*European Economic and Social Committee*

**ECO/101**
**Takeover bids**

Brussels, 14 May 2003

# OPINION

of the European Economic and Social Committee

on the

**Proposal for a Directive of the European Parliament and of the Council on takeover bids**

COM(2002) 534 final - 2002/0240 (COD)



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On 5 November 2002 the Council decided to consult the Economic and Social Committee on the

*Proposal for a Directive of the European Parliament and of the Council on takeover bids*
COM(2002) 534 final – 2002/0240 (COD).

The Section for Economic and Monetary Union and Economic and Social Cohesion, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 29 April 2003. The rapporteur was **Mr Cassidy.**

At its 399th plenary session held on 14 and 15 May 2003 (meeting of 14 May), the Economic and Social Committee adopted the following opinion by 101 votes to 8, with 17 abstentions.

## 1. Introduction

1.1 The EESC welcomes the latest Commission proposal as a further step towards the creation of a Single Market. The European Parliament and the Council are urged to proceed as quickly as possible to approve the latest Commission proposal[*].

1.2 The EESC believes that the ultimate aim must be the elimination of all obstacles to cross-border takeovers in the EU, equality of treatment of stakeholders and the phasing out of all defence mechanisms.

1.3 The Commission has under Article 18 five years after the implementation of the directive to propose revisions in the light of experience which the EESC hopes will enable some of the shortcomings in the present draft to be corrected.

1.4 The EESC hopes that Article 4 will achieve its objective of avoiding systematic litigation during takeover bids and that Member States shall ensure the transparency of the competent authorities' decision making, but fears that the rules introduced in Article 4 to determine the supervisory authorities and applicable laws for takeover bids may introduce unnecessary complexity and uncertainty and therefore proposes their simplification.

1.5 To ensure a more level playing field, the EESC asks the European Parliament and the Council to set a relatively narrow range of percentage voting rights as the control threshold triggering a mandatory takeover bid.

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[*] See Appendix, pages 7 to 9

1.6 The EESC particularly welcomes a new *Article 13* concerning timely and comprehensive information and consultation of employees' representatives and stresses that good management practice requires the cooperation of the employees of both offeror and offeree companies. It believes that employees or their representatives should be informed no later than the supervisory authorities, shareholders, the media and other stakeholders in order to ensure a level playing field between them, so as to make it possible for the boards of the offeror and the offeree companies to consider the views of their employees.

1.7 Article 13 is important to assist in overcoming the concerns previously expressed regarding protection for employees. Helpful references to information to be passed to employees representatives are included in Article 6 paras. 1 and 2 and the EESC welcomes that the text reflects in a more expansive way the importance of information and consultation of employees.

1.8 The EESC asks the European Parliament and the Council to establish a qualified majority threshold range for amending a company's Articles of Association in Article 11.4 of the directive.

1.9 The EESC has not proposed any amendments to Articles 14 and 15 as we believe that these two articles have been re-drafted by Council Working Parties.

1.10 In connection with the "level playing field" with non member countries, the EESC notes that there is no reference to this in the latest draft directive but stresses the importance of a level playing field within the EU.

1.11 The EESC approves the Commission text subject only to the amendments presented below:

## 2. Specific comments

### 2.1 Article 4.2(a)

2.1.1 Delete "if the securities of that company are admitted to trading on a regulated market in that Member State".

### 2.2 Article 5.3

2.2.1 The article should be rewritten as follows: *"The percentage of voting rights which* ***triggers off the obligation to make a bid under*** ~~*confers control for the purposes of*~~ *paragraph 1 and the method of its calculation shall be determined by the rules of the Member State in which the company has its registered office****. This percentage shall not be set lower than 30% nor higher than 40% of the company's voting rights."***

2.3 **Article 5.5**

2.3.1 Rewrite second paragraph as follows: *"Where the consideration offered by the offeror does not consist of liquid securities admitted to trading on a regulated market, Member States* ***should*** ~~*may*~~ *stipulate that such consideration has to include a cash consideration at least as an alternative."*

2.4 **Articles 5(6) and 6(4):**

2.4.1 These articles refer to comitology. This seems incompatible with the directive, which lays down minimum requirements that Member States must ensure are observed, if necessary by laying down additional and more stringent provisions (Article 3(2)).

2.4.2 The provisions related to the determination of the price and the conditions of the offer are essential rules which have to be governed by the directive itself.

2.4.3 The EESC calls for Article 5(6) and Article 6(4) to be deleted.

2.5 **Article 9**

2.5.1 **Article 9.3**

2.5.1.1 Add a final sentence: *"A share-repurchasing programme that started before the bid was made forms part of the normal course of the company's business".*

2.5.2 **Article 9.4**

2.5.2.1 Change the notice period for a general meeting from two weeks to three weeks.

2.5.3 **Article 9.5**

2.5.3.1 The board of the offeree company shall, before making public its opinion on the bid, consult with the employees to be able to include their views in the document. The sentence in Article 9.5 starting with "The board of the offeree company shall at the same time …" therefore ought to be replaced as follows:

> *"Before finalising the document the board of the offeree company informs and consults in a detailed and comprehensive way with the worker representatives or, failing that, with the workers themselves."*

2.6 **Article 10.1, 10.2 and 10.3:**

2.6.1 **Remarks to 10.1 and 10.2**

2.6.1.1 This article entitled *Information on companies referred to in Article 1(1)* is important and perfectly in keeping with the Commission's general approach in favour of financial transparency and transparency in company law[1]. As a preliminary remark, the EESC wishes to draw the attention of the Commission to the necessity of coordinating its different initiatives in this field.

2.6.1.2 The proposed wording is such that it places the same importance on information that the company must communicate on an ongoing or regular basis, and information that it must communicate when a bid is made, which is not relevant.

2.6.1.3 Some of this information is only useful or relevant in the context of a bid, for instance "significant agreements to which the company is a party and which take effect, alter or terminate upon a change of control of the company" (j). These agreements are often confidential business information and providing such information as part of the ongoing information requirement could have a detrimental effect on the company.

2.6.1.4 Moreover, point g) refers to agreements between shareholders. It is obvious that a company is only able to provide information on such agreements if it is aware of them.

2.6.1.5 The wording of point k) is unclear. Apparently it refers to what are commonly called "golden parachutes" and not to collective agreements. If that is the case, it would be better to specify that the employees concerned are "senior managers".

2.6.2 **Proposed amendments to 10.1, 10.2 and 10.3**

2.6.2.1 Add to 10.1 (g) the phrase: *"when the company is informed of those agreements" at the end of point (g).*

2.6.2.2 Add the phrase: *"when a bid is made"* to the beginning of points 10.1 (j) and (k).

2.6.2.3 In point 10.1 (k) replace "employees" with *"senior management"* in this paragraph.

1 See the *Report on issues related to takeover bids* (10.01.2002, p. 25) and the *Report on a Modern Regulatory Framework for Company Law in Europe* (4.11.2002, p. 45 and 95), both drawn up by the High Level Group of Company Law Experts, and the *Proposal for a Directive on the prospectus to be published when securities are offered to the public or admitted to trading* (COM(2001) 280 final).

2.6.2.4 Reword the beginning of paragraph 10.2 as follows: *"The information referred to in paragraph 1, with the exception of that mentioned in points (j) and (k) …..*" (the rest remains unchanged).

2.6.2.5 The wording of paragraph 10.3 is ambiguous, contradicts the description found in Article 11 and is incompatible with company law in some Member States.

2.6.2.6 It implies that all the points mentioned in paragraph 1 are either *"structural aspects"* - a term whose scope is, moreover, too wide to be attributed with such important effects - or defensive mechanisms, which is not the case.

2.6.2.7 Furthermore, a number of points mentioned in paragraph 1 are the responsibility not of the general meeting of shareholders but of other bodies of the company, and it is not the role of a directive on takeover bids to modify company law. This is the main criticism levelled by experts from almost all the Member States at the Group of High-Level Company Law Experts' report on this issue.

2.6.2.8 Approval by the general meeting is irrelevant. A report presented by the board every two years should be sufficient.

2.6.2.9 Reword paragraph 10.3 as follow: "The boards of companies whose securities are admitted to trading on a regulated market in a Member State, must present a descriptive report to the general meeting of shareholders at least every two years on the points referred to in paragraph 1".

2.7 **Article 11**

2.7.1 **Remarks to Article 11.1, 11.2 and 11.3**:

2.7.1.1 This article on contractual agreements is particularly problematic as it stipulates that any restrictions on the transfer of securities or voting rights provided for in contractual agreements between the offeree company and holders of its securities or between holders of securities of the offeree company will be unenforceable against the offeror during the period for acceptance of the bid or cease to have effect when the general meeting decides on any defensive measures. Such agreements, however, are covered by contract law and company law.

2.7.1.2 Finally, it is hard to understand how agreements between shareholders to which neither the company nor the management is a party could pose a problem for a directive on takeover bids.

2.7.2 **Proposed amendments to Article 11**

2.7.2.1 Delete the second paragraph of point 2 and the second paragraph of point 3.

2.7.2.2 In Art. 11.4, second paragraph, change the period of notice for convening a general meeting from two weeks to three weeks.

2.8 **Article 13**

2.8.1 To be able to present a well-founded bid as well as an opinion on a bid it is necessary for the boards of both the offeror and the offeree companies to consult with their employees. Such consultations are necessary not only before the initial proposals are presented but also during the whole process of a takeover. We, therefore, propose the following changed text for Article 13 instead of the text proposed by the Commission, which in fact only introduces already existing rules:

> *"The board of the offeror and the offeree have to inform and consult worker representatives, or failing that employees directly, at all stages of the takeover in a detailed and comprehensive manner."*

2.9 **Article 17**

*2.9.1* Replace with the following: *"A contact committee shall be appointed which has as its functions: (a) to facilitate the harmonised application of this directive through regular meetings dealing with practical problems arising in connection with its application; (b) to advise the Commission, if necessary, on modifications to this directive."*

Brussels, 14 May 2003.

| The President<br>of the<br>European Economic and Social Committee | The Secretary-General<br>of the<br>European Economic and Social Committee |
|---|---|
| **Roger Briesch** | **Patrick Venturini** |

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**N.B.**: Appendix overleaf.

**APPENDIX**

This proposal forms part of the Financial Services Action Plan and is a priority for integrating European financial markets.

It dates back to 1985 when the Commission White Paper on completing the internal market introduced the idea of a proposal for a directive on takeover bids. The Commission's initial proposal was for a Thirteenth Directive on Company Law[2]. This ran into strong opposition from certain Member States and was withdrawn for revision.

In 1996, the Commission tried again with a new proposal[3]. This contained a "framework" directive setting out general principles but not attempting detailed harmonisation. At the end of 1997, the Commission amended its proposal to take account of the opinions of the EESC and the European Parliament.

The Council Common Position[4] was adopted unanimously and the proposal returned to the European Parliament for a second reading. The Parliament passed a number of amendments to the Common Position, some of which were unacceptable to the Council. This triggered the Conciliation Committee procedure. The Council and Parliament's Conciliation Committee delegations reached an agreement on 6 June 2001. This agreement failed to achieve a majority when submitted to the Parliament plenary on 4 July 2001 for approval. In fact, it was a tied vote, with 273 votes for and 273 votes against.

However, the high vote against the proposal was a reflection of strong Parliament concern about three aspects of the directive:

i) the need for the management of a target company to have shareholder approval of defensive measures;

ii) concern that the protection for employees of the target company was insufficient;

iii) the failure to achieve a level playing field with the United States.

Following Parliament's rejection of the Conciliation Committee text, the Commission set up a Group of High-Level Company Law Experts under the chairmanship of **Professor Jaap Winter** tasked with making suggestions for resolving the issues raised by the

2 OJ C 64, 14.3.1989

3 OJ C 162, 6.6.1996

4 OJ C 283, 24.1.2001

European Parliament. This new proposal reflects some of the recommendations made by the Winter Group in its report published in January 2002.

The Commission's latest proposal is in line with the common position agreed by the Council before the July 2001 rejection by the European Parliament plenary.

However, a number of new articles have been inserted to meet the Parliament's objections. These are:

– **Article 10 – Information on companies referred to in Article 1(1)** regarding transparency.

– **Article 11** – **Unenforceability of restrictions on the transfer of securities and voting rights** to create a level playing field in EU takeover bids by banning some national restrictions that hinder them.

– **Article 13** – **Information for and consultation of representatives of employees** now required by 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[5].

– **Article 14** – **Squeeze-out right** enabling a successful bidder to acquire the remaining shares at a fair price.

– **Article 15** – **Sell-out right -** the counterpart of the squeeze-out right where a minority shareholder can require the majority shareholder to buy their shares.

– **Article 17 - Committee procedure -** not a new article but a provision for the European Securities Committee established by Commission Decision 2001/528/EC[6].

5 OJ L 80, 23.3.2002, p. 29

6 OJ L 191, 13.7.2001