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TAKEOVER MONITOR

CURRENT PUBLIC TENDER OFFERS UNDER THE GERMAN SECURITIES ACQUISITION AND TAKEOVER ACT

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The Morgan Lewis Takeover Monitor documents public tender offers in Germany for Morgan Lewis clients and interested persons. This issue covers published and announced current offers as of August 24, 2023.

In addition, it informs about two recent judgments by which the German Federal Court of Justice awarded payment claims to former shareholders of a target company that accepted a takeover offer, based on its findings that a separate agreement between the bidder and another shareholder concerning the acquisition of shares in the target company against a minimum compensation higher than the offer price constituted a price-relevant agreement on the basis of which a transfer of shares can be demanded.

PUBLIC TENDER OFFERS UNDER THE GERMAN SECURITIES ACQUISITION AND TAKEOVER ACT (WpÜG): OFFERS, RESULTS AND ANALYSES

CURRENT OFFERS

The current offers include delisting tender offers aimed at enabling revocation of the admission of shares in the respective target company to trading on a regulated market (delisting tender offers to the shareholders of **va-Q-Tec AG** and **home24 SE**, as well as the delisting takeover offer to the shareholders of **Schumag Aktiengesellschaft**).

According to the German Stock Exchange Act, a revocation of the admission of shares to trading on a regulated market is only legally permissible if, at the time of the submission of the application, a delisting tender offer or delisting takeover offer in accordance with the WpÜG and the German Stock Exchange Act has been published to all outstanding shareholders with reference to the application. Without such an offer, the management board of the target company cannot effectively apply for the revocation. Based on the German Stock Exchange Act, a segment change also requires such an offer since the revocation of admission to the regulated market (without prejudice to an existing or intended inclusion of the shares in trading on the open market) is the regulatory equivalent of a complete delisting.

Other common features of delisting tender offers include, *inter alia*, that the offer may not be subject to any conditions and that the offer document must contain notices about the consequences of the delisting for the target company's shares and shareholders.

Another notable development is that the German Federal Court of Justice (**FCJ**), in two recent judgments, awarded payment claims to former shareholders of a target company that accepted a takeover offer, based on its findings that a separate agreement of the bidder with another shareholder concerning the acquisition of shares in the target company against a minimum compensation higher than the offer price constituted a price-relevant agreement on the basis of which a transfer of shares can be demanded. With these decisions, the FCJ has developed its case law in relation to circumventions of the statutory minimum offer price rules under the WpÜG further, focusing on the WpÜG's fundamental principle of equal treatment of the shareholders.

Public delisting tender offer to the shareholders of va-Q-tec AG

In a delisting tender offer, **Fahrenheit AcquiCo GmbH**, with its registered office in Frankfurt am Main (**Fahrenheit AcquiCo**), is offering the shareholders of Würzburg-based **va-Q-tec AG** (**va-Q-tec**) to acquire all no-par value registered shares in va-Q-tec (ISIN DE0006636681) (**va-Q-tec Shares**) not directly held by Fahrenheit AcquiCo against a cash consideration of 26.00 euros per va-Q-tec Share during the acceptance period ending August 30, 2023.

The offered cash consideration of 26.00 euros per va-Q-tec Share exceeds the volume-weighted average stock price during the six months prior to the publication of the decision to launch the delisting tender offer determined by the German Federal Financial Supervisory Authority (the **BaFin**) in the amount of 24.95 euros per va-Q-tec Share. Because the offer consideration equals the highest price granted or agreed upon for the acquisition of va-Q-tec Shares by Fahrenheit AcquiCo, or persons acting jointly with it, during the six months prior to the publication of the offer document, it represents the statutory minimum offer consideration required under the WpÜG and in accordance with the German Stock Exchange Act.

The bidder and the target company:

The bidder, Fahrenheit AcquiCo, is a holding company controlled through a participation chain by entities with **EQT AB**, with its registered office in Stockholm, Sweden, as the ultimate holding company (**Bidder Parent Shareholders**). EQT AB is publicly listed and does not have a controlling shareholder. EQT AB, together with its affiliates referred to as **EQT**, is a purpose-driven global investment organization.

The target company, va-Q-tec, forms together with its 12 wholly owned foreign subsidiaries the va-Q-tec Group (**va-Q-tec Group**), which is a services and technology provider of products and solutions in the area of vacuum insulation and temperature-controlled supply chain logistics.

Key structuring steps leading up to the delisting tender offer:

The va-Q-tec Shares are admitted to trading on the regulated market of the Frankfurt Stock Exchange in its subsegment with additional post-admission obligations (Prime Standard) and are tradable via XETRA. In addition, the va-Q-tec Shares are traded on the open market of the stock exchanges in Berlin, Düsseldorf, Hamburg, Munich and Stuttgart, as well as via Tradegate.

On December 13, 2022, Fahrenheit AcquiCo and its Luxembourg-based majority shareholder **Fahrenheit HoldCo S.à r.l.** (**Fahrenheit HoldCo**) entered into a partnership agreement (as amended from time to time, the **Partnership Agreement**) with the two founders of va-Q-tec and their family members (these persons – Dr. Roland Caps, Margit Kuhn, Stefan Caps-Kuhn, Isabelle Caps-Kuhn, Dr. Joachim Kuhn, In Sook Yoo, Sua Tilla Kuhn, Noah Fridolin Kuhn – together, the **Family Shareholders**, held at that time a total of 3,464,635 va-Q-tec Shares (**Family Shares**); Family

Shareholders other than **Noah Fridolin Kuhn** (**NFK**), who is a minor, the **Participating Family Shareholders**).

Also on December 13, 2022, Fahrenheit AcquiCo and Fahrenheit HoldCo entered into a business combination agreement (**Business Combination Agreement**) with va-Q-tec under which Fahrenheit AcquiCo agreed to subscribe for, and va-Q-tec agreed to issue to Fahrenheit AcquiCo a total of 1,341,500 new va-Q-tec Shares (**New va-Q-tec Shares**) against cash contribution of 26.00 euros per New va-Q-tec Share (**Capital Increase**). The New va-Q-tec Shares were issued to Fahrenheit AcquiCo on July 11, 2023.

On January 16, 2023, Fahrenheit AcquiCo published a voluntary public takeover offer for the acquisition of all va-Q-tec Shares (**Takeover Offer**), which was accepted for approximately 54.48 % of va-Q-Tec's share capital and which was settled on July 6, 2023.

Based on the Partnership Agreement, with effect as of the settlement of the Takeover Offer, (and in respect of NFK with the prior consent of a court-appointed representative (**NFK Guardian**)), Fahrenheit AcquiCo acceded to a certain pool agreement between the Family Shareholders (**Pool Agreement**) providing, inter alia, for a uniform exercise of voting rights in relation to certain va-Q-tec Shares (together, the **Pooled Shares**) and to certain transfer restrictions in relation to the Pooled Shares. At the same time, a transitional voting agreement between Fahrenheit AcquiCo and the Participating Family Shareholders took effect, and the Participating Family Shareholders contributed and transferred to Fahrenheit AcquiCo with immediate effect (**Roll-over**), partly against a consideration in cash and partly against a consideration in newly issued shares in Fahrenheit AcquiCo, a total of 1,588,984 va-Q-tec Shares, corresponding to approximately 10.77 % of va-Q-tec's share capital, consisting of all Family Shares held by them, except for one Family Share held by Dr. Roland Caps (the **Permanently Retained Family Share**) and a total of 1,475,650 Family Shares held by **Dr. Roland Caps**, **Dr. Joachim Kuhn** and **Sua Tilla Kuhn** (the **Additional Retained Family Shares**, together with the Permanently Retained Family Share, the **Retained Family Shares**). In addition, Fahrenheit Holdco and the Participating Family Shareholders entered into a shareholders' agreement (**SHA**) containing, *inter alia*, provisions on the legal relationship between the Participating Family Shareholders and Fahrenheit HoldCo as shareholders of Fahrenheit AcquiCo. As a result of the transfer of the Family Shares to Fahrenheit AcquiCo, the Participating Family Shareholders other than the holders of the Retained Family Shares ceased to be a party to the Pool Agreement which thereafter has been continued between Fahrenheit AcquiCo, the holders of the Retained Family Shares and NFK, and which currently applies to a total of 3,689,760 va-Q-tec Shares, corresponding to approximately 25.004 % of va-Q-tec's share capital.

On December 13, 2022, Fahrenheit HoldCo's Luxembourg-based majority shareholder **Fahrenheit TopCo S.à r.l.** (**Fahrenheit TopCo**) (at that time the sole shareholder of Fahrenheit HoldCo), entered into a preliminary co-investment agreement with **MIC Investments 1 RSC Ltd.**, with registered seat in Abu Dhabi, United Arab Emirates (**Mubadala Co-Investor**), and **Cinven Capital Management (VI) Limited Partnership Incorporated**, with registered seat in St. Peter Port, Guernsey (**Cinven**), relating to co-investment arrangements between Fahrenheit TopCo, the Mubadala Co-Investor and **Envirotainer Midco Limited**, with registered seat in St. Helier, Jersey (**Cinven Co-Investor**), which preliminary co-investment agreement has been replaced meanwhile by a more detailed co-investment agreement between Fahrenheit TopCo, Fahrenheit HoldCo, the Mubadala Co-Investor and the Cinven Co-Investor (**Co-Investment Agreement**). Under the Co-Investment Agreement, the Mubadala Co-Investor and the Cinven Co-Investor (together, the **Co-Investors**) undertook, *inter alia*, to participate in the equity financing of the Takeover Offer and related acquisitions of va-Q-tec Shares by Fahrenheit AcquiCo by investing in Fahrenheit HoldCo *pari passu* with Fahrenheit TopCo. In addition to the provisions on the equity-financing undertakings of the respective Co-Investor that include the issuance by the Mubadala Co-Investor, and, in the case of the Cinven Co-Investor, by certain affiliates of Cinven, of a respective equity commitment letter to Fahrenheit AcquiCo, *inter alia*, for purposes of the delisting tender offer, the Co-Investment Agreement contains certain further provisions on the coordination of the conduct of the delisting tender offer with the respective Co-Investor and the relationship between each of the Co-Investors and Fahrenheit TopCo as shareholders of Fahrenheit HoldCo.

At the time of the publication of the delisting tender offer document, Fahrenheit AcquiCo directly held 10,969,669 va-Q-tec Shares, corresponding to approximately 74.34 % of va-Q-tec's share capital.[1] Furthermore, the voting rights attached to a total of 1,875,651 va-Q-tec Shares held by the holders of the Retained Family Shares and NFK, corresponding to approximately 12.71 % of va-Q-tec's share capital, are attributable to Fahrenheit AcquiCo, due to, inter alia, the obligation to a uniform exercise of voting rights under the Pool Agreement. Therefore, at the time of the publication of the offer document, the total number of voting rights held by, or attributed to, Fahrenheit AcquiCo amounted to 12,845,320, corresponding to approximately 87.05 % of va-Q-tec's share capital (these voting rights are also attributed to each of the Bidder Parent Shareholders).

[1] Thereof, 1,814,109 va-Q-tec Shares, corresponding to approximately 12.29 % of va-Q-tec's share capital, are Pooled Shares.

Under the Partnership Agreement, the Participating Family Shareholders holding the Additional Retained Family Shares are obliged to contribute and transfer their Additional Retained Family Shares to Fahrenheit AcquiCo outside the delisting tender offer upon Fahrenheit AcquiCo's request (**Bidder Acquisition Right**) and, subject to certain conditions, are entitled to themselves request such contribution and transfer (**Bidder Acquisition Obligation**).[2]

As a result of the acquisition of va-Q-tec Shares under the previous Takeover Offer, the Roll-over and the Capital Increase (together, the **Previous Transaction**), Fahrenheit AcquiCo is already a controlling shareholder of va-Q-tec.

The economic and strategic rationale of Fahrenheit AcquiCo and the Bidder Parent Shareholders for the acquisition of va-Q-tec Shares under the Previous Transaction has been the support and acceleration of all of va-Q-tec's business lines through the provision of new equity funding to va-Q-tec under the Capital Increase, as well as by certain intended corporate transactions.

Such intended transactions include a business combination (**Business Combination**) of va-Q-tec's service and systems business for the pharmaceutical sector (**Pharma Segment**) with Envirotainer AB, with its seat in Sollentuna, Sweden (**Envirotainer**, together with its subsidiaries, **Envirotainer Group**; and Envirotainer Group, together with the Pharma Segment, **New Pharma Group**).

Also intended is the further development of va-Q-tec Group's remaining business in the thermal energy efficiency and thermal boxes area (the **Products Segment**) within an independent new company in the legal form of a Würzburg-based German limited liability company (**New va-Q-tec Entity**, together with its subsidiaries, **New va-Q-tec Group**). It is intended that va-Q-tec transfers the Products Segment to the New va-Q-tec Entity, which at this time will be a wholly owned subsidiary of va-Q-tec, by way of a hive-down of assets and liabilities as well as rights and obligations predominantly attributable to the Products Segment (the **Hive-Down**). Subsequently, va-Q-tec's shareholding in the New va-Q-tec Entity is intended to be sold to an entity held by Fahrenheit AcquiCo's shareholders (**Products AcquiCo**) at fair market value and arm's-length conditions (such sale, together with the Hive-Down, the **Carve-Out**).

Following the implementation of the Carve-Out, the Business Combination is intended to be implemented by way of a sale or contribution by Fahrenheit AcquiCo's shareholders of their entire shareholding in Fahrenheit AcquiCo to Envirotainer Group (which is indirectly majority owned by EQT) against a participation in Envirotainer Group at fair market value and arm's-length conditions.

Following the completion of the Previous Transaction, by implementing the delisting tender offer, the Carve-Out and the Business Combination, Fahrenheit AcquiCo intends to strengthen New Pharma Group's and New va-Q-tec Group's roles as global competitive forces in their respective fields of business. Fahrenheit AcquiCo intends, and the parties to the Business Combination Agreement have agreed, to transfer patents as well as industrial and intellectual property rights owned by va-Q-tec Group (collectively, **IPR**) to either New Pharma Group or New va-Q-tec Group, whichever they predominantly relate to.

On June 30, 2023, Fahrenheit AcquiCo and va-Q-tec entered into a delisting agreement (**Delisting Agreement**) which sets forth the mutual understanding and intentions of the parties in relation to the delisting tender offer and the revocation of the admission to trading of all va-Q-tec Shares on the regulated market of the Frankfurt Stock Exchange (**Delisting**) (**Delisting Application**).

In the Delisting Agreement, Fahrenheit AcquiCo agreed to make the delisting tender offer, and va-Q-tec undertook, *inter alia*, to submit the Delisting Application and to (informally) request, upon the date on which the Delisting becomes effective, termination of trading of all va-Q-tec Shares at all stock exchanges at which the va-Q-tec Shares are traded in the open market at the relevant time. In addition, va-Q-tec also undertook not to apply for a re-listing of va-Q-tec Shares on any organized market or any regulated market of any stock exchange.

Rationale of the delisting tender offer:

The economic and strategic rationale of the Previous Transaction also applies to the delisting tender offer and the intended delisting.

Fahrenheit AcquiCo is convinced that long-term-oriented growth can best be achieved by a delisting, and thus in a private ownership setting outside the short-term focus and volatility of capital markets. The delisting will enable va-Q-tec to take decisions with a long-term perspective, independent of short-term expectations of the public equity capital markets. In addition, due to Fahrenheit AcquiCo's shareholding in va-Q-tec resulting from the Previous Transaction, Fahrenheit AcquiCo believes that the public equity capital markets are no longer the most advantageous source of equity for va-Q-tec. The Delisting will also allow for a reduction of the regulatory burden and administrative costs associated with maintaining the listing of the va-Q-tec Shares due to the special regulations that listed companies are subject to.

[2] Furthermore, should the Participating Family Shareholders holding the Additional Retained Family Shares acquire any of the Family Shares held by NFK, the Bidder Acquisition Right, and likewise also the Bidder Acquisition Obligation, shall extend to such Family Shares acquired by such Participating Family Shareholders from NFK (if any).

The Delisting will have the following consequences for va-Q-tec Shares and the shareholders of va-Q-tec:

In the event of the Delisting, trading of the va-Q-tec Shares on the regulated market of the Frankfurt Stock Exchange will end and, at the same time, so will trading of the va-Q-tec Shares on XETRA. Following the Delisting becoming effective, shareholders of va-Q-tec will no longer have access to a regulated market, which may detrimentally affect the ability to trade in va-Q-tec Shares and may result in declining share prices. Even if the va-Q-tec Shares continued to be included in an open market of a stock exchange, such market may not be sufficiently liquid to allow for ordinary trading activities. It cannot be ruled out that the Delisting Application or the Delisting may adversely affect trading in, and result in declines in the stock exchange price of, the va-Q-tec Shares in the future. With the Delisting becoming effective, several transparency and trading provisions will no longer apply to the trading with va-Q-tec Shares. This will result in a significantly lower level of protection for shareholders of va-Q-tec.

Intended integration measures:

Fahrenheit AcquiCo as dominating company intends to implement a domination and profit and loss transfer agreement (**va-Q-tec DPLTA**) with va-Q-tec as subordinated company. The agenda of the annual general meeting 2023 of va-Q-tec includes the resolution on the approval of an according draft of the DPLTA (**Draft va-Q-tec DPLTA**) and the joint proposal of both boards of va-Q-tec to grant such approval. The cash compensation set forth in the Draft va-Q-tec DPLTA amounts to 21.80 euros per va-Q-tec Share. Fahrenheit AcquiCo intends to vote in favor of such proposal and to enter into the va-Q-tec DPLTA with the aim of implementing it as soon as possible after the AGM 2023, but not, however, before 2024.

Fahrenheit AcquiCo has not made any decision whether to pursue a squeeze-out of the remaining shareholders of va-Q-tec and will make such decision at the relevant time taking into account the then-current circumstances.

Response by the target company to the delisting tender offer:

In their joint reasoned statement on the delisting tender offer, the management board and the supervisory board of va-Q-tec believe that the amount of the offer consideration is financially adequate and in line with the statutory requirements. They consider the intentions disclosed by Fahrenheit AcquiCo with a view to the further business activities of va-Q-tec, including the Carve-Out and the Business Combination to be positive. Therefore, both boards support the delisting tender offer and recommend that the shareholders of va-Q-tec accept the delisting tender offer.

Public delisting tender offer to the shareholders of home24 SE

In a delisting tender offer, **RAS Beteiligungs GmbH** (**RAS GmbH**), based in Vienna, Austria; **LSW GmbH**, based in Wels, Austria; and **SGW-Immo-GmbH**, based in Wels, Austria (each, a **Bidder**, and, jointly, the **Bidders**), are offering the shareholders of Berlin-based **home24 SE** to acquire all no-par value bearer shares in home24 SE (ISIN DE000A14KEB5) (**home24 Shares**) not directly held by the Bidders against a cash consideration of 7.50 euros per home24 Share during the acceptance period ending September 8, 2023.[3]

The offered cash consideration of 7.50 euros per home24 Share exceeds the volume-weighted average stock price during the six months prior to the publication of the decision to launch the delisting tender offer determined by the BaFin in the amount of 7.23 euros per home24 Share. Because the offer consideration equals the highest price granted or agreed upon for the acquisition of home24 Shares by the Bidders, or persons acting jointly with them, during the six months prior to the publication of the offer document, it represents the statutory minimum offer consideration required under the WpÜG and in accordance with the German Stock Exchange Act.

The Bidders and the target company:

The Bidders do not act as a partnership but as a so-called "bidder consortium" within the meaning of the WpÜG. Accordingly, each Bidder launches the delisting tender offer, and each Bidder has to fulfill the obligations set forth in the offer document.

At the time of the publication of the offer document, RAS GmbH directly held approximately 39.91 % of home24 SE's share capital, whereas LSW GmbH and of SGW-Immo-GmbH each directly held approximately 20.79 % of home24 SE's share capital. In addition, XXXLutz KG, as a person acting jointly with RAS GmbH, held approximately 9.96 % of home24 SE's share capital.

RAS GmbH is the parent company of the XXXLutz Group, in which material operating companies of the XXXLutz Group are bundled. Together with XXXLutz KG and its (indirect) subsidiaries, RAS GmbH operates more than 370 furniture stores in Europe. Generating annual revenues of more than 5 billion euros, the XXXLutz Group is one of the three largest furniture retailers in the world.[4]

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[3] Provided that new home24 Shares might be issued prior to the expiration of the acceptance period, the delisting tender offer by the Bidders applies also to the acquisition of all home24 Shares not already directly held by the Bidders prior to the expiration of the acceptance period.

[4] The limited partnership (*Kommanditgesellschaft*) **XXXLutz KG**, which is based in Wels, Austria (**XXXLutz**), holds 99.5 % of the share capital of RAS GmbH. The remaining 0.5 % of RAS GmbH's share capital is held at 0.25 % each by the private foundation **WSF Privatstiftung** and by the private foundation

The target company, home24 SE, and its subsidiaries form the home24 Group, which is a leading pure-play home and living e-commerce platform that is active in Germany, France, Austria, the Netherlands, Switzerland, Belgium, and Italy. It is also active in Brazil under the Mobly brand. The home24 Group also includes the lifestyle brand Butlers with more than 100 stores in the DACH region (Germany, Austria, Switzerland) and an additional 25 stores in the rest of Europe.

Key structuring steps leading up to the delisting tender offer:

On October 5, 2022, RAS GmbH, XXXLutz KG and home24 SE entered into a business combination agreement (**BCA**) that stipulates the principal terms and conditions as well as the mutual intentions and understandings with regard to the future collaboration and strategy. LSW GmbH and SGW-Immo-GmbH subsequently joined the BCA by entering into an accession agreement among home24 SE, XXXLutz KG and the Bidders as parties.

Also on October 5, 2022, RAS GmbH entered into a separate agreement with a shareholder of home24 SE, Mr. Wilhelm Josten, which has been amended by way of an amendment agreement dated May 2, 2023 among RAS GmbH, Mr. Wilhelm Josten, LSW GmbH and SGW-Immo-GmbH (**Transfer Agreement**), under which LSW GmbH, together with SGW-Immo-GmbH, is authorized, inter alia, to exercise the voting rights for 1,181,849 home24 Shares (approximately 3.51 % of home24 SE's share capital) at its own discretion, if there are no specific instructions from Mr. Wilhelm Josten, for the period until March 30, 2029. In addition to that power of attorney, LSW GmbH, SGW-Immo-GmbH and Mr. Wilhelm Josten agreed to the right of LSW GmbH and SGW-Immo-GmbH to require, within a period of two months from April 1, 2029, Mr. Wilhelm Josten to sell to them all 1,181,849 home24 Shares.[5]

On October 28, 2022, the Bidders entered into a consortium agreement governing their internal relationship (**Consortium Agreement**) due to which the Bidders' voting rights arising from home24 Shares are mutually attributed. Within the framework of the Consortium Agreement, the Bidders agreed to permanently coordinate their conduct in relation to the takeover offer regarding home24 SE and, in particular, the exercise of voting rights from home24 Shares and the permanent entrepreneurial orientation of home24 SE. Moreover, the Consortium Agreement governs the allocation of tendered home24 Shares to the Bidders following the ratio set forth by an allocation key as described in the offer document.

The Bidders published a takeover offer on November 11, 2022, which was subsequently successfully completed, and thereby acquired control of home24 SE.[6]

On June 28, 2023, the Bidders, XXXLutz and home24 SE concluded an agreement in which they laid out their mutual understanding and their intentions in relation to the planned delisting (**Delisting Agreement**). In the Delisting Agreement, home24 SE has undertaken, subject to preconditions, to file an application for the revocation of the admission of all home24 Shares to trading on the regulated market (*Regulierter Markt* – General Standard) of the Frankfurt Stock Exchange (**Delisting**) (**Delisting Application**), as well as to terminate any inclusion of home24 Shares for trading on any open market of any stock exchange (including the Berlin Second Regulated Market) and any other multilateral or organized trading facility within the meaning of the European Market Abuse Regulation to the extent that such inclusions have been initiated at the request of home24 SE.

The Bidders have confirmed in the Delisting Agreement, *inter alia*, that they will provide financial support of home24 SE, and have acknowledged their intentions, commitments, and undertakings set out in the BCA.

Rationale of the delisting tender offer:

The Bidders prepared and published the delisting tender offer to facilitate the Delisting Application.

From the perspective of the Bidders, the revocation of the stock exchange listing and the termination of any inclusion in other trading platforms enable home24 SE to save considerable costs associated with the maintenance of the stock exchange listing, to reduce the complexity of

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LSW Privatstiftung, which are both based in Wels, Austria. The general partners of XXXLutz are Ms. **Julia Fronik** and **XXXLutz Verwaltungs GmbH**, which is based in Wels, Austria, and, as the managing general partner, exercises full control over XXXLutz and indirectly over RAS GmbH. The limited partners of XXXLutz are in equal shares LSW GmbH which is wholly owned by LSW Privatstiftung, and SGW-Immo-GmbH which is wholly owned by WSF Privatstiftung. In the general meeting of XXXLutz KG, both general partners have one vote, whereas both limited partners have 250,000 votes each. The limited partners do not exercise joint control over XXXLutz KG. WSF Privatstiftung and LSW Privatstiftung each hold 50 % in XXXLutz Verwaltungs GmbH, and they do not exercise joint control over XXXLutz Verwaltungs GmbH. The sole shareholder of LSW GmbH is LSW Privatstiftung. **Dr. Andreas Seifert**, the founder of LSW Privatstiftung, is the sole managing director of LSW GmbH, and controls LSW Privatstiftung within the meaning of the WpÜG. SGW-Immo-GmbH is controlled by its sole shareholder WSF Privatstiftung.

5 LSW GmbH, SGW-Immo-GmbH and Mr. Wilhelm Josten agreed in the amended Transfer Agreement that Mr. Josten may require LSW GmbH and SGW-Immo-GmbH to purchase all (but not less than) 1,181,849 home24 Shares at a price of 7.50 euros per home24 Share, Furthermore, the Transfer Agreement provides for a right of LSW GmbH and SGW-Immo-GmbH to jointly request that Mr. Wilhelm Josten, within a period of two months from April 1, 2029, sells to them up to all of the home24 Shares held by him on that date. In turn, Mr. Wilhem Josten is entitled to request from LSW GmbH and SGW-Immo-GmbH that they acquire all 1,181,849 home24 Shares held by him at a price of 7.50 euros per home24 Share.

6 The takeover offer was accepted for a total of 23,254,956 home24 Shares, corresponding to approximately 69.08 % of home24 SE's current share capital.

home24 SE's business as well as regulatory expenditures, and to release the management capacities claimed by the stock exchange listing. Furthermore, home 24 SE does not need access to the capital markets for the foreseeable future due to alternative sources of financing.

The Delisting will, in particular, have the following effects on the home24 Shares and the shareholders of home24 SE:

In the event of the Delisting, the shareholders of home24 SE will no longer have access to a regulated market for home24 Shares, which may detrimentally affect the ability to trade in home24 Shares and result in declining share prices. The Delisting will also end trading of home24 Shares on XETRA, the electronic trading system of the Frankfurt Stock Exchange, and Gettex, the electronic trading system of the Munich Stock Exchange. It cannot be excluded that, in the future, the stock market price for home24 Shares, as well as the ability to trade home24 Shares, will be adversely affected by the Delisting Application, which may result in declining share prices. Moreover, upon completion of the Delisting, trading in home24 Shares will no longer be subject to several transparency and trading rules, which will result in a lower level of protection for the shareholders of home24 SE.

Intended integration measures:

The Bidders intend to maintain and continue the brands of home24 SE as independent brands after the completion of the delisting tender offer. The Bidders also do not intend to change the current corporate structure of the home24 Group.

In the event that, after the implementation of the Delisting, home 24 SE is unable to conclude independent financing with external banks, XXXLutz and the Bidders have undertaken *vis-à-vis* home24 SE to issue independent bank guarantee declarations for payment obligations of home24 SE arising in connection with new bank financing *vis-à-vis* the respective financing bank up to a certain amount, provided that the supervisory board of home24 SE has granted its approval prior to taking up such bank financings. Moreover, XXXLutz and the Bidders have undertaken to provide equity and debt capital to home24 SE up to an agreed amount in the event that external financing by external capital providers does not materialize or does not materialize at reasonable conditions despite the guarantee declaration.

After completion of the delisting tender offer, and subject to having reached the required majority shareholding, the Bidders intend to review a squeeze-out of remaining minority shareholders under the German Stock Corporation Act or the German Transformation Act.

In accordance with their commitment under the BCA, the Bidders do not intend to implement any structural measures. None of the Bidders will enter into a domination and profit transfer agreement with home24 SE for a period of three years after completion of the takeover offer.

Response by the target company to the delisting tender offer:

In their joint reasoned statement on the delisting tender offer, the management board and the supervisory board of home24 SE believe that the amount of the offer consideration is financially adequate and in line with the statutory requirements. Both boards support the delisting tender offer and recommend that the shareholders of home24 SE accept the delisting tender offer.

Takeover offer and delisting tender offer to the shareholders of Schumag Aktiengesellschaft

After the expiration of the acceptance period of the voluntary public takeover offer, which is at the same time a delisting tender offer (together, the **Delisting Takeover Offer**), by Aachen-based **TPPI GmbH** (**TPPI**), to the shareholders of Aachen-based **Schumag Aktiengesellschaft** (**Schumag**) to acquire all no-par bearer shares of Schumag (ISIN DE0007216707; DE000A31C3S6; DE000A31C3T4) not directly held by TPPI (**Schumag Shares**) against a cash consideration of 1.36 euros per Schumag Share, shareholders can subsequently accept the offer during an additional acceptance period ending September 7, 2023.

The offered cash consideration of 1.36 euros per Schumag Share is based on the business valuation of a neutral expert using the discounted-earnings method in accordance with the IDW standards (IDW S 1, as of 2008), which puts the value at 1.36 euros per Schumag Share as of the valuation dates of June 12, 2023, and June 15, 2023. The requirement of a business valuation for the determination of the statutory minimum consideration is prescribed by German takeover law as well as by the German Stock Exchange Act because, in view of the absence of prior acquisitions of Schumag Shares by TPPI or persons acting jointly with TPPI, the BaFin could neither determine a valid volume-weighted average stock price during the six months prior to the publication of the decision to launch the delisting tender offer on June 13, 2023, nor a valid volume-weighted average stock price during the three months prior to the publication of the decision to launch the takeover offer on June 16, 2023.

The Delisting Takeover Offer was accepted during the acceptance period for 223,367 Schumag Shares, corresponding to approximately 2.48 % of the share capital of Schumag.

The bidder and the target company:

The bidder, TPPI, is a holding company, that is controlled by its sole shareholder and sole managing director, **Professor Dr. Thomas Prefi**, with a business address in Aachen (**Professor Prefi**), who is also a member of the

supervisory board of Schumag.[7] At the time of the publication of the offer document, TPPI directly held a total of 2,250,000 Schumag Shares, corresponding to approximately 25.00 % of Schumag's share capital, the voting rights of which are to be attributed to Professor Prefi.

The target company, Schumag, is active in the manufacture of machinery and precision engineering. Schumag forms the Schumag Group together with its two wholly owned subsidiaries, namely Schumag Romania S.R.L., which is based in Timisoara, Chisoda, Romania, and is active in precision mechanics, and Aachen-based BR Energy GmbH, which is no longer active (**Schumag Group**).

Key structuring steps leading up to the Delisting Takeover Offer:

Schumag's share capital is divided into 8,999,998 no-par value bearer shares (**Schumag Shares**), of which 6,911,997 Schumag Shares are currently listed under the ISIN DE0007216707 (**Main ISIN**). The Schumag Shares listed under the Main ISIN are admitted to trading on the regulated market, and at the same time admitted to the subsegment of the regulated market with additional post-admission obligations (Prime Standard) of the Frankfurt Stock Exchange and to the regulated market of the Düsseldorf Stock Exchange (**Admitted Schumag Shares**). There are 1,382,399 Schumag Shares currently listed under the ISIN DE000A31C3S6. These Schumag Shares, like 705,602 other Schumag Shares listed under ISIN DE000A31CT4, are currently not admitted to trading on the regulated market of the Düsseldorf Stock Exchange or the Frankfurt Stock Exchange (collectively, **Non-Admitted Schumag Shares**).

The Delisting Takeover Offer is intended to enable Schumag to obtain the revocation of the admission of all Admitted Schumag Shares to trading on the regulated market of the Frankfurt Stock Exchange and the Düsseldorf Stock Exchange (**Delisting**). TPPI and Schumag have entered into a Delisting Agreement in which TPPI has undertaken to submit the Delisting Takeover Offer, and in which Schumag has undertaken, under certain conditions, to apply for a revocation of the admission of the Admitted Schumag Shares to trading on the regulated market of the Frankfurt Stock Exchange and the Düsseldorf Stock Exchange.

Rationale of the Delisting Takeover Offer:

TPPI does not aim to increase its stake in Schumag through the Delisting Takeover Offer. Rather, the Delisting Takeover Offer is intended to enable Schumag to obtain the Delisting of all Admitted Schumag Shares to trading on the regulated market.

TPPI is convinced that, in view of Schumag's shareholder structure where a small number of shareholders hold a large part of the shares, maintaining access to the regulated market no longer makes sense, especially since investors' interest in Admitted Schumag Shares has been low for a long time and trading in Admitted Schumag Shares occurs only sporadically and in very small volumes for several years.

TPPI is convinced that the obligations and costs associated with the stock exchange listing are no longer in reasonable proportion to the benefits of the stock exchange listing. The Delisting reduces the complexity of Schumag's business activities and the applicable legal provisions. This leads to significant cost savings and a significant relief for management. Listing on the stock exchange entails considerable costs and extensive follow-up and reporting obligations.

Schumag is, on the other hand, due to its cash flow and the financing potential of the Schumag Group, not dependent on the capital market for financing purposes.

With regard to the interests of shareholders to remain invested in Schumag, the intention is to apply for inclusion of the Schumag Shares in the open market of the Düsseldorf Stock Exchange at the same time as the application for the Delisting.

The open market, which is organized under private law, is significantly less regulated than the regulated market. In the opinion of both boards of Schumag, the savings in costs and workload that are aimed at with the Delisting will mainly occur also taking into account the planned continued inclusion of the Schumag Shares in the open market, due to the significantly lower level of regulation. Certain transparency requirements according to Regulation (EU) No. 596/2014 (Market Abuse Regulation, MAR), such as the prohibition on market manipulation, the obligation to publish ad hoc announcements, and the obligation to publish Directors' Dealings are also applicable in the open market. However, the increased requirements for financial reporting, which Schumag considers to be the main cost and expense driver, are not applicable to over-the-counter trading.

At the same time, those shareholders who do not accept the Delisting Takeover Offer for the time being and wish to remain shareholders of Schumag are given the opportunity, subject to corresponding prospective buyers, to also sell their Schumag Shares on the stock exchange.

The Delisting will enable Schumag to make decisions with a long-term perspective, independent of investor expectations and the special regulations that listed companies are subject to. In addition, the Delisting will reduce the complexity of the applicable legal requirements, thus enabling a reduction in the administrative costs associated with maintaining the listing and freeing up management capacities occupied by the listing.

[7] Since Professor Prefi, who is a person acting jointly with TPPI in the context of the offer, is the sole general partner and sole authorized representative of the Aachen-based limited partnership **Prefi Immobilien KG**, also Prefi Immobilien KG is a person acting jointly with TPPI.

The segment change, on the other hand, could prove disadvantageous for shareholders.

In the event of the Delisting, trading in the Admitted Schumag Shares on the regulated market of the Frankfurt Stock Exchange and the Düsseldorf Stock Exchange will end, and shareholders of Schumag will no longer have access to a regulated market, which may adversely affect the ability to trade Admitted Schumag Shares and may result in price declines.

It is possible that trading in the Admitted Schumag Shares on the open market of the Stuttgart, Hamburg, and Berlin stock exchanges will be discontinued when the Delisting takes effect. The respective stock exchanges decide on this at their own discretion. Instead, the Schumag Shares are to be included in the open market of the Düsseldorf Stock Exchange at the same time as the Delisting takes effect. However, even if the open market remains open to shareholders of Schumag, this market may not have sufficient liquidity to allow for ordinary trading activity.

If the management board of Schumag decides in the future to terminate the inclusion of the shares in open-market trading on the Düsseldorf Stock Exchange, no further delisting offer under the WpÜG or other legal provisions will be necessary.

With the completion of the Delisting, trading in Schumag Shares is no longer subject to some transparency and trading regulations, as well as certain other provisions of the stock exchange regulations of the Frankfurt Stock Exchange and the Düsseldorf Stock Exchange, and the WpÜG will no longer be applicable. This will result in a significantly lower level of protection for shareholders of Schumag.

Intended integration measures:

TPPI and Professor Prefi intend to support the current business strategy of Schumag, namely TPPI financially, for example, by exercising its subscription rights in the context of any further cash capital increases of Schumag, and Professor Prefi strategically in the context of his supervisory board activities. TPPI recognizes the integrity of the Schumag Group and its business and its material assets. TPPI does not intend to initiate or facilitate any sale or other disposal of Schumag Group's business or material assets. It does not intend to take any action aimed at or facilitating such a sale. TPPI has no intentions that would affect Schumag's use of assets or future obligations.

Response by the target company to the Delisting Takeover Offer:

In their joint reasoned statement on the Delisting Takeover Offer, the management board and the supervisory board of Schumag consider the amount of the offer consideration to be financially adequate, in line with the statutory requirements, and adequately reflect the value of the Schumag Shares. They consider the intentions disclosed in the offer document, in particular the Delisting, to be positive. Both boards therefore support the Delisting Takeover Offer, which they consider to be in the best interest of Schumag. They recommend that the shareholders of Schumag accept the Delisting Takeover Offer, even though they do not intend to accept the offer and want to remain shareholders of Schumag.

ANNOUNCED OFFERS

Type of offer	Bidder	Target	Announcement
Takeover offer	Orchid Lux HoldCo S.à r.l.	OHB SE	August 7, 2023
Mandatory offer	Baumann Vermögens-verwaltung GmbH	SPOBAG Aktien-gesellschaft	July 12, 2023

RECENTLY COMPLETED OFFERS

(Shareholding in each case as a percentage of the share capital)

Bidder/ Target	Bidder's shareholding before the offer (direct/indirect)	Acquisition through acceptance of the offer	Bidder's shareholding after the offer (direct/indirect)
MS ProActive Verwaltungs GmbH / MS Industrie AG [a]	9.18 % [b]	10.72 %	19.90 % [b]
Octapharma AG / SNP Schneider-Neureither & Partner SE [c]	38.23 %	25.61 %	63.83 %
Mosel Bidco SE / Software Aktiengesell-schaft [c]	4.99 %	59.29 %	84.29 % [f]
SD Thesaurus GmbH / BAUER Aktiengesell-schaft [d]	52.81 %	21.04 %	73.85 %
Fujitsu ND Solutions AG / GK Software SE [e]	68.03 %	3.61 %	72.07 %
SWOCTEM GmbH / Klöckner & Co SE [c]	29.97 %	11.56 % [d]	41.53 % [f]
Fujitsu ND Solutions AG / GK Software SE [c]	0 %	67.62 %	67.94 %
Oak Holdings GmbH / Vantage Towers AG [e]	89.26 %	0.05 %	89.31 %
Fahrenheit AcquiCo GmbH / va-Q-tec AG [c]	22.85 %	59.93 %	85.75 %

a) Delisting takeover offer.
b) Taking into account shares in MS Industrie AG directly held by MS ProActive Verwaltungs GmbH and persons acting jointly with it, but not taking into account voting rights attributed on the basis of contractual proxies to exercise voting rights.
c) Takeover offer.
d) Mandatory and delisting tender offer.
e) Delisting tender offer.
f) The consummation of the takeover offer remains subject to the fulfillment of offer conditions.

OTHER NOTABLE DEVELOPMENTS

The German Federal Court of Justice continues to develop its case law in relation to circumventions of the statutory minimum offer price rules under the WpÜG

The German Federal Court of Justice (**FCJ**), in two recent judgments (case numbers II ZR 219/21 and II ZR 220/21), awarded payment claims to former shareholders of a target company that accepted a takeover offer, based on its findings that a separate agreement of the bidder with another shareholder concerning the acquisition of shares in the target company against a minimum compensation higher than the offer price constituted a price-relevant agreement on the basis of which the transfer of shares can be demanded.

The FCJ found that an agreement is already a basis for a request for transfer of ownership if, viewed objectively, it contains a legal disposition of the bidder aimed at acquiring shares in the target company in which it is expressed that the bidder is willing to provide a consideration for the acquisition of shares that exceeds the consideration offered in a takeover offer or mandatory offer pursuant to the WpÜG. In the view of the FCJ, such an agreement does not require that the bidder can demand the transfer of shares.

Moreover, the FCJ found that an agreement with which a block shareholder undertakes, prior to the conclusion of a domination and profit and loss transfer agreement (hereinafter, **DPLTA**), to support the approval of the general meeting for the conclusion of a DPLTA with his or her voting rights if outside shareholders are offered a compensation with a specific amount, is not related to the statutory obligation to grant a compensation to shareholders of the target company.

The minimum offer price rules under the WpÜG are based on the fundamental principle of the WpÜG, namely the equal treatment of shareholders. In this context, acquisitions of shares or agreements on the basis of which a transfer of shares can be demanded, are relevant for the minimum offer price if they take place during a specified period before the offer, during the acceptance period of the offer, or during a specified period after the result of the offer during the acceptance period has been published. In order to prevent circumventions of the pricing rules, the legislator created the rule that agreements under the law of obligations, on the basis of which the transfer of shares can be demanded, are equivalent to an acquisition (*in rem*).

The FCJ held in previous judgments that the conclusion of such an agreement (and not the acquisition at a later date) is relevant to ensure that the bidder is bound to the price that the bidder regarded as adequate in the temporal context of the takeover offer. Thereby the (*in rem*) acquisition is replaced by the agreement of an acquisition right (FCJ, judgment of July 29, 2014, case number II ZR 353/12). In its judgment of November 7, 2017 (case number II ZR 37/16), the FCJ applied these principles to derivative acquisitions of convertible bonds (not directly giving rise to a claim for the transfer of shares but requiring a multi-act process in which a claim for the transfer of ownership is established at a later date) in relation to a circumvention of the pricing rules, based on its finding that the bidder, with the acquisition of rights that allow for the *in rem* acquisition of shares, shows what price it regards as adequate for the shares in the temporal context of the takeover offer.

In its recent decisions, the FCJ has now applied the same principles in relation to an agreement concluded close to the end of the acceptance period. The FCJ held as relevant the circumstance that by acquiring the option to request the shareholder's approval of a DPLTA, the bidder has already expressed that it is willing to acquire the shares for the promised minimum compensation and made a corresponding legal disposition.

Facts of the cases:

In both cases, the plaintiffs held shares in a German stock corporation that was the target company of two voluntary public takeover offers pursuant to the WpÜG in 2017. The defendant in both cases is the legal successor of the original bidder and is the sole shareholder of the current main shareholder of the target company.

In April 2017, the defendant submitted a voluntary public takeover offer to the shareholders of the target company that did not reach the minimum acceptance threshold. In July 2017, the target company published a notification according to which a certain investor E. and fund companies controlled by him (jointly, **E.**) held and controlled a total of 8.69 % of the target company's share capital.

On July 19, 2017, the defendant published a second voluntary public takeover offer at a price of 66.25 euros per share in the target company, with a minimum acceptance threshold of 63 % and an acceptance period until August 16, 2017. On August 18, 2017, the defendant announced that the minimum acceptance threshold had been reached and that there would be an additional acceptance period until September 1, 2017. The plaintiffs accepted the offer and submitted their shares.

After the target company announced on August 24, 2017, that it had been informed by the defendant of its intention to conclude a DPLTA, the defendant and E., who at that time held 13.26 % of the target company's share capital, concluded (on August 30, 2017) an English-language contract referred to as an "irrevocable commitment" (**Irrevocable Commitment**). In it, E. undertook to approve

a DPLTA at the target company's general meeting, among other things, if the compensation for outside shareholders specified therein was at least 74.40 euros per share. With this agreement, the defendant wanted to secure E.'s consent to the DPLTA because it could not achieve a majority of three-quarters of the capital represented in the resolution with its own voting rights.

On September 15, 2017, the defendant contributed its 65.82 % share of the target company's share capital to its wholly owned subsidiary N. GmbH. At the end of December 2017, N. GmbH concluded a DPLTA in which N. GmbH undertook to acquire the shares of outside shareholders for a cash compensation of 74.40 euros per share. The general meeting of the target company approved the DPLTA at the beginning of February 2018. The DPLTA was entered in the commercial register on March 20, 2018. In October 2018, the defendant published a public delisting tender offer at an offer price of 81.73 euros per share in the target company, which E. accepted on the basis of a previously concluded tender agreement.

In both lawsuits, the plaintiffs demanded from the defendant the difference between the price of 66.25 euros per share in the target company stated in the takeover offer and the minimum compensation of 74.40 euros per share promised to E. in the Irrevocable Commitment.

Whereas the District Court dismissed both lawsuits and the appeal court rejected the respective plaintiff's appeal against this, the FCJ allowed the appeals to the extent that a claim by the respective plaintiff pursuant to the WpÜG was denied. The FCJ found that the arguments for denying the plaintiffs' claim for the difference do not stand up to legal scrutiny on two crucial points, namely the assumption that the Irrevocable Commitment would not constitute an agreement that is equivalent to an acquisition, and the assumption that a claim for the difference would be excluded because the Irrevocable Commitment related to an acquisition of shares in connection with a legal obligation to grant a compensation to shareholders.

As a result, the FCJ annulled the judgments of the appeal court and, amending the judgments of the District Court and modifying their phrasing, granted the plaintiffs in each case the asserted payment claim for the difference, based on the number of shares for which each plaintiff had accepted the takeover offer.

FCJ finds that the Irrevocable Commitment constituted an agreement on the basis of which the transfer of shares can be demanded

The WpÜG stipulates that in the case of a takeover offer or mandatory offer, the bidder is obliged to pay the shareholders who have accepted the offer a cash payment in the amount of the difference if, within one year of the publication of the result of the offer during the acceptance period, the bidder acquires shares in the target company outside the stock exchange and grants or agrees to a higher consideration than that specified in the offer. The WpÜG also provides in this connection that agreements on the basis of which the transfer of title to shares can be demanded are equivalent to an acquisition.

In the context of its assessment as to whether the Irrevocable Commitment constitutes such an agreement on the basis of which the transfer of shares can be demanded, and therewith is equivalent to an acquisition, the FCJ reviewed first the opposing views as to whether such an agreement requires that the bidder can demand the transfer of shares,[8] and found that the phrasing of the relevant provision of the WpÜG does not mean that the bidder must have the ability to demand the transfer of shares. Rather, the provision covers in general agreements on the basis of which the transfer of shares can be demanded, without specifying who is entitled and who is obliged under the agreement. The FCJ pointed out that the reference to other provisions of the WpÜG does not offer any indication for an interpretation restricting the phrasing of the law. A comparison with other legal provisions also does not allow for a restrictive interpretation, particularly in view of the regulatory technique used by the legislature, and the different objectives of the legal provisions. The FCJ noted that the relevant provision of the WpÜG is not intended to convey transparency, but rather to protect against circumvention of the minimum offer price requirements in the WpÜG, which in turn are an expression of the principle of equal treatment of the shareholders of the target company. In the view of the FCJ, the legal materials do not contain an indication to a limitation to agreements that give the bidder a right to the transfer of shares. In addition, the FCJ has already decided that the history of the legal provision's origins suggests a broad interpretation in the sense of general protection against circumvention. The FCJ noted that the spirit and purpose of the relevant legal provision of the WpÜG also does not require a restrictive interpretation that excludes agreements by which the bidder grants a right to tender.

In the view of the FCJ, the principle of equal treatment is affected regardless of whether the bidder secures the acquisition of shares at a price higher than that stated in the offer or enables the sale at such price. The bidder can also indicate the price at which he or she is willing to acquire the shares by granting a right to tender and in this way give individual shareholders preferential treatment.

[8] The FCJ noted that, according to the prevailing opinion in case law and literature, an agreement whereby the bidder grants a shareholder in the target company the right to tender shares in the target company or enters into an obligation to purchase the shares should not be considered as an agreement that is equivalent to an acquisition. The opposing view considers it irrelevant whether the bidder can demand the transfer of ownership.

According to the FCJ, the fact that the bidder who grants a shareholder a right to tender does not have the opportunity to acquire the shares does not contradict the application of the legal provision. For the application of the provision, it is irrelevant whether shares are actually acquired at a later date. Rather, it is sufficient to conclude the agreement that replaces the acquisition *in rem*. The FCJ pointed out that it is equally irrelevant whether the bidder can enforce the acquisition, because the circumvention protection is not based on the bidder securing shares in the target company outside of the public offer, but on the fact that the bidder's legal disposition expressed in the agreement corresponds to that of a direct acquisition transaction.

The FCJ noted that when the bidder grants a shareholder a right to tender, thereby allowing the seller to decide whether an acquisition comes about, the bidder can show what price he or she is willing to pay for the acquisition of the shares. If this price is higher than the offer price, such a disposition constitutes unequal treatment of the shareholders accepting the offer, which should be avoided within the periods specified in the WpÜG. Accordingly, it is also irrelevant whether exercising the right to sell the shares may be regarded as probable.

In the view of the FCJ, an agreement is already a basis for a request for transfer of ownership if, viewed objectively, it contains a legal disposition of the bidder aimed at the acquisition of shares in the target company, which expresses that he or she is willing to provide consideration for the acquisition of shares that exceeds the offer consideration.

With regard to the intended protection against circumvention, an agreement on the basis of which the transfer of shares can be demanded does not only exist if it directly gives rise to a claim for the transfer of shares, but also if there is a multi-act process in which a claim for transfer of ownership is not established until a later date. In respect of this the FCJ reiterated that in a previous judgment it considered the derivative acquisition of a convertible bond to be an agreement on the basis of which the transfer of shares can be demanded even if the bond conditions would entitle to make a cash payment instead of delivering the shares under certain circumstances (judgment of November 7, 2017, case number II ZR 37/16).

The FCJ noted that if the agreement through which the bidder has secured the consent of a block shareholder to the DPLTA provides for a certain minimum compensation for outside shareholders, such agreement therewith contains a legal disposition of the bidder aimed at the acquisition of shares (after the bidder has announced its intention to conclude a DPLTA and as the agreement served to secure the required majority). Accordingly, the FCJ found that the Irrevocable Commitment, the DPLTA, and the approval of the shareholders' meeting for the DPLTA are, with regard to the compensation option right to be granted to outside shareholders under the DPLTA, a multi-act process at the end of which the bidder may acquire the shares.

For the FCJ, it is irrelevant whether the majority required for the DPLTA could only be achieved with the votes of the block shareholder. Rather, it is sufficient that the Irrevocable Commitment enabled the bidder to acquire the shares. By securing the majority of the share capital required for the approval of the shareholders' meeting through concluding the agreement the bidder achieved the certainty that by concluding the DPLTA on the agreed-upon conditions, it constituted the right of tender of the block shareholder and the other outside shareholders.

The FCJ noted further that the application of the legal provision to the Irrevocable Commitment is also not ruled out because the bidder could acquire the shares only after the DPLTA had been entered in the commercial register and after the exercising of the option right (to compensation) by the outside shareholders. It is equally irrelevant whether the bidder could expect to make an acquisition "within a reasonable period of time". In this context, the FJC pointed out that the legal provision of the WpÜG already equates the conclusion of the agreement (on the basis of which the transfer of shares can be demanded) with an acquisition. A limitation with regard to when the right to tender can be exercised cannot be inferred from the statutory provision. There is also no reason for such inference with regard to the intended protection against circumvention if the bidder, in concluding the agreement, reveals what price it is willing to pay for the acquisition of the shares. The legislator also had in mind agreements with a postponed period of performance, which explains why the claim for transfer of ownership from the agreement does not have to be due, and why conditional or limited agreements are also covered.

The FCJ noted that, in keeping with the purpose of the statutory provision, the basis on which the bidder bases his valuation of the shares is irrelevant. The decisive factor is whether the consideration granted or agreed to for the acquisition is higher than that stated in the offer. The bidder's motives are also irrelevant because the legal provision does not refer to subjective circumstances in the person of the bidder.

FCJ finds that the Irrevocable Commitment was not connected with a legal obligation to grant a compensation to shareholders

In the context of its assessment of whether a claim for the difference could be excluded because the WpÜG provides that the legal provision on which the claim for the difference is based does not apply to an acquisition of shares in connection with, *inter alia*, a statutory obligation to provide a compensation to shareholders of a target company, the FCJ noted that the scope of such exclusion

is disputed.[9] After assessing the opposing views, the FCJ found that an agreement with which a block shareholder undertakes, prior to the conclusion of a DPLTA, to use his or her voting rights to support the approval of the general meeting for concluding a DPLTA if a certain minimum compensation is offered to outside shareholders, is not related to the legal obligation to grant a compensation to shareholders of the target company. As a result, the application of the provision governing the claim for the difference amount is not excluded.

The FCJ noted that within the scope of the provision that equates agreements (on the basis of which the transfer of shares can be demanded) to an acquisition (*in rem*), there must therefore exist a connection between the agreement (on the basis of which the transfer of shares can be demanded) and a legal obligation to grant compensation to shareholders of the target company. The FCJ found that the phrasing of the law does not contain any more detailed specifications as to how this connection must be established.

Construed narrowly, the law only assumes a connection if the agreement establishes a statutory right to compensation or concerns an already established claim; construed broadly, it affirms a connection for any agreement (on the basis of which the transfer of shares can be demanded) if such agreement is ultimately related to a legal obligation to grant a compensation.

In the view of the FCJ, the nature of the provision as an exception rule suggests a narrow interpretation of the concept of connection, so as not to undermine the objective – underlying the bidder's obligation to pay the difference to the offer price – namely the equal treatment of shareholders also with regard to the agreed-upon prices within one year of the publication of the result of the offer during the acceptance period.

Moreover, the scope of application of the exception rule also suggests a narrow interpretation. The legal basis for a statutory compensation claim is either established before the bidder acquires the shares (through the conclusion of the DPLTA, in which the controlling company undertakes, at the request of an outside shareholder, to acquire shares of the controlled company against payment of reasonable compensation) or, in the case of an integration, upon the acquisition of the shares by the bidder.

The FCJ pointed out that this direct link with a statutory right to compensation corresponds to a narrow interpretation of the concept of connection, also for agreements that are merely equated with an acquisition. If, on the other hand, agreements relating to a statutory entitlement to compensation were made possible in advance of a statutory obligation to make compensation, this would mean a considerable expansion of the scope of application opened up under the provision.

The history of the origin of the legal provision also supports a narrow interpretation of the concept of connection. The federal government's draft law provided for exempting the acquisition of shares from a subsequent improvement claim "due to" a legal obligation to grant compensation to shareholders of the target company.

The FCJ found that the meaning and purpose of the exception rule do not require a broad interpretation of the concept of connection. Rather, the purpose of the legal provision also suggests a restrictive interpretation. The exception rule is intended to prevent the bidder from being exposed to incalculable costs over a disproportionately long period due to the possibility of a judicial review of the compensation with regard to a takeover-law claim regarding the difference. At the same time, the exception rule is an expression of the bidder's lack of voluntary commitment because the bidder is legally forced to pay an appropriate compensation. In the context of its assessment, the FCJ found that the coordination of a minimum compensation in advance of a DPLTA intended by the bidder with a block shareholder takes place without any legal obligation. It is the result of free negotiation between the contracting parties and is not included in the privileges of a DPLTA. The FCJ noted that in the decided case the bidder itself asserted that the promised minimum compensation was higher than the market value of the shares. In the view of the FCJ, the bidder neither incurs an unforeseeable cost risk nor is the bidder exposed to such a risk for the unforeseeable future as a result of a claim for the difference linked to such an agreement.

The FCJ pointed out that the object of an appraisal proceeding is not the minimum compensation freely negotiated in such an agreement between the bidder and the block shareholder, but the legally owed compensation. The fact that without the legal obligation to grant compensation there would generally not be agreement as to a minimum compensation payment (as in the Irrevocable Commitment) does not justify any other understanding. Rather, broadening the scope of the exception rule for compensation payment commitments to individual block shareholders with regard to later structural measures would make it possible to promise special benefits in order to achieve the bidder's takeover target, which is no longer covered by the purpose of the exception rule.

For the FCJ, an agreement to a minimum compensation before the envisaged structural measure constitutes a relevant unequal treatment of the shareholders in relation to the shareholders who have accepted the offer.

[9] According to one view, there should be no obligation to pay the difference to the offer price even if the bidder prematurely negotiates a compensation with a shareholder that exceeds the offer price. According to the opposing view, the exclusion rule does not apply to such agreements.

A relevant unequal treatment in relation to the other shareholders exists also from the point of view that the block shareholder is informed at an early stage of the valuation of the shares in the target company by the bidder and can limit his risks with regard to the amount of a later compensation from the outset. According to the FCJ, this opens up arbitrage opportunities that are not worthy of protection.

The FCJ noted that it is irrelevant for the application of the exception rule whether the minimum compensation agreed in the compensation agreement is included in a DPLTA and confirmed in a judicial award procedure. The claim for the difference between the offer consideration and the agreed minimum compensation arises upon the conclusion of the agreement; subsequent developments, the occurrence of which is uncertain at the time when the agreement is concluded, are not to be taken into account.

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