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# Germany

## Takeover Guide

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## INTRODUCTION

Discussions on creating a set of rules governing public takeovers across Europe had already begun in the mid-1970s. However, only in May 2004, and after many fruitless attempts, was the Directive 2004/25/EC on takeover bids (the 'Takeover Directive') adopted by the European Parliament and the Council of the European Union.

The provisions of the Takeover Directive are a marked result of compromise and, therefore, fall short of the objective to create a level playing field for takeovers in Europe. Nonetheless, the Takeover Directive provides a framework for national regulations and, as such, is an important set of rules for those who plan takeovers across the EU.

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## THE PURPOSE OF THE TAKEOVER DIRECTIVE AND ITS GENERAL PRINCIPLES

Prior to the implementation of the Takeover Directive by EU Member States, the rules relating to the conduct of takeover offers varied widely throughout the EU. As a result, takeover offers could not be undertaken with the same expectation of success in different EU Member States, and shareholders did not have the same protection and opportunities. Against this background, the Takeover Directive aimed at the harmonisation of the rules relating to:

- the conduct of takeover offers; and
- the protection of shareholders of target companies (in particular, minority shareholders) in the EU.

However, due to the widely diverging ideas of the respective EU Member States, the Takeover Directive merely established minimum standards by creating a framework consisting of certain common principles and a number of general requirements that EU Member States had to implement through more detailed rules in accordance with the applicable national laws of the respective EU Member States. Accordingly, EU Member States may provide for additional conditions and provisions that are more stringent than those set out in the Takeover Directive.

When implementing the Takeover Directive, EU Member States had to ensure that the following general principles were complied with:

- all target shareholders of the same class must be given equal treatment;
- if a person acquires control of a company, it has to make a mandatory takeover offer;
- the shareholders of the target company must have sufficient time and information to be able to reach a properly informed decision on the takeover offer;
- the board of the target company must make a public statement to its shareholders in which it sets out its opinion on the bid, in particular, its views on the effects of the implementation of the offer on all the interests of the target

company, and specifically on employment and the locations of the target company's places of business;

- the board of the target company must act in the interests of the company as a whole and must not deny the shareholders the opportunity to decide on the merits of the takeover offer;
- false markets must not be created in the securities of the target company, the bidder or any other company affected by the takeover offer in such a way that a rise or fall in the share prices becomes artificial and normal market functions are distorted;
- a bidder must announce a takeover offer only after ensuring that he/she can fulfil in full any cash consideration, if such is offered, and after taking all reasonable measures to secure the implementation of any other type of consideration; and
- the target company must not be hindered in the conduct of its business for longer than is reasonable by a takeover offer for its securities.

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## SCOPE OF APPLICATION

The Takeover Directive is applicable to

- takeover offers;
- securities of companies governed by the laws of an EU Member State; and
- where all or some of those securities are admitted for trading on a regulated market (within the meaning of Directive 2004/39/EC, repealing Directive 93/22/EEC) in one or more EU Member States.

Under the Takeover Directive:

- a 'takeover offer' means a voluntary or mandatory public offer made to the shareholders of a company to acquire all or some of their securities, which follows or has as its objective the acquisition of control of the company in accordance with the national law of the respective EU Member State;
- 'securities' means transferable securities carrying voting rights (however, some states have extended the scope of their national regulations to securities that do not carry voting rights).

The Takeover Directive does not apply to public offers:

- made by the target company itself;
- to acquire securities that do not follow or do not have as their objective the acquisition of control;
- for securities issued by EU Member States' central banks; and
- for securities issued by companies whose objective is the collective investment of capital provided by the public, which operates on the principle of risk-spreading and the units of which are, at the holder's request, repurchased or redeemed out of the assets of those companies.

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## SUPERVISORY AUTHORITY AND APPLICABLE LAW

Each EU Member State is to designate the authority or authorities competent to supervise takeover offers in the EU Member State. The authorities designated must be either public authorities, associations or private bodies recognised by national law or by public authorities expressly empowered for that purpose by national law.

In regards to supervision and applicable law, the following distinctions have to be made:

- if the securities of the target company are admitted for trading on a regulated market in the EU Member State in which the target company also has its registered office, the competent authority to supervise a takeover offer and the applicable law is that of the EU Member State; and
- if the shares of the target company are not admitted for trading on a regulated market in the EU Member State in which the target company has its registered office but in one or more other EU Member States, the applicable laws and the competence of the supervisory authorities are split between EU Member States as set out below. Thus, takeover offers for securities in such a target company have to be made in compliance with two sets of rules and the supervisory authorities will have jurisdiction over different elements of the takeover offer.

The competent authority and the applicable law in matters relating to:

- corporate law (in particular, the percentage of voting rights that confers control, the obligation to make a mandatory takeover offer and the restrictions on frustrating actions) or the information to be provided to the employees of the target company shall be those of the EU Member State in which the target company has its registered office;
- the offer consideration, the content of the offer document and the procedure of the takeover offer depends on whether the target company is listed in one or various EU Member States. If the securities of the target company are admitted for trading on a regulated market in:
  - only one EU Member State, the competent authority and applicable law shall be those of such EU Member State; and
  - more than one EU Member State, the competent authority and applicable law shall be those of the EU Member State on the regulated market of which the securities of the target company were first admitted for trading.

If the securities were first admitted for trading simultaneously on several exchanges, the target company or the supervisory authorities have to determine which of the supervisory authorities of those EU Member States shall be the competent authority.

### Table overview

Seat target	Listing target	Supervision (corporate) <sup>1</sup>	Supervision (general/procedure) <sup>2</sup>
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Member State	Member State	Member State supervisory authority	Member State supervisory authority
Member State	Other European Economic Area (EEA)	Member State supervisory authority	Other EEA supervisory authority
Member State	Several EEA	Member State supervisory authority	<ul style="list-style-type: none"> <li>• First listing</li> <li>• Parallel listings: target's choice</li> </ul>
Other EEA	Member State	Other EEA supervisory authority	Member State supervisory authority
Member State	United States	N/a	N/a
US	Member State	N/a	N/a

1 Eg, control threshold, mandatory offer and permitted defensive measures

2 Eg, consideration, procedure and offer document

## SIMPLIFIED OFFER TIMETABLE FOR A VOLUNTARY OFFER

Event	Time
Discussions with target company and/or shareholders	When the bidder chooses
Decision of the bidder to launch an offer	When the bidder chooses
Publication of the decision	Without undue delay after a decision is made
Supervisory authority is informed of the decision	EU Member States may also require information before the decision is made public
Boards of the target company and bidder inform their respective employee representatives	As soon as the decision is made public

Offer document to be submitted to the supervisory authority	Before the offer document is published  EU Member States may provide that the supervisory authority has to approve the offer document prior to its publication
Publication of the offer document	'In good time' (according to the directive), which means within a certain time after publication of the decision to be determined by the respective EU Member State
Boards of the target company and bidder inform their respective employee representatives	As soon as the offer document is made public
Offer period, that is, time allowed for acceptance of the offer	No less than two weeks and no more than ten weeks after the publication of the offer document  EU Member States may provide: <ul style="list-style-type: none"> <li>• for the right of the bidder to extend the offer period, if the bidder gives at least two weeks' notice</li> <li>• for rules deviating from the general period in specific cases</li> <li>• for the authorisation of the supervisory authority to amend the offer period in order to allow for a general meeting of the target company</li> </ul>
Reasoned opinion of the board of the target company	During the offer period

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## DISCLOSURE IN THE OFFER DOCUMENT AND BEYOND

All shareholders of the target company must be provided with the same information in relation to the bid. Shareholders also have to be provided with sufficient information to decide whether to accept or reject the takeover offer, principally through:

- the offer document;
- disclosure of the results of the takeover offer (which, in most EU Member States means disclosure not only of the final results but also of regular updates from the bidder as to the number of securities that have already been tendered); and
- the reasoned opinion of the target's board on the takeover offer.

### Offer document

The bidder must publish an offer document that contains the information necessary to enable the shareholders of the target company to reach a properly informed decision on the bid. The offer document has to at least contain information on:

- the terms of the offer;
- the identity of the bidder and, where the bidder is a company, the type, name and registered office of that company;
- the securities or, where appropriate, the class or classes of securities for which the offer is made;
- the consideration offered for each security or class of securities and, in the case of a mandatory offer, the method employed in determining it, with the particulars of the way in which that consideration is to be paid;
- the compensation offered for rights that might be removed as a result of the breakthrough rule (see below), with the particulars of the way in which that compensation is to be paid and the method employed in determining it;
- the maximum and minimum percentages or quantities of securities that the bidder undertakes to acquire;
- details of any existing holdings of the bidder, and of persons acting in concert with him/her, in the target company;
- all the conditions to which the offer is subject;
- the bidder's intentions with regard to:
  - the target company;
  - the future business of the bidder, in so far as it is affected by the offer;
  - the safeguarding of the jobs of their employees and management, including any material change in the conditions of employment; and
  - in particular, the bidder's strategic plans for the two companies and the likely repercussions on employment and the locations of the companies' places of business;
- the time allowed for the acceptance of the offer;
- where the consideration offered by the bidder includes securities of any kind, information concerning those securities;
- information concerning the financing for the offer;
- the identity of persons acting in concert with the bidder or with the target company and, in the case of companies, their types, names, registered offices and relationships with the bidder and, where possible, with the target company; and

- the national law that will govern contracts concluded between the bidder and the holders of the target company's securities as a result of the offer, and the competent courts.

If the offer document is subject to the prior approval of the respective supervisory authority and has been approved, it shall be recognised, subject to any translation required, in any other EU Member State where the target's securities are admitted for trading, without it being necessary to obtain the approval of the supervisory authorities of that EU Member State. Such authorities may require the inclusion of additional information in the offer document only in very limited circumstances.

### **Reasoned opinion of the target board**

The board of the target company shall draw up and make public a document setting out its opinion on the bid and the reasons on which it is based. Such a document must include the views of the target company's board:

- on the effects of the implementation of the bid on all the company's interests and specifically employment; and
- on the bidder's strategic plans for the target company and their likely repercussions on employment and the locations of the company's places of business as set out in the offer document.

### **Annual information (independent of a specific bid)**

According to the Takeover Directive, EU Member States shall ensure that companies subject to the Takeover Directive publish detailed information in their annual report and that the board presents an explanatory report to the annual general meeting of shareholders on the following:

- the structure of their capital, including securities that are not admitted for trading on a regulated market in a EU Member State, where appropriate with an indication of the different classes of shares and, for each class of shares, the rights and obligations attaching to it and the percentage of total share capital that it represents;
- any restrictions on the transfer of securities, such as limitations on the holding of securities or the need to obtain the approval of the company or other holders of securities;
- significant direct and indirect shareholdings (including indirect shareholdings through pyramid structures and cross-shareholdings);
- the holders of any securities with special control rights and a description of those rights;
- the system of control of any employee share scheme where the control rights are not exercised directly by the employees;
- any restrictions on voting rights, such as limitations on the voting rights of holders of a given percentage or number of votes, deadlines for exercising voting rights, or systems whereby, with the company's cooperation, the financial rights attaching to securities are separated from the holding of securities;



- any agreements between shareholders that are known to the company and may result in restrictions on the transfer of securities and/or voting rights;
- the rules governing the appointment and replacement of board members, and the amendment of the articles of association;
- the powers of board members, and in particular the power to issue or buy back shares;
- any significant agreements to which the company is a party and that take effect, alter or terminate upon a change of control of the company following a takeover offer, and the effects thereof, except where their nature is such that their disclosure would be seriously prejudicial to the company; this exception shall not apply where the company is specifically obliged to disclose such information on the basis of other legal requirements; and
- any agreements between the company and its board members or employees providing for compensation if they resign or are made redundant without a valid reason or if their employment ceases because of a takeover offer.

The information that has to be provided according to the Takeover Directive makes it much easier for a bidder to conduct meaningful due diligence of the target company with publicly available information, which is particularly important in hostile situations.

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## MANDATORY AND VOLUNTARY TAKEOVER OFFERS

In the event that a person, as a result of his/her own acquisition or the acquisition by persons acting in concert with him/her, reaches a certain percentage of voting rights in a company that gives him/her control of that company, EU Member States must ensure that such a person is required to make a mandatory takeover offer in order to protect the minority shareholders of that company. The percentage of voting rights that confers control and the method of its calculation are left to be determined by the rules of the EU Member State in which the company has its registered office. In many EU Member States, the threshold that triggers the obligation to make a mandatory takeover offer is 30 per cent (eg, in Germany, Spain or the Netherlands).

Such a mandatory takeover offer must be made without undue delay to all of the shareholders of the target company for all of their securities at an equitable price, which according to the Takeover Directive is a certain minimum offer price (see below).

According to the Takeover Directive, if and to the extent national law provides for an adequate protection of minority shareholders, the Member States can create derogations from the mandatory bid rule (all EU Member States have made use of such an option, to a certain extent).

In addition to mandatory takeover offers, the Takeover Directive also covers voluntary takeover offers made to all the shareholders for all their securities if such an offer is aimed at the acquisition of control of the target company. Where control has been acquired as a result of such a voluntary takeover offer, the obligation to make a mandatory takeover offer no longer applies.

The Takeover Directive does not cover voluntary offers for less than 100 per cent of the securities or that are not directed to all but only certain shareholders (limited offers). Therefore, it is left to EU Member States to decide whether and to what extent they allow/prohibit voluntary limited offers.

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## CONSIDERATION AND MINIMUM PRICING RULES

All shareholders of the target company must receive the same consideration for each security of the same class. In general, the bidder may offer as consideration:

- liquid securities;
- cash; or
- a combination of both.

However, a cash consideration must be offered, at least as an alternative, in the following events:

- the consideration offered does not consist of liquid securities admitted for trading on a regulated market. Please note that, for example, securities listed (only) in the US cannot be the sole consideration in a takeover offer;
- the bidder, or persons acting in concert with him/her, acquired securities carrying five per cent or more of the voting rights of the target company in return for a cash payment in the period beginning six to 12 months (as determined by the respective EU Member State) prior to the launch of the mandatory takeover offer and ending with the expiration of the acceptance period; and
- the respective EU Member State decided that a cash consideration (at least as an alternative) must be offered in any event.

As stated above, mandatory takeover offers must be made at an equitable price, which according to the Takeover Directive is the highest price paid for the same securities by the bidder, or by persons acting in concert with him/her:

- in a period to be determined by EU Member States of not less than six months and not more than 12 months prior to the launch of the mandatory takeover offer; and
- in the period from the launch of the mandatory takeover offer until the expiration of its acceptance period (in such a case, the bidder must increase his/her offer price so that it is not less than the highest price paid for the securities so acquired).

The supervisory authorities may be authorised by EU Member States to adjust the equitable price either upwards or down, in circumstances (eg, market price effects resulting from exceptional occurrences, market price manipulations or the collusion of a bidder with a person acting jointly) and in accordance with criteria that are clearly determined. Therefore, for example, according to the Court of Justice of the EU, a national regulation may provide three different methods for determining the price and, at the same time, it stipulates that the one leading to the highest price must always be chosen. Any such decision must be substantiated and made public.

For example, the bidder may be obliged to pay a higher price to shareholders that already tendered their securities if such a price has been paid subsequently (within one year after the offer period ended) to other shareholders, be it within or outside the offer procedure.

The Takeover Directive does not contain any requirements with respect to the consideration to be offered in a voluntary takeover offer. The provisions regarding the equitable price set out above relate only to mandatory takeover offers. However, EU Member States may decide (and some of them have decided) whether and to what extent they establish minimum standards with respect to the consideration to be offered in voluntary takeover offers. Because the obligation to make a mandatory takeover offer no longer applies where control has been acquired as a result of a voluntary takeover offer, there are indeed good reasons to apply at least similar minimum standards to those applied to mandatory takeover offers.

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## DEFENCE IN HOSTILE SITUATIONS

### Overview

Pursuant to the Takeover Directive, EU Member States can choose whether to apply:

- restrictions on frustrating actions of the management board of the target company (Article 9, duty of neutrality); and/or
- the unenforceability of certain restrictions in the target company's articles of association or in contractual agreements that could frustrate the takeover offer, for example, restrictions on the transfer of securities, voting rights or extraordinary rights concerning the appointment and removal of board members (Article 11, breakthrough).

If an EU Member State decides to opt out of Articles 9 and/or 11 it must grant the shareholders' meeting of the target company the option (which shall be reversible) of applying the relevant article.

Whereas the majority of EU Member States have implemented Article 9 of the Takeover Directive, only a very limited number of EU Member States have adopted Article 11.

### Restrictions on frustrating actions (Article 9)

If an EU Member State or the shareholders' meeting of the target company opted to impose restrictions on the frustrating actions of the management board of the target company set forth in Article 9, only the following actions by the management board would be permitted in the period from the time the board of the target company receives the information concerning the takeover offer until the result of the takeover offer is made public or the takeover offer lapses (EU Member States may prescribe that this period begins at an earlier stage, for example, the publication of the decision to launch a takeover offer):

- searching for a 'white knight';
- actions within the ordinary course of business;
- actions beyond the ordinary course of business, if the decision was taken before the beginning of the period set out above and has not yet been partly or fully implemented; and
- any actions, if authorised by a shareholders' meeting, taking place after the beginning of the period set out above. In order to facilitate obtaining the prior authorisation, EU Member States may adopt rules allowing a shareholders' meeting to be called at short notice (the minimum period, however, is two weeks).

If an EU Member State decided to opt out and the shareholders' meeting of the target company did not decide to opt in, the existing rules on permitted frustrating actions of the management board in the respective EU Member State (if any) remain applicable. Then, general authorisations by the shareholders' meeting before the beginning of the period set out above ('shelf defence') or other frustrating actions may be permissible.

### **Breakthrough (Article 11)**

If an EU Member State or the shareholders' meeting of the target company opted to apply the breakthrough rule set forth in Article 11, the following provisions apply:

- during the acceptance period, restrictions on the transfer of securities (provided for in the articles of association or in contractual agreements) do not apply vis-à-vis the bidder;
- during the acceptance period, at a shareholders' meeting that decides on any frustrating actions, restrictions on voting rights provided for in the articles of association or in contractual agreements have no effect and multiple-vote securities carry only one vote; and
- if the bidder holds 75 per cent or more of the capital carrying voting rights, at the first shareholders' meeting (called by the bidder) following the closure of the offer, restrictions on voting rights and any extraordinary rights of shareholders concerning the appointment or removal of supervisory board members do not apply and multiple-vote securities carry only one vote with regard to:
  - amendments to the articles of association;
  - and
  - removals and/or appointments of board members.

If rights are removed in accordance with the aforementioned provisions, fair cash compensation has to be provided for any loss suffered by holders of those rights. The Takeover Directive does not prescribe how such compensation is to be determined, which is still an open issue in most EU Member States.

The breakthrough principles do not apply with regard to:

- contractual restrictions on the transfer of securities and voting rights entered into before 22 April 2004; and
- securities where restrictions on voting rights are compensated for by specific pecuniary advantages (eg, non-voting preference securities).

### **Reciprocity**

EU Member States may allow that the shareholders' meeting of a target company that applies Article 9 and/or 11 (because the respective EU Member State or the shareholders' meeting of such company opted in) may resolve not to apply the relevant Article if there is no reciprocity, that is, if the bidder (or a company controlled, directly or indirectly, by the bidder) does not apply the relevant article. There are different views on whether the reciprocity provision can also be applied against non-EU bidders (in particular, in the case of competing bids from a US bidder and an EU bidder).

Furthermore, the Takeover Directive does not state who, in the case of a dispute, would make a binding decision on the question of the equivalence of prohibitions of frustrating actions. In practice, this may lead to considerable legal uncertainties for the management board of the target company.

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## SQUEEZE-OUT AND SELL-OUT

The Takeover Directive provides for a squeeze-out right enabling the majority shareholder to require the remaining minority shareholders to sell their securities at a fair consideration. EU Member States must introduce such a squeeze-out right in connection with takeover offers in one of the following situations:

- if the bidder holds securities representing at least 90 per cent of the capital carrying voting rights and 90 per cent of the voting rights in the target company; EU Member States may set a higher threshold that may not, however, be higher than 95 per cent of the capital carrying voting rights and 95 per cent of the voting rights; or
- if, through acceptance of the takeover offer, the bidder has acquired or firmly contracted to acquire securities representing at least 90 per cent of the capital carrying voting rights and 90 per cent of the voting rights in the takeover offer.

If the target company has issued more than one class of securities, EU Member States may provide that the squeeze-out right can be exercised only in the class of securities in which the threshold set out above has been reached.

The fair consideration must have the same form as the consideration offered in the takeover offer or must be in cash. EU Member States may provide that cash must be offered at least as an alternative. The Takeover Directive prescribes the following presumptions with respect to the fairness of the consideration:

- following a voluntary takeover offer, the consideration offered in the bid is deemed to be a fair consideration if, through acceptance of the takeover offer, the bidder has acquired at least 90 per cent of the capital carrying voting rights in the bid;
- following a mandatory takeover offer, the consideration offered in the bid must be presumed to be fair.

The squeeze-out right is combined with a sell-out right enabling minority shareholders to require the majority shareholder to buy their securities following a takeover offer at a fair consideration if the bidder meets the requirements for the takeover-related squeeze-out.

The squeeze-out right and the right of sell-out can only be exercised within three months after the end of the acceptance period.

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## OTHER

The Takeover Directive also asks EU Member States to provide for rules with regard to:

- the lapsing of bids;
- the revision of bids;

- competing bids;
- the irrevocability of bids; and
- the conditions permitted in connection with a bid.

Furthermore, the Takeover Directive provides for an obligation of the bidder to take the necessary measures to ensure that he/she can fulfil in full any cash consideration and that he/she has the required financial resources to pay the price for the securities at the time such a payment is due.

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## EUROPEAN COMMISSION'S 2012 REPORT ON THE APPLICATION OF THE TAKEOVER DIRECTIVE

From 2008 to 2012, the European Commission examined the impact of and compliance with the Takeover Directive in the EEA. The outcome of the report is generally positive, stating that the regime created by the Takeover Directive is working satisfactorily and that no structural compliance issues have emerged. Nonetheless, the European Commission identified a number of areas where the rules of the Takeover Directive lack sufficient clarity or where it is uncertain if they have been implemented adequately. The main issues identified are:

- the existence of different national definitions of acting in concert, which leads to uncertainty for investors who wish to cooperate without running the risk of being obliged to launch a mandatory offer;
- the existence of numerous national derogations from the mandatory offer obligation, which sometimes leaves it uncertain whether the relevant exception is admissible according to the Takeover Directive;
- the possibility for bidders to avoid the mandatory offer obligation by acquiring a stake close to the control threshold and launching a voluntary bid at a low price (so-called 'low balling'); and
- a certain dissatisfaction of employee representatives with the protection of employee rights under the Takeover Directive.

According to the European Commission, at this stage, there is no intention to amend the Takeover Directive. However, the European Commission is pursuing certain efforts to improve clarity and best practices, including an increase of the European Commission's informal cooperation with stakeholders, the European Securities and Markets Authority (ESMA) and national authorities, and infringement procedures in order to ensure the effective implementation of the Takeover Directive. For example, ESMA published a statement with information on shareholder cooperation and acting in concert under the Takeover Directive in 2014 that was last revised in 2019. This statement includes a so-called 'white list' of activities that will not, in and of itself, lead to the conclusion that shareholders are acting in concert.

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## BREXIT

As a result of the withdrawal of the United Kingdom from the EU, the Takeover Directive is not directly binding on the UK anymore. Yet, the European Union (Withdrawal) Act

2018 largely incorporated the provisions of the Takeover Directive into UK national law. There is, however, a difference in the UK Takeover Code with respect to its applicability. Unlike the respective provision in the Takeover Directive, the UK Takeover Code does not apply to offers for companies that have their registered offices in an EU Member State and whose securities are admitted to trading on a UK regulated market.

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## FINAL REMARKS AND OUTLOOK

The Takeover Directive leaves significant flexibility to EU Member States, which means that Europe, in numerous aspects, has remained an uneven playing field for public takeovers. Nonetheless, according to the report of the European Commission issued in June 2012, the legal framework created by the Takeover Directive is generally working satisfactorily. Furthermore, no structural compliance issues have emerged. Therefore, no extensive changes to the Takeover Directive itself are to be expected in the near future. However, it remains to be seen whether the European Commission will take further measures to ensure a more homogeneous and effective application of existing rules.