 28 February 2012 and 25 February 2013, were established to acquire 12.1% of the share capital at EUR 48.85 and EUR 49.92 per Postbank share. In order to secure the claims arising from the contractual agreements and the security provided by the Bidder, Deutsche Post pledged shares in the Target Company to the Bidder in December 2008 and January 2009. In addition, the pledge agreement concluded in this context contained provisions granting the Bidder approval reservations to any conversions, amendments to the articles of association and dividend distributions at the Target Company. End of 2009, the Bidder acquired shares amounting to 22.9% of the Target Company’s share capital via a subsidiary and subscribed to the mandatory exchangeable bond.

On 7 October 2010, the Bidder published a voluntary takeover offer to the shareholders of the Target Company providing for an offer price of EUR 25 per Postbank share. The plaintiffs of the underlying proceedings initially accepted this offer, but considered it inappropriate and therefore demanded payment of the difference, taking into account the consideration agreed in the SPA plus interest and, alternatively, the difference taking into account the consideration agreed in the supplementary agreement plus interest.

The plaintiffs argue that the Bidder had already gained control of the Target Company in 2008 and was therefore obliged to submit a significantly higher mandatory offer in accordance with sec. 35 para. 2 WpÜG. The plaintiffs argued that the agreements concluded between the Bidder and Deutsche Post, in particular the Approval Reservations, were aimed at securing the

contractual purpose of the extended acquisition process until execution in rem, in that Deutsche Post had undertaken to exercise its shareholder rights exclusively in a way that took into account the interests of the Bidder (so-called “interest protection clauses”). Accordingly, the Bidder and Deutsche Post had supposedly coordinated their conduct with regard to the Target Company on the basis of an agreement, sec. 30 para. 2 sentence 1 WpÜG. It is supposedly a coordinated conduct because the Bidder and Deutsche Post had agreed on the exercise of voting rights. The Bidder and Deutsche Post had also supposedly coordinated their conduct in other ways with the aim of collaborating for a lasting and significant change in the entrepreneurial orientation of the target company, sec. 30 para. 2 sentence 1 half-sentence 1 case 2, sentence 2 case 2 WpÜG.

In 2014, the BGH initially addressed the question of whether interest protection clauses constitute so-called “acting in concert” and can therefore justify the attribution of voting rights in accordance with sec. 30 para. 2 WpÜG for the first time in the same case (Case No. II ZR 353/12 – “*Postbank I*”). The BGH stated that an attribution of voting rights based on interest protection clauses was possible under law and referred the case back to the court of appeal. The Higher Regional Court of Cologne then established delimiting criteria for the attribution of voting rights based on interest protection clauses (Case No. 13 U 166/11; 13 U 231/17). The BGH now overruled those in its latest decision (Case No. II ZR 14/21 and II ZR 9/21 – “*Postbank II*”).



### (c) Legal Considerations

#### (i) Acting in concert, sec 30 para. 2 WpÜGw

The BGH had to determine the conditions under which an attribution of voting rights based on coordinated conduct pursuant to sec. 30 para. 2 WpÜG could be considered.

Pursuant to the BGH, in the case of a provision on the exercise of voting rights by the seller agreed in the purchase agreement for a block of shares as an interest protection clause, a coordination of conduct through an agreement on the exercise of voting rights could also be given if this was aimed at (i) maintaining the existing conditions at the target company in the period between the conclusion and execution of the purchase agreement and/or (ii) if no agreement or actual exertion of influence beyond the general duty of loyalty was provided for. It is solely required that the agreement reached between the bidder and a third party regarding the exercise of voting rights is aimed at an actual and definite exercise of influence on the target company (sec. 30 para. 2 WpÜG).

In this context, the BGH referred to its earlier decision (BGH, judgment of 25 September 2018 – II ZR 190/17). According to this decision, cooperation in other ways can also exist outside of the general meeting and requires the coordinated exercise of influence on the issuer mediated by corporate law based on a joint agreement and strategy. In this context, whereby actual influence is not required, but the mere intention is sufficient.

This represents an explicit departure from the delimitation criteria established by the Higher Regional Court of Cologne in the previous level of jurisdiction. The BGH argues that the dismissal of the assumed acting in concert due to the mere focus on the maintenance of the status quo, as done by the Higher Regional Court of Cologne, cannot be justified either with the intention of the legislator nor with the wording of sec. 30 para. 2 sentence 2 WpÜG. A limitation of the attribution to agreements

that go beyond the already existing performance loyalty obligations could also not be followed due to the transparency function of the attribution provisions. Whether the Bidder had an actual and concrete possibility of influencing the Target Company was left unanswered by the BGH in this specific case, as the completion of the transaction was expected before the next general meeting. In any event, an actual and definite exercise of influence could not be considered if the shares were to be transferred before the general meeting of the Target Company and, as a result, the corresponding votes would not be exercised. This had to be determined in an overall assessment and was the obligation of the court of appeal, which the BGH remanded the case to.

#### (ii) “Hold for account” pursuant to sec. 30 para. 1 sentence 1 no. 2 WpÜG

Furthermore, the BGH stated that the Higher Regional Court of Cologne incorrectly denied the attribution of voting rights of Deutsche Post to the Bidder within the meaning of sec. 30 para. 1 sentence 1 no. 2 WpÜG. In that context, the allocation of economic opportunities and risks, in particular the right to receive dividends, is a decisive element of the attribution pursuant to sec. 30 para. 1 sentence 1 no. 2 WpÜG.

It is not the formal legal classification that is decisive, but the economic allocation, which is why it must be determined whether the holder of the dividend right can actually make use of it. This is to be determined by means of an “overall view”. In any case, the bidder must be able to influence the exercise of voting rights; however, a legal right to give directions is not necessarily required.

A fixed price agreement in connection with an economic reference date in the past generally means that the seller effectively holds the shares in the economic interest of the purchaser until completion of the transaction. In any case, the findings of the Higher Regional Court of Cologne on the parties’ agreements tend to support the transfer of the

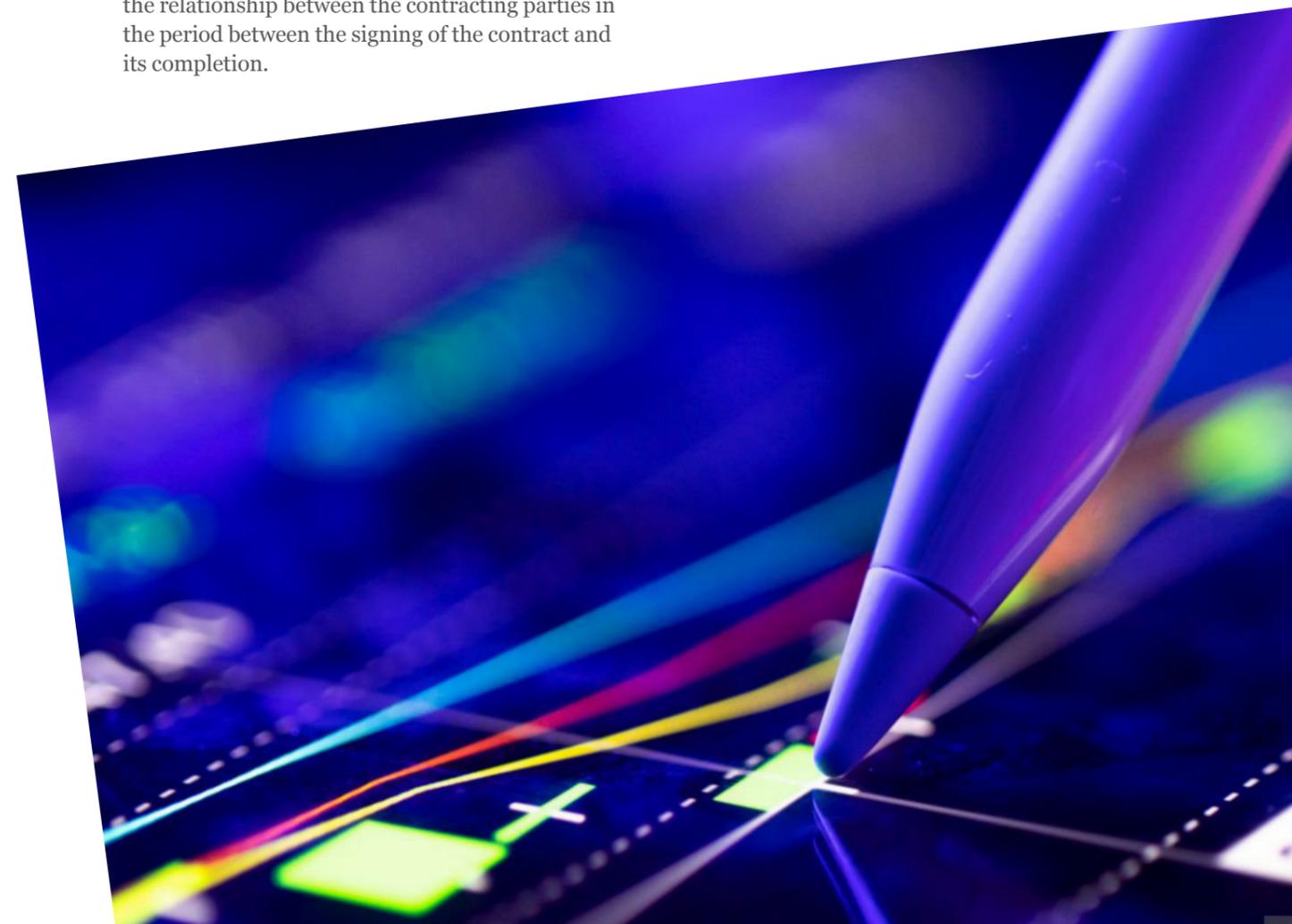
dividend opportunity to the bidder already upon conclusion of the SPA. This is based on the fact that future changes in value only affect the assets of the purchaser.

#### (d) Practical implications

With its decision, the BGH has further developed the requirements for the attribution of voting rights pursuant to sec. 30 para. 2 WpÜG, which has considerable practical relevance for the preparation of public takeovers. Previously, pure interest protection clauses without an explicit agreement on voting rights were considered unproblematic within the meaning of sec. 35 para. 2 WpÜG. This is no longer possible.

However, the BGH did not specify all relevant details. In practice, this results in legal uncertainties when drafting interest protection clauses and other contractual provisions that are intended to regulate the relationship between the contracting parties in the period between the signing of the contract and its completion.

In light of the issued ruling, the parties should carefully draft the individual clauses in purchase agreements, cooperation agreements and pledge agreements to avoid an unintended attribution of voting rights. In particular, secondary obligations that are not contractually regulated but are nevertheless suitable for justifying the attribution of voting rights should be avoided. An extension of the attribution of voting rights not only entails legal hurdles in the form of disclosure obligations and the obligation to submit a mandatory offer. In addition, breaches of these obligations may also result in the loss of rights from the shares concerned as well as fines and back-payment obligations.



## 4.2 Settlement agreement as price-relevant subsequent acquisition within the meaning of sec. 31 para. 5 and 6 WpÜG in the case of public takeovers, judgment of the BGH dated 23 May 2023 – II ZR 219/21

### (a) Introduction

In its ruling of 23 May 2023, the BGH also clarified the question of when agreements by the bidder regarding the acquisition of shares in the target company in public takeovers constitute an impermissible circumvention of the statutory price regulations that apply in cases of pre-acquisitions, parallel acquisitions and subsequent acquisitions of shares of the target company. The BGH has now clarified this in relation to agreements in which the bidder and a shareholder reach an agreement on the approval of a domination and profit and loss transfer agreement (DPLTA) and in which a minimum settlement price within the meaning of sec. 305 para. 1 of the German Stock Corporation Act (“AktG”) is stipulated as a prerequisite for the approval obligation.

### (b) Facts

The context for the decision was the takeover of STADA Arzneimittel Aktiengesellschaft (hereinafter “STADA”) in 2017, where the bidder had not achieved its target stake of 75% with its first takeover offer and then published a second offer at EUR 66.25 per share, the minimum acceptance threshold of which was significantly lower. One day before the expiry of the further acceptance period, the bidder entered into a so-called Irrevocable Commitment (IC) with the activist minority shareholder Elliott, which held 13.26% of STADA’s shares at that time. This contained the obligation of Elliott to approve the conclusion of a DPLTA at STADA’s general meeting if the compensation offered to the shareholders pursuant to sec. 305 para. 1 AktG amounted to at least EUR 74.40 per share. In this way, the bidder wanted to secure the conclusion of the DPLTA even in the event that it did not succeed in obtaining the necessary majority of voting rights under the takeover offer. However, the agreement did not grant the bidder the right to acquire the shares held by Elliott. In fact, Elliott did not submit its shares

in response to this compensation offer, but only in the subsequent public delisting purchase offer of the bidder’s parent company at a price of EUR 81.73 per share.

The plaintiff demanded payment from the bidder in the amount of the difference between the offer price in accordance with the takeover offer it had accepted and the compensation agreed in connection with the IC. The plaintiff essentially based its claim on sec. 31 para. 5 and 6 sentence 1 WpÜG. The previous levels of jurisdiction (Regional Court of Frankfurt am Main and Higher Regional Court of Frankfurt am Main) had denied all claims and dismissed the case. The BGH reversed these judgments and sentenced the defendant as requested.

### (c) Legal considerations

In contrast to the previous court decisions, the BGH recognized the IC as an agreement equivalent to an acquisition within the meaning of sec. 31 para. 3 to 5 WpÜG pursuant to sec. 31 para. 6 sentence 1 WpÜG and accordingly affirmed the claim for payment of the higher offer price under sec. 31 para. 5 sentence 1, 6 sentence 1 WpÜG. In particular, pursuant to the BGH, the qualification as such an agreement does not require that the bidder can demand the transfer of shares under a call option. Rather, a sufficient basis for a transfer request should already exist if the agreement, when viewed objectively, contains a legal disposition of the bidder aimed at the acquisition of shares in the target company, which expresses that the bidder is willing to provide a consideration for the acquisition of shares that exceeds the price offered in the offer document pursuant to sec. 11 para. 2 sentence 1 no. 4 WpÜG.

Pursuant to the BGH, a more restrictive interpretation is not indicated by the rather broad wording of sec. 31 para. 6 sentence 1 WpÜG in this respect and no other convincing reasons for this are apparent. Rather, the meaning and purpose

of the provision would suggest that it also covers agreements by which the bidder merely grants a right to tender as long as it thereby indicates what price it actually considers appropriate for the shares of the target company. Sec. 31 para. 6 sentence 1 WpÜG serves – as does sec. 31 para. 4 and 5 WpÜG – as an outgrowth of the general principle of equal treatment embedded in sec. 3 para. 1 WpÜG to prevent circumvention of the price rules contained in sec. 31 para. 1 sentence 2 WpÜG. In order to prevent a disadvantage for the other shareholders, the bidder should have to pay to such other shareholders the increased price that it was prepared to pay on the basis of such agreement.

The claim is also not excluded pursuant to sec. 31 para. 6 sentence 1, para. 5 sentence 2 case 1 WpÜG. This statutory ground for exclusion should not be applicable to voluntary agreements in which a shareholder undertakes, prior to the conclusion of a DPLTA, to support the approval of the general meeting for the conclusion of a DPLTA with its voting rights if the outside shareholders are offered a minimum compensation.

### (d) Practical implications

The ruling of the BGH primarily clarifies the legal implications of settlement agreements within public takeover proceedings.

The judgment also reveals the BGH’s tendency to restrict arbitrage strategies of activist shareholders with regard to bilateral special agreements with bidders. As the decision now clarifies that compensation agreements such as the IC result in a claim for additional payment by all other shareholders of the target company, it is therefore to be expected that this contractual instrument will no longer be used in the future to satisfy the arbitrage objectives of activist investors. In addition, the criteria established by the BGH for a classification as an agreement

within the meaning of sec. 31 para. 6 sentence 1 WpÜG – in the sense of the far-reaching protection against circumvention emphasized by the BGH – are also likely to exclude any alternative contractual arrangements.

For the outside shareholders, but also for the takeover market as a whole, the decision should represent an overall positive return to the status quo ante. The far-reaching protection against circumvention of the takeover price rules through compensation agreements established by the BGH strengthens the interest of outside shareholders in avoiding unequal treatment compared to more influential shareholders. For the takeover market as a whole, the decision is likely to increase the credibility of the published offer price.

For bidders in takeover proceedings, the BGH ruling means that they can no longer use this contractual instrument to secure the support of activist investors or other large shareholders speculating on a higher price than that of the takeover offer. However, their position is at least no worse than before the “invention” of such compensation agreements.

A detailed discussion of this decision by *Dr. Tim Oliver Brandt, LL.M.* and *Simon Kiefer, LL.M.* can be found in NZG 26/2023, p. 1212 et seq.



### 4.3 Change in BaFin's administrative practice: non-consideration decisions prior to acquisition of control

It is also noteworthy that there has been a significant change in the administrative practice regarding non-consideration decisions pursuant to sec. 36 WpÜG;

According to BaFin's previous administrative practice, applications pursuant to Section 36 WpÜG for voting rights not to be taken into account when calculating the control threshold were only decided after control had been obtained. In addition, in the past, decisions pursuant to sec. 36 WpÜG were not published by BaFin (in contrast to exemption decisions pursuant to sec. 37 WpÜG). This practice was vehemently criticised by the prevailing literature in the past, as it significantly limited the predictability of the applicability of sec. 36 WpÜG.

BaFin has now changed this practice in spring 2023: Firstly, in April and May 2023, it published several decisions pursuant to sec. 36 WpÜG on its homepage. Secondly, BaFin expressly stated in the published decisions that both the application pursuant to sec. 36 WpÜG and BaFin's decision on the application were already admissible prior to obtaining control. This change in administrative practice is very welcome, as it now (finally) makes it possible to obtain a formal decision from BaFin on the issue of the non-consideration of voting rights in accordance with sec. 36 WpÜG before the control situation is realised. The published decisions of BaFin pursuant to secs. 36, 37 WpÜG (exemptions from the mandatory offer) are available [here](#) (only available in German).

### 4.4 Effects of Financing for the Future Act on takeover law

On 1 January 2024, the Financing for the Future Act ("ZuFinG") of 11 December 2023 entered into force (Federal Law Gazette 2023 I No. 354), which, among other things, also provides for or indirectly results in significant changes to takeover law.

#### (a) Introduction of multiple voting rights and related attribution issues

In particular, the re-admission of shares with multiple voting rights in secs. 12 and 135a AktG, which entered into force on 15 December 2023, has a significant material impact on public takeovers. This refers to clauses in the articles of association that grant a shareholder more voting power than their capital and risk share. Since 1998, multiple voting rights were not permitted and the "one share, one vote" principle has been applied. However, the legislator saw a need in corporate practice to permit multiple voting rights in order to secure the influence of certain persons on the strategic direction and at the same time to prevent hostile takeovers. Germany should also be strengthened as a capital market location. Since 15 December 2023, the provision or issue of registered shares with multiple voting rights has therefore been permitted up to a voting ratio of 10:1. However, the new introduction of sec. 135a AktG also contains expiry events. Accordingly, multiple voting rights expire in the event of transfer, by the passage of time (generally after 10 years from the stock exchange listing, unless the period is extended by the articles of association) and in the event of a time limit set by the articles of association (so-called time-based sunset clause).

The introduction of multiple voting rights and the possibility of their automatic cancellation in the event of transfer raises numerous questions in connection with the attribution requirements of sec. 30 WpÜG.

In particular, it is doubtful which number of voting rights are to be attributed in the case of in rem call options within the meaning of sec. 30 para. 1 no. 5 WpÜG if the shares covered by the call option have multiple voting rights. In this respect, is the number of voting rights including the multiple voting rights relevant or are the multiple voting rights to be disregarded, as they would automatically expire in the event of the transfer of the shares to the bidder as a result of the exercise of the call option?

Furthermore, the automatic cancellation of the multiple voting rights in the event of share transfers may reduce the total number of existing voting rights and thus increase the proportionate voting weight of individual shareholders. This can lead to the (passive) exceeding of the control threshold of sec. 29 para. 2 sentence 1 WpÜG, which results in a mandatory offer pursuant to sec. 35 WpÜG.

Unfortunately, the legislator has not regulated the aforementioned and other attribution issues triggered by multiple voting rights in the ZuFinG. It is therefore up to practitioners, and BaFin in particular, to find appropriate solutions to these issues, unless the legislator clarifies them promptly on another occasion.

With the ZuFinG, the legislator is also pursuing the goal of implementing procedural simplifications in the German public takeover law. In particular, the digitalization of the administrative procedure under takeover law is to be welcomed. The former written form requirement is no longer applicable (see secs. 20 para. 1, 26 para. 5, 36 sentence 1, 37 para. 1 sentence 1 WpÜG). From 1 January 2024, all applications, notifications, declarations, notifications and transmissions must be submitted exclusively electronically via BaFin's notification and publication system (sec. 45 WpÜG). For this

purpose, the specialized procedure "Takeovers (WpÜG)" has been set up in the portal of the notification and publication platform ("MVP Portal"). Bidders, applicants, target companies and other authorized persons (e.g. lawyers) can use this portal to submit documents electronically.

In order to use the specialized procedure, (i) successful registration on the MVP Portal and (ii) registration for the specialized procedure "Unternehmensübernahmen (WpÜG)" are required. Please note that the electronic submission cannot be made immediately after registration, but only after activation of the specialized procedure. Activation, however, can only take place after the signed or electronically signed application has been sent and is usually carried out within one business day. This must be taken into account in particular when adhering to legal deadlines, as simply registering for the specialist procedure has no legal validity in terms of meeting deadlines. It is therefore advisable to initiate the registration process at an early stage.

The information sheet issued by BaFin dated 14 December 2023 with detailed instructions for registration and application can be accessed [here](#).

At the same time, with regard to the calculation of deadlines under the WpÜG, the reference to business days ("Werktag", i.e. Monday to Saturday) has been changed to working days ("Arbeitstag", i.e. Monday to Friday), which is intended to prevent de facto shortening of deadlines, cf. sec. 2 para. 9 WpÜG and secs. 21 para. 1 sentence 1, 25, 35 para. 1 sentence 1 WpÜG and sec. 8 sentence 2 WpÜG-AngebotsVO.

# Our team in Germany

## Hamburg



**Dr. Andreas H. Meyer, LL.M. (I.U.)**  
Of Counsel, Hamburg  
T +49 40 419 93 0  
andreas.meyer@hoganlovells.com

## Dusseldorf



**Dr. Christoph Louven**  
Senior Counsel, Dusseldorf  
T +49 211 13 68 0  
christoph.louven@hoganlovells.com

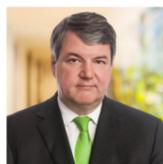


**Birgit Reese**  
Partner, Dusseldorf  
T +49 211 13 68 0  
birgit.reese@hoganlovells.com



**Daniel Dehghanian, LL.M. (Anglia Ruskin University)**  
Partner, Dusseldorf  
T +49 211 13 68 0  
daniel.dehghanian@hoganlovells.com

## Munich



**Dr. Lutz Angerer, LL.M. (University of Virginia)**  
Partner, Munich  
T +49 89 290 12 0  
lutz.angerer@hoganlovells.com



**Thomas Weber**  
Counsel, Munich  
T +49 89 290 12 0  
thomas.weber@hoganlovells.com



**Dr. Michael Rose**  
Partner, Munich  
T +49 89 290 12 0  
michael.rose@hoganlovells.com



**Dr. Tobias Kahnert, M.Jur. (Oxford), LL.B.**  
Partner, Munich  
T +49 89 290 12 0  
tobias.kahnert@hoganlovells.com

## Frankfurt



**Dr. Tim Oliver Brandi, LL.M. (Columbia)**  
Partner, Frankfurt  
T +49 69 962 36 0  
tim.brandi@hoganlovells.com



**Dr. Hanns Jörg Herwig**  
Partner, Frankfurt  
T +49 69 962 36 0  
joerg.herwig@hoganlovells.com



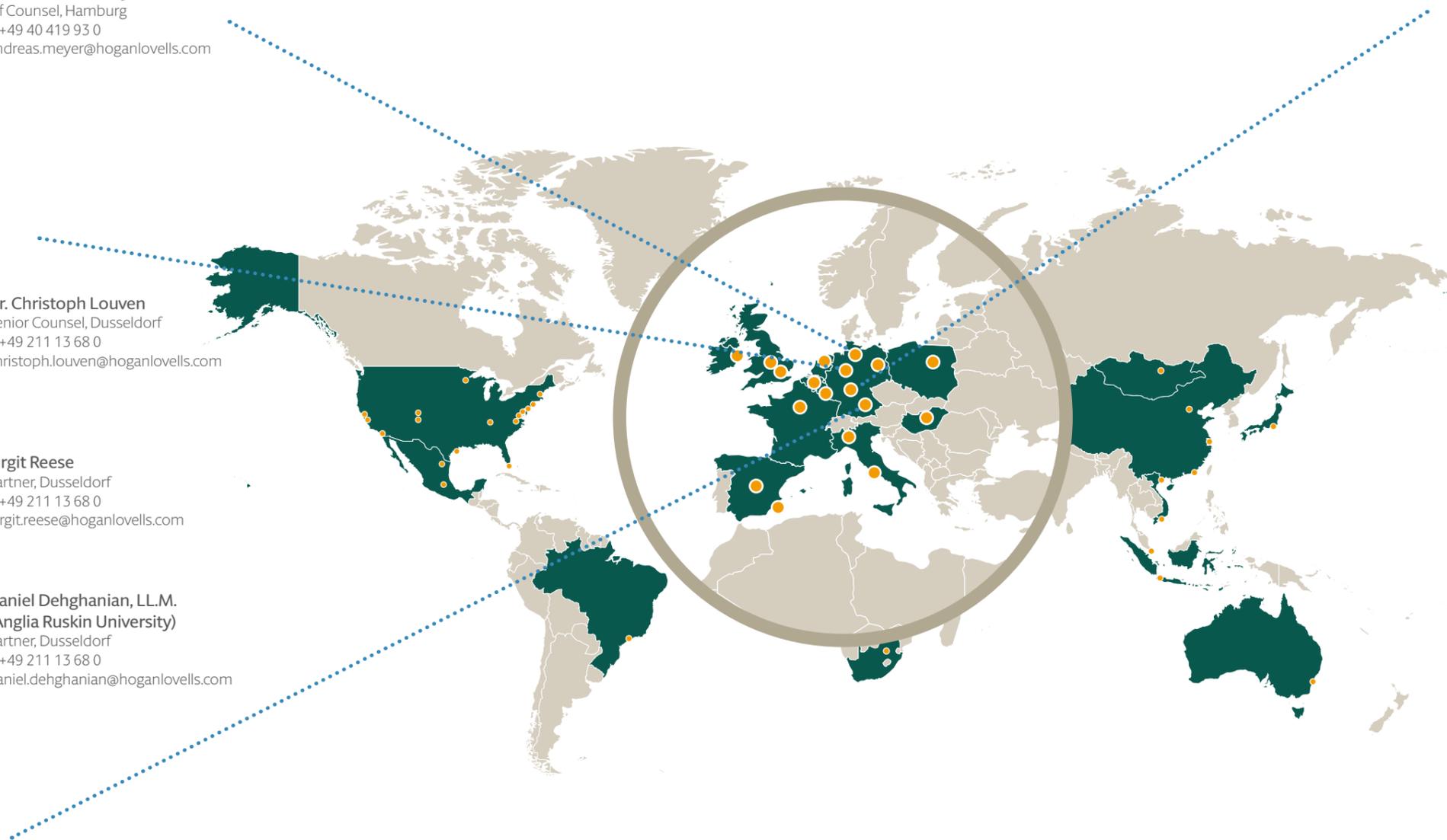
**Dr. Matthias Jaletzke**  
Partner, Frankfurt  
T +49 69 962 36 0  
matthias.jaletzke@hoganlovells.com



**Prof. Dr. Michael Schlitt**  
Partner, Frankfurt  
T +49 69 962 36 0  
michael.schlitt@hoganlovells.com



**Dr. Sebastian Biller**  
Counsel, Frankfurt  
T +49 69 962 36 0  
sebastian.biller@hoganlovells.com



Alicante  
Amsterdam  
Baltimore  
Beijing  
Berlin  
Birmingham  
Boston  
Brussels  
Budapest\*  
Colorado Springs  
Denver  
Dubai  
Dublin  
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