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**Fairness Opinions:
Principles for Management and
Supervisory Boards of Target and Bidder
Companies**

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Society of Investment Professionals in Germany

Imprint:

DVFA
Einsteinstraße 5
DE-63303 Dreieich
Tel.: +49 (0)6103 - 58 33-0
Fax: +49 (0)6103 - 58 33-34
Mail: info@dvfa.de
Web: www.dvfa.de

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Fairness Opinions for management and supervisory boards of target and bidder companies

Principles for the drafting of fairness opinions
in conjunction with offers for acquisition of securities in accordance with
the German Securities Acquisitions and Takeover Act (WpÜG)

Expert Group “Fairness Opinions”

Chairman:

Prof. Dr. Bernhard Schwetzler

Leipzig Graduate School of Management

Members:

Dr. Christian Aders, CEFA

Duff & Phelps GmbH

Dr. Ulrike Binder

Mayer, Brown, Rowe & Maw LLP

Dr. Thomas Gasteyer

Clifford Chance LLP

Andreas Heinrichs

Vontobel Securities AG

Guido Kerkhoff

Deutsche Telekom AG

Dr. Gerhard Killat

Lazard & Co. GmbH

Dr. Thomas Krecek

Clifford Chance

Dr. Hanns Ostmeier

Bundesverband Deutscher Kapitalbeteiligungsgesellschaften e.V.

Dr. Maximilian Schiessl, LL.M.

Hengeler Mueller

Christian Strenger

DWS Investment GmbH

Joachim von Brockhausen

WestLB AG

Dr. Robert Weber

White & Case LLP

Dr. Andreas Wilms/Nikolas Westphal

Leipzig Graduate School of Management

Introduction

The present paper on fairness opinions is the result of an intensive discussion between investors, investment bankers, legal specialists and experts in the area of company valuation and M&A transactions. It is the result of work by the DVFA Expert Group "Fairness Opinions" under the leadership of Dr. Bernhard Schwetzler of the Leipzig Graduate School of Management.

Fairness opinions are expert appraisals of the financial appropriateness of M&A transactions. In Germany, they are usually drafted for, and at the behest of, the management and supervisory boards of the bidder or target company in the context of a corporate takeover. The fairness opinion is generally authored by the advising investment banks of the company. Fairness opinions are an important source of information, but cannot replace an independent assessment of the transaction by investors.

Although the importance of fairness opinions in the context of M&A transactions in Germany has increased over recent years, there are, as yet, no uniform standards relating to content and form. Consequently, the goal of the DVFA Expert Group was to develop principles for content and transparency as well as publication and conflicts of interest.

Since fairness opinions have become an important decision-making tool for investors when it comes to assessing the appropriateness of the transaction, the DVFA considers it essential that they comply with best practice standards in terms of quality, reliability and methodology.

PART A

General

A.1. Preliminary remarks

The principles set forth below relate to fairness opinions for the management and supervisory boards of bidder and target companies obtained in the context of an offer for acquisition of securities in accordance with the German Securities Acquisition and Takeover Act (*Wertpapierübernahmegesetz – WpÜG*). Such fairness opinions assess the appropriateness of a bid for the shares of the target company within the meaning of the WpÜG from the perspective of the shareholders of the bidder or target company.

As a rule, fairness opinions comprise two parts:¹

- The 'valuation memorandum', which presents details of the transaction, the sources of information and valuation methods used, as well as the process of final assessment;
- The 'opinion letter', which summarises the transaction and final assessment.

Shareholders of the **bidder or target company** may become the indirect addressees of the fairness opinion if the board of the company refer to a fairness opinion in their investor communication:

- For the boards of the **target company**, the possibility to make reference to a

fairness opinion is present in the required statement of position on the offer pursuant to section 27 WpÜG. In conjunction with the assessment of the appropriateness of the offer required under the above provision, the management and supervisory boards can make reference to any fairness opinion obtained.

Beyond the general information requirements under the WpÜG, the WpHG (Securities Trading Act) or in connection with any principles of company law, there is no obligation for the boards of the **bidder company** to comment to shareholders on any intended M&A transaction.² However, it can make sense for the management board of the bidder company to refer to a voluntarily obtained fairness opinion, in order to help convince the capital market of its arguments in support of the takeover offer. In this way, the appropriateness of the offer is confirmed by a an objective third party.³

Ideally, by assessing the appropriateness of the offer from the perspective of the shareholders, the author of the fairness opinion plays a *gatekeeper* function in either case, for the protection of shareholders, who are less well informed structurally.⁴

If reference is made to a fairness opinion in communication with the shareholders, any differences in the perspective of the assessment should be indicated:

- For the **target company**, the statement of position in accordance with section 27

¹ For background cf. Schiessl, M.: "Fairness Opinions im Übernahme- und Gesellschaftsrecht", Zeitschrift für Unternehmens- und Gesellschaftsrecht, no. 32, 2003, pp. 814 – 852; Schwetzler, B./Aders, Ch./Salcher, M./Bornemann, Th.: "Die Bedeutung der Fairness Opinion für den deutschen Transaktionsmarkt", Finanzbetrieb, no. 7, 2005, pp. 114 – 124; Westhoff, A.: "Die Fairness Opinion", IDW Verlag, Düsseldorf 2006; Essler, W./Lobe, S./Röder, K.: "Fairness Opinion - Grundlagen und Anwendung", Schäffer-Pöschel Verlag, Stuttgart 2008

² The offer documentation pursuant to section 11 WpÜG is intended for the shareholders of the target company; the related information is inherently limited to the company's own valuations and, thus, of little use to the shareholders of the bidder company.

³ For information on the related certification function cf. Schwetzler, B./Aders, Ch./Salcher, M./Borne-mann, a.a.O. (footnote 1) p. 118. 1) p. 118.

⁴ For detailed information cf. Westhoff, A., *ibid.* (footnote 1), p. 6 ff.

WpÜG is meant to assess the appropriateness of the offer from the standpoint of the business interests of the target company, including the stakeholder interests mentioned under section 27 (1) sentence 2 WpÜG. A fairness opinion for the management and supervisory boards, on the other hand, is limited to an appraisal of the financial “fairness” of the offer for the shareholders of the target company.

- For the **bidder company** as well, the management board generally presents arguments focussing on the business interests of the company, e.g. strengthening of a competitive position, implementation of the company strategy or furthering growth of the company. Here too, there is a potential for deviations from the shareholder-perspective of the fairness opinion.

If not expressly indicated otherwise, this document assumes that the interests of a company and its shareholders are identical.

A.2. Purpose and basic requirements

A fairness opinion for the management and/or supervisory board is an appraisal of the financial appropriateness of a proposed M&A transaction. It is drafted by financial advisors engaged by the company in question. The fairness opinion is intended exclusively for the boards of the company (cf. PART B). Thus, the fairness opinion also serves as proof that board has fulfilled the requirement to conscientiously research the facts under the business judgement rule.

In certain cases, a fairness opinion is utilised by the company boards in communication with its own shareholders.

- The boards of the target company can utilise the fairness opinion as a source of information for their own statement of position vis-à-vis the shareholders in accordance with section 27 WpÜG (cf. PART C) This statement of position is meant to give shareholders a more

comprehensive reservoir of information on which to assess a takeover bid. The focus of the statement is on the “type and amount of the consideration offered” (section 27 (1) sentence 2 no. 1 WpÜG). The statement of position by the boards is designed to improve the target company shareholders’ information base and ensure the “knowledge of the facts” required under the transparency principle (section 3 (2) WpÜG) as the basis for an informed decision on acceptance or rejection of the offer.

- For the management board of the bidder company as well, it can make sense to voluntarily make reference to any fairness opinion obtained in connection with a takeover bid, in order to prevent negative price reactions when the bid is announced and/or when the amount of the offer is disclosed. The management is more well-informed than the shareholders when it comes to the actual risks and opportunities of the intended transaction. There is an inherent difference between the interests of the management and the shareholders. The motivations for the transaction are not always clear to the shareholders, and must be explained. In many cases, there is a degree of mistrust on the part of the capital market and external shareholders with respect to the assessment of financial attractiveness by the management.⁵

From the perspective of the shareholders, there is a threat that the management board may offer and pay a consideration greater than the stand-alone value of the target company, including the value of achievable synergies, in the context of M&A transactions. In this case, a fairness

⁵ “One must conclude, that in the aggregate, abnormal ... returns to buyer shareholders from M&A activity are essentially zero.” Bruner, R., “Does M&A pay? A Survey of Evidence for the Decision Maker”, Darden School of Business, 2001 p. 6. Detailed information is also available in Jensen, M. C., “Agency Cost of Free Cash Flow, Corporate Finance, and Takeovers”, American Economic Review, Vol. 76, 1986, pp. 323 - 329.

opinion can serve as a "corrective device for the subjective assessment of the management board".⁶ An objective third party examines and confirms the financial appropriateness of the intended transaction. The assessment is provided independent of any concrete or abstract self-interest on the part of the management, and thus bolsters the management's position. The author of the fairness opinion helps to improve the information base of the structurally less well-informed shareholders. Consequently, there are certain essential characteristics of a fairness opinion:

a) Fairness opinions are prepared in accordance with institutionally defined standards for company valuation or in line with *best practice/state of the art* criteria. The author does not allow existing business relationships with the company that initiated drafting of the fairness opinion or its board members to influence the findings.

b) If the boards of the company openly refer to the fairness opinion in communication with shareholders, an opinion letter should be published.

c) In the context of takeover bids, it must be ensured that the shareholders of both companies are informed about all relevant **conflicts of interest on the part of the boards** in relation to the transaction in question. The principle applies that these conflicts of interest are not to be addressed in the fairness opinion, because the proper handling of conflicts of interest is the responsibility of the boards themselves.

d) Potential **conflicts of interest on the part of the fairness opinion author** are to be fully disclosed; the relevant explanation is part of the opinion letter.

e) The sources of information used by the author are to be cited in the opinion letter, along with details on whether, and if so

which, sources have been independently verified.

In May 2006, the DVFA published its Principles of Proper Financial Research, which also cover conflicts of interest in the provision of financial services and contain recommendations for the transparency of valuations and opinions. The principles discussed below are in line with these Principles of Proper Financial Research⁷

⁶ Schiessl, M., *ibid* (footnote 1) p. 828.

⁷ Shareholders, boards, the target company, bidder company or market participants can derive no rights, direct or indirect, as a result of compliance or non-compliance with these principles.

PART B:

Relationship between the company boards and the author of the fairness opinion – recommendations for structuring of fairness opinions for the management and supervisory boards

B.1. The purpose of the fairness opinion: improving the information basis and mitigation of liability risk for the boards of the company

Together with other measures, the fairness opinion contributes to the appropriate preparation of a decision for the management board of the bidder and target companies, thus allowing them to fulfil the requirements within the context of the “business judgement rule” and to mitigate liability risks.

The supervisory board's function is to scrutinize the management board. By obtaining a fairness opinion or considering one prepared for the management board, the supervisory board informs itself as required, while also lessening its own liability risk.

B.2. Fairness Opinions for the management and supervisory boards of the target company

B.2.1. Reference date principle, value adjustment rule and extraordinary speculative influences

The fairness opinion should assess the financial benefits of a transaction and the appropriateness of an offered consideration exclusively from the standpoint of the shareholders. When assessing the appropriateness of the offer, the peer group for comparison and valuation benchmark are of great importance. The principle of methodological plurality applies for the selection of these indicators; the recommendations contained herein do not favour one benchmark or valuation

method over another, but do define certain requirements for transparency.

The reference date principle (*Stichtagsprinzip*) applies: the fairness opinion must clearly state the date and time to which the assessment of appropriateness of the offer as compared to the considered alternatives relates. As a rule, the reference date should correspond with the time at which the decision to submit an offer within the meaning of section 10 (1) WpÜG is published by the bidder company. If exceptional circumstances require selection of benchmarks relating to points in time prior to or after the reference date, these must be disclosed. In justified cases, speculation-related extraordinary price influences prior to the above reference date can be eliminated through the selection of an appropriate earlier date. Non-speculation-related factors that influence the value of the company after the reference date are to be accounted for via the value adjustment rule (*Wertaufhellungsregel*).

When assessing the value of the offer, the proposed consideration for shares of the target company must also be taken into account: if, for instance, shares of the bidder company are offered, the stated opinion as to the appropriateness of the offer must also consider the value of these securities.

B.2.2. Benchmark and reference date principle

The reference date principle requires that the benchmarks used relate to the point in time at which the decision to submit a bid is published. The following is an incomplete list of benchmarks that are in line with this principle:

a) A comparative market valuation, supported by multiples, which looks at several listed companies (peer group) and comparable transactions. For the performance and documentation of the

analyses and calculations, please refer to the DVFA Company Valuation Guidelines.

b) A stand-alone assessment of the target company, without consideration of synergies, on the basis of discounted valuation methods. This benchmark makes sense in the event of dubious valuation of the shares by the capital market. Here as well, for the performance and documentation of the analyses and calculations, please refer to the DVFA Company Valuation Guidelines.

c) In addition, the fairness opinion should contain a substantiated assessment as to the appropriateness of the premium offered on the market price at the reference date. This can be in the form, e.g. of a comparison with other premiums offered for similar transactions.

As a rule, if the premium offered on the market price at the reference date is negative, even when the requirements under the WpÜG Regulation on Offers (*WpÜG-Angebotsverordnung* – WpÜG-AngVO) are satisfied, the offer is to be deemed “inappropriate”. Detailed grounds must be given for opinions that deviate from this principle.

The reference date principle as defined above, in conjunction with the listing of exceptional circumstances, allows a differentiated view of the valuation methodology.

The following benchmarks may also be used for the assessment of the offer:

d) Speculation about a higher offer by the same bidder,

e) Speculation about a higher offer by another bidder (or a combination of d) and e)),

f) Speculation about the success of the existing offer, in conjunction with the expectation of a higher settlement (sections 305, 320b, 327b AktG), in the event of a subsequent squeeze out, integration via majority vote (section 320 AktG) or conclusion of an intercompany

agreement (section 291 AktG) via majority vote.

g) Price targets for the shares of the target company published by financial analysts prior to or after the reference date.

The financial outcomes related to these alternatives are highly uncertain and speculative, as they depend on the actions of others (e.g. higher bid by the same or another bidder). Thus, a negative assessment of the offer based solely on the benchmarks listed under d) to g) is not in line with these recommendations.

B.2.3. Value adjustment after the reference date and elimination of extraordinary speculative influences prior to the reference date

According to the reference date principle, the appropriateness of the consideration offered must be assessed based on the market price and benchmark at the time when the offer was announced.

The value enhancement rule requires that extraordinary influences that affect value after the reference date be taken into account. Factors such as the general performance of the capital market since announcement of the offer or any specific changes to the situation of the company can thus be taken into account for assessment of the offer.

If another bidder publishes a decision to submit its own higher bid within the meaning of section 10 (1) WpÜG between the reference date and the drafting of the fairness opinion, this situation must be made known in the fairness opinion for the earlier offer. An assessment of the higher alternative offer is not required; an additional fairness opinion may be obtained for the higher offer.

Discernable extraordinary speculative influences on the market price prior to the announcement of the offer can, in some cases, make it necessary to deviate from

the reference date principle and choose an earlier time of assessment. In such cases, grounds must be given for both the assumption of significant extraordinary influences and the choice of the diverging time of assessment.

In the event that negative financial consequences from a successful takeover bear on the assessment (e.g. termination rights within the context of change of control clauses in supplier or client agreements), their impact must be explained. The fairness opinion must also contain separate information on any negative financial consequences from an unsuccessful takeover (e.g. existing agreements on break up fees).

B.3. Fairness Opinions for management and supervisory boards of the bidder company:

B.3.1. Reference date

The reference date for assessment of the financial appropriateness of the offer is the point in time immediately prior to publication of the decision to submit an offer within the meaning of section 10 (1) WpÜG. This is the verifiable time of a decision for the M&A transaction. In order to reduce liability risk for the board member, the proof of “informed judgement” must relate to this point in time.

B.3.2. Comparative and valuation benchmarks

For the bidder company as well, a benchmark or alternative for action must be established to compare against the proposed transaction for assessment from the perspective of the shareholders. As a rule, the relevant alternative is a rejection of the takeover and realisation of the optimum strategy for the shareholders of the bidder company. The assessment is based on the changes to the company's enterprise value attributable to the

intended M&A transaction.⁸ This presupposes determination of the stand-alone value of the target company and an estimation and measurement of the financial benefits (synergies) to be generated by a combination of the two companies.

B.3.3. Valuation methods and offer price

A fairness opinion for the management board and/or supervisory board of the bidder company should contain a statement with respect to the **appropriateness of the offer for the purchase of shares** of the target company. This statement can be made in conjunction with information on the acceptable offer range in the valuation memorandum.

A later increase of the offer necessitates a re-assessment and new statement as to its appropriateness as part of a fairness opinion.

When assessing the value of the offer, the proposed consideration for shares of the target company must also be taken into account: if, for instance, shares of the bidder company are offered, the stated opinion as to the appropriateness of the offer must also consider the value of these securities.

A company valuation is generally performed as a basis for assessment of the offer. In this context, valuation of the concrete offer for the shares of the target company must take the following factors into consideration:

- The stand-alone **value of the target company** plus the value of potential financial benefits from the merger for the shareholders of the bidder company.
- The **probability of a successful offer**, which increases in line with the amount of

⁸ The theoretical basis for this benchmark is maximisation of enterprise value.

the offer price. Within the acceptable offer range, the shareholders should generally be offered a premium on the current market price of their shares, in order to motivate them towards acceptance of the offer. The number of current bidders, or potential later bidders, and the organisation of the bidding process (e.g. as an auction) are of relevance for assessing the probability of a successful offer.

- The **capital market environment** and related expectations by shareholders of the target company with respect to the takeover premium and potential for future price gains.

Discounted valuation methods are generally used for the measurement of company value; they are particularly useful for quantification of synergy effects. Comparative multiple-based valuations are also used: the comparison of the offer price with transaction-related multiples from other companies and comparable capital market valuations allows an assessment of the price and takeover premium offered.

B.4. Bidder and target company: Details of the final assessment

B.4.1. Transparency requirements

In the fairness opinion, the author states to the management or supervisory board of the relevant company whether the offer is appropriate or not. The boards of the company to which the fairness opinion is addressed must, at all times, have full ability to follow and understand the logic behind the final assessment.

This principle results in requirements for the author of the fairness opinion with respect to the transparency and documentation of the assessment process. The information and facts underlying the assessment are to be documented in the valuation memorandum of the fairness opinion and explained by the author in the meetings with the boards.

Here as well, for the performance and documentation of the analyses and calculations, please refer to the DVFA Company Valuation Guidelines.

B.4.2. Peer group and valuation benchmark / assessment process

The author of fairness opinions generally utilise several benchmarks in the assessment process. In addition to the documentation of the analyses performed as well as the alternatives and benchmarks utilised, the explanations to the boards that accompany the fairness opinion must make clear the influence of the individual findings on the overall assessment. This applies in particular when the individual analyses produced different results than the peer group and benchmark comparisons. In such a case, it must be ascertainable and understandable for the boards how the divergent individual results were aggregated into the final assessment, and which analyses and alternatives or valuation benchmarks led to appraisals different from the final assessment. Even if all analyses and peer group or benchmark comparisons support the final assessment, the explanations accompanying the fairness opinion must address any differences in the weighting of the various benchmarks for valuation and comparison. The boards of the relevant company must be able to identify the author's decision making process with respect to the weighting of the individual analyses and their results. A mere listing of all analyses performed does not satisfy this requirement.

B.5. Bidder and target company: Quality requirements for authors of fairness opinions for management and supervisory boards

Firms that author fairness opinions must have internal organisational and communication rules in place to prevent conflicts of interest. This includes, in particular, compliance with the following

process requirements for the drafting of a fairness opinion:

- Creation of a “fairness opinion committee”,
- Assurance of the fairness opinion author’s professional qualifications,
- Organisational separation, and separation of personnel between the fairness opinion committee and the working groups involved as advisors in the relevant transaction.

**B.6. Bidder and target company:
Conflicts of interest on the part
of the fairness opinion author**

Conflicts of interest that prevent independent and objective assessment as to the appropriateness of the offer, which is the purpose of the fairness opinion, may result if the author provides further services to the bidder or target company in the context of the planned takeover.

The author of the fairness opinion must disclose all contractual relationships with the relevant company from which a conflict of interest may arise. This applies not only to further advisory services in the context of the planned takeover, but also to long-term business relationships existing prior to the takeover bid if they are material to the situation (e.g. as auditor or financing bank).

If performance-based remuneration has been arranged with the fairness opinion author, this must be disclosed in the opinion letter. In particular, the factors on which the performance-based components of remuneration are based are to be disclosed (e.g. for target companies: defensive measures against the takeover, preserving independence, search for a more suitable partner etc.; or for bidder companies: successful completion of the takeover).

If a liability exclusion has been agreed for the author of the fairness opinion, this fact

must be disclosed in the opinion letter, along with the scope of the liability exclusion.

Finally, the point in time at which the author is engaged to draft the fairness opinion and to provide any other services, as well as the time at which work was commenced on the fairness opinion, must be documented in a way that the boards of the company and, (if reference is made to the fairness opinion in external communication), its shareholders can independently assess the scope and timeline of the hours worked.

Any conflicts of interest on the part of the participating bidder or target company boards are handled in accordance with the general provisions of company law and the German Corporate Governance Code, and are not subject the fairness opinion author’s duty of care.

PART C:

Fairness opinions in communication between the management board, supervisory board and shareholders

C.1. Target company:

Fairness opinions as a basis for the statement of position by the boards in accordance with section 27 WpÜG

C.1.1. General

The statement of position by the boards of the target company in accordance with section 27 WpÜG is meant to give its shareholders the ability to assess the takeover bid based on a broader reservoir of information. The focus is on the “type and amount of the consideration offered” (sentence 2 no. 1). The statement of position by the boards must improve the information base of the target company’s shareholders and ensure the “knowledge of the facts” required under the transparency principle (section 3 (2) WpÜG) as the basis for an informed decision on the acceptance/rejection of the offer.

In the case of competing offers within the meaning of section 22 WpÜG, the management and supervisory boards must also assess the competing offer in their statement of position. Given that the recommendations for fairness opinions set forth in PART B do not mandate such a statement of opinion for assessment of an individual offer, it is possible that a statement of position in accordance with section 27 WpÜG may be based on two different fairness opinions for the two competing offers.

C.1.2. Relationship between the statement of position and fairness opinion

C.1.2.1. Reference to a fairness opinion in the statement of position

If the boards of the target company obtain one or more fairness opinions on the appropriateness of the consideration offered as a basis for their statement of position in accordance with section 27 WpÜG, this fact must be disclosed in the statement. The corresponding opinion letter is then to be published together with the statement of position.

C.1.2.2. Relationship between independent analyses by the company boards and analyses in the fairness opinion

As a rule, the company boards are required to make an independent assessment as part of their statement of position in accordance with section 27 WpÜG. The fairness opinion obtained thus has merely a supporting function. It does not relieve the boards of their duty to perform independent analyses to assess the offer. For the shareholders to whom the statement is addressed, however, the analyses performed with the support of the fairness opinion must be distinguishable from those performed independently by the company boards. If the boards make only partial use of the benchmarks and analyses contained in the fairness opinion, this must also be made clear in the statement of position. A global reference in the statement of position to the fact that a fairness opinion was obtained is only permissible if all of the benchmarks and analyses in the fairness opinion, and by virtue the resulting assessment, are adopted in full by the boards.

C.1.3. Publication of the relevant benchmarks

C.1.3.1. Publication of the relevant benchmarks and aggregation of the final assessment

The opinions by the company boards about the financial appropriateness of the offered consideration as part of the statement of position must be understandable to the shareholders as the target audience. These must be able to ascertain which benchmarks and analyses were used by the management and supervisory boards of the target company to arrive at their conclusion.

In PART B, recommendations were developed with respect to possible benchmarks in the fairness opinion intended for the company boards. A statement of position by the boards to the shareholders based on a fairness opinion must therefore make clear whether and, if so, to what extent the above recommendations were taken into account in the drafting of the fairness opinion. The benchmarks and analyses used for the purposes of the fairness opinion as well as the results based thereon and their aggregation into a final assessment are to be detailed in the statement of position. Deviations from the above recommendations in the fairness opinion must also be identified in the statement of position, along with the grounds for such deviation.

C.1.3.2. Publication of the relevant benchmarking and valuation methods

If a comparative market valuation supported by multiples and/or enterprise value based on discounted valuation methods are used as a benchmark for the fairness opinion, the main features of the valuation are also to be published in the statement of position by the company boards.

As a result, minimum requirements for transparency and plausibility must be

observed for the assessment/valuation in the statement of position:

- In the case of a comparative market valuation, the multiples used for the comparison (e.g. enterprise value/EBIT, price/earnings ratio) must be identified and the resulting range of book values stated per share. At the same time, a disclosure must be made as to whether the underlying share values and share prices were determined through a comparison with prevailing market prices or with recently realised acquisition prices.

- The assessment of the premium offered on the market price at the reference date is included in the recommendations for structuring of fairness opinions (cf. B.2.2.). The statement of position by the boards of the target company must disclose the results of this assessment in the fairness opinion as well as the benchmarks used therein. A deviation in the fairness opinion from the above recommendations is to be documented in the statement of position by the boards, and grounds given.

- If the fairness opinion uses the stand-alone⁹ discounted valuation as a benchmark for assessing the offer, the statement of position must explain the main features of the underlying valuation model (e.g. DCF-WACC model, DCF-flow to equity model). The confidentiality obligation applicable to the boards of the target company generally prevent disclosure of key value drivers, in particular projected future profits. The statement of position by the boards, however, should disclose at least those significant valuation parameters that do not fall under the confidentiality obligation,

⁹ Inclusion of “real” synergies in the calculation of the enterprise value is inconsistent alongside an isolated assessment of the premium offered, given that the premium always takes into account synergy benefits.

and the resulting range for the stand-alone book value per share.

- If the offer is deemed inappropriate in the statement of position, grounds must be given for this conclusion. An explanation is required, in particular, as to whether this assessment is based on a different stand-alone valuation of the target company at the reference than that of the broader capital market, or on a determination that the premium offered on the market price is inappropriate.

- The appropriateness of the offer is gauged in the statement of position against the business interests of the company (section 3 (3) WpÜG). In the context of a fairness opinion, the appropriateness of the offer is assessed solely from a financial standpoint. A statement of position that negatively assesses the offer must address any deviations between itself and the fairness opinion as a result of using different benchmarks.

- If financial consequences based on the success or failure of the intended takeover play a role in the assessment of the offer, this must also be made clear in the statement of position by the boards, as well as the fairness opinion.

C.2. Bidder company

C.2.1. General

The reference date for assessment of the offer is the point in time at which the offer is announced, as the relevant time of decision by the management and supervisory boards of the bidder company for the business judgement rule.¹⁰ For the boards of the bidder company, there are general information and communication obligations vis-à-vis all capital market participants in the context of the

¹⁰ Cf. B.3.1. Fairness opinions drafted at a later date for corporate actions and any resolutions by the shareholders' meeting required in relation to these are not subject to the following principles.

transaction based on the provisions of the WpÜG and, if applicable, the Securities Trading Act (*Wertpapierhandelsgesetz – WpHG*): The decision to submit a bid triggers the disclosure obligations under section 10 WpÜG. If the offered consideration is not published simultaneously, the ad hoc disclosure requirement under section 15 WpHG applies when the amount is set. Unlike the target company, there are no further requirements for the bidder company relating to communication with its shareholders, for which a fairness opinion could be used. Nonetheless, the use of a fairness opinion for targeted communication with the shareholders of the bidder company can make sense: an M&A transaction is not necessarily always in the interest of the shareholders of the bidder company.¹¹ Since the shareholders generally have no right to participate directly in decision making, and no possibilities for internal monitoring in relation to M&A transactions, the use of the fairness opinion is recommended in communication with the capital market.

C.2.2. Publication

C.2.2.1. Timing

The reference date for assessment in a fairness opinion drafted for the boards of the bidder company is the point in time immediately prior to announcement of the offer. It is recommended that any intended use of the fairness opinion in communication with the shareholders of the bidder company be timed to coincide with the announcement of the offer or publication of the amount of the offered consideration, in order to allow the positive effect on the capital market to unfold as desired.¹²

¹¹ A transaction can be disadvantageous for the bidder company's shareholders, despite realised synergies, if the premium offered for the shares of the target company is too high. For more, cf. A.2.

¹² Subsequent increases of the offer are addressed under C.2.3.

C.2.2.2. Content: assessment criteria and benchmarks

If the boards of the bidder company refer openly to a fairness opinion, an opinion letter must be published. A mere public reference to the existence of a fairness opinion is inadequate.

Disclosure of the assessment and decision-making criteria is subject to other standards than those relating to fairness opinions by the target company: The publication of details about the valuation and assessment process could weaken the bargaining position of the bidder company. Therefore, no concrete information is necessary for the alternatives on which the assessment of the transaction is based.

For the use of valuation benchmarks, it is adequate to cite the valuation methods used. Details need not be disclosed. Accordingly, publication of the opinion letter, containing a statement that the offer is appropriate from the perspective of the shareholders, is sufficient.

C.2.3. Subsequent increase of the offer

If takeover bids are increased or adjusted by the bidder company, then the recommendation for disclosure in the relevant opinion letter¹³ also applies for subsequent increases.

¹³ For information on obtaining a fairness opinion by the management and supervisory boards in connection with subsequently increased offers, cf. B.3.3.

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DVFA

Einsteinstraße 5
63303 Dreieich

Tel.: +49 (0)6103 - 5833-0
Fax: +49 (0)6103 - 5833-34
Mail: info@dvfa.de
Web: <http://www.dvfa.de>