Procedure file

Basic information

COD - Ordinary legislative procedure (ex-codecision procedure) Directive	2002/0240(COD)
Company law: takeover bids Amended by 2012/0150(COD) See also 2012/2262(INI) Amended by 2016/0362(COD) Subject 2.60.04 Economic concentration, mergers, takeover bids, holding companies 3.45.01 Company law	Procedure completed

Key players

European Parliament

Committee responsible	Rapporteur	Appointed
JURI Legal Affairs and Internal Market	PPE-DE LEHNE Klaus-Heiner	15/04/2002

Committee for opinion	Rapporteur for opinion	Appointed
ECON Economic and Monetary Affairs (Associated committee)	ELDR HUHNE Christopher	27/11/2002
ITRE Industry, External Trade, Research, Energy	PPE-DE CHICHESTER Giles	23/01/2003
EMPL Employment and Social Affairs	PSE VAN DEN BURG Ieke	12/11/2002

Council of the European Union

Council configuration	Meeting	Date
Justice and Home Affairs (JHA)	2574	22/12/2003
Environment	2556	22/12/2003
Competitiveness (Internal Market, Industry, Research and Space)	2510	19/05/2003
Competitiveness (Internal Market, Industry, Research and Space)	2490	03/03/2003
Competitiveness (Internal Market, Industry, Research and Space)	2462	14/11/2002

European Commission

Commission DG	Commissioner
Financial Stability, Financial Services and Capital Markets Union	

Key events

01/10/2002	Additional information		Summary

02/10/2002	Legislative proposal published	COM(2002)0534	Summary
21/10/2002	Committee referral announced in Parliament, 1st reading		
14/11/2002	Debate in Council	2462	
03/03/2003	Debate in Council	2490	Summary
19/05/2003	Debate in Council	2510	Summary
27/11/2003	Vote in committee, 1st reading		Summary
27/11/2003	Committee report tabled for plenary, 1st reading	A5-0469/2003	
15/12/2003	Debate in Parliament		
16/12/2003	Decision by Parliament, 1st reading	T5-0571/2003	Summary
22/12/2003	Act adopted by Council after Parliament's 1st reading		
21/04/2004	Final act signed		
21/04/2004	End of procedure in Parliament		
30/04/2004	Final act published in Official Journal		

Technical information

Procedure reference	2002/0240(COD)
Procedure type	COD - Ordinary legislative procedure (ex-codecision procedure)
Procedure subtype	Legislation
Legislative instrument	Directive
	Amended by 2012/0150(COD) See also 2012/2262(INI) Amended by 2016/0362(COD)
Legal basis	EC Treaty (after Amsterdam) EC 044-p1; Rules of Procedure EP 57
Stage reached in procedure	Procedure completed

Documentation gateway

Legislative proposal		COM(2002)0534 OJ C 045 25.02.2003, p. 0001-0017 E	02/10/2002	EC	Summary
Economic and Social Committee: opinion, report		CES0589/2003 OJ C 208 03.09.2003, p. 0055-0057	14/05/2003	ESC	
Committee report tabled for plenary, 1st reading/single reading		A5-0469/2003	27/11/2003	EP	
Text adopted by Parliament, 1st reading/single reading		T5-0571/2003 OJ C 091 15.04.2004, p. 0029-0109 E	16/12/2003	EP	Summary
Follow-up document		COM(2012)0347	28/06/2012	EC	Summary

Additional information

European Commission	EUR-Lex

Final act

Directive 2004/25
OJ L 142 30.04.2004, p. 0012-0023 Summary

Company law: takeover bids

It is recalled that in 1989 the Commission presented a first proposal concerning takeovers and other general bids, but decided to revise its proposal on the basis of consultations with the Member States as of June 1993. Then, in 1996 the Commission presented to the Council and to the European Parliament a new proposal. This proposal for a "framework" directive was drawn up in the light of consultations with the Member States, setting out general principles but not aiming at a full harmonisation. After agreement between the European Parliament and the Council within the Conciliation Committee in June 2001 on this proposal, the European Parliament rejected the compromise text. Following this failure to adopt the proposed Directive, the Commission appointed a group of experts (the Winter Group) for the purpose of providing a basis for a new proposal.?

Company law: takeover bids

PURPOSE : proposal for a new regulation on takeover bids CONTENT : the Commission's previous proposal (COD950341) on takeover bids was rejected at third reading by the European Parliament on 4 July 2001, for the following reasons: - it rejected the principle whereby, in order to take defensive measures in the face of the bid, the board of the offerree company must first obtain the approval of shareholders once the bid has been made, and this until such time as a level playing field is created for European companies facing a takeover bid - the protection for employees of companies involved in a bid was insufficient; - the proposal failed to achieve a level playing field with the United States. This new proposal pursues the same objectives as its predecessor. It aims to strengthen the legal certainty of cross-border takeover bids in the interests of all concerned and to ensure protection for minority shareholders in the course of such transactions. The following provisions are the main ones which differ from the Commission's previous proposal: - there is a definition of the price to be paid in the case of a mandatory bid. To ensure that minority shareholders obtain the best price in all cases and to afford the offeror legal certainty, the highest price paid for the same securities by the offeror over a period of between six and twelve months prior to the bid is regarded as an equitable price. Member States may authorise the adjustment of that price in circumstances and according to criteria that are clearly determined; - the new proposal retains the principle that it is for shareholders to decide on defensive measures once a bid has been made public but there is greater transparency of the defensive structures and mechanisms in the companies affected. The relevant article lists the particulars that the companies covered by the Directive should publish at least in their annual report, with special reference to the structures and measures that could hinder the acquisition and exercise of control over the company by the offeror. Shareholders must take a decision every two years on the structural measures and defensive mechanisms; - there are restrictions on transfers of securities (e.g. the imposition of a ceiling on shareholdings or restrictions on the transferability of shares) and restrictions on voting rights (e.g. restrictions on the exercise of voting rights and deferral of voting rights) are rendered unenforceable against the offeror or cease to have effect once a bid has been made public. Following a successful bid, the offeror should also have the right to call a general meeting at short notice with a view to amending the articles of association and replacing members of the board, without any restrictions on the transfers of securities or the exercise of voting rights being imposed on the offeror. The Commission feels that the combination of greater transparency with the unenforceability of measures resulting in management entrenchment should enable progress towards a more level playing field with the US. - there is a new article on information and consultation of employees, responding to concerns of MEPs. It confirms that the close involvement of companies' employees' via their representatives, is an important factor. It stresses that, inaddition to the national rules which may be applicable, certain provisions of community law may be relevant in this context. This information and consultation is in addition to the specific procedure to be followed in the event of a takeover bid as provided in the proposal; - the introduction of a common squeeze-out procedure enabling a shareholder holding a given percentage of securities of a company to require the remaining minority shareholders to sell him their securities at a fair price. The proposal limits this right to cases where the percentage of securities was acquired following a takeover bid; - the introduction of a sell-out right, which provides that, following a takover bid, a minority shareholder can require the majority shareholder to buy his securities from him. - there is a procedure for revision of the provisions.?

Company law: takeover bids

The Council took note of the presidency's report on the progress made so far on the proposal for a Directive on take-over bids as well as of Delegations' concern on individual aspects of a presidency compromise proposal, in particular with regard t the balancing of Article 9 and 11, notably the question of multiple voting rights. The Council instructed the Permanent Representative Committee to purpose its work on this file as a matter of priority. Following the European Parliament's rejection of the outcome of the Conciliation Procedure in July 2001 on a previous proposal, the new text makes a fresh attempt at establishing a level playing field of take-over bids in the Community. However, broad agreement exists with the Council preparatory bodies not to re-open the debate on those Articles which appeared already in the text agreed upon by the Conciliation Committee and which have not changed substantially. Taking account of delegations' comments and building upon previous compromise proposal put forward by the Danish Presidency, the Greek Presidency tabled on 14 February 2003 a compromise proposal on most of the Article sunder discussion. No formal agreement has yet been reached on any of the Articles under examination. However, considerable progress has been achieved in building substantial consensus around a number of issues. The core outstanding issues in search of a global compromise is the appropriate balance to strike between, on the one hand, Article 9 which aims at ensuring that it is for the shareholders to decide on defensive measures once a take-ver bid has been made public, and, on the other hand, Article 11 which

provides for the neutralisation, both during and following a successful take-over bid, of measures that could be seen as pre-bid preferences (restrictions on transfer of securities, restrictions on voting rights).?

Company law: takeover bids

The Council held an extensive exchange of views on the proposal for a Directive on take-over bids, in particular on the scope of and the appropriate relationship between Articles 9 and 11 of the proposal. It discussed various possible solutions for this issue and instructed the Permanent Representatives Committee to pursue the examination with the aim of paving the way for a rapid adoption of the Directive. The intensive preparatory work so far has resulted in a broad convergence of views both on the main thrust and the ultimate objectives of the draft Directive as well as on individual provisions. However, no agreement has yet been reached on the key provisions of the draft Directive, that is a fair and balanced solution for Articles 9 and 11, related to defensive measures once a take-over bid has been made public and provisions for neutralisations of a number of agreements which could frustrate or unduly inhibit the launching or the successful conclusions of the bid. ?

Company law: takeover bids

The committee adopted the report by Klaus-Heiner LEHNE (EPP-ED, D) amending the proposal under the 1st reading of the codecision procedure. The amendments reflected the compromise reached in the Council following proposals made by the Italian Council Presidency. The report stipulated that the directive should not apply to takeover bids for securities issued by the Member States' central banks, in view of the "public interest purposes" served by those banks. The most important amendments, however, concerned compliance with key provisions of the directive as set out in Articles 9 (obligations of the board of the offeree company) and 11 (unenforceability of restrictions on the transfer of securities and voting rights). The committee agreed with the Council that, to take account of the differences in company law in the Member States, those provisions should be made optional, by making compliance with Articles 9 and 11 a discretionary decision of Member States. It accordingly introduced an entirely new article 11a ("Optional arrangements") to that end, while at the same time introducing some changes to existing Articles 9 and 11. Whereas, under Article 9, a company board must obtain the prior authorisation of the general meeting of shareholders before taking any defensive action (such as issuing shares) which may result in the frustration of the takeover bid, the proposed opt-out under new Article 11a would mean that a Member State may choose not to require companies to apply these provisions. At the same time, however, companies in that Member State would be allowed to "opt in" and apply the provisions if they chose to do so. The committee also amended the text of Article 9 so as to make it clear that 'company board' shall mean both the management board and the supervisory board of the company, where the organisation of the company follows a two-tier board structure. As regards Article 11, although the proposal provided that all restrictions on the transfer of securities or on voting rights would not have effect during takeover decisions, it did not refer to multiple voting rights. The committee agreed with the Council that, to create a level playing field, limitations on multiple voting rights should be the same as for other voting restrictions. It therefore amended the text of Article 11 so as to stipulate that "multiple voting securities shall carry one vote only at the general meeting which decides on any defensive measures in accordance with Article 9". It also said that, where rights are being removed under the provisions of Article 11, "equitable compensation" must be provided for any loss incurred by the holders of those rights. The same opt-out provisions for Member States and opt-in provisions for companies would apply for Article 11 as for Article 9. A further clause in the proposed new article would also allow companies which opt to apply Articles 9 and 11 to be exempted from the relevant provisions if they become targets of a takeover bid by a company which does not apply them. Lastly, to shore up the provisions aimed at the protection of minority shareholders, the committee amended the relevant article defining the "equitable price" of the mandatory bid to be made to all holders of securities by anyone who acquires a controlling share in a company. It stipulated that "if, after the bid has been made public and before the offer closes for acceptance, the offeror or any person acting in concert with him purchases securities at above the offer price, the offeror shall increase his offer to not less than the highest price paid for the securities so acquired". ?

Company law: takeover bids

The European Parliament adopted a resolution drafted by Klaus- Heiner LEHNE (EPP-ED, D) and reached agreement on a package of compromise amendments regarding the takeover directive, with a number of strategic amendments that make key provisions of the legislation optional. (Please see the summary of 27/11/03.) The resolution was adopted by 321 votes in favour, 219 against with 9 abstentions. The main amendments adopted concern the use of defensive measures, restrictions on votes and multiple voting rights, and especially the introduction of optional arrangements. A key point is that minority shareholders will be better protected. The Commission's text already proposed forcing any company launching a takeover bid to offer to buy all the target company's shares at an "equitable price", defined as "the highest price paid for the same securities by the offeror" over a period of 6-12 months prior to the bid. Under the new compromise amendment, the definition of an equitable price becomes more generous to minority shareholders. If, after the bid is made public and before it closes for acceptance, the bidder buys any shares at above his offer price, he will have to increase his offer price to at least match the highest price he has paid. Parliament also voted to ensure that multiple voting rights would be treated in the same way as restrictions on voting rights. However, opt-outs for Member States, as well as opt-ins for companies, will be available as in the case of defensive measures. Another amendment states that where such rights are being removed, "equitable compensation" must be provided for any loss the holders incur. The precise terms of this compensation are to be decided by each Member State. Commissioner Frits Bolkestein disagreed with the introduction of optional arrangements, saying this would send the wrong message to the markets. Members generally agreed that the directive as now amended represented little progress towards a genuine level playing field on takeovers in the EU, but most also supported rapporteur's position that "half a loaf is better than none" and that it was time to "put an end to this never-ending story". Although PES, EUL/NGL and Greens/EFA members wanted better information and consultation rights for employees, Commissioner Bolkestein insisted that the existing safeguards were sufficient. It should be noted that the new directive does not cover the "golden shares" held in major companies by many EU governments and sometimes used to block takeover bids. These are to be the subject of a separate directive.?

Company law: takeover bids

PURPOSE : to lay down measures coordinating the rules on takeover bids relating to company securities in a regulated market.

LEGISLATIVE ACT : Directive 2004/25/EC of the European Parliament and the Council on takeover bids.

CONTENT : this Directive coordinates the rules on takeover bids for the securities of companies governed by the laws of the Member States, where all or some of those securities are admitted to trading on a regulated market. This directive does not apply to takeover bides where a company's securities are, at the holder's request, repurchased or redeemed, directly of indirectly, out of the assets of those companies. Action taken by such companies to ensure that the stock exchange value of their units do not vary significantly from heir net asset value will be regarded as equivalent to repurchase or redemption.

The directive lays down certain common principles and a number of general requirements which Member States will have to respect through detailed implementing rules.

The general rules are as follows :

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

- the holders of the securities of an offeree company must have sufficient time and information to enable them to reach a properly informed decision on the bid. Where it advises the shareholders, the board of the offeree company must give its views on the effects of implementation of the bid on employment and location of the company's place of business;

- the board of the offeree company must not deny the shareholders the opportunity to decide on the merits of the bid;

- 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 of the prices of the shares become artificial and the normal functioning of the market is distorted;

- an offeror must announce a bid only after ensuring hat he can fulfil any cash consideration and after taking all reasonable measures to secure any other type of consideration;

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

The following points must be noted :

- minority shareholders must be protected when control of their companies has been acquired. The person who has acquired control of a company must make an offer to all the shareholders for all of their holdings at an equitable price in accordance with a common definition. The latter encompasses the following: if, after the bid is made public and before it closes for acceptance, the bidder buys any shares at above his offer price, he will have to increase his offer price to at least match the highest price he has paid;

- Member States are free to ensure more protection for shareholders, such as the obligation to make a partial bid where the offeror does not acquire control o the company or the obligation to announce a bid at the same time as control of the company is acquired;

- there are optional arrangements on the provisions on defensive measures by the offeree company and obligations of its board as well as the breakthrough provisions. Whereas an offeree board must obtain the prior authorisation of the general meeting of shareholders before taking any defensive action which may result in the frustration of the takeover bid, the opt-out means that a Member State may choose not to require companies to apply these provisions. At the same time, however, companies in that Member State are allowed to "opt in" and apply the provisions if they chose to do so;

- breakthrough provisions state that any restrictions on the transfer of securities by shareholders in the offeree company will not apply vis-à-vis the offeror during the time allowed for acceptance of the bid. Multiple voting securities will carry one vote only at the general meeting which decides on any defensive measures. Where rights are being removed under the breakthrough provisions of Article 11, equitable compensation must be provided for any loss incurred by the holders of those rights;

- where the company has a two-tier board structure, 'board' means both the management and supervisory board;

- the time allowed for acceptance of a bid may not be less than two weeks not more than ten weeks from the date of publication of the offer document. This can be extended under certain circumstances.

ENTRY INTO FORCE : 20/05/2004.

DATE FOR TRANSPOSITION : no later than 20/05/2006.

Company law: takeover bids

The Commission presents a review of the application of Directive 2004/25/EC1 on takeover bids, in accordance with Article 20 of the Directive. The report:

- describes the impact of the Takeover Bids Directive and how it has been complied with;
- identifies the main issues emerging from the application of the Directive and draws a number of conclusions.

The review of the operation of the Takeover Bids Directive shows that, generally, the regime created by the Directive is working satisfactory. No structural compliance issues have emerged in relation to the application of the legal framework in Member States. Stakeholders are generally satisfied with the clarity of the rules included in the Directive and the adequacy of their enforcement and consider the Directive be useful for the proper and efficient functioning of the market. The external study commissioned considers that the Takeover Bids Directive has contributed to improvements in relation to its objectives.

Nevertheless, there are areas where the rules of the Takeover Bids Directive merit some clarification in order to improve legal certainty for the parties concerned and the effective exercise of (minority) shareholder rights.

The concept of "acting in concert": this could be clarified on EU level, in order to provide more legal certainty to international investors as to the extent to which they can cooperate with each other without being regarded as "acting in concert" and running the risk of having to launch a mandatory bid. Clarification could, for instance, be provided through the development of guidelines, from the Commission and/or ESMA. Such

clarification would give greater opportunity to shareholders to hold boards accountable for their actions and promote good corporate governance standards in listed companies in the EU. However it should not limit the ability of competent authorities to oblige control seeking concert parties to accept the legal consequences of their concerted action. Possible initiatives in this area would be in line with the goals of the Commission's Green Paper on the EU Corporate Governance Framework and its Communication Towards a Single Market Act" to promote longer term, sustainable ownership to the benefit of sustainable growth of the European market. The Commission intends to announce what measures it intends to take in this area in October 2012.

National derogations to the mandatory bid rule: the review shows that there is a wide variety of national derogations to the mandatory bid rule and that it is not always clear how the general principle of the Directive, which requires the protection of minority shareholders in situations of change of control, is respected when a national derogation applies. As a possible way forward, the Commission intends to carry out further investigation on how minority shareholders are protected when a national derogation to the mandatory bid rule applies. More information is indeed needed on the scope of application of national derogations to the mandatory bid rule, on the extent to which national derogations limit the protection of minority shareholders in situations of change of control and, when relevant, what alternative mechanisms exist in national law to protect minority shareholders in situations of change of control. If, following the investigation, the protection of minority shareholders proves to be inadequate, the Commission will take the necessary steps (e.g. through infringement procedures) to restore the effective application of this general principle of the Directive.

Exemption to the mandatory bid rule: the review shows that the exemption to the mandatory bid rule included in the Takeover Bids Directive, for situations where control has been acquired following a voluntary bid for all shares of the company, has created a possibility for offerors of getting round the mandatory bid rule by acquiring a stake close to the mandatory bid threshold and then launching a voluntary bid for a low price. As a consequence, the offeror would cross the mandatory bid threshold without giving minority shareholders a fair chance to exit the company and share in the control premium. This technique is clearly not in line with the objective of the Directive to protect minority shareholders in situations of change of control, although it does not appear to breach the letter of the Directive. Examples in national legislation, such as additional mandatory bid thresholds or minimum acceptance conditions to takeover offers, show that there are ways to prevent the use of this technique. The Commission will take the appropriate steps to discourage the use of this technique across the EU, such as through bilateral discussions with the Member States concerned or Commission Recommendations.

Board neutrality and breakthrough rules: with regard to the optional Articles 9 and 11 of the Takeover Bids Directive, the review shows that although the board neutrality rule (Article 9) is transposed by a relatively large number of the Member States, this is not the case for the breakthrough rule (Article 11). However, the lack of application of the optional rules does not seem to have been a major obstacle to takeover bids in the EU, given that stakeholders have indicated that there are sufficient possibilities of breaking through takeover defences. In light of this and considering also the lack of economic evidence available to justify changing the situation, it does not, therefore, seem appropriate at this stage to propose to make the optional articles of the Directive mandatory.

Inadequate protection of employees: employee representatives have indicated that they are not satisfied with how the Takeover Bids Directive protects the rights of employees in a takeover situation, in particular with respect to the risk of changes in work conditions and job availability. The Commission will pursue its dialogue with employee representatives with a view to exploring possible future improvements. It will also investigate further the experience gained in practice with the provisions of the Directive which require disclosure of the offeror's intentions as regards the future business of the company and its employment conditions and the view of the offeree company's board on this, as well as disclosure of information concerning the financing of the bid and the identity of the offeror.

Member States, the European Parliament, the European Economic and Social Committee and other interested parties are invited to submit their views on this review.