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Study on the application of the Directive 2004/25/EC on takeover bids (the "Study")

Response of the Takeovers Joint Working Party of the City of London Law Society Company Law Sub-Committee and the Law Society of England and Wales' Standing Committee on Company Law

Introduction

The Law Society of England and Wales is the representative body for solicitors in England and Wales. The City of London Law Society represents the professional interests of solicitors in the City of London who represent 15 per cent. of the profession in England and Wales.

Below are the views of the Takeovers Joint Working Party of the City of London Law Society Company Law Sub-Committee and the Law Society of England and Wales' Standing Committee on Company Law (the "Working Party") on the above Study.

We understand the questionnaire in connection with the Study has only been sent to supervisors of takeovers and stakeholders such as companies and investors. In our view, most companies are likely to be able to give only limited views on the Takeover Directive for two reasons: the first is that they are unlikely to have been involved in more than one takeover subject to the Takeover Directive and are likely to have considered the takeover only from the perspective of either the offeror or the offeree; the second is that they are unlikely to be aware of whether the source of any particular regulation is the Takeover Directive itself or UK measures (either to implement the Directive or which existed before the Directive was implemented). The Working Party representatives are experienced legal practitioners who have between them advised stakeholders (both as offerors and offerees) on many takeovers, both before and after the implementation of the Directive. For that reason we think that we can make a worthwhile contribution in responding to the review of the Directive. We understand, from the email we received on 1 August 2011, that the views of the Working Party would be analysed and incorporated into the Study on that basis.

As the Working Party is not being formally consulted in connection with the Study, it has given its views on areas of particular interest instead of answering the questionnaire in full. We have made a number of general comments and then given some detailed comments on particular aspects covered by the questionnaire, following the order of the questionnaire and using the relevant headings.

The Working Party has given its comments based on its experience of having advised on takeovers in the UK.

General comments

It is worth noting that many of the requirements of the Directive were already contained in the rules of the UK Takeover Code prior to the Directive coming into force and its implementation in the UK. As a result, the regulation of takeovers in the UK did not significantly change as a result of the Directive.

The Working Party is not aware that the Directive (and its implementation) has given rise to any significant difficulties in the UK nor is it aware of any parties who argue that they have been significantly prejudiced or disadvantaged by its provisions. This therefore indicates that the regime is working as it is currently drafted. If, following the Study, it is proposed that changes be made to the Directive, those changes may upset the delicate balance that has been achieved between creating a level playing field and allowing Member States and supervisory authorities to regulate takeovers at a national level in line with their company law and with sufficient flexibility to make decisions based on the facts of a particular case. Any changes may therefore result in the Directive being less rather than more effective.

In particular, the Takeover Directive must accommodate, and should not override, each Member State's company law. It is right therefore that it leaves Member States to determine for example which threshold should be reached before an offeror is able to exercise squeeze out rights and the percentage of voting rights that confer control.

It is also important in the view of the Working Party that supervisory authorities have flexibility to make decisions based on the facts in any particular situation. For example, whether or not parties are acting in concert must be decided on the facts in the particular situation and supervisory authorities therefore need to be able to make a decision based on those facts, rather than having to fit the facts into a prescribed set of rules or prohibited practices contained in a Directive.

We understand that the supervisory authorities meet under the auspices of ESMA and that this forum provides an opportunity for those authorities to discuss practices and any problems that may arise. We support this approach.

Part I – Overview of the Takeover Bids Directive

1.1 Objectives of the Directive

Protection of the interests of stakeholders

The questionnaire seeks views on the protection of the interests of stakeholders other than shareholders, including employees. However, the recitals of the Directive do not provide for the protection of these stakeholders: Recitals (2) and (9) provide for the protection of the interests of the holders of securities of companies when they are the subject of takeover bids. Recital (23) provides that the provision of information to and consultation of representatives of the employees of the offeror and offeree should be governed by national law and that employees should be given the opportunity to state their views. In our view, this is the correct approach. It is not possible for the Directive to protect both the holders of securities in the offeree company (for whom the price to be paid by the offeror is most likely to be the determining factor in deciding whether to accept a takeover offer) and other stakeholders such as employees for whom price will not be relevant (except to the extent they also hold securities in the offeree). The Directive should not therefore be amended to provide further protection for other stakeholders as this would result in the Directive having conflicting functions. Each Member State balances the interests of different stakeholders in different ways in its company law and other legislation and in our view it is correct that the Directive does not interfere with those Member State arrangements.

Part II – Understanding of the Takeover Bids Directive

2.1.1 Legal certainty and unpredictability

We believe the Directive provides enough certainty and predictability and do not think there needs to be further guidance. The UK Takeover Panel already provides some guidance on the way in which it interprets the UK Takeover Code.

2.2 Acting in concert

As discussed in the General Comments section above, in the view of the Working Party, it is important for supervisory authorities to retain flexibility to decide whether parties are acting in concert on the facts. This may be influenced by the normal shareholder profile in a particular Member State and the relevant company law.

On the specific issue of whether the different definitions of acting in concert contained in the various Directives create problems in practice, it is the view of the Working Party that where problems have arisen it is as a result of Member States trying to create a single definition to cover all of the Directives. The issues therefore stem from bad implementation at a Member State level rather than as a result of different Directives having different definitions.

Part III – Supervisory authority and exemptions

3.1 Supervisors (Article 4 of the Directive)

In the view of the Working Party the drafting of the Directive could be clearer as regards the split of responsibility between supervisory authorities on a takeover offer which is subject to the jurisdiction of two authorities. However, we believe in practice that, where an offer has been subject to shared jurisdiction, the relevant supervisory authorities have worked successfully together to agree a framework that meets the requirements of both Member States and it is important that the supervisory authorities retain the flexibility to agree such a framework on a case by case basis.

In the UK, Article 9 is not optional. As far as we are aware, no UK companies have opted in to Article 11.

3.2 Exemptions to the Directive

We do not believe the UK Takeover Panel's ability to prescribe exemptions from the Directive has led to a significant weakening of the Directive.

Part IV – Mandatory bid rule

We are not aware of any issues with the operation of the mandatory bid rule and believe it works well in practice to protect minority shareholders appropriately. The rule has not had a significant effect in the UK as the rules existed before the Directive was implemented.

Part V – Disclosure and takeover bid procedure

We are not aware of any issues with the disclosure obligations and takeover bid procedures in the Directive. On the question as to whether the disclosure requirements protect stakeholders sufficiently, we believe the disclosures are sufficient to protect shareholders and we are not aware of any pressure from shareholders calling for more disclosure. We do not think their purpose is to protect other stakeholders, although the information provided may be of interest.

We do not think it will always be necessary to disclose information about an offeror's intentions as regards the main local business partners and sub-contractors of the offeree company. These may be significant in the context of the offeree but will not always be so. They are also unlikely to be significant for the offeror and in our experience are usually worked out at a later stage.

We think there is reasonable clarity regarding takeover bid procedure.

Part VI – Takeover defences

The Working Party wishes to emphasise that, whilst certain Member States appear not to have implemented the provisions of the Directive relating to takeover defences, it is important to look at the reasons why. For example, the UK did not implement Article 11 on break-through; the reason for this is because there are few companies in the UK whose constitutions contain provisions which would mean that an offeror could only successfully implement a takeover offer by using breakthrough provisions. It is also unusual in the UK for companies to adopt defensive measures (although companies do use preference shares as a way of raising finance rather as a defensive measure). Likewise we understand that Germany did not implement Articles 9 and 11 because they already had similar provisions contained in their company law. We believe the Takeover Directive needs to take account of the differing approaches of company law and the differing shareholder profiles in Member States. In practice the use of defensive measures in the UK has not changed significantly since the implementation of the Directive.

It does seem likely that the Directive should have contributed to more openness of the EU market for corporate control.

As explained above, we think the purpose of the Directive is to protect the interest of offeree company shareholders, rather than to protect the interests of offeree companies, employees and other stakeholders.

In the UK we think the rules on defensive measures work well in practice.

Part VII – Squeeze out rule (Article 15) and sell out rule (Article 16)

As discussed in the General Comments section above, in our view it is right that Member States determine which threshold should apply in order for an offeror to be able to exercise squeeze out rights. We do not therefore believe that the existence of different thresholds within the EU causes problems. The UK had squeeze out and sell out measures in place before the implementation of the Directive and these did not change significantly as a result of the introduction of the Directive. Squeeze out procedures are almost invariably used if the relevant conditions are met and so it is not normally necessary for sell out rights to be used. It is almost always important for an offeror to be sure that it can squeeze out minorities if the relevant threshold is met.

Part VIII – Impact of the Takeover Bids Directive on employees and the labor market

As discussed in Part I above, we believe that it is appropriate for employees to be protected in accordance with the relevant Member State's legislation through being given information about a takeover offer and having the right to make their views known. It would not be appropriate for them to be given protection beyond that under the Directive. If they were to be given further protection, it would be likely to be to the detriment of holders of securities and, as the recitals make clear, one of the Directive's primary functions is to protect security holders, not wider stakeholders.

Part IX – Impact of the Takeover Bids Directive on the EU economy

Whether environmental concerns and local communities are taken into account in the conduct of takeover bids depends on whether these issues are raised by the offeror, the offeree or other interested parties and their significance in the context of the proposed offer.

As discussed above in relation to employees, the Directive's function is to protect security holders and any increased protection for the environment or local communities, beyond increased disclosure obligations, could be to the detriment of holders of securities.

Part X – Improvement of the Takeover Bids Directive

We have not seen any increase in litigation as a result of the Directive.

We do not have any suggestions to improve the takeover rules and would encourage careful thought to be given before amendments are proposed as the regime seems to work well in practice; any increase in regulation is likely to lead to less flexibility at a Member State level which, in our view, it is essential to preserve so that decisions can be made based on the facts in any particular situation.