

**Possible issues raised by application by the Member States of the derogation power granted by Article 4(5) of Directive 2004/25/EC on takeover bids**

1. The national laws of EU member states have been recently harmonized with the provisions of the Directive 2004/25/EC on take over bids. In particular, according to Article 21 of the said Directive, the member states ought to have complied with the Directive no later than 20.5.2006.

2. Art. 4 para 5 of the Directive states that on the condition that “*general principles laid down in Article 3 (1) are respected, Member States may provide in the rules that they make or introduce pursuant to this Directive for derogations from those rules: i) by including such derogations in their national rules, in order to take account of circumstances determined at national level and/or ii) by granting their supervisory authorities, where they are competent, powers to waive such national rules, to take account of the circumstances referred to in (i) or in other specific circumstances, in which case a reasoned decision must be required*”.

The manner in which the Member States’ possibility to derogate is provided, is most general and requires a common understanding of the principles laid down in Article 3(1) of the Directive. Different understanding of such principles could lead to varying exceptions, which – if the case – could give rise to forum shopping, contrary to EU legislation.

3. A study of the derogations provided in the Greek Law implementing Directive 2004/25/EC<sup>1</sup> gives, on my point of view, rise to doubt about the compliance of certain of them with the general principles of Article 3 (1) of the Directive 2004/25/EC.

Specifically, Article 8 of Law 3461/2006 provides the exceptions from the obligation to submit a takeover bid. These cases are the following:

- (a) A third person holding a greater percentage of voting rights than the person, in accordance with the law, primarily obliged to submit a mandatory takeover bid.

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<sup>1</sup> Greek Legislation has been harmonised with the provisions of Directive 2004/25/EC by Law 3461/2006, published in the Official Gazette on 30 of May 2006.

- (b) The securities of the company having been acquired by virtue of a voluntary takeover bid submitted according to the provisions of the Law 3461/2006 and addressed to all the securities' holders and for the total of their securities.
- (c) The acquisition of securities being a result of transfer by virtue of parental grant or inheritance.
- (d) The person primarily obliged to submit a mandatory takeover bid, in accordance with the law, having acquired a percentage of voting rights not exceeding the limit imposed by the said law at a percentage greater than three (3) percent of the total of these voting rights and having undertaken in writing the obligation (aa) to sell the necessary amount of securities so as to revert below the limit, the excess of which requires the submission of a mandatory takeover bid within six (6) months from the acquisition at the latest and (bb) not to exercise within this period the voting rights corresponding to this percentage.
- (e) The securities having been acquired upon exercise of the subscription right at a share capital increase, to which right the person primarily obliged to submit a mandatory takeover bid was entitled as an old shareholder, on the condition that the exercise of the subscription right is not accompanied by the repeal of subscription rights of other shareholders.
- (f) The acquisition of securities being a result of a merger of companies being affiliated.
- (g) A procedure of privatisation of the Offeree Company being applied.
- (h) The acquisition of securities consisting part of the financial rescue plan procedure of the company according to articles 44 et. sec of Law 1892/1990.

Particularly in the cases described under (e) and (g) above an issue is raised as to whether the particular exceptions are in accordance with Article 4(5) in conjunction with Article 3(1) of Directive 2004/25/EC. More specifically, Article 3(1)(a) of the Directive is based on the investors' protection, stating that *“all holders of the securities of an offeree company of the same class must be afforded equivalent treatment; moreover, if a person acquires control of a company, the other holders of securities must be protected”*.

As for exception (e) above, excess of the limit imposing the obligation to submit a mandatory takeover bid through the acquisition of the securities (and the voting rights corresponding thereto) by virtue of the exercise of subscription rights, constitutes a derogation according to Greek Law, as mentioned above. This exception is obviously the result of a balancing of interests: Greek legislator has probably concluded that priority should be assigned to corporate actions as against the investors rights. It is questionable whether this conclusion by the Greek legislator is in compliance with the conclusion and evaluation embodied in Directive 2004/25/EC, where the protection of investors is at the forefront without any room for such a derogation.

A respective problematic is raised also in relation to exception (g).

4. It would be of interest for the Members of the EFMLG to express their opinion on the particular matter and, accordingly, to present the manner in which other member states have made use of the said derogation power, in order to ascertain whether there is room for further action.

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Dimitris Tsibanoulis