Perspectives in Company Law and Financial Regulation

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Protection of third-party interests under German takeover law

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During the legislative proceedings of the German Takeover Act, the interests of third parties – i.e. persons only indirectly concerned by but not actively involved in the takeover process as such, e.g. individual shareholders of a target company – did not figure prominently. However, this changed dramatically once the Act came into force. Numerous court decisions dealt with this question, launching an intensive and still ongoing discussion.

I. Introduction

The protection of (minority) shareholders confronted with a takeover of the company they are invested in has been an issue of lasting concern and interest for *Eddy Wymeersch*. He has long been a high-profile promoter as well as a critical commentator of the pertinent European developments.[1] This is especially true with respect to the Takeover

[1] See K. J. Hopt and E. Wymeersch (eds.), *European Takeovers. Law and Practice* (London: Butterworth, 1992); E. Wymeersch, 'The Mandatory Bid: A Critical View', in Hopt and Wymeersch (eds.), *European Takeovers*, 351–68; E. Wymeersch, 'Problems of the Regulation of Takeover Bids in Western Europe: A Comparative Survey', in Hopt and Wymeersch (eds.), *European Takeovers,* 95–131; E. Wymeersch, 'European Takeovers: The Mandatory Bid', *Butterworths Journal of International Banking and Financial Law* (1994), 25–33; E. Wymeersch , 'The Regulation of Takeover Bids in a Comparative Perspective' in R. Buxbaum, G. Hertig, A. Hirsch and K. J. Hopt (eds.), *European Economic and Business Law* (Berlin: de Gruyter, 1996), 291–323; E. Wymeersch, 'The Proposal for a 13th Company Law Directive on Takeovers: A Multi-jurisdiction Survey, Part 1', *European Financial Services Law* (1996), 301–307; 'Part 2', *European Financial Services Law* (1997), 2–7; E. Wymeersch, 'Les défenses anti-OPA après la treizième directive – commentaires sur l'article 8 de la future directive', *Financial Law Institute Working Paper Series*, (Jan. 2000); E. Wymeersch, 'Übernahme- und Pflichtangebote', *Zeitschrift für Unternehmens- und Gesellschaftsrecht,* 31 (2002), 520–45; G. Ferrarini, K. J. Hopt, J. Winter and E. Wymeersch (eds.), *Reforming Company and Takeover Law in Europe* (Oxford University Press, 2004).

Directive, whose main goal is the protection of the interests of holders of securities of companies that are the subject of takeover bids or of changes of control (Recital 2).[2] As a framework directive, the 13th Directive provides for basic principles to adhere to, but leaves ample scope for the Member States in other areas. A prominent example of this is the right of the Member States to determine how the protection prescribed in the Directive should be enforced, and whether rights for individual shareholders are to be made available at all. These may be asserted in administrative or judicial proceedings, either in proceedings against a supervisory authority or in proceedings between parties of a bid (Recital 8). Additionally, Article 4 (6) clarifies that the Directive neither affects the power of Member States to regulate whether and under which circumstances parties to a bid are entitled to bring administrative or judicial proceedings, nor does it affect the power of the Member States to determine the legal position concerning the liability of supervisory authorities or litigation between the parties to a bid. In sum, it is by and large left to the national laws of the Member States to determine how individual shareholders of a target company – the exemplary 'third parties' in the takeover proceedings besides the bidder and the target[3] – may or may not pursue their own interests in the context of a takeover or change of control situation.

This solution appears somewhat surprising from a regulatory point of view – though less so from a public choice perspective, given the previous thirty years of political bargaining about the Directive – because the question of whether and how individual shareholders may pursue their own interests in these situations is without doubt an issue of central importance for implementing the Directive's goals. Typical conflicts arise if a bidder, in spite of getting control of the target and thus being obliged to make a mandatory bid to acquire all outstanding shares, refuses to do so, or if the Supervisory Authority mistakenly exempts the bidder. Also, the target's shareholders may not be content with the price offered (and approved by the authority), especially when there are different classes of shares with different price tags attached by the bidder. These are but a few situations where the shareholders may want to have the legislative means to pursue their own interests. The German takeover law, however, at least in principle, does *not* grant many of these. Instead,

[2] Directive of the European Parliament and of the Council of 21 April 2004 on Takeover Bids 2004/25/EC [2004] OJ L142/2.

[3] Other 'third parties' are e.g. potential competitive bidders.

it is very restrictive with respect to the enforcement of third-party interests and offers surprisingly little protection on the procedural level. However, this outcome is highly disputed as will be discussed hereafter. The analysis is structured as follows. To frame the discussion, it begins with an overview of the legislative framework and institutional setting in Germany (part II). It then deals with the question of whether individual shareholders may assert their rights against the German supervisory authority (part III). Thereafter it discusses whether, as an alternative, civil law remedies are available in judicial proceedings between parties of a bid (part IV). Part V summarizes the findings.

II. Legislative framework and institutional setting

A. The Takeover Act

The relevant German legislative source is the 'Securities Acquisition and Takeover Act' (*Wertpapiererwerbs- und Übernahmegesetz*), the WpÜG of 2001.[4] The Act was the end of the German self-regulatory takeover regime based on the Takeover Codex of 1995.[5] The Codex had some functional shortcomings and mainly failed because it was not accepted by a sufficient number of listed companies.[6] The WpÜG was enacted on 1 January 2002, and thus predates the Takeover Directive. But given the freedom of choice discussed above that the Directive provides for national lawmakers, the German legislators rightly did not see a necessity under Community Law to amend the restrictive pertinent provisions of the WpÜG when implementing the Directive in 2006.[7] Therefore, case

[4] *Gesetz zur Regelung von öffentlichen Angeboten zum Erwerb von Wertpapieren und von Unternehmensübernahmen (WpÜG)*, Law of 20 December 2001, Federal Gazette I (2001) 3822, as amended; the law was accompanied by four ordinances dating from 27 December 2001, Federal Gazette I (2001) 4263 *et seq.*, as amended. English translations can be found with M. Peltzer and Voight, *German Securities Acquisition and Takeover Act* (Cologne: O. Schmidt, 2002); G. Apfelbacher, S. Barthelmess, T. Buhl and C. von Dryander, *German Takeover Law – A Commentary* (Munich: C.H. Beck, 2002).

[5] *Übernahmekodex der Börsensachverständigenkommission beim Bundesministerium der Finanzen* of 14 July 1995, amended 1 January 1998; see S. Schuster and C. Zschocke, *Übernahmerecht / Takeover Law* (Frankfurt: F. Knapp, 1996).

[6] *Cf.* C. Kirchner and U. Ehricke, 'Funktionsdefizite des Übernahmekodex bei der Börsensachverständigenkommission', *Die Aktiengesellschaft* (*1998*), 105–116.

[7] Act for Implementing the Takeover Directive (*Gesetz zur Umsetzung der Richtlinie 2004/25/EG des Europäischen Parlaments und des Rates vom 21. April 2004 betreffend Übernahmeangebote* [*Übernahmerichtline-Umsetzungsgesetz*]), Law of 8 July 2006, Federal Gazette I (2006) 1426.

law and discussion predating the implementation is still of unchanged relevance for the question of how third-party interests may be enforced.

The enactment of the WpÜG was triggered by what was – for most observers – the totally unexpected hostile takeover of Mannesmann AG, a traditional German manufacturer successfully turned into a mobile phone operator, by the British Vodafone plc, a foreign bidder, in 1999/2000. This was the biggest hostile takeover ever, amounting to more than €150 billion. It sent shock waves down the spine of corporate Germany, and the German government went into red alert. Accordingly, the ensuing legislative proceedings attracted wide public attention in Germany. Academia as well as practitioners were intensely involved in the discussion on the different drafts of the Takeover Act. However, again somewhat surprisingly, not much attention was paid to the question of whether and how individual shareholders and other third parties might pursue their own interests in the context of a takeover, though obviously this is an issue of high practical relevance. This situation changed dramatically once the WpÜG came into force. An unforeseen number of court decisions were forced to deal with this question, launching an intensive and still ongoing discussion.[8]

According to the official legislative texts, in substance – though not in form and structure – the WpÜG is modelled after the British City Code and thus has been, in principle, in accordance with the later Takeover Directive from the beginning. A core element of the WpÜG is the mandatory offer a bidder has to make if he has gained control of the target company.[9] The relevant threshold is 30% of the voting rights.[10] Based on the price regulation of the bid – the average share price or a higher price paid by the bidder during the previous six months[11] – minority shareholders participate in a possible control premium. To secure this outcome, the WpÜG – like the City Code – is necessarily characterized by a high regulatory intensity. Nevertheless, as in Britain, one of the official goals of the German legislators was to provide for a legislative framework that allows for speedy takeover procedures.[12] WpÜG § 3 (4) stipulates that the bidder and the target company must implement the procedure quickly, and the Act includes various provisions that oblige the parties to act without undue delay.

[8] These developments will be addressed below in Section III.

[9] § 35 (2) WpÜG. [10] § 29 (2) WpÜG.

[11] § 31 WpÜG, §§ 3–7 of the WpÜG Offer Ordinance (*WpÜG-Angebotsverordnung*), Ordinance of 27 December 2001, Federal Gazette I (2001) 4263 as amended.

[12] Legislative Materials, *BTDrucksache* 14/7034, 35.

However, in contrast to the British role model, the WpÜG is not an act of self-regulation but a body of public law whose actions may be and already have been challenged rather frequently in the courts, even though the Act has only been in force for a few years. This outcome differs markedly from the British experience, where due to the specific institutional setting takeover-induced litigation is extremely rare.[13]

B. Supervision in the public interest

Furthermore, the takeover-related supervisory structure in Germany differs fundamentally from the British. Power to carry out the supervision of *all* segments of the German financial markets lies with the 'Federal Financial Supervisory Authority' (*Bundesanstalt für Finanzdienstleistungsaufsicht*), the BaFin, established in its present form in 2002.[14] Since the enactment of WpÜG, its supervision includes takeovers. The BaFin is a major federal government agency somewhat similar to the SEC in the USA but different from the British 'Panel on Takeovers and Mergers', which was established in 1968 by the industry as an independent self-regulatory body and whose main functions are (only) to issue and administer the 'City Code on Takeovers and Mergers' and to supervise and regulate takeovers and other matters to which the Code applies.

According to § 4 (1) WpÜG, the BaFin shall carry out the supervision of takeover bids and other public bids for the acquisition of shares in accordance with the provisions of the Act. Within the scope of the tasks allocated to it, it has to counter any irregularities that may impair the orderly execution of bids or that may have materially adverse effects on the securities market in general. The Federal Authority may issue orders which are appropriate and necessary to eliminate or prevent such irregularities. Its exclusive competence to enforce and interpret the WpÜG as well as its exclusive right to grant exemptions secures a powerful position for the BaFin.

[13] G. Rosskopf, *Selbstregulierung von Übernahmeangeboten in Großbritannien* (Berlin: Duncker & Humblot, 2000), 191 *et seq.*; in general M. Button (ed.), *A Practitioner's Guide to the City Code on Takeovers and Mergers* (Surrey: Old Woking, 2004); M. A. Weinberg, M.V. Blank and L. Rabinowitz, *Weinberg and Blank on Takeovers and Mergers,* 5th edn, (London: Sweet and Maxwell, 2002).

[14] Information about the BaFin is supplied at www.bafin.de; see also H.-O. Hagemeister, 'Die neue Bundesanstalt für Finanzdienstleistungsaufsicht', *Wertpapiermitteilungen* (2002), 1773–9.

This quasi-monopolistic position is enhanced by the fact that the Authority is to perform the tasks and exercise the powers assigned to it under the Act *solely* in the interest of the general public, but *not* of individual investors (§ 4 (2) WpÜG), who are accordingly regarded by many as lacking the standing to challenge the Authority's decisions.[15] The BaFin's supervisory activities are aimed *only* at maintaining investor confidence in the processing of public takeovers in general; the legislators regarded this as essential but sufficient for the functioning of the market.[16]

This kind of restriction was first introduced in the Banking Act[17] after the German Supreme Court, the *Bundesgerichtshof*, decided in a shift of opinion in 1979 that the provisions of that Act describing the tasks of the former supervisory agency were meant to protect not only the public, but individual investors as well.[18] As a consequence, the government could be held liable under § 839 of the German Civil Code[19] in combination with Article 34 of the German Constitution to customers of failed banks if the damages these incurred were caused by faulty banking supervision. However, to principally exclude any state liability vis-à-vis the *individual* customers of banks, insurers, investment funds, or exchanges active in a financial market supervised by a government agency, all pertinent laws now include a provision which expressly stipulates that the supervision is carried out in the public interest only. Provisions identical to § 4 (2) WpÜG can be found in § 4 (4) of the Act Concerning the Federal Financial Supervisory Authority,[20] § 3 (3) of the Stock Exchange Act,[21] and § 81 (1) of the Act on the Supervision of Insurance Undertakings.[22]

Since their introduction, these restrictions have been disputed on constitutional and public policy grounds.[23] However, though the

[15] See the discussion hereafter at III.

[16] Legislative Materials, *BTDrucksache* 14/7034, 36.

[17] *Kreditwesengesetz*, Law of 10 July 1961 Federal Gazette I (1961), 881, as amended.

[18] BGHZ 74, 144 *et seq.*; BGHZ 75, 120 *et seq.*

[19] *Bürgerliches Gesetzbuch*, Law of 18 August 1896, newly publicized 2 January 2002, Federal Gazette I (2002), 42 and 2909, Federal Gazette I (2003), 738, as amended.

[20] *Gesetz über die Bundesanstalt für Finanzdienstleistungsaufsicht*, Law of 22 April 2002, Federal Gazette I (2002), 1310, as amended.

[21] *Börsengesetz*, Law of 21 June 2002, Federal Gazette I (2002), 2010, as amended.

[22] *Gesetz über die Beaufsichtigung der Versicherungsunternehmen*, Law of 17 December 1992, Federal Gazette I (1993), 2, as amended.

[23] For a detailed discussion, see e.g. B. Rohlfing, 'Wirtschaftsaufsicht und amtshaftungsrechtlicher Drittschutz', *Wertpapiermitteilungen* (2005), 311–19; L. Giesberts in H. Hirte and T.M.J. Möllers (eds.), *Kölner Kommentar zum WpHG* (Cologne: Carl Heymanns Verlag, 2007), § 4, marginal notes 34 *et seq.*; L. Giesberts in H. Hirte and

German Constitutional Court, the *Bundesverfassungsgericht* (BVerfG), has not yet decided on this question,[24] the Supreme Court held in 2005 that the former pertinent provision in the Banking Act – meanwhile replaced without any change in substance by § 4 (4) of the Act Concerning the Federal Financial Supervisory Authority – did not violate the Constitution.[25] Also, the Takeover Senate of the Frankfurt High Court, the *Übernahmesenat des Oberlandesgerichts Frankfurt am Main*, to which § 62 WpÜG assigns a special jurisdiction for takeover-related administrative proceedings, regarded § 4 (2) WpÜG in two decisions of 2003 as constitutional.[26] With respect to the aforementioned former provision of the Banking Act (and the accordingly restricted tasks of the pertinent agency acting as a precursor of the BaFin), the Court of Justice of the European Communities confirmed in 2004 that a Member State may assign the supervision over financial institutions to a government agency that acts solely in the public interest without violating Community law.[27]

With the various courts squarely backing the German legislators' attempts to avoid state liability for faulty supervision of their agencies, an intense discussion has arisen among academia and practitioners over what consequences this legislative policy has for third parties who want to assert their rights in the context of a takeover.[28] Two different

C. von Bülow (eds.), *Kölner Kommentar zum WpÜG* (Cologne: Carl Heymanns Verlag, 2003), § 4, marginal notes 24 *et seq.*

[24] In a decision of 2 April 2004 the BVerfG refused to deal with this question as not being relevant in that specific case; see BVerfG, *Wertpapiermitteilungen* (2004), 979.

[25] Decision of 20 January 2005; see *BGHZ* 162, 49 *et seq.*

[26] Decisions of 27 May 2003 and 4 July 2003; see *Neue Zeitschrift für Gesellschaftsrecht* (2003), 731, 1122 *et seq.*, respectively.

[27] Decision of 12 October 2004 – Rs C-222/02; see *Zeitschrift für Wirtschaftsrecht* (2004), 2039 *et seq.* (*Paul et al.* v. *the Federal Republic of Germany*).

[28] See C. Aha, 'Rechtsschutz der Zielgesellschaft bei mangelhaften Übernahmeangeboten', *Die Aktiengesellschaft* (2002), 160–169; A. Barthel, *Die Beschwerde gegen aufsichtsrechtliche Verfügungen nach dem WpÜG* (Cologne: Carl Heymanns Verlag, 2004); B. Berding, 'Subjektive öffentliche Rechte Dritter im WpÜG', *Der Konzern* (2004), 771–838; A. Cahn, 'Verwaltungsbefugnisse der Bundesanstalt für Finanzdienstleistungsaufsicht im Übernahmerecht und Rechtsschutz Betroffener', *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht,* 167 (2003), 262–300; M. Hecker, 'Die Beteiligung der Aktionäre am übernahmerechtlichen Befreiungsverfahren', *Zeitschrift für Bankrecht und Bankwirtschaft* (2004), 41–56; H.-C. Ihrig, 'Rechtsschutz Drittbetroffener im Übernahmerecht', *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht*, 167 (2003), 315–50; A. Möller, 'Das Verwaltungs- und Beschwerdeverfahren nach dem Wertpapiererwerbs- und Übernahmegesetz unter besonderer Berücksichtigung der Rechtsstellung Dritter', *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht*, 167 (2003), 301–314; Nietsch, 'Rechtsschutz der Aktionäre der Zielgesellschaft im

venues are being pondered: enforceable public rights against the German Supervisory Authority and, alternatively or additionally, civil law remedies against the bidder. As indicated in the text of the Directive cited at the beginning, both venues are available under Community law, but both are problematic with respect to the legislative design of the WpÜG.

III. Enforceable public rights against the German Supervisory Authority?

If a party involved in a takeover is the *addressee* of an administrative act by the BaFin, it may, as in any normal administrative procedure, appeal the decision (§ 48 WpÜG); if the appeal is unsuccessful, it may file an administrative suit against the Authority with the Frankfurt High Court, which has a special jurisdiction for these matters (§ 62 WpÜG). There are at least no major differences in comparison with general administrative proceedings.[29] Also, if a faulty order of the Authority caused damage for the addressee, it is not disputed that this kind of damage – though it may be rather rare – has to be compensated by the State in accordance with § 839 of the German Civil Code and Article 34 of the German Constitution.

But if individual investors who are *not* the addressees of the specific administrative Act but are only *indirectly* affected by the incriminated decision of the Authority want to challenge a decision of the BaFin, this central question arises: does the restriction to the public interest to avoid

Übernahmeverfahren, *Betriebs-Berater* (2003), 2581–2588; P. Pohlmann, 'Rechtsschutz der Aktionäre der Zielgesellschaft im Wertpapiererwerbs- und Übernahmeverfahren', *Zeitschrift für Unternehmens- und Gesellschaftsrecht*, 36 (2007), 1–36; von Riegen, 'Verwaltungsrechtschutz Dritter im WpÜG', *Der Konzern* (2003), 583; B. Rohlfing, 'Wirtschaftsaufsicht', (note 23, above), 311–19; Y. Schnorbus, 'Rechtsschutz im Übernahmeverfahren', *Wertpapiermitteilungen* (2003), 616–25 (Part I), 657–64 (Part II); Y. Schnorbus, 'Drittklagen im Übernahmeverfahren – Grundlagen zum Verwaltungsrechtsschutz im WpÜG', *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht*, 166 (2002), 72–118; C. H. Seibt, 'Rechtsschutz im Übernahmerecht', *Zeitschrift für Wirtschaftsrecht* (2003), 1865–1877; B. Simon, *Rechtsschutz im Hinblick auf ein Pflichtangebot nach § 35 WpÜG*, (Baden-Baden, Nomos, 2005); B. Simon, 'Zur Herleitung zivilrechtlicher Ansprüche aus §§ 35 und 38 WpÜG', *Neue Zeitschrift für Gesellschaftsrecht* (2005), 541–544; M. Uechtritz / G. Wirth, 'Drittschutz im WpÜG – Erste Entscheidungen des OLG Frankfurt a.M.: Klarstellungen und offene Fragen', *Wertpapiermitteilungen* (2004), 410–417; D. A. Verse, 'Zum zivilrechtlichen Rechtsschutz bei Verstößen gegen die Preisbestimmungen des WpÜG', *Zeitschrift für Wirtschaftsrecht* (2004), 199–209.

[29] The legislators have expressly stated this in the legislative materials to the WpÜG; see *BTDrucksache* 14/7034, 36.

state liability *necessarily* have the negative effect of denying these *any* standing? For example, do individual shareholders of the target company have the standing to request the BaFin to take action against the bidder who, in spite of getting control of the target, refuses to make a mandatory bid? Or do they have the standing to challenge an administrative act by the Authority that mistakenly exempts the bidder from doing so?

The BaFin and the courts have taken a clear position. The Authority has consistently decided *against* a standing of individual shareholders under these circumstances. In its view, shareholders lack the individual and direct rights necessary for any action because of the express restriction of its activities to the public interest in § 4 (2) WpÜG. The Frankfurt High Court has repeatedly confirmed this view and dismissed all pertinent suits filed by shareholders of targets against the BaFin.[30] The High Court argues that although various provisions of the WpÜG indeed do have the potential to favour the interests of shareholders, this fact as such does not imply that the legislators intended to create a regime of individual enforceable *public* rights to assert their interests by way of an active participation in the formal takeover proceedings.[31] Nor were they obliged to do so on constitutional grounds. As the High Court sees it, the legislators instead had the freedom to design the present regime restricted to the protection of the public interest only without violating any constitutional rights of third parties.[32] Instead of administrative remedies against the BaFin, the High Court refers shareholders to potential *civil* remedies against the bidder.

The High Court quotes legislative history in its argument. In fact, earlier drafts of the Takeover Act did contain a provision that provided for damages in the case of an abusive use of third-party rights. The existence of that provision clearly shows that, originally, the legislators must have planned to grant those rights. That would have made a lot of sense from the regulatory logic of the WpÜG, which requires that the Act, as well as the Securities Trading Act and other financial market-related laws, serve a dual purpose: protection of the functioning of the market in general as well as protection of individual investors.[33] However, in the course of

[30] See the decisions cited supra, note 26, and the decision of 9 October 2003; see *Neue Zeitschrift für Gesellschaftsrecht* (2004), 240 *et seq.*

[31] See Decision of 4 July 2003; see *Neue Zeitschrift für Gesellschaftsrecht* (2003), 1121 *et seq.*

[32] See Decision of 4 July 2003, see *Neue Zeitschrift für Gesellschaftsrecht* (2003), 1122 *et seq.*

[33] K.J. Hopt, 'Grundsatz und Praxisprobleme nach dem Wertpapiererwerbs- und Übernahmegesetz', *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht*, 166 (2002), 386 ('… Funktionen- und Anlegerschutz').

the legislative proceedings, actually at its very end, that provision was scrapped because the Financial Committee of the Parliament in charge of politically renegotiating the Act did not see any practical necessity for it; according to the Committee, third parties do not have any individual rights in this regard that they could possibly abuse.[34] In this view, protection of individual investors is but a mere 'legislative reflection' of the general protection of the market function.

The reasoning of the BaFin and the High Court is disputed on various grounds. Though the majority of commentators accept the constitutionality of § 4 (2) WpÜG – notwithstanding their criticism of the legal solution on policy grounds – some do so only under the precondition that the provision is at least interpreted in a constitutional manner which would exclude a complete denial of third-party rights.[35] This approach, however, is problematic. The legislative order of the provision – to act in the public interest only – is unequivocal.[36] Thus it does not seem permissible to circumvent the clearly expressed legislative intention by way of constitutional interpretation.[37]

Others promote a restrictive interpretation of § 4 (2) WpÜG. In this view the provision aims only at excluding state liability for faulty administrative acts or a failure to act by the BaFin, but does not say anything about the rights of third parties and their standing vis-à-vis the Authority.[38] However, this interpretation too is problematic. The exclusion of state liability is dependent on the assumption of non-existence of according individual rights against the Authority. Thus, if § 4 (2) WpÜG excludes state liability under the provisions of the Act, these cannot be contradictorily interpreted as simultaneously granting individual public rights enforceable against the BaFin with respect to other matters.[39]

[34] See Legislative Materials, *BTDrucksache* 14/477, 70; the technical conception of the WpÜG has been criticized strongly in this regard; see e.g. Y. Schnorbus, 'Drittklagen', (note 28, above), 117.

[35] See e.g. L. Giesberts, in H. Hirte and C. von Bülow (eds.), *Kölner Kommentar zum WpÜG* (note 23, above), § 4, marginal notes 62 *et seq*., 75; Aha, 'Rechtsschutz der Zielgesellschaft', (note 28, above), 162 *et seq.* Others plainly deny the constitutionality; see e.g. B. Berding, 'Subjektive öffentliche Rechte Dritter im WpÜG', (note 28, above), 774 *et seq.*

[36] A. Möller, 'Das Verwaltungs- und Beschwerdeverfahren', (note 28, above), 306.

[37] B. Simon, *Rechtsschutz*, (note 28, above), 117 *et seq.*

[38] See e.g. A. Cahn, 'Verwaltungsbefugnisse der Bundesanstalt', (note 28, above), 284 *et seq*.

[39] P. Pohlmann, 'Rechtsschutz der Aktionäre', (note 28, above), 20; M. Uechtritz and G. Wirth, 'Drittschutzim', (note 28, above), 414.

Also, it is not permissible, as some have attempted, to disregard the unequivocal legislative will to exclusively restrict the Act's regulatory aim to the protection of the market function by assuming that this does not actually mean a total exclusion of individual investor protection because some provisions of the Act expressly refer to their interests.[40] An example of this is § 37 (1) WpÜG. According to this provision, the BaFin may exempt bidders who have acquired a controlling stake from their duty to make a full bid for all outstanding shares only if this exemption would not be contrary to the interests of the other target's shareholders.[41] However, this reference to the shareholders' interests cannot be interpreted as a means to grant them individual and direct public rights. It is simply a legislative order addressed at the BaFin to balance the interests of the bidder with those of the other shareholders in general under specific circumstances.[42]

The above considerations can be summarized in the – not altogether happy – finding that the current German takeover legislation does not make available any direct public rights for third parties involved in a takeover that might be enforced in an administrative proceeding against the BaFin. Instead, third parties are forced to rely on the Authority's zest to supervise the country's takeover market. The only alternatives, if any, are civil law remedies against the bidder that might possibly provide some direct relief for the shareholders of the target and other third parties.

IV. Civil law remedies against the bidder?

From this perspective, the following questions are of specific practical interest: does § 35 WpÜG – stipulating the obligation to publish and to make an offer in the case of an acquisition or change of control – provide a legal basis for the other shareholders of the company against a shareholder that has acquired a controlling stake[43] to make an offer for all outstanding shares? If not, or if an offer is made but the consideration offered is insufficient, may the shareholders sue such a person for damages?

Once more, the issue is highly disputed. In principle, the WpÜG is conceived as a market surveillance law showing the typical mix of public

[40] See e.g. A. Barthel, *Die Beschwerde*, (note 28, above), 109 *et seq.*

[41] For details, see H. Krause and T. Pötzsch, in H. Assmann, T. Pötzsch, and U. H. Schneider (eds.), *Wertpapiererwerbs- und Übernahmegesetz* (Cologne: Otto Schmidt, 2005), § 37, marginal notes 31 *et seq.*

[42] B. Simon, *Rechtsschutz*, (note 28, above), 127 *et seq.*

[43] I.e. at least 30% of the target's voting rights, as defined in § 29 WpÜG.

law regulations, administrative powers, quasi-criminal sanctions and civil law consequences. Within this regulatory framework, the question of which provisions of the Act can be qualified as civil law in substance and what legal consequences are attached to this qualification can only be answered on a case-by-case analysis.[44] With respect to the market surveillance-oriented character of WpÜG, there is no underlying assumption that the provisions of the Act are intended to have civil law consequences in principle; instead, as an exemption this has to be shown for each individual provision.[45]

In the decisions cited, the Frankfurt High Court has (expressly) left open the question as to whether § 35 WpÜG actually provides a legal basis for shareholders to demand an offer for their shares from a controlling shareholder in accordance with the pertinent provisions of the Act and the WpÜG Offer Ordinance.[46] [47] The literature is divided, but a clear majority of commentators answer the question in the negative.[48] There is indeed no room for a different interpretation. The wording of § 35 does not mention shareholders at all but (only) stipulates a general duty for the controlling shareholder to publish an offer. This general order matches the market-oriented character of the provision. Any other understanding would lead to a plethora of difficulties when applying the rule in a civil law context. Additionally, a broad interpretation would be problematic on constitutional grounds, as the resulting far-reaching consequences for the controlling shareholder would have to be based on a narrowly defined rule.[49] Also, allowing for individual claims would be hard to reconcile with the Act's overarching aim to provide for a regulatory framework that guarantees speedy takeover procedures.[50] In other words, the legislators obviously did not intend to grant shareholders a direct civil law claim against a controlling shareholder under § 35.[51]

[44] Y. Schnorbus, 'Rechtsschutz', (note 28, above), 663.
[45] Y. Schnorbus, 'Rechtsschutz ', (note 28, above), 663.
[46] § 31 WpÜG, §§ 3–7 *WpÜG-Angebotsverordnung*, see supra note 11.
[47] See the decisions cited supra, note 26 and note 30.
[48] See e.g. H. Krause and T. Pötzsch, in H. Assmann, T. Pötzsch and U.H. Schneider (eds.), *Wertpapiererwerbs- und Übernahmegesetz* (Cologne: Otto Schmidt, 2005), § 35, marginal notes 252 *et seq.*; P. Pohlmann, 'Rechtsschutz der Aktionäre', (note 28, above), 11 *et seq.*; B. Simon, *Rechtsschutz*, (note 28, above), 206 *et seq.*
[49] H. Krause and T. Pötzsch, in H. Assmann, T. Pötzsch and U.H. Schneider (eds.), *Wertpapiererwerbs- und Übernahmegesetz* (Cologne: Otto Schmidt, 2005), § 35, marginal note 252.
[50] Legislative Materials, BTDrucksache 14/7034, 35.
[51] P. Pohlmann, 'Rechtsschutz der Aktionäre', (note 28, above), 12.

Even if the shareholders do not have a primary claim against the controlling shareholder, they may nevertheless possibly have a secondary claim in the form of damages based on § 823 (2) Civil Code in combination with § 35 WpÜG. § 823 (2) Civil Code provides for a general liability in damages in combination with specific protective provisions of other codes. The precondition for this is a violation of a rule that intends to protect not only the market as such but the individual claimant as well.[52] According to a minority view, the denial of direct *public* rights of individual shareholders as third parties under the WpÜG automatically implies that *none* of the provisions of the Act can be regarded from a *civil* law perspective as a protective norm in the sense of § 823 (2) Civil Code in order to prevent a contradictory policy interpretation.[53] This view, however, is not convincing. There is *no* compelling connection between a public law and a tort law evaluation.[54] Rather, the two questions – whether a person has an administrative claim against a state agency and/or whether that person, cumulatively or alternatively, has a tort claim against a controlling shareholder – have to be clearly distinguished and, accordingly, different answers to each do not constitute a contradiction in the evaluation of that norm.

The relevant question is thus whether § 35 as it stands may serve as a protective norm in the sense of § 823 (2) Civil Code. This again is controversially discussed.[55] As has been argued with respect to a possible primary claim against the controlling shareholder, there is also no indication in the wording of the provision (nor in the legislative materials)

[52] See in general H. Sprau, in Bassenge et al. (eds.), *Palandt. Bürgerliches Gesetzbuch*, 67th edn (Munich: C.H. Beck, 2008), § 826, marginal notes 56 *et seq.*

[53] Y. Schnorbus, 'Rechtsschutz', (note 28, above), 663; B. Berding, 'Subjektive öffentliche Rechte Dritter im WpÜG', (note 28, above), 777; H. Krause and T. Pötzsch, in H. Assmann, T. Pötzsch and U. H. Schneider (eds.), *Wertpapiererwerbs- und Übernahmegesetz* (Cologne: Otto Schmidt, 2005), § 35, marginal note 253 with respect to § 35 WpÜG.

[54] P. Pohlmann, 'Rechtsschutz der Aktionäre', (note 28, above), 21; D. A. Verse, 'Zum zivilrechtlichen Rechtsschutz', (note 28, above), 203 *et seq.*; H.-C. Ihrig, 'Rechtsschutz', (note 28, above), 338; C. H. Seibt, 'Rechtsschutz ', (note 28, above), 1868.

[55] *Pro:* e.g. C. von Bülow in H. Hirte and C. von Bülow (eds.), *Kölner Kommentar zum WpÜG* (Cologne: Carl Heymanns Verlag, 2003), § 35, marginal note 199; T. Baums and M. Hecker in T. Baums and G. F. Thoma (eds.), *WpÜG – Kommentar zum Wertpapiererwerbs- und Übernahmegesetz* (Cologne: RWS Verlag), § 35, marginal notes 297 *et seq.*; H.-C. Ihrig, 'Rechtsschutz', (note 28, above), 349. *Contra:* besides those cited supra at note 52, see e.g. P. Pohlmann, 'Rechtsschutz der Aktionäre', (note 28, above), 12 *et seq.*; Hommelhoff and C.-H. Witt in W. Haarmann and M. Schüppen (eds.), *Frankfurter Kommentar zum Wertpapiererwerbs- und Übernahmegesetz*, 2nd edn. (Franfurt am Main: Verlag Recht und Wirtschaft, 2005), § 35, marginal note 109; B. Simon, 'Zur Herleitung zivilrechtlicher Ansprüche', (note 28, above), 542.

that the legislators intended § 35 to serve as a protective norm for the individual shareholders as a basis for secondary damages claims. But such an expressed intent would be necessary. It is a common view that the mere fact that a norm may (also) have beneficial consequences for a person involved as such is not sufficient to assume a protective *purpose* of that norm. Furthermore, allowing for a secondary claim for the shareholders would in effect undermine the legislators' decision not to grant them a primary claim in the first place: according to § 249 (1) Civil Code, persons who are liable in damages must restore the position that would exist if the circumstance obliging them to pay damages had not occurred. This would mean that the claimants could require the controlling shareholder to make an offer to buy their shares as damages.

Instead of allowing for either a primary or a secondary claim in the form of damages, the legislators have created a unique system of triple sanctions against the controlling shareholder who failed to make a bid pursuant to § 35 WpÜG: (i) § 60 WpÜG provides for an administrative fine, (ii) § 59 WpÜG regulates the loss of rights for controlling shareholders as long as they do not comply with their duties, and (iii) § 38 WpÜG obliges them to pay the shareholders of the target company, for the duration of the contravention, interest on the amount of the consideration of five percentage points per year above the relevant base interest rate pursuant to § 247 Civil Code. Whether shareholders have a direct claim against the controlling shareholder based on § 38 WpÜG, and how this provision is to be characterized dogmatically – as a civil law claim or sanction – is once again controversial.[56] But this will no longer come as a surprise for the patient reader.

Less disputed, however, is the standing of the target's shareholders with respect to § 31 WpÜG. This provision is of central importance in the context of a mandatory bid. As already mentioned, it sets out the standards for an appropriate consideration which the bidder has to offer, and ensures that all shareholders get the same price.[57] To these ends, the average stock market price and purchases of shares up to six months prior to the publication of the bid have to be taken into consideration.[58]

[56] See B. Simon, 'Zur Herleitung zivilrechtlicher Ansprüche', (note 28, above), 543; P. Pohlmann, 'Rechtsschutz der Aktionäre', (note 28, above), 18 *et seq.*; Hommelhoff and C.-H. Witt in W. Haarmann and M. Schüppen (eds.), *Frankfurter Kommentar zum Wertpapiererwerbs- und Übernahmegesetz*, (note 55, above), § 38, marginal notes 1 *et seq.*, 31 *et seq.*; Y. Schnorbus, 'Rechtsschutz', (note 28, above), 663.

[57] Details are regulated in §§ 3–7 WpÜG Offer Ordinance; see supra note 11.

[58] § 31 (I) WpÜG together with § 4 WpÜG Offer Ordinance.

In addition, purchases made during the offer period for a higher price as well as purchases made within one year after the closing have to be considered.[59] If the price offered by the bidder violates these standards, the shareholders who have accepted the bid are entitled to file a claim against the bidder demanding the price difference. Though the dogmatic questions involved are again somewhat controversial, the fact that § 31 WpÜG provides for a direct civil law remedy against the bidder is generally acknowledged.[60] Thus, at least with regard to a consideration offered, the shareholders might take the initiative to assert their rights.

V. Conclusion

Perhaps the *tour d'horizon* above has unearthed more questions than it has answered. Indeed, the German takeover regulation shows a surprising amount of legal uncertainty and unresolved dogmatic questions. This complexity results partly from the fact that the WpÜG is to a significant degree a legal transplant whose imported features do not always fit seamlessly into the traditional German legal order. However, at least for commentators, this has obviously been a bone of contention. The numerous commentaries, the multitude of dissertations, and the countless academic articles on the German takeover regulation have assembled together to form an incredible amount of literature within a few years that some may regard as somewhat out of proportion with the *actual* number of takeovers in Germany. In this regard as well, the German takeover regime seems to differ significantly from its British role model.[61]

Third-party rights are but one example of the intense discussion. These have also been the cause of an unexpected – and rather 'un-British' – spat of litigation soon after the WpÜG was enacted. However, in most cases shareholders of target companies have tried to sue in vain. As they have discovered the hard way, though it is disputed, the current German takeover legislation does not make available any direct public rights for third parties involved in a takeover that can be enforced in an administrative proceeding against the BaFin in its capacity as supervising authority over the German takeover market.

[59] § 31 (4) (5) WpÜG.

[60] See e.g. D. A. Verse, 'Zum zivilrechtlichen Rechtsschutz', (note 28, above), 200 *et seq.*; Pohlmann, 'Rechtsschutz der Aktionäre', (note 28, above), 14 *et seq.*

[61] For a structural comparison, see H. Baum, 'Funktionale Elemente und Komplementaritäten des britischen Übernahmerechts', *Recht der Internationalen Wirtschaft* (2003), 421 *et seq.*

Thus the attention has shifted to civil law remedies as a possible alternative. But here, too, the picture is sobering. As a rule, the provisions of the WpÜG do not provide for directly enforceable rights against a bidder. This is especially true with respect to the mandatory bid. Shareholders do not have the means to force a shareholder who gained control to make a bid for all outstanding shares of the target company as required under the WpÜG. Some consolidation may come from the fact that, at least with respect to a consideration offered, shareholders may hold the controlling shareholder accountable.