



**Master of European Affairs
Business Law and Business Administration**

PROMOTING (IN)EFFICIENCY?

Cross-border takeovers and takeover defenses in the European Union with
and without the proposed 13th Company Law Directive

Theoretical application of simple finance theory and transaction cost economics

by

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Abstract

The market for corporate control is one of the cornerstones of economical systems in every country. The Commission of the European Communities has tried for the past 15 years to get accepted a Directive that aims at harmonizing takeover regimes in the Member States of the European Union. The paper examines the rationales behind takeovers and methods to prevent them from occurring through two alternative theories – the simple finance model and the transaction cost economics – to determine the need for the 13th Company Law Directive. The same theories are also applied to existing situations concerning takeovers in six European Union Member States. It becomes evident that the current system of takeover regulation in the Member States under examination converges and unexpectedly the transaction cost economics seems to explain the existing situation more precisely than the simple finance model. Closer examination of the proposed Directive shows several shortcomings that are not feasible based either on the simple finance model or transaction cost economics. Recent judgements of the ECJ seem nevertheless to provide a reason for the Directive as a remedy for faulty judgements. Natural convergence of markets for corporate control does not follow the path taken in the Directive, which questions the need for harmonization through such a radical legislative intervention.

Table of contents

I. INTRODUCTION	1
I 1. PURPOSE AND STRUCTURE.....	3
I 2. LIMITATIONS	5
I 2.1 <i>General limitations</i>	5
I 2.2 <i>Choice of countries under examination</i>	6
I 3. METHODOLOGY	7
I 3.1 <i>Choice of method</i>	7
I 3.2 <i>Choice of sources</i>	9
I 3.3 <i>Choice of corporate theories</i>	11
I 3.4 <i>Measuring cross-border takeover activity</i>	12
II THEORETICAL FRAMEWORK	13
II 1. CORPORATE ENVIRONMENT	13
II 1.1 <i>The actors</i>	14
II 2. CORPORATE THEORIES	15
II 2.1 <i>The simple finance model</i>	15
II 2.2 <i>Transaction cost economics</i>	18
III TAKEOVERS	21
III 1. DEFINING TAKEOVERS	21
III 2. THE TAKEOVER PROCESS.....	22
III 2.1 <i>The tender offer</i>	23
III 2.2 <i>The proxy fight</i>	24
III 3. EXPLAINING CROSS-BORDER INVESTMENT	25
III 4. GENERAL TAKEOVER MOTIVATIONS	27
III 4.1 <i>Target driven motivations</i>	27
III 4.2 <i>Bidder driven motivations</i>	28
III 5. UNDERSTANDING TAKEOVERS... ..	29
III 5.1 <i>...through the simple finance model...</i>	30
III 5.2 <i>...and through transaction cost economics</i>	31
IV TAKEOVER DEFENSES	34
IV 1. PRE-BID DEFENSIVE STRATEGIES	34
IV 1.1 <i>The poison pill</i>	35
IV 1.2 <i>Other “pills”</i>	35
IV 1.3 <i>Concentration of ownership</i>	36
IV 1.4 <i>Cross-ownership of shares</i>	36
IV 1.5 <i>Pyramiding</i>	36
IV 1.6 <i>Supermajority provisions</i>	37
IV 1.7 <i>Golden parachutes</i>	37
IV 1.8 <i>Staggered boards</i>	38
IV 1.9 <i>Differential voting rights</i>	38
IV 1.10 <i>Share transfer restrictions</i>	39
IV 2. POST-BID DEFENSIVE STRATEGIES.....	39
IV 2.1 <i>White knight</i>	39
IV 2.2 <i>White squire</i>	40
IV 2.3 <i>Management buy-out</i>	40
IV 2.4 <i>Capital structure changes</i>	40
IV 2.5 <i>Corporate restructuring</i>	41
IV 2.6 <i>Pac-Man defense</i>	41
IV 2.7 <i>Greenmail and standstill</i>	42
IV 2.8 <i>Litigation</i>	42
IV 3. RATIONALE OF ANTITAKEOVER MEASURES	42
IV 3.1 <i>...via management entrenchment hypothesis</i>	43
IV 3.2 <i>...and via the shareholder interest hypothesis</i>	45
CONCLUDING REMARKS FOR PART I.....	47

V TAKEOVER DEFENSES IN SIX EU COUNTRIES	48
V 1. FRANCE.....	48
V 1.1 <i>Defensive measures deriving from ownership structure</i>	49
V 1.2 <i>Defensive measures deriving from companies and company law</i>	50
V 1.3 <i>Regulation of takeover activity</i>	52
V 2. GERMANY	53
V 2.1 <i>Defensive measures deriving from ownership structure</i>	53
V 2.2 <i>Defensive measures deriving from companies and company law</i>	54
V 2.3 <i>Regulation of takeover activity</i>	55
V 3. ITALY	57
V 3.1 <i>Defensive measures deriving from ownership structure</i>	57
V 3.2 <i>Defensive measures deriving from companies and company law</i>	57
V 3.3 <i>Regulation of takeover activity</i>	59
V 4. THE NETHERLANDS.....	60
V 4.1 <i>Defensive measures deriving from ownership structure</i>	61
V 4.2 <i>Defensive measures deriving from companies and company law</i>	61
V 4.3 <i>Regulation of takeover activity</i>	63
V 5. SWEDEN	65
V 5.1 <i>Defensive measures deriving from ownership structure</i>	65
V 5.2 <i>Defensive measures deriving from companies and company law</i>	66
V 5.3 <i>Regulation of takeover activity</i>	67
V 6. UNITED KINGDOM.....	68
V 6.1 <i>Defensive measures deriving from ownership structure</i>	68
V 6.2 <i>Defensive measures deriving from companies and company law</i>	68
V 6.3 <i>Regulation of takeover activity</i>	69
V 7. CORPORATE THEORIES RE-APPLIED	71
VI CROSS-BORDER TAKEOVERS IN THE EU	73
VI 1. THEORETICAL REASONS FOR EUROPEAN CROSS-BORDER TAKEOVERS	73
VI 2. EUROPEAN CROSS-BORDER MERGERS AND ACQUISITIONS	75
VI 2.1 <i>Cross-border breakdown 1998-2003</i>	75
VI 3. ANALYZING EUROPEAN CROSS-BORDER INVESTMENTS	77
VI 4. CORPORATE THEORIES RE-APPLIED.....	78
CONCLUDING REMARKS FOR PART II	79
VII TAKEOVER DEFENSES IN EC LEGISLATION.....	80
VII 1. ACTIONS PRIOR TO THE BID	80
VII 1.1. <i>Structure of share capital and identity of holders</i>	80
VII 1.2. <i>Restrictions on transfer of shares</i>	81
VII 1.3. <i>Pyramids and cross-holding</i>	82
VII 1.4. <i>Employee share ownership plans</i>	82
VII 1.5. <i>Voting rights, board appointment and compensation and asset lock-up</i>	83
VII 2. ACTIONS DURING THE BID	83
VII 2.1 <i>Information on the bid</i>	84
VII 2.2 <i>Conduct of the target's board</i>	84
VII 2.3 <i>The break-through rule</i>	86
VII 3. LEGALITY OF DEFENSIVE STRATEGIES	87
VII 3.1. <i>Commission vs. Portugal (Case C-367/98)</i>	88
VII 3.2. <i>Commission vs. France (C-483/99)</i>	90
VII 3.3. <i>Commission vs. Belgium (C-503/99)</i>	91
VII 3.4. <i>Commission vs. Spain (Case C-463/00)</i>	92
VII 3.5. <i>Commission vs. United Kingdom (Case C-98/01)</i>	94
VII 3.6. <i>Effect on antitakeover measures</i>	95
VII 4. APPLICATION OF CORPORATE THEORIES	98
VIII CONCLUSIONS.....	100
REFERENCES.....	102
ANNEXES.....	120

List of figures

Figure 1: Structure of the paper.....	4
Figure 2: Corporate environment.....	13
Figure 3. The structure of cross-border M&As.....	22

List of annexes

Annex A: Proposals for the 13th Directive from 2002 and 1997.....	120
Annex B: M&A activity in the European Union	130
Annex C: M&A activity in the European Union.....	131
Annex D: Breakdown of target countries in European Union cross-border M&A activities 1998-1999.....	132
Annex E: Breakdown of target countries in European Union cross-border M&A activities 2000-2001.....	133
Annex F: Breakdown of target countries in European Union cross-border M&A activities 2002-2003.....	134
Annex G: Breakdown of bidder countries in European Union cross-border M&A activities 1998-1999.....	135
Annex H: Breakdown of bidder countries in European Union cross-border M&A activities 2000-2001.....	136
Annex I: Breakdown of bidder countries in European Union cross-border M&A activities 2002-2003.....	137

Preface

The subject of takeovers and takeovers has been extensively studied and thus anyone opening these pages should not expect a revelation. The paper serves as a chance for the author, and those interested enough in reading it, to learn something new and to expand the mental horizon. Due to the vast amount of research previously done on the subject, one of the consequences of this paper has been the provision of an up-to-date literature review.

The main purpose is nevertheless to provide an understanding of takeover defenses for those starting from the same position as the author – little knowledge and willingness to learn something new. It has to be emphasized that the paper is theoretical and therefore has little use for those actually participating in takeovers as targets or acquirers. Nevertheless, it is useful for those that want to broaden their perspective and/or to make an already complex matter more confusing – like the author itself. The length of the paper and the amount of research put into it have had the unfortunate effect of accomplishing more width than depth.

The paper is a result of a year of study in the Master of European Affairs program at the Lund University. It has provided me with more experience and knowledge than several previous years combined. This has not been only in terms of academic knowledge and experience but also socially. It has been so mainly because of the other graduate students with whom I shared this year – Tuukka, Karin, Amanda, Christian, Marcus, Todd and many others –, due to wonderful professors – Cecile and Henrik from the business law department, Ole from political science and naturally my supervisors Per and Matts who kept their faith in me through this hard and stressful journey. Due to my own choices their role in the paper has been small and all the mistakes remaining are one hundred percent mine. Most of all I would like to thank to my partner Izabela, who has given me more than I could ever express in words. This paper is to her.

Lund, summer of 2003

Ivo Toomla

We trained hard.... but every time we formed up teams we would be reorganized. I was to learn that we meet any new situation by reorganizing. And a wonderful method it can be for creating the illusion of progress while producing confusion, inefficiency and demoralization.

Petronius Arbiter, 210 BC

I. Introduction

In the late 1970s, the Commission of European Communities¹ contacted a British professor to work out a proposal for harmonizing takeover legislation in the European Community². In May 2003, after more than 25 years since the first expressions of interest, such legislation is yet to be implemented. The Directive of the European Parliament and of the Council on takeover bids³ in several versions⁴ has been discussed in the Council and in the Parliament for close to 15 years with no concrete legislative outcomes. The latest blow to the Commission's attempts to pass the Directive, was given by the European Parliament on July 4th 2001 when the plenary session voted on the act – 273 votes for, 22 absent and 273 votes against. A tie vote in the European Parliament leads to the act being rejected.

Despite the lack of legislative harmonization, cross-border takeovers in Europe have witnessed a tremendous growth during the last 15 years. To exemplify, in 1987 cross border mergers and acquisitions (M&A) involving European companies were valued at 12,7 billion dollars as sellers and 32,6 billion dollars as acquirers. In 1999 the respective figures were 344,5 billion dollars and 497,7 billion dollars. A 2700 (sic!) percentage growth in the value of cross-border sales and 1500 percentage growth in the value of European acquisitions while the global merger and acquisition activity during the same time increased “only” by 950 percent⁵.

Although the numbers are intriguing, they do not tell the full story. Member States of the European Community have individual company laws, separate takeover legislation and unique systems of corporate governance, which lead to cross-border takeovers being subject to different “rules of the game” for companies. The 13th Directive is aimed to reduce these differences to take another step in the creation of a common internal market. The importance of such an act has been recognized at the level of the heads of Member States, who, in the Lisbon summit of the European Council in 2000, perceived the regulation of European cross-border takeovers as a part of free movement of capital⁶

¹ Hereinafter the Commission

² The so called Pennington-report (Clausen and Sørensen, 1998) lead to the recommendation by the Commission that the Member States of the European Union adopt rules of mandatory bid in their national takeover regulation (77/534 OJ L 212, 8.8.77)

³ COM(2002)534, Hereinafter the 13th Directive

⁴ Annex A presents a comparison of the two most recent versions of the 13th Directive.

⁵ OECD (2000)

⁶ Based on Articles 56-60 of the Treaty establishing the European Community (hereinafter the Treaty)

to be one of priorities in the light of creating a truly integrated market in Europe⁷. The paper at hand studies the feasibility of the proposed Directive in its present form.

Despite these long attempts and the obvious significance of the topic, the subject of the 13th Directive has received only limited coverage in the literature⁸. One of the reasons would be the very fact that the proposal is constantly changing thus rendering impossible to analyze it with confidence. Also, as the European Court of Justice (ECJ) deals only with legislation in force, there has been little activity which would allow to stipulate about future judgements on this matter. Most thorough research on the field has been done by the High Level Group of Company Law experts⁹ that presented their report to the Commission in the beginning of 2002. The result was yet another proposal of the 13th Directive by the Commission presented to the European Parliament and the Council of Ministers in October 2002.

This paper is based on the final proposal that is expected to reach the plenary of the European Parliament sometimes in the autumn of 2003. As the issue of takeovers is wide and complex, it would be overly ambitious for a novice to try to cover the 13th Directive in its entirety on these limited pages. The paper therefore focuses on an aspect of takeovers that has provoked the minds of scholars, practitioners and politicians for almost as long as there has been takeover activity – possibilities for companies to use measures to avoid being taken over, i.e. takeover defenses¹⁰.

Takeover defenses are seen not only as enabling inefficient managers to protect their positions but also as protecting the constituencies of the company, who rely on the continued operation of the firm. In many instances, a takeover of a company results in radical changes in the strategy, corporate culture and purpose of the company. This has severe effects on everyone associated with the firm from employees to customers to creditors and suppliers.

To provide new inputs, takeovers and takeover defenses are approached from two alternative theories – the simple finance model, that has dominated the research in the area for decades, and the transaction cost economics, that will hopefully provide a different approach to understanding takeovers and takeover defenses by the end of this paper. Transaction cost economics has so far received only limited coverage as a theory for analyzing takeover defenses. These two theories are then used to explain the basic rationales behind takeovers and takeover defenses, which will in turn allow understanding the workings of the 13th Directive. The main aim of providing a different approach remains nevertheless theoretical for the extent of this paper. Simple finance model is not likely to disappear as the dominant theory for quite some time.

The same theories are also applied to existing takeover regimes in 6 European Union member states to examine the need for such harmonization first hand. The paper will also briefly stop on the occurrence of cross-border merger and acquisition activity in recent years. Once again, the transaction cost economics should be seen only as a possibility to broaden ones perspective.

⁷ Commission (1999)

⁸ Analysis of the 1990 version of the 13th Directive can be found in Bergström *et al.* (1995), the latest version has been subject to analysis for Hansen (2003) and Berglöf and Burkart (2003)

⁹ Report by the Group of High-Level Company Law Experts, European Commission, Brussels, 10.1.2002

¹⁰ Throughout the paper terms takeover defenses, defensive measures and tactics, antitakeover measures and tactics are used interchangeably

The paper also adds another approach to the 13th Directive. During 2002 and in the first half of 2003, the ECJ has delivered five judgements that can be seen as directly influencing takeover defenses available to companies within the European Union. Together with older judgements on the relationship between Community legislation and national company laws, it is now possible to anticipate the path the harmonization of European takeover laws will take. To the knowledge of the author of this paper, there has been no prior attempt to use such an approach.

I 1. Purpose and structure

There are two “red threads” connecting the paper together – that of the application of alternative theories and that of the 13th Directive. Although the Directive itself is approached in detail only in the last part of the paper, all the preceding discussion is aimed at paving the way to understanding the rationale behind the Directive. The purpose is to examine the effects of the Directive from the perspective of two alternative theories to establish whether they remain unchanged.

Following the introductory Chapter, the first part of the paper, consisting of Chapters II to IV, explains the basics of the applied theories, of takeovers and of takeover defenses. The aim is to bring forth any possible differences arising from the application of the theories. It is even more intriguing given that transaction cost economies and simple finance theory are not in fact opposing but to a large extent based on the same assumptions which will be provided in further pages of this paper.

The second part of the paper, Chapters V and VI examine briefly the existing takeover regimes and possibilities to use takeover defenses in six European Union member states and the occurrence of cross-border takeovers between European Union member states in recent years. The aim is to study the level of harmonization that has occurred without a common legislative act. Takeover regimes in six member states are also subjected to analysis through the two theories to study the level of their application in practice.

Chapter VII, which can be also seen as the third and final part of the paper, consists of the analysis of the proposed 13th Directive. The main input is coming from the case law of the European Court of Justice, whose judgements have, to the opinion of the author, significantly influenced the system, which the 13th Directive is aimed at regulating. Two corporate theories, applied throughout the paper are then also applied to the proposed Directive to examine the level of relevancy one or another theory has to that legislative act.

Although final conclusions are drawn in the last, the VIII Chapter, each part is ended with a short summary to aid the reader to gather thoughts and to stay focused despite the length of the paper. A visualization of the structure of the paper is provided on figure 1 on the following page.

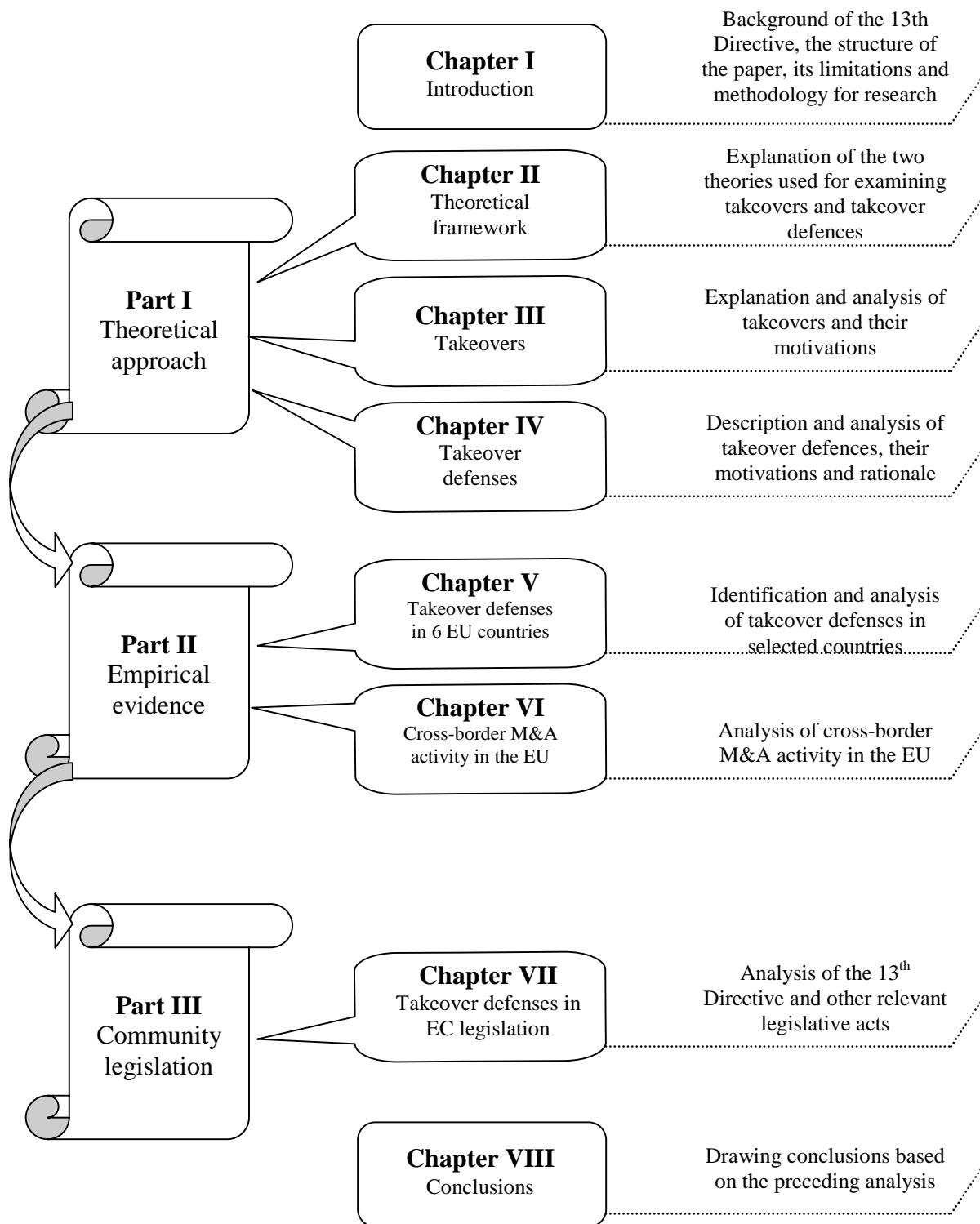


Figure 1. The structure of the paper

I 2. Limitations

I 2.1 General limitations

The paper will be limited to examining the effects of the 13th Directive on antitakeover measures. Hypothetical conclusions are drawn also on how the 13th Directive will influence takeover activity and national corporate governance systems, although the latter is subject to much wider set of influencing factors¹¹. Aspects of the 13th Directive, such as mandatory bid, squeeze-out, sell-out, supervisory authority and others are discussed to the extent which they are seen as contributing to antitakeover measures¹².

Furthermore, as the 13th Directive addresses the issues of open bids on companies listed on stock exchanges, only those aspects of takeovers and subsequently also takeover defenses are considered. Proxy contest, an alternative tactic for acquiring corporate control, is nevertheless provided to indicate the limited scope of the directive.

This paper does not address issues such as taxation and incorporation theories that have certain influence on the choice of targets and methods of acquisition, as they form a topic worthy of separate examination¹³. The paper will not address the financial aspects of takeovers and takeover defenses as they have been studied extensively elsewhere¹⁴. For the same reason also the protection of employees rights, in the case of a change of control of an undertaking, is not discussed.

Due to the nature of the European Communities law and the legislative type of the directive¹⁵, the implementation of the 13th Directive can be seen as leading to a myriad of court rulings based on the actions of the target and the bidder. As the detailed national laws and court rulings are too extensive to be covered in this paper, the thesis will focus on the role of the European Court of Justice (ECJ) in regulating measures through its case-law that have their effect of hindering takeover activity in Europe¹⁶.

In examining cross-border M&A activity, no distinction is made between friendly and hostile transactions. Access to data has been limited and in case where distinction could have been made¹⁷, the reliability of the source has been questionable.

¹¹ On this matter see for example La Porta *et al.* (1999), Coffee (2001) Roe (2002) Becht *et al.* (2002)

¹² On the mandatory bid see for example Bergström and Högfeldt (1995)

¹³ See for example Wymeersch (2003)

¹⁴ For example Weston *et al.* (1990), Brealey and Myers (1991), Gaughan (2002) and Ross *et al.* (2002)

¹⁵ Article 249 of the Treaty states ‘A directive shall be binding, *as to the result to be achieved*, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods’ (emphasis added)

¹⁶ Article 234 (b) of the Treaty gives the ECJ the jurisdiction to give preliminary rulings concerning “the validity and interpretation of acts of the institutions of the Community and of the European Central Bank”

¹⁷ Namely the Bloomburgs Mergers and Acquisition database

I 2.2 Choice of countries under examination

As the coverage of all 15 Member States would lead to excessive repetition, the study of national takeover defenses is limited to the examples of France, Germany, Italy, the Netherlands, Sweden and the United Kingdom. The choice of countries was based on the following rationale.

Takeover activity in Europe is not uniformly distributed. The countries chosen exhibit the largest share in the M&A activity during the period of 1991 to 1999¹⁸ and are thus perceived to have the highest interest in either accepting or rejecting the 13th Directive. The choice was made to include all the countries that count for more than 5 percent of the total number¹⁹. Their strong opposition to the previous drafts of the Directive motivated inclusion of Germany and the Netherlands further²⁰.

An alternative choice considered was to include countries that exhibit the highest level of cross-border²¹ activity. It can be argued that those countries are most likely to exhibit high levels of cross-border activity also after the implementation of the 13th Directive. Constraining the study to countries that already exhibit high numbers of cross-border takeovers, would limit the study to countries that are already relatively open as targets of (or bidders from) other countries.

Making the choice to include countries exhibiting overall importance in M&A would represent those that are more prone to M&A activity in general. As the aim of the 13th Directive is to make companies more easily acquirable to firms from other Member States, the general level of M&A activity exhibits also the possibility of cross-border mergers after harmonization of legislation.

The chosen countries were, as a final step, compared to the prevailing corporate governance systems in the EU according to the taxonomy developed by Weimer and Pape²². They considered several factors²³ in categorizing countries into two big groups – market and network oriented – and four subgroups –Anglo-Saxon, Germanic, Latin and Japanese.

The United Kingdom falls under the Anglo-Saxon system. Germany, the Netherlands and Sweden are all classified under the Germanic system. France and Italy are the biggest members of the Latin system. Thus it can be considered that all three prevailing

¹⁸ These six countries counted for close to 80 percent of the total M&A activity during that period. See table 3 in Annex B for a breakdown. The period is chosen to show both the periods prior the 1999 peak and after that. According to the reasoning in Goergen and Renneborg (2003) companies tend to be more aggressive and willing to take more risks during the peak periods

¹⁹ It is acknowledged that the choice of 5 percent is not based on any specific criteria but drawn by the need to limit the study. Spain, that very close to the 5 percent threshold was eliminated from the sample choice due to the limited access to data and language barriers.

²⁰ Austria, which has been also co-aligning with them in opposing the Directive proposals, was involved only in 2,09 percent of the M&A activity during the given period. It is also assumed that Austria follows to a large extent the example of Germany due to similar historical background and legal system.

²¹ Including activities with both intra-Community and other countries companies

²² Weimer and Pape (1999). Other classifications of corporate governance systems exist. For example based on market or bank oriented (Berglöf, 1993)

²³ Such as prevailing concept of the firm, the board system, salient stakeholders, importance of the stock market, presence of the market for corporate control, ownership structure, executive compensation's dependability on corporate performance and the time horizon of economic relationships

corporate governance systems in Europe are covered with the inclusion of these countries²⁴.

Another choice would have been to concentrate on one single country and to conduct an in depth analysis. The aim of the paper is nevertheless not to show the possibilities for implementation in individual Member States but to emphasize extant diversity of takeover defenses in the European Union.

Even with such limitations the paper covers an extremely wide field. The author believes it nevertheless to be necessary for providing new inputs to the discussion of takeovers and takeover defenses and the 13th Directive.

I 3. Methodology

Methodology for research plays an important role for establishing possible biases and errors in approach that the author of any research paper might possess. Undisputedly, an approach differing from the one taken here would lead to radically altered analysis and conclusions. This section explains the approach taken and the rationale behind choosing this specific path.

I 3.1 Choice of method

The paper is based on the hermeneutic research approach which strives at testing the applicability of existing theories to the actual situation²⁵ - in this case the comparative application of the simple finance model and the transaction cost economics to takeovers and takeover defenses and subsequently to the 13th Directive. The basic idea behind hermeneutic research is that each individual perceives each situation in a certain way, by giving a certain meaning to the phenomena by which he/she is surrounded. Gaining knowledge about these meanings is not in any way measurable, wherefore it has to be interpreted²⁶.

The central issue for hermeneutics is not the way the world is, but the way it is interpreted by people within it²⁷. Unfortunately that means also, there is no clear-cut objectivity²⁸. It is nevertheless congruent with the aim of the author to gain insight and develop understanding²⁹ as the subject matter is new to the author and hopefully also to some of the readers. Such an approach was preferred due to the nature of the Directive. It is a framework directive that has not yet been approved – thus there are no concrete results of the implementation to be examined nor is it possible to establish with certainty the exact wording of the implementation in national legislation. Thus only a theoretical interpretative approach is possible at this stage.

²⁴ Such a classification has the limitation of being descriptive since it enables only rough comparisons. From this perspective, a fair approach would have been to consider all the 15 countries, but for the reasons cited before, this is not viable

²⁵ Hartman (1998)

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ Cassell and Symon (1995)

²⁹ Clarke and Dawson (1999)

If one would use different terminology, then this approach can be also described as deductive, as the theoretical material plays an important role in steering the interpretation of facts³⁰. Similarly with hermeneutics, the deductive research approach is based on the idea that observations cannot be made with neutrality of theories, i.e. without presuppositions. The central issue is instead to pose an initial hypothesis and allow this to steer the observations in suitable directions. A researcher with a deductive approach starts with a general theory, out of which a hypothesis is created. An explanation is then found through observations of the real world. Thus, what is looked for in the study has been decided beforehand³¹. This research method has nevertheless been criticized for its partiality³² and the author is likewise compromised by that presupposition.

At the initial stages of the paper several different methods for conducting research were available. The author chose the one based on existing literature, i.e. secondary sources, and individual input in terms of interpreting the literature with minimal outside assistance. The positive side of such an approach is that it allows a wide array of supporting or contradicting material thus increasing the credibility of the findings. The negative side is that most of the materials used are based on already processed data, which could lead to misinterpretations. There were several other motives that led to that choice.

Firstly, as the paper approaches takeover regimes in 6 different countries, there are bound to be problems with terminology and interpretation. The lack of exact equivalence between mechanisms is also the principal cause for not conducting more in depth study of national takeover regimes. Takeover defenses do not have a uniform definition throughout the financial community and companies and together with problems of translation would leave a distorted picture. By conducting the research based on the existing literature, the author has shifted the burden of interpretation and translation to people with more experience and fluency in the legislation and language of a given country.

An option would have also been to conduct research based on interviews and other primary information on the willingness of companies to use takeover defenses. The option was rejected based on the limited resources available at the time of writing and due to possible differences in translation if using e-mail based approaches together with likely bias of the respondents. It is commonly accepted that no management of a company is willing to admit that they use takeover defenses to neither entrench themselves nor is any of them likely to admit that stakeholders such as employees and clients are unimportant in determining corporate response to a takeover bid.

Another choice would have been to study articles of association of a sample set of companies to determine the existence of takeover defenses in different legislative environments. Unfortunately it would require a far larger sample size for establishing any credibility than was possible due to restraints of available resources. The approach to conduct research based on the interpretation of national takeover regimes by other authors is thus justified.

³⁰ Wallen (1993)

³¹ Hartman (1998)

³² *Ibid.*

As the reader goes through the paper, he will find that it is not focused so much on the processes within the firm or the board of the company, but on the interaction between firms on the “market”. Although a study of the internal workings of takeovers inside companies is intriguing, it lies beyond the scope of the 13th Directive, which deals with the visible actions of the both the target and the bidder.

I 3.2 Choice of sources

The literature concerning the subject is wide. Although limitation is made only to antitakeover measures, several of these are embedded in the national corporate governance systems. As the world is developing, these systems tend to change. Thus studies and surveys even from early 1990s can turn out to be obsolete due to severe shocks occurring in the markets³³.

As a general rule, more recent information is preferred wherever possible. The situation on European and global capital markets is changing constantly and thus studies done in early or mid-nineties could be already outdated. Where this principle of the “most recent” has not been applicable, the sources are chosen based on their relative rate of reference in literature³⁴. The underlying assumption is that older studies have already undergone at least one level of scrutiny by the authors and, in case of studies/articles published in journals, another level of criticism by the editors of these publications. The author uses also the principal of “no charge”. Thus, all the publications made in this paper are available in one way or another without cost³⁵. Most sources are obtainable through the Lund University Library homepage³⁶, Social Science Research Network³⁷, Westlaw International³⁸ and/or National Bureau of Economic Research³⁹.

The principle of the “most recent” leads to the sources not being limited to official publications. On many occasions, working papers and conference papers are accessed via Internet on the authors’ or authors’ home-institution’s homepage. As this could be seen as using source information that has not been officially approved and scrutinized, the author of this paper limited the studies to authors⁴⁰ and institutions⁴¹ that have exhibited thorough knowledge and understanding of the subject and to papers that will be published in official journals⁴².

³³ For example the unification of East and West Germany renders obsolete any studies done before that period and gives only a partial picture of the subsequent years as changes do not transform the market rapidly but through a gradual process of adaptation and learning

³⁴ This rate has not been tested empirically. The rate is subjective, based on the articles and overall impression left by them on the author.

³⁵ This has a serious limitation to sources, as many publications highly relevant to this study could only be obtained for payment.

³⁶ www.lub.lu.se

³⁷ papers.ssrn.org

³⁸ Available through Lund University Law faculty homepage www.jur.lu.se

³⁹ www.nber.com

⁴⁰ For example works of Theodor Baums are considered as reliable due to his expertise and other publications about German corporate governance systems

⁴¹ Although every scholar undoubtedly has a unique mind and thus can also be seen as contributing something unique, the lack of research in the relevant area of the home institution of the author could influence the quality of the research.

⁴² Several publications provide the titles of articles to be published in upcoming issues.

For the theoretical part of Chapter II this logic is applied only partially. The author tried, whenever possible, to study the original works that have been the basis for further development of respective theories⁴³. Chapters III and IV, which are also to a large extent theoretical, have been based on the most recent available sources⁴⁴ or, where a specific concept has been developed, on the original studies⁴⁵. Empirical evidence supporting the claims made and views expressed in the paper, has been gathered from several periods and, where applicable, different findings of different studies have been mentioned. The assumption is that the takeover activity over the years does not show significant differences⁴⁶ and thus also empirical evidence showing the consequences of different takeovers or takeover defenses should not be highly dependent on the time of the conducted study. Also, as hostile takeovers were most common in the 1980s, a lot of the relevant empirical studies are from early to mid-1990s when the topic was the “hottest”.

Chapter V, examining the actual occurrence of cross-border takeovers in the European Union, is to a large extent based on the empirical data found in existing publications. Although the aim of those studies has not been the same as here, they report the rate of the M&A activity using the same source –Thomson Financial Securities Data (TFSD) Company⁴⁷ – and, based on the accompanying notes to those publications, use the same methodology and limitations⁴⁸. As the period covered by those sources does not exceed 2001, the subsequent 16 months are covered by the Bloomberg database⁴⁹.

In Chapter VI the author has relentlessly tried to use the most recent data available as national legislation can change rapidly. This does not apply to possible defenses embedded in the ownership structure of the company, as they do not tend to show significant changes from year to year. The principal of the recent over older is nevertheless applied.

Chapter VII on European Community legislation is based solely on the legislation in force⁵⁰ with the exception of the 13th Directive. As the EC legislation is widely accessible through the Internet, it can be guaranteed that the data is up to date and

⁴³ For example Coase’s seminal article on the theory of the firm originates from 1937 and Berle and Means first notifications on the separation between ownership and control are from 1932. Although these authors refer to a myriad of studies done prior to them, it is assumed that the period of close to 70 years would have brought to the surface any misconceptions that those authors might have had. The exception here is the transaction cost economics. Due to the extensive development of the theory during the last two decades by Williamson, it seemed overly enthusiastic to study the works of Herbert Simon from 1950s-1960s and those of John R. Commons from 1930s.

⁴⁴ Finance textbooks, available in most universities, seem to cover the merger and takeover process in a rather similar manner throughout the years. Preference is nevertheless given to more recent works as the financial markets and the takeovers might have undergone some changes over the years. Comparison of Weston *et al.* (1990) and Ross *et al.* (2002) does not support this view, but it should nevertheless be considered.

⁴⁵ For example Manne’s identification of the “market for corporate control” from 1965

⁴⁶ *Supra* note 40

⁴⁷ Based on the studies and reports identified by the author of this paper, TFSD is by far the most used and apparently also the most reliable database for both global and regional cross-border merger and takeover activity

⁴⁸ See section I 3.4 for more precise description

⁴⁹ The period covered by the Bloomberg database starts from 1997 but comparing the data of Bloomberg and TFSD shows a high degree of differences if the search is done using the same parameters. Therefore only the period of 2002-2003 is covered through this source and the author cannot take responsibility over the accuracy of that data.

⁵⁰ For example Directive 79/279/EEC is not anymore in force.

accurate. Relevant judgements of the European Court of Justice were accessed through the EUR-LEX⁵¹ and Westlaw International databases.

Concerning the criticism of the data and existing literature, the mere size of them both indicates that there is a lack of consensus among researchers. Even the basics of research seem to be impossible to agree upon, not to mention the subsequent conclusions and the path of analysis. The inner problem of that is naturally the somewhat abstract nature of the topic, which eventually comes down to the reason of existence of firms. As the paper serves as a literature review, criticism of specific pieces of literature and theories will follow in the main body.

I 3.3 Choice of corporate theories

The choice of corporate theories for explaining the processes of takeovers and takeover defenses, that form the core of this paper, was based on a preliminary research between several different theories. The first and most used in existing literature for defining and explaining takeovers and takeover defenses is the simple finance model. As it has been a dominant theory in the existing research, it deserved to be included. It is also supported by the fact that the paper serves not only the purpose of novelty but also of being a source of existing information.

Alternative theories that were considered were property rights⁵² transaction cost economics⁵³, stakeholder⁵⁴, institutional⁵⁵ and strategic theories⁵⁶. Strategic theories were rejected under the premises that they do not in fact focus on the relation between shareholders and the company and between different companies but examine the processes within the firm.

The use of institutional theories would have lead the discussion to a much broader arena, than had been envisaged by the author. This would have included the interaction of the company with its society and the effects that the change of legislation might have had on the entire corporate governance system.

Stakeholder theory was rejected as it involves a high degree of subjectivity. Although congruent with the hermeneutic approach taken for the research in the sense that it is highly normative, this would have led the discussion to be highly influenced by personal beliefs of the author that, although extant also in the current approach, was not the aim. Together with property rights theory, they were the strongest competitors to the transaction cost economics. As the transaction cost economics is the basis on which both the stakeholder theory and the property rights theory are based, the choice was made to include the basic approach. Although the discussion of the 13th Directive is partly focused on the property rights of contracting parties, it still stems from transaction cost economics.

⁵¹ europa.eu.int/eur-lex

⁵² Barzel (1989)

⁵³ Mainly works of Williamson

⁵⁴ Jones (1995), Spurgin (2001), Felo (2001)

⁵⁵ Kleine and Kerber (2000), Fogarty and Dirsmith (2001)

⁵⁶ Phelan and Lewin (2000)

Both of the chosen theories – the simple finance model and the transaction cost economics – are discussed in further detail in the following chapter.

I 3.4 Measuring cross-border takeover activity

Due to the availability of data, the takeover activity and the actual integration of merger and acquisition activities are examined for the period of 1998 to 2003. The unit for measurement is chosen to be based on corporate choices exhibited by cross border takeover activity⁵⁷. The underlying assumption is that as capital markets become more integrated, companies are able to carry out mergers and acquisitions across national boundaries more easily, so that cross-border M&A activity intensifies relative to domestic M&A activity. A matrix is built for each period (1998/1999, 2000/2001, and 2002/2003) with bidder countries in rows and target countries in columns. Each cell is represented as a percentage of the total number of cross-border intra-EU mergers and acquisitions involving that country respectively as either a bidder or a target. The data is gathered for the number of actions, as it is more reliable than data representing values, since for a number of mergers and acquisitions the value is not reported⁵⁸.

Breakdown of cross-border M&A activity is provided for three periods. 1998-1999 and 2000-2001 based on the publications of the European Commission that in turn are based on the data of SDC Platinum – Thomson Corporation. The data for annual cross-border M&A activity refers both to financial and non-financial companies between 1990 and 1999. The database covers all acquisitions of shareholdings of 5 percent or more and with a value over USD 1 million or an unknown value.

Mergers and acquisitions are equated with change of control of an enterprise. Both mergers and acquisitions are included. Mergers are not considered as a separate category, although they consist of two equal partners getting together and make the distinction between purchaser and target enterprise devoid of meaning. It is nevertheless a fact that one company is always approached by another one to initiate merger talks. The initiator in this case is considered to be the bidder. An activity is considered to be in the given years sample set if the announcement date of the acquisition lies within the same year. Only acquisitions where both the source and target country is given are included.

Period of 2002 to May 10, 2003 is based on the data gathered using Bloomberg Mergers and Acquisitions Database⁵⁹ search engine. The search criteria were specified only as transactions involving 15 EU Member States and falling within the defined time period. As the Bloomberg database apparently uses different methods for defining M&A activities, the information from the latter source should be approached with care. To eliminate distortions between data from different sources, the information is also provided as a percentage of the total. The assumption behind that approach is that even if Bloomberg has only limited and/or inaccurate information, it applies to the total data set. Thus, even if the total number of occurrences is incorrect, the relative weight of the observations should remain the same.

⁵⁷ Adam *et al.* (2002) have developed an index similar to one introduced by Shorrock (1978) and used it to study cross-border takeovers in the 15 European Union Member States for a period starting with 1990. As there is some doubt about the accuracy of the index, it shall not be included in this paper.

⁵⁸ This applies both to the SDC Platinum and Bloomberg's databases.

⁵⁹ Provided by Lundekonomen Information Center.

Economists in building up a theory have often omitted to examine the foundations on which it has erected.
R.H. Coase, 1937

II Theoretical framework

Takeovers, discussed in more depth in the third chapter, are an integral part of capital market activities. To understand takeovers, one must first have an understanding of the relationships between different constituencies that play a role in that process. The subsequent chapter is devoted to explaining briefly the interaction between different constituencies followed by the description of the two underlying theories chosen to further understanding of the mechanisms of takeovers.

II 1. Corporate environment

The takeover takes place on the capital markets by the exchange of shares in the company. Capital markets nevertheless form only a part of the environment where corporations operate. Figure 2 presents the visualization of the corporate environment that can be used also to identify the interactions between different actors in the takeover process.

The corporate environment of companies is defined by “all the influences affecting the institutional processes involved in organizing the production and sale of goods and services”⁶⁰. This shows the significance of not only the capital markets but also of other actors – employees, product markets, political institutions and the cultural and heritage⁶¹ determinants influencing the size, composition and other characteristics of the

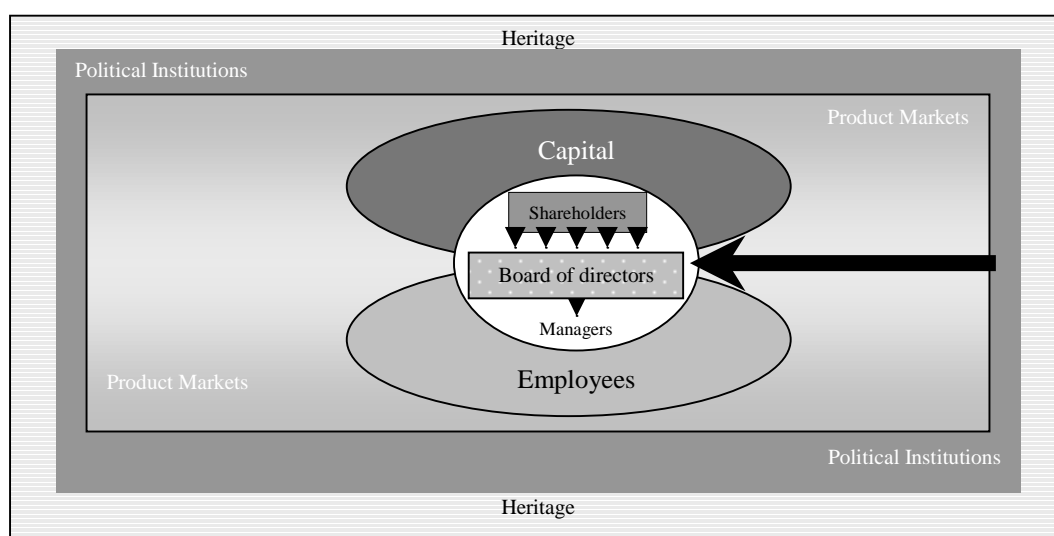


Figure 2. The corporate environment

Source: Adapted from Roe (2002)

⁶⁰ Also a definition of the corporate governance in Turnbull (1997)

⁶¹ Bartlett (1986) sees “administrative heritage” as one of the most important aspects determining directed or self-reliant development of corporate structures in changing environmental conditions

environment

The arrow originating from the political institutions and terminating at companies depicts the 13th Directive. It is a political measure aimed to influence the capital markets through regulating the conduct of the company's board, shareholders, managers and employees.⁶²

II 1.1 The actors

In the light of the upcoming discussion about corporate theories, takeovers and takeover defenses, it is important to distinguish between different actors in the these processes within the firm – the shareholders, the board, the management and the employees⁶³.

At the first level are the shareholders as individuals or legal entities that have acquired, through initial public offerings (IPO), through purchases from other shareholders or through privatization securities entitling them to cash flow and/or voting rights in the company.

The board of directors⁶⁴ is a body of individuals who have been elected by the shareholders to oversee the actions of management and to recommend actions to shareholders⁶⁵. The position is a part-time one and is often considered prestigious. Monetary incentives do not necessarily play a decisive role. The board appoints management who is in charge of the daily management of the company. The board relies on the information provided by the management and determines the overall objectives and principal strategies of the company.

The election of board members takes place in annual general meetings (AGM) of the corporations' shareholders for a limited time period – usually for one year⁶⁶. The board of directors is the body that approves or disapproves all merger and acquisition activities both in the target and also the acquiring firm or decides whether or not to put it up for a vote for the shareholders⁶⁷. In case if the acquiring company wants to change the management of the target, it usually does this by replacing the board of directors who in turn replace the management⁶⁸.

⁶² Becht *et al.* (2002)

⁶³ Other constituencies such as creditors and government are of importance but they shall not be included here as it is not possible to describe their role in the firm briefly, See also footnote 121

⁶⁴ The distinctions made between different board types and composition of the board are usually those of one-tier or unitary and two-tier and inside and outside respectively. Two-tiered board has the supervisory board, composed of non-executive board members, and the management board, composed entirely of executives. Unitary boards combine both executives and non-executives. In a similar manner the insider boards are composed of company's management whereas the outside board members are those that do not have direct managerial responsibilities for the company's day-to-day management.

⁶⁵ Gaughan (2002)

⁶⁶ See also Section IV 1.8 for staggered boards

⁶⁷ The situation may vary from country to country as is shown in Chapter VI but a general rule that it is the board rather than the management that decides the outcome of the offer, still holds. It can be argued nevertheless that passive board members rely too heavily on the information provided by the management and thus subsequently it is the management that has the ultimate power in merger and acquisition transactions.

⁶⁸ See Section III 2 for the takeover process

The management is in charge of the day-to-day activities of the company. He is usually the contractual party to all the agreements entered into on behalf of the company. This includes also employees, who are hired by the management either for a specified or unspecified time period. Compensation for the employees and the management is usually in the form of money and individual motivating factors. It is not uncommon that managers are motivated for better performance by allowing them to hold shares in the company they manage or by issuing stock options. Similar incentive mechanisms could also be used for “lower rank” employees.

II 2. Corporate theories⁶⁹

The fact that companies are not operated by the shareholders has been acknowledged for more than 70 years⁷⁰. Although there seems to be a silent agreement that managers operate the company under the supervision of the board, it has not been settled for whom and in whose interests they are doing it. Different answers have been offered stretching from the purpose of maximizing shareholders wealth by the supporters of the simple finance theory⁷¹ to a legal, political, economical and social responsibilities of companies by proponents of more elaborate view⁷².

The problems with takeovers are most commonly perceived as originating from the simple finance theory. This paper provides also an alternative to that by examining the takeover process and takeover defenses through transaction cost economies. Different theories have nevertheless different purposes and therefore different validity criteria and different implication. As the detailed comparison of theories requires a book of its own, the paper covers only those aspects that are of a direct concern to the takeover scenario and takeover defenses.

II 2.1 The simple finance model

The finance model, commonly known as the agency theory or principal-agency theory, is probably the narrowest and yet most widely used theory for explaining the existence and functioning of companies⁷³. The firm is seen as a “nexus for a set of contracting relationships among individuals”⁷⁴. The agency relationship is defined “as a contract under which one or more persons (principal(s)) engage another person (an agent) to perform some services on their behalf which involves delegating some decision making

⁶⁹ The use of the word “theory” is chosen for convenience. It can be said that explanations in the social sciences should be organized around (partial) mechanisms rather than (general) theories (Williamson (1998)). Thus the “theories” presented can be seen only as alternative mechanisms which help to learn more about the relevant environment

⁷⁰ The concept of separation of ownership and control in corporations is attributed to Berle and Means (1932) although they refer to studies done a decade before them indicating the growing depersonalization of ownership.

⁷¹ See for example Fama (1980), Abrahamson and Park (1994), Instefjord (1999), Ang *et al.* (2000) or La Porta *et al.* (2000)

⁷² See for example Roe (2002) or Engelen (2002)

⁷³ The paper is concerned only with the positivist agency theory. For a difference between positivist agency theory and principal-agency research see for example Eisenhardt (1989)

⁷⁴ Jensen and Meckling (1976)

authority to the agent”⁷⁵. The agency relationship is a straightforward manifestation of separation of ownership and control⁷⁶.

Although originally seen only as describing the relationship between a single agent (for example an employee or manager) and a single principle (respectively the employer or the shareholder) the theory has also developed to describe “common agency problems”⁷⁷, that is an agency problem involving one agent and multiple principals, or even a multi-principal-multi-agent problem, where both managers and employers are seen as agents for multiple classes of investors⁷⁸.

The central problem from the finance theory perspective (and perhaps also its single goal) is thus how to construct a set of “rules and incentives to effectively align the behavior of agents with the desires of principals”⁷⁹. The model is nevertheless concerned mainly with the rules developed by the firm system rather than by the legal/political/regulatory system and culture of the host economy⁸⁰.

The theory is concerned with resolving two problems occurring in the agency relationship – the agency problem and the problem of risk sharing. The first one arises when (a) the desires or goals of the principal and agent conflict and (b) it is difficult or expensive for the principal to monitor agent’s behavior. The second problem arises when the principal and the agent have different attitudes towards risk, leading to possible differences in action.

The basic assumption about the managers is, that they will act based on self-interest rather than to further the interests of the shareholders. Coupled with bounded rationality and risk aversion⁸¹, existence of a conflict between the participants and the possibility to buy information as a commodity, it leads to increased costs (the agency costs) for monitoring and bonding the managers⁸².

The conclusion of the finance theory is that the value of the company cannot be maximized because managers possess discretion that allows them to expropriate value to themselves⁸³. Without the problem of incomplete contracts⁸⁴ the managers would be assigned to do exactly what it perceived by the shareholders under any set of circumstances. The problem is that most future contingencies are too hard to describe and foresee, and as a result, complete contracts are technologically infeasible⁸⁵. This in turn leads to the management exercising powers and making decisions that are not anticipated by the initial contract. Based on information asymmetry and moral hazard, they tend to make decisions that put their own benefits above those of the shareholders.

The main criticism of the finance theory is its trivial nature. According to organizational theorists, the most important problems of organizations are how to establish appropriate

⁷⁵ *Ibid.*

⁷⁶ Based on landmark study by Berle and Means (1932)

⁷⁷ Turnbull (1997) referring to Hill and Jones (1992), American Law Institute (1992), Becht *at al.* (2002)

⁷⁸ Fama (1980)

⁷⁹ Turnbull (1997) referring to Hawley and Williams (1996)

⁸⁰ Turnbull (1997)

⁸¹ Concepts used also in the transaction cost theory but with slightly different shading

⁸² Eisenhardt (1989)

⁸³ Turnbull (1997)

⁸⁴ Phelan and Levin (2000) referring to Hart (1995)

⁸⁵ Shleifer and Vishny (1996)

routines for control, co-ordination and innovation that the finance model does not focus on⁸⁶. Another critique is based on the underlying theory of contracts and concerns mostly legal scholars⁸⁷. According to this view, the idea of implicit contracts is misleading metaphorical description of organizational relationships. Legal contracting assumes that informed parties freely negotiate and enter into agreements without coercion. Furthermore, the finance theory assumes stock market efficiency, meaning that the performance of the firm is adequately represented by changes in the stock price.

Throughout the years, different incentive mechanisms for solving the agency problem have been derived. These include capital market incentives⁸⁸, managerial compensation incentives⁸⁹, managerial monitoring⁹⁰, monitoring within the multidimensional structure⁹¹, director monitoring⁹², monitoring by institutional investors⁹³, stock option incentives⁹⁴, norms and values⁹⁵ firm rivalry⁹⁶ and the takeover threat⁹⁷ to just name a few.

It is necessary to point out that even proponents of agency theory acknowledge that the company cannot be run for the sole interests of shareholders. The “nexus of contracts” view does not assume that contracts exist solely between the shareholders and the managers but also with creditors, employees, clients and all other relevant parties. At the same time only contracts with shareholders are open ended⁹⁸ giving them the right for the residual claim thus also making the maximization of shareholder wealth equivalent with economic efficiency⁹⁹. As a result, the shareholders are ultimate monitors of contract input providers according to their opportunity costs for the receipt of the created value over those costs. In widely held organizations the direct supervision by shareholders has been replaced by the board of directors¹⁰⁰, which is viewed as developing endogenously to replace high monitoring costs incurred by dispersed owners.

Although shareholders can be viewed as residual claimants¹⁰¹ they are not always the bearers of residual risk. The shareholders in majority of widely held corporations are no longer the bearers of residual risk due to limited liability and a choice of debt as an alternative mean to finance investments¹⁰². Shareholders of widely held companies are also seldom concentrating all their holdings in a single company but diversify the risk by holding shares in several companies and they do not, more often than seldom, even control the shares and their allocation but entrust them to professional portfolio

⁸⁶ Perrow (1986)

⁸⁷ Clark (1985)

⁸⁸ Jensen and Meckling (1976)

⁸⁹ Fama (1980)

⁹⁰ *Ibid.*

⁹¹ Williamson (1985)

⁹² Fama (1980)

⁹³ Oviatt (1988)

⁹⁴ Bhagat *et al.* (1985)

⁹⁵ Katz and Kahn (1978)

⁹⁶ Williamson (1985)

⁹⁷ Manne (1965)

⁹⁸ Williamson (1985) first developed that notion which has been subsequently taken over by the proponents of agency theory

⁹⁹ Jensen and Meckling (1976)

¹⁰⁰ Fama and Jensen (1983)

¹⁰¹ Alchian and Demsetz (1972)

¹⁰² Blair (1995)

managers¹⁰³. Assuming the efficiency of stock markets, which the finance model proponents do, the shareholders have unrestricted rights to sell their shares, thus also enjoying unlimited¹⁰⁴ option of “exit”¹⁰⁵.

For the shareholders to remain residual risk bearers and thus also enjoy the residual gains, other constituencies of the firm – employees, creditors, suppliers etc. – would have to be compensated by the means of complete contracts. The compensation should include also all opportunity costs and predictable risk that can be foreseen at the time of “writing” the contract. This nevertheless is an assumption that can be debated, which brings us to the second approach towards a corporation – the transaction cost economies.

II 2.2 Transaction cost economics

An alternative, but not opposite view of the relationship in the firm between different constituencies,¹⁰⁶ is expressed by the proponents of transaction cost economics (TCE), which view firms as organizational structures¹⁰⁷. The role of human agents is subject to the same assumptions as in the agency theory – self-interest (opportunism) and bounded rationality (although intendedly rational)¹⁰⁸ but adding foresight (as opposed to myopia). A significant aspect of TCE is the correct measurement and allocation of tasks and rewards to the participants¹⁰⁹. Thus there are parallels between the transaction costs of negotiating, monitoring, harmonizing and enforcing contracts between the parties and the agency costs in the simple finance theory¹¹⁰. Every party in the relationship, according to TCE, has an objective to minimize transaction costs¹¹¹.

The problem that arises with that set-up is that it is impossible or too costly to completely protect the interests of the constituencies due to a set of unforeseen environmental factors related to a set of human factors mentioned above – bounded rationality and opportunism¹¹². Thus the participants will invest in the transactions up to the point where the marginal costs equal the marginal value of protection from the opportunism of other constituencies¹¹³. Organizing into firms provides a mechanism for reducing the costs through more efficient review and monitoring process.

¹⁰³ Lowenstein (1993)

¹⁰⁴ The assumption here is that the stocks of the company are liquid and there are always buyers. Williamson (1985) however argues that although it might be so for individual stockholders, it does not apply for all the shareholders in aggregate.

¹⁰⁵ See for example Kostnant (1999) discussing the works of Hirschman (1970) on exit, voice and loyalty as shareholder choices

¹⁰⁶ Stakeholder theory, not touched upon here, but which can be seen as a derivation of transaction cost economies defines these constituencies by their legitimate interests in the corporation (Wang and Dewhirst, 1992) or those groups without whose support the organization would cease to exist (Donaldson and Preston (1995) referring to Freeman (1984)).

¹⁰⁷ Williamson (1998)

¹⁰⁸ Williamson *et al.* (1989)

¹⁰⁹ Maitland *et al.* (1985)

¹¹⁰ But whereas the agency theory is concerned with the *ex ante* cost, transaction cost economics deals with *ex post* costs. (Williamson, 1996)

¹¹¹ Oviatt (1988)

¹¹² Williamson (1985)

¹¹³ *Ibid.*

An important aspect of opportunism is that it involves self-interest seeking with guile and includes shirking, cheating, data distortion and making of self-disbelieved promises¹¹⁴. When this opportunism is joined with a small-numbers condition¹¹⁵, the transactional dilemma arises where each party seeks terms most favorable to it through opportunistic representations and haggling. This leads to the problem of asset specificity.

The proposition is that the greater the degree of asset specificity, the more likely that transactions will be carried out more efficiently within organizations¹¹⁶. Assets' productivity increases with its specialization to other inputs used in the process. However, specialization also increases the risk of loss to the owner of the complementary asset if other inputs are withdrawn. Thus it can be seen that the owners of unique inputs have certain power over the owners of the specialized dependant assets.

By threatening to remove their unique inputs, the owners of specialized independent assets can expropriate the owners of the dependent assets by taking a larger share of the return from the process. This expropriable amount is a part of the quasi-rent¹¹⁷ value of the specialized asset, which is in turn explained as the excess of its value in current use over its salvage value. A quasi-rent is the excess above the return necessary to maintain its current service flow and represents a recovery of sunk costs when profits are not included in the measurement. The potentially expropriable specialized portion of the quasi-rent of the dependent asset is called the composite quasi-rent and equals its return in current use minus its prospective return in the second highest-valued use. In the absence of recourse, the owner of the dependent input has little choice but to allow expropriation up to the composite quasi-rent. There can also be reciprocal complementarity in which each input's value is dependent on the participation and behavior of the other. In this case, all the owners have incentive to engage in expropriative rent seeking¹¹⁸.

Based on the potential rent seeking, the asset owners have incentives to make pre-investment arrangements to discourage such behavior and promote confidence in joint use of assets. The greater the transaction costs relative to the value of the output unique to the joint use of the resources, the more critical the search for an economizing form. There are two solutions to that problem – long-term explicit contracts, that are not always viable as indicated before, and common ownership of complementary assets. The later is more likely when expropriate quasi-rent is larger¹¹⁹. An example of such an arrangement would be employee stock ownership.

¹¹⁴ Weston *et al.* (1990)

¹¹⁵ Oviatt (1988)

¹¹⁶ Klein *et al.* (1978)

¹¹⁷ The concept of quasi rents was developed by Klein *et al.* (1978). Blair (1995) provides an easily understandable explanation of rents and quasi-rents. "For example, suppose I can break even by building a house and renting it for \$1000 a month. If I rent it for \$1000 a month, I earn zero economic rents. But if the demand for rental property allows me to rent the house for \$1200 a month, I can earn \$200 a month in true economic rents. Now suppose I have already built a house, that I have no alternative use for it, and that it costs \$250 a month in out-of-pocket costs for me just to own the house. If I rent that house for \$1000 a month, I earn zero economic rents but \$750 in quasi rents"

¹¹⁸ Weston *et al.* (1990)

¹¹⁹ *Ibid.* If the owner of asset 1 invests in asset 2 (which is dependent on asset 1), he or she has less incentive to behave opportunistically that is, to later require the owner of asset 2 to pay more for the continued use of asset 1.

Although the corporation from the TCE perspective is considered as an organizational structure, it shares the conception of the agency theory that the board of directors develops endogenously to safeguard primarily the interests of the shareholders and secondarily those of the other constituencies¹²⁰. The distinction that the TCE makes, however, is that of the informational participation and of the voting capacity of board membership. Informational participation could be regarded as beneficial for overcoming possible problems that arise due to incomplete contracting. Voting capacity participation should be used only when the level of asset specificity is high and there are no other adequate mechanisms allowing to overcome possible breaches of contract that may arise due to changing environment¹²¹.

Criticism of the TCE follows, in a manner similar to the finance model, the critique about drawing parallels with contracts. At the same time, whereas finance model has been criticized for being overly narrow, the transaction cost economics has a tendency to try to explain too much. Through this, it evolves¹²² and becomes too wide to be applicable in practice¹²³.

¹²⁰ Williamson (1985)

¹²¹ *Ibid.*

¹²² Transaction cost economics of late 1970s is much more different than transaction cost economics of the 1990s (Williamson, 1998)

¹²³ This has effectively been one of the criteria for choosing the transaction cost economics. Due to its nature it seems to be perfectly suited for hermeneutic research method applied in this paper.

[Managers] have no incentive, as managers, to buy management services for the company at the lowest possible price.
H. Manne, 1965

III Takeovers

The following chapter shall bring forth different motives for the occurrence of takeovers from a theoretical perspective and describes the takeover process. The description is followed by an analysis of those motives from the simple finance model and transaction cost economics perspectives.

III 1. Defining takeovers

Takeover is defined in the 13th Directive as a “public offer (other than by the offeree company itself) made to the holders of the securities of a company to acquire all or some of the said securities, whether mandatory or voluntary, which follows or has its objective the acquisition of control of the offeree company in accordance with national law¹²⁴”. Such a definition draws a clear distinction with a merger where the offer is made directly to the board of the target company and thus the shareholders of the company are approached already by the consent board.

Although not specified so in the 13th Directive, the implicit aim is to regulate the acquisition activities between different Member States. Therefore the definition of a takeover for the purposes of this paper is “a public offer (other than by the offeree company itself) made to the holders of the securities of a company in a Member State different from the incorporation Member State of the offeree to acquire all or some of the said securities...” Figure 3 on the following page provides a visual distinction between cross-border mergers and acquisitions.

As can be seen, a distinction is also made between public and private companies, which is significant in the light of the judgement of the ECJ discussed in chapter VII. The aim of the directive is to regulate first hand mergers and acquisitions of private companies.

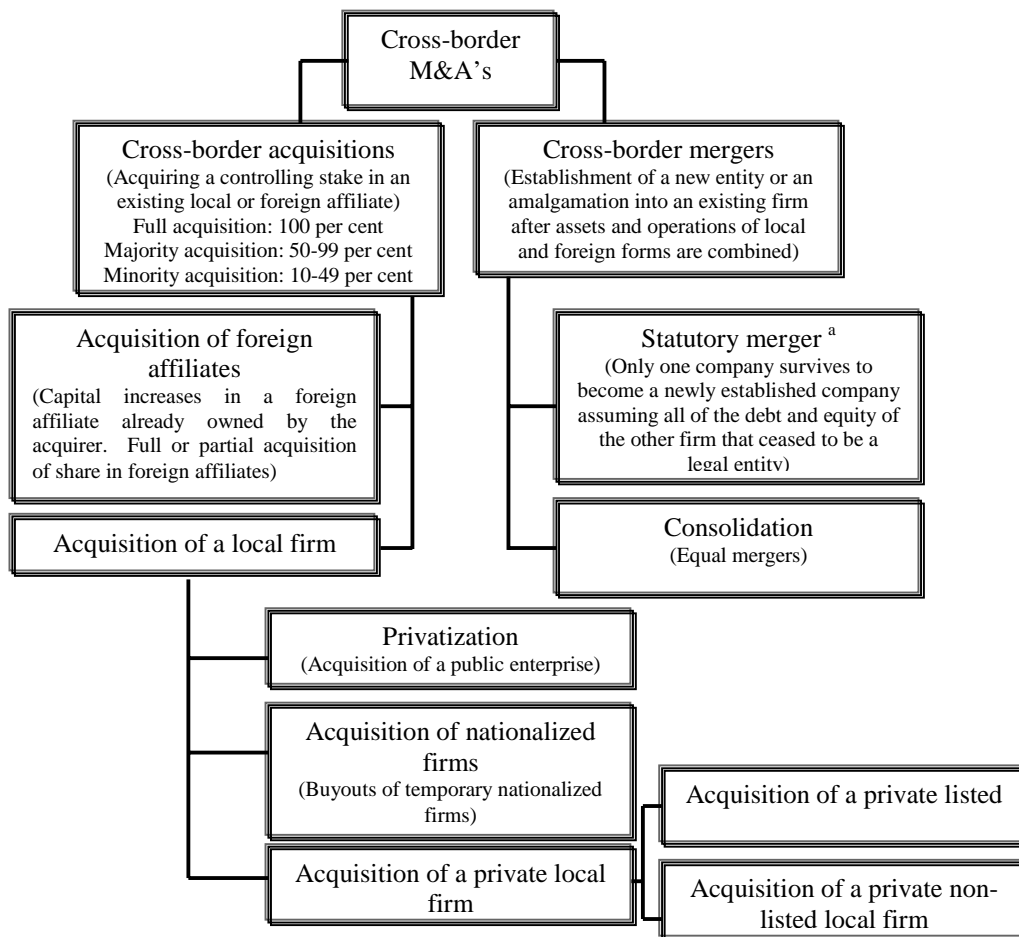
A further distinction can be made based on the nature of the merger or acquisition although in the light of takeover defenses they are irrelevant. Shortly, horizontal mergers involve two firms operating and competing in the same kind of business activity¹²⁵, vertical mergers occur between firms in different stages of production operation¹²⁶ and conglomerate mergers involve firms in unrelated types of business activity¹²⁷.

¹²⁴ Commission (2002a), Article 2(1)(a)

¹²⁵ For example merger of two car manufacturers

¹²⁶ Vertical integration is defined in United Nations (2000) as merger or acquisitions between firms in client-supplier or buyer-seller relationship. For example a car manufacturer acquiring the steel producer

¹²⁷ As defined by United Nations (2000) For example a car manufacturer acquiring a food retail chain



^a The key difference between statutory mergers and full acquisitions lies in the fact that a new legal entity is established in the former case, but not in the latter. These two forms, however, may otherwise be treated as identical

Figure 3. The structure of cross-border M&As

Source: Partly adopted from United Nations (2000)

III 2. The takeover process

The takeover process goes through several stages before becoming final¹²⁸. One of the first steps that the potential acquirer can use after identifying and valuing a potential target by the management, is to establish a toehold in the target company, usually done through open market purchases that does not require the approval of the board of directors or the shareholders.

It has the effect of lowering the average total costs of the acquisitions by allowing the acquirer to hold a percentage of shares in the target that are not subject to the premium paid to the holders of outstanding shares¹²⁹. On the other side, it might also signal to the capital markets the intention to buy the target or simply an increased interest for the

¹²⁸ There are numerous tactics for corporate takeovers and only the most common ones are discussed here. For a more extended view see for example Gaughan (2002)

¹²⁹ Betton and Eckbo (2000)

target's stock and thus drive up the premium. Establishing a toehold also increases the probability of a successful takeover¹³⁰.

III 2.1 The tender offer

Whether or not the acquirer has established a toehold, the probable next step is to approach the management or the board of the target to find out the target's possible reaction to the actions of the acquirer (leading either to a friendly or hostile acquisition depending on the response¹³¹) or to declare the express interest of acquiring the company. The later, also known as "bear hug"¹³², is often accompanied with a public announcement of the intentions and forces the target to openly take a position on the bid. The intent of bear hugs is to speed up the acquisition process by putting pressure on the target's board, especially if there is a potential for avoiding a tender offer.

The tender offer can be explained simply as purchases by the acquirer of the target's stock from existing shareholders. It has the characteristics of being open to all the shareholders of the target company¹³³, includes a premium over the pre-bid share price of the target and is open only for a limited period of time. The rationale of using a tender offer is to minimize the influence of target's board and was used extensively in the fourth merger wave¹³⁴ for carrying through hostile bids. The initiation of a tender offer usually means that the company will be taken over either by the bidder or another company¹³⁵.

The offer can take several forms. It can be either an all cash offer, equity offer by replacing the existing shares of the target company with the shares of the acquiring company, a debt offer when the shares in the target company are traded for bonds or it can be a mix of two or all three of those. The mix usually depends on the size of the deal and the characteristics of the both the target and acquirer shares. For example, if the acquiring company views its own shares as being undervalued, it would make sense to make an all cash offer and reap the benefits of the increasing share price without having to share them with the target's shareholders through equity swap. If the shares were perceived as overvalued, it would be beneficial to offer an equity swap, as the value of the shares is likely to drop in the future.

To complicate the matters further, the tender offer is usually conditional. This indicates that the offer is valid only if a certain percentage of shares are successfully transferred to the acquirer. If this does not occur, the acquirer has the right to cancel the offer. To facilitate the success of the offer, it can also have several tiers¹³⁶. The first tier includes a higher premium that drops in the subsequent tiers and thus encourages the shareholders to tender their shares early. This brings forth the problem of "prisoners

¹³⁰ Walking (1985) shows that having a toehold in the target increases the probability of a successful tender offer

¹³¹ See Chapter IV for an elaboration of the case when the management turns the offer down

¹³² Christensen (1991)

¹³³ A variation of that would be the creeping tender offer where the process takes longer time and includes purchases on the open market and via private transactions.

¹³⁴ See Chapter V Takeover activity in Europe

¹³⁵ See for example the explanation of "white knight" in Section IV 2

¹³⁶ Two-tiered tender offer is also sometimes referred to as a front end-loaded tender offer. Gaughan (2002)

dilemma”, whereby the shareholders are tempted to be the first ones to sell their shares for higher personal benefit. As the takeover process cannot be viewed as facilitating repeated games, there are no learning effects and thus increases the likelihood of a successful bid even further.

If the tender offer is successful¹³⁷, the bidder pays the existing shareholders and takes over the control of the target company by replacing the board of directors and usually also the senior management¹³⁸. If, however, the tender offer is not successfully completed and if the sole aim of the bidder is to acquire control of the company and there is no other way to acquire that, he will sell the stock that he has accumulated on the market. He may also remain as a minority shareholder and take the usual benefits in the form of voting in annual general shareholder meetings and dividend payments.

Two alternative methods for takeover could be considered. First one is through a proxy fight described below. The other method is described as going private whereby a small group of investors buys all the equity in a company. As it involves the transaction of buying stock, it is nevertheless not considered here as a takeover mechanism but is dealt with in Section IV 2.3 as a antitakeover strategy.

III 2.2 The proxy fight

The principle, on which the proxy fight is built, is that majority of shareholders of widely held companies do not exercise their voting powers directly but assign the rights to vote to third parties¹³⁹. This coincides with “voting with their feet”¹⁴⁰ or in other words, instead of actively exercising their voting rights, shareholders choose to remain apathetic and sell their shares if they are not satisfied with the management of the company. In other cases, the purchase of a share through intermediaries may automatically give the proxy right to that institution¹⁴¹ who will be notified in case of an AGM instead of the “real” owner.

The most usual beneficiary of the proxy is the management of the company who also decides the location for the AGM. The AGM can be called not only by the board or the management of the company but also by shareholders given that they hold a certain percentage or type of shares as defined by articles of association and prevailing corporate law¹⁴².

Under a proxy fight the acquiring company approaches the shareholders of the target company with an alternative strategy to run the company and thus encourages the passive shareholders to appoint them as the proxies of their stock¹⁴³ whereas the actual voting process is preceded by extensive solicitation of all the identifiable

¹³⁷ Due to the inclusion of mandatory bid rule in the 13th Directive, the partial bids are considered as irrelevant. Due to the inclusion of the squeeze-out article, the same applies also to the possible benefits of remaining a minority shareholder after the bid and the subsequent “free-rider” problem analyzed by Grossman and Hart (1980)

¹³⁸ Kini *et al.* (1995)

¹³⁹ Known as proxies Greener (1994)

¹⁴⁰ Easterbrook and Fischel (1983)

¹⁴¹ Referred to as shares held under “street names”

¹⁴² Gaughan (2002)

¹⁴³ Bebchuk and Hart (2002)

shareholders¹⁴⁴. It can take a form of either a contest for seats on the board of directors or a contest about management proposals. The proxy fight might not occur as a separate tactic but could be accompanied with a tender offer¹⁴⁵.

III 3. Explaining cross-border investment

Takeover of another country's firm is a form of cross-border investment. Despite a considerable level of legal harmonization in the EC, there are still substantial differences in the capital markets. Therefore, it is appropriate to consider intra-EU takeovers as not being conducted in a single market but as an investment between two separate economies. The following section shall describe the factors that are deterministic for the choice of cross-border investment.

It is widely agreed that cross-border investment takes place when three sets of determining factors (known as OIL) exist simultaneously¹⁴⁶. The first factor concerns the ownership specific advantages (of property rights and intangible assets). These arise from the firm's size and access to markets and resources, the firm's ability to co-ordinate complementary activities, such as manufacturing and distribution, and the ability to exploit differences between countries.

The second factor deals with internalization incentive advantages that arise from exploiting imperfections in external markets. These include the reduction of uncertainty and transactions costs in order to generate knowledge more efficiently and the reduction of state generated imperfections such as tariffs, foreign exchange controls and subsidies.

Finally, the location specific advantages that include differences in country's natural endowments, transport costs, macroeconomic stability, cultural factors and government regulations. These help determine which countries are host to multinational enterprises foreign production. Within this trinity of conditions for cross-border investment to occur, locational determinants are the only ones that host governments can influence directly¹⁴⁷.

These are in turn separated in to two categories: (i) national policy framework for investment including business facilitation, and (iii) economic motives. The most important determinants for the location of the investment – economic considerations – are of importance only if a favorable investment policy framework is in place¹⁴⁸.

¹⁴⁴ Gaughan (2002). The solicitation process includes high costs for both the target and the bidder in the form of professional fees to proxy solicitors, "communication" costs of printing and mailing, litigation and other forms. They are still less costly than full bids at an extensive premium. Then again, the proxy fight does not give ultimate control to the bidder and successive share purchases are always needed to ensure that the positive result of the proxy fight remains extant also for coming years. This is supported by the findings of Jensen and Ruback (1983) who indicate a substantial increase in the share prices of the target after the announcement of the proxy fight

¹⁴⁵ In fact, pure proxy contests are relatively few as compared to tender offers – during the period of 1979 to 1994 there were "only" 270 proxy contests

¹⁴⁶ Based on Dunning (1993)

¹⁴⁷ United Nations (1998)

¹⁴⁸ Dunning (1993)

Leaving aside the details of investment policy for now¹⁴⁹, the economic motives can be grouped into three clusters: (i) resource seeking, (ii) market seeking, and (iii) efficiency seeking.

Availability of natural resources, labor, creative assets and physical infrastructure promotes resource-seeking activities. Resource-seeking investment in its most common form is undertaken by manufacturing and service oriented multinational enterprises from countries with high real labor costs. These enterprises set up, or acquire, subsidiaries in countries with lower real labor costs to supply labor-intensive intermediate or final products.

Market-seeking enterprises aim to take advantage of factors such as market size¹⁵⁰ and market growth. In the most general sense, the long-run monetary benefits of doing business in a country are a function of the size of the market, the present wealth (purchasing power) of consumers in that market, and the likely future wealth of consumers¹⁵¹. For firms, establishing themselves on foreign markets provides a chance to stay competitive, grow within the industry as well as to achieve scale and scope economies¹⁵².

The motivation of efficiency seeking investment is to rationalize the structure of an established resource-seeking or market-seeking investment in such a way that the investing company can gain from the common governance of geographically dispersed activities. Furthermore, the intention of the firms is to take advantage of different factor endowments, cultures, institutional arrangements, economic systems and policies and market structures by concentrating production in a limited number of locations to supply multiple markets¹⁵³. This could in broad terms be classified also as an investment for synergy motives¹⁵⁴.

An important issue for national governments in cross border investment is how to attract “proper” investors, which are focused not on risky buying/selling operations¹⁵⁵, but, instead, on stable long-term presence. It may happen that the value of the expected utility from future profits could be too small in the long-term, but would allow speculative buying/selling transactions in the short run¹⁵⁶.

¹⁴⁹ The analysis of national antitakeover measures in Chapter VI and the analysis of the 13th Directive in Chapter VII are also indicators of the extant and forthcoming national investment regimes. The legislation governing investments and especially foreign investments is nevertheless much broader and falls outside the scope of this study.

¹⁵⁰ Both in absolute terms as well as in relation to the size and income of its population

¹⁵¹ Hill (2002)

¹⁵² This is directly linked to the managerialism and market power motives explained in section III 3.2

¹⁵³ Dunning (1993), Rugman (1998)

¹⁵⁴ As synergy is usually perceived as originating from both parties in the transaction and takeovers are characterized by one dominant party, the synergy motives are not considered as of primary importance.

¹⁵⁵ Baniak *et al.* (2002) recognizes the trend that firms interested in short run speculative transactions are more willing to invest in countries with high levels of uncertainty. This is indirectly supported also by Williamson (1996). Mello (1997) acknowledges that the institutional features, the degree of political stability, the nature of property rights legislation have a direct effect on the nature of foreign investment

¹⁵⁶ Cukrowski and Aksen (2002)

III 4. General takeover motivations

General theories explaining the occurrence of mergers and acquisitions can be categorized into two broad sections – those emphasizing the characteristics of the target and those that focus on the acquirer. Both of the shall be discussed here in more detail¹⁵⁷. It must be emphasized that the motives for takeovers are complementary to the motives for cross-border investment for the purposes of this paper.

III 4.1 Target driven motivations

The target driven explanations for mergers and acquisitions can include the need for diversification¹⁵⁸, financial synergy¹⁵⁹ and strategic realignment to changing environments¹⁶⁰ but these are seen as secondary for the purposes of this paper.

The most common view is based on the differential efficiency theory (also called the managerial synergy theory) according to which the management of one firm acquires the target if it perceives that it can manage the resources of the company more efficiently than the existing management. This would lead to synergy by combining the non-managerial capital of the target with the superior managerial resources of the acquirer. There are several assumptions for the application of this theory. There would have to be companies not operating up to their potential, there would have to be a mechanism for detecting such companies and, the acquirer would have managerial experience in similar line of business¹⁶¹.

A similar theory is based on managerial inefficiency, which resembles closely the differential efficiency theory, claims that the managers of the target firm are performing below all possible standards and thus the company can be run even by an inexperienced managers more efficiently thus eliminating the need for experience in similar line of business. Again there are assumptions underlying such a theory. Firstly, it is assumed that the shareholders of the company are unable to replace the existing managers for various reasons¹⁶². Secondly, if the replacement of inefficient managers would be the sole motive for the acquisition, it would be sufficient to operate the company only as a subsidiary, which is more of an exception than rule in reality. And finally, although evidence supports the removal of managers after a takeover, the same evidence supports shows that removal occurs not only after hostile takeovers, when the management is perceived to operate inefficiently, but also after friendly takeovers¹⁶³. In addition, management turnover does not occur at 100 percent level but it is also the case that the

¹⁵⁷ The following discussion is based to a large extent on Weston *et al.* (1990), Gaughan (2002) and Ross *et al.* (2002)

¹⁵⁸ This in turn can imply several factors such as promotion opportunities for employees, spreading the risk associated with firm specific investments or lack of internal growth capabilities to name just a few.

¹⁵⁹ For example for reducing the cost of external financing or carrying over losses and tax credits

¹⁶⁰ Realignment of corporate strategy by merger or acquisition is sometimes quicker than internal development

¹⁶¹ The operating synergy theory resembles closely the differential efficiency theory but emphasizes the possibility for scale economies

¹⁶² Limited managerial labor market can be named as one of those

¹⁶³ Martin and McConnell (1991), Choi (2001)

management is allowed to continue operating the company under new shareholders' control¹⁶⁴.

Another theory is based on the redistribution of wealth¹⁶⁵ whereby companies engage in takeovers to reap possible gains by expropriating the labor and other constituencies of the company to lower the costs they have to bear by the acquisition.

Last but not least among the target driven motivations, the under-valuation theory¹⁶⁶ of the target company has also been used to explain the takeover activity. One of the causes for that might be that the target company's management is not using the corporate potential sufficiently well and thus could be seen as an aspect of the managerial inefficiency theory. Under these assumptions the acquirer engages in the takeover to take advantage of the free cash flow not being utilized by the current management. It can also be seen as the acquirer possessing inside information that is not reflected in the stock price by the market. Most directly nevertheless, the under-valuation theory can be applied if there is a difference between the market value of assets and their replacement cost measured by Tobin's q-ratio¹⁶⁷. Thus if a company wants to add production capacity, it would be more beneficial to acquire an already existing undervalued company that has the q-ratio below 1 than to set up the production in house by purchasing the necessary equipment at going market rates.

III 4.2 Bidder driven motivations

In contrast to the above-mentioned theories, there are others that perceive mergers and acquisitions as being explained by the motivation of the acquiring company's management. The first one in this set is referred to as managerialism¹⁶⁸ according to which the managers are motivated to increase the size of their firms. The assumption behind that theory is that managers are compensated in relation to the size of the firm and are thus more aggressive in investing and expand the company through mergers and acquisitions.

Although seemingly correct, there are indications that the compensation is more closely related to the profitability of the firm rather than sales volume¹⁶⁹. Despite evidence relating compensation to profitability it seems to apply only to firms within a certain size set. It is not inappropriate to assume that a multibillion-dollar multinational conglomerate rewards its top management higher than a factory in the north of Scotland for example, no matter what their respective rate of profitability is. Thus the hypothesis

¹⁶⁴ Bradley, Desai and Kim (1983) indicate that point especially for mergers and takeovers pursuing synergy gains

¹⁶⁵ Weston *et al.* (1990) referring to Shleifer, A. and Summers, L. W. *Breach of Trust in Hostile Takeovers*, Chapter 2 in Auerbach, A. J. (ed.) (1988) *Corporate Takeovers: Causes and Consequences* by University of Chicago Press, Chicago

¹⁶⁶ Ross *et al.* (2002)

¹⁶⁷ The ratio of the market value of a company's debt and equity to the current replacement cost of its assets. The numerator includes all the firm's debt and equity securities whereas the denominator includes all assets (not just the firm's net worth as in the market-to-book ratio) at their estimated replacement cost at market prices as opposed to their original cost shown in the firm's books thus also including inflation measurement. Brealey and Myers (1991)

¹⁶⁸ Mueller (1969) referred to in Weston *et al.* (1990), Malmendier and Tate (2002)

¹⁶⁹ Lewellen and Huntsman (1970) referred to in Weston *et al.* (1990)

still holds – firms do want to increase in size and influence. Such an approach is congruent with the hypothesis of market power. In a similar manner to the managerialism theory, the goal of the company is to gain additional market share rather than simply increasing the size of the company.

More closely relating to the self-interest of managers is the hubris hypothesis¹⁷⁰ by which the acquirer's management overvalues the target due to excessive pride or hubris. If the valuation of the target company's stock made by the target exceeds the market value, the bid is made. But if there are no synergy gains, the mean of the valuations in the sample will be the current market price. Thus the offer for the bid is made only when the valuation is too high and the takeover premium is a mistake made by the bidder¹⁷¹. According to hubris hypothesis the overvaluation of the target is made due to the belief of the bidder that they are right despite the past experience of the contrary. Assuming efficiency of stock markets the hubris hypothesis views the bidder's management as possibly having good intentions but simply making a repeated error of judgement. An ironic consequence of the hubris hypothesis is that the company that values the target the highest by overestimating the company is likely to win the contest¹⁷².

Leaving aside tax considerations¹⁷³, the last theory presented here approaches merger activity from the perspective of free cash flow hypothesis¹⁷⁴. The theory states that managers are likely to use cash flows (in excess of the amounts required to fund all projects with positive net present values when discounted at the applicable cost of capital) for projects which do not always yield positive returns whereas they should use those funds for dividend payments to shareholders. By this the management is trying to avoid reduction in their powers and transparency through capital markets where they should turn for alternative financing.

The selection of explanatory theories provided above is just the tip of the iceberg but those presented are sufficient to bring forth the essential point – there is no uniform explanation for merger and acquisition activity. Just as much as there are different companies engaging in merger activities, there are different motivations for different cases encompassing perhaps one or more likely several of the above mentioned theories.

III 5. Understanding takeovers...

As has been presented, there are several different motivations for companies to engage in takeover activity. The following section explains the occurrence and motivation of takeover from the perspectives of agency theory and transaction cost economics.

¹⁷⁰ Roll (1986)

¹⁷¹ Gaughan (2002)

¹⁷² Varaiya (1988) Also known as the "winner's curse"

¹⁷³ For example carrying over losses and tax credits from one firm to another or substitution of capital gains for ordinary income

¹⁷⁴ Developed by Jensen (1986) based on studies of Smith (1986) referred to in Weston *et al.* (1990)

III 5.1 ...through the simple finance model...

Most common explanation for takeovers, based on the simple finance model, is that it serves as a disciplining mechanism and as a solution to agency problems. Based on the separation to ownership and control, it works as the control device of the last resort when all other incentive alignment mechanisms have failed¹⁷⁵. The takeover process allows the management of another firm to gain control of the inefficiently managed target while bypassing the existing management and the board of directors. The takeover does not have to actually take place – it is sufficient to acknowledge the possibility of a takeover.

Through this the takeover serves as a solution to the inefficiency theories and the under-valuation theory stating that if the agent is not able to utilize the resources entrusted to him by the principals, the takeover will provide these resources to a more apt agent. The incumbent agent of the target is pushed aside and the principals are rewarded for their efforts by the premium.

On the other hand, agency problems also arise in connection with the bidder. Recalling the free cash flow, managerialism and hubris hypotheses, the action of the target management serves primarily not the interests of the shareholders but those of the initiator if the bid – the management and the board of the bidder. Essentially, managers' the private gains that from controlling the utilization of real assets leads to the fight for survival¹⁷⁶. In this fight, the losers are sometimes surprisingly identified as the shareholders of the bidding firm. Empirical evidence shows repeatedly that the share price of the bidding firm drops in connection with the announcement of an acquisition thus supporting the hubris hypothesis¹⁷⁷.

Empirical findings also support the hubris hypothesis and market power. Managerial overconfidence increases the level of acquisitions not only in special circumstances but affects them positively on average¹⁷⁸. Hubris hypothesis can be seen as an explanation for the phenomena that the companies overvaluing the acquisition target are more likely to become targets themselves as the stock market perceives the acquisition as too risky and reflects it in the share price¹⁷⁹ thus increasing the relevance of agency problems within the bidding firm even more.

Hubris hypothesis is nevertheless less detrimental than the market power hypothesis where the management of the firm consciously and systematically disregards the interests of the shareholders by pursuing activities that they perceive will increase their private benefits. A recent study has shown that the market power and managerialism are

¹⁷⁵ Termed as “market for corporate control” after Manne (1965)

¹⁷⁶ Instefjord (1999)

¹⁷⁷ There seems to be a contradiction in empirical results. Morck *et al.* (1990), Holl and Kyriazis (1997) find a negative return for the bidder's shareholders whereas Goergen and Renneborg (2003) refer to studies by Gregory (1997), Loughran and Vijh (1997) and Lang *et al.* (1991) which show a positive return for both the target and the bidder. Empirical findings in all the papers nevertheless find that bidder's share price drops always in the case of a hostile bid.

¹⁷⁸ Malmendier and Tate (2002)

¹⁷⁹ Mitchell and Lehn (1990)

more likely to be the takeover motives than the disciplining effects of the market for corporate control and inefficiency hypothesis¹⁸⁰.

The proxy fight brings with it additional problems. According to the finance model, shareholders are perceived as the ones disciplining the management through GM and board of directors. Yet by assigning their votes to someone else, they forfeit their ownership rights and limit themselves merely to cash flow rights. Although this could be explained as the goal for small shareholders, even large institutional investors are prone to participate only through cash flow rights¹⁸¹.

The proxy fight could be seen as an act on behalf of the bidder to temporarily assume the position of an agent for the shareholders of the target. The bidder would be contracted through a proxy to further the interests of the shareholders. The agency problem becomes even more important as the shareholders have to decide which of the agents – the management appointed by the board or the bidder – would behave more in his interests'. A study of proxy contests in the US over the period of 1962 to 1986 shows that the contenders for the board from the bidders side were successful 42 percent of the time¹⁸² thus indicating that the choice for the shareholders is not predictable.

As has been shown, the finance model can be applied to both targets and bidders in the takeover context. But whereas the agency problem sees takeovers as a solution for the target's agency relationship, it creates agency problems for the bidder. It is an important point to make for the discussion of takeover defenses in the following chapter. At first through let us consider also takeovers from an alternative – transaction cost economics – perspective.

III 5.2 ...and through transaction cost economics

As the transaction cost economics sees its main aim in explaining the existence of firms in relation to markets and other forms, let us first consider the takeover process as a make-or-buy decision. It is easily explainable for vertical mergers and acquisitions whereby the acquiring company perceives the target company as performing functions that will be done more economically within the bidder¹⁸³. It motivates bringing the processes of the target firm within the bidder and is consistent with the differential efficiency hypothesis and synergy, diversification and strategic realignment motivations.

Takeovers are also seen as an alteration of existing governance mechanisms through transaction cost economics perspective. Targets shareholders are induced by the bidder to defect from an equilibrium set of contracts, which might have as its consequence the expropriation of quasi rents from other constituencies that have made firm-specific

¹⁸⁰ For example Alcalde and Espitia (2003) show that a comparison of Spanish takeover targets and randomly chosen companies in the same sector and size cluster over the period of 1991-1997 does not show any indication of the takeover targets performing worse than others.

¹⁸¹ Baums (1997)

¹⁸² Borstadt and Swirlein (1992)

¹⁸³ Similar approach can be used for horizontal and conglomerate actions whereby the perceived benefits of having control over the target are greater than the potential costs of the acquisition plus the costs incurred due to the continuous separation of the companies

investments¹⁸⁴. The argument goes further claiming that whereas the management of the target company is a party to explicit and implicit contracts crafted to provide safeguards for firm specific investments by constituencies (and thus has an obligation not to betray their trust), the bidders management does not bear the same obligations to the targets constituencies.

Transaction cost economics also aspires to assess symmetrically the contractual relation between each constituency and the enterprise¹⁸⁵. Recall that the input owners will contract with the firm in a discriminating way up to the level of composite quasi rent depending on the redeployability (specificity) of their asset. In the event of a tender offer the specificity of the input provided by the shareholders – the equity capital – disappears and becomes easily redeployable. Given opportunism they are leaned towards expropriating the bidder who values their input higher than the current shareholders. Thus the shareholders will sell their input and redeploy it somewhere else.

Approaching the motivations for acquisitions from the same perspective Based on “propositioning” as an adaptive response to distorted contracts¹⁸⁶, the hubris hypothesis could be explained as the preventive action of the bidders management towards its shareholders to opportunistically increase her bargaining power (the perceived specificity and thus also the dependability of her skills relative to the company) by presenting herself as more capable and possessing superior information than the other actors in the market. In such as way, based on the empirical evidence indicating the reduced value of bidders’ stock after the announcement of the acquisition¹⁸⁷, the management of the bidder is expropriating her shareholders.

The same line of reasoning would apply to the managerial inefficiency hypothesis but this has to be accompanied by the assumption that the target’s shareholders are unable to acknowledge that they are being expropriated until the actual tender offer from the bidder materializes.

Considering the market power and managerialism, the expropriation takes place on several levels. Firstly from the shareholders of the company and secondly from other potential acquirers of the target that are perceived as competitors. By increasing the market size or share of the bidder, the dependability of the customers increases relative to other firms that suffer a loss in market position.

Transaction cost economics has the highest relevance for takeovers motivated by the outright redistribution motives. The redistribution motive has been empirically tested and the results show that after successful takeovers there is a reduction in the wages¹⁸⁸ or the number of the employees¹⁸⁹ or the costs of financing shifts to the creditors¹⁹⁰.

¹⁸⁴ Williamson (1989) referring to an unpublished manuscript of Shleifer, A. and Summers, L. from 1987 – “Hostile Takeovers and Breaches of Trust”. See also supra note 111

¹⁸⁵ Williamson (1989)

¹⁸⁶ *Ibid.*

¹⁸⁷ Supra note 131

¹⁸⁸ Weston *et al.* (1990) supra note 111. However, McGuckin and Nguyen (2001) find in a study of ownership changes in the US manufacturing sector between 1977 and 1987 that typical ownership change increases jobs as measured by wages

¹⁸⁹ Conyon *et al.* (2001)

¹⁹⁰ McDaniel (1986), See also sections IV 2.3 and IV 3

Expropriation of quasi rents from other constituencies effectively results in private gains for the shareholders but not in social gains. In this manner the targets shareholders and bidders management form a coalition on the expense of other constituencies of the target.

The proxy contest, due to high costs incurred through solicitation¹⁹¹, can be considered as an extremely ineffective way of conducting takeovers. This could be viewed as an additional factor explaining the low level of proxy fights in relation to tender offers. Considering the expropriation hypothesis, the proxy does not result in any immediate tangible gains to the target shareholders. Possible beneficiaries are only the mediators of proxy contests – printing firms, lawyers and proxy solicitors.

¹⁹¹ The 1990 proxy fight between Lockheed and NL Industries resulted in both parties bearing only “communication” costs in excess of USD 1 million (Gaughan, 2002)

The art of takeover defense has evolved over the past two decades to become a sophisticated process.

P. A. Gaughan, 2002

IV Takeover defenses

Given that there is a possibility of an unsuccessful tender offer, the management (or board) of the target company might be willing to oppose the bid. If the board of the target company does not agree to the company being taken over, the acquisition is termed hostile¹⁹². The point of board's initial reluctance to allow the company to be taken over does not however assume that the board is not willing to change its mind. It is often the case that after initial hostility the acquisition becomes "friendly".

A hostile acquisition can be hampered by the usage of takeover defense strategies. As can be expected, both the proponents and the opponents present strong supporting arguments in favor of their respective positions. Most authors opposing board powers to influence the takeover process have relied on the agency problems¹⁹³ whereas the proponents of defensive actions have relied more on the constituency-considering theories¹⁹⁴.

The following chapter will discuss in more detail the different defenses to ward off takeovers and approaches both positive and negative opinions about their usage. The list of measures provided is by no means exhaustive, it just presents most common and used ones based on the relevant literature. Defensive measures can be categorized in several ways. The categorization made here is that of pre-bid and post-bid¹⁹⁵.

IV 1. Pre-bid defensive strategies

Pre-bid defensive strategies are adopted without there being an actual occurrence of a takeover bid. The aim of pre-bid strategies is to lower the possibility of a takeover by either making the takeover more costly for the bidder or by lowering the access to the shares (and voting rights) of the company¹⁹⁶. It is also possible to see some of the pre-bid strategies as forms of takeover barriers as their aim is not merely to avoid hostile takeovers but for example to increase co-operation and loyalty. The following section shall briefly describe most common pre-bid strategies.

¹⁹² Literature offers other synonyms to that term based on the perception of the target management (board) perception of the bid. For example Christensen (1991) uses the term "contested takeovers" to indicate that beyond the lack of co-operation between the target's and the acquirer's management, there are really no "hostile" elements in the bid. Bebchuk (2002) talks about "unsolicited acquisition offers" referring to an offer that is "not asked for" by the target.

¹⁹³ Bebchuk (2002)

¹⁹⁴ See for example Meade *et al.* (1997)

¹⁹⁵ Alternative ways to distinguish the strategies include for example preventive and active defenses (Gaughan, 2002) or more detailed classification into financial, poison pills, charter amendments and share repurchases (Weston *et al.*, 1990)

¹⁹⁶ It is also possible to differentiate between pre-bid strategies and takeover barriers. For the purpose of this paper, they are considered under the same heading.

IV 1.1 The poison pill

The most common and most widely used defensive tactic in the US is the poison pill¹⁹⁷. Although it takes effect after the bid, it is usually adopted prior to the bid. Having the status of falling neither fully in the category of pre-bid nor post-bid defenses but yet being the most actively used one in the US, it is considered first.

The earliest form of poison pills were referred to as preferred stock plans by which the management offers each common shareholder a dividend of preferred shares that would be convertible to a number of stocks in the company after a takeover. Due to problems with the effect of preferred stock to company's balance sheet¹⁹⁸ the pill in such a form was soon abandoned for what became known as the flip-over pill, also known as the call pill¹⁹⁹.

The flip-over pill is a form of a rights offering that enables to buy shares in the acquiring company at a low price thus taking the form of a call option and eliminating the adverse effects on the balance sheet²⁰⁰. The pill becomes affective after the triggering event – an acquisition of a certain percentage of outstanding stock or a tender offer. The pill, which has usually a fixed exercise period, is redeemable only by the management of the target company for a symbolic amount. A variation of the flip-over pill is called the flip-in pill, which allows buying stock not in the acquirer but in the target thus diluting the capital structure.

The poison pill could include also a “back-end” plan, also referred to as the put pill²⁰¹ whereby the target shareholders are allowed to change their stock for cash or other securities for a fixed (“back-end”) price set by the target's board. The price is set above the market price so it also establishes a minimum price for takeovers and is used mainly to fight against two-tiered bids.

IV 1.2 Other “pills”

Defensive strategies in principal similar to the poison pill but yet fundamentally different effect are called the vitamin pill and the people poison pill²⁰². The first one is an option issued to the shareholders of the company allowing them to sell their shares to the company at a future date for a fixed price. Such a right shall force the management of the company to struggle harder to rise the value of the stock above that level and by this manner shall also decrease the chance of a possible takeover.

The people poison pill includes two stages. Firstly the company's management must obtain an independent valuation of the company's shares after the bid has been

¹⁹⁷ Invented in 1982 to deal with the takeover abuses. Lipton (2002)

¹⁹⁸ Preferred stock can be added to the long-term debt thus increasing the leverage of the company and decreasing the attractiveness to potential investors.

¹⁹⁹ Christensen (1991)

²⁰⁰ Lipton (2002)

²⁰¹ Christensen (1991)

²⁰² *Ibid.*

announced. If the evaluation shows that the value of the company is higher than stipulated by the acquirer, the second stage triggers the pill whereby the removal of one member of top management without cause or changes in the responsibility of such member will be considered a removal of the entire management of the company. The pill thus eliminates all possible managerial synergy gains and coupled with “golden parachutes” increases substantially the costs of the takeover.

A device known as the poison debt may also be categorized under this heading. In this case the company enter into an agreement with a third party (usually a bank) that provides financial assistance to the firm that becomes payable the moment the bid takes place. The bidder will thus, after a successful tender be forced to start servicing the debt.

IV 1.3 Concentration of ownership

Although not being implemented by the target’s board or management, concentration of ownership can be viewed as highly detrimental to takeovers. The fact that the company is majority owned by a single shareholder or shareholder group acting in concert, could render impossible to acquire a sufficient amount of shares to exert any control over the company’s performance. Minority shareholders are thus left *de facto* only with cash flow rights.

IV 1.4 Cross-ownership of shares

Although historically not viewed as a takeover defense strategy but more of the mechanism of national corporate governance system, the cross-ownership of firms nevertheless deserves consideration as a takeover defense strategy due to its effect and its use in the continental Europe²⁰³.

Companies in a cross ownership structure are linked by horizontal cross holding of shares that reinforce and entrench the power of central controllers. Cross ownership places a number of shares in friendly companies and thus reduces the number of shares that must be acquired to retain the control of the company in case of a hostile bid²⁰⁴.

IV 1.5 Pyramiding

Another form of shareholding structure that discourages hostile takeovers is known as pyramiding. A firm is said to be controlled through pyramiding if it has an ultimate owner, who controls the firm indirectly through another corporation that it does not wholly control²⁰⁵.

²⁰³ See Section VI for a description of antitakeover measures in the selected countries

²⁰⁴ *Ibid.*

²⁰⁵ For example, if a family owns 15 percent of Firm X, that owns 20 percent of Firm Y, then Y is controlled through a pyramid at the 10 percent threshold. However, at the 20 percent threshold, we would say that Firm Y is directly controlled by Firm X (which is widely held at the 20 percent threshold) and no pyramiding would be recorded. If Firm X holds 100 percent of Firm Y, then again there is no pyramid.

Thus, similar to differential voting rights, the owner of the corporation is not enjoying voting rights proportionate to its cash flow rights. It does not however eliminate the possibility of the takeover, just makes the takeover process more complicated and could also mediate the need not to launch a tender offer against the target but also/only against the owner of the controlling share block²⁰⁶.

IV 1.6 Supermajority provisions

Several issues in corporations are put up for a vote in the annual general meeting. These could involve mergers, liquidation, lease of important assets, transactions with interested parties or the sale of the company. The supermajority provisions modify the corporate charters so that certain corporate actions do not require a simple majority but typically two-thirds up to as high as 95 percent of the votes²⁰⁷. Supermajority provisions can be highly effective if for example the board, the management or the employees of the company hold a percentage of the shares that would allow to block any action requiring a supermajority.

Such provisions nevertheless usually include also a “board out” clause that allows canceling the supermajority provisions if the board of directors has approved the merger. Supermajority provisions are most frequently used in conjunction with other takeover defenses to avoid a possible overruling by the shareholders. It must be emphasized that supermajority provisions are effective only against partial bids²⁰⁸.

The same heading could be seen as covering also amendments to articles of association limiting the powers of the shareholders to call an annual meeting. In such a way the management of the company would render it hard if not impossible for the target to control the timing of the bid and the proxy contest.

IV 1.7 Golden parachutes

Golden parachutes are compensation schemes that provide senior management with generous compensation in the event of the termination of the employment contract. The parachute is not, however, used only to fend off unwanted takeover bids but also as a part of the normal remuneration package, especially in large corporations. In case of a takeover, the golden parachute is triggered by an acquisition of a certain number of stocks²⁰⁹ or a change in the control. The golden parachute is nevertheless considered to be one of the least effective defensive measures, as the size of the compensation is usually small relative to the total costs incurred by the acquirer. Nevertheless, if the compensation package is substantial, it may eliminate some acquisitions.

Pyramiding implies a discrepancy between the ultimate owner’s ownership and control rights. In the above example, the family owns 3 percent of the cash-flow rights of Firm Y (the product of its ownership stakes along the control chain) but its control rights are measured by the weakest link in its control chain, i.e., 15 percent. Faccio and Lang (2002)

²⁰⁶ See Jäger (2002) for further discussion on the entrenching role of pyramiding

²⁰⁷ Gaughan (2002)

²⁰⁸ *Ibid.*

²⁰⁹ Lambert and Larken (1985) found the level to be 26,6 percent in the sample set studied.

Variations of the golden parachute are the tin parachute, whereby a number of employees of a company are provided with lucrative compensation in case of the termination of employment during a certain time period after the hostile takeover, and the pension parachute, which envisages the payment of substantial amount by the company to a pension plan for the benefit of the company's employees.

IV 1.8 Staggered boards

The staggered board defense varies the terms of the board of directors so that only a certain number of board members are replaced in a single year. For example, corporate charters may envisage that only one third of the board members are elected every year. Thus, in a case of a takeover, the acquirer is not able to replace the board and the management of the company in one year. Although they facilitate the independence of outside directors and promote board stability, they are still seen as a powerful tool for preventing takeovers, especially if coupled with other takeover defenses that need board approval for removal²¹⁰.

IV 1.9 Differential voting rights

Differential voting rights, most commonly used through dual class stock capitalization, are considered to be one of the most powerful pre-bid takeover defenses available²¹¹ since they limit the control the acquirer can exercise over the target even after the acquisition of majority of outstanding equity. Most commonly, the low (or non) voting shares are traded on stock markets whereas the high voting shares are held by a closed group of individuals, most commonly by the founders of the company.

The attractiveness of low vote shares lies in their higher dividend yields as compared to high vote shares. The most extreme form of differential voting right is the "golden share" which gives the holder a veto power over any strategically essential changes whereas does not bear any or very limited dividend rights and is often used for retaining government influence over privatized enterprises²¹².

The same heading covers also capped voting, whereby the number of votes are determined for each shareholder rather than for each share (most drastically exercised when each shareholder is assigned only one vote) and disparate voting rights, whereby the number of votes are restricted for a certain period of time after acquiring the shares²¹³.

²¹⁰ Bebchuk *et al.* (2002)

²¹¹ Christensen (1991)

²¹² Gaughan (2002)

²¹³ Christensen (1991)

IV 1.10 Share transfer restrictions

Share transfer restrictions are clauses in the corporate contract limiting the transfer of shares by requiring the board of directors' approval²¹⁴. This has the effect of limiting the acquisition of the shares only to companies that have gained the support of the company's board and thus eliminates possibilities of a hostile takeover.

IV 2. Post-bid defensive strategies

The pre-bid defensive strategies are incorporated in corporate charters/by-laws or implemented through capital investment decisions and networking even when there is no immediate threat of a hostile takeover. Contrary to that, the post-bid defensive strategies are used only when there is already either an indication of a potential takeover or after the actual launch of a tender offer for the target's shares.

The aim of post-bid strategies is not necessarily to disallow the hostile bidder from acquiring the control over the target. These strategies can be used also to increase the takeover premium, thus making the takeover more profitable for the shareholders. Post-bid defensive strategies take multitude of forms, most common of which are described here.

IV 2.1 White knight

One of the tactics the target can use in case of a hostile bid is to put the company up for auction. Auctioning the company after the hostile bid has been launched means encouraging other companies to engage in a bidding contest. It is considered to be the least detrimental strategy to be utilized as it has its aim the maximization of shareholders gains. This can be done simply by letting the investment community know that the firm is up for a contest and invite them for closer examination of the target or by approaching firms directly with the proposal to participate in the bid and providing them with all the necessary information. A company that is approached in such a manner is known as the white knight²¹⁵.

The white knight makes an offer to buy all or part the company on more favorable terms than those of the original bidder. The terms could be simply a higher price or could include also a promise not to disassemble the target or lay off management or other employees. The target has however weak bargaining power, as its primary aim is to avoid the sale to the initial bidder. Thus the potential white knight has the advantage of "calling the shots" which might not end up with the best possible deal for the company as a whole.

²¹⁴ Ferrarini (2000)

²¹⁵ Shleifer and Vishny (1986)

IV 2.2 White squire

A somewhat similar approach to the search for the white knight is the white squire defense also known as a lock-up²¹⁶. The difference lies in the fact that the target company will remain independent. White squire is the company that agrees to purchase a large block of the target company's shares²¹⁷. Such a defense might be also combined with the white knight defense whereby the target places stock or stock options in the hands of a white knight thereby giving him a preferential status for going ahead with a competitive bid.

A similar effect to the white squire defense is achieved through cancellation fees that are fixed amounts payable to an ally in the event that a negotiated merger does not materialize due to the intervention by a hostile bidder. Such agreements are sometimes accompanied with "no-shop" and "no-negotiation" clauses, which limit the action of the target company to actively look or negotiate with competing bidders.

IV 2.3 Management buy-out

If the target is unable to find an alternative suitor, the management of the company could undertake to purchase the outstanding shares of the company by itself²¹⁸. Known as management buy-out, a new company is formed by the target's management and other investors that will purchase the shares of both the existing shareholders and the hostile bidder. Also referred to as "going private" transaction, it often leads to a delisting of the company's shares. Frequently a third step is taken whereby the newly established acquiring company is merged with the previous target. Management buy-outs must be distinguished from share repurchases when the company uses its resources to lower the number of outstanding shares although share repurchases are often the first step to white squire or management buy-out.

IV 2.4 Capital structure changes

In a similar manner to share repurchases, if the target is unable or unwilling to take the company off the market or find a willing suitor, it may simply decide to change the capital structure of the firm. Leveraged buy-out that results in the company going private, often used as management buy-out method²¹⁹, is the most extreme form of capital structure change whereby all the equity is exchanged for debt.

Another radical form of capital structure change would be the leveraged re-capitalization. This occurs when the company takes on a huge amount of debt and pays

²¹⁶ Christensen (1991)

²¹⁷ Gaughan (2002)

²¹⁸ Weston *et al.* (1990) Finance literature sometimes considers buy-outs as forms of takeover. In this case, the offer to buy the shares by the management is not necessarily done in connection with a rivaling bid

²¹⁹ Gaughan (2002) on the other hand sees management buy-out as a form of leveraged buy-out but it must be noted that debt financing is not the only source (although unarguably the most probable) of raising capital.

it out as a dividend to stockholders. Thus most of its equity is replaced with debt thus making the company less attractive to the bidder who would, if pursuing with the acquisition, be forced to service that debt²²⁰.

The target company may also simply take on more debt and thus eliminate the possibilities of the potential acquirer to use the borrowing capacities of the firm to finance the acquisition. If low level of debt is beneficial for a company reducing its risk, increasing debt to equity ratio increases the risk to the point that may lead to bankruptcy.

IV 2.5 Corporate restructuring

Being unable to use the defense strategies mentioned above, the target might decide to make the company unattractive to the acquirer by corporate restructuring²²¹. In corporate restructuring the target sells its most valuable assets²²², acquires other companies²²³ or decides to liquidate the company²²⁴ or change the essence of the company²²⁵. Corporate restructuring is considered to be one of the more drastic antitakeover measures used as it usually leads to unrecoverable consequences for the target company which might eventually lead to bankruptcy.

There are however also proponents that see it as providing a possible benefit for the company. By such approach, corporate restructuring through the sale of subsidiaries or assets²²⁶ narrows the corporate focus. Known as a divestiture in this case, it is seen as increasing the value of company's stock thus making the acquisition less likely²²⁷.

IV 2.6 Pac-Man defense

The target, if unable to find any other effective defensive methods, may engage in transactions with the acquiring company. Probably one of the most amusing takeover defenses is called the Pac-Man defense. Named after a video game in which characters try to eat each other before they are eaten themselves, it occurs when the target makes an offer to buy the bidder in response to the latter's tender offer. Although it is often used to threaten the acquirer, it seldom used due to the high level of resources and legal complexity it creates²²⁸.

²²⁰ Gaughan (2002)

²²¹ Christensen (1991)

²²² Known as the scorched earth defense if involves sale of physical assets or spin-off if it involves the sale of a subsidiary.

²²³ Which could create problems with competition authorities, create profitability problems if the acquired company is making losses or, if financed by debt, create problems similar to capital structure changes

²²⁴ This could be considered beneficial even for the shareholders, if the value of corporate assets after all the obligations have been met (the liquidation value) exceeds the price offered by the acquirer as the liquidation is followed by the payment of the liquidation dividend.

²²⁵ Wooldridge (2003)

²²⁶ This does imply only to non-essential assets

²²⁷ Ross *et al.* (2002)

²²⁸ Gaughan (2002)

IV 2.7 Greenmail and standstill

Whereas Pac-Man is often used as threat by the target, the bidder may also engage in the takeover and use the greenmail to threaten the target. In greenmail or targeted share repurchase, the company buys back the share of the hostile bidder for a premium against a promise not to go further with the acquisition. Bearing similarities with blackmail, both the payers and receivers of greenmail receive negative publicity²²⁹.

Despite the negative publicity, greenmail is used by corporate “raiders” who engage in a hostile takeover with the sole aim of forcing the target to pay greenmail for the shares acquired through open market purchases. A targeted share repurchase is often accompanied with standstill agreements by which the bought out bidder agrees not to make further investments in the target company²³⁰.

IV 2.8 Litigation

The final post-bid defensive measure introduced here is the act of litigation against the acquirer. It is common and can be highly effective especially in common law countries that rely heavily on court judgements. Four reasons could be seen as mitigating the use of litigation: (i) a possibility to choose a more favorable forum, (ii) to preclude the raider from taking initiative and suing first, (iii) to delay the bidder, e.g. while the target looks for a white knight or simply iv) to provide a psychological lift to the target’s management²³¹.

Possible reasons for suing could include anti-competitive consequences, inadequate disclosure of necessary documentation or fraud. Very few cases are brought to court with the actual aim of forbidding the bidder to acquire the company, in most cases it is just a delaying tactic.

IV 3. Rationale of antitakeover measures...

Antitakeover measures are most commonly approached from two perspectives – using the management entrenchment hypothesis and the shareholder interest hypothesis. This section explains these two hypothesis followed by other perceptions that either defend or attack antitakeover measures.

²²⁹ Weston *et al.* (1990)

²³⁰ Christensen (1991)

²³¹ Gaughan (2002)

IV 3.1 ...via management entrenchment hypothesis

Management entrenchment hypothesis is based on the argument that the targets management acts based solely based on self-interest seeking to maintain its position through the use of antitakeover measures. Whereas the control imposed upon the management and the board through the market for corporate control leads them to choose corporate strategies that maximize the share price, takeover defenses reduce that level of control and thus lead to the adoption of non-profit maximizing strategies. According to the management entrenchment hypothesis, this is proven through the reduced value of the companies' shares that adopt antitakeover provisions²³². Through such explanation the management entrenchment hypothesis is built upon the assumptions underlying the simple finance theory whereby the management's aim is to maximize the welfare of the shareholders and to act in their interest in all the matters concerning the corporation.

Adoption of defensive measures thus breaches the trust the shareholders have vested into the management and the board of directors to promote their interests. The same hypothesis would apply also to the relationship between the target and the bidder if the latter has assumed the role as the principal by establishing a toehold in the target. Shareholders loose also through the elimination or lowered probability of tender offers that would maximize their immediate gain. Arguing the same point from transaction cost economics point of view, the managers use their position to expropriate quasi-rents from the shareholders.

Empirical evidence seems to support the hypothesis – adoption of takeover defenses is reflected immediately in the reduced value of the shares²³³. These effects concern naturally only pre-bid defenses and are mostly, due to the fact that “active”²³⁴ takeover defenses are most common in the US, concerned with the poison pill.

Managerial entrenchment hypothesis argues also for reduced welfare by lower threat of takeover that has found confirmation in recent empirical evidence. Companies that are more likely to be taken over show a positive effect on company's productivity²³⁵. Surprisingly though, the same evidence also shows that companies that are open to takeovers exhibit a strong negative effect on takeovers, which is even more evident in case of a possibility of a hostile takeover where there are no formidable takeover defenses allowed²³⁶. Recent evidence examining long-term effects of friendly and hostile bids indicates that shareholders of bidding companies engaging and winning a hostile bid receive positive premiums 18 months after the conclusion of the bid, whereas shareholders in friendly bids lose significantly in the long run²³⁷.

Thus, making companies more open to takeovers by removing the barriers has the effect of increasing the immediate returns to the shareholder. On the other hand, reducing the level of investments could be seen as favoring short-term benefits over long-term

²³² Novaes (2003)

²³³ For example early studies by Ryngaert (1988) and Malatesta and Walking (1988)

²³⁴ Those created by the management or the board

²³⁵ Nuttall (1999)

²³⁶ *Ibid.* This is the only study on that matter that was available at the time of writing this article. The results should therefore not be over-emphasized.

²³⁷ Raj and Forsyth (2002), Corhay and Rad (2000). See also supra note 193 referring to the announcement effect on the shares, i.e. short term wealth effects of takeovers

benefits. In a similar manner, the management entrenchment hypothesis fails to explain why many takeover defenses receive the explicit approval of shareholders²³⁸ and is based on the underlying assumption that managers are those that ultimately adopt defensive measures.

The second question finds an answer in the fact that boards of many companies, that are in fact the ones making the decision about the adoption of both pre-bid and post-bid defenses, are controlled by the managers of the company. Management is often the receiver of proxies from the shareholders and can thus fill the board with persons under his or her influence. At the same time the first question does not seem to be covered by the management entrenchment hypothesis and remains unanswered.

One possibility of course is that most takeover defenses are adopted through proxy voting where the management is the appointed beneficiary. Yet there is a lack of evidence that would support such a claim and it would be highly unlikely that shareholders would be willing to transfer their voting rights to the management that acts so grossly in contradiction with their interests, as perceived by the simple finance theory.

If one would hypothesize further, it could be that the managers possess certain special features that create a bond between them and the shareholders. For example, the company used to be family owned and to raise more capital, the company undertakes to list its shares on the stock exchange. As the firm is small, most buyers are persons who know the company and in order to protect the existing management, agree to adopt defensive measures.

This explanation would fall under transaction cost economics approach whereby the managers and the shareholders possess interdependent assets which they agree to protect from any expropriation by outsiders. The simple finance model nevertheless seems not to be applicable.

The application of management entrenchment hypothesis to pre-bid and post-bid defenses does not result in different outcomes. With the exception of concentration of ownership, which lies outside management control, all other pre-bid defensive strategies are directly or indirectly under the influence of the management of the corporation. Such actions, if directed towards the elimination of bids for the company, are in contrast with the interest of the shareholders and serve as a method for entrenching the management.

Similarly, post-bid strategies can be all seen as an active method of harming shareholders' interest, with the possible exceptions of white knight and management buy-out being, in broad sense, the same. This would be the case, if the only consideration by which to judge alternative bidders would be a higher share price. It is nevertheless a fact that it is only one consideration and for example effects on employment or corporate strategy may play a crucial role in determining the winner. In search of a white knight, it could be often the case that the management comes to bilateral agreement with the new bidder to keep its present positions or to receive a substantially higher reimbursement than in the case of the initial bidder.

²³⁸ Schnitzer (1995)

To apply transaction cost economics to the same strategies, then the management is trying to expropriate quasi-rents from the corporations shareholders for their own benefit both in the case of pre-bid and post-bid defensive strategies. The basic concept behind management entrenchment hypothesis remains unchanged – the management is acting in its own self-interest.

IV 3.2 ...and via the shareholder interest hypothesis

Opposing the managerial entrenchment hypothesis, the shareholder interest hypothesis claims that stockholder wealth increases when the company uses defensive actions²³⁹. Wealth increase might come from cost savings in the form of management time efficiencies, reduced expenditures in proxy fights and smaller investor relations department²⁴⁰.

All the studies of shareholder wealth effects of antitakeover measures have limited the sample period to on average only a few days prior and after the adoption. Although they find that the effects during this period are negative, the significance of those changes is minuscule. Although findings differ based on the antitakeover measure adopted, the ones concerning poison pills find that the negative change is around one percent of the abnormal returns within a two-day window of the adoption²⁴¹.

Much more striking is the fact that adoption of the certain takeover defenses significantly increases the premiums paid to the target shareholders in case of a bid. Shareholder gains in bids where the target company has adopted poison pills have been constantly reported as high as 50 percent over the bids where the target has not adopted poison pills²⁴². Moreover, studies done on the determinants of takeover premiums find that antitakeover measures in general are by far the single largest determining factor for premiums²⁴³.

Existence of takeover defenses thus increases the bargaining power of the company vis-à-vis the bidder forcing up the share premium. This would explain also why shareholders are willing to adopt defensive mechanisms even without an eminent threat of a takeover.

From the simple finance theory perspective the company's management is effectively upholding the interests of its owners and, instead of breach of trust and moral hazard, the management acts in the best interest of the shareholder. From a transaction cost economics perspective, the management and the board are using the dependability of the outcome of the takeover on its actions to expropriate the bidder up to its composite quasi-rents.

²³⁹ Grossman and Hart (1981)

²⁴⁰ Gaughan (2002)

²⁴¹ Malatesta and Walking (1988) indicate – 0,915 percentage negative abnormal stock return whereas Ryngaert (1988) shows a negative return of – 0,34 percent

²⁴² For example Nathan and O'Keefe (1989) 52 percent and Comment and Shwert (1995) 49,1 percent, on this matter see also Schnitzer (1995)

²⁴³ Varaiya (1988)

Similar line of reasoning could also lead to the conclusion that the shareholders are providing the management certain levels of security, thus making them more likely to contribute their inputs to the functioning of the firm. Following that, and extending the reasoning not just to the interaction between shareholders and managers, such safeguards would also enable the company to provide security to employees and creditors who, as has been shown before, are often subject to expropriation by the bidder in the case of a successful bid.

Thus, the transaction cost economics approach seems to confirm the observations by scholars and practitioners, that having the company constantly “on sale” significantly reduces long-term growth prospects and promotes short term gains²⁴⁴.

Consider the case of pyramidal structures. They are perceived as allowing a shareholder to exercise control not in proportion to his share in the equity. At the same time it can be argued that pyramidal structures are used not only to entrench management and to elude capital market discipline, but also to substitute for the absence of legal protection for a contracting party. Membership in such groups helps prevent opportunistic behavior. This is because the controlling parties at the top of the organizational pyramid of a group can force the members both to comply with their actual and implicit contractual obligations and to treat other parties fairly.

Recall also from Chapter III that the motivations for takeovers are not always objectively justified but driven by the self-interest of the bidding company. If this is the case and takeover defenses are in fact seen as protecting the company from a hostile bid, then there is no reason why management entrenchment hypothesis should prevail over the shareholder’s interest hypothesis.

In a similar manner, consider the fact that shareholders in a “modern” widely held company are not exercising control over the operations of the company directly but have delegated that power to the board of directors. In this manner they have vested the board with powers to promote their interests and, as financial interests of the board are not of primary importance for holding those positions, there is no reason to assume that the board is not looking after the interests of the shareholders in adopting defensive measures.

This would undeniably allow to explain the effects that for example staggered boards have on company performance. By allowing board members not to be elected *en masse* every year but classifying them over several periods would increase the specificity of their inputs to the firm and thus also increase their productivity and insight.

Naturally, management entrenchment hypothesis would argue that those instances are common only in companies where the board is under the influence of an inefficient manager. At the same time both in the US and UK, which are commonly held as being the most shareholder “friendly” capital market, witness the adoption of antitakeover measures by on average 40 to 50 percent of listed companies²⁴⁵. It would be unreasonable to suggest that these are only the companies where board members are “friends and relatives” of the management. One of the few studies done in Europe

²⁴⁴ Nutall (1999), Lipton (2002), Gordon (2002), see also supra note 249

²⁴⁵ Lipton (2002)

actually shows that institutional and dispersed shareholders are worse monitors of companies than the holders of controlling majorities²⁴⁶.

It would be unfruitful to continue the discussion for individual defensive mechanisms, as the outcome would be the same as for the ones discussed above – there will be supportive evidence for both management entrenchment and shareholder interest hypotheses. It is therefore proper to finish with Part I and draw the first conclusions.

Concluding remarks for Part I

The chapters above have raised an issue of the effects that takeovers and takeover defenses have on companies, shareholders and management. To a large extent the discussion here is not novel. The aim has been to show that by following the conventional path of the finance model, the shareholders are entitled to forbid the management and the board of the company from breaching the trust that they have bestowed upon them.

Even though empirical evidence supports repeatedly the fact that takeovers are motivated by the self-interests of the bidder's management, rather than by the inefficiency of the target's management, the target is perceived as acting inadequately when adopting defensive mechanisms whereas the bidder is merely trying to increase the welfare of its shareholders. And even this last argument has not found uniform support in the research.

Taking the approach of transaction cost economics would justify the actions of the board of the target company by allowing it to either protect long-term investments by themselves, by the employees and/or by other constituencies. It is nevertheless undeniable that all successful takeover defenses have the result of entrenching the management, as it is likewise undeniable that there are managers that pursue that aim. Subjecting the adoption of defensive mechanisms to the will of shareholders seems to limit those possibilities but not to eliminate them.

It is thus possible to conclude the first part by stating that it is not possible to conclusively claim that takeover defenses are either good or bad. In contrast to scholars that try to find a uniform answer to the question of the feasibility of defensive strategies in every occasion, I claim that such a question is possible to answer. There are instances where the adopted defensive strategies serve as entrenching the management and allowing them to abuse their position or to expropriate quasi-rents from the shareholders. At the same time there are takeovers where the protection of the corporation against a possible or actual takeover is justified by the need to uphold long-term interests and protect the constituencies that have contributed firm specific assets.

Recalling that the aim of the 13th Directive is to pose uniform legislative framework upon all 15 Member States of the European Union, one has to wonder if there is sufficient rationale behind it. If there is no answer to the feasibility of antitakeover measures, does it make sense to strive for uniformity? The paper shall return to the issue in the last chapters but first it is necessary to examine the existing situation in the countries that are most affected by the adoption of the 13th Directive and to examine the level of integration that has occurred in past years/decades without the 13th Directive.

²⁴⁶ Kabir, Cantrun and Jeunik (1997)

[The diversity of corporate law in the EU] forms altogether a cocktail of unnecessary, useless and costly complexity – Kafka plus the Tower of Babel, shaken and stirred

**F. Bolkestein, EC Internal Market Commissioner,
2001**

V Takeover defenses in six EU countries

The following section gives an overview of takeover defenses in France, Germany, Italy, the Netherlands, Sweden and the United Kingdom. Takeover defenses, as were shown in chapter IV, can be found at different levels of corporate environment. Here they are classified under three headings distinguishing between:

- 1) defenses extant in the ownership structure and thus generally lying beyond the powers of the management;
- 2) defenses identified in the national company law that limit the use of defensive measures by regulating for example voting rights and share issues
- 3) defenses that the board of the company can implement in case of an actual takeover bid

The section does not strive to give a detailed picture of the measures available within individual companies but to generalize and explore the possibilities used in national systems. It must be also considered that the list is not exhaustive, as there are aspects of national company laws that lie beyond the aspirations of the author.

V 1. France

The French word “société” means both “company” and “society”²⁴⁷ leading to the company pursuing goals of its own, rather than those of only the shareholders, management, employees or other constituencies²⁴⁸. The chairman of a French company is consequently sometimes considered not to act in the name of the interests of the shareholders whom he represents, but in the name of the company as an entity²⁴⁹ corresponding to the concept of French individualism known as “la logique de l'honneur”²⁵⁰.

²⁴⁷ Atkins *et al.* (2000)

²⁴⁸ Foster (2000)

²⁴⁹ Pastre (1998)

²⁵⁰ According to that “logic of honour”, the individual considers himself to be a sovereign, independent power that has to account for his or her actions only to his or her own conscience and to his or her own sense of honour. At the same time, an individual has an idea what is good for the organization he or she belongs to. (Groenewegen, 2000) The first Viennot report from 1995 stated in a similar matter that the primary aim of the company is to act “as a separate economic agent, pursuing its own objectives which are distinct from those of shareholders, employees, creditors including the internal revenue authorities, suppliers and customers. It nonetheless represents the common interest of all of these persons, which is for the company to remain in business and prosper” (Viennot, 1995)

V 1.1 Defensive measures deriving from ownership structure

The French system can be considered protectionistic. Primarily, it is indicated by the central role of the state in the formation and the evolution of French society, culture and economy²⁵¹. In recent years, as shareholder activism has increased and capital markets been turning outside France for financing, the state has undertaken number of privatizations²⁵². The privatization process has not, however, reduce the role the state plays in the economy. In many privatized companies the state maintained:

- 1) the right of the state to choose a “noyau dur”, a “hard core” group of stable (and loyal) shareholders;
- 2) the use of the “golden share”²⁵³

In addition, educational and social background plays an important role in individual careers, leading to the government and business sectors to be dominated by persons from the same school, city, social circle, etc²⁵⁴. Coupled with the fact that individual shareholders in France have a tendency not to hold their shares directly but through institutions²⁵⁵ it leads to the concentration of power in the capital markets in the hands of a closed group of individuals. Concentration of power has also historically lead to an increased role of financial intermediaries as financiers of the economy²⁵⁶.

A study from 1997 found that on average, for both non-listed and listed companies, the first owner holds 66 percent of the capital. The degree of concentration for listed companies is lower, but exceeds still half of the capital – 56 percent for the first owner and 21 percent for the second owner²⁵⁷. A similar study from 2002 finds the level of widely held firms out of a sample of 607 French firms to be 30 percent²⁵⁸, whereas the level of family and state controlled firms was close to 70 percent²⁵⁹.

Thus on the first level, takeovers are made harder by the concentrated ownership structure and the existence of strong government control both indirectly and through golden shares²⁶⁰. In addition, self-perception of the Frenchmen could act as a limiting

²⁵¹ Wallace (2002) pointing out the roles of Colbert in the 17th century and de Gaulle in the 20th century as promoters of state involvement and control over the economy

²⁵² Guyon (1994)

²⁵³ Wallace (2002)

²⁵⁴ *Ibid.*

²⁵⁵ Guyon (1994)

²⁵⁶ Pastre (1998)

²⁵⁷ Bloch and Kremp (1997) Surprisingly, they find that concentration increases with the firm’s size, reaching 88 percent for companies with more than 500 employees. Pedersen and Thomsen (1997), who rely on data from 1990-1992, find the level of combined dominant (20-50 percent of voting share), family (voting majority) and government (voting majority) owned companies among the hundred largest companies to reach 65 percent

²⁵⁸ Including financial and non-financial firms. Leaving out financial firms which are not covered by the 13th Directive would show the level of widely held firms to be only 17,8 percent

²⁵⁹ Faccio and Lang (2002). Although literature refers often to La Porta *et al.* (1999), they use a sample set of only 20 firms for each country. Thus their findings cannot be considered as representative for the entire country

²⁶⁰ See Section VII for a discussion of golden shares’ legitimacy in the EC

factor for cross-border takeovers, where a different regime is imposed upon the company²⁶¹.

V 1.2 Defensive measures deriving from companies and company law

Takeovers in France, by the definition of the 13th Directive, affect companies with shares listed on a French regulated market²⁶². Two forms of companies are allowed to list their shares - public limited companies (sociétés anonymes, SA) and partnerships limited by shares (sociétés en commandites par actions, SCA). A radical defense against a future takeover bid consists of the alteration of the articles of a SA so as to convert it into a SCA where the directors have an opportunity to block or postpone the bid²⁶³.

French legislation allows the issuance of three forms of ownership certificates without voting rights without modification to company statutes:²⁶⁴

- à dividende prioritaire (ADP)²⁶⁵ created when an increase of capital or a conversion of shares occur and cannot represent more than 25 percent of the capital and;
- certificats d'investissement (CI), providing cash flow rights but no voting rights, are freely transferable and issued in case of an increase of capital or a splitting of existing shares²⁶⁶ simultaneously with;
- certificats de droit de vote (CDV) which are distributed among voting shareholders in proportion to their voting rights and are not transferable.

Subject to certain limitations, issuing non-voting shares or CDV's to existing shareholders can consequently reduce the threat of takeovers.

Differentiation of shares can also result from a modification of company's statutes²⁶⁷:

- shares with double voting rights issued only to "faithful shareholders"²⁶⁸;
- preferred shares allowing for increased or cumulative cash flow rights and;
- limitation of voting rights are allowed with the consent of the shareholders²⁶⁹

Company statutes may also allow for the company to enter into contractual agreements that take effect after a bid, subject to removal by the management²⁷⁰.

²⁶¹ There is some indication that personal relationships do not constitute an active defense measure anymore, as capital markets are evolving (Kirry, 1998)

²⁶² Premier Marché and Seconde Marché regulated by Conseil des Marchés à Terme (CMT) and Nouveau Marché with its own set of rules

²⁶³ Wooldridge (2003)

²⁶⁴ Bloch and Kremp (1997)

²⁶⁵ Regulated by the law n°78-74, July 1978

²⁶⁶ The CI cannot nevertheless exceed 25 percent of capital

²⁶⁷ Wooldridge (2003)

²⁶⁸ Minimum two years of holding prior to issuance and for a period of maximum of 4 years in listed companies. Wooldridge (2003) nevertheless casts some doubt if they can really be considered to be legitimate but does not state that for certain

²⁶⁹ Bloch and Kremp (1997) Once again, Wooldridge (2003) argues for their potential illegitimacy

²⁷⁰ Wooldridge (2003)

For listed companies, transfers of bearer shares crossing the thresholds²⁷¹ must be notified to the company and the competent authority but is not otherwise restricted unless provided so in company clauses for both SA and SCA²⁷². Such “clause d'agrément” is nevertheless not opposable to the acquirer in case of a takeover bid²⁷³. Agreements between shareholders are not forbidden, but they must be reported to the CMF and since 2001 they are unenforceable unless so notified in case of a takeover bid.²⁷⁴

Cross-shareholdings between two public firms cannot exceed 10 percent of the voting capital²⁷⁵ but it applies only for two firms having their headquarters in France (not if one has its headquarters out of France)²⁷⁶. Extensive cross-shareholding is thus allowed, and in fact also practiced²⁷⁷, through indirect holdings by subsidiaries and intermediary companies located in other countries.

Both SA and SCA are at liberty to choose either a two-tier or one-tier board system²⁷⁸. The AGM is convened by the administrative board (conseil d'administration) or, where applicable, by the managing board (directoire) which also set the agenda for the meeting.

French company law allows companies to require that shareholders own their stock as long as five days before the AGM in order to vote. Many foreign institutions own French stock through a custodian or sub-custodian, which might in turn hold the shares under a street name. If the owner wishes to vote by proxy (“Mandats en Blanc”), he must request the custodian to ask the company to send the necessary registration form to him. French pension funds (fonds d'épargne retraite) are required by law to vote shares held by them which has been upheld by France's constitutional court²⁷⁹. A new law, implemented on May 3, 2002, significantly increases the possibilities of foreign shareholders to use their proxies as they see fit²⁸⁰.

The scope of the proxy is not generally valid for more than one AGM. The board of directors (or the managing board) generally benefits from the possibility by being empowered “en blanc”²⁸¹. These “en blanc” powers must be used by the president of the AGM to cast a vote in favor of the adoption of resolution proposals approved by the board of directors (or the managing board) and against the adoption of all other resolution proposals²⁸².

²⁷¹ Set out by Directive 2001/34/EC. See Chapter VII

²⁷² Bloch and Kremp (1997). Permissible under Art.L228-23 of the Commercial Code

²⁷³ Wooldridge (2003)

²⁷⁴ Bombrun and Houdayer (2002). Nathan and Fischer (2002) state that the transfer is illegal if the transfer agreement exceeds 0,5 percent of the voting stock and is not reported

²⁷⁵ Bloch and Kremp (1997)

²⁷⁶ Wooldridge (2003)

²⁷⁷ Wooldridge (2003) The reason why studies by Faccio and Lang (2002) and others did not indicate the existence of cross-holdings in France could be hidden in that piece of legislation. Under their methodology those shareholdings would be represented under the “foreign ownership” heading both in France and in the intermediary country

²⁷⁸ One-tier board meaning a body that has both the powers to issue directions for the management and to control their activity. In two-tier boards those tasks are separated.

²⁷⁹ Baums (1997) referring to a judgement of March 25, 1997

²⁸⁰ ISS (2002a)

²⁸¹ i.e., without indicating the name of the proxy holder

²⁸² Baums (1997)

As performance dependant executive compensation in Latin countries does not reach the same levels as in the Anglo-Saxon countries²⁸³, the usage of golden parachutes has remained modest²⁸⁴. There is also some doubt about the legality of golden parachutes in case of a takeover bid but it remains an open question until further legislation is developed. Directors are, as of May 2002, required to disclose both the size of their remuneration package and possible “golden parachutes” that they have been provided with²⁸⁵.

Both public forms of companies – SA and SCA – are allowed to buy out their own shares only if it is carried through by transfer of wealth, by law decision, in case of capital reduction, in order to be distributed to employees or in order to regulate the share price²⁸⁶. This affects nevertheless only shares that have no voting rights and is limited to 10 percent of all the shares in the same class²⁸⁷.

A committee, composed of France’s two largest employer associations, the Medef and the AFEP-AGREF and headed by Daniel Bouton, the chairman of Société Générale, issued a report in the third quarter of 2002 proposing changes to the French corporate governance system. One of the main recommendations of the so called Bouton report is to significantly increase the level of independent board members and to cut down the powers that the French system currently provides to the boards²⁸⁸.

V 1.3 Regulation of takeover activity

The French legal and regulatory framework for takeovers has underwent significant changes in past years²⁸⁹, predominantly as a result of the high-profile takeover bids which made the French headlines in the late 1990s. There are three supervisory authorities overseeing the compliance with main regulating instruments²⁹⁰ – the Commission des Opérations de Bourse (COB), Conseil des Marchés Financiers (CMF)²⁹¹ and the Société des Bourses Françaises (SBF). Takeover offers are categorized into the cash offer (offre publique d’achat, OPA) and the share offer (offre publique d’échange, OPE). An offer that is a mix of these, as it is often the case, is called the offre publique mixte (OPM).

French tender offers must be irrevocably guaranteed by the banks acting for the bidder from the day the offer is filed with the CMF. This concerns also mandatory bids, which are triggered when the bidder acquires at least 33 percent stake in the target corporation²⁹². In a similar manner, partial bids are not allowed under French

²⁸³ Weimer and Pape (1999)

²⁸⁴ Roe (2002) argues that this is due to the tensions that it would create between the line-workers and the senior managers

²⁸⁵ Wooldridge (2003)

²⁸⁶ Bloch and Kremp (1997)

²⁸⁷ Wooldridge (2003)

²⁸⁸ ISS (2002a)

²⁸⁹ Bombrun and Houdayer (2002)

²⁹⁰ Law of August 2, 1989 relating to the Security and Transparency of Stock Markets, the Règlement Générale issued by the CMF from November 5th 1998 and Règlement 89-03 of September 1989 by the COB (Wooldridge, 2003)

²⁹¹ Responsible for enacting general regulations governing the organization and operating principles of the stock markets

²⁹² Schoenfeldt (2000)

regulations. Takeover offers must be made for all of the target's ordinary shares and other securities (such as convertible bonds or warrants) that give access to ordinary equity or voting rights.²⁹³

Post-bid defensive measures are permitted provided that the general meeting has, prior to the offer, given express authorization for them for a period of time between two general meetings. Such authorization allows for defensive measures from poison pills to extended share acquisition of company's own shares²⁹⁴. What is prohibited in the French system, is altering of any strategic activities which may have made the target company attractive to the bidder. The management may, on its own initiative, search for competing bids – i.e. white knights – and initiate a Pac-Man defense.

Employee rights are protected by the inclusion of the requirement for the bidder to provide the target's works council with a copy of the offer document, which includes its labor policy for the target. If the bidder subsequently refuses to meet the representatives of the target's employees, the bidder will lose all the voting rights owned by the bidder in the target²⁹⁵. The bidder does not, however, have to modify the offer according to the opinion of the target's work council²⁹⁶.

V 2. Germany

The principle that echoes in the German corporate governance system is that economic efficiency is worth sacrificing to "protect" non-shareholder constituents of the corporation²⁹⁷. German system of corporate governance emphasizes heavily the role of employees, who have been given substantive powers, as compared to other European countries, to influence the management of the company²⁹⁸.

V 2.1 Defensive measures deriving from ownership structure

German corporate ownership is best described by a single word – banks. As a result of various economic and social factors, large German banks have become the largest shareholders and most active board members in the large corporations²⁹⁹.

Studies done on corporate ownership in Germany support this empirically. An examination of 402 officially listed companies in 1996 showed that 77 percent of an average firm's voting rights were controlled by large blockholders³⁰⁰, which

²⁹³ Nathan and Fischer (2002)

²⁹⁴ Wooldridge (2003)

²⁹⁵ Such voting rights are only restored when either the works council does not request another meeting within fifteen days of the initial meeting, or at the time the bidder meets with the works council

²⁹⁶ Nathan and Fischer (2002). This could be seen as a consequence of the efforts of the French socialist elite and politicians to stabilize employment (Roe, 2002)

²⁹⁷ Loewenstein (2002)

²⁹⁸ As Roe (2002) puts it: "codeterminations "just" formally (manifests) the underlying drive for institutions that would keep social peace and, historically, a middle way between harsh capitalism and strong socialism"

²⁹⁹ Loewenstein (2002)

³⁰⁰ Controlling at least 20 percent of voting rights

corresponds to 47 percent of the market value. About two thirds of that were controlled by banks, industrial firms, holdings, and insurance companies³⁰¹. Another study, relying on earlier information, shows that the share of dominant, family and government owned companies is 66 percent³⁰².

Out of 704 publicly listed firms in Germany, in a study based on data from 1999, the authors find that widely held firms in both financial and non-financial sector comprise about 24 percent out of which financial firms account for more than nine³⁰³. Leaving out also widely held corporations³⁰⁴, Germany exhibits the lowest level of widely held corporations among the 13 studied European countries.

Golden shares, remaining in the hands of the state after privatizations, are also allowed in Germany³⁰⁵. Likewise, Germany has the highest level of cross-holdings in Europe, accounting for about three percent of the total number of companies³⁰⁶. Thus, similarly to France, concentration of ownership with a substantial level of cross-holdings creates the first barrier to takeovers³⁰⁷.

V 2.2 Defensive measures deriving from companies and company law

The 13th Directive affects two types of companies allowed to be listed on German regulated markets³⁰⁸ – the stock corporations (Aktiengesellschaften, AG) and partnerships limited by shares (Kommanditgesellschaften auf Aktien, KGaA)³⁰⁹. Thus, in a similar manner to France, the company may alter its articles of association to restructure form itself from AG to KgaA. Due to close connections between German banks and companies, poison debt may be more easily used than in those countries that do not share such proximity³¹⁰.

A powerful antitakeover measure can be found in the very foundation of the German company law system – the two-tiered board. Under German legislation³¹¹, all stock companies and companies with a certain number of employees³¹² to have a two-tiered board system where the management (Vorstand) board is subject to scrutiny by the supervisory (Aufsichtsrat) board. Existence of a supervisory board with employee representation, next to the management board, forces any bidder to seriously consider the attitude of employees.

³⁰¹ Boehmer (1998)

³⁰² Pedersen and Thomsen (1997)

³⁰³ Faccio and Lang (2002)

³⁰⁴ Non-financial firms, widely held at 20 percent threshold

³⁰⁵ Wooldridge (2003)

³⁰⁶ Faccio and Lang (2002) Firm A controlled by another firm, that is controlled by A, or directly controls at least 20 percent of its own stocks.

³⁰⁷ This could be seen also as a reason why hostile takeovers in Germany are so rare. The historical bid of Vodafone from UK on Mannesmann in Germany could be carried through only because the shares of Mannesman were widely held. Majority of them by US investors (Höpner and Jackson, 2001)

³⁰⁸ Amtliche Notierung und Geregelter Markt including the Neuer Markt

³⁰⁹ Freshfields Bruckhaus Deringer (2002).

³¹⁰ Wooldridge (2003)

³¹¹ Codetermination Act of 1976

³¹² For companies that have between 500 and 2000 employees, one-third of the supervisory board must consist of employee representatives which increases to one half, if the number of employees exceeds 2000. Applies to all the forms of companies in Germany (Loewenstein, 2002)

An antitakeover measure used in Germany, deriving from the two-tiered board system, is the issuance of special class of shares having the right to make nominations to the supervisory board³¹³. Two-tiered board system makes the use of staggered boards also much more formidable than in countries with a one-tier board system.

Different levels of defenses prior to the bid can be implemented as a result of the combination of two boards³¹⁴. Increases in share capital³¹⁵, acquisition of company's own shares and shareholder agreements are allowed by the legislation with the approval of shareholders³¹⁶. Contrary to France, German legislation does not allow for the issuance of multiple vote shares³¹⁷ but does allow the issue of preference shares carrying no voting rights³¹⁸.

In Germany, registered share transactions take place by means of entries in a current account. Such shares are included in a collective safe deposit, and share registers are frequently maintained by electronic means. It is permissible to vote electronically in respect of such shares. Their use makes it possible for the bidder to easily determine who owns them, and to communicate with their owners³¹⁹ but given also the company the same opportunity.

Supermajority amendments are allowed according to German legislation if implemented through articles of association. As in France, the company may enter into contracts that take effect upon the realization of the bid³²⁰. Although the usage of golden parachutes might be in contradiction with legislation, allowing only "reasonable compensation"³²¹, there are indications that executive pay in Germany is rising and extraordinary high payments are more widely used³²².

V 2.3 Regulation of takeover activity

German takeover legislation was changed on November 15th, 2001 when the Bundestag passed the Act on the Acquisition of Securities and Takeovers (Wertpapiererwerbs- und Übernahmegesetz, hereinafter the Act)³²³, which entered into force on January 1, 2002. The Act replaced the non-binding Takeover Code, an instrument of voluntary self-regulation, which became effective on October 1, 1995³²⁴ but was not widely adhered to.

³¹³ Mennicke (2003) The supervisory board has the right to approve defensive measures. See following section

³¹⁴ Management board actions have to be confirmed by the supervisory board

³¹⁵ In the same manner as in France, it is limited only to 10 percent of share capital

³¹⁶ Wooldridge (2003)

³¹⁷ §12 (1) of the Public Companies Act (Aktiengesetz). This applies though only to ordinary shares

³¹⁸ *Ibid.* §139 (2) but only up to 50 percent of the share capital

³¹⁹ Krause (2002)

³²⁰ Wooldridge (2003)

³²¹ *Ibid.*

³²² Cheffins (2001)

³²³ Freshfields Bruckhaus Deringer (2002) All references to the Act are to the translation provided by this source

³²⁴ Amended on January 1st, 1998

Actions of the target are regulated primarily by §33 of the Act that sets about clear limitations on the activities the board of the target company can take. It states that “the managing board of the target company may not take any actions which could prevent the success of the offer”.³²⁵ At the same time it is also stated that such provisions “shall not apply to actions which a prudent (ordentlicher) and conscientious (gewissenhafter) manager of a company, which is not affected by a takeover offer, would also have taken, to the search for a competing offer and to actions consented to by the supervisory board of the target company”.³²⁶

Thus, although the actions of the board are limited to “business as usual” he may engage in a search for a white knight. It is not clear if “prudent and conscientious” behavior would allow for, for example, the sale of any assets or making additional acquisitions but it is doubtful. Action could nevertheless be taken if it were approved by the supervisory board, which, given the high level of representation of employees, could be obtained especially in case of a hostile bid³²⁷. This could be emphasized by the general provision that requires both the managing and the supervisory board to act in the best interest of the company, not merely the shareholders³²⁸.

On a more general level, similarly to France, the management board may take actions to “prevent the success of takeover offers”³²⁹ if explicit authorization has been given directly by the shareholders for 18 months at the most³³⁰. Such an action must get the acceptance of at least two thirds of the share capital represented at the vote but the articles of association may specify a higher majority and any further requirements.³³¹ A peculiarity of the two-tier board system is that the managing board is not directly liable to the shareholders but to the supervisory board. Thus, in case of any action taken by the management board that is not approved by the shareholders, the latter can only complain to the supervisory board.

The Act does not limit control only to securities bearing voting rights. Under the definition of securities subject to takeover offer³³² also securities comparable to and certificates representing shares are included. This would indicate that also rights issues and convertible debt, that are created for poison pill, are covered by the Act and would in that manner be also possible to buy by the bidder.

The Act does not only regulate the activities of the target. The bidder is liable for adhering to the offer document under a threat of paying damages to anyone who has accepted the bid (if he has acquired control in the company³³³) based on the information presented in the offer document if it turns out to be incomplete or incorrect³³⁴. This seems to represent another possibility for the protection of employees. In the existence of employee share ownership plans, employees may pursue subsequent litigation if they perceive that their rights position has been abused.

³²⁵ §33 (1) of the Act

³²⁶ *Ibid.*

³²⁷ Recall that as a consequence of a takeover, employees often have to bear some of the costs of the bidder

³²⁸ §3 (3) of the Act

³²⁹ §33 (2) of the Act

³³⁰ It has to be approved by the supervisory board

³³¹ *Ibid.*

³³² §2 (2) of the Act

³³³ §29 (2) defines it as being 30 percent of voting rights

³³⁴ §12 (1) of the Act

V 3. Italy

Italy presents corporate governance mechanisms that cannot be homogenized into any of the usually studied Anglo-Saxon, German or Japanese models. Small firms dominate the economy, with a limited number of even medium size firms. And yet those firms have obtained remarkable results by being clustered in the same area, the "industrial district," where they exploit externalities of various nature. They are linked through stable inter-firm relationships that mimic the productive structure of larger firms. Finally, these small firms have shown a notable tendency to invest in research and development³³⁵.

V 3.1 Defensive measures deriving from ownership structure

A characteristic of Italian ownership structure is an extensive use of pyramids. Approximately fifty to sixty percent of listed firms are a part of corporate groups and, unlike most other countries, even relatively small companies tend to participate³³⁶. Stand-alone companies have never presented more than 30 to 40 percent of the total number of companies on Milan Stock Exchange³³⁷.

Latest studies conducted on ownership structure in Italy find dominance of family controlled companies (60 percent)³³⁸. Earlier studies show a total lack of dispersed ownership with the government controlling 29 percent of all the voting rights in listed companies³³⁹. Combining that with a single dominating owner and family control shows, similarly to later studies, an overwhelming concentration by 71 percent leaving 29 percent to foreign owners.

A recent study on historical development of ownership structures in Italy shows that the picture has not changed a lot during the 100 years³⁴⁰. Privatizations by the government over years have reduced the share of government ownership, but the beneficiaries seem to be other concentrated groups of owners³⁴¹.

Thus, in a manner similar to France and Germany, concentrated ownership can be seen as acting as an obstacle to takeover activity.

V 3.2 Defensive measures deriving from companies and company law

Companies in Italy can be in general categorized into two broad groups - società di persone (società semplici, società in nome collettivo, società in accomandita semplice),

³³⁵ Portolano (2000)

³³⁶ Aganin and Volpin (2003), Bianchi, Bianco and Enriques (1997)

³³⁷ *Ibid.*, Faccio and Lang (2002) nevertheless report 29 percent of such holdings examining 181 companies controlled at 20 percent threshold

³³⁸ Faccio and Lang (2002) out of a sample of 208 listed companies

³³⁹ Pedersen and Thomsen (1997)

³⁴⁰ Aganin and Volpin (2003)

³⁴¹ *Ibid.*

where liability is unlimited for at least some of the owners, and società di capitali (società per azioni, società in accomandita per azioni and società a responsabilità limitata), where liability is, normally, limited³⁴². Only società per azioni are allowed to be listed on stock exchange and are thus subject to the articles of the 13th Directive.

In Italy, publicly traded companies are very rare. During the 1982 to 1992 period, 1700 companies satisfied the listing requirements of the Milan Exchange, but there were only 66 new listings of non-financial companies during that period. Those companies that were eligible to list were, on average, four times as large as their U.S. counterparts (based on annual sales). In fact, there was approximately the same number of firms listed on the Milan Stock Exchange in October 1996 (218) as there was in 1910 (210)³⁴³.

Cross-holdings of listed companies are limited to a maximum of two percent of share capital when both companies are listed³⁴⁴. If one of the two gains control on the other, however, the votes of the other cannot be exercised. If one company is listed and the other one is not, then when the listed company reports a ten per cent holding or more in the non listed company, the latter may not hold more than two per cent of the shares in the former. When the non-listed company reports a two per cent holding or more in the listed company, the latter may not hold more than ten per cent of the shares in the former³⁴⁵.

In società per azioni the shareholders meeting adopts resolutions upon the following matters:

- 1) the approval of annual accounts;
- 2) the election and removal of directors («amministratori»), internal auditors («sindaci»), and liquidators;
- 3) determination of their compensation;
- 4) for listed companies, choice of the external auditor;
- 5) other matters as indicated in the company statute or as submitted to its approval by directors or by internal auditors;
- 6) the authorization of liability suits against directors, «sindaci», and liquidators;
- 7) the modifications of the company statute (including mergers, divisions, and new issues of shares), issue of bonds, listing on a stock exchange, election and powers of liquidators.³⁴⁶

Minority shareholders representing at least 20 percent of the issued capital may request the assembly of GM. In order for shareholders to take part of the meeting, transfers of shares have to be registered in the shareholder register, and shares have to be deposited at the company's site or at the bank at least five days before the meeting. Such

³⁴² Bianchi, Bianco and Enriques (1997)

³⁴³ Aganin and Volpin (2003)

³⁴⁴ I.e., if a listed company reports a two per cent holding or more in another listed company, the latter may not exercise the voting rights attached to shares in the former exceeding two per cent of the voting shares

³⁴⁵ Bianchi, Bianco and Enriques (1997) For non listed companies there are no limits to cross holdings between two companies, when neither of them controls the other, although it is generally forbidden for two companies to reciprocally underwrite each other's shares. When a company is controlled by another company, it may not hold more than one tenth of the shares in the latter (taking also into account treasury shares and shares held by other controlled companies). Facio and Lang (2002) show that only 1 percent of companies use cross-holdings

³⁴⁶ *Ibid.*

requirements make it rather difficult for minority shareholders of large companies to obtain a shareholders meeting³⁴⁷.

Shareholder agreements are allowed by national legislation only if:

- a) notified to regulatory authority of the stock market (Consob) within five days from the date of their conclusion;
- b) published in abridged form in the daily press within ten days from the date of their conclusion;
- c) entered in the Company Register of the place where the company has its registered office within fifteen days from the date of their conclusion³⁴⁸.

Voting rights attached to listed shares for which the requirements have not been satisfied, may not be exercised³⁴⁹. Although multiple voting shares are not allowed in Italy since 1942, listed companies have been allowed to issue non-voting shares³⁵⁰ up to 50 percent value of the voting shares³⁵¹.

Directors, general managers and employees of the company or of a subsidiary company may not act as proxy in the company's meeting. Since 1974, banks are forbidden from offering proxy-voting services; in 1996 they were allowed to offer them to the clients of their asset management department. No one can act as proxy agent for more than 50, 100 or 200 shareholders of a listed company (10 for a non-listed company)³⁵².

Individual shareholders or minority shareholders may not sue directors for damages suffered by the company. Only the company, after a resolution by the shareholders' meeting, may do so. Directors are forbidden, even qua shareholders, from voting in the resolutions regarding their liability,. Shareholders representing at least 10 percent of the issued shares may ask a Court to order an inspection of the company, alleging serious irregularities; if such irregularities emerge, the Court may nominate a «judiciary director» who might also sue former directors³⁵³.

V 3.3 Regulation of takeover activity

Italy has rather recently seen a radical change in the legal regime of defensive tactics³⁵⁴. Although Italy has regulated tender offers since 1992, the legislation implemented in 1998 through the Financial Law Consolidated Act, created substantial shifts in the scope of antitakeover measures³⁵⁵. Whereas the 1992 legislation provided for the board of the target to adopt "absolute passivity", the subsequent changes allow defensive measures subject to shareholder approval.

³⁴⁷ *Ibid.*

³⁴⁸ Article 122 of the Italian Civil Code

³⁴⁹ Bonante and Tucci (1999)

³⁵⁰ Savings shares or "azioni di risparmio"

³⁵¹ Portolano (2000)

³⁵² Bianchi, Bianco and Enriques (1997) the increasing number is related to company's issued capital

³⁵³ *Ibid.*

³⁵⁴ Portolano (2000)

³⁵⁵ Bonante and Tucci (1999)

Thus, in a similar manner to Germany and France, Italian companies are allowed to adopt defensive measures with the prior approval of shareholders³⁵⁶. The article is nevertheless vague on what exactly constitutes shareholder approval by stating that “shareholders’ meetings, ..., shall adopt resolutions where shareholders representing at least thirty percent of the capital vote in favor”³⁵⁷. Shareholder approval seems to warrant all possible defense mechanisms available from poison pills to asset sell-off. Restrictions on those matters are imposed only upon the actions taken by the management and the board of the target.

Unlike in Germany and France, the target is forbidden to change its articles of association. In a similar manner, the target is also forbidden to use the acquisition of its own shares³⁵⁸ as a defensive mechanism. The company is nevertheless allowed to do it before the bid³⁵⁹ but, similarly to France and Germany, only up to 10 percent of the share capital and only for non-distributed profits resulting from the latest accounts³⁶⁰

No shareholders meeting is needed in order to buy back shares (which will be very difficult to achieve during a takeover attempt because of the requirement that a shareholders meeting will be called at least 15 days in advance³⁶¹), provided the shareholders' meeting has authorized the directors to buy back shares for a maximum period of 18 months. If this period expires without the company being subject to a takeover period, such authorization can be renewed for a further 18-month period³⁶².

The sale of 'crown jewels' appears to be feasible under Italian takeover legislation. The prohibition on altering significantly the assets and liabilities of the company, is referred to the company's directors. Accordingly, the company directors can call the shareholder's meeting in order to approve 'significant' alterations of its assets and liabilities and so any sale of the 'crown jewels'. In addition; it appears that it should be possible to establish in the company's memorandum of association that, in circumstances such as the company becoming the target of a takeover attempt, the directors can call the shareholders meeting to decide upon the sale of its 'crown jewels' to a 'white knight'³⁶³.

V 4. The Netherlands

Netherlands could be described as the “off-shore country” for managers. The Dutch Polder Model, aimed at a consensus of all the stakeholders in any significant matters³⁶⁴, together with the structuurregime³⁶⁵, creates an atmosphere where shareholder interests are only a part of the general interest of the company. The system seems to be

³⁵⁶ Article 104 of the Legislative Degree of 58 of 24 February 1998

³⁵⁷ Bonante and Tucci (1999)

³⁵⁸ *Ibid.* Regulated by Article 132 of the Degree

³⁵⁹ Without the explicit approval of the shareholders if the latter have granted such a permission during the preceding 18 months

³⁶⁰ Portolano (2000) According to Article 2357 of the Italian Civil Code

³⁶¹ Macey (1998)

³⁶² Bonante and Tucci (1999)

³⁶³ Portolano (2000)

³⁶⁴ Metter and Stumphius (2002)

³⁶⁵ Stumphius (2001)

transforming and shareholder wealth plays an increasingly more important role in running companies³⁶⁶.

V 4.1 Defensive measures deriving from ownership structure

Studies of the Netherlands ownership systems have been limited. The latest available information is from 1997 and covers only 20 of the largest companies³⁶⁷. These results show that those firms are either widely held (at 30 percent) or fall under the category of miscellaneous (35 percent)³⁶⁸. Earlier studies distinguish also between domestic and foreign owned companies finding the dominance of dispersed (23 percent) and foreign (34 percent) owners³⁶⁹. Same studies also indicate that Dutch companies are controlled most commonly by three large block-holders from within Netherlands. A possible reason for the lack of information in the later studies could be found in the comments quoting Stichting Toezicht Effectenverkeer (STE), the Securities Board of the Netherlands:

*“The implementation of the 1992 Act has resulted in the list of disclosed notifications being no more than an historical overview that has been overtaken by countless events and no longer provides the desired transparency of the (Dutch) stock market. Furthermore, the file corruption will become greater with the passage of time. Given the above and the fact that the 1996 Act does not empower the STE to take any measures in this regard which would lead to an up-to-date overview, the STE does not issue this list to third parties.”*³⁷⁰

Using older studies as a basis, it is possible to conclude that there are no obstacles to takeovers as majority of shares are widely held both by locals and foreigners or, opposing that, the concentration of control in the hands of intermediaries serves as promoting companies’ interests.

V 4.2 Defensive measures deriving from companies and company law

Large Dutch companies, which form an overwhelming majority of Dutch listed companies (naamloze vennootschap), are required under the Large Company Regime (structuurregime) to implement a two-tier board structure where the supervisory board has extensive powers. These include the appointment of members both to the management board and the supervisory board (sic!). The supervisory board is also responsible for accepting annual accounts. These provision can be overruled by the shareholders only with a two-third majority³⁷¹.

³⁶⁶ Kodde and Burggraaf (2002). Wider focus on shareholder value seems to be the result of the recommendations of the “Peters report” in 1997

³⁶⁷ La Porta *et al.* (1999)

³⁶⁸ *Ibid.* Miscellaneous is defined as covering pension funds, mutual funds, voting trusts, management trusts, groups, subsidiaries, non-profit organization and employees

³⁶⁹ Pedersen and Thomsen (1997)

³⁷⁰ Faccio and Lang (2002)

³⁷¹ Kabir, Cantrun and Jeunik (1997)

The supervisory board is required to act in the interests of the entire company and not merely the shareholders. Shareholders are allowed to dismiss the supervisory board only through the intervention of the enterprise court³⁷². Companies that do not fall under the requirements of the structuurregime³⁷³ are likewise allowed to have two-tier board system but it is not mandatory.

Under Dutch regulations, the company may also issue depository receipts (certificaten van aandelen) to the general public. These entitle the holder to cash flow rights but do not allow exercising voting rights of the shares against which the receipts are issued. Actual shares are held by a foundation with a board, which is usually composed of representatives of the company and some independent directors³⁷⁴. The depository receipts are exchangeable for shares only up to certain limit³⁷⁵.

In addition to depository receipts, also preference shares can be issued up to a certain percentage of nominal capital per year. In most cases these shares are issued to a special purpose foundation controlled by the management and the supervisory boards being limited to 50 percent of the total share capital of the company. If the foundation is not controlled by the company, either directly or indirectly, the amount of preference shares to be issued to that foundation can equal the amount of total outstanding share capital. Those shares can be issued also during the bid against the company and are to be paid up only up to 25 percent of their nominal value thus reducing significantly the requirements for financing³⁷⁶.

Companies can also issue priority shares providing the shareholders with specific voting rights set out in the articles of association. Most notably, this pertains to the right to submit a binding proposal for the appointment of the management board³⁷⁷.

Several other defensive measures exist in Dutch company law. For example, the company can issue two classes of shares with different nominal values but with similar economic rights and obligations³⁷⁸. Also, companies sometimes use a so-called twin structure (structuur vennootschappen)³⁷⁹. Thereby the shares of two companies, a holding and sub-holding company, are listed at the stock exchange. If the holding and sub-holding company each list say 49.9 percent of their shares, then maximum liquidity is realized, while retaining control of the company through the 50.1 percent of shares not listed.

Proxy solicitation was introduced into Dutch law in 1999 with the purpose of reducing shareholder absenteeism. The management board is granted the authority to determine a record date when convening a general meeting. Shareholders registered as such on the record date have voting rights, irrespective of whether they own the shares on the day of

³⁷² Stumphius (2001)

³⁷³ In short the company falls under the structuurregime if 1) the issued capital plus reserves are equal to or greater than euro 4613 million, (ii) the company (or a group company) has set up a works council, and (iii) the company, including its group companies, employs at least 100 people in the Netherlands,

³⁷⁴ Kodde and Burggraaf (2002)

³⁷⁵ Metter and Stumphius (2002)

³⁷⁶ Corhey and Rad (2000)

³⁷⁷ *Ibid.*

³⁷⁸ Under Dutch law voting rights depend on the nominal value of the shares. Consequently, by issuing a class of shares with a high nominal value, control can be exercised by a party holding a small number of these shares

³⁷⁹ For example Heineken

the meeting. The most contentious issue in the proxy solicitation provisions is the contemplated maximum record date period of seven days before the meeting, which according to many is insufficient to create a workable practice of proxy solicitation³⁸⁰.

A study done in 1997 found that 90 percent of Dutch companies are protected by at least one defensive measure and 27 percent adopt more than three different defensive measures³⁸¹.

Apparently the landscape is transforming. In January 2002, a legislative proposal was introduced containing a number of changes in Dutch corporate governance rules mainly aimed at increasing the power of the shareholders' meeting. The proposals have not questioned the fact that the company should be run for the interest of all the stakeholders of the company, not just the shareholders³⁸².

V 4.3 Regulation of takeover activity

Until recently, public offers in the Netherlands were almost exclusively regulated by the Merger Code, a set of voluntary rules of conduct. On September 5th 2001, chapter one of the Merger Code which contained rules protecting shareholders' interests in the case of a public offer, was incorporated in the obligatory Securities Transactions Supervisions Act 1995 (Wte)³⁸³.

Takeover regulation was separated into two phases. Phase one was the incorporation of chapter one of the Merger Code in the Wte. Phase two would involve investigating to what extent the offer rules should be amended in view of developments in the market and in EU initiatives relating to public offers (for example the 13th EC Directive)³⁸⁴.

Under new rules, the Financial Markets Authority (FMA) is given extensive freedoms to determine compliance with new regulations. FMA is authorized to enter the business premises of either the target or the bidder to obtain any information or documentation it deems appropriate. In addition, the Financial Markets Authority can instruct the bidder or the target company to follow a particular line of conduct whether in the form an order or a sanction. The offering rules are essentially not only directed at the bidder and the target company but also to their managers and directors and consequently the instructions given extend to these managers and directors as well. Any cost relating to carrying out inspections can be recovered by the authority from the bidder³⁸⁵.

All decisions may be appealed to the Trade and Industry Appeals Tribunal not only by the bidder and the target but also by all other interested parties. The decision of the tribunal is final³⁸⁶. Now that the offering rules form part of the Securities Act, any violation may, if a tort is committed, also give rise to an obligation to pay damages³⁸⁷.

³⁸⁰ Stumphius (2001)

³⁸¹ Kabir, Cantrun and Jeunik (1997)

³⁸² Metter and Stumphius (2002)

³⁸³ Kodde and Burggraaf (2002)

³⁸⁴ *Ibid.*

³⁸⁵ Metter and Stumphius (2002)

³⁸⁶ *Ibid.*

³⁸⁷ Kodde and Burggraaf (2002)

New rules regulate takeover bids also for all securities to which possible voting right is associated and also to non-exchangeable depository receipts for shares as opposed to previously regulating only offers on actual shares and depository receipts. However, an exemption applies to offering rules for offers made by companies on their own securities regardless of the type of securities. Moreover, all parties involved in a public bid are bound by the offering rules and the offering rules also apply to foreign bidders³⁸⁸.

If previous regulations applied only to Dutch companies listed on Dutch stock exchange, then the new regulation extends that to all the companies registered on Dutch stock exchanges. The bidder is also forbidden for three years after the bid not to buy shares in the target company at more favorable terms than envisaged in the offer document by other means than open market purchases³⁸⁹.

On the matter of defensive measures the regulation states that if a party, during a period of one year provides and has entered into a dialogue with the target 70 percent of the outstanding capital, this party may request the enterprise chamber to set aside certain protective measures of the company. This may mean that preference shares should either be withdrawn or transferred to the 70 percent majority shareholder, the supervisory board should resign, priority shares should be withdrawn or transferred and depository receipts should be exchanged against ordinary voting shares³⁹⁰.

In calculating the 70 percent capital, certain shares are disregarded. Essentially, shares either paid up in full or only in part, such as, for example, preference shares, shall be disregarded in the calculation of the 70 percent if the shares were issued with the aim of protecting the company against takeovers³⁹¹. Those restrictions can only be dismissed if the management and the supervisory boards show that the intentions of the majority shareholders are substantially against the interests of the company³⁹².

Furthermore, the enterprise chamber may attach certain conditions to setting aside protective measures. It could for example be required that a public bid on the remaining outstanding share capital is issued. The enterprise chamber can determine the equitable price for any such offer after having obtained expert advice.

The regulatory legislation relating to public bids gives extensive powers to the Financial Market Authority, allowing a series of measures against bidder and target companies. This new legislation confirms a trend whereby existing governance structures granting protection to management and supervisory boards are slowly being replaced by a tougher shareholders' wealth approach.

³⁸⁸ Metter and Stumphius (2002)

³⁸⁹ *Ibid.*

³⁹⁰ Kodde and Burggraaf (2002)

³⁹¹ *Ibid.*

³⁹² *Ibid.*

V 5. Sweden

The Swedish system of corporate governance system can be seen as an attempt to find a compromise between labor movement and capital owners. The system tries to promote long-term investments and social responsibility of employees by providing safeguards to the capital owners³⁹³.

V 5.1 Defensive measures deriving from ownership structure

The fact that few families or interest groups directly or indirectly control Swedish companies, is widely accepted. Studies on Swedish ownership structures show that the level of family control is extremely high. Recent evidence from 1998 shows that ownership is concentrated in the hands of families (47 percent) with wide ownership dispersion closely following (40 percent)³⁹⁴.

Another study from the same period, focusing solely on Sweden, finds the ownership structure to be even more concentrated. Families and interest spheres control 70 percent of all the 304 listed firms in the sample set holding on average almost 38 percent of voting rights³⁹⁵. An earlier study using 1992 data finds the level of dispersed ownership to be only 4 percent and together with foreign ownership only 18 percent with the rest being under the control of a single dominant shareholder, family, cooperative or the government³⁹⁶.

Next to Belgium, Sweden has also the highest fraction of firms with concentrated ownership structures – 53 percent through mainly pyramidal ownership structures³⁹⁷. Even more, Sweden has the highest level of cross-ownership of companies after Austria, Germany and Italy³⁹⁸ and extensive use of pyramidal structures³⁹⁹.

This leads to conclude that defensive measures found in the ownership structures are very strong and should even, on their own, reduce takeover activity significantly. There are sign though, that the system is transforming as the share of foreign ownership increases constantly⁴⁰⁰. Already now the Swedish Stock Exchange is one of the most competitive ones in the world⁴⁰¹.

³⁹³ *Ibid.*

³⁹⁴ Faccio and Lang (2002)

³⁹⁵ Agnblad *et al.* (2001)

³⁹⁶ Thomsen and Pedersen (1997)

³⁹⁷ La Porta *et al.* (1999)

³⁹⁸ Faccio and Lang (2002)

³⁹⁹ La Porta *et al.* (1999). Faccio and Lang (2002) show that out of 149 firms in their sample, 16 percent opt for pyramidal ownership.

⁴⁰⁰ Henrekson and Jakobsson (2002)

⁴⁰¹ A recent acquisition of the Finnish Stock Exchange by the Stockholm Stock Exchange serves as a vivid example

V 5.2 Defensive measures deriving from companies and company law

The only form of company in Sweden that is allowed to offer shares and other securities to the general public is the public limited liability company⁴⁰² (aktiebolag, AB). The shareholders of the AB are generally not liable for its obligations beyond their share in the equity and are thus shielded from unforeseen liabilities. The AB is also a legal entity separate from the shareholders thus only the board and general manager has the right to act on behalf of the company in relations with third parties⁴⁰³.

Next to concentrated ownership and pyramidal structures, Swedish companies also issue dual-class shares with the limitation of A-class shares having up to a maximum of 10 votes more than B-class shares⁴⁰⁴. Similarly also rights of preemption⁴⁰⁵, shareholder agreements and voting restrictions are allowed. A study from 1998 shows that out of a sample of 100 firms listed on the stock exchange 65 percent are using dual-class shares, 13 percent preemption rights, 4 percent voting restrictions and 5 percent shareholder agreements⁴⁰⁶.

This can be seen also as an indication towards promoting long-term investments as realization of capital gains is subject to high taxation⁴⁰⁷. Together with the significance of the social status and reputation concerns⁴⁰⁸ it probably also explains why golden parachutes are not commonly used, although permitted under national legislation⁴⁰⁹.

The AB is managed by a board of directors⁴¹⁰ and company's employees have the right to be represented in the board⁴¹¹. The duration of directors' mandate is set forth in the by-laws of the company. The term may nevertheless be more than four fiscal years and is fixed so that it expires at the end of the annual general meeting.

The general manager, in charge of day-to-day, activities has quite wide powers but he is not allowed to acquire long-term debt that will bind the company without board's approval.

⁴⁰² Regulated by the Swedish Companies Act

⁴⁰³ Baker & McKenzie (2002)

⁴⁰⁴ At least in 1999 Ericsson still had a vote/equity differential of 1/1000 but this is an exceptional case

⁴⁰⁵ A right to redeem a non-listed share class that have been passed to a new owner

⁴⁰⁶ Agnblad *et al.* (2001), Faccio and Lang (2002) show that 66 percent of companies in a sample of 245 firms use dual-class shares

⁴⁰⁷ Henrekson and Jakobson (2002) stating also that a central element of the Swedish Social-Democratic economic policy has been to discourage wealth accumulation at the individual level

⁴⁰⁸ Agnblad *et al.* (2001)

⁴⁰⁹ Consider in this light the reactions of the press and public to the USD 90 million compensation package received by the CEO of ABB, Percy Barnevik in 1996 and USD 50 million by Goeran Lindhal in 2000. Despite that, there seems to be a tendency for increased use of excessive remuneration packages for senior management. ISS (2002) reports that in 2002 approximately 25 percent of the most traded companies proposed stock option plans for their executives. In 1997, only 2 percent of the total compensation of executives were a result of conversion of stock options whereas in 2001 the figure was 22 percent.

⁴¹⁰ The board must consist of at least three persons who are elected at the general meeting of the shareholders if not otherwise stipulated in the by-laws of the company. The role and powers are generally regulated in Article 8 of the Companies Act

⁴¹¹ Act on Board Representation for Privately Employed allows for the representation of two members if the company employees at least twenty-five persons under the prerequisite that there is a collective agreement between the employer and the trade union

The power to adopt defensive measures lies within the board if it has received an explicit authorization from the shareholders. Generally though, shareholders have the right to overrule or install any defensive measures not prohibited by the law⁴¹².

V 5.3 Regulation of takeover activity

Sweden has adopted a self-regulatory system of takeover activity to which all the companies listed on the stock exchange have to adhere to. In addition to the Swedish Companies Act⁴¹³, Financial Instruments Trading Act⁴¹⁴, the Act on Stock Exchange and Clearing Activities⁴¹⁵ and regulations issued by the Financial Supervisory Authority, also the Swedish Industry and Commerce Stock Exchange Committee (NBK) recommendations govern the process of takeovers. NBK presented a new recommendation for a change on stock market takeovers in January 2003, which entered into force on March 1st, 2003.

While regulating matters such as application to foreign companies listed on Swedish Stock Exchange, bid's withdrawal, financial guarantees associated with the bid and equal treatment of target's shareholders, the matter of takeover defenses has remained the same. To a large degree, the NBK recommendations are based on the UK regulations⁴¹⁶.

Defensive measures available to the board of directors of a target company are restricted by the general legal duty of the board of directors to act in the interests of the company and all shareholders. Once negotiations between the acquirer and the target company have commenced or after an offer has been announced, the board of directors of the target company may not take any steps which might frustrate the making or maintenance of an offer unless it first obtains the approval of the shareholders at the general meeting.

The Swedish Companies Act formerly prohibited companies from acquiring their own shares, except in a few, very particular instances. A new legislation was passed becoming effective on March 10, 2000. Based on the provisions of Directive 77/91/EEC it limits the holding of shares to a maximum of ten percent of the total share capital and the decision to acquire or dispose of the shares must be taken or authorized by a shareholders' meeting. Acquisition of company's own shares is limited to stock exchanges⁴¹⁷ or it has to be made via an offer to all the shareholders of the company or all the holders of a certain class/classes of shares. The regulation thus practically prevents the use of greenmail.

Due to high degree of ownership concentration and defensive measures found in the company law, most Swedish takeovers are negotiated with the controlling owner.

⁴¹² Baker & McKenzie (2002)

⁴¹³ Act 1975: 1385

⁴¹⁴ Act 1991: 980

⁴¹⁵ Act 1992: 543

⁴¹⁶ Baker & McKenzie (2002)

⁴¹⁷ Or other regulated markets

V 6. United Kingdom

The United Kingdom (UK), together with Ireland, are the only Member States in the European Union that have opted for the so-called Anglo-Saxon model of corporate governance. Shareholders in the UK are the owners of the company whereas the board and the management are merely the caretakers of shareholders wealth⁴¹⁸. The UK has long had the most active takeover market in the EC, as well as a widely respected system for regulating such transactions.

V 6.1 Defensive measures deriving from ownership structure

Preference of shareholder interests over the interests of other constituencies is reflected also in the ownership structure of UK companies. All of the studies, not dependent on the year, find the share of dispersed ownership to be around 60 percent, the highest in Europe⁴¹⁹. At the same time family and single dominant ownership play also a significant role with about 20 to 25 percent⁴²⁰. Evidence shows that companies do opt for pyramidal structures at a rather significant level⁴²¹.

In the case of UK, there seem to be very few obstacles deriving from the ownership structure of companies. The existence of pyramidal structures complicates the matter somewhat, but as a stand-alone measure should not be seen as a significant obstacle.

V 6.2 Defensive measures deriving from companies and company law

Due to long history of takeovers in the UK and the prevailing common law system, takeovers are highly regulated. In addition to the City code on Takeover and Mergers, discussed in the following section, they are also regulated by the Financial Services Act of 1986 and the Companies Act of 1985. All of them have undergone several changes over the years but the principles have remained the same⁴²².

The most common type of share in the UK is the registered share⁴²³, which enables the company to communicate directly with the shareholders. The company can monitor its share registry and may give notice to any person⁴²⁴, who is (or has in the last three years been) interested in its shares, to give personal details of his interests. A response to the

⁴¹⁸ Foster (2000)

⁴¹⁹ Faccio and Lang (2002) show the level to be 63 percent for widely held and 73 percent for combined widely held, widely held corporations and widely held financial companies. Thomsen and Pedersen (1997) show 61 percent for dispersed ownership. La Porta *et al.* (1999), in their limited sample of 20 largest listed companies, find that all the companies are widely held

⁴²⁰ 25 percent in Faccio and Lang (2002), 19 percent for Thomsen and Pedersen (1997)

⁴²¹ Faccio and Lang (2002) show that 21 percent of companies controlled at the 20 percent threshold use pyramids. Together with multiple control chains, the share increases to 26 percent. It is remarkable that the level reaches the same heights as Germany and Italy and is significantly higher than in Sweden and France

⁴²² Nathan and Fischer (2002)

⁴²³ As opposed to bearer shares

⁴²⁴ Whether or not a registered holder of its shares

company's request must be given in writing within "reasonable" period⁴²⁵. Failure to reply is a criminal offence and may result in a reduction of the rights attaching to the shares in question⁴²⁶.

The UK system of company law adheres strongly to the principle of "one share, one vote". Multiple voting shares are not allowed and since 1968 also non-voting shares have been forbidden⁴²⁷. Companies are nevertheless allowed to issue preference shares, provided that these are given "adequate voting rights". These must satisfy the minimum requirements of voting when their dividend is in arrears, on resolutions for reducing share capital and winding-up the firm and on resolutions which are likely to affect their class rights⁴²⁸.

The board of directors convenes shareholders' meetings and information is usually passed directly to the shareholder. When an investor owns stock through a custodian or sub-custodian, which might in turn hold the shares under a street or nominee name, the burden is on the shareholder's local agent to pass the meeting information to the owner⁴²⁹.

There is no requirement in the UK company law to "block" or deposit shares with an institution or the company itself before and during the meeting. If a group of shareholders wishes to obtain the support of other members for their proposals, they can solicit proxy appointments from those members and use their votes at the meeting in addition to their own⁴³⁰.

Under the UK legislation, it is a criminal offence for any person to make a statement which he knows to be misleading, false or deceptive, for the purpose of inducing any person to enter into any investment agreement, including an agreement for the sale of shares. It also prohibits actions creating a false or misleading impression as to the market in or price or value of any investments for such a purpose⁴³¹. These legal obligations limit the powers of the directors of the target company in their exercise of defensive measures. This is worsened when the company's interests diverge from those of the company shareholders creating a somewhat contradictory situation⁴³².

V 6.3 Regulation of takeover activity

The most important regulatory act in the UK takeover system is the City Code of Takeovers and Mergers (the Code). The Code consists of ten General Principles and 38 specific Rules, accompanied by explanatory notes. It does not have the force of law, but compliance with it is effectively obligatory for merchant banks and brokers authorized to carry on investment business in the UK due to its effects on reputation. The Panel on

⁴²⁵ Towards the end of a hostile bid, this could be 24 hours of fewer

⁴²⁶ Pursuant to Section 212 of the Companies Act of 1985. (Young, 2002)

⁴²⁷ Faccio and Lang (2002)

⁴²⁸ Faccio and Lang (2002) show that 24 percent of companies out of a sample of 1953 actually use this opportunity

⁴²⁹ Baums (1997)

⁴³⁰ Baums (1997)

⁴³¹ Section 47 of the Financial Services Act of 1986

⁴³² Nathan and Fischer (2002)

Takeovers and Mergers (the Panel) is responsible for following the conduct of the companies and making amendments to the Code.

Rules Governing Substantial Acquisition of Shares (SAR), which form a part of the Code, regulate the acquisition of shares in the target through open market. Simply stated, the SAR prohibit any person from acquiring, in any seven day period, shares carrying ten percent or more of the voting rights of a company if the acquisition, when added with any existing holding, would give the acquirer between fifteen percent and thirty percent of the company's voting securities.

The principal purposes of the Code are to ensure fair and equal treatment of all equity shareholders in the target company, to provide an orderly framework for the conduct of takeover offers and to enable shareholders to make an informed decision on the merits of an offer⁴³³.

The introduction to the Code makes it clear that its rules are not framed in technical language and are to be interpreted so as to achieve their underlying purpose. Their spirit must be observed as well as their letter. The Panel encourages companies and their advisers to consult with them before and during an offer about how the Code should be applied in particular circumstances, rather than adopting a technical, legalistic, approach to its interpretation.

The Code reinforces certain directors' duties, providing that directors of the target company, must always, in advising their shareholders, act only in their capacity as directors and not have regard to their personal or family shareholdings or to their personal relationships with the companies⁴³⁴. The Code also obliges the board of the target to obtain competent independent advice on any offer, which should then be passed on to the shareholders⁴³⁵.

The City Code stipulates that once the target board believes a bona fide offer to be imminent or after such an offer has been communicated to it, it must not, without shareholder approval, act to frustrate the offer⁴³⁶. In defining "frustrating actions" by the board, the Code provides that the board should not, without the approval of the shareholders in general meeting, during the course of an offer, or earlier if it believes a bona fide offer might be imminent, unless already contractually committed or otherwise bound to do so, act as follows:

- (a) issue any authorized but unissued shares or rights over shares or issue or grant options in respect of unissued shares;
- (b) create or issue, or permit the creation of issue of, any securities carrying rights of conversion into or subscription for shares;
- (c) sell, dispose of or acquire, assets of a material amount or;
- (d) enter into contracts other than in the ordinary course of business, for example for the significant enhancement of directors' terms of service⁴³⁷

In defining "material amount"⁴³⁸ consideration to assets test has been replaced by a consideration to market capitalization test and further guidance on how the tests are to

⁴³³ The Code, General Principles

⁴³⁴ General Principle 9

⁴³⁵ The Code, Rule 3.1

⁴³⁶ The Code, General Principle 7. Also known as the strict neutrality rule

⁴³⁷ Regulated by Rule 21 of the Code

be applied has been set out. It should be noted that transactions of minor significance individually might be deemed frustrating action when considered in aggregate.

One of the strengths of the UK system is that it forbids some types of bids. For example, takeovers cannot be financed solely with debt⁴³⁹. This could one of the reasons why many Continental European countries have adopted certain provisions of the Code into their national takeover regulation.

As the common law system is known for the extensive use of court rulings, litigation defense has been used in the past but is now seen as a violation of the Code and thus should be used only when well justified⁴⁴⁰.

Although at first sight the UK system is prohibiting practically all measures at the board's own incentive, there are still certain possibilities left. Due to high regulation of takeovers, frustrating action may be taken by means of litigation indicating that the bidder has not fulfilled one or several publication or authorization requirements. After the target's board has objectively formed the view that it is not in the best interests of the target to be acquired because the business of the target company would be damaged by ownership by the offeror, it might also be possible to ask the Panel to allow frustrating actions⁴⁴¹.

V 7. Corporate theories re-applied

Although the applicability of the simple finance model and the transaction cost economics based on the limited approach taken is complicated and can lead to premature results, certain conclusions can be drawn.

It is clear that the protection of constituencies, including the management of the company, is extant in several European Union Member States. The United Kingdom is in this sense more of an island in the sea, perceiving the aim of the company to be the maximization of shareholders wealth. It would be an exaggeration to claim that the interests of other constituencies, namely the employees, would not be of concern in the UK. And yet it seems that their interests are secondary.

As such, the United Kingdom model of takeover regulation seems to follow closely the simple finance theory and subsequently also the management entrenchment approach to takeover defenses. Protection of other constituencies in the takeover context is left to other legislative acts. In a similar manner, the UK system of takeovers and takeover defenses seems to be based on the notion that takeovers occur primarily due to the inefficiencies of the target.

In contrast to the United Kingdom, other countries under scope here attach at least some consideration to the interests of other constituencies either directly through the takeover process or via the corporate governance system. Highest contrast to the UK seems to be the Netherlands system, where the management of the company could be viewed as the

⁴³⁸ Note 1 of Rule 21

⁴³⁹ Nathan and Fischer (2002)

⁴⁴⁰ *Ibid.*

⁴⁴¹ *Ibid.*

owner of the company in the sense that it has the most influence over the actions of the corporations. In this matter it is surprising that despite such protectionism shareholder activity and stock market capitalization is one of the highest in continental Europe. The German model seems to focus on the firm as an entity, where the shareholders are just one of the contributors. Also Sweden, Italy and France perceive that the corporation is not merely an organization to maximize shareholder wealth but to find a balance between different constituencies.

Although such a conclusion is pre-mature, it appears that the transaction cost economics model, at least in its simplest form, seems to be much more pleasing for the lawmakers of the continental Europe. It is not within the scope of this paper to take a normative position and to evaluate if the continental approach is better or not. And yet one has to wonder about such a possibility. Due to the wide scope of transaction cost economics, a well deserved criticism, it is hard to measure the applicability of the theory in figures and thus will never, or at least until such an approach is developed, satisfy certain scholars that value concrete data over simple assessments.

It is also visible, that most countries under examination allow a much wider array of defensive tactics than the United Kingdom. It seems to coincide with the influence of non-shareholder constituencies of corporations or, in the case of Italy, with the power of dominating shareholder. Despite that, several countries have recently commenced a transformation to a more transparent, UK-style takeover regulation. It is also possible that these countries have perceived that possibility of the 13th Directive being adopted to be so great that they took preemptive actions to align their national legislation with that of the proposed directive even before it got rejected in the European Parliament.

As the quote by Frits Bolkestein in the beginning of the chapter states – it is a mess. Apparently though, the mess is slowly clearing up, whereby the continental European states are abandoning aspects of their historical corporate governance system and replacing them with that of the Anglo-Saxon system. The consideration has been on the takeover regimes, thus would be proper to shortly examine the cross-border takeover activity in Europe over the past years.

VI Cross-border takeovers in the EU

As was shown in the previous chapter, Member States of the European Union allow companies to adopt a variety of defensive measures. At the same time there is also a visible convergence towards adopting more shareholder friendly regulations both in company law and takeover regulation. Yet, legislators in the Continental Europe have often refrained from excluding for example employees from the consideration of the takeover process. This chapter attempts to establish whether such an approach has proven to be controversial with the goal of promoting closer convergence of European markets for corporate control.

VI 1. Theoretical reasons for European cross-border takeovers

The theoretical understanding for takeovers and empirical evidence supporting different motives was developed in sections III 3 and III 4. The following section shall explain the relevance of those motives for the European context.

The under-valuation theory is significant in the European context assuming that the national capital markets are on different stages of development and the pricing mechanisms of stock markets in less developed and illiquid markets do not fully represent the true value of the company. Thus companies in countries with more expertise in detecting the true value of firms, consciously look for possible targets in other countries.

In a similar manner, due to the different ownership structures in different Member States, the efficiency theories are applicable. As many continental European companies have a large controlling shareholder, they may be willing to tolerate a certain degree of managerial inefficiency in return for larger benefits⁴⁴². The takeover by another country's company may aim at reducing or eliminating the influence of a dominant shareholder and reaping the gains from the increase in managerial efficiency.

Managerialism and the market power hypothesis can also be seen as relevant for the European context. Integration of European product and consumer markets leads to increased competition and brings the need to be competitive not in one single Member State but in the entire common market. Striving for economies of scale through cross-border acquisitions is a rapid way of achieving that. Increasing number of merger notifications for approval to the Competition Directorate General of the European Commission⁴⁴³ and the ECJ case-law on the matters of competition support the notion that companies do pursue increased market shares and company size⁴⁴⁴.

⁴⁴² Zingales (1994)

⁴⁴³ From September 21st, 1990 when the Merger Regulation (Council Regulation (EEC) No. 4064/89 of 21 December 1989, OJ L395 of 30.12.1989) came into force, to the end of 2001 DG COM received 1908 notifications

⁴⁴⁴ The paper is not dealing with competition matters in more detail. See section I 1.

Finally, let us consider the question of wealth redistribution discussed in Sections III 3.1 and III 6.2. At present, the level of shareholder protection in different Member States varies, allowing two-tier bids and squeeze-outs⁴⁴⁵. This allows expropriation by the bidder of the target shareholders. Furthermore, many continental European countries have developed a close relationship between the management and labor and companies and “their” banks.

On one hand, it can be seen as a beneficial method for enforcing long-term implicit contracts. On the other hand, it may also cause inefficiency if, for example, the labor has managed to use its position to expropriate the management by way of increased wages or if the low level of control over companies by “their” banks has reduced the incentives of the management to pursue profit maximizing goals. These inefficiencies would lead to being targeted for takeover, if the bidder perceives that he can utilize these inefficiencies and reverse expropriation. This expropriation is also strongly influenced by national labor protection laws.

The OIL approach explained in Section III 2. provides method for explaining cross border takeovers. Considering all three factors⁴⁴⁶ simultaneously then the common market is characterized by:

- 1) a size of the market comparable to that of the US with free access to labor⁴⁴⁷ and general ease of obtaining other resources⁴⁴⁸ with a long tradition of protecting ownership rights
- 2) the lack of tariffs⁴⁴⁹ and lack of exchange controls further enforced by the introduction of the euro⁴⁵⁰
- 3) to a large extent uniform macroeconomic conditions and ease of access to transportation
- 4) a certain degree of harmonization of legislation⁴⁵¹

These factors, especially the ease of access to transportation and lack of tariffs, contribute greatly to internal trade flows between the Member States. They also indicate that all three factors are present thus facilitating investments in the form of mergers and acquisitions between Member States. At the same time they can be seen as reducing the likelihood of intra-Community M&A activity as there are less obstacles for satisfying consumer needs via trade.

The next section shall examine the occurrence of cross-border takeovers in Europe to verify or overrule this preliminary analysis.

⁴⁴⁵ Squeeze-out allows the successful bidder, after accumulating a certain percentage of shares (usually at a 90 or 95 percent level), to force the remaining shareholders to sell their shares to the majority shareholder

⁴⁴⁶ Recall them being ownership specific, internalization incentive and location specific advantages

⁴⁴⁷ It is acknowledged that free movement of workers based on Article 39-42 of the Treaty are not yet fully operational and is being constantly regulated by secondary legislation, especially the

⁴⁴⁸ With the possible exception of capital and natural resources still controlled by national governments, all other resources are seen as falling under Part Three Title I (Free movement of goods) and Part Three Title III Chapters 3 (Services). Although both are still subject to further revision by the ECJ, it can be considered that the level of harmonization of these two topics has been achieved on a satisfactory level

⁴⁴⁹ Article 25 of the Treaty abolishing intra-Community custom duties has been implemented to its full extent

⁴⁵⁰ Capital controls between the euro area Member States and those outside of it have been also abolished

⁴⁵¹ It lies beyond the scope of this paper to discuss the relevant harmonizing legislation that supports the development of the common market

VI 2. European cross-border mergers and acquisitions

It is generally perceived that takeovers occur in cycles⁴⁵². The first merger wave is perceived as taking place as early as in 1880-1904 with the aim of creating monopolies. The following anti-trust regulation created the second merger wave in 1919-1929 and resulted in increased vertical integration. The third wave took place from early 1950s to mid-1960s and was focused on diversification and creation of globally competitive conglomerates.

The development of new financial instruments and markets (primarily the junk bonds) was the cause of the fourth wave from 1983-1989. The latest wave is seen as emerging in 1993 and lasting until 2000 driven by high levels of economic growth, integration of European stock exchanges and development of telecommunications⁴⁵³. Significant decrease of consumer confidence in the telecommunications industry and overcapacity in the traditional sectors caused an abrupt reduction in merger activities⁴⁵⁴.

The level of hostile bids in the latest wave is reported to have been also exceptionally high with 369 hostile bids occurring in 1999 against 14 in 1996, 7 in 1997, 5 in 1998 and 35 in 2000⁴⁵⁵. At the same time the share of cross-border M&A including both the target and the bidder from the European Union account for only 14 to 15 percent of the total number of M&A where one participant is a Member State⁴⁵⁶.

The following section provides a breakdown of the cross-border M&A activity among the European Union Member States with a focus on the six countries under examination in the previous chapter. In interpreting the following section, an assumption is made that takeover defenses influence the choice of the target up to the point when the bidder company rejects the idea and looks for targets in another country.

VI 2.1 Cross-border breakdown 1998-2003

Examination of the market data for the periods of 1998 to 1999, 2000 to 2001 and 2002-2003 reveals some surprising information. Italy is a target country in, on average, 6 percent of all the cross-border mergers and acquisitions occurring in the EU, and shows a trend of a rapid increase. In the period of 1998 to 1999⁴⁵⁷ it was a target of only 4,2 percent of cross order activities, raising to 6 percent in the 2000-2001⁴⁵⁸ period and

⁴⁵² See for example United Nations (2000), Ross *et al.* (2002), Gaughan (2002) or Weston *et al.* (1990)

⁴⁵³ Goergen and Renneborg (2003)

⁴⁵⁴ *Ibid.* See also table 2 in Annex B

⁴⁵⁵ *Ibid.*

⁴⁵⁶ See Table 1 in Annex B and Table 5 in Annex C

⁴⁵⁷ See Annex D for a breakdown of target countries by bidder countries for the period of 1998-1999

⁴⁵⁸ See Annex E for a breakdown of target countries by bidder countries for the period of 2000-2001

reaching 8 percent in the 2002- 2003 period⁴⁵⁹. The share of Netherlands seems to be dropping⁴⁶⁰ but is still on average the target for 10 percent of cross-border bids.

The German share has remained stable over the first two periods at around 16 percent with an increase in the final period to 22 percent. Although discrepancies in the source information could be one of the explanations, adoption of a new takeover code from the beginning of 2002 could be another. France shows similar increases and has reached almost 17 percent by 2002-2003 from only 11,5 percent in 1998-1999. Swedish share in these activities seems to be highly fluctuating – from 8 percent in 1998-1999 to 7 percent in the subsequent period to almost 12 percent in the latest period.

Most surprising is nevertheless the constantly decreasing share of the UK. In the first two periods, the decline has been from 22,3 percent to 19,6 percent which subsequently drops to only 11,6 percent in the final period⁴⁶¹.

Examining the data more closely shows nevertheless that the UK is the favorite target country for the EU countries under examination. In 1998-1999 period, 30 percent of German cross-border bids were against the UK target with France and the Netherlands showing similar numbers and Italy and Sweden following closely with 22 and 24 percent. In the following periods, the share of the UK targets for each of these countries, as also in general, drops significantly: from Germany to 28, France 27, Italy 20, the Netherlands 22 and Sweden 17 percent.

In the final period, the decrease is even more severe. Highest declines are for France – to 18 percent, for Italy – to 7 percent and for Germany – to 19 percent. Given the assumption that the data is not highly distorted, it is evident that the share of the UK targets in the cross-border takeovers in EU has decreased constantly over these periods.

Considering other countries as targets' home countries then the most evident examples of increase are France and Italy. The data clearly indicates that their share is constantly increasing in the entire EU sample and also specifically for the Member States under observation.

In examining countries that are most active bidders in cross-border M&A activities shows a more stable picture. The share of bids originating from the UK has been constant for the period of 1998-2001⁴⁶² with 14,5 percent and subsequently dropping to 11,6 percent in 2002-2003⁴⁶³. The most active “players” are Germany and France. The share of the first one, although fluctuating through the years, is constantly higher than UK reaching more than 22 percent in 2002-2003 period compared to 16,2 and 14,7 percent in 1998-1999 and 2000-2001 respectively. France, more stable, shows 15, 14,8 and 16,8 percent for the periods 1998-1999, 2000-2001 and 2003-2003 respectively. The three remaining countries in the sample show stability on the levels around 6 to 8 percent.

⁴⁵⁹ See Annex F for a breakdown of target countries by bidder countries for the period of 2002-2003. It must be emphasized once again, that due to possible inaccuracies of the Bloombergs database, the numbers for the final period should be approached with care

⁴⁶⁰ From 12,5 percent to 10,1 percent to 7,2 percent

⁴⁶¹ Once again, accuracy of original data could influence such an outcome.

⁴⁶² See Annex G for a breakdown of bidder countries by target countries for the period of 1998-1999 and Annex H for the period of 2000-2001

⁴⁶³ See Annex I for a breakdown of bidder countries by target countries for the period of 2002-2003

VI 3. Analyzing European cross-border investments

Given the data presented above, it is clear that the UK cannot be considered as the most active country in cross-border M&A activities if compared to the total number of cross-border mergers and acquisitions. A breakdown of M&A activity of EU Member States into domestic, Community and international for the period of 1998 to 1999 confirms it⁴⁶⁴. The UK exhibits the lowest level of M&A activity as a share of total M&A activity involving a UK company among the Member States. This is partly explained by the high number of available targets within the UK and a correspondingly higher number of takeovers in general.

Considering the OIL approach, labor seeking investments done mainly by manufacturing companies can be seen as secondary due to the similar level of wage differences in the European Union. It would nevertheless be supported if there would be high share of cross-border mergers and acquisitions, where less developed Member States such as Greece and Portugal would serve as targets. As Greek targets comprised only 1 percent of all intra-Community trades done in 2000-2001 and Portuguese targets accounted for 2,3 percent, the labor seeking investment theory does not seem to be of high importance.

Sectoral breakdown of targets in each Member State would provide a more accurate picture but due to limited access to data it is not possible at this point. Comparison of existing data for the three periods nevertheless brings forth an important aspect. The target countries for individual bidder countries are most likely to be the ones with whom they share common history, legal system or geographic proximity. Consider these examples visible on the tables:

- ☞ 41,4 percent of all the bids made by Danish companies were against a Swedish company
- ☞ 50 percent of all the bids made by an Austrian company were against German target in 2002-2003
- ☞ 78,6 percent of all the bids made by an Irish company were against a UK target in 1998-1999
- ☞ 86,2 percent of all the bids made by a Portuguese company were against a Spanish target in 1998-1999

The list goes on but these examples are sufficient to illustrate that the characteristics mentioned above play a crucial role in determining a potential target country for individual member state. The fact that the Netherlands has a formidable array of defensive measures did not stop Belgian companies to direct 20 percent of their bids and merger proposals towards Dutch companies in 1998-2001 and 30 percent in 2002-2003. Existence of dual class shares and concentrated ownership in Sweden has not prevented Finnish companies to direct 60 percent of all the cross-border bids against Swedish companies.

⁴⁶⁴ See Table 5 in Annex C

It is evident that the role of defensive mechanisms embedded in company law and takeover legislation plays a secondary role in determining the level of cross-border takeover activity in the European Union. Detailed examination of cross-border activities over the period of 1998 to 2003 indicates the predominance of cultural and physical proximity in the selection of targets.

This could be also seen as an explanation for the low share of UK companies in the total size of cross-border M&A in the European Union. As was shown in chapter V, the UK system of corporate governance differs from those of the continental Europe, thus providing an additional obstacle to cross-border takeovers.

VI 4. Corporate theories re-applied

In the light of these findings it is proper once again to visit the questions of takeovers and takeover defenses in the European context. Firstly, the significance of the UK system seems to be overemphasized in the light of cross-border activities. Existence of defensive measures perhaps decreases M&A activity in general, but seems to have a positive impact on the willingness of companies to engage in cross-border activities. Considering once again the simple finance model and transaction cost economics, possible reasoning could proceed like this.

Different characteristics of national takeover regimes and ownership structures have been embedded also in the minds of the participants in these systems. Thus, in selecting cross-border targets, managers attach certain levels of security to the system that they know. In such a way, the acquisition of a target in a country that exhibits the characteristics of the home country of the bidder, brings with it also a level of safeguards not found in more distant or “exotic” systems. Thus the creation of contracts between the participants in similar systems would be cheaper and thus also allow to economize on the costs associated with it.

Similarly, perceived through the simple finance model, the managers have much greater impetus to engage in cross-border transactions when the target’s system is known as it is easier to combine the two systems and to get faster returns which are either used for the benefit of the shareholders or for the benefit of the manager.

In both cases, it seems to be the familiarity of the system, not the extent of defenses in a given country that increases the probability of cross-border transactions. If this could be reduced to the level of corporate theories, it appears that the consideration of constituencies other than shareholders increases the chance of a more active cross-border M&A activity in the Continental Europe. It should not be interpreted as ignoring the shareholders, but more as targeting the takeover not only to the owners of explicit contracts of cash flow rights but also to the owners of implicit contracts.

Concluding remarks for Part II

Level of takeover defenses in the Member States examined varies a lot but there is a tendency to slowly move towards common standards. Yet, fundamental differences, especially about the concept for whom the firm should be run, are not changing.

This does not seem to have a strong effect on the level of cross-border merger and takeover activities. It seems to be rather the opposite – countries that exhibit similarities are more active, whereas the UK is losing its significance. Moreover, the UK system is the one with the lowest share of cross-border activities as of total M&A activities and thus raises the question of its applicability as a role model for the entire Europe.

It is true that the UK system is creating the highest number of takeovers and the highest number of hostile takeovers. At the same time, as was shown in Part I, target's inefficiency is not the primary motivation for takeovers but they are more likely to originate from the bidder. To combine these two points would result in the UK system as promoting bidder driven motivations thus creating a market where the companies are to be managed as constantly on sale.

At the same time, the systems of Continental Europe have taken a more careful approach and see relatively few takeovers as compared to the UK. The Continental systems appear to promote the welfare of the company as a whole and express it also in the cross-border context. The UK system has nevertheless influenced the Continental systems to provide more transparency and there seems to be a consistent pattern of moving towards "shareholder owned" companies also in the Continental Europe.

Contrary to the simple finance theory and managerial entrenchment, there is no indication other than a theoretical one that takeover defenses in Europe are used primarily as means of protecting the interests of managers. Naturally such an option exists but without empirical support it is not possible to take it as a rule. If this would be the case, then the usage of specifically manager-oriented defensive strategies – namely golden parachutes – would be on a much higher level.

The rise of the modern corporation has brought a concentration of economic power which can compete on equal terms with the modern state – economic power versus political power, each strong in its own field

A. Berle and G. Means, 1932

VII Takeover defenses in EC legislation

Although the 13th Directive is the first proposal for a legislative act on the Community level that tries to co-ordinate public takeovers, there is a legal basis on which to build an analysis of cross-border takeover regulation without the 13th Directive. Thus the chapter is not limited to only analyzing the 13th Directive but also other influencing acts.

Based to a large degree on the United Kingdoms City Code, the 13th Directive has its stated aim of ensuring an adequate level of protection for minority shareholders across the EU in the case of a change of company control and giving a legal framework for takeovers in Europe⁴⁶⁵. Proportionally though, it is much more concerned with protecting the shareholders from possible actions of the board of the company.

VII 1. Actions prior to the bid

Regulation of takeover activity by the 13th Directive does not commence with the bid. It sets out clear obligations upon Member States that should enforce the detailed publication of the existing defensive mechanisms extant in the target⁴⁶⁶.

VII 1.1. Structure of share capital and identity of holders

Article 10 of the Directive commences with a requirement to publish the structure of the company's share capital⁴⁶⁷ and the identity of the holders of the shares with special control rights⁴⁶⁸. These have the aim of letting the capital markets know the existence of multiple classes of shares and the identity of their holders even if those shares are not traded. These headings cover also golden shares held in privatized companies of many Member States by public bodies.

At the same time, it is possible to argue, "securities with special control rights" do not necessarily mean the same thing for all the Member States. First of all, the Directive defines securities as "transferable securities carrying voting rights in a company⁴⁶⁹".

Thus "securities with special control rights" would actually mean that they have to be:

a) transferable and

⁴⁶⁵ Commission (2002a) Impact Assessment Form attached to the proposal

⁴⁶⁶ Article 10 of the Directive

⁴⁶⁷ *Ibid.*, Article 10 1. (a)

⁴⁶⁸ *Ibid.*, Article 10 1. (d)

⁴⁶⁹ The Directive, Article 2.1 (e). It could also be argued that such a definition actually creates a logical paradigm whereby "securities" are defined as being "securities"

- b) carrying voting rights, in addition to
- c) enabling the owner to exercise special control rights

Given this description and the fact that many countries, as exhibited in Chapter V, are allowed to issue non-voting shares and non-transferable shares, it would seem that it is possible to refrain from reporting any shares that are assigned to any specific person and allowing for example veto power over acquisitions. Similar argumentation applies to shares that do not carry any voting rights but entitle the owner to extraordinary high dividends in case of a takeover.

VII 1.2. Restrictions on transfer of shares

The Directive continues with the obligation for the Member State to ensure the publication of any restrictions on the transfer of the shares extant in companies⁴⁷⁰, agreements between shareholders resulting in the restriction of the transfers of securities⁴⁷¹ and the powers of the board members⁴⁷².

These points concern the ability of the management, the board and/or the shareholders of the target company to restrict the transfer of shares to a potential bidder. It provides also indication of possible anti-greenmail provisions found in companies' articles of association or by-laws.

The second point on the transfer of securities does refer to “any restrictions”. At the same time, following the same logic as previously, those restrictions have to be reported only if the securities are transferable and carrying voting rights⁴⁷³. The point about shareholder agreements does elaborate on that matter and includes also “restrictions on the transfer of securities and/or voting rights” but only in “the meaning of Article 87(1)(c) of Directive 2001/34/EC⁴⁷⁴” which gives a definition of a “controlled undertaking” as any undertaking in which “a natural or legal entity...is a shareholder or member and alone controls a majority of the shareholders' or members' voting rights pursuant to an agreement entered into with other shareholders or members of the undertaking⁴⁷⁵”.

Thus, it seems that only agreements that are subject to the will of one single person or company and that establish control over majority⁴⁷⁶ of voting rights are to be reported. In this manner, agreements between shareholders where they merely agree to act in concert after negotiations on a specific matter or where an agreement, which subjects the votes of other shareholders to that one person, does not cover majority of votes, should not be reported. This would be especially important in case of a widely held company where majority of votes is not needed to exercise control over the company.

⁴⁷⁰ *Ibid.*, Article 10 1. (b)

⁴⁷¹ *Ibid.*, Article 10 1. (g)

⁴⁷² *Ibid.*, Article 10 1. (i)

⁴⁷³ This point shall be taken up also later in connection with unenforceability of restrictions on the transfer of securities and voting rights

⁴⁷⁴ Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities

⁴⁷⁵ Directive 2001/34/EC, Article 87(1)(c)

⁴⁷⁶ It can be assumed that this would mean simple majority of 50 percent plus one

VII 1.3. Pyramids and cross-holding

Although possibly also covered by the obligation to publish the structure of shareholding and simple accountancy rules, the Directive also requires Member States to ensure the publication of information on any significant direct and indirect shareholdings⁴⁷⁷. This refers to a possible defense embedded in the pyramidal and cross-ownership schemes.

The third point about shareholdings is to be considered within the meaning of Article 85 of the Directive 2001/34/EC. That Article in turn requires publication of holdings only in companies that are listed on stock exchanges situated or operating within the European Union⁴⁷⁸. Thus, if companies do wish to exercise the use of pyramid structures and cross-holdings, it is easy to do so by creating an intermediary company, that is not listed on stock exchange and is controlled by the management of the first corporation, that in turns acquires shares in other listed companies. The same article in the Directive 2001/34 requires reporting only if there has been a change in the shareholding. Thus, if the level of cross-holding has been held constant over the years, the company does not have to explicitly state it.

Furthermore, Directive 2001/34/EC provides an exemption to the publication of significant shareholdings. If the company is a member of a group of undertakings under the Seventh Company Law Directive⁴⁷⁹, he does not have the obligation to report the acquisitions if they will be shown in the accounts of the parent company or its parent company⁴⁸⁰. Thus any reporting of holdings in listed companies has to be adhered to only if the reporting company represents the highest level of a pyramidal structure.

VII 1.4. Employee share ownership plans

For the purposes of detecting a possible defensive mechanism that could be embedded in the employee share ownership scheme allowing the management or a party friendly to the management exercise the voting rights of those shares, the Directive requires the publication of systems of control where the employees of the company hold target's shares but do not exercise the voting rights of those shares⁴⁸¹.

Systems of control of the schemes of employee share ownership are rather clear. It does raise the question of what is meant with "directly by employees". If there exists a scheme to provide employees with shares in the target company and the controlling person/organ is obliged to acquire prior approval from the representative of the employees, does it constitute direct control? The shares are in fact used to vote directly as employees have instructed but through two middlemen – the representative and the fund manager.

⁴⁷⁷ *Ibid.*, Article 10 1. (c)

⁴⁷⁸ Directive 2001/34/EC, Article 85

⁴⁷⁹ Directive 83/349/EEC

⁴⁸⁰ Article 93, Directive 2001/34/EC

⁴⁸¹ *Ibid.*, Article 10 1. (e)

VII 1.5. Voting rights, board appointment and compensation and asset lock-up

The Directive envisions the publication of any restrictions on voting rights⁴⁸², which can be seen as being primarily directed towards capped voting but at the same time is also the only indent that indirectly addresses the issue of proxies.

Concerning the board of the target company, the Directive requires the publication of rules governing the appointment of the board and the amendments of the articles of association⁴⁸³ and agreements that provide compensation to the board members and/or employees in case of a an unjustified redundancy following a successful takeover bid⁴⁸⁴.

It should indicate the existence of golden or other kinds of parachutes and the presence of staggered boards but it also allows for detection of supermajority provisions. For detecting asset lock-ups and white squire defenses that have been pre-agreed between the management of the possible target and a third corporation should be detectable under Article 10.1. (j). That indent requires publication of agreements taking effect, alter or terminate upon the change of control of the company and the effects that these agreements have.

Whereas restrictions on voting rights, rules that govern board appointment and the existence extraordinary compensation mechanisms in case of redundancy seem to be clear, the indent in the Article relating to “significant agreements to which the company is a party and which take effect, alter or terminate upon a change of control...” leaves a lot of room for discretion. Primarily it concerns the level of “significance” that is hard to determine especially for intangible assets that the company may have. In a similar manner, the agreement does not have to take effect upon change of control but may instead be triggered by the bid.

All those possible pre-bid mechanisms are to be subjected to the approval by the shareholders at least every two years⁴⁸⁵. Publication of this information in a straight forward, transparent way⁴⁸⁶ would seemingly have the effect of making the existence of the majority of defensive mechanisms known to potential bidders. The Directive thus aims at ensuring that, if a bidder starts screening for potential targets, it can already at an early stage prepare itself for possible hostility or increased costs.

VII 2. Actions during the bid

The most influential provisions of the 13th Directive on takeover defenses are nevertheless found in the Articles governing the actions of the board and the target company during the bid.

⁴⁸² *Ibid.*, Article 10 1. (f)

⁴⁸³ *Ibid.*, Article 10 1. (h)

⁴⁸⁴ *Ibid.*, Article 10 1. (k)

⁴⁸⁵ *Ibid.*, Article 10.3

⁴⁸⁶ As envisaged by the Directive Article 10 2. it should be done in the company’s annual reports and updated during the year subject to transparency requirements of national stock exchanges

VII 2.1 Information on the bid

If Article 10 of the proposed Directive deals with the publication of information irrespective of whether a bid is imminent or not, then Article 6 of the Directive approaches directly information to be included in the publication of the bid and the appropriate behavior of both the bidder and the target.

In contrast to previous proposals and in line with the considerations of the European Parliament, the Article envisages that information on the bid is to be transmitted to the employees of both the target and the bidder. A peculiar feature of the Article is the inclusion of the obligation of the bidder to make the bid public without delay or, as pointed out in the commentary to the articles, to be transmitted to the target company (and the supervisory authority) as soon as it decides to make the bid. Inclusion of such a feature in national legislation would be first of all hard to control in practice. If successful, it would give grounds for a possibility to sue the bidder for previous purchases made on the open market as they could be interpreted as establishing a firmer toehold prior to the bid. Such strategy clearly indicates premeditation and is thus in contrast with the purpose of the article.

Although the proposed Directive sets out a list of items to be included in the offer document at minimum⁴⁸⁷, it does not include any obligations from the part of the bidder to remain true to that document. As it is a framework Directive, the Member States may and almost certainly will impose much stricter rules on the bidder. Such a possibility is already visible in the German takeover regulation that binds the bidder to the offer document with the possibility of imposing penalties⁴⁸⁸.

Disclosure of information is further regulated under Article 8 of the Directive, ensuring that the information on the bid will be accessible to everyone in order to avoid creating false markets for the securities. This includes expressly also the obligation to make sure that the employees of the participating companies are informed, thus imposing that both to the company and to the supervisory authority.

VII 2.2 Conduct of the target's board

After the board of the target company has received information on the bid⁴⁸⁹, it may not take any action that might result in the frustration of the bid without prior shareholder approval⁴⁹⁰. This does not apply to a search for a white knight. Specific issues are not expanded beyond “issuing any shares which may result in a lasting impediment to the offeror in obtaining control over the offeree company”. The commentary to the Directive states however that in general, such measures may be all operations which are not carried out in the normal course of the company's business or not in conformity with normal market practices.

⁴⁸⁷ Article 6.3 of the proposed Directive

⁴⁸⁸ §12 (1) of the Act Wertpapiererwerbs- und Übernahmegesetz

⁴⁸⁹ The Directive indicates also on the possibility that this moment may be when the board of the target company becomes aware of the bid, i.e. before the official proposal is made.

⁴⁹⁰ Article 9.1 of the proposed Directive

If defensive measures are taken by the target before the bid, they have to be approved by the target shareholders, if they:

- a) are not partly or fully implemented
- b) do not form part of the normal course of the company's business AND
- c) whose implementation may result in the frustration of the bid⁴⁹¹

This trinity together with the unclear moment the bid commences leaves an opportunity for the target company to exploit the system. Naturally, this not to be considered the final text, as it is going to be implemented in the national legislation. Taking it as it is presently would allow the target's board, if aware of the bid without formal notice from the bidder, to adopt defensive measures that do not require shareholder approval.

Once again, the interests of employees are considered protected by the communication of the bid document and a thorough opinion of the target's board on the effects of the takeover. In connection with that, there is a contradiction in the consideration that the board of the company has to give to the bid. Whereas the board "must not deny the holders of the securities the opportunity to decide on the merits of the bid"⁴⁹², the board is also "to act in the interest of the company as a whole"⁴⁹³. Thus, if the board perceives that for "the company as a whole", including for example the employees and themselves, the bid is detrimental but beneficial solely for the shareholders, it is forced to reject one of those requirements.

Although the Article specifically allows the board to seek for a "white knight", the general principle behind this Article is, that once the company has been targeted by another company, then without shareholders rejection, the company will be sold whether to the initial or to an alternative bidder.

The Directive has also incorporated clauses that regulate the applicability of possible defensive mechanisms during the shareholders meeting that decides about the adoption of post-bid defensive mechanisms. Under Article 11 paragraph 3, any restrictions on voting rights provided either in the articles of association or between the company and the shareholders or between shareholders shall cease to have effect. The purpose here is naturally to make sure that every shareholder has the possibility to express his opinion without any restrictions.

As the Directive is based largely on the UK experience, it is likely that the basic philosophy behind these paragraphs is likewise motivated by the similar clauses in the UK Takeover Code. As was shown in Chapter V the UK system is based on the notion that the corporation belongs to the shareholders and should thus primarily protect their interests. In the case of a bid, it is ultimately the general meeting that decides the faith of the company. The board has the option of influencing shareholders in their vote or looking for white knight but nothing more. The UK Takeover Panel has ruled that even litigation falls under the General Principle 7⁴⁹⁴ thus constituting frustrating action. Although the final implementation of the Directive is left up to the Member States, the Commission remains as the guardian of the legislation. Considering the approach taken in formulating the Articles, it is also likely that the UK experience will be extended.

⁴⁹¹ Article 9.3 of the proposed Directive

⁴⁹² *Ibid.*, Article 3 (1) (c)

⁴⁹³ *Ibid.*

⁴⁹⁴ Godden (2001)

VII 2.3 The break-through rule

Closely related to the ineffectiveness of voting rights during the general meeting is the breakthrough clause that has been a new addition to the Directive. Based on the findings of the High Level Group of Company Law experts, the paragraphs in Article 11 render ineffective all restrictions on the right of ownership that prevent the bidder from either purchasing shares or exercising control over the company.

There is no doubt that such a clause would please the bidder and cause bitterness to targets that have used the measures for management entrenchment. At the same time all the clauses extant in the articles of association or between the shareholders are unenforceable only against the bidder. Consider for example a situation when there is a restriction of shareholding of 15 percent of share capital. In these circumstances the bidder is the only one that is able to increase its share in the company over that limit whereas potential other bidders, willing to participate in the auction but not yet having published a bid, would not have the same opportunity.

It is not clear if the paragraphs in the Article 11 are effective also against poison pills adopted by shareholders but it must be assumed that the concept of 'transfer of securities' covers also options and issuing of new shares.

The political nature of the Directive comes especially clearly out also in the Article 11. The Commission refers explicitly in the commentary to the Articles to the fact that the break-through clause is not applicable to shares carrying multiple voting rights or no voting rights. The Commission explains that it can be argued that differential stock is a method of financing the corporation and that there is no proof that they render takeovers impossible.

It is indisputable that such a possibility exists but as the Commission itself points out – it is only an argument. In a similar manner, it can be argued, are differential shares especially designed to give a small number of shareholders monopolistic control over the company. It is also true that Scandinavian countries, which are the most common users of multiple voting shares, have seen takeovers. Yet at the same time the occurrence of hostile takeovers in Scandinavia is almost unheard. But as the Commission truthfully pointed out, it is a question of a constitutional nature that could delay or block the adoption of the Directive. It appears that the adoption of the Directive has become a goal of its own.

The question of dual class shares is nevertheless likely to re-emerge under Article 18 of the Directive. This Article entitles the Commission to reexamine the effects of Articles 10 and 11 and propose changes if necessary after 2010⁴⁹⁵. It is likely that the question of dual class shares will be raised in connection with this process if it remains in the final, adopted proposal.

⁴⁹⁵ The period given to Member States for adopting necessary regulation is until 1 January 2005. Article 18 shall give the Commission the power to examine the effects of the Directive 5 years after that date.

A further question is raised by the breakthrough rule that concerns the freedom of the shareholders to engage in contractual agreements. If the shareholders, either together with the company's board or on their own, agree to enter into a contract limiting or extending the rights attached to their shares, doesn't the obligation to render these contracts ineffective violate the basic rights of contractual freedom? If this is the case then doesn't the Directive contradict itself by eliminating one of the basic principles that it tries to promote – the right of the shareholders to make decisions.

It is stated clearly in Article 295 that “ [the Treaty] shall in no way prejudice the rules in Member States governing the system of property ownership”. Thus the question that arises is whether the Directive is in fact wandering into the area of corporate law where it is not meant to go. If the contractual freedom of shareholders is violated as a result of the Directive, does it constitute a breach of the Treaty?

VII 3. Legality of defensive strategies

As stated before, due to the fact that the 13th Directive is still in a preparatory phase, the ECJ has not issued any judgements that directly concern that legislative act. There have been, nevertheless, judgements that can be seen as directly concerning defensive measures – those concerning the existence of golden shares or other privileges enjoyed by the state in recently privatized companies and based on Treaty articles concerning free movement of capital and freedom of establishment.

Up to date, there have been five judgements concerning the “golden share” held by the governments of Member States –the judgements on June 4th, 2002, in the cases Commission versus Portugal⁴⁹⁶, France⁴⁹⁷ and Belgium⁴⁹⁸, and on the May 13th, 2003, Commission versus United Kingdom⁴⁹⁹ and Spain⁵⁰⁰

Prior to those judgements the illegitimacy of golden shares was brought to the attention of the Member States by the Commission Communication from 1997⁵⁰¹ concerning cross-border investments in the EU. The Communication concluded that discriminatory measures granting a veto right to the government are incompatible with Treaty Articles 56⁵⁰² and 43⁵⁰³ if they are applied to investors from other Member States. Such measures could be considered non-discriminatory only if they are i) applied in the same manner to both nationals and foreign investors, ii) they are based on a set of public, objective and stable criteria and iii) justifiable on the basis of imperative requirements in the general interest. The principle of proportionality had to be respected in all cases⁵⁰⁴.

⁴⁹⁶ C-367/98

⁴⁹⁷ C-483/99

⁴⁹⁸ C-503/99

⁴⁹⁹ C-98/01

⁵⁰⁰ C-463/00

⁵⁰¹ OJ 1997 C 220

⁵⁰² Article 73b in the original concerning free movement of capital

⁵⁰³ Article 52 in the original concerning right of establishment

⁵⁰⁴ Case C-367/98, §22

VII 3.1. Commission vs. Portugal (Case C-367/98)

In the case of Portugal, the provisions in question were certain laws and regulations concerning privatisations which limit the participation of non-nationals, and which establish a procedure for the grant of prior authorization by the Minister of Finance once the interest of the person acquiring shares in a privatized company exceeds a ceiling of 10 percent. The principal legal provision was contained in Law No 11/90 that provides in Article 13(3) for limits on foreign holdings in privatized corporations and corresponding methods of control. Penalties for non-compliance include forced sale of shares that exceed the limits set, loss of the voting rights conferred and nullity of the acquisitions or subscriptions. This provision was the basis for limitations included in many decree-laws on the privatization of certain undertakings⁵⁰⁵. In its application the Commission refers to 15 decree-laws providing for a limit on foreign participation ranging from between 5 percent and 40 percent in relation to undertakings operating in the banking, insurance, energy and transport sectors⁵⁰⁶.

The focus of the Commission action in this case was upon Decree-Laws No. 380/93 and 65/94 (applicable to the energy sector). Article 1 of Decree-Law No 380/93 provided for prior authorization by the Minister for Financial Affairs for any acquisition of shares representing more than 10 percent of the voting capital of companies following privatization (or any acquisition which when added to those already held would exceed such a limit)⁵⁰⁷. The provision in Decree-Law No 65/90 that attracted the Commission's attention set a ceiling of 25 percent on the participation by foreign entities in the capital of privatized companies⁵⁰⁸.

The Commission argued that Law No 11/90 and the provisions of the two Decree-Laws above were contrary to Articles 52, 56, 58, 73b and 221 of the Treaty and to Articles 221 and 231 of the Act of Accession⁵⁰⁹. The latter required the Portuguese Republic to carry out the liberalization of capital movements and invisible transactions according to a timetable⁵¹⁰. Although the Portuguese Government undertook not to use the possibility of limiting participation by Community investors in future privatisations that Law No 11/90 offered, and claimed that the system established by Decree-Law No 380/93 was applicable without any discrimination based on the nationality of investors⁵¹¹, the Commission decided to take action before the ECJ⁵¹².

In court, the Portuguese Republic used similar arguments to defend its national law. It claimed that although the relevant national laws enable discrimination based on nationality, the government has undertaken not to use those provisions and, by virtue of the direct effect and primacy of Community law, the provisions in question must in any event be interpreted as referring solely to investors who are not Community nationals⁵¹³.

⁵⁰⁵ §10 to §14, Case C-367/98

⁵⁰⁶ *Ibid.*, §12

⁵⁰⁷ *Ibid.*, §14

⁵⁰⁸ *Ibid.*, §13

⁵⁰⁹ *Ibid.*, §15

⁵¹⁰ *Ibid.*, §8 and §9

⁵¹¹ *Ibid.*, §16 and §18

⁵¹² *Ibid.*, §19

⁵¹³ *Ibid.*, §29

In a similar manner, prior authorization must be obtained by everyone, not just by nationals of other Member States or third countries⁵¹⁴

In case the Court would not consider these justification to be sufficient, the Portuguese government claimed that they are justified by overriding requirements of the general interest⁵¹⁵ to ensure that economic policy objectives are pursued and that the general rules of the Treaty allow Member States to safeguard its financial interests⁵¹⁶. The claims of unproportionality by the Commission⁵¹⁷ were rebutted under the claims that an assessment of operations which alter the structure of the share ownership constitutes an appropriate means of attaining the objective pursued⁵¹⁸, that it is applicable only to the re-privatization process⁵¹⁹ and it may be subject to review by courts⁵²⁰.

The Court effectively refused to accept the claims of Portugal on the grounds that it constitutes a restriction on the free movement of capital as defined in the Annex I of Directive 88/361⁵²¹, the existence of administrative practices cannot constitute a justification for the contrary restrictions found in national law⁵²², prohibition on free movement of capital does not apply only to discriminatory treatment of other Member States⁵²³ and moreover creates an illusory perception of the free movement of capital⁵²⁴.

In a similar manner, the Court refused to accept the claims of Portugal on the necessity of such restrictions. Referring to previous judgements exploring the relation of Article 295⁵²⁵ to the rest of Treaty Articles⁵²⁶, the court reaffirmed that this Article cannot be used to exempt a Member State from the fundamental principles of the Treaty⁵²⁷. As the restrictions found in Portuguese law did not fall under Article 58 (1)⁵²⁸, nor were they proportional⁵²⁹, nor were such obstacles justified by overriding requirements of the general interest⁵³⁰, the Court found that the Portuguese government has infringed Article 56 of the Treaty⁵³¹.

⁵¹⁴ *Ibid.*, §30

⁵¹⁵ *Ibid.*, §31

⁵¹⁶ *Ibid.*, §32

⁵¹⁷ *Ibid.*, §23

⁵¹⁸ *Ibid.*, §33

⁵¹⁹ *Ibid.*, §34

⁵²⁰ *Ibid.*, §35

⁵²¹ *Ibid.*, §42. Directive 88/361 can, according to the case C-222/97 Trummer and Mayer, §20 and §21, be used for the purposes of defining what constitutes a capital movement

⁵²² C-367/98, §41 referring to cases C-151/94 Commission v Luxembourg and C-358/98 Commission v Italy

⁵²³ *Ibid.*, §44

⁵²⁴ *Ibid.* §45 referring to cases C-163/94, C-165/94 and C-250/94 Sanz de Lera and Others and C-302/97 Konle

⁵²⁵ Stating "This Treaty shall in no way prejudice the rules in member States governing the system of property ownership"

⁵²⁶ C-302/97, Konle v Österreich

⁵²⁷ C-367/98, §48, established in C-182/83 Fearon v Irish Land Commission

⁵²⁸ *Ibid.*, §52

⁵²⁹ *Ibid.*, §49

⁵³⁰ Which the Portuguese government claimed to be economic interests of the country despite settled case-law that explicitly states that they can never serve as justifications (C-265/95 Commission v France and Case C-398/95 SETTG)

⁵³¹ *Ibid.*, §53 and §54

Based on the previous discussion, the Court found also that Portugal has failed to comply with Treaty Articles concerning freedom of establishment⁵³² but as the Commission did not specify the reasons for non-compliance with the Act of Accession⁵³³ the Court dismissed those claims⁵³⁴.

VII 3.2. Commission vs. France (C-483/99)

In the case of France, the Commission noted that Decree No 93-1298 of 1993 vests in the State a 'golden share' in Société Nationale Elf-Aquitaine, a company engaged in supplying France with petroleum products⁵³⁵. Through Article 1 of this Decree, a golden share is granted to the State in order to protect the national interest⁵³⁶. The rights accruing to the State are set out in Article 2 of the Decree. Under this provision, the Minister for Economic Affairs is required, first of all, to approve in advance an acquisition of shares or rights that exceeds established limits on the holding of capital, and secondly the Minister may oppose decisions to transfer shares or use them as security. Finally, two representatives of the State, appointed by decree, are entitled to sit on the board of directors of the company, without voting rights⁵³⁷.

Contrary to Portugal, the infringement proceedings were brought against France for a golden share held in a specific company that moreover was active in a strategically important sector – petroleum and oil products. Based on the pre-existing case law of the ECJ, safeguarding supplies of petroleum products in the event of a crisis is a matter of national security⁵³⁸, which was also the core of the French defense⁵³⁹ together with proportionality⁵⁴⁰ and the non-discriminatory nature of the share⁵⁴¹.

In a manner similar to the case against Portugal, the Court dismissed the claims of the French Republic. Although it acknowledged the strategic importance of the oil sector⁵⁴², it emphasized that any derogation must be interpreted strictly and not to be left at the discretion of Member States⁵⁴³. The Court thus found that the existence of a golden share in Elf-Aquitaine, and the rights assumed by the state in relation to that share, is not proportionate to the aim and therefore constitute an infringement of the Treaty Article 56.⁵⁴⁴

The Court thus ruled that the Articles in the national legislation concerning a rights of the state to approve holdings over certain percentage and the right to oppose the transfer

⁵³² *Ibid.*, §55 and §56

⁵³³ *Ibid.*, §57

⁵³⁴ *Ibid.*, §59

⁵³⁵ Case C-483/99, §1

⁵³⁶ *Ibid.*, §9

⁵³⁷ *Ibid.*

⁵³⁸ Case C-72/83 *Campus Oil and Others*

⁵³⁹ Case C-483/99, §28

⁵⁴⁰ *Ibid.*, §30

⁵⁴¹ *Ibid.*, §29

⁵⁴² *Ibid.*, §47

⁵⁴³ *Ibid.*, §48

⁵⁴⁴ *Ibid.*, §51 to §54 extending the same discussion also to the freedom of establishment in §55 and §56

of company's assets associated with the golden share held in Elf-Aquitaine constitute an infringement of free movement of capital⁵⁴⁵.

VII 3.3. Commission vs. Belgium (C-503/99)

In a manner similar to France, the case brought against Belgium concerned a golden share held in a specific company. In this case, two Royal Decrees of Belgium dating from 1994 were at issue. The first of these, the Royal Decree of 10 June 1994, vested in the State a 'golden share' in Société Nationale de Transport par Canalisations and carried with it the following rights. Firstly, the responsible Minister must have been given advance notice of any transfer, use as security or change in the intended destination of the company's system of lines and conduits that are used or are capable of being used as major infrastructures for the domestic conveyance of energy products. If the Minister considered that such operations adversely affect the national interest in the energy sector, he is entitled to oppose them. Secondly, the Minister may appoint two representatives of the Federal Government to the board of the Company. They could propose to the Minister the annulment of any decision of the board of directors that they regard as contrary to the guidelines for the country's energy policy. This includes Government objectives with respect to energy supply⁵⁴⁶.

The second of the Decrees at issue was the Royal Decree of 16 June 1994 vesting in the State a golden share in Distrigaz, the principal gas transporter and distributor. Through this device the responsible Minister has to be given advance notice of any transfer, use as security or change in the company's strategic assets, and is entitled to oppose such operations if he considers that they adversely impact upon the national interest in the energy sector. Secondly, the Minister may appoint two representatives of the Federal Government to the board of directors of the company. These representatives may propose to the Minister the annulment of any decision of the board of directors or of the management committee, which they regard as contrary to the guidelines for the country's energy policy⁵⁴⁷.

The Commission argued that the Belgian Government's failure to lay down precise, objective and permanent criteria for approval of, or opposition to, the operations noted above meant that the Kingdom of Belgium was in breach of its obligations under Articles 43 EC and 56⁵⁴⁸. While the Belgian Government made a number of structural adaptations to the special rights attaching to the golden shares in 1999, these did not, in the Commission's view, alter the relevant Articles in the two Royal Decrees⁵⁴⁹.

The defense used by Belgium was similar to that used by France raising the issue of public interest and security⁵⁵⁰ and proportionality⁵⁵¹. As in other judgements of that day, the court acknowledged that the companies concerned are important to Belgian national

⁵⁴⁵ *ibid.*, The Ruling

⁵⁴⁶ Case C-503/99, §1 and §9

⁵⁴⁷ *Ibid.*, §1 and §10

⁵⁴⁸ *Ibid.*, §16 to §24

⁵⁴⁹ *Ibid.*, §14

⁵⁵⁰ *Ibid.*, §27 for public interest and §32 to 34 for public security

⁵⁵¹ *Ibid.*, §27 to §30

economy⁵⁵² but, as opposed to the cases against France and Portugal, found, that the legislation in Belgium is justified by the objective of guaranteeing energy supplies in the event of a crisis⁵⁵³. As the court had established the prevailing interest of national security, the claims of the Commission on the failure to comply with Treaty Articles concerning freedom of establishment, were dismissed⁵⁵⁴

Perhaps the primary reason for a positive judgement for Belgium is found in the fact that the Commission failed to show a possibility of a less restrictive measure⁵⁵⁵. The proposal by the Commission to regulate the entire market, rather than just one company⁵⁵⁶, was found by the court to be even more restrictive⁵⁵⁷.

Simultaneously to the cases discussed above, the Commission started proceedings against Spain and United Kingdom for golden shares they held in recently privatized companies. The judgements for those cases were delivered on May 13th 2003.

VII 3.4. Commission vs. Spain (Case C-463/00)

In the case of Spain, the Commission was concerned with the possible effect on free movement of capital and freedom of establishment of administrative approval of action of certain nature in undertakings in the petroleum and energy (Repsol), telecommunications (Telefónica), banking (Argentaria), tobacco (Tabacalera) and electricity sectors (Endesa). The Spanish Law 5/1995 concerning the privatization of undertakings in the Spanish public sector provides that the state has the power to approve or disapprove mergers, winding-up, disposal of assets and shareholdings, change in the state ownership percentage of the company and acquisitions. For the undertakings operating in the petroleum, telecommunications, banking, tobacco and electricity sectors, Royal Decrees No 3/1996, 8/1997, 40/1998, 552/1998 and 929/1998 respectively, pursuant to Article 4 of Law 5/1995, were issued laying down the details of the system of approval. Each of the royal decrees defines its substantive scope by reference to that law, the transactions which are subject to prior administrative approval, the administrative body which is competent to grant approval and the date on which the system ceases to apply, the various decrees setting dates between 5 October 2000 and 8 June 2008⁵⁵⁸.

Despite extensive negotiation between the Spanish government and the Commission, the latter was not satisfied with the responses received and brought an action against the Kingdom of Spain⁵⁵⁹ on the 21st of December 2000. A peculiarity of the case is that some of these laws⁵⁶⁰ in the Spanish legal system had, by the time of the court hearings, ceased to apply. In addition, the Spanish government pointed out several inconsistencies

⁵⁵² *Ibid.*, §46

⁵⁵³ *Ibid.*, §55

⁵⁵⁴ *Ibid.*, §58 to §60

⁵⁵⁵ *Ibid.*, §53

⁵⁵⁶ *Ibid.*, §24

⁵⁵⁷ *Ibid.*, §53

⁵⁵⁸ Case C-463/00, §9 to §11

⁵⁵⁹ *Ibid.*, §12 to §16

⁵⁶⁰ Royal Decree No 40/1998 and Royal Decree No 552/1998, as amended by Royal Decree No 67/2000 of 21 January 2000

in the Commission's application and thus raised pleas of inadmissibility⁵⁶¹. Referring to extant case law⁵⁶² the court nevertheless rejected these pleas.

Following the argumentation in the cases against Portugal, France and Belgium, the Commission sees prior approval by administration as restricting both free movement of capital and freedom of establishment⁵⁶³, are not excusable under the claims of public security, order and health⁵⁶⁴ and does not pass the test of proportionality⁵⁶⁵. Commission also points out that in previous judgements⁵⁶⁶ prior approval by authorities has been held as incompatible with the relevant Treaty Articles⁵⁶⁷.

Spain responds to the accusations by explaining in detail the privatization process and the benefits of having certain control over it⁵⁶⁸. It also raises the issue of property ownership of Article 295 of the Treaty and claims that the respective parts of Spanish law ought to be regarded as compatible with the Community law based on the right of the Member State to decide whether or not to privatize public companies⁵⁶⁹. Furthermore, Spain also points out that the aim of the national legislation is to secure continuity of business undertakings and the non-discriminatory nature of the law in question⁵⁷⁰ next to the already common pleas for public interest⁵⁷¹, proportionality⁵⁷² and judicial review⁵⁷³. Finally, Spain brings forth Article 86 of the Treaty and claims, "without explaining its argument in detail⁵⁷⁴" that it allows derogation of not only from Articles concerning competition but also from all Treaty Articles⁵⁷⁵.

The Court follows reasoning, similarly to previous judgements on the same topic, about the nature of free movement of capital and direct investments⁵⁷⁶ and finds that any prior approval by the authorities constitutes an infringement of the Articles concerning the free movement of capital⁵⁷⁷ moving on to examine whether it can be justified on the grounds raised by Spain.

Not surprisingly, the court finds that tobacco companies and banks do not have their aim of serving public interests and thus dismisses any justifications for them on the basis of general public interest⁵⁷⁸. As far as other three companies are considered, the court finds the approval procedure to be overly secretive and closed, thus also not proportionate, and the possibilities to seek judicial review are too weak to justify the

⁵⁶¹ C-463/00, §17 to §20

⁵⁶² Case C-174/01 Commission v Luxembourg stating that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion and that the Court cannot take account of any subsequent changes

⁵⁶³ C-463/00, §32 and §33

⁵⁶⁴ *Ibid.*, §35

⁵⁶⁵ *Ibid.*, §36 and §37

⁵⁶⁶ Referring to already discussed cases against Portugal, France and Belgium

⁵⁶⁷ C-463/00, §38

⁵⁶⁸ *Ibid.*, §39

⁵⁶⁹ *Ibid.*, §41

⁵⁷⁰ *Ibid.*, §42

⁵⁷¹ *Ibid.*, §44

⁵⁷² *Ibid.*, §45

⁵⁷³ *Ibid.*, §47

⁵⁷⁴ *Ibid.*, §48

⁵⁷⁵ *Ibid.*

⁵⁷⁶ *Ibid.*, §51 to §53

⁵⁷⁷ *Ibid.*, §62

⁵⁷⁸ *Ibid.*, §70

existence of the laws of this nature⁵⁷⁹. It thus finds that Spain has failed to fulfil its obligations under Article 56 of the Treaty⁵⁸⁰.

VII 3.5. Commission vs. United Kingdom (Case C-98/01)

The case against United Kingdom was initiated to establish the legitimacy of a “special” share that the United Kingdom government held in the British Airport Authority (BAA) privatized in 1986⁵⁸¹. Under the accompanying legislation the “special share” is transferable only amongst public authorities of the country⁵⁸². The “special share” gave the holder the right to decide over certain activities such as winding-up the company and disposing of a designated airport⁵⁸³. In addition, the articles of association of the BAA forbade any single person to own more than 15 percent of the voting rights in the company⁵⁸⁴.

The United Kingdom’s reply to Commission’s reasoned opinion inquiring about the matter stated that Member States have the right to define, within the framework of national company law, the essential characteristics of shares in private companies, which are available on the market, and that use of that right does not impede access to the market in those shares⁵⁸⁵. Commission was not satisfied with that and brought proceedings against United Kingdom to the ECJ. In its argumentation in the Court the Commission stated that BAA’s articles of association have the effect of distorting free movement of capital and freedom of establishment⁵⁸⁶ referring to Directive 88/361. In a similar manner, the provisions in the articles of association of BAA limiting shareholder’s votes to 15 percent had to be considered as incompatible with the above mentioned freedoms⁵⁸⁷ due to the fact that they arise from parliamentary action and not through the normal operation of law⁵⁸⁸.

In its’ defense, the government of the United Kingdom explained that under national company law in force, different classes of shares may exist and that the rights attached to them may be different, both in relation to sharing in the company's profits and to its management. The “special share” concerned merely falls within one of those classes. In particular, shares without voting rights are commonly found in certain companies⁵⁸⁹. The defendants also raise the issue of the restrictions being of non-discriminatory manner and do not restrict access to the market⁵⁹⁰.

In this case, the United Kingdom government argued, neither the rules of private law which determine the characteristics of shares available on the market, nor those which entitle special shareholders to participate in the decisions of the company, or which

⁵⁷⁹ *Ibid.*, §73 to §76

⁵⁸⁰ *Ibid.*, §86

⁵⁸¹ Case C-98/01, §8

⁵⁸² *Ibid.*, §9

⁵⁸³ *Ibid.*, §10

⁵⁸⁴ *Ibid.*, §11

⁵⁸⁵ *Ibid.*, §16

⁵⁸⁶ *Ibid.*, §19

⁵⁸⁷ *Ibid.*, §22

⁵⁸⁸ *Ibid.*, §24

⁵⁸⁹ *Ibid.*, §26

⁵⁹⁰ *Ibid.*, §26

require the consent of the special shareholders before certain decisions can be taken, amount to restrictions on access to the market⁵⁹¹. Moreover, challenging the “special share” would enable holders of all classes of ordinary shares to rely on the Treaty in order to renegotiate the rights attached to them⁵⁹².

The court proceeds in already common manner to find that any measures requiring prior approval by authorities are to be considered as hindrances to free movement of capital⁵⁹³. In a similar manner, the court also rebuffs any arguments that restrictions on the amount of capital a person can hold in a company are not to be considered as restrictions on free movement of capital⁵⁹⁴.

What concerns the plea that attacking the “special share” constitutes an attack against the independence of national company law systems, the Court does not accept it. As claimed by the Commission, the issues here do not arise out of normal operation of company law but they were explicitly approved by the Secretary of State and thus the United Kingdom acted in its capacity as a public authority⁵⁹⁵. As the United Kingdom did not want to rely on any measures constituting possible overriding requirements relating to the general interest⁵⁹⁶, the Court found that the provisions of the articles of associations of BAA constitute an infringement of Article 56 of the Treaty⁵⁹⁷ and consequently also Article 43⁵⁹⁸.

VII 3.6. Effect on antitakeover measures

An extraordinary feature of the “golden share” judgements is that the Court did not approach the main issue that the Advocate-General (AG) of all the five cases, Ruiz-Jarabo Colomer, considered to be of essence – that of the possibility for the Community to interfere with the system of property ownership in Member States. In its first joined opinion for the cases ruled in June 2002, the AG stated that the Commission has made a fundamental error in the way in which these three actions were brought: the Commission has sidestepped the legal consequences that follow from Article 295 EC⁵⁹⁹.

The Commission argued that Article 295 EC is not relevant for the purposes of the proceedings. The argumentation was based on the notion that the issue is not whether State has the right to participate in the share capital of the company but whether it is allowed to attach special rights and powers to the shares⁶⁰⁰. As the AG points out, this leads to the concept that property ownership comes only in the form of private and public ownership corresponding to the size of the contribution to the object of ownership⁶⁰¹.

⁵⁹¹ *Ibid.*, §29

⁵⁹² *Ibid.*, §35

⁵⁹³ *Ibid.*, §43

⁵⁹⁴ *Ibid.*, §44 and §45

⁵⁹⁵ *Ibid.*, §48

⁵⁹⁶ *Ibid.*, §49

⁵⁹⁷ *Ibid.*, §50

⁵⁹⁸ *Ibid.*, §51 and §52

⁵⁹⁹ Joined opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered on 3 July 2001, paragraph 39

⁶⁰⁰ *Ibid.*, §41

⁶⁰¹ *Ibid.*, §42

It is not fruitful to follow the argumentation of the AG in detail. It is sufficient to point out that he used extensive argumentation to prove that the expression 'system of property ownership' refers not to the civil rules concerning property relationships but to the ideal body of rules of every kind, deriving from both private and public law, which are capable of granting economic rights in respect of an undertaking⁶⁰². In other words, it concerns rules, which allow the person vested with such ownership to exercise decisive influence on the definition and implementation of all or some of its economic objectives.

The Court in turn, as exhibited in previous sections, relied only on the previous existing case-law interpreting Article 295⁶⁰³ and declared that Article 295 is not to be used as an exemption from the fundamental freedoms of the Community.

Such a laconic argumentation was brought to the attention of the Court once again in connection with the cases ruled in May 2003. AG Colomer delivered its opinion on the cases on February 6, 2003 urging the ECJ to reconsider its positions. As he points out, Article 295 was ignored without stating why⁶⁰⁴. He pointed out that the judgements on June 4th 2002 had three basic flaws. Firstly, the concept of golden shares deals with the freedom of establishment not with the free movement of capital which is incidental⁶⁰⁵. Secondly, by dismissing Article 295 in its entirety, the ECJ has rendered that specific Article devoid of all practical effect⁶⁰⁶. And thirdly, the exemption given to Belgium was not based on any rational explanation⁶⁰⁷.

The AG does provide further argumentation in its opinion that should be highlighted. He points out that if the Court would not reconsider the judgements of June 2002, it would lead to a grave misinterpretation of the Treaty and allowing the Community to venture where it is not supposed to go – the system of private ownership of property⁶⁰⁸

The Court, as shown, did not consider such argumentation to be appropriate.

There are several conclusions that can be drawn from these judgements of the ECJ. Firstly, although concerning so far only public authorities, measures that require a prior approval to some actions that a company may take are in breach of the free movement of capital. Secondly, as exhibited in the case *Commission vs. United Kingdom*, any restrictions on the amount of capital to be held by a single shareholder constitute an infringement of the free movement of capital principles.

Thirdly, existence of a shares giving preferential treatment to the holder as regards decisions concerning for example acquisitions or board nominations, violate the principles of free movement of capital. Fourthly, a system of prior administrative approval is in accord with the principle of proportionality only if it is based on objective, non-discriminatory criteria which are known in advance to the undertakings

⁶⁰² *Ibid.*, §54

⁶⁰³ C-182/83 *Fearon v Irish Land Commission*, C-235/89 *Commission v Italy*, C-202/88 *France v Commission*, C-30/90 *Commission v United Kingdom* but most importantly C-302/97 *Konle v Austria*

⁶⁰⁴ Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 6 February 2003 Cases C-463/00 and C-98/01, §37

⁶⁰⁵ *Ibid.*, §36

⁶⁰⁶ *Ibid.*, §37

⁶⁰⁷ *Ibid.*, §38

⁶⁰⁸ *Ibid.*, §54 to §57

concerned and all persons, affected by a restrictive measure of that type, have a legal remedy available to them.

In addition, Annex I of the Directive 88/631, as has been repeatedly asserted in the judgements above⁶⁰⁹, can be used for defining capital movements between Member States. Heading I 2 of Annex I of that Directive states that direct investments (and thus capital movements) is also “participation in new or existing undertaking with a view to establishing or maintaining lasting economic links”.

Heading III Points 1 to 4 include all listed and non-listed securities, dealt and not dealt in stock exchanges, which are acquired by residents and non-residents. The Commission thus has the widest possibilities for determining the concept of capital movements. The Court has also repeatedly stated that Article 295 of the Treaty cannot be used as an exemption from the fundamental principals of the Treaty⁶¹⁰.

Given these findings it seems that the Directive is not in fact any more necessary. The system of property rights deriving from private and public law of Member States can in no way allow derogation from fundamental freedoms of the Treaty which includes also free movement of capital. The argument that these cases concerned the special powers held by the state is not applicable as the state acted merely in its capacity as a shareholder.

The question that remains is whether the protection of private companies constitutes an overriding economic interest that could justify derogation from the principles of free movement of capital. The ECJ has continuously held that all measures that are to be considered as exempt from the free movement of capital principles must pass the test of proportionality, be in conformity with legal certainty and cannot be implemented for purely economic ends⁶¹¹. It is clear that allowing the existence of national legislation that for example allows dual class shares or capped voting does not fall under the concepts of public order, public health nor public security.

As the Court has constantly held Annex I of the Directive 88/631 to include a reference to measures that are to be considered as capital movements and, based on the judgements of June 2002 and May 2003, Article 295 cannot be used as a derogation from participation in the share capital of a company, all measures restricting access to the share capital of a corporation are to be considered as violating Treaty Article 56.

Even more so, as Article 56 of the Treaty also prohibits all restrictions on the free movement of capital between the Member States and third countries, it seems that European companies are now vulnerable to the attacks of the U.S. companies. The latter has been one of the reasons for the rejection of the previous draft of the 13th Directive in the European Parliament.

If contractual freedom is no longer an option when devising measures that could be interpreted as defensive strategies, as seems to be the case after the “golden share” judgements, then there is in effect almost no possibility to prevent any company from being taken over. The only measures that have remained are in this case those resulting from the ownership structure of corporations. Holding a majority in both cash flow

⁶⁰⁹ Referring nevertheless to C-222/97 Trummer and Mayer §21

⁶¹⁰ C-182/83, C-302/97 and all of the “golden share” cases mentioned here

⁶¹¹ See for example C-19/92 Kraus and C-55/94 Gebhard

rights and voting rights or engaging in cross-ownership and pyramidal groups seem to be the only options available prior to the bid. Once the bid has been announced the options are either to influence the shareholders to adopt defensive mechanisms, either directly or through a proxy fight, or to search for a white knight.

There seems to be little doubt that once implemented in national legislation, the Directive, together with the regulative case-law of the ECJ, will have a profound effect on corporate governance systems of mainly Continental European companies. Options that remain available are, in addition to those mentioned above, not to go public at all or incorporating outside the EU. Both are detrimental to the aim of the Directive – to strengthen the worldwide competitiveness of companies incorporated in the European Union.

VII 4. Application of corporate theories

It remains to be seen whether the judgements of the ECJ will have such an effect as stipulated here but these seems to be little evidence to contradict it. In no judgements so far has Article 295 been allowed to take effect over fundamental freedoms provided in the Treaty.

Given the preceding analysis, it is clear that the application of corporate theories is to be done mainly through the simple finance theory, which is the basis also for the UK system of corporate ownership and takeover regulation. Shareholder supremacy under the Directive is not however absolute. As was shown, the Articles of the Directive are emphasizing the role of the bidder in every aspect. If shareholder agreements are unenforceable only against the bidder then there is no incentive for shareholders to enter into those agreements in the first place.

Considering such an approach through the simple finance model, the board and the management of the target company shall assume *de facto* principal-agency relationship only with the bidder after the control has been obtained. Although protection of minority shareholders is the stated aim of the Directive, the only remedies available to them are those of mandatory bid and sell-out clauses. It is not clear if Article 11 applies also to supermajority provisions that enhance the powers of minority shareholders but it can suspected to be so.

Assuming that the motivation underlying the Directive is the belief that majority of takeovers occur due to the inefficiency of the target, such regulation could be seen as proper. However, it has been shown that this consideration is inaccurate. Although the mandatory bid reduces the likelihood of takeovers, the benefits stemming from the break-through and board neutrality rules should be sufficient to give a kick-start for cross-European consolidation of corporations.

An effect of the implementation of the Directive could be a move towards closer relationship between the management and the shareholders. As the main option available to the management that considers a takeover to have negative effects on the corporation is to convince the shareholders of that, mutual trust could be seen as playing an increasingly more important role.

Such action in turn requires the usage of company resources to constantly communicate with the shareholders. If this would be the case and the shareholders would approve the situation, the effects of the Directive would be positive for the entire corporate environment in Europe. At the same time it could also promote falsification of data to show the company in more positive light than it actually is.

Thus, in application of the simple finance theory, the Directive seems to create additional problems next to the ones that it solves.

Considering the transaction cost economics approach, the Directive has much more negative implications. Corporations are no longer able to provide sufficient protection for explicit and implicit contracts that it has entered into with constituencies contributing company specific assets. The role of the employees is limited just as much as that of the board and the management. They may merely express their opinion. Role of the State as the protector of other constituencies is limited and there are no paragraphs in the Directive addressing the issue of creditors.

If defensive measures, viewed through transaction cost economics, are used for establishing the long-term stability of corporations, then the Directive does not meet any of these aims.

High occurrence of takeovers in the UK is certainly appealing if the aim is to promote the increase in the number of European takeovers. Yet there is no indication that UK based corporations are more competitive globally or even within the European Union. As a final thought it should be pointed out that only a fraction of takeovers actually end up increasing shareholder wealth whereas majority decrease it⁶¹². Perhaps the idea of opening the European market for takeovers at any cost needs to be reconsidered both from the perspective of transaction cost economics and also from the simple finance theory.

⁶¹² Hussey (2001) referring to KPMG (1999) where it was found that only 17 percent of mergers and acquisitions show an increase in the share price a year after the conclusion of the deal

The emphasis on making money is so great, the emphasis on getting rich, no matter how, is so tremendous, that it influences virtually every aspect of our society

**Lawrence Ritter, former president
of the American Finance Association**

VIII Conclusions

The concepts of takeovers and takeover defenses discussed in this paper have led to several conclusions. The first part of the paper discussed the different approaches to takeovers and takeover defenses that the simple finance theory and the transaction cost economics provide and provided empirical support for different findings.

Research by distinguished authors has shown that takeovers are often motivated by the ambitions of the bidder rather than the inefficiencies of the target. The different approaches taken in applying the principles of the simple finance model and the transactions cost economics lead to the conclusions that by concentrating on the first one, takeover defenses are to be considered as breaches of trust between the management and the shareholders of a company. If companies are viewed through transaction cost economics, adoption of takeover defenses can be seen as a positive step to protect constituencies that have contributed company specific assets to the long-term functioning of the corporation. There is no doubt that management entrenchment is one of the reasons why defensive strategies are proposed. Based on the simple finance theory it is sufficient reason to create rules limiting the power of the board and the management.

Yet, no firm conclusions can be drawn from that. The outcome of a takeover, with or without the utilization of defensive strategies, does not depend on the underlying theory explaining the process but on the personal motivation of the participating actors. Empirical evidence indicates that the use of takeover defenses increases shareholder returns from takeovers. At the same time it leads to the possibility that the company will not be sold at all thus depriving the shareholders of their gains. The question that arises in connection with the proposed 13th Company Law Directive is thus the very foundation on which it is built – is there a necessity to regulate only the action of the target?

The answer to the question is ‘yes’ if the underlying theory is the simple finance model and the main goal is to prevent the target’s management of using its position for personal benefits. It is possible that the interests of other constituencies are sufficiently protected under other legislative acts. If the corporation is nevertheless managed not only in the interests of the holders of cash-flow rights, the answer should be reconsidered. The mere fact that the simple finance model is dominating in both the academic and practical world leads to the conclusion that the alternative, however attractive, is not feasible in practice. The Commission has included Article 18 under which it can re-examine the situation. Perhaps one of the considerations should also be whether the outcome of the takeovers has provided shareholders with additional benefits.

The present situation concerning takeover regimes in Europe is diverse. Several countries show increasing influence of shareholder activism. Many countries have nevertheless kept their old systems under which the management and the board have extensive powers in the takeover context. Common standards are erecting and even now the share of cross-border mergers and acquisitions is increasing.

The extreme variance of company laws in the European Union Member States does not seem to be the main reason for hindering cross-border deals. Most countries exhibit a system of corporate ownership fundamentally different of that in the United Kingdom that is taken as the model for which all Member States should strive.

Concentration of ownership and patterns of cross-holding and pyramiding in European countries are the main obstacles to increasing takeovers. If takeovers do occur, the target is chosen based on geographical and cultural proximity, not on the nature of the legislation prevailing in the target's home country. The question that arises is thus – is it necessary to create a “level playing field” in the European Union?

The answer to the question depends on whether the present situation is considered to be adequate. It is clear that harmonization in this field has not occurred up to the level believed to be necessary by the Commission and the Council. It is nevertheless visible that convergence towards common rules and regulations is taking place. I believe that there is a need for further harmonization for capital to flow without obstacles between Member States. How “level” does the “playing field” need to be is nevertheless a totally different matter. The proponents of the simple finance theory believe in the efficiency of the market. Perhaps the markets are following the right track in the speed that suits them. It is easy to change legislation but this will benefit only those that are comfortable acting in such a system. In this case it would be mainly the United Kingdom.

The Directive, although in the form of a framework to be implemented by national legislators, takes strong positions concerning the outcome of the bid. The issues examined in this paper concerned publication of information, conduct of the board and rights of the bidder. It was shown that the rules have certain weak points but could be considered justifiable. Problems nevertheless arise in considering the already existing legislation, i.e. without the Directive.

Case-law of the ECJ has fundamentally altered the playing field which the Commission tries to harmonize. It can be claimed that there is no need for a harmonizing legislation as that can be achieved through already existing provisions in the Community law. The protection provided to Member States under Article 295 has been rendered ineffective by the ECJ. It could also be considered that due to that very reason the Directive is necessary as it avoids lengthy court proceedings. It nevertheless seems that the ECJ and the Commission, with the inclusion of the break-through rule, has entered a zone which could lead to unexpected outcomes. Perhaps it would be sufficient to limit the Directive to publication of information and let the market take its course. If market efficiency truly exists and simple finance theory applies, then it should lead to the same results without jeopardizing the interests of Member States in protecting their heritage. This again is a topic for another paper...

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Annexes

Annex A: Proposals for the 13th Directive from 2002 and 1995

Directive proposal from 2002
COM(2002)0534

Article 1

Scope

1. This Directive lays down measures coordinating the laws, regulations, administrative provisions, codes of practice or other arrangements of the Member States, including arrangements established by organisations officially authorised to regulate the markets (hereinafter "rules"), relating to takeover bids for the securities of a company governed by the law of a Member State, where all or some of those securities are admitted to trading on a regulated market within the meaning of Council Directive 93/22/EEC in one or more Member States (hereinafter "regulated market").

2. This 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. Action taken by such companies to ensure that the stock exchange value of their units does not vary significantly from their net asset value shall be regarded as equivalent to such repurchase or redemption.

Article 2

Definitions

1. For the purposes of this Directive:

- a) "takeover bid" or "bid" means a public offer (other than by the offeree company itself) made to the holders of the securities of a company to acquire all or some of the said 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;
- b) "offeree company" means a company whose securities are the subject of a bid;
- c) "offeror" means any natural or legal person governed by public or private law making a bid;
- d) "persons acting in concert" means 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 respectively at obtaining control of the offeree company or frustrating the successful outcome of a bid;
- e) "securities" means transferable securities carrying voting rights in a company;
- f) "parties to the bid" means the offeror, the members of the offeror's board if the offeror is a company, the offeree company, holders of securities of the offeree company and the members of the board of the offeree company, and persons acting in concert with such parties.

2. For the purposes of paragraph 1(d), persons controlled by another person within the meaning of Article 87 of Directive 2001/34/EC of the European Parliament and of the Council shall be deemed to be persons acting in concert with that other person and with each other.

Directive proposal from 1995
COM(1995)0655

Article 1

Scope

The coordination measures prescribed by this Directive shall apply to the laws, regulations and administrative provisions or other mechanisms or arrangements of the Member States relating to takeover bids for the securities of a company governed by the law of a Member State, where such securities are admitted, wholly or partially, to trading on a market in one or more Member States which is regulated and supervised by authorities recognized by public bodies, operates regularly and is accessible, directly or indirectly, to the public.

Article 2

Definitions

For the purposes of this Directive:

- 'takeover bid' ('bid') shall mean an offer made to the holders of the securities of a company to acquire all or part of such securities by payment in cash and/or in exchange for other securities. A bid may be either mandatory, if so provided by Member States as a means to protect minority shareholders, or voluntary,
- 'offeree company' shall mean a company whose securities are the subject of a bid,
- 'offeror' shall mean any natural person or legal entity in public or private law making a bid,
- 'securities' shall mean transferable securities carrying voting rights in a company or conferring entitlement to obtain transferable securities carrying such rights,
- 'parties to the bid' shall mean the offeror, the members of the offeror's administrative or management board, if the offeror is a company, the addressees of the bid and the members of the administrative or management board of the offeree company

Article 3

General principles

1. For the purpose of implementing this Directive, Member States shall ensure that the following principles are complied with:

- (a) all holders of securities of an offeree company of the same class are to be afforded equivalent treatment; moreover, if a person acquires control of a company, the other holders of securities are to be protected;
- (b) holders of securities of an offeree company are to have sufficient time and information to enable them to reach a properly informed decision on the bid; where it advises the holders of securities, the board of the offeree company is to give its views on the effects of implementation of the bid on employment, conditions of employment and the locations of the company's places of business;
- (c) the board of an offeree company is to act in the interests of the company as a whole and must not deny the holders of securities the opportunity to decide on the merits of the bid;
- (d) false markets must not be created in the securities of the offeree company, of the offeror company or of any other company concerned by the bid in such a way that the rise or fall in the prices of the securities becomes artificial and the normal functioning of the markets is distorted;
- (e) an offeror must announce a bid only after ensuring that it can fulfil in full any cash consideration, if such is offered, and after taking all reasonable measures to secure the implementation of any other type of consideration;
- (f) an offeree company must not be hindered in the conduct of its affairs for longer than is reasonable by a bid for its securities.

2. With a view to ensuring compliance with the principles set out in paragraph 1, Member States:

- (a) shall see to it that the minimum requirements set out in this Directive are observed;
- (b) may lay down additional conditions and more stringent provisions than those required by this Directive for regulating bids.

Article 4

Supervisory authority and applicable law

1. Member States shall designate the authority or authorities competent for supervising a bid for the purposes of the rules made or introduced pursuant to this Directive. The authorities thus designated shall be either public authorities, associations or private bodies recognised by national law or by public authorities expressly empowered for that purpose by national law. Member States shall inform the Commission of these designations, specifying all divisions of functions that may be made. They shall ensure that these authorities exercise their functions impartially and independently of all parties to the bid.

2. (a) The authority competent for supervising the bid shall be that of the Member State in which the offeree company has its registered office if the securities of that company are admitted to trading on a regulated market in that Member State.
- (b) If the securities of the offeree company are not admitted to trading on a regulated market in the Member State in which the company has its registered office, the authority competent for supervising the bid shall be that of the Member State on whose regulated market the securities of the company are admitted to trading.

If the securities of the company are admitted to trading on regulated markets in more than one Member State, the authority competent for supervising the bid shall be that of the Member State on whose regulated market the securities were first admitted.

Article 5

General principles

1. For the purposes of the implementation of this Directive, Member States shall ensure that the rules or other arrangements made pursuant to this Directive respect the following principles:

- (a) all holders of securities of an offeree company who are in the same position are to be treated equally;
- (b) the addressees of a bid are to have sufficient time and information to enable them to reach a properly informed decision on the bid;
- (c) the board of an offeree company is to act in the interests of the company as a whole;
- (d) false markets must not be created in the securities of the offeree company, of the offeror company, or of any other company concerned by the bid;
- (e) offeree companies must not be hindered in the conduct of their affairs for longer than is reasonable by a bid for their securities.

2. In order to attain the objective set out in paragraph 1, Member States shall ensure that rules are in force which satisfy the minimum requirements set out in the following Articles.

Article 4

Supervisory authority

1. Member States shall designate the authority or authorities, which will supervise all aspects of the bid. The authorities thus designated may include associations or private bodies. Member States shall inform the Commission of these designations and shall specify all divisions of functions that may be made.

2. The authority competent for supervising the bid shall be that of the Member State in which the offeree company has its registered office if the securities of the company are admitted to trading on a regulated market in that Member State. Otherwise, the competent authority shall be that of the Member State on whose regulated market the securities of the company were first admitted to trading and are still traded.

3. Without prejudice to their duty of professional secrecy, the competent authorities of the Member States shall cooperate, in so far as is necessary for the performance of their duties and for this purpose shall supply each other with any information that may be necessary.

4. The supervisory authorities shall have all the powers necessary for the exercise of their functions, which shall include responsibility for ensuring that the parties to a bid comply with the rules made pursuant to this Directive. In addition Member States can provide that their supervisory authorities may, on the basis of a reasoned decision, grant derogations from the rules drawn up in accordance with this Directive provided that in granting such derogations the supervisory authorities shall respect the principles mentioned in Article 5.

(c) If the securities of the offeree company are first admitted to trading on regulated markets within more than one Member State simultaneously, the offeree company shall determine which of the supervisory authorities of those Member States is the competent authority for supervising the bid by notifying these regulated markets and their supervisory authorities on the first trading day.

If the securities of the offeree company are already admitted to trading on regulated markets in more than one Member State at the date referred to in Article 20(1) and were admitted simultaneously, the supervisory authorities of these Member States shall agree on which one of them is to be the competent authority for supervising the bid within four weeks of the date mentioned in Article 20(1). Otherwise, the offeree company shall determine which of these authorities is to be the competent authority on the first trading day following the expiry of the period of time mentioned in the first sentence.

(d) Member States shall ensure that the decisions referred to in point (c) are made public.

(e) In the cases referred to in points (b) and (c), matters relating to the consideration offered in the case of a bid, in particular the price, and matters relating to the bid procedure, in particular the information on the offeror's decision to make a bid, the contents of the offer document and the disclosure of the bid, shall be dealt with in accordance with the rules of the Member State of the competent authority. In matters relating to the information to be provided to the employees of the offeree company and in matters relating to company law, in particular the percentage of voting rights which confers control and any derogation from the obligation to launch a bid, as well as the conditions under which the board of the offeree company may undertake any action which might result in the frustration of the bid, the applicable rules and the competent authority shall be those of the Member State in which the offeree company has its registered office.

3. Member States shall ensure that all persons employed or formerly employed by the supervisory authorities shall be bound by professional secrecy. Information covered by professional secrecy may not be divulged to any person or authority except by virtue of provisions laid down by law.

4. The supervisory authorities of the Member States under this Directive and other authorities supervising capital markets, in particular in accordance with Council Directive 89/592/EEC, Council Directive 93/22/EEC and Directive 2001/34/EC of the European Parliament and of the Council, shall cooperate and supply each other with information wherever necessary for the application of the rules drawn up in accordance with this Directive and in particular in cases covered by points (b), (c) and (e) of paragraph 2. Information thus exchanged shall be covered by the obligation of professional secrecy to which the persons employed or formerly employed by the supervisory authorities receiving the information are subject. Cooperation shall include the ability to serve the legal documents necessary to enforce measures taken by the competent authorities in connection with bids, as well as such other assistance as may reasonably be requested by the supervisory authorities concerned for the purpose of investigating any actual or alleged breaches of the rules made or introduced pursuant to this Directive.

5. The supervisory authorities shall be vested with all the powers necessary for carrying out their duties, including that of ensuring that the parties to the bid comply with the rules established pursuant to this Directive.

Provided that the general principles set out in Article 3(1) are respected, Member States may provide in their rules made or introduced pursuant to this Directive that their supervisory authorities may, in certain types of cases determined at national level and/or in other special cases, grant derogations from these rules on the basis of a reasoned decision.

5. This Directive does not affect the power which courts may have in a Member State to decline to hear legal proceedings and to decide whether or not such proceedings affect the outcome of the bid provided that an injured party enjoys adequate remedies, whether through an appeals procedure operated by the supervisory authority or through the right to take proceedings before the courts to claim compensation.

6. This Directive shall not affect the power of the Member States to designate judicial or other authorities responsible for dealing with disputes and for deciding on irregularities committed during the bid procedure or the power of Member States to regulate whether and under which circumstances parties to a bid are entitled to bring administrative or judicial proceedings. In particular, this Directive shall not affect the power which courts may have in a Member State to decline to hear legal proceedings and to decide whether or not such proceedings affect the outcome of a bid. This Directive shall not affect the power of the Member States to determine the legal position concerning the liability of supervisory authorities or concerning litigation between the parties to a bid.

Article 5

Protection of minority shareholders; mandatory bid; equitable price

1. Where a natural or legal person who, as a result of his own acquisition or the acquisition by persons acting in concert with him, holds securities of a company referred to in Article 1(1) which, added to any existing holdings and the holdings of persons acting in concert with him, directly or indirectly give him a specified percentage of voting rights in that company, conferring on him the control of that company, Member States shall ensure that this person is required to make a bid as a means of protecting the minority shareholders of that company. This bid shall be addressed at the earliest opportunity to all holders of securities for all their holdings at an equitable price.
2. Where control has been obtained following a voluntary bid made in accordance with this Directive to all holders of securities for all their holdings, the obligation to launch a bid laid down in paragraph 1 shall no longer apply.
3. The percentage of voting rights which confers control for the purposes of paragraph 1 and the method of its calculation shall be determined by the rules of the Member State in which the company has its registered office.
4. The highest price paid for the same securities by the offeror, or by persons acting in concert with him, over a period of between six and twelve months prior to the bid referred to in paragraph 1 shall be regarded as an equitable price. Member States may authorise their supervisory authorities to adjust the price referred to in the first subparagraph in circumstances and according to criteria that are clearly determined. To that end, they shall draw up a list of circumstances in which the highest price may be adjusted either upwards or downwards, for example where the highest price was set by agreement between the purchaser and a seller, where the market prices of the securities in question have been manipulated, where market prices in general or certain market prices in particular have been affected by exceptional occurrences, or in order to enable a firm in difficulty to be rescued. They may also determine the criteria to be applied in such cases, for example the average market value over a particular period, the break-up value of the company or other objective valuation criteria generally used in financial analysis. Any decision by a supervisory authority to adjust the equitable price shall be substantiated and made public.

Article 3

Protection of minority shareholders

1. Where a natural person or legal entity who as a result of acquisition, holds securities which added to any existing holdings give him a specified percentage of voting rights in a company referred to in Article 1, conferring on him the control of that company, Member States should ensure that rules or other mechanisms or arrangements are in force which either oblige this person to make a bid in accordance with Article 10 or offer other appropriate and at least equivalent means in order to protect the minority shareholders of that company.
2. The percentage of voting rights which confers control for the purposes of paragraph 1 and the way of its calculation shall be determined by the law of the Member State where the supervisory authority is located

Article 10

Mandatory bid

1. Where a Member State provides for a mandatory bid as a means to protect the minority shareholders, this bid shall be launched to all shareholders for all or for a substantial part of their holdings at a price which meets the objective of protecting their interests.
2. If the mandatory bid comprises only a part of the securities of the offeree company and the shareholders offer to sell to the offeror more shares than the partial offer covers, shareholders should be treated equally by means of a pro rata treatment of their shareholdings.

5. The consideration offered by the offeror may consist exclusively of liquid securities.

Where the consideration offered by the offeror does not consist of liquid securities admitted to trading on a regulated market, Member States may stipulate that such consideration has to include a cash consideration at least as an alternative.

In any event, the offeror shall offer a cash consideration at least as an alternative where, either individually or together with persons acting in concert with him, over a period beginning at least three months before his bid is made pursuant to Article 6(1) and ending before expiry of the period for acceptance of the bid, he has purchased in cash more than 5% of the securities or voting rights of the offeree company.

6. The Commission shall adopt, in accordance with the procedure referred to in Article 17(2), the rules for the application of paragraphs 4 and 5 of this Article.

7. In addition to the protection provided under paragraph 1, Member States may provide for further instruments aimed at protecting the interests of holders of securities in so far as these instruments do not hinder the normal course of the bid.

Article 6

Information on the bid

1. Member States shall ensure that the decision to make a bid is made public without delay and that the supervisory authority is informed of the bid. They may require that the supervisory authority is informed before this decision is made public. As soon as the bid has been made public, the boards of the offeree company and of the offeror shall inform respectively the representatives of their employees or, where there are no such representatives, the employees themselves.

2. Member States shall ensure that the offeror is required to draw up and make public in good time an offer document containing the information necessary to enable the holders of securities of the offeree company to reach a properly informed decision on the bid. Before the offer document is made public, the offeror shall communicate it to the supervisory authority. When it is made public, the boards of the offeree company and of the offeror shall communicate it respectively to the representatives of their employees or, where there are no such representatives, to the employees themselves.

Where the offer document referred to in the first subparagraph is subject to the prior approval of the supervisory authority and has been approved, it shall be recognised, subject to any translation, in any other Member State on whose market the securities of the offeree company are admitted to trading, without it being necessary to obtain the approval of the supervisory authorities of that Member State. The latter may require additional information to be included in the offer document only if such information is specific to the market of the Member State or Member States where the securities of the offeree company are admitted to trading and relates to the formalities to be complied with for accepting the bid and for receiving the consideration due at the close of the bid as well as to the tax arrangements to which the consideration offered to the holders of securities will be subject.

3. The offer document referred to in paragraph 2 shall state at least:

- (a) the terms of the bid;
- (b) the identity of the offeror and, where the offeror is a company, the type, name and registered office of that company;
- (c) the securities or, where appropriate, the class or classes of securities for which the bid is made;
- (d) the consideration offered for each security or class of securities and, in the case of mandatory bids, the method employed in determining it, with particulars of the way in which that consideration is to be paid;

Article 6

Information

1. Member States shall ensure that rules are in force requiring that the decision to make a bid is made public and that the supervisory authority and the board of the offeree company are informed of the bid before this decision is made public.

2. Member States shall ensure that rules are in force requiring the offeror to draw up and make public in good time an offer document containing the information necessary to enable the addressees of the bid to reach a properly informed decision on the bid. Before the offer document is made public, the offeror shall communicate it to the supervisory authority.

3. Those rules shall require that the document state at least:

- the terms of the bid,
- the identity of the offeror or, where the offeror is a company, the type, name and registered office of that company,
- the securities or class, or classes of securities for which the bid is made,
- the consideration offered for each security or class of securities and the basis of the valuation used in determining it with particulars of the way in which that consideration is to be given,
- the maximum and minimum percentages or quantities of securities which the offeror undertakes to acquire,
- details of any existing holdings of the offeror in the offeree company,
- all conditions to which the offer is subject,
- the offeror's intentions with regard to the future business and undertakings of the offeree company, its employees and its management,
- the period for acceptance of the bid, which may not be less than four weeks or more than 10 weeks from the date on which the document is made public,
- where the consideration offered by the offeror includes securities, information about those securities.

4. Member States shall ensure that rules are in force requiring that the parties to a bid to provide the supervisory authority at any time on request with all information in their possession concerning the bid which the supervisory authority considers necessary for the discharge of its functions.

- (e) the maximum and minimum percentages or quantities of securities which the offeror undertakes to acquire;
- (f) details of any existing holdings of the offeror, and of persons acting in concert with him, in the offeree company;
- (g) all the conditions to which the bid is subject;
- (h) the offeror's intentions with regard to the future business of the offeree company and, in so far as it is affected by the bid, the offeror company and with regard to safeguarding the jobs of their employees and management, including any material change in the conditions of employment. This shall concern in particular the offeror's strategic plans for the two companies and the likely repercussions on employment and the locations of the companies' places of business;
- (i) the period for acceptance of the bid;
- (j) where the consideration offered by the offeror includes securities of any kind, information about those securities;
- (k) information on the financing for the bid;
- (l) the identity of persons acting in concert with the offeror or with the offeree company and, in the case of companies, their type, name, registered office and relationship with the offeror and, where possible, with the offeree company;
- (m) indication of the national law which will govern contracts concluded between the offeror and holders of securities of the offeree company as a result of the bid and the competent courts.

4. The Commission shall adopt, in accordance with the procedure referred to in Article 17(2), the rules for the application of paragraph 3 of this Article.

5. Member States shall ensure that the parties to a bid are required to provide the supervisory authorities of their Member State at any time on request with all information in their possession concerning the bid which is necessary for the supervisory authority to discharge its functions.

Article 7

Period for acceptance

1. Member States shall provide that the period for acceptance of the bid may not be less than two weeks or more than ten weeks from the date of publication of the offer document. Provided that the general principle laid down in Article 3(1)(f) is respected, Member States may provide that the period of ten weeks may be prolonged on the condition that the offeror gives at least two weeks' notice of its intention to close the bid.

2. Member States may provide for rules modifying the period mentioned in paragraph 1 in specific cases. They may authorise the supervisory authority to grant a derogation from the period mentioned in paragraph 1 in order to allow the offeree company to call a general meeting to consider the bid.

Article 8

Disclosure

1. Member States shall ensure that a bid must be made public in such a way as to ensure market transparency and integrity for the securities of the offeree company, of the offeror or of any other company affected by the bid, in particular in order to prevent the publication or dissemination of false or misleading information.
2. Member States shall provide for the disclosure of all information or documents required by Article 6 in such a manner as to ensure that they are both readily and promptly available to the holders of securities at least in those Member States where the securities of the offeree company are admitted to trading on a regulated market and to the representatives of the employees of the offeree company or, where there are no such representatives, to the employees themselves.

Article 7

Disclosure

1. Member States shall ensure that rules are in force which require a bid to be made public in such a way as to avoid the creation of false markets in the securities of the offeree company or of the offeror.
2. Member States shall ensure that rules are in force which provide for the disclosure of all information or documents required in such a manner as to ensure that they are both readily and promptly available to the addressees of the bid.

Article 9

Obligations of the board of the offeree company

1. Member States shall ensure that rules laid down in paragraphs 2 to 5 below are complied with.
2. During the period referred to in the second subparagraph, the board of the offeree company must obtain the prior authorisation of the general meeting of shareholders given for this purpose before taking any action other than seeking alternative bids which may result in the frustration of the bid and in particular before issuing any shares which may result in a lasting impediment to the offeror in obtaining control over the offeree company.
Such authorisation shall be mandatory at least from the time the board of the offeree company receives the information concerning the bid referred to in the first sentence of Article 6(1) and until the result of the bid is made public or the bid lapses. Member States may stipulate that such authorisation is to be obtained at an earlier stage, for example from the time when the board of the offeree company becomes aware that the bid is imminent.
3. As regards decisions taken before the beginning of the period referred to in the second subparagraph of paragraph 2 and not yet partly or fully implemented, the general meeting of the shareholders shall approve or confirm any decision which does not form part of the normal course of the company's business and whose implementation may result in the frustration of the bid.
4. For the purpose of obtaining the prior authorisation or confirmation of the holders of securities referred to in paragraphs 2 and 3, Member States may adopt rules allowing a general meeting to be called at short notice, provided that the meeting does not take place within two weeks of notification being given.
5. The board of the offeree company shall draw up and make public a document setting out its opinion on the bid, together with the reasons on which it is based, including its views on the effects on all the interests of the company, including employment, and on the offeror's strategic plans for the offeree company and their likely effects on employment and the locations of the company's places of business as set out in the offer document in accordance with Article 6(3)(h). The board of the offeree company shall at the same time communicate that opinion to the representatives of its employees or, where there are no such representatives, the employees themselves. Where the board of the offeree company receives in good time a separate opinion from the representatives of its employees on the effects of the bid on employment, that opinion shall be appended to the document.

Article 10

Information on companies referred to in Article 1(1)

1. Member States shall ensure that companies referred to in Article 1(1) publish detailed information on the following:
 - (a) the structure of their capital, including securities which are not admitted to trading on a regulated market in a Member State, where appropriate with an indication of the different classes of shares and, for each class of shares, the rights and obligations attaching to it and the percentage of total share capital that it represents;
 - (b) any restrictions on the transfer of securities, such as limitations on the holding of securities or the need to obtain the approval of the company or other holders of securities, without prejudice to Article 46 of Directive 2001/34/EC;
 - (c) significant direct and indirect shareholdings (including indirect shareholdings through pyramid structures and cross-shareholdings) within the meaning of Article 85 of Directive 2001/34/EC;
 - (d) the holders of any securities with special control rights and a description of these rights;
 - (e) the system of control of any employee share scheme where the control rights are not exercised directly by the employees;
 - (f) any restrictions on voting rights, such as limitations of the right to vote for holders of a given percentage or number of votes, deadlines for exercising the right to vote or separation of the right to vote from the holding of a security;

Article 8

Obligations of the board of the offeree company

- Member States shall ensure that rules are in force requiring that:
- (a) after receiving the information concerning the bid and until the result of the bid is made public, the board of the offeree company should abstain from any action which may result in the frustration of the offer, and notably from the issuing of shares which may result in a lasting impediment to the offeror to obtain control over the offeree company, unless it has the prior authorization of the general meeting of the shareholders given for this purpose;
 - (b) the board of the offeree company shall draw up and make public a document setting out its opinion on the bid together with the reasons on which it is based.

- (g) agreements between shareholders which may result in restrictions on the transfer of securities and/or voting rights within the meaning of Article 87(1)(c) of Directive 2001/34/EC;
- (h) the rules governing the appointment and replacement of board members and the amendment of the articles of association;
- (i) the powers of board members, and in particular the power to issue or buy back shares;
- (j) significant agreements to which the company is a party and which take effect, alter or terminate upon a change of control of the company and the effects thereof;
- (k) any agreements between the company and its board members or employees providing for compensation if they are made redundant without valid reason following a takeover bid.

2. The information referred to in paragraph 1 shall be published in the company's annual report within the meaning of Article 46 of Council Directive 78/660/EEC and Article 36 of Council Directive 83/349/EEC and, where appropriate, updated during the year in accordance with the transparency requirements applicable to companies whose securities are admitted to trading on a regulated market.

3. Member States shall ensure that, in the case of companies whose securities are admitted to trading on a regulated market in a Member State, the general meeting of shareholders takes a decision at least every two years on the structural aspects and defensive mechanisms referred to in paragraph 1. They shall require the board to state the reasons for those structural aspects and defensive mechanisms.

Article 11

Unenforceability of restrictions on the transfer of securities and voting rights

1. Without prejudice to the obligations imposed by Community law on companies whose securities are admitted to trading on a regulated market in a Member State, Member States shall ensure that the safeguards referred to in paragraphs 2, 3 and 4 are afforded when a bid has been made public.

2. Any restrictions on the transfer of securities provided for in the articles of association of the offeree company shall be unenforceable against the offeror during the period for acceptance of the bid.

Any restrictions on the transfer of securities provided for in contractual agreements between the offeree company and holders of its securities or between holders of securities of the offeree company shall be unenforceable against the offeror during the period for acceptance of the bid.

3. Any restrictions on voting rights provided for in the articles of association of the offeree company shall cease to have effect when the general meeting decides on any defensive measures in accordance with Article 9.

Any restrictions on voting rights provided for in contractual agreements between the offeree company and holders of its securities or between holders of securities of the offeree company shall cease to have effect when the general meeting decides on any defensive measures in accordance with Article 9.

4. Where, following a bid, the offeror holds a number of securities of the offeree company which, under the applicable national law, would enable him to amend the company's articles of association, any restrictions on the transfer of securities and on voting rights referred to in paragraphs 2 and 3 and any special rights of shareholders concerning the appointment or removal of board members shall cease to have effect at the first general meeting following closure of the bid. To that end, the offeror shall have the right to convene a general meeting at short notice, provided that the meeting does not take place within two weeks of notification.

5. Paragraphs 2 and 3 shall not apply to securities without voting rights which carry specific pecuniary advantages.

Article 12

Other rules applicable to the conduct of bids
Member States shall also lay down rules which govern the conduct of bids at least as regards the following:

- (a) lapse of the bid;
- (b) revision of bids;
- (c) competing bids;
- (d) disclosure of the results of bids;
- (e) irrevocability of the bid and conditions permitted.

Article 9

Rules applicable to the conduct of bids
In addition Member States shall ensure that rules are in force which govern the conduct of bids at least for the following matters:

- (a) withdrawal or nullity of the bid
- (b) revision of bids
- (c) competing bids
- (d) disclosure of the result of bids.

Article 13

Information for and consultation of employees' representatives
Without prejudice to the provisions of this Directive, the provision of information to and consultation of representatives of the employees of the offeror and the offeree company shall be governed by the relevant national provisions, and in particular those adopted pursuant to Directives 94/45/EC, 98/59/EC and 2002/14/EC.

Article 14

Squeeze-out right

1. Member States shall ensure that, following a bid made to all the holders of securities of the offeree company for all their securities, an offeror is able to require the holders of the remaining securities to sell him those securities at a fair price in either of the following cases:

- (a) where he holds securities representing not less than 90% of the capital of the offeree company, or
- (b) where he has acquired, through acceptance of the bid, securities representing not less than 90% of the capital concerned by the bid.

In the case referred to in point (a) above, Member States may set a higher threshold that may not, however, be more than 95% of the company's capital.

2. Member States shall ensure that rules are in force making it possible to calculate when the threshold is reached.

Where the offeree company has issued more than one class of shares, the rule laid down in paragraph 1 shall apply separately within each class.

3. Member States shall ensure that a fair price is guaranteed. That price shall take the same form as the consideration offered in the bid.

Following a voluntary bid, the price shall be presumed to be fair where it corresponds to the consideration offered in the bid and the offeror has acquired, through acceptance of the bid, securities representing not less than 90% of the capital concerned by the bid.

Following a mandatory bid, the consideration offered in the bid shall be presumed to be fair.

4. In both the cases referred to in points (a) and (b) of paragraph 1, the fair price presumption shall apply only where the squeeze-out right is exercised within a period of three months after the end of the period for acceptance of the bid. In all other cases, the price shall be determined by an independent expert.

Article 15

Sell-out right

1. Member States shall ensure that, following a bid made to all the holders of securities of the offeree company for all their securities, a minority holder of securities is able to require the offeror holding not less than 90% of the capital of the offeree company to buy his securities from him at a fair price. They may set a higher threshold, but this may not be more than 95% of the company's capital.

However, the sell-out right may not be exercised where the specified threshold has been reached only for a short period.

2. Where the offeree company has issued more than one class of shares, the rule laid down in paragraph 1 shall apply separately within each class.

3. The price shall be determined in accordance with the provisions of Article 14(3) and (4).

Article 16

Sanctions

Member States shall determine the sanctions to be applied for infringement of the national measures adopted pursuant to this Directive and shall take all the necessary steps to ensure that they are put into effect. The sanctions thus provided for shall be effective, proportionate and dissuasive. Member States shall notify these measures to the Commission not later than the date laid down in Article 20(1) and any subsequent change thereto at the earliest opportunity.

Article 17

Committee procedure

1. The Commission shall be assisted by the European Securities Committee established by Commission Decision 2001/528/EC.

2. Where reference is made to this paragraph, the regulatory procedure laid down in Article 5 of Decision 1999/468/EC shall apply, having due regard to Articles 7(3) and 8 thereof.

3. The period referred to in Article 5(6) of Decision 1999/468/EC shall be three months.

Article 18

Revision

Five years after the date laid down in Article 20(1), the Commission shall examine Articles 4(2), 10 and 11 and, if necessary, propose that they be revised in the light of the experience acquired in applying them.

Article 19

Transitional period

Member States are authorised to postpone application of Article 9 for a period of not more than three years after the date laid down in Article 20(1), provided that they inform the Commission thereof not later than that date

Article 20

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 1 January 2005. They shall forthwith inform the Commission thereof.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the texts of the main provisions of national law that they adopt in the fields governed by this Directive.

Article 11

Transposition of the Directive

1. Member States shall ensure that the laws, regulations and administrative provisions or other mechanisms or arrangements necessary for them to comply with this Directive are in force before 1 April 1998.

2. Member States shall communicate to the Commission the provisions or other arrangements referred to in paragraph 1, making express reference to this Directive.

ANNEX B: M&A activity in the European Union

Evolution of National, Community and International M&A operations				
Year	National	Community	Internat.	Total
1991	65.1%	14.0%	20,90%	100.0%
1992	67.9%	12.9%	19,30%	100.0%
1993	63.5%	12.5%	24%	100.0%
1994	62.7%	13.6%	23,70%	100.0%
1995	61.0%	13.5%	25,40%	100.0%
1996	57.9%	13.5%	28,60%	100.0%
1997	56.8%	14.3%	28,90%	100.0%
1998	55.0%	14.5%	30,40%	100.0%
1999	56.5%	15.0%	28,60%	100.0%

Source : SDC – M&A.
Commission (2000)

Table 1

Evolution of M&A involving EU firms		
Year	Number	% change
1991	10657	
1992	10074	-5,50%
1993	8759	13,10%
1994	9050	3,30%
1995	9854	8,90%
1996	8975	-8,90%
1997	9784	9,00%
1998	11300	15,50%
1999	14335	26,90%
2000	16750	16,80%
2001	12557	25,00%
From 2002 to May 2003	7390	

Source : SDC – M&A 1990-2001
Commission (2001)
Bloombergs 2002-2003

Table 2

Distribution of M&A activity and GDP between Member States, 1991–1999		
Member State	Share of M&A activity (%)	Share of GDP (%)
B	2.80	3.2
DK	2.54	2.1
D	16.54	28.4
EL	0.67	1.4
E	4.84	6.9
F	14.38	18.1
IRL	1.58	0.8
I	6.39	12.7
L	0.47	0.2
NL	6.90	4.9
A	1.91	2.7
P	1.06	1.3
FIN	4.15	1.6
S	5.34	2.8
UK	30.45	13.0
EU	100	100

Note: In calculating this table, cross-border intra-Community operations are counted twice once for the bidder country and once for the target country.
Source: Commission (2000) SDC M&A.

Table 3

ANNEX C: M&A activity in the European Union

Distribution of M&A activity and GDP between Member States, 1991–2001 and 2002-2003			
Member State	Share of M&A activity (%)	Share of GDP (%)	2002/2003
B	2,83	3,2	3,2
DK	2,55	2,1	2,2
D	16,28	28,2	15,2
EL	1,12	1,4	2,6
E	5	7	4,2
F	13,5	18,1	10,3
IRL	1,68	0,9	1,6
I	6,23	12,6	7,3
L	0,48	0,2	0,7
NL	6,45	4,9	6,5
A	2,09	2,7	1,5
P	1,21	1,3	1,4
FIN	3,85	1,6	2,8
S	5,34	2,8	5,4
UK	31,39	13,2	35,3
EU	100	100	100

Note: In calculating this table, cross-border intra-Community operations are counted twice: once for the bidder country and once for the target country
Source: SDC M&A, Commission (2001) for 1991-2001
Own calculations based on Bloombergs

Table 4

Geographical breakdown by Member State 1998–1999				
	Operations			
	National	Community*	International	Total
B	32.3	46.1	21,6	100.0
DK	32.7	40.9	26,5	100.0
D	48.3	25.8	26	100.0
EL	71.9	10.6	17,6	100.0
E	58.7	21.6	19,7	100.0
F	42.1	30.6	27,3	100.0
IRL	27.9	42.6	29,5	100.0
I	44.7	31.5	23,8	100.0
L	4.9	68.1	27,1	100.0
NL	32.4	38.8	28,9	100.0
A	30.9	38.8	30,3	100.0
P	48.5	31.6	19,9	100.0
FIN	52.9	28.7	18,4	100.0
S	37.1	33.5	29,3	100.0
UK	59.1	14.7	26,2	100.0
EU	55.8	14.8	29,4	100.0

* At the level of individual Member States, the figures include both operations targeting firms in that country and operations in which that country's firms were bidders.
Source : SDC – M&A Commission (2000)

Table 5

ANNEX D: Breakdown of target countries in European Union cross-border M&A activities 1998-1999

Community operations - breakdown of target countries by bidder country 1998–1999																
Target country																
Bidder:	B	DK	D	EL	E	F	IRL	I	L	NL	A	P	FIN	S	UK	EU
B	–	2.7%	4.6%	0.0%	2.6%	12.0%	4.2%	3.3%	38.5%	15.5%	1.6%	6.3%	0.0%	2.8%	7.6%	6.5%
DK	2.7%	-	4.0%	0.0%	1.7%	1.2%	2.8%	1.8%	0.0%	4.6%	4.1%	0.0%	11.1%	15.6%	3.7%	3.8%
D	10.8%	17.1%	–	31.8%	15.8%	18.1%	8.3%	20.3%	17.9%	25.4%	66.7%	3.8%	6.3%	16.0%	19.4%	16.3%
EL	0.0%	0.0%	0.4%	-	1.0%	0.4%	0.0%	0.4%	0.0%	0.4%	0.8%	0.0%	0.0%	0.9%	1.4%	0.6%
E	1.1%	0.0%	1.6%	0.0%	–	2.2%	0.0%	2.9%	0.0%	0.7%	2.4%	50.6%	0.8%	0.0%	1.6%	2.5%
F	22.7%	7.2%	13.9%	13.6%	18.8%	-	1.4%	21.0%	5.1%	10.6%	1.6%	13.9%	2.4%	6.6%	16.3%	11.5%
IRL	0.5%	0.9%	0.9%	0.0%	0.3%	1.0%	–	0.7%	0.0%	1.1%	0.8%	1.3%	0.8%	1.9%	18.8%	3.5%
I	3.2%	0.0%	4.9%	13.6%	7.3%	8.3%	0.0%	-	15.4%	3.5%	4.1%	6.3%	1.6%	0.9%	4.9%	4.6%
L	2.2%	0.9%	1.5%	4.5%	0.3%	3.0%	0.0%	6.2%	–	1.8%	0.0%	0.0%	0.0%	0.9%	1.0%	1.7%
NL	28.6%	7.2%	20.9%	9.1%	12.5%	13.8%	2.8%	10.1%	2.6%	-	5.7%	5.1%	4.0%	9.0%	14.7%	12.5%
A	1.1%	0.0%	5.1%	0.0%	0.7%	1.6%	0.0%	3.6%	0.0%	0.0%	–	0.0%	1.6%	0.5%	1.4%	1.8%
P	0.0%	0.0%	0.0%	0.0%	8.3%	0.2%	0.0%	0.4%	0.0%	0.4%	0.0%	-	0.0%	0.0%	0.2%	0.9%
FIN	2.7%	7.2%	4.2%	0.0%	0.3%	1.6%	1.4%	2.9%	0.0%	1.8%	3.3%	0.0%	–	20.8%	2.4%	3.5%
S	2.7%	42.3%	7.9%	9.1%	4.3%	6.1%	1.4%	3.6%	5.1%	3.2%	0.8%	3.8%	60.3%	-	6.5%	8.1%
UK	21.6%	14.4%	30.0%	18.2%	26.1%	30.6%	77.8%	22.8%	15.4%	31.3%	8.1%	8.9%	11.1%	24.1%	-	22.3%
EU	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

Source : SDC – M&A.
Commission (2000)

Year

ANNEX E: Breakdown of target countries in European Union cross-border M&A activities 2000-2001

Community operations - breakdown of target countries by bidder country 2000-2001																
Target country																
Bidder:	B	DK	D	GR	E	F	IRL	I	L	NL	A	P	FIN	S	UK	EU
B	-	2.4%	4.5%	0.0%	2.6%	16.8%	3.1%	3.1%	14.3%	14.4%	2.5%	4.0%	1.1%	1.6%	5.0%	6.2%
DK	2.8%	-	3.2%	2.4%	1.5%	3.5%	0.8%	1.9%	0.0%	2.1%	1.9%	1.0%	13.7%	19.9%	5.4%	4.5%
D	17.5%	13.4%	-	14.3%	12.9%	18.0%	5.4%	19.1%	30.6%	24.1%	68.3%	10.0%	9.7%	12.4%	21.1%	16.4%
GR	0.8%	1.2%	1.2%	-	0.5%	0.5%	1.5%	1.6%	2.0%	1.6%	0.6%	0.0%	0.6%	0.3%	1.7%	1.0%
E	1.6%	0.6%	2.3%	2.4%	-	4.9%	1.5%	4.7%	2.0%	2.4%	1.2%	38.0%	3.4%	0.7%	1.2%	3.1%
F	27.5%	9.8%	16.1%	19.0%	19.6%	-	4.6%	26.6%	10.2%	14.7%	6.2%	17.0%	6.3%	7.2%	18.6%	13.7%
IRL	0.4%	1.2%	0.3%	0.0%	0.5%	0.9%	-	0.6%	0.0%	1.3%	1.9%	1.0%	3.4%	1.0%	15.8%	3.1%
I	2.4%	0.6%	7.8%	21.4%	11.6%	9.8%	2.3%	-	14.3%	3.7%	3.1%	6.0%	2.3%	2.9%	6.5%	6.0%
L	0.4%	0.6%	1.4%	4.8%	2.8%	2.0%	0.0%	2.5%	-	1.8%	1.2%	0.0%	0.0%	1.6%	0.6%	1.4%
NL	26.3%	7.9%	13.1%	14.3%	12.6%	10.2%	6.2%	8.8%	8.2%	-	2.5%	6.0%	4.6%	7.2%	12.1%	10.1%
A	1.2%	1.2%	10.4%	0.0%	0.5%	0.5%	0.0%	4.4%	0.0%	1.6%	-	0.0%	1.7%	2.6%	1.6%	2.7%
P	0.4%	0.0%	0.2%	2.4%	7.7%	0.5%	0.0%	0.6%	0.0%	0.5%	0.0%	-	0.0%	0.0%	0.6%	1.0%
FIN	2.0%	9.1%	6.1%	2.4%	1.0%	1.5%	1.5%	1.6%	0.0%	2.9%	0.6%	0.0%	-	24.8%	2.0%	4.1%
S	2.8%	36.0%	5.4%	2.4%	2.3%	3.8%	2.3%	4.1%	10.2%	6.8%	1.2%	4.0%	42.3%	-	7.8%	7.1%
UK	13.9%	15.9%	28.0%	14.3%	23.7%	27.1%	70.8%	20.6%	8.2%	22.0%	8.7%	13.0%	10.9%	17.6%	-	19.6%
EU	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%

Source:SDC - M&A
Commission (2001b)

ANNEX F: Breakdown of target countries in European Union cross-border M&A activities 2002-2003

Community operation - breakdown of target countries by bidder country 2002-May 2003																
Target country																
Bidder:	B	DK	D	EL	E	F	IRL	I	L	NL	A	P	FIN	S	UK	EU
B	-	4,5%	2,0%	0,0%	2,6%	4,8%	0,0%	2,4%	4,2%	10,5%	5,0%	0,0%	6,8%	2,6%	6,2%	4,8%
DK	0,0%	-	2,0%	0,0%	0,0%	0,0%	0,0%	0,0%	0,0%	3,5%	5,0%	0,0%	11,4%	15,6%	2,6%	3,5%
D	25,5%	4,5%	-	33,3%	15,8%	23,8%	20,0%	28,6%	33,3%	27,2%	75,0%	0,0%	27,3%	20,8%	23,8%	22,1%
EL	2,0%	4,5%	0,0%	-	0,0%	2,4%	0,0%	7,1%	0,0%	0,9%	0,0%	0,0%	0,0%	0,0%	0,5%	1,1%
E	7,8%	9,1%	6,0%	33,3%	-	13,1%	0,0%	16,7%	4,2%	7,0%	0,0%	80,0%	2,3%	2,6%	7,8%	7,4%
F	29,4%	18,2%	17,0%	0,0%	21,1%	-	5,0%	26,2%	25,0%	14,9%	0,0%	0,0%	4,5%	16,9%	24,4%	16,8%
IRL	0,0%	0,0%	1,0%	0,0%	0,0%	1,2%	-	0,0%	0,0%	2,6%	0,0%	0,0%	2,3%	1,3%	6,7%	2,4%
I	5,9%	18,2%	14,0%	0,0%	18,4%	14,3%	5,0%	-	16,7%	5,3%	0,0%	20,0%	2,3%	3,9%	6,7%	8,2%
L	2,0%	0,0%	5,0%	0,0%	0,0%	1,2%	0,0%	2,4%	-	0,9%	0,0%	0,0%	0,0%	0,0%	1,0%	1,3%
NL	13,7%	4,5%	10,0%	0,0%	2,6%	9,5%	5,0%	0,0%	4,2%	-	10,0%	0,0%	9,1%	7,8%	9,8%	7,2%
A	0,0%	0,0%	11,0%	0,0%	0,0%	3,6%	0,0%	4,8%	4,2%	1,8%	-	0,0%	4,5%	1,3%	0,0%	2,6%
P	0,0%	0,0%	2,0%	0,0%	23,7%	1,2%	0,0%	2,4%	4,2%	0,0%	0,0%	-	0,0%	0,0%	3,1%	2,4%
FIN	0,0%	9,1%	2,0%	0,0%	0,0%	0,0%	0,0%	2,4%	0,0%	0,0%	5,0%	0,0%	-	14,3%	1,6%	2,4%
S	2,0%	22,7%	9,0%	33,3%	2,6%	7,1%	15,0%	0,0%	0,0%	3,5%	0,0%	0,0%	25,0%	-	5,7%	6,2%
UK	11,8%	4,5%	19,0%	0,0%	13,2%	17,9%	50,0%	7,1%	4,2%	21,9%	0,0%	0,0%	4,5%	13,0%	-	11,6%
EU	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%

Source: Own calculations based on data provided by Bloombergs

ANNEX G: Breakdown of bidder countries in European Union cross-border M&A activities 1998-1999

Community operations - breakdown of bidder countries by target country 1998-1999																
Target country																
-	B	DK	D	EL	E	F	IRL	I	L	NL	A	P	FIN	S	UK	EU
B	-	1.4%	11.5%	0.0%	3.7%	28.0%	1.4%	4.1%	6.9%	20.2%	0.9%	2.3%	0.0%	2.8%	17.0%	100%
DK	3.9%	-	17.2%	0.0%	3.9%	4.7%	1.6%	3.9%	0.0%	10.2%	3.9%	0.0%	10.9%	25.8%	14.1%	100%
D	3.6%	3.5%	-	1.3%	8.7%	16.8%	1.1%	10.2%	1.3%	13.1%	14.9%	0.5%	1.5%	6.2%	17.3%	100%
EL	0.0%	0.0%	10.5%	-	15.8%	10.5%	0.0%	5.3%	0.0%	5.3%	5.3%	0.0%	0.0%	10.5%	36.8%	100%
E	2.4%	0.0%	10.7%	0.0%	-	13.1%	0.0%	9.5%	0.0%	2.4%	3.6%	47.6%	1.2%	0.0%	9.5%	100%
F	10.9%	2.1%	19.6%	0.8%	14.7%	-	0.3%	15.0%	0.5%	7.8%	0.5%	2.8%	0.8%	3.6%	20.7%	100%
IRL	0.9%	0.9%	4.3%	0.0%	0.9%	4.3%	-	1.7%	0.0%	2.6%	0.9%	0.9%	0.9%	3.4%	78.6%	100%
I	3.9%	0.0%	17.5%	1.9%	14.3%	27.3%	0.0%	-	3.9%	6.5%	3.2%	3.2%	1.3%	1.3%	15.6%	100%
L	6.8%	1.7%	13.6%	1.7%	1.7%	25.4%	0.0%	28.8%	-	8.5%	0.0%	0.0%	0.0%	3.4%	8.5%	100%
NL	12.5%	1.9%	27.0%	0.5%	9.0%	16.5%	0.5%	6.6%	0.2%	-	1.7%	0.9%	1.2%	4.5%	17.0%	100%
A	3.3%	0.0%	46.7%	0.0%	3.3%	13.3%	0.0%	16.7%	0.0%	0.0%	-	0.0%	3.3%	1.7%	11.7%	100%
P	0.0%	0.0%	0.0%	0.0%	86.2%	3.4%	0.0%	3.4%	0.0%	3.4%	0.0%	-	0.0%	0.0%	3.4%	100%
FIN	4.2%	6.7%	19.3%	0.0%	0.8%	6.7%	0.8%	6.7%	0.0%	4.2%	3.4%	0.0%	-	37.0%	10.1%	100%
S	1.8%	17.1%	15.6%	0.7%	4.7%	11.3%	0.4%	3.6%	0.7%	3.3%	0.4%	1.1%	27.6%	-	11.6%	100%
UK	5.3%	2.1%	21.8%	0.5%	10.5%	20.6%	7.4%	8.4%	0.8%	11.8%	1.3%	0.9%	1.9%	6.8%	-	100%
EU	5.5%	3.3%	16.2%	0.7%	9.0%	15.0%	2.1%	8.2%	1.2%	8.4%	3.6%	2.3%	3.7%	6.3%	14.5%	100%

Source : SDC – M&A
Commission (2000)

ANNEX H: Breakdown of bidder countries in European Union cross-border M&A activities 2000-2001

Community operations - breakdown of bidder countries by target country 2000-2001																
Target country																
-	B	DK	D	GR	E	F	IRL	I	L	NL	A	P	FIN	S	UK	EU
B	-	1.4%	10.5%	0.0%	3.6%	39.9%	1.4%	3.6%	2.5%	19.9%	1.4%	1.4%	0.7%	1.8%	11.6%	100%
DK	3.6%	-	10.7%	0.5%	3.0%	11.7%	0.5%	3.0%	0.0%	4.1%	1.5%	0.5%	12.2%	31.0%	17.8%	100%
D	6.1%	3.0%	-	0.8%	6.9%	16.3%	1.0%	8.4%	2.1%	12.7%	15.2%	1.4%	2.3%	5.2%	18.7%	100%
GR	4.4%	4.4%	17.8%	-	4.4%	6.7%	4.4%	11.1%	2.2%	13.3%	2.2%	0.0%	2.2%	2.2%	24.4%	100%
E	2.9%	0.7%	11.0%	0.7%	-	23.5%	1.5%	11.0%	0.7%	6.6%	1.5%	27.9%	4.4%	1.5%	5.9%	100%
F	11.4%	2.6%	17.3%	1.3%	12.5%	-	1.0%	14.0%	0.8%	9.2%	1.7%	2.8%	1.8%	3.6%	19.8%	100%
IRL	0.7%	1.5%	1.5%	0.0%	1.5%	4.4%	-	1.5%	0.0%	3.7%	2.2%	0.7%	4.4%	2.2%	75.6%	100%
I	2.3%	0.4%	19.2%	3.4%	16.9%	24.1%	1.1%	-	2.6%	5.3%	1.9%	2.3%	1.5%	3.4%	15.8%	100%
L	1.6%	1.6%	14.3%	3.2%	17.5%	20.6%	0.0%	12.7%	-	11.1%	3.2%	0.0%	0.0%	7.9%	6.3%	100%
NL	14.9%	2.9%	19.1%	1.4%	11.0%	15.1%	1.8%	6.3%	0.9%	-	0.9%	1.4%	1.8%	5.0%	17.6%	100%
A	2.5%	1.7%	57.1%	0.0%	1.7%	2.5%	0.0%	11.8%	0.0%	5.0%	-	0.0%	2.5%	6.7%	8.4%	100%
P	2.3%	0.0%	2.3%	2.3%	68.2%	6.8%	0.0%	4.5%	0.0%	4.5%	0.0%	-	0.0%	0.0%	9.1%	100%
FIN	2.7%	8.2%	21.9%	0.5%	2.2%	5.5%	1.1%	2.7%	0.0%	6.0%	0.5%	0.0%	-	41.5%	7.1%	100%
S	2.2%	18.8%	11.2%	0.3%	2.9%	8.0%	1.0%	4.2%	1.6%	8.3%	0.6%	1.3%	23.6%	-	16.0%	100%
UK	4.1%	3.0%	21.1%	0.7%	10.6%	20.5%	10.6%	7.6%	0.5%	9.7%	1.6%	1.5%	2.2%	6.3%	-	100%
EU	5.7%	3.7%	14.7%	1.0%	8.8%	14.8%	2.9%	7.2%	1.1%	8.6%	3.6%	2.3%	4.0%	6.9%	14.6%	100%

Source:SDC - M&A
Commission (2001b)

ANNEX I: Breakdown of bidder countries in European Union cross-border M&A activities 2002-2003

Community operations - breakdown of bidder countries by target country 2002-May 2003																
Target Country																
-	B	DK	D	EL	E	F	IRL	I	L	NL	A	P	FIN	S	UK	EU
B	-	2,5%	5,0%	0,0%	2,5%	10,0%	0,0%	2,5%	2,5%	30,0%	2,5%	0,0%	7,5%	5,0%	30,0%	100%
DK	0,0%	-	6,9%	0,0%	0,0%	0,0%	0,0%	0,0%	0,0%	13,8%	3,4%	0,0%	17,2%	41,4%	17,2%	100%
D	7,0%	0,5%	-	0,5%	3,2%	10,8%	2,2%	6,5%	4,3%	16,8%	8,1%	0,0%	6,5%	8,6%	24,9%	100%
EL	11,1%	11,1%	0,0%	-	0,0%	22,2%	0,0%	33,3%	0,0%	11,1%	0,0%	0,0%	0,0%	0,0%	11,1%	100%
E	6,5%	3,2%	9,7%	1,6%	-	17,7%	0,0%	11,3%	1,6%	12,9%	0,0%	6,5%	1,6%	3,2%	24,2%	100%
F	10,6%	2,8%	12,1%	0,0%	5,7%	-	0,7%	7,8%	4,3%	12,1%	0,0%	0,0%	1,4%	9,2%	33,3%	100%
IRL	0,0%	0,0%	5,0%	0,0%	0,0%	5,0%	-	0,0%	0,0%	15,0%	0,0%	0,0%	5,0%	5,0%	65,0%	100%
I	4,3%	5,8%	20,3%	0,0%	10,1%	17,4%	1,4%	-	5,8%	8,7%	0,0%	1,4%	1,4%	4,3%	18,8%	100%
L	9,1%	0,0%	45,5%	0,0%	0,0%	9,1%	0,0%	9,1%	-	9,1%	0,0%	0,0%	0,0%	0,0%	18,2%	100%
NL	11,7%	1,7%	16,7%	0,0%	1,7%	13,3%	1,7%	0,0%	1,7%	-	3,3%	0,0%	6,7%	10,0%	31,7%	100%
A	0,0%	0,0%	50,0%	0,0%	0,0%	13,6%	0,0%	9,1%	4,5%	9,1%	-	0,0%	9,1%	4,5%	0,0%	100%
P	0,0%	0,0%	10,0%	0,0%	45,0%	5,0%	0,0%	5,0%	5,0%	0,0%	0,0%	-	0,0%	0,0%	30,0%	100%
FIN	0,0%	10,0%	10,0%	0,0%	0,0%	0,0%	0,0%	5,0%	0,0%	0,0%	5,0%	0,0%	-	55,0%	15,0%	100%
S	1,9%	9,6%	17,3%	1,9%	1,9%	11,5%	5,8%	0,0%	0,0%	7,7%	0,0%	0,0%	21,2%	-	21,2%	100%
UK	6,2%	1,0%	19,6%	0,0%	5,2%	15,5%	10,3%	3,1%	1,0%	25,8%	0,0%	0,0%	2,1%	10,3%	-	100%
EU	4,8%	3,5%	22,1%	1,1%	7,4%	16,8%	2,4%	8,2%	1,3%	7,2%	2,6%	2,4%	2,4%	6,2%	11,6%	100%

Source: Own calculations based on data provided by Bloombergs