

COMMISSION OF THE EUROPEAN COMMUNITIES

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Proposal for a
THIRTEENTH COUNCIL DIRECTIVE

on Company Law concerning takeover and other general bids

(presented by the Commission)

Explanatory memorandum

I. Introduction

1. In its White Paper programme for removing all remaining internal barriers in the common market by 1992, the Commission saw a need for harmonizing Member States' law on takeover bids and announced that it would be bringing forward a proposal for a directive on this subject.

2. Takeovers are one of the areas yet to be covered in the programme of company law coordination directives under Article 54 of the EEC Treaty. The aim of the coordination is to afford shareholders and other interested parties equivalent standards of protection before the law in all Member States. To date the harmonization has covered requirements relating to disclosure,¹ formation and capital,² accounts³ and consolidated accounts,⁴ the qualifications of auditors,⁵ and two types of reconstruction or amalgamation, namely mergers⁶ (strictly speaking, "legal mergers" or "assets mergers") and "divisions".⁷

3. Takeovers, or "share mergers", are however also a common type of reconstruction or amalgamation of companies. It is therefore unsatisfactory that the harmonization legislation should not yet cover this type of financial operation, which is quite different from legal mergers and divisions.

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- 1 Directive 68/151/EEC, OJ L 65, 14.3.1968.
2 Directive 77/91/EEC, OJ L 26, 31.1.1977.
3 Directive 78/660/EEC, OJ L 222, 14.8.1978.
4 Directive 83/349/EEC, OJ L 193, 18.7.1983.
5 Directive 84/253/EEC, OJ L 126, 12.5.1984.
6 Directive 78/855/EEC, OJ L 295, 20.10.1978.
7 Directive 82/891/EEC, OJ L 378, 31.12.1982.

4. In a legal merger, all the assets and liabilities of a company are transferred to another company and the company being taken over is dissolved, without going through the liquidation procedure, and its shareholders issued with shares in the acquiring company. Alternatively, the assets and liabilities of two or more existing companies are transferred to a newly-formed company and both the original companies dissolved.¹

5. A division differs from a legal merger in that the assets and liabilities of an existing company, which is subsequently dissolved, are transferred to several other companies. Otherwise, the two operations are largely the same.

6. A takeover or "shares merger", although often commercially and economically the equivalent of a legal or assets merger, is legally quite different. It does not involve the dissolution of one of the companies or the transfer of its assets or liabilities to the acquiring company. The company whose shares are acquired remains in existence.

7. Legal mergers between companies from different Member States are not covered by Directive 78/855/EEC, but only intra-State ones. A proposal for a Tenth company law Directive to facilitate inter-State legal mergers was sent to the Council on 14 January 1985,² and is currently before Parliament. Takeover bids for companies in other Member States, can already be mounted without difficulty.

8. Unlike assets mergers, which in most European countries have been taking place since the 1930s, if not before, mergers by takeover are a phenomenon which has only emerged in the last 25 years and which varies greatly in frequency from country to country. This explains why some Member States have established very detailed rules on the subject while others have made no

1 Articles 3 and 4 of Directive 78/855/EEC.

2 OJ C 23, 25.1.1985, p. 11.

specific provision at all. Takeovers have nevertheless become an increasingly widely used technique throughout the Community, and one whose importance is growing with the gradual liberalization of capital markets.

9. A takeover bid is generally understood to mean an offer made to the holders of securities carrying voting rights in a company or convertible into securities carrying such rights (i.e., shares, convertible bonds, subscription rights, options and warrants) to acquire their securities for a consideration in cash or other securities, the purpose of the offer usually being to acquire control of the company or consolidate the offeror's existing control, and the offer being made conditional upon sufficient offerees accepting it to achieve the offeror's objective.

To guarantee the equal treatment of all shareholders, the directive fixes a threshold at which there is an obligation to launch a takeover bid. Besides, in order to protect minority shareholders and to avoid purely speculative partial bids the directive ensures that the offeror must make a bid concerning all the shares of the company.

10. To enable the addressees of a takeover or other general bid to make a properly informed assessment before deciding whether to accept, the offeror must be required to draw up and bring to their notice an offer document setting out all the terms of the bid. The Directive must also specify the circumstances in which an offer, once formally made to shareholders in this way, can be withdrawn. Another essential feature of a takeover bid is the setting of a closing date for acceptances, which should not, however, preclude revisions of the initial offer within certain limits.

As well as the offer document drawn up by the offeror, provision should also be made for shareholders to receive a report giving the view of the offeree company's board on the offer.

11. Rules to protect the interests of those affected by takeover bids are unlikely to be effective unless they are policed by an official regulatory body independent of the parties. The Directive requires Member States to

designate such a supervisory authority or authorities. How this regulatory system is organized is left to the Member States, provided the authorities have the power to effectively police the takeover rules. The Directive also lays down a rule for determining the supervisory authority responsible in cases where bids are launched simultaneously in several Member States and in such cases requires the mutual recognition of offer documents.

12. The Directive secures the protection of shareholders, by, inter alia, ensuring that they receive full and substantiated information on the offer, and by imposing the respect of the fundamental principle of equality of treatment of those to whom the offer is addressed. Such persons, especially when resident in a different Member State than the target company, should be properly informed of what is going on during a bid and appreciate the importance of the various steps in the bid procedure. Such shareholders often have only a small portfolio of shares and little information to go on apart from the annual accounts of their company and possibly the current stock exchange price of their shares. The company making the bid is usually better informed about the situation of the target company and the value of its shares than the company's shareholders, because it has taken the initiative.

The directive ensures a basic level of protection for the addressees of takeover bids throughout the Community. This does not affect Member States' right to maintain or introduce more far-reaching or detailed provisions in their law.

13. Certain recent events have raised the question whether the directive should introduce a reciprocity clause towards bidders from third countries.

The need for such a clause has been emphasized by those who say that in general it is easier for a company from a third country to take control of a Community company than the opposite.

The situation within the Community is not as open as one may think. Indeed, company law in several Member States also allows companies to adopt a range of defensive measures to ensure that control of the company remains in the hands

of friendly shareholders. These defensive measures are very widely used in some Member States. As a consequence the conditions in which a takeover bid is carried out vary considerably between Member States.

Against this background, and given the lacunae which exist within the Community, it would be premature to introduce a reciprocity clause now at Community level. For the time being and until subsequent harmonisation, Member States may introduce such a clause into their national law, bearing in mind their international commitments.

II. Article-by-article commentary

Article 1

The scope of the Directive as regards the types of companies covered is defined by reference to the company whose shares are the subject of the general bid.

Only public companies limited by shares are covered.

The public companies need not be quoted; to restrict the rules to quoted companies would discriminate between the shareholders of quoted and unquoted companies by according a higher standard of protection to the former. However, a number of special rules are laid down for those cases where the securities of quoted companies are offered to the shareholders of the offeree company to reflect capital market regulatory requirements.

Thus the obligation to make a bid for all the shares of a company, once a certain threshold of participation is reached does not depend for application on whether the target company is quoted on the Stock Exchange or not. The rules of the directive apply to obligatory bids and also to cases where someone decides voluntarily to make a bid for the shares of a small or medium-sized company not quoted on the Stock Exchange.

Because there are restrictions in many Member States on the transfer of shares of private limited companies, the Directive does not apply to bids for such companies.

The characteristic feature of a general bid is that the offer is made on the same terms to all the holders of voting stock of the company, or instruments convertible into voting stock, or of a particular class or classes of voting stock.

Article 2

The definition of "securities" includes instruments carrying potential voting rights such as convertible bonds, subscription rights, options and warrants.

Any person or company who launches a bid either on the basis of article 4 or on a voluntary basis is considered to be an "offeror". It goes without saying that if the members of the board of the target company decide to launch a bid they are to be considered as offerors too. They are subject to all obligations imposed by this directive.

The term "parties to the bid" is used in the requirement for an expert's report in certain cases where the consideration offered includes securities (Article 14(2)). The parties to the bid are the offeror and its agent, the addressees of the bid and the directors of the offeree company. The offeror may be a company or an individual. If it is a company, its directors are also parties to the bid.

Account must be taken of the fact that in a takeover bid the offeror often does not act alone but in concert with others. "Persons acting in concert" are defined as persons who, pursuant to an agreement, cooperate with one another to acquire a company's securities.

Article 3

The directive lays down in this article a fundamental principle of company law, that of equal treatment of shareholders who are in the same position. The text also contains provisions which apply this principle to individual situations, for example article 4 (obligation to make a bid), and article 16 (automatic revision).

Article 4

So that the principle of equal treatment of shareholders cited in Article 3 may be respected, the directive requires an offer to be made by persons wishing to acquire shares, which, when added to any existing holdings, give them a percentage of voting rights which Member States may not fix at less than one third.

To avoid purely speculative partial bids, the directive obliges the offeror to make a bid concerning all the shares in the company. This also has the aim of preventing shareholders suffering a loss caused by the reduction in value of the shares they continue to own after a partial bid.

For the purpose of the obligation imposed by this Article, the voting rights held by certain persons connected with the offeror must be added to those held by the offeror himself. These are on the one hand persons acting in their own name but on behalf of the offeror and on the other hand persons acting in concert with the offeror. Where the offeror is a company the voting rights held by companies belonging to the same group of companies as the offeror within the meaning of article 1 of the Directive 83/349/CEE on consolidated accounts and those held by the members of the management body of these companies must also be taken into account.

The threshold of one third is that from which the offeror may exercise a blocking minority. Indeed, numerous important decisions which, within a company, must be taken by the general meeting of shareholders, require at least a majority of two-thirds of the votes attached to the securities represented. This is the level used in community legislation to limit or suppress the right of preferential subscription for cases of increase of capital, for the reduction of capital, for the total or partial writing-off of capital¹ and for operations such as mergers² or scissions³.

In certain cases the obligation to launch a bid as set out in paragraph 1 of this Article could lead to undesirable results.

1 Cf. Art. 40 of the Directive 77/91/EEC

2 Cf. Art. 7 of the Directive 78/855/EEC

3 Cf. Art. 5 of the Directive 82/891/EEC

For example, it would be exaggerated to impose this obligation on those who reach the required threshold in an accidental manner (from donations, inheritance, etc.). A bid could be incompatible with the interests of shareholders or even with the objectives of the directive. That is why the supervisory authority may grant exemptions to this obligation. It must give the reasons for its decision and adopt all measures necessary to ensure equal treatment of all shareholders.

Article 5

The obligation described in Article 4 could result excessive if the company concerned is small or medium-sized. These are normally companies for which the obligations imposed by the offeror could lead to disproportionate costs by reference to the size and the value of the target company. Thus, when this company is small or medium-sized as defined in Article 27 of Directive 78/660/EEC on annual accounts or when it belongs to a group of undertakings which do not exceed the limits established by that article, and it is not quoted on the Stock Exchange, the offeror is exempt from the requirement to make a bid. If the offeror decides to make a bid anyway, it must be made in accordance with the requirements of the directive.

Article 6

Member States are required to designate a supervisory authority or authorities to monitor compliance with the rules by all bid parties and must inform the Commission of their arrangements, including the division of responsibilities between the authorities if several bodies have regulatory functions in the area.

The Directive leaves it to Member States whether a public or private or a nationally or regionally organized body is designated and how the authority operates, provided it has the necessary powers to effectively police the system and see that the Directive is respected. In this respect, the authority (or authorities) must have in every case either the power to forbid the publication of an offer document which is incomplete by reference to the requirements of the directive, or the power to oblige the offeror to revise such a document at a later date.

It is necessary to specify which Member State's authority is responsible for policing cross-frontier bids. This responsibility (in particular, for supervising the content and notification to shareholders of the offer document) is assigned to the authority of the Member State in which the offeree company has its registered office. Where a bid is launched simultaneously in several Member States, the Directive requires authorities to recognize offer documents drawn up under each other's supervision, as in the rules on listing particulars.¹

After the offer document has been published or otherwise brought to the notice of shareholders, the authorities of the various Member States concerned are required to assist one another in performing their duties and for this purpose to supply one another with all necessary information.

To avoid the creation of false markets in securities concerned in takeover bids, it is provided that all current or former officers or servants of supervisory authorities must be bound to strict confidentiality regarding information coming to their knowledge in the course of their professional duties and must not disclose such information to any person or body not legally entitled to receive it.

The liability position of supervisory authorities is to be governed by their national law.

Article 7

Article 7 is based on the principle that information capable of having an influence on the market in the securities concerned should be made public as soon as possible to reduce the scope for insider dealing. Hence, as soon as the offeror decides to make the bid, even though the details might not have been fully worked out, it must announce its intention to all the intended addressees by one of the means provided for by the Directive for notifying the offer document to them (Article 11). It must then immediately prepare an offer document meeting the requirements of Article 10 in order to inform the addressees of the exact terms of the offer.

1 Directive 87/345/EEC, OJ L 185, 4.7.1987, p. 81.

However the offeror must take certain steps before the publication of the offer document. He must forward the offer document to the supervisory authority and to the board of the offeree company.

Article 8

The administrative or management body of the offeree company must at all times act in the interests of the company. Unless the general meeting authorizes it to do so, therefore, it would be prohibited from impeding the bid by issuing new securities carrying voting rights in the offeree company, or deciding to engage in operations of an exceptional nature which might cause a substantial loss of the company's assets. In this connection, operations of an exceptional nature are considered to be those which are not carried out in the normal course of the company's business or not in conformity with normal market practice.

This ban would take effect when the offeror informs the administrative or management body of the offeree company that he intends to make a bid (Article 7(1)), and would last until the period for acceptance has expired.

Article 9

To ensure that offerors fully comply with the rules, they are required to be represented by a licensed dealer in securities or a financial institution authorised to act within the Community, which are subject to codes of practice in their activities as advisers in takeover bids and will thus help to ensure that the rules are observed and that shareholders are properly protected.

Article 10

This Article sets out the minimum content of the offer document.

The document must first identify the offeree company and the offeror and its agent.

It must also state the securities or class or classes of securities for which the bid is made and the holdings of such securities already in the possession of the offeror or its associates and the voting rights attached to the securities already held. The associates whose holdings must be disclosed are persons acting in their own name but for the account of the offeror, persons acting in concert with the offeror, and, where the offeror is a company, its directors and any companies belonging to the same group for the purposes of Article 1 of the consolidated accounts Directive 83/349/EEC. The date and price (or other considerations) at which such shareholdings were acquired must also be stated in the offer document. Where the offeror is a company, any stakes held by the offeree company in the offeror must be similarly disclosed.

The offer document must state the consideration offered for each security and the basis of the valuation used in calculating it and, where the offer is for cash or includes a cash element, provide guarantees of the offeror's ability to meet the financial obligations resulting from the bid. If the offeror finances the bid by any means that might cause debts to the target company he has to state this clearly in the offer document and specify the importance of this future indebtedness.

In the case of a share (or mixed cash and share) offer, the document must also state from what date the shares offered will become entitled to a dividend.

The offer may be made subject to conditions approved by the responsible supervisory authority. These, too, must be stated in the offer document.

The closing date for acceptances must be given within the limits laid down in Article 12.

The offeror must say what steps have to be taken by shareholders wishing to accept the bid in order to signify their acceptance and to receive the offeror's consideration for the shares they transfer to it.

In the interest of all parties to the bid and taking into account the social policy of the Commission, it seems indispensable to make clear in the offer document the intentions of the offeror concerning the future of the offeree company, especially as regards its activities, including the use of its assets but also as regards its management and staff.

The offeror must also disclose any special advantages it intends to grant to the directors of the offeree company and any agreements concerning exercise of the voting rights attached to the shares of the offeree company.

Finally, the offer document must identify all the offeror's associates and persons acting in concert with it in the bid, as specified above.

The Directive will not prevent regulatory authorities requiring additional items of information to be included in the offer document where it is necessary in the particular circumstances of the case that shareholders should be aware of them.

The Directive requires that, where the offer includes newly issued securities for which an official stock exchange listing has been applied for, the offer document must be accompanied by the listing particulars required by Council Directive 80/390/EEC.¹ Thus the recipients of the offer will receive full disclosure concerning the shares which are being offered to them.

With the same objective in mind, where no official stock exchange listing has yet been applied for securities offered in exchange, the Directive seeks to guarantee offerees adequate information by requiring that the offer document must put the offerees in possession of all the facts necessary to make an informed judgment of the issuer's assets and liabilities, financial position, record and prospects.

Article 11

Shareholders must be given an opportunity to acquaint themselves with the bid terms.

The offer document, and if appropriate the listing particulars or equivalent of securities offered in exchange, therefore need to be brought to their attention.

1 OJ L 100, 17.4.1980, p. 1.

This may be done in a number of ways. The offer document and any accompanying documents may be published in full in one or more national or mass-circulation newspapers and in the official gazette designated under Article 3(4) of Directive 68/151/EEC. Alternatively, the offeror may announce in the newspapers and the official gazette, or in some other medium approved by the supervisory authority, that the documents are available at stated addresses.

Where all the securities comprised in the bid are registered, the offeror may also circulate the offer document and any accompanying documents to all the addressees individually.

The offeror is required to file a copy of the documents with the supervisory authority so that it can carry out its duties with regard to the takeover rules.

Article 12

The directive sets out time-limits within which the offeror may fix the period for accepting the offer which may not be less than four weeks or more than ten, from the date of publication of the offer document.

On one hand, the period should be sufficiently long to allow offerees to obtain information concerning the conditions of the offer and to consult the report of the board of the offeree company. On the other hand, taking into account the limitations imposed by Article 8, the target company should not be prevented from carrying out its normal activities for too long a period.

Unless authorisation on the basis of a reasoned decision is given by the supervisory authority, the acceptance delay may only be changed unless a rival bid is launched.

Article 13

To allow the offeror to withdraw a bid once the offer document has been brought to the notice of the shareholders by one of the means provided for in the Directive would be to sanction abuse of the takeover process. The offeree

company and its shareholders must be protected against bids made for purposes other than the acquisition of control or a significant proportion of the voting rights in the company.

There are several other circumstances in which withdrawal is permitted. First, the bid may be withdrawn in accordance with Article 20(4) if a competing bid is made.

Withdrawal of the bid is also permitted if the approval of the general meeting of the offeror company is not obtained for the issue of new securities offered in exchange for the securities bid for or if the securities offered in exchange fail to obtain an official stock exchange listing as the offeror intended.

Another case in which a bid may be withdrawn is where the requisite judicial or administrative authorization for acquisition of the shareholding is refused. A typical example would be prohibition of the operation by the merger control authorities.

The offeror may also withdraw the bid if a condition of the bid approved by the supervisory authority is not met.

In wholly exceptional cases, when the offer cannot be made for reasons of force majeure the supervisory authority may authorize the withdrawal of that offer on the basis of a reasoned decision.

The withdrawal of the bid must be notified to the original addressees by the same means as the offer document and to the supervisory authority.

Article 14

The board of the offeree company is required to give its view of the bid in a report setting out, in particular, the arguments for and against acceptance.

Takeover bids are not always contested by the target company's management; indeed in many cases the latter has negotiated the takeover and its terms with the offeror. In the case of friendly takeovers of this kind, such matters

should not be concealed from shareholders but should be made clear in the report of the target company's board. The report should also specify any agreements between the offeree company's management and the offeror on the exercise of voting rights attached to the target company's shares.

In drawing up its report, the board is of course under a duty to act in the best interests of the offeree company.

Where the consideration offered in the bid includes securities for which at the time of the bid no official stock exchange listing has been applied for, the board's report is required to be accompanied by the report of an expert independent of the bid parties appointed or approved by the supervisory authority. In his report the expert must state whether, in his opinion, the consideration offered is fair and reasonable and give his views on the basis of the valuation used to determine the consideration. The purpose is to give the target company's shareholders an independent assessment of the share exchange ratio proposed, as in the experts' reports on the proposed terms of assets mergers under Article 10 of Directive 78/855/EEC.

The report of the target company's board and the expert's report, if required, must be notified to the addressees of the bid by the same means as the offer document before the expiry of the period for acceptance and filed with the supervisory authority. Where the bid is "friendly", there is no objective to the offer document and the report of the offeree company's board being published or otherwise notified to shareholders together.

Where there are competing bids or revised bids it is clear that the management of the target company should give its reaction to them and accordingly they are subject to the same rules as original bids.

Article 15

The Directive allows the offeror to revise the terms of the bid any time up to one week before the expiry of the period for acceptance. This limitation is necessary to maintain an orderly market in the shares and to ensure that the addressees are informed of the revised terms in time. Indeed, the offeror may not revise the offer during the last week of the acceptance period unless he

is authorised to do so by the supervisory authority on the basis of a reasoned opinion. To give addressees enough time to consider the new terms of the offer, however, it is provided that the initial period for acceptance must be extended by one week in that case. This can be modified by the supervisory authority on the basis of a reasoned decision.

No definition of "revision" is given. Consequently, a revision does not necessarily have to raise the cash price or share exchange ratio. Determining whether the terms of a new offer are better than those of the original one is often more difficult than comparing absolute prices or ratios, especially for share exchange or mixed cash and share offers.

As with the initial offer, the offeror must be required to make an immediate public announcement of its intention and then to notify shareholders of the new terms. The view of the offeree company's board on the amended offer must be similarly publicized and the revised bid terms and the board's report filed with the supervisory authority.

The principle of equality of treatment of all addressees of the bid must be upheld by requiring that all shareholders who have already accepted the previous offer may accept the revised bid instead.

Article 16

An irrefutable presumption of revision of the offer takes place in all cases where the offeror, persons acting in concert with him or persons acting in their own name but on behalf of the offeror buy during the acceptance period shares which are the subject of the offer at a higher price than that laid down in the offer document or one of its revisions. The effect of these acquisitions is the increase of the consideration for offers already accepted. In this way, once again, the principle of equality of treatment is respected.

Article 17

This Article is intended to ensure that the regulatory authorities are kept informed of the progress of the bid so that they can exercise their supervisory functions.

Throughout the period for acceptance of the bid the offeror should be required to inform the supervisory authority at any time, on request, of the number of acceptances received to date.

Furthermore, from the time the bid is publicly announced the supervisory authority should be informed of all further acquisitions of securities concerned in the bid by holders of 1% or more of the voting rights in the companies concerned or persons acting in concert with them or for their account, and the price at which the securities were acquired. The obligation laid down in this paragraph is particularly important because it permits the presumption of a revision laid down in Article 16 to operate.

Article 18

All parties should be properly informed of the outcome of the bid. For this purpose it is required that the result should be brought to the notice of the shareholders to whom the bid was addressed by one of the means required for notification of the offer document and should be communicated to the supervisory authority. In this way the offeror will have to make public such information as the number of acceptances, the voting rights attached to the securities transferred to it by acceptors, and whether the objective of the bid was achieved or the bid was withdrawn.

Article 19

One of the fundamental objectives of this Directive is to inform those chiefly concerned by the operation of its consequences. Among the persons mainly concerned are the employees of the target company for whom the operation may have serious repercussions. This article imposes on the administrative or management body of the target company the obligation to communicate to

employees' representatives the documents concerning the bid. These representatives thus have access to the offer document and to the documents foreseen in Article 10 paragraphs 3 and 4 for takeover bids where shares are offered in consideration as well as to the report of the management of the target company and, where appropriate, to the experts' report foreseen in Article 14 paragraph 2.

Article 20

The takeover rules should not stand in the way of competing bids, which are in the interest of the target company's shareholders.

All bids in competition with a bid already made must comply with the same rules as the initial bid as regards procedure, the content and notification to shareholders of the offer document and the report of the offeree company's board, the period for acceptance and revision of the bid.

To maintain an orderly market in the shares and to ensure that shareholders are informed in time, the competing offeror must be required to notify its offer document to the addressees before the period for acceptance of the initial bid expires.

The Directive does not allow competing bids from persons acting in concert with the original offeror or acting in their own name but for its account, except with the permission of the supervisory authority. This provision is intended to avoid a proliferation of bids that are competitive in name only, while allowing the supervisory authority to depart from this principle where the shareholders' interest requires.

The original offeror may withdraw his bid in the face of a competing one. If it does not, the period for acceptance of its bid is extended to the date of expiry of that of the competing bid. The extension must be notified to shareholders in the usual way and to the supervisory authority.

Article 21

The policing of the takeover rules by regulatory authorities in different Member States, and the possible delegation of some functions to other bodies, may give rise to problems. For this reason it is proposed to set up a contact committee to advise the Commission in three areas: firstly uniform application of the rules, for which regular consultations will be held, secondly to bring together the strategies followed by Member States seeking to obtain reciprocity of treatment for Community companies and nationals as regards the purchase of shares of a company by means of a takeover-bid, thirdly, changes in the rules. The committee formula is modelled on that in the accounts Directive 78/660/EEC.¹

1 Article 52 of directive 78/660/EEC

Proposal for a
THIRTEENTH COUNCIL DIRECTIVE

on Company Law concerning takeover and other general bids

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 54 thereof,

Having regard to the proposal from the Commission,

In cooperation with the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

Whereas it is necessary to coordinate certain safeguards which Member States require of companies and firms within the meaning of the second paragraph of Article 58 of the Treaty for the protection of members and others, in order to make such safeguards equivalent throughout the Community;

Whereas it is necessary to protect the interests of the shareholders of public companies limited by shares when these are the subject of a takeover or other general bid;

Whereas shareholders who are in the same position should be treated equally;

Whereas this equality of treatment requires that the obligation to make a bid is imposed on persons wishing to attain a certain level of participation in a company and in order to ensure the protection of minority shareholders and to avoid purely speculative partial bids, it is necessary to require that these persons make a bid for all the shares of that company;

Whereas each Member State should designate a supervisory authority or authorities to ensure that parties to a takeover or other general bid fulfil their obligations; and whereas it is necessary to determine which authority has territorial jurisdiction in the case of cross-frontier bids and to provide for the mutual recognition of offer documents within the Community; whereas the different authorities must cooperate with one another and their present or former officers and servants should be bound to preserve confidentiality;

Whereas to reduce the scope for insider dealing offerors should be required to announce their intention of launching a bid as soon as possible and to inform the supervisory authority and the offeree company's board of the precise terms of the bid before they are made public;

Whereas to avoid operations which frustrate the bid it is necessary to limit the powers of the board of directors of the offeree company to engage in operations of an exceptional nature;

Whereas to help ensure compliance with the obligations resulting from the Directive it should be compulsory for offerors to be represented by a person or credit institution licensed to deal on the financial markets;

Whereas the addressees of a takeover or other general bid should be properly informed of the terms of the bid by means of an offer document and, where the consideration offered includes securities, should be provided with certain additional information about the company issuing those securities;

Whereas the offeror should be required to bring the offer document to the attention of all addressees of the bid and where the offer document contains insufficient information to clarify the real intentions of the offeror, the supervisory authority should be able either to forbid the publication of the offer document or to make the offeror publish a revised document;

Whereas it is necessary to set a time-limit for takeover bids;

Whereas, in the interests of the offeree company and the addressees of the bid, it should be provided that once an offer document has been made public the bid may not be withdrawn except in certain specified circumstances;

Whereas the board of the offeree company should be required to report in writing to its shareholders its view of the bid, and whereas where the consideration offered in the bid includes securities for which at the time the bid is made no official stock exchange listing has been applied for it should also be required to obtain and make available to all addressees of the bid an additional report by an independent expert;

Whereas offerors are entitled to revise their bids; whereas limits should be placed on that right in order to maintain an orderly market in the shares and it should be ensured that the addressees of the bid are informed in time; whereas it is necessary that the offeror draw up and make public a fresh document setting out the amendments to the original bid and whereas addressees who have already accepted the bid should be entitled to accept the revised bid;

Whereas in order to ensure equal treatment of addressees of the bid, any acquisition by the offeror, or by certain persons associated with him, of shares which are the subject of the bid at a higher price than that laid down in the offer document or one of its revisions, must itself be considered as a revision;

Whereas to be able to perform their functions satisfactorily, supervisory authorities need to be able to find out at any time how many acceptances have been received to date and whereas, from the time the intention to make a bid is announced by the offeror, any dealing in the securities concerned must be made public by any person already having a significant shareholding;

Whereas the result of the bid must be made public and notified to the supervisory authority;

Whereas taking into account the social policy of the Community, it is necessary that representatives of the employees of the offeree company be informed with regard to the bid and that they should receive all the documents concerning that bid;

Whereas competing bids for the securities of a company are necessarily to the advantage of its shareholders; whereas all such bids should be subject to the same rules as the original bid and the original offeror should be entitled to withdraw his bid in such a case;

Whereas this Directive does not until subsequent coordination affect the capacity of Member States to forbid a takeover or other general bid where the offeror is either a national or a company from a third country, in particular where Community nationals and companies do not benefit from reciprocal treatment as regards the acquisition of shares by means of such a bid in a company governed by the law of that third country,

HAS ADOPTED THIS DIRECTIVE:

Article 1

(Scope)

The coordination measures prescribed by this Directive shall apply to the laws, regulations and administrative provisions of the Member States relating to takeover and other general bids addressed, on the same terms, to all holders of the securities, or the securities of a particular class or classes, of any of the following types of company:

- in Germany:

die Aktiengesellschaft, die Kommanditgesellschaft auf Aktien,

- in Belgium:

la société anonyme/de naamloze vennootschap, la société en commandite par actions/ de commanditaire vennootschap op aandelen,

- in Denmark:

aktieselskaber, kommanditaktieselskaber,

- in Spain:

la sociedad anonima, la sociedad en comandita por acciones,

- in France:

la société anonyme, la société en commandite par actions,

- in Greece:

Η ανώνυμη εταιρία, η ετερόρρυθμη κατά μετοχές εταιρία,

- in Ireland:

the public company limited by shares,

- in Italy:
la società per azioni, la società in accomandita per azioni,
- in Luxembourg:
la société anonyme, la société en commandite par actions,
- in the Netherlands:
de naamloze vennootschap,
- in Portugal:
sociedade anonima, sociedade em comandita por accoes,
- in the United Kingdom:
the public company limited by shares.

Article 2

(Definitions)

1. For the purposes of this Directive, "offeree company" shall mean a company whose securities are the subject of a takeover or other general bid (hereinafter referred to as "a bid").
2. For the purposes of this Directive, "offeror" shall mean any person or company including, where appropriate, the directors of the offeree company, who launches a bid in accordance with the obligation set out in Article 4 or on a voluntary basis.
3. For the purposes of this Directive, "securities" shall mean securities carrying voting rights in a company or which can be converted into securities carrying such rights.

4. For the purposes of this Directive, "parties to the bid" shall mean the offeror, the representative of the offeror within the meaning of Article 9, the directors of the offeror, if the latter is a company, the addressees of the bid and the directors of the offeree company.

5. For the purposes of this Directive, "persons acting in concert" shall mean persons who, pursuant to an agreement, cooperate with one another with the aim of acquiring the securities of a company.

Article 3

(Equal treatment)

Shareholders who are in the same position shall be treated equally.

Article 4

(Obligation to make a bid)

1. Any person aiming to acquire a number or percentage of securities, which, added to any existing holdings, gives him a percentage of the voting rights in a company which may not be fixed at more than 33 1/3%, shall be obliged to make a bid to acquire all the securities of that company.

2. To calculate the threshold referred to in paragraph 1, the following must be added to the voting rights held by the offeror:

- (a) voting rights held by persons acting in their own name but on behalf of the offeror;

- (b) where appropriate, voting rights held by companies belonging with the offeror to the same group of undertakings within the meaning of Article 1 of Council Directive 83/349/EEC¹;
- (c) voting rights held by persons acting in concert with the offeror;
- (d) where appropriate, voting rights held by directors of the offeror company.

3. The supervisory authority may grant exemptions to the rule laid down in paragraph 1, giving reasons for its decision and adopting all measures necessary to ensure equal treatment of all shareholders.

Article 5

(Exemptions on the basis of size of the offeree company)

Article 4 shall not apply:

- (a) where the securities of the offeree company have not been admitted to official stock exchange listing or have not been the subject of a request for such admission at the moment when the bid is announced in accordance with Article 7, and
- (b) where the offeree company, or, where appropriate, the group of undertakings within the meaning of Article 1 of Directive 83/349/EEC to which the company belongs, do not exceed, at the balance-sheet date, the amounts of two of the three criteria laid down in Article 27 of Council Directive 78/660/EEC².

1 OJ No L 193 of 18.7.1983, p. 1

2 OJ No L 222 of 14.8.1978 p. 11

Article 6
(Supervisory authority)

1. Member States shall designate the authority or authorities which must discharge the functions specified in this Directive. The authorities thus designated may delegate all or part of their powers to other authorities or to associations or private bodies. Member States shall inform the Commission of these designations and of any delegation of powers and shall specify all divisions of functions that may be made.

2. The authorities and, where appropriate, the associations or private bodies referred to in paragraph 1 must have all the necessary powers to ensure that this Directive is put into effect and, in any case, either the power to forbid the publication of an offer document which is incomplete by reference to the requirements of this Directive or the power to oblige the offeror to correct an inadequate offer document and to make it public by the means set out in Article 11 (1).

3. The authority competent for supervising the drawing-up and publication of the offer document shall be that of the Member State in which the offeree company has its registered office. Where the bid is made in several Member States simultaneously, the offer document as prepared under the supervision of the national authority responsible shall be accepted in the other Member States, without their supervisory authorities having the right to require the inclusion of any additional particulars in the document.

4. After an offer document has been made public in accordance with Article 11 (1), the competent authorities of the Member States shall give each other any cooperation required for the performance of their duties and for this purpose shall supply each other with any information that may be necessary.

5. All present or former officers or servants of supervisory authorities shall be bound by the rules of professional secrecy. Information that has come to their knowledge in the course of performing their professional duties shall not be disclosed to any person or body not legally entitled to receive it.

6. This Directive shall not affect the legislation of Member States concerning the liability of competent authorities.

Article 7

(Procedure prior to publication of the offer document)

1. As soon as it decides to make a bid, the offeror shall make public its intention of doing so by one of the means provided for in Article 11 (1). It shall inform the competent supervisory authority accordingly.

2. The offeror shall then immediately draw up an offer document in accordance with Article 10 and make it public in accordance with Article 11 (1).

3. Before the offer document is made public, the offeror shall communicate it to the competent supervisory authority and to the board of the offeree company.

Article 8

(Restriction of the powers of the board
of the offeree company)

After receiving the information referred to in Article 7 (1) and until the expiry of the period for accepting the bid, the board of the offeree company shall not, without the authorization of the general meeting of shareholders, decide:

- (a) to issue securities carrying voting rights or which may be converted into such securities;
- (b) to engage in transactions which do not have the character of current operations concluded under normal conditions unless the competent supervisory authority has authorized them, giving its reasons for such authorization.

Article 9

(Representative of the offeror)

The offeror shall be represented either by a qualified person authorized to deal on the Community financial markets or by a credit institution authorized within the Community.

Article 10

(Offer document)

1. The offeror shall draw up an offer document in respect of the bid stating at least:

- (a) the type, name and registered office of the offeree company;
 - (b) the name and address of the offeror or, where the offeror is a company, the type, name and registered office of that company;
 - (c) the name and address or, where appropriate, name and registered office of the representative of the offeror referred to in Article 9,
 - (d) the securities or class or classes of securities for which the bid is made;
 - (e) the securities, or the securities of the relevant class or classes, already held by:
 - (aa) the offeror,
 - (bb) other persons for the account of the offeror,
 - (cc) companies belonging with the offeror to the same group of undertakings within the meaning of Article 1 of Directive 83/349/EEC,
 - (dd) persons acting in concert with the offeror,
 - (ee) where the offeror is a company, its directors,
- and the voting rights attached to those securities and the date and the price at which they were acquired;
- (f) where the offeror is a company, the securities, or the securities of a particular class or classes, of the offeror held by the offeree company, and the voting rights attached to them and the date and the price at which they were acquired;
 - (g) the consideration offered for each security and the basis of the valuation used in determining it and, in the case of a cash consideration, the guarantees provided by the offeror regarding payment of that consideration, and, where appropriate, a statement concerning any future indebtedness of the offeree company to finance the bid;

- (h) where the consideration comprises securities, the date from which those securities will entitle their holders to a share in the profits and any special conditions affecting that entitlement;
- (i) any condition authorized by the competent supervisory authority which the offeror places on the bid;
- (j) the latest date on which the bid may be accepted;
- (k) the steps to be taken by the addressees of the bid in order to signify their acceptance and to receive the consideration for the securities which they transfer to the offeror;
- (l) the intentions of the offeror, explicitly expressed, regarding the continuation of the business of the offeree company, including the use of its assets, the composition of its board and its employees;
- (m) any special advantages which the offeror intends to grant to the directors of the offeree company;
- (n) all agreements concerning the exercise of the voting rights attached to the securities of the offeree company.

2. In addition, the offer document shall identify:

- (a) any person for whose account the offeror is acting;
- (b) any companies belonging with the offeror to the same group of undertakings within the meaning of Article 1 of Directive 83/349/EEC;

(c) any person acting in concert with the offeror.

3. Where the consideration offered includes newly-issued securities for which at the time of the bid an official stock exchange listing has been applied for, the offer document shall be accompanied by the listing particulars required by Council Directive 80/390/EEC.¹

4. Where the consideration offered includes securities for which at the time of the bid no official stock exchange listing has been applied for, the offer document shall contain all the facts necessary to enable the addressees of the bid to form an informed judgment as to the assets and liabilities, financial position, record and prospects of the issuer.

Article 11

(Publication of the offer document)

1. The offer document and, where appropriate, the documents required by Article 10(3) or (4) shall be either:

(a) published in full in one or more national or mass-circulation newspapers and in the national gazette designated under Article 3(4) of Council Directive 68/151/EEC,² or

(b) made available to the addressees of the bid at addresses announced in notices in the newspapers and the gazette referred to at (a) or by equivalent means approved by the competent supervisory authority, or

(c) where all the securities comprised in the bid are registered, circulated to all addressees of the bid.

1 OJ L 100, 17.4.1980, p. 1

2 OJ L 65, 14.3.1968, p. 8

2. The offer document and, where appropriate, the documents referred to in Article 10 (3) and (4) shall also be filed with the competent supervisory authority.

Article 12

(Period for acceptance)

1. The period for accepting the bid indicated in the offer document in accordance with Article 10 (1) (j) may not be less than four weeks or more than ten weeks from the date of publication of the document in accordance with Article 11 (1).

2. The period may not be modified without the authorization of the supervisory authority, giving its reasons, without prejudice to Article 20.

Article 13

(Withdrawal of bids)

1. Once a bid has been made public by the means provided for in Article 11 (1), it may be withdrawn only in the following circumstances:

- (a) where there are competing bids and the offeror decides to withdraw his bid in accordance with Article 20 (4);
- (b) in a bid in which new securities are offered in exchange for the securities bid for, where the approval of the general meeting of the offeror company is not obtained for the issue of the new securities;

- (c) in a bid in which securities are offered in exchange for the securities bid for, where the securities fail to obtain an official stock exchange listing as the offeror intended;
 - (d) where the necessary judicial or administrative authorization is not obtained for the acquisition of the securities for which the bid is made, and in particular in the event of lack of authorization of the acquisition by the merger control authorities;
 - (e) where a condition of the bid announced in the offer document in accordance with Article 10 (1)(i) and approved by the competent supervisory authority is not fulfilled;
 - (f) in exceptional circumstances and with the authorization of the supervisory authority, giving reasons, where the bid cannot be put into effect for reasons beyond the control of the parties to the bid.
2. The withdrawal of the bid shall be made public by the means provided for in Article 11 (1) and communicated to the competent supervisory authority.

Article 14

(Report of board of offeree company)

1. The board of the offeree company shall draw up a detailed report giving its views on the bid and setting out the arguments for and against acceptance. The report shall state whether the board is in agreement with the offeror on the bid and specify any agreements on the exercise of the voting rights attached to the securities of the offeree company.

2. Where the consideration offered comprises securities for which at the time of the bid no official stock exchange listing has been applied for, the board's report shall be accompanied by the report of an expert independent of the parties to the bid appointed or approved by the competent supervisory authority. This report shall in all cases state whether, in the expert's opinion, the consideration offered is fair and reasonable and shall give the expert's views on the basis of valuation used to determine the consideration.

3. The reports shall, in good time before the expiry of the period for acceptance, be made public by the means provided for in Article 11 (1) and filed with the competent supervisory authority.

4. Where the board of the offeree company is in agreement with the offeror, the board's report, accompanied, where appropriate, by the expert's report as referred to in paragraph 2, may be attached to the offer document provided for in Article 10.

5. The provisions of this Article shall also apply to revisions of the bid and to competing bids.

Article 15
(Revision of bids)

1. At any time before the last week of the period for acceptance announced in accordance with Article 10 (1)(j), the offeror may revise the terms of the bid. Article 7 (1) shall apply as regards the public announcement of the offeror's intention to revise the bid.

2. Where a bid is revised, the previous period for acceptance shall be automatically extended by one week.

3. The offeror shall draw up a document setting out the amendments to the offer document and making it public by the means provided for in Article 11 (1).

4. Member States shall ensure that persons who have already accepted the previous bid by the offeror may accept the revised bid.

5. The periods provided for in paragraphs 1 and 2 may be modified with the authorization of the competent supervisory authority, which must set out the reasons on which it is based.

Article 16

(Automatic revision)

The acquisition by the offeror, by persons acting in concert with him or by persons acting in their own name but on behalf of the offeror, during the acceptance period, of securities in respect of which the bid is made at a price higher than that established in the offer document or one of its revisions, will itself be considered as a revision of the bid and have the effect of increasing the consideration offered to those who have accepted previously.

Article 17

(Provision of information to the supervisory authority)

1. Throughout the period for acceptance of the bid the offeror shall provide the competent supervisory authority at any time on request with information as to the number of acceptances received to date.

2. From the time a bid is publicly announced in accordance with Article 7 (1), the offeror or any holder of 1 % or more of the voting rights of the offeree company, of the offeror company if the offeror is a company, or of any other company whose securities are offered by way of consideration, shall declare to the competent supervisory authority all acquisitions of securities of the said companies by the offeror or the holder, persons acting in concert with them or persons acting in their own name but for their account, and the purchase price of such securities.

Article 18

(Publication of result of bid)

Once the period for acceptance has expired, the result of the bid shall be made public by the means provided for in Article 11 (1) and shall be communicated to the competent supervisory authority by the offeror.

Article 19

(Information for representatives of employees of the target company)

The board of the offeree company shall communicate to its workers' representatives, as designated by national legislation or customary practice in Member States, the offer document and, where appropriate, the documents referred to in Article 10(3) and (4), as well as its own report as referred to in Article 14 and, if appropriate, the expert's report as referred to in Article 14(2).

Article 20
(Competing bids)

1. Where competing bids are made for the securities of the offeree company, this Directive shall apply to each such bid.

2. Competing bids shall be publicly announced in accordance with Article 7 (1). The offeror shall draw up an offer document in accordance with Article 10 and shall make it public by the means provided for in Article 11 (1) before the period for acceptance of the initial bid expires.

3. Except with the authorization of the competent supervisory authority, which must set out the reasons on which it is based, persons acting in concert with the offeror or acting in their own name but for the account of the offeror may not make a bid competing with the initial bid.

4. Where there are competing bids and the initial offeror does not withdraw its bid, the period for acceptance of the initial bid shall be extended automatically to the date of expiry of the period for acceptance of the competing bid. The extension shall be made public by the means provided for in Article 11(1) and communicated to the competent supervisory authority.

Article 21
(Contact Committee)

1. A Contact Committee shall be set up under the auspices of the Commission. Its function shall be:

- (a) without prejudice to the provisions of Articles 169 and 170 of the Treaty, to facilitate the uniform application of this Directive through regular consultations on, in particular, practical problems arising in its implementation;
- (b) to ensure concerted action upon the policies followed by the Member States in order to obtain reciprocal treatment for Community nationals and companies as regards the acquisition of securities of a company by means of a takeover bid;
- (c) to advise the Commission, if necessary, on additions or amendments to this Directive.

2. The Contact Committee shall be composed of representatives of the Member States and representatives of the Commission. The Chairman shall be a representative of the Commission. Secretarial services shall be provided by the Commission.

3. The Committee shall be convened by the Chairman either on his own initiative or at the request of one of its members.

Article 22

(Transposition of the Directive)

1. Member States shall adopt before the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith inform the Commission thereof.

2. Member States shall fix the date of entry into force of these provisions in any case at the latest by

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

Article 23

(Addressees of the Directive)

This Directive is addressed to the Member States.

Done at Brussels

For the Council

FICHE D'IMPACT SUR LA COMPETITIVITE ET L'EMPLOI

I. Quelle est la justification principale de la mesure?

1. Assurer que les actionnaires d'une société qui fait l'objet d'une offre publique d'achat ou d'échange (OPA) soient traités de façon égale.
2. Assurer que ces mêmes destinataires d'une OPA aient toute l'information dont ils ont besoin pour évaluer l'offre ainsi que le temps nécessaire pour décider s'ils l'acceptent ou pas.

II. Caractéristiques des entreprises concernées. En particulier:

- a) Y a-t-il un grand nombre de PME?
La directive prévoit une exemption lorsque la société visée est une PME non cotée (voir III ci-dessous), pour tenir compte de la spécificité des opérations impliquant ces sociétés.
- b) Note-t-on des concentrations dans des régions?
 - I. Eligibles aux aides régionaux des Etats membres?
 - II. Eligibles au FEDER?Non.

III. Quelles sont les obligations imposées directement aux entreprises?

Les mesures proposées imposent une série d'obligations aux personnes et aux sociétés voulant acquérir le contrôle d'une société en vue de garantir les objectifs mentionnés sous 1. ci-dessus. Il s'agit notamment de l'obligation de lancer une OPA à partir d'un certain seuil de participation dans une société, de l'obligation d'accorder un traitement égal aux actionnaires de la société visée se trouvant dans des conditions identiques, ainsi que de l'obligation d'informer les destinataires de l'offre en établissant un document contenant les conditions de celle-ci. Ce document doit également être publié. Toutefois en ce qui concerne l'obligation de lancer une offre la directive prévoit une exemption lorsque la société visée est une PME non cotée.

IV. Quelles sont les obligations susceptibles d'être imposées indirectement aux entreprises via les autorités locales?

Nulles.

Les autorités locales peuvent accorder des exceptions aux obligations décrites ci-dessus visant à alléger les obligations imposées par la directive lorsque celles-ci résulteraient en des charges excessives.

V. Y a-t-il des mesures spéciales pour les PME? Lesquelles?

Voir II a) ci-dessus.

VI. Quel est l'effet prévisible

a) sur la compétitivité des entreprises?

Effet positif. Les OPA constituent en général un moyen très sain d'assurer le renouvellement des équipes dirigeantes des entreprises européennes par le remplacement d'administrations peu efficaces ou non innovatrices. Cela provoque une sélection par le marché des entreprises plus compétitives et une restructuration des entreprises européennes qui est indispensable pour faire face à la concurrence internationale.

Dans la mesure où une OPA risquerait de provoquer une concentration excessive dans un secteur déterminé cela pourrait être évitée par l'utilisation des pouvoirs de la Commission en matière de libre concurrence.

b) sur l'emploi?

Pas d'effet direct.

VII. Les partenaires sociaux ont-ils été consultés? Quels sont leurs avis?

Le texte a été établi après consultation d'un groupe d'experts des Etats membres en matière de droit des sociétés et des principaux partenaires sociaux. Les avis des milieux concernés ont été pris en considération pour l'élaboration de la présente proposition de directive.