



EUROPEAN PARLIAMENT

2009 - 2014

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*Committee on Legal Affairs*

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**2012/2262(INI)**

6.12.2012

# **DRAFT REPORT**

on the application of Directive 2004/25/EC on takeover bids  
(2011/2262(INI))

Committee on Legal Affairs

Rapporteur: Klaus-Heiner Lehne

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## MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

### on the application of Directive 2004/25/EC on takeover bids

(2012/2262(INI))

*The European Parliament,*

- having regard to directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids<sup>1</sup>,
  - having regard to the report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 2004/25/EC on takeover bids (COM(2012)0347),
  - having regard to the study on the application of Directive 2004/25/EC on takeover bids (External Study) conducted on behalf of the Commission<sup>2</sup>,
  - having regard to the report on the implementation of the Directive on Takeover Bids of 21 February 2007<sup>3</sup>,
  - having regard to Rule 48 of its Rules of Procedure,
  - having regard to the report of the Committee on Legal Affairs (A7-0000/2013),
- A. whereas the Directive on Takeover Bids (the Directive) provides minimum guidelines which guarantee transparency and legal certainty of the conduct of a takeover bid and grants information rights for shareholders, employees and other stakeholders;
- B. whereas several Member States are considering or have already introduced changes to their harmonised national rules on takeover bids with the aim to increase capital market transparency and reinforce the rights of the targeted company and its stakeholders;
- C. whereas the Court of Justice of the European Union has ruled in several cases that the retention of special rights in a private company by a Member State must in general be considered as a limitation of the free movement of capital and can only be justified in duly limited instances<sup>4</sup>;
- D. whereas national competent authorities are responsible for the public oversight of takeover bids;
- E. whereas Article 1.3 of Regulation (EU) No 1095/2010<sup>5</sup> stipulates that the European Securities and Markets Authority (ESMA) shall also take appropriate action in the context

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<sup>1</sup> OJ L 142, 30.4.2004, p. 12.

<sup>2</sup> External Study on the application of the Directive on takeover bids, undertaken by Marccus Partners on behalf of the Commission, available at:

[http://ec.europa.eu/internal\\_market/company/docs/takeoverbids/study/study\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/takeoverbids/study/study_en.pdf).

<sup>3</sup> Commission staff working document (SEC (2007)268)

<sup>4</sup> E.g. Case C-171/08, *Commission v. Portugal* [2010] ECR I-6817.

<sup>5</sup> Regulation (EU) No 1095/2010 establishing a European Supervisory Authority, OJ L 331, 15.12.2010, p. 84.

of takeover bids; whereas ESMA has created a network of competent authorities that is supposed to enhance cooperation between them in the context of cross-border takeover bids;

1. Considers the Directive an important part of the EU company law *acquis*, which goes beyond the mere promotion of further integration and harmonisation of EU capital markets;
2. Stresses that the effects of the Directive are not limited to the core provisions on takeover bids but need to be assessed in the wider context of company law, including corporate governance, capital market law and also employment law;
3. Reiterates that the objectives of the Directive, in particular providing a level playing field for takeover bids while protecting the interests of shareholders, employees and other stakeholders, are crucial cornerstones for a well-functioning market for corporate control;
4. Welcomes the Commission's conclusion that the Directive is working satisfactorily<sup>6</sup>, and acknowledges the conclusions of the External Study that the Directive has improved the functioning of the market of corporate control<sup>7</sup>, thus achieving its objectives<sup>8</sup>;

### ***Level playing field***

5. Underlines that the Directive provides for a level playing field for takeover bids in Europe and believes that, in the long term, further improvements could be envisaged to strengthen this level playing field;
6. Respects the competence of the Member States to introduce additional measures which go beyond the requirements of the Directive, as long as the general objectives of the Directive are observed, but emphasises that the Member States should refrain from introducing measures protecting the target company against takeover bids from either Member States or non-EU Member States;
7. Notes, in this context, that some Member States have recently reacted to developments within their domestic markets for corporate control by introducing additional provisions regarding the conduct of takeover bids such as the 'put up or shut up' rule of the UK Takeover Panel, which strives for clarification on whether a takeover bid has to be launched ('put up') or not ('shut up') in cases where it is unclear if the offeror really intends to submit a bid for the offeree company;

### ***Supervision***

8. Welcomes the efforts of ESMA to enhance the cooperation between national authorities in the context of takeover bids via the Takeover Bids Network;
9. Believes, however, that it is not necessary to arrange for supervision of takeover bids at EU level, as takeover law is not limited to capital market law but is embedded in national

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<sup>6</sup> Commission Report on the Application of Directive 2004/25/EC on takeover bids, p. 9.

<sup>7</sup> See p. 25ff. of the External Study.

<sup>8</sup> See page 59 ff. of the External Study.

company law; stresses that the competent national authorities should remain responsible for the public oversight of takeover bids;

### ***Tackling emerging issues***

10. Welcomes the Commission findings and elaboration on the emerging issues resulting from the review of the operation of the Directive, and notes that additional aspects are identified by academics and practitioners<sup>9</sup>;

### ***Concept of ‘acting in concert’***

11. Believes that the concept of ‘acting in concert’ is essential when calculating the threshold that triggers the launch of a mandatory bid, and understands that Member States have transposed the definition provided for in the Directive differently; believes, however, that focusing on changes to the concept of ‘acting in concert’ solely within the Directive would fall short of enhancing legal certainty, as this concept is also relevant for other calculations required under EU company law; suggests, therefore, that a more detailed analysis is undertaken in order to identify possible means by which the concept of ‘acting in concert’ could be further clarified and harmonised;
12. Awaits, to this end, the Commission’s action plan on EU company law, where this issue should be addressed, and supports the Commission’s statement that the ability of national authorities to oblige control-seeking concert parties to accept the legal consequences of their concerted action should by no means be limited<sup>10</sup>;

### ***National derogations to the mandatory bid rule***

13. Stresses that the mandatory bid rule is the core provision for the protection of minority shareholders, and takes note of the results of the External Study that all Member States allow for exemptions from this rule; understands that these derogations are often used to protect the interests of controlling shareholders (e.g. no real change in control), creditors (e.g. when creditors have granted loans) and other stakeholders (e.g. to balance shareholders’ and other stakeholders’ rights); supports the Commission’s intention to gather additional information with a view to determine whether the widely used derogations are contrary to the protection of minority shareholders;
14. Stresses also that the mandatory bid rule enables minority shareholders, in case of change of control, to receive the premium paid for the controlling stake, and notes that the Directive only regulates the price for a mandatory bid (i.e. equitable price) but not for a voluntary bid; notes in particular that the Directive waives the obligation to launch a mandatory bid in cases where, after an initial voluntary bid, the controlling threshold has been reached with the result that the offeror can subsequently increase his participation in the target company via regular share acquisition (so-called creeping in); notes as well that, for such cases, some Member States have introduced an obligation for a second

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<sup>9</sup> See e.g. Freshfields Bruckhaus Deringer, Reform of the EU Takeover Directive and of German Takeover Law, 14. Nov. 2011, available at:

[http://www.freshfields.com/uploadedFiles/SiteWide/Knowledge/Reform\\_Eu\\_Takeover%20directive\\_31663.pdf](http://www.freshfields.com/uploadedFiles/SiteWide/Knowledge/Reform_Eu_Takeover%20directive_31663.pdf).

<sup>10</sup> Commission Report on the Application of Directive 2004/25/EC on takeover bids, p. 9.

mandatory bid, according to which a second offer is necessary if a certain increase (e.g. 3 %) has taken place within a certain period of time (e.g. 12 months) between two specified thresholds (e.g. between 30 % and 50 %);

15. Believes that the notification thresholds set out in Article 9 of Directive 2004/109/EC<sup>11</sup> (Transparency Directive, currently under review) provide for solid transparency of ownership and allow the early detection of creeping-in acquisitions; takes the view that national competent authorities should discourage techniques designed to circumvent the mandatory bid rule and thus avoid paying the control premium to minority shareholders;

### ***Board neutrality***

16. Notes that the board neutrality rule relating to post-bid defences has been transposed by the majority of Member States, while only a very limited number of Member States has transposed the breakthrough rule which neutralises pre-bid defences; understands that both pre-bid (e.g. pyramid structures or golden shares) and post-bid defences (e.g. white knight or debt increase) still exist in the Member States but are rarely used with success, and that at the same time there seem to be sufficient means to break through such defensive mechanisms; takes the view, therefore, that there is no need for a regulatory change with regard to the optional nature of the board neutrality rule in the Directive;

### ***Rights of employees in a takeover situation***

17. Underlines that the Directive foresees that employees are provided with information, in particular with regard to the offeror's intentions on the future of the target company and the future plans concerning jobs, including any material changes to employment conditions;
18. Notices; however, with concern the dissatisfaction of employees' representatives expressed in the External Study when it comes to the protection of employees' rights, and calls on the Commission to enhance the dialogue with the employee representatives on how pressing issues can be better tackled; insists that the relevant provisions of the Directive on the right to be informed on time are to be effectively applied and, where necessary, properly enforced;

### ***Takeover bids during the economic downturn***

19. Recalls that, according to Article 21 of the Directive, its provisions were to be transposed into national law by 20 May 2006, and notes that, according to the External Study, most of the Member States transposed the Directive between 2006 and 2007<sup>12</sup>;
20. Emphasises that the period of transposition of the Directive coincides with the beginning of the financial crisis, which eventually developed into an economic and debt crisis, and that takeover activities are closely linked to financial and economic developments both

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<sup>11</sup> Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC.

<sup>12</sup> See p. 284 and more generally page 58f. of the External Study.

within and outside of Europe;

21. Underlines that, according to the External Study, takeover activities have dramatically declined after the transposition date of the Directive as a result of the crisis, including in the UK, where activities in the market for corporate control are traditionally more concentrated than in the rest of the Union;
22. Takes the view that, as the market for corporate control has steadily been shrinking during this period of financial crisis, the assessment on whether and to what extent further harmonisation measures should be introduced with regard to takeover bids would be distorted;
23. Asks, therefore, the Commission to continue to close-monitor the developments in the market for corporate control and prepare a new assessment on the application of the Directive when takeover activities return to a more regular volume;

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24. Instructs its President to forward this resolution to the Council and the Commission and to the governments and parliaments of the Member States.

## EXPLANATORY STATEMENT

The rapporteur recalls that after decades of failed attempts the Directive was finally adopted by the European Parliament at the end of 2003 in second reading and published in the Official Journal in April 2004. Member States were given time until May 2006 to transpose the provisions of the Directive into their national laws.

The rapporteur appreciates that Member States have transposed the provisions of the Directive and believes this demonstrates that there was and still is an obvious need for harmonised rules on takeover bids in Europe.

The rapporteur has expressed his opinion on the various aspects raised in the Commission's report on the application of the Directive, which by no means can be considered exhaustive in the context of complex takeover bids. Indeed, some data put forward by the Commission and the External Study suggest that further consideration is given to additional harmonisation measures at EU level.

However, the rapporteur believes that in the light of financial and economic developments over the last few years it is difficult if not impossible to finally assess the application of the Directive properly. The financial crisis which started in 2007 struck all European markets. Despite a whole bundle of economic stabilisation and recovery measures the crisis exasperated and Europe is still stuck in a capital market, economic and debt crisis. The European market for corporate control has been hit by the crisis more or less simultaneously as have been the other economic sectors.

The rapporteur observes that the crisis has dramatic effects for the financing of takeovers. M&A activities often require sophisticated financial backing and if this support is withheld the market will not function properly. Market participants have indeed observed a credit shortage resulting inter alia from the withdrawal of financial investors from the market of corporate control. In addition, low share prices in the wake of the downturn rendered share acquisitions less attractive. These developments have only partially been compensated for by cash financed transactions.

Therefore, the External Study prepared for the European Commission demonstrates without surprise that, while the market for corporate control seemed to be overheated in the run up to the financial crisis, in the year 2009<sup>13</sup> the intra-EU market for corporate control was almost paralysed and only gradually turns upward. Also the highly active UK market was not spared, where the UK Takeover panel reported 127 successful proposals involving control for 2006-2007<sup>14</sup> this figure went down by almost 50% between 2010-2011<sup>15</sup>.

It is an unfortunate coincidence that the transposition date of the Directive coincides with the start of the crisis. In the light of these findings the rapporteur believes that the application of the Directive can not be properly assessed based on only limited data being available. Your

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<sup>13</sup> See p. 285 of the External Study.

<sup>14</sup> UK Takeover Panel, Annual Report 2007, p. 25. Available at: <http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/report2007.pdf>.

<sup>15</sup> UK Takeover panel, Annual Report 2011, p. 15. Available at: <http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/report2011.pdf>.

rapporteur therefore suggests that more relevant data is needed in order to establish not only the need for changes to the Directive but also the precise next harmonisation steps to be taken.