

## Corporate Governance Directives and Soft law. DNNII 2016\_17

- **Directive 2007/36/EC** sets certain rights for shareholders in listed companies,
  - timely access to relevant information on general meetings ( minimum 21 days, Spain 30 days since the General Meeting is called)
  - Easier proxy voting. Member States shall permit shareholders to appoint a proxy holder by electronic means. MS, shall ensure that proxy holders may be appointed, and that such appointment be notified to the company, only in writing. Beyond this basic formal requirement, the appointment of a proxy holder, the notification of the appointment to the company and the issuance of voting instructions, if any, to the proxy holder may be made subject only to such formal requirements as are necessary to ensure the identification of the shareholder and of the proxy holder, or to ensure the possibility of verifying the content of voting instructions, respectively, and only to the extent that they are proportionate to achieving those objectives.
  - Subject to modification at present time
- **Directive 2004/25/EC** sets minimum standards for **takeover bids** (or changes of control) involving securities of EU companies. It aims to protect minority shareholders, employees and other interested parties.

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

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

**‘offeree company’** shall mean a company, the securities of which are the subject of a bid;

**‘offeror’** shall mean any natural or legal person governed by public or private law making a bid;

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

**‘securities’** shall mean transferable securities carrying voting rights in a company;

**‘parties to the bid’** shall mean the offeror, the members of the offeror’s board if the offeror is a company, the offeree company, holders of securities of the offeree

company and the members of the board of the offeree company, and persons acting in concert with such parties;

**‘multiple-vote securities’** shall mean securities included in a distinct and separate class and carrying more than one vote each

**“hostile bid”** . Legally there is no difference. But Directors’ of the Offeree oppose the bid. They may want to engage operations to frustrate it (not all actions are possible without prior General Assembly permission)

**“mandatory bid”**. A bid is made mandatory when the offeror has acquirer control, deciding power in the offeree. The “break through level” (when the bid is mandatory) is defined by Member States of EU (ie, Spain acquisition of 30% of voting rights in General Assembly, etc)

**Equitable price.** Highest price paid for the same securities by the offeror, or by persons acting in concert with him/her, over a period, to be determined by Member States, of not less than six months and not more than 12 before the bid

### **Duties of the offeror**

Member States shall ensure that a decision to make a bid is made public without delay and that:

- The offeror draws up and makes public in good time an offer document containing the information necessary to enable holders of the offeree’s securities to reach a properly informed decision of the bid
- Supervisory authority is informed of the bid.
- Workers or workers representatives are informed

### **Directors of the offeree**

During the period of the bid, the board of the offeree company can look for alternative offers. But it needs prior permission of the General Assembly to carry out any other acts which may result in the frustration of the bid.

### **Breakthrough**

#### **The right of squeeze-out**

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

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

or

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

The percentage of voting rights which confers control for the purposes of paragraph 1 and the method of its calculation shall be determined by the rules of the Member State in which the company has its registered office (Spain 95%)

**Protection of minority shareholders, the mandatory bid (Derecho de No Exclusión) and the equitable price.-** Member States shall ensure that a holder of remaining securities is able to require the offeror to buy his/her securities from him/her at a fair price under the same circumstances as provided for above

### Soft Law

**Recommendation 2005/162/EC.** It deals with the role of **non-executive or supervisory directors** in listed companies. It: lays down rules on the **independence** of directors; and recommends that companies set up **committees** on the board (or supervisory board when there are two boards like in listed German Companies) to deal with:

- Nomination
- Remuneration
- Internal Audit issues (and choosing external auditors, etc).
- NOTE: such committees are mandatory in Spain for Public listed Companies. The members of such committees ought to include a majority of independent Directors.

### **Recommendation 2009/385/EC**

- remuneration should be performance-based and promote a company's long-term sustainability
- companies should publicly disclose their remuneration policies
- the remuneration committee should be involved
- shareholders should be able to influence remuneration policy

### **Recommendation on the quality of corporate governance reporting by listed companies ('comply or explain')**

Ad example. In Spain, "CUBG'2015, whose principles and recommendations follow the comply or explain principle