

German take-over law and “creeping in” strategies

1. Principles of German take-over law

According to the provisions of the German Act on the Acquisition of Securities and Take-overs [“Wertpapiererwerbs- und Übernahmegesetz” “(WpÜG)”] an investor gaining direct or indirect control over a listed target company is obliged to make the corresponding acquisition of his shareholding public within seven calendar days. “Control” within the aforementioned meaning is defined as the acquisition of at least 30 % of the voting rights of the target. In addition and within a time period of four weeks after gaining control, the investor has to make a public offer to the other shareholders of the target. The consideration in such offer may not be lower than the average stock price of the quoted shares of the target during the last three months prior to the publication of the offer. If the investor has fulfilled these obligations (including those resulting from the acceptance of the offer by the other shareholder of the target) he may acquire additional shares without any further restrictions or obligations to submit additional offers to minority shareholders. This is also the case if the investor exceeds the threshold of 50 % of the share capital of the target or has made use of the legally provided exemptions to submit a mandatory offer (e. g. in a restructuring scenario or in case of the existence of another majority shareholder with a greater portion in the share capital of the target than the investor).

2. “Creeping in” and the Legal Discussion in Germany

As explained above, according to German take-over law, an investor has not to submit any additional offer to the other shareholders if he is remaining below the 30 % threshold or is acquiring additional shares or even a majority of 50 % of the target after having already made a mandatory offer. This would allow an investor to acquire e. g. only 29 % in a first step without a mandatory offer and to wait a certain time period before acquiring an additional portion of shares (then exceeding the 30 % threshold in total) at a time when the stock price has decreased. Under such circumstances, the price quoted in the mandatory offer may be substantially lower than at the time of the first part of the acquisition. In other words, German take-over law does not have any provisions for a “creeping in” scenario and is so far more

favorable to an investor than jurisdictions of some other EU-member countries or the relevant provisions of take-over law in most of the US-federal states. This liberal approach of German take-over law has been criticised as insufficient to protect the rights of minority shareholders. It is argued that German take-over law protects minority shareholders where no protection is needed and refuses sufficient protection when actually needed. Therefore, the social democrats – as one of the leading opposition parties at the moment – brought a motion in Parliament to amend German take-over law in “creeping in” cases.

3. Comparison to China

Take-over law in China is providing a strict mandatory offer which has to be made when the 30 % threshold has been exceeded and also if the portion of voting rights is further increased. However, it is possible to file a motion for exceptions from the mandatory offer with the Chinese Securities Regulatory Commission. A similar “creeping in” provision also applies in Hong-Kong according to the laws of which a mandatory offer has to be made upon exceeding the 30 % threshold and in addition and each time when a further portion of 2 % of the voting rights is acquired by an investor whose interest is ranging between 30 % and 50 % in the share capital of the target company.

4. Conclusion

It is quite likely that Germany will amend its take-over law and will adopt “creeping in” provisions as already provided in other jurisdictions. This is especially true with regard to some cases in the recent past when investors acquired only 29 % of a target in a first step and without mandatory offer. Such “creeping in” strategy was e. g. followed by the Spanish ACS Group which only gradually increased its shareholding in Hochtief-AG, a German construction firm. The public discussion of this acquisition showed some unhappiness with the existing German take-over law.