

2022 | 4

TAKEOVER MONITOR

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



2022 | 4

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 October 12, 2022.

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

CURRENT OFFERS

The takeover offer to the shareholders of Lübeck-based **SLM Solutions Group AG (SLM)** draws particular attention because its closing and consummation are subject to the obtaining of foreign direct investment control approvals in several jurisdictions – at a time when national security considerations appear to be gaining influence in the review of foreign direct investment transactions.

Just recently, on September 15, 2022, President Joe Biden issued a first-of-its-kind executive order on the list of factors that the Committee on Foreign Investment in the United States (**CFIUS**) (established in 1975) should consider when reviewing transactions for national security concerns. The order was issued as a part of the Biden administration's broader strategy of tying CFIUS's role, actions, and capabilities to the administration's overall national security priorities – including preserving US technological leadership, protecting Americans' sensitive data, and enhancing US supply chain resilience.

In Germany, foreign direct investment control (**FDI**) review of the acquisition of a German company exceeding certain voting-rights entry thresholds (starting at 10%) or comprising a definable part of its operation or all of its essential operating equipment, is carried out by the German Federal Ministry for Economic Affairs and Climate Action (**BMWK**) and is based on the German Foreign Trade and Payments Act and the German Foreign Trade and Payments Ordinance. Apart from the rules for a sector-specific review that apply to all foreign acquisitions of certain defense or IT security companies, other rules for a cross-sectoral review apply to the acquisition by a non-EU or non-EFTA investor of any company regardless of its product portfolio. Under this regime, the BMWK may review whether such acquisition is likely to endanger the public order or security of the Federal Republic of Germany or of another member state of the European Union; or poses a threat in relation to projects or programs of EU interest within the meaning of Article 8 of the Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union (cross-sectoral review); or impair essential security interests of the Federal Republic of Germany (sector-specific review).

Over the last few years, two offer proceedings pursuant to the WpÜG lapsed due to the offeror's failure to obtain FDI clearance.

In 2016, the takeover offer of an indirect German subsidiary of the Chinese company Fujian Grand Chip Investment Fund LP for the acquisition of all shares, including all shares represented by American Depositary Shares, of Aixtron SE lapsed due to the nonfulfillment of an offer condition requiring CFIUS approval when President Obama (following a recommendation by CFIUS to suspend or prohibit the proposed takeover offer) issued an order prohibiting the proposed acquisition of the US business of Aixtron SE by the offeror. Therewith, another decision concerning German FDI clearance of the entire transaction that should have been made by the German Federal Ministry of Economics and Energy, as required by another offer condition (apparently a clearance certificate had been issued but was later withdrawn for renewed review), was rendered obsolete.

The takeover offer published in 2020 by an indirect German subsidiary of the Taiwanese company GlobalWafers Co., Ltd. for the acquisition of all shares in Siltronic AG lapsed due to the nonfulfillment of the completion condition requiring that until the long stop date of January 31, 2022, either (a) the offeror must have received a clearance certificate issued by the BMWK upon application of the offeror or (b) such clearance certificate must have been deemed to have been issued through the expiry of the applicable periods in the absence of any order prohibiting the transaction. The BMWK extended the assessment period for the issuance of the clearance certificate beyond the long stop date, and judicial relief against the continuation of the assessment process of the BMWK beyond the long stop date was not granted to the offeror.

Takeover offer for shares of SLM Solutions Group AG

Nikon AM. AG, with registered seat in Langen (**Nikon AM**), is offering the shareholders of Lübeck-based **SLM Solutions Group AG (SLM)** to acquire all no-par-value bearer shares in SLM Solutions Group AG (Listed SLM Shares: ISIN DE000A111338; Non-listed SLM Shares: ISIN DE000A289BJ8) (together: **SLM Shares**) not directly held by Nikon AM against a cash consideration of 20.00 euros per SLM Share during the acceptance period ending November 1, 2022, and possibly during an additional acceptance period.

The offered cash consideration of 20.00 euros per SLM Share exceeds the volume-weighted three-month average stock exchange price determined by the German Federal Financial Supervisory Authority (BaFin) to amount to 10.94 euros per SLM Share. Because the offer consideration equals the highest price granted or agreed upon for the acquisition of SLM Shares by Nikon AM or persons acting jointly with Nikon AM during the relevant period of six months prior to the publication of the offer document,

it represents the statutory minimum offer consideration required under the WpÜG.

Nikon AM is a wholly owned subsidiary of the Tokyo-based **Nikon Corporation (Nikon)**, which is one of the global leaders in optical technology and precision equipment. Apart from 2,270,172 SLM Shares (approximately 9.07% of the share capital of SLM) held by Nikon AM at the time of the publication of the offer document, Nikon AM holds no shares in other entities and has no employees.¹ In the context of the takeover offer, Nikon AM is acting jointly with its sole shareholder Nikon and the other subsidiaries of Nikon.

SLM, together with its subsidiaries, is a leading provider of industrial metal 3D-printing machines with a strategic focus on metal additive and multi-laser technology.

The takeover offer applies only to SLM Shares that are not directly held by Nikon AM.

Convertible Bonds issued by SLM may not be tendered for sale into the takeover offer. Holders of certain convertible bonds issued by SLM (Convertible Bonds 2020/2026, 2021/2026, and 2022/2026, as specified in the offer document; together: **Convertible Bonds Due 2026**) may participate in the takeover offer only after conversion of their Convertible Bonds Due 2026 into SLM Shares by tendering such converted shares during the acceptance period or additional acceptance period. To the extent that further SLM Shares might be issued on the basis of the conversion of Convertible Bonds Due 2026 prior to the end of the additional acceptance period, the takeover offer applies also to the acquisition of all SLM Shares not directly held by Nikon AM, which result from the conversion of Convertible Bonds Due 2026 prior to the end of the additional acceptance period.

The takeover offer is part of a transaction (the **Transaction**) consisting of (i) the takeover offer for the acquisition of all SLM Shares, including all further SLM Shares that might be issued on the basis of the conversion of the Convertible Bonds Due 2026 as well as (ii) a separate public offer (the **Bonds Offer**), which is not subject to the provisions of the WpÜG, for the acquisition of all Convertible Bonds 2020/2026 with ISIN DE000A289N86, all Convertible Bonds 2021/2026 with ISIN DE000A3H3HP1, and all Convertible Bonds 2022/2026 with ISIN DE000A3MQV02 or ISIN DE000A30VP59, each of which grants conversion rights

¹ According to the offer document, Nikon AM has entered into irrevocable undertakings with SLM shareholders regarding acceptance of the takeover offer at the offer price with respect to a total of 11,413,856 SLM Shares (corresponding to approximately 45.6% of the share capital of SLM), as well as an irrevocable undertaking with respect to certain Convertible Bonds Due 2026, which are to be tendered into a separate Bonds Offer (if converted into SLM Shares, those Convertible Bonds Due 2026 would result in 5,321,736 SLM Shares).

into shares of SLM. The Bonds Offer is subject to conditions precedent that correspond to the closing conditions of the takeover offer for SLM Shares.

The closing conditions (conditions precedent) of the takeover offer for SLM Shares require, on the one hand, that until the end of the acceptance period, none of certain capital measures specified in the offer document may occur at SLM (unless such capital measures are exclusively with Nikon AM or a person acting jointly with Nikon AM or are due to the conversion of Convertible Bonds Due 2026), and there must also be no insolvency proceedings in relation to SLM during the same period.

Apart from that, and first of all, further closing conditions require that – by no later than November 1, 2023 – Nikon AM must have obtained (or must by operation of law be deemed to have obtained) approvals for the consummation of the takeover offer by the competent FDI authorities in Germany, the United Kingdom, France, the United States, and Canada.

The respective national FDI filings under these jurisdictions are based on different aspects of the Transaction.

Relevant for the German (cross-sector) FDI review in particular is that SLM is a developer or manufacturer of goods with which components made of metallic or ceramic materials for industrial applications are manufactured using additive manufacturing processes, in particular powder-based manufacturing processes that have a protective gas atmosphere and use a laser or electron beam as the energy source, essential components of such goods, or powder materials processed by such manufacturing processes (additional triggers for a mandatory FDI filing may apply, but do not alter the conclusion that the Transaction is notifiable to the BMWK).

In a comparable way, the Transaction falls within the scope of the United Kingdom's national security and investment review regime as it involves a person gaining control over SLM, which is a "qualifying entity" because SLM conducts activity in one of the 17 areas of the economy in which national security risks are more likely to arise than in the wider economy, namely "advanced materials", including additive manufacturing capabilities.

On the other hand, the respective FDI filings in France, the United States, or Canada are based on the fact that the Transaction involves the indirect acquisition of the respective subsidiary of SLM in France, the United States, or Canada. Nikon AM noted that the filings in the United States and Canada are requisite to avoid any uncertainties stemming from the ability of governmental authorities to call in the Transaction for review and

investigation under local national security and investment laws and regulations.

Nikon AM stated that it will seek to complete the necessary FDI proceedings in the first quarter of 2023. However, due to the fact that SLM's technology is considered so-called "key future technology", as well as due to the limited experience with the partly new FDI proceedings that also include the assessment of national security interests, lengthy duration of such proceedings cannot be ruled out due to long review periods, and it is currently not possible to make a binding forecast as to when such proceedings will be completed.

The economic and strategic rationale of the takeover offer is to further support SLM and its management board in pursuing and implementing its business strategy comprising, inter alia, elements such as expanding and extending technology leadership in metal-based additive manufacturing by investing in Research & Development, cooperating with research institutes and universities to further develop SLM's technology, and enable this technology to be deployed for an increasing number of new applications in all sectors, accelerating adoption of laser-powder-bed-fusion-technology by customers across various industries, and becoming a full-service integrated solutions provider in the field of additive manufacturing, as well as growing the recurring service business and adjacent business areas such as metal powders.

Concurrently, Nikon AM and Nikon believe that the Transaction enhances Nikon's digital manufacturing capabilities, which are a focus area of Nikon's latest Medium-Term Management Plan, in which Nikon identified "material processing and robot vision" as key growth drivers for its digital manufacturing business. Given that the business activities of SLM and Nikon are complementary, Nikon does not expect any specific cost synergies from the acquisition of SLM.

Nikon AM, Nikon, and SLM have entered into an investment agreement that stipulates the principal terms and conditions of the takeover offer as well as the parties' mutual commitments, intentions, and understandings in relation to the takeover offer and SLM's future corporate governance.

Nikon AM has no intention of entering into a domination and/or profit-and-loss transfer agreement with SLM for a period of at least three years. It also does not intend to initiate, cause, or procure a sale of all or substantially all of SLM's business to any third party and/or a liquidation of SLM.

Provided that Nikon AM has obtained the required shareholding in SLM and subject to the prevailing market conditions and regulatory framework, and to the extent commercially reasonable, it is intended to evaluate a

delisting of SLM Shares from the regulated market of the Frankfurt Stock Exchange (Prime Standard) or a squeeze-out, change of legal form, merger, spin-off, or similar corporate reorganization of SLM pursuant to the German Transformation Act.

According to the offer document, SLM shareholders have the right to withdraw from the agreements concluded on the basis of the acceptance of the takeover offer without giving any reason and at any time (if and to the extent the takeover offer has not yet been consummated with respect to the tendered SLM Shares) until the end of the additional acceptance period, and, if the closing conditions have not been satisfied or effectively waived by that time, until the closing conditions' fulfillment date.

In their joint reasoned statement on the takeover offer, the management board and the supervisory board of SLM recommend that SLM shareholders accept the takeover offer.

ANNOUNCED OFFERS

Type of offer	Offeror	Target	Announcement
Takeover offer	RAS Beteiligungs GmbH	Home24 SE	October 5, 2022
Delisting tender offer	Deutsche Wohnen SE	GSW Immobilien AG	September 26, 2022
Tender offer (partial offer)	Weng Fine Art AG	artnet AG	September 19, 2022

RECENTLY COMPLETED OFFERS

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

Offeror/Target	Offeror's shareholding before the offer (direct/indirect)	Acquisition through acceptance of the offers	Offeror's shareholding after the offer (direct/indirect)
Deutsche Balaton AG/Biofrontera AG ^{a)}	<30%	0.53%	30.84%
Atlantic BidCo GmbH/Aareal Bank AG ^{a)}	9.99% ^{b)}	73.81% ^{c)}	83.80% ^{c)}

^{a)} Takeover offer.

^{b)} 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.

^{c)} 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.

The information contained in this report is intended for the personal use of the reader only. While we have made every attempt to ensure that the information contained in this documentation has been obtained and arranged with due care, Morgan, Lewis & Bockius LLP is not responsible for any incompleteness, inaccuracies, errors, or omissions contained in or relating to this information.

Morgan, Lewis & Bockius LLP accepts no liability for any actions taken as response hereto. The information is provided on the understanding that the authors and publishers are not herein engaged in rendering legal or other professional advice or services. Neither the information in this documentation nor any further informational material sent to you on request shall be deemed to establish a contractual relationship between Morgan, Lewis & Bockius LLP and yourself.

As such, the information provided in this documentation should not be used as a substitute for consultation. It should not be construed as, and does not constitute, legal advice on any specific matter, nor does this message create an attorney-client relationship. These materials may be considered attorney advertising in some jurisdictions.

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 specialists provides comprehensive corporate, transactional, litigation, and regulatory services in major industries, including education, 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 challenges across vast and rapidly changing landscapes. 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 usual contact person at Morgan Lewis or any of the following Morgan Lewis lawyers:

Dr. Christian Zschocke

Partner, Frankfurt
+49.69.714.00.711
christian.zschocke@morganlewis.com

Dr. Joachim Heine

Partner, Frankfurt
+49.69.714.00.759
joachim.heine@morganlewis.com

Dr. Ulrich Korth

Partner, Frankfurt
+49.69.714.00.741
ulrich.korth@morganlewis.com

FRANKFURT OFFICE

OpernTurm
Bockenheimer Landstrasse 4
60306 Frankfurt am Main
Germany

takeover@morganlewis.de
Tel. +49.69.714.00.777

Connect with us     

www.morganlewis.com

© 2022 Morgan, Lewis & Bockius LLP

© 2022 Morgan Lewis Stamford LLC

© 2022 Morgan, Lewis & Bockius UK LLP

Morgan, Lewis & Bockius UK LLP is a limited liability partnership registered in England and Wales under number OC378797 and is a law firm authorised and regulated by the Solicitors Regulation Authority. The SRA authorisation number is 615176.

*Our Beijing and Shanghai offices operate as representative offices of Morgan, Lewis & Bockius LLP. In Hong Kong, Morgan, Lewis & Bockius is a separate Hong Kong general partnership registered with The Law Society of Hong Kong. Morgan Lewis Stamford LLC is a Singapore law corporation affiliated with Morgan, Lewis & Bockius LLP.