REPORT

OF

THE HIGH LEVEL GROUP
OF
COMPANY LAW EXPERTS

ON

ISSUES RELATED
TO TAKEOVER BIDS

Brussels, 10 January 2002

THE HIGH LEVEL GROUP OF COMPANY LAW EXPERTS

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European Parliament and Council Directive on Company Law concerning Takeover Bids : Joint text approved by the Conciliation Committee on 6 June 2001

PREAMBLE

The Group's first report based on Commission mandate

This document constitutes the High Level Group of Company Law Experts' first report, in conformity with the Group's terms of reference which were defined by the European Commission on 4 September 2001 (see Annex 1).

First part of the mandate is related to Takeover Bids

The Group has been set up by the European Commission to provide independent advice in the first instance on issues related to pan-European rules for takeover bids and subsequently on key priorities for modernising company law in the European Union. The High Level Group has been requested to "…deliver a preliminary report on its recommendations concerning rules for takeover bids by the end of 2001…".

The 3 main elements of the Takeover Bids mandate

Taking account of the positions of the EU's Council of Ministers and the European Parliament during the last stages of negotiation of the previous proposal for a Takeover Bids Directive, the Group has been asked to consider the following three issues :

- How to ensure the existence of a level playing field in the European Union concerning the equal treatment of shareholders across Member States;
- The definition of the notion of an "equitable price" to be paid to minority shareholders;
- The right for a majority shareholder to buy out minority shareholders ("squeeze-out right").

Acknowledgements

The Chairman, Jaap Winter, and Members of the Group would like to thank the Members of the European Parliament's Legal Affairs and Internal Market Committee; the European Commissioner Frits Bolkestein; and the Director General of the European Commission's Internal Market Directorate General, John Mogg, for their assistance and cooperation.

The Group would also like to thank all those who have taken part in the Group's hearings or otherwise have made their views known to the Group, often making themselves available at very short notice. A summary of the main comments the Group has received is included in Annex 3 to the present report.

Finally, the High Level Group would like to thank the rapporteur, the secretariat and their staffs for their constructive and efficient contribution to their work within the tight schedule given to the Group.

SUMMARY OF THE HIGH LEVEL GROUP OF COMPANY LAW EXPERTS' OBSERVATIONS AND RECOMMENDATIONS

CHAPTER I - *"Takeover bids : the need for a level playing field"*

An important goal of the European Union is to create an integrated capital market in the Union by 2005. The regulation of takeover bids is a key element of such an integrated market. The extent to which in a given securities market takeover bids can take place and succeed is determined by a number of factors. These factors can be of a general kind, often macro-economic, or company specific.

Currently there are many differences between the various Member States, in terms of such general and company specific factors. Annex [4] gives an overview of company specific barriers to takeover bids which are lawful or actually applied in the Member States and which the Group has reviewed. As a result, takeover bids cannot be undertaken with the same expectation of success in the different Member States and shareholders in Member States do not have corresponding opportunities to tender their shares. This is what is generally referred to as the 'lack of level playing field' in the area of takeover bids in the European Union.

In the light of available economic evidence the Group holds the view that the availability of a mechanism for takeover bids is basically beneficial. Takeovers are a means to create wealth by exploiting synergies and to discipline the management of listed companies with dispersed ownership, which in the long term is in the best interests of all stakeholders, and society at large. These views also form the basis for the Directive. This is not to say that takeover bids are always beneficial for all (or indeed any) of the parties involved.

The mandate of the Group is to review whether and to what extent a level playing field for takeover bids could and should be created with respect to the mechanisms and structures allowed and created under company law in Member States which may frustrate or inhibit takeover bids. These are by nature company related factors. The Group acknowledges that any approach on this basis would leave the various general differences existing in Member States untouched. It believes, however, that its recommendations with respect to company law mechanisms and structures would, in addition to market driven changes, mark an important step forward in developing a general level playing field for takeover bids in the European Union.

The Group believes that any European company law regulation aimed at creating a level playing field for takeover bids should be guided by two principles:

1. Shareholder decision-making

In the event of a takeover bid the ultimate decision must be with the shareholders. They should always be able to decide whether to tender their shares to a bidder and for what price. It is not for the board of a company to decide whether a takeover bid for the shares in the company should be successful or not. This is not to say that the board has no responsibility at all in the context of a takeover bid.

It is sometimes argued that allowing the board to frustrate a takeover bid can be justified as a means to help take into consideration the interests of shareholders and other stakeholders in the company, notably the employees. The Group rejects these views. Defensive mechanisms are often costly. Most importantly, managers are faced with a significant conflict of interests. Shareholders should be able to decide for themselves and stakeholders should be protected by specific rules (e.g. on labour law or environmental law).

2. Proportionality between risk-bearing capital and control

In the Group's view, proportionality between ultimate economic risk and control means that share capital which has an unlimited right to participate in the profits of the company or in the residue on liquidation, and *only* such share capital, should normally carry control rights, in proportion to the risk carried. The holders of these rights to the residual profits and assets of the company are best equipped to decide on the affairs of the company as the ultimate effects of their decisions will be borne by them. This report will use the term 'risk-bearing capital' to refer to this concept.

The holder of the majority of risk-bearing capital should be able to exercise control. Capital and control structures in a company which grant disproportionate control rights to some shareholder(s) should not operate to frustrate an otherwise successful bid for the risk-bearing capital of the company. The concept of risk-bearing capital used here does not include those preference shares which have no exposure to the surplus but only carry a limited right to distributions of profits and on liquidation.

It may well be that in a fully integrated and well developed securities market whether or not companies adhere to the proportionality principle should be left to the market itself. Similar arguments might be applied to the principle of shareholder decision-making, though the conflict of interest of the board may well lead to market failure in this context.

Currently, however, such efficient markets do not exist across Europe. The Group therefore considers it to be necessary to specify the two principles in more detailed rules which are binding in the Member States. The Group has investigated two possible approaches for such rules, i.e. the application of the guiding principles on a general basis and the application of the guiding principles limited to the context of a takeover bid.

Many of the company specific structures that the Group has reviewed not only deviate from the two guiding principles in a takeover context but are pre-bid structures, which more generally have the effect of concentrating control rights in the hands of the board and/or minority shareholders. It could be argued that it would be consistent to apply the two guiding principles generally, and not only in the context of takeover bids. The various mechanisms would then have to be assessed in the particular context in which they operate and judged to see whether and under what circumstances any justification still exists for them.

Such an exercise lies beyond the Group's terms of reference for this report and does not appear to be necessary if an effective solution addressing the takeover context can be devised. However, in the Group's view one type of general and permanent rule should be established: listed companies should generally be required to fully disclose their capital and control structures. Only on the basis of full disclosure can markets properly judge the efficiency of companies with different capital and control structures.

Whatever the virtues and justifications of company law mechanisms and structures deviating from the two guiding principles may be generally, the Group takes the view that they should not frustrate or unduly inhibit takeover bids or their successful execution. When a takeover bid is made two stages should be distinguished. The first stage commences when a bid is announced. The second is the stage commencing after the successful completion of the bid. The Group believes that a level playing field can only be achieved in this context if rules are in place to ensure effective application of the two guiding principles in both stages of a takeover bid.

With respect to the first stage, article 9 (1) (a) of the Directive essentially required the board of the offeree company to be "neutral" after a bid has been announced. Article 9 confirms the principle of shareholder decision-making in response to a takeover bid. It ensures that shareholders can decide on whether or not to tender in a bid and that any action to frustrate the bid requires the specific authorisation of the general meeting of shareholders at that time.

Article 9 as such does not ensure that the principle of proportionality between risk-bearing capital and control is adhered to once a takeover bid has been announced. Disproportionate control rights can be used to authorise the board to frustrate the bid if the board or the minority shareholder controlling the board wishes to oppose it. Application of the proportionality principle once a takeover bid is announced means that an authorisation by the general meeting of shareholders to take actions frustrating the bid would only be valid if made by a majority of votes exercised by the holders of the proportionate majority of the risk-bearing capital of the company.

For the second stage, after successful completion of the bid, the Group holds the view that a level playing field is only created if the two guiding principles apply with reasonable efficacy to company law mechanisms and structures which may frustrate a bid and which may already be in place prior to the bid. This can be achieved by introducing a rule which allows the bidder to break-through such mechanisms and structures, as defined in the articles of association and related constitutional documents, in the case of a takeover bid which achieves such a measure of success as clearly to justify this.

In the view of the Group a break-through rule applied after a successful takeover bid would strike an appropriate balance between, on the one hand, the need, at least for the time being, to allow differences in the capital and control structures of companies in view of the current differences between Member States, and, on the other hand, the need to allow and stimulate successful takeover bids to take place in order to create an integrated securities market in Europe.

The Group believes that the break-through rule should be available to a bidder who has made a general bid on all the risk-bearing shares of the company and who has acquired a certain threshold of risk-bearing capital as a result of the bid. The Group takes the view that the threshold should not be set at a percentage higher than 75% of the risk-bearing capital of the company. Member States should be allowed to set the threshold at a lower level sufficient to take special resolutions like amendments of the articles of association and corporate reconstructions.

After the bid has been announced, the general meeting of shareholders may have resolved or authorised the board to issue new risk-bearing share capital as a post-bid defence. So long as this resolution has been carried with the support of the appropriate majority of the risk-bearing capital, this decision is to be respected as it in itself does not violate the principles of shareholder decision-making and proportionality between risk-bearing capital and control. The bidder should be allowed, in case where invocation of the break-through rule is necessary to achieve effective control, to make his general bid for all the risk-bearing share capital of the company conditional upon reaching the threshold percentage of risk-bearing capital and the consequential ability to use the break-through facility.

The effect of the break-through rule should be to redress the deviations in the articles of association and other constitutional documents from the principles of shareholder decision-making and proportionality between risk-bearing capital and control. This implies two types of rules.

1. At least where the bidder acquires 75% or more of risk-bearing capital, he should be able to exercise a proportionate percentage of the total votes that can be cast in a general meeting of shareholders. In calculating the votes in a general meeting held after the bidder has reached the threshold, various provisions in the articles of association of the company (in particular voting caps, multiple voting rights or double voting rights, provisions completely denying voting rights, provisions conferring inappropriate voting rights (i.e. other than proper protective provisions) to non-risk-bearing capital) will have to be overridden.

2. The bidder acquiring 75% or more of risk-bearing capital should be able to exercise the core control rights that company law grants to shareholders. These rights include the right to appoint, suspend and dismiss board members and the right to determine the constitution of the company and the way in which it is to be operated and managed. Provisions in the articles of association that hinder the exercise of these rights should be overridden. An exception should be made for nomination or appointment rights of third parties which are mandatory in the company law of the Member States (e.g. co-determination rules).

From a company law and capital markets perspective, there is no justification to distinguish between companies in which special control rights are held by private persons and companies in which special control rights are held by states. From the perspective of the wider public interest, the Group believes that, where special control rights are attached to golden shares held by Member States, then, even if the European Court of Justice would rule they do not violate the Treaty of Rome as such, such rights should be exercisable in accordance with the principles of public law and not in accordance with private company law principles.

The break-through rule should apply regardless of whether the relevant provisions in the articles of association were already included prior to the bid being made or have been included as a post-bid defence after a bid was made. If, after having approved a post-bid defence, the shareholders decide to tender their shares to the bidder to such an extent that he acquires 75% of risk-bearing capital, they have clearly reversed their initial decision.

The effect of the break-through rule should be immediate upon the acquisition of the threshold percentage of risk-bearing capital by the bidder after a general takeover bid. A waiting period would create unacceptable uncertainty for the bidder, the company, the other remaining shareholders, the board and other stakeholders.

The exercise of control rights by the bidder in proportion to his holding of risk-bearing capital requires that a general meeting of shareholders be held. The bidder who has reached the threshold should have the right to convene a general meeting of shareholders at short notice. In the meeting, the bidder (and other holders of risk bearing capital) has the right to exercise voting rights in proportion to the holding of risk-bearing capital.

The Group has considered whether the holder of shares carrying disproportionate voting rights or special control rights should be compensated for the loss of these rights which results from the bidder reaching the break-through threshold after a general takeover bid. The Group agrees that the bidder should not be required to offer such compensation. The loss of these special rights would be the result of a public policy choice made by the European Union and the Member States in order to create a level playing field for takeover bids across the Union. There may be exceptional cases where compensation for loss of specific control rights is due and the holder of such rights demonstrates specific damage. The Group recommends that it be further reviewed whether an appraisal procedure should be provided for in these cases. Such a right of appraisal should in any case not prevent the bidder from using the break-through rule to exercise control.

Certain types of company specific barriers to takeover bids should remain outside the scope of the break-through rule, basically because the break-through rule appears to be an inadequate way to deal with them. This is not to say that these mechanisms should not be dealt with at all and should continue to be barriers to takeover bids. The Group has considered ways to deal with three types of barriers.

The first type consists of provisions restricting the transferability of shares. The Listing Directive of 1979 requires that listed shares must be freely transferable. However, it is not uncommon for listed companies to list only part of the risk-bearing capital or to have a separate class or classes of non-listed risk-bearing share capital. The requirement of free transferability does not apply to these non-listed shares. The Group believes that holders of non-listed risk-bearing shares should be able to sell to the bidder and the bidder should be able to acquire them. A specific example of this is where a company has issued risk-bearing shares to a trust or administration office, which in turn issues non-voting depository receipts. The depository receipts should be freely exchangeable into the underlying voting shares in case of a takeover bid.

The second type is the contractual barrier to takeover bids. A wide variety of arrangements exists in contracts to which the company is a party which cause the contract to take effect, alter or terminate as a result of a change of control of the company. The Group believes that these contractual arrangements should not be subject to a break-through rule as it would be very difficult to deal with the perfectly acceptable reasons the counterparty to the agreement may have for requiring such provisions, its good faith in relying on them and its entitlement to compensation if a break-through were to take place.

Another type of contractual barrier to takeover bids is the agreement between shareholders which prohibit the transfer of shares by these shareholders to a bidder, sometimes enforced by substantial financial penalties. There is a serious concern that shareholders entering into such an agreement lack sufficient information to judge whether tendering their shares in a potential future bid would be attractive or not and the Group recommends to review whether a rule whereby these agreements would be unenforceable when a general takeover bid is made, should be adopted in all Member States.

The third type is the pyramid structure. In some Member States a person exercises control over a company through a cascade of listed and unlisted holding companies. There are minority, non-controlling shareholders in every holding company in the chain. Pyramid structures in a different way achieve a similar disproportionality between ownership of risk-bearing capital and control rights as is, for example, achieved by multiple voting rights (similar concerns arise in the case of circular or cross-shareholdings between various listed companies). The Group believes pyramid structures should remain outside the scope of the break-through rule, because it is difficult to see how such a rule could deal with these structures and because they pose general problems also outside the context of a takeover bid. The Group recommends that it be reviewed whether pyramid structures including several listed companies should be regulated and what adequate measures of protection of minority shareholders (in group law, in listing rules or otherwise) should be enforced in all Member States.

In the debate about the Directive, the argument was put forward that it did not create a level playing field between the European Union and the United States. European companies would be severely restricted in putting up defences against takeover bids under Article 9 of the Directive, while American companies could use a number of devices to defend against a takeover bid. It has also been suggested that the US regime represents a desirable model for Europe.

First, it should be noted that the laws of the various states in the US regulating takeover bids differ widely. As a result there is no clear level playing field for takeover bids within the United States. But it is true that the board of American companies generally has a broad discretion to put up defensive devices under what is called the business judgement rule.

However, the Group believes that the American example should not be followed in Europe, for a number of reasons. The broad discretion of the board of US companies to put up defensive mechanisms operates in a general legal and capital market environment which differs widely from the European environment. The takeover activity on the American capital markets is intensive and, as Annex [5] shows, European companies benefit to a very large extent from that activity. The current anti-takeover rules in the United States are contested even there by a large body of both economic and legal literature arguing that the ultimate decision on takeover bids should be made by shareholders.

Second, as for the alleged relative advantage of US companies, the Group is not satisfied that, given the other aspects of the US environment, such an advantage arises in practice. If political concerns remain, consideration could be given to requiring the application of the proposed rules only to bids by European listed companies.

On the basis of these observations, the Group makes the following recommendations.

Subject	Recommendation
Item I.1 **General disclosure of capital and control structures**	Recommendation I.1. (see p. 25) Listed companies should be required to disclose complete information about their capital and control structures (except for those deriving from general applicable law), for instance in their annual reports, listing particulars and prospectuses. If important changes occur in this information, listed companies should be under a continuous obligation to disclose such changes. Disclosure of some of these elements is already required under existing Directives: the Group recommends that these elements be disclosed and presented in a combined, coherent way.
Item I.2 **Shareholder decision-making after announcement of the bid**	Recommendation I.2. (see p. 27) After announcement of the bid, the board of the offeree company should not be permitted to take actions frustrating a takeover bid on the basis of a general meeting authorisation given prior to the bid. Only when a bid is actually announced and the shareholders can really assess all relevant information, can they in fairness be asked to decide whether this takeover bid should be frustrated by the board or not.

Item I.3 **Proportionality between risk and control after the announcement of the bid**	Recommendation I.3. (see p. 28) After announcement of the bid, any authorisation by the general meeting of shareholders to take actions frustrating the bid should be given by a majority of votes exercised by the holders of the proportionate majority of the risk-bearing capital of the company. The bidder should also be allowed to vote in such a meeting to the extent he already holds risk-bearing capital in the company.
Item I.4 **Break-through right after completion of the bid -** **Principle**	Recommendation I.4. (see p. 29) A rule should be introduced, which allows the bidder to break-through mechanisms and structures which may frustrate a bid, as defined in the articles of association and related constitutional documents, after completion of a takeover bid for all the risk-bearing shares of the company, which achieves such a measure of success as clearly to justify this.
Item I.5 **Break-through right after completion of the bid -** **Threshold**	Recommendation I.5. (see p. 30) The threshold for exercising the break-through right should not be set at a percentage higher than 75% of the risk-bearing capital of the company on the date of completion of the bid. Member States should be allowed to set the threshold at a lower level sufficient to take special resolutions like amendments of the articles of association and corporate reconstructions. Member States should ensure that qualified majorities required for special resolutions do not exceed the level of risk-bearing capital they set as a threshold for the break-through rule. The bidder should be allowed to make his general bid conditional upon reaching the threshold percentage of risk-bearing capital, in case where invocation of the break-through rule is necessary to achieve effective control.
Item I.6 **Break-through right after completion of the bid -** **Effect**	Recommendation I.6. (see p. 32) Provisions in the articles of association and other constitutional documents deviating from the principles of shareholder decision-making and proportionality between risk-bearing capital and control should be overridden. Such provisions include 1. the rules affecting voting rights and 2. the rules relating to the composition of the board and the determination of the constitution of the company. These provisions should be overridden, regardless of the fact that such provisions were already included prior to the bid being made or have been included as a post-bid defence after a bid was made. In case shares with special control rights are in the hands of Member States, and to the extent they are permissible under community law, they should be subject to public law principles and not exercisable solely under the private law applicable to companies.
Item I.7 **Break-through right after completion of the bid -** **Timing and procedure**	Recommendation I.7. (see p. 34) The effect of the break-through rule should be immediate upon the acquisition of the threshold percentage of risk-bearing capital by the bidder after a general takeover bid. The bidder who has reached the threshold should have the right to convene a general meeting of shareholders at short notice, in which he has the right to exercise voting rights in proportion to his holding of risk-bearing capital. This control of the general meeting should persist for so long as the relevant majority is retained.
Item I.8 **Break-through right after completion of the bid -** **Compensation**	Recommendation I.8. (see p. 35) The bidder should not be required to offer compensation to the holder of shares carrying disproportionate voting rights or special control rights for the loss of these rights which results from the bidder reaching the break-through threshold after a general takeover bid. There may be exceptional cases where compensation is due and the holder of such rights demonstrates specific damages: the Group recommends that it be further reviewed whether an appraisal procedure should be provided in these cases.

Item I.9 Provisions restricting the transferability of shares	Recommendation I.9. (see p. 36) In the event a bidder makes a general takeover bid for the risk-bearing capital of the company, restrictions on the transferability of non-listed risk-bearing shares should not be enforceable against him. If depository receipts for risk-bearing shares are listed, they should be freely exchangeable into the underlying shares in the event of a general takeover bid.
Item I.10 Contractual arrangements	Recommendation I.10. (see p. 37) Contractual arrangements in general, which can form barriers to takeover bids, should not be subject to a break-through rule, but should be dealt with in general contract and company law. In the particular case of contractual agreements between shareholders which prohibit the transfer of shares to a bidder, sometimes enforced by substantial financial penalties, the Group recommends that the Commission review whether a rule whereby these agreements would be unenforceable when a general takeover bid is made should be adopted in all Member States.
Item I.11 Pyramid structures	Recommendation I.11. (see p. 38) The Group believes pyramid structures should remain outside the scope of the break-through rule and recommends that the Commission review whether pyramid structures including several listed companies should be regulated and what adequate measures of protection of minority shareholders (in group law, in listing rules or otherwise) should be enforced in all Member States.
Item I.12 Level Playing Field between the EU and the US	Recommendation I.12. (see p. 39) The Group's proposals, if implemented, would not result in company law rules for takeover bids applied in the European Union being broadly similar to those applied in the United States. The Group nevertheless believes for a number of reasons that the European Union should not use the controversial US rules as a model, but rather consider what type of regulation of takeover bids is best suited to enhance the development of efficient integrated capital markets in the Union. If, however, political concerns would remain, it could be considered whether to allow Member States to provide that the benefits of the application of the principles of shareholder decision-making and proportionality between risk-bearing and control as recommended in this report can only be enjoyed by European listed companies making general takeover bids for other European listed companies, to the extent this would not violate international agreements and could practically be enforced.

CHAPTER II – *"The equitable price to be offered in mandatory bids"*

The notion of equitable price is included in Article 5(1) of the Directive, which seeks to harmonise the circumstances under which a mandatory bid has to be made and contains the following provision: "(…) This bid shall be addressed to all holders of securities for all their holdings at an equitable price. (…)".

The Group considers that the requirement to offer an equitable price is of the utmost importance in the context of mandatory bids to achieve an adequate protection of the minority shareholders.

In view of its mandate, the Group examines the notion of equitable price in the present report in relation to mandatory bids only. Apart from the limits on the Group's terms of reference, the exclusion of an equitable price requirement in voluntary offers is also justified on the ground that, in principle, the judgement on the adequacy of the offer price should be left to the market.

The lengthy discussions on the Directive have illustrated the difficulty of defining common rules regarding the consideration that should be offered in a mandatory bid, with respect to both the level and the nature of such consideration. The Directive contains the following rules :

- Article 5(1) refers to the situations in which a person acquires the control of a company and contains the principle of the mandatory bid, the notion of equitable price and some provisions (based on the "cash alternative" principle) related to the nature of the consideration which must be offered;
- Article 6(3) requires Member States to adopt rules relating to the information which has to be stated in the offer document in any type of offer (whether it be voluntary or mandatory).

In some of the Member States that currently apply a mandatory bid rule, the provisions on the consideration to be paid have a binding character, whereas a few Member States provide only recommendations. The provisions also differ widely with respect to both the level and the nature of the consideration to be offered. In a few Member States, the level of the consideration to be offered is determined by reference to general principles only (e.g. equal treatment of shareholders). However, a vast majority of Member States has adopted detailed provisions with respect to the consideration to be offered in a mandatory bid, but they vary considerably as to the nature and the number of the criteria used, and the way in which they are applied. In most Member States, a bidder is free to offer as consideration cash or securities.

The effect of the wording of article 5(1) of the Directive is that the issue whether a price is equitable is a matter of European law, ultimately determinable by the European Court of Justice. In the view of the Group, it is not desirable that such a question should be determined by long drawn out court proceedings. The Group therefore considers that, at the very least, it should be made clear that it is for the Member States to satisfy the Directive requirement to provide for one or several equitable price criterion/criteria.

The Group recognises that any sort of regulation on the consideration to be offered in a mandatory bid should allow for a reasonable degree of flexibility with the aim of effectively achieving an equivalent treatment of all holders of securities, but notes that an efficient functioning of the capital markets in the European Union requires a sufficient degree of predictability as to that consideration.

On the basis of these observations, the Group makes the following recommendations.

Subject	Recommendation
Item II.1 Introduction of a harmonised approach to the equitable price	Recommendation II.1. (see p. 48) A harmonised approach should be introduced at EU level with the aim of providing a means for offerors to predict and ideally to determine the equitable price they will have to pay in a mandatory bid. This approach should on the one hand create a strong presumption in favour of a price established by application of a common rule and at the same time provide for sufficient flexibility in particular circumstances.

Item II.2 **Common rule applicable in normal circumstances**	Recommendation II.2. (see p. 49) The price to be offered in the mandatory bid should, in normal circumstances, be equal to the highest price paid by the offeror for shares of the relevant class, whether on or off the market, during a certain period preceding the date of the acquisition of securities by the offeror, which resulted in the change in the control of the company. Member States should be free to set the length of this period between 6 and 12 months.
Item II.3 **Flexibility in particular circumstances**	Recommendation II.3. (see p. 50) Member States should be permitted to define both the situations in which the presumption above may be displaced and the criteria which may be applied by supervisory authorities in their decision to apply a price higher or lower than the highest price paid. With respect to the definition of the situations in which the presumption may be disproved, the Directive should contain the following principles: 1) the rule can be deviated from only where it is demonstrated that its application would plainly result in an unfair price, 2) where deviation would lead to a lower price, the burden of proof should lie with the offeror, 3) all unclear cases should be resolved by giving prevalence to the fair treatment of the target's shareholders. With respect to the criteria which may be applied in such circumstances, Member States should be permitted to retain: 1) the average market value over a certain period (ranging from 3 to 6 months) prior to the offer, 2) the liquidation value of the company, 3) any other objective valuation criteria usually applied in financial analysis. Any decision whereby a supervisory authority applies a price different from the highest price paid should be accompanied by the provision of complete supporting information.
Item II.4 **Timing of the mandatory bid**	Recommendation II.4. (see p. 51) The question of whether a price offered in the mandatory bid is equitable very much depends on the timing of the mandatory bid. The offeror should be required to make the mandatory bid within a short period (to be set by Member States at a maximum of 30 days) after having acquired control of the company through the acquisition of securities.
Item II.5 **Acquisition of securities on more favourable terms outside of or after the mandatory bid**	Recommendation II.5. (see p. 51) Member States could be required to implement either a) a system in which the acquisition of securities on more favourable terms is fully prohibited during the bid or for a certain period after the bid or b) a system whereby the acquisition of securities on more favourable terms during the bid or for a certain period after the bid obliges the offeror to pay the difference to the holders of securities who tendered their securities in the mandatory bid. Member States should be free to set the length of this period between 6 and 9 months.

CHAPTER III – *"The squeeze-out and sell-out rights after a takeover bid"*

The **squeeze-out right** basically refers to the right of a majority shareholder in a company to compel the minority shareholders to sell their shares to him at an appropriate price. Conversely, the **sell-out right** refers to the right of a minority shareholder to compel the majority shareholder to purchase his shares from him at an appropriate price.
In the light of its mandate, the Group focuses in this report on the desirability of squeeze-out and sell-out rights in the context of a takeover bid.

Neither the squeeze-out right nor the sell-out right are currently regulated by any of the existing company law instruments adopted at EU level, so that Member States are free to decide whether and under which conditions such rights should be introduced in their national legislation.
The vast majority of the Member States currently provide for a right of a majority shareholder to buy out the minority shareholders. However, the conditions under which that right may be exercised differ widely, in particular in the following areas : the types of companies for which the right exists, the link or lack of a link with takeover bids, the thresholds that have to be reached, and the determination of the consideration to be offered to the minority shareholders.
About half of the Member States provide for a right to sell out to the majority shareholder. Here again, the conditions under which that right may be exercised differ widely, in the same areas as identified above in relation to the squeeze-out right.

The Group holds the view that the right of a majority shareholder to buy out the minority shareholders subsequent to a takeover bid can be justified on the following grounds: the presence of minority shareholders after a takeover bid leads to various costs and risks, the squeeze-out right makes takeover bids more attractive for potential bidders and may be viewed as a counterpart to the mandatory bid rule, and the squeeze-out right is more efficient than a delisting procedure. The Group notes that property rights are protected at national and international level, but observes that various courts in the Member States have ruled that the squeeze-out right is not to be regarded as incompatible with these protective provisions.

The Group holds the view that the sell-out right of minority shareholders following a takeover bid can be justified on the following grounds : the majority shareholder may be tempted to abuse his dominant position after a takeover bid, minority shareholders cannot obtain appropriate compensation by selling their shares in the market if it has become illiquid, the sell-out right is an appropriate mechanism to counter the pressure on shareholders to tender in the takeover bid, and finally the sell-out right is to be regarded as a counterpart for the squeeze-out right.

On the basis of these observations, the Group makes the following recommendations.

Subject	Recommendation
Item III.1 **Availability of the squeeze-out and sell-out rights after a takeover bid**	Recommendation III.1. (see p. 63) In view of their justifications in the context of takeover bids, an initiative at EU level is necessary to ensure that the squeeze-out and sell-out rights exist in all Member States after a general takeover bid. With respect to both the definition of the applicable thresholds and the determination of the consideration to be offered, similar rules should be adopted throughout the EU while leaving sufficient room to Member States properly to take into account the peculiarities of their company law and the characteristics of their financial markets.
Item III.2 **Threshold for the squeeze-out right**	Recommendation III.2. (see p. 64) Member States should have the possibility to set the threshold for triggering the squeeze-out right by reference to the capital (between 90% and 95%). Alternatively, Member States should have the possibility to set the threshold by reference to the number of acceptances in the offer (at 90%). Where there are several classes of securities outstanding, the squeeze-out right should apply on a class by class basis, whichever of the two options mentioned above is retained at national level.

Item III.3 Consideration to be offered in exercising the squeeze-out right	Recommendation III.3. (see p. 65) With respect to the consideration to be offered in exercising the squeeze-out right, the price offered in the takeover bid should be presumed to be a fair price if the bid has been accepted by shareholders holding 90% or more of the share capital in respect of which the offer has been made. If a mandatory bid has been made, the mandatory bid price should be rebuttably presumed to be a fair price in the squeeze-out procedure even if the mandatory bid has not been accepted by shareholders holding 90% or more of the relevant share capital. In all other situations, the consideration should be determined by expert(s). Cash, or a cash alternative, should be offered if it was offered in the takeover bid.
Item III.4 Threshold for the sell-out right	Recommendation III.4. (see p. 66) Member States should set the threshold for triggering the sell-out right by reference to the capital (between 90% and 95%). Where there are several classes of securities outstanding, the sell-out right should apply on a class by class basis.
Item III.5 Consideration to be obtained in exercising the sell-out right	Recommendation III.5. (see p. 67) With respect to the consideration to be obtained in exercising the sell-out right, the Group recommends a mirroring of the proposals made above regarding the squeeze-out right.

INTRODUCTION

1. THE PROPOSALS FOR A TAKEOVER BID DIRECTIVE : A HISTORICAL PERSPECTIVE

1.1. The initial proposal

The Commission first announced its intention to propose a directive on the approximation of Member States' laws on takeover bids in its 1985 White Paper on completing the Internal Market.

Takeover bid directive first envisaged in 1985

On 19 January 1989, the Commission presented to the Council and the European Parliament a proposal for a Thirteenth Council Directive on company law concerning takeover and other general bids[1]. After having received the opinions of the Economic and Social Committee (27 September 1989)[2], and the European Parliament (17 January 1990)[3], the Commission presented an amended proposal on 10 September 1990[4].

Initial proposal presented by the Commission in 1989

Amended in 1990

The initial proposal was rather detailed and it soon became clear that it would be difficult to obtain a qualified majority in the Council on this proposal. Some Member States were of the view that the text was overly detailed. Other Member States did not believe that a directive on takeover bids was really necessary, particularly in the absence of a level playing field for takeover bids in the EU.

This initial proposal was rather detailed

In its declaration to the European Council in Edinburgh in December 1992 on subsidiarity, the Commission announced that it would revise its proposal. This intention was confirmed at the Essen European Council in December 1994. A consultation was launched with Member States on the basis of a questionnaire aiming at identifying those issues which could be included in a revised proposal on takeover bids.

Revision of the proposal decided on the ground of subsidiarity

1.2. The revised proposal

a) The Commission's proposal of 1996

On 8 February 1996, the Commission presented to the Council and to the European Parliament a second proposal for a Thirteenth Directive

Second proposal presented by the

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1 OJ C 64, 14.3.1989, p. 8; with explanatory memorandum, Suppl. 3/89 - Bull. EC.
2 OJ C 298, 27.11.1989, p. 56.
3 OJ C 38, 19.2.1990, p. 41.
4 OJ C 240, 26. 9.1990, p. 7; with explanatory memorandum, COM(90) 416 final - SYN 186.

on company law concerning takeover bids[5]. This second proposal was drawn up in the form of a framework directive, following the consultation with Member States which showed a clear preference for a document that would only contain the general principles governing takeovers bids, leaving much scope for Member States and for the competent authorities to deal with the detailed implementation of those principles. For example, the 1996 proposal, unlike the 1989 version, does no longer define the threshold which must be reached for the launch of a mandatory bid. It is left for Member States to lay down such a threshold in accordance with their traditions and practices.

Commission in 1996, in the form of a framework directive

The Economic and Social Committee endorsed the second proposal on 11 July 1996.[6] The European Parliament delivered its opinion on the second proposal at its plenary session on 25 and 26 June 1997.[7] In its opinion, Parliament approved the second proposal by a large majority, while proposing some 20 amendments.

Endorsed by ECOSOC and approved by EP

An amended proposal was presented by the Commission at the end of 1997[8].

Amended proposal in 1997

b) The Council's common position

At its meeting of 21 June 1999, the Internal Market Council reached a political agreement on the Directive. This agreement was however made subject to a satisfactory outcome of the negotiations between Spain and the United Kingdom on the question of Gibraltar. As Article 4 of the Directive required Member States to designate a competent authority for the supervision of bids, Spain wanted to avoid any possibility of creating a separate authority for take-over bids in Gibraltar.

Council political agreement in 1999, subject to the outcome of negotiations on the Gibraltar issue

Almost one year later, an agreement was reached on the Gibraltar question and the Council finally adopted a common position on 19 June 2000[9].

Council common position adopted in 2000

c) Second Reading in the European Parliament

The text of the common position was presented to the European Parliament for a second reading. Discussions in the European Parliament, based upon the report prepared by Klaus-Heiner Lehne (PPE-DE) proved difficult. The Parliament adopted in the end 20

Second reading in Parliament identified three main problems :

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5 OJ No C 162, 6.6.1996, p. 5; with explanatory memorandum, COM(95) 655 final.
6 OJ No C 295, 7.10.1996, p.1.
7 OJ No C 222, 21.7.1997, p.20.
8 OJ No C 378, 13.12.1997
9 OJ No C 23, 24.1.2001, p. 1.

amendments, proposing important changes to the text of the common position. The Parliament identified three main problems:

(1) the lack of harmonisation, particularly concerning the definition of the "equitable price" to be paid in the case of a mandatory bid;

- lack of harmonisation

(2) the introduction of the principle that shareholders must decide about defensive measures once a bid has been launched (so called principle of "neutrality" of the board);

- neutrality of the board

(3) the absence of specific measures aiming at the protection of employees in the case of a takeover bid.

- protection of employees

Furthermore, the Parliament also proposed to introduce into the text a harmonised procedure for squeeze-out.

and suggested introduction of squeeze-out

While the Commission could accept some of the amendments, several important amendments proposed by the Parliament were unacceptable to the Commission and to the Council. A conciliation procedure became therefore unavoidable.

Conciliation procedure became unavoidable

d) The Conciliation procedure

The conciliation procedure led to an agreement on most issues. As far as squeeze out and equitable price are concerned, the Commission declared that it would ask a Group of Company Law Experts to examine these issues as part of a broader mandate to review company law. Concerning employees' rights, the Council accepted most of the amendments presented by the Parliament to the extent that they related to the information to be presented to the employees and their representatives in the case of a takeover bid. The most difficult issue to resolve related to the question of board neutrality, which was put in the broader context of the lack of a level playing field for takeover bids within the EU and between the EU and the rest of the world, particularly the US.

Conciliation led to agreement on most issues

Equitable price and squeeze-out to be examined by Group of Experts

Level playing field heavily debated

Difficult negotiations led to the adoption of a joint text by the Conciliation Committee on 6 June 2001 (see Annex 6). This text is referred to in the present Report as "the Directive".

Joint text adopted in June 2001

When this text was presented to the European Parliament, it failed to obtain the required majority in the Plenary session on 4 July 2001 (273 members voted in favour and 273 members voted against the compromise text).

Rejection by the EP Plenary Session (July 2001)

2. PREPARATION OF A NEW PROPOSAL

Because agreement on a common solution for takeover bids is an essential feature of the Financial Services Action Plan, Commissioner Bolkestein announced at the ECOFIN Council meeting in July 2001 the Commission's intention to come forward with a new proposal as soon as possible. This new proposal would also have to address the issues raised by the European Parliament.

Commission's intention to come forward rapidly with a new proposal, announced in July 2001

Following a promise made to the European Parliament during the conciliation procedure, Commissioner Bolkestein decided in September 2001 to set up a High Level Group of Company Law Experts which should look at ways and means to modernise European company law. The mandate of the Group specifically includes the examination of the issues raised by the Parliament in relation to takeover bids. The Group would have to look at those issues as a matter of priority and report to the Commissioner by the end of 2001.

Creation in September 2001 of a High Level Group of Company Law Experts

Three issues were identified in the Group's mandate in relation with takeover bids: how to ensure 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.

Three takeover bids issues form first part of Group's mandate

3. PROTECTION OF THE RIGHTS OF THE EMPLOYEES

The Group does not specifically address the protection of employees' rights in the context of a takeover bid because it was only asked to look at a limited number of company law issues in relation to the Directive. Although the Group acknowledges that the interests of other stakeholders and in particular of employees may be at stake in the context of a takeover bid, it believes that this in itself does not justify defensive measures by the board which deny shareholders the opportunity to successfully tender their shares to a bidder who is willing to buy their shares.

Examination of the protection of employees' rights is not in the mandate of the Group

The Directive on takeover bids provided for extensive information requirements towards the employees. Further concerns for the interests of employees should be addressed by specific legislation providing for information and consultation of employees and for their protection in the event of a bid leading to restructuring. Many Member States already provide for these. An EU directive to harmonise information and consultation requirements is being prepared. Similar requirements are included in the Council Directive

Information and consultation rights are provided in the Directive on takeover bids and in several other instruments at EU level.

of 1994 on the establishment of a European Works Council[10] and in the Council Directive of 2001 supplementing the Statute for a European Company with regard to the involvement of employees[11]. The bidder will also be subject to these requirements after a successful bid. The decision to sell by target company shareholders does not affect the legal protections afforded to employees and other stakeholders.

Such protection is not affected by the completion of a takeover bid.

[10] 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, OJ No L 254, 30.9.1994, p. 0064

[11] Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, OJ No L 294, 10.11.2001, p. 0022

CHAPTER I

A LEVEL PLAYING FIELD FOR TAKEOVER BIDS

1. INTRODUCTION

Takeover bids regulation is key to an integrated EU capital market

An important goal of the European Union is to create an integrated capital market in the Union by 2005. The regulation of takeover bids is a key element of such an integrated market.

Takeover bids are influenced by a number of factors

The extent to which in a given securities market takeover bids can take place and succeed is determined by a number of factors. These factors can be of a general or structural kind, often macro-economic, or company specific.

General factors

General factors include the structure and stage of development of the securities market, the availability of alternative financial resources to the capital markets like long term credit and self-financing, the relative importance and role of the banking sector, share ownership patterns and the economic, social and cultural situation in a state.

Company specific factors

At company level, such factors include the extent to which the articles of association and other constitutive documents of the company prior to a bid confer voting rights on, or deny them to, shares acquired in a bid, or confer double or multiple voting rights or special control rights on other shares, the extent to which corporate structures confer majority rights on minority shareholders (pre-bid structures) and the availability of specific measures frustrating a bid once it is announced[1] (post-bid structures).

Many differences between Member States : lack of a level playing field

Currently, there are many differences between the various Member States in terms of such general and company specific factors. Annex [4] gives an overview of company specific barriers to takeover bids which are lawful and, in many instances, actually applied in the Member States and which the Group has reviewed. As a result, takeover bids cannot be undertaken with the same expectation of success in the different Member States and shareholders in Member States do not have equivalent opportunities to tender their shares. This is what is generally referred to as the 'lack of a level playing field' in the area of takeover bids in the European Union.

1 Art. 9 (1) (a) of the Directive allows Member States to provide that the authorisation of the general meeting of shareholders referred to in that article is required from an earlier time such as when the board of the offeree company becomes aware that the bid is imminent. For ease of reference this report only refers to 'when a bid has been announced or made' to indicate a post-bid situation.

In the light of available economic evidence, the Group holds the view that the availability of a mechanism which facilitates takeover bids is basically beneficial.

A takeover mechanism offers several benefits

Takeovers are a means for bidders to create wealth by exploiting synergies between their existing business and the target company. Many European companies will need to grow to an optimal scale to make effective use of the integrating internal market. The same is true for companies which compete on global markets. Takeover bids are a means to achieve this for those engaged in the business of both bidder and target.

Exploitation of synergies

Takeover bids also offer shareholders the opportunity to sell their shares to bidders who are willing to offer a price above the prevailing market price. Such a price will be offered where the bidders believe that the resources of the company can be better developed and exploited under their operation and control.

Opportunity to sell at a price higher than market price

Finally, actual and potential takeover bids are an important means to discipline the management of listed companies with dispersed ownership, who after all are the agents of shareholders. If management is performing poorly or unable to take advantage of wider opportunities the share price will generally under-perform in relation to the company's potential and a rival company and its management will be able to propose an offer based on their assertion of their greater competence. Such discipline of management and reallocation of resources is in the long term in the best interests of all stakeholders, and society at large. These views also form the basis for the Directive.

Discipline of management

This is not to say that takeover bids are always beneficial for the companies concerned, the target and the bidder, and their respective shareholders. As is the case for all types of mergers and acquisitions, takeover bids may be wealth-enhancing or wealth-destroying and benefits to shareholders of the target may be to the detriment of shareholders of the bidder. Whether or not the management of the bidder should undertake a takeover bid on the target company, and whether or not it should confer with its shareholders before executing the bid, is a matter of general corporate governance principles as applying to the bidder. It is outside the scope of the Directive.

This does not mean that takeover bids are always beneficial

The mandate of the Group is to review whether and to what extent a level playing field for takeover bids could and should be created with respect to the mechanisms and structures, allowed and created under company law in Member States, which may frustrate or inhibit takeover bids. These are by nature company related factors. The

Mandate of the Group concentrates on company specific factors (company law)

Group acknowledges that any approach on this basis would leave the various general and structural differences existing in Member States untouched. It believes, however, that its recommendations with respect to company law mechanisms and structures would, in addition to market driven changes, mark an important step forward in developing a general level playing field for takeover bids in the European Union.

Group's recommendations come in addition to market driven changes

2. TWO GUIDING PRINCIPLES

The Group believes that any European company law regulation aimed at creating a level playing field for takeover bids should be guided by two principles: shareholder decision-making and proportionality between risk bearing and control:

Level Playing Field : two principles

1. Shareholder decision-making

In the event of a takeover bid, the ultimate decision must be with the shareholders. They should always be able to decide whether to tender their shares to a bidder and at what price. This is an essential feature of companies listed on a stock exchange where shares can be acquired through purchases in the market and through public offers. The securities markets, and thus the capacity of European industry to finance itself, will only develop fully where this principle is generally adhered to.

In a takeover bid, the ultimate decision must always be with the shareholders

It is not for the board of a company to decide whether a takeover bid for the shares in the company should be successful or not. The board should not be able to frustrate or block a takeover bid and thereby deprive shareholders of the opportunity to tender in such a bid. Nor should it be free to take steps to facilitate a bid, or a preferred bid, if there is more than one, in a way which pre-empts the decision of the shareholders.

It is not for the board to decide whether a takeover bid should be successful or not

This is not to say that the board has no responsibility at all in the context of a takeover bid. Its insight into, and responsibility for, the strategy and day-to-day affairs of the company enable and require it to advise the shareholders on the takeover bid. The board should express its views on the consequences of the bid for the company and its business and on the attractiveness of the terms of the bid for the shareholders. If the board considers a particular bid not to be sufficiently attractive, it should be free and may sometimes be obliged to seek alternative bids from others. But then too, it is equally the case that the ultimate decision on the competing bids should be made by the shareholders. The board should not favour one of the bidders over another, for example by issuing shares to one of them.

Primary responsibility of the board is to advise the shareholders on the takeover bid

It is sometimes argued that allowing the board to frustrate a takeover bid can be justified as a means to help alleviate the pressure to tender that shareholders face, to increase the premium paid to them and to take into consideration the interests of other stakeholders in the company, notably the employees. The Group rejects these views. Even if board resistance to a takeover bid might in some circumstances help to achieve these goals, which is not always clear, any regime which confers discretion on a board to impede or facilitate a bid inevitably involves unacceptable cost and risk.

Various reasons are sometimes given to justify board discretion to frustrate a bid

The Group rejects these views

Defensive mechanisms are often costly in themselves, apart from the fact that they deny the bidder the opportunity to create wealth by exploiting synergies after a successful bid. Most importantly, managers are faced with a significant conflict of interests if a takeover bid is made. Often their own performance and plans are brought into question and their own jobs are in jeopardy. Their interest is in saving their jobs and reputation instead of maximising the value of the company for shareholders. Their claims to represent the interests of shareholders or other stakeholders are likely to be tainted by self-interest. Shareholders should be able to decide for themselves and stakeholders should be protected by specific rules (e.g. on labour law or environmental law).

Defensive mechanisms are often costly

Managers are faced with a conflict of interest

Interests of shareholders and stakeholders are better served otherwise

2. Proportionality between risk bearing and control

In open capital markets major (institutional) investors would normally prefer to invest where bearing the ultimate economic risk of the company confers proportionate control rights. The cost of capital of such companies is normally lower and they will be better able to raise capital on the securities markets. In the Group’s view, proportionality between ultimate economic risk and control means that share capital which has an unlimited right to participate in the profits of the company or in the residue on liquidation, and *only* such share capital, should normally carry control rights. All such capital should carry control rights in proportion to the risk carried. The holders of these rights to the residual profits and assets of the company are best equipped to decide on the affairs of the company as the ultimate effects of their decisions will be borne by them. This report will use the term ‘risk bearing capital’ to refer to this concept.

Share capital which has an unlimited right to participate in the profits or residue on liquidation, and only such share capital, should normally carry control rights

Reference in the present Report to “Risk bearing capital”

The extent to which a shareholder holds risk bearing capital should determine the extent to which he is able to determine the affairs of the company and the operation of its business. The holder of the majority of risk bearing capital should be able to exercise control. Capital and control structures in a company which grant disproportionate control rights to some shareholder(s) should not operate to frustrate an otherwise successful bid for the risk bearing capital of the company.

The holder of the majority of risk bearing capital should be able to exercise control

The concept of risk bearing capital used here[2] does not include the normal form of preference shares which have no exposure to the performance of the company beyond their preferred rights but only carry a limited right to distributions of profits and/or on liquidation. Such preference share capital has a similar economic function to debt. On a strict and complete application of the proportionality principle, if it is to carry votes at all then its voting power should be related to risk, i.e. it should be brought into operation only when there is a default in the payment of the preferential dividend and to enable appropriate protections to be activated to respond to the default. Preference shares which have a preferred entitlement to part of the profits or assets and also carry rights to share with other shares in the rest of the profits or assets are included in the concept of risk bearing capital as used in this report. Similarly, participation rights which carry the ultimate unlimited right to participate in the profits or assets of the company, although formally not deemed to be share capital, should also be included in this concept of risk bearing capital.

Preference shares and participation rights are included in the "risk bearing capital", if they carry an unlimited right to participate in the profits or assets of the company

Rules specifying the guiding principles

These two principles should provide an overall guide for EU legislation on takeover bids for listed companies. The principles are not self-enforcing. The consequences of the principles must be specified.

The two principles are not self-enforcing

It may well be that, in a fully integrated and well developed securities market, whether or not companies should adhere to the proportionality principle should be left to the market itself. Such a market may be able to judge correctly the cost of capital of companies with capital and control structures which deviate from this principle and normally more efficient alternative investments are available to investors in such a market. In the long run, structures deviating from this principle should wither and die out except to the extent that they are justified by the particular circumstances of a company.

In efficient markets, enforcement of the proportionality principle might be left to market forces

Similar arguments might be applied to the principle of shareholder decision-making, though the conflict of interest of the board may well lead to market failure in this context.

The same might be true for the shareholder decision-making principle

Currently, however, such efficient markets do not exist across Europe. The securities markets in Member States differ widely in levels of development. In some Member States, they may be able

Such efficient markets currently do not exist across Europe

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2 For the avoidance of doubt, the concept of risk bearing capital as used in this report is not identical to the concept of capital as used in the Second Directive on company law and in the company laws of the Member States nor does it correspond to the term "risk capital" as used in some member states to indicate peculiarly risky forms of investment such as venture capital.

efficiently to judge companies which do and do not adhere to these two principles. In most Member States, the Group believes that they cannot do so. These more and less developed markets must be integrated on a European level to enable the restructuring of European industry and the integration of European securities markets to proceed with reasonable efficiency and speed. Also, investor protection tends to be weaker in markets where the two principles are not generally followed.

In order to establish securities markets in the European Union which are both efficient and provide an adequate level of investor protection, the Group considers it to be necessary to specify the two principles in more detailed rules which are binding in the Member States. The Group has investigated two possible approaches for such rules, i.e. application of the guiding principles on a general basis and application of the guiding principles in a way which is limited to the context of a takeover bid.

Therefore the principles must be specified in detailed rules

Two possible approaches

3. GENERAL APPLICATION OF GUIDING PRINCIPLES

Many of the company specific structures that the Group has reviewed not only deviate from the two guiding principles in a takeover context but are pre-bid structures, which more generally have the effect of concentrating control rights in the hands of the board and/or minority shareholders.

Many structures deviate from the two principles on a permanent basis

Examples are control rights of board members relating to board appointments, the existence of various classes of shares with differentiated voting rights, e.g. a separate class of shares carrying a multiple of voting rights of another class of shares with the same nominal value and the same rights to participation in surplus, shares within the same class carrying double the voting rights of others within the class, classes of shares with limited voting rights, general voting caps for shareholders, special control rights, conferred on holders of a specific class (such as golden shares), or on the board, “voting trusts”, “pyramid structures”, and circular and cross-shareholdings.

Examples

It could be argued that it would be consistent to apply the two guiding principles generally, and not only in the context of takeover bids. On this approach all structures which deviate from the two guiding principles would have to be terminated and the capital and control structures of listed companies would have to be re-arranged accordingly.

It could be argued that the two principles should apply permanently

This would be a major operation, fundamentally affecting the ways listed companies in many parts of the Union are controlled, financed and operated. The various structures deviating from the guiding

Various structures have been developed in national contexts, principles in Member States have been developed in the respective national contexts, based on particular share ownership patterns and other factors affecting the control of companies. They often also serve purposes outside the scope of takeover bids. These have been and to some extent still are deemed to be justified in Member States.

where they often serve purposes outside takeover bids

Some structures, like special control rights for the board, voting caps and depository receipt structures have arguably been developed to protect a company with dispersed ownership against a small minority dominating the general meeting in the usual absence of the vast majority of shareholders. Structures like multiple voting rights and special control rights held by a minority shareholder often conform to particular ownership patterns in a Member State. By creating a strong minority shareholder who controls the company from the inside, such structures may have helped to overcome the problems related to disciplining management of companies with dispersed ownership. Structures deviating from the two guiding principles may also have been beneficial to companies and their shareholders at particular stages in their development, such as small and medium sized enterprises preparing for listing.

Examples of justifications

Other structures exist which appear to be difficult to justify from a general capital markets and company law perspective, like pyramid structures with multiple listings.

Other structures appear difficult to justify

In reviewing the effects of a general application of the two guiding principles, the various mechanisms deviating from them would have to be reviewed in detail. They would have to be assessed in the particular context in which they operate and judged to see whether and under what circumstances any justification still exists for them. It would then need to be decided how they are best dealt with if they are to be terminated. Such distortions in control structures may have been put in place to respond to defects in other governance mechanisms which would need in turn to be addressed before the distortion could be removed - for example in relation to the efficient and responsible operation of shareholders meetings.

A general application of the two principles would lead to a detailed examination of the various mechanisms deviating from them

This would constitute a major review which the Group was unable to undertake in the short time given to it to produce this report. But the Group also doubts whether such review would in the foreseeable future lead to general agreement on which structures could remain as acceptable deviations and under what circumstances, given the different stages of development of capital markets in the Member States, the different share ownership patterns and other general factors determining the level playing field among the Member States.

Such an ambitious exercise may prove to be difficult

Such an exercise might be feasible and useful in addressing other weaknesses in company governance structures, but a thorough

And it may simply not be necessary

examination of the issues lies beyond the Group's terms of reference for this initial report and does not appear to be necessary if an effective solution addressing the takeover context can be devised.

if a solution for takeovers can be devised

Duty to disclose

However, in the Group's view one type of general, permanent rule, should be established in order to help create an integrated capital market in the European Union. Listed companies should generally be required to fully disclose their capital and control structures. Such a disclosure requirement is also essential for the protection of investors in order to enable them to assess the value of and risks related to their investment. Only on the basis of full disclosure can markets properly judge the efficiency of companies with different capital and control structures.

However, listed companies should generally be required to fully disclose their capital and control structures

The Group recommends that listed companies in all Member States be required to disclose their capital and control structures, for instance in their annual reports, in their listing particulars and in prospectuses required to be published on the issue of new securities. If important changes occur in this information, listed companies should be under a continuous obligation similarly to disclose such changes. In the view of the Group, it should be encouraged to use a website dedicated to the company as an efficient and effective medium for providing this type of information to shareholders and others. The Group will come back to this in the second stage.

Disclosure in various places

Update is necessary

Use of website is encouraged

The information to be disclosed should include, inter alia:

Information to be disclosed

- direct and indirect significant shareholdings, including indirect holdings through pyramid structures and circular and cross-shareholdings
- shares and rights to acquire shares of board members and employees
- the system of control of any employee share scheme where the control rights are exercised on behalf of employees by another
- a description of classes of shares, including non-listed shares, the rights and obligations attached to each class of shares and the percentage of total share capital each class represents
- the holders of shares with special control rights and a description of their rights
- a description of the rules applicable to the appointment and removal of board members and the amendment of the articles of association
- a description of the powers of the board of directors, in particular whether or the board meeting has the power to issue and buy back shares

- 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.

Disclosure of some of these elements is already required under existing directives, such as the directive on disclosure of major shareholdings, and the first, second, fourth and seventh company law directives. The Group recommends that these elements be disclosed and presented in a combined, coherent way. However, companies should not be required to make reference to structures that arise under general applicable law.

Disclosure should be made in a coherent way

Disclosure does not encompass structures arising under general applicable law

4. APPLICATION OF THE GUIDING PRINCIPLES IN THE CONTEXT OF A TAKEOVER BID

Whatever the virtues and justifications of company law mechanisms and structures deviating from the two guiding principles may be generally, the Group takes the view that they should not frustrate or unduly inhibit takeover bids or their successful execution. In the context of a takeover bid, the principles of shareholder decision-making and proportionality between risk bearing capital and control should apply effectively to enable liquid and coherent markets in capital and corporate control to operate throughout the Union.

Whatever their virtues and justifications in general, deviating structures should not frustrate takeover bids

When a takeover bid is made two stages should be distinguished. The first stage commences when a bid is announced. Shareholders will have to consider how to respond to the bid and the question can arise whether a defence should be put up against the bid. Such a defence is generally referred to as a ‘post-bid defence’. The second is the stage commencing after the successful completion of the bid. The bidder may then be frustrated in his ability to exercise control over the company both by post-bid defences as well as by barriers which were already in place prior to the announcement of the bid. These latter barriers are generally referred to as ‘pre-bid defences’.

Takeover bids : two stages

First stage : a bid is announced

Second stage : a bid is completed

To ensure that the two guiding principles apply in both stages of a takeover bid, different regulatory approaches are required for each stage. The Group believes that a level playing field can only be achieved in this context if rules are in place to ensure effective application of the two guiding principles in both stages of a takeover bid. The recommendations the Group puts forward for rules to apply in each stage should therefore be understood and applied in combination. Neither of them would create a level playing field for takeover bids without the other.

Different regulatory approaches are required for each stage

Both are necessary to create a level playing field

4.1 Response to a takeover bid

Shareholder decision-making

Article 9 (1) (a) of the Directive essentially required the board of the offeree company to be "neutral" (in the special limited sense described above) after a bid has been announced. It must obtain the prior authorisation of the general meeting of shareholders, given for this purpose, before taking any action which may result in the frustration of the bid, other than seeking alternative bids, and notably before the issuing of shares which may result in a lasting impediment to the offeror obtaining control. This obligation to obtain the specific approval of the general meeting of shareholders is extended to the implementation of decisions taken before the bid has been announced but not yet fully implemented, article 9 (1) (b).

Article 9 of the Directive : Board neutrality principle

Specific approval of shareholders is necessary to frustrate the bid

Article 9 confirms the principle of shareholder decision-making in response to a takeover bid. It ensures that shareholders can decide on whether or not to tender in a bid and that any action to frustrate the bid requires the specific authorisation of the general meeting of shareholders at that time.

Article 9 confirms the shareholder decision-making principle in the first stage of a bid

The board can, and should under article 9 (1) (d), set out its opinion on the bid in a public document, explaining the reasons for its opinion, its views on the effects of implementation of the bid on all the interests of the company, including employment, and on the offeror's strategic planning for the offeree company and its likely impact on jobs and locations. The board has the explicit authority to seek alternative bids. The Group understands the obligation of the board under article 9 to include that it may not frustrate one bid to the benefit of a competing bid by, for example, issuing shares to the competing offeror, unless the general meeting of shareholders specifically authorises such issue of shares at that time. Nor should the board take steps to favour a bid which in any way pre-empts the right of shareholders to reject it.

Board must set out its opinion on the bid in a public document

Board may seek alternative bids

But shareholders must have the final word

The Group has considered whether Member States should be allowed to provide that the board can take actions frustrating a takeover bid if the general meeting of shareholders has authorised such actions in a period of for example eighteen months prior to the bid. The Group has come to the conclusion that this should not be allowed.

Frustrating actions based on an authorisation given prior to the bid should not be allowed

In the period prior to the bid shareholders will not be able to take into account and weigh all the circumstances which are relevant for their decision whether a takeover bid should be frustrated. They are not

Only when a bid is announced can shareholders really assess all aware of the general market conditions prevailing at the time of a potential future bid, have no information on the performance of the company until that time, do not know whether and when a bid will be made and have no information on whether a potential future bid is attractive to the company and to them. The circumstances leading shareholders to authorise the board to frustrate a potential future bid may very well have changed fundamentally by the time a bid is actually made. Only when a bid is actually announced and the shareholders can really assess all relevant information, can they in fairness be asked to decide whether this takeover bid should be frustrated by the board or not.

relevant information and make an appropriate decision

Proportionality between risk bearing capital and control

Article 9 as such does not ensure that the principle of proportionality between risk bearing capital and control is adhered to once a takeover bid has been announced. If, prior to the bid, the capital and control structures of the company deviate from this principle, the disproportionate control rights can be used, and are likely to be used, to authorise the board to frustrate the bid if the board or the minority shareholder controlling the board wishes to oppose it.

Article 9 as such does not prohibit the use of existing disproportionate control rights

Application of the proportionality principle once a takeover bid is announced means that an authorisation by the general meeting of shareholders to take actions frustrating the bid would only be valid if made by a majority of votes exercised by the holders of the proportionate majority[3] of the risk bearing capital of the company. The Group believes that this principle should be applied once a takeover bid has been announced. It recommends that a rule to this effect be included in a future Directive on takeover bids.

Proportionality principle should apply in the general meeting convened in the first stage of a bid

The effect of this rule is that a shareholders meeting called to decide on whether a post-bid defence should be put up against a takeover bid should be held on a re-arranged, proportional basis. All holders of risk bearing capital must have the right to attend such meeting and to be able to exercise votes in proportion to their holding of risk bearing capital. The bidder should also be allowed to vote in such a meeting to the extent he already holds risk bearing capital in the company.

All holders of risk bearing capital (including the bidder) must be able to attend the general meeting and vote in proportion to their holding

In particular, holders of non-voting shares or participation rights should, to the extent they constitute risk bearing capital in the sense used in this report, be able to exercise voting rights. Holders of depository receipts of shares which represent risk bearing capital should be free to exchange them for the underlying voting shares. Holders of non-risk bearing shares should not be able to exercise

This rule applies to all holders of risk bearing capital

Voting rights

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3 The normal rules applicable in each company to determine the majority required for such a decision should be applied. Application of the proportionality principle does not as such imply a specific majority.

voting rights. General voting caps and limitations to voting rights applicable to risk bearing shares are to be overridden. Shares carrying double and multiple voting rights should only carry voting rights proportionate to their share in the risk bearing capital.

should be proportional to risk bearing capital

The concern could be raised that applying the proportionality principle in this way to the general meeting held in this stage of the takeover bid would affect defensive measures relating to voting in the general meeting of shareholders only and would leave others intact, and in that sense would not help to create a level playing field. The Group does not share this concern. Art. 9 of the Directive already ensured the application of the principle of shareholder decision-making as soon as a bid is announced. Mechanisms which would deviate from this principle can no longer be applied to frustrate a bid after it is announced, unless the shareholders specifically agree to them at that time. The Group believes that a level playing field can only be achieved if the principle of proportionality between risk bearing capital and control is applied to the general meeting which is called to discuss measures to frustrate the bid. If this requirement would not be imposed, it would be possible for the board or the shareholder with disproportionate or special control rights to put up such defences that the break-through rule the Group proposes after a bid has been completed successfully (see paragraph 4.2 below) would become ineffective.

Application of proportionality principle, together with the other principle already ensured by Article 9, to first stage of the bid is necessary to achieve a level playing field

The absence of such a requirement would have contestable consequences

4.2 Break-through after successful completion of a takeover bid

The Group holds the view that a sufficiently level playing field can only be created in the context of a takeover bid if the two guiding principles are applied with reasonable efficacy to company law mechanisms and structures which may frustrate a bid and which may already be in place prior to the bid. This can be achieved by introducing a rule which allows the offeror to "break-through" such mechanisms and structures in the case of a takeover bid which achieves such a measure of success as clearly to justify this. Such a break-through facility would leave these mechanisms and structures in place unless a general takeover bid is made and has become successful. The Group believes a successful bidder who has acquired a substantial part of the risk bearing capital in a general bid for all the shares of the company should have the ability to break-through any mechanisms which frustrate the exercise of proportionate control.

The creation of a level playing field requires that the two principles apply after successful completion of a bid

A successful bidder should be able to break-through any frustrating mechanism

In the view of the Group a break-through rule applied after a successful takeover bid would strike an appropriate balance between, on the one hand, the need, at least for the time being, to allow differences in the capital and control structures of companies in view of the current differences between Member States, and, on the other

A break-through rule applied after a successful takeover bid is a balanced approach hand, the need to allow and stimulate successful takeover bids to take place in order to create an integrated securities market in Europe.[4]

When introducing a break-through rule, a number of issues need to be considered, in particular:

Four issues to consider

- the scope of a break-through rule
- the threshold to be reached by the offeror
- the effect of the break-through rule
- entitlement to compensation if special rights are lost as a result of the break-through

The Group reviews these issues below.

Scope

As is clear from the overview of company related defence mechanisms in Annex [4], these vary across a wide range. The Group believes that the break-through rule should apply to all provisions in the articles of association and related constitutional documents of the company which deviate from the principles of shareholder decision-making and proportionality. These provisions directly bear on the principles and the break-through rule can be applied to address them relatively easily. A number of barriers to takeovers fall outside this scope. Paragraph 4.3 below deals with some of these barriers.

Scope : provisions in the articles of association which deviate from the two principles

Some barriers fall outside this scope (see below 4.3.)

Threshold

The Group believes that the break-through rule should be available to an offeror who has made a general bid on all the shares of the company and who has acquired a certain threshold of risk bearing capital as a result of the bid, i.e. a certain percentage of the share capital which is entitled to the residual profits and assets of the company. Non-risk bearing capital in this sense should not be included in the calculation of the threshold.

Threshold should be defined by reference to the risk bearing capital

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4 The concept of a break-through rule is not unknown in the European Union. In France, the COB has suggested in its 1992 report that limitations on voting rights no longer apply if a bidder succeeds in acquiring one half of the share capital of the company. The same principle is also the basis for a proposal for a law submitted to the Dutch parliament in which a bidder having acquired 70% of the share capital can ask the court to amend or nullify the provisions in the company's constitution which prohibit him from exercising control over the company. Such a request, however, can only be made by the bidder after a waiting period of one year. In Italy, the law of 1994 on privatisations introduced a rule that voting restrictions in privatised companies were automatically removed in any case of a takeover leading the bidder to acquire the majority of the share capital. This rule has been changed to the effect that now voting restrictions are removed as soon as a takeover bid is launched with respect to at least 60 % of the share capital, regardless of the success of the bid.

The Group takes the view that the threshold should not be set at a percentage higher than 75% of the risk bearing capital of the company. Member States should be allowed to set the threshold at a lower level sufficient to take special resolutions like amendments of the articles of association and corporate reconstructions. If the offeror acquires the applicable percentage (referred to below as 75% for convenience) of the risk bearing capital, he should be able to exercise the control rights which normally apply in proportion to his holding and thereby control the affairs of the company and the operation of its business.

Threshold should not be set at a level higher than 75%

Member States should ensure that qualified majorities required for special resolutions do not exceed the level of risk bearing capital they set as a threshold for the break-through rule. Generally, the effect should be to allow the bidder to exercise all the general shareholder rights of control of the company (without prejudice to the general law on the protection of minorities) including control over the appointment and removal of members of the company's board who are appointed under the control of shareholders and powers to change the constitution.

Qualified majorities required for special resolutions should not exceed the level set as a threshold for the break-through rule

After the bid has been announced, the general meeting of shareholders may have resolved, or authorised the board, to issue new share capital as a post-bid defence. If the newly issued share capital is non-risk bearing capital, this does not affect the threshold the bidder should reach to enjoy the break-through; the newly issued shares are ignored in calculating whether the bidder has acquired sufficient risk-bearing capital. If the newly issued share capital is risk bearing capital, the effect is that the bidder will have to acquire more of the risk bearing capital outstanding prior to the issue in order to enjoy the break-through.

Risk bearing capital issued after announcement of the bid will influence application of the break-through rule

If new risk bearing shares are issued to a third party determined not to sell to the bidder equalling more than one third of the risk bearing capital outstanding prior to the issue, it becomes impossible for the bidder to reach the threshold. This then is the result of a decision of the shareholders of the company taken in a meeting after the bid has been announced. But it should be noted, that in view of our recommendation above this can only be achieved with full application of the proportionality principle (see par 4.1 above). This decision is to be respected as it in itself does not violate the principles of shareholder decision-making and proportionality between risk bearing capital and control.

Such an issue may result in fully frustrating the bid

Which in itself does not violate the two principles

The desired effect of the break-through rule is not to squeeze-out and in that sense expropriate minority shareholders, but merely to redress deviations from the shareholder decision-making and proportionality principles (see further below under effect) after a successful takeover bid. A higher threshold similar to the 90% the Group recommends as

Threshold is lower than for the squeeze-out right, because effects are not the same a minimum threshold for the squeeze-out right is therefore not justified as a threshold for the break-through facility.

The bidder should be allowed, in cases where invocation of the break-through rule is necessary to achieve effective control, to make his general bid for all the share capital of the company conditional upon reaching the threshold percentage of risk bearing capital (possibly increased as a post-bid defence with appropriate authorisation by the shareholders meeting after the bid has been announced) and the consequential ability to use the break-through facility.

Where necessary, the bidder should be allowed to make his general bid conditional upon reaching the threshold

Effect

The effect of the break-through rule should be to redress the deviations in the articles of association and other constitutional documents from the principles of shareholder decision-making and proportionality between risk bearing capital and control. The bidder acquiring 75% or more of risk bearing capital should be able to control the affairs of the company and the operation of its business. This implies two types of rules, each dealing with different mechanisms in the articles of association and other constitutional documents.

Break-through rule should allow to redress deviating provisions

Implies two types of rules

1. The bidder acquiring 75% or more of risk bearing capital should be able to exercise a corresponding percentage of the total votes that can be cast in a general meeting of shareholders. This means that, in calculating the votes and entitlement to participate in a general meeting of shareholders held after the offeror has reached the threshold, a number of provisions in the articles of association and other constitutional documents of the company will have to be overridden. For example:

1. Provisions preventing the exertion of proportional voting rights should be overridden, e.g. :

- provisions in the articles of association, or other constitutional document, installing general voting caps applicable to all shareholders or limitations on voting rights attached to a certain class of shares; to the extent these shares constitute risk bearing capital, they should carry voting rights proportionate to their stake in the total risk bearing capital of the company

Voting caps or other limitations

- provisions in the articles of association, or other constitutional document, granting multiple voting rights to the holders of a certain class of shares or double voting rights to certain holders within a class of shares; to the extent these shares constitute risk bearing capital, they should carry voting rights proportionate to their stake in the total equity capital of the company

Multiple or double voting rights

- provisions in the articles of association, or other constitutional document, completely denying voting rights to a certain class of risk bearing capital; these shares should carry voting rights proportionate to their stake in the total risk bearing capital of the company

Provisions denying voting rights

- provisions in the articles of association, or other constitutional

Voting rights

document, conferring voting rights on non-risk-bearing capital; these shares should be excluded from carrying voting rights, unless there is a default relating to their limited financial entitlements.

attributed to non risk bearing capital

2. The bidder acquiring 75% or more of risk bearing capital should be able to exercise the core control rights that company law grants in order to be able to control the conduct of the affairs of the company and the operation of its business. These rights include the right to appoint, suspend and dismiss board members and to set their conditions of appointment and the right to determine the constitution of the company by amending the articles of association and other constitutional documents. Provisions in the articles of association that hinder the exercise of these rights should be overridden. To the extent these provisions are not included in the articles of association but operate as default rules of general company law (e.g. a fixed term of appointment of board members as the default rule of company law), they should be overridden as well.

2. Provisions preventing the exertion of core control rights (board composition and constitution amendment) should be overridden

Such provisions include provisions that grant the holders of a special class of shares the exclusive right to make binding nominations for the appointment, suspension or dismissal of board members or that grant such rights to the board or third parties. An exception should be made for nomination or appointment rights of third parties which are mandatory in the company law of the Member States. These include the nomination or appointment rights of employees under mandatory national co-determination rules or, as to the European Company, under the Directive on the involvement of employees in the European Company[5]. The effect of the break-through should be that the bidder acquiring 75% or more of risk bearing capital is able to appoint, suspend and dismiss those directors that the general meeting of shareholders under applicable company law can appoint, suspend and dismiss. When the articles of association provide for staggered appointments of board members or appointments for a fixed period, these provisions should be overridden as well so as to allow the bidder immediately to dismiss the full board and appoint new members.

Various deviating provisions relating to the composition of the board should be overridden

Exception should be made for mandatory nomination or appointment rights of third parties

Similar provisions exist making the amendment of the articles of association subject to a prior proposal from the board or a meeting of holders of a specific class of shares. These should also be overridden after the offeror has reached the threshold. The bidder acquiring 75% or more of risk bearing capital should be able to amend the articles of association and any other constitutional document and thereby formalise reinstallation of the shareholder decision-making and proportionality principles on a permanent basis.

Various deviating provisions relating to the amendment of the constitution should be overridden

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5 Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European Company with regard to the involvement of employees.

Some Member States (or regional or local public authorities within Member States) hold shares with these control rights ('golden shares') in companies operating in certain economic sectors. Many of these companies are privatised former fully state-owned enterprises. State held golden shares may interfere with the free movement of capital (art. 56 Treaty of Rome) and the freedom of establishment (art. 43 Treaty of Rome). Several cases in which this is raised are currently under review by the European Court of Justice.

Some Member States hold such control rights in companies (golden shares)

From a company law and capital markets perspective, there is no justification for distinguishing between companies in which special control rights are held by private persons and companies in which special control rights are held by states. If a formerly state-owned enterprise is privatised and seeks to enjoy the benefits provided by the capital market, it should be subject to the same principles and rules of company law and capital market law as other companies. Therefore, the Group believes that the break-through rule should also apply so as to override special control rights attached to golden shares held by Member States, even if the European Court of Justice would rule they do not violate the Treaty of Rome as such. If Member States wish to retain control over a company for a legitimate public purpose, they should do so by legislation which is subject to public law principles. This would also help to ensure due process in the exercise of its powers by the state.

The break-through rule should also apply to golden shares

Legitimate control should be achieved by legislation subject to public law principles

The break-through rule should apply regardless of whether the relevant provisions in the articles of association were already included prior to the bid being made or have been included as a post-bid defence after a bid was made. The Group notes that, in its view, in the latter case the general meeting of shareholders can only have decided to include these provisions with due observance of the principles of shareholder decision-making and proportionality (see par. 4.1 above). If, nonetheless, thereafter the shareholders decide to tender their shares to the bidder to such an extent that he acquires 75% of risk bearing capital, they have clearly reversed their initial decision to put up a defence against the bid. Their later decision to tender their shares to such a large extent should prevail and the bidder should upon reaching the threshold be able to break-through the provisions in the articles of association that deviate from the two guiding principles.

The break-through rule should apply to deviating provisions, whether they were adopted as pre-bid or post-bid defences

The break-through rule should take effect immediately upon the acquisition of the threshold percentage of risk bearing capital by the bidder after a general takeover bid. If the break-through were only to take effect at the end of a certain period after reaching the threshold, this would create unacceptable uncertainty for the bidder, the company, the other remaining shareholders, the board and other stakeholders during such period. No reasonable interest is served by such a waiting period.

The break-through rule should apply immediately after successful completion of the bid

The exercise of control rights by the bidder in proportion to his holding of risk bearing capital, in particular to dismiss and appoint board members and amend the articles of association, requires that a general meeting of shareholders be held. The bidder who has reached the threshold should have the right to convene a general meeting of shareholders at short notice, provided that the meeting is not organised less than two weeks after its notification (cf. Art. 9 (1) (c) of the Directive for the convention of a general meeting at short notice to decide on defensive measures).

The break-through rule implies a general meeting

The successful bidder has the right to convene a meeting at short notice

In the meeting, the bidder (and other holders of risk bearing capital) has the right to exercise voting rights in proportion to the holding of risk bearing capital. The bidder can exercise his rights in order to cause the general meeting to dismiss and appoint board members and amend the articles of association of the company to make them consistent with his rights, thus removing any uncertainty and confusion amongst shareholders as to their position. Until such a meeting is held the board should be under an obligation not to frustrate the exercise of control by the bidder (cf. Art. 9 (1) (a) of the Directive for the obligation of the board not to frustrate the bid during the period of the bid).

In the meeting, the successful bidder can exercise the core control rights

Existing board must be neutral until that meeting

Compensation

The Group has considered whether the holder of shares carrying disproportionate voting rights or special control rights should be compensated for the loss of these rights which results from the bidder reaching the break-through threshold after a general takeover bid. The Group agrees that the bidder should not be required to offer such compensation. The loss of these special rights would be the result of a public policy choice made by the European Union and the Member States in order to create a level playing field for takeover bids across the Union. The holders of special rights lose them in a break-through situation basically because as a matter of public policy they should not be able to exercise those rights once a bidder has acquired 75% or more of risk bearing capital after a general takeover bid. The new regime may well lead to companies voluntarily restructuring their control provisions where they do not conform to the two guiding principles. There may be exceptional cases where compensation for loss of specific control rights is appropriate and the holder of such rights demonstrates specific damage. The Group recommends that it be further reviewed whether an appraisal procedure should be provided for in these cases. Such a procedure should in any case not prohibit the bidder from using the break-through rule to exercise control.

A bidder reaching the break-through threshold should not be required to offer compensation to the existing holders of special control rights

Group recommends to further review whether an appraisal procedure should be provided for in specific cases

Conclusion

The review of these issues results in a model for a break-through rule which should apply after a substantially successful takeover bid. The model will require further refinement in the Directive and may need to leave Member States some flexibility as to the way particular mechanisms (such as the basis and means of determining conclusively and assessing whether the threshold has been achieved) applied in the various Member States should be dealt with. The main principles of the model however should be laid down in a future directive on takeover bids.

Main principles of the break-through model should be laid down in a future directive on takeover bids

4.3 Other barriers to takeover bids

The Group takes the view that certain types of company specific barriers to takeover bids should remain outside the scope of the break-through rule, basically because the rule appears to be an inadequate way of dealing with them. This is not to say that these mechanisms should not be dealt with at all and should continue to be barriers to takeover bids. The Group has considered three types of barriers:

Some barriers should remain outside the scope of the break-through rule, and be dealt with otherwise

1. provisions in articles of association and related constitutional documents restricting the transferability of shares

The listing directive of 1979[6] requires that listed shares must be freely transferable. However, it is not uncommon for listed companies to list only part of the risk bearing capital (e.g. of the risk bearing ordinary shares only 50% is admitted to the listing) or to have a separate class or classes of non-listed shares of risk bearing capital. The requirement of free transferability does not apply to these non-listed shares. Companies can limit the transferability of these shares by imposing ownership caps or a right of first refusal or approval right for the company or other holders of these shares. If companies have issued a substantial amount of non-listed risk bearing shares which are subject to this type of transferability restrictions, it becomes effectively impossible for a bidder making a general takeover bid to reach the threshold of risk bearing capital required under the break-through rule.

Requirement of free transferability does not apply to non listed shares

Non listed risk bearing shares subject to transferability restrictions make it difficult to reach the break-through threshold

The Group believes that in the event that a bidder makes a general takeover bid for the risk bearing capital of the company, such restrictions on the transferability of non-listed risk bearing shares

Such restrictions should not be enforceable against the bidder

[6] Council Directive 79/279/EEC of 5 March 1979 coordinating the conditions for the admission of securities to official stock exchange listing.

should not be enforceable against him. The holders of non-listed risk bearing shares should be able to sell to the bidder and the bidder should be able to acquire them.

A specific example of this is where a company has issued risk bearing shares to a trust or administration office, which has issued listed non-voting depository receipts in respect of those shares. It is not uncommon that the articles of association of the company or the documents regulating the depository receipts of shares, either fully exclude the possibility to exchange depository receipts for the underlying shares or limit such exchange to a small percentage of the underlying shares which can be held by each shareholder. If depository receipts for risk bearing shares are listed, they should be freely exchangeable into the underlying shares in the event of a general takeover bid.

Listed depository receipts for risk bearing shares should be freely exchangeable into the underlying shares in the event of a takeover bid

2. contractual barriers to takeover bids

A wide variety of arrangements exist in contracts to which the company may be a party which cause the contract to take effect, alter or terminate as a result of a change of control of the company. Examples are golden parachutes for directors, granting them substantial fees if they have to vacate their offices as a result of a takeover bid, change of control provisions triggering default clauses in loan and credit agreements, and change of control provision resulting in the winding up or change of control over a joint venture.

Many contractual arrangements can be linked to takeover bids

The Group believes that these contractual arrangements should not be subject to a break-through rule as it would be very complicated to deal with the perfectly acceptable reasons the counterparty to the agreement may have for requiring such provisions, its good faith in relying on the provisions and its entitlement to compensation if a break-through takes place.

These arrangements should not be subject to the break-through rule

The Group believes that these contractual arrangements, which can form barriers to takeover bids, should be dealt with in general contract and company law. Contractual arrangements which only cause damage to the company and do not appear to be justified by the legitimate needs of the counterparty normally can be addressed under contract law of the Member States. Even if contract law would not give an opportunity to address them with effect as against the counterparty, company law imposes duties on directors of a company who enter into them on behalf of the company. The risk of liability for breach of duty is a deterrent for directors against entering into these contracts.

They should be dealt with in general contract and company law

Another type of contractual barrier to takeover bids is the agreement

Another type of

between shareholders which prohibits the transfer of shares by these shareholders to a bidder, sometimes enforced by substantial financial penalties. If shareholders agreeing to such restrictions hold substantial stakes in the company, this effectively rules out a successful takeover bid.

arrangement consists of shareholders agreements

In principle, shareholders are free to agree with other shareholders not to tender their shares in a (specific) takeover bid or, in a mitigated form, to offer their shares to such other shareholders in the case of a takeover bid. However, there is a serious concern, analogous to that which arises in the case of an authorisation for defensive measures given by a shareholders' meeting prior to a bid actually having been made, that shareholders entering into such an agreement lack sufficient information to judge whether tendering their shares in a potential future bid would be attractive or not. The concern is even greater where the undertaking not to tender shares in a potential future bid is enforced by substantial penalties which prohibit shareholders from reviewing their decision in the light of changed circumstances. These concerns have led one Member State (Italy) to provide that this type of provisions in shareholders agreements is unenforceable when a general takeover bid is made. The Group recommends that the Commission review whether this could be a general rule in all Member States.

Shareholders agreements can be freely made

But they raise some concerns where they are linked to takeover bids

Group recommends to review whether they could be made unenforceable when a general bid is made

3. pyramid structures[7]

In some Member States, a person exercises control over a company through a cascade of listed and unlisted holding companies, each owning a controlling stake in the next one, with the company at the bottom of the hierarchy being ultimately controlled through a relatively small economic stake. There are minority, non-controlling shareholders in every holding company in the chain. The result is that the ultimate owner with a limited economic risk-bearing investment in the company can exercise de jure or de facto control over the company through this pyramid of holding companies which he can control. The more holding companies in the pyramid, the smaller the economic investment of the ultimate owner needs to be to retain control over such a company.

Pyramid structures : through a cascade of holding companies, the company at the bottom is ultimately controlled through a small economic stake

Pyramid structures in a different way achieve a similar disproportionality between ownership of risk bearing capital and control rights to that which is, for example, achieved by multiple voting rights. In each holding company, however, a strict proportionality between ownership of risk bearing capital and control rights can be maintained. The economic disproportionality can be achieved by holding just the minimum percentage required to retain control at each level and by having minority shareholders in each holding

Disproportionality created by pyramid structures is similar to that achieved by multiple voting rights

[7] Similar concerns arise in the case of cross- or circular shareholdings between various listed companies.

company to finance the exercise of control by the ultimate owner.

Application of the break-through rule to pyramid structures would be highly expensive and complicated

It is difficult to see how a break-through rule could deal with these structures. It would have to be applied to the pyramid structure as a whole and would have to assume that the percentage of risk bearing capital held in the company at the bottom of the hierarchy is to be determined on the basis of the proportionate aggregate holdings of shareholders at each level. In order to reach the threshold on an aggregate basis, the bidder must extend his bid to, and acquire, risk bearing capital in at least some of the holding companies in the pyramid. This is probably expensive and potentially impossible to achieve. It is certainly unattractive and highly complicated if the various holding companies in the pyramid, as sometimes is the case, not only hold shares in other holding companies in the specific pyramid structure but also hold shares in other, sometimes unrelated, companies. The offers the bidder would have to make to acquire sufficient risk bearing capital in the various holding companies would then have to include a price for an investment in other companies in which he is not interested at all.

Pyramid structures should remain outside the scope of the break-through rule

They pose general problems outside the context of takeover bids

Group recommends to review whether and how they should be regulated

The Group believes pyramid structures should remain outside the scope of the break-through rule. They pose general problems also outside the context of a takeover bid. They undermine the transparency of the ownership structure of listed companies; they affect the pricing mechanism with regard to listed shares at all levels in the structure; they make control over companies belonging to such groups substantially incontestable, even when they are listed, or at least they make the acquisition of control of such companies extremely expensive; and finally, they create minority shareholders at several levels who directly and indirectly in total hold the majority of the risk bearing capital but are unable to exercise control at any level. Whether or not this is unacceptable also depends on the level and effectiveness of the minority protections which apply to secure the protection of shareholders throughout the group. We recommend that the Commission review whether pyramid structures (including the possibility of more than one company within the same group having a listing) should be regulated and what adequate measures of protection (in group law, in listing rules or otherwise) should be enforced in all Member States.

5. LEVEL PLAYING FIELD BETWEEN THE EU AND THE USA

It has been argued that the Directive did not create a level playing field between the EU and the US

In the debate leading up to the rejection of the last proposal of the Directive in the European Parliament, the argument was put forward that the Directive did not create a level playing field between the European Union and the United States. European companies would be severely restricted in putting up defences against takeover bids under Art. 9 of the Directive, while American companies could use a number of devices to defend themselves against a takeover bid.

No clear level playing field in the US themselves, because state laws differ widely

The Group would first like to point out that there is not one set of takeover rules generally applicable in the United States. Company law is a matter of state law in the United States and the laws of the various states regulating takeover bids differ widely. Federal securities regulation only has a limited relevance to the ability of companies to defend against takeover bids. As a result, there is no clear level playing field for takeover bids within the United States.

However, American companies generally have a broad discretion to defend themselves, under the "business judgement rule"

Having said this, it is true that boards of American companies generally have a broad discretion to put up defensive devices under what is called the business judgement rule, which in some states has been modified in the takeover context. This discretion is used to employ a wide variety of defensive devices, like poison pills, selling crown jewels, green mail, control clauses and golden parachutes, to name only a few. The board has to remain neutral only if it has decided that the company is to be sold and what is needed is a process for choosing between two or more competing bidders. In that case, the only duty of the board is to ensure that shareholders get the best price for their shares.

Boards are often permitted to consider other interests than shareholders' interests

In addition, many individual states have enacted laws specifically permitting the board to consider other interests than shareholders' interests (but not their own) when deciding how to respond to a takeover bid, or to prohibit the bidder from engaging the company in certain types of business combinations as long as he has not reached a certain threshold of the voting stock of the company. Some of these laws have been held unconstitutional or illegal by US courts, others are upheld and very commonly applied in practice. However, the US courts generally impose the burden of proving that the measures taken by the board were genuinely in the best interests of the company upon the directors and the obligations which arise are vigorously enforced by shareholders.

But they must prove that their decisions were in the best interests of the company

The American example should not be followed in Europe

The Group acknowledges that its proposals, if implemented, would not result in company law rules for takeover bids applied in the European Union being broadly similar to those applied in the United States. For a number of reasons, however, the Group believes that the American example should not be followed in Europe.

US board discretion operates in a widely differing general legal and capital market environment

1. The broad discretion of the board of US companies to put up defensive mechanisms operates in a general legal and capital market environment which differs widely from the European environment. American boards are subject to much more pressure to enhance shareholder value than their European counterparts typically are. They are judged by their performance on the capital markets. While in theory they can "just say no" to a potential bidder, they are subject

to pressures from non-executive directors on the board, investment banks and advisors and in particular from institutional investors. Their behaviour is widely transparent under the legal transparency rules and the intense scrutiny of the media. They also have to reckon with being replaced in a successful proxy contest through which the bidder can have more friendly board members appointed, although in case of a staggered board only after some time. Finally, it is relatively easy for shareholders to take board members to court in derivative actions. Liability suits against directors are a common phenomenon of the American corporate practice. Even though the (modified) business judgement rule is in place, the risk of liability is definitely higher for board members of American companies than for board members of European companies. Moreover, the American judicial system is very open to claims like these and generally better equipped to deal with litigation in a takeover context than judicial systems in European Member States.

Takeover activity in the US is intensive, and European companies benefit to a large extent from that activity

2. The relatively broad discretion of the board to defend against takeover bids has certainly led to a number of takeover bids not being successful or not being made at all. Nonetheless, takeover activity in the American capital markets is intensive and forms an essential part of its financial and economical structure. Hostile takeover bids (i.e. bids not agreed to by the board of the target company) are made regularly and under pressure of the legal and capital market system often become friendly (i.e. the board of the target company recommends the bid to its shareholders or at least stops its opposition) at a later stage. As Annex [5] shows, defensive mechanisms and state defensive laws have not blocked European companies taking over American companies. European companies benefit to a very large extent from the takeover activity on the American capital markets. In many parts of Europe on the other hand, takeover barriers existing in various Member States more often tend to result in control over listed companies being incontestable. In the view of the Group, this is undesirable in the European context, as an integrated capital market has to be build up in order for business to fully benefit from and make effective use of the integrating internal market in Europe.

A number of anti-takeover mechanisms are prompted by the ability of the bidder to obtain control by making a partial bid, which is not possible in the system of the Directive

3. A number of anti-takeover mechanisms applied in the United States are prompted by the ability of bidders to obtain control over a company by making a bid on only a part of the company's share capital. In order to prevent shareholders being pressured to tender, these mechanisms force the bidder to make a general takeover bid for all the shares in order to be able to exercise control. In Europe on the other hand, the mandatory bid provision in the Directive would require a bidder to make a general takeover bid to all shareholders for all their holdings at an equitable price, if he wishes to acquire control of the company. In the system of the Directive, specific anti-takeover mechanisms are not needed to achieve this goal.

4. The current anti-takeover rules in the United States are by no means uncontroversial even within the United States. Some accept them as the outcome of regulatory competition among the states and effective lobbying by the business community, but there is a large body of both economic and legal literature arguing that directors should be prohibited from engaging in defensive actions and that the ultimate decision should be made by shareholders. The reasons for this latter view are identical to those the Group has put forward for its proposals to ensure the principles of shareholder decision-making and proportionality in the context of takeover bids.

Anti-takeover rules are contested in the US themselves by a large body of economic and legal literature

The Group believes the European Union should in the first place consider what type of regulation of takeover bids is needed to enhance the development of efficient integrated capital markets in the Union. In the view of the Group this objective is best served by introducing rules that ensure the operation of the principles of shareholder decision-making and proportionality between risk bearing and control in the context of a takeover bid, as recommended in this report. The controversial American anti-takeover rules are likely to be less beneficial to the development of efficient integrated capital markets in the European Union. Furthermore, the Group believes its proposals would not give American companies an unfair advantage when trying to exploit the European internal market by taking over European companies, as compared with the conditions which apply for European companies exploiting the American market by taking over American companies. If, however, political concerns remain, it could be considered whether to provide that the benefits of the application of the principles of shareholder decision-making and proportionality between risk bearing and control as recommended in this report, can only be enjoyed by listed European companies making general takeover bids for other listed European companies, to the extent that this would not violate international agreements and could practically be enforced.

The EU should not copy the US system, but implement the takeover bids regulation which is the best suited to its environment and objectives

If political concerns remain, benefits from two principles could be restricted to listed EU bidders

To summarise, listed companies should be required to disclose complete information about their capital and control structures (except for those deriving from general applicable law), for instance in their annual reports, listing particulars and prospectuses. If important changes occur in this information, listed companies should be under a continuous obligation to disclose such changes. Disclosure of some of these elements is already required under existing directives : the Group recommends that these elements be disclosed and presented in a combined, coherent way.

Summary: *Complete information about capital and control structures of listed companies should be disclosed in a coherent way*

After announcement of the bid, the board of the offeree company should not be permitted to take actions frustrating a takeover bid on the basis of a general meeting authorisation given prior to the bid. Only when a bid is actually announced and the shareholders can really assess all relevant information, can they in fairness be asked to decide whether this takeover bid should be frustrated by the board or

Frustrating actions cannot be taken by the board after announcement of the bid, on the basis of an prior not.

authorisation

After announcement of the bid, any authorisation by the general meeting of shareholders to take actions frustrating the bid should be given by a majority of votes exercised by the holders of the proportionate majority of the risk bearing capital of the company. The bidder should also be allowed to vote in such a meeting to the extent he already holds risk bearing capital in the company.

After announcement of the bid, any general meeting authorisation should be given with proportionate majority of the risk bearing capital

A rule should be introduced, which allows the offeror to break-through mechanisms and structures which may frustrate a bid, as defined in the articles of association and related constitutional documents, in the case of a takeover bid which achieves such a measure of success as clearly to justify this.

A rule allowing the successful bidder to break-through frustrating structures should be introduced

The threshold for exercising the break-through right should not be set at a percentage higher than 75% of the risk bearing capital of the company on the date of completion of the bid. Member States should be allowed to set the threshold at a lower level sufficient to take special resolutions like amendments of the articles of association and corporate reconstructions. Member States should ensure that qualified majorities required for special resolutions do not exceed the level of risk bearing capital they set as a threshold for the break-through rule. The bidder should be allowed to make his general bid conditional upon reaching the threshold percentage of risk bearing capital.

The break-through threshold should not be set at a percentage higher than 75%

Provisions in the articles of association and other constitutional documents deviating from the principles of shareholder decision-making and proportionality between risk bearing capital and control should be overridden. Such provisions include 1. the rules affecting voting rights and 2. the rules relating to the composition of the board and the determination of the constitution of the company. These provisions should be overridden whether or not a) such special control rights are held by private persons and companies or by states, and b) such provisions were already included prior to the bid being made or have been included as a post-bid defence after a bid was made. In the case of such provisions in the hands of member states, they should only be permitted if they are subjected to public law principles, and of course if they are justifiable under community law.

Provisions deviating from the principles of shareholder decision-making and proportionality between risk bearing capital and control should be overridden

The effect of the break-through rule should be immediate upon the acquisition of the threshold percentage of risk bearing capital by the bidder after a general takeover bid.

Effect should be immediate

The bidder who has reached the threshold should have the right to convene a general meeting of shareholders at short notice, in which he has the right to exercise voting rights in proportion to his holding of risk bearing capital.

Successful bidder should be able to convene a general meeting

The bidder should not be required to offer compensation to the holder of shares carrying disproportionate voting rights or carrying special control rights for the loss of these rights which results from the bidder reaching the break-through threshold after a general takeover bid. There may be exceptional cases where compensation is due if the holder of such rights demonstrates specific damage : the Group recommends that it be further reviewed whether an appraisal procedure should be provided for in these cases.

Bidder should not be required to offer compensation for loss of existing control rights

In the event that a bidder makes a general takeover bid for the risk bearing capital of the company, restrictions on the transferability of non-listed risk bearing shares should not be enforceable against him. If depository receipts for risk bearing shares are listed, they should be freely exchangeable into the underlying shares in the event of a general takeover bid.

Restrictions on transferability and exchangeability of shares should be overridden

Contractual arrangements in general, which can form barriers to takeover bids, should not be subject to a break-through rule, but should be dealt with in general contract and company law. In the particular case of contractual agreements between shareholders which prohibit the transfer of shares to a (certain) bidder, sometimes enforced by substantial financial penalties, the Group recommends that the Commission review whether a rule whereby these agreements would be unenforceable when a general takeover bid is made could be adopted in all Member States.

Contractual arrangements in general should not be subject to break-through rule

Shareholders agreements should be further examined

The Group believes pyramid structures should remain outside the scope of the break-through rule and recommends that the Commission review whether pyramid structures including several listed companies should be regulated and what adequate measures of protection of minority shareholders (in group law, in listing rules or otherwise) should be introduced in all Member States.

Pyramid structures should be further examined

The Group's proposals, if implemented, would not result in company law rules for takeover bids applied in the European Union being broadly similar to those applied in the United States. The Group, nevertheless, believes for a number of reasons that the European Union should not use the controversial US rules as a model, but rather consider what type of regulation of takeover bids is best suited to enhance the development of efficient integrated capital markets in the Union. If, however, political concerns remain, it could be considered whether to provide that member states are free to make provision that the benefits of the application of the principles of shareholder decision-making and proportionality between risk bearing and control as recommended in this report can only be enjoyed by listed European companies making general takeover bids on other listed European companies, to the extent that this would not violate international agreements and could practically be enforced.

The EU should not use the controversial US rules as a model

If political concerns remain, benefits from two principles could be restricted to listed EU companies

CHAPTER II

THE EQUITABLE PRICE TO BE OFFERED IN MANDATORY BIDS

1. INTRODUCTION

The notion of equitable price is included in Article 5(1) of the Directive, which seeks to harmonise the circumstances under which a mandatory bid has to be made and contains the following provision : "(…) This bid shall be addressed to all holders of securities for all their holdings at an equitable price. (…)".

Notion of "equitable price" is included in Article 5(1) of the Directive

The Group considers that the requirement to offer an equitable price is of the utmost importance in the context of mandatory bids to achieve an adequate protection of the minority shareholders. A mandatory offer made for a price which was not equitable would not only fail to achieve such a protection, in that it would deprive the minority shareholders of an opportunity to sell their securities on fair terms. The absence of an equitable price requirement in a mandatory bid may also induce minority shareholders to sell their securities in a voluntary partial bid for a price which they do not deem to be equitable.

Presence of an equitable price in mandatory bids is fundamental to achieve minority shareholders protection

In the hearings organised by the Group, the view has been expressed that it is also desirable to adopt rules on equitable price in the context of voluntary bids. However, in view of its mandate, the Group examines the notion of equitable price in the present report in relation to mandatory bids only. Apart from the limits on the Group's terms of reference, the exclusion of an equitable price requirement in voluntary offers is also justified on the ground that, in principle, the judgement on the adequacy of the offer price should be left to the market. The Group therefore considers that the recommendations it makes in the present chapter are applicable to mandatory bids only.

The observations and recommendations made in the present chapter apply to mandatory bids only

The lengthy discussions on the Directive have illustrated the difficulty of defining common rules regarding the consideration that should be offered in a mandatory bid, with respect to both the level and the nature of such consideration. In view of these difficulties, the Commission proposal of 1996 simply stated that the bid must be launched at a price which meets the objective of protecting the interests of minority shareholders. In its common position adopted in June 2000, the Council deemed it preferable to use the notion of

Long discussions on the Directive illustrate the difficulty of defining common rules on the consideration to be offered in mandatory bids equitable price, without defining it, and introduced a rule about the nature of the consideration to be offered. The Parliament resolution of December 2000 contained a rule defining the minimum level of the consideration to be offered, and added a further rule on the nature of that consideration. Only the latter of these two modifications was finally included in the text approved by the Conciliation Committee.

This Chapter first outlines the rules relating to the notion of equitable price as they are provided for in the Directive, and gives a short overview of the rules on the same topic existing in the different Member States. The Group then observes that a definition of equitable price should achieve a proper balance between the competing objectives of flexibility and predictability, and examines whether some harmonisation at EU level seems desirable. The Group finally presents its recommendations as to the key characteristics of a European approach to the notion of equitable price.

This Chapter covers the present situation, the desirability of some harmonisation and the Group's recommendations

2. THE PRESENT SITUATION

2.1. The rules provided for in the Directive

The text approved by the Conciliation Committee on 6 June 2001 contains two rules relating to the consideration which must be offered in the context of a mandatory takeover bid :

Two rules in the Directive :

- Article 5(1) refers to the situations in which a person acquires the control of a company and contains the principle of the mandatory bid, the notion of equitable price and some provisions (based on the "cash alternative" principle) related to the nature of the consideration which must be offered[12];

Article 5(1) – determination of the consideration in a mandatory bid

- Article 6(3) requires Member States to adopt rules relating to the information which has to be stated in the offer document drawn up and made public by the offeror in any type of offer (whether it be voluntary or mandatory)[13].

Article 6(3) – information about the consideration in any type of offer

[12] "…, Member States shall ensure that rules are in force, which oblige this person to make a bid as a means to protect the minority shareholders of that company. This bid shall be addressed to all holders of securities for all their holdings at an equitable price. When the consideration offered by the offeror does not consist of liquid securities admitted to trading on a regulated market, such consideration has to include a cash consideration at least as an alternative.

In any case, the offeror must provide a consideration in cash at least as an alternative, if he, alone or in conjunction with persons acting in concert with him, has, during a period commencing not less than 3 months before the bid was made public pursuant to Article 6(1) and ending on the expiry of the acceptance period, acquired for cash more than 5% of the shares or voting rights in the offeree company."

[13] "(d) the consideration offered for each security or class of securities and, in the case of mandatory bids, the basis of the valuation used in determining it, with particulars of the way in which that consideration is to be given;"

2.2. The great diversity of the national regimes

In some of the Member States that currently apply a mandatory bid rule, the provisions about the consideration to be paid have a binding character; a few Member States provide only recommendations. The provisions also differ widely with respect to both the level and the nature of the consideration to be offered, as explained below.

At Member State level, existing rules differ widely (both in nature and in substance)

a) The level of the consideration to be offered

In a few Member States, the level of the consideration to be offered is determined by reference to general principles only (e.g. equal treatment of shareholders). However, a vast majority of Member States has adopted detailed provisions with respect to the consideration to be offered in a mandatory bid, but they vary considerably as to the nature and the number of the criteria used, and the way in which they are applied.

With respect to the level of the consideration, Member States use different criteria in different ways.

A majority of the Member States refer to the highest price (or a percentage thereof) paid by the offeror, or a person acting in concert, over a certain period (ranging from 3 to 12 months) prior to the offer. However, many other criteria are found in the same or other Member States:

- the average market value over a certain period (ranging from 3 to 12 months) prior to the offer;
- the price paid for a block of shares the acquisition of which led to the modification in control;
- the “net worth” / “theoretical asset value” / “liquidation value” of the company;
- the “objective valuation criteria usually applied” and the characteristics of the company.

Criterion most often used : the highest price paid over a certain period prior to the offer

A few Member States use only one of these criteria, i.e. the highest price paid by the offeror. The other Member States use more than one (in most cases two or three - including often the highest price paid and the average market value - , but even more in one Member State).

Most Member States use more than one criterion

Most of the Member States which use more than one criterion apply them on a cumulative basis, which means that the consideration to be offered is the higher of the prices obtained. In some Member States however, a different approach is followed, whereby the different prices obtained have to be “averaged” or “balanced”. Finally, a few Member States apply the different criteria on an alternative basis, the choice of the relevant rule depending on the circumstances.

Most Member States using more than one criterion apply them on a cumulative basis

The determination of the consideration to be offered in a mandatory bid may be further influenced by the following factors :

Other factors play a role :

- when different classes of securities exist, the criteria mentioned above must be applied on a class by class basis. In particular, where a mandatory offer arises out of the acquisition of control through a holding in one particular class, several Member States have specific rules applying to the other classes.

- existence of several classes

- in all Member States which have adopted detailed provisions, exceptions and derogations are allowed in specific circumstances provided that general principles are properly respected.

- presence of specific circumstances

- several Member States have rules which prevent the offeror from acquiring securities on better terms outside of or after (over a period ranging from 6 to 12 months) the mandatory offer. Such an acquisition may simply be prohibited, or in other Member States lead to a revision of the consideration paid in the mandatory bid.

- treatment of acquisitions on better terms outside of or after the offer

b) The nature of the consideration to be offered

In most Member States, the bidder is free to offer as consideration cash or securities (which, in some Member States, have then to be admitted to trading on a regulated market in a defined economic zone). In some Member States, when securities are offered, a cash alternative always has to be offered, whereas in a few other Member States, a cash alternative has to be offered in specific circumstances only. Finally, a few Member States generally require a cash offer and allow securities to be offered only in limited situations.

In most Member States, the consideration may consist freely of cash or securities

3. THE NEED FOR HARMONISATION

The effect of the wording of article 5(1) of the Directive is that the issue whether a price is equitable is a matter of European law, ultimately determinable by the European Court of Justice. In the view of the Group, it is not desirable that such a question - which will arise in the midst of a complex transaction where time is of the essence and where the issue will depend very much on particular circumstances if it is left undefined - should be determined by long drawn out court proceedings. The likelihood of such proceedings may well have the effect of deterring transactions altogether, which is undesirable.

The wording of Article 5(1) makes the issue whether a price is equitable a matter determinable by the European Court of Justice, which is not desirable

The Group therefore considers that, at the very least, it should be made clear that it is for the member states to satisfy the directive requirement to provide for one or several equitable price criterion/criteria, within the margin of appreciation laid down by a

It should at least be made clear that this issue is a matter primarily broad requirement in the Directive that the mandatory bid must be made at an equitable price.

determinable by Member States

The great diversity of the national regimes applicable to the consideration to be offered in a mandatory bid indicates that it is difficult to conceive one single rule which could be used in all countries and in all situations to achieve an adequate level of protection of minority shareholders. Not only are the different criteria used in Member States not equally relevant because of the specific characteristics of their capital markets, but also the significance of particular circumstances must be properly taken into account when determining the price to be offered. For both reasons, any sort of regulation should allow for a reasonable degree of flexibility, with the aim of effectively achieving an equivalent treatment of all holders of securities.

Any sort of regulation should allow for a reasonable degree of flexibility

On the other hand, the Group notes that an efficient functioning of the capital markets in the European Union requires a sufficient degree of predictability as to the consideration to be offered in a mandatory bid. It is indeed a major disincentive to the acquisition of control if such acquisition imposes an obligation to bid but the price to be paid is not predictable. The Group therefore recognises the desirability of introducing at EU level a harmonised approach in providing a means for offerors to predict and ideally to determine the equitable price. This approach should on the one hand create a strong presumption in favour of a price established by application of a common rule and at the same time provide for sufficient flexibility in particular circumstances.

But an efficient functioning of the capital markets requires at the same time a sufficient degree of predictability

4. THE KEY CHARACTERISTICS OF A EUROPEAN APPROACH

The key issues to be addressed by a European approach to the equitable price in a mandatory bid relate to the determination of the consideration to be offered in the bid and to the treatment of acquisitions during or after the bid on better terms.

A European approach on two issues

4.1. The consideration to be offered in the mandatory bid

The Group holds the view that the principle of equivalent treatment of all holders of securities of the same class requires that the price to be offered in the mandatory bid should, in normal circumstances, be equal to the highest price paid by the offeror for shares in that class, whether on or off the market, during a certain period preceding the date of the acquisition of securities by the offeror, which resulted in the change in the control of the company. Member States should be free to set the length of this period between 6 and 12 months.

Criterion applicable in normal circumstances : the highest price paid over a period preceding the acquisition of control

The highest price paid rule offers the double benefit of allowing the minority shareholders to fully share the premium paid by the acquirer at any time in the period under consideration, while at the same time giving the offeror the certainty that he will not have to pay more in the mandatory bid than he has been willing to pay in the preceding period and as a result permitting him to determine himself at which maximum price he is prepared to acquire all securities of the company.

Benefits associated to the highest price paid rule

The Group, nonetheless, considers that the highest price paid rule may not, in particular circumstances, achieve an equivalent treatment of holders of securities. Such circumstances include, but are not limited to, the following situations:
- the highest price paid was set by collusion (i.e. an agreement with the vendor aimed at evading the highest price paid rule);
- market prices in general have been affected by highly exceptional events;
- market prices for the relevant securities have been manipulated;
- a lower price may be a necessary condition to make it possible for companies in distress to be rescued from bankruptcy.

The highest price paid may not, in particular circumstances, achieve an equivalent treatment of holders of securities

Based on these observations, the Group holds the view that the Directive should :
- on the one hand, contain a rule whereby the highest price paid, as defined above, by the offeror is assumed to be an equitable price in a mandatory bid in normal circumstances;
- on the other hand, explicitly state that Member States are permitted to define both the situations in which this presumption may be displaced and the criteria which may be applied by supervisory authorities in their decision to retain a price higher or lower than the highest price paid.

Member States should be permitted to define both the situations in which the above presumption may be displaced and the criteria which may be applied.

With respect to the definition of the situations in which the presumption may be displaced, the Group considers that the Directive should contain the following principles :
- the main principle should be that of fairness - that is, the rule can be deviated from only where it is demonstrated that its application would plainly result in an unfair price;
- where deviation would lead to a lower price, the burden of proof should lie with the offeror, meaning that the supervisory authority would not even consider the request if the argument provided does not appear sufficient;
- in any areas of doubt, the judgement should be finally guided by the principle of “shareholders’ interest” - that is, all unclear cases should be solved by giving prevalence to the fair treatment of the target’s shareholders.

The Directive should contain the principles applicable to the definition of such situations

With respect to the criteria which may be applied in such circumstances, the Group considers that Member States should be permitted to retain one or more of the following criteria :
- the average market value over a certain period (ranging from 3 to 6 months) prior to the offer;
- the liquidation value of the company;
- any other objective valuation criteria usually applied in financial analysis.

Member States should be permitted to retain one or more of the criteria to be mentioned in the Directive

The Group recommends that any decision whereby a supervisory authority retains a price different from the highest price paid be accompanied by the provision of complete information as to the exact nature of the particular circumstances invoked, the precise reason why under these circumstances the highest price paid is not equitable, and the detailed rationale (nature of the criteria, way in which they have been combined, …) which led the supervisory authority finally to determine the price to be paid by the offeror.

Any decision to apply a price different from the highest price paid should be accompanied by complete supporting information

The Group observes that, when different classes of securities exist, the rules governing the determination of the equitable price must apply on a class by class basis. The Group furthermore considers that Member States should be required to adopt specific rules, where a mandatory offer arises out of the acquisition of control via a holding in one particular class, or some but not all classes, which apply in relation to the other classes in full conformity with the general principles of the Directive.

The rules governing the determination of the equitable price must apply on a class by class basis

The Group finally notes that the question of whether a price offered in the mandatory bid is equitable very much depends on the timing of the mandatory bid. Any reference to a price paid for or market value of the securities in a period preceding the acquisition of control by nature becomes less relevant the longer it takes after that moment before the mandatory bid is actually made. The Group believes therefore that the offeror should be required to make the mandatory bid within a short period (to be set by Member States at a maximum of 30 days) after having acquired control of the company through the acquisition of securities.

The question whether a price is equitable is linked to the timing of the mandatory bid

4.2. Rules applicable to the payment of a higher price during or after the mandatory bid

The Group considers that there are strong arguments that the principle of equivalent treatment of holders of securities of the same class should be regarded as requiring that a higher price may not be offered during the mandatory bid or for a certain period after the mandatory bid to holders of securities who do not sell in the bid. An additional benefit for minority shareholders of such a rule is that it acts as an incentive for the offeror to set the price offered in the

Acquisition on more favourable terms, outside of or after the mandatory bid, should be regulated mandatory bid at a reasonably high level.

In this approach, Member States would be required to adopt rules aimed at achieving this objective, but could be free to choose between a) a system in which the acquisition of securities on more favourable terms is fully prohibited during the bid or for a certain period after the bid and b) a system whereby the acquisition of securities on more favourable terms during the bid or for a certain period after the bid obliges the offeror to pay the difference to the holders of securities who tendered their securities in the mandatory bid.

Member States could choose between two systems

As to the length of the period, the Group recommends that Member States should be required to adopt one of between 6 and 9 months.

Relevant period : between 6 and 9 months

To summarise, a harmonised approach should be introduced at EU level with the aim of providing a means for offerors to predict and ideally to determine the equitable price they will have to pay in a mandatory bid. This approach should on the one hand create a strong presumption in favour of a price established by application of a common rule and at the same time provide for sufficient flexibility in particular circumstances.

Summary:
A harmonised approach at EU level should combine predictability and flexibility

The price to be offered in the mandatory bid should, in normal circumstances, be equal to the highest price paid by the offeror for shares of the relevant class, whether on or off the market, during a certain period preceding the date of the acquisition of securities by the offeror, which resulted in the change in the control of the company. Member States should be free to set the length of this period between 6 and 12 months.

Criterion applicable in normal circumstances : the highest price paid

Member States should be permitted to define both the situations in which the presumption above may be displaced and the criteria which may be applied by supervisory authorities in their decision to apply a price higher or lower than the highest price paid.

Member States are permitted to :

With respect to the definition of the situations in which the presumption may be displaced, the Directive should contain the following principles : 1) the rule can be deviated from only where it is demonstrated that its plain application would result in an unfair price, 2) where deviation would lead to a lower price, the burden of proof should lie with the offeror, 3) all unclear cases should be resolved by giving prevalence to the interest of the target’s shareholders.

- define the situations in which the presumption may be displaced

With respect to the criteria which may be applied in such circumstances, Member States should be permitted to retain one or more of the following criteria : 1) the average market value over a certain period (ranging from 3 to 6 months) prior to the offer, 2) the

- and select one or more of the criteria mentioned in the Directive

liquidation value of the company, 3) any other objective valuation criteria usually applied in financial analysis.

Any decision whereby a supervisory authority applies a price different from the highest price paid should be accompanied by the provision of complete supporting information.

Complete supporting information must be presented

The question of whether a price offered in the mandatory bid is equitable very much depends on the timing of the mandatory bid. The offeror should be required to make the mandatory bid within a short period (to be set by Member States at a maximum of 30 days) after having acquired control of the company through the acquisition of securities.

The mandatory bid should be made within a short period after the acquisition of control

Member States could be required to implement either a) a system in which the acquisition of securities on more favourable terms is fully prohibited during the bid or for a certain period after the bid or b) a system whereby the acquisition of securities on more favourable terms during the bid or for a certain period after the bid obliges the offeror to pay the difference to the holders of securities who tendered their securities in the mandatory bid. Member States should be free to set the length of this period between 6 and 9 months.

Member States could choose between two systems to regulate the acquisition on more favourable terms outside of or after the bid

CHAPTER III

THE SQUEEZE-OUT AND SELL-OUT RIGHTS AFTER A TAKEOVER BID

1. INTRODUCTION

The **squeeze-out right** basically refers to the right of a majority shareholder in a company to compel the minority shareholders to sell their shares to him. Conversely, the **sell-out right** refers to the right of a minority shareholder to compel the majority shareholder to purchase his shares from him. Where squeeze-out and sell-out rights have been provided for in law, the relevant provisions usually determine certain thresholds the majority shareholder must have reached in order to trigger the squeeze-out and sell-out rights.

Both squeeze-out right (in favour of the majority shareholder) and sell-out right (in favour of the minority shareholders) usually depend on certain thresholds

Squeeze-out and sell-out rights can be relevant to majority shareholders and minority shareholders in both companies listed on stock exchanges and private companies, and regardless of whether the threshold has been reached by way of a general bid on shares or otherwise. In the light of its mandate, the Group focuses in this report on the desirability of squeeze-out and sell-out rights in the context of a takeover bid, i.e. a general bid for shares which are admitted to trading on a regulated market. In its second report, the Group will address squeeze-out and sell-out more generally.

Squeeze-out and sell-out rights may be offered in widely differing circumstances, but the Group focuses in this report on their desirability in the context of a takeover bid

This Chapter first gives a short overview of the existing rules related to the squeeze-out and sell-out rights, both at EU level and in the different Member States. The Group then examines on the one hand whether squeeze-out and sell-out rights produce significant benefits in the context of takeover bids, and on the other hand the extent to which some harmonisation at EU level seems desirable. The Group finally recommends that squeeze-out and sell-out rights should be generally available in the EU following takeover bids, and presents the key characteristics of a European approach to both rights.

This Chapter covers the present situation, the desirability of some harmonisation and the Group's recommendations

2. THE PRESENT SITUATION

2.1. The squeeze-out right

a) The present situation at EU level

Squeeze-out right is not regulated at EU level

The squeeze-out right is not regulated by any of the existing company law instruments adopted at EU level.

The mechanisms provided for in the Second Directive are different from the squeeze-out right

In particular, the Second Company Law Directive on formation and capital maintenance of public limited companies[14] does not contain provisions related to the squeeze-out right. The mechanisms provided for in Article 36 (compulsory withdrawal of shares) and in Article 37 (redemption of shares) of the Second Directive are different from the squeeze-out right, in that they are financed out of the funds of the company itself, as opposed to the funds of the majority shareholder.

Modifications to the Second Directive proposed by the SLIM Group will be examined in the second part of the mandate

In the context of the SLIM exercise[15], a Company Law Working Group on the simplification of the First and Second Company Law Directives recommended an easing of the conditions under which a compulsory withdrawal of shares may be made in the Member States which have not introduced a squeeze-out right in their national legislation. This recommendation, together with the other recommendations made by the SLIM Group, will be further examined by the Group in the second part of its mandate.

The merger by acquisition provided for in the Third Directive is different from the squeeze-out right

The Group will consider this mechanism in the second part of its mandate

The Third Company Law Directive on mergers[16] does enable a majority of shareholders in an acquired company to agree that all the shares in that company including those in the hands of a dissenting minority should be replaced by shares in the acquiring company. However this provision, which does not apply to acquisitions of an undertaking by means of a takeover, is different from the squeeze-out right in that a) the shares of the minority shareholders are not transferred to the majority shareholders of the acquired company, and b) the Directive does not require that such mergers should be possible by means of cash consideration for the shareholders of the acquired company. The Group will consider such mergers in the second part of its mandate.

A form of squeeze-out right

A form of squeeze-out right was included in the draft 9th Directive on the conduct of groups[17], of which Article 33 would permit an

[14] Second Council Directive of 13 December 1976 on co-ordination of the safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (77/91/EEC).

[15] Report from the Commission to the European Parliament and the Council – Results of the Fourth Phase of SLIM – COM(2000)56 of 4 February 2000.

[16] Third Council Directive of 9 October 1978 based on article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies (78/855/EEC).

[17] European Communities Draft Ninth Company Law Directive on the Conduct of Groups Containing a Public Limited Company as a Subsidiary

undertaking which had acquired directly or indirectly 90 % or more of the capital of a public limited company to make a declaration leading to the formation of a group and providing for the compulsory acquisition of the shares of the minority shareholders. The draft 9th Directive has however not given birth to an official proposal from the Commission.

was included in the draft 9th Directive

The Directive on takeover bids[18] does not include any provision related to the squeeze-out right.

No provision on squeeze-out right in the Directive on Takeover bids

In this situation where Community law remains silent on the squeeze-out right, Member States are free to decide whether and under which conditions such a right should be introduced in their national legislation.

The introduction of a squeeze-out right is currently a matter of national regulation

b) The great diversity of the national regimes

The vast majority of the Member States currently provide for a right of a majority shareholder to buy out the minority shareholders. However, the conditions under which that right may be exercised differ widely, in particular in the following areas : the types of companies for which the right exists, the link or lack of a link with takeover bids, the thresholds that have to be reached, and the determination of the consideration to be offered to the minority shareholders.

Squeeze-out right exists in most Member States, but national regimes differ widely

Only in a few Member States may the right to buy out minority shareholders be exercised in all limited liability companies. In most of the Member States, this right applies only to public limited companies. A few of these Member States limit this right to companies the securities of which are admitted to trading on a regulated market (or companies having publicly offered securities).

Squeeze-out right usually applies only to (listed) public limited companies

Some Member States establish a direct link between the right to buy out minority shareholders and takeover bids, in that such a right may be exercised only when the applicable thresholds have been reached by virtue of a public offer. In other Member States, the right to buy out minority shareholders is offered generally, regardless of how the applicable threshold has been reached. However, some of these Member States have special rules applicable to the situation in which the right to buy out is exercised subsequent to a takeover bid.

In some Member States, squeeze-out right is linked – directly or indirectly – to takeover bids

The threshold upon which the right to buy out the minority shareholders is conditional varies in most Member States between

Most Member States have set the threshold

[18] See the Joint Text approved by the Conciliation Committee on 6 June 2001 in Annex 6 to this Report.

90% and 95%, with an extreme high of 98% in one Member State. In most Member States, the threshold is set by reference to the amount of capital held or the number of voting rights held. Most of these Member States have opted for only one of these criteria, but some Member States set the threshold by reference to both criteria together (capital and voting rights). In one Member State, the threshold has to be reached in terms of either capital or voting rights.

between 90 and 95 %

Reference is usually made to capital and/or voting rights

In some of the Member States where the right to buy out minority shareholders may be exercised only when the applicable thresholds have been reached by virtue of a public offer, the threshold is set by reference to the proportion of acceptances of the offer : the offer must have been accepted by shareholders holding 90% or more of the share capital in respect of which the offer has been made. It should be observed that, in such a situation, the rights and obligations arise on a class by class basis (which means that the right to buy out is subject to the existence of separate bids for classes of shares, with separate application of the threshold).

In some Member States, the threshold is set by reference to the proportion of acceptances of the offer (on a class by class basis)

With respect to the determination of the consideration to be offered, three groups of Member States may be distinguished. In the first group (Member States where the right to buy out may be exercised only when the capital/voting rights thresholds have been reached by virtue of a public offer), the consideration offered cannot in most Member States be lower than the one offered in the takeover bid.

Where the squeeze-out right is directly linked to takeover bids, the consideration usually cannot be lower than in the bid

In the second group (Member States where the right to buy out may be exercised when the capital/voting rights thresholds have been reached by virtue of a public offer or otherwise), the most frequent situation is that the consideration to be offered must be determined by experts appointed by a Court[19]. The criteria to be used by these experts are not necessarily clearly stated in the law, but some of these Member States do recognise that, if the right is exercised subsequent to a recent takeover bid, the consideration offered in that takeover bid should be properly taken into account, in most cases as a minimum).

Where the squeeze-out right is indirectly linked to takeover bids, the consideration is usually determined by experts (and the price in the bid is used as one reference)

In the third group (Member States where the threshold is set by reference to the proportion of acceptances of the offer), the majority shareholder normally has the right to acquire the remaining shares in a class on the same terms as those of the offer for that class (by virtue of a rebuttable presumption that these terms are fair if the acceptance threshold has been reached. If the minority shareholder can show that the offer price was not fair, he may demand a court supervised appraisal instead).

Where the squeeze-out right is linked to the proportion of acceptances of the offer, the price in the bid is presumed to be fair

[19] In one Member State, the consideration to be offered is determined by the majority shareholder and based on a multicriteria analysis and an expert enquiry and report (the expert appointed by the majority shareholder must receive the approval of the securities regulator).

2.2. The sell-out right

a) The present situation at EU level

The sell-out right is currently not regulated by any of the existing company law instruments adopted at EU level.

Sell-out right is not regulated at EU level

The Third Company law Directive on mergers[20] does enable Member States to exempt from certain requirements set out in the Directive a merger by a company which holds 90 % or more, but not all, of the shares of another company if the minority shareholders of the company being acquired are entitled to have their shares acquired by the acquiring company and to receive consideration corresponding to the value of their shares. However this provision, which does not apply to acquisitions of an undertaking by means of a takeover, is different from the sell-out right in that it is subject to a decision by the acquiring company to carry out a merger under simplified procedures.

The simplified procedure for a merger by acquisition provided for in the Third Directive is different from the sell-out right

A sell-out right was included in the draft 9th Directive on the conduct of groups, of which Article 39 would permit minority shareholders to request an undertaking which had acquired directly or indirectly 90 % or more of the capital of a public limited company to acquire their shares.

A form of sell-out right was included in the draft 9th Directive

The Directive on takeover bids does not include any provision related to the sell-out right.

No provision on sell-out right in the Directive on Takeover bids

As for the squeeze-out right, in this situation where Community law remains silent on the sell-out right, Member States are free to decide whether and under which conditions such a right should be introduced in their national legislation.

The introduction of a sell-out right is currently a matter of national regulation

b) The great diversity of the national regimes

About half of the Member States provide for a right to sell out to the majority shareholder[21]. Here again, the conditions under which that

Sell-out right exists in half of the Member

[20] Third Council Directive of 9 October 1978 based on article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies (78/855/EEC) : Articles 27 and 28.

[21] It should be noted that the Group deliberately restricted its examination to the national regimes providing for a sell-out right in normal circumstances. The special sell-out rights organised by the laws of several Member States in specific situations (e.g. where there has been an application by a shareholder or shareholders on the grounds of "oppression" ("unfairly prejudicial conduct of the company's affairs") by the controllers of the company, in which case the most frequent remedy is a court ordered buy-out of the complainants by the majority, or sometimes by the company) do not fall within the scope of the present Report.

right may be exercised differ widely, in the same areas as identified above in relation to the squeeze-out right.

States, but national regimes differ widely

Only in a small number of Member States may the sell-out right be exercised in all limited liability companies. In one of them, this right is open only to companies which are not admitted to trading on a regulated market. In most of the Member States where the sell-out right exists, this right applies only to public limited companies. A few of these Member States limit this right to companies the securities of which are admitted to trading on a regulated market (or companies having publicly offered securities).

Sell-out right usually applies only to (listed) public limited companies

In a small number of Member States, the sell-out right may be exercised only when the applicable thresholds have been reached by virtue of a public offer. In the majority of the Member States where the sell-out right exists, it is offered generally, regardless of how the applicable threshold has been reached. However, some of these Member States have special rules applicable to the situation in which the sell-out right is exercised subsequent to a takeover bid.

In some Member States, sell-out right is linked – directly or indirectly – to takeover bids

The threshold upon which the sell-out right is conditional varies in most Member States between 90% and 95%, with the exception of one Member State (in which this right is open only to limited liability companies which are not admitted to trading on a regulated market, and where the exercise of the right is not subject to any of the parties reaching any particular threshold but to the presence of appropriate reasons (e.g. a conflict of interests) to be presented to a court)[22].

Most Member States have set the threshold between 90% and 95%

In most Member States, the threshold is set by reference to the amount of capital held or the number of voting rights held. Most of these Member States have opted for both criteria cumulatively. In one Member State, the threshold has to be reached in terms of either capital or voting rights. However, a few Member States set the threshold by reference to the amount of capital only, and another one by reference to the number of ordinary (voting) shares).

Reference is usually made to capital and/or voting rights

In some of the Member States where the sell-out right may be exercised only when the applicable thresholds have been reached by virtue of a public offer, the rights and obligations arise on a class by class basis (which means that the sell-out right is subject to the existence of separate bids for classes of shares, with separate application of the threshold).

Where the sell-out right is directly linked to takeover bids, the rights and obligations sometimes arise on a class by class basis

With respect to the determination of the consideration to be offered, in some Member States the minority shareholders have the right to

The consideration to be offered may be linked –

[22] Similar anti-oppression remedies are found in many Member States.

sell the shares in a class on the same terms as in the offer for that class (by virtue of a rebuttable presumption that these terms are fair if the offeror holds more than 90% of the share capital in that class as a result of the offer. In this case either party may apply for a court-ordered appraisal instead). In the other Member States where the sell-out right exists, the consideration to be offered is most often determined by experts appointed by a Court, but is sometimes determined by the securities regulator or under its control. A small number of those Member States state that, if the right is exercised subsequent to a recent takeover bid, the consideration offered in that takeover bid should be properly taken into account.

directly or indirectly – to the terms of a takeover bid

3. THE JUSTIFICATION FOR THE SQUEEZE-OUT AND SELL-OUT RIGHTS AND THE NEED FOR HARMONISATION

3.1. The justification for the squeeze-out right

a) Grounds to justify the squeeze-out right

The Group holds the view that the right of a majority shareholder to buy out the minority shareholders subsequent to a takeover bid can be justified on the following grounds :

Justifications for the squeeze-out right :

- the continued existence of minority shareholders after the takeover bid creates various types of actual or opportunity costs and risks for the majority shareholder:

Minority shareholders lead to costs and risks

(i) the majority shareholder will incur costs related to his inability fully to integrate the acquired company into his group in terms of activities, use of assets, organisation and finance. The continued existence of minority shareholders inhibits efficient management by the majority shareholder of the company as a part of his group and thereby reduces the potential benefits of the takeover of the company;

Inability fully to integrate the acquired company into the group

(ii) the majority shareholder will incur direct costs for having to maintain the infrastructure for holding general meetings of shareholders with a view to the participation of minority shareholders (notices, meeting venue, disclosure, etc) and in relation to other rights exercisable by minority shareholders (calling of meetings of shareholders, requests for information, right to file a suit against the company, its directors, etc);

Costs related to the rights exercisable by minority shareholders

(iii) the majority shareholder runs the risk of abusive exploitation by the minority shareholders of their rights. They may threaten to use their rights only to inflict costs and disturbance on the majority shareholder in order to induce him to agree to their wishes or to obstruct his development of the company's business ("hold-ups").

Risk of abusive exploitation of minority shareholders rights

These costs and risks for the majority shareholder are caused by the rights of the remaining minority shareholders. The value of continued protection of these rights in public interest terms becomes

Minority shareholders

disproportionate to the costs and risks for the majority shareholder when the remaining minority is reduced to a very low level.

rights may become disproportional

- without a squeeze-out right, takeover bids are less attractive to potential bidders because of the costs and risks related to the existence of minority shareholders after the bid. This will reduce the likelihood of voluntary bids and the prices offered in them and the range of circumstances in which such bids are economic. In the same way, the squeeze-out right may be viewed as a counterpart to the mandatory bid rule.

Squeeze-out right makes takeover bids more attractive for potential bidders

- an effect similar to squeeze-out can be achieved in some Member States by a delisting procedure. Delisting procedures generally entail an obligation to make a bid for the remaining minority shares, with the burdens and costs of delays and disclosure. This is inefficient where the majority shareholder has just made a takeover bid and it does not guarantee that minority shareholders transfer their shares. The squeeze-out right is a more efficient means to achieve the same end.

Squeeze-out right is more efficient than a delisting procedure

b) Compatibility with the right of property

The ability of one party to enforce the acquisition of the shares of another represents a significant infringement of the latter's vested rights. The Group therefore takes the view that this facility can only be justified in exceptional circumstances and where there are sufficient safeguards in place.

Infringement of vested rights can only be justified in exceptional circumstances

The Group notes that property rights are protected in most Member States at Constitutional level, and are furthermore guaranteed by the European Convention on Human Rights. The protection offered by these provisions makes it possible to deprive a person of his property only if this is justified by the public interest and if appropriate compensation is offered.

Property rights are indeed protected at national and international level

Various courts in the Member States[23] have ruled that the squeeze-out right is not to be regarded as incompatible with these protective provisions, in that this right is not exercised to satisfy private interests only. There is indeed a general and public interest in having companies efficiently managed on the one hand, and securities markets sufficiently liquid on the other hand. So long as the squeeze-out right applies only when the minority is fairly small and appropriate

Various courts have ruled that the squeeze-out right is not incompatible with these protective provisions

[23] See for example :
- Decision of the German Supreme Court of 7 August 1962, Feldmühle.
- Decision of the French Supreme Court of 29 April 1997, Association de défense des actionnaires minoritaires et autres against Société Générale et autres, Recueil Dalloz 1998, pages 334-338.
- Decision of the German Supreme Court of 27 April 1999, DAT/Altana.
- Decision of the German Supreme Court of 23 August 2000, Moto Meter.

compensation is offered, the use of squeeze-out to address these public interests is proportionate.

3.2. The justification for the sell-out right

The Group holds the view that the sell-out right of minority shareholders following a takeover bid can be justified on the following grounds:

Justifications for the sell-out right :

- after a takeover bid, the majority shareholder may be tempted to abuse his dominant position, e.g. by causing the company to enter into transactions with related parties on a not-at-arm's-length basis, through changes in the dividend policy, by changing the strategy of the company to fit the objectives of the wider group of companies controlled by the acquiring company, by reducing the information provided to minority shareholders, etc. In some Member States, the rights granted to minority shareholders by law to protect against such abuse are no longer available if the minority shareholdings drop below a certain level and the Group believes that in most, if not all, Member States the practical difficulties for minorities in continuously protecting their position are likely to be considerable;

Risk of abuse of his dominant position by the majority shareholder

Minority protection no longer available below a certain level

- in situations where the market has become illiquid as a result of the takeover bid, minority shareholders cannot obtain appropriate compensation by simply selling their shares in the market;

Fair price difficult to obtain in illiquid markets

- the sell-out right is an appropriate mechanism to counter the pressure on shareholders to tender in the takeover bid. In the consultations organised by the Group, the view has been expressed that there is no justification for a sell-out right in situations where a takeover bid has taken place, because the minority shareholders have the opportunity to sell in that bid. The Group does not share this view and considers instead that minority shareholders may have good reasons (unattractive price, promising perspectives for the company…) for not selling in the course of the bid, but should be entitled to modify their decision in view of the outcome of the bid. A rule whereby the consideration required in the sell-out procedure should normally not be higher than the consideration offered in the bid would help to prevent purely speculative behaviours.

Appropriate mechanism to counter the pressure to tender in the takeover bid

- the sell-out right is to be regarded as a fair counterpart for the squeeze-out right conferred on the majority shareholders and a component in the proportionality of the squeeze-out solution.

Counterpart for the squeeze-out right

Another view expressed in the consultations organised by the Group was that a sell-out right subsequent to a takeover bid creates unduly

Sell-out right is not an unduly heavy burden for heavy financial burdens for the majority shareholder. The Group rejects this view. It sees grounds to justify a sell-out right following a takeover bid, i.e. a general bid for all the shares in the company. Such a bid may be voluntary or mandatory. The sell-out right does not require the majority shareholder to buy more than he was willing or required to buy when he made the takeover bid.

the majority shareholder

3.3. The need for harmonisation

In view of the justifications for the squeeze-out and sell-out rights following a general takeover bid, the Group takes the view that these rights should be offered throughout the European Union on a similar basis. Companies should have similar minimum opportunities everywhere in the EU to consolidate control and to support industrial restructuring, and an adequate level of protection of the holders of securities should be achieved on similar terms in all Member States.

Squeeze-out and sell-out rights after a takeover bid should be offered in all Member States

The Group considers that an initiative at EU level is necessary to ensure that squeeze-out and sell-out rights following general takeover bids exist throughout the EU and to harmonise the conditions under which the squeeze-out and sell-out rights may be exercised.

An initiative at EU level is necessary with respect to both rights in the context of takeover bids

The squeeze-out right may be regarded as a compensation for the mandatory bid rule included in the Directive. The absence of a squeeze-out right in some Member States is an impediment to voluntary bids, and the availability of a squeeze-out right is an incentive to launch a general bid. For these reasons, the introduction of a similar squeeze-out mechanism in all Member States should be favourable to the development of an efficient market for corporate control in the EU.

Squeeze-out right is a compensation for the mandatory bid rule, and is favourable to the development of an efficient market for corporate control

The sell-out right should be introduced everywhere in the EU under similar terms as a counterpart for the squeeze-out right. Transparent and harmonised rules on the protection of investors should contribute to increase their confidence and thereby the liquidity of the financial markets.

Sell-out right is a counterpart for the squeeze-out right and increases investors' confidence

The Group has not reviewed whether similar reasons justify offering squeeze-out and sell-out rights in other situations than where the applicable thresholds have been reached by virtue of a takeover bid. The Group will consider this question in its coming work on the second part of its mandate and reach appropriate conclusions in its second report.

Squeeze-out and sell-out rights outside the context of takeover bids will be examined in the second report

4. THE KEY CHARACTERISTICS OF A EUROPEAN APPROACH

The key issues to be addressed by a European approach to the squeeze-out right and sell-out right following a takeover bid relate to the definition of the applicable thresholds and the determination of the consideration. For these elements, similar rules should be adopted throughout the European Union, while leaving sufficient room to Member States properly to take into account the peculiarities of their company law and the characteristics of their financial markets.

Similar rules on thresholds and consideration should be adopted at EU level, while leaving sufficient room to Member States

4.1. The squeeze-out right

a) The criteria used to define the applicable thresholds

The Group considers that Member States should have the possibility to set the threshold for triggering the squeeze-out right of the majority shareholder by reference to the capital, held by the majority shareholder and any person acting in concert with him following his takeover bid, between 90% and 95%. Such a corridor would allow enough flexibility for Member States to take into account the characteristics of their financial markets (for example, a Member State where securities may be admitted to trading on a regulated market with only 10% of the capital might want to set the threshold at a figure higher than 90%).

Member States should have the possibility to set the squeeze-out threshold, by reference to the capital, between 90% and 95%

The minimum of 90% seems appropriate in view of the necessity to restrict any interference with the right of property to a reasonable degree. On the other hand, the maximum of 95% is justified in view of the practical difficulty in reaching a higher percentage through a takeover bid due to the presence in most companies of untraceable shareholders and the possible existence of an obdurate minority which refuses to accede to the bid even on reasonable terms.

Justifications for the minimum of 90% and the maximum of 95%

The Group reached the conclusion that Member States should alternatively have the possibility to set the threshold by reference to the number of acceptances in the offer, i.e. the offer must be accepted by shareholders holding 90% or more of the share capital in respect of which the offer has been made. The Member States which decide to apply this option would have to design appropriate rules dealing with the offeror's position at the commencement of the bid, for the purposes of determining which shares cannot be counted in calculating whether the 90% threshold has been achieved.

Alternatively, Member States should have the possibility to set the threshold by reference to the number of acceptances in the offer (at 90%)

The Group recognises that these two options produce different results, which depend on the initial shareholding held by the offeror.

The percentage of capital rule and the percentage of

As compared to a 90% of capital rule, the percentage of acceptances rule is always more exacting for the offeror. As compared to a 95% of capital rule, the percentage of acceptances rule is more exacting for the offeror when his initial shareholding was higher than 50% of the capital. On the other hand, this percentage of acceptances rule makes it possible to achieve progressive minority protection as minorities become smaller (which in turn is an incentive for launching early general bids) and to provide a robust valuation basis without the need for heavy reliance on appraisal procedures.

acceptances rule produce different results, but offer different advantages

The Group finally holds the view that, where there are several classes of securities outstanding, the squeeze-out right should apply on a class by class basis, whichever of the two options mentioned above is retained or introduced at national level. As a consequence, the squeeze-out right can be exercised only for the class(es) in which the applicable threshold (percentage of capital of the relevant class or percentage of acceptances for the relevant class) has been reached by virtue of a bid made in respect of the relevant class(es). The justification for such a class by class approach rests on it making possible a proportional application of the squeeze-out right, in the interest of both the majority shareholder (who need not reach the threshold for the company as a whole to be able to squeeze-out the minority shareholders in one class) and the minority shareholders (who cannot be squeezed-out from one class if the threshold is not reached in that particular class).

Where there are several classes of securities, the squeeze-out right should apply on a class by class basis, so as to guarantee a proportional application of the right

b) The consideration to be offered

The Group takes the view that, in both types of thresholds (percentage of capital or percentage of acceptances), the price offered in the takeover bid should be presumed to be a fair price for the shares of the minority shareholders if the bid has been accepted by shareholders holding 90% or more of the share capital in respect of which the offer has been made. This presumption would apply on condition that the squeeze-out right is exercised within a defined period following the bid. In the opinion of the Group, the length of this period should be set by Member States between 3 and 6 months, but this may need further testing with market experts. The presumption of the price of the bid as the fair price should be rebuttable, so that it could be challenged before courts or the authority supervising the takeover bid in particular circumstances.

Price offered in the takeover bid should be presumed to be a fair price in the squeeze-out procedure, if the bid has been accepted by 90% of the relevant shareholders

In the situation where a mandatory bid has been made, the Group considers that the price offered in that mandatory bid should be considered as fair in a subsequent squeeze-out procedure, even if the bid has been accepted by shareholders holding less than 90% of the share capital in respect of which the offer has been made, as the price offered in a mandatory bid has to be equitable. Here again, the presumption would be subject to a time limit and should be rebuttable

If this condition is not met but a mandatory bid has been made, the mandatory bid price should be presumed to be fair in the in particular circumstances.

squeeze-out procedure

In all the other situations (i.e. where the 90% acceptance rate is not reached, or when no mandatory offer has been made, or when the time limit has expired), the Group recommends that the consideration to be offered is determined by an expert or experts appointed by a Court or the authority supervising the takeover bid.

In all other situations, the consideration should be determined by expert(s)

As far as the nature of the consideration is concerned, the Group takes the view that the shareholders who refused the offer should be treated no less favourably than those who originally accepted it. As a consequence, if cash, or a cash alternative, has been offered in the takeover bid, cash, or a cash alternative, should be offered in the squeeze-out procedure as well.

Cash, or a cash alternative, should be offered if it was offered in the takeover bid

4.2. The sell-out right

a) The criteria used to define the applicable thresholds

The Group considers that Member States should have the possibility to set the threshold for triggering the sell-out right of minority shareholders by reference to the capital, held by the majority shareholder and any person acting in concert with him after the takeover bid, between 90% and 95%. Here too, such a corridor would allow enough flexibility for Member States to take into account the characteristics of their financial markets. In the opinion of the Group, it would not be appropriate to set the threshold for exercising the sell-out right by reference to the number of acceptances in the bid, because this would unduly work against the interests of the minority shareholders.

Member States should have the possibility to set the sell-out threshold, by reference to the capital, between 90% and 95%

The Group holds the view that, where there are several classes of securities outstanding, the sell-out right should apply on a class by class basis. As a consequence, the sell-out right can be exercised only for the class(es) in which the applicable threshold (percentage of capital of the relevant class) has been reached by virtue of a bid made in respect of the relevant class(es). The justification for such a class by class approach rests on it making possible a proportional application of the sell-out right, in the interest of both the minority shareholders (who may exercise their sell-out right as soon as the threshold is reached for the relevant class) and the majority shareholder (who will not be forced to buy out the minority shareholders if the threshold is not reached in the relevant class).

Where there are several classes of securities, the sell-out right should apply on a class by class basis, so as to guarantee a proportional application of the right

In the view of the Group, it appears necessary that Member States adopt provisions which would make sure that :

Member States should adopt provisions with

- the sell-out right would not be exercisable in situations where the threshold is reached only on a temporary basis;
- an adequate procedure would guarantee a fair treatment of all minority shareholders once one of them decides to exercise his sell-out right, which procedure should avoid the burdens of multiple applications.

respect to temporary situations and co-ordinated fair treatment of all minority shareholders

b) The consideration to be offered

The Group recommends a mirroring of the proposals made above with respect to the squeeze-out procedure.

Rules on sell-out consideration should be similar to the rules on squeeze-out consideration

To summarise, the Group takes the view that, in view of their justifications in the context of takeover bids, an initiative at EU level is necessary to ensure that the squeeze-out and sell-out rights exist in all Member States after a general takeover bid. With respect to both the definition of the applicable thresholds and the determination of the consideration to be offered, similar rules should be adopted throughout the EU while leaving sufficient room to Member States properly to take into account the peculiarities of their company law and the characteristics of their financial markets.

Summary :
The squeeze-out and sell-out rights should be offered throughout the EU on a similar basis after a general takeover bid

The Group considers that Member States should have the possibility to set the threshold for triggering the squeeze-out right by reference to the capital (between 90% and 95%). Alternatively, Member States should have the possibility to set the threshold by reference to the number of acceptances in the offer (at 90%). Where there are several classes of securities outstanding, the squeeze-out right should apply on a class by class basis, whichever of the two options mentioned above is retained at national level.

Squeeze-out threshold : two options

With respect to the consideration to be offered in exercising the squeeze-out right, the Group takes the view that the price offered in the takeover bid should be presumed to be a fair price if the bid has been accepted by shareholders holding 90% or more of the share capital in respect of which the offer has been made. If a mandatory bid has been made, the mandatory bid price should be rebuttably presumed to be a fair price in the squeeze-out procedure even if the bid has not been accepted by shareholders holding 90% or more of the relevant share capital. In all other situations, the consideration should be determined by expert(s). Cash, or a cash alternative, should be offered if it was offered in the takeover bid.

Squeeze-out consideration : reference to the takeover price where relevant

The Group considers that Member States should set the threshold for triggering the sell-out right by reference to the capital (between 90% and 95%). Where there are several classes of securities outstanding, the sell-out right should apply on a class by class basis.

Sell-out threshold set by reference to the capital

With respect to the consideration to be obtained in exercising the sell-out right, the Group recommends a mirroring of the proposals made above regarding the squeeze-out right.

Sell-out consideration : mirroring of the squeeze-out rules

Brussels, 10 January 2002

ANNEX 1

THE HIGH LEVEL GROUP OF COMPANY LAW EXPERTS' TERMS OF REFERENCE

PRESS RELEASE OF 4 SEPTEMBER 2001

Company law: Commission creates High Level Group of Experts

The European Commission has set up a High Level Group of Company Law Experts that will help the Commission to prepare a new proposal for a Directive on the conduct of takeover bids and to define new priorities for the broader future development of company law in the European Union. The group comprises seven members, selected on the basis of their competence in company law and the Commission's desire that the members should have broad experience of the various legal and economic systems in the EU. The group will hold its first meeting on 11 September 2001. It is due to deliver a preliminary report on its recommendations to the Commission concerning rules for takeover bids by the end of 2001 and a final report concerning broader issues for the development of EU company law by mid-2002.

Internal Market Commissioner Frits Bolkestein said "This High Level Group has been set up because the Commission wants to get top quality independent advice from leading European experts in the first instance on pan-European rules for takeover bids and subsequently on key priorities for modernising company law in the European Union. A clear set of pan-EU rules for the conduct of takeovers stands to benefit European companies and shareholders, especially minority shareholders, by clarifying their rights and obligations. It would also facilitate the goal set by the Lisbon Summit of restructuring the European economy to make it the most competitive in the world by 2010. The European Parliament's vote of 4 July to not endorse a previous proposal for a Takeovers Directive was very disappointing. However, the creation of this Group demonstrates the Commission's determination to come forward as soon as possible in 2002 with a new proposal that takes account of the broadest range of views".

The group comprises:

- Chairman Jaap WINTER, Professor at the Erasmus University of Rotterdam and legal advisor UNILEVER, Netherlands
- José Maria GARRIDO GARCIA, Professor at the University of Castilla-La Mancha, Spain
- Klaus J. HOPT, Geschäftsführender Direktor Max Planck-Institut, Germany
- Jonathan RICKFORD, Consultant for the Department of Trade and Industry, United Kingdom
- Guido ROSSI, former President of the Italian stock exchange supervisory body CONSOB, Italy
- Jan CHRISTENSEN, Professor at the University of Copenhagen, Denmark
- Joëlle SIMON, Legal Affairs Director, French Business Confederation - MEDEF, France.

The Group will hold its first meeting on 11 September 2001. Taking account of the positions of the EU's Council of Ministers and the European Parliament during the last stages of negotiation of the previous proposal for a Takeovers Directive (see MEMO/01/255), the Group of High Level Experts will initially consider the following three issues:

- how to ensure the existence of a level playing field in the EU concerning the equal treatment of shareholders across Member States
- the definition of the notion of an "equitable price" to be paid to minority shareholders and
- the right for a majority shareholder to buy out minority shareholders ("squeeze-out procedure").

The Group is due to deliver a report on these issues, including possible solutions, to the Commission's services by the end of 2001.

During a second stage, the Group is due to provide recommendations for a modern regulatory European company law framework designed to be sufficiently flexible and up-to-date to meet companies' needs, taking into account fully the impact of information technology. The Group will examine best practice developed in the Member States (as well as in the USA) and consider a range of issues including the following:

- the creation and functioning of companies and groups of companies, co-operatives and mutual enterprises, including corporate governance
- shareholders' rights, including cross-border voting and virtual general meetings
- corporate restructuring and mobility (for instance, the transfer of the corporate seat)
- the possible need for new legal forms (for instance, a European Private Company, which would be of particular relevance for SMEs)
- the possible simplification of corporate rules in light of the SLIM report on the Second Company Law Directive of 13 December 1976 on the formation and capital maintenance of public limited liability companies.

The Group is due to deliver a final report to the Commission's services by mid-2002.

ANNEX 2

WORKING METHODS
OF
THE HIGH LEVEL GROUP OF COMPANY LAW EXPERTS

The Group began its work on 11 September 2001, and finished the first phase with the presentation of the report on 10 January 2002 in Brussels.

In spite of a very tight schedule, the Group considered it essential to canvass opinions from a number of institutions and organizations.

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

The Group invited leading representatives of several organizations interested in the regulation applicable to takeover bids within the European Union to confidential hearings in Brussels. The Group had a total of 4 hearings on 5 November 2001, where representatives from the following organizations were heard :

- ETUC (European Trade Union Confederation)
- Euroshareholders
- FESE (Federation of European Stock Exchanges)
- UNICE (Union of Industrial and Employers' Confederations of Europe).

Others submitted comments to the Group at their own initiative.

A summary of the main comments submitted to the Group, either in the hearings or in written form, is included in Annex 3.

The report of the Group is submitted to the European Commission and presented to the Press on 10 January 2002 in Brussels.

ANNEX 3

SUMMARY OF COMMENTS TO THE HIGH LEVEL GROUP OF COMPANY LAW EXPERTS SUBMITTED IN THE ORGANISED HEARINGS AND OTHERWISE

Despite the tight time constraint, the Group decided to hold some hearings on 5 November 2001. It invited seven organisations representing at the European level the most interested parties in the debate about the Takeover bids Directive. Four of them accepted the invitation: UNICE (Union of Industrial and Employers' Confederations of Europe), ETUC (European Trade Union Confederation), Euroshareholders and FESE (Federation of European Securities Exchanges). Their views are summarised here under.

1. SQUEEZE-OUT

It was agreed that a common squeeze-out procedure would be useful to help companies to restructure themselves. A balance should be reached between the need for the fair treatment of minority shareholders and the competitiveness of the European capital market. Therefore, a new directive on takeover bids should allow a majority shareholder who has reached a sufficiently high threshold (90 or 95% of the share capital) to buy out the remaining shares at a defined price.

In order to achieve a balanced position, the majority of the participants was also in favour of the institution of the right for minority shareholders to sell out their shares to the majority shareholder.

One proposal was (i) the adoption of a procedure such that: if, for example, a 2/3 majority of the shareholders, excluding the dominant shareholder, decides to start a sell-out of the remaining shares, then a squeeze out procedure should be triggered, and (ii) an equitable price would be required.

2. EQUITABLE PRICE

It was agreed that the definition of the equitable price to be paid in the case of takeover bids, and above all in the case of a mandatory bid, is of the utmost importance. It should aim at the fair treatment of minority shareholders and the competitiveness of the European capital market, and should be based upon equal treatment of shareholders, at least in the same class of shares. A consensus seemed to be reached on the idea of the highest price paid by the offeror during a relevant period (to be indicated in the directive), although this price could be altered by the competent authorities in certain circumstances.

The following needs were also expressed: (i) that sufficient information should be provided to enable proper assessment of the price being offered, (ii) that shareholders should be offered the possibility to ask an independent institution to give its view about this price, and (iii) that due attention should be given to the marketability of the securities offered as a consideration.

3. LEVEL PLAYING FIELD

It was unanimously agreed (i) that the decision whether or not to sell a company belongs in essence to its owners, that is the shareholders and, in particular, not the managers of the company, and (ii) that there is a need for a level playing field for shareholders in the EU, and a directive on takeover bids is an important part of it.

On the other hand, there was a division on the content of the level playing field. Some suggested that attention should be given not only to take-over legislation but also to existing company law. Some proposed to reduce barriers to an absolute minimum and to prescribe the “one share-one vote” principle; others favoured the disclosure of the restrictions rather than the removal of these restrictions.

Proposals were made for (i) co-ordinating the rules on takeover bids with those on disclosure requirements and (ii) examining the possibility of establishing equivalent treatment between the US and the EU.

4. OTHER ISSUES

Some other ideas were submitted to the Group:

(i) introduction of a common threshold for the launch of a mandatory bid, with a preference for a fixed threshold system where the level to be fixed could be left up to national legislators within an established range;

(ii) re-examination of the social issues and recognition of the right for the employees to be consulted, and not only informed about the conditions of the bid; the Board should consult the employees before preparing its report on the bid, in order to have a joint evaluation of the bid and possible defensive measures.

ANNEX 4

OVERVIEW OF MOST IMPORTANT BARRIERS TO TAKEOVER BIDS

1. PRE-BID

1.1. BARRIERS TO THE ACQUISITION OF SHARES IN THE COMPANY

- Ownership caps
- Golden shares (some types)
- Restrictions to the transferability of shares (applicable to non-listed shares; listed shares may be subject to limitations in shareholders' agreements)
- Lack of access to the underlying shares (where depository receipts are traded instead of underlying shares)
- Dilution of the shares acquired by bidder or potential bidder (poison pills; certain classes of poison debt)
- Reduction of available shares by means of: acquisition of own shares; cross-shareholdings; pyramiding.

1.2. BARRIERS TO EXERTION OF CONTROL IN THE GENERAL MEETING

- Voting caps
- Shares with double or multiple voting rights
- Shares with limited or non-existent voting rights; participation rights carrying no votes
- Time lapse voting schemes
- Discriminatory quorum requirements
- Irrevocable proxies
- Binding voting agreements; voting trusts
- Supermajorities
- Golden shares (some types)

1.3. BARRIERS TO EXERTION OF CONTROL IN THE BOARD OF DIRECTORS

- Co-determination
- Other corporate structures that limit shareholders' control of the board (sociétés en commandite)
- Shares with special rights to appoint directors
- Staggered boards
- Fixed-term appointments for board members
- Qualifications for board membership (e.g. prior shareholding for a specified period)
- Golden parachutes
- Supermajority required to dismiss and/or elect the board

1.4. BARRIERS TO EXERTION OF CONTROL OVER THE ASSETS OF THE COMPANY

- Sale of assets ("scorched earth")

- Spin-offs
- Lock-ups of corporate assets (“crown jewels”)
- Change of control clauses in non-financial agreements

1.5. CREATION OF FINANCIAL BURDENS AS A CONSEQUENCE OF THE TRANSFER OF CONTROL

- Poison debt
- Golden and tin parachutes
- Change of control clauses in loan agreements

1.6. CREATION OF REGULATORY PROBLEMS

- Defensive acquisitions creating antitrust problems or businesses subject to special regulation
- Defensive acquisitions invoking cross-holding rules

2. POST-BID (N.B. SOME PRE-BID BARRIERS MAY ALSO BE ADOPTED POST-BID)

2.1. REDUCTION OF SHARES ACQUIRABLE BY BIDDER

- Share buybacks; self-bid; delisting bid
- Issue of capital to a friendly party (”white squire”)

2.2. INCREASE OF THE COST OF THE BID

- Issue of share capital with pre-emption rights

2.3. CREATION OF REGULATORY PROBLEMS

- Litigation (on the bid itself, or on antitrust or special regulatory problems, etc.)

2.4. SEARCH FOR ALTERNATIVE BIDDER

- ”White Knight”

2.5. ACQUISITION OF THE BIDDER’S INTEREST IN THE COMPANY

- ”Greenmail”

2.6. BID FOR THE BIDDER

- ”Pacman” Defence

ANNEX 5

FINANCIAL FLOWS BETWEEN EUROPE AND THE US OVER THE RECENT YEARS

1. MERGERS AND ACQUISITIONS ACTIVITY 1995-1999 (SOURCE OECD 2001)

1.1. Inward cross-border M&As, Europe

USD billion

		Acquirer	
Year	Total	U.S.A	Europe
1995	85,9	25,7	53,9
1996	96,5	36,4	48,0
1997	139,4	41,1	83,9
1998	229,5	64,1	137,4
1999	390,5	83,1	282,2

Allocation among the biggest European acquirers

Year	France	U.K	Germany
1995	10,0	9,2	12,1
1996	8,6	6,3	5,6
1997	14,1	24,8	9,8
1998	25,9	19,8	16,0
1999	70,3	62,5	69,7

1.2. Outward cross-border M&As, Europe

USD billion

		Targets			
Year	Total	Europe		North America	
1995	93,4	53,9	57,7%	38,1	40,8%
1996	112,0	48,0	42,9%	53,4	47,7%
1997	158,1	83,9	53,1%	55,4	35,1%
1998	352,1	137,4	39,0%	171,9	48,8%
1999	553,0	282,2	51,0%	203,5	36,8%

1.3. Inward cross-borders M&As, United States

USD billion

		Acquirer
Year	Total	Europe
1995	55,2	34,7
1996	70,4	51,5
1997	86,0	52,8
1998	220,4	170,2
1999	253,1	202,0

Allocation among the biggest European acquirers

Year	U.K.	Germany	France
1995	13,8	11,1	2,2
1996	19,5	12,5	6,6
1997	13,7	4,7	8,8
1998	85,1	47,3	13,1
1999	110,9	16,3	22,6

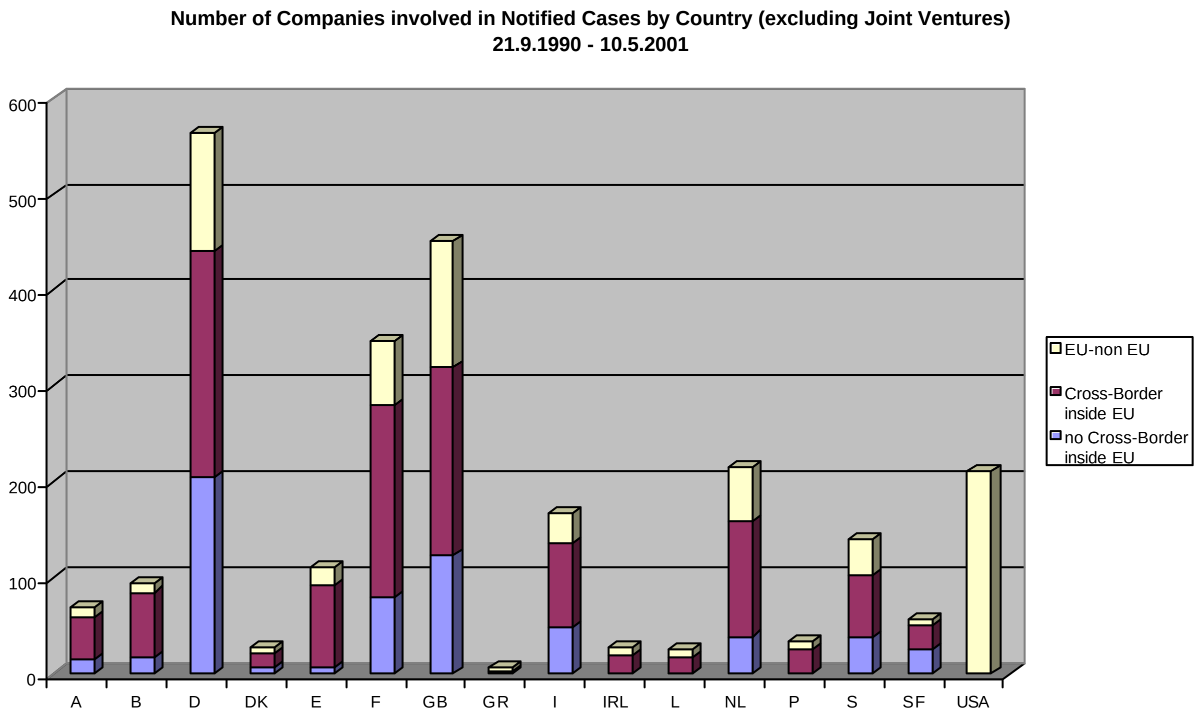
1.4. Outward cross-border M&As, United States

USD billion

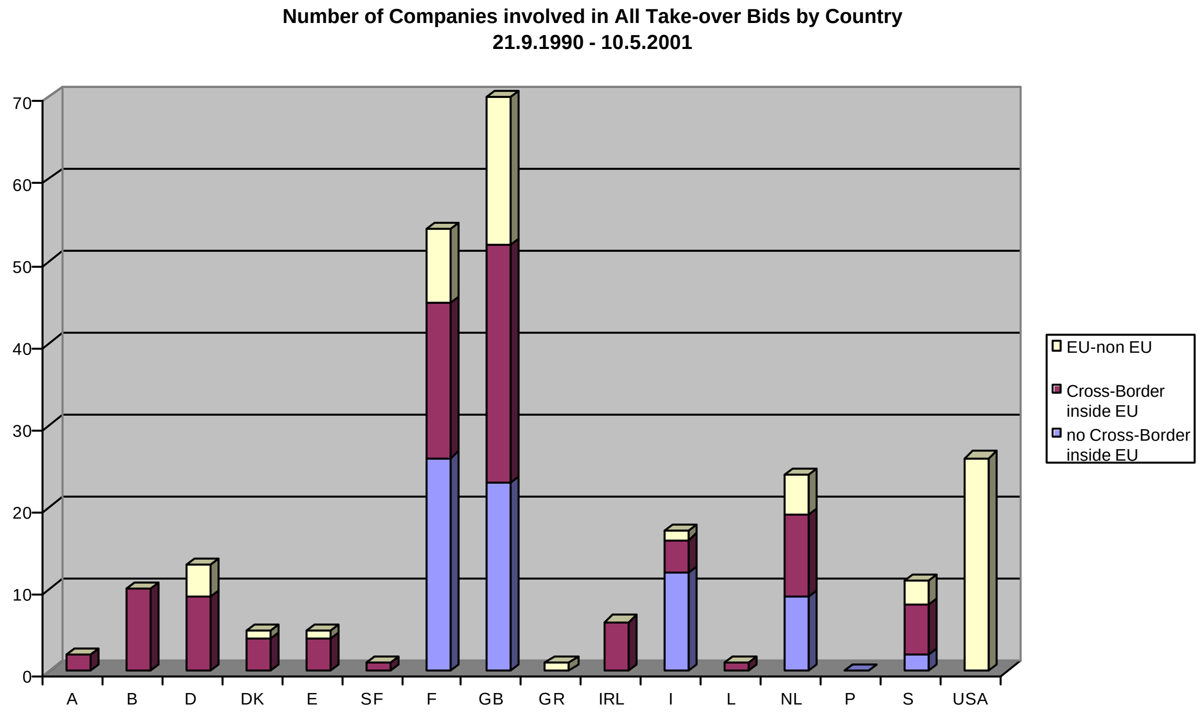
		Targets	
Year	Total	Europe	
1995	59,6	25,7	43,1%
1996	64,3	36,4	56,6%
1997	83,5	41,1	49,1%
1998	146,8	64,1	43,7%
1999	127,9	83,1	65,0%

2. Number of cases notified to the EU under the Mergers Regulation 1990-2000 (Source European Commission DG Competition)

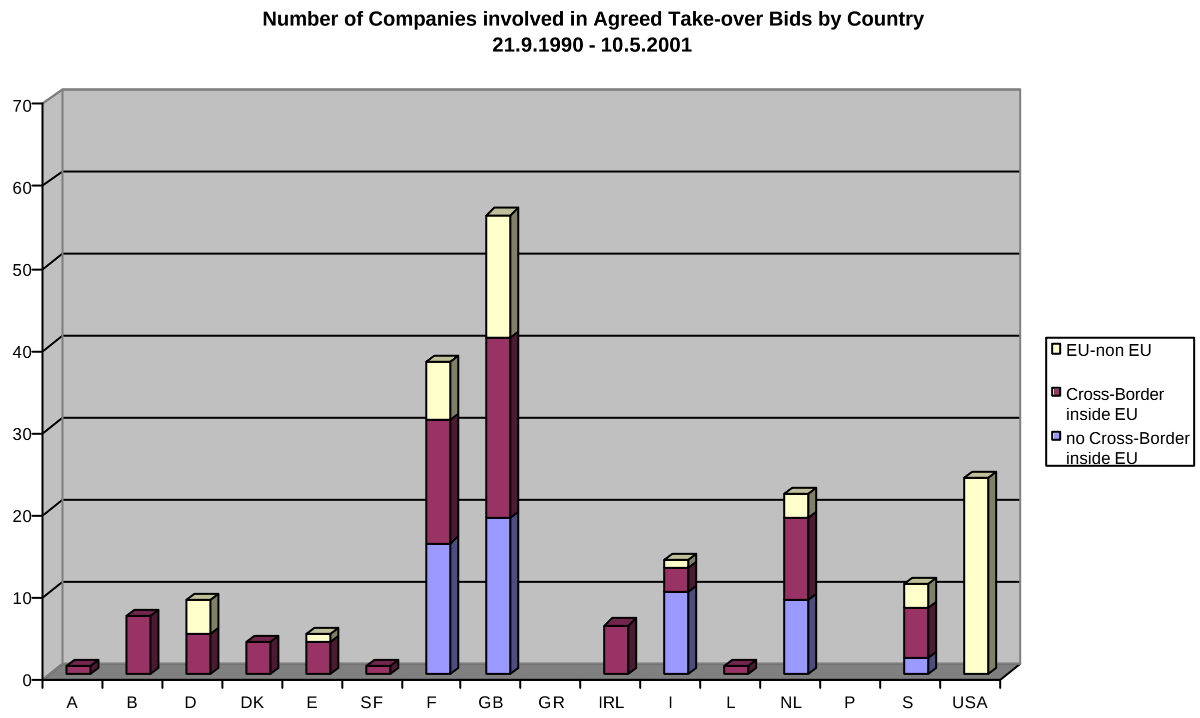
2.1 Total number of companies involved in notified cases by country



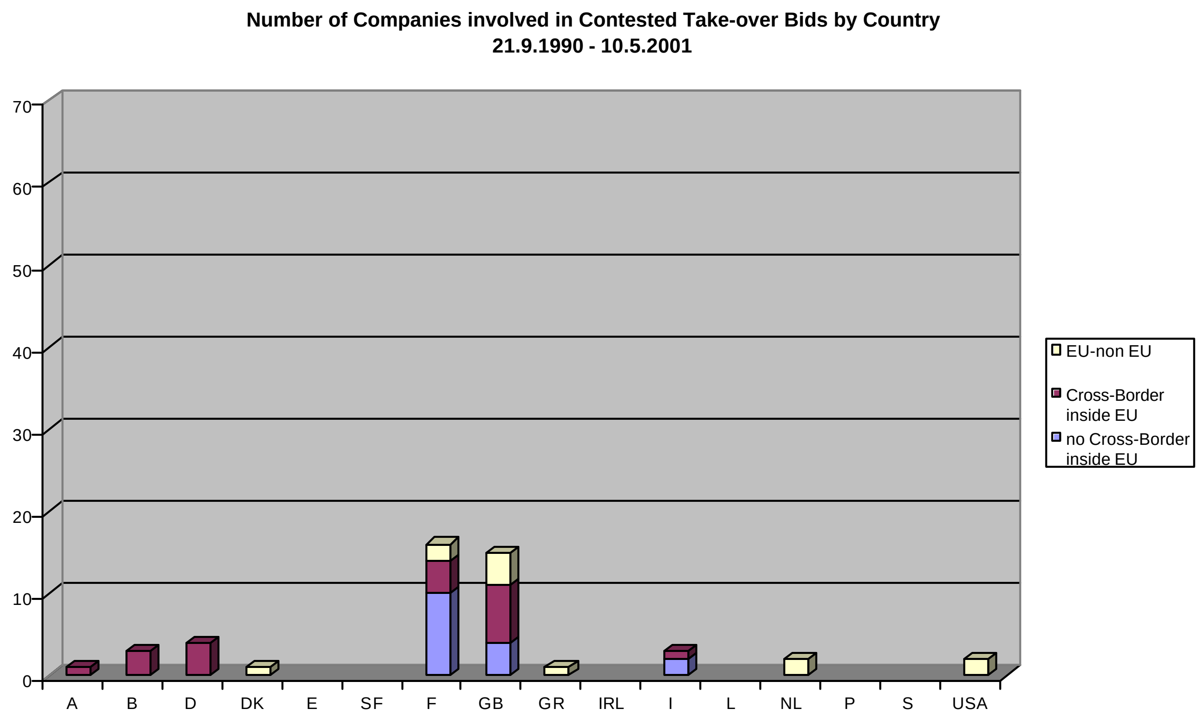
2.2 Total number of companies involved in takeover bids by country



2.3 Number of companies involved in agreed takeover bids by country



2.4 Number of companies involved in contested takeover bids by country



ANNEX 6

EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE ON COMPANY LAW CONCERNING TAKEOVER BIDS : JOINT TEXT APPROVED BY THE CONCILIATION COMMITTEE ON 6 JUNE 2001

EUROPEAN UNION

THE EUROPEAN PARLIAMENT | **THE COUNCIL**

Brussels, 19 June 2001
(OR. en)

1995/0341 (COD)
C5-0221/2001

PE-CONS 3629/1/01
REV 1

DRS 27
CODEC 493

LEGISLATIVE ACTS AND OTHER INSTRUMENTS

Subject : Directive of the European Parliament and of the Council on company law concerning takeover bids

Joint text
approved by the Conciliation Committee
provided for in Article 251(4) of the EC Treaty

DIRECTIVE 2001/ /EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of

on company law concerning takeover bids

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 44 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], in the light of the joint text approved by the Conciliation Committee on 6 June 2001,

Whereas:

(1) It is necessary to coordinate certain safeguards which Member States require of companies and firms within the meaning of the second paragraph of Article 48 of the Treaty for the protection of members and others, in order to make 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 their securities are admitted to trading on a regulated market within the scope of this Directive.

(3) Only action at Community level can ensure an adequate level of protection for holders of securities throughout the Community and provide for minimum guidelines for the conduct of takeover bids. Member States acting independently are not able to establish the same level of protection especially in the case of cross-border takeovers or acquisitions of control.

(4) 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.

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[1] OJ C 162, 6.6.1996, p. 5 and OJ C 378, 13.12.1997, p. 10.

[2] OJ C 295, 7.10.1996, p. 1.

[3] Opinion of the European Parliament of 26 June 1997 (OJ C 222, 21.7.1997, p. 20), confirmed on 27 October 1999, Council Common Position of 19 June 2000 (OJ C 23, 24.1.2001, p. 1) and Decision of the European Parliament of 13 December 2000 (not yet published in the Official Journal.) Decision of the European Parliament of and Decision of the Council of.

(5) Member States should take the necessary steps in order to protect holders of securities, and particularly those having minority holdings after the acquisition of control of their company. Such protection should be ensured by obliging the person who acquired control of a company to make a bid to all holders of securities for all of their holdings. It should be allowed, during a transitional period, to ensure this protection through other appropriate and at-least-equivalent means on condition that these means are specific to the transfer of control and include specific financial compensation for the minority shareholders. Member States may, in addition to the protection provided for by a mandatory bid or other equivalent means, provide for further instruments aimed at the protection of the interests of holders of securities.

(6) 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 legislation implementing this Directive enters into force.

(7) Member States may 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 make a bid simultaneously with the acquisition of control of the company.

(8) The obligation to launch a bid does not apply in the case of the acquisition of securities which do not carry voting rights in ordinary general meetings. Member States may establish that the obligation to make a bid to all holders of securities should include not only securities carrying voting rights but also securities only carrying voting rights in specific circumstances or carrying no voting rights at all.

(9) 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.

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

(11) Supervision may be exercised by self-regulatory bodies.

(12) In accordance with general principles of Community law, and in particular the right to a fair hearing, decisions of a supervisory authority will in appropriate circumstances be susceptible to review by an independent court or tribunal. However, this Directive leaves it to Member States 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.

(13) 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.

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

(15) 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 at the same time to the representatives of the company's employees or, failing that, to the employees directly.

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

(17) 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 it and should cooperate and supply information in an efficient and effective manner without delay to other authorities supervising capital markets.

(18) To avoid operations which 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.

(19) 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.

(20) It is necessary that Member States 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 and the irrevocability of the bid and the conditions permitted.

(21) It is important to entrust the Contact Committee set up by Article 20 of Council Directive 79/279/EEC of 5 March 1979 coordinating the conditions for the admission of securities to official stock exchange listing [4] with the task of assisting Member States and the supervisory authorities in the implementation of this Directive, particularly in areas such as cross-border takeover bids and the mutual recognition of offer documents, and to advise the Commission, if necessary, on additions or amendments to this Directive,

HAVE ADOPTED THIS DIRECTIVE:

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4 OJ L 66, 16.3.1979, p. 21. Directive as last amended by Directive 88/627/EEC (OJ L 348, 17.12.1988, p. 62).

Article 1

Scope

1. The coordination measures prescribed by this Directive shall apply to 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 such securities are admitted to trading on a regulated market within the meaning of Article 1(13) of Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field [5] in one or more Member States (hereinafter "regulated market").

2. The measures prescribed by this Directive shall not apply to takeover bids for securities is sued by companies the object of which is the collective investment of capital provided by the public, and 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 significantly vary from their net asset value shall be regarded as equivalent to such repurchase or redemption.

Article 2

Definitions

For the purposes of this Directive:

(a) "takeover bid" and "bid" mean a public offer (other than by the offeree company itself) made to the holders of the securities of a company to acquire all or part of such securities. A bid may be either mandatory or voluntary, and must follow or have as its objective the acquisition of control;

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

(c) "offeror" means any natural person or legal entity in public or private law making a bid;

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

Persons controlled by another person within the meaning of Article 8 of Council Directive 88/627/EEC of 12 December 1988 on the information to be published when a major holding in a listed company is acquired or disposed of [6] shall be deemed to be persons acting in concert with such persons and with each other;

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[5] OJ L 141, 11.6.1993, p. 27. Directive as amended by Directive 95/26/EC (OJ L 168, 18.7.1995, p. 7).

[6] OJ L 348, 17.12.1988, p. 62.

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

Article 3

General principles

1. For the purposes of the implementation of this Directive, Member States shall ensure that the rules or other arrangements made or introduced pursuant to this Directive respect the following principles:

(a) all holders of securities of an offeree company of the same class are to be given equivalent treatment; in particular, 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; when advising the holders of securities, the board of an offeree company shall present its views on the effects of implementation of the bid on employment, conditions of employment and the company locations.

(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 shall announce a bid only after ensuring that it can fulfil in full any cash consideration, if so offered, and after having taken 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. In order to attain the objectives set out in paragraph 1, Member States:

(a) shall ensure that rules are in force which satisfy the minimum requirements set out in this Directive;

(b) may have additional conditions and more stringent provisions than those required by this Directive to regulate bids.

Article 4

Supervisory authority

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 or associations or private bodies recognised by national law or by public authorities expressly empowered for that purpose by national law. Member States shall ensure that these authorities exercise their functions impartially and independently of all parties to the bid. Member States shall inform the Commission of these designations and shall specify all divisions of functions that may be made.

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. When this is not the case subparagraph (b) or (c) shall apply.

(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 has to determine 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 15(1) and were admitted simultaneously, the supervisory authorities of these Member States shall agree on who is to be the competent authority for supervising the bid within four weeks after the date mentioned in Article 15(1). Otherwise the competent authority shall be determined by the offeree company on the first trading day following the expiry of the period of time mentioned in the first sentence.

(d) Member States shall ensure that rules are in force requiring the decisions referred to in subparagraph (c) to be made public.

(e) In the cases referred to in subparagraphs (b) and (c) above, matters relating to the consideration offered in the case of a bid, particularly the price, and matters relating to the procedure of the bid, 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 88/627/EEC, Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing [7] and Council Directive 93/22/EEC, 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 Article 4(2) (b), (c) and (e). 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 should 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 purposes of investigating any actual or alleged breaches of the rules made or introduced to implement this Directive.

5. Provided that the general principles referred to 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, on the basis of a reasoned decision, grant derogation from these rules in particular types of cases and in specific appropriate cases.6. This Directive does not affect the powers of the Member States to designate judicial or other authorities responsible for dealing with disputes and for deciding on irregularities committed in the bid procedure nor does it affect 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 does 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 powers of the Member States to determine the legal position concerning the liability of supervisory authorities or concerning litigation between the parties to a bid.

<u>Article 5</u>

Protection of minority shareholders; mandatory bid

1. Where a natural person or legal entity 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

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

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 rules are in force which oblige this person to make a bid as a means to protect the minority shareholders of that company. This bid shall be addressed to all holders of securities for all their holdings at an equitable price. When the consideration offered by the offeror does not consist of liquid securities admitted to trading on a regulated market, such consideration has to include a cash consideration at least as an alternative.

In any case, the offeror must provide a consideration in cash at least as an alternative, if he, alone or in conjunction with persons acting in concert with him, has, during a period commencing not less than 3 months before the bid was made public pursuant to Article 6(1) and ending on the expiry of the acceptance period, acquired for cash more than 5% of the shares or voting rights in the offeree company.

2. Where a voluntary bid has been made in accordance with this Directive to all holders of securities for all their holdings and control has been obtained, the obligation to launch a bid no longer applies.

3. By way of derogation from paragraph 1, Member States, which provide at the time of adoption of this Directive for other appropriate and at-least-equivalent means in order to protect the minority shareholders of the company, may continue to apply such means for one year following the date mentioned in Article 15(1), on the condition that these means:

(a) are specific to the transfer of control, and

(b) include specific financial compensation for the minority shareholders.

4. In addition to the protection provided under paragraphs 1 and 3, Member States may provide for further instruments aiming at the protection of the interests of holders of securities insofar as these instruments do not hinder the normal course of the bid referred to in paragraph 1.

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

Article 6

Information

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

2. Member States shall ensure that rules are in force requiring the offeror 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 board of the offeree company shall communicate it to the representatives of its employees or, where there are no such representatives, to the employees themselves.

Where the offer document is subject to the prior approval of the supervisory authority and once it has been approved, it shall be recognised, subject to any translation, in the other Member State or Member States on whose markets the securities of the offeree company are admitted to trading, without its being necessary to obtain the approval of the supervisory authorities of that or those Member States and without their being able to require additional information to be included in the offer document. The supervisory authorities may, however, require that the offer document include information specific to the market of the Member State or Member States on whose markets the securities of the offeree company are admitted to trading concerning 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 the tax arrangements to which the consideration offered to the holders of securities will be subject.

3. Those rules shall require that the offer document 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 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 basis of the valuation used in determining it, with particulars of the way in which that consideration is to be given;

(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 continuation of the business of the offeree company and, so far as affected by the bid, of the offeror company, and with regard to the continued employment of their employees and their management, including any material change in the conditions of employment. This relates in particular to the offeror's strategic planning for those companies and the likely impact on jobs and locations;

(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, in the case of companies together with their type, name and registered office, and their relationship with the offeror and where possible with the offeree company.

(m) information on which national law will govern the contracts resulting from the bid between the offeror and the holders of securities of the offeree company.

4. Member States shall ensure that rules are in force requiring the parties to a bid 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 to be specified by the offeror in the offer document in accordance with Article 6(3)(i) 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 referred to 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 prior notice of its intention to close the bid.

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

Article 8

Disclosure

1. Member States shall ensure that rules are in force which require a bid to 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, and which particularly avoid the publication or dissemination of false or misleading information.

2. Member States shall ensure that rules are in force which provide for the disclosure of all information or documents required 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 are in force requiring the following:

(a) during the period set below, the board of the offeree company shall obtain the prior authorisation of the general meeting of the shareholders, given for this purpose, before taking any action which may result in the frustration of the bid, other than seeking alternative bids, and notably before the issuing of shares which may result in a lasting impediment for the offeror obtaining control over the offeree company. Such authorisation is required at all events after the board of the offeree company has received the information referred to in Article 6(1), first sentence, concerning the bid and until the result of the bid is made public or the bid lapses. Member States may provide that such authorisation is required from an earlier time such as when the board of the offeree company becomes aware that the bid is imminent;

(b) as regards decisions taken before the period referred to above and not yet partly or completely implemented, approval or confirmation by the general meeting of the shareholders is required if the decision was outside the normal course of business and its implementation may result in the frustration of the bid;

(c) for the purpose of obtaining prior authorisation of the general meeting of the shareholders as referred to above, Member States may provide for rules allowing a general meeting to be convened at short notice, provided that this meeting is not organised less than two weeks after its notification;

(d) 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 of implementation on all the interests of the company, including employment, and on the offeror's strategic planning for the offeree company and its likely impact on jobs and locations as set out in the offer document pursuant to Article 6(3)(h). The board of the offeree company shall at the same time communicate this opinion to the representatives of its employees or, where there are no such representatives, to the employees themselves. Where a separate opinion of the employees' representatives on the effects of implementation on employment is made available to the board of the offeree company in sufficient time, it shall be enclosed.

2. Member States may allow the board of the offeree company to increase the share capital during the period for acceptance of the bid on the condition that prior authorisation has been received from the general meeting of shareholders not earlier than 18 months before the beginning of the period of acceptance of the bid, with full recognition of the right of pre-emption of all shareholders as provided for in Article 29(1) of Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in

respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent [8].

Article 10

Rules applicable to the conduct of bids

In addition Member States shall ensure that rules are in force which govern the conduct of bids for at least the following matters:

(a) lapse of the bid;

(b) revision of bids;

(c) competing bids;

(d) disclosure of the result of bids;

(e) irrevocability of the bid and conditions permitted.

Article 11

Contact Committee

1. The Contact Committee set up by Article 20 of Directive 79/279/EEC shall also have as its functions:

(a) to facilitate, without prejudice to the provisions of Articles 226 and 227 of the Treaty, the harmonised application of this Directive through regular meetings dealing with practical problems arising in connection with its application;

(b) to advise the Commission, if necessary, on additions or amendments to this Directive.

2. It shall not be the function of the Contact Committee to appraise the merits of decision taken by the supervisory authorities in individual cases.

Article 12

Sanctions

Each Member State shall determine the sanctions to be applied for infringement of the measures taken pursuant to this Directive. The sanctions shall be sufficient to promote compliance with those measures.

[8] OJ L 26, 30.1.1977, p. 1. Directive as last amended by the 1994 Act of Accession.

Article 13

Revision of Article 4(2)

Three years after the date referred to in Article 15 (1), the European Parliament and the Council, acting on a proposal from the Commission, shall examine and if necessary revise Article 4(2) in the light of the experience acquired in applying Article 4(2).

Article 14

Amendment of Article 1(1) of Directive 88/627/EEC

Article 1(1) of Directive 88/627/EEC shall be replaced by the following:

"1. Member States shall make subject to this Directive natural persons and legal entities in public or private law who acquire or dispose of, directly or through intermediaries, holdings meeting the criteria laid down in Article 4(1) which involve changes in the holdings of voting rights in companies incorporated under their law the shares of which are admitted to trading on one or several regulated markets within the meaning of Article 1(13) of Directive 93/22/EEC.".

Article 15

Transposition of the Directive

1. Member States shall ensure that the laws, regulations, administrative provisions or other arrangements necessary for them to comply with this Directive are in force before [*]. Member States may however postpone compliance with Article 9 until [**]. They shall forthwith inform the Commission thereof.

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

2. Member States shall communicate to the Commission the provisions or other arrangements referred to in paragraph 1.

Article 16

Entry into force of the Directive

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

[*] Four years after the entry into force of this Directive.
[**] Five years after the entry into force of this Directive.

Article 17

Addressees of the Directive

This Directive is addressed to the Member States.

Done at ,

For the European Parliament For the Council

The President The President

EUROPEAN UNION

THE EUROPEAN PARLIAMENT **THE COUNCIL**

Brussels, 29 June 2001
(OR. en)

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LEGISLATIVE ACTS AND OTHER INSTRUMENTS: CORRIGENDUM

Subject : Directive of the European Parliament and of the Council on company law concerning takeover bids

Page 13, Article 4(5)

The following shall be inserted as a first paragraph:

"The supervisory authorities shall have all the powers necessary for the exercise of their functions which shall include the duty to ensure that the parties to the offer comply with the rules laid down pursuant to this Directive.".