Active Shareholders in Takeover Law - The Action Plan and Beyond

Martin Winner
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)
§ 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

$c$ conflicting goals
$c$ TOD as minimum harmonization
$c$ legal situation in MS varies considerably
$c$ result of guidance = lowest common denominator

$c$ work group of national takeover supervisors
$c$ within the realm of ESMA
$c$ substantial work finished July 2013
$c$ should be passed by supervisors and ESMA soon
$c$ 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?
DEPARTMENT FOR BUSINESS, LABOUR AND SOCIAL SECURITY LAW
Welthandelsplatz 1, Gebäude D3, 1. OG
1020 Vienna, Austria

UNIV.PROF. DR. MARTIN WINNER
T +43-1-313 36-4215
F +43-1-313 36-764
Martin.winner@wu.ac.at
www.wu.ac.at