COMMISSION
OF THE
EUROPEAN COMMUNITIES

Directorate-general
Internal Market

Directorate
Approximation of laws:
companies, public contracts,
intellectual property,
fair competition,
general questions

XI/C/1

XI/56/74 - E

REPORT ON TAKEOVER AND OTHER BIDS

by Professor Robert R. PENNINGTON
Special Adviser of the EEC

COMMISSION
OF THE
EUROPEAN COMMUNITIES

Directorate-General
for the International Market

Directorate for the Approximation
of Laws : Companies and Firms,
Public Contracts, Intellectual
Property, Fair Competition,
General Matters

XI/C/1

XI/97/75-E

ADDENDUM TO DOCUMENT XI/56/74

Additional Article prepared by Professor Pennington for inclusion in the suggested draft Directive contained in his Report on Take-Over Bids.

Article 2 A

1. The governments of Member States shall ensure that their respective national laws and practices in respect of general bids conform to the principles set out in paragraph 2 of this Article. This requirement shall apply to legislation enacted in order to give effect to the specific requirements of this Directive set out hereafter and to all other relevant law, professional and other codes of conduct and practice and conduct and practices actually engaged in, in connection with general bids.

2. The principles referred to in paragraph I are as follows :

a) All persons to whom a general bid is addressed, or to whom an intended general bid will be addressed, shall be treated on a basis of equality; no special advantage may be given or offered only to certain of those persons, and advantages given or offered to the generality of those persons may not be withheld from any of them;

b) The offeror and the offeree company shall give to the persons to whom a general bid is addressed all the information which is necessary to enable them to evaluate the bid and to assess the consequences of accepting or rejecting it;

c) The directors of the offeror and the offeree company shall act exclusively in the interests of the holders of securities issued by their respective companies, and in the event of conflicts of interest between the holders of different classes of such securities they shall act in the interests of the holders of ordinary shares; the directors of the offeror and the offeree company shall not do or abstain from any act in order to promote their own personal or family interests or the interests of any other person;

d) The directors of the offeree company and collaborators with it shall not do any act or enter into any transaction which is likely to frustrate a general bid or an intended general bid of which they are aware, unless the act or transaction has previously been expressly approved by a general meeting of the offeree company; they may nevertheless recommend the rejection of the bid and publish information and argument in support of a recommendation for rejection;

e) The parties to a general bid shall not enter into real or feigned transactions in securities of the offeror or offeree company in anticipation of a general bid being made for securities of the offeree company or during the period for acceptance of such a general bid if the purpose of so doing is to raise or depress the quoted or dealing price of the securities in order to encourage the acceptance or rejection of the bid by the persons to whom it is or will be addressed.

PREFACE

Takeover bids are a phenomenon of the period since the Second World War. They appeared first in the United Kingdom and the United States during the late 1940s as a technique for gaining control of a company without the need to negotiate a merger of the traditional kind with its board of directors. In effect, the offeror or bidder appealed to the shareholders of the company in question over the heads of the incumbent directors, and sought by offering them a price for their holdings which was in excess of the current market price to reject the incumbent directors in favour of the offeror. The earliest bids were mostly of this contentious kind, but the simplicity of the method of transferring control over the offeree company by means of a bid for its shares soon induced offerors and boards of offeree companies who were in agreement as to the terms of the bid to use it as a convenient instrument for vesting control in the offeror. These agreed bids were economically nothing more than mergers carried out by a different legal form, and during the last fifteen years such bids have far outnumbered contentious bids.

Inevitably abuses and unfair practices have occurred in connection with takeover bids, and national legislation in some of the member states of the European Communities and professional rules and codes of conduct in others have been devised to counter them. Because of the comparative newness of the takeover bid as a financial operation, there is a considerable difference between the standards prescribed by this legislation or quasi-legislation, and in some member states there are no rules specifically directed to deal with the problems created by takeover bids. The bid technique is now employed on a greater or less scale in all the member states, and since it is likely to be employed increasingly in the future, it is appropriate that harmonisation measures should be taken now, based on the experience of the last twenty years.

Although in some member states reliance has been placed on professional rules and codes of conduct to restrain abuses and malpractices in connection with takeover bids, it has been widely recognised that fundamentally bids involve questions of law (such as the legal rights and duties of the parties and the civil and criminal remedies and sanctions available against them), and that eventually the professional rules and codes of conduct adopted in some member states will have to be clothed in legal form if they are to be made effective. This is not surprising, because a takeover bid by its very nature involves a series of legal transactions - an offer to acquire shares or bonds made to numerous persons, the transfer of those securities to the offeror, the payment of the price offered or the furnishingof the other consideration offered for the shares, such as an issue by the offeror company of its own shares or bonds. These transactions, moreover, are more complex than an individual sale of shares by one seller to one buyer, and the general rules of law governing sales are not adequate to ensure that the transactions are properly and fairly carried out. Indeed, the emphasis of the general law in seeking to protect the buyer against the seller benefiting unfairly by his better knowledge of the subject matter of the sale has to be inverted in the case of takeover bids, because the offeror, as intending buyer, always knows more about the offeree company and the value of its shares than many of its shareholders, who may have only small holdings and depend entirely on the company's annual accounts and the currently quoted stock exchange price of their shares when negotiating a sale.

It is difficult to classify the branch of commercial law under which takeover bids should be subsumed. Since banks often act as auxiliaries in making or defending bids, banking law may be involved, and since the shares bid for are usually quoted on a stock exchange and dealings in them during a bid are regulated by the stock exchange's

rules, the law of stock exchanges may enter the picture. Basically, however, takeover bids are concerned with questions of company law. The subject matter of the bid is shares or bonds of the offeree company, and the rights attached to them and the procedure for their transfer is in the domain of company law. The result of a successful takeover bid is that control of the company passes to the offeror, and the rights and powers he may claim and the duties he is under toward the company and any remaining shareholders are also the subject matter of company law. Agreed takeovers are commercially and economically the equivalent of mergers, and mergers are traditionally regarded as an aspect of company law, except with regard to their anticompetitive effects, which are regulated by the law governing monopolies and market domination.

The character of the law relating to takeovers largely determines its form and content. It will not suffice to set up an administrative authority with broad discretionary powers to impose requirements and prohibitions on the parties to takeover bids on an ad hoc basis. This approach may be satisfactory in controlling the activities of banking and financial institutions, which are licensed by the state to carry out operations with an immediate impact on the public and the national economy. Takeover bids, in contrast, are operations where private interests primarily need to be protected, and this can only be done by legislation which lays down precise substantive rules and prescribes a fairly detailed procedure. The objective character of such legislation makes it an extension of traditional company law. This is not, of course, to say that the regulation of the anticompetitive effects of mergers and takeovers can be treated in the same way. This is an entirely different problem from the regulation of takeovers as commercial operations, and is wholly outside the scope of this report and the proposals it contains.

REPORT ON TAKEOVER AND OTHER BIDS.

INTRODUCTION

1. The expression "takeover bid" and its French equivalent, "offre publique d'achat ou d'échange", have never been comprehensively defined by legislation, but are generally understood to mean an offer made to the existing shareholders of a company, or to one or more classes of such shareholders, to acquire their shares for a consideration in cash or securities (i.e. shares or bonds), the purpose of the offer usually being to transfer control of the company to the offeror, and the offer being made conditional upon sufficient offerees accepting it to ensure that control is acquired by the offeror. The offeror is invariably a company, though in law there is nothing to prevent a takeover bid being made by an individual. A bid may, of course, be made for such a small quantity of shares that even if the bid is successful, the offeror will not have control of the offeree company, but it is not then known as a takeover bid in Britain. Such a bid must inevitably be a partial bid (i.e. a bid for no more than a fixed number of shares), but it does not, of course, follow that a partial bid will never result in the offeror gaining control of the offeree company. A bid made by an offeror already in control of the company whose shares are the subject of the bid is usually considered to be a takeover bid, although logically such a bid should be called a consolidation bid(a). In this Report takeover bids, consolidation bids and partial bids (whatever their actual or potential result) are collectively referred to as general bids. A company whose shares are the subject of a general bid is referred to as the offeree company.

2. If a takeover is carried out with the support of the directors of the company whose shares are bid for (hereafter referred to as "the offeree company"), the result is for practical purposes similar to a merger, since the undertakings of both the offeror and the offeree

(a) This expression originated in the United States, but is gaining acceptance in the United Kingdom as well.

companies are brought under unified control by the initiative of their respective boards of directors. Often, however, a takeover bid is resisted by the directors of the offeree company, either because they wish to continue managing the company themselves instead of making way for directors appointed by the successful offeror, or because they believe that the consideration offered for the shares bid for is inadequate and will be improved by the offeror in consequence of their opposition. In this situation the only way the offeror can gain control of the offeree company is by addressing an offer directly to its shareholders; the opposition of the board precludes a merger being carried out.

3. The consideration offered in connection with a general bid is either a cash purchase price or an allotment or transfer of shares or bonds of the offeror company or one of its associated companies, or a combination of such considerations. If a cash bid is made, the price offered is always more than the current quoted price of the shares in question (if they are quoted on a stock exchange) so as to induce the recipients of the bid to accept it instead of selling their shares on the stock exchange. In the case of a bid which offers an allotment of new shares or bonds, or a transfer of existing securities, with or without a cash supplement in exchange for the offeree company's shares, the market value of the securities offered plus the cash supplement (if any) is always higher than the current quoted price of the offerees' shares for the same reason. Because the market value of securities is primarily dependent on their yield or the earnings attributable to them, the immediate effect of a bid valuing the offeree company's shares at more than their quoted price is to depress the quoted price of the offeror company's own shares, and this has to be taken into account by the persons to whom the bid is addressed along with more long-term considerations, such as the future earnings and growth prospects of both companies.

4. If an offeror company offers to allot new securities in exchange for the offerees' shares, the form of the new securities and the rights attached to them is determined by the offeror company, and the recipients of the bid and the directors of the offeree company can seek to influence the terms offered only by bargaining and, if necessary, inducing the offeror to make a revised bid. Often the new securities offered are bonds, which will, of course, give the offerees security for their capital and ensure a fixed income, but will deprive them of any right to vote at general meetings of the offeror company or to participate in any future increase in the value of its ordinary shares. Because offerees are often unwilling to exchange their existing shares for bonds, it has become common for offeror companies to offer convertible bonds by general bids, the conversion price usually being calculated on the assumption that the offeror's ordinary shares will rise considerably in value before the right to convert becomes exercisable(b). From the offerees' point of view the most satisfactory kind of bid is one which offers an immediate allotment of the offeror company's ordinary shares, for the offerees are in most cases ordinary shareholders themselves(c), and in comparing the value and prospects of their existing holdings with ordinary shares offered in exchange, they are comparing like with like, and are more easily able to arrive at the best decision in their own interests. In bids for British companies, however, the new ordinary shares do not always carry voting rights (there being no prohibition on the issue of non-voting shares in British law) and the offerees must then bear in mind that if they accept non-voting shares they will have no influence over

---

(b) The conversion premium is often an over-optimistic estimate of the likely growth in the value of the offeror's ordinary shares, and is used as a means to persuade the offerees to accept the bid in the belief that the estimate will prove correct.

(c) If a takeover bid is made for the ordinary shares of a company which has issued preference shares, a simultaneous bid is sometimes made for the preference shares as well so as to make the company a wholly-owned subsidiary of the offeror. The consideration offered for the preference shares is invariably cash or bonds; for fiscal reasons the offeror company does not issue new preference shares in exchange, and it will not issue ordinary shares, carrying voting rights, for this would increase the fraction of its equity capital held by former shareholders of the offeree company, and might endanger the control enjoyed by the existing majority shareholders of the offeror.

the future conduct of the offeror company's undertaking even though they hold a substantial or even the greater part of its equity shares.

5. The difficulties of shareholders to whom new securities are offered in exchange for their shares instead of a cash bid being made are often eased by the offeror giving the shareholders an option to take cash or securities, though the amount of the cash offer is always less than the market value of the securities. Under British practice the cash alternative is for fiscal reasons provided by the merchant bank which represents the offeror offering to purchase the securities offered by the offeror from a shareholder of the offeree company at a fixed price if the shareholder notifies it of his intention to sell them by a certain date. The shareholder who wants cash then accepts the offeror's bid and at the same time accepts the merchant bank's offer to buy the securities which the offeror will issue to him. This arrangement by the merchant bank is known as underwriting, but it should not be confused with the underwriting of an issue of securities offered by a company to the public for subscription in cash. When a bid is underwritten, it is the accepting shareholder, not the offeror company, who receives the cash price from the underwriting bank.

6. If two or more offeror companies make contemporaneous takeover bids for control of a company, the offerees will, of course, wish to accept the bid which is most advantageous to themselves. To preserve their liberty of choice and to induce the bidders to revise their bids upwards competitively, the offerees will defer accepting any bid until the latest possible time before the period for accepting the bids closes. An offeree who accepts a bid as soon as it is made thereby contracts to transfer his shares at the price offered, and he cannot retract his acceptance if a more favourable bid is made by another offeror. On the other hand, the offeree's early acceptance will not bind the offeror

absolutely, because the offer document will expressly make the offer to acquire the offeree's shares conditional on acceptance of the bid by the holders of at least 51 per cent, or 75 per cent, or 90 per cent of the shares held by all the offerees (depending on the degree of control the offeror requires), or such smaller percentage as the offeror is willing to take. If a subsequent, more favourable bid is made successfully by another offeror, the first offeror will in reliance on this condition decline to take any of the shares in respect of which it has received acceptances, but the offeree who has accepted the first bid too early cannot safely accept the later one until the first offeror withdraws, for by accepting the later bid the offeree may commit himself to transfer twice the amount of his holding, and so may make himself liable in damages for breach of contract to one or other offeror. This is because the acceptance of a bid creates a binding contract between the accepting shareholder and the offeror, and not merely the possibility of such a contract coming into existence in the future if neither party has resiled from it before the condition as to the number of acceptances has been fulfilled(d).

7. In theory a general bid could be made for the convertible bonds of an offeree company instead of, or in addition to, its shares carrying voting rights. If the bid were successful as a takeover bid, the offeror company would convert the bonds into shares carrying voting rights and exercise control over the offeree company by aggregating those voting rights with the voting rights attached to shares already held by it. A takeover in such a form has not yet been attempted in any of the member states, but nevertheless is a practical possibility.

(d) Ridge Nominees Ltd. v. I.R.C. [1961] 3 All E.R. 1108; [1962] Ch. 376, where the English High Court so decided. In French law the contract for sale of the shares is effective immediately under art. 1583 of the Civil Code, but subject to a suspensive condition so far as the offeror's obligations are concerned. In German law the contract created by an offeree accepting a bid is subject to a suspensive condition, but the offeree's obligations are nevertheless binding on him retrospectively when the condition is fulfilled. (BGB §§ 158 (1) and 160 (1)).

8. In France general bids for the shares of companies which have a stock exchange quotation or whose whose shares are dealt in on a stock exchange are regulated by law, and in Belgium and Luxembourg bids for quoted and unquoted shares or bonds of public companies are similarly regulated. In France the relevant legislation comprises the Arrêtes ministeriels of 21 January 1970, 22 February 1972 and 6 March 1973, by which the Minister of Economics and Financial Affairs added articles 68 to 96 to Title II of the Règlement général de la compagnie des agents de change, and this legislation has been supplemented by the Décision générale of the Commission des Opérations de Bourse dated 13 January 1970 establishing a code of good conduct to be observed by parties to bids and their agents, which, despite its name, is supported by legal sanctions. In Belgium takeover bids are governed by the Arrêté royal sur le contrôle des banques of 9th July 1935, article 26 of which was amended by the Law of 10th June 1964 so as to extend the powers it conferred on the government appointed supervisory authority, the Commission Bancaire, in respect of new issues of shares and bonds to enable it to deal with all kinds of general bids as well. In Luxembourg the corresponding legislation is the Arrêté grand ducal concernant les opérations de banque et de credit of 19 June 1965.

9. In Italy and the Netherlands general bids are regulated by codes of conduct which do not have the force of law, but are enforced only by professional sanctions. The relevant Code of Conduct in Italy(e) was issued by the Milan Stock Exchange in December 1971, and applies only to companies whose shares are quoted or dealt in on that exchange, although it also establishes a pattern of conduct which could be adhered to by brokers who are members of other exchanges and by companies whose shares

(e) Codice di compartamento per le offerte pubbliche di acquisto di titoli.

are either quoted on other stock exchanges or are not quoted at all. In the Netherlands the Social and Economic Council (a body with semi-official status representing business interests) issued Rules of Conduct in respect of Mergers and Takeovers on 25th June 1971(f). These rules apply to general bids for shares of companies which are quoted or regularly dealt in on a Dutch stock exchange, and the rules extend to the parties to the bid and their agents.

10. The United Kingdom law and practice in respect of takeover and other bids is contained partly in legislation, namely the Prevention of Fraud (Investments) Act, 1958, and regulations made under it, and partly in the rules of the United Kingdom Stock Exchange and in the City Code on Takeovers and Mergers, both of which are reinforced by professional and moral sanctions but which do not form part of the law. In fact the scope of the British legislation is quite narrow, since it applies only to bids made by or through persons other than members of the United Kingdom Stock Exchange and the leading merchant banks, in other words, to bids made by outside brokers or by offeror companies direct, and these are rare. The Stock Exchange rules, on the other hand, apply to all quoted companies by or for which general bids are made, and the City Code applies to all general bids, whether the offeror or offeree companies have a quotation for their shares or not, but not to bids for the shares of private companies.

11. There is no legislation or professional or other codes of conduct in respect of takeover bids in Germany, Ireland or Denmark, but the former Dublin and Cork stock exchanges now form part of the United Kingdom

(f) Gedragsregels in acht te nemen bij het voorbereiden en tot stand brengen van Fusies, Overnemingen en Openbaare Biedingen.

Stock Exchange, and bids in respect of companies quoted on them are therefore subject to the rules of the Stock Exchange and the City Code on Takeovers and Mergers.

12. There is little published comparative material on the regulation of takeover and other bids under the law and practice of the member states of the European Communities. It will, therefore, be useful to examine the existing law and practice in some detail before going on to establish what common features the existing national systems contain and proposing steps for their harmonisation. British law and practice is undoubtedly the most developed in this field because of the longer experience of takeover and other bids in the United Kingdom. It will, therefore, be examinied first.

UNITED KINGDOM LAW AND PRACTICE

The legal rules in respect of general bids

13. A general bid is always made by means of an offer document, identical copies of which are sent to the shareholders to whom the offer is addressed. The offer document is not a prospectus, even if it proposes that the offeror company shall issue new shares or bonds to the offerees in exchange for their shares, for a document is a prospectus only if it offers new shares or bonds for subscription in cash(g). Consequently, the offer document need not contain the information required in a prospectus by the Companies Act, 1948, and the procedural rules in the Act relating to the registration and publication of prospectuses and the treatment of applications for shares or bonds made in response to

---

(g) Government Stock and Other Securities Investment Co. Ltd. v. Christopher, [1956] 1 All E.R. 490.

prospectuses do not apply. Nevertheless, an offer document is an invitation to the shareholders to whom it is addressed to dispose of their shares, and since copies of it in identical form are circulated to them, the document falls within the statutory regulation of investment circulars imposed by the Prevention of Fraud (Investments) Act, 1958(h). Consequently, copies of the offer document can be sent out only by a member of the United Kingdom Stock Exchange or by a member of an association of security dealers recognised by the Department of Trade and Industry, or by a dealer in securities licensed or exempted from licensing by the Department(i), or by the offeror company itself/or with the permission of the Department(j). In practice offer documents are almost always sent out by merchant banks which are exempted dealers, or by stockbrokers who are members of the United Kingdom Stock Exchange so that occasions rarely arise when the offeror must seek the Department of Trade's approval for the communication of a bid to the offerees.

14. Regulations made under the Prevention of Fraud (Investments) Act, 1958, specify the information which must be included in offer documents circulated in connection with takeover bids and in recommendations to accept takeover bids sent out by directors of the offeree company(k). For the purpose of these regulations a takeover bid is defined as an offer made to two or more holders of shares or bonds of the offeree

---

(h) Prevention of Fraud (Investments) Act, 1958, s.14 (1).
(i) A licensed dealer is a dealer in securities who is not a member of a recognised stock exchange or association of dealers in securities and who therefore requires a government licence to carry on business. An exempted dealer is one which would normally require such a licence, but because its business is primarily not concerned with dealing in securities it is granted exemption from having to apply for a licence. Most merchant banks, insurance companies and investment trust companies are exempted dealers.
(j) Prevention of Fraud (Investments) Act, 1958, s. 14 (3) (i) and (ii).
(k) Licensed Dealers (Conduct of Business) Rules, 1960, paras. 1 (d), 3 and 5 and First, Second and Third Schedules.

company which is calculated to result in any person acquiring control of that company, and control is defined as direct or indirect control over the majority of the votes which may be cast at general meetings of the offeree company, leaving out of account voting rights which may be exercised only in specified contingencies (l) or in respect of specified business (m) (n). An offer document is therefore not subject to the regulations if it is issued by an offeror company which already holds shares of the offeree company carrying voting control, and the purpose of the offer is to acquire the remaining shares or those of them which carry voting rights (i.e. a consolidation bid). Such a document is nevertheless an investment cirular, and the restrictions on its distribution dealt with in the preceding paragraph apply.

15. The regulations in respect of takeover bids apply in law only to circulars issued by dealers in securities licensed under the Prevention of Fraud (Investments) Act, 1958 (o). Nevertheless, the Department of Trade and Industry requires the regulations to be observed as a condition of giving its consent to the circulation of offer documents by persons other than licensed and exempted dealers and members of the United Kingdom Stock Exchange or recognised associations of security dealers, and persons in these last two categories do conform to the regulations voluntarily. Moreover, the Stock Exchange requires that offer documents issued by a quoted company, or in connection with a bid for the shares or debentures of a quoted company, should contain substantially the same information as an offer document issued by a licensed dealer (p). The result is that offer documents are standard in form, by whomsoever issued.

(l) E.g. voting rights exercisable by preference shareholders only if preference dividend is in arrear.
(m) E.g. voting rights exercisable by preference shareholders only on resolutions affecting their rights as such.
(n) Licensed Dealers (Conduct of Business) Rules, 1960, para. 18 (1).
(o) The regulations were made under s.7 (3) of the Act, which extends only to licensed dealers.
(p) Admission of Securities to Listing, Chapter 5, paras. 1 and 3. The Stock Exchange's requirements apply even though the bid, if successful, will not result in the offeror acquiring control of the offeree company.

16. An offer document subject to the regulations in respect of takeover bids must:- (a) set out the most recent middle market quotation of the shares or other securities bid for if they are quoted on a stock exchange, together with at least six other such quotations over the last six months, and if the offeror offers shares or bonds of another company in exchange, similar information in respect of those securities; (b) if the securities bid for or offered in exchange are not quoted on a stock exchange, set out at least six prices at which the securities have been sold during the preceding six months so as to give a fair view of fluctuations in price during that period; (c) state that the offer is open for acceptance for at least twenty-one days, and if it is conditional on acceptance by the holders of a certain minimum number of the securities bid for, it must also specify what that minimum is and the latest date by which the offeror may declare the offer unconditional and binding; (d) disclose the description and amount of any securities already held by the offeror or by nominees for the offeror in the offeree company; (e) disclose any payments or benefits to be given to any director of the offeree company as compensation for loss of office or in consideration of his retirement from office, and the offer document must also reveal whether any other agreement or arrangement made with any such director is conditional on the offer being accepted, or accepted to a certain extent; (f) state what form the consideration for the transfer of the securities bid for will take and within what period it will be received by persons who accept the bid; (g) disclose whether the offeror is aware of any material change in the financial position of the offeree company, or the company whose securities are offered in exchange for securities of the offeree company, since the date of their latest annual accounts; (h) set out the same information about any company whose securities are offered in exchange for the securities bid for as would be required in a prospectus issued by that company, or alternatively, if the securities

offered are unquoted, give information about that company's authorised and issued share capital and the classes into which it is divided, about issues of its shares since the end of its last financial year, about reorganisations of its capital during its last two financial years, about its loan capital and its directors and, whether the securities offered in exchange are quoted or unquoted, the amount of the company's profits or losses and the rates and amounts of its dividend distributions in each of its three preceding financial years; and (i) either be accompanied by copies of the memorandum, articles and last annual accounts of any company whose securities are offered in exchange for those bid for, or offer inspection of those documents at a convenient time and place(q). No takeover bid may be made conditional on the offerees consenting to directors of their company receiving payments or benefits as compensation for loss of office or in consideration of retirement(r). If the offer relates to only part of the issued securities of the class in question, it must nevertheless be made to all the holders of securities of that class, and if acceptances are received in respect of more securities than the number bid for, there must be provision for scaling down the acceptances rateably so that no accepting offerees are treated preferentially(s).

17. The terms of a takeover bid must be communicated to the directors of the offeree company at least three clear days before it is despatched to the offerees(t). If the directors send a recommendation to the persons to whom the bid is addressed to accept it, they must also disclose the amount of their own holdings in the offeror and offeree companies; whether they intend to accept the offer in respect of their own holdings;

(q) The Licensed Dealers (Conduct of Business) Rules, 1960, First Schedule, Parts I and II.
(r) Ibid., First Schedule, Part II, para 1 (3).
(s) Ibid., First Schedule, Part II, para. 1 (4).
(t) Ibid., para. 1 (d) (ii).

whether there are arrangements for compensating any of the directors for loss of office, or for making any payment or giving any benefit to them for retiring from office, or any other arrangements with any of the directors which are conditional on the success of the bid; whether any director has an interest in any contract with the offeror; and finally, any information the directors have as to sales of the securities bid for during the last six months (if they are unquoted) and as to changes in the financial condition or prospects of the offeree company since the date of its last annual accounts(u).

18. If an offer document or a recommendation circulated by the directors of the offeree company in connection with any general bid contains a false or misleading statement made knowingly, or if such a document omits information known to the persons issuing it which the law requires it to contain, any shareholder of a class to whom the bid is addressed may apply to the court for an injunction to restrain the offeror from proceeding with the bid or declaring it unconditional(v). However, an injunction will not be issued merely because the directors of the offeree company recommend acceptance of the bid despite the advice of the company's financial advisers that the price or consideration offered is inadequate, unless it is shown that the directors acted in bad faith(v). Moreover, even if an injunction is issued, it will relate only to the bid in connection with which the offending document was circulated, and so there will be nothing to prevent the withdrawal of that document and the making of a fresh bid based on a revised offer document or director's recommendation.

(u) The Licensed Dealers (Conduct of Business) Rules, 1960, First Schedule, Part II, para. 5 and Third Schedule.
(v) Gething v. Kilner, [1972], 1 All E.R. 1166.

19. It is a criminal offence punishable by up to seven years imprisonment for a person to issue an offer document or other document recommendint the acceptance or rejection of a general bid if it contains a false, misleading or deceptive statement, promise or forecast made knowingly or recklessly, or if to his knowledge it dishonestly conceals material facts(a).

The Stock Exchange's Requirements in respect of Takeovers

20. If a general bid is made by a company whose shares or bonds are quoted on the United Kingdom Stock Exchange or for the equity shares(b) carrying voting rights of such a company, the rules of the Stock Exchange require certain rules to be complied with in addition to those in the Licensed Dealers (Conduct of Business Rules), 1960.

21. The offer document in such cases must set out in addition to the statutory information:- (a) a statement whether the shares sought to be acquired will be transferred to the offeror cum or ex div; (b) particulars of the rights in respect of dividends, interest, capital and redemption attached to shares or bonds offered in exchange for the shares sought to be acquired; (c) if the offer is a partial bid, a statement of the reasons why an offer is not made to acquire all the shares of the class which is bid for; (d) particulars of all transactions in shares of the class bid for which the offeror company or its directors or any person acting in concert with it have engaged in during the previous twelve months; (e) particulars of any agreement or arrangement by the offeror to transfer any shares acquired by it under the offer to another person;

(a) Prevention of Fraud (Investments) Act, 1958, s. 13 (1).
(b) Equity shares are shares which carry the right to a dividend of an indefinite and variable amount out of the residual profits of the company after all interest on bonds and fixed dividends on preference shares have been paid. They therefore comprise primarily ordinary shares, but they also include preferred ordinary and deferred shares.

(f) a statement of the offeror's intentions in respect of the carrying on of the offeree's business and the continued employment of its employees if the bid is successful, including its intentions to make major changes in the offeree's business (if any) and the commercial reasons for doing so; (g) if the offer is of an exchange of securities of the offeror for the shares sought to be acquired, particulars of the offeror's business, its net profits (before tax) and the rates of dividend paid by it in each of its preceding five financial years, the financial advantages which shareholders who accept the offer will enjoy, and a statement of the offeror's assets and liabilities in its most recent annual accounts, together with particulars of any material changes in its business or financial position since the date of those accounts; and (h) a statement of any variation in the remuneration of the offeror's directors which will take place if the bid is successful(c).

22. The Stock Exchange rules also require experts' reports or opinions in offer documents or other circulars issued in connection with a bid to be supported by a statement in the document or circular that the expert has given and has not withdrawn his written consent to the inclusion of his report or opinion(d). This is to ensure that the expert is made legally liable to shareholders who accept the bid if he report or expressed the opinion fraudulently or negligently. Finally, the rules oblige the offeror to have available for public inspection at an address in the City of London while the offer is current a copy of its memorandum and articles, copies of its audited accounts for its two most recent financial years, and the originals of any professional valuation of assets referred to in the offer document and copies of all material contracts connected with the bid(e).

(c) The Admission of Securities to Listing, Chapter 5, para. 3.
(d) Ibid., para. 4.
(e) Ibid., para. 5.

The City Code on Takeovers and Mergers

23. Takeover bidders and directors of companies who resist takeover bids have often resorted to tactics other than simple persuasion of the persons to whom the bid is addressed to ensure that bids succeed or fail. Bidders have supported their efforts to gain control of the offeree company by buying shares of the classes bid for on the stock exchange or by private negotiation, and have maintained the market price of the offeror company's own shares by their directors buying them on the market so as to prevent the value of the new shares offered to the offerees from falling. Directors of offeree companies have resisted takeover bids by procuring alterations of the company's memorandum or articles of association so as to increase the directors' voting power in respect of their own shares, by exercising pre-emption rights conferred by the articles over the shares of offerees who accept the bid, or by allotting new voting shares of the company to friends of the directors so as to prevent the offeror company from obtaining control of the company. The legal effectiveness of such tactics depends on the rules relating to the tactic employed, and there is no overall rule which outlaws them simply because they unfairly promote or impede a takeover bid. Except where an alteration of the company's constitution is involved, the courts will not interfere to set aside what directors have done to defeat a takeover bid if a general meeting of shareholders of the company approve their actions(f). At such a meeting, however, votes may not be cast in respect of shares which have been allotted by the directors for the purpose of defeating the bid(f).

24. The absence of any specialised or detailed legal regulation of

---

(f) Hogg v. Cramphorn Ltd. [1966], 3 All E.R. 420; [1967] Ch. 254; Bamford v. Bamford [1969] All E.R.969; /Ch. 212.

takeover procedures and tactics has been made good to a large extent by the City Code on Takeovers and Mergers, which has no legal force, but is voluntarily observed by merchant banks and stockbrokers concerned in takeover transactions, and is backed by the disciplinary sanctions administered by the Stock Exchange and the Issuing Houses Association over their members. The Code was first published in March 1968, and was the product of a working party organised by the Bank of England in the previous October. The members of this working party were appointed by the Issuing Houses Association and the Accepting Houses Committee (the organs of the merchant banks), the Association of Investment Trusts, the British Insurance Association, the London Clearing Bankers' Committee (the organ of the joint stock banks), the Confederation of British Industry, the Stock Exchange and the National Association of Pension Funds. The observance of the Code by companies active in the takeover field and their professional advisers was to be supervised by a panel representative of the organisations which had joined in drafting it. The Code was revised in the light of experience after it had been in operation for less than a year, and it was re-published in April 1969. A third edition was published in February 1972 and is currently in force. The enforcement of the Code is entrusted to a staff of permanent officials headed by a Director-General, but there is a right of appeal against his rulings to the supervisory panel, and complaints made by outsiders about the conduct of parties to takeover and other general bids are dealt with by the supervisory panel in the first instance. If the supervisory panel decides that a party to a bid or a merchant bank or stockbroker involved in bid proceedings has infringed the Code, that person may appeal against the panel's findings to an Appeal Committee, whose chairman is at present a retired Lord of Appeal.

25. The City Code begins with a number of definitions, which curiously do not include the definition of a takeover bid, although it does contain a definition of an "offer". It is clear from this definition and from the rules of the Code that the Code is intended to apply to an offer to acquire the whole or part of any class of equity shares of a company if they carry voting rights, and its application is not conditional on the offeror company seeking to acquire, or already having, a holding which gives it control of the offeree company. Following the definitions, the Code lays down general principles for the conduct of bids, namely that the directors of both the offeror company and the offeree company must act in the best interests of their own shareholders(g), that all shareholders of the offeree company shall be treated similarly and shall all be given the same full information to enable them to judge whether it is in their individual interests to accept the bid(h), that rights of control over the offeree company must be exercised in good faith(j), that a general bid for shares following selective purchases by the offeror must not be on less favourable terms than those purchases(k), that all parties shall use every endeavour to prevent the creation of a false market in the shares of the offeror or offeree company(a), that the directors of an offeree company shall not take action which may frustrate a bona fide bid without the approval of a general meeting of the offeree company(b), and that all documents sent out in connection with a bid shall be drafted with the same standards of care as if they were a prospectus within the meaning of the Companies Act, 1948(c). It is the task of the supervisory panel to see

(g) Code, General Principles, paras. 2 and 11.
(h) Ibid., paras 3, 8 and 10.
(j) Ibid., para. 7.
(k) Ibid., para. 9.
(a) Ibid., para. 5.
(b) Ibid., para. 4.
(c) Ibid., para. 12.

that these principles are observed in the spirit as well as in the letter, and it has by its decisions established a growing body of "case law" which supplement the specific rules of the City Code by inhibiting ~~xxx xxfxdx~~ new unfair practices as and when they arise(d).

26. The rules in the second part of the City Code give more precise content to the general principles the Code lays down, but these rules in no way limit the application of the general principles to situations which are analogous to, or slightly different from, those covered specifically by the rules. In other words, the general principles underlie the rules, and so it is never possible to deduce a negative consequence from the rules by applying the principle expressio unius est exclusio alterius.

27. The rules in the Code do not prescribe the contents of offer documents and other bid circulars in detail, since they are already governed by the Licensed Dealers (Conduct of Business) Rules, 1960, and the Stock Exchanges requirements. The Code does, however, impose additional requirements with regard to profit forecasts and assets revaluations in both offer documents and recommendations by the board of the offeree company to its shareholders to accept or reject a bid. The accounting basis of profit forecasts and the basis of assets revaluations must be stated, and the basis used must be reported on by the company's auditors or by the consultant accountants engaged in connection with the bid, or in the case of revaluations, by independent professional experts; additionally, profit forecasts must be reported on by the company's financial advisers, a useful restraint on excessive optimism by directors of the offeror when the bid offers an exchange of shares or by directors of the offeree company who are fighting a bid(e). The Code requires an

(d) The rulings of the panel are summarised in its annual reports commencing in 1969.

(e) Code, Rules, para. 16.

offer document to disclose the size of the shareholdings of the offeror in the offeree company, and also the total number of shares in the offeree company and (in the case of a bid offering an exchange of shares) in the offeror company owned or controlled by the directors of the offeror company and by persons acting in concert with it, together with the names of such persons(f). This requirement was imposed in view of the practice of "warehousing" shares of the offeree company before takeover bids are made, that is, persons sympathetic to the offeror acquiring shares in the offeree company with the offeror's approval in order to strengthen its bargaining position without this being reflected in the offeree company's register of members. The circular sent out by the offeree company recommending acceptance or rejection of the bid must reveal correspondingly the size of the shareholdings of the offeree company in the offeror, and of the directors of the offeree company in the offeror and the offeree companies, and of persons acting in concert with them in the offeree company, and whether any such directors or other persons intend to accept the bid in respect of shares held by them(f). Additionally, both the offer document and the circular containing the offeree company's recommendations in respect of a bid must disclose dealings in shares of the offeror and offeree companies by persons whose holdings are subject to disclosure within one year before the announcement of the offer or between that time and the posting of the offer document, and the dates and prices of such transactions must also be stated(f).

28. The Code also requires an offer document which offers a cash consideration(g) as the whole or part of the price for the offeree company's shares, [illegible]

(f) Code, Rules, para. 17. References to shares in this paragraph include convertible [illegible] bonds.

(g) Throughout the Code, references to a cash consideration include consideration in the form of a debt instrument (i.e. a bond or an unsecured note) maturing for payment within three years.

~~shares~~, to contain a confirmation by the offeror company's financial advisers that the necessary cash is or will be available(h). Moreover, to prevent the abuse of effecting a takeover by cash purchases in the market behind the shield of an offer document which offers the issue of new securities of doubtful value by the offeror in exchange for the offeree's shares, an offeror company which purchases a total of more than 15 per cent of the issued shares of the class bid for within one year before the offer is announced, or between that time and the date when the offer becomes unconditional, must either offer cash for the shares sought to be acquired or must offer a cash alternative to the securities offered in exchange for those shares(i). In other cases the supervisory panel may impose this requirement to ensure equality of treatment between shareholders to whom the offer document is addressed, and conversely, in cases where the requirement would normally apply, it may absolve the offeror company from it(i). Where a cash offer or the offer of a cash alternative has to be made by the offer document, it must not be less than the highest price paid by the offeror company for any of the shares during the period mentioned above, unless the supervisory panel permits a lower offer to be made because of a subsequent change in the value of the shares(i).

29. Recommendations for acceptance or rejection of the bid sent out by the offeree company's directors must contain details of the directors' service contracts with it and its subsidiaries if they have more than twelve months to run, and except where the bid is for cash, the recomendation must show how directors' emoluments will be affected if the bid is successful(k). Finally, to enable the supervisory panel to do its

---

(h) Code, Rules, para. 18.
(i) Ibid., para. 33.
(k) Ibid., para. 19.

work, copies of all public announcements made and documents and circulars issued in connection with a bid must be sent to the panel at the same time as they are made or despatched(l); this is in addition to the requirement of the Stock Exchange that drafts of such circulars must be submitted to it before they are sent out(m).

30. The Code regulates closely the procedure to be adopted in making a bid. The bid must be notified first to the board of the offeree company or its advisers(n), and if the bid is made by an agent, the principal's identity must be disclosed(o). Subject to satisfying themselves that the offeror company will be able to provide the consideration offered by the bid(p), the board of the offeree company must immediately publish a press notice and circularise its shareholders in respect of a firm bid notified to it(q). If approaches are made which may lead to a bid, the press notice and circulars need not be released by the offeree company's board until there is agreement between the offeror and offeree companies' boards as to the basic terms of an acceptable offer (presumably, this means as soon as the price and form of the consideration to be given by the offeror have been settled), but if there is any "untoward movement" in the quoted prices of the offeror or offeree company's shares (indicating a leak of information about the negotiations), the press notice and circulars must be released immediately(q).

31. Partial bids for equity shares are castigated by the Code as being generally undesirable, and in special cases where they are considered justifiable, the supervisory panel's consent to the bid must be obtained before it is made and the offeror must make a pro rata offer to

(l) Code, Rules, para. 20.
(m) Admission of Securities to Quotation, Chapter 5, para. 2.
(n) Code, Rules, para. 1.
(o) Ibid., para. 2.
(p) Ibid., para. 3.
(q) Ibid., para. 5.

all the shareholders of the class concerned(r). Except in special circumstances a partial bid may not be made unless the bid, if successful, will result in the offeror company holding or controlling more than half of the voting rights at general meetings of the offeree company(r). Moreover, if the offeree company has more than one class of equity shares, a bid for one class must be accompanied by a comparable offer for the other classes unless the supervisory panel gives a dispensation, but when a bid for equity shares is made the offeror is under no obligation to bid for the non-equity shares of the offeree company as well(s).

32. The City Code requires a bid to be open for acceptance for at least twenty-one days after the posting of the offer document(t), and if the bid is revised (e.g. by an increased price being offered), the revised bid must be open for at least fourteen days after the circulars containing it are posted(u). No bid may be withdrawn without the supervisory panel's consent, unless a higher competing bid is subsequently made(a); this departs, of course, from the legal rule that the offeror may retract its bid at any time before it has been accepted. The general principles of the Code requires that the same original or revised bid price must be offered to all the shareholders of the offeree company(b), and the rules provide additionally that if the offeror purchases shares of the class bid for on the market at a higher price than the bid price during the period between the announcement of the bid and its closing date or its later becoming unconditional or lapsing, the offeror must pay

---

(r) Code, Rules, para. 27.
(s) Ibid., para. 21.
(t) Shares of United Kingdom companies are invariably in registered form, and all companies are required to supply a list of the names, addresses and holdings of their shareholders to any person who is prepared to pay the appropriate fee (Companies Act, 1948, s. 113 (2)). Consequently, offer documents are not published in the press (like prospectuses), but copies of them are sent by post to the shareholders concerned.
(u) Code, Rules, para 22.
(a) Ibid., para. 8.
(b) Code, General Principles, para. 8.

the shareholders who accept the bid a price equal to the highest price paid for such purchases, if it exceeds the bid price(c).

33. Except where the supervisory panel gives a special dispensation, the offer document containing a bid for sufficient shares to give the offeror voting control of the offeree company must state that the bid will become unconditional or may be declared unconditional by the offeror, when the period for accepting the bid closes, only if the shares in respect of which the offeror has received acceptances together with other shares held by the offeror in the offeree company, will confer on the offeror more than 50 per cent of the voting rights attributable to the offeree company's issued equity shares (including shares in respect of which subscription or conversion rights are exercisable during the period the offer is open), and the offeror must act in conformity with this statement(d). If a bid is made for equity shares, the offeror may not declare it unconditional without a special dispensation from the supervisory panel, unless by reason of acceptances of the bid or otherwise the offeror will control more than 50 per cent of the unrestricted voting rights exercisable at general meetings of the offeree company(d). The rules in the last two sentences are cumulative, and so if a bid is made for the whole or any class of the offeree company's equity shares (whether or not the bid extends to non-equity shares as well, and whether or not such non-equity shares carry voting rights), the offeror cannot declare the bid unconditional unless at the close of the bid the offeror controls more than 50 per cent of all the votes which can be cast at a general meeting of the offeree company and also more than 50 per cent of the votes which can be cast in respect of equity shares of the offeree.

(c) Code, Rules, para. 32. If the bid offers securities in exchange for the shares bid for, the bid price is taken as being the middle market quoted price of the securities offered in exchange on the date when shares of the offeree company are purchased on the market.

(d) Ibid., para. 21.

34. An offeree may withdraw his acceptance of a bid if it has not become or been declared unconditional at the expiration of twenty-one days after the last date for accepting the bid according to its terms, provided the bid has not become unconditional before the withdrawal is made(e). No bid (whether revised or not) may become or be declared unconditional more than sixty days after the initial offer is posted, but the supervisory panel may extend this period if a competing bid is made(e). A new offer may not be made after the sixty days have expired unless the supervisory panel consents(e). If a bid has become or is declared unconditional, the offeror must extend the period for late acceptances by the remaining shareholders for at least fourteen days from the date when the bid would otherwise have expired, unless the offeror has notified the shareholders of the offeree company at least ten days beforehand that there will be no extension; such notification could be given in the original offer document, but it cannot be given in any case where there are competing bids(f). Finally, to ensure that bids are not declared unconditional when the percentage of acceptances stipulated in the offer document has not been obtained by the offeror, the offeror must announce and notify the Stock Exchange by 9.30 a.m. on the day following the expiration of the original or any extended period for acceptance, or the day following any earlier or later date on which the bid becomes unconditional: (a) that the bid has closed, been extended, lapsed or become unconditional; and (b) if it has become unconditional, the number of shares in each of the classes bid for (i) in respect of which acceptances have been given, (ii) which were held by the offeror before the bid, and (iii) which have been purchased by the offeror and its associates on the market or by private negotiation during the bid(g). If an offeror which has declared its bid to be

---

(e) Code, Rules, parra. 22. Presumably an acceptance is withdrawn when the offeror is notified of the withdrawal.
(f) Ibid., para. 23.
(g) Ibid., para. 24.

unconditional fails to make this announcement and notification by 3.30 p.m. on the appropriate day, shareholders who have accepted the bid may withdraw their acceptances at any time before the offeror confirms that the bid is still unconditional, which cannot be earlier than eight days later nor before the offeror has made the announcement and notification afresh(h).

35. Perhaps the most important part of the Code is that regulating the behaviour of the offeror and offeree companies and persons connected with them in anticipation of or during the currency of a bid.

36. The general principles of the Code prohibit the directors of the offeree company from taking any action which may frustrate a bona fide bid after an intention to make it has been communicated to them, unless the shareholders of the offeree company approve the action proposed by resolution in general meeting(i). More specifically, the Code prohibits the issue of shares, or options or conversion or subscription rights over shares, or the acquisition or disposal of assets of a material amount by an offeree company during the currency of a bid or when the offeree company's board has reason to believe that a bona fide bid is imminent, unless (i) the offeree company has previously entered into a contract for the issue, acquisition or disposal, or (ii) negotiations for a contract have been concluded (although no formal contract has been made) and the supervisory panel consents, or (iii) a general meeting of the shareholders of the offeree company resolves that the transaction shall be carried out(k).

37. Secondly, directors of an offeree company who have an effective controlling interest must not, without the consent of the supervisory

---

(h) Code, Rules, para. 25.
(i) Code, General Principles, para. 4.
(k) Code, Rules, para. 38.

panel, accept an offer for their shares unless the offeror undertakes to make the same offer to the holders of other shares of the same class and a comparable offer to the holders of other classes of equity shares of the offeree (including non-voting shares) within a reasonable time(l). To keep open the possibility of a better offer being made for shares in the offeree company, directors who have controlling interests may not bind themselves to accept an offer made to them alone, nor transfer their shares to the offeror, until the offeror has made a general offer to the other shareholders of the offeree company(m).

38. Thirdly, unless the supervisory panel consents, a person may not purchase a significant holding or holdings(n) from a limited number of shareholders of a company if the purchaser will thereby acquire effective control of the company unless he extends his offer to the other shareholders on the same terms as would be required if directors were selling a controlling interest to the purchaser(o). Moreover, if by a single purchase or successive purchases a person or group of persons acting in concert has acquired shares carrying 40 per cent of the voting rights exercisable at a general meeting of a company, the purchaser or group must, unless the supervisory committee grants a dispensation, make an unconditional offer to acquire the remaining equity shares of the company for cash, or for securities with an option to take cash as an alternative, and the cash consideration offered must not be less than the highest price paid by the purchaser or group for shares of the same class within the preceding twelve months(p).

39. Fourthly, directors of an offeree company may not recommend its shareholders to accept the lower of two competing bids, and if the

---

(l) Code, Rules, para. 10.
(m) Ibid., para. 11.
(n) Presumably a holding is significant if it carries more than 10 per cent of the voting rights which may be exercised at a general meeting.
(o) Code, Rules, para. 34.
(p) Ibid., para. 35.

directors hold a controlling interest, they may not accept the lower of two competing bids in respect of their own shares, unless they take outside advice and are able to justify their recommendation or acceptance to the supervisory panel(q).

40. Fifthly, the Code deals with the problems raised by market dealings in the shares bid for, particularly the possibility of profits being made by persons who have information not available to the investing public generally. It does this by requiring bids and negotiations likely to result in bids to be promptly announced; by prohibiting persons (other than the offeror) "who [are] privy to the preliminary takeover or merger discussions" from dealing in the shares of the offeree company between the time when an initial approach is made to the offeree company, or when the offeree company's board has reason to expect an approach to be made, and the time when the bid or the breaking off of discussions is publicly announced(r); by requiring the same persons to observe the utmost secrecy until the public announcement is made, except that if the offeror offers an exchange of shares with a cash alternative, the underwriters may be informed of the intended bid in confidence so that an underwriting contract may be entered into(s); by requiring the offeror and offeree companies and their directors and associates(t) to notify the supervisory panel, the Stock Exchange and the press daily of their dealings

---

(q) Code, Rules, para. 9.

(r) Ibid., para. 30. The prohibition also applies to the offeror if the offeree company has supplied it with confidential information likely to affect the market price of shares in the offeree.

(s) Ibid., para. 7.

(t) "Associates" are not exhaustively defined by the Code, but they are intended to cover persons holding or dealing in shares of the offeror or offeree companies who have an interest (other than that of a shareholder) in the outcome of the bid; they include companies in the same group as the offeror and offeree, directors of any such companies and their close relatives, and persons holding or controlling 10 per cent or more of the equity shares of the offeror or offeree companies.

in shares of the offeror or offeree companies during the currency of the bid[a]; by prohibiting those persons from selling, purchasing or entering into arrangements to deal in shares of the offeror or the offeree companies with special favourable conditions attached when a bid is current or is reasonably in contemplation (e.g. a condition that the sale or purchase of shares shall be cancelled and the price returned to the purchaser if the bid is unsuccessful, or a condition that if the price currently offered by the offeror company is raised, the price to be paid by the purchaser shall be correspondingly increased)[b]; and by requiring associates of the offeror or offeree company who have a commercial interest in the result of a bid to consult the supervisory panel before engaging in any dealings in shares of those companies which may frustrate the bid[c]. Additionally, in the case of partial bids the Code prohibits the offeror company and its associates from dealing in shares of the offeree company during the currency of the bid, and if a successful partial bid is made for shares of the offeree company which results in the offeror holding or controlling less than 50 per cent of the votes which may be cast at general meetings of the offeree company, this prohibition extends for a further twelve months from the last date for acceptance of the bid, unless the supervisory panel grants a dispensation[d]. This latter prohibition is designed to prevent an offeror eventually acquiring control of the offeree company by making successive partial bids for small quantities of shares; such operations would become increasingly expensive in terms of the price bid, but the average price paid for all the shares acquired might well be less than that which would have to be offered if a takeover bid were made initially.

(a) Code, Rules, para. 31.
(b) Ibid., para. 36.
(c) Ibid., para. 37.
(d) Ibid., r. 31.

FRENCH LAW AND PRACTICE

41. Unlike the British situation, the rules governing general bids in France are wholly contained in legislative texts, namely the Arrêtés ministériels of 21 January 1970, 22 February 1972 and 6 March 1973 which added articles 68 to 96 to Title II of the Règlement général de la compagnie des agents de change (itself a regulation with the force of law issued under article 90 of the Code de Commerce), and the Décision générale of 13 January 1970 issued by the Commission des Opérations de Bourse, which was established with powers to regulate markets for securities by Ordonnance No. 67-833 of 28 September 1967. These enactments are reinforced by the penalties for fraud (escroquerie) under the Code Pénal, art. 405, which may be imposed on persons who deceive others by false or deceptive statements or fraudulent manoeuvres in connection with transactions in securities or other transactions.

42. The French legislation in respect of general bids applies only to bids for the shares of public companies (sociétés anonymes) which are quoted or dealt in on a stock exchange(e). The stock exchange authorities (chambres syndicales des bourses de valeurs) are more closely involved in proceedings on bids than the United Kingdom Stock Exchange, and the procedure is throughout supervised and controlled by the stock exchange authorities and the government-appointed Commission des Opérations de Bourse. This enables the supervising bodies to influence the form of bids and to ensure the regularity of the steps taken by the offeror and offeree companies in a way which the stock exchange authorities and the supervisory panel under the City Code cannot do in the United Kingdom. It also avoids the need for the French legislation to be as detailed and circumspect as the British law and the City Code.

(e) Règlement général, art. 68(1).

43. A general bid may be preceded by negotiations between the offeror and offeree companies' boards of directors, or the bid may be launched without prior notification to the board of the offeree company. Whether there are negotiations or not, all persons who are aware of the intended bid must maintain secrecy in respect of it until it is officially published(f). The first formal step in the bid is for its terms to be presented by the bank representing the offeror to the chambre syndicale of the stock exchange on which the shares sought are quoted or dealt in(g). The purpose of the bid must be the acquisition by the offeror of at least 15 per cent of the issued share capital of the offeree company, but less than this amount of capital may be bid for if the offeror already holds shares in the offeree company and the acquisition of the shares it now seeks will result in it holding more than one half of the offeree company's issued capital(h). It is therefore clear that the legislation governs not only to bids made to acquire control of the offeree company, but also to partial bids made by offerors, whether they already have control of the offeree company or not. The formal submission of the intended bid to the chambre syndicale must state the minimum number of shares the offeror requires for its bid to become unconditional, but if more than that number of shares are tendered, the offeror may reserve the right to acquire either that minimum number or any of the excess shares tendered as well(i). The submission must also state the price or other consideration offered for the shares comprised in the bid, must indicate how and when it will be paid or provided, and must show how the bid price is calculated with supporting reasons(j). If the bid offers shares or bonds to be issued by the offeror in exchange for the shares of the offeree company, the submission must contain an

---

(f) Décision générale, rule 2.
(g) Règlement général, art. 68 (1).
(h) Ibid., art. 69.
(i) Ibid., art. 70(1).
(j) Ibid., art. 70 (1) and (2).

irrevocable undertaking by the offeror's board of directors to seek any necessary authorisation from the offeror's shareholders in general meeting(k), but no undertaking is required that the authorisation will actually be given, so that if it is refused, the only consequence is that the bid lapses. Finally, the submission must be signed by the bank acting for the offeror and contain an irrevocable undertaking that the offeror will fulfil his obligations under the bid, and this must be guaranteed by the bank(l).

44. On receipt of the submission in respect of the intended bid, the chambre syndicale verifies that the bid will be in order, and it may require the offeror to supply further information to satisfy it on this point, or to give security (e.g. by the deposit of money or investment certificates) for the fulfilment of its obligations under the bid(m). If the chambre syndicale approves the submission, it must notify the Minister for the Economy and Financial Affairs, and within three clear days he may prohibit the bid from proceeding (e.g. because if successful it would result in a monopolistic concentration or the control of the offeree company passing to a foreign enterprise)(n). If the Minister does not exercise his power of prohibition, the chambre syndicale publishes a notice of the bid in the official journal of the stock exchanges (le Bulletin de la cote officielle)(o). This notice sets out the name of the offeror and the bank acting for it, the minimum number of shares which must be tendered for the bid to become unconditional, the price or other consideration offered in exchange for the offeree company's shares and the date by which shareholders who wish to accept the bid must deliver

---

(k) Règlement général, art. 70 (4).
(l) Ibid., art. 70 (3).
(m) Ibid., art. 71 (1).
(n) Ibid., art. 71 (2).
(o) Ibid., art. 72 (1)).

written orders for acceptance to their stockbrokers, being not less than one month after the notice of the bid is published(p).

45. The offeror cannot publish or circulate any material in support of the bid until the notice of it has been published by the chambre syndicale(q). Within three days thereafter, however, the offeror must deliver to the Commission des Opérations de Bourse and the offeree company a draft of the document for information (or offer document) it intends to publish, but it cannot release this document until it has obtained the Commission's approval of the draft, which will normally be given within seven days if any additions or amendments required by the Commission are agreed to by the offeror(r). The offer document must set out in particular the reasons why the bid is being made and the intentions of the offeror in respect of the offeree company's business (e.g. to continue carrying it on, to integrate it with another business or to divide off parts of it), the manner in which the acquisition of the shares bid for is to be financed, the number of shares in the offeree company already held by or on behalf of the offeror and, finally, the commission to be paid to stockbrokers who tender acceptances of the bid by their clients(s). If the consideration for the shares bid for is to be an issue of new shares or bonds by the offeror, the offer document must also contain the same information as the note for information published as part of the prospectus in connection with an offer to the public to subscribe for shares or bonds(t). Within five days after the chambre syndicale has published its notice of the bid in the official journal of the stock exchanges, the offeree company must deliver a draft document for information to the Commission setting out the opinion

---

(p) Règlement général, art. 70 (4).
(q) Ibid., art. 73.
(r) Décision générale, rules 3 and 7.
(s) Ibid., rule 4.
(t) Ibid., rule 5.

of the offeree company's directors whether the bid should be accepted or rejected with their supporting reasons, and disclosing the number of shares in the offeree company held by its directors[u]. When the Commission has approved this document for information (usually within five days), the offeror and offeree companies must publish their respective documents for information in a manner approved by the Commission [v]. In practice both documents are published together in one or more newspapers carrying legal notices and in the financial press, and copies are sent to persons asking for them on request. If any supplemental information is published by the offeror or offeree companies later during the course of the bid, notices must be inserted in the press and copies of the supplemental information must be sent to the Commission, which may require the offeror or offeree to publish further clarifying or corrective material, and may publish its own comments on the bid[a].

46. Shareholders of the offeree company who wish to accept the bid must give written orders for acceptance to their stockbrokers within the month or longer period specified in the notice of the bid published by the chambre syndicale. The order for acceptance must be expressed to be irrevocable[b], but acceptances become effective only if the total number of shares for which they are given equals or exceeds the minimum number of shares sought by the offeror. Within the time limited by the chambre syndicale after the expiration of the period for acceptance of the bid stockbrokers who have received orders for acceptance from their clients must deliver their clients' certificates for the relevant shares together with a letter confirming that the bid has been accepted by their clients in respect of those shares to the centralised stock clearing department of the stock exchange[c]. The certificates are then

---

(u) Décision générale, rule 8.
(v) Ibid., rule 11.
(a) Ordonnance No. 67-833, arts. 3 (3) and (4).
(b) Règlement général, art. 74.
(c) Ibid., art. 75.

delivered to the offeror if the bid becomes unconditional, or if it does not they are returned to the stockbrokers. The result of the bid is published by the chambre syndicale in the official journal of the stock exchange. The result may be that the bid lapses for lack of sufficient acceptances, that it becomes unconditional and the offeror takes up only the minimum number of shares for which the bid was made, or that it becomes unconditional and the offeror takes up all or some of the shares tendered in excess of the minimum; in the latter two cases the published notice of the result of the bid also states the percentage of shares tendered which the offeror will take up(d). The shareholders of the offeree company must be treated equally in such a case, and the number of shares tendered by them respectively must be rateably reduced to arrive at the number the offeror takes up(e).

47. The offeror may raise the price or other consideration offered for shares of the offeree company once only during the course of a bid; the increase must be not less than 5 per cent of the original price offered, and the amended bid must be notified to the chambre syndicale not later than ten days before the period for accepting the original bid expires(f). The period for acceptance cannot be extended because an increased offer is made or for any other reason.

48. If one or more competing bids are made for shares of the offeree company during the period for accepting the original bid, they are published by the chambre syndicale in the same way as the original bid, and the publication operates to cancel orders for acceptance of the original or a prior bid which shareholders have already given to their brokers(g). The original or prior offeror may revive his bid, however, and the period for accepting it is then extended to the date when the

---

(d) Règlement général, art. 76.
(e) Ibid., art. 77.
(f) Ibid., art. 78.
(g) Ibid., art. 82.

subsequent competing bid expires unless the offeror wishes to maintain the original closing date[h]. A competing bid must offer a price or consideration at least 5 per cent greater than the original or prior bid, and must extend to at least as many shares of the offeree company as the original or any prior bid[i]. If a competing bid is made, the original or prior offeror may exercise its right to raise its original offer once, but this may be countered by the competing offeror raising the price offered by it, and no further amended offers may then be made[k].

49. The provisions of the Règlement général mentioned in paragraphs 46 to 48 as above do not apply if the chambre syndicale permits the offeror company to make a bid by the simplified procedure governed by articles 86 to 90 of Title II of the Règlement général. Permission may be given for this purpose only if the shares sought are dealt in but not quoted on the stock exchange, although in exceptional cases the chambre syndicale may permit the simplified procedure to be used also in connection with bids for quoted shares[l]. Furthermore, the simplified procedure can only be used if the offeror already holds more than half of the offeree company's issued share capital and undertakes to acquire all the shares tendered in response to the bid without any restriction as to quantity[m]. The procedure for a bid made under the simplified procedure commences in the same way as for an ordinary bid (see paragraphs 43 to 45 above), but before approving the submission made in respect of the intended bid the chambre syndicale must ensure that the offeror complies with at least two of the following conditions, namely that the offeror holds at least 90 per cent of the issued share capital of the offeree company, that not more than 15,000 shares may be tendered under the bid, and that the most recent dealing prices on the stock exchange gives

---

(h) Règlement général, art. 83.
(i) Ibid., 80 and 81.
(k) Ibid., 78.
(l) Ibid., arts. 86 (1) and 90.
(m) Ibid., art. 86 (1) and (2).

those shares a total value not exceeding 2 million francs(n). The simplification introduced by the simplified procedure lies in the fact that acceptances of the bid and transfers of shares subject to the bid are not made through stockbrokers engaged by accepting shareholders and the stock exchange centralised clearing, but are communicated directly to the bank which represents the offeror(o). As in the case of an ordinary bid, this bank must guarantee the fulfilment of the offeror's obligations (i.e. the payment of the bid price or the issue or transfer of the shares or bonds given in exchange for the shares sought by the offeror), and the chambre syndicale may require the deposit of an amount of money equal to the price bid for those shares before it allows a cash bid to proceed(p).

50. Most of the provisions in the French legislation governing general bids are concerned with procedural matters. Nevertheless, the Décision générale of 13 January 1970 does set out certain general principles to guide the conduct of the parties to a bid. These resemble closely the principles contained in the City Code, but are expressed more briefly. They require that bids should be made in good faith solely for the purpose of acquiring the specified number of shares in the offeree company and so obtaining the degree of control attaching to a holding of that size. The directors of the offeror and offeree companies must act exclusively in the interests of their own shareholders and ensure that they are treated equally. Also the directors of those companies must ensure that the shareholders are given adequate information in sufficient time to enable them to reflect on the bid and obtain professional advice before deciding whether to accept or reject it. Finally, the offeror and offeree companies must abstain from operations designed

---

(n) Règlement général, art. 86 (3).
(o) Ibid., art. 87 (1).
(p) Ibid., art. 87 (3).

to affect the market price of the offeree company's shares or the shares or bonds of the offeror company offered in exchange while the bid is current.

51. The Décision générale also enjoins certain standards and prohibits certain activities which may affect a bid more specifically. The directors of the offeror and offeree companies must act with care in publishing statements, in exercising their powers as directors and in engaging in market operations during the currency of a bid, and in particular they must notify the press of any issue of shares in the company, or of any disposal of the company's assets, or of any acceptance or grant of credit in its name, if such acts go beyond the ordinary current management of its affairs(q). Additionally, during the currency of a bid the directors of the offeror and offeree companies and persons acting in concert with them must abstain from operations on the stock exchange likely to affect the price of the offeror or offeree company's shares, or likely to prevent normal transactions on the market taking place, and such persons must report sales and purchases by them of shares of the offeror and offeree companies daily to the chambre syndicale(r).

52. Under the Règlement général an offeror company can make a bid for a specified number of shares of an offeree company, and when that number has been obtained the offeror can refuse to acquire any more shares on the terms of the bid, even though it has gained control of the offeree company by means of the acceptances it takes up and the holders of the remaining shares are in the position of minority shareholders. Furthermore, under the original Arrêté ministerial of 21 January 1970 there was nothing to prevent one company acquiring control of another by purchasing shares on a stock exchange or elsewhere until it had accumulated sufficient shares to give it control, and it was under no obligation

---

(q) Décision générale, rule 13.
(r) Ibid., rules 14 and 15.

to make an offer to the remaining shareholders who were consequently in a minority position. This is no longer so. The Arrêté ministérial of 6 March 1973 nowrequires a company which is about to acquire a block of shares which will give it control of another company to notify the chambre syndicale beforehand, and when it has verified that control will in fact pass, the acquiring company must either submit proposals for making a bid subject to the rules dealt with in the preceding paragraphs, or must submit a proposal to acquire the remaining shares of the other company by an open offer(s). If the acquiring company chooses to make an open offer the chambre syndicale publishes a notice to that effect in the official journal of the stock exchange setting out the names of the acquiring company and the seller of the controlling block of shares, the price at which those shares are being acquired and an undertaking by the acquiring company to purchase any of the remaining shares at a stated price(t). The acquiring company's obligation under the open offer continues for the next ten working days of the stock exchange, and normally the price to be paid by it for shares tendered under the open offer must be not less than the amount paid by it for the controlling block, but a lower price may be offered for the remaining shares if the controlling block is purchased otherwise than for an immediate cash settlement (e.g. in return for deferred payment or an issue of securities)(u). The chambre syndicale may require the acquiring company to deposit cash or securities equal to the amount payable for all the shares subject to the open offer before it allows the acquisition of the controlling block of shares to proceed(v).

(s) Règlement général, arts. 91-93.
(t) Ibid., art. 94.
(u) Ibid., art. 95 (1) and (2).
(v) Ibid., art. 95 (3).

BELGIAN AND LUXEMBOURG LAW AND PRACTICE

53. The law governing takeover and other bids in Belgium is an extension of the legislation enacted in 1935 by which offers of shares or bonds of public companies (sociétés anonymes) to the public for subscription or purchase (including offers to exchange existing shares for shares to be issued under a general bid) must be preceded fifteen days beforehand by the submission of details of the proposed operation to the Commission Bancaire, a govenment appointed body, and by which the Commission may require the operation to be deferred for three months if it considers that it will disturb the market or if the publicity material intended to be used in connection with the operation may lead the public into error as to its nature(w). In 1964 legislation was passed by which the same rules were applied to offers to the public to buy or exchange shares or bonds, in other words to all kinds of general bids(a). Legal regulation therefore extends to bids which are not capable of resulting in the acquisition of control of the offeree company, and also to bids to acquire bonds (particularly convertible bonds). In the first of these respects Belgian law is wider than British law, and in the second of them it is wider than both British and French law. The Luxembourg legislation is in exactly the same form as the Belgian legislation of 1935, and is contained in an Arrêté grand-ducal of 19 June 1965, which established the office of Commissaire au contrôle des banques with the same powers and functions as the Belgian Commission Bancaire(b). Because of the close similarity of the two systems of law, only Belgian law is dealt with here, but it must be borne in mind that because of the limited terms of the Luxembourg

---

(w) Arrêté royal No.185 of 9 July 1935, arts. 26-29.
(a) Law of 10 June 1964, art. 22 (2).
(b) Arrêté grand-ducal of 19 June 1965, arts. 14-20 (corresponding to the Belgian Arrêté royal of 9 July 1935, arts. 26-33.

legislation, it applies only to bids for securities where the consideration offered consists of newly issued shares.

54. The most significant difference between Belgian law and practice on the one hand and British and French on the other, however, is that whilst the latter are based on detailed rules, Belgian law confers an almost unfettered discretion on the Commission Bancaire to prohibit the making of bids or to permit them only if the offeror complies with the Commission's requirements as to terms of the bid, disclosure of information or conduct while the bid is current. It is true that the Commission may only defer the launching or continuance of the bid for three months if its requirements are not met, but in practice this is sufficient to defeat any bid. Additionally, if the offeror seeks a stock exchange quotation for shares or bonds offered in exchange for shares sought to be acquired under a bid, the Commission may prohibit the grant of a quotation if its requirements in respect of the bid are not met(c).

55. In its annual reports the Commission sets out the rulings it has given in dealing with takeover and other bids. These rulings do not embody rules of law, of course, and they can be departed from or modified as the Commission considers necessary in dealing with new situations. Nevertheless, they are of sufficient generality to be treated as representing the present ground rules for practice in Belgium in respect of bids.

56. The Commission has made it clear that it does not take a view of the merits of bids, and does not attempt to ensure their success or defeat or to favour one of two or more competing bids(d). It is concerned merely to ensure that bids are fairly presented so that the shareholders of the offeree company can effectively decide on the basis

---

(c) Arrêté royal of 9 July 1935, art. 32.
(d) Annual Report, 1964, p.98.

of adequate information whether a bid shall succeed or fail. Shareholders must be treated on a basis of strict equality. The same price must be paid to all of them while a bid is current, both under the bid and outside it, and if an offeror purchases shares on the stock exchange or by private negotiation while a bid is current shareholders who accept the bid must be paid the same price as that paid for shares acquired outside the bid if it is higher than the bid price, and conversely, outside sellers must be paid the bid price if it is higher than the price at which they agreed to sell their shares(e). Furthermore, if a person or group of persons make extensive purchases of shares on the stock exchange and the Commission concludes that they are seeking to acquire control of the company in question, it will require them to publish the same information as though they had made a general bid and to accept shares tendered to them accordingly(f).

57. The offer document issued or published in connection with a bid must set out the name of the offeror and (if the offeror is an agent) the name of the principal on whose behalf the bid is made, the purpose of the offer (i.e. the acquisition of all the shares of the offeree company, or of a controlling shareholding, or of a certain minimum number of shares), the conditions on which the bid will become unconditional, the price or other consideration to be given for shares tendered under the bid, appropriate extracts from the latest published accounts of the offeree company and also of the offeror company if the bid offers an exchange of shares, and finally such further information as the Commission requires the offer document to contain(g). The Commission always requires the offeror to satisfy it that sufficient funds will be available

---

(e) Annual Report, 1971-2, pp. 163-4.
(f) Ibid., pp. 166-7.
(g) Annual Report, 1964, pp. 100-2.

to pay the bid price for the shares sought in the case of a bid wholly or partly for cash(h). A bid may only be made subject to conditions which are objective in character (e.g. acceptances being given in respect of a stated minimum number of shares, the quoted price for the shares sought not falling below a specified amount); an offeror will not be allowed to insert conditions enabling him to cancel the bid if he does not consider that he has acquired sufficient influence over the company's board or sufficient shares to ensure representation on the board(g). Normally, the Commission will allow a bid to be made only if its acceptance in full will result in the offeror acquiring control of the offeree company, or if the offeror already has such control(i). Nevertheless, bids which cannot result in the offeror acquiring control and any other kinds of partial bids may be permitted, but not if their purpose is to defeat a bid for control made by another person(i). The directors of the offeree company must be given an opportunity to comment on the terms of a bid before the offer document is published, but they are not bound to make a recommendation for acceptance or rejection of the bid to the offeree company's shareholders(k), unless there are competing bids, when they must at least publish a comparison of the bids for the shareholders' benefit(l). In the event of competing bids, the second or later bid should normally offer a price for the shares sought which is at least 5 per cent higher than the immediately preceding bid; the prior offeror or offerors must then be given an opportunity to raise their bids, and if they do not offer a higher price than the competing bid, they must release shareholders who have already accepted their bids so as to enable the shareholder to accept the competing bid(m).

(h) Annual Report, 1964, p. 103.
(i) Annual Report, 1971-2, pp. 158-9.
(k) Annual Report, 1964, p. 102.
(l) Annual Report, 1971-2, p. 162.
(m) Ibid., pp. 162-3.

58. The Commission has no direct legal power to prohibit stock exchange transactions, but it may do so indirectly in connection with general bids by imposing requirements on the parties to the bid. In addition to persuading the stock exchange authorities to suspend the quotation of shares subject to a bid while it is current(n), or in order to prevent speculative price movements when a bid is likely to be made(o), the Commission may prohibit the offeror and offeree companies and their directors and other persons acting on their behalf from entering into stock exchange transactions in the shares of either company between the announcement of a bid and its expiration(p). By this means the Commission seeks not only to prevent the offeror from acquiring shares in the offeree company at specially favourable prices, but also to prevent both the offeror and the offeree companies from manipulating the market prices for their respective shares with a view to promoting the success of a bid or a competing bid or in order to defeat a bid(q). As yet, however, the Commission has laid down no general principle that an intending offeror may not acquire shares of the offeree company between the time when it decides to make a bid and the publication of the bid.

ITALIAN PRACTICE

59. The Code of Conduct in respect of Takeover Bids issued by the Milan Stock Exchange in December 1971 is based on the French Arrêté ministeriel of 21 January 1970 and the Décision générale of the Commission des Opérations de Bourse dated 13 January 1970. The Code applies to offers to acquire the shares or bonds of public companies

---

Annual Report, 1971-2,
(n) [illegible]/p. 164.
(o) Annual Report, 1964, p. 97.
(p) Annual Report, 1971-2, p. 159.
(q) Ibid., p. 159.

(società per azioni) for cash or in return for the issue or transfer of quoted shares or bonds of another public company, and is administered by the Management Committee (Comitato direttivo) of the Milan Stock Exchange, which fulfils the same role as the Commission des Opérations de Bourse and the chambre syndicale together under the French legislation. Because of the similarity between the provisions of the French and the Italian provisions governing bids, only the distinctive and more important features of the Milan Code will be examined here.

60. The Code governs bids for both shares and bonds and applies whether the bid, if successful, will result in the offeror acquiring control of the offeree company or not(r). However, a bid cannot be made for less than 10 per cent of the issued shares or bonds of a company, unless the offeror already holds at least a half of its issued shares, when a bid may be made for any quantity of shares or bonds(s). There is in general no obligation on an offeror to acquire the remaining shares of a company when it has acquired control by a successful takeover bid or by purchases on the stock exchange or elsewhere, but if an offeror holds 90 per cent or more of the issued shares of a company in consequence of making a general bid for all or some of them, it must offer to acquire the remaining shares at the price offered under the bid within a period fixed by the Management Committee(t). The consideration offered by a bid must be either cash or shares or bonds of a company quoted on the Milan Stock Exchange, or a combination of these elements(u).

61. The procedure in connection with a bid follows the pattern prescribed by the French legislation. The offeror must submit particulars of the intended bid to the Management Committee for approval together with

---

(r) Code, art. 2 (1).
(s) Ibid., art. 2 (1) and (2).
(t) Ibid., art. 2 (3).
(u) Ibid., art. 4.

a draft of the offer document containing the terms of the bid, and must notify the offeree company that he has done so(v). The submission need not be made by a bank on behalf of the offeror, nor is a guarantee by a bank that the offeror will fulfil its obligations under the bid necessary. When the Management Committee's approval has been obtained, the offeror must publish the offer document by the means approved by the Committee (i.e. usually by advertisement in the press and circulars issued to banks and brokers)(a), and until this is done the existence and terms of the bid must be kept secret(b). The bid must be open for acceptance for a period of not less than 25 working days and not more than 45 working days(c). If the number of shares or bonds specified in the offer document are not deposited by accepting shareholders with the stock exchange authorities before the expiration of the period for acceptance, the bid lapses(d). If that number or more than that number of shares or bonds are deposited, the offeror is bound to accept the number bid for, unless the offer document reserves the right to withdraw and the offeror exercises this right within five working days after the expiration of the bid period(e). If more shares or bonds are deposited than specified in the offer document, acceptances of the bid are reduced proportionately, but in the offer document the offeror may reserve the right to take up all or any excess shares or bonds, and it may then exercise this right within five working days after the expiration of the period for acceptance of the bid(f). The Management Committee publishes the total number of shares or bonds deposited with it in acceptance of the bid daily during the period for acceptance, and it also

---

(v) Code, arts. 7 and 9.
(a) Ibid., art. 13.
(b) Ibid., art. 10.
(c) Ibid., art. 6 (1).
(d) Ibid., art. 6 (3).
(e) Ibid., art. 6 (4).
(f) Ibid., art. 6 (5) and (6).

publishes the total number of shares or bonds deposited in response to the bid within two working days after its expiration(g).

62. The provisions of the Code in respect of increases in the bid price and competing bids are exactly the same as those of the French legislation, except that if in a competing bids situation the first offeror increases the price it offers to equal the price offered by the second bid and the second bid lapses because insufficient acceptances are forthcoming, the first offeror may acquire the shares or bonds which have been deposited in acceptance of the second bid at the second bid price, but this right must be exercised within five days after the Management Committee publishes the result of the second bid, and if it is not exercised within that time, the second offeror may acquire the shares or bonds deposited at the same price within the following five days(h). Curiously the first and second offerors cannot exercise these rights if the first offeror increases the price it offers so as to exceed that offered by the second bid.

63. The Code concludes with a number of rules governing the behaviour of the parties to a general bid during its currency. All shareholders or bondholders whose holdings are subject to the bid must be treated equally, and no additional or special price or consideration may be given to any of them which is not available to them all(i). While a bid is current, the directors of the offeree company may not make major disposals of its assets or enter into commitments which will seriously affect the character or value of those assets, and this restriction applies also to the directors of the offeror company in respect of its assets if the bid offers an exchange of its shares or bonds for those of the offeree company(k). Finally, the offeror and

---

(g) Ibid., arts. 14 and 15.
(h) Ibid., arts. 17 to 22.
(i) Ibid., art. 3.
(k) Ibid., art. 25.

offeree companies are prohibited from entering into transactions in respect of their own and each other's shares and bonds during the currency of a bid[l], but there is no prohibition on the directors doing so on their own account nor on transactions by the offeror and offeree companies during the period between the offeror's decision to make a bid and its publication.

NETHERLANDS PRACTICE

64. The Rules of Conduct in respect of Mergers and Takeovers issued by the Netherlands Social and Economic Council in June 1971 are based on British law and practice, in particular the Stock Exchange rules as to the contents of documents in connection with general bids. The Netherlands rules are simpler than the British, however, and only an outline of them will be given here, but those features of the Netherlands rules which differ markedly from British practice will be specially noted. The Rules of Conduct apply to bids for the shares, or the shares and bonds, of a public company (naamloze vennootschap) made by another company or person, whether or not the bid (if successful) will result in control of the offeree company passing to the offeror[m].

65. An intending offeror must publish an announcement of its intention to make a bid as soon as agreement on basic terms has been reached between the offeror and the board of the offeree company[n]. If the offeror intends to make an offer without attempting to obtain the agreement of the board of the offeree company, or if changes in the market price of the shares of the offeror or offeree companies during negotiations with the offeree indicate that knowledge of the intended

---

(l) Ibid., art. 26.
(m) Rules of Conduct, art. 2 (1) and (2).
(n) Ibid., art. 3 (2) and (3).

bid has been obtained by third parties, notice of the offeror's intention to make a bid must be published immediately[n]. To ensure that proper publicity is given to intended bids, the Committee for Merger Affairs of the Social and Economic Council, which supervises the conduct of bids, may require the boards of companies to confirm or deny that they intend to make a bid or are engaged in discussions which may lead to a bid being made, and if an announcement of an intended bid is not made despite indicative fluctuations in the market price of the offeror or offeree company's shares, the offeree company or the Committee may request the Stock Exchange to suspend the quotation of the shares (if they are quoted)[o].

66. The terms of an intended bid must be communicated to the board of the offeree company at least seven days before the offer document is issued to shareholders or bondholders of the offeree company, so that the board of that company may express its views and seek any modification of the terms of the bid which they consider desirable[p]. The bid is made by an offer document issued by the offeror, or in the case of an agreed bid, by the offeror and the offeree company together. The offer document must contain a considerable amount of detailed information, including:- (a) the period during which shareholders or bondholders may accept the bid, not being less than 30 days from the publication of the offer document (or 20 days in the case of an agreed bid); (b) the basis on which the bid price has been calculated; (c) a summary of the assets of the offeree company and a statement of its profits for its last complete financial year and for its current financial year if more than a quarter of it has elapsed; (d) the intentions of the offeror as to the composition of the offeree company's board of directors if the

---

(n) Ibid., art. 3 (2) and (3).
(o) Ibid., art. 3 (4) and (5).
(p) Ibid., art. 4 (2).

bid is successful, and confirmation that the offeror will in that event adhere to the rules set out in the second part of the Rules of Conduct for the protection of the interests of employees of the offeree company; (e) details of acquisitions of shares or bonds of the offeree company by the offeror at prices higher than the bid price during the six months preceding the publication of the offer document; and (f) a statement of the number of shares or bonds whose holders have committed themselves in advance to accept the bid(q). If shares or bonds of the offeror company are offered in exchange for shares or bonds of the offeree company, the offer document must set out with supporting reasons the advantages expected to accrue to shareholders or bondholders who accept the bid, and must also contain the same financial information about the offeror company as is required in any offer document about the offeree company(r). Any conditions stipulated by the offeror for the bid to become binding on it must be set out in the offer document(s), but the only conditions which may be imposed are:- (a) that acceptances of the bid are given in respect of the minimum number of shares or bonds specified in the offer document; or (b) that the offeror may withdraw the offer if facts are discovered or circumstances arise before the offer is declared unconditional which the offeror was unaware of when the offer document was issued and which the stock exchange authorities consider sufficiently serious to justify a withdrawal; or (c) that the bid shall be cancelled or may be withdrawn if a competing bid is made; or (d) that the bid may be withdrawn if any other specified event occurs or state of affairs arises but the cause for withdrawal must not be dependent on the offeror's own opinion, discretion or volition(s). A copy of the offer document and of any recommendation issued by the board of the offeree company must be sent to the Merger Committee before

---

(q) Ibid., art. 6 (1).
(r) Ibid., art. 7.
(s) Ibid., art. 11.

or at the same time as they are published, and the same rule applies to all other circulars issued by the offeror and offeree companies in connection with the bid(t). Additionally, when the offer document is published the directors of the offeror and offeree companies must deliver to the Committee details of their dealings in shares and bonds of the offeree company during the preceding six months, and if the bid offers shares or bonds of the offeror in exchange for securities of the offeree, they must also deliver details of their dealings in shares and bonds of the offeror company during the same period(u). At the same time the directors of the offeree company must deliver to the Committee a statement of their holdings of shares and bonds of that company(v).

67. The Rules of Conduct contain few provisions as to the conduct of the parties to a general bid while the bid is proceeding and after its conclusion. The only prescriptions it does contain are that the board of the offeree company must hold a general meeting of its shareholders after the offer document has been published and not later than 8 days before the expiration of the period for acceptance of the bid, and they must at that meeting give the shareholders all relevant financial and other information to enable them to form a proper judgment whether the bid should be accepted(a). The general meeting is not intended to approve or disapprove the bid by passing a resolution, however, and if it does pass a resolution of approval or disapproval, it is not binding on individual shareholders, who remain free to accept or reject the bid as they think fit. The directors of the offeror company need only call a general meeting of its shareholders if the bid offers an issue of shares of the offeror in exchange for shares of the offeree company and the number of new shares which the offeror will have to issue if the bid

---

(t) Ibid., art. 13.
(u) Ibid., art. 8(1).
(v) Ibid., art. 8(2).
(a) Ibid., art. 9(1) and (2).

is accepted in full will exceed one-quarter of its existing issued share capital. In that case a general meeting must be held within the same time limits as the general meeting of the offeree company so that shareholder of the offeror may be informed of the terms and effects of the bid ans so that they may ask questions, which the board of the offeror company is bound to answer(b). Again, the purpose of the meeting is not to approve the bid, but merely to receive information about it. The final provision as to the conduct of the parties applies only if a partial bid for shares or bonds has been successful. In that case the offeror cannot within three years after the publication of the offer document in respect of the bid purchase shares or bonds of the class to which the offer related at a higher price or on more favourable terms than the price and terms offered by the bid itself(c). The purpose of this rule is to prevent secret arrangements for the acquisition of substantial shareholdings before a partial bid is made for less than a controlling holding of shares in the offeree company. If such shareholdings were acquired before the bid was made, the market price of the shares would probably rise and this would compel the offeror company to make the partial bid at a higher price than it intended. By deferring the acquisition of the shares at a higher price than the bid price, the offeror could prevent the market price rising and at the same time conceal from the shareholders to whom the bid was addressed the fact that eventually the offeror would acquire control of the offeree company, so making the shares purchased under the bid more valuable to it. By prohibiting offerors from making purchases after the bid has closed at higher prices than the bid price, the Rules of Conduct make this manoeuvre impossible in practice.

(b) Ibid., art. 10 (1). The requirement does not apply to a newly formed company (art. 10 (2)).
(c) Rules of Conduct, art. 12.

COMPULSORY ACQUISITION OF SHARES

68. It is not essential for the operation of any system of rules governing takeover or general bids that an offeror company should be given power to compel shareholders who have not accepted its bid to transfer their shares to it on the terms of the bid if a certain majority of their fellow shareholders accept it. In this respect a takeover differs from a merger, where the subject matter transferred to the acquiring company is the assets and undertaking of the merging company as a whole; In a merger the transfer must of necessity be binding on the minority of shareholders who dissent from it in order to be effective at all. On the other hand, since shares in an offeree company do not have to be transferred to the offeror as an undivided whole for the offeror's takeover bid to be successful, there is no reason why dissenting minority shareholders should not retain their shares, apart from the practical difficulties which the offeror may experience in having to deal with a small, discontented minority group in determining the future business policy of the offeree company. It is this reason alone which has led English and German law to provide for the compulsory acquisition of the dissenting minority's shares if the takeover bid is accepted by an overwhelming majority of the offeree company's shareholders.

69. In English law an offeror company which has made a bid for the whole of the issued shares of an offeree company, or the whole of its issued shares of a particular class, may compel shareholders who do not accept the bid to transfer their shares on the terms on which the bid was made if it is accepted by the holders of 90 per cent of the shares bid for within four months after the bid is made(d). Shares of the class bid for which are already held by the offeror or any of its

---

(d) Companies Act, 1948, s. 209 (1).

subsidiaries are not taken into account in calculating the 90 per cent acceptances, and if before the bid is made the offeror company holds more than one-tenth of the issued shares of the class concerned, it cannot acquire dissenting shareholders' shares compulsorily unless the bid is accepted by at least three-quarters in number of the persons to whom the bid is addressed, however small the percentage of shares held by the dissenting shareholders may be(d). The power to acquire shares compulsorily is exercised by the offeror company notifying the dissenting shareholders of its intention to acquire their holdings within two months after the expiration of four months from the time the bid was made, and any dissenting shareholder may appeal to the court against the obligation to transfer his shares within one month after he receives the offeror's notification(d). If the court considers that the bid price offered for the shares is unfair it may release the dissenting shareholders from their obligation to transfer their shares to the offeror, but the court cannot approve the compulsory acquisition of their shares at a higher price than the bid price or on different terms those on which the bid was made, even though the offeror company is willing to concede that higher price or more advantageous terms(e). In practice the court rarely upholds appeals by dissenting shareholders. The only substantive question with which the court concerns itself is whether the price offered for the dissenters' shares by the takeover bid is at least equal to the market value of those shares immediately before the bid was made(f). If it is, the dissenters will be compelled to transfer their shares at the bid price, and since an offeror company mus in practice always offer somewhat more than the market value of the shares bid for in order to obtain any acceptances of its bid, appeals by dissenters on the merits of a bid rarely succeed. In fact, the only occasions when the court has

---

(e) Re Carlton Holdings, Ltd. [1971] 2 All E.R. 1082.
(f) Re Press Caps, Ltd., [1949] Ch. 434; Re Grierson, Oldham and Adams, Ltd., [1968] Ch. 17.

allowed an appeal have been when the offer company or the persons in control of it have acted fraudulently or oppressively[g], or when there has been some defect of procedure in operating the compulsory acquisition provisions[h].

70. In German law a public company (Aktiengesellschaft) can consolidate another public company with itself so that they are in future treated as a single company although they retain their separate corporate identities (Eingliederung) if the first company holds at least 95 per cent of the issued share capital of the second[i]. The consolidation must be approved by a special resolution passed by a general meeting of the subsidiary company, and when the consolidation has been registered, the outstanding shares in the subsidiary not held by the shareholding company automatically vest in it, and the former holders of those shares are compensated by an allotment of shares in the shareholding company or, if that company is a subsidiary of another company, by an allotment of shares of that company or a cash payment at their choice[k]. If the compensation takes the form of shares, the number of shares to be allotted is arrived at in the same way as on a merger[l], i.e. strictly on the basis of the respective net values of the two companies' undertakings. If the compensation is a cash payment, the shares acquired by the shareholding company are valued on the basis of the net value of its undertaking and its prospective earnings[l]. The compulsory acquisition procedure may be used by a company which has acquired 95 per cent or more of the issued shares of another company as a result of a takeover bid or as a result of successive purchases of holdings of the other company's shares over a period of time. Consequently, the availability

(g) Re Bugle Press, Ltd., [1941] Ch. 270.
(h) Musson v. Howard Glasgow Associates, Ltd., 1961 S.L.T. 87.
(i) Aktiengesetz of 1965, §§ 319 (1) and 320 (1).
(k) Ibid., § 320 (1) - (5).
(l) Ibid., § 320 (5).

of the compulsory acquisition procedure is wider than the corresponding procedure under British law. Moreover, no time limits or formalities are prescribed for the acquisition of the outstanding shares; the acquisition is merely an incident of the operation of consolidating the two companies.

71. As a counterbalance to the power of compulsory acquisition of outstanding shares conferred on a successful takeover bidder, British law enables the outstanding shareholders to compel the bidder to acquire their shares even though the bidder is content to leave them outstanding. If a bid is made for all the shares of a company, or all its shares of a particular class, and within four months the bid is accepted to such an extent that the offeror company and its subsidiaries (if any) now hold 90 per cent of the issued shares of the offeree company, or 90 per cent of the issued shares of the class in question, the offeror must notify the remaining shareholders of that fact within one month from the expiration of the four month period, and any such shareholder may within three months after receiving such notification require the offeror to acquire his shares at the bid price, or at such other price as the parties agree or the court fixes on an application made by either of the parties(m). This provision is parallel to the rule in the City Code on Takeovers and Mergers by which a bid which has become unconditional must remain open for a further 14 days so that shareholders who have not accepted the bid may do so(n). The provision in the City Code differs from that in the Companies Act, 1948, however, first because it applies whatever percentage of the shares in question the offeror holds when the bid becomes unconditional, secondly because the period for late acceptance is much shorter than the three months allowed by the Act, and thirdly because it is possible to exclude the possibility of late acceptances under the City Code by the

(m) Companies Act, 1948, s. 209 (2).
(n) Code, para. 23.

terms of the offer document or by giving notice to the shareholders to whom the bid is addressed that it will not be extended, whereas the provisions of the Act are mandatory and cannot be excluded.

72. German law gives shareholders the right to exchange their shares for shares of another company or, in certain cases, to have their shares bought out for cash, only if a contract has been entered into between their own company and the other company by which the management of their company has been transferred to the other company (Beherrschungsvertrag) or if a contract has been made by which the entire future profits of their company will be transferred to the other company (Gewinnabfuhrungsvertrag)(o). The compensation for the disposal of their shares is then calculated in the same way as if their company had been consolidated with the other company(p). Contracts inducing such rights for shareholders to have their holdings acquired may be entered into after the other company has acquired a controlling shareholding in the original company by a takeover bid, but they are not the necessary consequence of a successful takeover bid, nor is it necessary that the other company should have a controlling shareholding for such contracts to be entered into. Consequently, such contracts and the rights of shareholders resulting from them are not incidents of takeover as such, but of quite independent operations.

(o) Aktiengeseltz of 1965, § 305 (1) and (2).
(p) Ibid., §§ 305 (3). See above, para. 70.

RECOMMENDATIONS

General Considerations

73. Although the commercial purposes and economic consequences of takeover bids and other general bids are the same in all industralised countries, they have been used more extensively and during a longer period in some of those countries than others, and consequently national law and the professional and ethical rules governing them are not equally developed. In some countries, particularly the United Kingdom and France, the law and rules of practice are detailed and well articulated. In other countries there are either no rules at all, or the rules which have been worked out are rudimentary and general in terms. It is therefore impossible to recommend provisions for the harmonisation of the law and practice of the member states in respect of takeover and other bids by seeking common features going beyond such general precepts as equality of treatment of the shareholders of the offeree company and the disclosure of all information necessary to enable them to make rational decisions whether to accept a bid or not. Instead the most useful and practical rules must be selected from each national system and moulded into a new structure after making such modifications and additions as are necessary to achieve consistency and effectiveness. This is what the draft proposal for a directive set out in the Appendix to this Report seeks to do.

74. Each existing national system of law or professional rules in respect of general bids is enforced by a responsible authority which in some countries is a body governed by public law (such as the French Commission des Opérations de Bourse and the Belgian Commission Bancaire) and in others is a body formed by the professional bodies most concerned with takeover bids (such as the supervisory panel which enforces the City Code on Takeovers and Mergers). It is a matter of indifference

whether the enforcing authority is of the one kind or the other provided it is effective, but to make it effective there can be no doubt that it must be invested with legal powers or, at least, that the rules it enforces and the decisions it gives must take effect in law and not merely be supported by professional sanctions. For this reason the draft proposal for a directive set out in the Appendix proposes that member states shall ensure that there is a national supervisory authority and that national law shall be altered to incorporate certain minimum rules in respect of bids and to make decision by the authority legally enforceable. This will not prevent national law being supplemented by more stringent legal or professional rules where this is thought necessary, provided they do not conflict with the requirements of the draft directive.

75. Takeover practice is still in course of developing, and new techniques and new means of circumventing established rules are constantly appearing. Unlike merger procedures, which in most western European countries took their present form in the 1930s if not earlier, takeovers are a phenomenon of the last twenty years, and it is unlikely that the varieties of bids and the procedures used to carry them out or to defeat them will become standardised for many years yet. Because of this no set of rules governing takeover or other bids can pretend to be exhaustive, and considerable discretion must be left to the national supervisory authorities in interpreting and applying the rules imposed under any directive and under national law. If the decisions of the national supervisory authorities are challenged before the courts, due weight must be given to their expertise, and their decisions should only be overruled if clearly inconsistent with the law or based on a clear misunderstanding of the relevant facts. Moreover, the rules governing takeover and other bids must be kept under continuous review, and modifications must be made speedily to any directive which is issued in order to deal

with new developments. For this purpose it would be useful to set up a small committee of persons with experience in the takeover field, such as businessmen, bankers, accountants, lawyers and stockbrokers, in order to undertake such a continuous review.

76. In some member states (particularly France and Italy) general bids are operations carried out on the stock exchanges, and the ordinary stock exchange rules governing dealings in quoted shares have been added to so as subject bids and proceedings under them to the supervision and control of the stock exchange authorities. In other member states (particularly the United Kingdom and the Netherlands) general bids are not treated primarily as stock exchange operations, even though the shares of the offeror and offeree companies are usually quoted on a stock exchange; consequently the stock exchange authorities do not have an important part to play in bid proceedings, and in practice confine themselves to suspending the quotation of the offeror or offeree company's shares if there are suspicious price movements or if the rules governing bids are flouted. It is immaterial whether the stock exchanges play a large or a small part in supervising and regulating general bids provided that a designated national supervisory authority does ensure that the rules governing them are respected, and the role of the stock exchanges can therefore be left to member states to decide for themselves. It would, of course, be possible for the national supervisory authority to be the governing body of the association of nation stock exchanges, but in practice it would probably be preferable for it to be more widely representative of the various public and private interests concerned with general bids.

77. These recommendations and the draft proposal for a directive in the Appendix are concerned only with defining the kinds of bid operations which should be regulated and with devising appropriate rules to protect

the interests of the shareholders and bondholders of the companies concerned. This Report is not concerned with the political or economic desirability of takeovers and the concentration of economic power in one or more member states which results from them. Such questions relate to competition policy, and arise whether economic concentrations are effected by takeovers or by mergers in the conventional form. It is important that the two matters should be kept distinct, both in the legal regulation of takeovers and in the administration of the law. The national supervisory body which is appointed to administer rules for the protection of shareholders in takeover situations should not concern itself with the economic consequences of a takeover succeeding or failing, but should be neutral in that respect so that it will not be misled in performing its proper function. Conversely, the authorities concerned with the administration of the law governing competition and economic concentrations should not use their powers to support or oppose a particular faction in a takeover struggle, but should be neutral as regards the personalities involved and the tactics they employ. The personalities of the parties are relevant in competition law only insofar as they reflect the existing distribution of economic power and the possibility of it being increased or consolidated by a takeover contrary to the general interests of the state or the Community. If the outcome of a takeover bid or of competing bids cannot in any case adversely affect competitive conditions to a substantial extent, the authorities which enforce competition law should not interfere with it, whatever tactics the parties to the bid may employ.

Scope of Application, Definitions and National Supervisory Authorities

78. The definition of a takeover or general bid for the purposes of a directive must be determined by the types of transactions it is desired to regulate, and not by the inherent juridical character of a

general bid for shares. The expression "takeover bid" suggests that to come within it a bid must be one which, if successful, will result in control of the offeree company passing to the offeror from the persons who previously held it, or at least in the offeror acquiring control by assembling a holding of blocks of shares which together carry control. Obviously it is not sufficient to include only such bids in the definition of bids covered by the directive, if for no other reason than that it would not catch a bid by an offeror who already has control of the offeree company and who seeks to increase it by acquiring some or all of the shares held by other persons. The minority shareholders require protection in such a situation even more than when the bid is made by a person who does not already have control. The French expressions for a bid, offre publique d'achat and offre publique d'échange, do not involve the idea that a bid must be designed to acquire or consolidate control of the offeree company, and a general bid to acquire any percentage of the offeree company's issued capital could therefore be described in those terms(g). Nevertheless, it is not necessary that the directive should extend to all bids, however small. A bid should be subjected to special rules which do not apply to sales of shares negotiated by traditional methods on the stock exchange or outside, only if the bid, when combined with similar successive bids or accompanied by privately negotiated purchases, may create a likelihood of control passing to the offeror eventually. It is difficult to quantify

---

(g) In fact the Arrêté ministériel of 20 January 1970 only applied to bids under which control of the offeree company might pass to the offeror, of by which the offeror's existing control might be increased. The Arrêté ministériel of 6 March 1973 has amended the original art. 69 of the Règlement général de la compagnie des agents de change so that bids for at least 15 per cent of the offeree company's issued capital are now regulated (see above, para. 43).

objectively the percentage of issued shares to which a bid must extend for this likelihood to arise, because the distribution of voting power is bound to vary widely from one company to another. Probably the most practical solution is to draw the dividing line at 10 per cent of the issued share capital of the offeree company carrying voting rights. It is unlikely that partial bids would be made for less than that percentage of issued shares if the offeror had it in mind to gain control of the offeree company eventually. On the other hand, successive acquisitions each in excess of 10 per cent of the offeree's issued voting share capital can soon result in control passing. In defining bids in a directive the significance of the percentage of shares bid for is lessened by the fact that size cannot be the only ingredient of the definition. The other features which distinguish general bids from purchases of shares by traditional methods are, first, that a bid is made to all the holders of shares in the offeree company, or at least to all the holders of shares of a particular class (other than the offeror, companies in the same group as the offeror and shareholders who have already agreed to sell their shares to the offeror), and secondly, that a bid is always made conditional on acceptances being tendered in respect of a stated minimum number of shares, even if the offeror later waives the condition. With these two features written into the definition of a bid for the purposes of the directive, there is no risk that the adoption of 10 per cent of the offeree's voting share capital as the dividing line would lead to the draft directive affecting dealings in shares carried out by traditional methods. One consequence of such a definition would be that partial bids would be permissible, unless prohibited or restricted by supplementary national law, but they would be subject to the same rules as takeover bids, whether control could pass to the offeror under them or not.

79. If the three features mentioned in the preceding paragraph are accepted as distinguishing general bids which should be regulated, the definition of bids for the purposes of the directive nevertheless needs further refinement. Private companies (Sociétés à responsabilitée, Gesellschaften mit beschränkter Haftung, società a responsabilità limitata and beslotene vennootschappen) are not often the subject of takeover bids; instead a person or company wishing to acquire control of a private company negotiates with its members individually, or purchases its undertaking instead of shares in it. Moreover, at present only British law regulates takeover bids for private companies by means of the Prevention of Fraud (Investments) Act, 1958, ss. 13 and 14 and the Licensed Dealers (Conduct of Business) Rules, 1960. French law applies only to bids for shares which are quoted or dealt in on a stock exchange (which shares of an S.à.r.l. cannot be), and Belgian law applies only to bids for actions, not for the parts of a société de personnes à responsabilité limitée. Although in time it may be useful to extend the legal rules governing takeovers to private companies, even though the impact of the extension may be small, at present the first directive governing bids should be confined to bids for public companies whether quoted on a stock exchange or not. A second refinement which must be made is in respect of the types of securities to which the directive will extend. Since the purpose of a bid is to acquire or facilitate the eventual acquisition of control of the offeree company, only securities which entitle or may eventually entitle their holders to voting rights at general meetings of the offeree company should come within the directive. If a bid were made for securities which do not carry voting rights at general meetings and which never will carry such rights, the offeror would merely be seeking to acquire an investment, and not to control the composition of the board of directors or the policy of the offeree company. The regulation of general bids is concerned with bids for

control; bids for the acquisition of pure investments rarely occur, and in any case never involve the tactics which it is the purpose of takeover legislation to control. On the other hand, the emphasis on voting rights exercisable in general meetings of the offeree company does not mean that a bid should be regulated only if it relates to shares. Regulation is equally needed if a bid is made for bonds or other securities (Genussrechte, parts de fondateur, parts bénéficiaires, oprichtingsbewijzen) which carry a right of conversion into voting shares or a right to subscribe for voting shares, whether exercisable immediately or in the future, whether the attached rights are to convert or to subscribe, the acquisition of sufficient bonds or securities may vest potential control of the offeree company in the offeror, either by themselves or when combined with voting shares held by the offeror.

80. The definition of a general bid in the draft directive therefore combines the elements of the size of the bid, the shares or other securities compriesed in the bid, the conditionality of the bid, the class of persons to whom the bid is addressed and the character of the offeree company. The remaining definitions required in the draft directive are mostly self-evident. The term "offeror" is used to designate the bidder, whether an individual, partnership, company or other body, although in practice most bids are made by companies. The term "offeree company" is used to designate the company whose shares or other securities are the subject of the bid; the offerees under the bid are, of course, the shareholders, bondholders etc. of the offeree company to whom the bid is addressed. Groups of companies are defined by reference to the terms which will probably be used in the draft directive on such groups on the basis of the report prepared by Professor H. Würdinger. The term "associate" which is used in the City Code on

Takeovers and Mergers is not employed in the draft directive because it is not susceptible of a sufficiently precise definition for the purpose of legislation, and it is in any case not a term in common use in the member states other than the United Kingdom. On the other hand the term "collaborator" is used in the draft directive to comprise not only the agents of the parties to a bid, but also persons who have agreed, formally or otherwise, to assist the cause of the offeror or the offeree companies in any of the ways enumerated or in any other way "which will or may affect the result of the bid". This appears to be sufficiently precise to be a workable legal definition, and it will, of course, apply to directors and senior executives of offeror and offeree companies who take an active part in proceedings on a bid.

81. As indicated in paragraph 74 above, the draft proposal for a directive leaves the governments of the member states free to designate a privately constituted body or a body subject to public law as the supervisory authority which will enforce the rules relating to general bids, give rulings on the application of the rules and exercise the discretionary powers created by the rules. The rules themselves will, however, form part of the law of the member states, and will therefore also be enforceable by penal proceedings and by civil actions for damages brought by interested persons, as well as by proceedings for injunctive or other remedies brought by the supervisory authority itself. Provision is made for civil and penal proceedings by articles 24 and 25 of the draft directive. The draft directive provides that the competent supervisory authority in respect of a bid should be the authority for the member state in which the offeree company has its <u>siège social</u> or registered office so as to simplify questions of jurisdiction between supervisory authorities of different member states. Nevertheless, it is proposed that the supervisory authorities and the courts of member states

other than the state to which the offeree company belongs should have power to enforce orders made in the bid proceedings (e.g. against an offeror resident in their own national territories) and to supplement them where necessary.

Proceedings before publication of the offer document in respect of a general bid.

82. The purpose of the proposed rules governing the preliminary stages of a bid are to ensure that the offeree company is notified of the offeror's intentions sufficiently in advance of publication of the bid for the offeree's directors to form a view about it, to prevent the offeror and the offeree companies and their directors and collaborators or supporters from dealing in securities of the offeree (or of the offeror or a third company if the securities of such a company are to be offered in exchange for those of the offeree company) during the period leading up to the publication of the full terms of the bid, and to ensure that if during this period there are "leaks" about the intended bid or movements in the market price of the offeror or offeree company's securities indicating that such leaks have occurred, the offeror's intentions are immediately made public.

83. At present only the British legislation and the City Code on Takeovers and Mergers require an approach to be made to the board of an offeree company before the terms of a bid are published. In practice such an approach is always made by the offeror in order to enlist the support of the offeree's directors, if possible, and also to obtain financial and other information beyond that normally published by the offeree company so as to enable the offeror to decide whether to go ahead with a bid and, if so, what price to offer for the offeree company's securities. An advantage of such a preliminary approach being made is

that the offeree company's directors are not caught unawares by the terms of a bid being published, and they are given at least a brief space in which to form an opinion whether the bid should be supported or opposed, so that they may advise the shareholders or security holders to whom the bid is addressed immediately its terms are published. The draft directive follows the accepted practice by making notification of an intended bid obligatory unless the national supervisory authority dispenses with it in exceptional cases (e.g. where the directors of the offeree company are aware of the likelihood of a bid and are about to take irreversible steps to defeat it by issuing voting shares to themselves or their supporters). The notification under the proposed rules will contain the barest essential information about the terms of the intended bid. At this stage the offer document will probably not have been drafted in full, and to require the notification to contain all or most of the information required in an offer document would only delay proceedings. The right to comment given to the directors of the offeree company, including the right to have their comments included in the offer document, may not be extensively relied on in practice since they will probably prefer to publish their comments and recommendations independently after the offer document has been published. Nevertheless, it would be an advantage for them to be able to state briefly through the offer document that they support or oppose the bid for certain basic reasons which they will elaborate later. Statements about the offeree company's enthusiasm for the bid made by the offeror in the offer document tend to be overcoloured and statements of the offeree's opposition to be played down. It is better to allow the directors of the offeree company to speak for themselves.

84. The period leading up to the publication of a general bid is often fraught with rumours, information leaks and erratic market price

movements in the shares and other securities of the offeror and offeree companies. It is desirable, as far as possible, to insulate the market for the securities of the companies from the effects of the bid until its full terms are properly announced, and for this reason the draft directive follows the City Code on Takeovers and Mergers in requiring the offeror and offeree companies and their directors and collaborators to abstain from making announcements or expressing opinions about a general bid before its full terms are published in the offer document. This period of silence should be a comparatively short one, and the prohibition on announcements by the parties during it should not only help to prevent erratic price movements, but should also ensure that announcements and opinions which are eventually published are better prepared and more accurate. Even more essential is a prohibition on dealings in securities of the offeror and the offeree companies by those companies and their directors and collaborators during the period leading up to publication of the offer document. Such dealings can not only affect the market price of the shares or securities of the offeree company which are the subject of the bid, but can also be entered into deliberately for the purpose of producing a market situation in which the bid is bound to succeed or fail. If the offeror company offers an exchange of securities by the bid, dealings in those securities can produce the same results. Consequently, the draft directive (like the City Code) imposes a general prohibition on dealings by the parties to a bid during this sensitive period, but recognises that there may be exceptional cases where the national supervisory authority may permit dealings for good reasons unconnected with the bid (e.g. a director of the offeror or offeree company selling shares for personal reasons or acquiring shares as an investment on his appointment). The standstill which the proposals seek to preserve during the period leading up to the publication of the offer document could easily be broken if the parties

to a bid were at liberty to seek commitments from other persons during that time (such as shareholders of the offeree company who had not taken part in the offeror's decision to make a bid). The proposed rules consequently prohibit such recruitment on the parts of both the offeror and the offeree companies, and to ensure that recruitment is not carried out indirectly, the prohibition is extended to their directors and existing collaborators. It may seem arbitrary to permit the offeror and offeree companies to enlist support for their differing viewpoints before the offeror decides to make a bid and then to prohibit them from doing so again until after the offer document is published. This would seem to give an unfair advantage to the party who is first to act, usually the offeror. In practice this is not so, because during the time an offeror is considering the possibility of making a bid, the only collaborators either party will seek to recruit will be large shareholders (particularly institutional investors) whose commitments or refusals of support will largely determine whether the offeror decides to make a bid or not. In other words, collaborators before a decision to make a bid is made are really parties to the decision itself. On the other hand, once the offeror has decided to make a bid, both parties are inclined to seek support from all useful sources in order to strengthen their tactical or bargaining positions, and since this means that approaches are often made to persons with only modest holdings in the offeree company or, more likely, to their professional advisers, there would, in the absence of a prohibition on recruitment, be a danger that such persons would commit themselves to support or oppose the bid without having seen its full terms and the other information required in the offer document. Because of the restricted definition of a collaborator there would, of course, be no impediment on the offeror or the offeree appointing professional advisers, such as banks and stockbrokers, provided that such persons do not commit themselves in respect of their own holdings or

undertake to recruit support among uncommitted holders of the offeree company's securities.

85. If persons other than the parties to a bid do obtain knowledge of an impending bid before the offer document is published and deal to their own advantage on the market, or if fluctuations in the market prices of the offeror or offeree company's securities indicate that there must have been a leak of information in respect of an intended bid, it is essential that the national supervisory authority should be informed and that it or the offeror should publish a statement about the intended bid, even though the offer document is not ready for publication. Only by this means can the market price of the offeror and offeree company's securities be stabilised, and all sellers and buyers of those securities be equally apprised of the intended bid and its basic terms. The draft directive, following the City Code on Takeovers and Mergers and the Netherlands Rules of Conduct, provides for appropriate publicity in these circumstances, and in order to make the powers of the national supervisory authority effective, the draft directive also empowers the authority at any time to require any company to state whether it intends to make a general bid for the securities of another company.

Obligation to make a general offer

86. The proposed draft directive deals with the question when a person or company must make a general offer to acquire securities by seeking a compromise between the City Code on Takeovers and Mergers (which calls for an offer for cash with a cash alternative when a person or company has acquired shares of another Company carrying 40 per cent of the voting rights at its general meetings, or is about to purchase from a limited number of sellers a holding of shares which confer effective control of the other company), the rule of French law

(which requires an intending purchaser of shares to make a general offer for other shares of the company in question if he would acquire control of it on completion of his contract to purchase) and the Belgian practice (by which the Commission Bancaire requires a purchaser of blocks of shares to make a general offer if his behaviour shows that he is seeking to acquire control of the company in question piecemeal). The purpose of all these rules is, of course, to ensure that the remaining shareholders are treated equally as favourably as those shareholders who sell their shares by private negotiation or on a stock exchange, and also to enable the remaining shareholders to dispose of their shares if they find that a controlling or near controlling holding is vested in one shareholder. The City Code also requires an offeror who makes a bid offering to acquire shares in exchange for shares or securities of another company to offer an alternative cash consideration if the offeror has purchased at least 15 per cent of the shares of the class comprised in the bid within the previous twelve months, and the cash alternative must not be less than the highest price paid by the offeror for such shares during that period. This rule is designed to prevent an offeror making a sham bid offering securities which have no certain value in exchange for the shares he seeks, merely as a cover so that he may continue to purchase shares selectively for cash on the market or by private negotiation. Nevertheless, the fact that 15 per cent of the issued shares in question have been purchased over a period as short as twelve months indicates an intention to acquire a controlling holding eventually, and in principle could justify imposing an obligation on the purchaser to make a general bid for cash, whether he makes a sham exchange offer or not.

87. The draft directive requires a person or company to make a general offer to acquire all the outstanding voting securities of another company

if the prospective offeror already holds securities carrying 40 per cent or more of the total voting rights at general meetings of the other company, or if the prospective offeror has acquired securities carrying 20 per cent or more of such voting rights during the preceding twelve months, or if the prospective offeror has agreed to purchase securities which when combined with his existing holding will give him voting control of the other company. In the first of these three situations a general offer is required because the prospective offeror has potential control of the other company, and in most cases de facto control as well; in the second situation because the potential offeror has shown by his conduct that he is seeking to acquire control by buying blocks of securities piecemeal or by making partial bids; and in the third situation because the prospective offeror is about to acquire de jure control of the other company. The obligation to make a general offer only extends to securities carrying voting rights. Investors in shares or bonds which do not carry actual or prospective voting rights are clearly unconcerned where control of the company in question resides, and if a change or potential change of control occurs, their position is in no way altered. If a person or company is required to make a general offer for outstanding voting securities, the offeror presumably does so unwillingly, or is at least in a position to depress the price offered because of the strength of the voting power attached to the offeror's existing holding. Consequently, the terms of the general offer must be regulated to some extent to protect the holders of the outstanding securities, and the proposed draft does this by requiring the general offer to be made for cash, or at least to contain a cash alternative, and by prescribing the minimum cash price which may be offered. To ensure that the obligation to make a general offer is fulfilled, the national supervisory authority is given powers of enforcement, and may, in particular, deprive securities already held by the offeror of the voting rights attached to them until

a proper general offer is made. Finally, the national supervisory authority is given a discretion to release or modify the offeror's obligation to make a general offer if there are special reasons why the obligation should not apply (e.g. because a person finds himself in control of 40 per cent of the voting rights of a company as a result of a reduction or reorganisation of its capital, or because a company which has acquired voting control of another company lacks sufficient liquid resources to be able to make a cash offer for outstanding voting securities, but is willing to issue its own readily marketable shares or bonds in exchange for them).

The Offer Document and Publicity: the Period for Acceptance and the Conclusion of the Bid.

88. The proposal for a draft directive introduces a necessary degree of formality into the proceedings on a general bid by requiring the publication of an offer document by the offeror and comments and a recommendation thereon by the offeree company, by requiring these documents to contain certain essential items of information to enable holders of securities to whom the bid is addressed to reach an informed and balanced judgment whether to accept the bid or not, and by requiring copies of these documents to be sent to the national supervisory authority before or at the time when they are published so that it may exercise its powers to require supplementary or corrective information to be published. All these requirements are essential to protect the holders of securities comprised in a bid, without in any way restricting the parties to a bid in presenting their cases as persuasively as possible. The rules as to the information which must be included in offer documents and comments and recommendations thereon by the offeree company are based on the rules of the City Code and the United Kingdom Stock Exchange, subject to certain modifications needed to make them appropriate to companies governed by the

laws of other member states. However, the Netherlands Rules of Conduct have also been taken into account. The more modest disclosure requirements of French law and Belgian and Italian practice are all covered by the proposed rules. The proposed draft seeks to restrict the offeror's freedom to frame the terms of a bid in only two ways, namely, by precluding the offeror from cancelling the bid for any reason other than the failure of the persons to whom it is addressed to accept the bid in respect of the minimum number of securities stipulated in the offer document, and by requiring all those persons to be offered exactly the same terms for their holdings. These rules are necessary to ensure that holders of securities are not induced to commit themselves to accepting a bid when there is no equally binding commitment on the part of the offeror, and also to prevent special arrangements being made for the benefit of holders of large blocks of securities by which they are paid rateably more for their securities than smaller investors. This does not, of course, conflict with later provisions of the draft directive by which an offeror is permitted to increase the consideration offered by a bid if the increase available to all the persons to whom the bid is addressed. Moreover, although an offeror cannot reserve a general contractual right to cancel a bid, the national supervisory authority is given a discretion by a later provision of the draft directive to allow an offeror to cancel a bid in special circumstances.

89. The requirement that offer documents and comments and recommendations thereon by the offeree company's directors should be published in at least one national daily newspaper in the offeree company's country is designed to meet the practical needs of bids for companies whose securities are in bearer form, but it will be an advantage to have these documents published in this form even in the case of bids for British and Irish companies, whose securities are almost always in registered form and

whose shareholders and bondholders can therefore be communicated with by post. The public at large has an interest in takeover bids, and publication of the principal bid documents in the press will ensure that errors and omissions in those documents, as well as the fact that a bid is being made or contested, will not escape notice. In the case of small cash bids for not more than one million units of account where all the securities bid for are in registered form, however, an exception is made, and the draft directive permits the offer document and the comments of the offeree company's directors to be communicated to the holders of the securities concerned by post alone. If a bid for registered securities were too large to come within this exception, or were a bid offering securities instead of or in addition to cash, the offer document and the comments of the offeree's directors would have to be published in a national newspaper and copies of those documents would also have to be sent by post to the holders of the securities comprised in the bid.

90. The proposed duration of the period for accepting a general bid will be between 28 and 42 days from the publication of the offer document. This compares with at least 21 days under the City Code on Takeovers and Mergers, at least one month under French law, between 25 and 45 working days under the Code of Conduct of the Milan Stock Exchange and not less than 30 days (or 20 days if the bid is an agreed one) under the Netherlands Rules of Conduct. It would seem best to express the upper and lower limits of the period for acceptance in terms of weeks for ease of calculation, and bearing in mind that the period should be long enough to give the persons to whom the bid is addressed time for reflection, but not so long as seriously to affect normal price movements for the securities in question, a minimum limit of four weeks and a maximum of six weeks would appear satisfactory. Similarly, a limit must

be placed on extensions of the period for acceptance if the offeror revises the consideration offered by the bid. No restriction is placed on the number of times a bid may be revised (as under French law) because it is in the interests of the persons to whom the bid is addressed that the offeror should increase the amount of his bid as often as necessary to gain the necessary percentage of acceptances, and in a situation of competing bids, that the contenders should be free to bid upwards against each other until one concedes defeat. The draft draft directive fixes the period of the extension of the period for acceptance at 21 days in the case of a revision to gain acceptances and the expiration of the competing bid (if later) if there is one. To prevent bids being indefinitely extended, however, the proposed draft fixes a maximum of 70 days from the publication of the offer document for the duration of a bid which has been extended several times. It would put an undue strain on the market for any bid to be pending for longer than ten weeks, which is some one and a half weeks more than the maximum of 60 days fixed by the City Code on Takeovers and Mergers. During the period for acceptance of a bid its terms or conditions may not be modified, but the consideration offered by the offeror may be increased or modified in the way indicated in the next paragraph. Furthermore, a bid may not be cancelled during the period for acceptance unless the national supervisory authority permits for special reasons. In that event the offeror and persons who have already accepted the bid would be restored to their original position before the bid was made, and any securities issued in connection with the bid would have to be cancelled.

91. The procedure for publishing a revised bid and the comments and recommendation of the offeree company's directors in respect of it follow the pattern of the publicity required in connection with the

original offer documents and the original comments and recommendation. The proposed draft permits revisions of a bid (and consequent extensions of the period for acceptance) only when the price or other consideration offered by the bid is increased or when its nature is changed (e.g. by an original bid offering shares or bonds of the offeror company being replaced by a cash bid or by a cash alternative being added). Contrary to British practice, the draft directive would not permit the extension of the original period of acceptance merely because acceptances have come in slowly and there is a likelihood that insufficient acceptances will be given by the end of the period to prevent the bid from lapsing. If the persons to whom the bid is addressed have not accepted it in sufficient numbers within six weeks after it is published (the maximum length of the original period for acceptance), that is a strong indication that they wish the original bid to lapse and its influence on the market to be brought to an end; if the offeror wishes to avoid this happening, he should increase his bid by a substantial amount and extend the period oc acceptance automatically by 21 days. Unlike French law, the proposed draft does not require an increase of the consideration offered by a bid to be at least 5 per cent of the amount originally offered. It is impossible to fix a percentage increase which would be appropriate in all situations. Instead it should be left to the offeror to judge what increase in the bid is necessary to gain the requisite acceptances, and since an increase cannot be made later than seven weeks after the original offer document was published, it is unlikely that any offeror would be able to increase the bid more than twice, even if the original period for acceptance were the minimum one of four weeks. The draft directive follows the City Code on Takeovers and Mergers and French law by entitling persons who have already accepted a bid before a revised bid is published to receive the increased consideration offered thereby. If the revised bid offers a different kind of consideration, however,

the most practical solution is that the original acceptance should be binding unless the person who gave it expressly chooses to accept the substituted consideration, and the draft directive provides that this shall be so.

92. To ensure that the persons to whom a bid is addressed are kept informed of the offeror and offeree company's tactics in dealing in securities in either of those companies during the period for acceptance of the bid, daily reports of such dealings to the national supervisory authority and weekly newspaper advertisements summarising the daily reports are called for. Also, the draft directive provides that if during the period for acceptance the offeror acquires securities of the kind comprised in the bid at a higher price or a more valuable consideration than that offered by the bid, the bid price must be correspondingly increased. If this were not so, the offeror would be able to pay more favourable prices than the bid price to selected sellers by buying their securities on the market instead of having them accept the bid.

93. The draft directive provides for weekly reports by the offeror to the national supervisory authority of the number of acceptances of a bid received during the period for acceptance and the publication of these reports in the national newspaper in which the offer document appeared. This should enable holders of securities comprised in the bid who are uncertain whether their fellow security holders will accept the bid in sufficient numbers for it to succeed, to form a picture of the likelihood of success or failure while there is still time for them to accept the bid. The publicity required by the proposed draft for the final result of a bid is essential for obvious reasons, and so also is a power for the national supervisory authority to investigate and declare the true outcome of the bid if it is suspected that the offeror has not received the number of acceptances required for the bid to become

unconditional. To accommodate the French and Italian practice by which acceptances are communicated through brokers to the stock exchange authorities, who are responsible for checking the number of acceptances, the reporting procedure in respect of the current number of acceptances and the final result of a bid is excluded by the draft directive where such a centralised system of settlement operates, but the exclusion would not apply if the simplified procedure for a bid under the French rules were employed. The outcome of a bid is, of course, determined by the number of acceptances obtained during the period for acceptance. Unless the acceptances equal the percentage of securities sought by the offeror, the bid lapses, but it is then still possible for the offeror to acquire the securities by individual negotiation with the persons who have given acceptances if they still wish to sell. If acceptances are given for more than the percentage of the securities specified in the offer document, the offeror can take up the whole or part of the excess securities at the bid price, and the acceptances are reduced rateably if the offeror does not take up the whole of the excess.

Conduct of the Parties to a General Bid: Civil and Penal Liabilities.

94. The draft directive seeks to give effect to the principle that all persons to whom a general bid is addressed shall be treated equally by prohibiting the offer of additional or substituted consideration to any of their number to induce him to accept the bid. In the absence of such a prohibition there would be a danger that holders of substantial fractions of the securities comprised in the bid might be given benefits which were not available on a pro rata basis to all other security holders, and that the latter might suffer by the price or other consideration offered by the offer document being correspondingly diminished. As a result of this provision of the draft directive it

would not be possible while a bid is current for the offeror to pay any consideration for a controlling shareholder's acceptance of the bid over and above the bid price set out in the offer document. If such a holding were purchased by the offeror on the market and not by the controlling shareholder accepting the bid, the purchase would be lawful, but its effect would be to raise correspondingly the amount payable under the bid for all the other shares comprised in it. With the same object of ensuring equality of treatment for all persons to whom a bid is addressed, the draft directive also prohibits the communication to some of them of any information or advice relevant to a bid by the parties to it unless the same information or advice is simultaneously made available to all such persons.

95. The draft directive seeks to prevent the directors of an offeree company from defeating a general bid by entering into transactions affecting the offeree company's assets or securities otherwise than in the normal course of carrying on its business with the result that even if the bid is successful, the offeror will not acquire the fraction of voting power he intended, or will find that the nature or composition of the offeree's assets has so changed that the offeree company is no longer the kind of undertaking it was when the bid was made. The directors of the offeree company are, of course, bound to use their powers of management in the interests of its shareholders and bondholders, and it is therefore open to the latter to approve unusual transactions designed to defeat a bid if they do not wish it to succeed. The proposed draft directive, therefore, permits the offeree company's directors to carry the transaction out if a general meeting of its shareholders so resolves, but in order to protect bondholders who have conversion or subscription rights (if the bid extends to their securities), the transaction must not only be approved by a general meeting of the offeree company (at

which they will not be able to vote), but must also be sanctioned by separate meetings of each class of bondholders concerned. The approval of transactions by shareholders and bondholders during a bid is an additional requirement, and not a substitute for any other approval or consent which would be required for a transaction under company law by reason of its nature. Consequently, any authorisation of a transaction by the supervisory board of the offeree company required by the ordinary rules of company law would still be needed in addition to that of a general meeting. Such a consent or approval would be given by an organ of the offeree company as such, whereas the approval of the shareholders or bondholders at their meetings would simply be a waiver of their right to object to the transaction in the special circumstances.

96. It is doubtful whether the general liability to pay compensation imposed by the Civil Codes or rules of common law of the member states would suffice to protect the persons to whom a general bid is addressed from loss caused by breaches of the rules contained in the draft directive, or from loss caused by defects or inaccuracies in the documents published in connection with the bid. Such a general liability is usually only imposed when the defendant is proved to have been at fault or guilty of negligence, and this requires the plaintiff to prove his state of knowledge of the relevant facts and his degree of responsibility for the act which caused the plaintiff loss. It is only just where persons create a situation where knowledge of the relevant facts is of the utmost importance and where they are likely to have such knowledge but the persons who are affected by the situation and who have to make a choice do not, that the persons responsible for creating the situation should bear a special responsibility for seeing that all necessary information is truthfully and completely communicated to those who have to make the choice. It is also only just that the responsibility of those

who create the situation should be collective, and that any adjustment of liability to take account of the degree of their personal fault should be made by contributions or indemnities between themselves, and that proof of personal fault should not be a pre-requisite for the recovery of compensation from any of their number. For these reasons the draft directive imposes liability on parties to a bid to compensate any person who holds securities comprised in a bid while it is current for loss resulting from a breach of the rules contained in the directive. The draft directive also imposes a particular liability on directors of the offeror and offeree companies and certain other persons for incorrect information and unsupportable opinions contained in offer documents and in comments and recommendations thereon to which they have put their names, and this liability is extended to persons who formally consent to the inclusion of statements or opinions by them in such documents. Neither of these liabilities is absolute, however, because the defendant may exonerate himself by showing that he exercised reasonable care to ensure that the breaches complained of should not occur, and when a person who has consented formally to the inclusion of a statement or opinion by him in an offer document or in comments and recommendations thereon is liable, the directors of the company which issued the document may escape liability merely by showing that that person was competent or qualified to make the statement or express the opinion in question (i.e. that they exercised reasonable care in selecting him). The important features, however, are that the burden of proving that due care was exercised would rest on the defendant, who should be in possession of evidence of the steps taken to ensure that the rules were complied with, and that it would not be possible for a defendant to escape liability merely by showing that he personally did not do the act or approve of the omission which caused the plaintiff loss.

97. Although it is desirable that the rules governing civil liability in connection with general bids should be prescribed in detail in the draft directive, it is not necessary that the penal sanctions for breaches of the rules governing bids should be prescribed as closely. Penal sanctions are best left to the discretion of the member states, which will adjust them having regard to the seriousness of breaches and the frequency with which they are likely to occur, or do in fact occur. It therefore suffices for the draft directive to require that penal sanctions shall be imposed if the rules governing bids are broken deliberately or as a result of gross negligence, or if false statements or unsupportable opinions are published or communicated knowingly (i.e. with full knowledge of their falsity or unsupportability in fact, and therefore fraudulently).

Protection of Employees of the Offeree Company.

98. The interests of employees of the offeree company are safeguarded by a number of provisions in the proposal for a draft directive. These are based on the revised Article 6 of the draft Third Directive on Mergers, and so far as possible they take the same form as that Article.

99. The offer document published by the offeror must set out the offeror's intentions (if the bid is successful) as to the future of the offeree company's undertaking and the continued employment of its existng employees. The offeree company must furnish a copy of the offer document to the representatives of its employees (e.g. works councils) as soon as such a copy is received from the offeror, and any employee may inspect the copy in the possession of the employees' representatives. Within the following seven days the directors must prepare written comments on the contents of the offer document mentioned at the beginning of this

paragraph, and must communicate them to the employees' representatives. The same comments, with or without modification, will of course also appear in the comments and recommendation in respect of the offer document which the directors of the offeree company have to publish within fourteen days after the publication of the offer document. A copy of these comments on the whole offer document must be supplied to the employees' representatives. To ensure that these representatives have an opportunity to make their own comments on the offer document known to the share or bondholders to whom the bid is addressed, the directors of the offeree company are required to discuss the effect of the bid on employees' interests with their representatives, and if required, to publish the representatives' comments thereon in the same way as the directors' comments on the offer document as a whole. There is, of course, nothing to prevent an earlier discussion taking place, or to prevent the employees' representatives discussing the bid with the offeror at any time. However, the appropriate time for the obligatory consultation of the employees' representatives is when they are in a position to express a final opinion on the bid, and this cannot be until they have seen the comments and recommendation made by the directors of the offeree company on the offer document generally.

100. Although an offeror may be willing to negotiate with the representatives of the employees of the offeree company before the result of the bid for its shares is known, it would be purposeless to impose a legal obligation to do so on the offeror until it is certain that the bid is successful and that the offeror will obtain the number of securities on which the bid was conditional. In this respect a

general bid differs from a merger, where the boards of the merging companies are necessarily in agreement that the operation should proceed, and its conclusion is merely contingent on the approval of the shareholders of those companies. The proper time to begin obligatory negotiations with the offeror in a bid situation is when the bid is known to have succeeded, and the offeror is consequently in a position to implement his proposals affecting the future of the company's undertaking and the continued employment of its employees. This is, of course, particularly so if the directors of the offeree company oppose the bid. The form of the negotiations and the provision for arbitration in the absence of agreement should naturally be the same as in a merger, and this is what the proposed draft directive provides.

Concluding Observations

101. The proposal for a draft directive in the Appendix to this Report is not intended to contain an exhaustive, and therefore ideal, code of regulations to govern takeover and other general bids. Instead it merely seeks to provide the minimum necessary protection for the persons to whom bids are addressed and to ensure sufficient similarity of procedure in connection with bids that holders of securities in offeree companies incorporated in any of the member states will recognise the relevant steps of the bid proceedings and their significance as they take place, and will know what are the minimum rights to which they are entitled. For this reason, the draft directive does not deal with the question of the compulsory acquisition of the shares of minority shareholders who do not accept a bid which is left to be regulated entirely by the law of each member state as it thinks fit.

This matter could quite properly be dealt with in a directive relating to takeover bids, but it is considered that the essential material contained in the draft directive is more likely to gain acceptance by the governments of the member states if it is not dealt with in it at this stage.

102. The proposal for a draft directive in the Appendix is drafted in the style for English legislation, and therefore inclines to be more exact and detailed than the style of legislation in the other member states. It also makes extensive use of standard expressions which are defined at the beginning of the draft directive. Wholly apart from questions of taste in legislative drafting, there can be no doubt that the directive on takeover and other bids (if one is eventually issued) will have to be more specific than the existing draft directives, all of which deal with aspects of company law where national legislation is already well developed and where there are more common elements in the existing laws of the member states. The law governing takeover bids is a comparatively new extension of company law. There is as yet little standardisation of technical terms in respect of it and few common elements of procedure in the different member states. For this reason any directive on the subject will have to supply its own technical definitions and regulate procedure in detail if the objective of harmonising the law of the member states so as to give equivalent protection for shareholders of companies involved in bids is to be attained.

A P P E N D I X

PROPOSAL FOR A ..... DIRECTIVE

to coordinate the safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, as regards general bids for the acquisition of shares and securities of public companies.

SCOPE OF APPLICATION, DEFINITIONS AND NATIONAL SUPERVISORY AUTHORITIES

Article 1.

The coordination measures prescribed by this Directive apply to the laws, regulations and administrative provisions of the Member States relating to general bids in respect of securities of the following types of company:

in Belgium:	de naamloze vennootschap la société anonyme
in Denmark:	et aktieselskab
in France:	la société anonyme
in Germany:	die Aktiengesellschaft
in Ireland:	the company limited by shares other than a private company within the meaning of the Companies Act, 1963
in Italy:	la società per azioni
in Luxembourg:	la société anonyme

in the Netherlands: de naamloze vennootschap

in the United Kingdom: the company limited by shares other than a private company within the meaning of the Companies Act, 1948.

Article 2.

In this Directive the following expressions shall have the meanings hereby assigned to them:

"cash" means money or an instrument entitling its holder to the payment of money on demand or at a date not more than six months after the issue of the instrument;

"collaborator" means a person or body of persons who agree expressly or tacitly to assist an offeror or an offeree company in connection with a general bid by acting on its behalf as its agent or otherwise by acquiring, retaining or disposing of securities or rights in respect of securities, or by doing or abstaining from any other act which will or may affect the result of the bid, but a person shall not be a collaborator by reason only of:

(i) doing any act exclusively on behalf of a person to whom the bid is addressed; or

(ii) acting in a professional capacity for the offeror or the offeree company as a lawyer, accountant, auditor, bank or stockbroker; or

(iii) expressing any opinion about the bid or the conduct of the offeror or offeree company in respect of the bid, unless he has agreed to do so for valuable consideration provided directly or indirectly by the offeror or offeree company, or by a collaborator;

"date of the offer document" means the date on which the offer document is first published;

"director" means a member of the board of directors of a company, or if it has a supervisory board, a member of its executive board;

"general bid" means an offer by any person or company to acquire securities carrying voting rights made at substantially the same time to all the holders of such securities or of such securities of the same class (other than the offeror, companies belonging to the same group of companies as the offeror, and collaborators with the offeror), where the offer is conditional on its acceptance by the holders of a specified amount or fraction of such securities, and either

(i) the offeror, companies belonging to the same group of companies as the offeror and collaborators with the offeror will collectively have voting control of the offeree if that condition is fulfilled; or

(ii) the offeror and companies belonging to the same group of companies as the offeror collectively have voting control of the offeree when the bid is made; or

(iii) the offer is conditional on acceptance by the holders of such amount or f action of securities as entitle their holders (where necessary, after exercising rights of conversion or subscription) to exercise collectively at least 10 per cent of the total voting rights which may be exercised at a general meeting of the offeree company held at the date of the offer document in respect of the bid;

"group of companies" means a controlling company and all the companies which are dependant on it;

"national newspaper" means a daily newspaper which circulates throughout the Member State in which the offeree company has its registered office or corporate seat (siège social);

"offeree company" means a company which has issued securities which are the subject of a general bid;

"offeror" means a person or company by or on behalf of whom a general bid is made, but does not include an agent who communicates or publishes a bid on behalf of an offeror;

"party to a general bid" means the offeror, the offeree company, a director of the offeror or the offeree company, or a collaborator in respect of the bid;

"period for acceptance" means the period from the first publication of offer document in respect of a general bid until the latest date on which the bid may be accepted;

"pre-publication period" means the period from the time when the offeror decides to make a general bid until the date of the offer document in respect of the bid;

"security" means a share, bond, debenture, certificate of indebtedness, right to participate directly or indirectly in the profits or assets of a company, right to an undivided share in a block of shares, bonds, debentures or certificates of indebtedness of a company and a right to subscribe for shares, bonds, debentures or certificates of indebtedness of a company;

"security carrying voting rights" means a security which entitles its holder to vote on resolutions for the appointment or objecting to the appointment of directors or members of the supervisory board

of a company, or which entitles its holder by the exercise of a right of conversion or subscription to acquire such a security;

"securities comprised in a bid" means the securities in respect of which a general bid is made;

"voting control" means the power, directly or indirectly, and whether by the exercise of voting rights, or rights arising under a contract, trust or otherwise, to determine how voting rights shall be exercised in respect of more than one-half of the total number of votes which may be cast at a general meeting of a company.

Article 3.

1. Member States shall each designate a national authority governed by public or private law to ensure that the rules prescribed by this Directive are observed and applied, and the designated national authority (in this Directive referred to as the Authority) shall in particular be empowered:

(a) to give rulings and decisions on questions arising in connection with general bids, either on its own initiative, or on the application of any party to a general bid or any person interested in securities comprised in a general bid;

(b) to order any party to a general bid to do or to abstain from doing any act for the purpose of ensuring compliance with the rules prescribed by this Directive, and to enforce such an order by proceedings brought in the name of the Authority in the courts of any Member States; and

(c) to exercise such discretions and give such permissions and exemptions as are provided by this Directive.

2. The competent Authority in respect of a general bid shall be the Authority for the Member State in which the offeree company has its registered office or corporate seat (siège social), but the Authorities of other Member States shall assist the competent Authority on request by providing it with information and by bringing proceedings in the courts of the Member States to which they respectively belong in order to enforce any order made by a competent Authority and by making such supplementary orders as may be required to effect such enforcement.

PROCEEDINGS BEFORE PUBLICATION OF THE OFFER DOCUMENT.

Article 4.

1. At least seven days before the offer document in respect of a general bid is first published the offeror shall notify the offeree company of the offeror's intention to make the bid, and shall invite the offeree company to send its written comments to the offeror within four days.

2. The notification shall state:

(a) the name of the offeror and of the agent for the offeror (if any) by whom the notification is given;

(b) the class and number of securities in respect of which the bid will be made;

(c) the price or other consideration which will be offered for each of those securities, or if the offeror has not finally determined the amount of that price or other consideration, the minimum price or other consideration which will be so offered; and

(d) the number of securities of the class or classes to be comprised in the bid which are respectively held by or on behalf of (i) the offeror and companies belonging to the same

group of companies as the offeror, and (ii) persons who have already agreed to accept the bid.

3. Within four days after receiving the notification the directors of the offeree company may send their written comments on the bid to the offeror (including, if they wish, their recommendation that the bid should be accepted or rejected), and the offeror shall include those comments in the offer document, unless the comments exceed a reasonable length and the Authority permits the offeror to omit them for that reason.

4. The offeror shall deliver to the Authority a copy of the notification immediately after it has been given and a copy of any written comments on the bid immediately after they are received.

5. In exceptional circumstances the Authority may permit an offeror to publish an offer document without complying with this Article.

Article 5.

1. Except for the purpose of obtaining professional advice and complying with the rules contained in this Directive the parties to an intending general bid shall not communicate any information or opinion in respect of it to any other person during the pre-publication period, and shall not during that period attempt to induce any other person to become a collaborator with the offeror or the offeree company.

2. During the pre-publication period the parties to an intended bid shall not enter into any transactions in connection with securities of the offeree company without the permission of the Authority.

3. If by an intended general bid the offeror will offer securities issued or to be issued by the offeror or any other company in exchange

for securities comprised in the bid, the parties to the intended general bid shall not during the pre-publication period enter into any transactions in connection with securities of the offeror or that other company without the permission of the Authority.

4. Paragraphs 2 and 3 shall not apply to transactions entered into by the offeree company or its directors before they have reason to believe that the offeror intends to make a general bid for securities of the offeree.

Article 6.

1. If during the pre-publication period in respect of an intended general bid the offeror or the offeree company has reasonable cause to believe either:

(a) that a person other than the parties to the bid has become aware of the offeror's intention to make a general bid and has in consequence entered into a transaction in connection with securities of the offeror or the offeree company; or

(b) that the quoted prices or published dealing prices of securities of the offeror or the offeree company have been affected by any such person becoming aware of the offeror's intention to make a general bid;

the offeror or the offeree (as the case may be) shall immediately notify the Authority of that fact and give the Authority all the information about the matter in its possession.

2. If during the pre-publication period the offeror comes under a duty to notify the Authority under paragraph 1, it shall also immediately publish an advertisement in a national newspaper stating that the offeror has formed an intention to make a general bid for securities of the offeree company and setting out the matters contained in the notification

of the bid which the offeror has given to the offeree company under Article 4. If the offeror has not given such a notification the advertisement shall set out the matters which would be required to be stated in a notification given on the date when the advertisement is published, other than the price or other consideration, or the minimum price or other consideration, which will be offered for the securities comprised in the bid if the offeror has not decided upon its amount.

3. If the Authority has reasonable cause to believe that an offeror or an offeree company should have given it a notification under paragraph 1 of this Article but has not done so, it may require the offeror or the offeree company (as the case may be) to give it all the information in its possession relating to the intended general bid, and if the offeror has not published an advertisement under paragraph 2 of this Article, the Authority may publish such an advertisement at the expense of the offeror setting out the matters required to be included in such an advertisement as fully and as accurately as possible from the information in its possession.

4. The Authority may at any time by written notice require the directors of any company to state whether they have decided to make a general bid for the securities of another company within the following six months, and if so, to state the name of the company and the securities in respect of which the general bid is to be made.

OBLIGATION TO MAKE A GENERAL OFFER

Article 7.

1. A person or company must make a general offer to acquire all the securities carrying voting rights of another company which are not

held by him or it if that person or company:

(a) holds securities of the other company which entitle their holders (where necessary, after exercising rights of conversion or subscription) to exercise collectively at least 40 per cent of the total voting rights which may be exercised at a general meeting of that other company; or

(b) has within the immediately preceding twelve months acquired (otherwise than by way of issue) securities of the other company which entitle their holders (where necessary, after exercising rights of conversion or subscription) to exercise collectively at least 20 per cent of the total voting rights which may be exercised at a general meeting of that other company; or

(c) enters into an agreement to acquire securities of the other company which, when added to the securities already held by that person or body of persons,will entitle their holders to exercise voting control over the other company.

2. For the purposes of this Article securities held by companies which belong to the same group of companies as a company which may be required to make a general offer shall be deemed to be held by that company.

3. A person or company which is required to make a general offer to acquire securities of another company must either:

(i) offer to acquire such securities for cash; or

(ii) offer to issue or transfer securities of itself or a third company in exchange for securities of the other company, but with the option for a holder of securities of the other company instead to receive cash for all or any of the securities held by him.

4. The price in cash which a person or company must offer for securities under a general offer made by it must:

(i) in the case of securities of a class already held by that person or company, be at least equal to the highest price in cash paid by him or it for any securities of the same class during the preceding twelve months; or

(ii) in any other case, be at least equal to the average offered price for such securities published by a stock exchange in a Member State during the preceding twelve months, or if it is not possible to ascertain such an average offered price or if the securities are not quoted or dealt in on a stock exchange, be at least equal to the fair value of such securities assessed by accountants appointed by the Authority on the application of any interested person.

5. If a person of company fails to make a general offer to acquire securities in compliance with this Article, the Authority may, after affording him or it an opportunity to make submissions in writing and considering such submissions, make an order requiring that person or company to make a general offer on the terms and conditions set out in the order and prohibiting the exercise of voting rights in respect of securities of the same class held by that person or company until he or it has published an offer document in performance of the order.

6. A general offer made for securities under this Article by a company shall satisfy the obligation of every other company belonging to the same group of companies to make a general offer in respect of the same securities in the same circumstances.

7. If a person or company makes a general offer for securities under this Article in the circumstances mentioned in paragraph 1 (a), that

person or company shall not be required to make a further general offer in respect of the same securities if it enters into an agreement within paragraph 1 (c).

8. The provisions of this Directive in respect of general bids and offer documents shall apply to a general offer to acquire securities as they apply to a general bid, except that:

(i) a general offer may not be made conditional on acceptance by the holders of a specified number or fraction of the securities comprised in it, and

(ii) paragraphs (h) and 2 (k) of Article 8, sub-paragraphs (b) to (e) of paragraph 2 of Article 19 and Article 20 shall not apply to a general offer.

9. The Authority may for special reasons:-

(i) release a person or company from the obligation to make a general offer to acquire any securities, either absolutely or subject to conditions; and

(ii) permit a person or company to make a general offer on terms and conditions other than those prescribed by paragraphs 3 and 4.

THE OFFER DOCUMENT AND PUBLICITY

Article 8.

1. An offer document in respect of a general bid must state:-

(a) the date on which it is first published;

(b) the name of the offeror and of the agent for the offeror (if any) by whom the offer document is published;

(c) the class of securities in respect of which the bid is made;

(d) if the offeror offers to acquire securities for cash, the

amount offered for each share or unit of a security comprised in the bid and the date on which payment of that amount will be made or the terms of any instrument by which payment will be secured;

(e) if the offeror offers to acquire securities otherwise than for cash, the nature of the consideration offered and the amount of it offered in exchange for each share or unit of a security comprised in the bid and the date on which it will be issued to or vested in holders of securities who accept the bid;

(f) if the offeror offers to acquire securities otherwise than for cash, whether the holder of any security comprised in the bid will have the option to receive a consideration in cash for that security, and if so, the conditions on which that option may be exercised and the date on which that consideration will be paid or the terms of any instrument by which that consideration will be secured;

(g) the means by which the offeror will provide the money required to satisfy the offeror's obligations to holders of securities who accept a bid made for cash, or who exercise an option to receive cash in the case of a bid made for a consideration other than cash;

(h) the number, amount or percentage of securities comprised in the bid whose holders must accept the bid if the offeror is to be bound to accept a transfer or to take delivery of any such securities; and

(i) the latest date on which the bid may be accepted and the steps to be taken by the holder of securities comprised in the bid in order to accept it and to receive the consideration for his securities.

2. An offer document in respect of a general bid must set out:-

(a) the number or amount of securities of the class comprised in the bid which are respectively held at the date of the offer document by or on behalf of:-

(i) the offeror and companies belonging to the same group of companies as the offeror;

(ii) directors of the offeror and those other companies;

(iii) collaborators with the offeror other than such directors; and

(iv) persons (other than collaborators with the offeror) who have agreed to accept the bid before the offer document is published;

(b) the number or amount of voting securities of the offeree company/(carrying voting rights other than securities of the class comprised in the bid) which are respectively held at the date of the offer document by the classes of persons mentioned in (a);

(c) the number or amount of securities of the class comprised in the bid which the offeror and companies belonging to the same group of companies as the offeror have acquired during the period of twelve months immediately preceding the date of the offer document; the highest and lowest prices paid in cash for such securities and the respective amounts of securities acquired at those prices and the dates when they were acquired; and the amount of such securities acquired otherwise than for cash or on special terms,/and the nature and amount of the consideration for which, or the special terms on which, they were acquired;

(d) if the securities comprised in the bid, or securities offered by the bid in exchange for them, are quoted or dealt in on one or more stock exchanges in the Member States, the highest and

lowest offered prices for such securities published by each such stock exchange during the twelve months immediately preceding the date of the offer document and the average offered price for such securities during the periods of three months and six months immediately preceding that date;

(e) so far as the offeror is aware the number or amount of voting securities of the offeror respectively held at the date of the offer document by or on behalf of (i) the offeree company and companies belonging to the same group of companies as the offeree company, and (ii) the directors of the offeree company and those other companies;

(f) the terms of any agreement or arrangement between the offeror, or any company belonging to the same group of companies as the offeror, or any collaborator with the offeror and any director or holder of securities of the offeree company which is connected with or dependent on the bid, or the acceptance of the bid by any of the persons to whom it is addressed, or/in the acceptance of the bid respect of any number or fraction of the securities to which it relates;

(g) the value of the assets of the offeree company after deducting its debts, liabilities and provisions as shown in its most recently published balance sheet, together with the date at which that balance sheet was made out;

(h) The net profits of the offeree company (before deducting provisions for taxation) as shown in its most recently published annual profit and loss account, together with the period for which that account was made out;

(i) the published net profits of the offeree company for each period or periods of less than a year ending since the date at which its most recently published balance sheet was made out;

(j) particulars published by the offeree company since the date at which its most recently published balance sheet was made out in compliance with Directive No. of [on interim reports and publicity];

(k) the intentions of the offeror (if the bid is accepted by the holders of the number or fraction of securities mentioned in sub-paragraph (h) of paragraph 1) as to:-

(i) the composition of the offeree company's board of directors;

(ii) the payment of compensation to directors of the offeree company who cease to be directors in consequence of the bid being made, or who cease to be directors on or after the date of the offer document;

(iii) the continuation, expansion or contraction of the offeree company's undertaking, the acquisition or disposal by it of substantial amounts of assets, and the alteration of the nature, composition or geographical location of the offeree company's undertaking or of a substantial part thereof;

(iv) the continued employment of the existing employees of the offeree company; and

(l) the written comments of the directors of the offeree company made under paragraph 3 of Article 4 of this Directive which the offeror is obliged to include in the offer document.

3. Every offer document shall contain a statement that the directors of the offeror company have taken all reasonable care to ensure that all the information contained in the offer document is correct at the date when it is published, and that all opinions, forecasts and valuations by the directors contained or referred to in the offer document are based on information which they have taken all reasonable care to ensure is correct at that date.

4. An offer document may be published by or on behalf of two or more offerors jointly, or may relate to two or more classes of securities of the offeree company. In that event the information required by this Article shall be given in the offer document separately in respect of each of the offerors, or in respect of each of those classes of securities (as the case may be).

Article 9.

If an offeror by a general bid offers to acquire securities in exchange for other securities issued or to be issued by the offeror or any other company, the offer document must set out the same information in respect of the offeror or that other company and in respect of the securities issued or to be issued by either of them as if the offer document were a prospectus published in connection with the admission of those securities to official quotation on a stock exchange, and Directive No. of [on prospectuses in connection with the admission of securities to quotation (O.J. No.C 131 of 13 December 1972)] shall apply accordingly.

Article 10.

No term or condition of a general bid (whether contained in an offer document or not) shall be valid insofar as:-

(a) it permits the offeror to cancel, terminate or modify his or its obligation to accept transfers or take delivery of securities whose holders accept the bid and to pay or provide the consideration offered for those securities in the offer document in any circumstances other than the bid not being accepted by the end of the period for acceptance by the holders of securities amounting to the number or fraction specified in

the offer document in compliance with paragraph 1 (h) of Article 8; or

(b) it provides that that obligation of the offeror shall be cancelled, terminated or modified in any circumstances other than the bid not being accepted by the end of the period for acceptance by the holders of that amount of securities; or

(c) the terms on which any person may accept the bid are in any respect more favourable than the terms on which any other person may accept it.

Article 11.

1. No statement, opinion, forecast or valuation which is expressed to be made by, or to represent the views of, a person other than a director of the offeror shall be included in an offer document, unless the person whose statement or opinion it purports to be or represent has given his written and signed consent to its inclusion before the offer document is published and has not withdrawn his consent before that time, and the offer document contains a statement to that effect.

2. If an offer document contains a valuation of any assets of the offeror, the offeree company or any other company, it must set out the name and qualifications of the person who made the valuation, the basis on which he made it and the date as at which it was made.

3. If an offer document contains a forecast of the future profits of the offeror, the offeree company or any other company, it must set out the basis on which the forecast is made, and must be accompanied by a statement made by an accountant who is qualified to audit the accounts of the company in question that in his opinion the forecast is reasonable, having regard to the company's financial condition and past profits.

Article 12.

1. An offer document shall first be published in a national newspaper, but may thereafter be published in full in any newspaper, as an advertisement or circular, or by any other means.

2. If a notice or advertisement is published by an offeror in connection with a general bid which does not contain the information required to be included in the offer document in respect of that bid, the notice or advertisement shall state that any person may obtain a copy of the offer document from the offeror or its agent (if any) by whom the offer document was published on request at a stated address in the Member State where the offeree company has its registered office or corporate seat (siège social), and the offeror or its agent shall supply a copy of the offer document/to any person who requests it at that address unless he has previously been supplied with a copy thereof. without charge

3. If any of the securities comprised in a general bid are in registered form, the offeror shall not later than the day preceding the first publication of the offer document in respect of the bid despatch a copy of the offer document by pre-paid post simultaneously to each registered holder of such securities at his registered address. To enable an intending offeror to comply with this requirement, the offeree company shall at the offeror's request and expense supply a list of the names and addresses of the registered holders of securities to be comprised in a general bid and of the numbers or amounts of such securities held by them respectively.

4. Paragraph 1 shall not apply if:-

(a) a general bid is made under which the total consideration payable on its acceptance by the holders of all the securities comprised in it will not exceed one million units of account and the whole of such consideration consists of cash; and

(b) all the securities comprised in the bid are in registered form.

In that case a copy of the offer document shall be despatched by pre-paid post simultaneously to each registered holder of securities comprised in the bid at his registered address, and the offer document shall be deemed to be first published when such copies are despatched. The second sentence of paragraph 3 shall apply when an offer document is published in the manner provided by this paragraph.

5. The offeror shall deliver to the Authority and the offeree company a copy of an offer document signed by the offeror (or if it is a company) by each of its directors before or at the same time as the offer document is first published, and the copy delivered to the Authority shall be accompanied by the written and signed consents required by paragraph 1 of Article 11 and a statement signed by the offeror (or if it is a company) by one of its directors that none of those consents has been withdrawn.

6. Immediately after receiving a copy of the offer document from the offeror the directors of the offeree company shall deliver a copy of it to the representatives of the employees of the company, and within seven days after its receipt the directors shall deliver to the employees' representatives their comments on the contents of the offer document which were required to be included therein by paragraph 2(k) of Article 8.

7. Every employee of the offeree company shall be entitled to inspect the copy of the offer document and the comments of the directors of the offeree company thereon which have been delivered to the employees' representatives under paragraph 6.

Article 13.

1. Within fourteen days after an offer document is first published the directors of the offeree company shall publish their comments thereon and their recommendation whether persons to whom the bid is addressed should accept it or not. The comments and recommendations may, if the offeror agrees, be published as an annex to the offer document.

2. In the comments the directors of the offeree company shall deal with all the statements, opinions, forecasts and valuations contained or referred to in the offer document, and if they consider that any of those statements, opinions, forecasts or valuations are inaccurate, unfounded or unreasonable, the comments shall contain such corrections as the directors of the offeree company consider to be necessary.

3. The comments and recommendation published under the Article shall set out:-

(a) the number or amount of securities comprised in the bid to which the offer document relates which are respectively held at the date when the comments and recommendations are first published (referred to in this Article as "the date of the offered company's comments") by or on behalf of: (i) the offeree company and companies belonging to the same group of companies as the offeree company; (ii) directors of the offeree company and those other companies; and (iii) collaborators with the offeree company;

(b) the number or amount of voting securities of the offeror and the offeree companies (other than securities comprised in the bid) which are respectively held at the date of the offeree's comments by the respective classes of persons mentioned in (a);

(c) the terms and conditions on which the directors of the offeree company hold their appointments at the date of the offeree's comments;

(d) all information additional to that contained in the offer document which is needed by the persons to whom the bid is addressed to enable them to form a proper judgment whether it is in their interests to accept the bid or not, including a statement whether the directors of the offeree company intend to accept the bid in respect of securities held by or on behalf of themselves.

4. Paragraph 3 of Article 8 and Articles 11 and 12 shall apply to the comments and recommendation published by the directors of the offeree company under this Article and to those directors as though the comments and recommendation were an offer document.

5. The directors of the offeree company shall deliver a copy of their comments and recommendation published under this Article to the representatives of the employees of the company immediately after publication, and paragraph 7 of Article 12 shall apply to that copy correspondingly.

Article 13A.

1. Immediately after the directors of the offeree company have published their comments on the offer document and their recommendation under Article 13 they shall discuss the effect of the general bid on the interests of the employees of the offeree company with the representatives of those employees.

2. The employees' representatives may deliver a written opinion about the effect of the general bid on the interests of the employees to the directors of the offeree company, and may require the directors to publish the opinion in the same manner as the offer document in respect of the bid.

3. If the employees' representatives consider that the proposals of the offeror made under paragraph 2 (k) of Article 8 are inadequate or will be prejudicial to the interests of the employees of the offeree company, they may require the offeror to negotiate with them with a view to reaching agreement on the measures to be taken in respect of employees. If no agreement is reached in these negotiations, the employees' representatives or the offeror may, within

two months after the offeror or the agent for the offeror reports to the Authority under paragraph 2 or Article 19 that the general bid is unconditional, refer the matter to an Arbitration Board which shall decide on the measures to be taken in respect of the employees. The Arbitration Board shall be composed of an equal number of persons appointed by the offeror and by the employees' representatives, and shall be presided over by a chairman appointed by the agreement of both parties, or in the absence of agreement, by the court.

Article 14.

The Authority may at any time:-

(i) require a party to a general bid to publish in such manner as it shall direct any information specified by the Authority by way of correction of or addition to any offer document, or any comments and recommendation published under Article 13, or any other matter published in connection with a general bid; or

(ii) prohibit the publication by a party to a general bid in connection with that bid of any document or matter which the Authority has reasonable cause to believe is false; misleading or incomplete, or which does not comply with the requirements of this Directive; or

(iii) permit the publication of an offer document or the comments and recommendation required by Article 13 in a manner different from that required by Article 12; or

(iv) publish in any manner it thinks fit comments or opinions in connection with a general bid which it considers desirable to publish in the interests of any party to the bid or the persons to whom the bid is addressed.

THE PERIOD FOR ACCEPTANCE AND THE CONCLUSION OF A GENERAL BID

Article 15.

1. The period for acceptance of a general bid shall not be less than 28 days nor more than 42 days from the date of the offer document.

2. If the offeror revises the nature or the amount of the consideration offered by a general bid, the offeror shall extend the period for acceptance until the expiration of 21 days from the date when the offer document in respect of the revised bid is first published (in this Directive referred to as"the date of the revised offer document"), or if there is a concurrent competing general bid, until the expiration of the period for acceptance of that bid, whichever is later.

3. The period for acceptance of a general bid shall in no case be extended to a date more than 70 days after the date of offer document in respect of it.

4. The offeror may not during the period for acceptance of a general bid either cancel or terminate the offer made by it or (except so far as Article 16 permits) modify the terms or conditions of the bid, but the Authority may permit the offeror to cancel the bid if:-

(a) a concurrent competing bid is made; or

(b) a material change of circumstances occurs after the date of the offer document which makes the nature or value of the securities comprised in the bid substantially different from their nature or value at that date.

5. A general bid shall be considered a concurrent competing bid if it is made in respect of all or some of the same securities as another general bid and the date of the offer document in respect of it is during the period for acceptance of the other general bid.

Article 16.

1. An offeror may revise the nature or the amount of the consideration offered by a general bid at any time before the expiration of the period for acceptance which is current at the date of the revised offer document, but in no case may a bid be revised more than 49 days after the date of

the offer document in respect of it.

2. The revision of a general bid shall be effected by the offeror publishing a revised offer document in the national newspaper in which the offer document was published. Articles 8 , 9, 11, 12 and 14 of this Directive shall apply to a revised offer document, but:-

(a) it shall not be necessary to state or set out in a revised offer document any information contained in the original or any previous revised offer document published in connection with the same general bid, except so far as necessary to make that information accurate and complete at the date of the revised offer document; and

(b) paragraph 1 of Article 11 shall not apply to a revised offer document in respect of a statement, opinion, forecast or valuation included or referred to therein if the same statement, opinion forecast or valuation was included or referred to in the same form in the original or any previous revised offer document published in connection with the same bid and paragraph 1 of Article 11 was complied with on that occasion.

3. It shall not be necessary for the directors of the offeree company to publish comments or a recommendation in respect of a revised offer document. If they do publish such comments or such a recommendation, paragraphs 2 and 3 of Article 13 of this Directive shall apply to the publication, and paragraph 4 of that Article shall also apply subject to the same exceptions as are made in respect of a revised offer document by paragraph 2 of this Article.

4. The offeror may not revise any of the terms or conditions of a general bid other than the terms as to the nature or amount of the

nsideration offered by it and any consequential terms as to the dates when, or the manner in which, that consideration will be paid or provided and as to the extension of the period for acceptance.

5. A revised bid may be accepted by a person who has already accepted the original or a previous revised bid, and if he accepts the revised bid his previous acceptance shall be considered as not having been given.

6. If by a revised bid the offeror offers an increased amount of the same consideration for the same securities of the offeree company as was offered by the original or a previous revised bid made by the offeror, persons who have already accepted the original or the previous revised bid shall be entitled to receive that increased amount of consideration.

Article 17.

1. During the period for acceptance of a general bid the parties to the bid shall each notify the Authority in writing daily of:-

(a) sales, purchases and other dealings by them in securities of the class comprised in the bid, in other securities of the offeree company and in securities of the offeror and any other company whose securities are offered by the bid in exchange for securities comprised in it; and

(b) the amount of the securities comprised in such transactions, the parties to them and the prices or other consideration paid or given in connection with them.

2. The offeror and the offeree company shall publish at weekly intervals in the national newspaper in which the offer document was

published a statement of the total amounts of securities of each class falling within paragraph 1 which they respectively and their respective directors and collaborators have dealt in since the date of the offer document or the date of the last preceding publication under this paragraph (as the case may be), and the total amounts of the consideration received, paid or given by them in connection with dealings in securities of each such class.

3. The Authority may:-

(a) exempt the offeror or the offeree company from its obligations under paragraph 2 or modify those obligations in such manner as it shall think fit;

(b) publish the whole or any part of the information required to be notified to it under paragraph 1 (whether in fact notified to it or not) in such circumstances as it shall think fit in the interests of the persons to whom a general bid is addressed.

Article 18.

1. If during the period for acceptance of a general bid the offeror or any of its directors or any other person acting on its behalf acquires securities comprised in the bid at a price in excess of the consideration offered for those securities by the offer document, or for a consideration whose value exceeds the consideration so offered, the consideration offered by the offer document shall be automatically increased by the amount of the excess, and all persons to whom the bid is addressed shall be entitled to the increased consideration, whether they accept the bid before or after the increase takes place.

2. The Authority shall on the application of any interested person:-

(a) determine whether the consideration offered for securities by an offer document has been increased under this Article, and if so by what amount; and

(b) if that consideration consisted wholly or partly of something other than cash, decide what increase shall consequently be made in the amount of that consideration.

3. If the consideration offered by a general bid is increased under this Article, the offeror shall not be considered to have revised the bid.

Article 19.

1. The offeror or the agent for the offeror named in the offer document shall report to the Authority the cumulative amount of securities in respect of which acceptances of a general bid have been received by the seventh day after the date of the offer document and by the end of successive periods of seven days thereafter during the period for acceptance. The report shall be in writing, and shall be delivered to the Authority within three days after the end of the period of seven days to which it relates.

2. The offeror or the agent for the offeror named in the offer document shall additionally report in writing to the Authority within three days after the expiration of the period of acceptance:-

(a) the total amount of securities in respect of which acceptances of a general bid have been received by the expiration of that period;

(b) the amount of securities comprised in the bid which was specified or referred to in the offer document under paragraph 1 (h) of Article 8;

(c) if the amount of securities reported under (b) exceeds that

reported under (a), that the general bid has lapsed;

(d) if the amount of securities reported under (a) equals or exceeds that reported under (b), that the general bid is unconditional and that the offeror is bound and entitled to acquire such securities; and

(e) if the amount of securities reported under (a) exceeds that reported under (b), whether the offeror does or does not agree to acquire securities in excess of the amount specified under (b), and if he so agrees, the amount of such excess securities which he agrees to acquire.

3. The offeror shall publish the reports made to the Authority under paragraphs 1 and 2 in the national newspaper in which the offer document was published immediately after delivery of each such report to the Authority.

4. Any interested person may object to the Authority within 21 days after the publication of the report made under paragraph 2 in the appropriate national newspaper that any particular contained in the report is incorrect, and after hearing the submissions of the offeror, the offeree company and the objector (or, if those persons consent and the Authority thinks fit, after considering their written submissions) the Authority may decide whether the objection is justified or not, and if it is, may correct the report delivered to it under paragraph 2.

5. The offeror shall publish the report made under paragraph 2 as corrected by the Authority in exercise of its powers under paragraph 4. The publication shall be made in the national newspaper in which the offer document was published. If the offeror fails to publish the corrected report within seven days after the Authority gives its decision, the objector or the offeree company may publish the corrected

report in that newspaper at the offeror's expense.

6. This article shall not apply to a general bid if in the Member State in which the offeree company has its registered office or corporate seat (siège social) there is provided a centralised system of settlement in respect of the bid, that is to say a system by which written acceptances of the bid or written authorisations to accept it, or instruments of transfer of securities in respect of which the bid is accepted, or the certificates for those securities are delivered to the Authority or the governing body or an office or agency of a stock exchange, and under the law of that State the Authority or that stock exchange is responsible for declaring the result of the bid and publishing the particulars mentioned in paragraph 2.

Article 20.

If a general bid is accepted in respect of a greater amount or fraction of the securities comprised in it than the amount or fraction specified in the offer document under paragraph 1 (h) of Article 8, and the offeror does not agree to acquire all the securities in respect of which acceptances have been given, the offeror shall acquire in satisfaction of his or its obligations under the bid from each person who has accepted it the same proportion of the securities for which he accepted it as the offeror acquires from every other such person.

CONDUCT OF THE PARTIES TO A GENERAL BID.

Article 21.

1. No party to a general bid shall directly or indirectly induce or seek to induce any person to accept the bid in respect of any securities by offering him any cash or other consideration or any advantage or benefit (whether quantifiable or capable of valuation in money or not) which is not equally available to all other persons to whom the bid is addressed strictly in proportion to the number of securities comprised in the bid to which they are respectively entitled.

2. References in paragraph 1 to persons to whom the bid is addressed shall in the case of securities comprised in the bid which are transferred on or after the date of the offer document (otherwise than in consequence of acceptances of the bid) be construed as references to the persons in whom the securities are vested for the time being.

Article 22.

The offeree company and its directors acting on its behalf shall not after receiving a notification of an intended general bid under paragraph 1 of Article 4 and before the expiration of the period for acceptance of the bid:-

(a) issue any securities carrying voting rights or create rights to subscribe for or to convert other securities into such securities;

(b) dispose or agree to dispose of a substantial part of the offeree company's assets otherwise than in the ordinary course of carrying on its business; or

( ) enter into any transaction which may influence the result of the bid and which is of an unusual character or is entered into on unusual terms or/special circumstances;

unless the issue of securities, or the right to subscribe or convert, or the disposal of assets or the transaction (as the case may be) either:-

(i) has previously been approved by the shareholders of the offeree company by a resolution passed at a general meeting, and also, if the bid comprises securities other than shares, by a resolution passed at separate meetings of the holders of each class of such securities comprised therein; or

(ii) is effected in performance of an obligation binding on the offeree company before the commencement of the pre-publication period or the date when the directors of the offeree company acquired knowledge of the offeror's intention to make the general bid (whichever is later).

Article 23.

1. The parties to a general bid shall not during the pre-publication period or the period for acceptance of the bid communicate any information, opinion, forecast or valuation in connection with the bid to any person to whom the bid is addressed or to anyone acting on his behalf unless the same material is communicated immediately to all other persons to whom the bid is addressed.

2. The Authority may give directions as to the manner and form of communication of material which is required to be communicated by this Article.

CIVIL AND PENAL LIABILITIES.

Article 24.

1. Proceedings to recover the amount of any consequential loss may be brought by any person who at any time during the pre-publication period or the period for acceptance of a general bid is interested in the securities comprised in it:-

(a) against a party to the bid who is responsible for a breach of any of the requirements of this Directive; or

(b) against the offeror and any director of the offeror in respect of the omission from the offer document published in connection with the bid or a revision thereof of any information required to be contained in it, or in respect of any false statement contained in such an offer document, or in respect of an opinion, forecast or valuation contained in it which is based on false information or is not reasonably supported in fact; or

(c) against a director of the offeree company in respect of the omission from the comments and recommendation published in connection with the bid or a revision thereof of any information required to be contained in it, or in respect of any false statement contained in such comments and recommendation, or in respect of an opinion, forecast or valuation contained in it which is based on false information or is not reasonably supported in fact; or

(d) against a person who has given a written consent under this Directive to the inclusion of material in the offer document or the comments and recommendation published in connection with the bid or a revision thereof and has not withdrawn that consent before the document to which it relates is first

published, if the loss results from any false statement contained in that material, or from an opinion, forecast or valuation contained in that material which is based on false information or is not reasonably supported in fact.

2. It shall be a defence for a person against whom an action is brought under paragraph 1 to prove:-

(i) that the defendant exercised reasonable care to ensure that the contravention of the requirement of this Directive in question should not occur; or

(ii) that the defendant exercised reasonable care to ensure that the information contained in the document in question was true at the date it was published and that opinions, forecasts and valuations contained therein were based on true information and could reasonably be deduced from the relevant facts at the date when the document was published.

3. For the purposes of this Article a person against whom proceedings are brought under paragraph 1 (b) or (c) shall be deemed to have exercised reasonable care to verify information or an opinion, forecast or valuation contained in material in respect of which another person is liable under paragraph 1 (d), if the defendant shows that that other person was competent or professionally qualified to give that information, opinion, forecast or valuation and had consented in writing to the inclusion of the material containing it in the document in question, and that at the date when the document was first published the defendant had no reason to believe that that material was false or misleading or was not reasonably supported in fact, or that the other person had withdrawn his consent to its inclusion in the document.

Article 25.

Member States shall impose penal sanctions on parties to a general bid who deliberately or as a result of gross negligence cause or permit breaches of any of the requirements of this Directive, or who in connection with the bid cause or permit the publication or communication of information which they know to be false, or of opinions, forecasts or valuations which are based on information which they know to be false, or of opinions, forecasts, or valuations which they know are not supported in fact.