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Some aspects of Cross border co-operation between business enterprises

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Abstract

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The second subject deals with cross-border take-over: issues of conflicts of laws are numerous. The rule of the market where the target's shares are traded, is dominant, but incidentally account will have to be taken of the jurisdiction of the target company, if registered in another state. The 13th directive contains useful connecting factors.

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Summary

The present analysis deals with two types of cross border co-operations between business firms: on the one hand the bi-national horizontal groups (type Shell, Unilever). This form of co-operation allows firms to fully integrate without loosing their legal identity. Proposals are made to develop a "default scheme" which firms could adapt.

The second subject deals with cross-border take-over: issues of conflicts of laws are numerous. The rule of the market where the target's shares are traded, is dominant, but incidentally account will have to be taken of the jurisdiction of the target company, if registered in another state. The 13th directive contains useful connecting factors.

Introduction

1. The object of cross border co-operation is an extremely vast one[1]. Several topics could be dealt with under this general heading such as:

- the cross border mergers, with reference to the proposal for a 10th EU directive[2]
- the proposed Statute for a European Company or "Societas Europea"[3]
- the European Economic Interest Group, or EEIG[4]
- international joint ventures
- aspects of the European Enterprise Council, as introduced by the Directive on the European Enterprise Council [5]

and many others.

Most of these subjects have been dealt with on other occasions, some remaining somewhat theoretical due to their being blocked at the EU level, while others are expected to be changed in the near future. Who dares to talk about the latest developments in the SE statute, as this has been on the agenda for more than 25 years and has changed so substantially that most of what was thought or written about it has been wiped out by later negotiations?

Therefore this analysis will be limited to some of the issues that have been less explored, or may be directly in the centre of today's interest.

These last three to four years there have several major cross border mergers, or amalgamations, as the English put it in former times. These transactions have led to bi-national companies, the resulting entity being based on two almost equally important partners, combining the business cultures of different firms and nations. Several of these transactions have been friendly, both partners agreeing on the transaction, that, whatever its form, came close to a cross

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1 For a recent overall perspective, see N. HORN, "Internationale Unternehmenszusammenschlüsse", *ZIP* 2000, 473.

2 See Proposal for a 10th directive concerning cross-border mergers of public limited companies, Com. (84) 727 Final, *OJ*, C.23, 25 January 1985, 11-15.

3 The latest published version of the SE company statute: *OJ* 1991, C 176, 1 (to be read in conjunction with the proposal for a directive on worker involvement, *OJ* 1991, C 138, 8; with respect to the latter aspect, see the "Davignon report", European Systems of Worker Involvement, May 1997).

4 See Council Regulation 2137/85/EEC of 25 July 1985, *OJ*, L. 199, of 31 July 1985, 1-9.

5 Directive 94/95/EEC of 22 September 1994, *OJ*, 30 September 1994.

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border economic merger. Some of these have taken the form of international take-overs whereby one company took over another, against the latter's will, the second company becoming a subsidiary of the former: sometimes this subsidiary was so important that it changed the nature of the new parent. Economically, these should be analysed as forms of integration of two more or less equal partners.

To better situate the topic, a few names can be dropped:

Daimler- Chrysler
Deutsche Bank - Banker's Trust
Aventis (Rhône-Poulenc and Hoesch)
Vodafone - Mannesmann
BP-Amoco

Each of these transactions has its own specific characteristics.

From the legal point of view, the Vodafone-Mannesmann deal presented some original features, at least at the outset, as it involved an unfriendly, cross border take-over, the first to take place in Germany.

The Daimler-Chrysler deal, although specific from the angle of German law, looks like a fairly regular financial merger, whereby the two operational units became integrated under one single parent company. In a national context, it would have been a regular transaction, but being cross-border and with German law applicable, it became a very complicated business[6]. The same applies to the Aventis deal.

2. There are some other cases on which it seems useful to draw some attention, and which present some similarity with the Aventis deal: these are the cases in which bi-national groups, or so-called "horizontal groups" have been created, where two entities, without subordination, integrate economically. Typically, the constituent companies are of different nationality, often both listed. These are the real "mergers between equals".

There have been numerous examples in Europe of these structures, some very old, and some more successful than others:

- Shell PLC and Koninklijke Nederlandse Petroleum Maatschappij NV, Europe's biggest business firm
- Unilever NV and PLC
- Dexia (Gemeentekrediet van België and Crédit Local de France)[7]
- Fortis (AG-Belgium - Amev Netherlands)
- Reed - Elsevier
- Eurotunnel
- ABB (ASEA- Brown Boveri)

But one should also mention some defunct ones:

Hoogovens- Hoesch
Fokker - VFW
Dunlop - Pirelli
Agfa - Gevaert
Never came into being: Renault -Volvo and General Bank - Amro Bank

And these are only the best known examples, but there certainly are many more[8].

6 Th. BAUMS, "Transnational quasi-mergers in German corporate law: The Daimler-Chrysler case", *TVVS* 1998, 217; see also infra the report by DECKER and GRUSON.

7 For an analysis: K. BYTTEBIER and A. VERROKEN, "De bi-nationale, horizontale groep Gemeentekrediet - Crédit local de France (Dexia)", *Vennootschapsrecht en Fiscaliteit* 1997, 243 en 401.

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3. The other subject in cross-border co-operation relates to cross border take-overs and the applicable legal rules. As these topics are being dealt with in the proposed 13th Company Law directive, and are expected soon to become law in all EU member states, it seemed worthwhile to dwell on this topic as well.

PART I. BI-NATIONAL HORIZONTAL GROUPS

4. Horizontal groups are co-operation agreements, moulded in a legal structure, between two enterprise groups, each of which is remaining legally independent, although integrated in the overall group in both management, commercial and financial terms[9]. Management is integrated contractually, or de facto, but the constituent entities remain legally independent.

The formula has often been used in Europe, frequently involving Dutch companies. Therefore, some form of expertise has been developed in the Netherlands in setting up this type of quite complicated structures.

A form of "path dependence" might explain the frequency of Dutch companies being involved, although cultural factors, and common attitudes to business also play a significant role[10].

5. The starting point in whether a full, legal merger, a take-over, or the creation of a horizontal group, is the core objective of the transaction is to achieve that the combined firm should be subject to the same central management. This can be achieved by creating a legal entity, directed by a single board, whereby the parent company subjects the integrated entity to its overall authority. The legal entities continue to exist, but then as subsidiaries, being separate subordinated entities without substantial management autonomy.

The same objective can be achieved by other means, in which the participating firms maintain their legal independence, but integrate at the level of management. Different formulas have been tested: partners may organise a structure whereby the existing entities will be directed by two boards, that are entirely, or in majority the same. Common decision structures may be put into place: the central policy decisions will be taken in this common committee, sometimes called "strategic", or "co-ordinating committee", to be implemented by the boards of the two participating companies[11]. A further hypothesis is based on a mere contractual arrangement: the two participating firms agree to follow the same policies, which may be achieved by pooling the two firms in an un-incorporated company, comparable to a "BGB Gesellschaft" or other partnership-like form of company.

Similar objectives may be achieved by merely co-ordinating the action of the shareholders: it will depend on the type of influence shareholders can exercise on the company's management whether this technique can be followed. In some legal systems, shareholders can have a substantial influence on the appointment of directors, and co-ordinate overall policy and action by insuring co-ordination as to their appointment. At the shareholders' level, this type of arrangement

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[8] For a thorough description, see K. BYTTEBIER and A. VERROKEN, "Grensoverschrijdende ondernemingsamenwerking", *Studiecentrum Ondernemingsgroepen* 1994, 515 p.; also in English by the same authors: *Structuring international co-operation between enterprises,* London, Graham and Trotman, 1995.

[9] See H. HONÉE, "Grensoverschrijdende fusie op basis van gelijkwaardigheid naar huidig recht" in: *Grensoverschrijdende samenwerking van ondernemingen*, Kluwer, 1992, 1.

[10] On path dependence, see L. BEBCHUCK, and M. ROE, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 Stanford L.R., [1999] 127.

[11] See P. VAN SCHILFGAARDE, *Contractuele structurering van bestuur en toezicht in Ondernemingsrechtelijke Contracten*, U. Groningen, Kluwer, 11 e.s.

than take the form of a pooling of their interests in common holding companies, in BGB Gesellschaften, or in similar structures or techniques (e.g. "stapled stocks"[12]). "Consortia", as some of these structures are called[13] may be created by juxtaposition of several companies, that have the same majority shareholders, acting in concert. These "de facto" horizontal groups create delicate problems of group law if assets between the group entities are being shifted. The Rozenblum-case[14], that is widely considered as a landmark in group law[15] - at least outside Germany - referred to that problem, and outlined the limits of permissible group action under the applicable French criminal law rules of "abus de biens sociaux".

6. The reasons for using these formulas are numerous and diverse. They often appear when two groups of different nationality are seeking a co-operation or a merger agreement, without, at least apparently, abandoning their separate existence. If the two groups are merging as equals, it is often attractive to postpone the full legal merger and try first something which is less far going, some type of LAT relation. But it need not be provisional: some of these structures have been in existence for almost a century, and are far from being demerged, or merged into one single company.

This formula has been used with success even when the parents are both listed companies: if, as a consequence of a full merger, the parents would have to move their stock exchange listings, this may be detrimental to their market standing especially as trading will move to the market most closely associated with headquarters.[16] Cultural factors also point to the same direction. So e.g. can one imagine that partners hesitate, at the early stage of their integration, to abandon their corporate image. Partners may also wish to refrain from abandoning their nationality, and the safety of the legal system connected with it, and fear to sever the ties with the economic and political systems with which they may be heavily involved. In the Volvo-Renault transaction, political motives have contributed to the failure of the deal.

This short description of possible motives also indicates the weaknesses of the system: often the structure is considered as a provisional one, a stepping stone on the road to the full merger.[17] This explains the high failure rate.

7. It seems useful to shortly describe some of these better known cases of bi-national groups.

The oldest ones are Shell Transport and Trading Company, Ltd - Koninklijke Nederlandse Petroleum Maatschappij NV, and Unilever NV and Ltd.

The Shell structure, founded in 1907, is based on two listed companies at the top, a Dutch one and a UK one. Between these two, a pooling agreement has been concluded, based on a 60/40 key, relating to their shareholdings in the three main subsidiaries. Income flows (dividends) are received by the two parents in this 60/40 repartition key.

Both companies have only partly common boards of directors: co-ordination is ensured by having directors appointed on the binding nomination by the holders of a priority class of shares, the majority of which are held by a Foundation[18], the remainder by each of the directors[19].

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[12] See about the topic: H. HONÉE, nt. 9 and 91.

[13] This is the definition given in the Belgian Companies Code, art. 10.

[14] Cass. fr., 4 février 1985, *Rev. Sociétés* 1985, 648, nte B. BOULOC, (ROZENBLUM e.a.); Cass. fr., 23 April 1991, *Rev. Sociétés* 1991, 785 (Broche), Cass. fr., 13 February 1989, *Rev. Sociétés* 1989, 693 (Duval).

[15] See Forum Europaeum, "Konzernrecht für Europa", *ZGR* 1999, 672.

[16] The merger of the stock-exchanges will certainly reduce the importance of this consideration.

[17] The Dexia structure has in the meantime been abandoned, while the Fortis bi-national group is considering integration into a single entity.

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The Dutch side is headed by a two tier board structure, the English side by a unitary board. There are no common directors at the level of the two listed holding companies. The holding companies are reported not to belong to the "group". The boards of the two entities meet regularly for general oversight of the combined group: these are the so-called “conferences” on which the general affairs of the group are discussed, especially the strategies, the business risks, and the internal management and audit systems [20]. There are also group committees for both entities: a "group audit committee", a "group remuneration and succession review committee" and a "Social responsibility committee".

The Foundation is directed by the members of the supervisory board, and of the management board.

Unified management is ensured by the fact that the members of the Dutch management board and the UK managing directors

- are directors of the three main operational subsidiaries
- are members of a common "management board" which is the long term planning and objectives unit, an informal internal organ
- are members of the boards of several of the further downstream subsidiaries.

At the level of the group, there are thus 5 group directors, that insure the core management of each of the three main operational companies that head the business lines, and further co-ordinate the subsidiaries downstream [21].

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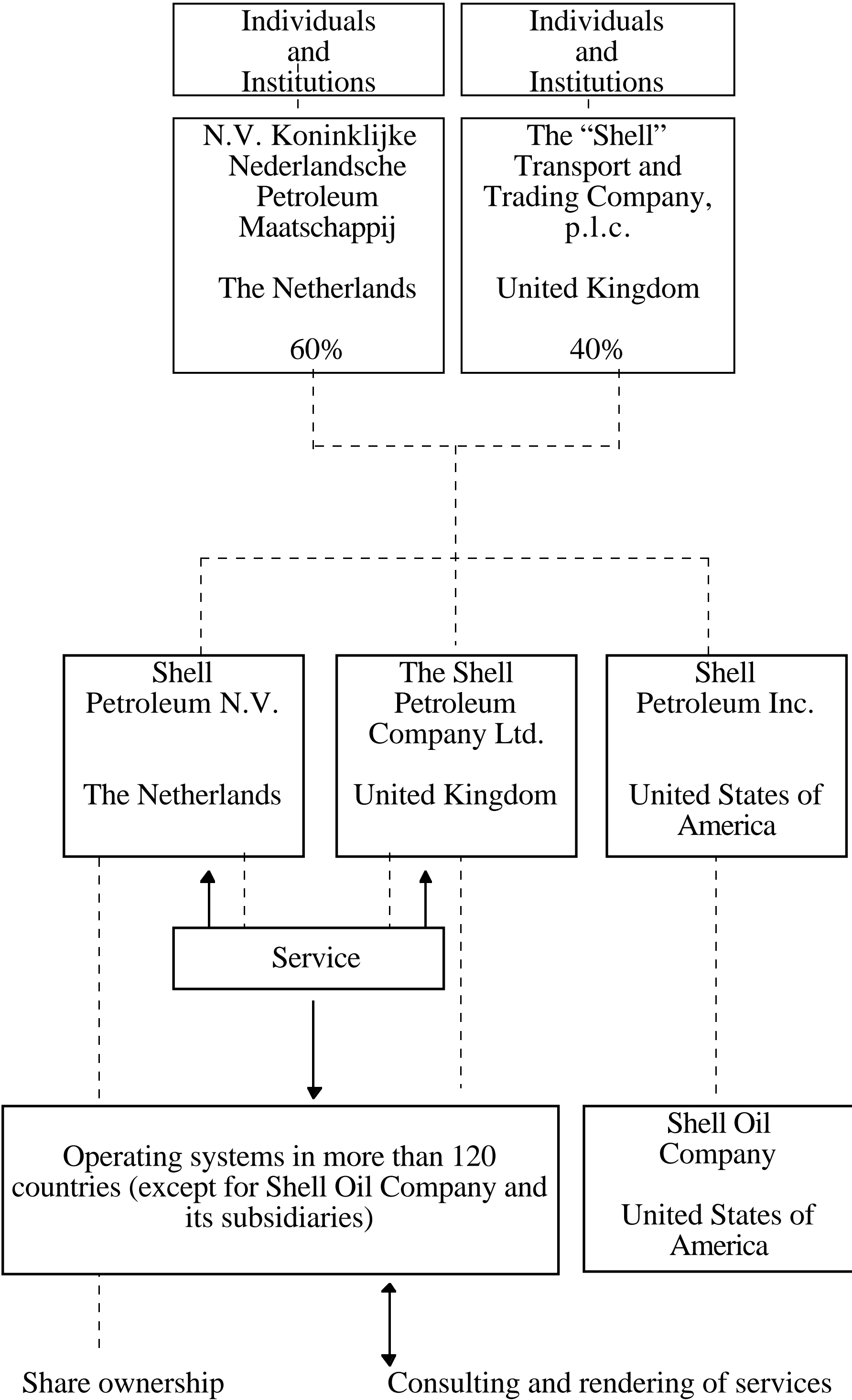
[18] This foundation owns 1434 shares "priority shares" giving right to nominate members for the both boards, and for changing the company charter.

[19] Six for each of the members of the supervisory board and of the management board.

[20] Annual Report of Koninklijke, 1997, p. 6.

[21] There are: Shell Petroleum NV, The Shell Petroleum Company Ltd, and Shell Petroleum Inc. Numerous operational companies depend on the first two while the third mainly holds the subsidiaries in the US. In between, there is a whole series of "service companies" that act for all group companies.

Figure 1: Structure of the Koninklijke / Shell Group



Source: *N.V. Koninklijke Nederlandsche Petroleum Maatschappij*, report 1996

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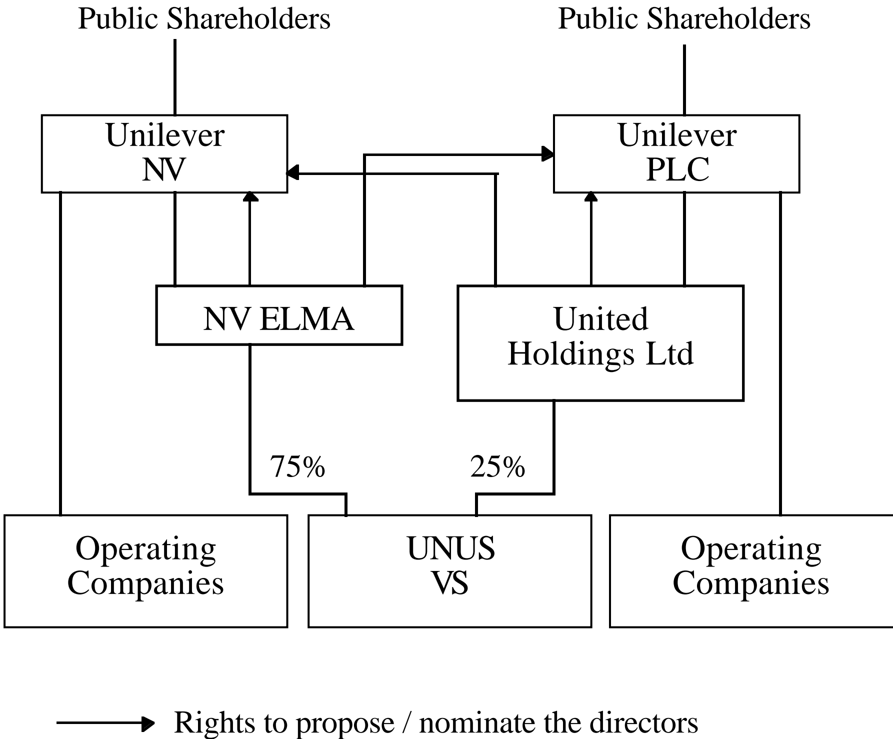
8. The Unilever scheme (set up in 1929) is different: here too a UK and a Dutch partner have pooled their interests.

Both boards have an identical composition. The directors are appointed by the general meeting, on the nomination of owners of a special class of shares held by a 100% subsidiary of both companies. Each of the two parent companies has its own subsidiaries. Income is received by each parent individually, but are pooled between the two parents due to a so-called "equalisation agreement"[22]. Under this agreement dividends will be determined in a set proportion between the two classes of shares. In case of losses by one entity, the profits, or reserves of the other will be affected to feed the dividends due by the other. The equalisation agreement ensures both parents to act as one entity, and avoids conflicting positions.

Figure 2: Structure of Unilever



9. Other structures are of a more recent date. They respond to similar schemes except that often the structures are based on a 50-50 participation of the parent in the whole range of subsidiaries of each of the parents which have been pooled. This pooling may take place directly, or through a common subholding. Each of the parents maintain their listing on the exchange in their home states: share prices should be fully parallel. In fact share prices do somewhat diverge, due to differences in regulation, and in taxation. Therefore additional refinements have to be introduced making sure this difference is equalised. In at least one case this difference has

[22] For a description, see BYTTEBIER and VERROKEN, 1994, at 273.

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persisted, and may have contributed to the final reorganisation leading to the formation of a single holding company[23].

In several of these structures one finds the creation of a central co-ordination committee, composed of the leading members of each of the participating parents. This is the committee where policies are worked out and long term options decided.

23 Dexia was transformed in 1999, into a single parent company, domiciled in Belgium.

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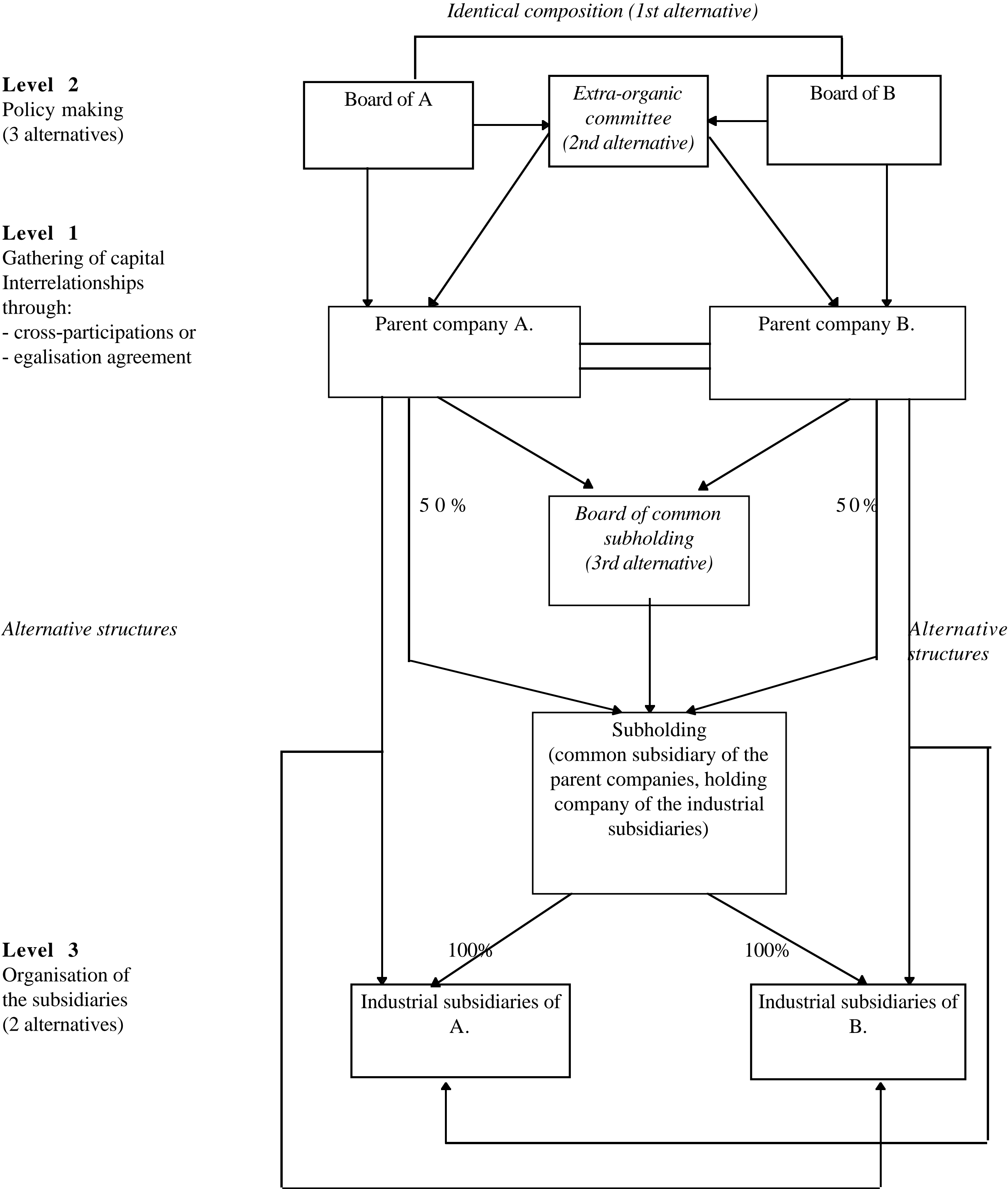
Figure 3 - Splitting of functions in case of cross-border co-operation



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Source: BYTTEBIER K, VERROKEN A., *Grensoverschrijdende ondernemingssamenwerking*, Brussels DWTC, 1990-94, p. 32.c

10. From the legal point of view, some of these structures have been well tested. This does not mean that all have resisted the touchstone of time. There have been some well known failures, which, in part at least, may be attributed to weaknesses or hindrances in the legal structure. These deserve some further analysis[24].

Although this may sound somewhat soft, it has often been reported that the core stumbling block on the way to success is the difficulty to integrate companies originating from two different business cultures, different management styles and tradition. This finding is not astonishing: it is typical for all reorganisations. Local mergers often are fraught with cultural conflicts, even with people speaking the same language, having the same cultural background, and so on. The absence of a firm, integrated, overall leadership will made multinational integration more difficult. The issue of the "nationality" of the group, where its headquarters will be located, under which legal system it will function are points of crystallisation of the same underlying tensions.

11. To focus on legal and financial issues, one can mention the following:

The central issue seems to be the difficulty to fully integrate management in the absence of a vertical structure.

The two parent's boards remain technically independent. Therefore techniques have been developed, whether to make the two boards fully identical, or at least insure identity of the majority of their members. To achieve this aim, all kinds of techniques were invented: they all boil down to reducing the shareholders' rights. So e.g. in the Shell scheme, directors are appointed on the nomination of the holders of priority shares. In fact this is some type of "autocontrol". Unilever relies on presentations made by its subsidiary: this is an equally strong form of "autocontrol". In the Fortis scheme, directors of one board are presented by the other board. Cross holdings, at the majority level, as has been proposed contain this feature in a legally even stronger degree. Sometimes, these aspects have been described as handsome anti-take-over protections: in some cases, the agreement between the two parents stipulates that if one is taken over, the other has the right to acquire all assets of the other.

The difficulty to fully co-ordinate the two boards leads to the creation of internal bodies, - co-ordinating committees, strategic committees - where policies are effectively formulated. Transparency is not too well served, while the role of the board is being hollowed out.

12. The absence of a clear prefixed legal scheme is a handicap, as lengthy negotiations have to be undertaken to find a custom made system, with difficult legal, tax, social and other questions; in a traditional share acquisition scheme, few of these hurdles show up. The schemes that have been put in place are all relatively easy to entangle: the shares in the pooled subsidiaries can be re-transferred, the contractual relationship at the parent's level unwound. This status has been nicknamed a LAT relation, with the partners thinking more about the consequences of divorce, than the prospects of their happy marriage.

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[24] For details see BYTTEBIER and VERROKEN, 1994, at 329, dealing with: Agfa-Gevaert, Dunlop-Pirelli, Fokker-VFW, Hoogovens-Hoesch, General Bank-Amro, Volvo-Renault, all cases in will consolidation later became necessary. See about the Renault case: F. NEUBAUER, and M. TAISHOFF, "Case Study: Institutional Investors and the Volvo-Renault Merger: The evolution of Active Ownership", *International Review of Corportate Governance* 1995, 90-99.

The problem becomes more difficult if the two entities have not the same financial weight, and some clauses have to be agreed to adjust for these differences[25].

Differences in ownership structure also may create tensions: concentrated ownership is difficult to marry with dispersed ownership, as it leads to aggregate the disadvantages of both types of ownership. This was a major factor in the failure of the Volvo-Renault deal, where the French state, 100% owner of Renault was refused by the numerous, mainly institutional shareholders of Volvo, who feared too strong intervention by the new major shareholder of the overall structure.

There are also securities market considerations. Each of the participating entities has a smaller market capitalisation, than would have a fully merged company. Therefore there will be less liquidity in the market. The shares, although theoretically fully identical in financial terms, often have different market developments, due i.a. to differences of taxation, foreign exchange conversion, what may make a full merger more attractive. Another handicap flows from differences in the regulatory regimes: insider trading rules e.g. applicable to the market in the shares of one entity, will necessary apply to the shares of the other, although each market is subject to a different jurisdiction[26].

Differences in legal structures may also constitute a handicap: especially with respect to co-determination rules, these might prevent the creation of fully equivalent boards at both sides of the transaction. In the Daimler-Chrysler deal this has led to organising German type co-determination at the level of the Daimler-Chrysler AG, with labour representatives standing for the German employees, but not clearly for the American, or other employees. In the Aventis deal, the new company is formed under the French two-tier board structure, without labour representatives at the level of the top holding company. It was mentioned in the offering documentation that

> "the Hoechst board of management will use its best efforts to receive the consent of the Aventis board to establish a commission consisting of members of the Aventis and Hoechst management and employees' representatives which will discuss a concept of employees' participation in the Aventis supervisory board on a voluntary basis".

Differences in valuation and accounting systems may also create tensions: this aspect is reported to have played an important role in the Pirelli deal, as Italian accounting and auditing procedures were, at that moment at least, quite different from the usual, especially UK, standards. Differences in the accounting treatment of goodwill on acquisition, versus pooling of interest, may contribute to choose for one or for the other formula.

Even if the cultural difficulties may finally be overcome at the highest levels, there often remain substantial points of friction at the lower echelons: so e.g. has it been reported that in the Fokker VFW deal, line management did not implement the directives given by the management, leading inevitably to the collapse which has resulted.

13. These are but a few of the difficulties that bi-national horizontal groups are facing. One will not be astonished that there are so few that have tried the experience, and why so few have succeeded.

However, there remain some good conceptual arguments for this organisational structure in Europe as it would allow the much asked for “merger between equals”. After the present wave of mergers, which is mainly taking place on a domestic basis, a second wave of consolidation

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[25] See for the Reed-Elsevier example: K. BYTTEBIER and A. VERROKEN, 1994, n° 675, 325.

[26] If, for insider trading purposes, in one of the jurisdictions directors are obliged to register their shares, they will have to extend that obligation to their trading in the other company's shares.

may be expected involving cross border transactions. If this further concentration will take place, this will be analysed as a battle between states and their economic systems, a “war like” situation, not particularly healthy for the state of the mind of the Union in Europe. One will remember some acid nationalistic remarks in recent English-German take-over!

Therefore I would like to repeat my call to the European Commission to make available a standard framework for this type of cross border deals, that could serve as a “default scheme”.

A proposal could be based on the following premises:

a- although both parents remain independent companies, the links between these lead to integrated management; this may be supported by strong contract-like agreements that cannot be undone except with a qualified majority of both general meetings. Contract law therefore has to be adapted. This eliminates the need for cross holdings as has been advocated, but which have detrimental effects on the market functioning;
b- the members of the boards should be elected by the shareholders of both companies, in one single meeting of both companies; here company law needs adaptation.
c- members of both boards should be identical, at least by majority. Co-determination may continue to play for half the membership of one entity;
d- shares are listed on both markets, and enjoy the financial rights in each entity as determined by the articles of association. This means that a 50-50 proportion is not essential. Also shares shouldn't necessarily have the same legal regime (e.g. one may issue Dutch certificates, the other effective shares with full rights);
e- control in one entity cannot be acquired except by acquiring control in the other; this means that a take-over on one company, should include a take-over on the other; this also means that if there are majority controlling shareholders in one, there can be no take-over on the other company except with the agreement of the controlling shareholder; but also if the controlling shareholder sells his control block, there should be a mandatory bid on the shares of both companies. Take-over law should allow these techniques.
Also each entity could have its own anti take-over protections, as this is a subject to be discussed among partners. But the whole structure as such should not have the effect of an anti-take-over device.
f- there are arguments for adapting tax regulations allowing equalising of net dividends, and as a consequence equalisation market prices. But as far as corporate income tax is concerned, taxation autonomy of the states concerned would remain unchanged.

These are a few points on which action can be taken. They constitute the core legal difficulties in the creation of this type of groups.

PART II. CROSS BORDER TAKE-OVERS

In this part, some attention will be paid to the issues raised by cross-border take-overs, especially in the light of the forthcoming 13th. Company Law Directive[27].

1. The different types of applicable regulations

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[27] At the moment of writing, the text of the directive has been agreed on by the experts, and was adopted by the Council of ministers, after the objections raised by Spain with regard to the application of the directive to Gibraltar, were lifted. On June 21, 2000 a common position was adopted by the Council. For the first commentaries of the directive: see S. LOISY. Le projet de treizième directive européenne en matière d'offres publiques, *RDAI-IBLJ* 2000, 183. For an extensive study of the pre-directive situation, see X. BOUCOUBZA, *L'acquisition internationale de société*, Paris, 1998, 217 e.s.

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14. Cross border take-overs raise numerous regulatory issues. The central question seems to be which rules are to be applied if bidder and target are located in different states, and therefore if the regulations of different jurisdictions would apply. One could identify the question as one of conflict of laws, the latter being understood in a broad sense, including take-over regulations, even of a private, self-regulatory nature[28]. The question is not only which regulation will apply to a given matter, that of the issuer or that of the target, but also which regulation is to apply if the target, as a consequence of its being traded on several markets, has to abide by regulations in each of these markets.

The question cannot be identified as merely relating to which take-over regulation will be applicable, as take-over regulation as such has not a proper nature, but is a mix of different types of regulations, such as market rules, rules on disclosure, company law like rules, elements of contract law, etc. In addition, one does have to pay attention to the fact that a take-over is a private law transaction, and therefore traditional conflicts of laws rules are applicable to these contractual aspects.

Without taking a definite stand as to the nature of the rules involved, we would propose to subdivide the subject in three layers.

15. The first layer represents the private contract law matters: the bid itself is an offer, or an invitation to offer. Although parties are free to frame their contract, its content is largely determined by the market regulations which in most states frame the take-over.

Secondly, the core of take-over regulation (especially disclosure and procedural rules), can be determined as belonging to the regulation of the market. Which regulation will be applicable will be decided by the market on which the target's securities are listed.

A third layer concerns the application of company law, both to the target and to the bidder. To the extent that behaviour of the companies involved, their shareholders and their directors are affected by the take-over, the legal status of their decisions and actions will be determined by the respective company laws, as applicable. Take-over regulation will also influence the way the actors in the take-over can behave.

Each of these levels deserve specific attention, as relating to rules designed to protect different interests.

An additional degree of complexity derives from the presence of several supervisory bodies that might be in charge of policing the transaction. As long as these bodies are called upon to apply their own regulation, no major difficulty arises. However, in some cases one may fear that they may be called upon to enforce, or at least to contribute to the enforcement of rules originating in another jurisdiction, rules that may be unfamiliar or even contrary to their own legal order. Here the directive offers a workable solution: market rules are to be administered by the body in charge of market supervision, company law rules to the bodies competent applying company law. The issue would become increasingly exacerbated due to the changes of the market structure as part of the merger of the stock exchanges. The London Take-Over Panel may have to deal with, or even have to enforce rules of German company law. As traditional jurisdictions have been used to apply foreign law, there should be no major conflict preventing an administrative body to do the same, provided it does not conflict with the fundamentals of its own legal order. The experience will undoubtedly be an unfamiliar one.

16. Before further analysing the different issues involved, it is worthwhile to situate the main hypotheses illustrating the matter of cross-border take-overs. In each case, there is diversity

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[28] See for the conflicts issues raised by the German voluntary code: M. DÜRIG, Kollisionsrechtliche Anknüpfung bei öffentlichen Übernahmeangeboten, *RIW* 1999, 746.

of jurisdiction between the legal system to which the company is subject, and the legal system under which protection trading of the securities takes place.

In a first case, the company is subject to a given jurisdiction, whether as a consequence of it having its corporate seat in that jurisdiction or as having been incorporated under that legal system, having its registered office in that state.

If the shares are traded exclusively on a regular market in that same state, the law and take-over rules of that state will apply. Both the regulatory responsibility will lie will the supervisory authority of that state, while company law conflicts will be solved according to the law of that state. The investors in the company may be located in many other states: having invested in foreign shares, they have acquired rights which necessarily were subject to the jurisdiction and the rules applicable in that state. They normally cannot claim the protection of their home jurisdiction.

However, some supervisors will extend protection as soon as the shares have been offered on their territory, even if here was not a listing on one of their regulated markets[29]. Protection can be even further extended and applied as soon as the take-over is addressed to investors in their state. In these case supervisors will claim competence as far as market and disclosure rules is concerned, leaving company law issues to the domestic jurisdiction of the company.

A second hypothesis is frequently found in Europe: in this case the company has its shares listed on several stock exchanges. On each of the exchanges some trading is taking place, but in most cases, the home market, being the one located in the state where the company is mainly operating, or has its headquarters, is the market where most of the trading is located and where the price is made. In this case, one could imagine that each of the supervisors would be competent for its part of the overall take-over, while the lead responsibility will lie with the supervisor of the company's home state.

According to a third possibility, the shares have no listing in the company's home state, having been listed in another, more important market, or on a market with no specific link to a national system (as Easdaq) .In this case there will be clear diversity between the state responsible for the company law status, and the jurisdiction involved in the trading.

If the shares relate to a company that is subject to a non-EU jurisdiction, there will be additional questions of enforceability of administrative decisions relating to the market in shares of non EU issuers, although most, if not all of the trading takes place within the EU, or within a market system that is subject to EU rules. Would EU supervisors claim competence? The above mentioned hypotheses two and three deserve separate attention.

Finally, it should be mentioned that the directive locates the company, according to the French text, according to the state where the corporate seat is located, while in the English version, reference is made to the "registered office". The diversity of criteria may lead to conflicts in case company with registered office in an "incorporation" state, would have its "real seat" in a "siège réel" state. In this case, the criteria used in the directive have to be read in conformity with the treaty, in article 48, according to which the three criteria have equivalent value in matters of cross border establishment or provision of services. A bid, launched by a UK registered company, with headquarters and corporate seat in France, would according to French company law be regarded as a French company. The reference to the "registered office" would prevent the French legal order to qualify this company as being a French one, at least as far as freedom of establishment is concerned. The validity of the decision to issue shares, taken by the UK company, should be appreciated according to UK law, especially as the application of French law

[29] The circulation of local depository receipt would be considered evidence of the offering of shares on the local market.

might prevent that company from bidding, and therefore to exercise it right to establishment. At least within the limits of the treaty's freedom of establishment, the French rules of conflict of laws would have to yield for the Treaty's principles[30]. However, the French supervisor could impose its own rules as far as the protection of the French investors are concerned, and this under the general "general good" reservation. It proportionality test will allow the French supervisor to require additional disclosures without being able to prevent the take-over to take place. rules that would

One can regret that the directive has not been more explicit on these issues.

§ 1. THE OFFER TO ACQUIRE SHARES OF THE TARGET COMPANY

17. The law to be applied to the offer to acquire shares of the target is determined according to the general rules of Private International Law.

Said principles will determine the rules on offer and acceptance, when title will pass, the conditions for the validity of the offer, the remedies to be applied in case of non-performance, etc. However, one will immediately see that several aspects of the offer are influenced by the applicable take-over regulation: the offer has to be firm, and non revocable, specific performance should be secured by a deposit or guarantee of the bid price, title will not pass upon mere acceptance of the offer, leaving room for higher bids, etc.

18. The Rome convention of the Law applicable to Contractual Obligations, of 19 June 1980 would normally be applicable to said offers. As the offer relates to the acquisition of shares in incorporated companies, the exception of article 1(2)(e) of the Convention would not apply. This exception relates to the "questions governed by the law of companies and other bodies corporate". There can be little doubt that the contract for the acquisition of shares is not part of company law. Although the acquisition of control can, in certain respects, be considered to belong to the company mechanism, control transactions are not mentioned among the subjects referred to in said exemptions from the Convention. These are but a consequence of a purchase of shares, not of a company institution.

19. Can the bidder freely choose the applicable law? According to article 3(1) of the Convention, freedom of choice is the rule.

In take-over practice, bidders have rarely made an explicit choice of law[31]. Therefore the contract can be deemed to be governed by the law of the country with which it is most closely connected. (art. 4.1 of the Convention).

The question therefore arises whether a take-over bid is an offer by the bidder to enter into indivudual contracts with the innumerable investors, to acquire their individual share, or rather whether it is a "collective transaction", whereby the offer to acquire, at the same condition, all or

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[30] This is our reading of the significance of the Centros case ECJ, 9 March 1999, Case C. 212/97, ECR, 1999; Among the very numerous comments: E. WERLAUFF, "Centros aus dänischer Sicht", *ZIP* 1999, 867; J.C. CASACANTE, note in *RIW* 1999, 450; W.F. EBKE, "Das Schicksal der Sitztheorie nach dem Centros-Urteil des EuGH ", *JZ* 1999, 656; P. ULMER, "Schutzinstrumente gegen die Gefahren aus der Geschäftstätigkeit inländischer Zweigniederlassungen von Kapitalgesellschaften mit fiktivem Auslandssitz", *JZ* 1999, 662; O. SANDROCK, "Centros: ein Etappensieg für die Überlagerungstheorie", *Betriebsberater* 1999, 1337; P. KINDLER, "Niederlassungsfreiheit für Scheinauslandgesellschaften?", *NJW* 1999, 1993; E. WYMEERSCH, "Centros: A landmark decision in European Company Law", in Festschrift for Richard Buxbaum. TH. BAUMS, K.J., HOPT, N. HORN, *Corporations, capital markets and business in the law*. Kluwer Law International 2000.

[31] No information was found in the prospectuses of following crossborder offers: Total (Petrofina), Suez (Tractebel), Axa (Royal Belge), Heidelberger (CBR), Bâloise (Mercator & Noordstar). At least some of these prospectuses mention that the contract is entered into at the place where the shares are tendered, which is the office of the bank receiving the shares from the investor.

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the stated percentage of the sharesso as to enable him to gain control. The issue can be solved in general terms: most take-over bids pursue control, but some bids -e.g. bids by a controlling shareholder ot the minority, - would not necessarily aim the transfer of control.

In the absence of an express choice, one could argue that as the transaction does not view the acquisition of individual shares, but the acquisition of control, the law of the target company should be applicable. The bidder is not interested in acquiring shares as such - in most cases, and in the future European directive, bids should view the acquisition of all of the outstanding shares - so that the transaction in essence is a control transaction, and therefore has to be submitted to the law of the target company, the final object of the offer. This solution may be practical, provided that most of the target's shareholders are located in the jurisdiction where the target has its registered office. This is often the case if the shares are listed on the stock exchange of the target's home state.

The question however arises whether a take-over bid is an offer to enter into individual contracts with the innumerable investors to acquire their individual shares, or rather whether it is a "collective transaction" whereby the offer to acquire, at the same conditions, all or the stated percentage of the shares, so as to enable the bidder to gain control. The issue cannot be solved in general terms: most take-overs pursue control, but some - e.g. bids by controlling shareholders on the remaining minority - cannot be treated in the same way. If the transaction views control, one could argue that the law of the target should be declared applicable as being the most closely connected to the jurisdiction under which the target is functioning. This solution is also practical, as in most cases investors are located in the jurisdiction where the target has its central office, which is also the place of the main listing. But the argument has limited validity in case of multi-state listing, or where the bids aims to acquire the remaining shares floating in the market.

If the investors are located in several jurisdictions, one could consider - whether by virtue of free choice of law, or in application of art.4.1. of the Convention - the laws of each of these jurisdictions applicable: this would make take-over bids unworkable, as the final outcome of the bid may be different from jurisdiction to jurisdiction. Passing of title may be declared conditional in one, unconditional in another: as bids often contain conditions, this rule would be very confusing and would result in a chaotic situations, which is highly undesirable in a take-over bid case.

One should also take into account that take-over regulation in many states contain detailed mandatory rules about how bids are to be framed, e.g. whether or they can be conditional, what conditions are admissible, what guarantees should be provided for the payment of the purchase price, what will be the result of higher or counter bids, etc. These rules will be the object of the supervisors' scrutiny. The freedom left to the bidder is therefore limited. The question arises whether it would not be more efficient to frame the private contract conditions of the bid along the same lines as applicable to the regulatory regime, i.e. follow the jurisdiction applicable to the take-over rules. As will be analysed later, under the regime of the directive, this would result in rendering the state where the offer is being made competent for applying the regulation, and in private law, applying its private contract rules. This solution will avoid an discussion about possible conflicts between the freely chosen contractual regime, and the applicable mandatory take-over rules, while insuring a maximum compatibility. It also offers a functional solution for take-over relating to shares traded in trading systems that are not clearly related a single Member State, or in case the merger of the Stock Exchanges lead the securities to be listed outside their home jurisdiction. The Convention does not prevent this result: the convention allows to set aside the presumption that the rule of the most characteristic performance should be applied "if it appears from the circumstances as a while that the contract is more closely connected with another country", being the country designated for applying the take-over rules.

For all these reasons it is preferable to determine the applicable law in function of the conflict rules that relate to the rules applicable to the take-over.

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20. Depending on the applicable rules of private law, once the bid has been accepted by the target company shareholder, title to his shares will normally pass. When title to listed shares passes is a matter traditionally rooted in the general rules of contract law. In most if not all States, title to listed securities passes upon agreement between the parties.

However, freedom of contract would prevail and the bidder may validly stipulate that title will not pass: by so doing the bidder could validly reserve his position. Take-over regulations would usually influence the bidder's freedom. On the one hand, the bidder must make a firm and irrevocable offer for all the shares. Conditional offers are frowned upon, and conditions must be stated explicitly[32]. On the other hand, as mentioned later, bids do not lead to the contract upon mere acceptance.

The effectiveness of the contract would, as a rule, not depend on any formalities being accomplished, especially dealing with transfer of the registration in the central share registry, or in a share giro account system. This was at least the situation under former French case law[33], where it has been decided that with respect to shares registered in a share giro account, and as between the parties, title is transferred by mere mutual consent, even if the transaction has not materialised in debiting the transferor's giro account, nor by crediting the beneficiary's account.

It seems safe to assume that the same applies in other systems. According to Belgian law also, one can accept that title passes by agreement of the parties. However, v.à.v. third parties, the transaction cannot be invoked unless after having been registered in the share account of the buyer[34].

In the meantime, French regulations have been adapted, and title passes at the moment of registration of the bookkeeping entries[35]. The rule applies to all securities registered with SICOVAM and traded on a regulated market, without regard to the "nationality" of the issuer[36]. Differences in national regimes may cause distortions. These will be the more significant under a unified regulatory framework, to be realised as a consequence of the merger of the Stock Exchanges.

However, national laws may impose different conditions and therefore the subject should be further investigated (n° 24).

21. Acquisition of title will also be affected by charter clauses restricting transfer to shareholders that have been admitted according to the articles of association. The transaction itself, as between the parties, would be considered valid and binding, but the company may refuse to recognise the transferee as shareholder, denying him all voting rights.

As there has been some doubt, these clauses have sometimes expressly been declared valid even in take-over situations. So e.g. does Belgian law[37] contain a rule allowing said restriction, but imposing the board refusing a candidate transfer shareholder to invite a white

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32 See e.g. rule 9.3 of the City Code in the case of a mandatory bid; rule 13 on "subjective conditions"; compare art. 3 of the Belgian R.D. of November 8, 1989 listing the permissible conditions.

33 Korzilius Case, Cass. fr. 22 November 1988, *Bull. Cass*. 1988, 4, n° 322, *Bull. Joly* 1989, 84; Cass. fr. 24 January 1989, *Bull. Cass*. 1989, 4, n° 39; Cass. fr. 23 November 1993, *Bull. Joly* 1994, 93, nt. LEPELTIER; *Dr. Sociétés*, 1994, n° 11, LE NABASQUE; G. RIPERT and R. ROBLOT, Traité de droit commercial, t. II, 12e ed. Paris, *L.G.D.J.,* 1990, p. 42, n° 1794; H. CAUSSE, "Les titres négociables", Paris, Litec, 1993, p. 329-331, nos. 663-664; J.-M. DELECCI and F. PELTIER, "Compte de dépot de titres", in *Juris-Classeur Banque et Crédit*, 2115, nos. 18 e.s.; M. TISON, "De uitgifte van gedematerialiseerde vennootschapseffecten", in*: Het gewijzigde vennootschapsrecht 1995*, H. BRAECKMANS and E. WYMEERSCH (Eds.), 1996, 239.

34 See for the conclusion M. TISON, o.c., 241.

35 In M. TISON, o.c., 241.

36 See art. 47Bis, Loi n° 93-1 of 3January 1993, as amended by Loi n° 93-1444 of 31 December 1993 and Loi n° 98-546 of 2 July 1998; H. DE VAUPLANE, J.-P. BORNET, *Droit des marchés financiers*, Paris, Litec, 1998, p. 71-72.

37 Art. 41, § 3, Companies Act, applicable to both charter and contractual limitations.

knight to take over the shares, at the same price, this is at the full bid price. The rule has been applied in the period preceding the rule's enactment[38].

In France, these clauses cannot be invoked against the bidder in a take-over[39]. As this rule aims at allowing the free functioning of the bid mechanism - it therefore is not a rule of company law in France, contrary to Belgium - it will be considered applicable to all bids, mainly effectuated on the French market, whether relating to French companies or not.

22. The same principles will apply if the transfer of title to the shares is subject to regulatory restrictions. National regulations may subject the transfer of title to certain conditions, e.g. the approval by the state authorities, competition clearance, foreign exchange permissions, or "golden share" privilege. These mandatory regulations will apply in take-over situations, notwithstanding the fact that these should be reviewed in light of the EU rules.

An example taken from a recent take-over case: in the French case of the BNP - Société Générale - Paribas take-over, the CECEI (Comité des établissements de crédit et des entreprises d'investissement) opposed to the BNP-Société Générale leg of the three party deal. This opposition was based on general policy grounds. It could be held - and was not challenged - that the banking authorities had the right to refuse a shareholder in a French bank. In a cross border context, and except for EU-related considerations of competition the financial authorities would be limited to scrutinising the "fit and proper" character of the candidate acquirer[40].

In Belgium, there was a regulation submitting the take-over by a non-European bidder of a Belgian listed company, to the authorisation of the Minster of Finance.

23. Other National regulations may also determine who is entitled to the status of shareholder: here the criteria will link the application of the rule to company law. The traditional example is the Post War Dutch regulation, obliging all shareholders to exchange their pre-war shares for new ones. The French Cour de Cassation has held that French shareholders who had omitted to exchange their shares, had forfeited their rights as the Dutch regulation was held to apply to relations of the company and its members. Lex rei sitae - French law according to the plaintiffs - therefore was considered not applicable[41].

24. In practice, take-over regulations heavily impinge on the passing of title by the mere acceptance of the offer.

Whether it has been expressly stipulated or not, title will not pass to the target immediately on acceptance, as take-over regulations usually provide that in case of a higher bid, or a counteroffer the shareholders may tender for the higher one although they had already tendered their shares in the first, and therefore accepted the first bid. The bid conditions will be deemed to contain a clause, whereby the acceptance, although binding v.à.v. the bidder, is provisional in the case other or better offers are submitted. In competing exchange offers, this type of withdrawal right may create difficult and non - transparent situations as shareholders often experience difficulties determining the best offer price. Therefore, both competing bidders may be able to obtain acceptances from part of the shareholders.

According to French law this rule even extends to sales of shares that have been completed before the offer period started: these pre-bid transactions never can be considered binding if a later, better bid is made public[42].

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[38] See Banking Commission, annual Report, 1987-88, 91 (Assubel case).

[39] Règlement de la Commission des opérations de bourse, n° 89-03, art. 3.

[40] Based on the Second banking directive, 89/646/EEC of 18 December 189, rat. 5 and 11, OJ., L. 386 of 30 December 1989, 1-13.

[41] Cas. civ 17 October 1972 (Royal Dutch Case), JDI, 1973, 716, nt. R. OPPETIT, Crit DIP, 1973, 520, nt BATTIFOL.

[42] OCP-Mutuelle du Mans see further nt 55.

A similar, although more limited interpretation was given to the take-over regulation by the Belgian Cour de Cassation[43].

25. In Europe, it is usual to construe the take-over transaction as a public bid for shares. This is but one formula. One sometimes finds transactions by which the shareholders are invited to tender their shares, whereby the bidder has the possibility to accept these offers or not. The price at which the bidder will accept is normally fixed in the tender document.

In at least one Dutch case, even the tender price was left open, the price being fixed according to the price indications given by the shareholders, creating some type of public auction. This technique has been forbidden in subsequent Dutch regulation[44].

26. The foregoing explanations indicate that with respect to the contract law aspects of take-overs, including the issue when titles passes, the matter is to be decided, firstly by taking into account the traditional conflict of laws rules, but secondly and mainly by taking due account of the regulatory environment in which these transactions take place. The rule of the market, as determined according to the applicable take-over regulation, will preferably also be the rule that designates the applicable contract law rule. Which rule should receive precedence in a specific case is a matter for further analysis. In a system with merged exchanges, the complexity if the issues will be further increased. There are therefore good arguments to make clear arrangements about these matters, and avoid confusion at the moment of closing a bid.

2. REGULATIONS ON TAKE-OVERS

27. The largest numbers of issues in cross border deals pop up with respect to the application of "securities or market" regulation, especially the rules on take-overs[45].

Should the regulation be followed as applicable in the target's jurisdiction, or as applicable in the market in which the target's shares are listed, or where its investors are located? The question will usually call for little comment in case the target company is located in the state in which its shares are listed and most of its shareholders are supposed to be located.

The question has been solved in rather diverse ways.

The City Code on take-over and mergers is applicable to all public companies, whether listed or unlisted, considered to be resident by the Take-Over Panel in the UK, the Channel Islands, or the Isle of Man. The Panel will normally consider a company to be so resident if it is incorporated in the UK, the Channel Islands or the Isle of Man, and has its place of central management in one of those jurisdictions[46]. The same rule applies to the Rules on Substantial Acquisitions, relating to the acquisition of blocks of shares that -although substantial, remain under the 30% threshold. Foreign investors, bidding for UK shares, have to abide by the City Code.

French law[47] declares the regulation applicable to all "public offers to acquire" of securities traded on a regulated market. Most rules will be applicable to shares of foreign companies, traded on a French regulated market; the mandatory bid rule is explicitly excepted.

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43 See Cass. b. 10 March 1994, *Revue de droit commercial belge*, 1995, 14, nt. Wagon Lits case.

44 See in the technique whereby the bidder invites tenders from the shareholders for a certain percentage of the shares, at prices to be fixed by the investor. M. RAAIJMAKERS, *Regelingen met betrekking tot openbare biedingen, in Center for Company Law, De toekomst van de gedragsregelen*, 1992, at 60 e.s. and Center for Company Law, Herziening van de fusiecode, 1994, at 48.

45 See X. BOUCOUBZA, "L'offre publique transfrontière", *Mélanges AEDBF France* 1997, *Banque*, 53.

46 See Introduction 4, to the City Code on Takeovers and Mergers.

47 Art. 5-1-1 of the Règlement général of the Conseil des Marchés Financiers.

Belgian law applies to all public bids for securities, whether listed or not[48]. The regulation on take-over bids - including mandatory bids[49] - applies to all bids for shares or other voting securities issued by Belgian companies, the shares of which are issued to the public at large ("public companies"). Listing on a Belgian stock exchange creates a presumption that the company is public, but other techniques of proof are admissible, e.g. a public flotation of the shares, or a listing on a foreign exchange.

The Italian law goes into the same direction: the general regulation is applicable to all public bids, the rules on mandatory bids apply to bids for Italian companies listed on Italian regulated markets[50]

Swiss law[51] applies to Swiss companies, part of the shares of which are listed on a Swiss regulated market. The mandatory bid rule is optional: companies can adopt a clause in their articles of association excluding the application of the mandatory bid rule.

Portuguese law[52] is applicable to all offers for shares realised on the national market, irrespective of the nationality of the offeror or of the intermediaries.

28. This conflicts of laws question has been extensively discussed in the framework of the 13th draft Company law directive.

First, the directive is addressed only to take-overs on companies governed by the laws of the Member states, provided their securities are traded on regulated markets in one of the Member states.[53] Non-EU companies, or unlisted companies are not governed by the directive, but may be dealt with on an equivalence basis by the Member States. E.g. Belgian law is applicable to all bids in Belgium.

Second, only equity securities are taken into account: according to the definition, “securities” should be read as transferable securities carrying voting rights in a company, thereby excluding convertibles, warrants, option rights and whatever other securities entitling to shares.

As to cross-border take-overs, taking place within the Union, the directive contains two sets of rules:

1. it firstly designates the body competent for supervising the transaction.
2. it identifies the rules relating to the transactions, distinguishing
   a) rules of “procedure”, governed by the law of the competent authority.
   b) rules of “substantive” law, relating to the functioning of the target company, governed by the law of the target company, and to be applied by the competent authority in which the target has its “registered office” (translated as “siège social” in the French version of the directive).

29. The rule has been formulated by giving priority to the “corporate seat” (in English: the “registered office”). [54] In case the securities are listed in the issuers’ home state, all jurisdiction

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[48] On the basis of art. 22, § 2, L. 10 June 1964 and of art. 1, R.D. 8 November 1989.

[49] Applicable to Belgian listed companies only.

[50] Art. 105, Testo Unico, Decreto legislativo 24 February 1998, n° 58; for a comment see: L. BIANCHI, *in* MARCHETTI and BIANCHI, *Disciplina delle sociétà quatate*, Giuffrè 1999, vol.1, 314.

[51] Art. 22, Loi sur les bourses of March 24, 1995.

[52] Art. 532 of the Portuguese Companies Act.

[53] Art. 1 (1) of the proposed directive.

[54] Apart from the discrepancy between the English (“registered office”) and French text (“siège social”, to be read as “siège réel”), the Dutch text refers to “statutaire zetel”, i.e. seat according to the company’s charter, which may be different from the two previous notions.

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will be exercised by and according to the rules of that state, both in terms of substantive law and of take-over regulations.

This rule is likely to create tensions, as no involvement has been provided for the supervisor of the state where an important part of the trading takes place. Underlying is a policy that does not favour listing in others markets, and hence submission to the authority of local market supervisors. It creates a perverse incentive to maintain listing in the home state, even if any substantive trading is absent.

The rule may have to be clarified as a consequence of the merger between the Stock Exchanges.

30. In case the securities have not been listed in the home state - at present a rather exceptional situation -, but are exclusively listed in another state, there might be diversity of competence.

With respect to supervision, the transaction in general will be supervised by the authority in charge of the market. A Luxembourg company, listed exclusively in Paris, will therefor come under French supervision. The subject matters to which this supervision extend, relate to the realisation of the bid, and will be detailed infra.

In case the securities have been listed in several states - the home state excepted, see n° 29 - there will be a rule based on time priority: the place of first listing will probably be the market where the securities have been most widely traded.

The directive further refines the hypothesis in case the securities have been admitted to several markets simultaneously: here the supervisory authorities will have to decide which one obtains supervisory competence. If this decision is not taken one month of the final date for implementation of the directive, the issuer will choose himself.

These elaborate provisions are obviously the result of an intensive discussion and arbitration, and do not necessarily reflect on clear conceptual approach. So e.g. is there no mention of assigning competence for securities of issuers originating in third states. The use of the time priority rule, without paying attention to the relative importance of the turnover in the markets involved, may lead to overburdening the supervisors in states with less experience in take-over matters.

31. The matter is further complicated by reserving issues related to company law to the competence of the "home state supervisor". This issue comes up only in case the securities have not been listed on the home market: indeed, only the home supervisor would than be in charge. (see nr. 29)

When a foreign supervisor is involved, he will only deal with the "procedural" aspect of the transaction. The company law related aspects will be dealt with by the home state supervisor, applying its domestic law. According to the preamble there will be a definite need for "co-operation between the different authorities".

32. Belong to the procedural or market related matters, and hence are of the competence of the state of trading, the following matters:

- "consideration offered in the case of a bid
- the procedure of the bid:
    - the information on the offeror's decision to make an offer
    - the contents of the offer document
    - the disclosure of the offer"

Belong to the realm of company related matters, and hence will be supervised by the "home state supervisor"

- the information for employees of the offeree company
- "matters related to company law:
    - the percentage of voting rights which confers control

- any derogation from the obligation to launch a bid
- the conditions under which the board of the offeree company may undertake any action which might result in the frustration of the offer".

Among the other important company law matters are rules relating to pre-bid defences[43] or the rules organising within the targets the power to take a stand on the bid.

33. The framework which has been set up by the directive can be illustrated by analysing a few typical issues encountered in take-over matters.

Disclosure has to follow the rules of the market on which the bid is placed, usually the market of the target's registered office, or - as indicated above - of its first listing. The same applies to the difficult question from which moment on a bid must be announced, who should announce the bid, what are the conditions of the bid, minimum or maximum duration of the bid[55], behaviour of the parties during the bid, restriction on acquisitions by the bidder and its allies, or by the target, its allies or directors, rules on higher bids or counter bids.

The directive does not mention that shareholders in all markets have to be informed in the same way. Apart from specific rules, one might refer to the equal treatment principle laid down in the 1979 directive, or to article 3(1)(a) of the directive, providing for "equivalent information"[56]. In any case, supervisors should collaborate to insure equal information in all markets concerned.

34. Some subjects have a definite relationship with company law. Only two will be analysed here: the rules on mandatory bids (art. 5), and the prohibition of defence tactics (art. 8). Although the principles have been laid down in the directive, the practicalities may show considerable differences between the states. So e.g. as to the bid price: some states request the bidder to offer the highest price at which he has accumulated his holding[57], while other states merely requests a "reasonable" price[58], or follow another price formula[59]. One can state, by way of hypothesis, that both rules comply with the wording of article 5 of the directive which calls for "an equitable price".

In a multi-state bid, which rule should be followed? The directive declares the home state rule applicable in case the shares are also listed in the home state.

In case of diversity, defined as described supra, the consideration should be determined according to the rules of the market of first listing. So, e.g. would a take-over of a Belgian company, exclusively listed in Paris, be governed by the less generous French rules, thereby facilitating take-overs. From a market perspective, there are good arguments for choosing the market rule: its effect on price formation, the reasonable expectation of market participants, the comparable treatment of all securities listed.

But if the securities are also traded in the home state, home state rules will prevail and considerable difference will be introduced between the securities on offer: the prices of Belgian shares, listed in Belgium, will expect and thus discount a higher return in case of a take-over than the French listed Belgian shares, reducing market transparency: To avoid more attractive French

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[43] In fact, legal writing before the directive took a similar position with repect to this point: Dürig, nt.20, at 748.

[55] It was announced that future French law would restrict duration to 6 months. See proposal introduced in the French Senate on 20 March 2000.

[56] Under schedule C, § 6 "equivalence of information". However, these rules are addressed to issuers of securities, not to bidders.

[57] E.g. the United Kingdom (§ 9.5 City Code) and Belgium (art. 41, RD 8 November 1989).

[58] France where art. 5-1-9 authorizes the CMF to appreciate the "recevabilité" of the offer. This implies an evaluation of the price offered, taking into account "whether objective criteria for valuation have been used and the characteristics of the target".

[59] In Italy, the price should not be less than the average of the market price for the last 12 months and the higher price for the same period at which the bidder acquired shares (art. 106, Testo Unico, or: Decreto legislativo 24 February 1998, n° 58).

take-over rules, Belgian company will maintain their Belgium listing. However, due to the merger of the Stock Exchanges, the place of listing may be determined, not by the issuer, by the Stock exchange. This will incite to regulatory arbitrage. The question is: are the mandatory bid rules, market or company law rules?

Some form of co-ordination, at least some clear policy guidelines, seem desirable.

35. The rules applicable to the target company will decide according to which regulatory system, the neutrality principle of article 8, declaring that the board of directors should abstain from "completing any action, other than seeking alternative bids which may result in the frustration of the offer", has to be applied. This rule cuts very deep into the company law structure, and severely limits shareholders and boards to protect themselves against hostile take-overs. It also affects, at least depending on the legal techniques followed, the company's financing: if the company plans to issue convertible bonds, it may be prevented from converting these into shares during the bid period as upon their conversion the board is "completing an action", that prohibition may ultimately decide on the outcome of the bid[60]. The directive only restricts post-bid defensive action, not the pre-bid defences.

Here too, Member States may implement the directive differently e.g. by further restricting pre-bid measures - as opposed to defensive or post-bid measures. If the state in which the company is listed forbids pre-bid protective measures, while the state in which the company has its registered office allows the board to have pre-bid protections against take-overs introduced, the solution to the conflict will have to be found in the directive. If the shares are listed in the home state where the target is located, only its jurisdiction will decide to what extent pre-bid defences can be put to work. As the directive does not forbid all pre-bid protective action, but only action undertaken by the board, the supervisory authority of the home state will have to measure to what extent anti-take-over techniques that have been put into place by the target run contrary to the wording of article 8 of the directive. The other states of trading will have to abide by the home state's position.

If no trading takes place in the company's home state, a decision of post-bid defences, and hence the demarcation line with pre-bid defences will be decided by the home state, and according to its legislation. It is considered a matter of company law, whatever the volume of trading that takes place outside the home state.

One can easily predict tensions between the two supervisors, the state where trading takes place being interested in promoting the success of the bid, while the home state wants to keep its domestic enterprises independent. This tension will become the more acute if trading on a regulated market in the home state has a merely marginal function in comparison to trading in the other states.

36. Equal treatment if often considered a fundamental principle of company law[61]. It has however no universal value[62]. The second directive imposed equal treatment only with respect to the matters dealt with in the directive[63]. Under Dutch law, equal treatment is not recognised as a general principle, as was highlighted in an important Hoge Raad decision[64].

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60 See for an analysis: E. WYMEERSCH, "Les défenses anti-OPA après la treizième directive; commentaires sur l'article 8 de la future directive", in FS Stoufflet, forthcoming.

61 See under Belgian law: M. NELISSEN-GRADE, "Het gelijkheidsbeginsel in het bijzonder bij inkoop eigen aandelen en kapitaalvermindering", in *Knelpunten van dertig jaar vennootschapsrecht*, 1999, 629.

62 See e.g. for the analysis under Dutch law: P. VAN SCHILFGAARDE, "Gelijke behandeling van aandeelhouders", in *Corporate Governance voor juristen*, Univ. Groningen, Kluwer, 1998, 19-28.

63 Art. 42 of the Second Company Law Directive.

64 HR 31 december 1993, *NJ* 1994, 436, nt. Ma. ("Verenigde Bootslieden").

The directive wisely does not adhere to strict equal treatment, but merely states that "all holders of securities are to be given equivalent treatment"[65]. Differences in treatment may be manifold, and justified.

The differences in the way the bid price is fixed in a mandatory bid case were mentioned above. According to the directive, market regulation is to be applied[66]. The investors will be thus confronted with the same offer. But there will be difference of treatment between bids depending on the place where the shares are listed.[67]

Equal treatment lies at the basis of the mandatory bid rule, as now introduced by article 5 of the proposed directive. According to Belgian case law, the right for a minority right to be entitled to tender his shares, in case of change of control, is a private, subjective right, flowing from the take-over regulation. The question will arise whether this right should be deemed to belong to the take-over rules, and hence will be governed by the rules of the place of trading or rather can be considered to be part of company law - being an instrument of minority protection, akin to a squeeze-out - and therefore are to be appreciated according to the law of the target company. The list in the directive gives no answer.

Should all shareholders be treated equally, and may shareholders who have sold their shares a short time before the bid, claim to be treated on the same footing as those who are responding to the bid? The case is important as bidders often attempt to acquire as many shares as possible before the bid: if these acquisitions are not final, the bidder's position may come under threat from a counterbidder. The answer to this question is positive in France, negative in Belgium.

The rule has been developed in French case law. In the "*Mutuelle du Mans*" decision[68], on the basis of a regulation enacted by the securities market supervisor[69], a public offer to acquire shares was held inadmissible due to the fact that a block holder had signed promises to transfer his shares to the prospective bidder, what would have lead to giving a clear advantage to the bidder and would have rendered all competition for the shares, and any counteroffer purposeless. The rule does not prevent the bidder to acquire shares before the bid provided these sales, having been effectuated before the bid is announced, have been duly disclosed, and would not have prevented counterbids to take place[70].

In Belgian law, pre-bid sales are final, even if they prevent other bidders to come in and bid a higher price[71]. The rule disfavours counterbids.

These differences in protection are without consequence in the system of the directive. Whether there is a difference will depend on the qualification of the rule as a provision of company law, or as a market rule. In the first case, the same rule will be applied, wherever the shares have been listed. In the second case, there will not be differences for a given bid: the conflict rules of the directive refer to one single legal system. One will only see differences between bids taking place in different states, or shareholders may be surprised that the rule to be applied will not be that of the company's status, but the rule of the market. If the above-mentioned rule preventing parties to conclude a deal forbidding the seller to tender his shares in a subsequent take-over is qualified as being part of company law, it will apply whatever the place of listing. If it is a market rule, it will apply if the shares have first been listed in that market, and have no listing in the target's home market. This may create difficulties. So e.g. if shares of a Belgian company

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65 Art. 3, (1)(a) of the Directive.

66 Art. 4 2(e) of the Directive.

67 See supra n° 34.

68 Paris 27 April 1993, *Rev. Sociétés* 1993, 605, nt. D. MARTIN and BOMPOINT; *Rev.Dr. Bancaire* 1993, 134, obs. GERMAIN and FRISON-ROCHE; *Bull. Joly Bourse* 1993, 396, nt. LE CANNU.

69 Règlement de la Commission des opérations de bourse, n° 89-03, art. 3.

70 Paris, 27 October 1993, D. 995, Somm., 200; *Bull. Joly Bourse* 1993, 748.

71 The facts referred to in the Wagons Lits case (Brussels, 6 August 1992, *R.Prat.Sociétés*, 1992, nr. 6611, 248 and Cass., 10 March 1994, *Rev. Dr. Comm. Belge* 1995, 15, nt. Glansdorff) was rather exceptional.

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are listed in Paris, a pre-bid sale would be fully binding under Belgian law, but would not prevent the seller to tender his shares as a subsequent bid on the French market. There also may be difficulties if in both jurisdiction, the rule is recognised, but applied under different conditions.

The French rule has been framed not as a company law rule, but as a technique to protect the effectiveness of take-overs, and the functioning of the control market. Logically the conclusion would be that only the rule of the market where the securities are traded should then be applied. It is not necessarily the rule that best protects investors: if French shares were only listed in Brussels, the French legal regime would not be applicable, resulting in a less take-over friendly regime.

37. Certain obligations imposed on the bidder by the target's take-over regulation, will also reflect on the bidder, even if the latter is not subject to a similar rule. These rules can be considered part of the take-over or “procedural” rules.

So e.g. the rule according to which the bidder has to abstain from - directly or indirectly - acquiring shares in the target during the bid period[72]. Although flowing from the latter's regulation, the bidder should be held to the same principle, as a rule of correct behaviour on the market.

Although affecting the ownership structure, the rule will be supervised and enforced by the supervisory authority in charge of the market of trading. Co-operation with the supervisor in the states where the company is located, or where the acquirer is located will be necessary.

This "spill-over" effect can be witnessed with respect to rules likely to affect the functioning on the market.

One can expect competition between regulators leading to upgrade their rules so that practices all over Europe will become comparable. This type of competition has been visible for many year, the London City Code having been considered the guideline and source of inspiration for several national regulators.

38. Whatever the place of listing, there will inevitably be issues that remain governed by the state under which the target has been functioning, this is according to its company law[73]. Challenges to the protective mechanisms which the target has introduced must inevitably be brought before the target state's supervisory bodies. Defensive action by the general meeting[74], or pursuant to validly undertaken pre-bid protections are matters of company law, and cannot be discussed, except in the home state of the company.

With respect to company law matters, the directive refers to the “applicable rules and the competent authority shall be those of the member state in which the offeree company has its registered office”. The question arises to what extent the supervisor in the company’s home state is competent in matters of company law: very often the administrative agencies in charge of applying the take-over regulations have no power to decide on company law issues, the latter being reserved for the courts. One can assume that the directive does not indirectly impose member states their judicial system.

In case different administrative agencies are involved, there will be a stringent need for co-operation between these agencies. The rules of the directive are somewhat weak in this respect. Between the judicial authorities there are no mechanisms for co-operation.

39. In some cases, the transaction may also involve the bidder's jurisdiction.

In exchange bids, the bidder is issuing securities in the target company's jurisdiction, calling for compliance with the latter’s securities regulation. There might be specific problems

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72 E.g. art. 5-2-13 of the Règlement général of the CMF.

73 But the ambit will be less ample than under the previous laws and interpretations: see X. BOUCOUBZA, *L'acquisition internationale de société*, Paris, 1998, nt. 550, 264.

74 Which is still permissible under art. 8 of the directive.

arising out of the technicalities of the rules relating to the issuance of said securities[75]. So e.g. it might be forbidden in certain jurisdiction to make a contribution in kind, in exchange for which the bidder's shares are issued under the condition that the outcome of the bid is successful. In these cases, the bidder's laws would be applicable.

Also if a contribution in kind is subject to preferential subscription rights, which was the case in some jurisdictions, e.g. Germany, the difficulty in issuing shares in favour of the sole target shareholders in an exchange deal may lead to rendering the bid unworkable. This would especially be the case if the share issue has to be decided on very short notice, this is by decision of the management board.

But the offer of these securities is subject to the rules of the place where the offer is made, i.e. in most cases in the target's state[76]. Here, the procedural rules of the directive would be applicable.

CONCLUSION

Cross border co-operation agreements between business enterprises raise numerous questions. Only two are tackled here: first, the difficulty to create bi-national horizontal groups. It was argued that there is a need for creating a "default form" set of rules, enabling firms to fully integrate without subordination, but by keeping their independent existence.

The second item analysed is that of cross border take-overs, a subject on which the impending EU-13th directive contains new rules. These rules will offer guidance for the whole range is issues and remove a great deal of uncertainty in the present market structure. The effect of the changed market structure as a consequence of the merger of the stock exchanges call for a further analysis[77].

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75 Paris, 13 July 1988, D. 1989, 160, nt. LE CANNU.

76 See A. VIANDIER, *OPA, OPE*, 1993, 513, and Paris, 13 July 1988, *D.* 1989, 160, nt. LE CANNU. Technically the case reviewed a decision by the Conseil des Bourses de Valeurs, refusing to admit a bid which due to previous arrangements with the seller of an important block, would have prevented the free competition to play especially in case of a counteroffer, and this contrary to the Cob’s regulation 89-03.

77 Which will be attempted in a study “The Harmonisation of Securities Regulation in Europe in the New Trading Environment” to be published in FERRAS, E, *Regulating European Markets.*