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The International Comparative Legal Guide to:

Mergers & Acquisitions 2016

10th Edition

A practical cross-border insight into mergers and acquisitions

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Country Question and Answer Chapters:

EDITORIAL

Welcome to the tenth edition of *The International Comparative Legal Guide to: Mergers & Acquisitions*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of mergers and acquisitions.

It is divided into two main sections:

Five general chapters. These chapters are designed to provide readers with an overview of key issues affecting mergers and acquisitions, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in mergers and acquisitions in 54 jurisdictions.

All chapters are written by leading mergers and acquisitions lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Michael Hatchard of Skadden, Arps, Slate, Meagher & Flom (UK) LLP for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

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Takeover Defences in Europe – The Debate on Board Passivity is Moot

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Takeover Defences in Europe – The Debate on Board Passivity is Moot

With the Great Recession clearly in the rear-view mirror and cross-border and transatlantic public M&A picking up pace (at least in terms of value) to levels not seen before the prior peak of 2007, we thought we would review the state of play of takeover defences in Europe.

Europe's approach to takeover defences has meandered and branched out over the years in several different directions and looks to be no more uniform than it was 10 years ago, when the European Takeover Directive was implemented across Europe.

While the original vision of a single set of takeover rules to match the single market ambition of EU competition regulation is far from having been achieved, the European Takeover Directive (and the Prospectus Directive) has achieved a lot in terms of harmonising much of the practice and many of the issues impacting cross-border European public M&A. However, to date, Europe has been unable to agree on a uniform European policy or approach to takeover defences, and the Great Recession has caused member states to stray further afield.

Europe's approach to defences in the Takeover Directive was the direct result of a political compromise (following the outcry from Vodafone's takeover of Mannesmann) that allowed member states to opt in and out of rules prohibiting active takeover defence or frustrating action and therefore the prospect of uniformity was doomed at the outset.

At the time the Takeover Directive was adopted, member states had essentially divided into two camps. A majority of member states (including the UK, France and Italy, and all Nordic member states) favoured the UK "passivity rule", where the target board is not allowed to frustrate unsolicited takeover offers in the absence of shareholder approval, the only structural protection being that afforded by the mandatory tender offer rule. A minority (including Germany and the Netherlands) instead allowed the board to adopt varying degrees of defensive/frustrating action or continue with their structural defences.

In the debate, each of the member states with a significant capital market approached the issue of takeover defences from different backgrounds, knowledge and experience of hostile takeovers and defences and national interests to protect.

The UK had far greater experience with regulating public M&A transactions than other member states and relied on a set of rules (the UK Takeover Code) built over 40 years by a tightly-knit community of financial and legal advisers and regulators based in the City. France and Italy subscribed to the UK model. In France, the passivity rule was a continuation of the approach historically taken to hostile bids, of which France had seen a few (e.g. Sanofi's hostile bid on Aventis, and BNP's hostile bid on Paribas). By contrast, Italy's capital markets were (and continue to be) constituted principally by companies controlled by one or more shareholders, which made the debate on the permissibility of takeover defences moot.

The Netherlands banked on its tradition of being an ideal place for large global or pan-European companies and wished to continue its Delaware-like approach to takeover defences, permitting takeover defences in broad terms so long as there was a threat to the corporate interest and those defences were not preclusive or disproportionate to the threat posed to the company. Germany instead, having been bruised badly by Vodafone's takeover of Mannesmann, was principally concerned with large national champions retaining the flexibility to block hostile takeovers.

Against this background, and after barely one year of M&A activity from the implementation of the Takeover Directive, Europe faced the dearth of M&A brought about by the Great Recession and the steep drop in stock valuations that resulted from it. As Europe slid further into recession over the next several years, the US and Chinese economies began to rebound and a gulf began to open between European stock valuations on the one hand and that of US and Chinese companies on the other; following which, cross-border M&A started to pick up pace again.

At that point, as European companies became vulnerable for an extended period of time, Europe saw various governments willing to intervene to influence the outcome of bid battles as well as introduce legislation which was intended to send a message that certain sectors and companies were not to be touched. Most European jurisdictions adopted specific laws to protect "strategic sectors".

Even the UK, the jurisdiction that inspired the Takeover Directive and promoted the concept of passivity supported by the mandatory tender offer rule, succumbed to the political pressure prompted by takeover activity. Following the outcry from Kraft's takeover of Cadbury, the UK engaged in a full review of the rules and regulations related to takeover activity. In addition to a number of other significant changes to takeover regulation, the UK came to the view that, with the system as it stood, the scale tipped too far in favour of bidders and decided to rebalance the playing field. However, rather than departing from the passivity rule, the UK modified its "Put up or Shut up" regime in a way that allows target UK companies to "just say no" to unsolicited takeovers and cause them to lapse.

France reversed the passivity rule. French boards can now take defensive measures, subject to the fiduciary duties of directors and the general requirement that a two-third majority of the shareholders approve certain transactions such as issuances of shares or mergers.

Moreover, France and Italy, in addition to introducing legislation protecting "strategic sectors", introduced, or promulgated legislation to encourage the use of, multiple voting right shares and loyalty shares to allow long-term or controlling shareholders to tighten their grip on target companies and reduce the influence of short-term investors in takeover contests.

As one looks at the current state of play of takeover defences in Europe, one cannot help but notice that while target board passivity continues to be a requirement in several major markets in Europe, the idea that the mandatory tender offer rule is the only structural defence that a public company really requires has been abandoned by those markets.

European governments are prepared to intervene in bid battles and use both influence and "strategic sector" legislation where necessary to drive an outcome. Some governments have perpetuated the power of controlling and "long-term" shareholders (allowing them to reduce their economic ownership while maintaining voting control) by awarding them multiple voting rights. In the UK, regulators have changed the takeover rules to tip the balance in favour of passive boards, requiring that target boards actively endorse an unsolicited approach in order to make it viable.

Against this backdrop and notwithstanding the continuing transformation of the shareholder base of European companies, which over time should empower shareholders, it is clear that target companies have the advantage over hostile or unsolicited approaches.

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Mr. Simpson's European M&A assignments have included: representing AAR in the $56 billion sale of TNK-BP to Rosneft; Outokumpu in a business combination involving the $3.5 billion acquisition of Germany's ThyssenKrupp's stainless steel unit; Colfax Corporation in its $2.4 billion acquisition of Charter International plc; Fresenius SE, in its agreement to acquire APP Pharmaceuticals Inc for $5.6 billion; Basell Polyolefins in its $22.2 billion acquisition of Lyondell Chemical Company; International Paper in its acquisition of a 50% equity interest in Ilim Holding; and Tele Atlas N.V. in connection with an agreed takeover proposal from TomTom N.V. and an unsolicited takeover proposal from Garmin Ltd.

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Lorenzo Corte concentrates on cross-border mergers and acquisitions, including contested takeovers, private sales and acquisitions, and joint ventures. His M&A assignments have included acting for: LetterOne in its $5.81 billion acquisition of RWE AG's oil and gas unit Dea; Assicurazioni Generali in connection with its $3.3 billion acquisition of the stake in its joint venture with PPF Group, which it did not already own; Altimo in connection with its acquisition of $3.6 billion of shares in VimpelCom from the Sawiris family and, previously, Vimpelcom Limited's $7 billion acquisition of the assets of Weather Investments S.p.A.; Portugal Telecom SGPS S.A. in the $9.8 billion acquisition by Telefónica S.A. (Spain) of Portugal Telecom's 50% stake in Vivo Participacoes S.A. (Brazil); and Arcelor in its defence against an unsolicited $22.8 billion bid from Mittal Steel Company N.V. and in their subsequent $33.8 billion merger.

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