

Company Law

Common position agreed on Takeover Directive

by Julian Harris

A common position on the proposed 'Thirteenth Company Law Directive on Takeovers' was adopted by the Council of Ministers on 19 June 2000. Under the co-decision procedure the directive will now be sent to the European Parliament for a second reading which must be completed by the end of October. If, as seems likely, areas of disagreement arise between Parliament and Council, it will then be subject to conciliation procedures (see also Commission press release IP/00/633, 19 June, and memo/00/36). As a part of the EU's Financial Services Action Plan the directive is seen as an important element in achieving the target of a single market in financial services by 2005, set by the Lisbon European Summit.

The first proposal for the directive was presented in 1989 and amended in 1990. The amended proposal included detailed provisions, such as the obligation to launch a full bid for 100 per cent of a target company's shares once a person acquired shares with more than one-third of the voting rights. The object of this was to ensure that minority shareholders were not excluded from the opportunity to sell their shares at an attractive bid price. Further detailed rules were proposed in areas including: the publication of bids; contents of offer documents and revision of bids; and general principles governing the conduct of takeovers.

In 1996 the Commission replaced previous proposals with a suggested framework directive which approached the issue in a different way. The framework directive established the same general proposals to govern the conduct of takeovers as were featured in the previous proposal, but omitted the detailed provisions which aimed to harmonise the manner in which these principles should be applied. Under the draft framework directive, member states' own rules on takeovers were required to respect a number of principles (including, for example, the requirement for the board of the target company to act in the interests of the company as a whole and not deny shareholders the opportunity to decide on the merits of the offer).

The directive was further amended in 1997, when the European Parliament decided that insufficient attention had been paid to the interests of employees. New rules were inserted requiring employees of target companies to be kept informed of bids, and for the offer document to be made available to them. The rules on disclosure with regard to shareholders were widened to cover employees, and management required to take into account employment concerns when considering the interests of the company as a whole.

SOME KEY MEASURES:

- (1) All investors holding the same class of shares must be equally treated, particularly when there is a change of control within the company (currently several member states do not require a full bid if control is transferred).
- (2) Shareholders in the target company must be given enough time and sufficient information to enable them to reach a properly informed decision on the bid (currently some member states allow the target company to take defensive measures without the prior consent of shareholders).
- (3) The board of the target company must act in the interests of the company as a whole and must not deny shareholders the opportunity to decide on the merits of the offer.
- (4) False markets must not be created in the shares of the target company.
- (5) The bid cannot be announced until the bidder has ensured that it can fulfil in full any cash consideration if offered and that it has taken all reasonable measures to ensure it can fulfil any other type of consideration.
- (6) A takeover bid should not unreasonably hinder the operation of the target company.

The proposed directive is designed to ensure an adequate level of protection for minority shareholders across the EU in the case of a change of company control. To ensure this, member states are obliged to require that bidders in such cases make a full bid for all the shares at an equitable price.

Lawyers involved with the conduct and regulation of takeovers in the UK do not for the most part welcome the proposed directive because they feel that it is likely to create extra litigation and delay without giving much in return. Those responsible for the directive in its present form were much influenced by the quick and flexible system of self-regulation offered by the UK Takeover Code. It is not without irony that just before the common position was adopted on the directive, the *Financial Services and Markets Act 2000* received Royal Assent and established the Financial Services Authority as the statutory body with responsibility for takeover regulation. The panel's future effectiveness and authority has been greatly reduced as a result. 

Julian Harris

Senior Information Officer, IALS