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ON THE WAY TO US-STYLE HOSTILE TENDER OFFERS IN GERMANY? - THE EUROPEAN ATTEMPT TO HARMONIZE THE TAKEOVER LAW AND ITS IMPACT ON GERMAN COMPANY LAW*

ROLAND DONATH**

I. INTRODUCTION

A lot of trees have died for the advancement of the law of corporate mergers and acquisitions, not only in America[1], but

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1. A data base check shows several hundred Law Review publications dealing with legal problems of mergers and acquisitions, a great many of them discussing hostile takeovers. This reflects perfectly well the reality of Corporate America during the eightiees: while in 1978 about 1450 mergers and acquisitions took place, their number increased steadily to 3500 in 1988. No less impressive is the amount of money involved: from about 35 Billions $ in total in 1979 the value of all transactions increased rapidly over the years to reach the incredible figure of 230 Billions $ in 1988 (*Profile*, MERGERS & ACQUISITIONS 53 (1989). The most recent publications in the US dealing with the subject of this article are Jeffrey P. Greenbaum, *Tender Offers in the European Community: The playing field shrinks*, 22 VAND. J. TRANSNAT'L L. 923 (1989); John C. Anjier, *Anti Takeover Statutes, Shareholders, Stakeholders and Risk*, 51 LA L. REV. 561 (1991); Philip N. Hablutzel/David R. Selmer, *Hostile Corporate Takeovers: History and Overview*, 8 NORTHERN ILL. L. REV. 203 (1988); Ronald J. Gilson, *The political Ecology of Takeovers: Thoughts on Harmonizing the European Corporate Governance Environment*, 61 FORDHAM L. REV. 161 (1992); Clark D. Stith, *Federalism and Company Law: A "Race to the Bottom" in the European Community*, 79 GEO. L.J. 1581 (1991); Edward F. Greene, *Regulatory and Legislative Responses to Takeover Activity in the 1980s: The United States and Europe*, 69 TEX. L. REV. 1539 (1991); Yedida Z. Stern, *Acquisition of corporate control by numerous privately negotiated transactions: A proposal for the resolution of street sweeps*, 58 BROOKLYN L. REV. 1195 (1993); Eric Grannis, *A problem of mixed motives, Applying Unocal to defensive Esops*, 92 COLUM. L. REV. 851 (1992); Paul E. Burns, *Timing is Paramount: The impact of Paramount v. Time on the law of hostile take-*

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also in Germany,[2] Italy,[3] France[4] the United Kingdom[5] and

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overs, 19 FLA. ST. U. L. REV. 761 (1992); Roberta Romano, *Competition for Corporate Charters and the lesson of takeover statutes*, 61 FORDHAM L. REV. 84 (1993); Jill E. Fisch, *Imprudent Power: Reconsidering U.S. Regulation of Foreign Tender Offers*, 87 *Nw. U. L. Rev.* 523 (1993); Stephen M. Bainbridge, *Redirecting state takeover laws at proxy contests*, 1992 WIS. L. REV. 1071 (1992); Randall S. Thomas and Robert G. Hansen, *A theoretic analysis of corporate auctioneers' liability regimes*, 1992 WIS. L. REV. 1147 (1992); Steven D. Gardner, *A step forward: Exclusivity of the statutory Appraisal Remedy for minority shareholders dissenting from going-private merger transactions*, 53 OHIO·ST. L. J. 239 (1992); Josef A. Grundfest, *Just vote no: A minimalist strategy for dealing with barbarians inside the gates*, 45 STAN. L. REV. 857 (1993); Randall S. Thomas, *Judicial Review of defensive tactics in proxy contests: When is using a rights plan right?*, 46 VAND. L. REV. 503 (1993); Raymond J. Blackwood, *Applying Fraudulent Conveyance law to leveraged buyouts*, 42 DUKE L.J. 340 (1992).

2. Michael Adams, *Was spricht gegen eine ungehinderte Übertragbarkeit der in den Unternehmen gebundenen Ressourcen durch ihre Eigentümer?*, DIE AKTIENGESELLSCHAFT 243 (1990); Carsten Thomas Ebenroth/A. Rapp, *Abwehr von Unternehmensübernahmen*, DWIR 2 (1991); Heinz-Dieter Assmann et al., *Übernahmeangebote*, ZEITSCHRIFT FÜR UNTERNEHMENS- UND GESELLSCHAFTSRECHT (SPECIAL ISSUE 9) (1990); Ingrid Depser, *Der Vorschlag der EG-Kommission zur Takeover-Richtlinie im Spiegel der amerikanischen Takeover-Erfahrung*, RECHT DER INTERNATIONALEN WIRTSCHAFT 351 (1992); Bernd F. v. Falkenhausen, *Das "Takeover-Game" - Unternehmenskäufe in den USA*, in FESTSCHRIFT FÜR ERNST STIEFEL 163 (1987); Barbara Grunewald, *Was bringt der Vorschlag einer 13. EG-Richtlinie über Übernahmeangebote für das deutsche Recht?*, WM 1233 (1989); id., *Der geänderte Vorschlag einer 13. EG- Richtlinie betreffend Übernahmeangebote*, WM 1361 (1991); K. H. Jander and R.T. McDermott, *Neue Methoden bei Unternehmenskäufen in den USA*, RECHT DER INTERNATIONALEN WIRTSCHAFT 957 (1990); Edgar Joussen, *Die Treuepflicht des Aktionärs bei feindlichen Übernahmen*, BETRIEBS-BERATER 1075 (1992); HEINZ-CHRISTIAN KNOLL, DIE ÜBERNAHME VON KAPITALGESELLSCHAFTEN UNTER BESONDERER BERÜCKSICHTIGUNG DES SCHUTZES VON MINDERHEITSAKTIONÄREN NACH AMERIKANISCHEM, ENGLISCHEM UND DEUTSCHEM RECHT (1992); Marcus Lutter, *Die Richtlinie über Übernahmeangebote*, EUROPÄISCHES UNTERNEHMENSRECHT (SPECIAL ISSUE 1) 67 (1991); id., DIE TREUEPFLICHT DES AKTIONÄRS, ZEITSCHRIFT FÜR HANDELSRECHT 446 (1989); Hans-Jochen Otto, *Übernahmeversuche bei Aktiengesellschaften und Strategien der Abwehr*, DER BETRIEB (SPECIAL ISSUE 12) (1988); Martin Peltzer, *Hostile Takeovers in der Bundesrepublik Deutschland*, ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 69 (1989); id., *Von Räubern, weißen Rittern und Jungfrauen - die Taktiken der amerikanischen Takeovers*, ZKW 291 (1986); JÜRGEN REUL, DIE PFLICHT ZUR GLEICHBEHANDLUNG DER AKTIONÄRE BEI PRIVATEN KONTROLLTRANSAKTIONEN, 1991; Jutta Stoll, *Rechtliche Aspekte von 'feindlichen' Übernahmen von Aktiengesellschaften*, BETRIEBS-BERATER 301 (1989); CLIVE M. SCHMITTHOFF EL AL., ÜBERNAHMEANGEBOTE IM AKTIENRECHT (1976); Peter Wiesner, *Stand des Europäischen Unternehmensrechts*, ZEITSCHRIFT FÜR EUROPÄISCHES WIRTSCHAFTSRECHT 500 (1993).

3. Filippo Annunziata, *La nuova disciplina dell'OPA in Francia*, RIV. SOC. 1280 (1992); Guiseppe Carcano, *OPA ostili e acquisto "difensivo" di azioni proprie negli Stati Uniti*, RIV. Soc. 1238 (1988); Guiseppe Carcano, *Acquisto di azioni proprie come tecnica di difesa dalle scalate: la CEE rafforza il divieto*, RIV. Soc. 1310 (1992); Giovanni E. Colombo, *La cessione dei pacchetti di controllo: considerazioni per una discussione*, RIV. SOC. 1443 (1978); Renzo Costi, *I sindacati di blocco e di voto nella legge sull'OPA*, BANCA, BORSA E TIT. CRED. 472 (1992); id., *Operazioni intragruppo e OPA obbligatoria*, GIUR. COMM. 65 (1993); Aldo Frignani, *Il Leveraged Buyout nel diritto italiano, Giur. Comm.* 419 (1989); Francesco Galgano, *Gruppi di società, Insider trading, OPA obbligatoria*, CONTR. E IMPR. 637 (1992); Agostino Gambino, *L'Opa e la circolazione del con-*

other European Countries.[6] Thus *Leebron*'s statement "no machination of the corporate or financial world has ever attracted greater attention from lawyers, legal scholars, financial economists or the lay press" seems to be very true.[7] Whoever thought that the collapse of the American junk bond market in 1989 and the related slowdown of hostile takeover activity battles for corporate control would end battles for corporate control was impressively proven wrong by the latest 1980's style takeover attempt in the media market.[8] The pattern has changed, however. Whereas cash was king during the takeover avalanche of the 1980s, stock is now the currency of choice, leading to greater shareholder influence in the decision-making process of such deals. It does not require much prophetic talent to predict that this resurgence of takeover battles will sooner or later end in the courts of Delaware[9] and, as a result, develop the law on takeovers further. With this renaissance of hostile takeover activity, it is interesting to look across the Atlantic where the European Community is about to harmonize the takeover laws of

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trollo all'interno del gruppo, RIV. SOC. 1249 (1992); Paolo Montalenti, *La legge italiana sulle offerte pubbliche: prime reflessioni*, GIUR. COMM. 831 (1992); Piergaetano Marchetti, *L'offerta pubblica di Acquisto in Italia*, RIV. SOC. 1155 (1971); id., *La disciplina dell'Opa in Germania*, RIV. SOC. 837 (1979); id., *La nuova disciplina francese delle offerte pubbliche*, RIV. SOC. 1031 (1979); id., *OPA obbligatoria e circolazione del controllo all'interno del gruppo*, RIV. SOC. 1258 (1992); Ariberto Mignoli, *Riflessioni critiche sull'esperienza italiana dell'OPA: idee, problemi, proposte*, RIV. SOC. 1 (1986); Giuseppe Sbisà, *Patto di Sindacato e OPA*, CONTR. E IMPR. 653 (1992); Roberto Weigmann, *La nuova legge italiana sulle offerte pubbliche*, BANCA, BORSA E TIT. CRED. 428 (1992).

4. Martin and Faugerolas, *Sécurité et transparence du marché financier. Nouveau Statut de la C.O.B. Réforme des O.P.A., O.P.E.*, BULLETIN JOLY Nr. 11bis; Wymeersch, *Cession de Controle et offres publique obligatoires*, REVUE PRATIQUE DES SOCIÉTÉS 207 (1991); AGNELLET ET AL., OPA ET STRATÉGIES ANTI-OPA, UNE APPROCHE INTERNATIONALE (1989); BERTREL and JEANTIN, ACQUISITIONS ET FUSIONS DES SOCIÉTÉS COMMERCIAUX. ASPECTS JURIDIQUES DE L'INGÉNNIÈRIE FINANCIÈRE (1989).

5. D.B. Richard Cooper, *In search of flexibility - a british view of the proposed takeover directive*, ZEITSCHRIFT FÜR EUROPÄISCHES WIRTSCHAFTSRECHT 289 (1991); Geoffrey Morse, *New Edition of the City Code on Takeovers and Mergers*, J. BUS. L. 176 (1991); Geoffrey Morse, *The City Code on Takeovers and Mergers - self regulation or self protection*, J. BUS. L. 509 (1991); PENNINGTON, REPORT ON TAKEOVER AND OTHER BIDS (1974).

6. *See* the comparative overview of Jan Wouters, *Towards a level playing field for takeovers in the European Community? An analysis of the proposed Thirteenth Directive in light of American experiences*, 30 COMMON MARKET L. REV. 267 (1993).

7. Leebron, *Games Corporations Play: A Theory of Tender Offers*, 61 N.Y.U. L. REV. 153 (1986).

8. *See* WALLSTREET JOURNAL of September 21, 1993, at 1: "Mixed Media: QVC's $ 9.5 Billion Bid for Paramount brings industry Titans to fray".

9. Since Paramount is a Delaware Company.

its Member States. Given the very limited number of comparative articles[10] on this issue, it is - at least for the American lawyer - very tempting to assume that takeover activity everywhere in the world is similar to the American process and automatically follows the pattern developed in the United States. This is not the case at all in Germany, for example, where to date a US-style takeover battle has never occured.

Even though American legal publications do not give very much attention to merger and acquisition activities that are not directly related to the United States, there are at least two international aspects that should be considered worthwhile. First, as recently shown by the rumors about the German Bertelsman Company and whether it will come up with a bid for Paramount,[11] the takeover battles do not remain within national borders, but rather the game is played on international playgrounds.[12] For American companies this area becomes more and more important regardless of whether they seek to enter the Community "before 'Fortress Europe' raises its drawbridge or whether they wish merely to take greater advantage of the strengthened European market".[13] Therefore, it is indispensable to know the rules observed in other parts of the world. Second, it is more than doubtful that the extent of debt-financed takeover activities found in the United States during the 1980s is good as far as the economy as a whole is concerned.[14] Antitrust

10. Even though the lessons one can draw in the field of corporate law from comparative law are somtimes questioned (*see, e.g.*, Roberta Romano, *A Cautionary Note on Drawing Lessons from Comparative Corporate Law* (Symposium: Economic Competitiveness and the Law), 102 YALE L.J. 1927 (1993)), comparative analysis of this subject is not only of academic interest. *See* also Alfred F. Conard, *The Supervision of Corporate Management: A Comparison of Developments in European Community and United States Law*, 82 MICH. L. REV. 1459 (1984); Marc J. Roc, *Some Differences in Corporate Structure in Germany, Japan and the United States* (Symposium: Economic Competitiveness and the Law), 102 YALE L.J. 1927 (1993).

11. *See "Reinhard Mohn Outlines Legacy For Bertelsmann"*, WALLSTREET JOURNAL of September 24, 1993, p. A 8.

12. *See* Jill E. Fisch, *Imprudent Power: Reconsidering U.S. Regulation of Foreign Tender Offers*, 87 NW. U. L. REV. 523 (1993).

13. *See* Greenbaum, *supra* note 1, at 925 & 926.

14. The question of whether takeovers are good or bad for the economy as a whole and for the companies involved was discussed in 1989, when the takeover activity has reached its peekpoint by SEGAL, CORPORATE MAKEOVER (1989), and HOLLAND, WHEN THE MACHINE STOPPED (1989) (both reviewed in the WALL STREET JOURNAL, Sept. 14, 1989, at p. A14), with a totally different result. A short overview of the positive and negative aspects of hostile takeovers is given *infra* accompanying text to footnote 227. When the takeover-waive was at its heights in the second half of the 1980s, even the principal role

issues are just one aspect, which, however, shall not be discussed here.[15]

But there is a whole bundle of other serious concerns,[16] for example, of whether a permanent takeover threat forces corporate managers to develop only short term profit-maximizing techniques[17] and prevent them from developing long term perspectives which would serve the company in the long run much better.[18] It is always interesting to see how foreign countries face these problems. The European Community, as part of its company law harmonization efforts, is about to harmonize the takeover law in the Community. In 1990, the Commission presented an amended Proposal for a Thirteenth Directive on Company Law, concerning takeovers and other general bids.[19] According to the "Bangemann-memorandum" of May 14, 1990, the Commis-

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of stock corporations and the institutions of stock exchanges at large were questioned. Originally introduced to provide capital for huge enterprises with extensive financial needs that could not be met by single persons, more and more, so was argued, they were abused by spaculators making corporations their toys, *see Manic Market*, TIME 44 (Nov., 1986). Other concernes were the effects of so many highly-leveraged-financed transactions on the economy as a whole. So a commentator in the WALL STREET JOURNAL came to the conclusion that the combination of high interest burdens relative to cash flow, high default rates of junk bonds, continued low profitability, and workers who more and more resist and who are ready to strike easier than in the past makes the whole construction of the American economy an extremely shaky house built on junk bond sand, *see* Cockburn, *U.S. Economy: A House Built on Junk Bond Sand*, THE WALL STREET JOURNAL A23 (October 19, 1989).

15. *See* Edward B. Rock, *Corporate Law through an antitrust lens*, 92 COLUM. L. R. 497 (1992); Jeffrey P. Greenbaum, *An American Perspective on the European Commission's "Amended proposal for a Council Regulation on the control of concentrations between undertakings" and its impact on hostile tender offers*, 7 DICK. J. INT'L. L. 195 (1989).

16. The fact that during the recent years about 40 States of the Union (among them Delaware, where more than 50 % of the 500 "Fortune Companies" are incorporated) have enacted anti-takeover laws shows that even if these regulations could not stop the takeover avalanche at all, also America's lawmakers were concerned about the increasing number of deals. For a brief discussion of the mechanics of these anti-takeover statutes, *see supra* note 13.

17. *See* Cosh et al., *Takeovers and shorttermism in the UK, Institute for Public Policy Research*, INDUSTRIAL POLICY PAPER No. 3 (1990).

18. *See* Hayes and Abernathy, *Managing our way to economic decline, Harv. Bus. Rev.* 67 (July-August 1980); Law, *A corporation is more than its stock*, HARV. BUS. REV. 80 (May-June 1986), 80. Lipton, *Takeover bids in the target's boardroom*, 35 BUS. LAW. 101 (1979). For a discussion of this issue *see* Wouters, *supra* note 6, at 276.

19. *See* Amended Proposal for a Thirteenth Council Directive on Company Law concerning takeover and other general bids, 1991 OJ No. C 240/7 (September 26, 1990). *See* also Additional Opinion of the Economic and Social Committee on the Amended Proposal for a Thirteenth Council Directive on Company Law concerning takeovers and other general bids, OJ No. C 102/49 (April 18, 1991).

sion regards takeover bids[20] in general as a positive phenomenon, because they provoke market selection of the more competitive companies as well as the restructuring of firms. Therefore, takeover bids shall be encouraged.[21] The purpose of this article is to examine whether this directive will eventually lead to US-Style hostile tender offers and takeover fights in Germany, which so far have not been observed.[22] It begins with a short overview of the mechanics of a typical hostile takeover, then outlines the relevant section of the German Stock Corporation Act and the law regarding hostile takeovers in Germany. Subsequently, a short overview of European company law is given, and then a closer look at the proposal for the directive is taken. Its main structural differences are briefly compared to the Williams Act. Finally, the directive's impact on German company law will be discussed.

II. MECHANICS OF A HOSTILE TAKEOVER

A. INTRODUCTION

In the following, a typical American hostile takeover is dissected into its basic characteristics, each of which is subsequently compared to German corporate law. Prior to this, the main structural concept of German corporate law is outlined with special emphasis given to the roles of shareholders, supervisory board, and board of management in the decision-making process of a publicly held corporation. As the concept of a German stock corporation cannot be properly understood without some basic knowledge about labor co-determination, this is discussed as well, even though - systematically spoken - it is not pure company law.[23]

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20. The terms takeover bid and tender offer are often used as synonyms, eventhough technically spoken, the second term is broader. The first expression is used in the United Kingdom, the latter in the United States.

21. Commission Communication of May 14, 1990 relating to hindrances of public takeover or exchange bids: Europe/Documents (May 17, 1990), No. 1619.

22. During the last couple of years, there were some hostile takeovers or attempts of them, such as Krupp/Hoesch and Conti/Pirelli, but they were not done by way of a tender offer, but rather by successive acquisition of shares at the stock exchange.

23. *See infra* text accompanying note 56.

B. Tender Offers

The game begins, long before the public realizes it, when the "raider" is looking for an appropriate target, the suitability of which depends on various facts such as market policy, market shares, product variety, etc. of both the acquiring and the target company.[24] After having selected the target, either the "raider" proposes a friendly takeover to the target's board or announces the tender offer directly without negotiations.[25] Therefore, a tender offer can be defined as a public offer made by the acquirer (mostly another company or the management team of the target company to purchase all or a designated percentage of the outstanding common stock of the so-called target company. The Securities Exchange Commission (SEC) has suggested an eight-factor test to determine whether a stock accumulation constitutes a tender offer ("Wellman Eight-Factor Test").[26] These eight factors are:

- active and widespread solicitation of public shareholders for the issuer's stock,
- solicitation made for a substantial percentage of the issuer's stock,
- offer to purchase made at a premium over the prevailing market price,
- terms of the offer are firm rather than negotiable,
- offer contingent on the tender of a fixed number of shares, and
- offer often subject to a fixed maximum number to be purchased,
- offer open only for a limited period of time,
- offeree subject to pressure to sell his stock.

In the United States a tender offer, like every acquisition of stock, must be in accordance with the provisions of the Security Exchange Act of 1934, amended by the Federal Williams Act of

24. *See* Earl and Fisher, *International Mergers and Acquisitions*, EUROMONEY 5 (1986); Bebchuk, *The case for Facilitating Competing Tender Offers: A Reply and Extension*, 35 STAN. L. REV 28 (1982).

25. Usually in the financial press and within business sections of national wide distributed newspapers.

26. This test was applied by the court in Wellman v. Dickinson, 475 F. Supp. 783, 823 -24, (1979).

1968[27] and regulations issued by the SEC thereunder. So, federal law provides the rules of the takeover process, whereas the state corporate law defines the position of the target.[28] The Williams Act will be compared briefly to the Proposal of the Commission of the European Community for a Thirteenth Directive on Takeovers and General Bids in Chapter VII, 1.[29]

C. Defensive Measures by the Target

After the announcement of the tender offer, it is the target board's turn to react. There are two possibilities: after having carefully[30] reviewed the conditions of the tender offer the board must propose to its shareholders either to accept or to reject the offer. As this article deals with hostile takeovers only, solely the second case will be discussed, i.e. the board has decided that it is in the best interest of the company to not give up its independence, and therefore, it will take defensive actions.

Two categories of defensive measures can be distinguished: proactive (pre-offer) and reactive (post-offer) measures. The first of which is subdivided into anti-takeover amendments ("by-laws") and "poison pills." All defensive actions have in common particular devices. The target can either make it more difficult for the acquiring company to purchase a sufficient amount of shares to gain corporate control, make the target less attractive for several reasons to the raider, or make it more difficult for the raider to exercise corporate control after he has acquired the majority of the stock. The legality of the various defensive devices, developed over the years by the boards of attacked targets and challenged in the courts by the bidders, is one of the significant issues of takeover discussion in the United States. Therefore, in Chapter IV, 2[31] the major American defensive devices will be outlined and compared to the legal situation in Germany.

27. Act of July 29, 1968, Pub. L. No. 90-439, 82 Stat. 454 (codified as 15 U.S.C.A. §§ 78m(d) - (e): 78n(d) - (f) [1970]. The Williams Act ammended the 1934 Securities Exchange Act, adding §§ 13(d)-(e) and 14(d)-(f) to it. The Williams Act was several times amended since, *see infra* note 106.

28. *See* 5 Loss and Seligmann, *Securities regulation* 2127-2128 (1989).

29. *See infra* text accomanying note 211.

30. *See* Smith v. Van Gorkom, Del. Supr., 488 A.2d. 858 (1985).

31. *See infra* text accompanying note 116.

D. CHANGE OF CORPORATE CONTROL

It was characteristic to a 1980's-style leveraged hostile takeover that the target company itself paid the price for its own acquisition. Technically this was accomplished by a merger between the target and the acquiring company or one of the latter's subsidiaries ("shell corporations") and a subsequent spin-off of the target company's assets. The target company is now "co-liable" for the debts of the acquiring company, which are a result of the acquistion.[32]

Thus, it is evident that the change of corporate control - which under German Law does not necessarily go hand in hand with the acquisition of the majority of the shares - is from the view of the raider the key to the success of the whole transaction. Only the one who exercises corporate control is able to milk the cash-box of the compnay. Therefore, in Chapter IV, 3[33] the concept of corporate control under German Law is outlined and subsequently will be analyzed as to where the obstacles lie in changing corporate control. One of the main reasons for a lack of a US-type hostile takeover activity in Germany will be found here.

32. For a discussion of the Delaware anti-takeover statutes, *see* Hablutzel and Selmer, *supra* note 1, at 221 et seq., and Ebenroth and Eyles, *Die Beschränkung von Hostile Takeovers in Delaware*, RECHT DER INTERNATIONALEN WIRTSCHAFT 413 (1988). Section 28(a) of the Securities and Exchange Act of 1934, 15.U.S.C. § 78bb(a) (1988), allows a state to regulate securities transaction "insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder". Today, various types of anti-takeover statutes can be found, the most common one being the "business combination statute", that typically prevents mergers between a target and another entity for a period of three to five years after an offeror has made what management considers to be an unacceptable acquisition of a certain percentage of the target's stock, *see* Greenbaum, *supra* note 1, at 928 note 24 (with several citations for state anti-takeover statutes and a discussion of the different kinds of anti-takeover statutes); *see* also Anjier, *supra* note 1, at 568; SOLOMON ET AL., CORPORATIONS, LAW AND POLICY 1112 (1982); Coffee, *Regulating the market for Corporate Control : A critical Assessment of the Tender Offers Role in Corporate Governance*, 84 COL. L. REV. 1252 (1982); Bainbridge, *supra* note 1; Romano, *supra* note 1; Greene, *supra* note 1.

33. *See infra* accompanying text to note 140.

III. BASIC STRUCTURE OF GERMAN CORPORATE LAW

A. Business Associations

As in most countries, the law of Germany provides basically two different forms of business: partnerships and corporations; the most significant legal distinction among them is the legal personality of the latter one. Partnerships are the subject of various regulations of the German Civil Code (BGB)[34] and the German Commercial Code (HGB)[35] but shall not be discussed here.

Germany has two conceptually and significantly different forms of corporations, the "Aktiengesellschaft" - AG (stock corporation, publicly held corporation) and the "Gesellschaft mit beschränkter Haftung" - GmbH (limited liability company, closely held corporation). Similar to the United State's corporate law, there are three main consequences[36] arising from the corporation being endowed with a legal personality separate and distinctive from its members: First, the corporation (and not its members) is the owner of the corporate assets. This means that only the corporation itself is subject to their creditors' claims, and the liability of its members is limited to their contributions to the corporation, which usually were designated when the corporation was founded.[37]

From this rule only a few exceptions exist, quite similar to what is referred to as "piercing the corporate veil" and "instrumentality rule" under American law.[38] Second, members of the corporation and its management are separated by the internal organization of the corporation. Therefore, the management is - at least as a general rule - independent from the owners of the corporation. Third, a change in the composition of the corpora-

34. Section 705 ff BGB.

35. Section 124 ff and 161 ff HGB.

36. *See* Peter Behrens, *The acquisition of Control over a Corporation*, in XIITH INTERNATIONAL CONGRESS OF COMPARATIVE LAW 10 (1986).

37. *See* sec. 3,5 of the limited liability company act in MUELLER ET AL., GMBH LAW (German Text with Synoptic English Translations and Introduction) (1976), and sec. 23 ff of the German Stock Corporation Act, in MUELLER and GALBRAITH, THE GERMAN STOCK CORPORATION LAW, (Bilingual Edition with Introduction (2nd ed., 1976).

38. Another exception are pre-incorporation transactions, *see* the comparative analysis of KLAUS HEINEMANN, PRE-INCORPORATION TRANSACTIONS (1990).

tion's members does not affect its integrity, and this allows a free transferability of the shares.

The main differences between the AG and the GmbH are less rigid separation of management and shareholders,[39] the lack of a supervisory board,[40] and the non-negotiability of the shares in case of the GmbH. While the AG clearly is designed for large enterprises as far as organizational and financial needs are concerned,[41] the limited liability company is the business form for smaller enterprises. However, there is no mandatory law for the choice between AG and GmbH,[42] and many very large companies today are organized as a GmbH. Although GmbHs could theoretically be a target of a takeover attempt as well, the following analysis will focus only on the AG, because the AG is the closest equivalent to the American publicly held corporation.

B. THE CONCEPT OF THE GERMAN PUBLICLY HELD STOCK CORPORATION (AG)

1. *General Introduction to the Stock Corporation Act*

The German publicly held stock corporation (AG) is regulated by the German Stock Corporation Act which first was enacted in 1856 and was slightly revised in 1884, 1937 and 1965, whereby the main structure is still the same as in 1856.[43] This act is generally considered - even abroad - to be comprehensive and to offer many original solutions to modern corporate problems.[44] It consists of five books,[45] the first one (sec. 1 - 277) dealing mainly with the formation of the AG, with the legal relation between the company and its shareholders, its constitution, accounting and appropriation of the profit, and its dissolution. The third book (sec. 291 - 338)[46] provides regulations for con-

39. *See* sec. 37 of the Limited Liability Company Act which provides the right of the shareholders to give orders to the management (*see* MUELLER ET AL., *supra* note 37).

40. This is the general rule and there are only a few exceptions (see sec. 52 of the limited liability company act).

41. *See* Behrens, *supra* note 36, at 11.

42. There are only a few exeptions for banking and insurance companies.

43. *See* Behrens, *supra* note 36, at p. 10.

44. D.F. Vogts, *Reforming the modern corporation: Perspectives from the German*, 80 HARV. L. REV. 23, at 64-75 (1966).

45. *See* the bilingual edition of the German Stock Corporation Act of MUELLER and GALBRAITH, *supra* note 37.

46. The second book (sec. 278 - 290) is dealing with the KGaA, a very special form

nected enterprises. Book four (sec. 339 - 393) provides regulations for mergers, transfer of assets, and liabilities and changes of the legal form of the corporation. The fifth book (sec. 394 - 410) contains special, penal, and final provisions.

2. *Two-Tier Board System and Labor Co-Determination*

Besides the the shareholders' meeting,[47] two organs of the AG which are independent of each other have to be distinquished: the supervisory board[48] and the management board.[49] This model structure represents - at least as long no homogenous interest group dominates the organs - a very well-balanced seperation of powers[50] within the corporation. Unlike most other foreign corporation laws, the German Stock Corporation Act does not allow a board of directors in the sense of an integrated board of directors consisting of management and non-management members.[51]

Therefore sec. 105 of the Stock Corporation Act provides:

> "A member of the supervisory board may not simultaneously be a member of the board of management, a permanent deputy of members of the board of management, a *Prokurist*[52] or a holder of a general Hanklungsvollmacht[53] of the association."

The *management board's* task is the day to day operations of the company, as well as "policy making" in the sense of the American board of directors' duties.[54] Moreover, the manage-

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of a stockcorporation (association limited by shares).

47. Referred to as "Hauptversammlung" in German language. Its role will be discussed *infra*, text accompanying note 93 et seq.

48. Referred to as "Aufsichtsrat" in German language. *See* sec 95 ff of the Stock Corporation Act.

49. Referred to as "Vorstand" in German language. See sec. 76 ff of the Stock Corporation Act.

50. *See* Behrens, *supra* note 36, at 13.

51. *See* MUELLER and GALBRAITH, *supra* note 37, at 10.

52. "Prokurist" is a holder of a special statuatory authority, called "prokura", *see* sec. 48 of the German commercial code.

53. "Handlungsvòllmacht" is a limited authority as defined in sec. 54 of the German commercial code; it may generally be granted for all business transactions or be limited to certain divisions of the enterprise or to specific transactions only.

54. *See* JUENGER and SCHMIDT, GERMAN STOCK CORPORATION ACT 10 (1967).

ment board has, as the executive arm of the corporation, a broad power to bind the compnay. This power is not limited by an "ultra virus doctrine,"[55] nor can it be limited to certain transactions by shareholders' consent. The only restrictions are organic changes and enterprise agreements, which are further discussed below.

The *supervisory board* has no direct equivalent in U.S. corporations. It consists of between three and twenty-one members.[56] The understanding of its composition - which is the main obstacle for US-type hostile takeover activity in Germany - requires a brief look at the basics of labor co-determination.[57]

The first attempts of German workers to install - in its broadest sense - a system of co-determination in Germany took place in the middle of the last century; its roots stem from the social consequences resulting from the growing industrialization of that time. In revolutionary Germany of 1848, a rather socialistic and liberal draft of trade law was proposed, providing for workers' representatives, workers' committees, and grievance tribunals in the factory. The idea was to give them an influence on the determination of their salaries, on dismissals and on the selection of their supervisors. However, the draft was not enacted, and it took another 45 years until the Business Practice Act,[58] enacted in 1890 for the first time, provided for the creation of workers' committees, giving the employees an influence on the working conditions at their companies. During World War I, in 1916, formation of workers' committees became mandatory for all enterprises involved in production of military

55. *See* Robert Hamilton, THE LAW OF CORPORATIONS IN A NUTSHELL 51 et seq. (2nd ed., 1989). When the European Community began to harmonize its Company Law with the First Directive of March 9, 1968, this issue was highly controversial and finally be settled in Article 9 of this directive ("Publicity Directive", O.J EC No. L 65/8 of March 14, 1968; it deals primarily with the uniformity of minimum disclosure provisions for company information, both as provided in the commercial register and in th press. Moreover, it addresses issues like validity of commitments made by company organs, and nullity of improperly established companies.

56. For some reasons it must always be divisible by three *see* sec. 95 of the Stock Corporation Act.

57. A rather comprehensive overview of co-determination in Germany and its history in English language can be found by Hartmut Dietrich, *Co-Determination*, in 3/31 BUSINESS TRANSACTIONS IN GERMANY (Bernd Rüster ed., looseleaf as of 1993) The following outline refers to it.

58. Referred to as "Gewerbeordnung" in German language.

equipment. The Weimar Constitution of 1919[59] created a major breakthrough for the workers' movement by providing in Article 165 that the employees shall cooperate with the employers on an equal basis in the regulation of wages and work conditions and in the economic development of the productive forces. This led in 1920 to the enactment of the Works Council Act[60] which provided, in addition, a second form of co-determination, the participation of one or two workers' councils on the supervisory board of the company. This was the beginning of co-determination as far as the companies' decision-making was concerned. Whereas the first form is referred to as co-determination at the working level,[61] the second form is called enterprise co-determination.[62] More or less abolished by the National Socialists,[63] both forms of co-determination were reinstalled immediately after World War II by the Allied Control Council.[64]

The next important step in the development of labor co-determination occured in 1947, when the British Military Authority issued exemplary articles of association for the companies under its control engaged in the steel and iron business. According to these articles of association, the supervisory board consisted of an equal number of shareholders and labor-representatives, and one member (often but not necessarily the chairman) had to be a "neutral person," enjoying the confidence of both the capital and the labor faction. In addition to that, one member of the management board, the so-called labor director, responsible for all social and personnel matters of the company[65] could neither be appointed nor removed without the agreement of the labor representatives of the supervisory board. This was a major extention of co-determination as it had existed so far, because now the employees had influence on the management board. After the founding of the Federal Republic of Germany

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59. Verfassung des Deutschen Reichs of August 11, 1919 (Reich Law Gazette = RGBl. 1919, p. 1383), referred to as "Weimarer Verfassung" in German language.

60. Betriebsrätegesetz of February 2, 1920 (Reich Law Gazette = RGBl. 1920 I, p. 147).

61. Referred to as "Betriebliche Mitbestimmung" in German language.

62. Referred to as "Unternehmerische Mitbestimmung" in German language.

63. For further reference *see* Dietrich, *supra* note 57, at 31-8.

64. *See* Allied Control Council Act no. 22/Works Council Act of April 4, 1946 (Law Gazette of the Allied Control Council = Amtsblatt des Kontrollrates 1946 No. 6, p. 133).

65. Or director of the personnel, referred to as "Arbeitsdirektor" in German language.

in 1949, the labor unions demanded, and finally under the threat of a general strike prevailed in extending this model of co-determination to the companies of the coal mining business.[66] Later attempts to apply these principles to all types of industries failed; but the Shop Constitution Act of 1952[67] was passed, reinstalling the co-determination approach taken in the Allied Control Council Act No. 22 of 1946[68] with works councils on the factory level and for certain larger companies with a supervisory board with one-third of its members being labor representatives. The Shop Constitution Act of 1972[69] improved only the co-determination on the factory level by granting further rights to the works councils, but left unchanged the one-third employee representation on the supervisory board.

The last major development took place in 1976, when the Co-Determination Act of 1976 was passed,[70] providing for a near-parity composition of the supervisory board in all companies with more than 2000 employees. Here, the supervisory board consisted of an equal number of shareholder and labor representatives, but other than in the coal mining and steel industry, no "neutral person" existed. In case of a tie, the chairman, who is elected by the shareholders, had the deciding vote. In all corporations with more than 500 and less than 2000 employees the supervisory board consisted of two-thirds of shareholder representatives and one-third of labor representatives.[71] No co-determination on the enterprise level existed in companies employing less than five hundred people.

It is important to notice that all members of the supervisory board have equal rights. Two of them together are able to call a

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66. Act concerning the co-determination of employees in supervisory boards and boards of management in the mining and iron and steel producing industries of May 21, 1951 (Federal Law Gazette = BGBl. 1951 I p. 347, as amended on May 21, 1981 (Federal Law Gazette = BGBl. 1981 I 441), referred to as "Montanmitbestimmungsgesetz" in German language. For further reference *see* Dietrich, *supra* note 57, at 31-9.

67. Shop Constitution Act of October 11, 1952 (Federal Law Gazette = BGBl. 1952 I p. 681), referred to as "Betriebsverfassungsgesetz 1952".

68. *See supra* note 64.

69. Shop Constitution Act of January 15, 1972 (Federal Law Gazette = BGBl. 1972 I p. 13), referred to as "Betriebsverfassungsgesetz 1972".

70. Act concerning the co-determination of Employees of May 4, 1976 (Federal Law Gazette = BGBl. 1976 I p. 1153), referred to as "Mitbestimmungsgesetz" in German language.

71. With some rare exceptions.

board meeting or force the management to report on specific issues to the supervisory board.[72] And, most importantly, the supervisory board appoints, removes, and supervises the management board, but it is not allowed to direct the management to concrete business measures. The supervisory board has the right, however, to make some important types of transactions, dependent on its approval which, in the case that it is denied, can be substituted by a shareholders' voting. The board of management is obligated to permanently report to the supervisory board. In order to avoid conflicts of interests, Sec. 112 of the Stock Corporation Act provides that the AG is represented by the management board in case of conflicts between the AG and the members of the supervisory board, while the latter represents the AG in case of conflicts between the AG and the board of management.

3. *The Roles of the Shareholders, the Supervisory Board, and the Board of Management in the Process of Corporate Decision-Making*

As is known from American hostile takeovers, the question of separation of power between board of directors and shareholders plays an important role. A good example is the Time-Paramount case[73] where the originally planned stock-swap merger between Time and Warner, which would have been subject to shareholders' approval, was as a consequence of the Paramount tender offer changed into a cash merger not subject to shareholders' approval. This situation shows the very limited role shareholders play in the corporate decision-making process according to American corporate law and also exemplifies how easy it is for the board of directors to relegate the shareholders to the background, even if fundamental changes in the existence of the corporation are in question. Unocal[74] and Van Gorkom[75] show that the board of directors is basically free in its choice of defensive measures after a takeover bid, unless the "business jugdement rule" is violated, and indicate that most of the defen-

72. *See* sec. 90 of the Stock Corporation Act.

73. Paramount Communications, Inc. v. Time, Inc., 571 A.2d. 114 (Del. 1989). *See* Burns, *supra* note 1.

74. Unocal Corporation v. Mesa Petroleum Co., Del. Supr., 493 A.2d. 946 (1985). *See*, for further details, Grannis, *supra* note 1.

75. Smith v. Van Gorkom, Del. Supr. 488 A2d. 858 (1985).

sive devices do not require shareholders' approval.[76] Even though this is not the reason for the takeover activity, it is - at least to a certain extent - the reason for takeover battles which are often very costly for the target company. As discussed further below, the situation is quite different under German corporate law[77] as well as the approach taken by the Proposal of the Commission of the EC for a Thirteenth Directive on Takeovers and General Bids.[78]

Before the basic elements of a typical U.S. hostile takeover and, in particular, the defensive measures and the would-be answers of German law are discussed, it is necessary to take a brief look how the power of decision-making is separated and balanced between the three organs of the German stock corporation.

a. Management Board

As already mentioned above the management board is the executive organ of the company which directs and represents the company in and out of court.[79] In accordance with a principle of all German business associations, the Stock Corporation Act, as well, makes a clear distinction between internal management[80] and external representation.[81] Section 77 provides that all decisions of internal management require a majority of the votes of all members of the management board, whereby each member has just one vote. This means the chairman is just "primus inter pares" or first among equals. This is mandatory law and cannot be changed by the articles of association. It shall be noticed, however, that in many German stock corporations it is an old

76. For the application of the business judgement rule *see* also Revlon, Inc. v. MacAndrews & Forbes Holdings, 506 A2d., 180 (Del. 1986); Aronson v. Lewis, 473 A2d. 805, 812 (Del. 1984); Mills Acqusition Co. v. Macmillan, Inc. 559 A2d.1261, 1279 (Del. 1989); Grobow v. Perot, 539 A 2d. 180, 187 (Del. 1988); *see* also Block et al., *The role of the business judgement rule in shareholder litigation at the turn of the decade*, 45 Bus. Law. 469, at 489-490 (1990); Gilson and Kraakman, *What triggers Revlon?*, 25 Wake Forest L. Rev. 37, 59 (1990). For a discussion of the cases *see* also Wouters, *supra* note 6, at 295 et seq.

77. *See infra* accompanying text to note 116

78. *See infra* accompanying text to note 180.

79. *See* sec. 76,78 of the Stock Corporation Act.

80. Referred to as "Geschäftsführung" in German language.

81. Referred to as "Vertretung" in German language.

tradition that all decisions are made unanimously.[82] As far as external representation is concerned, the management board is only authorized to represent the association jointly, but the articles of association may provide differently.[83] Most of the constitutions of AGs determine that the company can be represented only either jointly by two members of the board, or by one member acting jointly with a "prokurist".[84] Section 82 of the Stock Corporation Act provides that the authority of the board of management to represent the corporation externally cannot be limited. Only as far as internal management is concerned must the board remain within the limitations determined by the articles of association, the supervisory board or the shareholders.[85]

b. Supervisory Board

The supervisory board does not have a direct influence on the day to day decisions of the company. Section 111(4) of the Stock Corporation Act provides that measures of the management cannot be conferred upon the supervisory board. Its primary task - as implicated by its name - is to oversee the management board which is obligated to keep the former informed of the plans of the corporation, about the financial and economic situation, and about major business transactions.[86] As already mentioned, the supervisory board, rather than the shareholders, appoints and removes the members of the management board.[87] They are appointed for a maximum of five years, and - as far as takeovers are concerned - it is important to notice that the supervisory board may revoke the appointment of one or several members of the management board only for cause, which is a gross violation of duties, incapability of proper management or a withdrawal of confidence by the shareholders, unless the confidence has been withdrawn for obviously arbitrary reasons.[88]

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82. A prominent example for this tradition is the Deutsche Bank, one of the largest German stock corporations in terms of business assets.

83. *See* sec. 78(1) of the Stock Corporation Act.

84. *See supra* note 52.

85. This solution is completely different from the ultra vires doctrine; *see supra* note 55.

86. *See* sec. 90 of the Stock Corporation Act.

87. *See* sec. 84 of the Stock Corporation Act.

88. See sec. 84(3) of the Stock Corporation Act.

As pointed out above,[89] according to co-determination law, the supervisory board consists of two factions, the labor representatives and the shareholders. While the labor representatives are elected by the employees of the corporation in a complicated procedure,[90] the shareholders' representatives are elected at the shareholders' meeting, usually for the maximum allowed period of five years.[91] Their removal prior to the expiration of their term of office requires a majority, at least three-fourths of the votes cast, but the articles of association may determine a different majority and additional requirements.[92]

c. Shareholders' Meeting[93]

The shareholders are the third organ of the AG. Their role in the corporate decision-making process must be viewed against the background of the corporate principle with its two contradictory streams: property of the shareholders and independence of the association. The corporation is owned by its shareholders; each and every share represents (not legally but pictorally) a small part of the corporate assets. The consideration for the "borrowing" of this ideal part is the annual dividend, and in the case the corporation is dissolved, the shareholders receive that part of the total value that represents their amount of shares. But unlike the usual kind of property, the rights flowing out of this property have to be limited, otherwise the association would not be able to properly operate. Technically this limitation is reached by representation. The shareholders elect representatives who exercise for a certain period of time the ownership rights of the stockholders on their behalf. Therefore, the more weight given to the ownership aspect, the more limited is the association in independently conducting its business. The more weight given to the limitation aspect, the less important are the ownership rights and the freer the directors are in corporate decision-making. The principle task of a corporation law is to settle this conflict by a reasonable compromise. According to Sec.

89. *See supra* note 57.
90. The procedural provisions for this election are provided for in the various co-determination acts, *see* sec. 101 of the Stock Corporation Act. For further details *see* Dietrich, *supra* note 57.
91. *See* sec. 102(1) of the Stock Corporation Act.
92. *See* sec. 103 of the Stock Corporation Act.
93. See sec. 118 ff of the Stock Corporation Act.

134 of the Stock Corporation Act the shareholders' voting rights are exercised in relation to the nominal amounts of the share holding.[94] Unless otherwise determined by the article of association, generally the resolutions of the shareholders require a (simple) majoirty of the votes cast, but in some important cases the law requires a greater majority. As far as hostile takeovers are concerned the most important supermajority clauses provided by the law are the following: for all amendments of the articles of association, a majority of three-fourths[95] of the votes cast is required. The same majority is necessary for all major structural changes, like increases of the share capital,[96] the provision for conditional[97] and for authorized[98] capital, the issue of convertible bonds,[99] capital decreases,[100] and the dissolution of the company. Moreover, the three-fourths majority is required for enterprise contracts[101] and all kinds of mergers.[102] In all these cases the law allows the articles of association to determine additional requirements. Because of the three-fourths requirement for all major changes, the holding of more than one-fourth of the share capital is called "blocking minority".[103] In this context, another particularity of German corporate and capital market law must be briefly mentioned. From the beginning of the development of corporations, in Germany the banks[104] have handled the sale and purchase of shares. They hold them for the shareholders, collect the dividends, and exercise the voting rights on their behalf, un-

94. However, one important restriction exists, referred to as "Stimmrechtsbeschränkungen" in German language. Section 134(1) of the stock corporation act provides, in part, as follows: "The voting right is exercised pursuant to the nominal amounts of shares. In case a shareholder owns several shares the articles of association may limit the voting right by determining a maximum amount or graduations. In addition the articles of association may determine that the shares which belong to another person for the account of a shareholder shall be counted together with the shares owned by the shareholder. . . . The limitations may not be determined with regard to individual shareholders. The limitations are not considered for the calculation of a capital majority required by the law or the articles of association."

95. *See* sec. 179 of the Stock Corporation Act.

96. *See* sec. 182, 207 of the Stock Corporation Act.

97. *See* sec. 193 of the Stock Corporation Act.

98. *See* sec. 202 of the Stock Corporation Act.

99. *See* sec. 221 of the Stock Corporation Act.

100. *See* sec. 222, 229 of the Stock Corporation Act.

101. *See* sec. 293 of the Stock Corporation Act.

102. *See* sec. 340c, 353 of the Stock Corporation Act.

103. Referred to as "Sperrminorität" in German language.

104. Germany does not distinguish between investment banks and other banks. The banks are universal banks, allowed to be engaged in all kinds of financial services.

less otherwise determined by them.[105]

IV. US-HOSTILE-TAKEOVER-PATTERN AND THE GERMAN STOCK CORPORATION ACT

A. Tender Offers

1. *Legal Situation in the United States (Overview)*

Since 1968 when the Federal Williams Act came into force to complete the Securities Exchange Act[106] the SEC issued detailed rules for stock purchases in the context of takeovers and, in particular, for tender offers.[107] Section 13(d) provides that anyone, notwithstanding a private person or a corporation, who has acquired more than 5% of the common stock of a corporation within a period of ten days must inform the corporation, the stock exchange where the purchase took place, and the SEC. Section 14e - 14g dealing with tender offers in particular, provide that anyone who wants to acquire more than 5% of the common stock of a corporation by means of a tender offer must inform in advance - this means before the tender offer is publicly announced - the SEC, the target company, and its stockholders.[108] This information must include the identity of the offeror, the source of the money required for the transaction, the present amount of his stake in this company, and his future intentions with the target after the takeover as far as fundamental changes in the corporate structure are concerned.[109] The management of the target company is obligated to give to its shareholders a statement of assessment of the takeover bid.[110]

2. *Legal Situation in Germany*

No binding tender offer rule exists in Germany to date.[111]

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105. Referred to as "Depotstimmrecht der Banken"; *see* sec. 128, 134, 135 of the Stock Corporation Act. *See* also Lutter and Lammers, *"Hostile takeovers: Possibilities and limitations according to German law,* in DEFENSIVE MEASURES AGAINST HOSTILE TAKEOVERS IN THE COMMON MARKET 134 (Maeijer and Geens eds., 1990).

106. 15 U.S.C.A. sec. 78m(d) - (g); 78(d) - (g) [1988]. For the legal history *see supra* note 27.

107. *See* ROBERT HAMILTON, CORPORATION FINANCE 979 et seq. (1989).

108. *See* rule 14d - 5 (17 C.F.R. § 240.14d.5)[1988].

109. *See* rule 13d - 1 (17. C.F.R. § 240 13 d. -1)[1988].

110. *See* rule 14e - 2 (17 C.F.R. § 240. 14 e - 2)[1988].

111. For the reasons *see* C. E. Hauschka and T. Roth, *Übernahmeangebote und*

The only provision in that context is Sec. 20 of the Stock Corporation Act that provides that any enterprise that has acquired more than 25% of the shares of an AG ("blocking majority") must inform the corporation.[112] Besides that provision, there are only voluntary guidelines[113] published in 1979 by the Stock Exchange Committee of Experts, which is affiliated with the Federal Minister of Finance. These guidelines provide, in part, that

> - all shareholders of the target company must be treated equally, even though the offer price for the shares is raised during the transaction,[114]
> - the bidder shall inform the management of the target and all stock exchanges where the shares of the target are traded prior to his public offer,
> - no insider trading shall be allowed prior to the announcement of the offer,
> - the conditions of the offer shall be published comprehensively,
> - a tender offer shall be valid between 21 and 60 days.

Because these are only voluntary guidelines, no system for policing and enforcing exists, which in fact makes the conduct of a tender offer in Germany untrammeled. This legal situation will change in the years to come when the Proposal of the Commission of the European Community for a Thirteenth Directive will enter into force.[115] But experience from the past proves that it is a very long way from a proposal of the Commission of the European Community to mandatory law within the single Member States.

B. Defensive Measures by the Target[116]

In the following, the most common defensive devices devel-

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deren Abwehr im deutschen Recht, DIE AKTIENGESELLSCHAFT 181 (1988).

112. *See* Peltzer, *Hostile Takeovers*, *supra* note 2, at 73.

113. *See* MacLachlan and Mackesy, *Acquisitions of Companies in Europe - Practicability, Disclosure and Regulation: An Overview*, 23 BUS. LAW 373, 392 (1989). The guidelines are published in BAUMBACH ET AL., KOMMENTAR ZUM HANDELSGESETZBUCH Annex 18 (28th ed., 1989).

114. This is very similar to the "best price rule" stipulated in sec. 14 e (7) of the Securities Exchange Act, 15 U.S.C. § 78 n (d)(7) (1988).

115. *See infra* accompanying text to note 182.

116. *See* P.W. RICHTER, CORPORATE ANTI-TAKEOVER DEFENSES: THE POISON PILL DEVICE

oped over the years by "attacked" US-corporations and often challenged in the courts are briefly explained and subsequently compared to German corporate law. Two different types of defense-devices will be distinguished, pre-offer measures (part a) and post-offer measures (part b).[117]

1. *Proactive (pre-offer) Measures*

a. Anti-takeover Amendments

Many American companies have adopted *staggered board provisions*. They divide the firm's board of directors into sections and only one section stands for election each year. A typical provision divides the board into three sections, each serving a three year term. By way of these provisions takeover actions are hindered, because a majority stockholder must wait two years before being able to obtain majority representation on the company's board and to present the merger proposal for stockholder vote.[118] Usually a period fo two years is much too long for a "raider" to wait, because the takeover is financed with borrowed money that must be paid back as soon as possible, the merger being a prerequisite.

In Germany, staggered board provisions are also possible,[119] but practically do not exist.[120] Because of the two-tier board system and the principle of co-determination, there is no need for them to prevent a takeover. As pointed out above, the supervisory board appoints and removes the management, which virtually exercises corporate control. However, only half of the members of the supervisory board are shareholder representatives; a three-fourths majority resolution of the shareholders' meeting is required for removal prior to the regular expiration of their term of office. The other half of the supervisory board's members can-

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(1987); From the German point of view, *see* Ebenroth and Rapp, *supra* note 2, at 2 et seq.; Assmann et al., *supra* note 2, at 22; Falkenhausen, *supra* note 2; ; Joussen, *supra* note 2; KNOLL, *supra* note 2; Lutter, *Die Treuepflicht des Aktionärs*, *supra* note 2; Otto, *supra* note 2; Peltzer, *Hostile Takeovers*, *supra* note 2; id., *Von Räubern, weißen Rittern und Jungfrauen*, *supra* note 2; REUL, *supra* note 2; Stoll, *supra* note 2; SCHMITTHOFF ET AL., *supra* note 2.

117. For a overview of defensive tactics *see* Wouters, *supra* note 6.

118. *See* SOLOMON ET AL., *supra* note 32; Depser, *supra* note 2, at 355.

119. *See* Hauschka and Roth, *supra* note 110, at 188.

120. *See* Peltzer, *Hostile Takeovers*, *supra* note 2, at 75.

not be removed without the employees' approval. The employee representatives on the supervisory board will only cooperate with a "raider" if they are convinced that the plans of the acquiring company are for the benefit of the employees, which in a highly leveraged buyout will hardly be the case.[121]

Supermajority merger approval provisions which are a rather common defensive device in American companies require approval by an abnormally large number of share votes for mergers or other transactions involving interested parties or substantial stockholders. A substantial stockholder is usually defined as any entity with an equity holding equal to or greater than 5% of the firms outstanding common stock.[122]

In Germany, Sec. 340(c) of the Stock Corporation Act provides a three-fourths majority requirement of a resolution of the shareholders' meeting for any merger transaction. The articles of association may determine a higher majority and additional requirements.

Fair merger price provisions[123] stipulate a minimum shareprice in mergers for those who tender their shares later, i.e. after the "raider" has obtained the majority of the stock. According to these provisions, all shareholders must receive the price paid by the "raider" to acquire the majoirty. As a defensive device these provisions serve to avoid a "stampede effect" among the shareholders after the takeover bid, which would facilitate the raider in obtaining the majority of the stock.

In Germany, fair price provisions are unknown and not necessary,[124] because Sec. 340 and 340(b) of the Stock Corporation At provide that the consideration for the shares of stockholders, who tender their shares after a merger, must be evaluated by neutral experts. Therefore, it is not possible to buy their stock for a price lower than the fair market value.

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121. *See* Falkenhausen, *supra* note 2, at 195; Martin Peltzer, *Takeovers in den Vereinigten Staaten, Können ihre Spielregeln übertragen werden?*, in FESTSCHRIFT F. ZIMMERER 271, at 282 (1986).

122. *See* SOLOMON ET AL., *supra* note 32, at 1135 et seq.; Depser, *supra* note 2, at 353.

123. *See* SOLOMON ET AL., *supra* note 32, at 1132 et seq.; Depser, *supra* note 2, at 355.

124. *See* Hauschka and Roth, *supra* note 111, at 189.

Anti-takeover provisions make sense only if the "raider" cannot change them after having obtained the majority of the stock. Therefore, *lockup-provisions* require a supermajority approval to repeal anti-takeover amendments or limit the number of directors. This prevents the new majority stockholder from diluting incumbent directors' voting power by filling the board with directors of his choice.[125]

In Germany, Sec. 179 of the Stock Corporation Act provides that for each amendment of the articles of association a resolution of the shareholders is necessary, which requires at least a majority of three-fourths of the share capital represented at the passing of the resolution. Furthermore, the articles of association may require a different majority and additional requirements.

Increasing authorized share of common stock is another pre-offer defensive technique used by American companies.[126] In order to increase the amount of shares necessary to have a controlling interest in the firm the board can sell stock for cash. For the acquiring company this defensive device results in substantially higher costs for the takeover than planned.

In Germany, the Stock Corporation Act also provides the possibility of increasing the share capital.[127] The articles of association may authorize the board of management to increase the share capital up to a certain nominal amount ("authorized capital") by issuing new shares against contributions. However, the Stock Corporation Act provides that the amount of the authorized capital may not exceed one-half of the share capital existing at the date of the authorization and that the new shares shall not be issued without the consent of the supervisory board. Moreover, the act states that the authorization may require that the board of management is to decide on any exclusion of the preemptive rights.[128]

Golden parachutes are contractual agreements between top managers and the corporation which guarantee them a certain

125. *See* SOLOMON ET AL., *supra* note 32, at 1135 et seq.; *see* also Depser, *supra* note 2, at 354.

126. *See* SOLOMON ET AL., *supra* note 32, at 1135 et seq.; Depser, *supra* note 2, at 354.

127. *See* sec. 202 ff of the Stock Corporation Act.

128. Generally each shareholder must at his request be allocated a part of the new shares corresponding to his part of the existing share capital, *see* sec. 186 of the Stock Corporation Act.

amount of money in the event of a takeover. The reasoning behind this is that directors will think and act in the stockholders' interest rather than in their own interest in the case of a tender offer. Moreover, these golden parachutes can make up a substantial part of the takeover costs. This means that this amount of money has to be paid by the corporation and therefore is not available for paying back the acquisition debts.

Golden parachutes are not possible under German law, for either of the boards. The salary of the members of the supervisory board is assessed in the articles of association or granted by the shareholders. The compensation shall remain within an adequate relation to the duties of the members of the supervisory board and to the situation of the corporation.[129] No shareholders' meeting would ever accept a salary of such a high amount, though it is a significant obstacle for a proposed takeover, becasue it is only for the benefit of this particular member and not for that of the corporation as a whole.[130] As far as the compensation of the members of the board of management is concerned, the Stock Corporation Act provides that the supervisory board shall determine the aggregate compensation of the individual members of the management board (salary, profit sharing, compensation for expenses, insurance premiums, commissions and fringe benefits of any kind) in such a way that the total compensation keeps within reasonable relation to the duties of the members of the management board and to the situation of the association. This applies accordingly to pensions and considerations of related kinds. Both the accepting of an unreasonable high salary by a member of the management board and the granting of such a salary by the supervisory board is considered to be a violation of their respective duties, resulting for both in joint and several liability to the association for the resulting demages.[131] Finally Sec. 84 provides that the maximum term of office for the members of both boards is five years. Any provision which would lead directly or indirectly to a prolongation would be null and void.[132]

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129. *See* sec. 113 of the Stock Corporation Act.

130. *See* Hauschka and Roth, *supra* note 111, at 192; Peltzer, *Hostile Takeover*, *supra* note 2, at 74.

131. *See* sec. 116, 93 of the Stock Corporation Act; Hauschka and Roth, *supra* note 110, at 192.

132. *See* Peltzer, *Hostile Takeover*, *supra* note 2, at 74.

Buy-ops[133] are the repurchase of the company's own stock in the open market over a certain period of time. These shares are then put into a so-called ESOP, i.e. Employee Stock Ownership Plan, for later distribution to the employees (and sometimes also to the directors) of the firm. By way of such a repurchase shares are removed from the open market which remove them from the grasp of a potential "raider" and place them into friendly hands; as a result, the risk of a hostile takeover is reduced.

Buy-ops are not possible under German corporate law, because, as a general rule, German stock corporations are not allowed to deal in their own shares. Section 71 of the Stock Corporation Act provides that the corporation may only acquire its own shares if the acquisition is necessary to avert severe damage from the association or when the shares shall be offered for acquisition to the employees.[134] The change of the ownership of the corporation is not considered to be severe damage in that sense.[135] However, the aggregate nominal amount of the shares acquired for these purposes may not exceed 10% of the whole share capital, together with the amount of other shares the corporation has already acquired and still holds. The Stock Corporation Act provides further that these regulations cannot be circumvented by using a dependent corporation for acquisition-of-own-stock purposes.

b. Poison Pills[136]

This is a defensive device adopted by a firm's board, which usually does not require shareholders' approval. Poison pills consist of preferred stock right plans. These shares are issued to shareholders and remain inactive until "triggered" by a certain event, typically a tender offer for a large fraction of the firm (30%) or the accumulation of a large amount of the firm's common stock in the hands of a single shareholder. Usually the

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133. *See* SOLOMON ET AL., *supra* note 32, at 1132 et seq.; Depser, *supra* note 2, at 355.

134. There are some other rare exceptions which are of no interest in this context (*see* sec. 71 subsec. 1 No. 3,4 of the Stock Corporation Act).

135. *See* Hauschka and Roth, *supra* note 111, at 187; Falkenhausen, *supra* note 2, at 195.

136. *See* SOLOMON ET AL., *supra* note 32, at 1132 et seq.; Depser, *supra* note 2, at 355.

firm's board can redeem the rights for a specific period of time after the triggering event occurs. There are two different types of rights: flip over plans and flip in plans. Flip over plans give the shareholders of the target company the right to purchase preferred stock which is convertible to common stock of the bidding firm in the event of a takeover and a subsequent merger. Flip in plans allow the issuing corporation to repurchase the rights from the shareholders at a large premium, whereby the "raider" is excluded from the repurchase.

These alternatives are not allowed under German law for two reasons. First, both plans would violate Sec. 53(a) of the Stock Corporation Act which provides that all shareholders must be treated equally.[137] Second, flip over plans are not in accordance with the general principle of German law which does not allow the creation of contracts which disadvantage a third party.

2. *Reactive (post-offer) Measures*

a. Share Repurchases

As already noted above, German stock corporations are not allowed, in general, to deal in their own shares; only a few exceptions from this rule exist; takeover threats are not among them. Therefore, neither repurchases from "regular" shareholders in order to reduce the amount of common stock in the open market nor repurchases from a "raider" in order to finish the takeover action ("greenmailing" or "good-bye kisses") are allowed.

b. Pac man Defense[138]

In this less common defensive device, the target company initiates a tender offer of its own for the offeror. In general, a pac man situation is also possible under German law. However, Sec. 328 of the Stock Corporation Act provides that if a stock corporation and another enterprise constitute mutually participating enterprises, the rights from the participation of the other

137. *See* Hauschka and Roth, *supra* note 111, at 190, Peltzer, *supra* note 121, at 284; GODIN and WILHELMI, KOMMENTAR ZUM AKTG § 11 note 2.8 (4th ed., 1971).

138. *See* SOLOMON ET AL., *supra* note 32, at 1132 et seq.; Depser, *supra* note 2, at 355.

enterprise may only be exercised in the maximum of one-fourth of the aggregate stock of the other company.[139]

c. White Knight

In this defensive technique arrangements are made for the target to be bought by a "friendly" company.

The aid of a "white knight" is also possible under German law and does not create any legal problems.[140]

d. Sale of Crown Jewels

Here, after the tender offer, the target's management sells the most valuable assets of the company or those assets which were of particular interest to the bidder.

Crown jewel options as well do not create any legal problems under German corporate law, unless all the assets of the corporation are sold. In that case, the manufacturing company becomes a holding company. This requires the approval of the shareholders according to Sec. 361 of the Stock Corporation Act.

e. Corporate Suicide

This is the most radical "defensive device", because the company is dissolved.

In Germany, Sec. 262 of the Stock Corporation Act provides that the dissolution of the company requires the approval of the shareholders with a majority of at least three-fourths of the capital represented at the passing of the resolution.

3. *Change of Corporate Control*

As mentioned before the transfer of corporate control is the essential part of the whole hostile takeover process, because only

139. *See* Hauschka and Roth, *supra* note 111, at 193.
140. *Ibid.*

the one who exercises corporate control can force a merger which is necessary to finance the whole transaction. In the United States, under the corporate law of most states, at least as a general rule, the majority shareholder is able to exercise corporate control in that sense.

Under German law,[141] however, this is not the case at all, for several reasons. First, the two-tier board system does not allow even the majority shareholder to exercise corporate control. The management board which virtually has control over the corporation is appointed and removed by the supervisory board, not by the shareholders. Second, the rules of co-determination make it very difficult for the majority shareholder to gain control over the supervisory board in a short period of time, because only half of its members are shareholder representatives. Consequently, the second half cannot be removed or forced to agree to remove a certain board of management, but rather they only can be convinced by sound economic arguments with heavy emphasis on employees' benefits.[142] In case of a leveraged buyout with the prospect of a company over its head in debt and therefore on the permanent verge banktruptcy, it is hardly suitable to make them agree to such a transaction. Third, all major structural changes in German stock corporations require a three-fourths majority resolution of the shareholders so that a "blocking minority shareholder" - which exists very often in Germany - is an insurmountable obstacle for the take over of corporate control.

V. OVERVIEW OF EUROPEAN COMPANY LAW[143]

A. IDEA OF EUROPEAN COMPANY LAW: HARMONIZING RATHER THAN UNIFYING

With the beginning of industrialization in the nineteenth

141. *See* Otto, *supra* note 2.

142. As far as the decisive vote of the chairman, who is a representative of the shareholders, unless the company is engaged in the coal mining and steel industry, is concerned, *see infra* text after footnote 221.

143. *See* Stith, *supra* note 1, 1581; Erik Werlauff, *The Development of Community Company Law*, 17 EUROPEAN LAW REVIEW 207 (1992); ROBERT R. DRURY and PETER G. XUEREB, EUROPEAN COMPANY LAWS - A COMPARATIVE APPROACH (1991); ROBERT PENNINGTON and FRANK WOOLDRIDGE, COMPANY LAW IN THE EUROPEAN COMMUNITIES (3rd ed., 1982); FRANK WOOLDRIDGE, COMPANY LAW IN THE UNITED KINGDOM AND THE EUROPEAN COMMUNITY: ITS HARMONIZATION AND UNIFICATION (1991); CLIVE M. SCHMITTHOFF, THE

century, different company laws in the European States began to develop. Even though the basic concepts of the various company laws are quite similar,[144] there are considerable differences in detail, e.g. founding of corporations, minimum capital and raising of capital by corporations, and the representation of the corporation. Setting up a common market[145] which is the major interim goal of the European Community, requires the creation of equal conditions for all companies conducting business in this market. One possible way for this would be a unified company law effective in all Member States of the Community; another one is to harmonize the different laws only to the extent necessary. For several reasons, the drafters of the Treaty of Rome (hereinafter EC-Treaty)[146] have opted almost exclusively[147] for the latter alternative in the field of company law.

The Commission's Proposal of the Thirteenth Council Directive on Company Law can be understood only if the framework of European company law is clear. Therefore, in the following, the "constitutional level," meaning the provisions of the EC-Traty dealing directly or indirectly with company law, is outlined and subsequently a short overview of the law is provided on the harmonized law to date and the proposed measures.

B. The Constitutional Level: EC-Treaty Provisions

Article 2 of the EC-Treaty provides that the Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, the promotion throughout the Community of a harmonious development of economic activities, a continuous and bal-

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Harmonisation of European Company Law (1973); Margie Lindsay and Stanley Crossick, European Company Law (Belmont European Community Law Office, Brussels, 1990); Compendium of EC Company Law (1990).

144. *See* Richard M. Buxbaum and Klaus J. Hopt, *Legal Harmonization and the Business Enterprise*, in 4 Integration through Law 175, at 193 (1988).

145. *See infra* text accompanying note 147.

146. An English version is published in International Economic Law - Basic Documents (Philip Kunig et al., eds., 1989).

147. So far, in the field of company law, there is just one unified law setting up the framework for the "European Economic Interest Grouping"-EEIG, being an association of at least two individuals or firms from different EC Member States. *See infra* text accompanying note 173.

anced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the Member States. This article does not address company law directly; it only provides for a general program of the Community. Establishing a common market is one of the two intermediate objectives which is expected to bring about the ultimate goals of the EC-Treaty. In 1986 the EC-Treaty was amended by the Single European Act,[148] which provided for among other things the creation of an internal market no later than December 31, 1992.[149]

Somewhat more concrete is *Article 3* of the EC-Treaty, which states eleven specific activities of the Community which shall achieve the goals set forth in Article 2. Article 3(c) provides for the abolition, between Member States, of obstacles to freedom of movement of persons, services, and capital and Article 3(h) approximates the extent of harmonization of the laws of Member States required for the proper functioning of the common market.

The key provision of the EC-Treaty for the harmonization of the Member States' company laws is *Article 54(3)(g)*, requiring the Council and the Commission to carry out the duties delegated to them under the preceding provisions (that is Title III of the said Treaty, Chapter 2 on the right of establishment) and in particular:

> "(g): by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of Companies or firms within the meaning of the second paragraph of Article 58 with a view to making such safeguards equivalent throughout the community."

The wording of this provision is somewhat unclear. It means that minority shareholders, creditors, employees etc. are to a

148. European Single Act of February 17/28, 1986, O.J. EC 1987, No. L. 169, p. 1; For the impact of the Single European Act on the development of the EC, *see* Ernst Steindorff, *Gemeinsamer Markt als Binnenmarkt*, ZEITSCHRIFT FÜR HANDELSRECHT 687 (1986); Ehlermann, THE INTERNAL MARKET FOLLOWING THE SINGLE EUROPEAN ACT, 24 C.M.L. REV. 361 (1987); Pescatore, *Die Einheitliche Europäische Akte - Eine ernste Gefahr für den Europäischen Markt*, EuR 153 (1986).

149. *See* Articles 8A, 8B, 8C, 100A, 100B of the EC Treaty.

certain extent protected by each country's company legislation ("safeguards"), and the community by coordinating these provisions must be certain that a rather homogenius level of protection is reached.[150] Article 58 concludes Chapter I of Title III[151] by providing that companies or firms[152] formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purpose of this chapter, be treated in the same way as natural persons who are nationals of Member States.

Articles 100-102 of the EC-Treaty are the general provisions on the approximation of the laws of the Member States.[153]

Article 100 sets forth that the Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation, or administrative action in Member States as directly affect the establishment or functioning of the common market.[154] As a consequence of the Single European Act,[155] Article 100A was amended to the Treaty, providing, that by way of derogation from Article 100 and, where otherwise provided in the Treaty, the following provisions shall apply for the achievement of the objectives set out in Article 8A:[156]

> "The council shall, acting by a qualified majority[157] on a proposal from the Commission in coop-

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150. *See* Werlauff, *supra* note 143, at 208.

151. Title III deals with the free movement of capital, Chapter 2 of this title with the right of establishment.

152. According to Article 58(2) "companies or firms" means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non profit-making.

153. *See* Buxbaum and Hopt, *supra* note 144, at 205; W. SCHMEDER, DIE RECHTSANGLEICHUNG ALS INTEGRATIONSMITTEL DER EUROPÄISCHEN GEMEINSCHAFT (1978); HARMONIZATION OF LAWS IN THE EUROPEAN COMMUNITY: PRODUCT LIABILITY, CONFLICT OF LAWS AND CORPORATION LAW (P.E. Herzog ed., 1983).

154. Article 100 provides for the consultation of the European Parliament and the Social Committee in the case of directives whose implementation would in one or several Member States, involve the amendment of legislation.

155. *See supra* note 147.

156. Article 8A defines the internal market as an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the treaty and sets for that this internal market has to be established not later than by December 31, 1992.

157. This is the key word. No unanimous voting is required.

> eration with the European Parliament and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market."

Of lesser practical importance in the field of company law is *Article 220* of the EC-Treaty. Its third section concerns the mutual recognition of companies in the broadest sense, the retention of legal personality on transfer of headquarters from one country to another, and the possibility of transnational merger of companies. Whereas Article 100 of the EC-Treaty provides for directives as the means of approximating the Member States' laws, Article 220 provides that the Member States should, when necessary, negotiate with each other to meet these requirements in favor of their nationals.[158]

Article 235 of the EC-Treaty is the final basis for measures in the field of Company Law. If action by the Community should prove necessary in the course of the operation of the common market, and one of the objectives of the Community and the Treaty has not provided the necessary powers, the Council shall take the appropriate measures, acting unanimously on a proposal from the Commission and after consulting the European Parliament. This provision, concerning the demarcation between the competences of the Community and those of the Member States, is one of the most controversial provisions of the whole Treaty.[159] In the field of company law it has only been used once for the regulation creating the European Economic Interest Grouping.[160]

One more provision should be briefly mentioned, even though it does not particularly address issues of company law. *Article 189* of the EC-Treaty provides for the juridical tools to attain the goals mentioned in the Treaty. Therefore, in order to carry out their task, the Council and the Commission shall, in accordance with the Treaty, make regulations, issue directives,

158. *See* Buxbaum and Hopt, *supra* note 144, at 209.
159. *See* Buxbaum and Hopt *supra* note 144, at 211.
160. *See infra* note 174.

make decisions and recommendations or deliver opinions. In the field of company law the most important tool, so far, has been the directive. Article 189(3) of the EC-Treaty points out that the directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.[161]

C. EC-Secondary Legislation[162]

1. *Directives*

To date, the Council has issued some 15 directives[163] in the field of compnay law.[164] The most important among them are the First Directive of March 9, 1968,[165] the Second Directive of December 13, 1976,[166] the Third Directive of October 9, 1978,[167] the Fourth Directive of July 25, 1978,[168] the Sixth Directive of December 17, 1982,[169] the Seventh Directive of June 13, 1983,[170]

161. *See* Article 189(2) of the EC-Treaty.

162. A short discription of all directives issued in the field of company and capital market law as of 1988 can be found in Buxbaum and Hopt, *supra* note 144, at 250 et seq.

163. The counting system is somewhat confusing. Not all directives are numbered (in particular those directives are not numbered that amend former directives) and some numbers have been reserved for directives which are not yet in force (*e.g.* the Fifth, Ninth and Tenth Directive).

164. A complete list of all directives and proposals in the field of company and capital market law as of August 1993 (including directives dealing with labor law, banking and insurrance law) can be found by Wiesner, *supra* note 2, at 500 et seq.

165. Known as the "Publicity Directive", O.J. EC No. L 6⅝ (March 14, 1968). It deals primarily with the uniformity of minimum disclosure provisions for company information, both as provided in the commercial register and in th press. Moreover, it addresses issues like validity of commitments made by company organs, and nullity of improperly established companies.

166. Known as the "Capital Directive", O. J. EC No. L 26 (January 30, 1977). It coordinates conditions of establishment of publicly held stock corporations and the maintenance of the company‘s minimum or statet capital.

167. Known as the "Merger Directive", O.J. EC No. L 295/36 (October 20, 1978). It harmonizes the provisions of mergers of stock corporations which are subject to the same national laws and provides for a basis for the planned directive of international mergers.

168. Known as the "Balance Sheets Directive", O.J. EC No. L 222/11 (August 14, 1978). It harmonizes the provisions for accounting, balance sheets and the content and publication of the annual report of all kinds of limited liability companies.

169. Known as the "Corporate Split-Up Directive", O.J. No. L 378/47 (December 31, 1982). It deals with the splitting-up of stock corporations by way of takeovers and reincorporations. It is connected with the Third Directive (*see supra* note 167).

170. Known as the "Groups of Companies Accounts Directive", O.J. No. L. 193 (July 18, 1983). It is connected with the Fourth Directive (*see supra* note 168). It pro-

the Eighth Directive of April 10, 1984,[171] the Eleventh Directive of December 22, 1989,[172] and the Twelfth Directive of December 22, 1989.[173]

2. *Regulations*

So far only one regulation in the field of company law has been enacted by the Community, the Regulation on the Creation of the European Economic Interest Grouping (EEIG) of July 25, 1985.[174] The regulation provides for a rather flexible legal form for international cooperations, either by firms or by individuals. It is important to note that the EEIG is not a company itself but rather an association of companies or individuals.

The important regulation on the control of concentrations between undertakings ("merger control regulation")[175] lies in the borderline between antitrust and company law; therefore, strictly speaking, it is not a regulation on company law.

D. Proposed Legislation

There are several proposals for directives to be enacted in the field of company law, some of them pending for many years. Besides the proposed Thirteenth Directive on Takeovers discussed below and other general bids,[176] the most important propsals are the Amended Proposal of November 20, 1991 for a

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vides for a common framework for the annual reports of group of companies, notably transnational acting corporations.

171. Known as the "Auditor Directive", O.J. EC No. L 126/20 (May 12, 1984). It harmonizes the provisions of admission and qualification of auditors.

172. Known as the "Publicity of Branches Directive", O.J. EC No. L 395/36 (December 12, 1989). It coordinates the minimum disclosure provisions for branches of foreign companies.

173. Known as the "Single Member Stock Corporation Directive", O.J. EC No. L 395/40 (December 30, 1989). It provides for the possibility of a single member stock corporation in all Member States.

174. O.J. EC No. L 199 (July 31, 1985) which entered into force on July 1, 1989. *See* Margaret Anderson, Current EC Legal Developments: European Economic Interest Groupings (1990).

175. Council Regulation 4064/89, O.J. EC No. L 395. *See* Werlauff, *supra* note 143, at 224; Andreas Weitbrecht, *Die Europäische Fusionskontrollverordnung*, Europäische Zeitschrift für Wirtschaftrecht 18 (1990); Greenbaum, *supra* note 15.

176. *See infra* text accompanying note 182.

Fifth Council Directive,[177] and the Proposal of January 8, 1985 for a Tenth Directive.[178] The Proposal for a Ninth Directive, the "Group of Companies Directive"[179] is presently no longer discussed.[180]

VI. PROPOSED TAKEOVER DIRECTIVE[181]

A. INTRODUCTION

On February 2, 1989 the EC-Commission presented a Proposal for a Thirteenth Directive on Company Law, concerning takeovers and other general bids[182] which on May 10, 1990 was followed by an amended proposal for a Thirteenth Directive on Company Law, concerning takeovers and other general bids.[183]

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177. Known as the Proposal for a "Structure Directive", O.J. EC No. C 321 (December 12, 1991). It deals with the structure of the corporation and the powers and obligations of its bodies. Because of the involved problem of labor co-determination, it is very unlikely that it will be enacted in the forseeable future. *See* also Buxbaum and Hopt, *supra* note 144, at 259-262.

178. O.J. EC No. C 23/11 (January 14, 1985). It deals with transnational mergers of stock corporations. This proposal is the second attempt of the Community to settle this issue, after the first one, a transnational agreement under Article 220 of the EC-Treaty, failed, *see* Buxbaum and Hopt, *supra* note 144, at 254.

179. *See* LUTTER, EUROPÄISCHES UNTERNEHMENSRECHT, *supra* note 2, at 57 et seq.

180. *See* Buxbaum and Hopt, *supra* note 144, at 253; Wiesner, *supra* note 2.

181. *See* Gilson, *supra* note 1, at 161; Assmann et al., *Towards the Harmonization of EC-Member States Regulations on Takeover Bids: The Proposal for a Thirteenth Directive on Company Law*, 9 Nw J. Int'l L. & Bus. 487 (1989); McLachlan and Mackesy, *supra* note 113; Dassesse, *Selected Aspects of European Economic Community Law on Investments and Acquisitions in Europe*, 25 INTERNATIONAL LAWYER 375 (1991); Theodor Baums, *Übernahmeregeln in der Europäischen Gemeinschaft*, ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 1376 (1989); Klaus Peter Berger, *Unternehmensübernahmen in Europa*, ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 1644 (1991); Peter Hommelhoff and Dirk Kleindiek, *Takeover-Richtlinie und Europäisches Konzernrecht*, DIE AKTIENGESELLSCHAFT 106 (1990); K.G Loritz and K.R. Wagner, *Das "Zwangsübernahmeangebot" der EG-Takeover-Richtlinie aus verfassungsrechtlicher Sicht*, WERTPAPIER-MITTEILUNGEN 709 (1991); Hans Joachim Mertens, *Förderung von, Schutz vor Zwang zu Übernahmeangeboten*, DIE AKTIENGESELLSCHAFT 252 (1990); Martina Röhrich, *Gleichbehandlungspflicht bei Kontrollacquisitionen: Eine Analyse der 13. EG-Richtlinie aus ökonomischer Sicht*, RECHT DER INTERNATIONALEN WIRTSCHAFT 93 (1993); Jutta Stoll, *Zum Vorschlag der EG-Kommission für die 13. Richtlinie auf dem Gebiet des Gesellschaftsrechts über Übernahmeangebote*, BETRIEBS-BERATER 1489 (1989); Peter Salje, *"Feindliche Übernahmen" -Gegenstrategien und Regulierungh im zukünftigen europäischen Binnenmarkt*, JURISTISCHE ARBEITSBLÄTTER 321 (1990).

182. O.J. No. C 64/8 (March 14, 1989). Oppinion of the European Parliament: O.J. No. C 38/41 (February 19, 1990); Opinion of the Economic and Social Committee: O.J. No. C 298/56 (November 27, 1989).

183. O.J. EC No. C 240/7 (September 26, 1990); Additional Opinion of the Economic and Social Committee: O.J. EC No. C 102/49 (April 18, 1991) [hereinafter "the

Currently the Proposal, which was clearly inspired by the British City Code on Mergers and Takeovers,[184] is once again being reviewed by the Commission in light of the Principle of Subsidiarity[185] which was amended to the EC-Treaty in 1992.[186] The Commission considers such a Directive necessary to protect the interests of the holders of the securities of companies governed by the law of a Member State, when the securities of these companies, which are admitted to trading on a regular market, are the subject of a takeover or other general bid.[187] The Directive is designed to ensure that

> - all holders of securities of an offeree company who are in the same position are treated equally,
> - the addressees of a bid have sufficient time and information to enable them to reach a properly informed decision on the bid,
> - the board of an offeree company acts in the interests of all the shareholders and cannot frustrate the bid,
> - false markets are not created in the securities of the offeree company, of the offeror company, or of any other company concerned by the bid, and
> - offeree companies are not hindered in the conduct of their affairs beyond a reasonable time by an offer for their securities.[188]

B. Basics of the Proposal

Article 1 defines the scope of application of the directive. For example, in Germany, it applies to the "Aktiengesellschaft (AG)"[189] and the "Kommanditgesellschaft auf Aktien (KGaA),"[190] in the United Kingdom to the public company, limited by shares, in Italy to the "società per azioni" and to the

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Proposal"].

184. *See* Morse, *supra* note 5; Wouters, *supra* note 6, at 280.

185. For the meaning of this principle *see* Deborah Z. Cass, *The word that saves Maastricht? The principle of subsidiarity and the division of powers within the European Community*, 29 COMMON MARKET L. R. 1107 (1992); A. G. Toth, *The principle of subsidiarity in the Maastricht Treaty*, 29 COMMON MARKET L. R. 1079 (1992).

186. *See* Article 3(b) of the Treaty.

187. *See* Amended Proposal, *supra* note 183, at 7, 6th recital.

188. *See* Amended Proposal, *supra* note 183, at 8, 9th recital.

189. Stock Corporation, *see supra* text accompanying note 43.

190. Commercial Partnership limited by shares.

"società in accomandita per azioni",[191] in France to the "société anonyme" and the "société en commandite par actions."[192]

Article 2 defines technical terms. "Takeover or other general bid" is defined as "an offer made to the holders of the securities of a company to acquire all or part of these securities by payment in cash or in exchange for other securities." "Parties to the bid" are defined as "the offeror, the representative of the offeror within the meaning of Article 9,[193] the directors of the offeror, if the latter is a company, or the addressees of the bid and the directors of the offeree company." "Persons acting in concert" means "persons who, through concerted practices or pursuant to an agreement, cooperate with one another in connection with a bid."

Article 4 contains the most controversial provision of the whole proposal.[194] It provides that any person ("the acquirer") who as a result of acqusition by himself or by a person referred to in paragraph 2[195] holds securities which, added to any existing holdings, give him a percentage of the voting rights in a company (which may not be fixed at more than one-third of the voting rights existing at the date of acquisition) shall be obligated to make a bid to acquire all the securities of the company.

Article 6 provides for the installation of a supervisory authority which must discharge the functions specified in the directive. The authorities thus designated are allowed to delegate all or part of their powers to other authorities or to associations or private bodies. Moreover, the powers and tasks of the supervisory authorities are described in detail.[196]

Article 6(a) states the main functions of this supervisory authority. The agency must ensure the above-mentioned goals of

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191. Stock corporation and commercial partnership limited by shares.

192. Stock corporation and commercial partnership limited by shares.

193. Article 9 defines the representatives of the offeror.

194. For a critical review *see* Wouters, *supra* note 6, at 279; LUTTER, EUROPÄISCHES UNTERNEHMENSRECHT, *supra* note 2, at 642 et seq.

195. Paragraph 2 states how to calculate the threshold referred to in pragrah 1. It provides for, in part, that voting rights have to be added that are held by other persons or entities in their own names but on behalf off the acquirer or those voting rights held by undertakings controlled by the acquirer or voting rights held by any other person acting in concert with the acquirer.

196. For further details *see* Wouters, *supra* note 6, at 307 et seq.

the directive.[197]

Article 7 deals with the procedure prior to publication of the offer. As soon as the offeror has decided to make a bid, he shall inform the competent supervisory authority and the board of the offeree company and then make his decision public as described in detail in Article 11. Moreover, Article 7 provides that the offeror shall immediately create an offer document in accordance with Article 10 and make such document public. Before its publication, the offeror shall communicate the document to the supervisory authority and to the board of the offeree company.

Article 8, also a highly controversial provision,[198] provides for certain restrictions on the powers of the board of the offeree company. After receiving the information referred to in Article 7 and until the result of the bid is made public, the board of the offeree company shall not, without obtaining the authorization of the general meeting of shareholders within the period of acceptance, decide:

> - to issue securities,
> - to engage in transactions which would have the effect of altering significantly the assets or liabilities of the company or resulting in the company entering into commitments without consideration, unless the supervisory authority authorizes with reasons such transactions, or
> - to have the company acquire its own shares.

Additionally, Article 8 provides that the board of the offeree company may call a general meeting of shareholders before the expiration of the period of acceptance.

Article 9 deals with the representative of the offeror and states that such offeror shall be represented either by a qualified person authorized to deal on the Community financial markets or by a credit institution authorized within the community.

Article 10 prescribes quite extensively the content of the offer document, which must disclose all the information necessary to enable the addressees to reach a properly informed decision on

197. *See supra* text after note 186.

198. For a critical review *see* Wouters, *supra* note 6, at 285 et seq and 291 et seq.

the bid.[199]

Article 11 states the forms of disclosure of the bid, for example mass-circulation newspapers or national gazettes.

Article 12 deals with the period of acceptance. Member States shall provide that the period of acceptance of the bid may not be less than four weeks or more than ten weeks from the date on which the document is made public. According to paragraph 2 the period may not be modified without the authorization of the supervisory authority.

Article 13 specifies six circumstances under which a bid may be withdrawn or is void, for example when a competing bid by another offeror is made or in the case of a bid where new securities are offered in exchange for the original securities, and the approval of the general meeting of the offeror company is not obtained for the issue of new securities.

Article 14 states the obligation of the board of the offeree company to draw up an opinion on the bid. In this document, which must be made public well before the expiration of the period of acceptance,[200] the board must express its opinion on the bid and any of its revisions together with the reasons on which it is based. This document must specify at a minimum whether the board of the offeree company is in agreement with the offeror on the bid, any agreements on the exercise of the voting rights attached to the securities of the offeree company, so far as the board is aware of them, and whether the board members of the offeree company, who hold securities themselves, intend to accept the bid.

Article 15 deals with the revision of bids and provides that at any time before the last week of the period of acceptance the offereor may revise the terms of the bid. The Member States may take appropriate steps to ensure that any successive revisions of the bid do not improperly impede the operation of the offeree company and of the market.[201]

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199. Besides name, type registered office of both the offeree and the offeror company the document must specify the persons responsible for the offer document, the securities for which the bid is made, the securities already held by the offeror or other persons acting on behalf of the offeror or held by undertakings controlled by the offeror or held by persons acting in concert with the offeror. Moreover detailled information about the attached voting rights and about options to acquire securities must be given, and much more. In total, about 20 different different details of information are required.

200. *See* Article 14(3) of the Proposal.

201. *See* Article 15(2a) of the Proposal.

Article 16 provides for an "automatic revision." After the public announcement but until the end of the period of acceptance, if the offeror, other persons, or entities acting in their own name but on behalf of the offeror or in concert with the offeror acquires securities which are the subject of the bid on more favorable conditions than those in the offer document, or any revisions thereof, the Member States shall ensure that the addressees of the bid qualify for the more favorable conditions.

Article 17 deals with the information of the supervisory authorithy and provides for the obligation of all parties to the bid[202] to give detailed information concerning the bidding process to the supervisory authority.

Article 18 provides that on the expiration of the period of acceptance, the results of the bid shall be made public immediately.

Article 19 deals with the information for representatives of employees of the offeree company. The board of the offeree company shall communicate to its employees' representatives the offer document and other specified information. According to Article 19(2), such documents or information shall be communicated immediately after they are made public.

Article 20 provides that basically the same procedure as described in the foregoing articles applies to all competing bids.

Article 21 provides for the creation of a contact committee under the auspices of the Commission. It shall have the function of facilitating the uniform application of the Directive through regular consultations on, in particular, practical problems arising in its implementaton and ensuring concerted action in the policies followed by the Member States in order to obtain reciprocal treatment for Community nationals and companies in regard to the acquisition of securities of a company by means of a takeover bid. Finally, the contact committee shall advise the Commission, if necessary, on additions or amendments to the Directive.

Article 22 provides for the adoption of the Directive into national legislation.

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202. As defined in the fifth indent of Article 2.

VII. WILLIAMS ACT, PROPOSAL AND GERMAN LAW

A. PROPOSAL COMPARED TO THE WILLIAMS ACT[203]

The Williams Act, as pointed out above, governs the tender offer process in the United States.[204] It takes quite a different approach than the Proposal by focusing mainly on the flow of information between the offeror,[205] the target's management, and investors rather than on substantive rights of the offeror or the management.[206] The Williams Act only requires the offeror to disclose all the important information of the bid, i.e. the terms and conditions of the bid, to the investors[207] without giving advantage to either party of the bid.[208] In the United States, the federal law[209] creates a level playing field to the benefit of the shareholders. The Proposal goes far beyond that and tries to regulate the whole bidding process by ensuring equal treatment of all the shareholders. Both of the essentials of the Proposal, provided for in Article 4[210] and Article 8,[211] the obligation of the offeror, once he has acquired more than one-third of the targetss shares, to also bid for the remaining securities of the target company, and respectively, the prohibition of certain defensive tactics of the target's management during the time the bid is pending, have no counterparts in the Williams Act. In summary, *Greenbaum* is perfectly right, when he concludes: "The Proposal's more substantive regulation shrinks the playing field between the hostile bidder and incumbent management. The Proposal operates to deter a number of tender offers, but at the same time restricts the actions that target management may take while a hostile tender offer is pending. The shrinking of the playing field, moreover, occurs at all stages of the tender offer

203. *See* Greenbaum, *supra* note 1; Gilson, *supra* note 1; Stith, *supra* note 1; Greene, *supra* note 1; Wouters, *supra* note 6.

204. 15 U.S.C. §§ 78m,(d),(e), 78n(d) - (g) [1988]. It also regulates the acquisition of significant equity positions by shareholders. The following overview focuses on the provisions for tender offers only.

205. Referred to as "bidder" in the Williams Act.

206. *See* Greenbaum, *supra* note 1, at 927; Wouters, *supra* note 6, at 279.

207. *See* 15 U.S.C. § 78n(e) [1988].

208. In Edgar v. MITE Corp., 457 U.S. 624 (1982) the Supreme Court stated, that Congress took care in structuring the Williams Act to "avoid tipping the scales either in favor of the management or in favour of the person making the takeover bids".

209. As far as the state anti-takeover legislation is concerned, *see supra* footnote 32.

210. *See supra* text accompanying note 194.

211. *See supra* text accompanying note 198.

process. The smaller field, however, may be tilted in favor of the hostile bidder. Although the bidder has less room to maneuver and may have difficulty entering the game because of the regulatory obstacles, the target, without the ability to adopt extraordinary defensive tactits, may be chained to the goal post."[212]

B. Impacts of the Proposal on German Company Law

1. *Structural Obstacles for Hostile Tender Offers in Germany*

The foregoing has shown, that, as far as the present legal situation in Germany is concerned, the bidding process is governed only by voluntary guidelines, issued by the stock exchange's commission of experts. These guidelines, which can not be legally enforced, do not really bar hostile tender offers. However, no US-style hostile tender offers have taken place so far.[213] The reasons for this are structural rather than plain legal circumstances, some of which have already been addressed earlier. They can be summarized as follows:

From the country's approximately 2400 stock corporations, only about 500 are publicly traded,[214] and maybe about a third of them are well protected by a large minority or even a majority stockholder, usually a bank, insurance company or an old family trust.[215] Therefore, the takeover market is comparatively small.[216] The two-tier board system,[217] the principle of labor codetermination[218] with half or one third of the supervisory board being labor representatives and the three-fourths majority requirement for all major changes in the structure of the corporation make it not impossible, but at least somewhat complicated and time-consuming to create a change in corporate control. As pointed out above, German corporations in general are not al-

212. *See* Greenbaum, *supra* note 1, at 929-930.

213. *See supra* note 22.

214. As of the end of 1988. At the same time, approximately 350,000 privately held stock corporations were registered, *see* Wouters, *supra* note 6, at 269 note 3.

215. *See Why Germany dislikes Hostile Takeovers*, BUSINESS LAW BRIEF 17 (August 1988).

216. Community-wide, only 54% of the top 400 corporations are listed, compared to 99% in the USA, *see* Wouters, *supra* note 6, at 269.

217. *See supra* text accompanying note 47.

218. *See supra* note 57.

lowed to deal in their own stock.[219] This leads to a total absence of "greenmailing" activity. Whoever tries to takeover a company must fight to the bitter end and cannot leave the battlefield beforehand with a sweet "goodbye-kiss" of the company. Every fundamental change in the structure of a German stock corporation which brings with it a sale of assets or a dismissal of employees creates very high costs for the company: The sale of assets means tax-wise realization of hidden reserves,[220] and the dismissal of employees is not possible without reimbursing them for their lost jobs.[221] Today in Germany these are the major part of costs for any corporate restructural measure, notwithstanding what event the restruction has caused.[222]

Moreover, there is another factual obstacle that contributes much to the lack of US-style takeover activity. As pointed out earlier, the supervisory board is the first bastion that must be taken by a would-be conqueror on the way to corporate control. One might ask why it is not possible to take it and dismiss the old management, at least in those cases, where the chairman of the supervisory board is a shareholders' representative having the casting vote in case of a tie.[223] It probably would cause an uproar and - if one of the major German corporations in the banking, car manufacturing, chemistry or electronic branch were the target - very likely a strike within this whole particular branch of industry, if the prerogative were used in that way. Moreover, in Germany from the beginning the members of the supervisory board of the huge corporations have been reputable business and banking personalities from other corporations with major influence as main suppliers, main customer or house banks for this particular corporation.[224] To fire them like a char-

219. *See* sec. 71 ff of the Stock Corporation Act. From this general rule, only a few exceptions exist, *see supra* text accompanying note 134.

220. Being the difference between the fair market value of a corporate asset and its value on the books. The German system of tax accounting allows to a much greater extent than the American one an accumulation of such hidden reserves which are to be taxed in case they are sold, because under sec. 16, 34 of the German income tax code there is hardly any possibilities of a carry over.

221. Referred to as "Sozialplan" in German language.

222. *See* Günter Heckelmann, LABOR CONTRACTS, and Rainer Stachels and Markus Kappenhagen, *Works constitution*, both in BUSINESS TRANSACTIONS IN GERMANY, *supra* note 57.

223. All industrial corporations with more than 2000 employees, besides coal mining and steel industry.

224. By way of example, the Chief Executive Officer of Deutsche Bank, by far the

woman after a takeover of the stock majority would be an affront against the "old boys" of the established business society in Germany as a whole,[225] and would probably cause insurmountable difficulties to find successors for them with any reputation within the country's business and banking society. And even if they were replaced, their above-mentioned influence as customer, supplier or house bank would remain.

2. *Will The Proposal Bring About A Change In Germany?*

According to the "Bangemann memorandum",[226] the EC-Commission with its proposal for a takeover directive aims to encourage takeovers within the common market. The question this article examined was whether the Thirteenth EC-Directive on Company Law, concerning takeovers and other general bids, will bring on a change and lead eventually to US-style hostile tender offers and takeover fights in Germany. The answer is "probably not." The obstacles responsible for the lack of a US-style takeover activity in Germany are of a more factual rather than legal in nature, and they are not going to disappear with an implementation of the Directive, once entered into force. Therefore, it is hard to imagine that United States hostile takeover activity will be found in Germany in the near future. However this does not mean that the number of US-style hostile tender offers will remain absolutely zero.

C. FINAL REMARKS

Whether this is good or bad depends on whether unnegotiated takeovers are considered positive or negative for the economy as a whole. Examining this question is, if possible at all, well beyond the scope of this article[227] and would lead to the shaky grounds of economic theories on the law of the market. From an American point of view, being an investor that regards business corporations primarily as profit-generators, a continous

largest German banking corporation, is the chairman of the supervisory board of Daimler-Benz.

225. *See* Peltzer, *supra* note 121, at 282.

226. *See supra* note 21.

227. For a comparative overview of this discussion *see* Wouters, *supra* note 6, at 274 et seq.

lack of a German "market for corporate control"[228] is probably regrettable.[229] From a Continental-European standpoint, viewing business associations "institutionally," as autonomous and enduring groups of human beings in which shareholders' interests must be balanced against those of other interested parties, like employees, creditors, suppliers, customers or the local region or state,[230] the likely ongoing absence of US-style hostile takeover activity in Germany probably is highly welcomed.[231]

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228. *See* Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110 (1965).

229. The advantages for investors of a hostile takeover are obvious: the price per share in a hostile tender offer always contains a significant premium over the market price and in addition to that very often the initial offer is once again increased either by the offeror himself during the takeover battle or other, higher offers are made during the process of auctioning. And several examples from the US-takeovers show, that the management change lead to an increase of value of corporate assets. *See* Holderness and Sheehan, *Why corporate raiders are good news for stockholders*, in THE REVOLUTION OF CORPORATE FINANCE 414 (1989). However, it could be argued, that if it is really the change in management that leads to an increase of value of corporate assets then there are other possibilities of bringing on such a change without the disadvantages of a ruinous takeover fight, for example a proxy contest, *see* Randall S. Thomas, *supra* note 1, at 503.

230. *See* Wouters, *supra* note 6, at 274.

231. The main concerns are against highly leveraged transactions, which were characteristic for the US-deals in the 1980s. If the takeover is successful, the company is over its head in debt. The financial scope to meet challenges of the future, either caused by the need of environmental protection or by a highly competitive industry in the Far East not struggeling with takeover debts, is not available. If the company is going bankrupt or has to be reorganized after a ruinous takeover battle, than the price is not only paid by shareholders, but also by the employees loosing their jobs. And, so could be argued, even if a company will never become a target, the mere possibility of an eventual takeover has negative consequences; building financial reserves in good years for worse ones is not possible, because this would make the company an attractive target. Very costly long term investments for basic research in the field of high tech or chemical industry which temporarily may lead to fewer earnings, but which are indispensable to assure the existence of the corporation among international competitors in the future are not possible, because even a temporary revenue decrease leads to a lower stock price and makes a takeover cheaper and so more likely. When the number of corporations and the amounts of money involved in deals during the 1980s steadily increased, one of the "gurus" of American corporate directors, Lee Iacocca, took a critical standpoint in saying that foreign corporations have all the time they need to strengthen their position on the American market while US companies are fully busy with their takeover fights, *see Interview*, FRANKFURTER ALLGEMEINE ZEITUNG 13 (Feb. 3, 1987).