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Active Shareholders in Takeover Law - The Action Plan and Beyond

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Active Shareholders and the Law

- § Premiss: Institutional investors should exercise their voting rights.
 - § Wall Street Rule vs. „proper“ stewardship
 - § Green Paper “The EU corporate governance framework”
 - § UK Stewardship Code 2010

- § cooperation necessary for effective exercise
 - § direct cooperation or via proxy advisors

- § When does cooperation lead to acting in concert?
 - § within transparency rules (major shareholdings)
 - § within takeover law (mandatory bid)

Active Shareholders and Takeover Law

§ Art. 2 (1) (d) TOD:

“persons acting in concert shall mean [...] persons who **cooperate** with the offeror [...] on the basis of an **agreement**, either express or tacit, either oral or written, aimed [...] at **acquiring control** of the offeree company [...]”

§ national definitions vary
(minimum harmonisation!)

Consequences of aic

- § only partially covered by TOD
- § some MS: if one party aic acquires shares passing the threshold, all parties aic have to launch a bid
 - § no mandatory bid without acquisition of shares
 - § cf. UK, Belgium, Ireland ...
- § most MS: if parties come together to aic and together pass the mandatory bid threshold, they have to launch a bid
 - § mandatory bid even without acquisition of shares
 - § cf. France, Germany, Poland, Spain, Austria ...

Cooperation on Board Appointments

- § central issue for stewardship
- § managerial expertise as core value driver
- § cooperation on board appointment as aic?
 - § What constitutes an agreement (express or tacit)?
 - § Does appointment aim at acquisition of control?
- § different factors to be taken into account in MS
 - § independence from shareholders
 - § number of members to be appointed
 - § proposing a member vs. voting for a member
- § legal situation not sufficiently clarified

Development in the UK

- § Walker Review on Corporate Governance in Banks
 - § active shareholder engagement beneficial for good cg
- § Institutional investors
 - § City Code rules on aic barrier to cooperation
- § Takeover Panel Practice Statement No. 26 on Shareholder Activism
 - § cooperation on control-seeking resolutions as aic
 - § control = control of the board
 - § significant relationship between majority of board members and activist shareholder
 - § only acquisition of shares triggers bid obligation
 - § result: aic no impediment to activist shareholders

Development in Europe to the Action Plan

- § 2010 Green Paper „CG in Financial Institutions“
 - § lack of legal certainty in the area of aic
- § reiterated in Green Paper “The EU corporate governance framework”
 - § idea of guidance or of a white list appears
- § Commission „Report on application of TOD“
 - § revision of the TOD no aim of Commission
 - § main focus on (textual) transposition of TOD in MS, not on law in action
 - § solution: guidance by the Commission or by ESMA
- § 2012 Action Plan on Company Law: guidance to increase legal certainty to be delivered 2013

Beyond the Action Plan

provide legal certainty ↔ no change to TOD

§ conflicting goals

- § TOD as minimum harmonization
- § legal situation in MS varies considerably
- § result of guidance = lowest common denominator

§ work group of national takeover supervisors

- § within the realm of ESMA
- § substantial work finished July 2013
- § should be passed by supervisors and ESMA soon
- § to be expected in 2013

- § Can ESMA give guidance/offer opinions on TOD?
 - § guidance or opinions are addressed to „national competent authorities“ (cf. Art. 16, 29 ESMA Reg.)
 - § additional problem: addressees of information on aic should be investors, not authorities
 - § such authorities are applying specific regulations or directives enumerated in Art. 1 para 2 ESMA Reg.
 - § TOD not mentioned (result of negotiations in Council)
 - § but reference to „appropriate action in the context of takeover bids“
 - § open issue
- § likely solution: „public statement“
 - § contains factual information
 - § no specific legal basis required

The Results – General Issues

- § non-binding information on common practice of supervisory authorities
 - § „collective view of the supervisory authorities, who stand behind it“
 - § various Appendices on national practices

- § general guideline: cooperation for exercising good corporate governance should not be inhibited
 - § if cooperation is not control seeking

The Results – „White List“

- § „white list“ of activities which „in and of itself“ do not lead to aic
 - § decision always on the merits of each case
 - § no safe harbour, but presumption against aic
- § any joint representation to the board or
- § coordination of voting behaviour will not be considered aic
 - § non-exhaustive list of examples (e.g. directors' remuneration, acquisition or disposal of assets)
 - § exception: approval of related party transactions

The (Lack of) Results – Board

- § no substantial agreement between supervisory authorities
- § no guidance, no safe harbour
 - § „particularly sensitive“ in the context of control seeking
 - § national practices will not change
 - § institutional investors face different situations in MS
 - § transparency: supervisory authorities may introduce national guidance to clarify situation (soft pressure)
- § concept of guidance without changing TOD has limits

Beyond the Beyond - Outlook

- § stones instead of bread?
 - § important clarifications for use of voting rights by institutional investors
 - § crucial board issues still unresolved
 - § in spite of best efforts by supervisory authorities
 - § sufficient legal certainty for institutional investors?

- § Will the Commission be satisfied with the results achieved?



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