COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 2.10.2002
COM (2002) 534 final

2002/0240(COD)

proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on takeover bids

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. GENERAL CONSIDERATIONS

In its 1985 White Paper on completing the internal market, the Commission announced its intention to propose a directive on the approximation of Member States' legislation governing takeover bids. On 19 January 1989 it presented to the Council an initial proposal for a Thirteenth Directive on company law concerning takeover and other general bids.[1] On 10 September 1990 it adopted an amended proposal[2] that took account of the opinions of the Economic and Social Committee[3] and the European Parliament.[4]

This was an ambitious text aimed at achieving detailed harmonisation in the field of takeover bids at a time when economic circumstances were propitious. However, as the economic situation changed, the proposal encountered strong opposition from certain Member States. Consequently, the Commission indicated in its declaration on subsidiarity to the European Council at the Edinburgh Summit in December 1992 and confirmed to the Essen European Council in December 1994 that it was planning to revise its proposal on the basis of consultations with the Member States as of June 1993.

On 8 February 1996 the Commission presented to the Council and to the European Parliament a new proposal for a Thirteenth Directive on company law concerning takeover bids.[5] The proposal contained a "framework" directive drawn up in the light of consultations with the Member States and setting out general principles but not attempting detailed harmonisation. At the end of 1997 the Commission adopted an amended proposal that took account of the opinions of the Economic and Social Committee and the European Parliament.

On 19 June 2000 the Council unanimously adopted its common position.[6] In December 2000 the European Parliament proposed on second reading a number of amendments[7] that were not such as to meet with the Council's approval. The ensuing conciliation procedure ended with an agreement within the Conciliation Committee on 6 June 2001.

On 4 July 2001 there was a division in the European Parliament, with the compromise text being rejected (273 votes for and 273 votes against). The European Parliament's decision was motivated by three main political considerations: (1) rejection of the principle whereby, in order to take defensive measures in the face of a bid, the board of the offeree company must first obtain the approval of shareholders once the bid has been made, and this until such time as a level playing field is created for European companies facing a takeover bid; (2) regret that the protection which the directive would afford employees of companies involved in a takeover bid was insufficient; (3) the failure of the proposal to achieve a level playing field with the United States.

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1 OJ C 64, 14.3.1989, p. 8; for the explanatory memorandum, see Bull. EC Supplement 3/89.
2 OJ C 240, 26.9.1990, p. 7; for the explanatory memorandum, see COM(90)416 final.
3 OJ C 298, 27.11.1989, p. 56.
4 OJ C 38, 19.2.1990, p. 41.
5 OJ C 162, 6.6.1996, p. 5; for the explanatory memorandum, see COM(95)655 final.
6 OJ C 23, 24.1.2001, p. 1.
7 OJ C 232, 17.8.2001, p. 168.

However, the Lisbon European Council placed this directive, which forms part of the Financial Services Action Plan,[8] among the priorities as regards the integration of European financial markets by 2005. This view is shared by UNICE, which has repeatedly stressed the need for a common framework for cross-border takeover bids. The European Parliament itself recognised that a directive would be useful and important in this field. Under the circumstances, the Commission considers it essential to provide a European framework for cross-border takeover bids as part of the Financial Services Action Plan.

Such transactions can contribute to the development and reorganisation of European firms, a key condition for withstanding international competition and developing a single capital market. That said, they are still subject to very divergent national rules and give rise to numerous problems when they involve two or more Member States, e.g. the law applicable and the competent authorities. These uncertainties are neither acceptable nor even desirable within the European Union.

The Commission has, therefore, decided to present a new proposal for a directive that meets the concerns of the European Parliament without compromising the basic principles approved unanimously in the Council's common position of 19 June 2000. With this in mind, it set up a Group of High-Level Company Law Experts under the chairmanship of Professor Jaap Winter with the task of presenting suggestions for resolving the matters raised by the European Parliament. In preparing its proposal, the Commission has taken broad account of the recommendations made by the Group in its report on issues related to takeover bids, which was published in January 2002.[9]

The new proposal pursues the same objectives as its predecessor: alongside the general objectives of integrating European markets in line with the Financial Services Action Plan and undertaking harmonisation conducive to corporate restructuring, it sets out to strengthen the legal certainty of cross-border takeover bids in the interests of all concerned and to ensure protection for minority shareholders in the course of such transactions. It establishes a framework for action by Member States by laying down certain principles and a limited number of general requirements while allowing Member States to adopt the detailed implementing rules in accordance with their national practices, provided that the differences are not such as to jeopardise implementation of the directive at Community level.

The new proposal also has the same scope and lays down the same basic principles as its predecessor. However, it has been supplemented in such a way as to incorporate the amendments adopted by the European Parliament to the previous proposal. The proposal here follows the recommendations set out for the Commission in the Winter Report as regards a common definition of "equitable price" (Article 5) and the introduction of a squeeze-out right (Article 14) and a sell-out right (Article 15) following a takeover bid.

In line with the recommendations of the Winter Report, the new proposal retains the principle (in Article 9) that it is for shareholders to decide on defensive measures once a bid has been made public and proposes greater transparency of the defensive structures and mechanisms in the companies affected by the proposal (Article 10). These structural aspects and defensive mechanisms will be published in a detailed and thorough manner. The proposal adds to these

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8 COM(1999) 232, 11.5.1999.

9 Report by the Group of High-Level Company Law Experts, European Commission, Brussels, 10.1.2002.

recommendations an obligation to put the measures concerned to a vote at the general meeting every two years, together with the reasons for such measures.

The proposal does not take up all the recommendations of the Winter Report as regards neutralisation of defensive measures following a successful takeover bid (break-through right). This is because the recommendations met with opposition from virtually all Member States and interested parties, notably because of the legal problems to which they may give rise (application threshold, concept of risk-bearing capital, compensation for rights forgone, etc.). Moreover, a large majority of those questioned were opposed to the inclusion in the proposal of measures that would have had far-reaching implications for company law.

Nevertheless, following the logic of the Winter Report, the proposal stipulates that restrictions on transfers of securities (e.g. the imposition of a ceiling on shareholdings or restrictions on the transferability of shares) and restrictions on voting rights (e.g. restrictions on the exercise of voting rights and deferral of voting rights) are rendered unenforceable against the offeror or cease to have effect once a bid has been made public (Article 11). Following a successful bid, the offeror should also have the right to call a general meeting at short notice with a view to amending the articles of association and replacing the members of the board, provided that the company law rules in force are met, without any restrictions on the transfer of securities or the exercise of voting rights being imposed on the offeror.

The Commission takes the view that this proposal represents a consistent approach that is the most realistic as things stand. Combination of the greater transparency required by Article 10 with the unenforceability of measures that could result in management entrenchment, stipulated in Article 11, should enable significant progress to be made towards the more level playing field called for by the European Parliament, without undermining the competitive position of European businesses vis-à-vis their counterparts in non-member countries, and in particular the United States. This is a first step; the revision provided for by Article 18 will afford an opportunity for examining whether other initiatives should be taken in order to level the playing field further.

The Commission wishes, before concluding this general introduction, to refer to the recent judgments of the Court of Justice concerning infringements of the fundamental principle of the free movement of capital provided for in Article 56 of the EC Treaty (judgments of 4 June 2002 in Cases C-367/98 *Commission v Portugal*, C-483/99 *Commission v France* and C-503/99 *Commission v Belgium*). Although these judgments concern only rules adopted by Member States, the Court recalls, generally, that any restriction on investment or on the exercise of control in European companies is in breach of the principle of the free movement of capital: "the free movement of capital, as a fundamental principle of the Treaty, may be restricted only by national rules which are justified by reasons referred to in Article 58 of the Treaty or by overriding requirements of the general interest and which are applicable to all persons and undertakings pursuing an activity in the territory of the host Member State. Furthermore, in order to be so justified, the national legislation must be suitable for securing the objective which it pursues and must not go beyond what is necessary in order to attain it, so as to accord with the principle of proportionality". The present proposal is in no way intended to depart from this approach. Article 11 is concerned specifically with private-law restrictions on the transfer of securities and the exercise of voting rights and renders them unenforceable or ineffective in the event of a takeover bid. This precision is useful in the light of the resolution adopted by the European Parliament on 5 April 2001 concerning the updating of certain legal aspects relating to intra-Community investments.

Lastly, the proposal also incorporates provisions on committee procedure (Article 17) to replace the contact committee arrangements.

Commentary on the articles

Article 1 – Scope

As in the previous proposal, the Directive applies to companies governed by the law of a Member State all or some of whose securities are admitted to trading on one or more stock exchanges in the European Union. The words "all or some of" are the only innovation compared with the previous text and indicate clearly that the Directive applies also in cases where only a proportion of the offeree company's securities conferring voting rights is listed.

Since the Directive lays down minimum requirements, Member States are free to apply its provisions to companies whose securities are not listed on a stock exchange.

Article 2 – Definitions

This Article defines in the same way as in the previous text the most important terms used in the Directive. No change has been made.

It should be stressed that the provisions of the Directive apply to both mandatory and voluntary bids. A bid may be mandatory where it is required by Member States as a means of protecting minority shareholders in the event of a change of control. A bid may be voluntary when it is launched by a person with there being no obligation on him to do so, in order to acquire control of a company.

It is also worth pointing out which types of securities are covered by the Directive. It applies only to transferable securities carrying voting rights in a company. However, since the Directive lays down minimum requirements, Member States are free to apply its provisions to other types of securities.

Article 3 – General principles

As in the previous proposal, this Article contains a series of general principles which must be respected by the national rules transposing the Directive.

Article 4 – Supervisory authority and applicable law

As in the previous proposal, Member States are required to designate a supervisory authority or authorities to supervise all aspects of the bid and to ensure compliance by all the parties to the bid with the rules made pursuant to the Directive.

Determining which supervisory authority is competent and which law is applicable is a simple matter where the offeree company's securities are traded on a regulated market in the Member State in which it has its registered office: they are those of that Member State. The situation is somewhat more complex where the offeree company's securities are traded on a regulated market in one or more other Member States. The Directive draws a distinction according to whether the issues raised relate to the bid itself or to the operation of the company: in the latter case, the competent authority and the applicable law remain those of the Member State in which the company has its registered office whereas, in the former case, the competent authority and the applicable law are those of the Member State in which the company's securities are traded or the Member State in which they were first admitted to trading.

In order to ensure that the Directive is applied flexibly but that such flexibility does not go so far as to undermine its general principles, Member States may grant their supervisory authorities powers to waive certain national rules adopted pursuant to the Directive. Nevertheless, in doing so, the supervisory authority should always comply with the general principles laid down in the Directive. Such flexibility may be necessary in order to enable the supervisory authority to cope with the great variety of circumstances which can arise in fast-moving financial markets.

It is desirable to avoid systematic litigation during takeover bids. Member States are therefore free to decide to what extent and in what conditions judicial action may be brought, without prejudice to the right of an injured party to have recourse to the courts in order at least to claim compensation in case of damage.

As in the previous proposal, paragraph 2 of this Article is the subject of a revision clause (Article 18).

Article 5 – Protection of minority shareholders; mandatory bid; equitable price

As in the previous proposal, the aim of this Article is to ensure that, every time a person or entity acquires control of a listed company as a result of an acquisition, minority shareholders are protected. To that end, the Directive requires that national rules afford proper safeguards to minority shareholders by obliging that person or entity to address a bid to all holders of securities, for all their holdings, at an equitable price.

As in the previous proposal, and unlike earlier texts, the Directive itself does not attempt to specify the percentage of voting rights above which control can be deemed to have been acquired or the method of calculating such a percentage. It was decided that these matters were to be determined by the Member State where the supervisory authority is located.

Nevertheless, unlike the previous proposal, Article 5(4) defines the price to be paid in the case of a mandatory bid. To ensure that the minority shareholders obtain the best price in all cases and to afford the offeror the greatest possible legal certainty, the highest price paid for the same securities by the offeror, or by persons acting in concert with him, over a period of between six and twelve months prior to the bid is regarded as an equitable price. Nevertheless, in the current economic and financial climate this principle needs to be applied with some flexibility; Member States may therefore authorise their supervisory authorities to adjust that price in circumstances and according to criteria that are clearly determined, by means of a reasoned decision that is made public.

It is desirable to introduce the committee procedure (Article 17) to spell out these circumstances and criteria.

Article 6 – Information on the bid

As in the previous proposal, national rules must ensure that the addressees of a bid have sufficient information about the terms of the bid.

Moreover, as soon as the offeror decides to make the bid he must announce his intention to the supervisory authority and to the board of the offeree company. The offeror must also be required to prepare and make public in good time an offer document containing all the necessary information to enable the addressees of the bid to reach a properly informed decision. All parties to the bid should also be required to provide the supervisory authority, at its request, with all the information it deems necessary in order to discharge its duties.

It is desirable to introduce the committee procedure (Article 17) for amending, should this prove necessary, the list of information required in paragraph 3.

Article 7 – Period for acceptance

As in the previous proposal, the period for acceptance may not normally be less than two weeks or more than ten weeks in order that the conduct of the companies' affairs is not unduly hindered.

Article 8 – Disclosure

Member States must ensure that information capable of having an influence on the market in the securities concerned is made public in such a way as to reduce the risks of the creation of false markets and insider trading.

As in the previous proposal, and unlike earlier texts, the Directive does not enumerate the different forms of disclosure but leaves the Member States substantial discretion to decide on the matter, provided that all the necessary information is both clear and promptly available to the addressees of the bid.

Article 9 – Obligations of the board of the offeree company

As in the previous proposal, this Article requires Member States to ensure that the board of the offeree company refrains from taking any defensive measures that may result in the frustration of the bid unless it has the prior authorisation of the general meeting of shareholders for the purpose. Where control of the offeree company is at stake, it is important to ensure that its fate is decided by its shareholders. The authorisation of the general meeting must therefore be given explicitly with a view to responding to a specific bid.

The Directive does not define the measures which can frustrate a bid. In general, such measures may be all operations which are not carried out in the normal course of the company's business or not in conformity with normal market practices.

The board of the offeree company must also be required by national rules to give its opinion on the bid, together with the reasons on which it is based, in a report setting out the arguments for and against acceptance of the offer. The offeree company's employees should be associated with the opinion and should be able, if they disagree, to communicate their own opinion at the same time. These opinions are addressed to the shareholders, who have the responsibility to decide on the bid.

Member States are allowed a transitional period for the application of this provision.

Article 10 – Information on companies referred to in Article 1(1)

This new Article meets the need for transparency, something which is extremely important in the case of companies that may be the target of a takeover bid. It lists the particulars that companies covered by the Directive should publish at least in their annual report, with special reference to the structures and measures that could hinder the acquisition and exercise of control over the company by an offeror. The information should, where appropriate, be updated during the year. This Article should be seen in close connection with other Community rules on transparency (Council and Parliament Directive 2001/34/EC of

28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities[10] and draft proposal for a directive on transparency obligations for issuers and holders of securities admitted to trading on a regulated market). The Commission has repeatedly stressed the need for transparent information on listed companies. Recent events, such as the Enron affair, have served to confirm this need.

It is also proposed that all the shareholders should take a decision every two years on the structural measures and defensive mechanisms and that the board should state the reasons for them.

This Article should be re-examined, with a view to possible revision, five years after the deadline for implementing the Directive. It should be possible at that point to ascertain the extent to which market forces have, thanks to the transparency introduced by this Article, levelled the playing field for takeover bids.

Article 11 – Unenforceability of restrictions on the transfer of securities and voting rights

This new Article reflects the need to level the playing field in takeover bids in the European Union by banning certain legal restrictions that can be regarded as hindering bids. It therefore proposes that:

– any restrictions on the right of ownership which may prevent the offeror from acquiring securities of the offeree company, such as limitations on ownership or a right for the company or other holders of securities to veto any transfer of securities, should be rendered unenforceable against the offeror;

– any restrictions on voting rights which prevent holders of the offeree company's securities from exercising their rights when the general meeting decides on defensive measures after a bid has been announced, such as limits on voting rights, deadlines for exercising voting rights or agreements between holders of securities, should be rendered ineffective. In accordance with the principle laid down in Article 9, holders of securities should be able to make a completely free and properly informed decision on the bid;

– any restrictions on the transfer of securities and on voting rights, as well as any special rights of shareholders concerning the appointment or removal of board members, which may prevent an offeror who holds sufficient securities of the offeree company from exercising the corresponding voting rights in order to amend the company's articles of association should be lifted at the first general meeting following closure of the bid. "Sufficient securities" means a particular percentage which is normally required under the relevant national law for taking such decisions.

It should be noted that securities without voting rights are not regarded as restrictions in so far as they carry a preferential entitlement to a share in the profits or liquidation surplus.

These provisions are aimed at measures that could result in management entrenchment; they do not concern securities carrying double or multiple voting rights. It can be argued that securities with multiple voting rights form part of a system for financing companies and that there is no proof that their existence renders takeover bids impossible. The same applies to securities with double voting rights, which may make for a stable shareholder base. Moreover,

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[10] OJ L 184, 6.7.2001, p. 1.

the suppression of such rights, especially if no compensation were provided, would in some legal systems give rise to questions of a constitutional nature that could jeopardise or at least delay for a long time the adoption of the Directive. Nevertheless, if it were to prove at some later stage that such securities are used mainly as defensive mechanisms against takeover bids, the revision clause written into Article 18 would enable the Commission to re-examine the issue.

Article 12 – Other rules applicable to the conduct of bids

As in the previous proposal (former Article 10) and in line with the principle of subsidiarity, this Article lists a number of matters which national rules must cover, without going into any detail. This approach leaves the content of such rules to the discretion of the Member States, which must nevertheless ensure that the rules they adopt pursuant to this Article do not undermine the general principles of the Directive.

Article 13 – Information for and consultation of representatives of employees

This new Article responds to concerns voiced by certain Members of the European Parliament regarding protection of the employees of companies involved in a takeover bid (both the offeror and the offeree company).

It confirms that the close and effective involvement of the companies' employees, via their representatives, is an important factor not only for the success of the operation but also for proper consideration of the different interests that may be affected by the takeover. It stresses that, in addition to the national rules which may be applicable, certain provisions of Community law may be relevant in this context.

Such information and consultation is in addition to the specific procedure to be followed in the event of a takeover bid as provided for in Articles 6(3)(h) and 9(5).

Article 14 – Squeeze-out right

This new Article responds directly to an amendment made by the European Parliament to the previous proposal. It introduces a common squeeze-out procedure enabling a shareholder holding a given percentage of securities of a company to require the remaining minority shareholders to sell him their securities at a fair price.

The Directive nevertheless limits this right to cases where the percentage of securities was acquired following a takeover bid.

Article 15 – Sell-out right

This new Article constitutes the quid pro quo, for the benefit of the minority shareholders, of the right created by Article 14 for the benefit of the majority shareholder. It provides that, under similar conditions and again following a takeover bid, a minority shareholder can require the majority shareholder to buy his securities from him.

Article 16 – Sanctions

It is important that Member States should provide for adequate sanctions in the event of infringement of the measures taken pursuant to the Directive.

Article 17 – Committee procedure

The previous proposal (former Article 11) set up a Contact Committee for monitoring application of the Directive. That provision can now be replaced by a provision on committee procedure.

Article 18 – Revision

As in the previous proposal, a procedure is established for re-examining and if necessary revising some of the Directive's provisions. Any such revision would be aimed at achieving a more level playing field in takeover bids (Articles 4(2), 10 and 11).

Article 19 – Transitional period

It is nevertheless useful for Member States to be able to give their companies time to adjust to the new rules by allowing a transitional period of not more than three years for complying with Article 9.

Article 20 – Transposition

It is important that the national measures implementing the Directive should be in force at the end of the Financial Services Action Plan, to which it should make a key contribution.

2002/0240(COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on takeover bids

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 44(1) thereof,

Having regard to the proposal from the Commission,[1]

Having regard to the opinion of the Economic and Social Committee,[2]

Acting in accordance with the procedure referred to in Article 251 of the Treaty,[3]

Whereas:

(1) In accordance with Article 44(2)(g) of the Treaty, it is necessary to coordinate certain safeguards which, for the protection of the interests of members and others, Member States require of companies governed by the law of a Member State and whose securities are admitted to trading on a regulated market in a Member State, with a view to making such safeguards equivalent throughout the Community.

(2) It is necessary to protect the interests of holders of securities of companies governed by the law of a Member State when these companies are subject to a takeover bid or to a change of control and at least some of their securities are admitted to trading on a regulated market.

(3) It is necessary to create Community-wide clarity and transparency in respect of legal issues to be settled in the event of takeover bids and to prevent patterns of corporate restructuring within the Community from being distorted by arbitrary differences in governance and management cultures.

(4) Each Member State should designate an authority or authorities to supervise the aspects of the bid governed by this Directive and to ensure that parties to takeover bids comply with the rules made pursuant to this Directive. The different authorities should cooperate with one another.

(5) In order to be effective, takeover regulation should be flexible and capable of dealing with new circumstances as they arise and should accordingly provide for the possibility of exceptions and derogations. However, in applying any rules or

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3 Opinion of the European Parliament of ..., Council Common Position of ..., decision of the European Parliament of ..., decision of the European Parliament of ... and decision of the Council of ... .

exceptions laid down or in granting any derogations, supervisory authorities should respect certain general principles.

(6) Supervision should be able to be exercised by self-regulatory bodies.

(7) In accordance with general principles of Community law, and in particular the right to a fair hearing, decisions of a supervisory authority should in appropriate circumstances be susceptible to review by an independent court or tribunal. However, Member States should be left to determine whether rights are to be made available which may be asserted in administrative or judicial proceedings, whether in proceedings against a supervisory authority or proceedings between parties to a bid.

(8) Member States should take the necessary steps to protect holders of securities, and in particular those with minority holdings, after the acquisition of control of their company. Such protection should be ensured by obliging the person who has acquired control of a company to make a bid to all holders of securities for all of their holdings at an equitable price according to a common definition. Member States should be free to establish further instruments for the protection of the interests of holders of securities, such as the obligation to make a partial bid where the offeror does not acquire control of the company or the obligation to announce a bid at the same time as control of the company is acquired.

(9) The obligation to make a bid to all holders of securities should not apply to those controlling holdings already in existence at the date when the national legislation transposing this Directive enters into force.

(10) The obligation to launch a bid should not apply in the case of the acquisition of securities which do not carry voting rights at ordinary general meetings. Member States should, however, be able to provide that the obligation to make a bid to all holders of securities relates not only to securities carrying voting rights but also to securities which carry voting rights only in specific circumstances or which do not carry voting rights.

(11) To reduce the scope for insider dealing, offerors should be required to announce their decision to launch a bid as soon as possible and to inform the supervisory authority of the bid.

(12) The holders of securities should be properly informed of the terms of the bid by means of an offer document. Appropriate information should also be given to the representatives of the company's employees or, failing that, to the employees directly.

(13) It is necessary to regulate the period for the acceptance of the bid.

(14) To be able to perform their functions satisfactorily, supervisory authorities should at all times be able to require the parties to the bid to provide information on themselves and should cooperate and supply information in an efficient and effective manner without delay to other authorities supervising capital markets.

(15) In order to avoid operations which could frustrate the bid, it is necessary to limit the powers of the board of the offeree company to engage in operations of an exceptional nature without unduly hindering the offeree company from carrying out its normal business activities.

(16) The board of the offeree company should be required to make public a document setting out its opinion on the bid and the reasons on which it is based, including its views on the effects of implementation on all the interests of the company and specifically on employment.

(17) In order to reinforce the effectiveness of the existing provisions regarding freedom to deal in the securities of companies covered by this Directive and freedom to exercise voting rights, it is essential that the defensive structures and mechanisms envisaged by such companies be transparent and that they be regularly put to a vote at the general meeting.

(18) Member States should take the necessary measures to afford any offeror the possibility of purchasing the securities of the offeree company, by neutralising provisions placing restrictions on the transfer of securities and on voting rights, and to render ineffective any restrictions on the transfer of securities and on voting rights which may prevent an offeror who holds sufficient securities of the offeree company from exercising the corresponding voting rights in order to amend the company's articles of association, by neutralising restrictions on the voting rights and special appointment rights held by shareholders at the first general meeting following closure of the bid.

(19) Member States need to provide rules to cover the cases where the bid lapses, the right of the offeror to revise his bid, the possibility of competing bids for the securities of a company, the disclosure of the result of the bid, the irrevocability of the bid and the conditions permitted.

(20) The provision of information to and consultation of representatives of the employees of the offeror and the offeree company must be governed by the relevant national provisions, and in particular those adopted pursuant to Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees,[4] Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies[5] and Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community.[6] The employees of the offeree company, or their representatives, should nevertheless be afforded the opportunity of giving their views on the foreseeable effects of the bid on employment.

(21) Member States should take the necessary measures to enable a shareholder who has acquired a high level of control of a company following a takeover bid to require the remaining minority shareholders to sell him their securities. Likewise, where a shareholder has acquired a high level of control of a company following a takeover bid, the remaining minority shareholders should be able to require him to buy their securities.

(22) Since the objectives of the action envisaged (establishing minimum guidelines for the conduct of takeover bids and ensuring an adequate level of protection for holders of securities throughout the Community) cannot be sufficiently achieved by the Member

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4 OJ L 254, 30.9.1994, p. 64. Directive as amended by Directive 97/74/EC (OJ L 10, 16.1.1998, p. 22).

5 OJ L 225, 12.8.1998, p. 16.

6 OJ L 80, 23.3.2002, p. 29.

States (need for transparency and legal certainty in the case of cross-border takeovers or acquisitions of control) and can therefore be better achieved at Community level, the Community can take action in accordance with the principle of subsidiarity enshrined in Article 5 of the Treaty. In line with the subsidiarity principle as set out in that Article, this Directive does not go beyond what is necessary to achieve those objectives.

(23) The adoption of a directive is the appropriate procedure for laying down a framework consisting of certain common principles and a limited number of general requirements which Member States will be required to implement through more detailed rules according to their national systems and their cultural contexts.

(24) Member States should, however, establish sanctions for any infringement of the national measures transposing this Directive.

(25) The necessary measures must be taken for the implementation of this Directive in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission.[7]

(26) The Commission should be able to re-examine and if necessary revise the provisions requiring greater transparency and ensuring effective operation of general meetings in the context of a takeover bid.

(27) Member States should be allowed to postpone for a specified period application of the provisions relating to the obligations of the board of the offeree company,

[7] OJ L 184, 17.7.1999, p. 23.

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Scope

1. This Directive lays down measures coordinating the laws, regulations, administrative provisions, codes of practice or other arrangements of the Member States, including arrangements established by organisations officially authorised to regulate the markets (hereinafter "rules"), relating to takeover bids for the securities of a company governed by the law of a Member State, where all or some of those securities are admitted to trading on a regulated market within the meaning of Council Directive 93/22/EEC[8] in one or more Member States (hereinafter "regulated market").

2. This Directive shall not apply to takeover bids for securities issued by companies the object of which is the collective investment of capital provided by the public, which operate on the principle of risk spreading and the units of which are, at the holders' request, repurchased or redeemed, directly or indirectly, out of the assets of those companies. Action taken by such companies to ensure that the stock exchange value of their units does not vary significantly from their net asset value shall be regarded as equivalent to such repurchase or redemption.

Article 2

Definitions

1. For the purposes of this Directive:

a) "takeover bid" or "bid" means a public offer (other than by the offeree company itself) made to the holders of the securities of a company to acquire all or some of the said securities, whether mandatory or voluntary, which follows or has as its objective the acquisition of control of the offeree company in accordance with national law;

b) "offeree company" means a company whose securities are the subject of a bid;

c) "offeror" means any natural or legal person governed by public or private law making a bid;

d) "persons acting in concert" means natural or legal persons who cooperate with the offeror or the offeree company on the basis of an agreement, either express or tacit, either oral or written, aimed respectively at obtaining control of the offeree company or frustrating the successful outcome of a bid;

e) "securities" means transferable securities carrying voting rights in a company;

f) "parties to the bid" means the offeror, the members of the offeror's board if the offeror is a company, the offeree company, holders of securities of the offeree

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[8] OJ L 41, 11.6.1993, p. 27. Directive as last amended by Directive 2000/64/EC of the European Parliament and of the Council (OJ L 290, 17.11.2000, p. 27).

company and the members of the board of the offeree company, and persons acting in concert with such parties.

2. For the purposes of paragraph 1(d), persons controlled by another person within the meaning of Article 87 of Directive 2001/34/EC of the European Parliament and of the Council[9] shall be deemed to be persons acting in concert with that other person and with each other

Article 3

General principles

1. For the purpose of implementing this Directive, Member States shall ensure that the following principles are complied with:

(a) all holders of securities of an offeree company of the same class are to be afforded equivalent treatment; moreover, if a person acquires control of a company, the other holders of securities are to be protected;

(b) holders of securities of an offeree company are to have sufficient time and information to enable them to reach a properly informed decision on the bid; where it advises the holders of securities, the board of the offeree company is to give its views on the effects of implementation of the bid on employment, conditions of employment and the locations of the company's places of business;

(c) the board of an offeree company is to act in the interests of the company as a whole and must not deny the holders of securities the opportunity to decide on the merits of the bid;

(d) false markets must not be created in the securities of the offeree company, of the offeror company or of any other company concerned by the bid in such a way that the rise or fall in the prices of the securities becomes artificial and the normal functioning of the markets is distorted;

(e) an offeror must announce a bid only after ensuring that it can fulfil in full any cash consideration, if such is offered, and after taking all reasonable measures to secure the implementation of any other type of consideration;

(f) an offeree company must not be hindered in the conduct of its affairs for longer than is reasonable by a bid for its securities.

2. With a view to ensuring compliance with the principles set out in paragraph 1, Member States:

(a) shall see to it that the minimum requirements set out in this Directive are observed;

(b) may lay down additional conditions and more stringent provisions than those required by this Directive for regulating bids.

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9 OJ L 184, 6.7.2001, p. 1.

Article 4

Supervisory authority and applicable law

1. Member States shall designate the authority or authorities competent for supervising a bid for the purposes of the rules made or introduced pursuant to this Directive. The authorities thus designated shall be either public authorities, associations or private bodies recognised by national law or by public authorities expressly empowered for that purpose by national law. Member States shall inform the Commission of these designations, specifying all divisions of functions that may be made. They shall ensure that these authorities exercise their functions impartially and independently of all parties to the bid.

2. (a) The authority competent for supervising the bid shall be that of the Member State in which the offeree company has its registered office if the securities of that company are admitted to trading on a regulated market in that Member State.

(b) If the securities of the offeree company are not admitted to trading on a regulated market in the Member State in which the company has its registered office, the authority competent for supervising the bid shall be that of the Member State on whose regulated market the securities of the company are admitted to trading.

If the securities of the company are admitted to trading on regulated markets in more than one Member State, the authority competent for supervising the bid shall be that of the Member State on whose regulated market the securities were first admitted.

(c) If the securities of the offeree company are first admitted to trading on regulated markets within more than one Member State simultaneously, the offeree company shall determine which of the supervisory authorities of those Member States is the competent authority for supervising the bid by notifying these regulated markets and their supervisory authorities on the first trading day.

If the securities of the offeree company are already admitted to trading on regulated markets in more than one Member State at the date referred to in Article 20(1) and were admitted simultaneously, the supervisory authorities of these Member States shall agree on which one of them is to be the competent authority for supervising the bid within four weeks of the date mentioned in Article 20(1). Otherwise, the offeree company shall determine which of these authorities is to be the competent authority on the first trading day following the expiry of the period of time mentioned in the first sentence.

(d) Member States shall ensure that the decisions referred to in point (c) are made public.

(e) In the cases referred to in points (b) and (c), matters relating to the consideration offered in the case of a bid, in particular the price, and matters relating to the bid procedure, in particular the information on the offeror's decision to make a bid, the contents of the offer document and the disclosure of the bid, shall be dealt with in accordance with the rules of the Member State of the competent authority. In matters relating to the information to be provided to the employees of the offeree company and in 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 conditions under which the board of the offeree company may undertake any action which might result in the frustration of the bid, the applicable rules and the competent authority shall be those of the Member State in which the offeree company has its registered office.

3. Member States shall ensure that all persons employed or formerly employed by the supervisory authorities shall be bound by professional secrecy. Information covered by professional secrecy may not be divulged to any person or authority except by virtue of provisions laid down by law.

4. The supervisory authorities of the Member States under this Directive and other authorities supervising capital markets, in particular in accordance with Council Directive 89/592/EEC,[10] Council Directive 93/22/EEC and Directive 2001/34/EC of the European Parliament and of the Council, shall cooperate and supply each other with information wherever necessary for the application of the rules drawn up in accordance with this Directive and in particular in cases covered by points (b), (c) and (e) of paragraph 2. Information thus exchanged shall be covered by the obligation of professional secrecy to which the persons employed or formerly employed by the supervisory authorities receiving the information are subject. Cooperation shall include the ability to serve the legal documents necessary to enforce measures taken by the competent authorities in connection with bids, as well as such other assistance as may reasonably be requested by the supervisory authorities concerned for the purpose of investigating any actual or alleged breaches of the rules made or introduced pursuant to this Directive.

5. The supervisory authorities shall be vested with all the powers necessary for carrying out their duties, including that of ensuring that the parties to the bid comply with the rules established pursuant to this Directive.

Provided that the general principles set out in Article 3(1) are respected, Member States may provide in their rules made or introduced pursuant to this Directive that their supervisory authorities may, in certain types of cases determined at national level and/or in other special cases, grant derogations from these rules on the basis of a reasoned decision.

6. This Directive shall not affect the power of the Member States to designate judicial or other authorities responsible for dealing with disputes and for deciding on irregularities committed during the bid procedure or the power of Member States to regulate whether and under which circumstances parties to a bid are entitled to bring administrative or judicial proceedings. In particular, this Directive shall not affect the power which courts may have in a Member State to decline to hear legal proceedings and to decide whether or not such proceedings affect the outcome of a bid. This Directive shall not affect the power of the Member States to determine the legal position concerning the liability of supervisory authorities or concerning litigation between the parties to a bid.

Article 5

Protection of minority shareholders; mandatory bid; equitable price

1. Where a natural or legal person who, as a result of his own acquisition or the acquisition by persons acting in concert with him, holds securities of a company referred to in Article 1(1) which, added to any existing holdings and the holdings of persons acting in concert with him, directly or indirectly give him a specified percentage of voting rights in that company, conferring on him the control of that company, Member States shall ensure that this person is required to make a bid as a means of protecting the minority shareholders of that company. This bid shall be addressed at the earliest opportunity to all holders of securities for all their holdings at an equitable price.

2. Where control has been obtained following a voluntary bid made in accordance with this Directive to all holders of securities for all their holdings, the obligation to launch a bid laid down in paragraph 1 shall no longer apply.

3. The percentage of voting rights which confers control for the purposes of paragraph 1 and the method of its calculation shall be determined by the rules of the Member State in which the company has its registered office.

4. The highest price paid for the same securities by the offeror, or by persons acting in concert with him, over a period of between six and twelve months prior to the bid referred to in paragraph 1 shall be regarded as an equitable price.

   Member States may authorise their supervisory authorities to adjust the price referred to in the first subparagraph in circumstances and according to criteria that are clearly determined. To that end, they shall draw up a list of circumstances in which the highest price may be adjusted either upwards or downwards, for example where the highest price was set by agreement between the purchaser and a seller, where the market prices of the securities in question have been manipulated, where market prices in general or certain market prices in particular have been affected by exceptional occurrences, or in order to enable a firm in difficulty to be rescued. They may also determine the criteria to be applied in such cases, for example the average market value over a particular period, the break-up value of the company or other objective valuation criteria generally used in financial analysis.

   Any decision by a supervisory authority to adjust the equitable price shall be substantiated and made public.

5. The consideration offered by the offeror may consist exclusively of liquid securities.

   Where the consideration offered by the offeror does not consist of liquid securities admitted to trading on a regulated market, Member States may stipulate that such consideration has to include a cash consideration at least as an alternative.

   In any event, the offeror shall offer a cash consideration at least as an alternative where, either individually or together with persons acting in concert with him, over a period beginning at least three months before his bid is made pursuant to Article 6(1) and ending before expiry of the period for acceptance of the bid, he has purchased in cash more than 5% of the securities or voting rights of the offeree company.

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[10] OJ L 334, 18.11.1989, p. 30.

6. The Commission shall adopt, in accordance with the procedure referred to in Article 17(2), the rules for the application of paragraphs 4 and 5 of this Article.

7. In addition to the protection provided under paragraph 1, Member States may provide for further instruments aimed at protecting the interests of holders of securities in so far as these instruments do not hinder the normal course of the bid.

Article 6

Information on the bid

1. Member States shall ensure that the decision to make a bid is made public without delay and that the supervisory authority is informed of the bid. They may require that the supervisory authority is informed before this decision is made public. As soon as the bid has been made public, the boards of the offeree company and of the offeror shall inform respectively the representatives of their employees or, where there are no such representatives, the employees themselves.

2. Member States shall ensure that the offeror is required to draw up and make public in good time an offer document containing the information necessary to enable the holders of securities of the offeree company to reach a properly informed decision on the bid. Before the offer document is made public, the offeror shall communicate it to the supervisory authority. When it is made public, the boards of the offeree company and of the offeror shall communicate it respectively to the representatives of their employees or, where there are no such representatives, to the employees themselves.

Where the offer document referred to in the first subparagraph is subject to the prior approval of the supervisory authority and has been approved, it shall be recognised, subject to any translation, in any other Member State on whose market the securities of the offeree company are admitted to trading, without it being necessary to obtain the approval of the supervisory authorities of that Member State. The latter may require additional information to be included in the offer document only if such information is specific to the market of the Member State or Member States where the securities of the offeree company are admitted to trading and relates to the formalities to be complied with for accepting the bid and for receiving the consideration due at the close of the bid as well as to the tax arrangements to which the consideration offered to the holders of securities will be subject.

3. The offer document referred to in paragraph 2 shall state at least:

(a) the terms of the bid;

(b) the identity of the offeror and, where the offeror is a company, the type, name and registered office of that company;

(c) the securities or, where appropriate, the class or classes of securities for which the bid is made;

(d) the consideration offered for each security or class of securities and, in the case of mandatory bids, the method employed in determining it, with particulars of the way in which that consideration is to be paid;

(e) the maximum and minimum percentages or quantities of securities which the offeror undertakes to acquire;

(f) details of any existing holdings of the offeror, and of persons acting in concert with him, in the offeree company;

(g) all the conditions to which the bid is subject;

(h) the offeror's intentions with regard to the future business of the offeree company and, in so far as it is affected by the bid, the offeror company and with regard to safeguarding the jobs of their employees and management, including any material change in the conditions of employment. This shall concern in particular the offeror's strategic plans for the two companies and the likely repercussions on employment and the locations of the companies' places of business;

(i) the period for acceptance of the bid;

(j) where the consideration offered by the offeror includes securities of any kind, information about those securities;

(k) information on the financing for the bid;

(l) the identity of persons acting in concert with the offeror or with the offeree company and, in the case of companies, their type, name, registered office and relationship with the offeror and, where possible, with the offeree company;

(m) indication of the national law which will govern contracts concluded between the offeror and holders of securities of the offeree company as a result of the bid and the competent courts.

4. The Commission shall adopt, in accordance with the procedure referred to in Article 17(2), the rules for the application of paragraph 3 of this Article.

5. Member States shall ensure that the parties to a bid are required to provide the supervisory authorities of their Member State at any time on request with all information in their possession concerning the bid which is necessary for the supervisory authority to discharge its functions.

Article 7

Period for acceptance

1. Member States shall provide that the period for acceptance of the bid may not be less than two weeks or more than ten weeks from the date of publication of the offer document. Provided that the general principle laid down in Article 3(1)(f) is respected, Member States may provide that the period of ten weeks may be prolonged on the condition that the offeror gives at least two weeks' notice of its intention to close the bid.

2. Member States may provide for rules modifying the period mentioned in paragraph 1 in specific cases. They may authorise the supervisory authority to grant a derogation from the period mentioned in paragraph 1 in order to allow the offeree company to call a general meeting to consider the bid.

Article 8

Disclosure

1. Member States shall ensure that a bid must be made public in such a way as to ensure market transparency and integrity for the securities of the offeree company, of the offeror or of any other company affected by the bid, in particular in order to prevent the publication or dissemination of false or misleading information.

2. Member States shall provide for the disclosure of all information or documents required by Article 6 in such a manner as to ensure that they are both readily and promptly available to the holders of securities at least in those Member States where the securities of the offeree company are admitted to trading on a regulated market and to the representatives of the employees of the offeree company or, where there are no such representatives, to the employees themselves.

Article 9

Obligations of the board of the offeree company

1. Member States shall ensure that rules laid down in paragraphs 2 to 5 below are complied with.

2. During the period referred to in the second subparagraph, the board of the offeree company must obtain the prior authorisation of the general meeting of shareholders given for this purpose 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 offeror in obtaining control over the offeree company.

   Such authorisation shall be mandatory at least from the time the board of the offeree company receives the information concerning the bid referred to in the first sentence of Article 6(1) and until the result of the bid is made public or the bid lapses. Member States may stipulate that such authorisation is to be obtained at an earlier stage, for example from the time when the board of the offeree company becomes aware that the bid is imminent.

3. As regards decisions taken before the beginning of the period referred to in the second subparagraph of paragraph 2 and not yet partly or fully implemented, the general meeting of the shareholders shall approve or confirm any decision which does not form part of the normal course of the company's business and whose implementation may result in the frustration of the bid.

4. For the purpose of obtaining the prior authorisation or confirmation of the holders of securities referred to in paragraphs 2 and 3, Member States may adopt rules allowing

a general meeting to be called at short notice, provided that the meeting does not take place within two weeks of notification being given.

5. The board of the offeree company shall draw up and make public a document setting out its opinion on the bid, together with the reasons on which it is based, including its views on the effects on all the interests of the company, including employment, and on the offeror's strategic plans for the offeree company and their likely effects on employment and the locations of the company's places of business as set out in the offer document in accordance with Article 6(3)(h). The board of the offeree company shall at the same time communicate that opinion to the representatives of its employees or, where there are no such representatives, the employees themselves. Where the board of the offeree company receives in good time a separate opinion from the representatives of its employees on the effects of the bid on employment, that opinion shall be appended to the document.

Article 10

Information on companies referred to in Article 1(1)

1. Member States shall ensure that companies referred to in Article 1(1) publish detailed information on the following:

(a) the structure of their capital, including securities which are not admitted to trading on a regulated market in a Member State, where appropriate with an indication of the different classes of shares and, for each class of shares, the rights and obligations attaching to it and the percentage of total share capital that it represents;

(b) any restrictions on the transfer of securities, such as limitations on the holding of securities or the need to obtain the approval of the company or other holders of securities, without prejudice to Article 46 of Directive 2001/34/EC;

(c) significant direct and indirect shareholdings (including indirect shareholdings through pyramid structures and cross-shareholdings) within the meaning of Article 85 of Directive 2001/34/EC;

(d) the holders of any securities with special control rights and a description of these rights;

(e) the system of control of any employee share scheme where the control rights are not exercised directly by the employees;

(f) any restrictions on voting rights, such as limitations of the right to vote for holders of a given percentage or number of votes, deadlines for exercising the right to vote or separation of the right to vote from the holding of a security;

(g) agreements between shareholders which may result in restrictions on the transfer of securities and/or voting rights within the meaning of Article 87(1)(c) of Directive 2001/34/EC;

(h) the rules governing the appointment and replacement of board members and the amendment of the articles of association;

(i) the powers of board members, and in particular the power to issue or buy back shares;

(j) significant agreements to which the company is a party and which take effect, alter or terminate upon a change of control of the company and the effects thereof;

(k) any agreements between the company and its board members or employees providing for compensation if they are made redundant without valid reason following a takeover bid.

2. The information referred to in paragraph 1 shall be published in the company's annual report within the meaning of Article 46 of Council Directive 78/660/EEC[11] and Article 36 of Council Directive 83/349/EEC[12] and, where appropriate, updated during the year in accordance with the transparency requirements applicable to companies whose securities are admitted to trading on a regulated market.

3. Member States shall ensure that, in the case of companies whose securities are admitted to trading on a regulated market in a Member State, the general meeting of shareholders takes a decision at least every two years on the structural aspects and defensive mechanisms referred to in paragraph 1. They shall require the board to state the reasons for those structural aspects and defensive mechanisms.

Article 11

Unenforceability of restrictions on the transfer of securities and voting rights

1. Without prejudice to the obligations imposed by Community law on companies whose securities are admitted to trading on a regulated market in a Member State, Member States shall ensure that the safeguards referred to in paragraphs 2, 3 and 4 are afforded when a bid has been made public.

2. Any restrictions on the transfer of securities provided for in the articles of association of the offeree company shall be unenforceable against the offeror during the period for acceptance of the bid.

Any restrictions on the transfer of securities provided for in contractual agreements between the offeree company and holders of its securities or between holders of securities of the offeree company shall be unenforceable against the offeror during the period for acceptance of the bid.

3. Any restrictions on voting rights provided for in the articles of association of the offeree company shall cease to have effect when the general meeting decides on any defensive measures in accordance with Article 9.

Any restrictions on voting rights provided for in contractual agreements between the offeree company and holders of its securities or between holders of securities of the offeree company shall cease to have effect when the general meeting decides on any defensive measures in accordance with Article 9.

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[11] OJ L 222, 14.8.1978, p. 11.
[12] OJ L 193, 18.7.1983, p. 1.

4. Where, following a bid, the offeror holds a number of securities of the offeree company which, under the applicable national law, would enable him to amend the company's articles of association, any restrictions on the transfer of securities and on voting rights referred to in paragraphs 2 and 3 and any special rights of shareholders concerning the appointment or removal of board members shall cease to have effect at the first general meeting following closure of the bid.

   To that end, the offeror shall have the right to convene a general meeting at short notice, provided that the meeting does not take place within two weeks of notification.

5. Paragraphs 2 and 3 shall not apply to securities without voting rights which carry specific pecuniary advantages.

Article 12

Other rules applicable to the conduct of bids

Member States shall also lay down rules which govern the conduct of bids at least as regards the following:

(a) lapse of the bid;

(b) revision of bids;

(c) competing bids;

(d) disclosure of the results of bids;

(e) irrevocability of the bid and conditions permitted.

Article 13

Information for and consultation of employees' representatives

Without prejudice to the provisions of this Directive, the provision of information to and consultation of representatives of the employees of the offeror and the offeree company shall be governed by the relevant national provisions, and in particular those adopted pursuant to Directives 94/45/EC, 98/59/EC and 2002/14/EC.

Article 14

Squeeze-out right

1. Member States shall ensure that, following a bid made to all the holders of securities of the offeree company for all their securities, an offeror is able to require the holders of the remaining securities to sell him those securities at a fair price in either of the following cases:

(a) where he holds securities representing not less than 90% of the capital of the offeree company, or

(b) where he has acquired, through acceptance of the bid, securities representing not less than 90% of the capital concerned by the bid.

In the case referred to in point (a) above, Member States may set a higher threshold that may not, however, be more than 95% of the company's capital.

2. Member States shall ensure that rules are in force making it possible to calculate when the threshold is reached.

Where the offeree company has issued more than one class of shares, the rule laid down in paragraph 1 shall apply separately within each class.

3. Member States shall ensure that a fair price is guaranteed. That price shall take the same form as the consideration offered in the bid.

Following a voluntary bid, the price shall be presumed to be fair where it corresponds to the consideration offered in the bid and the offeror has acquired, through acceptance of the bid, securities representing not less than 90% of the capital concerned by the bid.

Following a mandatory bid, the consideration offered in the bid shall be presumed to be fair.

4. In both the cases referred to in points (a) and (b) of paragraph 1, the fair price presumption shall apply only where the squeeze-out right is exercised within a period of three months after the end of the period for acceptance of the bid. In all other cases, the price shall be determined by an independent expert.

Article 15

Sell-out right

1. Member States shall ensure that, following a bid made to all the holders of securities of the offeree company for all their securities, a minority holder of securities is able to require the offeror holding not less than 90% of the capital of the offeree company to buy his securities from him at a fair price. They may set a higher threshold, but this may not be more than 95% of the company's capital.

However, the sell-out right may not be exercised where the specified threshold has been reached only for a short period.

2. Where the offeree company has issued more than one class of shares, the rule laid down in paragraph 1 shall apply separately within each class.

3. The price shall be determined in accordance with the provisions of Article 14(3) and (4).

Article 16

Sanctions

Member States shall determine the sanctions to be applied for infringement of the national measures adopted pursuant to this Directive and shall take all the necessary steps to ensure that they are put into effect. The sanctions thus provided for shall be effective, proportionate and dissuasive. Member States shall notify these measures to the Commission not later than the date laid down in Article 20(1) and any subsequent change thereto at the earliest opportunity.

Article 17

Committee procedure

1. The Commission shall be assisted by the European Securities Committee established by Commission Decision 2001/528/EC.[13]

2. Where reference is made to this paragraph, the regulatory procedure laid down in Article 5 of Decision 1999/468/EC shall apply, having due regard to Articles 7(3) and 8 thereof.

3. The period referred to in Article 5(6) of Decision 1999/468/EC shall be three months.

Article 18

Revision

Five years after the date laid down in Article 20(1), the Commission shall examine Articles 4(2), 10 and 11 and, if necessary, propose that they be revised in the light of the experience acquired in applying them.

Article 19

Transitional period

Member States are authorised to postpone application of Article 9 for a period of not more than three years after the date laid down in Article 20(1), provided that they inform the Commission thereof not later than that date.

Article 20

Transposition

[13] OJ L 191, 13.7.2001, p. 45.

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 1 January 2005. They shall forthwith inform the Commission thereof.

   When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the texts of the main provisions of national law that they adopt in the fields governed by this Directive.

Article 21

Entry into force

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Communities*.

Article 22

Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament	*For the Council*
The President	*The President*

LEGISLATIVE FINANCIAL STATEMENT

Policy area(s): Internal Market

Activit(y/ies): Company Law

TITLE OF ACTION: PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON TAKEOVER BIDS

1. BUDGET LINE(S) + HEADING(S)

None

2. OVERALL FIGURES

2.1. Total allocation for action (Part B):

None

2.2. Period of application:

N/A

2.3. Overall multiannual estimate on expenditure:

N/A

2.4. Compatibility with the financial programming and the financial perspective

N/A

2.5. Financial impact on revenue:

N/A

3. BUDGET CHARACTERISTICS

N/A

4. LEGAL BASIS

Article 44(1) of the EC Treaty.

5. DESCRIPTION AND GROUNDS

5.1. Need for Community intervention

The proposed directive is part of the Financial Services Action Plan and was identified as a priority by the March 2000 European Council in Lisbon because it would facilitate pan-European restructuring and so contribute to making Europe the most competitive economy in the world by 2010.

The proposed Directive has two main objectives: to give a legal framework for takeovers in Europe and to ensure an adequate level of protection for minority shareholders across the EU in the case of a change of company control.

First, the proposed Directive sets fundamental principles to govern takeovers and provides for the means of determining which is the competent authority for the control of a takeover and which law is applicable, both of which are of crucial importance, particularly in relation to cross-border takeovers. It will also ensure a basic level of disclosure and information relating to the offer, thus guaranteeing transparency during the takeover bid.

The proposed directive then provides that shareholders should be afforded a minimum level of protection which should be equivalent throughout the EU because the situation is currently far from equivalent. For instance, at present some Member States do not require a full bid to be launched in the case of a transfer of control. Furthermore, several Member States permit the board of the target company to take defensive measures in the case of a hostile takeover bid without prior consent of the shareholders or allow shareholders for a certain period to give prior authorisation to the board to take defensive measures. Apart from this, some Member States allow further defence mechanisms. This is why, in particular, the European Parliament rejected the previous proposal in July 2001 in the absence of a “level playing field” for takeovers in Europe.

After the rejection by the European Parliament of the compromise text agreed within the conciliation procedure on the original Commission proposal, the need for Community intervention has become even greater. The new proposal does specifically address the questions raised by the European Parliament, i.e. the creation of a level playing field for shareholders in the EU, the definition of the equitable price to be paid in the case of a mandatory bid, the introduction of a squeeze-out procedure, without forgetting a reminder of the “acquis communautaire” relating to the rights of the employees of the companies affected by the offer. These changes are intended to bring about a greater level of harmonisation in this important area, in line with a specific request by the European Parliament.

5.2. Actions envisaged and arrangements for budget intervention

N/A

5.3. Methods of implementation

Member States are to bring into force the laws, regulations and administrative provisions necessary to comply with this Directive.

6. FINANCIAL IMPACT

None

7. IMPACT ON STAFF AND ADMINISTRATIVE EXPENDITURE

The necessary human and administrative resources will be covered within the budgetary allocation attributed to the managing DG.

8. FOLLOW-UP AND EVALUATION

When Member States adopt the necessary provisions, they must contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods for making such a reference must be laid down by Member States.

Member States must communicate to the Commission the texts of the provisions of national law which they adopt in the field covered by this Directive.

The Commission will review and, if necessary, make new proposals for a revision of a number of provisions in the Directive five years after the entry into force of the implementing legislation in the light of the experience acquired in applying those provisions.

9. ANTI-FRAUD MEASURES

Given the nature of the action, no specific fraud-prevention measures are necessary.

IMPACT ASSESSMENT FORM

THE IMPACT OF THE PROPOSAL ON BUSINESS WITH SPECIAL REFERENCE TO SMALL AND MEDIUM-SIZED ENTERPRISES(SMEs)

TITLE OF PROPOSAL

Proposal for a Directive of the European Parliament and the Council on takeover bids.

DOCUMENT REFERENCE NUMBER

There is as yet no reference number.

THE PROPOSAL

1. Taking account of the principle of subsidiarity, why is Community legislation necessary in this area and what are its main aims?

   The proposed directive is part of the Financial Services Action Plan and was identified as a priority by the March 2000 European Council in Lisbon because it would facilitate pan-European restructuring and so contribute to making Europe the most competitive economy in the world by 2010.

   The proposed Directive has two main objectives: to give a legal framework for takeovers in Europe and to ensure an adequate level of protection for minority shareholders across the EU in the case of a change of company control.

   First, the proposed Directive sets fundamental principles to govern takeovers and provides for the means of determining which is the competent authority for the control of a takeover and which law is applicable, both of which are of crucial importance, particularly in relation to cross-border takeovers. It will also ensure a basic level of disclosure and information relating to the offer, thus guaranteeing transparency during the takeover bid.

   The proposed directive then provides that shareholders should be afforded a minimum level of protection which should be equivalent throughout the EU because the situation is currently far from equivalent . For instance, at present some Member States do not require a full bid to be launched in the case of a transfer of control. Furthermore, several Member States permit the board of the target company to take defensive measures in the case of a hostile takeover bid without prior consent of the shareholders or allow shareholders for a certain period to give prior authorisation to the board to take defensive measures. Apart from this, some Member States allow other effective defence mechanisms such as ownership caps, voting caps or special rights to appoint board members. This is why, in particular, the European Parliament rejected the previous proposal in July 2001 in the absence of a “level playing field” for takeovers in Europe.

   Therefore, the proposal contains a number of provisions which aim at establishing a level playing field for shareholders in the EU. It defines the equitable price to be paid in the case of a mandatory bid and introduces a squeeze-out and sell-out procedure

following a takeover bid. It also provides for a reminder of the "acquis communautaire" relating to the rights of the employees of the companies affected by the offer.

Respecting the principle of subsidiarity, this Directive is a framework directive which leaves Member States a wide measure of discretion to cope with cultural, market, legal and administrative differences.

THE IMPACT ON BUSINESS

2. Who will be affected by the proposal?

The provisions of the Directive apply to the laws, regulations, administrative provisions, codes or other arrangements of the Member States relating to takeover bids for the securities of a company governed by the law of a Member State whose securities are admitted to trading on a regulated market of a Member State.

– which sectors of business?

The proposal does not affect any specific economic sectors.

– which sizes of business (what is the concentration of small and medium-sized firms)

The proposal concerns all companies whose securities are admitted to trading on a regulated market of a Member State. Indeed, regardless of the size of the company, the same need for protection of minority shareholders exists.

– are there particular geographical areas of the Community where these businesses are found ?

No

3. What will business have to do to comply with the proposal?

The proposal imposes obligations on the Member States.

The main requirement immediately following from this proposal for business is an increase in the transparency concerning the capital structure and defensive structures and mechanisms set up by listed companies. As this is a framework directive, business will also have to comply with the measures which Member States and their competent authorities might take in order to implement the principles which are incorporated in the Directive.

4. What economic effects is the proposal likely to have?

– on employment

The European Parliament has been concerned about the consequences of a takeover on employment and about the rights of the employees of the companies affected. The previous proposal, amended after the second reading and again after the conciliation procedure (compromise text), already provided for information for the employees or

their representatives (likely impact of the bid on employment, employment conditions and company locations), as well as for the right for shareholders to give their own opinion on the offer. The proposal does not introduce new consultation rights for employees. It does, however, specifically refer to the various Community measures that have already been adopted in this area.

– on investment and the creation of new businesses

Takeovers are a means for investors to create synergies between existing businesses and target companies. Many European companies will need to grow to an optimal size and therefore invest by means of takeover bids. The financial markets should benefit as well from more liquidity.

– on the competitiveness of businesses

Although the proposal does not promote takeover bids as such, the harmonisation of the rules which govern takeover bids will contribute to improving the competitive position of companies in Europe. At the moment there are legal, economic and structural differences between the Member States with respect to defensive measures that can be put into operation in order to fight hostile takeover bids, so that companies in some Member States are more protected than companies in other Member States. The proposal will reduce these differences in several ways, without compromising the competitiveness of EU companies in relation to companies of third countries.

5. Does the proposal contain measures to take account of the specific situation of small and medium-sized firms (reduced or different requirements etc)?

No

CONSULTATION

6. List the organisations which have been consulted about the proposal and outline their main views.

The proposal is to a large extent identical to the compromise text that was adopted by the Conciliation Committee in connection with the initial Commission proposal. This compromise text was the result of extensive negotiations and consultations that have taken place since 1989. As far as additions to this text are concerned, the Commission set up in September 2001 a High-Level Group of Company Law Experts, chaired by Jaap Winter, to provide advice on pan-European rules for takeover bids. The Group was asked to provide the Commission with recommendations on the issues which the European Parliament wanted to be addressed in a new Commission proposal. The Group, which presented its report in January 2002, collected opinions of several organisations and of the European Parliament:

– The Group appeared before the European Parliament Legal Affairs and Internal Market Committee in a hearing held on 5 November 2001;

– The Group invited representatives of several organisations interested in the regulation of takeover bids to give their views. It organised a hearing on 5

November 2001 at which representatives of the following organisations were heard:

– ETUC (European Trade Union Confederation)

– Euroshareholders

– FESE (Federation of European Stock Exchanges)

– UNICE (Union of Industrial and Employers' Confederations of Europe).

The report of the Group proposed to retain the fundamental principles of the previous Directive, and in particular the principle that shareholders must decide on the future of their company and therefore on any defensive measures after an offer has been launched, but to add new provisions to meet the concerns expressed by the European Parliament. Therefore, it proposed to create rights for squeeze-out and sell-out after a takeover bid, to give a definition of the equitable price to be paid in a mandatory bid, to improve transparency in the companies by disclosure of pre-bid defensive structures or measures and to impose a "break-through rule" in the case of a successful takeover bid.

The recommendations made by the High-Level Group of Company Law Experts were presented to the Legal Affairs and Internal Market Committee of the European Parliament in January and discussed with Member States in February 2002. Most of these recommendations were well received, except for the break-through rule. Several Member States raised objections either to its principle or to its legal and economic consequences.

Many submissions were made by business organisations, individual companies and Member States during the preparation of the proposal.