'ACTING IN CONCERT' UNDER AUSTRIAN TAKEOVER LAW: AVOIDING THE PITFALLS

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THE Austrian Takeover Commission has developed a growing and, at times, confusing body of case law on "acting in concert" in which it aggregated the shareholdings of significant shareholders and extending the mandatory offer requirement to them. Several minority investors in Austrian public companies who considered themselves protected by the "safe harbor" provisions of the Austrian Takeover Code recently found themselves exposed to investigations by the Commission and to the cost of a public tender offer. This article looks at risk mitigation strategies and defenses.

The Austrian Takeover Code ("Code") requires a person acquiring more than 30 % of the voting rights of an Austrian target company listed on a regulated market in Austria to make a mandatory takeover offer for all of the target's securities. To avoid a circumvention of the mandatory offer requirement, shareholdings of persons acting in concert ("AIC") must be aggregated for the purpose of determining whether any of them is required to launch a mandatory offer. AIC parties are jointly and severally liable for the mandatory offer consideration.

Both the mandatory offer requirement and the aggregation of shareholdings of persons acting in concert are not unique to Austrian law. The rules flow from the EU Takeover Directive which has been implemented in all EU member states. What is unique to Austria, however, and surprises many foreign investors is how broadly the Austrian Takeover Commission ("Commission") has interpreted the AIC concept in recent years. The Commission's practice has largely eroded the legal certainty that the 30% "safe harbor" threshold introduced in 2006 was meant to provide. The Commission's liberal interpretation of AIC can be explained by its dislike of the 30% bright line test compared with the test previously in place, which was based on a more flexible concept of control that focused on the effects of the bidder's shareholding on the target.

According to the Code, AIC parties are natural and legal persons who cooperate with the bidder or the target company on the basis of an agreement aimed at: (1) acquiring or exercising control of the target company (in particular by way of coordination of voting rights) or (2) frustrating the successful outcome of a takeover bid. There is a rebuttable presumption that two or more persons AIC if they (a) are parties to an agreement regarding the election of supervisory board members of a target company or (b) directly or indirectly hold a controlling interest in another person.

The two key elements of AIC are therefore (i) an agreement between the relevant persons and (ii) the aim of acquiring/exercising control of the target company or of frustrating a takeover bid.

COOPERATION ON THE BASIS OF AN AGREEMENT

The Commission considers a very broad range of practices to constitute an agreement for the purpose of determining whether two or more persons are AIC parties. In particular, any communication by a shareholder that can reasonably be expected to cause another shareholder to exercise its voting or other shareholder rights in a particular manner can be deemed an agreement, regardless of whether that communication has a binding effect.

The Commission first applied this broad understanding in the RHI case where it instituted ex officio proceedings to investigate whether two shareholders (holding approximately 26 % and 8.5 %, respectively) were obliged to launch a mandatory takeover offer valued at approximately EUR 1.5 bn for the shares of one of Austria's largest industrial companies. In its ruling, the Commission found that there was an "agreement" based on the fact that one shareholder, following oral discussions with the other, implicitly expected that the latter would support his nomination of particular members of the target's supervisory board.

In a number of other decisions, the Commission relied on circumstantial evidence to find an agreement. For example, in both the Binder+Co and the ECO Business Immobilien cases, the fact that the shareholders in question had cooperated for several years with respect to other companies with interlocking directorates was considered sufficient.

In summary, the ATC's threshold for finding the existence of an agreement is very low. In practice, this has the effect of blurring the distinction between AIC and non-coordinated uniform behavior of large shareholders.

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CONTROL-SEEKING AGREEMENTS

As discussed above, a finding of AIC also requires that the underlying agreement between the shareholders is aimed at the acquisition of control of the target or the frustration of another takeover bid. It follows that agreements regarding the exercise of voting rights that do NOT seek control of the target but relate to other matters, such as capital increases, restructurings or the distribution of dividends, generally do not qualify as AIC. Typical examples of control-seeking agreements are understandings regarding (i) the election of a majority of the members of the target's supervisory board (often in combination with the removal of existing board members) or (ii) the acquisition of shares of the target company that give the parties a majority of the votes.

Since an agreement on the election of a single member of the target's supervisory board is enough to trigger a rebuttable presumption of AIC (as in the KTM case), agreements aimed at the election or removal of supervisory board members must be carefully scrutinized from an AIC perspective, regardless of whether they are concluded on a long-term, temporary or even a one-off basis. The Commission has characterized agreements regarding the election of supervisory board members as non-control seeking where the election related only to (a) independent experts (rather than shareholder representatives) or (b) a minority of the board members (eg RHI; KTM, Erste Bank). In all such cases, however, the burden of proof as to the absence of AIC is on the parties to the agreement.

As a consequence, the distinction between permissible shareholder activism and AIC is not always clear for large but non-controlling shareholders.

Therefore, activist investors should consider the following AIC risk mitigation strategies when dealing with listed Austrian companies:

- Taking records/notes of any meetings/communications with other shareholders or their representatives;
- Procuring the presence of independent witnesses at meetings with other shareholders covering matters that could be deemed to be control seeking;
- At meetings where the coordination of voting rights is discussed, clearly stating the subject matter to which the coordination relates and the fact that the arrangement is not aimed at seeking control and also expressly limiting the duration of the understanding;
- Avoiding any substantive communication with other shareholders on matters that could be deemed to be control seeking, such as supervisory board elections without prior consultation with a legal counsel.

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