Northwestern Journal of International Law & Business

Volume 9
Issue 3 *Winter*

Winter 1989

Towards the Harmonization of EC-Member States' Regulations on Takeover Bids: The Proposal for a Thirteenth Council Directive on Company Law

Nathalie Basaldua

Towards the Harmonization of EC-Member States' Regulations on Takeover Bids: The Proposal for a Thirteenth Council Directive on Company Law

*Nathalie Basaldúa**

I. INTRODUCTION

In its White Paper Program advocating the removal of all remaining internal barriers in the Common Market by 1992,[1] the Commission for the European Communities ("Commission") expressed a need for harmonizing the laws of the Member States on takeover bids and announced that it would be bringing forward a proposal for a directive on this subject. Urged by the European Parliament[2] and after consultations with experts from Member States and interest groups, the Commission adopted the Proposal for a Thirteenth Council Directive on Company Law concerning takeover and other general bids (the "Proposal" or "proposed Directive").[3] Before this text enters into force, it will have to be adopted by the Council of the European Communities in cooperation with the European Parliament and following consultation with the Economic and Social Committee.[4] After such adoption, Member States will have to enact or modify their existing legislation to comply with the proposed Directive.[5] Takeovers are one of the areas not yet covered in the

---

* B.A., 1984, University of Bilbao; M.P.A., 1986, Hochschule für Verwaltungswissenschaften Speyer. European Commission (Directorate General for Financial Institutions and Company Law).

1 *Completing the Internal Market: White Paper from the Commission to the European Council,* COM(85)310 final (June 14, 1985)[hereinafter *White Paper*].

2 Resolution of Feb. 11, 1988.

3 COM(88)823 final (Dec. 22, 1988).

4 Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 26, 38, art. 54.

5 *Id.* art. 189, at 79.

program of company law coordination[6] under Article 54 of the Treaty of Rome. The proposed Directive attempts to provide shareholders and other interested parties equivalent standards of protection before the law in all the Member States. Accordingly, this Proposal does not deal with competition policy aspects on a European level which will be primarily governed by the merger control draft regulation[7] now under discussion in the Council of Ministers.

In England and the United States, the terms "merger" and "takeover bid" are often used interchangeably. It is true that a takeover bid is often economically the equivalent of a merger. They are both examples of concentration or amalgamation of companies. Legally, however, mergers and takeover bids are quite different.[8] In a merger, which is sometimes also called an "assets merger" or "legal merger", all of the assets and liabilities of one or more companies are transferred either to an existing company or a newly-formed company. The company or companies being acquired are wound up without going through the liquidation procedure, and their shareholders receive shares in the acquiring or the newly-formed company.[9] A takeover bid, also referred to as a "tender offer" in the United States, is generally understood to mean an offer of cash or new securities in exchange for securities that have voting rights in a company or are convertible into securities carrying such rights (*i.e.*, shares, convertible bonds, subscription rights, options and warrants). The purpose of the offer usually is to acquire control of the company or to consolidate the offeror's existing control. Thus, the offer is made conditional upon a transfer to the offeror of a sufficient number of shares to achieve the offeror's objective. Unlike the case of a merger, a takeover does not involve the winding up of one of the companies or the transfer of its assets and liabilities to the acquiring company. The company whose shares are acquired remains in existence.

6 To date, the coordination has covered requirements relating to the following: disclosure, 11 O.J. EUR. COMM. (No. L 65) 8 (1968)[hereinafter 1st Company Law Directive]; formation and capital, 20 O.J. EUR. COMM. (No. L 26) 1 (1977)[hereinafter 2nd Company Law Directive]; annual and consolidated accounts, 21 O.J. EUR. COMM. (No. L 222) 11 (1978)[hereinafter 4th Company Law Directive]; 26 O.J. EUR. COMM. (No. L 193) 1 (1983)[hereinafter 7th Company Law Directive]; qualifications of auditors, 27 O.J. EUR. COMM. (No. L 126) 20 (1984)[hereinafter 8th Company Law Directive]; legal mergers, 21 O.J. EUR. COMM. (No. L 295) 36 (1978)[hereinafter 3rd Company Law Directive]; and split-ups, O.J. EUR. COMM. (No. L 378) 82/891 (1982)[hereinafter 6th Company Law Directive]. Further proposals are being negotiated in Community institutions.

7 COM(88)734 final-revised version (Nov. 30, 1988).

8 This is why mergers and takeover bids are dealt with in two different EC-Company Law Directives.

9 3rd Company Law Directive, *supra* note 6, arts. 3, 4.

II. The Situation in Member States

Unlike mergers, which have been taking place in most European countries since at least the 1930s, takeover bids have only emerged in the last thirty years. In addition, takeover bids vary in frequency from country to country. These factors explain why Member States differ with respect to their regulations, the practice of takeover bids, and in particular the feasibility of contested takeovers.

A. Member States' Regulations on Takeover Bids

Some Member States have specific regulations for takeover bids. Others, such as Denmark and Greece, have no relevant legislation because takeover bids are practically unknown in these countries. Among Member States having specific regulations, the type of rules varies. Some have legal standards (Spain,[10] France,[11] and Portugal[12]), while in Belgium and Luxembourg the transactions are carried out according to the jurisprudence laid down by successive approaches by competent authorities.[13] There are codes of conduct in Germany,[14] Italy,[15] the Netherlands,[16] and the United Kingdom[17] (whose code also applies in Ireland in some cases[18]). Although in the United Kingdom the City Code on Takeovers and Mergers does not have the force of law, it is enforced indirectly especially since the adoption of the Financial Services Act of 1986. Furthermore, the financial institutions and other intermediaries acting on behalf of the parties to a bid are subject to sanctions imposed by their regulatory organizations for breaches of the City Code.

Member States' takeover regulations also diverge considerably on such questions as: the scope of application, the obligation to launch an offer, the control of the offer, the procedure of launching an offer, and an offer's effects. The scope of application of takeover regulations in most

---

[10] Ley reguladora del mercado de valores of Jul. 28, 1988, art. 60 and 61; Real Decreto 279/1984 of Jan. 25, 1984.

[11] In particular Réglement Général du Conseil des Bourses de Valeurs of Aug. 1988, art. 178-206-1. The Conseil Général des Bourses de Valeurs (stock exchange council) recently approved new rules which are subject to the approval of the Finance Minister acting on the advice of the Commission des Opérations de Bourse and the Banque de France.

[12] Codigo das Sociedadas Comerciais of Sept. 2, 1986, art. 306-315.

[13] The Commission Bancaire in Belgium and the Institut Monétaire in Luxembourg.

[14] Leitsätze der Börsensachverständigenkommission of 1979. This Article will use "Germany" to refer exclusively to the Federal Republic of Germany.

[15] Code of Conduct of the Milan Stock Exchange of 1972.

[16] Code of Conduct of the Social and Economic Council of 1975.

[17] City Code on Takeovers and Mergers (last revision Jan. 26, 1988).

[18] Where the offeree is a company quoted on the Dublin or Cork stock exchanges.

Member States includes only transactions concerning companies listed on stock exchanges. However, the United Kingdom's code regulates takeovers involving both listed and unlisted public companies and some private companies that have been somehow connected with the stock exchange[19] in the ten years prior to their acquisition. Obligation to launch takeover offers apply in the United Kingdom, Portugal, and Spain under certain circumstances, normally when a certain level of participation is reached.[20] Also, in the United Kingdom, partial offers are not allowed. This means that the United Kingdom prohibits offers in which the offeror has reached the 30% threshold and decides to acquire less than all the remaining shares of the target company. Spanish law requires a total bid when someone has acquired 50% of the capital of the target company.

The control exercised by the relevant authorities over takeover bids differs among Member States as well. In some Member States, the offer must be approved by the competent authority before it is published.[21] In others, such as Portugal, there is ex-post control of already published bids. In addition, some Member States mandate certain procedures to launch a bid. Belgium, Spain, and France require the offeror to announce its intentions to launch an offer first to the competent authorities. In the United Kingdom, Portugal, and the Netherlands, the target company is to be informed before anyone else. The German Code requires the offeror to address both the authorities and the target company.

Offers also have different effects in different Member States. In some countries, *e.g.*, Spain, Belgium, and France, the announcement of a bid automatically suspends the quotation and trading of the target company's shares. In the United Kingdom and in France, the offer also prohibits the management of the target company from undertaking any action that would frustrate the bid, such as raising the share capital or engaging in any extraordinary transactions such as the disposal of key assets. In the Netherlands, the management of a company may defend itself from an unwelcome offer by issuing new shares to friendly shareholders. Furthermore, there are significant differences among Member States with regard to the contents of an offer document, its publication requirements, the conditions under which an offer may be revised, and the effects of a competing bid on the initial one.

---

19 City Code on Takeovers and Mergers at A7.

20 Thirty percent of the voting rights of the target company in the United Kingdom, 20% in Portugal, and 25% of the capital of the target company in Spain.

21 "Nihil obstat" from the Commission Bancaire in Belgium, "déclaration de recevabilité" in France, and previous authorization in Spain.

B. Practice

In Europe, takeover bids are a phenomenon largely concentrated in the United Kingdom. However, there have recently been signs that the number of takeover operations in other Member States has begun to increase. Certainly the best known example in Europe is the hostile bid in January 1988 for the Société Générale de Belgique, a holding company controlling about one-third of the Belgian economy, by the Italian entrepreneur Carlo de Benedetti.

After the October 1987 crash, France experienced a real "bid mania" in the early months of 1988. Major companies such as Martell, Bénédictine, Rhin-Rhône, La Redoute, and especially Télémécanique were involved in takeover battles. One of the main political issues of last spring involved Schneider's takeover attempt of Télémécanique, the world's third largest producer of industrial automation. Télémécanique attempted to combat Schneider by seeking help from Framatome. Nonetheless, after more than five months, Schneider's bid succeeded.

Most people in Spain had never heard of takeover bids until November 30, 1987, the day Banco de Bilbao decided to acquire Banco Español de Crédito ("Banesto").[22] However, with the support of the Madrid Stock Exchange, Banesto rejected the bid. The Madrid Stock Exchange argued that Banco de Bilbao could not offer as consideration unissued shares whose existence was conditional upon shareholder authorization. Banco de Bilbao eventually withdrew.[23] The reason behind the Madrid authorities' support of Banesto was related to its position on how Spanish banks should be restructured before 1992. The Madrid authorities probably felt that hostile bids are not the correct means for the restructuring of Spanish banks. Instead, the restructuring should be done through agreed mergers, such as those currently being used.[24]

Takeover bids are very likely to increase as capital markets in Europe are liberalized within the framework of the single European Market. Although it is difficult to find statistics on the number of takeover bids that have taken place in the European Community ("Community" or "EC"),[25] one can say that in the United Kingdom there are more than twice as many takeover bids than in the rest of the Member States taken

22 *Cf.* La OPA del Banco de Bilbao. Documentos y dictámenes jurídicos, Banco de Bilbao (ed.), Madrid 1987.

23 Decision of Dec. 4, 1987.

24 Banesto decided to merge with Banco Central, and Banco de Bilbao with Banco de Vizcaya. Recently, however, Banesto and Banco Central decided not to proceed with the merger.

25 Most data concerning mergers and acquisitions do not differentiate between takeover bids and other forms of concentration such as mergers.

together. In 1987, there were about 260 takeover bids in the United Kingdom, compared to between ten and twenty-five bids in Belgium, France and Spain and between one and ten bids in Ireland, Italy, the Netherlands, Luxembourg, and Germany. Moreover, in 1987, there were no takeover bids in Portugal, Denmark, or Greece. Takeover bids in the United Kingdom are distinctive in another way.[26] British offerors seem primarily to target American companies,[27] while other European investors prefer acquiring European companies. The following description of the English, French, and German situations will help to account for these large differences in takeover activity within the European Community.

1. United Kingdom

The reason for the high frequency of takeovers in the United Kingdom is, above all, its very open and very developed capital market. In 1985 there were 5,500 public companies in England and Wales, 3,000 of which were traded in the different stock markets.[28] Companies in the United Kingdom, like those in the United States, can raise funds relatively easily on the stock exchange. Consequently, the shares held by the public are widely dispersed. Companies in the United Kingdom must meet high transparency standards to provide shareholders with investment information, and the management of companies cannot tightly control who its shareholders are. Such companies are thus more vulnerable to takeovers than are companies financed by banks.

The United Kingdom traditionally views takeover bids as being something positive, as an application of the principle of equal treatment of shareholders and the belief that the shareholders should have the final decision in all matters concerning their company. Furthermore, the United Kingdom believes that one should not *defacto* attain corporate control without enabling all shareholders to sell their shares at an attractive price. Thus, its code of conduct provides that a shareholder who has acquired 30% of the voting rights of a company must launch a general bid.

---

26 Information given to the Commission by Member States.

27 The value of United Kingdom acquisitions in the United States in 1988 reached $33.5 billion. Fin. Times, Jan. 18, 1988, at 8, col. X.

28 About 2,500 companies were listed on the Stock Exchange, some 300 were admitted to the United Securities Market, and about 150 were traded in over-the-counter markets. *Cf.* BEGG, P.F.C., CORPORATE MERGERS AND ACQUISITIONS 4 (1985).

2. *France*

Takeover activity in France rose considerably during 1988. Nevertheless, according to the Commission des Operations de Bourse ("COB")[29], French companies are less vulnerable to hostile bids than United Kingdom or United States companies for two reasons. First, the capital of French companies seems to be less dispersed among the public. Second, French companies may use a number of legal measures to reinforce the position of their managements. Companies may acquire up to ten percent of their own shares. Further, since 1966 the articles of association of a company may grant double voting rights to shares owned by the same shareholder for at least two years. Companies like Peugeot or Pernod Ricard have made use of such a possibility.[30] In addition, companies may raise capital by issuing investment certificates which do not give voting rights or preferential rights to dividends to the holders. Finally, companies may issue investment certificates which grant preferential rights to dividends but no voting rights. The issuance of such certificates is limited to twenty-five percent of the capital of a company.

3. *Germany*

In Germany, takeover bids are practically an unknown phenomenon. Although since October 1987 a number of companies have been quoted below their real values at potentially interesting prices, corporate Germany is still waiting for its first hostile takeover.[31] This is due to a number of factors. First, Germany has relatively underdeveloped stock markets.[32] At the end of 1986, there were 2,190 Aktiengesellschaften (AG, public limited companies).[33] Only 810 of these AG were traded on one of the German markets.[34] Shareholdings are not very widely spread. There are about 400 public companies with more than 1,000 shareholders and only nineteen companies[35] with more than 100,000. There is no company with more than 600,000 shareholders.[36]

---

[29] 1987 Paris, COMMISSION DES OPERATIONS DE BOURSE (COB) Rep. 20, 131.

[30] Quere, *French Poison Pills and Takeover Restrictions*, INT'L FIN. L. REV., June 1988, at 11.

[31] *Cf.* Otto, *Uberenahmeversuche bei Aktiengesellschaften und Strategien der Abuehr*, supp. 12 to 29 DER BETRIEB (July 22, 1988) (An interesting study comparing the situation in Germany and in the United States as regards defense measures against hostile takeover bids.).

[32] There are, however, signs that this situation is changing. *See*, *Sweeping Away Frankfurt's Old-Fashioned Habits*, THE ECONOMIST, Jan. 28, 1989, at 77.

[33] 51, 52 DER BETRIEB 2, 588 (Dec. 18, 1987).

[34] 3 DIE AKTIENGESELLSCHAFT R55 (1988).

[35] VEBA, Siemens, Volkswagen, Hoechst, Bayer, BASF, Daimler Benz, co op Frankfurt, Feldmuhle, RWE, Thyssen, VIAG, Mannesmann, Commerzbank, Dresdner Bank, AEG, Nixdorf, and Hoesch.

[36] *Supra* note 34, at R56.

Second, in Germany, as in all other Member States of the Community, there are a number of company law provisions that allow companies to adopt measures to ensure that the control of the company remains in friendly hands.[37] For example, the articles of association of a company may condition the transfer of its shares on the company's approval of the transfer ("Vinkulierung")".[38] Furthermore, German companies may limit the number of votes in respect of the shares alotted to one shareholder. Of the above mentioned nineteen companies which might be interesting targets for a takeover bid, at least seven have introduced provisions in their articles of association limiting the number of votes that a single shareholder may exercise to 5% (sometimes 10%) of the share capital.[39]

Third, there are relatively few companies with publicly traded stock in Germany and most of those are financed or controlled by banks. In 1986 there were 348,561 limited liability companies, of which 2,190 were public companies (AG) and 346,371 were private companies (Gesellschaft mit beschränkter Haftung, GmbH).[40] The overwhelming majority of companies are thus GmbH, which are often family-owned but not necessarily small. For example, Bosch, a very large electronics manufacturer, is a GmbH controlled by a foundation (Robert Bosch Stiftung).[41] Also, German banks play a very important role in corporate life.[42] They are important shareholders. For example, Deutsche Bank owns 28% of Daimler Benz.[43] Furthermore, shareholders often appoint the banks where their shares are deposited to represent them at the general meetings of shareholders. Finally, companies are mainly financed by banks and not by the market.

There are several other reasons why hostile takeover attempts in Germany are so rare. Company balance sheets, in particular the existence of hidden reserves, make it sometimes difficult to estimate the value of a potential target.[44] The German two-tiered management system creates a situation where a successful bid does not always automatically give

---

37 *Cf.* Hauschka & Roth, *Übernahmeangebote und deren Abwehr im deutschen Recht*, in 7 DIE AKTIENGESELLSCHAFT 181 (1988).

38 *Cf.* Sieveking & Technau, *Das Problem sognenannter "disponsibler stimmrechte" zur Umgehung der Vinkulierung von Namensaktien*, 1 DIE AKTIENGESELLSCHAFT 19 (1989).

39 *Supra* note 34, at R56.

40 *Supra* note 33.

41 COMMERZBANK, WER GEHÖRT ZU WEM, 126 (1988).

42 Deutsche Bank, the first German bank, is said to have played a major role in the failure of the attempted hostile takeover for Feldmühle-Nobel AG. *Cf.* 25 DER SPIEGEL 96 (1988).

43 *Cf. supra* note 41, at 477.

44 This problem is due to be solved partly by the implementation of the 4th and 7th Company Law Directives into German law. *See, supra* note 6.

the bidder full control of the management of the acquired company. Finally, cross-participations between companies are frequent. A hard core of friendly and reliable shareholders is an important deterrent to hostile takeovers.[45]

C. Creating a More Level Playing Field

Against this background, it is clear that the playing field for takeover bids in the Member States of the Community is very far from level. Therefore, the Commission has taken a number of measures to ensure that the conditions under which takeovers are made and the prospects of their success are equivalent throughout the Community. Most notable among these measures is the Proposal for a Thirteenth Company Law Directive.

III. The Proposal

A more level playing field for takeover bids will generally make such transactions easier in those Member States in which they are at present difficult. This should facilitate the restructuring of European industry, which will be vital in the preparation for 1992. At the same time, the protection of the shareholders involved in a bid, particularly those of the offeree company, must be ensured.

The Proposal contains a series of essential rules to guarantee equal treatment of shareholders. It also sets publicity and transparency requirements and regulates the conditions under which defensive measures can be adopted once a bid is announced. The Commission has taken account of the fact that takeovers evolve rapidly and continuously. Rigid rules would be inappropriate in this context, because supervisory authorities must be able to respond rapidly and flexibly to new and unexpected circumstances. Hence, a national supervisory authority will be empowered with all necessary powers to ensure that the guarantees foreseen in the Proposal will be respected in each Member State (Article 6).

A. Scope of Application

The proposed Directive applies to all cases where a takeover bid is launched to acquire the shares of a EC-public limited company, whether this company is listed or unlisted and whether the offeror is or is not an EC-national or an EC-company. As explained below, a takeover bid must be launched when someone reaches a certain level of participation

[45] *See*, Pelzer, *Prophylaktische Verteidigungsstrategien gegen unerwünschte Übernahmeversuche*, in 13 ZEITSCHRIFT FÜR DAS GESAMTE KREDITWESEN 577 (1988) (presenting an opposing opinion).

in a company (the "mandatory bid"). A bid can also be launched on a voluntary basis when no legal obligation exists (the "voluntary bid"). The Proposal applies to both mandatory and voluntary bids.

B. Equality of Treatment

The Proposal lays down a general and fundamental principle of Company Law, that of the equal treatment of shareholders (Article 3). Some provisions also apply this principle to particular situations, such as the obligation to launch a bid when a certain level of participation in a company is reached (Article 4). Those wishing to acquire shares, which would give them one-third[46] of the total voting rights must launch a takeover bid. In calculating shareholdings, the voting rights held by certain persons connected with the offeror must be added to those held by the offeror himself. These "connected persons" are those who act in their own name but on behalf of the offeror, who act in concert with the offeror, those companies belonging to the same group of companies as the offeror, and any members of the offeror's management bodies.

The threshold of one-third was chosen because, once someone has reached that level of participation of a company, he may exercise a blocking minority. In all Member States, important decisions which have to be taken by the general meeting of shareholders require a majority of at least two-thirds of the votes attached to the securities represented. This rule is imposed by Community Legislation to limit or suppress shareholders' preferential subscription rights in the case of an increase of the share capital, for the reduction of capital, for its total or partial writing-off,[47] and for transactions such as mergers[48] or split ups.[49]

The proposed Directive obliges the offeror to make a total bid, *i.e.*, for all the shares of the company. This system already exists in the United Kingdom and in Spain, and its introduction is currently being discussed in France. The aim of this rule is primarily to avoid partial speculative bids. It also seeks to protect shareholders, who, after a partial bid, would be left in a minority position and would suffer a loss in the value of their shares.

The total bid requirement may result in certain undesirable consequences in several specific instances. This is in large part due to the fact that the proposed Directive applies to all cases in which the offeree is an EC-public limited company, whether the company is quoted or non-

---

46 Member States may not fix this threshold at more than one-third.

47 2nd Company Law Directive, *supra* note 6, art. 40.

48 3rd Company Law Directive, *supra* note 6, art. 7.

49 6th Company Law Directive, *supra* note 6. art. 5.

quoted (Article 1). For example, a mandatory offer for stock in certain companies could lead to costs disproportionate to the size and the value of the target company. To prevent this situation, the Proposal exempts an offeror from the mandatory offer requirement when the offeree company is a small- or medium-sized[50] non-quoted company (Article 5). Moreover, even if the company to be acquired were a quoted or large non-quoted public limited company, a mandatory bid could be incompatible with the interests of the shareholders or even with the objectives of the Proposal. For example, it would be unfair to impose the launching of a bid on those who have reached the one-third threshold in an unintentional manner (from donations, inheritance, etc.). A national supervisory authority may grant exceptions in such cases, but it must clearly indicate its reasons and adopt all measures necessary to ensure equal treatment of shareholders (Article 4(3)).

All shareholders of the target company have to be given equal treatment in respect to the prices they are offered for their shares. If the offeror buys shares during the acceptance period at a higher price than that laid down in the offer document or one of its revisions, the offeror must increase the consideration given to those who have already accepted the bid (Article 16). Once a bid is launched, it can only be withdrawn by the offeror under specific circumstances stated in the Proposal (Article 13).

C. Transparency

Transparency is ensured by a number of provisions of the Proposal.[51] As soon as someone decides to take either a voluntary or mandatory bid (even though the details might not be fully worked out), he must publicly[52] announce his intentions (Article 7). The idea behind this rule is that all information capable of influencing the market should be made public as soon as possible to reduce the scope for insider dealing.

Transparency is assured particularly by publication of the offer document, which contains the conditions of the bid, and by publication of a report by the management of the target company. The proposed Directive is very flexible regarding the means of publication of these documents. They may either be published fully in newspapers or official

[50] A company is considered to be "small- or medium-sized" if it does not exceed the limits of two of the three following criteria: balance sheet total of 6.2 million ECU; net turnover of 12.8 million ECU and average number of employees during the financial year of 250. 4th Company Law Directive, *supra* note 6, art. 27.

[51] All transparency rules apply to any revisions of a bid and to competing bids.

[52] This announcement is published by the same means as the offer document which is mentioned below.

gazettes, made available to the addressees of the bid at places announced publicly, or sent directly to the shareholders (Article 11).

The Proposal also sets out the minimum content of the offer document (Article 10). In the interest of all parties to a bid, the offeror must clearly state in the offer document his intentions concerning the future of the company. Particularly important are the offeror's intentions regarding the company's activities, the intended use of the company's assets, and his plans as to the company's management and workers. The offeror also has to state clearly in the offer document any financing of the bid that might cause debts to the target company (*e.g.*, leveraged buy outs) and specify the importance of these future burdens. The authority responsible for policing bids in a particular Member State, however, may require additional information in the offer document where necessary. When a bid is launched simultaneously in several Member States,[53] the authority responsible for supervising the content and publication of the offer document is that of the Member State where the target company has its registered office. The authorities of all other Member States involved must recognize this offer document (Article 6(3)).

In the report to be prepared and published by the board of the offeree company, the board must state its opinion on the bid, including the arguments for and against acceptance of the bid (Article 14), and whether the takeover bid is friendly or contested. The report should also disclose any agreements on the exercise of voting rights attached to the shares of the target company. The board should provide this report to the addressees of the bid by the same means as the offer document and before expiration of the acceptance period.

Price disclosure is an important means of ensuring that all shareholders of the target company are offered the same price (Article 16). Consequently, once the bid is announced, the supervisory authorities must be informed of all acquisitions of securities by holders of 1% or more of the voting rights in the companies concerned. This obligation also applies to persons acting in concert with or on behalf of these holders. The prices at which such transactions were made must also be disclosed (Article 17(2)).

Finally, a bid for a company may have serious repercussions for its employees. Therefore the management of the target company must communicate the offer document and its own report to the representatives of its workers (Article 19).

[53] This might be the case if the shares of the offeree company are quoted on the stock exchange of different Member States.

D. Defense Measures

The Proposal only deals with defense measures adopted after a particular bid has been launched. It does not deal with the numerous defense measures that can be taken by a company when no bid has been made or is even intended. According to the Proposal, the management of the offeree company must at all times act in the interests of the company. Therefore, during the offer period, management cannot undertake any action that could frustrate the bid, unless the shareholders authorize it to do so. Examples of prohibited defense measures are issuing new shares or engaging in exceptional transactions without the supervisory authority's consent (Article 8). This provision is consistent with the very concept of a takeover bid, which, by its nature, is directed to the shareholders of a target company. That is, its aim is to ensure that the final decision concerning the bid is made by the shareholders of the target company.

E. Flexibility

An important reason why so many Member States either have no regulation concerning takeovers or just codes of conduct is that takeovers evolve rapidly and rules must be adapted to continuously changing situations. There is also a danger that the rigid regulation of takeovers might cause major contested takeovers to be argued and eventually decided in the courts. As noted above, supervisory authorities must be able to respond with flexibility to new circumstances. The Proposal therefore enables the supervisory authority to grant exceptions to: (1) the obligation to launch an offer (Article 4(3)); (2) the restriction of the powers of the management of the offeree to engage in exceptional transactions (Article 8(b)); (3) the respect of certain delays (Articles 12(2) and 15(5)); and (4) the withdrawal of bids (Article 13(1)(f)).

F. Reciprocity

In the context of takeover bids, reciprocity means that an offeror from a non-EC country is treated in the same manner as EC offerors are treated in that non-EC country. Reciprocity is particularly important in relation to contested takeovers. The defendants of reciprocity claim that both within and outside the Community, there are countries where it is relatively easy to acquire a company and others where it is not. This is an undeniable fact. However, the requirement of a reciprocity treatment at the Community level would imply that there is homogeneity within the Community as regards the feasibility of contested takeovers. As mentioned above, this is not the case. Therefore, the proposed Directive does not include a reciprocity clause. Reciprocity instead can operate on a national level: member States are free to forbid a takeover bid launched by a non-EC offeror on the ground that its nationals do not benefit from reciprocal treatment in that country. If a more uniform situation develops among Member States in the future, a Community-wide reciprocity policy may then be appropriate.

IV. CONCLUSIONS

The Proposal is a very important step towards creating a level playing field for takeovers in the Community. It will ensure equal treatment of shareholders and a high degree of transparency. Most significantly, the shareholders of the offeree company will ultimately decide whether a takeover will take place. There are aspects related to takeovers which the Proposal does not cover. Some have been ruled by other Community legislation. For example, the recently adopted Directive on the disclosure of major shareholdings[54] or the proposed Directive on insider trading.[55] Other uncovered aspects, such as the defense measures companies may adopt before the announcement of a particular bid, will be the subject of further Community action.[56] Nonetheless, the aspects not addressed by the Proposal do not diminish its significance. Hopefully, the Council of the European Commission will adopt the Proposal swiftly.

54 31 O.J. EUR. COMM. (No. L 348) 62 (1988).

55 COM(88)549 final (Oct. 4, 1988).

56 *E.g.*, one by issuing non-voting shares, by limiting the number of voting rights one shareholder may have, or by any other mechanism used for breaching the principle of proportionality between the amount of shares held and their voting rights. *Cf.* Press release of the Commission Spokesman, No. P153, Dec. 22, 1988, at 4.