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.

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