



COMMISSION OF THE EUROPEAN COMMUNITIES

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COMMISSION OPINION

**pursuant to Article 251 (2) (c) of the EC Treaty
on the European Parliament's amendments
to the Council's common position regarding the
proposal for a**

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND THE COUNCIL

ON COMPANY LAW CONCERNING TAKEOVER BIDS

**AMENDING THE PROPOSAL OF THE COMMISSION
pursuant to Article 250 (2) of the EC Treaty**

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1. PROCEDURE

The Commission adopted an initial proposal for a Thirteenth Council Directive on company law concerning takeover bids on 19 January 1989 (COM(88)823 final – SYN 0186)¹

The Economic and Social Committee delivered its opinion on 27 September 1989². Parliament delivered its opinion on 17 January 1990³.

The Commission on 10 September 1990 adopted an amended proposal which took account of those two opinions (COM(90) 416 final – SYN 0186)⁴.

The Commission presented a second proposal for a Thirteenth Directive on company law concerning takeover bids to the Council and Parliament on 8 February 1996 (COM(95)655 final (1995/0341 COD))⁵.

The Economic and Social Committee delivered its opinion on 11 July 1996⁶. Parliament delivered its opinion (first reading) on 26 June 1997⁷, approving the proposal by a large majority and proposing twenty amendments.

The Commission transmitted to the Council and Parliament on 11 November 1997 an amended proposal for a Directive which incorporated most of the amendments proposed by Parliament and the wishes expressed by the Economic and Social Committee⁸.

The Council unanimously adopted a common position on 19 June 2000.

The Commission accepted that common position on 26 July 2000.

¹ OJ C 64, 14.3.1989, p. 8; with explanatory memorandum, Suppl. 3/89 - Bull. EC.

² OJ C 298, 27.11.1989, p. 56.

³ OJ C 38, 19.2.1990, p. 41.

⁴ OJ C 240, 26.9.1990, p. 7; with explanatory memorandum, COM(90) 416 final - SYN 0186.

⁵ OJ C 162, 6.6.1996, p. 5; with explanatory memorandum, COM(95) 655 final.

⁶ OJ C 295, 7.10.1996, p. 1.

⁷ OJ C 222, 21.7.1997, p. 20.

⁸ OJ C 378, 13.12.1997.

The Council common position and the Commission opinion were transmitted to Parliament on 7 September 2000.

Parliament voted on 13 December 2000 (second reading), approving the common position with fifteen amendments.

In this opinion, the Commission adopts a position on Parliament's amendments in accordance with Article 251(2)(c) of the EC Treaty.

2. OBJECTIVE OF THE DIRECTIVE

The proposal for a framework Directive lays down certain common fundamental principles governing the conduct of takeover bids but leaves the Member States free to determine the implementing details. It has two main objectives:

- to harmonise national rules on takeover bids, particularly regarding the transparency of the procedure, in order to facilitate restructuring throughout Europe, and
- to provide throughout the Union equivalent protection for minority shareholders where there is a change of control of their company, by requiring that a mandatory bid be made for all remaining securities.

3. COMMISSION OPINION ON THE AMENDMENTS PROPOSED BY PARLIAMENT

Parliament adopted (second reading) fifteen amendments to the Council common position.

The Commission accepted three of those amendments in full and one in part, but rejected the others.

3.1. Amendments accepted by the Commission

Amendment 7 concerns Article 4(5) of the common position and limits derogations by deleting the expression "in specific appropriate cases".

The Commission can accept this amendment in the interests of clarity.

Amendment 14 adds a point (1a) to Article 6(3) with a view to specifying in the bid document "the law which governs the contracts between the offeror and the holders of securities of an offeree company which arise as a result of the bid".

The Commission can accept this amendment, which does not alter the spirit of the Directive.

Amendment 18 concerns Article 15(1) and reduces the period for transposing the Directive to two years.

The Commission can accept this amendment, which reflects its original proposal.

The first part of Amendment 20 concerns Article 9(1)(a) and extends application of the "principle of neutrality" from the time when, by whatever means, the existence of a bid becomes known to the managers of the offeree company.

The Commission can accept this amendment, which reinforces the principle in question.

3.2. Amendments rejected by the Commission

3.1.1. Amendments concerning the recitals and definitions

Amendment 1 makes two changes to recital 5: the term "minority", referring to the holders of securities that are to be protected, is deleted, as are the last two sentences concerning a transitional period.

The Commission cannot accept this amendment in its entirety because the first change could alter the whole meaning of the Directive and the second is not justified because the two sentences in question concern Article 5(3), which is not deleted.

Amendment 2 makes two changes to Article 2(a) by deleting the term "public", which qualifies the offer referred to in the Directive, and the expressions "may be either mandatory or voluntary" and "and [must] follow or", thus limiting the types of bid caught by the Directive.

The Commission cannot accept this amendment in its entirety because, firstly, it would alter the scope of the Directive, which, as its title indicates, concerns only takeover bids, albeit all takeover bids, whether mandatory or voluntary, and, secondly, because it would deprive this definition of any precision.

Amendment 3 makes an addition to Article 2(e), extending the scope of the Directive to securities which may carry voting rights as a consequence of their being exercised or converted.

The Commission cannot accept this amendment, although the idea is interesting, because its practical repercussions are difficult to envisage and the current means of monitoring markets are insufficient.

3.1.2. Amendments clarifying the Directive

Amendment 8 concerns Article 5(1) and adds a definition of "equitable price" and an obligation to effect payment in cash for the acquisition of blocks of shares representing at least 5% of the total.

The Commission cannot accept this amendment for the following reasons. With regard to the price, the Member States proved unable to choose a more precise definition - in spite of two years of negotiations - from among the various national definitions applied because they could not decide which might be the best for all of them. It was therefore thought deemed expedient to leave this matter to the discretion of the competent supervisory authorities. Parliament disagrees with this approach but is unable to demonstrate in what respects its definition is better than any other. As regards cash payment, there is no justification for the proposed arrangements.

3.1.3. Amendments contributing new ideas

Amendment 12 inserts a new Article 5a, which provides for a mechanism consolidating the offeror's position.

The Commission cannot accept this amendment, although the idea is interesting, because it has ramifications not just for takeover bids but also for the functioning of companies in general. The idea might be taken up as part of a review of company law.

3.1.4. Amendments concerning employees' rights

Amendment 4 concerns Article 3(1)(b) and gives the employees of the offeree company or their representatives a voice in decision-making on bids. Amendment 15 concerns Article 6(4) and ensures that the employees of the offeree company or their representatives are provided with the same information as the supervisory authorities.

The Commission cannot accept these amendments because they have no place in these provisions. With regard to the first amendment, only the holders of securities can decide whether or not to sell them and they are therefore the only parties concerned by it. With regard to the second amendment, the system was established to provide information to the supervisory authorities, and they are therefore the only parties concerned by it.

Amendment 5 inserts into Article 3(1)(c) adds a list of "interests" to be taken into consideration. Similarly, amendment 13 inserts into Article 6(3)(h) a list of information to be provided.

The Commission cannot accept these amendments for the following reasons: an excessively detailed list has no place in a framework directive, and there is invariably the added risk that it may not be exhaustive. In addition, whereas the purpose of the Directive is to harmonise company law, Amendment 13 tends to focus on labour law, which is already governed by other directives (see in particular Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (OJ L 61 of 5.3.1977, p. 26), Council Directive 94/45/EC of 22.9.1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (OJ L 254 of 30.9.1994, p. 64), Council Directive 98/59/EC of 20.7.1998 on the approximation of the laws of the Member States relating to collective redundancies (OJ L 225 of 12.8.1998, p. 16), and Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship (OJ L 288 of 18.10.1991, p. 32)).

The third part of Amendment 20 concerns Article 9(1)(b) and requires the opinion of the employees' representative body to be published.

The Commission cannot accept this amendment for the reasons indicated in the previous paragraph.

3.1.5. *Amendments of principle*

Amendment 16 affects Article 7 in three respects: 1) the period for acceptance of a bid may not be more than three months, as opposed to ten weeks; 2) the final sentence of Article 7(1) providing for the possibility of extending the period is deleted; 3) Article 7(2) now provides for the period to be extended only in the event of alternative takeover bids.

The Commission cannot accept this amendment in its entirety because the wording of the common position is the result of a delicate compromise designed to reconcile the need to avoid unduly disrupting the functioning of the businesses concerned with the need to take account of the fact that procedures may sometimes take longer, particularly in the United Kingdom. There are no grounds for restricting derogations, particularly in connection with the organisation of a general meeting. Since convening such meetings can be a lengthy, cumbersome procedure, this possibility of a derogation seems perfectly justified.

The second part of Amendment 20 concerns Article 9(1) and adds the requirement that the authorisation of the supervisory board, if there is one, must also be sought before defensive measures are adopted.

The Commission cannot accept this amendment because in some companies the supervisory board is a management or executive board which, like the other managers, is subject to the "principle of neutrality".

The second part of Amendment 17 adds to Article 9 a paragraph 2a listing other situations in which the supervisory authorities or the courts may authorise defensive measures.

The Commission cannot accept this amendment for the following reasons: 1) it is incompatible with the spirit of the rule whereby only the holders of securities can determine a company's future; 2) the supervisory authority must act as an arbiter, and it is not its role to take sides between two companies; 3) involvement of the courts may result in delays which are unacceptable to all parties to the bid, and should be avoided.

4. CONCLUSION

In accordance with Article 250(2) of the Treaty, the Commission is altering its proposal as indicated above.

It hopes that the Council and Parliament will be able to find common ground so that this Directive, which is keenly awaited by European companies and financial markets, can be adopted without further delay.