Take-Over Bids

Public Hearing
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by the Committee on Legal Affairs and the Internal Market
of the European Parliament

Comments on the proposal by the European Commission of October 2, 2002
for a Directive on Take-Over Bids

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The Council of Bars and Law Societies of the European Union (CCBE), through its member bars and law societies, is the representative body of over 500,000 European lawyers. In addition to the member bars and law societies the CCBE has observer representatives from additional 13 European countries. The CCBE has set up committees for various areas of law one of which is the Company Law Committee. I am the Chairman of such committee, besides my function as First Vice President of the CCBE.

The following presentation will follow the sequence of the working document of the rapporteur of November 22, 2002.

The establishment of a level playing field is of utmost importance to us. Only one member in our Company Law Committee felt that equally important is the freedom for companies and investors to structure the company capital and to agree on investor conduct.

It is of course realised that the legal nature of the various take-over obstacles differs very much from case to case. It is also realised that not all but only some of these obstacles are intended to frustrate a take-over bid while others may do so only as a side effect. It is further realised that

some of these obstacles, in particular multiple voting rights, in some countries have for long been a characteristic of the corporate landscape of the economy. All of this, however, does not justify a per se exemption from the Take-Over Directive.

Multiple voting rights shares are based on the freedom of target companies and shareholders to structure the capital as they wish. In this regard they are not different from the defence mechanisms and restrictions on the transfer of securities and on voting rights referred to in article 10 para 3 and article 11 of the Directive proposal. If in these other cases the freedom of target companies and shareholders cannot claim priority it is difficult to see why priority can be claimed in the case of multiple voting rights.

Of course, in the case of multiple voting rights there is the argument of constitutional protection of ownership. This argument, however, if it is correct, cannot not serve as a per se reason for exclusion. The aim should then rather be to find a solution for an equal level playing field that is constitutionally acceptable. The solution is that any loss of ownership in the constitutional sense is compensated fairly.

This could be achieved by on the one hand including multiple voting rights in article 11 so that the multiple voting rights do not have effect in the vote of the general meeting in accordance with article 9 and are eliminated after break-through, and by on the other hand giving the owner of these shares a put option right whereby the successful bidder could be forced to acquire the shares against fair compensation, including compensation for the loss of the multiple voting rights.

Not only Germany, where multiple voting rights were eliminated a few years ago, effectuating the one share one vote principle which is also a principle of EU law - not only Germany but also other countries have seen quite a number of writings by lawyers and economists on how to value multiple voting rights. Nevertheless, it will be difficult to give a precise valuation formula. Apart therefrom, it is probably better and fairer to have only a statement of principle that there has to be a fair compensation the amount of which, in case of dispute, will be decided by the courts.

This approach incidentally has been taken in the various national expropriation laws and in the EU Merger Directive.

The dispute on the amount of fair compensation should not delay the eventual consummation of the transaction, i. e. there should be two separate legal phases, one concerning the exercise and consummation of the option the other concerning the determination of the fair value compensation. This split procedure approach is again to be found in many national expropriation laws and merger laws.

In the CCBE Company Law Committee members from countries which for many years have had multiple voting right shares as a characteristic of their economy have expressed concern regarding the abolition of such rights. Should multiple voting rights be included in the Directive, they have suggested a total exemption for existing multiple voting right shares, or at least a transition period of say 5 years.

However, the majority view is, as a matter of principle, for the inclusion of multiple voting right shares. To exclude these shares from the Directive on the ground of constitutional ownership protection would be inconsistent with the community law principle of proportionality. The principle of proportionality should govern not only restrictions of individual rights but also exemptions from such restrictions, and the violation of this principle has implications for the principle of equal treatment that the European legislator must observe.

Holding company structures and pyramid structures present a problem from a take-over perspective primarily for factual reasons, not involving the use of special company law instruments, simply because of the factual situation prevailing in the shareholdership composition of the companies involved. To tackle these factual situations is a matter not so much for the Take-Over Directive but for the protection of minority shareholders and the systems existing therefor in the individual Member States. Extremely low thresholds for the triggering of compulsory bids would neither be reasonable nor likely to find a political majority.

To tie the break-through rule to various kinds of risk capital as suggested by the High Level Group would create severe definitional problems. These problems are avoided by article 11 para 4 which looks to the power to amend the company's articles of association. This threshold is simple and correctly reflects the relevant power over the company.

Public ownership of private companies is an issue that cannot be resolved by a Take-Over Bid Directive. This is rather a matter for competition and monopoly law.

Golden shares, as has been held by the ECJ, can work as obstacles to take-over and are justified only under stringent conditions of public interest lying outside the take-over field. This is therefore an area that should not be covered in the Take-Over Directive, either.

Another reason for not including public ownership companies and golden shares of governments is that the number of cases involved is rather small while their inclusion would trigger an avalanche of political opposition. If necessary in a given case the matter can be brought to the ECJ.

The issue of equal level playing field between the EU on the one hand and non-European companies, in particular from the US, on the other hand is quite difficult. The problem is a problem of principle.

The US are not part of the EU. So why should they participate in the EU internal market for corporate capital and corporate control?

As the Sarbanes-Oxley Act and the Rules proposed and/or adopted thereunder by the SEC have shown, the US are just beginning to be prepared to negotiate on a bilateral basis company law and accounting law matters with the EU. The problem is aggravated in the take-over bid field by the fact that the numerous measures against take-over bids permitted in the US are covered by State law. As the GATS experience shows the US Federal level as a matter of principle is not prepared to negotiate legal commitments that would be binding upon the States. Therefore, there

is at the moment no realistic chance to establish bilaterally a level playing field between the EU and the US.

This being so, the EU should not unilaterally extend the European level playing field to the US. This would give US offerors so to speak a windfall profit. The approach taken by the Directive should rather be the opposite, namely to exclude from the Directive take-over bids for EU companies by US companies or their European subsidiaries. This would leave the political pressure on the US and could help in the direction of an eventual harmonisation, i.e. a two way street level playing field.

One member of our committee does not wish to exclude US bidders or their European subsidiaries from taking advantage of the Directive, arguing that shareholders should be allowed to decide for themselves whether they wish to sell their shares to a US bidder or its subsidiary. The majority view, however, is that this position looks at the issue only from the shareholder viewpoint and not from an overall economic and political viewpoint. It would be politically contradictory to reject the one way requests from the US in the field of accountancy and corporate governance however to grant the US a one way level playing field access in the field of take-overs.

As regards degree of harmonisation, the Directive should not aim for a greater degree of harmonisation. The proposed level of harmonisation is a good compromise between what could be a desirable degree of harmonisation on the one hand, and realistic chances for political acceptance on the other hand. Greater degrees of harmonisation could be left to future directives if necessary.

We find the employees' rights sufficiently protected.

As regards supervisory authority and applicable law the present Directive proposal is complex but as a compromise superior to the old one.

As regards comitology, the normal legislative procedure (involving the EP and the Council of Ministers) should be observed with regard to the arrangements for determining an equitable price and the nature of the consideration. After all, these matters have constitutional connotation (protection of ownership). Arrangements for publishing the bid documents however could be left to the European Securities Committee.