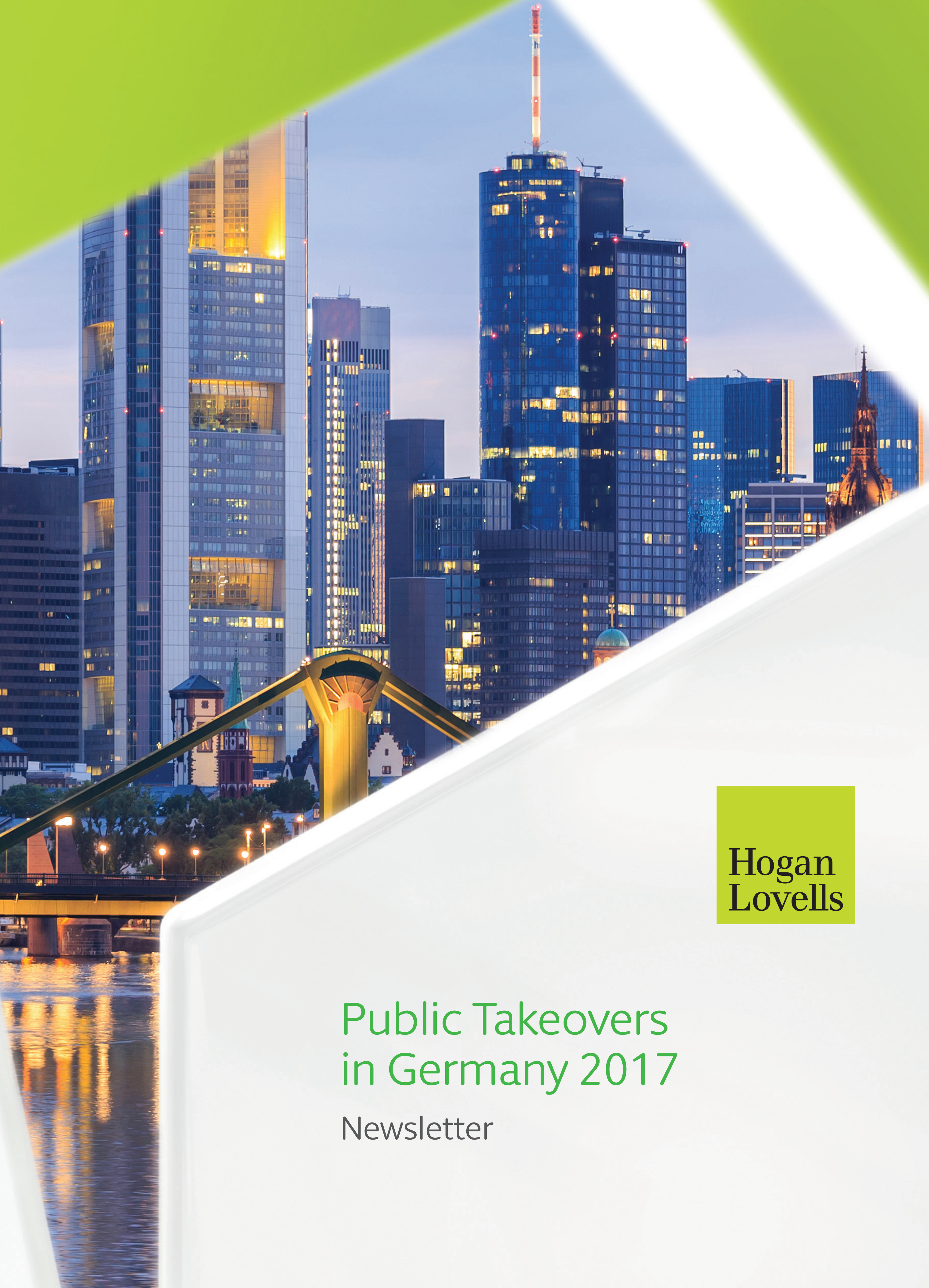


Public Takeovers in Germany 2017

Newsletter

Contents

Introduction

Welcome to the first edition of our "Public Takeovers in Germany" newsletter. It provides an overview of public takeovers carried out in Germany during 2017 under the German 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 last year under the German Takeover Act *(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 target companies. Wherever a public offer was amended, our analysis reflects only the data from the final version of the offer.

In the "Short Profile" section we showcase in more detail what we consider the most noteworthy public takeover bid of the preceding calendar year. In 2017 this was clearly the takeover offer for STADA Arzneimittel AG by Bain Capital and Cinven.

Lastly, we discuss recent legal developments which are relevant for the German takeover market. In this edition we focus on the judgment in the German Federal Court of Justice (*Bundesgerichthof – BGH*) concerning the takeover of Celesio AG by McKesson, and specifically regarding the question of whether the price paid for convertible bonds of the target company in a derivative purchase must be taken into account when determining the minimum price in accordance with the German Takeover Act.

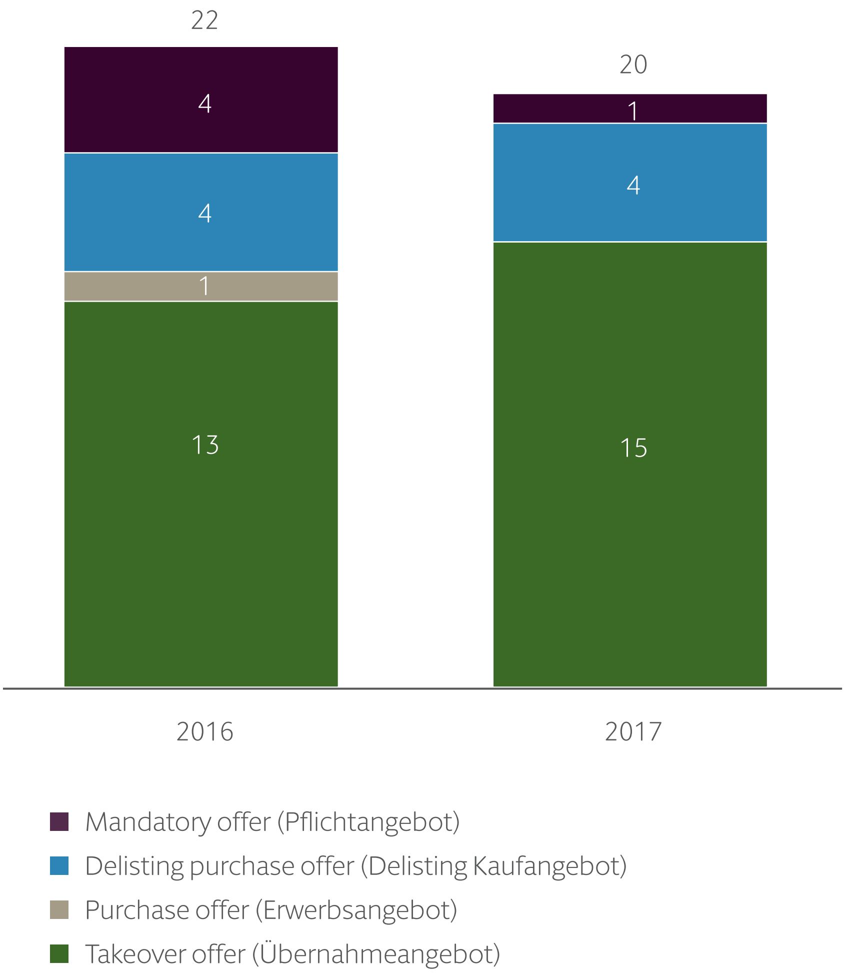
Statistics

Overview – market trends

In 2017 the public takeover market in Germany showed in particular the following trends:

- The use of delisting purchase offers continued to be an established takeover option also in 2017.
- The average offer premium of 14.10 percent in comparison to the three-month average stock price prior to the bid is significantly lower compared to the previous year 2016.
- In addition to the continuing high level of attractiveness of the technology sector, the number of takeovers has increased in particular in the healthcare sector.
- A significant number of the statements published by the management boards and supervisory boards in 2017 recommended rejecting the respective takeover offer (30 percent) or were neutral (15 percent).

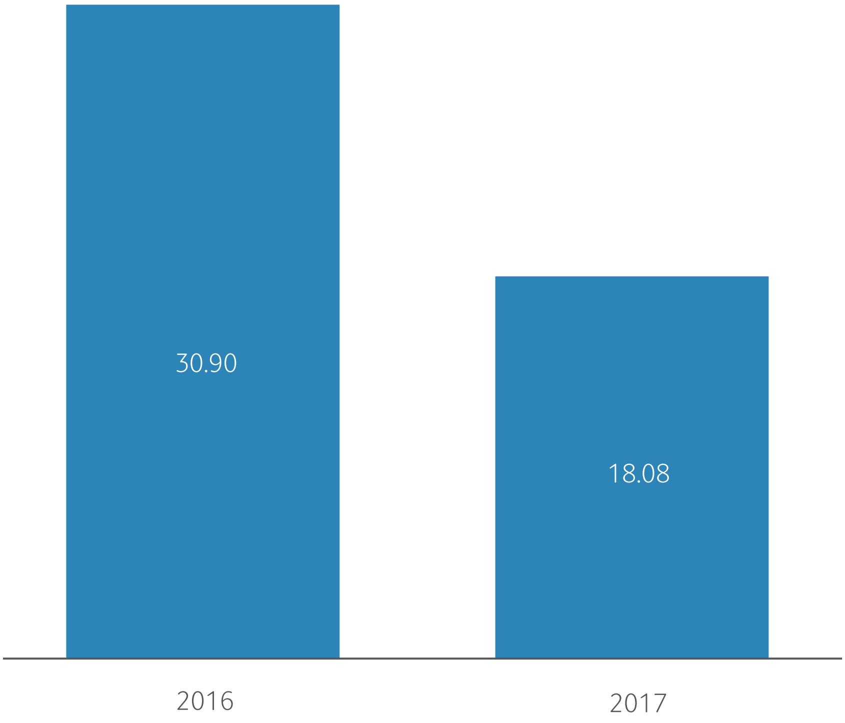
Public offers and offer types



Summary

- By the end of 2017, the number of public takeover bids in Germany totalled 20. Compared to the previous year 2016 (22 public bids), this constitutes a slight reduction.
- Most of the public offers in 2017 too, were takeover offers. While the number of delisting offers remained the same, the number of mandatory offers and simple purchase offers declined.

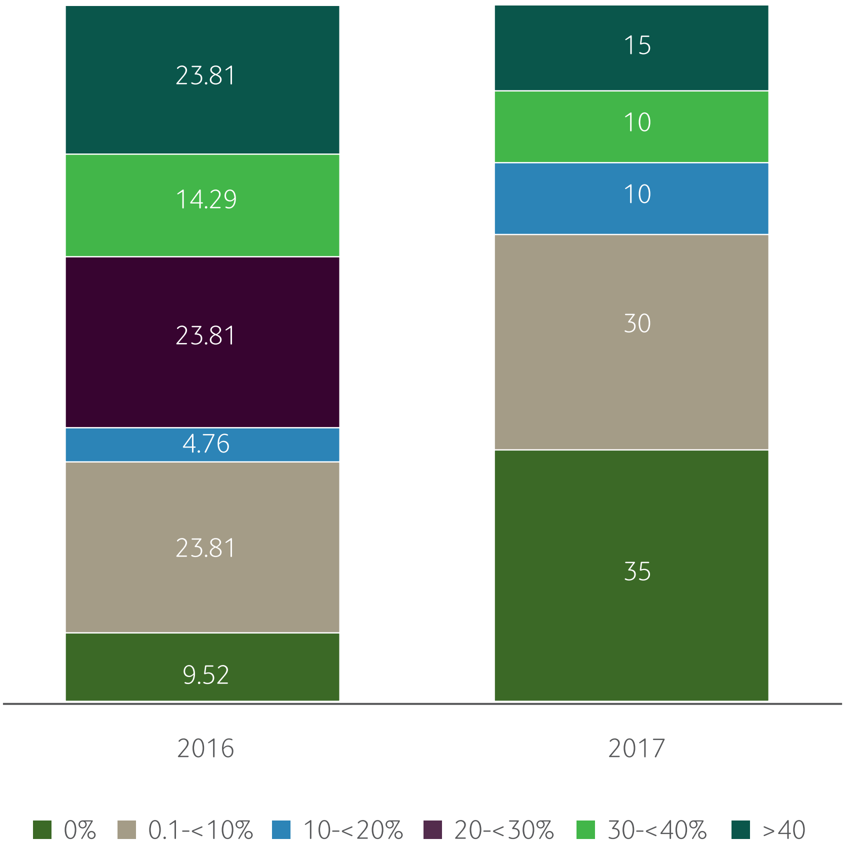
Offer volume (€ billion)



Summary

- The total offer volume in 2017 amounted to €18.08bn. Compared to 2016, this constitutes a major reduction.
- However, the high offer volume of €30.90bn in 2016 was primarily attributable to the failed takeover of Deutsche Börse AG (€22.07bn offer volume).
- The largest German takeovers in 2017 were the takeover of Uniper SE (€7.80bn), the takeover of STADA Arzneimittel AG (€4.13bn) and the takeover of Drillisch AG (€2.45bn).

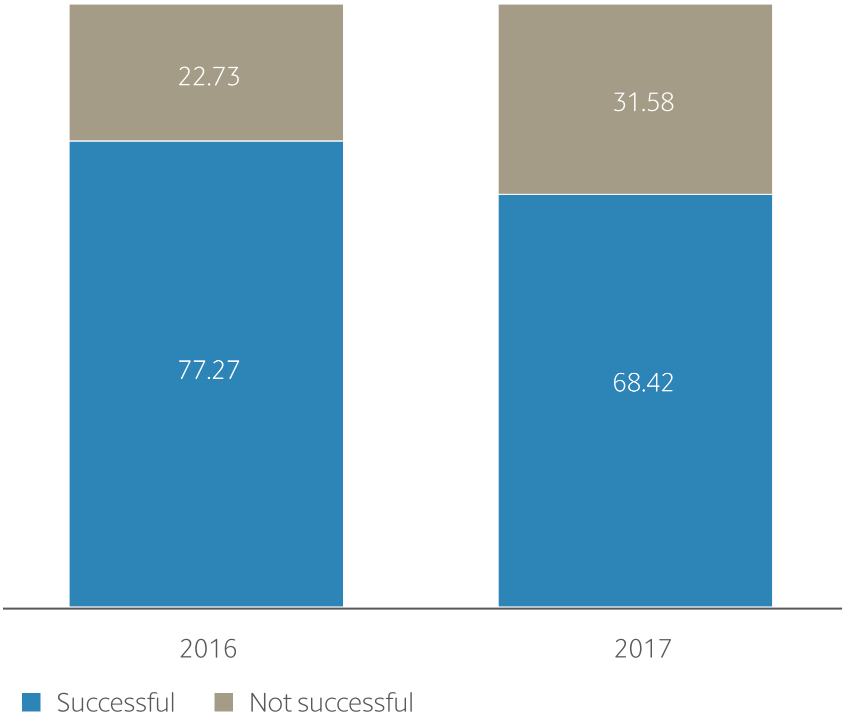
Offer premium (percent)



Summary

- The chart shows the offer premium in relation to the weighted three-month average German stock market price prior to the bid (for delisting purchase offers, the legally relevant six month average stock price was taken into account).
- The average offer premium in 2017 amounted to 14.10 percent which is a significant decrease compared to 2016 (31.66 percent).
- In 2017 the majority of offers provided a maximum premium of 10 percent. In contrast, premiums of 20 percent and more dominated in 2016.

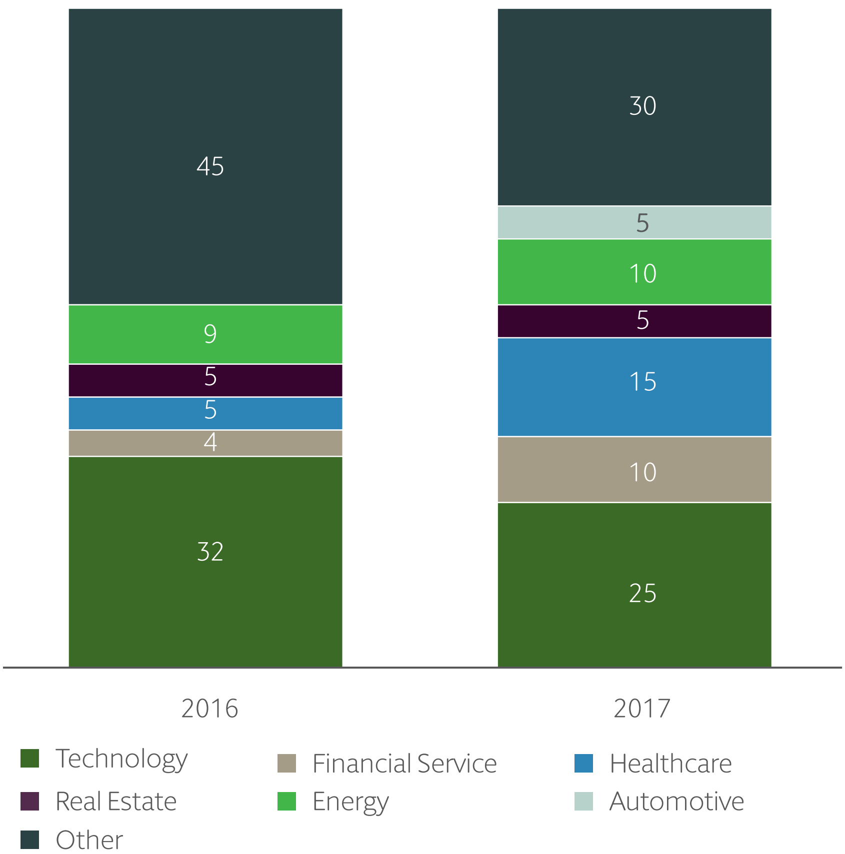
Successful takeovers (percent)



Summary

- By the end of 2017 68.42 percent of takeover offers had been successful, whereas 31.58 percent were unsuccessful.
- Compared to 2016 a slightly greater percentage of offers were unsuccessful.

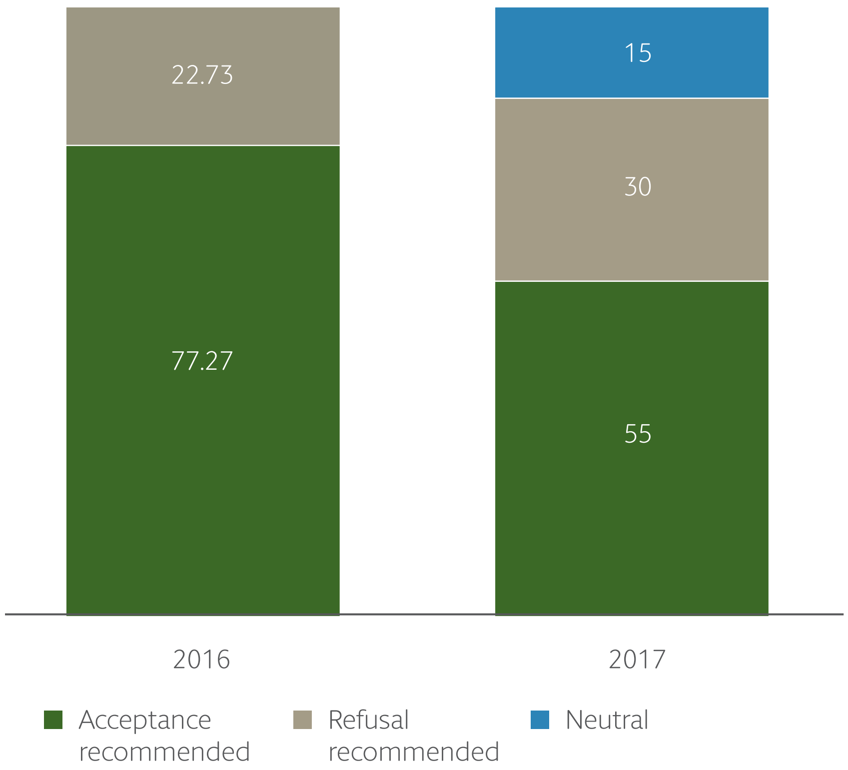
Takeovers by sectors (percent)



Summary

- In 2017 too, most of the takeovers took place in the technology sector. This is a continuation of the previous year's trend.
- However, in 2017, offers were distributed more evenly across the various industrial sectors than in the previous year.

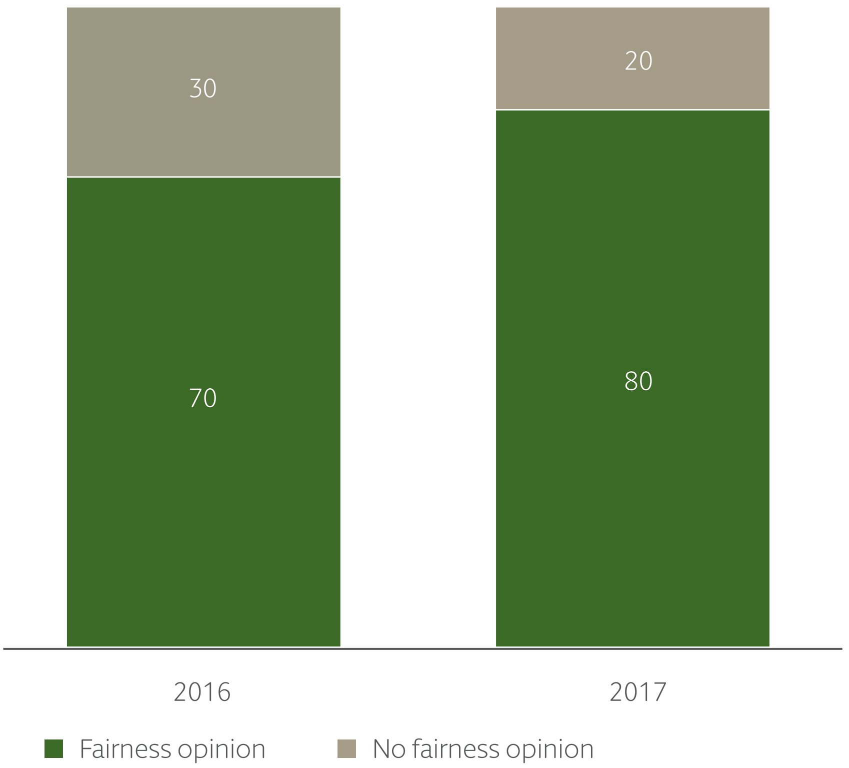
Management Board and Supervisory Board Statements (percent)



Summary

- In accordance with sec. 27 of the German Takeover Act, both the management board and the supervisory board have to submit a reasoned statement on the the public offer.
- In 2017, 55 percent of the statements recommended accepting the public offer, whereas 30 percent recommended refusing it. 15 percent of the statements expressed a neutral opinion in 2017.

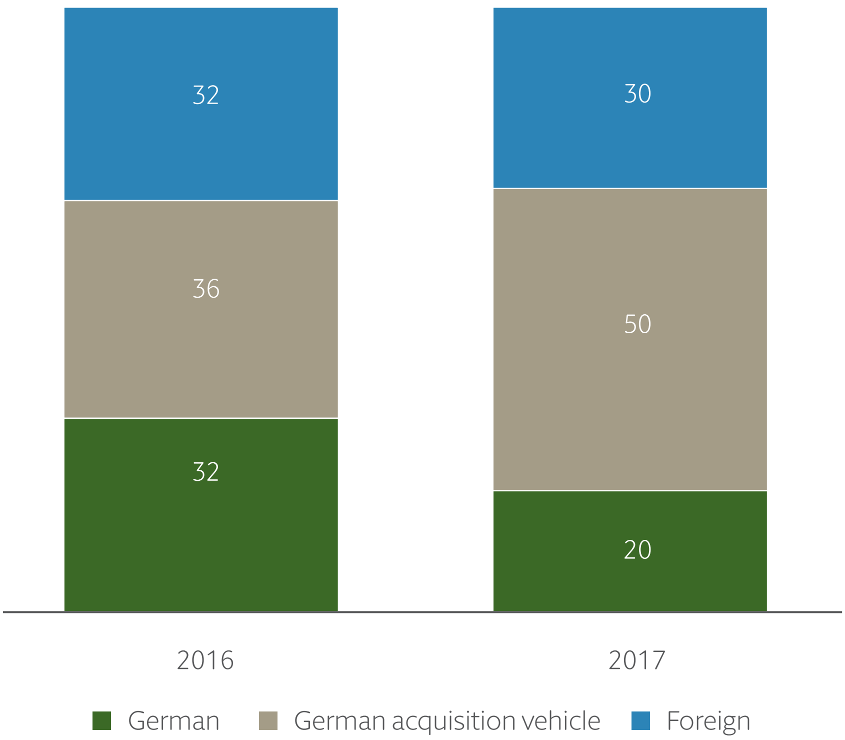
Fairness opinions (percent)



Summary

- Fairness opinions are statements by external experts on the adequacy of the public offer. Such expert opinions are often obtained by the management board and supervisory board as a basis for their own reasoned statement.
- In 2017, the management board and supervisory board obtained an external fairness opinion for 80 percent of offers. This represents an increase of 10 percent compared to the previous year. If the statement of the management board and supervisory board does not refer to a fairness opinion, we assumed that none was obtained.

Origin of bidders (percent)



Summary

- Compared to the previous year 2016, the ratio of foreign bidders to German bidders increased in 2017. For this purpose we consider a bidder as foreign if the offer was made either directly via a foreign bidder company or indirectly via a German acquisition vehicle.

Short profile

The STADA takeover

Nidda Healthcare Holding AG (Bain Capital/Cinven) – STADA Arzneimittel AG

In February 2017, Bain Capital and Cinven decided to as a consortium acquire STADA Arzneimittel AG (**"STADA AG"**), a German stock corporation headquartered in Bad Vilbel, Germany. STADA AG is an internationally active healthcare company with a focus on the pharmaceutical market. The consortium prevailed against other bidders in an auction process orchestrated by STADA AG prior to the launch of the public takeover offer.

On 22 June 2017, the first public takeover offer failed because it did not achieve the minimum acceptance threshold of 67.5 percent of the share capital.

The second attempt in July 2017 was successful. After the German Federal Financial Supervisory Authority granted an exemption from the mandatory exclusion period of one year which normally applies after a failed takeover offer, the consortium submitted an amended takeover offer. On 16 August 2017, the new minimum acceptance threshold of 63 percent was narrowly exceeded, achieving an acceptance quota of 63.87 percent of the share capital.

Overview	
Bidder	Nidda Healthcare Holding AG (Bain Capital/Cinven)
Target	STADA AG
Sector	Healthcare and pharmaceutical
Status	Successful
Acceptance rate	63.87%
Offer volume (max)	Approx. €4.13bn
Type of offer	Voluntary takeover offer by way of cash offer
Offer price	€65.53 per STADA share (final offer price, plus €0.72 possible dividend payout; first offer: €65.28 per share; the first offer was modified as it did not achieve the minimum acceptance threshold)
Acceptance period	19 July 2017 to 16 August 2017, 24:00 (local time Frankfurt am Main)
Stake building	No prior share purchases; the bidder entered into irrevocable agreements with several shareholders (approximately 19.6 percent of the share capital) before the second takeover attempt was launched
Business combination agreement	The bidder and STADA entered into an investment agreement that set out the principal terms and conditions for the execution as well as mutual intentions and plans with regard to the offer
Competing takeover offer	No parallel competing takeover offer was launched. However, a structured building process involving another bidder consortium (presumably Advent International and Permira) had been orchestrated by STADA AG prior to the launch of the takeover offer

Overview	
Statement by management board and advisory board	For both the initial and the amended offer the management board and the supervisory board of STADA jointly issued a statement recommending acceptance of the respective offer. The statements were supported by three fairness opinions which agreed with the recommendation
Financing	Equity and debt financing
Friendly/hostile	Friendly takeover
Conditions	– Merger control approval by the European Commission and seven other third countries – Minimum acceptance threshold of 63 percent of the shares (first offer: initally 75 percent then lowered to 67.5 percent; second offer 63 percent) – No resolution by STADA's annual meeting on a dividend exceeding the amount of €0.72 – No insolvency proceedings – No material capital increase
Other	The German Federal Ministry of Economic Affairs and Energy initiated a foreign investment review as to whether the indirect acquisition of STADA shares by Bain Capital and Cinven endangered the public order or security of the Federal Republic of Germany according to the German Foreign Trade and Payments Ordinance *(AWV)*.
Links	Offer document 27 April 2017 Offer document 19 July 2017

Recent legal developments

German Federal Court of Justice *(BGH)*, 7 November 2017, case ref. ZR 37/16 (McKesson Celesio/Magnetar)

As part of our discussion of recent developments in German takeover law, we present below the German Federal Court of Justice's judgment of 7 November 2017 (case ref. II ZR 37/16) in the matter McKesson/Celesio/Magnetar.

Facts

The German Federal Court of Justice considered a lawsuit by shareholders (including the U.S. fund Magnetar Capital) of Celesio AG who accepted the takeover offer made by McKesson, but in retrospect considered the offer to be inadequate and sued for an appropriate compensation. More precisely, the dispute dealt with the question of whether, in the context of determining the appropriate compensation for the takeover offer, the purchase price for convertible bonds which the bidder had acquired on the secondary market (i.e. from another bond holder) during the relevant period should also be taken into account.

The defendant McKesson had been planning the acquisition of Celesio AG since 2013. It sought to acquire a 75% shareholding in Celesio AG in order to conclude a controlling agreement with the target company after completion of the takeover. The first public takeover offer failed as it did not achieve the acceptance threshold set by McKesson. In the second attempt McKesson then acquired a 50.01% share in Celesio AG from Haniel Group at a purchase price of €23.50 per share and convertible bonds of Celesio AG from the hedge fund Elliot at a purchase price of €30.95/€30.94 per Celesio-share. At the end of January 2014, the conversion option under the convertible bonds was exercised by McKesson, as a result of which McKesson acquired further shares in Celesio AG. On 28 February 2014, McKesson published a takeover bid at a price of €23.50 for the outstanding shares of Celesio AG after the offer document with the afore-mentioned offer price had been been approved by the German Federal Financial Supervisory Authority *(BaFin)*. McKesson had disclosed to BaFin the prior acquisition of the convertible bonds and the price paid for them.

The claimants requested the payment of the difference amount of €7.45 between the offer price of €23.50 and the highest purchase price of €30.95 per share paid for the convertible bonds.

Legal analysis

In the event of a voluntary public takeover offer, pursuant to sec. 31 para. 1 German Takeover Act, the bidder must offer the shareholders of the target company appropriate compensation. The method of calculating this is set out in secs. 3 to 7 German Takeover Act Offer Ordinance *(WpÜG-AngebotsVO)*. The question to be considered was whether the prior derivative acquisition of convertible bonds had to be considered pursuant to sec. 31 para. 1 German Takeover Act to constitute an agreement equivalent to a purchase on the basis of which the transfer of shares can be demanded if the convertible bonds were acquired solely for the purpose of facilitating the takeover of the target company. Derivative acquisition means the purchase of existing convertible bonds from other bond holders as opposed to the purchase of convertible bonds newly issued by the target company.

In its 2014 annual report, BaFin stated that it would run counter to the meaning and purpose of the minimum price regulations of the German Takeover Act if the derivative purchase of convertible bonds had to be qualified as a relevant pre-acquisition in accordance with sec. 4 para 1 German Takeover Act Offer Ordinance and therefore refused to consider it when determining the applicable minimum offer price. BaFin argued essentially that as regards consideration as a relevant prior purchase it is not the purchase price for the acquisition of the bonds but solely the conversion price for converting the bonds is relevant.

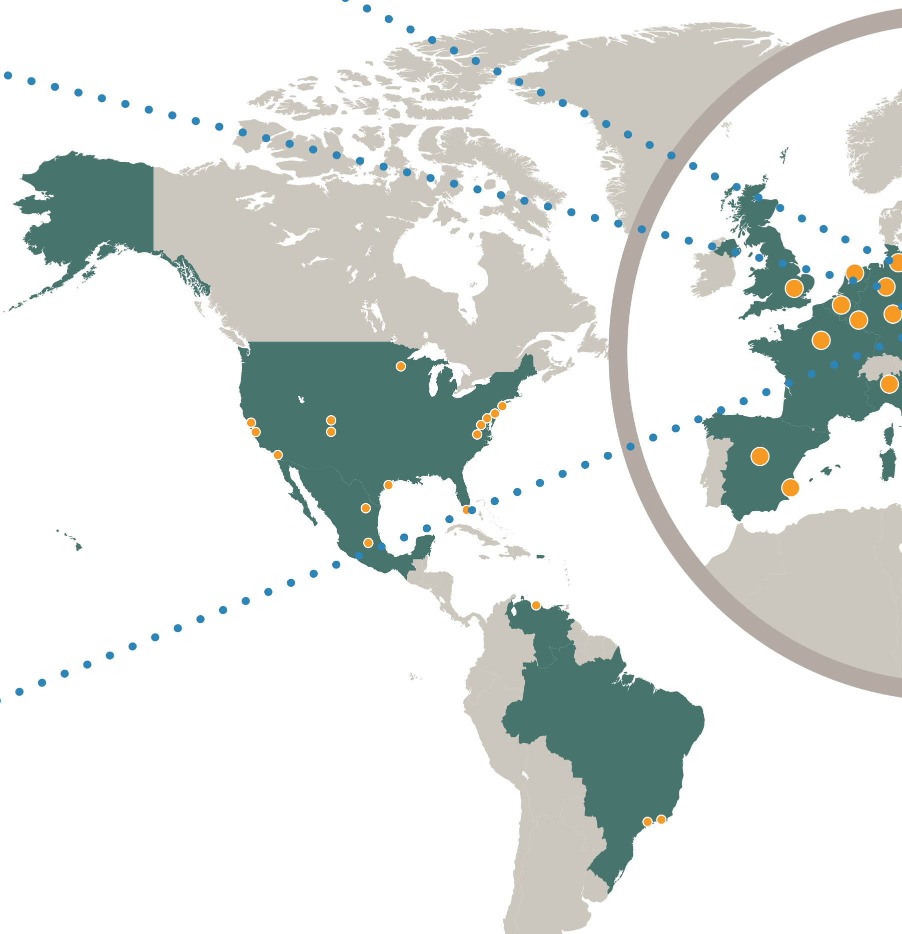
On the basis of this legal analysis, BaFin authorized the publication of the takeover offer by McKesson.

The District Court of Frankfurt as court of first instance concurred with the view taken by BaFin (case ref. 3-05 O 44/14). It argued that the derivative acquisition of convertible bonds should not be considered in the calculation of the adequate minimum price.

The decision was overturned on appeal by the Frankfurt Court of Appeals (case ref. 5 U 2/15), which argued that the derivative bond purchase should be treated as equivalent to a share purchase in such cases where, due to the short period of time between the acquisition and conversion of the convertible bonds, it became evident that the bond purchase was carried out only for the purpose of the subsequent takeover offer.

In the appeal on questions of law, the German Federal Court of Justice ultimately concurred with the Frankfurt Court of Appeals and passed a judgment in favor of the claimants (case ref. II ZR 37/16). The court based its decision on its understanding of the legal purpose of sec. 31 para. 6 sentence 1 German Takeover Act, stating that with the provision in sec. 31 para. 6 sentence 1 German Takeover Act the legislator wanted to prevent circumvention of the rules relating to the acquisition in rem in sec. 31 para. 1 sentence 2 German Takeover Act by means of contracts as an acquisition right. If a contract were concluded that enabled the acquisition in rem, this contract must be taken as a basis when determining the pre-acquisition price. The intention is to thus ensure that the bidder is bound to the price it itself considered adequate in the temporal context of the takover offer.

Our team in Germany



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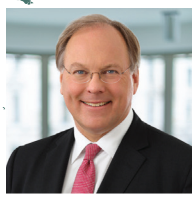

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