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# **TAKEOVER MONITOR**

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



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## **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 August 18, 2022.

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

### **CURRENT OFFERS**

The offeror of the current voluntary takeover offer for shares of Biofrontera AG appears to pursue a “low ball” strategy. Offerors who pursue such a low ball strategy tend to build up a shareholding in the target company close to the 30% control threshold and then issue an offer with no or only a small offer premium on the statutory minimum offer consideration. As a result, the offeror is able to pass the 30% control threshold without difficulty either through acceptance of the offer or through parallel acquisitions outside the offer. Consequently, the offeror is no longer obliged to make a mandatory offer if it later wishes to increase its shareholding in the target company. And even subsequent acquisitions off the market during the relevant period after the offer would only oblige the offeror to subsequently improve the offer consideration to those shareholders who tendered their shares.

#### **Takeover offer for shares of Biofrontera AG**

After the expiration of the regular acceptance period of the takeover offer of **Deutsche Balaton Aktiengesellschaft**, with its registered seat in Heidelberg (**Deutsche Balaton AG**), to the shareholders of **Biofrontera AG**, with its registered seat in Leverkusen, to acquire all no-par-value registered shares of Biofrontera AG (ISIN: DE0006046113) (**Biofrontera Shares**) against a cash consideration of 1.18 euros per Biofrontera Share, shareholders can subsequently accept the offer during an additional acceptance period ending August 31, 2022.

The takeover offer relates only to Biofrontera Shares that are not held directly by Deutsche Balaton AG. Holders of Biofrontera ADS (ISIN: US09075G1058), who want to make use of the offer for the underlying Biofrontera Shares represented by the Biofrontera ADS, must first exchange their Biofrontera ADS for Biofrontera Shares. These Biofrontera Shares can then be tendered for sale within the framework of the takeover offer.

The offered cash consideration of 1.18 euros per Biofrontera Share is equivalent to the volume-weighted three-month average stock exchange price (**vwap**) determined by the German Federal Financial Supervisory Authority (**BaFin**) to amount to 1.18 euros per Biofrontera Share. The vwap was applied here to determine the statutory minimum offer price because the highest price paid in the context of relevant prior acquisitions of Biofrontera Shares by Deutsche Balaton AG or persons acting jointly with it and their subsidiaries during the relevant period of

six months prior to the publication of the offer document was 1.17 euros per Biofrontera Share.

Biofrontera AG, the parent company of the Biofrontera Group, is a biopharmaceutical company specializing in the development and sale of medical cosmetics and drugs for the care and treatment of skin and inflammatory diseases. Among Biofrontera AG’s most important products is Ameluz<sup>®</sup>, a prescription drug for the treatment of light skin cancer and its precursors that has been marketed in the European Union since 2012 and in the United States since 2016. An American subsidiary, Biofrontera Inc., was established for marketing in the United States. In 2021, Biofrontera Inc. carried out an initial public offering on the Nasdaq stock exchange in order to finance itself independently and thus to be able to accelerate its marketing activities for Ameluz<sup>®</sup> in the United States. Due to the dilution of its shareholding in Biofrontera Inc., Biofrontera AG no longer holds the majority of shares in Biofrontera Inc. Its current shareholding corresponds to approximately 34% of the share capital of Biofrontera Inc.

Within its corporate purpose, Deutsche Balaton AG is active as an investment company, which acquires listed and unlisted shareholdings in Germany and abroad that it considers to be undervalued, without a special investment focus on specific sectors or regions. The primary focus is on long-term high upside potential of the respective investment.

#### **Control within the meaning of the WpÜG has been achieved**

With the takeover offer, which is not subject to any closing conditions, Deutsche Balaton AG is solely pursuing the goal of acquiring Biofrontera Shares to gain a controlling stake in Biofrontera AG, thereby consolidating its and the other Pool Members’ position as the largest shareholder group in Biofrontera AG. The WpÜG provides that if control over the target company (i.e., the holding of at least 30% of the voting rights in the target company from shares in the target company belonging to the offeror or voting rights in the target company attributed to the offeror) is acquired as the result of a takeover offer, the offeror and the other parties gaining control are not obligated to submit a mandatory offer – even if they later wish to increase their shareholding.

Deutsche Balaton AG is a party to a pool agreement, as amended by supplementary agreements (**Pool Agreement**), according to which the parties to the Pool Agreement agreed to coordinate their actions regarding the exercise of voting rights attached to Biofrontera Shares, and to vote as a block at general meetings of Biofrontera AG. In addition to Deutsche Balaton AG, **VV Beteiligungen Aktiengesellschaft (VV Beteiligungen AG)**,<sup>1</sup> **DELPHI Unternehmensberatung**

**Aktiengesellschaft (Delphi),<sup>2</sup> Mr. Wilhelm K. T. Zours,<sup>3</sup> Deutsche Balaton Biotech AG,<sup>4</sup> SPARTA AG,<sup>4</sup> and Heidelberger Beteiligungsholding AG<sup>4</sup>** are also currently parties to the Pool Agreement (**Pool Members**). The Biofrontera Shares held by the respective Pool Members are attributed as mutual holdings to the Pool Members. The purpose of the Pool Agreement is to permanently secure the current and future influence of the Pool Members on Biofrontera AG, to coordinate the interests of the Pool Members, and to vote as a block using their voting rights from Biofrontera Shares. The Pool Agreement covers all Biofrontera Shares that are held by the Pool Members. At the time of the publication of the offer, the Pool Agreement applied to 17,009,807 Biofrontera Shares held directly by the respective Pool Members, which represented an interest of approximately 29.99% in the share capital and voting rights of Biofrontera AG at the time.

The offer was accepted during the regular acceptance period for a total of 271,900 Biofrontera Shares (approximately 0.48% of Biofrontera AG's share capital and voting rights). Apart from that, Deutsche Balaton AG increased its direct shareholding during the regular acceptance period through acquisitions of 9,250 Biofrontera Shares<sup>5</sup> outside the offer from 2,294,789 Biofrontera Shares to 2,304,039 Biofrontera Shares. As a result (together with the conversion of 1,000 Biofrontera ADS into 2,000 Biofrontera Shares held by another Pool Member), the Pool Agreement applied to 17,021,057 Biofrontera Shares on July 26, 2022, representing approximately 30.01% of Biofrontera AG's share capital and voting rights, so that Deutsche Balaton AG and the other Pool Members attained control over Biofrontera AG already before the expiration of the regular acceptance period.

#### **Further intentions pursued with the takeover offer**

Deutsche Balaton AG and the other Pool Members consider the shareholding in Biofrontera AG as a long-term, profitable investment. They are not pursuing intentions of operational cooperation or the raising of synergy effects with the takeover offer and note that the economic and strategic background lies solely in increasing value through increasing the investment in Biofrontera AG.

<sup>1</sup> VV Beteiligungen AG is the majority shareholder of Deutsche Balaton AG.

<sup>2</sup> Delphi is the sole shareholder of VV Beteiligungen AG.

<sup>3</sup> Mr. Wilhelm K. T. Zours is the majority shareholder of Delphi. Apart from that, he is also the chairman of the supervisory board of Biofrontera AG.

<sup>4</sup> Deutsche Balaton Biotech AG, SPARTA AG, and Heidelberger Beteiligungsholding AG are subsidiaries of Deutsche Balaton AG.

<sup>5</sup> Acquisitions of 3,000 Biofrontera Shares from other persons acting jointly with Deutsche Balaton AG, as well as 6,250 Biofrontera Shares from third parties.

Deutsche Balaton AG has no intentions regarding capital market or legal structure measures relating to Biofrontera AG that may have an impact on the shareholding of the shareholders of Biofrontera AG, and it does not intend to conclude a domination and/or profit transfer agreement with Biofrontera AG.

Deutsche Balaton AG and the other Pool Members have no intentions regarding the use of the assets and future obligations of Biofrontera AG or regarding Biofrontera AG's employees, their employment conditions or their representation.

On the other hand, Deutsche Balaton AG and the other Pool Members intend to effect changes to the supervisory board of Biofrontera AG. In addition to proposing the election of Prof. Dr. Karin Lergenmüller to the vacant supervisory board position at the general meeting of Biofrontera AG convened for August 23, 2022, they also pursue the aim to ensure that at least half of the members of Biofrontera AG's supervisory board are elected upon proposal by them.

#### **Joint reasoned statement of Biofrontera AG's boards and separate opinion of Biofrontera AG's employees**

In their joint reasoned statement on the takeover offer, the management board and the supervisory board (with the supervisory board chairman Mr. Zours abstaining) of Biofrontera AG assessed the offer consideration as not financially adequate and recommended against this background to the shareholders to reject the offer.

They noted, among other things, that in their opinion (including the opinion of the supervisory board chairman Mr. Zours) the value of the subsidiaries Biofrontera Bioscience GmbH and Biofrontera Pharma GmbH already significantly exceeds the current stock market value of Biofrontera AG.

The management board and supervisory board stated that they will propose to the annual general meeting of Biofrontera AG, convened for August 23, 2022, to amend the articles of association and reduce the supervisory board to five members, and not elect a new sixth member as a successor to Prof. Dr. Franca Ruhwedel who resigned on February 22, 2022. In view of the proposal for reduction of the supervisory board, the supervisory board proposed to reject the election proposal of Deutsche Balaton AG.

They explained that the proposed reduction of the supervisory board to five members instead of the election of a sixth member is particularly intended to avoid that the supervisory board is dominated by one of the major shareholders in the future. According to Biofrontera AG's articles of association, resolutions of the supervi-

sory board require a majority of the votes cast, unless otherwise stipulated by mandatory law. If a vote results in a tie, the chairman of the supervisory board shall have two votes in the event of a new vote on the same resolution if this also results in a tie. A shareholder or a group of shareholders would therefore be in a position to dominate the supervisory board of Biofrontera AG and thus de facto control Biofrontera AG if it succeeds in obtaining at least half of the votes of the supervisory board members and the chairmanship of the supervisory board for a representative on the supervisory board.

In their separate opinion on the offer, the employees of Biofrontera AG and its subsidiaries stated that they consider the takeover offer detrimental to their interests and those of their company. They declared that none of the signatories of their opinion statement who are also shareholders of Biofrontera AG will accept the offer and that they will continue to oppose Mr. Zours's increasing control over the company.

### **Request for convening an extraordinary general meeting to discuss the offer**

On August 5, 2022, Biofrontera AG disclosed that it received a request from the shareholder Maruho Deutschland GmbH to convene an extraordinary general meeting in connection with the takeover offer, with the agenda item being a discussion of the takeover offer. The WpÜG provides that if a shareholders' meeting is convened in connection with a public tender offer, the acceptance period for such public tender offer would be extended to 10 weeks from publication of the offer document. Although Biofrontera AG's management board initially expressed its intention to convene an extraordinary general meeting, Biofrontera AG announced on August 10, 2022 that it has decided not to comply with the request for convening an extraordinary general meeting.

Because Biofrontera AG did not give the reasons for its decision not to comply with the request, one can only speculate about those reasons. It appears, however, to be likely that the decision was at least influenced by the fact that the acquisition of control had already occurred due to the acquisition of shares outside the offer, so that a discussion would no longer affect the result of the takeover offer.

According to the draft bill of the WpÜG, the German legislator intended, with the provision concerning the extension of the acceptance period if a shareholders' meeting is convened in connection with a public tender offer, to give the target company's management board the opportunity to bring about a resolution at the general meeting at short notice with the aim of preventing the offer from being successful. Because the convocation of the general meeting should take place with knowledge of the offer document, the convocation of the general meeting must take place after the publication of the offer document. Setting the mandatory extended acceptance period at 10 weeks is intended to ensure that a general meeting can be convened and held and that any resolutions of the general meeting can be implemented by the management board.

In practice, also convocations of general meetings in connection with public tender offers with the (sole) agenda item of discussing a respective public tender offer (i.e., without a specific resolution as an agenda item) are considered to fulfill the legal requirements of the mandatory extension of the acceptance period. During the last five years such convocations took place in four cases: 2017, in the context of the (first) takeover offer of Pangea GmbH to the shareholders of Pfeiffer Vacuum Technology AG; 2018, in the context of the voluntary partial acquisition offer of Deutsche Balaton Biotech AG to the shareholders of Biofrontera AG; 2019, in the context of the voluntary partial acquisition offer of Maruho Deutschland GmbH to the shareholders of Biofrontera AG; and 2020, in the context of the takeover offer of Asklepios Kliniken GmbH & Co. KGaA to the shareholders of RHÖN-KLINIKUM Aktiengesellschaft. It may be noted that the convocation of the shareholders' meeting of Pfeiffer Vacuum Technology AG resulted in the failure of the (first) "low ball" offer of Pangea GmbH because that takeover offer had been made subject to offer conditions including the nonoccurrence of a shareholders' meeting during the acceptance period.

## 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 offer	Offeror's shareholding after the offer (direct/indirect)
Elbstein AG/ERWE Immobilien AG <sup>a)</sup>	33.77%	3.53%	37.30%
Hercules BidCo GmbH/ Deutsche EuroShop AG <sup>b)</sup>	20.02%	64.36%	84.38%
Capana Swiss Advisors AG/ Philomaxcap AG <sup>c)</sup>	72.60% <sup>d)</sup>	3.59%	76.19% <sup>d)</sup>
JotWe GmbH/ Geratherm Medical AG <sup>e)</sup>	25.23% <sup>f)</sup>	22.14%	47.70% <sup>e)</sup>
Atlantic BidCo GmbH/Aareal Bank AG <sup>b)</sup>	9.99% <sup>h)</sup>	73.81% <sup>i)</sup>	83.80% <sup>i)</sup>

<sup>a)</sup> Mandatory and delisting tender offer.

<sup>b)</sup> Takeover offer.

<sup>c)</sup> Mandatory offer.

<sup>d)</sup> On the basis of a shareholders' agreement, the voting rights of the 1,021,500 Philomaxcap Shares held by the main shareholder Philocity Global GmbH (approximately 72.59%) are attributed to Capana Swiss Advisors AG, which held 100 Philomaxcap Shares (corresponding to approximately 0.0071% of the voting rights) before the offer.

<sup>e)</sup> Takeover and delisting tender offer.

<sup>f)</sup> JotWe GmbH subjected all of its Geratherm Shares that it either holds or acquires through acceptance of the offer or otherwise to a pooling agreement with G M F Capital GmbH, on the basis of which JotWe GmbH is attributed the voting rights from 852,093 of 2,071,071 Geratherm Shares held by G M F Capital GmbH (G M F Capital GmbH may reduce the number of its Geratherm Shares subjected to the pooling agreement to that extent by which the total number of Geratherm Shares subjected to the pooling agreement exceeds 25% of Geratherm's share capital plus one Geratherm Share).

<sup>g)</sup> JotWe GmbH also concluded an agreement with G M F Capital GmbH requiring G M F Capital GmbH, at JotWe GmbH's request, to acquire a total of up to 544,500 Geratherm Shares at the offer price from JotWe GmbH upon completion of the offer.

<sup>h)</sup> 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.

<sup>i)</sup> The consummation of the takeover offer remains subject to the fulfillment of several offer conditions, and the settlement for tendered Aareal Shares will take place after these offer conditions have been satisfied.

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