

Company law: takeover bids

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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](#)² 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.