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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 November 23, 2022.



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

### **CURRENT OFFERS**

The current offers aim at a delisting of the respective target companies, regardless of whether that may be a subsequent project envisaged at a later time, such as in the context of the takeover offer to the shareholders of **home24 SE**, or whether the delisting is directly connected with the completion of the offer proceeding, such as in the context of the delisting self-tender offer of **a.a.a. aktiengesellschaft allgemeine anlageverwaltung** or the delisting tender offer to the shareholders of **GSW Immobilien AG**.

#### **Takeover offer to the shareholders of home24 SE**

**RAS Beteiligungs GmbH (RAS GmbH)**, based in Vienna, Austria; **LSW GmbH**, based in Wels, Austria; and **SGW-Immo-GmbH**, based in Wels, Austria (each, an **Offeror** and, jointly, the **Offerors**), are offering the shareholders of Berlin-based **home24 SE** to acquire all no-par-value bearer shares in home24 SE (ISIN DE000A14KEB5) (**home24 Shares**) not directly held by the Offerors against a cash consideration of 7.50 euros per home24 Share during the acceptance period ending December 9, 2022, and possibly during an additional acceptance period.

Home24 SE and its subsidiaries form the home24 Group, a leading pure-play home and living e-commerce platform that is active under the home24 brand in Germany, France, Austria, the Netherlands, Switzerland, Belgium, and Italy, and that is also active in Brazil under the Mobly brand.

RAS GmbH is the parent company of the XXXLutz Group, in which material operating companies of the group are bundled. Together with XXXLutz KG and its (indirect) subsidiaries, RAS GmbH operates more than 370 furniture stores in Europe. Generating annual revenues of more than 5 billion euros, the XXXLutz Group is one of the three largest furniture retailers in the world.

The Offerors do not act as a partnership but as a so-called "bidder consortium" within the meaning of the WpÜG. Accordingly, each Offeror launches the offer and has to fulfill the obligations set forth in the offer document. Because LSW GmbH and SGW-Immo-GmbH subsequently decided to join the takeover offer originally intended solely by RAS GmbH, the Offerors entered into a consortium agreement governing their internal relationship (**Consortium Agreement**) due to which the Offerors' voting rights arising from home24 Shares

are mutually attributed. Within the framework of the Consortium Agreement, the Offerors agreed to permanently coordinate their conduct regarding the transaction and regarding home24 SE and, in particular, the exercise of voting rights from home24 Shares and the permanent entrepreneurial orientation. Moreover, the Consortium Agreement governs the allocation of tendered home24 Shares to the Offerors following the ratio set forth by an allocation key in the Consortium Agreement as described in the offer document.

The offered cash consideration of 7.50 euros per home24 Share exceeds the volume-weighted three-month average stock exchange price(s) during the last three months prior to the respective Offeror's publication of the decision to launch the takeover offer<sup>1</sup> determined by the German Federal Financial Supervisory Authority (**BaFin**) to amount to 3.11 euros per home24 Share or, respectively, 5.98 euros per home24 Share. Because the offer consideration equals the highest price granted or agreed to for the acquisition of home24 Shares by any of the Offerors or persons acting jointly with the Offerors 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.

The takeover offer is subject to several conditions subsequent. These require that until the expiration of the acceptance period no insolvency proceedings or capital increase of home24 SE (as specified in the offer document) may occur. Apart from that, merger-control approval of the envisaged acquisition of the home24 Shares by the Offerors by the European Commission and/or the responsible authorities in the EU member states to which they may be referred, must have been obtained prior to or on June 30, 2023, or statutory waiting periods in the respective jurisdictions must have expired by that time.

At the time of the publication of the offer document, RAS GmbH directly held approximately 9.07% of home24 SE's share capital.<sup>2</sup> Apart from that, RAS GmbH has entered into a separate transfer agreement with a shareholder of home24 SE that provides for the right of RAS GmbH to exercise at its own discretion the voting rights arising from 1,181,849 home24 Shares (approximately 3.52% of home24 SE's share capital) and, among other things, the right (existing upon execution of the takeover offer) to require said shareholder to sell to it all home24 Shares held by him. In addition, RAS GmbH has entered into irrevocable undertakings with other shareholders for the acceptance of the takeover offer

<sup>1</sup> RAS GmbH published its decision to make the takeover offer on October 5, 2022. LSW GmbH and SGW-Immo-GmbH published their respective decisions on October 28, 2022.

<sup>2</sup> LSW GmbH and SGW-Immo-GmbH did not hold home24 Shares at the time of the publication of the offer document.

for approximately 45.30% of home24 SE's share capital. Furthermore, XXXLutz KG, as a person acting jointly with RAS GmbH, has acquired in total approximately 10.83% of home24 SE's share capital on the stock market at a price not exceeding the offer consideration.

The limited partnership (*Kommanditgesellschaft*) **XXXLutz KG**, which is based in Wels, Austria, holds 99.5% of the share capital of RAS GmbH. The remaining 0.5% of RAS GmbH's share capital is held at 0.25% each by the private foundation **WSF Privatstiftung** and by the private foundation **LSW Privatstiftung**, which are both based in Wels, Austria. The general partners of XXXLutz KG are Ms. **Julia Fronik** and **XXXLutz Verwaltungs GmbH**, which is based in Wels, Austria, and as its managing general partner exercises full control over XXXLutz KG. The limited partners of XXXLutz KG are in equal shares WSF Privatstiftung and LSW GmbH which, in turn, is wholly owned by LSW Privatstiftung. **Dr. Andreas Seifert**, the founder of LSW Privatstiftung, is the sole managing director of LSW GmbH and controls LSW Privatstiftung within the meaning of the WpÜG. WSF Privatstiftung and LSW Privatstiftung each hold 50% in XXXLutz Verwaltungs GmbH. SGW-Immo-GmbH is controlled by its sole shareholder WSF Privatstiftung.

RAS GmbH, XXXLutz KG, and home24 SE entered into a Business Combination Agreement (**BCA**) that stipulates the principal terms and conditions as well as the mutual intentions and understandings with regard to the future collaboration and strategy. LSW GmbH and SGW-Immo-GmbH subsequently joined the BCA by entering into an accession agreement between home24 SE, XXXLutz KG, and the Offerors as parties.

None of the Offerors intends to enter into a domination and profit transfer agreement with home24 SE for a period of three years after completion of the takeover offer.

After settlement of the takeover offer and subject to having reached any required majority shareholdings, the Offerors intend to consider a delisting of home24 SE by means of a delisting offer or as a result of a squeeze-out, and the request or suggestion of the termination of the inclusion in the Open Market (*Freiverkehr*) of the stock exchanges Berlin, Düsseldorf, Hamburg, Hannover and Stuttgart as well as the tradability via Tradegate Exchange.

According to the allocation key in the Consortium Agreement, tendered home24 Shares are to be allocated to the Offerors in such manner that RAS GmbH shall reach a shareholding for the time being up to, but no more than, 39.166% of all issued home24 Shares (also including home24 Shares acquired outside the takeover offer and any home24 Shares transferred to RAS GmbH under

the transfer agreement). Additional tendered home24 Shares are to be allocated in equal parts to LSW GmbH and SGW-Immo-GmbH.<sup>3</sup>

As a consequence of this allocation key there is a high likelihood that none of the Offerors will own at least 95% of the voting share capital of home24 SE after the takeover offer, so that this statutory requirement for the so-called sell-out right of shareholders of a target company to subsequently tender their shares following a takeover offer or mandatory offer would not be fulfilled. For this reason, the offer document provides that, if the Offerors hold home24 Shares in an amount of at least 95% of the voting share capital of home24 SE, shareholders of home24 SE shall have, in an analogous application of the respective provision of the WpÜG, a sell-out right to subsequently tender their home24 Shares into the takeover offer, which right would need to be exercised within a sell-out period of three months after expiration of the acceptance period.

### **Delisting self-tender offer of a.a.a. aktiengesellschaft allgemeine anlageverwaltung**

Frankfurt am Main-based **a.a.a. aktiengesellschaft allgemeine anlageverwaltung (AAA AG)** is offering its shareholders to buy back all no-par-value bearer shares in AAA AG (ISIN DE0007228009) (**AAA Shares**) that are not held directly by AAA AG against a cash consideration of 2.17 euros per AAA Share during the acceptance period ending December 19, 2022.<sup>4</sup>

AAA AG's business consists of portfolio management and activities as a holding company. The portfolio of the AAA Group, which leases real estate in Germany, mainly in the Frankfurt am Main area, includes hotel properties as well as office and service space, each of which is held either by various property companies or directly.

The offered cash consideration of 2.17 euros per AAA Share equals the volume-weighted six-month average stock exchange price during the last six months prior to AAA AG's publication of the decision to launch the offer. Due to the absence of prior acquisitions of AAA Shares by AAA AG or persons acting jointly with AAA AG 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 German Stock Exchange Act.

<sup>3</sup> If the takeover offer is accepted for an uneven number of such additional tendered home24 Shares, one share more is to be allocated to LSW GmbH.

<sup>4</sup> Because AAA AG is the offeror and also the issuer of the shares that are the subject of this offer, the offer does not count as a takeover offer within the meaning of the WpÜG, which is aimed at acquiring control of the target company. Therefore, in contrast to a takeover offer, there is no additional acceptance period of two weeks for this offer in which the shareholders could accept the offer after the acceptance period has expired.

It may be noted in this context that the management board commissioned an expert opinion on the enterprise value of AAA AG, and that the commissioned expert determined an enterprise value of AAA AG as of October 13, 2022 (**Valuation Date**) resulting in a value per AAA Share of approximately 2.94 euros as of the Valuation Date. In this context, the management and supervisory board of AAA AG point out that the company, of which they are the organs, and the shareholders of AAA AG are direct opposite parties in the market with regard to the offer. Therefore, the management board and the supervisory board assess the appropriateness of the offer consideration primarily by stating that the legal regulation of appropriateness in terms of the volume-weighted six-month average stock exchange price has been complied with and that this conception is also suitable for an appropriate balance between the interests of the shareholders who want to remain invested in the company and the interests of the shareholders who want to exit the company.

AAA AG intends to apply for the delisting of all AAA Shares from trading on the regulated market of the Frankfurt Stock Exchange (General Standard) no later than 10 calendar days before the end of the acceptance period (**Delisting Application**). The Delisting Application is made with the proviso that the revocation of the admission of all AAA Shares to trading on the regulated market of the Frankfurt Stock Exchange (General Standard) will take effect at the end of the acceptance period at the earliest (collectively, the **Delisting**). The offer is made on the basis of the authorization resolution of the shareholders' meeting of AAA AG of August 30, 2022, on the repurchase of treasury shares, and launched with the objective of enabling the Delisting to be carried out as the management and supervisory board of AAA AG believe that the use of the capital market as a financing option is no longer necessary for AAA AG. The Delisting allows AAA AG to save significant costs associated with maintaining the listing, reduce regulatory burden, and free up the management capacity required by the listing.

With the offer, AAA AG is not pursuing any intentions with regard to its own business activities and with regard to the use of its immediate assets that go beyond the obligations arising from the offer and the cancellation of acquired treasury shares. AAA AG intends to continue its current corporate strategy. After the Delisting, it intends to adapt the company's orientation and, as a result, the company's personnel structure to the structure of a company that is no longer listed. Accordingly, the company intends to discontinue functions that arise as a result of the listing, and to transfer the relevant employees to other functions and tasks that are more closely related to the operations of the AAA Group.

Following settlement of the offer, AAA AG cannot exclude the possibility that individual shareholders will initiate, arrange for, or work toward structural measures such as the conclusion of an intercompany agreement, measures under the German Transformation Act, or a squeeze-out.

In the context of the offer, AAA AG, which does not hold any treasury shares, is acting jointly with Frankfurt am Main-based **Rothenberger 4 x S Vermögensverwaltung GmbH (4 x S)**, which directly holds approximately 89.57% of AAA AG's share capital and is therefore the controlling company of AAA AG within the meaning of the German Stock Corporation Act.<sup>5</sup> In addition, AAA AG is acting jointly with the direct and indirect subsidiaries of 4 x S and with its own direct and indirect subsidiaries.

Due to having entered into qualified non-tendering agreements (**Non-Tendering Agreements**) with shareholders whose shareholdings in AAA AG amount in total to approximately 97.49% of AAA AG's share capital,<sup>6</sup> AAA AG has ensured that the offer can be accepted for a maximum of 495,868 AAA Shares (the current outstanding number of all AAA Shares less AAA Shares subject to the Non-Tendering Agreements), which corresponds to approximately 2.51% of AAA AG's share capital. Accordingly, the restrictions regarding the repurchase of treasury stock by the company pursuant to German stock corporation law are not in conflict with the obligation of AAA AG as offeror to make a delisting tender offer to all shareholders.

### **Delisting tender offer to the shareholders of GSW Immobilien AG**

Berlin-based **Deutsche Wohnen SE (Deutsche Wohnen)** is offering the shareholders of Berlin-based **GSW Immobilien AG (GSW)** to acquire all no-par-value bearer shares in GSW Immobilien AG (ISIN DE000GSW1111) (**GSW Shares**) not directly held by Deutsche Wohnen against a cash consideration of 91.32 euros per GSW Share during the acceptance period ending November 30, 2022.<sup>7</sup>

The offered consideration of 91.32 euros per GSW Share equals the company value of GSW determined on the basis of a company valuation, divided by the number of

<sup>5</sup> In view of the fact that the shareholders of 4 x S, namely Dr. Stefanie Rothenberger, Dr. Silke Rothenberger, Dr. Sven G. Rothenberger, and Dr. Steen-G. Rothenberger, each hold 25% of the shares in 4 x S, the shares and voting rights held by 4 x S in AAA AG are not attributed to them.

<sup>6</sup> These shareholders include, in addition to 4 x S, Frankfurt am Main-based Günther Rothenberger Beteiligungen GmbH, and Brigitte und Günther Rothenberger Enkel GmbH, which is based in Bad Homburg vor der Höhe.

<sup>7</sup> Since Deutsche Wohnen had previously obtained control of GSW, the delisting tender offer is not aimed at acquiring control of GSW and is therefore not a takeover bid within the meaning of the WpÜG. Consequently, there is no additional acceptance period of two weeks after the acceptance period has expired.

outstanding GSW Shares, and represents the statutory minimum offer consideration required under the German Stock Exchange Act. In view of the absence of the other factors for the determination of the statutory minimum offer consideration, namely the volume-weighted six-month average stock exchange price determined by the BaFin during the period of six months prior to the publication of the decision to make the delisting tender offer, or relevant agreements concerning the acquisition of GSW Shares during the period of six months prior to the publication of the offer document,<sup>8</sup> the statutory minimum consideration had to be determined on the basis of a valuation of GSW.<sup>9</sup>

GSW is a publicly listed real estate company and parent company of the GSW Group. The GSW Group, whose business model is focused on the long-term ownership of its real estate portfolio, has been part of the Deutsche Wohnen Group with Deutsche Wohnen as the ultimate parent company since 2013, when Deutsche Wohnen, which is also a publicly listed real estate company, acquired control of GSW in the context of a previous takeover offer. Since 2014, a domination agreement between Deutsche Wohnen and GSW (**GSW Domination Agreement**) has been in place.<sup>10</sup>

As a result of the completion of a takeover offer of **Vonovia SE (Vonovia)** to the shareholders of Deutsche Wohnen in October 2021 through which Vonovia has reached a shareholding of around 86.87% of the voting rights in Deutsche Wohnen, Deutsche Wohnen has become a subsidiary of Vonovia and the Deutsche Wohnen Group is now a fully integrated sub-group within the Vonovia Group.

<sup>8</sup> Any acquisitions of GSW Shares under a domination agreement are regarded as not relevant, as they occur in connection with a legal obligation to provide shareholders with compensation. In addition, the acquisition of the GSW Shares tendered in the context of a previous takeover offer was completed outside the relevant period.

<sup>9</sup> In accordance with the German Stock Exchange Act, the offeror is obliged to pay a consideration that corresponds to the value of the company determined on the basis of a valuation if, for the securities of the target company to which the offer relates, stock market prices have been determined on fewer than one-third of the trading days during the last six months prior to the publication of the decision to make the delisting tender offer and if several stock exchange prices determined one after the other deviate by more than 5% from one another.

<sup>10</sup> Under the GSW Domination Agreement, GSW shareholders have compensation rights pursuant to the German Stock Corporation Act, upon exercise of which GSW shareholders will receive 7.0790 new Deutsche Wohnen bearer shares for every three GSW Shares. In addition, Deutsche Wohnen guarantees to GSW shareholders who do not wish to make use of the compensation offer payment of an annual fixed compensation payment in the form of a guaranteed dividend in accordance with the German Stock Corporation Act. The adequacy of the compensation offer and the guaranteed dividend under the GSW Domination Agreement is currently being reviewed as part of an appraisal proceeding.

At the time of publication of the offer document, Deutsche Wohnen directly held approximately 94.02% of GSW's share capital. In addition, Vonovia directly acquired 497,591 GSW Shares in the context of its own previous takeover offer to the shareholders of GSW, which corresponds to approximately 0.87% of GSW's share capital. Therefore, the direct and indirect shareholding of Vonovia, as a person acting jointly with Deutsche Wohnen, in GSW amounts to approximately 94.9% of GSW's share capital.

Deutsche Wohnen has entered into undertakings with Vonovia and with another shareholder of GSW that holds approximately 5.02% of GSW's share capital, according to which neither Vonovia nor the other shareholder will tender the GSW Shares held by them into the delisting offer.

Deutsche Wohnen and GSW have entered into a delisting agreement, in which GSW makes a binding commitment to Deutsche Wohnen, subject to legal obligations and the examination of the offer document, to apply for the revocation of the admission of all GSW Shares to trading on the Regulated Market (General Standard) of the Frankfurt Stock Exchange (**Delisting**) (the **Delisting Application**). If the Frankfurt Stock Exchange approves GSW's Delisting Application, the GSW Shares will be revoked from trading on the Regulated Market (General Standard) of the Frankfurt Stock Exchange.

Deutsche Wohnen is convinced that the public capital market does not represent a sensible financing option for GSW, precisely because GSW has two financially strong group parent companies. In the view of Deutsche Wohnen, GSW already has sufficient access to further equity and outside funds through Deutsche Wohnen and Vonovia.

The Delisting reduces the complexity of GSW's operations and applicable legislation, which may free up administrative capacity and reduce certain costs. A stock exchange listing on the Regulated Market (General Standard) causes considerable listing costs and requires GSW to comply with extensive additional follow-up and reporting obligations.

With the implementation of the delisting offer, Deutsche Wohnen is not pursuing any intentions that could affect GSW's business activities, use of assets, and future obligations.

Deutsche Wohnen does not intend to terminate the GSW Domination Agreement or to work toward its termination. Deutsche Wohnen also does not intend to conclude a profit-and-loss transfer agreement or to effect a squeeze-out of the remaining shareholders of GSW after the successful completion of the delisting offer.



## ANNOUNCED OFFERS

Type of offer	Offeror	Target	Announcement
Takeover offer	Oak Holdings GmbH	Vantage Towers AG	November 9, 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)
Nikon AM. AG/ SLM Solutions Group AG <sup>a)</sup>	8.82% <sup>b)</sup>	81.98% <sup>b) c) d)</sup>	90.80% <sup>b) c) d) e)</sup>
Weng Fine Art AG/artnet AG <sup>f)</sup>	26.46%	1.32%	27.88%
Deutsche Balaton AG/ Biofrontera AG <sup>a)</sup>	<30%	0.53%	30.84%
Atlantic BidCo GmbH/Aareal Bank AG <sup>a)</sup>	9.99% <sup>g)</sup>	73.81% <sup>h)</sup>	83.80% <sup>h)</sup>

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

<sup>b)</sup> Taking into account the increase of SLM Solutions Group AG's share capital after the publication of the offer document.

<sup>c)</sup> The consummation of the offer is still subject to a closing condition requiring that by no later than November 1, 2023, Nikon AM. AG must have obtained approval for the consummation of the takeover offer by the Committee on Foreign Investment in the United States (CFIUS).

<sup>d)</sup> 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 until the closing conditions fulfillment date.

<sup>e)</sup> Apart from the takeover offer, Nikon AM. AG also published a separate public offer (not subject to the WpÜG) for the acquisition of certain convertible bonds of SLM Solutions Group AG (**Bonds Offer**) that was accepted for convertible bonds, the conversion of which would result in 5,362,585 new SLM shares, so that Nikon AM. AG would reach a participation of approximately 92.38% of the (increased) share capital after such conversion. The consummation of the Bonds Offer is still subject to the fulfillment of a corresponding closing condition such as the takeover offer.

<sup>f)</sup> Partial tender offer for acquisition of up to 150,000 shares of artnet AG.

<sup>g)</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>h)</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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