Morgan Lewis

2023 | 1

2023 | 1

TAKEOVER MONITOR

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

2023 | 1

TAKEOVER MONITOR

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

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 May 2, 2023.

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

CURRENT OFFERS

The current offers are driven by a variety of strategies and objectives, including a delisting of the target company (delisting tender offer to the shareholders of **Vantage Towers AG**), a low-ball offer to exceed the control threshold without aiming at a majority shareholding (takeover offer for shares of **Klöckner & Co SE**), as well as acquiring a majority stake in the target as a basis for future cooperation (takeover offer for shares of **GK Software SE**).

Delisting tender offer to the shareholders of Vantage Towers AG

In a delisting tender offer, **Oak Holdings GmbH**, with registered office in Düsseldorf (**Oak Holdings**), is offering the shareholders of **Vantage Towers AG**, with registered office in Düsseldorf (**Vantage Towers**), to acquire all no-par value registered shares of Vantage Towers AG (ISIN DE000A3H3LL2) not directly held by Oak Holdings (**Vantage Towers Shares**) against a cash consideration of 32.00 euros for each Vantage Towers Share during the acceptance period ending May 3, 2023. The offered cash consideration of 32.00 euros per Vantage Towers Share is based on the highest price granted or agreed for acquisitions of Vantage Towers Shares during the six-month period prior to the publication of the offer document. Since this consideration was higher than the volume-weighted, six-month average stock exchange price prior to Oak Holdings' publication of the decision to launch the delisting tender offer of 31.74 euros, it also represents the statutory minimum offer consideration in accordance with the German Stock Exchange Act.

The bidder and the target company:

The bidder, Oak Holdings, is indirectly co-controlled by **Vodafone GmbH** and **Oak Consortium GmbH** in accordance with the principles on common control by more than one parent company.[1]

Vantage Towers is a leading European mobile telecommunications tower infrastructure operator. The principal business of the Vantage Towers group is building and operating telecommunications sites to provide space, energy management, and related services to customers that in turn provide mobile, voice, data, and other services to end-users.

Key structuring steps leading up to the delisting tender offer:

The delisting tender offer is based on several transactions through which Vodafone aims at creating a joint venture to hold Vodafone's majority stake in Vantage Towers in the context of a strategic co-control partnership with long-term investors with significant expertise in digital infrastructure to accelerate Vantage Towers' growth and value creation.

In the context of these transactions, Oak Holdings had already made a takeover offer to the shareholders of Vantage Towers. As a result of the completion of this takeover offer, as well as several other share transfers and other transactions relating to Vantage Towers Shares, Oak Holdings managed to end up with a total shareholding of approximately 89.26% of the share capital and voting rights in Vantage Towers at the time of the publication of the offer document for the delisting tender offer. Also, a final draft of a domination and/or profit and loss transfer agreement between Oak Holdings as controlling entity and Vantage Towers as controlled entity (**DPLTA**) has already been approved by the boards of Vantage Towers. The approving resolutions of the shareholders' meetings of both entities shall be adopted in May 2023.

Oak Holdings and Vantage Towers entered into a delisting agreement (**Delisting Agreement**) on March 20, 2023. Pursuant to the Delisting Agreement, Vantage Towers undertook, subject to certain conditions (e.g., publication of the delisting tender offer), to file the application for revocation of the admission of all Vantage Towers Shares to trading on the regulated market of the Frankfurt Stock Exchange (**Delisting**) (**Delisting Application**) prior to the expiration of the acceptance period. Furthermore, Vantage Towers committed that it would, upon submission of the Delisting Application, take all reasonable steps and actions to end any inclusion of Vantage Towers Shares for trading on the regulated unofficial market (open market) of the stock exchanges in Berlin (including the inclusion in the Berlin Second Regulated Market), Düsseldorf, Hamburg, Hannover, Munich and Stuttgart as well as Tradegate Exchange.

Rationale of the delisting tender offer:

The purpose of the delisting tender offer is to enable a delisting of the Vantage Towers Shares from the regulated market of the Frankfurt Stock Exchange (Prime Standard). According to the German Stock Exchange Act, a revocation of the admission of shares to trading on a

[1] Vodafone GmbH in turn is controlled, through a participation chain, by **Vodafone Group Plc**, with registered office in Newbury, United Kingdom (**Vodafone**), as the ultimate holding company. Oak Consortium GmbH is a holding company ultimately indirectly co-controlled through participation chains by **GIM Participation Fund Holding GP Limited**, with registered office in St. Peter Port, Guernsey, as well as by **KKR Management LLP**, a limited liability partnership incorporated under the laws of the State of Delaware, United States, and **KKR SP Limited**, a limited liability company incorporated under the laws of the Cayman Islands with registered office in Georgetown, Cayman Islands.

regulated market is only legally permissible if a delisting tender offer in accordance with the WpÜG and the German Stock Exchange Act has been published to all outstanding shareholders of the company to be delisted.

Oak Holdings is convinced that the Delisting of the Vantage Towers Shares and the immediate termination of all inclusions of the Vantage Towers Shares in all other organized trading platforms is in the best interest of Vantage Towers. These measures should enable Vantage Towers to save considerable costs associated with the maintenance of a stock exchange listing, reduce regulatory expenses and free up management capacities. Furthermore, for financing purposes Vantage Towers will not need access to the stock exchange due to alternative sources of financing.

The Delisting, however, will also have consequences for the shareholders of Vantage Towers. In the event of the Delisting, trading of the Vantage Towers Shares on the regulated market of the Frankfurt Stock Exchange will end. As a result, the prerequisites for the inclusion of the Vantage Towers Shares in the Berlin Second Regulated Market of the Berlin Stock Exchange are no longer met. As the Vantage Towers Shares are not admitted to trading on another regulated market in Germany or the European Union and/or the European Economic Area, shareholders of Vantage Towers will no longer have access to trade Vantage Towers Shares on a regulated market. In addition, the inclusion of Vantage Towers Shares in the MDAX and in the TecDAX indices will end upon completion of the Delisting.

As a consequence of the Delisting, it may be assumed that the trading volumes in Vantage Towers Shares will significantly decrease, which may have an adverse effect on the stock market price of Vantage Towers Shares. Moreover, upon completion of the Delisting, certain legal provisions, in particular transparency and reporting obligations, are no longer applicable to Vantage Towers, the shareholders of Vantage Towers and the Vantage Towers Shares. This will result in a significantly lower level of transparency.

Intended integration measures:

Oak Holdings intends for the Vantage Towers group companies on the one side and Vodafone GmbH or any of its affiliates on the other side to implement and enter into good-faith discussions regarding a number of amendments to master services agreements in Germany, Spain, Romania, Portugal, the Czech Republic and Ireland. The changes to be implemented relate to Vodafone's ability to exit certain sites, the roll-out of built-to-suit sites and future inflationary price adjustments. Further amendments shall, inter alia, reflect that Vodafone group (and the local Vodafone group companies) play a specific role as Vantage Tower's largest customer and anchor tenant in all local markets, procuring critical services from local Vantage Towers group companies under local master services agreements with very limited substitutes for such services.

Oak Holdings intends to increase the size of the Vantage Towers management board while the size of the supervisory board of Vantage Towers shall be reduced from nine to six members.

If, at any time, Oak Holdings and its controlling parties, directly or indirectly, hold a number of Vantage Towers Shares that is sufficient for the purpose of demanding a transfer of the minority shareholders' Vantage Towers Shares to the main shareholder, in return for the granting of appropriate cash compensation (**squeeze-out**), Oak Holdings intends to undertake the measures required for such a squeeze-out.

Response by the target company to the delisting tender offer:

The management board and supervisory board of Vantage Towers noted in their joint reasoned statement on the offer that in their opinion the Delisting and the delisting tender offer are in the best interest of Vantage Towers and recommended that the shareholders accept the offer.

Takeover offer for shares of Klöckner & Co SE

After the expiration of the acceptance period of the takeover offer by **SWOCTEM GmbH**, with registered office in Haiger (**SWOCTEM**), to the shareholders of **Klöckner & Co SE**, with registered office in Duisburg (**Klöckner**), to acquire all registered no-par value shares of Klöckner & Co SE (ISIN DE000KC01000; ISIN DE000KC01W15) (**Klöckner Shares**) not already held directly by SWOCTEM against payment of a cash consideration of 9.75 euros per Klöckner Share, shareholders can subsequently accept the offer during an additional acceptance period ending on May 12, 2023. The offered cash consideration of 9.75 euros per Klöckner Share slightly exceeds the volume-weighted average stock exchange price during the three months prior to the publication of the decision to launch the takeover offer of 9.70 euros per Klöckner Share.

The offer was accepted during the regular acceptance period for 2,762,114 Klöckner Shares, i.e., approximately 2.77% of Klöckner's share capital.

Rationale of the voluntary public tender offer:

This takeover offer represents a model case of a "low-ball" strategy. Bidders who pursue such a strategy tend to build up a shareholding in the target company close to the 30%-control threshold and then make an offer with no or only a small offer premium on the statutory minimum offer consideration. As a result, the bidder is able to pass the control threshold without difficulty either through acceptance of the offer or through parallel acquisitions outside the offer. Consequently, the bidder is no longer obliged to make a mandatory offer if it later wishes to increase its stake in the target company. Another advantage is that acquisitions of shares off-market during the 12 months following the offer at a price that is higher than the offer consideration only oblige the bidder to increase the offer consideration respectively vis-à-vis those shareholders who tendered their shares.

The bidder and the target company:

At the time of publication of the offer document, SWOCTEM, a wholly owned, direct subsidiary of **Professor Dr.-Ing. E.h. Friedhelm Loh** (**Prof. Loh**), already directly held approximately 29.97% of the total share capital of Klöckner. Prof. Loh is also a supervisory board member of Klöckner. The takeover offer is based on Prof. Loh's decision as a long-term-oriented investor to further expand his indirect shareholding. SWOCTEM's aim is to increase its shareholding in Klöckner to more than 30% in order to cross the relevant control threshold under the WpÜG.

Klöckner is the parent company of the Klöckner group, which is one of the world's largest producer-independent distributors of steel and metal products and one of the world's leading steel service center companies.

Key structuring steps leading up to the takeover offer:

SWOCTEM acquired 300 future contracts for 100 Klöckner Shares each (**Klöckner Futures**) immediately prior to the decision to launch the offer. The Klöckner Futures relate to the delivery of a total of 30,000 Klöckner Shares, corresponding to 0.03008% of the share capital and voting rights of Klöckner. Their maturity date is May 4, 2023, and the delivery date for the shares from the Klöckner Futures is expected to be May 8, 2023, i.e., after the expiry of the acceptance period but prior to the expiry of the additional acceptance period. If delivery is made to SWOCTEM, then SWOCTEM (together with the Klöckner Shares already held by it) will hold more than 30% of the Klöckner Shares and voting rights solely on the basis of the shares to be delivered from the Klöckner Futures and irrespective of the acceptance rate of the takeover offer.[2]

The takeover offer relates exclusively to Klöckner Shares.[3] Other securities relating to Klöckner Shares are expressly not the subject of the takeover offer.[4]

Intended integration measures:

SWOCTEM and Prof. Loh do not anticipate that SWOCTEM will own a majority stake in Klöckner following the offer, and therefore they also have no intention to take any structural measures. SWOCTEM and Prof. Loh also intend for Klöckner to remain a listed company. They also do not intend to actively intervene in any form in the ongoing business activities.

Offer conditions:

The consummation of the takeover offer and the agreements formed by its acceptance remains subject to several offer conditions. The offer conditions that have not been fulfilled so far include the granting of merger control clearances by the European Commission and/or the competent authorities in the Member States of the European Union to which the transaction is referred to, if any, and by the competent authorities in Mexico and in Brazil and expiry or termination of certain waiting periods in the United States, or, in each case, the corresponding fiction of the grant of the merger clearance by February 29, 2024. Other conditions require the granting of investment control clearances by the competent authorities in the United Kingdom and France and (to the extent that the Investments, Mergers and Acquisitions Security Screening Bill has entered into force in the Netherlands (expected for June 1, 2023) by the time all other offer conditions that have not previously been validly waived have become effective) by the competent authority in the Netherlands, or, in each case, the corresponding fiction of the grant of the investment control clearance by February 29, 2024.

Response by the target company to the takeover offer:

The management board and supervisory board of Klöckner stated in a joint response on the takeover offer that the consideration offered substantially undervalues the enterprise in light of the earnings performance and value prospects of the Klöckner group, and therefore recommended to all shareholders not to accept the takeover offer.

Takeover offer for shares of GK Software SE

After the expiration of the acceptance period of the takeover offer by **Fujitsu ND Solutions AG**, with registered seat in Munich (**Fujitsu ND**), to the shareholders of **GK Software SE**, with registered seat in Schöneck (Vogtland) (**GK**), to acquire all no-par value bearer shares in GK Software SE (ISIN DE0007571424) (**GK Shares**) not already directly held by Fujitsu ND against a cash consideration in the amount of 190.00 euros per GK Share, shareholders can subsequently accept the

[2] SWOCTEM reserved the right to close out the Klöckner Futures by way of a sale before May 4, 2023, or to sell a corresponding number of Klöckner Shares held by it before delivery of the Klöckner Shares from the Klöckner Futures.

[3] If new Klöckner Shares were created by conversion of convertible bonds issued by Klöckner's Luxembourg-based subsidiary Klöckner & Co Financial Services S.A. (**Klöckner Convertible Bonds**) (ISIN DE000A185XT1) by the expiry of the additional acceptance period, the takeover offer of SWOCTEM for the acquisition of all Klöckner Shares would also relate to these shares. Such conversion, however, is not expected because the conversion price is significantly higher than the offer price.

[4] Holders of American Depositary Receipts (**ADRs**) (ISIN US49865T1079) (**Klöckner ADRs**) who wish to accept the takeover offer with respect to the Klöckner Shares underlying the Klöckner ADRs (each Klöckner ADR represents one Klöckner Share) would need to instruct the trustee of the ADRs to tender the underlying Klöckner Shares into the takeover offer.

offer during an additional acceptance period ending May 9, 2023. The offered cash consideration of 190.00 euros per GK Share exceeds the volume-weighted three-month average stock exchange price of 141.10 euros per GK Share and therefore fulfills the statutory minimum offer consideration required under the WpÜG in view of the absence of prior acquisitions of GK Shares during the relevant period.

The offer was accepted during the regular acceptance period for 1,490,328 GK Shares, i.e., approximately 65.57% of the share capital and voting rights of GK.

The bidder and the target company:

The sole shareholder of Fujitsu ND is **Fujitsu Limited**, a stock corporation incorporated under the laws of Japan with registered seat in Kawasaki, Japan (**Fujitsu**), which is not controlled by one or several shareholders. Fujitsu is a global leader in technology and business solutions. In the context of the takeover offer, Fujitsu ND, which held no shares in other entities before the offer and has no employees, is acting jointly with Fujitsu and Fujitsu's other subsidiaries.

GK, together with its subsidiaries, is one of the world's leading technology groups for retail software with a special focus on solutions for large and very large, decentralized chain stores with a strategic focus on point-of-sale-software in grocery and food store retail.

Rationale of the takeover offer:

The acquisition of a majority stake in GK should provide the basis for further cooperation of Fujitsu with GK, which is known for highly flexible Software-as-a-Service-based digital transformation solutions. Fujitsu envisages helping GK accelerate international expansion, especially in Japan, the Americas, and Europe. Fujitsu intends to also provide GK with access to its enhanced technologies such as Artificial Intelligence and High-Performance Computing. Fujitsu and GK will cooperate as partners to help customers accelerate business impact. Given that the business activities of GK and Fujitsu are complementary, Fujitsu does not expect quantifiable cost synergies from the transaction.

Key structuring steps leading up to the takeover offer:

At the time of the publication of the offer document, neither Fujitsu ND nor persons acting jointly with Fujitsu ND held any GK Shares. The co-founders and key shareholders of GK, namely **Rainer Gläß** and his investment company **Mountain View Geschäftsführungs-GmbH**, as well as **Stephan Kronmüller** and his investment company **Kronmüller Vermögensverwaltungs-GmbH**, entered into irrevocable undertakings with Fujitsu ND and Fujitsu to tender their shares into the offer, corresponding to approximately 40.65% of the share capital and voting rights in GK. In addition, GK, Fujitsu ND, and Fujitsu entered into a business combination agreement (**BCA**) prior to the launch of the offer.

Offer conditions:

The takeover offer and the agreements resulting from the acceptance of the offer were subject to several closing conditions that were all fulfilled at the expiry of the acceptance period.

Intended integration measures:

Fujitsu ND and Fujitsu support the business strategy of GK, and Fujitsu also acknowledges that the management board of GK may develop the business strategy of GK further in the future. Fujitsu and Fujitsu ND take note that the co-founder and key shareholder of GK Rainer Gläß has the intention to withdraw from his executive positions within GK Group in case of a consummation of the takeover offer. The supervisory board of GK also informed Fujitsu and Fujitsu ND of its intention to appoint members of the second management level to the management board of GK. Fujitsu and Fujitsu ND will support such changes.

Provided that Fujitsu ND has obtained the required shareholding in GK after the successful consummation of the takeover offer, Fujitsu ND and Fujitsu may evaluate whether to initiate, cause, or procure a delisting of the shares of GK from the regulated market of the Frankfurt Stock Exchange or a squeeze-out of the remaining minority shareholders of GK.

Fujitsu and Fujitsu ND have no intention to enter into a domination and/or profit and loss transfer agreement with GK for a period of at least two years from the consummation of the takeover offer. In addition, they also intend not to initiate, cause or procure a sale of all or substantially all of GK's business to any third party and/or a liquidation of GK.

Fujitsu ND and Fujitsu have no intention to cause GK to relocate its principal corporate seat or headquarters, or material business units of GK from Schöneck (Vogtland). Fujitsu ND and Fujitsu fully respect the intellectual property (**IP**) of GK and all members of the GK group and acknowledge that such IP will remain with (and be used by) the GK group.

Response by the target company to the takeover offer:

The management board and the supervisory board of GK noted in their joint reasoned statement on the takeover offer that they consider the amount of the offer price to be fair, that central interests of the company and its material stakeholders are protected in a legally binding manner by the BCA, and recommended that the shareholders of GK accept the takeover offer.

ANNOUNCED OFFERS

Type of offer	Bidder	Target	Announcement
Delisting tender offer	Fujitsu ND Solutions AG	GK Software SE	May 2, 2023
Takeover offer	Mosel Bidco SE	Software AG	April 21, 2023
Delisting tender offer	SD Thesaurus GmbH	Bauer AG	April 18, 2023
Mandatory offer	SD Thesaurus GmbH	Bauer AG	March 31, 2023

Subsequent to the publication of its acquisition of control over Schrobenhausen-based Bauer AG and the announcement of its intention to issue a mandatory offer to the shareholders of Bauer AG, Munich-based SD Thesaurus GmbH announced on April 18, 2023, that it decided, after entering into a delisting agreement with Bauer AG on the same date, to also make a delisting tender offer to the shareholders of Bauer AG in a joint offer document.

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)
Triathlon Holding GmbH / Voltabox AG [a]	41.92%	0.74%	42.66%
Fahrenheit AcquiCo GmbH / va-Q-tec AG [b]	22.85%	59.93% [c]	85.75% [c]
Endurance GmbH & Co. KG / exceet Group SCA [a]	84.71%	4.15%	88.87%
Atlantic BidCo GmbH / Aareal Bank AG [b]	9.99% [d]	73.81% [c]	83.80% [c]

a) Mandatory offer.

b) Takeover offer.

c) The consummation of the takeover offer remains subject to the fulfillment of several offer conditions.

d) A person acting jointly with Atlantic BidCo GmbH entered into an agreement on the acquisition of Aareal Shares subject to conditions precedent; the shares were to be transferred to Atlantic BidCo GmbH.

Morgan Lewis

At Morgan Lewis, we are always ready to respond to the needs of our clients and craft powerful solutions for them.

Founded in 1873, our team of more than 2,200 lawyers and legal professionals provides comprehensive corporate, transactional, litigation, and regulatory services in all major industries, including energy, financial services, healthcare, life sciences, retail and ecommerce, sports, technology, and transportation. With more than 30 offices across 17 time zones, we focus on both immediate and long-term goals with our clients, helping them address and anticipate legal challenges.

For more information about Morgan Lewis or its practices, please visit us online at www.morganlewis.com.

If you have any questions regarding this Takeover Monitor, please contact your contact person at Morgan Lewis or any of the following Morgan Lewis lawyers:

FRANKFURT

OpernTurm
Bockenheimer Landstraße 4
60306 Frankfurt am Main
Germany
+49.69.714.00.777

Dr. Christian Zschocke
Partner
+49.69.714.00.711
christian.zschocke@morganlewis.com

Dr. Ulrich Korth
Partner
+49.69.714.00.741
ulrich.korth@morganlewis.com

MUNICH

Königinstraße 9
80539 Munich
Germany
+49.89.189.51.6000

Dr. Florian Harder
Partner
+49.89.189.51.6010
florian.harder@morganlewis.com

Dr. Veronika Montes
Of Counsel
+49.89.189.51.6014
veronika.montes@morganlewis.com

Connect with us

www.morganlewis.com

050423_222307_A4