

Directive 2004/25/EC of the European Parliament and of the Council
of 21 April 2004 on takeover bids (Text with EEA relevance)

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PARLIAMENT AND OF THE COUNCIL

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THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 44(1) thereof,

Having regard to the proposal from the Commission⁽¹⁾,

Having regard to the opinion of the European Economic and Social Committee⁽²⁾,

Acting in accordance with the procedure laid down in Article 251 of the Treaty⁽³⁾,

Whereas:

- (1) In accordance with Article 44(2)(g) of the Treaty, it is necessary to coordinate certain safeguards which, for the protection of the interests of members and others, Member States require of companies governed by the law of a Member State the securities of which are admitted to trading on a regulated market in a Member State, with a view to making such safeguards equivalent throughout the Community.
- (2) It is necessary to protect the interests of holders of the securities of companies governed by the law of a Member State when those companies are the subject of takeover bids or of changes of control and at least some of their securities are admitted to trading on a regulated market in a Member State.
- (3) 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.
- (4) In view of the public-interest purposes served by the central banks of the Member States, it seems inconceivable that they should be the targets of takeover bids. Since, for historical reasons, the securities of some of those central banks are listed on regulated markets in Member States, it is necessary to exclude them explicitly from the scope of this Directive.
- (5) Each Member State should designate an authority or authorities to supervise those aspects of bids that are governed by this Directive and to ensure that parties to takeover bids comply with the rules made pursuant to this Directive. All those authorities should cooperate with one another.

- (6) 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.
- (7) Self-regulatory bodies should be able to exercise supervision.
- (8) In accordance with general principles of Community law, and in particular the right to a fair hearing, decisions of a supervisory authority should in appropriate circumstances be susceptible to review by an independent court or tribunal. However, Member States should be left to determine whether rights are to be made available which may be asserted in administrative or judicial proceedings, either in proceedings against a supervisory authority or in proceedings between parties to a bid.
- (9) Member States should take the necessary steps to protect the holders of securities, in particular those with minority holdings, when control of their companies has been acquired. The Member States should ensure such protection by obliging the person who has acquired control of a company to make an offer to all the holders of that company's securities for all of their holdings at an equitable price in accordance with a common definition. Member States should be free to establish further instruments for the protection of the interests of the 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 announce a bid at the same time as control of the company is acquired.
- (10) The obligation to make a bid to all the holders of securities should not apply to those controlling holdings already in existence on the date on which the national legislation transposing this Directive enters into force.
- (11) The obligation to launch a bid should not apply in the case of the acquisition of securities which do not carry the right to vote at ordinary general meetings of shareholders. Member States should, however, be able to provide that the obligation to make a bid to all the holders of securities relates not only to securities carrying voting rights but also to securities which carry voting rights only in specific circumstances or which do not carry voting rights.
- (12) To reduce the scope for insider dealing, an offeror should be required to announce his/her decision to launch a bid as soon as possible and to inform the supervisory authority of the bid.
- (13) The holders of securities should be properly informed of the terms of a bid by means of an offer document. Appropriate information should also be given to the representatives of the company's employees or, failing that, to the employees directly.
- (14) The time allowed for the acceptance of a bid should be regulated.
- (15) To be able to perform their functions satisfactorily, supervisory authorities should at all times be able to require the parties to a bid to provide information concerning themselves and should cooperate and supply information in an efficient and effective manner, without delay, to other authorities supervising capital markets.

- (16) In order to prevent operations which could frustrate a bid, the powers of the board of an offeree company to engage in operations of an exceptional nature should be limited, without unduly hindering the offeree company in carrying on its normal business activities.
- (17) The board of an offeree company should be required to make public a document setting out its opinion of the bid and the reasons on which that opinion is based, including its views on the effects of implementation on all the company's interests, and specifically on employment.
- (18) In order to reinforce the effectiveness of existing provisions concerning the freedom to deal in the securities of companies covered by this Directive and the freedom to exercise voting rights, it is essential that the defensive structures and mechanisms envisaged by such companies be transparent and that they be regularly presented in reports to general meetings of shareholders.
- (19) Member States should take the necessary measures to afford any offeror the possibility of acquiring majority interests in other companies and of fully exercising control of them. To that end, restrictions on the transfer of securities, restrictions on voting rights, extraordinary appointment rights and multiple voting rights should be removed or suspended during the time allowed for the acceptance of a bid and when the general meeting of shareholders decides on defensive measures, on amendments to the articles of association or on the removal or appointment of board members at the first general meeting of shareholders following closure of the bid. Where the holders of securities have suffered losses as a result of the removal of rights, equitable compensation should be provided for in accordance with the technical arrangements laid down by Member States.
- (20) All special rights held by Member States in companies should be viewed in the framework of the free movement of capital and the relevant provisions of the Treaty. Special rights held by Member States in companies which are provided for in private or public national law should be exempted from the 'breakthrough' rule if they are compatible with the Treaty.
- (21) Taking into account existing differences in Member States' company law mechanisms and structures, Member States should be allowed not to require companies established within their territories to apply the provisions of this Directive limiting the powers of the board of an offeree company during the time allowed for the acceptance of a bid and those rendering ineffective barriers, provided for in the articles of association or in specific agreements. In that event Member States should at least allow companies established within their territories to make the choice, which must be reversible, to apply those provisions. Without prejudice to international agreements to which the European Community is a party, Member States should be allowed not to require companies which apply those provisions in accordance with the optional arrangements to apply them when they become the subject of offers launched by companies which do not apply the same provisions, as a consequence of the use of those optional arrangements.

- (22) Member States should lay down rules to cover the possibility of a bid's lapsing, the offeror's right to revise his/her bid, the possibility of competing bids for a company's securities, the disclosure of the result of a bid, the irrevocability of a bid and the conditions permitted.
- (23) The disclosure of information to and the consultation of representatives of the employees of the offeror and the offeree company should be governed by the relevant national provisions, in particular those adopted pursuant to 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⁽⁴⁾, Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies⁽⁵⁾, Council Directive 2001/86/EC of 8 October 2001 supplementing the statute for a European Company with regard to the involvement of employees⁽⁶⁾ and Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community — Joint declaration of the European Parliament, the Council and the Commission on employee representation⁽⁷⁾. The employees of the companies concerned, or their representatives, should nevertheless be given an opportunity to state their views on the foreseeable effects of the bid on employment. Without prejudice to the rules of Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse)⁽⁸⁾, Member States may always apply or introduce national provisions concerning the disclosure of information to and the consultation of representatives of the employees of the offeror before an offer is launched.
- (24) Member States should take the necessary measures to enable an offeror who, following a takeover bid, has acquired a certain percentage of a company's capital carrying voting rights to require the holders of the remaining securities to sell him/her their securities. Likewise, where, following a takeover bid, an offeror has acquired a certain percentage of a company's capital carrying voting rights, the holders of the remaining securities should be able to require him/her to buy their securities. These squeeze-out and sell-out procedures should apply only under specific conditions linked to takeover bids. Member States may continue to apply national rules to squeeze-out and sell-out procedures in other circumstances.
- (25) Since the objectives of the action envisaged, namely to establish minimum guidelines for the conduct of takeover bids and ensure an adequate level of protection for holders of securities throughout the Community, cannot be sufficiently achieved by the Member States because of the need for transparency and legal certainty in the case of cross-border takeovers and acquisitions of control, and can therefore, by reason of the scale and effects of the action, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary to achieve those objectives.

- (26) The adoption of a Directive is the appropriate procedure for the establishment of a framework consisting of certain common principles and a limited number of general requirements which Member States are to implement through more detailed rules in accordance with their national systems and their cultural contexts.
- (27) Member States should, however, provide for sanctions for any infringement of the national measures transposing this Directive.
- (28) Technical guidance and implementing measures for the rules laid down in this Directive may from time to time be necessary, to take account of new developments on financial markets. For certain provisions, the Commission should accordingly be empowered to adopt implementing measures, provided that these do not modify the essential elements of this Directive and the Commission acts in accordance with the principles set out in this Directive, after consulting the European Securities Committee established by Commission Decision 2001/528/EC⁽⁹⁾. The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission⁽¹⁰⁾ and with due regard to the declaration made by the Commission in the European Parliament on 5 February 2002 concerning the implementation of financial services legislation. For the other provisions, it is important to entrust a contact committee with the task of assisting Member States and the supervisory authorities in the implementation of this Directive and of advising the Commission, if necessary, on additions or amendments to this Directive. In so doing, the contact committee may make use of the information which Member States are to provide on the basis of this Directive concerning takeover bids that have taken place on their regulated markets.
- (29) The Commission should facilitate movement towards the fair and balanced harmonisation of rules on takeovers in the European Union. To that end, the Commission should be able to submit proposals for the timely revision of this Directive,

HAVE ADOPTED THIS DIRECTIVE:

Status: This is the original version (as it was originally adopted).

- (1) OJ C 45 E, 25.2.2003, p. 1.
- (2) OJ C 208, 3.9.2003, p. 55.
- (3) Opinion of the European Parliament of 16 December 2003 (not yet published in the Official Journal) and Council decision of 30 March 2004.
- (4) OJ L 254, 30.9.1994, p. 64. Directive as amended by Directive 97/74/EC (OJ L 10, 16.1.1998, p. 22).
- (5) OJ L 225, 12.8.1998, p. 16.
- (6) OJ L 294, 10.11.2001, p. 22.
- (7) OJ L 80, 23.3.2002, p. 29.
- (8) OJ L 96, 12.4.2003, p. 16.
- (9) OJ L 191, 13.7.2001, p. 45. Decision as amended by Decision 2004/8/EC (OJ L 3, 7.1.2004, p. 33).
- (10) OJ L 184, 17.7.1999, p. 23.