

Dissertation on

**Europe's long march to a unified takeover regulation:
The 13th Company Law Directive on
Takeover Bids – quo vadis?**

By Julia Meyer (stud.no. myrjul004)

Supervisor: Professor Dermott J. Devine

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the degree of Master of Laws in approved courses and a minor dissertation. The other part of the requirement for this degree was the completion of a programme of courses.

June 2001

Ed J
SCHOOL FOR ADVANCED LEGAL STUDIES
Faculty of Law
University of Cape Town
Cape Town
South Africa

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

Table of Contents:	page
Preface	1
Chapter 1: Takeover Law	3
1.1 Definitions	3
1.2 Aims of takeover regulation	4
1.2.1 Diverging interests of owners and controllers: danger of abuse? ...	4
1.2.2 Main principles of takeover regulation	6
1.2.3 Self-regulation or statutory regulation?	7
(a) Advantages of self-regulation	7
(b) Disadvantages of self-regulation.....	8
(c) Conclusion	9
Chapter 2: Takeover regulation in Europe and in the United States	11
2.1 History of takeover regulation in Europe	11
2.2 Status quo in the EU member states and in the U.S.	14
2.2.1 The United Kingdom	14
(a) Nature and purpose of the City Code.....	14
(b) The legal status of the City Panel.....	15
(c) Enforcement	16
(d) Basic contents of the City Code.....	16
(e) Fundamental principles	18
2.2.2 Germany.....	18
(a) Voluntary Takeover Code.....	18
(b) The forthcoming Takeover Act.....	19
(c) Outlook.....	22
2.2.3 Other EU member states	23
(a) France.....	23
(b) The Netherlands	26
(c) Italy	27

2.2.4	The United States	28
(a)	The role of the SEC.....	30
(b)	Takeover practices in the U.S.	30
(c)	The Business Judgement Rule	33
(d)	Basic contents of the Williams Act.....	35
(i)	Predisclosure requirements.	35
(ii)	Bidder disclosure requirements.....	36
(iii)	Substantive other requirements.....	36
(iv)	Antifraud provisions.....	37
2.3	Necessity for unification of takeover law in the EU.....	37
Chapter 3: The framework for EU legislative action		40
3.1	Legal foundations and instruments of European company law.....	40
3.2	Subsidiarity under the EU.....	42
3.3	Decision-making in the EU.....	43
3.3.1	The institutions involved.....	44
(a)	The Commission	44
(b)	The Council.....	44
(c)	The Parliament	45
3.3.2	The main legislative procedures.....	46
Chapter 4: The main controversial issues.....		52
4.1	Supervisory Authority.....	52
4.2	Alternative for the notion of a mandatory bid	53
4.3	Duty of neutrality.....	54
4.4	Rights of employees.....	57
Chapter 5: Conclusion		58
Appendix: The 13th European Company Law Directive on Takeover Bids (as agreed in the Conciliation Process)		60
Bibliography		68

- Preface -

The global financial markets are subject to lasting and far-reaching structural changes. One consequence of these changes are the increasing number and growing impact of company takeovers and mergers worldwide¹. Accordingly, European takeover activity has experienced an enormous increase in the last years. In 1999, deals involving European firms added up to US-\$ 1.5 trillion, more than twice as much as the previous year. For the first time since the beginning of the 1990s, Europe reached a higher volume of deals than America².

The main reasons for the global increase of takeovers and mergers are technical changes, especially in the field of communication and information technology. As a result, markets are growing together and national boundaries play a less significant role to the economic activity of corporate enterprises³.

In Europe, this process is encouraged by the adoption of a single market with a single currency. As the single market develops, domestic sectors such as banking and retailing are confronted with a growing pressure to strike out across the continent, motivated by obtainable cost advantages as well as by the fear of being overtaken by rivals and so disappointing investors. The euro has allowed investors to become much more flexible. The mobility of capital causes higher competition amongst companies seeking for investors' attention. Currency concerns do not affect investment decisions within the Community any more⁴.

Obstacles in this consolidation process have been financial and political establishments in Europe that kept frustrating hostile takeover bids, which thus rarely produced any result. However, over half of the bids launched in 1999 succeeded⁵. Facing the high number of hostile takeovers in the US in the last decades and growing cross-border takeover activity within Europe, the EU-Commission aims to find a regulatory solution for the European corporate

¹ Pöttsch/Möller *Das künftige Übernahmerecht (Future Takeover Law)* at 4.

² The Economist: "*Mariage a la mode – Why European companies are rushing to the altar*", 29.04.2000.

³ Pöttsch/Möller at 4.

⁴ The Economist: "*Mariage a la mode*".

market⁶. The current situation is a patchwork of broadly differing national rules. Whereas the British City Code on Takeovers and Mergers is friendly to takeover activities, the Germans' voluntary Takeover Code is less open, and laws in the Netherlands even thoroughly reject investors, the latter not having experienced any hostile takeover yet⁷. The liberal Dutch laws were used by Italian fashion house Gucci to ward off an unwanted takeover attempt by French luxury goods group LVMH, a case pending in the Amsterdam Court of Appeals at the moment. The complex and bizarre course of this case is described by an LVMH executive: "*We build a single market with a single currency, and at the same time, we let an Italian company use Dutch law to defend itself from a French company.*"⁸.

The Gucci case highlights the urgency of a unified takeover law for the European Union, as do some others. This dissertation will introduce basic problems of takeover regulation on specific issues from a European perspective. It will outline European legislation procedure as well as the controversial debate between the EU institutions involved. It will eventually try to predict the possible outcomes of the legislative process.

⁵ The Economist: "*Mariage a la mode*".

⁶ Nagel *Deutsches und europäisches Gesellschaftsrecht (German and European Company Law)* at 295.

⁷ The Wall Street Journal: "*Pressure grows to unify Europe's takeover laws*", 13.12.1999.

⁸ The Wall Street Journal: "*When it comes to takeovers, Europe isn't unified*", 23.04.1999.

CHAPTER 1

TAKEOVER LAW

1.1 Definitions

Dealing with takeover law in general firstly requires a definition of the term. The conventional meaning of ‘takeover’ is the acquisition by one company (i.e. the bidder or the offeror company) of sufficient shares in another company (i.e. the target or the offeree company) to give the purchaser control of that other company. Through the acquisition of shares including their voting rights, the bidder therefore gains control over the management and also, indirectly, over the target’s assets⁹.

Takeovers are a means of business expansion. Companies may seek vertical integration, if they acquire others at different stages in the production process, e.g. suppliers or customers. They may also seek horizontal integration in the case of acquisition of companies at the same stage of the production process, i.e. business competitors such as manufacturers of the same type of products or distributors competing in the same market area. Another possibility is the pursuit of diversification as in the case of conglomerates, i.e. the coming together of companies, which are neither competitors nor potential or actual customers or suppliers of each other, hence not related to each other horizontally or vertically¹⁰.

Frequently the term ‘merger’ is used as an alternative. This term describes the uniting of two companies, usually of roughly the same size. As this can happen through the acquisition by one company of a controlling holding of shares in another, the terms ‘takeover’ and ‘merger’ are often synonymously used. A ‘merger’ may result in a new company being formed. The term ‘merger’ can also describe a takeover that is effected with the concurrence of

⁹ Cilliers/Benade *Corporate Law* at 459; Farrar/Hannigan *Farrar’s Company Law* at 588; Palmer’s *Company Law* at 1133.

¹⁰ Farrar/Hannigan *Farrar’s Company Law* at 752; Weinberg/Blank on *Takeovers and Mergers* at 1003.

the parties involved. In common usage the term ‘takeover’ often relates to company law while ‘merger’ is used in relation to competition law¹¹.

A ‘takeover bid’ or ‘tender offer’ is the technique for effecting a takeover, frequently against the wishes of the target’s management. It may take the form of an offer to purchase shares for cash or of a share-for-share exchange, or of a combination of the two forms¹².

In this dissertation, the term ‘takeover’ will be used according to the definition above.

1.2 Aims of takeover regulation

1.2.1 Diverging interests of owners and controllers: danger of abuse?

As long as a company is controlled by persons who own its share capital completely, there are no conflicts between the interests of the controllers of the company and the interests of the owners of its shares. But when control becomes vested in persons with less than full ownership, ownership and control separate at least partially and interests diverge. Distinct interests of the controllers can be distinguished and consequently their personal advantage in being in such a controlling position¹³.

The crucial interests of the owners of a company’s share capital are that the company should make maximum profit at a reasonable risk. Moreover, the profit should be distributed to the shareholders to such an extent as the interests of the business allow. The owners have an additional interest in the fact, that shares should be freely marketable at a reasonable price.

This clear perspective leads to the shareholding owners’ essential interests concerning takeovers and mergers. Firstly, from the shareholders’ point of view, the company should only take over or merge with another if that would improve its own profit chances. Secondly, the company should only agree to be

¹¹ Cilliers/Benade *Corporate Law* at 460; Farrar/Hannigan *Farrar’s Company Law* at 589; Weinberg/Blank on *Takeovers and Mergers* at 1001.

¹² Cilliers/Benade *Corporate Law* at 460; Farrar/Hannigan *Farrar’s Company Law*, at 589.

¹³ Farrar/Hannigan *Farrar’s Company Law* at 305; Weinberg/Blank on *Takeovers and Mergers* at 1017.

taken over if the shareholders are likely to be better off with the consideration offered than by retaining their shares in the original company¹⁴.

The controllers of the company, i.e. generally the board of directors authorized by the shareholders, have the duty to act bona fide in the interests of the company¹⁵. This implies that the shareholders as a group will derive their benefit from the well-being of the company, though there does not exist any fiduciary relationship between the directors and individual shareholders. However, it can be seen that the directors' position is redressed to some extent by defining their duty to act bona fide in the interests of the company in terms of the interests of shareholders¹⁶.

The directors' interests run in somewhat the same direction, as the prosperity and welfare of the company will maintain or even improve the rewards for the management. Part of the company's income may be distributed to them in the form of remuneration and gratuities. Further incentives are power and prestige resulting from successful management of the company and causing shareholder welfare. Then again, in the field of takeovers and mergers, the controllers' reasons for initiating consolidating activities might be of a selfish nature and hence diverge from the interests of the shareholders. For instance, they may resist a bid that would be in the interests of shareholders just to protect their own positions as directors. Conversely, they may recommend a bid, which does not conform with the shareholders' interests, to maintain their employment under the new controllers or to be paid out in a very profitable way¹⁷.

These diverging interests bear the danger of abuse of powers. In a takeover situation, the managing controllers of a company are frequently tempted to disregard shareholders' interests for their own financial benefit. The complexity of business life will generally offer management a wide choice of activities, each having advantages and disadvantages for the company, but none of them being a clearly unjustifiable course of action to adopt¹⁸. Proof of

¹⁴ Weinberg/Blank on *Takeovers and Mergers* at 1018.

¹⁵ Cilliers/Benade *Corporate Law* at 139.

¹⁶ Cilliers/Benade *Corporate Law* pager 148;
Farrar/Hannigan *Farrar's Company Law* page 381.

¹⁷ Weinberg/Blank on *Takeovers and Mergers* page 1019.

¹⁸ Weinberg/Blank on *Takeovers and Mergers* page 1020.

a violation of the duty to act bona fide in the interests of the company justifying judicial measures against management may well be impossible to furnish.

This danger of abuse of power by management must be taken into account in establishing a regulatory system in the field of takeovers and mergers.

1.2.2 Main principles of takeover regulation

Owing to the complexity and susceptibility of the markets, clear rules are necessary, whether they are of a self-regulatory or of a statutory nature. Rules must be known to all interested parties beforehand to guarantee a fair and transparent procedure in the settlement of takeover bids. To ensure obedience to these rules, there has to be a supervisory authority with the necessary power to enforce compliance with the rules. Some basic principles occur in all kinds of takeover regulatory systems as a result of reflection on the necessity for protection of the parties involved.

In a takeover situation, holders of target companies' shares are confronted with an impending change of control over which they are likely to have little influence on if any. The shareholders must have the choice whether they want to continue the part ownership in the company that is to say whether they have optimistic expectations concerning continuance of business by a new management. They need to be fully informed about the pending transaction. They must have sufficient time to check the offer documents accurately to establish objectively a well founded assessment of the offer for themselves. Furthermore, they must have the chance to sell their shares without any detriment from the impending takeover. The target's shareholders must be treated equally, i.e. everybody must have the opportunity to accept the offer of the bidder under the same conditions. These principles all follow the core idea of the extensive *protection of minority shareholders*.

The target's management must be prevented from influencing the share price by publishing manipulative information and from making profit from their inside information. Of course, the bona fide duty to act in the interest of the company is also applicable in a takeover situation. Consequently, the

target's directors may not take any action concerning the bid that might harm the company, be it conduct to counteract or to encourage the success of the bid. To safeguard the company from mismanagement, *transparency* must be achieved to the greatest extent possible.

1.2.3 Self-regulation or statutory regulation?

Rules on takeovers, as others, can be set in various regulatory mechanisms. The different forms of regulation range from statutory prescriptions including sanctions (e.g. the Swiss and Austrian Takeover Acts) to codes of practice drawn up by private supervisory bodies (e.g. the British City Code on Takeovers and Mergers). The question of adequate regulation of takeovers requires an analysis of the strengths and weaknesses of the different forms.

(a) Advantages of self-regulation

The main arguments pro self-regulation are particularly *higher flexibility, expertise and lower costs*¹⁹.

Flexibility is typically appearing in self-regulatory systems under two aspects. One features direct responsiveness to changing circumstances from being able to make changes quickly and through access to information from informal sources. The other is flexibility in an administrative sense. Self-regulatory regimes are closer to the field of action than governmental bodies. Rule-making duties and enforcement can be carried out on a co-operative, consensual basis by supervision in an unbureaucratic fashion²⁰. Imminent weaknesses of flexibility are the potential for arbitrary treatment arising out of vagueness of rules, as well as concerns over procedural mechanisms for both adjudication and rule-making through the self-regulatory authority²¹.

In terms of *expertise*, a distinction can be drawn between that of staff in the public sector and of staff in self-regulatory authorities. The former is likely to be better versed in policy formulation and providing ministerial support, the

¹⁹ Cheffins *Company law: Theory, Structure, and Operation* at 379 et seq.; Cheffins relates to experiences with self-regulation in the United Kingdom which is said to have a tradition of self-regulation.

²⁰ Cheffins at 379-381.

²¹ Cheffins at 384.

latter might have a better understanding of company affairs and equity markets, derived from proximity to the marketplace. Self-regulatory bodies are more likely to have access to expertise from the private sector, whereas public bodies are more likely to be staffed by career civil servants²². However, this does not have to be necessarily so. At least the recruitment of managers from the private sector into leadership positions in governmental bodies is a reappearing phenomenon.

From a *cost* point of view, advantages from self-regulation may derive from the above characteristics concerning staff, speed and flexibility. But in both self-regulative and statutory models the problem of agency costs occurs. Agency costs arise out of the relation between principals and agents, in a corporate context shareholders and managers respectively. Both are supposed to have divergent incentives, each acting in their own best interest, which does not necessarily have to be in the best interests of the counterpart²³. Principals can limit the divergence between their interests and the interests of agents by giving them appropriate incentives and by monitoring their activities. Agents can expend resources to guarantee that they will not take action which is detrimental to principals. But even after these measures, there will remain some divergence between agents' self-interested incentives and those maximizing the welfare of principals. These agency problems inherent in cutting costs might be even greater in government departments than in a self-regulatory body. The former have restrained incentives for cost control, whereas the latter is watched by those institutions and corporations that voluntarily organised themselves in the body²⁴. The monitoring of the self-regulatory authority by its founding corporate bodies is therefore necessarily implied. The incentive to minimize agency costs is thus induced by self-interest of the self-regulatory body. This self-interest may be lacking in the public sector, which entails likely higher agency costs.

(b) Disadvantages of self-regulation

²² Cheffins at 386-388.

²³ Definition from <http://newrisk.ifci.ch/glossary.htm> (accessed on 06.04.2001).

²⁴ Cheffins at 391-395.

However, self-regulation does not only offer advantages as compared with supervision by government officials. There are some problems to be dealt with. The most counterproductive elements in self-regulatory systems are *bias, co-ordination and enforcement problems*²⁵.

The difficulty involved with bias is that self-regulatory bodies may unduly favour the interests of their own members at the expense of other interest groups. But bias is not an inevitable feature of self-regulation. Instead, supervisory bodies are confronted with pressures providing incentives to act in a balanced fashion, e.g. through public and media attention. Such scrutiny is likely to deter bias to a certain extent since those in charge fear the threat of government-imposed supervision, that might follow the allegations of self-interest²⁶. However, government authorities might also develop biases which favour interests linked to typical career patterns of their staff.

Furthermore, *co-ordination problems* can arise between the self-regulated bodies and public authorities when it comes to development or implementation of new policies and reforms. Comprehensive regulatory changes often require the prohibition or alteration of well-established practices. Such changes are difficult to enforce if the state depends on transformation by self-organized private schemes which may have developed and relied upon these practices. Devolution of authority to self-regulatory organisations can also cause problems if government does not succeed in taking some form of leadership role. Then the overall regulatory system is in danger of lacking coherence²⁷.

Finally, self-regulatory bodies might have difficulties in *enforcing* their own set provisions. They need the requisite powers to deter market participants from engaging in prohibited conduct. If direct statutory backing is missing, these private bodies are not endowed with the legislative authority to investigate, prosecute and punish misbehaviour, which undermines the possibility of effective enforcement²⁸. This must also be considered whilst establishing self-regulating authorities.

(c) Conclusion

²⁵ Cheffins at 397 et seq..

²⁶ Cheffins at 397-400.

²⁷ Cheffins at 405, 406.

²⁸ Cheffins at 412.

Questioning the strengths and weaknesses of self-regulative and statutory regimes, there can be no clear answer on which form of regulation is the most suitable. Both have their advantages and disadvantages. The design of a regulatory framework definitely needs an adjustment to the particular context. Important issues in takeover regulation, certainty of law, foreseeability, clarity and practicability of provisions, must be ensured. Owing to the fast developments and changes on corporate markets, a flexible system with a strong and competent supervisory authority must be created. This monitoring device must work independently following the principles of a free market. A system of self-regulatory takeover regulation would require statutory backing to invest a supervisory body with the essential powers of enforcement. It would need to be structured in a transparent way guaranteeing a clean, uninfluenced and objectively orientated manner of decision-making. Then a statutory regime would need to be endowed with flexibility and a supervising body with a high degree of professionalism and expertise. Both forms are conceivable as long as the particular takeover context and difficulties are borne in mind.

CHAPTER 2

TAKEOVER REGULATION IN EUROPE AND IN THE UNITED STATES

2.1 History of takeover regulation in Europe

The history of European legal regulation on takeovers commenced in 1974 with the Pennington Report to the Commission. The Commission first announced its intention of proposing a directive on the approximation of member states' laws on takeover bids in its 1985 White Paper on completing the Internal Market.

After drafts in 1987, Proposals for Directives were published in 1989 and 1990²⁹. The first of these had obviously been strengthened as a reaction to Benedetti's struggle to takeover the Société Générale de Belgique in 1988, which was warded off by Cie. de Suez' coming in as a white knight to enable SGB to remain Belgian. Benedetti's bid was the biggest hostile takeover bid in European history at that time. The second Proposal was an unsuccessful attempt to improve the situation in response to considerable criticism, which was mainly directed at the very detailed regulation of the conduct of takeovers of listed public companies³⁰.

The draft adopted many of the features of the UK Takeover Code as to the timetable for offers, the content of offer documents, the independent supervision of the takeover process, the restriction of defenses available to the board of directors of the target company and the obligation on a bidder to bid for the remainder of the shares when he has acquired a certain percentage (the so-called mandatory bid). The last two aspects of the Proposal were particularly controversial, especially the mandatory bid, which is not common in Continental member states and which was opposed by them³¹. One might have expected approval from the UK, as the proposed Directive was not only greatly influenced by the British, but was actually the result of British

²⁹ OJ C 64, 14.03.1989; later version OJ C 240, 26.09.1990, Com (90) 416 final.

³⁰ Hopt *Europäisches und deutsches Übernahmerecht (European and German Takeover Law)* ZHR 1997 at 373.

initiatives based upon the hope that the Directive would dismantle laws in Germany, the Netherlands and other continental countries which were hostile to takeovers³². However, the UK expressed concern about the continental tendency to regulate such matters legally, preferring self-regulation by its City Code on Takeovers and Mergers with its supervisory City Panel and the least possible litigation³³.

Negotiations in the Council working group were suspended in June 1991 due to strong opposition from some member states. In its declaration to the European Council in Edinburgh in December 1992, the Commission said it would withdraw its proposal, reconsider it under the impact of the subsidiarity principle of the Maastricht-Treaty, and revise it. This was confirmed at the Essen European Council in December 1994. After the Edinburgh summit, the Commission initiated detailed consultations with the member states in June 1993 in order to hear their views on the proposal and, generally, on the need for harmonisation in the field of takeovers.

On 8 February 1996, the Commission Proposal was resubmitted in a dramatically diluted form as a “framework” directive³⁴. This second proposal was drawn up in the light of the outcome of the above-mentioned consultations with the member states, in which a majority expressed a preference for a directive establishing general principles governing takeovers as opposed to the detailed harmonisation in the original text. For instance, the 1996 proposal did not define a shareholding threshold, at which the mandatory rule is triggered, but henceforth left it to member states to specify it in accordance with their practice.

The Commission argued that it is a legitimate concern of the European Union that within the internal market, shareholders of listed companies should enjoy equivalent safeguards in the case of a change of control and that a certain level of transparency should prevail during takeovers. Therefore the aims of the Directive are to ensure an adequate level of protection for shareholders

³¹ Farrar at 600.

³² DTI Consultation Paper *Barriers to Takeovers in the European Community*, A Consultative Document January 1990; Hopt at 373.

³³ Hopt at 373.

³⁴ Com (95) 655 final, 07.02.1996; Hopt at 373.

throughout the European Union and to provide for minimum guidelines on the conduct of takeover bids³⁵.

The Economic and Social Committee endorsed the second proposal in July 1996³⁶. The European Parliament delivered its opinion it under the co-decision procedure at its plenary session in June 1997. Parliament approved by a large majority, whilst proposing some 20 amendments³⁷. The amended, third proposal of the Directive took account of most of the amendments proposed by the Parliament and also of concerns expressed by the Economic and Social Committee³⁸. The Proposal was based on art. 44(2)(g) (former 54(3)(g)) of the EC Treaty, and could therefore be adopted by a qualified majority in the Council³⁹. However, controversial negotiations on the amended proposal lasted until June 1999, when political agreement on the text of the directive was attained. However formal adoption by the Council of a Common Position on the takeover directive failed owing to a reservation raised by Spain concerning the implementation of the directive in Gibraltar. This problem was solved in April 2000 by a bilateral agreement between Spain and the UK⁴⁰.

The Council then unanimously adopted a Common Position on the directive on 19 June 2000 at the Luxembourg summit, accepted by the Commission one week later. Both the Common Position and the Commission Opinion were transmitted to Parliament in September 2000. On 13 December 2000, the Parliament voted on proposals for alterations of the directive by its Legal Affairs Committee. These approved the Common Position subject to fifteen amendments by which the underlying principles were fundamentally modified, if not entirely removed. The Commission adopted a position on Parliament's amendments in accordance with Article 251(2)(c) of the EC Treaty, rejecting most of them as being opposed to the directive's fundamental principles⁴¹.

³⁵ Explanatory Memorandum to *Commission Proposal for a 13th European Parliament and Council Directive on Company Law Concerning Takeover Bids*, Com (95) 655 final, para 6, 07.02.1996 (www.europa.eu.int/prelex: accessed on 10.04.2001).

³⁶ OJ C 295, 07.10.1996.

³⁷ OJ C 222, 21.07.1997.

³⁸ OJ C 378, 13.12.1997; Com (97) 565 final.

³⁹ Hopt at 374.

⁴⁰ Pöttsch/Möller at 5.

⁴¹ Com (2001) 77, 12.02.2001.

2.2 Status quo in the EU member states and in the U.S.

The current situation regarding takeover regulation in Europe is a variety of diverse national laws ranging from the shareholder-friendly to the downright hostile. The author will deal mainly with the differing regulatory systems and practices of the United Kingdom and Germany, whilst giving an overview of some other EU member states. As the development of increasing cross-border acquisitions is not a European phenomenon, but is frequently tangential to the American corporate market, the American regime is also summarised.

2.2.1 The United Kingdom

In the United Kingdom, shareholder interests precede all other corporate constituencies as they are regarded as owners of corporate enterprise⁴². A significant portion of company and securities law is based on judicially-developed theories of fiduciary duty. The British clearly prefer their self-regulation to a statutory regime because of its flexibility, certainty and speed⁴³. As a result, takeovers in the UK are regulated by the City Panel on Takeovers and Mergers (the City Panel), a self-regulatory body that operates pursuant to the City Code on Takeovers and Mergers (the City Code). Public companies adhere to the City Code and rulings by the Panel are respected, owing to its ability to respond swiftly to meet changing circumstances and its power to apply severe sanctions against offenders. The Panel is acknowledged as an effective and constructive force in matters relating to takeovers and mergers in the UK⁴⁴.

(a) Nature and purpose of the City Code

The City Panel was set up in 1967 to govern matters relating to takeovers and mergers by voluntary principles⁴⁵. The main function of the Panel is to supervise the operation of the City Code, which was first published in March 1968. The Code and the Panel principally aim at ensuring fair and equal

⁴² King *King Report on Corporate Governance* at 1.

⁴³ Farrar at 591.

⁴⁴ Gore-Browne *on Companies* at 29.003.

⁴⁵ Halsbury's *Laws of England* at para 1194.

treatment of all shareholders in the course of takeovers. Furthermore, the Code provides an orderly framework within which takeover bids can be conducted. The shareholders of the target company have the opportunity to consider an offer for their company on its merits, on an informed basis and in an orderly and limited timescale⁴⁶. The Code represents the collective opinion of those professionally involved in the field of takeovers on good business standards and how fairness to shareholders can be achieved (Introduction para 1).

(b) The legal status of the City Panel

The City Panel is not a statutory body. Neither its decisions nor the provisions of the City Code have or seek to have the force of law (Introduction para 1). The precise legal status of the City Panel was analysed in *R v Panel on Takeovers and Mergers, ex parte Datafin plc*⁴⁷ where the issue was whether decisions of the Panel were susceptible to judicial review. Donaldson M.R. noted that the Panel was a remarkable body performing its functions without visible legal support and that its self-regulatory character was the result of a group of people acting in concert, using their collective power to force themselves and others to comply with a code of conduct of their own making. Nonetheless, the court thought that the Panel should be subject to judicial review as subjective rights can be affected by its decisions. The Panel in carrying out its responsibilities was performing a public duty and was amendable to judicial review. However, Donaldson M.R. taking into consideration

“...the special nature of the panel, its functions, the market in which it is operating, the time scales which are inherent in that market and the need to safeguard the position of third parties, who may be numbered in thousands, all of whom are entitled to continue to trade on an assumption of the validity of the panel’s rules and decisions, unless and until they are quashed by the court...”

regarded the relationship between the Panel and the court being of *“...rather historic than contemporaneous”* nature⁴⁸.

⁴⁶ Farrar at 590; Gore-Browne *on Companies* at 29.002.

⁴⁷ (1987) 1 All ER 564.

⁴⁸ (1987) 1 All ER 564, 579.

In *R v Panel on Takeovers and Mergers, ex parte Guinness plc*⁴⁹ Donaldson M.R. added that the court will only intervene, if something “...had gone wrong with the Panel’s procedure so as to cause real injustice and require the intervention of the court”⁵⁰. This general approach is seen as highly acceptable to the market, on the one hand allowing judicial review, but on the other preventing parties indulging in tactical litigation as a defensive mechanism⁵¹. Hence, unless and until the Panel’s decisions are set aside by a court of competent jurisdiction, its decisions remain fully effective. Government and other regulatory authorities acknowledge that those who seek to take advantage of the facilities of the securities markets in the UK should conduct themselves in matters relating to takeovers in accordance with the best business standards and so according to the City Code⁵².

(c) Enforcement

For those who do not do so, the facilities of those markets may be withheld by way of sanction. Breach of the City Code carries with it penalties ranging from a private reprimand by the Panel, to public censure, reporting the offender’s conduct to another regulatory body such as the Department of Trade and Industry (DTI), the London Stock Exchange (LSE), the Financial Services Authority (FSA) or relevant self-regulating organisations recognised under the Financial Services Act 1986 (SROs), or requiring further action to be taken as the Panel thinks fit (Introduction para 3). The FSA and SROs may require that those subject to their jurisdiction should not act in a takeover for any person who does not appear likely to comply with those standards. Moreover, if a person authorised by the FSA or an SRO to carry on an investment business fails to comply with the Code or a ruling of the Panel, that may lead to the withdrawal of authorization⁵³.

(d) Basic contents of the City Code

⁴⁹ (1989) 1 All ER 509.

⁵⁰ (1989) 1 All ER 509, 510.

⁵¹ Farrar at 592; Palmer at 1178, 1179.

⁵² Gore-Browne *on Companies* at 29.002.

⁵³ Gore-Browne *on Companies* at 29.002.

The Code requires persons who have acquired thirty percent of the voting stock of any company to make a cash offer for the entire company, which is conditioned upon receiving at least fifty percent of the voting shares (Rule 5.1)⁵⁴. Once the bidder has received fifty percent of the voting shares, it can make the offer unconditional (Rule 10). If the offer lapses without becoming unconditional, the bidder and persons acting with him cannot make a further bid for a period of one year, unless with the permission of the City Panel (Rules 9.1, 9.2, 9.3, 10). Once a bidder has acquired ninety percent of the shares for which the offer was made, it can force the remaining ten percent to accept under the same terms as the takeover bid (Rule 9.3). Acquisitions of fifteen percent of an issuer's shares trigger the requirement to notify the issuer and the LSE of this fact by the next day (Rule 17.1).

The Code consists of ten General Principles and thirty-eight specific Rules which are applicable to all offers. It further provides that both General Principles and Rules must be interpreted to achieve their underlying purpose and their spirit must be observed as well as their letter (Introduction para 3(a)). Among the technical requirements is that the bidder must first make the offer to the board of the target company. If the bidder has made a firm determination without preconditions to make a bid or has to make a bid because it and parties in concert with it have acquired thirty percent of the outstanding shares, the bid must be publicly announced (Rule 2.2).

Detailed disclosure by the bidder is required in the offer document with regard to, among other things, all the terms and conditions of the offer, financial and other conditions concerning the offeror, including shareholders in a company formed to conduct the bid, the bidder's financial resources (all cash required to pay the offer price must be available), and agreements, arrangements, or understandings between the offeror and directors or shareholders of the offeree (Rule 24). The bidder must post its offering documents to the shareholders within twenty-eight days of the announcement (Rule 30.1). The board must then obtain competent independent advice (Rule 3.1). Approximately fourteen days after the bidder posts the offering memoranda, the board must furnish the shareholders with its views on the

⁵⁴ Weinberg&Blank *on Takeovers and Mergers* at 7042, 7043.

offer, along with advice received from an independent advisor (Rule 30.2). The offer must remain open for twenty-one days from the date the offering documents are initially posted (Rule 31.1).

(e) Fundamental principles

More important than these procedural requirements are the fundamental principles that shareholders of an offeree company must decide whether or not an offer should succeed, and that all equity holders must be treated equally⁵⁵. In addition, after an offer is communicated to the board, or even if a board only believes that an offer is imminent, the offeree board must not take any action without the approval of shareholders at a general meeting. This could effectively frustrate an offer or deny the shareholders the opportunity of deciding on its success.

2.2.2 Germany

The German system of co-determination entails that employees are represented on the supervisory board (*Aufsichtsrat*) of the corporation and have as great a claim to corporate profits as shareholders. Commercial banks are the major shareholders of the most significant public companies, so lenders, rather than shareholders, have traditionally taken the lead in allocating capital⁵⁶.

German takeover and acquisition practice is quite different from that in many other countries. Acquisitions are traditionally made by private agreement⁵⁷. Following German reunification and the greater pressures for capital experienced by German corporations, changes are slowly being exerted upon German public corporations, but hostile takeovers are still rare and capital investors are not as protected as they are elsewhere⁵⁸.

(a) Voluntary Takeover Code

By now, the regulation of takeover bids has been a matter of voluntary self-regulation in Germany. The Takeover Code was introduced in October

⁵⁵ Farrar at 594.

⁵⁶ King *King Report on Corporate Governance (1994)* at 2.

⁵⁷ Begg *Corporate Acquisitions & Mergers* at pages 4.19, 4.49.

⁵⁸ Greene at 836.

1995 by the so-called Stock Exchange Experts Commission, which has been formed by a working group of representatives of various industries and investors. It has subsequently been amended in reaction to criticism and because of the possible statutory regulation of takeovers. The Code is administered by the Takeover Commission, whose members are appointed by the Stock Exchange Experts Commission, from the financial community, including credit institutions, academia, investment services and other participants in the capital markets. The Code's applicability depends on its formal acknowledgement. Parties must provide an affirmative "accession declaration" to the Takeover Commission, essentially resulting in a declaration that the Takeover Code will be complied with. The acknowledgement is not however enforceable, but due to the non-statutory nature of the Code is an entirely voluntary act. This is seen as a major obstacle to its effectiveness⁵⁹. As of the end of June 2000, the Code has been acknowledged by only 621 companies listed in Germany out of a total of more than 900. Only 79 of the DAX-100 companies and only a handful of foreign companies have accepted the Code⁶⁰. The weak adherence to the Code's provision is one of the decisive reasons why the Code has not been as successful as, for example, the City Code. Another major deficiency resulting from the non-statutory nature of the Code is the limited power of the Takeover Commission to impose sanctions. The only means of enforcement is the issuing of a public reprimand for companies failing to adhere to the Code⁶¹.

Accordingly, the urgent need for a binding statutory regime for the regulation of takeovers was generally recognised, even by the Commissions involved. The Stock Exchange Experts Commission proposed statutory provisions and adequate sanctions for violations⁶².

(b) The forthcoming Takeover Act

⁵⁹ Greene at 835, 836.

⁶⁰ Pöttsch/Möller at 13.

⁶¹ Hopt at 395, 396.

⁶² *Standpunkte zur künftigen Regelung von Unternehmensübernahmen (Consultation paper on Future Takeover Regulation)* published 02.99, www.bundesfinanzministerium.de: accessed on 03.02.2001; Pöttsch/Möller at 13.

On 12 March 2001, the German Federal Ministry of Finance published a draft of a future German “Acquisition of Shares and Takeover Act” (*“Wertpapiererwerbs- und Uebernahmegesetz” (WUEG)*) which should come into force by 1 January 2002. The Act should provide for takeovers and any acquisitions of securities in general. It is strongly influenced by the imminent 13th Directive on Takeover Bids and will, according to the German legislator, be amended after the directive’s final adoption in order to comply with the latter.

Chapter 6 of the forthcoming act provides serious sanctions for offences. Penalties include fines up to 1.5 million euro, but the responsible supervising authority, the Federal Authority for Securities Trading (*Bundesaufsichtsamt fuer den Wertpapierhandel*), may also ultimately prohibit a defective bid⁶³. The draft E.U. Directive leaves both the nature and scope of the penalties to the discretion of the member states, but requires that the sanctions must provide sufficient incentives to promote compliance (art. 12 of the draft Directive).

One of the most controversial issues of the Takeover Code, now contained in the draft of the Act, was the requirement to make a mandatory offer at the moment of passing a controlling threshold. The latter is now defined in section 29 as being thirty percent, hence a threshold equal to that in the City Code. This obligation is designed to protect minority shareholders against a possibly unwelcome investment by a new majority owner. The submission of a mandatory bid gives minority shareholders the chance to sell their shares at a fair price. The mandatory bid rule was adopted in view of the impending European directive which will also provide for such an obligation (art. 5). The Act, following the draft directive, allows the supervisory authority to grant exemptions from the mandatory bid principle in specific situations, if it thinks that the principles underlying the rule have been comprehensively taken into account (s. 37)⁶⁴.

Furthermore, the draft amends the German Stock Corporation Act (*Aktiengesetz*) and thereby introduces a so-called “squeeze-out” (compulsory buy-out) rule into German takeover law. If the bidder can manage to acquire

⁶³ Frankfurter Allgemeine Zeitung “*Übernahmeangebote erfordern detaillierte Angaben*“ (*Takeover bids require detailed information*), 17.03.2001 (found through LEXIS-NEXIS).

ninety-five percent of the shares for which the offer was made, it may exclude the remaining minority shareholders from the target company (ss. 327(a)-(f) Stock Corporation Act). The inevitable loss of ownership of these shares, which seems to contravene the constitutionally guaranteed protection of ownership, is justified exceptionally as an incentive to strengthening entrepreneurial flexibility and full compensation is to be paid to the shareholder. The rule is there to avoid extravagant formal expenses and costs deriving from very small stakes in a company and to reduce the risk of an abusive exercise of shareholder rights by minority shareholders⁶⁵.

In section 12 the draft Act establishes the minimum information to be contained in the offer document. The bidder must inform the shareholders of the target company on the details of the intended takeover, its effects and the objectives to be achieved by the takeover. The offer must contain all information necessary to enable the shareholders of the target company to make an informed decision whether to accept the bid or not. This includes information on the financing of the takeover, the expected consequences of a successful takeover on the financial conditions, the results of the takeover in view of the bidder, the bidder's ability to finance the takeover, the consideration and the method of its determination, and the plans of the bidder as to the future business of the target, including the impact on employees and their representative bodies⁶⁶. The draft Act is in accordance with the draft directive, which simply states that the offer document has to contain all necessary information and leaves regulation of details to the member states (art. 6 of the draft Directive).

The draft Act obliges the board of managing directors (*Vorstand*) and the supervisory board (*Aufsichtsrat*) of the target company to act neutrally, i.e. they must abstain from measures which may prevent the success of the bid during the period between the launching of the bid and the end of the offer period (section 31). This does not leave the target defenceless, as some measures are expressly conditional on prior shareholder consent. The target may seek alternative bidders (so-called *white knights*) or increase capital and issue new

⁶⁴ Pöttsch/Möller at 17.

⁶⁵ Pöttsch/Möller at 29, 30.

shares, provided that the underlying shareholders' vote was passed within a period of 18 months preceding the publication of the offer document (s. 31(3) of the draft Act).

Section 30 obliges the board to issue a detailed statement on the takeover bid. This has to assess the aims, individual measures and consequences of the takeover. The statement also must deal with the position of employees and their representative bodies, such as the workers' council (*Betriebsrat*). It must be published without undue delay after the offer document has been published⁶⁷.

(c) Outlook

With the latest endeavours to establish a statutory set of rules governing takeovers, Germany is on the right way. A legislative setting is obviously necessary, as the weak adherence to the Takeover Code led to the failure of the voluntary self-regulative system. As even more international takeovers can be expected in the future, only a new statutory law can guarantee companies a framework for competitive equality in the German corporate market and thus attract foreign investors. The draft Act, aligned with the draft European Directive and its role model, the UK City Code, now contains prerequisites for the protection of capital investors and provides for effective sanctions by the responsible supervising authority. The interests of enterprises, managers, minority shareholders and employees are given consideration in a balanced way. Therefore it is equitable that all parties involved must be fully informed at an early stage of the proceedings. This includes the employees, as a successful merger requires as much acceptance as possible by the workforce.

Although Germany has not experienced many hostile takeovers so far, experience in the takeover of the German Mannesmann AG by the British telecommunication giant Vodafone have sufficed to raise awareness of the necessity of a binding legal framework. Under the current draft, management's extensive duty of neutrality leaves little scope for adopting defensive measures unless the consent of the shareholders is solicited. This is still continuously

⁶⁶ Pöttsch/Möller at 20, 21.

⁶⁷ Pöttsch/Möller at 24.

criticised by trade associations, unions, academics and lawyers⁶⁸. However, this fundamental principle will basically remain unaffected, as the proposals under discussion would only introduce amendments on details. The procedure to be adopted reflects principles protecting shareholders, such as transparency and equal treatment of all equity holders. In the result, the Acquisitions of Shares and Takeover Act will not prevent a takeover bid or create serious obstacles for it.

2.2.3 Other EU member states

Facing the pending takeover directive, some EU member states are working on an assimilation of their national laws (see Germany as described above) or have even implemented a new law aligned with the directive (e.g. Austria's new Takeover Act of January 1998). Some have not reacted yet and wait for the directive to come, some of which are more open to takeovers (as France), some less open (as the Netherlands).

(a) France

The corporate landscape of France is subject to rapid structural changes. Though most of the takeovers involving French companies are still recommended, hostile bids are increasing. The French equity market has especially experienced stimulated takeover activity since 1999, when a number of high-profile mergers, including the takeover battle among the banks Banque Nationale de Paris, Paribas and Société Générale, and the battle for control of Gucci involving LVMH took place. While French takeover laws do not discriminate against foreign investors in general, a hostile takeover in France by a foreign investor would face a good deal of public and even official scrutiny⁶⁹.

⁶⁸ Frankfurter Allgemeine Zeitung "*Verbände: Bei Übernahme Neutralitätspflicht lockern*" (*Associations: Ease duty of neutrality in takeovers*), 04.04.2001; "*Vorstandspflicht zur Neutralität geht zu weit*" (*Boards of directors' duty of neutrality goes to far*), 07.04.2001 (both found through LEXIS-NEXIS).

⁶⁹ <http://www.plcinfo.com/scripts>: "*Law and regulation of public takeovers: France*"; New York Law Journal: "*Structuring Acquisitions in France: Critical Issues*", 15.11.1999; found through LEXIS-NEXIS.

France regulates the conduct of takeovers through the Conseil des Marchés Financiers (CMF) and the Commission des Opérations de Bourse (COB), both of which are statutorily created. French law on takeovers is regulated rather extensively⁷⁰. It applies to offers for companies with shares listed on a regulated market of the French stock exchange (art. 5.1.1 of the CMF General Regulation). The acquisition of a public company can take the form of either an “offre publique d’achat”, where shares are acquired for cash, or an “offre publique d’échange”, whereby the bid is made with securities held or issued, or to be issued, by the bidder (art. 5.1.3). A takeover bid may be either mandatory or voluntary. The mandatory rule is triggered (a) at the time at which an acquisition of one-third of the target’s stock has been achieved, (b) if an ownership of between one-third and half of the target’s stock has been increased by more than two percent within one year, or (c) with acquisition of a company holding more than a third of the target’s stock (art. 5.5.2-4). Besides, the CMF General Regulation sets out obligations of the bidder, criteria taken into account when deciding upon the authorisation of an offer, the consideration to be offered to the target’s shareholders, the offer timetable, the conditions for filing a competing bid or improving the terms of the bid, etc.⁷¹. The CMF’s main role is to examine and authorise the terms and conditions of offers and ensure that they comply with the provisions of its General Regulation. It is generally responsible for stock market regulation⁷².

The COB is in charge of protecting investors and is modelled after the U.S.’ Securities Exchange Commission (SEC). It is a public independent regulatory agency whose mission is to ensure the protection of investors, the adequacy of the information given to investors and the proper operation for the markets in financial instruments. Its regulations require the issuer of shares listed on a French stock exchange to make immediate public disclosure of material information which could possibly have a significant impact on the price of the affected financial instrument (COB Regulation 98.07)⁷³.

⁷⁰ Greene at 835.

⁷¹ <http://www.plcinfo.com/scripts/>: “*Law and regulation of public takeovers: France*”.

⁷² <http://www.cmf-france.org/english/regulat/regltgen/> (accessed on 07.05.2001).

⁷³ http://www.cob.fr/index_uk.htm, accessed on 08.05.2001.

In terms of the targets' boards' opportunities to ward off takeovers, it should be pointed out that French law is governed by the principle of limited defences. Upon the filing of a takeover bid with the CMF, the directors and management of the target must principally confine themselves to acts of everyday management. No action may be undertaken resulting in the frustration of a bid, denying the shareholders of the target the opportunity to decide on the offer or its merits. Nevertheless, the CMF rules recognise the bidder's right to withdraw an offer if the target makes defensive moves that "changes its substance", which implicitly preserves the target's right to defend itself (art. 5.2.9).

Permitted defences during a bid are, however, an increase of capital through a shareholder subscription with the shareholders' approval expressed at a general meeting prior to the launching of the bid. The target's management may also provide its shareholders with information to persuade them not to accept the offer, and encourage a shareholder of the target company or a third party to make a counter-offer. Another possible defence in the French takeover practice is the anticipation of takeovers. Prior to a bid, a company may enact a number of bylaw provisions which are effective defences against hostile takeovers, such as the creation of shares with double voting rights. Also very common and effective is a counterattack by launching a counter-bid at the initial bidders' shareholders⁷⁴. Thus, despite the management's general commitment to neutrality towards a bid, defensive measures are not completely ruled out, but recognised by the rules.

Additionally, French takeover regulation is regarded as containing massive burdensome red-tape, which has not only led to long duration and slow advancement in the settlement of takeover transactions, but also curtailed takeover activity⁷⁵. The French government has recently announced that it will amend the current regulation to achieve a simplification in the handling of takeovers⁷⁶.

⁷⁴ New York Law Journal: "*Structuring Acquisitions in France: Critical Issues*", 15.11.1999; found through LEXIS-NEXIS.

⁷⁵ U.S. Department of Commerce – National Trade Data Bank, September 1999; <http://www.tradeport.org/ts/countries/france/climate.html> (accessed on 08.05.2001); New York Journal: "*Structuring Acquisitions in France*".

⁷⁶ New York Journal: "*Structuring Acquisitions in France*".

(b) The Netherlands

The Netherlands' trade and investment policy is among the most open and internationally oriented in the world. The Dutch government generally maintains liberal policies toward foreign direct investment⁷⁷. Accordingly, the rules on corporate acquisitions are nondiscriminatory. All firms must conform to certain rules of conduct on mergers and takeovers, which are administered by the Socio-Economic Council (SER), an official advisory body composed of representatives of government, business and labour. The main intention of the SER Rules is the protection of interests of both shareholders and employees. They provide for timely announcement of merger and takeover schemes and for discussions with trade unions. Dutch corporate governance practices are regarded as being very transparent.

Despite the de jure open policy, the Netherlands are, along with Germany, viewed as the country where a takeover is hardest to attempt. Elaborate corporate protective measures against hostile takeovers may actually block takeovers by both Dutch and foreign investors. Some companies have mechanisms in place that enable them to ward off hostile bids or, more generally, to ensure that voting control is centralised and that shareholders have only economic control. Such mechanisms include the limitation of decision making powers of shareholders' meetings by the company's articles of association, or a contractual agreement with an independent foundation allowing it under certain circumstances to purchase defensive preference shares at a discount. About ninety percent of listed companies in the Netherlands are protected by mechanisms of this kind⁷⁸.

The Dutch Gucci Group NV was not protected by defence mechanisms at the time the French company Louis Vuitton Moet Hennessy SA (LVMH) was building up its stake in the company. However, the adjudicating Amsterdam Court of Appeal saw no reasons that might have prevented Gucci from using defence constructions, as the company did when issuing new shares to Pinault-

⁷⁷ U.S. Department of Commerce – National Trade Data Bank, September 1999; <http://www.tradeport.org/ts/countries/netherlands/mrr/mark0029.html> (accessed on 08.05.2001).

⁷⁸ http://www.lawdepartment.net/scripts/article.asp?Article_ID=11251 (accessed on 09.05.2001): "*Handbag wars at Gucci*" (Michael Clarkson, European Counsel).

Printemps-Redout (PPR), representing a 42% stake in Gucci, and in doing so diluting LVMH's share in Gucci from 34.4% to 21%. This happened without any solicitation of the shareholders' meeting. Regarding the issue of minority shareholder protection, the court asserted that, though Gucci failed to ensure that the acquisition of a significant number of shares entailed a public offer for all outstanding shares, thus discriminating against minority shareholders, the board could not be charged for mismanagement, as there was no clear Dutch law on this issue⁷⁹.

Dutch takeover law thus has some weaknesses and does not lay ideal foundations for smooth takeover processing. A move towards more open takeover practices is expected with the implementation of the EU Directive aligned with the UK City Code. However, this will require significant changes to the national takeover law of the Netherlands.

(c) Italy

Generally, foreign investors do not find major impediments to investing in Italy, apart from at times burdensome bureaucratic requirements. But some restrictions on foreign investment exist. Italian anti-trust law gives the government the right to review acquisitions over certain financial thresholds. The government has the authority to block takeovers involving foreign companies for reasons that are fundamental to the national economy or if the home government of the foreign company does not have a similar anti-trust law or applies discriminatory measures against Italian companies⁸⁰.

Limitations exist on cross-shareholding among banks and between banks and non-bank companies⁸¹. Complex cross-shareholding has been used to ward off takeover attempts in the financial sector, whether the bidder was a foreign company or not⁸².

⁷⁹ http://www.lawdepartment.net/scripts/article.asp?Article_ID=11251 (accessed on 09.05.2001): "*Handbag wars at Gucci*" (by Michael Clarkson, European Counsel).

⁸⁰ U.S. Department of Commerce – National Trade Data Bank, September 1999; <http://www.tradeport.org/ts/countries/italy/climate.html> (accessed on 09.05.2001).

⁸¹ Banks cannot hold more than 10 percent of the shares of another bank; non-bank companies cannot hold more than 15 percent of a bank's shares.

⁸² U.S. Department of Commerce – National Trade Data Bank, September 1999; <http://www.tradeport.org/ts/countries/italy/climate.html> (accessed on 09.05.2001).

The Italian corporate system has been subject to a modernisation process recently attendant to a new set of corporate governance rules designed to meet the EU's financial deregulation requirements. These reforms have broken up opaque and inscrutable practices of former times, when big shareholders could control a company though having well below half of the company's shares by relying on covert relationships with other shareholders. The new rules have rendered takeover processing much more transparent⁸³.

Italy's new takeover regulation restricts companies under attack in taking defensive action and introducing poison pills, unless it calls a shareholders' meeting in which at least 30 per cent of the voting share capital is represented. The effective launching of a bid requires the approval of the Commissione Nazionale per le Società e la Borsa (CONSOB)⁸⁴, the public authority responsible for regulating the Italian securities market, which must "rule valid" the bid. With its new takeover rules, Italy has adopted a clear approach to Anglo-Saxon regulation⁸⁵.

2.2.4 The United States

In the United States⁸⁶, the capital markets are structured and regulated to encourage capital formation by equity shareholders. Most large corporations are publicly owned and federal law protects investors primarily through mandated disclosure in capital raising and change of control transactions, and the prohibition of fraud and manipulation in the public securities markets⁸⁷. Tender offers are regulated by the Securities and Exchange Commission (SEC) pursuant to the Williams Act, which amended the Securities Exchange Act of 1934 (SEA) in 1968 by adding sections 13(d)-(e) and 14(d)-(f)⁸⁸. The U.S. Congress passed the Williams Act because it was concerned that block

⁸³ Financial Times (London edition): "*Rome to tackle company rules*", 08.12.1997 (found through LEXIS-NEXIS).

⁸⁴ See <http://www.consob.it/> (accessed on 09.05.2001).

⁸⁵ Financial Times (London edition): "*Olivetti bid for Telecom Italia ruled 'not valid' by watchdog*", 23.02.1999; "*Severe test for new regime: Italy*", 19.03.1999 (both found through LEXIS-NEXIS).

⁸⁶ The following paragraph will deal with federal law only.

⁸⁷ Pinto *Corporate Takeovers through the Public Markets in the U.S.* 42 Am.J.Comp.L at 351, 352.

⁸⁸ Loss/Seligman *Securities Regulation* at 2163; these sections were

purchases and large rapid accumulations, which could result in changes in corporate control, were taking place secretly. The Congress thus tried to achieve better shareholder protection whilst at the same time taking extreme care to avoid tipping the balance of regulation either in favour of management or in favour of the bidder⁸⁹. The Act generally deals with the disclosure obligations of bidders and was also intended to provide shareholders an opportunity to examine all relevant facts within the process of reaching a decision⁹⁰.

The applicability of the Williams Act is determined by scrutiny through the “jurisdictional means” test, which covers any tender offer made either directly or indirectly, by use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise. Owing to the broad sweep of this test, the Williams Act effectively reaches any tender offer for a security made to a person in the U.S.⁹¹.

The term “tender offer” itself is oddly nowhere defined in the Williams Act nor in any rule promulgated thereunder. Initially, the SEC resisted any definition of the term in view of the dynamic nature of takeover transactions and the need for a flexible interpretation of the Williams Act⁹². A defining rule proposed by the SEC was never transformed to a legislative definition⁹³. The SEC later developed an eight-factor test which let a tender offer be characterised by:

(1) active and widespread solicitation of public shareholders for the shares of an issuer, (2) solicitation of a substantial percentage of the issuer's securities, (3) offer of a premium over the prevailing market price, (4) rather firm than negotiable terms, (5) limited duration of the offer, (6) an offer contingent on the tender of a fixed number of shares, (7) offerees subject to pressure to sell their stock, and (8) a public announcement preceded or followed by a rapid accumulation of stock⁹⁴.

amended into their present form in 1970.

⁸⁹ Jennings/Marsh *Securities Regulation – Cases and Materials* at 671.

⁹⁰ Jennings/Marsh at 660, 661.

⁹¹ Greene at 833.

⁹² Loss/Seligman at 2198.

⁹³ Securities Exchange Act Release No. 16385, Jennings/Marsh at 676 et seq..

⁹⁴ Loss/Seligman at 2201.

This definition has been accepted by the courts, amongst others in the *Wellman v Dickinson* case⁹⁵, whereupon it became also known as the Wellman test. However, it has also been regarded as unsatisfactory in cases of unconventional tender offers⁹⁶. The purpose of the Williams Act, the protection of investors, would best be served by not limiting the meaning of tender offers⁹⁷.

(a) The role of the SEC

The administration of the Williams Act is assumed by the SEC, an independent quasi-judicial regulatory agency, which is composed of a chairman and four commissioners, all appointed by the President on advice of the Senate for five-year terms⁹⁸. The Commission as a deliberate collegial body meets numerous times monthly to debate and decides upon regulatory issues. Issues may be interpretations of federal securities laws, amendments to existing rules under these laws, new rules reflecting changed conditions in the marketplace, actions to enforce the laws or to discipline those subject to the Commission's regulation, legislation to be proposed, and matters concerning administration of the Commission itself. The most common activity is rulemaking, which is generally the result of staff recommendations made to Commissioners⁹⁹.

(b) Takeover practices in the U.S.

The understanding of the U.S.' disclosure focussed approach to takeover regulation demands a short view on the history of its takeover action. In the 1980s takeover activity dominated activity in all markets. It was predominantly stamped by aggressive open market purchases, sometimes concealed, which often entailed bids employing techniques designed to force rapid acceptance by target shareholders. In return, potential targets designed defensive counterstrategies, which aimed to slow down bidders or even ward off hostile offences.

⁹⁵ 475 F.Supp. 783 (S.D.N.Y. 1979); Jennings/Marsh at 692, 693.

⁹⁶ Loss/Seligman at 2202, 2203.

⁹⁷ Loss/Seligman at 2204, 2205; Greene at 834.

⁹⁸ Jennings/Marsh at 37.

⁹⁹ Jennings/Marsh at 48.

Both bidding and defensive strategies evolved took advantage of loopholes in the takeover laws, both federal and state laws. The SEC endeavoured to control the process by trying to protect shareholders and maintain a “level playing field” for bidders, but in no case wanted to curtail hostile takeovers, though bidding tactics became exceedingly aggressive¹⁰⁰.

Amongst these tactics were timing tricks to pressure shareholders into tendering quickly by taking advantage of the fact that shareholders not tendering into an otherwise successful offer might be left with an illiquid investment. These practices were encountered by rules ensuring that shareholders and target boards would have at least twenty business days to consider a hostile offer and alternatives¹⁰¹.

Another policy was the attempt to acquire secretly a significant portion in the target’s shares prior to making a formal offer, in order to reduce the likelihood of competition and costs in case of ultimate acquisition of control of the target, trying to avoid announcement of the result of the stock accumulation as long as possible. This was answered by introducing the so-called ten-day window of s. 13(d) requiring the disclosure of any share acquisition of more than five percent of any class of voting shares. However, still nothing hindered the accumulator from continuing his aggressive open market purchases, as there are no restrictions on the number of shares which can be so acquired¹⁰².

The so-called “street sweep” also took advantage of the absence of restrictions on large open market accumulations. In the case of a street sweep, the bidder commences a tender offer for the target’s shares. In doing so, it typically causes arbitrageurs and other institutional investors to accumulate large blocks of such shares. The bidder then terminates the offer by invoking one of the conditions of the bid, and afterwards buys blocks of the target’s shares held by the arbitrageurs and institutions. Thus the equal treatment of shareholders is endangered as only selected shareholders are given the opportunity to sell, whereas the remaining ones are locked.

¹⁰⁰ Greene *Regulatory and Legislative Responses to Takeover Activity in the 1980’s: The United States and Europe* 69 Texas LR at 1543.

¹⁰¹ Greene at 1544, 1545.

¹⁰² Greene at 1546, 1547.

As the courts failed to curb street sweeps, the SEC proposed a rule prohibiting any stock purchases within ten days after the termination of an offer, but the rule was never adopted. Apart from responsive state takeover laws, potential targets developed the “poisoned pill” to limitate the possible acquirable stake in shares. Poisoned pills are shareholder rights to buy securities of the target at a substantial discount if an accumulator crosses a certain ownership threshold without the consent of the target’s board of directors. The “flip-in” level, i.e. the percentage of ownership that triggers the shareholder right, was at fifty percent in early pills, but flip-ins have been used as low as to only ten percent. The exercising of the shareholders’ right makes it quite expensive for any party purchase a controlling block of shares, the successful bidder thus faces the prospect of heavy dilution¹⁰³.

In European countries, the acquisition of control through open market purchase is limited by the mandatory bid rules, which requires a bid to be made for the whole company once a certain threshold level of ownership has been achieved¹⁰⁴.

A further bidding strategy was the partial tender offer, which enabled a bidder who was unable to finance a cash bid for the entire company even to pressurise the target. The typical effect of a partial bid would be an oversubscription and a high number of shares being tendered, which could signal the market that the target is vulnerable and coerces the target to seek a “white knight” (i.e. a friendly bidder, willing to offer more for a target’s shares than an existing hostile bidder). Furthermore, the bidder had the chance to complete the partial gaining of control through the acquisition of the remaining shares at a lower price or for consideration consisting of securities (so-called “two-tier” offer). In effect, even shareholders not willing to sell their shares were compelled to tender facing the risk that the offer would nevertheless be successful and that all of the holder’s shares would be converted into the less attractive consideration of the second-step merger as shown in the case of Mesa Petroleum’s offer for Unocal in April 1985. The Texan Mesa Group, owner of approximately 13% of Unocal’s stock, commenced a two-tier cash tender offer

¹⁰³ Jennings/Marsh at 793 et seq..

¹⁰⁴ See above for UK: page 17, for Germany: page 20.

for 64 million shares, or approximately 37%, of Unocal's outstanding stock at a price of \$54 per share. For the remaining publicly held shares Mesa offered an exchange of securities purportedly worth \$54 per share¹⁰⁵.

Such strategies were mainly responded to by corporations themselves who asked their shareholders to amend corporate charters to include provisions preventing second-step control transactions unless the payment of a fair price was guaranteed, or unless a supermajority vote amongst the voting shares not controlled by the accumulator was achieved on such transaction. Furthermore, some states integrated fair price rules into their state corporate law¹⁰⁶.

As a last example for takeover practice in the U.S., permissible bid conditions should be mentioned. Bidders usually place a variety of conditions on an offer. This particularly enables the bidder to commence a tender offer without having the necessary financial resources ready, a situation that was impossible in the United Kingdom because of the City Code's Rule 24.7 which demands a demonstration of funds by the bidder's financial advisor¹⁰⁷. The absence of any requirement to have committed financing prior to commencement permitted leveraged bidders to let companies seem potential targets whilst risking very little capital. By the use of leverage, relatively small bidders were able to threaten large targets and force them into defensive restructuring action or to seek a white knight. Though there have only been modest regulatory responses to the use of leveraged bids, which did not significantly limit the ability of bidders to obtain financing, leveraged bids have almost disappeared. This has been the result of the capital market's aversion to leverage¹⁰⁸; again an outcome of the maintenance of a "level playing field" and the disciplining of takeover practice by the marketplace, which is the core of the SEC's takeover controlling policy. Thus the SEC never placed any substantive limitation on hostile bids or any aggressive tactics.

(c) The Business Judgement Rule

¹⁰⁵ Los Angeles Times: "*Pickens opens fight to gain control of Unocal*", 09.04.1985 (found through LEXIS-NEXIS).

¹⁰⁶ Greene at 1550, 1551.

¹⁰⁷ Compare above at page 18.

¹⁰⁸ Greene at 1554.

Confronted with an impending or even an express tender offer, the target's board of directors will be in a quandary. It is obliged to respond to the offer within a specified period of time. It may recommend to the shareholders to either accept or reject the offer. It will usually come to the conclusion, that the success of the offer is detrimental not only to the directors themselves who fear for the removal of their control, but also to the shareholders. The reaction may then be the adoption of defensive tactics to ward off a hostile offer, and in doing so, possibly breaching a fiduciary duty¹⁰⁹. Generally, the decision by the board of directors of the target company on how to respond to the offer is protected by the so-called "business judgement rule". The business judgement rule immunizes the board's decision from being overturned by a court, and the directors themselves from being liable for having made it, if

- (1) the decision was made after a reasonable investigation and due consideration by the board regarding the matter in question,
- (2) the directors making the decision are not interested in the transaction and are free of any conflict of interest, and
- (3) the action is taken in good faith, i.e. with the honest belief that the action is in the best interest of the corporation and in furtherance of a rational business purpose¹¹⁰.

With the U.S. takeover wave of the 1980s and its aggressively fought takeover battles, law appeared to be adjusted. In the *Unocal Corporation v Mesa Petroleum* case, the court heightened the standard for the application of the business judgement rule. The court was asked whether there were reasonable grounds for believing that a danger to corporate policy and effectiveness existed, and whether the defensive measure adopted was reasonable in relation to the threat posed, thereby assigning the burden of proof of reasonableness to the board. The directors could satisfy this requirement by demonstrating good faith and reasonable investigation¹¹¹.

The *Unocal* test was adopted by some jurisdictions, but others still required the plaintiffs to show the board's failure to comply with the test and so left an

¹⁰⁹ Campbell/Campbell *International Liability of Corporate Directors* at 698.

¹¹⁰ Jennings/Marsh at 780.

¹¹¹ The American Law Institute *Principles on Corporate Governance* at 406, 407.

enormous discretion in defensive conduct to the board. Demonstrating that the directors did not act reasonably, but merely to perpetuate their control of the corporation, is hardly attainable. As a result, a real change in the standards for the application of the business judgement rule against boards cannot be regarded as being achieved¹¹². Should a board however treat minority shareholders unfairly, thus contravene against its fiduciary duty owed, shareholders are entitled to claim damages as the door for liability is then opened¹¹³.

(d) Basic contents of the Williams Act

Keeping the development of takeover practice and liberal approach to a "level playing field" in mind, the emphasis on disclosure provisions in the Williams Act becomes easily understandable.

The Williams Act is codified by sections 13(d)-(e) and 14(d)-(f) of the Securities Exchange Act of 1934 and has four major components.

(i) Predisclosure requirements The first section added to section 13(d) SEA provides an early warning system designed to alert the target company's management and the market of any concentration in a company's stock that may foreshadow a future change of control. Section 13(d) requires that a statement pursuant to Schedule 13D must be filed within ten days by any person who, after acquiring any security registered under section 12 SEA, becomes the beneficial owner of more than five percent of such security. This statement must be sent to the issuer, to each stock exchange where the security is traded, and to the SEC. In a nutshell, Schedule 13D contains disclosure of the title of the class of equity securities, information concerning the identity and background of the issuer, disclosure of the source and amount of funds or other consideration used in making the stock purchases, information on the purposes of the acquisition, on data concerning the aggregate number and percentage of the class of securities, a description of any arrangements among the issuers or between the issuer and any person with respect to securities of

¹¹² Campbell/Campbell at 698, 699.

¹¹³ Campbell/Campbell at 697.

the issuer, and the filing of specified exhibits referred to¹¹⁴. The schedule goes far more into detail.

(ii) Bidder disclosure requirements Following the predisclosure requirements of section 13(d), an acquiring company must also disclose the substantive terms of the tender offer under 14(d) and (e). The second section included by the Williams Act, section 14(d)(1) SEA, prohibits making a tender offer that would result in the offeror holding more than five percent of a class of the target's shares without filing a disclosure statement (Schedule 14D-1 statement) with the SEC, the target, rival bidders and each exchange. Several of the requirements of Schedule 14D-1 are identical with the ones in Schedule 13D, e.g. the potential acquirer's plans for the target if the offer is successful. But whereas the Schedule 13D filing requirement is aimed at creeping acquisitions and large block purchases, the Schedule 14D filing requirement is aimed at "tender offers". Therefore some of the 14D requirements are new such as disclosure on a controlling parent of the bidder and disclosure of any material information concerning regulatory requirements that must be complied with. The prerequisites assist the target company's shareholders in deciding whether or not to tender their shares¹¹⁵.

(iii) Substantive other requirements The third section of the Williams Act, amending section 14(d)(5)-(7) of the SEA, regulates further substantive terms of the tender offer.

Section 14(d)(5) permits persons who have tendered to withdraw within the first seven calendar days after the tender offer and again after sixty calendar days from the offer's commencement. The SEC has expanded on these *withdrawal rights* by promulgating Rule 14d-7, which states that tendered securities may be withdrawn while the tender offer remains open¹¹⁶.

Section 14(d)(6) states that in case of a partial tender offer, all shares tendered within the first ten days of the offer must be purchased pro rata. The SEC has also extended this *pro rata rule* by Rule 14d-8, extending the proration requirement to the entire duration of the tender offer¹¹⁷.

¹¹⁴ Loss/Seligman at 2170-2172, 2187 et seq..

¹¹⁵ Loss/Seligman at 2208, 2209, 2219 et seq..

¹¹⁶ Loss/Seligman at 2227, 2228.

¹¹⁷ Loss/Seligman at 2228.

Section 14(d)(7) requires that any increase in price during a tender offer must apply to all shares purchased during the offer regardless of whether the shares were purchased prior to the price increase or not (so-called “*best price*” rule). As there is no comparable provision with respect to a decrease at a later stage of a tender offer, the above mentioned two-tier offer becomes possible¹¹⁸.

(iv) Antifraud provisions The fourth amending section of the Williams Act, resulting in section 14(e) SEA, prohibits misrepresentations and any fraudulent behaviour in connection with a tender offer. It makes it unlawful for any person to make any untrue statement of a material fact or to engage in any fraudulent, deceptive, or manipulative acts or practices. This applies to any tender offer or any solicitation in opposition to or in favour of a tender offer¹¹⁹.

It thus can be concluded, that the legislative intent to protect shareholders from having to make uninformed, coerced decisions on whether it would be in their best interests to tender their shares for the offered price by extensive disclosure from both sides, the bidder’s and the target’s management, becomes quite clear. By this even-handed disclosure approach the Act takes the most possible neutral position in order to avoid intervening in the self-regulating market in its evolution to a level playing field.

2.3 Necessity for unification of takeover law in the EU

As mentioned at the beginning, European takeover activity has experienced an enormous increase in the last years approximating and finally overtaking the U.S. corporate market. Technical changes, especially the fast progress in communication and information technology, have resulted in merging markets and decreasing relevance of national boundaries in the economic activity of corporate enterprises. Cross-border mergers have thus become a standard feature of an increasingly global world of international business.

This consolidation process meets impediments in the form of incongruent regulatory systems. Resulting from varying traditions in the national corporate markets and different economic and political ideologies, national approaches to regulation of takeovers diverge. In both the United Kingdom and the U.S.,

¹¹⁸ See above page 32; Loss/Seligman at 2230.

hostile takeovers have been common for decades and are regarded as the outcome of corporate markets' self-regulation, while continental European countries had their first experiences in this field only recently. In continental Europe, the amalgamation of companies has mostly been a consensus-based act, and aggressive takeover tactics have met massive repudiation. Social acceptance of hostile bids is low. The view that takeovers are an element of well-functioning market economies and are not by their nature harmful to the targets' shareholders and workforce could not prevail until different experiences were gained.

National economies that want to attract foreign investors need to create conditions that are competitive on the international capital market. Policy makers have to find out whether they can stick to their preferred national objectives or whether they need to adapt to the given international circumstances. The pending EU Directive has already been partially effective as an incentive in the process of adapting, but still foreign investors face a maze of national rules on takeovers within the EU. At the same time, some European companies are confronted with unfamiliar practices by foreign corporations trying to gain control over them without any prior consensus reached between them. Different codes of conduct exist, as do different practices. These differences not only lead to friction between companies, but also between governments. This was displayed in Berlin's grumbling over the Vodafone's unsolicited offer for Mannesmann, the French government's decision to reject Coca-Cola Co.'s revised bid to buy Orangina, and also by the reaction of British Prime Minister Tony Blair on German BMW's overtaking of Rover¹²⁰.

The losers in these unsatisfactory circumstances are not only the shareholders, often bereft of the opportunity to seize an attractive offer and deprived of their rights as owners of a corporate enterprise. The medley of takeover laws also impairs the entire EU economy. Foreign companies may be discouraged from investing in European ones, because it is too precarious to navigate through the jungle of diverse legal circumstances. Also intra-european

¹¹⁹ Loss/Seligman at 2250.

¹²⁰ Wall Street Journal: "*Pressure grows to unify Europe's takeover laws*",

takeovers are complicated and even retarded by the knotty multitude of regulations that have to be taken into account.

Hence, the implementation of the EU Takeover Directive is urgently needed to boost confidence in the stock markets and thus to improve the economic competitiveness of the EU as a whole.

CHAPTER 3

THE FRAMEWORK FOR EU LEGISLATIVE ACTION

3.1 Legal foundations and instruments of European company law

By far the largest part of European company law is only derivatively European: it is European company law by virtue of transformation. The legal foundations are specifically art. 44(2)(g) (former art. 54(3)(g)¹²¹) and, more generally art. 94-97 [100-102], 293 [220] and 308 [235] of the Treaty of Rome¹²² (as amended by the Treaty of Amsterdam). From this it follows that four instruments are available, namely the regulation, the directive, the recommendation and the agreement¹²³.

Most of the normative acts in European company law have been issued on the basis of art. 44(2)(g) [54(3)(g)] and accordingly are directives¹²⁴.

Examples of European company law in form of a regulation, based upon art. 94 [100] E.C., are the law of the European Economic Interest Group (EEIG)¹²⁵ and the future law of the European public company (*Societas Europaea*)¹²⁶. Regulations are binding in all respects and directly applicable in each member states¹²⁷.

So far, an example of an agreement based upon art. 293 [220] E.C. has not entered into effect in the field of company law. Neither does an example of the use of the recommendation for the purposes of European company law exist¹²⁸, though the Commission chose to use recommendations on a number of occasions for the harmonisation of the laws of banking and stock exchanges¹²⁹.

¹²¹ The Treaty of Amsterdam introduced a renumbering of treaty articles. In the following, articles will be cited according to the amendments of the Amsterdam Treaty whilst quoting the former numbering in squared brackets.

¹²² hereinafter: E.C.; published in the consolidated version incorporating the changes made by the Treaty of Amsterdam (signed 02.10.1997): OJ C 340, 10.11.1997, pp. 173-308.

¹²³ Hopt at 374; Hanlon *European Community Law* at 83 et seq..

¹²⁴ *Levy Developments in European Company Law*, <http://www.ili.org/pubeuro.html> (accessed on 15.05.2001); Hanlon at 278.

¹²⁵ OJEC L 139, 31.07.1985; Nagel *German and European Company Law* at 21, 352.

¹²⁶ Com (93) 570 final; *Levy Developments in European Company Law*; Nagel at 350 et seq..

¹²⁷ Kapteyn/VerLoren van Themaat *Introduction to the Law of the European Communities* at 324.

¹²⁸ Hopt at 380, 381.

¹²⁹ E.g. Commission Recommendation of 25 July 1977 concerning a European code of conduct relating to transactions in transferable securities, published in OJ L 212 ,

The UK would have preferred to have a recommendation instead of a directive on takeover bids as the British feared for their well-functioning City Code and Panel based on voluntary self-regulation. Whereas recommendations are not legally binding and have not been questioned in the European Court of Justice as to their validity, but are more of a persuasive quality, directives have binding force in relation “to the result to be achieved” (art. 249 [189] E.C.). This can be defined as the legal or factual situation, which redresses that interest of the EU which the directive is to ensure. A directive sets out the objectives to be achieved, but leaves the choice of the form and method of implementation to the member states. Consequently, a directive does not automatically become part of the national law, and is therefore not directly applicable. It must be implemented by the legislatures of the member states. In contrast to a regulation, which is aimed at uniformity, a directive is a method in which national laws can be harmonised in line with Community law. The member states have discretion concerning the way and means employed to implement the requirements of a new directive. A directive also sets out a period for implementation by the member states. The time scale generally depends on the complexity of the subject matter and the urgency of the legislation¹³⁰.

Directives have emerged as the most effective means in the company law harmonisation process. The use of the directive as an instrument has both advantages and disadvantages. Traditionally, the general view appears to be that the advantages prevail. The peculiarity of directives in comparison to regulations is that they provide for greater flexibility and leave a degree of discretion to the member states for their transformation, which makes it easier to fit suggested solutions into national systems. Consequently, there is a greater readiness to agree upon directives. The use of directives of course neither precludes the possibility of a very detailed regulation, nor does it mean that national legislators may not be well-advised in particular cases to follow the text of the directives more or less verbatim¹³¹.

20.08.1977, http://europa.eu.int/eur-lex/en/lif/dat/1977/en_377X0534.html (accessed on 17.05.2001).

¹³⁰ Hanlon at 85; Kapteyn/VerLoren van Themaat at 327, 328.

¹³¹ Nagel at 353; Hopt at 380, 381; see also reasons given in the Draft Proposal of 1996,

3.2 Subsidiarity under the EU

Subsidiarity is a strong concept in the European Union. The directive proposals of 1989 and 1990 were fully trapped in the subsidiarity debate by the member states. This did not lead to a total retreat¹³², but they were considerably modified and greatly diluted in content in the proposal of 1996. The subsidiarity principle is incorporated formally into the E.C. Treaty by art. 5 [3(b)] as follows:

“In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.”

The principle therefore has two elements that are relevant to the proposed directive¹³³. The first is that the objectives of the draft directive cannot be sufficiently achieved by member states' action and that those objectives can therefore be better achieved by action on the part of the Community. The second is that Community measures should leave as much scope for national decision as possible, consistently securing the aim of the directive and observing the requirements of the Treaty¹³⁴.

The objectives to be achieved are determined by the European organs. These objects can only be questioned by the member states in relation to their realisation. They may argue that these objects can be achieved nationally, thus without any action taken by the EU. Consequently, the member states would

OJ C 162/5, 06.06.1996.

¹³² As it happened earlier with the 9th Directive concerning groups of companies.

¹³³ Assuming that the legal harmonisation in the area of takeovers does not fall within the exclusive competence of the Community and thus contravening the opinion of the Commission, which regards harmonisation needed for the realisation of the internal market to fall within the exclusive competence of the Community (see Steiner/Woods *EC Law* at 29; Hopt at 380 fn.46 referring to Commission Doc. Sec (92) 1990 final, 27.10.1992: The Subsidiarity Principle).

¹³⁴ Steiner/Woods *EC Law* at 30; UK Department of Trade and Industry “*Proposal for a Thirteenth Directive on Company Law concerning Takeover Bids – A Consultative document*” (published in April 1996).

have to be able to achieve harmonisation in the field of takeover law, which is difficult to imagine without the help of EU-wide measures. Besides, the very disagreement between member states showed that leaving this area to national legislation would not result in a takeover regime that would promote cross-border takeovers or a Community market for corporate control¹³⁵. The harmonisation of takeover law in the EU therefore clearly requires action by the Community.

Furthermore, the national legislators must be given the widest possible discretion in shaping the law. A mere recommendation based on art. 249 [189] E.C. would surely correspond with the subsidiarity principle less problematically. But a recommendation is inappropriate in this context as it is not legally binding. Evidence of this is provided by the fate of the European Code of Conduct for Securities Transactions of 1977 with its suggestion that a compulsory takeover bid should be introduced. This has been totally ignored by Germany so far¹³⁶. Therefore it is necessary to choose a directive as the appropriate regulative measure. It must be concluded, that the aims of takeover regulation for a EU-wide corporate market are best achieved by a directive at Community level, which is in conformity with the subsidiarity principle.

3.3 Decision-making in the EU

Decision-making in the European Union comprises several different procedures, i.e. the different institutions play different roles depending on the subject matter concerned. Decision-making in the EU principally involves three institutions: the European Parliament, the Council and the Commission. However, other institutions and bodies such as the European Central Bank, the Economic and Social Committee and the Committee of the Regions also play a role in certain specific areas. The various bodies operate within the powers conferred on them by the Treaties. The number of procedures provided for in the Treaties is considered to be between 20 and 30. It was one of the original aims of the Treaty of Amsterdam to “tidy up” the number of procedures,

¹³⁵ Andenas *The European Takeover Directive and the City* (The Company Lawyer 1997) at 104.

¹³⁶ Hopt at 380, there see footnote 48.

preferably by reducing them. The various procedures are all somewhat variations of one or other of four basic procedures. These are the consultation procedure, the cooperation procedure, the co-decision procedure and the assent procedure. The Treaty of Amsterdam has affected a shift towards the use of the co-decision procedure, thereby sustaining the influence of the European Parliament within the legislative process¹³⁷.

3.3.1 The institutions involved

Involved in the legislative process are the European Parliament, the Council and the Commission. First of all, these institutions should be looked at briefly.

(a) The Commission

Legislation starts with a proposal from the Commission, which has twenty members nominated by the member states on the grounds of their general competence. The Commissioners have the duty and the right to perform their tasks with complete independence in the general interest of the Communities and must not seek or take instructions from any government or other body (art. 213 [157] E.C.)¹³⁸. The powers and tasks of the Commission are set out in art. 211 [155] E.C.. The results of this is that its institutional structure is not characterised by a rigid separation of powers and its functions are of a legislative, administrative, executive and judicial nature. The role of the Commission can therefore be described as being (1) the initiator and coordinator of Community policy, (2) the executive agency of the Community and (3) the “guardian of the Treaties”. The latter is the Commission’s most prominent role. In its performance it is empowered to bring member states to the Court of Justice for alleged violations of the treaties and rules adopted thereunder, as well as to investigate matters of state aid and anti-competitive activities (arts. 88 [93], 81, 81 [85, 86] E.C.)¹³⁹.

(b) The Council

¹³⁷ Hanlon at 17, 18; Kapteyn/VerLoren van Themaat at 418, 419.

¹³⁸ Kapteyn/VerLoren van Themaat at 195.

¹³⁹ Hanlon at 33 et seq.; Kapteyn/VerLoren van Themaat at 202 et seq..

The Council of Ministers, representing the member states, is the main legislative organ of the Community and is the forum in which the interests of the member states find direct expression. Its legislative authority is exercised in certain procedures jointly with the Parliament. The Presidency of the Council rotates among the member states, each taking a six-months period in the chair. The Council consists of representatives of each of the member states at ministerial level (art. 203 [146] E.C.). It is left to the discretion of the governments to decide which minister is sent to the Council. Normally, foreign ministers or ministers of state act as members of the Council. But they will usually be accompanied or replaced by those colleagues, under whose national competence particular questions come. Therefore, the composition of the Council is not static but made up depending on the subject matter under discussion of the particular national ministers. For instance, in finance meetings the national finance ministers meet for discussion. The limitation to representatives at ministerial level is the result of the contracting parties' intention to include those who bear direct political responsibility for national policies in the decision-making process of the Community, thus making the readiness and power to take decisions at Community level as great as possible¹⁴⁰.

Art. 202 [145] E.C. imposes the duty on the Council to ensure the coordination of the general economic policies of the member states, and empowers it to take decisions and to delegate tasks to the Commission. It has the final power of decision-making for the adoption of the Commission's legislative proposals, but may have to consult with the Parliament and a Committee, or may have to adopt the cooperation or co-decision procedures, as provided by the E.C. Treaty¹⁴¹.

(c) The Parliament

The European Parliament is composed of 626 members (MEPs), directly elected¹⁴² every five years. It consists of "representatives of the peoples of the states" (art. 189 [137] E.C.), thus is representing the peoples of the Community

¹⁴⁰ Hanlon at 30, 31; Kapteyn/VerLoren van Themaat at 186 et seq..

¹⁴¹ Hanlon at 31 et seq.; Kapteyn/VerLoren van Themaat at 190, 191.

¹⁴² Since 1979; the original body set up by the E.C. Treaty was called the Assembly and

collectively and independently. The Parliament is involved in the decision-making process, has a degree of political control over the Commission and has budgetary powers. In detail, it scrutinises proposed legislation and acts as the EU's public forum in debating issues and questioning the Commission and the Council. It may propose amendments to legislation, insist on changes in the budget or reject it, approve the nomination of Commissioners and, as an ultimate weapon in the right of supervision, has the power to dismiss the Commission through a censure vote¹⁴³.

One major aspect of the Parliament's work is the work of committees. In each committee a range of political views is represented. Individual committees are responsible for preparing amendments to legislative proposals. This simple means of concentration and specialisation has helped the Parliament to maximise the effectiveness of its work¹⁴⁴.

Members of Parliament sit in cross national-political groupings, as the Parliament's Rules of Procedure provide for the official recognition of political groups. Currently, the European People's Party (201 MEPs) and other right of centre groups constitute the majority, having superseded the European Socialist Group in the 1999 election. However, this shift does not seem as important as a similar shift in a national parliament would be. Reasons might be underlying domestic interests, the fact that more technical than ideological questions are to be solved, and the requirement of absolute majority votes under the co-decision procedure, which often makes the two major groups combine to ensure that legislation is passed¹⁴⁵.

3.3.2 The main legislative procedures

As mentioned above, there are four main legislative procedures, namely the consultation procedure, the cooperation procedure, the co-decision procedure and the assent procedure.

consisted of members nominated by the governments of the member states.

¹⁴³ Kapteyn/VerLoren van Themaat at 217 et seq..

¹⁴⁴ Hanlon at 29.

¹⁴⁵ Hanlon at 28; Kapteyn/VerLoren van Themaat at 209, 210.

The *consultation procedure* requires the Council to consult the European Parliament before coming to a decision on Community legislation. For this purpose, the procedure involves one reading by the Council after having received the advice of the Parliament and a possible amendment from the Commission. The Council is in no way bound by the Parliamentary opinion, but is rather free to ignore it. This lack of power in Parliament has been regarded as a democratic deficit as the unelected Council adopts legislation without the control of the (now¹⁴⁶) democratically elected Parliament¹⁴⁷. It is a remnant of earlier days of the Community when Parliament was still an assembly of political appointees who were not supposed to wield power at the expense of sovereign member states. Therefore, only a few policy areas to which the consultation procedure applies are left; these are mainly found in the area of agricultural policy and some issues of justice and home affairs to be found in the E.C.¹⁴⁸.

The simple method of soliciting Parliament's consent before the Council acts is used for agreements with third countries and related implementing legislation. This technique, known as *assent procedure*, is reserved for special and important circumstances, such as applications from states to join the EU (art. 49 [art. O] EU Treaty). Because the consent of Parliament is needed, the latter has the final say, which is in sharp contrast to the consultation procedure¹⁴⁹.

Between these two extreme legislative procedures, very little influence of the EU Parliament on the one hand and decisive influence on the other, lie two more moderate procedures.

The *cooperation procedure* is now set out in art. 252 [189c] E.C.. It was the first increase of the Parliament's powers versus the Council in the legislative process after the Parliament was elected directly. The cooperation procedure requires two examinations by the Parliament and Council and two options to amend for the Commission. It gives the Parliament an opportunity to

¹⁴⁶ See above, footnote 142.

¹⁴⁷ Steiner/Woods *EC Law* at 31.

¹⁴⁸ Hanlon at 18; Kapteyn/VerLoren van Themaat at 419 et seq..

¹⁴⁹ Hanlon at 21, 22.

discuss and amend the Council's proposed text, according to the Council's "common position" in respect of the proposal.

The cooperation procedure has given Parliament a more important role in the legislative process than it had before. Its legislative power was further increased by the TEU with the introduction of the co-decision procedure. As the latter was another addition to the various legislative procedures, the Treaty of Amsterdam, in an attempt to reduce this multitude, virtually removed the cooperation procedure from the Treaty. It is now confined to some aspects of the European Monetary Union (e.g. art. 107 [106] and art. 111 [109] E.C.). Other areas, which had previously been covered by the cooperation procedure, were transferred to the co-decision procedure¹⁵⁰.

As a result, since the Amsterdam Treaty, Parliament has had powers of co-decision over many policy areas including the internal market, consumer protection, health and safety, social policy, the environment etc., amounting practically to most of what the EU does¹⁵¹. The *co-decision procedure* has been put into art. 251 [189b] E.C. to give greater recognition to the joint involvement of Council and Parliament. The Parliament's power is essentially the right to amend and veto, not to initiate legislation. Hence it has no direct legislative power, but rather a negative one.

The co-decision procedure can involve between one and three stages, depending on how soon the Council and the Parliament can agree on controversial issues.

At the first stage, the Commission's proposal is submitted to both the Council^h and the Parliament and the first reading in each of these institutions takes place. The Council takes the opinion of the Parliament and, acting by a qualified majority, can adopt the measure if it approves proposed amendments made by the Parliament in case there are any.

If agreement cannot be reached, the Council in the second stage adopts a so-called "common position", accompanied by the reasons leading to it. The Parliament then has three months in which to react, and this phase is known as the second reading of the Parliament. It may either approve, or amend, or reject

¹⁵⁰ Kapteyn/VerLoren van Themaat at 425; Hanlon at 19, 20.

¹⁵¹ The Economist: "For Europe's Parliament, power without love", 22.02.2001.

outright, or take no action at all. In case of approval or inaction, the Council can definitively adopt its common position as a legislative act. If however, the Parliament rejects the common position or proposes amendments to it, in each case by an absolute majority of its members, the proposed act cannot be adopted.

Rejection however cannot simply take place without more ado. The Parliament must inform the Council about the intention to reject the common position, so that the Council has the chance to convene a meeting of the Conciliation Committee to explain further its position. Only then, depending on the result of this explanation, the Parliament may confirm its rejection of the common position, whereby the proposal is deemed not to have been adopted. The Parliament may alternatively propose amendments to the common position. But whether as a result of retreat from a threat of rejection or not, the right to propose amendments in the second reading is seen as a 'second bite at the cherry', thus normally no new amendments are proposed by Parliament in its second reading, although the opportunity can be used to include further amendments upon which the Council and the Parliament have agreed as a compromise in the Conciliation Committee. The Parliament's Rules of Procedure, strictly speaking in Rule 80, provide for the admissibility of such amendments, setting up certain requirements. Rule 80 (3) defines an exception from the restrictions laid down in 80 (2), for the situation that new elections have taken place since the first reading, which has been the case during the procedure of the Takeover Directive¹⁵².

The matter is then passed to the Council again, which in its second reading (again a three months' period) has the following options: it can either approve all the amendments of the Parliament, thereby adopting the act in question, or refer the matter to a Conciliation Committee. This Committee is composed of an equal number of representatives from the Council and the Parliament. Its task is to reach agreement on a joint text. Herein it is assisted by the Commission, which acts as a kind of honest broker and takes all necessary initiatives with a view to reconciling the parties' positions. The Committee

¹⁵² The European Parliament's Rules of Procedure, based on art 190[142] E.C., can be found on http://europa.eu.int/eur-lex/en/lif/dat/1999/en_399X0802_01.html (accessed on

must conclude its activities within six weeks or, upon agreement of the Parliament and the Council, up to eight weeks.

If the Conciliation Committee approves a joint text within this period, both the Council and the Parliament have another six (or, if extended, eight weeks) weeks time to approve the joint text in their third reading, the Parliament acting by absolute majority, the Council by qualified majority. If either of the institutions fails to do so, the act is deemed not to have been adopted.

If the Conciliation Committee fails to approve a joint text, the default position is that the proposed act is not adopted. However, the Council has the opportunity to affect this situation, again within six or, if extended, eight weeks, as it may confirm its common position (adopted prior to the start of the conciliation procedure) whereby the default position then becomes that the act is finally adopted. The Council may vary its common position to take account of amendments proposed by Parliament. If then the Parliament, within six weeks or the agreed eight weeks, this time by absolute majority of its component members, rejects the Council's text, the failure of the proposed act is definitive.

Therefore, Parliament has the last word by the exercise of a right of veto, but it can do so only if it can gather sufficient support among its members¹⁵³. Parliament has already been able to muster the necessary majority¹⁵⁴, but experiences with the budgetary procedure where it has a similar right of veto, showed that the mere existence of the right forces the Council to treat it with the requisite respect¹⁵⁵.

In the case of the 13th Company Law Directive on Takeover Bids, a Conciliation Committee had to be convened, after Parliament proposed amendments to the Council's common position, thereby fundamentally modifying the underlying principles of the directive as considered in the

18.05.2001).

¹⁵³ Kapteyn/VerLoren van Themaat at 430 et seq.; Hanlon at 20, 21; for the conciliation procedure see also the Parliament's Rules of Procedure, Rules 81-84, published on http://europa.eu.int/eur-lex/en/lif/dat/1999/en_399X0802_01.html (accessed on 19.05.2001).

¹⁵⁴ E.g. in July 1994, when it rejected the Council's confirmation of its common position on the proposed Directive on the application of open network provision to voice telephony, see Kapteyn/VerLoren van Themaat at 437, footnote 550.

¹⁵⁵ Kapteyn/VerLoren van Themaat at 437.

common position, and consequently not meeting the Council's approval. The Conciliation Committee convened on 10 April 2001¹⁵⁶. The Conciliation Committee finally agreed on a joint text on the day of the deadline on 6 June 2001¹⁵⁷.

¹⁵⁶ For the sequence in the decision-making process of the Takeover Directive see <http://europa.eu.int/prelex/> search: COM (1995) 655 (accessed on 19.05.2001).

¹⁵⁷ See websites of the EU institutions: Parliament: www.europarl.eu.int/, Council: <http://ue.eu.int/>, Commission: www.europa.eu.int/ (accessed on 08.06.2001).

CHAPTER 4

THE MAIN CONTROVERSIAL ISSUES

In view of the variety of national regulations, traditions and interests, the ongoing discussions on the content of the directive are not surprising. The perspective is obvious: the lesser the modifications of national laws demanded in the course of implementation, the higher the likelihood of approval of the directive by the member states. This hampers the harmonisation process. Each state tries to assert its own interests. In the light of the scarcely reconcilable patchwork of national rules, every single proposal of a takeover directive will inevitably collide with the position of one country or another, and will inescapably have its weaknesses. Thus agreement on the text of a takeover directive can only be compromise. Consequently, the main objectives of the directive are clear: it should harmonise national rules on takeover bids while providing the highest level of protection for minority shareholders. On these objectives its core principles are based: Firstly, minority shareholders should have the right to sell their shares when corporate control is transferred. Secondly, the decision on whether or not to accept a hostile bid should be left to shareholders and not to the management of the target company. The latest draft available will be attached as an annex. In the following some of the most controversial issues will be discussed.

I. Supervisory Authority

In view of the increasing significance of cross-border takeovers, one point under discussion was art 4, which regulates the designation and powers of the authority supervising all aspects of the bid. The subject of discussion was whether non-public bodies could execute the supervisory function, and if yes, under what conditions and to what extent. Initially, supervisory authorities were supposed to be put on a statutory basis. The UK government feared essential alterations of the legal status of the City Panel. The Datafin decision established that courts would give the City Panel latitude in interpreting the City Code and that they would be unlikely to intervene in takeover situations

unless they were satisfied that the Panel had acted unfairly. This case has led to the practical consequence that parties refrained from commencing litigation, as such attempts were unlikely to succeed, virtually resulting in a removal of tactical litigation. Putting the Panel on a statutory footing would be likely to modify the position set forth in the *Datafin* judgement¹⁵⁸, possibly obliging courts to take a less restrictive view of its role in relation to judicial review of the Panel's decisions than laid down in *Datafin*. This could jeopardise the whole concept and the efficiency of the autonomous self-regulative scheme of takeover supervision in the UK and would give rise to the presumption of an increase of purely tactical litigation¹⁵⁹.

However, British insistence on the maintenance of their well-functioning system led to the current version of art 4 which expressly provides that the authorities designated may include associations or private bodies such as the City Panel. Art 4(6) leaves the form of administrative and court proceedings very much to member states disposal. Without this, the British delegation would have been unable to accept the Council's common position on the draft¹⁶⁰.

II. Alternative for the notion of a mandatory bid

Especially those states whose national laws have not provided for a mandatory bid so far, but which have other means of minority shareholder protection in situations in which an offeror succeeds in gaining control of a target by a takeover bid, have been interested in the provision of alternatives. Such a provision had been included temporarily in the draft owing to the German attempt to regard the German law relation to groups of companies (*Konzernrecht*) as equivalent to the British mandatory takeover bid in Rule 9 of the City Code. However, "other appropriate and at least equivalent means"¹⁶¹ did not gain the necessary international backing and the equivalence of German law concerning groups of companies to the mandatory bid rule was fundamentally doubted by critics. It was argued that an investor is certainly

¹⁵⁸ See above at pages 15, 16.

¹⁵⁹ DTI Consultation Paper at 5, 6.

¹⁶⁰ Pöttsch/Möller at 10 et seq..

more effectively protected when he is able to escape, with the help of a mandatory bid, those risks which *Konzernrecht* removes only at a later stage and in a way which involves uncertainties¹⁶². The provision now contained in art 5(3), tracing back to the wish of the Finnish delegation, allows alternative “at-least-equivalent means” of minority shareholder protection for a transitional period of one year upon the entry into force of the directive¹⁶³.

III. Duty of neutrality

One fundamental issue, if not the core issue in takeover law, is the question of the admissibility of defensive measures and the role of the board of the target company. This point, dealt with in art 9 of the draft, has been subject to the utmost controversy not only between the member states, but also amongst the European institutions. The discussion is basically founded on differences in corporate culture. Hostile takeovers have been common in the U.S. and the United Kingdom for decades, but more of a rarity in continental Europe. The few experiences in continental Europe, where amalgamation has happened after reaching consensus between the merging companies, have not been able to overcome the massive social repudiation of hostile takeovers. This repudiation is mainly based on the differing approach to corporate governance, which affects its fundamental question, the so-called stakeholder debate. On behalf of whom are companies to be governed? The maximisation of the total value of companies for the benefit of the shareholder has predominantly been regarded as being the final aim of corporate activity. But it has been debated recently whether companies should adopt a more inclusive approach and consider the interests of other constituencies such as employees, customers or the wider community by providing social welfare¹⁶⁴.

The Anglo-American model of corporate governance is predicated upon shareholder democracy. Hostile takeovers are mostly regarded as monitoring devices within a self-regulating market for corporate control, as the ultimate

¹⁶¹ As mentioned in former art 3(1); the mandatory bid is now provided by art 5.

¹⁶² Hopt at 388.

¹⁶³ Pöttsch/Möller at 8.

¹⁶⁴ Bradley *The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads*, Law & Contemp. Probl. Vol. 62, at 33 et seq.;

sanction on managerial underperformance by threatening to replace one management by another dedicated to raising the return on corporate assets. Thus, even the possibility of a takeover has a disciplinary effect, and through this mechanism, managers are not only controlled from within the company, but also by the market¹⁶⁵.

In continental Europe, other constituencies in corporate activity have traditionally been paid more attention, most significantly in the form of the German two-board structure, which is mandatory in public companies with more than 500 employees (*Aktiengesellschaften*), providing employee co-determination through the supervisory board¹⁶⁶. This aspect nurtures concerns about the negative outcomes of takeovers. Takeovers are seen to be aggressive and often misguided attempts to minimise costs and maximise short term benefits. They are feared to result in major changes within the company and the possible enforcement of new working conditions and terms of employment that may be unfavourable to the workforce, at their worst leading to actual job losses in the course of cost-saving measures. From the consensus tradition perspective, the hostility of takeovers inevitably leads to resentment, which entails opposition from targets and thereafter human resources problems if the deal is concluded¹⁶⁷.

Hence, positions and argumentation in the debate on the duty of neutrality set down in the art 9, become comprehensible. Continental European states feared that the board's obligation to refrain from "any action which may result in the frustration of the bid" without shareholders consent would render them defenceless, especially towards the aggressive policies of U.S. corporations but also takeover attempts by companies from EU member states. The crucial debate in the Conciliation Committee, almost defeating the draft directive, was whether a target's management should have means to ward off takeovers at its disposal, to compensate for the obstacles to cross-border takeover bids that still exist in some countries. In some member states, techniques such as

Farrar at 386, 387.

¹⁶⁵ www.managementfirst.com/articles/hostiletakeovers.htm (accessed on 11.06.2001):
"Hostile takeovers: the ins and outs".

¹⁶⁶ Bradley at 52, 53.

¹⁶⁷ The Royal Economic Society "Hostile mergers: The impact on jobs and productivity"
www.res.org.uk/media/Confrep/conyan.htm (accessed on 11.06.2001).

disproportionate voting rights or “golden shares”, i.e. shares providing special rights, are still applied, thus establishing an exemption from the “one share, one vote” principle. With the help of veto-rights in boardroom decisions such as from “golden shares”, the governments of Spain, Italy and the UK can prevent takeovers in certain companies. Disproportionate voting rights of individual shareholders, e.g. existing for the government of France and the federal government of Lower Saxony in Germany in some privatised companies, can at least make takeovers much more difficult¹⁶⁸. If such techniques are not available for the shareholders of the target, the target’s management may regard itself as being discriminated against as it may have no defensive means available.

The EU Commission has already referred some member states to the European Court of Justice for abusing “golden share” techniques and pursued others in similar cases. However, vehement objections towards the duty of neutrality in the current text came from Germany, as its national law had already removed the “golden share” in 1998. As a result, Germany regarded its companies as being easy targets and demanded the provision of poisoned pills to level the playing field. Here the German government was basically voicing the criticism of domestic firms and unions. With the massive support of MEPs from the European People’s Party, which is subject to strong German influence and currently dominating the EU Parliament, the ratification of the directive was prevented in the second reading by the proposal of fundamental amendments practically weakening the duty of neutrality¹⁶⁹.

Nonetheless, the supply of a poisoned pill in the directive would be a step backwards in the EU’s attempt to improve the competitiveness of its corporate market. Though the conditions existing may not be equal yet, the right answer is to eliminate the remaining defensive measures available in some countries. By granting member states 4 years to implement the takeover directive and a transitional period of up to 5 years to phase out legislation that allows the use

¹⁶⁸ Handelsblatt: “*Vorstoss zum Übernahmerecht gescheitert*” (06.06.2001); Financial Times: “*EU agrees new takeover bid rules*” (06.06.2001) (found on www.ft.com, accessed on 06.06.2001).

¹⁶⁹ See EP’s amendments to the Council’s common position on the directive: <http://europa.eu.int/prelex/> (accessed on 10.04.2001), standard search: series: com, year: 1995, number: 655, EP opinion second reading 13.12.2000, doc. A5/2000/368.

of poison pills, thus complying with the requirements set by art 9, the directive supplies the background for a successful transition in national takeover laws. In the meantime, the member states can allow poisoned pills where necessary, and the Commission needs to tackle existing legislative obstacles in order to provide equal conditions EU-wide.

IV. Rights of employees

Another issue raised by Parliament concerns the rights of employees under the draft directive. According to the above-mentioned tradition of attributing interests to stakeholders other than shareholders, such as employees, in takeovers, Parliament considered that employees of the offeree company or their representatives should have a voice in decision-making on the bids and that they should be provided with the same information as the supervisory authorities¹⁷⁰. Since of course, shareholders only can decide whether or not to sell their shares, there is no conceivable option that lets employees influence the change of control of the company. MEPs in the Conciliation Committee succeeded however in winning the necessary support for a clause, which gives more information and better safeguards to employees faced with takeover bids. Although the directive does not deal with employee protection as such, it nevertheless ensures that employees are properly informed concerning the likely impact of a successful bid on employment, employment conditions and company locations (art 6(2), 6(3)).

¹⁷⁰ See EP's amendments to the Council's common position on the directive: <http://europa.eu.int/prelex/>, standard search: series: com, year: 1995, number: 655, EP opinion second reading 13.12.2000, doc. A5/2000/368.

CHAPTER 5

CONCLUSION

Company takeovers are becoming an increasingly frequent phenomenon as worldwide market globalisation progresses. The EU member states, apart from the United Kingdom, have been rather sceptical with regard to this development in which their consensus-based practice of processing takeovers in the course of corporate market consolidation has been increasingly superseded by successful hostile takeover bids.

Recognition of the benefit of hostile takeovers as an effective means of monitoring boards of directors has however led to a greater readiness to adapt existing regulatory systems to the requirements of the vastly changing corporate markets. Hostile takeovers force managers to seek maximum returns, since underperforming managers risk being replaced by a new management dedicated to raising the return on corporate assets. Thus, even the possibility of a takeover has a disciplinary effect.

This control mechanism is interfered with by management activity that frustrates takeover bids and thus reduces the influence of shareholders to decide on the destiny of the target company. Defensive measures reduce the attractiveness of the company's shares for a potential investor. Hence they exempt the company from a possibly needed adjustment of managerial performance. To provide the necessary legal background for a properly functioning and self-revising corporate market, any possibility of the management adversely affecting the success of a takeover bid must be eliminated. The draft directive in its conciliation text takes this into account. It obliges management to solicit the shareholder meeting before taking defensive steps to frustrate an offer and to maintain a neutral position in the takeover process.

Obstacles deriving from opposing national interests hamper the harmonisation of takeover laws in the EU member states. Thus every possible solution inevitably entails prejudicial effects in one case or another. The compromise nature of the draft directive compulsorily implies that individual

states must forego some of their particular interests. The long transitional period set by art 15 allows member states to adjust their national laws in the medium term whilst observing all safeguards to prevent impending detriments. The draft can therefore be regarded as a reasonable solution in the light of differing preoccupations in the member states.

If the EU wants to improve the competitiveness of its internal market, it must attract capital investors by opening up to global financial markets and creating conditions that promise profitable returns. This necessitates the creation of a legal framework that facilitates takeovers as an element of a well-functioning economy. The conciliation text of the directive has still to be approved by Council and Parliament in a third and final reading. Whereas the member states achieved common consent on the agreed text within the Council delegation, the parliamentary delegation was still divided in the conciliation process. Germany, whose parliamentary delegates voted against the proposed text in conciliation, can be expected to try to gain influence within Parliament by political lobbying before the third reading. The directive must secure an absolute majority in Parliament, which is expected to vote on it in the session week of 2 July in Strasbourg, France. However, it seems unlikely that Germany will be able to achieve sufficient support amongst MEPs to prevent ratification by the EP plenary¹⁷¹.

The takeover directive is a necessary step to boost confidence in the EU market and to enhance its global competitiveness. Parliament would be well advised not to reject it.

¹⁷¹ Email exchange with Mr Philip Sack, staff member of the UK Department of Trade and Industry (DTI), 11 June 2001.

**Appendix: PROPOSAL FOR A 13TH EUROPEAN PARLIAMENT AND COUNCIL
DIRECTIVE ON COMPANY LAW CONCERNING TAKEOVER BIDS****Text:**

Proposal for a 13th European Parliament and Council Directive on company law concerning takeover bids (text agreed in the Conciliation Committee on 6 June 2001; source: DTI UK)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty establishing the European Community, and in particular Article 54 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the Economic and Social Committee,

Whereas it is necessary to coordinate certain safeguards which Member States require of companies and firms within the meaning of the second paragraph of Article 58 of the EC Treaty for the protection of members and others, in order to make such safeguards equivalent throughout the Community;

Whereas it is necessary to protect the interests of shareholders of companies governed by the law of a Member State when these companies are subject to a takeover bid or to a change of control and their securities are admitted to trading on a regulated market within the scope of this Directive;

Whereas only action at Community level can ensure an adequate level of protection for shareholders throughout the Union and provide for minimum guidelines for the conduct of takeover bids; whereas Member States acting independently are not able to establish the same level of protection especially in the case of cross-border takeovers or purchases of control;

Whereas the adoption of a directive is the appropriate procedure for laying down a framework consisting of certain common principles and a limited number of general requirements which Member States will be required to implement through more detailed rules according to their national systems and their cultural contexts;

Whereas Member States should take the necessary steps in order to protect shareholders having minority holdings after the purchase of the control of their company; whereas such a protection can be ensured either by obliging the person who acquired the control of a company to make a bid to all shareholders for all or for a substantial part of their holdings or by providing for other means which attain the objective of at least an equivalent level of protection of minority shareholders;

Whereas each Member State should designate an authority or authorities to supervise all aspects of the bid and to ensure that parties to takeover bids comply with the rules made pursuant to this Directive; whereas the different authorities must cooperate with one another; Whereas it is desirable to encourage the voluntary control exercised by self-regulatory bodies in order to avoid recourse to administrative or judicial action;

Whereas to reduce the scope for insider dealing offerers should be required to announce their intention of launching a bid as soon as possible and to inform the supervisory authority and the offeree company's board of the bid before they are made public;

Whereas the addressees of a takeover bid should be properly informed of the terms of the bid by means of an offer document;

Whereas it is necessary to set a time limit for takeover bids;

Whereas to be able to perform their functions satisfactorily, supervisory authorities must at all times be able to require the parties to the bid to provide information on it;

Whereas to avoid operations which frustrate the bid it is necessary to limit the powers of the board of directors of the offeree company to engage in operations of an exceptional nature;

Whereas the board of the offeree company should be required to make public a document setting out its opinion on the bid and the reasons on which it is based;

Whereas it is necessary that Member States provide for rules covering the cases when the bid may be withdrawn or declared void once the offer document has been made public, the right of the offerer to revise its bid, the possibility of competing bids for the securities of a company which are necessarily to the advantage of its shareholders and the disclosure of the result of the bid,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Scope

1. The coordination measures prescribed by this Directive shall apply to the laws, regulations, administrative provisions, codes of practice or other arrangements of the Member States, including arrangements established by organisations officially authorised to regulate the markets (hereinafter "rules"), relating to takeover bids for the securities of a company governed by the law of a Member State, where such securities are admitted to trading on a regulated market within the meaning of Article 1(13) of Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field in one or more Member States (hereinafter "regulated market").

2. The measures prescribed by this Directive shall not apply to takeover bids for securities issued by companies the object of which is the collective investment of capital provided by the public, and which operate on the principle of risk spreading, and the units of which are, at the holders' request, repurchased or redeemed, directly or indirectly, out of the assets of those companies. Action taken by such companies to ensure that the stock exchange value of their units does not significantly vary from their net asset value shall be regarded as equivalent to such repurchase or redemption.

Article 2

Definitions

For the purposes of this Directive:

- (a) "takeover bid" and "bid" mean a public offer (other than by the offeree company itself) made to the holders of the securities of a company to acquire all or part of such securities. A bid may be either mandatory or voluntary, and must follow or have as its objective the acquisition of control;
- (b) "offeree company" means a company whose securities are the subject of a bid;
- (c) "offeror" means any natural person or legal entity in public or private law making a bid;
- (d) "persons acting in concert" means natural persons or legal entities who cooperate with the offeror or the offeree company on the basis of an agreement, either express or tacit, either oral or written, and aimed respectively at obtaining control of the offeree company or frustrating the successful outcome of a bid. Persons controlled by another person within the meaning of Article 8 of Council Directive 88/627/EEC of 12 December 1988 on the information to be published when a major holding in a listed company is acquired or disposed of shall be deemed to be persons acting in concert with such persons and with each other;
- (e) "securities" means transferable securities carrying voting rights in a company;
- (f) "parties to the bid" means the offeror, the members of the offeror's board, if the offeror is a company, the offeree company, holders of securities of the offeree company and the members of the board of the offeree company, or persons acting in concert with such parties.

Article 3

General principles

1. For the purposes of the implementation of this Directive, Member States shall ensure that the rules or other arrangements made or introduced pursuant to this Directive respect the following principles:

- (a) all holders of securities of an offeree company of the same class are to be given equivalent treatment; in particular, if a person acquires control of a company, the other holders of securities are to be protected;
- (b) holders of securities of an offeree company are to have sufficient time and information to enable them to reach a properly informed decision on the bid; when advising the holders of securities, the board of an offeree company shall present its views on the effects of implementation on employment, conditions of employment, and the company locations.
- (c) the board of an offeree company is to act in the interests of the company as a whole, and must not deny the holders of securities the opportunity to decide on the merits of the bid;

- (d) false markets must not be created in the securities of the offeree company, of the offeror company, or of any other company concerned by the bid in such a way that the rise or fall in the prices of the securities becomes artificial and the normal functioning of the markets is distorted;
 - (e) an offeror shall announce a bid only after ensuring that it can fulfil in full any cash consideration, if so offered, and after having taken all reasonable measures to secure the implementation of any other type of consideration;
 - (f) an offeree company must not be hindered in the conduct of its affairs for longer than is reasonable by a bid for its securities.
2. In order to attain the objectives set out in paragraph 1, Member States:
- (a) shall ensure that rules are in force which satisfy the minimum requirements set out in this Directive;
 - (b) may have additional conditions and more stringent provisions than those required by this Directive to regulate bids.

Article 4

Supervisory authority

1. Member States shall designate the authority or authorities, competent for supervising a bid for the purposes of the rules made or introduced pursuant to this Directive. The authorities thus designated shall be either public authorities or associations or private bodies recognised by national law or by public authorities expressly empowered for that purpose by national law. Member States shall ensure that these authorities exercise their functions impartially and independently of all parties to the bid. Member States shall inform the Commission of these designations and shall specify all divisions of functions that may be made.

2. (a) The authority competent for supervising the bid shall be that of the Member State in which the offeree company has its registered office if the securities of that company are admitted to trading on a regulated market in that Member State. When this is not the case subparagraph (b) or (c) shall apply.

(b) If the securities of the offeree company are not admitted to trading on a regulated market in the Member State in which the company has its registered office, the authority competent for supervising the bid shall be that of the Member State on whose regulated market the securities of the company are admitted to trading. If the securities of the company are admitted to trading on regulated markets in more than one Member State, the authority competent for supervising the bid shall be that of the Member State on whose regulated market the securities were first admitted.

(c) If the securities of the offeree company are first admitted to trading on regulated markets within more than one Member State simultaneously, the offeree company has to determine the competent authority for supervising the bid by notifying these regulated markets and their supervisory authorities on the first trading day. If the securities of the offeree company are already admitted to trading on regulated markets in more than one Member State at the date referred to in Article 15(1) and were admitted simultaneously, the supervisory authorities of these Member States shall agree on who is to be the competent authority for supervising the bid within four weeks after the date mentioned in Article 15(1). Otherwise the competent authority shall be determined by the offeree company on the first trading day following the expiry of the period of time mentioned in the first sentence.

(d) Member States shall ensure that rules are in force requiring the decisions referred to in subparagraph (c) to be made public.

(e) In the cases referred to in subparagraphs (b) and (c) above, matters relating to the consideration offered in the case of a bid, particularly the price, and matters relating to the procedure of the bid, in particular the information on the offeror's decision to make a bid, the contents of the offer document and the disclosure of the bid shall be dealt with in accordance with the rules of the Member State of the competent authority. In matters relating to the information to be provided to the employees of the offeree company and in matters relating to company law, in particular the percentage of voting rights which confers control and any derogation from the obligation to launch a bid, as well as the conditions under which the board of the offeree company may undertake any action which might result in the frustration of the

bid, the applicable rules and the competent authority shall be those of the Member State in which the offeree company has its registered office.

3. Member States shall ensure that all persons employed or formerly employed by the supervisory authorities shall be bound by professional secrecy. Information covered by professional secrecy may not be divulged to any person or authority except by virtue of provisions laid down by law.

4. The supervisory authorities of the Member States under this Directive and other authorities supervising capital markets, in particular in accordance with Council Directive 88/627/EEC, Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing and Council Directive 93/22/EEC, shall cooperate and supply each other with information, wherever necessary for the application of the rules drawn up in accordance with this Directive and in particular in cases covered by Article 4(2) (b), (c) and (e). Information thus exchanged shall be covered by the obligation of professional secrecy to which the persons employed or formerly employed by the supervisory authorities receiving the information are subject. Cooperation should include the ability to serve the legal documents necessary to enforce measures taken by the competent authorities in connection with bids, as well as such other assistance as may reasonably be requested by the supervisory authorities concerned for the purposes of investigating any actual or alleged breaches of the rules made or introduced to implement this Directive.

5. Provided that the general principles referred to in Article 3 (1) are respected, Member States may provide in their rules made or introduced pursuant to this Directive that their supervisory authorities may, on the basis of a reasoned decision, grant derogation from these rules in particular types of cases and in specific appropriate cases.

6. This Directive does not affect the powers of the Member States to designate judicial or other authorities responsible for dealing with disputes and for deciding on irregularities committed in the bid procedure nor does it affect the power of Member States to regulate whether and under which circumstances parties to a bid are entitled to bring administrative or judicial proceedings. In particular this Directive does not affect the power which courts may have in a Member State to decline to hear legal proceedings and to decide whether or not such proceedings affect the outcome of a bid. This Directive shall not affect the powers of the Member States to determine the legal position concerning the liability of supervisory authorities or concerning litigation between the parties to a bid.

Article 5

Protection of minority shareholders; mandatory bid

1. Where a natural person or legal entity who, as a result of his own acquisition or the acquisition by persons acting in concert with him, holds securities of a company referred to in Article 1(1) which, added to any existing holdings and the holdings of persons acting in concert with him, directly or indirectly give him a specified percentage of voting rights in that company, conferring on him the control of that company, Member States shall ensure that rules are in force which oblige this person to make a bid as a means to protect the minority shareholders of that company. This bid shall be addressed to all holders of securities for all their holdings at an equitable price. When the consideration offered by the offeror does not consist of liquid securities admitted to trading on a regulated market, such consideration has to include a cash consideration at least as an alternative. In any case, the offeror must provide a consideration in cash at least as an alternative, if he, alone or in conjunction with persons acting in concert with him, has, during a period commencing not less than 3 months before the bid was made public pursuant to Article 6(1) and ending on the expiry of the acceptance period, acquired for cash more than 5% of the shares or voting rights in the offeree company.

2. Where a voluntary bid has been made in accordance with this Directive to all holders of securities for all their holdings and control has been obtained, the obligation to launch a bid no longer applies.

3. By way of derogation from paragraph 1, Member States, which provide at the time of adoption of this Directive for other appropriate and at-least-equivalent means in order to

protect the minority shareholders of the company, may continue to apply such means for one year following the date mentioned in Article 15(1), on the condition that these means:

- (a) are specific to the transfer of control, and
- (b) include specific financial compensation for the minority shareholders.

4. In addition to the protection provided under paragraphs 1 and 3, Member States may provide for further instruments aiming at the protection of the interests of holders of securities insofar as these instruments do not hinder the normal course of the bid referred to in paragraph 1.

5. The percentage of voting rights which confers control for the purposes of paragraphs 1 and 3 and the method of its calculation shall be determined by the rules of the Member State in which the company has its registered office.

Article 6 Information

1. Member States shall ensure that rules are in force requiring that the decision to make a bid is made public without delay and that the supervisory authority is informed of the bid. Member States may require that the supervisory authority is informed before this decision is made public. As soon as the bid has been made public, the board of the offeree company shall inform the representatives of its employees or, where there are no such representatives, the employees themselves.

2. Member States shall ensure that rules are in force requiring the offeror to draw up and make public in good time an offer document containing the information necessary to enable the holders of securities of the offeree company to reach a properly informed decision on the bid. Before the offer document is made public, the offeror shall communicate it to the supervisory authority. When it is made public, the board of the offeree company shall communicate it to the representatives of its employees or, where there are no such representatives, to the employees themselves. Where the offer document is subject to the prior approval of the supervisory authority and once it has been approved, it shall be recognised, subject to any translation, in the other Member State or Member States on whose markets the securities of the offeree company are admitted to trading, without its being necessary to obtain the approval of the supervisory authorities of that or those Member States and without their being able to require additional information to be included in the offer document. The supervisory authorities may, however, require that the offer document include information specific to the market of the Member State or Member States on whose markets the securities of the offeree company are admitted to trading concerning the formalities to be complied with for accepting the bid and for receiving the consideration due at the close of the bid as well as the tax arrangements to which the consideration offered to the holders of securities will be subject.

3. Those rules shall require that the document state at least:

- (a) the terms of the bid;
- (b) the identity of the offeror and, where the offeror is a company, the type, name and registered office of that company;
- (c) the securities or class, or classes of securities for which the bid is made;
- (d) the consideration offered for each security or class of securities and, in the case of mandatory bids, the basis of the valuation used in determining it, with particulars of the way in which that consideration is to be given;
- (e) the maximum and minimum percentages or quantities of securities which the offeror undertakes to acquire;
- (f) details of any existing holdings of the offeror, and of persons acting in concert with him, in the offeree company;
- (g) all the conditions to which the bid is subject;
- (h) the offeror's intentions with regard to the continuation of the business of the offeree company and, so far as affected by the bid, the offeror company, and the continued employment of their employees and their management, including any material change in the conditions of employment. This relates in particular to the offeror's strategic planning for those companies and the likely impact on jobs and locations;
- (i) the period for acceptance of the bid;

- (j) where the consideration offered by the offeror includes securities of any kind, information about those securities;
- (k) information on the financing for the bid;
- (l) the identity of persons acting in concert with the offeror or with the offeree company, in the case of companies together with their type, name and registered office, and their relationship with the offeror and where possible with the offeree company;
- (m) information on the national law which will govern the contracts resulting from the bid between the offeror and the holders of securities of the offeree company.

4. Member States shall ensure that rules are in force requiring the parties to a bid to provide the supervisory authorities of their Member State at any time on request with all information in their possession concerning the bid which is necessary for the supervisory authority to discharge its functions.

Article 7

Period for acceptance

1. Member States shall provide that the period for acceptance of the bid to be specified by the offeror in the offer document in accordance with Article 6(3)(i) may not be less than two weeks or more than ten weeks from the date of publication of the offer document. Provided that the general principle referred to in Article 3(1)(f) is respected, Member States may provide that the period of ten weeks may be prolonged on the condition that the offeror gives at least two weeks prior notice of its intention to close the bid.

2. Member States may provide for rules modifying the period mentioned in paragraph 1 in specific appropriate cases. Member States may authorise the supervisory authority to grant derogation from the period mentioned in paragraph 1 in order to allow the offeree company to organise a general meeting to consider the bid.

Article 8

Disclosure

1. Member States shall ensure that rules are in force which require a bid to be made public in such a way as to ensure market transparency and integrity for the securities of the offeree company, of the offeror or of any other company affected by the bid, and which particularly avoid the publication or dissemination of false or misleading information.

2. Member States shall ensure that rules are in force which provide for the disclosure of all information or documents required in such a manner as to ensure that they are both readily and promptly available to the holders of securities at least in those Member States where the securities of the offeree company are admitted to trading on a regulated market and to the representatives of the employees of the offeree company or, where there are no such representatives, to the employees themselves.

Article 9

Obligations of the board of the offeree company

1. Member States shall ensure that rules are in force requiring the following : During the period set below, the board of the offeree company shall obtain the prior authorisation of the general meeting of the shareholders, given for this purpose, before taking any action which may result in the frustration of the bid, other than seeking alternative bids, and notably before the issuing of shares which may result in a lasting impediment for the offeror obtaining control over the offeree company. Such authorisation is required at all events after the board of the offeree company has received the information referred to in Article 6 (1), first sentence, concerning the bid and until the result of the bid is made public or the bid lapses. Member States may provide that such authorisation is required from an earlier time such as when the board of the offeree company becomes aware that the bid is imminent. As concerns decisions taken before the period referred to above and not yet partly or completely implemented, approval or confirmation by the general meeting of the shareholders is required if the decision was outside

the normal course of business and its implementation may result in the frustration of the bid. For the purpose of obtaining prior authorisation of the general meeting of the shareholders as referred to above, Member States may provide for rules allowing a general meeting to be convened at short notice, provided that this meeting is not organised less than two weeks after its notification.

2. The board of the offeree company shall draw up and make public a document setting out its opinion on the bid, together with the reasons on which it is based, including its views on the effects of implementation on all the interests of the company, including employment, and on the offeror's strategic planning for the offeree company and its likely impact on jobs and locations as set out in the offer document pursuant to Article 6(3)(h). The board of the offeree company shall at the same time communicate this opinion to the representatives of its employees or, where there are no such representatives, to the employees themselves. Where a separate opinion of the employees' representatives on the effects of implementation on employment is made available to the board of the offeree company in sufficient time, it shall be enclosed.

Article 10

Rules applicable to the conduct of bids

In addition Member States shall ensure that rules are in force which govern the conduct of bids for at least the following matters:

- (a) lapse of the bid;
- (b) revision of bids;
- (c) competing bids;
- (d) disclosure of the result of bids;
- (e) irrevocability of the bid and conditions permitted.

Article 11

Contact Committee

1. The Contact Committee set up by Article 20 of Directive 79/279/EEC shall also have as its functions:

- (a) to facilitate, without prejudice to the provisions of Articles 226 and 227 of the Treaty, the harmonised application of this Directive through regular meetings dealing in particular with practical problems arising in connection with its application;
- (b) to advise the Commission, if necessary, on additions or amendments to this Directive.

2. It shall not be the function of the Contact Committee to appraise the merits of decisions taken by the supervisory authorities in individual cases.

Article 12

Sanctions

Each Member State shall determine the sanctions to be applied for infringement of the measures taken pursuant to this Directive. The sanctions shall be sufficient to promote compliance with those measures.

Article 13

Revision of Article 4(2)

Three years after the date referred to in Article 15(1), the European Parliament and the Council, acting on a proposal from the Commission, shall examine and if necessary revise Article 4(2) in the light of the experience acquired in applying Article 4(2).

Article 14

Amendment of Article 1(1) of Directive 88/627/EEC

Article 1(1) of Directive 88/627/EEC shall be replaced by the following: "1. Member States shall make subject to this Directive natural persons and legal entities in public or private law who acquire or dispose of, directly or through intermediaries, holdings meeting the criteria laid down in Article 4(1) which involve changes in the holdings of voting rights in companies incorporated under their law the shares of which are admitted to trading on one or several regulated markets within the meaning of Article 1(13) of Directive 93/22/EEC."

Article 15

Transposition of the Directive

1. Member States shall ensure that the laws, regulations, administrative provisions or other arrangements necessary for them to comply with this Directive are in force before (*four years after entry into force*). Member States may however postpone compliance with Article 9 until (*five years after entry into force*). They shall forthwith inform the Commission thereof. When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.

2. Member States shall communicate to the Commission the provisions or other arrangements referred to in paragraph 1.

Article 16

Entry into force of the Directive

This Directive shall enter into force on the day of its publication in the Official Journal of the European Communities.

Article 17

Addressees of the Directive

This Directive is addressed to the Member States.

End of the document

Bibliography:Books and articles:

The American Law Institute: *Principles of Corporate Governance:*

Analysis and Recommendations – Vol 1, Parts I-IV, American Law
Institute Publishers 1994

Andenas, Mads: *The European Takeover Directive and the City*, *The Company
Lawyer* – Vol 18 No 4 (1997), pages 101-104

Baumgardner, Astrid R.: *Structuring Acquisitions in France: Critical Issues*,
New York Law Journal, 15 Nov 1999 (found through LEXIS-NEXIS)

Begg, Peter FC: *Corporate Acquisitions and Mergers – Vol 2*, Graham &
Trotman 1994

Bradley, Michael: *The Purposes and Accountability of the Corporation in
Contemporary Society: Corporate Governance at a Crossroads*, *Law and
Contemporary Problems* – Vol 62 No 3 (1999), pages 9-86

Campbell, Dennis; Campbell, Christian T: *International Liability of Corporate
Directors*, Lloyd's of London Press Ltd. 1993

Cheffins, Brian R: *Company law: Theory, Structure, and Operation*, Oxford
University Press 1997

Cilliers HS; Benade ML: *Corporate Law*, 3 ed Butterworths 2000

Dep. of Trade and Industry, UK: Consultation Paper: *Proposal for a Thirteenth
Directive on Company Law concerning Takeover Bids, A Consultative
Document*, April 1996

Farrar JH, Hannigan BM: *Farrar's Company Law*, 4 ed Butterworths 1998

Gore-Browne, Sir Francis; Boyle AJ: *Gore-Browne on Companies – Vol 2*
44 ed Jordans 1986 (supplement 36 of 2000)

Gower LCB; Davies PL: *Gower's Principles of Modern Company Law*, 6 ed
Sweet & Maxwell 1997

Greene, Edward F: *Regulatory and Legislative Responses to Takeover Activity
in the 1980's: The United States and Europe*, Texas Law Review 1991,
pages 1540-1592

idem: *Toward a Cohesive International Approach to Cross-Border Takeover
Regulation*, University of Miami Law Review – Vol 51, 1997, pages 823-
874

Halsbury LHC; Hailsham of St. Marylebone LHC: *Halsbury's Laws of
England*, 4 ed Butterworths 1996 (reissue)

Hanlon, James: *European Community Law*, 2 ed Sweet&Maxwell 2000

Hopt, Klaus: *Europäisches und deutsches Übernahmerecht (European and
German Takeover Law)*, ZHR 1997, pages 373-420

Jennings, Richard W.; Marsh, Harold Jr.: *Securities Regulation, Cases and
Materials*, 6 ed Foundation Press 1987

Kapteyn, P.J.G.; VerLoren van Themaat, P.: *Introduction to the Law of the
European Communities*, 3 ed Kluwer Law International 1998

King, Mervyn E: *The King Report on Corporate Governance*, The Institute of
Directors In Southern Africa (first published in 11/1994)

Loss, Louis; Seligman, Joel: *Securities Regulation – Vol 5*, 3 ed Little, Brown
and Company 1990

Morse, Geoffrey: *Controlling Takeovers - The Self Regultaion Option in the
United Kingdom*, Journal of Business Law 1999, pages 58-74

Nagel, Bernard: *Deutsches und europäisches Gesellschaftsrecht (German and
European Company Law)*, Verlag Vahlen 2000

Palmer, Francis Beaufort: *Palmer's Company Law*, 24 ed Stevens & Sons 1987

Pöttsch, Thorsten; Möller, Andreas: *Das künftige Übernahmerecht (Future Takeover Law)*, WM extra edition no 2 to edition 31/2000

Steiner, Josephine; Woods, Lorna: *EC Law*, 5 ed Blackstone Press Limited 1996

Weinberg, Mark A; Blank, Victor: *Takeovers and Mergers*, 5 ed Sweet & Maxwell 1989

Newspaper articles (in alphabetical order of press media):

The Economist: “*For Europe’s Parliament, power without love*”, 22.02.2001; “*Mariage a la mode – Why European companies are rushing to the altar*”, 29.04.2000

Financial Times (London edition): “*Rome to tackle company rules*”, 08.12.1997; “*Olivetti bid for Telecom Italia ruled 'not valid' by watchdog*”, 23.02.1999; “*Severe test for new regime: Italy*”, 19.03.1999 (found through LEXIS-NEXIS); “*EU agrees new takeover bid rules*”, 06.06.2001 (found on www.ft.com, accessed on 06.06.2001)

Frankfurter Allgemeine Zeitung: “*Übernahmeangebote erfordern detaillierte Angaben*”, (*Takeover bids require detailed information*), 17.03.2001; “*Verbände: Bei Übernahme Neutralitätspflicht lockern*” (*Associations: Ease duty of neutrality in takeovers*), 04.04.2001; “*Vorstandspflicht zur Neutralität geht zu weit*” (*Boards of directors’ duty of neutrality goes to far*), 07.04.2001 (found through LEXIS-NEXIS)

Handelsblatt: “*Vorstoss zum Übernahmerecht gescheitert*” (*Approach in Takeover Law Failed*), 06.06.2001 (found on www.handelsblatt.com, accessed on 06.06.2001)

Los Angeles Times: “*Pickens opens fight to gain control of Unocal*”, 09.04.1985 (found through LEXIS-NEXIS)

Wall Street Journal: “*Pressure grows to unify Europe’s takeover laws*”,

13.12.1999; “*When it comes to takeovers, Europe isn’t unified*”,
23.04.1999 (found on www.wsj.com, accessed on 20.02.2001)

Internet sources (in chronological order of access):

03.02.2001: Bundesministerium der Finanzen: www.bundesfinanzministerium.de

10.04.2001: European Union Online: www.europa.eu.int/prelex: Explanatory Memorandum to the *Commission Proposal for a 13th European Parliament and Council Directive on Company Law Concerning Takeover Bids*, Com (95) 655 final

10.04.2001: European Union Online: <http://europa.eu.int/prelex/>: standard search: series: com, year: 1995, number: 655: Monitoring of decision-making process between institutions

07.05.2001: PLC Publications: <http://www.plcinfo.com/scripts>: “*Law and regulation of public takeovers: France*” (analysis by Linklaters & Alliance)

07.05.2001: Conseil des Marchés Financiers: <http://www.cmf-france.org/>

08.05.2001: Commission des Opérations de Bourse: <http://www.cob.fr/>

08.05.2001: Tradeport: <http://www.tradeport.org/>: *1999 Investment Climate Statement on France, the Netherlands and Italy* (U.S. Department of Commerce)

09.05.2001: Commissione Nazionale per le Società e la Borsa (CONSOB): <http://www.consob.it/>

09.05.2001: PLC Law Department UK: <http://www.lawdepartment.net/>: “*Handbag wars at Gucci*” (Michael Clarkson, European Counsel)

15.05.2001: International Law Institute: <http://www.ili.org/pubeuro.html>: “*Developments in European Company Law*” (David A. Levy)

17.05.2001: European Union Online: <http://europa.eu.int/eur-lex/>: Commission Recommendation of 25 July 1977 concerning a European code of conduct relating to transactions in transferable securities

18.05.2001: European Union Online: <http://europa.eu.int/eur-lex/>: European

Parliament's Rules of Procedure, based on art 190[142] E.C.

08.06.2001: European Parliament: www.europarl.eu.int/; European Council:

<http://ue.eu.int/>; European Commission: www.europa.eu.int/

11.06.2001: The Royal Economic Society:

www.res.org.uk/media/Confrep/conyan.htm: "*Hostile mergers: The impact on jobs and productivity*"