DEVELOPMENTS

Agreements on voting conduct in the election of the supervisory board (*Aufsichtsrat*) – a case for a mandatory offer? Case Note – The Ruling of the Regional Appellate Court Munich (OLG *München*) of 27 April 2005 – 7 U 2794/04, ZIP 2005, 856

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A. Introduction[1]

So-called "acting in concert" is one of the most controversial problems in German takeover law. The latest discussion of the topic has been fuelled by the claim that investors, mainly investment funds, acted in concert through the application of strong pressure in order to cause the personnel change in the management structure of *Deutsche Börse AG*." A further contribution has been made by the much noted ruling of the Regional Appellate Court Munich (*OLG München*) of 27 April 2005[2] concerning acting in concert in the cause of the election of the supervisory board (*Aufsichtsrat*). The following article concentrates on a critical analysis of this ruling of *OLG München.*

B. Acting in Concert

According to § 35 sec. 2 *Wertpapierübernahmegesetz* (WpÜG)[3] a mandatory offer has to be made to the other shareholders of the offeree company by a shareholder

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[1] Case note to the Ruling of the *Oberlandesgericht* München (Regional Appellate Court Munich) of 27 April 2005 – 7 U 2794/04, published in Zeitschrift für Wirtschaftsrecht (ZIP) 2005, 856.

[2] *Id.*, 1.

[3] *Wertpapiererwerbs- und Übernahmegesetz* of 20 September 2001, BGBl. (Federal Gazette) 2001 I, 3822.

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gaining control of the company. According to § 29 sec. 2 WpÜG such control is obtained as soon as a shareholder holds thirty percent of the voting rights. 30 sec. 2 WpÜG, the German regulation on acting in concert, indicates that the above rules also apply in the situation when different shareholders coordinate their voting conduct thereby gaining comparable influence without any single shareholder actually holding thirty percent of the voting rights.

In the recent past, the discussion of § 30 sec. 2 WpÜG has focused on the question of under which circumstances do agreements concerning the election of the supervisory board constitute acting in concert. The first guiding decision in this area was the long-awaited ruling of the Regional Appellate Court Frankfurt (*OLG Frankfurt*) in 2004.[4] In its ruling of 27 April 2005 *OLG München* decided that the coordinated voting conduct in the election of the supervisory board amounted to acting in concert in the relevant case thereby departing from the ruling of *OLG Frankfurt* in central aspects.

The potential reach of the wording of § 30 sec. 2 WpÜG is considerable since it applies not only to explicit agreements between shareholders, but also to the coordination of voting conduct in any other way (*in sonstiger Weise*). Therefore, the question of how far § 30 sec. 2 WpÜG ought to be construed narrowly is of central interest.

The aim of § 30 sec. 2 WpÜG, in addition to § 29 sec. 2 and § 35 WpÜG, is the protection of the minority shareholders of the company. In cases of de facto control of a company by a single shareholder they are meant to be given the opportunity of opting out. No conclusion for the interpretation of § 30 sec. 2 WpÜG can be drawn from a systematic comparison with § 22 sec. 2 WpHG.[5] In spite of the identical wording, differing interpretations are not precluded as the two provisions are related to two different European directives. § 22 sec. 2 WpHG is the result of the implementation of the Transparency Directive[6] into German law, whereas § 30 sec. 2 WpÜG corresponds with provisions in the Takeover Directive.[7] It is worth noting

[4] OLG Frankfurt am Main, Decision of 25 June 2004, Neue Juristische Wochenschrift (NJW) 3716 (2004); see also Matthias Casper, 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, 5 GERMAN LAW JOURNAL 941 (2004).

[5] Matthias Casper, *Acting in Concert – Grundlagen eines neuen kapitalmarktrechtlichen Zurechnungstatbestandes*, ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (ZIP) 2003, 1469, 1472; Jens-Uwe Franck, *Die Stimmrechtszurechnung nach § 22 WpHG und § 30 WpÜG*, ZEITSCHRIFT FÜR BANK- UND KAPITALMARKTRECHT (BKR) 709, 711 (2002).

[6] EC Directive 2004/109 of 15 December 2004, O.J. 2004 L 390/38.

[7] EC Directive 2004/25 of 21 April 2004, O.J. 2004 142/12.

that the Takeover Directive makes a more confined approach to acting in concert than § 30 sec. 2 WpÜG.[8] The comparison of § 30 sec. 2 WpÜG with similar provisions in foreign jurisdictions also points towards a restrictive interpretation. § 30 sec. 2 WpÜG goes far beyond its English counterpart in Rule 9.1 of the London City Code on Takeovers and Mergers, to name just one example.[9] In contrast to § 30 sec. 2 WpÜG, its English counterpart only regulates the coordinated acquisition of shares but not the coordinated use of voting rights. For a conduct to amount to acting in concert in the meaning of Rule 9.1 of the London City Code on Takeovers and Mergers it must be done with the purpose of gaining control of the company whereas § 30 sec. 2 WpÜG only focuses on the acquisition of thirty percent or more of the voting rights irrespective of the involved shareholders' motivation.

As widely agreed,[10] for a conduct to constitute acting in concert in accordance with § 30 sec. 2 WpÜG two requirements have to be fulfilled: first, a certain degree of sustainability must be manifested, and second the coordination must be of a continuous kind.

Sustainability as used in this context initially means that the coordination of voting rights has to be of substantial influence.[11] The influence is of a substantial kind if it aims at the leadership structures of the company. The application of this requirement by *OLG München* in cases when the coordination of voting rights takes place in the course of the election of a chairman of the supervisory board is not convincing. *OLG München* wrongly refers to the generally powerful position of the

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[8] Klaus J. Hopt, Peter O. Mülbert, Christoph Kumpan, *Reformbedarf im Übernahmerecht*, ZEITSCHRIFT FÜR DAS GESAMTE AKTIENWESEN FÜR DEUTSCHES, EUROPÄISCHES UND INTERNATIONALES UNTERNEHMENS- UND KAPITALMARKTRECHT (AG) 109, 111 (2005); Peter O. Mülbert, *Umsetzungsfragen der Übernahmerichtlinie – erheblicher Änderungsbedarf bei den heutigen Vorschriften des WpÜG*, NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT (NZG) 633, 637 (2004).

[9] Ulrich Noack, *§ 30 WpÜG*, in: KAPITALMARKTRECHTS-KOMMENTAR (Eberhard Schwark ed., 3rd ed., 2004); margin number 10; Christoph v. Bülow, *§ 30 WpÜG*, in Kölner Kommentar zum WpÜG (Heribert Hirte, Christoph v. Bülow eds., 1st ed., 2003) margin number 106; Matthias Casper, *Acting in Concert – Grundlagen eines neuen kapitalmarktrechtlichen Zurechnungstatbestandes*, ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (ZIP) 1468, 1470 (2003).

[10] OLG Frankfurt am Main, Decision of 25 June 2004, published in NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 3716, 3718 (2004); OLG München, Decision of 4 April 2005, published in ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (ZIP) 856, 857 (2005).

[11] Ulrich Noack, *§ 30 WpÜG*, in KAPITALMARKTRECHTS-KOMMENTAR (Eberhard Schwark ed., 3rd ed., 2004) margin number 24; Matthias Casper, *Acting in Concert – Grundlagen eines neuen kapitalmarktrechtlichen Zurechnungstatbestandes*, ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (ZIP) 1469, 1476 (2003); Oliver Lange, *Aktuelle Rechtsfragen der kapitalmarktrechtlichen Zurechnung*, ZEITSCHRIFT FÜR BANKRECHT UND BANKWIRTSCHAFT (ZBB) 22, 27 (2004); Thomas Liebscher, *Die Zurechnungstatbestände des WpHG und WpÜG*, ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (ZIP) 1005, 1008 (2002).

chairman of the supervisory board and his important role in safeguarding the interests of the company and its shareholders. Keeping in mind that § 30 sec. 2 WpÜG is meant to prevent the circumvention of § 29 sec. 2 WpÜG, the application of § 30 sec. 2 WpÜG requires that the coordination of voting rights puts a single shareholder in a position equivalent to that of a shareholder holding 30 percent or more of the voting rights. In the case of the election of a chairman of the supervisory board the same degree of potential influence as in § 29 sec. 2 WpÜG is only reached if the chairman of the board is a mere agent of the coordinating shareholder. Conclusions from the rules governing the de facto group (*faktischer Konzern*) can help to define this threshold. A substantial influence is thus given in any case when the coordinating shareholder acquires a position equivalent to the influence of the management of a group on a subsidiary company.

Such a restrictive approach is the only interpretation that adequately takes account of minority shareholders' rights. The strengthening of shareholder rights is the very aim of the current discussion on good Corporate Governance. As owners of the company the shareholders bear the economic risk of the enterprise and consequently, they should generally be given a strong influence over the choice of its management.

"Continuous conduct" is the second requirement that distinguishes "acting in concert" from an isolated case (*Einzelfall*) of coordinated voting conduct in the meaning of § 30 sec. 2 WpÜG. This requirement is only fulfilled if the coordinating shareholder is put in a position in which he can exercise continuous control over the company. Unfoundedly, *OLG München* bases the affirmation of continuity in the relevant case on the fact that the election of the supervisory board has a long-term impact on the company. However, it is the exercise of control itself and not the aim of the coordination of voting rights on which the requirement of continuity must be measured.[12] In the circumstance of the election of a supervisory board, a continuous exercise of control should be found if agreements concerning the voting conduct are made repeatedly or if the supervisory board is found to be bound by the instructions of the relevant shareholders.

The preceding examination leaves us with the conclusion that high demands should be made for a conduct to amount to acting in concert in the meaning of § 30 sec. 2 WpÜG. Usually any conduct meeting the requirements of sustainability and continuity will also constitute a violation of provisions on company law.

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[12] Thorsten Kuthe, Guido Brockhausen, in DER BETRIEB – WOCHENSCHRIFT FÜR BETRIEBSWIRTSCHAFT, STEUERRECHT, WIRTSCHAFTSRECHT, ARBEITSRECHT (DB) 1266 (2005); Christoph v. Bülow, Thomas Bücker, *Abgestimmtes Verhalten im Kapitalmarkt- und Gesellschaftsrecht*, ZEITSCHRIFT FÜR UNTERNEHMENS- UND GESELLSCHAFTSRECHT (ZGR) 669, 714 (2004).

Against this background, the ruling of *OLG München* is not convincing. It can only be hoped that the Federal High Court of Justice (*BGH*) will follow the ruling of *OLG Frankfurt* as well as the predominant parts of academic literature[13] rather than the reasoning of *OLG München*.

Above all, German legislators ought to use the still outstanding implementation of the Takeover Directive into German law to confine the too far reaching § 30 sec. 2 WpÜG to the coordinated acquisition of shares.[14] Indeed, harmonizing the provision with its counterparts in most foreign jurisdictions would certainly constitute the most desirable approach to the difficult subject of acting in concert.

[13] Hans Diekmann, *§ 30 WpÜG*, in KOMMENTAR ZUM WPÜG (Theodor Baums, Georg F. Thoma eds., 2004) margin number 75; Christoph H. Seibt, *Grenzen des übernahmerechtlichen Zurechnungstatbestandes in § 30 Abs. 2 WpÜG (Acting in Concert)*, ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (ZIP) 1829, 1833 (2004); Christoph v. Bülow, Thomas Bücker, *Abgestimmtes Verhalten im Kapitalmarkt- und Gesellschaftsrecht*, ZEITSCHRIFT FÜR UNTERNEHMENS- UND GESELLSCHAFTSRECHT (ZGR) 669, 714 (2004); Lothar Weiler, Ingo Meyer, *„Abgestimmtes Verhalten" gemäß § 30 WpÜG: Neue Ansätze der Bundesanstalt für Finanzdienstleistungsaufsicht?*, NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT (NZG) 909, 910 (2003).

[14] *See also*: Matthias Casper, *Acting in Concert – Reformbedürtigkeit eines neuen kapitalmarktrechtlichen Zurechnungstatbestandes?*, in: REFORMBEDARF IM ÜBERNAHMERECHT, 45, 56 (Rüdiger Veil, Henrik Drinkuth eds., 1st ed., 2005).