Public M&A Report 02/2024

The German public takeover market in the first half of 2024

Editorial

There is upward movement in the market.

Dear readers,

Half a year has passed since the last Noerr Public M&A Report came out, and we are pleased to present the latest edition, in which we take a close look at market activity in the first half of 2024.

We consider the market trend to be positive. In particular, the number of transactions has risen compared to the same period of last year. After adjusting for a special effect from the previous year, there is an upward trend in the offer value. The first half of 2024 is characterised by many large-cap transactions with values in the low to mid single-digit billion range, though no mega takeovers in the double-digit billion range were observed. In contrast, the mid-cap market was quiet with only two transactions. Further, we noticed that fairness opinions to assess the appropriateness of consideration were not obtained in connection with a relatively large number of reasoned statements.

Our focus article in this issue of the report explores *"The role of banks in public takeovers under the German Securities Acquisition and Takeover Act"*. The importance of these institutions in the structuring, financing, settlement and valuation of public offers for both bidders and target companies cannot be overstated. We outline their most important functions within the legal context of the German Securities Acquisition and Takeover Act.

The Noerr Public M&A Report 02/2024 would not have been possible without the contributions of many colleagues at Noerr. We would like to express our special thanks to them, in particular to *Philip Schmoll* for preparing the article on reasoned statements and *Juri Stremel* for his editorial support.

We hope that you will enjoy reading this report!

Dr Volker Land

Dr Stephan Schulz

Highlights

Continuation of the positive market trend

In the first half of 2024, the number of public takeover bids increased to 13 compared to 11 in the same period of 2023. Despite this rise in transactions, the total offer value, measured by market capitalisation at the offer price "**MCO**", fell by 13 % year-on-year from EUR 21.5 billion to EUR 18.7 billion. This decline is largely due to the significant impact of the EUR 16.2 billion delisting offer to the shareholders of Vantage Towers AG in the first half of 2023. Nonetheless, the market continues to show a positive trend following the downturn in 2022.

Ongoing delisting trend and negative trend in takeover bids

The high number of pure and combined delisting offers already observed in the same periods of the previous years increased significantly once again, rising from four in the first half of 2023 to nine in 2024. In contrast, the number of takeover bids fell from five to four. A trend can also be seen here, albeit a negative one: While takeover bids regularly accounted for the largest share of all offers in the 2010s, delisting bids have been challenging them for this position since the early 2020s.

High number of large-cap transactions with a low average value

Six offers in the large-cap segment (including four delisting offers) were submitted in the first half of 2024, which represents a significant increase compared to the same period of the previous year (two offers in the large-cap segment). However, the average offer value of these transactions was EUR 3.0 billion, which was significantly lower than the EUR 9.3 billion average recorded in the first half of 2023, a period marked by the significant delisting offer to the Vantage Towers AG shareholders. Additionally, when comparing the first six months of 2020 to 2022, the average offer value was only surpassed by the notably low figure of EUR 1.6 billion in the first half of the negative year 2022.

Mid-cap activities at a low level

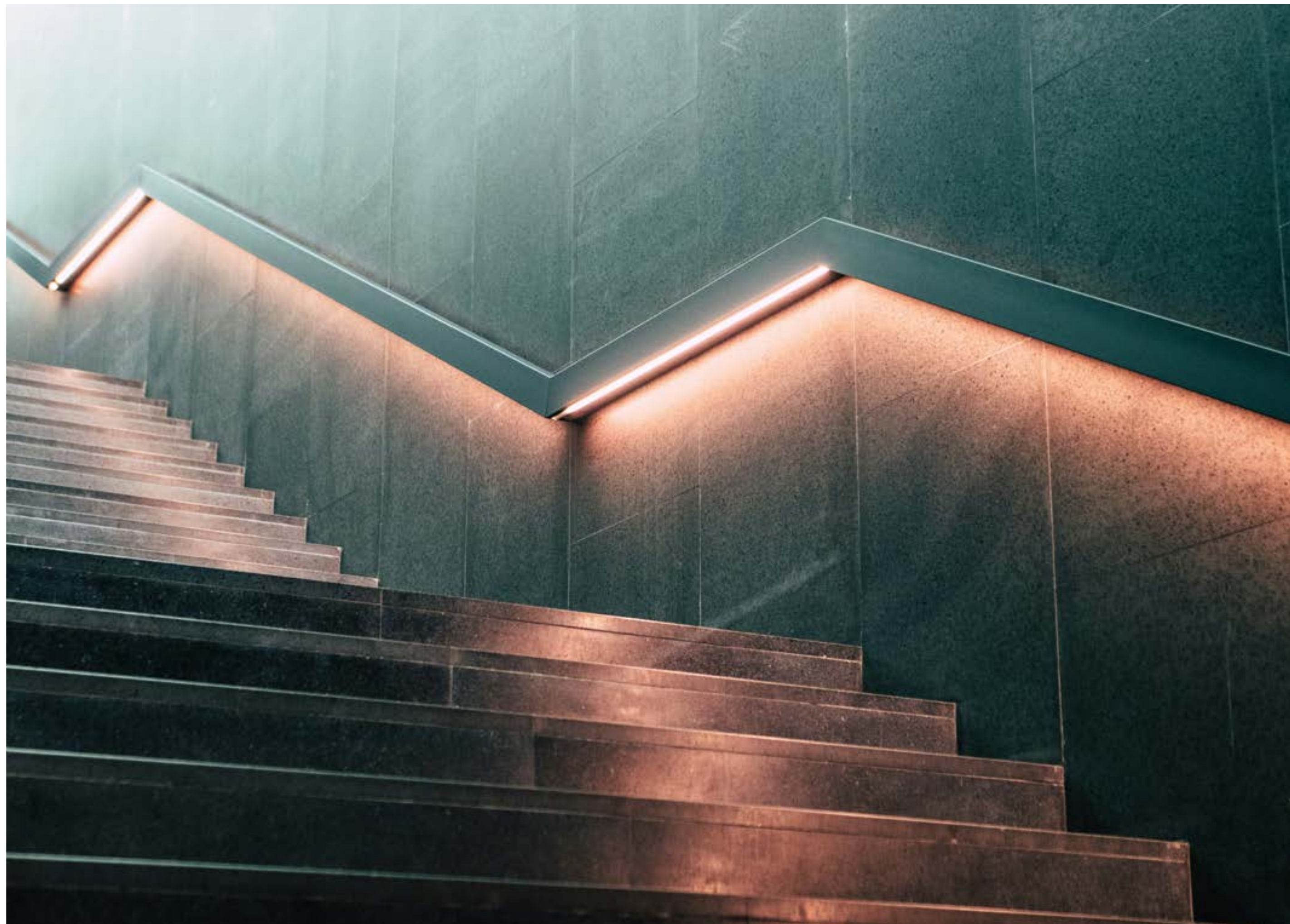
In contrast, the mid-cap market experienced a downturn in the first half of 2024 compared to the same period in the previous year. While there were seven transactions in the first half of 2023, with an average value of EUR 416.46 million, 2024 saw only two offers with an average value of EUR 201.18 million. This performance was thus on a par with the first half of 2022, which also had two transactions with an average value of EUR 205.64 million.

Slight increase in average premium and higher premium for takeover bids

The average premium paid rose slightly from 16.11 % to 20.75 % compared to the same period of the previous year. However, this figure is strongly influenced by the premium of 136.11 % offered to the shareholders of MorphoSys AG. When adjusted for this outlier, the average premium would only be 9.21 %. In contrast, the average premium for takeover bids rose significantly from 28.85 % to 45.09 % compared to the first half of 2023.

Fewer fairness opinions obtained for reasoned statements

In the first half of 2024, fairness opinions were obtained to support only around 31 % of the reasoned statements, a decrease from 55 % in the same period of the previous year. This decline is largely attributed to the high proportion of mandatory and delisting offers in the small-cap and mid-cap segments, where the corporate bodies of target companies often refrain from obtaining fairness opinions for cost reasons.



Market overview

Number and value of offers

In the first half of 2024, the number of transactions increased slightly compared to the same period of the previous year, despite a decrease in total offer value, thus continuing the market recovery observed in the previous year.

All 13 public offers reviewed by the German Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*, “**BaFin**”) in accordance with the German Securities Acquisition and Takeover Act (*Wertpapiererwerbs- und Übernahmegesetz*, “**WpÜG**”) were approved and published by the bidders. The offers related to target companies with a total market capitalisation at the offer price (“**MCO**”) of EUR 18,687.80 million. The 13 transactions consisted of six delisting offers, four takeover offers and three mandatory offers, whereby two takeover offers and one mandatory offer were combined with a delisting offer.

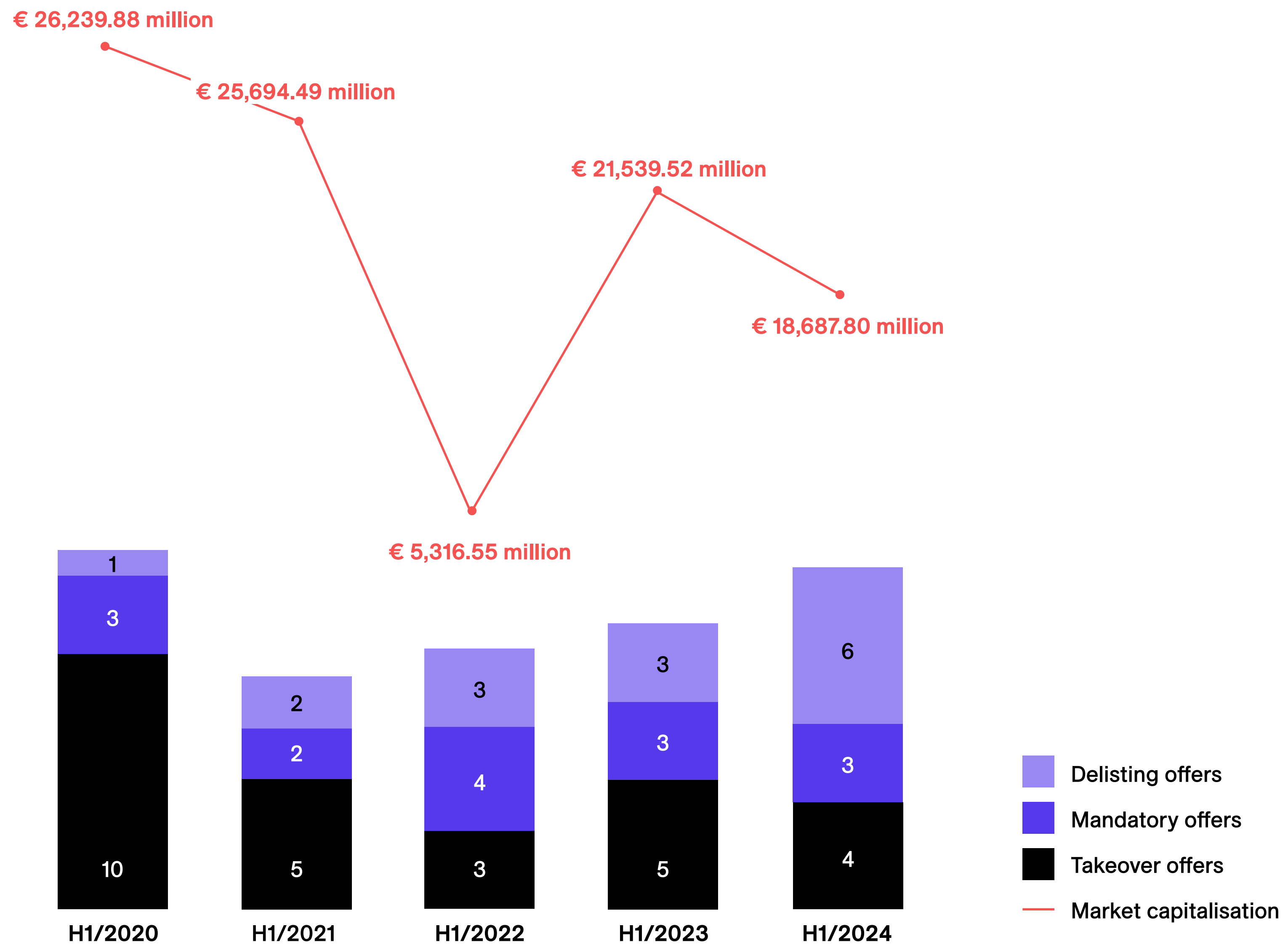
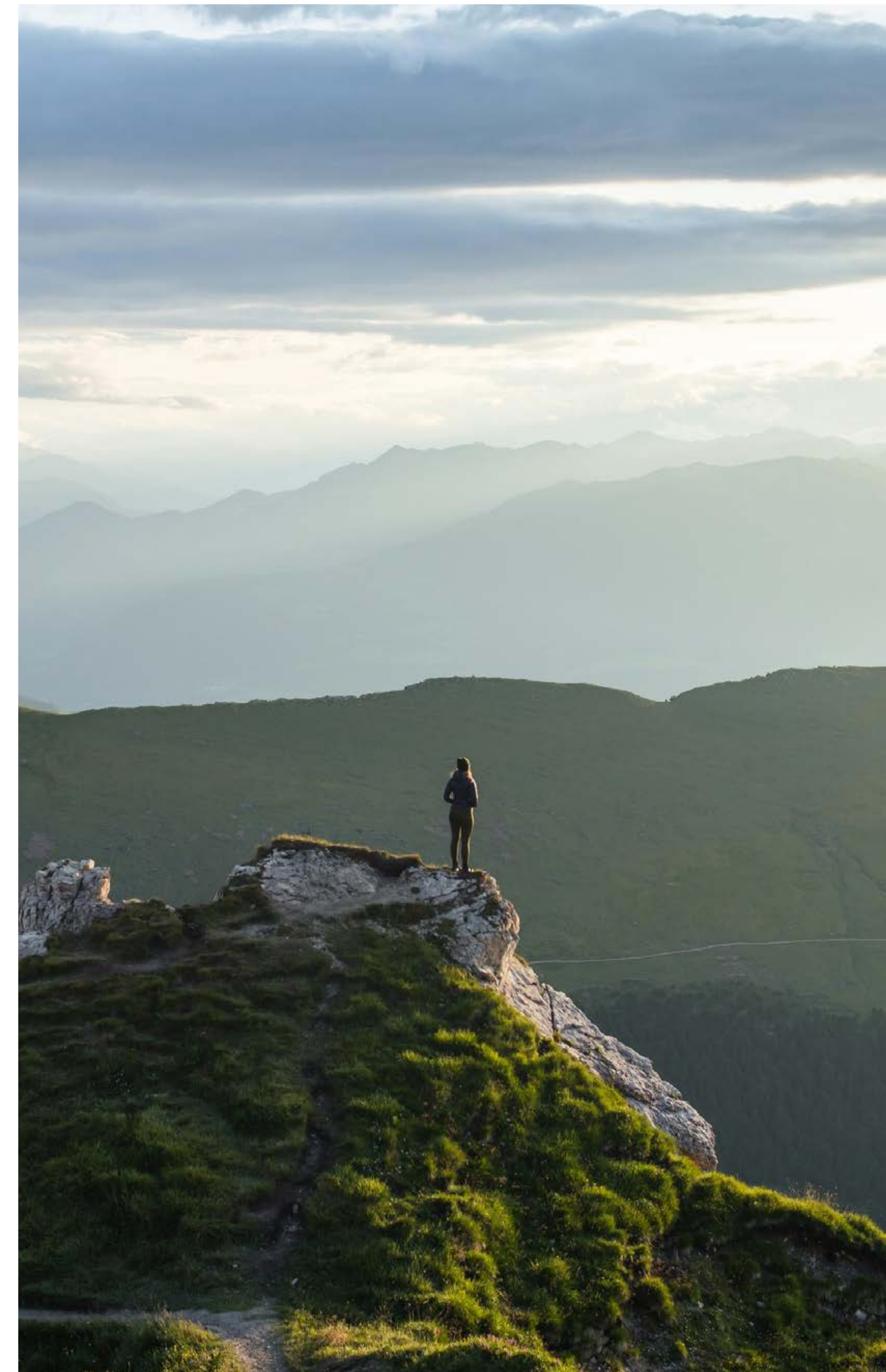


Fig. 1: Number, type and value of offers

Source: Noerr Research.

Despite an increase in the number of offers in the first half of 2024 compared to the same period in 2023, the total offer value decreased slightly. This decline is largely due to the significant impact of the previous year’s delisting offer by Oak Holdings GmbH to Vantage Towers AG shareholders in the amount of EUR 16,185.02 million. Even taking into account the long-term averages since 2014, which include 10.2 transactions and a total offer value of EUR 15,782.61 million for the first half of the year, the positive market trend from last year appears to be continuing.

The number of pure delisting offers increased significantly, rising from three to six compared to the first half of 2023. If combined offers are included, there was an even greater increase from four to nine offers. The delisting trend observed in recent years is thus continuing at an accelerated pace. In contrast, the number of takeover bids fell from five to four compared to the first half of 2023, with two of these being combined with delisting offers. A trend can also be seen here, albeit a negative one: While takeover bids regularly accounted for the largest share of offers under the WpÜG in the 2010s, delisting bids have been challenging them for this position since the beginning of the 2020s.



Development in the segments (large-cap, mid-cap and small-cap)

Many large-cap transactions with a comparatively low average offer value shaped the market in the first half of 2024. There was little activity in the mid-cap segment, while the small-cap segment showed no noteworthy developments.

In detail, the development of the average MCO in the individual segments is as follows:

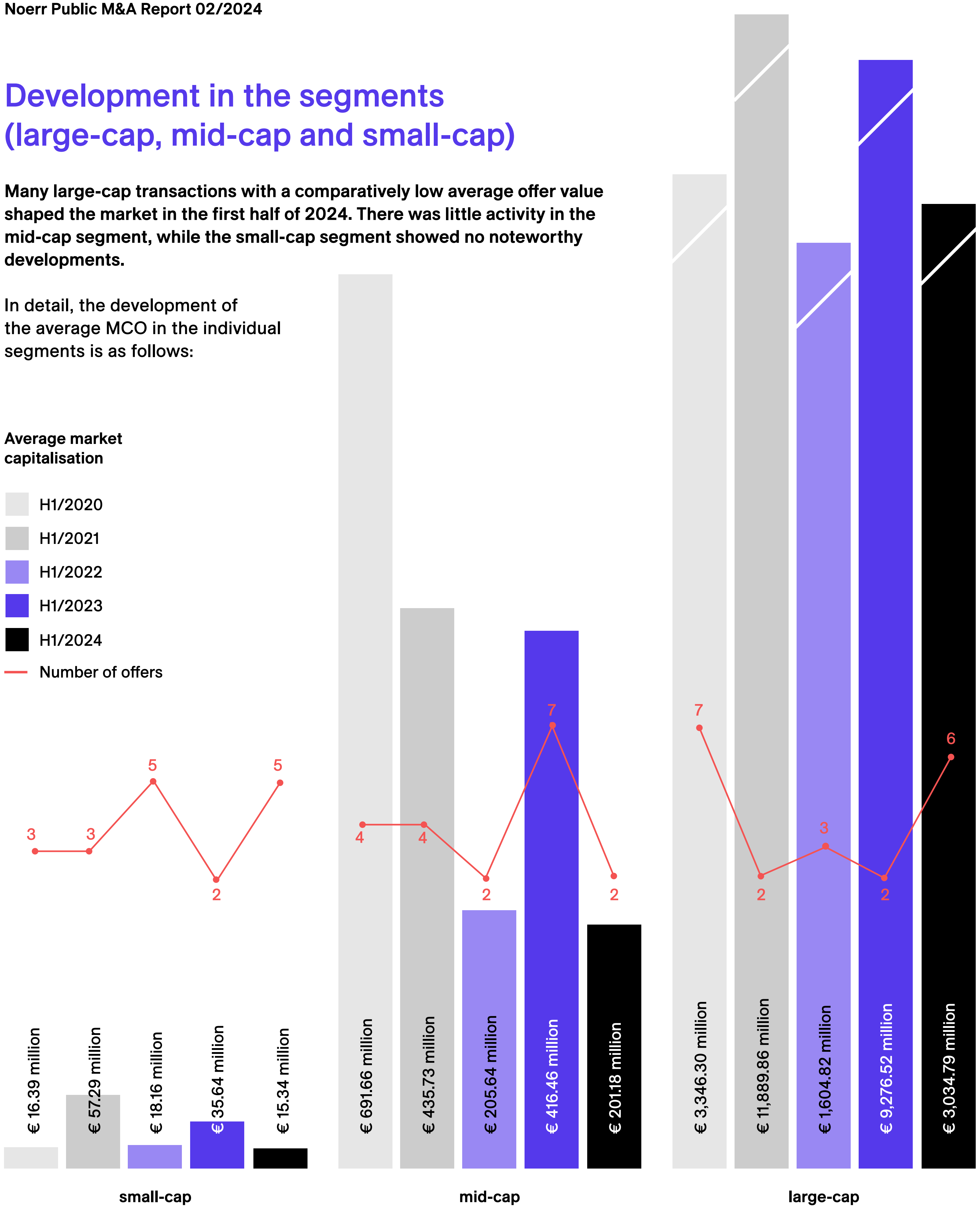


Fig. 2: Development in the segments

Source: Noerr Research.

In the first half of 2024, six offers were submitted in the large-cap segment, making a significant increase from the two offers recorded during the same period in the previous year. However, the average offer size of these transactions was EUR 3,034.79 million, which is significantly lower than the corresponding figure for the first half of 2023 (EUR 9,276.52 million), which was influenced by the delisting offer made by Oak Holdings GmbH to the shareholders of Vantage Towers AG. When compared to the first halves of 2020 to 2022, the 2024 average offer size was only higher than the corresponding figure for the first half of the negative year 2022 (EUR 1,604.82 million). In addition, the average value for the first half of 2024 falls considerably short of the annual average value since 2014 (start of our data collection) of EUR 5,851.48 million.

The number of transactions in the mid-cap segment fell significantly to just two offers with an average value of EUR 201.18 million. This is a significant decrease from the seven transactions recorded in the first half of 2023, which had an average value more than double at EUR 416.46 million. The current performance aligns with the market level seen in the first half of 2022, which also had two mid-cap offers with an average value of EUR 205.64 million.

In the small-cap segment, five transactions with an average value of EUR 15.34 million were recorded in the first half of the year. This marks a significant increase in the number of offers compared to the first half of 2023, which saw only two offers in the small-cap segment. However, the average value in the first half of 2024 was less than half of the EUR 35.64 million average for the same period of the previous year, indicating that the small-cap market as a whole performed similarly to the first half of 2022.

Segmentation:

large-cap

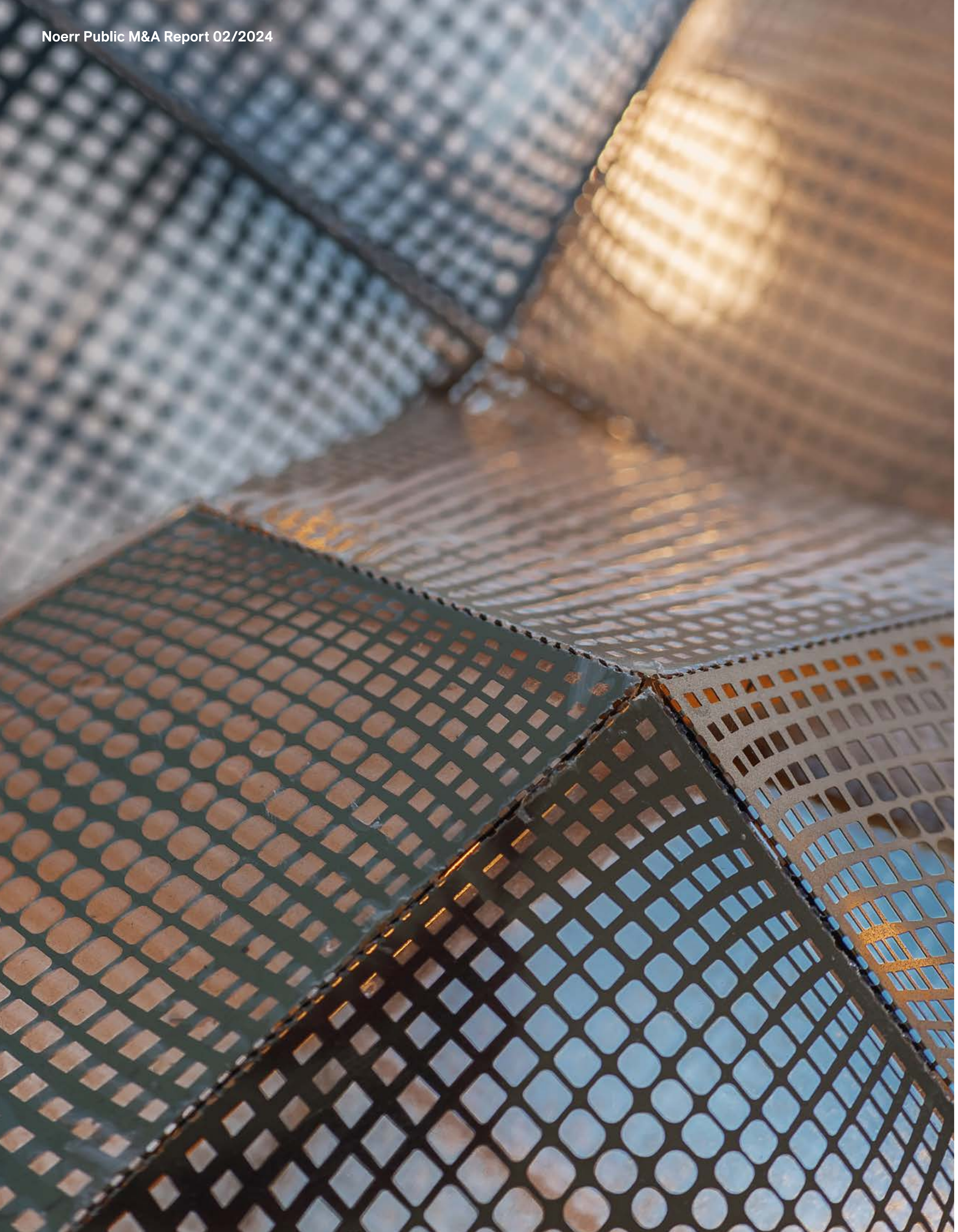
MCO of the target company greater than EUR 1,000 million.

mid-cap

MCO of the target company less than EUR 1,000 million and greater than or equal to EUR 100 million.

small-cap

MCO of the target company less than EUR 100 million.



Distribution of offer value and number of transactions

Six offers in the large-cap segment in the first half of the year accounted for 97.44 % of the total offer value in the public takeover market. This share is not only significantly higher than the corresponding figure for the first half of 2023 (86.13 %), but also exceeds the annual average from 2014 to 2023 (89.69 %).

The delisting offer by Telefónica Local Services GmbH to the shareholders of Telefónica Deutschland Holding AG had the highest offer value. With an MCO of EUR 6,990.20 million, it accounted for 37.41 % of the total market value in the first half of the year. In contrast, the share of the highest offer in the first half of 2023 was over 75 %, which, however, with its exceptionally high MCO of EUR 16,185.02 million, also almost equalled the sum of all offer values of the large-cap transactions in the first half of 2024 (EUR 18,208.77). The absence of offers in the tens of billions led to a relatively even distribution of total value across individual large-cap offers compared to previous years.

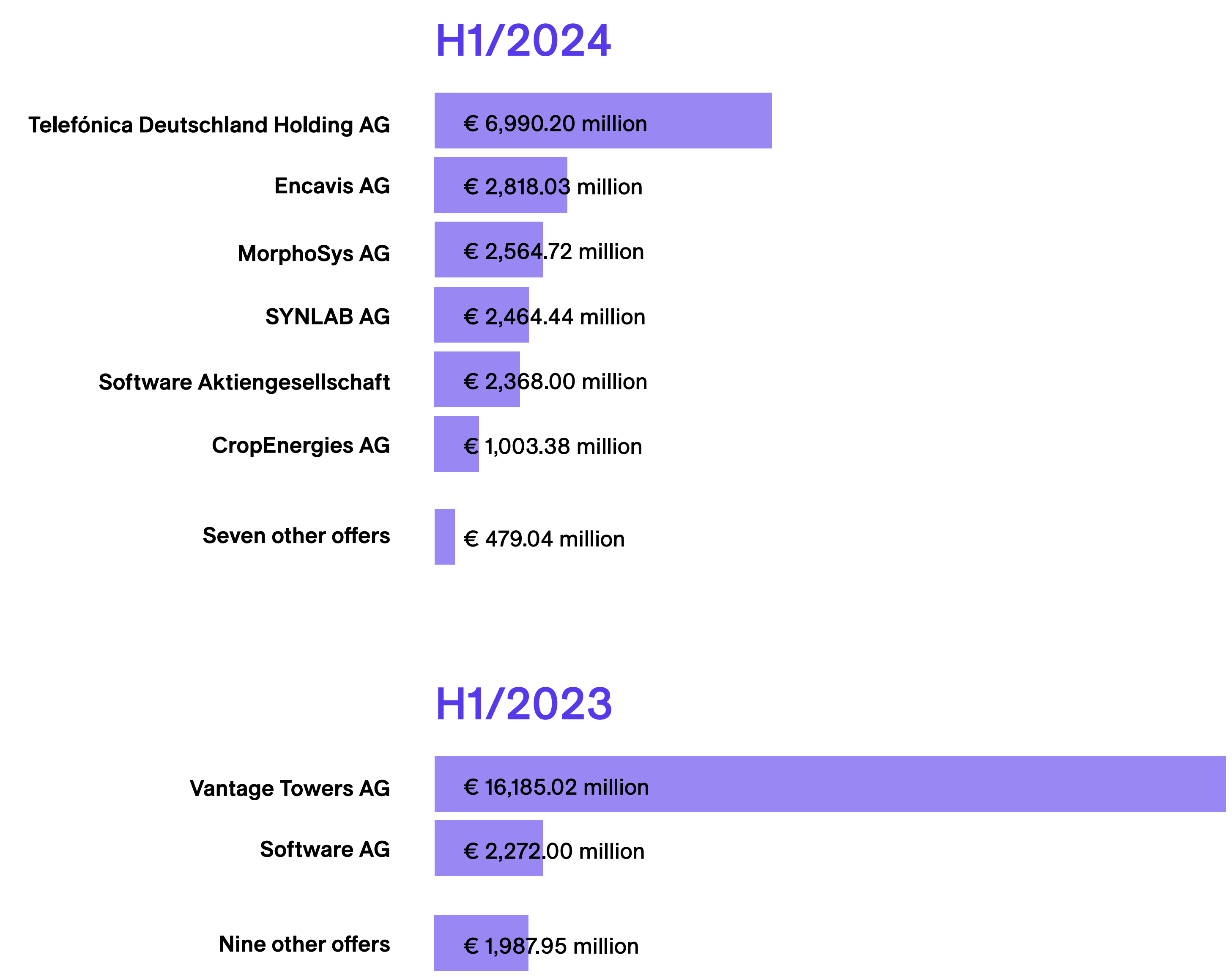


Fig. 3: Distribution of supply value and number of transactions

Source: Noerr Research.

Premium amount

In the first half of 2024, there was a slight increase in the average premium in the overall market for all offer types, while the average premium for takeover bids rose more significantly.

In the first half of 2024, the average premium on the volume-weighted average price (**“VWAP”**) of the target companies’ shares over the three months (or six months for delisting offers) prior to the bidder’s announcement of the offer or acquisition of control (“**three-month VWAP**” or “**six-month VWAP**”) amounted to 20.75 %. This figure surpasses both the 16.11 % recorded in the same period of the previous year and the long-term average value of 19.68 % for the first half of the year since 2014.

The mandatory offers made by Technology Center Holding GmbH and Enapter AG to the shareholders of MARNA Beteiligungen AG, as well as Rostra Holdings Pte. Ltd.’s offer to the shareholders of Decheng Technology AG, were not taken into account because the German Federal Financial Supervisory Authority was unable to determine the three-month VWAP or six-month VWAP for them.

The highest premium was paid by Novartis BidCo AG to the shareholders of MorphoSys AG as part of a takeover bid, in which it granted the shareholders a premium of 136.11 % on the three-month VWAP. In determining the offer price, Novartis BidCo AG considered in particular the historical stock market prices of MorphoSys shares as well as financial analysts’ recommendations regarding the target price of MorphoSys shares. The offer price was also the result of negotiations with MorphoSys AG.

The following chart shows the premiums offered for transactions in the first half of 2024, broken down into various categories, as well as the corresponding average premiums and compares these with the premiums and average values for the first half of 2019 to 2023.

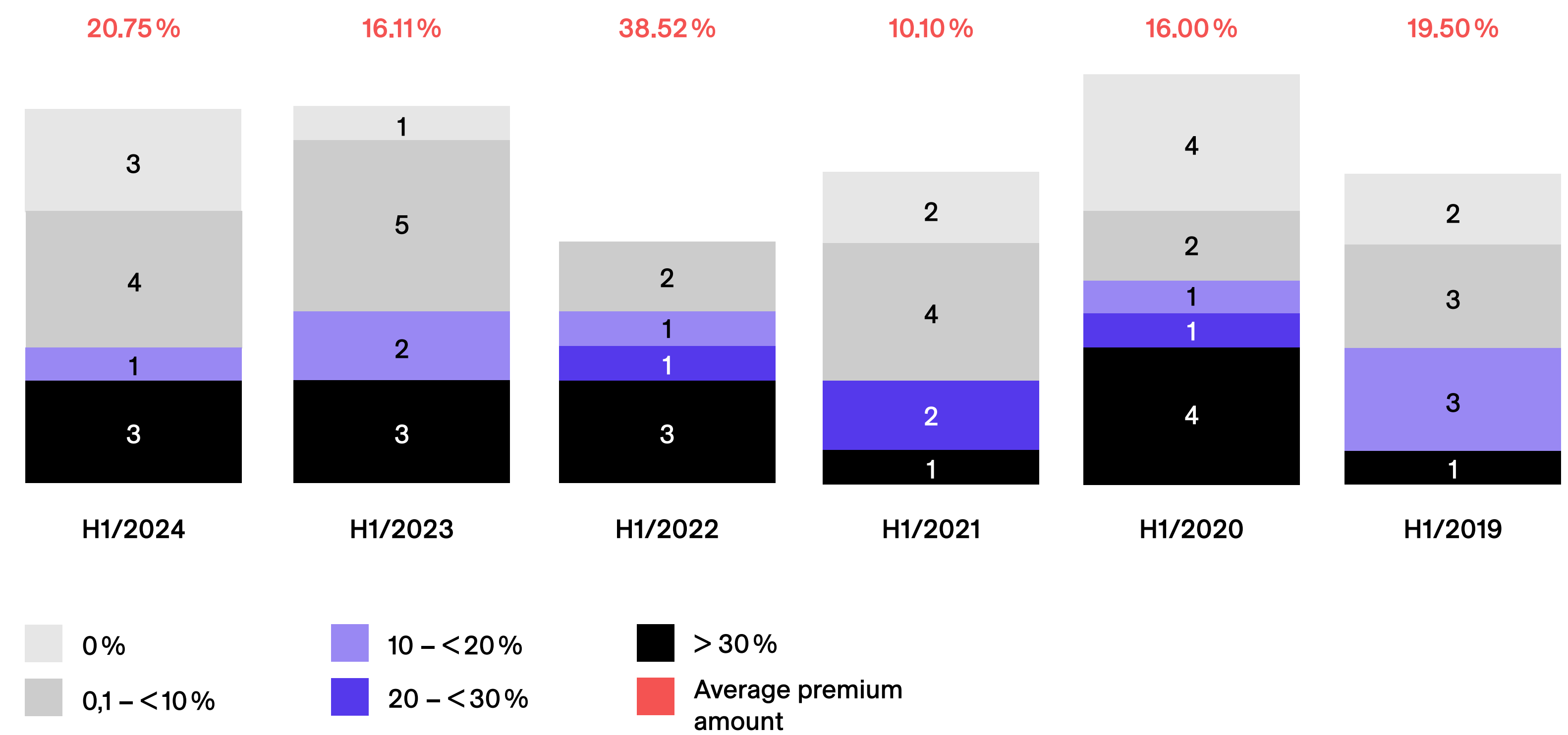


Fig. 4: Premium amount

Source: Noerr Research.

In the first half of 2024, the average premium level across the market increased from 16.11 % to 20.75 %, marking a 28.80 % rise compared to the same period in the previous year. A higher premium level was only achieved once in the past five years, during the first half of 2022. The year-on-year increase is largely attributed to the substantial 136.11 % premium offered to the shareholders of MorphoSys AG. Without this offer, the average premium would have been just 9.21 %.

There was a significant increase in the number of offers without premiums, with three such offers recorded in the first half of 2024, up from one in the same period of 2023. Even if offers with premiums of less than 1 % are taken into account, the number increased from three to five compared to the first half of 2023.

The premium for the four takeover bids averaged 45.09 % in the first half of 2024 and was therefore significantly higher than the figures for the first half of 2023 (28.85 % for five takeover bids) and the corresponding periods from 2020 to 2022 (below 20 % in each case). This trend indicates a growing willingness among bidders to pay higher premiums to gain control of target companies.

By Dr Philip M. Schmoll, lawyer, Noerr Partnerschaftsgesellschaft mbB, Frankfurt am Main

Reasoned statements pursuant to section 27 WpÜG

In the first half of 2024, the corporate bodies of target companies published a total of 13 reasoned statements in accordance with section 27 WpÜG on 13 public offers. These were all joint reasoned statements by each target company's management and supervisory boards.

Overall evaluation of the offers

In the first half of 2024, the boards of target companies issued reasoned statements for 13 bids, as shown in the following chart.

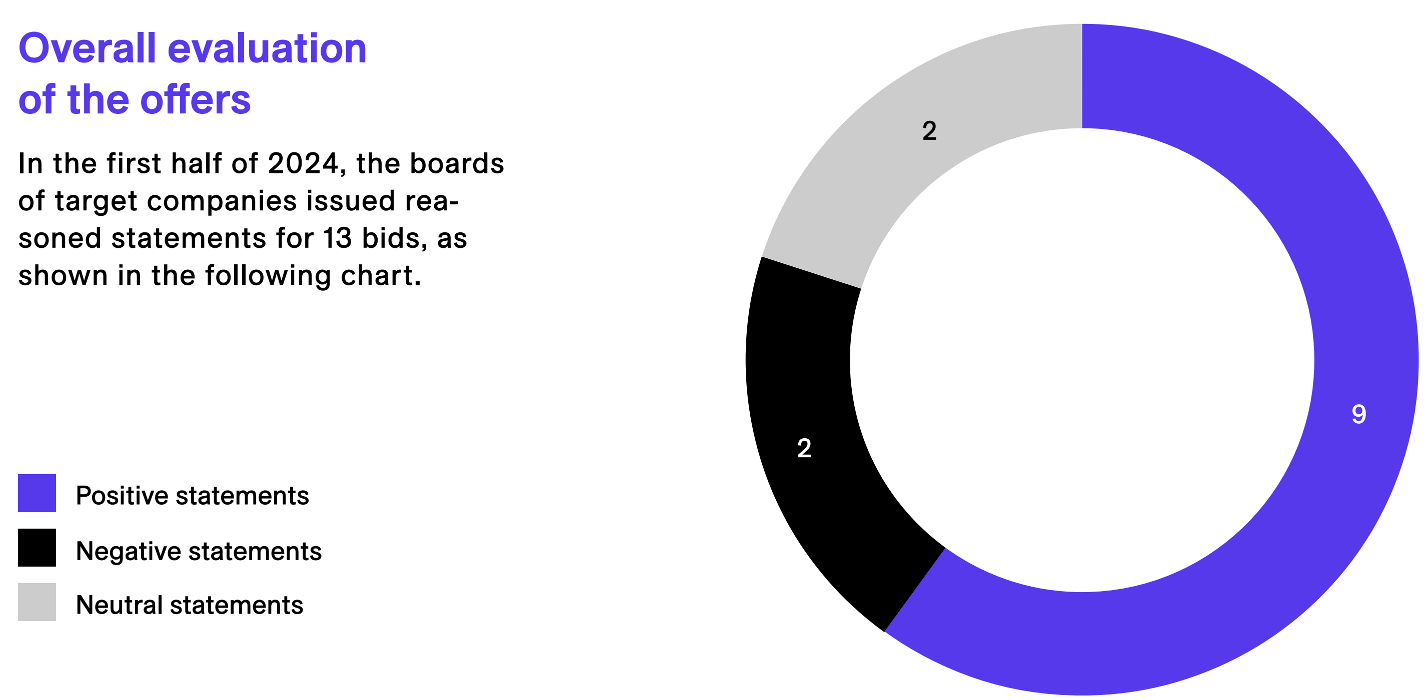


Fig. 5: Reasoned statements pursuant to section 27 WpÜG

Source: Noerr Research.

Reasons for neutral and negative reasoned statements

The management and supervisory boards of MARNA Beteiligungen AG based their negative statement on the business opportunities linked to the integration of a company active in the fuel cell sector into the largely inactive target company through a capital increase against contribution in kind. Against this background, they advised shareholders of the target company to retain their shares in order to capitalise on these business opportunities. The management and supervisory boards of NSI Asset AG issued a negative statement, arguing that by rejecting the offer, shareholders would have the opportunity to benefit from the company's downlisting to the m:access segment of the Munich Stock Exchange. In both cases, however, the boards deemed the consideration offered to be appropriate.

The management and supervisory boards of SYNLAB AG and Software Aktiengesellschaft issued neutral statements regarding the delisting and the delisting offer in each case as well as the bidders' intentions, acknowledging them as positive in both cases. Nevertheless, they were unable to fully assess the appropriateness of the consideration offered, or could only do so to a limited extent.

Fairness opinions

In the first half of 2024, fairness opinions were obtained from external advisors on the appropriateness of the consideration offered for only four of the 13 reasoned statements, representing approximately 31 % compared to 55 % in the same period of 2023. This decline is primarily due to the high proportion of mandatory and delisting offers in the small-cap and mid-cap segment. In these segments, the boards of target companies often refrain from obtaining fairness opinions due to cost considerations.

Only the management and supervisory boards of ENCAVIS AG obtained more than one fairness opinion, with each board commissioning its own advisors. Despite this, they issued a joint reasoned statement regarding the underlying takeover bid in the large-cap segment.

Date of submission of the reasoned statements

In the first half of 2024, reasoned statements were submitted on average 7.9 days after the publication of the offer document, a decrease from the 9.5-day average in the same period of 2023. In 11 of the 13 reasoned statements (around 85 %), the boards of the target companies were aware of the impending public offer due to a transaction agreement concluded with the bidder prior to the announcement of the offer pursuant to section 10 WpÜG ("section 10 announcement"). Despite this prior knowledge, the average publication time for these reasoned statements was still eight days after publication of the offer document, indicating no significant acceleration in the process.

In focus

The role of banks in public takeovers under the German Securities Acquisition and Takeover Act

Banks play an important yet often underappreciated role in public offers under the German Securities Acquisition and Takeover Act (*Wertpapiererwerbs- und Übernahmegesetz*, "**WpÜG**"). The degree to which transaction parties depend on banks' support can vary from case to case, but banks consistently fulfil key functions for both the bidder and the target company.

It is therefore fair to say that the public takeover market would not operate effectively without the involvement of banks. This article examines the typical roles and responsibilities that banks undertake or are required to undertake in the context of public M&A transactions.

Bidder's side

On the bidder's side, banks' activities can be divided into the areas of advisory, settlement and financing.

Advisory: structuring of offers

As advisors to the bidder with regard to the offer structure or financing, banks do not operate in their capacity as regulated financial institutions. Instead, they compete with corporate finance advisors and other players in the takeover market. The need for advice on the bidder's side is most pronounced in the run-up to and early phase of the offer process, involving the identification and valuation of the target company, analysis of market conditions and offer structuring. By advising on these issues, banks play a key role in formulating the bidder's takeover strategy.

Financing: submission of the financing confirmation

Banks are also regularly engaged in financing the offer. This involvement includes traditional financing tasks such as granting loans, arranging syndicated loans and facilitating capital market financing through bond or share issues. However, these tasks are not necessary if the bidder can complete the transaction without external financing, i.e., using existing internal funds or through group financing.

In addition, the WpÜG requires the involvement of an independent investment services company[1] in cash offers. To secure approval of the offer pursuant to section 13(1), sent. 2 WpÜG, the bidder must furnish a financing confirmation.

This confirmation attests that the bidder has taken the necessary measures to ensure that the funds required for the complete fulfilment of the offer will be available when the cash consideration becomes due.

The issuer of a financing confirmation fulfils a control function within the framework of obligations under the WpÜG. Pursuant to section 13(1), sent. 1 WpÜG, the bidder primarily has a financing responsibility; it must take the necessary measures to ensure that the funds required for the complete fulfilment of the offer are available to it when the claim to the consideration becomes due. However, the issuer of the financing confirmation must ensure that (i) the bidder has implemented adequate financing measures, (ii) these measures remain in place until completion and (iii) they guarantee that the bidder can pay the consideration in full and on time. In this context, the issuer must review the measures taken by the bidder in practical and legal terms, with the level of effort required in this respect depending on the specific type of consideration. If the offer is to be fulfilled using funds already available to the bidder, their existence and availability must be verified by the expected date of fulfilment. This can be done without great effort if the funds are available in a blocked account held by the issuer and cannot be used for other purposes without the issuer's consent. For more complex financing arrangements, especially those involving necessary capital measures, however, more complex checks are required, for which issuers usually seek external legal advice.

The financing confirmation must be included in the offer pursuant to section 11(2), sent. 3, no. 4 WpÜG. A copy of the confirmation is usually attached as an annex. The issuer is liable if, contrary to the financing confirmation, the bidder has not taken the necessary measures and, for this reason, does not have the necessary funds at its disposal at the time the cash payment is due (section 13(2) WpÜG).

Settlement process

The involvement of a bank on the bidder's side as the settlement agent is mandatory. In this role, the bank is responsible for the settlement process, which primarily includes receiving the shares tendered for acceptance and paying the consideration to the custodian banks for distribution to shareholders who accept the offer as part of the settlement. The settlement agent also performs important tasks in earlier phases, such as coordinating the provision of information to shareholders via their custodian banks, drawing up technical guidelines for settlement and ensuring the tradability of shares for which the offer has been accepted until settlement of the offer. In share-for-share offers, additional tasks include acting as a trustee for the exchange of shares. Often, the bank that issues the financing confirmation also serves as the settlement agent. Between the beginning of 2016 and mid-2024, this dual role was observed in 109 out of 192 public offers, accounting for 56.77 %.

1 The WpÜG uses this term in the same sense as section 2(10) of the German Securities Trading Act (*Wertpapierhandelsgesetz*). It includes domestic credit institutions and financial services institutions within the meaning of section 1(1) and (1a) of the German Banking Act (*Kreditwesengesetz*, "**KWG**") as well as foreign institutions domiciled in a state of the European Economic Area pursuant to section 53b (1), sent. 1 KWG.

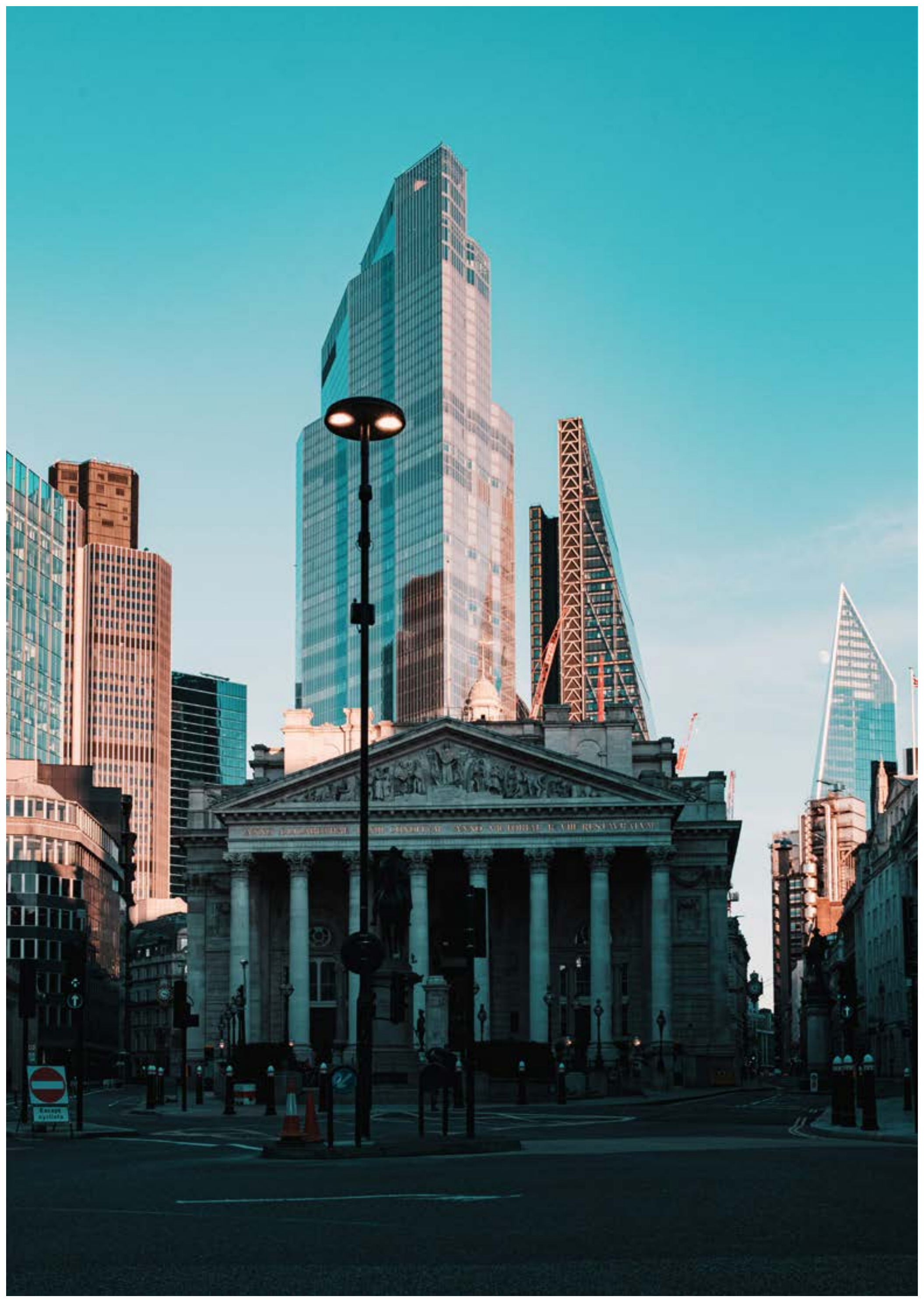
Target company's side

On the target company's side, banks usually fulfil two functions.

Advisory

The management and supervisory boards of the target company often need advice on handling offers that goes beyond mere legal and strategic assessments of the offer. This applies in particular to uncoordinated or even hostile takeover attempts. In these scenarios, the question arises as to possible defence strategies, which may include capital market-related actions like placing shares or convertible bonds with the public or a friendly investor ("white knight"). In these situations, banks can play a crucial advisory role, significantly contributing to the success of the defence strategy.

In this context, it is also important to highlight the activities of banks in the context of takeover prevention strategies. When a bidder approaches a target company with the intention of making a takeover bid, experience shows that the time for an appropriate reaction is short. This is particularly true once the intention to make a takeover bid is announced in accordance with section 10 WpÜG ("section 10 announcement"), which imposes the rigid time frame of the WpÜG on the actions of the bidder and the target company. Furthermore, from this point onwards, the management board is subject to the neutrality requirement under takeover law pursuant to section 33 WpÜG, which only permits actions that could prevent the success of the offer if further conditions are met. Therefore, it is prudent for potential takeover candidates to define the key responsibilities within the target company, identify advisors to be involved and outline the first steps for both internal and external communications in the event of a takeover bid. It is also advisable to create a defence manual that outlines these stipulations. Given the central importance of the management and supervisory boards' (preliminary) assessment of the appropriateness of the offer price, especially for necessary communications after the section 10 announcement has been addressed or published, involving a bank or corporate finance advisor in preparing the defence manual is recommended. If necessary, this early involvement can quickly provide a reliable assessment of the appropriateness of the consideration, enabling the target company's corporate bodies to respond adequately to the offer.



Evaluation of the offer: issuance of a fairness opinion

The second classic role of banks in advising the target company is to provide support in assessing the financial appropriateness of the consideration offered by the bidder. For this purpose, the target company engages an investment bank to issue a fairness opinion based on a capital market-oriented valuation of the target company. This opinion serves as a foundation for the management and supervisory boards' statements on the offer. Like advising the bidder, issuing a fairness opinion is not a task that a bank performs due to its regulatory position. In this area, banks compete with non-regulated corporate finance advisors and auditing firms. Particularly in very complex cases or where potential conflicts of interest exist between the management and supervisory boards, several fairness opinions may even be obtained. From the beginning of 2016 to mid-2024, this was observed in 34 out of 192 public offers, representing 17.71 %, with an average market capitalisation at the offer price (MCO) of EUR 4,865.70 million. Although not legally required, obtaining a fairness opinion has nevertheless become standard practice, especially for larger transactions in the takeover market. In the same period, only 68 out of 192 transactions, or 35.42 %, proceeded without a fairness opinion being obtained.

Role of banks in public offerings

Bidder	Target company
– Advisory: structuring of offers – Financing: submission of the financing confirmation – Settlement process	– Advisory – Evaluation of the offer: issuance of a fairness opinion

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