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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 July 12, 2023.

In addition, it informs about a recent decision of the German Federal Court of Justice regarding the possibility of determining the adequate compensation of outside shareholders, as well as the guaranteed dividend, based on the market value of the company in the context of an appraisal proceeding.

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

CURRENT OFFERS

Current offers, driven by a variety of strategies and objectives, include a takeover offer aimed at advancing an intended change of the target company's corporate governance system (takeover offer for shares of **SNP Schneider-Neureither & Partner SE**), a delisting takeover offer aimed at enabling a segment change (downlisting) of the target company (delisting takeover offer to the shareholders of **MS Industrie AG**), as well as a takeover offer aimed at a later delisting of the target company (takeover offer for shares of **Software Aktiengesellschaft**).

Another notable development is that the German Federal Court of Justice, in a recent decision, held that the adequate compensation of outside shareholders, as well as the guaranteed dividend, can be determined based on the market value of the company in the context of an appraisal proceeding.

Takeover offer for shares of SNP Schneider-Neureither & Partner SE

Octapharma AG, with registered office in Lachen SZ, Switzerland (**Octapharma**), is offering the shareholders of Heidelberg-based **SNP Schneider-Neureither & Partner SE** (**SNP**) to acquire all no-par value bearer shares of SNP (ISIN DE0007203705) not directly held by Octapharma (**SNP Shares**) in return for a cash consideration of 33.50 euros per SNP Share during the acceptance period ending July 24, 2023, and, subsequently, during an additional acceptance period.[1]

The offered cash consideration of 33.50 euros per SNP Share exceeds the volume-weighted average stock price during the three months prior to the publication of the decision to launch the takeover offer determined by the German Federal Financial Supervisory Authority (the **BaFin**) in the amount of 29.67 euros per SNP Share. Because the offer consideration equals the highest price granted or agreed upon for the acquisition of SNP Shares by Octapharma 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.[2]

[1] Since the only offer condition has been fulfilled, the takeover offer and the contracts that come about as a result of its acceptance are no longer subject to an offer condition.

[2] In the event that Octapharma pays an increase amount (as defined in the offer document) under a share purchase agreement of May 17, 2023, concerning the prior acquisition of 694,192 SNP Shares, the statutory minimum consideration and thus the offer price paid or to be paid in the context of the takeover offer, rises by the increase amount.

The bidder and the target company:

The bidder, Octapharma, is directly controlled by its sole shareholder, **Octapharma Nordic AB**, with registered office in Stockholm (Sweden), and indirectly by **Wolfgang Marguerre** (Octapharma Nordic AB and Wolfgang Marguerre collectively the **Octapharma Controlling Shareholders**).[3] Octapharma is part of a globally active healthcare group whose business activities focus on three therapeutic areas: hematology, immunotherapy and critical care. Octapharma's group is one of the largest human protein product manufacturers. It develops medicines based on human proteins from human cell lines and human plasma, sourced largely from its own plasma donation centers. Through continued investment in research and development, the family-owned enterprise pursues the goal of developing new and innovative solutions for different areas of healthcare.

The target company, SNP, is a globally active enterprise in the IT sector that helps multinational enterprises from all industries manage digital transformation and data migration processes. To that end, SNP provides software products that make it possible – through automated implementation – to model data and its history in a new IT system, to integrate data into that environment or to extract data from it. Changing and adapting enterprise resource planning systems (so-called ERP systems) is SNP's principal activity. An ERP system handles the administration of corporate resources and business processes. In the context of individual projects, the SNP Group additionally offers its customers consuling and training services tailored to the provided software. The SNP Group also offers complementary consulting and training services covering SAP as well as hosting, cloud and application management services.

Key structuring steps leading up to the takeover offer:

In the context of the takeover offer, Octapharma and its subsidiaries are acting jointly with Wolfgang Marguerre, as well as with Octapharma Nordic AB and its further subsidiaries.

[3] Octapharma Nordic AB's shareholders are the five children of Wolfgang Marguerre, none of whom holds the majority of the shares or voting rights in Octapharma Nordic AB, or otherwise dominates Octapharma Nordic AB alone or jointly with other shareholders. Octapharma Nordic AB's shareholders received the shares in Octapharma Nordic AB held by them from Wolfgang Marguerre, who was originally the holder of all shares in Octapharma Nordic AB, by way of donations. In donations of shares relating to roughly 81.65% of the voting rights in Octapharma Nordic AB, Wolfgang Marguerre has reserved a life-long voting right and the option to exercise membership rights as the usufructuary and he has obliged his donee children to grant him (i.e. Wolfgang Marguerre) proxy to exercise voting rights for the general meeting of Octapharma Nordic AB. Based on the agreements made in the share donations, Wolfgang Marguerre has the sole and autonomous decision-making power over at least 81.65% of the voting rights in Octapharma Nordic AB, and he therefore controls Octapharma Nordic AB.

During the six months prior to the publication of the decision to launch the takeover offer, Wolfgang Marguerre increased his shareholding in SNP through purchases of SNP Shares off the stock exchange at prices below the offer consideration. At the time of publication of the offer document, Wolfgang Marguerre held 2,129,083 SNP Shares directly (approximately 28.83% of SNP's share capital and voting rights).

On May 17, 2023, Octapharma concluded an agreement on the acquisition of 694,192 SNP Shares (approximately 9.40% of SNP's share capital and voting rights) in which a cash amount of 33.50 euros per SNP Share was agreed as total consideration. The agreement provides that if Octapharma sells at least one SNP Share at a price higher than 33.50 euros or carries out any transaction commercially equivalent to a sale at a price higher than 33.50 euros in the period lasting from the acquisition of the 694,192 SNP Shares until the end of one year after the later of (i) the publication of the results of the takeover offer after expiry of the original acceptance period or (ii) the execution of the prior acquisition of the SNP Shares, then Octapharma would be obliged to pay to the seller the difference between 33.50 euros and the higher sale price per sold SNP Share. The fulfillment of that agreement was subject to the condition precedent of the issuance of merger control clearance in Germany, which condition precedent was fulfilled on June 27, 2023.

On June 12, 2023, Octapharma entered into an agreement with the Octapharma Controlling Shareholders on an understanding regarding the exercise of the voting rights attached to the SNP Shares held by each of them. The agreement was not to become effective until the completion of Octapharma's prior acquisition of SNP Shares. Based on that agreement, as from the point in time that Octapharma's prior acquisition of SNP Shares is executed, the voting rights attached to the SNP Shares held by Wolfgang Marguerre directly will be attributed to Octapharma and Octapharma Nordic AB, and the voting rights attached to the SNP Shares held by Octapharma will be attributed to Wolfgang Marguerre and Octapharma Nordic AB.

Rationale of the takeover offer:

Octapharma and the Octapharma Controlling Shareholders seek to convert SNP into an SE with a dualistic corporate governance system.

SNP's current legal form is that of an SE (Societas Europea) with a monistic corporate governance system. In a monistic system, the board of directors is the most important corporate body. It takes the fundamental management decisions for the company. The board of directors appoints and supervises the managing directors, who are responsible for managing the company's day-to-day business. The managing directors are bound by the instructions given to them by the board of directors. In the case of SNP, the monistic corporate governance system was tailored to the company's late founder, Dr Andreas Schneider-Neureither. Until his death, he was the chairman of the board of directors and also a managing director and chief executive officer of SNP. Since his death, this management model, with one prominent role, namely that of a chairman of the board of directors who is a managing director at the same time, no longer suits SNP, and a suitable successor has not been found.

This is why Octapharma and the Octapharma Controlling Shareholders intend to change the corporate governance system of SNP to the dualistic management structure common for companies listed in Germany with two corporate bodies: an executive board and a supervisory board. In the dualistic system, the executive board manages the company and its business. In doing so, it is not bound by instructions from the supervisory board. The responsibility of the supervisory board is to monitor the executive board.

In the dualistic corporate governance system desired by Octapharma and the Octapharma Controlling Shareholders, the current managing director and chief executive officer, Dr. Jens Amail, could manage SNP on his own responsibility as the sole executive board member and could be monitored and advised by the supervisory board. Octapharma and the Octapharma Controlling Shareholders are convinced that the legal competence for managing SNP should be vested in the same body or person managing it entrepreneurially. Returning to a dualistic system with transparently allocated responsibilities creates a clearly structured system. The executive board members are responsible for the company's management as their positions are their principal professional activity, and they are most familiar with the exigencies of managing a company. The supervisory board, for whose members this work is just an ancillary activity, assists the executive board through monitoring and advising it. In the view of Octapharma and the Octapharma Controlling Shareholders, returning to the dualistic system is therefore better suited to further the company's interests than the current system, in which the factual management of the company and the legal competencies are incongruent.

Although the aim of converting SNP into an SE with a dualistic corporate governance system is widely supported among shareholders – as demonstrated by roughly 57.67% of the votes validly cast during SNP's recent annual general meeting – the necessary majority to change the corporate governance system in the interests of SNP has not been achieved to date.

Octapharma and the Octapharma Controlling Shareholders seek to expand their holding in SNP in order to advance the change into a dualistic corporate governance system. They intend, after the completion of the takeover

offer, to further pursue their goal to convert SNP's corporate governance system into a dualistic system at a future extraordinary or annual general meeting.

The change to the dualistic system will require an amendment of the articles of association of SNP. The proposed change of system will not result in a change of the legal form or a change in the statutory provisions applicable to SNP under the relevant national law. The responsibilities of the general meeting and the rights of the shareholders of SNP will for the most part remain the same. The proposed change of system is not expected to affect the customers and employees of SNP, either.

Intended integration measures:

Octapharma considers its holding in SNP a financial investment and not a strategic investment.

Octapharma and the Octapharma Controlling Shareholders are not seeking to integrate SNP into the Octapharma Group and, accordingly, are not seeking to leverage synergies. On the contrary, the intent is for SNP to develop successfully as an independent company with a stable shareholder structure and a new corporate governance system.

Octapharma and the Octapharma Controlling Shareholders believe in SNP's business model and support the strategy of the current managing director and chief executive officer, Dr Jens Amail, to exploit the business opportunities arising in SNP's dynamic market environment. Accordingly, they have no intentions to change SNP's business activities. Nor do they have any intentions regarding SNP's assets.

Although it is not the intention of Octapharma and the Octapharma Controlling Shareholders to pursue a delisting of SNP, initiate a squeeze-out of SNP's minority shareholders, or enter into a domination and/or profit and loss transfer agreement with SNP, they cannot rule out that they may consider such measures at a later date, depending on how SNP and its shareholder structure develop over time.

Response by the target company to the takeover offer:

In their joint reasoned statement on the takeover offer, the board of directors and the managing directors of SNP regard the offer consideration as financially reasonable, particularly for short-term investors. They note that in the interests of all shareholders, they are bound by the current decision of the general meeting to continue the current corporate governance system, and by any resolutions of future general meetings in this regard.

From their point of view, the takeover offer may have significant consequences for SNP's financing due to change-of-control clauses in contractual agreements that could lead to a considerable need for refinancing. In case of renegotiation of affected financing agreements, changed conditions on the banking and/or capital market could lead to one-off or permanent burdens on SNP.

Against this background and taking into account different options for evaluating the offer, the board of directors and the managing directors assess the takeover offer largely neutrally and refrain from a recommendation to the shareholders.

Delisting takeover offer to the shareholders of MS Industrie AG

In a delisting takeover offer, Spaichingen-based **MS ProActive Verwaltungs GmbH** (**MS ProActive**) is offering the shareholders of Munich-based **MS Industrie AG** (**MS Industrie**) to acquire all no-par value bearer shares of MS Industrie AG (ISIN DE0005855183) not directly held by MS ProActive (**MS Shares**) against a cash consideration of 1.61 euros per MS Share during the acceptance period ending July 21, 2023, as well as, subsequently, during an additional acceptance period.

The offered cash consideration of 1.61 euros per MS Share is based on the volume-weighted average stock price during the three months prior to the publication of the decision to launch the takeover offer as determined by the BaFin. Because it also exceeds the volume-weighted average stock price during the six months prior to the publication of the decision to launch the delisting takeover offer (determined by the BaFin to amount to 1.54 euros per MS Share), and since MS ProActive or persons acting jointly with it did not make or agree upon prior acquisitions of MS Shares during the six months prior to the publication of the offer document, it also represents the statutory minimum offer consideration in accordance with the German Stock Exchange Act.[4]

The bidder and the target company:

The bidder, MS ProActive, has the business purposes of acquisition and holding of shares in companies in Germany and abroad as well as the assumption of personal liability and representation in limited partnerships. According to the offer document, MS Proactive has no employees and does not hold any subsidiaries.

The two shareholders of MS ProActive are **Dr. Andreas Aufschnaiter**, with business address in Munich, and **Armin Distel**, with business address in Spaichingen. They are also the sole management board members of MS Industrie. In addition, Armin Distel is the managing director of MS ProActive. Dr. Andreas Aufschnaiter and Armin Distel each hold a company share in the nominal amount of 12,800.00 euros (50.00% of the registered

[4] MS ProActive has also had an auditing company carry out a valuation of MS Industrie using the discounted earnings method in accordance with the IDW standards (IDW S 1, as of 2008). This valuation report puts the value, as of the valuation date of May 14, 2023, at 1.58 euros per MS Share and thus below the offer consideration.

capital and the voting rights) in MS ProActive. Thus, MS ProActive is not controlled by a single shareholder or by its two shareholders jointly (e.g., through voting rights commitments or similar agreements).

At the time of the publication of the offer document, MS ProActive held 241,531 MS Shares (approximately 0.81% of MS Industrie's share capital and voting rights) and is therefore not a significant shareholder of MS Industrie, does not have a secure majority at the general meeting, and is therefore a non-controlling company.

Dr. Andreas Aufschnaiter and Armin Distel, the shareholders of MS ProActive, have agreed with MS ProActive on the acquisition of MS Shares as part of the delisting takeover offer (in particular as part of a financing commitment) and are therefore deemed to be persons acting jointly with MS ProActive. At the time of the publication of the offer document, Dr. Andreas Aufschnaiter directly held a total of 1,925,106 MS Shares (approximately 6.42% of MS Industrie's share capital and voting rights), and Armin Distel directly held a total of 587,571 MS Shares (approximately 1.96% of MS Industrie's share capital and voting rights).

In addition, based on contractual proxies to exercise voting rights, MS ProActive is to be attributed a total of 4,312,681 voting rights (approximately 14.38%) of MS Industrie.[5]

The target company, MS Industrie, is a holding company and acts as the parent company of the MS Group. According to its own information, the MS Group is a manufacturer of components for heavy combustion engines and ultrasonic welding machines that is mainly active in Germany, Europe, and North America. The product portfolio is divided into the two segments Powertrain Technology and Ultrasonic Technology. The MS Group maintains production sites in Germany, the United States and Brazil, and a sales company in China.

Key structuring steps leading up to the delisting takeover offer:

The shares of MS Industrie are admitted and listed for trading on the regulated market of the Frankfurt Stock Exchange.

The aim of the offer is to no longer allow the shares of MS Industrie to be traded on the regulated market, but rather in the m:access market segment of the Munich Stock Exchange.

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 MS Industrie cannot effectively apply for the revocation. Based on the German Stock Exchange Act, also the segment change 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.

For this reason, MS ProActive and MS Industrie concluded a delisting agreement on May 12, 2023, in which MS Industrie agreed to submit an application for the revocation of the admission of all MS Shares for trading on the regulated market of the Frankfurt Stock Exchange and an order to continue XETRA trading with the responsible Designated Sponsor.

In addition, the management board of MS Industrie submitted an application on May 19, 2023, to have the shares of MS Industrie included in trading in the m:access market segment of the Munich Stock Exchange, which was approved on May 26, 2023. The MS Shares have been traded in the m:access market segment of the Munich Stock Exchange since June 1, 2023.

Rationale of the delisting takeover offer:

The purpose of the delisting takeover offer is to enable a segment change from the admission of the MS Shares to trading on a regulated market to trading on the open market. The m:access market segment of the Munich Stock Exchange and the electronic trading system XETRA belong to the open market and are not regulated markets.

The segment change from the regulated market to m:access brings numerous simplifications for MS Industrie in terms of reporting, which, in the opinion of MS ProActive and MS Industrie´s management board, is better suited to the medium-sized structure of MS Industrie and brings with it only minor potential disadvantages for shareholders. It also amounts to considerable cost savings, especially in the area of preparing the annual financial statements and auditing.

Since it was founded, MS Industrie has developed from a listed holding company with strong inorganic growth aspirations into a focused, medium-sized industrial holding company with largely organic growth dynamics. While the former business model requires the company to continuously generate funds via the capital market, further development of the existing business model using own funds is possible.

In the opinion of MS ProActive and MS Industrie, the significant regulatory and administrative expenses for

[5] These proxies to exercise voting rights include, inter alia, the voting rights from the MS Shares held directly by Armin Distel.

maintaining the listing on the regulated market are not appropriate to the size of MS Industrie and offer comparatively few advantages for shareholders. Apart from this, MS ProActive anticipates a further tightening of regulations for companies in the regulated market, and this is likely to lead to future cost increases.

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

In comparison to trading on the regulated market, inclusion in the m:access market segment could lead to a reduction in the daily traded volume of MS Shares and thus to less liquidity of the shares or, respectively, increased volatility of the share price, since individual trades can have a greater impact on the price if there is less liquidity. Other possible disadvantages include higher transaction fees for trading in MS Shares, or restricted borrowability of MS Shares in the future.

It is conceivable that institutional investors will withdraw from their investment in MS Shares or not invest in the future, as certain institutional investors have defined inclusion in the regulated market as a basic requirement for an investment. Such withdrawal may be associated with permanent price losses. It also cannot be ruled out that the application for revocation of the admission to the regulated market will have a negative impact on the stock market price of the shares in the future, and subsequently lead to price losses.

After the revocation of the admission to the regulated market, the MS Shares will only be traded over the counter. A delisting from the open market (leaving no possibility of trading the shares on the open market) would be possible without a renewed public offer for all MS Shares in accordance with the provisions of the WpÜG and the German Stock Exchange Act.

The implementation of the revocation of the admission to the regulated market will mean that some transparency and trading regulations, as well as certain other provisions of the Frankfurt Stock Exchange's rules and regulations, will no longer be applicable. This will result in a lower level of protection for shareholders of MS Industrie.

Intended integration measures:

As the two shareholders of MS ProActive are the sole management board members of MS Industrie and have held this position for several years, the offer does not aim to fundamentally change the business activities of MS Industrie. MS ProActive intends to further develop and expand the business of the MS Group. A change in the activity of MS Industrie as a holding company of a focused industrial group is currently not intended. MS ProActive has no intentions regarding the use of MS Industrie's assets. MS ProActive intends to continue to support the payment of moderate dividends in the future, provided that this appears appropriate in light of the overall economic situation and MS Industrie's state of liquidity.

MS ProActive intends to support an application by the management board of MS Industrie to the management of the Frankfurt Stock Exchange to revoke the admission of the MS Shares to trading on the regulated market. MS ProActive does not intend to enter into a domination and/or profit and loss transfer agreement with MS Industrie, to institute any measures at MS Industrie in accordance with the German Transformation Act (merger, demerger, asset transfer or change of legal form), to conduct a corporate squeeze-out, or to exclude minority shareholders pursuant to other statutory provisions.

Response by the target company to the takeover offer:

In their joint reasoned statement on the delisting takeover offer, the management board and the supervisory board of MS Industrie noted that they are – independently of one another – of the opinion that the revocation of the admission to trading on the regulated market and the delisting takeover offer as a prerequisite for the revocation are in the best interests of MS Industrie. However, on the basis of the offer consideration, which is at a level similar to the share prices observed in the recent past, and against the background that the shares will remain tradable in the future, the two boards do not see themselves in a position to provide the shareholders with a clear recommendation regarding the acceptance of the delisting takeover offer.

Takeover offer for shares of Software Aktiengesellschaft

After the expiration of the extended acceptance period of the takeover offer by **Mosel Bidco SE**, with registered office in Munich and current business address in Mülheim an der Ruhr (**Mosel SE**), to the shareholders of Darmstadt-based **Software Aktiengesellschaft** (**SAG**) to acquire all registered no-par value shares in SAG (ISIN DE000A2GS401) (**SAG Shares**) not directly held by Mosel SE, against a cash consideration of 32.00 euros per SAG Share, shareholders can subsequently accept the offer during an additional acceptance period ending July 17, 2023.

The offered cash consideration of 32.00 euros per SAG Share exceeds the volume-weighted average stock price during the three months prior to the publication of the decision to launch the takeover offer determined by the BaFin to amount to 20.32 euros per SAG Share. Because the offer consideration equals the highest price granted or agreed upon for the acquisition of SAG Shares by Mosel SE 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.

The takeover offer was accepted during the extended acceptance period for 32,146,037 SAG Shares, i.e., approximately 43.44% of SAG's share capital and voting rights. As of the expiration of the acceptance period, the total number of SAG Shares for which the takeover offer has been accepted plus the number of SAG Shares directly held by Mosel SE or a person acting jointly with Mosel SE, including SAG Shares for which Mosel SE or a person acting jointly with Mosel SE has entered into agreements to acquire such SAG Shares came to 46,946,036 SAG Shares (approximately 63.44% of SAG's share capital and voting rights).

The extension of the acceptance period was a legal consequence of an amendment to the takeover offer made by Mosel SE by waiving its original minimum acceptance threshold condition. Several other conditions subsequent to which the takeover offer is subject have so far not been fulfilled or waived. Such offer conditions require that prior to or on June 14, 2024, investment control clearances for the acquisition of control over SAG by Mosel SE pursuant to the takeover offer must have been granted by the respective competent authorities in Germany, Austria, France, Spain, and the United Kingdom (or, in each case, the respective offer condition being deemed to have been satisfied).

The takeover offer relates exclusively to SAG Shares. Holders of American depositary receipts issued in relation to SAG Shares not sponsored by SAG (**SAG ADRs**) who wish to accept the takeover offer must arrange for the cancellation of their SAG ADRs and withdrawal of the SAG Shares underlying the SAG ADRs from the deposit facility and obtain SAG Shares (of which only full SAG Shares may be tendered into the takeover offer).

The bidder and the target company:

Mosel SE, the bidder, is a holding company controlled by funds managed or advised by Silver Lake, a global technology investment firm.

SAG provides its customers with software products and services that expand existing IT architecture through innovation and allow integration of new functions and technologies.

Key structuring steps leading up to the takeover offer:

On February 15, 2022, SAG issued subordinated unsecured convertible bonds in a total nominal amount of 344,300,000.00 euros denominated in bonds of 100,000.00 euros each and at a conversion price of 46.54 euros per share (**Convertible Bonds 2022**) that bear interest at 2% p.a. and mature on February 15, 2027, to two persons acting jointly with Mosel SE, namely **SLP Clementia Holdco**, Grand Cayman, Cayman Islands (**SLP Investor**), and **SLA Clementia Holdco**, Grand Cayman, Cayman Islands (**SLA Investor**). The Convertible Bonds 2022 entitle the holders to convert into a maximum of 7,397,937 SAG Shares in total (which would correspond to approximately 9.99% of the share capital of SAG at the time of the publication of the offer document). Mosel SE noted in the offer document that it has not formed any intentions as to how to proceed with the Convertible Bonds 2022.

On April 21, 2023, Mosel SE and SAG entered into an investment agreement which the parties amended with an agreement dated May 4, 2023 (together, the **Investment Agreement**). The Investment Agreement outlines certain parameters of the takeover offer and its implementation as well as covenants regarding the ordinary course of business until completion of the takeover offer and certain other undertakings. In the Investment Agreement, SAG and Mosel SE have agreed to primary measures of success and to jointly develop a value creation plan. Furthermore, the management board of SAG committed to supporting Mosel SE's delisting strategy to possibly effectuate a delisting of the SAG Shares on the basis of a delisting agreement.

Also on April 21, 2023, Mosel SE and the Darmstadt-based foundation **Software AG-Stiftung** (the **SAG Foundation**) entered into a share purchase agreement (**SPA**) under which the SAG Foundation agreed to transfer 18,558,425 SAG Shares (approximately 25.08% of SAG's share capital) to Mosel SE at a price equal to the offer price. The SAG Foundation accepted the takeover offer for these 18,558,425 SAG Shares. The parties to the SPA have further agreed that the SAG Foundation shall not sell or transfer any SAG Shares held by it (including those not sold to Mosel SE under the SPA) to parties other than Mosel SE for a period of 18 months.

On April 27, 2023, **SLP Cayman Holding LP**, Grand Cayman, Cayman Islands, a person acting jointly with Mosel SE, acquired 3,000,000 SAG Shares (approximately 4.05% of SAG's share capital) at a price of 30.00 euros per SAG Share on the stock market.

On April 28, 2023, Mosel SE and another shareholder of SAG entered into a share purchase agreement under which such shareholder agreed to transfer 691,000 SAG Shares (approximately 0.93% of SAG's share capital) to Mosel SE outside the takeover offer at a price equal to the offer price. The share purchase agreement was consummated on May 30, 2023.

During the extended acceptance period, Mosel SE entered outside the takeover offer into a share purchase agreement regarding the acquisition of 7,414,800 SAG Shares (approximately 10.02% of SAG's share capital) at a price equal to the offer consideration, and SLP Cayman Holding LP acquired additional SAG Shares via the stock exchange at prices which did not exceed the offer consideration.

Rationale of the takeover offer:

Since Mosel SE does not have any operating business, it does not seek any synergies. Rather, Mosel SE wishes to continue to strengthen SAG's business and promote growth. Mosel SE acknowledges and strategically supports SAG's business strategy, which aims to simplify and refocus SAG's business and enhance the customer value proposition, resulting in a sustainable and profitable growth trajectory. Since achieving the strategy requires a multi-year and investment-heavy value creation plan, which may be more difficult to realize in a public company with a focus on results and expectations for dividends, Mosel SE believes that the strategy can be supported by a delisting of the SAG Shares.

Intended integration measures:

Following the settlement of the takeover offer, Mosel SE intends to terminate the admission for trading of the SAG Shares at the regulated market of the Frankfurt Stock Exchange in accordance with the WpÜG and the German Stock Exchange Act, and to further terminate trading of SAG Shares in the regulated unofficial market of the stock exchanges in Berlin, Düsseldorf, Hamburg, Hannover, Munich, and Stuttgart, as well as Tradegate Exchange.

Depending on the size of its shareholding in SAG after consummation of the takeover offer as well as the economic situation and regulatory framework at the time, Mosel SE intends to assess a squeeze-out of remaining minority shareholders of SAG.

Mosel SE does not intend to implement a domination and/or profit-and-loss transfer agreement between Mosel SE as holding company and SAG as subsidiary, because a domination and/or profit-and-loss transfer agreement is not required for Mosel SE to finance the takeover offer or to realize its economic and strategic objectives.

Response by the target company to the takeover offer:

In their joint reasoned statement on the takeover offer, the management board and the supervisory board of SAG provided a detailed description of the events in connection with the competing expressions of interest for a potential acquisition of up to all SAG Shares from Mosel SE and another interested third party, which eventually resulted in the increase of Mosel SE's initially offered consideration from 30.00 euros per SAG Share to 32.00 euros per SAG Share, and the amendments to the Investment Agreement, particularly in relation to the definition of what can be considered a superior offer. The two boards explained the considerations on the basis of which they had concluded that the interested third party's non-binding offer did not constitute a superior offer. Such considerations included, among other things, the likelihood of contemplated transactions as regards secured financing, required approvals, and due diligence. They also noted that the interested third party is a competitor of SAG. In their opinion, the potential outcome of an offer by the interested third party, namely that two major shareholders emerge with large stakes in SAG and nonaligned strategic rationales and objectives, is not in the best interest of SAG.

The two boards noted, inter alia, that a transfer of more than 50% of the SAG Shares to Mosel SE could lead to elimination of existing loss carryforwards, or a decrease of the free float of the SAG Shares that could result in the exclusion of the SAG Shares from the SDAX index. However, the two boards stated that the offer price is fair from a financial point of view and recommended on this basis that the shareholders of SAG accept the takeover offer.

ANNOUNCED OFFERS

Type of offer	Bidder	Target	Announcement
Mandatory offer	Baumann Vermögens-verwaltung GmbH	SPOBAG Aktien-gesellschaft	July 12, 2023
Delisting tender offer	Fahrenheit AcquiCo GmbH	va-Q-tec AG	June 30, 2023
Delisting tender offer	RAS Beteiligungs GmbH; LSW GmbH; SGW-Immo-GmbH	home24 SE	June 28, 2023
Takeover and delisting tender offer	TPPI GmbH	Schumag Aktien-gesellschaft	June 16, 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)
SD Thesaurus GmbH / BAUER Aktien-gesellschaft [a]	52.81%	21.04%	73.85%
Fujitsu ND Solutions AG / GK Software SE [b]	68.03%	3.61%	72.07%
SWOCTEM GmbH / Klöckner & Co SE [c]	29.97%	11.56% [d]	41.53% [d]
Fujitsu ND Solutions AG / GK Software SE [c]	0%	67.62%	67.94%
Oak Holdings GmbH / Vantage Towers AG [b]	89.26%	0.05%	89.31%
Fahrenheit AcquiCo GmbH / va-Q-tec AG [c]	22.85%	59.93%	85.75%

[a] Mandatory and delisting tender offer. [b] Delisting tender offer. [c] Takeover offer. [d] The consummation of the takeover offer remains subject to the fulfillment of several offer conditions.

OTHER NOTABLE DEVELOPMENTS

THE GERMAN FEDERAL COURT OF JUSTICE FINDS THAT THE ADEQUATE COMPENSATION OF OUTSIDE SHAREHOLDERS, AS WELL AS THE GUARANTEED DIVIDEND, CAN BE DETERMINED ON THE BASIS OF THE MARKET VALUE OF THE COMPANY

The German Federal Court of Justice found, in its decision of February 21, 2023 (case number II ZB 12/21), that the adequate compensation of outside shareholders, as well as the guaranteed dividend, can be determined based on the market value of the company within the context of an appraisal proceeding. The importance of the decision follows from the fact that a domination and/or profit and loss transfer agreement, or a corporate law squeeze-out regularly involves a business valuation. However, these structural measures are, nevertheless, frequently followed by an appraisal proceeding. With its recent decision, the highest German civil court secures leeway for courts in appraisal proceedings to choose among several permitted valuation methods.

Facts of the case:

The appraisal proceeding concerned the determination of the adequate compensation of outside shareholders, as well as the guaranteed dividend, under a domination agreement which was entered into 2017 by a bidder and a target company after a takeover offer for the acquisition of the shares in the target company (**Target Shares**) in exchange for shares of the bidder (**Bidder Shares**). Within the context of that takeover offer, the offer consideration of 4 Bidder Shares for every 23 Target Shares included the statutory minimum consideration required under the WpÜG (based, in view of the absence of previous acquisitions, on the volume-weighted average stock price of the Target Share and the Bidder Share during the three months prior to the publication of the decision to launch the takeover offer determined by the BaFin) plus a premium (in comparison to the three-month volume-weighted average price of the Target Share).

For the evaluation of the adequacy of the compensation and the guaranteed dividend under the domination agreement, the contracting parties used a neutral expert determining the earnings values (objectified business values) of the companies per share in accordance with the IDW S1 standard "Principles for the Performance of Business Valuations" (**IDW S1**). The neutral expert calculated the equity value per Target Share and derived from such value, applying a reasonable annuity interest rate, the guaranteed dividend. Based on the equity values per share, the board members of the contracting parties set the exchange ratio at 4 Bidder Shares for every 23 Target Shares.

In the appraisal proceeding, the court of first instance dismissed shareholder requests for the determination of a higher compensation and a higher guaranteed dividend. Its findings that the compensation and the guaranteed dividend are adequate, however, were based on the market value of the companies, and not on a business valuation. Since the court of appeals confirmed the findings of the lower court as well as the lower court's use of the market value of the companies as a basis for its determination, the applicants appealed to the German Federal Court of Justice which found that the decision of the court of appeal stands up to legal scrutiny.

Determination of adequacy of compensation based on the market value:

The German Federal Court of Justice (**FCJ**) held that the adequacy of the compensation for the outside shareholders pursuant to the German Stock Corporation Act can be determined based on the stock market value of the company. The FCJ expressed the view that in a case of compensation in shares, the value relation between the participating companies can be determined based on their stock exchange prices. Relevant is the respective average stock exchange price within a reference period of three months before the reference date of the announcement of the structural measure (in the case at issue, the announcement of the intention to enter into the domination agreement).

In the view of the FCJ, the prerequisite for determining the value of a shareholding based on the market value is not that the capital market is strictly allocation and information-efficient with regard to the shares, i.e. there is a state of perfect competition and all public and non-public information that is accessible in principle is correctly processed in the prices. The FCJ stated that only if in a specific case it cannot be assumed that the market participants can effectively evaluate the information, so that the stock market price does not allow a reliable statement to be made about the market value of the company participation, the share value cannot be determined using the stock market price.

The FCJ pointed out that it is a legal question whether a valuation method chosen by the judge of fact or a calculation method chosen within the valuation method contradicts the statutory valuation goals, whereas the question of which of the valuation methods in the individual case correctly reflects the value of the company participation is part of the actual assessment of the facts and is to be assessed based on the economic or business evaluation theory and practice.

According to the FCJ, the choice of which of the several methods of calculation permitted in a specific case is best suited to depicting the enterprise value is the responsibility of the judge of fact as part of the determination of

the facts. Since every valuation is associated with numerous forecasts, estimates and methodological individual decisions, which cannot be checked in court for correctness, but only for reasonableness, no valuation method can calculate the value of the company participation exactly. Rather, each method can only provide mathematical results that form the basis and point of reference for the court's estimate. The FCJ noted in this context that valuation methods are not legal norms and do not resemble them, so that the court is not bound by them. According to the FCJ, this applies all the more to methods of calculation developed by economics or auditing practice, even if they are recorded in writing as "valuation standards".

In the view presented by the FCJ, a method is only ruled out if, due to the circumstances of the specific case, it is not suitable for depicting the "true" value.

In addition, the FCJ held that the judge of fact, who is responsible for choosing the method in the appraisal proceedings, is not bound by the valuation method used by the party liable for compensation. According to the FCJ, the party liable for compensation may not justifiably trust that the court in the appraisal proceedings will retain the method on which the compensation offer was based, and also the outside shareholders or the minority shareholders may not justifiably trust that the compensation will be determined by the court in the appraisal proceedings according to the calculation method used by the party liable for compensation for its compensation offer. Rather, the sole protection of those entitled to compensation is that they are protected from the negative consequences of selecting a different valuation method in that the court cannot determine any compensation below the compensation offered by the party liable for compensation.

Determination of adequacy of guaranteed dividend based on the market value:

The FCJ reviewed the assessment of the adequacy of the guaranteed dividend by the court of appeal and found that the court of appeal's decision stands up to legal scrutiny. Consenting to the court of appeal's findings, the FCJ noted that determining the guaranteed dividend based on the company's stock market value can be a suitable method for determining an adequate guaranteed dividend pursuant to the German Stock Corporation Act.

The German Stock Corporation Act stipulates that the guaranteed dividend for the outside shareholders is to be calculated based on the company's previous earnings situation and its future earnings prospects, taking into account appropriate depreciation and value adjustments, but without the formation of other revenue reserves.

The FCJ noted that it is disputed which methodological specifications for the calculation of the compensation result from this.[6] The FCJ assessed the opposing views and found that the market value of a company can be suitable for adequately reflecting both its previous earnings situation and its future earnings prospects in the individual case and can therefore be the basis for determining the adequate guaranteed dividend.

According to the FCJ, the wording of the relevant provision of the German Stock Corporation Act does not prevent recourse to the stock market value of a company to determine the adequate guaranteed dividend. Insofar as the amount then matters which, based on the company's previous earnings situation and its future earnings prospects, could probably be distributed as an average share of profits on the individual share, it is not stipulated that the amount would have to be determined solely using the discounted earnings method. In particular, the legal provision does not prescribe the basis on which to forecast future earnings prospects and the amount that could likely be allocated to each share. In the view of the FCJ, it cannot be inferred from the provision that it would be impossible for the judge of fact to proceed from the forecasts of the market, which are expressed in the respective stock exchange price, when choosing the method. For the FCJ, this is so because the consideration of the stock market value is based on the assumption that the market participants, on the basis of the information and information possibilities made available to them, correctly assess the earning power of the company whose shares are concerned and that the market valuation is reflected in the stock market price of the shares.

The FCJ noted that the sense and purpose of the legal provision are based on the methodical recourse to the market value of a company to determine the appropriate guaranteed dividend for the outside shareholders. The purpose of the provision is to protect the outside shareholders from the impairment of their pecuniary position resulting from their membership. The aim is to compensate for the losses that they may incur as a result of the controlling company exercising its authority to issue instructions to the controlled company. According to the will of the legislator, the outside shareholders have a "dividend guarantee". The FCJ stated that although the legislator may have had in mind a valuation based on the discounted earnings method when drafting the predecessor of the current legal provision without focus-

[6] According to one view, the guaranteed dividend is to be determined solely according to the discounted earnings method, based on the wording of the provision, which is primarily based on the (future) earnings prospects of the company and thus specifies the discounted earnings method as the calculation model. According to another opinion, also represented by the court of appeal, the guaranteed dividend can also be derived from a company value, which is determined according to the market-oriented method based on the stock market value of the company, because the stock market value can also adequately express the earnings situation of a company and future earnings prospects.

ing on a specific procedure for determining the amount of appropriate guaranteed dividend, the goal formulated by the legislator of giving the outside shareholders an appropriate replacement for the dividends withdrawn is also achieved if the stock market value of the company is used instead of the discounted earnings method. The FCJ noted that the future earnings prospects of a company (as part of its earning power) are correctly assessed by a large number of market participants through real transactions in a functioning capital market. Thus, the participation of a shareholder in the company is valued through this interplay of supply and demand.

Accordingly, as the FCJ noted, a prerequisite for the meaningfulness of the stock market value for the valuation of a company is an effective information evaluation by the market participants. In this respect, an effective evaluation by the market not only includes the past earnings situation of the company, but also its future earnings prospects.

In addition, the FCJ found that the system of the relevant provision of the German Stock Corporation Act also does not prevent the judge of fact from resorting to the stock market value methodically. The FCJ reminded that determining the appropriate compensation based on the company's stock market value can be a suitable method for determining the adequate compensation of outside shareholders pursuant to the German Stock Corporation Act. According to the FCJ, a synchronization of the available methods can therefore not only be achieved if both the determination of the guaranteed dividend and the compensation of the outside shareholders are based solely on the discounted earnings method. For the FCJ, it is equally possible, with regard to the common reason for the valuation, to synchronize the methods in such a way that the valuation methods recognized for the determination of the adequate compensation can also be used for the determination of the adequate guaranteed dividend. This is so because both provisions are intended to ensure, in accordance with the constitutional guarantee of property pursuant to Article 14 of the German Federal Constitution, that the outside shareholder is fully compensated economically.

According to the FCJ, however, recourse to stock market prices is ruled out when determining the guaranteed dividend, as well as when determining the compensation of outside shareholders, pursuant to the German Stock Corporation Act, if there is no functioning capital market, i.e., there has been practically no trading in the company's shares over a longer period of time or there is a tight market. For the FCJ, indications of the existence of a tight market can be low trading volumes, trading on only a few trading days, or a low free float of the shares. Stock market prices are also not sufficiently meaningful if there are inexplicable price fluctuations, or price manipulations, or if capital market disclosure requirements have not been complied with.

Furthermore, the FCJ noted that the choice of the appropriate method for determining an appropriate annuity rate for deriving the appropriate guaranteed dividend in the individual case is, like the question of choosing the appropriate valuation method for determining the value of an investment in a company (in the context of the determination of the adequate compensation of outside shareholders), a factual finding incumbent on the judge of fact.

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