TAKEOVERS IN ENGLISH AND GERMAN LAW
Takeovers in English and German Law

Edited by

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Foreword

This volume represents the collected and edited papers of the second biennial Oxford Anglo-German law conference held at St. John’s College, Oxford, on 13–15 September 2001. The conference series, jointly organised by leading German and English law firms and the Oxford University Law Faculty and hosted by Oxford, was the brainchild of Nikolas Tarling, and its purpose is to provide a congenial forum for discussion of key issues in fields of mutual interest by comparisons and contrasts between English and German law in the context of international and European Community developments. The 2001 conference was attended by some 32 delegates and, as in 1999, was marked by a combination of intense work and convivial gatherings, the highlights being a dinner at Pembroke College, where we were warmly welcomed by the new Master, Giles Henderson, who by a happy coincidence was the previous managing partner of Slaughter and May and a dinner at Worcester College, whose Vice-Provost, Professor James Campbell, gave a witty account of the history of the college.

The first volume in the series, Joint Ventures in English and German Law, edited by Dr Eva Michaeler and Professor Dan Prentice, was highly regarded, and I have no doubt that the same warm welcome will be extended to this new volume, skilfully collated and edited by Jennifer Payne. The subject of takeovers is of great topicality and importance. It was ironic that shortly before the conference the proposed EC Takeover Directive failed to be adopted by the narrowest of margins—273 votes for, 273 against!—but it is now being revised and this will allow appropriate account to be taken of the various comments made on the earlier text by the conference speakers. In England the takeover scene has been significantly affected by the regulatory regime introduced by the Financial Services and Markets Act 2000, with an all-powerful Financial Services Authority as the universal regulator, and the Human Rights Act 1998, which is beginning to have a pervasive effect on both the substance and the procedure of regulation in a variety of forms. In Germany the Wertpapiererwerbs- und Übernahmegeset (WpÜG), the Act on Acquisition of Securities and Takeovers, came into force on 1 January 2002. The text is contained in Appendix 1 and a commentary will be found in Appendix 2.

The nine contributors to Takeovers in English and German Law have combined analytical rigour with a profound practical knowledge of takeovers and cross-border mergers. This book is therefore informative not merely on the law but also on such practical issues as the management of conflicts of interest and defence tactics to a hostile takeover.
Foreword

My first pleasurable task is to express the warm appreciation of the Oxford Law Faculty to Hengeler Mueller and Slaughter and May for their financial contribution to the conference. This helps to provide the resources needed to enhance the study of German law in Oxford, which has expanded significantly in recent years with the strong support of the German government and of generous private benefactors. I should also like to thank Nick Tarling, who served as Conference Director, and to the steering group members of the two firms, Ulrich Blech of Hengeler Mueller and George Goulding of Slaughter and May. Especial words of appreciation are due to Slaughter and May’s conference organiser, Alison Hahn, who with the assistance of her colleagues Louise Stoker and Frances Jamieson, organised the 2001 conference with wonderful efficiency, supported at the Oxford end by Alison Beech, Domestic Manager of St. John’s College, other college staff, Arianna Pretto of Brasenose College and my own hardworking secretary, Pat Dibb. Finally, we are grateful to Richard Hart of Hart Publishing, who published the first volume, for undertaking the publication of this attractively produced second book in the series, which should be required reading for all those who are involved or interested in takeovers.

Oxford Law Faculty

20 August 2002.

ROY GOODE
1

Introduction

JENNIFER PAYNE

This book originated at a conference held in St John’s College, Oxford in September 2001. Takeovers are a topic of interest to lawyers, investment bankers and their corporate clients alike. It is a topic which has recently taken on a new dimension in Europe and the timing of this conference, investigating the similarities and differences in the approaches adopted in English and German law to this topic was particularly apt.

On 29 June 2000, partly in response to the successful takeover bid by the UK-based mobile phone company Vodafone AirTouch for its German rival Mannesmann AG, the German Federal Ministry of Finance submitted a draft German Takeover Act (Übernahmegesetz). It was widely accepted that the existing non-binding Takeover Code, which operated by way of voluntary self-regulation, had not created an appropriate legal framework within which takeovers could take place in Germany and should be replaced. Just 10 days before the submission of this draft Takeover Act, on 19 June 2000, the Council of Ministers of the EU adopted a Common Position on the Thirteenth Company Law Directive concerning Takeover Bids, choosing to adopt a ‘framework approach’ to the issue in order to permit the maintenance of national differences.\(^1\) This proposal was, however, rejected by the European Parliament on 4 July 2001. Meanwhile, in England, difficulties have been raised for the existing structure of takeover regulation both by the potential impact of the Human Rights Act 1998 and by the impact of the Financial Services and Markets Act 2000 (FSMA). These are therefore interesting times for those concerned with takeovers, particularly in England and Germany. The conference in Oxford proved an invaluable forum for discussing the impact of these various changes on takeover law in the two jurisdictions. This book, which has arisen directly out of the papers and discussions at that conference, demonstrates what a lot there is to be learned by comparing and contrasting the two systems.

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\(^1\) Common Standpoint, interinstitutional dossier 1995/0341 (COD).
The purpose of this introduction is to provide a brief overview of the subjects discussed at the conference and to give some of the flavour of the discussion of both the contributors and those who attended. One of the interesting issues to arise in the context of takeovers is that of the equality of treatment of shareholders within an offer. Three different forms of equality are identifiable: equality amongst those to whom an offer is made; equality between those who accept an offer and those who sell to the bidder outside the offer process; and the equality engendered by the mandatory bid rule. The first and second forms of equality are well accepted in both the English and German systems. The third is more problematic. The mandatory bid rule requires an acquirer of shares to make an offer when, in the absence of such a rule, an offer would not be forthcoming for the general body of the shareholders. There are good rationales for this rule. Without it there is obviously a danger that a high initial offer will be scaled back once de facto control of the target has been reached. In this way the mandatory bid rule helps to preserve undistorted choice for the target shareholders—they are under no pressure to sell quickly in order to capture that high price. Also, the mandatory bid rule is felt to protect non-controlling shareholders in a company, recognising that other, more general company law protections, such as section 459 Companies Act 1985 in English law, are not capable of protecting minority shareholders against unfairness in all circumstances.

However, Paul Davies argues that the mandatory bid rule comes at a price. Where the ownership of the shares is dispersed, as it tends to be in UK plc's, there are cost disincentives for potential acquirers and consequently the possibility of reduced control shifts. Where ownership is concentrated, as is more common in Germany, there is an additional disincentive for the majority shareholders who will not get a premium for loss of control. Other jurisdictions have tackled these concerns. One possibility is to require the offeror under a mandatory bid rule to pay not the highest price paid to acquire the acquiring block, but merely a fair price. An alternative is to allow the shareholders in the target company to disapply the mandatory bid rules or to modify them in some way or to apply some alternative set of rules, such as agreeing to partial bids. Neither English nor German law has adopted such an approach. An unqualified mandatory bid rule is easier to accept in German law where minority protection for shareholders is stronger than in the UK. However, it seems clear that unqualified mandatory bid rules in both jurisdictions require more thought.

Another topic which causes difficulties for any system of takeover regulation is that of violations of secrecy. These violations are most common before the bid occurs, particularly in the context of hostile takeovers, but obviously can also occur post-bid, for instance where the target's board is searching for a white knight. The UK has clear rules in place in the City Code\(^{2}\) to deal with the issue of secrecy. Interestingly, Germany has adopted a different approach, leaving the

\(^{2}\) Eg, UK City Code on Takeovers and Mergers (the ‘City Code’), Rule 2.1.
issue to be dealt with under general insider dealing principles rather than adopting takeover-specific rules. This does not seem ideal, and Klaus Hopt points out the obvious conflict between insider dealing regulations and takeover law which can arise, arguing that the presently ambiguous situation surrounding the passing on of information in the context of a takeover needs to be resolved. During his review of a cluster of issues surrounding the topic of secrecy in takeovers, both pre-and post-bid, Professor Hopt highlights some of the special difficulties faced in Germany in relation to these issues, such as the impact of the two-tier board structure on the decision as to when instant disclosure of a takeover decision must be made. This issue demonstrates some of the complexities inherent in the German system. The Takeover Act exempts the decision to make a takeover offer from the requirement of instant disclosure found in the general law unless the offeror has failed to comply with the requirements of the Takeover Act requiring mandatory publication of the decision to make the offer, in which case the general law provisions regarding instant disclosure continue to apply. As Professor Hopt argues, these general law provisions are by no means clear in the context of the two-tier board, although the better view is that no disclosure is required until the decision is final within both boards, subject to limited exceptions where the decision of the management board has legal relevance (in addition to business relevance) of its own.

The difficulties associated with insider information have been creating difficulties for multiple function fiduciaries, such as financial intermediaries, for some time. How far can one client protect information that is attributable to the relationship which he or she has with the intermediary from use by the intermediary for the benefit of others with whom it is also in a fiduciary relationship? In England two cases in recent years, HRH Prince Jefri Bolkiah v KPMG and Young v Rhodes Robson, have discussed the use of Chinese walls in this context. This is an issue which is unlikely to go away. Consultation papers published to date suggest that existing provisions under the Core Conduct of Business rules of the Financial Services Authority (FSA), which provide that Chinese walls are an effective means of avoiding conflict of interest difficulties under section 47 Financial Services Act 1986, will be carried forward into the new provisions under FSMA, so that an effective Chinese wall can protect multi-function fiduciaries from the misuse of information offence under the new market abuse regime. This obviously requires an effective Chinese wall to be put in place and at present English law on this point is unclear, particularly in relation to single departments within a firm. The Bolkiah decision suggests that Chinese

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3 German Securities Trading Act (WpHG), s 15.
4 Takeover Act, s 10.
5 [1999] 1 All ER 517.
6 [1999] 3 All ER 524.
7 CP 57 paras 7.6–7.11 and CP 59 para 6.37.
8 See Financial Services and Markets Act 2000, s 118.
walls can exist but that they will be difficult to establish since it is for the firm to demonstrate that there is no risk of disclosure, that is, that the wall is effective to prevent actual and potential conflicts of interest. *Rhodes Robson*, by comparison, albeit only a High Court decision, suggests that it is acceptable to interpret *Bolkiah* as allowing an individualistic approach so that the risk is balanced against the harm which might result on the actual facts of the case. This would allow ad hoc Chinese walls to exist in appropriate circumstances, despite their Lordships’ apparent dislike of this concept in *Bolkiah*. The difficulties associated with conflicts of interest are, if anything, more complex in relation to German banks as a result of the universal banking system operating in that country, as Klaus Hopt explains. Professor Hopt argues that that German experience to date, in particular in relation to the existing German Takeover Code, suggests that self-regulation will not work. The solution, he suggests, will be to take any difficulties arising from the conflicts of interest which are bound to arise to the courts rather than to develop a system akin to the Takeover Panel in London.

One of the great benefits of the English system of takeover regulation is seen as the flexibility (coupled with the longstanding experience) provided by the Takeover Panel. Self-regulation has proved a great success to date. Although the English courts do have a potential role in reviewing the decisions of the Panel, historically the courts have seen that role as one of providing guidance to the Panel as to its future activities rather than reviewing and overruling past Panel decisions.¹ In practice this has allowed the Panel to act as the final decision-taker in takeover regulation. Patrick Drayton argues that a number of changes threaten this situation, in particular the enactment of FSMA which introduces a parallel regulator alongside the Panel in relation to certain of its functions. The new civil market abuse regime under FSMA applies to the parties in takeover bids and regulates behaviour which, pre-FSMA, was regulated by the Panel. Now that FSMA is in force, therefore, there is substantive potential overlap between the functions of the FSA and the Panel in the context of takeovers.

The best outcome, suggests Mr Drayton, will be for the FSA to confine its own intervention in takeovers along *Datafin*-type principles,¹⁰ that is to intervene only after the offer is over, and then only in a punitive capacity. Ideally the FSA will not call into question any decision of the Panel. The FSA does seem to be developing its thinking along these lines, but there could still be problems in practice. In particular the Panel and the FSA are likely to seek to ensure that their decisions are secure in the face of potential legal challenge, and in the case of the FSA this will include any decision on its part not to intervene in a Panel decision. The speed of decision-making in takeovers is likely to deteriorate as a

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¹ *R v Panel on Takeovers and Mergers ex p Datafin* [1987] QB 815.
result. While this may be a benefit to aggrieved parties in contested or competing bids it seems unlikely to benefit the market as a whole.

Given that the self-regulatory ‘soft law’ approach has clearly not been successful in Germany so far, the approach of the German reformers facing the difficult task of revamping the German regulatory system in relation to takeovers, has been to adopt a statutory approach. Thorsten Pötzsch’s analysis of the major provisions within the German Takeover Act highlights the difficulties inherent in rendering rules which exist in a relatively flexible self-regulatory form in the UK into statutory form. Some of these, such as setting the limit at which the mandatory bid rule will operate\(^\text{11}\) are not too difficult, whereas others, such as the extent to which the management of the offeree company in a takeover situation can adopt measures which could result in the frustration of the bid, are more problematic.\(^\text{12}\) Dr Pötzsch argues that the approach adopted by the German Takeover Act, which effectively leaves the final decision to the shareholders, is the most appropriate one in the circumstances.

As regards the relationship between the directors and the shareholders of the target company, obvious issues of conflict of interest arise. The jobs of senior management are at risk in a takeover, and directors have an incentive to oppose takeovers which are beneficial from the shareholders’ point of view. The approach in both England and Germany is to side-line the board in a bid process. As William Underhill and Andreas Austmann’s detailed survey of defence tactics in both jurisdictions makes clear, there is little scope for the target’s management to engage in technical defences to fend off an unwanted bid. A particularly difficult aspect of the directors’ role in this regard is in relation to lock-out agreements. Is it acceptable for directors to enter into legally binding undertakings with a bidder not to recommend a subsequent bid to the shareholders? Although directors can agree not to solicit a third party offer it is generally accepted that directors cannot limit their discretion to act in the best interests of the company at any given time, although the case generally cited in support of this proposition\(^\text{13}\) arguably rests on the basis that there was no intention in that case to create contractual relations—opening up obvious possibilities for circumvention. It also remains unclear whether the general principle that directors may not fetter their discretion means that lock-out agreements can never be valid.\(^\text{14}\) By comparison under German law even the ability of the board to agree not to solicit offers seems open to doubt.\(^\text{15}\) Ultimately, it seems clear that the defence of the company to a hostile bid will in fact depend on winning the battle of words with the bidder, ie convincing the shareholders to reject the bid.

\(^{11}\) Takeover Act ss 29(2) and 35(2).
\(^{12}\) Takeover Act, s 33.
\(^{15}\) See Übernahmegesetz s 33 para 1.
Of course, takeover law is an intensely practical topic and no review of English and German law on this topic would be complete without an analysis of some of the principal legal issues which arise in relation to takeovers involving listed companies in the two jurisdictions. Ulrich Blech and Robert Stern undertake such an analysis, concentrating their attention on share-for-share offers. They first consider ‘single-headed structures’, both where a UK listed company acquires the shares of a German listed company and vice versa, considering the advantages and disadvantages of both schemes. They suggest that some of the difficulties arising from this structure, for example the fact that the ‘target’ shareholders end up with non-domestic shares and then may sell out, thereby depressing the share price, can be solved by adopting a ‘dual headed structure’, whether that be a joint venture or a parallel structure. Joint venture structures, where the top two companies remain as purely domestic holding companies whilst at the same time all the operating businesses are combined under one or both jointly owned sub-holding companies, are complex to set up but offer very real opportunities for the combination of the two businesses. Parallel structures, which are the same as the joint venture structure but in which the underlying businesses remain separate, are simpler to create, but obviously lack the opportunity for real business integration.

POSTSCRIPT

It is worth noting that at the conference in September 2001 from which this book originated it was the draft of the new German Takeover Act which was the focus of interest. Subsequent to the conference and just prior to the Act being finally resolved by the Deutsche Bundestag in November 2001, the draft was subject to a number of amendments and changes. Some of the changes and amendments may well have been initiated by the discussions in Oxford, others were not anticipated. Rather than incorporating these changes and amendments into the papers which were prepared for the conference, it has been decided to leave the chapters unchanged in this respect.

When reading this book it is therefore important to be aware that the final Act, as it came into force on 1 January 2002, incorporates changes which were not discussed at the conference in Oxford and are therefore not reflected in the chapters gathered here. Some of these changes reflect practical necessities, other changes have stronger political implications and are therefore highly controversial. This is particularly true with regard to the ability of the management of a target to frustrate an unwelcome offer. Section 30 WpÜG now provides explicitly that a management board can only do those acts which may result in a frustration of the offer if a prudent management board would have done the same acts if there had been no offer. Furthermore, the board may only implement frustrating acts which are within its competence and which have been approved by the supervisory
board. Therefore, the ability to frustrate unwelcome offers has been extended even beyond what had been expected under the draft Act as it was discussed at the conference in Oxford. The text of the final version of the Act (in German) is included at Appendix 1 of this book. A commentary (in English) of the major provisions of the Act is included at Appendix 2.
The Notion of Equality in European Takeover Regulation

PAUL L DAVIES

1 THE POTENTIAL SCOPE OF EQUALITY RULES IN TAKEOVER REGULATION

In any comprehensive system of takeover regulation there are three relationships upon which the regulation needs to focus. Two of them are examples of the traditional relationships the regulation of which stand at the heart of company law: that between the directors of the target company and its shareholders (as a class) and that between the controlling shareholders, if any, of the target (often plus directors) and non-controlling shareholders. The third is the relationship between the bidder and the target company (its directors, its shareholders as a class or its non-controlling shareholders, as the case may be). The regulation of this third relationship is a novel one for company law, and tends, overall, to give takeover regulation its particular characteristics, because the bid also provides the spur and the context for the takeover specific regulation of the first two relationships. Finally, takeover regulation could also deal with the relationship between the bidder and non-shareholder stakeholders in the target company, such as employees, though in fact takeover regulation as such in Europe (in contrast to general corporate law) tends to touch on this last relationship only gingerly.

It is conceivable that the regulation of these relationships could be supplied by means of a development of the principles of general corporate law, without the separation out of a distinct body of takeover rules. To some extent this is the approach adopted by state law in the United States, though even here Federal Law has provided a specific set of rules for information disclosure in takeover bids.²

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² FBA. Cassel Professor of Commercial Law at the London School of Economics and Political Science. I should like to thank Matthias Boizard and Ferna Ipekel, research students at the LSE, for discussion of some aspects of the material which appears in this paper.

¹ Also highly relevant is the relationship between the board and the shareholders of the bidding company, but this is normally left to be regulated by general company law.

Moreover, even in Delaware, where the state legislature has remained largely silent on the subject of tender offers, the courts’ development of the principles of general fiduciary law to deal with takeovers has led to an identifiable body of tender offer ‘case-law’ which displays, to a significant degree, a set of dynamics which is all its own. In any event, in Europe it is more usual to have a distinct set of statutory or self-regulatory rules aimed at takeovers, often developed as part of the reform of the law of public share markets, though some rules relevant to takeovers may still be found in the general corporate law.

The first relationship—directors and shareholders as a class—raises well-known issues of conflicts of interest. Broadly, because the jobs of senior management are at risk in a takeover, the directors may have an incentive to oppose takeovers which are beneficial from the shareholders’ point of view and to promote changes of control which are not, but which preserve the incumbent management in post or confer other private benefits. There are several techniques which are available to deal with this problem. In innovative fashion the City Code on Takeovers and Mergers in the UK seeks to side-line the board in the bid process: there are to be no management actions which have a frustrating effect on the bid or prevent the shareholders from taking a decision unless the shareholders in general meeting approve the action in the face of the bid. Such a rule turns the third relationship—bidder and target company—into a relationship between, principally, bidder and target shareholders, either as a class or with the controlling shareholders. A more traditional approach, deployed, for example in Delaware, is to leave substantial management powers with the board, even during bids, but to seek to control the resulting conflict of interest through the established techniques of fiduciary duty or exercise of the shareholders’ power to remove directors with whom they are dissatisfied. Under this rule, the bidder has a principal/agent relationship with both target board and target shareholders.

3 Though see § 203 of the Delaware General Corporation Act on post-acquisition business combinations.


5 See n 11 below.

6 Panel on Takeovers and Mergers, City Code on Takeovers and Mergers, 7th edn., May 2002 (hereafter ‘City Code’) General Principle 7 and rule 21.

7 Since the non-frustration rule is not a passivity rule—the target board can, for example, seek a competing bidder or ‘white knight’, invoke the competition authorities or simply give target shareholders persuasive advice against the bid—the bidder still has a lively interest in the actions of the target board.

The regulation of the bidder/target board relationship is, of course, very controversial. It is ultimately the matter upon which the proposed thirteenth Directive of the EU was rejected by the European Parliament in July 2001. It is also the subject of papers elsewhere in this volume.9 This paper will concentrate on the other two relationships identified above: those between controlling and non-controlling shareholders of the target and between bidder and target shareholders.10 More particularly, it will concentrate on the role of the idea of equality in the regulation of these two relationships. It will look at the issue in part from a comparative perspective, taking six major European economies which either have substantial experience with takeover regulation or which have recent experience of reform efforts in this field. They are: Austria, France, Germany, Italy, Switzerland and the UK. All place emphasis on the equal treatment of shareholders of the target in a takeover.11 But what is the function of the equality notion? What goals does it serve?

The focus of this paper is on companies whose securities are traded on a public market. Although takeover offers are not logically confined to such companies, clearly the acquisition of shares of a target company is facilitated if the target’s shares are traded on a public market. Probably for this reason, many countries have developed distinct rules for control transactions as part of their regulation of public markets more generally12 and leave control transactions for non-traded companies to be dealt with by the general governance rules of company law.

In the takeover context the equality principle is essentially a sharing rule. The consideration which the acquirer is prepared to pay for control of the target company should be shared equally among shareholders of the same class and

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10 As noticed, under the City Code this is the main relationship between bidder and target which has to be regulated, once the target board has been side-lined, but even under the Delaware approach this relationship comes into focus if the board allows the bidder access to the target’s shareholders, either voluntarily or under court pressure.

11 For Austria see Federal Act on Takeover Bids, 1998 (hereafter ‘ÜbG’) Art 3; for France see Règlement No 2002–04 of the Commission des Opérations de Bourse (hereafter ‘COB regs’) Art 4 and Reglement Général du Conseil des Marchés Financiers (hereafter ‘CMF regs’) Art 5-1-1; for Germany see Gesetz zur Regelung von öffentlichen Angeboten zum Erwerb von Wertpapieren und von Unternehmensübernahmen, December 2001 (hereafter ‘WpUG’) Art 3(1); for Italy see Legislativa Decreto 58 of 24 February 1998 (hereafter ‘Decree 58’) Art 103(1) and Consob Regulation 1971/1999 (hereafter ‘Consob Regulation’) Art 42; for Switzerland see Loi Fédérale sur les Bourses et le Commerce des valeurs mobilières (hereafter ‘LBVM’) Art 24 and Ordonnance de la Commission des OPA sur les Offres Publiques d’Acquisition (hereafter ‘Ordonnance sur les OPA’) Art 1; for the UK City Code General Principle 1.

12 Thus, in France the regulation applies only to companies which are or, in some cases, have been traded on a regulated market (COB regs, Art 1; CMF regs, Art 5-1-1). To the like effect Art 22 of the LBVM (Switzerland); art 1 of the WpUG (Germany); and Art 2 of the ÜbG (Austria). Contrast the City Code (UK) p A8 and Decreto 58, Art 102(2) (Italy), applying more broadly.
proportionately among shareholders of different classes. However, the equality rule arises for consideration in a wide range of circumstances within takeover bids. In order to begin to identify the function of the notion of equality in this area, it is helpful to set out three broad circumstances (or sets of circumstances) where the equality notion could be deployed by rule-makers in relation to takeovers. First, the rules could require equality among those to whom the offer is made. Thus, it could be stipulated that all members of the same class of shareholder should be made the same offer; that members of different classes of shareholder should be made comparable offers; and that increases in the offer made in the course of the bid should be extended to those shareholders who have accepted the earlier, lower offer. More controversially, it could be required that the emergence of a competing offeror permits shareholders to resile from their acceptances of the rival, but lower offer. This can be referred to as equality within the bid.

Second, the equality notion could be extended so as to embrace equality between those who accept an offer and those who sell to the bidder outside the offer process. Thus, if a bidder buys shares in the market during the offer period but at a higher price, it could be required to raise the offer price to the level of market purchases and perhaps also, if it is not already a cash offer, to provide a cash alternative. This can be referred to as equality between offerees and sellers outside the offer. The most intriguing issue in this area is whether the rule should be confined to those who sell outside the offer but during the offer period or whether purchases by the offeror prior to the formal offer should have any influence on the level or type of consideration required to be offered in the bid. In a large-scale bid the acquirer’s strategy is likely to couple a public offer to all the shareholders with the pre-bid acquisition, through the market, of as large a ‘launch-pad’ shareholding in the target as the acquirer can manage without revealing the subject of its intended offer. So, the issue of the impact of prior purchases on the equality principle is an important one in practice.

Third, equality could be taken to require an acquirer of shares to make an offer when, in the absence of such a rule, an offer would not be forthcoming for the general body of the shareholders. Thus, the acquisition of a de facto controlling block of shares in a company could trigger a requirement on the new controller to make a general offer for the rest of the shares not held by it. This is the famous mandatory bid rule and may be said to express the idea of securing equal treatment upon a change of control. The mandatory bid technique requires a number of consequential questions to be answered: what is control;
should there be any exceptions to the mandatory bid requirement; if there are, how does one deal with reinforcement of control; at what level should the general offer be pitched and what type of consideration should be offered? The answers to these questions shed light on the underlying rationale for requiring the mandatory bid in the first place.

II RATIONALES FOR EQUALITY RULES

The takeover rules in all six jurisdictions contain some equality rules falling in each of the above categories, including, perhaps surprisingly, mandatory bid rules (the third category). Why do takeover rules place so much stress upon equality of treatment? It might be said that this is no more than a reflection within takeover rules of a general principle of company law of equal treatment of shareholders. One can accept that there is a presumption in all company laws in favour of equal treatment of shareholders of the same class, but it is not a strong presumption. Thus, in British law directors are under a duty to treat shareholders fairly but not necessarily equally. Again, general British law accepts the idea that in principle controlling shares are worth more than non-controlling ones, which contradicts at least some versions of the mandatory bid rule. Perhaps most telling is that, whereas some company laws have long provided a right for minority shareholders to sell out when a single shareholder or a group acting in concert acquire 90 per cent or more of a company’s shares, before the advent of specific takeover regulation the conferral of such a right where there was merely an acquisition of de facto control (usually set at about a 30 per cent holding) seems to have been unknown. This suggests that something more than the working out of a general presumption in favour of equal treatment has influenced the content of takeover regulation in this area.

The rest of this paper argues that three rationales can be advanced which, singly or together, go far to explain the centrality of the idea of equality in takeover regulation. These rationales are: providing the conditions under which the choice of the target shareholders in favour of or against a particular bid is

15 ÜbG Part 3 (Austria); CMF regs ch V (France); WpÜG ch 5 (Germany); Decree 58, ch II, section II (Italy—in this case applying only to companies whose securities are traded on regulated markets, cf n 6 above); LBVM Art 32 (Switzerland); City Code r 9 (UK).


17 See Short v Treasury Commissioners [1948] AC 534, HL.

18 All the percentage rules relating to control which are discussed in this paper apply to shares held by the bidder or those acting in concert with it. Such aggregation rules are important for otherwise the bidder could easily avoid rules based on percentage shareholdings. However, an analysis of the different ways in which aggregation is approached in the various jurisdictions is beyond the scope of this paper.

19 See the discussion below in s II.3.
undistorted; redressing the balance between shareholders close to and those not close to the market; and giving more effective protection to non-controlling shareholders as against controlling shareholders. However, the equality rules carry with them certain costs, notably that they may operate so as to reduce the number of offers made. For some regulators, that consequence may indeed be a welcome one, but, where the regulatory approach is neutral on the matter, the challenge for the rule-maker is to maximise the benefits of the equality principle, whilst minimising its chilling effects. We shall examine each rationale in turn, paying attention to both costs and benefits.

1 Undistorted Choice

Equality Within the Bid

Undistorted choice on the part of shareholders is clearly a crucial element in the design of takeover rules which deal with the board/shareholder relationship in the target by side-lining the directors of the target and giving the bidder free access to put an offer to the shareholders of the target. The whole weight of decision-making on bids then falls on the shareholders of the target. If it is not possible to have confidence in the way in which those shareholders decide whether to accept the bid or not, then the whole structure of the regulation is called into question. A central aspect of confidence in relation to shareholder decision-making is that the bidder should not be able to pressurise the shareholders of the target into acceptance of a bid which they do not perceive to be in their interests. Even in those systems which interpose the target board between bidder and target shareholders, the principle of undistorted choice is important for those bids which the directors allow, or are required to allow, to go forward to the shareholders for consideration. Although the board may screen out offers which are formulated so as to pressurise the shareholders into acceptance, they cannot be relied upon to do so in all cases. For example, where the directors have an interest in promoting the bid, as in a management buy out, they may support the pressure on the shareholders to accept the offer.20

The opportunity for the bidder to attempt to distort target shareholders’ decisions arises from the collective action problems which those shareholders face. In a takeover bid decision-making by the shareholders is atomised. A takeover does not normally involve any decision of the company and thus a meeting of the shareholders.21 Rather, the bidder deals with each shareholder separately and, so far as the decisions of other shareholders are relevant to the

20 In this situation independent advice on the merits of the bid becomes of even more importance than it normally is. See, for example, City Code, n 1 to Rule 3.1.
21 Though, obviously, this may happen in some cases, as where the shareholders meet to approve defensive actions on the part of the board.
decision of any one shareholder, shareholders may find it hard to obtain reliable
information about their fellow shareholders’ intentions. Thus, there are endless
possibilities for ‘divide and rule’ strategies on the part of acquirers. An obvious
technique from the bidder’s point of view for pressurising target shareholders
into acceptance of a bid which they think is sub-optimal is to offer the (overall
inadequate) consideration to the shareholders of the target in a skewed manner.
Thus, a crude form of this technique is to offer an enhanced price to selected
shareholders or to those who respond quickly to the offer, so as to secure de
facto control of the target or something near it, thus leaving the other share-
holders the unattractive choice of accepting the lower offer or remaining as
minority shareholders under the new controller. The rule that all shareholders
of the same class must receive the same offer helps to combat this type of
approach; as does the rule that when a public offer is made, all classes of equity
shareholder must be included in it.22 The enhanced price may be disguised, of
course, in a number of ways, and it is important that the ‘anti-variation’ rule be
broad enough to pick up such cases.23 An extension of the variable consideration
technique, where there is more than one class of voting shares, can be regulated
by a rule that different classes of share must receive comparable offers.

Thus, our first class of rule, equality within the bid, helps to preserve undis-
torted choice for target shareholders. Of course, this type of rule is not enough
by itself to guarantee undistorted choice. Three examples can be given of dis-
torted choice problems which an equality rule arguably does not deal with.
First, an offer which is open only for a short period of time might be said to
respect the principle of equality, since all receive the same offer, but such offers
put pressure on shareholders to accept before they have had a proper opportu-
nity to assess the offer. This problem may be dealt with by rules requiring the
offer (and any variation of it) to be open for a minimum period of time, and
such rules are now virtually universal.

Second, even in the context of a uniform offer irrational shareholder decision-
making may result from inadequate information, and it is not surprising, there-
fore, that a central element of all takeover regulation is the requirement that
large quantities of information be provided by both bidder and target board to
the shareholders of the target.

Third, even with these safeguards, shareholders may be led to accept an offer
which is regarded by them as sub-optimal. As Professor Bebchuk has pointed
out,24 from any individual shareholder’s point of view, there are three, not two,
possible outcomes of an offer: the offer is rejected; the offer is accepted by the

22 CMF regs Art 5-1-2 (France); Ordonnance sur les OPA, Art 10 (Switzerland); City Code r 14
(UK).
23 Cf City Code (UK) r 16.
24 L Bebchuk, ‘Pressure to Tender: An Analysis and a Proposed Remedy’ in JC Coffee, L Lowenstein
and S Rose-Ackerman (eds) Knights, Raiders and Targets, (Oxford University Press, New York,
majority of the shareholders, including that individual; the offer is accepted by a majority of the shareholders which does not include that individual. The shareholder may prefer the first outcome (because he or she does not think the offer attractive), but may regard the third as so undesirable (because he would end up holding a minority position under a new controller of whose policies he disapproved) that he or she votes for the second outcome in order to avoid the third. However, this collective action problem is easily solved by requiring the offer to remain open for a short period after it has become clear that the majority are in favour of it.25

Thus, the argument is not that equality within the bid guarantees undistorted choice, but rather that it is a rule which plays an important part in the achievement of that objective and that it sits comfortably within the corpus of takeover rules, along with other rules aimed at the same objective.

Equality with Sellers Outside the Bid

It is obvious that mechanisms for directing additional benefits to some shareholders, in exchange for their shares, are not confined to unequal offers to shareholders. In fact, inequality is perhaps more likely to result from actions which take place outside the formal offer, most obviously by purchases of the shares of some shareholders at a higher price than is offered in the general bid. Practices of this type were in fact a major factor behind the introduction of the City Code in the UK in the late 1960s. This risk can be guarded against, to some extent, by prohibiting purchases of shares during the offer period other than through the general offer26; or, less intrusively, by prohibiting market purchases in share exchange offers only, on the grounds that the offer in such a case is not for cash, whilst market purchases will have been on that basis.27 Alternatively, market purchases may be permitted but be coupled with a rule requiring any higher price paid outside the bid to trigger an upward revision of the general offer.28 This latter rule could be accompanied by a requirement that purchases outside the offer be on-market, in order to promote the transparency of the price paid outside the general offer.29

However, the application of the equality rule to acquisitions outside the offer raises two interesting questions. First, since market purchases will have been for

25 See ÜbG Art 19(3) (Austria); City Code r 31.4 (UK).
26 Cf Rule 10b-17 (US)
27 Cf Règ gén Art 5-2-12 (France). A share exchange offer necessarily exposes the acceptor to the risk of market fluctuations in the period between acceptance of the offer and delivery of the securities, and there may be additional uncertainty about the cash value of share exchange offers where the securities offered are ‘unseasoned’.
28 ÜbG Art 16(2) (Austria); CMF regs Art 5-2-11 (France); WpÜG Art 31(4) (Germany); Ordonnance sur les OPA Art 10 (Switzerland); City Code r 11 (UK).
29 CMF regs Art 5-1-11 (France); Consob regulations, Art 42 (Italy). An off-market transaction could involve an artificially low price collusively set by seller and purchaser, which is compensated for in other (non-disclosed) ways.
cash, the question arises whether the offeror should not merely have to raise the level of its offer but also, if this is not the case already, introduce a cash alternative. On the one hand, equality of treatment might be thought to demand cash, but a cash requirement undoubtedly is an expensive rule to impose in a bidder, at least in the middle of a bid. However, the bidder can easily avoid this predicament by not purchasing shares on the market during the course of a share-exchange offer. Probably for this reason the British and German rules are strict on the requirement for the offer to be in cash or accompanied by a cash alternative if purchases for cash occur during the offer period, whilst the French rules prohibit purchases outside the offer in the case of a share-exchange offer.

The second question is whether shares in the target purchased before the offer should have an impact upon the required level or composition of the consideration offered in the general bid. It would be an easy way of pressurising shareholders of the target, both before and after the bid, if purchases made in the period before the bid could be at a higher level and/or in a more favourable form of consideration than the general offer. Those dealing with the bidder in advance of the general offer would feel under pressure to accept the offer being made by the potential bidder, if they knew or suspected that a subsequent general offer would be less favourable, whilst those receiving the general offer might find that the bidder already had de facto control of the target. Thus, requiring the general offer to be at the level of the prior purchases is a common requirement, though there are variations between setting the general offer price at the highest level paid in the market (thus giving no opportunity to the bidder to disfavour the general offerees) and setting the level of the general offer at some average of the market price. Equally difficult is knowing whether to require the offer to be in cash if the prior acquisitions have been for cash. Probably because a cash requirement is potentially burdensome, and might chill takeover offers, both the British and German rules allow some purchases prior to the bid, without the cash requirement being triggered. The City Code sets the relevant level at 10 per cent (over the 12 months before the bid), whilst the German law sets it at five per cent (over the previous three months), though the British rules

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30 The City Code (r 11.1) requires cash if any cash purchases are made during the offer period; the German rules apply if the cash purchases exceed 1% (WpÜG Art 31(3)).
31 CMF regs Art 5-2-12.
32 City Code (UK) r 6 requires the consideration offered in the bid to be at the highest level paid for shares acquired in the three months prior to the bid (unless r 11 below n 28 imposes a different result). The German rules appear to deal with this issue, where the acquisition was not for cash, under the general provision about the fairness of offers: see n 34 below.
33 R 11.1(a) (the rule is applied on a class by class basis). R 11.2 now requires a share offer where the 10% limit has been exceeded on a share exchange basis.
34 WpÜG Art 31(3) and WpÜG—Angebotsverordnung, 27 December 2001, Art 4.
expressly preserve to the Panel the right to require cash, even though the 10 per cent level has not been reached, if the equality principle requires this. The Panel has indicated that an appropriate case might be where the vendors are the directors of the target.

Mandatory Bids

The mandatory bid rule is normally discussed in connection with protection of minority shareholders, and will be so discussed below. However, it can be argued that a mandatory bid rule also protects undistorted choice by shareholders. Although the rule cannot be justified on the basis of pressure to accept a general offer, since ex hypothesi there would not be one in the absence of the rule, nevertheless, the absence of a mandatory bid rule would permit the acquirer to put pressure on those to whom private or market offers are made as part of a plan to acquire control. The implicit statement by the acquirer is to the following effect:

I offer you an attractive price for your shares. If you do not accept it now, I may not repeat it and, in addition, you may find that your shares have declined in value because I may not be prepared to make a general offer to all shareholders once I have obtained control of the company.

In a private purchase this statement may be made explicitly. However, since the main function of the mandatory bid rule is probably in connection with minority protection, a full discussion of the rule is postponed until then.

Conclusion

All three types of equality rule can contribute to the promotion of the goal of undistorted choice. In practice, however, the greatest opportunities for bidders to differentiate among shareholders arise out of the freedom offerors would have in absence of regulation to strike more favourable deals with some shareholders outside the general offer. In consequence, of the three aspects of equality it is the rule of equality between offerees and sellers outside the offer and the mandatory bid rule which are of the greatest importance for the promotion of undistorted choice.

2 Protection of Those Not Close to the Market

The argument here is that shareholders (typically individual shareholders), who are not close to the market, may be disadvantaged in comparison with those

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35 R 11.1(c).
36 Note 4 to r 11.
who are (typically institutional shareholders), in their ability to respond to offers which are made apparently on equal terms. This argument has been particularly important, historically, with the British regulator,\textsuperscript{37} though it may have played a part in the design of other systems of takeover regulation as well. Since it is an argument about the relationship of different types of shareholder with the market, it does not have a bearing on the first class of equality rules (equality within the bid) but it may provide an additional rationale for regulation through the second and third types of equality rules (equality with sellers outside the bid and equality upon a change of control). This rationale for regulation has obvious policy resonance in an era of privatisation, involving, at least in part, the sale of securities to citizens on a large scale.

This argument can be used to address an objection made by those who say that even where a bidder purchases shares outside the general offer, whether before or during the bid, the principle of equality is not infringed, provided those purchases are made on a public market. By definition, all shareholders are entitled to trade on a public market and so can accept whatever offer the bidder makes through the market mechanism. The thrust of the argument about those close to and not close to the market is that the above objection carries weight only if the bidder stands in the market for a significant period of time and is prepared to deal throughout that period on the same terms, which tends not to be the case. Otherwise, in practice those close to the market may be better placed to accept the favourable terms on offer outside the bid, whilst those not close may in fact be unable to accept them.

However, it can be doubted whether the distorted choice arguments, made above, are defeated, even if all shareholders do have equal access to the market and so in fact have an equal opportunity to dispose of their shareholdings on the market. Since, ex hypothesi, the acquirer is willing to purchase only a proportion of the company’s shares on the market, the target shareholders, in the absence of regulation, may feel pressurised to accept the market offer, because any general offer may be lower or not forthcoming at all. If a general offer is made later, the now non-controlling shareholders may also feel pressure to accept it, because the bidder already has de facto control of the company. In

\textsuperscript{37} Cf the remarks of the British Panel in its 1970/1 Annual Report, referring to the circumstances causing the introduction of the rule that purchases outside the offer might require the offeror to include a cash alternative in the general offer. ‘There were several occasions during the year when an offeror who had announced a paper bid, which was or was likely to be opposed, sought to decide the contest by heavy purchases of offeree shares for cash in the market or outside it, making later any upward revision to the terms of his paper offer which might be required. To the offeror, his actions appeared unobjectionable. . . At times, however, the technique appeared . . . to be in breach of General Principle 8 (now GP 1) which requires all shareholders of the same class to be treated similarly by an offeror company. The breach appeared all the more grave when the offeror succeeded in buying control of the offeree company in the market while shareholders were still digesting the offer document with the result that, frequently, the more experienced or better advised investors were found to have realised their investment for cash while the remainder had to be content with the offer of less marketable paper’.
other words, under the undistorted choice argument a sharing (equality) rule is imposed, not because of any perceived inequality in access to the market (which may or may not exist), but as a remedy to deal with untoward pressure on shareholders to decide in favour of the bid. The gravamen of the undistorted choice principle is that shareholders must not be pressurised to accept an offer they think is sub-optimal, even if they all have an equal opportunity to submit to that pressure. Illegitimate behaviour is not legitimised simply because it is applied to all shareholders. By contrast, under the distinction between those close to and those not close to the market, the sharing rule is indeed a response to a perceived inequality (in access to markets). So, the proximity to the market argument is a distributional argument (as among different classes of shareholder), whereas the undistorted choice argument is an efficiency argument (based on the premise of promoting allocational efficiency).

As with equality within the bid, the rule of equality between offerees and sellers outside the offer is only one type of rule for the protection of those not close to the market. Other, non-equality rules support the rationale of protection of unsophisticated investors, such as the rules which slow down the pace at which acquirers can build up positions through market purchases.38

3 Protection of Non-Controlling Shareholders

The Mandatory Bid Rule and Corporate Law Sell-Out Rights

With the rationale of protecting non-controlling shareholders, equality rules in takeover regulation join the mainstream of company law, in terms of objectives, but do so in a rather dramatic way. By requiring an acquirer of de facto control of a company (usually defined as holding one third of the voting rights) to make an offer, at a fair price, to purchase the remaining shares, the mandatory bid rule confers an exit right on non-controlling shareholders. A number of countries have long had unilateral exit routes for minority shareholders where a single shareholder or a group acting together has acquired 90 per cent or more of the shares of a company, sometimes only where that percentage has been reached as the result of a general offer,39 and sometimes no matter how that level of majority holding has been reached.40 However, the mandatory bid rule clearly goes much further.

38 See City Code, r 5 and SARs (Rules on Substantial Acquisitions of Shares) 1-2. These rules may also function to protect incumbent management to some extent; they give management a little more time to respond to the creation of a controlling block by a third party.
39 Companies Act 1985 (UK) s 430A.
40 Decree 58 (Italy) Art 108 (90%). Further, some countries use exit at a fair price as a remedy for minority oppression (eg Companies Act 1985 (UK) s 459), but here there is no unilateral right to exit the company, at best an entitlement to do so if oppression is made out.
The Winter Group has recently recommended that a sell-out right, set at somewhere between 90 per cent and 95 per cent, should become a requirement of EC law in the aftermath of a takeover offer. The Group suggest three reasons for an exit right at this level: protection of minority shareholders against abuse by the new controller; protection against the vagaries of an illiquid market for the company’s shares; and protection against pressure to tender. However, it is highly doubtful whether an exit right to the 90 per cent level adequately achieves any of the objectives which the Group attributes to it. Taking the third rationale first, pressure to tender results from a shareholder’s fear that it will not be able to resist unfavourable action on the part of the new controller, if the bid is successful. That fear is likely to be generated by levels of shareholding on the part of the acquirer which are much lower than 90 per cent. As we have noted above in Section II.A undistorted choice requires a rule which enables the non-acceptor to change its mind once it is clear that the bidder has acquired control, no matter what the level of control may be. The reason for this is that the powers of the controller to abuse the minority are not uniquely linked to a 90 per cent level of shareholding, so that the first rationale is also inadequately achieved by a sell-out right confined to this level. The second rationale seems more plausible: the smaller the size of the outstanding shares, the more illiquid the market and 10 per cent will often be too little to support an effective market in a way that, for example, a 25 per cent share can. However, the ability to sell into a liquid market does not constitute an adequate protection against abuse by controlling shareholders, unless the fear of abuse is fanciful and not shared by the market as a whole. Otherwise, the risk of abuse will have been factored into the market price, so that selling will enable the shareholder to crystallise its loss but not to be saved from it. For all these reasons, it is useful to ask what a mandatory bid rule can contribute to the achievement of the goals identified by the Winter Group.

It seems likely that, historically, the main explanation for the sell-out right at the 90 per cent level is that it was seen as ‘a fair counterpart for the squeeze-out right conferred on the majority shareholders and a component in the proportionality of the squeeze-out solution.’ A squeeze-out right at the 90 per cent

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41 Report of the High Level Group of Experts on Issues Related to Takeover Bids, Brussels, January 2002, p. 63. This was set up to examine certain issues connected with takeovers after the European Parliament’s rejection in July 2001 of the Council’s common position and, indeed, of the compromise reached between Parliament and Council in a Conciliation Committee.
43 Clearly, the size of the controlling block has some impact upon the powers of the majority because many important shareholder decisions require supermajority approval. However, corporate laws are more likely to set supermajority approval at two-thirds or three-quarters level than at nine tenths, so that the emphasis on this last fraction remains puzzling.
45 Above, n 42.
level or above is a feature of the corporate laws of most European states, though, again, sometimes provided only where the relevant percentage has been achieved as a result of a public offer, sometimes no matter how the large majority has been acquired. Expulsion rights exercisable only after a public offer which has been accepted by the overwhelming majority of the independent shareholders of the target has the advantage that it makes the price of the shares to be compulsorily acquired easier to fix, since normally the price in the public offer can be used. The squeeze-out right represents a recognition of the hold-up power which the minority are able to exploit if a 90 per cent holder wishes to move to 100 per cent, for which there may be good business reasons, notably the full integration of a subsidiary into a group. The availability of the squeeze-out mechanism can thus act as an incentive to bidders, for it eliminates the hold-up power which the minority can exploit where the bidder has pressing reasons to move to 100 per cent ownership. For this reason, the Winter Group recommended it become part of EC law. Nevertheless, it is difficult to accept the equivalence of the sell-out and squeeze-out rights at the 90 per cent-plus level. In the latter the 90 per cent-plus figure probably is pitched at a level which accurately identifies the mischief in question (hold-up powers for the minority), whereas in the former, effective protection against majority abuse or, still more, pressure to tender would seem to require a mechanism which is triggered at a much lower level of shareholding.

The Functions of the Mandatory Bid Rule

Whatever may be the appropriate policy on sell-out rights in general corporate law, the mandatory bid rule from takeover regulation provides a dramatic example of the unilateral exit right, because it is triggered by such a small controlling holding, normally one third or 30 per cent of the voting rights in the company. For this reason, the mandatory bid rule normally carries with it more exceptions and derogations than a buy-out at the 90 per cent-plus level, so that for

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46 Decree 58 (Italy) Art 111 (98%); LBVM (Switzerland) Art 33 (98%); Companies Act 1985 (UK) s 429 (90%). Where the rule is attached to the public offer, it is sometimes framed in terms of acceptance by 90% of the offerees (on a class by class basis), which is a more demanding test than simply holding 90% of the shares of a class, because pre-bid holdings of the acquirer do not count.

47 CMP regs ch VII (France—95 per cent). For Germany the WpÜG adds to the Aktiengesetz a 95% expulsion right (AktG Arts 327a–f), which is justified on the grounds that ‘Die Praxis zeigt, dass Kleinbeteiligungen oftmals missbraucht würden, um die Mehrheitsaktionär bei der Unternehmensführung zu behindern.’ (Begründung, Allgemeiner Teil, para 9).


49 Above n 41.

50 It may be significant that in the UK the sell-out right was introduced into the Companies Act only in 1947 whereas the squeeze-out right had been added in the 1929. Further, in Germany the newly added squeeze out right has no sell-out equivalent, though, within a public offer, the minority are protected by the mandatory bid rule and outside it by Konzernrecht.
example a bid is not required in the case of 30 per cent holding acquired as a result of a corporate rescue, where a higher value is placed upon the success of the rescue than on equal treatment of shareholders. Because of these derogations, the rules have to deal with reinforcement of control as well as its acquisition. Can a person who lawfully holds 30 per cent plus simply add to his or her holdings at will? Unless the shareholder already has de jure control of a company, it is not normally permitted for that person to make additional acquisitions, though most jurisdictions, but no longer the UK, allow de minimis acquisitions without the bid obligation being triggered.51

We have already noted that the mandatory bid rule furthers the policy of providing the conditions under which shareholders’ decisions are undistorted, by removing pressure on shareholders to sell out to the acquirer who is in the process of building up a controlling shareholding. This is because those who do not accept will know that, if the acquirer does succeed in assembling a controlling block, an offer on fair terms will have to be made to the general body of shareholders. This is the *ex ante* effect of the rule. However, by the same token, the rule also has an effect *ex post*, when the mandatory bid is triggered, which effect is more than just the implementation of the promise made *ex ante* that a general bid would be forthcoming. This is because the general offer operates for the benefit of all the shareholders in the company, whether or not they treated with the acquirer whilst it was building up its controlling stake.

The *ex post* impact of the mandatory bid rule can be justified on a minority protection rationale. What the mandatory bid rule prevents is acquisition of control over the whole of the company’s assets by the purchase of only a proportion of the shares. It thus removes the incentive on the controller to exploit the private benefits of control and channels acquirers towards acquisitions whose financial rationale is based on more efficient exploitation of the company’s assets. For this reason, it is not surprising to observe that the mandatory bid rule goes hand-in-hand with controls over partial bids: indeed, to maintain a mandatory bid rule, whilst permitting offerors freely to launch partial bids, would be incoherent.52 A partial bid may be preferable to permitting the building up of a controlling stake through market purchases because it is more likely to involve equal treatment of those who sell out to the acquirer, but in terms of its impact upon the remaining non-controlling shareholders a partial bid has

51 In the UK acquisitions of 2% and 1% of the target’s shares in any one year have been permitted, but that facility has now been withdrawn, seemingly as a result of the court decision in *Re Astec (BSR) plc* [1998] 2 BCLC 526, which revealed the limited scope of the statutory minority protection law where the minority feared unfair treatment from the controllers but could not show that it had yet occurred. The Panel retains a general discretion to exempt from the mandatory bid rule, which could be exercised in the case of de minimis acquisitions.

52 There could either be prohibition of partial bids (as under WpÜG, Art 32 (Germany)); special rules for partial bids (as under the City Code r 36 (UK), where the regulator’s consent for partial bids is required) or a subjection of the partial bid to the mandatory bid requirement if the result of the partial bid falls within the parameters of the mandatory bid rule (as in ÜbG Art 22/11—Austria).
no less of an impact than a stake built up through private deals or market purchases.

The mandatory bid operates in two ways to secure the interests of non-controlling shareholders. First, the unilateral exit right at a fair price can be presented as a pre-emptive strike at illegal acts of oppression of the minority which the new controller may engage in. The strength of this argument depends upon establishing that the remedies which company law grants in the face of actual oppression are inadequate, for otherwise it is difficult to see why the shareholder should have a right of exit as a protection against illegal acts which may or may not occur. The fact that a particular person has acquired a controlling position in the company does not normally justify a prediction of future illegal acts. Nevertheless, in systems where minority protection remedies are weak, either because the law does not provide any or because it is difficult to show that the relevant rules or standards have been transgressed by the controlling shareholder, the mandatory bid rule does provide non-controlling shareholders who anticipate unlawful conduct with an effective remedy, albeit one which requires the shareholder to terminate his or her relationship with the company entirely on the basis of a possibly difficult judgement about the future conduct of the new controller.

An alternative and less demanding rationale, which assumes that the new controlling shareholder will remain on the correct side of the dividing line between legality and illegality, is that the interests, if not the rights, of the non-controlling shareholders are likely to be adversely affected by a change of control. The acquirer, even if it does not intend to loot the company, may embark upon a different and less successful strategy; may be less respectful of the minority’s interests and rights; or may just simply use the acquired control systematically for implementing a group strategy at the expense of the new group member company and its minority shareholders. In the last case, where a previously independent company becomes a member of a group, there will be no guarantee that it, rather than some other company in the group, is given the opportunity to attack a promising new market or to develop a promising new product. For the shareholders of the holding company it may be beneficial that these opportunities be allocated to another group member, but in that situation the minority shareholders in the new subsidiary will lose out.

On this analysis a change of control constitutes a significant alteration in the nature of the company in which the shareholders have invested, which should entitle them to an exit right at a fair price. Once put in these terms, it becomes clear that the acquisition by a new shareholder of a controlling block is but one of a number of examples of developments in the life of a company which could

53 It was the perceived premature nature of the minority’s claim which defeated them in Re Astec (see n 51).
54 Though it may do if the acquirer has a history of looting target companies.
be argued to trigger an exit right. This broader rationale for the exit right is probably most clearly recognised in French law, where the CMF is empowered to require a controlling shareholder to offer exit at a price approved by the CMF in a number of situations. These include not only significant changes in the company’s constitution, but also fundamental changes in the company’s business policy, such as the merger of a subsidiary with its controlling parent; alienation by a company of all or the majority of its assets; a fundamental change in its business activities; and its failure to pay dividends on its capital over a number of years. The risk with such controls is that they inhibit beneficial developments in the company’s business, because of the cost of funding the non-controllers’ buy-out rights. No doubt for this reason, the events listed above do not trigger an automatic right for the non-controllers to be bought out, but simply empower the CMF to determine whether the events are so significant that an exit opportunity ought to be offered to the minority.

A final and important aspect of the ex post impact of the mandatory bid rule should now be noticed. It protects the non-controlling shareholders against anticipated disadvantageous conduct on the part of the new controller of the company, whether or not that control was purchased from an existing controlling shareholder or was put together as a result of a number of separate, small purchases on the market or otherwise. In other words, what the mandatory bid rule concentrates on is the acquisition of control, whether or not it is accompanied by a transfer of control from an existing controlling shareholder. Or to put the matter another way, transfers of control from management to bidder are within the scope of the rule, just as transfers of control from existing controlling shareholders are. It might be said that transfers of control from existing controlling shareholders should not be within the rule, because the non-controlling shareholders were subject to a controlling shareholder before the transfer and are still so subject after it, and so their position has not worsened. However, it can be responded that the risk of exploitation of control, to the disadvantage of the non-controlling shareholders, may be greater with the transfer of control to a new shareholder (especially where the existing controlling shareholder has sold its controlling shareholding dearly), just as it is the risk of disadvantageous conduct which, we have seen, underlies the mandatory bid rule when it is applied to transfers of control from management to controlling shareholder. What is clear, however, and is examined further below, is that the costs of the mandatory bid rule are greater in transfers of control than in acquisitions of control.

55 CMF regs Art 5-6-6.
56 A Viandier, OPA OPE et autres offres publiques (Éditions Francis Lefebvre, Paris, 1999) p 437–8. In principle, a similar power is available to the British courts under s 459 of the CA 1985, but they have so far found it difficult to identify the circumstances in which the power should be used in public or listed companies.
The Costs of the Mandatory Bid Rule

There is no doubt that there are costs, as well as benefits, in a mandatory bid rule, in the sense that a mandatory bid rule may reduce the number of control shifts which take place. The disincentives of the mandatory bid rule may operate on potential acquirers of controlling positions or upon potential sellers of control blocks.

Disincentives from the Perspective of Potential Acquirers of Controlling Positions. The additional costs to the acquirer of a mandatory bid rule are (i) the obligation to offer for the whole of the share capital of the company and (ii) usually an obligation to offer cash as consideration (since the rule of equality as between acceptors of the general offer and sellers outside the offer will normally require the general offer to embrace cash). It seems reasonable to suppose, a priori, that more bids would be launched if bidders could offer for only part of the shares of the target and if they could offer cash and shares differentially to shareholders of the target. However, there seems to be no public policy in favour of simply maximising the number of bids. The market in corporate control can be defended on the basis of its disciplinary effect upon incumbent management and upon its role in shifting resources to higher value users. As we have noted, offers motivated by the prospect of maximising the private benefits of control (a particular risk with partial bids) or implemented by techniques which pressurise target shareholders into accepting an offer (as where only some of them will receive cash) may not be driven by either of the generally accepted justifications for the market in corporate control. Even highly effective incumbent management may be undone by bidders motivated by private benefits, and shareholders who are pressurised into acceptance may well misjudge where the most efficient user of the company’s assets lies. The argument from the point of view of disincentives to the acquirer can be substantially discounted.

Nevertheless, it is relatively easy to adapt the mandatory bid rule so as to permit acquisition of control of a company without an offer to buy all of its shares, where it is thought desirable to do so. Normally, this is done by allowing some types of partial bid to proceed, despite the mandatory bid rule. As mentioned above, the partial bid, because it is a general offer, is more likely to allow all shareholders to dispose of the same proportion of their shares and so constitutes an attractive way of derogating from the full rigour of the mandatory bid rule. Ex hypothesi, however, even the most equally implemented partial bid will leave a minority of shares which are not sold into the offer. The most common technique for addressing this issue is to subject the partial offer (or certain types of partial offer) to the consent of the shareholders as a whole, as a separate

decision from the decision of any particular shareholder to accept the offer. In effect, shareholders are permitted to relax the ban on (some types of) partial bids, where they value the proposed change of control even if it will not enable them to exit the company in respect of the whole of their shareholdings. By requiring a separate vote on the principle of the partial offer, shareholders who would rather the offer were not made, but wish to accept it if it is, can express that set of preferences by voting against the bid in principle but accepting the offer.

However, it is not usual to permit shareholders a free hand to disapply the ban on partial bids. Usually, the legislature imposes certain ‘quality controls’ on the partial bids which may be approved. Thus, in Italy the partial offer must be for at least 60 per cent of the target’s shares; must have been approved by a majority of the shares of the target, from which body are excluded shares held by the offeror or associates and the shares of a majority shareholder; and the offeror must not have acquired more than one per cent of the shares of the target in the 12 month period before the partial offer. Even then, the offeror may subsequently be required to make a full offer if the offeror or associates buy a further one per cent or more shares in the target in the following 12 months. To similar effect is rule 36 of the City Code in the UK, except that the level of the partial offer is left to the discretion of the Panel.

Disincentives from the Perspective of Potential Sellers of Controlling Blocks.
The mandatory bid rule may have additional effect, where the shareholdings in the target company contain a controlling block, because it now has a chilling effect upon the willingness of existing controlling shareholders to sell as well as upon potential acquirers to offer. Here, one can hypothesise that the existing controlling shareholder (or small group of shareholders) already enjoys private benefits of control. However, a mandatory bid rule may deprive that shareholder of compensation for giving up these benefits, depending upon how the price in the compulsory offer is set. Where it is set at the highest level paid for the purchase of the de facto controlling block, then the effect of the mandatory bid rule is to deprive the existing controllers of any premium for their existing control and thus to reduce their incentive to sell out. In an economy characterised by concentrated shareholdings this may significantly reduce the number of control shifts. In particular, it may slow down the transfer of control in medium-sized companies from the families which built them up to wider public ownership and management control.

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58 Otherwise, a controlling shareholder could easily exclude the mandatory bid rule on a transfer of control.
59 So that equality between those accepting the partial offer and those selling outside it is maintained.
60 Decree 58, Art 107.
However, design of the mandatory bid rule is capable of avoiding these problems. The price in the general offer may be set in such a way that existing controlling shareholders are permitted to retain some control premium, whilst the price in the general offer is still fair. In other words, the mandatory bid rule becomes an entitlement to exit at a fair price, not necessarily at the price secured by the controlling shareholders. In this case, the principle of equality between those who accept the general offer and those who sell outside the bid is qualified in the interest of promoting beneficial control shifts. Thus, Italian law allows the offeror to escape the consequences of small purchases at high prices;62 Austrian law sets the price at the higher of the average market price of the securities in the preceding six months and 85 per cent of the highest price paid by the acquirer for the shares in the previous 12 months, thus allowing a premium of 15 per cent of the average market price to be paid to an existing controlling shareholder;63 and Swiss law goes even further by requiring only that the offer be at not less than the higher of the market price when the bid is made or 75 per cent of the highest price paid for the shares over the previous 12 months, thus permitting a 25 per cent premium.64

Alternatively (or in addition) the general body of the shareholders may be given the freedom to decide whether they want a full application of the mandatory bid rule (but possibly fewer offers) or some qualification of its operation to encourage bids, but with less extensive legal protection for the non-controlling shareholders. Thus, the Swiss regulation permits the shareholders, by provision in the company’s constitution, to raise the triggering percentage from one third (the default setting) to up to 49 per cent or to disapply the obligation entirely.65 Raising the triggering percentage to just short of 50 per cent will facilitate the transfer of controlling blocks, in a way that permitting partial bids does not, because, as noted, in a partial general offer all shareholders have an equal opportunity to sell out part of their holding. In the case of total disapplication of the mandatory bid rule, the company is free to act without judicial control if the decision to disapply is taken before the company’s securities are traded on a public market; thereafter, the shareholders’ decision is subject to the rather imprecise control that the alteration must not be contrary to the company’s interests. Of course, such provisions still leave the burden of proof on those arguing against the mandatory bid rule.

62 The offer must be at not less than the arithmetic mean of the highest price paid by the offeror in the previous 12 months and the average market price over that period: Legislative Decree 58 of 24 February 1998, Art 106(2).
63 ÜbG Art 26(1), though the company in its constitution may lower or eliminate that premium (Art 27(1).
64 LBVM, Art 32(4) and 22.
65 LBVM, Arts 32(1) and 22(2). These provisions must be contained in the company’s constitution. The Portuguese Securities Code, Art 187(4), also permits the constitutions of unlisted companies to raise the mandatory bid threshold to 50%.
The Costs of Not Having a Firm Mandatory Bid Rule

Despite the examples given above of qualifications to the mandatory bid rule—by allowing partial bids, by relaxing the equal price requirement, or by raising the triggering threshold or by disapplying it entirely—such qualifications are not universal within Europe. Thus, the City Code insists in principle on the offer being at the highest price paid for any shares forming part of the controlling block acquired in the previous 12 months or during the offer period, does not allow modification of the rule by shareholder vote and treats partial bids with suspicion. This might be explained on the grounds that block-holding is not a widespread phenomena in the UK in listed companies and so British law has less need to address the chilling effect of the mandatory bid on the willingness of existing controllers to sell out. However, the German rules make no special concession as regards the price at which the mandatory bid must be launched, and they contain a blanket ban on partial bids for control. Similar rules on pricing and on partial bids obtain in France. In France, the regulator (CMF) has to approve the price offered by a bidder. In the case of a voluntary offer, this scrutiny may not be demanding, but in the case of a mandatory bid the practice is for the CMF to require an offer at the highest price paid for the shares whose acquisition has triggered the bid obligation. Yet, both France and Germany are countries where block-holding is prevalent.

France in fact displays a very interesting history in this area, because it developed an exit mechanism for minorities in relation to transfers of control before it did so for acquisitions of control. From the early seventies the French regulators imposed an obligation on those who acquired controlling blocks from existing controllers to stand in the market and buy such shares of the non-controlling shareholders as were offered to them. Only in 1989 was the mandatory offer introduced, applying to acquisitions as well as transfers of control, and only in the 1990s did it become an obligation to offer to acquire all the outstanding shares, being previously limited to two-thirds. The former obligation survives in the form of the garantie de cours, which requires a transferee of

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66 On price see City Code, rule 9.5, but with a discretion in the Panel to dispense with the highest price requirement (note 3 to rule 9.5). On partial bids see r 36.
67 See n 61 above.
68 In contrast to the draft of June 2000, which seemed to follow the Austrian law.
69 WpUG Art 32.
70 Usually prohibited by CMF regs 5-1-2.
71 CMF regs 5-1-9.
72 Viandier, p 155.
74 CMF regs Ch IV. The garantie de cours sits uneasily with the now fully-fledged mandatory bid obligation, and the CMF can insist on the mandatory bid procedure if this is necessary to ensure equality: CMF regs 5-4-3. It has some advantages over the mandatory bid, for example, speed, because the transferee need stand in the market for only 10 working days and the procedure is simpler.
control to stand in the market and offer to acquire the non-controlling shares at
the price paid for the controlling block or the current market price, whichever is
the higher.75

The French experience thus suggests that some rule-makers see the existence
of controlling blocks and their transferability as reasons for insisting on a shar-
ing rule, despite the disincentives thus created for control shifts, and therefore
reject any qualification of the equality principle in this situation. This might be
because of a desire to encourage investment in minority shareholdings in com-
panies controlled by block-holders, such investment being encouraged by strong
and visible rights for minority shareholders. In other words, there is a trade-off
between encouraging existing block-holders to transfer control (qualified manda-
tory bid rule) and encouraging minority investment (unqualified manda-
tory bid rule). We noted above that French law is relatively strongly attached to
the notion of providing an exit right for minority shareholders across a range of
situations, and a whole chapter of the regulations issued by the CMF is devoted
to ‘les offres publics de retrait.’76 An unqualified exit right for minority share-
holders where control is transferred perhaps simply illustrates a more general
policy choice on the part of the French legislature for minority protection over
control shifts. The Winter Group also committed itself to the view that ‘nor-
mally’ the price to be paid in the mandatory bid should be the highest price paid
by the offeror for shares of the relevant class and did not list the encouragement
of control shifts as one of the grounds on which Member States should be per-
mitted to derogate from the norm.77 The introduction of such a requirement
into EU law would be likely to have a significant impact upon the takeover laws
of some of the Member States.

III CONCLUSION

Equal treatment of shareholders (ie the sharing of consideration) is an impor-
tant and highly developed aspect of European takeover regulation. Strong func-
tional arguments can be made in favour of the deployment of the equality
principle in three ways: within the bid; as between those who accept the offer
and those who deal with the offeror outside the bid; and upon a change of con-
trol. In the first two cases, the equality principle is essential to the integrity of
the takeover process. In the third case, where a public offer is imposed, the
takeover appears as a remedy imposed by law for the protection of minority
shareholders, rather than as a commercially generated transaction whose imple-
mentation the law seeks to regulate. The mandatory bid is also a rule with

75 CMF regs 5-4-2 and Viandier, pp 389–390.
76 CMF regs ch VI; and see the text attached to n 55 above.
77 Above, n 41, p 49.
significant costs as well as benefits. Under the overall uniformity of the six jurisdictions in imposing a mandatory bid rule lies considerable divergence in how these costs and benefits are weighed, with significant consequences for the shape of the obligations which the rule imposes.
Takeovers, Secrecy, and Conflicts of Interest: Problems for Boards and Banks

KLAUS J HOPT

I. THE GERMAN DRAFT ACT ON PUBLIC SECURITIES OFFERS AND TAKEOVERS OF 11 JULY 2001

1 General Observations on the New Rules of the Draft Takeover Act and on their Relation to German Law of Groups of Companies

The Official Draft Takeover Act, Post-Offer Defences and Other Changes

To talk in England about takeovers and takeover regulation is, to quote the Romans, ‘carrying owls to Athens’. My dictionary indicates that this translates into English as the phrase ‘carrying coals to Newcastle’, but in view of the problems with coal and steel anywhere, I thought I had better stick to the original Roman saying. In any case, Germany has little experience with public takeovers and even less with hostile takeovers, and while we still have the German Takeover Code (the ‘Takeover Code’), this self-regulation is by no means a peer of the UK’s City Code on Takeovers and Mergers (the ‘City Code’). Therefore, it is the common opinion in Germany that a takeover act is badly needed. This Act is now in preparation, and according to clear governmental declarations, it will be enacted in 2001.1

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This haste seems strange in view of the fact that Germany has delayed this matter for decades. The first pleas for regulating takeovers in Germany were already being made in early 1975. But it was a series of events that finally convinced the legislators to move. These included one of the first threats of a serious hostile takeover in the *Krupp/Thyssen* case in March 1997; pressures of the financial markets; competition between stock exchanges as evidenced in the failed merger of the German Stock Exchange in Frankfurt and the London Stock Exchange; and finally the successful bid of *Vodafone* for *Mannesmann*.\(^2\)

Still, the haste can be explained in another way. The German Ministry of Finance, with the approval of the government, has agreed to a reform that nobody ever expected, not the former Christian-Democrats and even less so the present Social-Democratic government, namely leaving the proceeds from sales of participations in enterprises tax-free.

The traditional industrial scene in Germany has been described—without too much exaggeration—as Germany Incorporated. Not only a host of groups of companies, but an extensive web of direct and indirect cross-participations emerged at the beginning of the century. Tax law prevented the unbundling of these networks because hidden reserves had accumulated in the participations, some of which dated from the beginning of the symbiosis between German banks and industry in the second half of the nineteenth century. Selling a participation would have meant opening up these hidden treasures and having the fiscal authorities tax away more than half of the profit. Now, as of 1 January 2002, this tax provision will disappear. It is expected that this will lead to a wave of sales and other restructurings of the intertwined German banks and industries. The merger of the Munich insurance giant *Allianz*, which had already taken over the Dresdner Bank, the second largest of the three German large banks (*Großbanken*), in anticipation of this tax reform in early 2001, is but an example of what we can expect. In this situation, it becomes essential that there is a framework of rules in place for the mergers and acquisitions and the public takeovers that will take place in the coming years.

Hostile takeovers are still highly unpopular with many in Germany, particularly with trade unions and labour, but also among large parts of German industry and the German press. As ever, politicians who live for re-election reckon with such fears. Therefore, the German Takeover Act was prepared with great care. First, a so-called discussion draft was issued by the Ministry of Finance in order to prepare the field and to sound out reactions. Then an unofficial draft (the

\(^2\) This was initially a hostile takeover but subsequently became one which was friendly in form.
ministerial draft) was prepared, taking into consideration the objections made at a public hearing in the Ministry of Finance. A further hearing was held. Finally, on 11 July 2001, the official governmental draft (the ‘Takeover Act’) was released. This official draft was held back until the outcome of the draft thirteenth EU directive on takeovers was clear. The Takeover Act differs substantially from the former drafts. The three major differences concern post-bid defences, the regulation of general public securities offers, and the price to be offered in a mandatory offer.

Post-Bid Defences. It has been reported widely in the financial press how Volkswagen and the German trade unions were successful, via the European Parliament and the Schröder connection, in defeating the anti-frustration rule contained in the Common Standpoint reached on the thirteenth directive in June 2000. I have already commented on this quite acidly in the Frankfurter Allgemeine Zeitung. For Germany, this was worse than a pyrrhic victory. Post-bid defences are permissible under section 33 of the Takeover Act with the consent of the general assembly, which can be given in advance. We shall certainly come back to this in the section on defensive tactics.3

The Regulation of General Public Securities Offers. The inclusion of general public securities offers in the draft Act is a step forward and helps to raise German securities regulation to international standards, though the details have met with criticism. This inclusion is reflected in the new name of the Act, namely the Act on Public Securities Offers and Takeovers (Wertpapiererwerbs- und Übernahmegesetz, WpÜG).

The Price to be Offered in a Mandatory Offer. The new price rules provide for a full price sharing rule based on the price paid for the securities during a period of three months before the offer, without allowing a discount of up to 15 per cent as under the previous unofficial draft of the Act.

Takeover Law and Groups of Companies Law: An Uneasy Relationship

The three differences just mentioned concern general, internationally recognised, problems in every system of takeover regulation. Yet there are two further

problems particular to German Konzernrecht (rules concerning groups of companies). First, the mandatory bid rule gives the minority shareholders an early right of exit in case of a control shift. Functionally speaking, it is therefore a part of the law of groups, more precisely of the formation of groups.\(^4\) It protects the minority shareholders at that stage. Other means of protection at that stage could be, for example, a mandatory resolution of the offeree’s general shareholders’ meeting on the control shift. Such a mandatory shareholder resolution rule was indeed proposed early on in the German reform discussion on the Takeover Act, but it was rightly rejected. It appears again in a modified form in the context of the post-offer defences, since section 33 of the Takeover Act makes frustrating actions of the managing and supervisory boards dependent on a shareholder resolution in a general assembly. Of course, the particularity of section 33 is that such a resolution may empower the board to take defensive action against a future hostile takeover. Traditional company lawyers and academics distrust the mandatory offer rule precisely because they think that in German company law the problems of the group are dealt with by the provisions of the German Konzernrecht, that is, mainly \textit{ex post} when the group has come into existence and is active. A fully-fledged control \textit{ex ante} seems to them to be superfluous beside this set of rules; worse still, it unbalances it. This fear is particularly acute since the Takeover Act has now made it clear that the mandatory offer must be made not only to the shareholders of the offeree company, but also to the shareholders of all its direct and indirect subsidiaries, a rule that has met with harsh criticism from German business. In terms of German Konzernrecht, this means that the mandatory offer has to be made groupwide.

The second problem is closely interrelated to the first. If Germany is going to have a mandatory offer rule—and I am convinced it must—the question should be put the other way around. If the mandatory offer protects minority shareholders at the stage of the formation of the group, are the very detailed and burdensome rules of Konzernrecht still justifiable in their entirety, or does the cumulative application of both sets of rules amount to over-regulation and lead to a plea for deregulating parts (not all) of the German Konzernrecht? Even if the answer is negative, there are a number of difficult harmonisation problems between takeover law and the Konzernrecht. In particular, it seems strange that the minority shareholders who choose an early exit are under a different protectionist regime, obtain a different price for their shares, and can avail themselves of a different procedure than those minority shareholders who remain in the group and get an exit right later on in case of the change into a contractual group or in case of a squeeze-out. In the first case (that is, exit \textit{ex ante}) the price is set by the stock market, while in the second, that is (exit \textit{ex post}) there is a

complicated judicial procedure and the price is fixed by the court sometimes many years afterward on the basis of an evaluation by an outside auditor. This discrepancy has been criticised widely in German law, but as yet there are no convincing solutions in sight. Furthermore, it might be argued that granting an \textit{ex ante} exit right implies also granting an \textit{ex post} exit right to those minority shareholders who have remained in the company, at least if they end up being a tiny minority and are themselves subject to a squeeze-out. It then makes sense to give them the possibility of forestalling a squeeze-out by availing themselves of an exit right.\textsuperscript{5}

2 Special Problems concerning Secrecy and Conflicts of Interest

When Roy Goode asked me to make some observations at the conference held at St Johns College, Oxford in September 2001, on which this book is based, and suggested that I comment together with Paul Davies on equality of treatment of target shareholders, I wondered whether it would not be more interesting if I tackled a slightly different problem area. Talking about traditional German company law, which denies such equality, and saying that the draft Act more or less follows the British example as to pricing rules (one of the differences being the three month period as compared with the English 12 month period) was not an option that turned me on. Just presenting the content of the official German draft Act would, of course, have been a possibility, but again hardly a challenging one. I decided, therefore, (with the agreement of Roy Goode and his steering group, for which I am grateful) to take up a complex of problems that is considered particularly delicate for German boards and banks, that is, secrecy and conflicts of interests in takeovers. These problems have an additional resonance in Germany because of the two-tier board structure, the leadership role of the German management board in deciding what is good or bad for the shareholders, labour and the enterprise as a whole, and the traditional but quickly changing structure of the German banking system which is characterised by the freedom to create all-purpose banks, called the universal banking system.

Yet even with this topic I discovered that quite a number of the issues that are presently being debated in Germany as to secrecy and conflicts of interest in takeovers were anticipated in the rules and practice of the London Takeover Panel. In addition, most of the secrecy and conflicts of interest problems are not dealt with specifically in the German draft Act. They remain to be resolved either by the supervisory authority—which for takeovers will be the German Federal Supervisory Office on Securities Trading (Bundesaufsichtsamt für den

Wertpapierhandel, BA We)—or suggestions for solutions will be put forward by German academics in their articles and commentaries. Ultimately it will be for the courts and, in the last instance, the second senate of the Federal Court of Last Instance (Bundesgerichtshof) to decide these questions and conflicts. Here we see a difference in history and legal and financial culture between the UK and Germany. In Germany, the legislators and the judiciary play a comparatively major role in setting the rules, whereas in the UK self-regulatory bodies play a major role and in the context of takeovers there is considerable reluctance to involve the courts. Maybe I should come back to these differences for a few moments at the end of my lecture. But now I propose to take up a number of problems both as to secrecy and disclosure (section II) and as to conflicts of interest of boards and banks (section III).

II SECRECY AND DISCLOSURE

1 Secrecy Before an Offer

It is generally agreed that absolute secrecy before an announcement of a takeover offer is of vital importance. Rule 2.1 of the City Code says this expressly and continues to impose secrecy on all persons privy to confidential information, particularly if it is price-sensitive. A similar duty of secrecy was contemplated by the German discussion draft, though in that case it was confined to the offeror and the persons acting in concert with him. An exception was made insofar as the offeror was permitted to discuss his plans with the offeree and the shareholders of the offeree. The offeree company and its shareholders were also bound to maintain secrecy. At the hearing, questions were posed as to the offeree’s permission to discuss the plans with its shareholders, and it was taken for granted that both the offeror and the offeree must be allowed to pass confidential information about the takeover plans on to lawyers, auditors and banks. Unfortunately, instead of broadening the reach of the secrecy provision as in rule 2.1, the unofficial draft dropped the provision as did the official draft.

The consequence is not that under German law there is no rule on secrecy before the offer, but that this is no longer a specific takeover rule. Instead, a similar rule follows from general company law and the law of obligations for the board and the professionals to whom the board passes on the information. In addition, the duty of secrecy follows from German insider law which, like UK insider dealing laws, is under the realm of the EC insider trading directive of 1989. In May 2001, the European Commission put forward a draft directive on market abuse which proposes new rules on market manipulation and will integrate the insider prohibition and market manipulation rules. Yet one should realise that the general law and the insider law rules on secrecy do not have the
same content and reach as a specific takeover rule on pre-offer secrecy. Insider secrecy, for example, covers only price-sensitive information; takeover also secrecy does, although not necessarily, as rule 2.1 rightly shows. Therefore, it will be up to the Supervisory Authority or, in the last instance, the courts to develop a specific takeover law duty of the offeror, the offeree, and all persons concerned to keep secrecy before the offer.

In this context, it should be mentioned that it is regrettable that the relationship between insider law and takeover law has remained ambiguous under European law. The conflict between insider and takeover law is well known. The temptation to insider trading—for example, a quick purchase of shares of the target company before the general public, or a timely sale at the impending breakdown of negotiations, or informing third parties—seems especially irresistible at takeovers. It is true that the EC insider trading directive contains a sentence in its preamble which indicates that insider trading law should be subordinated to takeover law. Yet the extent of this is by no means clear. This lack of clarification was criticised with regard to the insider trading directive of 1989, and there were hopes that the thirteenth directive would bring some clarification. Yet quite apart from the final failure of the directive, the common standpoint lacked such clarification. The draft market abuse directive of 2001 also remains silent in this respect, as does the German Takeover Act. It follows that passing on information in the context of takeovers—to possible co-bidders, for example—may not be safe under European insider trading law, and there may be cases in which the European Court of Justice might be called upon by a referral to decide how far European insider trading law extends in this respect. This is an area in which European law intervenes in both German and English takeover law.

2 Instant Disclosure of Takeover Plans

Involvement of Advisers, Banks, and Co-offerors

One of the most extensively discussed questions about secrecy in the context of takeovers is the problem of mandatory instant disclosure under section 15 of
the German Securities Trading Act (‘WpHG’). As in the UK, instant disclosure is mandated by the EC stock exchange admission directive of 1979, which was modified, inter alia, by the Insider Trading Directive of 1989. Article 3 (a) of this Directive covers the case of passing on inside information to an adviser or a similar professional ‘in the normal course of the exercise of his employment, profession, or duties.’ The draft Market Abuse Directive has retained Article 3(a) in a slightly different form, but with the same meaning. Accordingly, under English and German law there are no problems with secrecy in takeovers as regards advisers and similar professionals, including banks. This is different if the third party called in by the future bidder is to be rewarded for his services by early inside information on the forthcoming offer which he can exploit at the market before the offer is actually made. This so-called ‘warehousing’, which has already been dealt with by Paul Davies in his contribution to our common European insider dealing book of 1991, seems to be prohibited under the City Code. The same is true under German insider law.

On the one hand, it has remained unclear under the European Insider Trading Directive as well as under German insider and instant disclosure law whether the prospective offeror is allowed to approach various banks for financing or potential purchasers or offerors to form a takeover offer consortium. On the other hand, he may not be able to mount the offer without the help of more than one bank and other consortium members and thus there may be an argument for allowing such approaches to take place. Rule 2.2 of the City Code states in this context that an offeror wishing to approach a wider group—for example, in order to arrange financing for the offer (whether equity or debt), to seek irrevocable commitment, or to organise a consortium to make the offer—should consult the Panel. Under German law this would hardly be an acceptable solution. Instead, a clear answer as to whether this is legally permissible or not would be sought. In a related case, rule 2.2 is also clearer. An announcement is required when the board of a company is seeking one or more potential offerors and the number of the potential purchasers or offerors approached is about to be increased to include more than a very restricted number of persons. It should be kept in mind that these uncertainties can be traced back to the European Insider Trading Directive, which implies that doubts as to the interpretation must in the end be referred to the European Court of Justice. It would not be the first time that the European Court of Justice had been asked to interpret the insider trading directive. The draft Market Fraud Directive may be of some assistance. It contains an Article 6 under which the member states must ensure that all issuers of financial instruments disclose inside information as soon as possible to the public, and that issuers and persons who pass on inside

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9 P Davies, ‘The Take-over Bidder Exemption and the Policy of Disclosure’, n 7 above, 243, 254 et seq.
information in the normal course of the exercise of their employment, profession or duties to a third party, pass on this information at the same time to the public. But Article 6 goes on to exempt the issuer and the professionals from this obligation if the third person is obliged to the issuer to maintain secrecy.

*Takeover Plans Made Before Final Approval by the Supervisory Board: A Special Problem of the German Two-Tier Board*

The duty of instant disclosure is particularly relevant in the context of prospective takeover offers because of the German two-tier board system. It is an obvious and common practice in mergers and acquisitions and in takeovers to prepare and take the decision of making an offer in a very small circle of persons. Usually this circle does not even comprise the whole management board. In the case of the merger of Daimler and Chrysler, a small number of those on the German board flew over to the United States to meet their American colleagues without even informing the German supervisory board. Only later on, when the plan was agreed upon and ready, was it presented to the supervisory board in Stuttgart for a decision. The question of whether the news of the planned merger or offer may be kept secret within the offeror company until the supervisory board has given its formal consent is one of the most controversial legal questions under section 15 WpHG. The two extreme answers given are, on the one hand, that in cases of multi-layer or stretched decision-making processes, the decision is only made when the last body needed to legally finalise the decision has agreed. After all, it still could withhold its agreement and then the decision could not be made. On the other hand, any decision reached within the management board may have a substantial impact on the price of the share of the company quoted on the stock exchange. According to this view, what counts is simply the probable impact on the stock market. If there is such an impact, it is irrelevant whether the supervisory board has already agreed to or even been informed of the decision of the management board.

In my view, the correct answer is—as is so often the case—in the middle. In general, instant disclosure should be required only once a final decision has been reached by both boards. This is particularly compelling if it is a fundamental business decision that is to be taken by both boards, that is, for which the management board needs the consent of the supervisory board. If the management board were obliged to immediately disclose its internal decision to the general public, the competence of the supervisory board would be severely curtailed. Often following such a public disclosure, there is no way back without heavy financial consequences for the share price, the shareholders, and the enterprise as a whole. This is particularly relevant in view of the German practice of joint decision-making with the workforce, because such an early disclosure could

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render meaningless the right of joint decision-making of the workforce on all matters that are up to the supervisory board to decide.

On the other hand, there must be exceptions to this rule. Such an exception may be envisaged if the decision of the management board alone has some legal relevance of its own, in addition to business relevance. A good example is the annual financial statements. It is up to the management board to prepare and complete them and to submit them to the supervisory board together with the proposal for appropriation of distributable profits. After the consent of the supervisory board this is to be presented to the shareholders’ meeting. In this case, the fact that the management board has already completed the annual financial statements before passing them on to the supervisory board makes it a legally separate act that obviously may have a palpable impact on the stock price. It would be unwarranted to allow the company to keep this information secret until the consent of the supervisory board is forthcoming or, even less, until the shareholders had met and made up their mind as to the distribution of profits.

The opposite view, which treats every decision of the management board separately as a possibly relevant fact for instant disclosure, faces with the problem of examining each and every decision of the management board for its possible impact on the stock price. If one looks closely at the criteria used, one finds that this view requires instant disclosure only if there is a high or totally prevailing or overwhelming probability that the decision, if made public, will have an important impact on the stock price. A further disadvantage of this view is that if the supervisory board refuses to give its consent, the instant disclosure made before that decision must now be corrected by a further, and contrary, instant disclosure that the company is not, in fact, going forward with its plan. This is bound to cause uncertainty and misunderstanding among the investing public, and in the worst case may even undermine investor confidence in the company and its future plans.

It is, therefore, a good move that the Takeover Act contains a provision in its section 10 which states that section 15 WpHG concerning instant disclosure shall not be applicable to a decision made concerning the making of an offer. In the context of this provision, an offer means not only a mandatory offer or even a takeover offer, but any public offer for a financial instrument. Technically, the provision of the Takeover Act takes precedence over the instant disclosure provision of general securities regulation. The motives of the Takeover Act state that the exemption from instant disclosure is applicable only if the requirements of the rule of the Takeover Act on mandatory publication of the decision to make an offer are fully met. If this is not the case—for instance, if not all information required under section 10 of the Takeover Act is given in the publication of the decision to make an offer—section 15 remains applicable if the decision qualifies for instant disclosure under this section. The wording of section 10 (6) exempts only the decision to make an offer and does not cover the offeree. It is
arguable that the aim of this provision can only be achieved if the latter is also
included by way of teleological interpretation.

A final point should be made as to European law. As explained, section 10 of
the Takeover Act on takeovers constrains section 15 of the German insider law.
While this is, of course, no problem under German law since the later, and more
specialist, provision takes precedence over the former or more general provision,
there might be a problem of European law. German takeover law, which has no
basis in European law due to the failure of the thirteenth directive, is not per-
mitted to impinge upon the reach of the European insider trading and stock
exchange admission directives. The problem of instant disclosure in cases of
decisions made by the management board when the consent of the supervisory
board is still outstanding is therefore a European problem. If the management
board were to be fined for not instantly disclosing its decision, the case could be
referred to the European Court of Justice under Article 234 of the Treaty.

Instant Disclosure by the Offeror and the Offeree

Contrary to rules 2.2. and 2.3 of the City Code, the German Takeover Act does
not contain a rule on instant disclosure by the offeror and the offeree. Rule 2.2
outlines when an announcement is required and specifies inter alia how to deal
with rumours and speculation as to a possible takeover offer. Rule 2.3 states that
before the board of the offeree company is approached, the responsibility for
making an announcement lies only with the offeror, while the primary respon-
sibility passes to the offeree company following an approach. This is a clear
division of competence and duty between the offeror and the offeree. It makes
sense since the prospective offer is particularly relevant to the share price of the
offeree, and since a suspension will only be granted by the stock exchange at the
request of the company whose shares are to be suspended.

The absence of a similar provision in the German Takeover Act makes it nec-
essary to deal with this problem as a question of general instant disclosure
under section 15 WpHG. It is generally agreed that as a matter of principle, it
is up to the offeror rather than the offeree to take care of instant disclosure in
the context of a prospective takeover offer. The new facts to be published are
only those that belong to the sphere of the issuer. General market data, such as
the threat of a takeover bid or even mere rumors of the imminence of such a bid,
are not included.

However, in some extreme cases, the offeree company may also have a duty
of instant disclosure.12 This may be the case if a friendly takeover is arranged
with the cooperation of the board of the offeree company, and if the offeree
company issues its own statements that prove to be wrong in the light of later
developments. The guiding principle is that the offeree company must avoid

12 Ibid., at comment 55 with further references.
causing the shareholders and the public to be misled by its own interference. Of course, the offeree company must also disclose instantly, following the announcement or even following the offer by the offeror, any new and relevant facts within the realm of the offeree company itself which may have a substantial impact on stock prices.

Concerning rumours, the position of German law is that as a matter of principle there is no duty of the company and its board to comment, that is, no duty of instant disclosure, either for the offeror or for the offeree. Otherwise it would be easy to force a company to disclose information it still wants to keep secret by spreading false rumours. It is true that sometimes a comment as to a false rumour may lie in the interest of the offeree company itself because the price of its securities is affected. But it is felt that the law should not interfere except in exceptional circumstances. Such circumstances can arise when an action of the offeror or the offeree has led to the particular rumour as laid down in rule 2.2 (d) of the City Code, or when the offeror has asked for exceptional permission of the supervisory authority not to be held to instant disclosure because the publication of the fact is likely to damage the legitimate interests of the offeror.\textsuperscript{13}

\textit{Instant Disclosure in Group Situations}

As is well known, Germany is keen on groups of companies and rules concerning groups of companies (Konzernrecht). Group law problems also arise in the context of instant disclosure. They have been discussed in Germany only very recently. As a general rule, the duty of instant disclosure is up to the issuer—or in a takeover situation, to the offeror—and not to other members of the group to which the issuer or offeror belongs.\textsuperscript{14} There might very well be exceptions to this rule, though they are by no means settled. Two fact patterns should be distinguished. In the first, the relevant information has an impact on the price of the securities of the group member. In the second, the parent had or could have had an influence on the nondisclosure by the subsidiary.

The takeover offer and possibly already the prospective offer may by themselves have financial consequences for the share price of another group member, be it the parent or a subsidiary. Under section 15 WpHG, instant disclosure is to be made by the company in whose field of activity the new fact occurs. A narrow view would hold that the takeover offer occurs only in the field of activity of the offeror, not of other members of the group as long as the parent is not bound to publish consolidated balance sheets including the subsidiary in question. Yet it could very well be said that the fact that this offer may have a substantial impact on the stock price of the securities of the group member is in itself a fact that

\textsuperscript{13} KJ Hopt, \textit{Bankrechts-Handbuch}, n 6 above, vol III, at § 107 comment 52.

\textsuperscript{14} Ibid., at comment 48.
occurs in the field of the latter.\textsuperscript{15} On the other side, such a rule must avoid forcing a group member to make instant disclosure on a prospective bid by the offeror before the latter has had the opportunity to make an announcement.

The case is quite different if a 100 per cent subsidiary violates the duty of instant disclosure. It is questionable whether the parent has its own direct or indirect responsibility if it is aware of, or even responsible for, this violation. Is it enough to require the parent in such a case to urge the subsidiary to disclose, or might it even be obliged to fulfill the instant disclosure obligation itself? Some go as far as requiring the latter. A few go further and even hold the subsidiary liable for making instant disclosure of facts which have arisen with the parent provided they have an impact on the subsidiary. If one denies these extensive interpretations, the parent may at least become liable as an aider and abettor if it has caused the subsidiary not to comply with its instant disclosure obligation.

3 Mandatory Disclosure of Shareholdings

In the present context of secrecy in takeovers, mandatory disclosure of shareholdings shall be mentioned only briefly. Mandatory disclosure of shareholdings was imposed on the member states by the EC in the transparency directive of 1988 from a threshold of 10 per cent. In the UK and some other states, mandatory disclosure rules already existed long before and at much lower levels. Usually the level is five per cent, such as, for example, in Germany, France, and outside the EU in Switzerland. In France the company may lower this threshold by a provision in its statutes down to 0.5 per cent. In 1989 the UK lowered the threshold to 3 per cent. In addition, there is a provision that the company can require any shareholder or suspected shareholder to disclose the extent, if any, of its beneficial ownership of the company’s shares.

It is not clear whether this rule is just a transparency rule or is instead intended to give the management of a company an early warning about a possible future offeror. It may very well be assumed that it is the latter, that is, a rule against creeping up, though of course this is seldom conceded in the legislative motives. In any case, the rule has an effect on future takeover offers because the management cannot easily be taken by surprise as was the case, for example, under the traditional German company law rule that required disclosure only for stakes of 25 per cent and higher. The rule should, therefore, be discussed in the context of structural impediments to—and, if the company may take action, of pre-bid defences against—takeovers.\textsuperscript{16} If one is

\textsuperscript{15} KJ Hopt, ‘Konzernrecht und Kapitalmarktrecht in Deutschland’ in P Hommelhoff, KJ Hopt and M Lutter (eds), \textit{Konzernrecht und Kapitalmarktrecht} (Munich, 2001) 31, 59 \textit{et seq}.

convinced that post-bid defensive action is incompatible with the free functioning of the internal market, it is near at hand to extend this reasoning also to pre-bid defences.

Successive stock purchases by the prospective offeror or the granting of a participation by the potential offeree company are not in violation of insider law per se. But the fact that the offeror has reached the threshold of five or more per cent without the registration required under sections 21 et seq. WpHG may in itself constitute inside information. If the future offeror continues to purchase, this may be in violation of insider law.

4 Selected Problems of Information and Liability of the Offeror and the Offeree

The centrepiece of all takeover regulations is duties of information disclosure, both for the offeror and the offeree, though the exact extent of what has to be disclosed or as to what the shareholders, the general public, and maybe specifically the workforce of the offeree have to be informed of, varies substantially. The information given might be incorrect or incomplete. The takeover regulations do not trust the market, competition, and reputation to take care of this, but provide for legal liability, which again is quite different in various countries. Out of the many problems in this context, I want to pick up two: the information to be given by the offeror to the workforce and possible liability of the offeror; and the views and possible liability of the board of the offeree company.

Under section 11 of the German Takeover Act, the information to be given in the offer document contains statements about the intentions of the offeror as to the future activities of the offeree, in particular the seat and location of relevant parts of the enterprise, the use of its assets, its future liabilities, the workforce and its representatives, the management, and relevant changes in the conditions of employment, including the measures which are provided for insofar. More detailed rules on the information to be given and on its presentation are reserved for a regulation of the Ministry of Finance or the supervisory authority. Rule 24 of the City Code contains more or less similar provisions. As to the workforce, it reaches further and includes the intentions of the offeror with regard to the continued employment of the employees of the offeree company and of its subsidiaries. I think this is a serious omission in the German Takeover Act. Very often, the new owner will take measures to restructure and lay off not—or not only—in the parent company, but in the subsidiaries. I hope that this will be amended in the final version.

Section 12 of the German Takeover Act contains a liability provision that closely follows the stock exchange prospectus liability. Yet the German provisions on liability for false or incomplete stock exchange prospectuses have long been criticised for being far more restrictive than general tort law liability and
even general civil law prospectus liability. In particular, this liability is only for gross negligence. It does not cover the full money damage, and it is statute-barred after six months or—if the purchaser did not know about the incorrectness of the prospectus—after three years.\textsuperscript{17} Section 12 keeps the requirement of gross negligence, but allows recovery of full money damage and contains a time bar of only 12 months or three years. The latter change is in reaction to the harsh criticism of the German shareholders’ associations, which pointed out that the six-month period is totally unrealistic, and that even the three-year period may not be sufficient time to establish the facts in order to prepare a lawsuit.\textsuperscript{18} All these discrepancies between the statutory and the general civil law liability provisions are highly unsatisfactory. It remains to be seen whether German legislators can be persuaded to harmonise them more thoroughly in the forthcoming fourth or fifth Financial Market Promotion Acts of 2001 and 2002. The pleas for harmonisation not only concern Germany, but in my view should extend further. It does not make much sense to have common prospectus requirements in the European Union, but when it comes to liability for false prospectus information, to have liability that differs considerably among the various member states. If it is true—and I am convinced that it is—that correct prospectus information is necessary in the internal market, then this is not only a question of common requirements as to information, but also as to liability and possibly even enforcement. So in my view, the European Union should consider common framework rules for prospectus liability.

Section 27 of the Takeover Act requires the management board of the offeree company to issue its view as to the offer, including a statement as to whether the board members intend, in respect of their own shareholdings, to accept or to reject the offer. This corresponds to rules 25.1 and 25.3 of the City Code. But a closer look reveals that these duties under the German Takeover Act are only imposed on the members of the management board, not on the whole board as in the UK. This is unsatisfactory since the views and intentions of the outside directors, which the supervisory board members usually claim to be, are important for the shareholders and their decision. There is also no provision for split boards, as in note 2 on rule 25.1 of the City Code. According to this, in the case of a split board, the directors who are in a minority should also publish their views and the Takeover Panel will normally require that they are circulated by the offeree company. A further substantial lacuna is the omission of the Takeover Act to require the offeree company to obtain competent independent advice and to make it known to the shareholders as provided for in rule 3.1 and rule 25.1 (a) of the City Code. The discussion draft did contain the requirement of advice, but there was no requirement of independence. Unfortunately this

\textsuperscript{17} KJ Hopt, ‘Das Dritte Finanzmarktförderungsgesetz—Börsen- und kapitalmarktrechtliche Überlegungen’ in Festschrift für U. Drobnig (Tübingen, 1998) 525, 528 et seq.

\textsuperscript{18} Ibid, at 532.
provision was dropped on the basis that the offeree company itself is competent to evaluate the offer. It was not understood that the gist of the advice was that it would be made by an independent adviser and it would be made known to the shareholders.

At the hearings on the German discussion draft, the question was raised as to whether the views of the board should be supported by a liability provision modeled on the liability provision for the public offer. The drafters of the Act shied away from this because they thought that a liability provision might deter the management board from giving a frank view to the shareholders. Yet this could prove to be shortsighted, since it may very well be that German courts will hold the board members liable for incorrect or biased views. A liability provision along the lines of section 12 concerning the public offer document would, strangely enough, better protect the management from liability since, as mentioned above, it is based on the model of the rather restrictive stock exchange prospectus liability. Obviously the problem of adviser liability, which in general is rather controversial in German law, is not a specific problem of takeover law, though it arises frequently in this context.

5 White Knights, Inside Information and Due Diligence

Insider trading activities or violations of secrecy in connection with hostile takeovers usually occur before the bid. Violations after publication of the offer, e.g., at or during the search for a white knight, are the exception, but they do occur. As mentioned above, a person planning to purchase a block of shares or to make a takeover offer that will considerably influence the price of the shares cannot be prevented by insider law from doing so, since treating one’s own plans as inside information would not make sense in such cases. This is true for the offeror company and its board, which is allowed to prepare the offer without interference from insider law. Yet for the offeree company and its board, a similar problem arises when they possess inside information about an offer they are going to receive. It is submitted that insider law should not prevent defensive measures by the offeree which are allowed under takeover law, that is, working together with shareholders and banks in anticipation of a hostile bid as well as searching for a white knight. Yet until the coordination of European insider and takeover law, it is not clear from the Insider Trading Directive and its preamble whether this is actually the content and meaning of European law. If the board of the offeree wants to be sure, it might very well have only one way out—publication.

Another question that is very controversial in German company and takeover law is the legitimate extent of due diligence and, in the specific context of this article, whether the provisions against insider trading limit the normal due diligence examination. Allowing a due diligence examination can be very helpful for the board of the offeree company when searching for a white knight. The motives to the WpHG point out that the giving and receiving of inside information is permissible in the context of selling a block participation. This is the case when an interested party (the white knight) inspects the books of the target company in the course of the due diligence examination and gains inside information in this way.\(^{20}\) Interestingly enough, rule 21.1 of the City Code states that the principle of equality of information for shareholders does not prevent the furnishing in confidence by an offeree company to a bona fide potential offeror or vice versa.

Obviously, the board of the offeree company in a hostile takeover will not and must not permit the hostile offeror a due diligence examination. However, if a prospective white knight has been allowed to inspect the books of the offeree company in a due diligence exercise, the question is whether the same information must be given to the offeror. The German draft is silent on this point and the problem is rarely mentioned. It seems that German law would not require the passing on of information given or allowed to be taken by the white knight to the offeror. Rule 20.2 of the City Code, which deals with equality of information to competing offerors, is more specific. It requires that any information given to one offeror or potential offeror must, on request, be given equally and promptly to another offeror or bona fide potential offeror even if that other offeror is less welcome. This requirement, however, will usually only apply when there has been a public announcement of the existence of the offeror or potential offeror to which information has been given. This seems to be balanced well, though it must be seen that the requirement that the less welcome offeror should specify the questions to be answered (‘on request’) may prevent full equality. In practice, of course, the catalogue of questions can be expected to be lengthy. Even more difficult questions arise in the case of management buy-outs.

Purchases beyond the earlier company commitment (alongside purchases) attributable to the exploitation of inside information are not permitted, either to the offeror or to the offeree.\(^{21}\) This is true also for the purchaser of a participation who, after obtaining inside information from a due diligence examination,
acquires even more shares than previously intended, either on or off the exchange.

III CONFLICTS OF INTEREST OF BOARDS AND BANKS

1 Board Responsibility Beyond Shareholders’ Interests Under General Company Law

When dealing with conflicts of interest of the board in takeover situations, it is not my intention to deal generally with the question of how the opposite interests of the offeror and the shareholders of the offeree company and of the latter and their board should be balanced. After all, this is what takeover regulation is all about. Furthermore, one of the most controversial conflict of interest situations in takeovers, that is, the conflict of interest of the board of the offeree when faced with a hostile takeover and the respective problem of post-bid defences, has been omitted here since it will be examined in a separate chapter of this book. Instead, only specific conflicts of interest of boards and banks will be discussed here. Still, one word on allowing post-bid defences—as in the US—or restricting them by a non-frustration rule—as in the UK—may be allowed. The UK rule more or less eliminates the conflict by leaving the decision on the offer and possible defences to the shareholders. The US rule is said by its proponents to protect the shareholders of the offeree company. Yet it does so without ensuring that the incumbent management acts in the shareholders’ interest only and not in the interest of it remaining in office. As long as this problem cannot be solved, in my view the UK rule seems preferable. Details are presented elsewhere.

In German law, as well as in some other jurisdictions including the UK, the prototype of a conflict of interest of the board of the offeree company in a takeover situation is the constituency rule under German company law. The traditional interpretation of the business judgment rule for the management board under section 76 of the German Stock Corporation Act (Aktiengesetz: ‘AktG’) is that the management board has direct responsibility for the management of the company, and that this responsibility reaches beyond the shareholders and includes the interest of the employees and even the common good. On this interpretation, the management board is neither obliged nor entitled to act solely in the interest of the shareholders. It is therefore the responsibility of the management board to balance these interests and to bring them to practical concordance. Within this framework rule there is ample room for following the

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22 See chapter on defence tactics by Underhill and Austmann in this volume.
23 As to the different agency conflicts to be addressed in takeover regulation, see P Davies and KJ Hopt, ‘Control Transactions’ in R Kraakman et al n 16 above.
shareholder value principle. This sort of constituency rule under German company law is similar to what had been proposed in the draft thirteenth directive, first in Article 3 section 1 (c) of the Common Standpoint ('the board of an offeree company is to act in the interest of the company as a whole'), and more specifically in the legislative resolution of the European Parliament as to the Common Standpoint. Article 3 section 1(c) continues: ‘in particular in the interest of the business policy and its continuation, the shareholders and the employees, as well as in regard to securing jobs.’

The problem with all these constituency rules is similar to the problem with the general business judgement rule concerning post-bid defences. The rule sounds very good, but it is not possible for the shareholders to check whether the judgement of the management board is valid, since there are nearly always arguments for justifying any action either by reference to the interests of the workforce or of the common good. Nor do the workers have a right to check the decision, since they do not have individual enforceable claims. It is therefore not surprising that the similar constituency statutes in many American states have been criticised as being utterly misguided, because in the end they result in decisions which maximise managers’ utility, raising the cost of equity capital and impairing the effective market distribution.

As to frustrating a takeover offer, it has been argued under German company and takeover law that quite apart from the general business judgement rule for the management board under section 76, it is not up to the management board to make decisions on the composition of the company’s shareholders.24 If this general principle is accepted as the majority view in Germany, fundamental decisions on the composition of the company’s shareholders, including post-bid frustrating action, are up to all shareholders in the general assembly. The German Takeover Act seems generally to be in line with this. It states in section 33 that post-bid defensive actions need to be authorised by the general assembly. The principal development in this section, which was proposed unsuccessfully by Germany for the thirteenth directive and has now been incorporated in subsection 2, is that the general assembly may give such authorisation up to 18 months before the actual offer. It is quite obvious that before having had the opportunity of seeing the actual offer, the shareholders cannot really evaluate whether it is worthwhile or not, and practitioners doubt that such authorisation will be sought by many boards and accepted by many general assemblies. Indeed, such a shareholder resolution could signal that the enterprise considers itself a candidate for takeover, which may have unwelcome consequences on the stock market.

It remains to mention that these objections toward creating and maintaining such a conflict of interest for the board do not extend to the information to be

given to the workers. Indeed, such duties of information disclosure not only to shareholders but also to workers are to be found in many takeover regulations, including the German one and the draft thirteenth directive.

2 Inducement Fees, Views of the Board and Conflicts of Interest

If one talks about conflicts of interest of directors, one thinks of the classic cases of self-dealing, corporate opportunity, excessive remuneration, and competing with the company. This is discussed elsewhere and shall not be treated here. Instead, we shall take up the phenomenon of inducement fees, which seems to be relatively recent in Europe.

According to the new rule 21.2 of the City Code, which was preceded by a statement of the Takeover Panel 16 July 1999, and enacted last year, an inducement fee is:

an arrangement which may be entered into between an offeror or a potential offeror and the offeree company pursuant to which a cash sum will be payable by the offeree company if certain specified events occur which have the effect of preventing the offer from proceeding or causing it to fail (e.g., the recommendation by the offeree company board of a higher competing offer).

Inducement fees—or deal protection fees or break fees—have long been common in US takeover practice and have also been discussed for some time in the UK. In the Vodafone/AirTouch takeover, AirTouch had promised a break fee of $225 million to Vodafone inter alia if the shareholders of AirTouch would not accept the Vodafone takeover offer, and a break fee of $775 million if they accepted the offer of a third offeror within one year of Vodafone’s offer. I dare not go into the discussion of English company law as to whether inducement fees serve the proper purposes of the company or fetter the discretion of the directors, and whether such fees might be penalty clauses and financial assistance under section 151 of the Companies Act 1985. Interestingly, neither did the Takeover Panel when it made rule 21.2. It suffices to say that the Panel in rule 21.2 requires that any inducement fee be de minimis (normally no more than one per cent of the offer value) with confirmation by the board of the offeree company and its financial adviser in writing that, inter alia, they believe the fee to be in the best interest of shareholders. Of course, all such arrangements must

be fully disclosed in the announcement made under rule 2.5 of the City Code and in the offer document.

In Germany, these kinds of arrangements are not yet commonly known or discussed. But it is, of course, just a question of time until the same clauses are also used here in takeovers. The legal treatment of such promises is ambiguous. In a certain light, they are the opposite of frustrating actions in the sense of section 33 because they facilitate the offer by giving a certain assurance to the offeror. Yet, of course, by the same token they reduce the chances of success of a possible competing offer. They must, therefore, be considered to be potentially frustrating, at least if they amount to more than a small fraction of the offer value in question. In this respect, the exception under section 33 paragraph 1 sentence 2 of the Takeover Act might be relevant. It allows action that a conscientious director of a company not subject to a takeover offer would undertake. If the inducement fee is just enough to assure that the prospective offeror does not make a distinct loss when his offer is not accepted, this would probably be acceptable. Beyond this it is questionable, however, whether the board does not fetter its discretion by making such a promise either in the name of the company or for itself. Yet under the general business judgement clause of section 76 of the Aktiengesetz, this is difficult to detect. There is no doubt that at least full disclosure of such fees should be made. But again it is difficult to find a basis for requiring such a disclosure. Neither the information required to be contained in the offer statement according to section 11 of the Takeover Act and the pertinent provisions of the draft regulation, nor the mandatory content of the views of the board according to section 27 of the Takeover Act, contains such a disclosure statement. It could possibly be argued that since the management board of the offeree has to give its views on the offer and reasons for them, it must also disclose such facts that might be relevant for evaluating these views in the eyes of an ordinary shareholder. If one considers the duty of the board to give its views as a professional duty of information disclosure toward investors, this might bring this duty under the general theory and case law of duty of information and advice by professionals. In this body of law, it is commonly agreed that the information must be true, complete, and clearly understandable by the recipient. It follows that inducement fees are to be disclosed with the views of the board of the offeree, if a reasonable shareholder may consider this information relevant to his decision whether or not to trust the views of the board in making his decision to accept or not to accept the takeover offer. What is lacking in German takeover law is confirmation by an independent adviser of the offeree that the inducement fee is in the interest of the offeree. Such confirmation from an independent adviser who might himself become liable may well be more valuable than the duty of the management board to act in the interest of

26 For detailed case law, see A Baumbach and KJ Hopt, Handelsgesetzbuch, 30th edn (Munich, 2000) s 347 comment 24 et seq.
the company and disclosure of having entered into such a fee arrangement. Once more the lacuna in the Takeover Act of not requiring independent advice to the offeree proves to be harmful for the shareholders.

3 Conflicts of Interest of Banks in Takeovers: A Special Problem for Continental European All-Purpose Banks

Conflicts of interest in takeovers may become particularly relevant for German banks. This is because in Germany and some other continental European states, such as Switzerland and Austria, the so-called all-purpose or universal banking system prevails. Under this system there is no mandatory separation of credit banks and investment banks as there was formerly under the Glass-Steagall Act in the US. There is no common practice of not combining these functions. It is well known that these combinations may lead to considerable conflicts of interest. This has been described elsewhere. Here some specific conflicts of interest situations for banks in takeovers shall be mentioned and possible solutions shall be discussed. I have omitted the conflicts that arise from inside information in respect of a bank’s own security dealings or those carried out by bank-owned fund managers, including the interesting note 5 on rule 4.1 and 4.2 [of the City Code] which prohibits dealing contrary to published advice. I shall also leave aside the question raised in the English case *Mannesmann v Goldmann Sachs International* on how to restrain an adviser from acting on a takeover.

The most prominent German case was the intended takeover offer of Krupp to the shareholders of Mannesmann in March 1997. This was not only memorable because of its status as the first public threat of a serious hostile takeover, but also because of the conflict of interest in which one of the Big Three (private German banks) found itself and for which it was severely criticised in the German press and by German business. The bank had deputised one member of its management board into the supervisory board of Thyssen. Later on, the bank was approached by Krupp to render advisory and financial services in the planned takeover offer transaction. The bank agreed to do so, becoming—at least according to the information known to the public—the first large German private bank ready to support a hostile bid. This was a spectacular turnaround in German banking policy. One remembers the words of the late spokesman of the Deutsche Bank, Herrhausen, who had characterised takeovers as the ‘wrong track of capitalism.’ Yet it was a turnaround that had been predicted since major business opportunities and competition from foreign investment banks had encouraged traditional restraint in favour of industrial clients of the banks.

The new policy of banks toward takeovers highlighted once more the old problem of conflicts of interest of German all-purpose banks. At the same time,
public criticism of these interests in the press, in politics, and in academia was mounting. In the heated and occasionally venomous political debate on the reform of stock corporation and banking law in 1997 and 1998, proposals were made to severely curtail the possibilities of banks holding participations in other companies, deputising representatives in their supervisory boards, and exercising the so-called depository voting for their clients who had deposited with them their shares in other companies. In the Reform Act of 1998, these far-reaching reforms were rightly not included. Instead, less spectacular and more prudent steps were taken. Yet the discussion has not come to an end. The new Social-Democratic government charged a commission headed by Professor Baums of Frankfurt with investigating corporate governance and the need for reform in German company law. In June 2001 the commission published a long list of reform proposals, some of which concern conflicts of interests.

Independently of this, the banking community itself considered whether self-regulatory measures would be advisable, in particular in view of the expectations and pressures of large institutional investors from the US and the UK who are accustomed to stricter standards concerning conflicts of interest and are not well acquainted with the combination of functions exercised by German all-purpose banks. At the symposium held in 1997 at the Max Planck Institute for Foreign Private and Private International Law in Hamburg on Comparative Corporate Governance, the spokesman of the Deutsche Bank, Rolf-E Breuer, announced that the policy of the Deutsche Bank regarding the acceptance of supervisory board seats in other companies would change. In this respect, the Deutsche Bank’s Corporate Governance Principles of March 2001 state that, in general, members of the management board of the Deutsche Bank do not accept the chair in the supervisory boards of companies that do not belong to the Deutsche Bank group. Furthermore, it is stated that supervisory board members must disclose conflicts of interests to the president of the supervisory board, and the president himself to the presiding committee. If conflicts of interest are unavoidable, the board member must abstain from voting or step down, but in a way which safeguards the interest of the enterprise on whose supervisory board he serves. These two principles are but two in a list of ten principles concerning rules for avoiding conflicts of interest, four of which concern members of the management board holding seats on supervisory boards and similar committees, and six of which concern the supervisory board of the bank itself and its members. These corporate governance principles of the Deutsche Bank are the most open, advanced, and sensible principles of a bank as to conflicts of interest of board and banks that I know of.

The non-legal nature of the Deutsche Bank principles allows dealing with such conflicts of interest in a much more detailed, nuanced and flexible way.

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than any legislation could. This resembles the way the Takeover Panel deals with conflicts of interest of the board of an offeror company, though of course this is a code for the whole city and not just a unilateral declaration of one institution such as the Deutsche Bank. Because conflicts of interest in takeovers of the kind described here are not dealt with by organised Panel-style self-regulation in Germany, I shall discuss some possible solutions under German company law which may either prevent future conflict or help solve it when it arises. Of course, these solutions are not new and, at least in principle, are well known to US and UK lawyers.

4 Possible Solutions: Preventing Future Conflicts or Solving Present Conflicts

Prevention: Chinese Walls, General Incompatibility, Special Incompatibility

The best way of dealing with conflicts of interest is to prevent them from arising. Here, US, British and international banking practice points first at the practice and beneficial effects of Chinese walls. This practice and the benefits and shortcomings of Chinese walls have been often described, both in the UK and in Germany. In the UK, McVea analysed this means of regulating conflicts of interest as early as 1993. In the meantime, there has been much discussion following the famous Bolkiah case of 1998, in which the House of Lords for the first time considered the law relating to conflicts of interest and Chinese walls. The more recent decision of Young v Robson Rhodes dealt with Chinese walls in a case of merger of accountants. In Germany, the supervisory authority considers the installation of Chinese walls to be appropriate measures for providers of investment services, but to my knowledge there has not yet been the chance to test Chinese walls in a court case. While Chinese walls are certainly necessary and helpful, under German law and possibly also under UK law, at least after Bolkiah, establishing Chinese walls is not considered in itself a safe haven for the bank or another party subject to conflicts of interest. As the late Professor Gower once observed: ‘I have never met a Chinese wall that did not have a grapevine trailing over it.’ In practice Chinese walls can lead to embarrassing results for the bank as Deutsche Bank experienced. Its research department recommended buying shares of Deutsche Telecom. The next day the bank sold

29 See ss 3.3.1 (areas of discretion, so-called Chinese walls) and 3.3.2 (information flow across areas, wall crossing) of the Regulation of the BAWe as to concretisation of the organisational duties of providers of investment services under s 33 subs 1 of the WpHG as of 25 October 1999; KJ Hopt, ‘Insiderwissen und Interessenkonflikte im deutschen und europäischen Bankrecht’, n 6 above, 319 et seq.; most recently P Buck, Wissen und juristische Person (Tübingen, 2001) 500 et seq.
31 Bolkiah (Prince Jefri) v KPMG [1999] 1 All ER 517.
32 [1999] 3 All ER 524.
a large block of Deutsche Telekom shares for a client. This caused the stock price to go down by 20 per cent. The bank insisted that this was the result of having installed and respected Chinese walls. The public nevertheless was furious and the financial press criticised the bank for having been deliberately difficult.

A more rigorous way of preventing conflicts of interest would be to prescribe general incompatibility rules for board members, for example, rules that would not allow management members of competing companies to sit on the board of the other, or rules severely restricting the possibility of deputising bank representatives on boards of other enterprises. On the one hand, such provisions are very abstract and general and unduly restrict banks and businesses which choose to have such representations. On the other side, they do not prevent all conflicts of interest because takeovers happen not just between competing companies, and conflicts of interest in takeovers arise for bank board members as well as non-bank board members. In any case, the present incompatibility rules of German company law do not cover this case. But it is likely that the first-mentioned solution, that is, no supervisory board members from competing companies, will be part of the future German Corporate Governance Code which will be adopted by the German Corporate Governance Commission under the presidency of Mr Cromme from Thyssen-Krupp.

An example of such an incompatibility rule is a rule requiring the board member to step down when a takeover that would bring him into a situation of conflict of interest is anticipated. Yet it is very doubtful whether such special incompatibility rules work in practice. Takeover plans are kept secret, and once a takeover offer can be foreseen, it might already be too late. More important, if the bank deputy steps down, this might give rise to speculation and rumours about possible takeovers or differences of opinion between the enterprise and the bank. In any case, the fact that the bank has deputised one of its management board members to the board of the prospective offeree company does not hinder the bank from accepting the invitation of the offeror to render its services, by way of advice and financing, in the coming takeover. Deputising somebody is neither equivalent to a promise not to help a possible offeror even in a hostile bid, nor does it bring with it a fiduciary duty of this kind. It is self-evident that the bank deputy may not pass inside information from the board of the company to the bank, nor from the bank board to the company. As laid down in the Schaffgotsch case and as generally agreed, board secrecy has precedence over the duties of the bank deputy to his own bank.33

Solutions: Abstaining from Voting, Exclusion from Deliberation, Stepping Down, Revocation of Office

It remains to try to resolve the conflict of interests in a takeover when the offer is prepared or has already been made and the questions arise as to how the bank and the bank deputy in the offeree company should conduct themselves. There seem to be at least four possibilities. The least severe is to require the bank deputy in the offeree company to abstain from voting in resolutions of the board of the offeree company concerning the offer. The logic of this solution as extended to the expression of the views of the board implies that the director, when a conflict of interest arises, should not normally be joined with the remainder of the board in the expression of its views on the offer, and the nature of the conflict should be clearly explained to the shareholders. The director might have to sign the document but make clear that he does not share the views of the board and does not accept responsibility for it. This is the position adopted by the Takeover Panel.

A slightly more severe solution would be to forbid the bank deputy from participating in the relevant session of the board, since mere participation in the discussion will already have been tainted by the conflict of interest and might influence the outcome. Reputedly, the Deutsche Bank’s deputy, Cartellieri, serving on the board of Thyssen in 1997 chose this way, though not openly: he pretended he was ill. It is not clear whether under German takeover law this would imply also that the bank deputy might not take part in formulating and issuing the views of the board of the offeree company under section 27 of the Takeover Act. An alternative interpretation might be that he can join in with a dissenting opinion, provided that he has disclosed his interest in it. This solution is oriented to the position of the Takeover Panel that encourages the publication of dissenting votes in case of a split board.

If the conflict of interest is such that it cannot be resolved by either of these measures, or if it is clear that the conflict is serious and continuing, the director has to resolve the conflict by stepping down. The conflict of interest is good cause for him to give up his office. If he does not do this by himself, there may ultimately be cause for revocation of office.

5 Rule of Law and Self-Regulation: Differences in History, Corporate Governance, and Financial Culture Between the UK and Germany

The different attitudes to self-regulation in the UK and Germany have been commented upon before. It suffices to say that Germany’s experience with the
voluntary insider trading guidelines has been quite unsatisfactory in many respects, inter alia, as to the extent of the prohibition on insider trading, the sanctions, the lack of transparency and the procedure. This has been described in detail elsewhere. The experience with the voluntary Takeover Code has been better, but not fully convincing either. Its main problem was that many German companies were just not ready to accept the Code voluntarily. It is true that the Takeover Code had the congenital defect of requiring prior acceptance of the Code by all enterprises concerned. I warned Mr Baumann from Siemens against this on the basis of experience with the former insider trading guidelines and the fact that not even the City Code contained such a requirement. If the German Takeover Commission had been able to do without such acceptances and simply apply the code in the concrete case, the result would have been much more impressive. Since the Takeover Code became effective on 1 October 1995, until 13 June 2000, the Takeover Commission registered 95 proceedings with 113 total offers. Out of these offers, 87 were voluntary, 13 were mandatory, in three cases the commission granted an exception, and only ten offers were publicly criticised by the commission as not, or not fully, respecting the Takeover Code. Yet the unsatisfactory acceptance rate was decisive. As of 12 April 2001, only 74.3 per cent of all domestic enterprises with securities quoted on the stock exchange had accepted the Takeover Code. Among the DAX 30 companies, the most prominent companies that still refused acceptance were BMW and Volkswagen. The takeover offers that were administered in full conformity with the Takeover Code included, for example, the Vodafone Mannesmann takeover and the Allianz Dresdner Bank deal. In the end, the Stock Exchange Expert Commission at the Ministry of Finance, which authored the Takeover Code, and the Takeover Commission itself pleaded publicly for a takeover act. The Takeover Act does away with self-regulation. Only very rudimentary elements of self-regulation can still be found in it.

These German experiences with self-regulation differ considerably from those in the UK, even taking into consideration the fundamental changes brought about by the Financial Services Act 2000, and regardless of the ongoing discussion on the Takeover Panel and the Takeover Code. It is not easy to explain these differences. They are related to history or, as one says today, they are path-dependent. First of all, in financial matters and elsewhere, Germany

34 Mr Baumann, then chief financial officer of Siemens, was the head of the Commission of Stock Exchange Experts at the Ministry of Finance. This Commission had already favoured a takeover statute solution, but under the presidency of Mr Baumann decided for a takeover code solution.
35 § 5 of the German Draft Act (see n 1) provides for an advisory council. Yet its competence is very small indeed. It is to advise the supervisory office before the latter enacts regulations, but it is not involved in the actual day to day supervision and decision of cases.
36 See KJ Hopt, ‘Self-Regulation in Banking and Finance—Practice and Theory in Germany’ in AEDBF and EFBER-Belgium (eds), La Déontologie bancaire et financière/The Ethical Standards in Banking & Finance (Bruylant, Brussels, 1998) 53; KJ Hopt, ‘Das System der Unternehmensüberwachung in Deutschland’ in Institut der Wirtschaftsprüfer in Deutschland e.V. (IDW) (ed), Kapitalmarktorientierte Unternehmensüberwachung (Dusseldorf, 2001) 27, 55 et seq.
has always had state regulation and the concept of prohibition and order instead of self-regulation. The few exceptions to be found in the regulation of stock exchanges, and of banking supervision and regulation by the Federal Banking Authority and the German Bundesbank, are but proof of the general rule. In addition, the rise of the German constitution, the Rechtsstaat, and the administrative judiciary after the Third Reich must be mentioned. In Germany, businesses are accustomed to being able to go to court against any public action of supervision or enforcement. There is no room for a threat of being blacklisted or put in the pillory or expelled from professional activities as in the UK. The consequence is that the authority of the Takeover Panel is probably de facto higher than the legal authority of some state administration in Germany.

This also shows in different practices. While German enterprises and financial actors are also, of course, in close contact with the supervisory office (BAWe), it is hardly conceivable that the BAWe would issue a statement like that of the Panel in the City Code: ‘To take legal, or other professional, advice on the interpretation or application of the Code is not an appropriate alternative to obtaining a ruling . . . from the Executive.’ With inducement fees in the UK, for example, the details of such fees are discussed and settled in an informal way with the Takeover Panel before the takeover offer, causing the problem of what is permissible or not to perhaps remain unsettled and not even become public. In contrast, in Germany there are textbooks, so-called commentaries and a host of legal academic articles, doctoral theses, and books which treat these questions in a dogmatic or practical lawyer’s way. When the matter is brought before the court, the attorney and the court look to these publications and may very well cite them as persuasive authority. It is not my task to judge which is best. Each system has its advantages and disadvantages. Among the advantages of the German state supervisory system may be greater foreseeability and transparency, together with the possibility of having each state interference scrutinised thoroughly in an administrative court proceeding (which may take a long time and be economically costly). A clear advantage of UK self-regulation by the Takeover Panel is longstanding experience and an enormous flexibility, which under a legalistic system such as the German one can never be reached and is probably much better suited to quickly changing financial markets and practices. It is hardly surprising that one of the major British fears regarding the thirteenth directive was getting the courts involved in takeovers. It is clear enough that once the German Takeover Act comes into force, there will undoubtedly be court proceedings in Germany.

IV SUMMARY

The German Takeover Act on public securities offers and takeovers of 11 July will still be enacted in 2001. The reason for this hurry is the German tax law

37 The City Code of Takeovers and Mergers, s A, para 3(b).
reform, which will have the result that proceeds from sales of participations in enterprises will be tax-free. It is expected that this will lead to a wave of sales and restructurings of the interwoven German banks and industry. The Takeover Act differs from the former drafts in three major respects: post-bid defences, the regulation of public securities and the offer price. Further problems concern the uneasy relationship between takeover law and the law of groups of companies (Konzernrecht). These have not yet been resolved, nor have the special problems of how to deal with secrecy and conflicts of interest in takeovers.

Secrecy before the offer does not follow from the Takeover Act, but from insider law and general company law regarding secrecy. The conflict between insider law and takeover law is well known. It might involve European law. Instant disclosure of takeover plans is mandated under takeover law as well as securities law and presents a number of legal problems. The involvement of advisers and banks by the offeror is safe except for warehousing. It is less clear whether the offeror can freely approach various banks for financing or potential purchasers or offerors to form a takeover offer consortium. Takeover plans made before final approval by the supervisory board present a special problem of the German two-tier board. The moment at which instant disclosure must be made of a decision that has been reached is highly controversial. A sensible solution consists of requiring instant disclosure only when a decision is final within the management board as well as the supervisory board. Yet there are exceptions to this rule. It is therefore helpful that the Takeover Act provides for the precedence of takeover law disclosure over the instant disclosure rules of general securities law. Instant disclosure is usually a question for the offeror and not for the offeree. However, in rare cases, the offeree company may have its own duty of instant disclosure. This may be the case if a friendly takeover is arranged with the cooperation of the board of the offeree company, and if the offeree company issues statements that prove to be wrong in the light of later developments. Concerning rumours, the position of German law is that as a matter of principle there is no duty on the company and its board to comment, that is, no duty of instant disclosure, either by the offeror or by the offeree. Instant disclosure in group situations is highly controversial. Two fact patterns should be distinguished. In the first, the relevant information has an impact on the price of the securities of the group member. In the second, the parent had or could have had an influence on the nondisclosure by the subsidiary. Mandatory disclosure of shareholding begins in Germany at five per cent. This goes beyond what is required under European law. It is not clear whether this rule is just a transparency rule or is rather intended to give the management of a company early warning of a possible future offeror. There are many problems of information and liability of the offeror and the offeree. One serious lacuna of the Takeover Act as compared to the City Code is that the information required about the workforce and the relevant changes in the conditions of employment does not cover the employees of the offeree’s subsidiaries. Section 12 of the German Takeover Act contains a liability provision that is closely
patterned on the stock exchange prospectus liability. Yet the German provisions on liability for false or incomplete stock exchange prospectuses have long been criticised for being far more restrictive than general tort law liability and even general civil law prospectus liability. Insider law should not prevent defensive measures by the offeree that are allowed under takeover law, that is, working together with shareholders and banks in anticipation of a hostile bid as well as searching for a white knight. The European Insider Trading Directive is not clear on this. Other problems relate to the legitimate extent of due diligence and whether the provisions against insider trading limit the normal due diligence examination. If a prospective white knight has been allowed to inspect the books of the offeree company in a due diligence exercise, it is unclear under German law whether the same information must be given to the offeror.

As to conflicts of interest of boards and banks it must be remembered that under section 76 of the German Stock Corporation Act (AktG), the management board has direct responsibility for the management of the company. This responsibility reaches beyond the shareholders and includes the interest of the employees and even the common good. The problem with this constituency rule is similar to the problem with a general business judgement rule concerning post-bid defences. The rule sounds very good, but it is not possible for the shareholders or the workers to check whether the judgement of the management board is valid. In the end, the rule results in decisions maximising managers’ utility. According to the majority view, under section 76 AktG it is not up to the management board to make decisions on the composition of the company’s shareholders. Section 33 of the Takeover Act (in the version following the failure of the thirteenth directive) may modify this. In Germany, inducement fees are not yet commonly known or discussed. The legal treatment is ambiguous. If the inducement fee is just to provide reassurance that the prospective offeror will not make a distinct loss if his offer is not accepted, this would probably be all right. It is questionable, however, whether the board does not fetter its discretion by making such a promise. Yet under the general business judgment clause of section 76 AktG, this can hardly be ascertained. At the least, there should be a full disclosure of such fees. Conflicts of interest in takeovers may become particularly relevant for German banks. This is so because in Germany—and some other continental European states such as Switzerland and Austria—the so-called all-purpose or universal banking system prevails. The Corporate Governance Principles of the Deutsche Bank of March 2001 state in this respect that, in general, members of the management board of the Deutsche Bank do not accept the chair in the supervisory boards of companies which do not belong to the Deutsche Bank group, and that supervisory board members must disclose conflicts of interests to the president of the supervisory board (and the president himself to the presidial committee). The best way of dealing with conflicts of interest is to prevent them from coming into existence. This can be done by utilising Chinese walls, the principle of general incompat-
ibility, or rules of special incompatibility. Under German law and possibly also under UK law, at least after Bolkiah, establishing Chinese walls is not considered a safe haven in itself for the bank or another party subject to conflicts of interest. General and special incompatibility rules are problematic. It remains to try to solve the conflict of interests in a takeover when the offer is prepared or has already been made and questions arises as to how the bank and the bank deputy in the offeree company should behave. There seem to be at least four possibilities: abstaining from voting, exclusion from deliberation, stepping down, and revocation of office. As to the choice between rule of law and self-regulation, there are major differences in history, corporate governance, and financial culture between the UK and Germany. They are related to history or, as one says today, they are path-dependent.
Regulatory Structures:  
The Relationship Between the  
Takeover Panel, the FSA and the  
Courts

PATRICK DRAYTÓN*

I INTRODUCTION

THE TAKEOVER PANEL regulates the conduct of takeovers of UK public companies. It aims to secure fairness for shareholders and an orderly framework for the conduct of bids. It is not concerned with the merits of bids, nor with anti-trust issues: these are matters for the companies themselves, their shareholders and other regulatory bodies.

At the risk of understatement, the Panel is an unusual body. It exercises considerable de facto power, but it does not have any direct statutory basis for its functions. The City Code on Takeovers and Mergers (the ‘City Code’) which the Panel issues and administers is just that, a code, without legal force. Nonetheless, the Panel is recognised in various statutes and is supported by the rules of other financial services regulators. And in view of its functions it is supervised by the courts.

However, the courts have, as a practical matter, leant over backwards to let the Panel get on with its job. They have taken the view that, in general, shareholders involved in takeovers have a clear interest in speedy regulatory decisions, to resolve stock market uncertainties. Accordingly, in the case law, notably  

Datafin, the courts have expressed the view that they would not expect to review decisions of the Panel during the currency of a bid, but do so after the bid is over with a view to guiding the Panel as to its future conduct rather than to changing the past.

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The courts have thus been accommodating to the Panel system of regulation. However, this must be put in context. The courts would intervene if the Panel acted conspicuously unfairly—for this reason, the Panel has been meticulous in its procedures and in the reasoning of its decisions. The net result is that no tactical purpose has been served by seeking to overturn Panel decisions in the courts. And since no tactical purpose is served, the Panel has not, in practice, been challenged and it has been able to deliver speedy and conclusive decisions.

II LEGISLATIVE CHANGES

The historical balance between the Panel and the courts is being disturbed by changes in the wider legal framework.

The Human Rights Act 1998 has created new grounds for legal challenge. This has led to changes in the Panel’s procedures to protect the Panel’s decisions, for example, the separation of the Panel’s rule making and adjudicative functions and the recognition that an appeal hearing may be held in public, with the parties having legal representation.

The Financial Services and Markets Act 2000, when fully implemented in November 2001, will create a single statutory financial services regulator, the Financial Services Authority (FSA), with important new functions in relation to market abuse which overlap with those of the Panel. The manner in which the FSA, the Panel and the courts are likely to inter-relate is dealt with in detail below.

Finally, despite the collapse of the proposed European Takeover Directive in the European Parliament, there remains the possibility that it will be resurrected. Although this was a well-intentioned measure, it would have significant implications for the nature of the Panel and the City Code. The Panel itself would be designated as the supervisory authority in the implementing legislation and would assume some of the characteristics of a statutory body. The Code and decisions of the Panel would have to be consistent with the directive itself and the case law in the European Court; in these respects, the Panel would be administering the law, rather than a code of conduct. These changes would create new bases for legal challenge.

The draft directive itself had text that would have enabled the UK implementing legislation to limit the damage that might be done to the Panel’s system of regulation. For example, the implementing legislation could have ensured that the directive did not create rights and obligations which could be litigated between the parties to a bid—disputes would have had to be channelled through the Panel system for resolution. Furthermore, the draft directive explicitly recognised that the courts could continue to exercise their discretion not to intervene in a manner that would affect the outcome of a bid, thereby enabling a continuation of the Datafin approach.
III MARKET ABUSE

The principles and rule books of financial service regulators in the UK have for many years enabled them to regulate behaviour by authorised firms and their employees that would now be termed market abuse. In addition, there has long been criminal law applying to insider dealing and market manipulation. What is innovative about the new market abuse regime under the Financial Services and Markets Act 2000 is that it is structured as a civil regime that extends to all persons, not just to the financial services community. Thus the regime will apply to the parties to bids—the companies concerned, their directors and their wider concert parties—and not simply to the financial intermediaries. And the standard of proof is civil rather than criminal.

Three types of behaviour can constitute market abuse:

a) Misuse of unpublished information in relation to a qualifying investment.2
b) Creation of a false or misleading statement as to the supply or demand or the price or value of a qualifying investment.
c) Distortion of the market in a qualifying investment.3

Each of these three types of behaviour is subject to a ‘regular user’ test—an objective test of the standard of behaviour that is expected by a regular user of the market. In addition, there are various defences that a person can make if he is accused of market abuse: that he believed on reasonable grounds that his behaviour was not abusive; or that he took all reasonable precautions and used all due diligence to avoid abusive behaviour.

The FSA can penalise a person who has engaged in market abuse or who has required or encouraged another person to engage in market abuse (whether by taking or refraining from taking action).4

1 The Substantive Overlap with Takeover Regulation

The Takeover Panel today regulates market abuse in the context of public takeovers. In relation to the misuse of information, General Principal 6 of the City Code requires all parties to an offer to use every endeavour to avoid the creation of a false market and Rule 4.1 of the City Code prohibits dealings by persons (other than the offeror) in possession of confidential price-sensitive information about an offer.

2 Qualifying investments include shares which are traded on the London Stock Exchange, virt-x and Jiway.
3 Financial Services and Markets Act 2000, s 118. As a short hand, the second and third of these types of behaviour—creation of a false or misleading impression and market distortion—will be referred to as market manipulation.
4 Ibid, s 123.
In relation to the creation of a false or misleading impression and market distortion, General Principle 6 is again relevant. Other general principles, and the rules which give them more practical meaning, are also relevant. For example, General Principle 4 of the Code requires that shareholders should be given sufficient information to enable them to reach a properly informed decision and that no relevant information should be withheld from them. General Principle 5 requires that any document or advertisement addressed to shareholders should be prepared to prospectus standards.

There will therefore be a significant overlap between the FSA’s responsibility for the market abuse regime and the Takeover Panel’s responsibility for takeover regulation. In practice, this overlap is likely to be more significant in relation to market manipulation than to the misuse of information.

Breaches of security, leaks and the false markets which they create have been evident in many public takeovers. The Panel Executive is often unsuccessful in investigations of breaches of security or leaks and it has for many years referred cases involving possible breach of Rule 4.1 to other authorities, in the first instance the London Stock Exchange, since such cases may involve breach of the criminal law on insider dealing. The Exchange conducts an initial investigation, the results of which are now passed to the FSA. This approach will continue when the market abuse regime comes into force, the difference being that the FSA will then have additional powers (including financial penalties and public censure) available to it under the market abuse regime.

Having referred a case of possible insider dealing to other authorities, the Panel Executive has not itself pursued disciplinary action for breach of Rule 4.1. However, it has imposed remedies if it considers that the acquisition of shares by one of the parties to an offer, in breach of Rule 4.1, has disadvantaged another party.

By contrast, the investigation of alleged market manipulation and the imposition of appropriate remedies are in practice central to the Panel Executive’s day-to-day regulation of bids.

2 The FSA’s Powers

It should be clear from the above that there will be a substantive overlap between the functions of the FSA and the Panel in the context of takeovers. In addition, and hardly surprising given that the FSA has been established as the statutory regulator, the FSA has extensive powers under the market abuse regime. The FSA’s powers will in many respects be more unwieldy than the Panel’s, but the FSA’s powers will be sufficient for many aspects of takeover regulation.

First, the FSA has significant information gathering and investigative powers. In particular, the FSA can appoint an investigator in relation to cases of suspected market abuse. Furthermore, the FSA has the power to compel cooperation with an investigation. It can apply to a magistrate for a search warrant authorising the
police to search premises and seize or copy documents. Furthermore, failure to cooperate with the investigator may be a criminal offence.

The Takeover Panel has no formal powers of investigation. The Panel expects parties to bids, their directors and professional advisers to co-operate with it. The Panel’s approach is underpinned by the FSA’s cooperation rule, which requires certain authorised persons (for example, firms providing corporate finance advice) to provide, at the request of the Panel, any information and documents and any other assistance that they can.

Secondly, the FSA has the power to apply to the court for injunctions against persons, whether authorised or not, in cases of market abuse. For these purposes, an injunction includes an order to take steps to remedy the market abuse. In addition, the FSA may ask the court to freeze a person’s assets. Finally, the FSA (and the Secretary of State) may apply to the court for an order for restitution, for example in favour of a person who has suffered loss as a result of the abuse.

Again, the Takeover Panel has no formal powers to restrain or remedy a person’s behaviour. In practice, however, the Panel exercises considerable de facto power through rulings of the Panel Executive or the Panel itself. Where the Panel Executive or the Panel finds a breach of the Code, it puts in place what it considers to be the appropriate remedy. Depending on the circumstances of the breach, it may, for example, require a person who is party to an offer to: make specific disclosures; correct (or not repeat) a statement that is false or misleading; dispose of shares; not vote shares; make (or not make) an offer; revise (or not revise) an offer; introduce a new form of offer consideration; waive an offer condition; compensate shareholders who have sold shares (whether in the market or by acceptance of an offer); allow an offer to lapse; cease dealing in shares; amend the offer timetable, including freeze the offer timetable. In practice, the Panel’s decisions are implemented by the relevant parties.

Finally, the FSA will have significant punitive powers. It will have the power to impose a financial penalty or to apply to the court to impose a financial penalty. There is no statutory limit to the size of a financial penalty. As an alternative to a financial penalty, the FSA may issue a statement of public censure.

The Takeover Panel uses the sanction of public censure and may withdraw the facilities of the securities markets by invoking the FSA’s cold shouldering rule. In addition, the Panel may refer a person’s conduct to another regulatory body, such as the FSA or the Department of Trade and Industry.

3 Safe Harbours

Before addressing how the FSA expects to use its powers, it is worth making some comments on safe harbours.

In its Code of Market Conduct, the FSA has created safe harbours for certain provisions of the City Code that address market manipulation. These safe harbours apply mainly to provisions of the Code dealing with announcements,
disclosures and standards of care. In limiting the benefit of the safe harbours to these types of provisions, the FSA has helpfully drawn a distinction between market abuse and what it calls shareholder abuse. For example, the FSA has made it clear that it does not view Code rules that address equality of treatment for shareholders or which provide for an orderly framework for the conduct of bids (such as rules relating to the bid timetable) as rules that fall within the scope of market abuse.

At first sight, the narrowness of the City Code rules that have been granted safe harbours might seem to indicate that the substantive overlap between the market abuse regime and the Code is not great. However, this would be to underestimate the significance during the course of bids of allegations of false or misleading disclosures or the absence of required disclosures in takeover disputes. In particular, allegations that a person has failed to disclose, or has not fully disclosed, share dealings in a target or his concertedness with the bidder or the existence and terms of a related ‘special’ deal are often at the heart of the most problematic disputes that the Panel has to address. Furthermore, as and when the true position becomes known and disclosed, the consequences may be severe under the equality of treatment rules or may be significant to the subsequent course of the bid because of the impact on market perception.

The safe harbours do not limit (and were not designed to limit) the overlap in jurisdiction between the FSA and the Takeover Panel. In accordance with the Financial Services and Markets Act 2000, it is for the FSA to determine whether the provisions of the Code have been complied with, and therefore whether the benefit of the safe harbour is available. The FSA has stated that it will consult the Panel and will attach considerable weight to the views of the Panel in reaching the FSA’s own decision, but nonetheless it will be the FSA’s decision. The FSA has recognised that the specific rules of the Code are to be interpreted purposively in accordance with the general principles.

From both the Takeover Panel’s and the FSA’s perspective, it is preferable that the FSA should limit (by limiting the number of Code rules that are subject to the safe harbour) the range of situations in which it has to make a decision about the application of the City Code. The FSA would not want to spend its time interpreting another body’s rule book and the Panel would not want its decisions on its own rule book routinely to be double guessed by the FSA.

4 FSA’s Policies

The FSA has adopted a number of policies in its enforcement manual that set out how it expects to use its powers. Its policies in relation to market manipu-
lation in the context of takeovers will materially address practical concerns about the overlap of the FSA's functions and powers with those of the Panel. In many respects the FSA seems to be applying its own version of Datafin principles to the exercise of its powers. Its approach is extremely helpful to the Panel in a number of respects.

First, where market manipulation may have occurred during a takeover, the FSA will refer to the Takeover Panel and give due weight to its views. Where the Panel has procedures for complaint—as it would if the alleged or actual behaviour was by a person with responsibilities under the City Code—the FSA expects parties to exhaust those procedures through the Panel system. These procedures would involve complaint to the Panel Executive, investigation and ruling by the Executive and appeal to the Panel itself and possibly to the Appeal Committee of the Panel. Prior to the exhaustion of these procedures, the FSA does not expect to use its powers to impose penalties or apply to the court to impose penalties, injunctions or restitution other than in exceptional circumstances.

Secondly, the FSA recognises that the Takeover Panel will often be able to address concerns about market manipulation during the currency of a takeover offer. The principal circumstances in which the FSA is likely to consider the exercise of any of its powers to combat market manipulation under the market abuse regime during the currency of an offer are:

a) Where the Takeover Panel is unable to investigate properly due to lack of cooperation by the relevant people.

b) Where a person has deliberately or recklessly failed to comply with a Panel ruling.

c) Where the behaviour extends to securities outside the Panel's jurisdiction.

f) Depending on the circumstances, where the Panel asks the FSA to use its powers to impose penalties or apply to the court to impose penalties, injunctions or restitution.

d) Where the behaviour threatens the stability of the financial system.

e) Depending on the circumstances, where the Panel asks the FSA to use its powers to impose penalties or apply to the court to impose penalties, injunctions or restitution.

Thirdly, in any case where the FSA considers that the exercise of its powers might affect the timetable or outcome of a takeover offer, and therefore not be in the interests of the markets, it will consult the Panel before using any of its powers. Equally, the FSA will consult the Panel, and give due weight to its views, if the FSA considers that the publication of the details of financial penalties imposed by it might affect the timing or outcome of an offer.

Fourthly, the FSA may consider the use of its powers to combat market manipulation after an offer has been concluded in a range of circumstances. These circumstances include all the items in a) to e) above and also:

f) Where the FSA's approach in previous similar cases (whether or not in the context of takeover offers) suggests that a financial penalty should be imposed.

The relationship between the Takeover Panel, the FSA and the Courts
Finally, in deciding whether to take enforcement action or determining the level of a financial penalty, the FSA will take into account, among other matters, whether the person concerned has cooperated with the Takeover Panel’s investigation and complied with the Panel’s rulings (for example to remedy any breach of the City Code). Similarly, in considering whether a person benefits from the two statutory defences, the FSA will take account of whether the person complied with the City Code or consulted the Panel. In these respects the FSA’s policies reinforce the authority of the Panel.

5 Practical Implications

A more effective regulatory approach can be expected to the misuse of information, in particular because of the combination of the FSA’s information gathering and investigative powers and the civil standards of proof that will apply to the FSA’s enforcement actions.

In relation to market manipulation, there are potential problems in a number of areas for the Takeover Panel.

First, the FSA may consider using its powers where the Panel is unable to investigate properly due to lack of cooperation by relevant people. The Panel has no formal powers of investigation. It relies on the cooperation of the parties to offers, in particular on the financial advisers to the offeror and offeree. The Panel may freeze the timetable of an offer to enable it to conduct an investigation, but investigations are normally conducted at speed, not least because one of the principal benefits of its form of regulation is that regulatory decisions are made swiftly, thereby minimising market uncertainty. Although the Panel is experienced and is prepared to draw inferences from incomplete information, it is potentially vulnerable to the argument of an aggrieved party that only the FSA has the ability properly to investigate the complaint.

Secondly, the FSA needs to ensure that its decisions not to intervene are themselves safe from legal challenge. In particular this will require it to be able to demonstrate in any case that it has not blindly followed its policies and that it has not, in effect, delegated its decision making to the Panel.

If there is a legal challenge to a decision of the FSA not to intervene or if, in the appropriate exceptional circumstances, the FSA decides to exercise its powers during the course of an offer, the Panel will have to decide whether or not to freeze the bid timetable. The Panel’s decision will obviously depend on

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6 A reasonable belief that his behaviour did not amount to market manipulation or the taking of all reasonable precautions and exercise of all due diligence.

7 In relation to authorised persons, the FSA separately provides underpinnings to the Panel’s authority through its endorsement of the Code and through its cooperation and cold-shoulder rules.
the circumstances of each case and will no doubt take account of consultation with the FSA.

Given the tactical importance of time, especially in contested or competing offers as important milestones in the offer timetable approach (eg for revision or for the offer to be declared unconditional as to acceptance), any success by an aggrieved party in achieving delay could establish tactical litigation as an effective takeover tactic.

It is not in the interests of either the Takeover Panel or the FSA for these matters to be problems in practice. The FSA will be determined to make its decisions safe from legal challenge. The net effect, particularly in the early days of the market abuse regime, will be a slowing down of regulatory decision. There are bound to be testing cases which will mould the longer term manner in which the two organisations operate and which could determine new practical limits to the Panel’s authority.

The best outcome will be one where the FSA in practice is able to confine its enforcement actions in relation to market abuse during the course of takeovers to punitive action after the offer is over.
Regulatory Structures

DR THORSTEN PÖTZSCH*

I INTRODUCTION

FOR THE LAST two decades the financial markets have been faced with a process of profound structural change. In Germany, this change has been accompanied by a number of legislative measures aimed at enhancing Germany’s status as a financial centre. The most prominent of these measures have been the three Financial Market Promotion Acts (Finanzmarktförderungsgesetze), adopted in 1990, 1994 and 1998. Of these Acts the Second Financial Market Promotion Act is commonly regarded as a cornerstone, containing not only a completely new Securities Trading Act (Wertpapierhandelsgesetz), but also establishing a central supervisory authority, the Federal Securities Supervisory Authority (Bundesaufsichtsamt für den Wertpapierhandel).

Recently, two new chapters were opened in the field of capital market and securities regulation in Germany. On 4 September 2001, the German Federal Ministry of Finance published a discussion draft of the Fourth Financial Market Promotion Act, which comprises a complete revision of the Stock Exchange Act (Börsengesetz) as well as numerous other amendments of existing provisions. This draft is due to be presented to parliament later this year; it is planned to come into effect in the summer of 2002.

The second chapter deals with takeovers. In June 2000 and March 2001, the Federal Ministry of Finance published two drafts concerning takeover legislation. Both drafts have been discussed at extensive hearings, resulting in a governmental draft on 11 July 2001. Parliamentary proceedings are now taking place, and it is expected that by the end of this year, for the first time ever, Germany will have legislation dealing specifically with takeovers. In the wake of

* Regierungsdirektor, Bundeskanzleramt, Berlin (Director, Federal Chancellery, Berlin).
1 Erstes Finanzmarktförderungsgesetz, Bundesgesetzblatt (Federal Law Gazette) I 1990 p 266.
4 Viertes Finanzmarktförderungsgesetz.
the Mannesmann/VodafoneAirtouch takeover the draft Takeover Act, together with its European sister, the draft thirteenth Directive on company law concerning takeover bids, has been at the centre of public and political interest, not only in Germany. Let’s take a closer look at the draft and its history, starting with a very brief look at the economic situation.

II A BRIEF LOOK AT THE ECONOMIC SITUATION

The number and importance of company takeovers worldwide is growing. Despite the recent drop in mergers and acquisitions (M&A) activity during the last year, it can safely be said that for a number of reasons the economic environment is ripe for takeovers. Markets are merging on account of technological change, in particular in the field of information and communications technology. National borders play an ever less important role in the business activities of companies. In Europe, economic and monetary union and the introduction of the euro are further factors leading to an increase in the number and volume of mergers and takeovers. In Germany, this development is also being encouraged by the spread of deregulation, the increasing depth of the national capital market, and also by the steadily growing proportion of shares in the assets of private households. Against this background, it is essential for a capital market to have a reliable set of rules dealing with takeovers.

III PRIOR TAKEOVER REGULATION IN GERMANY: THE ‘SOFT LAW’ APPROACH

Germany has long been attempting to come to terms with the subject of ‘company takeovers’. In 1979 the Stock Exchange Experts Commission (Börsensachverständigenkommission) at the Federal Ministry of Finance published guidelines for company takeovers. These guidelines provided only a minimum set of rules: some general principles, rules regarding insider trading, the preparation of an offer, the offer document and the offer period. Rules concerning a mandatory bid were not included. The guidelines were regarded as recommendations; they had no binding force—and went more or less unheeded.

A second attempt was made in July 1995. The Stock Exchange Experts Commission established a Takeover Code (Übernahmekodex). Furthermore, a supervisory body, the Takeover Commission (Übernahmekommission), was installed. Again, this Code, which is still ‘in force’, has a voluntary basis. It is not statutory law but a recommendation concerning the conduct of parties.
involved in takeovers and public share offers. The basic elements and structure of this Code follow the Anglo-Saxon model of the City Code on Takeovers and Mergers6 (‘the City Code’). The Takeover Code is designed as a flexible instrument, to be modified over time to conform to practical experience.

A preamble describes the goals of the Takeover Code. The sections following the preamble include definitions of the most important terms, the basic rules applicable to takeover proceedings, the offer document and the duties of the offeror and the target company. In addition to this, a mandatory bid rule is included.

To ensure compliance with the Takeover Code, hundreds of companies—mostly listed companies—were requested to accede to the provisions of the Code. The Executive Office of the Takeover Commission has regularly published a list of companies and persons that have acceded to the Code. Furthermore, the admission of a company to the German stock market index DAX requires acceptance of the Code. In the event of violation of the Code, the Executive Office may publish its comments, recommendations and decisions.

Although the Takeover Code has been applied in numerous cases over the past five years, the problem of widespread acceptance of these rules by market participants still remains. Only 755 of the 1016 German companies listed on German stock exchanges have accepted the Code, including 86 companies listed in the DAX 100.7 The Takeover Code has not become a standard generally accepted by market participants.

Against this background, in February 1999 the Stock Exchange Experts Commission recommended that takeover rules should be established as statutory law,8 thus ensuring general applicability of and adherence to the rules. An ‘Expert Commission on Corporate Takeovers’ appointed by the Federal Chancellor in spring 2000, comprising representatives from the business and academic worlds and the trade unions as well as representatives of the federal ministries concerned, also came to the same recommendation. The Commission also drew up concrete proposals for a future legislative basis for takeovers.

Given the parallels between the City Code and the German Takeover Code, one must ask why the ‘soft-law approach’ failed to succeed in Germany. It is likely that the following reasons were decisive. Firstly, other than with statutory arrangements, the first question to arise with the soft-law approach is who sets the rules for what procedure. The question may seem at first glance to be a formalistic one, yet it is of fundamental significance for the acceptance of voluntary rules. Such rules will be acceptable to market participants only if they have been involved in the drafting of the arrangement. In the City Code, this is reflected right from the start in 1(a) of the Introduction, where it says: ‘The

6 Panel on Takeovers and Mergers, City Code on Takeovers and Mergers, July 2000 edition.
7 As at 11 April 2001.
8 Standpunkte der Börsensachverständigenkommission zur künftigen Regelung von Unternehmenübernahmen.
Code represents the collective opinion of those professionally involved in the field of takeovers as to business standards and as to how fairness to shareholders can be achieved. At the same time, it is accepted by the financial community that the Panel on Takeovers and Mergers draws up the rules of the game with the involvement of market participants and alters them as and when required. Germany attempted to follow a similar path, thus charging the Stock Exchange Experts Commission with drafting the Takeover Code. The Experts Commission is a body that has been in existence since 1968 to advise the Federal Ministry of Finance on questions of capital market policy. It is a high-calibre body made up of representatives of investor protection associations, banks, insurers, investment firms, stock exchanges, industry, the Deutsche Bundesbank and the academic world. Despite the involvement of this body, once the Code had been adopted major undertakings refused to accept its provisions, stating that they had not been given sufficient scope to bring in their own ideas as to the form the Code should take. Similar protests were voiced in 1998 when the Takeover Code was revised. Whether these objections were merely a pretext or were in fact substantiated, the fact remains that at least in Germany the acceptance of a soft-law approach failed because the legitimacy of the responsible bodies and the procedure of drafting the rules were called into question.

Secondly, the acceptance of soft law is also crucially dependent on the sanctions that may be imposed for non-observance of the rules. In this respect, experience in Germany has shown that public censure is clearly not likely to be an effective sanction in the case of takeovers. The English way out of this problem has been to involve another regulatory authority. Violations are reported to another authority, for example, the Department of Trade and Industry, the London Stock Exchange or the Financial Services Authority, which then exercises its powers, for instance by ordering those who have broken the City Code to be ‘cold-shouldered’, or takes disciplinary action against regulated persons. But this approach has little in common with ‘soft law’. The point is that these are sovereign measures which in the final analysis do not leave the persons concerned any freedom to choose whether to accept or to disregard any specific rules. Presumably, the thinking behind this is that ultimately it is not desirable for the persons concerned to have freedom of choice. In other words, the harder the soft law is, the better it is.

IV KEY POINTS OF THE GOVERNMENT DRAFT ON TAKEOVERS

1 General Aim

The new Act on Acquisition of Securities and Takeovers (Wertpapiererwerbs- und Übernahmegesetz: the ‘Takeover Act’) aims at introducing unbiased rules
for company takeovers in Germany which give due consideration to the
demands of globalisation and to the financial markets.
This aim is achieved by:
— creating guidelines for a fair and speedy procedure without promoting or hinder-
ing company takeovers;
— improving information and transparency for shareholders and employees;
— strengthening the legal position of minority shareholders in the event of company
takeovers; and
— giving consideration to international standards in the field of company takeovers.

2 Scope of Application

The Takeover Act will apply not only to public offers aimed at the transfer of
corporate control and mandatory bids, but also to every other public offer for
the purchase of shares of a German company, provided the shares are listed on
a regulated market as defined by Article 1 No 13 of the Investment Services
Directive\textsuperscript{9} within the European Economic Area.\textsuperscript{10} As a result, the Takeover Act
will cover both (i) offers which, if successful, will result in a smaller stake than
30 per cent of the voting capital and (ii) offers made by a controlling share-
holder for the topping-up of his position. Further, the Takeover Act will apply
not only to public offers or the purchase of shares but also to public offers for
other securities that can be converted into shares.\textsuperscript{11} Therefore, the scope of
application will be even broader than the scope of the City Code and the Rules
Governing Substantial Acquisition of Shares (SARs).

3 General Principles

The Takeover Act also provides for certain general principles. According to
these principles:
— shareholders of the same class must be treated equally;
— all holders of securities of the target company must have sufficient time and the
necessary information to be able to decide on a well-informed basis about the
offer;
— the offeror and the target company are obliged to complete the procedure without
delay. Additionally, the business activity of the target company may not be
impeded for longer than acceptable; and

Journal of the European Communities, No L 141, 27.
\textsuperscript{10} Ss 1 and 2 (1), (7) Takeover Act.
\textsuperscript{11} Ibid, s 2 (2), No 2.
4 Timetable

The Takeover Act also provides for a very strict timetable. The timetable is designed to avoid the target company being ‘besieged’ over an excessive period of time and at the same time to enable the offeree company to hold a shareholders’ meeting during the offer period. In the light of these objectives, the offeror will have to submit the offer document to the supervisory authority no later than four weeks after announcing the bid. After approval by the supervisory authority (to be granted within ten and, in exceptional cases, 15 business days), the offer document is to be published without delay in printed form and on the internet.

The offer period is to last between four and ten weeks. In exceptional circumstances the offer period is extendable, such as where a competing bid emerges or the offeror modifies his offer within the last two weeks of the offer period. If a takeover bid has been successful, there will be an additional two-week acceptance period for the shareholders who did not accept the bid in the first place. While a takeover bid is pending, a shareholders’ meeting of the offeree company can be convened with only two weeks’ notice. If such a meeting is convened, the offer period is automatically extended to 10 weeks.

5 The Offer Document

Shareholders must be given sufficient information to reach a properly informed decision. Therefore, the offeror must inform the shareholders and employees of the target company about the offer and the consequences of the proposed takeover in a German-language offer document. The offer document must include information concerning the funding of the bid and the offeror’s financial situation after completion of the takeover and the offeror’s post-takeover business strategy. The offeror is liable for damages if the offer document is incorrect or incomplete in any material respect.

12 S 3 Takeover Act.
13 Ibid, s 14.
14 Ibid, s 16 (1).
15 Ibid, s 22 (2).
16 Ibid, s 21 (5).
17 ‘Sitting on the fence’ rule: Ibid, s 16 (2).
18 The general rule is one month.
19 S 16 (3), (4) Takeover Act.
20 Ibid, s 11.
21 Ibid, s 12.
6 Consideration

In the case of public offers aimed at the transfer of corporate control and mandatory bids, specific rules regarding the consideration apply. In general, the offeror will be able to fund takeover bids using shares. This is, however, subject to the proviso that the shares offered as consideration confer voting rights, are ‘liquid’ and are listed on a regulated market within the European Economic Area.

In a takeover bid, the consideration must consist of cash if the offeror has purchased for cash 5 per cent of the share capital during the three-month period before the bid is announced, or if the offeror has purchased additional shares for cash after the announcement of the bid. Offerors will be free to offer any other consideration as an alternative. The minimum price of a voluntary or mandatory takeover bid must in general be equivalent to the higher of: (i) the weighted average stock exchange price of the target shares during the three-month period before announcement of the bid; and (ii) the highest price paid by the offeror if the offeror has purchased target shares during this three-month period. Purchases made by persons acting in concert with the offeror are to be taken into account.

Before publishing the offer document, the offeror must have taken the necessary steps to ensure that the consideration can be paid when due. If the consideration consists of cash, an independent bank or provider of securities services will have to confirm in writing that the necessary steps have been taken to ensure that funds will be available. The statement confirming certain funds is to be annexed to the offer document. The issuer of such a statement will be liable for damages if it is incorrect or incomplete in any material respect.

7 Mandatory Bid

The relevant threshold for the mandatory bid will be 30 per cent of the voting rights. Shares held by persons acting in concert are to be taken into account. Under certain circumstances (for example the restructuring of a group of companies) exceptions will apply. If the holding of more than 30 per cent of the voting rights does not confer control, or under other exceptional circumstances

\[22 \text{ Ibid, s 31 and 39.}\]
\[23 \text{ Ibid, s 31 (2), 2 (7).}\]
\[24 \text{ Ibid, s 31 (3).}\]
\[25 \text{ Ibid, s 31 (1); S 3 et seq. Takeover Ordinance.}\]
\[26 \text{ S 13 Takeover Act.}\]
\[27 \text{ For further discussion of the mandatory bid rule see P Davies ‘The notion of equality in take-over regulation’ at Ch 2.}\]
\[28 \text{ Ss 29 (2), 33 (2) Takeover Act.}\]
\[29 \text{ Ibid, s 36.}\]
(financial crisis, successions in family-owned companies, etc) the Federal Supervisory Securities Authority will have the power to exempt from the mandatory bid upon application.\textsuperscript{30}

If there is a change of control in a parent company that has listed subsidiaries (indirect change of control), the mandatory bid must be extended to the shareholders of such subsidiaries as well. The Federal Securities Supervisory Authority may exempt from a mandatory bid upon application if the book value of the parent companies' shareholding in the relevant subsidiary companies amounts to less than 20 per cent of the book value of all assets of the parent company,\textsuperscript{31} the reason being that in these cases the subsidiary normally will not be the main target of the offeror.

8 ‘Cooling Off’ Period

Where the supervisory authority has prohibited an offer from going forward, or where an offeror fails to reach the threshold upon which the bid was made conditional, the offeror will be prohibited for a period of one year from making another bid for the offeree company. However, the Federal Securities Supervisory Authority will have the power to lift the one-year prohibition upon application provided the offeree company agrees with this.\textsuperscript{32} This will usually be the case if there is another bid for the offeree company and the target management has asked the former offeror to act as a ‘white knight’.

9 Duties of the Target’s Management

A very controversial issue during the final discussions on the thirteenth Directive on company law concerning takeover bids was the question of whether and to what extent the management of the offeree company in a takeover situation can adopt measures which could result in the frustration of the bid.\textsuperscript{33}

The pros and cons of this issue are familiar enough. One of the grounds for restricting the scope for action by the management of the offeree company is that the offer is directed to the shareholders, not to the management, and that the shareholders and not the management should decide on the offer. Added to this is the conflict on the part of management staff of not wishing to lose influence and possibly their own positions as a result of the takeover. Moreover, the management board looks after third party interests, namely those of the

\textsuperscript{30} S 37 Takeover Act; S 9 Takeover Ordinance.
\textsuperscript{31} S 9 sentence 2 no 3 Takeover Ordinance.
\textsuperscript{32} S 26 Takeover Act.
\textsuperscript{33} For a further discussion of this issue see W Underhill and A Austmann ‘Defence Tactics’ at Ch [6] especially pp 87–122.
company and its shareholders, and this function conflicts with the scope for exerting influence on the circle of shareholders by warding off a takeover. In contrast, an argument in favour of allowing the management broad scope for action is that even during a takeover bid it must still be possible to adopt measures in the interests of the company even if such measures may in any one case lead to the bid being frustrated.

A further important aspect is that the issue of warding off hostile takeover bids cannot be restricted to a discussion of the scope for action available to the management board of the offeree company, but must be considered in a broader perspective. It is notable in this respect that although numerous countries stipulate that the management board of the target company must refrain from frustrating an offer, hostile takeovers can be prevented by other means, such as golden shares, multiple voting rights and voting right restrictions—an aspect that has to be taken into account when discussing the concept of creating a ‘level playing field’. The significance of this aspect is considerable, as it was precisely this aspect that led to the failure of the thirteenth Directive.

The German Takeover Act attempts to combine the aforementioned aspects into a unified system. The pre-eminence of the shareholder decision is taken into account by stipulating that, in general, all takeover defences by the management and the supervisory board need to be authorised by the shareholders.34

To ensure that the offeree company remains able to operate normally during a takeover bid, the Takeover Act provides that during an offer the management and supervisory board may take steps that could prevent the takeover bid from succeeding if a reasonable and diligent managing director of a company that has not become the target of a takeover bid would have taken such steps as well. In line with the vast majority of takeover regulations in Europe it will also be admissible to seek a competing bid (‘white knight’).35

An authorisation to defend takeovers can be granted either by a shareholders’ meeting convened at short notice while a takeover bid is pending or, as a matter of prevention, by a shelf resolution. Such a shelf resolution requires a majority of 75 per cent of the shares present and voting in the meeting; the articles of association of the company may stipulate a higher majority and impose further requirements. The takeover defences are to be specified in the resolution; a ‘blank cheque authorisation’ is inadmissible. The authorisation may be granted for up to 18 months. Before making use of the takeover defences specified in the authorisation, the management board is required to obtain supervisory board approval.36

Whether or not shelf resolutions will attain major significance in practice cannot at present be fully assessed. Yet it is doubtful whether shareholders—especially institutional shareholders—will be prepared to give the management

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34 S 33 (1) sentence 1 Takeover Act.
36 Ibid, s 33 (2).
such licence. Furthermore, the adoption of such a measure sends a clear signal to the capital market that the management sees the company as a potential takeover target and that in response the management at all events is thinking, not primarily in terms of enhancing the company value, but of maintaining the status quo—scarcely a measure that is likely to gain positive acceptance in the capital market.

In the final analysis, the German rules regarding frustrating actions—although strongly criticised in public—appear justifiable. They leave the final decision with the shareholders. Additionally, for future political discussion at European level these rules in one of the largest European countries are a clear indication that every attempt to regulate company takeovers has to include company law aspects as well; therefore a ‘package solution’ will have to be found.

In addition to the aforementioned duties of the management, the management board of the target company must publish a statement on the proposed takeover which is to consider the interest of the target company as a whole and must also include the position of the works council (if any).\textsuperscript{37} Further, an offeror is prohibited from effecting payments to members of the target management board and supervisory board in connection with the takeover bid.\textsuperscript{38}

10 Sanctions

Compliance with the takeover rules is to be enforced by effective sanctions:

— if an offeror fails to submit a mandatory offer, the consideration to be offered is subject to interest for the period of this failure at a rate of five per cent above the basic interest rate;\textsuperscript{39}
— violations of the offeror’s obligation to submit a mandatory bid can lead to a loss of all rights vested in the shares of the offeror;\textsuperscript{40} and
— administrative fines of up to 1 million euro may be imposed.\textsuperscript{41}

11 Supervisory Authority

Public offers for the purchase of shares will be supervised by the Federal Securities Supervisory Authority.\textsuperscript{42} This will ensure that supervision is in the
hands of a body whose impartiality in the event of disputes is beyond doubt
and which at the same time can exercise sovereign powers and impose effective
sanctions.

An Advisory Committee (Beirat) will also be installed at the Federal
Securities Supervisory Authority, whose members will include representatives of
the business community, the investors and the employees as well as further
experts. The function of the Advisory Committee is to be involved in supervi-
sion and in particular to advise the Federal Securities Supervisory Authority
when issuing ordinances. It will also have the function of submitting to the
Supervisory Authority proposals for the nomination of experts to serve on the
Appeal Panel, which decides on appeals lodged against specific orders issued
by the Supervisory Authority.

The establishment of the Advisory Committee enables the Supervisory
Authority to have recourse to the specialist knowledge available in the business
community, which is indispensable in the case of takeovers.

12 Relationship Between the Supervisory Authority and the Courts

If the rules are to function properly it is especially important for procedural
delays and legal disputes to be avoided as far as possible. The pattern of regu-
lar resort to court which is familiar from the United States is a warning exam-
ple in this respect. The German draft attempts to deal with this problem in
several ways.

The strict timetable concerning the offer procedure has already been
described. Furthermore, the offeror is obliged to observe short time-limits for
the preparation and submission of the necessary documentation. The supervi-
sory authority is also obliged to conclude the necessary examinations within a
period of ten working days (or 15 working days in exceptional cases).

In addition, some important decisions (in particular those taken by the
Supervisory Authority regarding exemptions from a mandatory bid) are to be
taken in the form of discretionary decisions (Ermessensentscheidungen). Such
decisions are subject to review by the courts only to a limited extent. Moreover,
the law stipulates that supervisory activity is conducted exclusively in the public
interest. This means that decisions taken by the Supervisory Authority may
be contested by the addressees of those decisions, but not by third parties. This
restricts the circle of persons who are entitled to take action against such
decisions.

43 See 12 below.
44 § 5 Takeover Act.
46 Ibid, s 37.
Additionally, an Appeal Panel (Widerspruchsausschuss) is to be set up at the Supervisory Authority to decide on appeals lodged against specific orders issued by the Supervisory Authority. The Panel is to be staffed by officials of the Supervisory Authority and other expert persons whose nomination is to be proposed to the Supervisory Authority by the Advisory Committee. This will enable decisions taken by the Supervisory Authority to be reviewed without recourse to the courts. Further, including persons with practical experience on the Appeal Panel will increase the acceptability of supervisory decisions and reduce the likelihood of litigation.

Recourse to the courts is also subject to special rules. Thus with regard to measures taken by the Supervisory Authority the draft generally provides for a single-tier procedure, with decisions (except those concerning administrative fines) being concentrated at a single court (Oberlandesgericht Frankfurt am Main). A special senate for cases relating to securities purchases and company takeovers is to be set up at this court, thus ensuring that specialist knowledge is concentrated at one point. Civil-law disputes between the parties will be assigned to the courts of the Länder. The Länder will also have the scope to concentrate the relevant responsibilities.

13 Ensuring Flexibility of the Regulations with the Use of Ordinances

In many areas, regulation is conducted with the use of ordinances rather than at statutory level. In addition to the content of the offer document, this relates to the determination of the consideration in takeover offers and mandatory offers and the exemption from a mandatory offer. This arrangement ensures that regulations remain flexible without endangering the necessary legal certainty.

V OUTLOOK

The future will show whether the new German rules are able to withstand the test of time. What we can be sure of is that Germany will shortly be seeing an increase in the number of takeover bids, especially in view of the new tax arrangements on the sale of substantial cross-corporation holdings that come into effect in 2002. 2002 will certainly be an interesting year.

48 S 6 Takeover Act.
49 Ibid, s 5 (3).
50 Ibid, s 49 (4).
51 Ibid, s 68.
52 Ibid, s 67.
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Defence Tactics

WILLIAM UNDERHILL* AND ANDREAS AUSTMANN+

I INTRODUCTION

1 Hostile Takeovers in the UK

HOSTILE TAKEOVERS ARE a well established part of corporate life in the UK. Since January 2000 there have been 21 bids for UK listed companies which were unsolicited and, at least initially, were not recommended.

Received wisdom at the beginning of 2000 was that defending an unsolicited cash bid was almost an impossible task. That view was changed by the successful defences by Blue Circle Industries plc against an offer by Lafarge SA. This was followed by defences by Wickes, British Polythene Industries and Wolverhampton & Dudley Breweries. The pre-conditional offer by Lloyds TSB for Abbey National failed at the anti-trust hurdle. But it is not so easy to beat the lessons of experience. Both Blue Circle and Wickes initially remained independent but the respective bidders were left with substantial shareholdings which formed the basis for subsequent discussions with management. In each case the bidder was able subsequently to negotiate a recommended offer which was successfully completed. The regulatory framework for the conduct of takeovers in the UK established by the Takeover Code is based on an assumption that the possibility of hostile takeover is an important part of an open and efficient stock market. The rules are designed to avoid impediments which would prevent hostile bids and to ensure that the decision on whether a bid should succeed should be left to shareholders.

2 Hostile Takeovers in Germany

Germany does not have an active market for hostile takeovers. History has produced only few examples. The first German company approached by a hostile

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bidder was Continental AG in 1990. The Italian Pirelli Group and a number of Italian allies had bought shares which, in aggregate, did not amount to 50 per cent of the share capital, but might have been sufficient for a simple majority in the shareholders meeting. Pirelli and its allies ultimately failed in their attempt to unlock the five per cent voting rights restriction of Continental. The legal reason was that the shareholdings of the allies were attributed to Pirelli so that the voting power of the whole of the concert party was reduced to five per cent of all outstanding shares. The economic reason was that Pirelli did not win the backing of Deutsche Bank and other German financial and industrial investors who protected Continental in its effort to stay independent. A tender offer to all shareholders was never made.

A major consolidation of the German steel industry began in 1992, when Fried. Krupp AG took over Hoesch AG. The transaction began hostile by Krupp’s chairman announcing that Krupp had acquired a 30 per cent stake in Hoesch. Before a public offer was made, however, the Hoesch management gave up its resistance and both companies worked towards a statutory merger.

Fried Krupp AG Hoesch Krupp struck again in 1997. In that year it was leaked that Krupp, still being protected by its majority shareholder Krupp Foundation, had plans to take over its much bigger rival Thyssen AG. After a series of high level contacts involving the state of North Rhine-Westphalia, the takeover was abandoned and both companies began exploring common opportunities. This eventually led to a merger of the steel businesses in 1998 and a full merger of the listed holding companies in 1999.

Towards the end of 1999, Vodafone plc began its takeover of Mannesmann AG. The attempt was clearly hostile, against the fierce resistance of the Mannesmann management, and produced major investor relations efforts by both parties as well as an intensive press battle. Despite a ten per cent voting rights restriction in Mannesmann’s articles of association (which was due to expire in mid 2000), Vodafone launched a public offer for all Mannesmann shares. When it transpired that Vivendi SA, Mannesmann’s intended white knight or white squire, would rather deal with Vodafone, the Mannesmann management ceased its defence and recommended acceptance of an increased Vodafone offer to its shareholders. Since Vodafone/Mannesmann, the record of hostile takeover attempts seems to be growing more quickly. WCM Beteiligungs- und Grundbesitz AG made a successful unsolicited bid for Klöckner-Werke AG in 2000. At the time of this writing in September 2001, INA has launched a hostile offer for FAG Kugelfischer AG and Bosch is rumoured to have cast an eye on Buderus AG.

Does the reason for the relative scarcity of hostile takeovers lie in the effectiveness of defence mechanisms available to German target companies? It is submitted here that this is not the case, that, to the contrary, German law does not

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offer the target's management particularly effective defence tools. There are
other factors deterring bidders from approaching a target on a non-consensual
basis. These factors include the fact that German banks and German insurance
companies still hold significant equity stakes in many listed German companies.
In view of this, they have been granted seats on the supervisory boards of the
respective companies. The (personal) relationships arising from these arrange-
ments can prove helpful for the target management in a hostile bid situa-
tion. The situation may change with the new tax regime in Germany entering
into force in January 2002. It is widely believed that the financial institutions
will part with much of their industrial shareholdings once the tax on capital
gains stemming from the sale of such shares has been abolished for corporate
shareholders.

In addition of course, Germany has a two tier board system where the share-
holders elect the members of the supervisory board\(^2\) and the supervisory board
appoints the members of the management board\(^3\) of a corporation. Hence,
shareholders have only indirect control over the composition of the manage-
ment board. Removal of existing managing directors and appointment of new
managing directors could require the replacement of uncooperative members of
the supervisory board as a first step\(^4\) and is made even more cumbersome by the
German co-determination regime. The supervisory boards of large public cor-
porations (with more than 20,000 employees in the group) consist of 20 mem-
ers, ten of which are elected by the shareholders while the remaining ten are
elected by the employees.\(^5\) Although the shareholders' representatives on the
supervisory board will ultimately prevail,\(^6\) the decision-making process is some-
what protracted. Recent proposals in Germany to make changes to the system
of corporate governance leave the two tier board system untouched.

The German standards of reporting tend to require less information from a
public company than do other important reporting systems. It is thus more
difficult for investors to assess the intrinsic value of a company. However, the
situation is gradually changing. More and more German companies apply
International Accounting Standards or, seeking a listing on the New York stock
exchange, even US. Generally Accepted Accounting Principles. Further report-
ning requirements follow from a listing on the New York Stock Exchange.

Bidders frequently want to acquire 100 per cent of the share capital of the tar-
get company in order to facilitate corporate control and possible restructuring
measures. This goal can normally not be achieved since German law does not
contain squeeze-out provisions and not all shareholders will tender their shares
pursuant to a public offer. However, again, the situation is about to change. The

\(^2\) Stock Corporation Act (\textit{Aktiengesetz}), s 101.
\(^3\) \textit{Ibid}, s 84.
\(^4\) \textit{Ibid}, s 103.
\(^5\) Co-Determination Act (\textit{Mitbestimmungsgesetz}), s 7 para 1 sentence 1 no 3.
\(^6\) \textit{Ibid}, ss 27, 29, 31 and 32.
new German Takeover Act (Wertpapiererwerbs- und Übernahmegesetz)\(^7\) likely coming into effect in January 2002, will be accompanied by amendments to the Stock Corporation Act (Aktiengesetz) allowing a bidder to squeeze-out a remaining minority once the bidder has acquired at least 95 per cent of the target’s outstanding shares.\(^8\) It can thus be seen that entry barriers into corporate Germany are constantly being lowered. This makes members of management boards wonder which defence tools the German legal system might allow them and when and how they might use them.

II LEGAL AND REGULATORY FRAMEWORK

1 Legal and Regulatory Framework in the UK

Takeovers of public companies in the UK are subject to regulation by the law relating to companies and by the City Code on Takeovers and Mergers (the ‘City Code’). Listed public companies are also required to comply with the Listing Rules made by the UK Listing Authority. When considering the tactical options for the management of a company for which an unsolicited bid has been made (which we refer to as the ‘target’) and which is seeking to defend itself against that bid take each of these must be taken into account.

The principles of company law most relevant are:

— Directors’ fiduciary duties which define the obligations of the directors faced with a bid.
— The requirements for appointment and removal of the directors. These define the tactical objective of the bidder (control of the board) with a view to achieving its strategic objective (control of the target).
— The statutory regime governing the issue of shares by the company, in particular the requirement for shares to be issued pre-emptively (unless waived by shareholders).

The elements of the City Code most relevant are:

— The board of the target should not take any action which could result in any bona fide offer being frustrated.\(^9\)

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\(^7\) The official government draft with official annotations can be found at <www.bundesfinanzministerium.de/Aktuell-.528.2127/Wertpapiererwerbs-und-Uebernahmegesetz-WpUeG.htm>.

\(^8\) Draft s 327a Stock Corporation Act, as amended by the omnibus Bill also containing the new Takeover Act.

— All documents issued in the context of a takeover must conform to the highest standards of care and accuracy.

The Listing Rules are principally relevant in that they restrict the listed company’s ability to enter into certain transactions.

Directors’ Fiduciary Duties

The fiduciary duties of directors are part of the common law (including, for this purpose, principles of equity) and in relation to takeovers those duties, as expounded by the courts in past decisions, diverge considerably from current business practice. There have been relatively few decisions relating to takeovers and almost none in recent times, which leaves the law in a state of incomplete development. It is interesting that in the Law Commission’s recent review of directors’ duties10 there was almost no reference to duties arising in a takeover situation and the proposed codification of directors’ duties does not contain any reference to the duties of directors in such circumstances. On the contrary, the principle duty is suggested as being to ‘promote the success of the company.’11

The relevant fiduciary duties are, firstly, the duty to act in good faith in what the directors consider to be the best interests of the company (the duty of loyalty), and, secondly, the requirement that directors must exercise their powers for a proper purpose.

The duty of loyalty is familiar enough but its emphasis on the company as having an interest separate from its existing shareholders’ individual interests creates problems when the board is faced with a takeover. A strict application of this principle suggests that the board of a target should only involve itself in a takeover where the transaction would have an effect on the company itself. This would have some unexpected consequences for the conduct of the board.

The target board may conclude that a bidder seeking to extract synergies from the acquisition will damage the business in doing so and possibly deprive the company of the ability to carry on its business independently. The board might feel in these circumstances that it should do everything in its power to prevent the bid succeeding. The board would be entitled (or bound) to disregard any benefit existing shareholders might obtain (either from a cash premium or from a share for share exchange in which they would share in the benefit of the synergies through their shareholding in the combined group). On the other hand, if the bidder represents no threat to the business of the target, the target board has no proper interest in the outcome of the offer and should play

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10 Company Directors: Regulating Conflicts of Interests and Formulating a Statement of Duties (LCCP No.153/SLCDP No 105).

no part in it. On this view, the takeover is a matter simply between the existing shareholders and the bidder.

The reality is that directors of listed public companies spend a considerable amount of time being concerned with their company’s share price and maximising shareholder value. Shareholders in public listed companies probably think the directors of a target owe them a duty to obtain as high a price as possible from the bidder. It is far from clear that the courts would go that far12 but the extreme position described above has been modified. If directors do participate in the takeover process (by expressing views on the merits or disadvantages of the offer) they must do so as fiduciaries—acting in good faith and reasonably. In addition, the Takeover Code imposes an obligation on directors of public companies to concern themselves with such matters. The board of a company for which a bid is made must obtain advice on the offer and make the substance of that advice known to shareholders.13 The board is also required to provide information to shareholders, including the board’s views on the merits of the offer.14

In practice, no-one would challenge the propriety of the board of a target in engaging advisers and paying (sometimes very large) fees15 and in undertaking a communication programme to ensure shareholders have the full benefit of their views. However, the doubtful theoretical basis for this practice is a constraint on excessive commitment of resources in the cause of the defence.

It is clear, however, that the requirement that directors of a company must exercise their powers for a proper purpose is a real impediment to boards of targets undertaking significant defensive transactions. Acting to prevent a takeover on its own is not a proper purpose.16 The corollary of the absence of a proper interest in the identity of their shareholders is that under English law a board of directors cannot be compelled legally to seek a bidder for the company.17 However, any communications of opinions to shareholders must be true and given in good faith which leads to the conclusion that a board may be forced to recommend an offer which they find unpalatable. Further protection for shareholders is found in the requirement to obtain independent advice and make the

12 In Heron International Ltd v Lord Grade [1984] BCLC 244 it was held that there was a duty upon directors to assess the value of competing offers and choose the higher. But in that case the board was faced with exercising a power to approve the transfer of the shares concerned and had a clear choice between two bidders.
13 The City Code, Rule 3.
14 Ibid, Rule 25.
15 The practice of paying ‘success fees’ to advisers on a defence (ie where the fee is increased if the target retains its independence) was perhaps questionable (but very widespread). It has now been outlawed by the City Code, Rule 3.3, n 3.
16 See Howard Smith Ltd v Ampol Petroleum Ltd [1974] AC 821 discussed at p. 113 below.
17 This is in clear distinction from the approach of the courts in the USA., where it is clear that at a certain point the duty of the directors changes from preservation of the company as an independent entity to ‘auctioneers’ who must try to achieve the best possible result on a sale of the company.
substance of that advice known to shareholders. A board determined to reject an offer must carry its financial adviser with it.

**Other Company Law Issues**

Two other elements of English company law must be borne in mind in any assessment of takeover tactics. The first is perhaps obvious to English lawyers but is often a surprise to lawyers from other jurisdictions. This is the statutory power for ordinary shareholders to remove directors by ordinary resolutions. An ordinary resolution may be passed by a simple majority of shareholders present and voting at a meeting of shareholders. The result is that the bidder seeking to acquire control of an English company (with a single class of ordinary share capital) can achieve certainty of success with one share more than 50 per cent of the issued share capital. The second important consideration is shareholder pre-emption rights. Shareholders have a pre-emption right in relation to issues of shares for cash. This right can be waived by shareholders by special resolution (requiring a 75 per cent majority of shareholders present and voting at a shareholder meeting). Guidelines promulgated by institutional investors limit the ability of companies to obtain general waivers of this requirement to issues of not more than five per cent of issued share capital. An issue of more than this amount will generally require a specific shareholder approval.

**The City Code**

It is a fundamental principle of the City Code that the board of the target must not take action designed to frustrate an offer or prevent it being made. This general principle is consistent. The general principle is supplemented by a detailed rule which prohibits transactions outside the ordinary course of business, material acquisitions and disposals of assets, changes to directors’ service contracts and issues of shares or options. Such actions are permitted if shareholder approval is obtained. A hostile bidder would invariably make it a condition of its offer that no such action is taken. The result is that, while the board of a target may propose any of these measures, shareholders will have a choice of accepting the offer or voting for the board’s proposal. The approach of requiring shareholder approval for ‘frustrating’ transactions is also consistent with the legal position; such approval would prevent the transaction being in breach of the directors’ fiduciary duties.

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18 Companies Act 1985, s 303.
19 A bidder could achieve de facto control at a lower level of ownership but Rule 9 of the City Code (which requires a general offer to be made if more than 30% is acquired) makes it difficult for a bidder to acquire de facto control in this way.
20 Companies Act 1985, s 89.
21 The City Code, General Principle 7.
22 Ibid, Rule 2.
The other constraint imposed on the board defending a hostile bid is in the rules relating to information. These are designed to ensure that shareholders are properly informed about the issues in relation to the bid. Prospectus standards must apply to all documents, selective disclosure is not allowed and the use of advertisements and telephone campaigns is significantly constrained. The use of broadcast media is discouraged. The bidder is subject to the same constraints but that may be little comfort to the target’s board.

**Listing Rules**

The Listing Rules made by the United Kingdom Listing Authority will be relevant principally to the extent that the rules require listed companies to obtain approval from shareholders before entering into certain transactions. In particular, transactions with related parties (substantial shareholders and directors) or transactions over a certain size.

2 Legal and Regulatory Framework in Germany

In a takeover situation, the target’s management must pay particular attention to two sets of rules: the board members must adhere to the relevant takeover legislation and they must conduct their business in conformity with the Stock Corporation Act.

For the time being, the takeover rules are still contained in the Takeover Code, which has been in effect since 1995 and which, although voluntary in nature, for practical purposes governs every serious takeover transaction in Germany. As of 1 January 2002, the Code will most likely be made obsolete by a set of statutory rules contained in the Takeover Act, the official government draft of which was published on 11 July 2001. Since the Takeover Code is about to expire and the EU directive on takeovers and mergers finally failed in the European parliament on 4 July 2001, the following analysis will deal with the new Takeover Act, as contained in the official government draft, which will be the exclusive source of takeover legislation in Germany.

The draft Takeover Act regulates, among other things, the technicalities of a bid and the conduct of the different parties in a takeover situation, particularly the bidder and the target. The Stock Corporation Act contains the legal tools that might be used to fend off a hostile bidder (for example, rules on the issuance of shares). In addition, it governs the conduct of board members gen-

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23 The City Code, General Principle 7, Rules 19, 20, 23 and 25.
24 Listing Rules, Chs 10 and 11.
25 The text of the Takeover Code and information on its administration is accessible both in German and English at <www.kodex.de>.
26 Joint text approved by the Conciliation Committee provided for in Art 251 (4) of the EC Treaty, PE-CONS 3629/01.
erally, in all situations, including a takeover. The Takeover Act is a special statute applicable only in a takeover scenario. As a special statute, its rules will prevail over any conflicting rule of the more general Stock Corporation Act. Accordingly, the Takeover Act can forbid the use of defensive measures which would be perfectly legal under the provisions of the Stock Corporation Act, and it can allow the use of defensive measures where the Stock Corporation Act would require the target’s management to hold still. This will substantially alter the current position of German corporate law on the hotly debated issue of neutrality of the target’s board.

Neutrality of the Target’s Board

Section 33 paragraph 1 sentence 1 of the draft Takeover Act contains the principle that acts of the management board and the supervisory board of the target company which are performed in the period between announcement and termination of the offer and which could frustrate the offer, require prior approval by the shareholders meeting. In order to determine whether a management act could frustrate an offer, a fully objective standard will be used. It is not necessary to show that the management had the intent to frustrate the offer. It is furthermore immaterial whether the offer is actually frustrated if the management act has been performed. It will be sufficient to demonstrate that from an ex-ante perspective the management act had the potential to frustrate the offer.27

The rule in section 33, paragraph 1, sentence 1 of the draft Takeover Act is based on the doctrine that the target’s management should be completely neutral in a takeover situation. The official annotations to the draft28 submit that, according to a widespread interpretation in legal literature, this is also the position of the Stock Corporation Act. But this is far from clear. At best, one can say that it used to be the interpretation of legal commentators that the management should not be concerned with the composition of the company’s shareholder base and, therefore, should not interfere when a public offer is made.29 The last decade, however, has produced much more refined opinions, and there has been a clear shift towards wider room for manoeuvre by the target’s management.30

The currently prevailing view in German corporate law is that management is bound to act in the best interest of the company. This interest is defined as the sum

27 Official annotations to the draft Takeover Act, p 141.
28 Ibid, p 141.
of the multiple interests of all company stakeholders, that is, shareholders, employees, creditors and the concerned general public (for instance, the municipality where production facilities are located). Board members are not regarded as stakeholders. If the interests of different groups of stakeholders conflict, management must seek a balanced solution.\(^\text{31}\) If this is not possible, the shareholders’ interests, particularly their interest to invest and disinvest at their sole discretion, will prevail.\(^\text{32}\) As a general matter, German corporate law contents itself with giving the other stakeholders, particularly the employees, the opportunity to inform themselves of proposed changes affecting their situation and to make their views heard and solicit (public) sympathy for their position. As long as the respective procedural rights are respected, the substantive decision can be taken against their interests and for the benefit of the shareholders. Within this framework, management may concern itself with the composition of the company’s shareholder base. In a takeover situation, management may take action frustrating the bid if this appears justified in balancing the different interests involved.\(^\text{33}\)

Despite the development described above, it appears (but only appears) that the German legislators have made a clear decision and have opted for strict neutrality in the target’s management at the outset. As explained above, the rule in section 33 paragraph 1 sentence 1 of the draft Takeover Act overrides anything to the contrary in the Stock Corporation Act. On its own, the rule on neutrality would severely limit the conduct of the target’s management. The target company could not even pursue its normal course of business, if this carried the potential of frustrating the offer. Hence, a prior draft of the Takeover Act listed a series of possible measures that were still admissible in a takeover situation. One of these exceptions was the authority of the target’s management to duly carry on with the current business in the interest of the company. In the new governmental draft, the exceptions have been combined in a catch-all clause that effectively turns the principle of neutrality on its head.

The true law of the land regulating the conduct of the target’s management is to be found in sentence 2 of section 33 paragraph 1 of the Takeover Act. The provision owes its existence to the German government changing its mind on the issue of neutrality and has crept into the draft rather unnoticed by the public.\(^\text{34}\) The rule says that sentence 1 (forbidding frustrating actions) does not apply to acts which a diligent and loyal manager of a (i.e. any) company not subject to a takeover bid would have performed. This is indeed most extraordinary. The rule simply repeats the wording of section 93 paragraph 1 sentence 1 of the

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\(^{32}\) Mülbert IstR (1999), 83/84; Kirchner WM 2000, 1821/1822.

\(^{33}\) See also Maier-Reimer ZHR 165 (2001), 258–61.

\(^{34}\) It has probably been modelled after a proposal by Krieger, made in a conference on takeovers in March 2001, printed in Henze and Hoffmann-Becking (eds), Gesellschaftsrecht (Cologne, 2001), pp. 289–309.
Stock Corporation Act which contains the general standard of care to be applied by managing directors. So the new Takeover Act says, in essence, that the target’s managing directors can completely ignore the takeover situation as long as they act within the normal boundaries of conduct set up by the Stock Corporation Act. It should be noted that not even the limitations discussed above in relation to the Stock Corporation Act will apply because sentence 2 of section 33 paragraph 1 of the Takeover Act specifically states that the takeover situation must not be taken into consideration. So, for example, on the question of whether new shares should be issued, the target’s directors need not consider the effects of the share issuance on an outstanding public offer and the financial interests of the company’s shareholders and can go ahead with the share issuance even if this will frustrate the bid and even if this is an unwelcome side-effect of an otherwise sound business measure.35

It is not entirely clear from the official annotations to the draft Takeover Act whether the German legislators have fully understood these consequences of their law making. The annotations refer only to the authority of the target’s management to continue the conduct of the day-to-day business and pursue strategies which are already being implemented.36 If the legislators did not intend to completely reverse the principle of neutrality, they might wish to consider whether the prior system of a general rule with a limited number of exceptions would not be a more suitable solution. Alternatively, if one wanted only a general rule, the law could require the target’s management to take possibly frustrating effects of their actions into consideration, rather than neglect them, and to carefully weigh any benefits to the company and their shareholders stemming from independence against any disadvantages to shareholders who cannot tender their shares.

The provision most hotly debated in public when the German government changed its view on the neutrality of the target’s management, can be found in section 33 paragraph 2 of the draft Takeover Act. Pursuant to this rule, the shareholders meeting can authorise the management board even before a public offer has been announced, to perform certain acts which would frustrate a future offer. Such an authorisation has a limited lifetime of 18 months. The respective shareholders resolution requires a majority of at least 75 per cent of the capital participating in the vote. Any frustrating action of the management board would require consent of the supervisory board.

The idea behind these reserve authorisations is that the management board would have an arsenal of defence weapons ready at hand without having to consult the shareholders meeting during a pending hostile bid. This is a major simplification for the target’s management although holding an ad hoc shareholders meeting before the end of the offer period is being facilitated by the

35 This interpretation seems to be shared by Schüppen WpG 2001, 958/971.
36 Official annotations to the draft Takeover Act, p 143.
draft Takeover Act\textsuperscript{37} and would be technically possible. A reserve authorisation could, for example, empower the target’s management to issue shares, buy back the target’s own shares or sell or acquire important assets in order to frustrate the bid. In exercising its power, the management would, of course, have to respect the limits to the respective corporate action set by the Stock Corporation Act (which are discussed in detail below). There is no indication in the text of the draft Takeover Act or its official annotations that reserve authorisations would release the target’s management from any requirement of corporate law other than the duty not to frustrate the bid.

Reserve authorisations will have no practical value if the interpretation of section 33 paragraph 1 sentence 2, as suggested above, is correct; even without authorisation from the shareholders, the management board could enter into any frustrating action if such action were permissible under the general duties of management. Since it would not normally be expected that a (new) law has no practical value, this is another reason for rethinking the concept of section 33 paragraph 1 of the draft Takeover Act in the remaining legislative process.

III \ \textbf{DEFENCE TACTICS—BEFORE THE BID}

This section describes structural defence mechanisms which are designed to increase the legal hurdles which would have to be overcome by a prospective bidder. These defences have a long-term effect on the every-day life of the target company and will generally be regarded negatively in the capital markets. It may be possible for these tactics to be adopted in the face of an impending bid, in the same way as the ad-hoc measures explained in section IV below. But generally they would require approval of shareholders in that context. A defence which requires shareholder approval provides little or no protection to management as the outcome will be left in the hands of shareholders.

1 \ \textbf{Staggered Board}

The principle of a ‘staggered board’ is that the members of the body which is responsible for the management of a company or the appointment of the company’s management should be appointed for fixed terms, with a number expiring and being renewed (or a new appointment being made) each year. The desired result is that a change in ownership of the equity of the company would not immediately confer a right to change the management. The potential difficulties caused by a delay between the time a controlling interest is acquired

\textsuperscript{37} S 16 para 3 provides for an extension of the offer period up to a total of ten weeks if a shareholders’ meeting is called. S 16 para 4 shortens the invitation period from the usual one month (Stock Corporation Act, s 123 para 1) to 2 weeks.
(and paid for) and the time management changes can be implemented makes a hostile bid much less attractive and much more risky.

**UK**

Although the annual retirement and re-election of directors is a routine part of good corporate governance practice, staggered boards of the kind described above cannot be implemented under English law as it is not possible (in the context of a listed company) to limit the ability of shareholders by ordinary resolution at any time to remove directors from office.

**Germany**

In practice, the term of office of the entire shareholders’ side of the supervisory board is usually identical. All members are elected at the same time for the maximum statutory term, that is, for about five years.

It is legally possible, however, to provide for staggered terms for the shareholder board members. For example, with respect to a supervisory board having 20 members, ten of which would be elected by the shareholders meeting, the articles of association could provide that at each annual shareholders meeting two members of the supervisory board are elected. Under these circumstances, an acquiror would be in the position to take control of the company only after a period of four to five years, unless the majority necessary for the removal of members of the supervisory board (normally 75 per cent of the votes cast in the shareholders meeting) has been obtained.

It should be noted that staggered terms for shareholder members of the supervisory board are not very common in Germany. The employee members of the supervisory board would have the advantage of continuity because they are all elected at the same time for about five years. In addition, most companies want to avoid a discussion about the election of members of the supervisory board at each annual shareholders meeting.

2 Board Designation Rights

Board designation rights are rights conferred on identified shareholders to appoint directors. If a board is entirely or principally appointed by such shareholders rather than the shareholders as a whole a bidder can only succeed in its bid if it obtains agreement from those shareholders.

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39 Companies Act 1985, s 303.
40 Stock Corporation Act, s 102 para 1.
UK

English Company law allows the articles of association of the company to determine the method of appointment of directors and it is therefore theoretically possible for a company to adopt board designation rights. Such rights would not, however, override the right of the general body of shareholders (and therefore a new controller) to remove the directors so appointed. Board designation rights would therefore be practically unworkable.

Germany

The articles of association can provide that individual shareholders or the holders of specific shares have the right to designate one or more members of the supervisory board. The designation right of holders of specific shares can only be granted to holders of restricted name shares (vinkulierte Namensaktien). The number of designation rights is limited to one third of the shareholder board members. In principle, designated supervisory board members can only be removed by the designating shareholder.

In theory, designation rights provide for an effective protection, in particular for co-determined companies. The bidder does not obtain the majority on the supervisory board and cannot determine the composition of the management board. In practice, however, there are serious doubts and problems. To begin with, it is unclear which shareholders should have the designation rights and how shareholders would be persuaded to approve the necessary amendment of the articles. The company would have to live with the designation rights every day since these rights could not be installed contingent on a takeover situation. Furthermore, the scheme only works on the assumption that the employee board members ‘defend’ the company.

3 Shark Repellents, Maximum Voting Rights and Enhanced Voting Rights

Shark repellents are supermajority clauses. They are designed to make it more difficult for a bidder to achieve control of the management of the target, by increasing the requisite majority for shareholder resolutions to over 50 per cent of the votes cast. Maximum voting rights provisions impose a limit on the percentage of the votes at a meeting of shareholders which one shareholder (and its concert parties) may cast. Enhanced voting rights concentrate voting power in the hands of a small number of shareholders (for example, members of an original founding family) disproportionately to their ownership of the equity.

41 Stock Corporation Act, s 101 para 2.
42 Ibid, s 103 para 2.
UK

In general (including, in particular, appointment and removal of directors and creation of new share capital) shareholders resolutions are passed by simple majority. Others require a 75 per cent majority of shares voted. By limiting the ability of a bidder to control the passing of shareholders resolutions, each of these approaches could theoretically provide defensive protection for management. As with Board Designation Rights it would be possible under English law for a company to adopt a shark repellent, maximum voting rights (some companies, including a number of privatised former utilities, retain limits on voting established through ‘Golden Shares’) or enhanced voting rights. Such provisions would require changes to the articles of association of the company concerned, requiring approval by shareholders by special resolution. It is not clear how shareholders would benefit from such provisions and what incentive they would have, therefore, to approve them.

Germany

Shareholders resolutions require in any case a majority of the votes cast. Certain important resolutions require in addition a majority of 75 per cent of the share capital participating in the vote (these are yes and no votes; abstentions are not counted for this purpose). In particular, the 75 per cent majority is required for all topics which are of interest to a bidder, such as amendment of the articles of association, changes to the share capital, issuance of convertible bonds, corporate (enterprise) agreements, integrations and mergers, removal of shareholder members of the supervisory board. It is possible, although unusual in practice and hardly advisable, to stipulate higher majorities or additional requirements. The additional protection against a takeover would have to be weighed against the loss of flexibility in the every-day life of the company.

43 *Ibid*, s 133 para 1.
45 *Ibid*, ss 182 para 1 sentence 1, 193 para 1 sentence 1, 202 para 2, 207 para 2 sentence 1, 222 para 1 sentence 1, 229 para 3.
46 *Ibid*, s 221 para 1 sentence 2.
47 *Ibid*, s 293 para 1 sentence 2, para 2 sentence 2.
49 *Transformation Act (Umwandlungsgesetz)*, s 65 para 1 sentence 1.
50 Stock Corporation Act, s 103 para 1 sentence 2. Technically, this provision speaks of 75% of the votes cast rather than the share capital participating in the vote. Since maximum voting rights have been abolished and enhanced voting rights are about to expire and do not play a practical role in Germany any longer (see below), the votes cast correspond to the share capital participating in the vote (1 share = 1 vote).
51 This authority is contained in the provisions cited in the preceding footnotes or in the sentence immediately following the respective provision.
For some cases, the Stock Corporation Act grants the authority to lower the requirement of 75 per cent of the capital participating in the vote to a simple majority. This applies to removal of shareholder members of the supervisory board, amendments of the articles of association, except the amendment of the corporate purpose, and capital increases with pre-emptive rights of the shareholders. Many of the large listed public companies have made use of this possibility. This makes them slightly more vulnerable to takeovers, but at the same time more attractive for investors.

Following a recent change of the law, the introduction of new maximum voting rights for listed companies is no longer permissible. Existing limitations of voting rights for listed companies lost their effectiveness on 1 June 2000. Since that date, each share in a listed company carries full voting rights in proportion to the fraction of the issued voting capital represented by that share.

The creation of enhanced voting rights is no longer permissible. Existing enhanced voting rights will terminate on 1 June 2003, at the latest, unless the shareholders meeting resolves that they be continued. Such resolution would require a majority of at least three quarters of the capital participating in the vote, and holders of enhanced voting rights would not be entitled to vote. It is unlikely that a resolution continuing existing enhanced voting rights will be passed.

4 Cross Shareholdings

The management of a company which perceives itself as potentially vulnerable to takeover may seek to protect itself by forming strategic alliances with other companies, possibly companies in the same or a similar business operating in a different country. By issuing shares to such a third party in exchange for an issue of shares by that party, or by each party purchasing shares of the other party, each of them may increase their security against unwanted takeover.

UK

An English company may be able to undertake such a transaction without any approval by shareholders. The issue of shares in exchange for shares of the friendly third party will fall outside the statutory pre-emption regime as the

52 Stock Corporation Act, s 103 para 1 sentence 3.
53 Ibid, s 179 para 2 sentence 2.
54 Ibid, ss 182 para 2 sentence 2, 186 para 3 sentence 2.
55 Ibid, s 134 para 1 sentence 1 and 2.
56 Ibid, s 12 para 2.
57 Introductory Act to the Stock Corporation Act (Einführungsgesetz zum Aktiengesetz), s 5 para 1.
consideration for the issue is not cash.\textsuperscript{58} The only requirement for shareholder approval would arise if the company needed to increase its authorised share capital or as a result of the Listing Rules requirements to approve significant transactions.\textsuperscript{59} In either case the requirement would be for an ordinary resolution. The directors will need to justify the transaction as a proper exercise of the power to issue shares. Unless the defensive benefit is evidently the principal reason for the proposal it is likely that the directors will find sufficient real business benefit from the alliance to justify the transaction.

**Germany**

Cross shareholdings are not common in Germany. The Stock Corporation Act contains provisions aimed at discouraging cross shareholdings.\textsuperscript{60} These provisions limit the exercise of shareholder rights once each party owns more than 25 per cent of the other party’s share capital. The most important consequences in this situation are that the party receiving notice of a more than 25 per cent shareholding from the other party or otherwise learning of such shareholding, is barred from exercising shareholder rights in excess of 25 per cent of the other party’s share capital and is totally prohibited from voting in the election of the other party’s supervisory board members. Although the statutory provisions are explicitly limited to both parties being domiciled in Germany, there are several attempts in legal literature to expand the application of these provisions to foreign shareholders.\textsuperscript{61} Additional difficulties ensue if the cross shareholdings involve more than two parties.

In addition to the limitations on shareholder rights once a cross shareholding is established, the entering into such a structure may not be easy. The parties will usually want to avoid mutual share acquisitions for cash unless they have a surplus of funds available. Hence, they will attempt to make mutual share issues for contribution in kind (namely the other party’s shares). These share issues are subject to a number of restrictions explained under ‘White Squire’ below.

5 Restrictions on Share Transfers

The management of a company can retain control if they can prevent ownership of the shares of the company being transferred. This would generally require a restriction in the company’s constitution on the transfer of shares without consent.

\textsuperscript{58} Companies Act 1985, s 89(4).
\textsuperscript{59} Listing Rules, Ch 10.
\textsuperscript{60} Stock Corporation Act, ss 19, 328.
\textsuperscript{61} Münchkomm. AktG/Bayer, 2000, § 19 Rn 27, with further references.
UK

A company listed in the UK must have shares which are freely transferable. A requirement for approval for share transfers is a restriction on transfer which would make the company ineligible for listing.

Germany

The articles of association can provide that the issued shares are name shares (Namensaktien) and that any share transfer requires the approval of the corporation in order to be effective (registered name shares—vinkulierte Namensaktien). Approval would be granted by the management board unless the articles provide that the decision is to be made by the supervisory board or the shareholders meeting. The articles may specify the reasons for approval being withheld. In the absence of specifications in the articles, the management board (or, if the articles so provide, the supervisory board or the shareholders meeting) has broad discretion when deciding on the approval of a proposed share transfer.

These rules may conflict with the stock markets’ requirement that shares of listed companies must be freely transferable. The German listing rules allow the listing of restricted name shares only if the approval requirement for transfers does not cause impediments to trading in the respective shares. A stock exchange would typically admit the shares to trading only after the issuing company had declared to the stock exchange that the approval of share transfers would normally be granted. This declaration would not bar the company from withholding its approval if the transfer was to a suspected hostile bidder.

In practice, the use of restricted name shares will only work for companies which have issued these name shares because the conversion of bearer shares into restricted name shares requires the consent of each shareholder affected, which is unlikely to be obtained. Even in the case of a company which has issued restricted name shares, the approval requirement could be evaded by trust agreements, voting agreements or the like. Although such agreements will normally be null and void, their existence would be difficult to prove.

6 Poison Pills

Poison pills in their original design are shareholder rights plans, which were invented in the US takeover battles of the early 1980s and are in widespread use
in the US. They may now take a number of different forms. Their central element is that the existing shareholders of a company will receive a large amount of equity rights (shares, options with conversion rights etc.) at a very substantial discount if one single shareholder obtains a controlling stake in the company without approval of the target’s management. The issuance of the discounted equity rights would not only destroy the hostile bidder’s voting majority, but also grossly dilute the bidder’s investment. Thus, poison pills are aimed at deterring bidders from closing the transaction without first negotiating a waiver of the shareholder rights plan.

UK

There is nothing in English law which would prohibit the adoption of a rights plan by an English company, although there would be some difficult technical issues to overcome. For example, the issue of equity shares or rights over equity shares would require the creation of sufficient share capital and the disapplication of the statutory pre-emption rights (unless the rights were issued free by way of capitalisation of reserves, which would raise its own set of issues). However, such a rights plan could only be adopted with approval of shareholders by special resolution (to approve changes to articles of association and disapplication of pre-emption rights) and there are some very powerful reasons why shareholders would be unlikely to agree to such a plan being adopted.

In particular, with the English law of directors’ fiduciary duties in its current state of development, shareholders in an English company would be ill-advised to approve a mechanism (the rights plan) which would give the board the ability to determine who was to be allowed to take control of the company. In the US, rights plans owe their popularity in no small part to the fact that under the law of many states it is possible for a rights plan to be adopted by management without recourse to shareholders. While the courts have permitted directors to adopt rights plans they have also been prepared to step into the law and accordingly prevent directors abusing the position of power which the rights plan ostensibly gives them. Shareholders in US companies have ready access to courts to require a board of directors to justify their refusal to waive a rights plan. The same is not true in the UK. As explained above, the law on directors’ duties does not clearly differentiate the position of a company in a takeover situation and it is far from certain that a court would require directors to waive a rights plan.

Aside from such technical considerations, institutional investors in UK companies are likely to see little which could possibly benefit them in approving a rights plan. The City Code effectively prevents the acquisition of control without a general offer being made and ensures that if control does pass the shareholders are certain to have sufficient time to accept the offer. Shareholders

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67 The City Code, Rule 9.
would be likely to be extremely reluctant to surrender control of the takeover process to the board.

Germany

Poison pills are illegal in Germany. Since their characteristic feature involves the issuance of shares or other equity rights, contingent upon change of control over the company, to only a part of the shareholders, they violate two essential rules of German stock corporation law. Contingent capital increases can only be undertaken for a limited number of purposes which do not include defending a hostile bid. Poison pills would arguably also violate the basic principle that all shareholders must be treated equally unless different interests justify a differentiation.

IV DEFENCE TACTICS—AFTER THE BID

1 Sale of ‘Crown Jewels’

In a ‘Crown Jewels’ defence, the target sells all or some of its principal assets. In the most refined sense it involves the sale of that part of its business of which the bidder is seeking to acquire control.

UK

A board considering a Crown Jewels defence will need to be satisfied that it is acting for a proper purpose and that the sale of the assets concerned is in the best interests of shareholders. If the sole purpose of the directors is to defeat the offer, their action in approving it would be subject to challenge unless shareholder approval is also obtained.

Disposals of assets may constitute ‘frustrating action’ prohibited by the City Code. If the assets are ‘material’, the disposal would require shareholder approval. For this purpose, ‘materiality’ is to be judged by a ten per cent test applied to various parameters for comparison of the transaction with the target company. The tests are similar to but not identical to the requirements of the Listing Rules relating to significant transactions. It will usually be the case that

68 Specified in Stock Corporation Act, s 192 para 2.
69 Ibid, s 53a.
70 City Code, Rule 21.
71 Note 2 to Rule 21.1, which defines ‘material amount’ for the purposes of Rule 21.1(d), requires comparisons of (a) value of consideration for the sale to market capitalisation of the target, (b) book value of assets disposed of to the assets (total assets less current liabilities) of the target, and (c) profit attributable to the business disposed of to profit of the target.
the City Code requirement for shareholder approval will be satisfied before the equivalent Listing Rules (for which the materiality level is 25 per cent) becomes relevant. Transactions are aggregated for these purposes, so the City Code effectively sets a ceiling on the total amount of acquisition and disposal activity which may be undertaken by a company once a bid is in prospect.

**Germany**

In principle, the sale of assets is within the authority of the management board. In addition, the articles of association usually require consent of the supervisory board. However, such measures must satisfy certain requirements of corporate law and, therefore, will often not work as takeover defences.

First of all, the management board (and the supervisory board) always have to act in the best interest of the company. The disposal of strategic assets, even if made for fair consideration, will mostly be detrimental to the company and therefore will not justify such measures. In addition, a decision of the Federal Supreme Court in 1982 has restricted the authority of management when major portions of a business or an entire division are put for sale.72 According to this decision, the management board is required to obtain the prior approval of the shareholders meeting in all cases where the planned measure has such a significant impact on the company or the rights or interests of its shareholders that the board cannot reasonably assume that it is entitled to take exclusive responsibility for such a decision (‘Holzmüller’ doctrine). The court did not establish firm thresholds constituting a ‘significant impact’. In the case at bar, the disinvested business constituted 80 per cent of the book value of all assets. Legal commentators have subsequently developed a host of different tests and thresholds, reaching down as far as ten per cent of book value, market value or revenues.73 For practical purposes, management need generally not seek shareholder approval if the disposal does not eliminate an established, characteristic line of trade of the company and does not reach 50 per cent of the indicators set out above.

2 Significant Acquisition

The target may propose a significant acquisition as part of its defence. Such an acquisition would be designed to increase the value of the target, making it more expensive for the bidder to acquire control. If the consideration for such an acquisition is shares of the target, the cost of the bid may be increased significantly.

72 BGHZ 83, 122 *Holzmüller*.

73 See the overview at Münch Hdb GesR IV/Krieger, 2nd edn (1999), § 69 Rn 8 with Fn 28.
UK

The issues are the same as in relation to a Crown Jewels defence. It is more likely that to be significant enough to achieve the purpose, the proposed acquisition will be of a size which would require shareholder approval. If the consideration is to be satisfied by an issue of shares of the target, it may be necessary for the target to increase its share capital for the purpose, which would require approval of shareholders (by ordinary resolution).

Germany

The general limitations set out above under the crown jewel defence apply here as well. In particular, consent of the shareholders meeting will often be necessary since the Holzmüller doctrine arguably applies to acquisitions as well as to disposals.\(^\text{74}\)

When a competitor of the offeror is acquired, the offeror might be deterred by potential anti-trust problems. The deterring effect is rather weak, though, if the offeror can commit itself vis-à-vis the anti-trust authorities to re-sell the business newly acquired by the target. As a result, the acquisition of Orange plc by Mannesmann was ultimately no deterrent against Vodafone’s takeover bid.

In connection with the Vodafone/Mannesmann takeover another defence tactic has been developed. If the target company has previously acquired another company with significant strategic value, it is disputed whether and under what conditions the management of the target can, in the case of a successful takeover, legally be instructed by the offeror as new parent company to dispose of such company.\(^\text{75}\)

3 Pacman

A ‘Pacman’ defence involves the target making an offer to acquire the bidder. It is a tactic rarely employed and rarely successful. A recent example in the UK occurred in 1999 when Marston Thompson & Evershed plc bid for Wolverhampton & Dudley Breweries plc. Marston were eventually unsuccessful.

UK

In legal terms, the Pacman defence raises the same issues as described above in relation to any substantial acquisition. However, given its size it will almost inevitably require shareholder approval.

\(^\text{75}\) Vodafone and Mannesmann have each produced three opinions on the issue by renowned German law professors, each side unsurprisingly arriving at exactly opposite conclusions.
Germany

The measures to be taken under the Pacman defence are not *per se* prohibited. The general requirements for acquiring another business have to be met, such as *ultra vires* restraints (the company’s purpose as set forth in the articles of association has to provide for acquisitions in the bidder’s trade)\(^{76}\) and the observance of management’s duties (diligence and loyalty, serving the best interest of the company). In addition, the Holzmüller doctrine will in all likelihood call for shareholder approval.

4 Recapitalisation

The target may propose to match or beat the value offered by the bidder by returning cash to shareholders with the necessary increase in gearing as a result. The return of cash may be by way of a special dividend or a purchase (or, if permitted, redemption) of shares. Recently a number of defences in UK bids have involved proposals of this kind (for example, the successful defence of Blue Circle against Lafarge in 2000 (followed by Wickes and British Polythene Industries) and the (unsuccessful) defence of National Westminster Bank against Royal Bank of Scotland in 1999).

UK

In addition to the English law requirements to implement the proposal (which may require the approval of shareholders, any proposal of this kind is likely to require shareholder approval under the City Code. Payment of a special dividend may amount to frustrating action contrary to Rule 21\(^{77}\) and would therefore require shareholder approval. Purchase by a company of its own shares during the course of an offer (or before, if the offer might be imminent) generally requires shareholder approval.\(^{78}\)

Germany

The target’s management can submit a proposal for a special dividend to the shareholders, provided that the company has sufficient annual profit or

\(^{76}\) Note that, under German corporate law, *ultra vires* does not limit the management board’s authority to represent the company and enter into binding agreements, but rather circumscribes the management’s powers and duties vis-à-vis the company, in cases of violations subjecting the directors to personal liability pursuant to s 93, Stock Corporation Act. See, eg, *Hüffer AktG*, 4th edn 1999, § 82 Rn 1.

\(^{77}\) City Code, Rule 21.1, n 3.

\(^{78}\) *Ibid*, Rule 37.3.
distributable reserves which management does not regard as crucial for carrying on with the company’s business or for implementing necessary expansion plans. Since, however, distribution of profit or reserves requires annual accounts, only the ordinary shareholders meeting can vote on the dividend proposal.\(^{79}\) This will likely be too late to work as an effective defence against a takeover bid.

The acquisition of own shares is permissible only under exceptional circumstances listed in the Stock Corporation Act.\(^{80}\) Only two of these exceptions might apply in the context of a re-capitalisation defence and in both cases the aggregate value of own shares must not exceed ten per cent of the company’s share capital.\(^{81}\)

— A company may acquire its own shares if this is necessary to prevent the company from being severely and imminently damaged.\(^{82}\) It is disputed whether and under what circumstances a threatened takeover would constitute severe damage within the meaning of the law. Clearly, if the objectives of the bidder were the elimination of the target as competitor or the liquidation of the target, the acquisition of own shares could be justified.\(^{83}\)

— The shareholders meeting can authorise the management board to acquire up to ten per cent of the company’s shares.\(^{84}\) The authorisation is valid for a period of up to 18 months. The authorisation may be linked to special purposes, but may also leave the definition of the purpose to the management board. The authorisation must specify the minimum and the maximum price for the acquisition. When acquiring the shares, the management board must observe the principle of equal treatment of the shareholders. The equal treatment rule will also govern any re-issue of the shares. Unless the shareholders’ authorisation allows for a differentiation, unequal allocation of the shares has to meet the aforementioned prerequisites for exclusion of pre-emptive rights.

5 Standstill Agreements

These are agreements between the bidder and the target company whereby the offeror undertakes to refrain from further pursuing the takeover attempt and in return receives financial compensation (‘green mail’).

\(^{79}\) Stock Corporation Act, ss 57 para 3, 174 para 1.
\(^{80}\) Ibid, s 71 para 1.
\(^{81}\) Ibid, s 71 para 2 sentence 1.
\(^{82}\) Ibid, s 71 para 1 no 1.
\(^{83}\) See BGHZ 33, 175/186 Minimax II on the allocation of new shares from a capital increase; see also Hüffer AktG, 4th edn (1999), § 71 Rn 9.
\(^{84}\) Stock Corporation Act, s 71 para 1 no 8.
UK

Under English law the generally held view is that the board of a company may properly enter into an agreement with a shareholder which limits that shareholder’s acquisition of further shares provided that this can be justified by some corporate benefit (which may be simply avoiding the expense of defending an inadequate offer or the potential disruption and damage caused to the company’s business). The making of payments, however, would be more problematic. The consequences for the directors would be potentially far more serious as they could be required to reimburse the amount of the payment, if found to be a misapplication of the company’s property. In addition, any standstill agreement with a shareholder who actually threatens to bid would amount to frustrating action prohibited by the City Code.

Germany

Standstill agreements for financial compensation are not valid under German law, as they conflict with the legal ban on repayment of capital to shareholders outside dividend distribution.85

6 Golden Parachutes

Management of the target may seek to defend themselves (if not the company) by adopting service agreements which provide substantial compensation in the event of a takeover. Such provisions may be substantial enough to amount to a deterrent to a bid. If not, the management will take comfort from the financial protection of their personal position.

UK

Provisions in service agreements for executive directors and senior management not infrequently provide for liquidated compensation payments in the event of termination of employment following takeover (which may include voluntary termination by the employee without examining the merits of any offer of continuing employment by the successful bidder). Such provisions are legitimate if they are justified by the need to employ or retain the individuals. It is unlikely that excessive or disproportionate payments could be justified in this way. The ‘defence’ motivation is clearly not acceptable. If a takeover offer is in prospect the variation of a service contract of a director to include such terms would

85 Ibid, s 57.
amount to frustrating action which would be prohibited by the City Code, unless shareholder approval was obtained.

Germany

The service agreement with a member of the management board can, in principle, contain a right of the managing director to terminate the service contract if control of the company changes, and provide for severance payments. The supervisory board which is competent to determine the remuneration, has to ensure that it bears a reasonable relationship to the duties of the respective member of the management board and the overall condition of the company. As the members of the supervisory board can be personally held liable if the remuneration exceeds such ‘reasonable relationship’, they will probably be rather reluctant to implement ‘golden parachutes’ that are excessive.

German corporate law distinguishes between the service agreement of a managing director and the director holding office. Corporate practice makes use of this distinction and typically entrusts the service agreement, containing, inter alia, the termination and remuneration provisions, to a small supervisory board committee, thereby removing it from the eyes of the other supervisory board members, the shareholders and the public (including a prospective bidder). This is not possible for appointment of a director to and, removal of a director from, office, where the entire supervisory board is called upon to make a decision. Problems may arise from the doctrine that the committee, in deciding on the terms of the service agreement, must not prejudice the entire board in its decisions on appointment and removal of directors.

7 White Squire

In a ‘White Squire’ defence, the target issues shares to a friendly party who wishes to see the target remain independent. The number of shares to be issued will depend on the circumstances. As the objective is to deter the bidder, the issue would usually represent 25 per cent to 30 per cent of the share capital of the target after the issue.

UK

White Squire defences can only be implemented in the UK if shareholders approve the transaction. The Directors of the target must exercise their power to allocate shares for a proper purpose. It is not enough that they consider that

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86 Stock Corporation Act, s 87 para 1.
87 Ibid, ss 107 para 3 sentences 2, 84 para 1 and 3.
88 BGHZ 79, 38/42–43; 83, 144/150.
issuing the shares would be in the best interests of the company. They must not use the power to entrench themselves in office. The issue could be validated by approval by shareholders by ordinary resolution.

Issues of shares for cash are subject to the statutory pre-emption provisions described above. The issue of the shares would, therefore, require approval of shareholders by special resolution. The requirement for a special resolution can be avoided if the ‘White Squire’ contributes a company or business. Such an issue of shares would be a breach of Rule 21 of the City Code unless approved by shareholders.

Germany

In order to avoid a time-consuming and complex regular increase in share capital, the law allows a more simple procedure, called ‘authorised capital’ (*genehmigtes Kapital*). The management board can be authorised by the shareholders meeting for a maximum of five years to increase the share capital by a specified amount, the maximum equalling 50 per cent of the share capital existing at the time when the authorised capital is entered into the commercial register of the company. By the creation of authorised capital the authority to increase the capital is shifted from the shareholders meeting to the management board.

In principle, each shareholder has a pre-emptive right to subscribe for newly issued shares in proportion to the respective shareholder’s stake at the time of issue of the new shares. This also applies with respect to authorised capital. Authorised capital can serve as a white squire defence only when the newly created shares can be issued without any right of pre-emption for the existing shareholders.

The exclusion of the shareholders’ pre-emptive rights has to pass three hurdles:

- the shareholders must resolve on the exclusion of pre-emptive rights with a majority of at least three quarters of the share capital participating in the vote.
- the management board has to submit to the shareholders meeting a written report on the reasons for the exclusion of pre-emptive rights.
- the exclusion must be in the interest of the company. It must be necessary and

89 See *Howard Smith Ltd. v Ampol Ltd* [1974] AC 281. In that case, the directors of a company in respect of an offer issued shares to a competing offeror, depriving the first offeror (and another shareholder acting in concert) of control. The Privy Council held that the directors had exercised their power for an improper purpose and the issue was invalid.

90 Stock Corporation Act, s 202.

91 *Ibid*, s 186 para 1 sentence 1.


suitable for the achievement of the aim pursued and it must be compatible with the principle of reasonableness.94

The exclusion of pre-emptive rights can be resolved by the shareholders meeting in the same resolution by which the management board is authorised to increase the share capital. Alternatively, the shareholders resolution authorising the management board can provide that the management board (with the approval of the supervisory board) has to determine at the time of the issuance of the new shares whether pre-emptive rights shall be excluded.95

On the basis of two decisions of the Federal Supreme Court in 1978 and 1982, the exclusion of pre-emptive rights had to be justified with reference to a concrete proposal.96 Therefore, the creation of an authorised capital with the aim of protecting the company in general against takeovers was not possible. This may have changed after a decision of the Federal Supreme Court in 1997. Pursuant to that decision pre-emptive rights may be excluded if:

— the shares are used as consideration in an acquisition (rather than for the purpose of raising money);
— the type of acquisition is described generally and in abstract form in the shareholders resolution and the subsequent acquisition fits this description; and
— the acquisition is in the interest of the company.97

The new decision may form the basis to use an authorised capital as a White Squire defence. Since the new shares would have to be issued as consideration in an acquisition, the White Squire would have to contribute a participation or a business to the target. The contributed assets would have to fit into the target’s acquisition strategy and would have to be fairly priced because—takeover situation or not—the management would otherwise not be entitled to buy.

It should be noted that management could not control the voting of the White Squire’s shares. An agreement by which a shareholder undertakes to exercise voting rights in accordance with the instructions of the company or the management board or the supervisory board is void under German law.98

8 White Knight

In a ‘White Knight’ defence, the target board seeks an offer from an alternative bidder. The motivation may be simply to encourage an auction in order to

94 BGHZ 71, 40/46 Kali & Salz; 83, 319/321, 325 Holzmann.
95 Stock Corporation Act, s 203 para 2 sentence 1.
96 BGHZ 71, 40/46 Kali & Salz; 83, 319/322 Holzmann.
97 BGHZ 136, 133/139–40 Siemens/Nold.
98 Stock Corporation Act, s 136 para 2.
ensure that the highest price is received by shareholders. It may also be to find a bidder whose plans for the target offer a better outcome for its other stakeholders—although generally the White Knight must match or beat the original offer if it is to be successful.

**UK**

In the UK, the practice of seeking a White Knight is generally accepted. The directors must of course act in accordance with their fiduciary duties when considering, for example, the extent of disclosure of confidential information to make. The extent of disclosure is also effectively constrained by the City Code, which requires a target to disclose the same information to all competing bidders.99

One of the principal concerns of a potential ‘White Knight’ will be to avoid a bidding war with the original offeror. In the UK, the scope for protecting the deal with the White Knight against a higher offer from the original offeror is very limited. A modest break fee may be paid100 although this may cover the White Knight’s costs it would rarely be sufficient to deter the original offeror. The other ‘deal protection’ mechanism commonly used in the United States is for the target to grant options to subscribe new shares. A UK company is effectively precluded from granting such an option by the rules governing the issue of shares described under ‘White Squire’ above. These constraints will make it more difficult to attract a White Knight to make an offer unless the advantages compared to the unwelcome bidder are clear (and to the shareholders of the target that would generally mean the price is significantly higher).

**Germany**

Section 33 paragraph sentence 2 of the draft Takeover Act specifically permits the White Knight defence. This is a logical consequence of the fact that the statute otherwise empowers the target’s management to perform all acts which a diligent and loyal manager of a company not subject to a takeover bid would have performed. Since the management of a company not subject to a takeover bid would not seek a White Knight, a respective authorisation had to be specifically written into the law.

The target’s management might want to disclose certain information to the White Knight, or even allow the White Knight a limited due diligence, in order to assist the White Knight in preparing a counter-bid. Disclosure of information to the White Knight is subject to a number of limitations under the Stock

99 City Code, Rule 20.2.
100 The maximum fee (referred to by the City Code (as an inducement fee) is an amount equal to 1% of the value of the offer: City Code, Rule 21.2.
Corporation Act and the Securities Trading Act (Wertpapierhandelsgesetz). Corporate law generally allows due diligence by an interested acquiror if the acquisition is in the best interest of the company. This can be the case if the information is disclosed to a White Knight for preparation of a counter-bid. The type of information submitted would have to be carefully evaluated in order to avoid violations of the management board’s duty of confidentiality pursuant to section 93, paragraph 1, sentence 2 of the Stock Corporation Act. In addition, the White Knight will have to be aware that the counter-bid and its terms must not be based on insider information, as defined in the Securities Trading Act, gained through disclosure from the target.

There are only limited mechanics available in Germany for protecting the deal with the White Knight against a counter-counter-bid from the original offeror. A modest break fee in the form of a lump-sum, intended to cover the White Knight’s expenses, may be in order under German Corporate law; prohibitive penalty clauses are not permissible. Granting options for new shares to the White Knight will generally not work under the rules described under ‘White Squire’ above.

If the White Knight makes a counter-bid, the term of the original offer will be extended until the date when the counter-bid lapses. Shareholders who have already accepted the original offer before the counter-bid has been published, have the right to withdraw their acceptance before the end of the offer period.

9 Anti-trust

If the bid raises anti-trust issues it may be possible for the target to cause the bid to be blocked through lobbying of anti-trust authorities or, conceivably, through litigation.

UK

The boundaries of the kind of lobbying which is acceptable for the board of a UK target are vague and probably changing. It is clearly legitimate for the target to respond to requests for information from anti-trust authorities. The question is: how far beyond this can the target go? It is also generally accepted that the target can make submissions to the anti-trust authorities to explain the background to the markets which may be relevant and to provide information which will assist the authorities in their assessment of the effect of the transaction. Most would go further and accept as permissible active advocacy of the case for the ‘defence’

101 R. Werner ZIP 2000, 989/991–994 with further references.
102 Securities Trading Act, ss 13, 14.
104 Draft Takeover Act, s 22 para 2.
105 Ibid, s 22 para 3.
with the objective of achieving at least a detailed review and possibly an outright prohibition. More questionable activities include lobbying pressure groups to seek their support in opposing the bid and encouraging the anti-trust authorities to intervene. Again, these activities are permissible to a limited extent.

The current state of the law on directors’ fiduciary duties provides ample scope for the directors, as a legal matter, to justify lobbying of this kind, where they perceive a benefit to the company, as a separate entity from avoiding the offer. Although the Code does not deal specifically with this question, it is necessary to consider the effect of General Principle 7. The principal decision of the Takeover Panel on this question was in relation to the bid by Hoylake for BAT Industries PLC. The Takeover Panel decided that lobbying of politicians and others, participating in the US regulatory process and intervening in proceedings between the bidder (Hoylake) and the relevant authorities (in that case US State Insurance Commissioners) did not amount to frustrating action.

We do not consider that lobbying generally of politicians and others is capable of contravening General Principle 7. It is not a very direct way of obstructing an offer, and since it is possible for the bidder to engage in counter lobbying, the effect of the process is simply to enable one of the public interest decision takers to have presented to them both sides of the argument.

That decision was in 1989. Since then it is probably the case that shareholders have become less tolerant of management who have used anti-trust arguments to avoid a bid. Any board which does so unsuccessfully may find that they have lost the sympathy of key institutions. If they succeed the victory is likely to be pyrrhic at least so far as the management is concerned. The Panel is not insensitive to changes of mood of this kind: it is quite possible that if considered in the current climate the BAT decision might have been made differently.

Germany

Anti-trust defences of the kind mentioned above have not yet been questioned under German law. The anti-trust authorities will be glad to receive as much information as possible for the evaluation of the merger. German corporate law requires the target’s management to respect the general limits of the duty of confidentiality, submit only information to the anti-trust authorities that is true and not misleading, and be careful with any kind of market forecasts.

10 Litigation

The target’s management will wish to examine opportunities to take legal action against the bid, either with a view to preventing or at least delaying the

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106 Stock Corporation Act, s 93 para 1 sentence 2.
bid. The basis for litigation may be to prevent alleged breach of some applicable law or regulation relating to the takeover or, to protect some private right of the target (for example, to prevent misuse of confidential information). Use of litigation of this kind is routine in the USA and the question whether a target’s management can engage in tactical litigation of this kind is most likely to arise where US tender offer rules apply.

UK

In the UK the issues are similar to those discussed under ‘Anti-trust’ above. There is unlikely to be a legal difficulty with the use of litigation. However, the Takeover Panel has made it clear that in general litigation designed to frustrate an offer is not acceptable. In the decision in the case of Minorco’s offer for Consolidated Gold Fields plc, the Panel ruled that Consgold directors should not continue litigation in the US to restrain the bid. Their decision rested on the central importance of allowing the shareholders of the target to decide on the merits of the offer.107

Germany

It is difficult to see how the target could fend off the bidder by resorting to litigation. Clearly, if the bidder violated private, absolute rights of the target (including its business secrets), breached contracts with the target or interfered with the target’s third party agreements, the target would have a cause of action. But why should the bidder resort to these measures? Violations of the Takeover Act by the bidder would arguably not give the target a right to sue.108 The target would rather ask the Federal Agency for the Supervision of Securities Trading (Bundesaufsichtsamt für den Wertpapierhandel) administering the Takeover Act, to take remedial action against the bidder, for instance in cases of excessive campaigning discussed below. If, however, the target does have a cause of action against the bidder, it will be free to litigate even if the litigation will frustrate the offer.

11 ‘Winning the Argument’

The board of the target may simply decide that it will not recommend the offer and do nothing to facilitate it. The question then to be considered is: to what extent can the board actively encourage shareholders to reject the bid?

107 Takeover Panel notice 1989/7.
108 The reason is that most of the rules of the draft Takeover Act are designed to protect shareholder interests rather than the target’s interests. But the discussion to come may produce different views, at least for specific provisions of the draft Takeover Act.
It will be clear from the discussion of other ‘tactics’ that there is little scope for a target’s management to engage in technical defences to fend off the unwanted bid. Ultimately, the defence of a company to a hostile bid will depend on winning a battle of words with the bidder. Each side will present its ‘case’ to shareholders. The bidder will claim that its offer represents a fair price and a premium to the trading value of the target’s shares. The target’s board will assert that the offer is inadequate and fails properly to reflect the true value of the target’s shares. Almost all of the other defence tactics described above which may be used by a company are in reality elements of this argument. The bid will be defeated only if the shareholders of the target are convinced that the value they will enjoy by retaining their shares (that value being enhanced by disposals, acquisition, re-capitalisation measures proposed) is such that the price offered by the bidder is insufficient.

UK

Particularly for the UK, the foregoing is somewhat starkly financial in nature. No mention is made of other stakeholder interests. For example, in the past arguments have been made that a takeover was against the material interest, that it would have a devastating effect on employment, that it was not soundly financed and would damage the business of the target in the future. No doubt these arguments will be made again in the future. But the tide of institutional investor sentiment has turned strongly against arguments of this kind. The target board is likely to be advised that these arguments may be counter-productive—suggesting that the board has lost sight of ‘shareholder value’ in its efforts to stay independent.

The City Code assumes that this kind of debate will carry on and even, to some extent requires it. Rule 25.1 of the City Code requires the board of the target to ‘circulate its views on the offer’. The City Code also regulates the way in which the case can be put (both by the bidder and the target). In order to ensure that information is provided to all shareholders equally, the primary form for the debate is in printed documents sent to shareholders. Selective disclosure (for example, to institutional shareholders and analysts) is not permitted. While it is permissible for meetings to take place, they must be policed by the financial adviser and must not disclose material information which has not been provided to all shareholders. For the same reason the parties to an offer must be careful when dealing with the press and broadcast media.

Documents which are produced must be to ‘prospectus standard’. This constrains the kinds of argument that can be used. External sources for material

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109 That this was not always so can be seen in the rules of the City Code. An offeror is required to disclose his intentions regarding the target and its employees (Rule 24.1). The target board must ‘insofar as relevant’ comment on the offeror’s statements on these matters.
statements must be cited, quotations must not be out of context and graphs and diagrams must be ‘without distortion’. Advertisements relating to the offer are not permitted. In the 1980s it was common for the ‘takeover battle’ to involve extensive press advertising. This was regarded as excessive and a rule severely curtailing the use of advertising was introduced in 1986.\textsuperscript{110}

Profit forecasts and asset valuations must be reported on by the target’s auditors and financial adviser (these reports covering the accounting policy and calculations) and to confirm that the target’s board has compiled the forecast after ‘due care and consideration’.\textsuperscript{111} This can be a material constraint on a target as it is generally difficult for the auditors and financial adviser to feel able to report on forecasts beyond the end of the current financial year. In the current environment—in which analysts will produce their own forecasts for three, four or five years (or possibly longer), such a forecast will probably add little. However, the rules apply only to forecasts for the target as a whole. It remains open to the target to publish forecasts or projections for part of its business (or for an important valuation parameter other than profit—for example, revenues).

The target is prohibited from publishing new financial information after ‘Day 39’ (the 39th day after the initial offer document is mailed to target shareholders).\textsuperscript{112} Day 39 is one week before the last time the offeror is permitted to increase its offer.\textsuperscript{113} The intention is to ensure that the offeror can make its best offer with the benefit of full information.

\textit{Germany}

The draft Takeover Act contains elaborate provisions on the contents of the offer document, liability for false or incomplete statements in the offer document, and publication of the offer document. Furthermore, the draft Takeover Act obliges the target’s management to issue a reasoned response to the offer. In addition to these documents, Vodafone and Mannesmann have engaged in a large scale investor relations and press battle in the hostile phase of the bid. Both have, for example, issued full-page advertisements in the major German business newspapers, containing almost no factual information, but clearly aimed at emotions and unreflected decision making. Obviously in response to this, the draft Takeover Act authorises the Federal Supervisory Office for Securities Trading to issue cease and desist orders with respect to certain advertisements or certain methods of advertising.\textsuperscript{114} Such orders would be based solely on inappropriate content of communications to shareholders and the

\textsuperscript{110} See Panel Statement 1986/13.
\textsuperscript{111} City Code, Rule 28.1
\textsuperscript{112} Ibid, Rule 31.9.
\textsuperscript{113} In a case where the timetable is delayed as a result of anti-trust delays, there will often be a deemed ‘Day 39’ after the final clearance is obtained.
\textsuperscript{114} Draft Takeover Act, s 28.
public. Although public campaigning tends to be costly, management has not yet been challenged for incurring substantial expenditures for this purpose. German corporate law allows management to spend appropriate sums of money on communications, even if these are very considerable. The same is true for fees due to external advisors.

V CONCLUSION

The issues faced by the management of a target company do not differ materially according to whether the company is in the UK or Germany. In both systems the opportunities for technical solutions are very limited: the guiding principle is that shareholders should decide. In our view the position of the target in Germany is more comfortable, not least as a result of the wider issues alluded to under ‘Introduction—Hostile takeovers in Germany’ above. The new German Takeover Act, if enacted in its current form, may further tilt the balance in favour of the German management. But those influences should not be overstated and need to be set against the powerful forces in the global capital markets, which demand transparency and openness in the market. The markets are developing (or will develop) enough sophistication to impose a price penalty on the shares of a company whose management is cocooned against the possibility of a change in ownership. The only real defence therefore is to win the argument on value.
THE PURPOSE OF this paper is to review some of the principal legal issues which arise in relation to cross-border merger transactions between UK listed companies on the one hand and German listed companies on the other. These issues would be relevant to takeovers, whether mutually agreed or hostile. Rather than focusing on straightforward cash acquisitions, this paper will deal with share-for-share transactions. In doing so, this paper first reviews the implications where the UK listed company acquires the shares in the German listed company on a share for share basis. It then goes on to consider the position where the UK listed company becomes a subsidiary of a German holding company.

In evaluating the relative merits of the alternatives it will be necessary to compare these structures against a number of commonly occurring key objectives.

Any structure should be capable of fast and efficient execution and should expose the transaction and the prospective merging parties to as low a risk as possible of third party intervention.

If the merger involves the acquisition of the shares of one party by the other or by a new holding company, the structure should preferably not involve any material risk of the merged group finding itself with minority shareholders remaining in the acquired company once the merger has been completed, if those shareholders cannot be forced to surrender their position as minority shareholders.

Equally, it is likely to be important that the merger should be capable of implementation on a satisfactory basis from an accounting standpoint—the
availability of merger relief and the application of the merger accounting rules, rather than the acquisition accounting rules, may be important in this context.

In addition, the transaction should create as tax efficient an environment as possible for the shareholders of both companies, not only in terms of the tax consequences involved in implementing the transaction, but also in terms of the ongoing tax position of those shareholders in relation to the receipt of dividends. Equally, the relative merits of the various possible structures must be evaluated from the standpoint of the combined group itself.

The structure should not create avoidable pressure on any group of investors in the merged companies to sell their shares and thus create an overhang in the market, possibly depressing the share price for all shareholders. Plainly, it would be unrealistic to structure a nil-premium cross-border merger in a way that was likely to force substantial numbers of shareholders in one or other of the companies to sell what, to those shareholders, is a foreign share and in respect of the holding of which such shareholders may experience difficulties or constraints. This could lead such shareholders ultimately to realise their investment at a discount to its market value prior to the merger, when on a simple cash takeover they could perhaps have expected to receive a substantial premium to that market value.

This chapter will then also review whether it is possible to address some of the above mentioned market-related difficulties, as well as some of the tax issues associated with having a single holding company in one of the two jurisdictions involved, by arranging for the merged group to be owned by two holding companies, one in each of the two jurisdictions. Accordingly, this paper also briefly examines what such ‘dual headed’ structures involve and the extent to which they can help to solve some of the problems encountered in effecting a cross-border merger by the apparently simple expedient of one company acquiring all the shares in the other.

II UK HOLDING COMPANY STRUCTURE

1 German Implications of UK Holding Company Structure

*German Corporate Law*

If a UK company is to be the holding company for the merged group, the most direct way to proceed would be for the listed UK company (UK plc) to acquire in a share-for-share transaction the German listed company (G-AG), that is, make a public offer to the shareholders of G-AG to tender their shares for shares in UK plc.

As of 2002 such offer will be primarily governed by the Wertpapiererwerbs-ü
Übernahmegesetz (WpÜG), the German Takeover Act. Even though the WpÜG
is still a bill and not yet approved by Parliament, it is expected that it will be enacted without major amendments or changes to the drafts published on 11 July 2001. In a nutshell, the provisions of the new German Takeover Act will be as follows.

An offeror may offer its shares, rather than cash, as consideration provided such shares are listed on an organised and liquid market within the EEA (European Economic Area); consequently stock listed on the London Stock Exchange would be eligible. An offeror will, however, be obliged also to make a cash offer if during a period of three months prior to publication of its offer, it acquired five per cent or more of targets shares for cash or if it acquires any shares for cash once it has published its offer.¹

When calculating the exchange rates in a share-for-share transaction an offeror will have to base its calculations on the average stock market price of the shares in the target as well as of its own shares during the three months prior to the offer being published. If, however, the offeror had acquired shares within three months of the offer on the basis of a higher price than such average it will be obliged to base its offer on such higher price. Correspondingly, the offeror will be obliged to improve its offer if it acquires share for a higher price during the term of the offer. If the offeror within 12 months after the transaction acquires additional shares at a higher price it will have to compensate the shareholders who tendered their shares for the shortfall.

An offer may be subject to conditions, provided that these are beyond the control of the offeror. Thus, an offer may be made subject to approval by the merger control authorities or to a certain minimum level of acceptance of the offer. If the offeror makes its offer conditional upon its shareholder meeting approving such offer, such approval has to be obtained, at the latest, five days before the acceptance period for the offer expires.

The offer must be open for acceptance for at least four weeks and a maximum period of 10 weeks. It may be extended under certain circumstances, in particular, if there is a competing offer.

An acquirer who has acquired control over 30 per cent or more of the shares in the German Stock Corporation is required to submit a mandatory offer to acquire all outstanding shares.²

It will not be necessary to file a separate prospectus in Germany in relation to the offer of UK plc shares in exchange for the shares in G-AG. However, the offer documents will have to contain information basically similar to the required contents of a prospectus.

Until the end of 2001 public offers will still be governed by the German Takeover Code, which, even though it applies only on a voluntary basis, effectively governs all transactions with corporations which are members of the

¹ Wertpapiererwerbs- u. Übernahmegesetz (WpÜG), s 31 para (3).
² Ibid, s 35.
DAX or are listed on the Neuer Markt. The Code in general provides for a mandatory offer only if the acquirer controls more than 50 per cent of the shares. Under the Code an offer must be open for acceptance for a minimum period of 28 days and a maximum of 60 days. Since the Takeover Code is voluntary it does not provide for relief from the obligation to file a prospectus for the shares in UK plc if such shares are offered as consideration to the shareholders of G-AG in Germany. If the shares in UK plc are also to be listed in Frankfurt as a result of the merger, it will be necessary for UK plc to publish listing particulars in Germany. These can effectively be a German translation of the listing particulars used in the UK, with the inclusion of some additional technical information relevant to German investors.

If the acquisition of the shares in G-AG, that is, the public offer, is based on a merger or business combination agreement between G-AG and UK plc, as would typically be the case in a mutually agreed transaction, the question arises as to whether it is necessary to obtain prior shareholder approval for such agreement under the so-called ‘Holzmüller’ doctrine. This doctrine requires major structural decisions which, in particular, may have an impact on the efficiency of the exercise of shareholder rights, to be approved by the shareholders. There are good arguments, however, that such approval is not required for an agreement which provides for an offer to shareholders, i.e. where it is ultimately up to the shareholders themselves to decide whether they accept the new structure by accepting the offer. It may therefore be possible to dispense with holding a shareholder meeting of G-AG to approve that agreement, if timing is thought to be very critical to the successful implementation of the merger transaction.

Integration Issues

From 2002 the German Stock Corporation Act (Aktiengesetz—AktG) will allow a shareholder who owns at least 95 per cent of all shares in a German corporation to force the remaining shareholders to transfer their shares to the controlling shareholder at a fair compensation,\(^3\) which is subject to a special court review (Spruchstellenverfahren). This will markedly improve the prospects, under the UK holding company structure, of achieving a fully integrated merger between UK plc and G-AG.

At the moment, however, German law does not provide any mechanism or procedure under which minority shareholders can be forced out of G-AG once a substantial majority of the shares in G-AG have been acquired by UK plc. The controlling UK plc might instead consider a domination agreement (Beherrschungsvertrag) with G-AG under which it can instruct the management of G-AG to act in the interests of the whole of the merged group, rather than only the interests of G-AG. Such a domination agreement requires the approval

\(^3\) German Stock Corporation Act (Aktiengesetz—AktG), s 327a.
of shareholders by a 75 per cent majority and, thus, also offers an alternative if
the 95 per cent majority for a forced transfer cannot be obtained. If a domina-
tion agreement is concluded, the minority shareholders are entitled to a guar-
anteed dividend and to a mandatory offer from the controlling shareholder to
acquire the shares of the minority shareholder. The guaranteed dividend as well
as the price under the mandatory offer are subject to court review in a
Spruchstellenverfahren. The downside of this approach is, however, that UK plc
will have to pay compensation in respect of any annual net loss incurred by the
dominated G-AG during the term of such domination agreement.4

A statutory merger (Verschmelzung) or a statutory integration (Eingliederung)
of G-AG in UK plc will not be feasible since they cannot be implemented on a
cross-border basis.

**German Taxation Considerations**

The acquisition of all the shares in G-AG will not trigger any German stamp
duty taxes. If G-AG owns property, however, property transfer tax will become
payable if UK plc acquires 95 per cent or more of the shares in G-AG.

It is also necessary to consider the German capital gains tax position of the
German shareholders in G-AG. This is because the German tax authorities will
not grant a capital gains tax rollover to the German shareholders who exchange
their shares in G-AG for shares in UK plc. Instead, the German shareholders
will realise any inherent capital gain in exchanging their shares in G-AG for
shares in UK plc. Whether this is a material issue depends on the shareholder
profile within G-AG. Thus, as from 2002, capital gains arising in respect of
shares held by a German corporation are tax exempt, and an individual share-
holder who has owned his shares for more than one year and who holds less
than one per cent can dispose of his shares without any capital gains being
taxable.

It is therefore likely that taxable capital gains will present difficulties for the
implementation of the merger on the basis of the UK holding company struc-
ture only if there are substantial, privately held, shareholdings in G-AG. It
should be noted that such shareholdings are still quite commonly found in
German corporations.

German shareholders exchanging their shares in G-AG for shares in UK plc
will receive any dividends paid by UK plc, with the benefit of a 95 per cent tax
exemption, in the case of German corporate shareholders; and with the benefit
of a 50 per cent tax exemption, in the case of German individual shareholders.
Such shareholders are also able to receive a full credit against their German tax
liability for withholding tax on the dividends, though currently there is none in
respect of UK dividends paid to German residents.

4 *Ibid, s 302.*
This compares favourably with the tax treatment in Germany of locally sourced dividends paid to German tax residents. No tax problems are to be expected with regard to dividends as G-AG will be able under the EU Parent-Subsidiary Directive to pay dividends to UK plc without any withholding tax.

Any profits earned by G-AG will be subject to corporate income tax amounting to 25 per cent, together with trade tax of about 13 per cent (though the actual amount differs regionally) and a solidarity surcharge of 1.375 per cent. As from 2002, any capital gains and dividends received by G-AG will be tax exempt.

Broadly speaking, however, in evaluating the merits from the standpoint of tax efficiency within the overall combined group of implementing the merger through a UK holding company structure, the dominant consideration is likely to be the issues arising as a matter of UK tax law. These are reviewed below.

2 UK Implications of UK Holding Company Structure

UK Corporate Law

The approval of the shareholders in UK plc is likely to be necessary for the merger to proceed. Under the UK Listing Authority’s Class 1 rules, the approval of the shareholders of UK plc, given by ordinary resolution, is required if any of the comparative tests summarised below show a ratio of 25 per cent or more:

— turnover of G-AG as a proportion of turnover of UK plc;
— assets of G-AG as a proportion of assets of UK plc;
— value of consideration for G-AG as a proportion of market capitalisation of UK plc;
— profits of G-AG as a proportion of profits of UK plc; or
— gross capital of G-AG as a proportion of gross capital of UK plc.

In addition, an ordinary resolution of the shareholders of UK plc is likely to be required in order to create the requisite amount of share capital of UK plc and to authorise its directors to issue shares to the shareholders of G-AG in accordance with the merger proposals.

On the assumption that consummation of the transaction will lead to UK plcs issued ordinary share capital increasing by more than 10 per cent, the issue and publication of listing particulars will be required as part of the procedure to gain admission to listing on the London Stock Exchange of the shares to be issued in exchange for the shares in G-AG. As indicated above, a suitably translated version of this document may, in practice, also form the basis for the offer documentation required to implement the merger in Germany.

Section 103 of the Companies Act 1985 requires an experts valuation to be produced and delivered to the recipient of shares prior to allotment where a
public company issues shares for a non-cash consideration. However, there is an
exemption where the same offer is made for the entire issued share capital (or
an entire class of capital) of another body corporate.

The normal requirement on the issue of shares by UK plc will be to reflect the
full value of the assets acquired in the share capital and share premium account.
However, where UK plc acquires at least 90 per cent of the equity of G-AG as a
result of the offer, section 131 of the Companies Act 1985 permits UK plc to
record nothing in the share premium account. Unless the merger accounting
rules described below apply, the whole of the market value of G-AG would typ-
ically be included in UK plc’s balance sheet in the value of investments in sub-
sidiaries with the difference between that amount and the nominal value of the
consideration shares issued by UK plc being credited to a merger reserve. If the
market value of G-AG is reduced as a result of the payment of dividends up to
UK plc, the amount of distributable profits in UK plc can nevertheless be main-
tained at the level to which they have been enhanced by the dividends so
received. This is achieved by matching the reduction in the value of the invest-
ment in G-AG by a corresponding balance sheet transfer from the merger
reserve. This leaves UK plc free to distribute the pre-acquisition profits of G-AG
among the shareholders of UK plc. So effectively, the distributable reserves of
both companies can be pooled in the top company under this régime. This is
clearly a material consideration, because UK plc is likely to need to enhance its
own distributable reserves in this way in order to continue to fund dividends, in
accordance with whatever is to be the agreed dividend policy following the
merger, to a much larger shareholder base.

If the merger accounting rules apply, no adjustment in the consolidated bal-
ance sheet of the merged group is necessary to the value of the assets and lia-
Bilities of the German group and the results of both the UK group and the
German group are included in the consolidated profit and loss account of the
merged group for the whole financial year. An adjustment is made to consoli-
dated reserves, being the difference between the nominal value of the equity
issued by UK plc and the nominal value of the equity in G-AG acquired by UK
plc. The effect of this is to eliminate the need for an appreciable goodwill figure
to be included in the consolidated balance sheet which would then have to be
written off against profits in the consolidated profit and loss account. It can
therefore often be important that the merger accounting rules—as opposed to
the acquisition accounting rules where the assets and liabilities of the acquired
group are brought into the consolidated account at their market value—should
apply to mergers of the kind under discussion. For the merger accounting rules
to apply, there must be a full share merger of two companies of broadly similar
size, which are co-operating to establish a combined group with a management
structure drawn from both of the merging groups.

No UK stamp duty should be payable on the acquisition of the shares in the
German company. Shareholders of the UK company will not require any
rollover for capital gains tax purposes, as they are not disposing of their shares. Any UK resident shareholders in the German company swapping shares for shares in UK plc should qualify for rollover for UK tax purposes. No UK withholding tax is imposed on dividends paid by UK plc. In addition, there are significant advantages for UK resident shareholders to receive a dividend from UK plc, rather than from the German company. UK companies do not suffer any tax on dividends received from other UK companies, and other UK taxpayers should qualify for a tax credit to shelter part or all of their income tax liability in respect of the dividend.

The potential disadvantages of using the UK as a holding company jurisdiction are that:

— the UK still has a full capital gains tax charge on the disposal of any subsidiaries;
— dividends received by UK plc from non-UK subsidiaries are taxable, subject to the benefit of credit for underlying tax paid; and
— the UK has a fairly rigorous controlled foreign companies system.

Against the above, however:

— the UK is currently considering the introduction of a deferral or exemption relief for capital gains realised on the sale of subsidiaries;
— a measure of protection against capital gains in respect of foreign subsidiaries can already be secured by holding the relevant subsidiaries through, for example, one or more Dutch BVs which have the benefit of Dutch participation exemption;
— if foreign subsidiaries suffer tax at a rate broadly equivalent to the UK tax rate, dividends may be paid back to the UK without suffering any further UK tax; and
— dividends paid from EU subsidiaries will escape withholding tax when paid to UK plc, and UK plc may pay dividends to UK and foreign shareholders without any UK withholding tax.

III GERMAN HOLDING COMPANY STRUCTURE

The second structure to consider involves UK plc becoming a subsidiary within an enlarged group owned by a German holding company. One possible way of achieving this structure, although, as is explained below, it is not without its difficulties in Germany, would involve G-AG acquiring UK plc and issuing to the shareholders in UK plc shares in G-AG by way of an increase in capital against a contribution in kind. The UK implications of this structure will be reviewed first, before the issues that arise in Germany are considered.
1 UK Implications of German Holding Company Structure

UK Corporate Law

Public acquisitions in the UK allow for two possible structures, a public takeover offer made on behalf of G-AG to all of the shareholders in UK plc, or a scheme of arrangement involving the shareholders of UK plc. Under a scheme of arrangement, the shareholders of UK plc approve by a prescribed majority the acquisition of all of the shares of UK plc by G-AG at a specially convened meeting. The scheme also requires the subsequent sanction of the scheme by the High Court. The scheme is then binding on all the members of UK plc, whether or not they voted in favour of it at the meeting. The main factors relevant to the choice between a scheme and an offer are procedural and tactical. Schemes of arrangement also offer the incidental advantage that they can be structured so as to avoid stamp duty, which is otherwise payable on the transfer of shares in UK plc under an offer.

An offer for ordinary shares in UK plc, in order to become unconditional as to acceptances, requires acceptances from more than 50 per cent in value of all the holders (although acceptances from 90 per cent or more in value are required to avoid minority shareholders remaining in UK plc). A scheme requires the approval of 75 per cent or more in value and a majority by number of the shareholders of the class of the target company who actually vote (whether in person or by proxy). Shareholder apathy can make the required majority for a scheme relatively easier to obtain: if a large number of shareholders do not vote, in practice the approval of substantially less than 75 per cent of all shareholders will be required. Conversely, if there is an organised minority opposed to the merger, the minority will need less support to be able to block the scheme than it would need to prevent an offer becoming unconditional as to acceptances.

An offer can in theory become unconditional as to acceptances approximately three weeks after posting of the offer document. In practice, and almost invariably where regulatory consents are required, the period by which the offer can become wholly unconditional is more likely to be extended significantly. A scheme can become effective approximately eight weeks after posting of the scheme document. The timetable depends to a large extent on Court availability and is often more lengthy than is the case with an offer. Because of the need, in the case of an offer, to apply the compulsory acquisition procedures, however, it is likely that a scheme would result in achieving acquisition of 100 per cent of UK plc at an earlier date than under an offer.

An offer is comparatively easy to revise; a revised offer document simply needs to be despatched to shareholders. Under a scheme, it would in most cases be necessary to restart the timetable from posting, post new documents and hold a fresh shareholder meeting of UK plc (to the extent such a meeting had already taken place). However, where, as in the present case, the transaction
involves a nil premium merger—such that there is no prospect of varying the
terms in practice—this consideration is likely to be neutral in weighing up the
relative merits as between an offer and a scheme on such a transaction.

To summarise the position, the offer route is more flexible, there is less
opportunity for public opposition, there is no shareholders meeting or Court
hearing for UK plc as the target company and it is less likely, therefore, that a
well-organised minority could disrupt the process. A material point to bear in
mind in making the choice is to consider how significant is the risk of interвен-
tion by a third party where the exposure is slightly greater under a scheme than
under an offer. And it is also important to remember that with a scheme, in the
present circumstances, it would be UK plc rather than G-AG which had the
more control over the process.

The Takeover Code in the UK will apply (with certain modifications in the
case of a scheme) whether the merger is structured as an offer or as a scheme of
arrangement. As has already been noted, the rules governing the regulation of
the conduct of takeovers in Germany are no less onerous than those which pre-
vail in the UK, and in some respects may make it preferable (in terms of the con-
straints imposed by takeover regulations) to adopt a structure where UK plc is
the acquired, rather than the acquiring, company.

The offer document or, in the case of a scheme of arrangement, the scheme
document should be approved by an authorised person under the Financial
Services Act 1986. The offer document (or the scheme document) will have to
comply with the requirements of the Takeover Code in the UK and if the shares
in G-AG are the subject of listing in London then UK listing particulars will
also be required. However, the EU mutual recognition rules will facilitate the
utilisation of a translated version of the listing particulars published in
Germany by the acquiring company as the basis for the UK listing particulars.

As noted above, if the transaction proceeds by way of offer and it is accepted
by the holders of at least 90 per cent of the shares in UK plc, then G-AG will be
able to apply the compulsory acquisition provisions in sections 428 to 430 of the
Companies Act 1985 to acquire the outstanding minority. If a scheme of
arrangement is implemented successfully, then it binds everyone, even those
who did not vote in favour of the scheme. So the scheme procedure effectively
contains its own squeeze out.

UK Taxation Considerations

The acquisition of UK plc by a German company will generally involve a trans-
fer of shares of UK plc which will be subject to stamp duty at the rate of 0.5 per
cent of the value of the consideration given for the shares. This stamp duty may
be avoided by structuring the acquisition as a cancellation scheme of arrange-
ment, whereby the existing shares of UK plc are cancelled, and new shares in
UK plc are issued to the German company and the German company issues new shares to the former shareholders of UK plc.

UK resident shareholders of UK plc who receive shares in the German company for their shares in UK plc will enjoy a tax free rollover. This rollover should also be available if the transaction is effected as a cancellation scheme of arrangement, although the opportunity to offer shareholders a combination of shares and loan notes and/or cash may be more restricted.

UK shareholders, including UK corporates, are subject to UK tax on dividends received from non-UK companies. The only tax credit that is available is for any foreign withholding tax, unless the shareholder is a company that holds more than 10 per cent of the voting power of the foreign company. For this reason, it might be desirable to consider whether a dividend access arrangement could be put in place, allowing UK shareholders in the German company to continue to receive dividends from a UK company.

So far as UK tax law is concerned, it is certainly possible to contemplate structures under which, although UK shareholders might end up receiving German shares in a takeover, they could still be left with some theoretical holding of shares in issue from a UK subsidiary of the German group. These shares would carry the potential of delivering UK dividends to the shareholders in place of the German dividends that they would otherwise ordinarily receive. There is a sensitivity to a possible anti-avoidance section in the UK, section 703 of the Income and Corporation Taxes Act 1988, that could be invoked in the context of such dividend access or stapled share arrangements. It is, however, frequently the case that dividend access schemes cannot be implemented, because of tax or corporate law objections in the counterpart jurisdiction. From a UK perspective, however, they should not be ruled out automatically.

Dividend access schemes have been implemented in a number of different ways. Sometimes, the access shares have been stapled to the shares of the holding company; sometimes a few shares are held in a trust and dividends are then paid through the trust to the relevant shareholders in the holding company in respect of the shares held in the trust. Generally speaking, the access shares have no value and no capital value because their rights are cast so that they will receive such dividends as the directors elect to pay rather than having any entitlement to dividends. And to the extent that directors do elect to pay dividends, then that will reduce, pro tanto, the shareholders entitlement to dividends on the listed shares of the holding company in respect of which the dividend would otherwise be paid.

Where dividend access arrangements are in place, they are of no significance to the issue of whether the share of the German company to which the dividend access shares may be attached can rank as a UK share for index listing or tracker purposes. The stapled share has no bearing on these points and is simply relevant to delivering the right category of income for UK tax purposes.
So far as the position in Germany is concerned, there would be technical problems in implementing these dividend access structures to benefit the UK shareholders in both jurisdictions; the tax authorities in both those jurisdictions might well treat the dividends paid on the access shares as a constructive dividend by the German holding company, potentially therefore risking the imposition of a withholding tax on the dividend and negating much of the advantage sought by adopting the access arrangement.

Two further points of more general applicability arise. First, the UK tax grouping rules generally look to the worldwide group, and therefore the consolidated group arrangements may subsist even if there is not a common UK parent company. Secondly, if the change of control of the UK company is accompanied by a change in the trade or business of any UK company with carried forward tax reliefs, these reliefs may be forfeited.

2 German Implications of German Holding Company Structure

German Corporate Law

The shares in G-AG to be issued to the shareholders in UK plc are issued by way of an increase in capital against a contribution in kind, consisting of the shares in UK plc. In order to be able to allot the new shares to the shareholders in UK plc in consideration of the acquisition of their shares the statutory pre-emption right (Bezugsrecht) of the existing shareholders in G-AG needs to be excluded.

If and to the extent that the Management Board of G-AG has been authorised by the shareholders of G-AG beforehand to issue new shares against a contribution in kind on the basis of authorised capital (genehmigtes Kapital) and to exclude the statutory pre-emption right of the existing shareholders, the shares required for the acquisition of the UK plc can be issued quite easily without any material risk that intervening shareholders may block the transaction. However, any authorised but unissued capital is limited by law to a maximum of 50 per cent of the registered share capital existing prior to such capital increase. So, the existing authorised capital may not suffice to acquire a company of about the same size as G-AG.

If no authorised capital is available, a shareholder resolution will be required (i) to increase the registered share capital of G-AG by a contribution in kind and (ii) to exclude the statutory pre-emption right of the existing shareholders. The 75 per cent majority required for such resolutions in general does not pose a problem. However, opposing minority shareholders may try to challenge such resolutions in court for various reasons. They might in particular question whether the exclusion of the pre-emption right is justified in the interest of the corporation. It seems that the courts are developing a more practical approach to these issues so that the risk of such law suits being successful might be rather limited. The
consequences of these law suits nevertheless succeeding—possibly after years of litigation—are, however, severe as the resolution to increase the capital and the ensuing issue of shares will be invalidated if the law suits succeed. Shares bearing such risk, however small it might be, have to be specifically marked and are inevitably traded at a considerable discount. Therefore, German companies wishing to make acquisitions using their share capital have, in the past, generally refrained from implementing capital increases requiring shareholder resolutions, if there was a risk of shareholders challenging the resolutions.

To eliminate this risk, an alternative approach has been developed and put in place, most notably in the Daimler-Chrysler merger. Under this approach, a new German holding company (German Newco) is established to acquire the shares in G-AG and UK plc simultaneously. As German Newco has no minority shareholders at the time the capital increase is authorised, there is no risk that such resolutions will be challenged, nor that the issue of the shares might subsequently be declared invalid.

The business combination agreement under which UK plc and G-AG agree to adopt this structure might, according to a very cautious, however, not prevailing view, require the consent of the shareholders in G-AG under the so-called Holzmüller doctrine. If therefore a shareholder meeting is called to obtain this consent, timing will be an issue when planning this transaction. Any court review of a Holzmüller resolution cannot, however, result in the invalidation of the issue of the consideration shares by the German Newco. The acquisition of the shares in G-AG by Newco will be governed by the Takeover Code or the new Takeover Act respectively, whereas factors relevant to the acquisition of the shares in UK plc from the UK shareholders are outlined above.

If the new Takeover Act is applicable in Germany one could question, however, whether an offer of new shares in the German Newco in consideration for the shares in G-AG conforms with the wording of the new Takeover Act and the corresponding draft decree (Verordnung über öffentliche Angebote zum Erwerb von Wertpapieren und über Unternehmensübernahmen). The Act requires—if shares are offered as a consideration—that such shares are listed on an organised market. Furthermore, the decree stipulates that for calculating the value of the shares offered as consideration their average market price has to be taken into account. One cannot derive from that however that only shares which already have been listed for a while and therefore have a market price may be offered as a consideration as the official annotations to the Act explicitly state that the shares offered only need to be listed when they are actually issued to the shareholders. Thus, the shares in the German Newco can be offered if such shares will actually be listed when the shares are issued.

Consequently, in order to determine the correct exchange ratio of G-AG shares and UK plc shares into German Newco shares, one cannot take the

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5 WpÜG, s 31 para (2).
pre-transaction value of the German Newco Shares into consideration but must refer to the value, that is, stock market price of UK plc, as in substance the shares of G-AG and UK plc are exchanged.

The shares acquired by German Newco are then contributed into Newco which as consideration increases its capital and issues new shares in Newco to the UK shareholders as well as to the German shareholders. To implement the capital increase resolved in the German Newco, an auditor will have to confirm that the actual value of the shares contributed covers the issue price of the shares, that is, the increase in the registered capital plus a premium, if any. This valuation, in general, is more of a timing issue than a substantive one as German corporate law allows a lower issue price for the new shares to be shown than the actual market value of the acquired shares.6 Ultimately the capital increase needs to be registered with the commercial register to become effective. If organised effectively, no delays should result from this procedure.

Furthermore, it will be necessary to secure a listing for the shares in the German Newco, conceivably in both Frankfurt and London, which will be an application for listing by that company for the first time. This may be marginally more complex than obtaining a listing for new shares to be issued by an existing company the issued capital of which is already listed.

If the German Newco structure is adopted, G-AG might still have minority shareholders. Full control of G-AG by the German Newco may be obtained as of 2002 through the power to squeeze out minority shareholders, provided Newco holds 95 per cent of the shares in G-AG. Alternatively one might consider either a domination agreement, as outlined above, or a statutory merger of the German Newco with G-AG, resulting effectively in G-AG becoming the controlling entity. As such a merger can only be effected between two German-incorporated companies, it could not be applied to UK plc.

Merger relief in Germany is not problematic. German corporate law allows the issue price (nominal amount of the shares issued plus any premium) for the new shares issued to be set below the fair market value of the companies—G-AG and UK plc—which are being acquired. Thus, the valuation of the shares in G-AG and UK plc and the accounting for the new shares in the balance sheet of the German Newco will not limit the German Newcos ability to distribute dividends received from the subsidiary.

German companies whose shares are included in the DAX increasingly tend to draw up their accounts under the IAS Rules. Under these rules, the question arises as to whether consolidation is effected under acquisition or uniting of interests accounting. The latter, which avoids the inclusion of any appreciable goodwill in the consolidated accounts, requires that shares between the com-

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6 See below.
bining enterprises are exchanged and that the shares so exchanged represent a substantial majority, if not all, of the shares.

German consolidation rules offer the same accounting alternatives. The rules, however, are more flexible. In particular, the requirements for uniting of interests accounting are less strict than under IAS. More flexibility also results from the fact that German corporate law allows the full value of the acquired enterprise not to be shown in the balance sheet if new shares in the acquirer are issued as consideration.

**German Tax Considerations**

The acquisition of G-AG by the German Newco does not trigger any German stamp duty. It will result in real estate transfer tax becoming payable if Newco acquires more than 95 per cent of the shares in G-AG. The transaction will be tax neutral for German shareholders in G-AG with respect to capital gains as a roll-over is available for those German shareholders who want it.

Any dividends paid by the German Newco to German corporate shareholders will be tax exempt. Fifty per cent of the dividends paid by the German Newco to German individuals will be taxable at the relevant prevailing rates but a full withholding tax credit will be granted. Foreign shareholders generally are subject to German withholding tax of 20 per cent. Such tax rate is reduced to 15 per cent under the German/UK Tax Convention. Thus, from a German point of view, no inherent disadvantage results from German tax law for foreigners holding German shares, unless such disadvantages result from the respective foreign tax environment.

G-AG and the German Newco are subject to corporate income tax at a rate of 25 per cent, trade tax of about 13 per cent (this differs regionally) and solidarity surcharge of 1.375 per cent. However, German corporations will be fully tax exempted for all capital gains from the disposal of shares. Furthermore, 100 per cent of domestic dividends and 95 per cent of UK dividends received by the German Newco will be tax exempt. Consequently, from a corporate point of view, having G-AG as the ultimate holding company may prove to be advantageous.

**IV INDEX CONSIDERATIONS**

Under the Ground Rules for the Management of the UK Series of the FTSE Actuaries Shares Indices, which determine eligibility for inclusion in, for example, the FTSE 100 index, shares are, in principle, classified by the country where the quoted company is legally incorporated. Where a primary share listing and significant trading are on an exchange in the country of incorporation, the stock
will be allocated to that country. Only companies allocated to the UK are eligible for inclusion in the UK Series.

The effect of these rules is to exclude the shares of the German Newco from qualifying for inclusion in the FTSE UK Series. The FTSE Equity Indices Committee does have power, under the rules, to make an exception and admit a foreign-incorporated company to the UK Series if the stock market listing, share trading and/or share ownership clearly warrant a different allocation. But it is thought that this power exists to assist issuers having their primary market in London but which are incorporated, possibly for taxation reasons, outside the UK. It is thought unlikely to assist in having the shares of the German Newco included in the UK Series.

Similar requirements apply in Germany for inclusion in the DAX. Only companies domiciled in Germany are eligible for inclusion in the DAX. This means that UK plc cannot be a DAX company. In consequence, for much the same reason that UK institutions may find themselves forced sellers of shares in the German Newco, so German institutional shareholders in G-AG may have to dispose of the shares in UK plc which they would receive on any exchange. One may note, however, that some of the more modern German share indices, the Neuer Markt and EMAX indices for example, take a more relaxed approach and extend eligibility to companies which do not have their domicile in Germany.

In consequence of the above rules, if shareholders are asked to exchange their domestic shares listed in the Dax or the FTSE UK Series for shares in the foreign Newco, selling pressures may arise in the domestic market. Funds tracking the FTSE 100 companies, for example, which acquire shares in the German Newco in exchange for their shares in UK plc may be forced sellers of the shares of the German Newco. Moreover, holdings of foreign shares are often subject to investment limits imposed on pension funds, insurance companies and other institutions. And the resultant selling pressure (flowback) may depress the share price for both groups of shareholders in the merged entity.

V SUMMARY OF THE ADVANTAGES/DISADVANTAGES OF VARIOUS SINGLE HOLDING COMPANY STRUCTURES

Pulling together all of the strands in the previous four sections of this chapter, it is possible to draw some broad and very general conclusions, using as a guide the objectives which, in the introduction to this paper, were identified as being key considerations in reaching a decision about the structure best suited to implementing a merger between UK plc on the one hand and G-AG on the other. These conclusions may be illustrated schematically as follows:
UK plc acquires G-AG
German Newco acquires UK plc and G-AG

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<th>UK plc acquires G-AG</th>
<th>German Newco acquires UK plc and G-AG</th>
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<td>Fast execution and low intervention risk</td>
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<td>Integration efficiency</td>
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<td>Tax efficiency for shareholder rollover</td>
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<td>Tax efficiency for corporate structure</td>
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<td>Minimising ‘flowback’</td>
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✔ ✔ good
✔ reasonable
✗ challenging

Turning first to the acquisition of G-AG by UK plc, we have seen that the process involved in UK plc making an offer to the G-AG shareholders to exchange their shares in G-AG for shares in UK plc is not complex and has many similarities with that involved in a purely UK domestic offer. So the transaction should be capable of relatively fast execution with a correspondingly reduced period of risk of intervention from a third party. Provided UK plc holds at least 95 per cent of G-AG, then it will (from 2002 onwards) be in a position to acquire forcibly the outstanding minority. There are other ways of addressing this problem. However, they seem less favourable in the context of this kind of transaction. Both merger relief and merger accounting are potentially available to UK plc, dependent upon the precise circumstances. Capital gains tax rollover may well not be available to German shareholders in G-AG—this may not be a significant problem, provided that G-AG does not have individuals as substantial shareholders. Otherwise, this could be a significant issue.

The UK holding company structure is very much favoured by the UK shareholder, owing to the significant preference he has, from a taxation standpoint, for receiving UK sourced dividend income. And the German shareholder suffers no disadvantage in relation to the receipt of dividends from UK plc in terms of the absence of any withholding on dividends from the UK to both of those jurisdictions. German shareholders are likely to be no worse off from a tax standpoint in receiving a UK sourced dividend than a German sourced one. There are both advantages and disadvantages in using a UK holding company structure from a corporate tax planning standpoint. But nowadays, following abolition of the ACT régime, the overall standing of the UK as a holding company jurisdiction is more finely balanced than it used to be. It bears comparison with Germany, although there is still less flexibility in relation to gains on investments in subsidiaries. Finally, German institutions are perhaps marginally less
constrained than their UK counterparts when giving up a share which is included within their principal domestic share index in exchange for one which is not. Nevertheless, there is still a significant risk of ‘flowback’ to the London market of shares issued by UK plc to institutional shareholders in G-AG.

It is now possible to compare the above position with the acquisition of UK plc by the German Newco in the following ways.

The interposition of an entirely new German holding company over UK plc and G-AG is likely to be a more involved and potentially cumbersome, even though tested, process than simply acquiring the shares of one (rather than both) of the two listed companies. So that can weigh against the German Newco structure for the merger in terms of speed of execution and consequent reduction in the risk of intervention by third parties.

From an integration efficiency point of view, the acquisition of UK plc by the German Newco can be structured (whether by offer or by scheme of arrangement) so as to ensure that any minority shareholders in UK plc are compulsorily acquired—provided, in the case of the offer, that the necessary 90 per cent acceptance threshold is passed. Moreover, in Germany, the usual merger relief and merger accounting principles should be capable of applying to the transaction.

The capital gains tax rules in the UK will mean that the UK shareholders in UK plc will receive a full capital gains tax rollover in respect of the exchange of shares.

Due to UK tax laws, there is a significant disadvantage for UK shareholders in relation to the taxation of dividend income in exchanging a share in a UK company for a share in a German company. They will suffer an increased tax burden as a result of being in receipt of foreign source dividend income rather than UK source dividend income. The possibility of alleviating this disadvantage by the utilisation of dividend access shares issued directly to the UK shareholders by a UK subsidiary within the combined group does exist but in Germany this is unlikely to be a viable solution, either from a corporate law or from a tax standpoint.

Germany offers a full participation exemption régime and, from that perspective, the tax efficiency of a corporate structure headed by a German parent company compares rather favourably.

Ultimately depending on the actual shareholder structure the risk of flowback of shares to the stock market in the holding company jurisdiction can be greater where the transaction is structured using a German holding company. As UK institutions might, from time to time, be more constrained than their German counterparts in relation to the extent to which they can acquiesce in the transformation of an investment which is within the main domestic stock index into one which is not.
VI DUAL-HEADED STRUCTURES

1 Introduction

Having dealt with the pluses and minuses of what might be termed the single holding company structure, this paper will now examine the other possible structures, each of which can be referred to as dual-headed. The market and tax related difficulties associated with having a single holding company in one of the two jurisdictions involved are addressed in each of these structures by arranging for the merged group in effect to be owned by two holding companies, one in each of the two jurisdictions.

Although there are many possible permutations of the way in which such twin-headed company structures can be established, there are probably two basic models, as follows:

— The joint venture structure, where the activities are transferred to one or more sub-holding companies, the shares of which are split between the parties, which in turn become feeder funds for investors in their respective jurisdictions to invest in the merged business.

— The parallel structure, where G-AG and UK plc continue to own their respective operations but, without combining them under the ownership of a single entity, seek to create the economic effect of such a combination for their respective investors by entering into one or more agreements, commonly called equalisation agreements, to achieve that objective.

Each of these structures has been adopted on cross-border mergers involving English companies, but there are no recent examples in relation to German companies.

2 The Joint Venture Structure

Structural Overview

The basic principle of the joint venture structure is that the two top companies remain as pure domestic holding companies, whilst at the same time all the operating businesses are combined under one or more sub-holding companies jointly owned by the two top companies. This offers a number of advantages. The shares of the top companies stay in their respective domestic indices and their shareholders receive domestic dividends but, at the same time, the businesses of the two parents are brought together at the operational level thereby
assisting the delivery of the synergies and efficiencies being sought through the
merger.

There are also potential disadvantages. The first is that the existence of sep-
arately listed shares in two discrete parent companies may lead to one of the
parent shares trading at a discount to the other (relative to the equalisation ratio
established at the time of coming together). This lack of symmetry is very
largely market driven, but it raises difficulties in relation to future capital rais-
ing transactions when a value has to be placed on the equity of the merged
enterprise. Secondly, a basic structuring consideration is that in some jurisdic-
tions, notably in the UK, there may be a requirement to demonstrate that the
holding company in that jurisdiction has genuine control over the merged busi-
ness and is not solely a medium exercising no control over that business through
which investors in that jurisdiction can invest in the joint venture. There has to
be some genuine substance to the parent and its control rights.

Implementation

In terms of deal execution, there are normally two cornerstone agreements,
these being:

— An ‘implementation agreement’ between the top companies which, inter
alia, identifies the steps to be taken to incorporate the sub-holding company
or companies and to move the businesses underneath the sub-holding com-
pany or companies, sets out conditions to completion (such as regulatory
clearances) and contains certain warranties and indemnities. The mechanics
set out in the implementation agreement to combine the businesses of the
two enterprises will obviously be heavily influenced by tax considerations.
Indeed, the very viability of the joint venture structure, necessitating the
movement of potentially substantial businesses, is likely to depend upon
finding a tax efficient way to achieve a combination under the joint venture
structure.

— A ‘governing agreement’ which determines how the venture will run and the
rights and obligations of the parent companies.

The governing agreement will deal with various issues including, importantly,
corporate governance and takeover protection. In terms of governance it will
obviously be critical to determine how board control at the sub-holding com-
pany level will be organised, including whether it is sensible to differentiate
between the boards at the sub-holding company level and those at the parent
company levels.

There has, in recent years, been a movement towards unified board structures
(for example, with Reed Elsevier) where the aim is to have more or less the same
board for each parent and the sub-holding company. There are technical com-
plexities in achieving this, given the different shareholder constituencies at the
top level. For example, it is not possible to preclude the possibility of the share-
holders of UK plc exercising their right under Section 303 of the Companies Act
1985 to remove a director by ordinary resolution.

As a further strand to the overall governance issue, there will typically be
some procedure for shareholders resolutions in one top company to be endorsed
by the shareholders meeting of the other top company (and vice versa). The idea
is that one should aim, as far as possible, to create one shareholder universe.
The basic objective is that shareholders should be treated as much as possible as
if they had a share in the overall enterprise rather than in their own domestic
parent company.

It will be important to consider the requirement for takeover protection. If
the two groups are coming together as one merged enterprise, it should not be
possible for a predator to take over only part of that enterprise. Therefore, in
nearly all of these structures, matters will be arranged so that, by one means or
another, a bidder cannot, or is very unlikely to want to, acquire G-AG without
also acquiring UK plc. This may be achieved by providing that G-AG will lose
its rights to appoint directors of Newco if a bidder makes an offer for G-AG
without making a comparable offer for UK plc. Another approach was found in
the Allied Zurich structure: one of the top companies was given an option over
some extra shares in the sub-holding company if the other party was the subject
of a takeover bid.

There will also need to be an equalisation contract. The object of this con-
tract is to ensure that, even if receipts from the subsidiaries have slightly devi-
ated from the agreed ratio, ultimate distributions to shareholders (both
dividend distribution and capital distributions in liquidation) will always be in
the ‘equalisation’ ratio. This contract not only provides a final check to ensure
that the ratio is maintained, but also enables expenses and tax costs in the actual
holding companies themselves to be built into the equation and the cost of those
to be shared between the two companies in the same relevant ratio.

If the joint venture structure is to be implemented in full there are many more
transactions to accomplish and inherently more complexity which can give rise
to the following tax issues:

— There would inevitably be debate as to the appropriate jurisdiction in which
to locate the sub-holding company. Under the previous ACT system the use
of a non-UK sub-holding company would have required the introduction of
dividend access shares into the structure or alternatively the use of more
than one sub-holding company. This would not, however, be as crucial
under the current tax system.

— If the primary aim is to have more than one jointly held company owned in
the agreed ratio, the share exchange rollover essentially available to each
parent on disposing of its subsidiaries may not operate smoothly if the
subsidiaries being contributed into each of the joint companies by the minority shareholder do not happen to be worth the agreed percentage of the shares to be issued by each holding company.

— The transfers of subsidiaries into the jointly held company or companies are also likely to involve numerous UK stamp duty considerations, possible UK capital gains charges on the occasion of subsidiaries leaving the original group and equivalent points in the other jurisdiction.

German Aspects of Implementing a Joint Venture Structure

To implement a joint venture structure a sub-holding company jointly held by G-AG and UK plc will have to take over the operations from G-AG and UK plc. The transfer of the business of G-AG underneath the sub-holding company requires a shareholder resolution pursuant to section 179a AktG and possibly on an amendment of G-AGs Articles with a 75 per cent majority of the votes cast. Shareholders may challenge such resolutions in court. Whether they can do so on the ground that the shareholding in the sub-holding company received by G-AG for contributing its business does not reflect the relative value of such business in relation to the value of the business transferred by UK plc has not yet been decided by the courts.

As outlined above, it will be of interest to co-ordinate the decision making and the board representation in G-AG and UK plc, ideally to the effect that the boards of G-AG, UK plc and the sub-holding company are identical. This could be provided by G-AG and UK plc entering into a co-ordination group agreement (Gleichordnungsvertrag) which stipulates that the management board and the supervisory board of G-AG are staffed identically to the Board of UK plc and vice-versa. Alternatively, such an agreement may also provide that the control of both companies is transferred to a joint committee which co-ordinates the activities. Such co-ordination group agreement, however, will need to be approved by the shareholders with a 75 per cent majority.

Even though these structures have been discussed in the past—most recently for the merger of Hoechst AG and Rhone Poulenc into Aventis—they have not been implemented yet and are therefore untested in Germany. The reluctance to test such structures might be caused, inter alia, by the fact that any agreement on the staffing of the Supervisory Board of G-AG would only include the shareholder representatives but not the representatives of the employees on the board which—depending on the size of G-AG—could account for to up to 50 per cent of the members of the supervisory board; thus, no completely identical membership of the boards can be achieved. In addition it is technically challenging to implement a parallel structure as G-AG has a two tier system consisting of the management board and the supervisory board whereas other corporate systems like in the UK plc have one tier systems.
In general, by having a jointly held sub-holding company a fair allocation of profits but also of losses or risks resulting from the operational entities held by the sub-holding company is effected. If nevertheless there is a need to equalise profits and losses between G-AG and UK plc both parties could—subject to shareholder approval (with a 75 per cent majority in the case of G-AG)—enter into a profit partnership agreement (Gewinngemeinschaftsvertrag).

The joint venture structure requires that both G-AG and UK plc transfer their operations to the sub-holding company. Generally, the transfer of a business operation results in the realisation of a taxable capital gain in the amount of the difference between the book value and the fair market value of the transferred operation. However, if certain requirements are met, the German Reorganisation Tax Act (‘UmwStG’) permits a rollover of the tax basis to the acquirer (thereby avoiding a capital gain). Consequently, the contribution to a German sub-holding can be structured tax-neutrally. A similar rule applies where neither the seat nor the management of the sub-holding company is located in Germany but in another member state of the EU provided that the transferee maintains a permanent establishment in Germany, which, however, does not have to exist prior to the contribution but could instead be constituted also by the transfer of the operation. A similar regime applies if the operation to be contributed is incorporated. G-AG can contribute shares in a subsidiary to a German or to a non-German EU sub-holding company without incurring a taxable capital gain provided, however, that the sub-holding company is able to continue the tax basis of the contributed shares.

Finally, the transfer of a business operation, as well as the transfer of 95 per cent or more of the shares of a subsidiary can result in property transfer tax if the business transferred comprises, or the subsidiary owns, property. Dividends which the sub-holding company distributes to G-AG are exempt from corporation income tax and trade tax at G-AG’s level regardless of whether the sub-holding company is located in Germany or abroad. Dividends which G-AG distributes from profits distributed to it by the sub-holding are fully exempt from German corporate income tax in the hands of the corporate shareholders and partially (50 per cent) exempt from income tax in the hands of the individual shareholders of G-AG regardless of whether the sub-holding company is a German or a foreign company.

3 The Parallel Structure

Structural Overview

The joint venture structure may be too difficult or costly (in commercial or tax terms) to implement. This may lead the parties to consider the parallel
structure, the most frequently quoted example of which is the Unilever PLC and NV structure, dating from 1929. The parallel structure is materially different from the joint venture structure in that the underlying businesses remain separate. There is no sub-holding company with businesses intertwined beneath it but, instead, there is a group of G-AG subsidiaries under G-AG and a group of UK plc subsidiaries under UK plc.

**Implementation**

There will be an equalisation agreement providing, in brief summary, that each parent company will pay equalised dividends or capital distributions to its respective shareholders and, if there should be any shortfall on either side, the other company will make up the difference. There will also be a co-operation and sharing agreement under which the parent companies adopt the same operating policies, agree to share intellectual property and know-how and agree to source raw materials in a cooperative way.

Unity of management is achieved by ensuring that the boards of the parent companies are as nearly as possible identical. There are differing ways in which this can be approached depending upon the legal systems applicable in the jurisdictions of the respective parent companies. In Unilevers case, nomination to each parent company board may only be made by two companies. Those two companies are each owned in a 50:50 deadlock by PLC and NV. Accordingly, nominations may only be made to the board with the agreement of the combined corpus of the NV and plc boards. As indicated above, it is not possible to preclude the possibility of the shareholders of UK plc exercising their right to remove a director by ordinary resolution.

The parallel structure therefore manages to retain the domestic share for both groups of original shareholders (albeit that, as with the joint venture structure, it does not increase the market capitalisation of either in its domestic index). It has the not inconsiderable advantage of being simple to establish. It also has the benefit of not triggering change of control provisions and perhaps avoiding many of the potential tax complexities of combining the businesses under the joint venture structure. These may well be particularly relevant in certain areas—for example, mining where many leases will contain pre-emption rights triggered on a change of control. The RTZ/CRA unified structure was constructed on a parallel basis, substantially for this reason.

**Tax Implications**

It is occasionally suggested that the parallel structure is flawed, in that there is a doubt as to the tax treatment of a subvention payment from one group to the other should such a payment eventually be required to fund either equal
dividends or equal liquidation distributions. And in the final analysis, in funding equal distributions in a liquidation, the cross flows between the two top companies could be extremely substantial.

In practice, however, this point tends to be unimportant. Particularly with well planned attention to the point in advance, it will usually be the case that each parent ought to have sufficient distributable profit and cash to fund its own dividends without the need to receive equalisation payments. The creation of joint companies and the opportunity to waive dividends or to pay disproportionate dividends from such joint companies will often give a further opportunity for subsidising one parent, if required, without the need to resort to strict equalisation payments. In the RTZ/CRA structure arrangements exist one tier down the group for each company to have cross holdings of shares in the other carrying 10 per cent of the voting power, so that if dividends had to flow on these shares the payments, whilst being non-deductible in the paying jurisdiction, would qualify for credit relief for underlying taxes in the recipient jurisdiction, and thus provide a perfectly acceptable tax regime for the payments.

German Aspects of Implementing a Parallel Structure

In the parallel structure no joint sub-holding company is created but G-AG with its subsidiaries and businesses remains a separate legal entity. In order to achieve an ‘operational merger’, however, UK plc and G-AG may enter into a coordination group agreement (Gleichordnungsvertrag) in order to ensure that the two companies are controlled by the same persons and governed in a coordinated way either by identical boards or through a joint committee. As pointed out above such a coordination group agreement is feasible under German law but as yet practically untested in Germany.

Whereas in the joint venture structure the fair allocation of profits but also of losses and risks resulting from the operational entities is effected through the sub-holding company, in the parallel structure an additional agreement will be required to ensure that the profits and losses of the respective subsidiaries of G-AG and UK plc are equalised. To effect such equalisation G-AG may—subject to shareholder approval with a 75 per cent majority—enter into a profit partnership agreement (Gewinngemeinschaftsvertrag) with the other party.

The fact that in the parallel structure G-AG and UK plc remain separate legal entities seems to indicate that they can be easily ‘de-merged’ simply by terminating the respective coordination group agreement and the equalisation agreement. Any termination clause, however, will necessarily have to contain detailed provisions on the balancing and compensation of advantages/disadvantages either party may have received or incurred during the term of such agreements but which continue to have effects even after termination of the respective coordination group agreement and equalisation agreement. Since neither assets of a
business operation nor shares are transferred upon the implementation of the parallel structure no capital gain is realised that could be subject to tax on implementation. Real state transfer tax is not triggered either.

Although practical examples are rather rare and therefore one cannot speak of a well established practice, equalisation payments made between the two parallel companies should—if properly structured—be deductible for the paying and income for the receiving company. This would require that the respective agreement to make such payments exists between the two companies and that there is an economic benefit for such arrangement for the companies (not only for their shareholders). Otherwise, it cannot be entirely ruled out that a payment, for example by G-AG, would be treated as a non-deductible dividend to the shareholders of G-AG. Consequently, the receipt of an equalisation payment would then have to be characterised as a tax neutral contribution. Only in a worst case scenario would the tax treatment of the payment and a tax treatment of the receipt of the payment not be harmonised and constitute—although non-deductible for the paying company—taxable income for the receiving company.

4 Combining Joint Venture and Parallel Structures

Joint venture and parallel structures are not mutually exclusive alternatives. Either permits an element of the other to be incorporated and there can therefore be any variation between the two extreme structures. This is because almost all joint venture type structures incorporate an equalisation contract as a final safety mechanism for achieving correct sharing and in order to share the tax and other expenses within the two top companies. Whilst an equalisation contract may render it totally unnecessary to merge underlying operations together under one or more sub-holding companies and to have a proportion of the shares held by each of the top companies, there is nevertheless no objection to shareholdings being held jointly in a parallel structure.

Theoretically speaking, the parallel structure could be created with a top level equalisation contract and without thereafter any further transactions at all. However, that will also be unsatisfactory, in as much as there will be bound to be a preference to consolidate various existing businesses and subsidiaries into coherent sub-groups, both in product categories (for rationalisation reasons) and in tax jurisdictions (to achieve tax consolidation). These sorts of demands are almost bound to create an element of consolidation of subsidiaries into joint companies. This is why, on any new cross-border combination, the structure adopted is likely to consist of something midway between the strict joint venture and the strict parallel structure.
5 Further Tax Considerations Relevant to Dual-Headed Structures

Joint venture and parallel structures will have slightly different implications (and in turn different implications from the single top entity structure) as regards transfer pricing legislation in different jurisdictions, and the application of controlled foreign company provisions. In many jurisdictions, the transfer pricing provisions would operate in the joint venture type structure as between all companies held beneath joint venture companies, and between subsidiaries in the different joint venture sub-groups that happen to be held in the same ratio by the same two ‘feeder funds’. But if more was left of the pure parallel structure, a company wholly owned by one parent is probably not under common control with a company held in the other group, though the economic fortunes of the two shareholder groups are, of course, inter-twined. Another tax question which is likely to be raised with both the joint venture and the parallel structures is whether the tax residence of G-AG in its jurisdiction of incorporation and that of UK plc in its jurisdiction of incorporation is susceptible to challenge, particularly if the boards of the two are identical. How can it be that one company is accorded one status for tax purposes and the other the precise opposite?

Where the two companies are based in jurisdictions having the fairly familiar ‘tiebreaker’ clause in the double tax treaty, the problem becomes far less significant. The UK company first is bound to be UK incorporated and thus UK tax resident unless (a) the other taxing authority asserts that the UK company is also resident in its jurisdiction and (b) (under the ‘tiebreaker’) ‘effective management’ is exercised in the other jurisdiction. Such a conclusion under the tiebreaker is unlikely where the UK company is directly administering its subsidiaries. And in the case of the other holding company, that is likely to be treated as a resident of Germany (as the case may be) under that jurisdiction’s domestic law. Unless thus the UK Revenue contends (a) that the other holding company is managed and controlled in the UK, and (b) that the tiebreaker test is to be reconciled in favour of concluding that the overseas holding company is ‘effectively managed’ in the UK, the other company would end up being resident solely in the other jurisdiction.

A reasonably cooperative attitude can be expected from the UK Revenue in relation to this kind of issue, even where a tiebreaker clause is not in the most favourable form or where there may be no tiebreaker in the treaty at all. The UK Revenue is unlikely to want to treat, say, a US company in a parallel structure as being UK resident when that would probably result in the UK Revenue never succeeding in charging any tax after giving credit for US tax. A cooperative approach from the UK Revenue can be expected, provided that certain precautions are taken in dealing with the Board structures.
6 The Discount Problem

One of the more troublesome features that tends to arise with dual headed structures relates to the significant variations between the share prices of the two parent companies.

There are numerous possible reasons for this discount arising including the fact that the tax treatment for holders in particular jurisdictions of one share may be more attractive than for a holding of the other; or that there may be greater liquidity or more attractive index membership for one share than the other.

In terms of solutions, there are various possibilities, including the lower priced parent boosting its distributions to shareholders with a view to closing the discount. This is not attractive, because it is contrary to the principle that each share in whichever of the two holding companies shares equally in one economic enterprise. Alternatively, it may be possible to implement a switch to a single top company structure at parity at some defined point in time.

VII CONCLUSIONS

Drawing the above strands together, some general observations can be made as to the relative merits of the single holding company structure and the two dual-headed company structures which have been examined in this paper.

The Single holding company structure is a stable, unified structure with no ongoing discount issue. It is simple and maximises the size of the group in a single index. The downside is that on establishment the ‘target’ shareholders end up with non-domestic shares and may sell out—depressing the price for everybody. The cross-border flow of dividends may also prove to be tax inefficient, particularly for UK shareholders, as this paper has shown. There are dividend access ways of ameliorating this issue but not without complexity, and they appear not to be available on a cross-border merger between a UK company and a German company.

Legal and tax issues will certainly be significant in assessing whether G-AG or UK plc should be the holding company but, at the end of the day, these issues are unlikely to be determinative. The decision in any particular case is likely to depend on a judgement about the extent of any likelihood of substantial ‘flow-back’ to the stock market in the acquiring company’s jurisdiction and an analysis and judgement of the shareholder structure, actual intervention risk, political considerations, and corporate governance issues.

Alternatively, both joint venture and parallel structures retain a domestic share for the two sets of shareholders. The joint venture structure is discouragingly complex but brings with it scope for real business combination. The parallel structure is simpler to put together but the lack of integration may mean
that the synergistic and other benefits of merging business units structurally are less easy to capture.

Whilst recent trends suggest that dual-headed structures may not provide a long term solution in all circumstances they have undoubtedly served numerous businesses well and, where the political need to establish a merger without losing a domestic position or other particular circumstances apply, they will doubtless continue to be addressed very carefully.

It may be the case that, for certain cross-border mergers, the dual-headed combination will provide a means of implementing the transaction without immediately having to address some of the harder issues which can arise with the single holding company structure. It may then be somewhat easier to move from the dual-headed combination to the unified holding company structure after an interim period, when the parties are better able to judge how to resolve some of those harder issues.
Appendix 1

Gesetz
zur Regelung von öffentlichen Angeboten
zum Erwerb von Wertpapieren und von Unternehmensübernahmen

Vom 20. Dezember 2001

Der Bundestag hat das folgende Gesetz beschlossen:

Artikel 1
Wertpapiererwerbs- und Übernahmegenetz
(WpÜG)

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Abschnitt 1
Allgemeine Vorschriften

§ 1 Anwendungsbereich

Dieses Gesetz ist anzuwenden auf Angebote zum Erwerb von Wertpapieren, die von einer Zielgesellschaft ausgegeben wurden und zum Handel an einem organisierten Markt zugelassen sind.

§ 2 Begriffsbestimmungen


(2) Wertpapiere sind, auch wenn sie für sie keine Urkunden ausgestellt sind,

1. Aktien, mit diesen vergleichbaren Wertpapiere und Zertifikate, die Aktien vertreten,

2. andere Wertpapiere, die den Erwerb von Aktien, mit diesen vergleichbaren Wertpapieren oder Zertifikaten, die Aktien vertreten, zum Gegenstand haben.

(3) Zielgesellschaften sind Aktiengesellschaften oder Kommanditgesellschaften auf Aktien mit Sitz im Inland.

(4) Bieter sind natürliche oder juristische Personen oder Personengesellschaften, die allein oder gemeinsam mit anderen Personen ein Angebot abgeben, ein solches beabsichtigen oder zur Abgabe verpflichtet sind.


(6) Tochterunternehmen sind Unternehmen, die als Tochterunternehmen im Sinne des § 290 des Handelsgesetzbuchs gelten oder auf die ein beherrschender Einfluss ausgeübt werden kann, ohne dass es auf die Rechtsform oder den Sitz ankommt.


(8) Der Europäische Wirtschaftsraum umfasst die Staaten der Europäischen Gemeinschaften sowie die Staaten des Abkommens über den Europäischen Wirtschaftsraum.

§ 3 Allgemeine Grundsätze

(1) Inhaber von Wertpapieren der Zielgesellschaft, die derselben Gattung angehören, sind gleich zu behandeln.

(2) Inhaber von Wertpapieren der Zielgesellschaft müssen über genügend Zeit und ausreichende Informationen verfügen, um in Kenntnis der Sachlage über das Angebot entscheiden zu können.

(3) Vorstand und Aufsichtsrat der Zielgesellschaft müssen im Interesse der Zielgesellschaft handeln.

(4) Der Bieter und die Zielgesellschaft haben das Verfahren rasch durchzuführen. Die Zielgesellschaft darf nicht über einen angemessenen Zeitraum hinaus in ihrer Geschäftstätigkeit behindert werden.

(5) Beim Handel mit Wertpapieren der Zielgesellschaft, der Bietergesellschaft oder anderer durch das Angebot betroffener Gesellschaften dürfen keine Marktverzerrungen geschaffen werden.

Abschnitt 2
Zuständigkeit des Bundesaufsichtsamtes für den Wertpapierhandel

§ 4 Aufgaben und Befugnisse

(1) Das Bundesaufsichtsamt für den Wertpapierhandel (Bundesaufsichtsamts) übt die Aufsicht bei Angeboten nach den Vorschriften dieses Gesetzes aus. Es hat im Rahmen der ihm zugewiesenen Aufgaben Missstände entgegenzuwirken, welche die ordnungsmäßige Durchführung des Verfahrens beeinträchtigen oder erhebliche Nachteile für den Wertpapiermarkt bewirken können. Das Bundesaufsichtsamts kann Anordnungen treffen, die geeignet und erforderlich sind, diese Missstände zu beseitigen oder zu verhindern.

(2) Das Bundesaufsichtsamts nimmt die ihm nach diesem Gesetz zugewiesenen Aufgaben und Befugnisse nur im öffentlichen Interesse wahr.

§ 5 Beirat

(1) Beim Bundesaufsichtsamts wird ein Beirat gebildet. Der Beirat besteht aus

1. vier Vertretern der Emittenten,
2. je zwei Vertretern der institutionellen und der privaten Anleger,
3. drei Vertretern der Wertpapierdienstleistungsunternehmen im Sinne des § 2 Abs. 4 des Wertpapierhandelsgesetzes,
4. zwei Vertretern der Arbeitnehmer,
5. zwei Vertretern der Wissenschaft.


(2) Das Bundesministerium der Finanzen kann durch Rechtsverordnung, die nicht der Zustimmung des Bundesrates bedarf, nähere Bestimmungen über die Zusammensetzung des Beirates, die Einzelheiten der Bestellung seiner Mitglieder, die vorzeitige Beendigung der Mitgliedschaft, das Verfahren und die Kosten erlassen. Das Bundesministerium der Finanzen kann die Ermächtigung durch Rechtsverordnung auf das Bundesaufsichtsamt übertragen.


(4) Der Präsident des Bundesaufsichtsamtes lädt zu den Sitzungen des Beirates ein. Die Sitzungen werden vom Präsidenten des Bundesaufsichtsamtes oder einem von ihm beauftragten Beamten geleitet.

(5) Der Beirat gibt sich eine Geschäftsordnung.

§ 6 Widerspruchsauusschuss

(1) Beim Bundesaufsichtsamt wird ein Widerspruchsauusschuss gebildet. Dieser entscheidet über Widersprüche gegen Verfügungen des Bundesaufsichtsamtes nach § 4 Abs. 1 Satz 3, § 10 Abs. 1 Satz 3, Abs. 2 Satz 3, § 15 Abs. 1 und 2, § 20 Abs. 1, §§ 24, 28 Abs. 1, §§ 36 und 37.

(2) Der Widerspruchsauusschuss besteht aus:
1. dem Präsidenten des Bundesaufsichtsamtes oder einem von ihm beauftragten Beamten, der die Befähigung zum Richteramt hat, als Vorsitzendem,
2. zwei vom Präsidenten des Bundesaufsichtsamtes beauftragten Beamten als Beisitzen,
3. drei vom Präsidenten des Bundesaufsichtsamtes bestellten ehrenamtlichen Beisitzen.

Bei Stimmengleichheit entscheidet der Vorsitzende.

(3) Die ehrenamtlichen Beisitzen werden vom Präsidenten des Bundesaufsichtsamtes für fünf Jahre als Mitglieder des Widerspruchsauusschusses bestellt.

(4) Das Bundesministerium der Finanzen kann durch Rechtsverordnung, die nicht der Zustimmung des Bundesrates bedarf, nähere Bestimmungen über das Verfahren, die Einzelheiten der Bestellung der ehrenamtlichen Beisitzen, die vorzeitige Beendigung und die Vertretung erlassen. Das Bundesministerium der Finanzen kann die Ermächtigung durch Rechtsverordnung auf das Bundesaufsichtsamt übertragen.

§ 7 Zusammenarbeit mit Aufsichtsbehörden im Inland

(1) Das Bundeskartellamt, das Bundesaufsichtsamt für das Kreditwesen, das Bundesaufsichtsamt für das Versicherungswesen sowie das Bundesaufsichtsamt haben einander die für die Erfüllung ihrer Aufgaben erforderlichen Informationen mitzuweisen. Bei der Übermittlung personenbezogener Daten ist § 15 des Bundesdatenschutzgesetzes anzuwenden.

(2) Das Bundesaufsichtsamt kann sich bei der Durchführung seiner Aufgaben nach diesem Gesetz privater Personen und Einrichtungen bedienen.

§ 8 Zusammenarbeit mit zuständigen Stellen im Ausland


§ 9 Verschwiegensehnsuchtpflicht

(1) Die beim Bundesaufsichtsamt und bei Einrichtungen nach § 7 Abs. 2 Beschäftigten, die Personen, der sich das Bundesaufsichtsamt nach § 7 Abs. 2 bedient, sowie die Mitglieder des Beirates und Beisitzer des Wider-

spruchsaußersatches dürfen ihnen bei ihrer Tätigkeit bekannt gewordene Tatsachen, deren Geheimhaltung im Interesse eines nach diesem Gesetz Verpflichteten oder eines Dritten liegt, insbesondere Geschäfts- und Betriebsgeheimnisse, sowie personenbezogene Daten auch nach Beendigung ihrer Dienstverhältnisse oder ihrer Tätigkeit nicht unbefugt offenbaren oder verwerten. Dies gilt auch für andere Personen, die durch dienstliche Berichterstattung Kenntnis von den in Satz 1 bezeichneten Tatsachen erhalten. Ein unbefugtes Offenbaren oder Verwerten im Sinne des Satzes 1 liegt insbesondere nicht vor, wenn Tat-

sachen weitergegeben werden an

1. Strafverfolgungsbehörden oder für Straf- und Buß-
geldsachen zuständige Gerichte,

2. Stellen, die kraft Gesetzes oder im öffentlichen Auftrag

mit der Bekämpfung von Wettbewerbsbeschränkun-
gen, der Überwachung von Angeboten zum Erwerb

von Wertpapieren oder der Überwachung von Börsen

oder anderen Wertpapier- oder Derivatmärkten, des

Wertpapier- oder Derivatehandels, von Kreditinstitu-
ten, Finanzdienstleistungsinstituten, Investmentgesell-

schaften, Finanzunternehmen oder Versicherungsunter-

nehmen betraut sind, sowie von solchen Stellen

beauftragte Personen,

soweit die Tatsachen für die Erfüllung der Aufgaben dieser Stellen oder Personen erforderlich sind. Für die in

Satz 3 genannten Stellen beschäftigten oder von ihnen beauftragten Personen gilt die Verschwiegensehnsuchtpflicht

nach den Sätzen 1 bis 3 entsprechend. An eine aus-

ländische Stelle dürfen die Tatsachen nur weitergegeben

werden, wenn diese Stelle und die von ihr beauftragten

Personen einer der Sätze 1 bis 3 entsprechenden Ver-

schwiegensehnsuchtpflicht unterliegen.

(2) Die §§ 93, 97, 105 Abs. 1, § 111 Abs. 5 in Verbindung

mit § 105 Abs. 1 sowie § 116 Abs. 1 der Abgabenordnung

gelten nicht für die in Absatz 1 Satz 1 und 2 bezeichneten

Personen, soweit sie zur Durchführung dieses Gesetzes

tätig werden. Sie finden Anwendung, soweit die Finanz-

behörden die Kenntnisse für die Durchführung eines Ver-

fahrens wegen einer Steuerstraftat sowie eines damit

zusammenhängenden Besteuerungsverfahrens benötigen,

an deren Verfolgung ein zwingendes öffentliches

Interesse besteht, und nicht Tatsachen betroffen sind, die
den in Absatz 1 Satz 1 oder 2 bezeichneten Personen
der die durch eine Stelle eines anderen Staates im Sinne von

Absatz 1 Satz 3 Nr. 2 oder durch von dieser Stelle beauf-

tragte Personen mitgeteilt worden sind.

(3) Die Mitglieder des Beirates und die ehrenamtlichen

Beisitzer des Widerspruchsaußersatches sind nach dem

Verpflichtungsgesetz vom 2. März 1974 (BGBl. I S. 469,

547), geändert durch § 1 Nr. 4 des Gesetzes vom

15. August 1974 (BGBl. I S. 1942), in der jeweils geltenden

Fassung vom Bundesaufsichtsamt auf eine gewissenhafte

Erfüllung ihrer Obliegenheiten zu verpflichten.

Abschnitt 3 Angebote zum Erwerb von Wertpapieren

§ 10 Veröffentlichung der Entscheidung zur Abgabe eines Angebots

(1) Der Bieter hat seine Entscheidung zur Abgabe eines Angebots unverzüglich, nach § 3 Abs. 1 Satz 1 zu verö-

fentlichlen. Die Veröffentlichung nach Satz 1 besteht auch,

wenn für die Entscheidung nach Satz 1 der Beschluss der

Gesellschafterversammlung des Bieters erforderlich ist

und ein solcher Beschluss nicht erfolgt ist, die Dezisio-

nenpflicht kann der Bieter auf Antrag abweichend von

Satz 2 gestatten, eine Veröffentlichung erst nach dem

Beschluss der Gesellschafterversammlung vorzunehmen,

wenn der Bieter durch geeignete Vorkehrungen sich

stellen, dass durch Marktverzerrungen nicht zu befürch-

ten sind.

(2) Der Bieter hat die Entscheidung nach Absatz 1 Satz 1 vor der Veröffentlichung

1. den Geschäftsführungen der Börsen, an denen Wert-
papiere des Bieters, der Zielgesellschaft und anderer

durch das Angebot unmittelbar betroffener Gesell-

schaften zum Handel zugelassen sind,

2. den Geschäftsführungen der Börsen, an denen Deri-
vate im Sinne des § 2 Abs. 2 des Wertpapierhandelsgesetzes gehandelt werden, sofern die Wertpapiere

gegenstand der Derivate sind, und

3. dem Bundesaufsichtsamt

mitzuteilen. Die Geschäftsführungen dürfen die ihnen

nach Satz 1 mitgeteilten Entscheidungen vor der Verö-

fentlichung nur zum Zwecke der Entscheidung verwen-

den, ob die Feststellung des Börsenpreises auszusetzen

oder einzustellen ist. Das Bundesaufsichtsamt kann

gestatten, dass Bieter mit Wohnort oder Sitz im Ausland

mit einer Derivate in der Zukunft beauftragt werden

können, dass Bieter mit entsprechenden Geschäfte

bewilligen, die durch den Bieter zum Handel zugelassen

werden, und Versicherungsunternehmen mit der

Übertragung der Geschäfte sicherzustellen, dass durch

Marktverzerrungen nicht zu befürchten sind.

(3) Die Veröffentlichung der Entscheidung nach Absatz 1 Satz 1 ist

1. in mindestens einem überregionalen Börsenpflichtblatt

oder

2. über ein elektronisch betriebenes Informationsver-

breitungssystem, das bei Kreditinstituten, Finanz-

dienstleistungsinstituten, nach § 53 Abs. 1 des Geset-

zes über das Kreditwesen tätigen Unternehmen, ande-

ren Unternehmen, die ihren Sitz im Inland haben

und an einer inländischen Börse zur Teilnahme am Handel

zugelassen sind, und Versicherungsunternehmen weit

verbreitet ist,

in deutscher Sprache vorzunehmen. Dabei hat der Bieter

die Adresse anzugeben, unter der die Veröffentlichung

der Angebotsunterlage im Internet nach § 14

Abs. 3 Satz 1 Nr. 1 erfolgen wird. Eine Veröffentlichung

in anderer Weise darf nicht vor der Veröffentlichung

nach Satz 1 vorgenommen werden.

(4) Der Bieter hat die Veröffentlichung nach Absatz 3

Satz 1 unverzüglich den Geschäftsführungen der in

Absatz 2 Satz 1 Nr. 1 und 2 erfassten Börsen und dem
Bundesaufsichtsamt zu übersenden. Dies gilt nicht, soweit das Bundesaufsichtsamt nach Absatz 2 Satz 3 gestattet hat, die Mitteilung nach Absatz 2 Satz 1 gleichzeitig mit der Veröffentlichung vorzunehmen.

(5) Der Bieter hat dem Vorstand der Zielgesellschaft unverzüglich nach der Veröffentlichung nach Absatz 3 Satz 1 die Entscheidung zur Abgabe eines Angebots schriftlich mitzuteilen. Der Vorstand der Zielgesellschaft unterrichtet den zuständigen Betriebsrat oder, sofern ein solcher nicht besteht, unmittelbar die Arbeitnehmer, unverzüglich über die Mitteilung nach Satz 1.

(6) § 15 des Wertpapierhandelsgesetzes gilt nicht für Entscheidungen zur Abgabe eines Angebots.

§ 11

Angebotsunterlodge


(2) Die Angebotsunterlage hat den Inhalt des Angebots und ergänzende Angaben zu enthalten. Angaben über den Inhalt des Angebots sind

1. Name oder Firma und Anschrift oder Sitz sowie, wenn es sich um eine Gesellschaft handelt, die Rechtsform des Betriebes,
2. Firma, Sitz und Rechtsform der Zielgesellschaft,
3. die Wertpapiere, die Gegenstand des Angebots sind,
4. Art und Höhe der für die Wertpapiere der Zielgesellschaft gebotenen Gegenleistung,
5. die Bedingungen, von denen die Wirksamkeit des Angebots abhängt,
6. der Beginn und das Ende der Annahmefrist.

Ergänzende Angaben sind

1. Angaben zu den notwendigen Maßnahmen, die sicherstellen, dass dem Bieter die zur vollständigen Erfüllung des Angebots notwendigen Mittel zur Verfügung stehen, und zu den erwarteten Auswirkungen eines erfolg- reichen Angebots auf die Vermögens-, Finanz- und Ertragslage des Betriebes,
2. Angaben über die Absichten des Bieters im Hinblick auf die künftige Geschäftstätigkeit der Zielgesellschaft, insbesondere den Sitz und den Standort wesentlicher Unternehmesteile, die Verwendung ihres Vermögens, ihre künftigen Verpflichtungen, die Arbeitnehmer und deren Vertretungen, die Mitglieder ihrer Geschäfts- führungsgremie und wesentliche Änderungen der Be- schäftigungsbedingungen einschließlich der insoweit vorgesehenen Maßnahmen,
3. Angaben über Geldleistungen oder andere geldwerte Vorteile, die Vorstands- oder Aufsichtsratsmitglieder der Zielgesellschaft gewährt oder in Aussicht gestellt werden,
4. die Bestätigung nach § 13 Abs. 1 Satz 2 unter Angabe von Firma, Sitz und Rechtsform des Wertpapierdienst- leistungsunternehmens.

(3) Die Angebotsunterlage muss Namen und Anschrift, bei juristischen Personen oder Gesellschaften Firma, Sitz und Rechtsform, der Personen oder Gesellschaften auf- führen, die für den Inhalt der Angebotsunterlage die Ver- antwortung übernehmen; sie muss eine Erklärung dieser Personen oder Gesellschaften enthalten, dass ihres Wis- sens die Angaben richtig und keine wesentlichen Um- stände ausgelassen sind.

(4) Das Bundesministerium der Finanzen kann durch Rechtsverordnung, die nicht der Zustimmung des Bun- desrates bedarf,

1. nähere Bestimmungen über die Gestaltung und die in die Angebotsunterlage aufzunehmenden Angaben erlassen und
2. weitere ergänzende Angaben vorschreiben, soweit dies notwendig ist, um den Empfängern des Angebots ein zutreffendes und vollständiges Urteil über den Bieter, die mit ihm gemeinsam handelnden Personen und das Angebot zu ermöglichen.

(5) Das Bundesministerium der Finanzen kann die Er- mächtigung nach Absatz 4 durch Rechtsverordnung auf das Bundesaufsichtsamt übertragen.

§ 12

Haftung für die Angebotsunterlage

(1) Sind für die Beurteilung des Angebots wesentliche Angaben der Angebotsunterlage unrichtig oder unvoll- ständig, so kann derjenige, der das Angebot angenom- men hat,

1. von denjenigen, die für die Angebotsunterlage die Verantwortung übernommen haben, und
2. von denjenigen, von denen der Erlass der Angebotsunterlage ausgeht, als Gesamtschuldner den Ersatz des ihm aus der Annahme des Angebots entstandenen Schadens verlangen.

(2) Nach Absatz 1 kann nicht in Anspruch genommen werden, wer nachweist, dass er die Unrichtigkeit oder Unvollständigkeit der Angaben der Angebotsunterlage nicht gekannt hat und die Unkenntnis nicht auf grober Fahrwärtsigkeit beruht.

(3) Der Anspruch nach Absatz 1 besteht nicht, sofern

1. die Annahme des Angebots nicht auf Grund der Angebotsunterlage erfolgt ist,
2. derjenige, der das Angebot angenommen hat, die Unrichtigkeit oder Unvollständigkeit der Angaben der Angebotsunterlage bei der Abgabe der Annahme- erklärung kannte oder
3. vor der Annahme der Angebots in einer Veröffent- lichung nach § 15 Abs. 3 des Wertpapierhandelsgesetzes oder einer vergleichbaren Bekanntmachung eine deutlich gestaltete Berichtigung der unrichtigen oder unvollständigen Angaben im Inland veröffentlicht wurde.

(4) Der Anspruch nach Absatz 1 verjährt in einem Jahr seit dem Zeitpunkt, zu dem derjenige, der das Angebot angenommen hat, von der Unrichtigkeit oder Unvoll- ständigkeit der Angaben der Angebotsunterlage Kenntnis erlangt hat, spätestens jedoch in drei Jahren seit der Ver- öffentlichung der Angebotsunterlage.
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(6) Eine Vereinbarung, durch die der Anspruch nach Absatz 1 im Voraus ermäßigt oder erlassen wird, ist unwirksam.


§ 13 Finanzierung des Angebots

(1) Der Bieter hat vor der Veröffentlichung der Angebotsunterlage die notwendigen Maßnahmen zu treffen, um sicherzustellen, dass ihm die zur vollständigen Erfüllung des Angebots notwendigen Mittel zum Zeitpunkt der Fälligkeit des Anspruchs auf die Gegenleistung zur Verfügung stehen. Für den Fall, dass das Angebot als Gegenleistung die Zahlung einer Geldleistung vorsieht, ist durch ein vom Bieter unabhängiges Wertpapierdienstleistungsunternehmen schriftlich zu bestätigen, dass der Bieter die notwendigen Maßnahmen getroffen hat, um sicherzustellen, dass die zur vollständigen Erfüllung des Angebots notwendigen Mittel zum Zeitpunkt der Fälligkeit des Anspruchs auf die Geldleistung zur Verfügung stehen.

(2) Hat der Bieter die nach Absatz 1 Satz 2 notwendigen Maßnahmen nicht getroffen und stehen ihm zum Zeitpunkt der Fälligkeit des Anspruchs auf die Geldleistung aus diesem Grunde die notwendigen Mittel nicht zur Verfügung, so kann derjenige, der das Angebot angenommen hat, von dem Wertpapierdienstleistungsunternehmen, das die schriftliche Bestätigung erteilt hat, den Ersatz des ihm aus der nicht vollständigen Erfüllung entstandenen Schadens verlangen.

(3) § 12 Abs. 2 bis 6 gilt entsprechend.

§ 14 Übermittlung und Veröffentlichung der Angebotsunterlage

(1) Der Bieter hat die Angebotsunterlage innerhalb von vier Wochen nach der Veröffentlichung der Entscheidung zur Abgabe eines Angebots dem Bundesaufsichtsamt zu übermitteln. Das Bundesaufsichtsamt bestätigt dem Bieter den Tag des Eingangs der Angebotsunterlage. Das Bundesaufsichtsamt kann die Frist nach Satz 1 auf Antrag um bis zu vier Wochen verlängern, wenn dem Bieter die Einhaltung der Frist nach Satz 1 auf Grund eines grenzüberschreitenden Angebots oder erforderlicher Kapitalmaßnahmen nicht möglich ist.

(2) Die Angebotsunterlage ist gemäß Absatz 3 Satz 1 unverzüglich zu veröffentlichen, wenn das Bundesaufsichtsamt die Veröffentlichung gestattet hat oder wenn seit dem Eingang der Angebotsunterlage zehn Werkstage verstrichen sind, ohne dass das Bundesaufsichtsamt das Angebot untersagt hat. Vor der Veröffentlichung nach Satz 1 darf die Angebotsunterlage nicht bekannt gegeben werden. Das Bundesaufsichtsamt kann vor einer Unter- sagung des Angebots die Frist nach Satz 1 um bis zu fünf Werkstage verlängern, wenn die Angebotsunterlage nicht vollständig ist oder sonst den Vorschriften dieses Gesetzes oder einer auf Grund dieses Gesetzes erlassenen Rechtsverordnung nicht entspricht.

(3) Die Angebotsunterlage ist zu veröffentlichen durch 1. Bekanntgabe im Internet und 2. Abdruck in einem überregionalen Börsenpflichtblatt oder durch Bereithalten zur kostenlosen Ausgabe bei einer geeigneten Stelle im Inland; im letzten Fall ist in einem überregionalen Börsenpflichtblatt bekannt zu machen, bei welcher Stelle die Angebotsunterlage bereit gehalten wird.

Der Bieter hat dem Bundesaufsichtsamt unverzüglich einen Beleg über die Veröffentlichung nach Satz 1 Nr. 2 zu übersenden.

(4) Der Bieter hat die Angebotsunterlage dem Vorstand der Zielgesellschaft unverzüglich nach der Veröffent- lichung nach Absatz 3 Satz 1 zu übermitteln. Der Vorstand der Zielgesellschaft hat die Angebotsunterlage unverzüglich dem zuständigen Betriebsrat oder, sofern ein solcher nicht besteht, unmittelbar den Arbeitnehmern zu übermitteln.

§ 15 Untersagung des Angebots

(1) Das Bundesaufsichtsamt untersagt das Angebot, wenn
1. die Angebotsunterlage nicht die Angaben enthält, die nach § 11 Abs. 2 oder einer auf Grund des § 11 Abs. 4 erlassenen Rechtsverordnung erforderlich sind,

2. die in der Angebotsunterlage enthaltenen Angaben offensichtlich gegen Vorschriften dieses Gesetzes oder einer auf Grund dieses Gesetzes erlassenen Rechtsverordnung verstößen,

3. der Bieter entgegen § 14 Abs. 1 Satz 1 dem Bundes- aufsichtsamt keine Angebotsunterlage übermittelt oder

4. der Bieter entgegen § 14 Abs. 2 Satz 1 die Angebotsunterlage nicht veröffentlicht hat.

(2) Das Bundesaufsichtsamt kann das Angebot untersagen, wenn der Bieter die Veröffentlichung nicht in der in § 14 Abs. 3 Satz 1 vorgeschriebenen Form vornimmt.

(3) Ist das Angebot nach Absatz 1 oder 2 untersagt worden, so ist die Veröffentlichung der Angebotsunterlage verboten. Ein Rechtsgeschäft auf Grund eines nach Absatz 1 oder 2 untersagten Angebots ist nichtig.

§ 16 Annahmefristen; Einberufung der Hauptversammlung

(1) Die Frist für die Annahme des Angebots (Annahmefrist) darf nicht weniger als vier Wochen und unbeschadet der Vorschriften des § 21 Abs. 5 und § 22 Abs. 2 nicht mehr als zehn Wochen betragen. Die Annahmefrist beginnt mit der Veröffentlichung der Angebotsunterlage gemäß § 14 Abs. 3 Satz 1.

(2) Bei einem Übernahmeangebot können die Aktionäre der Zielgesellschaft, die das Angebot nicht angenommen haben, das Angebot innerhalb von zwei Wochen nach der in § 23 Abs. 1 Satz 1 Nr. 2 genannten Veröffentlichung (weitere Annahmefrist) annehmen. Satz 1 gilt nicht, wenn der Bieter das Angebot von dem Erwerb eines Mindestanteils der Aktien abhängig gemacht hat und dieser Mindestanteil nach Ablauf der Annahmefrist nicht erreicht wurde.

(3) Wird im Zusammenhang mit dem Angebot nach der Veröffentlichung der Angebotsunterlage eine Haupt-
versammlung der Zielgesellschaft einberufen, beträgt die Annahmefrist unbeschadet der Vorschriften des § 21 Abs. 5 und § 22 Abs. 2 zehn Wochen ab der Veröf-

fentlichung der Angebotsunterlage. Der Vorstand der Ziel-

gesellschaft hat die Einberufung der Hauptversammlung der Zielgesellschaft unverzüglich dem Bieter und dem

Bundesaufsichtsamt mitzuteilen. Der Bieter hat die Mittei-

lung nach Satz 2 unter Angabe des Ablaufs der Annahme-

frist unverzüglich in einem überregionalen Börsenpflicht-

blatt zu veröffentlichen. Er hat dem Bundesaufsichtsamt unverzüglich einen Beleg über die Veröffentlichung zu

übersenden.

(4) Die Hauptversammlung nach Absatz 3 kann bis spä-
testens zwei Wochen vor dem Tag der Versammlung ein-

berufen werden. Abweichend von § 121 Abs. 5 des Akti-

ingesetzes und etwaigen Bestimmungen der Satzung ist
de Gesellschaft bei der Wahl des Versammlungsortes frei.

Wird die Monatsfrist des § 123 Abs. 1 des Aktiengesetzes

unterschritten, so betragen die Anmelde- und Hinter-

legungsfristen und die Frist nach § 125 Abs. 1 Satz 1 des

Aktiengesetzes vier Tage. Die Gesellschaft hat den

Aktionären die Erteilung von Stimmrechtsvollmachten soweit nach Gesetz und Satzung möglich zu erleichtern.

Mitteilungen an die Aktionäre, ein Bericht nach § 198

Abs. 4 Satz 2 des Aktiengesetzes und fristgerecht einge-

reichte Anträge von Aktionären sind allen Aktionären

zugänglich und in Kurzfassung bekannt zu machen. Die

Zusendung von Mitteilungen und Gegenanträgen kann

unterschiedlich werden, wenn zur Überzeugung des Vorstands mit

Zustimmung des Aufsichtsrats der rechtzeitige Eingang

bei den Aktionären nicht wahrscheinlich ist. Für Abstim-

mungsvorschläge gilt § 128 Abs. 2 Satz 2 des Aktien-

gesetzes in diesem Fall auch bei Inhaberakten.

§ 17

Unzulässigkeit
der öffentlichen Aufforderung
zur Abgabe von Angeboten

Eine öffentliche auf den Erwerb von Wertpapieren der

Zielgesellschaft gerichtete Aufforderung des Bieters zur

Abgabe von Angeboten durch die Inhaber der Wertpapie-

re ist unzulässig.

§ 18

Bedingungen;
Unzulässigkeit des Vorbehalts
des Rücktritts und des Widerrufs

(1) Ein Angebot darf vorbehaltlich § 25 nicht von Bedin-


gungen abhängig gemacht werden, deren Eintritt der Bio-

ter, mit ihm gemeinsam handelnde Personen oder deren

Tochterunternehmen oder im Zusammenhang mit dem

Angebot für diese Personen oder Unternehmen tätige

Berater ausschließlich selbst herbeiführen können.

(2) Ein Angebot, das unter dem Vorbehalt des Widerrufs

der des Rücktritts abgegeben wird, ist unzulässig.

§ 19

Zuteilung bei einem Teilangebot

Ist bei einem Angebot, das auf den Erwerb nur eines

bestimmten Anteils oder einer bestimmten Anzahl der

Wertpapiere gerichtet ist, der Anteil oder die Anzahl der

Wertpapiere, die der Bieter erwerben kann, höher als der

Anteil oder die Anzahl der Wertpapiere, die der Bieter
der Annahme zu erwerben sich verpflichtet hat, so sind die Annahme-
erklärungen grundsätzlich verhältnismäßig zu berück-

sichtigen.

§ 20

Handelsbestand

(1) Das Bundesaufsichtsamt lässt auf schriftlichen An-

trag des Bieters zu, dass Wertpapiere der Zielgesellschaft

bei den ergänzenden Angaben nach § 11 Abs. 4 Nr. 2, den

Veröffentlichungspflichten nach § 23, der Berechnung des

Stimmrechtsanteils nach § 29 Abs. 2 und der Bestimmung

der Gegenleistung nach § 31 Abs. 1, 3 und 4 und der Geld-

leistung nach § 31 Abs. 5 unberücksichtigt bleiben.

(2) Ein Befreiungsantrag nach Absatz 1 kann gestellt

werden, wenn der Bieter, die mit ihm gemeinsam han-

delnden Personen oder deren Tochterunternehmen

1. die betreffenden Wertpapiere halten oder zu halten

beabsichtigen, um bestehende oder erwartete Unter-

schiede zwischen dem Erwerbspreis und dem Ver-

äußerungsgewinn kurzfristig zu nutzen und

2. darlegen, dass mit dem Erwerb der Wertpapiere,

soweit es sich um stimmberechtigte Aktien handelt,

nicht beabsichtigt ist, auf die Geschäftsführung der

Gesellschaft Einfluss zu nehmen.

(3) Stimmrechte aus Aktien, die auf Grund einer Be-

freung nach Absatz 1 unberücksichtigt bleiben, können

nicht ausgeübt werden, wenn im Falle ihrer Be-

rücksichtigung ein Angebot als Übernahmeangebot ab-

zugeben wäre oder eine Verpflichtung nach § 35 Abs. 1

Satz 1 und Abs. 2 Satz 1 bestünde.

(4) Beabsichtigt der Bieter Wertpapiere, für die eine Be-

freung nach Absatz 1 erteilt worden ist, nicht mehr zu den

in Absatz 1 Nr. 1 genannten Zwecken zu halten oder auf
die Geschäftsführung der Gesellschaft Einfluss zu neh-

men, ist dies dem Bundesaufsichtsamt unverzüglich mit-

zuteilen. Das Bundesaufsichtsamt kann die Befreiung

nach Absatz 1 außer nach den Vorschriften des Verwal-

tungsverfahrensgesetzes widerrufen, wenn die Verpflich-

tung nach Satz 1 nicht erfüllt worden ist.

§ 21

Änderung des Angebots

(1) Der Bieter kann bis zu einem Werktag vor Ablauf der

Annahmefrist

1. die Gegenleistung erhöhen,

2. wahlweise eine andere Gegenleistung anbieten,

3. den Mindestanteil oder die Mindestzahl der Wertpa-
Piere oder den Mindestanteil der Stimmberechtigten, von
dessen Erwerb der Bieter die Wirksamkeit seines Angebots abhängig gemacht hat, verringern oder

4. auf Bedingungen verzichten.

Für die Wahrung der Frist nach Satz 1 ist auf die Veröf-

nentlichung der Änderung nach Absatz 2 abzustellen.

(2) Der Bieter hat die Änderung des Angebots unter Hin-

weis auf das Rücktrittsrecht nach Absatz 4 unverzüglich
gemäß § 14 Abs. 3 Satz 1 zu veröffentlichen. § 14 Abs. 3

Satz 2 und Abs. 4 gilt entsprechend.

(3) § 11 Abs. 1 Satz 2 bis 5, Abs. 3, §§ 12, 13 und 15

Abs. 1 Nr. 2 gelten entsprechend.
Appendix 1

(4) Im Falle einer Änderung des Angebots können die Inhaber von Wertpapieren der Zielgesellschaft, die das Angebot vor Veröffentlichung der Änderung nach Absatz 2 angenommen haben, von dem Vertrag bis zum Ablauf der Annahmefrist zurücktreten.

(5) Im Falle einer Änderung des Angebots verlängert sich die Annahmefrist um zwei Wochen, sofern die Veröffentlichung der Änderung innerhalb der letzten zwei Wochen vor Ablauf der Angebotsfrist erfolgt. Dies gilt auch, falls das geänderte Angebot gegen Rechtsvorschriften verstößt.

(6) Eine erneute Änderung des Angebots innerhalb der in Absatz 5 genannten Frist von zwei Wochen ist unzulässig.

§ 22
Konkurrierende Angebote

(1) Konkurrierende Angebote sind Angebote, die während der Annahmefrist eines Angebots von einem Dritten abgegeben werden.

(2) Laufet in Falle konkurrierender Angebote die Annahmefrist für das Angebot vor Ablauf der Annahmefrist für das konkurrierende Angebot ab, bestimmt sich der Ablauf der Annahmefrist für das Angebot nach dem Ablauf der Annahmefrist für das konkurrierende Angebot. Dies gilt auch, falls das konkurrierende Angebot geändert oder untersagt wird oder gegen Rechtsvorschriften verstößt.

(3) Inhaber von Wertpapieren der Zielgesellschaft, die das Angebot angenommen haben, können bis zum Ablauf der Annahmefrist vom Vertrag zurücktreten, sofern der Vertragsschluss vor Veröffentlichung der Angebotsunterlage des konkurrierenden Angebots erfolgte.

§ 23
Veröffentlichungspflichten des Bieters nach Abgabe des Angebots

(1) Der Bieter ist verpflichtet, die Anzahl sämtlicher ihm, den mit ihm gemeinsam handelnden Personen und deren Tochterunternehmen zustehenden Wertpapiere der Zielgesellschaft einschließlich der Höhe der jeweiligen Anteile und der von ihm zustehenden und nach § 30 zuzuordnenden Stimmrechtsanteile sowie die sich aus den ihm zugegangenen Annahmeverkündungen ergebende Anzahl der Wertpapiere, die Gegenstand des Angebots sind, einschließlich der Höhe der Wertpapier- und Stimmrechtsanteile

1. nach Veröffentlichung der Angebotsunterlage wöchentlich sowie in der letzten Woche vor Ablauf der Annahmefrist täglich,

2. unverzüglich nach Ablauf der Annahmefrist und

3. unverzüglich nach Ablauf der weiteren Annahmefrist gemäß § 14 Abs. 3 Satz 1 zu veröffentlichen und dem Bundesaufsichtsamt mitzuteilen. § 14 Abs. 3 Satz 2 und § 31 Abs. 6 gelten entsprechend.

(2) Erwerben bei Übernahmeangeboten, bei denen der Bieter die Kontrolle über die Zielgesellschaft erlangt hat, und bei Pflichtangeboten der Bieter, mit ihm gemeinsam handelnde Personen oder deren Tochterunternehmen nach der Veröffentlichung der Angebotsunterlage und vor Ablauf eines Jahres nach der Veröffentlichung gemäß Absatz 1 Nr. 2 außerhalb des Angebotsverfahrens Aktien der Zielgesellschaft, so hat der Bieter die Höhe der erworbenen Aktien- und Stimmrechtsanteile unter Angabe der Art und Höhe der für jeden Anteil gewährten Gegenleistung unverzüglich gemäß § 14 Abs. 3 Satz 1 zu veröffentlichen und dem Bundesaufsichtsamt mitzuteilen. § 31 Abs. 6 gilt entsprechend.

§ 24
Grenzüberschreitende Angebote

Hat der Bieter bei grenzüberschreitenden Angeboten zugleich die Vorschriften eines anderen Staates außerhalb des Europäischen Wirtschaftsraums einzuhalten und ist dem Bieter deshalb ein Angebot an alle Inhaber von Wertpapieren unzumutbar, kann das Bundesaufsichtsamt dem Bieter auf Antrag gestatten, bestimmte Inhaber von Wertpapieren mit Wohnsitz, Sitz oder gewöhnlichem Aufenthalt in dem Staat von dem Angebot auszunehmen.

§ 25
Beschluss der Gesellschafterversammlung des Bieters

Hat der Bieter das Angebot unter der Bedingung eines Beschlusses seiner Gesellschafterversammlung abgegeben, hat er den Beschluss unverzüglich, spätestens bis zum fünften Werktag vor Ablauf der Annahmefrist, herzustellen.

§ 26
Sperrfrist

(1) Ist ein Angebot nach § 15 Abs. 1 oder 2 untersagt worden, ist ein erneutes Angebot des Bieters vor Ablauf eines Jahres unzulässig. Gleiches gilt, wenn der Bieter ein Angebot von dem Erwerb eines Mindestanteils der Wertpapiere abhängig gemacht hat und dieser Mindestanteil nach Ablauf der Annahmefrist nicht erreicht wurde. Die Sätze 1 und 2 gelten nicht, wenn der Bieter zur Veröffentlichung nach § 35 Abs. 1 Satz 1 und zur Abgabe eines Angebots nach § 35 Abs. 2 Satz 1 verpflichtet ist.

(2) Das Bundesaufsichtsamt kann den Bieter auf schriftlichen Antrag von dem Verbot des Absatzes 1 Satz 1 und 2 befreiwen, wenn die Zielgesellschaft der Befreiung zustimmt.

§ 27
Stellungnahme des Vorstands und Aufsichtsrats der Zielgesellschaft

(1) Der Vorstand und der Aufsichtsrat der Zielgesellschaft haben eine begründete Stellungnahme zu dem Angebot sowie zu jeder seiner Änderungen abzugeben. Die Stellungnahme muss insbesondere eingehen auf

1. die Art und Höhe der angebotenen Gegenleistung,

2. die voraussichtlichen Folgen eines erfolgreichen Angebots für die Zielgesellschaft, die Arbeitnehmer und ihre Vertretungen, die Beschäftigungsbedingungen und die Standorte der Zielgesellschaft,

3. die vom Bieter mit dem Angebot verfolgten Ziele,

4. die Absicht der Mitglieder des Vorstands und des Aufsichtsrats, soweit sie Inhaber von Wertpapieren der Zielgesellschaft sind, das Angebot anzunehmen.

(2) Übermitteln der zuständige Betriebsrat oder, sofern ein solcher nicht besteht, unmittelbar die Arbeitnehmer der Zielgesellschaft dem Vorstand eine Stellungnahme zu
dem Angebot, hat der Vorstand unbeschadet seiner Verpflichtung nach Absatz 3 Satz 1 diese seiner Stellungnahme beizufügen.

(3) Der Vorstand und der Aufsichtsrat der Zielgesellschaft haben die Stellungnahme unverzüglich nach Übermittlung der Angebotsunterlage und deren Änderungen durch den Bieter gemäß § 14 Abs. 3 Satz 1 zu veröffentlichen. Sie haben die Stellungnahme gleichzeitig dem zuständigen Betriebsrat oder, sofern ein solcher nicht besteht, unmittelbar den Arbeitnehmern zu übermitteln. Der Vorstand und der Aufsichtsrat der Zielgesellschaft haben dem Bundesaufsichtsamt unverzüglich einen Beleg über die Veröffentlichung gemäß § 14 Abs. 3 Satz 1 Nr. 2 zu übersenden.

§ 28

Werbung

(1) Um Missverständen bei der Werbung im Zusammenhang mit Angeboten zum Erwerb von Wertpapieren zu begegnen, kann das Bundesaufsichtsamt bestimmte Arten der Werbung untersagen.

(2) Vor allgemeinen Maßnahmen nach Absatz 1 ist der Beirat zu hören.

Abschnitt 4

Übernahmeangebote

§ 29

Begriffsbestimmungen

(1) Übernahmeangebote sind Angebote, die auf den Erwerb der Kontrolle gerichtet sind.

(2) Kontrolle ist das Halten von mindestens 30 Prozent der Stimmrechte an der Zielgesellschaft.

§ 30

Zurechnung von Stimmrechten

(1) Stimmrechten des Bieters stehen Stimmrechte aus Aktien der Zielgesellschaft gleich,
   1. die einem Tochterunternehmen des Bieters gehören,
   2. die einem Dritten gehören und von ihm für Rechnung des Bieters gehalten werden,
   3. die der Bieter einem Dritten als Sicherheit übertragen hat, es sei denn, der Dritte ist zur Ausübung der Stimmrechte aus diesen Aktien befugt und bekundet die Absicht, die Stimmrechte unabhängig von den Wei- sungen des Bieters auszüüben,
   4. an denen zugunsten des Bieters ein Niederbrauch besteht,
   5. die der Bieter durch eine Willenserklärung erwerben kann,
   6. die dem Bieter anvertraut sind, sofern er die Stimmrechte aus diesen Aktien nach eigenem Ermessen aus- üben kann, wenn keine besonderen Weisungen des Aktionärs vorliegen.

Für die Zurechnung nach Satz 1 Nr. 2 bis 6 stehen dem Bieter Tochterunternehmen des Bieters gleich. Stimmrechte des Tochterunternehmens werden dem Bieter in voller Höhe zugerechnet.


§ 31

Gegenleistung


(2) Die Gegenleistung hat in einer Geldleistung in Euro oder in liquiden Aktien zu bestehen, die zum Handel an einem organisierten Markt zugelassen sind. Werden Inhabern stimmberechtigter Aktien als Gegenleistung Aktien angeboten, müssen diese Aktien ebenfalls ein Stimmrecht gewähren.

(3) Der Bieter hat den Aktionären der Zielgesellschaft eine Geldleistung in Euro anzubieten, wenn er, mit ihm gemeinsam handelnde Personen oder deren Tochterunternehmen
   1. in den drei Monaten vor der Veröffentlichung gemäß § 10 Abs. 3 Satz 1 insgesamt mindestens 5 Prozent der Aktien oder Stimmrechte an der Zielgesellschaft oder
   2. nach der Veröffentlichung gemäß § 10 Abs. 3 Satz 1 und vor Ablauf der Annahmefrist insgesamt mindestens 1 Prozent der Aktien oder Stimmrechte an der Zielgesellschaft

gegen Zahlung einer Geldleistung erworben haben.

(4) Erwerben der Bieter, mit ihm gemeinsam handelnde Personen oder deren Tochterunternehmen nach Veröffentlichung der Angebotsunterlage und vor der Veröffentlichung gemäß § 23 Abs. 1 Satz 1 Nr. 2 Aktien der Zielgesellschaft und wird hierfür wertmäßig eine höhere als die im Angebot genannte Gegenleistung gewährt oder vereinbart, erhöht sich die den Angebotsempfängern der jeweiligen Aktiengattung geschuldete Gegenleistung wertmäßig um den Unterschiedsbetrag.


(7) Das Bundesministerium der Finanzen kann durch Rechtsverordnung, die nicht der Zustimmung des Bundesrates bedarf, nähere Bestimmungen über die Angemessenheit der Gegenleistung nach Absatz 1, insbesondere die Berücksichtigung des durchschnittlichen Börsenkurses der Aktien der Zielgesellschaft und der Erwerbe von Aktien der Zielgesellschaft durch den Bieter, mit ihm gemeinsam handelnder Personen oder deren Tochterunternehmen und die hierbei maßgeblichen Zeiträume sowie über Ausnahmen von dem in Absatz 1 Satz 2 genannten Grundsatz und die Ermittlung des Unterschiedsbetrages nach den Absätzen 4 und 5 erlassen. Das Bundesministerium der Finanzen kann die Ermächtigung durch Rechtsverordnung auf das Bundesaufsichtsamt übertragen.

§ 32
Unzulässigkeit von Teilangeboten
Ein Übernahmeangebot, das sich nur auf einen Teil der Aktien der Zielgesellschaft erstreckt, ist unzulässig und nach § 24 unzulässig.

§ 33
Handlungen des Vorstands der Zielgesellschaft
(1) Nach Veröffentlichung der Entscheidung zur Abgabe eines Angebots bis zur Veröffentlichung des Ergebnisses nach § 23 Abs. 1 Satz 1 Nr. 2 darf der Vorstand der Zielgesellschaft keine Handlungen vornehmen, durch die der Erfolg des Angebots verhindert werden könnte. Dies gilt nicht für Handlungen, die auch der ordentlichen und gewissenhaften Geschäftsführung einer Gesellschaft, die nicht von einem Übernahmeangebot betroffen ist, vorgenommen hätte, für die Suche nach einem konkurrierenden Angebot sowie für Handlungen, denen der Aufsichtsrat der Zielgesellschaft zugestimmt hat.


(3) Dem Bieter und mit ihm gemeinsam handelnden Personen ist es verboten, Vorstands- oder Aufsichtsratsmitgliedern der Zielgesellschaft im Zusammenhang mit dem Angebot ungerechtfertigte Gewährleistungen oder andere ungerechtfertigte geldwerten Vorteile zu gewähren oder in Aussicht zu stellen.

§ 34
Anwendung der Vorschriften des Abschnitts 3
Für Übernahmeangebote gelten die Vorschriften des Abschnitts 3, soweit sich aus den vorstehenden Vorschriften nichts anderes ergibt.

Abschnitt 5
Pflichtangebote
§ 35
Verpflichtung zur Veröffentlichung und zur Abgabe eines Angebots
(1) Wer unmittelbar oder mittelbar die Kontrolle über eine Zielgesellschaft erlangt, hat dies unter Angabe der Höhe seines Stimmrechtsanteils unverzüglich, spätestens innerhalb von sieben Kalendertagen, gemäß § 10 Abs. 3 Satz 1 und 2 zu veröffentlichen. Die Frist beginnt mit dem Zeitpunkt, zu dem der Bieter Kenntnis davon hat oder nach den Umständen haben musste, dass er die Kontrolle über die Zielgesellschaft erlangt hat. In der Veröffentlichung sind die nach § 30 zuzurechnenden Stimmrechte für jeden Zurechnungstatbestand getrennt anzugeben. § 10 Abs. 2, 3 Satz 3 und Abs. 4 bis 6 gilt entsprechend.

(2) Der Bieter hat innerhalb von vier Wochen nach der Veröffentlichung der Erlangung der Kontrolle über eine Zielgesellschaft dem Bundesaufsichtsamt eine Angebotsunterlage zu übermitteln und nach § 14 Abs. 2 Satz 1 ein Angebot zu veröffentlichen. § 14 Abs. 2 Satz 2, Abs. 3 und 4 gilt entsprechend. Ausgenommen von der Verpflichtung nach Satz 1 sind eigene Aktien der Zielgesellschaft, Aktien der Zielgesellschaft, die einem abhängigen oder im Mehrheitsbesitz stehenden Unternehmen der Zielgesellschaft gehören, und Aktien der Zielgesellschaft, die einem Dritten gehören, jedoch für die Rechnung der Zielgesellschaft, eines abhängigen oder eines im Mehrheitsbesitz stehenden Unternehmens der Zielgesellschaft gehalten werden.

(3) Wird die Kontrolle über die Zielgesellschaft auf Grund eines Übernahmeangebots erworben, besteht keine Verpflichtung nach Absatz 1 Satz 1 und Absatz 2 Satz 1.

§ 36
Nichtberücksichtigung von Stimmrechten
Das Bundesaufsichtsamt lässt auf schriftlichen Antrag zu, dass Stimmrechte aus Aktien der Zielgesellschaft bei der Berechnung des Stimmrechtsanteils unberücksichtigt bleiben, wenn die Aktien erlangt wurden durch
1. Erbgang, Erbauseinandersetzung oder unentgeltliche Zuwendung unter Ehegatten, Lebenspartnern oder Verwandten in gerader Linie und bei dritten Grade oder durch Vermögensauseinandersetzung aus Anlass der Auflösung einer Ehe oder Lebenspartnerschaft,
2. Rechtsformwechsel oder
3. Umstrukturierungen innerhalb eines Konzerns.
§ 37
Befreiung von der Verpflichtung zur Veröffentlichung und zur Abgabe eines Angebots

(1) Das Bundesaufsichtsamt kann auf schriftlichen Antrag den Bieter von den Verpflichtungen nach § 35 Abs. 1 Satz 1 und Abs. 2 Satz 1 befreien, sofern dies im Hinblick auf die Art der Erlaubnis, die mit der Erlangung der Kontrolle beabsichtigte Zielsetzung, ein nach der Erlangung der Kontrolle erfolgendes Unterschreiten der Kontrollschwelle, die Beteiligungsverhältnisse an der Zielgesellschaft oder die tatsächliche Möglichkeit zur Ausübung der Kontrolle unter Berücksichtigung der Interessen des Antragstellers und der Inhaber der Aktien der Zielgesellschaft gerechtfertigt erscheint.

(2) Das Bundesministerium der Finanzen kann durch Rechtsverordnung, die nicht der Zustimmung des Bundesrates bedarf, nähere Bestimmungen über die Befreiung von den Verpflichtungen nach § 35 Abs. 1 Satz 1, Abs. 2 Satz 1 erlassen. Das Bundesministerium der Finanzen kann die Ermächtigung durch Rechtsverordnung auf das Bundesaufsichtsamt übertragen.

§ 38
Anspruch auf Zinsen

Der Bieter ist den Aktionären der Zielgesellschaft für die Dauer des Verstoßes zur Zahlung von Zinsen auf die Gegenleistung in Höhe von fünf Prozentpunkten auf das Jahr über dem jeweiligen Basiszinssatz verpflichtet, wenn
1. er entgegen § 35 Abs. 1 Satz 1 keine Veröffentlichung gemäß § 10 Abs. 3 Satz 1 vornimmt,
2. er entgegen § 35 Abs. 2 Satz 1 kein Angebot gemäß § 14 Abs. 3 Satz 1 abgibt oder
3. ihm ein Angebot im Sinne des § 35 Abs. 2 Satz 1 nach § 15 Abs. 1 Nr. 1, 2 oder 3 untersagt worden ist.

§ 39
Anwendung der Vorschriften des Abschnitts 3 und 4

Für Angebote nach § 35 Abs. 2 Satz 1 gelten mit Ausnahme von § 10 Abs. 1 Satz 1, § 14 Abs. 1 Satz 1, § 16 Abs. 2, § 18 Abs. 1, §§ 19, 25, 26 und 34 die Vorschriften der Abschnitte 3 und 4 sinngemäß.

Abschnitt 6
Verfahren

§ 40
Ermittlungsbeauftragte des Bundesaufsichtsamtes

(1) Der Bieter, die mit ihm gemeinsam handelnden Personen sowie deren Tochterunternehmen haben auf Verlangen des Bundesaufsichtsamtes Auskünfte zu erteilen und Unterlagen vorzulegen, die das Bundesaufsichtsamt benötigt zur Überwachung der Einhaltung der Pflichten
1. nach § 10 Abs. 1 bis 5 Satz 1, § 14 Abs. 1 bis 4 Satz 1, §§ 21 Abs. 2, §§ 23, 27 Abs. 2 und 3 und § 31 Abs. 1 bis 6 oder auf Grund einer nach § 31 Abs. 7 erlassenen Rechtsverordnung, § 35 Abs. 1 und 2 Satz 1 und 2 und
2. nach § 11 Abs. 1 oder zur Prüfung, ob die Angebotsunterlage die Angaben enthält, die nach § 11 Abs. 2 oder einer auf Grund des § 11 Abs. 4 und 5 erlassenen Rechtsverordnung erforderlich sind.

(2) Die Zielgesellschaft hat auf Verlangen des Bundesaufsichtsamtes Auskünfte zu erteilen und Unterlagen vorzulegen, die das Bundesaufsichtsamt zur Überwachung der Einhaltung der Pflichten nach § 10 Abs. 5 Satz 2, § 14 Abs. 4 Satz 2, §§ 27 und 33 benötigt.


(4) Die inländischen Börsen haben auf Verlangen des Bundesaufsichtsamtes Auskünfte zu erteilen und Unterlagen vorzulegen, die das Bundesaufsichtsamt zur Überwachung der Einhaltung der Pflichten nach § 31 Abs. 1, 4 und 5, jeweils auch in Verbindung mit einer Rechtsverordnung nach Abs. 7, benötigen.

(5) Der zur Erteilung einer Auskunft Verpflichtete kann die Auskunft auf solche Fragen vorweisen, deren Beantwortung ihn selbst oder einen der in § 383 Abs. 1 Nr. 1 bis 3 der Zivilprozessordnung bezeichneten Angehörige der Gefahr strafgerichtlicher Verfolgung oder eines Verfahrens nach dem Gesetz über Ordnungswidersetzungen aussetzen würde. Der Verpflichtete ist über sein Recht zur Verweigerung der Auskunft zu belehren.

§ 41
Widerspruchsverfahren

(1) Vor Einlegung der Beschwerde sind Rechtsmäßigkeit und Zweckmäßigkeit der Verfügungen des Bundesaufsichtsamtes in einem Widerspruchsverfahren nachzuprüfen. Einer solchen Nachprüfung bedarf es nicht, wenn der Abhilfebescheid oder der Widerspruchsbescheid erstmalig eine Beschwerde enthält. Für das Widerspruchsverfahren gelten die §§ 68 bis 73 der Verwaltungsgerichtsordnung, soweit in diesem Gesetz nichts Abweichendes geregelt ist.

(2) Das Bundesaufsichtsamt trifft seine Entscheidung innerhalb einer Frist von zwei Wochen ab Eingang des Widerspruchs. Bei besonderen tatsächlichen oder rechtlichen Schwierigkeiten oder bei einer Vielzahl von Widerspruchsverfahren kann das Bundesaufsichtsamt die Frist durch unanfechtbaren Beschluss verlängern.


(4) Der Widerspruchsaußerschluss kann das Verfahren ohne mündliche Verhandlung dem Vorsitzenden durch unanfechtbaren Beschluss zur alleinigen Entscheidung übertragen. Diese Übertragung ist nur zulässig, sofern die Sache keine wesentlichen Schwierigkeiten in tatsächlicher und rechtlicher Hinsicht aufweist und die Entscheidung nicht von grundsätzlicher Bedeutung sein wird.
Appendix 1

§ 42
Sofortige Vollziehbarkeit
Der Widerspruch gegen Maßnahmen des Bundesaufsichtsamtes nach § 4 Abs. 1 Satz 3, § 15 Abs. 1 oder 2, § 28 Abs. 1 oder § 40 Abs. 1 bis 4 hat keine aufschiebende Wirkung.

§ 43
Bekanntgabe und Zustellung
(1) Verfügungen, die gegenüber einer Person mit Wohnsitz oder einem Unternehmen mit Sitz außerhalb des Geltungsbereiches dieses Gesetzes ergehen, gibt das Bundesaufsichtsamt der Person bekannt, die als Bevollmächtigte benannt wurde. Ist kein Bevollmächtigter benannt, so erfolgt die Bekanntgabe durch öffentliche Bekanntmachung im Bundesanzeiger.

(2) Ist die Verfügung zustellen, so erfolgt die Zustellung bei Personen mit Wohnsitz oder Unternehmen mit Sitz außerhalb des Geltungsbereiches dieses Gesetzes an die Person, die als Bevollmächtigte benannt wurde. Ist kein Bevollmächtigter benannt, so erfolgt die Zustellung durch öffentliche Bekanntmachung im Bundesanzeiger.

§ 44
Veröffentlichungsrecht des Bundesaufsichtsamtes
Das Bundesaufsichtsamt kann seine Verfügungen nach § 4 Abs. 1 Satz 3, § 10 Abs. 2 Satz 3, § 15 Abs. 1 und 2, § 20 Abs. 1, § 28 Abs. 1, § 36 oder § 37 Abs. 1, auch in Verbindung mit einer Rechtsverordnung nach Abs. 2, auf Kosten des Adressaten der Verfügung im Bundesanzeiger veröffentlichen.

§ 45
Mitteilungen an das Bundesaufsichtsamt
Anträge und Mitteilungen an das Bundesaufsichtsamt haben in schriftlicher Form zu erfolgen. Eine Übermittlung im Wege der elektronischen Datenfernübertragung ist zulässig, sofern der Absender zweifelsfrei zu erkennen ist.

§ 46
Zwangsmittel

§ 47
Kosten
Das Bundesaufsichtsamt erhebt für Amtshandlungen auf Grund von § 10 Abs. 2 Satz 3, §§ 14 und 15 Abs. 1 oder 2, §§ 20, 24, 28 Abs. 1, §§ 36, 37 Abs. 1, auch in Verbindung mit einer Rechtsverordnung nach Abs. 2, oder § 41 in Verbindung mit § 6 Kosten (Gebühren und Auslagen). Das Bundesministerium der Finanzen bestimmt die Kostentarifbestände im Einzelnen und die Höhe der Kosten durch Rechtsverordnung, die nicht der Zustimmung des Bundesrates bedarf. Das Bundesministerium der Finanzen kann die Ermächtigung durch Rechtsverordnung auf das Bundesaufsichtsamt übertragen.

Abschnitt 7
Rechtsmittel

§ 48
Statthaftigkeit, Zuständigkeit
(1) Gegen Verfügungen des Bundesaufsichtsamtes ist die Beschwerde statthaft. Sie kann auch auf neue Tatsachen und Beweismittel gestützt werden.

(2) Die Beschwerde steht den am Verfahren vor dem Bundesaufsichtsamt Beteiligten zu.


(4) Über die Beschwerde entscheidet ausschließlich das für den Sitz des Bundesaufsichtsamtes in Frankfurt am Main zuständige Oberlandesgericht.

§ 49
Aufschiebende Wirkung
Die Beschwerde hat aufschiebende Wirkung, soweit durch die angefochtene Verfügung eine Befreiung nach § 10 Abs. 1 Satz 3 oder § 37 Abs. 1, auch in Verbindung mit einer Rechtsverordnung nach Abs. 2, oder eine Nichtberücksichtigung von Stimmen in einer Abstimmung nach § 38 widerrufen wird.

§ 50
Anordnung der sofortigen Vollziehung
(1) Das Bundesaufsichtsamt kann in den Fällen des § 49 die sofortige Vollziehung der Verfügung anordnen, wenn dies im öffentlichen Interesse oder im überragenden Interesse eines Beteiligten geboten ist.

(2) Die Anordnung nach Absatz 1 kann bereits vor der Einreichung der Beschwerde getroffen werden.

(3) Auf Antrag kann das Beschwerdegericht die aufschiebende Wirkung von Widerspruch oder Beschwerde ganz oder teilweise anordnen oder wiederherstellen, wenn
1. die Voraussetzungen für die Anordnung nach Absatz 1 nicht vorgelegen haben oder nicht mehr vorliegen,
2. ernstliche Zweifel an der Rechtmäßigkeit der angefochtenen Verfügung bestehen oder
3. die Vollziehung für den Betroffenen eine unbillige, nicht durch überwiegende öffentliche Interessen gebotene Härte zur Folge hätte.

(4) Der Antrag nach Absatz 3 ist schon vor Einreichung der Beschwerde zulässig. Die Tatsachen, auf die der

(5) Beschlüsse über Anträge nach Absatz 3 können jederzeit geändert oder aufgehoben werden. Soweit durch sie den Anträgen entsprochen ist, sind sie unanfechtbar.

§ 51
Frist und Form
(2) Ergeht auf einen Antrag keine Verfügung, so ist die Beschwerde an keine Frist gebunden.
(4) Die Beschwerdebegründung muss enthalten
1. die Erklärung, inwieweit die Verfügung angefochten und ihre Abänderung oder Aufhebung beantragt wird, und
2. die Angabe der Tatsachen und Beweismittel, auf die sich die Beschwerde stützt.

§ 52
Beteiligte am Beschwerdeverfahren
An dem Verfahren vor dem Beschwerdegericht sind der Beschwerdeführer und das Bundesaufsichtsamt beteiligt.

§ 53
Anwaltszwang
Vor dem Beschwerdegericht müssen die Beteiligten sich durch einen bei einem deutschen Gericht zugelassenen Rechtsanwalt oder Rechtslehrer an einer deutschen Hochschule im Sinne des Hochschulrahmengesetzes mit Befähigung zum Richteramt als Bevollmächtigten vertreten lassen. Das Bundesaufsichtsamt kann sich durch einen Beamten auf Lebenszeit mit Befähigung zum Richteramt vertreten lassen.

§ 54
Mündliche Verhandlung
(1) Das Beschwerdegericht entscheidet über die Beschwerde aufgrund mündlicher Verhandlung; mit Einverständnis der Beteiligten kann ohne mündliche Verhandlung entschieden werden.
(2) Sind die Beteiligten in dem Verhandlungstermin trotz rechtzeitiger Benachrichtigung nicht erschienen oder gehörig vertreten, so kann gleichwohl in der Sache verhandelt und entschieden werden.

§ 55
Untersuchungsgrundsatz
(1) Das Beschwerdegericht erforscht den Sachverhalt von Amts wegen.
(2) Das Gericht hat darauf hinzuwirken, dass Formfehler beseitigt, unklare Anträge erläutert, sachdienliche Anträge gestellt, ungenügende tatsächliche Angaben ergänzt, ferner alle für die Feststellung und Beurteilung des Sachverhalts wesentlichen Erklärungen abgegeben werden.
(3) Das Beschwerdegericht kann den Beteiligten aufgehen, sich innerhalb einer zu bestimmenden Frist über erklärungsbedürftige Punkte zu äußern, Beweismittel zu bezeichnen und in ihren Händen befindlichen Urkunden sowie andere Beweismittel vorzulegen. Bei Versäumnung der Frist kann nach Lage der Sache ohne Berücksichtigung der nicht beigebrachten Beweismittel entschieden werden.

§ 56
Beschwerdeentscheidung; Vorlagepflicht
(1) Das Beschwerdegericht entscheidet durch Beschluss nach seiner freien, aus dem Gesamtergebnis des Verfahrens gewonnenen Überzeugung. Der Beschluss darf nur auf Tatsachen und Beweismittel gestützt werden, zu denen die Beteiligten sich äußern konnten. Das Beschwerdegericht kann hiervon abweichen, soweit Beigaben aus berechtigten Interessen der Beteiligten oder dritter Personen Akteneinsicht nicht gewährt und der Akteninhalt aus diesen Gründen auch nicht vorgetragen worden ist. Dies gilt nicht für solche Beigaben, die an dem streitigen Rechtsverhältnis derart beteiligt sind, dass die Entscheidung auch ihnen gegenüber nur einheitlich ergehen kann.
(2) Hält das Beschwerdegericht die Verfügung des Bundesaufsichtsamtes für unzulässig oder unbegründet, so hebt es sie auf. Hat sich die Verfügung vorher durch Zurücknahme oder auf andere Weise erledigt, so spricht das Beschwerdegericht auf Antrag aus, dass die Verfügung des Bundesaufsichtsamtes unzulässig oder unbegründet gewesen ist, wenn der Beschwerdeführer ein berechtigtes Interesse an dieser Feststellung hat.
(3) Hält das Beschwerdegericht die Ablehnung oder Unterlassung der Verfügung für unzulässig oder unbegründet, so spricht es die Verpflichtung des Bundesaufsichtsamtes aus, die beantragte Verfügung vorzunehmen.
(4) Die Verfügung ist auch dann unzulässig oder unbegründet, wenn das Bundesaufsichtsamt von seinem Erpressen fehlerhaft Gebrauch gemacht hat, insbesondere wenn es die gesetzlichen Grenzen des Ermessens überschritten oder durch die Ermessensentscheidung Sinn und Zweck dieses Gesetzes verletzt hat.
(5) Der Beschluss ist zu begründen und den Beteiligten zuzustellen.
(6) Will das Beschwerdegericht von einer Entscheidung eines Oberlandesgerichts oder des Bundesgerichtshofs abweichen, so legt es die Sache dem Bundesgerichtshof vor. Der Bundesgerichtshof entscheidet anstelle des Oberlandesgerichts.
§ 57
Akteneinsicht

(1) Die in § 52 bezeichneten Beteiligten können die Akten des Beschwerdegerichts einsehen und sich durch die Geschäftsstelle auf ihre Kosten Ausfertigungen, Auszüge und Abschriften erteilen lassen. § 299 Abs. 3 der Zivilprozessordnung gilt entsprechend.

(2) Einsicht in Vorlagen, Belieferung, Gutachten und Unterlagen über Auskünfte ist nur mit Zustimmung der Stellen zulässig, denen die Akten gehören oder die die Äußerung eingeholt haben. Das Bundesaufsichtsamt hat die Zustimmung zur Einsicht in die ihm gehörenden Unterlagen zu ver- sagen, soweit dies aus wichtigen Gründen, insbesondere zur Wahrung von berechtigten Interessen Beteiligter oder dritter Personen, geboten ist. Wird die Einsicht abgelehnt oder ist sie unzulässig, dürfen diese Unterlagen der Ent- scheidung nur insoweit zugrunde gelegt werden, als ihr Inhalt vorgetragen worden ist. Das Beschwerdegericht kann die Offenlegung von Tatsachen oder Beweismitteln, deren Geheimhaltung aus wichtigen Gründen, insb. zur Wahrung von berechtigten Interessen Beteiligter oder Dritter verlangt wird, nach Anhörung des von der Offenlegung Betroffenen durch Beschluss anordnen, soweit es für die Entscheidung auf diese Tatsachen oder Beweismittel ankommt, andere Möglichkeiten der Sachaufklärung nicht bestehen und nach Abwägung aller Umstän- de des Einzelfalles die Bedeutung für die Sicherung eines ordnungsgemäßen Verfahrens das Interesse des Betroffenen an der Geheimhaltung überwiegt. Der Beschluss ist zu begründen. In dem Verfahren nach Satz 4 muss sich der Betroffene nicht anwaltlich vertreten lassen.

§ 58
Geltung von Vorschriften des Gerichtsverfassungs- gesetzes und der Zivilprozessordnung

Im Verfahren vor dem Beschwerdegericht gelten, soweit nichts anderes bestimmt ist, entsprechend
1. die Vorschriften der §§ 169 bis 197 des Gerichtsverfassungs- gesetzes über Öffentlichkeit, Sitzungspolizei, Gerichtssprache, Beratung und Abstimmung und

Abschnitt 8
Sanctionen

§ 59
Rechtsverlust

Rechte aus Akten, die dem Bieter, mit ihm gemeinsam handelnden Personen oder deren Tochterunternehmen gehören oder aus denen ihm, mit ihm gemeinsam handelnden Personen oder deren Tochterunternehmen Stimmeigentum gemäß § 30 Abs. 1 Satz 1 Nr. 2 zugerechnet werden, bestehen nicht für die Zeit, für welche die Pflich- ten nach § 35 Abs. 1 oder 2 nicht erfüllt werden. Dies gilt nicht für Ansprüche nach § 58 Abs. 4 des Aktiengesetzes und § 271 des Aktiengesetzes, wenn die Veröffentlichung oder das Angebot nach § 35 Abs. 1 Satz 1 oder Abs. 2 Satz 1 nicht vorsätzlich unterlassen wurde und nachgeholt worden ist.

§ 60
Bußgeldvorschriften

(1) Ordnungswidrig handelt, wer vorsätzlich oder leicht- fertig
1. entgeht
   a) § 10 Abs. 1 Satz 1, § 14 Abs. 2 Satz 1 oder § 35 Abs. 1 Satz 1 oder Abs. 2 Satz 1 oder
   b) § 21 Abs. 2 Satz 1, § 23 Abs. 1 Satz 1 oder Abs. 2 Satz 1 oder § 27 Abs. 3 Satz 1
   eine Veröffentlichung nicht, nicht richtig, nicht voll- ständig, nicht in der vorgeschriebenen Weise oder nicht rechtzeitig vornimmt,
2. entgeht
   a) § 10 Abs. 2 Satz 1, auch in Verbindung mit § 35 Abs. 1 Satz 4, § 14 Abs. 1 Satz 1 oder § 35 Abs. 2 Satz 1,
   b) § 10 Abs. 5, auch in Verbindung mit § 35 Abs. 1 Satz 4, oder § 14 Abs. 4, auch in Verbindung mit § 21 Abs. 2 Satz 2 oder § 35 Abs. 2 Satz 2, oder
   c) § 27 Abs. 3 Satz 2
   eine Mitteilung, Unterrichtung oder Übermittlung nicht, nicht richtig, nicht vollständig, nicht in der vorgeschriebenen Weise oder nicht rechtzeitig vornimmt,
3. entgeht § 10 Abs. 3 Satz 3, auch in Verbindung mit § 35 Abs. 1 Satz 4, oder § 14 Abs. 2 Satz 2, auch in Verbindung mit § 35 Abs. 2 Satz 2, eine Veröffentlichung vornimmt oder eine Angebotsunterlage bekannt gibt,
4. entgeht § 10 Abs. 4 Satz 1, auch in Verbindung mit § 35 Abs. 1 Satz 4, eine Veröffentlichung nicht, nicht richtig, nicht vollständig oder nicht rechtzeitig über- sendet,
5. entgeht § 14 Abs. 3 Satz 2, auch in Verbindung mit § 21 Abs. 2 Satz 2, § 23 Abs. 1 Satz 2 oder § 35 Abs. 2 Satz 2, oder entgeht § 27 Abs. 3 Satz 3 einen Beleg nicht, nicht richtig oder nicht rechtzeitig übersezt,
6. entgeht § 15 Abs. 3 eine Veröffentlichung vornimmt,
7. entgeht § 26 Abs. 1 Satz 1 oder 2 ein Angebot abgibt oder
8. entgeht § 33 Abs. 1 Satz 1 eine dort genannte Hand- lung vornimmt.

(2) Ordnungswidrig handelt, wer vorsätzlich oder fahrlässig
1. einer vollziehbaren Anordnung nach § 28 Abs. 1 zu- widerhandelt oder
2. entgeht § 40 Abs. 1, 2 oder 3 Satz 1, auch in Verbin- dung mit Satz 2, eine Auskunft nicht, nicht richtig, nicht vollständig oder nicht rechtzeitig erteilt oder eine
Unterlage nicht, nicht richtig, nicht vollständig oder nicht rechtzeitig vorliegt.

(3) Die Ordnungswidrigkeit kann in den Fällen des Absatzes 1 Nr. 1 Buchstabe a, Nr. 3, 6 bis 8 mit einer Geldbuße bis zu einer Million Euro, in den Fällen des Absatzes 1 Nr. 1 Buchstabe b, Nr. 2 Buchstabe a und Nr. 4 mit einer Geldbuße bis zu fünfhunderttausend Euro, in den übrigen Fällen mit einer Geldbuße bis zu zweihunderttausend Euro geahndet werden.

§ 61
Zuständige Verwaltungsbehörde

Verwaltungsbehörde im Sinne des § 36 Abs. 1 Nr. 1 des Gesetzes über Ordnungswidrigkeiten ist das Bundesaufsichtsamt.

§ 62
Zuständigkeit des Oberlandesgerichts im gerichtlichen Verfahren

(1) Im gerichtlichen Verfahren wegen einer Ordnungswidrigkeit nach § 60 entscheidet das für den Sitz des Bundesaufsichtsamtes in Frankfurt am Main zuständige Oberlandesgericht; es entscheidet auch über einen Antrag auf gerichtliche Entscheidung (§ 62 des Gesetzes über Ordnungswidrigkeiten) in den Fällen des § 52 Abs. 2 Satz 3 und des § 69 Abs. 1 Satz 2 des Gesetzes über Ordnungswidrigkeiten. § 140 Abs. 1 Nr. 1 der Strafprozessordnung in Verbindung mit § 46 Abs. 1 des Gesetzes über Ordnungswidrigkeiten findet keine Anwendung.

(2) Das Oberlandesgericht entscheidet in der Besetzung von drei Mitgliedern mit Einschluss des vorsitzenden Mitglieds.

§ 63
Rechtsbeschwerde zum Bundesgerichtshof

Über die Rechtsbeschwerde (§ 79 des Gesetzes über Ordnungswidrigkeiten) entscheidet der Bundesgerichtshof. Hebt er die angefochtene Entscheidung auf, ohne in der Sache selbst zu entscheiden, so verweist er die Sache an das Oberlandesgericht, dessen Entscheidung aufgehoben wird, zurück.

§ 64
Wiederaufnahme gegen Bußgeldbescheid

Im Wiederaufnahmeverfahren gegen den Bußgeldbescheid des Bundesaufsichtsamtes (§ 82 Abs. 4 des Gesetzes über Ordnungswidrigkeiten) entscheidet das nach § 62 Abs. 1 zuständige Gericht.

§ 65
Gerichtliche Entscheidung bei der Vollstreckung

Die bei der Vollstreckung notwendig werdenden gerichtlichen Entscheidungen (§ 104 des Gesetzes über Ordnungswidrigkeiten) werden von dem nach § 65 Abs. 1 zuständigen Gericht erlassen.

Abschnitt 9
Gerichtliche Zuständigkeit; Übergangsregelungen

§ 66
Gerichte für Wertpapiererwerbs- und Übernahmesachen

(1) Für bürgerliche Rechtsstreitigkeiten, die sich aus diesem Gesetz ergeben, sind ohne Rücksicht auf den Wert des Streitgegenstandes die Landgerichte ausschließlich zuständig. Satz 1 gilt auch für die in § 12 Abs. 6 genannten Ansprüche und für den Fall, dass die Entscheidung eines Streitstreichers auch oder teilweise von einer Entscheidung abhängt, die nach diesem Gesetz zu treffen ist. Für Klagen, die auf Grund dieses Gesetzes oder wegen der in § 12 Abs. 6 genannten Ansprüche erhoben werden, ist auch das Landgericht zuständig, in dessen Bezirk die Zielgesellschaft ihren Sitz hat.

(2) Die Rechtsstreitigkeiten sind Handelsachen in dem Sinne der §§ 93 bis 114 des Gerichtsverfassungsgesetzes.

(3) Die Landesregierungen werden ermächtigt, durch Rechtsverordnung bürgerliche Rechtsstreitigkeiten, für die nach Absatz 1 ausschließlich die Landgerichte zuständig sind, einem Landgericht für die Bezirke mehrerer Landgerichte zuzuweisen, wenn eine solche Zusammenfassung der Rechtspflege in Wertpapiererwerbs- und Übernahmesachen dienlich ist. Sie werden ferner ermächtigt, die Entscheidungen über Berufungen und Beschwerden gegen Entscheidungen der nach Absatz 1 zuständigen Landgerichte in bürgerlichen Rechtsstreitigkeiten einem oder einigen der Oberlandesgerichte zuzuweisen, wenn in einem Land mehrere Oberlandesgerichte errichtet sind. Die Landesregierungen können die Ermächtigungen auf die Landesjustizverwaltungen übertragen. Durch Staatsverträge zwischen den Ländern kann die Zuständigkeit eines Landgerichtes für einzelne Bezirke oder das gesamte Gebiet mehrerer Länder begründet werden.

(4) Wird gegen eine Entscheidung des Gerichts für Wertpapiererwerbs- und Übernahmesachen Berufung eingereicht, können sich die Parteien durch Rechtsanwälte vertreten lassen, die bei dem Oberlandesgericht zugelassen sind, vor das die Berufung ohne eine Regelung nach Absatz 3 gehören würde. Die Mehrkosten, die einer Partei dadurch erwachsen, dass sie sich nach Satz 1 durch einen nicht bei dem Prozessgericht zugelassenen Anwalt vertreten lässt, sind nicht zu erstatzen.

§ 67
Senat für Wertpapiererwerbs- und Übernahmesachen beim Oberlandesgericht

In den ihm nach § 48 Abs. 4, § 62 Abs. 1, §§ 64 und 65 zugewiesenen Rechtsachen entscheidet das Oberlandesgericht durch einen Wertpapiererwerbs- und Übernahmesenat.

§ 68
Übergangsregelungen

(1) Der Widerspruchsaußerschuss besteht bis zur Beendigung von ehrenamtlichen Beisitzern auf Grund von Vorschäden des Beirates nach § 5 Abs. 3 Satz 3, spä-
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testens bis zum 30. Juni 2002, ausschließlich aus den in § 6 Abs. 2 Satz 1 Nr. 1 und 2 genannten Personen.

(2) Dieses Gesetz findet vorbehaltlich Absatz 3 keine Anwendung auf Angebote, die vor dem 1. Januar 2002 veröffentlicht wurden.


Artikel 2
Änderung des Wertpapierhandelsgesetzes


1. In § 21 Abs. 1a und 2 werden jeweils die Wörter „zum amtlichen Handel an einer Börse“ durch die Wörter „zum Handel an einem organisierten Markt“ ersetzt.

2. § 22 wird wie folgt gefasst:

§ 22
Zurechnung von Stimmrechten
(1) Für die Mitteilungspflichten nach § 21 Abs. 1 und 1a stehen den Stimmrechten des Meldepflichtigen Stimmrechte aus Aktien der börsennotierten Gesellschaft gleich,
1. die einem Tochterunternehmen des Meldepflichtigen gehören,
2. die einem Dritten gehören und von ihm für Rechnung des Meldepflichtigen gehalten werden,
3. die der Meldepflichtige einem Dritten als Sicherheit übertragen hat, es sei denn, der Dritte ist zur Ausübungen der Stimmrechte aus diesen Aktien befugt und bekundet die Absicht, die Stimmrechte unabhängig von den Weisungen des Meldepflichtigen auszuüben,
4. an denen zugunsten des Meldepflichtigen ein Nißbrauch bestellt ist,
5. die der Meldepflichtige durch eine Willenserklärung erwerben kann,


(3) Tochterunternehmen sind Unternehmen, die als Tochterunternehmen im Sinne des § 290 des Handelsgesetzbuchs gelten oder auf die ein beherrschender Einfluss ausgeübt werden kann, ohne dass es auf die Rechtsform oder den Sitz ankommt.

(4) Die zurechnenden Stimmrechte sind in den Mitteilungen nach § 21 Abs. 1 und 1a für jede der Nummern in Absatz 1 und für Absatz 2 Satz 1 getrennt anzugeben."

3. In § 25 Abs. 2 Satz 1, § 26 Abs. 1 Satz 1, Abs. 3 und § 30 Abs. 1 Nr. 4 werden jeweils die Wörter „zum amtlichen Handel an einer Börse“ durch die Wörter „zum Handel an einem organisierten Markt“ ersetzt.

4. In § 28 Satz 1 wird die Angabe „§ 22 Abs. 1 Nr. 1 oder 2“ durch die Angabe „§ 22 Abs. 1 Satz 1 Nr. 1 oder 2“ ersetzt.

5. In § 39 Abs. 1 Nr. 1 Buchstabe c wird die Angabe „§ 22 Abs. 1 oder 2“ durch die Angabe „§ 22 Abs. 1, 2 oder 4“ ersetzt.

6. § 41 wird wie folgt geändert:

a) Die Überschrift wird wie folgt gefasst:

„Übergangsregelung für Mitteilungs- und Veröffentlichungspflichten“.

b) Absatz 2 wird wie folgt gefasst:


c) In Absatz 3 wird die Angabe „§ 25 Abs. 1 Satz 1, 2 Abs. 2“ durch die Angabe „§ 25 Abs. 1 Satz 1 und 2, Abs. 2“ ersetzt.

d) In Absatz 4 wird die Angabe „§§ 23, 24, 25 Abs. 1 Satz 3, Abs. 3 Satz 2, Abs. 4“ durch die Angabe „§§ 23, 24, 25 Abs. 3 Satz 2, Abs. 4“ ersetzt.

e) In Absatz 5 Nr. 2 wird die Angabe „§ 25 Abs. 1 Satz 1 oder 2 Abs. 2“ durch die Angabe „§ 25 Abs. 1 Satz 1, 2 oder 2“ ersetzt.
Artikel 3
Änderung des Gesetzes über Kapitalanlagegesellschaften

„(1a) Die Kapitalanlagegesellschaft ist hinsichtlich der von ihr verwalteten Sondervermögen kein Tochterunternehmen im Sinne des § 22 Abs. 3 des Wertpapierhandelsgesetzes und des § 2 Abs. 6 des Wertpapiererwerbs- und Übernahmegesetzes und keine Mehrheitsbeteiligung im Sinne des § 135 Abs. 1 Satz 3 des Aktiengesetzes. Stimmrechte aus Aktien, die zu einem von der Kapitalanlagegesellschaft verwalteten Sondervermögen gehören, das kein Spezialfonds ist und dessen Vermögensgegenstände im Miteigentum der Anteilinhaber stehen, gelten für die Anwendung des § 21 Abs. 1 des Wertpapierhandelsgesetzes und des § 29 Abs. 2 des Wertpapiererwerbs- und Übernahmegesetzes als Stimmrechte der Kapitalanlagegesellschaft; stehen die Vermögensgegenstände dieses Sondervermögens im Eigentum der Kapitalanlagegesellschaft, sind auf die Stimmrechte § 22 Abs. 1 des Wertpapierhandelsgesetzes und § 30 Abs. 1 des Wertpapiererwerbs- und Übernahmegesetzes nicht anzuwenden."

Artikel 4
Änderung des Auslandinvestment-Gesetzes

„(2) Die Investmentgesellschaft ist hinsichtlich der von ihr verwalteten ausländischen Investmentvermögen kein Tochterunternehmen im Sinne des § 22 Abs. 3 des Wertpapierhandelsgesetzes und des § 2 Abs. 6 des Wertpapiererwerbs- und Übernahmegesetzes. Kann der Anteilinhaber im Regelfall keine Weisungen für die Ausübung der Stimmrechte erteilen, gelten Stimmrechte aus Aktien, die zu einem von der Investmentgesellschaft verwalteten Investmentvermögen gehören, dessen Vermögensgegenstände im Miteigentum der Anteilinhaber stehen, für die Anwendung des § 21 Abs. 1 des Wertpapierhandelsgesetzes und des § 29 Abs. 2 des Wertpapiererwerbs- und Übernahmegesetzes als Stimmrechte der Investmentgesellschaft; stehen die Vermögensgegenstände des Investmentvermögens im Eigentum der Investmentgesellschaft, sind auf die Stimmrechte § 22 Abs. 1 des Wertpapierhandelsgesetzes und § 30 Abs. 1 des Wertpapiererwerbs- und Übernahmegesetzes nicht anzuwenden."

Artikel 5
Änderung des Gesetzes über das Kreditwesen

Artikel 6
Änderung des Verkaufsprospektgesetzes

„9. als Gegenleistung im Rahmen eines Angebots nach dem Wertpapiererwerbs- und Übernahmegesetz angeboten werden."

Artikel 7
Änderung des Aktiengesetzes

1. Die Inhaltsübersicht vor § 1 wird wie folgt geändert:

2. Nach § 327 wird folgender neuer Teil eingefügt:
   „Vierter Teil
   Ausschluss von Minderheitsaktionären
   § 327a
   Übertragung von Aktien gegen Barabfindung
   (2) Für die Feststellung, ob dem Hauptaktionär 95 vom Hundert der Aktien gehören, gilt § 16 Abs. 2 und 4.“
§ 327b Barabfindung

(1) Der Haftaktionsrät legt die Höhe der Barabfindung fest; sie muss die Verhältnisse der Gesellschaft im Zeitpunkt der Beschlussfassung ihrer Hauptversammlung berücksichtigen. Der Vorstand hat dem Haftaktionsrät alle dafür notwendigen Unterlagen zur Verfügung zu stellen und Auskünfte zu erteilen.

(2) Die Barabfindung ist von der Bekanntmachung der Eintragung des Übertragungsbeschlusses in das Handelsregister an mit jährlich 2 vom Hundert über dem jeweiligen Basiszinssatz zu verzinsen; die Geldtendmaching eines weiteren Schadens ist nicht ausgeschlossen.

(3) Vor Einberufung der Hauptversammlung hat der Haftaktionsrät dem Vorstand die Erklärung eines im Geltungsbereich dieses Gesetzes zum Geschäftsbetrieb befugten Kreditinstituts zu übermitteln, durch das das Kreditinstitut die Gewährleistung für die Erfüllung der Verpflichtung des Haftaktionsrats übernimmt, den Minderheitsaktionären nach Eintragung des Übertragungsbeschlusses unverzüglich die festgelegte Barabfindung für die übergegangenen Aktionen zu zahlen.

§ 327c Vorbereitung der Hauptversammlung

(1) Die Bekanntmachung der Übertragung als Gegenstand der Tagesordnung hat folgende Angaben zu enthalten:
1. Firma und Sitz des Haftaktionsrats, bei natürlichen Personen Name und Adresse;
2. die vom Haftaktionsrat festgelegte Barabfindung.

(2) Der Haftaktionsrat hat der Hauptversammlung einen schriftlichen Bericht zu erstatten, in dem die Voraussetzungen für die Übertragung dargelegt und die Angemessenheit der Barabfindung erläutert und begründet werden. Die Angemessenheit der Barabfindung ist durch einen oder mehrere sachverständige Prüfer zu prüfen. Diese werden auf Antrag des Haftaktionsrats vom Gericht ausgewählt und bestellt. § 299a Abs. 2 und 3, § 293c Abs. 1 Satz 3 bis 5 sowie die §§ 293d und 293e sind sinngemäß anzuwenden. In Rechtsverordnungen nach § 293c Abs. 2 kann die Entscheidung nach Satz 3 in Verbindung mit § 293c Abs. 1 Satz 3 bis 5 entsprechend übertragen werden.

(3) Von der Einberufung der Hauptversammlung an sind in dem Geschäftsbereich der Gesellschaft zur Einrichtung der Aktionäre auszulegen
1. der Entwurf des Übertragungsbeschlusses;
2. die Jahresabschlüsse und Lageberichte für die letzten drei Geschäftsjahre;
3. der nach Absatz 2 Satz 1 erstattete Bericht des Haftaktionsrats;
4. der nach Absatz 2 Satz 2 bis 4 erstattete Prüfungsbericht.

(4) Auf Verlangen ist jedem Aktionär unverzüglich und kostenlos eine Abschrift der in Absatz 3 bezeichneten Unterlagen zu erteilen.

§ 327d Durchführung der Hauptversammlung

In der Hauptversammlung sind die in § 327c Abs. 3 bezeichneten Unterlagen auszulegen. Der Vorstand kann dem Haftaktionsrat Gelegenheit geben, den Entwurf des Übertragungsbeschlusses und die Be- messung der Höhe der Barabfindung zu Beginn der Verhandlung mündlich zu erläutern.

§ 327e Eintragung des Übertragungsbeschlusses

(1) Der Vorstand hat den Übertragungsbeschluss zur Eintragung in das Handelsregister anzumelden. Der Anmeldung sind die Niederschrift des Übertragungsbeschlusses und seine Anlagen in Ausfertigung oder öffentlich beglaubigter Abschrift beizufügen.

(2) § 319 Abs. 3 und 6 gilt sinngemäß.


§ 327f Gerichtliche Nachprüfung der Abfindung

(1) Die Anfechtung des Übertragungsbeschlusses kann nicht auf § 243 Abs. 2 oder darauf gestützt werden, dass die durch den Haftaktionsrat festgelegte Barabfindung nicht angemessen ist. Ist die Barabfindung nicht angemessen, so hat das in § 306 bestimmte Gericht auf Antrag die angemessene Barabfindung zu bestimmen. Das Gleiche gilt, wenn der Haftaktionsrat eine Barabfindung nicht oder nicht ordnungsgemäß angeboten hat und hierauf gestützte Anfechtungsklage innerhalb der Anfechtungsfrist nicht erhoben, zurückgenommen oder rechtskräftig abgewiesen worden ist.


3. Der bisherige Vierte und der bisherige Fünfte Teil des Dritten Buches werden Fünfter und Sechsteter Teil.

Artikel 8 Änderung des Gerichtskostengesetzes


1. In § 1 Abs. 1 Buchstabe a werden nach dem Wort „Wettbewerbsbeschränkungen“ ein Komma und die Wörter „nach dem Wertpapiererwerbs- und Übernahmegesetz“ eingefügt.
2. § 12a wird wie folgt geändert:
   a) Die Überschrift wird wie folgt gefasst:
      § 12a
      Wertberechnung in Beschwerdeverfahren nach dem Gesetz gegen Wettbewerbsbeschränkungen und nach dem Wertpapiererwerbs- und Übernahmegesetz.
   b) Absatz 1 Satz 1 wird wie folgt gefasst:
      „Im Verfahren über Beschwerden gegen Verfügungen der Kartellbehörde, über Rechtsbeschwerden (§§ 63 und 74 des Gesetzes gegen Wettbewerbsbeschränkungen) und über Beschwerden gegen Verfügungen des Bundesanwaltsgesamtes für den Wertpapierhandel (§ 48 des Wertpapiererwerbs- und Übernahmegesetzes) bestimmt sich der Wert nach § 3 der Zivilprozessordnung.“
   c) Absatz 3 wird wie folgt geändert:
      a) In den Absätzen nach der Angabe „Verfahren nach § 319 Abs. 6 des Aktiengesetzes“ ein Komma und die Angabe „auch in Verbindung mit § 327e Abs. 2 des Aktiengesetzes“ eingefügt.
      b) In Absatz 3 werden nach der Angabe „§ 80a Abs. 3 der Verwaltungsgesichtsordnung“ das Wort „oder“ durch ein Komma ersetzt und nach der Angabe „§ 60 Abs. 3, 5 der Finanzgerichtsordnung“ die Angabe „oder § 50 Abs. 3 bis 5 des Wertpapiererwerbs- und Übernahmegesetzes“ eingefügt.
   d) Absatz 4 wird wie folgt geändert:
      a) In Satz 1 werden nach der Angabe „Verfahren nach § 319 Abs. 6 des Aktiengesetzes“ ein Komma und die Angabe „auch in Verbindung mit § 327e Abs. 2 des Aktiengesetzes“ eingefügt.
      b) In Satz 2 werden vor den Wörtern „ein Zehntel des Grundkapitals“ die Wörter „im Falle des § 319 Abs. 6 des Aktiengesetzes oder des § 16 Abs. 3 des Umwandlungsgesetzes“ eingefügt.

4. Die Anlage 1 wird wie folgt geändert:
   a) Die Überschrift der Gliederung des Teils 1 und die Überschrift des Teils 1 werden jeweils wie folgt gefasst:
      „Teil 1
      Bürgerliche Rechtsstreitigkeiten, Verfahren nach § 1 Abs. 2 und 3 GKG und Beschwerdeverfahren nach dem Gesetz gegen Wettbewerbsbeschränkungen und dem Wertpapiererwerbs- und Übernahmegesetz vor den ordentlichen Gerichten außerhalb der Verfahren der Zwangsversteigerung und Zwangsverwaltung“.
   b) In der Überschrift des Abschnitts II.2 des Teils 1 wird die Angabe „§§ 63 und 116 GWB“ durch die Angabe „§§ 63, 116 GWB und § 48 WpÜG“ ersetzt.
   c) In der Bemerkung zu den Nummern 1226 und 1227 wird die Angabe „§§ 63 und 116 GWB“ durch die Angabe „§§ 63, 116 GWB und § 48 WpÜG“ ersetzt.
   d) In Nummer 1650 wird nach der Angabe „§ 319 Abs. 6 AktG“ ein Komma und die Angabe „auch i.V.m. § 327e Abs. 2 AktG“ eingefügt.

2. Nach Nummer 1650 wird folgende Nummer 1651 eingefügt:
   e) Nach Nummer 1650 wird folgende Nummer 1651 eingefügt:
      Nr. Gebührentatbestand Gebührenbetrag oder Satz der Gebühr nach § 11 Abs. 2 GKG
      „1651 Verfahren über den Antrag nach § 50 Abs. 3 bis 5 WpÜG. Mehrere Verfahren gelten innerhalb eines Rechtssuges als ein Verfahren

Artikel 9
Änderung der Bundesgebührenordnung für Rechtsanwälte


1. § 42 wird wie folgt gefasst:
   „§ 42
   Verfahren nach § 319 Abs. 6 des Aktiengesetzes, auch in Verbindung mit § 327e Abs. 2 des Aktiengesetzes, oder § 16 Abs. 3 des Umwandlungsgesetzes
   In Verfahren nach § 319 Abs. 6 des Aktiengesetzes, auch in Verbindung mit § 327e Abs. 2 des Aktiengesetzes, oder § 16 Abs. 3 des Umwandlungsgesetzes erhält der Rechtsanwalt die Hälfte der in § 31 bestimmten Gebühren.“

2. Nach § 65b wird folgender § 65c eingefügt:
   „§ 65c
   Verfahren nach dem Wertpapiererwerbs- und Übernahmegesetz
   Im Beschwerdeverfahren nach dem Wertpapiererwerbs- und Übernahmegesetz gelten die Vorwürfe dieser Abschnitts sinngemäß. Im Verfahren über einen Antrag nach § 50 Abs. 3 bis 5 des Wertpapiererwerbs- und Übernahmegesetzes gilt § 40 sinngemäß. Die Gebühren richten sich nach § 11 Abs. 1 Satz 4.“

Artikel 10
Änderung der Verkaufsprospekt-Verordnung

Dem § 4 der Verkaufsprospekt-Verordnung in der Fassung der Bekanntmachung vom 9. September 1998 (BGBl. I S. 2553) wird folgender Satz angefügt:

„Werdet Aktien angeboten, hat der Verkaufsprospekt einen Hinweis darauf zu enthalten, dass die Regelungen des Wertpapiererwerbs- und Übernahmegesetzes, insbesondere die Verpflichtung zur Abgabe eines Angebots an alle Aktionäre bei Erlangung der Kontrolle über den Emittenten, keine Anwendung finden.“
Artikel 11  
Rückkehr zum einheitlichen Verordnungsrang

Die auf Artikel 10 beruhenden Teile der dort geänderten Rechtsverordnung können auf Grund der jeweils einschlägigen Ermächtigung durch Rechtsverordnung geändert werden.

Artikel 12  
Inkrafttreten


Die verfassungsmäßigen Rechte des Bundesrates sind gewahrt.

Das vorstehende Gesetz wird hiermit ausgefertigt und wird im Bundesgesetzblatt verkündet.


Der Bundespräsident
Johannes Rau

Der Bundeskanzler
Gerhard Schröder

Der Bundesminister der Finanzen
Hans Eichel

Die Bundesministerin der Justiz
Däubler-Gmelin
Appendix 2

A New Takeover Regime for Germany: 
German Act on Acquisition of 
Securities and Takeovers

INTRODUCTION

ON 1 JANUARY 2002, the new German takeover regulation, the Act on Acquisition of Securities and Takeovers (Wertpapiererwerbs- und Übernahmegesetz; WpÜG), entered into force. The Act replaces the non-binding Takeover Code, an instrument of voluntary self-regulation, which became effective on 1 October 1995 and was subsequently amended as of 1 January 1998. The Takeover Code was not accepted by all companies listed in Germany, and a considerably large number of companies refused to adhere to the provisions of the Code. Accordingly, a need for the enactment of binding statutory rules for the regulation of takeovers was generally recognised.

The Federal Ministry of Finance (which is responsible for the regulation of capital markets) began working on a draft Takeover Act in 1999. In early 2000, in the aftermath of Vodafone’s successful takeover bid for Mannesmann AG, German Chancellor Gerhard Schröder convened an Expert Commission which was asked to advise the Ministry of Finance on the forthcoming Act. In its final session on 17 May 2000, the Expert Commission set forth recommendations consisting of 10 so-called cornerstones, which the Federal Ministry of Finance took into account. On 29 June 2000, the Federal Ministry of Finance submitted a tentative draft (Diskussionsentwurf), which was sent for discussion purposes to business and banking circles as well as to leading academic experts. During the course of several experts’ hearings, it became highly unlikely that the Act would enter into force on 1 January 2001, as originally scheduled.

Another draft Act was published on 12 March 2001, by the Federal Ministry of Finance (Referentenentwurf). After its publication, the German Government took into account the reservations which German politicians, trade associations and a section of German industry held towards the duty of neutrality which the Referentenentwurf (in line with the proposed EU Takeover Directive) sought to establish for the board of a target company. Accordingly, the draft Act published by the Government (Regierungsentwurf) on 11 July 2001 allowed for advance shareholder approval of defensive measures.
As a next step, the Government introduced the *Regierungsentwurf* to the *Bundestag*. After another experts’ hearing, the Financial Committee (*Finanzausschuß*) of the Bundestag published its final Report with Voting Recommendations on 14 November 2001. It proposed several amendments to the *Regierungsentwurf*, mainly concerning defensive measures which the board of the target company is allowed to take, as well as transitional provisions. On 15 November 2001, the Bundestag passed the Act on Acquisition of Securities and Takeovers. Adoption of the Act by the *Federal Council* (Bundesrat) took place as scheduled on 30 November 2001. The Act entered into force on 1 January 2002.

Just 10 days before submission of the tentative draft of the Act on 19 June 2000, the Council of Ministers of the EU adopted a Common Position on the 13th Directive on Company Law concerning Takeover Bids. Rather than formulating detailed rules, the EU Directive chose a ‘framework approach’ which allowed for the maintenance of national differences. On 13 December 2000, the European Parliament passed 15 amendments to the provisions laid down in the Common Position. The Conciliation Proceedings between the EU Parliament, the EU Commission and the EU Council of Ministers which were completed on 5 June 2001 rejected the German Government’s proposal, which had been introduced into the regulatory process at a very late stage, to allow member states broad discretion with regard to defensive measures in takeover battles. The compromise reached during the discussions in the course of the Conciliation Proceedings envisaged an implementation period of five years with respect to the duty of neutrality. The joint draft approved by the Conciliation Committee required approval by the European Parliament and Council, which was expected to take place in July 2001. However, on 4 July 2001, the European Parliament, in a deadlock decision, rejected the draft previously agreed upon by the delegates of the Council and Parliament in the Conciliation Proceedings, and thereby frustrated the adoption of the EU Takeover Directive. The EU Commission now intends to introduce a new proposal for a Directive on takeover bids. A High Level Group of Company Law Experts was already set up to advise on certain issues of concern; its first report was published on 10 January 2002.

**THE ACT ON ACQUISITION OF SECURITIES AND TAKEOVERS:**

**KEY ISSUES CONCERNING THE NEW LEGISLATION**

The main aspects of the new Act can be summarised as follows:

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**Scope of the Act on Acquisition of Securities and Takeovers:**

The Act on Acquisition of Securities and Takeovers applies to all public bids targeted at a company in the legal form of a stock corporation.
(Aktiengesellschaft) or a partnership limited by shares (Kommanditgesellschaft auf Aktien) having their registered office in Germany, provided that the shares of the target company are admitted for trading on a domestic stock exchange (official and unofficial listing (Amtliche Notierung and Geregelter Markt) including the Neuer Markt) or on an organised market in any other contracting state of the EEA. Whereas the voluntary Takeover Code also applies if the shares in the target company are traded over the counter (Freiverkehr, non-regulated market) with the company’s consent, the Takeover Act does not include shares traded in the Freiverkehr, unless they are admitted to the Geregelter Markt, which is always the case once the shares of the company are listed in the market segment of the Neuer Markt.

According to an explanatory comment to the Act by the Federal Government, it does not make any difference whether the shares are admitted to trading in both Germany and in another contracting state of the EEA, only in Germany or only in another EEA state. Unlike the draft EU Directive which contained detailed provisions on the determination of the applicable national takeover law and the internationally competent supervisory authority in cases of cross-border takeover bids, the Act does not provide for any specific rules dealing with international takeover bids.

The Act not only regulates so-called takeover bids (ie bids targeted at the acquisition of control as defined by the Act, see below), but all other publicly made bids where the bidder intends to acquire only part of the shares (thereby not acquiring control) or where the bidder intends to consolidate an already existing controlling position. Such public bids have to comply with certain minimum requirements as laid down in the Act concerning bid proceedings, transparency of the bid procedure and contents of the bid, as well as disclosure requirements and equal treatment of the shareholders in the target company. The respective provisions also apply to takeover bids (including mandatory offers, see below). In addition, takeover bids are subject to further rules and regulations concerning consideration (shares or cash), determination of an offer price, the obligation to make a mandatory offer to all shareholders, and duties and obligations of the management of the target company.

The Act not only applies to all kinds of bids for the acquisition of shares, but also includes bids for the acquisition of securities which entitle the holder to acquire shares (eg convertible bonds).

The Act on Acquisition of Securities and Takeovers does not apply to offers which were published before the Act entered into force, ie 1 January 2002. However, if a bidder acquires control over the target company (as defined by the Act, see below) after 1 January 2002 due to an offer which was published before this date, a mandatory offer is triggered (for details see below).
Rules and Regulations Applying to all Kinds of Public Bids

Offer Document and Liability for Offer Document:

In the offer document, the bidder must inform the shareholders of the target company of the bid and its effects. The offer document must be in German and has to contain all information which is necessary to enable the shareholders of the target to make an informed decision whether to accept the bid or not. The board of managing directors (Vorstand) of the target company has to pass on the offer document without delay to the competent works council (Betriebsrat) or, in case a works council does not exist, directly to the employees.

The offer document has to convey detailed information as prescribed by the Act on Acquisition of Securities and Takeovers and statutory order (Verordnung) issued by the Federal Ministry of Finance, particularly on:

- The contents of the bid, such as details on the bidder and the target, the securities which are the subject of the bid, the acceptance period and any conditions the bid is subject to;
- The consideration to be given, the methods of its determination, and why such consideration is adequate. In case of securities (shares) as consideration, information and data required for an offer prospectus under stock exchange law must be provided (unless such prospectus has been published within the last twelve months preceding the bid);
- Financing of the bid and the expected consequences of a successful takeover on the financial condition and the results of operations of the bidder;
- The plans of the bidder as to the future business of the target, including the impact on employees and their representative bodies (e.g., plans for dismissals, transfer of the company’s domicile, closing down of branches);
- The status of antitrust clearance procedures and any other administrative procedures, if applicable;
- Information on payments or any other benefits in monetary amounts granted or promised to members of the board of managing directors (Vorstand) or to members of the supervisory board (Aufsichtsrat) of the target company.

The Act on Acquisition of Securities and Takeovers places liability on the issuers of an offer document, and on those persons who sign as responsible for the offer document, for wrong, misleading or incomplete statements made in the offer document which are material to the evaluation of the bid, unless such defendant can prove that it did not know (and that such ignorance was not due to gross negligence) that the issued statements were wrong, misleading or incomplete.

Financing of the Bid:

Before publishing the offer document, the bidder must meet all necessary requirements for being able to satisfy the offer when the consideration becomes due. In the case of a cash offer, an independent investment services
enterprise (Wertpapierdienstleistungsunternehmen) has to confirm in writing the bidder’s ability to finance the bid. Any shareholder who accepts the offer and suffers a loss due to the insufficient financing of the bid can hold such investment services enterprise liable for any losses incurred, unless such defendant can prove that it did not know (and that its ignorance was not due to gross negligence), that the issued statements were wrong, misleading or incomplete.

Relevant Periods of Time and Proceedings:

Within four weeks\(^1\) after publication of the decision to launch a bid or after the acquisition of ‘control’ as the case may be, the bidder has to file the offer document with the Federal Authority for Securities Trading (Bundesaufsichtsamt für den Wertpapierhandel). Upon application of the bidder, this period of time can be extended by up to four weeks if the bidder is not able to comply with the ‘original’ four weeks’ period due to the requirements to be met in the case of a cross-border offer or a necessary capital increase. Immediately after approval of the offer document by the Authority, the document has to be published on the Internet and in one national Exchange Publications Newspaper (eg Frankfurter Allgemeine Zeitung, Handelsblatt). The same applies if the Authority has not forbidden the bid within 10 working days after submission of the offer document by the bidder.

The offer period may last no less than four weeks (Takeover Code: 28 days) and, generally, no longer than ten weeks (Takeover Code: 60 days). The offer period is always 10 weeks if a shareholders’ meeting of the target company is called (see below).

The board of managing directors and the supervisory board of the target company together have to issue a detailed statement evaluating the bid. Both boards can either publish a joint document or each board can publish its own. The statement must consider in particular the kind and amount of the consideration offered by the bidder, the impact of the bid on the interests of the company, including its employees and their representative bodies, and the aims of the bidder. Furthermore, both boards have to indicate whether any of their members intends to accept the bid.

— Special Rules and Regulations Applying to Takeover Bids

In addition to the general rules and regulations applying to all public bids for the acquisition of securities, the Act on Acquisition of Securities and Takeovers contains specific provisions applying to so-called takeover bids

\(^1\) Not merely 2 weeks as was provided for under the tentative June 2000 draft, which was regarded as extremely short in terms of the preparation of the offer document, especially in cross-border takeover situations.
(including mandatory bids, see below). The Act defines takeover bids as bids which are targeted at gaining ‘control’ over the target company. The Act lays down a clear-cut percentage rule by defining ‘control’ as the holding of at least 30 per cent of the voting rights (including voting rights which are attributed to the bidder as further defined in the Act). The most important issues with respect to special rules and regulations applying to takeover bids are the following:

**Consideration: Cash Offers and Exchange Offers (Share for Share):**

The voluntary Takeover Code did not set forth whether the bidder had to pay the offer price in cash or by way of shares. The Act on Acquisition of Securities and Takeovers, however, contains a detailed provision dealing with the kind of consideration to be offered to the shareholders. In principle, the bidder is free to choose whether it will offer cash (currency: €) or shares. In the latter case, the shares which are offered as consideration have to be traded in a liquid market and admitted to trading on an organised market within the EEA. Therefore, any company which is domiciled outside the EEA can offer its own shares as consideration, provided that the shares are admitted to trading on a stock exchange within the EEA.

However, the bidder is obliged to make a cash offer if:

- within the three months before the publication of the decision to launch a takeover bid, the bidder has acquired, against cash, at least 5 per cent of the shares in the target or shares which represent at least 5 per cent of the voting rights of the target; or
- the bidder acquires, against cash, at least 1 per cent of the shares in the target company or shares which represent at least 1 per cent of the voting rights of the target during the takeover procedure, ie after publication of the decision to launch the bid and before the end of the offer period.

**Offer Price/Consideration:**

Pursuant to the Act, the consideration offered must be adequate. In principle, the average weighted stock exchange price of the target’s shares and other acquisitions of shares in the target company by the bidder have to be taken into consideration when determining adequate consideration.

Further details on the determination of the consideration are laid down in a statutory order (Verordnung) issued by the Federal Ministry of Finance (or, by way of delegation, the Federal Authority for Securities Trading), thereby giving the authorities additional flexibility to prescribe in more detail the criteria for offer price determination.

According to the rules and regulations contained in the statutory order, consideration for shares in the target, which are admitted to a domestic organised market, must at least be equal to the average weighted stock exchange price during the three month period preceding the publication of
the intention to make a takeover bid. If the shares are admitted only to an organised market in another member state of the EEA, the consideration must be at least equal to the average stock exchange price during the three month period. As such, the volatility of the market is taken into account when determining whether the consideration is adequate, whereas under the voluntary Takeover Code, the offer price had in principle only to be reasonably related to the current stock exchange price.

If the bidder has acquired shares in the target company during the three month period before launching the bid, the offer price must at least be equal to the highest price paid in such share acquisition. A discount to such a control premium is not allowed. An earlier draft of the statutory order allowed the bidder to deduct up to 15 per cent. However, the respective provision was heavily criticised by representatives of minority shareholders’ associations, and, as a consequence, the German Government decided to exclude this provision.

It should be noted that (similarly to the Takeover Code) the bidder is under an obligation to increase its offer if it acquires shares in the target company during the offer period and pays or agrees to pay a higher consideration than the one offered in the takeover bid. The same applies if shares are acquired at a higher price outside of an organised stock exchange during the first year after the end of the offer period.

**Duty of Neutrality and Defensive Measures:**

The tentative draft of June 2000 as well as the draft Act of March 2001 established a duty of neutrality on the part of the board of managing directors and the supervisory board of the target company during the takeover period. This provision was heavily criticised as too far-reaching, especially by industry representatives, trade unions and politicians. In addition, on the European level, the corresponding provision contained in the Common Position on the Takeover Directive was heavily criticised, mainly by Germany, and such criticism finally led to a rejection of the compromise text of the EU-Directive by the European Parliament on 4 July 2001. It was argued that the duty of neutrality as provided for in the Common Position and the earlier drafts of the Takeover Act would lead to a competitive disadvantage for EU companies in comparison to US corporations which are allowed to take defensive measures within the broad scope of the so-called business judgement-rule.

The final version of the Act as entered into force still does not allow for defensive measures, ie measures which are capable of preventing the success of the takeover bid, to be taken by the board of managing directors. However, this does not apply to the following measures:

- measures which a prudent and conscientious manager of a company that is not subject to a takeover bid would have taken. This allows for measures taken in
the ordinary course of business, as well as measures which would have been
taken irrespective of the takeover offer;
- the search for a ‘white knight’; and
- measures which have been approved by the supervisory board of the target com-
pany. Shareholder consent is not expressly required; however, if both boards
decide to take a certain measure which, under German stock corporation
law, falls within the scope of authority of the shareholders’ meeting
(Hauptversammlung), shareholder approval is required.

Furthermore, the board of managing directors may take certain measures,
which are approved by the shareholders up to 18 months before a certain
measure is taken. This means, in effect, that the shareholders’ meeting of
the target company may empower the board in advance to take defensive
measures in case a takeover bid for the shares of the company is launched.

The Act further provides that such approval must expressly state which
kind of measures (e.g., sale of shareholdings, issuance of new shares) the
board of managing directors would be allowed to take in the event of a
takeover bid. To obtain shareholders’ approval requires a 75 per cent vote
of the capital present at the general meeting, unless stricter requirements
are provided for in the company’s articles. Such approval lasts for up to
18 months. Once a takeover bid has been launched, the board of managing
directors needs the approval of the supervisory board in order to adopt a
defensive measure in the form approved by the shareholders.

The bidder is not allowed to make or to offer to make any payments or
grant any other unjustified benefits to members of the board of managing
directors or supervisory board of the target company in connection with the
takeover.

**Mandatory Offer:**

A mandatory offer to all shareholders is triggered if the bidder acquires con-
trol over the target company. The Act on Acquisition of Shares and
Takeovers defines ‘control’ as having acquired at least 30 per cent of the vot-
ing rights, thereby using a clear-cut percentage rule. For a calculation of the
30 per cent threshold, own voting rights and such voting rights which are
attributed to the bidder according to the Act are relevant. For example, vot-
ing rights resulting from shares, which are owned by a subsidiary which is
dominated by the bidder or are owned by a third person for the account of
the bidder or which the bidder may acquire by exercising option rights, are
attributed to the bidder thereby constituting indirect control over the target
company.

Pursuant to the Act, a shareholder must publish the fact that it has
acquired control of the target, and such publication must be made without
delay and not later than seven calendar days after the shareholder knew or
should have known about its acquisition of control. Additionally, within
four weeks after such publication, the controlling shareholder is required to make the mandatory offer.

There is, however, no obligation to make a mandatory offer if control was acquired by way of a takeover bid under the rules and regulations of the Act.

The bidder may apply to the Federal Authority for Securities Trading as the competent authority to request that certain voting rights as defined in the Act be disregarded when calculating the 30 per cent threshold (e.g., acquisition due to family succession, change of legal form, group-internal restructuring measures).

In addition, the Federal Authority for Securities Trading can grant an exemption from the obligation to make a mandatory offer in certain situations, especially when it is expected that the bidder will be unable to exert control for whatever reason or when the obligation to bid would be detrimental to the bidder, as is sometimes the case in rescue operations. Further details are defined by statutory order (Rechtsverordnung).

The Federal Authority also grants an exemption from the obligation to make a mandatory offer if control was gained after the Act entered into force (i.e., 1 January 2002) due to an offer which was made before this date, provided that the offer complied with the rules on determination of compensation as laid down in the Act (see also above, ‘Scope of the Act’).

If a bidder acquires control over a target company which controls a subsidiary within the terms of the Act, the bidder thereby also acquires (indirect) control over the subsidiary because the voting rights resulting from the shares the target holds in its subsidiary are attributed to the bidder. Under the Act, a mandatory bid is triggered by the acquisition of both direct and indirect control. Therefore, the bidder would, in principle, be obliged to make a mandatory offer for all shares of the subsidiary as well (provided that its shares are admitted to trading on an organised market). As such an obligation to make a mandatory offer in the case of indirect control can make takeover bids much more expensive or even prevent a bidder from making a takeover bid for a company which has one or several subsidiaries, the Federal Authority may grant (upon application of the bidder) an exemption from the obligation to make a mandatory offer, provided that the book value of the shareholdings in the subsidiary does not exceed 20 per cent of the book assets of the target company.

Supervision and Sanctions:

The Federal Authority for Securities Trading situated in Frankfurt (Main) is in charge of administering the new takeover law and supervising compliance with the provisions of the Act on Acquisition of Securities and Takeovers. It has been granted the necessary supervisory and investigatory powers.

An appeals committee (Widerspruchsaußschuff) consisting of the President of the Federal Authority (or a fully-qualified lawyer appointed by the
President) as chairman and five other members has been installed within the Authority. The Appeals Committee decides on most of the appeals of the decisions of the Federal Authority. Appeals are to be decided within two weeks, and the decisions are, in principle, immediately enforceable. The decisions of the Federal Authority are subject to appeal (Beschwerde) to the Court of Appeals (Oberlandesgericht), Frankfurt (Main), within a period of one month. The decisions of the Court of Appeals are not subject to further appeal.

The Act on Acquisition of Securities and Takeovers provides for sanctions to be imposed by the Federal Authority for Securities Trading should the bidder or any other person violate the duties and obligations imposed on them by the Act. The sanctions include fines of up to one million Euro as well as the loss of rights arising from shares (e.g., voting rights) owned by the bidder throughout the period in which certain obligations are not fulfilled.

INTRODUCTION OF A SQUEEZE-OUT RULE

So far, German law has not permitted squeeze-outs of minority shareholders. In order to enable a majority shareholder to acquire all of the shares in the target company, a squeeze-out rule has been introduced, under which a squeeze-out of minority shareholders is possible against adequate cash compensation if the majority shareholder has acquired at least 95 per cent of the shares.

The new squeeze-out rule is not part of the new Act on Acquisition of Securities and Takeovers, but is included in the Stock Corporations Act (Aktiengesetz); it entered into force together with the Act on Acquisition of Securities and Takeovers. As a consequence, the squeeze-out rule does apply to all stock corporations, whether listed or not. Furthermore, there is no obligation to launch a public bid as a prerequisite of a squeeze-out.

The shareholders must decide in the shareholders’ meeting, which is called upon the application of the main shareholder, whether to approve the squeeze-out. When determining the amount of the cash compensation, the majority shareholder has to take into account the situation of the company at the time of the shareholders’ meeting, in which the shareholders decide whether or not to approve the squeeze-out. According to court rulings, compensation paid to shareholders may not be below the market value of the shares. The main shareholder must provide the shareholders’ meeting with a comprehensive written report in which the adequacy of the amount of the cash compensation is explained and substantiated. In addition, one or several independent qualified auditors to be appointed by the court upon motion of the main shareholder shall review the adequacy of the cash compensation.

The resolution of the shareholders’ meeting may be set aside upon an action for a violation of the law or the articles (Anfechtungsklage). However, such
action may not be based on the ground that the cash compensation offered to the minority shareholders is inadequate. Upon motion of a minority shareholder, the adequacy of the cash compensation will be determined in special court proceedings (Spruchstellenverfahren) which will not delay or prevent the execution of the squeeze-out.

HENGELER MUELLER
Düsseldorf, January 2002