

# COMMISSION OF THE EUROPEAN COMMUNITIES

COM(90) 416 final - SYN 186

Brussels, 10 September 1990

Amended proposal for a

## THIRTEENTH COUNCIL DIRECTIVE

**ON COMPANY LAW, CONCERNING TAKEOVER AND OTHER GENERAL BIDS**

(presented by the Commission pursuant to Article 149(3)  
of the EEC-Treaty)

EXPLANATORY MEMORANDUM

I. General

On 19 January 1989 the Commission presented to the Council a proposal for a Thirteenth Council Directive on company law, concerning takeover and other general bids.<sup>1</sup> The Economic and Social Committee delivered its opinion on 27 September 1989,<sup>2</sup> and the European Parliament delivered its opinion on 17 January 1990.<sup>3</sup>

The Commission has adopted this amended proposal on the basis of Article 149(3) of the Treaty, taking account of these two opinions.

The new version also contains a number of amendments intended in particular to reflect the outcome of discussions in the Council working party. These are technical improvements, and in no way affect the thinking or the objectives behind the proposal. The main such changes are as follows:

- (a) The term "bid" has been defined (Article 2, first indent).
- (b) An objective test has been included to determine when the obligation to make a bid arises (Article 4(1)).
- (c) The rules on the calculation of the voting rights threshold have been redrafted (Article 4(2)) to reflect the wording of other directives already adopted in the field.
- (d) A list of possible exemptions from the obligation to make a bid has been included (Article 4(2c)), setting out particular cases covered by the general exemption clause which already formed part of the proposal (Article 4(3)).

1 OJ No C 64, 14.3.1989, p. 8; with explanatory memorandum, Suppl. 3/89 - Bull. EC.

2 OJ No C 298, 27.11.1989, p. 56.

3 OJ No C 38, 19.2.1990, p. 41.

- (e) A deadline has been inserted for the granting of prior approval of the offer document, if prior approval is required (Article 6(2a)).
- (f) Rules are laid down to deal with the case where a bid is made public in more than one Member State (Article 11(1a)).
- (g) Changes have been made to the thresholds at which certain acquisitions of securities made while the bid is open must be declared (Article 17).
- (h) Addressees who have already accepted one bid are permitted to accept a competing bid (Article 20(5)).

II. Commentary on the Articles

The amended proposal incorporates a whole series of amendments relating exclusively to terminology, which do not require comment.

Article 1

Scope

At the request of Parliament, the Commission has agreed to restrict the scope of the Directive. The Directive as amended applies only to companies governed by the law of a Member State whose securities are admitted to trading on one or more stock exchanges in the Community.

Nevertheless, it is necessary to reserve the Commission's right to reconsider this matter following the lapse of five years after the entry into force of the transposal provisions of the Directive (Article 22(2)) and if necessary to put forward a new proposal extending the scope of the Directive.

It will be evident that, since this Directive is merely concerned to set down certain minimum requirements, the Member States remain free to apply it to companies whose securities are not quoted on a stock exchange.

Article 2

Definitions

In order to delimit the effect and scope of the Directive it is advisable to define the term "takeover or other general bid". Accordingly, a new

4

definition has been introduced in this Article. The term means an offer made to the holders of the securities of a company to acquire all or part of these securities by payment in cash or in exchange for other securities.

### Article 3

#### Equal treatment

In view of the introduction of a series of principles applicable to the discharge of the functions of the supervisory authority (Article 6a) this Article, which sets out only one of these principles, has become superfluous.

### Article 4

#### Obligation to make a bid

Several amendments have been introduced to this Article.

First, it is necessary to specify more clearly than in the original proposal the time when the obligation to make a bid arises. The test adopted is a purely objective one: there is an obligation to bid when, as a result of the acquisition of holdings in a company, the level of a person's holdings goes beyond a specified threshold. This threshold has not been altered. Accordingly, a person, irrespective of his initial holding, who acquires securities bringing his holding to one-third or more of the voting rights of a company must make a bid in accordance with the Directive. Nevertheless, the Member States may fix another threshold provided that it is lower than one-third of the voting rights. It is permissible to retain legislation providing that the requirement to make the bid arises on the subjective criterion of the intention of the acquirer to exceed the threshold, so that this obligation arises specifically at the time when such an intention is formed. This is because that test is more stringent than the one laid down in the Directive, and the obligation to make a bid thus comes into existence at an earlier point.

Second, with regard to the rules for calculating the threshold requiring a bid to be made (Article 4(2) and (2a)), the amended proposal takes account of the wording of Article 7 of Council Directive 88/627/EEC on the information to be published when a major holding in a listed company is acquired or disposed of.<sup>4</sup> In addition, it is laid down that in effecting this calculation the voting rights that cannot be exercised in pursuance of Article 22 of Council Directive 77/91/EEC on the formation of limited

<sup>4</sup> OJ No L 348, 17.12.1988, p. 62.

liability companies and the maintenance and alteration of their capital<sup>5</sup> may not be taken into consideration (Article 4(2b)).

Third, the amended proposal retains power to grant exemption from the obligation to make a bid. It has proved necessary to specify a series of situations in which Member States may enact legislation to the effect that, although a person has acquired a holding exceeding the threshold, he need not make a bid. The cases envisaged by the Directive are as follows: acquisition without consideration; acquisition within the framework of a projected merger or following division of a company; cases where the threshold is exceeded by less than 3% of the voting rights, and an undertaking is given to return within the threshold within a maximum period of one year; cases where the company is already controlled by the acquirer or by an undertaking he controls or which controls the acquirer; cases where the company is already controlled by one or more persons giving a formal undertaking not to transfer their securities to the acquirer; and acquisition resulting from an increase in subscribed capital in the course of which the acquirer has exercised a right of pre-emption. In addition to these cases for which express provision has been made, the supervisory authority may permit exemptions in special cases; it must give its reasons for so doing.

#### Article 5

Exemptions on the basis of size of the offeree company

This Article has been deleted. There was no longer any reason to retain it in view of the limitation of the scope of the Directive to companies listed on a stock exchange.

#### Article 6

Supervisory authority

In accordance with the opinion of Parliament, the amended Proposal clarifies the designation of the authority responsible for supervising the drawing-up and publication of the offer document. The authority is to be that of the Member State in which the registered office of the offeree company is situated, provided that the securities of the company are accepted for trading on a regulated market in the state. In other cases, the appropriate authority would be that of the Member State on whose regulated market the securities of the offeree company were first admitted to trading.

In order to prevent long approval procedures before the issue of the offer document creating hidden impediments to the success of a bid and entailing additional unjustified expense for the offeror, the amended proposal fixes

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<sup>5</sup> OJ No L 26, 31.1.1977, p. 1.

a time-limit for granting prior approval. The same thinking is reflected in the Merger Control Regulation, Council Regulation (EEC) No 4064/89, which likewise sets deadlines and lays down precise rules for the suspension of a transaction.<sup>6</sup> Under the new provision introduced here, the authority has three working days after the lodging of the offer document within which to take a decision on the document. If the authority fails to take a decision within this time, it is deemed to have approved the document.

The amended proposal maintains the basic principle of mutual recognition of the offer document. Nevertheless, as is generally accepted in the recognition of stock exchange listing particulars, it is specified that recognition is conditional on prior approval of the offer document.

With regard to cooperation between the authorities of the various Member States, the wording has been amended to bring it into line with the Directives already adopted on the markets in transferable securities.

#### Article 6a

Principles applicable to the discharge of the functions of the supervisory authority

In order to render the Directive sufficiently flexible, while at the same time ensuring that such flexibility does not go so far as to infringe the principle of legal certainty, this Article introduces a series of principles for the guidance of supervisory authorities in the discharge of their functions, in particular when they grant exemptions from the rules of the Directive.

These principles are those proposed by Parliament in its opinion. The first principle is that holders of securities in the offeree company who are in the same position should be accorded equal treatment. Second, it is necessary to ensure that persons to whom the bid is addressed have sufficient time and all the necessary information to take a decision on the bid. The third principle is concerned to ensure that the board of the offeree company refrains from taking measures liable to frustrate the bid. The objective of the fourth principle is to prevent the creation of false markets in the securities of companies concerned by the bid (the offeror company, the offeree company and any other companies whose securities are offered as a consideration for those of the offeree company). Finally, the purpose of the fifth principle is to ensure that the affairs of the offeree company are not impeded for an unreasonable time.

### Article 7

#### Procedure prior to publication of the offer document

The Article as reworded retains the principle that the offeror must make public his intention to launch a bid as soon as he takes the decision to do so. Nevertheless, two amendments have been introduced. First, the offeror must provide advance information of the decision to the board of the offeree company and to the supervisory authority. Second, the means whereby the intention to launch a bid is publicized must ensure wide coverage for this information.

### Article 8

#### Restriction of the powers of the board of the offeree company

This Article maintains the provision in the original proposal requiring the board of the offeree company to refrain from adopting defensive measures without the authorization of the general meeting. It is expressly laid down that the foregoing also applies to the acquisition by the company of its own securities. By way of derogation from Article 19(1)(a) and (2) of the Second Company Law Directive, already referred to (Council Directive 77/91/EEC), it is laid down that the board of the offeree company may not acquire its own securities without the authorization of the general meeting of shareholders.

Any authorization by the general meeting for the adoption of defensive tactics must be accorded during the period for acceptance, in order to enable the holders of securities of the offeree company to take a decision in full knowledge of the conditions of the bid. Any prior authorization of the general meeting must therefore be confirmed by the meeting while the bid is still valid. With that in view, it has been expressly stated, at the request of Parliament, that the board of the offeree company may call a general meeting of shareholders.

### Article 10

#### Offer document

The purpose of the offer document is clarified. It must contain all the information necessary to enable the persons to whom the bid is addressed to arrive at an informed appraisal of the bid. In this connection, in addition to the general power of Member States to require additional information under their national legislation, the supervisory authority may in particular cases require additional information or permit the offeror to refrain from publication of certain information on condition that it

cannot be obtained in time or without excessive cost or is not considered necessary for the protection of the shareholders or employees of the offeree company.

New items of information are introduced into the offer document.

The names of the persons responsible for the document must be mentioned, together with a declaration by them that the information contained in the document is accurate.

In addition, the offer document must specify the minimum and maximum number of securities which the offeror undertakes to acquire. This requirement does not alter the fact that under Article 4(1) the bid must extend to all the securities of the company.

The offeror must guarantee that the consideration will be available not only where the consideration is in cash but also, under the amended proposal, where the consideration is in securities. In the latter case the offeror must either have at his disposal securities to exchange or undertake to call the general meeting to authorize the issue of these securities.

In accordance with an amendment introduced by Parliament, the offeror must indicate the possible consequences of the financing of the bid not only for the offeree company but for the offeror company as well.

In order to provide full information to the addressees of a bid, the offer document must give them notice of any circumstances which may lead to the withdrawal of the bid or its being declared void.

At the request of Parliament, a series of amendments has been introduced with a view to clarifying in the offer document the objectives of the offeror in making his bid.

The principle that the offer document must be transparent requires that if the offeror is acting in his own name but on behalf of another person the information in the document should refer to the latter, not the offeror.

If the consideration offered comprises securities which have been admitted to listing on a stock exchange situated or operating in a Member State within twelve months of the announcement of the bid, the offer document is to be accompanied by the appropriate listing particulars. In the absence of such information, the offeror is required to provide equivalent information enabling the addressees of the bid to make an informed judgment on the assets and liabilities, financial position, record and prospects of the company issuing the securities.



To attain greater flexibility, the proposal as amended permits the supervisory authority to require additional information to be included in the offer document or to allow certain information to remain undisclosed, giving reasons.

#### Article 11

##### Forms of disclosure

The amended proposal lays down rules governing the launching of the same bid in more than one Member State. The information is then to be made public in each Member State in accordance with that state's laws. Furthermore, the date on which the offer document is made public may be later in certain Member States than in the Member State in which the offeree company has its registered office. Nevertheless, despite the later publication, the addressees of the bid must be able to reach a fully informed decision on the bid.

#### Article 14

##### Opinion of the board of the offeree company

The minimum requirements for the content of the opinion of the board of the offeree company have been increased. The members of the board must indicate whether they themselves intend to accept the bid and to sell their securities in the offeree company.

The requirement in the original proposal that the opinion of the board of the offeree company should be accompanied by a report by an expert where the offer comprises securities and where the securities offered are not quoted on the stock exchange at the time when the bid is made has been dispensed with. This requirement is superfluous in view of Article 10(4).

The proposal as reworded expressly lays down that the fact that the board of an offeree company has failed to discharge its duty to give its opinion of a bid cannot impede the proper course of the bid. This is an important clarification, in particular in cases where the offeror and the board of the offeree company are not in agreement regarding the bid.

The former paragraphs 4 and 5 are considered superfluous. Paragraph 4 permitted publication of the offer document and the opinion of the board of the offeree company in the same document; it was of a purely optional nature, and its inclusion in the Directive seemed unnecessary. The content of paragraph 5 (the requirement that the board of the offeree company should also give its opinion on revisions of the offer and competing offers) is incorporated in Article 14(1) and Article 20(1).

Article 15

## Revision of the bid

The amended proposal enables Member States to adopt measures to avoid a succession of revisions improperly impeding the operation of the offeree company, in particular by restricting the powers of the board under Article 8, and indeed impeding the operation of the market in general.

Article 17

## Provision of information to the supervisory authority

Two important changes have been introduced into this Article. First, the obligation laid down in the original proposal to the effect that the offeror was under an obligation to inform the supervisory authority at any time of the number of acceptances received has been altered to make it a general obligation, applicable to all parties to the bid, to provide the supervisory authority, at its request, with all information required by the authority for the discharge of its duties.

Second, the Article has retained, albeit in a different form, the obligation to notify the supervisory authority of certain acquisitions of securities of the offeree company, the offeror company, and any other company whose securities are offered as a consideration. The Article as amended draws a distinction between the following: (a) persons already having a significant holding (5% or more of the voting rights) in one of these companies; (b) persons acquiring an appreciable holding (0.5% or more of the voting rights) in the course of the bid; and (c) persons holding less than 5% of the voting rights and acquiring less than 0.5% of these rights in the course of the bid. The persons referred to in (a) are required to notify all acquisitions of the securities of the company in which they have a significant holding. The persons referred to in (b) are required to notify the acquisition of an appreciable holding, and any subsequent acquisition of the securities of the company in which they have such a holding. The persons referred to in (c) are not required to make a notification. The advantage of these arrangements is that they do not require insignificant acquisitions to be notified, that is, acquisitions giving the acquirer less than 0.5% of the voting rights in total. In addition, the arrangements make it possible to identify not only acquisitions by large shareholders (having 5% or more of the voting rights) but also acquisitions of relatively significant holdings (those carrying 0.5% or more of the voting rights).

### Article 18

#### Disclosure of result of bid

The Article as amended lays down that the result of the bid is to be made public immediately. This requirement takes on increased significance in view of the fact that Article 8 restricts the powers of the board of the offeree company pending the announcement of the result of the bid.

### Article 19

#### Information for representatives of employees of the offeree company

At the request of Parliament, the Article has been amended to require the inclusion among the documents to be communicated to the representatives of the employees of the offeree company documents concerning the revision, withdrawal, and result of the bid.

In addition, in order to ensure that the employees are informed in good time, it is laid down that the documents and information concerning the bid are to be communicated to the employees' representatives immediately after they are made public.

### Article 20

#### Competing bids

Paragraph 2 of the original proposal has been deleted. It overlapped paragraph 1, which lays down that the Directive applies to all competing bids.

Three new provisions are introduced. First, in line with what has been laid down concerning the revision of the bid, the Member States must, in competing bids, ensure that the addressees of bids who have accepted an earlier bid qualify for a subsequent competing bid. This accords with the penultimate recital, in which it is stated that competing bids must of necessity be beneficial to the holders of the securities of the offeree company. Nevertheless, certain exceptions to this principle must be allowed. Accordingly, a second provision has been introduced enabling Member States to grant exemption from the general rule if their legislation permits irrevocable acceptance of a bid. Third, as is the case with successive revisions of a bid, Member States may take appropriate steps to ensure that competing bids do not impede the proper operation of the offeree company or of the market.

Article 22

Transposition of the Directive

The dates for the transposal of the Directive (1 January 1992) and the entry into force of the national provisions (1 January 1993) have been fixed as requested by Parliament.

## II

*(Preparatory Acts)*

## COMMISSION

**Amended proposal for a thirteenth Council Directive on company law, concerning takeover and other general bids**

*COM(90) 416 final — SYN 186*

*(Submitted by the Commission on 14 September 1990 pursuant to Article 149 (3) of the EEC Treaty)*

(90/C 240/09)

## ORIGINAL PROPOSAL

## AMENDED PROPOSAL

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 54 thereof,

unchanged

Having regard to the proposal from the Commission,

Having regard to the proposal from the Commission <sup>(1)</sup>,

In cooperation with the European Parliament,

In cooperation with the European Parliament <sup>(2)</sup>,

Having regard to the opinion of the Economic and Social Committee,

Having regard to the opinion of the Economic and Social Committee <sup>(3)</sup>,

Whereas it is necessary to coordinate certain safeguards which Member States require of companies and firms within the meaning of the second paragraph of Article 58 of the Treaty for the protection of members and others, in order to make such safeguards equivalent throughout the Community;

unchanged

Whereas it is necessary to protect the interests of the shareholders of public companies limited by shares when these are the subject of a takeover or other general bid;

Whereas it is necessary to protect the interests of the holders of the securities of companies governed by the law of a Member State when the securities of these companies, admitted to trading on a regulated market within the scope of this Directive, are the subject of a takeover or other general bid;

<sup>(1)</sup> OJ No C 64, 14. 3. 1989, p. 8.

<sup>(2)</sup> OJ No C 38, 19. 2. 1990, p. 41.

<sup>(3)</sup> OJ No C 298, 27. 11. 1989, p. 56.

## ORIGINAL PROPOSAL

Whereas shareholders who are in the same position should be treated equally;

Whereas this equality of treatment requires that the obligation to make a bid is imposed on persons wishing to attain a certain level of participation in a company and in order to ensure the protection of minority shareholders and to avoid purely speculative partial bids, it is necessary to require that these persons make a bid for all the shares of that company;

Whereas each Member State should designate a supervisory authority or authorities to ensure that parties to a takeover or other general bid fulfil their obligations; and whereas it is necessary to determine which authority has territorial jurisdiction in the case of cross-frontier bids and to provide for the mutual recognition of offer documents within the Community; whereas the different authorities must cooperate with one another and their present or former officers and servants should be bound to preserve confidentiality;

## AMENDED PROPOSAL

deleted

Whereas equality of treatment of holders of securities requires that persons wishing to attain a certain level of holdings in a company be obliged to make a bid; whereas in order to protect persons having minority holdings and avoid purely speculative partial bids, it is necessary to require that persons who have acquired a considerable holding make a bid for all the securities of the company; whereas, in order to attain greater flexibility in the application of this provision, the Member States may provide for a series of exemptions from this obligation;

unchanged

Whereas in taking decisions applying the requirements of this Directive the supervisory authority should be guided by a set of principles directing it to seek to ensure that:

- (a) all holders of securities of an offeree company who are in the same position are treated equally;
- (b) the addressees of a bid have sufficient time and information to enable them to reach a properly informed decision on the bid;
- (c) the board of an offeree company acts in the interests of all the shareholders, and cannot frustrate the bid;
- (d) false markets are not created in the securities of the offeree company, of the offeror company, or of any other company concerned by the bid;
- (e) offeree companies are not hindered in the conduct of their affairs beyond a reasonable time by an offer for their securities;

ORIGINAL PROPOSAL	AMENDED PROPOSAL
<p>Whereas to reduce the scope for insider dealing offerors should be required to announce their intention of launching a bid as soon as possible and to inform the supervisory authority and the offeree company's board of the precise terms of the bid before they are made public;</p>	unchanged
<p>Whereas to avoid operations which frustrate the bid it is necessary to limit the powers of the board of directors of the offeree company to engage in operations of an exceptional nature;</p>	unchanged
<p>Whereas to help ensure compliance with the obligations resulting from the Directive it should be compulsory for offerors to be represented by a person or credit institution licensed to deal on financial markets;</p>	unchanged
<p>Whereas the addressees of a takeover or other general bid should be properly informed of the terms of the bid by means of an offer document and, where the consideration offered includes securities, should be provided with certain additional information about the company issuing those securities;</p>	unchanged
<p>Whereas the offeror should be required to bring the offer document to the attention of all addressees of the bid and where the offer document contains insufficient information to clarify the real intentions of the offeror, the supervisory authority should be able either to forbid the publication of the offer document or to make the offeror publish a revised document;</p>	unchanged
<p>Whereas it is necessary to set a time limit for takeover bids;</p>	unchanged
<p>Whereas, in the interests of the offeree company and the addressees of the bid, it should be provided that once an offer document has been made public the bid may not be withdrawn except in certain specified circumstances;</p>	<p>Whereas, in the interests of the offeree company and the addressees of the bid, it should be provided that once an offer document has been made public the bid may not be withdrawn or declared void except in certain limited cases;</p>
<p>Whereas the board of the offeree company should be required to report in writing to its shareholders its view of the bid, and whereas, where the consideration offered in the bid includes securities for which at the time the bid is made no official stock exchange listing has been applied for, it should also be required to obtain and make available to all addressees of the bid an additional report by an independent expert;</p>	<p>Whereas the board of the offeree company should be required to make public a written opinion addressed to holders of its securities, setting out its view of the bid;</p>

## ORIGINAL PROPOSAL

Whereas offerors are entitled to revise their bids; whereas limits should be placed on that right in order to maintain an orderly market in the shares and it should be ensured that the addressees of the bid are informed in time; whereas it is necessary that the offeror draw up and make public a fresh document setting out the amendments to the original bid and whereas addressees who have already accepted the bid should be entitled to accept the revised bid;

Whereas in order to ensure equal treatment of addressees of the bid, an acquisition by the offeror, or by certain persons associated with him, of shares which are the subject of the bid at a higher price than that laid down in the offer document or one of its revisions, must itself be considered as a revision;

Whereas to be able to perform their functions satisfactorily, supervisory authorities need to be able to find out at any time how many acceptances have been received to date and whereas, from the time the intention to make a bid is announced by the offeror, any dealing in the securities concerned must be made public by any person already having a significant shareholding;

Whereas the result of the bid must be made public and notified to the supervisory authority;

Whereas taking into account the social policy of the Community, it is necessary that representatives of the employees of the offeree company be informed with regard to the bid and that they should receive all the documents concerning that bid;

Whereas competing bids for the securities of a company are necessarily to the advantage of its shareholders; whereas all such bids should be subject to the same rules as the original bid and the original offeror should be entitled to withdraw his bid in such a case;

Whereas this Directive does not until subsequent coordination affect the capacity of Member States to forbid a takeover or other general bid where the offeror is either a national or a company from a third country, in particular where Community nationals and companies do not benefit from reciprocal treatment as regards the acquisition of shares by means of such a bid in a company governed by the law of that third country.

## AMENDED PROPOSAL

Whereas offerors are entitled to revise their bids; whereas it may be necessary to limit that right with a view to the proper operation of the offeree company and the maintenance of an orderly market and it should be ensured that the addressees of the bid are informed in time; whereas it is necessary that the offeror draw up and make public a fresh document setting out any amendments to the original bid; and whereas addressees who have already accepted the bid should be entitled to accept the revised bid;

unchanged

Whereas to be able to perform their functions satisfactorily, supervisory authorities must at all times be able to require the parties to the bid to provide information on it; whereas after the offeror has announced his intention to make a bid certain transactions concerning the securities of the companies concerned by the bid must be notified to the supervisory authorities;

unchanged

unchanged

Whereas competing bids for the securities of a company are necessarily to the advantage of the holders of its securities; whereas all such bids should be subject to the same rules as the original bid and the original offeror should be entitled to withdraw his bid in such a case; whereas addressees who have already accepted the initial bid must be able to accept the competing bid;

unchanged



## ORIGINAL PROPOSAL

## AMENDED PROPOSAL

HAS ADOPTED THIS DIRECTIVE:

HAS ADOPTED THIS DIRECTIVE:

*Article 1**Article 1***Scope****Scope**

The coordination measures prescribed by this Directive shall apply to the laws, regulations and administrative provisions of the Member States relating to takeover and other general bids addressed, on the same terms, to all holders of the securities, or the securities of a particular class or classes, of any of the following types of company:

(1) The coordination measures prescribed by this Directive shall apply to the laws, regulations and administrative provisions of the Member States relating to takeover and other general bids for the securities of a company governed by the law of a Member State where these securities are admitted to trading on a market in one or more Member States which is regulated and supervised by authorities recognized by public bodies, operates regularly and is accessible, directly or indirectly, to the public.

— *in Germany:*

die Aktiengesellschaft, die Kommanditgesellschaft auf Aktien,

— *in Belgium:*

la société anonyme / de naamloze vennootschap, la société en commandite par actions / de commanditaire vennootschap op aandelen,

— *in Denmark:*

aktieselskaber, kommanditaktieselskaber,

— *in Spain:*

la sociedad anónima, la sociedad en comandita por acciones;

— *in France:*

la société anonyme, la société en commandite par actions;

— *in Greece:*

η ανώνυμη εταιρεία, η ετερόρρυθμη κατά μετοχές εταιρεία;

— *in Ireland:*

the public company, limited by shares;

— *in Italy:*

la società per azioni, la società in accomandita per azioni;

— *in Luxembourg:*

la société anonyme, al société en commandite par actions;

(2) After a period of five years following the date referred to in Article 22 (2), the Commission shall submit to the Council a report on the extension of the scope of this Directive to some or to all companies governed by the law of a Member State whose securities are not accepted for trading on one of the markets referred to in paragraph 1 and, if appropriate, shall put forward a proposal to the Council to that end.

## ORIGINAL PROPOSAL

## AMENDED PROPOSAL

— *in the Netherlands:*

de naamloze vennootschap;

— *in Portugal:*

sociedade anónima, sociedade em comandita por acções;

— *in the United Kingdom:*

the public company, limited by shares.

## Article 2

## Definitions

1. For the purposes of this Directive, 'offeree company' shall mean a company whose securities are the subject of a takeover or other general bid (hereinafter referred to as 'a bid').

2. For the purposes of this Directive, 'offeror' shall mean any person or company including, where appropriate, the directors of the offeree company, who launches a bid in accordance with the obligation set out in Article 4 or on a voluntary basis.

3. For the purposes of this Directive, 'securities' shall mean securities carrying voting rights in a company or which can be converted into securities carrying such rights.

4. For the purposes of this Directive, 'parties to the bid' shall mean the offeror, the representative of the offeror within the meaning of Article 9, the directors of the offeror, if the latter is a company, the addressees of the bid and the directors of the offeree company.

5. For the purposes of this Directive, 'persons acting in concert' shall mean persons who, pursuant to an agreement, cooperate with one another with the aim of acquiring the securities of a company.

## Article 2

## Definitions

For the purposes of this Directive:

— 'takeover or other general bid' ('bid') shall mean an offer made to the holders of the securities of a company to acquire all or part of these securities by payment in cash or in exchange for other securities,

— 'offeree company' shall mean a company whose securities are the subject of a bid,

— 'offeror' shall mean any natural person or legal entity in public or private law making a bid,

— 'securities' shall mean transferable securities carrying voting rights in a company or conferring entitlement to obtain transferable securities carrying such rights,

— 'parties to the bid' shall mean the offeror, the representative of the offeror within the meaning of Article 9, the directors of the offeror, if the latter is a company, the addressees of the bid and the directors of the offeree company,

— 'persons acting in concert' shall mean persons who, through concerted practices or pursuant to an agreement, cooperate with one another in connection with a bid.

## ORIGINAL PROPOSAL

## AMENDED PROPOSAL

*Article 3*

deleted

**Equal treatment**

Shareholders who are in the same position shall be treated equally.

*Article 4**Article 4***Obligation to make a bid****Obligation to make a bid**

1. Any person aiming to acquire a number or percentage of securities, which, added to any existing holdings, gives him a percentage of the voting rights in a company which may not be fixed at more than 33 ⅓ %, shall be obliged to make a bid to acquire all the securities of that company.

1. Any person ('the acquirer') who as a result of acquisition by himself or by a person referred to in paragraph 2 holds securities which added to any existing holdings give him a percentage of the voting rights in a company which may not be fixed at more than one-third of the voting rights existing at the date of acquisition shall be obliged to make a bid to acquire all the securities of the company.

2. To calculate the threshold referred to in paragraph 1, the following must be added to the voting rights held by the offeror:

2. To calculate the threshold referred to in paragraph 1, the following shall be added to the voting rights held by the acquirer:

(a) voting rights held by persons acting in their own name but on behalf of the offeror;

(a) voting rights held by other persons or entities in their own names but on behalf of the acquirer;

(b) where appropriate, voting rights held by companies belonging with the offeror to the same group of undertakings within the meaning of Article 1 of Council Directive 83/349/EEC (1);

(b) voting rights held by undertakings controlled by the acquirer within the meaning of Article 8 of Council Directive 88/627/EEC of 12 December 1988 on the information to be published when a major holding in a listed company is acquired or disposed of (1);

(c) voting rights held by persons acting in concert with the offeror;

(c) voting rights held by any other person acting in concert with the acquirer;

(d) where appropriate voting rights by directors of the offeror company.

(d) voting rights attached to securities held by the acquirer which are lodged by way of security, except where the holder of the security controls the voting rights and declares his intention of exercising them, in which case they shall be regarded as his voting rights.

2a. To calculate the threshold referred to in paragraph 1, the voting rights held by the acquirer or by any of the other persons or entities referred to in subparagraphs (a) to (d) of paragraph 2 shall be deemed to include the voting rights attached to the following securities:

(1) OJ No L 193, 18. 7. 1983, p. 1

(1) OJ No L 348 17. 12. 1988, p. 62.

## ORIGINAL PROPOSAL

## AMENDED PROPOSAL

- (a) securities in which they have the life interest;
- (b) securities which they are entitled to acquire, on their own initiative alone, under a formal agreement;
- (c) securities deposited with them carrying voting rights which they can exercise at their discretion in the absence of specific instructions from the holders.

2b. Voting rights whose exercise is prevented by Article 22 of Council Directive 77/91/EEC of 13 December 1976 on the formation of public limited liability companies and the maintenance and alteration of their capital (\*) shall not be taken into account in calculating the threshold referred to in paragraph 1.

2c. Member States may make provision for exemption from the obligation laid down in paragraph 1 where:

- (a) the securities have been acquired by transmission without consideration;
- (b) the acquirer has undertaken to carry out a merger within the scope of Article 3 of Council Directive 78/855/EEC of 9 October 1978 concerning mergers of public limited liability companies (\*\*) with the company whose securities have been acquired;
- (c) the acquisition results from a division within the scope of Article 2 of Council Directive 82/891/EEC of 17 December 1982 concerning the division of public limited liability companies (†);
- (d) the acquirer acquires a percentage of the voting rights which exceeds the threshold referred to in paragraph 1, but not by more than 3 % of the total of these rights, and gives a written undertaking to transfer the securities necessary to come within the threshold within a period which may not exceed one year;
- (e) the company whose securities have been acquired is already controlled within the meaning of Article 8 of Council Directive 88/627/EEC by the acquirer or by another undertaking controlling the acquirer or controlled by him within the meaning of that Article;

(\*) OJ No L 26, 31. 1. 1977, p. 1.

(\*\*) OJ No L 295, 20. 10. 1978, p. 36.

(†) OJ No L 378, 31. 12. 1982, p. 47.

## ORIGINAL PROPOSAL

## AMENDED PROPOSAL

3. The supervisory authority may grant exemptions to the rule laid down in paragraph 1, giving reasons for its decision and adopting all measures necessary to ensure equal treatment of all shareholders.

*Article 5***Exemptions on the basis of size of the offeree company**

Article 4 shall not apply:

- (a) where the securities of the offeree company have not been admitted to official stock exchange listing or have not been the subject of a request for such admission at the moment when the bid is announced in accordance with Article 7; and
- (b) where the offeree company, or, where appropriate, the group of undertakings within the meaning of Article 1 of Directive 83/349/EEC to which the company belongs, do not exceed, at the balance-sheet date, the amounts of two of the three criteria laid down in Article 27 of Council Directive 78/660/EEC<sup>(1)</sup>.

*Article 6***Supervisory authority**

1. Member States shall designate the authority or authorities which must discharge the functions specified in this Directive. The authorities thus designated may delegate all or part of their powers to other authorities or to associations or private bodies. Member States shall inform the Commission of these designations and of any delegation of powers and shall specify all divisions of functions that may be made.

(f) the company whose securities have been acquired is already controlled within the meaning of Article 8 of Council Directive 88/627/EEC by a shareholder or jointly by a number of shareholders who give a written undertaking not to transfer their securities to the acquirer on the conditions he offers;

(g) the securities have been acquired following an increase in the subscribed capital and the acquirer has exercised his right of pre-emption in accordance with Article 29 of Council Directive 77/91/EEC.

3. The supervisory authority may grant exemption from the obligation laid down in paragraph 1, giving reasons, in cases other than those specified in the foregoing paragraph.

deleted

*Article 6***Supervisory authority**

1. unchanged

<sup>(1)</sup> OJ No L 222, 14. 8. 1978, p. 11.

## ORIGINAL PROPOSAL

2. The authorities and, where appropriate, the associations or private bodies referred to in paragraph 1 must have all the necessary powers to ensure that this Directive is put into effect and, in any case, either the power to forbid the publication of an offer document which is incomplete by reference to the requirements of this Directive or the power to oblige the offeror to correct an inadequate offer document and to make it public by the means set out in Article 11 (1).

3. The authority competent for supervising the drawing-up and publication of the offer document shall be that of the Member State in which the offeree company has its registered office. Where the bid is made in several Member States simultaneously, the offer document as prepared under the supervision of the national authority responsible shall be accepted in the other Member States, without their supervisory authorities having the right to require the inclusion of any additional particulars in the document.

4. After an offer document has been made public in accordance with Article 11 (1), the competent authorities of the Member States shall give each other any cooperation required for the performance of their duties and for this purpose shall supply each other with any information that may be necessary.

5. All present or former officers or servants of supervisory authorities shall be bound by the rules of professional secrecy. Information that has come to their knowledge in the course of performing their professional duties shall not be disclosed to any person or body not legally entitled to receive it.

## AMENDED PROPOSAL

2. The supervisory authorities, and, where appropriate, the associations or private bodies referred to in paragraph 1, shall have all the powers necessary for the exercise of their functions, which shall include responsibility for ensuring that the parties to a bid comply with their obligations under this Directive. The authorities' powers shall include either the power to forbid the publication of an offer document which is incomplete by reference to the requirements of this Directive or the power to oblige the offeror to correct an inadequate offer document and to make it public in accordance with Article 11 (1).

2a. If a Member State requires the offer document to be approved by the supervisory authority prior to publication, the authority shall have a maximum period of three working days from lodging of the document within which to grant or withhold approval. If the authority fails to take a decision within that period approval shall be deemed to be granted.

3. The authority competent for supervising the drawing-up and publication of the offer document shall be that of the Member State in which the offeree company has its registered office if the securities of the company are admitted to trading on a regulated market in that Member State. Otherwise the competent authority shall be that of the Member State on whose regulated market the securities of the company were first admitted to trading. If the document so drawn up has received prior approval it shall be accepted by the other Member States, whose supervisory authorities may not require the inclusion of any additional particulars.

4. The competent authorities of the Member States shall cooperate notwithstanding paragraph 5, in so far as necessary for the performance of their duties and for this purpose shall supply each other with any information that may be necessary.

5. (a) Each Member State shall provide that all present or former officers or servants of supervisory authorities shall be bound by the rules of professional secrecy. Information covered by professional secrecy shall not be disclosed to any person or authority not legally entitled to receive it.

(b) Without prejudice to their obligations in judicial proceedings in criminal matters, the supervisory authorities in receipt of the information referred to in paragraph 4 may use such information only for the discharge of their functions under paragraph 1 and in connection with administrative or legal proceedings specifically relating to the discharge of their functions.

## ORIGINAL PROPOSAL

## AMENDED PROPOSAL

6. This Directive shall not affect the legislation of Member States concerning the liability of competent authorities.

6. unchanged

Nevertheless, if the supervisory authority which has supplied information consents, the recipient supervisory authority may make use of the information for other purposes or transmit it to the supervisory authorities of other states.

*Article 6a***Principles applicable to the discharge of the functions of the supervisory authority**

In discharging the functions referred to in Article 6 (2) and in granting exemptions pursuant to Articles 4 (3), 8 (1) (b), 10 (5), 11 (1), 12 (2), 13 (1) (e) and (f), 15 (5) and 20 (3), the supervisory authority shall seek to ensure that:

- (a) all holders of securities of an offeree company who are in the same position are treated equally;
- (b) the addressees of a bid have sufficient time and information to enable them to reach a properly informed decision on the bid;
- (c) the board of an offeree company acts in the interests of all the shareholders, and cannot frustrate the bid;
- (d) false markets are not created in the securities of the offeree company, of the offeror company, or of any other company concerned by the bid;
- (e) offeree companies are not hindered in the conduct of their affairs beyond a reasonable time by a bid for their securities.

*Article 7***Procedure prior to publication of the offer document**

1. As soon as it decides to make a bid, the offeror shall make public its intention of doing so by one of the means provided for in Article 11 (1). It shall inform the competent supervisory authority accordingly.

*Article 7***Procedure prior to publication of the offer document**

1. As soon as he decides to make a bid, the offeror shall inform the competent supervisory authority and the board of the offeree company and then make his decision public in accordance with Article 11 (1) (a).

## ORIGINAL PROPOSAL

2. The offeror shall then immediately draw up an offer document in accordance with Article 10 and make it public in accordance with Article 11 (1).

3. Before the offer document is made public, the offeror shall communicate it to the competent supervisory authority and to the board of the offeree company.

*Article 8***Restriction of the powers of the board of the offeree company**

After receiving the information referred to in Article 7 (1) and until the expiry of the period for accepting the bid, the board of the offeree company shall not, without the authorization of the general meeting of shareholders, decide:

- (a) to issue securities carrying voting rights or which may be converted into such securities;
- (b) to engage in transactions which do not have the character of current operations concluded under normal conditions unless the competent supervisory authority has authorized them, giving its reasons for such authorization.

*Article 9***Representative of the offeror**

The offeror shall be represented either by a qualified person authorized to deal on the Community financial markets or by a credit institution authorized within the Community.

## AMENDED PROPOSAL

2. The offeror shall then immediately draw up an offer document in accordance with Article 10 and make it public, accompanied where appropriate by the other documents referred to in that Article, in accordance with Article 11 (1).

3. Before the offer document is made public, the offeror shall communicate it to the supervisory authority, which shall exercise the powers referred to in Article 6 (2) where appropriate, and to the board of the offeree company.

*Article 8***Restriction of the powers of the board of the offeree company**

1. After receiving the information referred to in Article 7 (1) and until the result of the bid is made public, the board of the offeree company shall not, without obtaining the authorization of the general meeting of shareholders within the period for acceptance, decide:

- (a) to issue securities within the meaning of the fourth indent in Article 2;
- (b) to engage in transactions which would have the effect of altering significantly the assets or liabilities of the company or resulting in the company entering into commitments without consideration, unless the supervisory authority authorizes such transactions, giving reasons;
- (c) to have the company acquire its own shares, as provided for in Article 19 (1) (a) and (2) of Council Directive 77/91/EEC.

2. The board of the offeree company may call a general meeting of shareholders before the expiry of the period for acceptance referred to in the foregoing paragraph.

*Article 9***Representative of the offeror**

unchanged



## ORIGINAL PROPOSAL

## AMENDED PROPOSAL

*Article 10**Article 10***Offer document****Offer document**

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| <p>1. The offeror shall draw up an offer document in respect of the bid stating at least:</p> <p>(a) the type, name and registered office of the offeree company</p> <p>(b) the name and address of the offeror or, where the offeror is a company, the type, name and registered office of that company;</p> <p>(c) the name and address or, where appropriate, name and registered office of the representative of the offeror referred to in Article 9;</p> <p>(d) the securities or class or classes of securities for which the bid is made;</p> <p>(e) the securities, or the securities of the relevant class or classes, already held by:</p> <p>(aa) the offeror;</p> <p>(bb) other persons for the account of the offeror;</p> | <p>1. The offeror shall draw up an offer document containing the information necessary to enable the addressees to reach a properly informed decision on the bid and stating at least:</p> <p>(a) unchanged</p> <p>(b) unchanged</p> <p>(c) unchanged</p> <p>(ca) the persons responsible for the offer document, and their names and positions, together with a declaration that to the best of their knowledge and belief the particulars contained in the offer document are correct and that no material fact has been omitted from the document;</p> <p>(d) unchanged</p> <p>(da) the maximum and minimum percentages or quantities of securities which the offeror undertakes to acquire;</p> <p>(e) the securities, or the securities of the relevant class or classes, already held by:</p> <p>(aa) the offeror;</p> <p>(bb) other persons or entities acting in their own name but on behalf of the offeror;</p> |
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## ORIGINAL PROPOSAL

## AMENDED PROPOSAL

(cc) companies belonging with the offeror to the same group of undertakings within the meaning of Article 1 of Directive 83/349/EEC;

(dd) persons acting in concert with the offeror;

(ee) where the offeror is a company, its directors;

and the voting rights attached to those securities and the date and the price at which they were acquired;

(f) where the offeror is a company, the securities, or the securities of a particular class or classes, of the offeror held by the offeree company, and the voting rights attached to them and the date and the price at which they were acquired;

(g) the consideration offered for each security and the basis of the valuation used in determining it and, in the case of a cash consideration, the guarantees provided by the offeror regarding payment of that consideration, and, where appropriate, a statement concerning any future indebtedness of the offeree company to finance the bid;

(cc) undertakings controlled by the offeror within the meaning of Article 8 of Council Directive 88/627/EEC;

(dd) any other person acting in concert with the offeror;

(ee) the offeror or one of the other persons or entities referred to in points (bb) to (dd) if the securities have been lodged by way of security, except where the holder of the security controls the voting rights and declares his intention of exercising them, in which case the securities shall be regarded as his securities;

and the voting rights attached to those securities, and the date and price of any acquisition or disposal of such securities within the 12 months preceding the public announcement required by Article 7 (1) and until the offer document is made public;

the securities held by the offeror or by any of the other persons or entities referred to in points (bb) to (dd) shall be deemed to include:

— securities in which they have the life interest,

— securities which they are entitled to acquire, on their own initiative alone, under a formal agreement,

— securities deposited with them carrying voting rights which they can exercise at their discretion in the absence of specific instructions from the holders;

(f) where the offeror is a company, the securities or the securities of a particular class or classes of the offeror held by the offeree company or by other persons on behalf of the offeree company and the voting rights attached to them so far as the offeror is aware of them;

(g) the consideration offered for each security or class of securities and the basis of the valuation used in determining it, with particulars of the way in which that consideration is to be given, and

— where the consideration comprises cash, the steps that have been or will be taken with a view to payment.

## ORIGINAL PROPOSAL

## AMENDED PROPOSAL

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|   | <p>— where the consideration comprises securities, particulars establishing that the offeror has these securities at his disposal or, where appropriate, an undertaking to call a general meeting of the offeror's shareholders in order that they may authorize the issue of the securities in question;</p>  |
| <p>(h) where the consideration comprises securities, the date from which those securities will entitle their holders to a share in the profits and any special conditions affecting that entitlement;</p>           | <p>(ga) a statement concerning any future indebtedness of the offeror and, where appropriate, of the offeree, to finance the bid;</p>  |
| <p>(i) any conditions authorized by the competent supervisory authority which the offeror places on the bid;</p>  | <p>(h) where the consideration comprises securities, the date from which they will entitle their holders to a share in dividends or interest and any special conditions affecting that entitlement;</p> <p>(i) any condition beyond the offeror's control and authorized by the supervisory authority, on which the bid is dependent;</p>  |
| <p>(j) the latest date on which the bid may be accepted,</p>  | <p>(ia) the cases in which the bid may be withdrawn or declared void in accordance with Article 13;</p> <p>(j) the beginning and the end of the period during which the bid may validly be accepted;</p>   |
| <p>(k) the steps to be taken by the addressees of the bid in order to signify their acceptance and to receive the consideration for the securities which they transfer to the offeror;</p>                          | <p>(k) unchanged</p>   |
| <p>(l) the intentions of the offeror, explicitly expressed, regarding the continuation of the business of the offeree company, including the use of its assets, the composition of its board and its employees;</p> | <p>(l) the objectives of the offeror in making the bid and his intentions towards the offeree company if the bid succeeds, in particular regarding the use of its assets, the continuation of its business, the location where the offeror will establish the registered office of the offeree company, any restructuring of the offeree company and of companies controlled by it within the meaning of Article 8 of Council Directive 88/627/EEC, the continuation in office of members of the board of the offeree company, employment policy in the offeree company and companies controlled by it within the meaning of the said Article 8; and any special arrangements concerning employees' rights of participation which the offeror intends to maintain or to introduce, any amendments to the statutes or instrument of incorporation of the offeree company, any measures concerning the listing of the securities of the offeree company and any policy on return on capital;</p> |

## ORIGINAL PROPOSAL

## AMENDED PROPOSAL

(m) any special advantages which the offeror intends to grant to the directors of the offeree company;

(m) unchanged

(n) all agreements concerning the exercise of the voting rights attached to the securities of the offeree company.

(n) all agreements to which the offeror is a party or of which he is aware concerning the bid or the exercise of the voting rights attached to the securities of the offeree company.

2. In addition, the offer document shall identify:

2. In addition, the offer document shall identify the persons or entities referred to in paragraph 1 (e) (bb) to (ee).

(a) any person for whose account the offeror is acting;

2a. If the offeror is acting in his own name but on behalf of another person or entity, the information referred to in paragraphs 1 and 2 shall relate to that person or entity and not to the offeror.

(b) any companies belonging with the offeror to the same group of undertakings within the meaning of Article 1 of Directive 83/349/EEC;

(c) any person acting in concert with the offeror.

3. Where the consideration offered includes newly issued securities for which at the time of the bid an official stock exchange listing has been applied for, the offer document shall be accompanied by the listing particulars required by Council Directive 80/390/EEC<sup>(1)</sup>.

3. Where the consideration comprises securities which have been admitted to official listing on a stock exchange situated or operating within a Member State in the 12 months preceding the public announcement required by Article 7 (1) the offer document shall be accompanied by listing particulars drawn up in accordance with Council Directive 80/390/EEC of 17 March 1980 on the listing particulars to be published for the admission of securities to official stock exchange listing<sup>(1)</sup>.

4. Where the consideration offered includes securities for which at the time of the bid no official stock exchange listing has been applied for, the offer document shall contain all the facts necessary to enable the addressees of the bid to form an informed judgment as to the assets and liabilities, financial position, record and prospects of the issuer.

4. Where the consideration comprises securities other than those referred to in paragraph 3, the offer document shall contain all the information equivalent to that contained in the listing particulars referred to in paragraph 3 enabling the offerees to form an informed judgment as to the assets and liabilities, financial position, record and prospects of the issuer.

(<sup>1</sup>) OJ No L 100, 17. 4. 1980, p. 1.

(<sup>1</sup>) OJ No L 100, 17. 4. 1980, p. 1.

## ORIGINAL PROPOSAL

## AMENDED PROPOSAL

*Article 11***Publication of the offer document**

1. The offer document and, where appropriate, the documents required by Article 10 (3) or (4) shall be either:

- (a) published in full in one or more national or mass-circulation newspapers and in the national gazette designated under Article 3 (4) of Council Directive 68/151/EEC<sup>(1)</sup>; or
- (b) made available to the addressees of the bid at addresses announced in notices in the newspapers and the gazette referred to at (a) or by equivalent means approved by the competent supervisory authority; or
- (c) where all the securities comprised in the bid are registered, circulated to all addressees of the bid.

<sup>(1)</sup> OJ No L 65, 14. 3. 1968, p. 8.

*Article 11***Forms of disclosure**

5. The supervisory authority may require the inclusion in the offer document of additional information. Where an item of information cannot be obtained in time or without excessive cost, or is not considered necessary for the protection of the shareholders or employees of the offeree company, the supervisory authority may exempt the offeror from the obligation to make it public giving reasons.

1. Without prejudice to Article 7 (1), where this Directive requires that a document or information be made public, the Member States shall select not less than one of the forms of disclosure set out below:

- (a) publication in one or more national or mass-circulation newspapers or in the national gazette designated under Article 3 (4) of Council Directive 68/151/EEC of 9 March 1968 on disclosure requirements<sup>(1)</sup>, or by other means affording wide circulation of the information and approved by the supervisory authority;
- (b) making available to the addressees of the bid at addresses announced in notices in the newspapers and the gazette referred to at (a) or by equivalent means approved by the supervisory authority;
- (c) circulation to all the addressees of the bid, where all the securities which are the subject of the bid are registered.

1a. Where the securities of the offeree company are admitted to trading on the market of Member States other than the State in which the company has its registered office, disclosure shall take place in each Member State in accordance with the law in force in that state. In that case, the offer document may be made public at a later date in these Member States than in the Member State where the offeree company has its registered office, provided that, taking account of the period for acceptance fixed in the offer document, the addressees of the bid in these Member States have sufficient time to reach a properly informed decision on the bid.

<sup>(1)</sup> OJ No L 65, 14. 3. 1968, p. 8.

## ORIGINAL PROPOSAL

2. The offer document and, where appropriate, the documents referred to in Article 10 (3) and (4) shall also be filed with the competent supervisory authority.

*Article 12***Period for acceptance**

1. The period for accepting the bid indicated in the offer document in accordance with Article 10 (1) (j) may not be less than four weeks or more than 10 weeks from the date of publication of the document in accordance with Article 11 (1).

2. The period may not be modified without the authorization of the supervisory authority, giving its reasons, without prejudice to Article 20.

*Article 13***Withdrawal of bids**

1. Once a bid has been made public by the means provided for in Article 11 (1), it may be withdrawn only in the following circumstances:

- (a) where there are competing bids and the offeror decides to withdraw his bid in accordance with Article 20 (4);
- (b) in a bid in which new securities are offered in exchange for the securities bid for, where the approval of the general meeting of the offeror company is not obtained for the issue of the new securities;
- (c) in a bid in which securities are offered in exchange for the securities bid for, where the securities fail to obtain an official stock exchange listing as the offeror intended;
- (d) where the necessary judicial or administrative authorization is not obtained for the acquisition of the securities for which the bid is made, and in particular in the event of lack of authorization of the acquisition by the merger control authorities;

## AMENDED PROPOSAL

2. The Member States shall take appropriate measures to ensure that documents and information made public in accordance with paragraph 1 are communicated to the supervisory authority.

*Article 12***Period for acceptance**

1. Member States shall provide that the period for acceptance of the bid to be specified by the offeror in the offer document in accordance with Article 10 (1) (j) may not be less than four weeks or more than 10 weeks from the date on which the document is made public in accordance with Article 11 (1).

2. Without prejudice to Articles 15 (2) and 20 (4), the period may not be modified without the authorization of the supervisory authority, giving its reasons.

*Article 13***Withdrawal or nullity of the bid**

1. When a bid has been made public in accordance with Article 11 (1), it may be withdrawn or declared void only in the following circumstances:

- (a) unchanged
- (b) unchanged
- (c) unchanged
- (d) where the necessary judicial or administrative authorization for the acquisition of the securities for which the bid is made is refused or is not obtained, in particular if the operation is not authorized by the merger control authorities;

## ORIGINAL PROPOSAL

## AMENDED PROPOSAL

(e) where a condition of the bid announced in the offer document in accordance with Article 10 (1) (i) and approved by the competent supervisory authority is not fulfilled

(e) unchanged

(f) in exceptional circumstances and with the authorization of the supervisory authority, giving reasons, where the bid cannot be put into effect for reasons beyond the control of the parties to the bid.

(f) unchanged

2. The withdrawal of the bid shall be made public by the means provided for in Article 11 (1) and communicated to the competent supervisory authority.

2. The fact that the bid has been withdrawn or declared void shall be made public in accordance with Article 11 (1).

*Article 14***Report of board of offeree company**

1. The board of the offeree company shall draw up a detailed report giving its views on the bid and setting out the arguments for and against acceptance. The report shall state whether the board is in agreement with the offeror on the bid and specify any agreements on the exercise of the voting rights attached to the securities of the offeree company.

2. Where the consideration offered comprises securities for which at the time of the bid no official stock exchange listing has been applied for, the board's report shall be accompanied by the report of an expert independent of the parties to the bid appointed or approved by the competent supervisory authority. This report shall in all cases state whether, in the expert's opinion, the consideration offered is fair and reasonable and shall give the expert's views on the basis of valuation used to determine the consideration.

*Article 14***Opinion of board of offeree company**

1. The board of the offeree company shall draw up a document setting out its opinion, together with the reasons on which it is based, on the bid and on any revisions of it. The document shall specify as a minimum:

- (a) whether the board of the offeree company is in agreement with the offeror on the bid and any agreements on the exercise of the voting rights attached to the securities of the offeree company, so far as the board is aware of them;
- (b) whether the members of the board of the offeree company who hold securities in it themselves intend to accept the bid.

2. **deleted**

## ORIGINAL PROPOSAL

3. The reports shall, in good time before the expiry of the period for acceptance, be made public by the means provided for in Article 11 (1) and filed with the competent supervisory authority.

4. Where the board of the offeree company is in agreement with the offeror, the board's report, accompanied, where appropriate, by the expert's report as referred to in paragraph 2, may be attached to the offer document provided for in Article 10.

5. The provisions of this Article shall also apply to revisions of the bid and to competing bids.

*Article 15***Revision of bids**

1. At any time before the last week of the period for acceptance announced in accordance with Article 10 (1) (j), the offeror may revise the terms of the bid. Article 7 (1) shall apply as regards the public announcement of the offeror's intention to revise the bid.

2. Where a bid is revised, the previous period for acceptance shall be automatically extended by one week.

3. The offeror shall draw up a document setting out the amendments to the offer document and making it public by the means provided for in Article 11 (1).

4. Member States shall ensure that persons who have already accepted the previous bid by the offeror may accept the revised bid.

## AMENDED PROPOSAL

3. In good time before the expiry of the period for acceptance of the bid, the document referred to in paragraph 1 shall be made public in accordance with Article 11 (1). The failure of the board of the offeree company to fulfil its obligation to draw up the document referred to in paragraph 1 in good time shall not have any suspensory effect concerning the bid.

4. **deleted**

5. **deleted**

*Article 15***Revision of bids**

1. At any time before the last week of the period for acceptance announced in accordance with Article 10 (1) (j), the offeror may revise the terms of the bid. Article 7 (1) and (3) shall apply to the public announcement of the offeror's intention to revise the bid.

2. **unchanged**

2a. The Member States may take appropriate steps to ensure that any successive revisions of the bid do not improperly impede the operation of the offeree company and of the market.

3. The offeror shall draw up a document setting out the amendments to the offer document and make it public in accordance with Article 11 (1) in good time before the expiry of the period for acceptance of the bid.

4. **unchanged**



## ORIGINAL PROPOSAL

5. The periods provided for in paragraphs 1 and 2 may be modified with the authorization of the competent supervisory authority, which must set out the reasons on which it is based.

*Article 16***Automatic revision**

The acquisition by the offeror, by persons acting in concert with him or by persons acting in their own name but on behalf of the offeror, during the acceptance period, of securities in respect of which the bid is made at a price higher than that established in the offer document or one of its revisions, will itself be considered as a revision of the bid and have the effect of increasing the consideration offered to those who have accepted previously.

*Article 17***Provision of information to the supervisory authority**

1. Throughout the period for acceptance of the bid the offeror shall provide the competent supervisory authority at any time on request with information as to the number of acceptances received to date.

2. From the time a bid is publicly announced in accordance with Article 7 (1), the offeror or any holder of 1% or more of the voting rights of the offeree company, of the offeror company if the offeror is a company, or of any other company whose securities are offered by way of consideration, shall declare to the competent supervisory authority all acquisitions of securities of the said companies by the offeror or the holder, persons acting in concert with them or persons acting in their own name but for their account, and the purchase price of such securities.

## AMENDED PROPOSAL

5. unchanged

*Article 16***Automatic revision**

Where after the public announcement required by Article 7 (1), until the end of the period for acceptance, the offeror, other persons or entities acting in their own name but on behalf of the offeror, undertakings controlled by the offeror within the meaning of Council Directive 88/627/EEC, or any other person acting in concert with the offeror, acquires securities which are the subject of the bid on more favourable conditions than those in the offer document, or any revisions thereof, the Member States shall ensure that the addressees of the bid qualify for the more favourable conditions.

*Article 17***Provision of information to the supervisory authority**

1. Throughout the period for acceptance of the bid, all parties to the bid shall provide the supervisory authority at any time on request with all information in their possession concerning the bid and necessary to the discharge of the functions of the authority.

2. From the time a bid is publicly announced in accordance with Article 7 (1) until the end of the period for acceptance of the bid:

— the offeror or any person or entity holding 5% or more of the voting rights of the offeree company, or where appropriate the offeror company, or any other company whose securities are offered as consideration, shall immediately inform the supervisory authority of all acquisitions of securities of these companies by the offeror or the holder, other persons or entities acting in their own name but on behalf of the offeror or the holder, undertakings controlled by them within the meaning of Article 8 of Council Directive 88/627/EEC, or any other person acting in concert with them, and of the price of these securities, and of any voting rights already held in the company in question,

## ORIGINAL PROPOSAL

## AMENDED PROPOSAL

*Article 18***Publication of result of bid**

Once the period for acceptance has expired, the result of the bid shall be made public by the means provided for in Article 11 (1) and shall be communicated to the competent supervisory authority by the offeror.

*Article 19***Information for representatives of employees of the target company**

The board of the offeree company, shall communicate to its workers' representatives, as designated by national legislation or customary practice in Member States, the offer document and, where appropriate, the documents referred to in Article 10 (3) and (4), as well as its own report as referred to in Article 14 and, if appropriate, the expert's report as referred to in Article 14 (2).

*Article 20***Competing bids**

1. Where competing bids are made for the securities of the offeree company, this Directive shall apply to each such bid.

2. Competing bids shall be publicly announced in accordance with Article 7 (1). The offeror shall draw up an offer document in accordance with Article 10 and shall make it public by the means provided for in Article 11 (1) before the period for acceptance of the initial bid expires.

— any person or entity acquiring 0,5 % or more of the voting rights of the offeree company, or where appropriate, the offeror, or where appropriate any other company whose securities are offered as consideration, shall immediately inform the competent supervisory authority of that acquisition and of any subsequent acquisitions of the securities of these companies by him, other persons or entities acting in their own name but on his behalf, companies controlled by him within the meaning of Article 8 of Council Directive 88/627/EEC, or any other person acting in concert with him, of the price of these securities, and of any voting rights he already holds in the company in question.

*Article 18***Disclosure of result of bid**

On the expiry of the period for acceptance, the result of the bid shall be made public immediately in accordance with Article 11.(1).

*Article 19***Information for representatives of employees of the offeree company**

1. The board of the offeree company shall communicate to its employees' representatives, as designated by national legislation or customary practice in the Member States, the offer document and, where appropriate, the documents referred to in Article 10 (3) and (4), the opinion required by Article 14 (1) and all documents or information made public in accordance with Article 11 (1) concerning the revision, withdrawal and result of the bid.

2. Such documents or information shall be communicated immediately after they are made public in accordance with Article 11 (1).

*Article 20***Competing bids**

1. unchanged

2. **deleted**

## ORIGINAL PROPOSAL

3. Except with the authorization of the competent supervisory authority, which must set out the reasons on which it is based, persons acting in concert with the offeror or acting in their own name but for the account of the offeror may not make a bid competing with the initial bid.

4. Where there are competing bids and the initial offeror does not withdraw his bid, the period for acceptance of the initial bid shall be extended automatically to the date of expiry of the period for acceptance of the competing bid. The extension shall be made public by the means provided for in Article 11 (1) and communicated to the competent supervisory authority.

*Article 21***Contact committee**

1. A contact committee shall be set up under the auspices of the Commission. Its function shall be:

- (a) without prejudice to the provisions of Articles 169 and 170 of the Treaty, to facilitate the uniform application of this Directive through regular consultations on, in particular, practical problems arising in its implementation;
- (b) to ensure concerted action upon the policies followed by the Member States in order to obtain reciprocal treatment for Community nationals and companies as regards the acquisition of securities of a company by means of a takeover bid;
- (c) to advise the Commission, if necessary, on additions or amendments to this Directive.

## AMENDED PROPOSAL

3. unchanged

4. unchanged

5. The Member States shall ensure that the addressees of a competing bid who have already accepted a prior bid qualify for the competing bid.

6. The Member States may take appropriate steps to ensure that the existence of competing bids does not improperly impede the operation of the offeree company and of the market.

7. Member States may refrain from applying paragraph 5 to irrevocable acceptances in cases of competing bids if such acceptances are permitted under their legislation.

*Article 21***Contact committee**

unchanged

## ORIGINAL PROPOSAL

## AMENDED PROPOSAL

2. The contact committee shall be composed of representatives of the Member States and representatives of the Commission. The chairman shall be a representative of the Commission. Secretarial services shall be provided by the Commission.

3. The Commission shall be convened by the chairman either on his own initiative or at the request of one of its members.

*Article 22***Transposition of the Directive**

1. Member States shall adopt before ... the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith inform the Commission thereof.

2. Member States shall fix the date of entry into force of these provisions in any case at the latest by ...

3. Member States shall communicate to the Commission the texts of the main provisions of national law which they adopt in the field covered by this Directive.

*Article 23***Addressees of the Directive**

This Directive is addressed to the Member States.

*Article 22***Transposition of the Directive**

1. Member States shall adopt before 1 January 1992 the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith inform the Commission thereof.

2. The date of entry into force which Member States lay down for these provisions shall be no later than 1 January 1993.

3. unchanged

4. The provisions adopted pursuant to paragraph 1 shall make express reference to this Directive.

*Article 23***Addressees of the Directive**

unchanged