

Company law: takeover bids

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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". ?