

Chapter 7

Worker participation rights under the EU Takeover Bids Directive: a deviant Danish case

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1. Introduction

Due to the historically and institutionally specific ownership structures in the Danish economy, takeovers – in particular, unsolicited ones – are not very common. Dispersed ownership is still fairly rare, with most listed corporations essentially being held by a foundation (*fond*). Such foundations are separate legal entities with their own board of directors and specific statutes and objectives. Dual class shareholding is common, whereby the foundation holds the ‘A’ class shares and other shareholders own the ‘B’ class shares with weaker voting rights attached. This works as a structural defence against takeovers. NovoNordisk, Mærsk, Carlsberg and Vestas are examples of Danish companies with a foundation ownership structure (see, for example, Thompson 2014).

This chapter provides an overview of key aspects of workers’ rights in Danish takeover legislation, focusing on the implementation and revision of the Directive on takeover bids (2004/25/EC). Following a discussion of the broader legislative context, the case of the Thrane & Thrane takeover by Cobham in 2012 will be used to illustrate some of the core dimensions of worker participation rights. The relevant bodies of law are the Danish Securities Trading Act and the Public Companies Act (here in particular Chapters 4, 10 and 15), supplemented by the Executive Order on Takeover Bids. The Danish Takeover Order specifies principles and rules for voluntary and mandatory takeover bids. The latest amendment came into force on 1 July 2014. Rules are administered by the *Finanstilsynet* (the Danish equivalent of the Financial Services Authority, or FSA).

Under the initial transposition of the information and consultation provisions of the Takeover Directive in May 2006, employee representatives have the opportunity to be involved in discussions of takeover bids at two levels: at board level or at the level of employee

representatives or codetermination committee. These provisions mirror the opportunities already existing prior to the Takeover Directive (Knudsen 2006).

2. Employee information and consultation in Danish corporate governance

Workplace cooperation, which is strongly influenced by the Scandinavian model of social partnership, is (along with collective bargaining) a core element of Danish industrial relations. The 1973 Act on Employee Representation established the right of employees in public limited companies or commercial foundations with more than 35 employees, on the basis of a vote among all employees, to elect two or more members to the board of directors, representing at least one-third of the seats on the board. Most Danish companies with a public listing indeed have employee board members. These essentially have the same rights and obligations as the other members of the board of directors.

In addition to the board-level employee representatives, the main channels of workplace representation are the shop steward (*tillidsmand*) and the co-determination committee (*medarbejderudvalg*), which consists of an equal number of employee and management representatives. The codetermination committee's focus is on issues such as training, working conditions and implementation of job restructuring, and it is a good example of the generally consensual, social partnership-type approach to decision-making. In addition to the sectoral cooperation agreements, the obligation to inform and consult employees is stipulated in the Act on Information and Consultation of Employees (*Lov om information og høring af lønmodtagere*, No. 303 of 2 May 2005), as an implementation of Directive No. 2002/14/EC (the Information and Consultation Directive).

Moreover, the Danish corporate governance code (*Anbefalinger for god selskabsledelse*) states:

The company's investors, employees and other stakeholders have a joint interest in stimulating the Company's growth, and in the company always being in a position to adapt to changing demands, thus allowing the company to continue to be competitive and create value. Therefore, it is essential to establish a positive interaction not

merely between management and investors, but also in relation to other stakeholders.¹

The corporate governance code also contains a specification that ‘in the view of the Committee, employee representatives are not independent’, which has been discussed critically by employee representatives and labour lawyers (echoing similar debates about the role of employee board representatives in other European jurisdictions). Furthermore, it states that ‘pursuant to the Companies Act, members of the supreme governing body elected by employees are subject to the same responsibilities as members of the supreme governing body elected by the general meeting’.

3. Worker information and consultation in case of a takeover

A takeover offer must be approved by the Danish FSA. Under the Takeover Order one of the minimum requirements for information in the offer document is a description of the offeror’s future plans for the target company, including employment. As soon as the takeover bid has been made public, the boards of the offeror and the offeree/target companies have to submit the document to their respective employee representatives or, where there are no such representatives, to the employees themselves (Article 13(6)).

Under Article 14(1) of the Executive Order, upon receiving the offer document, the board of the target must prepare a document containing an opinion on the bid, including its views on the effect of the implementation of the bid on all of the company’s interests, specifically employment, and on the offeror’s strategic plans for the target company and their likely repercussions for employment and the locations of the company’s places of business as set out in the offer documents. This document is to be communicated immediately to employee representatives, or otherwise to the employees directly. The offeror is not required to consult its own employees or the employees of the target company regarding the tender. According to Article 14(3), if the employees of the target company decide to put together a separate opinion on the effects of the offer on employment, this statement must be published by the

1. Available at <http://corporategovernance.dk/file/522921/anbefalinger-for-god-selskabsledelse-2013-senest-opdateret-november-2014.pdf>, latest update November 2014.

target company's management, and forwarded to the FSA and to the market on which the shares are admitted to trading.

The offeror must immediately disclose an acquisition of the controlling shareholding (Article 4(1)), and following the acquisition announcement, the boards of the offeree and the target company must immediately inform their respective employee representatives, or the employees themselves (Article 4(5)). Overall, there seems to be little focus on information and consultation rights in the broader debate about corporate governance in Denmark, with somewhat parallel structures between the development of a corporate governance code and the Executive Order on Takeovers, and the existing provisions in the area of industrial relations.

4. The 2012 Thrane & Thrane case

In 2012 there was a takeover of the Danish company Thrane & Thrane (T&T) by the British aerospace and defence electronics group Cobham.

T&T is a manufacturer of equipment and systems for global mobile communications based on satellite and radio technology (Satcom). The company was founded in 1981 by the brothers Lars and Per Thrane. It is headquartered in Kongens Lyngby, to the north of Copenhagen and in close vicinity to the Danish Technical University. T&T also has a manufacturing and distribution facility in northern Jutland (Aalborg). At the time of the takeover in 2012 it had around 600 employees in total, located in Denmark, the United States, Norway, Sweden, China and Singapore, with a global network of distributors. Cobham (plc) is a British aerospace and defence manufacturer based in Dorset. Founded in 1934, it is the fifth largest defence company in the United Kingdom. In 2014, it listed its pre-tax profits at 288 million pounds and employs more than 10,000 people worldwide. Cobham's main activities are still in defence contracting, but the company is increasingly looking to diversify towards commercial markets.

Prior to the takeover Cobham and T&T had worked together in the Satcom market, and Cobham had approached the T&T board prior to the bid. T&T's share price had been around DKK 200 in summer 2011, giving rise to speculation about potential takeover attempts. On 27 February 2012 T&T announced that they had received an expression of interest to acquire a majority of shares (an unsolicited takeover) from a third party. This first

bid was unanimously rejected by the board. This was also the first time the employees were informed about the takeover attempt. The offer was withdrawn by Cobham on 12 March 2012, following the decision by the T&T board not to recommend accepting the bid. It was only on this day that the identity of the bidder (Cobham) was revealed. The initial bid had been set at DKK 420 per share. In the context of the unsolicited offer, the board commissioned a strategic review of the company. Its main business strategy was to focus on highly qualified employees, as well as strong technological and commercial capabilities.

Cobham came back with a renewed bid in April 2012, still at DKK 420 and initially with a shareholding in T&T at 2.9 per cent. Amid tensions between the board and several shareholders about what position to take on the bid, the chairman of the T&T board resigned on 16 March 2012. In May 2012, the offer was revised to DKK 435 per share, 48 per cent above market value. The increase in the offer price was justified by the value of a dividend that would otherwise have been declared in June 2012. By Easter 2012, Cobham had built up 25.6 per cent of T&T shares, while Lars Thrane, the company co-founder, held 24 per cent. The company's strategic review was published, but in the meantime several institutional investors (among them, Jupiter Asset Management and Maj Invest) decided to sell their shares and voting rights to Cobham in April 2012. This development made it more difficult for T&T to enter into cooperation with companies other than Cobham, if it wished to do so.

While the board initially rejected the bid, it changed its position after these developments. It appears that the changes in shareholdings did not leave much strategic leeway for the T&T board (including the employee representatives), and many shareholders had publicly voiced their disagreement with Lars Thrane. On 3 May, the T&T board unanimously (with the exception of Thrane) decided to recommend to the shareholders to accept the revised offer. Due to his significant shareholding in the company and the resulting potential conflict of interest, Lars Thrane did not participate in the board statement/recommendation.

On 5 May 2012, Cobham announced that it held 50.05 per cent of the voting rights. By 22 May, it held 90 per cent of all shares, so a mandatory offer ('squeeze out') was made. The transaction was completed on 19 June 2012 and the company was delisted from the Danish stock market. Thrane & Thrane is now integrated into Cobham Satcom.

5. Conclusion

The Thrane & Thrane takeover is interesting for several reasons. Given that takeovers, in particular hostile ones, are rare in Denmark, there was substantial media coverage in the Danish (and UK) financial press, as well as in the broader Danish media. The founder of the company fought hard against the takeover, arguing that it would lead to a reduction of the company's value and a decrease in technological innovation. As one of the leading high-tech satellite/radio companies in Denmark, the takeover attempt by a British defence company was portrayed as 'foreigners' taking over a Danish company. Lars Thrane accused Cobham of trying to take the production of satellite systems out of Denmark. The offeror, however, had promised to relocate the R&D and management responsibilities for their combined Satcom systems to Lyngby. According to Cobham, the rationale for the takeover bid was the highly complementary nature of products and strategies, and the plan to build on T&T supply chain arrangements outside Denmark.

The public debate about the takeover also touched on the risk for potential loss of jobs. Cobham had in their revised offer guaranteed to 'honour existing contractual commitments relating to conditions of employment' and to 'retain the employment of the senior management team on terms similar to their existing arrangements', without providing more details. Following the completed takeover, there were indeed around twelve engineering jobs that vanished in the Danish company. In 2014, however, Cobham decided to move parts of its US R&D activities to Denmark, arguing that development and production are more competitive there. This also has to do with the fairly flat Danish wages for highly educated employees, compared with, for example, those in the United States. The production/warehouse site has been moved to a larger facility in Pandrup, just north of the previous facility in Aalborg. In the aftermath of the takeover, it appears that the integration of T&T into Cobham Satcom has met some of the general challenges of takeovers and acquisitions, with the former T&T employees reporting a significant drop in satisfaction with their new management.

But of more particular interest here is that the T&T takeover also sheds light on the nature of worker and employee information and consultation in Denmark in a case of dispersed shareholding, that is, a 'deviant case' compared with the majority of ownership structures in Denmark. As of May 2012, there were approximately 4,235 T&T shareholders. The

‘standard’ practices of worker information and consultation in Denmark in a takeover case, as described above, play out in characteristic ways in a situation in which there is an owner with a significant shareholding, but otherwise dispersed shareholding.

During the takeover, all information and consultation provisions in the Executive Order were complied with. The T&T board had informed the employee representatives of the respective bids, namely the first bid that had been rejected and the renewed bid in April 2012. Workplace organisation seemed rather weak at the company headquarters, as the shop steward (*tillidsmand*) was located at the production site. Of particular interest here are the employee representatives on the company board. There were two representatives, one from the company headquarters in Lyngby (from the engineers) and one from the production/warehouse facility in Jutland.

There was no statement on the offer from the employee side; it is also moot whether it would have made much difference, given the tensions between board and shareholders. Hence the consultation dimension was fairly limited because the employees did not exercise their right to express an opinion on the bid, and more importantly because the employee representatives on the board were broadly aligned with the management’s initial position against the offer. This points to the broader discussion about the role of employee representatives on the board (which is a debate that has come increasingly to the fore in Denmark in the past decade). One of the employee board representatives argued that ‘when you’re an employee representative, you also have to make sure that the shareholders get what they ask for.’ Asked about the usual ways in which employee representatives were integrated into the overall board, he mentioned that board meetings were generally well prepared and constructive, but that there were also some decisions that had clearly been taken in advance. Moreover, it appears that the two employee representatives did not actually communicate much with each other because they did not ‘share the same ... strategic values.’ The employee representative from the engineering side of the workforce appeared more interested in maintaining the company’s edge in technological innovation, stating that he felt he had more in common with the company founder than the other employee representative, while the representative from the production site was more protective of employment as such. As board members, the employee representatives were not allowed to disclose sensitive information regarding the takeover proceedings. Having been approached

by colleagues for more information on developments, the respondent sought legal advice and was advised not to make any statements regarding the situation. The T&T employees hence only received the mandatory amount of information published according to the Executive Order. Given that there seems to have been some fragmentation among the different groups of workers in the company, stronger coordination and concertation might have led to a more pronounced position on the part of the workforce vis-à-vis the takeover bid.

Overall, in a system that is still characterised by social dialogue also at the shop floor level, it seems that a takeover situation with a retrenched board and dispersed shareholding constitutes a break in these practices and leads to a situation in which workers have little leeway to go beyond the minimum information and consultation rights. The fact that the bid was unsolicited also meant that at the management level there was no previous (informal) discussions that could have filtered through to the employees, as can be the case in the rather informal channels in the Danish employee information and consultation context. There are no provisions for 'early involvement/warning' in the legal framework. In the case of an unsolicited takeover attempt the provisions in the Act on Employee Information and Consultation keep employee representatives on the board from sharing information on the grounds of a confidentiality obligation (§7), and could also mean that management is not obliged to comply with information and consultation requirements if the information could harm the company's functioning or the company itself (§5).

The developments outlined above include several of the issues highlighted in this study, including fairly vague statements about employment impact and workers not using their right to state their opinion on the bid. The T&T takeover might have been a rather specific case, in particular because it was in the high-tech sector, but given the increasing pressure to move towards dispersed ownership models, the question arises of how the Danish model will cope if there are more and more takeovers of this kind, without allowing for more options for workers to make their voices heard in a context in which the standard social partnership channels do not apply.

References

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