

# Chapter 5

## The Austrian Takeover Act – an instrument for worker participation?

Helmut Gahleitner

### 1. Introduction

Two significant institutional features of Austria's political economy that are highly relevant for takeovers are (i) the concentrated ownership of listed Austrian companies and (ii) the strong system of worker involvement through works councils and board-level employee representation. The first feature in most cases reduces the effectiveness of protections for workers provided by the EU Takeover Bids Directive, because takeover deals in Austria are typically arranged 'behind the scenes' by the majority shareholders of the companies involved. In practice, a deal between an offeror and the controlling shareholder of the offeree company is frequently completed before the offer is announced and before the formal takeover process starts in accordance with the Takeover Act. It thus becomes difficult for a works council to influence a takeover procedure once it has been launched. On the other hand, a strong system of worker involvement through works councils and board-level employee representation makes it possible for workers to be involved in the takeover process when this is not the case.

The Austrian case thus illustrates the weaknesses of the protections for workers provided by the EU Takeover Bids Directive in many cases, because the owners of companies are not obliged to inform or consult with workers while deals are being made between controlling shareholders. However, the case study presented (Voestalpine's 2007 takeover of Böhler-Uddeholm) is atypical for this country, because it is one of the only two cases known to the author in which worker representatives issued an opinion on the bid document. It is also one of the few cases of hostile takeovers in Austria. It illustrates the role worker representatives can play in influencing the outcome of takeover attempts in situations in which a 'behind the scenes' deal has not been made, through building coalitions with other relevant actors.

## 2. Key elements of the Austrian Takeover Act

Since 1 January 1999 the Austrian Takeover Act has been applicable to listed Austrian companies. The Act contains principles and rules for voluntary and mandatory takeover bids. In 2006, the European Directive 2004/25 on takeover bids was implemented through the Takeover Act of 2006. The Austrian Takeover Commission has 12 members and fulfils the tasks specified in the Act. The Commission is an independent body responsible for supervising the offer procedure and deciding whether a mandatory bid has to be made. Members of the board have only limited means to intervene because of the ‘neutrality’ clause.

This section provides an overview of the most important aspects of the Austrian Takeover Act.

### 2.1 Change of control

The 2006 Takeover Act incorporated a new definition of ‘controlling interest’. A change of control is generally presumed to have taken place if more than 30 per cent of the voting stock of a target or offeree company is directly or indirectly held by an individual or legal entity. A bidder (or parties acting in concert) who acquires a controlling interest in a target company is obliged to launch an offer to all other shareholders of the target company to purchase their shares (a so-called ‘mandatory bid’). Since 2006 the Takeover Act contains a so-called ‘safe harbour rule’. This means an acquisition of voting rights not exceeding 30 per cent will in no case trigger a mandatory bid.

### 2.2 Minimum purchase price of the bid

The Takeover Act (§26) contains two pricing rules: the price of a mandatory bid or of a voluntary bid to acquire a controlling interest shall not be less than the price paid by the offeror – and any parties acting in concert with them – for any shares of the offeree company purchased within the preceding 12 months before the announcement of the bid. The price shall correspond at least to the average market price of the offeree shares during the six-month period prior to announcement of an intention to make an offer. A mandatory offer should be in cash, but shares may be offered as an alternative to a basic cash offer.

## 2.3 Minimum content of the bid

§7 of the Takeover Act sets out minimum requirements for offer documents. From the employees' point of view the following information in the offer document is important:

- The offeror must state their intentions regarding the future business of the offeree company and, insofar as it is affected by the bid, of the offeror company with regard to the safeguarding of the jobs of their employees and management, including any material change to employment conditions. It must also lay out its strategic plans for the two companies and the likely repercussions on employment and the locations of the companies' place of business.
- The Takeover Commission must check the offer documents before the offer is published. The Commission also checks whether the information provided and the offer price are in compliance with the Act. The Takeover Commission may prohibit the publication of the offer document if it determines that the bid or the offer documents are not in conformity with the law.

## 2.4 Statement of the offeree management and supervisory board, and of the works council

Before publication, the offeror has to submit the offer documents to the management board and the supervisory board of the offeree company. The offeror and the management board of the offeree company must immediately inform their respective works councils and transmit the offer documents upon receipt. Moreover, the management of the offeree company has to inform its works council of the possibility of making a statement and of the planned time of the announcement of the takeover bid.

According to §14 of the Takeover Act the management board and the supervisory board of the offeree company shall publish a response to the bid immediately after publication of the offer documents. The response shall contain, in particular, an assessment of whether the consideration offered and the other terms of the bid take adequate account of the interests of all shareholders. Furthermore, based on the strategic planning of the offeror regarding the offeree company, it should assess what the

probable effects of the bid would be on the offeree company, especially with respect to employees (jobs, working conditions and the fate of locations), to creditors and with regard to the public interest. Should the management board or supervisory board be unable to give a final recommendation, they must in any case outline the arguments for accepting or rejecting the bid, highlighting the most important features.

The management board must publish its response, together with any response of the supervisory board and works council, within ten exchange trading days of publication of the offer documents, but at the latest five exchange trading days prior to expiry of the acceptance period.

## 2.5 Prohibition of attempts to prevent takeovers and the obligation of neutrality

The management board and supervisory board of the offeree company may not take measures to deprive their shareholders of the opportunity to make a free and informed decision on the bid. Shareholders must approve defensive measures taken to discourage bids. Only the search for other competing bids is allowed without the express approval of shareholders.

## 2.6 Publication of the outcome of the bid

The period for accepting the bid shall be not less than two weeks and no longer than ten weeks after the publication of the bid documents. The result of the bid has to be published by the offeror. In certain cases – for example, mandatory bids – the acceptance period is prolonged by three months from the day of the announcement.

# 3. Statistical data on and functioning of takeover bids<sup>1</sup>

As of December 2013 the Takeover Commission had dealt with 57 takeover bids. In 45 cases there was a change of control. In 19 of those cases the offeror made a voluntary offer to acquire a controlling interest

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1. For more information: [www.takeover.at](http://www.takeover.at); Wolf Theiss: Takeovers of public companies in Central and South-eastern Europe, p. 23ff. [http://www.wolftheiss.com/tl\\_files/wolftheiss/CSC/Guides/Wolf\\_Theiss\\_Guide\\_to\\_Takeovers\\_of\\_Public\\_Companies\\_in\\_Central\\_and\\_Southeastern\\_Europe.pdf](http://www.wolftheiss.com/tl_files/wolftheiss/CSC/Guides/Wolf_Theiss_Guide_to_Takeovers_of_Public_Companies_in_Central_and_Southeastern_Europe.pdf), downloaded on 11.3.2014.

and in 26 cases the offeror obtained a controlling interest and had to make a public offer.

Most of the companies listed on the Vienna Stock Exchange are controlled by a majority shareholder, a core shareholder or a syndicated group of shareholders. This means that hardly any Austrian public companies have a large free float (the number of small shareholders is low). This also applies to the acquired companies. A typical takeover situation in Austria is organised like this: the offeror and the controlling shareholder of the offeree company negotiate the acquisition and the deal is already completed before the offer is announced. Often this happens before the management board or supervisory board of the offeree company is informed. The offeree company thus gets a new controlling shareholder regardless of the outcome of the takeover bid. The mandatory takeover gives all shareholders the choice either to stay in the offeree company with the new controlling shareholder or to leave the company on the same terms as the old core shareholder. Because the package price that the old controlling shareholder get from the offeror is normally higher than the market price, the small shareholders typically accept the offer.

In other words, it often does not make sense for the works council to make a statement on the takeover because de facto the company already has a new controlling shareholder. After a review of all takeover bids in Austria since 1999 by the author it was possible to identify only two cases where works councils utilised this right. This first was Voestalpine/Böhler-Uddeholm, in which the (European) Works Council issued an opinion. The second was in 2014, when the Mexican mobile phone company America Movil launched a public takeover bid to the shareholders of Telekom Austria. In this case the works council of Telekom Austria made use of the right to express an opinion.

## **4. Case study: Voestapline's 2007 takeover of Böhler-Uddeholm**

### 4.1 The Böhler-Uddeholm group

Böhler-Uddeholm was formed in 1991 as a result of a merger between the Austrian company Böhler and the Swedish firm Uddeholms AB. Initially, it was a state-owned enterprise. In 1995 the government, represented by the Österreichischen Industrie Holding AG (ÖIAG), started to reduce the

size of its shareholding via an IPO (initial public offering). In 2003 ÖIAG sold the remaining 25 per cent of shares it held, thus Böhler-Uddeholm became a fully privatised enterprise. The new controlling shareholder was an Austrian private investor group that initially held 25 per cent of the shares of Böhler-Uddeholm. In the year of acquisition (2007) it held around 21 per cent of shares through BU Industrieholding GmbH.

The Böhler-Uddeholm group became a worldwide leader in specialty steel and materials with a focus on four divisions: high-performance metals, welding consumables, precision strip and special forgings. Böhler-Uddeholm was one of the most important Austrian industrial companies, employing approximately 14,300 employees worldwide and generating sales of more than 3 billion euros in 2006.

## 4.2 Takeover attempt by CVC Capital Partners

In 2007 it was announced that the core shareholder of Böhler-Uddeholm, BU Industrieholding GmbH – which was owned by the Austrian private investor group – was interested in selling its shares.<sup>2</sup> In March 2007 the British private equity fund CVC Capital Partners confirmed talks with the core shareholders and informed the public that CVC was considering making a takeover offer. The financial investors also announced that CVC was interested in a long-term investment but would make a takeover offer only if the management of Böhler-Uddeholm gave its approval. On 21 March 2007 CVC said it had reached an agreement with BU Industrieholding GmbH to buy its stake.

The attempt by CVC to buy Böhler-Uddeholm prompted criticism at the highest levels in Austrian politics. It was said that a takeover of Böhler-Uddeholm by CVC would be catastrophic for the company and not in the interests of Austria. The works council of Böhler-Uddeholm also expressed its concern and stressed that the workforce was worried about the long-term future of the company. It was feared that, after a resale of Böhler-Uddeholm by CVC, there could be a hostile takeover or filleting of the group. Böhler-Uddeholm's CEO Claus Raidl, one of the most respected managers in Austria, said he needed some time to analyse the position paper received from CVC, the prospective new owner. Over the

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2. All documents are available at the homepage of the Austrian Takeover Commission: [www.takeover.at](http://www.takeover.at); see also: <http://www.voestalpine.com/group/de/konzern/>

next few days the intended takeover was a leading topic in the media and in the background various people were looking for an alternative solution.

### 4.3 Böhler-Uddeholm's CEO rejects a takeover by CVC – a 'white knight' is presented

A week later, on 28 March 2007, Böhler-Uddeholm's CEO Raidl told the controlling shareholder, BU Industrieholding GmbH, that it should not accept the offer; any deal with CVC would fail to create a sustainable shareholder structure for Böhler-Uddeholm and was not in the interests of the company. The British private equity fund was stunned. One day later, on 29 March, BU-Industrieholding GmbH (represented by Rudolf Fries), Böhler-Uddeholm CEO Claus Raidl and a new investor, Voestalpine (represented by CEO Wolfgang Eder) announced in a joint press conference an 'elephant wedding' in the Austrian steel industry.

Voestalpine agreed with the shareholders of BU Industrieholding GmbH to acquire their holdings, thereby indirectly owning almost 21 per cent of the shares of Böhler-Uddeholm, as BU Industrieholding GmbH's business purposes were limited to the holding and management of Böhler-Uddeholm shares. In addition, Voestalpine launched a voluntary public takeover bid to the shareholders of Böhler-Uddeholm at 69 euros per share. Its 'white knight' bid thus shelved the offer by private equity firm CVC Capital Partners, whose offer had sparked fierce political resistance.

For decades Voestalpine and Böhler-Uddeholm had operated under the umbrella of the nationalised industries. After the breakup of this umbrella in the early 1990s they went separate ways. Voestalpine group, today a fully privatised enterprise with significant employee ownership, is a leading European processing group with its own steelmaking facilities and its registered office in Austria. The group is divided into four divisions – steel, railway systems, automotive and profile form – and employs about 26,000 employees worldwide. In the fiscal year 2005/06, the Voestalpine group generated revenues of 6.5 billion euros. It has production and distribution companies in 31 countries worldwide. The group's holding company, Voestalpine AG, has been listed on the Vienna Stock Exchange since 1995. In 2007 the major shareholders of Voestalpine were:

- Raiffeisenlandesbank Oberösterreich Invest GmbH & Co OG: 15 per cent

- Voestalpine employee shareholding scheme: 10.3 per cent
- Oberbank AG: more than 5 per cent
- Axa Group

BU-Industrieholding GmbH strongly welcomed the takeover by Voestalpine as a ‘great industrial solution for Böhler-Uddeholm’. Also Böhler-Uddeholm CEO Claus Raidl was satisfied with the solution found after the turmoil surrounding the takeover plans by CVC saying ‘Voestalpine and Böhler-Uddeholm live in a common world, we have a partner who understands our business’. In 2007/8 the created group generated 10 to 11 billion euros in sales and employed almost 40,000 people worldwide.

#### 4.4 Offer document published on 26 April 2007

On 26 April 2007 Voestalpine AG published a voluntary public takeover bid to all shareholders of Böhler-Uddeholm. Voestalpine offered Böhler-Uddeholm shareholders 69 euros a share ex dividend 2006. The average share price of Böhler-Uddeholm shares within the six months preceding the announcement of the intention to launch the bid was 57.33 euros per share. The bid price per share was therefore 20.4 per cent higher than the average price and corresponded to the purchase price of 69 euros per share received by BU-Industrieholding GmbH.

The takeover bid was conditional upon Voestalpine AG reaching a shareholding of more than 50 per cent of Böhler-Uddeholm AG’s voting stock and obtaining the relevant merger control approvals.

The offer documents contained the following main points regarding the impact of the takeover on the offeree company and on employment and business locations of the offeree company:

- Voestalpine planned that the Böhler-Uddeholm group should retain all company names, corporate designations and trademarks after the takeover;
- the Böhler-Uddeholm group and its management would be preserved as an Austrian stainless steel group with a global presence and the head office would be maintained for this part of the group; and

- Voestalpine planned to integrate Böhler-Uddeholm in its current structure into the group as its fifth division. There were no plans to close or transfer sites following the acquisition of a majority of the shares in Böhler-Uddeholm, nor were there plans to reduce the workforce after the envisaged takeover.

#### 4.5 The management and supervisory boards of Böhler-Uddeholm recommend acceptance of the takeover bid

The management board and the supervisory board emphasised that Voestalpine AG's takeover bid did not lead to a deterioration in the current position of employees (jobs, working conditions and the fate of the locations), of customers and creditors, as well as of the public. Both welcomed the assured preservation of market profile, the maintenance and development of the four divisions, the continuation of policy regarding capital expenditures and acquisitions, as well as the preservation of Böhler-Uddeholm as an Austrian speciality steel group with a global presence.

#### 4.6 Statement of the European Works Council

The Austrian works council of Böhler-Uddeholm handed over the task of dealing with the takeover to the European works council (EWC). The EWC issued a comprehensive opinion stressing that the offeree company had a strong corporate culture that manifested itself in a fair and efficient operational partnership between owners, management and employee representatives. Although synergies would be created by the merger, closures were not expected. The project was evaluated positively because the offer documents, management board and supervisory board stressed in their statements that there were no plans to close or transfer sites or to reduce the workforce following the acquisition of a majority of the shares in Böhler-Uddeholm. The EWC also welcomed plans for the Böhler-Uddeholm group to retain all company names, corporate designations and trademarks after the takeover. The EWC was confident that the Böhler-Uddeholm group would remain an independent unit. Although there was no statement in the offer regarding the future cooperation between the worker representatives of Böhler-Uddeholm and Voestalpine, the EWC pointed out that the works councils of both companies had a strong corporate culture and were interested in balancing conflicts of interest. Based on these arguments the EWC had no objection to the merger.

#### 4.7 Voestalpine increases the bid price and is successful in taking over Böhler-Uddeholm

On 19 May 2007 Voestalpine increased its initial bid price by 4 euros (around 5.8 per cent) from 69 euros to 73 euros ex dividend 2006 ('Increased Bid Price'). Within the acceptance period the free float sold 33.7 per cent of the equity capital of Böhler-Uddeholm to Voestalpine. Considering the Böhler-Uddeholm shares acquired indirectly through BU Industrieholding GmbH (20.9 per cent), Voestalpine secured a share of approximately 54.6 per cent of Böhler-Uddeholm's aggregate equity capital. Thus the condition of Voestalpine AG reaching a holding of more than 50 per cent of Böhler-Uddeholm AG's voting stock was fulfilled and the takeover was successful.

In 2008 Voestalpine held more than 90 per cent of Böhler-Uddeholm shares. The remaining shareholders were bought out through a squeeze-out and as of 23 June 2008 Böhler-Uddeholm was no longer listed on the Vienna Stock Exchange. Böhler-Uddeholm is today completely integrated into the Voestalpine group and has changed its name to Voestalpine Edelmetall GmbH.

At present the Voestalpine group consists of 500 companies and has locations in more than 50 countries on five continents. In the business year 2012/13, the group reported revenue of 11.5 billion euros and an operating profit (EBITDA) of 1.45 billion euros. It has around 46,400 employees worldwide. The largest shareholders are still the Austrian bank Raiffeisenlandesbank Oberösterreich Invest GmbH & Co OG (14.96 per cent) and the Voestalpine Employee Shareholding Scheme (14.4 per cent).

### 5. Conclusions

The Austrian case illustrates the weakness of the workers' rights provided by the EU Takeover Bids Directive, which are focused mainly on the right of workers' representatives to state an opinion on the takeover bid. Since 1999, Voestalpine/Böhler-Uddeholm has been one of only two takeover attempts in which the works council (in this case the EWC) issued an opinion on the bid. It appears that the possibility of making a works council statement within the takeover procedure has no impact on the process. This is because most companies listed on the Vienna Stock Exchange are controlled by a majority shareholder, core shareholder or

syndicated group of shareholders. In the event of a takeover, the deal is usually completed before the offer is announced and before the formal takeover process starts in accordance with the Takeover Act.

This shows that it is important that workers' representatives be involved earlier in the takeover process. Critical statements regarding a takeover attempt have to be made at an earlier stage, because in the formal takeover procedure a new controlling shareholder de facto usually already exists when the formal bid is made. Therefore it makes more sense for the works council to be able express an opinion as soon as rumours about a possible takeover are on the market.

The Voestalpine/Böhler-Uddeholm case, which is atypical of Austria due to the hostile nature of the initial takeover bid, shows that workers' representatives can have an important influence on the takeover process in cases in which a deal has not been struck between controlling shareholders for a transfer of ownership. This can be done in such situations through forming a coalition with other relevant interests, such as the management of the target company and the government. In this case an initial approach made by the private equity firm CVC was opposed by such a coalition. A 'white knight', the Austrian company Voestalpine, was recruited and its alternative bid successfully implemented, in part due to the support of the works councils of both the target and the 'white knight' companies.