Takeovers Directive

Implementation and impact

Illustration: Chris Andrews

While the EC Takeovers Directive was due to be implemented into national law by 20 May 2006, many member states are still in the process of putting in place the necessary legislation. In this feature, Herbert Smith, Gleiss Lutz, Stibbe, Cuatrecasas and Gianni Origoni Grippo & Partners review some common issues that all member states implementing the Directive are facing, and consider the effect implementation is having in certain key jurisdictions.

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Discussions on a European Directive on takeovers began over 20 years ago, with the aim of creating a Community-wide set of rules governing the conduct of takeovers across Europe. Following much negotiation and compromise, Directive 2004/25/EC on takeover bids (the Directive) was eventually adopted in May 2004, with implementation scheduled for 20 May 2006. Its aim of establishing a level playing field for takeovers across Europe was hindered by the level of compromise involved in agreeing the provisions of the Direc-

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Takeovers Directive: general principles

The Takeovers Directive sets out six general principles governing the conduct of takeovers - member states must ensure compliance with these principles:

- All target shareholders of the same class must be afforded equal treatment; in addition, if a person acquires control of a company, the other holders of securities must be protected.

- Target shareholders must have sufficient time and information to enable them to reach a properly informed decision on the bid; when advising its shareholders, the target board must give its views on the effect of the bid on employment, conditions of employment and location of place of business of the target.

- The target board must act in the interests of the company as a whole and must not deny shareholders the opportunity to decide on the merits of a bid.

- False markets must not be created in the shares of the bidder, the target, or any other company involved in the bid, such that the price of the securities concerned artificially rises or falls and the normal functioning of the markets is distorted.

- A bidder must announce a bid only after taking all reasonable measures to secure the implementation in full of the consideration offered.

- A target company must not be hindered in the conduct of its business by a bid for its shares for longer than is reasonable.

tive; as such, it is not an "EU Takeover Code", but instead is a framework directive, establishing minimum standards for the regulation of takeovers (*see box, Takeovers Directive: general principles*).

Reflecting the freedom given to member states under the Directive to impose more stringent takeover rules where they see fit, countries are taking different approaches to implementation. The European Commission published a report in February 2007 on the implementation of the Directive and concluded that because many of the member states have used the options available in the Directive on key provisions, and in particular, the provisions restricting frustrating action (*see below*), new barriers to takeovers may in fact have been created rather than existing barriers being eliminated. The Commission says that, as a result, it will continue to closely monitor the way that the Directive is operating in practice and may bring forward a full review.

Member states are at various stages of implementation and, with the impact becoming clearer in some jurisdictions, this article reviews some key issues that are common to all member states and looks at the effect implementation of the Directive is having on the conduct of public takeovers in Belgium, France, Germany, Italy, The Netherlands, Spain and the UK.

Key issues for all member states

The Directive raises certain key issues that all member states must address, including those regarding:

- Shared jurisdiction.

- Pre-bid defences and frustrating action.

- Squeeze-outs and information.

Shared jurisdiction

Under the Directive, a takeover is to be regulated by the supervisory authority where the target company has its registered office if its shares are admitted to trading on a regulated market in that member state. If a company does not have its registered office and shares admitted to trading on a regulated market in the same member state, bids for such a company must be made in compliance with two sets of rules and the regulators will have jurisdiction over different elements of the bid.

This concept of shared jurisdiction has already raised questions in Deutsche Börse and the New York Stock Exchange's battle for Paris-listed Euronext (which is incorporated in The Netherlands).

In addition, not all markets are regulated markets. Companies listed on the junior or high-tech markets are generally not covered by the Directive (Alternext, for example) but local rules may subject them to similar rules (such as Alternative Investment Market companies in the UK).

Pre-bid defences and frustrating action: opting in or out

Articles 9 and 11 are two of the Directive's most controversial provisions and will affect bids for European targets, particularly by non-European bidders. Under the Directive, member states can choose whether to apply either or both:

- The restriction on frustrating action, which requires the board of the target company to obtain the shareholders' approval before undertaking any action which may frustrate a bid (*Article 9*).

- The breakthrough provisions, which allow a bidder to override target shareholders' blocking rights, such as transfer restrictions, limitations on share ownership and weighted voting rights (*Article 11*).

Even if member states opt out of the compulsory application of these provisions, individual companies can voluntarily opt back in.

These options for individual member states and companies create a level of uncertainty for bidders as to which provisions will apply in any particular target's case. Even where member states opt out, there may still be existing restrictions in their local laws that are similar. For example, Germany has opted out of Article 9 but has retained its current restrictions on frustrating action (*see below, Implementation by key member states: Germany*).

A further layer of complexity is added by the Directive's reciprocity provisions (*Article 12*). If a member state applies either or both Articles 9 and 11 and elects to allow reciprocity, a company subject to either or both of these articles can disapply them if it becomes the target of a bid by a company not subject to the same restrictions. So if, for instance, a

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member state permits reciprocity, a target which has opted in to Article 9 can reverse that decision and take frustrating action if a bid is made for it by a company that is not subject to the restriction on frustrating action.

One of the problems with reciprocity is that there is a range of uncertainties on which member states are taking different views, such as whether the reciprocity provisions should be applied against non-EU bidders. For example, if there were competing bids for a target from a US bidder and an EU bidder, and both the target and the EU bidder had opted in to Article 9 and were applying the reciprocity provisions, the target might be permitted to take frustrating action for the US offer but not the EU offer. However, this is not the case in France, for instance, where, if one of the bidders is not subject to restrictions on frustrating action, the target can take frustrating action against all bidders.

Squeeze-outs and information

The Directive prescribes that a squeeze-out should be permitted when between 90% and 95% of the target shares have been acquired (*Article 15*), and has left member states to fix their own thresholds and time periods. Most countries will retain their existing thresholds for squeeze-out. A number, including Germany, France and Spain, have simplified the process for squeezing out the minority.

Due diligence on public bids has been facilitated in some respects. Companies with shares listed on a regulated market (not just those in a live takeover situation) will be required to publish detailed information in their annual reports on restrictions on share transfers and shareholding structures and significant agreements to which the company is a party that are affected by a change of control on a takeover (*Article 10*).

Implementation by key member states

This section sets out the extent to which certain key member states have implemented the Directive, and considers the changes that have been, or are likely to be, put in place. A number of jurisdictions are also taking the opportunity to make other changes to their takeover regimes.

(See also box, Implementation of the Takeovers Directive: a snapshot.)

Belgium

Implementation status. The Directive has not yet been implemented. However, draft legislation is in the pipeline and implementation is expected in the next few months.

Proposed changes. It is likely that the trigger for mandatory bids will be determined by the legislation implementing the Directive and is expected to be more than 30% of shares with voting rights.

It is expected that the squeeze-out procedure will apply when the bidder holds at least 95% of the share capital carrying voting rights and 95% of the voting rights (at the moment the threshold is 95% of shares with voting rights). A sell-out right will probably apply when the bidder holds 90% or more of shares with voting rights (the current threshold is also 90% of such shares).

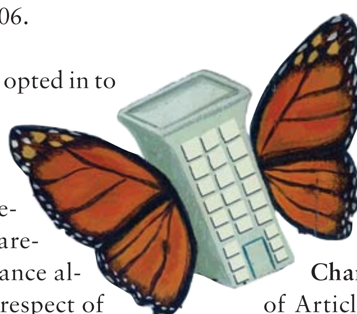
Belgium will probably opt out of Articles 9 and 11 of the Directive, on the basis that a Belgian company will have the opportunity to decide to apply these provisions. Under the current Belgian legislation, a target board is prevented from taking frustrating action without shareholder approval once a bid is announced, but restrictions on transferability of shares can be used against a bidder under certain conditions.

The reciprocity provided for in Article 12 of the Directive will probably be permitted with respect to Articles 9 and 11 if a Belgian target has voluntarily decided to opt in to one or both of these provisions.

France

Implementation status. France fully implemented the Directive by the Takeover Act (*Loi sur les offres publiques*) of 31 March 2006 and by amendment of the general regulations of the Financial Markets Authority (*Autorité des Marchés Financiers*) (AMF) published on 18 September 2006.

Changes. As France opted in to Article 9, there are now restrictions on frustrating action during an offer period without shareholder approval. France allows reciprocity in respect of Article 9, and therefore permits targets to take frustrating action against a bidder that does not apply the same restrictions.



Despite the position on frustrating action, "poison pill warrants" have been introduced. These are a new form of bid defence (which may be used either pre- or post-bid), which allow French companies to issue free warrants, subject to shareholder approval, to existing shareholders giving them the right to subscribe for shares on preferential terms. So far, only a small number of companies have authorised the issue of such warrants in their constitutions, including Eurazeo, Bouygues, Hermès International, Saint Gobain and Suez.

France has opted out of the breakthrough provisions but retains the ability for French companies to opt in to Article 11 on a voluntary basis. Reciprocity is, however, not allowed in this respect.

There is also a new and quicker squeeze-out procedure, which can be implemented within three months of a tender offer, if the bidder holds at least 95% of the capital and voting rights of the target as a result of the offer. This new procedure does not require the bidder to first launch a buy-out offer.

The trigger for mandatory bids remains unchanged at one third of the capital or voting rights. There is a new minimum price requirement for mandatory bids of the highest price paid for the same securities by the bidder in the 12 months before the offer is made.

Finally, the AMF has been given authority to require a person who it reasonably believes is preparing a public takeover to inform the AMF of its intentions, which will then make the information public. The AMF will also be able to block an offer for six months if a company states that it does not intend to make an offer but subsequently changes its mind.

Germany

Implementation status. The Directive was implemented in Germany on 14 July 2006 by amendments to the existing Securities Acquisition and Takeover Act.

Changes. Germany has opted out of Article 9, although existing and, to some extent, similar rules permitting frustrating action based on supervisory

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Implementation of the Takeovers Directive: a snapshot

The following table sets out the approach of certain key member states to opting in to the Takeovers Directive's provisions on frustrating action, breakthrough and reciprocity, and mandatory bid and squeeze-out thresholds.

Country	Has the Takeovers Directive been implemented?	Is it applying Article 9 (frustrating action)?	Is it applying Article 11 (breakthrough)?
Belgium	Not yet - expected in the next few months.	Probably not.	Probably not.
France	Yes, by implementing law of 31 March 2006 and regulations of 18 September 2006.	Yes.	No.
Germany	Yes, on 14 July 2006.	No.	No.
Italy	Not yet - expected in the next few months.	Probably yes.	Probably yes.
The Netherlands	Not yet - final implementation expected in spring 2007.	No.	No.
Spain	Not yet - bill published on 20 October 2006; further regulations necessary.	Probably yes.	Probably not.
UK	Yes.	Yes.	No.

board approval and (pre-offer) shareholder approval remain in place. Germany has also opted out of Article 11. Pre-existing transfer restrictions continue to apply on a bid as well as pre-existing voting restrictions. Companies may voluntarily opt in to Articles 9 and 11 by amending their articles of association.

Where a company has voluntarily opted in to Article 9 and/or 11, shareholders can resolve not to apply these provisions if a bidder does not adhere to them on a reciprocal basis.

A new squeeze-out regime for takeovers has been introduced in addition to the existing squeeze-out provisions. Under the new regime the threshold for squeeze-out of voting shares is 95% of the voting shares and 95% of the entire registered share capital for non-voting shares. The same thresholds apply for sell-out. Following a takeover offer, the squeeze-out process must be approved by the court (no shareholders' resolution is required). There is also a presumption that the offer price is fair consideration for the squeeze-out if the bidder has received 90% acceptances of the offer. The old squeeze-out procedure under the Stock Corporation Law, which is still also applicable to non-takeover situations, requires the main shareholder to hold at least 95% of the registered share capital.

Germany's mandatory bid threshold is 30% of the voting rights. The German Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*) (BaFin) now has new statutory investigative powers.

Italy

Implementation status. Italy did not meet the implementation deadline. Proposals for implementation of the Directive were published in December 2005 and, following the April 2006 elections, were replaced by a further government proposal in June 2006 (the draft proposal). The implementation of the Directive is, however, likely to be imminent because the Italian government has been recently empowered (by a draft decree not yet in force although publication in the Italian Official Gazette is pending) to issue a legislative decree (the decree) amending the current tender offer rules in line with the draft proposal.

The draft proposal may be amended before being issued in its final form. However, the existing Italian legislation is relatively similar to the provisions of the Directive so it is expected that there will be few changes of substance.

Proposed changes. The offer price will have to be equal to or higher than the highest price agreed on or paid by the offeror, or by entities acting in agreement with the offeror, in the 12 months preceding the offer. Failing a price being determined in this way, the offer price should be equal to the average market price in the 12 months preceding the offer. The Italian supervisory authority, the National Commission for Companies and the Stock Exchange (*Commissione Nazionale per la Società e la Borsa*) (CONSOB), will have the power to fix either:

- A lower price if the purchase of the shareholding which gives rise to the bid is aimed at rescuing the target company or the market price has been affected by exceptional circumstances; or
- A higher price if the bidder has been fraudulent (in certain circumstances).

Italian companies cannot undertake any frustrating action that may prejudice an offer, unless approved by shareholders. The draft proposal confirms this principle, but allows Italian companies to include provisions in their constitutions to permit frustrating action in respect of certain partial tender offers and exchange tender offers that do not provide for cash as an alternative to securities.

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Is it permitting reciprocity for Article 9 and/or 11?	What is the mandatory bid threshold?	What is the squeeze-out threshold?
Will most likely be permitted.	Expected to be more than 30% of shares with voting rights.	Expected to be 95%.
Article 9: yes. Article 11: no.	One third of capital or voting rights.	95%.
Yes.	30% of voting rights.	95%.
Probably yes.	30% of issued shares.	Expected to be 95%.
Yes.	30% of voting rights.	95%.
Probably yes.	30%.	Expected to be 90%.
No.	30%.	90%.

Breakthrough is already permitted under existing Italian legislation to the extent that shareholders may withdraw from any shareholders' agreement in the event of an offer. The draft proposal confirms this principle, and also allows Italian companies to include provisions in their constitutions that, for example, selling and voting restrictions and governance provisions do not apply to the bidder during an offer period.

Italy is likely to allow reciprocity in principle; the draft proposal permits Italian companies to include provisions in their constitutions to enable them to apply the reciprocity provision.

It is proposed that the squeeze-out threshold (currently set at 98%) be reduced to 95%.

The current legislation sets the mandatory bid threshold at 30% of the issued share capital; this remains in place under the draft proposal.

The Netherlands

Implementation status. The Netherlands did not meet the implementation deadline. The delay was largely due to the government's proposals for a far-reaching breakthrough provision, which were ultimately withdrawn. The draft legislation has now passed the Parliament's lower house and final implementation is expected in spring 2007.

Proposed changes. Significantly for The Netherlands, mandatory offers will be introduced for the first time. The obligation will arise when a person, or persons acting in concert, obtains at least 30% of the votes exercisable at a shareholder meeting.

The Netherlands will opt out of Article 9. However, individual companies will be allowed to opt in, in accordance with the Directive. The Netherlands will also opt out of Article 11, although Dutch companies will be able to opt in on a voluntary basis.

There are a number of ways for targets to protect themselves, which may still be available in The Netherlands even if companies opt in to Articles 9 and 11. These include:

- A crown jewel structure, such as the one used in the Arcelor/Mittal case where certain assets were dropped down into a separate trust, taking away a level of control over those assets by top management.
- Granting special rights to an entity that is not a shareholder.
- Granting veto rights in respect of a change to the articles of association to specific shareholders.

The Netherlands will allow reciprocity in respect of Articles 9 and 11. Where a Dutch company has opted in to one or both Articles it may decide to opt back out if it becomes the target of a bid by an EU entity which has bid defence measures in place. The decision to opt out is subject to shareholder approval, which cannot be granted more than 18 months before the making of the bid.

Although there will be technical changes to the squeeze-out rules in accordance with the Directive, the squeeze-out threshold will remain at the current level of 95%.

Spain

Implementation status. Spain did not meet the implementation deadline. The bill containing the amendments to the Spanish Securities Market Act was published on 20 October 2006 and, although it may still change, sets out the basis of the new takeover regime in Spain. In addition, a new Royal Decree will be required to regulate all matters that will not be determined under the new Act.

Proposed changes. Spain plans to opt in to Article 9. This changes the current provisions on frustrating action, by requiring the target board to obtain the approval in a shareholders' general meeting with an attendance quorum of 50% at first call and 25% at second call (if less than 50% of the share capital attends, a voting quorum of two-thirds of the voting rights present or represented will be required).

Under the bill, Spain will opt out of Article 11, although individual companies may approve any breakthrough measures with the same majority of shareholders as for approval of frustrating action.

Both Articles 9 and 11 will be subject to reciprocity, so that target companies may opt out of these articles if a bidder does not have similar mechanisms in place.

The bill changes the rules relating to mandatory bids substantially. A bid will be mandatory only once "control" has been acquired, as opposed to the existing system where mere "intention to ob-

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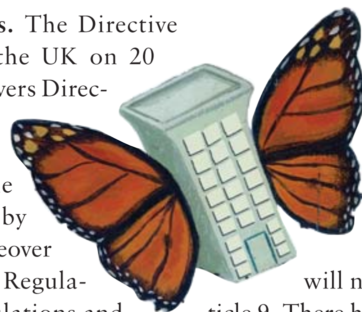
tain control" triggers the obligation. The existing mandatory bid thresholds will be abolished (as will the partial bid regime) and the threshold will now be 30%. (At present, the threshold of 25% triggers an obligation to make a partial bid for at least 10% of the company, and the threshold of 50% triggers a bid for the entire company.)

At present, Spain has no squeeze-out procedure and the minority is usually bought out by agreement between the majority and consent from the minority. A new squeeze-out/sell-out procedure has been proposed, which will be triggered if the takeover has been accepted by shareholders that represent at least 90% of the voting rights, and the offeror has reached a holding representing at least 90% of the voting rights.

UK

Implementation status. The Directive was implemented in the UK on 20 May 2006 by the Takeovers Directive (Interim Implementation) Regulations 2006 (the Regulations) and by changes to the UK Takeover Code (the Code). The Regulations were interim regulations and were replaced in April 2007 by the (largely similar) provisions in the Companies Act 2006.



Changes. The Directive was, to a large extent, modelled on the UK takeovers regime and, as a result, its implementation did not result in a complete overhaul of the UK system. However, despite the stated aim of the UK Takeover Panel (the Panel) that it would be "business as usual" after implementation, in practice there have been some significant changes to takeover documentation. Since May 2006, there has been a large number of bids (many of them high-profile) for UK companies which have highlighted some of the changes (for example, Ferrovial's takeover of BAA, the takeover of Anglian Water by a consortium led by 3i, and the competing bids for Corus from Tata Steel and Companhia Siderurgica Nacional).

The UK has opted in to Article 9 and the substance of the restriction is similar to the UK's previous regime on frustrating action under Rule 21 of the Code. Reciprocity is not permitted. As a result, if a UK company becomes the target of a bid by a company not subject to the same restrictions, it will not be able to disapply Article 9. There has been a tightening up of Rule 21 as a result of the implementation of the Directive, which has had an impact in practice. In particular, Panel consent is now specifically required to enable the target to dispense with obtaining shareholder approval for an action in pursuance of an existing contract or obligation.

The UK has opted out of Article 11 on breakthrough, although individual companies can opt in with the approval of a 75% majority of shareholders. Reciprocity is not permitted.

UK companies are unlikely to opt in to Article 11 as the types of arrangements and structures at which breakthrough is aimed (weighted voting rights, for example) are unusual in UK companies. The main reason that a UK company might want to opt in to Article 11 is to take advantage of the reciprocity provisions in another member state. However, the directors need to have carefully considered the benefits of this. Once the company has opted in, it cannot reverse the decision for a year and there may be unintended consequences (for example, irrevocable undertakings not to accept an offer may become unenforceable because they are contractual restrictions on target shareholders transferring shares to the bidder). To date, the authors are unaware of any UK company that has opted in.

The squeeze-out threshold remains at 90% but for listed companies there is no longer any time limit:

- On reaching the 90% level (it used to be four months).
- Within which notices must be sent out (it used to be two months from the date of reaching 90%).

Financial advisers are becoming increasingly careful when making their cash confirmation statement that the bidder has sufficient resources to finance the bid, to ensure that the length of time for which they are giving the cash confirmation has a definite end. In some instances, financial advisers have considered contractually obliging the bidder to conduct the compulsory acquisition as soon as it can and requiring the bidder to obtain the cash confirmer's consent if it wants to declare its offer unconditional at a level below 90%.

The mandatory bid threshold remains unchanged at 30%. However, a signifi-

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cant change was made in May 2006 although it was unconnected to the implementation of the Directive. Previously, the 30% threshold was calculated by reference only to actual holdings in shares; now it has been broadened to include all interests in shares (including put and call options and derivatives).

Other areas where the impact of the Directive has been noticeable are:

- **Employees' rights.** There are significant new rights for employees. More specific information is now required in takeover documents about the effect of the bid on the employees of the bidder and the target. In addition, the target board must give its views on the likely repercussions on employment. As a result, more information about employees is generally being included in bid documentation than would previously have been set out. While this information is still sparse in some bids, this may be due to the fact that a number of recent takeovers have been by private equity bidders and therefore the immediate impact on employees would be relatively limited.

There is also a new requirement to allow the target's employee representatives to append their views on the offer to the offer document. So far, only a handful of target employees' representatives have taken the opportunity to do this, including Anglian Water and Cambridge Antibody Technologies where both opinions were in favour of the bid. It remains to be seen how active and significant a force employee representatives will be on takeovers. The real test of these new provisions will be when the employee representatives are hostile to the bid.

- **Overseas shareholders.** Takeover documentation must now be sent to all target shareholders wherever they are situated in the world unless, in the case of non-EEA shareholders, this would present a significant risk to the bidder or target of civil, regulatory or criminal exposure. If this is the case and more than 3% of the target's shareholders are in the particular non-EEA jurisdiction, specific Panel dispensation must be obtained. There is no need to consult the Panel if the percentage is less than 3%. However, even if the percentage is below 3%, bidders and targets need to be in a position to prove to the Panel that they fall within the exemption if the Panel asks.

Before May 2006, many bidders routinely did not send bid documentation into particular jurisdictions (including the US, Australia, Canada and Japan). Now that parties to takeovers are spending more time considering the target's shareholder base and whether offers can be made, and documents sent to, non-EEA shareholders, there is some movement towards more offers being made to Japanese, Australian and US shareholders. This is especially the case on cash bids and where the takeover is being effected by a scheme of arrangement.

- **Penalties and the Panel's status and powers.** It is now a criminal offence for parties to takeovers to publish offer documentation that does not comply with certain Directive-based content requirements for which they are responsible (including information on the effect of the bid on employees). The offence applies to offers (not schemes) for companies listed on the Official List of the London Stock Exchange. The offence arguably catches the bidder's investment bank if (as was customary in the UK) it makes the offer on behalf of its client and, as a result, this practice has now stopped.

The Takeover Panel has new statutory enforcement powers, including new powers to order compensation and to apply to the court for it to enforce a Panel decision. The Panel has said that although it has these new statutory powers, it will continue to use its long-established consensual approach to the regulation of parties to takeovers wherever possible. Only time will tell if these new powers will lead to a change in the Panel's approach but there has been no evidence of it doing so to date.

- **Management buyouts.** Arrangements giving the target management some involvement in the bid vehicle will now always require approval by the target shareholders, in addition to the target's financial adviser publicly stating that the arrangements are fair and reasonable. Previously, if the bidder and the management together held less than 5% of the target, the financial adviser had to give its opinion but no extraordinary general meeting was required.

- **Information in annual reports.** Listed companies have yet to grapple with the new information requirements on share and control structures to be included in their annual reports (regardless of whether they are in a takeover situation), for financial years beginning on or after 20 May 2006. However, they will soon have to start identifying the information they will need to include and, in particular, will need to consider whether they must disclose any significant agreements that would terminate on a change of control.

The contributors to this article are:

- Alex Kay, Gillian Fairfield and Sharon Watters, Herbert Smith LLP, UK.
- Michael Arnold, Gleiss Lutz, Germany.
- Maarten Sanders, Stibbe, The Netherlands.
- Olivier Clevenbergh, Stibbe, Belgium.
- Frederic Grillier, Herbert Smith LLP, France.
- Pere Kirchner, Cuatrecasas, Spain.
- Bruno Bartocci, Gianni Origoni Grippo & Partners, Italy.

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