# *Case Note* - The *Pixelpark*-ruling of the Regional Appellate Court Frankfurt (*OLG Frankfurt*) of 25 June 2004: The first decision on "Acting in Concert" and its expected effects on German Takeover Law

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In the form of § 30 sec. 2 *Wertpapierübernahmegesetz* (WpÜG),[1] German capital market law provides for a provision, which is - following its foreign examples - described as "acting in concert," since 2002.[2] According to the WpÜG, a mandatory offer has to be made to the other shareholders of the offeree company by a shareholder gaining control of this company. The WpÜG assumes that such control is established as soon as a shareholder holds thirty percent of the voting rights. § 30 sec. 2 WpÜG contains further provisions avoiding that a shareholder distributes his voting rights among several persons, with whom he then coordinates his voting conduct. A coordination in any other way (*in sonstiger Weise*) is also sufficient.

The German provision on acting in concert goes beyond its English counterpart in Rule 9.1 of the London City Code on Takeovers and Mergers. While the English provision only aims at the co-ordinated acquisition of shares, § 30 sec. 2 WpÜG covers *any* agreement on voting conduct.[3] Additionally, the German provision does not require that the agreement is made for the sole purpose of gaining control of the company. Thus, the mere crossing of the thirty percent threshold is covered, irrespective of the motivation of the involved shareholders. In this regard it is of fundamental importance to narrowly construe the meaning of a coordination in any other way (*in sonstiger Weise*) so that the reach of the provision does not get out of hand.

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[1] *Wertpapiererwerbs- und Übernahmegesetz* of 20 September 2001, BGBl. 2001 I, 3822.

[2] Since 2002 an equivalent provision can also be found in § 22 sec. 2 *Wertpapierhandelsgesetz* (WpHG).

[3] For a more profound examination of the legally comparative context *see*: Casper ZIP 2003, 1469, 1470.

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In the course of the *Pixelpark*-decision of the OLG Frankfurt of 25 June 2004[4] a German appellate court had the opportunity to take a stand on the reach of § 30 sec. 2 WpÜG for the first time. The relevant facts of the case can be summarized as follows. Two shareholders each acquired twenty percent of the shares of a company. The acquisition was arranged by the former sole shareholder and founder of the company. The two shareholders were tied to each other by a joint strategy paper concerning the rehabilitation of the company. Apart from these elements, no further proof of any coordination of the voting conduct was found in the relevant cases.

In its long awaited decision, the OLG Frankfurt refused the assumption of acting in concert. Its decision is based on two central aspects; a formal and a material one. On the one hand the court stated that acting in concert required the intentional cooperation of the shareholders with the aim of a continuous and co-ordinated use of the voting rights. In this respect the court's decision was at least in its result modelled on the preparatory work by the relevant academic literature which had always demanded that a cooperation of shareholders in the sense of § 30 sec. 2 WpÜG required a mutual communicative process resulting in a homogeneous conduct.[5] This makes clear that one-sided passing with the rest as well as prior obedience and unconscious parallel behaviour are not sufficient to assume acting in concert. The court also confirmed that the coordination had to be part of a sustained and continued connection. The second important aspect of the decision lies in the fact that the *Bundesanstalt für Finanzdienstleistungsaufsicht* (BAFin) has to prove such an agreement against the involved shareholders in the relevant case. A mere suspicion of an agreement is not sufficient.[6] The court especially rejected the presumption that two shareholders, who acquire shares from the same person at the same time and are tied to each other by a strategy paper, come to an agreement in the sense of acting in concert inevitably.

The decision should be welcomed. It provides the first contribution to an indispensable high court practice limiting the too-far-reaching German acting in concert provision. However, the decision falls short of being a true milestone in this direction, as the court does not clearly specify the remaining requirements of § 30 sec. 2 WpÜG. Nevertheless it ought to be appreciated, that the OLG highlighted the merits of a restrictive interpretation of the provision. In view of the much desired

[4] OLG Frankfurt, decision of 25 June 2004, Az. WpÜG 5, 6 and 8/03, ZIP 2004, 1309; also compare the previous summary proceedings in the same case: OLG Frankfurt ZIP 2003, 1977; AG 2004, 36.

[5] Casper ZIP 2003, 1469, 1474; Pentz ZIP 2003, 1478, 1480; Liebscher ZIP 2002, 1005, 1008; Noack in *Kapitalmarktrechtskommentar*, § 30 Rn. 21 (Schwark ed., 2004).

[6] In this sense already: Pentz ZIP 2003, 1478, 1481.

strengthening of Germany's capital market as well as of the further legal consequences for potential bidders of the mandatory offer, the court has pointed in the right direction. By rejecting a broader interpretation of § 30 sec. 2 WpÜG in the sense of a fall-back provision, it also carved out the eventually paralyzing effects on the capital market that an alternative holding could likely have had. Thus the weighing of the interests of the potential bidders against those of the remaining minority shareholders, for whom the *Wertpapierübernahmegesetz* is meant to give a right of opting out, has been decided in favour of the potential bidders.

It can be expected that further decisions, especially by the German Federal Court of Justice (*Bundesgerichtshof*), will be necessary in order to confer clear outlines on acting in concert in Germany.