The EC Takeover Regime: Directive 2004/25/EC

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Screening process
Explanatory meeting with Croatia and Turkey

Reasons for the Takeover Directive ('TOBD')

- To facilitate takeover activity in the EU, which will
  - facilitate cross-border restructuring and consolidation,
  - create a vibrant market for corporate control (provide possibilities to change the management of poorly run firms)
  - enhance the competitiveness of the European economy
- To improve transparency
- To protect minority shareholders

What is a takeover bid?

- Public offer
- made to the holders of the securities of a company to acquire all or some of those securities
- follows or has its objective the acquisition of control of the offerree company
- mandatory or voluntary

Main guiding principles of the TOBD

- ❖ Equality of treatment of all shareholders
- ❖ Shareholders' decision making in relation to a takeover bid
  - Post-bid defences enacted by the board should be subject to shareholder approval (board neutrality rule)
- ❖ Proportionality
  - Where there exist a separation of capital and voting rights through control devices such as dual class shares or voting ceilings, these should be reunified for the purposes of deciding the outcome of a takeover contest (breakthrough rule)

Main rules of the TOBD

- Supervisory authority and applicable law (Art. 4)
- Rules on the bid process
  - Information concerning bids (Art. 6), disclosure (Art. 8)
- Transparency
  - Information on companies (Art. 10)
- Protection of minority shareholders: mandatory bid and equitable price (Art. 5)
- Shareholder decision making: obligations of the board regarding the use of post bid defences (Art. 9)
- Breakthrough of pre-bid defences (Art. 11)
- Optional arrangements and reciprocity (Art. 12)
- Squeeze-out and sell-out (Art. 15 and 16)

Transparency

- Information concerning bids
- Information on companies (publication in the company's annual report)
  - structure of the capital
  - restrictions on the transfer of securities
  - pre-bid defences (multiple voting shares, voting caps, special control rights, etc.)
  - Powers of management to apply post-bid defences

Protection of minority shareholders: mandatory bid and equitable price

- Obligation to make a bid
  - to all shareholders of the offeree company,
  - at an equitable price,
- if a person acquires -alone or with other persons acting in concert with him- securities in a company which give him a specific percentage of voting rights in that company which confer control on that company

Shareholder decision on post-bid defences (Art. 9)

- rationale: conflict of interest between managers and shareholders
- board neutrality rule:
  - obligation for the board
  - to obtain prior shareholder approval
  - for any actions which may result in the frustration of the bid
  - exception: seeking alternative bids (white knight)

Breakthrough of pre-bid defences (Art. 11)

3 elements:

- restrictions on the transfer of securities (in the articles of association or contractual arrangements) do not apply vis-à-vis the offeror during the bid period
- post-bid GM: restrictions on voting rights (in the articles of association or contractual arrangements) do not have effect at the general meeting deciding on post-bid defences, multiple-vote securities carry one vote
- in case of successful bid: where the offeror holds 75% of the capital, no restrictions on the transfer of securities or on voting rights, nor any extraordinary rights of shareholders concerning the appointmant or removal of board members shall apply, multiple vote securities carry one vote

exception: golden shares

Optional arrangements

- Board neutrality and breakthrough are optional

- Complex, 2-level optional arrangements
  - Option at Member State level (mandatory application or opt-out)
  - Option at company level (if MS opted out, the GM has the possibility to opt in, this choice is reversible)

- Disclosure of rules applying to companies

Reciprocity

- ❖ Possibility to reciprocate: not to apply board neutrality and/or breakthrough
- ❖ Conditions of reciprocity:
  - – Member States allowed its use
  - – the company applies board neutrality and/or breakthrough and
  - – the company is subject to a bid by a bidder who does not apply the same rules
  - – Fresh GM authorisation

Squeeze-out, sell-out

- Right of squeeze-out: offeror should be able to require all the holders of the remaining securities to sell him those securities, if:

  - offeror holds securities representing 90 % of the capital carrying voting rights and 90 % of the voting rights

  - he offers a fair price

- Right of sell-out: the holders of the remaining securities should be able to require the offeror to buy their shares at a fair price, if the same conditions apply