

January 14, 2002

A New EU Takeover Directive?

The Committee of Company Law Experts formed to consider an EU Takeover Directive is unanimously recommending that a Directive be implemented to mandate that the member states of the EU adopt laws that will in large measure parallel the rules of the City of London Takeover Panel. There is a much higher likelihood that this time (after many years of disagreement) a Directive will be approved in some form and become binding.

According to the Committee, any European company law regulation aimed at creating a level playing field for takeover bids, *i.e.*, a proposed Directive, should be guided by these principles:

- All takeover bids should be for all shares—no partial bids;
- Shareholders should be the ultimate decision makers in the context of a takeover bid—shareholders (not the board) should be able to decide whether to tender their shares to a bidder and for what price; and
- Proportionality between risk-bearing capital and control—the holder of a majority of the share capital should be able to exercise control.

There are three key elements of the proposed Directive:

1. **No Frustration of the Bid.** The target of a takeover bid will be prohibited from adopting a poison pill or taking any other action to defeat the bid unless that action is approved by a majority of the share capital *after the bid is announced*. Pre-bid takeover defenses, whether or not approved by the shareholders, will not be effective against a subsequent bid. Essentially, in the context of an unsolicited bid, the board of the target is relegated to advising the shareholders and seeking a white knight.
2. **Squeeze-Out at 90%.** If a bidder obtains 90% of the shares, it will be able to squeeze out minority shares at the bid price. If a bidder obtains the 90% threshold, minority shareholders will be able to put their shares to the bidder at the bid price.
3. **Break Through of Shark Repellants at 75%.** Targets with shark repellants, such as no or low voting shares, restrictions on transfer of shares, supermajority requirements and limitations on votes exercisable by one shareholder, will not be able to maintain such structures against a bidder that obtains 75% of the share capital. The same would be true if these rights were held by member states (*i.e.*, so-called “golden shares”) or private persons.

The Committee recognizes that it is in effect hanging a “For Sale” sign on all EU public companies and that EU takeover rules will be virtually the opposite of those in the U.S. The Committee believes that, at this stage of the EU markets and company consolidation, its recommendations—not the U.S. approach—is what is right for the EU. There is no doubt that, when the EU rules go into effect, there will be a significant increase in EU takeover activity.

M. Lipton
D.A. Katz