The 2003 Proposal for a Directive on Takeover Bids - Impact on the Regulation in Scandinavia

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1 The Background to the New Draft Directive

Since 1987 the EU Commission has put forward a series of proposals for a 13th Company Law Directive on takeover bids. At one point it seemed as if the Commission's efforts would finally bear fruit, when on 19th July 2000 the Council adopted a Common Position on the directive proposal which had been put forward in 1997.[1] During the European Parliament's second reading of the proposal a number of amendments were proposed which the Council could not support. The conciliation procedure was therefore initiated and led to agreement in the Conciliation Committee on 6th June 2001. However, on 4th July 2001 the European Parliament rejected the conciliation agreement with 273 votes in favour and 273 votes against. This was a serious setback for the work on a directive on takeover bids.

The Parliament's objection was particularly due to German concerns that German companies would be taken over by foreign companies, in the same way as the German company Mannesmann had been taken over in 1999 by the British company Vodafone AirTouche. In particular, German members questioned the principle that the management of the target company should not, on its own authority, take defensive measures against a takeover bid.[2] It was also

1 *Cf.* the proposal of 10th November 1997, COM (1997) 565 final. Concerning this proposal, *see e.g.* Nis Jul Clausen & Karsten Engsig Sørensen, *Takeover bids – The Danish, Norwegian and Swedish Regulation to be challenged by the 13th Company Law Directive*, DJØF Publishing, Copenhagen, 1998 at 13 et seq., Nis Jul Clausen & Karsten Engsig Sørensen, *The Regulation of Takeover Bids in Europe: The Impact of the Proposed 13th EC Company Law Directive on the Present Regulation in the EU Member States*, International and Comparative Corporate Law Journal 1999 vol. 1 at 169 et seq. *See* also Erik Werlauff, *Overtagelsestilbud i børsselskaber – et direktiv med respekt af subsidiaritetsprincippet*, Ugeskrift for Retsvæsen 1996 B at 216 et seq. concerning the 1995 proposal, COM (1995) 655 final.

2 Germany introduced new legislation on takeover bids which entered into force on 1st January 2002 - Wertpapiererwerbs- und Übernahmegesetz. *See* Niels Krause, *The New German*

objected that there was inadequate protection for the employees of the target company, and that the proposed directive ought to contain rules on establishing the bid price in connection with mandatory bids.[3]

With a view to overcoming the concerns of Parliament, the Commission asked the High Level Group of Company Law Experts to consider a number of questions in relation to takeover bids, including

1 How to ensure a level playing field for shareholders in the EU,

2 How to define an 'equitable price' to be paid in connection with mandatory takeover bids, and

3 Whether rules should be introduced for buying out minority shareholders ('squeeze out') in connection with takeover bids.

On 10th January 2002 the High Level Group presented its proposals on how these questions could be regulated in a new takeover directive.[4] The most controversial proposal is the introduction of a 'break-through rule', under which a shareholder who acquires 75% of the risk-bearing capital should have the possibility of exercising effective control over the company, including appointing his own management and amending the company's articles of association. To enable this exercise of control, the rules in articles of association and legislation which restrict voting rights should no longer apply to the majority shareholder. The consequence of this proposal would thus be that shares with differential voting rights as found in Denmark, Norway and Sweden would have equal voting rights if a shareholder succeeds in obtaining 75% of the capital. This proposal met with opposition in a number of countries including the Scandinavian countries which allow differential voting rights.

On 2nd October 2002 the Commission adopted a new proposal for a directive on takeover bids.[5] It is clearly stated in Art. 3.2 of the proposal that the directive is a minimum directive leaving room for more stringent national regulation. To a large extent the proposal carries forward the draft directive which the Conciliation Committee agreed to in 2001. However, debates in the spring 2003 have shown that some provisions in the latest proposal are controversial, and it is uncertain when a directive is going to be adopted.

Takeover Law: An Overview of the New Regime, International and Comparative Corporate Law Journal 2002 vol. 4, at 345 et seq.

3 On this, *see* Rolf Skog, *The Takeover Directive – A Never Ending Saga*, European Business Law Review 2002 Vol 13, iss. 4, at 301 et seq.

4 *See*, the High Level Group of Company Law Experts *Report on Issues Related to Takeover Bids*, 10th January 2002. The Report is available on the Commission's website at "europa.eu.int/comm/internal_market/en/index.htm".

5 *Cf.* OJ 2002, C 045 E at 1. It should be noted that the proposed directive is no longer referred to as the 13th Company Law Directive, but merely *proposal for a Directive of the European Parliament and of the Council on takeover bids.*

This article[6] contains an analysis of some of the important elements of the proposal seen from a Scandinavian point of view. It will be discussed to what extent changes in the existing regulation in Denmark, Norway[7] and Sweden are necessary if the proposal is adopted in its current form.[8] The first part, subsection 2 deals with the main points of new proposal. The second part will focus on the proposed regulation on the target company and barriers to takeovers. Subsection 3, 4 and 5 deal with the duties of the board of directors, increased transparency about barriers to takeovers, and unenforceability of restrictions on the transfer of securities or voting rights, respectively. A conclusion is found in subsection 6.

2 The Main Points of the New Proposal

In relation to existing Scandinavian regulation on takeovers, the principal content and significance of the proposal can be summarised as follows:

2.1 General Principles etc

Art. 3 of the proposal sets out a number of general principles which should be reflected in the Member States' rules on takeover bids, including the principle of equal treatment of owners of shares in the same class, sufficient time and

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6 This article is in part based on an article focusing on the Danish aspects of the new proposal for a takeover directive. *See* Nis Jul Clausen & Karsten Engsig Sørensen, *Eliminering af (visse) barrierer for overtagelsestilbud – nyt forslag til direktiv om overtagelsestilbud*, Ugeskrift for Retsvæsen 2003 B at 25 et seq.

7 Though Norway is not a member of the European Union it follows from the Agreement on European Economic Area of 2nd May 1992 that upon its adoption the takeover directive shall be implemented into Norwegian law as well.

8 References to regulation in the Scandinavian countries in this article are: For Denmark, lovbekendtgørelse nr. 587 of 09.07.2002 om værdipapirhandel mv. as changed by lov nr. 453 of 10.06.2003 (the Danish Securities Trading Act), lovbekendtgørelse nr. 9 of 09.01.2002 om aktieselskaber as changed by lov nr. 453 of 10.06.2003 (the Danish - public limited - Companies Act) and bekendtgørelse nr. 827 of 10.11.1999 om tilbudspligt, om frivillige overtagelsestilbud samt om aktionærers oplysningsforpligtelse (the Danish Takeover Order). For Norway, lov 1997.06.19. nr 79 om verdipapirhandel as changed by lov 2002.12.13. nr 74 (the Norwegian Securities Trading Act), lov 1997.06.13. nr 45 om allmenaksjeselskaper as changed by lov 2003.04.25. nr 25 (the Norwegian – public limited - Companies Act) and Forskrift 1997.11.07. nr 1151 om krav til oplysninger i prospekt ved offentlig tilbud om tegning eller kjøp av omsetteligeverdipapirer (the Norwegian Disclosure Regulation). For Sweden, Aktiebolagslag 1975:1395 (the Swedish Companies Act) and Regler rörande offentliga erbjudanden om aktieförvärv of 2003-09-01 (the Swedish Takeover Recommendation). It shall be noted that while the Danish and Norwegian regulation on takeovers are based on provisions in the securities trading acts the Swedish regulation has no basis in a formal act. Like in the UK the swedish takeover regulation is issued by a self regulatory body – the Swedish Industry and Commerce Stock Exchange Committee (Näringslivets Börskommitté). Generally on the regulation of financial markets in Denmark, Finland, Iceland, Norway and Sweden, *see* Jesper Lau Hansen (ed.), *Nordic Financial Market Law*, DJØF Publishing, Copenhagen, 2003.

information for holders of securities to enable them to reach a properly informed decision on the bid and a duty on the board of the target company to act in the interest of the company as a whole. The current regulation in the Scandinavian countries for the most already reflects these principles and the Swedish Takeover Recommendation lists somewhat similar basic principles in its introduction.

There are also provisions about the duty to provide information in connection with a takeover bid, including the content of the offer document, cf. Art. 6. These requirements will also have a limited effect in Scandinavian law since the current rules already largely satisfy these requirements and in some aspects go beyond the requirements of the directive. Most extensive regulation on the contents of the offer document is found in Sweden requiring a prospectus to be drawn up and published.[9]

However, for Sweden the requirement with respect to the supervisory authority is troublesome. Under Art. 4.1 of the directive, the supervisory authority shall be a public authority, association or private body recognised by national law or by a public authority expressly empowered for that purpose by national law. As mentioned in Sweden the takeover regulation and the supervision hereof is the responsibility of the self-regulatory bodies Näringslivets Börskommittee and Aktiemarknadsnämnden (the Securities Council). The power of theses bodies is not based on law and it is very doubtful whether Sweden will be able to maintain the current arrangements.[10]

2.2 The Obligation to Make a Bid

The directive maintains that Member States shall introduce rules on mandatory bids, which apply when a person or company acquires, directly or indirectly, a controlling portion of the capital in a company whose shares are traded on a regulated market, cf. Art. 5. It is up to the Member States to determine the threshold at which control is regarded as having been obtained, but currently in most countries a mandatory bid is triggered upon the acquisition of less than

9 For details, *see* the Swedish Takeover Regulation point V and appendix 1. The less extensive requirements are in Denmark listed in the Danish Takeover Order § 3. For Norway, *see* the Norwegian Disclosure Regulation.

10 For a discussion of the corresponding problem in relation to the 1997 proposal for the 13th Company Law Directive, *see* Nis Jul Clausen & Karsten Engsig Sørensen, *The Regulation of Takeover Bids in Europe*, International and Comparative Corporate Law Journal 1999 vol. 1 at 182 et seq. Under the listing requirements of Stockholm Stock Exchange listed companies are obliged to observe rules issued by Näringslivets Börskommittee (NBK). Under the first NBK Recommendation of 1971 the Swedish Supreme Court held that there was sufficient basis for the Stockholm Stock Exchange to charge a fee from companies not fulfilling the requirements of the NBK's Recommendation. The Supreme Court referred to the registration contract between the Stock Exchange and the companies involved. It should be noted that both the target company and the bidding company were listed companies and the financial intermediary involved was member of the Stockholm Stock Exchange. Thus the Court has not ruled - and cannot be expected to rule - that the NBK Recommendation is binding for a bidder who is not being listed or member of the Stock Exchange. *Cf.* NJA 1985 at 343 and further Lars Afrell, Håkan Klahr & Per Samuelsson, *Lärobok i kapitalmarknadsrätt* Norstedts, Stockholm, 2 ed 1998 at 234 et seq.

50% of the voting rights.[11] While previous proposals allowed for the possibility of Member States introducing a number of alternative rules for the protection of minority shareholders, there are no such possibilities for exemptions in the new proposal.

The terms of the proposed directive on triggering a mandatory bid do not, in themselves, mean that there is a need to amend the criteria currently laid down in the Scandinavian countries. Norway and Sweden use a fixed percentage of 40%[12] and 30%[13] of the voting rights, respectively. The criteria in Denmark is different as the mandatory bid obligation comes into force either when obtaining more than 50% of the voting rights or controlling influence and more that 1/3 of the voting rights.[14] On the other hand, the existing stock exchanges co-operation under NOREX including Copenhagen, Oslo and Stockholm Stock Exchanges means that consideration should be given to whether it is appropriate that the percentage used in the three countries differs considerably. In particular, the Danish rules using a partially discretionary criterion may be troublesome.

2.3 The Offer Price

A new feature of the proposed directive is that Art. 5.4 lays down what price – referred to as the equitable price – shall be offered to the minority shareholders when there is a mandatory bid. The starting point is that the offer price shall be the highest price paid for the same securities by the offeror over a period of between six and twelve months prior to the bid. The offer price can be adjusted by the supervisory authorities in circumstances and according to criteria that are clearly determined.

The highest price principle laid down in the Scandinavian countries, is in accordance with the directive proposal, since the offer price generally shall correspond to the highest price which the offeror has paid for shares within six months prior to the bid.[15]

2.4 Squeeze-out and Sell-out

Under Articles 14 and 15 of the proposed directive, Member States shall introduce rules on the offeror's right to squeeze-out minority shareholders and

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11 *See* Nis Jul Clausen & Karsten Engsig Sørensen, *The Regulation of Takeover Bids in Europe*, International and Comparative Corporate Law Journal 1999 vol. 1, 188 et seq.

12 *Cf.* the Norwegian Securities Trading Act, § 4-1.1.

13 *Cf.* The Swedish Takeover Recommendation point III.1. A Swedish mandatory bid obligation came into force by 1st July 1999. Before then no such requirement was found. For a critical point of view of a Swedish mandatory bid rule, *see* Rolf Skog, *Does Sweden need a Mandatory Bid Rule? – A Critical Analysis*, 1995, Juristförlaget, Stockholm.

14 *See* § 31.1 of the Danish Securities Trading Act.

15 *See* the Danish Takeover Order, § 5.1, the Norwegian Securities Trading Act § 4-10.4, and the Swedish Takeover Recommendation point III.5. Under certain circumstances another price may be accepted or decided by the relevant authorities.

the rights of minority shareholders to sell-out their shares to the offeror. An offeror who, after carrying out a takeover bid, acquires at least 90% of the target company's total share capital,[16] shall have the right to buy-out the remaining shareholders at an equitable price. This squeeze-out right also applies if, by acceptances of his offer, the offeror acquires at least 90% of the shares which have been the subject of the offer.[17] Under Art. 15, in similar conditions the minority shareholders will have a corresponding right to require the offeror to redeem their shares at an equitable price. If a company has several classes of shares, the squeeze-out/sell-out rights will apply to each class, provided that the offeror has obtained 90% of the capital in the individual classes. The basis for an equitable price will be the price used for the takeover bid, provided that the redemption of the remaining shares takes place within 3 months from the end of the offer period for the takeover. In all other cases the price will be fixed by an independent expert.

These provisions will also have limited effect in Scandinavian law, since there are already provisions on squeeze-out and sell-out rights in general company law.[18] What is different about the rules now proposed in the directive is that they will only apply to listed companies and when the 90% majority is obtained on the basis of a takeover bid. The existing rules under Scandinavian company law apply to all companies and in all cases where a 90% majority is acquired, so the rules clearly also cover the takeover situations referred to in the directive. However, there will be a need to adopt some special rules in order to implement the directive, since there are some specific points on which the Scandinavian rules differ from the proposed directive. There is a difference in the procedure for setting the share redemption price. The Scandinavian companies acts set up a special procedure for deciding the redemption price and if the parties can not reach an agreement there is a possibility of appointing an expert valuer to decide the price. The criteria for fixing the redemption price in company law are not directly linked to the price that may have been offered in a previously announced takeover bid.[19] Under the directive, redemptions which

16 In this case, the Member States may set a higher minimum for squeeze-out, though not more than 95% of the share capital.

17 In this situation, which typically arises after a voluntary bid in which the offeror has not necessarily obtained 90% of the company's total share capital, there is only a right to acquire the remaining 10% of the shares in the classes of shares which were the subject of the offer. There is no right to acquire shares in other classes of shares.

18 *See* §§ 20b and 20d of the Danish Companies Act, § 4-25 of the Norwegian Companies Act and 14 Cap. 31-35 §§ of the Swedish Companies Act.

19 A recent Norwegian Supreme Court decision dated 06.06.2003, no. 2002/1347C, not yet published, stated that there must be an independent price setting under the redemption regulation in company law. The price in the prior takeover bid was 16 Norwegian kroner and the two lower courts set the price to 34.50 and 30.40 Norwegian kroner. The criteria outlined by the Supreme Court will lead to an even higher price per share to the remaining shareholders. According to current Danish practice, when a mandatory bid is made in accordance with the Securities Trading Act, and is followed by a squeeze-out or sell-out under the provisions of the Companies Act, the redemption price will be presumed to be the same as the takeover offer price, cf. decision by Copenhagen Stock Exchange (Afgørelser og udtalelser 2001, no. 2.1 and no. 2.2). For Sweden, *see* the Takeover Recommendation point III.3.2.

take place within 3 months from the end of the offer period for the takeover will be based on the takeover price, and it will only be for redemptions claimed after this 3 month period that there will be a possibility of using an independent expert.

2.5 Choice of Law

Articles 4.2 and 5.3 of the proposed directive contain a new solution to the problem of the conflict of laws which arises when a company is incorporated in one Member State and listed on a regulated market in another Member State.

Firstly, the proposal will establish which Member State shall be responsible for supervising the takeover bid.[20] If the target company is incorporated in Member State A, and has its shares listed on a regulated market there, it will always be subject to the supervisory authority in Member State A, cf. Art. 4.2.(a). If the target company is incorporated in Member State A, without having its shares listed there, but on regulated markets in one or more other Member States, the takeover shall be subject to the supervisory authority of the Member State on whose regulated market the securities were first listed, cf. Art. 4.2.(b). If the target company's shares have been listed simultaneously in more than one other Member State, then the company can itself choose which of the supervisory authorities of those Member States is the competent authority for supervising the bid, cf. Art. 4.2.(c).

Secondly, the directive deals with which Member State's law shall apply. When there is a cross-border element, questions relating to the offer price and to the bid procedure, in particular the content of the offer document and its publication, shall be dealt with under the rules of the Member State of the supervisory authority. On the other hand, the following questions shall be decided under the laws of the Member State in which the target company is incorporated: 1) what percentage of voting rights confers control, 2) any exemptions from the obligation to make a bid, and 3) the conditions under which the board of the target company may undertake any action which might result in the frustration of the bid, see Art. 4.2.(e).

This solution reflects the fact that rules on takeover bids are in a grey area between securities law and company law. In some Member States, different rules of affiliation have been used hitherto.[21] While the Member States had sought to arrange the choice of law rules so as to identify the laws of one country to apply to all elements of a takeover, with its proposed solution the Commission now seeks to split regulatory responsibility. Those elements which are primarily of a securities law nature will be regulated by the laws of the Member State in which the company was first listed on a regulated market. Those elements which are

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20 As discussed further in subsection 2.1 *supra* under Art. 4.1 of the directive the supervisory authority shall be a public authority, association or private body recognised by national law or by a public authority expressly empowered for that purpose by national law.

21 For more details, *see* Nis Jul Clausen & Karsten Engsig Sørensen, *The Regulation of Takeover Bids in Europe*, International and Comparative Corporate Law Journal 1999 vol. 1, at 214 et seq.

primarily of a company law nature will be determined under company law of the member state where the target company is incorporated.[22] The solution chosen is not unreasonable, but it will probably cause problems in practice. On the one hand it will be more difficult for shareholders and others to identify which rules will apply to takeover bids for companies with cross-border listings, and on the other hand it can be expected that it will be problematic to make a precise distinction between those rules which follow the choice of law rules of securities law and those which follow the choice of law rules of company law.[23]

The new approach will in the Scandinavian regulation as well as in other Member States require major changes in the existing regulation on choice of law. The following regulations on choice of law are in existing in the Scandinavian countries: The Danish regulation on takeovers applies to all Danish and foreign companies provided that their shares are listed on Danish regulated markets.[24] There is no regulation dealing with situations where a company may be listed on more than one market, and hence in case of multi-listing the Danish regulation must in all cases be observed. In Norway the regulation only applies to shares listed on a Norwegian stock exchange and

22 When the Commission points to the state of incorporation as determining which company law rules shall apply, it is making a choice between the incorporation state doctrine and the real seat doctrine. The Commission's choice of the incorporation state, and thus its implicit support for the incorporation state doctrine, seems to mean that the Commission believes that the real seat doctrine can no longer be sustained, since it involves a restriction on the free movement of companies, in contravention of the right of establishment, cf. Art. 43 EC Treaty. The question of the real seat doctrine's compatibility with the right of establishment has given rise to considerable debate since judgment was given in Case C-212/97 *Centros* [1999] ECR I-1459. For the Danish debate, *cf.* Søren Friis Hansen, *Nekrolog over Hovedsædeteorien*, Julebog 1999, Copenhagen, DJØF Publishing at 143 et seq., Karsten Engsig Sørensen, *Centro Ltd-afgørelsen og dens konsekvenser*, Nordisk Tidsskrift for Selskabsret 1999:2, at 92 et seq. and Søren Friis Hansen, *From C 212 to L 212 – Centro Revisited,* European Business Organization Law Review 2001 vol. 2, iss. 1 at 141 et seq. *See* also Søren Friis Hansens contribution to this volume of Scandinavian Studies in Law, *The free movement of companies – The 'real seat doctrine' is dead – Long live the 'incorporation state doctrine'. See* also Case C-208/00 *Überseering* [2002] ECR I-9919, and Case C-167/01 *Kamer van Koophandel en Fabriken voor Amsterdam v Inspire Art ltd* (not yet reported) from which it appears that the real seat theory cannot be fully sustained.

23 The just recently adopted prospectus directive also contains a special provision on the choice of law in connection with the approval of prospectuses for the issue of shares. According to Art. 13.1, it is the competent authority in the company's home Member State which shall approve prospectuses. According to Art. 2.1.(m)(ii), in the first instance it is the Member State where the issuer is incorporated. This applies even if the offer is made in a Member State which is not the home Member State. A duty to seek approval in a specific Member State, the company's home State, does not exist today. The adoption of the proposed directive will therefore limit a company's possibility for choosing which national authority shall be responsible for the approval. The prospectus directive does not give any justification for this limitation of a company's scope for this kind of forum shopping, but it has presumably to do with the desire to restrict the right of companies to have a prospectus approved in a country with a low information requirement, and then use the approved prospectus to make an offer of securities in a market with a higher disclosure requirement. However, this restriction on forum shopping will only apply for 5 years. *See*, the Commissions amended proposal OJ 2002, C 020 E at 122 et seq. and the common position OJ 2003, C 125 E at 21 et seq.

24 *Cf.* the Danish Securities Trading Act § 31.1.

issued by a company registered in Norway. If such shares are listed on other exchanges relief from Norwegian law can be granted if deemed necessary.[25] Foreign companies listed in Norway are not obliged to comply with the regulation. Likewise, the Swedish regulation only applies to public offers by a Swedish or foreign physical person or legal entity to shareholders in a Swedish company that has issued shares listed on a Swedish stock exchange or other kind of regulated markets.[26]

2.6 Barriers to Takeovers

The most controversial and innovative measures in the proposed directive concern the desire to remove some of the current barriers to carrying out a takeover bid. These measures are contained in part in a list of duties of the management of the target company set out in the directive, and in part in rules which are intended to ensure greater openness about a company's structure etc. which can prevent the carrying out of takeover bids. Finally a mini break-through rule is introduced, under which certain restrictions in a company's articles of association or in shareholders agreements on the transfer of shares or exercise of voting rights are removed.

These issues are dealt with very differently in the Scandinavian countries. In particular the regulation in Denmark is limited. The adoption of the directive would thus require substantial changes to Scandinavian securities law and company law, as discussed in detail below.

3 The Duties of the Board of Directors

3.1 Defensive Measures

The draft directive puts considerable emphasis on the requirement that all important decisions shall be taken by the owners of a company at a general meeting if a change of control over a company is possible.

Under Art. 9.2 of the directive, the board may not, without prior authorisation of the general meeting, take any measures with a view to frustrating a takeover bid. There is no extensive description of the kind of defensive manoeuvres that the board can not initiate on its own. This is left to the Member States to decide. However, it is explicitly stated that the board may not, on its own authority, increase the share capital. The only defensive measure which the board may itself initiate is to seek alternative bids, since this may be assumed to be in the interest of the shareholders.

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25 *Cf.* the Norwegian Securities Trading Act § 4-1.1(1) and § 4-4. When deciding when dispensation should be given, the decisive factor is whether Oslo Stock Exchange or the foreign exchange is to be regarded as the primary market, *see* G. Sundby, *Nye regler om tilbudsplikt* 1998:2 Revisjon og Regnskab at 35 et seq.

26 *Cf.* the Swedish Takeover Recommendation point I.1.

Under Art. 9.3, if a decision is taken before a takeover bid is made, but not yet implemented, the decision must once again be approved or confirmed by the general meeting if its implementation may result in the frustration of the bid. This applies even though authorisation may previously have been given by the general meeting. Member States can lay down rules making it possible to convene a general meeting at short notice, though not less than 2 weeks.[27]

As stated, the aim of the directive is to ensure that it is the shareholders of the company, and not the board or management, who decide on a takeover bid. This may mean that interests other than shareholders' interest, such as those of employees and other stakeholders, do not have an independent claim to be taken into consideration in connection with a takeover bid.[28] The failure to take employees' interests into account was partly why the European Parliament opposed an earlier version of the directive, as referred to above under section 1. The new proposal may therefore be criticised on this point.

In current Danish law there are no special provisions regulating the board's and management's rights to take defensive measures. The limits to the board's and management's freedom of action are primarily based on their general duty under company law to act in the interests of the company, and the Companies Act's provisions on the protection of minority shareholders.[29] The starting point is thus that the board has a certain freedom of initiating defensive manoeuvres, as long as it is in the interest of all the shareholders rather than just some of the shareholders, e.g. the majority shareholder. Board is also allowed to take into account other considerations and the interest of stakeholders, including the interests of the company's trading partners, employees etc., in assessing whether defensive measures are appropriate. On the other hand, it is clear that the board may not take defensive measures purely to protect or favour their own personal interests.

A few Danish court cases has dealt with how far reaching the board's authorisation to issue new shares given previously by the general meeting is in order to resist a possible bid.[30] However, there is no case law which illustrates the scope for initiating defensive measures when the general meeting has not authorised the board to do so. As case law does not establish any firm guidelines for the board the fact is that the board has quite wide discretion to decide whether or not to institute defensive measures. This means that the board of

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27 The duty to refrain from taking defensive measures arises no later than when the board of the target company receives official notice that an offer is being made. However, the draft directive allows Member States to provide that the duty should arise when the board becomes aware that an offer will be made.

28 However, when the board draws up its opinion on the bid it shall take into account all the interest of the company, including employment, *cf.* Art. 9.5 and below under subsection 3.2.

29 *Cf.* §§ 54, 63 and 80 of the Danish Companies Act.

30 *See* in particular the Supreme Court decision referred in Ugeskrift for Retsvæsen 1991.180 H. For a discussion hereof, *see* Jan Schans Christensen, *Ledelse og aktionærer,* 1992, GadJura, Copenhagen at 111 et seq., Paul Krüger Andersen & Nis Jul Clausen, *Børsretten* 2nd ed. 2003, DJØF Publishing, Copenhagen at 388 et seq., as well as Nis Jul Clausen & Karsten Engsig Sørensen, *Takeover Bids – The Danish, Norwegian and Swedish Regulation to be challenged by the 13th Company Law Directive*, 1998, DJØF Publishing, Copenhagen at 63 et seq.

directors in Danish companies have better possibilities of resisting takeover bids than is the case in most Member States. To implement the directive Denmark will have to introduce more restrictive rules on defensive measures.

In Norway restrictions to the boards conduct is found in § 4-17 of the Securities Trading Act. The restrictions relates only to mandatory and not to voluntary bids. From the time when the board is informed of the bid, until the bid lapses and the result is clear, the board and management may not make decisions in regard to

1 Issue shares or other financial instruments by the company and by a subsidiary,

2 Merger of the company and a subsidiary,

3 Sale or purchase of substantial areas of operation of the company and its subsidiaries, or other dispositions of material significance for the nature or scope of the company's operation, or

4 Purchase or sale of company's shares.

However, the ban on the board's decision making is not absolute. The board may still take decisions as part of normal ongoing business operations, and a general meeting can in advance empower the board or management to make certain defensive measures in the event of a takeover bid.[31]

The fact that the Norwegian rules only apply to mandatory bids and the general exception for decision that are part of the usual business makes it necessary to change the Norwegian law if it is to comply with the draft directive.

Traditionally the most exhaustive regulation of defensive measure is found in Sweden, where point II.16 of the Takeover Recommendation deals with the issue. The board is prevented from taking any measure which would be likely to have a negative impact on the offer. The provisions does not contain a list of prohibited measures, but according to the official comments to the provision, buying back shares, an offer to the shareholders in the bidding company to acquire their shares are examples of measures which could have this effect. There are two exceptions from this duty not to oppose the offer. Firstly, the general meeting of shareholders may approve such measures. Secondly, Aktiemarknadsnämnden (the Securities Council) may allow the board to take measures where it finds that it is necessary for the board to take rapid actions.

The duty not to oppose a bid applies from the time where the board or senior management of the target company has good reason to assume that a serious offer is imminent, due to information received from a person that intends to make the bid. This means that rumours alone is not enough to trigger the obligation.

On the face of it the Swedish rules correspond to the wording of the draft directive, with the possible exception of the authority given to

31 *Cf.* the Norwegian Securities Trading Act § 4-17(2).

Aktiemarknadsnämnden to allow the board to take measure where it is necessary to take rapid actions.

In conclusion the rules in both Denmark and Norway have to be supplemented if they are to comply with Art. 9.1-4 of the directive.

3.2 The Board's Report on a Bid

Under Art. 9.5 of the directive, the board of the target company will have to draw up and publish a document setting out its opinion on the bid, together with the reasons on which it is based. The report shall give the board's view on the effect of the bid on all the interests of the company, including employment, and on the offeror's strategic plans for the company. The board must also communicate its opinion to the employees' representatives.

In addition to these requirements it ought to be considered whether rules should be introduced which would go further than the minimum requirements of the directive. Of special interest is to what extent the board members should be obliged to disclose any special agreements which they have entered into with the bidder, and how the individual members of the board intend to act with regard to the shares they may own in the company. Finally, it should also be considered whether information should be given on how the board intends to react to competing bids, including information on to what extent the board will encourage competing bids which could be beneficial for the shareholders.

Under Danish law the board of directors shall draw up a report on the advantages and disadvantages of the offer, including taking into account the company's expected development.[32] It is also stated how and when the report shall be published. But apart from this, there are no detailed requirements as to the content of the board's report, including any requirements for information as to whether members of the board who own shares in the target company have accepted or intend to accept the offer, or whether they have or are to receive any special benefits in connection with the offer.

However, in connection with a case where a Danish bank (Danske Bank) was making a voluntary bid for a large mortgage credit institution (Realkredit Danmark), the Copenhagen Stock Exchange required that certain information on benefits to board members should be disclosed.[33] The takeover resulted from an agreement between the bank and the credit institution, and among other things it was agreed that some board members of the credit institution would resign following the takeover. These board members were given compensation equivalent to one years pay as board members. This information was not disclosed by the board of the credit institution when it recommended the shareholders to accept the offer. Copenhagen Stock Exchange ruled that information about the payments should be disclosed, even if, seen in isolation; they were not material. For its authority to make such a ruling, Copenhagen Stock Exchange referred to the general provisions on disclosure, the duty to

32 *Cf.* § 7 of the Danish Takeover Order which was issued in 1999 under the authority of § 32.3 of the Danish Securities Trading Act.

33 *Cf.* decision from Copenhagen Stock Exchange (Afgørelser og udtalelser 2001 no. 1.3).

publish an offer document and the rules on prospectuses. In addition to this, it was argued that it is in the interests of the market to be made aware of circumstances and incentives which may lie behind the decisions of the board in situations involving potential conflict of interest. It is thus the view of Copenhagen Stock Exchange that there is a duty to disclose information about special benefits which may be granted to members of the board in connection with a takeover bid, even though this requirement cannot be directly derived from the Danish Securities Trading Act or from the Takeover Order.[34]

In Norway the board is required to make a statement on the bid.[35] The statement must be made on mandatory as well as on voluntary bids.[36] The statement, which is to be published not later than one week before the expiration of the bid, shall include the employees' opinion on the bid and contain other information relevant to the shareholders' decision making. If any of the board members or managers of the company own shares in the company, the statement must contain their opinion on the bid, as shareholders.[37] But generally the board is not obliged to recommend or advise against the bid. If any of the members of the board are involved in making a bid, the Oslo Stock Exchange decides who is to prepare the statement.[38]

The Swedish Takeover Recommendation, point II, 14 requires the board to make a statement on the bid, accompanied by an explanation as to whether it opposes the bid or not. If the board can neither approve nor reject the offer it must explain its attitude. If a board member has not participated in making the opinion on the ground of conflict of interest or for some other reason this must be disclosed. If a member of the board has tabled reservation this must also be stated.

If the bidder is a board member or a senior executive of the target company or has a close relationship to such a person,[39] a number of further requirements must be served and additional information disclosed.[40] Point IV.3 of the Recommendation prescribes that in this situation the board cannot discharge its duty merely by publishing a statement, because of the obvious conflict of interest. Therefore a statement is to be prepared by an independent expert who is to assess the value of the target company and, where the offered consideration

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34 Even though the point of view taken by Copenhagen Stock Exchange is reasonable, it can be argued that there is not sufficient authority to reach this conclusion, *cf.* Nis Jul Clausen, *Københavns Fondsbørs Afgørelser og udtalelser 1. juli - 31. december 2001*, Nordisk Tidsskrift for Selskabsret 2002:1 at 393. On this decision, *see* also Peer Schaumburg-Müller & Erik Werlauff, *Børsretlig praksis – de væsentligste børsretlige afgørelser i 2001*, Ugeskrift for Retsvæsen 2002 B at 150.

35 *Cf.* the Norwegian Securities Trading Act § 4-16.

36 *Cf.* § 4-18.1.

37 *Cf.* § 4-16.1(2).

38 *Cf.* Knut Bergo, *Børs- og verdipapirhandelsrett*, 1998, Cappelen, Oslo at 468 et seq.

39 The concept of senior executive is specified in the Takeover Recommendation, point IV.1, and includes, e.g. managing directors and deputy directors of the target company and its subsidiaries. The Recommendation also specifies persons who are considered closely related to such persons - spouse, children etc. and affiliated companies.

40 *See* for details, the Takeover Recommendation, point IV.

consists of shares, the value of such consideration. The conclusion of this assessment is to be published in the prospectus which the bidder shall draw up.

The adoption of the proposed directive will particular in Denmark require that the rules on the content of the board report must be more detailed on certain points, and in all three Scandinavian countries information of the employees must be ensured.

4 Increased Transparency about Barriers to Takeovers

The most significant barriers to takeovers are not in the defensive measures which the board may institute on its own authority. Structural obstacles and obstacles found in the company's articles of association or in agreements between the shareholders are much more important. It ought to be a minimum requirement that shareholders and the market should be informed of any such barriers, since this is necessary to enable shareholders to decide whether they would like to remove the barriers. It may be in the interest of shareholders that the possibility of a takeover exists, since this may have a positive effect on the price of the shares.

This is presumably the rational which lies behind Art. 10 of the directive. According to Art. 10.1, companies will be required in details to disclose the following information in their annual report:

- the structure of their capital,
- the different classes of shares and the rights and obligations attached to them,
- 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,[41]
- information about major shareholdings.[42] Information shall also be given about cross-holdings of shares,[43]
- any restrictions on voting rights,

41 Note, however, that restrictions on the transferability of securities are not permitted in the articles of association in relation to listed securities, *cf.* Art. 46 of Directive 2001/34/EC, *cf.* OJ 2001, L 184 at 1 et seq.

42 *Cf.* the provisions on major shareholdings in Art. 85 et seq. in Directive 2001/34/EC, *cf.* OJ 2001, L 184 at 1 et seq.

43 The draft directive does not define cross-holdings, and without such a definition it must be expected that the requirement to inform on cross-holdings will have limited effect. How cross-holding between European companies should be regulated is discussed in detail by Karsten Engsig Sørensen in Mette Neville & Karsten Engsig Sørensen (eds.), *The Regulation of Companies*, Sweet & Maxwell, fortcoming.

- agreements between shareholders which may restrict the transfer of securities,
- the rules governing the appointment and replacement of board members and the amendment of the articles of association,

- any agreements between the company and its board members or employees providing for compensation if they are made redundant without valid reason following a takeover bid.

Some of the above information is currently required to be given in connection with a company's annual report or under the disclosure regulation of the Scandinavian stock exchanges. But on a number of points the directives disclosure requirements significantly expanded. Art. 10 will therefore require the new rules in all three Scandinavian countries.

This increased transparency may, in itself, be expected to remove certain barriers to takeovers, but in addition to this, Art. 10.3 of the draft directive requires Member States to ensure that the general meeting of listed companies shall take a decision at least every two years on the structural aspects and defensive mechanisms referred to in Art. 10.1. Moreover, shareholders can require the board of directors and management to justify these circumstances. This means that Member States must have a requirement that listed companies shall discuss defensive measures at the general meeting at least every other year.[44]

A decision to remove defensive measures may be taken at a general meeting, subject to the usual company law rules on simple or qualified majorities, depending on the nature of the defensive measure in question. For example, under Danish company law the removal of differential voting rights will require a 2/3 majority among holders of the shares with multiple voting rights, while cross-holdings can be removed by a simple majority.

5 Unenforceability of Restrictions on the Transfer of Securities and Voting Rights

Under this heading, Art. 11 of the directive contains a mini break-through rule which removes certain legal barriers to takeovers. The provision is rather complicated in its formulation. The Commission does not propose such an extensive break through rule as the High Level Group of Company Law Experts did, *cf.* section 1 above. In particular, the Commission has not proposed a rule which would influence the scope for Member States to allow and keep differential voting rights. In its commentary on Art. 11, the Commission argues that there is no evidence that the existence of shares with multiple voting rights

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44 Under Art. 18 of the draft directive, Art. 10 shall be examined and if necessary revised 5 years after the entry into force of the directive. This will ensure that the Commission will have the possibility of assessing whether the increased requirement for transparency will have helped to remove barriers to takeovers.

renders takeover bids impossible.[45] It is also pointed out that a repeal of multiple voting rights could raise constitutional law questions, which doubtless is a reference to the debate in many Member States as to whether depriving shareholders of existing voting rights is tantamount to an expropriation of their property under constitutional law.[46]

During the negotiation on the draft directive in the first half of 2003 the issue of differential voting rights was raised again. The Portuguese presidency made different proposals which would allow the offeror to break though barriers of this type.[47] These proposals were strongly opposed by the Scandinavian countries as it is not uncommon in these countries that listed companies have two classes of shares; one class having multiple voting rights (A-shares) and others having normal voting rights (B-share).[48] In some instances only B-shares of a company are listed, while the A-shares controlled by the founder (and family) or by a foundation are not listed. Therefore any attempt to introduce a break-though mechanism directed at a system of differential voting rights may have a major impact on the capital market in the Scandinavian countries.

Since the Portuguese Presidency did not succeed in its effort to introduce new solutions to this problem it is not possible to predict whether a break through rule will be part of the final takeover directive. The following will deal with Art. 11 of the draft directive as proposed by the Commission in October 2002.

In its arguments in support of the new draft directive, the Commission points out that the principle of the free movement of capital in itself prohibits Member States from establishing certain forms of restriction on takeover bids. On the basis of a number of recent decisions by the Court of Justice, Member States have limited possibilities for maintaining provisions which ensure that certain undertakings (typically privatised undertakings) cannot be taken over or transferred to foreign investors. Takeovers could be prevented due to provisions restricting the number of shares which foreigners can acquire or by arrangements whereby the acquisition of a given proportion of the shares requires governmental approval.[49] Such arrangements can also be found in Scandinavian companies. For instance the Commission has questioned whether the rules

45 However, the Commission points out that it will be possible to examine and revise this question 5 years after the entry into force of the directive, in accordance with the provisions in Art. 18.

46 On this question, *see* Erik Werlauff, *EU Company Law*, 2003, DJØF Publishing, Copenhagen, at 367 et seq. The High Level Group discussed this question in its report of 10th January 2002, *see supra* note 4, but arrived at the conclusion that there was no reason to compensate shareholders whose voting rights were restricted in this way.

47 *See* further, Jan Scans Christensen in Mette Neville & Karsten Engsig Sørensen (eds.), *The Regulation of Companies*, Sweet & Maxwell, forthcoming.

48 Differential voting rights are not valid in all forms. In Sweden and Denmark the maximum differential voting right is 1:10, meaning that all share must have one vote and no share can have more than ten. In Norway there is no limit to variations in voting rights, but non-voting share may not exceed one half of the total share capital, *cf.* Jesper Lau Hansen, *Nordic Company Law*, 2003, DJØF Publishing, Copenhagen at 150.

49 *Cf.* the decisions of the Court given on 4th June 2002 in Case C-367/98, *Commission v. Portugal*, ECR 2002 I-4731, C-483/99 *Commission v. France*, ECR 2002 I-4781 and C-503/99, *Commission v. Belgium*, ECR 2002 I-4809. *See* also the later judgement in C-98/01, *Commission v. UK*, judgement from 13 May 2003, not yet reported.

applying to Copenhagen Airport restricting ownership to a maximum of 10% for all other shareholders than the Danish State, is in conformity with the rules on free movement of capital and the freedom of establishment.[50]

Art. 11.2-4 concerns three different kinds of restrictions. Since none of the Scandinavian countries have had such rules at present, an implementation of the directive in its current form will require substantial new regulation to be introduced in all three countries. The following will focus on evaluating the impact of the provision, with special emphasis on the type of barriers which are most frequent in the Scandinavian countries.

5.1 Restriction on the Right of Transfer

According to Art. 11.2 of the draft directive, any restrictions on the transfer of securities provided for in the articles of association of the target company will be unenforceable against the offeror during the period for acceptance of the bid. If a listed company has a provision in its articles of association requiring the consent of the board to a transfer of shares such provision will be unenforceable against the offeror.[51] Likewise, if the articles impose a ceiling on share ownership; that is a maximum to the number of shares one person/company may own. The practical effect of such provisions especially concerns companies which have both listed and non-listed classes of shares, since articles of association which restrict transferability are generally not permitted for listed classes of shares. Art. 11 thus covers non-listed shares, cf. the definition of “securities” in Art. 2.1(e). As mentioned previously some listed companies in Scandinavia have unlisted classes of shares often held by the founder and his family. Between these shareholders there are frequently agreements and other arrangements that restrict the transferability of shares and voting rights and therefore it is most likely that art. 11 will have great impact in these unlisted classes of shares.

Art. 11.2 of the directive also ensures that any restrictions on the transfer of securities provided for in contractual agreements between the target company and its shareholders or between shareholders themselves shall be unenforceable against the offeror during the period for acceptance of the bid. The draft directive does not define what constitutes a restriction on transfer within the terms of Art. 11.2.[52]

If shareholders have entered into an agreement by which some shareholders have to give their consent to a new shareholder, such a right to object will not be

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50 *See* press release dated 5th February 2003, IP/03/178.

51 Even though restrictions on transfers of shares are generally not allowed in listed companies, *cf.* Art. 46.1 of Directive 2001/34/EC, OJ 2001 L 184 at 1 et seq., exceptions may be granted provided that they do not interfere with the normal function of the market, *cf.* Art. 46.3. E.g. in Denmark under specific conditions the board’s approval of transfer of shares in listed companies has been accepted, *see* Paul Krüger Andersen & Nis Jul Clausen, *Børsretten,* 2nd, ed. 2003, DJØF Publishing, Copenhagen at 169 et seq.

52 A similar concept is found in Art. 46 of Directive 2001/34/EC, OJ 2001 L 184, 1 et seq., according to which restrictions on the transfer of securities in the article of associations will not be permitted in listed companies. Even though the purpose of this rule is somewhat different, the concept of restrictions may be interpretated similarly.

enforceable against the offeror. Presumably the same will apply if a group of shareholders has an agreement giving mutual right of first refusal whereby a shareholder who wants to sell his shares has to offer the shares to the other shareholders first. It could be argued that in this case it is merely an option which gives the other shareholders the right to acquire the shares when a transfer is intended. Therefore such an agreement does not restrict the transferability of shares; it just requires the shareholder to sell to a certain person. However, from the offeror's point of view such rights of first refusal can have the effect of depriving him from getting the shares, and therefore the break-though rule shall also cover this type of agreement. A "tag-along" agreement, where a shareholder can only sell his shares as long as he ensures that the buyer also buys one or more of the shares of the other shareholders, must also be regarded as being covered by Art. 11.2. If the first right of refusal or the tag-along provisions are included in the articles of association - which is not common for listed classes of shares - then these provisions will also be covered by Art. 11.2.

Restrictions on transfers between others than the company and the shareholders, for example where shares are given as a security in a lending agreement between a shareholder and his bank, or an agreement between the underwriter of an issue and a majority shareholder that the shareholder may not sell his shares within a given period, are not covered by the provision. There is thus the possibility of circumvent the proposed rule by getting the company's bank or others to enter into an agreement containing such restrictions. It therefore seems that, in order to ensure that Art. 11 is effective in these cases, an assessment should be made as to whether such restrictions are agreed upon for the benefit of the involved third party. Only if this is the case ought the break-through rule not to take effect.

5.2 Voting Restrictions and Defensive Measures

According to Art. 11.3, any restrictions on voting rights provided for in the articles of association of the target company shall cease to have effect when the general meeting decides on any defensive measures against a bid. As discussed in section 3.1 above, Art. 9 of the proposed directive contains a provision which ensures that it is the general meeting and not the board which decides on defensive measures. Art. 11.3 is intended to ensure that the offeror and the other shareholders can exercise the voting rights attached to their shares and thus try to prevent the general meeting from approving defensive measures against the bid.

The kind of voting restrictions in question are provisions which block voting rights on shares, for example where a new holder of shares is blocked from exercising his voting right for a certain period of time after the acquisition of the shares. Another frequently used restriction in listed companies is voting ceilings, whereby the articles of association provided that a shareholder only has the right to exercise a maximum number of votes no matter how many shares he possesses. The effect of this type of provision is that a shareholder may exercise voting rights on some but not all of his shares, and therefore it ceases to have effect according to Art. 11.3. According to Art. 11.5, these provisions do not apply to securities without voting rights provided that they carry specific pecuniary advantages. The most obvious advantage is a prior right to the payment of dividends.[53]

Any restrictions on voting rights in contractual agreements between the target company and its shareholders or between the shareholders of the target company shall cease to have effect when the general meeting decides on any defensive measures. For example, if a shareholder is required under a shareholders agreement to use his voting rights in a given manner, or if he has transferred his voting rights to another shareholder, these agreements will be unenforceable in respect of votes cast at general meeting deciding on defensive measures. This applies both in relation to shares which the offeror acquires and to other shareholders who may have their voting rights limited in this way. Correspondingly, an agreement whereby a shareholder gives the board of directors power of attorney to exercise his voting rights shall be without effect.[54]

5.3 Removal of Restrictions Following the Completion of a Takeover

If, after the completion of a takeover bid, the offeror has acquire a sufficient proportion of the share capital and voting rights to amend the articles of association[55] a number of other restrictions to takeovers are removed, cf. Art. 11.4.

The barriers which are removed are restrictions on transfers of securities and restrictions on voting rights, as referred to in Art. 11.2 and 3, as well as any special rights of shareholders concerning the appointment or removal of board members. These restrictions are not enforceable against the offeror with effect at the first general meeting following the closure of the bid. The aim of this provision is to give the offeror the possibility, at this general meeting, of appointing his own board and to make any changes to the articles of association, to secure control over the company. Under Art. 11.4, the offeror has a right to convene a general meeting at short notice provided the meeting does not take place within two weeks of notification.

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53 One can argue about what is meant by the expression “specific pecuniary advantages”. This has previously been debated in connection with Art. 33 of the proposed 5th Company Law Directive on company structure, which would likewise allow a reduction of voting rights where shares have “special advantages”, *cf.* the discussion on this Karsten Engsig Sørensen & Poul Runge Nielsen, *EU-Retten 2*, 1999, DJØF Publishing, Copenhagen at 65 et seq. and Erik Werlauff, *Flere aktieklasser* in Revision & Regnskabsvæsen 1990:9 at 33 et seq. as well as Bernhard Gomard, *Stemmeretten i aktieselskaber i EF og i Danmark* in Revision & Regnskabsvæsen 1993:1 at 8 et seq.

54 The fact that both Art. 11.2 and 11.3 restrict the effect of an agreement prompts the question of whether it can have other consequences in relation to the parties to an agreement. Can one party for instance sue the other parties to the contract for damages due to a breach of contract, or can a party invoke an agreed penalty? For Art. 11 to have full effect, it must be assumed that release from contractual restrictions must also make it impossible for a contract party to take such steps, and therefore Art. 11 is indirectly regulating the relationship between parties to an agreement.

55 Under company law in the Scandinavian counties amendment of the articles of association usually requires a majority of 2/3rds of the capital and voting rights, c*f.* Jesper Lau Hansen, *Nordic Company Law*, 2003, DJØF Publishing, Copenhagen at 86.

It sometimes happens, that a shareholder is granted a special right, by the articles of association or by a shareholders agreement, to appoint or dismiss certain members of the board. This form of special right will be overridden by Art. 11.4. According to its wording, Art. 11.4 only covers cases where the right to appoint or dismiss board members is given to shareholders. Thus it will not apply if a non-shareholder is granted such a right. This restriction of the scope of Art. 11.4 is not acceptable, since it makes it possible to circumvent the provision by giving a friendly outsider, a "white knight", the right to appoint or dismiss the board.

In all Scandinavian countries it is to some extent possible for the articles of association to allow a person or a company who is not shareholder to elect some of the board members.[56] On the other hand, it would be inconceivable to have special provisions in the articles of association on the right to appoint or dismiss directors and managers since, the appointment or dismissal of those persons is a matter for the board of directors and not the shareholders.[57] Under Danish law it is also conceivable to provide in the articles of association that a special majority may be required to dismiss the board, or even provide that the board cannot be dismissed during its ordinary election period.[58] Such provisions could also be set aside under Art. 11.4.

Finally, it should be mentioned that the mini break-through rule in Art. 11.4 does not eliminate the requirement for a double majority which is found in the Scandinavian countries. According to this amendments to the articles of association require both 2/3rds of the share capital represented and 2/3rds of the voting rights. If the offeror obtain 2/3rds of the capital, but because of voting differentials does not have 2/3rds of the voting rights, he will under Scandinavian Law be unable to change the articles of association at the first general meeting.

6 Conclusion

The fact that the draft directive on takeover bids as proposed by the Commission in October 2002 aims to remove some of the barriers to takeover bids and thus seeks to create a market for corporate control makes the directive controversial and problematic seen from a Scandinavian point of view. If the directive is adopted in its current form major changes will be needed in the Scandinavian regulation in particular on the responsibility of the board and management and with respect to legal barriers to takeovers. The other elements of the directive are less troublesome, as the requirements of the directive are for the most already fulfilled in existing regulation. Further, the regulatory changes needed are

56 *Cf.* Jesper Lau Hansen, *Nordic Company Law*, 2003, DJØF Publishing, Copenhagen at 110.

57 *Cf.* Jesper Lau Hansen, *Nordic Company Law*, 2003, DJØF Publishing, Copenhagen at 114.

58 *Cf.* Paul Krüger Andersen, *Aktie-og anpartsselskabsret* 7th ed., 2002, DJØF Publishing, Copenhagen at 267 and Bernhard Gomard, *Aktieselskaber og andelsselskaber* 4th ed. 2000, DJØF Publishing, Copenhagen at p. 212 note 29. A different view is suggested by Erik Werlauff, *Kommenterede Aktieselskabslov*, 2002, DJØF Publishing, Copenhagen at 302.

expected to have a significant influence on the financial markets in Scandinavia, as a market for corporate control may arise.

For many years there have been theoretical discussions as to whether it can be and/or should be possible to create a market for corporate control through regulation. It is therefore thought-provoking that this has suddenly become a political aim of the European Union, more or less by chance, primarily because German business wanted to delay the adoption of a directive on takeover bids. The High Level Group did give some thoughts to whether such a market should be created, but the reality is that the decision had already been taken.