



## ETUC POSITION ON DIRECTIVE 2004/25/EC ON TAKEOVER BIDS

Adopted at the Executive Committee on 5-6 December 2012

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Directive 2004/25/EC on takeover bids is currently under review. A takeover bid should be understood as a public offer to the holders of a company to acquire all or some of their securities with a view to acquire control of that company. The ETUC challenges the philosophy underlying the Directive, according to which takeovers enable needed restructuring and improve the efficiency of the European economy, and should thus be promoted.

The ETUC does not support the further liberalization of the current legal framework, in particular having regard to hostile takeovers. It is therefore essential that adequate defensive mechanisms remain in place. With regard to the board neutrality rule, it should be clarified that the board of the offeree company must act in the long term interest of the company and its stakeholders.

Furthermore, a complete rethinking of the provisions on workers' rights is urgently needed, with a view to bring the Directive in line with the rest of the Community acquis. In particular, the ETUC calls for:

- a clear reference to Directive 2001/23/EC on safeguarding of employees' rights in the context of transfer of undertakings;
- effective sanctions. In case of serious violations of employees' rights, legal effects of the takeover bid should be suspended until all the obligations have been adequately fulfilled;
- consultation rights with both the offeror and the offeree, with a view to reach an agreement before any decision can be finalized;
- the takeover Directive should grant employees' representatives a right to expertise. The cost should be borne by management and only employees' representatives should be able to select the most appropriate experts.

## **Annex 1: Background**

A takeover bid should be understood as a public offer to the holders of a company to acquire all or some of their securities with a view to acquire control of that company. In June 2012, the Commission has published a report on the application of Directive 2004/25/EC on takeover bids, making recommendations for possible revision. This report is based on the findings of a study, to which the ETUC contributed in October 2011<sup>1</sup>. Member States, the European Parliament, the European Economic and Social Committee and other interested parties are now invited to submit their views. Accordingly, the European Parliament is about to start discussions in an own initiative report.

In this context, the ETUC wants to positively contribute to the debate with concrete proposals for a revision. In spite of takeovers having a significant impact on working conditions throughout Europe, the Directive contains very weak provisions on workers' rights. A revision of the Directive is clearly required, with a view to change the current shareholder value model into a broader stakeholder approach. This means in particular that the provisions on workers' rights need considerable strengthening.

### **The impact of takeovers on stakeholders and the EU economy**

Takeovers on the whole must be seen critically with respect to their impact on stakeholders and the economy. The main benefactors of takeovers appear to be the shareholders in the company being taken over (the so-called "offeree company") and the top managers of the acquiring company (the so-called "offeror company"). Typically, share prices of companies subject to a takeover bid increase by 20-30 percent in the short run. Top managers in the acquiring company also reap substantial benefits, since remuneration is to a great extent determined by the size of the company managed, and can thus be expected to rise after the takeover is completed. Top managers in the company being taken over may also benefit substantially, to the extent that they have "golden parachutes" or own shares or options in their own company.

These benefits however do not appear to be shared by employees and society as a whole. Takeovers frequently involve significant decreases in employment levels and working conditions. One of the key motives for many takeovers is cost reduction through reducing employment levels and benefits (such as wages and pension benefits), increasing work intensity and reallocating production to "cheaper" sites. Research on the employment impact of takeovers also shows that, on average, employment declines in a 2-3 year period after the takeover.

Although not yet systematically investigated, the high levels of debt taken on to finance many takeovers, e.g. for very large private equity takeovers (so-called "mega buyouts"), should also be mentioned as a cause of concern. The financial pressure on highly leveraged companies to meet interest payments during crisis conditions may lead to greater reductions in employment and investments (such as research and development) compared to companies with lower debt levels. Many of these companies also face substantial difficulties in refinancing their debt in the near future.

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<sup>1</sup> [http://ec.europa.eu/internal\\_market/company/takeoverbids/index\\_en.htm](http://ec.europa.eu/internal_market/company/takeoverbids/index_en.htm)

A final point is that many companies that are acquired are better-performing, faster growing companies. The view in economic theory that takeovers (particularly hostile takeovers) are primarily a corrective for underperforming companies by replacing management therefore does not appear correct.

The key assumption underlying the takeover directive, namely that takeovers are on the whole in the interests of the European economy and should therefore be encouraged, is therefore challenged by the evidence. Many takeovers appear to be motivated instead by “empire building”, that is, the interests of top managers in increasing the size of the company they run. The tendency of takeovers to occur in waves at the peak of business cycles (when cash levels at companies are high and bank lending conditions generous) also suggests that takeovers are to a large extent determined by financial as opposed to operating factors.

In the review report, the Commission considers that the Directive is working satisfactorily. Nevertheless, some “clarifications” are envisaged with regard to the concept of “acting in concert”<sup>2</sup>, national derogations to the mandatory bid rule<sup>3</sup>, board neutrality and breakthrough rules<sup>4</sup>.

The ETUC does not support further liberalization of the current legal framework, in particular having regard to hostile takeovers. It is therefore essential that adequate defensive mechanisms remain in place. With regard to the board neutrality rule, it should be clarified that the board of the offeree company must act in the long term interest of the company and its stakeholders.

### **An inadequate protection of employees’ rights**

The Commission acknowledges in its report that employee representatives are not satisfied with how the takeover bids Directive protects the rights of employees and that it will pursue its dialogue with a view to exploring possible improvements. The ETUC very much welcomes the broadening of the discussions to include workers’ rights and stresses that cosmetic changes will not suffice. A complete rethinking of the provisions on workers’ rights is urgently needed, with a view to bring the Directive in line with the rest of the Community acquis.

In particular, the ETUC calls for:

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<sup>2</sup> Art 2 (1) (d) of the Directive defines acting in concert as the cooperation with the offeror or the offeree on the basis of an express or tacit agreement aimed at acquiring control of the offeree company or at frustrating the successful outcome of a bid.

<sup>3</sup> Art 5 stipulates that if an entity acquires control over a company, it is obliged to make a full takeover bid for all the remaining voting securities at an equitable price.

<sup>4</sup> The board neutrality rule provides that during the bid period, the board of the target company must obtain prior authorisation of the shareholders before frustrating the bid (Art 9). The breakthrough rule neutralises pre-bid defences such as share transfer or voting restrictions during a takeover (Art 11).

a. A clear reference to Directive 2001/23/EC on safeguarding of employees' rights in the context of transfer of undertakings:

Directive 2001/23/EC is one of the cornerstones of European labour law. According to this instrument, a transfer of undertakings does not in itself constitute valid grounds for dismissal. This means that unless dismissals can be motivated for economic, technical or organisational reasons not connected to the transfer, rights and obligations arising from an employment relationship shall be maintained after the transfer. Information and consultation about the proposed transfer must also be carried out beforehand.

Currently, workers who are the subject of a transfer where the legal personality of the company has not been changed (which is the case of a share sales) do not benefit from the protection of Directive 2001/23/EC. The ETUC has repeatedly called for a uniform application of this Directive to all workers in the EU. It is absurd that workers in a similar situation should be treated differently depending on whether or not their company is listed.

b. Consultation rights

Worker “voice” during a takeover bid is extremely weak. Currently, employee representatives can express their opinion, and this opinion is supposed to be forwarded by management to the shareholders of the offeree company. However, only the shareholders in the “target company” have the right to decide on whether or not to accept the takeover offer. These shareholders will typically not share the interests of employees in the long-term sustainability of the company. Instead, they have a great incentive to “cash in” on the premium in the takeover bid and “exit” the company by selling their shares.

A specific right to consultation must be introduced in the Takeover Directive. “Consultation” should be understood as the establishment of a meaningful dialogue between employees’ representatives and both the offeror and the offeree, with a view to reach an agreement on the proposed measures. It is very important that this dialogue takes place before any decision is finalized and that both existing management and the acquiring company are involved.

c. Effective sanctions

Currently, the takeover Directive merely relies on the Member States to determine effective, proportionate and dissuasive sanctions for the infringement of the Directive. This provision is clearly insufficient and has failed to guarantee proper implementation.

The Directive contains obligations to inform employees’ representatives about certain aspects of the bid, in particular with regard to the repercussions on employment. Although offerors are required by the Takeover Directive to provide information on their “intentions with regard to the future business of the offeree company”, including employment levels and conditions, these stated intentions

are frequently not fulfilled in practice, and there are no effective sanctions for this non-fulfillment.

The takeover Directive also foresees that the rules on information and consultation contained in other EU instruments such as the European Works Council Directive must be applied. However, these obligations are frequently not respected in practice.

The ETUC considers that the only way to guarantee the respect of the obligations contained in the Directive is to provide that the legal effects of the takeover should be suspended until all the obligations have been adequately fulfilled. This should be the case in particular in instances of serious violations of employees' right to information and consultation.

d. The right to expertise

In order to provide a valuable and well informed input, employees' representatives often need to have recourse to expertise because of the complexity of questions surrounding bids for take overs. Experts can be specialist – lawyers, economists etc. – depending on the subject matter. Experts can also play a monitoring and supporting role. In this regard, expert can be trade union representatives.

The takeover Directive should grant employees' representatives a right to expertise. The cost should be borne by management and only employees' representatives should be able to select the most appropriate experts.