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Perspectives in Company Law and Financial Regulation

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Adoption of the European Directive on takeover bids: an on-again, off-again story

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The on-again, off-again progress of the takeover Directive began in the 1980s at a time when major economic restructurings were being carried out. The debate on the Directive became less active in 2004 and was thereafter resumed at the beginning of 2005 and came to fruition in March 2006.[2]

This progress corresponds to a series in five episodes:

1st episode (from 1985 to 1999): the rise. Why a takeover directive? What provisions should this directive contain?

2nd episode (from 2000 to 2001): the downfall. Many accidents marred the progress of the directive and led to its rejection by the European Parliament in 2001.

3rd episode (from the end of 2001 to 2003): the reprieve. Mr. Bolkestein did not accept this setback and sought to give a new momentum to these efforts by entrusting a group of experts with the task of finding a way to break the deadlock.

4th episode (in 2004): smoke and mirrors. Adoption in 2004 of a non-directive.

5th episode (starting from 2004): implementation in the domestic laws of the Member States.

[1] The author states her personal views in this chapter.

[2] See also, L. Lambert and S. Bedrossian, '*La réglementation des OPA dans l'Union européenne, un chantier plein de surprises*', HEC dissertation, May 2002; D. Muffat-Jeandet, 'OPA: l'histoire d'une directive européenne. Le rejet de la proposition de 1989 et de ses versions revises', *Revue du Marché commun et de l'Union européenne*, 475 (2004), 111; J. Simon, 'OPA: divine surprise ou faux semblant?', *Revue européenne de droit bancaire et financier*, 3 (2003), 329.

I. 1st episode: Why a takeover directive? What provisions should this directive contain?

In 1985, the Commission published its White Paper (Completing the Internal Market) and announced its intent to propose a directive in order to approximate Member States' legislations on takeover bids. The Commission then launched a four-year works programme.

Upon completion of these works, in 1989, the Commission submitted a proposal for a 13th company law directive concerning takeover bids. This proposal was amended on 10 September 1990 in order to take into account the opinions issued by the ESC and the European Parliament. This ambitious proposal had been drafted in a context in which international takeover bids were becoming more numerous. This proposal was also prepared under the pressure of several Member States that deemed it advisable to create fair-play rules in order to protect all parties concerned by a takeover bid.

The Commission intended to be neutral vis-à-vis takeover bids and saw these bids as a way of contributing to the growth and development of European companies in order to cope with international competition.[3] With the recession that led to a slowdown in M&A activity, the demand from Member States for a takeover directive became less strong, and criticism was levelled against the initial proposal.

In December 1992, during the Edinburgh European Council, the Commission announced that it would revise its text. After lengthy consultations with Member States, the Commission submitted in 1996 a second proposal that was less ambitious and set a number of objectives to be reached by Member States.

After the ESC issued its opinion in July 1996 and after a review by the European Parliament in June 1997, the Commission submitted to the Council a third, amended proposal that integrated a large part of the proposed amendments.

In July 1998, negotiations resumed within the Council.

On 21 June 1999, the Chairmanship brokered a political agreement among the E-15 despite the reluctance of the United Kingdom and the Netherlands.

[3] G. Ferrarini, 'Take Over Defences and New Proposal for a European Directive', Second European Conference on Corporate Governance, Brussels, 28–29 November 2002; Lambert and Bedrossian, '*La réglementation des OPA dans l'Union européenne*, (note 1, above).

The terms of the agreement were then as follows:

- a framework directive allowing for certain specific local features provided that the same are not incompatible with the principles laid down in the directive,
- a directive aimed at fostering takeovers within the European Union,
- a directive aimed at protecting minority shareholders and providing a measure of information and publicity during the time of the offer,
- a directive asking each Member State to appoint a supervisory authority and enforcing the principles and obligations imposed by the directive.

II. 2nd episode: The downfall. Many accidents marred the progress of the directive and led to its rejection by the European Parliament in 2001

Several incidents hindered the progress of this initiative: the Gibraltar issue and the German opposition.

A. The Gibraltar issue

The long-standing dispute between Spain and the United Kingdom concerning the status of Gibraltar blocked the passing of a number of EU provisions. Spain exercised pressure in order to oblige the United Kingdom to reach a general agreement concerning the status of this autonomous territory. Finally, Spain and the United Kingdom reached an agreement in April 2002, and Spain withdrew its reservation concerning the proposal for a directive.

B. The German opposition

The German opposition was triggered by the Vodafone/Mannesmann deal: in Germany, the takeover bid launched by Vodafone for Mannesmann seemed like a bolt of lightning out of the blue. Until then, the German industrial community had never voiced any specific opposition to the harmonization of the rules concerning takeover bids. Even though Mannesmann was already controlled by foreign shareholders, this bid came as a shock.

This takeover bid triggered an immediate reaction from the German government. The takeover bill that was being prepared was amended in order to re-introduce anti-takeover bid defences with the *Voratbeschluss*, i.e. the possibility for officers of a company to approve any defence against a takeover bid if shareholders have granted an approval to that end during the eighteen preceding months.

The proposal for a directive then became the focus of attacks by German commentators. The reporter of the Parliament's Legal Affairs Commission, Mr. Klaus Lehne, launched the offensive by targeting mainly Article 9, which laid down the principle according to which general meetings had the final say. Such a provision deprived German companies of any defence, while companies from other Member States and third countries could adopt defensive measures that were henceforth prohibited in Germany, such as multiple voting rights. Mr. Lehne then emphasized the need for a level playing field.

On 13 December 2000, Parliament approved the Council's joint position with fifteen amendments (control threshold, definition of fair price, etc.), one of which aimed at introducing a German-style exception. However, these amendments were eventually dismissed by the Council after receiving the Commission's opinion.

A conciliation procedure then started.

Finally, the German opposition agreed with the German Government, which took a position unfavourable to Article 9 which asserts the general meeting's power as regards takeover bids. Despite Germany's opposition, other Member States decided to maintain their initial position during the negotiation with Parliament and reached a compromise on 5 June 2001.

The EDF case: EDF, which was at the time a public-sector agency and was therefore not subject to the takeover regulations, started buying companies in Spain and Italy, thus triggering an anti-EDF, and thus an anti-takeover, campaign in Italy. The Italian members of the majority then joined all those opposing the directive.

A surprising turn: the directive was rejected by the European Parliament.

On 4 July 2001, the European Parliament surprised everyone by dismissing the compromise by 273 votes in favour and 273 votes against the proposal, the equality of votes resulting in the rejection of the proposal. All German MPs voted against the proposal. It seems that such was also the case for certain French MPs.

III. 3rd episode: The reprieve. A new momentum

Mr Bolkestein, who was at the time Commissioner in charge of the Internal Market, refused to concede defeat. After being encouraged by certain Member States and enterprises from certain countries (MEDEF had supported this directive), he decided to table a new proposal for a directive.

Then, an expert group came into play, comprising seven individuals: Jaap Winter (Netherlands), Jonathan Rickford (United Kingdom), Guido Rossi (Italy), Jose Garrido Garcia (Spain), Jan Christensen (Denmark), Klaus Hopt (Germany) and Joëlle Simon (France).

Already in spring 2001, Mr. Bolkestein had decided to set up an expert group in order to examine the future of European company law in the next few years. Indeed, it is necessary to point out that European institutions had not been very active as regards company law, aside from the last-minute agreement reached at the end of thirty years of efforts in relation to the European company.

Mr Bolkestein took this failure personally and asked the group to deliver to him, on a priority basis, a report by January 2002 concerning the three following issues, which are of unequal importance, but were defined by the European Parliament:

- How is the fair price to be defined in case of a mandatory offer?
- Is it necessary to provide for a mandatory expulsion procedure (squeeze-out and sell-out)?
- Is it possible to create a level playing field and, if so, how?

While the first two issues did not lead to overly heated debates, things went differently for the third question[4].

Fair price: the various existing systems were reviewed, including the French multi-criteria approach, taking into account in particular tangible assets and the affiliation with a group. The group finally approved the definition used in the United Kingdom, i.e. the highest price paid by the offeror during a period preceding the offer, such period being determined by each Member State and ranging between six and twelve months, with possible exceptions. While it is true that this definition has the merit of facilitating the calculation of the fair price and being more favourable to minority shareholders, the application of this test nevertheless leads

[4] European Commission, *Report on Issues Related to Takeover Bids, Report of the High Level Group of Company Law Experts,* (2002).

to an increase in the price of takeovers and is not necessarily fair for the offeror in particular at times of sharp and swift share price fluctuations. Thus, by making takeovers more expensive, this test may, in certain cases, be an anti-takeover defence, and this is paradoxical.

Squeeze out and sell out: there is already, in a number of Member States, including France, a procedure for the expulsion of minority shareholders by majority shareholders holding between 90% and 95% of the capital (mandatory withdrawal if the offeror holds 95% of the voting rights). As this procedure restricts minority shareholders' rights, it may seem logical to have it set off by a withdrawal right offered to minority shareholders who may procure the redemption of their shares (under French law, such right exists when the majority shareholder holds 95% of the voting rights, and the minority shareholder does not belong to the majority group; a decision made by the AMF is indispensable), even though the parallelism of these procedures is challenged by certain commentators.

The level playing field: do we need a level playing field? The search for a level playing field, which is a little bit like the quest for the Holy Grail, relies on the following postulate.

Theoretically, when a company taps the market in order to finance its operations, and all or part of its shares are admitted to trading on a regulated market, an offeror should be able to acquire control of the company, without having to face any anti-takeover defences.

However, it is interesting to note that on the two most important financial markets (the US and the UK), the response given is totally different, while the capital structure is similar in both countries, with scattered capital.

US law never barred takeover defences, whether they consisted of poison pills or takeover-proof companies. In contrast, UK law does not allow anti-takeover measures. Thus anti-takeover barriers can survive market laws.

Nevertheless, this does not mean that this issue is not debated in the United States, and certain commentators recommend barring anti-takeover measures. Also, the impact of these measures is assessed in diverging manners. Certain observers consider that they have only a limited impact on the outcome of the bids and only have a marginal impact,[5] while others

[5] See, in that sense: J. McCahery and G. Hertig, 'An Agenda for Reform: Company and Takeover Law in the EU', in G. Ferrarini, K. Hopt, J. Winter and E. Wymeersch (eds.), *Modern Company and Takeover Law in Europe* (Oxford University Press, 2004).

conclude that the most frequently used poison pills caused the number of hostile takeover bids to drop by 75% in ten years in the United States.[6]

This raises the very issue of challengeability of control that largely depends on the structure of capital.[7] While it seems that this issue has not been widely debated in Europe, it has been covered by in-depth analyses conducted by US academics.[8]

According to certain US authors, control does not necessarily have negative effects on shareholders, and may even benefit minority shareholders. On the other hand, the *European Round Table* considers that it has not been demonstrated that the challengeability of control increases the target's value, by questioning management. According to those defending this approach, a directive concerning takeover bids in Europe should not be used as an instrument for restructuring European economies: the market alone should decide on where it invests and therefore on the structure of capital. However, because Parliament and the Commission settled this debate by choosing the opposite direction, the Commission entrusted the group of experts with the task of defining the best ways of reaching this goal.

How could this be done? This issue gave rise to arduous and complex discussions, at the end of which the group proposed a relatively complex scheme:

- the general meeting must have the final say, without any possible delegation;
- the risk taking should be commensurate with the control exercised after the launch of the bid: this is the risk-bearing share capital rule according to which shareholders may only vote according to the share of capital that they hold: one share, one vote.
- principle of neutralization of the defence mechanisms after the successful completion of the takeover, i.e. when a certain threshold is reached;
- principle of transparency of structures and control.

Discussions within the group showed how difficult it was to cover all defence mechanisms: thus, do shareholder agreements (which are

[6] See: A. Ferrel, 'Why Continental Takeover Law Matters', in Ferrarini, Hopt, Winter and Wymeersch (eds.), *Modern Company and Takeover Law in Europe*, (note 5, above).

[7] For a different opinion, see Guido Ferrarini, '*The challenge of the 13th directive in the EU*', debate organized on 4 March 2003 by the Centre of European Policy Studies.

[8] See: J. Coates, 'Ownership, Takeovers and EU Law: How Contestable Should EU Corporations be', in Ferrarini, Hopt, Winter and Wymeersch (eds.), *Modern Company and Takeover Law in Europe* (note 5, above).

governed by the law of contracts) and pyramid structures avoid the neutralization principle, as well as Dutch foundations. Therefore, the double or multiple voting rights constituted an easy target. Such an approach is not necessarily without guile.

The presentation of the report's conclusions prompted a strongly negative response from many Member States.

The sudden emergence of the debate concerning the level playing field, i.e. on the evenness of the rules of the game applying throughout the European Union in case of a takeover bid, had a considerable impact on the very design of the rules that should apply to takeover bids within the European Union and on the future status of the proposal for a directive. There is no doubt that this rekindled the opposition to a text that was nearly adopted by all Member States, but one.

Most Member States reacted quite harshly to this report, as they considered that the proposals had too much of an impact on company law and were raising constitutional issues because of the lack of indemnification of shareholders whose rights would be neutralized. Thus, if the recommendations contained in this report were to be applied, a voting right would again be attached to formerly non-voting shares, while financial benefits had been granted in consideration for the removal of the relevant voting rights.

Therefore, the Commission did not endorse all of the group's proposals, but asserted very clearly the general meeting's decision-making power, by going one step beyond the earlier text, by removing the possibility of delegating authority to the Board. Also the Commission laid down the principle of neutralization of certain defence measures.

The debate then focused on the two issues below, possibly to the detriment of other technical issues.

1. Board versus general meeting.

The issue that observers believed to be definitively settled in favour of the general meeting of shareholders as a result of the 2001 compromise was reopened again, as Parliament considered that the Board could not be deprived of its powers so long as there was no level playing field between companies of the various Member States.

Even though the Commission, relying on the groups of experts' report and the Member States, confirmed this choice in favour of the general meeting, the debate was not totally closed between those advocating the US system in which the Board has all powers and those willing to give the final say to the general meeting of shareholders. Incidentally, this is shown by the option selected in the text of the directive.

Those promoting, in Europe, a US-style system argued that the vote of shareholders in companies having a scattered capital structure was only an illusion and that it was not certain that the board's neutrality rule would have only positive effects: risks of litigation and difficulty for officers of maximizing shareholders' investment. Three days after the launch of a takeover bid, one third of the shares has already changed hands and is held by arbitrageurs.

In contrast, those opposing a US-style solution considered that such a system could not be imported into Europe, as the Board's omnipotence in the United States was legitimately set off by a liability in tort, on grounds of which shareholders did not hesitate in particular to file class actions. However, such a debate existed also in the United States where shareholders recently submitted to general meetings of US companies draft resolutions under which decisions for the adoption of poison pills were to be submitted for approval to the shareholders.

It is worthy of note that those advocating the Board's decision-making powers include representatives of employees who thus consider that the Board is better placed than the general meeting of shareholders (who represent the capital) to take into account the interests of employees. The idea of freedom of choice between the general meeting and the Board was even brought forward, assuming the creation of an adequate dispute settlement mechanism. However, because of the small likelihood of finding adequate means of effecting such a settlement in Europe, those favouring this idea recommended giving the final say to the general meeting. The future of this provision is indubitably linked to that concerning the neutralization of defence measures.

2. Up to what point is it necessary to neutralize defence measures?

The group of experts proposed to apply the neutralization principle immediately from the launch of the bid as regards the measures departing from the proportionality principle, after the offeror reached a threshold defined according to the threshold required in the Member State concerned, in order to amend the company's articles of association as regards all of the relevant measures.

While the neutralization principle did not per se raise many objections in Europe, such is not the case for the list of measures to which such neutralization may apply. On the contrary, US authors challenge the very usefulness of neutralization measures, in that they doubt their effectiveness in order to create a level playing field and even consider that neutralization measures might create additional costs.

In any event, the neutralization of certain measures, such as the measures preventing free trading in shares (incidentally such measures are often barred as regards companies whose shares are admitted to trading on a regulated market) may not be subject to a serious challenge.

In contrast, and although the scope of the Commission's proposal and the final text of the directive did not finally include double voting rights, we may regret that such double voting rights eventually became the focus of the debate, while other mechanisms were not discussed. Those willing to give double voting rights a bad name had political afterthoughts and knew very well that any attempt to challenge these mechanisms would unavoidably prompt certain Member States to oppose the proposal.

Regardless of our opinion concerning mechanisms departing from the 'one share, one vote' principle, we may deplore that this debate largely contributed to blocking, for months, any significant progress towards the adoption of a directive.

In addition, even if the proportionality principle were to be applied, US authors consider that the neutralization principle would not have any effect on most listed European companies which they see as immune to takeover bids. This principle would then lead to the application of the measures to less transparent systems, such as pyramids.

Finally, US structures show that there is no evidence that structures with double or multiple voting rights have a lower performance and are used in order to support a poor management team.[9] The use of these structures and that of the non-voting shares forms part of enterprises' right to freely choose their organization and management mode in order to gain readier access to capital markets. For the market, the controlling factor is the transparency of the structures and control, proper corporate governance and a high-quality audit process.

IV. 4th episode: Breaking the deadlock through a conjuring trick – the obscuring of the level playing field

Those many years of debate on the harmonization of European takeover bid law were not completely futile, as they are likely to have contributed

[9] See in particular Ferrel, 'Why Continental Takeover Law Matters', (note 3, above) and McCahery and Hertig, 'An Agenda for Reform', (note 5, above). It is also necessary to note the change in Mr. Klaus-Heiner Lehne's position in this respect in Revised draft of the report concerning the proposal for a directive of the European Parliament and the Council concerning takeover bids.

to a change in domestic laws: virtually all Member States now have takeover regulations. The last Member State not to have had such regulation, i.e. Luxembourg, adopted takeover rules in connection with Mittal's bid for Arcelor. Therefore was a directive still necessary, as the United States does not have any uniform legislation in this area? It is necessary to answer this question in the affirmative, and not only for symbolic reasons: such was the unanimous decision of the Member States (Spain abstained) and the European Parliament.

A. *If so, what should the directive's contents consist of?*

Past debates have been marked by the rejection of an overly detailed and technical directive and the adoption of a text that is half political and half technical. Curiously, the final outcome is a directive affording a double option to Member States and, where applicable, to enterprises: nobody would have bet on the chances for success of the so-called Portuguese proposal, i.e. a directive containing an option for Member States and for enterprises. After a few amendments, this proposal was endorsed by the Italian Presidency and was eventually approved.

Finally, the Directive lays down the principle according to which the general meeting of shareholders has the final say (Article 9) and that certain defence measures must be neutralized (Article 11), but offers Member States and enterprises, as the case may be, the possibility of not applying either or both of these Articles (Article 12–3).

B. *A first outline of the level playing field*

As regards the decision-making body, the text no longer makes it possible, contrary to the draft that was rejected in 2001, for the general meeting to grant, from the outset, authority to the Board. Concerning the neutralization rule, the directive sets forth that its provisions shall apply to restrictions on the free trading of shares, set forth in articles of association or in contractual arrangements, and to provisions of the articles of association or contracts limiting voting rights and governing shares with multiple voting rights.

In addition, the directive sets forth that where, following a bid, the offeror holds 75% or more of the capital carrying voting rights, no such restrictions nor any extraordinary rights of shareholders concerning the appointment or removal of board members provided for in the articles of association of the offeree company or multiple voting rights shall apply during the first general meeting following the bid as convened by the offeree company in order to enable it to amend the company's articles of association or remove or appoint the members of the board. The holders of the said rights must then be entitled to fair indemnification making whole any loss possibly sustained.

However, while the highly complicated text of this compromise eventually ruled for the neutralization of securities with multiple voting rights, the compromise excludes, from the scope of this regulation, securities having a double voting right, because of the definition given to multiple voting securities. Indeed, these securities are defined as securities included in a distinct and separate class and carrying more than one vote each, which is not the case in French law for shares having a double voting right.

Indeed, double voting rights are not vested unless certain objective requirements are satisfied: the shares must be registered and held for no less than two years and no more than four years as regards companies whose securities are admitted to trading on a regulated market. Such double voting right is forfeited in the event of a share sale.

C. . . . with the possibility for Member States, and possibly for enterprises, to provide for exceptions

Member States may reserve the right not to require companies registered on their territory to apply Article 9 (2 and 3) (neutrality of the Board) and Article 11 (neutralization of defence measures). However, in such event, the said Member States may nevertheless authorize the said companies to apply either or both of the said Articles on a voluntary basis.

The decision will then be made by the general meeting of shareholders (this is consistent with Article 9) subject to the quorum and majority rules imposed by the company's articles of association. Notice of this decision shall be given to the supervisory authority of the Member State in which the company has its registered office and to all supervisory authorities of the Member State in which the company's securities are admitted to trading on a regulated market or where such admission has been requested.

Finally, Member States may, under the conditions determined by national law, exempt companies which apply Article 9 (2 and 3) and/or Article 11 from the application of the said Articles, if they become the subject of an offer launched by a company which does not apply the same

Articles as they do or by a company controlled, directly or indirectly, by such a company (Article 12–3).

In the current drafting of this text, it seems that this possibility is granted to all Member States, and therefore even to those Member States that require their domestic companies to apply Articles 9 and 11. In such event, an authorization will have to be granted by the general meeting of the offeree company. Such authorization may not be granted more than eighteen months in advance of the time when the bid is made public. The general meeting may, at any time, withdraw such an authority.

It is interesting to note that the proposal does not provide for the irreversibility of the options, whether as regards Member States or companies, while such irreversibility was a feature of the Portuguese proposal – which is rather fortunate.

Indeed, it is likely that such irreversibility might have created constitutional issues in certain States. Moreover, the irreversibility of the choice made by a company for the application of Articles 9 and 11 is consistent with the spirit of the proposal, i.e. over time to turn such application into a general rule, but is contrary to the company law principle according to which a corporate body must be able to undo any decision that it has made.

Those advocating this system consider that it corresponds to a liberal solution, in that the market should prompt companies to adopt the board's neutrality principle and remove defence measures. Articles 9 and 11 would then constitute the benchmark, even though certain observers characterize these provisions as a half-way benchmark in that they target only certain defence measures.

Although this mechanism is ingenious, it also raises a number of questions, while leaving other questions unanswered.

Certain observers have feared that the system would not reach the assigned objective, in that it might prompt Member States, under pressure from their enterprises, and possibly thereafter these enterprises, to choose the most protective system. This might thus lead to a regression within the Member States currently applying the principles set forth in Articles 9 and 11. This did in fact happen, as we shall see.

This system runs counter to a minimum harmonization of rules applicable to takeover bids. This system is complex to apply, in particular because the option made available to Member States and enterprises may cover either or both of these two Articles.

Even though reciprocity requires a decision of the Member State and the approval of the general meeting of the offeree company, this system lacks consistency and may prove difficult to manage for supervisory authorities and may lack clarity for investors. This reciprocity principle is totally new in EU company law and even seems contrary to the fundamental principles of EU company law: i.e. freedom of establishment and free movement of capital. This may be an unwelcome precedent in EU company law, with a view to the preparation of the action plan prepared by the European Commission.

D. We may therefore question the merits of a 'cherry-picking' directive

Wouldn't it have been preferable to adopt an admittedly less ambitious and more pragmatic solution, i.e. a Directive without Articles 9 and 11? This would have made it possible to dispense with this needlessly complex mechanism that is contrary to EU company law principles. Incidentally, this result will be reached by this complex mechanism whenever the reciprocity rule shall apply on a case-by-case basis. Indeed, a Directive not containing Article 9 or Article 11 would not have been completely without merit, as it would have created a common foundation consisting in the following principles:

- mandatory bid
- protection and information of employees and minority shareholders
- squeeze-out and sell-out procedures
- transparency of structures and control.

Contrary to the opinion of certain commentators, abandoning Articles 9 and 11 would not have been seen as a setback. It is true that the proposal, rejected in 2001 by Parliament, included an Article 9. However, if we take the example of France, it was very unlikely that the country would call into question the affirmed principle of neutrality of the board and the decision-making power of the general meeting or the neutralization of voting right restrictions in the event of a successful bid. This was confirmed by the Act of 31 March 2006. However, it is true that the political process may be driven by reasons that are foreign to law making.

E. Non-optional provisions of the directive:

1. Scope (Articles 1 and 2)

The directive applies to:

- companies governed by the laws of Member States whose securities are admitted to trading on a regulated market in one or more Member States;

- voluntary or mandatory takeover bids leading to the acquisition of control of the offeree company.

2. General principles (Article 3)

Pursuant to the subsidiarity principle, the directive merely sets forth a number of general principles:

- Equality: all holders of the securities of an offeree company of the same class must be afforded equivalent treatment.
- The intended recipients of the offer must have a right to be informed in due time in order to be able to make a decision with full knowledge of the facts.
- The board or management board of the offeree company must act in the interest of the company as a whole and must not deny the holders of securities the opportunity to decide on the merits of the bid.
- An offeror must announce a bid only after ensuring that he/she can fulfil the promises made.
- An offeree company must not be hindered in the conduct of its affairs for longer than is reasonable.

In all cases, Member States may impose more restrictive rules.

3. Supervisory authority and applicable law (Article 4)

Member States shall designate the authority or authorities competent to supervise bids and enforce the rules set forth in the directive:

- public or private authority (AMF),
- requirements: impartiality and independence of all parties to the offer,
- close cooperation among supervisory authorities for cross-border transactions.

4. Rules of conflict for the determination of the supervisory authority and applicable law

The Directive sets forth conflict rules for the determination of the supervisory authority and applicable law in the case of a takeover bid involving one or more Member States. The principle is as follows: the supervisory authority and the applicable law are those of the Member State in which it has its registered office, when the securities are admitted for trading on a regulated market of such Member State.

If the registered office is different from the place of listing, the solution is different depending on the issues raised:

- *company law:* in particular as regards the control threshold, the information provided to employees: the supervisory authority and the applicable law are those of the country in which the company has its registered office;
- *offer procedure and offered consideration:* the rules applied are those of the country in which the securities are listed and, if there are several listing places, the rules of the country in which the shares have been first listed.

In the first case, shareholders are anticipating complying with the rules of the offeree company's home country. In the second case, it is advisable that the offer procedure be governed by the laws of the market on which the bid is launched.

5. Protection of minority shareholders (Article 5)

The best way to protect minority shareholders consists in offering them the possibility of selling their shares at a fair price. This is the objective of the mandatory bid sent to all holders of securities for the purchase of all of their securities at a fair price. We may regret that the Directive no longer defines the percentage of voting rights giving control or the mode of calculation of such percentage.

6. Information (Article 6)

The decision to launch a bid must be disclosed forthwith. The supervisory authority must be informed in order to be able to check whether the information that shall be published meets all applicable requirements. The board of directors or the management board must also inform the employees as soon as the bid has been made public. The Directive lists the minimum information that must be contained in the offer document.

7. Time allowed for acceptance (Article 7)

- such time may not be less than two weeks or more than ten weeks from the date of publication of the offer document;
- such time may not hinder corporate operations for too long a period;
- such time must where applicable enable the offeree company to organize a general meeting concerning the offer.

8. Disclosure (Article 8)

Any information likely to influence the market for the relevant securities must be disclosed, in order to ensure the transparency and integrity of the market for the securities and avoid the publication or circulation of false or deceptive information.

V. 5th episode: Implementation in the laws of the Member States

The implementation of the Directive gave rise to heated discussions in certain Member States and in particular in France where the debate, which was somehow stimulated by Mittal's offer for Arcelor, primarily covered the way in which the options were to be exercised, as most of the provisions of French law were already in line with the Directive. Act No. 2006–387 of 31 March 2006 on takeover bids eventually confirmed the principle of neutrality of general meetings (Article 9), provided for the neutralization of certain control mechanisms (partial application of Article 11), and the implementation of the reciprocity clause (Article 12).

In February 2007, the European Commission published a report on the implementation of the directive in the Member States[10].

Upon publication of the report, seventeen Member States had implemented the Directive.[11]

Board neutrality principle: eighteen Member States have imposed or shall impose the neutrality rule, thus confirming, except for five Member States, a rule already contained in their substantive law. Five Member States, including France, chose to apply the reciprocity exception.

The possibility introduced in French law to issue securities similar to those existing under the US right plans is presented as a negative measure.

Rule for the neutralization of anti-takeover restrictions: the large majority of Member States did not impose or shall not impose such

[10] Commission Staff Working Document-report on the Implementation of the Directive on Takeover Bids, Commission of the European Communities, Brussels, 21 February 2007.

[11] The Directive was implemented in French law by Act No. 2006–387 of 31 March 2006 concerning takeover bids. The said Act confirmed the decision-making powers of the general meeting of shareholders during an offer period and chose to partly apply Article 11 consisting in the confirmation of the neutralization of voting right restrictions by the general meeting if the offer is successful and the prohibition of approval clauses in the articles of association of listed companies. The Act also approved the reciprocity clause.

neutralization, which is a mere option available to enterprises. Only Baltic countries, which account for only 1% of EU listed companies, shall impose such neutralization. However, certain Member States have already eliminated the multiple voting rights and/or the other defence measures. Other Member States have already done so for certain measures, such as France and Italy.

Reciprocity: a majority of Member States introduced the reciprocity rule as regards the implementation of (i) the board neutrality rule and/or (ii) the rule for the neutralization of defence mechanisms. This was seen by the Commission as the expression of a certain form of protectionism. Incidentally, the European Commission illustrated its demonstration by citing excerpts from French parliamentary debates. However, the Commission also cites the argument stated in the Lepetit report, according to which the reciprocity rule prompts companies to apply on a voluntary basis the provisions of the directive, if they do not want to have the reciprocity rule used against them in case of an acquisition on foreign markets.

VI. Conclusion

In conclusion, although the Commission does not discount the positive effects of the directive (mandatory takeover bid, information given to shareholders and employees, etc.), it criticizes Member States' reluctance to remove anti-takeover obstacles.

The Commission will closely monitor the implementation of the directive and hold public hearings in 2008, while waiting for 2011 which is the scheduled time for a possible review.

Let us stay tuned . . . while waiting for the next episode.