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*****I** **REPORT**

on the proposal for a European Parliament and Council directive on takeover bids
(COM(2002) 534 – C5-0481/2002 – 2002/0240(COD))

Committee on Legal Affairs and the Internal Market

Rapporteur: Klaus-Heiner Lehne

Draftsman(*): Christopher Huhne, Committee on Economic and Monetary Affairs

(*) Enhanced cooperation between committees – Rule 162a

Symbols for procedures

- * Consultation procedure
majority of the votes cast
- **I Cooperation procedure (first reading)
majority of the votes cast
- **II Cooperation procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend
the common position*
- *** Assent procedure
*majority of Parliament's component Members except in cases
covered by Articles 105, 107, 161 and 300 of the EC Treaty and
Article 7 of the EU Treaty*
- ***I Codecision procedure (first reading)
majority of the votes cast
- ***II Codecision procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend
the common position*
- ***III Codecision procedure (third reading)
majority of the votes cast, to approve the joint text

(The type of procedure depends on the legal basis proposed by the Commission)

Amendments to a legislative text

In amendments by Parliament, amended text is highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the legislative text for which a correction is proposed, to assist preparation of the final text (for instance, obvious errors or omissions in a given language version). These suggested corrections are subject to the agreement of the departments concerned.

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(*) Enhanced cooperation between committees – Rule 162a

PROCEDURAL PAGE

By letter of 4 October 2002 the Commission submitted to Parliament, pursuant to Article 251(2) and Article 44 of the EC Treaty, the proposal for a European Parliament and Council directive on takeover bids (COM(2002) 534 – 2002/0240 (COD)).

At the sitting of 21 October 2002 the President of Parliament announced that he had referred this proposal to the Committee on Legal Affairs and the Internal Market as the committee responsible and the Committee on Economic and Monetary Affairs and the Committee on Employment and Social Affairs for their opinions (C5-0481/2002).

At the sitting of 23 January 2003 the President of Parliament announced that he had also referred the proposal to the Committee on Industry, External Trade, Research and Energy for its opinion.

At the sitting of 13 March 2003 the President of Parliament announced that the Committee on Economic and Monetary Affairs, which had been asked for its opinion, would be involved in drawing up the report under Rule 162a.

The Committee on Legal Affairs and the Internal Market appointed Klaus-Heiner Lehne rapporteur at its meeting of 15 April 2002.

The committee considered the Commission proposal and draft report at its meeting of 3 December 2002, 20 February 2003, 24 March 2003, 23 April 2003, 10 June 2003, 10 September 2003 and 27 November 2003.

At the last meeting it adopted the draft legislative resolution by 19 votes to 10, with 2 abstentions.

The following were present for the vote: Bill Miller vice-chairman; Klaus-Heiner Lehne, rapporteur; Ward Beysen, Hans Udo Bullmann (for Willi Rothley), Michael Cashman (for Maria Berger), Bert Doorn, Raina A. Mercedes Echerer (for Uma Maija Aaltonen), Francesco Fiori (for Paolo Bartolozzi), Janelly Fourtou, Marie-Françoise Garaud, Evelyne Gebhardt, Fiorella Ghilardotti, Malcolm Harbour, Carlos Lage, Kurt Lechner, Sir Neil MacCormick, Toine Manders, Hans-Peter Mayer (for Lord Inglewood), Christopher Huhne (for Diana Wallis), Arlene McCarthy, Manuel Medina Ortega, Angelika Niebler (for Rainer Wieland), Marcelino Oreja Arburúa (for José María Gil-Robles Gil-Delgado), Imelda Mary Read (for Carlos Lage), Anne-Marie Schaffner, Ursula Schleicher, Paolo Pastorelli, Peter William Skinner (for Ioannis Koukiadis), Marianne L.P. Thyssen, Antonios Trakatellis (for Giuseppe Gargani), Ieke van den Burg (for François Zimeray, pursuant to Rule 153(2)), Joachim Wuermeling, Stefano Zappalà. The opinions of the Committee on Economic and Monetary Affairs, the Committee on Industry, External Trade and the Committee on Employment and Social Affairs are attached.

The report was tabled on 8 December 2003.

DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

on the proposal for a European Parliament and Council directive on takeover bids
(COM(2002) 534 – C5-0481/2002 – 2002/0240(COD))

(Codecision procedure: first reading)

The European Parliament,

- having regard to the Commission proposal to the European Parliament and the Council (COM(2002) 534¹),
 - having regard to Article 251(2) and Article 44(1) of the EC Treaty, pursuant to which the Commission submitted the proposal to Parliament (C5-0481/2002),
 - having regard to Rule 67 of its Rules of Procedure,
 - having regard to the report of the Committee on Legal Affairs and the Internal Market and the opinions of the Committee on Economic and Monetary Affairs, the Committee on Employment and Social Affairs and the Committee on Industry, External Trade, Research and Energy (A5-0469/2003),
1. Approves the Commission proposal as amended;
 2. Calls on the Commission to refer the matter to Parliament again if it intends to amend the proposal substantially or replace it with another text;
 3. Instructs its President to forward its position to the Council and Commission.

Text proposed by the Commission

Amendments by Parliament

Amendment 1
Recital 3 a (new)

(3a) In view of the public interest purposes served by the central banks of the Member States, it seems inconceivable that they can be the target of a takeover bid. Since, for historical reasons, some of these central banks have their securities listed in a regulated market of a Member State, it is necessary to exclude them explicitly from the scope of application of this Directive.

¹ OJ C 45 E, 25.2.2003, p.1.

Justification

Compromise as reached in Coreper/ Council of the European Union.

Amendment 2
Recital 17

(17) In order to reinforce the effectiveness of the existing provisions regarding freedom to deal in the securities of companies covered by this Directive and 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 ***put to a vote at*** the general meeting.

(17) In order to reinforce the effectiveness of the existing provisions regarding freedom to deal in the securities of companies covered by this Directive and 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 a report to*** the general meeting.

Justification

See Amendment 1.

Amendment 3
Recital 18

(18) Member States should take the necessary measures to afford any offeror the possibility ***of purchasing the securities of the offeree company, by neutralising provisions placing restrictions on the transfer of securities and on voting rights, and to render ineffective any restrictions on the transfer of securities and on voting rights which may prevent an offeror who holds sufficient securities of the offeree company from exercising the corresponding voting rights in order to amend the company's articles of association, by neutralising restrictions on the voting rights and special appointment rights held by shareholders at the first general meeting following closure of the bid.***

(18) Member States should take the necessary measures to afford any offeror the possibility ***of acquiring a majority interest in other companies and of fully exercising their control. To this end, restrictions on the transfer of shares, restrictions on voting rights, extraordinary appointment rights and multiple voting rights should be removed during the period for acceptance of the bid or when the general meeting decides on defensive measures or on amendments of the articles of association or the removal or appointment of board members at the first general meeting following closure of the bid. When a loss has arisen by the holders of securities as a result of the removal of rights, equitable compensation should be provided for according to the technical modalities set by Member States.***

Justification

See Amendment 1.

Amendment 4
Recital 18 a (new)

(18a) All special rights held by Member States in companies have to be considered in the framework of 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.

Justification

See Amendment 1.

Amendment 5
Recital 18 b (new)

(18b) 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 territory to apply the provisions of the present directive limiting the powers of the board of the offeree company during the period of acceptance of a bid and those rendering ineffective barriers provided for in the articles of association or in specific agreements. In this case Member States should, at least, give to the companies established within their territory an option, which is reversible, to apply these provisions. Without prejudice to international agreements in which the European Community is a party, Member States should be allowed not to require companies which apply these provisions in accordance with the optional arrangements

to apply them when they become subject to an offer launched by a company which does not apply the same provisions as a consequence of the use of these optional arrangements.

Justification

See Amendment 1.

Amendment 6

Recital 20

(20) The provision of information to and consultation of representatives of the employees of the offeror and the offeree company must be governed by the relevant national provisions, and 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, Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies 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. ***The employees of the offeree company, or their representatives, should nevertheless be afforded the opportunity of giving their views on the foreseeable effects of the bid on employment.***

(20) The provision of information to and consultation of representatives of the employees of the offeror and the offeree company must be governed by the relevant national provisions, and 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 employees¹, Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies² ***Council Directive 2001/86/EC of 8 October 2001 supplementing the statute for a European Company with regard to the involvement of employees³*** 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 Community⁴. ***The employees of the companies concerned, or their representatives, should nevertheless be afforded the opportunity of giving their views on the foreseeable effects of the bid on employment. Without prejudice to the rules of the Directive 2003/6/EC of the European Parliament and the Council of 28 January 2003 on insider dealing and market manipulation (market***

abuse)⁵, Member States may always apply or introduce national provisions concerning information to and consultation of representatives of the employees of the offeror before launching an offer.

¹ OJ L 254, 30.9.1994, p. 64. Directive as amended by Directive 97/74/EC (OJ L 10, 16.1.1998, p. 22).

² OJ L 225, 12.8.1998, p. 16.

³ OJ L 294, 10.11.2001, p. 22.

⁴ OJ L 80, 23.3.2002, p. 29.

⁵ OJ J 96, 12.4.2003, p. 16.

Justification

See AMC 1.

Amendment 7

Recital 21

(21) Member States should take the necessary measures to enable *a shareholder who has acquired a high level of control of a company following a takeover bid to require the remaining minority shareholders to sell him their securities. Likewise, where a shareholder has acquired a high level of control of a company following a takeover bid, the remaining minority shareholders should be able to require him to buy their securities.*

(21) Member States should take the necessary measures to enable *an offeror who has acquired, following a takeover bid, a certain percentage of the capital carrying voting rights of a company to require the holders of remaining securities to sell him their securities. Likewise, where an offeror has acquired, following a takeover bid, a certain percentage of the capital carrying voting rights of a company, the holders of remaining securities should be able to require him to buy their securities. These squeeze out and sell out procedures only apply under specific conditions linked to takeover bids. Member States may continue to apply national rules to squeeze out and sell out procedures outside these conditions.*

Justification

See Amendment 1.

Amendment 8
Recital 25

(25) **The necessary measures must be taken** for the implementation of this Directive 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. ¹

(25) 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 according to the principles set out in this Directive, after consulting the European Securities Committee established by Commission Decision 2001/528/EC ¹. 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 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 to advise the Commission, if necessary, on additions or amendments to this Directive. In so doing the contact committee can make use of the information which Member States will provide on the basis of the Directive concerning takeover bids that have taken place on their regulated markets.

¹ OJ L 184, 17.7.1999, p. 23.

¹ OJ L 191, 13.7.2001, p. 45.

¹ OJ L 191, 13.7.2001, p. 45.

Justification

See Amendment 1.

Amendment 9
Recital 26

(26) The Commission should be able to re-examine and if necessary revise the provisions requiring greater transparency and ensuring effective operation of general meetings in the context of a takeover bid.

(26) The present directive is only a first step towards a higher degree of harmonisation for takeover bids. Therefore, the Commission should be able to facilitate and accelerate this process by submitting proposals for a timely revision of this Directive

Justification

See Amendment 1.

Amendment 10
Recital 27

(27) Member States should be allowed to postpone for a specified period application of the provisions relating to the obligations of the board of the offeree company,

deleted

Justification

See Amendment 1.

Amendment 11
Article 1 paragraph 2 a (new)

2a. This Directive shall not apply to takeover bids for securities issued by the Member States' central banks.

Justification

See Amendment 1.

Amendment 12
Article 2 paragraph 1 subparagraph (f)a (new)

(fa) "multiple voting securities" means securities included in a distinct and separate class and carrying more than one vote.

Justification

See Amendment 1.

Amendment 13
Article 4

1. Member States shall designate the authority or authorities competent for supervising a bid for the purposes of the rules made or introduced pursuant to this Directive. The authorities thus designated shall be either public authorities, associations or private bodies recognised by national law or by public authorities expressly empowered for that purpose by national law. Member States shall inform the Commission of these designations, specifying all divisions of functions that may be made. They shall ensure that these authorities exercise their functions impartially and independently of all parties to the bid.

2. (a) The authority competent for supervising the bid shall be that of the Member State in which the offeree company has its registered office if the securities of that company are admitted to trading on a regulated market in that Member State.

1. Member States shall designate the authority or authorities competent for supervising a bid for the purposes of the rules made or introduced pursuant to this Directive. The authorities thus designated shall be either public authorities, associations or private bodies recognised by national law or by public authorities expressly empowered for that purpose by national law. Member States shall inform the Commission of these designations, specifying all divisions of functions that may be made. They shall ensure that these authorities exercise their functions impartially and independently of all parties to the bid.

2. (a) The authority competent for supervising the bid shall be that of the Member State in which the offeree company has its registered office if the securities of that company are admitted to trading on a regulated market in that Member State.

(b) If the securities of the offeree company are not admitted to trading on a regulated market in the Member State in which the company has its registered office, the authority competent for supervising the bid shall be that of the Member State on whose regulated market the securities of the company are admitted to trading.

If the securities of the company are admitted to trading on regulated markets in more than one Member State, the authority competent for supervising the bid shall be that of the Member State on whose regulated market the securities were first admitted.

(c) If the securities of the offeree company are first admitted to trading on regulated markets within more than one Member State simultaneously, the offeree company shall determine which of the supervisory authorities of those Member States is the competent authority for supervising the bid by notifying these regulated markets and their supervisory authorities on the first trading day.

If the securities of the offeree company are already admitted to trading on regulated markets in more than one Member State at the date referred to in Article **20(1)** and were admitted simultaneously, the supervisory authorities of these Member States shall agree on which one of them is to be the competent authority for supervising the bid within four weeks of the date mentioned in Article **20(1)**. Otherwise, the offeree company shall determine which of these authorities is to be the competent authority on the first trading day following the expiry of the period of time mentioned in the first sentence.

(d) Member States shall ensure that the decisions referred to in **point** (c) are made public.

(e) In the cases referred to in **points** (b) and (c), matters relating to the consideration offered in the case of a bid, in particular the price, and matters relating to the bid procedure, in particular the information on

(b) If the securities of the offeree company are not admitted to trading on a regulated market in the Member State in which the company has its registered office, the authority competent for supervising the bid shall be that of the Member State on whose regulated market the securities of the company are admitted to trading.

If the securities of the company are admitted to trading on regulated markets in more than one Member State, the authority competent for supervising the bid shall be that of the Member State on whose regulated market the securities were first admitted.

(c) If the securities of the offeree company are first admitted to trading on regulated markets within more than one Member State simultaneously, the offeree company shall determine which of the supervisory authorities of those Member States is the competent authority for supervising the bid by notifying these regulated markets and their supervisory authorities on the first trading day.

If the securities of the offeree company are already admitted to trading on regulated markets in more than one Member State at the date referred to in Article **19(1)** and were admitted simultaneously, the supervisory authorities of these Member States shall agree on which one of them is to be the competent authority for supervising the bid within four weeks of the date mentioned in Article **19(1)**. Otherwise, the offeree company shall determine which of these authorities is to be the competent authority on the first trading day following the expiry of the period of time mentioned in the first sentence.

(d) Member States shall ensure that the decisions referred to in (c) are made public.

(e) In the cases referred to in (b) and (c), matters relating to the consideration offered in the case of a bid, in particular the price, and matters relating to the bid procedure, in particular the information on the offeror's

the offeror's decision to make a bid, the contents of the offer document and the disclosure of the bid, shall be dealt with in accordance with the rules of the Member State of the competent authority. In matters relating to the information to be provided to the employees of the offeree company and in matters relating to company law, in particular the percentage of voting rights which confers control and any derogation from the obligation to launch a bid, as well as the conditions under which the board of the offeree company may undertake any action which might result in the frustration of the bid, the applicable rules and the competent authority shall be those of the Member State in which the offeree company has its registered office.

3. Member States shall ensure that all persons employed or formerly employed by the supervisory authorities shall be bound by professional secrecy. Information covered by professional secrecy may not be divulged to any person or authority except by virtue of provisions laid down by law.

4. The supervisory authorities of the Member States under this Directive and other authorities supervising capital markets, in particular in accordance with Council Directive 89/592/EEC,¹ Council Directive 93/22/EEC and Directive 2001/34/EC of the European Parliament and of the Council, shall cooperate and supply each other with information wherever necessary for the application of the rules drawn up in accordance with this Directive and in particular in cases covered by **points (b), (c) and (e) of paragraph 2**. Information thus exchanged shall be covered by the obligation of professional secrecy to which the persons employed or formerly employed by the supervisory authorities receiving the information are subject. Cooperation shall include the ability to serve the legal documents necessary to enforce measures taken by the competent authorities in

¹ OJ L 334, 18.11.1989, p. 30.

² OJ L 334, 18.11.1989, p. 30.

decision to make a bid, the contents of the offer document and the disclosure of the bid, shall be dealt with in accordance with the rules of the Member State of the competent authority. In matters relating to the information to be provided to the employees of the offeree company and in matters relating to company law, in particular the percentage of voting rights which confers control and any derogation from the obligation to launch a bid, as well as the conditions under which the board of the offeree company may undertake any action which might result in the frustration of the bid, the applicable rules and the competent authority shall be those of the Member State in which the offeree company has its registered office.

3. Member States shall ensure that all persons employed or formerly employed by the supervisory authorities shall be bound by professional secrecy. Information covered by professional secrecy may not be divulged to any person or authority except by virtue of provisions laid down by law.

4. The supervisory authorities of the Member States under this Directive and other authorities supervising capital markets, in particular in accordance with Council Directive 89/592/EEC ², Council Directive 93/22/EEC and Directive 2001/34/EC of the European Parliament and of the Council, shall co-operate and supply each other with information wherever necessary for the application of the rules drawn up in accordance with this Directive and in particular in cases covered by **paragraph 2(b), (c) and (e)**. Information thus exchanged shall be covered by the obligation of professional secrecy to which the persons employed or formerly employed by the supervisory authorities receiving the information are subject. Co-operation shall include the ability to serve the legal documents necessary to enforce measures taken by the competent authorities in

connection with bids, as well as such other assistance as may reasonably be requested by the supervisory authorities concerned for the purpose of investigating any actual or alleged breaches of the rules made or introduced pursuant to this Directive.

5. The supervisory authorities shall be vested with all the powers necessary for carrying out their duties, including that of ensuring that the parties to the bid comply with the rules established pursuant to this Directive.

Provided that the general principles set out in Article 3(1) are respected, Member States may provide in their rules made or introduced pursuant to this Directive *that their supervisory authorities may, in certain types of cases determined at national level and/or in other special cases, grant derogations from these rules on the basis of a reasoned decision.*

6. This Directive shall not affect the power of the Member States to designate judicial or other authorities responsible for dealing with disputes and for deciding on irregularities committed during the bid procedure or the power of Member States to regulate whether and under which circumstances parties to a bid are entitled to bring administrative or judicial proceedings. In particular, this Directive shall not affect the power which courts may have in a Member State to decline to hear legal proceedings and to decide whether or not such proceedings affect the outcome of a bid. This Directive shall not affect the power of the Member States to determine the legal position concerning the liability of supervisory authorities or concerning litigation between the parties to a bid.

connection with bids, as well as such other assistance as may reasonably be requested by the supervisory authorities concerned for the purpose of investigating any actual or alleged breaches of the rules made or introduced pursuant to this Directive.

5. The supervisory authorities shall be vested with all the powers necessary for carrying out their duties, including that of ensuring that the parties to the bid comply with the rules established pursuant to this Directive.

Provided that the general principles set out in Article 3(1) are respected, Member States may provide in their rules made or introduced pursuant to this Directive *for derogations from these rules: i) by including such derogations in their national rules, in order to take account of circumstances determined at national level; ii) and/or by granting their supervisory authorities, where they are competent, powers to waive such national rules, to take account of the circumstances referred to in point i) or in other specific circumstances, with a reasoned decision required in the latter case.*

6. This Directive shall not affect the power of the Member States to designate judicial or other authorities responsible for dealing with disputes and for deciding on irregularities committed during the bid procedure or the power of Member States to regulate whether and under which circumstances parties to a bid are entitled to bring administrative or judicial proceedings. In particular, this Directive shall not affect the power which courts may have in a Member State to decline to hear legal proceedings and to decide whether or not such proceedings affect the outcome of a bid. This Directive shall not affect the power of the Member States to determine the legal position concerning the liability of supervisory authorities or concerning litigation between the parties to a bid.

Justification

See Amendment 1.

Amendment 14 Article 5

1. Where a natural or legal person who, as a result of his own acquisition or the acquisition by persons acting in concert with him, holds securities of a company referred to in Article 1(1) which, added to any existing holdings and the holdings of persons acting in concert with him, directly or indirectly give him a specified percentage of voting rights in that company, conferring on him the control of that company, Member States shall ensure that this person is required to make a bid as a means of protecting the minority shareholders of that company. This bid shall be addressed at the earliest opportunity to all holders of securities for all their holdings at *an* equitable price.

2. Where control has been obtained following a voluntary bid made in accordance with this Directive to all holders of securities for all their holdings, the obligation to launch a bid laid down in paragraph 1 shall no longer apply.

3. The percentage of voting rights which 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.

4. The highest price paid for the same securities by the offeror, or by persons acting in concert with him, over a period *of between six and* twelve months prior to the bid referred to in paragraph 1 shall be regarded as an equitable price.

1. Where a natural or legal person who, as a result of his own acquisition or the acquisition by persons acting in concert with him, holds securities of a company referred to in Article 1(1) which, added to any existing holdings and the holdings of persons acting in concert with him, directly or indirectly give him a specified percentage of voting rights in that company, conferring on him the control of that company, Member States shall ensure that this person is required to make a bid as a means of protecting the minority shareholders of that company. This bid shall be addressed at the earliest opportunity to all holders of securities for all their holdings at *the* equitable price *defined in paragraph 4.*

2. Where control has been obtained following a voluntary bid made in accordance with this Directive to all holders of securities for all their holdings, the obligation to launch a bid laid down in paragraph 1 shall no longer apply.

3. The percentage of voting rights which 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.

4. The highest price paid for the same securities by the offeror, or by persons acting in concert with him, over a period, *to be determined by Member States, of not less than six and not more than* twelve months prior to the bid referred to in paragraph 1 shall be regarded as the equitable price. *If, after the bid has been made public and before the offer closes for acceptance, the offeror or any person acting in concert with*

Member States may authorise their supervisory authorities to adjust the price referred to in the first subparagraph in circumstances and according to criteria that are clearly determined. To that end, they **shall** draw up a list of circumstances in which the highest price may be adjusted either upwards or downwards, for example where the highest price was set by agreement between the purchaser and a seller, where the market prices of the securities in question have been manipulated, where market prices in general or certain market prices in particular have been affected by exceptional occurrences, or in order to enable a firm in difficulty to be rescued. They may also determine the criteria to be applied in such cases, for example the average market value over a particular period, the break-up value of the company or other objective valuation criteria generally used in financial analysis.

Any decision by a supervisory authority to adjust the equitable price shall be substantiated and made public.

5. The consideration offered by the offeror may consist exclusively of liquid securities.

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

In any event, the offeror shall offer a cash consideration at least as an alternative where, **either individually or together with** persons acting in concert with him, over a period beginning **at least three months before his bid is made pursuant to Article 6(1) and ending before expiry of the period for acceptance of the bid, he has purchased in cash more than 5% of the**

him purchases securities at above the offer price, the offeror shall increase his offer to not less than the highest price paid for the securities so acquired.

Provided that the general principles of Article 3 (1) are respected, Member States may authorise their supervisory authorities to adjust the price referred to in the first subparagraph in circumstances and according to criteria that are clearly determined. To that end, they **may** draw up a list of circumstances in which the highest price may be adjusted either upwards or downwards, for example where the highest price was set by agreement between the purchaser and a seller, where the market prices of the securities in question have been manipulated, where market prices in general or certain market prices in particular have been affected by exceptional occurrences, or in order to enable a firm in difficulty to be rescued. They may also determine the criteria to be applied in such cases, for example the average market value over a particular period, the break-up value of the company or other objective valuation criteria generally used in financial analysis.

Any decision by a supervisory authority to adjust the equitable price shall be substantiated and made public.

5. The offeror may offer as consideration securities, cash or a combination of both.

However, where the consideration offered by the offeror does not consist of liquid securities admitted to trading on a regulated market, such consideration has to include a cash alternative.

In any event, the offeror shall offer a cash consideration at least as an alternative where **he or** persons acting in concert with him, over a period beginning **at the same time as the period decided by the Member State in accordance with paragraph 4 and ending when the offer closes for acceptance, has purchased in cash securities carrying 5% or more of the voting rights of the offeree**

securities or voting rights of the offeree company.

company.

6. The Commission shall adopt, in accordance with the procedure referred to in Article 17(2), the rules for the application of paragraphs 4 and 5 of this Article.

Member States may provide that a cash consideration shall be offered, at least as an alternative, in all cases.

deleted.

7. In addition to the protection provided under paragraph 1, Member States may provide for further instruments aimed at protecting the interests of holders of securities in so far as these instruments do not hinder the normal course of the bid.

7. In addition to the protection provided under paragraph 1, Member States may provide for further instruments aimed at protecting the interests of holders of securities in so far as these instruments do not hinder the normal course of the bid.

Justification

See Amendment 1.

Amendment 15

Article 6 paragraph 3 subparagraph (d) a (new)

(da) the compensation offered for the rights which might be removed as a result of the breakthrough rule laid down in Article 11(4), with particulars of the way in which that compensation is to be paid and the method employed in determining it;

Justification

See Amendment 1.

Amendment 16

Article 7 paragraph 1

1. Member States shall provide that the period for acceptance of the bid may not be less than two weeks or more than ten weeks from the date of publication of the offer document. Provided that the general principle laid down in Article 3(1)(f) is

1. Member States shall provide that the period for acceptance of the bid may not be less than two weeks or more than ten weeks from the date of publication of the offer document. Provided that the general principle laid down in Article 3(1)(f) is

respected, Member States may provide that the period of ten weeks may be ***prolonged on the*** condition that the offeror gives at least two weeks' notice of its intention to close the bid.

respected, Member States may provide that the period of ten weeks may be ***extended on*** condition that the offeror gives at least two weeks' notice of its intention to close the bid.

Justification

See Amendment 1.

Amendment 17
Article 8 paragraph 2

2. Member States shall provide for the disclosure of all information or documents required by Article 6 in such a manner as to ensure that they are both readily and promptly available to the holders of securities at least in those Member States where the securities of the offeree company are admitted to trading on a regulated market and to the representatives of the employees of the offeree company or, where there are no such representatives, to the employees themselves.

2. Member States shall provide for the disclosure of all information or documents required by Article 6 in such a manner as to ensure that they are both readily and promptly available to the holders of securities at least in those Member States where the securities of the offeree company are admitted to trading on a regulated market and to the representatives of the employees of the offeree company ***and the offeror*** or, where there are no such representatives, to the employees themselves.

Justification

See Amendment 1.

Amendment 18
Article 9 paragraph 5 a (new)

5a. For the purposes of paragraph 2, the board shall mean both the management board of the company and the supervisory board of the company, where the organization of the company follows a two-tier board structure.

Justification

See Amendment 1.

Amendment 19
Article 10

1. Member States shall ensure that companies referred to in Article 1(1) publish detailed information on the following:

(a) the structure of their capital, including securities which are not admitted to trading on a regulated market in a Member State, where appropriate with an indication of the different classes of shares and, for each class of shares, the rights and obligations attaching to it and the percentage of total share capital that it represents;

(b) any restrictions on the transfer of securities, such as limitations on the holding of securities or the need to obtain the approval of the company or other holders of securities, without prejudice to Article 46 of Directive 2001/34/EC;

(c) significant direct and indirect shareholdings (including indirect shareholdings through pyramid structures and cross-shareholdings) within the meaning of Article 85 of Directive 2001/34/EC;

(d) the holders of any securities with special control rights and a description of these rights;

(e) the system of control of any employee share scheme where the control rights are not exercised directly by the employees;

(f) any restrictions on voting rights, such as limitations of the right to vote for holders of a given percentage or number of votes, deadlines for exercising the right to vote or ***separation of the right to vote from the holding of a security***;

(g) agreements between shareholders which may result in restrictions on the transfer of securities and/or voting rights within the meaning of ***Article 87(1)(c) of Directive 2001/34/EC***;

(h) the rules governing the appointment and replacement of board members and the

1. Member States shall ensure that companies referred to in Article 1(1) publish detailed information on the following:

(a) the structure of their capital, including securities which are not admitted to trading on a regulated market in a Member State, where appropriate with an indication of the different classes of shares and, for each class of shares, the rights and obligations attaching to it and the percentage of total share capital that it represents;

(b) any restrictions on the transfer of securities, such as limitations on the holding of securities or the need to obtain the approval of the company or other holders of securities, without prejudice to Article 46 of Directive 2001/34/EC;

(c) significant direct and indirect shareholdings (including indirect shareholdings through pyramid structures and cross-shareholdings) within the meaning of Article 85 of Directive 2001/34/EC;

(d) the holders of any securities with special control rights and a description of these rights;

(e) the system of control of any employee share scheme where the control rights are not exercised directly by the employees;

(f) any restrictions on voting rights, such as limitations of the right to vote for holders of a given percentage or number of votes, deadlines for exercising the right to vote, or ***systems whereby, with the company's co-operation, the financial rights attached to securities are separated from the holding of securities***;

(g) agreements between shareholders, which ***are known to the company and*** may result in restrictions on the transfer of securities and/or voting rights within the meaning of Directive 2001/34/EC;

(h) the rules governing the appointment and replacement of board members and the

amendment of the articles of association;

(i) the powers of board members, and in particular the power to issue or buy back shares;

(j) significant agreements to which the company is a party and which take effect, alter or terminate upon a change of control of the company and the effects thereof;

(k) any agreements between the company and its board members or employees providing for compensation if they are made redundant without valid reason **following** a takeover bid.

2. The information referred to in paragraph 1 shall be published in the company's annual report within the meaning of Article 46 of Council Directive 78/660/EEC and Article 36 of Council Directive 83/349/EEC **and, where appropriate, updated during the year in accordance with the transparency requirements applicable to companies whose securities are admitted to trading on a regulated market.**

3. Member States shall ensure that, in the case of companies whose securities are admitted to trading on a regulated market in a Member State, **the general meeting of shareholders takes a decision at least every two years on the structural aspects and defensive mechanisms referred to in paragraph 1. They shall require the board to state the reasons for those structural aspects and defensive mechanisms.**

amendment of the articles of association;

(i) the powers of board members, and in particular the power to issue or buy back shares;

(j) significant agreements to which the company is a party and which take effect, alter or terminate upon a change of control of the company **following a takeover bid**, and the effects thereof, **except when their nature is such that their disclosure would be seriously prejudicial to the company; such exception shall not apply when the company is specifically obliged to disclose such information on the basis of other legal requirements ;**

(k) any agreements between the company and its board members or employees providing for compensation if they **resign or** are made redundant without valid reason **or if their employment ceases because of** a takeover bid.

2. The information referred to in paragraph 1 shall be published in the company's annual report within the meaning of Article 46 of Council Directive 78/660/EEC and Article 36 of Council Directive 83/349/EEC.

3. Member States shall ensure that, in the case of companies whose securities are admitted to trading on a regulated market in a Member State, **the board must present an explanatory report to the annual general meeting of shareholders on the matters referred to in paragraph 1.**

Justification

See Amendment 1.

Unenforceability of restrictions on the transfer of securities and voting rights

1. Without prejudice *to the obligations imposed by Community law on companies whose securities are admitted to trading on a regulated market in a Member State, Member States shall ensure that the safeguards referred to in paragraphs 2, 3 and 4 are afforded* when a bid has been made public.

2. Any restrictions on the transfer of securities provided for in the articles of association of the offeree company shall ***be unenforceable against the offeror*** during the period for acceptance of the bid.

Any restrictions on the transfer of securities provided for in contractual agreements between the offeree company and holders of its securities or between holders of securities of the offeree company ***shall be unenforceable against the offeror*** during the period for acceptance of the bid.

3. ***Any restrictions*** on voting rights provided for in the articles of association of the offeree company shall ***cease to have effect when*** the general meeting decides on any defensive measures in accordance with Article 9.

Any restrictions on 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 shall ***cease to have effect when*** the general meeting decides on any defensive measures in accordance with Article 9.

Breakthrough

1. Without prejudice *to other rights and obligations laid down in Community law for companies referred to in Article 1(1), Member States shall ensure that the provisions referred to in paragraphs 2 to 6 apply* when a bid has been made public.

2. Any restrictions on the transfer of securities provided for in the articles of association of the offeree company shall ***not apply vis-à-vis the offeror*** during the period for acceptance of the bid ***laid down in Article 7(1)***.

Any restrictions on the transfer of securities provided for in contractual agreements between the offeree company and holders of its securities, or ***contractual agreements*** between holders of securities of the offeree company ***entered into after the adoption of this Directive, shall not apply vis-à-vis the offeror*** during the period for acceptance of the bid ***laid down in Article 7(1)***.

3. ***Restrictions*** on voting rights provided for in the articles of association of the offeree company shall ***not have effect at*** the general meeting ***which*** decides on any defensive measures in accordance with Article 9.

Restrictions on voting rights provided for in contractual agreements between the offeree company and holders of its securities, ***or contractual agreements*** between holders of securities of the offeree company ***entered into after the adoption of this Directive, shall not have effect at*** the general meeting ***which*** decides on any defensive measures in accordance with Article 9.

Multiple voting securities shall carry one vote only at the general meeting which decides on any defensive measures in

4. Where, following a bid, the offeror holds ***a number of securities of the offeree company which, under the applicable national law, would enable him to amend the company's articles of association***, any restrictions on the transfer of securities and on voting rights referred to in paragraphs 2 and 3 and any ***special*** rights of shareholders concerning the appointment or removal of board members shall cease to have effect at the first general meeting following closure of the bid.

To that end, the offeror shall have the right to convene a general meeting at short notice, provided that the meeting does not take place within two weeks of notification.

5. Paragraphs ***2 and 3*** shall not apply to securities ***without voting rights which carry*** specific pecuniary advantages.

accordance with Article 9.

4. Where, following a bid, the offeror holds ***75% of the capital carrying voting rights***, any restrictions on the transfer of securities and on voting rights referred to in paragraphs 2 and 3 and any ***extraordinary*** rights of shareholders concerning the appointment or removal of board members ***provided for in the articles of association of the offeree company shall not apply and multiple voting securities shall carry one vote only*** at the first general meeting following closure of the bid, ***called by the offeror in order to amend the articles of association or to remove or appoint board members.***

To that end, the offeror shall have the right to convene a general meeting at short notice, provided that the meeting does not take place within two weeks of notification.

4a. Where rights are being removed on the basis of paragraphs 2, 3, 4 and/or Article 11A, equitable compensation must be provided for any loss incurred by the holders of these rights. The terms for determining such compensation and the modalities of its payment will be set by Member States.

5. Paragraphs ***3 and 4*** shall not apply to securities ***where the restrictions on voting rights are compensated for by*** specific pecuniary advantages.

5a. This Article shall not apply where Member States hold securities in the offeree company which confer special rights on the Member States which are compatible with the Treaty and to special rights provided for in national law which are compatible with the Treaty and to cooperative enterprises.

Justification

See Amendment 1.

Article 11a

Optional arrangements

1. Member States may reserve the right not to require companies referred to in Art. 1(1) which have their registered offices on their territory to apply Articles 9(2) and (3) and/or 11.

2. When Member States make use of the option referred to under paragraph 1, they must nevertheless give companies which have their registered offices on their territory an option, which is reversible, to apply Articles 9(2) and (3) and/or 11, without prejudice to Article 11 (6).

The decision of the company must be taken by the general meeting of shareholders, based on the applicable law where the company has its registered office in accordance with the rules applicable to amendments of the Articles of association. The decision must be notified to the supervisory authority of the Member State where the company has its registered office and to all supervisory authorities of Member States where its securities are admitted to trading on a regulated market or where such admission has been requested.

3. Member States may, under the conditions determined by national law, exempt companies which apply Articles 9(2) and (3) and/or 11 from applying Articles 9(2) and (3) and/or 11 if they become subject to an offer launched by a company which does not apply the same Articles as they do, or by a company controlled, directly or indirectly, by the latter, pursuant to Article 1 of Directive 83/349/EEC.

4. Member States shall ensure that the provisions applicable to the respective companies are disclosed without delay.

5. The application of any measure applied

according to the provision of paragraph 3 is subject to the authorization of the general meeting of the shareholders of the offeree company, which should have been received not earlier than 18 months before the bid was made public in accordance with Article 6 (1).

Justification

See Amendment 1.

Amendment 22
Article 13

Without prejudice to the provisions of this Directive, the provision of information to and consultation of representatives of the employees of the offeror and the offeree company shall be governed by the relevant national provisions, and in particular those adopted pursuant to Directives 94/45/EC, 98/59/EC and 2002/14/EC.

The provisions of this Directive are without prejudice to the rules relating to information and to consultation of representatives of and, if Member States so provide, codetermination with the employees of the offeror and the offeree company governed by the relevant national provisions, and in particular those adopted pursuant to Directives 94/45/EC, 98/59/EC, 2001/86/EC and 2002/14/EC.

Justification

See Amendment 1.

Amendment 23
Article 14

1. Member States shall ensure that, following a bid made to all the holders of securities of the offeree company for all their securities, *an offeror is able to require the holders of the remaining securities to sell him those securities at a fair price in either of the following cases:*

(a) where he holds securities representing not less than 90% of the capital of the

1. Member States shall ensure that, following a bid made to all the holders of securities of the offeree company for all their securities, *the provisions in paragraphs 2 to 5 apply.*

offeree company, or

(b) where he has acquired, through acceptance of the bid, securities representing not less than 90% of the capital concerned by the bid.

In the case referred to in point (a) above, Member States may set a higher threshold that may not, however, be more than 95% of the company's capital.

2. Member States shall ensure that rules are in force making it possible to calculate when the threshold is reached.

Where the offeree company has issued more than one class of *shares*, *the rule laid down in paragraph 1 shall apply separately within each class.*

3. Member States shall ensure that a fair price is guaranteed. That price shall take the same form as the consideration offered in the bid.

Following a voluntary bid, the price shall be presumed to be fair where it corresponds

2. Member States shall ensure that an offeror is able to require all the holders of the remaining securities to sell him those securities at a fair price. Member States shall introduce this right in one of the following situations:

(a) where the offeror holds securities representing not less than 90% of the capital carrying voting rights and 90% of the voting rights of the offeree company, or

(b) where he has acquired or has firmly contracted to acquire, following acceptance of the bid, securities representing not less than 90% of the offeree company's capital carrying voting rights and 90% of the voting rights comprised in the bid.

In the case referred to in (a) above, Member States may set a higher threshold that may not, however, be higher than 95% of the capital carrying voting rights and 95% of the voting rights.

3. Member States shall ensure that rules are in force making it possible to calculate when the threshold is reached.

Where the offeree company has issued more than one class of *securities*, *Member States may provide that the squeeze-out right can be exercised only in the class in which the threshold laid down in paragraph 2 has been reached.*

to the consideration offered in the bid and the offeror has acquired, through acceptance of the bid, securities representing not less than 90% of the capital concerned by the bid.

Following a mandatory bid, the consideration offered in the bid shall be presumed to be fair.

4. In both the cases referred to in points (a) and (b) of paragraph 1, the fair price presumption shall apply only where the squeeze-out right is exercised within a period of three months after the end of the period for acceptance of the bid. In all other cases, the price shall be determined by an independent expert.

4. The offeror must exercise the squeeze-out right within a period of three months after the end of the period for acceptance of the bid referred to in Article 7.

5. Member States shall ensure that a fair price is guaranteed. That price shall take the same form as the consideration offered in the bid or consist of cash. Member States may provide that cash shall be offered at least as an alternative.

Following a voluntary bid, in both cases referred to in points (a) and (b) of paragraph 2, the consideration offered in the bid shall be presumed to be fair where the offeror has acquired, through acceptance of the bid, securities representing not less than 90% of the capital carrying voting rights comprised in the bid.

Following a mandatory bid, the consideration offered in the bid shall be presumed to be fair.

Justification

See Amendment 1.

Amendment 24 Article 15

1. Member States shall ensure that, following a bid made to all the holders of

1. Member States shall ensure that, following a bid made to all the holders of

securities of the offeree company for all their securities, *a minority holder of securities is able to require the offeror holding not less than 90% of the capital of the offeree company to buy his securities from him at a fair price. They may set a higher threshold, but this may not be more than 95% of the company's capital.*

However, the sell-out right may not be exercised where the specified threshold has been reached only for a short period.

2. Where the offeree company has issued more than one class of shares, the rule laid down in paragraph 1 shall apply separately within each class.

3. The price shall be determined in accordance with the provisions of Article 14(3) and (4).

securities of the offeree company for all their securities, *the provisions in paragraphs 2 and 3 apply.*

2. Member States shall ensure that a holder of remaining securities is able to require the offeror to buy his securities from him at a fair price under the same circumstances as provided for in Article 14(2).

3. The provisions of Article 14(3) to (5) shall apply mutatis mutandis.

Justification

See Amendment 1.

Amendment 25 Article 17

1. The Commission shall be assisted by the European Securities Committee established by Commission Decision 2001/528/EC. ¹

2. Where reference is made to this paragraph, *the regulatory procedure laid down in Article 5 of Decision 1999/468/EC shall apply, having due regard to Articles 7(3) and 8 thereof.*

3. The period referred to in Article 5(6) of Decision 1999/468/EC shall be three months.

1. The Commission shall be assisted by the European Securities Committee established by Commission Decision **2001/528/EC** (*hereinafter referred to as the "Committee"*).

2. Where reference is made to this paragraph, *Articles 5 and 7 of Decision 1999/468/EC shall apply, having regard to Article 8 thereof, provided that the implementing measures adopted according to this procedure do not modify the essential provisions of this Directive.*

3. The period referred to in Article 5(6) of Decision 1999/468/EC shall be three months.

¹

4. Without prejudice to the implementing measures already adopted, on the expiry of a four-year period following the entry into force of this Directive, the application of its provisions requiring the adoption of technical rules and decisions in accordance with paragraph 2 shall be suspended. On a proposal from the Commission, the European Parliament and the Council may renew the provisions concerned in accordance with the procedure laid down in Article 251 of the Treaty and, to that end, they shall review them prior to the expiry of the period referred to above.

¹ OJ L 191, 13.7.2001, p. 45.

Justification

See Amendment 1.

Amendment 26
Article 17 a (new)

Article 17a

Contact committee

1. A contact committee shall be appointed which has as its functions:

(a) to facilitate, without prejudice to Articles 226 and 227 of the Treaty, 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 additions or amendments to this Directive.

2. It shall not be the function of the Contact Committee to appraise the merits of decisions taken by the supervisory authorities in individual cases.

Justification

See Amendment 1.

Amendment 27
Article 18

Five years after the date laid down in Article **20(1)**, the Commission shall examine **Articles 4(2), 10 and 11** and, if necessary, propose **that they be revised in the light of the experience acquired in applying them.**

Five years after the date laid down in Article **19(1)**, the Commission shall examine **this Directive in the light of the experience acquired in applying it** and, if necessary, propose **a revision with a view to achieving a higher degree of harmonisation for takeovers bids in the European Union.**

To that effect, Member States shall provide the Commission annually with information on the takeover bids which have been launched on companies whose securities are admitted to trading on their regulated markets. Such information shall include the nationality of the companies involved, the result of the offer and any other information that is relevant in order to understand how takeover bids operate in practice.

Justification

See Amendment 1.

Amendment 28
Article 19

Article 19

deleted

Transitional period

Member States are authorised to postpone application of Article 9 for a period of not more than three years after the date laid down in Article 20(1), provided that they inform the Commission thereof not later than that date.

Justification

See Amendment 1.

Amendment 29
Article 20 paragraph 1 subparagraph 1

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than **1 January 2005**. They shall forthwith inform the Commission thereof.

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than **[2 years after the entry into force of this Directive]**. They shall forthwith inform the Commission thereof.

Justification

See Amendment 1.

Amendment 30
Article 21

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Communities*.

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

Justification

See Amendment 1.

1 December 2003

OPINION OF THE COMMITTEE ON ECONOMIC AND MONETARY AFFAIRS

for the Committee on Legal Affairs and the Internal Market

on the proposal for a directive of the European Parliament and of the Council on take-over bids

(COM(2002) 534 – C5-0481/2002 – 2002/0240 (COD))

Draftsman: Christopher Huhne (*)

(*) Enhanced cooperation between committees – Rule 162a

PROCEDURE

The Committee on Economic and Monetary Affairs appointed Christopher Huhne, draftsman at its meeting of 27 November 2002.

It considered the draft opinion at its meetings of 2 December 2002, 27 January, 17 March, 11 June, 1 October, 6 October and 24 November 2003.

At the last meeting it adopted the following conclusions by 31 votes to 1, with 0 abstentions.

The following were present for the vote: Christa Randzio-Plath, chairman; José Manuel García-Margallo y Marfil, Philippe A.R. Herzog and John Purvis, vice-chairmen; Christopher Huhne, draftsman; Hans Blokland, Renato Brunetta, Manuel António dos Santos (for Pervenche Berès), Harald Ettl (for Hans Udo Bullmann), Francesco Fiori (for Generoso Andria, pursuant to Rule 153(2)), Robert Goebbels, Lisbeth Grönfeldt Bergman, Marie-Thérèse Hermange (for Ingo Friedrich, pursuant to Rule 153(2)), Mary Honeyball, Giorgos Katiforis, Christoph Werner Konrad, Wilfried Kuckelkorn (for David W. Martin), Werner Langen (for Fernando Pérez Royo), Klaus-Heiner Lehne (for Othmar Karas, pursuant to Rule 153(2)), Alain Lipietz, Astrid Lulling, Erika Mann (for Bernhard Rapkay), Simon Francis Murphy (for Peter William Skinner), Mikko Pesälä (for Helena Torres Marques), Elly Plooijs-van Gorsel (for Carles-Alfred Gasòliba i Böhm), Alexander Radwan, Karin Riis-Jørgensen, Herman Schmid (for Armonia Bordes), Olle Schmidt, Bruno Trentin, Ieke van den Burg (for a member to be nominated) and Theresa Villiers.

AMENDMENTS

The Committee on Economic and Monetary Affairs calls on the Committee on Legal Affairs and the Internal Market, as the committee responsible, to incorporate the following amendments in its report:

Text proposed by the Commission¹

Amendments by Parliament

Amendment 1
Recital 3 a (new)

(3a) In view of the public interest purposes served by the central banks of the Member States, it seems inconceivable that they can be the target of a takeover bid. Since, for historical reasons, some of these central banks have their securities listed in a regulated market of a Member State, it is necessary to exclude them explicitly from the scope of application of this Directive.

Justification

Compromise as reached in Coreper/ Council of the European Union.

Amendment 2
Recital 17

(17) In order to reinforce the effectiveness of the existing provisions regarding freedom to deal in the securities of companies covered by this Directive and freedom to exercise voting rights, it is essential that the defensive structures and mechanisms envisaged by

(17) In order to reinforce the effectiveness of the existing provisions regarding freedom to deal in the securities of companies covered by this Directive and freedom to exercise voting rights, it is essential that the defensive structures and mechanisms envisaged by

¹ Not yet published in OJ.

such companies be transparent and that they be regularly *put to a vote at* the general meeting.

such companies be transparent and that they be regularly *presented in a report to* the general meeting.

Justification

See Amendment 1.

Amendment 3
Recital 18

(18) Member States should take the necessary measures to afford any offeror the possibility *of purchasing the securities of the offeree company, by neutralising provisions placing restrictions on the transfer of securities and on voting rights, and to render ineffective any restrictions on the transfer of securities and on voting rights which may prevent an offeror who holds sufficient securities of the offeree company from exercising the corresponding voting rights in order to amend the company's articles of association, by neutralising restrictions on the voting rights and special appointment rights held by shareholders at the first general meeting following closure of the bid.*

(18) Member States should take the necessary measures to afford any offeror the possibility *of acquiring a majority interest in other companies and of fully exercising their control. To this end, restrictions on the transfer of shares, restrictions on voting rights, extraordinary appointment rights and multiple voting rights should be removed during the period for acceptance of the bid or when the general meeting decides on defensive measures or on amendments of the articles of association or the removal or appointment of board members at the first general meeting following closure of the bid. When a loss has arisen by the holders of securities as a result of the removal of rights, equitable compensation should be provided for according to the technical modalities set by Member States.*

Justification

See Amendment 1.

Amendment 4
Recital 18 a (new)

(18bis) All special rights held by Member States in companies have to be considered in the framework of 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.

Justification

See Amendment 1.

Amendment 5
Recital 18 b (new)

(18 ter) 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 territory to apply the provisions of the present directive limiting the powers of the board of the offeree company during the period of acceptance of a bid and those rendering ineffective barriers provided for in the articles of association or in specific agreements. In this case Member States should, at least, give to the companies established within their territory an option, which is reversible, to apply these provisions. Without prejudice to international agreements in which the European Community is a party, Member States should be allowed not to require companies which apply these provisions in accordance with the optional arrangements to apply them when they become subject to an offer launched by a company which does not apply the same provisions as a consequence of the use of these optional arrangements.

Justification

See Amendment 1.

Amendment 6 Recital 20

(20) The provision of information to and consultation of representatives of the employees of the offeror and the offeree company must be governed by the relevant national provisions, and 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, Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies 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. The employees of the *offeree company*, or their representatives, should *nevertheless* be afforded the opportunity of giving their views on the foreseeable effects of the bid on employment.

(20) The provision of information to and consultation of representatives of the employees of the offeror and the offeree company ***should be part of the bid procedures and*** must be governed by the relevant national provisions, and 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, Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies¹, ***Council Directive 2001/86/EC of 8 October 2001 supplementing the European Company statute with regard to the involvement of employees***² 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 Community³. The employees of the companies concerned, or their representatives, should be afforded the opportunity of giving their views on the foreseeable effects of the bid on employment. ***Without prejudice to the rules of the Directive 2003/6/EC of the European Parliament and the Council of 28 January 2003 on insider dealing and market***

¹ OJ L 225, 12.8.1998, p. 16.

² OJ L 294, 10.11.2001, p. 22.

³ OJ L 80, 23.3.2002, p. 29.

manipulation (market abuse)¹, Member States may always apply or introduce national provisions concerning information to and consultation of representatives of the employees of the offeror before launching an offer.

Justification

See Amendment 1.

Amendment 7
Recital 21

(21) Member States should take the necessary measures to enable *a shareholder who has acquired a high level of control of a company following a takeover bid to require the remaining minority shareholders to sell him their securities. Likewise, where a shareholder has acquired a high level of control of a company following a takeover bid, the remaining minority shareholders should be able to require him to buy their securities.*

(21) Member States should take the necessary measures to enable *an offeror who has acquired, following a takeover bid, a certain percentage of the capital carrying voting rights of a company to require the holders of remaining securities to sell him their securities. Likewise, where an offeror has acquired, following a takeover bid, a certain percentage of the capital carrying voting rights of a company, the holders of remaining securities should be able to require him to buy their securities. These squeeze out and sell out procedures only apply under specific conditions linked to takeover bids. Member States may continue to apply national rules to squeeze out and sell out procedures outside these conditions.*

Justification

See Amendment 1.

Amendment 8
Recital 25

¹ OJ J 96, 12.4.2003, p. 16.

(25) *The necessary* measures **must be taken** for the implementation of this Directive 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.¹

(25) 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 according to the principles set out in this Directive, after consulting the European Securities Committee established by Commission Decision 2001/528/EC¹. 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 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 to advise the Commission, if necessary, on additions or amendments to this Directive. In so doing the contact committee can make use of the information which Member States will provide on the basis of the Directive concerning takeover bids that have taken place on their regulated markets.

¹ OJ L 184, 17.7.1999, p. 23.

¹ OJ L 191, 13.7.2001, p. 45.

Justification

See Amendment 1.

¹ OJ L 191, 13.7.2001, p. 45.

Amendment 9
Recital 26

(26) The Commission should be able to re-examine and if necessary revise the provisions requiring greater transparency and ensuring effective operation of general meetings in the context of a takeover bid.

(26) The present directive is only a first step towards a higher degree of harmonisation for takeover bids. Therefore, the Commission should be able to facilitate and accelerate this process by submitting proposals for a timely revision of this Directive

Justification

See Amendment 1.

Amendment 10
Recital 27

(27) Member States should be allowed to postpone for a specified period application of the provisions relating to the obligations of the board of the offeree company,

deleted

Justification

See Amendment 1.

Amendment 11
Article 1 paragraph 2 a (new)

2a. This Directive shall not apply to takeover bids for securities issued by the Member States' central banks.

Justification

See Amendment 1.

Amendment 12
Article 2 paragraph 1 subparagraph (f)a (new)

(fa) "multiple voting securities" means securities included in a distinct and separate class and carrying more than one vote.

Justification

See Amendment 1.

Amendment 13
Article 4

1. Member States shall designate the authority or authorities competent for supervising a bid for the purposes of the rules made or introduced pursuant to this Directive. The authorities thus designated shall be either public authorities, associations or private bodies recognised by national law or by public authorities expressly empowered for that purpose by national law. Member States shall inform the Commission of these designations, specifying all divisions of functions that may be made. They shall ensure that these authorities exercise their functions impartially and independently of all parties to the bid.

2. (a) The authority competent for supervising the bid shall be that of the Member State in which the offeree company

1. Member States shall designate the authority or authorities competent for supervising a bid for the purposes of the rules made or introduced pursuant to this Directive. The authorities thus designated shall be either public authorities, associations or private bodies recognised by national law or by public authorities expressly empowered for that purpose by national law. Member States shall inform the Commission of these designations, specifying all divisions of functions that may be made. They shall ensure that these authorities exercise their functions impartially and independently of all parties to the bid.

2. (a) The authority competent for supervising the bid shall be that of the Member State in which the offeree company

has its registered office if the securities of that company are admitted to trading on a regulated market in that Member State.

(b) If the securities of the offeree company are not admitted to trading on a regulated market in the Member State in which the company has its registered office, the authority competent for supervising the bid shall be that of the Member State on whose regulated market the securities of the company are admitted to trading.

If the securities of the company are admitted to trading on regulated markets in more than one Member State, the authority competent for supervising the bid shall be that of the Member State on whose regulated market the securities were first admitted.

(c) If the securities of the offeree company are first admitted to trading on regulated markets within more than one Member State simultaneously, the offeree company shall determine which of the supervisory authorities of those Member States is the competent authority for supervising the bid by notifying these regulated markets and their supervisory authorities on the first trading day.

If the securities of the offeree company are already admitted to trading on regulated markets in more than one Member State at the date referred to in Article **20(1)** and were admitted simultaneously, the supervisory authorities of these Member States shall agree on which one of them is to be the competent authority for supervising the bid within four weeks of the date mentioned in Article **20(1)**. Otherwise, the offeree company shall determine which of these authorities is to be the competent authority on the first trading day following the expiry of the period of time mentioned in the first sentence.

(d) Member States shall ensure that the decisions referred to in *point* (c) are made public.

(e) In the cases referred to in *points* (b) and

has its registered office if the securities of that company are admitted to trading on a regulated market in that Member State.

(b) If the securities of the offeree company are not admitted to trading on a regulated market in the Member State in which the company has its registered office, the authority competent for supervising the bid shall be that of the Member State on whose regulated market the securities of the company are admitted to trading.

If the securities of the company are admitted to trading on regulated markets in more than one Member State, the authority competent for supervising the bid shall be that of the Member State on whose regulated market the securities were first admitted.

(c) If the securities of the offeree company are first admitted to trading on regulated markets within more than one Member State simultaneously, the offeree company shall determine which of the supervisory authorities of those Member States is the competent authority for supervising the bid by notifying these regulated markets and their supervisory authorities on the first trading day.

If the securities of the offeree company are already admitted to trading on regulated markets in more than one Member State at the date referred to in Article **19(1)** and were admitted simultaneously, the supervisory authorities of these Member States shall agree on which one of them is to be the competent authority for supervising the bid within four weeks of the date mentioned in Article **19(1)**. Otherwise, the offeree company shall determine which of these authorities is to be the competent authority on the first trading day following the expiry of the period of time mentioned in the first sentence.

(d) Member States shall ensure that the decisions referred to in (c) are made public.

(e) In the cases referred to in (b) and (c),

(c), matters relating to the consideration offered in the case of a bid, in particular the price, and matters relating to the bid procedure, in particular the information on the offeror's decision to make a bid, the contents of the offer document and the disclosure of the bid, shall be dealt with in accordance with the rules of the Member State of the competent authority. In matters relating to the information to be provided to the employees of the offeree company and in matters relating to company law, in particular the percentage of voting rights which confers control and any derogation from the obligation to launch a bid, as well as the conditions under which the board of the offeree company may undertake any action which might result in the frustration of the bid, the applicable rules and the competent authority shall be those of the Member State in which the offeree company has its registered office.

3. Member States shall ensure that all persons employed or formerly employed by the supervisory authorities shall be bound by professional secrecy. Information covered by professional secrecy may not be divulged to any person or authority except by virtue of provisions laid down by law.

4. The supervisory authorities of the Member States under this Directive and other authorities supervising capital markets, in particular in accordance with Council Directive 89/592/EEC,¹ Council Directive 93/22/EEC and Directive 2001/34/EC of the European Parliament and of the Council, shall cooperate and supply each other with information wherever necessary for the application of the rules drawn up in accordance with this Directive and in particular in cases covered by *points (b), (c) and (e) of paragraph 2*. Information thus exchanged shall be covered by the obligation of professional secrecy to which the persons employed or formerly employed by the supervisory authorities receiving the

¹ OJ L 334, 18.11.1989, p. 30.

² OJ L 334, 18.11.1989, p. 30.

matters relating to the consideration offered in the case of a bid, in particular the price, and matters relating to the bid procedure, in particular the information on the offeror's decision to make a bid, the contents of the offer document and the disclosure of the bid, shall be dealt with in accordance with the rules of the Member State of the competent authority. In matters relating to the information to be provided to the employees of the offeree company and in matters relating to company law, in particular the percentage of voting rights which confers control and any derogation from the obligation to launch a bid, as well as the conditions under which the board of the offeree company may undertake any action which might result in the frustration of the bid, the applicable rules and the competent authority shall be those of the Member State in which the offeree company has its registered office.

3. Member States shall ensure that all persons employed or formerly employed by the supervisory authorities shall be bound by professional secrecy. Information covered by professional secrecy may not be divulged to any person or authority except by virtue of provisions laid down by law.

4. The supervisory authorities of the Member States under this Directive and other authorities supervising capital markets, in particular in accordance with Council Directive 89/592/EEC ², Council Directive 93/22/EEC and Directive 2001/34/EC of the European Parliament and of the Council, shall co-operate and supply each other with information wherever necessary for the application of the rules drawn up in accordance with this Directive and in particular in cases covered by *paragraph 2(b), (c) and (e)*. Information thus exchanged shall be covered by the obligation of professional secrecy to which the persons employed or formerly employed by the supervisory authorities receiving the

information are subject. Cooperation shall include the ability to serve the legal documents necessary to enforce measures taken by the competent authorities in connection with bids, as well as such other assistance as may reasonably be requested by the supervisory authorities concerned for the purpose of investigating any actual or alleged breaches of the rules made or introduced pursuant to this Directive.

5. The supervisory authorities shall be vested with all the powers necessary for carrying out their duties, including that of ensuring that the parties to the bid comply with the rules established pursuant to this Directive.

Provided that the general principles set out in Article 3(1) are respected, Member States may provide in their rules made or introduced pursuant to this Directive *that* their supervisory authorities *may, in certain types of cases determined at national level and/or in other special cases, grant derogations from these rules on the basis of* a reasoned decision.

6. This Directive shall not affect the power of the Member States to designate judicial or other authorities responsible for dealing with disputes and for deciding on irregularities committed during the bid procedure or the power of Member States to regulate whether and under which circumstances parties to a bid are entitled to bring administrative or judicial proceedings. In particular, this Directive shall not affect the power which courts may have in a Member State to decline to hear legal proceedings and to decide whether or not such proceedings affect the outcome of a bid. This Directive shall not affect the power of the Member States to determine the legal position concerning the liability of supervisory

information are subject. Co-operation shall include the ability to serve the legal documents necessary to enforce measures taken by the competent authorities in connection with bids, as well as such other assistance as may reasonably be requested by the supervisory authorities concerned for the purpose of investigating any actual or alleged breaches of the rules made or introduced pursuant to this Directive.

5. The supervisory authorities shall be vested with all the powers necessary for carrying out their duties, including that of ensuring that the parties to the bid comply with the rules established pursuant to this Directive.

Provided that the general principles set out in Article 3(1) are respected, Member States may provide in their rules made or introduced pursuant to this Directive *for derogations from these rules: i) by including such derogations in their national rules, in order to take account of circumstances determined at national level; ii) and/or by granting* their supervisory authorities, *where they are competent, powers to waive such national rules, to take account of the circumstances referred to in point i) or in other specific circumstances, with* a reasoned decision *required in the latter case.*

6. This Directive shall not affect the power of the Member States to designate judicial or other authorities responsible for dealing with disputes and for deciding on irregularities committed during the bid procedure or the power of Member States to regulate whether and under which circumstances parties to a bid are entitled to bring administrative or judicial proceedings. In particular, this Directive shall not affect the power which courts may have in a Member State to decline to hear legal proceedings and to decide whether or not such proceedings affect the outcome of a bid. This Directive shall not affect the power of the Member States to determine the legal position concerning the liability of supervisory

authorities or concerning litigation between the parties to a bid.

authorities or concerning litigation between the parties to a bid.

Justification

See Amendment 1.

Amendment 14 Article 5

1. Where a natural or legal person who, as a result of his own acquisition or the acquisition by persons acting in concert with him, holds securities of a company referred to in Article 1(1) which, added to any existing holdings and the holdings of persons acting in concert with him, directly or indirectly give him a specified percentage of voting rights in that company, conferring on him the control of that company, Member States shall ensure that this person is required to make a bid as a means of protecting the minority shareholders of that company. This bid shall be addressed at the earliest opportunity to all holders of securities for all their holdings at ***an*** equitable price.

2. Where control has been obtained following a voluntary bid made in accordance with this Directive to all holders of securities for all their holdings, the obligation to launch a bid laid down in paragraph 1 shall no longer apply.

3. The percentage of voting rights which 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.

4. The highest price paid for the same securities by the offeror, or by persons acting in concert with him, over a period ***of between six and*** twelve months prior to the bid referred to in paragraph 1 shall be regarded as an equitable price.

1. Where a natural or legal person who, as a result of his own acquisition or the acquisition by persons acting in concert with him, holds securities of a company referred to in Article 1(1) which, added to any existing holdings and the holdings of persons acting in concert with him, directly or indirectly give him a specified percentage of voting rights in that company, conferring on him the control of that company, Member States shall ensure that this person is required to make a bid as a means of protecting the minority shareholders of that company. This bid shall be addressed at the earliest opportunity to all holders of securities for all their holdings at ***the*** equitable price ***defined in paragraph 4.***

2. Where control has been obtained following a voluntary bid made in accordance with this Directive to all holders of securities for all their holdings, the obligation to launch a bid laid down in paragraph 1 shall no longer apply.

3. The percentage of voting rights which 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.

4. The highest price paid for the same securities by the offeror, or by persons acting in concert with him, over a period, ***to be determined by Member States, of not less than six and not more than*** twelve months prior to the bid referred to in paragraph 1 shall be regarded as the equitable price. ***If,***

Member States may authorise their supervisory authorities to adjust the price referred to in the first subparagraph in circumstances and according to criteria that are clearly determined. To that end, they **shall** draw up a list of circumstances in which the highest price may be adjusted either upwards or downwards, for example where the highest price was set by agreement between the purchaser and a seller, where the market prices of the securities in question have been manipulated, where market prices in general or certain market prices in particular have been affected by exceptional occurrences, or in order to enable a firm in difficulty to be rescued. They may also determine the criteria to be applied in such cases, for example the average market value over a particular period, the break-up value of the company or other objective valuation criteria generally used in financial analysis.

Any decision by a supervisory authority to adjust the equitable price shall be substantiated and made public.

5. The consideration offered by the offeror may consist exclusively of liquid securities.

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

In any event, the offeror shall offer a cash consideration at least as an alternative where, **either individually or together with** persons acting in concert with him, over a period beginning **at least three months before his bid is made pursuant to**

after the bid has been made public and before the offer closes for acceptance, the offeror or any person acting in concert with him purchases securities at above the offer price, the offeror shall increase his offer to not less than the highest price paid for the securities so acquired.

Provided that the general principles of Article 3 (1) are respected, Member States may authorise their supervisory authorities to adjust the price referred to in the first subparagraph in circumstances and according to criteria that are clearly determined. To that end, they **may** draw up a list of circumstances in which the highest price may be adjusted either upwards or downwards, for example where the highest price was set by agreement between the purchaser and a seller, where the market prices of the securities in question have been manipulated, where market prices in general or certain market prices in particular have been affected by exceptional occurrences, or in order to enable a firm in difficulty to be rescued. They may also determine the criteria to be applied in such cases, for example the average market value over a particular period, the break-up value of the company or other objective valuation criteria generally used in financial analysis.

Any decision by a supervisory authority to adjust the equitable price shall be substantiated and made public.

5. The offeror may offer as consideration securities, cash or a combination of both.

However, where the consideration offered by the offeror does not consist of liquid securities admitted to trading on a regulated market, such consideration has to include a cash alternative.

In any event, the offeror shall offer a cash consideration at least as an alternative where **he or** persons acting in concert with him, over a period beginning **at the same time as the period decided by the Member State in accordance with paragraph 4 and ending**

Article 6(1) and ending before expiry of the period for acceptance of the bid, he has purchased in cash more than 5% of the securities or voting rights of the offeree company.

when the offer closes for acceptance, has purchased in cash securities carrying 5% or more of the voting rights of the offeree company.

6. The Commission shall adopt, in accordance with the procedure referred to in Article 17(2), the rules for the application of paragraphs 4 and 5 of this Article.

Member States may provide that a cash consideration shall be offered, at least as an alternative, in all cases.

deleted.

7. In addition to the protection provided under paragraph 1, Member States may provide for further instruments aimed at protecting the interests of holders of securities in so far as these instruments do not hinder the normal course of the bid.

7. In addition to the protection provided under paragraph 1, Member States may provide for further instruments aimed at protecting the interests of holders of securities in so far as these instruments do not hinder the normal course of the bid.

Justification

See Amendment 1.

Amendment 15

Article 6, paragraph -1a (new)

-1a. Member States shall provide that a natural or legal person that is considering a bid shall inform and consult its employee representatives about this matter, as soon as talks about a possible takeover bid are announced, without prejudice to Article 6, paragraph 2 of Directive 2002/14/EC of the European Parliament and of the Council and to the extent that this is within the terms of the relevant national provisions adopted pursuant to Directive 2002/14/EC of the European Parliament and of the Council; employee representatives may be bound by confidentiality clauses and will be subject to regulation with respect to insider dealing

Justification

The consultation of employee representatives and the provision of information to these representatives should commence as soon as talks about a possible takeover bid are announced, without prejudice to the Directive on worker consultation and information.

Amendment 16

Article 6 paragraph 3 subparagraph (d) a (new)

(da). the compensation offered for the rights which might be removed as a result of the breakthrough rule laid down in Article 11(4), with particulars of the way in which that compensation is to be paid and the method employed in determining it;

Justification

See Amendment 1.

Amendment 17

Article 7 paragraph 1

1. Member States shall provide that the period for acceptance of the bid may not be less than two weeks or more than ten weeks from the date of publication of the offer document. Provided that the general principle laid down in Article 3(1)(f) is respected, Member States may provide that the period of ten weeks may be ***prolonged on the*** condition that the offeror gives at least two weeks' notice of its intention to close the bid.

1. Member States shall provide that the period for acceptance of the bid may not be less than two weeks or more than ten weeks from the date of publication of the offer document. Provided that the general principle laid down in Article 3(1)(f) is respected, Member States may provide that the period of ten weeks may be ***extended on*** condition that the offeror gives at least two weeks' notice of its intention to close the bid.

Justification

See Amendment 1.

Amendment 18

Article 8 paragraph 2

2. Member States shall provide for the disclosure of all information or documents required by Article 6 in such a manner as to ensure that they are both readily and promptly available to the holders of securities at least in those Member States where the securities of the offeree company are admitted to trading on a regulated market and to the representatives of the employees of the offeree company or, where there are no such representatives, to the employees themselves.

2. Member States shall provide for the disclosure of all information or documents required by Article 6 in such a manner as to ensure that they are both readily and promptly available to the holders of securities at least in those Member States where the securities of the offeree company are admitted to trading on a regulated market and to the representatives of the employees of the offeree company *and the offeror* or, where there are no such representatives, to the employees themselves.

Justification

See Amendment 1.

Amendment 19

Article 9, paragraph 5

5. The board of the offeree company shall draw up and make public a document setting out its opinion on the bid, together with the reasons on which it is based, including its views on the effects on all the interests of the company, including employment, and on the offeror's strategic plans for the offeree company and their likely effects on employment and the locations of the company's places of business as set out in the offer document in accordance with Article 6(3)(h). The board of the offeree company shall *at the same time communicate that opinion* to the representatives of its employees *or*, where there are no such representatives, the employees themselves. Where the board of the offeree company receives in good time a separate opinion from the representatives of its employees on the effects of the bid on employment, that opinion shall be appended to the document.

5. The board of the offeree company shall draw up and make public a document setting out its opinion on the bid, together with the reasons on which it is based, including its views on the effects on all the interests of the company, including employment, and on the offeror's strategic plans for the offeree company and their likely effects on employment and the locations of the company's places of business as set out in the offer document in accordance with Article 6(3)(h). The board of the offeree company shall *consult with* the representatives of its employees *before finalising its opinion, to the extent that this is within the terms of the relevant national provisions adopted pursuant to Directive 2002/14/EC of the European Parliament and of the Council*. Where there are no such representatives, *the opinion shall be forwarded to the employees themselves*. Where the board of the offeree company receives in good time a separate opinion from the representatives of its employees on the effects of the bid on employment, that opinion shall be appended to the document.

Justification

It is important that employee representatives be consulted before the Opinion is finalised. This amendment provides that before the Opinion is finalised, the board of the offeree company should consult the employee representatives, where this is within the terms of the national implementing measures for the Directive on information and consultation. If there are no representatives of employees, the Opinion should be sent directly to the employees.

Amendment 20 Article 9 paragraph 5 a (new)

5a. For the purposes of paragraph 2 of this Article, the board shall mean both the management board of the company and the supervisory board of the company, where the organization of the company follows a two-tier board structure.

Justification

See Amendment 1.

Amendment 21 Article 10

1. Member States shall ensure that companies referred to in Article 1(1) publish detailed information on the following:

(a) the structure of their capital, including securities which are not admitted to trading on a regulated market in a Member State, where appropriate with an indication of the different classes of shares and, for each class of shares, the rights and obligations attaching to it and the percentage of total share capital that it represents;

(b) any restrictions on the transfer of securities, such as limitations on the holding of securities or the need to obtain the approval of the company or other holders of securities, without prejudice to Article 46 of Directive 2001/34/EC;

(c) significant direct and indirect

1. Member States shall ensure that companies referred to in Article 1(1) publish detailed information on the following:

(a) the structure of their capital, including securities which are not admitted to trading on a regulated market in a Member State, where appropriate with an indication of the different classes of shares and, for each class of shares, the rights and obligations attaching to it and the percentage of total share capital that it represents;

(b) any restrictions on the transfer of securities, such as limitations on the holding of securities or the need to obtain the approval of the company or other holders of securities, without prejudice to Article 46 of Directive 2001/34/EC;

(c) significant direct and indirect

shareholdings (including indirect shareholdings through pyramid structures and cross-shareholdings) within the meaning of Article 85 of Directive 2001/34/EC;

(d) the holders of any securities with special control rights and a description of these rights;

(e) the system of control of any employee share scheme where the control rights are not exercised directly by the employees;

(f) any restrictions on voting rights, such as limitations of the right to vote for holders of a given percentage or number of votes, deadlines for exercising the right to vote or ***separation of the right to vote from the holding of a security***;

(g) agreements between shareholders which may result in restrictions on the transfer of securities and/or voting rights within the meaning of ***Article 87(1)(c) of Directive 2001/34/EC***;

(h) the rules governing the appointment and replacement of board members and the amendment of the articles of association;

(i) the powers of board members, and in particular the power to issue or buy back shares;

(j) significant agreements to which the company is a party and which take effect, alter or terminate upon a change of control of the company and the effects thereof;

(k) any agreements between the company and its board members or employees providing for compensation if they are made redundant without valid reason ***following*** a takeover bid.

shareholdings (including indirect shareholdings through pyramid structures and cross-shareholdings) within the meaning of Article 85 of Directive 2001/34/EC;

(d) the holders of any securities with special control rights and a description of these rights;

(e) the system of control of any employee share scheme where the control rights are not exercised directly by the employees;

(f) any restrictions on voting rights, such as limitations of the right to vote for holders of a given percentage or number of votes, deadlines for exercising the right to vote, or ***systems whereby, with the company's co-operation, the financial rights attached to securities are separated from the holding of securities***;

(g) agreements between shareholders, which ***are known to the company and*** may result in restrictions on the transfer of securities and/or voting rights within the meaning of Directive 2001/34/EC;

(h) the rules governing the appointment and replacement of board members and the amendment of the articles of association;

(i) the powers of board members, and in particular the power to issue or buy back shares;

(j) significant agreements to which the company is a party and which take effect, alter or terminate upon a change of control of the company ***following a takeover bid***, and the effects thereof, ***except when their nature is such that their disclosure would be seriously prejudicial to the company; such exception shall not apply when the company is specifically obliged to disclose such information on the basis of other legal requirements*** ;

(k) any agreements between the company and its board members or employees providing for compensation if they ***resign or*** are made redundant without valid reason ***or if their employment ceases because of a***

2. The information referred to in paragraph 1 shall be published in the company's annual report within the meaning of Article 46 of Council Directive 78/660/EEC and Article 36 of Council Directive 83/349/EEC **and, where appropriate, updated during the year in accordance with the transparency requirements applicable to companies whose securities are admitted to trading on a regulated market.**

3. Member States shall ensure that, in the case of companies whose securities are admitted to trading on a regulated market in a Member State, **the general meeting of shareholders takes a decision at least every two years on the structural aspects and defensive mechanisms referred to in paragraph 1. They shall require the board to state the reasons for those structural aspects and defensive mechanisms.**

takeover bid.

2. The information referred to in paragraph 1 shall be published in the company's annual report within the meaning of Article 46 of Council Directive 78/660/EEC and Article 36 of Council Directive 83/349/EEC.

3. Member States shall ensure that, in the case of companies whose securities are admitted to trading on a regulated market in a Member State, **the board must present an explanatory report to the annual general meeting of shareholders on the matters referred to in paragraph 1.**

Justification

See Amendment 1.

Amendment 22 Article 11

Unenforceability of restrictions on the transfer of securities and voting rights

1. Without prejudice **to the obligations imposed by Community law on companies whose securities are admitted to trading on a regulated market in a Member State, Member States shall ensure that the safeguards referred to in paragraphs 2, 3 and 4 are afforded** when a bid has been made public.

2. Any restrictions on the transfer of securities provided for in the articles of association of the offeree company shall **be unenforceable against the offeror** during

Breakthrough

1. Without prejudice **to other rights and obligations laid down in Community law for companies referred to in Article 1(1), Member States shall ensure that the provisions referred to in paragraphs 2 to 6 apply** when a bid has been made public.

2. Any restrictions on the transfer of securities provided for in the articles of association of the offeree company shall **not apply vis-à-vis the offeror** during the period

the period for acceptance of the bid.

Any restrictions on the transfer of securities provided for in contractual agreements between the offeree company and holders of its securities or between holders of securities of the offeree company **shall be unenforceable against the offeror** during the period for acceptance of the bid.

3. **Any restrictions** on voting rights provided for in the articles of association of the offeree company shall **cease to have effect when** the general meeting decides on any defensive measures in accordance with Article 9.

Any restrictions on 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 shall **cease to have effect when** the general meeting decides on any defensive measures in accordance with Article 9.

4. Where, following a bid, the offeror holds **a number of securities of the offeree company which, under the applicable national law, would enable him to amend the company's articles of association**, any restrictions on the transfer of securities and on voting rights referred to in paragraphs 2 and 3 and any **special** rights of shareholders concerning the appointment or removal of board members shall cease to have effect at the first general meeting following closure of the bid.

To that end, the offeror shall have the right

for acceptance of the bid ***laid down in Article 7(1)***.

Any restrictions on the transfer of securities provided for in contractual agreements between the offeree company and holders of its securities, or **contractual agreements** between holders of securities of the offeree company **entered into after the adoption of this Directive, shall not apply vis-à-vis the offeror** during the period for acceptance of the bid ***laid down in Article 7(1)***.

3. **Restrictions** on voting rights provided for in the articles of association of the offeree company shall **not have effect at** the general meeting **which** decides on any defensive measures in accordance with Article 9.

Restrictions on voting rights provided for in contractual agreements between the offeree company and holders of its securities, **or contractual agreements** between holders of securities of the offeree company **entered into after the adoption of this Directive**, shall **not have effect at** the general meeting **which** decides on any defensive measures in accordance with Article 9.

Multiple voting securities shall carry one vote only at the general meeting which decides on any defensive measures in accordance with Article 9.

4. Where, following a bid, the offeror holds **75% of the capital carrying voting rights**, any restrictions on the transfer of securities and on voting rights referred to in paragraphs 2 and 3 and any **extraordinary** rights of shareholders concerning the appointment or removal of board members **provided for in the articles of association of the offeree company shall not apply and multiple voting securities shall carry one vote only** at the first general meeting following closure of the bid, **called by the offeror in order to amend the articles of association or to remove or appoint board members**.

To that end, the offeror shall have the right

to convene a general meeting at short notice, provided that the meeting does not take place within two weeks of notification.

5. Paragraphs 2 and 3 shall not apply to securities ***without voting rights which carry specific pecuniary advantages.***

to convene a general meeting at short notice, provided that the meeting does not take place within two weeks of notification.

4a. Where rights are being removed on the basis of paragraphs 2, 3, 4 and/or Article 11A, equitable compensation must be provided for any loss incurred by the holders of these rights. The terms for determining such compensation and the modalities of its payment will be set by Member States.

5. Paragraphs 3 and 4 shall not apply to securities ***where the restrictions on voting rights are compensated for by specific pecuniary advantages.***

5a. This Article shall not apply where Member States hold securities in the offeree company which confer special rights on the Member States which are compatible with the Treaty and to special rights provided for in national law which are compatible with the Treaty and to cooperative enterprises.

Justification

See Amendment 1.

Amendment 23
Article 11 a (new)

Optional arrangements

1. Member States may reserve the right not to require companies referred to in Art. 1(1) which have their registered offices on their territory to apply Articles 9(2) and (3) and/or 11.

2. When Member States make use of the option referred to under paragraph 1, they must nevertheless give companies which have their registered offices on their territory an option, which is reversible, to apply Articles 9(2) and (3) and/or 11, without prejudice to Article 11 (6).

The decision of the company must be taken by the general meeting of shareholders, based on the applicable law where the company has its registered office in accordance with the rules applicable to amendments of the Articles of association. The decision must be notified to the supervisory authority of the Member State where the company has its registered office and to all supervisory authorities of Member States where its securities are admitted to trading on a regulated market or where such admission has been requested.

3. Member States may, under the conditions determined by national law, exempt companies which apply Articles 9(2) and (3) and/or 11 from applying Articles 9(2) and (3) and/or 11 if they become subject to an offer launched by a company which does not apply the same Articles as they do, or by a company controlled, directly or indirectly, by the latter, pursuant to Article 1 of Directive 83/349/EEC.

4. Member States shall ensure that the provisions applicable to the respective companies are disclosed without delay.

5. The application of any measure applied according to the provision of paragraph 3 is subject to the authorization of the general meeting of the shareholders of the offeree company, which should have been received not earlier than 18 months before the bid was made public in accordance with Article 6 (1).

Justification

See Amendment 1.

Amendment 24
(Compromise amendment replacing all Amendments to Article 13)
Article 13

Without prejudice to the provisions of this Directive, *the provision of* information to *and* consultation of representatives of the employees of the offeror and the offeree company *shall be* governed by the relevant national provisions, and in particular those adopted pursuant to Directives 94/45/EC, 98/59/EC and 2002/14/EC.

The provisions of this Directive *are without prejudice to the rules relating to* information *and to* consultation of representatives of *and, if Member States so provide, codetermination with* the employees of the offeror and the offeree company governed by the relevant national provisions, and in particular those adopted pursuant to Directives 94/45/EC, 98/59/EC, **2001/86/EC** and 2002/14/EC.

Justification

See Amendment 1.

Amendment 25 Article 14

1. Member States shall ensure that, following a bid made to all the holders of securities of the offeree company for all their securities, *an offeror is able to require the holders of the remaining securities to sell him those securities at a fair price in either of the following cases:*

(a) where he holds securities representing not less than 90% of the capital of the offeree company, or

(b) where he has acquired, through acceptance of the bid, securities representing not less than 90% of the capital concerned by the bid.

In the case referred to in point (a) above, Member States may set a higher threshold that may not, however, be more than 95% of the company's capital.

1. Member States shall ensure that, following a bid made to all the holders of securities of the offeree company for all their securities, *the provisions in paragraphs 2 to 5 apply.*

2. Member States shall ensure that an offeror is able to require all the holders of the remaining securities to sell him those securities at a fair price. Member States shall introduce this right in one of the following situations:

(a) where the offeror holds securities representing not less than 90% of the

capital carrying voting rights and 90% of the voting rights of the offeree company, or (b) where he has acquired or has firmly contracted to acquire, following acceptance of the bid, securities representing not less than 90% of the offeree company's capital carrying voting rights and 90% of the voting rights comprised in the bid.

In the case referred to in (a) above, Member States may set a higher threshold that may not, however, be higher than 95% of the capital carrying voting rights and 95% of the voting rights.

2. Member States shall ensure that rules are in force making it possible to calculate when the threshold is reached.

Where the offeree company has issued more than one class of *shares*, *the rule laid down in paragraph 1 shall apply separately within each class.*

3. Member States shall ensure that a fair price is guaranteed. That price shall take the same form as the consideration offered in the bid.

Following a voluntary bid, the price shall be presumed to be fair where it corresponds to the consideration offered in the bid and the offeror has acquired, through acceptance of the bid, securities representing not less than 90% of the capital concerned by the bid.

Following a mandatory bid, the consideration offered in the bid shall be presumed to be fair.

4. In both the cases referred to in points (a) and (b) of paragraph 1, the fair price presumption shall apply only where the squeeze-out right is exercised within a period of three months after the end of the period for acceptance of the bid. In all other cases, the price shall be determined by an independent expert.

3. Member States shall ensure that rules are in force making it possible to calculate when the threshold is reached.

Where the offeree company has issued more than one class of *securities*, *Member States may provide that the squeeze-out right can be exercised only in the class in which the threshold laid down in paragraph 2 has been reached.*

4. The offeror must exercise the squeeze-out right within a period of three months after the end of the period for acceptance of the bid referred to in Article 7.

5. Member States shall ensure that a fair

price is guaranteed. That price shall take the same form as the consideration offered in the bid or consist of cash. Member States may provide that cash shall be offered at least as an alternative.

Following a voluntary bid, in both cases referred to in points (a) and (b) of paragraph 2, the consideration offered in the bid shall be presumed to be fair where the offeror has acquired, through acceptance of the bid, securities representing not less than 90% of the capital carrying voting rights comprised in the bid.

Following a mandatory bid, the consideration offered in the bid shall be presumed to be fair.

Justification

See Amendment 1.

Amendment 26 Article 15

1. Member States shall ensure that, following a bid made to all the holders of securities of the offeree company for all their securities, ***a minority holder of securities is able to require the offeror holding not less than 90% of the capital of the offeree company to buy his securities from him at a fair price. They may set a higher threshold, but this may not be more than 95% of the company's capital.***

However, the sell-out right may not be exercised where the specified threshold has been reached only for a short period.

2. Where the offeree company has issued more than one class of shares, the rule laid down in paragraph 1 shall apply separately within each class.

3. The price shall be determined in

1. Member States shall ensure that, following a bid made to all the holders of securities of the offeree company for all their securities, ***the provisions in paragraphs 2 and 3 apply.***

2. Member States shall ensure that a holder of remaining securities is able to require the offeror to buy his securities from him at a fair price under the same circumstances as provided for in Article 14(2).

3. The provisions of Article 14(3) to (5)

accordance with the provisions of Article 14(3) and (4).

shall apply mutatis mutandis.

Justification

See Amendment 1.

Amendment 27
Article 17

1. The Commission shall be assisted by the European Securities Committee established by Commission Decision 2001/528/EC.¹

2. Where reference is made to this paragraph, *the regulatory procedure laid down in Article 5 of Decision 1999/468/EC shall apply, having due regard to Articles 7(3) and 8 thereof.*

3. The period referred to in Article 5(6) of Decision 1999/468/EC shall be three months.

1. The Commission shall be assisted by the European Securities Committee established by Commission Decision **2001/528/EC (hereinafter referred to as the "Committee").**

2. Where reference is made to this paragraph, **Articles 5 and 7 of Decision 1999/468/EC shall apply, having regard to Article 8 thereof, provided that the implementing measures adopted according to this procedure do not modify the essential provisions of this Directive.**

3. The period referred to in Article 5(6) of Decision 1999/468/EC shall be three months.

4. Without prejudice to the implementing measures already adopted, on the expiry of a four-year period following the entry into force of this Directive, the application of its provisions requiring the adoption of technical rules and decisions in accordance with paragraph 2 shall be suspended. On a proposal from the Commission, the European Parliament and the Council may renew the provisions concerned in accordance with the procedure laid down in Article 251 of the Treaty and, to that end, they shall review them prior to the expiry of the period referred to above.

¹ OJ L 191, 13.7.2001, p. 45.

Justification

See Amendment 1.

Amendment 28
Article 17 a (new)

Contact committee

1. A contact committee shall be appointed which has as its functions:

(a) to facilitate, without prejudice to Articles 226 and 227 of the Treaty, 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 additions or amendments to this Directive.

2. It shall not be the function of the Contact Committee to appraise the merits of decisions taken by the supervisory authorities in individual cases.

Justification

See Amendment 1.

Amendment 29
Article 18

Five years after the date laid down in Article **20(1)**, the Commission shall examine **Articles 4(2), 10 and 11** and, if necessary, propose **that they be revised in the light of the experience acquired in applying them.**

Five years after the date laid down in Article **19(1)**, the Commission shall examine **this Directive in the light of the experience acquired in applying it** and, if necessary, propose **a revision with a view to achieving a higher degree of harmonisation for takeovers bids in the European Union.**

To that effect, Member States shall provide the Commission annually with information on the takeover bids which have been launched on companies whose securities

are admitted to trading on their regulated markets. Such information shall include the nationality of the companies involved, the result of the offer and any other information that is relevant in order to understand how takeover bids operate in practice.

Justification

See Amendment 1.

Amendment 30
Article 19

Transitional period

deleted

Member States are authorised to postpone application of Article 9 for a period of not more than three years after the date laid down in Article 20(1), provided that they inform the Commission thereof not later than that date.

Justification

See Amendment 1.

Amendment 31
Article 20 paragraph 1 first subparagraph

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than **1 January 2005**. They shall forthwith inform the Commission thereof.

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than **[2 years after the entry into force of this Directive]**. They shall forthwith inform the Commission thereof.

Justification

See Amendment 1.

Amendment 32
Article 21

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Communities*.

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the **European Union***.

Justification

See Amendment 1.

20 February 2003

OPINION OF THE COMMITTEE ON EMPLOYMENT AND SOCIAL AFFAIRS

for the Committee on Legal Affairs and the Internal Market

on the proposal for a Council directive on takeover bids
(COM(2002) 534 – C5-0481/2002 – 2002/0240(COD))

Draftsperson: Ieke van den Burg

PROCEDURE

The Committee on Employment and Social Affairs appointed Ieke van den Burg draftsperson at its meeting of 12 November 2002.

It considered the draft opinion at its meetings of 10 December 2002, 22 January 2003 and 20 February 2003.

At the last meeting it adopted the following amendments by 31 votes to 3, with 1 abstention.

The following were present for the vote: Theodorus J.J. Bouwman, chairman; Marie-Hélène Gillig, vice-chairperson; Winfried Menrad, vice-chairman; Marie-Thérèse Hermange, vice-chairperson; Ieke van den Burg, draftsperson; Sylviane H. Ainardi, Regina Bastos, Hans Udo Bullmann (for Jan Andersson), Philip Bushill-Matthews, Chantal Cauquil (for Arlette Laguiller), Alejandro Cercas, Alexander de Roo (for Hélène Flautre, pursuant to Rule 153(2)), Proinsias De Rossa, Harald Ettl, Jillian Evans, Carlo Fatuzzo, Ilda Figueiredo, Fiorella Ghilardotti (for Elisa Maria Damião), Anne-Karin Glase, Roger Helmer, Stephen Hughes, Anne Elisabet Jensen (for Elspeth Attwooll), Karin Jöns, Jean Lambert, Thomas Mann, Mario Mantovani, Claude Moraes, Manuel Pérez Alvarez, Bartho Pronk, Lennart Sacrédeus, Herman Schmid, Miet Smet, Gabriele Stauner (for Luigi Cocilovo), Helle Thorning-Schmidt, Anne E.M. Van Lancker, Barbara Weiler and Sabine Zissener (for Enrico Ferri).

SHORT JUSTIFICATION

The Directive COM(2002) 534 had predecessors from 1989 and 1996. Consistently the European Parliament has criticized the lack of information and consultation rights for employee representatives and the exclusive focus on shareholders' decision taking.

The explanatory statement of the new proposal mentions the three main political objections from the European Parliament: “ (1) rejection of the principle whereby, in order to take defensive measures in the face of a bid, the board of the offeree company must first obtain the approval of shareholders once the bid has been made, and this until such time as a level playing field is created for European companies facing a takeover bid; (2) regret that the protection which the directive would afford employees of companies involved in a takeover bid was insufficient; (3) the failure of the proposal to achieve a level playing field with the United States.”

The opinion of the Employment and Social Affairs Committee will concentrate on the first and second one, following previous opinions; the third issue will be dealt with in the Legal Affairs Committee.

The good news is that the new proposal for the first time explicitly recognizes the effects on employment and restructuring from a takeover. Besides that the Commission proposal contains a new article 13, dealing with information and consultation of employee representatives, with reference to the Council Directives 94/45/EC on the European Works Councils,¹ 98/59/EC on collective redundancies² and 2002/14/EC on information and consultation.³

The bad news is, that the rights for employees and their representatives are formulated too restrictive. The new article 13 should be reformulated to fulfil the intentions described in the explanatory statement and recitals. Also article 6 dealing with the making public of the bid by the offeror company, and article 9 dealing with the reactions of the offeree company with respect to the bid, are to be improved. They provide now only for information “*as soon as the bid is made public and as soon as the opinion of the board of the offeree company is presented*”. This is not in conformity with article 13 and with the previous opinions of the European Parliament. There should be information in advance, timely consultation and a serious taking into account of the advice of employee representatives..

The second important issue is the position with respect to defensive measures against hostile bids. The Directive still builds on the assumption that lazy company managers should be triggered by hostile takeovers and deprived of the capacity to take defensive measures without prior shareholders' authorisation. This does not duly take into account that also the motives of bidders and of the individual shareholders of the offeree company may be biased and not at all geared to the real value adding capacities for companies in the longer run. Recent academic studies show, that the large majority of mergers and acquisitions in the last two decades have failed to create economic value or profitable market power, and that total returns are negative, both for jobs and share values. Since 1996 all mergers in Europe have created negative aggregate value and in 1999 they suffered their greatest loss. Since then activity has

¹ OJ L 254, 30.9.1994, p. 64. Directive as amended by Directive 97/74/EC (OJ L 10, 16.1.1998, p. 22).

² OJ L 225, 12.8.1998, p. 16.

³ OJ L 80, 23.3.2002, p. 29.

diminished considerably.¹

In most of the continental Member States' traditions, companies – listed or not - are not simply the property of shareholders. They have a broader societal function, and are considered to be carried by both capital and labour, and to be led by a management - be it in a one-tier or two-tier structure – that is expected to find the right balance between interests of shareholders, employees and other stakeholders in the perspective of a healthy future and a profitable continuity of the firm. Not only on the continent, also in the present debate about revision of Company Law in the UK, and in the discussions following the disastrous bankruptcies and failures of US companies, this broader mission of companies is stressed. Besides that a broader debate gains ground about Corporate Social Responsibility of companies.²

The draftsman is of the opinion that such traditions and trends should be taken much more seriously. If the Commission deems it necessary to aim at harmonisation of Company Law, a much broader and comprehensive debate is necessary. It would be wrong to force upon Member States via this Directive a “one-size-fits-all” model of decision making, which deeply infringes in their Company Law traditions.

Of course a certain extent of convergence of rules for takeover bids and for the reaction of offeree companies to them, is desirable. At least transparency and fair involvement of all relevant parties (including employees' representatives) should be guaranteed. The draftsman proposes to oblige the board of an offeree company to immediately convene a general meeting of shareholders to discuss a bid and the intended reaction to it, including possible defensive measures. She does not agree that prior authorisation of the general meeting of shareholders should be forced upon all Member States' company law via this Directive. Other systems in which for instance supervisory boards play a major role in such decisions about defensive measures should be fully respected. It is much more appropriate and in line with subsidiarity to focus on an obligation for Member States to provide for adequate administrative or judicial procedures. The parties that are not satisfied with the decisions taken in reaction to a takeover bid by the party that is authorised to take such decisions according to the company law rules in force, must have due recourse to administrative or judicial procedures within a restricted timeframe. Also article 10 and 11 should only aim at providing maximum transparency, and not force upon Member States a harmonisation of the rules with respect to voting rights and legal property.

AMENDMENTS

¹ See for instance Professor Hans Schenk, Tilburg University, Erasmus University Rotterdam and Utrecht University, <http://go.to/hans.schenk>

² The European Commission recently issued a green paper and a Communication on Corporate Social Responsibility (COM (2001) 366 and COM (2002) 347)

The Committee on Employment and Social Affairs calls on the Committee on Legal Affairs and the Internal Market, as the committee responsible, to incorporate the following amendments in its report:

Text proposed by the Commission¹

Amendments by Parliament

Amendment 1
Recital 3 a (new)

The traditions of company law in Member States, particularly with regard to the relation of ownership and control, should be respected.

Justification

The aim of this directive is not to harmonise company law.

Amendment 2
Recital 3 b (new)

The popular theory of the positive disciplinary and economic effects of hostile take-overs has been proven not to be accurate, since research shows that take-overs often result in lower shareholders value and loss of jobs and output.

Justification

Scientific research has shown that take-overs often fail to deliver the economic benefits suggested by popular theory.

Amendment 3
Recital 12

The holders of securities should be properly informed of the terms of the 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 holders of securities should be properly informed of the terms of the bid by means of an offer document. Appropriate ***and detailed*** information ***on the terms of the bid*** should also be given ***in due time*** to the

¹ Not yet published

the employees directly.

representatives of the company's employees or, failing that, to the employees directly.

Justification

It is essential that detailed (e.g. written) information on the terms of the bid and its possible consequences is given in due time to the employee representatives, so that information and consultation of employees can proceed properly and employees views and proposals on the take over bid can be taken into account.

Amendment 4
Recital 14 a (new)

Scientific research¹ on the effects of such takeover bids has not been able to show any benefits either in economic terms or in terms of employment.

¹ EP Directorate-General for Research, Division for Social and Legal Affairs, Ref. IV/WIP/2003/01/0008

Justification

Scientific research has not shown convincingly that takeover bids bring any economic benefit.

Amendment 5
Recital 15

In order to avoid operations which could frustrate the bid, it is necessary to limit the powers of the board of the offeree company to engage in operations of an exceptional nature without unduly hindering the offeree company from carrying out its normal business activities.

In order to avoid operations which could **wrongfully** frustrate the bid, it is necessary to limit the powers of the board of the offeree company to engage in operations of an exceptional nature without unduly hindering the offeree company from carrying out its normal business activities

Justification

Not all operations with a view to frustrate a bid are to be considered wrong and unjustified.

Amendment 6
Recital 17

(17) In order to reinforce the effectiveness of the existing provisions regarding freedom to deal in the securities of companies covered by this Directive and 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 put to a vote at the general meeting.***

(17) In order to reinforce the effectiveness of the existing provisions regarding freedom to deal in the securities of companies covered by this Directive and freedom to exercise voting rights, the defensive structures and mechanisms envisaged by such companies ***should*** be transparent.

Justification

In accordance with the subsidiarity principle, it is up to the company law of the Member States to determine whether such structures and mechanisms should be decided on by a vote at the general meeting.

Amendment 7
Recital 18

Member States ***should*** take the necessary measures to afford any offeror the possibility of purchasing the securities of the offeree company, by neutralising provisions placing restrictions on the transfer of securities and on voting rights, and to render ineffective any restrictions on the transfer of securities and on voting rights which may prevent an offeror who holds sufficient securities of the offeree company from exercising the corresponding voting rights in order to amend the company's articles of association, by neutralising restrictions on the voting rights and special appointment rights held by shareholders at the first general meeting following closure of the bid.

Member States ***may*** take the necessary measures to afford any offeror the possibility of purchasing the securities of the offeree company, by neutralising provisions placing restrictions on the transfer of securities and on voting rights, and to render ineffective any restrictions on the transfer of securities and on voting rights which may prevent an offeror who holds sufficient securities of the offeree company from exercising the corresponding voting rights in order to amend the company's articles of association, by neutralising restrictions on the voting rights and special appointment rights held by shareholders at the first general meeting following closure of the bid.

Justification

In line with the principle of subsidiarity this should not be an obligation to Member States, but just an option.

Amendment 8 Recital 20

The provision of information to and consultation of representatives of the employees of the offeror and the offeree company must be governed by the relevant national provisions, and 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, Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies 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. ***The employees of the offeree company, or their representatives, should nevertheless be afforded the opportunity of giving their views on the foreseeable effects of the bid on employment.***

The provision of information to and consultation of representatives of the employees of the offeror and the offeree company must be governed by the relevant national provisions, and 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, Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies 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. ***The employees of the offeree company and their representatives, as well as the representatives of the offeror company or - if there are no such representatives – the employees themselves should be informed and consulted timely and comprehensively in all phases of a takeover and be able to express their views on the foreseeable affects of the bid, particularly on employment and restructuring.***

Justification

It is in line with the Directives and national provisions referred to, to provide not only the employees and their representatives of the offeree company, but also the employee representatives of the offeror with information and consultation rights. These should be afforded in due time and not only on employment effects but on all aspects where these rights relate to.

The law of Member States is far from being harmonised, concerning information of workers during a takeover. In order to avoid distortions to competition it is completely insufficient to refer back to national provisions.

Amendment 9 Article 4.2. (e)

(e) In the cases referred to in points (b) and (c), matters relating to the consideration offered in the case of a bid, in particular the price, and matters relating to the bid procedure, in particular the information on the offeror's decision to make a bid, the contents of the offer document and the disclosure of the bid, shall be dealt with in accordance with the rules of the Member State of the competent authority. In matters relating to the information to be provided to the employees of the offeree company and in matters relating to company law, in particular the percentage of voting rights which confers control and any derogation from the obligation to launch a bid, as well as the conditions under which the board of the offeree company may undertake any action which might result in the frustration of the bid, the applicable rules and the competent authority shall be those of the Member State in which the offeree company has its registered office.

(e) In the cases referred to in points (b) and (c), matters relating to the consideration offered in the case of a bid, in particular the price, and matters relating to the bid procedure, in particular the information on the offeror's decision to make a bid, the contents of the offer document and the disclosure of the bid, shall be dealt with in accordance with the rules of the Member State of the competent authority. In matters relating to the information **and consultation** to be provided to the employees of the offeree company and in matters relating to company law, in particular the percentage of voting rights which confers control and any derogation from the obligation to launch a bid, as well as the conditions under which the board of the offeree company may undertake any action which might result in the frustration of the bid, the applicable rules and the competent authority shall be those of the Member State in which the offeree company has its registered office.

Justification

Self-explanatory.

Amendment 10
Article 6, paragraph 1

1. Member States shall provide that an offeror that considers to make a bid shall inform and consult its employee representatives before a final decision to make the bid is taken and made public; the information to be given shall include at least the data referred to in art 6.3 under a, b, f, g, h, k and l; Member States shall provide that employee representatives may be bound by confidentiality clauses and will be subject to regulation with respect to insider dealing.

1. Member States shall ensure that the decision to make a bid is made public without delay and that the supervisory authority is informed of the bid. They may require that the supervisory authority is informed before this decision is made public. As soon as the bid has been made public, the boards of the offeree company and of the offeror shall inform respectively the representatives of their employees or, where there are no such representatives, the employees themselves.

Member States shall ensure that the decision to make a bid is made public without delay and that the supervisory authority is informed of the bid. They may require that the supervisory authority is informed before this decision is made public. As soon as the bid has been made public, the boards of the offeree company and of the offeror shall inform respectively the representatives of their employees or, where there are no such representatives, the employees themselves.

Justification

This amendment clarifies the original amendment.

The new paragraph obliges Member States to provide for information and consultation of employees before a company decides to make a bid. It is in line with the European and national information and consultation provisions referred to in art 13 of the Directive to involve employee representatives in such major decisions and to inform and consult them, particularly with respect to its employment and restructuring implications. As a safeguard of course confidentiality and rules regarding abuse of the information are legitimate.

Where Member States may provide that supervisory authorities are informed in advance they may also provide that for information and consultation of employees. It is rather odd that in the Commission's proposal information to the employees is only foreseen "as soon as the bid has been made public".

Amendment 11
Article 9, paragraph 1

1. Member States shall ensure that rules laid down in paragraphs 2 to 5 below are complied with.

1. Member States shall ensure that rules laid down in paragraphs 2 to 5 below are complied with, ***without the structure of the company system being adversely affected thereby.***

The board of the offeree company shall immediately after receiving the offer document referred to in art. 6(2) convene with its general meeting of shareholders in order to discuss the bid, the board's initial opinion on the bid, and any intention to measures regarding the bid, including such measures as to counteract the bid with a view to securing the long term interests of the company.

Justification

This directive does not seek to harmonise company law, even if this impression has been given by the Commission. This amendment is tabled in order to counteract the impression that the European Parliament shares this view.

Instead of obliging several Member States to completely revise their company law by prescribing that the general shareholders meeting shall be the highest decision making level to authorise in advance the reaction of the board of the offeree company, it is more in line with subsidiarity to take more account of the differing national company law systems. The reformulated paragraph restricts the European level obligation to organising a general meeting of shareholders as soon as possible, and to giving complete transparency about the bid, and the intentions of the board with respect to the reaction. It's up to Member States' company law provisions then, where the decisions are taken.

Amendment 12
Article 9.2., 1st subparagraph

2. During the period referred to in the second subparagraph, the board of the offeree company must obtain the prior authorisation of the general meeting of shareholders given for this purpose before taking any action other than seeking alternative bids which may result in the frustration of the bid and in particular before issuing any shares which may result in a lasting impediment to the offeror in obtaining control over the offeree company.

2. ***Member States may provide that during the period referred to in the second subparagraph, the board of the offeree company must obtain the prior authorisation of the general meeting of shareholders and/or the supervisory board, according to the company law of the Member State of the offeree company, taking into account legal provisions and procedures in that Member State that are prescribed to deal with the serious consultation of employee representatives as referred to in art 13 of this Directive. Such authorisation must be*** given for this purpose before taking any action other than seeking alternative bids which may result in the frustration of the bid and in particular before issuing any shares which may result in a lasting impediment to the offeror in obtaining control over the offeree company.

Justification

In line with the principle of subsidiarity and the reformulation of art. 9.1 the provision that the general meeting of shareholders should give prior authorization is adapted to national company law systems where a dual decisionmaking level exists with supervisory boards in which sometimes shareholders are represented, and sometimes also employee representatives. The provision about prior authorization is also not forced upon all Member States, but only given as an option, since other systems may provide for other checks and balances, particularly in the sphere of judicial procedures, elaborated in an amendment for a new paragraph 9(6).

Amendment 13
Article 9.3.

3. As regards decisions taken before the beginning of the period referred to in the second subparagraph of paragraph 2 and not yet partly or fully implemented, the general meeting of the shareholders shall

3. ***Member States may provide that as regards decisions taken before the beginning of the period referred to in the second subparagraph of paragraph 2 and not yet partly or fully implemented, the***

approve or confirm any decision which does not form part of the normal course of the company's business and whose implementation may result in the frustration of the bid.

general meeting of the shareholders **and/or the supervisory board** shall approve or confirm any decision which does not form part of the normal course of the company's business and whose implementation may result in the frustration of the bid.

Justification

In line with the previous amendments that opt for subsidiarity and due account for different systems of company law.

Amendment 14 Article 9.5.

5. The board of the offeree company shall draw up and make public a document setting out its opinion on the bid, together with the reasons on which it is based, including its views on the effects on all the interests of the company, including employment, and on the offeror's strategic plans for the offeree company and their likely effects on employment and the locations of the company's places of business as set out in the offer document in accordance with Article 6(3)(h). ***The board of the offeree company shall at the same time communicate that opinion to*** the representatives of its employees or, where there are no such representatives, the employees themselves. Where the board of the offeree company receives in good time a separate opinion from the representatives of its employees on the effects of the bid on employment, that opinion shall be appended to the document.

5. The board of the offeree company shall draw up and make public a document setting out its opinion on the bid, together with the reasons on which it is based, including its views on the effects on all the interests of the company, including employment, and on the offeror's strategic plans for the offeree company and their likely effects on employment and the locations of the company's places of business as set out in the offer document in accordance with Article 6(3)(h). ***Before finalising this document the board of the offeree company shall inform and consult in a detailed and comprehensive way*** the representatives of its employees or, where there are no such representatives, the employees themselves ***and indicate which conclusions it takes from their opinion.*** Where the board of the offeree company receives in good time a separate opinion from the representatives of its employees on the effects of the bid on employment, that opinion shall be appended to the document.

Justification

In line with the intentions of the article 13 of this proposal it is imperative that employee representatives are informed and consulted about the reaction of the board of an offeree company to a bid, as described in this article. Serious consultation means that before finalising that document this consultation takes place, and that the board gives its arguments with respect to the advice of the employee representatives. Only appending their opinion to the document, is not enough!

Amendment 15 Article 9.5a (new)

5a. Member States shall ensure that adequate access to administrative or judicial procedures is available for the offeror as well as for the shareholders of the offeree company, to enable them to have unreasonable measures of the board of the offeree company against the bid redressed. In Member States where the general meeting of shareholders must give prior authorisation for defensive measures, such access to administrative or judicial procedures shall be ensured for the board of the offeree company and its employees' representatives and/or third parties with a major interest. Member States shall ensure that this recourse to an administrative or judicial procedure will be given within a reasonable timeframe after the bid, which is not more than 6 months, and that the decision will be given within a period of not more than 3 months, and that such a procedure will provide for substituting authorisation for or against the takeover.

Justification

To take due account of checks and balances in the interests and arguments of the different parties involved in public bids, an essential condition is that Member States have adequate administrative or judicial procedures for the parties who – according to the system of company law in their Member State, following the principle of subsidiarity – may be

overruled and dissatisfied by decisions taken by other parties. In the case of Member States' company law where the board (and/or supervisory board) of the offeree company still has discretionary power (an alternative option for the "one size fits all" approach of the Commission) the offeror and the shareholders of the offeree company should have adequate access to such procedures; in the case of Member States' company law where the general meeting of shareholders must give prior authorisation (the preferred option of the Commission's proposal) the board of the offeree company as well as the employee representatives must have that access. In all cases the procedures should be within a reasonable timeframe to prevent undue retardation and sabotage.

Amendment 16
Article 10, paragraph 3

3. Member States shall ensure that, in the case of companies whose securities are admitted to trading on a regulated market in a Member State, the general meeting of shareholders takes a decision at least every two years on the structural aspects and defensive mechanisms referred to in paragraph 1. They shall require the board to state the reasons for those structural aspects and defensive mechanisms. *deleted*

Justification

It seems pointless to authorise such defensive mechanisms in advance if it is not known that such offers may be made.

Amendment 17
Article 11.1.

Unenforceability of restrictions on the transfer of securities and voting rights

1. Without prejudice to the obligations imposed by Community law on companies whose securities are admitted to trading on a regulated market in a Member State, Member States **shall** ensure that the safeguards referred to in paragraphs 2, 3

Unenforceability of restrictions on the transfer of securities and voting rights

1. Without prejudice to the obligations imposed by Community law on companies whose securities are admitted to trading on a regulated market in a Member State, Member States **may** ensure that the safeguards referred to in paragraphs 2, 3

and 4 are afforded when a bid has been made public.

and 4 are afforded when a bid has been made public.

Justification

This article 11 which intends to create a “breakthrough” in statutory and contractual restrictions for transferability of securities and for voting rights during public bids, is heavily criticised for subsidiarity reasons and because it does not provide the level playing field that it pretends to create. Without going into all the details this amendment intends to make it optional instead of mandatory.

Amendment 18 Article 13

Information for and consultation of employees' representatives

Without prejudice to the provisions of this Directive, the provision of information to and consultation of representatives of the employees of the offeror and the offeree company ***shall be*** governed by the relevant national provisions, and in particular those adopted pursuant to Directives 94/45/EC, 98/59/EC and 2002/14/EC.

Information for and consultation of employees' representatives

The provisions of this Directive ***are without prejudice to the rules relating to*** the provision of information to and consultation of representatives of the employees of the offeror and the offeree company governed by the relevant national provisions, and in particular those adopted pursuant to Directives 94/45/EC, 98/59/EC and 2002/14/EC.

The board of the offeror company and of the offeree company have to inform and consult the representatives of their respective employees, or failing that, their employees directly, in due time before and during all phases of the take over in a detailed and comprehensive manner.

Justification

The intention of the article is (according to the explanatory statement) and should be that the provisions of the proposed Directive take due account of the already existing European acquis (the three Directives referred to) and the national provisions dealing with information and consultation of employees and their representatives. This is better formulated in the amendment.

As already outlined before, the law of Member States is far from being harmonised, concerning information of workers during a takeover. In order to avoid distortions to

competition it is completely insufficient to refer back to national provisions.

It is essential to stress that information and consultation of employees has to be guaranteed during all stages of the take over process, securing that information is given in a detailed and comprehensive fashion and in due time, so that employees views can be taken into account.

Amendment 19
Article 16

Member States shall determine the sanctions to be applied for infringement of the national measures adopted pursuant to this Directive and shall take all the necessary steps to ensure that they are put into effect. The sanctions thus provided for shall be effective, proportionate and dissuasive. Member States shall notify these measures to the Commission not later than the date laid down in Article 20(1) and any subsequent change thereto at the earliest opportunity.

Member States shall determine the sanctions to be applied for infringement of the national measures adopted pursuant to this Directive and shall take all the necessary steps to ensure that they are put into effect. The sanctions thus provided for - ***including on breaches of the duties of the offeror and the offeree company to organise a proper process of information and consultation of their employees*** - shall be effective, proportionate and dissuasive. Member States shall notify these measures to the Commission not later than the date laid down in Article 20(1) and any subsequent change thereto at the earliest opportunity.

Justification

It needs to be emphasised that national sanctions regimes on takeovers explicitly refer to a proper functioning of information and consultation of employees and that breaches of the respective duties of companies boards should consequently be sanctioned.

30 April 2003

OPINION OF THE COMMITTEE ON INDUSTRY, EXTERNAL TRADE, RESEARCH AND ENERGY

for the Committee on Legal Affairs and the Internal Market

on the proposal for a European Parliament and Council directive on takeover bids
(COM(2002) 534 – C5-0481/2002 – 2002/0240(COD))

Draftsman: Giles Bryan Chichester

PROCEDURE

The Committee on Industry, External Trade, Research and Energy appointed Giles Bryan Chichester draftsman at its meeting of 23 January 2003.

At the last meeting it adopted the following amendments unanimously.

The following were present for the vote Carlos Westendorp y Cabeza (chairman), Jaime Valdivielso de Cué (vice-chairman), Giles Bryan Chichester (draftsman), Konstantinos Alyssandrakis, Per-Arne Arvidsson (for Sir Robert Atkins), Luis Berenguer Fuster, Freddy Blak (for Fausto Bertinotti), Guido Bodrato, David Robert Bowe (for Massimo Carraro), Gérard Caudron, Nicholas Clegg, Harlem Désir, Francesco Fiori (for Bashir Khanbhai), Concepció Ferrer, Norbert Glante, Michel Hansenne, Roger Helmer (for Werner Langen), Rolf Linkohr, Caroline Lucas, Eryl Margaret McNally, Hans-Peter Martin (for Hans Karlsson), Marjo Matikainen-Kallström, Bill Newton Dunn (for Willy C.E.H. De Clercq), Seán Ó Neachtain, Paolo Pastorelli, Elly Plooi-j-van Gorsel, John Purvis, Imelda Mary Read, Mechtild Rothe, Christian Foldberg Rovsing, Paul Rübig, Konrad K. Schwaiger, Claude Turmes, Roseline Vachetta, W.G. van Velzen, Alejo Vidal-Quadras Roca, Dominique Vlasto and Olga Zrihen Zaari.

SHORT JUSTIFICATION

I. Background

The current proposal for a Directive of the European Parliament and the Council on takeover bids is the third one that the European Commission has presented, after the proposals from 1989¹ and 1996². In relation to the 1996 proposal, the Council unanimously adopted its common position in June 2000³, but in December 2000 the European Parliament presented several amendments on second reading⁴ which were not acceptable to the Council. As a result, a conciliation procedure was engaged and on 4th July 2001 the European Parliament rejected the compromise text of the Conciliation Committee with a vote of 273 in favour and 273 against.

The Parliament's rejection was based on 3 major concerns: (1) it was opposed to the principle which would require the board of the offeree company to obtain permission from shareholders before taking defensive measures in the face of a bid; (2) the insufficient protection which the Directive would afford employees of companies involved in a takeover bid, and (3) the failure of the proposal to achieve a level playing field with the United States.

The Commission set up a Group of High-Level Company Law experts with the task of presenting suggestions for resolving the matters raised by the European Parliament. In January 2002, the group presented its recommendations in the Winter Report (named after its chair Professor Jaap Winter) which addresses, and in part confirms, various European Parliament concerns, namely: the inadequate degree of harmonisation; *the insufficiency of transparency in the defensive structures and mechanisms*; the need for a basis for calculating an 'equitable price' and the introduction of the so-called "squeeze-out" clause.

II. Contents of the proposal

The proposal is key priority to the Financial Services Action Plan and pursues the same objectives as its predecessor: integrating European markets in line with the Financial Services Action Plan; undertaking harmonisation conducive to corporate restructuring; strengthening the legal certainty of cross-border takeover bids in the interest of all concerned and ensuring protection for minority shareholders in the course of such transactions. The proposal establishes a framework for action by Member States by laying down certain principles and a limited number of general requirements while allowing Member States to adopt the detailed implementing rules in accordance with their national practices.

Your Draftsman considers that this proposal is an improvement on the previous Directive in certain respects, having taken up the following recommendations of the Winter Report:

- the definition of equitable price (Article 5);
- increased transparency obligations (Article 10);
- the inclusion of a "squeeze-out" right (Article 14);

¹ OJ C 64, 14.3.1989, p.8.

² OJ C 162, 6.6.1996, p.5.

³ OJ C 23, 24.1.2001, p.1.

⁴ OJ C 232, 17.8.2001, p.168.

- the inclusion of a "sell-out" right following a takeover bid (Article 15).

Some recommendations contained in the Winter Report have not been taken up by the new proposal. Your Draftsman has concerns about the following articles, which conflict with what was outlined in the Winter Report:

- the scope of the mini-breakthrough rule (Article 11): it makes unenforceable restrictions on the transfer of securities and on voting rights contained in articles of association or in contractual agreements between offeree and its shareholders, or indeed between shareholders themselves. It does not address shares with differential voting rights or golden shares, as recommended in the Winter Report;
- the unchanged provisions relating to shared jurisdiction (Article 4): such jurisdiction occurs where the target company's country of registered office and country where its shares are traded are different; it is not clear which competent authority will be responsible for particular issues and there is no mechanism for resolving jurisdictional disputes between supervisory authorities;
- the new Article permitting comitology (Article 17): it is not clear how the comitology procedure would operate without imposing wider requirements and additional rules which are specifically the preserve of individual Member States.

Another important issue for European industry is that of establishing a level playing field with non-Member States, to which the proposal does not make any reference. One must determine if the Directive should also provide for special measures when takeover bids are launched by a non-European bidder, in particular from the United States. The Winter Report suggested either not taking any specific action or stipulating that the benefit of the breakthrough rule should only be "enjoyed by listed European companies making general takeover bids for other listed European companies..." It is not clear why this the breakthrough rule should be limited to listed European companies or if such a provision should take the form of a reciprocity clause.

In response to this question, there may be two options:

- A reciprocity clause focusing on Articles 9-11: the result would be to empower management against shareholders when the bidder is non European (contrary to the philosophy of this Directive).
- A provision by which Member States, subject to EC Law and the international obligations of each Member state, are free to object to takeover bids by third country companies, if they can substantiate that a European company would not be entitled to bid for and take over, upon comparable terms and conditions, a listed company in the State of incorporation of the bidder.

III. Draftsman's opinion

Your Draftsman considers the proposal in its present form to be balanced and a good basis for finding a compromise between Parliament and the Council. This proposal contains new elements to respond to previous demands of the European Parliament and follows to a large extent the recommendations of the Winter Report.

Taking into account the politically complex nature of this Directive and the numerous informal negotiations which are currently in course, your Draftsman prefers to await further developments and the debate within the framework of the ITRE Committee before deciding whether amendments would be desirable.

AMENDMENTS

The Committee on Industry, External Trade, Research and Energy calls on the Committee on Legal Affairs and the Internal Market, as the committee responsible, to incorporate the following amendments in its report:

Text proposed by the Commission¹

Amendments by Parliament

Amendment 1

Recital 12

(12) The holders of securities should be properly informed of the terms of the 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.

The holders of securities should be properly informed of the terms of the bid by means of an offer document. **Detailed** information **on the terms of the bid must** also be given to the representatives of the company's employees or, failing that, to the employees directly.

Justification

Workers shall enjoy wide-ranging information rights.

Amendment 2

Recital 20

(20) The provision of information to and consultation of representatives of the employees of the offeror and the offeree company must be governed by the relevant national provisions, and 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,

(20) The provision of information to and consultation of representatives of the employees of the offeror and the offeree company must be governed by the relevant national provisions, and 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,

¹ OJ C 45, 25.2.2003, p. 17.

Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies 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. ***The employees of the offeree company, or their representatives, should nevertheless be afforded the opportunity of giving their views on the foreseeable effects of the bid on employment.***

Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies 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. ***The representatives of workers of the offeror and the offeree company should be comprehensively informed and consulted in good time by their respective board before and during a takeover. The employees of the offeror company, or their representatives, should be afforded the opportunity of giving their views on the foreseeable effects of the bid, particularly on employment.***

Justification

Employee representatives should be genuinely consulted on matters relating to the takeover. If the outcome of a takeover is to be a productive and prosperous business, it is important for it to have the support of its employees, both from the offeror and the offeree. Ensuring that workers feel their views have been taken into account throughout the whole takeover process is the most productive way of achieving this.

Amendment 3 Recital 26a (new)

(26a) The differences in legal provisions governing extra-European markets mean that Member States must be given the right to make bids originating directly or indirectly in third countries subject to national authorisation.

Justification

The lack of reciprocity vis-à-vis third countries could create distortions and jeopardise the establishment of a level playing field.

Amendment 4 Recital 26b (new)

(26b) Agreements concluded by the offeree company with third parties or with the management immediately before the bid or during the takeover itself and which are designed to prevent the offeror from acquiring shareholdings in the offeree company shall be without effect.

Justification

This is justified in the light of the rules provided for in Articles 10 and 11.

Amendment 5
Article 1, paragraph 2a (new)

2a. This directive shall not regulate the fundamental corporate rules of the Member States governing the relationship between ownership and control. This means that rules governing the influence of company boards and the system of shares with multiple voting rights shall not be affected by this directive.

Justification

The directive must not seek to change the fundamental corporate structures of the Member States, particularly where it has not been clarified what the effects of such changes are.

Amendment 6
Article 4, paragraph 2

(a) The authority competent for supervising the bid shall be ***that*** of the Member State in which the offeree company has its registered office ***if the securities of that company are admitted to trading on a regulated market in that Member State.***

(b) If the securities of the offeree company are not admitted to trading on a regulated market in the Member State in which the

(a) The authority competent for supervising the bid ***and the jurisdiction*** shall be ***those*** of the Member State in which the offeree company has its registered office.

deleted

company has its registered office, the authority competent for supervising the bid shall be that of the Member State on whose regulated market the securities of the company are admitted to trading.

If the securities of the company are admitted to trading on regulated markets in more than one Member State, the authority competent for supervising the bid shall be that of the Member State on whose regulated market the securities were first admitted.

(c) If the securities of the offeree company are first admitted to trading on regulated markets within more than one Member State simultaneously, the offeree company shall determine which of the supervisory authorities of those Member States is the competent authority for supervising the bid by notifying these regulated markets and their supervisory authorities on the first trading day.

If the securities of the offeree company are already admitted to trading on regulated markets in more than one Member State at the date referred to in Article 20(1) and were admitted simultaneously, the supervisory authorities of these Member States shall agree on which one of them is to be the competent authority for supervising the bid within four weeks of the date mentioned in Article 20(1). Otherwise, the offeree company shall determine which of these authorities is to be the competent authority on the first trading day following the expiry of the period of time mentioned in the first sentence.

(d) Member States shall ensure that the decisions referred to in point (c) are made public.

(e) In the cases referred to in points (b) and (c), matters relating to the consideration offered in the case of a bid, in particular the price, and matters relating to the bid procedure, in particular the information on the offeror's decision to make a bid, the contents of the offer document and the

disclosure of the bid, shall be dealt with in accordance with the rules of the Member State of the competent authority. In matters relating to the information to be provided to the employees of the offeree company and in matters relating to company law, in particular the percentage of voting rights which confers control and any derogation from the obligation to launch a bid, as well as the conditions under which the board of the offeree company may undertake any action which might result in the frustration of the bid, the applicable rules and the competent authority shall be those of the Member State in which the offeree company has its registered office.

Justification

Sharing of jurisdiction is inherently unsatisfactory and carries particular risks in relation to takeovers, which can be fast-moving, contentious and complex events; any uncertainty as to which regulator's rules or decisions apply to a particular situation will be exploited by parties to the bid to suit their own interests.

Clarity and certainty of jurisdiction is needed, in particular for the industrial sector and undertakings, to avoid uncertainties, delays and potential conflicts of responsibility. Effective regulation would be best served by the supervisory authority in one country alone being responsible. The supervisory authority in the country where the offeree company has its registered office should be the sole supervisory authority since the detailed takeover rules of a country (made in accordance with the Directive) will continue to be principally founded on the company law of that country.

Amendment 7

Article 6, paragraph -1 (new)

-1. Member States shall provide that an offeror considering making a bid shall inform and consult its employee representatives before a final decision to make the bid is taken and made public; the information to be given shall include at least the data referred to in Article 6.3 under (a),(b),(f), (g), (h), (k) and (l); Member States shall provide that employee representatives may be bound by confidentiality clauses and will be subject

to regulation with respect to insider dealing.

Justification

It is in a company's interest to inform and consult its employee representatives when taking a decision of such significance for the company. If a workforce feels that its representatives have been consulted in advance of a decision, it is more likely that a company's employees will offer their support during the takeover process.

Amendment 8
Article 9, paragraph 5

5. The board of the offeree company shall draw up and make public a document setting out its opinion on the bid, together with the reasons on which it is based, including its views on the effects on all the interests of the company, including employment, and on the offeror's strategic plans for the offeree company and their likely effects on employment and the locations of the company's places of business as set out in the offer document in accordance with Article 6(3)(h). ***The*** board of the offeree company shall ***at the same time communicate that opinion to*** the representatives of its employees or, where there are no such representatives, the employees themselves. Where the board of the offeree company receives in good time a separate opinion from the representatives of its employees on the effects of the bid on employment, that opinion shall be appended to the document.

5. The board of the offeree company shall draw up and make public a document setting out its opinion on the bid, together with the reasons on which it is based, including its views on the effects on all the interests of the company, including employment, and on the offeror's strategic plans for the offeree company and their likely effects on employment and the locations of the company's places of business as set out in the offer document in accordance with Article 6(3)h. ***Before finalising the document the*** board of the offeree company shall ***inform and consult in a detailed and comprehensive way with*** the representatives of its employees or, where there are no such representatives, the employees themselves. Where the board of the offeree company receives in good time a separate opinion from the representatives of its employees on the effects of the bid on employment, that opinion shall be appended to the document.

Justification

This amendment would ensure that employee representatives are genuinely consulted on matters relating to the takeover. If the outcome of a takeover is to be a productive and prosperous business, it is important for it to have the support of its employees. Ensuring that workers feel their views have been taken into account throughout the whole takeover process is the most productive way of achieving this.

Amendment 9
Article 11, paragraph 1

1. Without prejudice to the obligations imposed by Community law on companies whose securities are admitted to trading on a regulated market in a Member State, Member States shall ensure that the safeguards referred to in paragraphs 2, 3 and 4 are afforded when a bid has been made public. *deleted*

Justification

The directive should restrict itself to its original aims: transparency and protection of minority shareholders. There is no economic or legal justification for such radical interference in Member States' company law.

Amendment 10
Article 11, paragraph 2

2. Any restrictions on the transfer of securities provided for in the articles of association of the offeree company shall be unenforceable against the offeror during the period for acceptance of the bid. *deleted*

Any restrictions on the transfer of securities provided for in contractual agreements between the offeree company and holders of its securities or between holders of securities of the offeree company shall be unenforceable against the offeror during the period for acceptance of the bid. *deleted*

Justification

The directive should restrict itself to its original aims: transparency and protection of minority shareholders. There is no economic or legal justification for such radical interference in Member States' company law.

Amendment 11
Article 11, paragraph 3

3. Any restrictions on voting rights provided for in the articles of association of the offeree company shall cease to have effect when the general meeting decides on any defensive measures in accordance with Article 9. *deleted*

Any restrictions on 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 shall cease to have effect when the general meeting decides on any defensive measures in accordance with Article 9.

Justification

The directive should restrict itself to its original aims: transparency and protection of minority shareholders. There is no economic or legal justification for such radical interference in Member States' company law.

Amendment 12
Article 11, paragraph 4

4. Where, following a bid, the offeror holds a number of securities of the offeree company which, under the applicable national law, would enable him to amend the company's articles of association, any restrictions on the transfer of securities and on voting rights referred to in paragraphs 2 and 3 and any special rights of shareholders concerning the appointment or removal of board members shall cease to have effect at the first general meeting following closure of the bid. *deleted*

To that end, the offeror shall have the right to convene a general meeting at short notice, provided that the meeting does not

take place within two weeks of notification.

Justification

The directive should restrict itself to its original aims: transparency and protection of minority shareholders. There is no economic or legal justification for such radical interference in Member States' company law.

Amendment 13
Article 11, paragraph 5

5. Paragraphs 2 and 3 shall not apply to securities without voting rights which carry specific pecuniary advantages. *deleted*

Justification

The directive should restrict itself to its original aims: transparency and protection of minority shareholders. There is no economic or legal justification for such radical interference in Member States' company law.

Amendment 14
Article 13

Information for and consultation of employees' representatives

Without prejudice to the provisions of this Directive, the provision of information to and consultation of representatives of the employees of the offeror and the offeree company ***shall be*** governed by the relevant national provisions, and in particular those adopted pursuant to Directives 94/45/EC, 98/59/EC and 2002/14/EC.

Information for and consultation of employees' representatives

The provisions of this Directive ***are without prejudice to the rules relating to*** the provision of information to and consultation of representatives of the employees of the offeror and the offeree company governed by the relevant national provisions, and in particular those adopted pursuant to Directives 94/45/EC, 98/59/EC and 2002/14/EC.

The board of the offeror and the offeree shall inform and consult worker representatives or, where there are no such representatives, the employees directly, before and during the takeover in a detailed

and comprehensive manner.

Justification

This amendment would ensure that employee representatives are genuinely consulted on matters relating to the takeover. If the outcome of a takeover is to be a productive and prosperous business, it is important for it to have the support of its employees. Ensuring that workers feel their views have been taken into account throughout the whole takeover process is the most productive way of achieving this.

Amendment 15
Article 17 a (new)

17a. The Member States may adopt provisions designed to prohibit or impose conditions on takeover bids by offerors from a third country. The same applies to takeover bids from offerors controlled by a third country by virtue of association or control agreements. Member States may only invoke this rule if they prove that a national or European company would not be entitled to take over, upon comparable terms and conditions, a listed company registered in the offeror's State. When applying this rule, Member States must observe the international obligations of each Member State, as well as those of the European Community.

Justification

US law provides for wide-ranging defensive measures that do not need to be approved by shareholders in the case of takeovers by companies from other States. Taking into account that this directive will bring about an effective level playing field throughout Europe, it seems appropriate to provide equivalent measures for companies facing takeover bids launched by a non-European bidder. An appropriate reciprocity clause is therefore necessary to guarantee a level playing field between Europe and third countries. Companies, irrespective of their origin, should enjoy similar rights and opportunities in a global market economy.