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Abstract

The 2004 takeover directive has been implemented in most EU states. It has achieved a very welcome harmonisation of the securities regulatory provisions, especially by introducing a rather strict home rule regime along with mutual recognition, and levelling the conditions for bids (irrevocability, disclosure, equal treatment) although regretfully many concepts remain undefined ("equitable" price, concert action, etc.).

The company law provisions of the directive, and mainly the rules on anti-takeover defences have, generally spoken, not been implemented by the states. This refers to the more general debate on the role of the shareholder, often summarized in the slogan "one share, one vote"). Although originally supportive of OSOV, the Commission recently decide to drop that approach. This change of mood takes place on the background of more aggressive action of activist shareholders, the fear for hedge funds and the like, and the appearance of sovereign wealth funds.

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The Takeover Bid Directive, light and darkness

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Takeover bids have now become a standard phenomenon in the capital markets in all the member states of the European union. They occur more or less frequently in all states, whether as friendly offers, mandatory bids, or intragroup offers, unfriendly offers, and any other variety of transactions one could think of. Takeover bids are part of the wider subject of the so-called market for corporate control, in which other phenomena play an important role, such as mergers, asset or share acquisitions, going private, squeeze-outs and sell outs but also: the action of activist shareholders, of hedge funds, private equity funds, sovereign wealth funds and so on. Takeover bids are only one technique for exercising corporate control. In its technical sense it could be defined as a bid made by one party for the shares of another, in order to acquire or reinforce control.

As takeover bids now have become standard ingredients of our capital markets, most jurisdictions have gained large experience on the subject. A common understanding of the phenomenon and of the rules of the game is being developed, also because decisions are being consulted by market participants in other jurisdictions.

Most takeovers take place without great upheaval: they are friendly offers, or parent-subsidiary offers, or mandatory bids due to the acquisition of a controlling block from the previous principal shareholder. In these cases the rules have been fairly well spelled out, and the Takeover directive has facilitated procedures in a cross border context. This does not mean however that there are no fine legal questions raised by these transactions, or in the running up to them[1]. But matters are generally well under control.

There are at least two varieties of takeover situations that will always create concern: these are the unfriendly offers, and the cross border offers. The former because the management, or the controlling shareholders oppose the bid, and therefore raise anti- takeover defences. In these cases the bid develops into a real warfare situation, with tactical moves from both bidder and target. Here one meets interesting questions like the role of the target's board, whether defences are permissible and to what extent the board can entrench itself, possibly destroying shareholder value. More philosophical questions will arise: should the role of the board be to attempt to improve shareholder value, or also to guarantee the independence of the company, sometimes declaring the bidder unworthy as a future shareholder[2]. And should the continuity

[1] The « put up or shut up » rule is an example, whereby markets rumors or pre-emptive declarations can lead to the superior to require whether a bid, or an abstention period for a certain period of time.

[2] In one recent case the target designated itself as a seller a high quality perfume, while he scolded on the bidder as a salesman for cheap "eau de cologne". The bidder won.

of the firm not be more important than the short term interest of some investors – translate: hedge funds – who seek short term profits, but plan to sell at a higher price even before the closure of the bid, having no interest in the long or even the short term value of the firm. And more fundamentally one will wonder whether disproportional voting rights, or other protections against takeovers are permissible or nor and for what reasons.

The second class of issues are of a more preoccupying nature: they concern the tendency of governments or their agents to influence, eventually block certain transactions or adopt prohibitive legislation aimed at keeping firms in national hands. One sees substantial inventivity from the governments to achieve this goal, going from offering financial assistance, notwithstanding the prohibition of state aid, to arranged marriages with another national partner, creating a "national champion", to simply blocking transactions on the grounds of national interest, including national "economic policy".

This neat division of subjects outlined above should not be taken at its face value: usually the different subjects are blurred and linked: innocent transactions sometimes contain the germs of major policy conflicts, and issues that did not exist in the beginning of a deal – especially state intervention – become prevalent some time later. Recently one should add to this series the role of sovereign investment funds, raising – real or purported – issues of national sovereignty.

In all these matters the legal issues abound. How should cross border deals be addressed? What is the supervisory regime? And how to deal with anti-takeover defences? But more difficult: what is the role of the hedge funds, and how far can they dictate changes in the target company without owning it? And what about "empty voting" where shareholders vote, although they have no financial interest in the shares, due e.g. to share borrowing?

One should stop asking questions and try to develop paths to answers.

Officially takeover bids in Europe are subject to the rules of the takeover bid directive. This directive has often been severely criticized, not always on justified grounds. In fact the directive brought only very partial solutions, and the national rules continue to be more important than the European ones, as the latter have merely facilitated bids, especially the cross border transactions. But the real issues continue to lie at the national level.

The European Takeover bids directive

The European directive on Takeover Bids of 21 April 2004 has now been implemented in almost all European member states. This is the provisional semi-final point in a process that has taken more than 17 years, and according to some even more than 30 years on the way to opening up the European markets for corporate control. As is well known, the adoption of a directive in this field has been a calvary, with a dramatic culmination in the European

parliament voting down the initial proposal – with a tie vote – and a new proposal, barely supported by the Commission and its then Commissioner Bolkestein, that resulted in the present directive[3].

The present directive is often considered not a great success: according to a Commission staff document on the implementation, the objectives of the Commission have not been attained[4]. Some are already warming up for the revision procedure, starting on 20 May 2011[5]. Comments from very different angles criticise the directive: in many quarters, the prevailing feeling is that it has not solved anything, and that many stakeholders are dissatisfied. However, is such dark pessimism justified? One should clearly evaluate this directive on the basis of all its provisions.

1. The double track nature of the directive

The directive as it now stands in fact contains two different sets of rules that might better have been separated. The first main topic is the harmonisation of the rules on the takeover bid as a financial transaction; the second relates to the anti takeover defence mechanisms. The first There where the first topic is more traditional harmonisation work, with not too much political impact, the second one is highly politically sensitive, has been the cause of the failure of the first attempt, and ultimately has resulted in the largely non-committal provisions in the present directive.

a) The securities regulatory part is a successful harmonisation

The directive contains some important rules relating - essentially but not only - to the organisation of the takeover bids:

1° a number of rules allowing for a better coordination of the supervision on takeover bids, mainly in a cross border context. These include

- The designation of a single authority in charge of supervising the bid (art. 4) including the recognition of non- statutory bodies, a matter essentially of interest to the UK [6];
- The principle of mutual recognition according to which the documentation or prospectus that will be approved by the home supervisor and be mutually

[3] For a history of the directive, see i.a. V. Edwards, The directive on takeover bids – Not Worth the Paper it's Written on? ECFR, 2004, 416-439; A. Nilsen, The EU takeover directive and the competitiveness of European Industry, The Oxford Council on Good Governance, http://www.oxfordgovernance.org/fileadmin/Publications/EY001.pdf; http://enarpri.org/Article.php?article_id=310; Community Directive on Takeover Bids, http://www.epp-ed.eu/Policies/pkeynotes/35takeover-bids_en.asp

[4] Commission staff paper, see Commission Report on the Implementation of the directive on takeovers bids, Sec(2007/268) 22 February 2007; http://ec.europa.eu/internal_market/company/docs/takeoverbids/2007-02-report_en.pdf

[5] Art. 20 states that five years after the entry into force, the Commission shall if necessary propose its revision

[6] These are the « private bodies recognized by national law » of art. 4 (1). On the advantages of the UK approach, see: DTI, Implementation of the EU directive on Takeover bids, http://www.berr.gov.uk/files/file28530.doc. See § 624 to 657 Companies Act UK.

recognized in all other European jurisdictions[7]; practical details are however lacking;
- The identification of a number of general principles which member states should make applicable to all bids, but which also have to be respected by the supervisors, such as the equal price rule[8];
- The obligation for national authorities to further cooperation throughout the transaction, e.g. on transaction reporting, on checking press releases or advertisements, etc.

2° Clarifying the takeover procedure.

As takeover bids – especially the unsolicited ones – often are potentially highly conflict-ridden, it is important that the procedures which the battle has to follow be clearly spelled out. Most national provisions contain elaborate procedural rules. The directive imposes a number of these provisions, although in a fairly high level of generalisation:

- early disclosure of the bid
- consultation of the target board and of employee representatives
- the precise conditions of the bid, including irrevocability (art 13)
- minimum-maximum time for acceptance of the bid
- prohibiting false or misleading information
- all markets to be informed equally
- more generally: national rules have to be provided relating to competing bids, revision of bids, lapsing bids, publication of the outcome of the bid, etc.

Due to the high level of generalisation of these provisions, additional implementing rules will be needed. Unfortunately, the directive contains no significant delegation to comitology, as is now usually the case for the more recent directives. Hence national provisions have to be plugged in, with all the diversity one could expect.

3° disclosures (art. 11)

The directive calls for a great number of disclosures that will contribute to clarify the ownership position within listed companies. Although some of these data are already available on the basis of the Transparency directive[9], the takeover directive goes in more detail with respect to the control positions within the companies. These data are likely to make the corporate control market more transparent, offering an insight into the hurdles that potential bidders may have to overcome. It also gives useful information on clauses relating to a control change. However the restrictions may be more important than the rule: no disclosure is required if it would inflict serious harm to the company (art. 11, j).

Although published in 2004 the directive has been conceived several years before. Hence some disclosure requirements that according to today's practices in the markets would be deemed indispensable are not part of it. One refers here to the disclosure of interest in voting

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7 M. Siems, The Rules on Conflict of Laws in the European Takeover Directive, ECFR, 2004, vol. 4, p. 458 e.s.

8 Criticized as counterproductive by : Clas Bergström & Peter Högfeldt: The Equal Bid Principle: An Analysis of the Thirteenth Council Takeover Directive of the European Union, http://ideas.repec.org/a/bla/jbfnac/v24y1997i3p375-396.html; see also the interesting analysis in htpp://www.aph.gov.au/senate/committee/corporations_ctte/completed_inquiries/1999-02/manbid/report/c01.pdf

9 Directive 2004/109 of 15 December 2004, art. 9 and 10.

securities by whether securities borrowers, parties to equity swaps, and the like. These "empty voters" have become major players in the run-up to takeover bids, and – except for securities borrowers[10] – holders of these voting rights can lawfully remain hidden.

4° mutual recognition

The harmonisation of securities regulation relating to takeover bids has been very successful, and constitutes a major step in facilitating cross border takeover bids[11]. One should remind that previously, cross border takeover bids were subject to approval procedures in each of the states affected, and that all disclosures had to be approved in each of these states. This system has now been replaced by the home state rule, whereby a bid will be subject to the law of the registered office or corporate seat of the target company, if, as is the case most of the time, the securities of that company are also listed on the exchange in that state. If the securities are listed on other exchanges, these markets would as a rule not be involved[12]. This system – fully in line with the other securities directives – considerably simplifies the supervision of takeover bids, as all rules applicable – both market rules as company law rules - will be those of the home state. Decisions taken by that single authority will be applicable in all other jurisdictions, e.g. prospectuses and all other disclosure documents will have to be checked once, and can be used immediately thereafter all over Europe[13].

5° the mandatory bid rule

A second major aspect of the Directive concerns the introduction of the mandatory bid rule. Although in 2004 most – but not all - jurisdictions had introduced some mandatory bid rule in their national legal system, formulations were quite different. Henceforth, all states will have a comparable provision, offering the same minimum protection to the investors in companies, especially with concentrated ownership, while warning potential buyers that they may be confronted with a mandatory bid for all shares. Taking into account the importance of concentrated ownership in European companies, the mandatory bid rule is a major instrument for avoiding significant shareholders from appropriating the control premium upon the sale of their control block, which is the usual case in which the rule will come into play, at least in continental European companies. Henceforth, all shareholders will have to be dealt with on the same footing and be offered an exit price that, according to the directive, has to be "equitable". This rule will contribute to confidence in the securities markets by allowing the control premium, a large part of which often correspondents to the private benefits of the dominant shareholders, to be distributed to all shareholders while clarifying the position of acquiring shareholders. Although the rationale of the rule has been criticized[14], it now has

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10 See Transparency directive art. 10 (c), which however is only applicable from the 5% threshold on.

11 Few positive comments have been made in this sense : see a more positive evaluation in Finland: Anders Carlsberg, D & I, Law firm, Implementation of the Takeover Directive in Finland http://www.dittmar.fi/whats_new/newsletters/D&I%20Focus%2006%202006.pdf

12 Art. 4 Directive states other rules in case the securities are not admitted to trading in the home state.

13 This applies to the prospectus, but, at least according to some national regulations, not to the advertisements.

14 See E. Wymeersch, Mandatory takeover bids: a critical view, in K.J. Hopt and E. Wymeersch (Ed), European takeovers, law and practice, 351-368, 1992, S.M. Sepe, Private sale of corporate control, Why the European mandatory bid rule is inefficient http://www.unisi.it/lawandeconomics/simple/043_Sepe.pdf; L. Enriques, The Mandatory Bid Rule in the Takeover Directive: Harmonization Without Foundation? (2004) 4 European Company and Financial Law Review; SSRN, 702461, and Harmonisation as Rent-seeking? In: G. Ferrarini a.o. (ed.) Reforming Company and takeover Law in Europe, 2004, 767, argues that not the shareholders, but the controlling shareholders and the directors, and the advisers to the companies, including the supervisors are the real beneficiaries of this rule. See J. Lau Hansen 'When Less Would be More: The EU Takeover Directive in its Latest Apparition' (2003) 9 The Columbia Journal of European Law; B.

become an essential part of price formation in the European securities markets and a significant ingredient in corporate strategies about going public.

b) Less satisfactory elements

Although the above mentioned elements constitute the first stepping-stones towards a more harmonised regime for take-over bids, and of special importance to cross border bids, harmonisation in its outcome is still rather weak. This is not so much due to the fact that the directive allows member states to add additional provisions, but mainly to the rather limited nature of the harmonisation. The directive contains numerous concepts that will deserve further clarification and harmonisation, such as the "equitable price", "acting in concert" or the level of acquisition for mandatory bids. As a first attempt to harmonise the field of takeovers, leaving open these essential elements of interpretation was probably the most efficient way to proceed. If in depth harmonisation would have been the objective, an extremely detailed set of rules would have to be agreed on. The innumerable issues that are encountered in a bid situation lead to still very diverse attitudes, and to harmonise these, innumerable detailed provisions would be necessary.

How can further harmonisation be pursued in this field? A first question relates to the need for harmonisation. As long as transactions are purely domestic, that need is not so very great. However, as more and more cross border deals are concluded, especially of the unsolicited species, some additional harmonisation may be welcome. There are several ways to proceed in these matters.

The first would be the adoption of a Lamfalussy style type of delegation of regulatory powers to the Commission.
The directive contains a Lamfalussy provision according to which on the rather limited subject of implementing art.6, § 3 on information to be disclosed in the offer document, specific rules could be adopted by the Commission following the procedures of comitology[15]. The mandate given is too narrow to be of great use. This characteristic is due to the historical origin of the directive that dates back to pre- Lamfalussy times. In the future a further delegation seems unavoidable.

The question will then arise whether this directive should be included in the series of securities directives that have all made use of Lamfalussy techniques of regulation, leading to the involvement of the European Securities Committee and the European Committee of Securities Regulators[16]. As the largest expertise with takeover bids has been developed by the securities commissions, it appears evident that these should be actively involved. In fact, CESR has already started to organise an exchange of experience among the securities commissions and other competent authorities if different, that is generally considered very

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Sjäfjell 'The Golden Mean or a Dead End? The Takeover Directive in a Shareholder versus Stakeholder Perspective' in: S.M. Bartman (ed European Company Law in Accelerated Progress, Kluwer Law International, 2006; M.J. Sillanpaää 'Enhancing Shareholders' Equality by a Takeover Bid Rule in the Articles of Association' in Law under Exogenous Influences, M. Suksi (ed) (Turku, Turku Law School, 1994); R. Skog Does Sweden Need a Mandatory Bid Rule? A Critical Analysis (Stockholm, Juristförlaget, 1995): J. Schans Christensen, Contested Takeovers in Danish Law: A Comparative Analysis based on a Law and Economics Approach, Copenhagen, 1991, pp. 226-231.

15 Referred to in art. 18.

16 It should be noticed that this directive, originally announced as the 13th company law directive, does not further refer to the company law series of directives, but obviously has been rescheduled in the securities series of directives.

helpful in present practice. In jurisdictions where takeover supervision is not exercised by th securities supervisor – the UK, for example – that supervisor should then take part in the cooperative effort, also at the level of comitology.

The second would be to develop practice rules, or guidance for the solution of certain unregulated issues. These would be non-binding, and merely aim to assist supervisors in their search for practical solutions. For some matters, market participants could also find guidance in these practice rules, as these would render the supervisor's decisions more predictable. Another approach that has been developed within CESR is the constitution of a database with precedents - both administrative and judicial -, which the national supervisors could consult as the "normal interpretation" or the "best practice" for a specific situation. The comparative analysis that is being undertaken among the supervisors within CESR[17] indicate that the differences of approaches are still very considerable and cannot lead to satisfactory results in terms of developing common rules except after considerable exchange of views among the supervisors.
At least as matters now stand, and taking into account the still considerable differences among national practices, the latter way of dealing with cross border cases would be preferable to a regulatory intervention.

To give an example of the latter approach one could mentions the analysis of the cases in which a mandatory bid requirement should be waived. Questions such as: is a bid necessary if it leads to a crossing of a threshold as a consequence of an increase in capital, decided by the general meeting, or whether a bid should be launched if a change of control occurs after a merger, are items on which different answers exist within the union. In a cross border context it will be necessary to harmonise the answers to these questions; however a first step would be to analyse the existing interpretations.

c) The company law provisions

The main stumbling blocks in the directive are the provisions relating to company law issues, mainly the anti-takeover defences. As is well known the directive regulates a certain number of topics, but allows at the same time its opposite. On the one hand a series of anti-takeover defences is forbidden, on the other the directive allows member states to waive the application of these rules, and obviously they have massively done so. Some have even taken advantage of the change in their laws to strengthen the anti-takeover defences[18]. Regrets about the absence of harmonisation measures should therefore be taken with more than a pinch of salt.

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[17] See CESR, Takeover bids network at http://www.cesr-eu.org/index.php?page=groups&mac=0&id=55. This network serves the exchange of information and experiences, not standard setting.

[18] See Commission staff report nt. 3; about the new protective techniques introduced in France: see: Herbert Smith paper about modifications in the Code monétaire et financier, and in the Règlement general de l'AMF, 28 September 2006; Herbert Smith, Implementation of the EU Takeover Directive in France, http://www.herbertsmith.com/NR/rdonlyres/0507455E-0862-4A43-ACD4-34E595EF5B79/2828/5770FrenchBriefingD3.pdf ; Shermann and Sterling: Implementation in France of the Takeover Directive and the new French poison pill: How does it affect defensive measures available to French Companies ? 6 April 2006, http://www.shearman.com/ma_040606/; Other papers criticize the French change of the law allowing "warrants" to be used as poison pills. Célia Pascaud – Bruxelles, La directive OPA compte pour du beurre, Euractiv, 25 April 2006: http://www.cafebabel.com/fr/article.asp?T=A&Id=1759: "la fusion entre Gaz de France et Suez annoncée par l'Etat français pour parer à une offre de l'italien Enel ou encore l'intervention du gouvernement espagnol pour empêcher l'OPA du groupe allemand E.ON sur Endesa ».
For the Netherlands, where the mandatory breakthrough, an idea originally developed in the Netherlands, was abandoned during the Parliamentary discussion: See M. Muller, Verplichte doorbraak

This technically apparent contradiction in the directive hides two further layers of discussion, the first more technical, being the debate about the proportionality of voting rights to capital committed, and the second, the more general political debate about the acquisition of control by parties that are unwanted whether by the present board and shareholders, or even by the political class. Looking at the complexity of the issues involved, the opposing philosophies in place and the political fears or ambitions of some of the major member states, a uniform European approach was almost inevitably bound to fail. One can even wonder why the Commission has pursued this path and has not preferred to make small steps by limiting itself to the lower hanging fruit of the harmonisation of the securities regulation part.

1 - The anti takeover defences

The directive adopts a strong position on a number of items that will be summarized for the purposes of the further discussion:

- Neutrality of the board in case of a takeover: the board shall not undertake any defensive action, except seeking an alternative bid; the general meeting can waive the application of the rule but that only once the bid has been launched[19]
- Restrictions on the transfer of securities will have no effect;
- Restrictions in voting rights will have no effect after the announcement of the bid; shares with multiple voting rights will carry one vote;
- The breakthrough rule, being the authority given to a bidder who has acquired 3/4th of the shares, to call a general meeting where all shares will carry one vote per share and therefore will break up the controlling position of the previously controlling shareholders.
- The reciprocity rule: companies can be exempted by their national law from restrictions with respect to their defences, if attacked by a company that is not held by the same defences[20].

These rules would in effect have significantly curtailed the position of the blockholders that are present in a large majority of European states. According to some it would have transformed the prevailing form of "coordinated capital in Europe" into a Chicago-school

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beschermingsconstructies van de baan, Allen Overy, Amsterdam http://www.allenovery.com/AOWEB/AreasOfExpertise/Editorial.aspx?contentTypeID=1&contentSubTypeID=7944&itemID=34705&aofeID=301&langID=413&prefLangID=410

19 The principle was criticized by Ieke van den Burg, MEP who believes that the board neutrality rule is based on the dogmatic pursuit of shareholder value maximization, though proved unrealistic. in: Can Bolkestein Finally Break the Takeover Directive Deadlock?http://ceps01.link.be/Article.php?article_id=68.

20 Art. 12(3) ; this provision was read by some as an unfair defense against non-EU bidders; see: the US Securities Industry Association was concerned by the reciprocity rule as being directed against US takeovers: http://www.sifma.org/regulatory/comment_letters/comment_letter_archives/30502357.pdf; Scott Simpson, EU Directive fails to harmonize takeovers, also predicting a greater role for the courts, http://www.skadden.com/content/Publications/Publications1035_0.pdf; also: Célia Pascaud - Paris - 10.4.2006: The takeover directive is worthless: http://www.cafebabel.com/en/article.asp?T=T&Id=6558. The (in) validity of the argument is analysed by McCahery, Renneboog, Ritter and Haller, nt. Ferrarini (ed.) nt. 24; However, S. Maul and A. Kouloridas, in The takeover Bids Directive, German Law Journal No. 4 (1 April 2004) wrote "It should be noted that due to international agreements (Article II No. 1 of GATS I[13]) it is questionable whether the reciprocity clause can be used against third country bidders, like US companies. Contrary to the opt-in provision mentioned above, the reciprocity clause does not give a direct right to companies, but allows Members States to decide whether or not they want to give such discretion to their companies. http://www.germanlawjournal.com/article.php?id=411 .

liberal system.[21] Indeed, the options before the regulators are those between two economic models, that previously have been labelled the Rhineland model and the Anglo-Saxon model. As the rules were made optional it will not astonish that almost all member states have preferred not to introduce them[22].

2 - The Policy debate

2.1. The debate about the directive

Analysing the numerous - sometimes vigorous[23] - positions that have been published on this topic, it is clear that one has to do with some quite fundamental policy issues. To explain these, it is useful to go back to the reports on which the final directive was based, although the positions expressed there were already widely followed in the previous version of the directive. The main document is the first report of the High Level Group of Company Law Experts on Issues related to Takeover Bids[24], a consultative group created by the Commission to advise it especially on the then failed original directive. According to that report, the basic policy objectives were the realisation of a level playing field[25] and to take advantage of the benefits of the takeover mechanism (especially for disciplining management, enhancing corporate performance and hence improve economic growth). From these objectives, the report derived two basic legal approaches i.e. only shareholders[26] should decide on takeovers (leading to the neutrality rule of art 9 thereby eliminating the role of the board, except for seeking alternative bids[27]) and the objective of proportionality between risk-bearing capital and control, also known as the "breakthrough rule" [28]. It is especially the latter proposal that has stirred uneasiness in Europe, taking into account the prevailing concentrated ownership structure. The proposal would have amounted to a mandatory neutralisation of control positions in European listed companies, at least in case of a takeover. Charter provisions restricting voting rights or the contractually agreed preferential transfer of securities would be declared inapplicable against the bidder. The bidder who acquired 75% of the shares should be entitled to exercise voting rights on a one share, one vote basis. The report added that although these measures would have significantly interfered with ownership rights and share value, no compensation should be considered with respect to the deprivation of disproportionate voting rights leading to a change of control[29].

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21 A. Nilsen, nt. 2.

22 See for an overview: Commission staff document, nt. 3.

23 Vigorous opposition: Célia Pascaud, nt. 17 ; The Centre for European Policy Studies (CEPS) has also reported several times arguments pleading against an undifferentiated attitude towards anti-takeover devices : See already before the adoption of the directive: CEPS, The Challenge of the 13th Takeover directive in the EU, http://www.ceps.be/Article.php?article_id=101

24 http://ec.europa.eu/internal_market/company/docs/takeoverbids/2002-01-hlg-report_en.pdf, January 10, 2002. The report was criticized i.a. by McCahery, Renneboog, Haller, Ritter, The economics of the proposed European Takeover Directive, CEPS, Research Report in Finance and banking http://www.oecd.org/dataoecd/46/53/2506091.pdf

25 This was considered not a value yardstick for takeover regulation, being based on fairness rather than allocative efficiency : McCahery, c.s. nt. 24.

26 The involvement of employees has also been discussed but obviously found a satisfactory solution: see artt. 9(5) and 14.

27 See K.J. Hopt, Aktionärskreis und Vorstandsneutralität, ZGR, 1993, 534- 566.

28 See p. 24 of the report.

29 The directive itself contains a vague provision in that respect: art 11(5) providing for equitable compensation. One does not see how this can be put to work.

These concepts were incorporated in the later directive, although some in a less radical way[30].

The reactions – both before, during and after the adoption of the directive – have been very numerous. From a Google query[31], more than 800.000 hits are displayed. Two main lines of thought can be distinguished: these correspond to the two main lines of ownership structure, i.e. dispersed ownership, mainly prevailing in the UK, but also defended e.g. in the Netherlands, and the concentrated ownership structure, especially defended in the North of Europe. According to the first tendency, the directive was a disappointment as it did not create a "level playing field", and maintained structures deemed inefficient in terms of management and capital allocation[32]. The second line of thought, while questioning the need for harmonisation, mainly stated that there was no evidence in support of the negative effects of concentrated ownership, while by abolishing disproportional voting rights property rights would have been violated if the regime was made mandatory. The final outcome was the "compromise" as it now exists, it is that all solutions are acceptable. But it is clear that the debate has been postponed, not ended.

Two tendencies seem to have developed, one considering the directives useless as it did not sufficiently affect the control positions[33], the other developing new pressures to avoid companies being taken over. In many publications, it is regretted that the directive has not brought about a uniform regime for takeovers across Europe[34]: inconsistencies in the way the directive has been implemented have prevented the objective of a level playing field to be achieved. Some even say that one may have been better off without directive [35]

In academic writing, there has been quite some criticism about the directive: on the one hand there is a widespread opinion that corporate control should be made more contestable, and that the managerial and macro-economic benefits of changes of control, if needed by unsolicited bids, have to be secured. On the other, writers are aware of the risk of a major downside, preventing forceful action against inefficient management. Some argue that the real battle is about national, eventually government induced restrictions against takeovers and therefore their action to safeguard national champions, or the "patriotisme économiqiue" as was so ably publicly coined by a former French prime minister?

Doubts about specific rules were expressed by many leading scholars: Becht considered that the reciprocity rule would lead to a massive transformation of corporate control in Europe, the benefits of which are far from certain[36]. Hertig and McCahery[37] are sceptical of the advantages of the level playing field. The breakthrough rule will according to McCahery,

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30 The ambit of the breakthrough rule was limited there where the HLCLEG proposed a generalised application.

31 Under "Takeover directive" "takeover bid directive" and under "Directive OPA".

32 Dan Roberts, Sunday Telegraph "CBI to attack overseas protectionism warning" that the recent upsurge in foreign bids for British companies puts them at a disadvantage because they are not able to reciprocate: http://www.telegraph.co.uk/moneymain.jhtml?xml =/money/2006/11/26/cncbi26.xml

33 Mild criticism, in: The European Directive on Takeover Bids: A Comparison with U.S. Tender Offer Practices, summer 2005, Jones Day http://www.jonesday.com/pubs/pubs_detail.aspx?pubID=S2875

34 See already before the adoption of the directive: CEPS, The Challenge of the 13th Takeover directive in the EU, CEPS March 2003, http://www.ceps.be/Article.php?article_id=101

35 The Adam Smith Institute, Issues, http://www.adamsmith.org/index.php/main/individual/the_takeover_directive/. It seems that the CBI has taken a similar position.

36 M. Becht, Reciprocity in Takeovers, in Ferrarini (ed.) nt. 13, at 647.

37 G. Hertig and J. MacCahery: An agenda for Reform: Company and Takeover Law in Europe, Ferrarini, (ed) nt.13 at 21 e.s.

Renneboog a.o[38], not contribute to the emergence of a market for corporate control, and while supporting the creation of an active corporate control market, they formulated criticism on several points, such as on board neutrality, the compensation rule, and especially the breakthrough rule, while welcoming other rules such as the mandatory bid equitable price.

Taking into account the numerous objections that have recently been raised in literature, one wonders why still so many politicians and business people continue to plead for a so-called "level playing" field[39], including the removal of disproportional voting mechanisms. Is this battle not being fought against the wrong foe ?

Beate Sjäfell summarises part of the opinion as follows: "It seems somewhat paradoxical that rather than first considering rationally the pros and cons of the existing systems of corporate governance in Continental Europe, the Commission tries through the takeover directive to facilitate simultaneously the introduction of the Anglo-American shareholding structure and the solution to the problems that this very system is perceived to entail."[40]

The discussion if far from closed: the Commission has already voiced that it is not pleased with the present status of implementation, and will attempt to put the question on the table in 2011.

In the recent Volkswagen decision, the ECJ has on the one hand admitted that parties may by private contract introduce certain voting caps, or other voting enhancing mechanisms, as the shareholders are then free to introduce it or not, but that in the case of Volkswagen, these extraordinary instruments were introduce by the law itself, without giving shareholders the possibility the possibility to derogate from them. Hence these legal provisions were held contrary to art. 56 of the Treaty on freedom of capital movement[41].

2.2. The debate about "one share, one vote"

Already during the discussion about the takeover directive, one finds several allusions to the further, in fact underlying debate about "one share, one vote". Commissioner Bolkestein announced further action on that topic, invoking "shareholder democracy"[42]. The subject was taken up by Commissioner McCreevy, who also called a couple of times for a Europe wide introduction of the "one share, one vote" rule, thereby referring to "shareholder democracy"[43].

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38 See supra OECD paper, nt.23; these arguments were further summarised in a testimony before the European parliament by J. McCahery, Commentary of the Draft Takeover Directive, http://www.europarl.europa.eu/hearings/20030128/juri/mccahery.pdf

39 This point is argued in many interventions: see e.g. Bolkestein, The takeover directive: a Commission perspective, Speech, 4 March 2003, 03-206; for a critical analysis, see J. McCahery, L. Renneboog, P. Ritter and S. Haller, The economics of the proposed European takeover directive, in Ferrarini (Ed) nt. 13, at 574.

40 B. Sjäfell, Political path dependency in practice: the takeover directive, ssrn. 959999.

41 ECJ, 23 October 2007, C. 112/05.

42 Can Bolkestein Finally Break the Takeover Directive Deadlock? http://ceps01.link.be/Article.php?article_id=68 reflecting a discussion with the Commissioner: "Commissioner Bolkestein believes that the one-share one-vote regime is the long-term objective of the level playing field and it is conducive to the optimal allocation of resources throughout the Union. The one-share one-vote regime would promote shareholder democracy and achieve a single, integrated and liquid securities market in the European Union."

43 McCreevy, Speech 05/683 en FT Oct 15, 2005. However, his attitude has become more nuanced : The highs and lows of cross-border deals, http://www.worldfinance.com/news/135/ARTICLE/1176/2007-08-15.html .

However, further factual information was needed: in 2006, the Commission launched a wide scale investigation on the subject, resulting in an ISS study entitled "Report on the Proportionality Principle in the European Union". The overall study is composed of three parts, the ISS part being essentially fact finding, while the second and the third one, produced under the aegis of the European Corporate Governance Institute have dealt with the theoretical[44] and the empirical[45] aspects of the "one share, one vote" rule.

The ISS report reveals that almost all member states have CEMs, many of a legal nature – dual class voting systems, multiple voting shares, etc. – while factual systems - such as pyramids, or the issuance of non-voting certificates by a third party, prevail in states where "one share, one vote" is practised. The study also investigates the effects of the CEMs on the investing strategy of institutional investors. The responses indicate that the portfolio managers generally do not like CEMS but upon making individual investment decisions, they act on a case-by-case basis, looking at the merits of each case.

The comparative empirical study came to the conclusion that there is no clear evidence of any significant positive or negative influence of these CEMs. Several of these techniques have ambivalent effects[46], where the concrete circumstances in which they are used may whether strengthen the position of the minority, or weaken it. This part of the study concludes that there is no evidence of the negative impact of CEMS on the enterprise value, nor of a discount that would be due to CEMs.
On the last point, the investment managers contradicted these findings: they argued that the CEMS have a negative price influence of 20 to 30% to the market value.

The results of these studies are rather differentiated. On the one hand it does not appear that all CEMS constitute a threat to the development of the economy in Europe. On the other, certain instruments have a more negative effect on market valuation. An undifferentiated approach according to which "one share, one vote" would be introduced as the benchmark for all European public issuers, is not a convincing policy objective.

On the 3rd October 2007, Commission McCreevy declared before the Parliament: There is no economic evidence of a causal link between deviations from the so-called proportionality principle and the economic performance of companies …". Since there is no economic case and member states have their own cultural traditions, there is no reason for action at the European level", added the Commission **spokesman**.[47]

However, even if this discussion has now been ended, the underlying issues are still there and will, over time require some form of further analysis. Alternative remedies may be needed to further some of the economic objectives that were aimed at in the one share one vote discussion. It is interesting to note that the discussions in the European Corporate Governance Forum, which has published its opinion in September, were preceded by an elaborate study,

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He recently stated. "I'm not so inclined to make any dramatic moves, given the considerable hostility that the proposal of my immediate predecessor went through"; Add: Buck, T., McCreevy steps back from straight push on « one-share, one-vote'", FT, 6 June 2007, p.3.

44 S. Burkhart and S. Lee, One share one vote debate, the theoretical perspective, ECGI, Finance Working paper, 176/2007; (May 2007) http://www.ecgi.org/wp/wp_id.php?id=243

45 R. Adams and D. Ferreira, Ownership Proportionality and Firm Value The empirical evidence, ECGI, Finance Working paper, 177/2007; http://www.ecgi.org/wp/wp_id.php?id=244 (May 2007).

46 Such as voting caps that reduce the power of large shareholders but prevent takeovers, thereby protecting the directors in place.

47 FT, October 4, 2007, p. 1.

prepared by a committee of lawyers, from which appears a more nuanced opinion, but also alternatives to the somewhat abrupt "one share, one vote" approach.[48].

The Forum concluded in its advice to the Commission[49] that considering the pro and cons of a regulatory intervention, it would be preferable to follow first the path of disclosure of all CEMs, inviting companies to state the reasons for maintaining them. Attention is also called to disclosure about share borrowing and similar mechanisms where votes are cast by a party that has no financial interest in the share ("empty voting"). Conflicts of interest, both at the director's' but more importantly also at the shareholder level should be considered. And finally - and in my view importantly - work should be undertaken to ensure that companies are informed about the identity of their shareholders, inviting custodian banks to communicate the identity of the shareholders for whom they hold shares, except if the latter prefer to remain anonymous.

Indeed, one increasingly wonders what is the fundamental issue with CEMs, why derogations from the proportionality rule should be considered per se detrimental to shareholders, the firm or the economy as a whole, and for what superior reasons European company law should intervene in a matter than some consider as one of freedom of contract. The role of CEMs in a going concern hypothesis should be distinguished from their use as anti-takeover instruments. In the hypothesis that no takeover is imminent, CESMs are reported to have a negative impact on the share price, reduce or even eliminate the disciplining effect of the markets, and open the door to private benefits. The impact on the share price is case bound, not universal and contested in research. Investors that buy on the market enter at a discount but also leave at a discount. The disciplining effect on management is probably stronger with a dominant shareholder, and at least not weaker than in fully dispersed companies, where recent scandals illustrate to what abuses the too wide freedom given to managers can lead. Remains the point of the private benefits of control. Here again, empirical research indicates that these benefits, although not to be denied, differ considerably depending on the legal environment in which they are realised. This research indicates that in the Nordic countries, the benefits are quite limited (1% for Sweden) - and can be considered to stand for the cost of monitoring the company, there where in the Southern European and similar economies, they can be quite substantial, reaching up 28% (for Italy) to 36% (for Mexico)[50]. Provided these data are confirmed in further research, one should conclude at least that not all companies should follow the same pattern, and that the "one share, one vote" rule should not be generalised. On the other hand, where private benefits are widespread, adequate regulations on conflicts of interest, including on corporate opportunities and the like should be introduced, curtailing the possibility to create these benefits. More vigilant independent directors, explicit preventive procedures, stricter liabilities for violation of the duty of loyalty, and extension the ambit of the rules to shareholders are some of the devices that could usefully be considered. Largely

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[48] Paper of the Working group on proportionality, http://ec.europa.eu/internal_market/company/docs/ecgforum/workinggroup_proportionality_en.pdf

[49] European Corporate Governance forum, Statement on Proportionality, http://ec.europa.eu/internal_market/company/docs/ecgforum/statement_proportionality_en.pdf

[50] R. Gilson, Controlling shareholders and corporate governance, 119, Harvard L.R., nr. 6 (April 2006) on the basis of the findings by T. Nenova, The Value of Corporate Voting Rights and Control: A cross-country analysis, 68 J. Fin..Econ, 325 (2005). Comp. A. Dyck and L. Zingales, Private benefits of Control: an International comparison, 59 J.Fin Econ, 537(2004); see more generally: G. Ferrarini, One Share, one vote: a European Rule ? ECGI, Law Working Paper 058/2006; A. Katchaturyan, The one-share-one vote controversy in the EU, ECGI, ECMI, Working Paper, August 2006.; the matter was also debated in the European Parliament: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20070312+ITEM-023+DOC+XML+V0//EN

eliminating these benefits would affect the pricing of these stocks and reduce the control premium that is being offered in case of a takeover bid. It would make bids less expensive and in that sense contribute to the restructuring of the industry.

A final point: takeovers will always be necessary, but they are a very expensive form for changing control. Should companies not be able to find a better use for their funds than for the distribution of considerable control premiums to shareholders, premiums that will later have to be drawn out at the expense of the later shareholders and of the firm? Other means for increasing the role of the shareholder may be imagined, activating their role as responsible, engaging shareholders, in pr outside the general meeting.

Conclusion

The takeover directive has positively contributed to the integration of the European securities markets in the sense that it has streamlined the procedures for cross border takeovers and introduced a uniform mandatory bid requirement.
However, the attention has mainly been focused on the provisions dealing with the anti - takeover defences. These provisions have been the subject of contradictory opinions that ultimately refer to the dividing lines between the continental en the Anglo-Saxon company concepts. The arguments proposed for one and the other are controversial. The discussion is not closed and will pop up again as part of the controversy about the "one share, one vote" rule. The economic foundation for the latter is strongly related to the private benefits of control. Rather than imposing a flat rule on voting rights, it seems useful to consider if these private benefits should not be the focal point of attention.

Since the entry into force of the directive, there have been no widespread cases of bids being blocked by shareholders: if bids were blocked, this has come, not - or not only - from the shareholders, but from the policymakers, and often did deal not only with takeovers that had effectively been launched, but were formulated in the preceding phase, scaring potential bidders from making a bid.

The overall assessment is therefore more positive than was initially predicted[51]

The final evaluation would be that one should not be blind for what the takeover directive has achieved – which is valuable – and not be obnubilated by the anti-takeover bid defences that are often easily overcome once the bid is an offer not to be refused.

To be followed…..

[51] See V. Edwards, The directive on takeover bids – Not Worth the Paper it's Written on? ECFR, 2004, 416-439. The question relates to a statement by Commissioner Bolkestein, Bulletin Europe, 26 November 2003.

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