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Common Legal Framework for Takeover Bids in Europe

VOLUME I

General Editor
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Common Legal Framework for Takeover Bids in Europe: Volume I

The Council Directive of 21 April 2004 on takeover bids sets forth the general principles applicable to takeover bids and clarifies certain minimum rules with respect to the procedure for a takeover bid, the obligation to make a mandatory bid in the event a minimum threshold is crossed and the majority shareholder's squeeze-out right as well as the minority shareholders' sell-out right. Furthermore, the Directive defines the authority that is competent to approve offer documents and supervise takeover bids, and provides for optional restrictions on the actions of the target company's management and on defence mechanisms. This book discusses the Takeover Directive and its implementing rules in each Member State of the European Union and the European Economic Area, providing companies and their advisors with useful insight into the legal framework and principles applicable to takeover bids in the region.

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Common Legal Framework for Takeover Bids in Europe

VOLUME I

General Editor DIRK VAN GERVEN

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Preface

Making a takeover bid for securities in different Member States of the European Union has traditionally been a hassle, since the offer document and relating publicity materials had to be approved by the supervisory authority of each Member State in which the bid was made. This resulted in lengthy discussions with the supervisory authorities and unnecessary delays in the bid process. Furthermore, differences in national law rendered the simultaneous launch of a takeover bid in several Member States a complicated undertaking. The Takeover Directive intends to facilitate cross-border takeover bids and oblige the national supervisory authorities to co-operate. This directive designates a single authority that is competent to approve the offer document required to make a takeover bid. An offer document thus approved can be used in other Member States to which the bid is extended. The only limitations on this so-called 'European passport' are that the supervisory authorities of the other Member States may require the inclusion of additional information relating to the acceptance formalities and the applicable tax rules, and national law may require that the offer document be translated into one or more official languages of these other states. The deadline for implementation of the Takeover Directive in national law was 20 May 2006. Almost all Member States have adapted their national legislation accordingly.

The Takeover Directive also seeks to harmonize the minimum rules and conditions applicable to takeover bids. It defines the principles that must be complied with in takeover bids in order to ensure that: all securities holders are treated equally and are sufficiently informed and protected, the market continues to operate normally and the target company is not inconvenienced for too long by the bid. The Directive furthermore renders a takeover bid mandatory when a person acquires control by crossing a minimum threshold as the result of an acquisition of voting securities. This threshold is defined by national law and consequently differs from one Member State to another. In the event of a successful bid, the offeror is granted a squeeze-out right, while the remaining shareholders have a sell-out right. The Directive also defines the minimum information to be included in an offer document, and sets forth minimum rules with respect to the procedure for the bid. Finally, the Takeover Directive provides for an optional system of restrictions on the powers and actions of the target company's board to frustrate a bid, and on other defence mechanisms liable to jeopardise a takeover bid, thus transferring the power to decide on the bid to the company's shareholders. The Member States, however, are not obliged to implement these rules; even if they do, companies can, in certain circumstances, opt out of them.

The Takeover Directive only harmonizes rules on takeover bids for the voting securities of companies governed by the laws of a Member State of the European Economic Area and which are admitted to trading on a regulated market in the European Economic Area. National law may extend the application of these rules to takeover bids for other securities, in which case the offer document shall not benefit from the European passport introduced by the Takeover Directive.

A book providing a comprehensive analysis of the European legal framework on takeover bids and the implementing legislation in each Member State of the European Union and the European Economic Area is a useful tool for those seeking to acquire companies through a friendly or hostile takeover bid. It will also prove helpful to their advisors and intermediaries involved in preparing and conducting a takeover bid in Europe. This book consists of two volumes. Part I of the first volume explains the legal framework and the Community rules laid down in the Takeover Directive, and contains an analysis of the rules laid down in the Takeover Directive from a US perspective. Part II focuses on the rules implementing the Takeover Directive in each Member State. Volume I contains reports from sixteen Member States. Reports from the remaining Member States will be published in the second volume.

Finally, I would like to thank the contributors to this book, esteemed practitioners from law firms throughout Europe, all of whom are well positioned to discuss the rules applicable in their respective countries. My thanks also go out to those whose names are not mentioned in the reports but whose work was essential to the success of this book, namely Katherine Raab, Bianca Porcelli and all those from NautaDutilh who provided valuable assistance in this project.

Dirk Van Gerven
Brussels

PART I

EC rules on takeover bids

1

Rules of Community law applicable to takeover bids

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Introduction

Purpose of the Takeover Directive and the European passport

1.1 The purpose of Directive 2004/25 of 21 April 2004 on takeover bids[1] (the 'Directive') is to establish minimum rules for the conduct of takeover bids on securities in the European Union, thereby ensuring the creation of an adequate and uniform level of protection for securities holders throughout the European Union and the European Economic Area.

However, as explained below, the Directive only regulates takeover bids for voting securities of companies governed by the laws of Member States where all or some of these securities are admitted to trading on a regulated market (see no. 1.6 of this report). Takeover bids for securities that are not traded on a regulated market or that are traded on a regulated market but issued by non-EEA companies are not subject to the provisions of the Directive; nor are takeover bids for non-voting securities. These bids will be governed entirely by the national laws of the Member States, with the resulting disparity. National law, however, may extend the application of the Directive to such bids.[2]

1.2 The Directive also permits a European passport to be obtained for an offer document for a takeover bid, regardless of whether the bid is voluntary. A European passport allows the offeror to use the offer document without re-approval being required in other Member States where the offeree company's securities are admitted to trading. As explained below, however, a European

1 *Official Journal of the European Communities*. L 142 of 30 April 2004 (hereafter '*Official Journal*').

2 Ninth recital of the Directive.

passport will be granted only if certain conditions are fulfilled (see no. 1.33 of this report).

In order to benefit from a European passport, the offer document must be approved by the competent supervisory authority (see no. 1.32 of this report).

Brief history

1.3 The first proposal for a directive on takeover bids was presented by the European Commission on 19 January 1989.[3] However, it soon became clear that the proposal called for a too-detailed harmonization of national law. The laws and underlying philosophies of the Member States were too different to reach a consensus on this point. After various consultation rounds with the Member States, the Commission prepared a new proposal, which was presented to the European Council and the European Parliament on 8 February 1996.[4] This proposal set forth general principles without pursuing a detailed harmonization strategy. However, the European Council and the European Parliament could not agree on it.

The European Commission entrusted the High Level Group of Company Law Experts, chaired by Professor J. Winter (the 'Winter Commission'), with the task of formulating suggestions to solve the issues raised by the European Parliament without compromising the principles laid down in the European Council's common position of 19 June 2000.[5] The Winter Commission presented its report on 10 January 2002. Based on its findings, the European Commission presented a new proposal for a directive on 2 October 2002.[6]

In its Opinion of 14 May 2003, the Economic and Social Committee formulated a few amendments.[7] The European Parliament approved a number of additional amendments in its meeting of 16 December 2003.[8] The European Council approved the amendments proposed by the European Parliament at its meeting of 30 March 2004.[9]

Application

1.4 The deadline for transposition of the Directive into national law by the Member States was 20 May 2006 (Art. 21 Dir.).

Most Member States were late in enacting implementing legislation, and some have yet to do so. Currently, almost all Member States have notified the European Commission that they have transposed the Directive. On 1 January 2007, Bulgaria and Romania acceded to the European Union. Consequently, the

3 *Official Journal* C 64 of 14 March 1989. 4 *Ibid.*, C 162 of 6 June 1996.

5 The common position of the European Council was published in the *Official Journal* C 23 of 24 January 2001.

6 *Official Journal* C 45 of 25 February 2003. 7 *Ibid.*, C 208 of 3 September 2003.

8 A5/2003/469 (www.europarl.europa.eu, last accessed 1 April 2008).

9 CS/2004/7736 (consilium.europa.eu, last accessed 1 April 2008).

Directive will also apply in these countries with immediate effect, and Bulgaria has already implemented the Directive.

The Directive also applies to the countries of the European Economic Area (EEA), i.e., Norway, Iceland and Liechtenstein.[10] Therefore, any references in this report to the European Union or its Member States should be construed to include these three countries as well, unless specified otherwise.

Definition and scope

1.5 A takeover bid is defined as:

> a public offer (other than by the offeree company itself) made to the holders of the securities of a company to acquire all or some of those securities, whether mandatory or voluntary, which follows or has as its objective the acquisition of control of the offeree company in accordance with national law. (Art. 2(1)(a) Dir.)

The offer must be public. This implies that it is made to the public at large, i.e., to the holders of securities. Private transactions in which a person proposes to one or a limited number of securities holders to purchase their securities are not deemed public offers. A public offer implies that it is made in a public manner, i.e., using advertisements or other public means accessible by a large number of persons. The public nature of a bid will be defined by national law.

The Directive is applicable regardless of whether the takeover bid is voluntary or the result of a statutory obligation. For example, an offer must be made in the event of a change in control (see no. 1.21 of this report).

A public offer to redeem securities by the company that has issued them does not qualify as a takeover bid within the meaning of the Directive.

1.6 The Directive only seeks to harmonize national laws throughout the European Economic Area with respect to takeover bids for transferable voting securities of companies that are governed by the laws of the Member States where all or some of these securities are admitted to trading on a regulated market (Art. 1(1) Dir.).

1.7 The bid should be made for transferable voting securities issued by companies governed by the laws of a Member State and which are traded on a regulated market in the European Union.

Transferable voting securities are defined as securities carrying voting rights in a company and which can be transferred (Art. 2(1)(e) Dir.). The Directive only applies to securities entitled to vote at ordinary general meetings and not to securities that carry voting rights only under specific circumstances, such as when no dividend has been paid for a certain period of time.[11]

10 Further to the Decision of 29 April 2005 of the EEA Joint Committee, amending Annex IX to the EEA Agreement (*Official Journal* L 239 of 15 September 2005).

11 Eleventh recital of the Directive.

In addition, the securities should be issued by companies governed by the laws of a Member State of the European Union. Securities issued by a company governed by the laws of a foreign country are not subject to the Directive, even though they may be traded on a regulated market in the European Union. Of course, a Member State can always extend its rules to takeover bids for securities of non-EU companies launched on the territory of that state. Whether a company is governed by the laws of a Member State is determined by national law.

Finally, the securities should be admitted to trading on a regulated market in one or more EU Member States. If the securities are traded on a regulated market outside the European Union, the Directive will not apply. This will be the case for securities listed outside the European Union by both foreign and EU-based issuers. In general, the takeover bid should, in this case, not extend to the European Union. However, the situation could be different if the securities are held by a large number of persons residing in a Member State, such as employees of an EU-based company whose securities, while listed outside the European Union, are subject to a takeover bid. In this case, the offeror may wish to extend its takeover bid to this Member State, and instruct banks in this state to allow for the tender of the securities. Finally, national rules on takeover bids may be extended to public offers for unlisted securities to the extent that the bid is publicised on the territory of that particular state.

A regulated market is defined as:

> a multilateral system operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third-parties buying and selling interests in financial instruments[12] – in the system and in accordance with its non-discretionary rules – in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules and/or systems, and which is authorised and functions regularly and in accordance with the provisions of Title III of the Directive 2004/39 of 21 April 2004 on markets in financial instruments.[13]

Each Member State must keep a list of the regulated markets for which it is considered the home Member State within the meaning of Directive 2004/39, and forward this list to the other Member States and to the European Commission. The latter shall publish this list in the *Official Journal of the European Communities*.[14]

12 The term ‘financial instruments’ is defined in Section C of Annex I to the Directive of 21 April 2004 on markets in financial instruments.

13 Article 2(1) of the Directive refers to the Directive of 10 May 1993 on investment services in the securities field, as last amended by Directive 2000/64 of 7 November 2000 (*Official Journal* L 290 of 17 November 2000). This directive has since been repealed by Article 69 of the Directive of 21 April 2004 on markets in financial instruments, effective 1 May 2006. Any references to the repealed directive should thus be construed to refer to the equivalent terms as defined in the Directive of 21 April 2004 (Art. 69 Dir.). The current definition of a ‘regulated market’ is contained in Article 4(1)(14) of the Directive of 21 April 2004.

14 Art. 47 Directive of 21 April 2004.

Takeover bids for securities listed on other markets or unlisted securities held by a large number of persons, entailing the creation of an unofficial market, are not governed by the provisions of the Directive. Several Member States, however, do regulate such bids or have extended their rules on takeover bids to cover such securities.

1.8 Takeover bids for securities issued by the central banks of the Member States are excluded from the scope of the Directive (Art. 1(3) Dir.). To protect the public interest, a central bank cannot be the target of a takeover bid. National law prohibits the takeover of such institutions in order to preserve their independence and public status. However, since the securities of central banks are traditionally listed and traded on regulated markets, it was necessary to expressly exclude them from the scope of the Directive.[15]

Takeover bids for securities issued by companies whose corporate purpose is the collective investment of capital provided by the public and that operate on the principle of risk-spreading, and whose units are, at the holder's request, repurchased or redeemed, directly or indirectly, out of the company's assets (Art. 1(2) Dir.), are governed by specific rules to ensure investor protection. Actions taken by such companies to ensure that the exchange value of their units does not vary significantly from their net asset value shall be regarded as equivalent to repurchase or redemption (Art. 1(2) *in fine* Dir.).

General principles applicable to takeover bids

1.9 The Directive formulates six general principles that must be transposed into national law (Art. 3(1) Dir.). The Member States must bring their national legislation into line with these principles. These six principles are the following:

(1) All holders of the securities of an offeree company of the same class must be afforded equivalent treatment; moreover, if a person acquires control of a company, the other holders of securities must be protected.

Equal treatment means first and foremost that any takeover bid must be made to all holders of securities in the same manner and with the same conditions. Differences can only be justified due to different classes of securities – those with different rights and obligations – and solely to this extent. Any differences in treatment must, in this case, be justified by differences in the rights and obligations attached to the securities.

In the event of an acquisition of control and a resulting mandatory takeover bid, the remaining securities holders must all be allowed to tender their securities (see no. 1.21 of this report).

15 Fourth recital of the Directive.

(2) *The holders of the securities of an offeree company must have sufficient time and information to enable them to reach a properly informed decision on the bid; where it advises the holders of securities, the board of the offeree company must give its views on the effects of implementation of the bid on employment, conditions of employment and the locations of the company's places of business.*

This principle ensures that sufficient information is made available to the holders of securities so that they are able to make an informed assessment of the bid.

(3) *The board of the offeree company must act in the interests of the company as a whole and must not deny the holders of securities the opportunity to decide on the merits of the bid.*

The board, in most cases, represents the majority of shareholders. Consequently, especially in a takeover bid, it will be under pressure to decide in the majority's interest, depending on whether the latter thinks the bid is interesting or not. If so, the board may be inclined to encourage the minority to accept as well. If the majority is not interested, the board may take defensive measures to discourage the bid. This will especially be the case in the event of an acquisition of control. The controlling shareholder will seek to persuade the board to follow its interests.

This principle states that the board should act in the interests of the company as a whole, including the interests of the holders of all securities, and comprises an obligation to take into account other interests of importance to the company, such as those of creditors and employees.

(4) *False markets must not be created in the securities of the offeree company, of the offeror company or of any other company concerned by the bid in such a way that the rise or fall of the prices of the securities becomes artificial and the normal functioning of the markets is distorted.*

The Member States must take measures to ensure that the market reflects the actual price of the securities, resulting from normal transactions. Any initiatives to control the market should be prohibited.

(5) *An offeror should announce a bid only after ensuring that it can pay in full any cash consideration, if offered, and after having taken all reasonable measures to secure any other type of consideration.*

A takeover bid should only be allowed if the offeror is able to pay the full price. The supervisory authority will require proof to this effect.

(6) *An offeree company must not be hindered in the conduct of its affairs for longer than is reasonable by a bid for its securities.*

A takeover bid is a heavy burden on any company. The board and management are required, for weeks, and perhaps even months, to focus on the bid, thus diverting attention from ordinary business. In general, expensive consultants – such as investment banks, lawyers and auditors – are called upon to assist management in handling a takeover bid, especially when it is hostile.

It is therefore of the utmost importance that the bid be limited to a short period of time in order to permit the company to resume business as usual as soon as possible.

1.10 The above general principles are further elaborated in the Directive. National law must ensure that the above principles are observed in takeover bids. However, additional conditions and provisions more stringent than those laid down in the Directive may be provided in national law to regulate takeover bids, if such is required, to ensure compliance with the above general principles (Art. 3(2) Dir.).

National law may provide for derogations from the national rules applicable to takeover bids in order to take into account specific circumstances in such Member States, to the extent that such derogations comply with the above principles (Art. 4(5)(i) Dir.; see also no. 1.13 of this report).

Supervisory authorities

Designation of a competent authority

1.11 Each Member State must designate an authority competent to supervise takeover bids: either a public authority, an association or a private body recognised by national law or by public authorities as expressly empowered for that purpose under national law. Several authorities can be designated, each being competent for a portion of the review required by the Directive.

Measures must be taken to ensure that the competent authority exercises its functions impartially and independently of all parties to a takeover bid (Art. 4(1) Dir.), including the offeror, members of the offeror's board, the offeree company holders of securities of the offeree company, board members of the offeree company and any persons acting in concert with such parties (Art. 2(1)(f) Dir.). 'Persons acting in concert' are considered all those who co-operate with the offeror or the offeree company on the basis of an agreement – either express or implied, oral or written – aimed at acquiring control of the offeree company or at frustrating the successful outcome of the bid (Art. 2(1)(d) Dir.), including any persons controlled by any such persons (Art. 2(2) Dir.).

If follows from the foregoing that personnel of the designated supervisory authority must meet strict independence standards and, for instance, may not hold shares in listed companies. This standard can form part of an ethics code applicable to the authority. The code can provide for derogations under limited circumstances that do not affect the authority's impartiality and independence.

The Member States must inform the European Commission of the authority they designate. If several authorities are designated, the Commission must also be informed of the division of functions amongst them.

Authority competent to supervise bids

1.12 The authority competent to supervise a takeover bid in accordance with the Directive will depend on where the securities of the target company (the 'offeree company') are traded on a regulated market.

If the securities of the offeree company are admitted to trading in the Member State where its registered office is located, the authority of that Member State will be competent to supervise the takeover bid (Art. 4(2)(a) Dir.). If this is not the case, i.e., the securities of the offeree company are not admitted to trading in the Member State where that company's registered office is located, the competent authority will be that of the Member State where the securities are admitted to trading on a regulated market. If the securities are admitted to trading in regulated markets in several Member States (but not the Member State where the offeree company's registered office is located), the authority of the Member State where the securities were first admitted to trading will be solely competent to supervise the bid (Art. 4(2)(b) Dir.).

If the securities were simultaneously first admitted to trading on several regulated markets in different Member States (excluding the Member State of the offeree company's registered office), the company must determine the competent supervisory authority on the first day of trading and notify these regulated markets and their supervisory authorities of its choice at that time (Art. 4(2)(c) Dir.). The choice of supervisory authority will then be made public in the relevant Member States (Art. 4(2)(d) Dir.).

If on 20 May 2006 (the deadline for transposition of the Directive) a listed company had securities admitted to trading in several Member States, and admission to several of these markets occurred simultaneously before that date, the supervisory authorities of the Member States where the securities were first admitted to trading had four weeks, i.e., until 21 June 2006, to reach an agreement on which supervisory authority should be competent to supervise takeover bids for the purposes of the Directive. If they failed to do so, the company had to select a competent supervisory authority (Art. 4(2)(c) *in fine* Dir.) and publicise its choice in the relevant Member States (Art. 4(2)(d) Dir.).

Powers of the competent authorities

1.13 The supervisory authorities shall be vested with all powers necessary to carry out their duties under the legislation implementing the Directive, including the power to ensure that the parties to a takeover bid comply with the rules made or introduced pursuant to the Directive (Art. 4(5) Dir.), such as laws, regulations, administrative provisions, codes of practice and other arrangements of the Member States, including arrangements established by organisations officially authorised to regulate the markets relating to takeover bids (Art. 1 Dir.).

National law will define the powers of the supervisory authorities to require the parties to a takeover bid to provide information concerning themselves at all times.[16]

The supervisory authorities may be entitled under national law to waive application of the national rules implementing the Directive in order to take into account circumstances determined at national level or other specific circumstances. In order to create flexible takeover legislation that is capable of dealing with new circumstances as they arise, the supervisory authorities should be given the power to grant derogations and exceptions.[17] A derogation or exception requires a reasoned decision from the supervisory authority. Derogations must comply with the six general principles set forth in the Directive and explained under no. 1.9 of this report (Art. 4(5) second para. Dir.). This power to derogate from the national rules is in addition to the automatic derogations provided for by national law in order to take into account circumstances at national level (Art. 4(5)(i) Dir.; see also no. 1.10 of this report).

The liability of the supervisory authorities will be determined by national law (Art. 4(6) Dir.).

1.14 National law may designate judicial or other authorities, in addition to the competent authorities, to supervise takeover bids, deal with disputes and rule on irregularities committed in the course of such bids. National law may also regulate whether, and under which circumstances, the parties to a takeover bid are entitled to bring administrative or legal proceedings.

Decisions of the supervisory authorities should be subject to review by an independent court in appropriate circumstances, as defined by national law. The remedies and procedure will be determined by national law.[18]

The Directive does not affect national rules allowing the courts to refuse to hear certain proceedings and to decide whether such proceedings will influence the outcome of a takeover bid (Art. 4(6) Dir.).

Co-operation between the competent supervisory authorities

1.15 The Directive expressly requires the national supervisory authorities to co-operate and supply one another with information when necessary for application of the rules on takeover bids (Art. 4(4) Dir.). National law will thus require the authorities to co-operate and supply information to one another efficiently and effectively and without delay.[19]

This co-operation obligation extends not only to the authorities entrusted with supervising takeover bids but also in general to all authorities that supervise the capital markets, such as those entrusted with supervising application of the rules implementing: (i) Directive 2004/39 of 21 April 2004 on markets

16 Fifteenth recital of the Directive. 17 Sixth recital of the Directive.
18 Eighth recital of the Directive. 19 Fifteenth recital of the Directive.

in financial instruments;[20] (ii) Directive 2001/34 of 28 May 2001 on the admission of securities to official stock exchange listings and on information to be published on those securities;[21] (iii) Directive 2003/6 of 28 January 2003 on insider dealing and market manipulation (market abuse);[22] and (iv) Directive 2003/71 of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market.[23]

This duty to co-operate is important, as cross-border takeover bids require the immediate attention of, and co-ordination of, the supervisory authorities in various Member States in order to proceed smoothly. Co-operation is essential in order to prevent needlessly protracted preparation and undesired effects on the offeree company and the markets. Shortening the period of time required to complete a takeover bid is a reflection of the sixth general principle set forth in the Directive, with which the parties to a bid, including the supervisory authorities, must comply (see no. 1.9 of this report).

Such co-operation includes ensuring that legal documents necessary to enforce measures taken by the competent authorities in connection with a takeover bid can be properly served, and includes providing assistance, as other supervisory authorities may reasonably request, for the purpose of investigating an actual or alleged violation of rules made or introduced pursuant to the Directive, including laws, regulations, administrative provisions, codes of practice and other arrangements of the Member States, including arrangements by organisations officially authorised to regulate the markets (Art. 1 Dir.).

1.16 Current and former employees of the supervisory authorities are bound by a duty of confidentiality (an obligation of professional secrecy) with respect to information exchanged and received (see no. 1.17 of this report).

Duty of confidentiality

1.17 All persons employed by the supervisory authorities shall be bound by a duty of confidentiality (an obligation of professional secrecy), which should continue to apply after their employment ends. The Member States must transpose this duty into national law (Art. 4(3) Dir.).

20 *Official Journal* L 145 of 30 April 2004. This directive repeals and replaces Directive 93/22 of 10 May 1993 on investment services in the securities field, as last amended by Directive 2000/64 of 7 November 2000 (*Official Journal* L 290 of 17 November 2000), to which Article 4(4) of the Directive still refers.

21 *Official Journal* L 184 of 6 July 2001.

22 *Ibid.*, L 96 12 April 2003.

23 *Ibid.*, L 345 of 31 December 2003. See also D. Van Gerven, 'General Provisions of Community Law Relating to the Prospectus to be Published when Securities are Offered to the Public or Admitted to Trading', in D. Van Gerven (ed.), *Prospectus for the Public Offering of Securities in Europe*, Cambridge University Press, 2008, 65.

Information covered by this obligation shall be treated as confidential and may not be disclosed to any person or authority except under, and in accordance with, the applicable statutory provisions (Art. 4(3) *in fine* Dir.).

Applicable law

1.18 In the event a takeover bid is made for the securities of a company within the European Union, while the securities of that company are listed on one or more regulated markets outside its home Member State, different (conflicting) laws may apply, i.e., the law governing the company may conflict with the law of the Member State where the securities are listed and whose supervisory authority is, in accordance with the rules set forth under no. 1.12 of this report, competent to supervise the bid.

In this case, matters relating to the consideration offered in the takeover bid – in particular the price, procedural matters, the provision of information on the offeror's decision to launch a takeover bid, the content of the offer document and disclosure of the bid – shall be dealt with in accordance with the rules of the Member State where the competent authority is located (Art. 4(2)(e) Dir.).

Contrarily, the rules of the Member State in which the offeree company has its registered office will apply to matters relating to: (i) the information to be provided to employees of the offeree company; (ii) company law, in particular the percentage of voting rights that confers control and any derogation from the obligation to launch a takeover bid; and (iii) the conditions under which the offeree company's board may undertake actions liable to frustrate the bid (Art. 4(2)(e) *in fine* Dir.).

Information on listed companies

1.19 In order to render markets more transparent for shareholders and other securities holders, companies governed by the laws of a Member State whose securities are listed on a regulated market in the European Union, i.e., companies for which a takeover bid is subject to the Directive (see no. 1.7 of this report), must make the following information public:

(i) their capital structure, including any securities not admitted to trading on a regulated market in a Member State with, where appropriate, an indication of the different classes of shares and, for each class, its rights and obligations and the percentage of the total share capital it represents;
(ii) 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 of other holders of securities, without prejudice to the requirement that shares should be freely transferable;[24]

24 This requirement is imposed by Article 46 of Directive 2001/34 of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities (*Official Journal* L 184 of 6 July 2001).

(iii) significant direct and indirect shareholdings (including indirect shareholdings through pyramid structures and cross-shareholdings) within the meaning of Article 9 of Directive 2004/109 of 15 December 2004 on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market;[25] this provision imposes a notification requirement on the acquisition of securities resulting in a shareholding that reaches, exceeds or falls below any of the following thresholds: 5%, 10%, 15%, 20%, 25%, 30%, 50% or 75%;
(iv) the holders of any securities with special control rights and a description of such rights;
(v) the system of control for any employee share scheme in which control rights are not exercised directly by the employees;
(vi) any restrictions on voting rights, such as limitations on the voting rights of holders of a given percentage of share capital or votes, deadlines to exercise voting rights or mechanisms whereby, with the company's co-operation, the financial rights attached to securities are separated from the holding of these securities;
(vii) any agreements between shareholders known to the company that may result in restrictions on the transfer of securities and/or voting rights within the meaning of Directive 2004/109 of 15 December 2004 on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market;
(viii) rules governing the appointment and replacement of board members and amendment of the company's articles of association;
(ix) the powers of board members, in particular the power to issue or buy back shares;
(x) any significant agreements to which the company is a party and which take effect, alter or terminate upon a change in control following a takeover bid, and the effects thereof, except where the nature of the agreement is such that its disclosure would be seriously prejudicial to the company; this exception shall not apply if the company is specifically obliged to disclose such information on the basis of other statutory obligations;
(xi) 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 due to a takeover bid (Art. 10(1) Dir.).

This information must be published in the company's annual report and consolidated annual report (Art. 10(2) Dir.).

25 *Official Journal* L 390 of 31 December 2004. This directive has repealed Title IV, 'Ongoing obligations relating to securities admitted to official listing', of Directive 2001/34, to which Article 10 of the Directive refers.

Furthermore, the company's board of directors must present an explanatory report on the above information to the annual general meeting of shareholders (Art. 10(3) Dir.).

Voluntary takeover bids

1.20 The Directive does not set forth special rules applicable to voluntary takeover bids. Such bids are thus governed by provisions of national law.

A voluntary takeover bid must comply with the six general principles discussed under no. 1.9 of this report, and must follow the procedures established for takeover bids, for which the Directive contains some guidelines (see below).

Mandatory takeover bids

Obligation to launch a bid

1.21 The Directive provides that, as a general rule, a person acquiring control of a company should make a bid to the holders of all remaining voting securities in order to protect minority shareholders. It is applicable to the acquisition of control of a company governed by the law of a Member State and which securities are all or in part admitted to trading on a regulated market in the European Economic Area (Art. 5(1) Dir.; see no. 1.7 of this report for a definition of a regulated market). This obligation applies regardless of the price paid to acquire control. Consequently, even if control is acquired for a price below the market price, a bid is mandatory. Control acquired through acquisition on a regulated market at market price will also trigger the obligation to make a mandatory bid.

National law may provide additional protection for minority shareholders. Any such additional measures may not hinder the normal course of a takeover bid, however (Art. 5(6) Dir.). Such measures can include an obligation to make a partial bid where the offeror does not acquire control of the company or an obligation to announce a takeover bid simultaneously with the acquisition of control of the company.[26]

1.22 Control is defined as 'holding a specified percentage of voting rights in the offeree company'. This percentage will be defined by national law and will thus vary from one Member State to another. It was not politically feasible to specify a percentage in the Directive that would apply throughout the European Union. National law will also determine the method of calculating the controlling percentage. The national law of the Member State where the offeree company's registered office is located will apply to determine the percentage that triggers a mandatory bid (Art. 5(3) Dir.; see also no. 1.18 of this report).

26 Ninth recital of the Directive.

Control is determined following an acquisition by adding up all securities held directly or indirectly by the acquirer and those persons acting in concert with the acquirer (Art. 5(1) Dir.).

To determine whether a natural person or legal entity has acquired control, the securities held by any persons acting in concert with that person are taken into account, i.e., all persons, whether natural persons or legal entities, who co-operate with the offeror or the offeree company on the basis of an agreement – either express or implied, oral or in writing – aimed either at acquiring control of the offeree company or at frustrating a bid (Art. 2(1)(d) Dir.). Persons controlled by another shall be deemed to be acting in concert with the latter and with one another (Art. 2(2) Dir.). In this respect, an entity shall be deemed controlled if: (i) a natural person or legal entity holds a majority of its voting rights; (ii) a natural person or legal entity has the right to appoint or remove a majority of the members of its administrative, management or supervisory body and is also a shareholder or board member; (iii) a natural person or legal entity is a shareholder or board member of the entity and alone controls a majority of the shareholders' or board members' voting rights pursuant to an agreement entered into with the shareholders or board members; or (iv) a natural person or legal entity has the power to exercise, or actually exercises, dominant influence or control over the entity.[27] With respect to (ii), the voting, appointment and removal rights shall include those of any other undertaking controlled by the shareholder and of any natural person or legal entity acting, albeit in its own name, on behalf of the shareholder or of any other undertaking controlled by the latter.[28]

Furthermore, securities held both directly and indirectly are taken into account (Art. 5(1) Dir.). The term 'indirectly' is not defined in the Directive and will thus depend on national law.

The acquisition of securities that do not carry the right to vote at ordinary general meetings of shareholders will not trigger the obligation to launch a mandatory takeover bid.

1.23 There is an obligation to launch a mandatory takeover bid only when control results from acquisition by a relevant person or by persons acting in concert with that person. For the definition of 'persons acting in concert', see no. 1.22 of this report. Where control is established through other means, such as a shareholders' agreement, there is no obligation to launch a takeover bid under the Directive.

Acquisition is not defined but includes any type of acquisition of title to voting securities, whether through the sale or subscription of such securities. This means that a subscription to securities issued as a result of a capital

27 Article 2(1)(f) of Directive 2004/109 of 15 December 2004 on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (*Official Journal* L 390 of 31 December 2004) has repealed Article 87 of Directive 2001/34 of 28 May 2001, to which Article 2(2) of the Directive refers.

28 Art. 2(2) Directive 2004/109 of 15 December 2004.

increase in the offeree company will be considered an acquisition within the meaning of the Directive.

Acquisition as a triggering event is not limited to the acquisition of transferable voting securities of the offeree company. Control may also result from the acquisition of an indirect stake in the offeree company's parent company.

The acquisition of control through a voluntary takeover bid made in accordance with the rules of the Directive to all holders of securities for all their holdings does not trigger the obligation to launch a mandatory bid (Art. 5(2) Dir.).

1.24 Control acquired prior to transposition of the Directive into national law will not trigger the obligation to launch a bid.[29]

Obligation to extend the bid to the holders of all securities for all their holdings

1.25 When control is acquired, the acquirer is obliged to make a takeover bid to the holders of all transferable voting securities in the offeree company for all their holdings. The bid must be made at the earliest opportunity (Art. 5(1) Dir.) and in accordance with the rules laid down in the Directive and implementing national law.

The bid must be made for all *holdings* of the holders of securities. The term 'holdings' refers to transferable voting securities (Art. 2(1)(e) Dir.; see no. 1.7 of this report).[30] Consequently, the bid need not necessarily be extended to other securities. Of course, the offeror can always extend its bid to other securities in accordance with the provisions of national law. Furthermore, national law may require that a bid be extended to other securities issued by the offeree company, such as those carrying voting rights only in specific circumstances and non-voting securities.[31]

Obligation to offer the same price to the holders of all securities

1.26 The price offered for the securities must be equitable.

An equitable price is the highest price paid for the same securities by the offeror, or persons acting in concert with the offeror, over a period before the bid, as determined by national law of the competent authority's Member State (Art. 5(4) Dir.; see no. 1.12 of this report). This period may, in any event, not be less than six months or exceed twelve months before the bid.

National law may allow the supervisory authority to adjust the price under certain circumstances and in accordance with clearly defined criteria. Such an adjustment should always be in accordance with the six general principles discussed under no. 1.9 of this report.

29 Tenth recital of the Directive.

30 This follows from a combined reading of Article 5(1) ('[s]uch a bid shall be addressed at the earliest opportunity to all the holders of those securities for all their holdings at the equitable price') and the eleventh recital of the Directive.

31 Eleventh recital of the Directive.

To that end, national law may specify circumstances under which the highest price can be adjusted upwards or downwards. Such circumstances can include, for example: (i) when the highest price was set by an agreement between the purchaser and the seller; (ii) when market prices of the securities have been manipulated; (iii) when market prices in general or certain market prices have been affected by exceptional occurrences; or (iv) to enable a company in difficulty to be rescued. National law may also define the criteria applicable in such cases, such as the average market value over a particular period, the company's break-up value or other objective valuation criteria generally used in financial analysis (Art. 5(4) second para. Dir.).

A decision by the supervisory authority to adjust the equitable price must be substantiated and made public (Art. 5(4) third para. Dir.).

1.27 If the offeror, or any person acting in concert with the offeror, purchases securities after a bid has been made public but before the close of the offer for a price higher than the offer price, the offer price must be increased to at least the highest price paid for the securities (Art. 5(4) Dir.).

1.28 The consideration offered for the securities in a takeover bid may take the form of cash, securities or a combination of the two (Art. 5(5) Dir.). The securities offered should be transferable voting securities (Art. 2(1)(e) Dir.).

If the consideration consists of securities that are not fungible and admitted to trading on a regulated market, the offer must include a cash alternative (Art. 5(5) second para. Dir.).

Furthermore, if the offeror, or persons acting in concert with the offeror, has purchased for cash securities carrying 5 per cent or more of the voting rights in the offeree company over a period starting at the same time as the reference period to determine the equitable price (as defined by national law; see no. 1.26 of this report) and ending on the closing date of the offer, the offeror must offer consideration in cash as an alternative (Art. 5(5) third para. Dir.).

Finally, national law may provide that any offer of securities must include a cash alternative (Art. 5(5) fourth para. Dir.).

Information on takeover bids in an offer document

Publication of a takeover bid and notification of the competent supervisory authority

1.29 A decision to make a takeover bid or an obligation to make such a bid must be made public without delay. Furthermore, the competent supervisory authority must be immediately informed of the bid. National law may require that the supervisory authority be informed of the bid before it is made public (Art. 6(1) Dir.) to reduce the risk of insider trading.[32]

32 Twelfth recital of the Directive.

As soon as a bid has been made public, the boards of the offeree company and the offeror companies shall inform their respective employee representatives. If no representatives have been appointed, the employees must be informed directly (Art. 6(1) *in fine* Dir.) in the manner generally used within the company to inform the employees or their representatives.

National law may permit and regulate the disclosure of information regarding an intended takeover bid to, and consultation in relation thereto with, the offeror's employee representatives before the offer is launched.[33] These provisions shall not render employees or their representatives immune from sanctions for insider trading if they use this information to deal in the offeror's securities.

In addition, the offeror and the offeree company must comply with Community and national rules on the information of, and consultation with, employees and employee representatives (Art. 14 Dir.). The relevant Community rules are contained in Directive 94/45 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,[34] Directive 98/59 of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies,[35] Directive 2001/86 of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees,[36] and Directive 2002/14 of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community.[37]

1.30 The offeror must prepare an offer document, which shall be made public (Art. 6(2) Dir.). The offer document must not be made public simultaneously with publication of the intention (or obligation) to launch a takeover bid. In general, it will not be possible to make an offer document public until it has been approved by the relevant supervisory authority.

The draft offer document must be submitted to the relevant supervisory authority before being made public. With respect to designation of a supervisory authority, see no. 1.12 of this report.

The supervisory authorities should be entitled to request that the parties to the bid provide them at any time with all information in their possession concerning the bid necessary for the authorities to exercise their supervisory functions (Art. 6(5) Dir.). The parties to the bid are the offeror, members of the offeror's board, the offeree company, holders of the offeree company's securities and members of its board and any persons acting in concert with such parties (Art. 2(1)(f) Dir.). Persons acting in concert are all those who co-operate with the offeror or the offeree company on the basis of an

33 Twenty-third recital of the Directive.

34 *Official Journal* L 254 of 30 April 1994, as amended by Directive 97/74 of 15 December 1997 (*Official Journal* L 10 of 16 January 1998).

35 *Ibid.*, L 225 of 12 August 1998.

36 *Ibid.*, L 294 of 10 November 2001.

37 *Ibid.*, L 80 of 23 March 2002.

agreement – either express or implied, oral or in writing – aimed at acquiring control of the offeree company or at frustrating the successful outcome of a bid (Art. 2(1)(d) Dir.), including persons controlled by any of the foregoing (Art. 2(2) Dir.).

Content of the offer document

1.31 The offer document should contain all information necessary to enable the holders of the offeree company's securities to reach a properly informed decision on the bid (Art. 6(2) Dir.).

The offer document should contain at least the following information (Art. 6(3) Dir.):

(i) the terms of the bid;
(ii) the identity of the offeror and, if the offeror is a company, its corporate form and name and the address of its registered office;
(iii) the securities or, where appropriate, the class or classes of securities for which the bid is made;
(iv) the consideration offered for each security or class of securities and, for a mandatory bid, the method used to determine it, with particulars of how the consideration is to be paid;
(v) the compensation offered for rights that may be extinguished as a result of the breakthrough rules discussed under no. 1.54 of this report (Art. 11(4) Dir.), with particulars as to how the compensation is to be paid and the method used to determine it;
(vi) the maximum and minimum percentages or quantities of securities the offeror undertakes to acquire;
(vii) details of any existing holdings of the offeror, and of persons acting in concert with the offeror, in the offeree company;
(viii) all conditions to which the bid is subject;
(ix) the offeror's intentions with regard to the business of the offeree company and, insofar as it is affected by the bid, its own business and, with regard to the safeguarding of employee and management jobs, any material changes in the conditions of employment, in particular the offeror's strategy for the two companies and the likely consequences for employment and the locations of the companies' places of business;
(x) the time allotted to accept the bid;
(xi) if the consideration includes securities of any kind, information about these securities;
(xii) information about the financing of the bid;
(xiii) the identity of any persons acting in concert with the offeror or the offeree company and, for a company, its corporate form and name, the address of its registered office and its relationships with the offeror and, if applicable, the offeree company;

(xiv) the national law that will govern contracts concluded between the offeror and the holders of the offeree company's securities as a result of the bid, as well as the competent courts.

The European Commission can adopt rules regarding application of the above, provided these do not change essential provisions of the Directive (Art. 6(4) Dir.). These rules must be prepared in accordance with Council Decision 1999/468 of 28 June 1999, laying down the procedures for the exercise of implementing powers conferred on the Commission (Art. 24(2) Dir.).[38] In preparing these implementing measures, the Commission can call upon the assistance of the European Securities Committee (ESC), established by a Commission decision of 6 June 2001.[39] No regulation has been adopted yet.

European passport for an approved offer document

1.32 The Directive does not require that an offer document be approved in all cases by the competent supervisory authority. National law will determine in which cases approval is required.

1.33 If the offer document is subject to prior approval by the competent supervisory authority, it can benefit from a European passport once approved (Art. 6(2) second para. Dir.).

A European passport implies that the offer document must be recognised in other Member States where the offeree company's securities are admitted to trading. Re-approval by the supervisory authorities of these states is not required, and national law may not require such approval subject to the limitations mentioned below.

There are two limitations on the European passport. First, the supervisory authorities of other Member States where an offer document is made available in the framework of a takeover bid may require the inclusion of additional information specific to the local market on which the offeree company's securities are admitted to trading. Additional information can only be required to the extent that it relates to: (i) the formalities to accept the bid and receive consideration at the close of the bid; and (ii) tax arrangements to which the consideration offered will be subject.

Second, the national law of other Member States may require that a translation of the offer document into one or more official languages of these states be made available to the public (Art. 6(2) second para. Dir.).

These two limitations mean that the competent authorities of other Member States in which a takeover bid is launched may require that the amended and translated offer document be submitted to them before approving it. Consequently, a European passport may be contingent on prior review by the competent authorities of other Member States.

38 *Ibid.,* L 184 of 17 July 1999. 39 *Ibid.*, L 191 of 13 July 2001.

1.34 The European passport for an approved offer document in a cross-border takeover bid is more limited than the passport available for a prospectus for a public offering of securities prepared and approved in accordance with the Prospectus Directive.[40]

A prospectus approved in accordance with the Prospectus Directive can be used in any other Member State ('host Member State') without re-approval. The supervisory authorities of other Member States where the prospectus is made available to the public cannot require the inclusion of additional information relating to their local markets.

Furthermore, a prospectus approved by the competent authority of the home Member State can be made available in host Member States, in a language customary in international financial circles, if the offeror or issuer does not wish to translate the prospectus into the languages of the host Member States where the public offering is made or admission to trading sought.[41] The competent authorities of these states cannot require a translation of the prospectus into any of their official languages; they can only require a translation of the summary.

Prospectus obligation under the Prospectus Directive

1.35 If the consideration offered in a takeover bid takes the form of securities, in whole or in part, it must be determined whether a prospectus is required in accordance with the Prospectus Directive.[42]

Under the Prospectus Directive, no prospectus is required if the offer document contains information that is regarded by the competent authority as equivalent to the information set forth in the prospectus required by the Prospectus Directive.[43] In order to determine whether information is 'equivalent', the content of the offer document is compared with the information required by the Prospectus Regulation.[44] There is no obligation to provide all information required for a prospectus.[45]

40 Directive 2003/71 of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading (*Official Journal* L 345 of 31 December 2003).

41 Art. 19 Prospectus Directive; Van Gerven, 'General Provisions of Community Law', 49, no. 53.

42 Directive 2003/71 of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading (*Official Journal* L 345 of 31 December 2003) (the 'Prospectus Directive').

43 Art. 4(1)(b) Prospectus Directive.

44 Regulation 809/2004 of 29 April 2004 implementing the Prospectus Directive as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and the dissemination of advertisements.

45 Summary record of the 3rd Informal Meeting of 26 January 2005 of the informal taskforce of representatives of the supervisory authorities organised by the Commission on Prospectus Transposition, p. 5 (available at http://europa.eu.int/comm/internal_market, last accessed 2 April 2008).

The Prospectus Directive does not indicate which Member State's authority is competent to decide whether the information in the offer document is equivalent to the information required by the Prospectus Regulation in the event a public offer is made simultaneously in several Member States. More specifically, with respect to the decision on equivalence, the Prospectus Directive does not refer to the authority competent in the home Member State to approve prospectuses under the Prospectus Directive.[46] Consequently, the competent authority will be the supervisory authority in the Member State where the takeover bid is launched or organised (see no. 1.12 of this report).

In practice, a certificate of equivalence should be requested from the supervisory authority in the Member State where the offer document is made public.[47] This authority will then render an opinion on whether the information contained in the offer document is equivalent to that required by the Prospectus Directive and Prospectus Regulation for the type of securities being offered.

However, the supervisory authority's opinion does not necessarily imply a passport.[48] It follows that the competent authorities in other Member States where the bid is made simultaneously need not accept this opinion, and will verify independently whether the information contained in the offer document is equivalent.[49]

In a cross-border takeover bid, it will be necessary to solicit opinions from various authorities. Of course, these authorities must consult each other with a view to ensuring a common position on the issue of equivalence (Art. 4(4) Dir.).

1.36 If the competent authority within the meaning of the Prospectus Directive reaches the opinion that the offer document does not contain equivalent information to that required by the Prospectus Directive, a prospectus will be required. In this case, the offeror must have its prospectus approved by the competent authority, determined in accordance with the rules contained in the Prospectus Directive (see below), before launching its bid and making its prospectus public.[50] The competent authority for purposes of the Prospectus Directive is not necessarily the same authority responsible for supervising the bid.

46 Art. 2(1)(m) Prospectus Directive; see also no. 1.36 of this report, below.

47 This is also the opinion of the informal taskforce of representatives of the supervisory authorities organised by the Commission (summary record of the 3rd Informal Meeting of 26 January 2005 on Prospectus Transposition, p. 6) (available at http://europa.eu.int/comm/internal_market, last accessed 2 April 2008). During this meeting, the Commission stated it has no immediate plans to adopt implementing measures with respect to the meaning of 'equivalence' in this provision of the Prospectus Directive.

48 Summary record of the 4th Informal Meeting of 8 March 2005 of the informal taskforce of representatives of the supervisory authorities organised by the Commission on Prospectus Transposition, p. 3 (available at http://europa.eu.int/comm/internal_market, last accessed 2 April 2008).

49 This has been confirmed by the informal taskforce of representatives of the supervisory authorities organised by the Commission (see preceding footnote).

50 Art. 3(1) Prospectus Directive.

In general, the authority competent to approve a prospectus is that of the Member State where the issuer's registered office is located. If the issuer is incorporated outside the European Union, the competent authority will be that of the Member State where the securities are intended to be offered to the public for the first time after the entry into force of the Prospectus Directive, i.e., after 31 December 2003, or where the first application for admission to trading on a regulated market is made, at the choosing of the issuer, the offeror or the person requesting admission to trading, as the case may be. If the securities are intended to be offered simultaneously to the public in different Member States, the competent authority for purposes of the Prospectus Directive can be in any of those states.[51] Issuers have a choice for issues of large-denomination debt securities, i.e., non-equity securities with a denomination per unit of at least €1,000 or, for non-equity securities denominated in a currency other than euros, nearly equivalent to €1,000, and issues of non-equity securities that carry the right to acquire transferable securities or to receive cash consideration as a result of their conversion or the exercise of the rights they confer, provided the issuer of the non-equity securities is not the issuer of the underlying securities or an entity belonging to the same group.[52] In the latter case, the issuer can choose the home Member State from amongst: (i) the Member State where it has its registered office; and (ii) the Member State where the securities were or are to be admitted to trading on a regulated market or offered to the public.[53]

In most cross-border transactions, the competent authority will not be the authority responsible for supervising the takeover bid. Indeed, the competent authority for purposes of the Prospectus Directive is determined based on the location of the registered office of the issuer whose securities are offered as consideration to the public. Only for large-denomination debt securities and securities issued by non-EU companies will the authority of the Member State where the securities are admitted to trading or offered to the public be competent. In general, the competent authority for purposes of a takeover bid is determined by the location of the offeree company's registered office or of the regulated market where the offeree company's securities are admitted to trading (see no. 1.12 of this report).

Of course, the authorities are bound to co-operate under both directives and must therefore consult whenever different authorities are competent for an offer document that also qualifies as a prospectus. Furthermore, in general, the

51 A transitional rule is provided for in Article 30(1) of the Prospectus Directive for foreign issuers whose securities were admitted to trading on a regulated market before 1 July 2005 (for a discussion of this rule, see Van Gerven, 'General Provisions of Community Law', 26–7, no. 21).

52 The denomination of non-equity securities in a foreign currency should be determined upon submission of the draft prospectus for approval (Question 9 of 'Frequently asked questions regarding Prospectuses: Common positions agreed by CESR Members', 18 July 2006, available at www.cesr.eu, last accessed 2 April 2008).

53 Art. 2(1)(m) Prospectus Directive.

supervisory authority for takeover bids and the authority competent to approve prospectuses will be one and the same.

Finally, the offeror could propose completing the offer document with the necessary information in order to avoid having to prepare a prospectus. This could be the best solution to avoid application of two sets of rules and the involvement of two different supervisory authorities, which would no doubt slow down the process, and is in accordance with the sixth general principle that a takeover bid must not hinder the offeree company for longer than reasonably necessary in the conduct of its business (see no. 1.9 of this report).

Procedure for a takeover bid

Timetable

1.37 The time given to accept a takeover bid may not be less than two weeks or more than ten weeks from the publication date of the offer document. National law will determine the exact length of the period during which the holders of securities can validly accept the offer and tender their securities (Art. 7(1) Dir.).

The above-mentioned ten-week time period may be extended by national law provided the offeror gives at least two weeks' notice of its intention to close the bid. The extension should respect the sixth general principle that a takeover bid must not hinder the offeree company for longer than reasonably necessary in the conduct of its business (Art. 7(1) *in fine* Dir.).

Furthermore, national law may provide rules to adjust the above-mentioned time period in specific cases and authorise the supervisory authority to grant derogations from the time allotted to accept a bid in order to allow the offeree company to call a general meeting to consider the matter (Art. 7(2) Dir.).

Public disclosure of a takeover bid

1.38 A takeover bid must be made public in such a way as to ensure market transparency and integrity for the securities of the offeree company, the offeror or any other company affected by the bid. Publication must, in particular, be organised in such a way as to prevent the publication or dissemination of false or misleading information (Art. 8(1) Dir.). The manner of publication, in accordance with the above rules, shall be determined by national law.

National law shall provide for publication of the offer document and of any other information relating to the bid that must be made public in accordance with Article 6 of the Directive (see no. 1.29 of this report). Publication must be organised so that the information is readily and promptly available to: (i) the holders of securities in at least those Member States where the offeree company's securities are admitted to trading on a regulated market; and (ii) the employee representatives of the offeree company and the offeror or, if no representatives have been appointed, the employees of these companies themselves (Art. 8(2) Dir.).

Other rules governing the conduct of takeover bids

1.39 The conduct and procedure of takeover bids are governed by national law. For the applicable national law, see no. 1.18 of this report.

National law should at least regulate the following:

(i) the expiry of a takeover bid;
(ii) the revision of a bid, i.e., the conditions pursuant to which a bid must or may be revised by the offeror and adapted to reflect changed circumstances;
(iii) competing bids, i.e., counter bids and higher bids;
(iv) the disclosure of results (see no. 1.38 of this report); and
(v) the irrevocability of bids and permitted conditions, i.e., conditions precedent and subsequent that allow the offeror to withdraw its bid (Art. 13 Dir.).

The national rules implementing the foregoing are discussed in the various national reports in this book.

Obligations and actions of the offeree company's board

Actions intended to frustrate a takeover bid

1.40 The powers of the offeree company's board should be restricted during a takeover bid in order to ensure that the holders of securities are free to tender. This reflects one of the two principles enunciated by the High Level Group of Company Law Experts in its report of 10 January 2002 on issues related to takeover bids.[54] According to the first general principle, the ultimate authority to accept a takeover bid lies with shareholders. As discussed below, the Member States can opt out of these rules, or allow companies to voluntarily opt out, in the event of a takeover bid by a company that does not impose such restrictions on its board (see nos. 1.43 *et seq*. of this report).

The above implies that the offeree company's board must obtain the prior authorisation of the general meeting of shareholders before taking any action liable to frustrate a takeover bid. This is especially true for an issuance of shares that could permanently impede the offeror's acquisition of control of the offeree company (Art. 9(2) Dir.). If the company has a two-tier management structure, the term 'board' shall be construed to mean both the management board and the supervisory board (Art. 9(6) Dir.).

54 The second principle is designed to ensure proportionality between risk-bearing capital and control, i.e., shares should carry control rights in proportion to the risk borne, hence any restriction to ensure that a minority shareholder continues to control the company following a successful takeover bid is unacceptable. The High Level Group of Company Law Experts' report is available at http://ec.europa.eu/internal_market/company, last accessed 2 April 2008.

However, this limitation may not prevent the offeree company's board from seeking alternative bids in the general interest of its securities holders. Furthermore, the board is better placed and informed to find alternate bidders.

The requirement of prior shareholder approval applies from the time the board is first informed of the takeover bid (see no. 1.29 of this report) until the result of the bid is made public or the bid expires (Art. 9(2) second para. Dir.). However, national law may provide that the board must seek prior shareholder approval even earlier. It may provide, for example, that the prior authorisation of shareholders is necessary from the time the board learns that a takeover bid is imminent (Art. 9(2) second para. Dir.).

1.41 Any decision taken before the start of the period referred to above – implementation of which could frustrate a takeover bid, and which has not been (fully or partially) implemented at the start of this period – must be approved or confirmed by the general meeting of shareholders. Approval is not required if the decision is taken in the ordinary course of business (Art. 9(3) Dir.). Such restrictions on the board should not unduly hinder the company in its business and should be limited to exceptional circumstances.[55]

The above applies, for example, to a board decision to increase the company's share capital if no subscriptions have been made at the time a takeover bid is made public.

1.42 National law may provide for a short notice period to call a general meeting to approve or confirm actions intended to frustrate, or that shall result in the frustration of, a bid. The notice period, however, may not be less than two weeks (Art. 9(4) Dir.).

1.43 A Member State may decide not to apply the above restrictions to the boards of companies with their registered offices in that state (Art. 12(1) Dir.).

If a Member State decides to opt out of the above rules, it should nevertheless allow companies with their registered offices in that state to opt in, i.e., to apply these restrictions to their boards. These companies can always decide later to undo their decision and once again allow their boards to take actions to frustrate a takeover bid (Art. 12(2) first para. Dir.).

A decision to opt in must be taken by the general meeting of shareholders, in accordance with the provisions of national law of the Member State where the company's registered office is located, to amend the company's articles of association. In other words, a quorum and special majority are required.

If a company decides to opt in, it must inform the supervisory authority of the Member State in which its registered office is located and the supervisory authorities of the Member States where its securities are admitted to trading on a regulated market or where admission to trading is sought (Art. 12(2) second para. Dir.). For a request for admission to trading, the company must inform

55 Sixteenth recital of the Directive.

the supervisory authority designated in accordance with the Directive (see no. 1.12 of this report). The authorities or the company itself will make public the applicable rules governing the board's power to frustrate the bid (see no. 1.45 of this report).

1.44 Finally, the Member States may, under the conditions determined by national law, exempt companies with their registered offices in those states and which have opted in from applying restrictions on their boards to frustrate a bid (the so-called 'voluntary opt-out') if these companies become the target of a takeover bid launched by a company that 'does not apply the same articles as they do' or that is controlled, directly or indirectly, by such a company within the meaning of Article 1 of Directive 83/349 of 13 June 1983 on consolidated accounts[56] (Art. 12(3) Dir.). The reference to 'same articles', i.e., Article 9 (and Article 11 of the Directive) is unclear, but undoubtedly means when the bidder (or its parent company) is not subject to identical or similar restrictions on the powers of its board to frustrate a bid as a result of optional arrangements.[57] In general, this voluntary opt-out will be available when a bid is launched by a company with its registered office in a Member State that has opted out, but the company has not opted in.

The above opt-out can also be used in the event of a takeover bid by a non-EU company if the latter (or its parent) does not impose similar restrictions on its board to frustrate a takeover bid. The opt-out should indeed also be available for a takeover bid by a non-EU company, even though the wording of Article 12 of the Directive is not clear in this respect, as this was the original intention.[58]

In order for a company to voluntarily opt out, and consequently for its board to act outside the restrictions made applicable as the result of an opt-in, the authorisation of the general meeting is required. Such authorisation must be granted no earlier than eighteen months prior to the time the takeover bid is made public; if given earlier, it will be ineffective (Art. 12(5) Dir.)(with respect to publication, see no. 1.29 of this report).

1.45 The Member States must take the necessary measures and adopt appropriate provisions to ensure that the information discussed above is disclosed without delay (Art. 12(4) Dir.). For purposes of market transparency,[59] they must ensure that the public, in particular investors, is fully aware of any restrictions on the powers of a company's board and of any optional arrangements applicable to a company.

Furthermore, the Directive suggests that any defence mechanisms put in place should be regularly disclosed in reports to the general meeting.[60] National law can provide rules to this effect and, for example, require that the board set forth the cases in which it will exercise its powers.

56 *Official Journal* L 193 of 18 July 1983. 57 Twenty-first recital of the Directive.

58 Germany was of the opinion that its listed funds would otherwise be defenceless against hostile takeover bids by US companies.

59 Eighteenth recital of the Directive. 60 *Ibid.*

The board's opinion on the takeover bid

1.46 After having been notified of a takeover bid, the offeree company's board will prepare an opinion on the bid, explaining the reasons on which this opinion is based. This document should include the board's views on the effects of implementation of the takeover bid on all parties involved, especially employees, and on the offeror's plans for the offeree company and the likely consequences for employment and the locations of the company's places of business (defined in the offer document; see no. 1.31(9) of this report) (Art. 9(5) Dir.).

The board's opinion must be made public. National law will specify the time and manner for doing so.

The employee representatives or, in the absence thereof, the employees themselves must be informed of the board's opinion at the same time it is made public, and be given an opportunity to express their views on the foreseeable effects of the bid on employment within the company.[61] If the board receives a separate opinion in due time from the employee representatives on the effects of the bid on employment, this opinion will be appended to the document prepared by the board (Art. 9(5) Dir.).

Defence mechanisms and other restrictions

General remarks: no obligation to apply

1.47 In its report of 10 January 2002, the High Level Group of Company Law Experts formulated two principles designed to create a level playing field for takeover bids.[62]

The first principle is that the ultimate authority to tender shares and to accept a takeover bid should rest with shareholders, who should always be in a position to tender their shares and decide freely whether the price offered is acceptable.

The second principle is based on proportionality between risk-bearing capital and control, i.e., shares with an unlimited right to participate in profits or liquidation proceeds should normally carry control (voting) rights in proportion to the risk borne. Consequently, the holder of a majority of risk-bearing capital should be able to exercise control. Corporate and other control mechanisms that grant disproportionate voting rights to certain shareholders may not be used to frustrate a takeover bid. To this end, rules must be adopted to allow the bidder to circumvent or break through such mechanisms and structures, regardless of whether they are included in the company's articles of association or related documents, such as shareholder agreements.

61 Twenty-third recital of the Directive.

62 *Report of the High Level Group of Company Law Experts*, available at http://ec.europa.eu/internal_market/company, last accessed 2 April 2008.

The above principles and implications, as further explained in the experts' report of 10 January 2002, are only partially introduced in the Directive. Furthermore, the Member States may opt out of these rules and thus not apply them or implement them in their national laws. These optional arrangements are discussed in this report (see nos. 1.43 and 1.59) and were necessary due to differences in company law mechanisms and structures in the Member States.[63]

One application of the above principles can be found in the restrictions imposed on the offeree company's board with respect to actions liable to frustrate a takeover bid (see nos. 1.40 *et seq*. of this report).

The breakthrough rules, to permit the bidder to effectively acquire control, constitute a second application and are discussed below (see nos. 1.48 *et seq*.)

Breakthrough rules

Level playing field

1.48 A level playing field for takeover bids is only possible if securities holders are not unnecessarily hampered in tendering their shares. In keeping with this rule, the Directive sets aside restrictions on the transfer of securities and on voting rights.

Only restrictions contained in the offeree company's articles of association and in contractual agreements can be set aside. Statutory restrictions on the transfer of securities or on voting rights shall continue to apply (see no. 1.55 of this report).

Transfer restrictions

1.49 Restrictions on the transfer of securities contained in the offeree company's articles of association will not apply to the offeror during the takeover bid, i.e., the period during which securities can be tendered (Art. 11(2) first para. Dir.).

The same holds true for restrictions on the transfer of securities that are embedded in contractual agreements between the offeree company and the holders of its securities or between holders of the offeree company's securities themselves (Art. 11(2) second para. Dir.). This rule applies only to contractual arrangements entered into 'after the adoption' of the Directive, i.e., after 21 April 2004.[64] Transfer restrictions contained in contractual agreements entered into before that date will remain enforceable against the offeror, and will apply to the holders of securities who wish to tender in the bid. National law can provide otherwise, however, and set aside such transfer restrictions as well.

63 Twenty-first recital of the Directive.

64 In the Dutch text of the Directive, Article 11 refers to the date of entry in force of the Directive ('*inwerkingtreding*'), which is clearly a mistranslation.

Restrictions on voting rights

1.50 Restrictions on voting rights mentioned in the offeree company's articles of association shall have no effect at a shareholders' meeting called to vote on any defensive measures in accordance with Article 9 of the Directive (Art. 11(3) first para. Dir.). This refers to the authorisation granted by shareholders to the board to take actions intended to frustrate a bid (see no. 1.40 of this report).

In addition, voting restrictions provided for in contractual agreements between the offeree company and the holders of its securities and between the holders of the offeree company's securities themselves entered into after adoption of the Directive, i.e., after 21 April 2004, shall have no effect at a shareholders' meeting called to authorise the board to take actions to frustrate a takeover bid (Art. 11(3) second para. Dir.). Voting restrictions in contractual arrangements entered into before 22 April 2004 shall remain in full effect (unless national law provides otherwise).

Securities that carry multiple votes will be limited to one vote each at a shareholders' meeting called to authorise the offeree company's board to take actions to frustrate a takeover bid (Art. 11(3) third para. Dir.). This limitation applies to all multiple-vote securities, i.e., securities in a distinct class that carry more than one vote each (Art. 2(1)(g) Dir.).

1.51 Voting restrictions on securities that are compensated for by specific pecuniary advantages will continue to apply (Art. 11(6) Dir.). This will be the case with non-voting securities that carry the right to a preferred dividend and which are entitled to vote if no dividend has been paid for a certain period of time.

Control of 75 per cent or more of the capital carrying voting rights

1.52 When following a successful takeover bid the offeror holds 75 per cent or more of the capital carrying voting rights, it will benefit from a full breakthrough, i.e., no restrictions on the transfer of securities or voting rights will apply (Art. 11(4) Dir.).

First, all restrictions on the transfer of securities, whether included in the offeree company's articles of association or in contractual agreements (regardless of the date of execution), will be set aside. The remaining holders of securities will be entitled to sell their securities to the offeror. This only applies to transferable voting securities within the meaning of the Directive (see no. 1.7 of this report). Statutory restrictions on the transfer of securities shall continue to apply.

Second, restrictions on voting rights included in the offeree company's articles of association or in contractual agreements (regardless of the date of execution) will not be given effect. Once again, statutory restrictions on voting rights shall remain applicable.

Third, any extraordinary shareholder rights concerning the appointment or removal of board members provided for in the offeree company's articles of association shall no longer apply, thus permitting the offeror to remove and replace board members.

Fourth, multiple-vote securities shall carry only one vote each at the first general meeting following the close of the bid called by the offeror to amend the articles of association or to remove and appoint board members.

Finally, the offeror will be entitled to convene a general meeting at short notice (no less than two weeks) (Art. 11(4) second para. Dir.).

1.53 The above rules do not apply to securities with voting restrictions that are compensated by specific pecuniary advantages (Art. 11(6) Dir.) (see no. 1.51 of this report).

Compensation

1.54 In the event statutory or contractual rights are set aside in accordance with the provisions discussed under nos. 1.49 to 1.52 of this report, equitable compensation must be provided by the offeror for any loss suffered by the holders of such rights. This compensation and the way in which it is determined and will be paid must be included in the offer document (Art. 6(3)(e) Dir.). National law will set the terms for determining this compensation and arranging for payment (Art. 11(5) Dir.). This also applies when rights are set aside under any optional arrangements concluded in accordance with Article 12 of the Directive.

Permitted statutory restrictions and exemption for co-operatives

1.55 The above breakthrough rules do not apply to: (i) securities held by Member States that confer special rights on such states, to the extent they are compatible with the EC Treaty; (ii) special rights provided for by national law that are compatible with the EC Treaty; and (iii) co-operatives (Art. 11(7) Dir.). The validity of these rights and restrictions will be verified in light of the free movement of capital and the relevant provisions of the Treaty.[65]

The first category of exempted restrictions is special rights conferred on Member States or governmental entities that permit the latter to intervene in listed companies. These rights are typically created for companies operating in areas that affect the public interest, such as the energy sector or defence, and that are mentioned in the company's articles of association and attached to one or more securities, termed 'golden shares'. Such shares are further examined at no. 1.57 of this report.

The second category is special rights provided for by law that give Member States the right to intervene in the transfer of shares of the offeree company or in the latter's decision-making process.

Golden shares and special rights are only exempt if they comply with the EC Treaty, in particular the provisions on the free movement of capital and

65 Twentieth recital of the Directive.

services (see no. 1.57 of this report). To the extent they are compatible, they can be exercised to hinder or frustrate a takeover bid.

1.56 Co-operatives[66] are also exempt from application of the breakthrough rules set forth in Article 11 of the Directive.

In general, the transfer of shares in a co-operative is highly restricted, which usually prohibits their admission to trading on a regulated market. A co-operative that issues transferable voting securities and has them listed on a regulated market in the European Union will be exempt from the breakthrough rules (even in Member States that have made these rules applicable to companies with offices on their territory).

In its communication of 23 February 2004 on co-operative societies in Europe, the European Commission defined co-operatives as entities that:

> [o]perate in the interests of their members, who are at the same time users, and . . . not managed in the interests of outside investors. Profits are received by members in proportion to their businesses with the co-operative, and reserves and assets are commonly held, non-distributable and dedicated to the common interests of members. Because personal links among members are in principle strong and important, new membership is subject to approval while voting rights are not necessarily proportional to shareholdings (one man one vote). Resignation entitles the member to repayment of his part and implies reduction of the capital.[67]

The significance of characterisation as a co-operative varies greatly from one Member State to another. In some countries, co-operatives operate as professional associations, providing services solely to their members, while in others they have evolved into commercial companies that present an alternative to other corporate forms.

Golden shares

1.57 Golden shares are shares issued by companies that carry special rights, permitting their holder to have a say in the company's decision-making process. Such special rights can include the right to oppose a decision of the general meeting or of other corporate bodies, the right to impose a decision on the general meeting or on other corporate bodies or the right to appoint one or more directors or managers. These rights are typically mentioned in the articles of association of companies whose activities impact the public interest upon privatisation of such companies, or when their shares are admitted to trading on a regulated market.

Golden shares are meant to allow the Member States to safeguard the public interest. Consequently, they should only be exercised in the public interest.

66 Also termed 'co-operative societies' in Article 48 of the EC Treaty.

67 See also the recitals of Regulation 1435/2003 of 22 July 2003 on the Statute for a European Co-operative Society (SCE) (*Official Journal* L 207 of 18 August 2003).

The rights attached to golden shares are defined in the company's articles of association, and can also be defined or supplemented in the national law applicable to the company.

These special rights can be attached to a single share. In general, a golden share should remain in the hands of the Member State or governmental entity acting in the public interest. Generally, these rights give Member States a say in important, particularly strategic, decisions proposed by the company's corporate bodies.

1.58 Exclusion of the breakthrough rules to golden shares is only permissible to the extent the shares comply with the EC Treaty. The European Court of Justice has issued numerous rulings on golden shares, and has defined the limits of their use in company law.

Requiring the prior authorisation of a Member State for the transfer of a company's securities is a restriction on the free movement of capital, as it undoubtedly dissuades investors from other Member States from investing in that company. Such a restriction can only be justified: (i) within the limits of Article 58(1)(b) of the EC Treaty, i.e., in order to prevent violations of national law and regulations, to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, to take measures that are justified on the grounds of public policy or public security or by overriding requirements in the general interest; and (ii) to the extent that it applies to all persons and undertakings pursuing an activity in that Member State, i.e., it is based on objective, non-discriminatory criteria. The restriction must, in accordance with the principle of proportionality, be suitable to secure the objective it pursues and must not go beyond what is necessary in order to attain it.[68] This implies that the Member State must determine whether the same goal can be achieved by less restrictive means, such as an *ex post facto* declaration of a transfer of securities. The European Court of Justice has held that the general financial interests of a Member State, such as strengthening or protecting a local market and choosing a strategic partner, do not constitute adequate justification for requiring prior authorisation.[69]

According to the European Court of Justice, safeguarding energy supplies in the event of a crisis is a legitimate public interest that would allow a Member State to retain a golden share in a privatised energy company, which entitles it to oppose: (i) any transfer, use as security or change in the intended destination of lines and conduits or of certain other strategic assets; as well as (ii) certain management decisions regarded as contrary to the state's energy policy.[70] In the latter case, the Member State did not require its prior authorisation, and the

68 ECJ, 4 June 2002, C-367/98, *Commission* v. *Portuguese Republic*, ECR, 2002, I-4731.

69 ECJ, 4 June 2002, C-503/99, *Commission* v. *Kingdom of Belgium*, ECR, 2002, I-4809.

70 ECJ, 4 June 2002, C-503/99, *Commission* v. *Kingdom of Belgium*, ECR, 2002, I-4809; ECJ, 13 May 2003, C-98/01, *Commission* v. *United Kingdom of Great Britain and Northern Ireland*, ECR, 2003, I-4641.

golden share only entitled it to oppose a decision liable to seriously jeopardise public security.

In addition, ensuring petroleum supplies and the provision of telecommunication services have been recognised as cases in which the public interest and security may require restrictive measures to avoid crisis situations.[71] The same holds true for the organisation of a universal postal service.[72]

Consequently, a golden share held by a Member State will be acceptable if it entitles that state to oppose a decision by the company that could jeopardise the public interest or public security, i.e., constitute a genuine and sufficiently serious threat to a fundamental state interest. To that end, the exercise of rights attached to a golden share should be based on precise criteria and backed by a statement of reasons that renders effective judicial review possible.[73] These rights should go no further than necessary, and must be exercised in a non-discriminatory manner. Moreover, it should not be possible to come up with less restrictive means of ensuring the same level of protection for the state's interests. Clearly, it will be more difficult to establish that a restriction on the transfer of shares in a listed company whose activity relates to the public interest or security is required in the public interest.

In determining whether the public interest or security could be jeopardised, existing Community legislation in the field in which the company operates should be taken into account. Such legislation may already provide sufficient measures to protect the public interest and security.[74]

Optional arrangements

1.59 A Member State may provide that companies with their registered offices in that state need not apply the breakthrough rules set out above (Art. 12(1) Dir.). This opt-out requires an express statutory provision to this effect.

71 ECJ, 4 June 2005, C-483/99, *Commission* v. *Republic of France*, ECR, 2002, I-4781; ECJ, 13 May 2003, C-463/00, *Commission* v. *Kingdom of Spain*, ECR, 2003, I-4581. In this case, Spain held a golden share requiring its prior approval to: (i) wind up, demerge or merge the company; (ii) dispose of or pledge assets or shareholdings necessary to attain the company's corporate purpose; (iii) deal in the company's share capital if such dealings would reduce the Spanish government's stake by 10% or more; and (iv) transfer shares if the transfer would result in a holding of at least 10% of the company's share capital, where the state's shareholding in the company has been reduced by at least 10% and has fallen below 50% or where the holding has been reduced to less than 15% of the share capital. The requirement of prior authorisation and the absence of any restrictions relating to public security on the exercise of these rights were deemed reasons to characterise the golden share as an unacceptable restriction on the free movement of capital.

72 ECJ, 28 September 2006, C-282/04 and C-283/04, *Commission* v. *Kingdom of the Netherlands* (publication pending).

73 *Ibid.* For an analysis of the ECJ's case law, see N. Thirion, 'Golden shares, droit des sociétés et marché intérieur', *Cah dr. Eur.*, 2003, 225.

74 See the Commission Staff Working Document of 22 July 2005, 'Special Rights in Privatised Companies in the Enlarged Union – A Decade Full of Developments', 8.

The same option exists for restrictions on actions by the offeree company's board to frustrate a takeover bid (see no. 1.43 of this report).

1.60 If a Member State decides to opt out of the breakthrough rules, it should nevertheless give companies with their registered offices in that state the opportunity to apply them (an opt-in). These companies can always subsequently decide to undo their decision and set aside the breakthrough rules (Art. 12(2) first para. Dir.). As the Directive does not provide for a partial opt-in, this will depend on national law.

A decision to opt in must be taken by the general meeting, in accordance with the provisions of law of the Member State where the company's registered office is located, to amend the company's articles of association. Thus, quorum and majority applicable for modifications to the articles of association will be required.

If a company decides to opt in, it must inform the supervisory authority of the Member State in which its registered office is located, as well as the supervisory authorities of the Member States in which its securities are admitted to trading on a regulated market or where admission to trading is sought (Art. 12(2) second para. Dir.). In the event of a request for admission for trading, the company must inform the supervisory authority designated in accordance with the Directive (see no. 1.12 of this report).

1.61 Finally, the Member States may, under the conditions determined by national law, exempt companies with their registered offices in those states, which have opted in, from applying the breakthrough rules, and thus authorise them to invoke the transfer and voting restrictions in their articles of association and contractual agreements (voluntary opt-out) if they become the target of a takeover bid by a company that 'does not apply the same articles as they do' or that is controlled, directly or indirectly, by such a company within the meaning of Article 1 of Directive 83/349 of 13 June 1983 on consolidated accounts[75] (Art. 12(3) Dir.). This means that the voluntary opt-out will be available when the bidder (or its parent) is not subject to identical or similar breakthrough rules and, in general, if a bid is launched by a company with its registered office in a Member State that has opted out and the company has not opted in.

The voluntary opt-out can also be used in the event of a takeover bid by a non-EU company if the latter (or its parent) is not subject to similar breakthrough rules (see no. 1.44 of this report).

In order for a company to voluntarily opt out and, consequently, apply any restrictions on the transfer of its securities and on its voting rights set forth in its articles of associations or in contractual agreements (which have been set aside as a result of the opt-in), the authorisation of the general meeting is required. This authorisation must be granted no earlier than eighteen months before the

75 *Official Journal* L 193 of 18 July 1983.

takeover bid is made public (Art. 12(5) Dir.) (with respect to publication, see no. 1.29 of this report).

1.62 The Member States shall take the necessary measures to ensure that the provisions applicable to such companies are disclosed without delay (Art. 12(4) Dir.). They must ensure that the public, in particular investors, is fully aware of the breakthrough rules and the extent to which they apply to a particular company.

Squeeze-out

Application

1.63 If, following a successful takeover bid, the offeror holds at least 90% of the voting capital and voting rights in the offeree company, it is entitled to force the holders of all remaining securities to sell to it at a fair price (Art. 15(2)(a) Dir.). In this case, national law may set a higher threshold, which, however, may not exceed 95% of the voting capital and voting rights (Art. 15(2) Dir.).

The same right applies if, following a takeover bid, the offeror has acquired, or has firmly contracted to acquire, securities representing at least 90% of the offeree company's voting capital and voting rights targeted by the bid, i.e., to which the bid is addressed (Art. 15(2)(b) Dir.).

National law should contain provisions allowing determination of the squeeze-out threshold (Art. 15(3) Dir.).

The squeeze-out right only applies to transferable voting securities within the meaning of the Directive (see no. 1.7 of this report). National law may, however, extend this right to other securities of the offeree company.

1.64 Squeeze-out implies that the holders of securities must transfer their securities if the offeror decides to exercise its right. They cannot refuse to do so. National law must provide for the automatic transfer of title upon exercise of a squeeze-out right.

The offeror need not exercise its squeeze-out right and is not automatically bound to launch a new bid if it has acquired more than 90% of the offeree company's voting capital and voting rights. The remaining securities holders, however, can always oblige the offeror to purchase their shares (see no. 1.69 of this report).

1.65 In the event the offeree company has issued more than one class of securities, national law may provide that the squeeze-out right can be exercised only for those classes in which the above threshold has been reached (Art. 15(3) Dir.). Two classes of listed securities will imply a separate listing of each class on the regulated market. These securities can be treated separately. The squeeze-out of only one class will result in a minority continuing to hold securities in the other