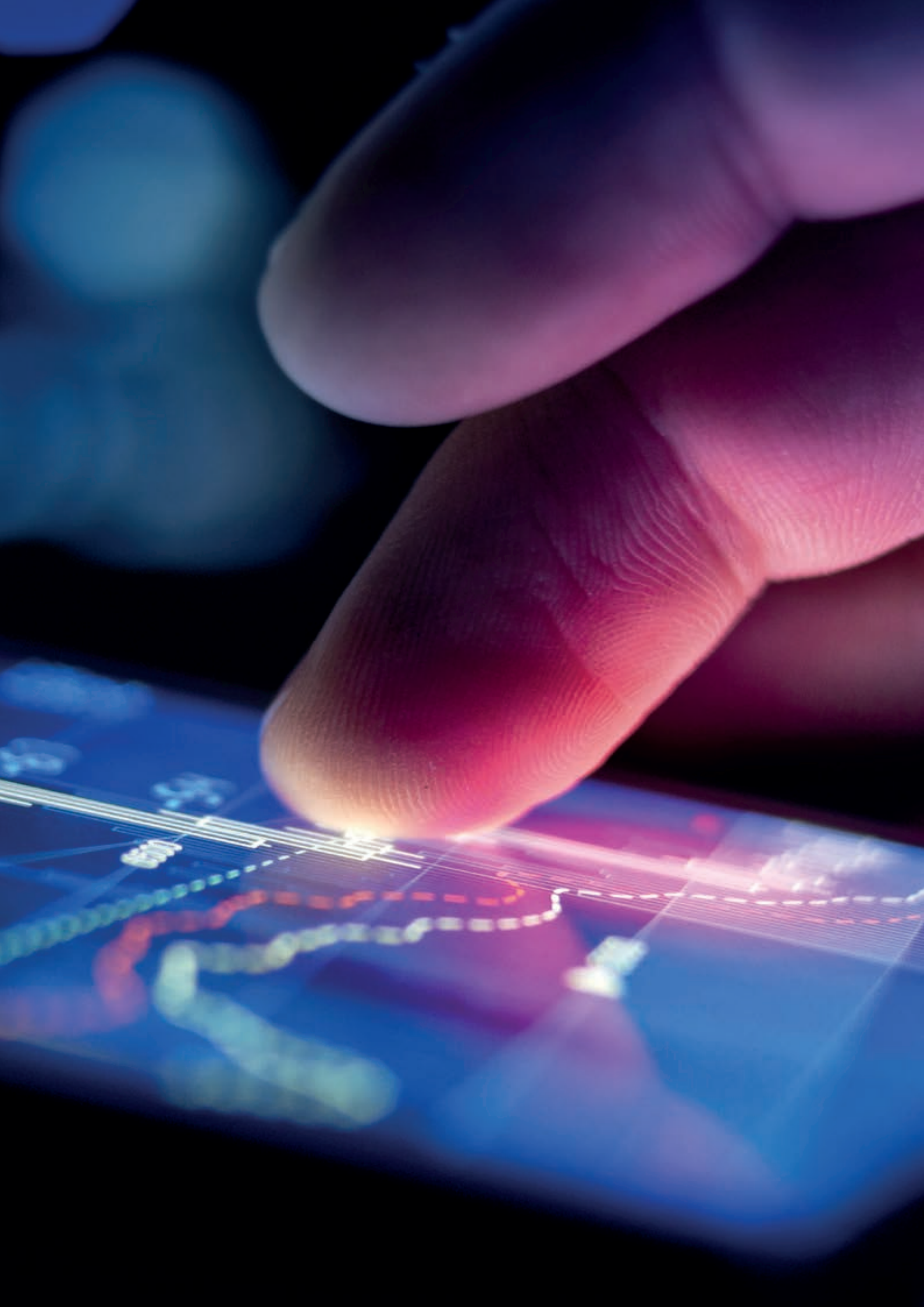


Public Takeovers in Germany

Newsletter

2019





Contents

1. Introduction	5
2. Statistics	6
2.1 Overview – market trends	6
2.2 Public offers and offer types	6
2.3 Offer volume	7
2.4 Development in market segments	8
2.5 Offer premium	9
2.6 Takeovers by sectors	10
2.7 Management board and supervisory board statements	11
2.8 Fairness opinions	12
2.9 Origin of bidders	12
3. Short profile	13
The innogy SE takeover	
4. Recent legal developments	16
4.1 Higher Regional Court of Frankfurt/Main (OLG Frankfurt/Main), 8 January 2018 – Third-party protection pursuant to German Takeover Act	16
4.2 German Federal Court of Justice (BGH), 25 September 2018 – Acting in Concert	18
4.3 Changes of the BaFin “Issuer’s Guide” (Emittentenleitfaden) – Module B	20



1. Introduction

Welcome to the second edition of our “Public Takeovers in Germany” newsletter. It provides an overview of public takeovers carried out in Germany during 2018 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 in 2018 under the German Takeover Act. 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 past calendar year. In 2018 this was the takeover offer for innogy SE by E.ON Verwaltungs SE.

Finally, we discuss the recent legal developments which are relevant for the German takeover market. In this edition we focus on the judgment by the German Higher Regional Court (Oberlandesgericht – OLG) of Frankfurt/Main concerning third-party protection in the German Takeover Act. In the previous edition of our newsletter, we reported on the judgement by the German Federal Court of Justice (Bundesgerichtshof – BGH) in the McKesson/Celesio/Magnetar case. This complaint was filed by shareholders who had originally accepted the takeover offer by McKesson for Celesio AG. In contrast, the decision of the Higher Regional Court of Frankfurt/Main now affects those shareholders who did not accept the offer.

Beyond this, we focus on the judgement by the German Federal Court of Justice concerning “acting in concert” and specifically regarding the question of whether in case of agreements in individual cases no attribution of voting rights takes place due to “acting in concert”. This edition also contains information on the new “Issuer’s Guide” (Emittentenleitfaden) by BaFin. On 17 December 2018, BaFin published the new Module B as a further part of the fifth edition of the new “Issuer’s Guide”. With regard to German takeover law, Module B contains the chapters “information on significant voting rights” and “information required for the exercise of rights arising from securities”.

2. Statistics

2.1 Overview – market trends

In 2018 the public takeover market in Germany showed the following trends in particular:

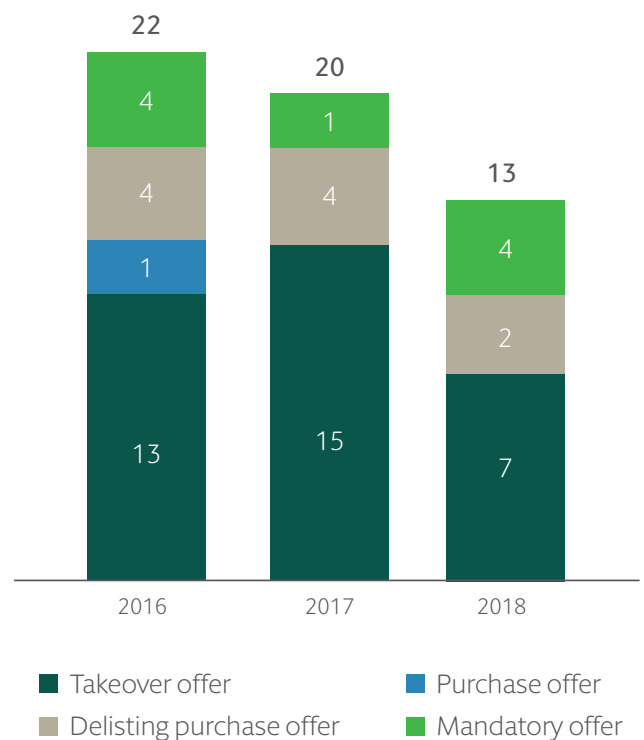
- The number of public offers declined significantly to only 13.
- The average offer premium of 7.76 % in relation to the three-month average rate prior to the bid is considerably lower than in the previous year (2017: 14.10 %), which itself was already very low.
- The strong appeal of the technology sector in previous years ended in 2018. Instead, the real estate sector recorded a sharp upturn. The healthcare/pharmaceutical and automotive sectors were also very popular.
- In the past year, a significant proportion of the statements issued by management boards and supervisory boards rejected takeover offers (30.77 %) or were neutral towards them (23.08 %).
- Foreign investors accounted for 69 % of public takeovers, either submitting bids directly or via German acquisition vehicles.

2.2 Public offers and offer types

By the end of 2018, there were a total of 13 public offers in Germany. This represents a marked decline compared with 2016 (22 public offers) and 2017 (20 public offers).

Once again, most of the offers made in 2018 were takeover offers. While there were two delisting purchase offers, the number of mandatory offers increased.

BaFin (sec. 15 WpÜG) prohibited takeover offers on two occasions this year: firstly, the offer by Deutsche Balaton AG for Biofrontera AG and, secondly, the offer by Triton Liegeschaften GmbH/ Mr. Jochen Schwarz for Pinguin Haustechnik AG. The former offer for Biofrontera AG was prohibited due to a lack of mandatory information and was corrected and then resubmitted in the course of the year.



2.3 Offer volume

The total volume of offers in 2018 amounted to €25.82 bn. This constitutes a major increase compared with 2017.

However, the vast majority of the 2018 figure was attributable to the takeover of innogy SE for €21.33 bn.

Furthermore, the delisting purchase offer regarding STADA Arzneimittel AG (€1.77 bn) and the takeover offer relating to VTG AG (€1.08 bn) should also be mentioned.



2.4 Developments in market segments

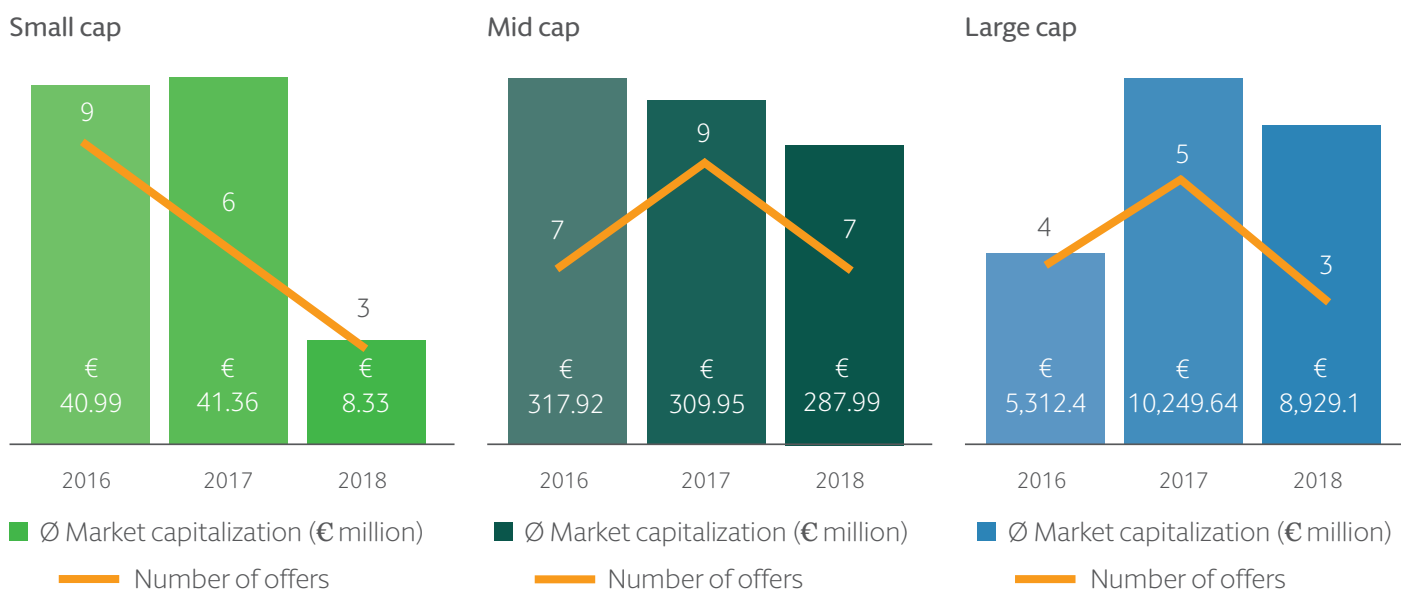
The market segments are defined as follows according to the respective market capitalization of the target company:

- Small cap: under € 100 million;
- Mid cap: € 100 million to € 1,000 million; and
- Large cap: € 1,000 million or higher.

The overall low takeover activity in 2018 hit the small cap sector the hardest, with only three takeover bids being recorded. The average market capitalization of target companies amounts to a mere €8.33 million.

While the number of takeover bids in the mid cap segment again approached the 2016 figure, the average market capitalization in this area also showed a significant decline to €287.99 million.

At €8.9 billion, the average market capitalization in the large cap segment was below the level of 2017, but well above 2016. This is mainly due to the large offer volume for the innogy SE takeover.

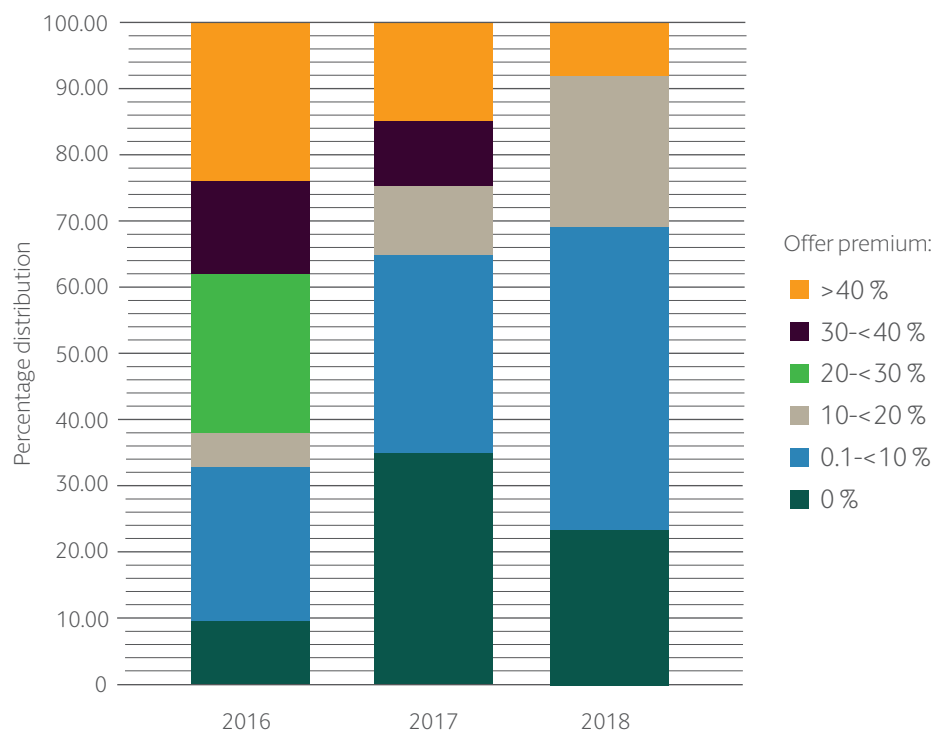


2.5 Offer premium

The following 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 2018 amounted to 7.76 %. This represents a further significant decrease compared with 2017 (14.10 %) and 2016 (31.66 %).

In 2018 the majority of offers provided a maximum premium of 10 %. At around 69 %, this represents only a slight increase over the previous year's 65 %. However, at 92.41 %, the predominant offer premium in 2018 is limited to a maximum of 20 %. In contrast, 25 % of the offers in 2017 still contained a premium of more than 20 %.



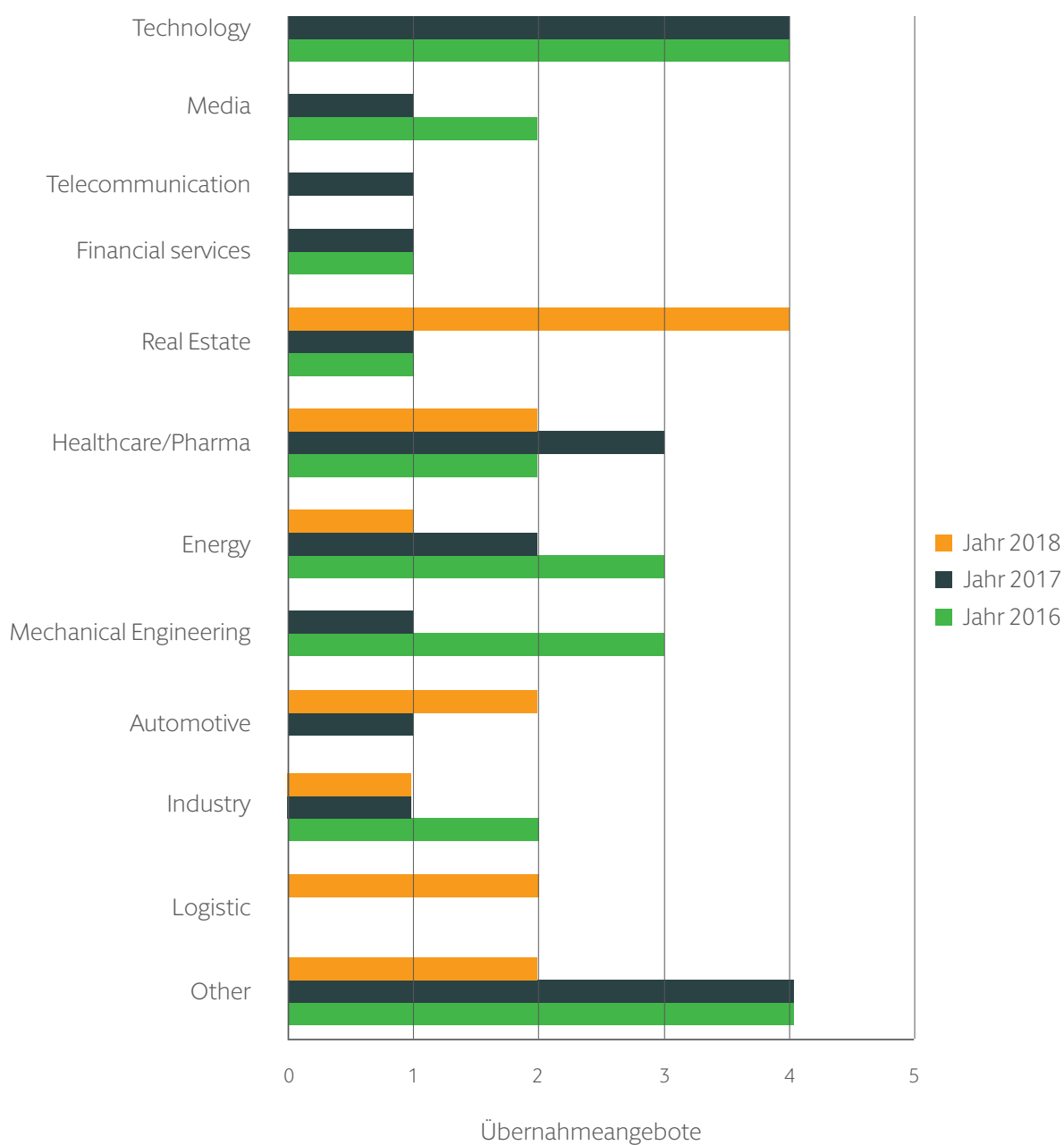
2.6 Takeovers by sector

In 2016 and 2017, the TMT sector (technology, media, and telecommunications) recorded the highest level of activity in the German takeover market.

This trend ended in 2018. In contrast, there has been a significant upturn in the real estate sector, which accounts for almost a third of all takeovers. The healthcare/pharmaceutical and energy sectors recorded similar levels of activity compared with the previous year.

There were no takeovers in the mechanical engineering sector in 2018, while activity in the automotive sector increased.

Overall, the German acquisition market in 2018 was dominated by the real estate, automotive and healthcare sectors.

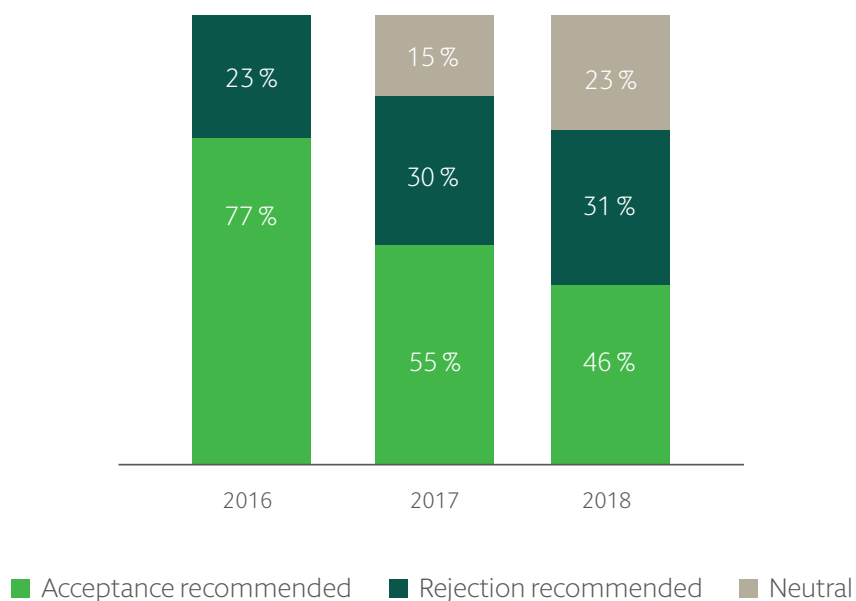


2.7 Management board and supervisory board statements

In accordance with sec. 27 of the German Takeover Act, both the management board and the supervisory board must issue a reasoned statement on the public offer.

In 2018, 46 % of the statements recommended accepting the public offer, whereas 30 % recommended rejecting it. 23 % of the statements expressed a neutral opinion.

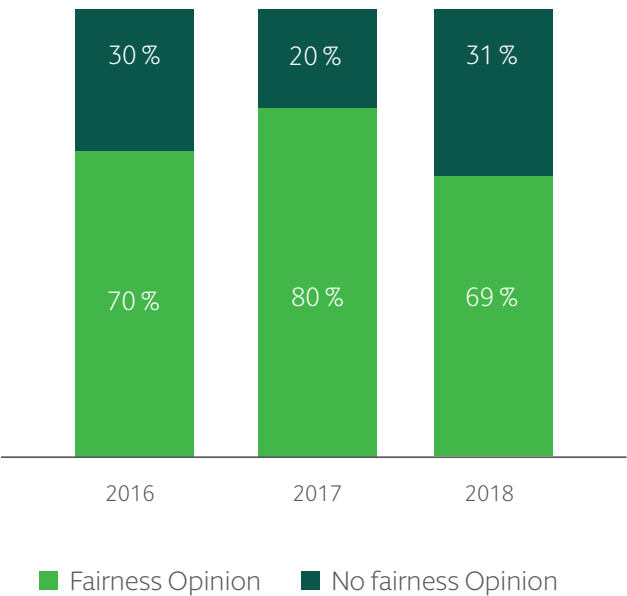
The decreasing support of management boards and supervisory boards is in line with the low average offer premiums compared with previous years.



2.8 Fairness opinions

Fairness opinions are statements by external experts on the appropriateness 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.

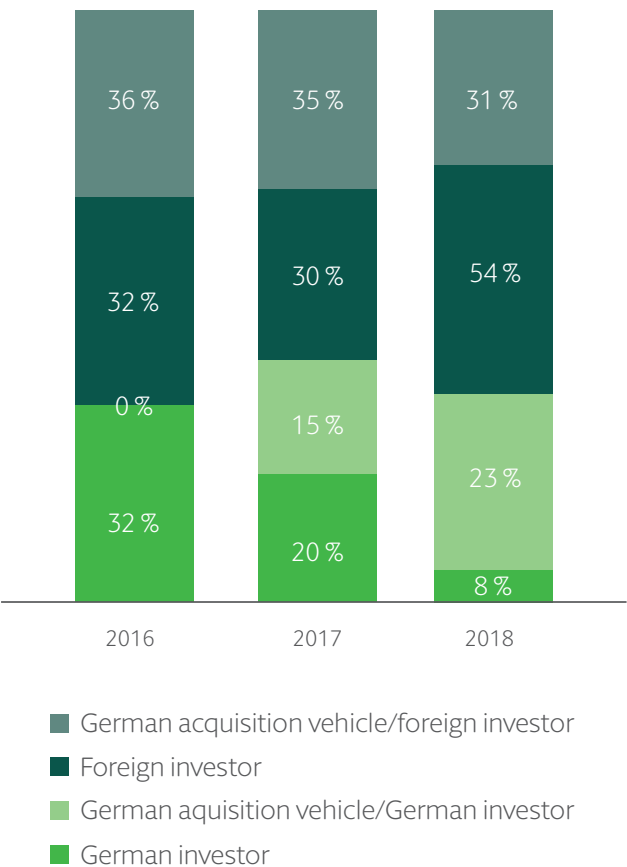
In 2018, management boards and supervisory boards obtained an external fairness opinion for 69 % offers. This roughly corresponds to the level of 2016, after a slight increase was recorded in 2017.



2.9 Origin of bidders

In 2018, 69 % of the offers came from foreign investors who published an offer either directly or via German acquisition vehicles.

In contrast, 31 % of takeover bids were submitted by domestic companies directly or via a German acquisition vehicle.



3. Short profile

The innogy SE takeover

On 27 April 2018, E.ON Verwaltungs SE submitted a public takeover offer (cash offer) for innogy SE. With a maximum offer volume of €21.33 bn, this was by far the largest public offer in Germany in 2018. The major shareholder RWE undertook to sell 76.79 % of the innogy shares held by RWE Downstream Beteiligungs GmbH to E.ON Verwaltungs SE. In addition, E.ON was able to acquire a further 9.4 % of innogy shares as part of the public takeover offer. At 86.2 %, E.ON's shareholding has not yet reached the threshold of 90 % that is relevant for a merger squeeze-out.

The innogy takeover was notable in particular for the long deadline by which the offer conditions had to be fulfilled at the latest. In the case of offer conditions governed by antitrust law, BaFin has previously deemed a period of up to 10 months after the end of the acceptance period to be legitimate in individual cases or, as an absolute limit, even 12 months (synchronized with the subsequent acquisition period in sec. 31 para. 5 sentence 1 German Takeover Act) after the end of the acceptance period. In respect of the innogy takeover, a period of approximately 15.5 months has now been allowed. The reasons for this were the possible implications of Brexit, which were unclear at that time, and a complex antitrust review in the energy sector.

According to BaFin's administrative practice, in the case of such long periods, bidders are required to make certain compensation payments in order to protect shareholders. Usually, the bidder allows the shares of those shareholders who have accepted the offer to be traded under a separate securities identification number until the completion of the offer. Such an unusually long deadline as in this case meant that further measures were necessary: (i) The post-acquisition period relevant for the assessment of the takeover price was extended on a contractual basis parallel to the end of the deadline and (ii) all subsequent acquisitions must be published by a notary by the deadline.

(cf. also Hippeli, *Der Konzern* 2018, 465 (469 ff.))

Overview	
Bidder	E.ON Verwaltungs SE
Target	innogy SE
Sector	Energy
Status	Successful
Acceptance rate	86.2 %
Offer volume (max.)	Approx. € 21.33 bn
Offer type	Voluntary takeover offer by way of cash offer
Offer price	<p>€ 36.76 per innogy share</p> <p>In addition, innogy shareholders are to participate in the dividends for financial year 2017 and financial year 2018.</p> <p>For financial year 2017, innogy shareholders will receive € 1.60 per innogy share of the payable dividend.</p> <p>If the takeover is completed prior to the date on which the decision on the appropriation of the net profit for financial year 2018 is made, the offer price will increase by €1.64 per innogy share. If the decision takes place thereafter, the shareholders will receive the corresponding dividend. Should the dividend be lower than €1.64 per innogy share, the bidder will bear the difference.</p>
Acceptance period	27 April to 6 July 2018, 24:00 (local time Frankfurt/Main)
Stake building	This takeover offer represents one of several transactions in which RWE Aktiengesellschaft and RWE Downstream Beteiligungs GmbH, undertook to sell the 426,624,685 innogy shares held by RWE Downstream Beteiligungs GmbH (corresponding to approx. 76.79 % of the innogy shares) to the bidder, i.e. E.ON.
Business Combination Agreement	-
Competing takeover offer	-
Statement by the management board and supervisory board	<p>The management board and supervisory board have not made a recommendation to the innogy shareholders (neutral statement). The management board and the supervisory board consider the offer price to be reasonable within the meaning of sec. 31 para. 1 WpÜG. However, they cannot conclusively assess whether (i) the total value is reasonable when also taking into account the share purchase and transaction agreement with RWE, (ii) in the event of future integration measures by E.ON, higher compensation may be paid to innogy shareholders who have not accepted the offer, and (iii) there will be a planned reduction of up to 5,000 jobs (to date, binding provisions to adequately safeguard the interests of the employees of innogy SE have failed).</p> <p>The statement was accompanied by three fairness opinions which all consider the total value to be appropriate from a financial point of view.</p>
Financing	Equity and debt
Friendly/hostile	Friendly takeover

Closing Conditions	<ul style="list-style-type: none">• Antitrust clearance by the European Commission by 31 December 2019.• The waiting periods under the Hart-Scott-Rodino Antitrust Improvements Act have expired or been terminated by 31 December 2019.• In the case of a declaration of competence by the British Competition and Markets Authority ("CMA"), in the event of the withdrawal of the United Kingdom from the EU, the acquisition of the innogy shares by E.ON has been cleared by the CMA until 31 December 2019 or is deemed to have been cleared.• The acquisition by RWE Aktiengesellschaft of the minority interest in E.ON and the right of RWE Aktiengesellschaft to appoint a member of the supervisory board of E.ON must be approved by the German Federal Cartel Office (Bundeskartellamt) and the CMA by 31 December 2019 or will be deemed to have been approved by them.• Until the acceptance period has expired or until the otherwise last unfulfilled conditions have been met, no temporary injunction or temporary judgement has been issued prohibiting or rendering unlawful the completion of the takeover offer or the transfer of the innogy shares.• Neither the insolvency of innogy SE nor a significant deterioration in EBITDA in the network & infrastructure and sales divisions of innogy SE has occurred.• No capitalization or similar measures were carried out.• No material assets of the network & infrastructure and sales divisions of innogy SE have been sold.
Links	Offer document dated 27 April 2018 Statement of the management board and supervisory board dated 10 May 2018

4. Recent legal developments

In the context of current legal developments in German takeover law, the following aspects were particularly relevant in 2018.

4.1 Higher Regional Court of Frankfurt/Main (OLG Frankfurt/Main), 8 January 2018 – Third-party protection pursuant to German Takeover Act

In our last newsletter, we reported on the decision by the German Federal Court of Justice in the McKesson/Celesio/Magnetar case, judgement dated 7 November 2017 (case ref II ZR 37/16). This related to a lawsuit brought by shareholders who had in this case accepted the takeover bid by McKesson for Celesio AG. The decision of the Higher Regional Court of Frankfurt/Main (OLG Frankfurt/Main) (case ref WpÜG 1/17) now considers the shareholders who have **not** accepted the offer and who are now also demanding an increased offer price of approximately €30.95.

a) Facts

The appellant is a British investment manager of fund companies in the legal form of a Limited Liability Partnership LLP. The appellant did not accept the takeover bid because it deemed the consideration to be inappropriate (i.e. too low).

Following the successful action before the Higher Regional Court of Frankfurt/Main of those shareholders who originally accepted the offer, the appellant approached BaFin on 8 April 2016 and requested that the approval notice of 28 February 2014 for the publication of the offer document be reviewed. According to this request, BaFin should withdraw this notice and, instead, oblige the bidder to submit a mandatory offer at a price of €30.95, pursuant to sec. 35 para. 1 sentence 1 and para. 2 sentence 1 German Takeover Act. BaFin did not grant this request on the grounds that the German Takeover Act does not contain any subjective public right, according to the established practice of the Higher Regional Court of Frankfurt/Main. Thus, no protective effect for third parties exists. A third party could therefore not force BaFin to intervene against a bidder.

Thereafter, the appellant requested that it be invited to participate in the approval procedure and, alternatively, that it be granted a hearing and access to the files. BaFin issued a decision denying these requests. The appellant then lodged an objection, which was unsuccessful.

The appellant has now filed an appeal with the Higher Regional Court of Frankfurt/Main against the decision to dismiss its objection and has submitted a motion that BaFin be obliged to reverse the decision regarding the objection, to revoke the approval notice and to oblige the bidder to submit a mandatory offer (including further alternative motions).

b) Legal analysis

The Higher Regional Court of Frankfurt/Main dismissed the appeal as inadmissible, stating that BaFin supervises takeover procedures exclusively in the public interest (sec. 4 para. 2 German Takeover Act). In the court's view, leave to appeal (sec. 48 para. 3 sentence 1 German Takeover Act) could only be granted if the appellant can claim to have a corresponding right to the desired administrative action by BaFin. However, there is no such subjective public right that entitles the appellant to have administrative action taken. The German Takeover Act does not have any protective effect for third parties. With regard to the issue of being invited to participate in the procedure pursuant to sec. 13 German Administrative Procedure Act (VwVfG), the court ruled that the appellant had also failed to recognize that the decisive factor here is not only the formal involvement of BaFin, but that a rule protecting third parties was also necessary for the admissibility of the complaint. At most, a gross violation of fundamental rights under the German Basic Law (GG) could be considered. However, capital as such is not protected by Article 14 German Basic Law.

c) Practical consequences

The Higher Regional Court of Frankfurt/Main has confirmed its established practice: The provisions of the German Takeover Act do not provide third-party protection. Thus, shareholders who have not accepted the takeover offer are not entitled to any legal protection under administrative law.

d) Follow-up issue: civil liability arising out of culpa in contrahendo

At best, this leaves the possibility of a civil action against the bidder. To date, such a move has only been open to shareholders who accepted the offer (sec. 12 German Takeover Act). For those who rejected the offer, a claim could at best arise from the initiation of a contract (referred to as culpa in contrahendo - c.i.c.) pursuant to secs. 311 para. 2, 280 para. 1, 241 para. 2 German Civil Code (BGB). This basis for a claim was only touched on in a decision of the Regional Court of Cologne (judgment dated 20 October 2017 – case ref. 82 O 11/15) and ultimately rejected.

In contrast, in appraisal proceedings relating to a similar case, the Regional Court of Stuttgart (judgment dated 17 September case ref. 2018 – 31 O 1/15) addressed the issue of c.i.c. as the basis for a claim in more detail obiter dictum:

According to the Regional Court of Stuttgart, the submission of the takeover bid initially gave rise to a pre-contractual obligation within the meaning of secs. 311 para. 2 and 241 para. 2 of the German Civil Code. This obliges the bidder to offer all shareholders appropriate consideration, not only the accepting shareholders. By offering inappropriate consideration, the bidder had breached this duty defined under the law of obligations. With regard to this breach of duty, the Regional Court of Stuttgart again referred to the decision of the Higher Regional Court of Frankfurt/Main and the decision of the German Federal Court of Justice in the McKesson/Celesio/Magnetar case, which we reviewed in our last newsletter. The Regional Court of Stuttgart ruled that, furthermore, the bidder was responsible for the breach of duty (sec. 280 para. 1 sentence 2 German Civil Code). Firstly, the bidder could not invoke the legal situation prevailing prior to the decision of the German Federal Court of Justice. Until then, opinion was divided in the literature as to whether the price paid for convertible bonds of the target company under a derivative acquisition must be taken into account when determining the minimum price in accordance with the German Takeover Act. In the court's view, if such a legal question has not been conclusively resolved, an unavoidable legal error that is not attributable to fault cannot be deemed to have been committed. Secondly, the bidder could not exculpate itself by arguing that

BaFin should have prohibited the publication of the takeover bid. The threshold for prohibiting a takeover bid is very high and such a prohibition is only necessary in the case of „obvious“ violations of the law. Consequently, the Regional Court of Stuttgart considers the prerequisites for c.i.c. to be fulfilled.

The legal consequence of c.i.c. is the injured party's claim for damages, although this is limited to the so-called negative interest, under which the injured party must be put in the position that he would have been in if he had not relied on the legal validity of the contract. However, this legal consequence is not helpful because the matter at hand concerns the shareholders who did not accept the offer. These shareholders are asserting their positive interest, i.e. they want to be put in the position that they would be in if the obligations had been duly fulfilled. However, according to the established practice of the German Federal Court of Justice concerning c.i.c., compensation for this positive interest is only due if it is certain that, had the injuring party acted in a due and proper manner, the parties would have concluded the contract on terms that are more favorable to the injured party. According to the Regional Court of Stuttgart, no such findings can be made in this case. From the point of view of damage law, it should not be assumed that the bidder intended to submit an offer of €30.95 „if necessary“. In fact, there was certainly the possibility that the bidder could have refrained from submitting the takeover bid completely.

However, it should be noted that the decision of the Regional Court of Stuttgart was based on appraisal proceedings. A different chamber of the Regional Court of Stuttgart is responsible for the civil law action asserting c.i.c. For that reason, the legal situation under civil law for this scenario has not yet been fully clarified.

4.2 German Federal Court of Justice (BGH), 25 September 2018 – No attribution of voting rights due to “acting in concert” in case of individual agreements

The German Federal Court of Justice heard a case concerning so-called “acting in concert” (judgment dated 25 September 2018, case ref. II ZR 180/17). This involves the voting rights of a third party being attributed to the party subject to reporting obligations or to one of its subsidiaries if the parties jointly agree on a course of action in relation to the issuer. However, pursuant to sec. 34 para. 2 German Securities Trading Act – WpHG (which matches the parallel provision of sec. 30 para. 2 German Takeover Act – WpÜG), agreements in individual cases are excluded from being attributed. The German Federal Court of Justice has now specified the conditions under which agreements in individual cases exist.

a) Facts

Insolvency proceedings were initiated against the defendant, a listed stock corporation (Aktiengesellschaft – AG). On 13 May 2011, the annual general meeting under the direction of “R”, the sole member of the management board and shareholder, resolved to continue the company and to reduce the share capital with a subsequent capital increase. In this context, the plaintiff became a major shareholder of the defendant and held 19.56 % of the subscribed capital. For this purpose, the plaintiff submitted a corresponding voting rights notification on 23 April 2013. After his dismissal on 10 April 2013, R held 10.89 % of the shares.

The plaintiff challenged several resolutions passed at an extraordinary general meeting on 21 February 2014, on the grounds that he was wrongly denied entry to the extraordinary general meeting. The Regional Court (Landgericht – LG) granted the complaint, but the Higher Regional Court (Oberlandesgericht – OLG) dismissed it.

The Higher Regional Court justified its decision by stating, on the one hand, that the plaintiff was not entitled to contest the resolutions pursuant to sec. 245 No. 2 of the German Stock Corporation Act (Aktengesetz – AktG), because he did not attend the annual general meeting. Furthermore, the plaintiff had not fulfilled his reporting obligations under sec. 21 German Securities Trading Act (old version). Pursuant to sec. 22 para. 2 German Securities Trading Act (old version), the voting rights of R are attributable to the plaintiff. As a result of the reporting violation, the plaintiff forfeited the rights conveyed by his shares pursuant to sec. 21 para. 1 German Securities Trading Act in conjunction with sec. 28 para. 1 German Securities Trading Act (old version). R. and the plaintiff had agreed on their conduct by jointly drafting a request to convene an extraordinary shareholders' meeting on 5 March 2013. The aim was to remove the chairman of the supervisory board and to elect further representatives to the understaffed supervisory board in order to realign the business of the stock corporation.

b) Legal analysis

First, the German Federal Court of Justice decided that the liaison between the shareholders regarding the composition of the supervisory board and the associated realignment of the stock corporation did not meet the statutory prerequisites for “acting in concert”, which are that the party subject to reporting obligations and the third party work together with the aim of achieving a permanent and substantial change in the focus of the business. This may also take place outside the annual general meeting, and the mere intention to exert influence is sufficient, rather than actual influence. However, in the court's view, in the present case no change in the focus of the business was intended as a result, since only the already established corporate strategy was supported.

Irrespective of this, the exception of agreements in individual cases pursuant to sec. 34 para. 2 German Securities Trading Act applies. To date, the German Federal Court of Justice has left open the question of whether the term “individual case” should be defined formally or under substantive criteria. The German Federal Court of Justice has now expressly adopted the formal approach. In the court's opinion, both the wording and the concept of legal certainty may argue in favor of this. According to the meaning and purpose of the provision, only those cases should be excluded in which the concerted conduct is not continuous and consistent. The court found that a substantive criteria approach that focuses solely on the possible effect of an individual measure is not suitable. Therefore, the frequency of the concerted action is decisive. According to the court, the merely one-time agreement on a course of action therefore fulfils the prerequisites for an agreement in an individual case pursuant to sec. 34 para. 2 German Securities Trading Act, which means that no voting rights can be attributed.

c) Practical consequences

To date, the German Federal Court of Justice has left open the question of whether the term “individual case” within the meaning of sec. 34 para. 2 WpHG (or sec. 30 para. 2 WpÜG) should be defined formally or under substantive criteria. The German Federal Court of Justice has now opted for the formal approach and thus created legal certainty. In administrative practice, BaFin has so far (Issuer's Guide (Emittentenleitfaden), 2013, s VIII.2.5.8.2., p.122) taken a substantive-law approach. The 5th edition of the new Issuer's Guide (Issuer's Guide, 2018, Module B, I.2.5.10.2, p.28) does not take into account court rulings either. It therefore remains to be seen whether and when administrative practice will change.

4.3 Changes to the “Issuer’s Guide” (Emittentenleitfaden) – Module B

On 17 December 2018, BaFin published Module B as a further part of the 5th edition of the Issuer’s Guide. Due to changes in European and national law, as well as court rulings on administrative law, it became necessary to revise the preliminary edition, which dates back to 2013. Module B contains the chapters „Information on significant shares of voting rights“ and „Information required for the exercise of rights arising from securities“, which are relevant to takeover law.

The new edition contains numerous editorial changes, in particular due to changes in the numbering of the German Securities Trading Act (WpHG) as a result of the Second Financial Market Amendment Act. In addition, individual sections are simplified and explanations of new legal provisions that were made long ago are deleted. BaFin has also included further examples from practical supervision and clarified explanations regarding the background to recent court rulings.

Link: [Module B of the new Issuer’s Guide](#)



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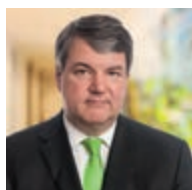
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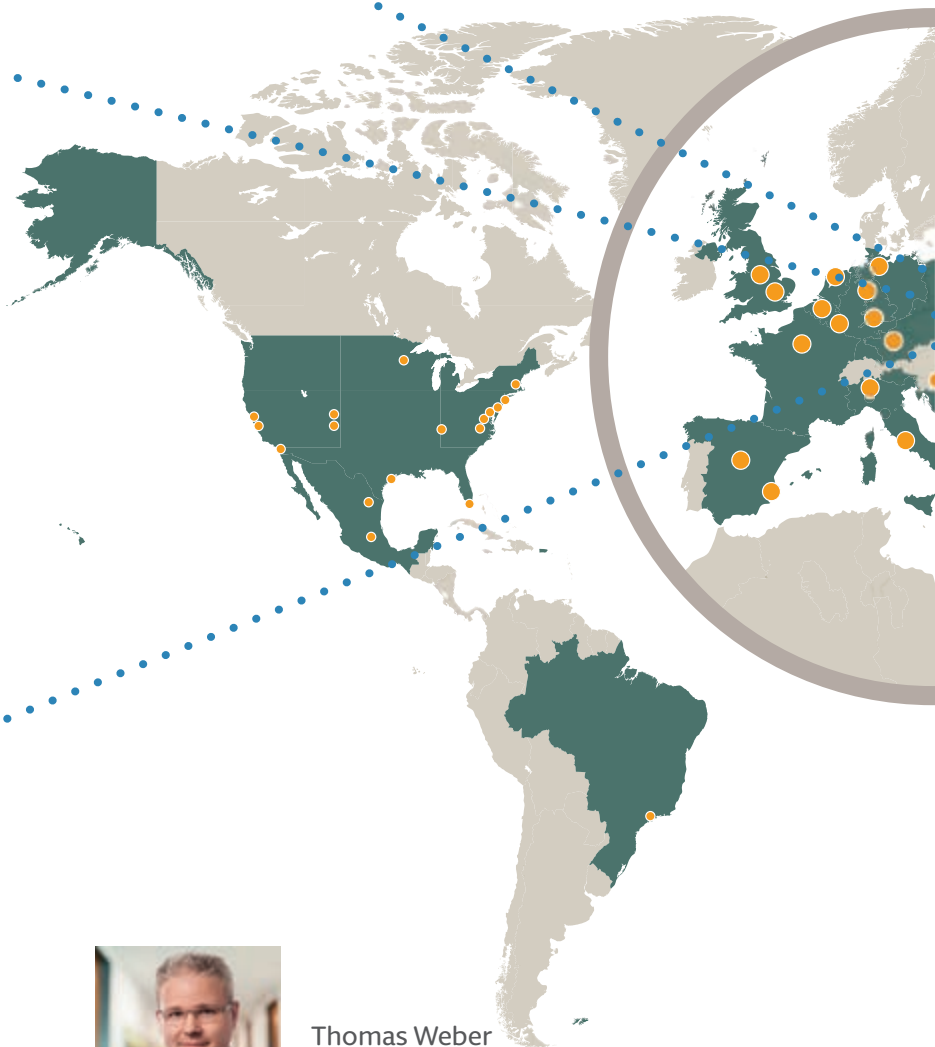
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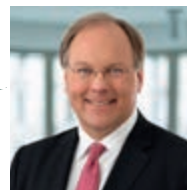
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