

Morgan Lewis

2020 | 1

# TAKEOVER MONITOR

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



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The Morgan Lewis takeover monitor is a documentation of public tender offers in Germany that Morgan Lewis publishes for its clients and interested persons. This issue covers published and announced current offers until August 26, 2020.

## PUBLIC TENDER OFFERS UNDER THE GERMAN SECURITIES ACQUISITION AND TAKEOVER ACT (“WPÜG”): OFFERS, RESULTS AND ANALYSES

Following the lapse of the takeover offer to the shareholders of QIAGEN B.V. caused by the failure to meet the reduced minimum acceptance condition at the end of the extended acceptance period and the completion of the mandatory offer to the shareholders of Vita 34 AG, there are presently no ongoing offer proceedings to report.

Several public tender offers have been announced, including a mandatory offer to the shareholders of S & O Beteiligungen AG as well as takeover offers for the acquisition of shares in InTiCa Systems AG, shares in Easy Software AG, or shares in 4basebio AG. On the other hand, the BaFin prohibited an announced mandatory offer to the shareholders of Fritz Nols AG for failure to submit an offer document within the mandatory time period.

The recent offers sought to acquire shares in COVID-19 winners or companies that seem to cope successfully with the economic difficulties caused by the COVID-19 pandemic. Not surprisingly, however, the BaFin is also handling cases of less fortunate target companies whose businesses have been adversely affected by COVID-19. In the case of co-don AG, the BaFin granted potential acquirers of control an exemption from the mandatory offer obligation vis-à-vis the target’s shareholders if, and on the ground that, control will be attained in connection with the target’s restructuring. The BaFin is also seeking the submission of an offer document for a mandatory offer to the shareholders of Travel24.com AG, a stock corporation active in the tourism sector. In one of its “normal” (i.e., COVID-19 unaffected) cases, the BaFin granted an exemption from the mandatory offer obligation vis-à-vis the shareholders of WCM Beteiligungs- und Grundbesitz AG on the ground of the so-called book value clause.

Other recently completed offers include the takeover and delisting acquisition offer to the shareholders of Westgrund AG, as well as the takeover offers to the shareholders of MVV Energie AG and the shareholders of RHÖN-KLINIKUM AG.

### RECENT OFFERS

#### Takeover offer for the acquisition of shares of QIAGEN N.V. lapses, even despite offer amendments

On August 13, 2020, **Quebec B.V.**, based in Breda, the Netherlands, announced that its takeover offer to the shareholders of **QIAGEN N.V.**, based in Venlo, the Netherlands (“**QIAGEN**”), to acquire their ordinary shares with a par value of 0.01 euro in QIAGEN N.V. (each a “**QIAGEN Share**”), lapsed because of the non-fulfillment of the (reduced) minimum acceptance threshold condition of the offer.

Quebec B.V., which is a wholly-owned subsidiary of **Thermo Fisher Scientific Inc.**, a Delaware corporation and the group parent company of the Thermo Fisher Group (“**Thermo Fisher**”), based in Waltham, Massachusetts, USA, amended its offer on July 17, 2020, particularly by reducing the minimum acceptance threshold condition and increasing the cash offer consideration to 43.00 euros per QIAGEN Share from originally 39.00 euros. According to the amendment, the aggregate number of validly tendered (including under guaranteed delivery procedures), not

withdrawn QIAGEN Shares (including any QIAGEN Shares held by Thermo Fisher or any of its affiliates) had to be at least 66.67% of QIAGEN’s issued and outstanding ordinary share capital at the end of the acceptance period, as amended (excluding any QIAGEN Shares held by QIAGEN in treasury at that time). The offer was accepted for 107,546,187 QIAGEN Shares, corresponding to approximately 46.59% of the share capital and voting rights of QIAGEN, so that the offer condition was not satisfied.

Neither Quebec B.V. nor the persons acting jointly with it held directly or indirectly any voting rights or instruments in relation to QIAGEN Shares upon publication of the offer document or at the end of the acceptance period. The offer was based on a Business Combination Agreement entered into by Thermo Fisher and QIAGEN, which was amended during the acceptance period. Since QIAGEN’s headquarters are in the Netherlands and the QIAGEN Shares are only listed in Germany in the European Economic Area, the offer had to comply with German takeover law in terms of the consideration offered, the content of the offer document and the procedures for the offer. Dutch law applied in respect of corporate law questions and information to be provided to QIAGEN’s employees. As the QIAGEN Shares are also listed in the United States, the offer also had to comply with U.S. offer rules.

Before the offer was improved, shareholders showed little interest in accepting it, probably mainly because increased global demand for coronavirus-testing products drove unanticipated stronger sales at QIAGEN, a development that is likely to continue in the longer term. However, even after the offer amendments, some shareholders indicated to QIAGEN that they would not tender their shares into the revised offer, as they still considered it to fall short of the company’s fair value.

#### Consequences and options if an offer lapses due to the failure to meet a minimum acquisition threshold condition

The German Securities Acquisition and Takeover Act (“**WpÜG**”) provides that if an offeror has made its offer subject to the condition of acquiring a minimum portion of the target company’s securities and if the offer lapses because the minimum acquisition threshold was not reached at the end of the acceptance period,

- (a) the offeror (of the lapsed offer);
- (b) a person which acted jointly with the offeror during the time period from the publication of the decision to make the lapsed offer until the end of the acceptance period of the lapsed offer;
- or
- (c) a person which is acting jointly with the offeror, or with a person described above under (b), at the time of the publication of the decision to make an (additional) offer;

may not make an additional offer to the shareholders of the target company, or publish the decision to make such an offer until one year has lapsed.

This complicated structure is the result of a recent amendment to the relevant WpÜG provision, by which the German legislator has sought to clarify the circle of those persons who are subject to the one-year blocking period to prevent a circumvention of such blocking period.<sup>1</sup> If an offer lapses due to the failure to meet the

<sup>1</sup> The explanatory memorandum regarding the amendment (Bundestag document 19/15196, p. 58/59) states that the previous wording of the provision allowed offer-

minimum acceptance threshold condition, the blocking period commences on the day after the acceptance period of the lapsed offer has ended.

The legislator's rationale behind introducing the blocking period under the WpÜG was to ensure that, after a prohibited offer or an offer that has lapsed for failure to meet the minimum acquisition threshold condition, the target company can continue its business operation undisturbed, which interest was considered to outweigh any interest of such offerors to conduct another offer proceeding shortly afterwards.

The foregoing notwithstanding, the rules concerning the blocking period do not apply if the respective offeror is obligated to publish its direct or indirect acquisition of control of the target company, and submit and publish a mandatory offer to the shareholders of the target company. The explanatory memorandum of the WpÜG bill explains that otherwise, if the requirements for a mandatory offer are triggered by acquisitions of the offeror in the meantime, the blocking period would work to the detriment of the minority shareholders designed to be protected by the mandatory offer rules by giving them an opportunity to exit the target company against reasonable consideration.

In addition, the BaFin may exempt the respective offeror, on written request, from observing the blocking period if the target company consents to the exemption. The explanatory memorandum of the WpÜG bill mentions in this context that unexpected developments at the target company may render the blocking period unreasonable, in which case the law allows the BaFin to exempt the respective offeror from observing it if the target company (which is to be protected by the blocking period) consents thereto. In light of the risk that the consent of the target company (which is represented by the management board) could be influenced by extraneous deliberations, such as, for example, the prospect of a lucrative position after a successful takeover, the granting of the exemption lies in the discretion of the supervisory authority. In the commentary literature, however, some authors emphasize that management continuity is actually in the interest of a target company. Other authors argue that the discretion to withhold the exemption should exist in cases where the offeror is unreliable, for example if the financing of the previous offer was not properly ensured or the offeror failed to disclose material information necessary to make a well-informed decision about the offer. An offeror may appeal the BaFin's decision denying the requested exemption.

### Mandatory offer to the shareholders of Vita 34 AG

The mandatory offer of **AOC Health GmbH**, based in Frankfurt am Main, to the shareholders of Leipzig-based **Vita 34 AG** to

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ors whose offer was prohibited or whose offer lapsed for failure to meet the minimum acquisition threshold condition to circumvent the blocking period by simply forming a new offeror company as the old wording of the provision, due to an editorial mistake, solely addressed the offeror itself without including other persons, even if they are affiliated with the offeror under corporate law or in any other way.

The first circumvention of this kind occurred in 2019. At the end of the respective acceptance period of the competing takeover offers of Luz (C-BC) BidCo GmbH and of Opal Bidco GmbH for the acquisition of shares of OSRAM Licht AG, the respective minimum acceptance threshold condition of each of the offers was not fulfilled. As a result, both of these takeover offers lapsed and the respective offerors were subject to the blocking period. However, only a short time after the offers had lapsed, ams Offer GmbH, which, like Opal Bidco GmbH, is a subsidiary of ams AG, announced an additional takeover offer to the shareholders of OSRAM Licht AG. The BaFin did not intervene. The additional offer of ams Offer GmbH was published and successfully completed. This course of events spurred the German legislature to act.

acquire their shares against a cash payment of 10.76 euros for each no-par value registered share ("**Vita 34 Share**") during the acceptance period until July 27, 2020 was accepted for approx. 5.25% of the share capital of Vita 34 AG. Therewith, after settlement of the offer, approx. 36.44% of the share capital and voting rights of Vita 34 AG are held by, or attributed to, AOC Health GmbH. By publishing its mandatory offer, AOC Health GmbH simultaneously satisfied the mandatory offer obligations of the persons directly or indirectly controlling it.

The mandatory offer obligation arises from an attainment of control, which is assumed as soon as a company holds or is attributed at least 30% of the voting rights in the target company.<sup>2</sup> In the case of Vita 34 AG, control was attained when AOC Health GmbH acquired ownership of 1,132,464 Vita 34 Shares, the voting rights of which correspond to a total of approx. 31.19% of the voting rights in Vita 34 AG after attribution of the voting rights from 160,536 Vita 34 Shares held by **Polski Bank Komórek Macierzystych S.A.**, Warsaw, Poland ("**PBKM**") to AOC Health GmbH, in which the latter holds a majority stake.

AOC Health GmbH's principal business activity consists in building up participations in PBKM and Vita 34 AG. Vita 34 AG, one of the first private umbilical cord blood banks in Europe and a pioneer in cell banking, is a full-service provider for cryopreservation offering the collection logistics, preparation and storage of stem cells from umbilical cord blood and umbilical cord tissue. Similarly to Vita 34 AG, PBKM and its subsidiaries operating in the market under the designation "FamiCord Group" offer cryopreservation, collection logistics, processing and storage of stem cells from umbilical cord blood and umbilical cord tissue. While Vita 34 AG holds a leading market position in the German-speaking countries, FamiCord Group is mainly active in Poland, Turkey, Portugal, Spain, Hungary, Romania, Switzerland, Italy and Latvia. Since the activities of both groups barely overlap geographically and complement each other well, AOC Health GmbH intends to work towards combining their businesses.

The management and supervisory boards of Vita 34 AG considered the offer price inadequate, despite the fact that it corresponded to the weighted domestic stock exchange price ("**vwap**") of Vita 34 Shares during the last three months before the announcement of the acquisition of control, and thus the statutory minimum offer price. They criticized that the wvap takes the stock exchange price decreases caused by COVID-19 in March 2020 into account.

### ANNOUNCED OFFERS

**PRINTad Verlags – GmbH**, based in Passau, on August 17, 2020 announced its decision to make a voluntary public takeover offer to the shareholders of Passau-based **InTiCa Systems AG** ("**InTiCa**") to acquire all no-par value bearer shares in InTiCa Systems AG (each an "**InTiCa Share**") not directly held by it against payment of a cash consideration of 6.00 euros per InTiCa Share. Apart from disclosing its direct holding in InTiCa's share capital

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<sup>2</sup> The German legislature assumes that the ownership of 30% of the voting rights is sufficient to effectively control a public company since 30% of the total voting rights typically represent the majority of the represented votes during shareholder meetings. In addition, a person controlling 30% of the total voting rights can block major decisions of a German stock corporation, such as changes to the articles of association that by law, typically require a majority of at least 75% of the votes.

of approx. 29.99%, PRINTad Verlags – GmbH, which is an indirect subsidiary of **Dr. Dr. Axel Diekmann**, announced that the offer will be subject to conditions including, among others, a minimum acceptance threshold condition of 50% (plus one InTiCa Share) of all issued InTiCa Shares, including the InTiCa Shares already held by PRINTad Verlags – GmbH and excluding any treasury shares held by InTiCa.

Hong Kong-based **BluGreen Company Limited** published on August 11, 2020 that it acquired 760,913 bearer shares of Heidelberg-based **S&O Beteiligungen AG (“S&O”)** (i.e., approx. 61.47% of the voting rights), thereby attaining control of S&O on 10 August 2020. BluGreen Company Limited, which is a subsidiary of its majority shareholder **Mr. Sebastian-Justus Schmidt**, resident in Thailand, announced that it will make a mandatory offer to the outside shareholders of S&O, intending to offer a cash consideration of 5.00 euros per share.

Heidelberg-based **Sparta AG (“Sparta”)** announced on July 27, 2020 its decision to make a voluntary public takeover offer to the shareholders of Heidelberg-based **4basebio AG (“4basebio”)** to acquire their registered shares against a cash payment. Sparta intends to offer a cash payment of 2.00 euros for each share in 4basebio. Sparta also announced that it has entered into a voting rights pooling agreement with other shareholders of 4basebio.

**deltus 36. AG**, based in Frankfurt am Main, its current address being c/o Cormoran GmbH, Berlin, announced on July 24, 2020 its decision to make a voluntary public takeover offer to the shareholders of **Easy Software AG**, based in Mülheim an der Ruhr, to acquire their no-par value bearer shares against a cash payment of 11.50 euros per share. The offer will be subject to conditions including, inter alia, a minimum acceptance threshold of 75% of the share capital. **deltus 36. AG** announced that its indirect parent company has concluded agreements with two shareholders regarding the acceptance of the offer for approx. 62.08% of Easy Software AG’s current share capital.

## OTHER DEVELOPMENTS

### Prohibition of mandatory offer to the shareholders of Fritz Nols AG

The BaFin’s administrative decision, prohibiting the announced mandatory offer of **Naif Omar A Alharthi**, resident in Saudi Arabia, on behalf of his subsidiary **Dana Middle East Technology W.L.L.**, based in Manama, Kingdom of Bahrain, to the shareholders of Frankfurt am Main-based **Fritz Nols AG**, because the offerors failed to submit an offer document to it, was published on August 25, 2020. Dana Middle East Technology W.L.L. had acquired control of Fritz Nols AG on June 22, 2020 through the acquisition of shares.

In its decision, the BaFin stated that it has no discretion in this matter and must therefore prohibit the offer whenever an offeror fails to submit an offer document to it within the statutory time period of four weeks of the publication of the acquisition of control. However, the prohibition of the offer does not remove the existing mandatory offer obligation. Rather, the effect of the prohibition is primarily that the obligation to pay interest on the consideration for the duration of the violation, as well as the respective loss of rights, is no longer a disputed question. The decision mentions that the offerors explained their failure to meet

the statutory submission deadline mainly with the tense situation caused by the coronavirus pandemic as well as with the lack of a contact person at the target company. The offerors still intend to publish the mandatory offer as obligated.

### BaFin’s handling of reticent offerors who fail to submit an offer document

The WpÜG provides that anyone who directly or indirectly attains control of a target company must promptly publish this fact, submit an offer document to the BaFin for review, and publish an offer. Rights from shares belonging to the offeror, persons acting jointly with it, or its subsidiaries, or rights from which voting rights are attributed to these persons (except for claims pertaining to dividends or distribution of assets) are suspended for as long as these obligations are not met. Failure to meet any of the above requirements constitutes an administrative offense and may be punishable by a fine.

On the other hand, the German Federal Court of Justice, in a judgment dated June 11, 2013 (II ZR 80/12), ruled that shareholders are not entitled to claim the statutory minimum consideration in accordance with the pricing rules under the WpÜG if an acquirer of control does not publish a mandatory offer pursuant to the WpÜG in breach of its obligation to do so and that interest, as provided for by the WpÜG, is only owed if and insofar as a mandatory offer has been published.

On January 15, 2020, Leipzig-based **VICUS GROUP AG** published the indirect acquisition of control (on October 4, 2019) of Leipzig-based **Travel24.com AG**. On March 11, 2020, the BaFin published its administrative decision prohibiting the offer because the offeror failed to submit an offer document to it, stressing at the same time that prohibition of the offer does not remove the existing and continuing mandatory offer obligation.

On June 25, 2020, the BaFin published an administrative decision requesting VICUS GROUP AG to submit an offer document for the mandatory offer within two weeks and threatening that failure to comply with its request might result in the imposition of a penalty payment of 50,000 euros. On July 21, 2020, the BaFin published another administrative decision determining the imposition of the penalty payment of 50,000 euros and threatening that failure to comply with its submission request within two weeks might result in the imposition of an additional penalty payment of 100,000 euros. On August 7, 2020, the BaFin published yet another administrative decision determining the imposition of the penalty payment of 100,000 euros and threatening that failure to comply with its submission request within two weeks might result in the imposition of an additional penalty payment of 200,000 euros.

### Exemption from mandatory offer obligation vis-à-vis shareholders of co.don AG

The BaFin granted **Bauerfeind Beteiligungsgesellschaft mbH**, based in Zeulenroda-Triebes (the “applicant”), together with other applicants<sup>3</sup>, an exemption from the mandatory offer obligation vis-à-vis the shareholders of Teltow-based **co.don AG** should the applicant attain control of co.don AG through the acquisition of shares in co.don AG in connection with certain measures<sup>4</sup>

<sup>3</sup> Bauerfeind AG, based in Zeulenroda-Triebes, Prof. Hans Bauerfeind Familienstiftung, based in Zeulenroda, and Professor Hans B. Bauerfeind.

<sup>4</sup> These measures include subscription guarantees in the context of capital

under the financial restructuring program for co.don AG. Prior to the exemption, the applicant held approx. 27.82% of the shares in co.don AG.

The legislator's rationale for exemptions of this kind is to avoid imposing a double burden on investors willing to restructure the finances of a distressed target company. However, depriving the minority shareholders of the opportunity to exit the target company by divesting their shares in a mandatory offer must be justified on the ground that the minority shareholders will ultimately benefit from the restructuring and the resulting increase in value of their shareholding. Such restructuring exemptions require that: (i) the target company is in a financial crisis and in need of financial restructuring; (ii) the investor has worked out a realistic restructuring plan which is appropriate to overcome the crisis and continue the business of the target as a going concern; and (iii) the investor actually provides a financial contribution to the financial restructuring of the target in addition to acquiring existing shares in the target company.

On April 8, 2020, co.don AG published the loss of half of its share capital. On April 27, 2020, it further announced that the timely presentation of established and audited annual and consolidated financial statements for the 2019 financial year was unlikely, as its significantly increased liquidity needs caused by the coronavirus crisis made it difficult to meet the conditions for accounting on a going-concern basis. The business of co.don AG (active in developing, manufacturing and marketing cell-based pharmaceutical products for joint-preserving, regenerative treatment of articular cartilage defects (cell and tissue grafts)) has been adversely affected by the COVID-19 pandemic. A significant drop in sales of its products is expected since the demand for its products used to treat cartilage damage in various joints has fallen, owing to such treatments being classed as non-urgent treatments and currently largely postponed.

To restructure its business operations in a sustainable manner, co.don AG resolved to implement a restructuring plan that provides for some operative measures as well as certain financial restructuring steps to close existing financing gaps ("financing concept"). For this purpose, the applicant entered into an agreement with co.don AG with commitments to implement the financing concept designed to ensure sufficient liquidity for co.don AG. Based on the status of the audit, co.don AG's auditor assumed that the restructuring plan and restructuring contributions promised by the applicant will enable the company to continue its business and that an audit certificate can be issued.

The BaFin granted the exemption against the above background, subject to rights of withdrawal in case of failure to achieve certain elements of the financing concept in specific cases of attainment of control of co.don AG during specified time periods.

### Exemption for Aroundtown SA from mandatory offer obligation to the shareholders of WCM Beteiligungs- und Grundbesitz AG

The BaFin can also grant an exemption from the mandatory offer obligation if the target company is an economically insignificant subsidiary of a company over which the offeror has acquired control. Such economic insignificance may be assumed if the sub-

siary's interest in the parent company's balance sheets has a book value of less than 20%. In such cases, the legislator typically assumes that the acquisition of control regularly is not the actual goal of the acquisition, but only its indirect consequence.

On July 10, 2020, the BaFin published its administrative decision granting Luxembourg-based **Aroundtown SA** an exemption from the obligation to publish its attainment of indirect control on February 14, 2020 of Frankfurt am Main-based **WCM Beteiligungs- und Grundbesitz AG** ("WCM AG") and from the obligation to make a mandatory offer.

Upon consummation of its takeover offer to the shareholders of Berlin-based **TLG Immobilien AG** ("TLG"), Aroundtown SA acquired a holding in TLG representing approx. 77.49% of the voting rights in TLG, thereby attaining control of TLG. Prior to this, when Aroundtown SA applied for the exemption, TLG held shares in WCM AG corresponding to approx. 92.53% of the voting share capital so that WCM AG was a subsidiary of TLG when Aroundtown SA acquired indirect control of WCM AG. As of December 31, 2019, the book value of WCM AG was about 8.2% of the book value of TLG's assets.

## RECENTLY COMPLETED OFFERS

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

Offeror/ Target	Offeror's shareholding before the offer (direct/ indirect)	Acquisition through acceptance of the offers	Offeror's shareholding after the offer (direct/ indirect)
<b>AOC Health GmbH / Vita 34 AG</b> <sup>1</sup>	approx. 31.19%	approx. 5.25%	approx. 36.44%
<b>Asklepios Kliniken GmbH &amp; Co. KGaA / RHÖN-KLINIKUM AG</b> <sup>2</sup>	approx. 43.55%	approx. 42.51%	approx. 92.58%
<b>ADO Properties S.A. / Westgrund AG</b> <sup>3 4</sup>	approx. 96.88%	approx. 1.36%	approx. 98.24%
<b>FS DE Energy GmbH / MVV Energie AG</b> <sup>2</sup>	approx. 95.18%	approx. 0.67%	approx. 95.85%

1 Mandatory Offer

2 Takeover Offer

3 Takeover and Delisting Acquisition Offer

4 Shareholders may subsequently accept the offer during a sell-out period until September 22, 2020

increases of co.don AG; conversion of convertible bonds issued by co.don AG; or exercising options issued by co.don AG together with option bonds.

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