

CLIENT UPDATE

NO PRIVATE RIGHTS OF ACTION TO FORCE MANDATORY TENDER OFFER IN GERMANY

FRANKFURT

Dr. Thomas Schürle
tschuerrle@debevoise.com

Dr. Peter Wand
pwand@debevoise.com

Philipp von Holst
pvonholst@debevoise.com

Klaudius Marius Heda
kheda@debevoise.com

LONDON

Guy Lewin-Smith
glsmith@debevoise.com

PARIS

Pierre Clermontel
pclermontel@debevoise.com

Philippe Tengelmann
ptengelmann@debevoise.com

Investors who take stakes in German public companies, including private equity funds and hedge funds, should be aware of a new decision confirming that shareholders do not have private rights of action to enforce the statutory obligation to make a mandatory tender offer. The German Federal Supreme Court (*Bundesgerichtshof*) recently held that shareholders can neither claim consideration for their shares nor damages or default interest from a person acquiring control if such person violates its obligation to launch a mandatory tender offer. (BGH, II ZR 80/12)

INTRODUCTION

The German Securities Acquisition and Takeover Act (*Wertpapiererwerbs- und Übernahmegesetz – WpÜG*) requires any person acquiring direct or indirect control of a company listed on a regulated market in Germany to publish that fact and to make a mandatory tender offer for all outstanding shares of the target. The offer must be made within certain time limits and at a consideration in line with minimum price rules. “Control” is deemed to exist where one or several persons acting in concert hold at least 30% of the voting rights of the target.

If the person acquiring control does not comply with its mandatory tender offer obligation, the German Securities Acquisition and Takeover Act explicitly provides for the following consequences:

- Imposition of a fine of up to EUR 1 million by the German Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht – BaFin*).
- Automatic suspension of the rights (including voting and dividend rights) attached to any shares that are attributable to the person acquiring control from the date the acquisition of control had to be published or the date the mandatory tender offer had to be made, respectively, until the person acquiring control complies with the respective obligation. An exception exists for the right to receive dividends and liquidation proceeds if the violation was not willful and was subsequently remedied.
- Payment of default interest by the person acquiring control to the other shareholders on the consideration for their shares in an amount of 5% p.a. above the applicable base interest rate for as long as the violation continues.

NO PRIVATE RIGHTS OF ACTION

Thus far, it was not clear whether individual shareholders of the target have a private right of action against the person acquiring control to compel him to make a mandatory tender offer (or to pay consideration or damages) if the person acquiring control does not comply with the mandatory tender offer obligation. Moreover, it was not clear whether the default interest payment obligation exists if the mandatory tender offer is not launched at all.

The German Federal Supreme Court has now clarified that the minority shareholders can neither claim the payment of consideration nor damages or default interest from the person acquiring control of the target if such person violates its obligation to launch a mandatory tender offer. The court found that the primary purpose of the German Securities Acquisition and Takeover Act is to protect the functioning of the securities market at large and not the interests of individual shareholders.

SUFFICIENT OTHER SANCTIONS

The German Federal Supreme Court believes that the sanctions expressly provided for in the German Securities Acquisition and Takeover Act are sufficient to ensure that a person acquiring control of a target launches a mandatory tender offer. In its view, such sanctions are in line with the requirements set forth in the EU Directive on Takeover Bids (2004/25/EC), and in particular Article 17, which requires EU Member States to provide for sanctions which are “effective, proportionate and dissuasive.”

The court left open whether the BaFin may order the person acquiring control to comply with its mandatory tender offer obligation and enforce such order using its administrative powers.

The court noted a strong deterrent against a violation of the mandatory tender offer obligation in the automatic suspension of rights (including voting and dividend rights) attached to the shares of the target attributable to the person acquiring control. Once automatic suspension takes effect, all resolutions of the general shareholders' meeting of the target which would not have been passed but for the votes of the person acquiring control (despite automatic suspension of the voting rights), are voidable and may be challenged by the target or other shareholders.

APPROACHES IN OTHER EU MEMBER STATES

The ruling of the German Federal Supreme Court has attracted criticism. The key concern raised is whether the powers of the BaFin are sufficient to police the mandatory tender offer obligation of persons acquiring control or whether private actions must be permitted for the obligation to have the necessary sting. According to some, the current situation is aggravated by the restrictive case law of the competent Higher Regional Court of Frankfurt (*Oberlandesgericht Frankfurt*), which grants neither the target nor its shareholders a right to force the BaFin to intervene where the mandatory offer obligation or other obligations under the German Securities Acquisition and Takeover Act are violated.

EU Member States differ in their sanctions in cases of violation of the mandatory tender offer obligation:

- In the United Kingdom, the Takeover Panel may impose sanctions on a person acquiring control that fails to make a mandatory bid when required to do so under the Takeover Code, including private or public criticism and the exercise of various statutory enforcement powers, including compensation rulings in favor of the shareholders who should have received the mandatory offer (although these have not been used to date). The Takeover Code does not provide for a private right of action if the person acquiring control were to default. In practice, however, such a situation is widely seen as unlikely to occur as the Takeover Panel activity scrutinises the acquisition by one or more persons acting in concert of an interest in 30% or more of the voting rights of the target and enforces any resulting mandatory bid obligations.
- In France, a person acquiring control who violates his obligation to launch a mandatory tender offer would automatically see the voting rights attached to the shares exceeding the ownership threshold that triggered the obligation (generally

30%), suspended until he complies with his obligation. Furthermore, the Financial Markets Authority (*Autorité des Marchés Financiers – AMF*) may issue an injunction to comply with such obligation (and arguably impose a fine) or ask the president of the Paris court to issue a court injunction. The court may impose a daily penalty to be paid by the defaulting person until the filing of the tender offer with the AMF. Legal authors generally believe that a minority shareholder may hold the defaulting person liable and seek damages for any loss resulting from such violation. There is one precedent where a French court granted damages to a minority shareholder for the delay of the majority shareholder in launching a compulsory offer to minority shareholders upon reaching 95% of the voting rights of the target (*offre publique de retrait obligatoire*) (*Cour d'appel de Paris, 5 février 2002, Parfival / Viel & Cie Finance*).

- In Italy, in addition to the powers of the Companies and Stock Exchange Commission (*Commissione Nazionale per le Società e la Borsa – Consob*) to force a person acquiring control to make a mandatory tender offer, individual shareholders can claim damages if the obligation is not complied with.

OUTLOOK

The German legislator will have to keep an eye on the sanctioning of a violation of the mandatory tender offer obligation under the German Securities Acquisition and Takeover Act. If the BaFin is not seen to be actively enforcing violations, and if the automatic suspension of rights does not bite in practice, the legislation may have to be tightened to ensure that Germany provides for sanctions which are “effective, proportionate and dissuasive” as required by the EU Directive on Takeover Bids.

* * *

Please do not hesitate to contact us with any questions.

September 20, 2013