



Mergers, Acquisitions and Corporate Restructurings (Session 2)

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Legal framework in Europe

European parliament and council directive
2004/25/EC of 21 April 2004 on takeover bids
(A summary)

- The Takeover Bids Directive contains minimum guidelines for the conduct of takeover bids, including disclosure, involving securities with voting rights of companies governed by the laws of Member States, where all or some of these shares are admitted to trading on a regulated market.
- Member States may lay down additional conditions and provisions more stringent than those of the Directive

General principles of takeover bids in Europe

- all holders of securities of the target company must be given equal treatment;
- if a person acquires control of a company, the other holders of securities must be protected;
- the addressees of the bid must have sufficient time and information to be able to reach a properly informed decision on the bid;
- where it advises the holders of securities, the board of the target company must give its views on the effects of implementation of the bid on employment, the conditions of employment and the locations of the company's places of business;
- the board of the target 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;
- 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 in the prices of the securities becomes artificial and the normal functioning of the market is distorted;
- an offeror must announce a bid only after ensuring that he 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;
- an offeree company must not be hindered in the conduct of its affairs for longer than is reasonable by a bid for its securities.

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Supervisory authority and applicable law

- Member States are to designate the authority or authorities competent to supervise bids. The authorities thus designated must be either public authorities, associations or private bodies recognized by national law or by public authorities expressly empowered for that purpose by national law. Member States must inform the Commission of those designations. They must ensure that those authorities exercise their functions impartially and independently of all parties to a bid.
- The authority competent to supervise a bid is 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. In all other cases (e.g. where securities are not admitted or are admitted to trading on more than one regulated market), the Directive lays down rules for deciding the competent supervisory authority.
- Member States must ensure that all persons employed or formerly employed by their supervisory authorities are bound by professional secrecy.
- The supervisory authorities and the authorities responsible for supervising capital markets must cooperate and supply each other with information. Information thus exchanged will be covered by the rules of professional secrecy.

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Protection of minority shareholders, mandatory bid and equitable price

- Where a natural or legal person, as a result of his own acquisition or the acquisition by persons acting in concert with him, holds securities of a company which give him a specified percentage of voting rights that results the control of that company, Member States must 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 must be addressed at the earliest opportunity to all the holders of those securities for all their holdings at the equitable price.
- Where control has been acquired following a voluntary bid to all the holders of securities for all their holdings, the obligation to launch a bid no longer applies.
- The percentage of voting rights which confers control and the method of its calculation must be determined by the rules of the Member State in which the company has its registered office.
- The supervisory authorities may be authorized by Member States to adjust the equitable price, in circumstances and in accordance with criteria that are clearly determined. Any such decision must be substantiated and made public.
- By way of consideration the offeror may offer securities, cash or a combination of both. Where the consideration does not consist of liquid securities admitted to trading on a regulated market, it must include a cash alternative.
- Member States may provide that a cash consideration must be offered, at least as an alternative, in all cases.

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Information concerning bids

- Member States must ensure that a decision to make a bid is made public without delay and that the supervisory authority is informed of the bid.
- They must also 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.
- The Directive lays down the minimum information that the offer document must contain. It must, for example:
 - state the terms of the bid;
 - the identity of the offeror;
 - the consideration offered;
 - the maximum and minimum percentages or quantities of securities which the offeror undertakes to acquire;
 - the conditions to which the bid is subject;
 - the offeror's intentions with regard to the future business of the offeree company;
 - the time allowed for acceptance of the bid;
 - the national law which will govern the contract.

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Employees' rights

- The Directive requires that employees or representatives of the offeree company must be informed in detail in the event of a takeover bid.
- It even extends the obligation to inform or consult staff to the employees of the offeror company.
- It also expressly stipulates that information for and consultation of employees must be in line with the relevant national provisions and with the various Community provisions adopted in this field, such as Directive 94/45/EC on European Works Councils, Directive 98/59/EC on collective redundancies and Directive 2002/14/EC on informing and consulting employees.

Time allowed for acceptance

- Member States must provide that the time allowed for the acceptance of a bid **may not be less than two weeks or more than ten weeks from the date of publication of the offer document.**
- In certain circumstances, they may provide that the period of ten weeks may be extended.

Obligations of the board of the offeree company

- Although the Directive does provide for arrangements in this area, it leaves it up to Member States whether or not to apply them.
- The requirement that the board of the offeree company must obtain the prior authorization of its shareholders before taking any defensive action is thus optional.
- Member States leave it up to the companies themselves to decide whether or not to apply this rule.

Breakthrough

- The requirement to freeze members' extraordinary rights (such as multiple voting rights, appointment rights and restrictions on the transfer of securities) during the bid is also optional.
- Member States leave it up to the companies themselves to decide whether or not to apply this rule.

Other rules applicable to the conduct of bids

Member States must lay down rules governing the conduct of bids, at least as regards the following:

- the lapsing (cancelation) of bids;
- the revision of bids;
- competing bids;
- the disclosure of the results of bids;
- the irrevocability of bids (impossible to cancel) and the conditions permitted.

Right of squeeze-out

- The Directive provides for a "squeeze-out right" enabling a majority shareholder to require the remaining minority shareholders to sell him their securities. Member States must ensure that an offeror is able to require all the holders of the remaining securities to sell him those securities at a fair price.
- Member States must introduce the squeeze-out right in one of the following situations:
 - where the offeror holds securities representing not less than 90 % of the capital carrying voting rights in the offeree company. 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; or
 - where, following acceptance of the bid, he has acquired or firmly contracted to acquire securities representing not less than 90 % of the capital carrying voting rights and 90 % of the voting rights comprised in the bid.
- If the offeror wishes to exercise the right of squeeze-out, he must do so within three months of the end of the time allowed for acceptance of the bid. Member States must ensure that a fair price is guaranteed.

Right of sell-out

- The right of squeeze-out is combined with a "sell-out right" enabling minority shareholders to require the majority shareholder to buy their securities following a takeover bid.
- Member States must ensure that a holder of remaining securities is able to require the offeror to buy his securities from him at a fair price.

IMPLEMENTATION OF THE DIRECTIVE ON TAKEOVER BIDS IN EUROPE

Marcus Partners, in cooperation with the Centre for European Policy Studies (June 2012), Study on the application of Directive 2004/25/EC on takeover bids
Available at:
http://ec.europa.eu/internal_market/company/takeoverbids/index_en.htm

A general overview of the implementation

- No structural compliance issue has emerged.
- Takeover Bids Directive has not led to major changes in the legal framework of the Member States because similar rules already existed or were in the making at national level prior to the adoption of the Directive.
- The Takeover Bids Directive has contributed to improvements in relation to its objectives, for instance through the introduction of coordination rules for supervisors with regard to cross border offers, general principles of the directive, disclosure rules, the mandatory bid rule and squeeze-out and sell-out rights.

Transposition of the optional provisions of the Takeover Bids Directive

- 19 Member States have transposed the board neutrality rule
- Only 3 Member States have transposed the breakthrough rule
- In accordance with
- About half of the Member States allow companies who are subject to the board neutrality rule and/or breakthrough rule (by law or based on the articles of association of the company) not to apply the rule when they are confronted with a takeover bid by an offeror who is not subject to the same rule (reciprocity).

Results of the survey

- Stakeholders who participated in the perception survey, conducted for the preparation of the External Study, consider the Takeover Bids Directive to be useful for the proper and efficient functioning of the market.
- Stakeholders are generally satisfied with the clarity of the rules included in the Directive and the adequacy of their enforcement.
- Stakeholders generally believe that the Directive has strengthened the position of minority shareholders and are positive about the disclosure regime, the mandatory bid rule and the squeeze-out and sell-out rights included in the Directive.
- Representatives of employees, consulted through the perception survey, are however less satisfied with the Directive. In particular, they expressed the view that the Directive does not sufficiently protect employees against the risk of change in working conditions or redundancies after the takeover.
- With regard to the optional provisions of the Takeover Bids Directive, which regulate the use of defensive measures, stakeholders appear to believe that they had little effect.

M&A PROCESS AND CRITICAL SUCCESS FACTORS

Process and Critical Success Factors

M&A PROCESS

CRITICAL SUCCESS FACTORS

Strategic
Planning

❑ **STRATEGIC CONSISTENCY**

Search & Screening

❑ **TEAM THAT MANAGES THE PROCESS AS A
LEARNING ORGANIZATION**

❑ **POTENTIAL TO CREATE STRATEGIC AND
OPERATIONAL VALUE**

Valuation and
Negotiation

❑ **ECONOMIC ACCURACY AND RIGOR**

❑ **FAVORABLE ENVIRONMENT FOR NEGOTIATION**

Integration
Post-Acquisition

❑ **FINDING PROGRAMS THAT CREATE VALUE**

❑ **WELL PLANNED INTEGRATION**

❑ **MANAGEMENT SYSTEMS COMPATIBLE WITH
VALUE CREATION PROCESS**

Post-Acquisition
Audit

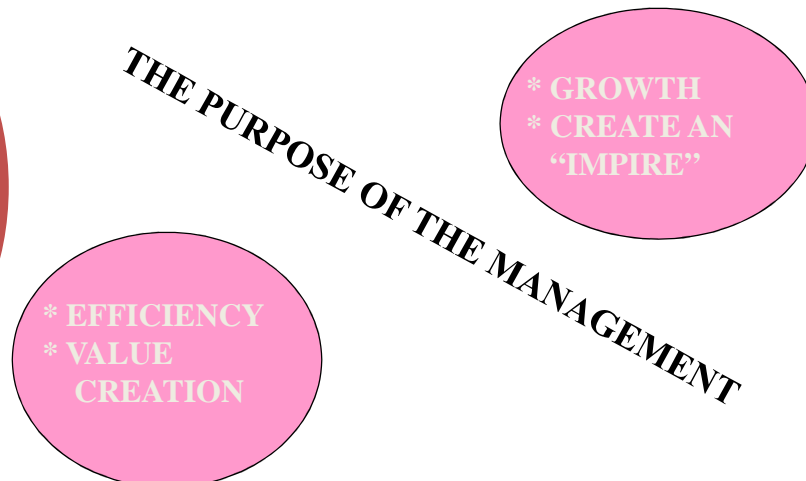
❑ **CONTROL AND LEARNING PROCESS FOR THE
CREATION OF VALUE**

FINANCIAL THEORY AND CREATION OF VALUE

Financial theory on value creation

- Target company is undervalued
 - Inefficiency of financial markets
 - Inefficiency of the management of the target company
 - Market for corporate control
- Synergy

What is the motive for corporate control?



Theories on M&A

- Agency problems
- Efficiency
 - Operational synergy including economies of scale
 - Financial synergy
 - Strategic synergy
 - Complementarities of product mix and market mix
 - Economies of scope
 - Economies of vertical integration
- Market power
- Tax benefits
- Information asymmetry
- Hubris theory - pre-calculation of synergy is often too high to justify the takeover premium
- Retirement of the entrepreneur

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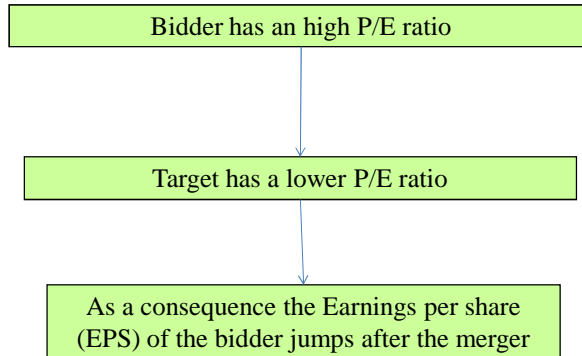
Industries that look for world market shares

- Businesses that are affected by technology, regulation and barrier to international trade:
 - Telecommunications
 - Banking
 - Insurance
 - Chemical
 - Pharmaceuticals
 - Publishing
 - Information Technology
 - Electricity, Gas and water supply
 - Distribution and logistics
 - Food and beverage
 - Motorcars

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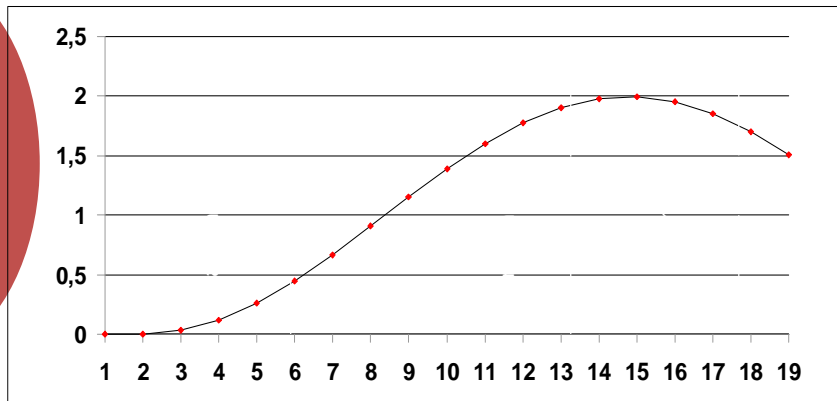
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P/E differences is not financial sound



Does the life cycle of the industry
explains the level of M&A?

Does the life cycle explains the M&A



Strategic Realignment
Vertical Integration
Strengthening the portfolio

No motives for
M&A

Horizontal
Acquisitions

Exit
Diversification
MBO

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Three pages assignment:

- Do mergers create value?
- Why do merger fail?
- What are the successful factors of M&A?