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Christoph VAN DER ELST
en Lientje VAN DEN STEEN

Opportunities in the M&A aftermarket: squeezing out and selling out

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Christoph VAN DER ELST en Lientje VAN DEN STEEN

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In a second part of this paper the legal framework of the squeeze-out right and the sell-out right is examined. First, it is shown that an economically efficient flexible framework can be in conflict with the constitutional protection of private property. Next, the mandatory rules for the squeeze-out and sell-out rights in the European Takeover Directive and in five European Member States – Germany, United Kingdom, France, Belgium and the Netherlands – are examined. The analysis shows that the straightforward economic analysis can not easily be transposed in a comprehensive regulatory framework. Part of it is due to the incomplete economic theory of the squeeze-out right and sell-out right. This is the case for the assessment of the price as the parties involved have conflicting interests. Courts, parties, independent experts, supervisory authorities all play a role in a different degree in the different countries. Next, there are national policy considerations. Third, some rules suggest that the economic theory is ignored. Finally, the European Takeover Directive is considered as another layer of legislation on top of the national rules. The harmonization efforts of the European Union are, if any, not successful. It can be expected that corporate mobility will compel legislators to offer an effective and efficient squeeze-out and sell-out system.

Opportunities in the M&A aftermarket: squeezing out and selling out

Christoph Van der Elst, CCL and Tilec, Tilburg University; FLI, Ghent University
Lientje Van den Steen, FLI, Ghent University

Abstract

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keywords

Takeover Directive - Squeeze-out - Sell-out - Fair price –Free rider problem – Economic efficiency – European Convention on Human Rights - Belgium –France – The Netherlands – Germany – The United Kingdom.

JEL Classifications: G34, G38, K22

Several studies have documented the cyclical pattern of mergers and acquisitions. In the 20th century five waves have been observed: the early 1900s, the 1920s, the 1960s, the 1980s, and the 1990s (Renneboog and Martynova, 2006). The sixth wave can be added: the 2000s (Renneboog and Martynova, 2005). The new deal volume surpasses any level ever reached. During the first half of 2006 the deal value of the announced mergers and acquisitions exceeded the deal value of 2002 and 2003. Especially in Europe merger activity soared significantly. The deal value in the first half 2006 exceeded $ 700 billion in Europe, even more than in the US. The increase of the deal value is not caused by an increase in the number of deals. The number of deals soared approximately 15 per cent. Hence the individual deal value increased. One phenomenon that explains this development is private equity funds that have the funds to acquire all but the very largest companies. Another reason is a number of large international mergers and acquisitions: the successful takeover of Arcelor by Mittal, the planned merger of Suez and Gaz de France and the tender offer of E.ON for Endesa account for more than 15 per cent of the European deal volume in the first half of 2006.

[INSERT TABLE 1 ABOUT HERE]

Economic, managerial and legal literature on mergers and acquisitions is overwhelming. The economic literature focuses on the efficiency of mergers and takeovers and in particular its role to discipline the management, (the allocation of) the control premiums, the influence on consumers and employees, valuation and the cost of capital, anti-takeover measures and more recently the common European business groups, pyramids and dual class shares. The interest of the management literature goes to the tactics of the game and post-deal integration of personnel, structures, systems and cultures. The legal literature studies can be subdivided in the business law approach which tackles issues like due diligence, representations and warranties and legal particularities of the take-over and merger process like legal obstacles, mandatory offers, anti-takeover measures, etc.

New legal rules and in particular the European Takeover Directive has shifted the interest of study to some particular features like the breakthrough rule and the political issue of reciprocity. Among the topics that, at least in Europe, did not receive the same amount of study are squeeze-out and sell-out rights.

The squeeze-out right is the (conditional) right of a majority shareholder to force the minority to surrender their financial instruments to the majority shareholder who as a result acquires 100 per cent ownership of the corporation. The sell-outright is the right of a minority (shareholder) to compel the majority shareholder to purchase the shares from the minority.

Due to the importance to fully integrate the companies involved in the transaction and to take into account the rights of minority shareholders, squeeze-out right and sell-out right must be considered important post-deal integration tools.

In countries where the squeeze-out procedure has been introduced, it is frequently used. It indicates that a regulatory system is efficient for the majority shareholder. In Germany the majority of the delistings go hand in hand with a squeeze-out. During the first year that the squeeze-out procedure was introduced, almost 90 per cent of all delistings followed a squeeze-out procedure. The following years the number of delisting drastically decreased together with the number of delistings where the majority shareholder froze the minorities out. By 2005 only two thirds of the delistings belonged to that kind. A number of majority shareholders awaited the regulatory change to start the procedure. This explains the high relative number in 2002. It is however less clear why the relative number continued to decrease after 2002. It could be that due to the retake of the stock market in 2002 a number of large shareholders rediscovered the advantages of a listing.

[INSERT TABLE 2 ABOUT HERE]

The anecdotic evidence for the sell-out procedure is less convincing. In France both squeeze-out and sell-out procedures are available. Squeeze-out procedures are far more often initiated than sell-out procedures. Viandier (1999) has only found 11 sell-out procedures over a period of ten years from 1989 to 1999, whereas the number of squeeze-outs exceeded 120 over a three year period from 1996 to 1999.

The remaining part of the chapter is structured as follows. Section 1 discusses the rationale for a squeeze-out and sell-out procedure. The economics of the take-over game and position of the squeeze-out right and sell-out right are examined. The advantages of the procedures are discussed. Section 2 briefly analyses the protection of private property vis-à-vis the squeeze-out procedure. Section 3 compares the procedures in different countries and highlights the differences. Section 4 concludes.

1. Rationale for the squeeze-out right and the sell-out right.

The analysis of the rationale for a squeeze-out and a sell-out regulation starts with the question whether any government intervention for this type of rules is desirable or necessary. The contractual view of the corporation opposes against regulation if the market economy achieves the efficient outcome without intervention. If it is in the interest of the firm, the corporate constituents will provide it. If it is in the interest of the firm to protect the position of the majority shareholders – the squeeze-out rule – or the minority shareholder – the sell–out rule - it can be left to the discretion of the corporate constituents to determine the efficient rules in the statutes of the firm. A corporate charter clause compelling a shareholder to start an acquisition bid is, at least in some jurisdictions, considered valid. A number of large Swedish corporations had such a type of clause before the mandatory bid rule was introduced (Nieuwe Weme, 2004:34). In other countries the legal doctrine disagrees whether these types of corporate charter clauses are valid. Different arguments plead against this kind of clause: it is not possible to compel a shareholder contributing against its will anything above and beyond the requirement, the performance is not in the interest of the company, it is not possible to oblige the shareholder to acquire the shares of other shareholders and it is in conflict with the independence of the shareholder (Van Olffen, 2000). These arguments are refutable if the provision is only applicable for the founders of the company and those shareholders who approve the provision. In that case the founders consider the clause efficient and the shareholders who approve the clause are autonomous to decide whether they will acquire the triggering number of shares or not. Despite the legal uncertainty, some charters do contain mandatory bid provisions. The July 2004 articles of association of the Dutch food nutrition company Numico states:

> “Any Shareholder (the “Offeror”) who obtains at its disposal or is deemed to obtain at its disposal Shares or Voting Rights, as a result of which this Shareholder has at its disposal or is deemed to have at its disposal Shares or Voting Rights representing thirty per cent (30 per cent) or more of the issued capital of the Company (“the Offer

> Threshold"), must make an offer to acquire all remaining outstanding Shares (the "Offer").
> …"

Similarly a sell-out right can be part of a contractual arrangement. In fact, due to the interest of the founders and incumbent shareholders of a company, clauses guaranteeing a sell-out right are common in shareholder agreements or articles of association. This tag along right gives the holder of an economic interest in a company the right to transfer this interest to a third party in a private negotiation for part of the shares. It requires from the seller of his economic interest to ensure that the arrangement with the bidder contains an offer by the bidder to purchase the interests of the other holders for an amount to be negotiated but generally equal to the amount the seller of the shares receives or an appraised value. However, these agreements and articles are commonly found in closed corporations though not in public corporations. Next, if this tag along right is part of a shareholders agreement, it is far from sure all shareholders all involved. Hence, regulatory intervention must be considered.

Contractual agreements without a regulatory back up lack effective enforcement. Furthermore these contracts will only take into account the maximization of the return of the constituent parties. This type of agreement can be socially inefficient. Self interested founders and shareholders will enter into agreements that extract a larger share of the future surplus (Burkart and Panunzi, 2004: 741-742). They will extract private benefits to the detriment of other parties. These parties have conflicting interests. Takeover regulation comes in as an instrument to mitigate these conflicts of interest. However, takeover regulation should offer solutions according to the different kind of parties involved. Ownership structures – the parties involved in the aforementioned contractual arrangements – can be classified in two main classes: concentrated ownership and dispersed ownership (Barca and Becht, 2001; La Porta, R., Lopez-de-Silanes, F., Shleifer, A. And R. Vishny, 1999; C. Van der Elst; 2001). In continental European countries most companies have major or controlling shareholders whereas the US and the UK are familiar with companies with a widely dispersed ownership structure.

In both continental European countries and Anglo-Saxon countries both types of ownership structures can be found, though the relative number differs. For a large sample of companies with a listing both in 1999 and 2005, the data reveal a large difference between continental European countries and the United Kingdom. In the United Kingdom, almost 80 per cent of listed companies have a dispersed ownership structure with no shareholders owning more than 25 per cent of the shares. 4 per cent of the companies have a majority shareholder. The largest shareholder of a British company has a mean voting stake of 18 per cent. In continental European countries between 40 per cent to 60 per cent of all companies have a majority shareholder. Nevertheless, between 20 per cent and 35 per cent of the listed companies have no major shareholder. The mean voting block of the largest shareholder in continental Europe is approximately 45 per cent.

Since both types of ownership structures exist in both systems, efficient takeover regulation should offer a framework to mitigate both types of opportunistic behavior. First, takeover regulation should help to restrain opportunistic managerial behavior in the dispersed ownership system. Small shareholders lack the incentives to effectively monitor management and rely on different mechanisms of external control like accountants and the market for corporate control. Second, takeover regulation, like sell-out rights and the exit on fair terms, should also protect minority shareholders in systems with concentrated ownership (Goergen; Martynova and Renneboog, 2005).

[INSERT TABLE 3 ABOUT HERE]

Grossman and Hart (1980) studied the dynamics of control allocations and the free rider problem. Their analysis is of importance as it provides a framework and motives for a squeeze-out right and a sell-out right. They consider a firm with a widely dispersed ownership structure and a bidder who does not own shares of the corporation before he approaches the corporation. When the bidder makes the offer, the shareholders of the firm can reasonably assume that the target company is worth more than the price the bidder offers. Otherwise he would not have made the offer and the efforts to acquire the shares of the corporations. When the bidder will be in control the return will be higher. Hence the strategy of the target shareholders will be to hold the shares and not to tender. They will free ride on the bidders' efforts to realize a higher value for the target company. If all shareholders believe the value-increasing efforts of the bidder and all of them think that their decision to tender or not will have a negligible impact on the bidder's likelihood of success, no shareholder will tender and the take-over will fail. In fact, acquirers will anticipate the future failures of tender offers and will no longer make bids for companies and the market for corporate control will dry. Like Burkart and Panunzi (2004:746) point out the success of the value-increasing effect of the takeover is a public good for the target shareholders and the incumbent shareholders prefer to extract the maximum gains resulting in a failure of the bid and refrain the market from further bids. Squeeze-outs can discourage this free riding.

Fortunately this picture is incomplete. Grossman and Hart (1980) suggest that the bidder must be able to withhold part of the post takeover share value from the minority shareholders. Shareholders will be tendering as long as the takeover price is considered to be higher than the share value under the incumbent management. After a successful bid the acquirer could divert a part of the dividends he collects.

Empirical evidence shows that controlling shareholders can allocate to itself a disproportionate part of the gains of the company. Recently a number of studies attempt to quantify the private benefits. The authors use one of two methods available to assess this expropriation by all shareholders. In the first method is it argued that the price the acquirer of a controlling block pays, reflects the cash flow benefits and the private benefits the acquirer obtains from his controlling position in the corporation. The market price after the announcement of the acquisition only reflects the cash flow benefits the other shareholders expect to receive. Hence the difference between the price paid for the controlling block and the market price reflects the private benefits of control. The second method studies companies, which have issued multiple classes of shares with similar cash flow rights but with differential voting rights. It allows the computation of the value of the voting rights. The market value of the votes is seen as a proxy for the private benefits of control. Only shares with voting rights can decide to dismiss the directors or decide how to complete the corporate contract. Dyck and Zingales (2004) applied the first method. In their study, a shareholder block transfer is defined as a control transaction if at least 10 percent of the stock is involved and the acquirer moves from less than 20 percent of the shares to more than 20 percent of the shares. All transactions were screened to exclude non control transfers like the transfer of shares among subsidiaries of one group, repurchases, recapitalizations and the like. The private benefit is measured as the price difference between the price per share paid for the control block and the price on the stock exchange two days after the announcement of the control transaction, divided by the price on the stock exchange after the announcement and multiplied by the proportion of cash flow rights represented in the controlling block. This correction is necessary to avoid a miscalculation due to imperfect competitive markets for controlling blocks. When the share price after the announcement is deducted from the price for the controlling block it assumes that the seller is able to capture the full value of the security benefits – those benefits that are not private - produced by the buyer. Dyck and Zingales (2004) discovered for 39 countries and 393 bids a mean premium of 14 per cent, going as high as 65 per cent in Brasil and -4 per cent in Japan. The maximum premium that has been paid was 299 per cent in Brazil and 217 per cent in the Czech Republic. In the Philippines one case was found with a negative bid price of 40 per cent. Dyck and Zingales (2004) further differentiated between acquisitions of control blocks of more than 50 per cent and others. The absolute majority of the votes increases the value of the block by 9,5 per cent of the total value, a significant difference.

Nenova (2003) applied the second method to measure the private benefits. She calculated the value of the votes of a control block in companies that have issued classes of shares with similar dividend rights but with different voting rights. Her study contains data of 18 countries. The value of a control block is computed. The value of a marginal vote depends on the voting power of the multiple-voting shares, the relative number of shares in each class and the size of the corporation and other characteristics. The adjusted value controls for firm size, the concentration of ownership, the excess dividend payment to a limited voting share and the liquidity of the different share class. The mean values were negative in Hong Kong and Finland but were as high as 48 per cent in Korea.
The observations for the value of votes are comparable to the block premium in control transactions with the exceptions for the results in Australia and Brazil. However Dyck and Zingales pointed at a sample bias and the number of Australian companies in the database of Nenova is very limited.

Both methods only measure the economic benefits of the control block. It is likely that shareholders in control enjoy other benefits, and in particular the psychic benefits from running the corporation. Dyck and Zingales (2004) suggest that both methods underestimate the value of control.

The evidence supports the idea that the cases of self-dealing will discourage free-riding by target company shareholders. Bradley (1980) discovered that the stock price of the target company did not soar in the post acquisition period though fell by 13 per cent. The stock price of the acquiring company's stock increased which is not in the interest of the remaining target shareholders. Further in most cases the bidder already has a stake in the target. Even if the post-takeover value has to be offered, the value improvement of the initial stake flows to the bidder. In general, the initial stake will be less than 30 per cent as this is the triggering threshold for the mandatory take-over bid. This rule does not apply to the companies with a majority shareholder. It can be argued that in those companies a large part of the value improvement will remain in the hands of the acquirer. However, the influence of the majority shareholder before the bid can be considered substantial. Hence the post-takeover share value might be limited. Another alternative to solve the free riding problem besides the extraction of private benefits and squeeze-outs, can be leverage. Minority shareholders will tender if they anticipate the risks of remaining a minority shareholder in a highly leveraged company (Burkart and Panunzi, 2004). Debt will be senior to equity and this will decrease the expected post-takeover share value.

Other arguments that support the introduction of a squeeze-out and sell-out rule are:

- The buyer of the company frequently wishes to acquire all shares of the target company in order to obtain exclusive control over the target. The exclusive control offers a number of advantages: general meetings – if any is necessary – can be organized as the acquirer thinks appropriate (like a written general meeting), there are no minorities that can ask questions at the general meeting of shareholders, etc. In short, retaining a small number of shareholders can be costly (McCahery, Renneboog, Ritter and Haller, 2004, 636). Full control is seen as a part of the acquisition planning. As Herzel and Colling (1984) put it: "The ability to squeeze-out minority shareholders and thus obtain 100 per cent of the equity of a corporation is a basic condition of the current market for corporations."
- Related with the former argument is the ability for the bidder to easily access the assets of the target to pay off the debt for the financing of the deal. The remaining minority shareholders can successfully argue that it is not in the interest of the company or of all shareholders that the assets of the target are used to pay back the debt of the acquisition. Freezing the minority shareholders out avoids this kind of dispute. It must be noted that in Europe there are strict rules to finance the acquisition of the shares with the assets of the target.
- In groups of companies the board of directors of the 100 per cent-held subsidiary can align the management of the subsidiary with the group's strategy and subordinate the interest of the subsidiary. In companies with (small) minority shareholders the board of directors has to run the company strictly in its own best interests and take into account the interests of the minority shareholders in its decision procedures. Synergy gains are important business considerations in acquisition decisions. In groups of companies it can be difficult to structure the development of new activities if the group management must take into account the interests of the minority shareholder. Must a business opportunity equally be allocated among the companies of the affiliated group in order to allow minority shareholders' participation or can it be allocated in one subsidiary (Gilson and Black, 1995)? Conversely, minority shareholders can use the sell-out rights in circumstances where they judge the board does not sufficiently take into consideration their interests.
- The acquisition of the full control over the company allows going private by means of canceling the remaining equity securities. It eliminates the costs of public ownership which are considered significant. Gilson and Black (1995) estimated these costs between 60.000$ and 400.000 $ each year. Securities law, listing rules and company law are not necessarily harmonized. A successful takeover does not necessarily allow the bidder delisting the target and fully integrate the acquired company. A squeeze-out helps this process if the relation between the different legal instruments is not disputed.
- Some tax rules only allow transfer of losses and profits in a group if it is a 100 per cent-held subsidiary (Bergström, Högfeldt and Molin, 1994).
- Finally, the squeeze-out right enhances legal security. In some jurisdictions the supervisory authority compelled the majority shareholder ex post to share the control premium with the minority shareholders.[1] This ex post approach creates legal insecurity and can distort the proper functioning of the market.

In short, full ownership is considered of higher value than large majority ownership. Under this condition, a bidder would be willing to offer a higher price for the remaining shares after a successful (or conditional) takeover bid. Minority shareholders will anticipate and not tender their shares or the bidder must already offer the higher price in the first stage of the offer. The squeeze-out rule can overcome this problem. Hence the squeeze-out rule can influence the dynamics of the tender offer (Burkart and Panunzi, 2004). A bidder can set the condition for a bid to be retained at the squeeze-out level. If the bid is successful, the bidder will decide whether or not he squeezes the minority. In case he does, the minority shareholders will receive the bid price.

The shareholder compares the returns of tendering and retaining. There are five possible outcomes but one of them is unlikely to happen. First, if the bid fails, the position of the shareholder does not change whether he tenders or retains. Theoretically his value of the shares remains at the level of the pre-takeover value. If the shareholder tenders, he will receive the bid price if the bid is successful. If he retains and he is squeezed the shareholder receives the bid price. If the bid is successful and the bidder does not squeeze the retaining shareholders, their return will be the post-takeover value. However, if this value is higher than the bid price, it is very unlikely the bidder will not make use of the squeeze-out procedure. He will have to share the additional value with the retaining shareholders. Hence, the shareholder will realize a maximum return when accepting the bid price. The additional post-takeover value flows to the bidder, solving the Grossman and Hart free rider problem. It should be noted that the threshold to squeeze depends on other factors, like different tax advantages at different levels of ownership concentration. Further, if markets are efficient, competition by the incumbent management make it unlikely that the bid price of less than the pre-takeover value will be successful. In theory a bidder will anticipate and starts a bid at a price that at least equals the pre-takeover value. However, empirical evidence contradicts this argument. The study of Dyck and Zingales (2004) proves bids below the market price of the shares are regularly launched. Furthermore, there is a trade-off between the protection of minority shareholders and the development of the market for takeovers. The higher the threshold, the higher the probability an insufficient number of shareholders will tender, the higher the probability the bidder will offer a higher bid price, the lower his return, the lower the number of takeovers. Figure 1 summarizes the decision tree.

[INSERT FIGURE 1 ABOUT HERE]

The sell-out right offers the minority shareholder the opportunity to compel the majority shareholder to buy his shares. The sell-out right comforts the shareholder to retain and to reject an offer, especially when the bid price is lower than the pre-take over share value. If it turns out that the takeover is successful, it offers the minority the right to sell. The minority shareholder will use this right if the sell-out price is higher than the post-takeover share value.

The aforementioned theory of Grossman and Hart started from the hypothesis of a widely dispersed ownership structure and a bidder without a stake in the company. The data of the ownership structure of continental European corporations show that the majority of companies have a controlling shareholder. This setting creates another type of transactions. A bidder negotiates with the controlling shareholder. If the negotiation results in a transaction, a mandatory bid is launched to acquire the stakes of the other shareholders.

Wymeersch (1998) studied the takeover market in France and Belgium from 1988 to 1996. More than half of the takeovers in France are started after the acquisition of a controlling shareholder block. Most of the takeovers are followed by a freeze-out. A similar pattern can be found in Belgium. In a majority of the acquisitions, the majority shareholder started a bid to acquire the remaining minority stakes.

[INSERT TABLE 4 ABOUT HERE]

The incumbent controlling shareholder will sell his stake if the bidder's price is higher than the sum of the security benefits and the private benefits he enjoys. The security benefits and the private benefits will also determine the bidder's price. In this setting not all transactions will be socially beneficial and some transactions that take place will be to the detriment of the minority shareholders. The private benefits of both bidder and incumbent controlling shareholder influence the efficiency of the transactions. First, if the security benefits of the bidder are smaller than the security benefits of the incumbent controlling shareholder but the private benefits of the bidder are larger than the private benefits of the incumbent shareholder including the difference between the higher security benefits of the incumbent controlling shareholder and the security benefits of the bidder, the transaction will take place but the remaining minority shareholders will be worse off. The minority shareholders will be left with the lower security benefits of the bidder.

The other scenario is that the private benefits of the incumbent controlling shareholder are high whereas the private benefits of the bidder are low. If the security benefits of the bidder are higher than those of the incumbent controlling shareholder, the beneficial take-over will not take place as long as the joint security and private benefits of the bidder do not exceed the joint security and private benefits of the incumbent shareholder. He will not accept an offer that is lower than his total benefits. The positive externality will not be taken into account.

The new mandatory take-over rule intensifies the problem. The bidder not only has to pay the incumbent controlling shareholder a price exceeding his security and private benefits, he will have to offer the minority shareholders an "equitable" price. Despite the difference between "equitable" and "equal", a potential bidder can be discouraged to start take-over negotiations with the incumbent controlling shareholder. Conversely, bids that are launched are efficient as the price the bidder is willing to pay will exceed the sum of the private and security benefits of the incumbent controlling shareholder. Due to the mandatory bid rule, all the minority shareholders will be offered an "equitable" price. Hence, there is a trade-off between the protection of the minority shareholders and efficient control transfers.
Squeeze-out and sell-out rights can enhance the efficiency in the market of control blocks. The squeeze-out right allows the bidder who bought a control block and started the mandatory bid to take the aforementioned advantages. The sell-out right guarantees the minority shareholder he can compel the majority to purchase his stake.

In the European setting squeeze-out and sell-out rights can have value outside the scope of takeover regulation. Controlling shareholders can increase their stake up to the level a squeeze-out is allowed. Conversely, minority shareholders can compel a controlling shareholder to acquire the remaining stakes. The European High Level Group of Company Law Experts addressed the issue, although they focused on these rights in the context of a takeover bid. First, a majority shareholder may be tempted to abuse his dominant position. Next the market in the share can become illiquid and the market price can be considered inappropriate (HLGCLE, 2002). Both considerations are valid outside the scope of takeovers. Both considerations and especially the first are valid as soon as the company has a controlling shareholder. Why should the squeeze-out right and the sell-out right be restricted to situations where the expropriation is less an issue? A small controlling block might create stronger incentives to abuse corporate power than a supermajority block (Enriques, 2004). In cases the majority shareholder has a stake of more than 2/3 or ¾ of the votes, or in some countries 4/5

of the votes, the rights of minority shareholders are extremely limited. The squeeze-out and sell-out thresholds go even beyond these levels of ownership concentration. Both rights could overcome these expropriation problems if the threshold is set at a lower level.
A comparison can be made with a merger or division. In a merger or division scenario a (super)majority approves the transaction and binds the minority shareholders. These shareholders must accept the consideration or make use of the appraisal rights. The difference with the squeeze-out lies in the consideration. In a merger or division, shareholders are not truly gone but receive shares in the new entity. In freeze-outs, the consideration is in cash. The legislator argues that this type of transaction, including a cash consideration, requires the application of additional tests, like an entire fairness test or a higher threshold than for mergers or divisions. Delaware law offers a way-out. When the bidder acquires more than 90 per cent of the shares the freeze-out transaction can be effected without the formal action of the controlled subsidiary's board. Hence this type of transaction is started after a tender offer conditioned on the acquisition of at least 90 per cent of the stock. Burdensome requirements like the entire fairness tests are avoided. The economic rationale of this high threshold lies, at least for the squeeze-out right, in the equilibrium of the constitutionally protected property rights (of the shares) and the social efficiency gains of efficiently managed 100 per cent-subsidiaries. In this equilibrium, the property right includes the individual assessment of the shareholder that the shares, considered as a commodity, results in an optimal return as well as the idea of the continued willingness of shareholders cooperation. Efficiently managed companies contain the element of liquid markets. Hence, the optimal trade-off cannot be fixed and trial and error of most corporate law systems ended with a triggering threshold of 90 per cent to 98 per cent for the squeeze-out and the sell-out.

Goergen, Martynova and Renneboog (2005) summarize the economic rationale for a squeeze-out right and the sell-out right as follows. The squeeze-out right mitigates Grossman and Hart's potential free-riding behavior of minority shareholders and allocates a larger share of the takeover gains to the bidder. It facilitates takeovers. Conversely, sell-out rights offer minority shareholders a larger part of the benefits and they discourage bids and the take-over market. Both measures reduce the conflicts of interest between the majority shareholder and the minority shareholder. Goergen, Martynova and Renneboog (2005:252) first conclude that both rules can reduce the incentives of holding controlling blocks in the long run in countries where the concentrated ownership structure is the most common ownership structure but continue that the impact is likely to be small, due to the considerable private benefits of controlling blocks, especially in French law jurisdictions (Goergen, Martynova and Renneboog, 2005:260). Table 5 summarizes the findings of Goergen, Martynova and Renneboog (2005)
Next the issue of the protection of property rights is addressed.

[INSERT TABLE 5 ABOUT HERE]

2. Squeeze-out right and the protection of private property.

2.1. The First Protocol of the European Convention of Human Rights.

Article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11 (Paris, 20 March 1952) states that « every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law ». In the second paragraph of this article, this right is mitigated by recognising "the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".

The European Court on Human Rights (ECHR) first spelt out the article's purpose in the *Marckx* judgment, declaring that "by recognising that everyone has the right to the peaceful enjoyment of his possessions, article 1 is in substance guaranteeing the right of property." The concept of property is autonomously interpreted, and is granted a very broad interpretation by national courts and the ECHR alike.

The conditions for application of article 1 were later defined in the *Sporrong and Lönnroth* Case.[2] As interpreted by the Court, the article's three sentences embody three rules for protection. The first is general, and states the principle of peaceful enjoyment of property. The second covers deprivation of possessions and subjects it to certain conditions. The third recognises that states are entitled to control the use of property in accordance with the general interest. The last two rules must be interpreted in the light of the general principle laid down in the first. Each of these three rules corresponds to a different kind of interference with property ("interference with the substance of property", deprivation of property, control of the use of property). Control and deprivation are two very different types of interference, deduced from the letter of article 1. Deprivation may be defined as dispossession of the subject of property: by taking the possession away from its owner, it removes the attributes of property from it. Deprivation is, in principle, transfer of property. Control involves no transfer: the owner retains his property, but is restricted in his use of it. "Interference with the substance" of ownership is a purely judicial construct.

When the ECHR is called upon to judge on a case, it must first consider whether there is a property right. To avail usefully of the protection offered by article 1 of Protocol No. 1, an applicant must show that his right to use or dispose of his property has been interfered with. If this is the case, then the court must decide under which of the three rules of article 1 the interference falls. First, the Court assesses if the case falls within the ambit of the second or third rule. If this is not so, it turns to the first rule. Next, the Court will examine whether the interference serves a legitimate objective in the public or general interest. Secondly, it will look into the proportionality of the interference. That is, does it strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights? Thirdly the interference must comply with the principle of legal security or legality. If the answer to any of these questions is negative, article 1 is infringed.

The interference with property must be legitimate. It should be in accordance with the public interest (in cases of deprivation of property) and the general interest (in cases of control of the use of property). The concept of public interest is very broadly interpreted. The ECHR recognised that the public interest could be the interest of another individual: "a taking of property effected in pursuance of legitimate social, economic or other policies may be 'in the public interest', even if the community at large has no direct use or enjoyment of the property taken".[3] Definitions of public interest also vary from country to country and over time. As a consequence, this interpretation falls within the margin of appreciation granted to states in implementing the Convention. Furthermore, any interference with property should be "appropriate". The legislature's judgment must be manifestly without reasonable foundation to be declared incompatible with article 1. Secondly, the interference should be "proportionate", meaning that a measure is "both appropriate for achieving its aim and not disproportionate thereto".[4] This allows the Convention bodies to verify that the aims of legislation and the means it employs are balanced if no other, less harsh measures can be used. In cases of deprivation of property, proportionality is respected if the dispossessed owner is awarded compensation. Thirdly the interference must be lawful, i.e. in accordance with domestic law.

2.2.The application of the first protocol to the squeeze-out rule.

At first sight, the squeeze-out rule could be considered a type of deprivation, since it involves dispossession of the shareholder, following a legal provision. However, already in 1982 the ECHR decided in the *Bramelid Case*[5] that the (Swedish) squeeze-out did not fall within the second rule, since this reglementation only restricted the rights and duties of shareholders within the company. This leads to an examination regarding applicability of the first rule of article one of the Protocol (the right to peaceful enjoyment of one's possessions) to the squeeze-out regulation. In other cases, the applicability of article 1, second rule, does not seem to have been a problem.[6]

As stated above, in order to decide if the squeeze-out rule infringes article one, the Court applied the threefold test described above. Assuming that the lawfulness condition is fulfilled (meaning that the squeeze-out is performed in accordance to domestic law), the legitimacy of the squeeze-out needs to be examined first. In other words: does a freeze-out conflict with the "public interest"? Does the bidder avail of a real, legitimate interest to buy out the minority shareholders? This can be answered affirmatively; due to the squeeze-out the bidder can turn a publicly held company private, or even delists it, and furthermore avoid unnecessary administrative costs. The economic rationale of the squeeze-out and sell-out right is discussed in the first paragraph of this chapter. Secondly, the proportionality test applies to two parts. The first weighs the means of the regulation against the purpose of the regulation. Are there other, less harmful, means to obtain the same result? The squeeze-out mechanism is very hard to replace. Other means, less harsh but obtaining the same result, are hard to come across. The second part of the proportionality test balances the disadvantages caused by the squeeze-out against the general interest. In squeeze-out matters this "general interest" is that of the company itself, since it is the company who is deemed to benefit most from the squeeze-out procedure. Because the minority shareholders are indemnified, it is usually stated that the squeeze-out rule does not cause a disproportionate disadvantage.

The Report of the High Level Group of Company Law Experts on issues related to takeover bids likewise stated that, because the ability of one party to enforce the acquisition of the shares of another represents a significant infringement of the latter's vested rights, such a squeeze-out right can only be justified in exceptional circumstances and where there are sufficient safeguards in place.

Various courts in the Member States have ruled that the squeeze-out right is not to be regarded as incompatible with protective provisions such as the European Convention on Human Rights, in that this right is not exercised to satisfy private interests only.[7] There is indeed a general and public interest in having companies efficiently managed on the one hand, and securities markets sufficiently liquid on the other hand. So long as the squeeze-out right applies only when the minority is fairly small and appropriate compensation is offered, the use of squeeze-out to address these public interests is proportionate (Report of the High Level Group of Company Law Experts on issues related to takeover bids, 2002:61).

A high threshold to trigger a squeeze-out and/or a sell-out can be in conflict with the economic efficiency hypothesis. Different thresholds can optimize the result in different settings, though deviating from high thresholds could be judged as contrary to the constitutional right of property protection.

3. The squeeze-out right and the sell-out right in a comparative legal perspective.

The equilibrium between the optimal functioning of the capital market and the protection of property rights of minority shareholders puzzles the legislator in many countries. At the European level the takeover directive requires the European Member States to provide majority shareholders the squeeze-out right and the minority shareholders the sell-out right in a takeover transaction. Despite the harmonization efforts of the European Union, the legislators still struggle to provide both rights outside the limited scope of the directive. The next section analyses the legal framework in some of the Member States.

The economic analysis of the (dis)advantages of the squeeze-out and the sell-out right enables an assessment of the different operational squeeze-out and sell-out systems in a number of European countries. Most of the Member States are familiar with companies with concentrated ownership, the United Kingdom being the exception. This assessment will illustrate how the different Member States as well as the European Union address the equilibrium between the protection of property rights (of the shares) of the minority shareholders and the efficiency of the market.

Before, the European Takeover Directive was enacted the sell-out and squeeze-out were not regulated by any of the existing company law instruments adopted at EU level. A form of squeeze-out right and sell-out right was included in the draft 9th Directive on the conduct of corporate groups, of which article 33 and article 39 would permit an undertaking which had acquired directly or indirectly 90 per cent or more of the capital of a public limited company to make a declaration leading to the formation of a group and providing for the compulsory acquisition of the shares of the minority shareholders. The draft 9^{th} Directive has however not led to an official proposal from the Commission.

The Takeover Directive lays down the principles for the squeeze-out and the sell-out right in the articles 15 and 16. Clearly the need to ensure an adequate level of minority shareholder protection leads the European legislator to level both rights, despite their diverging economic rationale. Article 16 of the Directive, concerning the sell-out right, is drafted to assimilate almost entirely to the squeeze-out provisions of article 15 of the Directive. From now on, any reference to the Directive will refer to both the squeeze-out and sell-out rule. Any differences between the two will be expressly indicated wherever necessary. Special sell-out rights organized by the laws of several Member States in specific situations, e.g. following an application by a shareholder or shareholders on the grounds of "oppression" ("unfairly prejudicial conduct of the company's affairs") by the controllers of the company, usually leading to a court ordered buy-out of the complainants by the majority, or sometimes by the company do not fall within the scope of the present chapter.

The comparative analysis includes the squeeze-out and sell-out rules in Belgium, France, The Netherlands, the UK and Germany and the Takeover Directive.

Regarding other European Member States, some important features can be highlighted. Italian law mostly is renowned for setting its squeeze-out threshold at 98 per cent, the highest of all Member States, while Ireland has set the lowest threshold, being 80 per cent, both for squeeze-out and sell-out. It is understood that in its Proposal implementing the Takeover Directive, Ireland will increase the threshold to 90 per cent but only for companies falling within the Directive's ambit. (Sagayam, 2006:12). Austria allows a squeeze-out only under certain conditions, and in a statutory upstream merger. Luxembourg enacted the law implementing the Takeover Directive on 19 May 2006, almost literally taking over the Directive, although the squeeze-out threshold is set at 95 per cent and the sell-out threshold at 90 per cent. Sweden, Finland and Denmark have squeeze-out procedures, all setting forth a 90 per cent threshold. The Portuguese squeeze-out threshold is set at 90 per cent as well. Spanish law does not provide for a proper squeeze-out procedure, there is, as long as the Takeover Directive is not implemented, only a sort of "redemption" procedure. This is subject to four strict rules. The majority shareholders must own at least 90 per cent of the target shares, the redemption must be approved at a shareholders' meeting by a majority of the minority shareholders, the redemption must comply with the target's corporate interests and finally, the redemption price must be fair. If no redemption is possible, the target may delist its shares by launching a buyback offer on terms (including price) approved by the Spanish stock-exchange regulator.

In short, the squeeze-out procedure is available in English, German and Scandinavian legal origin countries, but only in a small majority of the French legal origin countries. The majority of the German legal jurisdictions adopted the rule since the 1990, whereas it was already available before that time in Scandinavian and English origin countries (Goergen, Martynova and Renneboog, 2005). More countries will adopt this right due to the provision in the takeover directive.

Belgium, France, the Netherlands, Germany and the UK all have a squeeze-out regulation, but only France and UK have a proper sell-out mechanism in place. Hence, both rules are not considered as joint procedures to be provided for. Before examining more closely the minority shareholder protection mechanisms in the selected countries, the legal framework in place in these countries will be briefly described.

3.1. General framework of the squeeze-out right and the sell-out right in selected European countries.

3.1.1. Belgium.

The Reparation Law of 13 April 1995 introduced a squeeze-out procedure into Belgian company law, aiming at rationalising the well functioning of a company with highly concentrated ownership. As research abundantly has shown, the Belgian corporate landscape historically has been dominated by controlling shareholders, similar to most continental European countries (Berglof and Burkart, 2003:176). The decrease after the 1995 law until the late 1990s did not continue in the new millennium (Van der Elst, 2006).

Article 513 of the Companies Code (old article 190 quinquies) provides the main legal framework, governing different types of squeeze-outs for "public" and "private" companies. The amended Royal Decree of 1989 on Takeovers and the Royal Decree implementing the Companies Code contain a detailed set of rules, the former decree for "public" companies limited by shares, the latter for "private" companies. The Royal Decree on takeovers for "public" companies, provides for two types of squeeze-outs. The first is called a "simplified squeeze-out procedure" and can be initiated by a bidder who controlled the company (directly or indirectly, alone or with others) before the initial public takeover bid; and, following the bid, owns 95 per cent or more of the securities of the company. If the bidder owns 95 per cent of the securities in the target, following either the bid or the reopening of the bid (which is mandatory when the bidder owns at least 90 per cent of the securities to which the public takeover offer relates), provided it reserved such right in the offer document (prospectus), it can reopen the bid again for at least 15 days with a view to 'squeeze-out' the remaining shareholders on the same terms as the original offer. However, there is also a view that also in this case only cash can be offered in a squeeze-out. Any securities not sold at the end of this period are deemed to be transferred automatically to the bidder and the funds necessary to pay for the shares are put into an escrow account, according to article 32, 3rd par of the Royal Decree on Takeovers. Secondly, chapter IV of the Royal Decree on Takeovers allows a person who holds 95 per cent of the voting securities of a company other than as a result of a public bid to squeeze-out the remaining shareholders. The procedure is similar to the squeeze-out following a bid but is adapted to take into account its specific nature. For instance, the offer can only be made in cash and the bidder must include in the offer document a report from an independent expert containing an opinion as to the fairness of the price offered.

As for "private" companies, the Royal Decree implementing the Companies Code grants a squeeze-out right to a bidder, owning 95 per cent of voting securities of the target company, being a "private" company. A private company is a company limited by shares which does not publicly appeal to the savings.

The sell-out right does not yet exist in Belgian law. At most one can refer to the conflict settlement rules, which grant shareholders the right to compel other shareholders to buy their shares, but only in cases of serious conflict which make virtually it impossible to continue holding the shares in the company, e.g. in cases of unsolvable conflict.

The Court of arbitration ('Cour d'arbitrage/Arbitragehof') decided in an important judgement of 14 May 2003 that the difference between the shareholders of "public" companies and the shareholders of "private" companies, consisting in the fact that in the context of a squeeze-out procedure, the former have the right to refuse the transfer of their shares when the latter have not the same right is not contrary to articles 10 and 11 of the Belgian Constitution (i.e. not discriminatory). The Court of arbitration also judged that the difference between the shareholders holding 95 per cent of the shares of a company limited by shares (NV/SA) and the minority shareholders (holding 5 per cent) of the same company consisting in the fact that only the majority shareholders have the right to launch a squeeze-out when the latter do not possess a 'symmetric' right (so called 'sell-out') is not contrary to articles 10 and 11 of the Constitution. The Court of arbitration did not expressly examine the question of the legality of the squeeze-out procedure in light of the rules protecting the private property, in particular article 16 of the Belgian Constitution concerning expropriation for public purpose. However, it can be deducted from the Court's decision that the legal guarantees offered to the shareholders of "public" companies, such as a report from an independent expert and control by the Belgian Banking, Finance and Insurance Commission, ensure that the squeeze-out regulation is not contrary to article 16 of the Belgian Constitution nor to article 1 of the first protocol of the European Convention of Human Rights (protection of private property) (L.-F. du Castillon, 2003:301).

A Bill implementing the Takeover Directive is being drafted.

3.1.2. France.

In 2000, the French Code Financier & Monétaire compiled several separate laws and regulations in financial law into one Code. Article 433-4, in replacement of Law nr. 96-597 of 2 July 1996, offers the regulatory framework for the squeeze-out and sell-out rights. Article 433-4 provides the right for the minority shareholders to be "duly compensated". The detailed filling in of article 433-4 is left to the General Regulation of the Financial Markets Authority (Règlement Général de l'AMF). The AMF issued this Règlement Général in 2004. The second book of the Règlement Général, implementing article 433-4 of the Code Financier & Monétaire, contains separate chapters for the squeeze-out and sell-out rights, hereby replacing article 5-6-1 up to 5-7-3 of the old General Council Rules. Particular about the French system, is that the minority shareholder must initiate a buy out offer (article 236), before continuing the actual squeeze-out or sell-out (article 237). Article 236-3 and 236-4 provide the buy-out offer rules regarding squeeze-outs, whereas article 236-1 and 236-2 do the same for sell-outs. In some cases, as put forward in the articles 236-5 and 236-6 a controlling shareholder can be compelled to make a public buy-out offer. Article 237 contains the actual procedure for a "retrait obligatoire", a mandatory freeze-out.

The Act of 31 March 2006 on takeover bids ("Loi relative aux offers publiques d'acquisition"), implements the Takeover Directive. The content of this legislation must be seen within the political and economical background of the French upheaval around the alleged Danone takeover by PepsiCo. This act adds a paragraph to article 433-4 of the Code Financier & Monétaire. In April 2006, the AMF launched a consultation concerning the proposed changes it will have to make to its Règlement Général, implementing the March 2006 Act. As to the squeeze-out and sell-out rights, article 236 Règlement Général remains mostly unaltered. The Senate's Financial Commission's proposal to reduce the threshold to 90 per cent of the voting share capital was rejected by the Senate. Especially article 237 of the Règlement Général will be revised according to the Directive's guidelines, by introducing a squeeze-out and sell-out right applicable without having to make a public buy out offer first. A three month term, after the bid period, is installed, although the AMF remarks that this is a considerably long period. The 95 per cent threshold applies to the capital or the voting rights. The valuation method refers, first to the price proposed in the last bid (presumed to be fair, according to article 433-3, I new Code Financier & Monétaire), or in subsidiary order, to the price resulting from the evaluation made by an independent expert (following the old "multicriteria" approach). The new article 237 states that the consideration can be securities if the first bid was in securities, conditional upon an optional offer in cash though, determined according to the expert's opinion. Furthermore, the old Règlement Général did not demand the bidder to retain a minimal price in his buy out offer, while in the Proposal for the new Règlement Général, the bid offer which does not reflect an accurate valuation of the target company, may be rejected.

The old rules regarding squeeze-out and sell-out being triggered after a public buy out, remain in force next to the procedure in the revised article 237 of the Règlement Général.

3.1.3. United Kingdom.

The UK Companies Acts contains only a limited number of provisions with regard to the conduct of a takeover offer. There are, however, a number of provisions of the Companies Act 1985 which are relevant to the squeeze-out and sell-out right.

Already in 1926 the Green committee on Company Law Amendments recommended allowing the compulsory purchase of minority shareholders after a takeover. The Companies Act 1929 implemented squeeze-out provisions in article 209, later accompanied by the reverse right for the minority shareholder to sell-out. Both rules were inserted into the 1985 Companies Act in its part XIIIA (correspondingly, Part 14 A of the Companies Northern Ireland Order 1986).

Takeover activities in the UK are overseen by the Takeover Panel since 1968, a highly reputed body which also drew up The City Code on Takeovers and Mergers, a set of guidelines concerning takeovers, which however has no legal force. Up to this point the Code does not foresee a squeeze-out nor a sell-out right to minority shareholders. The Companies Act retains a broader ambit than the Code.

The British legislator aimed at preserving the benefits of the flexibility and informality of the UK 's existing takeover regulatory regime within the new legal framework established by the Directive. The Takeover Directive is being implemented into UK national law through the introduction of the Company Law Reform Bill ("CLR Bill") and changes to the Takeover Code. The "squeeze-out" and "sell-out" provisions and certain other aspects of the Companies Act 1985 are being altered in order to take account of the Directive.

As the CLR Bill will not become law before the required date for implementation of the Directive, 20 May 2006, interim regulations to implement the Directive, also referred to as The Takeovers Directive (Interim Implementation) Regulations 2006 ("the Regulations"), have been drawn up. These regulations take effect on 20 May 2006 and will remain in force until the relevant provisions of the CLR Bill become operative (which is expected in 2007). During this interim period, those involved in the takeover of a company registered in and traded on a regulated market in the EEA will need to refer to both the Regulations and the Takeover Code for a full statement of the legal requirements.

The Regulations only contain squeeze-out and sell-out provisions necessary to give effect to the Directive, and therefore will only apply in the Interim Period to bids and companies covered by the Directive (essentially bids for UK registered companies traded on a regulated market). In the UK the Official List of the London Stock Exchange is a regulated market but the AIM Market and OFEX are not. Accordingly, for those companies whose shares are traded on the AIM Market or OFEX (and for other companies whose shares are not traded publicly but are governed by the Code) takeover bids will continue to be governed by the Code until the CLRB becomes law.

Since the squeeze and sell-out provisions in the Directive are broadly consistent with the provisions in Part 13A Companies Act, only some minor changes were required. These amendments are addressed in the CLR Bill and, for companies whose securities are admitted to trading on a regulated market, are being implemented by way of the Regulations 2006. It is important to ensure that offer documentation properly reflects the appropriate legislation depending on the nature of the target company.

In conclusion, there are two parallel regulatory frameworks operational in the intermediary period until the Company Law Reform Bill is implemented.

- For companies whose shares are traded on a regulated market (primarily fully listed companies), the principal regulatory framework for takeovers will comprise the following:
    - the City Code on Takeovers and Mergers ("the Code");
    - the Regulations; and
    - the Directive.

- For companies whose shares are not traded on a regulated market (ie. primarily AIM companies and other unquoted companies to which the Code applies) the principal regulatory framework for takeovers will comprise the following:
    - the Code; and
    - the Companies Act 1985 ("the Companies Act")

Once the CLR Bill comes into force, the changes to the squeeze-out and sell-out provisions in Part 13A will apply to all companies and all bids within the current ambit of Part 13A.

3.1.4. Germany.

Until halfway the 1990's, public takeover bids did not play an important role in Germany. There was no statutory regulation of public takeovers. The Ministry of Finance's Stock Exchange Experts Commission had developed rules concerning public takeover bids, but these "Guiding Principles" of 1979 consisted only of few non-binding recommendations. In July 1995 the Commission published a new, comparatively comprehensive takeover code. This Code was implemented through contractual recognition by potential offerors, target companies and companies engaged in share dealing.

At that time, the only way to effect a squeeze-out was through a so-called "transferring liquidation," ("übertragende Auflösung") i.e. the sale of the operations of the target company to the majority shareholder combined with a subsequent dissolution of the target company.

In 2002 takeover regulation was formalised and the squeeze-out procedure was introduced. Article 7 of the Securities Acquisition and Takeover Act (Wertpapiererwerbs- und Übernahmegesetz (WpUG)) changed the Companies Act (AktienGesetz (AktG)) by inserting a new chapter regarding the squeeze-out of minority shareholders. Section 327a of the AktG entered into force on 1 January 2002. A sell-out right was not provided. The "transferring liquidation," remains available and could be considered if the required 95 per cent threshold for a conventional squeeze-out cannot be reached. The "transferring liquidation", however, is subject to considerable risk of shareholder litigation.

Due to the implementation of the Directive, the new takeover law squeeze-out (new article 39a of the Takeover Act - WpÜG) is an annex to a takeover or mandatory offer for a German corporation, thus existing independently, next to the old, "corporate" squeeze-out. However, it is impossible to start both the corporate and the takeover squeeze-out procedure at the same time.

3.1.5. The Netherlands.

On 15 May 1970 the Dutch SER Social and Economic Council (SER), adopted the first version of the Code of Conduct (the so-called SER Merger Code): a legally non binding set of rules to be observed when a public offer is being prepared or made and when mergers of are being prepared or implemented. These Rules have been amended several times. In 2001 the chapter of the Rules of Conduct concerning public takeovers was implemented into the 1995 Act on Supervision of the Securities Markets and the Decree of the Supervision of Securities Markets, thus becoming legally binding. However, nor a squeeze-out right nor a sell-out right were provided.
Despite the Supervision of the Securities Markets Act, a general squeeze-out right already exists in the Dutch Civil Code. This squeeze-out right was introduced in the New Dutch Civil Code (NCC) in 1988. Article 2:92a NCC provide for the squeeze-out right in companies limited by shares (NV - "naamloze vennootschap") and 2:201a NCC contains a similar rule for private limited companies (BV - "besloten vennootschap"). The squeeze-out right is not related to a particular type of transaction.

Dutch law does not yet provide a sell-out right to minority shareholders. The only alternative available to shareholders is the conflict settlement regulation (art 2:343 NCC). However, this very laborious procedure can only be used when certain conditions are met, and not only because a shareholder (alone, or acting in concert with others) has acquired 95 per cent of share capital.

The Dutch legislator has taken the initiative to implement the Takeover Directive into Dutch law by enacting a Proposal of law in 2006. The implementation of the Takeover Directive coincides with the steps being taken to modernise the rules for public takeovers in the Netherlands. These rules will be set out in the Decree on Public Offers (*Besluit Openbare Biedingen*) to be promulgated pursuant to the 1995 Act on Supervision of Securities Markets.

A squeeze-out and a sell-out right is being introduced in a new article 2:359 NCC, which deals with takeovers on companies limited by shares (NV) whose shares are listed on a regulated market. This implies that both rights can only be enforced after a public takeover offer. As to the squeeze-out right the Dutch legislator has tried to follow as closely as possible the existing legislation in book two of the Civil Code. The sell-out right imitates this procedure.

On 15 May 2006 the Temporary Exemption Regulation for Public Offers (*Tijdelijke vrijstellingsregeling overnamebiedingen*) was issued. This regulation deals primarily with those provisions of the Takeover Directive which have direct effect, i.e. which could be invoked by market parties and which could consequently lead to complications within the European Union pending the full implementation of the Takeover Directive. The main feature of the Temporary Exemption Regulation for Public Offers is the introduction of the EU Passport pursuant to which offer circulars approved by a regulator in another EU member state will be recognised in the Netherlands in accordance with the provisions of the Takeover Directive.

3.2. A comparative analysis of legal issues regarding the squeeze-out right and sell-out right.

The Directive aims at a minimal harmonisation of cross border takeover procedures. In light of the freedom granted to Member States, and the differences between the existing legal dispositions in all Member States, it is interesting to compare the legal framework and the

implementing Acts of some Member States. Especially as to the following topics the current legislation seems to differ (Report of the High Level Group of Company Law Experts on issues related to takeover bids, 2002:11). First the type of transaction (3.2.1.), triggering the squeeze-out or sell-out right may differ. Some countries allow for a squeeze-out right not only after a takeover bid, but also after a merger. Similarly, the type of companies (3.2.2.) involved may differ. The conditions which have to be met to exercise the squeeze-out and sell-out right, are another variable. The threshold (3.2.4.) and the securities (3.2.3.) to which it applies, may vary, as does the procedure (3.2.5.) the party triggering the squeeze-out/sell-out right needs to follow. An important procedural aspect of the squeeze-out or sell-out procedure is the valuation method used to compensate the minority shareholders (3.2.6.).
Finally, there are different time constraints (3.2.7.).

3.2.1. Type of transaction.

The Takeover Directive is applicable to a “takeover bid”, being “a public offer (other than by the offeree company or target itself) made to the holders of the securities of a company to acquire all or some of those securities, whether mandatory or voluntary, which follows or has as its objective the acquisition of control of the offeree company in accordance with national law”.[8] The Directive only applies to takeover bids of companies whose securities are listed on a regulated market. However, the Member States might take the implementation of the Directive as an opportunity to bring their regulation on internal takeover bids in line with the European legal framework. Economically, there is no reason to develop two different procedures. For the squeeze-out and the sell-out right the Explanatory Memorandum does not only allow the Member states to expand the squeeze-out and sell-out beyond cross border takeover transactions but also to provide these procedures outside the scope of takeovers. The Report of the High Level Group of Company Law Experts on issues related to takeover bids (2002:13) even encourages Member States to do so.

Both French and British regulation only refers to takeover transactions. In France, the Règlement Général does not specify how the 95 per cent threshold is reached. Article 237 of the draft Règlement Général, implementing the Takeover Code, specifies however that it applies after a takeover bid (“offre publique”), despite the existing article 236 of the Règlement Général, containing the existing sell-out and squeeze-out rules. Hence, in our view, article 236 applies regardless of how the threshold was reached. The British Companies Act provides rules for both a squeeze-out and a sell-out after a take over offer for (all shares of) a company with its registered office in the UK with securities traded on a UK regulated market, or an offer for other public and certain private companies resident in the UK.

In the other examined Member States the squeeze-out right is available, regardless of how the applicable threshold has been reached. In Belgium, different squeeze-out systems coexist. The simplified squeeze-out procedure is applicable in the aftermath of a public takeover – both after a voluntary and a mandatory bid (when the target is a listed company in Belgium). The squeeze-out in both “public” and “private” companies only refers to the simple possession of a certain percentage of voting securities, without specifying how this possession was acquired. The squeeze-out regulation in the Dutch Book 2 on Companies does not refer to a specific transaction leading to the required possession of the shares. The bill implementing the Takeover Directive is applicable to takeovers, and will be existing next to the old squeeze-out rule. The German corporate squeeze-out is not restricted to takeovers, but applies regardless

of how the threshold of the possession of the shares was attained. It could be the result of a merger, a capital increase or any other transaction or acquisition of shares.
The new “takeover” squeeze-out (and sell-out alike) obviously applies after a takeover. It does not replace the old rules, but applies independently to transactions falling within its proper ambit.

Table 6 summarizes the different types of transactions that are triggering events for allowing the squeeze-out and sell-out rules.

[INSERT TABLE 6 ABOUT HERE]

In light of the theory of private benefits for controlling shareholders and the advantages of 100-percent held subsidiaries as well as the large number of controlled companies in continental European countries, the Belgian, Dutch and German approach should be supported. However, for the latter countries it should be encouraged integrating the rules transposing the directive in the existing legal framework. In our opinion there is no reason to develop separate frameworks for the squeeze-out and sell-out rights within and outside the scope of the directive.

3.2.2. Company Type.

European law limits the types of companies for which the squeeze-out and sell-out right is applicable. Only companies governed by the laws of Member States, where all or some of those securities are admitted to trading on a regulated market within the meaning of Directive 93/22/EEC(11) in one or more Member States (as replaced by the MifiD Directive of 2004), fall within the scope of the Directive. The European Commission estimates the number of stock exchange listed companies in the European Union at 7.000.

Article 1 of the Directive also provides some exceptions. The Directive shall not apply to takeover bids for securities issued by companies, the object of which is the collective investment of capital provided by the public, which operate on the principle of risk-spreading and the units of which are, at the holders' request, repurchased or redeemed, directly or indirectly, out of the assets of those companies, nor to takeover bids for securities issued by the Member States' central banks. In light of the purpose and organization of the first type of companies, is the protection of the controlling or the minority shareholders with a squeeze-out right and a sell-out right redundant. The number of listed national banks is limited. The Belgian National Bank is stock exchange listed but the Belgian State controls 50 per cent of the shares and the votes. Despite the policy considerations to exclude the national banks from the takeover directive, there are no reasons to exclude shareholders of these companies from the squeeze-out right and the sell-out right.

The French scope of application was already in line with the Directive: the existing framework refers to companies limited by shares (SA/ “société anonyme”) whose shares are admitted to trading on a regulated market or whose securities have ceased to be quoted on a regulated market.

The UK Companies Act chapter on Takeovers does not clearly state which type of company falls within its scope, so it must apply to “any type of company within the meaning of the act”. Typically, a takeover aims at acquiring all of the shares in a public company, as defined in section 1 of the Companies Act (usually a company which is publicly listed). It is however possible to make an offer for the shares in a private company.

The existing legislation of some of the other Member States retains a broader scope than the Directive.

In Belgium, the squeeze-out rule can be applied both to a "private" company and to a "public" company. A private company is either a company limited by shares (NV/"naamloze vennootschap" - SA/"société anonyme") or a partnership limited by shares (Comm VA/"commanditaire vennootschap op aandelen" - SCA/"société en commandite par actions") that has not made a public appeal to the savings A "public" company is a NV/SA making (or having made) a public appeal to the savings.

The Dutch "ordinary" squeeze-out regulation refers to all the public and private limited liability companies (the NV /naamloze vennootschap and the BV/besloten vennootschap). The Bill implementing the Thirteenth Directive, containing a new article 2:359 CC, deals with companies limited by shares (NV) whose shares are listed on a regulated market.

The same goes for the corporate squeeze-out in Germany, applicable to a German Stock Corporation (AG "Aktiengesetz") or a partnership limited by shares (KGaA "Kommanditgesellschaft auf Aktien). The new set of "takeover rules" refers to a German stock corporation (AG) or partnership limited by shares (KGaA) which are admitted to trading on a EU or EEA regulated market. The "corporate" regulation ("listed" securities) and the "takeover" regulation ("traded securities") are not identical.

[INSERT TABLE 7 ABOUT HERE]

The aforementioned overview illustrates that the different legislators distinguish two or even three company types with regard to squeeze-out and/or sell-out right. This classification is, at least from an economic perspective, artificial. The first class is the companies listed on a regulated market or formerly listed on that market. For this class of companies all legislators provide a squeeze-out right (and a sell-out right). It includes companies limited by shares and partnerships limited by shares. The former type is the most common though the latter is well known in some member states where it is used a "special purpose vehicle" for protection against hostile takeover bids or for the development of specific activities like real estate in Belgium. The second class of companies is the other companies limited by shares and in most jurisdictions partnerships limited by shares. It is a very heterogeneous group of entities, going from large even listed entities on a stock exchange like the UK "AIM", the French "Marché libre" or the Belgian "Vrije Markt" over companies traded over-the-counter, companies that have made a public appeal on the savings, large non-listed companies and sometimes thousands of smaller "open" entities limited by shares. Not all jurisdictions offer a squeeze-out right for this type of companies and even less offer a sell-out right but all are treated identical in all jurisdictions. It raises a number of questions. In the "contractarian company approach" the constituent parties draft an efficient open ended company contract. The first question is why do different countries treat the shareholders of similar company types differently, i.e. do some countries offer a squeeze-out right to controlling shareholders while others do not? Second, company law offers large controlling shareholders the option to transform the company into another legal form. All power remains in the hands of the large controlling shareholder who can decide to continue as a non-listed entity or to opt for a listing on a regulated market or a listing on another market. The decision is decisive for the applicable framework. Can there be a justification for the lock in of all other shareholders? It is a static approach to solve a dynamic company issue. In light of the aforementioned advantages of the squeeze-out and the sell-out right it is hard to discover the rationale for the different treatment of a company listed on an "alternative or free" market and a company listed on a regulated market. The third class is the closed companies. Only in the Netherlands a squeeze-out rule is offered for this company type. In all other countries the "lock in" of shareholders is considered to be part of the contract. Parties are informed about the low or even non-existent liquidity of the securities. Only in the Netherlands the legislator considered the freeze-out rule an essential part of the legal framework for closed companies. In the UK it is open for controlling shareholders of closed corporations but only after a takeover. The consequence of the Dutch approach is the absence of a company type with limited liability for all shareholders without a squeeze-out rule.

3.2.2. Financial Instruments.

Only transferable securities carrying voting rights are taken into account when the calculation of the threshold set forth in the Takeover Directive. Member states may extend this to securities convertible into voting securities. The Memorandum adds that "the obligation to launch a bid should not apply in the case of the acquisition of securities which do not carry the right to vote at ordinary general meetings of shareholders. Member States should, however, be able to provide that the obligation to make a bid to all the holders of securities relates not only to securities carrying voting rights but also to securities which carry voting rights only in specific circumstances or which do not carry voting rights."[9]

In most Member States, the threshold is set by reference to the amount of capital held or the number of voting rights held.

It is a common factor to refer to securities carrying voting rights.
Belgian legislation refers to all securities, conferring voting rights, that may or may not represent the capital, and all securities that give the right to subscribe to or obtain similar securities or the conversion of such securities with the exception of ordinary debentures. The prerequisite that it must concern securities conferring voting rights, has brought about controversy amongst Belgian scholars. For instance, "winstbewijzen" / "Parts bénéficiaires", securities which do not form the capital but only give right to a part of the profit, can have voting rights if it has been provided in the articles of association. According to the letter of the law, such securities should be excluded in calculating the threshold. This would, however, contradict the rationale of the law. It would, in that respect be better to read the law accordingly and take these types of securities into account.

The French Règlement Général refers to voting rights laid down in shares, investment certificates or voting right certificates. All securities must be (have been) listed. According to Viandier (1997:447) securities convertible into shares are also to be seen as shares in light of the Règlement Général.

The UK Companies Act only mentions "shares", without explicit reference to the voting rights attached to the shares. Section 430 F of the Companies Act allows for securities convertible into shares to be seen as a "class" of shares.

The Dutch general squeeze-out equally only relates to issued capital in general ("geplaatste kapitaal"), without referring to the voting rights the shares incorporate, although only shares through which can be voted, are meant (Maeijer,1994:718). The new legislative bill also mentions share capital carrying voting rights.

In Germany, the “corporate” squeeze-out only refers to capital (“Grundkapital”)..The new Implementation Law takes up the Directive’s threshold: share capital carrying voting rights (“stimmgerechtigtes Grundkapital”).

In the economic view it would be of help that the legislator provides as a rule that all holders of securities with (conditional) rights that can hinder the optimal use of the advantages of a 100 per cent subsidiary can be squeezed-out or have a sell-out right. It is connected with the reassessment of the need to calculate the triggering threshold for each class of securities separately. This issue is discussed next.

3.2.4. Triggering threshold.

According to the Takeover Directive, the squeeze-out right and sell-out right can be triggered when, following a bid made to all the holders of the offeree company's securities for all of their securities, one of the two following conditions is met: either
(a) where the offeror holds securities representing not less than 90 per cent of the capital carrying voting rights and 90 per cent of the voting rights in the offeree company.
or
(b) where, following acceptance of the bid, he/she has acquired or has firmly contracted to acquire securities representing not less than 90 per cent of the offeree company's capital carrying voting rights and 90 per cent of the voting rights comprised in the bid.

The first case refers to the situation where the holder simply holds a part of the capital. In this case Member States may set a higher threshold that may not, however, be higher than 95 per cent of the capital carrying voting rights and 95 per cent of the voting rights. The minimum of 90 per cent is considered appropriate at the European level in view of the necessity to restrict any interference with the right of property to a reasonable degree. On the other hand, the maximum of 95 per cent is justified in view of the practical difficulty in reaching a higher percentage through a takeover bid due to the presence in most companies of untraceable shareholders and the possible existence of an obdurate minority which refuses to accede to the bid even on reasonable terms. In the second case, the bidder’s possession follows from the takeover offer, and refers to the acceptances made through the takeover.

Member States shall ensure that rules are in force making it possible to calculate when the threshold is reached. Where there are several classes of securities outstanding, the squeeze-out/sell-out right should apply on a class by class basis. As a consequence, the right can be exercised only for the class(es) in which the applicable threshold (percentage of capital of the relevant class or percentage of acceptances for the relevant class) has been reached by virtue of a bid made in respect of the relevant class(es). This allows for a proportional application of the squeeze-out right, in the interest of both the majority shareholder (who need not reach the threshold for the company as a whole to be able to squeeze-out the minority shareholders in one class) and the minority shareholders (who cannot be squeezed-out from one class if the threshold is not reached in that particular class).

Particular about the Directive guidelines is the double standard, made in both situations: Reference is made to both the capital carrying voting rights and the voting rights themselves.

In most Member States, the threshold is set by reference to the amount of capital held or the number of voting rights held.

In Belgian law, the threshold is set at 95 per cent of all voting securities, regardless of whether they represent the capital, both in the simplified squeeze-out, the "ordinary" squeeze-out for "public" companies and the squeeze-out for "private" companies. Moreover, the simplified squeeze-out procedure presupposes that the bidder in the squeeze-out procedure possesses control over the company before starting the squeeze-out procedure.

French legislation requires the bidder to hold 95 per cent of voting shares and investment certificates as well as voting certificates. The law only refers to 95 per cent of the voting rights, since a shareholder in a French company may obtain double voting rights after two years. The Proposal for a new Règlement Général grants a squeeze-out and sell-out right for the remaining securities, representing not more than 5 per cent of the capital *or* voting rights, which are not held by a majority shareholder.

In the UK, the bidder must have acquired or contracted to acquire by virtue of acceptances of the offer 90 per cent (nine tenths) in value of all shares for which the offer is made. The threshold is set for each class of shares. This threshold must be met with respect to acceptances in relation to shares to which the offer relates. There is a possibility to count in the bidder's shares, acquired in another way than through acceptance in the offer period as well but that should be allowed by the court. The takeover offer can be made conditional upon reaching the 90 per cent threshold to be tendered in the offer. Due to the new set of Takeover Rules a dual test will be imposed: the bidder must have acquired both 90 per cent of the shares carrying voting rights to which the offer relates and 90 per cent of the voting rights in the target company. It is considered that the changes to the calculation of the relevant thresholds will make little practical difference as the percentage of total equity capital carrying voting rights in the target company and the percentage of voting rights will normally be the same.

In Dutch squeeze-outs, the bidder must own at least 95 per cent of the issued share capital. The new bill on squeeze-out and sell-out after takeovers prescribes that the bidder must own at least 95 per cent of share capital, carrying at least 95 per cent of voting rights as well.

Germany sets the threshold by reference to the amount of share capital. The German corporate squeeze-out bidder must own 95 per cent of the capital ("Grundkapital"). Own shares held by the corporation should be deducted from the capital for the determination of the 95 per cent shareholding. According to the German new takeover rules the bidder must own 95 per cent of voting capital ("stimmberechtigten Grundkapital"). The law only sets the threshold in reference to the voting capital, and not cumulatively in reference to the voting rights, for in German listed stock companies owning the voting capital normally implies owning the voting rights. This 95 per cent threshold is not linked to the acquisition of shares through the offer, at least not expressly, meaning that it can be attained through market purchases as well – although it must be noted that the squeeze-out is only possible within 3 months of the end of the offer period. This is mostly a theoretical question. If the bidder owns 95 per cent of the voting capital, the preference shares without voting rights will have to be transferred to him as well after he has made his request to squeeze-out the minority shareholders.

A related question to the threshold setting concerns the way the majority is calculated. The Takeover Directive states that "persons acting in concert" shall mean "natural or legal persons who cooperate with the offeror or the offeree company on the basis of an agreement, either express or tacit, either oral or written, aimed […] at acquiring control of the offeree company […]". Persons controlled by another person within the meaning of Article 87 of Directive 2001/34/EC (12) shall be deemed to be persons acting in concert with that other person and with each other. This Directive was replaced by the Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC[10].

In Belgian law, article 513 Companies Code states that the threshold can be reached by a natural person or legal entity if it holds alone or in concert with another person, 95 per cent of the voting securities.

The same goes for French law, both for the squeeze-out and the sell-out: the majority shareholder may hold the voting rights alone, or "together, in the sense of article L 233-10 of the French Commercial Code". The British Companies Act also take into account the "associates" of a bidder. There are four categories of associates. These are eg. a nominee of the offeror, a holding company, subsidiary or fellow subsidiary of the offeror, or a nominee of any such company, or any company in which the offeror is substantially interested.

Dutch law grants the squeeze-out right to two or more group corporations acting in concert. The German Stock Corporation Act.G. refers to a general rule concerning groups and it is accepted that shares held by an entity under dominant influence by a controlling shareholder are treated as shares of that controlling shareholder.

[INSERT TABLE 8 ABOUT HERE]

In all European countries the threshold is very high and we agree with Enriques (2004) that smaller controlling blocks offer more interesting opportunities of expropriation than a large controlling block. Hence a lower threshold should be encouraged. However, considering the modest ownership dispersion in most European countries a lower threshold can endanger the business process of a large number of European companies. A constant threat of controlling and minority shareholders to make use of their squeeze-out or sell-out right will hamper the development of a well-balanced corporate strategy. Hence as a second best solution the high threshold can be supported. It requires further study to evaluate whether appraisal remedies or other rights offer an adequate alternative in cases of high expropriation risks by controlling shareholders.

There are apparent fiscal implications attached to the threshold, although these will not be revised in detail in this chapter.

In a European perspective, the threshold, necessary to be able to squeeze-out and sell-out the minority shareholders after a takeover, is not only of importance to obtain the right to (enforce) a squeeze-out. It is often also the threshold to obtain tax benefits. In France, for instance, holding 95 per cent of the voting rights, the bidder becomes eligible for consolidation ("integration fiscale") with the target and its 95 per cent held subsidiaries. This allows for the interest charge incurred at the bidder's level to be deducted from the profits made at the target's level. In the UK, although squeezing out and selling out requires a 90 per cent threshold, the fiscal advantages of a takeover are available from the moment the bidder owns 75 per cent of the target's shares. Even Spain, not providing a proper squeeze-out mechanism (yet), allows for the bidder to obtain tax advantages from a 75 per cent possession of the targets shares. Group tax relief is not available under Belgian law. Therefore the bidder's interest expenses could not be offset against target's profits to reduce tax liabilities. Subject to certain conditions, other techniques however, mostly allowing for movements of cash upstream are available to achieve the same result (e.g. dividend distribution, reduction of share capital, repurchase of shares by the target, and so on).

3.2.5. Conditions and Procedure.

The Directive nor the Report of the High Level Group of Company Law Experts contain provisions as to the squeeze-out and sell-out procedure, the question if the minority shareholders have a right to object, the conditions and considerations that have to be taken into account, etc. All this is left entirely up to the discretion of the Member States.

The different Member States opted for different approaches and harmonization is unlikely to occur. Some procedures, such as the French and Belgian modus operandi, call upon the supervisory authority – The Belgian Banking, Finance and Insurance Commission (CBFA) and the French Autorité des Marchés Financiers (AMF)- for an assessment of the claim; whereas others refer the parties to the Courts, like it is the case for the Dutch squeeze-out procedure and the new German procedure that transposes the European Directive. The "corporate" German squeeze-out and the British rules leave it up to the parties, although judicial review is at hand.

The Belgian squeeze-out procedure is rather lengthy, and differs as to the type of squeeze-out, as mentioned before. Therefore, only a brief overview is given here, setting aside the details of the procedures. The simplified squeeze-out is only applicable when the bidder, after a takeover bid, owns 95 per cent or more of voting securities, and if the prospectus contained a provision allowing the simplified squeeze-out. If the threshold is met, then the bidder may re-open the bid for a period of 15 days after the takeover offer results have been published. The securities which have not been transferred after this time are deemed to be transferred automatically to the bidder.

In case of a squeeze-out in a "public" company, the bidder makes a public offer for all voting securities, not yet owned by the bidder, affiliated persons or persons acting in concert with it; as well as all securities that give a right to subscribe, acquire or convert those securities. The public buy-out offer is communicated to the CBFA (Banking, Finance and Insurance Commission) and must take place one month before the beginning of the transaction.
The buy out offer is published and can only be altered from then on in favour of the shareholders or upon an order by the CBFA. The public buy out offer must mention the price, the main terms and conditions of the offer, and contain a file with, amongst others, a draft prospectus, a report from an independent accounting expert who gives his advice about (the relevance of) the valuation methods, and the opinion of the board of directors of the target company. The examination of the conditions of the offer in terms of its regularity is carried out by the minority stockholders. They have no insight into the draft prospectus. The minority stockholders have a period of 15 days after notification of the buy out offer to make their opposition known to the CBFA. After the expiration of this period, the CBFA will assesses the quality of the information regarding the public buy-out bid that will be disseminated in the prospectus and whether the interests of the stockholders are being safeguarded. If the prospectus is approved by the CBFA, it is published. After this publication, the shareholders

have minimum ten days and maximum twenty days to accept the buy out offer. The securities that have not been transferred to the bidder during this period are deemed to have been transferred automatically.

The squeeze-out procedure in "private" companies is less formalistic. The bidder must make an elaborate report concerning the buy out offer. This report contains e.g. the price offer, the valuation method used, the targeted shares, and so on. The report also includes a report from the board of directors of the bidder, a report by an accountant or auditor concerning the valuation methods, and the advice of the target company board. The shareholders receive due notice that these reports are available. Within thirty days after this notification, the shareholders may confer their objections concerning the offer to the bidder. The bidder can only alter the offer in a more advantageous manner for the shareholders, or leave the offer as it was. Either way the bidder chooses, the (un)altered offer must be published within fifteen days after expiry of the thirty day period. After this publication, the shareholders have minimum ten days and maximum twenty days to accept the buy out offer. In this period, the shareholder may also inform the bidder that he does not wish to abstain from his securities.

The securities which have not been transferred to the bidder during this period, are deemed to have been transferred automatically, except for the securities, owned by the shareholder which explicitly stated that he did not wish to abstain from his securities. In short, the main differences between the squeeze-out in a "public" and a "private" company, are that the latter does not require a prospectus to be drafted but only an elaborate report, that the CBFA does not intervene, that the valuation methods are reviewed by an auditor instead of an independent expert, and that the offer is not binding for the minority shareholders.

In France, there are two separate stages to a squeeze-out procedure: first a public buyout offer ("offre publique de retrait" – OPR) effected by the bidder making purchases in the market for at least 10 trading days; and secondly, immediately following the end of the buyout offer, the automatic transfer of all outstanding shares to the bidder as part of the squeeze-out offer, provided that the bidder reached 95 per cent of the voting rights of the company.

The first step, the buy out offer, may also be launched at the discretion of a holder of 95 per cent of the shares in a company or at the request of the AMF upon application by minority shareholders who can demonstrate that there is no longer sufficient liquidity to enable them to sell their shares in the market. This is the sell-out right for minority shareholders.

In addition, the AMF may request that a buyout offer be made when the controlling shareholder(s) (even if he(they) hold(s) less than 95 per cent of the voting rights) propose(s) significant changes to the company's by-laws (for example a change to the corporate form or the procedure for transferring shares or voting rights). It includes proposals to merge to dispose of all or substantially all of its principal assets; decisions to change the business purpose or to exclude the payment of dividends. It also applies after the decision to convert an SA (company limited by shares) into an SCA ("société en commandite par actions" / partnership limited by shares).

The buy out offer must always contain minimal conditions, which easily can be altered, concerning the identity of the independent expert, the evaluation methods, and the expert's appreciation of the bid price. After the AMF approves of this, the fact that a squeeze-out will take place is published.

According to the UK Companies Act, whenever a shareholder obtained the required threshold, he can serve a notice on those who have not accepted the offer that he desires to acquire those shares. The board of directors from the target company must recommend whether to accept or reject the offer. If the notice is duly made, the bidder is entitled and bound to acquire the shares on terms of the offer. Within a period of six weeks following the notice, which is the time within any choice of consideration must be made, the bidder must send a copy of the notice to the target company and pay to it the consideration for the non – offered shares. This six weeks timetable is suspended if a shareholder applies to court. The minority shareholders have a right to apply to the court, either to prevent the compulsory purchase, or to specify different terms.

In the Netherlands, the Enterprise Chamber (in Amsterdam) investigates the claim of the bidder. The shareholders have a right to object. The claim can be dismissed if the Enterprise Chamber finds that the transfer will cause the targeted shareholder to suffer from serious material damage despite the financial compensation offered by bidder. Next, the case will be dismissed if a targeted shareholder owns shares with special codecision rights or that the bidder had given up its right to invoke the squeeze-out right. Hence, the preferred shares are an important instrument to discourage takeovers as they exclude the possibility for the bidder to fully integrate the target without the consent of the preferential shareholder. If the Chamber does not come across such an inhibitive circumstance and decides that the controlling shareholder complies with all conditions for the squeeze-out procedure, it orders the shares to be transferred against payment of the price, as set according to the Chamber. Against the decisions by the Enterprise Chamber, only appeal with the Supreme Court (Hoge Raad) is possible. In the final judgement, the shareholders are condemned to transfer their shares to the bidder. The bill implementing the European directive refers to this procedure, both for squeeze-out and sell-out. The Enterprise Chamber investigates the claim of the bidder to see if the bidder meets the threshold. If the Chamber decides that the controlling shareholder meets all requirements, it orders the shares to be transferred against payment of the price, as set according to the Chamber.

The German corporate squeeze-out procedure requires that the majority shareholder can call a shareholder meeting to decide upon the transfer of all shares. The decision to squeeze-out is made by way of a resolution (taken with an ordinary majority) by the general meeting of shareholders. The controlling shareholder is allowed to participate. Hence, the decision is a mere formality. The squeeze-out becomes effective when this shareholder resolution is registered in the commercial register. Shareholders have a right to object to the valuation, although this does not affect the transaction itself and the registration of the shareholder decision. Such objection can consist in a violation of the shareholders' right to information relating to the adequacy of the compensation. The competent Court will, if deemed necessary, determine an adequate compensation itself. The general meeting decides the resolution of the squeeze-out. This decision requires a report of the majority shareholder as well as an auditor's fairness opinion. The minority shareholders also have to receive the financial statements of the previous year. Disagreements will be settled in court. Two types of court procedures can be distinguished. First, there is the compensation settlement procedure. This procedure only challenges the compensation package but does not block the transaction. The risk of the majority shareholder is the additional amount of money he will have to pay to all the minority shareholders even if they did not participate in the court procedure. In the second court procedure the squeeze-out itself is challenged and it prevents the squeeze-out from becoming effective.

The new German “takeover squeeze-out and sell-out procedure” calls upon the court. No shareholder meeting is required, nor a formal shareholder resolution. The bidder applies to the district Court of Frankfurt am Main, centrally for all German Corporations, which publishes this request. The Court decides upon the squeeze-out/sell-out. This means that challenges from minority shareholders concerning substantive and formal errors of the decision are not possible. Registration in the corporation register is no longer required.

The transfer of shares becomes effective if the decision is final and can no longer be appealed. Appeal can only be applied to the Oberlandesgericht Frankfurt am Main, the final appeal Court for these matters. Appeal can e.g. concern the important issue of compensation: concerning the constitutionality of the decision (regarding expropriation, which demands justification and fair compensation in German law). The decision is effective against all shareholders.

[INSERT TABLE 9 ABOUT HERE]

3.2.6. Valuation.

According to the Directive, Member States shall ensure that a fair price is guaranteed. That price shall take the same form as the consideration offered in the bid or shall be in cash. Member States may provide that cash shall be offered at least as an alternative.

Following a voluntary bid, the consideration offered in the bid shall be presumed to be fair where, through acceptance of the bid, the offeror has acquired securities representing not less than 90 per cent of the capital carrying voting rights comprised in the bid. According to the Report of the High Level Group of Company Law Experts on issues related to takeover bids, this should apply in both types of thresholds (percentage of capital or percentage of acceptances). This can result in a fair price, to the extent of course that the period in which the squeeze-out or sell-out can be invoked, is limited, such as provided in the Directive. However this presumption is rebuttable, so that it can be challenged before courts or the authority supervising the takeover bid in particular circumstances. Following a mandatory bid, the consideration offered in the bid shall be presumed to be fair, even if the bid has been accepted by shareholders holding less than 90 per cent of the share capital in respect of which the offer has been made, as the price offered in a mandatory bid has to be equitable. Here again, the presumption is rebuttable. In all other situations, the consideration should be determined by expert(s), according to the Report of the High Level Group of Company Law Experts on issues related to takeover bids. As far as the nature of the consideration is concerned, the shareholders who refused the offer should be treated no less favourably than those who originally accepted it. As a consequence, if cash, or a cash alternative, has been offered in the takeover bid, cash, or a cash alternative, should be offered in the squeeze-out procedure as well. This policy consideration is in conflict with the aforementioned Grossman and Hart theory.

Valuation standards vary enormously in each country. Some jurisdictions provide a very detailed valuation procedure, such as Germany. Others, like the UK, grant the bidder a considerable amount of discretion in deciding the bid price.

In Belgium, the bid price is decided by the bidder, but the consideration should be motivated. The terms of the offer must comply with the applicable regulations and must safeguard the minority shareholders' interests (in particular with relation to the price). Only cash consideration is allowed. The motivation of the price refers to the type of valuation methods that has been used, the weight granted to these methods, and so on. It should be noted that the valuation of the company and the price offered for the shares, do not necessarily converge.

For buy-outs in "public" companies, an independent expert evaluates the bid price. Furthermore, the CBFA controls and approves the prospectus.

In squeeze-out procedures for "private" companies, an accountant or auditor must report on the valuation methods. However, in light of the refusal right for the shareholders to accept the squeeze-out, the bidder will tend to suggest an equitable price.

All funds necessary for the realisation of the bid are available, either in an account with a credit institution established in Belgium or in the form of an irrevocable and unconditional credit facility made available to the bidder by a credit institution established in Belgium. These funds are deposited in a blocked bank account. A credit institution or a stock exchange company established in Belgium is appointed to ensure the payment of the price.

According to French legislation, the price is determined in the proposal to squeeze-out and reference is made to a number of specified criteria (called the multi-criteria approach). The price offered to the minority shareholders is based on a valuation of the target's securities by the bidder using 'objective methods applied to business or share transfers, based on the value of the company's assets, its earnings, the market price of its shares, its business prospects and its subsidiaries', in each case, appropriately weighted. The bidder's valuation must be accompanied by an independent expert valuation report giving its opinion on the bidder's valuation, including the relevance of the criteria used and their respective weighting. The appointment of the expert has to be approved by the AMF.
As with any other form of takeover offer, the terms of the offer are subject to review and approval by the AMF. If the AMF would judge that the proposal damages the interest of the minority shareholders, it may request the bidder to alter the proposal. The AMF's decision concerning the valuation may be challenged in the French courts. The minority shareholders may also apply the "attestation d'équité", in order to evaluate the price. This attestation is modelled after the American fairness opinion. The compensation is to be done in cash according to the Règlement Général, but according to French scholars, it is also possible in securities (Viandier, 1999:470). However, it is interesting to note that, unlike in the UK legislation for example, the bidder is not obliged to offer the same terms as formulated in the initial takeover offer. The Proposal for a new Règlement Général relies closely upon the Directive's general guidelines as to valuation.

The UK Companies Act states very briefly that the entire procedure must follow the terms of the offer, or on such terms as agreed upon. The consideration is left to the discretion of the bidder. It may consist of shares or debentures of the bidder or another company, of cash, or of a combination. It is important to bear in mind that the offer must be on the same terms for assenting and dissenting shareholders (eg. Both cash and securities) (Davies, 2003:12073.).

According to the Dutch Book Two of the New Civil Code, the price is set by the Enterprise Chamber ("Ondernemingskamer") who may order one up to three experts to evaluate this price. Appointing the experts however is only done in exceptional circumstances. The Chamber determines independently the value of the shares at the date the court considers appropriate. The Enterprise Chamber also set the method for determining the price, which should be in cash. As long as the price is not paid, interest is being charged. In the takeover bill, the valuation procedure remains more or less the same. A "fair price" is set by the Enterprise Chamber who may order one up to three experts to evaluate this price. However, if a mandatory bid was made, the price paid in this offer is considered to be a fair price if 90 per cent of the shares, at which the takeover offer aimed, was acquired. In that situation, the Court may appoint one up to three experts to assess the value of the shares to be transferred.

The German corporate squeeze-out bid price is determined by the bidder, in light of the current value of (the future earnings of) the target company, through a formal enterprise evaluation. The majority shareholder is required to prepare a squeeze-out report that explains how the cash payment to be made to the minority shareholders has been calculated. The valuation must take into account the relations within the company at the time of the decision by the general shareholders meeting concerning the squeeze-out. The German valuation method, adopted by the German Institute of Accountants is called EDW S1 (formerly the "IDM-S1 method") – A discounted future earnings analysis. This standard considers the enterprise value to be the net present value of the net profits accrued to the shareholders. The cash compensation should be made at fair value (the law expresses it as "full real value" of the shares). This is stressed by the German Constitutional Court, stating that a loss of personal assets can only be compensated through full compensation of the loss. This constitutional guarantee is also important in light of the valuation as proposed by the Directive since this price is always under review by the German Constitutional Court, and will be weighed as to its full compensation ability. The German valuation method can be criticized from an economic perspective as the private benefits of the controlling shareholder will not be taken into account. It is important to note that due to a best-price-rule, the successful bidder that buys additional shares within one year after the offer for a price exceeding the offer price, is obliged to pay this premium to every shareholder who tendered. It encourages the controlling shareholder to use this period to expropriate the minority shareholders and put pressure on the future earnings, hence lowering the squeeze-out price.

The squeeze-out report must be audited by an independent, court-appointed auditor who must confirm that the price paid to the minority shareholders is adequate. In addition, the majority shareholder must furnish the target company management with a confirmation from a bank. Every shareholder may challenge this valuation. The proceedings must be initiated within two months following the registration of the transfer in the commercial register. However, this proceeding does not suspend or otherwise affect the validity of the transfer of the shares. The court will examine the valuation, if necessary appoint an expert, and set its own fair price, with final and binding effect. This procedure usually leads to increasing the price in the advantage of the minority shareholder.

The law that transposes the directive introduces an additional procedure. According to the new takeover rules, the price is decided by the bidder. The kind of compensation must be identical as the takeover consideration. If it is an exchange offer, a cash compensation must be offered. "Fair" compensation is required. The offer price under the preceding takeover offer is considered to be fair if at least 90 per cent if the shares were acquired through the takeover or mandatory offer. If the 90 per cent threshold is not met, the court will have to decide upon the valuation, through an independent expert valuation of the current value of (the future earnings of) the company. If however the 90 per cent threshold is met, an enterprise evaluation is no longer required, although litigation remains possible. Legal scholars already pointed at some weaknesses.

Uncertainty in the legal framework discourages the efficient organisation of the business environment.

The conditions and the valuation procedure are important legal issues. However, the economic theory does not assess this part of the legal procedure. In a squeeze-out the bidder determines the price and if the bid is successful economists consider the price appropriate as the large majority of the shareholders assessed the bid price high enough to tender. However, outside the scope of takeovers it is extremely difficult to develop an efficient valuation methodology that takes into account the innumerable number of variables. To name but a few: the position and behaviour of the controlling shareholders, the position and behaviour of the minority shareholders, time, quality of the courts, available information, quality of the experts, etc. This topic requires much more research.

3.2.7. Timing and time table.

The Takeover Directive requires that the squeeze-out or sell-out procedure is initiated within three months of the end of the time allowed for acceptance of the bid referred to in article 7 of the Directive.

Most examined countries do not provide for a time table within which the right to squeeze-out or to sell-out must be exercised. This does not come as a surprise as the squeeze-out right can be applied outside the scope of takeovers.

Most timing references are of a procedural nature. The UK sets forth the clearest rule as to timing to exercise both rights. Squeeze-out rights can be exercised within a period of four months beginning with the date of the offer and have to be exercised within two months of reaching the 90 per cent threshold. Sell-out rights may be exercised during a three month period following the end of the period within which the bid can be accepted. The new regime will also allow an offeror to leave its offer open indefinitely and thereby maintain its ability to squeeze-out minorities without a time limit.

In Belgian law on the other hand, the timing mainly refers to the procedure, and depends upon the type of squeeze-out procedure. In both the squeeze-out for “public” and “private” companies, the shareholders have minimum ten days and maximum twenty days to accept the buy out offer. The securities which have not been transferred to the bidder during this period, are deemed to have been transferred automatically.

The new French Law, the German implementing Act and the Dutch Bill have taken over the Directive’s timing.

4. Conclusion: beyond any harmonized approach

Companies require flexibility of the legal framework to optimally implement strategic goals. Contracts cannot solve all the conflicting interests of the constituents and third parties. Hence, the legislator should provide for an appropriate framework. Financing the corporation is one of the issues were the legal framework should not only consider the strategic needs of the companies but also the protection of the different corporate constituents. Squeeze-out rights help the majority shareholder to profit from all the advantages of a fully integrated subsidiary. At the same time the rules must protect the minority shareholders against the expropriation of the controlling shareholder. Conversely, sell-out rights look after the protection of the minority shareholders when the majority shareholder confuses his personal interest with the interests of the company. This framework should achieve the right balance between property rights and efficient allocation of power. It is shown that the economically required flexibility conflicts with the European legal setting.

The European Member States approach deviates significantly from the American method which starts from the idea that certain kind of transactions go hand in hand with 100 per cent held subsidiaries and hence offer a number of techniques to freeze-out the minority, be it a long-form merger, a reverse stock split, a tender offer with a pre-approved merger or a second step short form merger. In Europe, probably due to the different ownership structure with large controlling shareholders, most Member States developed a setting where the transaction is not necessarily the triggering event to start a freeze-out procedure. The threshold determines whether the controlling shareholder in a freeze-out or the minority shareholder in a sell-out can start a procedure. The European Directive thwarts the European Member States methodology. Takeovers must be accompanied with a right for majority shareholders to squeeze-out the minority and to cash out as a minority. The result is an additional level of regulation for the – relatively speaking limited number of - listed companies that comes on top of the existing rules in the different Member States. It is hard to find any harmonization in the legal framework for squeeze-out and sell-outs. It must be considered as a missed opportunity.

The examined legal rules of the Member States all offer a squeeze-out right. The sell-out right is more an exception than a rule. It illustrates the power of the incumbent controlling shareholders. Next, the devil is in the details. All Member States have different systems. It is sufficient to point at the different company types for which the squeeze-out right is available to illustrate the legal patchwork. Large majority shareholders of Belgian public companies limited by shares and partnerships limited by shares, Dutch private and public companies limited by shares and French listed companies are granted the right to squeeze-out the minority shareholders. While corporate mobility is growing at the speed of light (Becht, Mayer, Wagner, 2006) and the stock exchanges merged, the French, Dutch and Belgian legislators with headquarters less than 400 km from each other issued divergent rules for which even policy considerations seem to be missing. The economic rationale for the different treatment of the Belgian, French and Dutch controlling shareholder of a private company limited by shares and a public unlisted company limited by shares is mysterious. However, it affects hundreds of thousands companies.

Finally, all the differences put pressure on the academic law and finance community to develop enhanced models to assess the relationship between law and finance. The chapter illustrates that the dummy-variable approach is insufficient to measure the complex legal patchwork.

There remains a long road ahead and it seems to be getting longer.

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Table 1: Announced Target M&A by Nations
Source: Thomon Financial

Deals

	2002	2003	2004	2005	6/2006
World	26271	28652	31467	32568	16921
US	7026	8837	8550	9045	4901
Canada	1599	1135	1445	1493	784
Europe	9458	9954	8994	8952	5204
France	880	774	1027	1054	588
Germany	1228	1200	1283	1308	656
UK	2391	2714	2442	2291	1155

Value $m

	2002	2003	2004	2005	6/2006
World	1207246	1379542	1953347	2703275	1843236
US	439494	570008	848703	1131292	702156
Canada	46647	34891	58128	107418	93501
Europe	481552	504917	721758	1012623	718325
France	80662	56589	125290	109526	111239
Germany	54789	54806	63877	111169	60819
UK	147052	128227	254648	294367	128018

Table 2: Delistings and squeeze-out procedures in Germany between 2002 and 2005
Own calculations based on Aktienführer 2006.

	2002	2003	2004	2005
delisting with squeeze-out	88,6%	80,8%	70,8%	67,6%
other delistings	11,4%	19,2%	29,2%	32,4%
number of delistings	70	52	24	34

Table 3: Ownership structures of listed companies in five European countries
Own research

2005	Belgium	Germany	France	United Kingdom	Italy
Average voting block largest shareholder	43,6%	45,0%	45,7%	18,0%	46,4%
Number of comp. with blockholder > 50%	42,5%	43,1%	50,9%	4,1%	58,6%
Number of comp. with blockholder 25%>X> 50%	36,8%	25,2%	15,2%	16,2%	19,8%
Number of comp. with largest shareholder stake < 25%	20,8%	31,7%	33,9%	79,7%	21,6%
Number of companies	105	404	112	537	162

Table 4: Control transactions in France and Belgium during the first half of the 1990s
Source: Wymeersch, 1998.

France		1989	1990	1991	1992	1993	1994	1995	
A	Total bids	32	25	23	17	11	15	32	
B	Freeze-outs		27	20	41	33	30	70	
C	Block Transactions	48	81	67	40	24	14	18	
	C/(C+A)	60%	76%	74%	70%	69%	48%	35%	
Belgium		1988	1989	1990	1991	1992	93/94	1995	1996
A	bid majority shareh.	5	15	13	15	11	na	8	14
B	Other bids	12	5	16	3	7	na	6	7
C	total bids	17	20	29	18	18	na	14	21
	A/C	29%	75%	45%	83%	61%		57%	67%

Table 5: Consequences of the squeeze-out and the sell-out regulation
Source: Goergen, Martynova and Renneboog, 2005:256.

Elements of takeover regulation	Concentrated ownership structure			Dispersed ownership structure		
	Impact on M&A activity	Impact on Minority shareholder protection	Impact on ownership structure	Impact on M&A activity	Impact on Minority shareholder protection	Impact on ownership structure
Squeeze-out	More M&A	Better protection	More dispersion	More M&A	Better protection	No impact
Sell-out	Fewer M&A	Better protection	More dispersion	More M&A	Better protection	No impact

Table 6: The triggering event for a squeeze-out and a sell-out

	Directive	Belgium	Germany	France	The Neth.	UK
Squeeze-out	Takeover	• Simplified squeeze-out in public companies: after takeover • Squeeze-out in public companies: all • Squeeze-out in private companies: all	• Corporate squeeze-out: All • Takeover squeeze-out: takeover	• Article 236: all (our view) • New art. 237: public takeover	• General Procedure: all • Bill: takeover	Takeover
Sell-out	Takeover	Not applicable yet	Takeover sell-out: takeover	• Art. 236: all (our view) • New art. 237: public takeover	Bill: takeover	Takeover

Table 7: Companies for which the squeeze-out right and sell-out right is available

	Directive	Belgium	Germany	France	The Neth.	UK
Squeeze-out	Companies governed by the laws of Member States, where all or some of those securities are admitted to trading on a regulated market in one or more Member States	• Simplified squeeze-out in public companies: NV/SA • Squeeze-out in public companies: NV/SA • Squeeze-out in private companies: NV/SA or CommVA /SCA	• Corporate squeeze-out: German Stock Corporation (AG "Aktiengesetz") or a partnership limited by shares (KGaA "Kommanditgesellschaft auf Aktien), if the issuer is domiciled in Germany and its shares are listed on a regulated market in Germany or another member state of the European Economic Area •Takeover squeeze-out: German stock corporation (AG) or partnership limited by shares (KGaA) which are admitted to trading on a EU or EEA regulated market.	Article 236: companies (SA/ "société anonyme") whose shares are admitted to trading on a regulated market or whose securities have ceased to be quoted on a regulated market • New Article 237: Companies (SA/ "société anonyme") whose shares are admitted to trading on a regulated market or whose securities have ceased to be	• General Procedure: the public and private limited liability companies (NV /naamloze vennootschap and BV/besloten vennootschap). • Bill: companies limited by shares (NV) whose shares are listed on a regulated market.	Public or private company within the scope of the companies act

				quoted on a regulated market		
Sell-out	Companies governed by the laws of Member States, where all or some of those securities are admitted to trading on a regulated market in one or more Member States	Not applicable yet	Takeover sell-out: German stock corporation (AG) or partnership limited by shares (KGaA) which are admitted to trading on a EU or EEA regulated market.	Companies (SA/ "société anonyme") whose shares are admitted to trading on a regulated market or whose securities have ceased to be quoted on a regulated market	Bill: companies limited by shares (NV) whose shares are listed on a regulated market.	Public or private company within the scope of the companies act

Table 8: Triggering threshold to initiate a squeeze-out or sell-out procedure

	Directive	Belgium	Germany	France	The Neth,	UK
Squeeze-out	Bidder holds 90 % (max 95%) of the capital carrying voting rights and 90 % of the voting rights Or After acceptance of the bid, bidder acquired or has firmly contracted to acquire securities representing 90 % of the offeree company's capital	Simplified squeeze-out in public companies: Bidder holds after the bid 95% of the voting securities in the target Squeeze-out in public companies: bidder holds 95 % of all voting securities Squeeze-out in private companies:	Corporate squeeze-out: bidder owns 95% of the capital (Grundkapital) Takeover squeeze-out: bidder owns 95% of voting capital (stimm-berechtigten Grundkapital)	Article 236: bidder holds 95 % of the voting rights New Article 237: bidder holds 95 % of the capital or voting rights,	General Procedure: 95% of the issued share capital Bill: the bidder must own at least 95% of share capital, carrying at least 95 % of voting rights as well	• Bidder holds 90% (nine tenths) in value of all shares for which the offer is made •New set of Takeover Rules: the bidder must have acquired both 90 per cent of the shares carrying voting rights to which the offer relates and 90 per cent of the voting rights in the target company.

	carrying voting rights and 90 % of the voting rights comprised in the bid.	bidder holds 95 % of all voting securities				
Sell-out	Bidder holds 90 % (max 95%) of the capital carrying voting rights and 90 % of the voting rights Or After acceptance of the bid, bidder acquired or has firmly contracted to acquire securities	Not applicable yet	Takeover sell-out: bidder owns 95% of voting capital (stimm-berechtigten Grundkapital)	Art. 236: bidder holds 95 % of the voting rights New art. 237: bidder holds 95 % of the capital or voting rights,	Bill: the bidder must own at least 95% of share capital, carrying at least 95 % of voting rights as well	Bidder holds 90% (nine tenths) in value of all shares for which the offer is made New set of Takeover Rules: the bidder must have acquired both 90 per cent of the shares carrying voting rights to which the offer relates and 90 per cent of the voting rights

	representing 90 % of the offeree company's capital carrying voting rights and 90 % of the voting rights comprised in the bid.					in the target company.

Table 9: Conditions for a squeeze-out and a sell-out

	Directive	Belgium	Germany	France	The Neth.	UK
Price determined by	Not Specified Member States only must guarantee that it is a "fair" price.	Bidder	•Corporate squeeze-out: Bidder, in light of the current value of (the future earnings of) the target company, through a formal enterprise evaluation. •Takeover squeeze-out/sell-out: the bidder	•Article 236: Bidder. •New Article 237: Bidder	•General Procedure: : Enterprise Chamber ("Ondernemingskamer") •Bill: "Fair Price" Set by the Enterprise Chamber	The consideration is left to the discretion of the bidder. The entire procedure must follow the terms of the offer, or on such terms as agreed upon.
Form of price?	Price is the same as the consideration offered in the bid or in cash.	In Cash	•Corporate squeeze-out: The cash compensation should be made at fair value (the law expresses it as "full real value" of the shares).	Article 236: cash (French doctrine: also securities) New Article. 237: Price is the same as the consideration offered in the bid or in cash.	• General Procedure: Cash •Bill: The price is payable in cash	

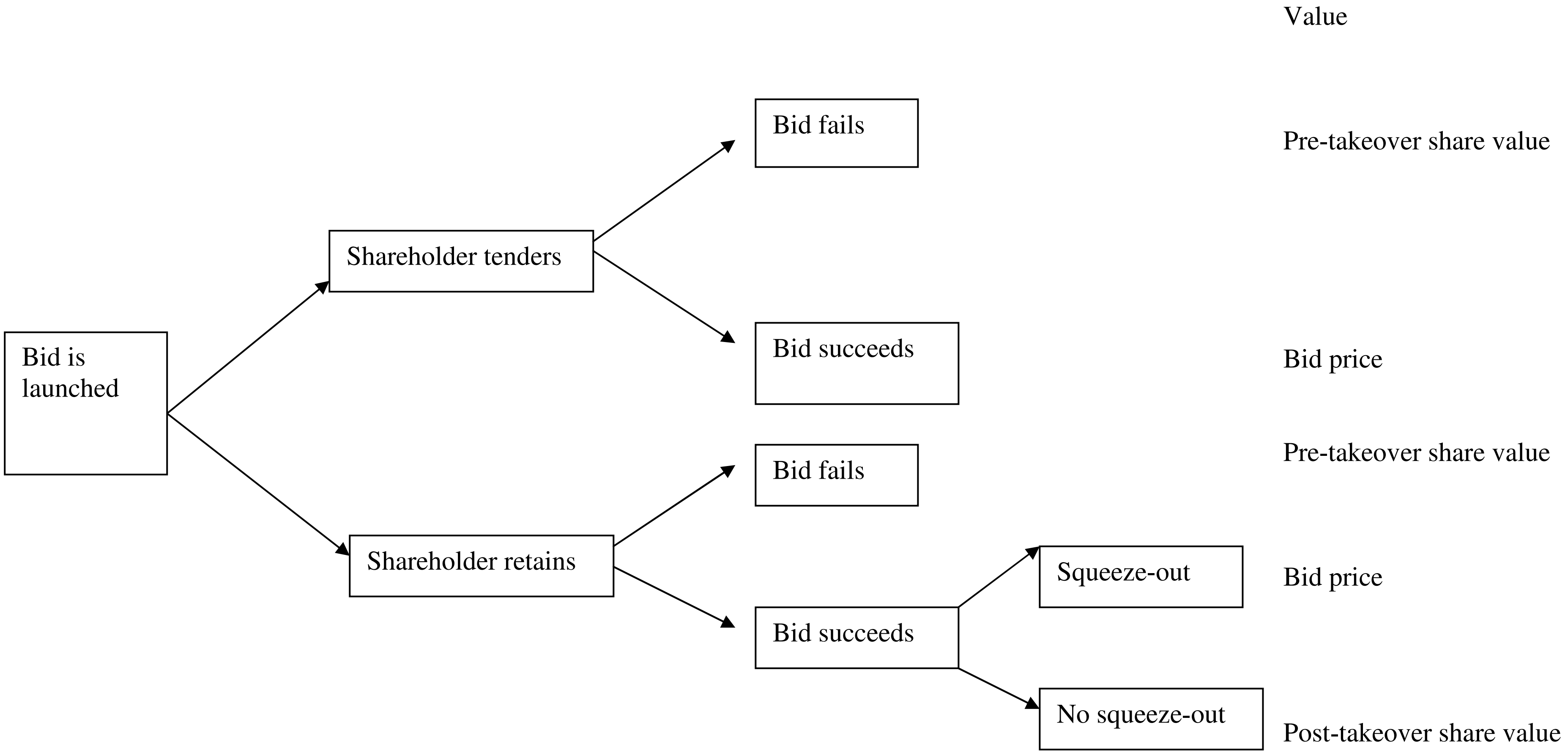
			• Takeover squeeze-out / sell-out: The kind of compensation must be the same as the consideration under the offer. If it is an exchange offer, a cash compensation must be offered.			
Determinants of price	Presumption of "fair" price if offeror acquired minimal 90 per cent of all shares following a voluntary bid. Presumption of fair price following a mandatory bid		• Corporate squeeze-out: Price determined in light of the current value of (the future earnings of) the target company, through formal enterprise evaluation. • Takeover squeeze-out /	Old art. 236: multi-criteria approach: based on the value of the company's assets, its earnings, the market price of its shares, its business prospects and its subsidiaries', in each case, appropriately weighted New art. 237: Takeover offer price or multicriteria method	General Procedure: The Chamber determines independently the value of the shares at the date the court considers appropriate. The Enterprise Chamber also set the method for determining the price. •Bill: "Fair Price" Chamber determines the worth of the shares on a certain moment, chosen by the judge.	Shares or debentures of the bidder or another company, or cash, or of a combination.

			sell-out: "Fair" compensation. Offer price under the preceding takeover offer presumed "fair" if at least 90 % if the shares were acquired through the takeover or mandatory offer. If the 90 % threshold is not met, the court will have to decide upon the valuation, through an independent expert valuation of the current value of (the future earnings of)		The Enterprise Chamber is free to decide upon the determining elements constituting the price setting. After a mandatory bid, the price paid in this offer is considered to be a fair price if 90% of the shares, at which the takeover offer aimed, was acquired. In that situation, the Judge may appoint one up to three experts to assess the worth of the shares to be transferred.	

			the company.			
Expert control	Not Specified	•Squeeze-out in "public company: Independent expert •Squeeze-out in "private" company: accountant or auditor	•Corporate squeeze-out: The squeeze-out report must be audited by an independent, court-appointed auditor who must confirm that the price paid to the minority shareholders is adequate. • Takeover squeeze-out / sell-out: if presumption is not applicable	Independent expert valuation report	•Old procedure: Chamber may order one up to three experts to evaluate this price (only in exceptional circumstances). •Bill: Enterprise Chamber (court of law) who may order one up to three experts to evaluate this price Whenever the prsumption of a "fair price" is applicable, the Chamber may appoint one up to three experts to assess the worth of the shares to be transferred.	Not Specified
Expert election	Not Specified		Appointed by the court	Appointed by bidder but approved by AMF	Appointed by the court	Not Specified
Court intervention -	Not Specified	No	•Corporate squeeze-out: If	The AMF's decision concerning the valuation may be challenged in the French courts.	Yes. Against any judgement by the Enterprise	Not Specified

Kind of intervention			shareholders challenge this valuation. The court will examine the valuation, if necessary appoint an expert, and set its own fair price, with final and binding effect. •Takeover squeeze-out / sell-out: if presumption is not applicable		Chamber, only appeal with the Supreme Court is possible	
Other regulatory supervision	Not Specified	•Squeeze-out in "public company: CBFA controls prospectus	No	Terms of the offer are subject to review and approval by the AMF. If the AMF would judge that the proposal damages the interest of the minority shareholders, it may request the bidder to alter the proposal.	No	Not Specified

Figure 1: Return for shareholders in a system with squeeze-out rules



Endnotes

1 See for a discussion about this case and the legal arguments Nieuwe Weme, 2004:31.

2 Judgment of 23 September 1982 [1982] ECHR 5.

3 ECHR, *James and Others* judgment of 21 February 1986, Series A no. 98., para. 45.

4 *James* judgment, para. 50

5 Bramelid & Malmstrom / Sweden, 12 October 1982.

6 *Offerhaus* decision, as cited in M. Andenas, 2004:167

7 Reference can be made to e.g. The Feldmühle decision of the German Supreme Court of 7 August 1962 and the DAT/ALtana Decision of 23 August 2000; the Decision of the French Supreme Court of 29 April 1997, Association de défense des actionnaires minoritaires et autres against Société Générale et autres, Recueil Dalloz 1998, pages 334-338; the Dutch Enterprise Chamber Decision of 10 december 1992, NJ 1993, 324.

8 Article 2,1,a) of the Takeover Directive

9 Explanatory Memorandum to the Takeover Directive, nr. 11

10 OJ L 390, 31.12.2004, p. 38–57