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SEMINARIO INTERNAZIONALE IN MATERIA DI OPA

Senato della Repubblica, Palazzo Giustiniani

Roma, 29 maggio 1998

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- Europa e Usa: due esperienze a confronto

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THE NEW ITALIAN LAW ON TAKEOVER BIDS

M. Martini (*)

I. GOALS OF THE SEMINAR

The new Italian law on corporate governance, which will entry into force on the 1st of July of this year, has introduced substantial changes to the previous takeover and mandatory bid regulation. The new law is the fruit of the quite intense and debated work carried on for several months within the so-called "Commissione Draghi", from the name of the Treasury Director General that chaired it, although some of the proposals submitted to the Italian Parliament were subsequently modified.

Contrary to the previous law, the new one is much simpler and only establishes some quite general principles. Consob has the role of translating these choices into specific and operational secondary rulings. All of the main regulatory choices can be clearly identified in the law, and these choices seem quite in line with those made in other European countries, particularly in France and U.K. The German case is peculiar since, although the recently introduced Takeover Code is similar in most aspects to the U.K. City Code, it has been adopted only by a relatively small number of listed companies. The German general company law includes, however, some provisions that allow for shareholder protection in case of a change in the controlling shareholder. From this perspective the new Italian law on takeover is more similar to the U.K. and French regulation.

The seminar is aimed to discuss and analyse the following points: the objectives and the instruments of takeover regulation and the interrelation between primary and secondary law. The latter is an issue of particular interest to Consob, since we are currently devoting substantial efforts to writing down secondary rulings on takeover and sales of corporate control. Our goal is to produce a "market friendly" regulation that reduces the burdens and the compliance costs for operators to those strictly necessary to achieve specific policy objectives. I hope that the contributions from the invited speakers and from the general discussion can help Consob to pursue this goal and the audience and the financial community to have an international perspective on public offering regulation.

In my opening remarks I will try to address some of the key regulatory choices that any regulator or legislator has to face, showing how these choices affect the degree of activism in the market for corporate control and the degree of protection afforded to minority shareholders. I will

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also try to discuss why these two potential objectives of regulation may conflict and how a specific regulatory choice affects the tradeoff.

II. THE MARKET FOR CORPORATE CONTROL

I think that it is useful to put the considerations in the perspective of the different characteristics of the market of corporate control in the European countries. Some few statistics may give an idea of the diversity of takeover activity and control block sales frequency in the various markets: from 1992 to the end of 1997, on average 3,5% of the Italian listed companies were acquired or taken over per year, and the average value of such operations was equal to roughly 0.5% of total market capitalization. In France, since 1991, on average 4,8% of the listed companies were acquired per year, while in the U.K. the same percentage raises to 5,7.

Hence, Italy has a relatively less developed market for corporate control and the frequency of acquisitions and takeovers on listed companies is much lower than in more developed equity markets. Obviously this reflects the higher concentration in the ownership structure of Italian listed companies, but it also raises the interesting question of how the Italian regulation can promote - or at least not obstacle - takeover activity.

III. THE DEBATE ON TAKEOVER AND SALE OF CORPORATE CONTROL REGULATION

In the recent debate on takeover regulation law scholars and regulators have shown some sort of agreement on what should be the objectives of regulating the acquisition of listed companies: on one side to protect shareholders' interests and on the other side to promote efficient reallocation of control rights.

Economists are more sceptical. Even assuming that one of the motives for acquisitions should be researched in private benefits and expropriation of minority shareholders' wealth (by both managers and controlling shareholders), fairness is not an unquestionable regulatory goal. Some economists are sceptical, on the basis of their empirical findings, about the need for a "fair" legislation and refuse the idea that block purchasers should be obliged to buy out the minority shareholders at the same price per share as they paid for the block. In particular, they contrast the view that the control premium reflects a value inherent in the company and thus belongs to all the shareholders, regardless of the ownership structure.

IV. THE KEY REGULATORY CHOICES AND THE TRADEOFF EFFICIENCY/FAIRNESS

When designing a specific regulatory framework, the regulator is always confronted with the tradeoff efficiency/fairness. There are two key areas in the regulation of acquisition of listed companies where the tradeoff typically emerges: sale of corporate control regulation and takeover regulation. Within each of these two areas regulators can choose among different sets of combination of "instrumental variables" in order to achieve an appropriate tradeoff efficiency/fairness. Each regulatory choice on a specific instrumental variable has a certain impact on the tradeoff; for example, setting very strict disclosure rules can have an adverse effect on takeover activity, but reduces the probability that a minority shareholder will have to trade with the potential raider at a price below the takeover bid price. We can score each regulatory choice evaluating its effects on the two objectives of efficiency and fairness; strict disclosure rules would have a low score for efficiency and a high one for fairness.

To sum up, the current debate seems to suggest that the regulator's choice of objectives and instruments should depend on which motive is considered most plausible in explaining transfers of control and on the expected welfare effects. Hence it seems clear that optimal regulation does not exist and rules have to be decided on essentially empirical and institutional grounds.

In the area of sale of corporate control and control block transfer the regulator has to make a decision on the following "instrumental variables":

a.1. mandatory vs non-mandatory bid. This is the first choice that the regulator has to make: i.e. whether to introduce or not any form of mandatory bid rule. Recent economic literature suggests that a non-mandatory bid regime (so-called market rule) promotes economic efficiency as it allows any potentially efficient changes of corporate control. On the other hand, it does not protect minority shareholders from value-reducing control transfers. This seems to be the regulatory choice that has the main impact on the tradeoff efficiency/fairness; it can be supposed that whenever Commercial Law and the corporate governance rules are not very effective in protecting minority shareholders, the provision of the mandatory bid may be adopted in order to make up for these deficiencies.

a.2. the price of the mandatory bid. The price of the mandatory bid can vary between the market price (or pre-acquisition price) and the price of the block transaction. Choosing the block price has the effect of protecting minority shareholders against value-decreasing transactions, but may prevent some socially desirable control transfers. Hence such a provision would tilt the balance in favour of protection and against efficiency. On the other hand, choosing the market price means to introduce a system similar to the so-called *appraisal right* (assuming that the bid is on all the outstanding shares): every shareholder is offered the option to exit the company receiving the pre-acquisition value of the shares. Whether this pre-acquisition value should be determined

by the courts or can be proxied with market prices is an open question. In any case, however, there would be no externalities associated to the change of control, since all minority shareholders have the option to sell their stocks at a price that reflects the value of the company before any change of controlling shareholder. In the economic literature it has been shown that this type of mechanism allows any socially efficient (or value-increasing) acquisitions.

a.3. full vs partial mandatory bids. Once the regulator has decided to introduce a mandatory bid regime and has decided which should be the price of the bid, he has to decide also whether to opt for a full or partial mandatory bid. A full bid at the price of the control block transaction (i.e. including the control premium) corresponds to the so-called equal opportunity rule (EOR). A full bid at market price (i.e. without the control premium) corresponds, on the other hand, to previously mentioned *appraisal right*. Hence, combining the choice of the price with that of the quantity of the mandatory bid we can have four different combinations. At one extreme we have a full bid at the block price (EOR); with this option the *trade-off* efficiency/fairness is resolved in favour of fairness and shareholders' protection. At the other extreme, a partial bid at the market price is clearly in favour of the objective of efficiency in the reallocation of control rights.

a.4. fixed vs variable threshold. One of the regulatory problems of a mandatory bid regime is that of defining the criteria that trigger the bid. This has to do with the definition of when corporate control is actually changing hands. While in some cases this is quite evident, in others the issue may not be completely uncontroversial. To avoid such ambiguities, regulations typically establish that whoever has acquired a percentage of total voting rights in excess of a given threshold (which is the same for all listed companies), has automatically to promote a mandatory bid directed to minority shareholders. This is the rule in the major European countries; Italy, until the introduction of the new law on corporate governance, used to be an exception to this rule. Consob, in fact, had the duty to define, case by case, and given the ownership structure of each listed company, which was the appropriate level of the threshold that triggered a mandatory bid (what we call a "variable threshold" system). Although both systems - fixed or variable threshold - do not seem to have a particular differential impact on the tradeoff efficiency/fairness, a fixed threshold rule may be more protective for minority shareholders, and yet not penalizing in terms of efficiency, because it avoids enforcement problems in those cases where the reallocation of control rights is such that it does not allow to clearly identify a new controlling shareholder. A variable threshold approach, on the other hand, requires that the regulator has a substantial degree of discretionality, possibly granted by a primary law provision, in deciding whether a specific block transaction implies a change of controlling shareholders. This may lead to a quite intrusive approach by regulators because they have to check that the new blockholder has actually been able to appoint most of the directors or that he has exerted a so-called "dominant influence" in the shareholders meeting.

a.5. Definition of "acting in concert". Lastly, regulators have the option to specify whether control or actions intended to acquire control can be taken jointly by two or more persons, and the cases when this joint action is assumed by default. Although this is mainly a technical issue it may have a certain relevance in countries where cross-shareholdings and shareholders agreements are widespread. A clear and wide enough definition of the notion of "acting in concert" may contribute to ensure a better protection of minority shareholders, while it has no obvious effect on efficiency.

In the area of takeover regulation the main "instrumental variables" under the control of regulators are the following:

b.1 disclosure rules on shareholdings. As described before, disclosure rules can have a direct impact on takeover activity and on the profit of the bidder. We define with the term "toehold", which is now standard in the literature and in the jargon, the level of shareholdings above which disclosure is required - the term has not to be confused with the term "threshold", that we used previously to indicate the level of shareholdings that triggers a mandatory bid. If the rules are such that the toehold above which full transparency is required is high, the potential bidder can buy all the shares up to the toehold at a price lower than that of the bid (which normally includes a premium in the order of 30% over market price). Hence a high toehold means higher profits for the bidding company. On the other hand, with a high toehold the probability that a target shareholder will sell his shares before the bid at lower price is proportionally higher. In this case it is evident how the tradeoff efficiency/fairness works: high toeholds imply a higher takeover activity, and hence a higher efficiency, and a lower target shareholders protection. In this context, however, protection has to be intended more in the sense of fairness, or equal treatment. Higher toeholds, in fact, do not simply imply that target shareholders, as an aggregate, will be worse off, but also that some will be treated differently from others.

Disclosure rules on shareholdings in listed companies across European countries are generally less strict than in Italy, where any stake above 2% of the total voting capital has to be disclosed; in Germany and in France disclosure is required for stakes in excess of 5% of voting capital, while in U.K. the toehold is 3%.

b.2 partial takeover bids. The effects of purchases below the toehold by the potential bidder on target shareholders wealth is not entirely measurable when partial takeover bids are allowed. In this case, the target shareholder that sells his stake before the bid receives a lower price but may completely liquidate his investment, while other shareholders that tender their shares in the takeover bid may be "locked in", since shares will be bought only on a pro-rata basis. This is the reason why in the U.K. the Takeover Panel does not normally allow partial bids if the acquiring company has bought a stake before the bid. P. Lee (1992), Deputy Director General of the Takeover Panel, reports, in fact, that the Panel would not authorize a partial bid if "...the offeror has bought a lot of shares recently, because this would mean that some holders had been bought

out in toto while most shareholders were only being offered the chance to sell part of their holding".

Hence, with partial bids target shareholders as a whole are worse off (and thus protection is lower compared with a full bid regime), but it may be not clear whether shareholders that sell their stake before the bid are worse off than other shareholders.

b.3 defensive measures. Since it is not possible to know *a priori* whether an acquisition is in the interest of target shareholders, it is equally not possible to establish whether defensive measures should be prohibited (or at least regulated). However, the US experience - and to a much limited extent the European one - shows that typically takeover premia are substantial (in the order of 30% of the market price) and thus target shareholders may appropriate a considerable part of total surplus originated from the acquisition. Hence the prohibition or limitation of defensive measures may be considered, on the basis of purely empirical evidence, a mean to protect shareholders and at the same time to increase takeover activity and efficiency. The fact that the tradeoff efficiency/fairness seems to disappear may explain why so many countries have at least regulated the scope for the adoption of defensive measures by target companies. It is also interesting to note that while in most countries defensive measures are strictly regulated, protective measures included in corporate charters have received a much more heterogeneous and loose discipline. In fact, as Wymeersch (1992) notes: "the differences in regulatory attitude with respect to the rules against frustration (of takeovers) and those relating to protective measures are quite striking. While the former are forbidden, or at least strictly regulated, the latter are largely left to general company law".

V. THE EU HARMONIZATION AND THE PROPOSAL OF DIRECTIVE ON ACQUISITIONS AND TAKEOVERS

Some degree of harmonization with respect to the above mentioned regulatory choices across EU countries seems highly desirable, since with the introduction of the single currency, competition between European equity markets will intensify and differences in regulation may inevitably favour some countries against others. Other regulatory problems may emerge in the case of foreign or multi-listing: for example, an Italian company listed simultaneously on the Milan and London Stock Exchange, would be regulated by the new Italian law on takeovers, while other U.K. companies listed on the London Stock Exchange would be regulated by the City Code. Hence, companies listed on the same market, and possibly with shares denominated in the same currency, would have to comply with different regulations.

Currently the EU proposal of directive on takeover regulation represents a very broad framework and it allows for a very low level of harmonization. Quite different regulatory choices would be, in fact, consistent with the provisions of the directive proposal. Next speakers will probably come on this issue in more details.

VI. CONCLUSION

The above considerations have covered those that appear to our experience the most critical regulatory issues; however, the list is not complete and some of the points that I introduced were touched only very briefly and superficially. I hope that some of the next speakers will come on those issues in greater detail or talk about other regulatory problems that I did not cover.

In the next section of the seminar we will have two views on takeover regulation: the first from a EU regulator, Mrs. Blanquet, and the second from a US law scholar, professor Macey from Cornell University. One of the issues that it would be interesting to hear from the speakers is whether they consider the U.S. as an example for the European Community, i.e. to what extent they think that the U.S. three-level regulatory system (with federal regulation, state regulation and corporate charter rules) could be a model to adopt in the European Union, and to what extent the proposal of directive on takeovers of the European Commission is consistent with the U.S. "contractarian" paradigm where corporate charters and court rulings are the key ingredients in shaping takeover regulation.

I leave the floor to the next speaker, Mrs. Blanquet from the Directorate General 15th of the European Commission.

LES ORIENTATIONS COMMUNAUTAIRES

Françoise Blanquet^(*)

1. POSITION DU PROBLEME

Le nombre des offres publiques d'acquisition en 1998 témoigne un fort mouvement de restructuration qui touche les sociétés cotées. D'une façon générale on constate que la procédure d'offre publique est souvent un mode de rapprochement de groupe et un outil de restructuration des sociétés.

Un encadrement juridique est nécessaire pour assurer les acquisitions au niveau national. Un cadre juridique est également nécessaire au niveau européen dans la mesure où les opérations transfrontalières contribuent au développement et à la réorganisation des entreprises européennes, une condition indispensable pour pouvoir affronter la concurrence internationale.

L'objectif de la mise en place d'une réglementation est de veiller à ce que, pour chaque offre d'acquisition, l'opération se déroule dans un contexte de sécurité juridique dans lequel toutes les parties intéressées disposent d'une connaissance préalable des conditions dans lesquelles elles devront agir.

Un terrain de jeu avec des règles de base uniques et claires permettra aux entreprises de l'Union Européenne de choisir leur structure optimale pour être compétitives dans le marché mondial.

2. GRANDES LIGNES DE LA PROPOSITION

I. GÉNÉRALITÉS

1. Dans son Livre blanc sur l'achèvement du marché intérieur de 1985, la Commission a annoncé son intention de proposer une directive sur le rapprochement des législations des Etats membres en matière d'offres publiques d'acquisition.

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Le 19 janvier 1989, la Commission a présenté au Conseil une proposition de treizième directive en matière de droit des sociétés concernant les offres publiques d'acquisition⁽¹⁾. Le Comité économique et social a rendu son avis le 27 septembre 1989⁽²⁾ et le Parlement européen a émis un avis favorable le 17 janvier 1990⁽³⁾.

Le 10 septembre 1990, la Commission a adopté une proposition modifiée prenant en compte les avis de ces deux institutions⁽⁴⁾.

Le groupe de travail du Conseil a suspendu les négociations sur cette proposition en juillet 1991 en raison de la forte opposition manifestée par certains Etats membres. Les points les plus contestés sont :

2.1 l'obligation de lancer une offre portant sur tous les titres de la société, conçue comme le seul moyen de protéger les intérêts des actionnaires minoritaires en cas d'acquisition ou de changement de contrôle;

2.2 la limitation des pouvoirs de l'organe d'administration ou de direction de la société visée au cours de la période d'acceptation de l'offre et;

2.3 la nécessité d'introduire des dispositions juridiquement contraignantes régissant la procédure d'offre, en raison notamment de l'absence, dans plusieurs Etats membres, de mesures levant les obstacles structurels aux offres d'acquisition.

3. Dans sa déclaration au Conseil européen concernant la subsidiarité, lors du sommet d'Edimbourg en décembre 1992, la Commission a indiqué qu'elle se proposait de revoir sa proposition, une intention qu'elle a confirmée lors du Conseil européen d'Essen, en décembre 1994.

Après le sommet d'Edimbourg, la Commission a entrepris, dès juin 1993, des consultations détaillées avec les Etats membres afin de leur donner l'occasion de présenter leur position sur la proposition et, plus généralement, sur la nécessité de procéder à une harmonisation dans le domaine des offres d'acquisition.

4. La présente proposition de directive "cadre" a été élaborée en prenant en compte les résultats de cette consultation avec les Etats membres, au cours de laquelle ils ont exprimé, dans

(1) *JO C 64 du 14.3.1989, p. 8; avec exposé des motifs, suppl. 3/89 - Bull. CE*

(2) *JO C 298 du 27.11.1989, p. 56.*

(3) *JO C 38 du 19.2.1990, p. 41.*

(4) *JO C 240 du 26.9.1990, p. 7; avec exposé des motifs, COM(90)416 final - SYN 186.*

leur majorité, leur préférence pour une directive qui établirait des principes généraux régissant les offres d'acquisition, sans tenter de réaliser une harmonisation détaillée comme le faisait le texte proposé à l'origine.

5. La proposition originale de la Commission était un texte ambitieux qui avait été présenté à la fin des années quatre-vingts, période au cours de laquelle les opérations internationales de fusion et d'acquisition s'étaient multipliées. Du fait de la période d'inactivité relative qui a suivi, causée par la récession, les Etats membres se sont montrés moins disposés à se laisser lier par un texte aussi détaillé.

Entretemps, il est indéniable que les opérations de prise de contrôle, spécialement transfrontalières, sont à nouveau à la hausse dans certains Etats membres, alors même que la proposition de dixième directive "droit des sociétés" sur les fusions transfrontalières reste bloquée. En l'état actuel des choses, les contextes dans lesquels interviennent les offres d'acquisition restent très dissemblables d'un Etat membre à l'autre, tant au niveau de la réglementation applicable à ce type d'opérations financières qu'à celui de leur faisabilité et de leur fréquence.

6. En proposant la directive, la Commission n'avait pas pour but d'encourager les acquisitions comme une fin en soi. Son point de vue a toujours été que ces opérations devaient être jugées favorablement dans la mesure où elles contribuent au développement et à la réorganisation des entreprises européennes, une condition indispensable pour pouvoir affronter la concurrence internationale. L'objectif de la Commission est de veiller à ce que, pour chaque offre d'acquisition, l'opération se déroule dans un contexte de sécurité juridique dans lequel toutes les parties intéressées disposent d'une connaissance préalable des conditions dans lesquelles elles devront agir.

La Commission considère également qu'il lui appartient de faire en sorte en vertu de l'article 54 du Traité que l'Union européenne ait pour souci de veiller à ce que, dans le marché intérieur, tous les actionnaires des sociétés cotées en bourse jouissent de garanties équivalentes en cas de prise de contrôle et à ce qu'un certain degré de transparence soit préservé dans ces opérations. Les objectifs de la directive sont donc d'assurer un niveau suffisant de protection des actionnaires de toute l'U.E. et de définir des orientations minimales pour la conduite des offres publiques d'acquisition.

7. La directive proposée crée un cadre qui fixe certains principes et un nombre limité d'exigences générales que les Etats membres seront ensuite tenus de mettre en oeuvre au moyen de règles plus détaillées. Cette nouvelle approche permettra aux Etats membres d'arrêter les règles détaillées transposant la directive conformément à leurs pratiques nationales avec une liberté de manœuvre beaucoup plus grande que ce qui aurait été le cas avec la directive plus détaillée proposée à l'origine.

La directive proposée vise donc à surmonter la plupart des difficultés causées antérieurement par les importantes divergences d'appréciation apparues entre les Etats membres quant à la nécessité de réglementer les opérations d'acquisition. La directive cadre se borne en fait à fournir une structure qui permette de conserver les spécificités nationales actuelles à condition que ces différences ne soient pas de nature à remettre en cause l'application des principes et exigences communs énoncés par la directive au niveau communautaire.

8. Les Etats membres ont l'obligation de désigner une autorité de contrôle et de veiller, moyennant l'adoption de règles plus détaillées, à ce que les principes et exigences généraux définis dans la directive soient effectivement appliqués. Ces exigences portent essentiellement sur la protection des actionnaires minoritaires, sur le degré nécessaire d'information et de publicité pendant la procédure et sur le rôle que doit jouer l'organe d'administration ou de direction de la société visée au cours de l'offre.

9. La proposition impose l'adoption de règles nationales spécifiques garantissant la protection des intérêts des actionnaires minoritaires en cas d'acquisition ou de prise de contrôle d'une société cotée en bourse. Contrairement à la proposition précédente, l'offre obligatoire n'est plus considérée comme le seul moyen permettant de protéger les actionnaires minoritaires pour tenir compte des spécificités nationales. Il s'agit là de l'innovation la plus importante de la présente proposition de directive cadre. Cette protection peut être assurée par une offre obligatoire ou par tout autre moyen pouvant être considéré comme équivalent. Il appartient aux Etats membres de définir la notion de contrôle en termes de droits de vote. Lorsque la législation d'un Etat membre prévoit l'offre obligatoire, toutes les exigences de la directive doivent être remplies. Si ce n'est pas le cas, ces exigences devront s'appliquer aux offres lancées sur une base volontaire et destinées à prendre le contrôle de la société visée.

10. La directive proposée impose aux Etats membres d'assurer un niveau minimum adéquat de publicité et d'information garantissant la transparence du déroulement de l'offre. C'est aux Etats membres eux-mêmes qu'il revient de déterminer la manière dont cette transparence sera assurée. A la demande du Parlement Européen, la directive contient des dispositions portant sur les modalités d'information des travailleurs de la société visée.

11. La directive proposée fait obligation aux Etats membres de désigner une ou plusieurs autorités dotées des pouvoirs nécessaires pour contrôler le respect des règles d'acquisition. Plusieurs dispositions nouvelles ont été insérées afin de donner à l'autorité de contrôle un certain degré d'autonomie dans l'exercice de ses responsabilités. Par ailleurs, la directive n'exclut pas que le contrôle puisse être exercé par des organismes professionnels du secteur ayant compétence pour traiter les plaintes concernant une offre d'acquisition. Pour tenir compte des spécificités nationales, la mesure dans laquelle les tribunaux peuvent connaître de ces affaires est laissée à l'appréciation des Etats membres, à condition toutefois que toute partie lésée ait au moins le droit

d'intenter une action en réparation devant les tribunaux. Il n'y a pas d'obligation de prévoir la suspension ou l'interruption de la procédure d'offre dans les cas où une partie porterait l'affaire devant les tribunaux.

II. MOTIVATION DE LA DIRECTIVE AU REGARD DU PRINCIPE DE LA SUBSIDIARITÉ

La présente proposition de directive vise à réviser la proposition de treizième directive du 10 septembre 1990, justement pour tenir compte du principe de la subsidiarité et des résultats de la consultation lancée avec les Etats membres par la Commission.

La précédente proposition fixait les objectifs poursuivis et les procédures à suivre pour les atteindre d'une manière très détaillée.

En revanche, la présente proposition de directive cadre fixe les objectifs à atteindre tout en laissant aux Etats membres une marge de manoeuvre importante pour sa mise en oeuvre. Plus particulièrement, la directive vise à assurer aux actionnaires, qui souvent sont dispersés dans différents Etats membres, une protection minimale équivalente dans toute la Communauté, conformément à l'article 54.3g. Pour ce faire, les Etats membres ont le choix entre le recours à l'offre obligatoire ou à d'autres moyens qui puissent assurer le même résultat, mais qui sont plus proches des traditions juridiques nationales. En effet, comme mentionné plus haut, la directive cadre fournit une structure qui permet le maintien de différences nationales, à condition que celles-ci ne soient pas de nature à remettre en cause les principes communs et les objectifs à atteindre définis par la directive au niveau communautaire.

Par ailleurs, cette proposition vise les offres publiques d'acquisition qui sont des opérations complexes comportant également des aspects transnationaux. Toute action individuelle des Etats membres, ayant des effets territorialement limités, n'est pas à même d'atteindre les objectifs poursuivis par la présente proposition.

III. COMMENTAIRE DES ARTICLES

Article premier - Champ d'application

La directive s'applique aux sociétés relevant du droit d'un Etat membre dont les titres sont admis, en tout ou en partie, à être négociés sur une ou plusieurs bourses de la Communauté. L'introduction des mots "*en tout ou en partie*" représente la seule innovation par rapport au texte précédent et vise à indiquer que la directive s'applique aussi dans les cas où seule une fraction des titres de la société visée conférant un droit de vote sont cotés. La directive se limitant à formuler des exigences minimales, il va de soi que les Etats membres sont libres d'étendre son champ d'application à des sociétés dont les titres ne sont pas cotés en bourse.

Article 2 - Définitions

Comme dans le texte précédent, cet article définit les termes les plus importants utilisés dans la directive.

Il convient en particulier de préciser que les dispositions de la directive s'appliquent *à la fois aux offres obligatoires et aux offres volontaires*. Une offre peut être obligatoire si les Etats membres en disposent ainsi afin de protéger les actionnaires minoritaires en cas de changement de contrôle. Une offre peut être volontaire si elle est lancée par une personne qui n'est pas tenue d'employer ce moyen, afin d'acquérir le contrôle d'une société mais décide néanmoins de lancer une O.P.A.

Article 3 - Protection des actionnaires minoritaires

Cet article reflète la nouvelle approche contenue dans la directive.

L'objectif est de veiller à ce que la protection des actionnaires minoritaires reste assurée, dans tous les cas où une personne physique ou une entité juridique prend le contrôle d'une société cotée en bourse à la suite d'une acquisition. À cet effet, la directive impose que les règles adoptées au niveau national fournissent des garanties de protection appropriées aux actionnaires minoritaires.

Ces garanties de protection peuvent être fournies soit en prévoyant une offre obligatoire, comme l'exigeait la version précédente de la directive, soit par d'autres moyens, comme c'est le cas dans certains Etats membres. Dans certains cas, la législation applicable aux groupes de sociétés prévoit la protection des actionnaires minoritaires après l'achat d'une participation importante dans le capital de la société. C'est ainsi, par exemple, que les actionnaires minoritaires d'une société passée sous le contrôle d'une autre société, dans le cadre d'un groupe à base contractuelle, sont en droit de recevoir des paiements périodiques ou ont la possibilité de se retirer de la société contrôlée après avoir reçu une indemnisation. De plus, les actionnaires minoritaires de la société contrôlée ont la possibilité d'intenter une action en dommages-intérêts contre les membres des organes de la société exerçant le contrôle. Par ailleurs, si le changement de contrôle intervient dans le cadre d'un groupe de facto, la société ayant acquis le contrôle est tenue de dédommager la société passée sous son contrôle des éventuel préjudices.

Les Etats membres n'adoptant pas le système de l'offre obligatoire pour protéger les actionnaires minoritaires doivent démontrer que les autres moyens dont ils disposent garantissent effectivement une protection adéquate des actionnaires minoritaires. La nouvelle approche a été nécessaire pour désamorcer les critiques de certains Etats membres, qui étaient particulièrement opposés à l'introduction, comme moyen de protection des actionnaires minoritaires, d'une obligation de lancer une offre publique d'acquisition des titres de la société visée. Ces Etats membres estiment en effet que cette protection est garantie sur leur territoire par d'autres moyens efficaces, comme ceux décrits ci-dessus.

Contrairement au texte précédent, la directive ne se propose plus de définir le pourcentage de droits de vote à partir duquel le contrôle peut être considéré comme acquis, ni la méthode de calcul de ce pourcentage. Compte tenu des difficultés rencontrées lors des négociations sur la version précédente, il a été décidé que ces questions seraient traitées par l'Etat membre dans lequel, en vertu de l'article 4, est située l'autorité de contrôle compétente.

Article 4 - Autorité de contrôle

Les Etats membres sont tenus de désigner l'autorité ou les autorités qui contrôlent tous les aspects de l'offre et veillent au respect par les parties à l'offre des règles fixées conformément à la présente directive.

Dans les cas où le siège social de la société visée n'est pas situé dans l'Etat membre dans lequel ses titres sont cotés, l'autorité compétente est celle de l'Etat membre sur le marché réglementé duquel les titres de la société ont été admis à être négociés pour la première fois *et sont encore négociés*.

Afin d'assurer une *application souple* de la directive tout en veillant à ce que cette souplesse reste dans des limites compatibles avec les principes généraux qu'elle définit, les Etats membres ont la possibilité d'autoriser leurs autorités de contrôle à déroger à certaines des règles nationales adoptées en application de la directive, sous réserve cependant que ces autorités restent guidées, dans l'exercice de cette dérogation, par les principes généraux qu'elle énonce. Cette souplesse peut s'avérer nécessaire pour permettre à l'autorité de contrôle de faire face à l'extrême diversité des cas de figure susceptibles d'apparaître sur des marchés financiers très mouvants.

Les dispositions du paragraphe 5 répondent au souci d'éviter un *recours systématique aux tribunaux* au cours des offres d'acquisition. Les Etats membres ont la possibilité d'investir leurs autorités de contrôle de pouvoirs leur permettant d'ordonner toute mesure qu'elles jugeraient nécessaire concernant une offre publique d'acquisition. En outre, l'engagement de procédures devant ces autorités peut même être explicitement encouragé afin d'éviter la saisine des tribunaux. Ces procédures ne sauraient toutefois porter atteinte au droit d'une partie lésée d'intenter une action en justice, au moins pour obtenir réparation en cas de préjudice.

Article 5 - Principes généraux

Cet article énonce une série de principes généraux auxquels doivent se conformer les règles nationales transposant la directive. Les objectifs des principes figurant dans le texte précédent ne sont pas affectés.

1. Le premier principe dispose que tous les détenteurs de titres de la société visée qui se trouvent dans des situations identiques doivent bénéficier d'un traitement égal.

2. Le second précise que les destinataires de l'offre doivent disposer d'un temps et d'une information suffisants pour être en mesure de prendre une décision sur l'offre en connaissance de cause.
3. Le troisième vise à garantir que l'organe d'administration ou de direction de la société visée agira bien dans l'intérêt de l'ensemble de la société, notamment dans celui de ses actionnaires.
4. L'objectif du quatrième principe est d'interdire la création de faux marchés des titres de la société visée.
5. Enfin, le cinquième principe a pour but d'assurer que la société visée ne soit pas gênée dans ses activités au-delà d'un délai raisonnable.

Article 6 (Information)

Les règles nationales doivent garantir que les destinataires d'une offre disposent d'une information suffisante sur les conditions de l'offre. En outre, dès qu'il a décidé de lancer son offre, l'offrant doit en informer l'autorité de contrôle et l'organe d'administration ou de direction de la société visée.

Les règles nationales doivent également imposer à l'offrant l'obligation d'établir et de rendre public en temps utile un document d'offre contenant les informations nécessaires pour que les destinataires de l'offre puissent prendre une décision sur celle-ci en toute connaissance de cause. Le document doit être communiqué à l'autorité de contrôle avant sa publication. Les parties à une offre doivent également être tenues de communiquer à l'autorité de contrôle, sur sa demande, toute information jugée nécessaire à l'exercice de ses fonctions.

Article 7 - (Publicité)

Les Etats membres doivent veiller à ce que les informations susceptibles d'influer sur le marché des titres concernés soient rendues publiques selon des modalités permettant de réduire les risques de création de faux marchés et les opérations d'initiés.

Contrairement au texte précédent, la directive n'énumère plus les divers modes de publicité. Elle laisse aux Etats membres un pouvoir discrétionnaire assez large pour décider des formes de publicité requises, sous réserve que toutes les informations nécessaires soient mises à la disposition des destinataires de l'offre d'une manière à la fois claire et rapide.

Article 8 - (Obligations de l'organe d'administration ou de direction de la société visée)

Cet article fait obligation aux Etats membres de veiller à ce que l'organe d'administration ou de direction de la société visée s'abstienne de prendre des mesures défensives de nature à compromettre la réussite de l'offre s'il n'a pas reçu l'autorisation préalable de l'assemblée générale des actionnaires à cet effet.

Dans un contexte dans lequel le contrôle de la société visée est en jeu, il est important de garantir que le sort de cette société sera décidé par ses actionnaires. La directive ne définit pas les mesures susceptibles de faire échec à une offre. Il s'agit en général des divers types d'opérations qui ne sont pas réalisées dans le cadre normal des activités de la société ou qui ne sont pas conformes aux pratiques normales du marché. L'autorisation de l'assemblée générale doit être accordée explicitement en vue de répondre à une offre.

Cette interdiction s'applique dès que l'offrant informe l'organe d'administration ou de direction de la société visée de son intention de réaliser une offre et jusqu'au moment où le résultat de cette offre est rendu public conformément aux règles nationales.

Les règles nationales doivent également obliger l'organe d'administration ou de direction de l'entreprise visée à rendre un avis motivé sur l'offre dans un rapport précisant les arguments en faveur de l'acceptation ou du rejet de l'offre.

Article 9 - Règles régissant les offres

Cet article énumère, sans entrer dans les détails, un certain nombre de domaines que les règles des Etats membres doivent couvrir. Cette approche laisse aux Etats membres un pouvoir discrétionnaire substantiel pour ce qui est de la définition du contenu de ces règles. Ces règles doivent préciser: a) les circonstances dans lesquelles une offre peut être retirée après avoir été rendue publique; b) la procédure que l'offrant doit suivre s'il souhaite réviser les conditions de son offre; c) la façon dont les offres concurrentes doivent être traitées et, d) les modalités selon lesquelles les parties doivent être informées des résultats de l'offre, et à quel moment elles doivent l'être.

Les Etats membres doivent veiller à ce que les règles nationales adoptées en vertu de cet article ne portent pas préjudice à l'application des principes généraux, en particulier de celui qui dispose que la société visée ne doit pas être gênée dans ses activités au-delà d'un délai raisonnable.

La directive ayant procédé à l'harmonisation des principes généraux qui doivent inspirer les règles nationales applicables au déroulement des offres d'acquisition, elle ne cherche pas à harmoniser les procédures détaillées relatives à leur mise en oeuvre.

Article 10 - Offre obligatoire

L'offre obligatoire n'est plus le seul moyen de protéger les actionnaires minoritaires envisagé par la directive. Toutefois, lorsque les Etats membres prévoient que l'offre doit être obligatoire, l'article 10 s'applique. En vertu de cet article, les Etats membres sont autorisés à prévoir une offre obligatoire portant soit sur la totalité, soit sur une partie des titres de la société visée.

La règle applicable lorsqu'il est prévu que l'offre obligatoire doit porter sur la totalité des titres fait obligation à la personne qui acquiert le contrôle d'une société cotée en bourse de lancer une offre publique d'acquisition portant sur la totalité des titres restants de la société. L'objectif de cette règle est d'accorder un droit de "sortie" de la société à tous les actionnaires restants qui n'accueilleraient pas favorablement le changement de contrôle.

L'offre obligatoire portant sur la totalité des titres était la seule règle que prévoyait le texte précédant afin d'assurer que tous les actionnaires auraient droit au même traitement que ceux ayant vendu la participation majoritaire. Mais des objections sérieuses ont été soulevées contre cette volonté d'imposer dans tous les Etats membres une offre obligatoire portant sur la totalité des titres. Il a été reproché à cette exigence de :

1. Représenter un fardeau excessif pour les entreprises
2. Etre susceptible de compromettre le bon fonctionnement des mécanismes du marché et;
3. Désorganiser les marchés financiers.

Le texte actuel autorise les offres partielles, à condition qu'elles respectent l'objectif de traitement égal des actionnaires et qu'elles ne soient pas d'ordre purement spéculatif.

En vertu de la règle applicable en cas d'offre obligatoire partielle, la personne qui acquiert le contrôle d'une société cotée en bourse doit être tenue de lancer une offre portant sur un pourcentage substantiel des actions restantes; ce pourcentage doit être d'au moins 70 % pour que la protection des minorités soit garantie. Le respect du principe de traitement égal des actionnaires en cas d'offre obligatoire partielle est assuré moyennant l'obligation d'acquérir les titres des autres actionnaires au prorata des participations qu'ils détiennent.

Qu'elle porte sur la totalité ou une partie des titres, l'offre doit s'adresser à tous les actionnaires, lesquels doivent avoir la possibilité de vendre leurs titres à un prix satisfaisant à l'objectif de protection de leurs intérêts.

3. POSITION DES ETATS MEMBRES

I. LE DROIT NATIONAL ACTUEL

La situation de la protection des actionnaires minoritaires en cas de changement du contrôle n'est pas équivalente dans les divers Etats membres. Un examen des différents systèmes nationaux permet de constater:

Dans sept Etats membres (B, FR, IT, E, PORT, FI, DK) la loi prévoit la protection des actionnaires moyennant l'offre obligatoire. Néanmoins, les critères du déclenchement de l'offre obligatoire ainsi que sa portée sont divergents.

Dans trois Etats membres (UK, IRL, D) ladite protection est prévue par un code de conduite ce qui ne signifie pas qu'elle est assurée aussi efficacement que par une loi.

La protection des actionnaires en cas d'O.P.A. n'est pas assurée dans trois pays (S, NL, GR) même si des codes de conduite existent sur la procédure de l'opération.

Dans deux Etats membres (AUT, LUX) aucune réglementation n'existe.

En principe, les systèmes selon lesquels la protection des actionnaires est assurée par une loi ne devraient pas poser de problèmes de conformité avec la directive. On peut considérer cette protection comme équivalente, compte tenu de l'approche « directive cadre ».

Il convient d'examiner les systèmes selon lesquels la protection des actionnaires est assurée actuellement par des codes de conduite ou n'est pas prévue du tout.

Au Royaume-Uni, le City Code vise à assurer une protection adéquate des actionnaires minoritaires. Cette protection est assurée par le Takeover Panel, qui applique le City Code. L'offre obligatoire à 100 % est prévue lors de franchissement du seuil de 30 % des droits de vote ? Néanmoins, selon le système actuel toute contestation des parties est évitée vu le fait que le Takeover Panel assume le rôle du « législateur » et du « judiciaire » qui contrôle l'application de ses propres « lois » et en sanctionne la violation.

L'Irlande, qui actuellement applique le City Code britannique, envisage de changer la situation et d'adopter une loi.

Le code d'autodiscipline n'est pas obligatoire en Allemagne. Il s'applique uniquement aux sociétés qui ont déclaré expressément se soumettre à ce code. Depuis l'adoption de ce code (\pm 2 ans), très peu de sociétés ont fait cette déclaration.

En Suède, on ne peut pas parler d'un vrai code d'autodiscipline. Il y a des recommandations établies par le Comité de la Bourse qui concernent uniquement la procédure. Il n'y a pas de dispositions particulières sur la protection des actionnaires car on se réfère au droit des sociétés en général.

Au Pays-Bas, le code d'autodiscipline se limite à régler la procédure en cas d'O.P.A. volontaire. Aucune disposition particulière n'est prévue en matière de protection des actionnaires minoritaires. Ici également on se réfère au droit des sociétés en général.

En Grèce, il n'y a ni loi, ni code d'autodiscipline structuré. On retrouve des principes issus de la Commission de la Bourse d'Athènes qui concernent uniquement la transparence d'une O.P.A.

Quant aux deux autres Etats membres (Luxembourg, Autriche), ils n'ont ni loi, ni code d'autodiscipline. Quelques dispositions dispersées de protection des actionnaires sont mentionnées dans le droit des sociétés en général.

La situation décrite démontre clairement l'absence d'une protection équivalente des actionnaires. La directive est basée sur l'article 54,3g du Traité qui stipule la protection équivalente des actionnaires dans la Communauté. La directive cadre, souhaitée par la majorité

des Etats membres, impliquerait que le législateur national « remplisse ce cadre » en tenant compte de traditions et spécificités nationales. Les Etats membres seront tenus de définir à partir de quel moment le contrôle d'une société cotée en bourse est considéré comme acquis pour que l'obligation de protéger les actionnaires minoritaires soit déclenchée. Ainsi, les investisseurs (fonds de pension, etc.) pourront dans un cadre de sécurité juridique acheter des titres cotés en bourse dans tous les Etats de l'Union avec les mêmes garanties reconnues partout. Par ailleurs, la directive ferait en sorte que les codes de conduite actuellement sur place ne seront pas modifiés dans le futur de façon à ne plus remplir les critères d'équivalence établis pour se conformer à la directive.

II. POSITIONS EXPRIMÉES PAR LES ETATS MEMBRES CONCERNANT LES PRINCIPES CONSACRÉS PAR LA DIRECTIVE

- (a) Toutes les délégations se sont exprimées en faveur d'une protection des actionnaires minoritaires en cas de changement de contrôle dans une société cotée en bourse. Onze délégations ont indiqué que la directive fournit les garanties nécessaires pour atteindre cet objectif. Trois délégations (NL, S, UK) ont exprimé des doutes quant à l'efficacité des solutions proposées par la directive pour assurer cette protection.
- (b) La plupart des délégations sont favorables à laisser une certaine flexibilité au législateur national pour la définition de la notion de contrôle, mais se sont réservés quant à leur position définitive. NL et S ont posé la question de la plus-value d'une telle disposition par rapport à l'état actuel. UK a exprimé la crainte que le fait pour un Etat membre de mettre un seuil très élevé pour déterminer le contrôle risque de vider de son sens la protection des actionnaires minoritaires. E a indiqué sa préférence pour une harmonisation plus poussée dans le sens que le seuil de droits de vote devrait figurer dans la directive. B a regretté le fait que la directive ne donne pas une définition des « actions en concert ».
- (c) La plupart des délégations ont posé des questions sur les moyens qui pourraient être considérés comme équivalents à l'offre obligatoire. D a expliqué son système de protection des actionnaires minoritaires dans le cadre de droit de groupes et s'est félicité de l'ouverture d'esprit dont la Commission a fait preuve en n'imposant pas l'offre obligatoire comme seul moyen de protection. Sur ce point des conclusions n'ont pas été tirées mais les délégations vont mieux étudier le système allemand sur la base de la note que les autorités allemandes ont adressé à la Commission lors de leur réponse au questionnaire. UK et NL ont fait valoir que l'offre partielle met les actionnaires minoritaires dans une situation plus mauvaise car il leur sera plus difficile de vendre leurs titres restants.

- (d) Sept délégations (I, EL, B, FIN, A, UK, L) se sont prononcées en principe en faveur des mesures défensives contre une O.P.A. hostile, autorisées par l'assemblée générale des actionnaires durant la procédure. B a fait part de sa préoccupation de tenter de trouver un équilibre dans le cadre de la politique de la société pour des opérations entreprises 'in tempore non suspecto' » p.ex. l'augmentation de capital. UK a suggéré que l'interdiction de prendre des mesures défensives couvre également la période où une OPA est imminente avant même son lancement officiel.
Cinq délégations (DK, S, F, P, D) n'ont pas été en mesure de prendre position. NL s'est exprimé contre.
- (e) Huit délégations (E, B, S, F, P, FIN, D, A) se sont exprimées en faveur d'une information des salariés de la société visée. I et EL ne voient pas à quoi sert une information aux travailleurs au moment où l'offre est rendue publique. UK est réservé mais en principe pourrait être en faveur à condition que les salariés aient la même information que les actionnaires.
- (f) Toutes les délégations se sont mises d'accord sur le fait que la directive doit régler la question de l'autorité compétente et de la loi applicable au cas d'une O.P.A. transfrontalière. Néanmoins, la question des critères de sa détermination étant fort complexe du point de vue juridique, les délégations souhaitent approfondir les solutions à retenir. En particulier, la question qui s'est posée en cas d'O.P.A. transfrontalière est celle de savoir comment concilier le droit du siège de la société visée et le droit de l'autorité compétente lorsque ces deux droits relèvent de deux Etats Membres différents.
- (g) Sur la nécessité d'une directive
Onze délégations (I, EL, DK, E, B, F, P, FIN, D, A, L) ont manifesté leur accord en faveur d'une harmonisation et ont considéré la proposition de directive comme une bonne base de discussion.
Trois délégations (NL, S, UK) restent opposées. NL et S estiment que la directive ne se justifie pas par rapport au principe de subsidiarité. Le UK a émis une réserve générale sur l'ensemble de la directive surtout à cause de sa crainte de l'augmentation de « litigation ». La présidence autrichienne va consacrer à ce dossier cinq réunions du groupe de travail du Conseil de l'Union Européenne pendant le deuxième semestre et espère arriver à un accord avant la fin de cette année.

4. CONCLUSIONS

Les O.P.A. communautaires représentent un moyen de restructuration des sociétés particulièrement important en l'absence de possibilité juridique de faire des fusions transfrontalières tant que la 10e directive qui vise à les organiser n'est pas en vigueur.

Sans encadrement juridique les opérations d'O.P.A. peuvent affecter la stabilité de l'activité économique et par conséquent des intérêts des actionnaires.

La diversité des législations ou codes et leur valeur inégale ne permet pas de garantir pour l'instant la même sécurité juridique et la même transparence dans tous les Etats membres.

Si depuis 1991 8 Etats membres ont introduit ou modifié leurs règles sur les O.P.A. c'est que ces opérations posent un problème. S'il se pose pour les O.P.A. nationales il se pose encore davantage pour les O.P.A. transfrontalières qu'un Etat ne peut régler seul. Par exemple, l'investisseur britannique qui lance une O.P.A. sur une société italienne est soumis à la loi italienne si cette société est cotée en Italie.

La position des Etats membres concernant les O.P.A. est partagée entre 2 réactions fort différentes:

- Certains Etats estiment que leurs sociétés doivent être à même de prendre des mesures défensives contre des O.P.A. « raids » purement spéculatifs initiés par des plus forts parfois au détriment d'intérêts nationaux ce qui provoque des détournements de technologie et de réseaux commerciaux.
- D'autres Etats estiment en revanche que l'O.P.A. est un moyen de restructuration des sociétés – une bonne chose – un moyen technique d'obtenir le contrôle d'une société qui doit être encouragé.
- La Commission n'a pas opté entre ces 2 options. Son action par voie de « directive cadre » vise à assurer dans toute l'Union, une procédure d'O.P.A. transparente et qui donne des garanties équivalentes aux investisseurs et aux actionnaires minoritaires.

(6) Pour la Commission, face à une multiplication des O.P.A. transfrontalières dont la cible est une entreprise communautaire qui depuis les années 94-95 sont passées de 10 milliards à 57 milliards d'écus, et représentent 30 % des O.P.A., le temps est venu d'adopter des règles du jeu communes pour mettre à disposition des entreprises les moyens dont elles ont besoin pour se restructurer.

Il ne faut pas attendre « le scandale du siècle » pour établir ces règles du jeu.

TAKEOVERS IN THE UNITED STATES:
A LAW AND ECONOMICS PERSPECTIVE

Jonathan R. Macey^(*)

ABSTRACT

This article presents a descriptive as well as a normative, law and economics perspective on takeovers. It describes the nature of U.S. takeover regulation at the federal, state, and intrafirm level.

There is no question that takeovers benefit both target firm shareholders and society as a whole, subject only to standard concerns about mergers that occur to achieve monopoly power. The appropriate role to be played by government regulation of takeovers seems clear from the analysis presented here. Regulation should be promulgated at the firm level, with oversight to ensure that inefficient managers do not entrench themselves in office by resisting too much.

Unfortunately, it is unlikely that governments will impose the optimal level of regulation. This is because widely dispersed shareholders cannot galvanize into an effective political coalition to counter the efforts of concentrated, highly organized incumbent management. This is why state law in the United States is so much more restrictive than federal law: states have incentives to export the costs of regulation. States pass restrictions on takeovers that benefit local management groups at the expense of out-of-state shareholders. In Europe, where share holding patterns are more localized, the prospects for efficient local (i.e. state as opposed to EU) level regulation are much better.

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I. INTRODUCTION: THE COSTS AND BENEFITS OF THE SEPARATION OF OWNERSHIP AND CONTROL

The bifurcation of share ownership and management control of U.S. corporations is the central and distinguishing feature of the U.S. system of corporate governance. This characteristic is viewed by some as strange and inefficient since it leads to the exploitation of small-stakes, widely disbursed, and often unsophisticated minority shareholders by entrenched management which exploits the separation of ownership and control by diverting corporate resources to their own ends. For others, by contrast, the separation of ownership and control is efficient from the investors' perspective for three reasons.

I.1 THE BENEFITS OF THE SEPARATION OF OWNERSHIP AND CONTROL

First, the separation of ownership and control permits efficient specialization through the unbundling of the management function with the risk-bearing function associated with owning the residual claims to the corporation's cash flows. In other words, the separation of ownership and control permits managers to specialize in managing the firm, and shareholders to specialize in bearing the risks associated with holding the residual claims involved in ownership.

Second, the separation of ownership and control permits shareholders to reduce risk through their ability to diversify their investments through the ownership of many (small) claims in various firms. And, as is well known in the field of corporate finance, investment diversification permits investors to eliminate the firm-specific risks associated with share ownership. This, in turn, leads to lower capital costs for firms in the economy, and to greater innovation, as shareholders are capable of investing in riskier ventures due to their ability to mitigate such risk through diversification.

Finally, the separation of ownership and control is efficient because it provides incentives for the formation of a robust venture capital sector within the economy. Venture capital has proven to be a critical avenue for funding entrepreneurial activity, particularly in the high technology sector. Many, if not most, of the successful high technology start-up companies that have prospered in such places Silicon Valley, California, and Research Triangle Park, North Carolina were begun with funds from venture capitalists. Venture capitalists', of course, like other investors, only have incentives to invest if they think that they will receive a return on their investments. In the world of venture capital this simple insight translates into a need by venture capitalists for a "market out" for their funds. The presence of widespread, small stakes shareholders creates a secondary market, which, in turn, creates a market for the initial public offerings that provide venture capitalists with the market out that they need to induce them to make their initial investments in start-up companies.

To these micro-economic virtues of the separation of ownership and control should be added two additional, related advantages from a macro-economic or political perspective. The

first is that developed post-industrial economies such as those that exist in western Europe and the U.S. obviously must provide for some means by which the large amounts of capital necessary to fund large-scale business ventures like automobile or airplane manufacturing, oil exploration and drilling, computer hardware and software design can obtain the funds necessary to finance their activities. By tautology, in economies in which share ownership is not dispersed, it is concentrated. And concentration of share ownership, of course, necessarily means a concentration of economic, and hence political power within a society. Thus widespread share ownership permits provides a mechanism by which the funds required to finance a modern, post-industrial economy can be accumulated without a concomitant concentration of political and economic power within the economy.⁽¹⁾

A second and related advantage of the widespread separation of ownership and control is that it contributes to political and social stability by permitting the development of a large “investing class” with a significant stake in economic progress of the nation. The importance of this characteristic of the separation of ownership and control should not be under-estimated in an economy such as that of the United States in which demographic diversity can lead to social tension.

I.2 THE COST OF THE SEPARATION OF OWNERSHIP AND CONTROL

While separating the ownership of residual claims from the management of a firm has distinct advantages, this corporate governance structure is not without costs. In particular, as mentioned above, the fact that shareholders are widely dispersed and often unsophisticated creates monitoring problems. Because of collective action problems of free-riding and rational ignorance, shareholders in corporations characterized by widely disbursed management structure generally lack the incentives or the capabilities either to monitor management, or to galvanize into an effective political coalition to change things when management is performing poorly.

Thus the cost of the separation of ownership and control is that firms will be managed sub-optimally as managers exploit the inability of widely disbursed shareholders effectively to monitor the firms in which they have invested. As in all other areas of economic life, the costs of the separation of ownership and management - which come in the form of reduced incentives by

(1) *Of course an alternative mechanism for allocating capital without concentrating economic and political power in private hands is state financing of industry. The problem with this approach is that the allocation of finance inevitably becomes political and capital does not flow to its highest valuing users. This, in turn, leads to sub-standard economic performance. The sustained, pervasive and systematic under performance of state enterprises explains not only the collapse of the Soviet Union and the increasing reliance on markets in countries such as China, but also the poor performance of other economies such as Cuba and North Korea, and the interest in privatization in countries such as the France, Italy and the U.K.*

shareholders to invest due to fears of exploitation, and hence higher costs of capital - must be weighed against the benefits.

Moreover, and again this is true for all other aspects of economic life, incentives exist for entrepreneurs to reduce the costs associated with the separation of ownership and control in order to be better placed to exploit the benefits. Specifically, entrepreneurs wishing to take their firms public, have incentives to make credible commitments not to exploit shareholders and other potential investors because such investors will reduce the amount they are willing to invest in a new venture by an amount large enough to compensate them for the costs of any expected exploitation by the entrepreneurs. In other words, entrepreneurs wishing to raise capital by taking their firm's public will internalize the costs associated with the separation of ownership and control. Contrary to popular myth, shareholders don't bear these costs because shareholders can protect themselves from exploitation, not only by refusing to invest, but also by adjusting the prices they are willing to pay for shares. That is why economies that are unable to offer credible commitments to protect investors can easily be identified by the weaknesses in their capital markets. Until recently, this situation has characterized continental Europe.

II. MARKET SOLUTION TO AGENCY COST PROBLEM: THE MARKET FOR CORPORATE CONTROL

Entrepreneurs attempt to mitigate the costs associated with the separation of ownership and control in a variety of ways. For example, they engage informational intermediaries, such as investment banks, accounting firms, and other entities that warrant the honesty of the entrepreneur by lending their reputations to the entrepreneur's public offering. Similarly, entrepreneurs can cause their firms to be listed on a bona fide stock exchange, like the New York Stock Exchange, as a means of signaling that the firm is willing to accept rules that benefit investors. And, firms can adopt corporate governance structures that include having a majority of independent directors or outside audit committees to signal that they are willing to bind themselves to a governance regime in which exploitation is more difficult.

However takeovers, sometimes characterized as the "Market for Corporate Control" are the most important mechanism by which shareholders can assure themselves that they will not be exploited by entrepreneurs/managers after they have invested in a public company. The critical characteristics of the market for corporate control are the following:

- bidders have incentives to monitor to identify arbitrage possibilities, (i.e. firms that would be valued more highly after a change in management). Such firms can be purchased at current market prices (plus whatever premium the market requires). Bidders profit by the difference between the post-takeover value of the firm and the pre-takeover value of the firm, less the costs associated with the acquisition (transaction costs plus takeover premium);

- managers who operate in a corporate governance system characterized by a robust market for corporate control have strong incentives to improve their performance to insure that share prices remain sufficiently high to deter hostile bids (this is because incumbent management generally is replaced by the bidders after a successful takeover);
- the threat of a takeover, therefore, creates a positive (pecuniary) externality as managers of all firms, even those that are not subject to an outside bid, have incentives to maximize share value in order to reduce the arbitrage possibilities for outside bidders, and thereby retain their posts;
- thus all shareholders, not just shareholders who receive bids benefit by a robust market for corporate control

III. THE NEED FOR REGULATION OF THE MARKET FOR CORPORATE CONTROL

Like other markets, the market for corporate control is not frictionless. Some ordering mechanism is needed to reduce the transaction and information costs that plague this market. The specific problems that plague the market for corporate control are collective action problems which can lead to the exploitation of shareholders by bidders, and agency cost problems that can lead to the exploitation of shareholders by management.

III.1 COLLECTIVE ACTION PROBLEMS

Shareholders face the following types of collective action problems. To fully understand the collective action problems facing shareholders when confronted with an outside bid, one should contrast the position of a small stakes shareholder faced with a bid for his shares by an outside firm wishing to acquire control, with the position of a single (100%) owner of an enterprise who is presented with a purchase offer. Clearly, the single owner sometimes finds that it is in his interest to negotiate the purchase price. The problem for shareholders is that - due to collective action problems - they lack the incentives to invest the optimal amount of resources in negotiating.

The particular collective action problems facing shareholders can be described as follows:

- Rational Ignorance. Shareholders will not invest sufficiently in determining whether they should accept or reject a proposed bid because their ownership stakes are so small that the cost of investing in analyzing the bids is greater than the value of any improvements that could be gained by carrying out such an investigation.
- Free-Riding. Another reason widely dispersed shareholders in U.S. companies may not negotiate very well on their own behalf is because free-rider problems give shareholders incentives to under invest in evaluating the merits of an outside bids. This is because any

gains associated with a successful bid must, of course, be shared *pro rata* with all of the other shareholders. This will lead to an under investment in bids. Suppose, for example that the gains associated with investigating a bid and negotiating with a bidder are \$1,000,000, and that there are 100,000 shareholders, each of whom owns 10 shares. This translates into a gain of \$10 per share or \$100 per shareholder. This means that, while the economically efficient amount of investment in investigating the merits of an outside bid are any sum up to \$1,000,000, no shareholder has an incentive to invest more than \$100. Thus, in this context, the free-riding phenomenon leads to a gross under-investment in evaluating and negotiating with outside bidders.

- Prisoner's Dilemma caused by partial bid. Widely dispersed, small stakes shareholders also face a prisoners' dilemma when confronted with a partial bid. The dilemma can arise under the following circumstances: (1) when a bidder threatens to make a bid in two stages, with the first stage being a bid for an amount sufficient to obtain control but less than 100%, where the target shareholders think that the subsequent, second stage acquisition will be made at a significant discount below the initial price; (2) when a bidder makes a bid at a bid at a premium for less than 100% of the target firm's stock and the target firm shareholders believe the bidder will manage the firm dishonestly, or incompetently if it obtains control; (3) where the bidder makes a partial bid with a promise or threat to purchase the balance of the shares at a later date, a prisoner's dilemma will exist, even if both the front stage bid and the back stage bid are at a premium over the pre-bid price of the target company, if the shareholders think that another bidder (so-called "white knight") will appear later and offer an even higher premium if the first bidder is defeated.
- The nature of the prisoner's dilemma, which can lead to shareholders being exploited by an outside takeover bid can be described as follows. Imagine a firm with 101 shares of stock outstanding. An outside bidder has acquired one (1) of these 101 shares in an open market purchase at the firm's pre-bid market price of \$50.00. The outside bidder now makes a tender offer for fifty (50) of the one-hundred (100) remaining shares at \$65, to be followed by a "take out merger" at some later date at \$30.00/share. If, as of course will be the case with widely dispersed, small stakes shareholders, the two shareholders in this firm cannot effectively coordinate their activities, under these circumstances they will pursue individual strategies that will make them collectively worse off. This is because for each of the shareholders, the best possible outcome would be to tender or sell his shares, *provided that the other shareholder does not tender*. This, in turn, is because if one of these shareholders sells and the other does not. The selling shareholder receives a price of \$65 or a thirty percent premium. By contrast, for each shareholder, the worst possible outcome would be not to tender his shares, *provided that the other shareholder does tender*. This is because the non-selling shareholder will receive only \$30.00 in the subsequent, second-stage merger, which, of course, represents a significant loss when compared with the pre-tender offer price of \$50.00.

- Thus each individual shareholder must sell his shares both in order to avoid the worst possible outcome (\$30.00 per share) and to have a chance of receiving the best possible outcome (\$65.00 per share). In contrast, from the perspective of both shareholders' joint interests, it would be better for neither the shareholders to sell their shares. This is because if both shareholders sell, the bidder, under U.S. law will be required to purchase the shares being tendered *pro rata*, i.e. one-half of each shareholder's shares will be purchased. Thus each shareholder will sell one-half of his shares for \$65.00 and one-half for \$30.00 if both tender. This will result in a total price received for each shareholder of only \$47.50, which, of course represents a loss in comparison with the pre-tender offer price of \$50.00.
- Perverse Incentives Caused by a Partial Bid. Another collective action problem caused by having widely dispersed shareholders is that, when partial bids are made, shareholders have disincentives to sell to superior management teams, but they have strong incentives to sell to weak management teams. To illustrate the point, imagine you are a shareholder in a firm that receives a bid for 60% of its shares at a premium of 25% over the current share price. If you think that the new managers of the firm will do an outstanding job managing the firm and that they also will be honest and forthright, and that the firm's shares under this new, high quality management team will increase in value by 50%, you will not want to sell your stock since you will prefer to hold on (hoping that other shareholders will sell) so that you can realize the 50% premium instead of the 25% premium being offered. On the other hand, if you think that the firm will be managed ineptly or dishonestly by the new managers, you have every incentive to sell since you don't want to be stuck as a minority shareholder in an inefficiently or dishonestly managed firm.

III.2 AGENCY COST PROBLEMS

The collective action problems described above suggest that at times, particularly in the face of partial bids, shareholders, when viewed from a group perspective, may not act in their own collective self-interest. In particular, collective action problems may lead to a sub-optimal amount of resistance. By contrast agency cost problems between managers and shareholders can manifest themselves in the form of too much resistance. This is because managers may resist not in order to secure a better price for shareholders, or in order to solve or mitigate the collective action problems described above, but rather in order to save their own jobs.

IV. REGULATION OF TAKEOVER

IV.1 REGULATING TAKEOVERS: TYPE 1 AND TYPE 2 ERROR

Unfortunately, from a regulatory perspective, the solutions to collective action problems described in section III.1 exacerbate the agency cost problems described in section III.2. And the solutions to the agency cost problems described in section III.2 exacerbate the collective action problems described in section III.1.

Every regulation that mitigates the collective action problems facing shareholders (either by giving managers more power to resist (negotiate) with outsider bidders, or, as has been done in Italy and the U.K., by eliminating the ability of bidders to make partial bids), makes bids more costly for bidders and thus imposes costs on shareholders. Thus while providing managers with more power to negotiate on behalf of the shareholders solves the collective action problems described in section III.1 - which manifest themselves in the form of permitting bidders to purchase target firm shares too cheaply - it exacerbates the agency cost problems described in section III.2.

Similarly, depriving managers of power to negotiate on behalf of shareholders mitigates the agency cost problem - which manifests itself in the form of too much resistance - but exacerbates the collective action problem, at least where bidders can make partial bids. As noted above the solution to this problem adopted in Italy and the U.K. has been to ban partial bids. Indeed, the prisoner's dilemma described above provides the best justification for banning partial bids that exists. But it must be recognized that while banning partial bids has benefits, it also has costs. Specifically, banning partial bids makes bids more expensive for bidders and thus results in not only in a diminution of socially desirable takeovers, but also in a reduction in the amount of monitoring of firms by takeover entrepreneurs.

In deciding how to regulate, we must, therefore, consider the natural biases of the system. Left unregulated, will there be a "natural bias" within the market towards type 1 error or towards type 2 error. It seems clear that the natural bias in the system will be in favor of too much resistance because managers rather than widely dispersed shareholders control the firms for which they work, and their natural tendency will be to resist. Thus, in light of the fact that firms can engage in activities that both solve the collective

In Europe and the United States, regulation of the market for corporate control can be organized on one or more of the following three levels. First, regulation can occur at the firm level. Second, regulation can occur at the state or country level, and finally regulation can occur at the national or EU level. Regulation of the market for corporate control is subject to the classic problems of Type 1 and Type 2 error. In this context, Type 1 error is the error that regulation of takeovers will be made too stringent, thereby discouraging bidders. Type 2 error is the error that regulation of takeovers will not be sufficiently stringent so that bidders will be able to exploit the shareholders by purchasing stock in the target firm at too-low of a price.

It seems clear for several reasons that the market for corporate control is much more prone to Type 1 (too much regulation) error than to Type 2 error (too little regulation). There will be too much regulation of takeovers at the firm level because managers face a conflict of interest between their duty to maximize value for shareholders, and their personal interests in retaining their jobs. This will lead managers to resist and to favor intra-firm rules that make takeovers more costly even when such actions are not in the shareholders' best interests. Similarly, managers are a much more effective political force than widely dispersed shareholders. This is particularly true at the state level in the United States, where managers of a local company generally are well-organized and well-connected politically within their home state, but small stakes shareholders are not only disorganized, they also are widely dispersed throughout the fifty states.

IV.2 REGULATION OF TAKEOVERS IN THE U.S. AT THE FEDERAL LEVEL

As noted above, in the US, as in Europe, federal regulation of takeovers occurs at three levels. In the U.S., the federal regulation is called the Williams Act, which is part of the Securities Exchange Act of 1934 (as amended). The basic provisions of the Williams Act were enacted in 1934. The Williams Act gave the U.S. Securities and Exchange Commission substantial power to regulate takeovers.

In the U.S. each state also has its own rules related to takeovers, and each firm also has its own, internal rules of corporate governance that relate to the market for corporate control. It must be stressed that in the U.S. as in Europe and elsewhere, *these three levels of regulation are substitutes*. This means that any regulation that exists at the national level could also be implemented by a firm or by an individual state. Thus when one sees regulation at a particular level, one should ask why the regulation is occurring at that level, rather than at some other level.

With respect to the allocation of regulatory authority, there are essentially two points of view among U.S. commentators. According to one school of thought, state regulation is all that is needed. Adherents of this, federalist approach, believe that the regulatory problems presented by takeovers are best solved locally or even at the firm level. This view holds that firms that choose sub-optimal regulatory regime will suffer in capital markets, thus there will be a "race for the top" in terms of the jurisdictional competition as firms have incentives to adopt the regulatory structure that maximizes shareholder value, and thus lowers capital costs. The federalists also take the view that different firms have different needs, and that permitting regulation at the firm or at most the state level is the best way to allow an economy to achieve the customized set of rules for particular situations.

The opposing view holds that federal regulation is needed for takeovers because individual states can create *negative externalities*. According to this view, individual states attempt to benefit local management at the expense of out-of-state shareholders. As noted above, at least at present

this would seem to be a much more serious problem in the U.S. than in Europe, because patterns of out-of-state share holdings are much more widespread in the U.S. than in Europe.

IV.3 THE WILLIAMS ACT

In the U.S., federal regulations concerning disclosure by bidders is triggered by “toe hold” obtained via open-market purchases or “tender offer”. Regulation of so-called “toe hold acquisitions” work as follows: disclosure by bidders is required within 10 days of acquiring 5% of another firm’s equity securities. The acquisition of the 5% is the “toe hold” that triggers disclosure within 10 days.

For tender offers, unlike “toe hold acquisitions”, immediate disclosure is required. This, of course, presents the legal question, What is a tender offer? The term is undefined by the statute. Generally a tender offer is a public offer to purchase a specified number of shares at a premium within a specified period, subject to specified terms stipulated by the bidder.

Disclosure Rules under the Williams Act for “toe hold” acquisitions and tender offers:

- if disclosure is triggered by a “toe hold” acquisition, the bidder must complete a Form Schedule 13D. If disclosure is triggered by a “tender offer” the bidder must file a Form Schedule 14D-1. Both of these forms require the following information:
- bidder must disclose (1) identity and background; (2) source and amount of funds for making the purchase; (3) the number of target firm shares held by the acquiror; (4) any arrangements the target has with others concerning the target’s shares; (5) the acquiror’s purpose for making the acquisition.
- Special Federal Rules for Tender Offers
- Offers must remain open for a 20 day-period (SEC Rule 14e-1)
- Shareholders have the right to withdraw their shares at any time during the pendency of the offer (SEC Rule 14d-7)
- Offers must be non-discriminatory. This means that they must be made to “All-Holders” (the “all-holders” rule) ((SEC Rule 14d-10(a)(1))
- The bidder must offer the best-price paid to any shareholder to all shareholders (SEC Rule 14d-10(c)(1))
- In case of a partial bid (i.e. a bid for less than 100% of the target firm’s stock, the bidder must purchase the shares pro rata purchase. For example, if a bidder makes an offer for 50% of the target company’s shares, and 75% of the shares are tendered, the bidder may not purchase the shares on a “first-come, first-served” basis. Rather, the pro rata purchase requirement requires the bidder to purchase, in this example 50/75 or 2/3 of the shares tendered. Shares not purchased must be returned to shareholders. (SEC Rule 14d-8)
- The bidder cannot make purchases outside the tender offer during the period when the tender offer is open (SEC Rule 10b-13)

- SEC Rules also prohibit fraud or deception “in connection with” tender offers
- Target firm management must make a statement responding to any tender offers within ten (business) days after the offer is made (SEC Rule 14e.2).
- There is a special rule regarding the use of inside information in the context of tender offers. It is illegal for anybody except bidders to trade on the basis of material, non-public information concerning a tender offer. Unlike the general rules in the U.S. regarding insider trading, this prohibition on insider trading does not require that the person with the inside information breached a fiduciary duty in obtaining the information. (SEC Rule 14e-3).

Effect of Williams Act:

The Williams Act, like other rules concerning takeovers, have both costs and benefits. In particular, the Williams Act affects the supply and demand of bids. The bad news is that the Williams Act results in fewer bids being made. The good news is that those bids that are made occur at higher prices than they would occur in the absence of the Williams Act.

IV.4 STATE REGULATION OF TAKEOVERS IN THE U.S.

The first legal issue that must be confronted in connection with regulation of takeovers at the state level in the U.S. is the question of the legality of such rules under the U.S. Constitution. Specifically, the Commerce Clause and Supremacy Clause of the U.S. Constitution prohibit states from passing laws that interfere with interstate commerce (takeovers are considered to be interstate commerce), or that conflict with or have been pre-empted by a particular federal law. For example, in the case of Edgar v. Mite 457 U.S. 624 (1982), the Supreme Court of the United States held that the Illinois antitakeover statute was unconstitutional on Commerce clause grounds because it discriminated against out-of-state tender offers. Court indicated problems under Supremacy clause as well with the Illinois statute.

More recent statutes have passed constitutional muster. However, it should be noted that boards of directors of U.S. firms have the power to decide to “opt out of” or refuse to be subject to the provisions of virtually all of these statutes. Boards of directors even can decide to avoid the applicability of a statute with respect to a particular bidder.

Current antitakeover statutes include the following provisions:

- Control Share Statutes -- These statutes allow the shareholders (excluding the bidder and management) to decide on whether a bid should succeed. Under some control share statutes, bidders must obtain shareholder approval to acquire “control shares.” Under other control share statutes, bidders can acquire all the shares they want to, but voting rights do not attach to these shares unless the other shareholders approve. The provisions of control share statutes are triggered by when a bidder acquires a certain, statutorily defined

threshold (20, 33, 50 percent) of the target firm's stock. Control share statutes protect against the collective action problems described above.

- Business Combination Statutes -- These statutes also protect against the problems of partial bids by preventing bidders who acquire above a certain threshold percentage of a target firm's stock from entering into a merger or other subsequent, "second-stage" transaction unless the board and a specified majority or super-majority of the other shareholders approve; or the bidder acquired control in a tender offer for a significant majority (85%), or the original board of directors approved the bidder's acquisition.
- Fair Price Statutes -- Fair price statutes prohibit second-stage transactions such as mergers between bidders and targets unless bidders pay what is considered a "fair price" for the target at the second stage. The fair price is determined by a formula. Typically these formulas assure that shareholders will receive a price equal to at least the price paid in the front-end of the acquisition. Fair price statutes solve the problem described in the prisoner's dilemma discussed above.
- Appraisal Statutes - these statutes give shareholders the right to force bidders to buy their shares for cash at a price determined by a formula specified in the statute.
- Nonshareholder Constituency Statutes - these statutes allow directors in considering whether to resist an outside bid, to take the interests of "stakeholders" or "nonshareholder constituencies" into account. Stakeholders are generally defined to include employees, suppliers, and local communities.

IV.5 INTRA-FIRM REGULATION

- Poison Pills -- Poison pills work as follows. A company's board of directors issues "rights" to shareholders. Each of these rights gives the shareholders the right to buy preferred stock at prices in excess of market value, i.e. these rights are "out of the money". Additional "rights" are triggered if there is an acquisition. Under a typical poison pill rights plan, if any person or firm buys more than 20% of the firm's shares or makes a tender offer for more than 30% of the firm's shares, the target firm's board of directors has 10 days to redeem the rights plan, that is to void it. If the board does not void the poison pill rights plan then target shareholders would gain rights to purchase, say, \$200 worth of the target's securities for \$100 (a flip-in pill) or \$200 of the acquiror's securities for \$100 (flip-over pill)
- Shark Repellant Amendments -- these are equivalent to fair price statutes, except that they are adopted by firms rather than state legislatures.
- Golden Parachutes -- this is the name for executive compensation agreements that provide substantial payments to management in the event the firms they work for are taken over. The proponents of golden parachutes argue that these compensation arrangements align the interests of management and shareholders by giving managers a financial incentive to

accept outside bids that increase shareholder wealth. Detractors argue that golden parachutes also give management incentives to accept sub-optimal bids.

V. CONCLUSION

This article has presented a normative, law and economics perspective on takeovers and has described the nature of U.S. takeover regulation at the federal, state, and intra-firm level. There is no question that takeovers benefit both target firm shareholders and society as a whole, subject only to standard concerns about mergers that occur to achieve monopoly power.

The appropriate role to be played by government regulation of takeovers seems clear from the analysis presented here. Regulation should be promulgated at the firm level, with oversight to ensure that inefficient managers do not entrench themselves in office by resisting too much.

Unfortunately, it is unlikely that governments will impose the optimal level of regulation. This is because widely dispersed shareholders cannot galvanize into an effective political coalition to counter the efforts of concentrated, highly organized incumbent management. This is why state law in the United States is so much more restrictive than federal law: states have incentives to export the costs of regulation. States pass restrictions on takeovers that benefit local management groups at the expense of out-of-state shareholders. In Europe, where share holding patterns are more localized, the prospects for efficient local (i.e. state as opposed to EU) level regulation are much better.

LA REGULATION DES OFFRES PUBLIQUES EN FRANCE

Marie-Josèphe Vanel^(*)

I. PREAMBULE : LE PAYSAGE INSTITUTIONNEL FRANÇAIS - BREF RAPPEL DE LA CONFIGURATION POST-LOI DU 2-07-96 (DSI 10-05-93)

En quelques mots puisque ce n'est pas l'objet essentiel du débat.

Le régulateur professionnel qu'est le Conseil des Marchés Financiers résulte de la fusion des deux « anciens » - Conseil des Bourses de Valeurs et Conseil du Marché à Terme -. Il a en charge l'ensemble des services d'investissement autres que la gestion dévolue à la Commission des Opérations de Bourse.

Il exerce trois types de responsabilités :

- fonctions réglementaires: fixation des règles de bonne conduite des prestataires de services d'investissement, conditions d'attribution des cartes professionnelles, principes d'organisation des marchés réglementés et des chambres de compensation, conditions d'application de la règle de concentration des ordres, et règles des offres publiques.
- fonctions de gestion: approbation des programmes d'activité des prestataires, approbation des règles de fonctionnement des marchés réglementés et gestion des offres publiques.
- fonctions de contrôle et de sanction: contrôle du respect de la réglementation par les prestataires et sanctions au titre des manquements constatés.

Les autorités bancaires - Comité des Etablissements de crédit et des Entreprises d'Investissement CECEI et Comité de la Réglementation bancaire et Financière CRBF, Commission Bancaire - agréent les entreprises d'investissement, édictent des règles sur le statut et la situation financière des établissements, surveillent la situation de l'ensembles des prestataires.

En matière de gestion, la COB agréée, réglemente et contrôle.

Pour ce qui est des offres publiques, la compétence est double: au CMF la fixation des règles relatives aux offres spontanées comme aux offres obligatoires , la gestion du déroulement des offres; à la COB le contrôle de l'information du public à l'occasion des offres - le document d'offre qui est ou une note d'information soumise à son visa ou un communiqué soumis à son accord préalable - , les règles assurant la transparence pendant la période d'offre qu'il s'agisse des actes et déclarations des sociétés concernées ou des déclarations auxquelles doivent procéder les intervenants sur le marché des titres en cause. Le document d'offre n'est pas une formalité

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et une offre ne peut être ouverte qu'après accord de la COB sur son contenu ce qui confère à celle-ci en quelque sorte un droit de veto: encore faut-il qu'un refus de visa soit motivé. C'est une situation qui n'a jamais été rencontrée à ce jour.

J'en viens au vif du sujet selon le schéma suivant:

- d'abord une présentation synthétique et résumée des règles en vigueur sur l'obligation d'offre, ses dérogations, les typologies des différentes offres publiques;
- et, de façon moins descriptive mais avec quelques références concrètes, une analyse de la hiérarchie des textes que j'ai intitulée «un ancrage dans la loi tardif et général» et quelques considérations sur les difficultés de l'exercice sous l'en-tête «le chemin étroit et délicat des textes d'application».

II. L'OBLIGATION D'OFFRE ET LES DEROGATIONS - LES DIFFERENTS TYPES D'OFFRES PUBLIQUES

- Les franchissements de seuils du tiers, de plus de 2% en moins d'un an entre le tiers et la moitié et de 50% par une personne agissant seule ou de concert rendent obligatoire le dépôt d'une offre publique. Il s'agit des seuils du tiers en capital *ou* en droits de vote., les clauses statutaires de droits de vote double après deux ans de détention ou plus sous forme nominative, prévues par la loi sur les sociétés, étant très répandues parmi les sociétés cotées.

Le Conseil *peut* accorder des dérogations à cette obligation dans des cas limitativement énumérés par le Règlement actuellement en cours de révision. Les cas en vigueur à ce jour sont les suivants:

- transmission à titre gratuit, apports et fusions, augmentation de capital réservée à personnes dénommées;
- dépassement de 3% du seuil du tiers avec engagement de reclassement dans les 18 mois;
- augmentation du pourcentage de détention résultant de la diminution du nombre d'actions ou de droits de vote existants dans la société;
- détention préalable du contrôle de fait par le demandeur;
- contrôle majoritaire détenu par un tiers;
- acquisition par une entité d'un groupe qui contrôle déjà la société (consolidation dans ses comptes);
- reclassement à l'intérieur d'un groupe;
- mise en concert sans acquisition par les partenaires dans l'année précédente et assortie de l'engagement de ne pas modifier pendant deux ans l'équilibre de leurs participations respectives.

Le Conseil s'est ouvert la faculté de prendre une décision de dérogation avant le franchissement du seuil.

Une offre obligatoire ne peut comporter de condition minimale.

- la garantie de cours: procédure consistant à ce que l'acquéreur d'un bloc majoritaire offre le même prix à l'ensemble des actionnaires. Ce prix ne fait pas l'objet d'une appréciation par le Conseil.
- Le règlement distingue deux procédures d'offre: la «normale» et la «simplifiée».

La procédure normale s'applique lorsque l'offrant détient initialement moins de 50% du capital ou des droits de vote. Elle se caractérise par le fait que les ordres de présentation à l'offre sont centralisés in fine. Une offre de ce type peut faire l'objet d'offres concurrentes et/ou de surenchères qui doivent proposer 2% de plus. Une surenchère peut aussi consister, sans qu'il y ait modification du prix, à supprimer une condition minimale. Le délai normal de l'offre est de 25 jours de bourse. Sa date de clôture est arrêtée après publication de la note en réponse de la société visée s'il s'agit d'une offre non concertée.

La procédure simplifiée n'est ouverte qu'aux offrants qui détiennent déjà au moins 50% du capital et des droits de vote. Elle est dite simplifiée parce qu'elle se réalise par achats sur le marché s'il s'agit d'une OPA et sur une durée plus courte (10 jours de bourse pour une OPA, 15 pour une OPE).

L'offre publique de retrait, OPR, est une des variantes de l'offre simplifiée. Elle couvre notamment l'offre émise par un majoritaire qui détient déjà 95% au moins des droits de vote et peut être suivie d'un retrait obligatoire. Elle couvre aussi le cas de la transformation en commandite par actions ou celui d'une offre de sortie faite par le contrôlant lorsqu'il est décidé de modifier significativement le «pacte social» - changements statutaires, réorientation de l'activité sociale, cession de la totalité ou du principal des actifs, par exemple - .

Les offres publiques de rachat par les sociétés de leurs propres actions relèvent également du règlement du Conseil dans le cadre fixé par la loi sur les sociétés, de même que les offres faites sur certaines catégories de titres de capital (actions à dividende prioritaire ou certificats d'investissement).

A l'exception de la garantie de cours, toutes les offres font l'objet d'un examen de recevabilité par le Conseil qui décide si sont acceptables le prix ou la parité d'échange, le cas échéant le seuil de renonciation ainsi que la nature, les caractéristiques, la cotation ou le marché des titres à remettre en échange.

A l'exception des offres de rachat par les sociétés de leurs propres actions et d'offres sur certificats de droits de vote - qui ne peuvent être légalement acquis que par des porteurs de certificats d'investissement -, toutes les offres publiques doivent, depuis 1992, viser la totalité du capital et des titres donnant accès au capital. Ce quantum était des deux tiers en 1989.

III. UN ANCRAGE DANS LA LOI TARDIF ET GENERAL

Tardif car il a fallu attendre 1989 pour que le législateur se penche sur les offres publiques alors que depuis 1973 dans le règlement de la Chambre Syndicale des agents de change et dans

des décisions de la COB figurait déjà l'offre obligatoire qu'était alors la procédure dite de maintien de cours: obligation pour l'acquéreur d'un bloc conférant le contrôle de fait - pas de seuil défini - d'offrir le même prix à l'ensemble des autres actionnaires.

Généra: en 1989 le législateur a posé des principes laissant au CBV le soin d'arrêter les règles d'application.

Les principes: l'offre obligatoire à partir d'un certain seuil (seuil non fixé par le législateur et quantum visé non plus); l'obligation de garantie de cours en cas d'achat d'un bloc conférant le contrôle majoritaire en capital ou en droits de vote; l'OPR en cas de transformation d'une société anonyme en société en commandite par actions; l'OPR à l'initiative du majoritaire ou à la demande du minoritaire en cas de détention par le majoritaire d'une fraction déterminée des droits de vote.

Le débat au Parlement avait été plus précis avec des tentatives de figer le seuil d'offre obligatoire dans la loi et même de déterminer certains cas de dérogation.

L'introduction du squeeze out fin 1993 par complément apporté à la loi s'est faite dans les mêmes conditions, encore que davantage de précisions ont alors été fixées par le législateur: sur le pourcentage susceptible de faire l'objet d'expropriation (5% du capital ou des droits de vote) et sur les méthodes applicables (méthodes objectives pratiquées en cas de cession d'actif tenant compte, selon une pondération appropriée à chaque cas, de la valeur des actifs, des bénéfices réalisés, de la valeur boursière, de l'existence de filiales et des perspectives d'activité).

La loi actuelle du 2 juillet 1996 a repris les éléments antérieurs: elle donne plus explicitement qu'auparavant au CMF délégation pour fixer les règles relatives à toutes les offres publiques, limite son champ d'intervention aux offres sur des sociétés admises sur un marché réglementé - ou l'ayant été pour ce qui est du retrait obligatoire-.

On le voit donc une loi cadre qui ne peut entrer en vigueur qu'une fois élaboré et homologué par le Ministre le texte d'application que constitue le Règlement du Conseil.

Une telle souplesse ne me paraît pas en soi critiquable. Elle a le mérite au moins de permettre des modifications rapides en cas d'impérieuse nécessité. Nous l'avons observé en 1992 quand, devant les excès de l'utilisation de la limitation possible aux deux tiers de toute offre publique, il a fallu porter ce quantum à 100%. Elle me paraît compatible avec la mission qui incombe à une autorité professionnelle dans une matière par définition vivante et donc changeante. Elle me paraît en outre acceptée par l'ensemble de la place, par les professionnels de la finance comme par ceux du droit, qui sont largement associés à l'élaboration des textes.

Le Conseil Constitutionnel, saisi lors du vote de la loi de 1989, n'avait pas émis d'objection à la délégation donnée au Conseil des Bourses de Valeurs.

Il convient de souligner que le législateur a instauré une possibilité de recours contre les décisions du CBV puis du CMF, non plus devant les juridictions administratives, mais devant une chambre spécialisée de la Cour d'appel de Paris statuant dans des conditions de délai compatibles avec les opérations, qui est apparue aux professionnels de la finance et surtout du droit comme un rééquilibrage bienvenu. Dans notre Etat de droit il ne pouvait en être autrement.

IV. LE CHEMIN ETROIT ET DELICAT DES TEXTES D'APPLICATION

L'oeil expert des avocats, la lecture orientée de conseils financiers ou juridiques, les coups de semonce de la Cour d'appel nous montrent quelquefois combien un mot, un adverbe omis ou mal placé dans un article peut ou pourrait avoir des conséquences fâcheuses.

Seconde remarque sur les difficultés de cet exercice: la tentation de conserver une certaine faculté d'interprétation et d'adaptation qui peut inciter à l'abus de formules du type *en principe - notamment - en particulier* ou tout simplement du *peut*. La simple référence aux circonstances d'une opération est en elle-même de nature à ne pas assurer la sécurité juridique souhaitable, en dépit de la faculté de recours ouverte à tout intéressé.

Par ailleurs, l'exercice peut nous renvoyer à la loi sur les sociétés qui détermine les règles de déclaration de franchissement de seuil, qui définit la notion de contrôle. C'est la loi sur les sociétés qui définit l'action de concert en des termes généraux, sans exigence d'un accord écrit. Le Conseil peut difficilement donner sa propre définition du contrôle ou du concert.

En voici trois illustrations:

- l'offre obligatoire et les dérogations
 - la question du *peut* ou du *doit*. Le règlement précise que le Conseil peut accorder une dérogation dans certaines situations strictement énumérées. Il ne s'oblige donc pas à déroger systématiquement même si les conditions posées sont exactement remplies. Je mettrais volontiers en parallèle avec cette observation le fait que le Conseil ne dispose pas d'une faculté générale d'exemption, à l'inverse de nos amis britanniques - «*except with the consent of the Panel*» - .
La révision en cours du titre 5 n'apportera pas de changement sur ce point. Il est néanmoins envisagé de donner un peu de corps à ce «peut» en faisant référence aux circonstances du franchissement du seuil, à l'évolution qu'il implique dans le contrôle de la société, au fait qu'il soit ou non dépendant d'une assemblée générale des actionnaires de la société concernée.
 - la mise en concert et ses effets
La réunion de deux actionnaires ou plus dans une action de concert vis-à-vis d'une société est génératrice d'une offre publique si cette réunion fait franchir un des seuils déclenchants. Si l'alliance s'opère entre un actionnaire ancien important et un plus petit, le Conseil peut considérer qu'il n'y a pas lieu à offre tant que l'équilibre entre les alliés reste le même. Mais quid en cas de variations dans les participations respectives? comment apprécier le moment où la prédominance de l'un s'affaiblit au profit de l'autre? A l'extrême, ce sont les franchissements de seuils individuels en baisse qui deviennent générateurs d'offre.
 - la notion de contrôle
Le Conseil depuis 1989 fait référence à la loi sur les sociétés pour apprécier si une dérogation peut être accordée sur le fondement du contrôle de fait déjà détenu et

exercé par le requérant. Or la loi est restrictive dans son approche - la Cour d'appel vient de le rappeler à l'occasion d'un recours que le CMF a gagné - puisqu'elle parle d'une société comme contrôlant et non de personnes physiques et qu'elle prend en compte les conventions de vote seulement lorsque l'une des parties transfère l'exercice de ses droits de vote à l'autre alors qu'une action de concert classique laisse formellement à chacun la maîtrise de l'exercice de ses votes même s'il y a accord pour voter en concertation.

- les prix d'offre

Le Conseil apprécie un prix d'offre ou une parité d'échange, peut demander sa modification, peut déclarer un projet irrecevable pour ce motif. L'écriture de l'article en cause du Règlement a été revue en 1992: nous nous sommes alors largement inspirés de la jurisprudence de la Cour d'appel en reprenant les termes mêmes qu'elle avait pu utiliser: appréciation en fonction des critères d'évaluation objectifs usuellement retenus et des caractéristiques de la société visée.

L'acceptation d'un prix par le Conseil est souvent mal interprétée: on peut croire qu'il fixe lui-même le prix, ce qui n'est pas vrai; on fait croire qu'en avalisant il bénit, ce qui n'est pas vrai: il apprécie seulement si ce prix n'est pas lésionnaire, en d'autres termes un peu triviaux si ça passe ou si ça casse. Il est illusoire de croire qu'il existe un prix pour un titre donné. Le prix instantané c'est celui qui ressort du marché et de la loi de l'offre et de la demande, du marché de détail en quelque sorte. Le prix d'offre est celui qu'une personne articule pour racheter tous les titres qu'elle ne détient pas; tout dépend là aussi des circonstances: bataille boursière ou non, intention de refermer la société, retrait obligatoire. Les circonstances ainsi que les intentions de l'initiateur ne peuvent être méconnues. Ceci sera d'ailleurs précisé dans le nouveau règlement.

Il n'empêche que figer par des mots la traditionnelle approche multi-critères réduit forcément la capacité d'incitation vis-à-vis de l'offrant. Nous sommes quelquefois un peu frustrés: si l'on ne veut pas dire oui, il faut pouvoir justifier un refus autrement qu'à la marge et ne pas céder aux foudres de l'arbitraire ou du discrétionnaire sauf à prendre le risque du recours.

En 1997 le Conseil a fait augmenter des prix d'offre publiques de retrait avec retrait obligatoire à trois reprises et a refusé une OPA simplifiée.

- les demandes d'OPR par un actionnaire minoritaire

La loi fixe le principe de demande d'offre publique de retrait par un minoritaire.

Au fil du temps, le Conseil s'est rendu compte que certaines demandes pouvaient être injustifiées. L'on a vu ainsi un actionnaire qui, dès la clôture d'une OPE, est venu réclamer une OPR sans doute pour avoir du numéraire et non du titre, un autre acheter dès la clôture d'une offre à un prix décoté par rapport au prix d'offre et demander l'OPR avec plus-value garantie, un autre avec des alliés acquérir jusqu'au tiers du flottant avant de faire la requête auprès du Conseil.

Dans la pratique, le Conseil a dû mettre un terme à ce type d'agissements. Sa démarche a d'ailleurs été validée par la Cour d'appel.

Il s'agit d'un autre exemple d'une obligation posée par la loi et des difficultés d'application qu'elle peut poser en raison, il faut le souligner, des contournements que certains spécialistes voient comme possibles et qui ont pour effet, concrètement, de vider de son sens le principe posé par le législateur.

Relativisons cependant ce tableau: c'est à l'autorité professionnelle d'assumer ce type de responsabilités, l'important restant qu'elle motive ses décisions, explique son approche et développe ainsi sa jurisprudence. Nous nous félicitons régulièrement d'avoir pu en 1993 dresser un premier bilan qui posaient des questions mais apportait aussi des lumières. Nous avons réitéré un exercice du même genre en 1997 en délivrant une note de réflexions sur les dérogations qui était un résumé d'un travail approfondi ayant donné lieu à un séminaire du Conseil.

Je crois aussi qu'une place se grandit par la solidarité des gens qui la composent et l'animent. Nous ne sommes pas en France au niveau du Club de nos confrères anglais mais la composition même de l'autorité professionnelle qu'est le CMF, savamment dosée en représentants des sociétés, des investisseurs, des professionnels, répond à ce souci.

Il est enfin un autre aspect redoutable dans l'exercice d'écriture des règles, c'est l'oeil latent de la Cour d'appel. Les présidents successifs du CBV puis du CMF, de même d'ailleurs que les services, ont toujours affirmé qu'il était sain et même souhaitable que des décisions soient déférées devant la Cour ce qui ne peut que contribuer à la jurisprudence d'ensemble, orienter utilement le Conseil et renforcer son assise, même en cas de décision annulée. La Cour, est-il besoin de le préciser est très vigilante aux textes qui gouvernent la chose, ainsi qu'aux procédures. Elle a ainsi annulé une décision du Conseil prise par consultation écrite sans réunion physique et une autre - octroi d'une dérogation - qui avait été prise avant que l'assemblée extraordinaire ne délibère sur les apports entraînant les seuils alors que le Règlement ne le prévoyait pas expressément. Nous y avons mis bon ordre rapidement à cet obstacle. La même décision, prise cette fois après l'assemblée et le franchissement de seuil correspondant, a de nouveau été attaquée par la même personne et le recours rejeté.

Il reste que nous avons réalisé en ces occasions que la moindre accroche de forme pouvait conduire à une annulation. Ainsi le requérant mettait-il en avant que la lettre de demande avait été adressée aux Services et non au Président, qu'il n'avait pas été auditionné par le Conseil comme il l'avait demandé - nous avons seulement proposé qu'il soit entendu par les Services - que la décision publiée n'était pas valable au sens judiciaire du terme, que les noms des membres ayant assisté et participé au vote ne figuraient pas dans la décision publiée etc.

En d'autres termes, certains jouent ou tentent de jouer du caractère de juridiction de première instance que serait selon eux le Conseil, ce qu'il n'est pas, ou de jouer sur l'aspect autorité administrative, ce qu'il n'est pas non plus. La Cour d'appel a tranché dans un sens défavorable au requérant. Ces débats, outre qu'ils sont aujourd'hui stériles, obligent à une

vigilance extrême dans la forme qui ne doit pas être envahissante au point de faire perdre de vue l'essentiel.

Tous comptes faits la critique est facile mais l'art est difficile.

Loin de moi l'idée de prétendre, dans cette ville prestigieuse aux trésors artistiques inégalés, que la réglementation des offres publiques est un art au sens noble du terme. Mais, si je me fie au dictionnaire qui constitue autant que le règlement général un de mes ouvrages professionnels favoris, dans une de ses acceptions l'art est aussi défini comme un «ensemble de moyens, de procédés réglés qui tendent à une certaine fin». On n'est plus très loin du sujet et je me permettrais de souhaiter à nos hôtes et amis de la Consob qu'ils réussissent dans cette entreprise, avec l'appui d'une loi qui est déjà plus précise que la nôtre, dans l'intérêt du marché, des investisseurs et des actionnaires qui sont la raison d'être de l'édifice réglementaire.

Je vous remercie de votre attention.

THE REGULATION OF TAKEOVER BIDS IN THE U.K.

Noel Hinton^(*)

Speakers this morning have been asked to provide you with information covering a number of topics but I am sure that you appreciate that in the time available I can do no more than provide you with the bare bones of these major areas of interest. To put flesh on the bones would take too long.

What is the Takeover Panel? It is the body responsible in the United Kingdom for the regulation of takeovers. The Panel has a very precise focus since it is not, for example, interested in whether the takeover produces a monopoly or competition problem - that is dealt with by the Office of Fair Trading and the Monopolies and Mergers Commission in the United Kingdom. It is not the concern of the Panel whether the offer is financially or commercially advantageous to shareholders - these are matters for the target company and its shareholders. What the Panel is interested in is fairness to shareholders: after all, it is shareholders who are being asked to make the decision on whether to sell their shares to the offeror. The basic purpose of the Code is to ensure that shareholders can make this decision on an informed basis. Clearly, at all times during a takeover, all the parties concerned must comply with the relevant Companies Acts and Stock Exchange legislation which apply 365 days of the year. The Rules of the Code, which on occasion are tougher than legislation, obviously only apply during the offer period while one company is seeking to obtain control of another.

Who is the Takeover Panel? The Chairman, Deputy Chairman and some independent members of the Panel are appointed by the Governor of the Bank of England. In addition, its membership comprises representatives of various bodies which, jointly, represent the collective opinion of parties involved in the field of takeovers from various perspectives: the Confederation of British Industry is obviously on the Panel representing the interests of companies, as are various shareholding interests (the Association of British Insurers, the Association of Investment Trust Companies, the National Association of Pension Funds etc). Those involved more directly in corporate finance are also involved, namely the British Bankers Association and the London Investment Banking Association, as well as the Institute of Chartered Accountants. In sum, the Panel represents a wide range of interests both from the offeror and offeree company perspective as well as from shareholders' viewpoint.

The Panel is responsible for the publication of the Takeover Code (and any revisions). The Takeover Code contains all the necessary Rules and General Principles which apply during the

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process of the takeover. I have been asked to comment on whether there is "a regulation issued by a regulatory body on takeover bids". The simple answer is obviously that the regulation is the City Code which is issued by the Takeover Panel.

Let me briefly talk about the Code in practice. As explained in the Introduction - "The Code and the Panel operate principally to ensure fair and equal treatment of all shareholders in relation to takeovers". It is perhaps best summarised again by quoting from the Introduction to the Code.

"The Code is based upon a number of General Principles, which are essentially statements of good standards of commercial behaviour. These General Principles apply to all transactions with which the Code is concerned. They are, however, expressed in broad general terms and the Code does not define the precise extent of, or the limitations on, their application. They are applied by the Panel in accordance with their spirit to achieve their underlying purpose; the Panel may modify or relax the effect of their precise wording accordingly.

In addition to the General Principles, the Code contains a series of Rules, of which some are effectively expansions of the General Principles and examples of their application and others are provisions governing specific aspects of takeover procedure. Although most of the Rules are expressed in more detailed language than the General Principles, they are not framed in technical language and, like the General Principles, are to be interpreted to achieve their underlying purpose. Therefore, their spirit must be observed as well as their letter and the Panel may modify or relax the application of a Rule if it considers that, in the particular circumstances of the case, it would operate unduly harshly or in an unnecessarily restrictive or burdensome, or otherwise inappropriate, manner."

In describing the main provisions of the Code, it seems to me that there are some obvious objectives for a regulator of takeovers which are contained in the Code Rules:-

- (i) all shareholders of the same class of an offeree company must be treated similarly by an offeror;
- (ii) shareholders must be given sufficient information and advice to enable them to reach a properly informed decision and must have sufficient time to do so;
- (iii) all parties to an offer must try to prevent the creation of a false market in the securities of an offeror or the offeree company (care should therefore be taken that any statement issued to the public is correct and should not mislead shareholders or the market); and
- (iv) at no time after the board of the offeree company has reason to believe that an offer might be imminent, should it take any action which might frustrate the offer or deny shareholders the opportunity of deciding on the merits of the offer (unless shareholders agree!).

This is a very broad summary. The Rules in the Code provide details of what information should be given to shareholders, details of the timetable for an offer, the responsibilities of the offeree company board and disclosure requirements which might affect all shareholders who deal during the course of an offer. Quite frankly, I do not have the time to go into any detail. Inevitably, these are wide-ranging areas and to give you some little bits of information on how one aspect of the Rule works could be misleading without giving you all the details and the last thing that I want is for the Takeover Panel to mislead anyone.

You will, however, have seen from the extract that I read from the Introduction to the Code that it is possible for there to be dispensations from the applications of the Rule in circumstances where the Rule serves no purpose. Indeed, I would suggest that flexibility is one of the key words in the takeover regulator's vocabulary. Speaking personally, it is one of the fascinations of the job that even though we have a comprehensive set of Rules, it is quite common for circumstances to occur which have never happened before. You would have thought that after 30 years and 6,000 published cases the Takeover Panel would have dealt with all the possibilities and know the answers immediately. I am delighted to report this is not the case: the job remains extremely stimulating. The ability to look at new situations and to see how they should be dealt with is obviously vitally important for any regulator. In examining whether or not any discretion, any flexibility should be used, the Takeover Panel Executive will, whenever possible, listen to the arguments from all parties before deciding on whether or not a dispensation, minor or major, can be granted.

I have been asked to provide particular information about mandatory bids. As it would take me approximately half an hour simply to read out the relevant Rules, I am sure that you will forgive me again for doing my best to summarise them. In the United Kingdom, a mandatory bid is required when a person (or persons acting in concert) come to own 30% or more of the voting rights of a company. This is obviously usually through the purchase of shares. Once that threshold of 30% has been crossed, an offer has to be announced immediately. This offer has to be in cash and is required to be made to all other shareholders. The price to be offered is the highest price which the offeror (or persons acting in concert with it) have paid for shares in the target company in the 12 months before the start of the offer period but would also include prices paid during the offer period (ie after the offer has been announced). In other words, it is a very straightforward approach. While the offer must be in cash, it is perfectly possible for the offeror to provide a share offer as well. In other words shareholders have the opportunity of accepting either shares in the offeror company or cash. Finally, the offeror is allowed only one condition to its offer, namely that of an acceptance condition of 50%. This means that whenever acceptances, combined with the shares already held or purchased by the offeror, total over 50%, the offer has been successful and shareholders will receive their money.

A number of questions obviously arise.

What is "acting in concert"? The Code definition is as follows:

"Persons acting in concert comprise persons who, pursuant to an agreement or understanding (whether formal or informal), actively co-operate, through the acquisition by any of them of shares in a company, to obtain or consolidate control of that company."

Why 30%? There is no logical answer to this question. However, the first threshold that the Panel had was 40% and, clearly, it was seen as far too easy to get from 40% to 50% and statutory control of the company. The threshold was therefore reduced to 30%. This threshold has stood the test of time and also been examined on several occasions by committees of the Confederation of British Industry who are satisfied that the level of 30% is appropriate. Obviously a company chairman with a hostile 29% shareholder might feel that the level should be lower while a chairman with a friendly 29% shareholder feels the level is just right. There is no correct answer. Indeed, if one considers the thresholds used in various countries around the world, it varies. I cannot, hand on heart, say that 30% is right in every case in the United Kingdom ie that it is right that a shareholder who owns over 30% has effective control. It is, however, a straightforward approach which is easily understood by the marketplace.

Why cash? The simple answer here is so that shareholders in the target company can take the cash and have no further involvement with the company that now controls the target company. The offeror must have purchased shares to gain control and some shareholders were therefore able to realise their investment for cash. It is felt appropriate under the equal treatment principle that all shareholders should have the same opportunity in the event that control has already passed.

Why 50%? I am told by colleagues who have been at the Panel far longer than me that originally there was no acceptance condition attached to mandatory bids. This meant that if you accepted the offer it was guaranteed that you would receive the value per share which was being offered. However, this made it rather difficult for some shareholders to make a decision. Assume that you are a shareholder who is appalled that there is now another company that controls over 30% of "your" company. The last thing that you want to do is to accept the offer and give this person greater control. However, the position might change dependent on whether the offeror has 31% or 49%. It was therefore felt appropriate that there should be an objective test for success or failure of the offer. A shareholder who did not want statutory control to pass, and therefore does not accept at the outset has the ability, under our timetable, to accept once an offer has been declared unconditional as to acceptances ie after statutory control has passed.

I have also been asked what Rules must be observed to assure full disclosure and fair treatment of shareholders. There is no distinction in the United Kingdom between mandatory or voluntary offers. The same level of information disclosed in a voluntary offer must also be disclosed in a mandatory bid: shareholders must still receive sufficient information such that they can make an informed decision.

Finally, I have been asked whether there are specific exemptions from making mandatory bids. We do have in the Code six specific exemptions. I cannot think of any exemption from a Rule 9 offer that has been granted other than in the circumstances clearly set out in the Code. They are as follows:

- (i) there is no requirement to make a mandatory offer if the holder of non-voting shares becomes upon enfranchisement of those shares a holder of 30% or more of the voting rights of a company, except where non-voting shares have been purchased at a time when the purchaser had reason to believe that enfranchisement would take place;
- (ii) the Panel will consider waiving the requirement for a general offer where holders of shares carrying 50% or more of the voting rights state in writing that they would not accept such an offer;
- (iii) if due to an inadvertent mistake, a person incurs an obligation to make an mandatory offer, the Panel will not normally require an offer if sufficient shares are sold within a very limited period to independent persons;
- (iv) where a shareholding in a company is charged as security for a loan from a bank, say, and, as a result of enforcement of the security, the lender would otherwise incur an obligation to make a mandatory offer, the Panel will normally waive the requirement provided that the security was not given at a time when the lender had reason to believe that enforcement was likely;
- (v) when a company is in such a serious financial position that the only way it can be saved is by an urgent rescue operation which involves the issue of new shares to the rescuer such that it owns 30% or more of the company;
- (vi) when there is a vote of independent shareholders on the issue of new securities ("whitewash") as consideration for an acquisition or a cash subscription and, as a result, a person would incur an obligation to make a mandatory offer, the Panel will normally waive this obligation if there is a vote of independent shareholders to approve the issue of the new shares, independent shareholders having been provided with relevant information on which to make an informed decision.

Ladies and gentleman, a new secondee arrived at the Panel recently to start his two year secondment and I have been taking him through the Rules. It took me a whole morning to deal with mandatory bids. You have therefore been given a very short explanation of the approach. Perhaps I can conclude my comments on mandatory bids by making the following statements. It is clearly a choice of the offeror as to whether or not it buys shares, exceeds the threshold and incurs the obligation. Any offeror that breaches the threshold does so knowing the consequences. Similarly, and a point that is sometimes forgotten, is that while it is mandatory to make such an offer, it is not mandatory for shareholders to accept it. Shareholders may be quite content having seen the track record of an offeror to stay in the company and see their investment prosper. Finally, I would just like to mention that although the statistics will vary enormously from year

to year, in broad terms, it would seem that mandatory bids amount to approximately 10% of the total of offers over time.

Ladies and gentlemen, this morning I have given you the very bare bones of takeover regulation in the United Kingdom by outlining who the Panel is, what it is trying to achieve with particular emphasis on mandatory bids. I have not mentioned much detail; I have not mentioned the appeals procedure against decisions of the Panel Executive; the timetable; profit forecasts, asset valuations etc.

If I were to summarise in a few words the nature of takeover regulation in the United Kingdom, I would say that it has a number of attributes:

- it is flexible so that it can deal with unexpected situations;
- it is speedy since, by providing an alternative dispute resolution procedure, the Panel keeps matters out of the courts; and, finally,
- it is effective. If there is one attribute that any regulator, whether of takeovers or not, needs, it is effectiveness.
- According to Wall Street Journal, "in the UK it is better to be a shareholder, in the USA it is better to be a lawyer".

TAKEOVERS FROM A COMPARATIVE PERSPECTIVE

Eddy Wymeersch^(*)

1. For the last ten to fifteen years, takeover bids are a subject that is receiving continuous attention in most of the EU-member states. This is partly due to the proposals for a thirteenth company law directive, presently being discussed in Brussels⁽¹⁾.

Before further analysing the significance of this phenomenon, it seems useful to sketch a few elements of the background on which takeovers are taking place in Europe. The actual practice differs considerably from state to state. There also is considerable confusion at the level of terminology.

The propensity to see takeovers developed as instruments of the corporate control market varies considerably with the structure of ownership of shares within the European Union. Member states in which ownership of shares is heavily concentrated, leading to listed companies being controlled by one or two large shareholders, will logically know very few takeover. On the other hand, the largest number of takeovers in any EU-State take place in the UK, where shares are widely owned, very few companies having dominant shareholders.

I. BACKGROUND FIGURES

2. From research undertaken at the University of Ghent, the following figures can be extracted with respect to the concentration of ownership in listed companies⁽²⁾.

It appears that in most continental European states, ownership in a majority of companies⁽³⁾ or in a large minority is controlled by one single shareholder. At the other side of the spectrum, only a limited number of companies are widely owned, making them possible targets for aggressive takeovers. Even then, the figures have to be further qualified, as there may be

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(1) *The latest proposal dated November 11, 1997, has been published in OJEC, C. 378/10 of 13 December 1997. For an in depth analysis of the legal policy issues, see: HOPT, K.J., Europäisches und deutsches Übernahmerecht, ZHR, 1997, 368-420.*

(2) *For the full list of figures, see WYMEERSCH, E., A Status report on Corporate Governance Rules and Practices in Western Europe, 1998, in Comparative Corporate Governance, Oxford University Press (to be published).*

(3) *These figures relate to the number of companies listed on the exchange in which one party has reported to hold a block of shares that represents more than 50% of the shares issues. As a rule, voting rights have been taken into account. For Belgium, the figure includes concertation and voting agreements.*

agreements among significant shareholders, co-ordinating their votes or limiting the transfer of their shares⁽⁴⁾.

Table I gives an overview of the ownership concentration in a few selected European states. The figures relate to the number of listed companies that, according to the official share ownership report, are owned by one shareholder, holding a percentage of votes, as indicated.

TABLE I
OWNERSHIP CONCENTRATION IN EUROPE

	D	B	I	CH	SW ¹	N	F	UK ²
OVER 50%	68	68	66	55	45	44	37	7
25 % TO 50%	21	26	19	17	39	20	32	12
UNDER 25%	11	6	15	28	16	36	31	81

¹ At the 20% level. ² A sample of 425 companies.

From the table one can deduct that in most continental European states, concentration is very high, a majority of the shares being firmly held by one party. Even in Sweden, and in France, more than 1/3rd of the listed companies are fully controlled. The Netherlands is a special case, due to the frequency of “anti-takeover protections”, introduced in the articles of incorporation. Here protection would prevent takeovers for the vast majority of the listed companies.

A second observation relates to the way the corporate control market functions in the continental European States. As described infra, differently from the UK situation, or from the US, in the continental European markets, control is not acquired by launching a bid in the market, but by a private transaction effectuated by one or a few controlling shareholders selling their block to a single purchaser. Here the mandatory bid rule comes in a central element in continental European takeover regulation.

3. The frequency of takeovers can be illustrated in the following tables:

(4) *These agreements have not always been reported in the official disclosures.*

TABLE 2

TAKEOVER IN THE UNITED KINGDOM

TAKEOVERS IN THE UK	88-89	89-90	90-91	91-92	92-93	93-94	94-95	95-96	96-97
1. SUCCESSFUL PROPOSALS	184	163	102	99	62	57	75	123	137
2. UNSUCCESSFUL PROPOSALS	40	36	11	22	13	11	11	16	14
3. PROPOSALS WITHDRAWN BEFORE ISSUE OF DOCUMENTS	7	6	1	3	1	0	2	5	5
4. PROPOSALS INVOLVING MINORITIES	22	25	18	18	12	13	20	12	15
5. TOTAL 1-4	253	230	132	142	88	81	108	156	171
<i>OF WHICH</i>									
6.1. NUMBER OF COMPANIES INVOLVED	224	211	130	130	85	79	100	145	156
6.2. MANDATORY BIDS				13	13	10	12	7	9
6.3. INITIALLY UNRECOMMENDED				39	28	24	33	37	37
6.4. UNRECOMMENDED AT END OF OFFER PERIOD			34	17	9	8	24	32	30
7. OTHER CASES UNDER CONSIDERATION	195	142	142	116	141	340	201	241	223

Source: Takeover Panel, Annual reports

The above figures illustrate the frequency of takeovers in the UK: over the years, about 8 to 10 % of the listed companies have been involved as target of a takeover that was effectively published. If one adds the number of transactions that were taken into consideration, even those that have not materialised, or were not published, then the percentage of all listed companies involved increases to about 15 to 20%. The threat of a takeover is not to be disregarded in the UK.

According to the number of "unrecommended bids", in about one third of these cases the management opposed the bid. Mandatory bids under Rule 9 of the Takeover Code are relatively low: these represented on average 11% of all bids. This would indicate that markets have largely assimilated the rule whereby crossing the 30% threshold leads to a mandatory bid. Often investors buy up to 29.9%. In other cases bidder would go for an outright 100% bid. The reported cases probably point to acquisitions against the management's recommendation.

TABLE 3

PUBLIC BIDS FOR SHARES IN FRANCE

PUBLIC BIDS FOR SHARES IN FRANCE	1989	1990	1991	1992	1993	1994	1995
A. CASH TAKEOVERS (OPA)							
1. NUMBER OF TARGETS	23	13	23	9	6	7	6
2.1. INCREASED BID	8	8	0	2		3	12
2.2. NUMBER OF TARGETS	4	2		2	0	1	3
3.1. COMPETING BIDS	1	2	0	2	2	2	7
3.2. NUMBER OF TARGETS	1	1		2	0	2	4
4. TOTAL OPA	32	23	18	13	8	12	25
B. EXCHANGE OFFERS (OPE)		2	5	4	3	3	6
B.1 COMPETING BIDS							2
C. TOTAL BIDS	32	25	23	17	11	15	25
D. FREEZE-OUT (OPR)	N.A.	27	20	41	33	30	70
E. BLOC TRANSACTIONS	48	81	67	40	24	14	18
F. TOTAL CONTROL TRANSACTIONS (6+8)	80	106	90	57	41	29	43

4. Related to the number of companies listed, about 2 to 3 % of all listed companies have been involved in a takeover situation. These bids are mostly friendly, at least as far as one can see from the figures published⁽⁵⁾. There were one or a few contested bids in most of these years, resulting in competing bids, and then later in increased bids. There seems to be a tendency for having less takeover bids, in general, but more competing bids once a fight has been triggered. Although no figures have been published about their frequency, the mandatory bid rule (at a 1/3 rd threshold in France) also has influenced the structure of the takeover market, as the bidder might prefer to publicly bid for the shares without first acquiring a 1/3 rd block beforehand, as was usual before the rule was modified. Also bidders now must bid for all the shares, rather than for 2/3rds as was the rule before.

The French figures are not fully comparable: the number of bids as published by the French Commission des opérations de bourse includes transactions that may not be related to the corporate control market. So e.g. should one mention separately the Freeze-outs, that also make use of the takeover technique, and the bloc transactions, whereby a shareholder, who already owns a substantial block of shares, crosses the 50% threshold, and is obliged to bid for all the remaining shares. This usually takes the form of a stock exchange order.

(5) *If only a minority was tendered, then bids could also be analysed as being unfriendly bids, at least bids to which the incumbent management has not agreed to.*

5. There are also some Belgian figures available. Here again the definitions are different. However the figures show that most bids are launched by majority shareholders, partly as a consequence of acquiring a controlling block. The bids relating to control transactions are mentioned under "other bids": one sees that aggressive bids are not unknown. Striking are the figures for real estate funds: here competing and increased bids have been very frequent, as the certificates of these funds were widely owned, having been acquired for pure investment purposes

TABLE 4

TAKEOVERS IN BELGIUM

	1988	1989	1990	1991	1992	93-94 N.A.	1995	1996
1. BID BY MAJORITY SHAREHOLDER	5	15	13	15	11		8	14
<i>OF WHICH "EXCHANGE ORDER"</i>	1	6	5	3	2		2	
2. REPURCHASE BID FOR OWN SHARES	2	0	1	0	5		3	4
3. OTHER BIDS	2	5	9	2	1		2	3
<i>OF WHICH AGGRESSIVE BIDS</i>	6	0	0	0	1		2	0
4. BIDS FOR FOREIGN SHARES	2	0	6	1	1		0	N.A.
5. TOTAL BIDS FOR SHARES	17	20	29	18	18		14	21
6. BIDS FOR REAL ESTATE FUNDS	0	8	14	15	2		1	0
7. TOTAL NUMBER OF BIDS	17	28	43	33	21		15	23

Source: Banking and Finance Commission, Statistical Bulletin

TABLE 5

TAKEOVER BIDS IN ITALY
OFFERS TO ACQUIRE (1974 LAW) AND TAKEOVER BIDS (1992 LAW)

	1992	1993	1994	1995	1996	1997/1
<i>1974 LAW</i>	0	2	4	8	15	6
<i>1992 LAW</i>						
VOLONTARIA	2		2	3	8	3
CONCORRENTE		1		1		
RILANCIO				1		
OBBLIGATORIA						
PREVENTIVA		2				1
SUCCESSIVA	2	3	11	9	9	4
INCREMENTALE					1	
RESIDUALE		5	6	9	10	3
<i>TOTAL</i>	4	11	19	23	28	11

Source: Consob, Bollettino, Ed. Speciale, 5/97

6. Interesting are the figures for the other markets: in Switzerland, there have been relatively frequent bids, most of the time as a consequence of a transfer of a controlling block. In one case a contested bid has been launched.

In the Netherlands, there have been several attempts to launch a takeover bid, against the will of the incumbent management. None has succeeded, in effect because the protective devices which most Dutch companies have put into place have been consistently upheld by Dutch jurisdictions. Hence no real takeovers against the will of the management have occurred.

A similar picture prevails on the German market, where a couple of attempts have been made for acquiring control by launching a public bid: all of these have failed, either as a consequence of effective defence mechanisms, or because political and labour pressure urged the parties to look for other ways to reorganise the companies involved.

7. This short overview of past practice leads to the conclusion that if many member states know takeovers, the purpose for which takeovers are used may be very different. Mainly in the UK, less in France, Belgium and Italy, takeovers are used as instruments of the corporate control market. In these, and in other states the takeover techniques are used to offer an exit to the minority shareholders, after the transfer of control. Here, investor protection is the main purpose.

Differences in the ownership structure lay at the basis of this differentiation of the takeover technique.

II. SPECIFIC ISSUES

1. THE EUROPEAN MARKET FOR CORPORATE CONTROL

8. The foregoing figures illustrate the differences that exist with respect to the functioning of the market for corporate control in some of the European states.

In states in which ownership of shares is widely dispersed, as in the UK, the market for corporate control functions by setting into motion the takeover procedure. The bidder who has decided to launch a takeover bid, will approach the incumbent management: if it agrees with the takeover, it will be a - mostly successful- "recommended" bid. If it disagrees, the bid will be "unrecommended", and the decision will be taken by the shareholders, who sometimes may have the choice between competing bids. Potential bidders should not accumulate their stake by continuously and systematically buying on the market: investors should be treated equally, and therefore, once the threshold is crossed, the bidder should bid for all of the shares. The management's role is limited to convincing the shareholders not to tender their shares, so as to obtain a higher bid. The management should not stand in the way of the shareholder's choice: frustration of a bid, as this is called in the UK, is strictly forbidden. For similar reasons, defences against a bid, introduced before the bid has been launched, are equally considered inadmissible. According to the listing rules, protective techniques against takeovers, such as dual class shares, differentiated voting rights should be banned. In fact, some companies have maintained their previously existing protective techniques.

9. On the European continent, the same scenario is sometimes met: this is the case in takeovers on the widely owned companies that exist - mostly a minority, in terms of companies listed - in the different European systems. There are some well documented cases in France and Belgium. Most of the time however, due to the structure of ownership, the control market will be set in motion by a private offer, made by the bidder, and addressed to the present owner of the controlling block of shares. If he agrees to transfer his shares, the control transaction will be finalised. The management has no role to play: regulation would forbid it to stand in the way of the controlling shareholder. In the UK version, the same rule serves to protect the auction market within the framework of the takeover, but also to avoid the board to act in its own interest, against that of the investors. In the continental-European scheme, it serves to avoid that the board should thwart the major shareholder's decision to transfer control.

On the European continent, the transfer of a controlling block would in most states trigger the mandatory bid mechanism: this seems similar to the UK rule. It differs however in some respects.

In the UK, the mandatory bid rule is aimed at avoiding the creation of a dominant position within the company, presumed to exist as soon as a shareholder exceeds 30%. This would prevent the market from functioning regularly and smoothly. There seems to be less concern that this

accumulation of a considerable percentage in the hands of a single party would create a parent-subsidiary relationship. The latter has been a constant motive for European regulators to impose the mandatory bid: the exit is offered to protect investors against possible oppression that the new controlling shareholder might engage in, in practice within the context of a group of companies. From this perspective, one understands the rule in the proposed directive according to which Member States may offer “other appropriate and at least equivalent means in order to protect the minority shareholders of that company”⁽⁶⁾.

On the continent, the rule usually serves to entitle the “minority” shareholders to share in the spills of the change of control: all shareholders are considered entitled to share in the control premium, which has been cashed by the selling controlling shareholder. This is achieved by guaranteeing the same exit price to all shareholders, controlling or not, a feature found in UK and Belgian regulation. However, in this respect, legal systems differ considerably, as not all impose an equal price requirement, some obliging the bidder to merely offer the pre-bid price, others any other real “value”. In the latter types of regulation, the aspect of minority protection is put forward, while in the UK, market equality is put forward: all shareholders should be able to share the best prices the bidder has been willing to pay to some of them. On the continent, the rule serves as a minority protection instrument: if the controlling shareholder has been able to exit, so will all other shareholders either at the same conditions, or at least at market.

10. The arguments for and against the mandatory bid have been numerous and diverse⁽⁷⁾.

Equality of treatment is the most traditional one: all investors should be able to exit at the same conditions. However, in practice, this principle is not followed in all systems, as these allow the post control acquisition bid to take place at a price below the control acquisition price. So e.g. the Italian law, where the bidder should offer the average between market and control acquisition price⁽⁸⁾, the Swiss law, based on market, or higher but not exceeding 75% of the control acquisition price⁽⁹⁾. Moreover there are theoretical issues involved; equal treatment as a principle usually relates to the relationship between the company and its shareholders, not to the relationship between the shareholders horizontally. As a Dutch writer remarked, when I buy the nicest house in the street, should I buy all of them?⁽¹⁰⁾

(6) Art. 3 (1) of the proposed directive.

(7) See PAGANO, M., PANUNZI, F. and ZINGALES, L., *Osservazioni sulla Riforma della disciplina dell'opa, degli obblighi di comunicazione del possesso azionario e dei limiti agli incroci azionari*, Riv. Società, 1998, 152.

(8) Art. 106, 2; both calculated on a six months period.

(9) See art. 33 (4) of the Swiss Stock Exchange law; comp. § 26 (1) of the Austrian proposed law, where a 15% differential is allowed. The German code refers to a “price reasonably related to the highest stock exchange price within the last three months”.

(10) TIMMERMANS, L., *Tegen het verplicht overnamebod*, in *Corporate Governance voor de Jurist*, forthcoming, 1998 Congress.

Protection against a possible predatory conduct of the bidder also often is mentioned: this is the groups of companies argument⁽¹¹⁾. However, this protection is needed on a continuous basis, also before and after the takeover, and applies not only to listed companies, but to all companies in which minority shareholders are confronting a dominating shareholder. It has been proposed to introduce more permanent instruments to protect the minority especially against the predatory conduct of parent companies⁽¹²⁾. This protection would be more necessary if the parent is engaged in the same line of business as the listed subsidiary, as apart from direct conflicts involving parent-subsidiary transactions, delicate issues of conflicts of interest with respect to corporate opportunities will exist.

“All investors should benefit from the control premium, which, standing for the control function, is part of the company and belongs to all of them”. The argument is not convincing from the economic point of view: the bidder, as the highest value user, should be entitled to keep the benefits of the transaction to himself, inciting him to maximise his profit. By not doing so, necessary transactions do not materialise⁽¹³⁾.

11. The long term economic effects of the mandatory bid rule calls for additional comments. The rule reduces the willingness to take over firms, and hence slows down the necessary restructuring, as the bidder will have to pay 100% of the shares in order to be able to turn the firm around. In fact the rule has been devised, at least in some states, as a technique to protect the company against an aggressive takeover, as it was considered that a potential “predator” would back out of a transaction that was too costly to him. This has proved a false argument, but was well received in times takeovers were considered “the unacceptable face of capitalism”.

In cases in which the largest firms were involved, one has witnessed the depressing effect of the rule on the possibility to sell an existing controlling block. Relatively large blocks in substantial firms could not easily be sold on the local markets, as these generally are relatively small. Purchasers for these blocks are few, as the deal would call for a substantial mobilisation of funds in order to be able to bid for 100% of the shares at the full price. In certain cases, in which vital sectors of a national economy were involved, no purchasers on the domestic market could be found, leading to a foreign takeover, exacerbating sometimes the already existing feeling about excessive Überfremdung.

The increased cost of capital involved necessarily has to be gained back on the acquired firm, leading to the disposal of sometimes useful parts of the acquired business, or to additional

(11) HOMMELHOFF, P., *Take-over Richtlinie und europäisches Konzernrecht*, AG, 1990, 106.

(12) See art. 60bis of the Belgian Companies Act., relating to transactions between a stock exchange listed company and its controlling shareholder. These transactions are subject to a procedure based on the valuation of independent directors, with professional assessment of the transaction, considering the benefit for the company, and full disclosure. However, sanctions are weak.

(13) See BEBCHUK, L.C., *Efficient and Inefficient Sales of Corporate Control*, *Quarterly Journal of Economics* 1994, 957.

pressures on the wages of the employees of the acquired firm. Takeovers most of the time are opposed by the employees.

Whatever the arguments, in the markets in which the mandatory bid rule has been introduced, it cannot be done away with: investors have adapted their expectations - and the market prices - to the existence of possible takeover chances. To modify the rule would necessarily mean destruction of portfolio value for some investors⁽¹⁴⁾.

2. FEATURES OF THE MANDATORY BID RULE

12. The mandatory bid rule, which has now been introduced in several European states, presents features that are relatively different from state to state. The proposed 13th company law directive would not harmonise these differences, and therefore would not create the "level playing field" which one can expect it to create. Rather, by leaving open the option between the mandatory bid and the enactment of equivalent minority protection rules, it may contribute to maintain the present diversity.

In the second half of 1998, the proposal will be discussed under the Austrian presidency. As matters stand, the directive, and especially the mandatory bid rule, is opposed by at least two or three member states⁽¹⁵⁾, the United Kingdom having strong reservations as to the necessity to regulate on this matter.

The regulation of mandatory bids creates a number of difficult technical issues, some of which will be reviewed hereafter.

2.1 *Self-regulation or state law*

13. In many jurisdictions, in a first attempt to come to grips with the takeover phenomenon, regulation was developed by self-regulatory bodies, especially by the stock exchanges: this was

(14) *The increase of the threshold at which a mandatory bid should be launched, e.g. from 30 to 50% would normally result in lowering the market prices, as the chance of a favourable exit is reduced. Also the controlling shareholder would have greater freedom to sell his controlling block, at a premium, without having to oblige the bidder to go after the remaining shares. Hence, he would be better off. The opposite phenomenon would also play: by lowering the threshold, the bidder would not be willing to pay the full price to the dominant shareholder, as he should have to pay the same to all investors. Hence, the investors would be better off. Whether the legislator has the right to modify the terms of trading, thereby destroying financial value for one of the market participants, could be analysed from the constitutional angle, or as a "human rights" issue. It would seem that general measures that destroy potential financial value would not raise objections, except if the dominant shareholder has already agreed to sell his shares, or if the rule would be applied retroactively. In these cases, the law may not deprive anyone of the assets he already owns (see Human Rights Court, 20 November 1995, *Presson Compania Naviera a.o. v. Belgium, Public*. Eur./C.H.R., Série A, 332.)*

(15) *See Sweden: see SKOG, R., Does Sweden need a mandatory bid rule? A critical analysis, Corporate Governance Forum, Juristförlaget, 1995, 65 p. For the Netherlands: TIMMERMAN, nt. 12 In Germany, opinions are very divided.*

the case in the United Kingdom, where this continues to be the main, if not the only form of regulation applicable to takeovers, even after the introduction of the Financial Services Authority. In the Netherlands, a Code on Mergers or “Fusiecode” was introduced, aimed in part at the financial aspects of takeovers, but also at the social and employment aspects⁽¹⁶⁾. Self-regulation was followed in other states as in Italy⁽¹⁷⁾, in Switzerland⁽¹⁸⁾, in Germany⁽¹⁹⁾, in Sweden⁽²⁰⁾ and to a certain extent in France⁽²¹⁾ as well. Up to 1989, Belgium⁽²²⁾ followed a flexible line, based on case by case precedents.

Most of these voluntary instruments had to be abandoned, sometimes after severe enforcement lacunae had come to light. This was the origin of the Belgian and the French move to more formal regulation.

As cross border takeovers will develop more readily within Europe, the compatibility of both types of regulation is likely to raise additional difficulties, both in terms of allocating the legal regime applicable to the transaction, and attributing regulatory and supervisory competence to one or several of the states involved. Unless the subject is tackled in a European directive, these issues will not be settled in a satisfactory way⁽²³⁾. Mutual assistance between self-regulatory and government bodies may pose difficult legal issues⁽²⁴⁾, whereby enforcement is likely to become more and more crucial.

On the other hand there is no need for obliging all states to adopt the single mould of state imposed regulation: subsidiarity also leaves the states free to adopt the type of regulation that is best suits their legal needs and traditions. A directive could however insure the bridge between equivalent approaches and insure transparency as to the attribution of regulatory competencies.

(16) *Reforms have been envisaged in light of the 13th directive: See RAAIJMAKERS, M.J.G.C., De toekomst van de fusiegedragsregels, 1992.*

(17) *In the 1970's, the Milan Stock Exchange issued a code of conduct relating to takeovers.*

(18) *See: Code Suisse des Offres Publiques d'Achat, published by the Association des Bourses suisses, starting from 1989.*

(19) *See: Übernahmekodex der Börsensachverständigenkommission beim Bundesministerium der Finanzen, 14 July 1995.*

(20) *See SKOG, R., Does Sweden need a mandatory bid rule? A critical analysis, Corporate Governance Forum, Juristförlaget, 1995, 65 p.*

(21) *See for a comparative overview, Problems of the Regulation of takeover Bids in Western Europe: A comparative survey, in HOPT and WYMEERSCH (eds.), European Takeovers, law and practice, London, 1992, 95 e.s.*

(22) *On the basis of a law of June 10, 1964, the Banking Commission was empowered to deal with “offer to acquire”. Until 1989, the Commission adequately dealt with takeovers and imposed the mandatory bid rule, on a purely factual basis. This type of regulation did not withstand the test of the aggressive bid on Belgium's largest company at that time, the Société générale de Belgique.*

(23) *See art. 4 (2) of the proposed directive.*

(24) *Mutual recognition, powers of derogation, privacy rules, decisional procedures, review procedures can be mentioned as causes of friction between the two approaches. Several of these aspects are dealt with in the proposed directive.*

2.2 Control defined by setting a threshold

14. As mentioned above, the mandatory bid rule is triggered on a change of control. Some states have declared the rule applicable on the acquisition of a definite percentage of shares, mostly about 30% as this constitutes the factual majority in most general meetings. Other states have referred to the general notion of “control”, and delegated to the market supervisor to decide if and when control has changed.

The United Kingdom applies the rule on crossing the 30% threshold, some proposals to lower it to 20% having recently been discussed. The Italian law⁽²⁵⁾ has adopted the same standard. France and Switzerland⁽²⁶⁾ have introduced a somewhat different criterion: the acquisition of 1/3 of the shares triggers the bid obligation. In addition, certain fundamental changes in the company structure also obliges to launch a bid⁽²⁷⁾. The Spanish regulation is more complex, as it links different bid obligations to the acquisition of shares that cross different levels⁽²⁸⁾.

A second series of states has introduced a bid obligation on acquiring control, the latter being defined by the supervisory body. The Italian technique, since abandoned, was based on fixing for each company the level of control. The Belgian technique is more diffuse: in each case, the supervisor decides whether the acquisition has lead the acquirer to obtain control, which is often the case upon the acquisition of less than 50% of the votes. A comparable approach is followed in the proposed Austrian law⁽²⁹⁾.

15. The fixed threshold approach undoubtedly has advantages: it clarifies the position of all parties and introduces a beacon in control transactions which the parties will no readily loose out of sight. However in some cases it may be too strict and therefore exemptions will be necessary. Under UK practice, exemptions could be granted by the Takeover Panel⁽³⁰⁾. French practice⁽³¹⁾ has developed a series of exemptions, without however granting full exemptive powers to the supervisory agency. For legal reasons other states would equally object to the supervisor being able to exempt the bidder from an obligation that directly confers private rights of action to the

(25) Art. 106.

(26) See Art. 32 of the Stock Exchange Law. However, articles of incorporation could raise the 1/3rd threshold to 49% of the voting rights. Furthermore companies could opt out of the mandatory bid regime (art. 22)

(27) See art. 5.5.4 and 5.5.5. of the French *Règlement du Conseil des Bourses de Valeurs*.

(28) See for details about Spain: *Ofertas publicas de adquisicion, La Lucha por el Control de las grandes Sociudades, Deusto, 1992.*

(29) See § 22 of the Austrian Draft law.

(30) UK the Takeover Panel has an express exemptive power: according to Rule 9.1. the obligation applies “except with the consent of the Panel...”.

(31) See art. 5.4.6 of the *Règlement CBV*; see further supra the report by VANEL, M.J.S. in this volume.

minority investors⁽³²⁾. Therefore the flexibility which characterises self-regulation will always be absent from the system in which takeovers are regulated in state imposed regulation.

Another approach to the bid obligation is found in Belgian, in former Italian law and in the future Austrian regulation whereby the rule applies on acquiring “control”, a notion to be defined by the supervisor. The notion of control is very difficult to seize: as mentioned, Italian practice has relied on fixed control levels, set for each company in advance to any transaction. Belgian practice has fixed the control level each time a transaction takes place, i.e. each time a controlling block changes hands. Although intellectually satisfactory, this approach may appear to be impracticable. In the recent Belgian case of the General Bank, the acquirer Fortis had secured the purchase of about 34% of the shares of the bank, and was held to bid for the remaining 64%. However, a last minute competing bid by Dutch ABN-Amro was also declared receivable, which may appear almost a “*contradictio in terminis*”: either Fortis had not acquired control, and should not have launched a mandatory bid, or the bid by ABN-Amro should have been refused, control having already passed. This example illustrates the difficulty to apply rules that are framed in general terms.

16. In order to avoid creeping acquisitions, the same obligation is triggered if a substantial shareholder, who holds more than 30% of the shares, acquires an additional 1% within a twelve month period⁽³³⁾. However, the Takeover Panel has announced its intention to abolish this exception, and rely on exemptions for cases of accidental acquisition of additional shares⁽³⁴⁾. Here again, the rule has a different effect in a system which is based on controlling shareholders: the rule effectively freezes the controlling blocks, and forbids substantial shareholders to further establish and reinforce their control, possibly even beyond the 50% level.

The effects of the rule may be to incite blockholders to reduce their block, as it becomes more difficult to transfer it. There is no evidence as to whether blockholders have felt inclined to reduce their holding and diversify their portfolio.

On the other hand, there is evidence that Belgian controlling shareholders have systematically increased their holdings after the 1988 turmoil. Belgium does not apply the same rule on creeping acquisitions extension of control does not trigger the mandatory bid rule, as control already existed and had not substantively changed⁽³⁵⁾.

To be briefly mentioned is the issue of indirect control acquisitions, whereby the bidder acquires control in a holding company that holds a substantial block of shares in the listed

(32) *Comp. art. 106 (5) Italian law.*

(33) *See e.g. French rule art. 5.4.4.*

(34) *See “Notes on Dispensations from Rule 9”, under Rule 9.7.*

(35) *But a mandatory bid is required in case of change from joint to exclusive control see: Banking and Finance Commission, Annual report 1990-91, 79 (mandatory bid in case of change from joint to exclusive control).*

company. Some regulators have expressly stated the rule⁽³⁶⁾, other have come to similar results by interpretation. The common core of these rules is that the intermediate holding should have as its main asset, the block of shares in the listed company.

It seems useful that the directive would impose on those member states that decide to introduce the mandatory bid rule, to clearly state the rules with respect to creeping acquisitions and indirect acquisitions.

2.3 *Partial bids*

The directive allows partial bids, at least in case of a mandatory bid: member states can limit the bid requirement to 70% of the securities tendered⁽³⁷⁾. The supervising authorities could grant duly justified exemptions. The present regulations in several member states contain the requirement for a full bid, for 100% of the shares⁽³⁸⁾. In France, the rule has been amended in 1992, after it had appeared that the partial bid was very detrimental to the interest of the minority shareholders.

The disadvantages of partial bids are well known: even if they do not lead to a prisoners' dilemma, all shareholders being entitled to the same reduction on all shares tendered, the remaining shareholders remain hostage to the new controlling shareholder. Especially if the company is going to be included in a new group, fully legal intragroup transfers could seriously reduce the value of their shares. Furthermore, liquidity in the market will be reduced and depressed under the expected threat of a future buy-out at a lower price. The argument that the situation where there remains only 30% of the shares on the market is not very different from a listing which according to the European listing particulars directive does not call for a listing of more than 30%, is not convincing, as in the latter case the shareholders are free to accept the decision, while in the mandatory bid case, the situation is forced upon them.

2.4 *Exchange offers*

17. Regulations have mostly been drafted with cash offers in mind. Difficult issues arise when the offer is made in exchange for other securities, especially unlisted and hybrid securities, problems exacerbated in cases in which the bid is opposed by another bidder.

In this case both securities will have a separate price, changing day per day. In case of a competing bid, the premium of one offer over the other changes per day. As regulations often contain the rule that a competing bid should exceed the previous bid with at least 5%, this price

(36) *E.g. in French Regulation, art. 5.4.3.*

(37) *Art. 10 of the proposed directive.*

(38) *E.g. United Kingdom, Rule 9.1; France, art. 5.4.1; Belgium, art. 3 RD; Italy, art. 106, 1 °; Switzerland, art. 32; see however the exceptions in art. 107, Austrian proposal, § 22(1); the Spanish regulation contains a layered system.*

difference should be established at the moment the competing bid is launched, and not at a later date. Later changes in the respective prices of the securities offered in exchange should not affect this obligation. Therefore, an initially attractive competing bid may become less so as a consequence of market forces.

Some regulations⁽³⁹⁾ contain the requirement that in case of an exchange offer, there should always be a cash alternative. This goes a long way in solving some of the issues mentioned.

2.5 *Voluntary bid after mandatory bid*

18. In case the bidder has been bound to launch a mandatory bid, and that an opposing bid comes in, does the bidder continue to be bound by his promise to offer an exit to all shareholder? The case has been decided in that sense under Belgian law, especially as the original bidder is legally bound to acquire all shares tendered under a Cour de Cassation decision⁽⁴⁰⁾. According to this case, the investors have a private right of action to see their shares taken over by the acquirer of the controlling block. Hence, he cannot withdraw his offer, even if a competing bid comes in.

Once introduced the mandatory bid rule substantially affects price formation on the markets: this would especially be the case if the rule obliges the acquirer to bid for the remaining shares at the highest pre-bid price. The UK has adopted this proviso: the acquirer who has accumulated a block by market purchases, is obliged to pay the same price to all shareholders. The same applies in Belgium: the bid is to be brought at the price at which the acquirer has bought the control block, this is in practice at the price including the control premium.

The effects of this rule are considerable: originally, the rule was based on an equal treatment reasoning: there should be no preferential treatment for the seller of the control block who has cashed the - often considerable - control premium. Therefore the same, high price should be paid all investors. In practice it also was considered to be a protective device, as it would increase the cost for aggressive bids: this has appeared not to be well founded. However, indirectly the rule drove down the bid price for the seller of the control block, and hence his willingness to sell. Necessary transactions did therefore not materialise. From the bidders' side, the rule causes bids to become more expensive, as the acquirer has to bid for all shares at the highest price.

(39) E.g. *United Kingdom, Rule 9.1.; France, art. 5.4.1; Belgium, art. 3 RD.; Italy, art. 106, 1 °; see however the exceptions in art. 107. Austrian proposal, § 22(1);. The Spanish regulation contains a layered system Switzerland, art. 32.*

(40) See *Cass. 10 March 1994, Revue de droit commercial belge, 1995, 15, nt. Glansdorff (Wagon Lits).*

Therefore, although at odds with the underlying rationale, one can understand why some regulators have preferred not to impose the highest price, but an intermediate formula⁽⁴¹⁾. Belgium has experienced difficulties in assessing the price if the selling controlling shareholder has stipulated certain “private benefits” such as director’s remuneration, rental agreements, and so on.

2.6 *Scope of the regulation*

The proposed 13th directive would be applicable to stock exchange listed companies only⁽⁴²⁾. Is there not an argument for extending the regulation to unlisted shares? Legislators have refrained from entering into that direction, which would considerably affect company law in general.

If one looks at the issue of minority protection, the right for the minority to claim a takeover at the same conditions as obtained by the selling controlling shareholder is certainly a powerful instrument. However, as already mentioned a legislator introducing default rules, should not lightly engage into that direction. The rule would substantially limit the negotiating position of the controlling shareholder and reduce the value of his shares. He may have acquired his controlling block at a substantial control premium: why should the other shareholder benefit from that. From the legal point of view, one can wonder whether a change in the law could modify the right of the controlling shareholder’s right to receive a control premium: this is a kind of expropriation, against which the may be “human rights” objections.

The answer to this question lies in another direction: the right of minority shareholders the follow the selling controlling shareholder should be more readily put in agreements between shareholders. One could consider that on joining the company, the minority could adequately protect itself by stipulating the necessary exit rights. This is a matter between shareholders and is not part of the company’s functioning. However, the exit right would then not be applicable to existing companies: here the traditional minority protection rules would apply. The fundamental issue therefore is whether the traditional techniques for protection of the minority are sufficient, and whether new techniques should not be reinforced. The law of the Member states contain interesting examples of more efficient minority protection⁽⁴³⁾ Mandatory bids should

(41) *E.g. in Italy, art. 106 (2); French law delegates the price valuation to the CBV. In Switzerland, the market price is the criterion, but if the bidder has acquired shares during the last 12 months, the price differential should not be less than 25% of the highest price paid. In Austria the six months average and the maximum acquisition minus 15% constitute the range: § 26 of the proposed law.*

(42) *Art. 1 of the directive. The original proposal, as part of the series of company law directive, was also applicable to unlisted companies.*

(43) *See e.g. the Dutch rules on the investigation powers (enquêterecht), or the Belgian rules on conflicts of interest, referred to nt. 10. For the latter, see WYMEERSCH, E., Belangenconflictenregeling in de vennootschappen, 1996, 204.*

not be isolated from minority protection, and certainly do not render stronger minority protection rules superfluous.

UNA TESTIMONIANZA SUL MERCATO ITALIANO

S. Preda^(*)

1. Desidero ringraziare il Presidente, i Commissari e il Direttore Generale della Consob per aver voluto invitare la Borsa Italiana Spa a portare una propria testimonianza in questa importante occasione di confronto e riflessione su un tema così rilevante come quello dell'Opa. Poiché questo è un tema, sia pure di grande rilievo, che è solo una parte della più generale riforma della normativa dei mercati finanziari italiani, desidero svolgere qualche breve considerazione introduttiva, in cui inquadrare poi il tema dell'Opa.

Constato con piacere che l'evoluzione della normativa primaria e secondaria italiana in materia di regolamentazione dei mercati finanziari sta seguendo una linea di coerente apertura a un ruolo autonomo e attivo dell'organo di gestione del mercato.

Il Testo unico delle disposizioni in materia di intermediazione finanziaria è uno strumento che concorre allo sviluppo del mercato mobiliare nazionale. L'opera di razionalizzazione e aggiornamento di un quadro normativo nel passato non sempre in linea con quello degli altri Paesi ha disegnato una disciplina coerente ed equilibrata che completa il processo di riforma degli intermediari e dei mercati attuato negli anni scorsi e pone solide basi affinché il mercato azionario possa divenire un ancora più importante canale di finanziamento delle imprese e uno strumento efficiente di trasferimento della proprietà in grado di accrescere, indirettamente, l'efficienza stessa del sistema produttivo.

Si opera ormai in un ambiente totalmente competitivo in cui sono cadute tutte le barriere alla mobilità delle società quotate, degli investitori e degli intermediari. Solo il congiunto operare di una società-mercato efficiente e di un sistema normativo e di vigilanza che assicuri trasparenza e protezione degli investitori crea le condizioni per mantenere nel nostro paese un mercato finanziario vitale e capace di finanziare lo sviluppo delle imprese italiane.

In particolare la disciplina delle Opa costituisce un punto nodale della credibilità di un mercato finanziario. In tal senso credo che si risolva, anche se non per intero, il dilemma tra efficienza ed equità. Solo in presenza di una disciplina credibile, il mercato riceve liquidità e trasferisce sui prezzi l'aspettativa di Opa, anche in assenza o in presenza di un minor numero di Opa effettive.

2. Anche di recente ho avuto modo di riscontrare durante un incontro a Londra con la *business community* che le innovazioni che caratterizzano il nostro sistema finanziario, dal Testo unico alla

(*) *Presidente della Borsa Italiana Spa.*

privatizzazione dei mercati, sono considerate ampiamente meno soddisfacenti e pongono il nostro Paese in linea, se non in alcuni aspetti in una posizione più avanzata, fra i migliori mercati e ordinamenti internazionali. La disciplina prevista per l'Opa è senz'altro una di quelle che più contribuisce a tale positiva percezione.

Peraltro, ciò si è già riflesso in alcune variabili fondamentali. Vorrei ricordare solo pochi numeri significativi. Ormai il nostro mercato di borsa è stabilmente il quarto in Europa - e addirittura terzo nell'ultimo mese - per volume di scambi. La capitalizzazione sul Pil ha superato il 40%, in linea con i Paesi non anglosassoni.

L'Idem si posiziona al secondo posto in Europa per gli scambi di derivati azionari, davanti a Paesi più grandi del nostro e dietro solamente alla Germania.

La propensione alla quotazione delle imprese italiane, grazie anche alle nuove regole e ai prezzi competitivi del nostro mercato, si sta accelerando con decisione e il *budget* fissato in 25 nuove ammissioni nel 1998 appare realistico.

La Borsa si conferma anche come canale essenziale di finanziamento sano delle imprese e di riallocazione della proprietà dal pubblico al privato. Contro i 120.000 miliardi raccolti negli ultimi cinque anni, è ragionevole attendere una raccolta di circa 40.000 miliardi nel solo 1998.

Il mercato italiano è quindi in grado di giocare, e anche di vincere, la sfida internazionale posta soprattutto ma non solo dall'integrazione europea. La Borsa è tuttavia consapevole di essere parte, anche se centrale, di un sistema Paese e di un sistema finanziario che deve giocare e vincere insieme questa sfida.

Per questo desidero qui confermare il convinto appoggio della Borsa al progetto di "Piazza finanziaria italiana", lanciato dal Presidente Padoa-Schioppa qualche tempo fa e autorevolmente ripreso proprio ieri.

Un comitato che sia un luogo di discussione e di confronto delle strategie delle varie parti del mercato finanziario italiano (Borsa, Mts, Autorità di controllo, Governo, Istituzioni finanziarie, Città di Milano), in tal modo facilitando la congiunta realizzazione e utilizzo delle varie leve operative (finanziarie, politiche, normative, fiscali, gestionali, logistiche) che rendono competitiva una piazza finanziaria, è non solo benvenuto, ma anzi necessario.

Tutti i partecipanti dovranno dare miglior contributo nell'opera comune, ben sapendo però che a ciascuno continuerà a toccare una chiara responsabilità per le proprie strategie di struttura e di funzionamento.

La Borsa Italiana Spa è disponibile a farsi carico della gestione organizzativa e funzionale del progetto, ma auspica che, data la valenza prioritaria per il sistema Paese di tale progetto, un soggetto al di sopra delle parti e privo di *vested interest*, come ad esempio il Ministero del tesoro, ne assuma la paternità.

3. Uno dei punti qualificanti della filosofia sottesa al Testo unico consiste nella scelta di spostare sul piano della normativa secondaria una parte significativa, per quantità e qualità, degli interventi regolamentari. Ciò permette un migliore *fine tuning* della normativa, che può più agevolmente essere adattata alle esigenze del mercato.

La Consob nella predisposizione della normativa secondaria, di cui tutte le categorie interessate hanno potuto consultare i testi tecnici anticipatori, sta interpretando in maniera ampia e innovativa la *ratio* del Testo unico. Mi sembra infatti evidente la preferenza per una impostazione centrata su un numero ridotto di norme, dal contenuto più generale, di enunciazione di principi. Essa lascia, in alcuni casi, in capo agli stessi soggetti interessati l'adozione di regole di dettaglio in grado di perseguire gli obiettivi indicati dal regolamento (cfr. Regolamento sulla prestazione dei servizi di investimento) e, in altri casi, a comunicazioni successive della Consob la funzione esplicativa della norma. Ciò consente di "aggiustare" più rapidamente il contenuto della norma all'evoluzione della prassi di mercato.

Mi sembra vada anche sottolineato positivamente il passaggio da una normativa basata sull'esistenza di numerosi vincoli operativi ad una che preferisce puntare sulla trasparenza e sulla correttezza dei comportamenti, riconoscendo in capo alle diverse componenti del mercato la scelta di operare nel modo ritenuto più efficiente, fatti salvi alcuni principi di tutela degli investitori.

Si viene altresì, in generale, ad ampliare la gamma di informazioni disponibili al pubblico rispetto alla normativa vigente, nella quale molte delle informazioni risultano riservate alla Consob o ai soci degli emittenti.

Ci adeguiamo così ulteriormente agli ordinamenti prevalenti all'estero, che - non a caso - sono stati considerati quali importanti punti di riferimento nei lavori predisposti dalla Consob. Di ciò il mercato non può che avvantaggiarsi, divenendo le sue modalità di funzionamento più "familiari" agli operatori internazionali.

Dagli stessi Paesi la Consob ha tratto spunto per la prassi della consultazione che a questo punto può ritenersi consolidata anche in Italia.

4. Anche in materia di Opa, con il Testo Unico, si è scelta un'impostazione vicina a quella prevalente in ambito europeo, semplificando notevolmente il dettato normativo e al contempo arricchendolo di contenuti sostanziali in materia di trasparenza e di correttezza dei comportamenti dell'offerente, della società *target*, dei possibili concorrenti. E', questo allineamento, essenziale in ambito europeo e internazionale, ormai privo di ogni barriera protettiva domestica, il primo motivo del grande favore che il mercato esprime per questa nuova normativa.

Il rapporto tra sviluppo del mercato, tutela degli azionisti e disciplina dell'Opa non è univoco e nessuna soluzione normativa può essere in grado di soddisfare contemporaneamente tutte le diverse esigenze dei partecipanti al mercato (e quelle del mercato medesimo). L'approccio seguito dal legislatore - dopo un lungo e attento processo di riflessione - ha saputo disegnare una normativa conforme con la struttura degli assetti proprietari delle società italiane, con le dimensioni del comparto delle stesse in rapporto all'economia nazionale e con le esigenze di tutela degli investitori-azionisti di minoranza. E' stata significativa la scelta del Testo unico di non limitarsi a configurare tale tutela come mero diritto a un *exit* risarcitorio successivo al trasferimento del controllo, ma di rafforzarla - anche e soprattutto *ex-ante* - con il monitoraggio sull'operato degli amministratori esercitato dal mercato, reso possibile da adeguate condizioni di contendibilità.

Contendibilità del controllo, tutela degli investitori-azionisti di minoranza e previsione dell'Opa preventiva parziale rappresentano i punti qualificanti della normativa Opa contenuta nel Testo unico. Si tratta di un'impostazione che la Borsa condivide, nella convinzione che lo sviluppo del mercato è favorito dalla presenza di una regolamentazione chiara, coerente e in linea con i migliori standard internazionali.

5. Con riferimento alla nota tecnica redatta dalla Consob ai fini dell'emanazione del regolamento attuativo per l'Opa, devo manifestare la nostra piena approvazione alla linea seguita: la trasparenza e la flessibilità dei comportamenti contribuiscono infatti, anche in questo caso, in maniera significativa all'efficienza del mercato, il cui sviluppo sarebbe invece ostacolato dalla presenza di norme eccessivamente rigide.

Avvalendosi dell'esperienza accumulata in questi ultimi anni, la Consob utilizza il suo potere regolamentare per colmare le lacune emerse nella applicazione della previgente disciplina.

La combinazione tra semplificazione, flessibilità e contributo dell'esperienza consentirà alla Consob di adattare con tempestività la nuova disciplina e i propri interventi, modulandoli in funzione dei comportamenti futuri, a priori non codificabili.

Si tratta di riconoscere che la dialettica tra operatori del mercato, che esercitano la fantasia per massimizzare i propri vantaggi, e Autorità di vigilanza, che adattano le norme e gli interventi per mantenere salda la salvaguardia del mercato e degli investitori, non è destinata ad esaurirsi. Essa anzi può essere fonte di innovazione e di crescita se l'Autorità è capace, come finora ha ampiamente dimostrato, di interpretare le norme nei singoli casi, in modo da impedire comportamenti elusivi.

6. Entrando brevemente nel merito delle linee regolamentari proposte dalla Consob, va sottolineata la positiva soluzione dell'asimmetria che caratterizzava l'informativa sull'intenzione di procedere a un'Opa a seconda della natura dell'offerente e della contrapposizione tra normativa Opa e normativa *insider trading*. L'impianto proposto, privilegiando la trasparenza e la capacità del mercato di interpretare l'annuncio, individua in quest'ultimo il primo destinatario dell'informativa contenendo così anche i possibili fenomeni di *insider trading*.

E' altresì apprezzabile il grado di flessibilità ipotizzato per le modalità di diffusione del documento di offerta. A questo proposito sarà opportuno valutare la possibilità di utilizzare il *floor* virtuale che la Borsa Italiana Spa sta predisponendo per la distribuzione delle informazioni di mercato attraverso Internet, quale canale alternativo alla pubblicazione su quotidiano nazionale dell'intero documento informativo.

Il ruolo della Borsa Italiana è ampliato ad aspetti tecnici, quali la fissazione della durata dell'operazione: ciò consentirà di modulare opportunamente la tempistica evitando sovrapposizioni con eventuali scadenze tecniche. La Borsa intende a tale proposito stabilire norme a valenza generale, per evitare di dover procedere discrezionalmente nei singoli casi. E' da valutare se il principio generale debba essere quello di privilegiare l'iniziativa dell'offerente nella scelta del periodo di durata dell'operazione.

7. Ritengo che il processo di consultazione avviato dalla Consob possa portare a un'opera di *fine tuning* di alcuni aspetti di natura tecnica. Mi riferisco in particolare alla disciplina delle offerte concorrenti, in cui la facoltà per l'offerente concorrente di ridurre in prima battuta il quantitativo, incrementando il corrispettivo globale, introduce un *trade-off* tra aspetti concorrenziali ed esigenze di confrontabilità da parte degli investitori, che potrebbero non tener conto in misura opportuna del potenziale impatto delle differenze nel riparto. Inoltre, nei casi di operatività sui titoli nel corso del periodo di offerta - dove si è individuata una soluzione che ben interpreta i principi di trasparenza e di correttezza di comportamento - potrebbe essere opportuno prevedere una tempistica assai breve per le modalità di comunicazione e, in caso di necessario adeguamento del prezzo, un lasso di tempo sufficiente per consentire al mercato di valutare le nuove condizioni, soprattutto al fine di evitare comportamenti elusivi.

Restando sempre nell'ambito tecnico, vorrei segnalare come sia opportuno consentire un leggero basculamento delle partecipazioni entro limiti determinati, senza che ciò comporti l'obbligo di Opa successiva. Coerentemente con quanto avviene all'estero, potrebbe essere valutata l'opportunità di interventi discrezionali della Consob nel distinguere i casi in cui le partecipazioni comprese tra il 30 per cento e il 50 per cento già configurino un controllo di fatto, da quelle in cui ciò non avvenga; questo al fine di ridurre l'impatto del limite generale all'incremento annuale della partecipazione, peraltro già più ampio rispetto ai limiti vigenti in Francia e Regno Unito.

Sono infine pienamente condivisibili la disciplina della condizionabilità dell'Opa, nonché quella delle esenzioni. Con riferimento a quest'ultima, in particolare all'esenzione accordata in caso di salvataggio, condivido l'estensione del beneficio a più soggetti e, soprattutto, gli obblighi di trasparenza relativamente al piano di ristrutturazione del debito e al suo stato di avanzamento. Auspico tuttavia l'introduzione di un obbligo di informazione tempestiva alla Consob e al mercato delle operazioni sui titoli effettuate dai soggetti beneficiari dell'esenzione, entro un certo periodo di tempo dopo l'assunzione della partecipazione.

8. In conclusione di questo mio intervento, desidero, in un momento che segna temporalmente il passaggio del Dott. Padoa-Schioppa dalla Presidenza della Consob a una responsabilità di grande importanza a livello europeo, avere l'opportunità di ringraziarlo per il contributo che ha dato alla realizzazione di una società di Borsa, che si pone obiettivi ambiziosi che pensa di poter raggiungere. Egli, come la Commissione nel suo complesso, non è mai uscito dal suo ruolo di vigilanza, ma ha fornito indicazioni e formulato richieste, che io credo siano state regolarmente accolte, non solo perché proposte dalla nostra Autorità di controllo, ma soprattutto perché sono state dalla Borsa sempre percepite come contributi reali alla sua operatività ottimale e alla sua integrità.

Per un'Autorità di controllo, non credo che ci sia un modo migliore per svolgere il proprio ruolo e neppure, sono convinto, migliore riconoscimento.

APPENDICE

ÜBERNAHMEKODEX

**DER BÖRSENSACHVERSTÄNDIGENKOMMISSION
BEIM BUNDESMINISTERIUM DER FINANZEN**

**VOM
14. JULI 1995**

(einschließlich der Änderungen zum 1. Januar 1998)

TAKEOVER CODE

**OF THE EXCHANGE EXPERT COMMISSION
AT THE FEDERAL MINISTRY OF FINANCE**

**OF
JULY 14, 1995**

(including the amendments effective as of January 1, 1998)

**Text of the German Takeover Code
adopted by the Exchange Expert Commission
at the Federal Ministry of Finance
on July 14, 1995**

The text includes the amendments to the Takeover Code adopted by the Exchange Expert Commission at its meeting on October 16, 1997, which became effective on January 1, 1998.

The amendments modified the definition of "Offeror" as well as Articles 16 and 17.

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Public Tender Offers

Offeror

Target Company

Securities

Takeover Commission

Executive Office

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Introduction

The Takeover Code (*Übernahmekodex*), prepared by the Exchange Expert Commission (*Börsensachverständigenkommission*), recommends rules of conduct for parties involved in voluntary public tender offers. The Code has been conceived - without prejudice to statutory provisions - as a flexible instrument, that may be modified over time to conform to practical experience. While the Code expresses no opinion regarding the expedience of public takeovers, it seeks to assist in ensuring that public tender offers contain all information necessary to enable the holders of securities and the corporate bodies of the company concerned (the target company) to make a considered and appropriate decision. The Code is intended to prevent market manipulation and to ensure that all parties involved adhere to principles of good faith. Therefore, the Code is to be observed not only literally, but also in accordance with its intent.

Definitions

Public Tender Offers

Public tender offers within the meaning of this Code are public purchase and exchange offers, as well as invitations to tender such offers, which are made by an offeror, without legal obligation, to the holders of securities in a target company with the objective of acquiring the holders' securities for a specified price in cash or in exchange for other securities within the meaning of § 2(1) of the German Securities Trading Act (*Wertpapierhandelsgesetz*).

Offeror⁽¹⁾

An offeror within the meaning of this Code is any natural or legal person having its seat in Germany or abroad that makes a public tender offer either alone or together with other persons.

Target Company

A target company within the meaning of this Code is any stock corporation (*Aktiengesellschaft*) or partnership limited by shares (*Kommanditgesellschaft auf Aktien*) having its registered office in Germany whose securities are the subject of a public tender offer and are admitted for trading on a domestic exchange or, with the company's consent, traded on the over-the-counter market.

(1) *Definition of Offeror amended by resolution of the Expert Exchange Commission of October 16, 1997.*

Securities

Securities within the meaning of this Code are all rights that the offeror seeks to acquire and that, directly or indirectly, grant the right to vote at shareholders' meetings of the target company. The term includes common shares, shares with multiple voting rights, and such preferred shares as have voting rights at the time of the publication of the offer, and surrogates for any such securities (*e.g.*, American Depositary Receipts (*ADRs*)). Securities within the meaning of this Code also include rights that entitle the legal holder thereof to subscribe to qualifying shares that can be created by unilateral declaration of intent by such holder. This Code also applies to tender offers for the purchase of securities not admitted for trading on an exchange or traded on the over-the-counter market, provided that other securities of the same issue are traded on an exchange.

The rules of this Code apply *mutatis mutandis* to public tender offers for preferred shares without voting rights.

Takeover Commission

The members of the Takeover Commission are appointed by the Exchange Expert Commission. The Takeover Commission primarily fulfills an arbitral function.

Executive Office

The Executive Office of the Takeover Commission is its executive body. The Executive Office monitors compliance with this Code.

Basic Principles

Article 1

[Equal Treatment]

Within the scope of a public tender offer, the offeror must treat all holders of securities of the same class equally.

Article 2

[Information]

The offeror and the target company must provide to all holders of the securities that are the object of the public tender offer the same information material for the evaluation of the tender offer. The information must accurately and adequately reflect the facts. This applies not only to the information listed in Article 7, but also to any additional information supplied, irrespective of whether such information is contained in the tender offer itself or otherwise made public by the offeror or the target company.

After a public tender offer has been made, the managing board of the target company is obligated, within reasonable discretion and in the interest of the holders of securities, to provide the same

information as is provided to the original offeror to other persons who have credibly demonstrated serious interest in the takeover of the target company.

Upon application of the target company, the Takeover Commission shall make a determination regarding the seriousness of the relevant interest.

Article 3

[Prevention of Unusual Price Movements]

The offeror and the target company are obligated during the offer period to refrain from anything that could result in unusual price movements of securities of the target company or of securities offered in exchange for securities of the target company. In particular, no statements may be made that could mislead the holders of securities of the offeror or the target company or the market.

Article 4

[Discussions with the Target Company]

The publication of a tender offer shall generally be preceded by discussions between the offeror and the target company.

Article 5

[Notification and Publication of the Tender Offer]

Prior to making a public tender offer, the offeror must inform the domestic exchanges on which the securities of the target company and any securities offered in exchange are listed, the Federal Supervisory Authority for Securities Trading (*Bundesaufsichtsamt für den Wertpapierhandel*), and the Executive Office of the Takeover Commission, about the content of the tender offer, and must thereafter publish the tender offer without undue delay in at least one national newspaper designated for exchange notices.

Article 6

[Engagement of an Investment Services Enterprise]

The offeror shall engage an enterprise permitted to conduct investment services within the meaning of the EC Directive for the preparation and settlement of the tender offer. This enterprise shall have its registered office or a branch in a member state of the European Union.

Content of the Tender Offer

Article 7

[Minimum Information]

The tender offer must contain at least the following information:

1. Firm name or personal name of the offeror and of any facilitating enterprise, pursuant to Article 6 of this Code;

2. Firm name of the target company;
3. The securities that are the subject of the tender offer;
4. The highest and/or lowest number of securities that the offeror commits to purchase as well as explanations concerning the allocation procedure pursuant to Article 10;
5. Information regarding both the purchase price and other consideration and the settlement of the tender offer;
6. Information regarding the principal factors that were decisive in determining the consideration;
7. An indication whether the tender offer will be deemed accepted upon a declaration of acceptance by the shareholder of the target company or whether the shareholders of the target company are merely invited to offer securities of the target company to the offeror;
8. Information regarding the number of securities of the target company purchased by the offeror prior to the tender offer, and the time of such purchase(s), as well as information regarding agreements to purchase such securities that have been concluded but not yet performed;
9. If applicable, information regarding the target company's direct and indirect holdings in the offeror (if known);
10. Comment by the target company, if any;
11. Offer period;
12. Conditions of the tender offer, if any, and reservation by the offeror of the right to withdraw the tender offer, if any;
13. Information regarding the objectives and intentions which the offeror seeks to accomplish through the tender offer with respect to the target company, as well as the possible consequences of a successful tender offer, in particular with respect to the financial position of the offeror and the target company;
14. An indication that the holders of securities of the target company can withdraw their declaration of acceptance of the tender offer pursuant to the terms of Article 14;
15. An indication of the point in time at which the results of the tender offer will be made public;
16. Information regarding the status of antitrust clearance procedures, if applicable;
17. Reference to any exemption from provisions of this Code which may have been granted by the Takeover Commission;
18. The commitment of the offeror to comply with the provisions of this Code.

Article 8

[Publications]

Any publication addressed to the holders of securities of the target company must be prepared with the highest standards of care and accuracy.

Article 9

[Conditions of the Offer]

The tender offer may be made contingent only upon conditions outside the control of the offeror. In case of doubt, any conditions should be agreed to in advance with the Executive Office.

Article 10

[Allocation Procedure]

If the number of securities which the holders of securities agree to sell by accepting the public tender offer exceeds the number of securities that the offeror has committed to purchase, then the securities shall be sold on a *pro rata* basis according to the amount each holder of securities agreed to sell. The allocation procedure must be explained in the tender offer.

Article 11

[Offer Period]

The offeror must grant to the holders of the securities that are the subject of the tender offer a reasonable period of time to examine the tender offer and to make a decision. This offer period may last no less than 28 days and no longer than 60 days.

Obligations of the Offeror

Article 12

[Notification and Announcement of Securities Transactions]

The offeror is obligated to notify the Executive Office of any transactions involving the securities of the target company (including volume and price) entered into by the offeror, or on the offeror's behalf, after publication of the public tender offer, no later than the business day immediately following such transactions and to announce any such transactions publicly. This obligation also applies to transactions involving securities within the meaning of § 2 (1) of the Securities Trading Act if such securities are offered in exchange for securities of the target company. Purchases of shares within the meaning of § 71(1) No. 2 of the German Stock Corporations Act (*Aktiengesetz*) are excluded.

Article 13

[Purchase at More Favorable Conditions]

If the offeror purchases securities of the target company during the offer period at conditions that are more favorable than the conditions stated in the tender offer, then the more favorable conditions are applicable to all holders of securities of the same class, even if they have already accepted the public tender offer.

Article 14

[Extension of a More Favorable Tender Offer]

The offeror may extend a more favorable tender offer to the holders of securities of the target company during the offer period, in particular if, after the publication of the tender offer pursuant to Article 5, more favorable tender offers are extended by third parties to purchase the relevant securities of the target company. In this case, the offeror may extend the initial offer period by a period to be agreed upon with the Executive Office of the Takeover Commission. If the offeror makes use of this right, then the offeror is obligated to ensure retroactively equal treatment of the holders of securities who have already accepted the tender offer. Such holders of securities will have the right to withdraw from the previously accepted tender offer to accept the more favorable tender offer.

Article 15

[Subsequent Improvement]

If, within a period of time to be determined by the offeror in the offer but in any event no less than 12 months, the offeror extends a more favorable voluntary tender offer and if, within this same period, no tender offer has been extended by any third party, then the offeror is obligated to grant a corresponding subsequent improvement to those persons who accepted the initial offer.

Article 16⁽²⁾

[Mandatory Offer]

Whoever obtains control over a target company must immediately extend to all other holders of securities of the target company a tender offer with respect to their securities (mandatory offer).

Control over a target company has been obtained by anyone who:

controls a majority of voting rights of the target company, including the voting rights attributable to such holder by applying § 22(1) numbers 1 to 7 of the Securities Trading Act *mutatis mutandis*;

based on an agreement with other holders of securities of the target company, is entitled to exercise the majority of voting rights alone or jointly with other holders of securities; has the right to appoint or to remove the majority of the members of the administrative, managing or supervisory body of the target company, or reaches a share of voting rights, through acquisition or otherwise, that, for the first resolution passed at each of the three preceding shareholder meetings of the target company, would have constituted a percentage of voting rights equal to at least three quarters of the share capital present and entitled to vote.

No mandatory offer is required:

(2) *Article 16 amended by the resolution of the Expert Exchange Commission of October 16, 1997.*

if control has been obtained by the respective holder of securities on the basis of securities held only temporarily for purposes of further placement with third parties;
if a holder of securities unintentionally obtains control and immediately relinquishes it;
if, within in period of 18 months after obtaining control, it is intended to approve resolutions of the holder of the securities and the target company with respect to:

- an agreement between enterprises (*Unternehmensvertrag*) pursuant to §§ 291 *et seq.* of the Stock Corporations Act;
 - the integration of the target company pursuant to §§ 319 *et seq.* of the Stock Corporations Act;
 - the change in the corporate form of the target company pursuant to §§ 190 *et seq.* of the Transformation Act;
 - the merger of the target company pursuant to §§ 2 *et seq.* of the Transformation Act;
- or [resolutions] of the target company with respect to an exemption from the obligation to make a mandatory offer, provided that in this last case the controlling holder of securities may not exercise his voting rights;
and this intention is declared to the Executive Office immediately after obtaining control;
if such resolutions are not passed or the intention is abandoned, the mandatory offer must be extended immediately.

Voting rights of securities that are part of trading stock and for which an exemption by the Federal Supervisory Authority for Securities Trading (*Bundesaufsichtsamt für den Wertpapierhandel*) has been granted pursuant to the provisions of § 23(2) of the Securities Trading Act shall not be taken into account under this provision.

Article 17⁽³⁾

[Mandatory Offer Price]

If a majority shareholder after obtaining control and prior to extending a mandatory offer has not purchased additional securities of the target company, then the mandatory offer price must be reasonably related to the highest stock exchange price within the last three months prior to obtaining control.

If a holder of securities after obtaining control and prior to extending a mandatory offer, has purchased additional securities of the target company, then the mandatory offer price must be calculated as the weighted average of the prices of these purchases, to the extent that such weighted average price is higher than the price referred to in paragraph 1 of this Article.

These provisions apply *mutatis mutandis* if securities are offered by way of exchange.

(3) *Article 17 amended by the resolution of the Expert Exchange Commission of October 16, 1997.*

Obligations of the Target Company

Article 18

[Comment]

The target company must publish immediately - no later than two weeks after publication of the tender offer - a reasoned comment upon the tender offer.

Article 19

[Measures by the Target Company]

Following publication of a public tender offer, and until the outcome of the tender offer is published, the executive or managing body of the target company, including the executive or managing bodies of the related companies of the target company, may not take any measures that run counter to the interest of the holders of securities in taking advantage of the tender offer.

Such measures may include, among others:

Resolutions with respect to

- the issuance of new securities;
- a substantial change in the assets or liabilities of the target company; and
- the conclusion of agreements outside the scope of ordinary business activities.

This provision does not apply to ongoing capital measures, to the performance of contracts that the target company has entered into prior to the publication of a public tender offer, or to measures expressly approved by the general assembly in the event of a public tender offer.

Takeover Commission

Article 20

[Members; By-Laws and Rules of Procedure]

1. The Takeover Commission shall consist of at least seven but not more than 15, members.
2. The members of the Takeover Commission, its chairman and the chairman's alternates are appointed by the Exchange Expert Commission.
3. The members are each appointed for a period of five years. Appointments may be renewed.
4. In the composition of the Takeover Commission consideration should be given in particular to the following groups:
 - issuers,
 - institutional investors,
 - private investors,
 - credit institutions and investment services enterprises.
5. Upon the departure of a member of the Takeover Commission, the Exchange Expert Commission shall appoint a new member for the remaining term.
6. The Exchange Expert Commission shall adopt by-laws and rules of procedure for the Takeover Commission and the Executive Office.
7. The Takeover Commission shall appoint the head officer of the Executive Office.

Article 21

[Accession; Violation]

Potential offerors, target companies, and investment services enterprises are requested to accede to the provisions of this Code. The Executive Office will regularly publish a list of companies and persons that have acceded to such provisions.

In the event of violation of this Code, the Executive Office may publish its comments, recommendations and decisions with respect to the case. Prior to such publication, the Executive Office is obligated to grant to the parties concerned a right to be heard. Thereafter, but prior to the publication, such parties can appeal to the Takeover Commission, which will make a final decision.

Article 22

[Review of a Tender Offer]

The Executive Office must review a public tender offer with regard to its compliance with this Code within two weeks after publication thereof. The offeror, the target company, and the enterprises involved pursuant to Article 6 commit to provide the Executive Office with all information and statements necessary for compliance with this Code and the supervision thereof.

Article 23

[Exemption]

The Takeover Commission may exempt the offeror or the target company in part or in whole from individual provisions of this Code if the application of such provisions would harm the legitimate interests of the offeror, the target company or the holders of securities of the target company. This particularly applies to the obligation to extend an offer pursuant to Article 16. Decisions regarding exemptions, indicating the reasons therefor, will be published by the Takeover Commission.

Article 24

[Entry into Force]

The Takeover Code shall enter into force on October 1, 1995⁽⁴⁾.

(4) *The amendments to the Takeover Code by resolution of the Exchange Expert Commission of October 16, 1997 became effective on January 1, 1998.*

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