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# TAKEOVER MONITOR

## SPECIAL ISSUE: GERMAN FEDERAL COURT OF JUSTICE ON NON-TENDERING SHAREHOLDERS

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## SPECIAL ISSUE: GERMAN FEDERAL COURT OF JUSTICE ON NON-TENDERING SHAREHOLDERS

With this issue we supplement the documentation of public tender offers in Germany by our Morgan Lewis takeover monitor for Morgan Lewis clients and interested persons with respect to recent judgments of the German Federal Court of Justice relating to public tender offers under the German Securities Acquisition and Takeover Act as well as legislative developments relating to German takeover law.

## RECENT CASE LAW RELATING TO PUBLIC TENDER OFFERS UNDER THE GERMAN SECURITIES ACQUISITION AND TAKEOVER ACT (WPÜG):

The German Federal Court of Justice (**FCJ**) pronounced on November 23, 2021 two judgments in parallel proceedings[1] that may have landmark effect. In contrast to the FCJ's earlier judgment of July 29, 2014,[2] in which the FCJ discussed claims of a shareholder who had accepted the concerned public takeover offer and held that if the consideration offered in the context of a takeover offer is not adequate, then shareholders who accepted the takeover offer are entitled to a claim for payment of the adequate consideration against the offeror, the FCJ now discusses claims brought by shareholders or, respectively, swap holders who had declined to accept a public takeover offer, which they claimed was underpriced.

In its recent judgments, the FCJ held that

(i) following the publication of a public takeover offer, the target company's shareholders are not entitled to adequate consideration under the provision of the WpÜG that obligates the offeror to offer the shareholders of the target company an adequate consideration[3] independent of accepting the offer, and thus only the target company's shareholders who accept a public tender offer are entitled to a claim for adequate consideration;

(ii) the offeror's statutory obligation to offer an adequate consideration does not constitute a pre-contractual ancillary obligation of the offeror vis-à-vis the shareholders of the target company (the culpable violation of which can give rise to damage claims);

(iii) the provision of the WpÜG that obligates the offeror to offer the target company's shareholders an adequate consideration is not a protective rule within the meaning of the provision of the German Civil Code,[4] according to which a person who commits a breach of a statute that is intended to protect another person (protective rule), is liable to make compensation to the other party for the damage arising in the same manner as a person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property, or another right of another person.

The judgments concerned in each case an appeal on points of law against the respective appeal court judgment dismissing damage claim against the offeror on the basis of the *culpa-in-contrahendo* doctrine[5] brought by plaintiffs who did not accept the (in their view underpriced) public takeover offer submitted by the defendant on February 28, 2014 for the acquisition of all shares in the target company at an offer price of 23.50 euros per share.[6]

The offer document, in which the prior acquisitions and the determination of the offer price were explained in detail, was reviewed and approved by the German Federal Financial Supervisory Authority (**BaFin**). The offer document disclosed convertible bond purchases by the offeror or a person acting jointly with the offeror in October 2013 and January 2014, as well as the acquisition of shares in the target company by exercising a conversion right. In the explanations on the determination of the offer consideration, the offer document stated that the bond purchases were not relevant for the determination of the minimum consideration.

Prior to the publication of the offer document, the BaFin had informed the offeror that albeit derivative acquisitions of convertible bonds were not relevant for determining the minimum price, exercises of conversion rights from convertible bonds were relevant.

The FCJ ruled in a judgment of November 7, 2017,[7] dealing with a legal dispute between the offeror and former shareholders of the target company who had accepted the offer, that the adequate consideration was 30.95 euros per share because the acquisition of the convertible bonds was deemed to be a relevant prior acquisition within the meaning of the WpÜG, and therefore the prices paid for the acquisition of convertible bonds (due to their conversion into shares in the relevant period) had to be taken into account when determining the adequate offer consideration.

## NO ENTITLEMENT OF SHAREHOLDERS TO ADEQUATE CONSIDERATION INDEPENDENT FROM ACCEPTANCE OF THE TAKEOVER OR MANDATORY OFFER

In its recent judgments, the FCJ first assessed the controversially discussed question in the literature of whether the provision of the WpÜG that obligates the offeror to offer the target company's shareholders an adequate consideration entitles the shareholders to a claim

[1] Case numbers II ZR 312/19 and II ZR 315/19.

[2] Case number II ZR 353/12.

[3] Section 31 (1) sentence 1 WpÜG.

[4] Section 823 (2) of the German Civil Code (BGB).

[5] Section 280 (1) in connection with Sections 311 (2), 241 (2) BGB.

[6] In the case number II ZR 315/19, the plaintiffs held shares in the target company; they alleged that they declined the offer because they relied on the accuracy of the offer document. In case number II ZR 312/19, the plaintiffs had concluded so-called total return swap agreements with various banks as counterparts relating to shares of the target company. The plaintiffs alleged that they had been in the position to decide on the acceptance of the offer because of their rights under the swap agreements and they would have decided for acceptance of the offer if the defendant would have offered the adequate consideration. In both proceedings, the plaintiffs asserted damage claims in the amount of the adequate offer price against concurrent transfer of title of their shares plus lost profit, on the ground that the defendant, with the underpriced offer, violated its duty to offer the shareholders an adequate consideration.

[7] Case number II ZR 37/16.

for payment of the difference between the offered and the adequate consideration, independent of whether they have accepted the offer, and answered it in the negative, in line with the prevailing view in the legal literature.

The FCJ found that the wording of the provision merely establishes a corresponding obligation of the offeror without mentioning a claim of the shareholders. For the FCJ, the structure of the WpÜG suggests that an individual claim to adequate consideration of the shareholders depends on accepting the offer. Otherwise, the provision,[8] according to which only shareholders who have accepted a takeover or mandatory offer are explicitly entitled to a claim for the difference between the offer consideration and a higher consideration granted or agreed in the context of a subsequent acquisition outside the stock exchange during the relevant period after the offer, would not be understandable if a direct claim of the shareholders existed irrespective of accepting the offer. The WpÜG does not generally give the target company's shareholders the opportunity to tender their shares to the offeror outside the framework of the public tender offer if it later transpires that the consideration offered was inadequate.

The FCJ concluded from references in the bill on the WpÜG that the price rules of the WpÜG are intended to have an effect on a contract concluded between the offeror and the shareholder through acceptance of the public offer but are not intended to safeguard any claims independently from a contractually based claim to consideration.

Under the WpÜG, shareholders who declined a takeover or mandatory offer shall be entitled to subsequently tender their shares to the offeror only if the legal prerequisites for a sell-out[9] are fulfilled, namely if the offeror is entitled to demand a squeeze-out of the remaining shareholders under German takeover law,[10] and only within the respective period. A squeeze-out entitlement under the WpÜG requires, however, that the offeror, after a takeover or mandatory offer, owns at least 95% of the voting shares regardless of whether the consideration was adequate.

The FCJ noted that the shareholders' direct claim, which is independent from accepting the offer, can also not be based on the offeror's obligation to contract (at the adequate price) because the conditions under which an indirect obligation to conclude a contract is assumed in the case law outside an express statutory provision are not met. For the FCJ, the requirements of an infliction of damage contrary to public policy are neither readily met in the situation where the offeror publishes an offer with inadequate consideration, nor is the offeror's situation comparable to that of a company with a strong or dominant market position.

In its assessment of whether a claim to adequate consideration that is independent from accepting the offer can be justified with regard to the interests of the parties involved, the FCJ held that the shareholders' risk of losing the possibility of withdrawing from the company in return for an adequate consideration (by accepting an underpriced offer, while only uncertain legal protection is available for the interest in adequate consideration) is a risk that is inherent in the minimum price rules and the structure of the WpÜG and that, on the one hand, should be reduced by transparent and legally secure price rules and on the other hand by a preventive offer control by the BaFin. If, in the event of such a direct claim, an offeror would be obligated by reason of publishing the offer to take over the shares of the target company at the price required under the minimum price rules for an initially unforeseeable period of time and irrespective of fault, this would not only impair the transaction security for the offeror, but also would especially impair other general principles of the WpÜG such as, e.g., that the takeover procedure is to be carried out quickly and without market distortions in the trading of the securities. The FCJ held that at least from the point of view of a temporally unlimited opportunity to pursue the claim to an adequate consideration, shareholders who declined the offer would be given protection-unworthy arbitrage opportunities and would be capable of causing market distortions in the trading of the securities.

## OFFEROR'S STATUTORY OBLIGATION TO OFFER ADEQUATE CONSIDERATION DOES NOT CONSTITUTE A PRE-CONTRACTUAL ANCILLARY OBLIGATION OF THE OFFEROR VIS-À-VIS THE SHAREHOLDERS

In the context of its assessment of whether the offeror's obligation to offer an adequate consideration constitutes a pre-contractual ancillary obligation vis-à-vis the shareholders of the target company within the meaning of the *culpa-in-contrahendo* doctrine, the culpable violation of which can give rise to damage claims, the FCJ did not share the views that the published offer document contains the offeror's implied declaration that the statutory requirements, including the price rules, have been complied with, or that the offeror's duties of consideration should be determined from the provisions of the WpÜG, so that the duty of consideration toward the shareholders would also include the duty to observe the statutory minimum price rules.

Instead, the FCJ held that the offeror's obligations of consideration under the WpÜG only relate to informing the shareholders about the circumstances relevant for assessing the adequacy of the consideration.

[8] Section 31 (5) WpÜG.

[9] Section 39c WpÜG.

[10] Pursuant to Section 39a (1) WpÜG.

Based on its finding that the entitlement of the target company's shareholders to adequate consideration does not exist independently from accepting the offer, as well as considering the design of the WpÜG, which is to create rules for a fair and orderly offer process and to improve information and transparency for the shareholders concerned who shall be provided by the offeror with sufficient information as to be able to make an informed decision on the offer, the FCJ held that the protection of the shareholders' freedom of decision and disposition does not require protecting their interest in adequate consideration in advance of any conclusion of contract through acceptance of the public tender offer.

Although the FCJ admitted that it is conceivable that a shareholder declines the offer due to relying on the correctness of an underpriced offer, and thus loses the opportunity to sell his or her shares at an adequate price in the public offer, the FCJ stated that obvious errors in the determination of the adequate consideration should generally already be detected during the review of the offer document (by the BaFin) if the offeror discloses the relevant factual circumstances for determining the adequate consideration. If, on the other hand, the determination of the adequate consideration is subject to uncertainties, the interest of the target company's shareholders in making an informed decision on the offer is sufficiently safeguarded by the fact that the shareholders are informed about the uncertainties in the determination of the consideration in the offer document.

The FCJ, on the other hand, held that it is not reasonable for an offeror to bear the risk of a correct assessment of the consideration vis-à-vis the shareholders after the publication of the offer document irrespective of a later conclusion of contract. A breach of such an obligation would mean that the offeror would have to place the target company's shareholders in such a position as if adequate consideration had been offered. For the FCJ, a regular liability of the offeror for the positive interest at the contract initiation stage would increase the transaction risks and make the planning of the takeover procedure more difficult, and it would particularly not be justified if the shareholder in question was fully informed and during the offer phase had already formed an accurate opinion of the value of the consideration to be offered.

The FCJ also held that a referral to the European Court of Justice for a preliminary ruling is not required. In its view, neither the wording nor the objective of the European Takeover Directive suggests that the target company's shareholders' interest in adequate consideration must additionally be protected before and independently of accepting the offer. For the FCJ, the provisions of the European Takeover Directive aim to ensure that shareholders are sufficiently informed about the terms of the offer and further protection of the shareholders' interests cannot be inferred from the European Takeover Directive. Such protection is not required when the information provided in the offer document complies with the provisions of the WpÜG. Also, the European Takeover Directive provides for an entitlement of remaining shareholders after a mandatory or takeover offer to subsequently tender their shares to the offeror only if the prerequisites for a sell-out are fulfilled.

Apart from this, the FCJ held that the question of whether the offeror can also be liable to the target company's shareholders due to insufficient information in the offer document did not need to be answered in the specific case(s).

## THE PROVISION OF THE WPÜG THAT OBLIGATES THE OFFEROR TO OFFER THE SHAREHOLDERS OF THE TARGET COMPANY AN ADEQUATE CONSIDERATION IS NOT A PROTECTIVE RULE

The FCJ noted that for the assessment of whether the provision of the WpÜG that obligates the offeror to offer the target company's shareholders an adequate consideration is a protective rule under German tort law, it must be examined, in a comprehensive assessment of the entire regulatory context of the concerned provision, whether there is a legislative tendency to link the violation of the protected interest to the violator's tortious liability. In this connection, it must be taken into account that the legislator has decided against a general tortious liability for primary property damage and that asset protection in the tortious liability system is generally only ensured by the German Civil Code provision governing an infliction of damage contrary to public policy.

Noting that the provision protects the target company's shareholders' interests to exit the company against adequate consideration in the event of an imminent or already occurred acquisition of control, the FCJ stated that it already held in a previous judgment[11] that the statutory obligation to make a mandatory offer only provides reflexive protection for shareholders and that the respective provision is also not a protective rule. The interest of the other shareholders associated with an acquisition of control is safeguarded in the regulatory context of the WpÜG by the fact that an offeror who does not submit a mandatory offer despite acquiring control cannot exercise his or her rights from the shares pursuant to the WpÜG and that, in the case of a published takeover or mandatory offer, the shareholder receives upon the acceptance of the offer a claim to adequate consideration that is enforceable under civil law. This regulatory context marks at the same time the limits of the asset protection of the target company's shareholders intended by the law and would be undermined by a tortious claim outside an intentional infliction of damage contrary to public policy.

## DISCUSSION

In its recent judgments, the FCJ emphasized the interests of the offerors in transaction security and the depth of

[11] FCJ, judgment of June 11, 2013, case number II ZR 80/12.

the review by the BaFin in comparison to the interests of the target company's shareholders when it assessed and distributed risks involved with a public tender procedure.

The attention given by the FCJ, in its assessment of the interests of the parties involved in the context of the claim to adequate consideration that is independent from accepting the offer, to the fact that in the case of a temporally unlimited opportunity for a shareholder to pursue such claim to an adequate consideration, shareholders who declined the offer would be given protection-unworthy arbitrage opportunities and would be capable of causing market distortions in the trading of the securities, raises the question whether it would have made a difference had the plaintiffs not been institutional investors but, instead, shareholders holding smaller participations.

Whereas the FCJ's finding that only the shareholders of the target company who accept a public tender offer are (i.e., remain) entitled to adequate consideration may have the indirect effect of increasing the general pressure to tender for the shareholders of a target company, it has in fact to be complemented by additional prerequisites not expressly mentioned by the FCJ, namely "*if they lodge a complaint for payment of the difference amount between the offered consideration and the adequate consideration; and if such complaint is successful*." It should be noted that such a legal dispute extends over years until a final judgment, that its outcome is uncertain, and that the final judgment is only binding for the parties to the proceeding and has no effect for and against everyone. If shareholders would be willing to take the risk that the expected top-up on the offered consideration cannot be achieved, the courts would face a significant number of complaints from shareholders.

The FCJ's considerations, in view of the conceivable risk that a shareholder declines the offer due to relying on the correctness of an underpriced offer, and thus loses the opportunity to sell his or her shares at an adequate price in the public offer, seem to be at least partly based on challengeable general assumptions. The FCJ's statement that obvious errors in the determination of the adequate consideration should generally already be detected during the review of the offer document by the BaFin if the offeror discloses the relevant factual circumstances for determining the adequate consideration seems to contradict with findings of the FCJ in its July 29, 2014 judgment.[12] The FCJ noted there (in relation to the examination of the offered consideration in the offer document) that even though the BaFin examines the offeror's offer document, such examination has to be carried out within only 10 to 15 working days under the WpÜG, and its standard of examination is limited to an obvious violation of the law. Therefore, the FCJ determined that the BaFin's review of an offer does not have the same depth as a review in the context of a legal dispute before the civil courts. In the case that gave rise to the claims that were now adjudicated by the FCJ, the BaFin ignored - already before approving the offer document - public statements from a shareholder association regarding the adequate consideration, and the adequate consideration was determined not by the civil court of first instance but only by the higher civil courts long after the expiration of the offer period.

The FCJ's finding that wording and structure of the WpÜG and the European Takeover Directive require (merely) that the shareholders of a target company shall be provided by the offeror with sufficient information as to be able to make an informed decision on the offer, and that the offeror's obligations of consideration under the WpÜG only relate to informing the shareholders about the circumstances relevant for assessing the adequacy of the consideration, appear to give offerors further creative leeway in structuring offers and the information in offer documents rather than providing clarification for shareholders.

It appears doubtful when the FCJ's states that if the determination of the adequate consideration is subject to uncertainties, the interest of the target company's shareholders in making an informed decision on the offer is sufficiently safeguarded by the fact that the shareholders are informed about such uncertainties in the offer document. In particular, the FCJ does not provide any indication as to what might be regarded as necessary information on such uncertainties. Such general statement does not take into account the fact that the shareholders are not a homogeneous group with similar ability to assess the information provided. It appears as if the FCJ ignored the fact that it is the offeror who structures the offer proceeding, the offer document, and the information contained therein.[13] The FCJ's assumption appears to ignore that the offeror therewith controls whether there are uncertainties in the determination of the consideration, for example through minimum price-relevant transactions that have not been clarified by the courts. The FCJ's assumption also ignores that it is the offeror who prepares the provided information on uncertainties in the determination of the consideration whereas the shareholders are to bear ensuing risks. For example, in the case that gave rise to the claims that were now adjudicated by the FCJ, it appears unclear whether all target company shareholders would have interpreted the explanations on the determination of the offer consideration where the offer document stated that the bond purchases were not relevant for the determination of the minimum consideration, as a referral to uncertainties in the determination of the consideration, unless an offeror would clearly note that this issue can be evaluated differently and that the legal question

[12] Case number II ZR 353/12, paragraph 24.

[13] Rather, the FCJ held in its recent judgments that a regular liability of the offeror for the positive interest at the contract initiation stage would increase the transaction risks and make the planning of the takeover procedure more difficult.

has not been clarified by the courts. The offer document did not contain such information.

The question of whether an offeror can be liable due to insufficient information in the offer document was not reviewed in the FCJ's judgments. However, the FCJ did not exclude the possibility that nontendering shareholders could bring damage claims based on infringements of information obligations as a precontractual ancillary obligation of the offeror vis-à-vis the target company's shareholders within the meaning of the *culpa-in-contrahendo* doctrine.

All in all, it remains to be seen which approach shareholders might take who suspect that the offer document contains incomplete or wrong information. If a shareholder suspects that the offered consideration is inadequate, he or she may want to bear in mind that tendering his or her shares (and subsequently lodging a civil law complaint) might protect his or her claim to adequate consideration, but only in return for the risk of losing his or her share against an unwelcome consideration if he or she loses the litigation.

## RECENT LEGISLATIVE DEVELOPMENTS RELATING TO GERMAN TAKEOVER LAW

The possibilities for shareholders of a target company to seek access to information in the files of the BaFin in accordance with the provisions of the German Freedom of Information Act (**IFG**) governing the professional duty of confidentiality to be observed by employees of the BaFin or persons or institutions of whom the BaFin avails itself in performing its functions under the WpÜG. According to the amendment, effective as of June 26, 2021, the interests of not only the persons liable to provide information under the WpÜG or any third party, but also now especially the interests of the competent authorities require confidentiality pursuant to the provision's wording. The German legislature therewith introduced the so-called regulatory obligation of professional secrecy of the public authorities into the WpÜG, although that legal institution is based on the case law of the European Court of Justice and the German Federal Administrative Court in relation to the system created by the European legislature for the continuous monitoring of the activities of investment firms, which is not found in the European Takeover Directive the wording of which does not mention any continuous monitoring of the supervised companies.

If this new rule persists, even despite an EU law–compliant interpretation of the provision, then it might have significant consequences for information access claims pursuant to the IFG. According to the available case law, the regulatory obligation of professional secrecy covers the monitoring methods used by the competent authorities, the correspondence and the exchange of information between the various competent authorities and between such authorities and the supervised companies and all other non-public information about the status of the supervised markets and the transactions taking place there. It excludes access to information already if it is shown by general considerations that there is a real possibility of impairment of the functioning of the financial supervision. Moreover, the case law considers the presumption rule for trade and business secrets, according to which information is no longer current after the passing of five years unless its continuing competitive relevance is shown, not applicable in relation to the regulatory obligation of professional secrecy.[14]

[14] In accordance with the provisions of the IFG, everyone is entitled to a claim for access to official information from the authorities of the federal government, such as the BaFin, unless the entitlement to access to information does not apply because of specified exclusionary grounds such as, *inter alia*, where the information is subject to professional or special official secrecy.

[14] Section 9 WpÜG.

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