

TABLE OF CONTENTS

Preface	xiii
Preface of the First Edition of 2002	xv
Abbreviations	xvii
PART ONE	
The Legal Framework for Stock Corporations	1
1. Introduction	3
1.1 Legal Framework	3
1.2 German Equity Capital Markets and Their Historic Dimension	3
1.3 Public and Private Stock Corporations	7
1.4 The German Real Estate Investment Trust	8
1.5 The German Stock Exchange	8
1.5.1 Market Segments	8
1.5.2 Index Markets	10
2. Corporate Governance and the Corporate Bodies of a German Stock Corporation	10
2.1 The German Corporate Governance Code	12
2.2 The Management Board	13
2.2.1 Composition and Appointment	13
2.2.2 Dismissal	15
2.2.3 Resignation by a Management Board Member	16
2.2.4 Other Termination Issues	16
2.2.5 Duties and Responsibilities	16
2.2.6 Liability	18
2.3 The Supervisory Board	19
2.3.1 Composition	19
2.3.2 German Particularity: Co-Determination	21
2.3.3 Appointment	22
2.3.4 Dismissal	23
2.3.5 Internal Organization of the Supervisory Board	23
2.3.6 Specific Duties and Responsibilities	24
2.3.7 Liability	25
2.4 Shareholders' Meeting	25
2.4.1 Function and Competence	25
2.4.2 Organization	26
2.4.3 Resolutions	26
2.4.4 Reform of the Right to Challenge Resolutions in Court	27
3. Shareholders' Rights	28
3.1 General Remarks	28
3.2 Membership Rights	29
3.2.1 Property Rights	29

TABLE OF CONTENTS

3.2.2	Administration Rights	30
3.2.2.1	Information Rights	30
3.2.2.2	Voting Rights	31
3.2.2.3	Right to Bring an Action	31
3.3	Statutory Minority Shareholder Rights	32
3.3.1	1% of the Nominal Share Capital and/or EUR 100,000 Par Value of Shares	32
3.3.2	5% of the Nominal Share Capital and/or EUR 500,000 Par Value of Shares	32
3.3.3	10% of the Share Capital Represented in a Shareholders' Meeting	33
3.3.4	10% of the Nominal Share Capital and/or EUR 1 Million Par Value of Shares	33
3.3.5	25% of the Nominal Share Capital Plus One Share Represented in the Shareholders' Meeting	33
3.4	Exclusion of Minority Shareholders (Squeeze-Out)	34
3.5	Investor Class-Action Lawsuits	34
4.	Share Capital and Equity Financing	35
4.1	The Shares	35
4.1.1	Classes of Shares	35
4.1.2	Disposal of Shares	36
4.1.2.1	Legal Background	36
4.1.2.2	Practical Aspects	37
4.1.2.3	Restrictions on Transferability of Shares	37
4.2	Principles on the Raising and Maintenance of Capital	37
4.3	Raising Capital	38
4.3.1	Capital Increase	38
4.3.1.1	Capital Increase against Contribution in Cash or in Kind	39
4.3.1.2	Conditional Capital Increase	39
4.3.1.3	Authorized Capital	39
4.3.1.4	Capital Increase out of Retained Earnings	40
4.3.2	Debt and Mezzanine Financing	40
4.4	Maintenance of Capital	41
4.4.1	Acquisition of the Company's Own Shares	41
4.4.2	Repayment of Capital	42
4.4.3	Capital Reduction	42
5.	Compliance Requirements in Share Acquisitions	43
5.1	Notifications under the Stock Corporation Act	43
5.2	Notifications under the Securities Trading Act	44
5.3	Financial Statements	44
5.3.1	Preparation and Approval of Financial Statements	45
5.3.2	Transparency of Defensive Measures against Takeover Offers	45

TABLE OF CONTENTS

5.3.3 International Accounting Standards (IAS/IFRS)	47
5.3.4 Appropriation of Profits	48
6. German Partnership Limited By Shares	48
PART TWO	
Public Offers	51
1. Overview	53
1.1 The Structure of the WpÜG	54
1.2 Definitions	55
1.3 Three Types of Offers	56
1.3.1 Main Premises	56
1.3.1.1 Offers	56
1.3.1.2 Takeover Offers	56
1.3.1.3 Mandatory Offers	56
1.3.2 WpÜG Structure Concerning Offer Types	56
1.3.3 Main Consequences of Offer Types	58
1.3.4 Empirical Data	60
1.4 Scope of Application	61
1.4.1 Application to Offers	61
1.4.2 Application to Takeover Offers and Mandatory Offers	61
2. Takeover Offer	63
2.1 Public Offer	64
2.2 Offeror	64
2.3 Securities	64
2.4 Organized Market	65
2.5 Control	65
2.5.1 Attribution of Voting Rights and Acting in Concert	66
2.5.2 Exemptions	66
2.6 The Decision to Make a Takeover Offer and Pre-Decision Considerations	67
2.6.1 Merger Control	68
2.6.2 Creeping-In and Disclosure Obligations	68
2.6.3 Effect of Prior Acquisitions on Takeover Offer Price and Type of Consideration	69
2.6.4 Timing	70
2.6.5 Financing	70
2.6.6 Conditions	70
2.6.6.1 Impermissible Conditions	70
2.6.6.2 Permissible Conditions	71
2.7 Impermissible Offers	73
2.7.1 No <i>Invitatio ad Offerendum</i>	73
2.7.2 No Reservation of the Right to Revoke or Rescind	73
2.7.3 No Partial Offer	73
2.7.4 Partial Offers in Cross-Border Situations	73

TABLE OF CONTENTS

2.7.4.1	Exclusion of Foreign Shareholders – § 24 WpÜG	74
2.7.4.2	Limiting the Distribution of the Offer Document	75
2.8	Obligations Once the Decision Has Been Made	75
2.8.1	Notification Duties Concerning the Decision	79
2.8.2	Publication of the Decision	80
2.8.3	Duty to Notify the Target Company	81
2.9	Preparation of the Offer Document	81
2.9.1	Details of the Consideration	84
2.9.1.1	Type of Consideration	84
2.9.1.2	Amount of the Consideration	85
	2.9.1.2.1 Securities Traded Exclusively on a German Organized Market	85
	2.9.1.2.2 Taking into Account Prior Acquisitions	86
	2.9.1.2.3 Valuation Methods	86
2.9.2	European Passport Regulation	86
2.10	Modification of the Takeover Offer	86
2.11	Acceptance Period	87
2.12	Liability for an Incorrect or Incomplete Offer Document	88
2.13	Submission of the Offer Document to the BaFin and Verification of Compliance	89
2.14	Publication of the Offer Document	91
2.15	Duties of the Target Company's Management Board and Supervisory Board	92
2.16	Acceptance Period and Further Procedure	93
2.16.1	Standard Case	93
	2.16.1.1 Further Acceptance Period – The Wren-Rule	93
	2.16.1.2 Publication Duties during and after the Acceptance Period	94
	2.16.1.3 Other Publication Duties	95
2.16.2	Special Case 1: The Offeror Modifies the Offer	95
2.16.3	Special Case 2: The Target Company Calls an Extraordinary Shareholders' Meeting	96
2.16.4	Special Case 3: A Competing Offer Intervenes	97
2.17	Subsequent Improvement of Consideration Due to Share Acquisitions	98
	2.17.1 Acquisitions during the Acceptance Period	98
	2.17.2 Acquisitions after the Lapse of the Acceptance Period	99
3.	Mandatory Offer	99
3.1	Control	99
	3.1.1 Attribution of Voting Rights	100
	3.1.2 Acting in Concert	100
	3.1.3 Disregarding Voting Rights	102
	3.1.4 Possible Exemptions	103
3.2	Publication Duty	104

TABLE OF CONTENTS

3.3 Duty to Make the Mandatory Offer	104
3.4 Consequences of Non-compliance	105
3.5 Strategies to Avoid the Mandatory Offer Rule	106
4. Simple Offer	106
4.1 Consideration	107
4.2 Admissibility of Partial Offers	107
5. Overview of Defensive Measures	108
5.1 General Observations	108
5.2 Defensive Measures Against Simple Offers	109
5.3 Defensive Measures Against Takeover Offers and Mandatory Offers	109
5.3.1 Default Provisions on Defensive Measures	109
5.3.2 Anticipatory Resolution	110
5.3.3 Opting for the Stricter Rules of the Takeover Directive	116
5.3.4 Stricter Provisions on Board Neutrality	116
5.3.5 Breakthrough Rule and Compensation	116
5.3.6 Reciprocity in Cross-Border Takeovers	117
5.4 Prohibition of Unjustified Benefits	118
6. Supervisory Powers of the BaFin	118
7. Appeal Procedure	118
8. Enforcement	120
9. Costs	120
 PART THREE	
Options of the Offeror after a Successful Offer	121
1. Factual and Legal Position of the Offeror after a Successful Offer	123
1.1 Control over the Target Company?	123
1.2 Statutory Regime Governing Relationship between Target Company and Its Main Shareholder	125
1.2.1 General Remarks	125
1.2.2 Detrimental Influence over a Stock Corporation	125
1.2.3 Sanctions for Exercising Detrimental Influence	127
2. Main Considerations Regarding Changes at the Level of the Target Company	128
2.1 Employee Co-Determination	128
2.2 Rights of Remaining Minority Shareholders	129
2.3 Administrative Burdens	129
2.4 Use of Assets in the Interests of the Target Company	129
2.5 Tax Considerations	130
3. Options for Action and Their Limits	130
3.1 Replacement of Members of the Company's Governing Bodies	130
3.1.1 Supervisory Board	130
3.1.2 Management Board	131
3.2 Conclusion of Enterprise Agreements	133

TABLE OF CONTENTS

3.2.1	General Concept	133
3.2.2	Legal Requirements and Legal Consequences	135
3.3	Squeeze-Out of Minority Shareholders	137
3.3.1	Squeeze-Out According to the Stock Corporation Act	138
3.3.1.1	Constitutionality of the Squeeze-Out Rules	138
3.3.1.2	Main Shareholder	138
3.3.1.3	Procedure	139
3.3.1.4	Adequate Cash Compensation	141
3.3.1.5	Bank Guarantee	141
3.3.1.6	Calling of the Shareholders' Meeting	142
3.3.1.7	Shareholders' Resolution	142
3.3.1.8	Application to the Commercial Register	143
3.3.1.9	Judicial Review and Compensation	143
3.3.1.10	Action against the Transfer Resolution	143
3.3.1.11	Action to Increase the Cash Compensation	144
3.3.1.12	Merger Control, Regulatory Filings	146
3.3.2	Squeeze-Out According to WpÜG	146
3.3.2.1	Request for Procedure	146
3.3.2.1.1	Offeror as Main Shareholder	147
3.3.2.1.2	Threshold	147
3.3.2.1.3	Limited Period for Application	147
3.3.2.2	Publication of the Request and Procedural Rules	147
3.3.2.3	Compensation	148
3.3.2.3.1	Adequacy of the Compensation	148
3.3.2.3.2	Type of Compensation	149
3.3.2.4	Remedies	149
3.3.2.5	Relationship Between the Takeover Squeeze-Out and the Corporate Law Squeeze-Out	149
3.3.3	Sell-Out	149
3.4	Combination of Asset Transfer and Liquidation	150
3.5	Integration into Another Stock Corporation	150
3.6	Delisting	152
3.6.1	Delisting upon Application of the Target Company as Issuer – General Remarks	152
3.6.1.1	Application of the Issuer	152
3.6.1.2	Shareholders' Meeting	153
3.6.1.3	Written Report of the Management Board	153
3.6.1.4	Purchase Offer	153
3.6.1.5	Compensation	154
3.6.1.6	Decision by Stock Exchanges	155
3.6.1.7	Challenging Actions	155
3.6.2	Delisting upon the Initiative of the Stock Exchange	156
3.6.3	'Cold' Delisting	156

PART FOUR

Statutory Materials	159
----------------------------	------------

APPENDICES

1. Europäische Übernahmerrichtlinie	161
European Takeover Directive	161
2. Wertpapiererwerbs- und Übernahmegesetz – WpÜG	201
Securities Acquisition and Takeover Act	201
3. WpÜG-Anwendbarkeitsverordnung	265
WpÜG Applicability Regulation	265
4. WpÜG-Baufsichtigungsmittelungsverordnung	267
WpÜG-Supervision Notice Regulation	267
5. WpÜG-Angebotsverordnung	269
WpÜG Offer Regulation	269
6. WpÜG-Gebührenverordnung	281
WpÜG Fees Regulation	281
7. WpÜG-Beiratsverordnung	285
WpÜG Advisory Committee Regulation	285
8. WpÜG-Widerspruchsausschussverordnung	289
WpÜG Objection Committee Regulation	289
9. Aktiengesetz – Aktg (Auszug)	293
Stock Corporation Act (Excerpt)	293
10. Deutscher Corporate Governance Kodex	475
German Corporate Governance Code	475
11. Handelsgesetzbuch – HGB (Auszug)	497
Commercial Code (Excerpt)	497
12. Börsengesetz – BörsG (Auszug)	501
Stock Exchange Act (Excerpt)	501
13. Wertpapierhandelsgesetz – WpHG (Auszug)	503
Securities Trading Act (Excerpt)	503
14. Wertpapierhandelsanzeige- und Insiderverzeichnisverordnung – WpAIV	551
Securities Trading Reporting and Insider Register Regulation	551
15. Marktmanipulations-Konkretisierungsverordnung – MaKonV	567
Market Manipulation Regulation	567
16. EG-Fusionskontrollverordnung (Auszug)	579
European Merger Control Regulation – ECMR (Excerpt)	579
17. Gesetz gegen Wettbewerbsbeschränkungen – GWB (Auszug)	593
Act against Restraints of Competition (Excerpt)	593
Index	633