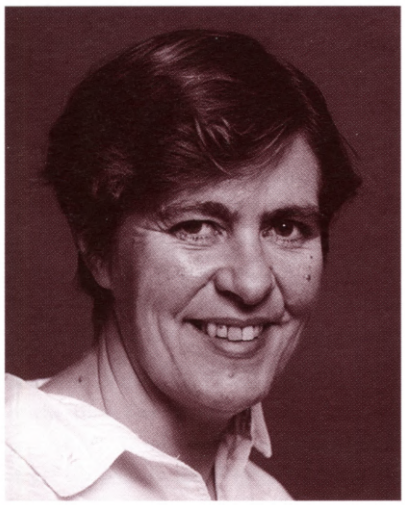
Company Law

The new draft thirteenth directive – Datafin and the DTI

by Professor Janet Dine



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A 'streamlined' (Commission's description) proposal for a thirteenth directive on takeovers has been put forward by the European Commission (OJ 1997 C378/10, COM(97)565 final–96/0341(COD)).

The major differences that the framework structure seem to have made are:

(1) The mandatory bid is no longer treated as the only means to protect minority shareholders

(2) Changes have been made to the description of the supervisory body

(3) The extent of court intervention is addressed.

The issue discussed here is the extent of possible court intervention in a bid.

DIRECTIVE'S PROVISIONS

The directive specifically provides for a *Datafin*-type solution by reserving:

'... the power which courts may have in a member state to decline to hear legal proceedings and to decide whether or not such proceedings affect the outcome of the bid' (art. 4 (5)).

The only requirement is that an injured party should enjoy adequate remedies.

In *R v Panel on Takeover and Mergers, ex parte Datafin plc & Anor* (1987) 3 BCC 10 the court held that the decisions of the city panel on takeovers and mergers was subject to judicial review. However, in order to deter tactical litigation a litigant must first seek leave before applying for review, and the panel's decisions are to be treated as binding unless and until set aside. It is clear that both these safeguards are expressly preserved by the current draft.

DTI INTERPRETATION

In the Department of Trade and Industry's (DTI) consultation document on the draft directive, *Datafin* is presented as if the court ruled out remedies other than a declaration:

'In the context of the panel's power to grant dispensation from the operation of the rules, the court said that the exercise of the power could be attacked only in exceptional circumstances and, even then, the court indicated that the appropriate remedy would be a declaration'.

In fact the court did not seek to fetter its discretion in future exceptional circumstances, speaking only of its 'expectations'. This obviously leaves it open for court intervention in exceptional circumstances. The relevant passage reads:

'I should expect the relationship between the panel and the court to be historic rather than contemporaneous. I should expect the court to allow contemporary decisions to take their course, considering the complaint and intervening, if at all, later and in retrospect by declaratory orders which would enable the panel not to repeat any error and would relieve individuals of the disciplinary consequences of any erroneous finding of breach of the rules.'

The use of the term 'expectation' clearly leaves an unexpected, extreme position to be dealt with as the court sees fit. The DTI's contention that:

'The change of legal status of the code might oblige a court to take a less restrictive view of its role in relation to judicial review'

is therefore suspect. So too is the view that judicial review on the basis of non-implementation of the directive might cause problems. In view of the wide discretion afforded to the member state and the regulatory authority, such a situation is difficult to envisage and, if it did arise, would be a situation so extreme that the court might well be persuaded to interfere under the present *Datafin* regime.

The DTI remain unimpressed. In an explanatory memorandum dated 19 March 1996 the directive is attacked on the grounds that 'the introduction of tactical litigation' would cause problems and the directive:

'would alter the legal basis of takeover regulation in the UK, thereby making it easier for parties to challenge decisions throughout the courts and to engage in tactical litigation.'

There seems to be little basis for these assertions. Despite this, these misgivings were echoed by many of those giving evidence to the House of Lords' European Community committee, with the notable exception of the financial law panel.

EUROPEAN RIGHT

A further argument is that the right under European law to an 'adequate remedy' could provide scope for litigation during the bid on the ground that compensation would not be an adequate remedy. This argument requires a tortuous reading of the directive, which appears to provide that the right to claim compensation will be an adequate remedy, whilst reserving the powers of the courts to permit the supervisory authority to complete its work on the bid itself. The DTI paragraph continues:

'Where compensation is not appropriate the courts may feel compelled to intervene by way of injunction or other preliminary relief.'

So they might; but the cases will be very rare and the position is an exact description of the present situation under *Datafin*.

The DTI document also questions who would be liable to pay compensation. The directive 'does not make it clear'. It does not need to be clear. The directive is concerned with the provision of an adequate remedy, not who is to be the defendant, which is therefore a matter for member states.

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