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Topic III

**Cross Border Mergers in Company Law and Competition Law:
removing the final barriers**

The German Perspective

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A. The Competition Regime

1. *What is the view from your country² on the functioning of the threshold levels in Article 1(2) as well as the 2/3 rule in the Merger Regulation, and the proposal in the Commission's Green Paper for amendment of Article 1(3) to deal with the problems of multiple filings?*

The criteria laid down in Article 1(2) of the Merger Regulation³ define the jurisdiction of the EC Commission and the Member States respectively in an appropriate and

¹ All the answers represent the personal opinions of the rapporteur and are not official statements by German public bodies or the *Wissenschaftliche Gesellschaft für Europarecht* (Society for the Study of European Law). The rapporteur wishes to thank all lawyers at GLEISS LUTZ who assisted him in providing the answers to the questions, and particularly Dr. Ralf Thaeter for his suggestions and for reviewing that part of the questionnaire dealing with company law, and Michael Schedl for his assistance in preparing the manuscript.

² The aim is not here to have an authoritative statement but a report which can contribute to the discussion. For EEA (non member) country rapporteurs, the subject of the question is intended to be the EEA regime. For non member (non EEA) countries, there are special issues. Country rapporteurs are welcome to limit their answers in the way they believe to be most helpful or interesting with the purpose of the questionnaire in mind.

³ Council Regulation (EEC) No. 4064/89 of 21.12.1989 on the control of concentrations between undertakings, OJ L 395 of 30.12.1989, p. 1, rectified version in OJ No. L 257 of 21.9.1990, p. 1, last amended by Council Regulation (EC) No. 1310/97 of 30.6.1997, OJ. L 180 of 9.7.1997, p. 1.

practicable manner. The turnover thresholds have proven to be a workable criterion, though reducing them would be one way of avoiding complicated reforms of Article 1(3) of the Merger Regulation (see below). The 2/3 rule embodies the concept that a concentration should be examined in the country(ies) where the undertakings involved do most of their business (and thus where most of the competition takes place). There is no need for any changes in this respect.

According to the Commission's proposal in its Green Paper on the Merger Regulation, the Commission will automatically have jurisdiction if a concentration is subject to notification in at least three Member States.⁴ There is definitely general approval for what the Commission is seeking to do here, namely to thereby avoid multiple filings, though there is some doubt as to whether the proposed amendments would really be workable in practice. As the Commission acknowledges itself, the criteria laid down by the merger control laws as regards the concentrations that come under their purview still vary greatly from Member State to Member State - in the countries that apply market share thresholds, for example (Greece, Portugal, Spain, UK), it is not possible to establish whether a concentration has to be notified without conducting detailed investigations. Furthermore, the effect principle (cf., e.g., section 130(2) of the German Act against Restraints of Competition) leads to a situation where there is often much uncertainty as to whether a concentration is subject to notification at all, at least until the national authority has made a statement - as proposed by the Commission. Clearing up these doubts can not only cause significant delays, which would mean having to extend the deadline provided for in Article 4(1) Merger Regulation, but would also leave the undertakings concerned in a state of uncertainty as to the protection of their rights. Statements issued by the national authorities would presumably only be appealable before the national courts, which would either establish the competence of the Commission with retroactive effect or deny its jurisdiction. Further problems result from the fact that the definitions of a concentration contained in the various national merger control regulations differ. Under the German Act against Restraints of Competition, for example - in contrast to the EU Merger Regulation - the acquisition of 25% of the capital or voting rights in another undertaking constitutes a concentration (section 37(1), no. 3(b))⁵. At Community level transactions of this kind would be

⁴ Green Paper for the amendment of Council Regulation (EEC) No. 4064/89 of 11.12.2001, KOM(2001) 745/6 final, no. 57.

⁵ The competition law of Austria contains similar rules.

examined under Article 81 EC provided, that is, they did not give the acquirer control over the other undertaking.

Given that full and complete harmonisation of the national merger control laws is neither desirable nor realistic, reducing the threshold laid down in Article 1(2) of the Merger Regulation (and deleting Article 1(3) at the same time) would be the easiest and most practicable solution. The resulting extension of the Commission's jurisdiction could be limited by providing more effective referral rules. This model would also avoid the Member States having to go through the time-consuming procedure of dealing several times with the same matter (establishing that a concentration is subject to notification, notification to the Commission, referral to the Member States).

2. *In light of the experiences made in your country, do member states have sufficient flexibility to call for mergers to be referred back under Article 9 of the Merger Regulation? In light of the proposal in the Commission's Green Paper, what is your view on the circumstances in which this power should be exercised?*

The requirements for referral of concentrations to the Member States are strict. Article 9 of the Merger Regulation contains two alternatives: Under subsection 2(a) a Member State applying for a concentration to be referred to it must be able to show that the concentration threatens to create or strengthen a dominant position on a distinct market. Even if the Member State does succeed in presenting a *prima facie* case, it is still within the Commission's discretion to decide whether or not to refer the case to the Member State. In a joint protocol the Council and the Commission did, however, state that concentrations that threaten to create or strengthen a dominant position in a substantial part of the common market should only be referred to the Member States in exceptional cases.⁶

If a concentration is to be referred under Article 9(2)(b) it must affect competition on a market within the Member State which presents all the characteristics of a distinct market and which does not constitute a substantial part of the common market. On account of the fact that the Commission and the Community courts

⁶ Printed at WuW 1990, p. 240.

interpret the term “substantial part of the common market” broadly⁷ only concentrations that really affect limited regional markets within a Member State are capable of being referred under this rule⁸ The Commission does not have the jurisdiction to deal with cases of this kind, anyway, as Article 2 limits its jurisdiction to concentrations that impede competition in the common market or a substantial part of it.

There has been a significant increase in the absolute number of referrals since 1997, and by mid-2002 there had already been the same number as in the entire year before.⁹ The second alternative for referring concentrations to the Member States, which came into force on March 1, 1998, had practically no share in this increase.¹⁰

From the point of view of the undertakings concerned, the strict limitation of referrals is definitely a good thing. Referrals only prolong the procedures, involve additional costs, and it is difficult to predict their outcome. They deprive the undertakings of the biggest advantage, namely obtaining one decision that applies in the entire EU (or the entire EEA, as the case may be - “one-stop-shop”). This applies to part referrals and referrals to other Member States. Extending the possibilities for referral would therefore be acceptable only as a way of counterbalancing an extension of the Commission’s jurisdiction (see question 1, above).

The Commission is quite right in wanting to dispense with the “threat of market dominance” criterion. Investigating whether there really is a threat of market dominance is time-intensive and as such this is not a valid criterion when it comes to allocating jurisdiction. Incidentally, it is still not altogether clear what the requirements as regards presenting a *prima facie* case for a threat of market

⁷ The territories of the individual Member States may well be considered to be substantial parts of the common market (in dispute for Luxembourg, confirmed in a procedure in accordance with Article 86 EC Treaty by Advocate-General Warner, opinion in case no. 77/77, BP/Commission, ECR 1978, 1513, 1537). The same may apply to individual regions or certain parts of large Member States and was, for example, confirmed in relation to the port of Genoa, cf. case no. C-179/90, Porto di Genova/Garielli, ECR 1991, I-5889, no. 15, and case no. C-18/93, Corsica Ferries, ECR. 1994, I-1783 no. 41.

⁸ Cf. COMP/M.2730 - Connex/DNVBVG. The concentration concerned public transport services.

⁹ Referral decisions: 1990 to 1995: 0 to 1 per year, 1996: 3, 1997 to 2001: 4 to 7, 2002 (up to 30.6.): 7.

¹⁰ In relation to the number of merger notifications, the number of referrals decreased continuously after 1997 and is not expected to go above the 1997 figure again until 2002.

dominance. On some occasions the Commission has been very lenient in this respect.¹¹ Where competition has been shown to be affected in the Member State concerned, it would seem more appropriate to determine jurisdiction on the basis of the geographic extent of the concentration. The Commission should refer concentrations that have merely regional effects within one Member State to the Member State in question, regardless of whether the region concerned forms a substantial part of the common market. The same should apply in the case of concentrations that affect purely national markets which represent distinct markets and have no appreciable effects outside these markets. Where a concentration has effects beyond the borders of an individual Member State, or where the markets concerned have developed into European ones, then the concentration should be examined by the Commission. Precise guidelines on the referral of concentrations to the Member States would be very welcome, especially because they would provide more legal certainty. Among other things, the guidelines should explain in detail the Commission's practice in applying the referral criteria and comment on the involvement of the undertakings concerned and third parties in the referral procedure. The reduction of the application period for Member States from three to two weeks, as proposed by the Commission, would be appreciated, but is not absolutely necessary. It would not seem necessary to have the Commission refer concentrations to the Member States *ex officio*. The same applies to the proposal to the effect that the Merger Regulation should always be applied to referred cases instead of national legislation. In Germany procedures take up to four months, which is in line with the time-period provided for in Article 9(6) of the Merger Regulation.

3. *Is the system of consultation between the European Commission and the national competition authorities (NCAs) working adequately? Does there need to be a better formalised system for consultation between NCAs directly involved either in the case of multiple filings outside the merger control regulation or in cases where more than one member state exercises the Article 9 request?*

It is difficult for a lawyer to answer this question. In the context of EC merger control procedures, and specifically when it comes to negotiating remedies, deficits

¹¹ Cf. COMP/M.2760 - Nehlsen/Rethmann/swb/BEG.

in the system of consultation between the Commission and the NCAs do become apparent. Both in the first and the second phase of the investigations consultations between the Commission and the Member States do sometimes cause delays in the procedure, with the result that the undertakings only have limited possibilities of “improving on” the remedial measures they proposed, or even no possibility at all. The increased cooperation between Member States under Article 22(3) of the Merger Regulation¹² is to be welcomed. Referring a concentration to the Commission means that the parties obtain one consistent decision. The fact that not much use has been made of this rule in the past, however, coupled with the problems with regard to its application and interpretation,¹³ would seem to indicate that Article 22(3) is not capable on its own of solving the problem of multiple filings.

4. *How does the test under the law of your country compare to that under the Merger Regulation? Should all member states adopt the same test as under the Merger Regulation, and should this EU test be the (US) 'significant lessening of competition' test rather than the present EU 'dominance' test?*

Under the German Act against Restraints of Competition a concentration has to be prohibited by the Federal Cartel Office if it is to be expected that a dominant position will be created or strengthened, unless the undertakings involved can show that the concentration will also lead to improvements in competition and that these improvements outweigh the disadvantages of market dominance (section 36(1) of the Act against Restraints of Competition). According to the definition given in section 19(2) of the Act, one or more undertakings are dominant where they have no competitors or are not exposed to any substantial competition, or have a paramount market position in relation to their competitors which puts them in a position of being able to act with not regard for competitors, customers and other market players. Under section 19(3) a dominant position is assumed in the case of certain market shares. Under the Merger Regulation the criterion applied is whether a dominant position is created or strengthened which significantly impedes effective competition in the common market or a substantial part of it (Article 2(2), (3) of the Merger Regulation). The Act against

¹² Cf. COMP/M.2698 Promatech/Sulzer and COMP/M.2738 GES/Unison. These cases were jointly referred to the Commission by seven Member States.

¹³ It is unclear, for example, what incidents trigger the time-period provided for in Article 22(4) of the Merger Regulation.

Restraints of Competition and the Merger Regulation therefore coincide, at least with regard to the criterion involving the creation or strengthening of a dominant position.

It would undoubtedly be desirable if all EU Member States were to lay down uniform criteria for the appraisal of concentrations in their merger control laws. However, a comparison of German and EC merger control shows that the market dominance test is only a part of the appraisal. Whilst in Germany market dominance is assumed if certain thresholds are met, the Commission has to provide full proof of market dominance. On the other hand, on the basis of the “consideration clause” in section 36(1) of the Act against Restraints of Competition, market-dominating effects can be tolerated under certain circumstances. To date the Merger Regulation has on the whole been interpreted more strictly, although the words “which significantly impedes effective competition in the common market or a substantial part of it” do leave room for a less stringent interpretation.

Standard application of the market dominance test or the substantial lessening of competition test (the “SLC” test) would be no guarantee of uniform substantive merger control legislation in the EU, anyway, at least not on its own. While, on the one hand there is much in common between the Member States whose merger control legislation is centred around the market dominance test and those that apply the SLC test - the issue of market strength being, for example, a central criterion under the SLC test in the USA,¹⁴ as well as in Australia and New Zealand, for example,¹⁵ on the other hand there are some substantial differences between the merger control laws in countries that apply the SLC test (e.g. in relation to the importance attached to market concentration and other criteria).¹⁶

Incidentally, the vast majority of EU Member States and candidates for accession apply the market dominance test (cf., e.g., the new Polish and Czech competition legislation).

¹⁴ See point 2.0 of the *Horizontal Merger Guidelines*. The term “market power” is defined as being the possibility to act in a different way than if there was effective competition in the market. The SLC test therefore looks at the very same “uncontrolled scope of competitive action” as is usually used to define a dominant market position in the context of European merger control.

¹⁵ Cf. the Federal Cartel Office’s discussion paper „Das Untersagungskriterium in der Fusionskontrolle - Marktbeherrschende Stellung versus Substantial Lessening of Competition“ (The Criterion for Prohibiting a Merger - Dominant Position versus Substantial Lessening of Competition); which can be accessed at „www.bundeskartellamt.de/Diskussionsbeitraege.html“.

¹⁶ Cf. footnote 15.

On balance, at the present stage harmonisation of the substantive examination criteria of the EU and its Member States would appear to be less important than efficient cooperation at the level of specific cases.¹⁷ Experience shows that the actual divergencies in specific concentrations are less than they would appear from the theoretical discussion of the examination criteria to be applied.¹⁸

5. *Are the procedural and judicial safeguards adequate to protect parties from abuse of power by the competition authorities? How does the laws of your country compare to EC law in this respect?*

The procedural rights under the Act against Restraints of Competition and the Merger Regulation are very similar (at least on paper). Under section 40(1) of the Act against Restraints of Competition the Federal Cartel Office has to inform the notifying undertakings within one month of receipt of the complete notification that it is initiating the main examination procedure. Under section 40(2) of the Act against Restraints of Competition the Federal Cartel Office has four months from receipt of the complete application to decide whether to prohibit or clear a concentration. Both time-periods are preclusive periods upon expiry of which the Federal Cartel Office no longer has the right to prohibit a concentration. The Merger Regulation provides for comparable time-periods (first phase: one month; second phase: four months), on expiry of which a concentration is deemed to have been cleared (Article 10(6) of the Merger Regulation).

If the Federal Cartel Office intends to prohibit a concentration, it sends the parties a “warning letter” (*Abmahnung*) informing them of the grounds it expects to give in its decision for the prohibition of the concentration. This instrument serves to give the parties a right of audience and is comparable with the statement of objections under the Merger Regulation. Under section 56(1) of the Act against Restraints of Competition the competition authorities have to give the parties the opportunity to comment and invite them to attend a hearing (cf. Article 18(1) of the Merger Regulation). Under German law the parties have the right to inspect the files (cf. section 29 Code of Administrative Procedure; *Verwaltungsverfahrensgesetz*) - not only the actual file on

¹⁷ As the Commission says itself in paragraph 169 of the Green Paper, this paradigm shift is not sufficiently discussed in the Green Paper.

¹⁸ Cf. International Competition Policy Advisory Committee (to the Attorney General and the Assistant Attorney General for Antitrust); Final Report of 28 February 2000, p. 51.

the procedure itself, but also all files related to the subject-matter of the procedure and which could be of importance for the decision. Under the Merger Regulation the parties to the procedure (i.e. including affected third parties) have access to the files in the second phase (Article 18(3) of the Merger Regulation).¹⁹

Decisions issued by the Federal Cartel Office, e.g. prohibitions or conditional clearances, may be appealed with Düsseldorf Higher Regional Court (*Oberlandesgericht*) (section 63(1) and (4) of the Act against Restraints of Competition). Section 66(1) stipulates that written grounds for the appeal have to be filed with the Federal Cartel Office within one month from service of the appealed decision. There is some controversy as to whether under German law, if a conditional clearance is issued, such conditions (or obligations) can be appealed on their own.²⁰ Appeals on a point of law may be lodged with the Federal Court of Justice against decisions handed down by Düsseldorf Higher Regional Court. Except in cases that come under section 74(4) of the Act against Restraints of Competition leave of appeal has to be granted (section 74(1) of the Act against Restraints of Competition; for the grounds for the grant of leave of appeal, see section 74(2) of the Act against Restraints of Competition).

Under Article 230(4) EC, in EC merger control procedures actions for cancellation can also be filed with the Court of First Instance against prohibitions or the issue of special conditions and requirements. Its rulings can be appealed with the European Court of Justice. Although the rights of appeal at German and European level are very similar, the rights of parties in Germany hitherto enjoyed more effective protection in practice because procedures were much shorter in Germany than at EU level.²¹ Introduction of the expedited procedure before the Community courts may result in an approximation, but whether this procedure will prove effective remains to be seen.²²

Under German law appeals against clearances have no suspensive effect (section 64(1) Act against Restraints of Competition). Consummation can, however, be suspended by

¹⁹ Cf. also Commission Notice on internal procedural rules for the treatment of requests for access to files.

²⁰ Cf. Immenga/Mestmäcker, *GWB-Kommentar* (Commentary on the Law against Restraints of Competition), 3rd ed. 2001, section 40 no. 72.

²¹ Proceedings before the Community courts take about two years per instance; before the German courts proceedings generally take less than one year for the first instance, and rather more than one year for the appeal.

²² Cf. Notice on the amendment of the code of procedure of the Court of First Instance to expedite proceedings, OJ L 322 of 19.12.2000, p. 4.

the court of appeal if this is in the public interest or in the prevailing interest of one of the parties (section 65(3), 2nd sentence, of the Act against Restraints of Competition). This is the case if consummation would result for the party concerned in undue hardship not justified by prevailing public interests (section 65(3), 2nd sentence, in conjunction with section 65(3), 1st sentence, no. 3). The court of appeal may also issue a provisional order to temporarily settle a matter (section 64(3) in conjunction with section 60 of the Act against Restraints of Competition). In some cases,²³ it may even allow consummation of a prohibited merger.²⁴

All in all, therefore, German law has a number of substantive and procedural safeguards designed to effectively prevent any abuse of procedure by the authorities.

6. *Below are a number of questions relating to domestic law which may assist in a comparative analysis.*
 - a) *Please provide an overview of the structure of and main features of the relevant domestic legislation and the institutional framework (who enforces it)? It may be helpful with some information about the role of private rights of action.*

Merger control was introduced in Germany in the year 1973. The relevant statutory rules are to be found in Chapter 7 of the Act against Restraints of Competition (sections 35 to 43), a law from the year 1958, as amended by the 6th amendment of the Act against Restraints of Competition. The chapter on merger control contains special rules on the relevant thresholds, the substantive appraisal of concentrations, what constitutes a merger, notification and reporting obligations, procedural matters, etc. Otherwise (e.g. as regards the definition of market dominance or participation in procedures) the general provisions of the Act against Restraints of Competition apply.

The Federal Cartel Office, an independent superior federal authority (*Bundesoberbehörde*) located in Bonn, has sole jurisdiction when it comes to ordering measures aimed at controlling mergers (section 48(2) of the Act against Restraints of Competition). There is one exception to this rule, this being ministerial permission in

²³ There have to be serious doubts about the legality of the prohibition order and a threat of extraordinary and irreparable damage if the non-consummation order is upheld.

²⁴ Cf. KG WuW/E 2571 *Gaslöschanlagen*.

accordance with section 42 of the Act against Restraints of Competition, which can be granted by the Minister of Economics.

Concerning the rights of private third parties in the context of merger control, we refer to our answer to question 6 i).

b) *What kinds of transactions are caught? Are joint ventures caught? What are the jurisdictional thresholds? Is it difficult to identify with sufficient certainty whether a filing is in fact required under national law? Are foreign-to-foreign mergers caught?*

Under section 37 of the Act against Restraints of Competition the following combinations of undertakings are deemed concentrations:

- The acquisition of all or a substantial part of the assets of another undertaking;
- The acquisition by one or more undertakings of direct or indirect control over all or part of one or more other undertakings;
- The acquisition of shares in another undertaking if these shares, either separately or together with other shares already held by the purchaser, amount to or exceed 50% or 25% of the capital or voting rights of the other undertaking;
- Any other combination of undertakings enabling one or more undertakings to directly or indirectly exercise a competitively significant influence on another undertaking.

Joint ventures are caught by the Act against Restraints of Competition (cf., in particular, section 37(1), no. 3, 3rd sentence). Concentrations are subject to control if the undertakings involved had a total worldwide turnover of more than €500 million in the last business year and at least one of the undertakings involved had a domestic turnover of more than €25 million. Even where parties to a concentration reach these thresholds, notification is not necessary if the target is an independent undertaking that had less than €10 million turnover in the last business year (section 35(2), no. 1, of the Act against Restraints of Competition). Notification is not required, either, if the market affected is a so-called *de minimis* market (annual turnover of less than €15 million; section 35(2), no. 2 of the Act against Restraints of Competition).

In most cases it is relatively easy to determine with a fair degree of certainty whether a notification has to be filed or not, though problems may occur sometimes in connection with the appraisal of the domestic effect of foreign concentrations, which under section 130(2) is a prerequisite for application of the Act against Restraints of Competition, and thus for an obligation to file a notification, as well as for the application of the aforementioned *de minimis* rule (section 35(2), no. 2, of the Act against Restraints of Competition). The Federal Cartel Office has published an information leaflet which provides assistance when it comes to determining whether there are domestic effects within the meaning of section 130(2) of the Act against Restraints of Competition.²⁵

- c) *Is the filing mandatory or voluntary? Who is responsible for filing? What is involved in the preparation of a filing? What are the deadlines for filing? What are the waiting periods and does implementation of the transaction have to be suspended?*

Concentrations that qualify as a merger under the Act against Restraints of Competition (see questions 6 a) and b), above) have to be notified to the Federal Cartel Office (section 39(1) of the Act against Restraints of Competition). A sanctioned notification obligation does not exist as such, but concentrations may not be consummated before they are cleared (section 41(1) of the Act against Restraints of Competition). Under certain circumstances the Federal Cartel Office may grant an exception to the rule of non-consummation (section 41(2) of the Act against Restraints of Competition). The notification has to be filed by the parties to a concentration and, in the case of the acquisition of assets or shares, by the seller, too (section 39(2) of the Act against Restraints of Competition).

A complete notification must contain certain information concerning the structure of the concentration and the undertakings involved. Section 39(3) of the Act against Restraints of Competition stipulates that information must be provided, *inter alia*, on the nature of the parties' business, their turnover, market shares, including information on the basis for calculating the same if they add up to more than 20%, the size of the interest being acquired and the name and address of a person in Germany authorised to accept service. In practice, however, the Federal Cartel Office frequently dispenses with information

²⁵ Explanatory leaflet on domestic effect, January 1999, to be found on the Federal Cartel Office's web site: www.Bundeskartellamt.de.

that is not relevant to its appraisal of the concentration. Generally speaking, notifications to the Federal Cartel Office tend to be very much shorter than those on Form CO to the Commission. Section 39(6) of the Act against Restraints of Competition stipulates that the undertakings involved have to report consummation of the concentration to the Federal Cartel Office without undue delay.

- d) *What are the issues and possible sanctions involved in closing before clearance? What is the timetable for clearance and can it be speeded up?*

Under section 41(1) of the Act against Restraints of Competition undertakings may not consummate a concentration nor participate in the consummation thereof until such time as clearance has been given. This non-consummation rule covers all legal acts that are intended to bring about the consummation of the concentration under civil law as well as all acts that anticipate the economic effects of the concentration. Violation of this rule is an administrative offence which may render the parties concerned liable to a fine of up to €500,000 and, over and above this, up to three times the amount of the additional revenue generated as a result of the violation (section 81(1), no. 1, in conjunction with (2) of the Act against Restraints of Competition). The legal transaction performed in violation of the non-consummation rule is temporarily null and void. It will subsequently be validated, with retroactive effect, if the merger control procedure takes place and the Federal Cartel Office decides to clear the concentration. On application the Federal Cartel Office may grant an exemption from the non-consummation rule, but this is at the Federal Cartel Office's discretion and there have to be weighty reasons, such as the threat of serious losses for one of the undertakings involved or for third parties if there is any further delay in consummating the concentration. The exemption may be granted at any time, even before notification, and special conditions and requirements may be imposed in connection therewith (section 41(2) of the Act against Restraints of Competition).

In cases subject to merger control the Federal Cartel Office has a period of four months in which to complete its investigation procedure (Commission: five months). The Federal Cartel Office may prohibit a concentration only if it informs the notifying parties within one month from the date when the time-period starts running that it is examining the concentration (main examination procedure) (section 40(1) of the Act

against Restraints of Competition). This so-called “one-month” letter is informal and does not constitute an official order. Its purpose is merely to give the Federal Cartel Office the full four months to examine the concentration; the only substantive requirement is that further examination of the concentration is necessary. The one-month period is a preclusive period, i.e. if the Federal Cartel Office fails to send the letter within the given time, the concentration is automatically cleared (see question 5, above). The same applies to the entire examination period of four months from receipt of the notification. The Federal Cartel Office does not have to wait the full month before sending the parties the “one-month” letter. The same applies to the four-month time period.

e) Are there any special rules applicable to public takeover bids?

There are no special rules applicable to public takeover bids.

f) What is the substantive test for clearance?

Regarding the substantive test for clearance in Germany we refer to our answer to question 4.

g) To what extent are non-competition issues relevant to the review process?

Non-competition issues are relevant in the context of the procedure for the grant of a ministerial authorisation. Under section 42(1) of the Act against Restraints of Competition the Federal Minister of Economics can, on application, grant authorisation for a concentration prohibited by the Federal Cartel Office if the overall economic advantages of the concentration are such that they outweigh the restriction on competition or if the concentration is justified owing to overriding public interests. Overall economic advantages could be, for example, the maintenance of technical potential or know-how that is particularly valuable for the country’s economy as a whole, assistance in overcoming structural crises, reorganisation and rescue of the undertakings involved, and strengthening of international competitiveness. Overriding

public interests could be, for example, socio-political reasons such as securing jobs, or reasons to do with regional, military or health policy. According to section 42(2), 2nd sentence, of the Act against Restraints of Competition the procedure for a ministerial authorisation should also take into account the competitiveness of the undertakings involved in foreign markets - from the point of view of both maintaining existing competitiveness and improving their position in foreign markets thanks to improved competitiveness. The most recent example of the application of section 42(1) of the Act against Restraints of Competition is the ministerial authorisation granted to E.ON for acquisition of the control over Ruhrgas AG (E.ON/Gelsenberg and E.ON/Bergemann concentrations).

h) Is it possible to remedy competition issues?

Yes. Under section 40(3) of the Act against Restraints of Competition clearances can be granted subject to special conditions and obligations, though these may not be designed to subject to the conduct of the undertakings involved to continued control.

i) What are the typical steps during the investigation? What rights do complainants have? What publicity is given to the process? What are the opportunities for judicial review?

After a notification has been filed the Federal Cartel Office will first examine whether it is complete. If it is not, then the Federal Cartel Office will request the parties to provide the missing information - to the extent it needs such information for its examination. Not until full and complete information has been provided do the time-periods start running. The Federal Cartel Office will then look at whether the information available is sufficient in order to appraise the concentration. If not, it will obtain additional information from the undertakings involved, or from third parties if necessary. Where the concentration does not appear to involve any substantial problems with regard to competition in Germany, the Federal Cartel Office will write to the parties within one month giving the go-ahead for consummation. This letter cannot be appealed.²⁶

²⁶ Bechtold, *GWB-Kommentar* (Commentary on the Law against Restraints of Competition), 2nd ed. 1999, section 40 no. 6.

If, on the other hand, the Federal Cartel Office has concerns that the concentration could create or strengthen a dominant position, or if material information is still missing, it will send the parties the so-called “one-month” letter advising them that it has commenced its examination of the concentration (main examination procedure). On expiry of a period of four months from receipt of the notification the Federal Cartel Office will either prohibit or clear the concentration (possibly subject to conditions and obligations). Both prohibitions and clearances are formal administrative acts, for which the grounds have to be presented and which can be subject to judicial control.

Parties to a concentration may appeal prohibitions, and also clearances granted subject to conditions and obligations. There is some controversy as to whether obligations or conditions can be appealed on their own (see question 5, above). Third parties may appeal decisions in accordance with section 63(1) of the Act against Restraints of Competition. However, under section 63(2) only those who are party to the procedure before the cartel authorities have the right of appeal (section 54(2) of the Act against Restraints of Competition). This means that only interested third parties who applied for admittance to the administrative proceedings (section 54(2) of the Act against Restraints of Competition) have a right of appeal.

The Federal Cartel Office does not publish details of notifications, though its decisions on important concentrations are made public in press releases or in its reports of cases, which are published every second year. All decisions issued on completion of a main examination procedure have to be published in the Federal Gazette (*Bundesanzeiger*), as do notices of consummation (section 43 of the Act against Restraints of Competition). A list of notified concentrations and the afore-mentioned decisions can be found on the homepage of the Federal Cartel Office (“www.bundeskartellamt.de”). Business secrets are deleted before publication.

j) What are the enforcement powers? How does administrative and civil sanctions compare with the EC regime? And what are the criminal sanctions, and are they used?

Where a concentration is such that it has to be prohibited by law, the Federal Cartel Office will prohibit the concentration (section 36(1) of the Act against Restraints of Competition). It can also order the divestiture of a concentration that has already been

consummated (section 41(3) of the Act against Restraints of Competition). To enforce its order the Federal Cartel Office may impose fines, prohibit the exercise of voting rights, or appoint a trustee to have the concentration dissolved (section 41(4) of the Act against Restraints of Competition).

Both under the Act against Restraints of Competition and the Merger Regulation the parties can be fined in case of certain violations. Neither of the above provides for criminal sanctions.²⁷

Under Article 14(1) of the Merger Regulation fines of between €1,000 and €50,000 can be imposed for failure to file a notification or for provision of false information. Under Article 14(2) of the Merger Regulation the fines for violation of the non-consummation rule may amount to up to 10% of the total turnover. Article 15 of the Merger Regulation also gives the Commission the right to enforce certain measures, e.g. the provision of information, by imposing fines.

Regarding the sanctions under German law, reference is made to the answer to question 6 d). The Federal Cartel Office can also impose fines of up to €25,000 for provision of false information, incorrect or incomplete details in the notification, for delay in filing or failure to file the notification, and failure to report consummation, or incorrect information in the report of consummation (section 81(1), nos. 4, 7, 8 in conjunction with (2) of the Act against Restraints of Competition).

k) Do the authorities cooperate with other antitrust authorities?

Yes. The Federal Cartel Office is a member of the association of European Competition Authorities (ECA), a discussion forum for the competition authorities of the states belonging to the European Economic Area, for the European Commission, and the EFTA Supervisory Authority. The forum, which was set up in April 2001, set itself the task of improving cooperation between the authorities and, consequently, enforcement of the respective national, and European competition legislation. Since September 2001

²⁷ Article 14(4) of the Merger Regulation specifically states that decisions taken pursuant to paragraphs 1 and 2 shall not be of criminal law nature. Whether this is actually true substantively with regard to the extremely broad scope of application of Article 14(2) of the Merger Regulation remains to be seen.

the national authorities have been keeping each other informed of all mergers that are subject to notification in more than one ECA state (multiple notifications). Thanks to this cooperation, we have experienced the first instances of several national competition authorities jointly referring concentrations to the European Commission in accordance with Article 22 of the Merger Regulation.²⁸

The Federal Cartel Office is also a founder member of the International Competition Network (ICN), an international discussion forum for competition authorities whose opening conference is scheduled to take place in Naples on September 28/29, 2002. ICN seeks to bring about an exchange of information among competition authorities worldwide.

l) Are there also rules on foreign investment, special sectors or other relevant approvals?

Section 37(3) of the Act against Restraints of Competition provides for an exemption for banks, financial institutions and insurance undertakings in that if they acquire shares in another undertaking for the purpose of resale, this shall not be deemed to constitute a concentration as long as they do not exercise the voting rights attaching to the shares and provide the shares are resold within one year.

m) Are there current proposals to change the legislation?

The most recent (major) reform of the Act against Restraints of Competition was in 1998 (entered into force on January 1, 1999). Following the introduction of the euro the amounts of money referred to in the Act against Restraints of Competition were converted 2:1. No further amendments are planned at the present time.

²⁸ Cf. footnote 12.

B. Company Law and Financial Market Regulatory Regime

7. *What will you identify as the main obstacles to take overs where a company²⁹ from your jurisdiction is either bidder or target and the other company is from another EU jurisdiction³⁰?*

On January 1, 2002 the Securities Acquisition and Takeover Act came into force governing the takeover of listed companies domiciled in Germany.³¹ The Act does not distinguish between public offers from German bidders and those from other EEA or non-EEA states.

Under this Act public takeover bids are governed by detailed provisions concerning the offer (offer documents, consideration, amendment of offers, liability, etc.) and the procedure to be followed. On the basis of the memorandum of intent relating to the government bill, the Securities Acquisition and Takeover Act is intended to provide guidelines to ensure a fair and orderly offer procedure, without thereby promoting or preventing takeovers.³² The Act does essentially fulfil this objective, though it contains some provisions that could present obstacles to bidders. While it is true that target's managing board may not perform any acts that could jeopardize the success of the offer (so-called "neutrality obligation", section 33(1), 1st sentence, of the Securities Acquisition and Takeover Act), this does not apply to

„actions that a prudent and diligent manager of a company that is not affected by a takeover bid would have taken similarly nor to the search for a competing bid nor to action to which the supervisory board of the offeree company has consented.“ (section 33(1), 2nd sentence, Securities Acquisition and Takeover Act)

²⁹ Focus is here mainly on listed companies but information about non listed and also non public companies will be of interest if this is possible to provide.

³⁰ Here too the following applies. For EEA (non member) country rapporteurs, the subject of the question is intended to be the EEA regime. For non member (non EEA) countries, there are special issues. Country rapporteurs are welcome to limit their answers in the way they believe to be most helpful or interesting with the purpose of the questionnaire in mind.

³¹ Law of 20.12.2001 governing public bids for the acquisition of securities, and takeovers, Federal Law Gazette I, p. 3822.

³² Government bill, *BT-Drs.* 14/7034, p. 28.

In addition, the general meeting may adopt what is known as a “reserve resolution” (*Vorratsbeschluss*) - which is valid for 18 months and requires a three-quarters majority of the share capital represented when the vote is taken - authorising the managing board to take certain defensive measures (section 33(2) of the Securities Acquisition and Takeover Act). It can be assumed that it will be above all the last alternative provided in section 33(1), 2nd sentence, that will prove important in practice. With the supervisory board’s consent the managing board can take action (e.g. sell important parts of the undertaking) to prevent the takeover. According to Federal Court of Justice precedents, however, the consent of the general meeting is required if the act represents a grave interference with the shareholders’ rights and interests.³³ These criteria would presumably also apply here. The search for a white knight could make a takeover much more costly or even thwart it altogether. Having “reserve resolutions” of this kind adopted is not likely to be a course of action that managing boards would frequently resort to, however, because it would be tantamount to admitting to the general meeting that they are concerned that the company may be taken over. As it is not easy to say precisely what acts a prudent and diligent manager would take and what not, this exemption will probably not be very important in practice. In this situation target’s managing board will probably be at pains to have its actions approved by the supervisory board.

Mandatory bids in accordance with section 35 et seq. of the Securities Acquisition and Takeover Act represent a further obstacle to bidders. Anyone who obtains control (according to the Securities Acquisition and Takeover Act, 30% or more of the voting rights) of target is under obligation to publish this fact without undue delay, indicating the percentage of voting rights, and to publish a bid after submitting an offer document (section 35 of the Securities Acquisition and Takeover Act). The offer must include all the shares not yet held by the bidder (sections 32, 39 of the Securities Acquisition and Takeover Act). As a mandatory bid has to be made not only for targets control of which has been acquired directly, but also for those over which the bidder has indirect control, in the case of cross-shareholdings of target’s this may mean having to make multiple mandatory bids.³⁴ The bidder may apply for exemption from the obligation to make bids where it has not obtained control over target despite exceeding the 30% threshold.³⁵

³³ So-called *Holz Müller* cases, BGH NJW 1982, p. 1703.

³⁴ Cf., however, section 9, 2nd sentence, no. 3 of the Regulation of 27.12.2001 on the content of the offer document, Federal Law Gazette I, p. 4263 (Bid Regulation), according to which an exemption may be granted from the obligation to make mandatory offers if in connection with the gain of control over a par-

The consideration offered in a mandatory bid must be the maximum price that a bidder paid in the three months before acquiring control.³⁶ This includes the acquisition of large blocks of shares, for which a block premium is often paid. This increases the cost of the transaction for the bidder and makes takeover bids more difficult.

In Germany, the only special rule of corporate law that makes a takeover of a particular undertaking more difficult is the so-called VW Law³⁷ which secures control over Volkswagen AG for the state of Lower Saxony. As such special rules still exist in a number of other Member States, they present substantial obstacles for German undertakings wishing to take over companies there.

8. *Do hostile take overs by companies from other EU jurisdictions in fact take place in your country?*

Yes, though all the examples started off as hostile and ended up as friendly takeovers. Recent examples are the takeovers of Mannesmann AG (Germany) by Vodafone Airtouch plc (UK) and Kamps AG (Germany) by Barilla (Italy).

ent company, indirect control is also gained over its subsidiaries and the book value of the interest in the subsidiary amounts to less than 20% of the reported assets of the parent company.

³⁵ For further exemptions from the mandatory bid, cf. sections 36, 37 Securities Acquisition and Takeover Act.

³⁶ Cf. section 4 of the Bid Regulation.

³⁷ Law on the Transfer into private hands of the equity interests in Volkswagenwerk Gesellschaft mit beschränkter Haftung, Federal Law Gazette I 1960, p. 585.

9. *To what extents are there any sectors (utilities, financial institutions) that in practice are further protected from hostile take overs, or foreign³⁸ take overs in particular? Are there any policy statements or particular legal mechanisms that give effect to this protection, or is it a matter of informal mechanisms?³⁹*

Special rules apply in Germany for banks and insurance companies. Under section 2b of the Banking Act anyone intending to acquire a significant interest in a bank must notify the Federal Banking Supervisory Authority and the German Federal Bank accordingly without delay, indicating the size of interest he wishes to acquire. The Federal Banking Supervisory Authority may prohibit the acquisition or increase of a significant share within three months from receipt of the notification if there are facts that indicate that the notifier or, if it is a legal entity or a trading partnership, its statutory representative or personally liable partner is not reliable. The acquirer also has to conduct an owner control procedure with the German Bank Auditing Association if the target is a member of the deposit insurance fund of the Federal Association of German Banks.⁴⁰ This procedure is not required by law, but by the statutes of the deposit insurance fund and is intended to guarantee its operation. Violations of participation obligations laid down in the statutes of the deposit insurance fund can lead to exclusion from the fund.

Under section 104 of the Law on the Supervision of Insurance Companies, anyone intending to acquire a significant interest (10% or more of the nominal capital or voting rights of an insurance stock corporation - section 7a(2), 3rd sentence, of the Law on the Supervision of Insurance Companies) in a primary insurance company must notify the supervisory authority accordingly, indicating the size of the share he intends to acquire. Under certain conditions the supervisory authority may prohibit the planned acquisition or increase of a significant interest.⁴¹ Furthermore, insurance companies themselves are

³⁸ “Foreign” here includes both take overs from other member states and from non member states (or non EEA countries).

³⁹ In the case of banks or insurance companies, the relevant ministry and supervisor would be usually be able to block take overs on prudential grounds and their involvement would be difficult to review. Similar mechanisms would be in place for many utilities where state ownership often adds to the problems. An extensive review is not required, but it would be useful with an assessment of how such mechanisms function. If there have for instance not been any take over by a foreign bank, that is an interesting point.

⁴⁰ The deposit insurance fund is a voluntary private insurance fund that protects customers’ deposits held by the private German banks belonging to the Federal Association of German Banks.

⁴¹ Section 104(1)(a), 1st sentence, of the Law on the Supervision of Insurance Companies reads: „The supervisory authority may prohibit the intended acquisition of a qualifying participation or its increase if there are facts from which it may be concluded that

obligated under section 13d(4) of the Law on the Supervision of Insurance Companies to notify the supervisory authority if a significant interest in their own business is acquired or sold, if participations reach, exceed or drop below the thresholds of 20%, 33% and 50% of the voting rights or the nominal capital, and if they become subsidiaries of other undertakings.

10. *What are the company law techniques of completing a take over or merger that are used in practice where one of the companies is from another EU jurisdiction? Please give particular attention to how this would differ from the usual completion of a take over or merger where both companies are from your jurisdiction. It would be useful if you could add a comment about the consequences on the techniques used of the taxation regime and of any differential tax treatment of take overs or mergers where one party is from another EU jurisdiction.*

The Securities Acquisition and Takeover Act does not distinguish between domestic bidders and those from other EU Member States. Here a concentration is achieved through the acquisition of shares.

There is also the possibility of a concentration by means of a merger within the meaning of section 1(1), no. 1 and section 2 of the German Reorganisation Act.⁴² This option is only available to undertakings domiciled in Germany.

I would add that the sale by corporations of interests in corporations has been tax-free in Germany for approximately one year.

1. the notifying party is not reliable or otherwise fails to meet the standards to be imposed in the interest of the sound and prudent management of the primary insurance company;

2. as a result of the creation or increase of the participation the primary insurance company would together with the holder of the qualifying participation become part of a group of undertakings which, owing to the structure of the cross-shareholdings or a lack of economic transparency, may jeopardise effective supervision of the insurance undertaking, or

3. as a result of the creation or increase of the qualifying participation the primary insurance company would become a subsidiary of an insurance undertaking in a third country [...] that is not effectively supervised in the country in which it is domiciled or has its head office, or whose competent supervisory authority is not prepared to cooperate in a satisfactory manner.“

⁴² Reorganisation Act of 28.10.1994 (Federal Law Gazette I, p. 3210, last amended on 23.3.2002, Federal Law Gazette I, p. 1163).

11. *A duty on listed companies to disclose capital and control structures is proposed in Issues Relating to Takeover Bids, the First Report of the High Level Group of Company Law Experts (see p 25). Would this require amendments in the legislation in your country? How would these amendments in case be implemented (in primary company law, securities law, stock exchange regulations etc.)?*

Section 21 of the Securities Trading Act provides that any person whose shareholding in a listed company reaches, exceeds or falls short of 5%, 10%, 25%, 50% or 75% of the voting rights by purchase, sale or by any other means must inform the company and the Federal Financial Supervisory Office in writing. The listed company, for its part, is obligated to publish notices within the meaning of section 21(1) Securities Trading Act in a supra-regional press organ authorised to publish mandatory stock exchange announcements. Where the shares of the listed company are admitted for trading on a stock exchange in another EU Member State or a contracting state to the EEA, the company must also publish the information in a similarly authorised press organ in that state or, if the law of that state prescribes that the information be made public in some other form, in that form. The announcement must be published in a language that is admitted in that state for such announcements (section 25(1) and (2) Securities Trading Act). On written application the Federal Financial Supervisory Office will release the listed company from the disclosure requirements if publication of the information would be contrary to the public interest or would cause the company considerable damage, unless in the latter case that non-disclosure may result in the public being misled about facts and circumstances which are essential for assessing the securities in question (section 25(4)). The requirement to publish the information in Germany in a supra-regional press organ authorised to publish mandatory stock exchange announcements also applies to companies domiciled abroad whose shares are admitted for trading on a German stock exchange if the changes in voting rights referred to in section 21(1), 1st sentence, of the Securities Trading Act occur (section 26(1) of the Securities Trading Act). Section 26(3) implements Council Directive 88/627/EEC of 12 December 1988 on the information to be published when a major holding in a listed company is acquired or disposed of.⁴³ Section 26(3) provides that companies domiciled in another Member State of the EU or an EEA contracting state, whose shares are admitted to trading on

⁴³ OJ L 348 of 17.12.1988, p. 62.

both a stock exchange in the state of domicile and a German stock exchange must publish announcements prescribed by the law of the state of domicile on the basis of Article 10 of Council Directive 88/627/EEC. The announcement must be published in Germany and in German in a supra-regional press organ authorised to publish mandatory stock exchange announcements.⁴⁴

The percentages of voting rights are published in a data base on the web site of the Federal Financial Supervisory Office: www.BAFIN.de.

Issuers of securities admitted to trading on a German stock exchange must also publish and announce any information which is likely to have an effect on the stock exchange price of the securities (section 15 of the Securities Trading Act). On July 1, 2002 a rule was introduced to the effect that members of the managing and supervisory boards of listed companies must publish the fact if they enter into any transactions involving the company's own securities with their spouses, registered cohabitants, or immediate next of kin ("directors' dealings" - section 15a of the Securities Trading Act). Under the German Commercial Code corporations (stock corporations, partnerships limited by shares, and limited liability companies) must prepare an annual financial statement (section 325 et seq. German Commercial Code), which must identify the company's interests in associated undertakings (cf. section 327(1) German Commercial Code). Under section 40 of the Stock Exchange Act issuers of shares admitted to trading must also regularly publish at least one interim report in the course of the business year, which, with the help of figures and explanations, must provide a fair and true picture of the financial situation and general business situation of the issuer in the reporting period.

Besides these statutory requirements, there are also other disclosure obligations which are imposed on the issuer by the stock exchange, such as structured quarterly reporting on the New Market, which must also include a report on the market segment.

Whether German law will be amended as a result of the proposal made by the High Level Group of Company Law Experts therefore hinges on the actual structure of the

⁴⁴ The thresholds regarding the obligation to notify incumbent on the persons subject to notification in accordance with Article 4 of Directive 88/627/EEC differ from those stipulated in section 21(1) of the Securities Trading Act. Differences of this kind are permitted under Articles 3 and 4(1) of Directive 88/627/EEC.

new legislative initiative. The fundamental idea behind both proposals is already anchored in German law. Any amendments required would probably be made in those statutory rules in which these proposals are essentially already realized (see above).

12. *A so called break through rule after take over bids is another of the proposals in Issues Relating to Takeover Bids, the First Report of the High Level Group of Company Law Experts (see p 29). Would this require amendments in the legislation in your country? How would these amendments in case be implemented (in primary company law, securities law, stock exchange regulations etc.)?*

The break through rule could be anchored in the Securities Acquisition and Takeover Act. The Stock Corporation Act would have to be amended accordingly. One would have to incorporate a mechanism making it possible following a successful takeover, i.e. one by which the purchaser acquires control, to cancel safeguards, if any, against hostile takeovers built into the company's articles. Under mandatory law, amendments of a company's articles currently require a resolution to be adopted at the general meeting with (as a rule) a three-quarters majority of the votes cast. If the break through rule were to be introduced by Community law, the so-called VW Law would have to be subjected to this mechanism as well. Consequently, the Securities Acquisition and Takeover Act would either have to specifically provide that the break through rule also breaks through special rights granted by law, or a corresponding reservation would have to be incorporated in the VW Law. Lastly, the question arises whether the break through rule should also make it possible to remove the supervisory board. If so, then the Stock Corporation Act would also have to be amended accordingly.

13. *In your view, would these two new rules as proposed have any material impact on the existing barriers to take overs in your country (or in others as seen from your point of view)? It would be helpful if you could demonstrate the impact, or lack of it, by going through one or more recent take over bids that failed in your country (or in some other member state, by a company from your country).*

The introduction of rules governing the disclosure of capital and control structures (to the extent not already introduced) would have little effect on takeovers in Germany. As already mentioned (see question 11), far-reaching disclosure obligations already exist in Germany with regard to equity interests, which means that control structures are transparent to a large extent. Above all, introducing a break through rule would mean that the restrictions imposed by the VW Law would be lifted. This new development would only have further all-encompassing and far-reaching consequences if it were made generally possible, following a successful takeover offer, to amend company statutes to remove possible defence measures with simplified formal requirements, in particular with a lower majority for resolutions adopted at general meetings.

14. *Below are a number of questions which may assist in a comparative analysis.*

a) *What are the main features of the relevant domestic take over legislation constituting the company law and financial market regime, and who enforces it (independent regulators, regulatory bodies with appeal to ministry, stock exchange)? What is the extent of intervention by the takeover regulator(s) – to what extent does the regulator have wide or general discretions to block and play a protectionist role (for example in its capacity as approver of the offer terms/documentation)?*

Under German law relating to takeovers the offeror must publish its decision to launch a bid (section 10 of the Securities Acquisition and Takeover Act). No later than four weeks after publication of the decision to launch a bid, the offeror must file the offer document with the Federal Financial Supervisory Office (section 14 Securities Acquisition and Takeover Act). The Federal Financial Supervisory Office examines the offer document, which has to contain the details listed in section 11(2) of the Securities Acquisition and Takeover Act, including information about the type and amount of consideration being offered for the securities of the target, the conditions upon which the effectiveness of the bid is contingent, and the first and last day of the period for acceptance. Further requirements regarding the content of the offer document are set forth in section 2 of the Bid Regulation issued in connection with the Securities

Acquisition and Takeover Act.⁴⁵ The Federal Financial Supervisory Office must prohibit the bid if the offer document does not contain the information required by law, if the information contained in the offer document is in violation of the law, or the offeror failed to file or publish the offer document. In addition, the Federal Financial Supervisory Office *can* prohibit the bid if the offeror failed to publish it in the prescribed form (section 15(2) of the Securities Acquisition and Takeover Act).

The bid must be binding (cf. section 17 of the Securities Acquisition and Takeover Act) and - except for the proviso as to the consent of the shareholders' meeting - may not be made dependent on conditions the fulfilment of which can only be brought about by the offeror. Nor may a bid be subject to rescission or revocation (section 18 of the Securities Acquisition and Takeover Act). There are also precise rules as to the consideration to be paid (section 31 of the Securities Acquisition and Takeover Act). The period for acceptance of a bid may not be less than four weeks or more than ten weeks (section 16(1), 1st sentence, of the Securities Acquisition and Takeover Act). In the event of a takeover bid, the shareholders of target that have not accepted the offer have a further two weeks after announcement of the percentage of shares and voting rights acquired in which to accept the offer (section 16(2), 1st sentence, of the Securities Acquisition and Takeover Act). Amendments to the bid are possible only to a limited extent (increase of consideration, offer of alternative consideration, reduction of minimum percentage if the offeror has made its bid contingent upon the acquisition of such minimum, waiver of conditions; cf. section 21 of the Securities Acquisition and Takeover Act).

The Federal Financial Supervisory Office has the possibility to intervene in particular in connection with its examination of the offer documents. The fact that the requirements imposed as regards the offer document are many and detailed could - theoretically - put the Federal Financial Supervisory Office in the position of being able to obstruct takeover bids, though there is no reason at the present time to assume that it does so. The Federal Financial Supervisory Office also has investigative powers under section 40 of the Securities Acquisition and Takeover Act. In accordance with this provision the

⁴⁵ Regulation of 27.12.2001 on the contents of the offer document, the consideration in the case of takeover bids and mandatory bids and the exemptions from the obligation to publish and make a bid, Federal Law Gazette I, p. 4263.

offeror must provide information and documents which the Federal Financial Supervisory Office requires to monitor compliance with the statutory obligations.

- b) *Are there restrictions on a board taking action to frustrate a bid that has been made? When do the relevant restrictions start to apply – earlier than a formal announcement/filing of a bid? To what extent can shareholders approve the taking of frustrating action in advance of any bid?*

I refer in this respect to the answer to question 7.

- c) *Are there restrictions on the type of consideration that can be offered in a bid, for example securities only if these are listed in the target country's home state or the EU?*

As a general rule, in the case of a takeover bid the consideration must be in the form of a cash payment in euros or in liquid shares which are admitted to trading on an “organised market” (cf. section 2(7) of the Securities Acquisition and Takeover Act) in the EEA. If the shares the bidder wishes to acquire are voting shares, then the shares offered as consideration must also be voting shares. The bidder must at least offer the minority shareholders of target the alternative of consideration in the form of a cash payment in euros if it or persons acting together with it or their subsidiaries acquire against cash more than 5% of the shares of target or during a period of three months before the takeover bid or more than 1% of the shares of target during the takeover procedure.

- d) *Are there effective compulsory acquisition procedures regarding a small non-accepting minority? Can a bidder make its offer conditional on achieving the number of shares required so it can operate a squeeze out?*

On the introduction of the Securities Acquisition and Takeover Act the German legislator added squeeze-out rules to the Stock Corporation Act.⁴⁶ Also, a shareholder

⁴⁶ Section 7 of the Act of 20.12.2001 governing public bids for the acquisition of securities and takeovers, Federal Law Gazette I, p. 3822.

who holds 95% or more of the share capital of a stock corporation or a partnership limited by shares may purchase the minority shareholders' shares against their will against payment of reasonable cash compensation. The cash compensation must take into account the company's situation at the time the resolution is adopted by the general meeting (section 327b of the Stock Corporation Act). The minority shareholders' shares are acquired by means of the adoption of a resolution at the general meeting and the entry of said resolution in the Commercial Register (sections 327c to 327e of the Stock Corporation Act). Actions for avoidance of the transfer resolution cannot be based on the argument that the cash compensation set is not reasonable (section 327f(1), 1st sentence, of the Stock Corporation Act). Instead, the amount of compensation is subject to judicial verification on application by any outgoing shareholder in accordance with section 306 of the Stock Corporation Act. The costs of this proceeding are borne by the main shareholder (section 306(7), 7th sentence, of the Stock Corporation Act).

An offeror may make the effectiveness of its offer dependent on its acquiring a minimum percentage of the shares of target (inversion of section 21(1), no. 3, of the Securities Acquisition and Takeover Act). This means that an offeror may also make its offer dependent on its acquiring 95% of the capital of target, giving it the right to then squeeze out the minority shareholders.

- e) *Is there a principle of board neutrality? Can a target board align itself with a particular bidder/agree measures such as exclusivity arrangements to protect a particular deal?*

The Securities Acquisition and Takeover Act provides for the principle of board neutrality in section 33(1), 1st sentence (cf. question 7). While the board of target may search for a competing bid (section 33(1), 2nd sentence, of the Securities Acquisition and Takeover Act), it can only support this bid to the extent that its action may be regarded as the act of a prudent and diligent manager of a company or has been given the consent of the supervisory board (section 33(1), 2nd sentence, of the Securities Acquisition and Takeover Act). According to the memorandum of legislative intent concerning the government bill, acts of a prudent and diligent manager also include pursuing corporate strategies already embarked upon.⁴⁷ Consequently, if the company

⁴⁷ Government bill, *BT-Drs.* 14/7034, p. 58.

was already intending to seek a takeover by another company, then it should be possible for the board to support such strategy.

f) Can a target board hand over information to a potential bidder?

The Securities Acquisition and Takeover Act itself does not contain any rules prohibiting the disclosure of information to potential offerors. In this respect, therefore, the board must comply with its general duties of prudence and care (cf. section 93 Stock Corporation Act) and the insider rules in section 12 et seq. of the Securities Trading Act.

g) Are structures permitted which concentrate control rights in the hands of minority shareholders? Are structures permitted which place limitations/restrictions on voting rights, caps for example on voting rights above a certain threshold?

Structures of this kind are not permitted under German stock corporation law. Section 12(2) of the Stock Corporation Act forbids multiple voting rights. Voting right caps are not provided for under German stock corporation law, either, except in the VW Law.

h) Can restrictions be placed on the transferability of shares either by the issuer (in articles of association or by other means) or by arrangements between shareholders? Can a board delay registering transfers of shares?

It is permitted to make the transfer of registered shares dependent on the consent of the company (represented by the board), the supervisory board or the general meeting (section 68(2) of the Stock Corporation Act). Outside of the articles of association, individual shareholders may agree reciprocally, within the bounds of the freedom of contract, not to dispose of shares.

i) What contractual barriers (including share holder agreements) to take over bids are in use in public companies (eg golden parachutes, change of control provisions triggering

default of loan agreements, or winding up or change of control of joint ventures)? What are the prospects of review by courts on the basis of contract or company law and by regulators on the basis of securities laws or stock exchange regulations?

No such provisions exist in Germany.

j) Are there current proposals to change the legislation relating to take overs?

No. The Securities Acquisition and Takeover Act only came into force on January 1, 2002.

C. Final Issues

15. In your view, what is the extent to which the complexity of the regulatory arrangements, within national jurisdictions and between the Commission and member states, present an obstacle to take overs?

One obstacle is that not all the Member States have regulated the area by statute. Also, stock corporation legislation differs greatly from Member State to Member State, so that a comparison of the rules on takeovers alone is not enough to establish whether there are obstacles resulting from any special features peculiar to the stock corporation law in any particular country. One special feature of German law, for example, is the two-tier system of management by the managing board and the supervisory board.

16. Can you list some instances where different rules in the different regulatory systems have caused practical obstacles in a take over process? (One instance could be different time limits under the EC Merger Regulation and national merger rules on the one hand and under stock exchange rules on the other.)

I am not aware of any such instances in relation to takeovers in the EU.