

THE SUPERVISION OF TAKEOVER MATTERS IN THE EUROPEAN UNION -
THE AUSTRIAN PART

Stefan Weber, Stefan Arnold and Katharina Oberhofer

9/2009

This paper can be downloaded without charge from:

The Social Science Research Network Electronic Paper Collection:

<http://ssrn.com/abstract=1472419>

The Austrian Takeover Commission:

<http://www.takeover.at/literatur.html>

This paper is also a discussion paper of the
Institute of European Studies at Saarland University

THE SUPERVISION OF TAKEOVER MATTERS IN THE EUROPEAN UNION -
THE AUSTRIAN PART

Stefan Weber^{*}, Stefan Arnold[†] and Katharina Oberhofer[‡]

ABSTRACT

This paper investigates the effect of the rules contained in the Takeover Bids Directive on the supervisory practice of the Austrian Takeover Commission as part of the European takeover authorities' network. The Takeover Bids Directive created a system of cooperation of national takeover authorities. It did not establish a centralized European regulator and/or supervisor, i.p. for cross border takeover bids. By evaluating and categorizing the takeover cases handled by the Austrian Takeover Commission, the paper aims to prepare the ground for a focused policy debate in view of the upcoming revision of the Takeover Bids Directive, to be proposed by the European Commission. It does not analyze the still ongoing policy debate, in particular, with respect to anti takeover defense measures.

The paper ascertains certain procedural and substantive elements of European takeover law. It provides (i) an empirical study of the cases decided by the Austrian Takeover Commission between its establishment in 1999 and 2008, based on (ii) an outline of the Takeover Bids Directive as transposed into Austrian law and (iii) an outline of the structure of the Austrian Takeover Commission.

JEL Classifications: F15, G38, K22

Keywords: Corporate governance, takeovers, tender offers, mergers and acquisitions, anti-takeover provisions, corporate control, corporate restructuring, capital market, company law, European integration, EU harmonization, regulatory competition, Takeover Bids Directive, approximation of laws, internal market, free movement of capital, comitology, Austrian Takeover Commission, supervision.

* Attorney-at-Law; Professor of International Business Law and Finance Law, Saarland University; Member of the Austrian Takeover Commission.

† Chief Administrative Officer, Austrian Takeover Commission.

‡ Staff Member, Austrian Takeover Commission.

I. INTRODUCTION

In 2004, after vigorous debates, the European Community enacted the *Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids* (the “Directive”)¹. The Directive is part of the Lamfalussy Package (Financial Services Action Plan - FSAP)² and provides for a minimum harmonization of the takeover rules in the European Union, in view of creating a secure and transparent environment for cross-border takeovers and restructuring in the single market. The Directive does not provide for a centralized authority which supervises takeover matters. It rather leaves it to the EU Member States to designate the authority or authorities competent to supervise bids for the purposes of the rules which they make or introduce pursuant to the Directive.

In Austria, the authority designated and competent pursuant to the Directive is the Takeover Commission (*Übernahmekommission*; the “Commission”). With respect to the disclosure rules in Art. 10 of the Directive, the designated and competent authority is the Austrian Financial Market Authority (FMA).³ The Commission was established in 1999, since Austrian takeover regulation dates back to 1998. Between 1 January 1999 and 31 December 2008, on average, 94 companies were subject to its jurisdiction. During that period, the Commission has handled 181 cases.

This paper aims to ascertain certain procedural and substantive elements of European takeover law as transposed into Austrian law and as applied by the Commission. The paper gives an overview of EU takeover regulation as well as of the structure of the Commission as a European national takeover authority and analyses in what way the Commission has operated since its establishment in 1999. As an independent judicial body, the Commission

¹ See, e.g., S. Maul et al., *Takeover Bids in Europe - The Takeover Directive and Its Implementation in the Member States* (2008); B. J. Clarke, *The Takeover Directive: Is a Little Regulation Better Than No Regulation?*, 15 *European Law Journal* 174 (2009); E. Wymeersch, *The Takeover Bid Directive, Light and Darkness*, (January 2008) Financial Law Institute Working Paper No. 2008-01. Available at SSRN: <http://ssrn.com/abstract=1086987>; L. Enriques, *The Mandatory Bid Rule in the Takeover Directive: Harmonization Without Foundation*, 4 *E.C.F.R.* 440 (2004); V. Edwards, *The Directive on Takeover Bids – Not Worth the Paper It’s Written On?*, 4 *E.C.F.R.* 416 (2004); see also M. Ventoruzzo, *Europe’s Thirteenth Directive and U.S. Takeover Regulation: Regulatory Means and Political and Economic Ends*, 41 *Tex. Int’l L.J.* 171, 203 (2006).

² Commission Communication of 11 May 1999, “Implementing the framework for financial markets: action plan”, COM(1999) 232 final.

³ This paper does not cover the disclosure cases handled by the Austrian Financial Market Authority (FMA).

has, on the one hand, to advise and give guidance to the parties involved and, on the other hand, to act as an adjudicating authority.

The procedural elements presented in this paper include the procedures applied by the Commission, the kinds of decisions made (decree or statement), the initiation of procedures, including referrals from Federal Courts, cross border cases, the use of general opinions by the plenum of the Commission and references made for a preliminary ruling by the European Court of Justice.

The substantive takeover law elements presented in this paper include the type and structure of takeover bids (mandatory bids, voluntary bids for control, and non-control-related tender offers), the decisions concerning mandatory takeover bids (acting in concert, passive change of control, creeping-in), the decisions on exemptions from mandatory bid requirement and on suspension of voting rights, decisions on supplementary measures taken in such cases, breakthrough, decisions on offer price and conditions in offer documents, decisions on the prohibition to launch a bid, and the use of administrative penalties.

The paper commences, in Part I, with an overview of the legal framework for the supervision of takeover bids in the EU. This is followed in Part II by an outline of the structure of the Commission. Part III contains the analysis of the cases handled by the Commission. Finally, Part IV provides certain observations from a European point of view.

The raw data for the paper was obtained (i) from the annual reports of the Commission and (ii) from the written reasons documents, posted on the Commission's website (www.takeover.at) and (iii) internal data of the Commission, all over a period between 1 January 1999 and 31 December 2008.

II. THE SUPERVISION OF TAKEOVER BIDS IN THE EUROPEAN UNION

Since the end-1980ies⁴, the European Commission has repeatedly attempted to introduce trans-border takeover regulation in order to foster corporate restructuring and to integrate capital markets through transparent rules applicable throughout the European Union.⁵ Finally, in 2004, the European Community introduced the Directive. The Directive establishes minimum guidelines for the conduct of takeover bids involving target companies governed by the laws of any EU Member State, the shares⁶ of which are listed on a stock exchange⁷ in any EU Member State. EU Member States were obliged to transpose the Directive into national law by 20 May 2006.⁸ The Directive seeks to provide an adequate level of protection for shareholders throughout the European Union, by establishing a framework of common principles and general requirements (i) for takeover transactions and (ii) for anti takeover defense measures, which EU Member States are to implement through more detailed rules.⁹ The Directive is a piece of experimentalist governance¹⁰ in the European Union. Several fundamental concepts are not defined by the Directive (e.g. control, equitable price) or may be opted out by the national legislators (e.g. breakthrough-rule, board neutrality). The comitology procedure, as used in comparable Lamfalussy legislation, however, has only a very limited scope. The determination of fundamental takeover concepts is therefore up to the EU Member States which set the rules in accordance with their national systems and cultural contexts, driven by the coordinative effects of the implementation

⁴ See E. Wymeersch, *The Takeover Bid Directive, Light and Darkness*, (January 2008) Financial Law Institute Working Paper No. 2008-01. Available at SSRN: <http://ssrn.com/abstract=1086987>, 2f. The first proposal for a takeover directive was presented in November 1997, see Company law: Amended Proposal for a Directive on Takeover Bids, IP/97/1022; see also Commission Communication of 11 May 1999, “Implementing the framework for financial markets: action plan”, COM(1999) 232 final.

⁵ Cf. Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe, 2002; Proposal for a Directive of the European Parliament and of the Council on takeover bids, COM/2002/0534 final, OJ 045 E, 25/02/2003, 12 – 17; see R. Skog, *The Takeover Directive – An Endless Saga?*, 13 E.B.L.R. 301, 307 (2002).

⁶ The Directive uses the term “securities”, defined as transferable securities carrying voting rights (Art. 2/1/d of the Directive).

⁷ The Directive uses the term “admitted to trading on a regulated market”; see supra note 12.

⁸ The Directive – stating this explicitly in its header – not only applies to the 27 EU Member States but to all EEA (European Economic Area) members, thus also to Iceland, Liechtenstein and Norway.

⁹ On the status of implementation of the Directive at national level see Commission Staff Working Document of 21 Feb 2007, “Report on the Implementation of the Directive on Takeover Bids”, SEC (2007) 268.

¹⁰ C. F. Sabel and J. Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the EU*, 14 E.L.J. 271, 296 (2008).

process and by the experience gained with takeover matters during time. For 2011, the European Commission is called to propose revisions to the Directive (Art. 20 of the Directive).

A. The National Takeover Authorities, Jurisdiction, Cooperation, Comitology

Unlike federal unions, the European Union has not established a central regulator and/or supervisor for takeover bids, i.p. for cross border takeover bids. The Directive introduces a system of cooperation of national supervisory authorities in charge of takeover matters. EU Member States are to designate the authority or authorities competent to supervise takeover matters (Art. 4/1 of the Directive). The authorities thus designated must either be public authorities, associations or private bodies recognized by national law or by public authorities expressly empowered for that purpose by national law. EU Member States must ensure that these authorities exercise their functions impartially and independently of all parties to a takeover bid (Art. 4/1 of the Directive).

As a general rule, Art. 4/2a of the Directive lays down that the authority competent for supervising the takeover bid shall be that of the Member State in which the target company has its registered office,¹¹ if the shares of that company are listed on a stock exchange (“a regulated market”¹²) in that Member State. The Directive contains conflict rules for deciding the competent takeover authority, if e.g. shares are not listed in that EU Member State or listed in more EU Member States.¹³ If the target company’s shares are not listed in the EU

¹¹ The Directive –also the German version – remains unclear whether the incorporation or the registered office of a company is relevant. See C. Seibt and K. Heiser, *Analyse der EU-Übernahmerichtlinie und Hinweise für eine Reform des deutschen Übernahmerechts*, 34 ZGR 200, 205 ff (2005).

¹² Within the meaning of Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field (“ISD”) (OJ L 141, 11.6.1993, p. 27), last amended by Directive 2002/87/EC of the European Parliament and of the Council (OJ L 35, 11.2.2003, p. 1). According to Art. 1/13 of the ISD a “regulated market” is a market for financial instruments which (i) is recognized as such by its home Member State, (ii) functions regularly, (iii) is characterized by the fact that regulations issued or approved by the competent authorities define the conditions for the operation of the market, the conditions for the operation of the market, the conditions for access to the market and where Directive 79/279/EEC on admission to official listing is applicable, the conditions governing admission to listing imposed in that Directive and, where that Directive is not applicable, the conditions that must be satisfied by a financial instrument before it can effectively be dealt in on the market, and (iv) complies with all the reporting and transparency requirements laid down pursuant to Articles 20 and 21 of the ISD.

¹³ See M. Siems, *The Rules on Conflict of Laws in the European Takeover Directive*, 1 E.C.F.R. 458 (2004). Available at SSRN: <http://ssrn.com/abstract=853845>. With regard to multiple listings, it is decisive where the shares were first admitted (Art. 4/2/b of the Directive). If shares were admitted simultaneously, the target can determine which law will be applied (Art. 4/2/c of the Directive).

Member State in which the company has its registered office, the takeover authority of the listing state is competent to supervise a takeover bid (Art. 4/2/a of the Directive). The listing state's takeover authority, in accordance with its applicable rules, is competent to rule on matters relating to the consideration offered in a bid, in particular the price, and matters relating to the bid proceedings, especially the information on the bidder's decision to make a bid, the contents of the offer document and the disclosure of the bid (Art. 4/2/e of the Directive). The takeover authority where the registered office of the target company is located, in accordance with its applicable rules, is competent to rule on matters relating to company law, in particular the percentage of voting rights which confers control and any derogation from the obligation to launch a bid, as well as the information to be provided to the employees of the target company, the conditions under which the board of the target company may undertake any action which might result in the frustration of the bid (Art. 4/2/e of the Directive). This structure comes along with the mutual recognition of the decisions of the competent takeover authorities and leads to a simplification of the supervision of takeover matters in the European Union.

The Directive contains delegation to comitology¹⁴ only with respect to the contents of the offer document (Art. 6/4 and 18/2 of the Directive).

Outside the scope of the Directive (e.g. where target companies do not have their registered office in the EU), Member States are free to determine the applicability of their national takeover law.¹⁵

¹⁴ The European Parliament and the Council can confer legislative powers on the European Commission. The European Commission must act in conjunction with committees who may have the power to block the Commission and refer the matter to the Council ("comitology"). The committees consist of representatives from EU Member States and are chaired by the Commission. There are four categories of committee: advisory, management, regulatory and regulatory with scrutiny. Advisory committees give opinions which the European Commission must take into account, but it retains the power of decision. Management committees can block a proposed European Commission measure by a qualified majority. A regulatory committee needs a qualified majority to approve a proposed European Commission measure. Measures not adopted are referred to the Council for a decision (or Council and Parliament under the regulatory committee with scrutiny). In practice, each legislative instrument specifies the scope of the implementing powers conferred on the Commission. In this context, the Treaty provides for the Commission to be assisted by a committee, in line with the procedure known as "comitology". See B. Scheel: *Die Neuregelungen der Komitologie und das europäische Demokratiedefizit*. 2006 ZEuS 521-554.

¹⁵ See D. Zimmer, *Aufsicht bei grenzüberschreitenden Übernahmen*, 31 ZGR 731, 737 (2002); J. von Hein, *Grundfragen des europäischen Übernahmekollisionsrechts*, 2001 AG 213, 232.

The national takeover authorities and other authorities supervising capital markets¹⁶ are obliged to cooperate and to supply each other with information wherever necessary for the application of the EU takeover rules, in particular, in cases in which the registered office of a target company is not the state in which its shares are listed (Art. 4/4 of the Directive).¹⁷ The takeover authorities are obliged to serve the legal documents necessary to enforce measures taken by the competent authorities. They shall provide assistance as may reasonably be requested by the authorities concerned for the purpose of investigating any breaches of EU takeover rules.

In Austria,¹⁸ the authority designated and competent pursuant to the Directive¹⁹, in general, is the Commission (*Übernahmekommission*).²⁰ The Commission was established before the Directive was enacted. The Austrian legislator passed the Takeover Act (*Übernahmegesetz*,²¹ the “Act”²²) in mid-1998.²³ The Act took effect on 1 January 1999. The Act contains detailed rules for international cooperation (§27d of the Act).

B. European and National Takeover Law

The Directive lays down measures coordinating the laws, regulations, administrative provisions, codes of practice and other arrangements of the EU Member States, including arrangements established by organizations officially authorized to regulate the markets relating to takeover bids. It contains detailed rules on the protection of minority shareholders in takeover situations, which are to be transposed by the EU Member States into national

¹⁶ *I.e.* in particular in accordance with Directive 93/22/EEC, Directive 2001/34/EC, Directive 2003/6/EC and Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when shares are offered to the public or admitted to trading.

¹⁷ In cases of Art. 4/2/b, c and e of the Directive. *See supra* note 13.

¹⁸ *Cf.* in the United Kingdom: the British Takeover Panel, in Germany: the German Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin), in France: the French Autorité de Marchés Financiers (AMF), in Italy: the Italian Commissione Nazionale per le Società e la Borsa (CONSOB).

¹⁹ With respect to the disclosure rules in Art. 10 of the Directive, the designated and competent authority is the Austrian Financial Market Authority (FMA). This paper does not cover the disclosure cases handled by the Austrian Financial Market Authority (FMA).

²⁰ The Commission’s website is available at www.takeover.at.

²¹ BGBl I 1998/127 (Austrian Federal Law Gazette).

²² An English translation of the Takeover Act (non-official and provisional version) is available at http://www.takeover.at/takeover_regulation.html.

²³ *See* P. Huber (ed), *Übernahmegesetz – Kommentar* (2nd ed. 2007); C. Dregger et al., *Das österreichische Übernahmerecht* (2nd ed. 2006); P. Pösch, *Takeover-Rules in Austria*, 10 INT. CO. COMMERC. LAW. REV. 93 (1999).

law.²⁴ Art. 2/1/a of the Directive defines a takeover bid as a public offer made to holders of shares of a company to acquire all or some shares, whether mandatory or voluntary, which follows or has as its objective the acquisition of control of the target company. Art. 3/1/a of the Directive provides for the principle of equal treatment: all shareholders of a target company must be afforded equivalent treatment; if a person acquires control of a company, the other shareholders must be protected.

The Directive regulates, in addition to the national takeover authorities, the behavior of bidders and the behavior of target companies. EU Member States may lay down additional conditions and provisions more stringent than those of the Directive (Art. 3/2 of the Directive). In Austria, the Directive is implemented by the Act.²⁵

1. Behavior of the Bidder

Rules addressing the bidders concern either the market behavior of bidders in general or the behavior of bidders vis-à-vis the target company and its shareholders.

Mandatory Bid and Voluntary Bids for Control. A person that, as a result of an acquisition, holds shares, which, added to any existing holdings, directly or indirectly give the person control of a company, is required to make a takeover bid (Art. 5/1 of the Directive). A person may also choose to make a voluntary takeover bid to all shareholders in accordance with the Directive rules for mandatory bids, in which case there is no further obligation to launch a mandatory bid (Art. 5/1 of the Directive).

Regarding voluntary bids for control, the Act, going beyond the Directive, provides for the statutory condition that the bidder must receive acceptance declarations that account for more than 50% of the voting shares of the target company (§25a/2 of the Act). In addition, the Act regulates tender offers, i.e. non-control-related voluntary bids (Part II of the Act).

²⁴ Cf. the UK City Code on Takeovers and Mergers, the German Wertpapierübernahmegesetz (WpÜG), the French Code de Commerce and Code Monétaire et Financier, or the Italian Testo Unico della Finanza.

²⁵ For the implementation of the Directive in Austria see S. Kalss, *Österreich*, in *Die Umsetzung der Übernahmerrichtlinie in Europa 22* (Baums/Cahn ed. 2006); C. Herbst, *Implementation of the European Takeover Directive*, in *The European Takeover Directive and its Implementation* 131 (Paul van Hooghten ed. 2009).

Control. The concept of control was heavily discussed among the EU Member States, the European Commission, and interest groups. As an agreement was not possible, the Directive does not contain a definition; it, however, contains a definition of “parties acting in concert” (Art. 2/17d of the Directive). The Directive leaves it to the EU Member State in which the target company has its registered office to determine (i) the percentage of voting rights which confers control and (ii) the method of its calculation (Art. 5/3 of the Directive).

In Austria, the percentage for a controlling interest²⁶ is set at 30%²⁷ of the shares with permanent voting rights of the target company (§22/2 of the Act).²⁸ The charter of a target company may provide for a lower percentage (§27/1/1 of the Act). Before the transposition of the Directive into Austria law in 2006, Austria had a substance-based definition linking the concept of control with the usual presence of shareholders in the shareholders meeting.²⁹ Beyond the Directive, Austrian law regulates creeping-in (§22/4 of the Act)³⁰ and the passive change of control (§22b of the Act).³¹

Offer Document. The shareholders must have sufficient information to be able to reach a properly informed decision on a takeover bid (Art. 3/1/b of the Directive). Thus, a bidder is required to draw up and publish in good time an offer document containing the

²⁶ A controlling interest can be acquired either directly or indirectly. A direct controlling interest is an interest held in a target company that gives the holder more than 30% of the shares with permanent voting rights (§22/2 of the Act). An indirect controlling interest is held when the share held in the target company is held (i) by a listed stock company in which more than 30% of the shares with permanent voting rights are held or (ii) by any other legal entity the share or other rights of which enable the holder to exercise a controlling interest over this entity (§22/3/1-2 of the Act).

²⁷ The same threshold can be found *e.g.* in the United Kingdom, Germany, Italy, Belgium, Sweden and Spain. Other thresholds include 1/3 of the shares with voting power in France. Under Portuguese law the trigger for a mandatory bid is 1/3 or 50% of voting rights in a company.

²⁸ See M. Winner, *Das Pflichtangebot nach neuem Übernahmerecht*, 2006 ÖJZ 659; A. Birkner and C. Hasenauer, *A New Takeover Code in Austria*, 4 E.C.L. 147 (2007).

²⁹ At this time, the Act empowered the Commission to define controlling interest on its own discretion, which the Constitutional Court declared as unconstitutional, *see p. 24. See also M. Winner, Rechtspolitisches zum Pflichtangebot – eine Würdigung des ÜBRÄG 2006*, 2007 GesRZ 391ff.

³⁰ *I.e.* if a shareholder who already has a controlling interest but not the majority of the permanent voting shares in a target company, acquires additional shares within a period of twelve months that give him at least additionally 2% of the voting rights, he must immediately report this to the Commission and announce a bid for all remaining shares of the target company.

³¹ *I.e.* a shareholder who has gained a controlling interest and who has not caused such change of control by any action, in particular by acquiring shares, is not under the obligation to make a bid, if she was not in the position to expect such change of control. The shareholder has to notify to the Commission that she obtained a controlling interest. The Commission has the power to order a bid to be made or to impose conditions instead of making a bid. The voting rights exceeding 26% must not be exercised (§22b/2 of the Act). The Commission may, upon request, replace this suspension of voting rights by conditions which provide an equivalent level of investor protection. The Commission may not, however, lift the suspension of voting rights in excess of 30% (§22b/3 of the Act).

information necessary to enable shareholders to make well-informed decision on the bid. Before the offer document is made public, the bidder shall communicate it to the takeover authority (Art. 6/2 of the Directive). The Directive requires certain information to be included in the offer document (Art. 6/3 of the Directive). In Austria, these provisions were implemented by §7 of the Act.³²

Adequate Offer Period. The shareholders must have sufficient time to be able to reach a properly informed decision on a takeover bid (Art. 3/1/b of the Directive). The time allowed for the acceptance of a bid may not be less than two weeks nor more than ten weeks from the date of publication of the offer document (Art. 7/1 of the Directive). The takeover authority may grant derogation from this period in certain circumstances (Art. 7/2 of the Directive). These provisions were implemented by §19/1 of the Act.

Pricing. The highest price paid for the shares over a period of not less than six months and not more than twelve months before the bid shall be regarded as the equitable offer price. If, during the tender proceedings, the bidder acquires shares under more favorable conditions, the offer price shall be raised accordingly (Art. 5/4 of the Directive).

Austria has set the pre-bid period at twelve months (§26/2 of the Act). Beyond the Directive, Austrian law provides for additional pricing rules for control-related offers: (i) the offer price shall correspond at least to the average exchange price in the preceding six months (§26/1 of the Act); (ii) the offer price shall not be less than the consideration paid by the bidder within nine months of the end of the (extended) acceptance period (§16/7 of the Act); and (iii) if a controlling interest is resold within nine months of the end of the (extended) acceptance period, the offer price shall be raised by the pro-rata amount of the profit gained by the bidder (§16/7 of the Act).

³² Pursuant to §7 of the Act, the offer document must include the following information: the terms of the bid; particulars of the bidder; the shares which are the object of the bid; the consideration offered for each share and the method of valuation; where applicable, the maximum and minimum percentages or quantities of shares which the bidder undertakes to acquire and a description of the rules of allocation; the bidder's shares in the target company and those already held by the parties acting in concert; all conditions and rights of withdrawal to which the bid is subject; the bidder's intentions regarding the future business of the target company; the period for acceptance of the bid and for the delivery of the consideration; the conditions under which the bidder is to finance its bid; information on any parties acting in concert with the bidder, or if known to the bidder, with the target company; information on the national law which will govern contracts concluded between the bidder and the holders of the target company's shares as a result of the bid and the competent courts.

Consideration. By way of consideration the bidder may offer shares, cash or a combination of both (Art. 5/5 of the Directive).

According to Austrian law, a consideration in cash is mandatory (§25b/2 of the Act). However, the bidder may additionally offer an exchange for other shares.³³

Conditions. EU Member States may lay down rules which govern the conduct of bids, in particular the conditions permitted, the lapsing of bids, the revision of bids, competing bids, the disclosure of the results of bids, and the irrevocability of bids (Art. 13 of the Directive).

Under Austrian law, voluntary bids for control and tender offers may contain adequate conditions (*sachlich gerechtfertigte Bedingungen*) (§8 of the Act).³⁴ The Act further provides for a statutory condition of voluntary bids for control: a bidder must receive acceptance declarations that comprise more than 50% of the targeted shares (§25a/2 of the Act).³⁵

Financial Strength. A bidder must announce a bid only after ensuring that she can fulfill in full any cash consideration and has to take all reasonable measures to secure the implementation of any other type of consideration (Art. 3/1/e of the Directive). In Austria, this provision was implemented by §7 of the Act.

Market Behavior and Disclosure. A bid is to be made public in such a way as to ensure market transparency and integrity for the shares of the target company, of the bidder or of any other company affected by the bid, in particular in order to prevent the publication or dissemination of false or misleading information (Art. 8/1 of the Directive). False markets must not be created by the bid in such a way that the rise or fall in the prices of the shares

³³ Pursuant to Art. 5/5 of the Directive the consideration may be granted by shares, cash or a combination of both. However, where the consideration offered by the bidder does not consist of liquid shares admitted to trading on a regulated market, it shall include a cash alternative. In any event, the bidder shall offer a cash consideration at least as an alternative where he has purchased for cash shares carrying 5% or more of the voting rights in the target company. Member States may provide that a cash consideration must be offered, at least as an alternative, in all cases.

³⁴ Pursuant to §8 of the Act, a bid may be made subject to conditions or rights of withdrawal if these are objectively justified, in particular, if they result from legal obligations of the bidder, or if the application of the condition or the exercise of the right of withdrawal does not depend entirely on the bidder's discretion. See C. Herbst, *Bedingungen und Rücktrittsvorbehalte in Übernahmeangeboten*, 2003 JBl 693.

³⁵ E.g. if a bidder already holds 20% of the shares of a target company and wants to increase her stake to more than 30% through a voluntary bid, she must receive acceptance declarations amounting to at least 40% of the issued shares. The existing shareholding of 20% is not covered by the bid and, thus, not calculated towards the 50% threshold. Only the remaining 80% of the issued shares are the calculation basis.

becomes artificial and the normal functioning of the market is distorted (Art. 3/1/d of the Directive). In Austria, these provisions were implemented by §3 and 4 of the Act.

2. *Behavior of Target Company*

Certain provisions of the Directive are addressed to the target company and concern disclosure requirements and anti takeover defense mechanisms.

Disclosure. The Directive, together with the Transparency Directive,³⁶ contains a number of disclosure requirements that shall make visible the ownership and control positions within target companies (Art. 10 of the Directive). In Austria, these provisions were implemented by §§91ff of the Stock Exchange Act.³⁷

Neutrality. As a principle, the board of the target company must act in the interests of the company as a whole and must not deny the holders of shares the opportunity to decide on the merits of the bid (Art. 3/1/c of the Directive).³⁸ In Austria, this provision was implemented by §12 of the Act.

Frustration of Bid. It is up to the EU Member States to decide, whether or not the board of the target company shall obtain the prior authorization of the general meeting before taking any action, other than seeking alternative bids, which may result in the frustration of the bid and, in particular, before issuing any shares which may result in a lasting impediment to the bidder's acquiring control of the target company (Art. 9/2 of the Directive).³⁹ This

³⁶ Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC.

³⁷ The competence to supervise disclosure matters lies with the Austrian Financial Market Authority (FMA) and not with the Commission.

³⁸ This is a key feature of the Directive: It is considered a chief device for increasing takeover activity, as it aims to neutralize the most significant anti-takeover defenses.

³⁹ The board neutrality rule (and also the break-through rule pursuant to Art. 11 of the Directive – another key feature of the Directive), is not mandatory, but can be opted out by Member States. The fact that its adoption relies upon choices by national legislators puts into serious question whether the Directive accomplishes to establish an efficient pan-European market for corporate control. See M. Gatti, *Optionality Arrangements and Reciprocity in the European Takeover Directive*, 6 E.B.O.R. 553 (2005).

optional provision was implemented in Austria by §12 of the Act and contains more stringent rules⁴⁰ than the Directive.

View of Target Company. The board of the target company shall make public a document setting out its opinion of the bid and the reasons on which it is based, including its views on the effects of the bid on the company's interests and specifically employment, and on the bidder's strategic plans for the company and their likely repercussions on employment and the locations of the company's places of business (Art. 9/5 and 3/1/b of the Directive). In Austria, these provisions were implemented by §§12-14 of the Act. The employee representatives may comment as well (§14/1 of the Act).

Breakthrough. The Directive seeks to regulate the proportionality between risk-bearing capital and control in a way that, in a takeover situation, (i) restrictions on the transfer of securities will have no effect (Art. 11/1/2 of the Directive), (ii) restrictions in voting rights will have no effect, shares with multiple voting rights will carry one vote (Art. 11/1/3 of the Directive), and through (iii) the breakthrough rule, being the authority given to a bidder who has acquired 75% of the shares, to call a general meeting where all shares will carry one vote per share and therefore will break up the controlling position of the previously controlling shareholders (Art. 11/1/4 of the Directive). Austrian law provides for a legal option for target companies to include these rules in their charter (opting-in, §27a of the Act).

Reciprocity. The Directive further provides for a reciprocity rule: companies can be exempted by their national law from restrictions with respect to their defenses, if attacked by a company that is not subject to the same defenses (Art. 12 of the Directive). Austria chose not to apply the reciprocity rule.

3. Sanctions

EU Member States shall determine the sanctions to be imposed for infringement of the national measures adopted pursuant to the Directive and shall take all necessary steps to ensure that they are put into effect (Art. 17 of the Directive).

⁴⁰ *E.g.* whereas the Directive requires the board to observe the obligation not to frustrate the bid only when the bid was made public pursuant to Art. 6/1 of the Directive, the Act obliges the board to respect this principle as soon as the board becomes aware of the bidder's intention to make a bid.

Austrian law provides the following sanctions: the Commission may (i) prohibit to make public the offer documents and to launch a takeover bid if the offer does not comply with the provisions set out in the Act (§10/3 of the Act), thus being able to impose certain terms and conditions on a takeover bid, (ii) declare that a mandatory bid was not properly made (§33/1/1 of the Act), (iii) declare that a mandatory bid was not launched in violation of the law (§33/1/2 of the Act) (iv) suspend voting rights,⁴¹ if the bidder fails to publish a mandatory bid or violates the pricing rules or if any other provision of the Act was violated (§34/1 of the Act), (v) impose administrative penalties (*Verwaltungsstrafen*) ranging from €5,000 to €50,000 (§35/2 of the Act). In addition, the Act provides for an exclusion from launching a takeover bid in case of violation of certain notification or disclosure requirements (§21 of the Act). The general rules on damages apply.⁴²

C. CESR Takeover Bids Network

To enhance mutual cooperation, the national takeover authorities, including the Commission, are members of the CESR Expert Group on Takeover Bids.⁴³ This group of national authorities meets on an ad hoc basis to discuss experiences with the implementation of the Directive, its substantial issues and future developments in takeover law. CESR aims at facilitating a common and uniform implementation of EU legislation. In general, it fulfills this role by producing administrative guidelines, interpretative recommendations, common standards, peer reviews, and comparisons of regulatory practice in order to improve consistent application and enforcement of the legislation or the standards concerned. So far, CESR has organized an exchange of experience among the national takeover authorities; the CESR Expert Group, however, has not issued any guidelines yet.⁴⁴ Presently, CESR is in the process

⁴¹ Declaratory decision by the Commission in case of (i) non-launch of a mandatory bid or (ii) violation of the pricing rules; the voting rights are suspended by statutory law (§34/1 of the Act). Constitutive decision in case of violations of other provisions of the Act (§34/3 of the Act). *See also* p.33.

⁴² S. Größ, *Anlegerschutz im Übernahmerecht - Schadenersatzansprüche und alternative Rechtsbehelfe* (2003).

⁴³ Committee of European Securities Regulators; <http://www.cesr-eu.org/index.php?page=groups&mac=0&id=55>. CESR's main role is to provide a platform for cooperation between the national regulators within the EU to ensure consistent and equivalent transposition of the relevant legislation.

⁴⁴ However, CESR set up a questionnaire in accordance with Art. 20 of the Directive in order to carry out an examination of the Directive in 2011 and to provide the European Commission with information on takeover bids taking place in the markets of the EU Member States. EU Member States are asked to report every cross-border case, which for the purpose of the reporting requirement is defined as a takeover bid where the bidder and the target company have their registered office in different countries.

of being replaced by the new European Securities Authority (ESA).⁴⁵ ESA will carry on CESR's missions, but in addition have increased responsibilities, defined legal powers and greater authority. In takeover matters, this may also contribute to the development of practice rules, guidance for the solution of certain unregulated issues, or even a single set of harmonized rules.⁴⁶

III. THE AUSTRIAN TAKEOVER COMMISSION

The Commission was established upon effectiveness of the Act in 1999. It has comprehensive competence to rule on all matters regulated by the Directive and the Act.

A. The Commission as a Judicial Body and its Panels

The Commission is an independent judicial body pursuant to a specific parity system under the Austrian Constitution (*Kollegialbehörde mit richterlichem Einschlag*, Art. 133/4 of the Federal Constitution Act) (§28 of the Act).⁴⁷ The Commission has twelve members. It consists of three panels of four members each. Each panel consists of one member who acts as chairperson or vice chairperson of the Commission, one member who is a federal judge, one member who is appointed upon proposal of the Federal Economic Chamber (*Wirtschaftskammer Österreich*), and one member who is appointed upon the proposal of the Federal Chamber of Labor (*Österreichische Bundesarbeitskammer*). The members are appointed by the Federal Minister of Justice in agreement with the Federal Minister of Finance.

⁴⁵ The EU has proposed to establish the European Securities Authority (ESA) as successor of CESR, which, together with the European Banking Authority (EBA) and the European Insurance and Occupational Pensions Authority (EIOPA), shall form the European System of Financial Supervisors (ESFS). The national supervisory models have lagged behind the integrated and interconnected reality of today's European financial markets in which many financial firms and other market participants operate on a cross border or global basis. The three new authorities shall still rely on the national authorities for direct supervision of regulated entities and enforcement. But, they shall have rulemaking authority, a dedicated staff and budget and the legal authority to insist that national authorities enforce the European rules in a uniform way. See COM/2009/0252 final.

⁴⁶ See also E. Wymeersch, *The Takeover Bid Directive, Light and Darkness*, (January 2008) Financial Law Institute Working Paper No. 2008-01. Available at SSRN: <http://ssrn.com/abstract=1086987>, 6f.

⁴⁷ The Constitutional Court (*Verfassungsgerichtshof*) affirmed the constitutionality of the Commission, VfGH v. 12.12.2000, B 2010/9 (VfSlg 16.048).

Members are free from any instructions, in particular from the government, the Financial Market Authority, as well as from the Vienna Stock Exchange, and they may not be dismissed from office (§28/3 of the Act). The panels decide by simple majority, with the chairperson having a casting vote. The individual panel's jurisdiction is determined by the target company's name. The Commission has its office at the Vienna Stock Exchange.

B. Jurisdiction

The Commission has jurisdiction to decide in all matters which are regulated by the Act (§29/1 of the Act). The Act applies to (i) all takeover bids to acquire shares issued by Austrian stock companies the shares of which are listed on the Vienna Stock Exchange, (ii) the determination of a change of control concerning Austrian stock companies the shares of which are not listed on the Vienna Stock Exchange but on another stock exchange in the EU, and (iii) supervision of takeover bids concerning stock companies registered in another EU Member State the shares of which are listed on the Vienna Stock Exchange (§2, §27b and §27c of the Act).⁴⁸

The Commission may at any time initiate procedures *ex officio* (§29/1 of the Act).

C. Conflicts of Jurisdiction

On the European level, the Directive contains conflict rules for deciding the competent takeover authority.⁴⁹

In Austria, Federal Courts are competent to rule on contractual claims, even if such claims relate to takeover bids. In cases in which a judgment on a contractual claim depends on the solution of a takeover law issue, a Federal Court is obliged to suspend its proceedings and to refer the matter to the Commission for a preliminary ruling (§29/2 of the Act). Considering the broad definition of the Commission's jurisdiction ("all matters governed by the Act"),

⁴⁸ K. Alscher in *Übernahmegesetz*, *supra* note 23 at § 27b.

⁴⁹ *See above* p. 5f.

conflicts of jurisdiction may arise between the Commission and the Federal Courts, e.g. in relation to shareholders agreements.⁵⁰

D. Decision Making by the Commission

The Commission is an independent judicial body. Its procedures are governed by the *Allgemeines Verwaltungsverfahrensgesetz* (General Administrative Procedure Act) (§30/2 of the Act).⁵¹

Before a case is assigned to a panel, the Commission may communicate with the parties concerned, e.g. with respect to preliminary inquiries or legal guidance or consultations (§29/1 of the Act) (informal guidance).⁵²

In this phase, the chair of the Commission may issue a response to questions submitted to the Commission in form of a non-binding written or oral statement pursuant to §29/1 last sentence of the Act (response by the chair).

Concerning cases assigned to a panel, Commission practice has shaped three kinds of procedures: (i) procedures that are closed in a non-authoritative way in form of a non-binding *Stellungnahme* (statement) (§29/1 of the Act), (ii) procedures that are closed in an authoritative way in form of a *Bescheid* (decree) or (iii) procedures that end without any formal decision, e.g. because the opinion of the Commission is accepted by the bidder which is reflected in the offer document. Before issuing any decree, the Commission shall use statements to communicate its legal view to the parties. The Commission shall use its efforts to amicably settle differences of opinion.

Procedures relating to an offer document are characterized by an intensive dialogue between the Commission and the bidder. Usually, the bidder informally files a draft offer document with the Commission. From a very early stage on, the Commission provides comments on such draft. In case of different opinions, after detailed discussions, the

⁵⁰ M. Gall in *Übernahmegesetz*, *supra* note 23 at § 29 no. 2.

⁵¹ See e.g., R. Walter and H. Mayer, *Grundriss des österreichischen Verwaltungsverfahrenrechts* (8th ed. 2003); J. Hengstschläger and D. Leeb, *Kommentar zum Allgemeinen Verwaltungsverfahrensgesetz* (2004).

⁵² M. Gall in *Übernahmegesetz*, *supra* note 23 at § 29 no. 4f.

Commission articulates a position which the bidder usually follows. In this case, no formal decisions, statements or decrees, are taken. If no agreement can be reached between the bidder and the Commission, the Commission may prohibit the publication of the offer document (§10/3 of the Act).

E. Timing

In general, the Commission has to decide as quickly as possible (§3/5 and §30/1 of the Act), in any case within one month after initiation of the procedures. However there is no legal remedy in case the Commission exceeds this period.⁵³

For the examination of offer documents, the Commission has available at least eleven trading days, with an option of extending this period (§11/1 of the Act) by prohibiting the publication of the offer documents for a certain period.

In certain declaratory procedures (§33 and §26a of the Act), the Commission shall decide within a reasonable period of time.

Apart from the general rules on limitation according to the General Administrative Procedure Act, no specific timing rules apply for administrative penalties (§35 of the Act).

F. Remedies

In general, the decisions of the Commission are final and not subject to any ordinary remedy (§30/1 last sentence of the Act).⁵⁴

In case of violation of constitutional rights, the parties may call the *Verfassungsgerichtshof* (Constitutional Court) according to Art. 144 of the Federal Constitution Act. Decisions on administrative penalties (§35 of the Act) may be appealed to

⁵³ M. Gall in *Übernahmegesetz*, *supra* note 23 at §30 no. 1f. Incomplete filings with the Commission sometimes render it impossible to comply with this time-frame. Especially cross-border cases make it hard to meet the deadline set out in the Act.

⁵⁴ A reform of this system has been repeatedly proposed by introducing an appellate court, *see* H. P. Rill, *Ist das Übernahmerecht verfassungswidrig*, 2006 ZfV 178.

the *Unabhängiger Verwaltungssenat* (Independent Administrative Tribunal, §35/3 of the Act).

G. The Chair, the Registry, and the Plenum of the Commission

The chair is the external representative of the Commission.⁵⁵ The chair gives guidance to the parties involved, until a panel is made competent. The chair's tasks include the supervision of the markets *ex officio*, in view of identifying possible violations of the Act (§28/3 of the Act). The chair is also authorized to request information from the market participants with respect to takeover matters. The Commission (penal) may penalize market participants who deliberately give false information (§35/1/4 of the Act). After the assignment of a case to the competent panel, jurisdiction lies with such panel (§30/4 of the Act).

The chair and the panels are supported by the registry (*Geschäftsstelle*). The registry is responsible for the day-to-day work of the Commission. It oversees the daily markets, observes major developments and their influence on the M&A business, and prepares the decisions of the panels. The registry gives preliminary guidance to persons that are contacting the Commission.

The plenum of the Commission is competent to decide in two instances: (i) matters, which were decided in a different way by separate panels, and (ii) matters of principal importance (§28/7 of the Act). The plenum of the Commission also decides on the adoption of the internal rules of procedure, on terminating a membership, and on the comment to the fee schedule for Commission procedures issued by the Vienna Stock Exchange.

H. The Financial Market Authority and the Vienna Stock Exchange

The Commission and the *Finanzmarktaufsicht* (Financial Market Authority, FMA)⁵⁶ are obliged to support each other (§22/2 of the Austrian Financial Market Authority Act). In

⁵⁵ M. Gall in *Übernahmegesetz*, *supra* note 23 at §28 no. 20.

⁵⁶ www.fma.gv.at. The FMA is responsible for the legal supervision of the stock exchange and supervises the propriety and fairness for trading in shares. In addition, the FMA examines the market surveillance system of the

practice, information on certain shareholdings is provided by the FMA to the Commission. In addition, all governmental authorities and government agencies are obliged to support and to provide information to the Commission (§28/11 of the Act). The FMA is responsible for supervising disclosure matters regulated in Art. 10 of the Directive.

The Commission and the Vienna Stock Exchange⁵⁷ closely cooperate, on a daily basis, with respect to sales data of share trading, and from time to time, upon announcement of a takeover bid, since the Vienna Stock Exchange has to decide on a suspension of trading of the affected shares.

IV. THE CASES HANDLED BY THE COMMISSION

This part of the paper illustrates the cases handled by the Commission on the basis of empirical data. The study distinguishes between procedural aspects of cases and substantive takeover law aspects.

A. Procedural Aspects of the Cases Handled by the Commission

The procedural aspects presented below include procedures applied by the Commission, the kinds of decisions made (decree or statement), the initiation of procedures, including referrals from Federal Courts, cross border cases, the use of general opinions by the plenum of the Commission and references made for a preliminary ruling by the European Court of Justice.

Vienna Stock Exchange. Another main task of the Securities Supervision is the supervision of issuers and shareholders with regard to ad-hoc-disclosure obligations, regular disclosure obligations, the notification of voting rights and as of 1 May 2001 also transactions of members of the executive bodies and senior executives with shares of their own company. See E. Brandl and R. Wolfbauer, *Die wirklich neue Finanzmarktaufsichtsbehörde*, 2002 *ecolex* 294.

⁵⁷ www.wienerborse.at; see P. Knobl, *Wer überwacht den Handel an der Börse*, 1999 *ecolex* 797.

P.1 Cases Assigned to a Panel and Responses by the Chair

When the Commission is approached with questions on takeover matters on a general level without a defined takeover case, such questions are answered by the registry without a case being assigned to a panel and without a formal response by the chair (informal guidance). Such guidance, of course, has its limits: it must not lead to a situation in which a party concerned tactically delays proceedings. In most cases, concrete takeover situations require an assignment to a panel (cases assigned to a panel). However, if the factual and legal situation of a takeover case is clear, the chair may issue a statement clearing such a case upfront (response by the chair).

No data is available with respect to the number of inquiries dealt under the informal guidance by the registry.

During the investigation period, most takeover cases were assigned to a panel. Rarely, the chair of the Commission gave a response.

Table P.1 Cases Assigned to a Panel and Responses by the Chair

	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	TOTAL
Cases Assigned to a Panel	9	17	20	22	18	24	23	12	14	12	171
Responses by the Chair	4	3	1	1	0	0	0	0	0	1	10

P.2 Kinds of Panel Decisions

Panel procedures are closed either (i) in a non-authoritative way in form of a non-binding *Stellungnahme* (statement) or (ii) in an authoritative way in form of a *Bescheid* (decree) or (iii) without any decision, e.g. because the bidder accepts the opinion communicated by the Commission by adapting the offer document.

During the investigation period, the Commission used all kinds of decisions in dealing with parties concerned.

Table P.2.1 Kinds of Panel Decisions

	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	TOTAL
Statements	3	2	5	2	3	8	6	5	4	6	44
Decrees	3	7	9	10	6	9	8	3	5	3	63
Adaption of Offer Document*	4	7	2	6	7	4	3	0	4	1	38

* Number equals total offer documents published between 1999 and 2008.

The Commission may issue decrees (i) outside of takeover proceedings or (ii) during takeover proceedings. Legal issues arising in course of takeover proceedings are usually solved through informal guidance by the Commission. However, some takeover bids required the issue of decrees by the Commission. In most cases, the filing period was prolonged or the waiting period⁵⁸ was shortened.

Almost twice as many decrees were issued outside of takeover proceedings than during takeover proceedings.

Table P.2.2 Decrees Issued Outside of and During Takeover Proceedings

	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	TOTAL
Decrees Outside of Takeover Proceedings	1	4	6	6	5	5	7	2	2	2	40
Decrees During Takeover Proceedings	2	3	3	4	1	4	1	1	3	1	23

P.3 The Initiation of Commission Procedures

Procedures may be initiated by persons affected by takeover situations. The Commission, as well, may initiate procedures ex officio at any time (§29/1 of the Act), typically based on results from monitoring the market developments (trading and non-market share price and sales developments), the media, and the notifications on changes of shareholdings. Eventually, Federal Courts may refer a takeover matter to the Commission. If a

⁵⁸ After filing an offer document with the Commission, the bidder has to wait for a minimum of 12 and a maximum of 15 trading days before the offer document must be published (§11/1 of the Act).

preliminary takeover law question arises in a civil court procedure, a Federal Court must suspend the procedures and obtain a decision of the Commission. The decision of the Commission on the preliminary question is binding on the Federal Court.

During the investigation period, almost three out of four procedures were initiated upon application. More than one out of four procedures was initiated ex officio. There has not been a court referral.

Table P.3 The Initiation of Commission Procedures

	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	TOTAL
Ex Officio	2	3	5	3	5	5	4	3	5	5	40
Upon Application	7	14	15	19	13	19	19	9	9	7	131
Upon Court Referral	0	0	0	0	0	0	0	0	0	0	0

P.4 Initiation by Application

Procedures upon application may be initiated by a core shareholder, by a minority shareholder, by a bidder, by a target company or by others, e.g. investment banks.

During the investigation period, almost half of the procedures upon application were initiated by core shareholders. Two out of three procedures upon application were initiated by bidders.

Table P.4 Initiation by Application

	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	TOTAL
Core Shareholders	2	6	8	7	6	9	11	3	4	3	59
Minority Shareholders	0	0	1	0	0	2	3	1	0	0	7
Bidders	4	7	6	11	6	7	4	3	4	2	54
Target Companies	1	1	0	1	1	1	0	0	0	2	7
Others	0	0	0	0	0	0	1	2	1	0	4

P.5 Remedies to the Constitutional Court

Out of the 63 decrees issued by the Commission, two decrees were challenged by filing a complaint to the Constitutional Court. In the first case (VfGH, 12.12.2000, VfSlg 16.048), the Court upheld the decision by the Commission and declared that the establishment and the structure of the Commission do not violate the Austrian Constitution.⁵⁹ The second case (VfGH, 6.10.2006, VfSlg 17.961) concerned a Commission ruling on change of control, which led to a reform of the Act and the introduction of the 30% control threshold.⁶⁰

Table P.5 Remedies to the Constitutional Court

	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	TOTAL
Remedies	0	1	0	0	0	0	0	1	0	0	2

P.6 Cross Border Cases

In general, the forum for resolving disputes about changes of control is the takeover authority of the EU Member State in which the target company has its registered office, and the forum for resolving disputes about takeover bids as such is the takeover authority of the EU Member State in which the shares are listed (Art. 4/2/e of the Directive).

§27b and §27c of the Act provide for such intercommunity scope of application in line with the Directive. §27b of the Act governs target companies with a registered office in Austria and an exchange listing in another EU Member State. During the investigation period, eight companies fell in this category. §27c of the Act governs target companies with an exchange listing in Austria and a registered office in another EU Member State. Two companies fell in that category.

⁵⁹ See R. Rittler, *Die Verfassungswidrigkeit der Übernahmekommission ist saniert*, 1999 RdW 635; see also *supra* note 47.

⁶⁰ M. Winner, *Rechtspolitisches zum Pflichtangebot - eine Würdigung des ÜbRÄG 2006*, 2007 GesRZ 391; M. Winner, *Das Pflichtangebot nach neuem Übernahmerecht*, 2006 ÖJZ 661; C. Keindl and B. Rieder, *Neuerungen für das Pflichtangebot und Gesellschafterausschluss*, 2006 GesRZ 247.

Since the transposition of the Directive, only two cross border cases were handled by the Commission. In both cases, the target company had its registered office in Austria and the shares were listed on a stock exchange in Germany.

Table P.6 Cross Border Cases

	2006	2007	2008	TOTAL
§27b Cases	0	0	2	2
§27c Cases	0	0	0	0

P.7 General Opinions by the Plenum of the Commission

The jurisdiction to decide in cases brought before the Commission or initiated ex officio, in general, lies with the panels. The plenum of the Commission is competent to decide in two instances (§28/7 of the Act): (i) matters which were decided in a different way by separate panels, and (ii) matters of principal importance.

During the investigation period, the plenum of the Commission had no reason to intervene because of inconsistent case law by the panels. The Commission rendered only two opinions in matters of general importance: the general opinion of 3 December 2001 on the relationship between competition law and takeover law,⁶¹ and the general opinion of 17 May 2006 on the change of the control definition in course of the amendment of the Act in 2006.

Table P.7 General Opinions by the Plenum of the Commission

	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	TOTAL
Inconsistent Decisions	0	0	0	0	0	0	0	0	0	0	0
Principal Importance	0	0	1	0	0	0	0	1	0	0	2

⁶¹ ÜbK v. 3.12.2001, GZ 2001/V/1, available at http://www.takeover.at/entscheidungen_generelle_stellungnahmen.html

P.8 References for a Preliminary Ruling by the European Court of Justice

National courts, including judicial bodies, are bound to apply EC law. To ensure the effective and uniform application of EC law and to prevent divergent interpretations, national courts may, and sometimes must, turn to the Court of Justice and ask that it clarifies a point concerning the interpretation of EC law (Art. 234 of the European Community Treaty). As a judicial body, the Commission, should the need arise, is obliged to present to the European Court of Justice questions concerning the interpretation of European law, and more specifically, the implementation of the Directive.

During the investigation period, the Commission has not initiated any preliminary ruling procedure.⁶²

Table P.8 References to the European Court of Justice

	2006	2007	2008	TOTAL
References	0	0	0	0

B. Substantive Aspects of the Cases Handled by the Commission

The aspects of substantive takeover law presented below include the type and structure of takeover bids (mandatory bids, voluntary bids for control, and non-control-related tender offers), the decisions concerning mandatory takeover bids (acting in concert, passive change of control, creeping-in, exemptions), the decisions on exemption cases and suspension of voting rights, decisions on supplementary measures taken in such cases, breakthrough, decisions on offer price and conditions in offer documents, decisions on the prohibition to launch a bid, and the use of administrative penalties.

⁶² So far, there have been no petitions to the Court of Justice for a preliminary ruling regarding the Directive according to Art. 234 of the European Community Treaty.

S.1 The Structure of Takeover Bids and Tender Offers

Types of Bids. The Act regulates (i) mandatory takeover bids upon acquisition of a controlling interest, (ii) voluntary takeover bids to acquire a controlling interest (control related bids), and, beyond the Directive, (iii) voluntary tender offers (not aiming to gain a controlling interest). The control threshold is set at the holding of a minimum of 30% of the shares with permanent voting rights in the target company, subject to a lower threshold set in the charter (§22 and §27/1/1 of the Act). One Austrian target company has set this threshold at 20%.

Tender offers are bids that do not aim at gaining a controlling interest over the target company. Tender offers may be made (i) to acquire less than 30% of the permanent voting rights of a target company or, if a shareholder already controls a target company, to increase the shareholding in the target company, and (ii) by a target company itself to acquire its own shares.

During the investigation period, a total of 38 bids were launched. Three out of four bids were control related bids. Tender offers, i.p. of target companies for own shares, became less popular during the last years.

Table S.1.1 Types of Bids

	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	TOTAL
Mandatory Bids	1	2	2	3	4	1	2	0	2	1	18
Voluntary Bids for Control	1	1	0	1	1	2	1	0	1	0	8
Non-Control Offers by Shareholders or Investors	1	2	0	2	1	1	0	0	1	0	8
Non-Control Offers by Target Company	1	2	0	0	1	0	0	0	0	0	4

Duration of the Acceptance Period. The period for accepting the bid may be not less than two weeks and nor more than 10 weeks from the publication of the bid (§19 of the Act).

Between 1999 and 2008, in for three out of four offer documents the acceptance period was set between four and six weeks.

Table S.1.2 Duration of the Acceptance Period of Bids

	1999 – 2008
2 – 3 weeks	3
4 – 6 weeks	28
7 – 10 weeks	7

Takeover Bids Subject to Conditions. Voluntary bids for control and tender offers may contain other adequate conditions (§8 of the Act). Voluntary takeover bids to acquire a controlling interest are subject to the statutory condition that the bidder must receive acceptance declarations accounting for at least 50% of the targeted shares (§25a/2 of the Act).

The 20 offer documents for voluntary bids for control and tender offers contained conditions, among others, relating to merger clearance by competition authorities, to changes of the charter or shareholders resolutions, to minimum acceptance thresholds, and to material adverse changes and status quo.

Table S.1.3 Takeover Bids Subject to Conditions⁶³

	1999 – 2008
Statutory Minimum Acceptance Threshold of 50%*	8
Competition Clearance	5
Shareholders Resolutions / Changes of Charter	4
Additional Minimum Acceptance Threshold	4
Material Adverse Change / Status Quo	2
Insolvency	3
Other	2

*Equals number of voluntary bids for control

⁶³ Multi-counting due to bids with multiple conditions.

Improvements of Takeover Bids. In order to enhance the chances for the success of a bid, e.g. due to a minimum acceptance threshold, the bidder may improve the bid during the acceptance period, effective for all shareholders. If a bidder acquires shares on terms more favorable than those of the bid, she is obliged to improve the bid accordingly.

During the investigation period, seven out of 38 takeover bids were improved with respect to the offer price or to the terms and conditions of the offer.

Table S.1.4 Improvements of Takeover Bids

	1999 – 2008
Price related	5
Other	2

S.2 Decisions on Acting in Concert

The Commission frequently deals with the different ways of how a controlling interest can be reached. In certain cases, shares held by one shareholder are attributed to another shareholder or shares are mutually attributed to two or more shareholders, such attribution having an effect on the calculation of the controlling interest (§23 of the Act). Shares of parties acting in concert (§1/6 of the Act) are mutually attributed.⁶⁴ Acting in concert is assumed, if a legal entity holds a direct or indirect controlling interest in one or more other legal entity, or if several shareholders reach agreement on the election of a supervisory board member; also a target company may be considered as a party acting in concert (§1/6 of the Act; see Art. 2/1/d of the Directive). The concept of acting in concert is paramount to many takeover cases, e.g. for determining control or the equitable price. Cases are especially challenging when private foundations in relation to their founders or complex holding

⁶⁴ Shares are unilaterally attributed in the following cases: to the owner, if the shares are held by a third person on the account of the owner; to the other party (holder of voting rights, holder of collateral shares, beneficiary of *usus fructus* rights, or owner of certain options), if the owner has assigned her right to give voting instructions (§23/2 of the Act).

structures are concerned. In fact, the acting in concert rule proves to lead to the most controversial cases.⁶⁵

During the investigation period, the acting in concert rule was frequently discussed between the registry and the parties involved during informal guidance procedures. Decisions by the Commission, however, remained rare. Based on a specific notification requirement which was dropped in 2006 (§25/1/2 of the Act), most decisions concerned changes within a shareholders' syndicate.

Table S.2 Decisions on Acting in Concert

	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	TOTAL
Acting in Concert	1	0	0	0	0	0	0	0	2	2	5
Insignificant Changes within Shareholders Syndicates	0	4	6	8	7	5	7	n.a.	n.a.	n.a.	37

S.3 Decisions on Passive Change of Control and Creeping-in

Special rules⁶⁶ apply in cases in which a person obtains a controlling interest without acquiring shares (passive change of control) (§22b/1 of the Act).

A shareholder who holds a controlling interest but is not entitled to the majority of the permanent voting shares has to launch a takeover bid, if she acquires additional shares within a period of twelve months that give her at least an additional 2% of the voting rights (creeping-in) (§22/4 of the Act).

During the investigation period, from time to time, creeping-in and passive change of control were discussed between the registry and the parties involved during informal guidance procedures. Decisions by the Commission were rare.

⁶⁵ See T. Papadopoulos, *The Mandatory Provisions of the EU Takeover Bid Directive and Their Deficiencies*, 1 *L.F.M.R* 525, 530 (2007). For Austria see M. Gall, *Acting in Concert und die Angebotspflicht im ÜbG*, 2008 *GesRZ* 139.

⁶⁶ The Commission has the power to order a bid to be made or to impose conditions for not making a bid. The voting rights in excess of 26% must not be exercised (§22b/2 of the Act). The Commission may, upon request, replace this suspension of voting rights by conditions which provide an equivalent level of investor protection; the Commission may not, however, lift the suspension of voting rights in excess of 30% (§22b/3 of the Act).

Table S.3 Decisions on Passive Change of Control and Creeping

	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	TOTAL
Passive Change of Control	0	0	0	0	0	1	0	0	0	1	2
Creeping In	0	0	0	0	0	0	0	0	1	0	1

S.4 Decisions on Exemptions of Mandatory Takeover Bids

The Directive does not provide for a harmonization of the exemptions to the mandatory bids obligation. The Act lists a number of cases in which there is no obligation to launch a mandatory takeover bid, even though a controlling interest is reached:

- In case of transfer of shares, if the beneficial owner does not change (§24/1 of the Act).
- If the shareholding in the target company does not give a control, i.e. because (i) another shareholder has at least the same number of voting shares (§24/2/1 of the Act), (ii) the shares do not count for the majority of the voting rights, based on the usual presence of other shareholders at the shareholders' meetings (§24/2/2 of the Act), or (iii) the voting rights are limited to 30% under the charter (§24/2/3 of the Act).
- Upon acquisition of an indirect controlling interest, if the book value of the direct interest in the target company amounts to less than 25% of the book value of the net assets of the legal entity that holds the direct interest (§25/1/1 of the Act).
- Shares are acquired for the purpose of a reorganization of the company (§25/1/2 of the Act).
- The control threshold is exceeded only temporarily or unintentionally, provided that the share transfer is reversed immediately (§25/1/3 of the Act).
- Shares are given as gift among relatives, are inherited or are transferred upon termination of a marriage (§25/1/4 of the Act).

- Shares are transferred to a holding company or to a private foundation, with the existing shareholders or their relatives remaining beneficial owners (§25/1/5 of the Act).
- The party involved initiates squeeze out procedures within five months, subject to equitable price for the shares (§25/1/6 of the Act).

Crossing the control threshold as a consequence of a capital increase decided by the shareholders meeting as well as a change of control that occurs after a merger are not exempt from the mandatory bid requirement under Austrian law.

During the investigation period, more than one out of three cases concerned the reorganization of the target company and more than two out of five cases concerned the transfer of shares without change of the beneficial owner.

Table S.4 Decisions on Exemptions of Mandatory Takeover Bid

		1999-2008
No Change of Beneficial Owner	§24/1	12
Larger Shareholding	§24/2/1	0
No majority in Shareholders' Meeting	§24/2/2	0
Maximum Voting Right of 30%	§24/2/3	0
Indirect Acquisition	§25/1/1	3
Reorganization	§25/1/2	10
Temporary / Unintentional Acquisition	§25/1/3	3
Transfer to Family	§25/1/4	0
Transfer to Holding or Private Foundation	§25/1/5	0
Squeeze-Out	§25/1/6	0
Total		28

S.5 Decisions on Suspension of Voting Rights

The Commission may suspend voting rights, (i) if a bidder makes a bid in violation of the Act (§34/3 of the Act), and (ii) if a party fails to make a notification or announcement despite being requested to do so by the Commission (§34/4 of the Act). If a bidder fails to publish a mandatory bid or violates the pricing rules in a bid, its voting rights are suspended by law (§34/1 of the Act). The Commission may end the suspension of voting rights as soon as a bid or payment, as the case may be, has been made. The Commission also may rescind the suspension of voting rights in certain cases (§34/2 of the Act).

The suspension of voting rights is a strong legal tool of the Commission and works as a deterrent. It was not frequently used during the investigation period.

Table S.5 Decisions on Suspension of Voting Rights

	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	TOTAL
Suspension of Voting Rights	0	1	0	0	0	1	0	0	0	0	2

S.6 Decisions on Measures in an Exemption Case or in Case of Suspension of Voting Rights

If an exemption applies, the Commission may require the controlling shareholder to take measures that are necessary to avoid any damage to the financial interests of shareholders of the target company (§25/2 and §25/3 of the Act). Such measures include

- the launch of a mandatory takeover bid despite of the exemption,
- the prohibition to acquire additional shares,
- the obligation to sell shares,
- the suspension of voting rights,
- the appointment of a majority of independent supervisory board members,

- reporting obligations vis-à-vis the shareholders' meeting,
- reporting obligations vis-à-vis the Commission.

In case of non-publication of an offer document or violation of pricing rules, the Commission may apply further conditions (§34/5 of the Act), including

- the right of a shareholder to withdraw from the acceptance of a bid,
- the prolongation of the offer period,
- the re-opening of the bid for new acceptance declarations.

Even though the Commission has a wide selection of instruments, only very few instruments were actually used.

Table S.6 Decisions on Measures in an Exemption Case or in Case of Suspension of Voting Rights

	1999-2008
Obligation to sell shares	2
Equitable Price	3
Independent supervisory board members	1

S.7 Decisions on Equitable Offer Price

The Act provides for a specific set of pricing rules for control related takeover bids: (i) the offer price shall not be less than the highest consideration in cash paid or agreed on for shares in the target company within the preceding twelve months before the announcement of the bid (§26/1 of the Act); (ii) the offer price shall correspond at least to the average exchange price in the preceding six months (§26/1 of the Act); (iii) the offer price shall not be less than the consideration paid by bidder within nine months of the end of the (extended) acceptance period (§16/7 of the Act); and (iv) if a controlling interest is resold within nine months of the

end of the (extended) acceptance period, the offer price shall be raised by the pro-rate amount of the profit gained by the bidder (§16/7 of the Act).

During the investigation period, the equitable price was subject to discussions, virtually in all takeover cases. Formal decisions on that matter, however, were rare.

Table S.7 Decisions on Offer Price

	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	TOTAL
Offer Price	0	1	2	0	0	0	1	1	2	0	7

S.8 Decisions on Conditions in Offer Documents

The Commission has to decide as to whether (i) the conditions in an offer document are adequate (§8 of the Act) and (ii), in case of voluntary takeover bids for control, the statutory condition for more than 50% of the targeted shares is met (§25a/2 of the Act).

During the investigation period, the conditions in offer documents were subject to discussions, virtually in all voluntary bids and tender offers. Formal decisions on that matter, however, were rare.

Table S.8 Decisions on Conditions in Offer Documents

	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	TOTAL
Conditions	1	0	0	0	0	1	0	0	1	0	2

S.9 Prohibitions to Launch a Bid

The bidder has to notify the Commission and file the offer document within ten trading days⁶⁷ after disclosing his intention to make a bid (§10/1 of the Act). Upon

⁶⁷ This period may be extended by the Commission upon application of the bidder to up to 40 trading days (§10/1 of the Act).

notification, the Commission has to review the offer document; the bidder has to publish the offer document not earlier than twelve and not later than fifteen trading days after the filing with the Commission (§11 of the Act). The Commission may prohibit the publication of the offer document and thus the execution of the bid (§10/3 of the Act).

During the investigation period, only two bids were prohibited. In the first case, the circumstances of the case materially changed shortly before publication date and the Commission needed more time to review the offer document. In the second case, the bidder was not able to set an equitable price in due time; this takeover bid failed.

Table S.9 Prohibitions to Launch a Bid

	1999 - 2008
Prohibited Takeover Bids	2

S.10 Breakthrough

Austrian law provides that target companies may incorporate the breakthrough rules in their charter (§27a of the Act).

During the investigation period, no target company has made use of this provision by amending its charter accordingly. As a result, the Commission was not confronted with breakthrough cases.

Table S.10 Breakthrough

	2006	2007	2008	TOTAL
Breakthrough Companies	0	0	0	0

S.11 Administrative Penalties

The Commission has comprehensive authority to impose administrative penalties, in particular against the bidder, parties acting in concert, the board members of these entities, the target company and anyone who provides incorrect information upon request of the chair of the Commission (§35 of the Act). Appeals are heard by the *Unabhängiger Verwaltungssenat* (Independent Administrative Tribunal) in Vienna.

During the investigation period, the Commission only once imposed an administrative penalty for a violation to report on a relevant shareholding threshold.

Table S.11 Administrative Penalties

	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	TOTAL
Administrative Penalties	0	0	0	0	0	0	0	0	1	0	1

V. CERTAIN OBSERVATIONS FROM A EUROPEAN POINT OF VIEW

A. Items Regulated by the Directive

Cross Border Supervision. The joint supervision by the Commission together with other national takeover authorities is infrequent. Only eight companies have a registered office in Austria and an exchange listing in another EU Member State; only two companies have an exchange listing in Austria and a registered office in another EU Member State. Only two offers involving cross border supervision were launched, both for companies having a registered office in Austria and an exchange listing in Germany.

Breakthrough. In Austria breakthrough remained on the level of academic discussion. The option for the target companies to incorporate breakthrough provisions in their charter was not used by a single target company.

Acting in Concert. Numerous cases handled by the Commission involved the interpretation and application of the concept of “acting in concert” as provided for in Art.

2/1/d of the Directive. An intensive exchange of views with other national takeover authorities took place on CESR level. The Directive does not provide for comitology in this respect. No case was referred to the European Court of Justice.

B. Items Not Regulated by the Directive

Control. Upon transposition of the Directive, but not caused by this transposition, Austria changed from a substance-based definition, linking the concept of control to the usual presence of shareholders in the shareholders meeting, to a formal definition drawn on a fixed percentage threshold of shareholding (30%) with the option for the target companies to set a lower threshold in their charter. The debate was vigorous. Arguments are still exchanged. In the European Union, inter-member-state competition is shaping different approaches to the concept of control. Whether a common definition in the Directive would lead to better results, remains open.

Exemptions from Mandatory Bid. Most of the decisions of the Commission concerned the exemptions from the obligation to launch a takeover bid. Exemptions from the mandatory bid requirement are not regulated in the Directive. Also in this respect, inter-member-state competition is shaping different approaches.

C. Procedural Items

Acceptance by Parties. Out of a total of 63 authoritative decisions issued by the Commission (decrees) during the investigation period, only two decrees were challenged in court.

No Referrals to the European Court of Justice. Even though the interpretation of EC law is involved in the daily work of the Commission (e.g. “acting in concert”) no referrals to the European Court of Justice were made. Usually, the tight timeframe of Commission procedures does not allow for delay caused by such legal procedures.

Low Shareholder Activity. During the investigation period, out of a total of 131 procedures initiated by application, only seven procedures were initiated by minority shareholders.

No Court Cases. During the investigation period, no legal cases in Federal Courts were pending in which takeover law matters were at issue.

D. General

Rare Application of Severe Sanctions. During the investigation period, it was rarely necessary for the Commission to apply the severe sanctions provided for in the Act to protect shareholders. The Commission twice forced a core shareholder to sell shares in order to terminate its controlling position. The Commission did not come into a position to take a decision on violation of pricing rules, on suspension of voting rights, or to require a shareholder to launch a mandatory offer.

Interpretation of EC Law. No referrals to the European Court of Justice were made for the interpretation of the Directive. For the application of the Directive, comitology procedures have only a limited role (i.e. to contents of offer documents). Thus, the existing coordination mechanisms on CESR level are and, in future, the further developed coordination mechanisms on ESA level will be of significant importance for the interpretation and application of the Directive.