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Obstacles to corporate restructuring: observations from a European and German perspective

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In Europe there are still many obstacles to corporate restructuring, even beyond the takeover context. The experience with the implementation of the 13th Directive on Takeovers is sobering indeed. The number of Member States implementing the directive in a seemingly protectionist way is unexpectedly large. This is in line with a growing popular fear of globalization and definite trends toward political protectionism regarding foreign investments in various Member States. Germany is not an exception, as the Risk Limitation Act of July 2008 and the ongoing discussion on further restrictions illustrate. The declaration by Commissioner McCreevy of 3 October 2007 that there will be no European action on the issue of one-share/one-vote should not mean the end of the discussion. The report of the European Corporate Governance Forum Working Group on Proportionality of June 2007 is right in pleading for an enhanced disclosure regime concerning control-enhancing mechanisms. In any case, there is a definite need for more data and further analysis.

I. Introduction

The topic of this chapter is 'Obstacles to Corporate Restructuring', with an emphasis on takeover rules and the market of corporate control. There are two underlying implications to this choice: first, that takeovers play or can play an important role in corporate restructuring; and second, that there are other important parameters for corporate restructuring beyond takeovers. Let me make two preliminary remarks on this.

* This essay is dedicated to Eddy Wymeersch, colleague and friend since the 1970s, with whom I had such a longstanding and fruitful cooperation that we pass for academic twin brothers.

As to the role of takeovers in corporate restructuring, one should keep in mind that this is twofold. Takeovers may have synergistic grounds as well as disciplinary reasons. Empirical evidence suggests that there is a certain disciplinary effect on the management of badly performing companies, insofar as functioning markets of corporate control are indeed a means of external corporate governance, as it is sometimes called. But on the whole, takeover targets are not noticeably badly performing companies. This implies that the synergistic reasons for takeovers are more frequent and more important. More details can be found in the ISS report and related studies of the ECGI for the European Commission.[1]

As to the second implication, two other parameters beyond takeovers and takeover law are of key importance for corporate restructuring: the possibility for companies of merging beyond national borders,[2] and the availability of sound rescue procedures before and after formal insolvency. The possibility of merging beyond national borders has been considerably improved by the European directive of 26 October 2005 on cross-border mergers of limited liability companies,[3] which is in the process of being transformed by the Member States. The *Sevic* decision of the European Court of Justice of 13 December 2005[4] has gone even further in opening this door. Company practice in the various Member States is working hard on using both of these new ways of restructuring companies: the way via the directive is narrower but its requirements are more spelled out, therefore making it safer; the way via the ECJ decision is more far-reaching, but it lacks the details of how to go about it and is therefore rather insecure. When things become tighter for companies, the availability of sound rescue procedures becomes paramount. I will just mention in passing that in many of the Member States, both pre- and post-insolvency rescue law reforms have been enacted in the last

[1] Institutional Shareholder Services (ISS) in collaboration with Shearman & Sterling LLP and the European Corporate Governance Institute (ECGI), *Report on the Proportionality Principle in the European Union* (18 May 2007); Deutsche Bank AG London, 'Corporate Governance, The control of corporate Europe', *Report* (16 March 2007); see also infra II A.

[2] ECFR Symposium 'Cross-border Company Transactions', Milan, 13 October 2006, *European Company and Financial Law Review*, 4 (2007), 1–172.

[3] European Parliament and Council Directive 2005/56/EC [2005] OJ L310/1.

[4] Case C-411/03, *Landgericht Koblenz* v. *Sevic Systems* AG, [2005] ECR-I-10805, also in *Neue Juristische Wochenschrift* (2006), 425 with many comments in various law reviews, e.g., W. Bayer and J. Schmidt, 'Der Schutz der grenzüberschreitenden Verschmelzung durch die Niederlassungsfreiheit', *Zeitschrift für Wirtschaftsrecht (ZIP)* (2006), 210; C. Teichmann, 'Binnenmarktmobilität von Gesellschaften nach "Sevic"', *Zeitschrift für Wirtschaftsrecht* (2006), 355.

years or are being discussed – for example, in the UK in 2002, in France in 2005, in Germany in 2007, as well as in Italy and elsewhere.[5]

From these two preliminary remarks, it would appear that identifying and overcoming obstacles to corporate restructuring in the takeover context is important, but only as part of a much greater task. If the outcome of our discussion is that not very much can be done on the European takeover front at the moment, then there might be other fields in which the conditions for corporate restructuring in Europe are better, can be used, and should and could be further improved.

Having said this, I shall turn to the obstacles to corporate restructuring in the takeover context. I shall first have a quick look at the implementation of the 13th Directive on Takeover Bids,[6] using the report of the European Commission of 21 February 2007.[7] As we shall see, the findings of the European Commission are not very encouraging, though the overall pessimistic undertone of the report may be exaggerated. Furthermore, the most recent discussions and reform plans in a number of Member States suggest that there is a popular fear of globalization and open markets combined with a new wave of protectionism. I shall illustrate the danger of such a development, even in a traditionally European-minded Member State like Germany, in the second part of my article by taking a short look at the law on limitation of risks of July 2008 and the pending reform of the foreign investment law. In the last part I shall present the findings of the European Corporate Governance Forum Working Group on Proportionality as of June 2007.[8] While there is scepticism about a European one-share/one-vote rule, this group has made some policy recommendations on how to proceed further with deviations from the proportionality principle.

II. The sobering experience with the implementation of the 13th Directive

A. Basic principles of the European 13th Directive on Takeovers

a) The history of the origins, aims, and content of the 13th Directive of 21 April 2004 on takeovers cannot be repeated here. The coming

[5] The contributions of a symposium of the ECFR in 2007 in Paris can be found in *European Company and Financial Law Review*, 5 (2008), 135 et seq.

[6] Directive 2004/25/EC [2004] OJ L 142/12.

[7] European Commission Staff Working Document, *Report on the Implementation of the Directive on Takeover Bids* (21 February 2007), SEC(2007) 268.

[8] Infra IV.

about of the directive took decades: it was full of regulatory and political ups and downs, and it was made possible at the end only by a complicated political compromise. The regulatory idea underlying the directive[9] is that in an internal market, takeovers may not be blocked nationally, and that takeovers – including hostile ones – are in general economically useful. This is because a well-functioning market for corporate control strengthens the competitiveness of enterprises and is an important means of external corporate governance. The threat of takeovers tends to discipline managers and encourages them to strive for good share prices. These lie in the interest of both shareholders and management and are the best defence against hostile takeovers. The regulation of takeovers faces three serious principal-agent problems: the first exist between the shareholders and the managers (the board, one-tier or two-tier); the second between the majority shareholders or the parent and the minority shareholders of the target; and the third between the acquirer and the non-shareholder constituencies, in particular labour and other creditors. The first principal-agent problem is particularly relevant in those countries where public companies and dispersed shareholders are the rule, such as the United States and the United Kingdom. The second is prominent in countries with block holders, family enterprises and companies controlled by the state or other public entities; examples are Germany, France and other continental European countries. The regulatory problems for takeover law vary according to these shareholders structures.[10]

b) The 13th Directive tries to solve the first problem apart from disclosure rules through the anti-frustration rule for the board, or, in the case

[9] European Commission, High Level Group of Company Law Experts, *Report on Issues Related to Takeover Bids* (10 January 2002), reprinted in G. Ferrarini, K. J. Hopt, J. Winter, E. Wymeersch (eds.), *Reforming Company and Takeover Law in Europe* (Oxford University Press, 2004), Annex 2, 825–924.

A law and economics study on the regulation of takeovers in various countries can be found in: P. Davies and K. J. Hopt, 'Chapter on Control Transactions', in R. R. Kraakman, P. Davies, H. Hansmann, G. Hertig, K. J. Hopt, H. Kanda, E. Rock (eds.), *The Anatomy of Corporate Law, A Comparative and Functional Approach* (Oxford University Press, 2004); the revised and enlarged 2nd edition is to appear in winter 2008/09.

[10] See in more detail Davies and Hopt, 'Chapter on Control Transactions', (note 9, above); Cf. also J. Armour and D. A. Skeel, 'Who Writes the Rules for Hostile Takeovers and Why? – The Peculiar Divergence of U.S. and U.K. Takeover Regulation', *Georgetown Law Journal*, 95 (2007), 1728–94.

of a two-tier board, for the managing board as well as for the supervisory board (Art. 9 on obligations of the board of the offeree company). This rule means that the board of the target company may not engage in defensive actions which may frustrate the bid. Defensive actions are strictly reserved for the shareholders in the general assembly. The reason for this rule is that the directors are tempted to act in their self-interest of keeping their job. The anti-frustration rule is modelled after the example of the English Code on Takeovers and Mergers and is sometimes also called the neutrality principle, though this is not precise since the board is not meant to be strictly inactive, but must give an advisory opinion of its own to the shareholders and may look for a white knight. The anti-frustration rule is supplemented by the breakthrough of certain restrictions in the target, for example on the transfer of securities and on voting rights provided for in the articles of association or in contractual agreements between the target and holders of its securities (Art. 11; in the German version this is wrongly translated as '*Durchgriff*', which means 'piercing the corporate veil').

The second principal-agent problem is mitigated by the mandatory bid, which must be made to all shareholders at an equitable price (Art. 5). By such a bid the minority shareholders are enabled to exit at an early stage of acquisition of control or change of controller. This is one of the few European group law rules, i.e., a rule which already takes effect upon entry into the group (group entry control). In contrast, in some countries (like Germany) there is an established group law only during the operation of the group, leading to problems of interpretation, proof and enforcement.[11] Of course, the drawback of the mandatory bid is that it makes the bidder's decision to make a bid more costly, thereby discouraging bids. On the other hand, the successful bidder has the right to squeeze out a small minority left after the bid (from 90% of the voting rights on, Art. 15). This squeeze-out right of the controlling shareholders is balanced by a parallel sell-out right of the small minority (Art. 16).

The third principal-agent problem is dealt with by mere disclosure, as well as the general principle that the board of the target must act in the interests of the company as a whole (Art. 3 (1) (c)).

[11] K. J. Hopt, 'Konzernrecht: Die Europäische Perspektive', *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht*, 171 (2007), 199–240.

The above-mentioned compromise that made the directive acceptable in the end consists of a double option of the Member States and an option of the companies concerned. The Member States may opt out of the anti-frustration and breakthrough rules (Art. 9 (2) and (3) and/or Art. 11). But if they do, they must allow the companies with seats in their territory to voluntarily opt in to these rules by a decision of the general meeting (Art. 12 (1) and (2)). In this regard, the Member States may enact a reciprocity rule for companies that have opted in (Art. 12 (3)). Reciprocity means that if such a company becomes the target of a takeover bid by a bidder that is not itself subject to the same restrictions as the target company, the target company is not bound by its option decision, but can defend itself against the bid like any other company in this state.

B. Implementation of the 13th Directive in the Member States

a) The implementation of the 13th Directive by the Member States went rather slowly. A Commission Staff Working Document of 21 February 2007 delivered an interim report on the implementation. The key findings of the report are rather sobering. The two major pieces of the 13th Directive on which the document reports are the anti-frustration and breakthrough rules, and the minority shareholder protection by a mandatory bid and a sell-out right that balances the squeeze-out right of the acquirer.

According to the report, the anti-frustration rule has been imposed or is expected to be imposed by eighteen Member States. But what is relevant in this context is that an anti-frustration rule of this or a similar kind already existed previously in all of these Member States, with the exception of only one, namely Malta. Furthermore, five of these Member States have introduced or intend to introduce the reciprocity exception under Article 12 (3).

As to the breakthrough rule, the report says that it is expected to be imposed (or indeed may have been imposed already) only by the Baltic States, and that no other country will obligate its companies to apply this provision in full. Instead, according to the report, all the other countries have made the breakthrough optional for companies under Article 12 (1). Hungary has gone even further and eliminated the partial breakthrough rule it had before. Yet since the publication of the report, Italy has transformed the 13th Directive and now has a breakthrough

rule which fully corresponds to Article 11.[12] The report's statement that just 1% of listed companies in the EU will apply the breakthrough rule on a mandatory basis must therefore be corrected. In any case, the majority of Member States have adopted or will adopt the reciprocity rule here as well.

As to minority shareholder protection, most Member States already had the mandatory bid rule previously, but they have used the flexibility granted by the directive to maintain their national exceptions from the mandatory bid rule. These exceptions and far-reaching discretionary powers of the supervisory agencies, for example in the UK,[13] can undermine the effectiveness provided by this rule.

Only as far as the sell-out rule is concerned can clear progress be reported. This rule has been or will be introduced in a large number of Member States for the first time as a consequence of Article 16 of the directive.

b) How should we evaluate these findings? The report concludes on a pessimistic note: 'The number of Member States implementing the Directive in a seemingly protectionist way is unexpectedly large.' The Commission even fears that the new takeover rules of the 13th Directive will have potentially negative effects on the European market. While this is not based on evidence, it is certainly incontestable that there is a strong reluctance among Member States to lift takeover barriers, and particularly to do so in the international context. This is in line with a popular fear of globalization and a general trend in the Member States toward political protectionism.[14]

On the other hand, the facts found by the report should not be evaluated too negatively either. The implementation corresponds to the instructions of the directive, which expressly concedes options and room for discretion. It is quite understandable that the Member States made use of them, in particular if the underlying rules of the directive departed from their national takeover law. Therefore, such

[12] Decreto Legislativo 19 novembre 2007, n. 229, *Gazzetta Ufficiale* n. 289 del 13 dicembre 2007, Art.104-bis del decreto legislativo n. 58 del 1998: 'Regola di neutralizzazione.' Cf. M. Lamandini, 'Takeover Bids and 'Italian' Law Reciprocity, *European Company Law* 5 (April 2008) issue 2, 56–7.

[13] It is interesting to confront these far-reaching discretionary powers of the Takeover Panel with the much more legalistic approach taken by the German legislators, which is to be explained by German history and a strict supervision of the German BaFin by the administrative courts. This is a nice example of path dependency.

[14] K. J. Hopt, 'Editorial, Feindliche Übernahmen, Protektionismus, One share one vote?', *Europäische Zeitschrift für Wirtschaftsrecht*, (2007), 257.

implementation is not necessarily only protectionist; depending on the country, it may simply be the preservation of the existing path dependency and a reasonable policy of implementation 'one to one'[15] instead of going further and even gold-plating. This is true for the mandatory bid and the national exceptions from it as well as for the anti-frustration rule.

But most of all, the European Commission and the discussion on implementation in the Member States following it seem to misconceive two important facts. First, the directive represents progress insofar as it contains uncontested and well-implemented rules on many issues other than only those contained in Articles 9 and 11, in particular transparency rules and rules on fair behaviour and procedure in takeovers. Such rules are of key importance for enterprises and shareholders in the EU that need legal certainty and no conflicting legal requirements in the twenty-seven Member States when they make their investment or disinvestment decisions. As far as Articles 9 and 11 are concerned, the directive sets a model that is particularly relevant for those countries and companies with diverse shareholderships. Insofar, the option compromise of the directive in Article 12 is much better than a watered-down version of the anti-frustration rule or even the omission *in toto* of the breakthrough rule would have been.

Second, the reciprocity rule of Article 12 (3) and the fact that the Member States have made use of it so widely is not to be seen only negatively as an exception to the basic rules of Articles 9 and 11. Reciprocity may quite possibly also have positive effects. If a company can be sure not to be taken over by a bidder who himself is not subject to the anti-frustration and/or breakthrough rules, the company may be more willing to opt into these rules itself. As to the latter case, there is no case experience yet, but it is not expected to remain merely theoretical. Certain companies may consider an opting in as a positive signal on the capital market, or they may be under pressure by international, in particular Anglo-American, institutional investors to do so, rather than to fence themselves in by defensive actions. It follows that while reciprocity is an exception of Articles 9 and 11, it may have the positive effect of promoting companies to voluntarily opt in to these rules.

[15] In Germany the government made this principle of transformation 'one to one' part of its political programme as reflected in the coalition agreement.

III. Popular fear of globalization and trends toward political protectionism regarding takeovers and foreign investments: the German example

A. Discussion in the member states on unwelcome and potentially dangerous foreign investments

a) As mentioned in the introduction, the globalization movement has led to strong fears among the population of most European Member States, a development that is akin to the fear of international terrorism in the United States. While this fear may be irrational and the challenges and opportunities of larger European and globalized markets outweigh the risks by far, the fear is real.[16] This is so quite apart from the fact that it is an illusion that single states may be successful in the long run in fencing off their markets. In search of popularity and votes, politicians in many Member States are reacting by making general rules that raise the barriers to private investments and takeovers, and by state intervention in specific cases. There are a great many examples for such specific interventions. The French government massively supported the takeover of Aventis by the French Sanofi instead of letting the Swiss group Novartis make the deal. The Spanish government impeded the takeover of the Spanish Endesa by its German competitor E.ON. The French government forced the merger of the French Suez and Gaz de France instead of letting the Italian Enel come in. And the French government started to question the already existing participation of Siemens in the French Areva.[17] Similar cases might be reported from Italy, Poland and other countries.

b) Some pretend that Germany has a much better record. Yet this is doubtful in view of a long list of cases in which takeover fears and takeover defences have influenced the outcome. The 180-degree turnaround of former Chancellor Schröder is unforgotten. In 2001 Schröder defected from the unanimously agreed-upon common standpoint of the Council on the draft 13th Directive of the European Commission that contained an anti-frustration rule which clearly followed the British model.[18] The

[16] K. J. Hopt, E. Kantzenbach, T. Straubhaar (eds.), *Herausforderungen der Globalisierung* (Göttingen: Vandenhoek & Rupprecht, 2003); C. Linzbach *et al.* (eds.), *Globalisierung und Europäisches Sozialmodell* (Baden-Baden: Nomos, 2007); R. Howse, 'The End of the Globalization Debate: A Review Essay', *Harvard Law Review 121* (2008), 1528.

[17] For details, see R. von Rosen, 'Die Umsetzung der EU-Übernahmerichtlinie in Europa, Eine erste Bilanz', *Management Zeitschrift für Corporate Governance*, 6 (2007), 241, 243 *et seq.*

[18] See R. Skog, 'The Takeover Directive: An Endless Saga?', *European Business Law Review*, 13 (2002), 301; K. J. Hopt, 'La treizième directive sur les OPA-OPE et le droit allemand',

financial press commented that this was a closing of ranks between Wolfsburg, the seat of the Volkswagen corporation, and Hannover, the capital of Lower Saxony, and pointed at the Volkswagen Act[19] with its right for Lower Saxony to be represented in the Volkswagen board. Indeed, Schröder as Prime Minister of Lower Saxony had been a member of the board of Volkswagen and had gotten so close to the automobile industry that he was nicknamed the 'automobile chancellor'.

In a similar vein, the heated debate on the anti-frustration rule in the German takeover statute ended with the anti-frustration rule as the principle, but subject to four exceptions.[20] The first three are innocuous, including the possibility of an anticipated authorization of the board to engage in defensive actions to be given by the general assembly up to eighteen months before the takeover bid.[21] The Trojan horse is the fourth exception, i.e., the permissibility of all kinds of defensive actions if the managing board gets the consent of the supervisory board. This waters down the anti-frustration rule considerably, since notwithstanding the mandatory separation of the two boards in the German two-tier system,

in *Aspects actuels du droit des affaires, Mélanges en l'honneur de Yves Guyon* (Paris: Dalloz, 2003), 529, 537 *et seq*.

[19] In the meantime, see the decision of the Case C-112/05, *Commission* v. *Germany*, [2007] ECR-I-8995, ('Volkswagen-Gesetz,') holding parts of this Act in violation of the EC Treaty. The decision is reprinted and commented e.g., by J. van Bekkum, J. Kloosterman, J. Winter, 'Golden Shares and European Company Law: the Implications of Volkswagen', *European Company Law,* 5 (2008) issue 1, 6–12, as well as in many German law reviews, e.g., *Zeitschrift für Wirtschaftsrecht* (2007), 2068 and *Neue Juristische Wochenschrift* (2007), 3481. The most recent German reaction to this decision proves the point made in this article. The German government intends to maintain the Act with a few changes only insofar as the board delegation rights of the Federal Republic of Germany and of Lower Saxony and the voting cap of 20% combined with a supermajority of 80% for changes of the company statutes are deleted, but the necessity of a supermajority of 80% is to be maintained. In addition, a new requirement for the consent of the supervisory board with a two-thirds majority for important investment decisions is to be introduced. By this the overwhelming influence of labour via the codetermined board is maintained, and restructuring involving changes of plants after foreign takeovers is *de facto* made impossible. An expert opinion for the blockholder Porsche corporation holds that this is in violation of European law, 'Wegen des VW-Gesetzes drohen Zwangsgelder', *Frankfurter Allgemeine Zeitung*, (1 February 2008), No. 27, 14; cf. also F. Möslein, 'Aufsichtsratsverfassung und Kapitalverkehrsfreiheit', *Der Aufsichtsrat* (2008), 72–73; T. Käseberg and F. Möslein, 'Auch die Mitbestimmungsregeln im VW-Gesetz sind fragwürdig', *Frankfurter Allgemeine Zeitung*, (12 March 2008), No. 61, 23.

[20] Section 33 subsection 1 sentence 1 of the German Takeover Act. For a neutrality requirement as to the managing board under company law see Bundesgerichtshof decision of 22 October 2007, *Die Aktiengesellschaft*, (2008), 164.

[21] Section 33 subsection 2.

the German supervisory board cannot be considered to be independent. The practical relevance of the fourth exception is even greater if one considers that in all major German stock corporations, a mandatory system of quasi-parity labour codetermination is forced upon all major corporations. As a matter of experience, in cases of hostile takeovers the best allies for the board of the target are the representatives of labour in its supervisory board. Both stand to lose if the takeover is successful – the former their jobs as directors, the latter their employment in case of restructuring and dismissals.[22] It is telling that when the statutes of the Thyssen Krupp corporation were modified in order to give to the Krupp Foundation three seats in the supervisory board, it was made clear that by this move the corporation would be immune from hostile takeovers, since under such a threat there would always be a thirteen-vote majority (i.e., the three directors delegated by the foundation and the ten labour representatives).

The discussion on defending German enterprises from foreign takeovers reached a new peak in 2005 when foreign hedge funds forced the German Stock Exchange in Frankfurt to change its takeover strategies concerning a friendly takeover offer to the London Stock Exchange, to oust its CEO Seifert, and to overhaul the composition of its supervisory board, including forcing its chairman Breuer to step down. The German financial markets supervisory agency (*Bundesanstalt für Finanzdienstleistungsaufsicht*, BaFin) reacted by starting an inquiry into whether these hedge funds had acted in concert in trying to acquire control of the company, and might even have had the obligation under German law to make a mandatory bid. It is hardly surprising that this inquiry led to nothing and after a while was silently tabled. Many observers believe that the conditions for a mandatory bid had in fact been fulfilled, but that this just could not be proved. Then came the battle over ABN AMRO, which ended with a total victory for the team surrounding 'Fred the Shred' and with the defeat and dismantling of this major bank.[23] In Germany and other Member States, this battle was observed with mixed feelings and afterthoughts on what this might mean for their own national bank and industrial champions. Most recently, the grow-

[22] This is essentially the principal-agent conflict between the shareholders and the directors of the target mentioned supra II 1 a. Cf. Davies and Hopt, 'Chapter on Control Transactions', (note 9, above).

[23] G. H. White, A. W. Konevsky and B. Anglette, 'The battle for ABN AMRO and certain aspects of cross-border takeovers', *Butterworths Journal of International Banking and Financial Law* (April 2008), 171–176.

ing activity of huge foreign state investment funds like the one from China has created nervousness in the public and among politicians. These funds have accumulated billions of dollars, and the suspicion is that once they acquire important stakes in key national industries they might use their influence not just for shareholder profit as other private funds, but for political purposes. The consequence of all this was that a draft Risk Limitation Act was drawn up by the Ministry of Finance and plans were made to tighten up the foreign investment law.

B. German Risk Limitation Act of July 2008 and the pending reform of the German Foreign Investment Law

a) The draft Risk Limitation Act was triggered in late summer 2007 by the fact that private equity investment in Germany was lagging and a new risk capital investment law and a reform of the law on participations in enterprises was urgently needed. The draft law on facilitating private equity investment in Germany by tax and other deregulatory measures was meant to contribute to the position of Germany in the international competition for private equity investment. But the left wing of the Social Democratic Party as well as influential parts of the Christian Democratic Party opposed the so-called tax gifts to private equity, and asked for protective measures against what they called 'predatory wild animal capitalism'. At the end, such burden easing for capital was politically unacceptable without being matched by 'limitations of the risk' allegedly presented by this. In order to keep these limitations at a level which would not endanger the attractiveness of Germany as an investment place, the German Ministry of Finance asked the Hamburg Max Planck Institute to compare what other states do in limiting the predatory activities of private equity, hedge funds and state funds. Though the result of this inquiry was that basically the free internal market concept still prevailed internationally, the Ministry reacted with the draft of the so-called Risk Limitation Act in late September 2007. To begin with, it can be observed that while the expectation of getting real deregulation and a sensibly better tax environment for the investment industry was not met, the draft Risk Limitation Act was not eased up correspondingly.

As of December 2007 the draft law contains a whole set of technical reforms, among them disclosure rules. An investor with 10% or more must tell the issuer on demand whether he intends a long-term strategic investment and whether ultimately he even might aim at acquiring

control of the company. To be sure, this is not a one-shot obligation; changes of intention must also be disclosed. The investor must also disclose to what extent he is financing his acquisition by his own means or by outside financing. Furthermore, the true owners of the shares will be more easily identifiable by the company in the future. The banks are supposed to find out and disclose to the company the true ultimate owner of a block, thereby piercing through the chain of street name registrations. The draft does not say how these duties will be enforced against non-national banks and nominees, but it is intended to withhold the voting rights in case of non-compliance. It is quite obvious that this would create considerable uncertainty on the final outcome of shareholder voting and would encourage the so-called predatory shareholders to blackmail the corporations by contesting the votes before the courts,[24] quite apart from costly and probably fruitless inquisition efforts of the banking community. Furthermore, the information rights of the employees of the company against block investors are to be reinforced.[25]

Yet the most important and controversial draft reform concerns the considerably stiffened rules on acting in concert as compared with the old text.[26] Under the proposed rule, acting in concert presupposes an acting in concert by the owners of shares with a view toward a common enterprise policy.[27] In the future, the concerted acquisition of blocks of shares will already be relevant. By this, a restrictive decision of the German Bundesgerichtshof would be set aside which had interpreted the law in the sense that it covers only acting in concert within the general

[24] This is a peculiarity of the German corporate reality quite unlike that which exists in other countries; see T. Baums, A. Keinath and D. Gajek, 'Fortschritte bei Klagen gegen Hauptversammlungsbeschlüsse? Eine empirische Studie', *Zeitschrift für Wirtschaftsrecht*, (2007), 1629; T. Baums and F. Drinhausen, 'Weitere Reform des Rechts der Anfechtung von Hauptversammlungsbeschlüssen', *Zeitschrift für Wirtschaftsrecht*, (2008), 145.

[25] Together with presenting the draft Risk Limitation Act, the government announced that it would examine whether to take legislative action concerning the sale of credit claims, a controversial consumer protection reform. G. Nobbe, 'Der Verkauf von Krediten', *Zeitschrift für Wirtschaftsrecht*, (2008), 97.

[26] Section 30 subsection 2 sentence 1 of the German Takeover Act says that votes of a third party are to be counted as votes of the bidder 'if thereby the bidder or his subsidiary act in concert as to the target either by agreement or else; agreements on voting in single cases are excepted'. A. Raloff, *Acting in Concert* (Gottmadingen: Jenaer Wissenschaftliche Verlagsgesellschaft, 2007).

[27] The formula of the draft act is: 'There is acting in concert, if the bidder or his subsidiary and a third party act in concert in a way which is apt to permanently or considerably influence the entrepreneurial line of the target.'

assembly.[28] Furthermore, the exception under the old law that acting in concert in single cases remains legitimate is meant to be done away with. In the discussion there is even talk about *de facto* presumptions of concerted action under certain circumstances. Because of the drastic possible consequence of a mandatory bid, this proposed change is by far the most controversial reform measure in the public discussion.

The draft Risk Limitation Act met with a criticism that was stronger and more widespread than anything the Ministry of Finance had experienced before. This criticism was articulated not only in the press, but in particular in a public hearing of the Committee of Finance of the German Bundestag in January 2008. The protocols of this hearing are available[29] and need not be taken up here in more detail. It suffices to mention the critical but moderate comments by the German Share Institute,[30] which had organized a seminar on the draft the day before; by the commercial law committee of the German Attorneys Association;[31] and by the leading German shareholder association, the German Association for Protection of Securities.[32] It is hardly surprising that the observations made by the institutional investors were most critical, such as those made by Christian Strenger, a director of the supervisory board of DWS, the investment arm of the Deutsche Bank, or from abroad by Hermes, the well-known British pension fund with around €100 billion in assets. On the other side, the German Trade Union Confederation[33] and some academics were in favour of the new law and even asked for further restrictions for fear of a sell-out of German industry, of losing jobs, and of nurturing further, as it has been called, 'neo-liberal market ideology'.[34] Academic critique was made in more detail at the biannual

[28] Bundesgerichtshof decision of 18 September 2006, case 'WMF,' *Entscheidungen des Bundesgerichtshofes in Zivilsachen* 169, 98 *et seq*., no. 17.

[29] German Bundestag, 16th Voting Period, Committee of Finance, 23 January 2008, Berlin, Protocol No. 16/82.

[30] Deutsches Aktieninstitut (DAI) Frankfurt am Main, Comments of 18 January 2008.

[31] Handelsrechtsausschuss des Deutschen Anwaltsvereins (DAV), 'Stellungnahme zum Regierungsentwurf eines Risikobegrenzungsgesetzes', *Neue Zeitschrift für Gesellschaftsrecht*, (2008), 60.

[32] Deutsche Schutzvereinigung für Wertpapierbesitz, Comments of 9 January 2008.

[33] Deutscher Gewerkschaftsbund (DGB).

[34] Cf. R. Stürner, *Markt und Wettbewerb über alles? Gesellschaft und Recht im Fokus neoliberaler Marktideologie* (Munich: C. H. Beck, 2007). But see, e.g., H. Siebert, *Jenseits des sozialen Marktes, Eine notwendige Neuorientierung der deutschen Politik* (Munich: Deutsche Verlags-Anstalt, 2005); H.-W. Sinn, *Ist Deutschland noch zu retten?,* 3rd edition, (Munich: Econ, 2003); S. Empter and R. B. Vehrkamp (eds.), *Soziale Gerechtigkeit – eine Bestandaufnahme* (Gütersloh: Bertelsmann, 2007).

symposium of the leading German company law journal by Holger Fleischer[35] and at the yearly meeting of the working group on economics and the law by Peter Mülbert.[36] These criticisms are well-founded in several respects:[37]

(1) Transparency is one thing and – as a general rule – positive, though details of the proposed disclosure rules are critical. Yet a too harsh mandatory bid rule frightens off potential bidders, takes away choices for the shareholders, and weakens the takeover market. It follows that it would be better to dissolve the parallelism between the rules on acting in concert in the German Securities Exchange Act and the Takeover Act.[38]
(2) More generally, the consequences of the new rule on corporate governance must be taken into consideration. Investors must be able to discuss investments to be made among themselves. Active shareholders are welcome. Board members are controllers and need to be able to act together in pursuing this task. A well-functioning takeover market supplements this internal control from outside and is an important part of external corporate governance.
(3) For example, shareholders who intend to jointly prevent a too-risky policy of their corporation (standstill), or want to oust a chairman whose entrepreneurial policy they do not support, or who are ready to jointly rescue the corporation in case of financial crisis, must be able to do this without running the risk of facing a mandatory bid requirement. These and similar situations should at least be mentioned as a safe harbour in the motives of the Act.[39]

It remains to be seen what the legislators will finally decide in the near future. It might be that the old exception for acting in concert in single cases will be maintained, or that the proposed alternative of being apt

[35] H. Fleischer, 'Finanzinvestoren im ordnungspolitischen Gesamtgefüge von Aktien-, Bankaufsichts- und Kapitalmarktrecht', *Zeitschrift für Unternehmens- und Gesellschaftsrecht*, 2–3 (2008), 185.

[36] Arbeitskreis Wirtschaft und Recht, 25 January 2008. See also G. Spindler, 'Acting in Concert – Begrenzung der Risiken durch Finanzinvestoren?', *Wertpapier-Mitteilungen*, (2007), 2357.

[37] See K. J. Hopt, 'Viel zu defensiv', *Handelsblatt*, (30 January 2008), No. 21, 19.

[38] The same view has been taken expressly by the statement of DAI (note 30, above), 3.

[39] See also the statement of the DAI (note 30, above), suggesting to make clear in the motives that an exchange of opinion between investors on entrepreneurial topics is safe provided its result is still open, and that it must remain possible to try to win others over to one's own position.

to exercise a 'permanent or considerable' influence will be replaced by 'considerable' influence only. But it is pretty certain that acting in concert, even outside the general assembly, and also with others than group members, will be caught by the new provision. On the other hand, if the text stays as it is now or is not relativized by safe-harbour remarks in the motives, there will be a serious danger for internal corporate governance, i.e., active shareholdership, as well as for external corporate governance, i.e., an active market for corporate control.[40]

The latest news is that on 25 June 2008 the Financial Committee of the German Bundestag reached the following difficult compromise: 'There is acting in concert, if the bidder or its subsidiary and the third party come to an agreement with each other as to the exercise of votes or if they otherwise cooperate with the aim of reaching a permanent and considerable change of the enterpreneurial direction of the target.' The German Parliament has accepted this version and enacted the Risk Limitation Act on 27 June/4 July 2008. The final outcome is a tightening up with which one can live.

b) The pending reform on the German foreign investment law[41] goes too far as well, at least in its present form which contains only a vague general clause instead of concrete formulas that could guarantee legal certainty for the companies of M&A deals or those involved in takeovers. This reform has its origins in two situations: the decision of the People's Republic of China to establish a US$200 billion state fund company which would also seek investment opportunities in foreign corporations; and the interest of the Russian gas producer Gazprom in looking for investments in the German transport sector and in the distribution of natural gas. A list consisting of the more than forty most significant worldwide state funds shows that the state funds of the Arab Emirates, Singapore, Norway, Saudi Arabia and Kuwait have still higher assets than the new Chinese state fund, with the Arab Emirates holding assets of US$875 billion.[42]

[40] Some even see a violation of European law, cf. R. Schmidtbleicher, 'Das „neue" acting in concert – ein Fall für den EuGH?', *Die Aktiengesellschaft*, (2008), 73.

[41] Federal Ministry of Economics and Technology, Draft 13th Act Modifying the Foreign Investment Act and the Foreign Investment Ordinance as of 5 November 2007.

[42] Abu Dhabi Investment Authority (ADIA) with US$ 875 billion <Milliarden>. A list of the largest state funds can be found in: State Experts Council for Evaluation of the Economic Development at Large (Sachverständigenrat zur Begutachtung der gesamtwirtschaftlichen Entwicklung), *Annual Expert Opinion* (2007/08), table 55, 396. According to a more recent study of the London International Financial Services Institute the total assets held by the state funds is estimated to increase dramatically by 2015, 'Neue Macht aus

Since it is technically difficult to single out hedge funds, and politically unwise to openly hit state investment funds, the draft foreign investment law reform plans a rule under which any foreign (now from outside the EU) investment of 25% or more in a German corporation may be forbidden if public security is concerned. Originally even the strategic infrastructure was included in this protection. This is very vague indeed, since specific sectors of industry – such as energy and armament, to name just two – are not mentioned in the proposal. Even worse, while there is no requirement of state permission for such investments, the government may take up such transactions within three months, ask for full information and, after having received it, forbid it within another two months (though not longer). Originally there were even plans to extend the time frame for state intervention up to three years retroactively, and the reform would have extended to all foreign investors, i.e. also those from within the European Union.[43] The European Commission and members of the European Parliament have criticized these reform plans. While the original version ('strategic infrastructure') would certainly have infringed on the freedoms of establishment and capital of the EC Treaty, it is still doubtful whether such a general clause is compatible with European law since such a general clause lacks the clarity needed by foreign investors and thereby impedes the investment flow.[44]

dem Osten', *Handelsblatt* (1st April 2008), No. 63, 24. See also S. Butt, A. Shivdasani, C. Stendevad and A. Wyman, 'Sovereign Wealth Funds: A Growing Global Force in Corporate Finance', *Journal of Applied Corporate Finance* 19 (2007), 73–83.

[43] See the draft new section 7 subsection 2 No. 6 of the Foreign Investment Act: 'Transactions on the acquisition of enterprises having their seat in Germany as well as of participations in such enterprises, if the acquisition endangers the public order or security of the Federal Republic of Germany'. See also the draft new section 53 subsection 1 sentence 1 of the Foreign Investment Ordinance: 'Acquisition of an enterprise having its seat in Germany or of a direct or indirect participation in such an enterprise by a foreigner or a national enterprise in which a foreigner holds at least 25% of the votes…'. In the meantime the Minister of Labour demanded to have a say in the decision with the clear aim of protecting domestic labour. Fortunately this protectionist move was not accepted. The compromise as of 11 July 2008 is that the decision to take up the affair shall be made by the Minister of Economics alone, while a decision to prohibit the transaction is up to the federal government after having heard the various ministries. 'Federführung bei Staatsfonds entschieden', *Handelsblatt* (14 July 2008), No. 134, 5.

[44] 'EU-Kommission lehnt Regeln für Staatsfonds ab', *Frankfurter Allgemeine Zeitung* (28 February 2008), No. 50, 12. Unfortunately in the meantime the European Commission yielded to the political pressures by Germany as transmitted by the German industry Commissioner Verheugen and by other Member States: 'EU billigt Vorgehen gegen Staatsfonds', *Handelsblatt* (13 March 2008), No. 52, 6. See W. Bayer and C. Ohler, 'Staatsfonds ante portas', *Zeitschrift für Gesellschaftsrecht* (ZGR), (2008), 12–31 and most recently M. Nettesheim, 'Unternehmensübernahmen durch Staatsfonds:

The State Experts Council in its yearly report 2007/8[45] severely criticized the reform plans. According to the Council, other less intrusive alternatives are available, in particular antitrust and competition law measures and the possibility of the state keeping or acquiring a majority participation in the industries concerned (to be sure, not just a golden share that gives votes out of proportion to the actual shareholding of the state).[46] The German Council denies, at least at present, that the state funds present a danger since their aim is to build up a capital stock for future generations and to help to stabilize prices of natural resources in case of price fluctuations. It is true that more transparency is needed, but this would be sufficient. Also the elaboration of a Code of Conduct for these state funds as planned under the auspices of the International Monetary Fund is useful. The OECD and the European Commission declared to be willing to cooperate with the IMF in this matter, and the European Parliament is preparing a transparency initiative too[47]. Deliberations on the code are under way with the aim that the state funds commit themselves to make their investment decisions irrespective of any political influence. It is expected that the Code could be ready by October 2008.[48] As a countermove to such a Code the Western industrial nations should be expected to refrain from their protectionist moves and to keep their markets open for foreign investments including those made by state funds.[49]

The German Council is well aware of the fact that the US has a new Foreign Investment and National Security Act (FINSA) since October 2007 which gives the basis for a very restrictive and insecure treatment of foreign investments in the United States.[50] Yet the Council is fully right in stating that this example is leading in the wrong protectionist direction

Europarechtliche Vorgaben und Schranken', lecture given at the 150 Years Anniversary Symposion of the *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* on 6 June 2008 in Berlin.

[45] State Experts Council, (note 42, above).

[46] State Experts Council, (note 42, above), ch. 7, 385–437 with dissenting opinion by Bofinger. Similarly J. B. Donges et al. (Kronberger Kreis), *Staatsfonds: Muss Deutschland sich schützen?* (Berlin 2008).

[47] European Parliament, Committee on Legal Affairs, Klaus-Heiner Lehne, 'Transparency of the Institutional Investors', *Working Document* (22 January 2008); the final version by the European Parliament is expected by autumn 2008; cf. also the short report by Fischer zu Cramburg, 'Hedgefonds und Private Equity', *Finanzplatz* 2 (March 2008), 28.

[48] 'Neue Macht aus dem Osten', *Handelsblatt* (1 April 2008), No. 63, 24.

[49] M. Maisch, 'Staatsfonds, Die neue Macht', *Handelsblatt* (2 April 2008), No. 64, 10.

[50] State Experts Council, (note 42, above), 432 *et seq.* Australia seems to go into the same direction: 'Australien rüstet sich gegen Staatsfonds', *Frankfurter Allgemeine Zeitung*

and should not be followed by Germany. Germany is an export-oriented nation, not only as far as products and services are concerned but also as to capital. Indeed, if Germany were to protect its own industry from capital inflows, this would be inconsistent with its own capital export record and could lead to retaliation. Furthermore, it is probable that the planned reform would also frighten off those investors and investments that are clearly useful and welcome. Protection is needed only for a very few specific sectors, such as armament, the atomic industry, and the energy sector. Catching all kinds of foreign investment under the vague general clause of 'public order and security' is going too far, since no M&A deal could be sure any longer whether or not there will be state intervention.

The general conclusion as to the foreign investment reform plans is that Germany has an elementary interest in keeping the capital market open. Germany has a large capital balance surplus[51] and cannot afford restrictions that would backfire. Foreign investments – also from state funds – create jobs and may rescue enterprises in difficulties, as illustrated quite clearly in the current finance crisis of American banks such as Citibank, Merrill Lynch and even Morgan Stanley. Measures taken specifically against state funds and/or hedge funds are problematic. As to the latter, single-handed efforts are bound to fail. International efforts – such as better transparency for hedge funds[52] and possibly further requirements for banks that finance these funds[53] – are more promising alternatives.

(4 March 2008), No. 54, 16. Russia has followed, T. Wiede, 'Russland verschärft die Regeln für Investoren', *Handelsblatt* (26 March 2008), No. 58, 6.

[51] For statistical information see State Experts Council, (note 42, above), at 389 *et seq*.

[52] The fourteen largest European hedge funds under the lead of Andrew Large have agreed to set up a code of conduct according to which there will be more transparency, control of the development of the investments by independent experts, and no more voting in the general assemblies with shares that are only lent and not owned. See Hedge Fund Working Group (HFWG), *Hedge Fund Standards: Final Report (Large Report),* London (January 2008) and, 'Hedge-Fonds öffnen sich', *Handelsblatt* (23 January 2008), No. 16, 22. From the USA see the two private-sector committees reports to the President's Working Group on Financial Markets: Asset Managers' Committee, *Best Practices for the Hedge Fund Industry,* and Investors' Committee, *Principles and Best Practices for Hedge Fund Investors,* Washington (April 15, 2008).

[53] See the path-breaking study by M. Kahan and E. B. Rock, 'Hedge Funds in Corporate Governance and Corporate Control', *University of Pennsylvania Law Review*, 155 (2007), 1021–93; see also from Germany: H. Eidenmüller, 'Regulierung von Finanzinvestoren', *Deutsches Steuerrecht*, (2007), 2116; H. Eidenmüller, 'Private Equity, Leverage und die Effizienz des Gläubigerschutzrechts', *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* 171 (2007), 644; C. Kumpan, 'Private Equity und der Schutz deutscher Unternehmen', *Die Aktiengesellschaft*, (2007), 461; C. Kumpan, *DAJV Newsletter*

IV. One-share/one-vote discussion and recommendations of the European Corporate Governance Forum Working Group on Proportionality of June 2007

A. One-share/one-vote discussion and the reply of Commissioner McCreevy

In this section, I move to the European discussion on proportionality. The outcome of the one-share/one-vote studies by ISS Europe, the ECGI and Shearman & Sterling which were published by the European Commission on 4 June 2007 are well known.[54] On 3 October 2007, Commissioner McCreevy reacted, declaring before the European Parliament that he had made a deliberately provocative statement when announcing his plans to bring about a European one-share/one-vote rule. He acknowledged that there is no economic evidence of a causal link between deviations from the proportionality principle and the economic performance of companies, and concluded that there is no need for action at the EU level on this issue. Unfortunately, he also declared that he does not intend to propose any action in this context, not even concerning more transparency.

I belong to those experts and investors who, even in light of the economic evidence brought forward in the aforementioned studies, plead for more transparency in the need for and use of control-enhancing mechanisms. This is what the recommendations of the European Corporate Governance Forum Working Group on Proportionality of June 2007 say.[55]

(2007), 166, concerning the US; G. Spindler, 'Die Regulierung von Hedge-Fonds im Kapitalmarkt- und Gesellschaftsrecht', *Wertpapier-Mitteilungen*, (2006), 553 *et seq*. and 601 *et seq*.; A. Graef, *Aufsicht über Hedgefonds im deutschen und amerikanischen Recht* (Berlin 2008). As to the European initiatives see Athanassiou, 'Towards Pan-European Hedge Fund Regulation? State of the Debate', *Legal Issues of Economic Integration*, 35 (2008) 1, 1–41.

[54] European Commission, Institutional Shareholder Services ISS, Shearman & Sterling, European Corporate Governance Institute ECGI, *Report on the Proportionality Principle in the European Union* (18 May 2007); M. Burkhart, S. Lee, 'One Share – One Vote: The Theory', *Review of Finance*, 12 (2008), 1–49; R. Adams, D. Ferreira, 'One Share – One Vote: The Empirical Evidence', *Review of Finance*, 12 (2008), 51–91.

[55] IV B-D are closely following the Paper of the European Corporate Governance Forum Working Group on Proportionality of 12 June 2007. This group was headed by Jaap Winter, the former chairman of the High Level Group of Company Law Experts (note 9, above) and comprised both members of the High Level Group (among them myself) and some outside members, including Eddy Wymeersch.

B. Variety of control-enhancing mechanisms, the repudiation of a general one-share/one-vote rule and the need for better understanding

To begin with, the group makes a distinction between four different disproportionality dimensions: l) corporate institutional arrangements directly affecting shareholder rights, 2) corporate institutional arrangements indirectly affecting shareholder rights, 3) other corporate institutional entrenchment mechanisms, and 4) non-corporate institutional mechanisms. Examples for these four rings are 1) multiple voting rights and voting ceilings, 2) priority shares conferring an exclusive right to nominate board members, 3) share transfer restrictions, staggered board provisions and certain codetermination arrangements, and 4) pyramids and cross-shareholdings as well as market techniques that allow for decoupling of voting rights from cash flow rights, resulting, for example, in votes being exercisable without any economic investment (so-called 'empty voting')[56]. In light of these wide variations, the group concluded that an overall European proportionality rule is neither useful nor feasible. Shareholder democracy is a misleading catchword that draws unfounded analogies to politics and democracy of the people.

On the other hand, the group sees a need for an objective framework for further analysis of control-enhancing mechanisms, with due consideration of the differences of the instruments used in the four rings just mentioned – in particular, whether or not they are furthering the entrenchment of the board and the controlling shareholder, and whether they might function as obstacles to corporate restructuring. In this context, competing objectives should be examined, such as monitoring by the controlling shareholder,[57] easier access to capital markets, long-term orientation and stakeholder protection, and last but not least, freedom of contract and efficient competition. Only under three conditions – namely, if certain mechanisms are to be judged negatively on balance, if such mechanisms inhibit the achievement of EU policy objectives and if regulatory intervention at the EU level seems desirable – should the following possible regulatory tools be discussed and possibly prove useful.

[56] See most recently H.T.C. Hu and B. Black, 'Equity and Debt Decoupling and Empty Voting II: Importance and Extension', *University of Pennsylvania Law Review*, 156 (2008), 625–739.

[57] See most recently A. M. Pacces, *Featuring Control Power* (Rotterdam Institute of Law and Economics, 2007).

C. *Toward an enhanced disclosure regime concerning control-enhancing mechanisms*

In this light and in view of the many open questions found by the two ECGI studies, the group recommends in the short term an enhanced disclosure regime.[58] This disclosure regime might include the following four building blocks[59] to be discussed:

First, in addition to the disclosure obligations pursuant to Article 10 of the 13th Directive and the disclosures under the Transparency Directive, companies could be required to provide more detailed transparency on disproportionate mechanisms applied by them.

Second, shareholders who derive a voting position from such mechanisms exceeding, say, 10% of the total votes that can be cast in a meeting, could be required to provide insight into the size and nature of their shareholdings and their policy on the exercise of the relevant powers.

Third, companies and shareholders could also be required to provide more transparency on the actual use of disproportionate mechanisms – for example, in respect to specific related party transactions not entered into on an arm's length basis.

Alternatively, the Commission could ask the Member States to provide it annually with comparable information regarding application of disproportionate structures in their jurisdictions to the aforementioned extent. This would be an extension of the reports due by the Member States under Article 20 of the 13th Directive.

D. *Particularly pressing problem areas and the need for more data and further analysis*

The Forum Working Group further identified a number of particularly pressing problem areas in the field where it believes that, as a matter of principle,[60] a more substantial approach than mere disclosure is needed. Among them are:

[58] For a survey of the use of disclosure in European law, see S. Grundmann and F. Möslein, *European Company Law, Organization, Finance and Capital Markets* (Antwerpen/Oxford: Intersentia, 2007), § 9. As to the disclosure principle for enterprises in a historical, economic and legal perspective see H. Merkt, *Unternehmenspublizität* (Tübingen: Mohr Siebeck, 2001).

[59] For the building block system in European law making, cf. Forum Europaeum Group Law, 'Corporate Group Law for Europe', *European Business Organization Law Review*, 1 (2000), 165–264.

[60] With due respect to the context, see supra IV B last paragraph.

First, instances where full board entrenchment is achieved. According to the group, the European Commission should make it clear in a recommendation that as a matter of principle this is unacceptable from a corporate governance perspective.

Second, the group is concerned by the decoupling of voting rights and economic ownership through mechanisms such as securities lending, contracts for difference, and call/put options whose mechanisms may affect the effective exercise of proportionate voting rights.[61] This point has also been made forcefully by the ECGI paper on empirical evidence concerning one-share/one-vote.

In addition to better disclosure, the EU should concentrate on the role of securities intermediaries in the voting process of their clients. The role of these intermediaries is crucial.

Overall there is a clear need for more data and further analysis. Part of this could be brought to light by the enhanced disclosure regime mentioned above. In addition, empirical studies are needed on the various control-enhancing mechanisms, their functions and implications, and the economic pros and cons. These studies should be supported morally as well as financially because they are in the public interest.

V. Conclusions

In Europe there are still many obstacles to corporate restructuring in the takeover context and beyond. According to an Interim Report of the European Commission, the experience with the implementation of the 13th Directive on Takeovers in the Member States is sobering indeed. As the Commission Report says, even though too pessimistically, the number of Member States implementing the directive in a seemingly protectionist way is unexpectedly large. This is in line with a growing popular fear of globalization and definite trends toward political protectionism regarding foreign investments in various Member States. In many, the legislators are tempted to raise the barriers to private investments and takeovers from abroad, and the governments tend to interfere when they see their national banking or industry champions threatened by takeovers from abroad. Germany is not an exception, as the legislative history of the Risk Limitation Act of July 2008 and the ongoing discussion on further restrictions of the foreign investment law illustrate. The far-reaching plans of Commissioner McCreevy of mandating

[61] Note 56, above.

a one-share/one-vote rule by European law could not be upheld in the light of the results of the Commission-mandated studies by ISS Europe, the ECGI and Shearman & Sterling. Yet the conclusions drawn from them by the European Commission are too pessimistic, and the declaration by Commissioner McCreevy of 3 October 2007 that there will be no European action on the issue of one-share/one-vote should not mean the end of the discussion. While there is a definite need for more data and further analysis, the report of the European Corporate Governance Forum Working Group on Proportionality of June 2007 sees a need for further development of the European internal market and pleads for an enhanced disclosure regime concerning control-enhancing mechanisms.