



**COMPANY LAW
IMPLEMENTATION OF THE
EUROPEAN DIRECTIVE ON
TAKEOVER BIDS**

A Consultative Document

JANUARY 2005



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The Department of Trade and Industry invites comments, by **15 April 2005**, on the issues set out in this consultative document.

You are invited to send comments, together with any supporting evidence on any part of this consultation, preferably by email, to:

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We will handle any personal data which is provided in accordance with the requirements of Data Protection Act 1998.

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Foreword by the Secretary of State



Rt. Hon. Patricia Hewitt MP, Secretary of State for Trade and Industry and Minister for Women and Equality

An effective, well run system of takeover regulation is crucial for the confidence and well being of financial markets. Takeover regulation in the UK has been overseen by the Takeover Panel, essentially on a non-statutory basis, for the past 36 years. The Panel model – designed to ensure flexibility, certainty and speed in decision-making – has served to harness the expertise of City and business interests and so inspire confidence amongst market participants. It has also enabled the UK to benefit from an open corporate marketplace, whilst maintaining the trust of investors.

The Takeovers Directive had a long and difficult history during the course of EU negotiations. The final agreement achieves less than might have been hoped in terms of overcoming barriers to takeovers in the EU but, nevertheless, represents a step forward through laying down minimum standards for takeover regulation and applying many of the core values of the UK system at the EU level.

Implementation of the Directive raises some new challenges for the UK system of regulation but also affords an opportunity for us to look afresh at the way in which it operates and build on its strengths. The Government is committed to maintaining the benefits of the current system, and the competitive advantages that an open corporate market place brings. This document seeks your views on specific proposals for achieving that objective. Implementing the Directive requires the introduction of a statutory framework but the intention is to preserve the independence and authority of the Takeover Panel and its capacity to make and enforce rules regulating takeover activity. The document explains the issues which are involved and which the implementing legislation will need to address. I very much hope that you will take time to provide us with your comments.

Section 1: Introduction

1.1 This consultative document seeks your views on implementation of the European Directive on Takeover Bids (“the Takeovers Directive”) in Great Britain. The Takeovers Directive lays down minimum standards in relation to regulation of takeovers of companies which are registered in a Member State and admitted to trading on a regulated market within the EU and EEA¹. The Directive completed the European legislative process on 21 April 2004 and must be implemented into national law by all Member States no later than 20 May 2006. The full text of the Directive is set out at Annex E.

1.2 The Department of Enterprise, Trade and Investment will carry out a separate consultation based on this document with a view to making discrete legislation to apply the Takeovers Directive in Northern Ireland. Generally, the policy described, therefore, relates solely to the proposed implementing provisions in Great Britain. However, where the United Kingdom is required or allowed by the Directive to exercise an option (“a Member State option”), the proposed implementing provisions relate to the United Kingdom as a whole.

Your Opportunity to Comment

1.3 Implementation of the Takeovers Directive raises some technical and complex legal issues. We have tried to present the issues as clearly as possible in non-technical terms. A glossary of terms used is included at Annex B.

1.4 We would welcome comments and evidence on the proposals set out in this document and especially on the analysis of costs and benefits in the Partial Regulatory Impact Assessment at Annex D. Please reply to Peter Brower (details at page 1) at the Department of Trade and Industry by **15 April 2005**.

History of Takeovers Directive and Approach to Negotiations

1.5 Political agreement to a Directive on takeover bids was an objective of the Financial Services Action Plan, agreed by Heads of State and Government at the Lisbon Summit in March 2000 for completion by 2005 and with the aim of creating an integrated financial market within the EU.

¹ All further references in this consultative document to “EU” also include the three States that make up the EEA.

1.6 Despite the political consensus on the desirability of a Directive in this area, negotiations on the Directive have had a long and difficult history from the publication of the first Commission proposal in 1989. The critical issue in the later stages of negotiations was the extent to which the Directive should, in substance, override the barriers to takeovers which exist in a number of Member States.

1.7 The Government accepted throughout the negotiations that the minimum standards approach adopted by the Directive would not enhance the effectiveness of the domestic takeover regime overseen by the Takeover Panel since 1968, essentially on a non-statutory basis. Information on the history, aims and current functions of the Takeover Panel can be found on its website: www.thetakeoverpanel.org.uk. Many of the core values established by the Panel are now contained within the Takeovers Directive itself. The Government wishes to acknowledge the considerable assistance given by the Takeover Panel during the course of the negotiations and in developing proposals for implementation.

1.8 The Government also recognised that the Directive might give rise to an increased risk of litigation within the bid process, which could have the effect of delaying or frustrating a takeover bid and hindering the opportunity for shareholders to decide upon its merits.

1.9 Equally, however, the Directive opened up the prospect of improved shareholder protection and access to capital markets across Europe and a potential stimulus for more transparent corporate governance structures with extended shareholder involvement. Negotiation, therefore, involved a balancing exercise in which the Government sought to minimise the potential for disruption to the domestic takeover regime whilst maximising the benefits in Single Market terms of the Directive.

1.10 The Government considers that, on balance, the Directive that was ultimately adopted does represent a step forward in laying down minimum safeguards for takeover regulation and minority shareholder protection within the EU whilst presenting a basic legislative framework that is acceptable in terms of the risks to the domestic takeover regulatory system.

Implementation of the Directive: the Government's Approach and What is Involved

1.11 The Government recognises considerable strengths in the existing system of takeover regulation within Great Britain overseen by the Takeover Panel as follows:

- flexibility, speed and certainty in decision-making;
- independence and regulatory autonomy;

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- principle based regulation;
- involvement of key City and business stakeholders in developing takeover rules and the regulatory framework;
- professional expertise in regulatory activities, notably through Panel membership and secondments;
- consensual approach to regulation amongst market participants.

1.12 The Government wishes to preserve these core characteristics of takeover regulation. Equally, however, the Government recognises that the benefits of the relative flexibility and informality of the existing regime must be weighed against the need to ensure proper legal certainty and confidence within the new legal framework created by the Directive following implementation. After careful consideration and discussion with the Panel and others participating and advising in the takeover field, the Government has sought to address the tension between these two objectives through an approach which aims to provide statutory underpinning to all the activities of the Takeover Panel whilst ensuring that the Panel retains considerable scope to determine its own constitutional and operational framework and to continue to make rules governing takeover regulation.

1.13 There are four broad areas where implementing measures will be necessary, as follows:

- *Takeover Regulatory Framework* – placing takeover regulation and the takeover regulatory authority in Great Britain within a complete and coherent statutory framework for the first time. Presently, the Takeover Panel and the rules it applies (the Takeover Code and the Substantial Acquisitions Rules) fall substantially outside any statutory structure (see section 2 below);
- *Takeover Rules* – ensuring that minimum rules on takeovers are in place in accordance with the requirements of the Directive – these relate to matters such as the mandatory bid (the requirement for any person gaining control of a company to make a bid to all shareholders at an equitable price), the contents of bid offer documents, the period during which an offer may extend, etc. These minimum rules are considered to be broadly consistent with the existing Takeover Code provisions but some changes will be necessary to ensure full compliance with the Directive (see section 2 below);

- *Barriers to Takeovers* – significant choices are left to Member States as to the extent to which it is proper for national law to override obstacles to takeovers that may be in place. Irrespective of the decisions taken, however, it will be necessary to put in place a legislative framework which facilitates override of a wide variety of takeover defences. This will also include imposing a requirement for companies admitted to trading on a regulated market to publish consolidated details relating to their governance and control structures in their annual report (see section 3 below);
- *Squeeze-out and Sell-out* – modifications are required to bring existing provisions of the Companies Act 1985 dealing with the problems of, and for, residual shareholders following a successful takeover bid into line with Directive requirements. Consideration is also given to the merits of implementing those proposals made by the Company Law Review (see section 4 below).

Section 2: The Takeover Regulatory Framework and the Takeover Rules

2.1 Throughout the negotiations on the Takeovers Directive, domestic consultees have maintained their confidence in the present domestic takeover regulatory regime overseen by the Takeover Panel, a non-Government and non-statutory body. That confidence has been strongly reaffirmed by major stakeholders and practitioner bodies since the Directive was agreed.

2.2 Confidence in the Panel is a major argument for maintaining the Panel as the regulator, and the Takeover Code as the regulatory regime, for takeover activity in the UK. However, in examining options for implementing the Directive, the Government has necessarily considered other possibilities.

2.3 Takeover regulation falls neither entirely within what may be described as “company law” (territory traditionally regulated by the Department of Trade and Industry) nor “financial services regulation” (overseen by the Treasury and the Financial Services Authority) but forms its own discrete area of regulation involving disciplines from both the company law and financial services fields. The regulation of takeover bids also needs to extend to both companies whose shares are admitted to trading on a regulated market (which might more naturally be the province of the financial market regulator) and other types of public and private company.

2.4 Many issues related to takeover activity also impact on other corporate or financial services areas. For example, the duties of directors under company law are highly relevant to their conduct during a bid, whilst orderly announcements related to bid activity are clearly critical to the proper conduct of financial markets. In line with this, different Member States adopt different approaches to takeover regulation. Some, such as Ireland and Sweden, have a dedicated regulator. In others, however, (e.g. Italy, France and Germany) takeover regulation falls within the wider remit of financial services, stock exchanges or other corporate regulators.

2.5 Against this background, one possible option in implementing the Directive in Great Britain would be to transfer responsibility for takeover regulation to the Financial Services Authority, thereby concentrating responsibility for financial services regulation in the hands of a single body. This would promote a unified approach to regulation of financial market activities and could have benefits in terms of optimising flows of information and enhancing efficiency, or providing a single point of regulatory contact for the public relating to financial services. However, these potential benefits need to be set against concerns that any centralisation of responsibility along these

lines would substantially change the basis of takeover regulation in Great Britain and that the flexibility, speed and certainty in decision-making and the other benefits offered by the current regime referred to above could be lost.

2.6 Another possibility would be for the Government itself to take on the role as part of its overall responsibility for company law with the Panel perhaps operating as an agency of the Department of Trade and Industry. This would, however, run counter to the Government's established policy of placing responsibility for market regulation in the hands of professional regulators and reducing direct Ministerial involvement in day to day regulatory decision making. It would also substantially change the nature of the Panel and the way in which it operates and result in some of the strengths of the current regime being lost.

2.7 The Government recognises that the Takeover Panel has well developed current structures and procedures for overseeing and adjudicating upon takeover bid activity and making rules in relation to takeover regulation. It also has good lines of communication with other regulators in the financial services area and a vast body of experience, all of which a fundamental reorganisation of the takeover regulatory environment might jeopardise. Accordingly, in order to maintain the advantages of the current regime, the Government has concluded that the Takeover Panel should remain the regulator of takeover activity in Great Britain and that a central objective in implementing the Directive should be to build on the strengths of the existing system.

2.8 A second issue arises in relation to the scope and jurisdiction of the Takeover Panel's functions. Currently, the Takeover Panel regulates a number of matters that do not fall within the ambit of the Takeovers Directive, for instance takeover bids for public companies whose shares are not admitted to trading on a regulated market and other transactions which, whilst not strictly takeover bids as defined by the Directive, lead to an effective change or consolidation of control in a company (such as dual-holding company transactions, schemes of arrangement and offers for minorities). The Takeover Panel also lays down and administers rules ("the SARS") governing substantial acquisitions of shares. Furthermore, the Takeover Code contains a significant number of detailed rules that go beyond the requirements of the Takeovers Directive.

2.9 Two questions arise from this. The first is whether the Takeover Panel should continue to have authority to regulate such matters. On that issue, the Government has concluded that there is no case for restricting the Panel's ability to operate in these additional areas. The second is whether the legislation implementing the Takeovers Directive should provide in substance for the entirety of the Panel's functions, i.e. both those activities falling within the scope of the Directive and those falling outside. The alternative would be to allow a parallel regime with a non-statutory system applying to matters falling outside the scope of the Directive.

2 The Takeover Regulatory Framework and the Takeover Rules

2.10 Whilst the possible benefits of a lighter touch approach to certain matters falling outside the Directive are acknowledged, it is considered that it would not be appropriate to differentiate between “Directive” and “non-Directive” matters in this way. It would not be in line with the current situation where there is one rule-book, the Takeover Code, which applies to all such transactions. This creates a coherent and readily understandable regulatory environment. In addition, there could be difficulties under a parallel regime in determining into which regime a given matter falls. In order to maintain a coherent and consistent framework, the Government considers that all matters currently overseen by the Takeover Panel should continue to be regulated by the Panel in the same way.

Q1 Do you agree that the Takeover Panel should remain responsible for regulating takeovers?

Q2 If so, should the central objective of the implementing legislation be to preserve the flexibility, speed and certainty of the current regime consistent with meeting the requirements of the Directive?

Q3 Do you agree that the same regime should apply to all takeovers and other transactions currently covered by the Takeover Code whether or not they are covered by the Directive?

Q4 Do you agree that the same regime should apply to all companies currently covered by the Takeover Code whether or not they are covered by the Directive?

Options for Implementing the Regulatory Framework

2.11 The Government has considered at length the practical and legal implications of the various options for implementing the Takeovers Directive consistent with the broad policy approach to implementation described above. This has involved analysis of the legal risks, the prospect of new legal challenges arising and, critically, the need to maintain the practical advantages and benefits of the existing system, such as the independence of the takeover regulatory authority and a consensual approach to takeover regulation. In particular, the Department has held discussions with the Takeover Panel and others participating and advising in the takeover field. The Government has reached its conclusions on the way forward in the light of those discussions.

2.12 Under Community law, the provisions of the Directive have to be implemented by rules which have legally binding effect in some way. Not implementing the Directive could lead to the Government facing infraction proceedings before the European Court of Justice. Currently, whilst there are substantive rules under the Takeover Code, there are no statutory provisions within Great Britain in many of the areas of takeover regulation covered by the Directive.

2.13 The following options for placing takeover regulation within a statutory framework have been considered.

Direct Statutory Provision

2.14 It would be possible to make provision (which could be done by regulations made under section 2(2) of the European Communities Act 1972) comprehensively setting out everything necessary to implement the Directive (or adopting a version of the Takeover Code which was consistent with the Directive). The provisions would need to designate a supervisory body, such as the Takeover Panel, and provide it with the necessary powers. However, this approach leads to a number of significant difficulties as follows:

- *Scope to Delegate Rule-Making Power to the Takeover Panel and Achieve a Single Coherent Regime* – it would not be permissible under section 2(2) to delegate a rule-making power to the Takeover Panel to make rules in relation to takeover regulation (currently contained in the Takeover Code). This would not be consistent with a regulatory approach which sought to leave takeover regulation in the hands of the Takeover Panel which already has in place a Committee and consultation procedures to deal with changes to the Takeover Code arising from developments in the market place;
- *Going Beyond What is Strictly Required by the Directive* – currently the Takeover Panel regulates a number of matters which are not covered by the Directive. There are clear advantages in seeking to avoid the creation of a parallel system of takeover regulation (part falling within the statutory scope of regulation and the rest outside). Whilst section 2(2) is wide enough to enable provision for matters arising out of, or related to, implementation of the Directive, a single regime, rather than parallel ones, could only be achieved through primary legislation.

2.15 The Government has also considered whether there may be powers elsewhere in primary legislation to put in place the necessary implementing provisions by secondary legislation and has concluded that such powers are not available. In particular, the Regulatory Reform Order procedure under the Regulatory Reform Act 2001 could not be used in respect of the Takeovers Directive because that procedure is restricted to the “reform” of existing legislative provisions in Great Britain.

2 The Takeover Regulatory Framework and the Takeover Rules

Recognition of the Takeover Code

2.16 A radically different approach would be to provide that failure to comply with the requirements of the Code as applied by the Takeover Panel became a breach of, for example, the Listing Rules made under Part 6 of the Financial Services and Markets Act 2000 (“the Listing Rules”). The Panel would continue to make and apply rules under the Takeover Code as at present. This would build upon the fact that both the jurisdiction and authority of the Takeover Panel and the Takeover Code are already expressly or implicitly recognised by the legislation and the courts (for instance, section 143 of the Financial Services and Markets Act 2000 provides for a statutory mechanism under which the Takeover Code is endorsed).

2.17 Such an approach would certainly require secondary legislation under section 2(2) of the European Communities Act, and may require primary legislation, but could avoid the need to include detailed rules or to confer an express rule-making power related to takeovers within the framework of that legislation. However, other important issues related to the constitution and powers of the Takeover Panel would still remain to be dealt with and such an approach to implementation has a number of further drawbacks:

- there are considerable legal uncertainties – in particular, as to whether recognition of a non-statutory Code as applied by a non-statutory body even with the back-up of the Listing Rules or other statutory support would constitute proper implementation of the Directive;
- the need to deal with a number of other issues (relating to, for example, constitution, funding, control and liability of the Panel) would not be removed;
- certain key parties to takeover bids, including, for example, financial advisers, lawyers and shareholders would not be effectively regulated.

Delegated Statutory Powers

2.18 Implementation could be achieved through replicating, to the greatest extent possible, the Panel’s current jurisdiction, practices and procedures within a statutory framework, including giving the Panel power to make statutory rules. Primary legislation would definitely be needed. The principal risks associated with implementation by means of primary legislation are as follows:

- the uncertainties associated with securing Parliamentary passage given that the Directive must be implemented by 20 May 2006;

- placing the Panel within a fully statutory framework would represent a departure from the present position. Particular care would have to be taken to ensure that new legal rights or opportunities for tactical litigation were not inadvertently created as a consequence of this process and that necessary rule-making and jurisdictional powers were extended to the Panel which fully reflected its current remit.

2.19 Given the objective of maintaining the advantages of the current regime, the Government has concluded that the most transparent, effective and legally certain means of proceeding would be to place the regulatory activities of the Takeover Panel within a legislative regime in primary legislation when Parliamentary time allows. Set out below is the scope of the provisions which would be required to put in place this option.

Proposed Scope of Legislation Which Places Takeover Regulatory Activities of the Panel within a Statutory Framework

2.20 It is proposed that the implementing legislation would include the following provisions.

Takeover Panel

2.21 The legislation would provide for the Takeover Panel to act as the competent authority to supervise bids. The Panel would retain considerable autonomy to provide for its own constitution and appointment procedures. However, a minimum constitutional structure would have to be established in the legislation enabling the Panel to make arrangements for carrying out its functions and, in particular, to function through committees, sub-committees, officers and members of staff. The Panel would continue to carry out its day-to-day activities acting through its executive. The legislation would also provide that:

- the rule-making functions and judicial functions of the Panel would be carried out by separate Panel committees whose memberships would be mutually exclusive;
- when appearing before a committee of the Panel exercising a judicial function, the Panel would have to act through an officer or member of staff of the executive;
- rulings of the Panel in exercising its judicial functions would be subject to appeal to an independent appellate committee, whose members could not be members of the Panel.

2.22 Such an approach would ensure a clear and transparent division of responsibilities between the various organs of the Panel in its executive, judicial and rule-making roles.

2 The Takeover Regulatory Framework and the Takeover Rules

2.23 The Panel is an unincorporated body, the majority of whose members are appointed from a variety of stakeholder organisations. The Chairman and Deputy Chairmen as well as three other members are presently appointed by the Governor of the Bank of England which has traditionally acted as “sponsor” of the Panel.

2.24 The Panel is currently considering jointly with the Bank of England whether, in the new environment following implementation of the Directive, it would be appropriate to maintain these arrangements. It intends to publish shortly an Explanatory Paper summarising, amongst other things, its plans for a revised constitution which will include the establishment of Nomination and Remuneration Committees for the appointment of those Panel members who are not appointed by the stakeholder organisations. It will also clarify the functions and procedures of its judicial and rule-making committees. The Panel intends to incorporate these proposals in another paper which it intends to publish later in the year setting out the detailed changes to the Code (including a revised introduction to the Code) which will be required as a result of the Directive and the proposed implementing legislation, on which it will consult as appropriate.

Q5 Do you agree that the Panel should retain autonomy to determine its own constitution consistent with the minimum requirements as to separation of executive, judicial and rule-making functions proposed to be laid down in the legislation?

Rule-making Power to be Conferred on the Regulatory Authority

2.25 The Takeover Panel would be given statutory power to make and amend rules in relation to takeover regulation – effectively on the basis of the existing Takeover Code and the current mechanisms for amending the Code. The rule-making power would be relatively broadly drawn to ensure that the Takeover Panel could continue to make rules on the range of matters presently regulated within the Takeover Code and analogous types of transaction and activity. In particular, it is envisaged that the following provisions would be included:

- the Takeover Panel would be placed under an obligation to make rules in relation to takeover activity as required by the Takeovers Directive. This would include such matters as those related to the protection of minority shareholders, mandatory bid and equitable price (article 5), contents of takeover bid documentation (article 6), time allowed for acceptance of a bid and publication of a bid (articles 7 and 8), obligations of the management of the target company (article 9) and other rules applicable to the conduct of bids (article 13). The rules would be required to be consistent with the general principles laid down at article 3 of the Directive (such as equivalent treatment of shareholders and the ability of shareholders to decide on the merits of a bid). The Panel’s rules would not, however, deal with certain matters such as squeeze-out and sell-out, information to be published by

companies in their annual reports and breakthrough which are more appropriately dealt with in company legislation. The rule-making power would enable the Panel to derogate in its rules from the requirements of the Directive where it so permits, subject to the general principles;

- the Panel would be permitted to make rules on transactions which were of a similar nature to those public takeover offer transactions falling within the Directive and other matters currently provided for in the Takeover Code. The power would be sufficiently flexible to enable the Panel to make new rules to take account of future market developments. Types of matters currently covered by the Takeover Code include the takeovers of companies not admitted to trading on a regulated market and transactions involving a change of control of a like nature to takeovers (such as dual-holding company transactions and merger procedures). The Panel would also be given power to make rules in relation to the SARs.

2.26 The main regulatory provisions under the Takeovers Directive are considered to be broadly consistent with the Takeover Code (although the Code provides far more detailed rules than those laid down in the Directive and would be able to continue to do so under the proposed legislative provisions). It will, nevertheless, be necessary for the Takeover Panel to conduct a detailed assessment of the provisions of the Code to ensure that they are consistent with the requirements of the Directive. It is not anticipated that it will be necessary to take forward changes identified as a result of this exercise in the implementing legislation as this could be achieved by changes to the Code but the Takeover Panel will need to ensure that any changes which were required were brought into force prior to the implementation date (20 May 2006).

2.27 The Panel is in the process of identifying changes that will have to be made to the Code. These will be set out in broad terms in the Explanatory Paper which the Panel will be publishing shortly. As explained above, the Panel will subsequently publish another paper setting out the detailed changes to the Code which will be required as a result of the Directive and the proposed implementing legislation, on which it will consult as appropriate.

2.28 The primary legislation would also make provision in relation to publication and certification of the Rules.

Q6 Do you agree that the proposed scope of the rule-making power is satisfactory?

Q7 Have you any other comments on the proposed rule-making power?

2 The Takeover Regulatory Framework and the Takeover Rules

Funding

2.29 Presently, the Takeover Panel has no statutory revenue raising powers. The Panel is funded through two principal sources:

- “document charges” – a sliding scale charge on offer documents in connection with offers valued at £1 million or more. This raised approximately £5.9 million in the Panel’s last financial year;
- “the levy” – contributions collected by member firms of the London Stock Exchange and OFEX. The levy is currently a flat rate charge of £1 on contract notes on all chargeable transactions with a consideration in excess of £10,000. This raised approximately £4 million last year.

2.30 Additionally, the Takeover Panel receives income from sales of the Takeover Code and fees in relation to the Panel’s review of entities which seek or hold the status of “exempt principal trader” or “exempt fund manager” under the Code (such status relieves the exempt entity from certain obligations of the Code in relation to concert parties). These sources of funding raised approximately £250,000 and £340,000 respectively last year.

2.31 The Government considers that the funding of takeover regulation should continue to mirror existing arrangements i.e. that the burden should be borne jointly by those involved in bid activity and who benefit directly from a properly supervised regulatory regime (by means of the document charge) and participants more generally in the financial markets who gain from the increased certainty and confidence that results (contributing through the levy). However, in order to ensure security of funding post-implementation of the Directive, it will be necessary to put these arrangements on a more formal basis than has existed to date. Accordingly, it is proposed that the funding arrangements of the Panel should comprise the following three elements:

- a statutory fee raising power to enable the Panel to charge fees for regulatory activities undertaken under the Act. It is envisaged that this power would be used by the Panel to continue to impose the document charge on bidders, as at present, and to charge for the review of those enjoying or seeking or holding exempt status;
- continuation of the levy under the existing arrangements but with the Secretary of State having a reserve power to impose a levy charge on participants in the financial markets should these arrangements not operate satisfactorily. This power would be exercisable by affirmative instrument the first time that a levy charge was prescribed or where it was intended to alter the category of persons upon whom the levy was imposed. Any subsequent change to the rate of the levy would be exercised by statutory instrument subject to negative resolution. These arrangements would ensure that proper Parliamentary accountability

applied to any charge levied on market participants generally, whilst allowing, should the need arise, flexibility for the levy to be imposed or varied in response to the changing situation or funding requirements of the Panel;

- provision in the legislation ensuring that the Panel could continue to charge for sales of the Takeover Code.

Q8 Do you agree that the funding arrangements of the Takeover Panel should continue to reflect a balance between those parties directly involved in takeover activity and market participants more generally? If not, how would you change those arrangements?

Q9 Do you consider that there are any reasons why the Takeover Panel should not be granted a power to enable it to charge fees for supervisory activity undertaken?

Q10 Do you think that there should be a reserve power available to the Secretary of State to place the levy charge on a statutory footing? If not, how should the Takeover Panel make up any resulting shortfall in its finances?

Tactical Litigation

2.32 Tactical litigation may broadly be described as legal proceedings taken by parties to a bid with a view to frustrating or hampering the bid or the defence of a bid. It is undesirable for two reasons. The first of these is that it can defeat the objects of the bid and so deny the shareholders of the target company the opportunity of deciding on the merits of the bid. Equally, it can be costly and time-consuming, thus prolonging uncertainty imposed by the bid on the business and employees of the target company.

2.33 The current system of takeover regulation in Great Britain is designed to provide speed, flexibility and certainty in the regulation of takeover bids. Tactical litigation, or the threat of tactical litigation, in relation to the interpretation of the Takeover Code could undermine these important benefits of the current system. There may be some potential for increased tactical litigation as a result of the new legal framework created by the Takeovers Directive.

2.34 A central plank in the negotiating position taken by the Government on the Directive was to minimise the risks associated with the possible increase in tactical litigation. This was achieved, in particular, through article 4.6 of the Directive which expressly provides that the “Directive shall not affect the power which courts may have in a Member State to decline to hear legal proceedings and to decide whether or not such proceedings affect the outcome of a bid. This Directive shall not affect the power of the Member States to determine the legal position concerning the liability of supervisory authorities or concerning litigation between the parties to a bid”.

2 The Takeover Regulatory Framework and the Takeover Rules

2.35 Consideration has been given as to whether it would be appropriate to establish a bespoke judicial mechanism (such as a special arbitration procedure) for determination of issues in takeover proceedings to take advantage of the flexibilities offered by article 4.6 of the Takeovers Directive. However, the Takeover Panel framework has well established judicial systems that operate efficiently and fairly, and sufficiently clear guidance exists from the courts as to the extent to which they would intervene by way of judicial review of Takeover Panel decisions. Accordingly, the view has been taken that the costs and risks associated with creating a bespoke judicial mechanism for takeover proceedings would outweigh any possible benefits.

2.36 Presently, there are, in most cases, two tiers in the judicial and review processes of the Takeover Panel. A person dissatisfied with a ruling of the Panel executive has a right to appeal to the Panel for the matter to be considered afresh. The executive also has the right to refer cases of exceptional complexity, novelty or importance to the Panel for determination. Appeals from decisions of the Panel can be brought before the Appeal Committee. If such avenues of appeal have been exhausted, a party may seek judicial review of a ruling of the Appeal Committee on the interpretation and application of the Takeover Code. Fuller details of the structure of these bodies and the appeal process are set out on the Panel's website: www.thetakeoverpanel.org.uk. Whilst, as noted above, the Takeover Panel is currently considering its future constitution, this essential judicial and appeal structure will be retained.

2.37 There are two ways in which tactical litigation on the interpretation and application of the Takeover Code might be introduced into the bid process. The first of these might come in the form of judicial review of decisions taken by the Takeover Panel in interpreting or applying the Code. Historically, the courts have been reluctant to intervene to reopen decisions made by the Panel. The key judgment on this issue was that delivered in a 1987 case, *Datafin*, in which the court took a robustly practical approach, concluding that generally the courts should limit themselves only to reviewing the Panel's decision-making processes after the bid had been concluded.

2.38 It would certainly not be appropriate for legislation to remove any right which may otherwise exist for parties to takeover proceedings to apply for judicial review of decisions taken by the Takeover Panel in certain circumstances. The Court of Appeal's position in the *Datafin* case, however, underlies the Government's approach to implementation by clearly setting out factors to which the court should have regard in deciding whether or not it is appropriate to intervene in decisions taken by the Takeover Panel. It is intended that the implementing legislation should neither undermine nor be inconsistent with the principles established in the *Datafin* case.

2.39 The second way in which tactical litigation may intervene in the bid process is through civil litigation, that is litigation based on the interpretation or application of the Takeover Code, between parties to a bid. Currently, within Great Britain there is no precedent for such action because the Code does not have legal force. In the light of implementation of the Directive, it is desirable to maintain this position and necessary to take advantage of the discretion afforded to Member States by the Directive to put in place legislative provisions designed to avoid tactical litigation between parties to a bid. Three specific provisions in this respect are proposed:

- *Exclusion of New Rights of Action for Breach of Statutory Duty* – there is a concern that, in the absence of specific provision, it could be argued that the legislation created rights for persons which may give rise to an action for breach of statutory duty either against the Panel or any other person. Accordingly, it is intended that the legislation would expressly provide that implementation does not give rise to any right of action for breach of statutory duty;
- *Protecting Transactions* – the certainty afforded by the current system for regulating takeover activity would be seriously undermined if transactions could be unravelled following a legal challenge against a Panel decision or as a result of a breach of the Code. Bid parties would be unable to rely on the certainty offered by the Code and the decisions of the Panel. Accordingly, it is proposed that transactions should not be capable of being set aside by reason of breach of the Code or failure to comply with a Panel ruling. As now, transactions could be set aside or unravelled, in cases of, for example, misrepresentation or fraud;
- *Parties to be Bound by Decisions of the Takeover Panel* – in order to prevent parties failing to attend a Panel hearing in order subsequently to seek to contest the resulting Panel ruling in the courts, it is proposed that the legislation should expressly provide that parties who attend or are invited to attend hearings of the Takeover Panel and have not successfully challenged them directly be bound by the decisions of the Panel.

2.40 It is stressed that these provisions are not designed to prevent parties being able to make representations in relation to decisions of the Takeover Panel and appeal those decisions to the Appeal Committee, or (following exhaustion of any such right of appeal) to apply to the courts for judicial review of those decisions in appropriate cases. The intention rather is to ensure that consideration of rulings on matters of takeover regulation takes place within the context of the procedures established under the Panel framework, backed up by the availability of judicial review.

Q11 Do you agree that it is important to seek to minimise tactical litigation to ensure that the takeover bid process can proceed smoothly and efficiently? If not, what are your reasons?

Q12 Do you think that the following measures are a proper and sufficient means of limiting the scope for civil litigation in the implementing legislation: exclusion of new rights of action for breach of statutory duty; protection of transactions; and parties to be bound by decisions of the Takeover Panel?

Limited Immunity from Liability of the Takeover Panel

2.41 Closely linked to the issue of tactical litigation is the prospect of claims being brought against the Takeover Panel or those involved in carrying out its functions. In a modern, regulatory, financial environment, it is appropriate that regulators of takeover activity be granted immunity from being pursued for damages arising as a consequence of regulatory decisions made in good faith. It is essential that, in order to attract and retain staff, secondees, members and officers of the requisite calibre and expertise, protection from liability should be afforded to the Panel and those involved with it in the reasonable exercise of the Panel's regulatory functions.

2.42 Accordingly, the Government intends to confer a package of immunity provisions upon the Takeover Panel and those involved with it in the exercise of its regulatory functions. These would be consistent with the provisions recently extended to the Financial Services Authority and the Financial Reporting Council in the exercise of their duties under financial services and company legislation. Immunity from liability would be excluded where the Panel or those involved in its regulatory activities acted in bad faith or where such immunity would prevent an award of damages under section 6(1) of the Human Rights Act 1998.

Q13 Do you agree that a limited immunity package should be conferred on the Panel and those involved in its regulatory activities? If not, how would you propose to overcome the problems outlined in paragraphs 2.41 and 2.42?

Powers of the Takeover Panel

2.43 The Takeover Panel has sought to exercise its regulatory authority through fostering a consensual approach to regulation amongst parties involved in takeover activity. (Presently, the Panel has no statutory powers to enforce the Takeover Code or rulings made in respect of the Code.) Whilst this approach has led to a high level of compliance with the Code, and whilst the Panel is likely to continue to follow such an approach, in implementing the Directive it is necessary to ensure that the Panel could have recourse, if required, to specific powers set out in the legislation. In particular, article 4.5 of

the Directive requires that takeover supervisory authorities are vested with all the powers necessary to ensure “that all parties to a bid comply with the rules made or introduced pursuant to [the] Directive”.

2.44 It is therefore proposed to extend to the Panel a number of specific statutory powers designed to ensure that parties to a bid comply with the rulings of the Panel and to facilitate the Panel in the exercise of its supervisory functions. Central to these powers will be a right for the Takeover Panel to require persons in possession of information which is reasonably required by the Panel in the conduct of its activities to pass that information to the Panel. The legislation would impose controls on the circumstances in which requests for information could be made and the use to which the information acquired could be put and to whom the information could be passed. The Panel’s new information gathering powers would also be subject to legal professional privilege.

2.45 Additionally, it is proposed that the Panel should be given a number of further powers to enforce its rulings. The broad legislative scheme would be that the rule-making powers conferred on the Panel would enable it to make provision for matters in respect of which the powers were exercisable. The mechanism by which the powers would be enforced would, however, be contained in the legislation itself on the following basis:

- where it was not possible to proceed by consent, the Panel would make a ruling on the application or interpretation of the Code;
- in the event that a party failed to comply with a ruling, the Panel would be able to apply to the court for the summary enforcement of that ruling;
- failure to comply with a court order would be a contempt of court.

2.46 This procedure is designed to respect the Panel’s existing judicial processes whilst ensuring an effective means of enforcement is in place. As set out above, a ruling by the Panel would be challengeable by any party through the normal avenues (review by the Panel and appeal to the Appeal Committee with judicial review being available in appropriate cases). Consequently, it is not envisaged that the court asked to enforce the ruling would normally need to reopen the substance of any ruling made by the Panel in the exercise of its proper authority and judicial processes.

2.47 The rule-making powers that are intended to be made available to the Panel under these provisions would include the following:

- *Compensation Power* – to order restitution or financial redress (together with interest) in consequence of a breach of certain of the rules which may require monetary payments to be made in specific circumstances (for instance, to order a bidder to pay to shareholders any difference

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between the price actually paid and any higher price for shares that the bidder would have been obliged to pay under the relevant Code provisions in making a bid);

- *Power to Require Parties to Act in a Certain Way or to Restrain Them From Taking a Certain Course of Action* – for example, the Panel could require a party who had passed the relevant control threshold (currently 30% of voting rights) to make a mandatory bid to all shareholders, or could require a party to correct a misleading statement.

2.48 The Panel will also be given a power to grant waivers from the strict application of the Takeover Code. The Panel currently has a discretion to grant waivers (subject only to judicial review). The power to grant waivers is specifically permitted by article 4.5(ii) of the Takeovers Directive provided that waivers respect the general principles laid down in article 3 of the Directive and are granted in specific circumstances on the basis of a reasoned decision.

2.49 The powers granted to the Panel will be reinforced by provisions in the Code requiring parties subject to obligations under the Code to disclose to the Panel promptly information of which the Panel would reasonably expect notice.

Q14 Do you agree that formal information-gathering and enforcement powers should be extended to the Takeover Panel in the implementing legislation? If not, what, if anything, would you propose in their place?

Q15 Do you agree that the proposed information gathering power is appropriate?

Q16 Do you agree that the proposed rule-making powers in relation to enforcement are appropriate? If not, which powers do you consider are not appropriate or what additional powers do you consider should be granted?

Q17 Do you consider that the proposed model for granting of the other powers to the Panel is the right one (i.e. through power conferred on the Panel to make rules in respect of such powers)? If not, what other model would you suggest?

Q18 Do you consider that the summary court order enforcement mechanism proposed is appropriate? If not, how would you propose that the Takeover Panel should be able to enforce its rulings?

Sanctions

2.50 Currently, the Panel's rules are enforced largely without the availability of statutory powers or sanctions. Notwithstanding this, a high level of compliance with the Takeover Code and the rulings of the Panel has been attained. The absence of formality has been seen as a strength of the Panel in achieving speed in decision making and a good degree of openness from those involved in the takeover bid process.

2.51 Consistent with the obligation to implement the Directive effectively, it is proposed that a relatively light touch approach should be adopted in the implementing legislation in relation to the formal sanctions of the Panel. Currently, the Panel may resort to private or public censure of persons in breach of the Takeover Code. Additionally, the Panel may seek to draw misconduct in relation to the Takeover Code to the attention of other regulatory authorities. The Financial Services Authority may consider such misconduct to be a basis for bringing disciplinary action against financial advisers authorised by the Authority through the mechanism of section 143 of the Financial Services and Markets Act 2000 and this may involve levying fines. Particularly flagrant breaches of the Code may also lead to the Panel publishing a statement indicating that the offender is someone who is not likely to comply with the Code. The rules of the Financial Services Authority and certain professional bodies oblige their members, in certain circumstances, not to act for such persons in a transaction subject to the Code, including dealing in relevant securities requiring disclosure under rule 8 of the Takeover Code (so-called "cold-shouldering").

2.52 Consideration has been given to extending the formal powers of sanction available to the Panel in relation to misconduct in the course of takeover proceedings, for instance by conferring a fining power on the Panel or by providing that breach of the Takeover Code would be a breach of the Listing Rules. The rule making power which it is proposed to extend to the Panel will include a specific power to censure but, otherwise, it has been concluded that extension of further formal sanction powers would not lead to significantly improved compliance with the Takeover Code, especially given the high level of compliance already achieved.

2.53 Critical to this approach is the view that the initial focus of the Panel should remain on bringing those in contravention of the Takeover Code into compliance during the regulatory process. Consideration will continue to be given, subsequently, to the need for disciplinary action.

2.54 Furthermore, given that the Takeover Code will have legal force, it is considered that there will no longer be a need to maintain section 143 of the Financial Services and Markets Act 2000 under which the Takeover Code is presently endorsed by the Financial Services Authority. This will not, however, preclude the Takeover Panel from reporting breaches of the Code by authorised financial advisers in relation to takeover bids to the Financial

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Services Authority, as at present, and any such breaches will still be taken into account by the Authority in assessing whether such persons are fit and proper to be authorised for business of that sort (for example, whether they consistently fail to meet proper standards of market conduct). The Panel will similarly be able to continue to draw to the attention of other regulatory bodies (such as the accountancy or legal regulatory bodies) misconduct in relation to takeovers by professionally authorised persons.

2.55 Misconduct in relation to takeover activity also needs to be set in the wider context of the overall regulatory framework and the protections available to shareholders and others. A robust market regulatory regime and company law framework is in place in Great Britain to investigate and pursue misconduct in relation to corporate or financial services activity (for instance, sanctions with stringent penalties are in place to deter fraudulent misrepresentation or market abuse). Whilst the Government is satisfied that these protections and sanctions cover many situations where, for example, a party deliberately sought to mislead shareholders in the context of a takeover, it is nevertheless important to ensure that a complete regime deterring potential abuses, particularly in relation to the contents of bid documentation, is in place. The Government is currently assessing the adequacy of coverage of the existing sanctions in this field.

2.56 The net result of the proposals outlined in this and the preceding section would be to extend considerably the formal sanctions and other remedies available to the Takeover Panel compared with the present position. A table showing the position before and after implementation of the Directive is set out below.

Sanction/ Other Remedy	Present Position	Post Implementation of the Directive
Private censure	Yes – Code-based	Yes – Code-based* deriving from a statutory power
Public censure	Yes – Code-based	Yes – Code-based deriving from a statutory power
Reporting conduct to other professional bodies (including, in the case of authorised financial advisers, to the Financial Services Authority)	Yes – Code-based supported by, in the case of authorised financial advisers, provision under section 143 of the Financial Services and Markets Act 2000	Yes – Code-based deriving from statutory gateways to pass information, but Section 143 of the Financial Services and Markets Act 2000 will be repealed. It will still be possible, however, for breaches of the Code by authorised financial advisers to be reported to the Financial Services Authority
Taking action for the purposes of the “cold-shouldering” procedures, under which certain regulators oblige members of their regulatory communities in certain circumstances not to act for a person named by the Panel in a transaction subject to the Code	Yes – Code-based	Yes – Code-based deriving from a statutory power
Order compensation	No formal power	Yes – Code-based deriving from a statutory power with ability to obtain court enforcement order
Require persons to carry out/refrain from specific acts	Yes – Code-based	Yes – Code-based deriving from a statutory power with ability to obtain court enforcement order
* Note Code-based in this column means rules with statutory effect		

Q19 Do you agree that section 143 of the Financial Services and Markets Act 2000 should be repealed in view of the fact that the rules made by the Takeover Panel will be given statutory effect by the implementing legislation? If not, why do you consider section 143 should be retained?

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Additional Matters

2.57 There are a number of other issues that will be provided for in the implementing legislation, particularly in the field of regulatory cooperation. The Takeover Panel will be given “gateways” to exchange information with other domestic regulatory authorities for use in relevant regulatory activities. Equivalent gateway provisions already exist in relation to a number of regulatory authorities under companies and financial services legislation. The information exchanged would be subject to the confidentiality restrictions that applied when the information was in the possession of the Takeover Panel.

2.58 Additionally, the Takeovers Directive (article 4.4) requires that financial services regulatory authorities provide reasonable assistance to other EU financial services regulatory authorities in the exercise of their takeover regulatory functions. It is proposed that the Takeover Panel be placed under a statutory duty to give such assistance as it considers appropriate when required to do so. Similar obligations will apply in relation to the Financial Services Authority and other relevant authorities.

2.59 The Takeover Panel will publish an annual report. Issues to be covered in the report will include takeover and bid activity; the markets and other developments; and the constitution and financial position of the Panel.

2.60 More generally, the Panel and the Financial Services Authority already work closely together in carrying out their different responsibilities. The basis of this relationship is set out in Operating Guidelines available on the Financial Service Authority’s website:

www.fsa.gov.uk/pubs/other/operating_guidelines.pdf.

2.61 Implementation of the Directive provides the opportunity to build on the co-operation which already exists, e.g. in relation to monitoring and surveillance of market activities, in ways which improve operational efficiency and effectiveness whilst avoiding duplication and unnecessary costs. Any such initiative is a matter primarily for the Financial Services Authority and the Panel and their respective stakeholders but the Government would wish to encourage close collaboration between the Authority and the Panel and any action on their part which enables them to discharge their respective responsibilities in ways which maximise effectiveness and efficiency.

Section 3: Barriers to Takeovers, the Level Playing Field and Optionality

3.1 The central matter of controversy during negotiation of the Directive was the extent to which the Directive should address in substance barriers to takeovers within the EU. There are numerous examples of such barriers, but they may loosely be categorised under two headings:

- *Pre-bid Defences – Now Addressed by “Breakthrough” Provisions at Article 11 of the Directive* – these are defences to takeovers which are put in place before a bid occurs, such as differential share structures under which a minority shareholder or shareholders may exercise disproportionate voting rights, restrictions on transfer of shares in the company articles or in contractual agreements; and limitations on share ownership;
- *Post-bid Defences – Now Addressed by the Provisions Imposing Obligations on the Board of an Offeree Company at Article 9* – these are actions taken by the management of a target company to frustrate a takeover bid without the approval of the shareholders of the company at the time of the bid.

3.2 The Government has long supported reducing barriers to takeovers in Europe. It was a key UK objective to ensure that strong provisions relating to post-bid defences were included in the Directive.

3.3 Another issue of importance in considering the barriers to takeover provisions was the question of whether it was appropriate to ring-fence the provisions of the Directive from bids made by “third country offerors” (companies registered outside the EU). The argument was raised that it was unfair that EU companies, which might be subject to a radical liberalising regime under the Directive, could become exposed to bids from companies outside the EU which were allowed to maintain vigorous defences to takeovers. On this latter point, City and business consultees stressed the advantages of the present open takeover regime in the UK, no matter where the bidder was located.

3.4 All these issues came to be dealt with under the banner of the “level playing field” – the need to achieve some kind of equity in the manner in which the Directive addressed post-bid and pre-bid defences and the question of parity with third country takeover regimes. Ultimately, it became impossible for political agreement to be reached on a Directive which dealt robustly with defensive measures and a proposal was put forward (“optionality”) which

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sought to overcome this hurdle by making the key articles 9 and 11 dealing with barriers to takeovers “optional”. This was the solution adopted to secure final agreement to the Directive. Optionality operates at three levels:

- the Member State level – each Member State can choose whether or not to impose articles 9 and/or 11 on companies registered within its territory;
- the individual company level – where a Member State decides not to impose articles 9 and/or 11 on companies registered within its territory, the Member State is nevertheless required to put in place a legal framework for articles 9 and/or 11 so that companies can voluntarily decide to opt in to that framework. Opted in or opted out status must be disclosed. It was argued that, by this means, companies would be encouraged to adopt more liberal structures in response to market forces;
- reciprocity (again, effectively, a Member State option) – where companies are permitted to, and choose to, apply articles 9 and/or 11 voluntarily, Member States may nevertheless exempt those companies when they are the target of a bid from a company which is itself not also subject to those articles (or from a company controlled by such a company).

3.5 Finally, to assist in exposing barriers to takeovers across the EU, extensive disclosure and transparency provisions were laid down in article 10 of the Directive applying, on an ongoing basis, to all companies admitted to trading on a regulated market in the EU. There are consequently three policy choices to be made:

- whether or not all companies registered in the UK and whose shares are admitted to trading on a regulated market should be obliged to comply with the requirements of article 9;
- whether or not all companies registered in the UK and whose shares are admitted to trading on a regulated market should be obliged to comply with the requirements of article 11;
- whether or not the UK should adopt reciprocity provisions.

Article 9 – Obligations of the Board of the Offeree Company

3.6 The principles of article 9 have long been at the heart of the Takeover Code (rule 21) as key to protecting minority shareholders. They include the fundamental principle that it should be for shareholders, not the management, of a target company to decide on the merits of a takeover bid. Throughout the

negotiations on the Directive, important UK City and business stakeholders emphasised their support for article 9 and the principles underlying it. The Government therefore intends that the implementing legislation will require all companies registered in the UK and admitted to trading on a regulated market to be bound by the obligations of article 9. The detailed provisions relating to article 9 will be laid down in the rules made under the proposed rule-making power to be extended to the Takeover Panel and will be set out in the Explanatory Paper which the Panel will be publishing shortly.

Article 11 – Breakthrough

3.7 There are currently no restrictions on the way that UK companies which are admitted to trading on a regulated market can structure their share capital and control. However, market pressure brought to bear, in particular, by institutional investors has ensured that there are now few UK listed companies with differential voting structures or restrictions on transfer of shares or voting rights. Such structures are, however, more prevalent elsewhere in the EU.

3.8 Some elements of the institutional investment community have expressed strong support for the principles underlying article 11 and advocated its adoption in the UK. However, others support the retention of the existing approach based on freedom of contract for companies to structure as they choose, provided that differential share structures are fully disclosed to the market place. The Government welcomes an overall approach designed to ensure greater transparency of differential share and control structures across the EU.

3.9 While the Government recognises the importance of open control structures – such as those structures that consist solely of one share, one vote – to the UK’s efficient takeover markets, it considers that, in the present circumstances, there would be few benefits in imposing article 11 on all UK companies and a number of drawbacks, as follows:

- market forces have reduced the number of companies with differential share structures without legislative intervention;
- imposition of article 11 might not have the desired effect of promoting more open takeover markets and liberal one share/one vote structures. Companies might simply choose to move their listing outside the EU or to another EU Member State which did not impose article 11 or adopt structures which circumvented the breakthrough mechanisms prescribed by the article;
- it would restrict the current flexibility that enables companies and shareholders to construct share structures as they see fit. There are special cases where differential share structures may be argued to provide entrepreneurial or other advantages. For example, differential share structures may prove an incentive for entrepreneurs to bring new

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companies to the market whilst protecting special (e.g. founders') interests. Equally, differential share structures have themselves been used in facilitating restructuring opportunities such as dual holding companies.

3.10 The Government does not, therefore, intend to impose article 11 on UK companies.

Reciprocity

3.11 The Directive provides that Member State may also decide to specify that the benefits of articles 9 and/or 11 may only be exercised by a bidder against a target company subject to those provisions where the bidder company and any controlling company are similarly subject to the regime imposed by articles 9 and/or 11. A possible argument in favour of such a provision is that reciprocity would encourage companies to move to a more liberal regime voluntarily – where companies choose to subject themselves to an open takeover regime, they can benefit fully from that regime where they are the predator company in a takeover bid. However, this rationale is substantially undermined by the fact that the decision by companies to opt-in to articles 9 and/or 11 must be reversible. In addition, allowing reciprocity in relation to article 9 would undermine the principles underlying the present rule 21 of the Takeover Code.

3.12 Additionally, there are considered to be significant disadvantages in utilising the reciprocity provisions, as follows:

- City and business consultees have always stated that they see considerable benefits in the current open takeover regime and that a policy of protectionism should not be pursued;
- seeking to ring-fence UK companies from takeovers by third country companies could lead to retaliation and have adverse consequences for international trade;
- utilisation of the reciprocity provisions would add considerably to the complexity of the implementing provisions.

3.13 Accordingly, it is proposed that the UK should not allow companies to take advantage of the reciprocity provisions.

Q20 Do you agree that all companies registered in the UK and whose shares are admitted to trading on a regulated market should be obliged to comply with the requirements of article 9? If not, what advantages do you consider there are in allowing companies not to be bound by those requirements?

Q21 Do you agree that companies registered in the UK and whose shares are admitted to trading on a regulated market should not be bound by article 11? If not, what advantages do you consider there are in imposing the requirements of article 11 on all UK companies?

Q22 Do you agree that the UK should not utilise the reciprocity provisions? If not, what advantages do you see in the UK allowing companies to make use of these provisions?

Detailed Proposed Implementing Provisions for Optionality and Article 11 (Breakthrough)

3.14 As explained above, notwithstanding the proposal that article 11 should not be imposed on UK registered companies, it is still necessary to put in place a statutory framework which will enable companies voluntarily to subject themselves to the provisions of the article. The decision to opt-in must be a positive one taken by the general meeting of shareholders in accordance with the law of the Member State in which the company has its registered office on the basis of the rules applicable to amendment of the articles of association.

3.15 There are two routes by which implementation of article 11 might be achieved. It would be possible to put in place a full statutory regime, setting out detailed provisions on all aspects of article 11. An alternative approach would be to make provision for the mechanics of article 11 to be resolved by the shareholders of the company as part of the process by which the decision was taken to opt-in, utilising existing protections in relation to any changes in the articles of association of a company.

3.16 The rules in relation to amendment of the articles of association of a company registered in Great Britain are set out in section 9 of the Companies Act 1985. A special resolution, that is support from three quarters of the shareholders who vote, is required. These rules are also subject to provisions elsewhere in the Companies Act 1985. For instance, in the context of considering differential voting rights, class rights of shareholders can only be varied where consent of the shareholders of that class is first obtained (sections 125-128). Additionally, section 459 contains a specific right for any shareholder to apply to the court for relief where he considers his position is being unfairly prejudiced, for instance by a proposed amendment of the company's articles. These provisions would, therefore, apply in relation to any decision to opt-in to article 11.

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3.17 Breakthrough under article 11 involves the following components:

- over-riding of restrictions on the transfer of securities during the time allowed for acceptance of the bid (such restrictions may be contained in the articles of association or in contractual agreements between the company and shareholders or, where they are entered into after the date of adoption of the Directive, contracts between shareholders);
- over-riding of restrictions on voting rights contained in articles of association or in contractual agreements at any meeting to consider frustrating action in accordance with article 9;
- reduction to one vote only of the voting rights of “multiple-vote securities” at any meeting to consider frustrating action in accordance with article 9;
- calculation of the “breakthrough” threshold (to define a “successful bid). The breakthrough provisions will be triggered under the Directive “where the offeror holds 75% or more of the capital carrying voting rights”;
- removal of restrictions on transfer of securities, on voting rights and on extraordinary rights of shareholders concerning the appointment or removal of board members provided for in the articles of association following attainment of the breakthrough threshold by the bidder. So long as the successful offeror holds 75% or more of the capital, restrictions and provisions of this nature will not apply;
- reduction to one vote only of the voting rights of “multiple-vote securities” following attainment of the breakthrough threshold by the bidder. This reduction in voting rights will only apply at the first general meeting of shareholders following closure of the bid called by the offeror in order to amend the articles of association or to remove or appoint board members;
- compensation – article 11 provides for equitable compensation for rights removed as a consequence of breakthrough.

3.18 The proposed approach to be taken as regards compensation is as follows:

- *Loss of Voting or Shareholder Rights as a Consequence of Breakthrough* – there is no need to provide for compensation in these circumstances. The decision to opt in will have been taken in accordance with the usual rules involved for changing the articles of association (including protection of class rights). It will be open to the parties to agree on terms, including any compensatory payment. There is, therefore, no loss suffered by shareholders as a consequence of subsequent override of rights;
- *Compensation for Contractual Restrictions that are Overridden* – compensation will be determined in the first instance by the bidder. This is because the bidder is required to state (article 6.3(e)) in the bid documentation, “the compensation **offered** for the rights which might be removed as a result of the breakthrough rule” and the method employed in determining it. This may facilitate negotiation of the appropriate level of compensation between the bidder and the party holding the rights to be overridden by breakthrough. A party whose contractual rights are removed will be able to apply to the court on the grounds either that the compensation was insufficient or that the nature of consideration offered was inappropriate (for instance if the bidder offered shares by way of compensation, rather than cash). Compensation would be awardable to the person who suffers loss on a just and equitable basis by the court and paid by such persons as the court deemed fit.

Q23 Do you consider that, in implementing the opt-in under article 11, it is sufficient to rely on existing procedures and protections in relation to proposed changes in the articles of a company? If not, why do you think such procedures and protections are inappropriate and what further legislative provisions do you think are required?

Q24 Do you agree that it is not necessary to provide for equitable compensation for loss of shareholder voting rights as a consequence of breakthrough under the article 11 opt-in? If not, why not and how would you suggest compensation be provided for?

Q25 Do you agree with the proposed compensation provisions in relation to override of contractual rights? If not, why not and how would you suggest compensation be provided for?

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Disclosure by Companies of Control and Structure of their Shares

3.19 Articles 10(1) and 10(2) of the Directive require companies admitted to trading on a regulated market to provide, in their annual reports, detailed information (as set out in those articles) on the following:

- structure of the share capital;
- restrictions on transfer of securities;
- significant shareholdings;
- shareholders with special control rights and a description of those rights;
- system of control of any employee share schemes;
- restrictions on voting rights;
- agreements between shareholders which may restrict transfers of securities or voting rights;
- rules governing the appointment and replacement of board members and changes to the articles;
- powers of board members to issue or buy back shares;
- significant agreements to which the company is a party which take effect, alter or terminate upon a change of control of the company following a takeover bid;
- agreements providing for compensation to board members or employees resulting from resignation or redundancy following a takeover bid.

3.20 Article 10(3) requires the boards of companies to present an explanatory report to shareholders on the above issues at the company's AGM.

3.21 It should be noted that these are general requirements to help bring greater transparency to the market and apply to all relevant companies whether or not they are involved in a takeover. Accordingly, the requirements will apply to all companies registered in the UK which have shares traded on a regulated market, whether or not that market includes an official listing in London.

3.22 The Government is conscious that the disclosure requirements under article 10 must be viewed in the light of the wider reporting requirements imposed on companies admitted to trading on a regulated market. There have been substantial recent initiatives in this field, both at the domestic level (in the form of the proposed Operating and Financial Review) and within the EU context in the form of draft legislation for amending the 4th and 7th Directives on accounting. As drafted, this includes a requirement for an annual corporate governance statement which, inter alia, should include elements of the disclosures required under article 10 of the Takeovers Directive. The Government is concerned to ensure that compliance costs in relation to the disclosures required under article 10 are minimised and, more generally, to avoid unnecessary duplication in company reporting, and to simplify the presentation of information to shareholders. These considerations will underpin its approach to implementation of articles 10(1) and 10(2) and negotiation on the proposed amendments to the 4th and 7th Directives. Any views which consultees might have on this would be welcome.

3.23 In implementing these provisions, the Government will, therefore, seek to minimise the costs of complying with the disclosure requirements under articles 10(1) and 10(2) (information to be provided in annual report) in line with the broader reporting requirements on companies.

3.24 Two possible means of implementing article 10(3) (explanatory report to be presented to meeting of shareholders) have been considered. The first of these is that the explanatory report would be contained by way of additional narrative text in the annual report (which will be before the annual general meeting) alongside the information required by articles 10(1) and 10(2). Alternatively, the explanatory report could be presented at the annual general meeting.

Q26 Do you consider that the requirement for companies to make an explanatory report to shareholders on share and control structures should be met by requiring such information to be included in the annual report? Alternatively, do you think a report on this matter should be required to be made at the annual general meeting?

Section 4: Squeeze-out and Sell-out

General Provisions of the Directive

4.1 The concepts of “squeeze-out” and “sell-out” are designed to address the problems of, and for, residual minority shareholders following a successful takeover bid. Squeeze-out rights enable a successful bidder to compulsorily purchase the shares of remaining minority shareholders, who have not assented to the bid. Sell-out rights enable minority shareholders, in the wake of such a bid, to require the majority shareholder to purchase their shares. Because they involve the compulsory purchase or acquisition of shares against the will of the holder of the shares or the acquirer, high thresholds apply to the exercising of such rights and there are protective rules on the price that must be paid for the shares concerned.

4.2 Squeeze-out and sell-out provisions have been a feature of national company law for many years. Articles 15 and 16 of the Directive, however, introduce EU-wide rules requiring all Member States to put appropriate provisions in place for the first time.

Comparison of Directive Provisions on Squeeze-out and Sell-out and Part 13A of the Companies Act 1985

4.3 The rules laid down in the Directive in relation to squeeze-out and sell-out are broadly consistent with existing provisions in Great Britain under Part 13A (sections 428-430F) of the Companies Act 1985. However, the Directive’s provisions only apply to companies whose shares are admitted to trading on a regulated market, whereas the existing Companies Act provisions apply to all companies, whether public or private, registered under the Act. It is considered that it would be contrary to better regulation principles to create a two-tier regime which differentiated between companies falling within the scope of the Directive and those companies falling outside. Similarly, the rules on squeeze-out and sell-out apply only when there has been a bid for all shares in a company and not when there is more than one class of shares and the bid is not for all of the classes. Again, it would be contrary to better regulation principles to create a two-tier regime which applied differently to different types of bid. Consequently, it is intended that the following proposals will apply equally to all companies and all bids within the current ambit of Part 13A of the Companies Act 1985, regardless of whether or not the Directive is required to be applied to such companies and bids.

4.4 The following changes have been identified which are required to be made to Part 13A as a consequence of the need to implement the Directive:

- *Calculation of Squeeze-out Threshold (Sections 429(1) and 429(2))* – there should be a dual test imposed in that the bidder must have acquired **both** 90% of the shares (or class of shares) carrying voting rights to which the offer relates **and** 90% of the voting rights in the company (or class of shares). Currently, the threshold requirement under Part 13A is that the bidder must attain 90% of shares (or class of shares) to which the offer relates;
- *Calculation of Sell-out Threshold (Sections 430A(1) and 429(2))* – paralleling the change to be made in relation to the squeeze-out threshold, a dual test must similarly be imposed in relation to the sell-out threshold so that the bidder must hold **both** 90% of the capital carrying voting rights in the company (or class of shares) **and** 90% of the voting rights in the company (or class of shares). Currently, the test is 90% of all shares in the company (or class of shares);
- *Revised Period During Which Squeeze-Out and Sell-Out Rights may be Exercised* – the Directive provides (articles 15.4 and 16.3) that squeeze-out and sell-out rights must be exercisable within a 3 month period following the time allowed for acceptance of the bid. Currently, Part 13A provides that squeeze-out may be exercised within a period of four months beginning with the date of the offer and must be exercised within two months of reaching the 90% threshold (section 429(3)). However, sell-out must be exercised within a period which must not be less than three months after the end of the period during which the offer may be accepted (section 430A(4)). Accordingly, no change is needed for sell-out but for squeeze-out it is proposed to replace the existing provision with that in the Directive.

4.5 In most instances, it is considered that the first and second changes above will make no practical difference as the percentage of total capital carrying voting rights in a company (or class of shares) and the percentage of voting rights will normally be the same.

Company Law Review Recommendations

4.6 The independent Company Law Review sponsored by the Department of Trade and Industry also considered the issue of squeeze-out and sell-out and the scope for improving the existing Companies Act provisions. Its Final Report published in July 2001 (chapter 13, pages 282-300), made a number of recommendations in relation to the reform of Part 13A. Further detail about the reasoning behind the recommendations in the Final Report is set out at Annex B (pages 377-390) of the “Completing the Structure” document published in November 2000. All of the Company Law Review documents are available on the DTI website: www.dti.gov.uk/cld/review.htm.

4 Squeeze-out and Sell-out

4.7 In implementing the Takeovers Directive, it is intended to take the opportunity to adopt the recommendations of the Company Law Review, except to the extent that they are not consistent with articles 15 and 16 of the Directive. The recommendations made by the Company Law Review are set out at Annex C. The only recommendations which are not wholly aligned with the provisions of the Directive are those which sought to modify the time-limit applicable in relation to squeeze-out (section 429(3)). As stated above, the Directive requires that squeeze-out rights must be exercisable for a period of up to three months from the end of the time allowed for acceptance of the bid.

4.8 It should also be noted that in its recently published proposal for amendment of the Second Company Law Directive, the Commission stated that it intends that a general squeeze-out and sell-out rule be introduced across the EU, i.e. including in circumstances other than following a takeover. In taking forward the implementation of the Takeovers Directive, progress on the EU negotiations on the amendment to the Second Directive will need to be taken into account.

Q27 Do you agree that all the recommendations of the Company Law Review (Annex C) compatible with the provisions of the Takeovers Directive should be adopted? If not, please state which recommendations you consider should not be implemented and set out your reasons.

Q28 Do you agree that the proposed changes should apply to all companies and bids currently subject to Part 13A of the Companies Act 1985, regardless of whether or not the Takeovers Directive applies to them?

Section 5: Other Issues

Costs, Savings and Benefits

5.1 A partial regulatory impact assessment (RIA) is attached at Annex D.

Q29 We would welcome comments and evidence on the RIA, especially on the savings and benefits (or any costs) on the proposed provisions implementing the Directive. Comments are also invited on any unintended consequences or other implications.

What Happens Next?

5.2 The Government will issue a summary of responses within three months of the closing date of this consultation. It is intended that the Government response to this consultation be issued at the same time.

5.3 The necessary legislation to implement the Takeovers Directive must be in place by 20 May 2006.

Help with Queries

5.4 If you have comments or complaints about the way this consultation has been conducted, these should be sent to:

Louisa Renwick
Consultation Co-ordinator
Department of Trade and Industry
Room 723
1 Victoria Street
London
SW1H 0ET

Annex A: Summary of Questions

Q1 Do you agree that the Takeover Panel should remain responsible for regulating takeovers?

Q2 If so, should the central objective of the implementing legislation be to preserve the flexibility, speed and certainty of the current regime consistent with meeting the requirements of the Directive?

Q3 Do you agree that the same regime should apply to all takeovers and other transactions currently covered by the Takeover Code whether or not they are covered by the Directive?

Q4 Do you agree that the same regime should apply to all companies currently covered by the Takeover Code whether or not they are covered by the Directive?

Q5 Do you agree that the Panel should retain autonomy to determine its own constitution consistent with the minimum requirements as to separation of executive, judicial and rule-making functions proposed to be laid down in the legislation?

Q6 Do you agree that the proposed scope of the rule-making power is satisfactory?

Q7 Have you any other comments on the proposed rule-making power?

Q8 Do you agree that the funding arrangements of the Takeover Panel should continue to reflect a balance between those parties directly involved in takeover activity and market participants more generally? If not, how would you change those arrangements?

Q9 Do you consider that there are any reasons why the Takeover Panel should not be granted a power to enable it to charge fees for supervisory activity undertaken?

Q10 Do you think that there should be a reserve power available to the Secretary of State to place the levy charge on a statutory footing? If not, how should the Takeover Panel make up any resulting shortfall in its finances?

Q11 Do you agree that it is important to seek to minimise tactical litigation to ensure that the takeover bid process can proceed smoothly and efficiently? If not, what are your reasons?

Q12 Do you think that the following measures are a proper and sufficient means of limiting the scope for civil litigation in the implementing legislation: exclusion of new rights of action for breach of statutory duty; protection of transactions; and parties to be bound by decisions of the Takeover Panel?

Q13 Do you agree that a limited immunity package should be conferred on the Panel and those involved in its regulatory activities? If not, how would you propose to overcome the problems outlined in paragraphs 2.41 and 2.42?

Q14 Do you agree that formal information-gathering and enforcement powers should be extended to the Takeover Panel in the implementing legislation? If not, what, if anything, would you propose in their place?

Q15 Do you agree that the proposed information gathering power is appropriate?

Q16 Do you agree that the proposed rule-making powers in relation to enforcement are appropriate? If not, which powers do you consider are not appropriate or what additional powers do you consider should be granted?

Q17 Do you consider that the proposed model for granting of the other powers to the Panel is the right one (i.e. through power conferred on the Panel to make rules in respect of such powers)? If not, what other model would you suggest?

Q18 Do you consider that the summary court order enforcement mechanism proposed is appropriate? If not, how would you propose that the Takeover Panel should be able to enforce its rulings?

Q19 Do you agree that section 143 of the Financial Services and Markets Act 2000 should be repealed in view of the fact that the rules made by the Takeover Panel will be given statutory effect by the implementing legislation? If not, why do you consider section 143 should be retained?

Q20 Do you agree that all companies registered in the UK and whose shares are admitted to trading on a regulated market should be obliged to comply with the requirements of article 9? If not, what advantages do you consider there are in allowing companies not to be bound by those requirements?

Annex A Summary of Questions

Q21 Do you agree that companies registered in the UK and whose shares are admitted to trading on a regulated market should not be bound by article 11? If not, what advantages do you consider there are in imposing the requirements of article 11 on all UK companies?

Q22 Do you agree that the UK should not utilise the reciprocity provisions? If not, what advantages do you see in the UK allowing companies to make use of these provisions?

Q23 Do you consider that, in implementing the opt-in under article 11, it is sufficient to rely on existing procedures and protections in relation to proposed changes in the articles of a company? If not, why do you think such procedures and protections are inappropriate and what further legislative provisions do you think are required?

Q24 Do you agree that it is not necessary to provide for equitable compensation for loss of shareholder voting rights as a consequence of breakthrough under the article 11 opt-in? If not, why not and how would you suggest compensation be provided for?

Q25 Do you agree with the proposed compensation provisions in relation to override of contractual rights? If not, why not and how would you suggest compensation be provided for?

Q26 Do you consider that the requirement for companies to make an explanatory report to shareholders on share and control structures should be met by requiring such information to be included in the annual report? Alternatively, do you think a report on this matter should be required to be made at the annual general meeting?

Q27 Do you agree that all the recommendations of the Company Law Review (Annex C) compatible with the provisions of the Takeovers Directive should be adopted? If not, please state which recommendations you consider should not be implemented and set out your reasons.

Q28 Do you agree that the proposed changes should apply to all companies and bids currently subject to Part 13A of the Companies Act 1985, regardless of whether or not the Takeovers Directive applies to them?

Q29 We would welcome comments and evidence on the RIA, especially on the savings and benefits (or any costs) on the proposed provisions implementing the Directive. Comments are also invited on any unintended consequences or other implications.

Annex B: Glossary of Terms

Note – the definitions of terms used in the Takeovers Directive are set out in article 2 of the Directive. The glossary below sets out the terms used more generally in this consultative document.

Term	Definition/Explanation
Breakthrough	Provision where restrictions on the transfer of shares, voting rights and certain other rights do not apply once a bidder holds shares carrying 75% of the voting rights of the target company
Datafin	Judgment in a 1987 court case which concluded that, in general, the courts should limit themselves to reviewing the Takeover Panel's decision-making processes only after a bid had been concluded. The court did not rule, however, that the Panel's decisions were not subject to judicial review
Directive/ Takeovers Directive	Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on Takeover Bids
EEA/European Economic Area	The 25 countries comprising the EU together with Iceland, Liechtenstein and Norway
Equitable price	Requirement that the price to be offered by the bidder for shares under a mandatory bid must be the equitable price, i.e. the highest price paid by the bidder for the same shares over a period – to be determined by Member States – and which must be between 6 and 12 months before the bid is tabled. The present equivalent provision in the Takeover Code has a period of 12 months
Mandatory bid	Requirement that once a person has acquired a certain percentage of a company's shares, he is required to make a bid for the remainder of the shares so as to protect minority shareholders. The threshold is left to the discretion of Member States. The present equivalent provision in the Takeover Code has a threshold of 30%

Annex B Glossary of Terms

Offeree	Company, the shares of which are the subject to a bid, i.e. the target company
Offeror	Natural or legal person making the bid, i.e. the bidder
Sell-out	Right enabling minority shareholders to require the successful bidder to purchase their shares following a bid once the bidder has reached a particular threshold (nominally 90% of the target company's shares)
Squeeze-out	Right enabling a successful bidder to compulsorily purchase the shares of remaining minority shareholders who have not assented to the bid once the bidder has reached a particular threshold (nominally 90% of the shares bid for)

Annex C: Squeeze-out and Sell-out – Summary of Proposed Changes to Part 13A of the Companies Act 1985 Resulting from the Company Law Review

Definition of a takeover offer – section 428

Section 428 sets out the definition of a takeover. It is proposed that it be made clear that an offer is to be treated on the same terms regardless of the relative ability/inability of offerees to take it up. It is also proposed that it be clarified that an offer will be a takeover offer for the purposes of the expropriation provisions even if some shareholders agree to accept more onerous obligations than those in the terms of the offer to the generality of members.

Shares that the offeror has “contracted to acquire” – section 428(5)

In the phrase “contracted to acquire” in section 428(5), which deals with the offeror’s position at the start of the bid, for the purposes of determining which shares cannot be counted toward the achievement of the 90% threshold (at which point shares may be compulsorily purchased), it is unclear as to whether section 428(5) covers conditional as well as unconditional contracts. It should be clarified that, in ascertaining the offeror’s position at the start of the bid, the shares he has conditionally contracted to acquire (other than those subject to irrevocable undertakings, as at present) should be so treated.

Shares that the offeror has “contracted to acquire” – sections 429(1), 429(2), 429(3) and 429(8)

The position (in respect of sections 429(1), 429(2), 429(3) and 429(8)) should be further clarified, with the effect that such conditional contracts which have not yet gone unconditional should be treated as not amounting to acceptances but as continuing to count towards the shares subject to the offer. This change is desirable to bring the provision into line with article 15(2)(b) of the Takeovers Directive which refers to the bidder having “acquired or firmly contracted to acquire securities”. This would appear to exclude conditional acceptances in calculating the “squeeze-out” threshold.

Shares that the offeror has “contracted to acquire” – sections 430A(1)(a), 430A(1)(b), 430A(2)(a) and 430A(2)(b)

Section 430A provides that minority shareholders may require the offeror to buy their shares (sell-out). Section 430A(1)(a) and section 430A(2)(a) should be clarified to make clear that the reference is to shares unconditionally acquired. On the other hand, where the phrase appears in sections 430A(1)(b) and 430A(2)(b), in relation to shares other than those acquired by virtue of acceptances, the reference should be amended to make clear that it refers both to conditional and unconditional contracts.

Shares that the offeror has “contracted to acquire” – section 430C

Section 430C(5) allows an offeror who has not satisfied the thresholds in sections 429(1) and 429(2) to apply to the court for an order authorising him to give notices under the relevant subsection if certain conditions are satisfied. One of the conditions is that the shares he has “acquired or contracted to acquire” together with those he wishes to acquire would take him above the 90% threshold. The clarification proposed above to sections 429(1) and 429(2) should also be made to section 430C(5), ie that the shares must be subject to unconditional contracts in order to count toward the threshold.

Date of the offer – section 428(1)

Section 428(1) provides that the date for calculating which shares must be excluded from the offer (and thus from being counted toward the 90% threshold) should be “the date of the offer”. It is proposed that this be amended to “the date of the offer or such earlier date as may be prescribed by regulations”.

Date of the offer – section 428(1)

The phrase “the date of the offer” is also used as the starting point of the (currently four month) period during which the offeror must attain the 90% threshold in order to benefit from the compulsory acquisition provisions set out in section 429(3)). It is proposed that this be amended to “the date of the offer or such other date as may be prescribed by regulations”. **This recommendation is not considered to be compatible with article 15 of the Takeovers Directive – which requires that squeeze-out rights must be exercisable within three months of the end of the time allowed for acceptance of the bid – and therefore cannot be implemented.**

Date of the offer – section 429(8)

Section 429(8) deals with the situation where, during the period within which a takeover offer can be accepted, the offeror acquires or contracts to acquire any of the shares to which the offer relates otherwise than by acceptance of the

offer. It is proposed that the application of section 429(8) be extended to include acquisitions “on or after the date on which a takeover offer is made”, by which is meant the date of announcement, or if there was no announcement, the date on which the offeror first sends copies of the offer document to the offerees.

Irrevocable undertakings – section 428(5)

Section 428(5) provides that shares already held by the offeror include those which he has contracted to acquire but does not include shares which are the subject of a contract binding the holder to accept the offer for no consideration. It is proposed that the requirement that the registered holder must give the undertaking be replaced by a provision that allows contracts the effect of which is to require the registered holder to accept the offer to be included.

Irrevocable undertakings – section 428(5)

It is proposed that shares subject to undertakings given for any consideration other than consideration of material value (perhaps defined in such a way that made it clear that promises to make the offer, whether or not conditional, fall outwith “material value”) should be counted toward the 90% threshold.

Communication of offer – section 428

It is proposed that where an offeror is intending to send a notice to a shareholder of a target company of the intention to purchase that shareholder’s shares compulsorily, and that target shareholder has no registered address in the EEA and has not given the target company an address in the EEA for the service of notices on him, that notice of the offer in the Gazette should be both necessary and sufficient.

Communication of offer – section 428

It is proposed that in a notice to a shareholder of a target company of the intention to purchase that shareholder’s shares compulsorily it should be made clear that the place where a copy of the offer document can be obtained must be in the EEA, or on the internet accessible from the EEA.

Right of offeror to buy out minority shareholders – treatment of options etc – section 429(1)

Where an offeror makes an offer for all the target company’s allotted shares, and all or any shares subsequently allotted before a date specified or determined in accordance with the terms of the offer, it is proposed that the following will apply:

Annex C Squeeze-out and Sell-out – Summary of Proposed Changes to Part 13A of the Companies Act 1985 Resulting from the Company Law Review

- in deciding whether the offeror has reached the 90% threshold for the purposes of section 429(1), the offeror need only bring into the calculation shares which are actually in issue (ie allotted) at the relevant time;
- if the offeror serves notices under section 429(1) and more shares are subsequently allotted which take the percentage of acceptances then received below 90%, that will not invalidate the notices already served;
- if the offeror wishes to serve further notices under section 429(1) he must have at least 90% acceptances of shares then in issue and subject to the offer at the time he sends the notices out.

Right of offeror to buy out minority shareholders – treatment of options etc – section 429(1)

Following on from the proposals immediately above concerning the proposed clarification of the 90% threshold, a further clarification should be made so that when the threshold is satisfied, each round of notices should be capable of extending to all remaining shares of the relevant class in issue as at the date of the notice.

Right of offeror to buy out minority shareholders – treatment of options etc – sections 428 and 429

One problem with the existing legislation is how to treat any variations in value attributable to derivative securities between the time of the offer and the acquisition of the underlying shares. It is proposed that the shares should be treated as one class of shares for the purposes of section 429, and that the offeror should be treated as making an offer on the same terms even if he agrees to pay more for shares that carry a dividend than those which do not. It is proposed that an amendment be made so as to achieve the aim that, provided the difference in price corresponds to the difference in market value of the two categories of shares, they should be treated as a single class purchased for equivalent consideration.

Time Limits – section 429(3)

Section 429(3) provides that an offeror may not issue a notice to minority shareholders compulsorily purchasing their shares unless he reaches the 90% threshold within four months of the date of the offer. It is proposed that the four month period be increased to five months. There is a further requirement under section 429(3) that a notice must be issued within two months of reaching the 90% threshold. There are no plans to change this period. **Article 3.2(b) of the Takeovers Directive, which permits additional, more stringent rules, would allow this recommendation to be adopted in addition to implementation of article 15, which requires that squeeze-out rights must be exercisable within three months of the end of the time allowed for**

acceptance of the bid, but this would result in an unduly complicated rule and it is therefore proposed that the existing rule be replaced with that in the Directive.

Time Limits – section 429(3)

It is proposed that section 429(3) should be amended to achieve the following:

- the basic rule should (continue to) be that the offeror should have two months from the time at which he first achieves the 90% threshold in which to send out notices;
- where shares are allotted more than two months from the time when the offeror first achieves the 90% threshold, the offeror should be able to send out notices to the holders of those shares within one month of their allotment, provided that at the time he issues the notices he has more than 90% of the shares then in issue;
- the offeror should be unable to issue notices in respect of shares allotted more than 18 months after first achieving the 90% threshold;
- where shares are allotted shortly before the end of the period for initially achieving the 90% threshold, thereby preventing the offeror from reaching the threshold in time, the time limit for reaching the 90% threshold should be extended to one month after the date of allotment of the shares.

Time Limits – section 430A(3)

Section 430A deals with the right of minority shareholders to be bought out by the offeror (sell-out). It is proposed that the one month period in section 430A(3) (notification by the offeror to non-acceptors of their right to be bought out and the period for its exercise) be extended to two months, so that the offeror should not have to send out notices under that section before he sends out notices under section 429 (ie that he intends to purchase, compulsorily, their shares).

“Mix and match” Offers – section 430(2) – 430(5)

It is proposed that where a “mix and match” offer (eg a mixture of shares and cash) is made, and some of the shareholders do not accept within the initial offer period, the offeror should offer those to whom section 429 notices are sent a choice of consideration giving the same proportions of the various types of consideration as was available to those who participated in the original “mix and match”. Where there has been more than one “mix and match”

Annex C Squeeze-out and Sell-out – Summary of Proposed Changes to Part 13A of the Companies Act 1985 Resulting from the Company Law Review

arrangement, the offeror should be required to offer the minority a choice between the outcomes of those arrangements. In the event that a shareholder fails to choose within six weeks from the date of the notice, then he should be allocated the primary consideration provided by the offer.

Applications to the Court – section 430C

Section 430C provides that a recipient of a section 429 notice may make an application to the court (within six weeks of receiving the notice) seeking to overturn an offeror's intention to purchase his shares compulsorily. It is proposed to include a requirement that the offeror be promptly notified of such an application.

Applications to the Court – section 430C

It is proposed, as a consequence of the above proposal, that an offeror should be obliged, at the earliest opportunity, to notify shareholders not party to a section 430C application that proceedings have been initiated.

Annex D: Partial Regulatory Impact Assessment

The Takeovers Directive

Implementation of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on Takeover Bids

Purpose and Intended Effect of Measure

Objective

The Directive lays down minimum standards in relation to the regulation of takeovers of companies and provides for the protection of their shareholders. It will apply, with effect from 20 May 2006, to the regulation of takeover bids for companies incorporated in the EU (and EEA²) whose shares are admitted to trading on a regulated market in the EU.

2 The principal features of the Directive are as follows:

- a “mandatory bid” rule whereby any person acquiring control of a company is required to launch a bid for all of the company’s shares;
- detailed provisions to ensure that an “equitable price” is paid to shareholders for their shares by a bidder following the making of a mandatory bid;
- provisions preventing a target company’s management taking defensive measures without the approval of shareholders at the time of the bid. There is, however, a Member State option to make the provisions voluntary for companies rather than mandatory;
- extensive disclosure provisions requiring companies to make known their share structure and control systems to allow the market to identify and address defensive share structures across the EU;
- a “breakthrough” provision which permits the override of restrictions on the transfer of shares and voting rights (contained within a company’s articles or contractual agreements) and multiple voting

² All further references in this Regulatory Impact Assessment to “EU” also include the three States that make up the EEA.

rights (shares in a distinct and separate class and carrying more than one vote) following a successful takeover bid. However, there is a Member State option to make the provision voluntary for companies rather than mandatory. If Member States decide not to impose the requirement companies may, nevertheless, still decide voluntarily to opt-in following a positive decision taken by a general meeting of shareholders;

- provisions designed to deal with the problems of, and for, minority shareholders following a successful takeover (“squeeze-out” and “sell-out” rights);
- a review clause which will require the Commission in 2011 to assess the effectiveness of the Directive in the light of experience and, if necessary, to propose revisions.

3 The Directive applies to the United Kingdom. It is intended that national legislation implementing the Directive be enacted, separately, in Great Britain and in Northern Ireland.

Background

4 A Directive on takeover bids has been under consideration since 1985. A first proposal made by the Commission in 1989 included detailed rules on which it became clear it would be difficult to obtain agreement in Council. Consequently, a revised proposal was published by the Commission in 1996 on the basis of a framework Directive containing general principles but leaving considerable latitude for Member States and the relevant takeover supervisory authorities to deal with the detailed implementation of those principles. Following detailed discussions within the European Parliament and the Council, a joint text of the Directive was approved by the Conciliation Committee on 6 June 2001 but failed on a tied vote to be adopted by the European Parliament on 4 July 2001.

5 Following the narrow failure of the Directive to be adopted in 2001, the Commission appointed a High Level Group of Company Law Experts to examine a number of issues related to takeovers which the Commission considered to have been of concern to the European Parliament, principally the issue of ensuring a “level playing field” for shareholders (or the existence of different share and control structures) across the EU. The High Level Group reported on those issues in January 2002 and the Commission presented a new proposal for a Directive in October 2002. Following further detailed discussions the present Directive was finally adopted on 21 April 2004.

6 At present, the regulation of takeover bids in Great Britain and Northern Ireland is undertaken essentially on a non-statutory basis by the Panel on Takeovers and Mergers (the “Takeover Panel”), which administers the City Code on Takeovers and Mergers (the “Takeover Code”). The rules set out in the Takeover Code seek to secure the fair treatment of all shareholders and create an orderly framework for the conduct of takeover bids. In particular, the Takeover Panel will police any conflict between the companies where the bid is a hostile one (i.e. not recommended for acceptance by the board of the offeree).

7 Since the Takeover Panel was established in 1968, it has overseen over 7,000 announced takeover offers and, in addition, approximately half as many cases where no offer was, in the event, announced. In the year ending 31 March 2004, there were 136 resolved takeovers, of which 110 involved a change of control. Corresponding figures for the years ending 31 March 2002 and 31 March 2003 were 107 and 96, and 108 and 85 respectively.

8 The key strengths of the present system of takeover regulation overseen by the Takeover Panel can be summarised as follows:

- flexibility, speed and certainty in decision-making;
- independence and regulatory autonomy;
- principle based regulation;
- involvement of key City and business stakeholders in developing takeover rules and the regulatory framework;
- professional expertise in regulatory activities, notably through Takeover Panel membership and secondments;
- consensual approach to regulation amongst market participants.

The Government wishes to preserve, as far as possible, these core characteristics of takeover regulation.

Risk Assessment

9 The Directive is considered by the Government to be less than ideal in some respects. The principal defect is that the provision requiring the management of a company which is the target of a takeover bid should only take action to defend the bid with the approval of shareholders at the time of the bid is a Member State option. Such a requirement is one of the cornerstones of the Takeover Code. In addition, the Directive will not significantly increase

protections for shareholders of companies registered in England & Wales or in Scotland, nor improve the effectiveness of the Takeover Code. However, it might give rise to an increased risk of litigation within the bid process, which could have the effect of delaying or frustrating a takeover bid and hindering the opportunity for shareholders to consider the benefits of the bid.

10 On the other hand, the Directive does open up the prospect of improved shareholder protection and access to capital markets across Europe. It should act as a stimulus for more transparent corporate governance structures with extended shareholder involvement. It could also encourage cross-border takeover activity and, potentially, consequential improvements in corporate management and performance benefiting all those with a stake in the markets. These benefits are considerably less than those which the UK sought from the Directive. However, the Government considers, on balance, that the Directive represents a step forward in laying down minimum safeguards for takeover regulation and minority shareholder protection within the EU, whilst presenting a basic legislative framework that is acceptable in terms of the risks to the domestic takeover regulatory system.

Options

11 Before considering the options under the Directive it is worthwhile setting out the four broad areas where measures to implement the Directive will be necessary. These are explained in paragraphs 12 – 16 below.

The Takeover Regulatory Framework

12 There will be a need to place takeover regulation and the takeover regulatory authority in Great Britain within a complete and coherent statutory framework for the first time. At present, the Takeover Panel and the Takeover Code that it administers fall outside any statutory structure.

Takeover Rules

13 There will be a need to ensure that minimum rules on takeovers are in place in accordance with the requirements of the Directive. The provisions of the Directive are broadly consistent with the existing Takeover Code rules but some changes will be necessary to ensure full compliance with the Directive.

Barriers to Takeovers

14 There will be a need to provide for the barriers to takeovers provisions in the Directive. These provisions address matters such as the action that the management of a target company can take to frustrate a takeover bid and also include imposing the requirement for companies admitted to trading on a regulated market to publish consolidated details related to their governance and control structures in their annual report.

15 Modifications are required to bring the existing provisions in Great Britain (dealing with the problems of, and for, residual shareholders following a successful takeover bid) in the Companies Act 1985 into line with the requirements of the Directive. The provisions in the Directive dealing with squeeze-out and sell-out are referred to in paragraph 34 below.

16 Whilst, as noted above, there will be a need to legislate in respect of barriers to takeovers and squeeze-out and sell-out, by far the most important aspects of the Directive, in terms of the implementing legislation, are placing both the regulatory activities of the Takeover Panel and the Takeover Code within a statutory framework. Accordingly, the following paragraphs do not cover barriers to takeovers and squeeze-out and sell-out except in the concluding paragraph 23.

The Options for Implementation

17 The following options for placing takeover regulation within a statutory framework have been considered.

Option 1 – Do Nothing

18 Option 1 is a non-starter. Not implementing the Directive could lead to the Government facing infraction proceedings before the European Court of Justice since, under Community law, the provisions of the Directive have to be implemented by rules which have legally binding effect in some way. Currently, whilst there are substantive rules under the Takeover Code, there are no statutory provisions in Great Britain in many of the areas of takeover regulation covered by the Directive. Accordingly, options 2, 3 and 4 set out below are, in practice, the only options open to the Government in implementing the Directive.

Option 2 – Direct Statutory Provision

19 It would be possible to make provision (which could be done by regulations made under section 2(2) of the European Communities Act 1972) comprehensively setting out the rules necessary to implement the Directive (or adopting a version of the Takeover Code which was consistent with the Directive). The provisions would need to designate a supervisory body such as the Takeover Panel and provide it with the necessary powers. However, this approach leads to two significant problems, as follows:

- it would not be permissible under section 2(2) to delegate a rule-making power to the Takeover Panel. This would not be consistent with the current approach – which the Government is keen should continue – that the rules relating to takeover regulation should continue to be made and enforced by the Takeover Panel in its administration of the Takeover Code;

- although section 2(2) is wide enough to enable provision for matters arising out of, or related to, implementation of the Directive, all that might be necessary to produce a single regime, rather than parallel ones, could only be achieved through primary legislation. At present, the Takeover Panel regulates a number of matters which are not covered by the Directive, the principal example of which is takeover bids for public companies which are not admitted to trading on a regulated market. It would be illogical and confusing to create two parallel systems of takeover regulation, one of which fell within the statutory scope of section 2(2) regulations and one of which did not.

20 Consideration has been given as to whether there are powers in other primary legislation which would provide that the Directive could be implemented by secondary legislation. No such powers are available. In particular, the Regulatory Reform Order procedure under the Regulatory Reform Act 2001 could not be used in respect of the Directive since that procedure is restricted to the “reform” of existing legislation.

Option 3 – Give Recognition to the Takeover Code

21 A radically different approach would be to provide that failure to comply with the requirements of the Takeover Code as applied by the Takeover Panel became a breach of, for example, the Listing Rules made under Part 6 of the Financial Services and Markets Act 2000 (“the Listing Rules”). The Takeover Panel would continue to make and apply rules under the Takeover Code as at present. This would build upon the fact that both the jurisdiction and authority of the Takeover Panel and the Takeover Code are already expressly or implicitly recognised by the legislation and the courts. Such an approach would certainly require secondary legislation under section 2(2) of the European Communities Act, and may require primary legislation, but could avoid the need to include detailed rules or to confer an express rule-making power related to takeovers within the framework of that legislation. However, other important issues related to the constitution and powers of the Takeover Panel would still remain to be dealt with and such an approach to implementation has a number of further drawbacks:

- there are considerable legal uncertainties, in particular, as to whether recognition of a non-statutory Code as applied by a non-statutory body even with the back-up of the Listing Rules or other statutory support would constitute proper implementation of the Directive;
- such an approach would not remove the need to deal with a number of other issues relating to, for example, constitution, funding, control and liability of the Panel;

- an approach focussing on infringement of the Listing Rules would not effectively regulate certain key parties to takeover bids, including, for example, financial advisers, lawyers and shareholders.

Option 4 – Delegated Statutory Powers

22 The Directive could be implemented through replicating, to the greatest extent possible, the Panel's current jurisdiction, practices and procedures within a statutory framework, including giving the Takeover Panel the power to make statutory rules. Primary legislation would definitely be needed. The implementing legislation would have to confer a specific rule-making power and enforcement powers on the Takeover Panel, as well as addressing matters relating to constitution, funding and liability of the Panel. The principal risk with primary legislation is that placing the Takeover Panel within a fully statutory framework would represent a departure from the present position. Particular care would have to be taken to ensure that new legal rights or opportunities for tactical litigation were not inadvertently created as a consequence of this process and that necessary rule-making and jurisdictional powers were extended to the Takeover Panel which fully reflected its current remit. In addition, the uncertainties associated with securing Parliamentary passage, given that the Directive must be implemented by 20 May 2006, would need to be taken into account.

23 The Government has concluded that, in order to maintain the advantages of the current regime, the most transparent, effective and legally certain means of proceeding would be to place the regulatory activities of the Takeover Panel within a legislative regime in primary legislation when Parliamentary time allows.

Benefits and Costs – Sectors and Groups Affected

24 The Directive applies to companies whose shares are admitted to trading on a regulated market. There are approximately 1,700 companies which are both incorporated and traded in Great Britain and around a further 500 companies incorporated outside GB but traded in GB. Such companies will fall within all sectors of business and the Directive is not, therefore, restricted to particular sectors or groups.

25 The Directive does not apply to private limited companies or to public limited companies which are not admitted to trading on a regulated market. However, for the purposes of ensuring a consistent regulatory takeover regime for all companies and transactions, it is proposed that the Takeover Code as administered by the Takeover Panel (but now within a statutory framework) will continue to apply to certain companies not covered by the Directive (for example, public companies which are not traded) as it does now. The intention

behind this proposal is simply to ensure the continuation of the present situation where one rule-book, i.e. the Takeover Code, applies to all “takeover transactions” irrespective of whether or not they would fall within the scope of the Directive. This means that any changes to the Takeover Code which might be required in order to ensure that it complies with the requirements of the Directive will apply to all companies regulated by the Code.

Benefits – Economic

26 The principal benefits likely to arise from the Directive are in relation to the possible encouragement of cross-border takeover activity as a central element of the EU Financial Services Action Plan³. Takeover activity can serve to exploit business synergies, act as a discipline upon corporate management and allow shareholders to sell their shares for a price above the existing market value. Such advantages can benefit all those with a stake in the markets, whether directly or indirectly (such as through pensions funds). There are a number of specific provisions in the Directive that should be helpful in freeing up the market and making it more transparent. These measures are set out below.

Mandatory Bid Requirement

27 Article 5 of the Directive requires Member States to introduce a rule that where a party acquires a “specified” percentage of shares carrying voting rights it is required to make a bid for all the remaining shares (the so-called mandatory bid requirement). Article 5 reflects one of the key requirements in the Takeover Code. Without a mandatory bid requirement, shareholders will have no right of exit from the company which they may consider essential since their rights may, in effect, become subservient to those of a single dominant controlling shareholder. Moreover, they would not be able to benefit from the “control premium” attributable where the real control of a company changes hands. Again, a key provision in Great Britain takeover regulation is therefore reflected in the Directive. However, one deficiency of the Directive is that the threshold at which a mandatory bid has to be tabled (which in the Takeover Code is set at 30% of voting rights) is not prescribed in the Directive but is left to individual Member States to determine. Accordingly, Member States could set a very high threshold and thereby limit the protection offered to shareholders. However, whatever the level of the threshold, shareholders will receive protection which they may not currently be receiving under a Member State’s rules. GB shareholders of EU companies in other EU markets will therefore receive similar protection to shareholders of GB companies.

³ Communication from the Commission to the Council and the European Parliament: Modernising Company Law and Enhancing Corporate Governance in the European Union – a Plan to Move Forward. Com (2003) 284 Final. 21 May 2003.

Equitable Price

28 Article 5 of the Directive sets out the provision on “equitable price”. The equitable price is, broadly, the highest price paid by the offeror for the same shares during the period of not less than six months and not more than twelve months before the bid is tabled. Member States have the option to set the period within those parameters. When tabling a takeover bid, the offeror has to offer the offeree’s shareholders a price equivalent to at least the equitable price. In addition if, after the bid has been made public and before the offer closes for acceptances, the offeror purchases shares at higher than the offer price, the offeror has to increase the price so that it is not less than the highest price for the shares so acquired. Moreover, if the offeror’s offer does not consist of shares admitted to trading on a regulated market (i.e. they are shares which are not listed and therefore cannot easily be traded) the offeror has to offer a cash equivalent. Similar provisions are already included in the Takeover Code although the Code has a stricter requirement, which it will be possible to maintain post-implementation, in that a cash alternative has to be offered in all mandatory bid cases. The effect will again be to extend the rights and protection of GB shareholders of GB companies to GB shareholders of companies in other EU markets.

Disclosure by Companies of Control and Structure of their Shares

29 Articles 10(1) and 10(2) of the Directive require companies to provide, in their annual reports, detailed information on their share and control structures. This includes the following: structure of the share capital; restrictions on transfer of securities; significant shareholdings; shareholders with special control rights and a description of those rights; system of control of any employee share schemes; restrictions on voting rights; agreements between shareholders which may restrict transfers of securities or voting rights; rules governing the appointment and replacement of board members and changes to the articles; powers of board members to issue or buy back shares; significant agreements to which the company is a party which take effect, alter or terminate upon a change of control of the company following a takeover bid; and agreements providing for compensation to board members or employees resulting from resignation or redundancy following a takeover bid. Article 10(3) requires the boards of companies to present an explanatory report to shareholders on the above issues at the company’s AGM.

30 The disclosure requirements in articles 10(1) and 10(2) are broadly consistent with existing disclosure requirements under GB law and regulatory provisions (for instance, details relating to the structure of share capital and restrictions on transfer of shares will be contained in a company’s articles). However, the requirements to provide the information in a consolidated format is new as is the requirement in article 10(3) to report annually to shareholders. The latter requirement could be met by including some additional narrative

text in the annual report alongside the information required by articles 10(1) and 10(2). Alternatively, the explanatory report might be presented at the annual general meeting.

31 The intention behind the requirements of article 10 is to help break down barriers to takeovers and to bring greater transparency to the market. By requiring companies to disclose share structures which clearly disadvantage certain shareholders and act as a disincentive to new investment (such as share structures which give disproportionate and unjustifiable voting rights to certain shareholders) companies may be encouraged to change to more open systems such as share structures which consist solely of one share, one vote. The requirements apply to all companies whose shares are admitted to trading on a regulated market whether or not they are involved in a takeover. Accordingly, the requirements will apply to all companies registered in the EU which have shares listed in London or any other European Stock Exchange.

Frustrating Action

32 Article 9 of the Directive restricts the management of an offeree from taking action to frustrate a bid (i.e. with the intention of delaying or stopping a bid) without the prior authorisation of shareholders at a general meeting given for this purpose during the period of acceptance of the bid. (The offeree may, however, seek alternative bids.) Article 9 cites, specifically, the issuing of new shares as an example of frustrating action which could lead to a lasting impediment to the offeror gaining control of the offeree. Article 9 is closely in line with key provisions of the Takeover Code which are central to minority shareholder protection.

33 The one downside is that, under article 12, Member States may decide not to implement article 9 although, also under article 12, Member States which do not implement article 9 must allow, under their national implementing legislation, companies voluntarily to opt back in, and therefore be subject to the requirements of article 9, if they receive the agreement of their shareholders at a general meeting. It is the intention of the UK to implement article 9 which will, therefore, continue the protection from which GB which shareholders already benefit under the Takeover Code. A provision along the lines of article 9 was one of the key requirements for the UK when negotiating the Directive. Market forces may also dictate that companies which are not subject to article 9 through their Member States' implementing legislation will nevertheless force companies to adopt more transparent and liberal regimes.

Squeeze-out and Sell-out

34 Section 429 of the Companies Act 1985 provides that, following a takeover bid, once the offeror has acquired, or contracted to acquire, at least 90% of the shares under offer, the offeror has the right (often referred to as “squeeze-out”, although not in the Act) to purchase the remaining minority shares. The right to buy the remaining shares is designed to enable a purchaser who has already acquired the large majority of a company to acquire the relatively few remaining shares in order to facilitate any restructuring which he may wish to carry out. There is a corresponding provision (often referred to as “sell-out”, although again not in the Act) in section 430A that requires the offeror to purchase a minority shareholder’s shares – at that shareholder’s request – once the offeror has acquired or contracted to acquire 90% of the shares in the company or in a class of shares in the company: this threshold is more easily crossed than the squeeze-out threshold, tilting the balance in favour of minority shareholders. Articles 15 and 16 of the Directive include squeeze-out and sell-out provisions which are broadly consistent with sections 429 and 430A, although the details are not identical. The effect is that one of the key post-takeover regulatory provisions in Great Britain will apply across the EU. Accordingly, GB shareholders in EU companies registered in other EU states will receive the same or similar protection to shareholders in GB companies.

Benefits – Environmental and Social

35 The Directive would appear not to include any environmental or social benefits.

Costs – Economic

36 The implementation of the Directive will result in a change of the legal basis of takeover regulation in Great Britain since both the Takeover Panel and the Takeover Code will be placed within a statutory framework for the first time. The very existence of the Takeovers Directive creates a legislative environment which did not exist previously. It also introduces, inevitably, the possibility of new legal considerations and challenges, and the associated costs.

37 As explained in paragraphs 17 – 23 above, along with the Takeover Panel and others participating and advising in the takeover field, the Government has considered in detail the practical and legal implications of the various options for implementing the Takeovers Directive. The Government has concluded that the most transparent, effective and legally certain means of proceeding is to place the activities of the Takeover Panel within a legislative regime in primary legislation.

38 The Directive will not require significant changes to the Takeover Code since much of the substance of the Directive reflects the approach already adopted in Great Britain. Accordingly, very few costs will be imposed on companies resulting from the implementing of the Directive. In addition, since the Directive applies only to companies whose shares are admitted to trading on a regulated market – the Takeover Code applies to all public companies – it will not bring more companies within the scope of takeover regulation.

39 The one exception to the basic premise set out in paragraph 38 above is the disclosure requirements that will be imposed on all companies with shares that are admitted to trading on a regulated market under article 10 of the Directive. As paragraphs 29 to 31 above make clear, companies will be required to include various facts and figures relating to the control and structure of their shares in their annual reports and to make a report to their shareholders at the company's AGM.

40 All of the information required by article 10(1) will be readily known to companies (or at least be accessible) and some is likely already to be included in annual reports. However, it is unlikely that any company would presently make a report on such information to its shareholders, as required by article 10(3). It therefore follows that the principal cost will be in staff time in:

- initially researching and preparing the information in the format required by the Directive;
- updating it as and when necessary;
- drafting the report(s).

It seems unlikely that the costs of producing and printing the annual report will increase as a result of the new article 10 requirements.

41 The amount of time that will be taken up preparing the information and drafting the report will clearly vary from company to company. However, if it assumed that a manager would spend between four and eight hours on this work the cost would be, approximately, between £100 and £200⁴. It seems likely that most companies would seek the opinion of a solicitor on the information set out in the annual report (most companies will, in any case, employ a solicitor to consider their annual reports prior to publication) and if it assumed that a solicitor would spend between one and two hours considering the information the cost would be, approximately, between £300 and £600⁵.

⁴ In 2003, the average hourly pay, excluding overtime, of a manager/senior official in Great Britain was £19.28. The cost of a manager's time, including non-wage costs and overheads is estimated at 30% of wage costs. The hourly cost of a manager's time is, therefore, £19.28 x 1.3 = £25.06. Source: New Earnings Survey (NES) 2003.

⁵ This is based on a rough estimate of hourly fees of £300 (excluding VAT).

Accordingly, in the first year following implementation of the Directive, the cost per company of complying with article 10 would, on the above basis, be between £400 and £800. Costs in subsequent years would depend on the extent to which the circumstances of the company changed during the course of the reporting year but would almost certainly, for the majority of companies, be less.

42 As noted in paragraph 24 above, the Directive applies only to companies whose shares are admitted to trading on a regulated market. There are approximately 1,700 such companies incorporated and traded in Great Britain and the cost per annum, therefore, for all GB companies is estimated to be between £680,000 and £1,360,000. It is, however, possible that some costs might be offset to some extent by the increased ease of access to information on share and control structures on companies elsewhere within the EU and from wider benefits to a company arising from periodic review of the appropriateness of its corporate structures.

Costs – Environmental and Social

43 The Directive would appear not to impose any environmental or social costs.

Equity and Fairness

44 The Directive applies only to companies whose shares are admitted to trading on a regulated market. Accordingly, it will apply only to public companies and only to those GB registered public companies whose shares are admitted to trading on the London Stock Exchange (which will exclude AIM companies since AIM no longer constitutes a regulated market) or another EU exchange. It is estimated that there are 1,700 such companies. All other public companies (i.e. 11,300 of the total of 13,000 public companies) will not be affected by the Directive but will continue to be subject to the Takeover Code. The Takeover Code applies to private companies only in very limited circumstances. Accordingly, the Directive will not affect the 2.1m GB registered private companies. Public companies whose shares are admitted to trading on a regulated market will need to comply with the article 10 requirements referred to in paragraphs 29 to 31 above but otherwise the requirements that they will need to comply with will be the same (Takeover Code requirements) faced by other public companies.

Consultation with Small Business: the Small Firms' Impact Test

45 The Directive will have no effect on small firms since it applies only to public companies whose shares are admitted to trading on a regulated market. It is a requirement of company law that the minimum share capital of a public

company is £50,000. Moreover, it is a requirement of the Financial Services Authority's Listing Rules that no company may list on the London Stock Exchange unless it has a minimum share capital of £700,000. Most small businesses will be private companies or sole traders and, even though some will be public companies, none will have a share capital of £700,000.

Competition Assessment

46 The Directive will affect all markets since takeovers are not restricted to any particular sector. It is not anticipated that the costs of the Directive will affect some firms substantially more than others, nor that the Directive will lead to higher set-up costs or ongoing costs for new or potential firms that existing firms will not have to meet. The Directive will not restrict the ability of firms to choose the price, quality, range or location of their products.

47 The Directive, in itself, is not likely to affect market structure in Great Britain, i.e. it will not change the number or size of firms in GB. Whilst takeovers clearly result in a change to the numbers and size of companies, it is not anticipated that the Directive will have any effect on takeovers of GB companies, i.e. companies will not be encouraged or discouraged by the Directive to embark on takeovers of GB companies that they would not otherwise have done. However, as noted in paragraph 26 above, it is possible that the Directive may result in more takeovers by GB companies of companies in other EU States. It is not anticipated that the Directive will affect competition, either positively or negatively, in GB.

Enforcement and Sanctions

48 In the main, the Directive's provisions will be included in the Takeover Panel's Takeover Code. Most of the provisions are already included in the Takeover Code in one form or another although some minor changes will need to be made. The Takeover Code will, for the most part, continue to be enforced as it is now. The Takeover Panel's rules are presently enforced largely without the availability of statutory powers or sanctions. Notwithstanding the relative informality of the Takeover Panel's existing powers and sanctions, a high level of compliance with the Takeover Code and the rulings of the Takeover Panel has been attained. The absence of formality has been seen as a strength of the Takeover Panel in achieving speed in decision making and a good degree of openness from those involved in the takeover bid process.

49 Consistent with the obligation to implement the Directive effectively, it is proposed that a relatively light touch approach should be adopted in the implementing legislation in relation to the formal sanctions of the Takeover Panel. At present, the Takeover Panel may resort to private or public censure of persons in breach of the Takeover Code. In addition, the Takeover Panel may

seek to draw misconduct, in relation to the Takeover Code, to the attention of other regulatory authorities. The Financial Services Authority (FSA) may consider such misconduct to be a basis for bringing disciplinary action against financial advisers authorised by the FSA under the Financial Services and Markets Act 2000. Moreover, particularly flagrant breaches of the Takeover Code may also lead to the Takeover Panel publishing a statement indicating that the offender is someone who is not likely to comply with the Takeover Code. The rules of the FSA and certain professional bodies oblige their members, in certain circumstances, not to act for such persons in a transaction subject to the Takeover Code, including dealing in relevant securities requiring disclosure under rule 8 of the Takeover Code (so-called “cold-shouldering”).

50 Consideration has been given to extending the formal powers of sanction available to the Takeover Panel in relation to misconduct in the course of takeover proceedings, for instance by conferring a fining power on the Takeover Panel or by providing that a breach of the Takeover Code would be a breach of the Listing Rules. In general, it has been concluded that extension of further formal sanction powers would not lead to significantly improved compliance with the Takeover Code, especially given the high level of compliance already achieved. Moreover, the Takeover Panel’s right to censure persons will specifically be included in the rule-making power proposed to be extended to the Takeover Panel by the implementing legislation.

51 It is proposed that the Takeover Panel be given an important statutory power to order restitution or financial redress in consequence of a breach of certain of the rules which may require monetary payments to be made in specific circumstances (for instance, to order a bidder to pay to shareholders any difference between the price actually paid and any higher price for shares that the bidder would have been obliged to pay under the relevant Takeover Code provisions in making a bid, together with interest).

52 The initial focus of the Takeover Panel will remain on bringing those in contravention of the Takeover Code into compliance during the regulatory process. Consideration will continue to be given, subsequently, to the need for disciplinary action.

53 Two exceptions in respect of how the Directive will be enforced and by whom relate to the provisions on squeeze-out and sell-out and on disclosure. Sections 429 and 430A of the Companies Act 1985 already include provisions on squeeze-out and sell-out and will need to be amended in order to implement the Directive. Section 234 of, and Schedule 7 to, the 1985 Act deal with the contents of annual reports and will need to be amended to implement the disclosure requirements of article 10. Enforcement of company law – including sections 429/430A and section 234/Schedule 7, all of which make

provision for criminal penalties for non-compliance (although the enforcement of sections 429 and 430A is largely a matter of civil remedies) – is the responsibility of the Department of Trade and Industry (DTI).

Monitoring and Review

54 Article 20 of the Directive provides that the Commission shall, in 2011, examine the Directive in the light of experience and, if necessary, propose its revision. The examination is to include a survey of the control structures and barriers to takeover bids that are not covered by the Directive. To help the Commission with its examination, article 20 requires Member States to provide the Commission annually with detailed information relating to takeover activity. DTI and the Takeover Panel will also keep the implementation of the Takeovers Directive under review and, if necessary, propose amendments to the Takeover Code and to the implementing legislation. The Takeover Panel routinely makes amendments to the Takeover Code (three such changes were made in 2003) and on which it consults. Implementation of the Directive will not affect the Takeover Panel's ability to propose changes to the Takeover Code although such changes will, of course, have to be compatible with the Directive.

Consultation

Within Government

55 DTI consulted widely within Government including the Cabinet Office, Department for Constitutional Affairs, HM Treasury and Department of Enterprise, Trade and Investment (Northern Ireland) as well as the Financial Services Authority and Small Business Service before the issuing of the January 2005 consultative document.

Public Consultation

56 DTI also consulted a number of organisations that were considered to have a particular interest in the Takeovers Directive both during the negotiations on the Directive and before the issuing of the January 2005 consultative document. These organisations included the Takeover Panel, representatives of the legal profession, merchant banking and investment communities and companies that might be affected by the provisions of the Directive.

Summary and Recommendation

57 Action is required to implement the Takeovers Directive. The responses to the January 2005 consultative document will help to determine which method of implementation the Government adopts.

Contact Point

58 Queries on this Partial Regulatory Impact Assessment should be addressed to:

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Annex E: Takeovers Directive

L 142 Official Journal of the European Union 30.4.2004

**Directive 2004/25/EC of the European Parliament and of the Council
of 21 April 2004 on Takeover Bids**

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 44(1) thereof,

Having regard to the proposal from the Commission⁶,

Having regard to the opinion of the European Economic and Social Committee⁷,

Acting in accordance with the procedure laid down in Article 251 of the Treaty⁸,

Whereas:

(1) In accordance with Article 44(2)(g) of the Treaty, it is necessary to coordinate certain safeguards which, for the protection of the interests of members and others, Member States require of companies governed by the law of a Member State the securities of which are admitted to trading on a regulated market in a Member State, with a view to making such safeguards equivalent throughout the Community.

(2) It is necessary to protect the interests of holders of the securities of companies governed by the law of a Member State when those companies are the subject of takeover bids or of changes of control and at least some of their securities are admitted to trading on a regulated market in a Member State.

(3) It is necessary to create Community-wide clarity and transparency in respect of legal issues to be settled in the event of takeover bids and to prevent patterns of corporate restructuring within the Community from being distorted by arbitrary differences in governance and management cultures.

⁶ OJ C 45 E, 25.2.2003, p. 1.

⁷ OJ C 208, 3.9.2003, p. 55.

⁸ Opinion of the European Parliament of 16 December 2003 (not yet published in the Official Journal) and Council decision of 30 March 2004.

(4) In view of the public-interest purposes served by the central banks of the Member States, it seems inconceivable that they should be the targets of takeover bids. Since, for historical reasons, the securities of some of those central banks are listed on regulated markets in Member States, it is necessary to exclude them explicitly from the scope of this Directive.

(5) Each Member State should designate an authority or authorities to supervise those aspects of bids that are governed by this Directive and to ensure that parties to takeover bids comply with the rules made pursuant to this Directive. All those authorities should cooperate with one another.

(6) In order to be effective, takeover regulation should be flexible and capable of dealing with new circumstances as they arise and should accordingly provide for the possibility of exceptions and derogations. However, in applying any rules or exceptions laid down or in granting any derogations, supervisory authorities should respect certain general principles.

(7) Self-regulatory bodies should be able to exercise supervision.

(8) In accordance with general principles of Community law, and in particular the right to a fair hearing, decisions of a supervisory authority should in appropriate circumstances be susceptible to review by an independent court or tribunal. However, Member States should be left to determine whether rights are to be made available which may be asserted in administrative or judicial proceedings, either in proceedings against a supervisory authority or in proceedings between parties to a bid.

(9) Member States should take the necessary steps to protect the holders of securities, in particular those with minority holdings, when control of their companies has been acquired. The Member States should ensure such protection by obliging the person who has acquired control of a company to make an offer to all the holders of that company's securities for all of their holdings at an equitable price in accordance with a common definition. Member States should be free to establish further instruments for the protection of the interests of the holders of securities, such as the obligation to make a partial bid where the offeror does not acquire control of the company or the obligation to announce a bid at the same time as control of the company is acquired.

(10) The obligation to make a bid to all the holders of securities should not apply to those controlling holdings already in existence on the date on which the national legislation transposing this Directive enters into force.

(11) The obligation to launch a bid should not apply in the case of the acquisition of securities which do not carry the right to vote at ordinary general meetings of shareholders. Member States should, however, be able to provide that the obligation to make a bid to all the holders of securities relates not only to securities carrying voting rights but also to securities which carry voting rights only in specific circumstances or which do not carry voting rights.

(12) To reduce the scope for insider dealing, an offeror should be required to announce his/her decision to launch a bid as soon as possible and to inform the supervisory authority of the bid.

(13) The holders of securities should be properly informed of the terms of a bid by means of an offer document. Appropriate information should also be given to the representatives of the company's employees or, failing that, to the employees directly.

(14) The time allowed for the acceptance of a bid should be regulated.

(15) To be able to perform their functions satisfactorily, supervisory authorities should at all times be able to require the parties to a bid to provide information concerning themselves and should cooperate and supply information in an efficient and effective manner, without delay, to other authorities supervising capital markets.

(16) In order to prevent operations which could frustrate a bid, the powers of the board of an offeree company to engage in operations of an exceptional nature should be limited, without unduly hindering the offeree company in carrying on its normal business activities.

(17) The board of an offeree company should be required to make public a document setting out its opinion of the bid and the reasons on which that opinion is based, including its views on the effects of implementation on all the company's interests, and specifically on employment.

(18) In order to reinforce the effectiveness of existing provisions concerning the freedom to deal in the securities of companies covered by this Directive and the freedom to exercise voting rights, it is essential that the defensive structures and mechanisms envisaged by such companies be transparent and that they be regularly presented in reports to general meetings of shareholders.

(19) Member States should take the necessary measures to afford any offeror the possibility of acquiring majority interests in other companies and of fully exercising control of them. To that end, restrictions on the transfer of

securities, restrictions on voting rights, extraordinary appointment rights and multiple voting rights should be removed or suspended during the time allowed for the acceptance of a bid and when the general meeting of shareholders decides on defensive measures, on amendments to the articles of association or on the removal or appointment of board members at the first general meeting of shareholders following closure of the bid. Where the holders of securities have suffered losses as a result of the removal of rights, equitable compensation should be provided for in accordance with the technical arrangements laid down by Member States.

(20) All special rights held by Member States in companies should be viewed in the framework of the free movement of capital and the relevant provisions of the Treaty. Special rights held by Member States in companies which are provided for in private or public national law should be exempted from the 'breakthrough' rule if they are compatible with the Treaty.

(21) Taking into account existing differences in Member States' company law mechanisms and structures, Member States should be allowed not to require companies established within their territories to apply the provisions of this Directive limiting the powers of the board of an offeree company during the time allowed for the acceptance of a bid and those rendering ineffective barriers, provided for in the articles of association or in specific agreements. In that event Member States should at least allow companies established within their territories to make the choice, which must be reversible, to apply those provisions. Without prejudice to international agreements to which the European Community is a party, Member States should be allowed not to require companies which apply those provisions in accordance with the optional arrangements to apply them when they become the subject of offers launched by companies which do not apply the same provisions, as a consequence of the use of those optional arrangements.

(22) Member States should lay down rules to cover the possibility of a bid's lapsing, the offeror's right to revise his/her bid, the possibility of competing bids for a company's securities, the disclosure of the result of a bid, the irrevocability of a bid and the conditions permitted.

(23) The disclosure of information to and the consultation of representatives of the employees of the offeror and the offeree company should be governed by the relevant national provisions, in particular those adopted pursuant to Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community scale groups of undertakings for the purposes of informing and consulting employees⁹, Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective

⁹ OJ L 254, 30.9.1994, p. 64. Directive as amended by Directive 97/74/EC (OJ L 10, 16.1.1998, p. 22).

redundancies¹⁰, Council Directive 2001/86/EC of 8 October 2001 supplementing the statute for a European Company with regard to the involvement of employees¹¹ and Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community – Joint declaration of the European Parliament, the Council and the Commission on employee representation¹². The employees of the companies concerned, or their representatives, should nevertheless be given an opportunity to state their views on the foreseeable effects of the bid on employment. Without prejudice to the rules of Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse)¹³, Member States may always apply or introduce national provisions concerning the disclosure of information to and the consultation of representatives of the employees of the offeror before an offer is launched.

(24) Member States should take the necessary measures to enable an offeror who, following a takeover bid, has acquired a certain percentage of a company's capital carrying voting rights to require the holders of the remaining securities to sell him/her their securities. Likewise, where, following a takeover bid, an offeror has acquired a certain percentage of a company's capital carrying voting rights, the holders of the remaining securities should be able to require him/her to buy their securities. These squeeze-out and sell-out procedures should apply only under specific conditions linked to takeover bids. Member States may continue to apply national rules to squeeze-out and sellout procedures in other circumstances.

(25) Since the objectives of the action envisaged, namely to establish minimum guidelines for the conduct of takeover bids and ensure an adequate level of protection for holders of securities throughout the Community, cannot be sufficiently achieved by the Member States because of the need for transparency and legal certainty in the case of cross border takeovers and acquisitions of control, and can therefore, by reason of the scale and effects of the action, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary to achieve those objectives.

(26) The adoption of a Directive is the appropriate procedure for the establishment of a framework consisting of certain common principles and a limited number of general requirements which Member States are to implement through more detailed rules in accordance with their national systems and their cultural contexts.

¹⁰ OJ L 225, 12.8.1998, p. 16.

¹¹ OJ L 294, 10.11.2001, p. 22.

¹² OJ L 80, 23.3.2002, p. 29.

¹³ OJ L 96, 12.4.2003, p. 16.

(27) Member States should, however, provide for sanctions for any infringement of the national measures transposing this Directive.

(28) Technical guidance and implementing measures for the rules laid down in this Directive may from time to time be necessary, to take account of new developments on financial markets. For certain provisions, the Commission should accordingly be empowered to adopt implementing measures, provided that these do not modify the essential elements of this Directive and the Commission acts in accordance with the principles set out in this Directive, after consulting the European Securities Committee established by Commission Decision 2001/528/EC¹⁴. The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission¹⁵ and with due regard to the declaration made by the Commission in the European Parliament on 5 February 2002 concerning the implementation of financial services legislation. For the other provisions, it is important to entrust a contact committee with the task of assisting Member States and the supervisory authorities in the implementation of this Directive and of advising the Commission, if necessary, on additions or amendments to this Directive. In so doing, the contact committee may make use of the information which Member States are to provide on the basis of this Directive concerning takeover bids that have taken place on their regulated markets.

(29) The Commission should facilitate movement towards the fair and balanced harmonisation of rules on takeovers in the European Union. To that end, the Commission should be able to submit proposals for the timely revision of this Directive,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Scope

1. This Directive lays down measures coordinating the laws, regulations, administrative provisions, codes of practice and other arrangements of the Member States, including arrangements established by organisations officially authorised to regulate the markets (hereinafter referred to as 'rules'), relating to takeover bids for the securities of companies governed by the laws of Member States, where all or some of those securities are admitted to trading on a regulated market within the meaning of Directive 93/22/EEC¹⁶ in one or more Member States (hereinafter referred to as a 'regulated market').

¹⁴ OJ L 191, 13.7.2001, p. 45. Decision as amended by Decision 2004/8/EC (OJ L 3, 7.1.2004, p. 33).

¹⁵ OJ L 184, 17.7.1999, p. 23.

¹⁶ Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field (OJ L 141, 11.6.1993, p. 27). Directive as last amended by Directive 2002/87/EC of the European Parliament and of the Council (OJ L 35, 11.2.2003, p. 1).

2. This Directive shall not apply to takeover bids for securities issued by companies, the object of which is the collective investment of capital provided by the public, which operate on the principle of risk-spreading and the units of which are, at the holders' request, repurchased or redeemed, directly or indirectly, out of the assets of those companies. Action taken by such companies to ensure that the stock exchange value of their units does not vary significantly from their net asset value shall be regarded as equivalent to such repurchase or redemption.

3. This Directive shall not apply to takeover bids for securities issued by the Member States' central banks.

Article 2

Definitions

1. For the purposes of this Directive:

(a) 'takeover bid' or 'bid' shall mean a public offer (other than by the offeree company itself) made to the holders of the securities of a company to acquire all or some of those securities, whether mandatory or voluntary, which follows or has as its objective the acquisition of control of the offeree company in accordance with national law;

(b) 'offeree company' shall mean a company, the securities of which are the subject of a bid;

(c) 'offeror' shall mean any natural or legal person governed by public or private law making a bid;

(d) 'persons acting in concert' shall mean natural or legal persons who cooperate with the offeror or the offeree company on the basis of an agreement, either express or tacit, either oral or written, aimed either at acquiring control of the offeree company or at frustrating the successful outcome of a bid;

(e) 'securities' shall mean transferable securities carrying voting rights in a company;

(f) 'parties to the bid' shall mean the offeror, the members of the offeror's board if the offeror is a company, the offeree company, holders of securities of the offeree company and the members of the board of the offeree company, and persons acting in concert with such parties;

(g) 'multiple-vote securities' shall mean securities included in a distinct and separate class and carrying more than one vote each.

2. For the purposes of paragraph 1(d), persons controlled by another person within the meaning of Article 87 of Directive 2001/34/EC¹⁷ shall be deemed to be persons acting in concert with that other person and with each other.

Article 3

General principles

1. For the purpose of implementing this Directive, Member States shall ensure that the following principles are complied with:

(a) all holders of the securities of an offeree company of the same class must be afforded equivalent treatment; moreover, if a person acquires control of a company, the other holders of securities must be protected;

(b) the holders of the securities of an offeree company must have sufficient time and information to enable them to reach a properly informed decision on the bid; where it advises the holders of securities, the board of the offeree company must give its views on the effects of implementation of the bid on employment, conditions of employment and the locations of the company's places of business;

(c) the board of an offeree company must act in the interests of the company as a whole and must not deny the holders of securities the opportunity to decide on the merits of the bid;

(d) false markets must not be created in the securities of the offeree company, of the offeror company or of any other company concerned by the bid in such a way that the rise or fall of the prices of the securities becomes artificial and the normal functioning of the markets is distorted;

(e) an offeror must announce a bid only after ensuring that he/she can fulfill in full any cash consideration, if such is offered, and after taking all reasonable measures to secure the implementation of any other type of consideration;

(f) an offeree company must not be hindered in the conduct of its affairs for longer than is reasonable by a bid for its securities.

¹⁷ Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities (OJ L 184, 6.7.2001, p. 1). Directive as last amended by Directive 2003/71/EC (OJ L 345, 31.12.2003, p. 64).

2. With a view to ensuring compliance with the principles laid down in paragraph 1, Member States:

(a) shall ensure that the minimum requirements set out in this Directive are observed;

(b) may lay down additional conditions and provisions more stringent than those of this Directive for the regulation of bids.

Article 4

Supervisory authority and applicable law

1. Member States shall designate the authority or authorities competent to supervise bids for the purposes of the rules which they make or introduce pursuant to this Directive. The authorities thus designated shall be either public authorities, associations or private bodies recognised by national law or by public authorities expressly empowered for that purpose by national law. Member States shall inform the Commission of those designations, specifying any divisions of functions that may be made. They shall ensure that those authorities exercise their functions impartially and independently of all parties to a bid.

2. (a) The authority competent to supervise a bid shall be that of the Member State in which the offeree company has its registered office if that company's securities are admitted to trading on a regulated market in that Member State.

(b) If the offeree company's securities are not admitted to trading on a regulated market in the Member State in which the company has its registered office, the authority competent to supervise the bid shall be that of the Member State on the regulated market of which the company's securities are admitted to trading.

If the offeree company's securities are admitted to trading on regulated markets in more than one Member State, the authority competent to supervise the bid shall be that of the Member State on the regulated market of which the securities were first admitted to trading.

(c) If the offeree company's securities were first admitted to trading on regulated markets in more than one Member State simultaneously, the offeree company shall determine which of the supervisory authorities of those Member States shall be the authority competent to supervise the bid by notifying those regulated markets and their supervisory authorities on the first day of trading.

If the offeree company's securities have already been admitted to trading on regulated markets in more than one Member State on the date laid down in Article 21(1) and were admitted simultaneously, the supervisory authorities of those Member States shall agree which one of them shall be the authority competent to supervise the bid within four weeks of the date laid down in Article 21(1). Otherwise, the offeree company shall determine which of those authorities shall be the competent authority on the first day of trading following that four-week period.

(d) Member States shall ensure that the decisions referred to in (c) are made public.

(e) In the cases referred to in (b) and (c), matters relating to the consideration offered in the case of a bid, in particular the price, and matters relating to the bid procedure, in particular the information on the offeror's decision to make a bid, the contents of the offer document and the disclosure of the bid, shall be dealt with in accordance with the rules of the Member State of the competent authority. In matters relating to the information to be provided to the employees of the offeree company and in matters relating to company law, in particular the percentage of voting rights which confers control and any derogation from the obligation to launch a bid, as well as the conditions under which the board of the offeree company may undertake any action which might result in the frustration of the bid, the applicable rules and the competent authority shall be those of the Member State in which the offeree company has its registered office.

3. Member States shall ensure that all persons employed or formerly employed by their supervisory authorities are bound by professional secrecy. No information covered by professional secrecy may be divulged to any person or authority except under provisions laid down by law.

4. The supervisory authorities of the Member States for the purposes of this Directive and other authorities supervising capital markets, in particular in accordance with Directive 93/22/EEC, Directive 2001/34/EC, Directive 2003/6/EC and Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading shall cooperate and supply each other with information wherever necessary for the application of the rules drawn up in accordance with this Directive and in particular in cases covered by paragraph 2(b), (c) and (e). Information thus exchanged shall be covered by the obligation of professional secrecy to which persons employed or formerly employed by the supervisory authorities receiving the information are subject. Cooperation shall include the ability to serve the legal documents necessary to enforce measures taken by the competent authorities in connection with bids, as well as such other assistance as may reasonably be requested by the supervisory authorities concerned for the purpose of investigating any actual or alleged breaches of the rules made or introduced pursuant to this Directive.

5. The supervisory authorities shall be vested with all the powers necessary for the purpose of carrying out their duties, including that of ensuring that the parties to a bid comply with the rules made or introduced pursuant to this Directive.

Provided that the general principles laid down in Article 3(1) are respected, Member States may provide in the rules that they make or introduce pursuant to this Directive for derogations from those rules:

(i) by including such derogations in their national rules, in order to take account of circumstances determined at national level

and/or

(ii) by granting their supervisory authorities, where they are competent, powers to waive such national rules, to take account of the circumstances referred to in (i) or in other specific circumstances, in which case a reasoned decision must be required.

6. This Directive shall not affect the power of the Member States to designate judicial or other authorities responsible for dealing with disputes and for deciding on irregularities committed in the course of bids or the power of Member States to regulate whether and under which circumstances parties to a bid are entitled to bring administrative or judicial proceedings. In particular, this Directive shall not affect the power which courts may have in a Member State to decline to hear legal proceedings and to decide whether or not such proceedings affect the outcome of a bid. This Directive shall not affect the power of the Member States to determine the legal position concerning the liability of supervisory authorities or concerning litigation between the parties to a bid.

Article 5

Protection of minority shareholders, the mandatory bid and the equitable price

1. Where a natural or legal person, as a result of his/her own acquisition or the acquisition by persons acting in concert with him/her, holds securities of a company as referred to in Article 1(1) which, added to any existing holdings of those securities of his/hers and the holdings of those securities of persons acting in concert with him/her, directly or indirectly give him/her a specified percentage of voting rights in that company, giving him/her control of that company, Member States shall ensure that such a person is required to make a bid as a means of protecting the minority shareholders of that company. Such a bid shall be addressed at the earliest opportunity to all the holders of those securities for all their holdings at the equitable price as defined in paragraph 4.

2. Where control has been acquired following a voluntary bid made in accordance with this Directive to all the holders of securities for all their holdings, the obligation laid down in paragraph 1 to launch a bid shall no longer apply.

3. The percentage of voting rights which confers control for the purposes of paragraph 1 and the method of its calculation shall be determined by the rules of the Member State in which the company has its registered office.

4. The highest price paid for the same securities by the offeror, or by persons acting in concert with him/her, over a period, to be determined by Member States, of not less than six months and not more than 12 before the bid referred to in paragraph 1 shall be regarded as the equitable price. If, after the bid has been made public and before the offer closes for acceptance, the offeror or any person acting in concert with him/her purchases securities at a price higher than the offer price, the offeror shall increase his/her offer so that it is not less than the highest price paid for the securities so acquired.

Provided that the general principles laid down in Article 3(1) are respected, Member States may authorise their supervisory authorities to adjust the price referred to in the first subparagraph in circumstances and in accordance with criteria that are clearly determined. To that end, they may draw up a list of circumstances in which the highest price may be adjusted either upwards or downwards, for example where the highest price was set by agreement between the purchaser and a seller, where the market prices of the securities in question have been manipulated, where market prices in general or certain market prices in particular have been affected by exceptional occurrences, or in order to enable a firm in difficulty to be rescued. They may also determine the criteria to be applied in such cases, for example the average market value over a particular period, the break-up value of the company or other objective valuation criteria generally used in financial analysis.

Any decision by a supervisory authority to adjust the equitable price shall be substantiated and made public.

5. By way of consideration the offeror may offer securities, cash or a combination of both.

However, where the consideration offered by the offeror does not consist of liquid securities admitted to trading on a regulated market, it shall include a cash alternative.

In any event, the offeror shall offer a cash consideration at least as an alternative where he/she or persons acting in concert with him/her, over a period beginning at the same time as the period determined by the Member State in accordance with paragraph 4 and ending when the offer closes for acceptance, has purchased for cash securities carrying 5 % or more of the voting rights in the offeree company.

Member States may provide that a cash consideration must be offered, at least as an alternative, in all cases.

6. In addition to the protection provided for in paragraph 1, Member States may provide for further instruments intended to protect the interests of the holders of securities in so far as those instruments do not hinder the normal course of a bid.

Article 6

Information concerning bids

1. Member States shall ensure that a decision to make a bid is made public without delay and that the supervisory authority is informed of the bid. They may require that the supervisory authority must be informed before such a decision is made public. As soon as the bid has been made public, the boards of the offeree company and of the offeror shall inform the representatives of their respective employees or, where there are no such representatives, the employees themselves.

2. Member States shall ensure that an offeror is required to draw up and make public in good time an offer document containing the information necessary to enable the holders of the offeree company's securities to reach a properly informed decision on the bid. Before the offer document is made public, the offeror shall communicate it to the supervisory authority. When it is made public, the boards of the offeree company and of the offeror shall communicate it to the representatives of their respective employees or, where there are no such representatives, to the employees themselves.

Where the offer document referred to in the first subparagraph is subject to the prior approval of the supervisory authority and has been approved, it shall be recognised, subject to any translation required, in any other Member State on the market of which the offeree company's securities are admitted to trading, without its being necessary to obtain the approval of the supervisory authorities of that Member State. Those authorities may require the inclusion of additional information in the offer document only if such information is specific to the market of a Member State or Member States on which the offeree company's securities are admitted to trading and relates to the formalities to be complied with to accept the bid and to receive the consideration due at the close of the bid as well as to the tax arrangements to which the consideration offered to the holders of the securities will be subject.

3. The offer document referred to in paragraph 2 shall state at least:

(a) the terms of the bid;

(b) the identity of the offeror and, where the offeror is a company, the type, name and registered office of that company;

- (c) the securities or, where appropriate, the class or classes of securities for which the bid is made;
- (d) the consideration offered for each security or class of securities and, in the case of a mandatory bid, the method employed in determining it, with particulars of the way in which that consideration is to be paid;
- (e) the compensation offered for the rights which might be removed as a result of the breakthrough rule laid down in Article 11(4), with particulars of the way in which that compensation is to be paid and the method employed in determining it;
- (f) the maximum and minimum percentages or quantities of securities which the offeror undertakes to acquire;
- (g) details of any existing holdings of the offeror, and of persons acting in concert with him/her, in the offeree company;
- (h) all the conditions to which the bid is subject;
- (i) the offeror's intentions with regard to the future business of the offeree company and, in so far as it is affected by the bid, the offeror company and with regard to the safeguarding of the jobs of their employees and management, including any material change in the conditions of employment, and in particular the offeror's strategic plans for the two companies and the likely repercussions on employment and the locations of the companies' places of business;
- (j) the time allowed for acceptance of the bid;
- (k) where the consideration offered by the offeror includes securities of any kind, information concerning those securities;
- (l) information concerning the financing for the bid;
- (m) the identity of persons acting in concert with the offeror or with the offeree company and, in the case of companies, their types, names, registered offices and relationships with the offeror and, where possible, with the offeree company;
- (n) the national law which will govern contracts concluded between the offeror and the holders of the offeree company's securities as a result of the bid and the competent courts.

4. The Commission shall adopt rules for the application of paragraph 3 in accordance with the procedure referred to in Article 18(2).

Annex E Takeovers Directive

5. Member States shall ensure that the parties to a bid are required to provide the supervisory authorities of their Member State at any time on request with all the information in their possession concerning the bid that is necessary for the supervisory authority to discharge its functions.

Article 7

Time allowed for acceptance

1. Member States shall provide that the time allowed for the acceptance of a bid may not be less than two weeks nor more than 10 weeks from the date of publication of the offer document. Provided that the general principle laid down in Article 3(1)(f) is respected, Member States may provide that the period of 10 weeks may be extended on condition that the offeror gives at least two weeks' notice of his/her intention of closing the bid.

2. Member States may provide for rules changing the period referred to in paragraph 1 in specific cases. A Member State may authorise a supervisory authority to grant a derogation from the period referred to in paragraph 1 in order to allow the offeree company to call a general meeting of shareholders to consider the bid.

Article 8

Disclosure

1. Member States shall ensure that a bid is made public in such a way as to ensure market transparency and integrity for the securities of the offeree company, of the offeror or of any other company affected by the bid, in particular in order to prevent the publication or dissemination of false or misleading information.

2. Member States shall provide for the disclosure of all information and documents required by Article 6 in such a manner as to ensure that they are both readily and promptly available to the holders of securities at least in those Member States on the regulated markets of which the offeree company's securities are admitted to trading and to the representatives of the employees of the offeree company and the offeror or, where there are no such representatives, to the employees themselves.

Article 9

Obligations of the board of the offeree company

1. Member States shall ensure that the rules laid down in paragraphs 2 to 5 are complied with.

2. During the period referred to in the second subparagraph, the board of the offeree company shall obtain the prior authorisation of the general meeting of shareholders given for this purpose before taking any action, other than seeking alternative bids, which may result in the frustration of the bid and in particular before issuing any shares which may result in a lasting impediment to the offeror's acquiring control of the offeree company.

Such authorisation shall be mandatory at least from the time the board of the offeree company receives the information referred to in the first sentence of Article 6(1) concerning the bid and until the result of the bid is made public or the bid lapses. Member States may require that such authorisation be obtained at an earlier stage, for example as soon as the board of the offeree company becomes aware that the bid is imminent.

3. As regards decisions taken before the beginning of the period referred to in the second subparagraph of paragraph 2 and not yet partly or fully implemented, the general meeting of shareholders shall approve or confirm any decision which does not form part of the normal course of the company's business and the implementation of which may result in the frustration of the bid.

4. For the purpose of obtaining the prior authorisation, approval or confirmation of the holders of securities referred to in paragraphs 2 and 3, Member States may adopt rules allowing a general meeting of shareholders to be called at short notice, provided that the meeting does not take place within two weeks of notification's being given.

5. The board of the offeree company shall draw up and make public a document setting out its opinion of the bid and the reasons on which it is based, including its views on the effects of implementation of the bid on all the company's interests and specifically employment, and on the offeror's strategic plans for the offeree company and their likely repercussions on employment and the locations of the company's places of business as set out in the offer document in accordance with Article 6(3)(i). The board of the offeree company shall at the same time communicate that opinion to the representatives of its employees or, where there are no such representatives, to the employees themselves. Where the board of the offeree company receives in good time a separate opinion from the representatives of its employees on the effects of the bid on employment, that opinion shall be appended to the document.

6. For the purposes of paragraph 2, where a company has a two-tier board structure 'board' shall mean both the management board and the supervisory board.

Article 10

Information on companies as referred to in Article 1(1)

1. Member States shall ensure that companies as referred to in Article 1(1) publish detailed information on the following:

(a) the structure of their capital, including securities which are not admitted to trading on a regulated market in a Member State, where appropriate with an indication of the different classes of shares and, for each class of shares, the rights and obligations attaching to it and the percentage of total share capital that it represents;

(b) any restrictions on the transfer of securities, such as limitations on the holding of securities or the need to obtain the approval of the company or other holders of securities, without prejudice to Article 46 of Directive 2001/34/EC;

(c) significant direct and indirect shareholdings (including indirect shareholdings through pyramid structures and cross shareholdings) within the meaning of Article 85 of Directive 2001/34/EC;

(d) the holders of any securities with special control rights and a description of those rights;

(e) the system of control of any employee share scheme where the control rights are not exercised directly by the employees;

(f) any restrictions on voting rights, such as limitations of the voting rights of holders of a given percentage or number of votes, deadlines for exercising voting rights, or systems whereby, with the company's cooperation, the financial rights attaching to securities are separated from the holding of securities;

(g) any agreements between shareholders which are known to the company and may result in restrictions on the transfer of securities and/or voting rights within the meaning of Directive 2001/34/EC;

(h) the rules governing the appointment and replacement of board members and the amendment of the articles of association;

(i) the powers of board members, and in particular the power to issue or buy back shares;

(j) any significant agreements to which the company is a party and which take effect, alter or terminate upon a change of control of the company following a takeover bid, and the effects thereof, except where their nature is such that their disclosure would be seriously prejudicial to the company; this exception shall not apply where the company is specifically obliged to disclose such information on the basis of other legal requirements;

(k) any agreements between the company and its board members or employees providing for compensation if they resign or are made redundant without valid reason or if their employment ceases because of a takeover bid.

2. The information referred to in paragraph 1 shall be published in the company's annual report as provided for in Article 46 of Directive 78/660/EEC¹⁸ and Article 36 of Directive 83/349/EEC¹⁹.

3. Member States shall ensure, in the case of companies the securities of which are admitted to trading on a regulated market in a Member State, that the board presents an explanatory report to the annual general meeting of shareholders on the matters referred to in paragraph 1.

Article 11

Breakthrough

1. Without prejudice to other rights and obligations provided for in Community law for the companies referred to in Article 1(1), Member States shall ensure that the provisions laid down in paragraphs 2 to 7 apply when a bid has been made public.

2. Any restrictions on the transfer of securities provided for in the articles of association of the offeree company shall not apply vis-à-vis the offeror during the time allowed for acceptance of the bid laid down in Article 7(1).

Any restrictions on the transfer of securities provided for in contractual agreements between the offeree company and holders of its securities, or in contractual agreements between holders of the offeree company's securities entered into after the adoption of this Directive, shall not apply vis-à-vis the offeror during the time allowed for acceptance of the bid laid down in Article 7(1).

3. Restrictions on voting rights provided for in the articles of association of the offeree company shall not have effect at the general meeting of shareholders which decides on any defensive measures in accordance with Article 9.

¹⁸ Fourth Council Directive 78/660/EEC of 25 July 1978 on the annual accounts of certain types of companies (OJ L 222, 14.8.1978, p. 11). Directive as last amended by Directive 2003/51/EC of the European Parliament and of the Council (OJ L 178, 17.7.2003, p. 16).

¹⁹ Seventh Council Directive 83/349/EEC of 13 June 1983 on consolidated accounts (OJ L 193, 18.7.1983, p.1). Directive as last amended by Directive 2003/51/EC.

Restrictions on voting rights provided for in contractual agreements between the offeree company and holders of its securities, or in contractual agreements between holders of the offeree company's securities entered into after the adoption of this Directive, shall not have effect at the general meeting of shareholders which decides on any defensive measures in accordance with Article 9.

Multiple-vote securities shall carry only one vote each at the general meeting of shareholders which decides on any defensive measures in accordance with Article 9.

4. Where, following a bid, the offeror holds 75 % or more of the capital carrying voting rights, no restrictions on the transfer of securities or on voting rights referred to in paragraphs 2 and 3 nor any extraordinary rights of shareholders concerning the appointment or removal of board members provided for in the articles of association of the offeree company shall apply; multiple-vote securities shall carry only one vote each at the first general meeting of shareholders following closure of the bid, called by the offeror in order to amend the articles of association or to remove or appoint board members.

To that end, the offeror shall have the right to convene a general meeting of shareholders at short notice, provided that the meeting does not take place within two weeks of notification.

5. Where rights are removed on the basis of paragraphs 2, 3, or 4 and/or Article 12, equitable compensation shall be provided for any loss suffered by the holders of those rights. The terms for determining such compensation and the arrangements for its payment shall be set by Member States.

6. Paragraphs 3 and 4 shall not apply to securities where the restrictions on voting rights are compensated for by specific pecuniary advantages.

7. This Article shall not apply either where Member States hold securities in the offeree company which confer special rights on the Member States which are compatible with the Treaty, or to special rights provided for in national law which are compatible with the Treaty or to cooperatives.

Article 12

Optional arrangements

1. Member States may reserve the right not to require companies as referred to in Article 1(1) which have their registered offices within their territories to apply Article 9(2) and (3) and/or Article 11.

2. Where Member States make use of the option provided for in paragraph 1, they shall nevertheless grant companies which have their registered offices within their territories the option, which shall be reversible, of applying Article 9(2) and (3) and/or Article 11, without prejudice to Article 11(7).

The decision of the company shall be taken by the general meeting of shareholders, in accordance with the law of the Member State in which the company has its registered office in accordance with the rules applicable to amendment of the articles of association. The decision shall be communicated to the supervisory authority of the Member State in which the company has its registered office and to all the supervisory authorities of Member States in which its securities are admitted to trading on regulated markets or where such admission has been requested.

3. Member States may, under the conditions determined by national law, exempt companies which apply Article 9(2) and (3) and/or Article 11 from applying Article 9(2) and (3) and/or Article 11 if they become the subject of an offer launched by a company which does not apply the same Articles as they do, or by a company controlled, directly or indirectly, by the latter, pursuant to Article 1 of Directive 83/349/EEC.

4. Member States shall ensure that the provisions applicable to the respective companies are disclosed without delay.

5. Any measure applied in accordance with paragraph 3 shall be subject to the authorisation of the general meeting of shareholders of the offeree company, which must be granted no earlier than 18 months before the bid was made public in accordance with Article 6(1).

Article 13

Other rules applicable to the conduct of bids

Member States shall also lay down rules which govern the conduct of bids, at least as regards the following:

- (a) the lapsing of bids;
- (b) the revision of bids;
- (c) competing bids;
- (d) the disclosure of the results of bids;
- (e) the irrevocability of bids and the conditions permitted.

Article 14

Information for and consultation of employees' representatives

This Directive shall be without prejudice to the rules relating to information and to consultation of representatives of and, if Member States so provide, co-determination with the employees of the offeror and the offeree company governed by the relevant national provisions, and in particular those adopted pursuant to Directives 94/45/EC, 98/59/EC, 2001/86/EC and 2002/14/EC.

Article 15

The right of squeeze-out

1. Member States shall ensure that, following a bid made to all the holders of the offeree company's securities for all of their securities, paragraphs 2 to 5 apply.

2. Member States shall ensure that an offeror is able to require all the holders of the remaining securities to sell him/her those securities at a fair price. Member States shall introduce that right in one of the following situations:

(a) where the offeror holds securities representing not less than 90 % of the capital carrying voting rights and 90 % of the voting rights in the offeree company,

or

(b) where, following acceptance of the bid, he/she has acquired or has firmly contracted to acquire securities representing not less than 90 % of the offeree company's capital carrying voting rights and 90 % of the voting rights comprised in the bid.

In the case referred to in (a), Member States may set a higher threshold that may not, however, be higher than 95 % of the capital carrying voting rights and 95 % of the voting rights.

3. Member States shall ensure that rules are in force that make it possible to calculate when the threshold is reached.

Where the offeree company has issued more than one class of securities, Member States may provide that the right of squeeze out can be exercised only in the class in which the threshold laid down in paragraph 2 has been reached.

4. If the offeror wishes to exercise the right of squeeze-out he/she shall do so within three months of the end of the time allowed for acceptance of the bid referred to in Article 7.

5. Member States shall ensure that a fair price is guaranteed. That price shall take the same form as the consideration offered in the bid or shall be in cash. Member States may provide that cash shall be offered at least as an alternative.

Following a voluntary bid, in both of the cases referred to in paragraph 2(a) and (b), the consideration offered in the bid shall be presumed to be fair where, through acceptance of the bid, the offeror has acquired securities representing not less than 90 % of the capital carrying voting rights comprised in the bid.

Following a mandatory bid, the consideration offered in the bid shall be presumed to be fair.

Article 16

The right of sell-out

1. Member States shall ensure that, following a bid made to all the holders of the offeree company's securities for all of their securities, paragraphs 2 and 3 apply.

2. Member States shall ensure that a holder of remaining securities is able to require the offeror to buy his/her securities from him/her at a fair price under the same circumstances as provided for in Article 15(2).

3. Article 15(3) to (5) shall apply *mutatis mutandis*.

Article 17

Sanctions

Member States shall determine the sanctions to be imposed for infringement of the national measures adopted pursuant to this Directive and shall take all necessary steps to ensure that they are put into effect. The sanctions thus provided for shall be effective, proportionate and dissuasive. Member States shall notify the Commission of those measures no later than the date laid down in Article 21(1) and of any subsequent change thereto at the earliest opportunity.

Article 18

Committee procedure

1. The Commission shall be assisted by the European Securities Committee established by Decision 2001/528/EC (hereinafter referred to as 'the Committee').

2. Where reference is made to this paragraph, Articles 5 and 7 of Decision 1999/468/EC shall apply, having regard to Article 8 thereof, provided that the implementing measures adopted in accordance with this procedure do not modify the essential provisions of this Directive.

The period referred to in Article 5(6) of Decision 1999/468/EC shall be three months.

3. Without prejudice to the implementing measures already adopted, four years after the entry into force of this Directive, the application of those of its provisions that require the adoption of technical rules and decisions in accordance with paragraph 2 shall be suspended. On a proposal from the Commission, the European Parliament and the Council may renew the provisions concerned in accordance with the procedure laid down in Article 251 of the Treaty and, to that end, they shall review them before the end of the period referred to above.

Article 19

Contact committee

1. A contact committee shall be set up which has as its functions:

(a) to facilitate, without prejudice to Articles 226 and 227 of the Treaty, the harmonised application of this Directive through regular meetings dealing with practical problems arising in connection with its application;

(b) to advise the Commission, if necessary, on additions or amendments to this Directive.

2. It shall not be the function of the contact committee to appraise the merits of decisions taken by the supervisory authorities in individual cases.

Article 20

Revision

Five years after the date laid down in Article 21(1), the Commission shall examine this Directive in the light of the experience acquired in applying it and, if necessary, propose its revision. That examination shall include a survey of the control structures and barriers to takeover bids that are not covered by this Directive.

To that end, Member States shall provide the Commission annually with information on the takeover bids which have been launched against companies the securities of which are admitted to trading on their regulated markets. That information shall include the nationalities of the companies involved, the results of the offers and any other information relevant to the understanding of how takeover bids operate in practice.

Article 21

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive no later than 20 May 2006. They shall forthwith inform the Commission thereof.

When Member States adopt those provisions, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.

2. Member States shall communicate to the Commission the text of the main provisions of national law that they adopt in the fields covered by this Directive.

Article 22

Entry into force

This Directive shall enter into force on the 20th day after that of its publication in the *Official Journal of the European Union*.

Annex E Takeovers Directive

Article 23

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 21 April 2004.

For the European Parliament – The President – P. COX

For the Council – The President – D. ROCHE

Annex F: Code of Practice on Consultations

The Consultation Code of Practice Criteria

1 Timing of consultation should be built into the planning process for a policy (including legislation) or service from the start, so that it has the best prospect of improving the proposals concerned, and so that sufficient time is left for it at each stage.

2 It should be clear who is being consulted, about what questions, in what timescale and for what purpose.

3 A consultation document should be as simple and concise as possible. It should include a summary, in two pages at most, of the main questions it seeks views on. It should make it as easy as possible for readers to respond, make contact or complain.

4 Documents should be made widely available, with the fullest use of electronic means (though not to the exclusion of others) and effectively drawn to the attention of all interested groups and individuals.

5 Sufficient time should be allowed for considered responses from all groups with an interest. Twelve weeks should be the standard minimum period for a consultation.

6 Responses should be carefully and open-mindedly analysed, and the results made widely available, with an account of the views expressed, and the reasons for decisions finally taken.

7 Departments should monitor and evaluate consultations, designating a consultation co-ordinator who will ensure the lessons are disseminated. The complete code is available on the Cabinet Office's web site: www.cabinet-office.gov.uk/servicefirst/index/consultation.htm.

