Workshop on the implementation of the takeover bids directive

Germany

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A. Origins of Takeover Law in Germany

- no regulatory regime for takeovers in Germany until 2002 due
to a general low number of takeover transactions
  - two-tier-board system (Vorstand/Aufsichtsrat)
  - workers co-determination
  - limitation on leverage buy-outs
  - dominance of banks in the German economy
  - German disease \( \Rightarrow \) reciprocity networks in the German economy

- creation of a non-binding codex in the 1970s \( \Rightarrow \) almost no influence in practice
- creation of a new codex in 1995 \( \Rightarrow \) also almost no influence

- need for changes in 2001
  - growing influence of international capital markets in Germany
  - takeover of Mannesmann AG by Vodafone AirTouch plc
    \( \Rightarrow \) creation of the German Securities Acquisitions and Takeovers Act (Wertpapiererwerbs- und Übernahmegesetz [WpÜG]) in 2001
B. Implementation of the Takeover Directive


• minor modifications of the existing German Securities Acquisitions and Takeovers Act
  o orientation of the original German Securities Acquisitions and Takeovers Act at the already existing – and later failed – proposal for a takeover directive
  o creation of an opt-in/opt-out model
  o creation of the sell out
  o Breakthrough provisions
  o Squeeze out following a takeover or mandatory bid

Recent literature in English:

C. Current Status of German Takeover Law

I. Scope of the WpÜG

• scope of application before 2006: offers to acquire securities of stock corporations and partnerships with registered seat in Germany

• new scope of application – relation only to Germany:
  o Securities of stock corporations and partnerships limited by shares with registered seat in Germany and
  o Offers to acquire securities that have been issued by the offeree company and are admitted to trading on an organized market in Germany (Sec. 1(1) WpÜG)

• new scope of application – cross border issues:
  o application to securities admitted to trading on foreign organized markets of stock corporations and partnerships limited by shares with registered seat in Germany only for corporate law issues (determined by the WpÜG-Anwendbarkeitsverordnung)
  o application to securities admitted to trading on an organized markets in Germany of stock corporations and partnerships limited by shares with registered seat outside Germany only for capital market law issues
C. Current Status of German Takeover Law

II. General Principles

• Equal treatment ⇒ general principle in German Stock Corporation Law (Sec. 53a AktG)

• Sufficient time to reach a properly informed decision on the bid
  o Acceptance period: not less than four weeks and not more than ten weeks from publication of the offer document (Sec. 16 (1) WpÜG) – extended by competing offers (Sec. 22 WpÜG) and shareholder meeting (Sec. 16 (2) WpÜG)
  o Duty of the board to issue a statement concerning the offer (Sec. 27 WpÜG)

• Acting of the board in the interest of the company ⇒ Sec. 33 WpÜG

• No Creation of false markets ⇒ mainly prohibited by the German Securities Exchange Act (WpHG) – Market Abuse Directive

• Ensuring cash consideration ⇒ confirmation of an investment service enterprise that the offeree can fulfill this obligation – liability (Sec. 12, 13 WpÜG)

• No hindrance in the conduct of affairs of the target company ⇒ see Sec. 16, 22 WpÜG concerning the Sufficient time to reach a properly informed decision on the bid
C. Current Status of German Takeover Law

III. Supervisory Authority

• Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin) as the central authority for capital markets in Germany

• **Powers** (Sec. 4 WpÜG)
  - supervise bids in accordance with the WpÜG
  - investigative powers (power to gather information from everybody in connection with duties under the WpÜG; power to search the property of these persons)
  - limitation in cross-border cases ➔ need for legal and administrative cooperation

• **Judicial Review** of the decisions of the BaFin
  - administrative objection procedure ➔ possibility of the BaFin to review and change its own decision
  - appeal to the administrative court of Frankfurt/Main (special jurisdiction for all act of the BaFin in connection with the WpÜG)
C. Current Status of German Takeover Law

IV. Offers

Public offer
Acquisition of a non-controlling interest
(Sec. 10-28 German Securities Acquisitions and Takeovers Act)

Voluntary Takeover bids
Acquisition a controlling interest
(Sec. 29-34 German Securities Acquisitions and Takeovers Act)

Mandatory bids
Bids made after gaining control
(Sec. 35-39 German Securities Acquisitions and Takeovers Act)
C. Current Status of German Takeover Law

V. Mandatory Bid

• gaining control of the target company (Sec. 35 WpÜG) ➔
  controlling interest defined in Sec. 29 (2) WpÜG ≥ 30% of
  voting rights of the target company

• extension concerning gaining of control (Sec. 30 WpÜG) ➔
  o includes also acting in concert (Sec. 30 (2) WpÜG) (attribution
  of voting rights of third parties if bidder acts in concert with
  third parties basing of an agreement or otherwise ➔ exercise of
  voting rights, permanent and substantial change of business
  strategy of the offeree company) ➔
  o not determined by the Takeover Directive

• extension of the mandatory bid to all shares of the target
  company (Sec. 35 (2) WpÜG ➔ but Art. 2(1)(e) Takeover
  Directive – only voting rights), but exclusion for
  o own shares of the target company
  o shares of the target company held by companies dependent on the
    offeree company
  o shares of the target company held by third persons for account of
    the offeree company
  ➔ no interference with interest of minority shareholders (Art. 5
    Takeover Directive)
C. Current Status of German Takeover Law

V. Mandatory Bid

• offering of an equitable consideration and equal treatment of shareholders (Art. 5 (4) Takeover Directive)

• average weighted price on stock exchange of the shares in the three month prior to notification of gaining control (Sec. 5(1) WpÜG-Angebotsverordnung) or six month in case of prior acquisitions (Sec. 4 WpÜG-Angebotsverordnung).

• Right to choose for the bidder to offer cash or shares as consideration – but: offer of cash obligatory in the case that the bidder or persons acting jointly have acquired at least five percent of the shares or voting rights of the target company within the last six month (Sec. 31 (3) WpüG)

• Subsequent acquisitions: duty of the offeror to pay the difference between the paid price and the price paid within one year after the publication of the total number of acceptances for shares of the target company over the counter (Sec. 33 (5) WpÜG)
C. Current Status of German Takeover Law

V. Mandatory Bid

- **Exemptions** from the considerations in the calculation of the percentage of voting rights upon written application at the BaFin (Sec. 36 WpÜG):
  - Hereditary succession, distributions of a decedent’s estate, gifts between spouses, domestic partners or relatives who are direct ascendants or descendants up to the third degree, or distribution of assets resulting from the dissolution of a marriage or domestic partnership
  - Change in the form of organization, or
  - Restructurings within a group of companies
    ➔ doubtfull compatibility with the Takeover directive

- **Exemptions** from the considerations in the calculation of the percentage of voting rights upon written application at the BaFin (Sec. 37 WpÜG):
  - Justified by the type of the acquisition of control
  - Objectives pursued through gaining of control
  - Bidder falling short of the control treshold after gaining control
    ➔ defined in Sec. 9 WpÜG-Angebotsverordnung
  - Generally accepted by German scholars concerning the compability with the Takeover directive
C. Current Status of German Takeover Law

VI. Voluntary Takeover Bid

• defined as bid to gain control (Sec. 29 (1) WpÜG)

• covering of all shares of a company and not only securities carrying voting rights

• consideration ➔ application of the same rules as for mandatory bids (prior acquisitions, parallel acquisitions, average weighted stock-exchange price) ➔ idea of synchronization the determination of the price for mandatory and take over bids
C. Current Status of German Takeover Law

VII. (Usual) Procedure

Notification of the bid ➔ publishing the decision to submit an offer
(Sec. 10 WpÜG)

Approval by the BaFin and publication of the offer document
(Sec. 14 WpÜG)

Opinion of the boards of the target company
(Sec. 27 WpÜG)

Acceptance Period – between four and ten weeks
(Sec. 16 WpÜG)

Employee information and consultation of the target company
(Sec. 27 WpÜG)
C. Current Status of German Takeover Law

VIII. Offer Document

• written in German containing all information shareholder need in order to make a decision about the bid (Sec. 11(2) WpÜG and especially WpÜG-Bid-Regulation

• declaration of responsibility for the content (Sec. 11(3) WpÜG) compensation in case of misrepresentations for shareholder who accepted the offer or where involved in a sell out; excluded in the case of:
  o acceptance of the offer basing on other information
  o awareness of incorrectness or incompleteness
  o clearly specified correction was published before acceptance of the offer

• European bid (Sec. 11a WpÜG)
  obid approved by another competent regulatory authority in another EU/EEA state
  obid must relate to a foreign target company which securities are admitted to trading on an organized market in Germany
  ➔ no additional control by the BaFin
C. Current Status of German Takeover Law

IX. Defense Mechanisms

• Sec. 33 WpÜG ➔ duty of the board not to undertake any actions that could hinder the success of the bid, but:
  o actions undertaken with the consent of the supervisory board
  o actions a prudent and conscientious director of a company would have undertaken with the existence of the bid
  o search for an alternative bid
  o actions which have been approved by the shareholder meeting (3/4 majority) ➔ approval may be given in advance (max. 18 month)

• Actions not falling under these exemptions and **which are considered as forbidden**:
  o golden parachutes
  o Change of control clauses
  o Crown jewel defense
C. Current Status of German Takeover Law

IX. Defense Mechanisms

• **Opt-out model (Art. 12 (1) Takeover Directive)**
  - Sec. 33a WpÜG → possibility to waive application of Sec. 33 WpÜG in favor of the stricter European neutrality clause
  - application of the rules set out by Art. 9 (2)(3) Takeover directive
  - differences (allowed by Sec. 33 WpÜG but forbidden by the European neutrality rule)
    - (final) implementation of decisions already made before the offer
    - decisions approved by the supervisory board
    - pre-bid authorization for the board by the shareholder meeting
    - no full application of Sec. 33 WpÜG concerning the supervisory board
  → so far no German corporation did the opt-in

• **Reciprocity clause**
  - possibility for the shareholder meeting to opt-in for the neutrality rule of Sec. 33 WpÜG in case that the offeror is not subject to the neutrality rule
  - unclear situation with corporations from non-EU countries
C. Current Status of German Takeover Law

IX. Defense Mechanisms

• Breakthrough rule
  • not existing in German law before the takeover directive
  • abolishing of longer, maximum and multiple voting rights in Germany
  • no permission of agreements on voting in German law (Sec. 136 (2) AktG)
  ➔ rather small importance in Germany due to the relatively strong orientation to capital markets

• Implementation of the breakthrough rule in German law in Sec. 33b WpÜG
  • opt-in option for German corporations in their corporate charter
  • reciprocity clause ➔ implemented in Sec. 33c (2) WpÜG
  • rights affected
    - transfer restrictions under the law of obligations
    - statutory transfer restrictions on shares
    - Voting rights agreements

• duty to compensate the removal of rights ➔ no concrete determination procedure in Germany (doubtful concerning Art. 11 (5) Takeover Directive)
C. Current Status of German Takeover Law

X. Squeeze-out

• implemented in Sec. 39a WpÜG

• possession of 95% of the share capital representing voting rights

• also inclusion of shares not carrying voting rights (as in the mandatory bid)

• exclusion procedure ➔ application at the Regional Court of Frankfurt/Main – transfer takes place after the court decision has become final and absolute – usually rather long due to the review of the appropriate price in the proceedings (no application of the Spruchstellenverfahren)

• duty to offer cash (Sec. 39a (3) p. 2 WpÜG)

• Compensation ➔ equitable price
  o consideration given in the context of an offer leading to a 90% position deemed to be appropriate ➔ assumption is considered as irrefutable by the German legislator (Sec. 39 (3) WpÜG)
  o no rule besides Sec. 39 (3) WpÜG for the case that 90% are not reached
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XI. Sell-out

• possibility of shareholder to sell the shares to the bidder when the bid could make a squeeze-out (Art. 16 Takeover Directive)

• implementation in Sec. 39c WpÜG ➔ hardly regulated due to the simple reference to the original offer

• Sell-out right:
  o three months after the expiration of the acceptance period
  o right of the bidder to apply for a squeeze-out

• compensation in cash only when the original offer included an cash offer (doubtful accordance with Art. 16 Takeover Directive due to the direct reference to the Squeeze-out provisions)
D. Conclusion

• minor modifications of the existing German Securities Acquisitions and Takeovers Act by the Takeover Directive

• modifications limited to:
  o Competences of the BaFin
  o Applicable law
  o Scope of the WpÜG
  o Provisions concerning the mandatory bid
  o Duties of managerial board

• new features:
  o Breakthrough provisions
  o Squeeze out following a takeover or mandatory bid
  o Sell out

• option model ➔ opt-out as the rule and opt-in as the option
  - no creation of a level playing field by the German legislator alone

• Criticism:
  o lack of compensation regulation for breakthrough rule
  o exemptions concerning the mandatory bid
  o Lack of provisions in the case of a non-applicability of the presumption of adequacy of pricing
  o regulation of sell-out