

COMMISSION OF THE EUROPEAN COMMUNITIES

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Obstacles to takeover and other general bids

Communication from the Commission to the Council

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1. Introduction

In its White Paper on completing the Internal market by 1992 the Commission declared itself in favour of harmonization of the laws of the Member States on takeover and other general bids (in this paper, for simplicity, called "takeover bids"). For this purpose it sent the Council a proposal for a Thirteenth Directive¹ which is currently being amended in response to the opinions of Parliament and the Economic and Social Committee.

When it adopted the proposal the Commission was aware that there were obstacles in the way of takeovers which might mean that the Directive would not apply uniformly throughout the Community. The Commission therefore requested an external consultant to undertake a study identifying these barriers and making recommendations for their removal. The results of that study were outlined to the Council at its meeting on 23 November 1989.

The purpose of this communication is to outline the proposals which the Commission intends to submit to the Council in order to remove these obstacles.

It is desirable from the standpoint of a level playing field in a Single Market that the openness of companies in different Member States to takeovers should be broadly similar. This is very difficult to achieve in view of the different levels of capitalization of different national markets within the Community and other structural differences. The Commission is conscious, in bringing forward the regulatory proposals which follow, that they do not themselves overcome this underlying problem.

It should be stressed that the Commission does not wish to encourage takeover bids as ends in themselves. Its standpoint is rather that, in general, takeover bids may be viewed in a positive light in so far as they encourage the selection by market forces of the most competitive companies and the restructuring of European companies which is indispensable to meet international competition. It is important here to ensure that the fate of the target company be decided by all of its shareholders.

2. Obstacles identified

The obstacles may be divided into two categories. The first concerns maintenance of the company capital, and the second concerns the voting rights of the shareholders.

¹ COM(88)823 final - Thirteenth Directive on company law, concerning takeover and other general bids.

The first category consists more specifically of the following:

- the power of the directors to acquire the company's own shares; and
- the right of a subsidiary to acquire shares in a holding company and to exercise the voting rights carried by these shares.

The obstacles in the second category are as follows:

- disproportion between a shareholders' holding in the company capital and his voting rights;
- difficulties with proxy voting;
- difficulties in bringing about changes in the management of the company.

3. Measures proposed

In order to remove the obstacles to takeover bids described above, the Commission will be proposing the following to the Council.

- (a) It needs to be made clear that the proposal for a Thirteenth Directive restricts the power of the board of the target company to acquire the company's own shares while the takeover bid is open. By way of exception from other provisions of Community law allowing the board of a company to decide that the company should acquire its own shares, the board should require the authorization of the general meeting of shareholders in order to do so while a takeover bid is open, and this authorization should be obtained after the takeover bid is launched. A clause to this effect will be inserted in the amended version of the proposal for a Thirteenth Directive which will be forwarded to the Council after the Commission adopts it.
- (b) The Second Company Law Directive will have to be amended to extend the rules on the acquisition of the company's own shares to cover acquisition by subsidiaries. A subsidiary could then acquire shares in its parent only on the conditions laid down for the acquisition of its own shares by the parent itself. This would mean in particular that:
 1. In calculating the maximum number of its own shares which a company may hold (10%), all shares held by its subsidiaries would have to be added to those held by the parent company;
 2. the voting rights attaching to shares held by the subsidiaries in the parent company would be suspended.
- (c) To amend the proposal for a Fifth Company Law Directive along the lines set out below ensuring the coherence with the Statute of the European Company.
 1. Non-voting preference shares could not be issued to a value exceeding 50% of the total share capital. If the company did not actually grant the special advantages carried by such shares within a stated time the shares would automatically become voting shares.

2. The possibility of restricting the voting rights which may be exercised by any one shareholder would be abolished.
3. Neither the law nor the memorandum and articles of association could require a majority greater than the absolute majority for a decision to make changes in the board of a company.
4. Provisions in the memorandum or articles of association giving certain shareholders the exclusive right to propose the appointment of all directors will be forbidden.