

Hostile takeover bids in the European Union: regulatory steps en route to an integrated capital market¹

Ofertas públicas de aquisição hostil na União Europeia: etapas regulatórias a caminho de um mercado de capitais integrado

András Kecskés²

Vendel Halász³

Abstract: This paper intends to highlight the regulatory direction concerning hostile takeover bids, along the European Union moves forward. For the first sight it was difficult to forecast the effects of the EU Takeover Directive. Some of its provisions certainly meant a significant step towards establishing a higher level of protection for minority shareholders. However, some other provisions could have indirect adverse effects. The breakthrough rule for instance, as currently implemented into the national laws, seems unlikely to carry any kind of notable benefit in the short term.

-
- 1 This paper was supported by the János Bolyai Research Scholarship of the Hungarian Academy of Science.
 - 2 PhD by University of Pécs – Faculty of Law. Head of Department in the Department of Business and Commercial Law.
 - 3 PhD student in University of Pécs – Faculty of Law. Head of Unit in Audit and Regularities Unit of the Ministry of National Development.

There is a fundamental difference that can be revealed between the regulatory systems of the United States and the European Union in terms of their orientation. In the United States the practice of the Delaware courts definitely rejected shareholder decision making in numerous significant decisions concerning takeovers and simultaneously emphasized the importance of directors in corporate management. However, in Europe the regulations rely on shareholder decision making to a much greater extent.

Keywords: Breakthrough rule. Capital market. Delaware. European Union. Directive. Hostile takeover bid. Neutrality rule. Shareholders. United States of America.

Resumo: O presente artigo pretende destacar a instrução normativa concernente à oferta pública de aquisição hostil, ao longo da qual a União Europeia tem avançado. A princípio, era difícil prever os efeitos da Diretiva de Aquisição da UE (Diretiva 65/2014). Algumas das suas disposições, certamente, representam um passo significativo no sentido de estabelecer um nível mais elevado de proteção aos acionistas minoritários. Contudo, outras disposições podem apresentar efeitos adversos indiretos. A regra de ruptura, por exemplo, como atualmente implementada nas legislações domésticas (nacionais), parece pouco provável de realizar qualquer tipo de benefício notável em curto prazo. Há uma diferença fundamental que pode ser observada entre os sistemas regulatórios dos Estados Unidos e da União Europeia, em termos de sua orientação. Nos Estados Unidos, a prática dos tribunais de Delaware rejeitou definitivamente a tomada de decisão pelos acionistas em inúmeras e significantes decisões relativas à oferta pública de aquisição e, simultaneamente, enfatizou

a importância do corpo administrativo na gestão corporativa (empresarial). Na Europa, no entanto, as regulações dependem, em uma extensão muito maior, da tomada de decisão dos acionistas.

Palavras-chave: Regra de ruptura. Mercado de capitais. Delaware. União Europeia. Diretiva. Oferta pública de aquisição hostil. Regra da neutralidade. Acionistas. Estados Unidos da América.

1. Introduction

The European Union intended to regulate takeovers for the sake of establishing an integrated capital market.⁴ The target was therefore, to set up a single, efficient and liquid market of securities, which produces higher company value and lower costs of capital for European companies, meanwhile presents higher yield to the investors (shareholders).⁵ Furthermore, the directive can contribute to the establishment of a single European market of financial services; it can also promote the restructuring of companies and thereby enhance the European Union's competitiveness.⁶ It was an important aim of the legislator to abate the internationally significant role of the United States in the field of capital market regulation and to organise a strong capital market in Europe that could be one day the rival of the American one.⁷

4 TUCHINSKY, 2006-2007, p. 691.

5 Several studies comprise and justify the statement that hostile takeovers can increase the operational efficiency of companies. See, *e.g.*, TUCHINSKY, 2006-2007, p. 691, BEBCHUK, 1992, p. 1435, BERGSTROM *et al.*, 1995, p. 495 and p. 500 and CARY, 1974, p. 663.

6 HARVEY; NOURRY, 2008, p. 20.

7 TUCHINSKY, 2006-2007, p. 692.

Although the first remarkable step in this direction was the European Commission's White Paper of 1985,⁸ and on 19 January 1989 the European Commission introduced the initial proposal of the 13th company law directive to the Council (the purpose of which was to regulate takeovers), the adoption of the directive was a result of a more than 10-year⁹ long process.¹⁰ The Directive was finally signed by the European Parliament and the Council on 2 April 2004. The takeover directive – directive 2004/25/EC, which is also called the 13th company law directive – entered into effect on 20 May 2004. According to the Directive, Member States had to implement its provisions by 20 May 2006 the latest.

The main aim of this article is to introduce the most important rules of the European takeover directive, and its main effects. These remarkable, and in some cases groundbreaking rules are the following: the mandatory bid rule, the equal treatment of shareholders and equitable price, the neutrality rule, the breakthrough rule and the sell-out/squeeze-out rules.

2. The European regulation on mandatory bids

A remarkable achievement of the Directive for the protection of shareholder interests is the rule of mandatory bids that is applicable in case of takeovers (if a certain degree of control is acquired in the target company) and that is unknown to the legal system of the United States.¹¹ The above

8 COMMISSION OF THE EUROPEAN COMMUNITIES, 1985, p. 35, point 139 and COMMISSION OF THE EUROPEAN COMMUNITIES, 1992, p. 29 of the annex.

9 HARVEY; NOURRY, 2008, pp. 19-20.

10 CHEN, 2007, p. 101 and KECSKÉS; HALÁSZ, 2013, p. 431.

11 MAGNUSON, 2009, pp. 219-220.

statement is sustainable even considering that by 2004, most Member States of the European Union had adopted a similar requirement in their national legislation.¹² These provisions however, were quite different. As an achievement of the Directive, the regulation on mandatory bids in connection with the acquisition of control in public corporations is uniformly applicable in all member states and it provides protection to the small investors of these companies. Pursuant to the Directive, a takeover bid shall mean 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 those securities, whether mandatory or voluntary, which follows or has as its objective the acquisition of control of the offeree company in accordance with national law.¹³

The effect of corporate takeover regulation reforms on ownership structures in the European Union was examined by Marc Goergen, Marina Martynova and Luc Renneboog. They found that in the case of concentrated ownership structures, the mandatory bid rule decreases the number of transactions in respect of the shares providing control over the company, thereby rendering the block holder system less efficient, where the purchase of controlling share blocks represents the primary method for changing control over companies. Consequently, control over the company is maintained by the inefficient blockholder. The regulation further decreases the extent of the share block which the offeror may propose without making a mandatory bid. It is also a significant consideration that the high price payable in the case of a mandatory bid may have a negative effect on the offeror's intention to make a bid. As the price determination rule of the takeover directive is based on

12 ENRIQUES, 2004, p. 457.

13 Article 2, paragraph 1, point a of Directive 2004/25/EC.

the principle of the highest price paid,¹⁴ this may influence the intention to make a bid. Based on the foregoing, the concentrated ownership structure presumably will remain concentrated.¹⁵ The introduction of the mandatory bid rule has no significant effect on the shareholder structure in the case of dispersed ownership structure. As a possible effect, we may refer to the fact that the mandatory bid applicable to all shares may decrease the number of takeover transactions. In light of the function of takeovers in the supervision of the management, such decrease may strengthen the position of the management. However, it is unlikely that the mandatory bid rule could render in itself the ownership structure more concentrated.¹⁶ It is an advantageous effect of the mandatory bid rule that it can mitigate the risk of expropriation of the unfavorable position of minority shareholders. However, as an unfavorable effect, the mandatory bid rule may also unsettle certain value-creating takeovers, thereby decreasing the probability of their implementation. The mandatory bid rule renders the acquisition of control over companies more expensive, therefore, it may result in the uncertainty of the intention to bid.¹⁷

According to Article 5 paragraph 1 of the 13th company law directive, if a natural or legal person, as a result of his/her own acquisition or the acquisition by persons¹⁸ acting in concert with him/her, holds securities of a company, which

14 Article 5, paragraph 4 of Directive 2004/25/EC.

15 GOERGEN; MARTYNOVA; RENNEBOOG, 2005, pp. 11-12.

16 GOERGEN; MARTYNOVA; RENNEBOOG, 2005, pp. 11-12.

17 GOERGEN; MARTYNOVA; RENNEBOOG, 2005, p. 11.

18 According to Article 2, paragraph 1, point d of Directive 2004/25/EC, 'persons acting in concert' shall mean natural or legal persons who cooperate with the offeror or the offeree company on the basis of an agreement, either express or tacit, either oral or written, aimed either at acquiring control of the offeree company or at frustrating the successful outcome of a bid.

directly or indirectly give him/her a specified percentage of voting rights in that company,¹⁹ giving him/her control of that company, Member States shall ensure that such a person is required to make a bid as a means of protecting the minority shareholders of that company.²⁰ It is also necessary to ensure the equal treatment of shareholders of the same class.²¹ The percentage of voting rights which confers control²² and the method of its calculation shall be determined by the rules of the Member State in which the company has its registered office.²³ Therefore the Directive does not set forth the percentage of voting rights that is to be considered as a controlling interest. One could criticise the Directive for not stipulating an exact threshold,²⁴ or at least a percentage, which should by all means be considered as controlling interest in the member states of the European Union. The legislators – when searching for a minimum level of community regulation – gave up on providing criteria for determining the threshold of controlling interest in the target company in connection with a mandatory bid,²⁵ so the Directive has only a limited harmonizing effect in this regard.²⁶

19 Directive 2004/25/EC – according to Article 1, paragraph 1 – is applicable to takeover bids for the securities of companies governed by the laws of member states, where all or some of those securities are admitted to trading on a regulated market within the meaning of Directive 93/22/EEC in one or more member states. See HARVEY; NOURRY, 2008, pp. 20–21.

20 EDWARDS, 2004, p. 433, ENRIQUES, 2004, p. 443 and MENJUCQ, 2006, p. 226.

21 MAUL; MUFFAT-JEANDET, 2004, p. 226 and Article 3, paragraph 1, point a of Directive 2004/25/EC.

22 HARVEY; NOURRY, 2008, p. 23.

23 Article 5, paragraph 3 of Directive 2004/25/EC.

24 EDWARDS, 2004, p. 434.

25 GADÓ, 2006, p. 335, EDWARDS, 2004, p. 433 and ENRIQUES, 2004, pp. 445 and 447–448.

26 EDWARDS, 2004, pp. 434 and 439.

With regard to mandatory bids, the implementation of the Directive made various effects in the member states. In the United Kingdom, prior to the implementation of the Directive, the *City Code on Takeovers and Mergers* had already required a mandatory takeover bid from a 30% acquisition of control. The situation was similar for example in France and Germany. Typically these member states applied a threshold of control between 30 and 33.33%. For instance the regulations of Belgium, Spain and the Netherlands prior to the implementation of the Directive are in strong contrast to the above. Before implementing the Directive, mandatory bids were only required in case of the acquisition of more than 50% of control in Belgium. The obligation to launch a bid was individually determined in other cases, pursuant to different thresholds. Following the amendment of the Belgian regulation with the purpose of legal harmonisation in 1 April 2007, the previous regulatory regime was significantly altered, and as a general rule, a threshold of 30% was set forth.²⁷

The bid shall be addressed at the earliest opportunity to all the holders of those securities for all their holdings,²⁸ except for the shares not carrying voting rights.²⁹ Such a distinction of shareholders seems interesting, especially in the light of the fact that the strengthening of the one share one vote principle for the sake of establishing shareholder democracy has already been addressed in the field of

27 HARVEY; NOURRY, 2008, p. 23, MENJUCQ, 2006, pp. 226-227 and GOERGEN; MARTYNOVA; RENNEBOOG, 2005, pp. 6-29.

28 Article 5, paragraph 1 of Directive 2004/25/EC.

29 Article 2, paragraph 1, point e of Directive 2004/25/EC. Pursuant to this provision, 'securities' shall mean transferable securities carrying voting rights in a company. See also point 11 of the Preamble of Directive 2004/25/EC, according to which the regulation should not apply in the case of the acquisition of securities which do not carry the right to vote at ordinary general meetings of shareholders.

European corporate law, which was also one of the middle-term targets of the Company Law Action Plan that was adopted by the European Commission in these times.³⁰ Consequently, the Directive does not provide the holders of shares not carrying voting rights with the guaranteed option to get out of the company.³¹ It would be quite reasonable to enable that in the national laws at least, as the shareholder with a controlling interest might use its beneficial position to the disadvantage of the shareholders lacking voting rights. On the other hand, the offeror's obligation to purchase applies to all shares carrying voting rights.³²

Mandatory bids provide protection to the minority shareholders by allowing them to sell their holdings if the control of the company changes, and they also receive a part of the premium paid for the block of shares ensuring control. Member states made good use of the flexibility that had been granted to them by the Directive with regard to mandatory bids, by applying several derogations in their legislation. Certain exemptions ensure that the rule is applied positively in case of transfer of control. Other exemptions however, lead further beyond that. Supervisory authorities in some member states were given strong powers to establish exemptions from the rule on mandatory bids. These exemptions and the broad discretionary powers are able to undermine the protection that mandatory bids are supposed to provide.³³

Thus, a system of wide-ranging exemptions is applied in several member states. A good example for that is Italy. In this member state of the European Union one must present

30 FERRARINI, 2006, pp. 152-153 and COMMISSION OF THE EUROPEAN COMMUNITIES, 2003, p. 14.

31 ENRIQUES, 2004, p. 447.

32 BICZI, 2002, p. 7 and ENRIQUES, 2004, p. 447.

33 See COMMISSION STAFF WORKING DOCUMENT, 2007, pp. 9-10.

a universal (*totalitaria*) mandatory bid when one acquires shares that carry at least 30% of the voting rights, which number obviously includes shares acquired by persons acting in concert and also shares owned indirectly. The mandatory bid is triggered by the passing of the 30% threshold, based on the assumption that it provides *de facto* control of the issuer company.³⁴ Nonetheless, there are several exemptions from under this rule. Such is for example, if one or more other shareholders hold the majority of voting rights in the company at the time of the acquisition, which ensures their control of the company. Another exemption is a transaction that takes place within the group of companies (intergroup transactions). In this case, the acquisition is carried out between controlled and controlling companies, or companies controlled by the same party. We can also mention the case when one exceeds the 30% threshold only temporarily and does not exceed another 3% of the shares carrying voting rights, and the purchaser undertakes to sell these securities within 12 months and not to exercise the voting rights they carry. It is also an exemption when the control of 30% derives of the acquisition of newly issued shares during the course of a capital increase, if such measure was applied as part of a rescue package introduced because of the companies' economic and financial crisis and if such measure was aimed at avoiding the insolvency of the listed corporation.³⁵

In Finland, there are also some exemptions from under the mandatory bid, which is applicable in case of acquiring shares carrying 30% or 50% or more of the voting rights. One does not have to launch a mandatory bid, if there is already a shareholder in the company that has an even bigger controlling stake. A mandatory bid is not required

34 JUVARA; SANTARELLI, 2008, p. 470.

35 JUVARA; SANTARELLI, 2008, pp. 474–475.

either if the shareholder's proportion of voting rights exceeds the threshold of mandatory bids exclusively as a result of the activities of the issuer or another shareholder, or if the supervisory authority (FFSA – Finnish Financial Supervision Authority) grants an exemption for a special reason.³⁶

In Lithuania, generally one has to present a mandatory bid if one acquires the shares carrying more than 40% of the voting rights, however there are also exemptions from under this rule. For instance, mandatory bids do not have to be launched if the threshold is passed following a voluntary bid covering all shares, or if the acquisition was carried out in concert with a person, who is already bound by the obligation to launch a bid. The exceeding of the mandatory bid threshold as a result of reorganisation or statutory restructuring is also an exemption, similarly to the case when the acquisition is carried out within the group of companies, among the companies that belong to the same group.³⁷

In Romania, mandatory public offers are to be presented to all securities holders for all of their shares when one acquires more than 33% of the voting rights. The bid must be produced as soon as possible, but within 2 months from the acquisition of control the latest.

Voting rights above the 33% threshold may not be exercised prior to the mandatory bid, and until that time the bidder may not acquire any further shares in the target company either. However, one does not have to consider the 33% threshold relevant at all times. If one acquired a holding that exceeded 33% before the Securities Law entered into effect, one has to present a bid only if one's holding exceeds 50%.³⁸ If the acquisition exceeding 33% is not carried out

36 WIST; FAGERNAS, 2008, p. 246.

37 BURGIENÉ, 2008, pp. 535–536.

38 MCGREGOR, 2008, p. 707.

intentionally (for instance as a result of a capital reduction in the target company, the exercise of a preemptive right, etc.), the one acquiring control has two options: either to launch a bid, or reduce its holding below 33% by selling its shares.³⁹

The Commission's report issued on June 28, 2012 and titled "Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Application of Directive 2004/25/EC on takeover bids (COM(2012) 347)" also sets forth in relation to the mandatory bid rule that the wide range of national derogations to the mandatory bid rule raises the question as to whether the mandatory bid rule adequately protects minority shareholders in situations of change of control. Furthermore, the Report divides into categories the most important derogations applied by the member states in relation to the mandatory bid rule:

- Certain member states provide discretionary power to their national supervisory authorities to grant an exemption from the mandatory bid rule.⁴⁰ Nevertheless such exemption is only infrequently applied by the member states, it is worthy of note in the case of Finland, Ireland and the United Kingdom.⁴¹
- Certain member states entitle the shareholders of the offeree company (at the general meeting) to release the offeror from the obligation to launch a mandatory bid (whitewash procedures). Such regulation is applied by Ireland, the Netherlands, Spain and the UK.⁴²

39 MCGREGOR, 2008, p. 708.

40 See COMMISSION OF THE EUROPEAN COMMUNITIES, 2012, p. 7.

41 See COMMISSION OF THE EUROPEAN COMMUNITIES, 2012, p. 7.

42 See The Takeover Bids Directive Assessment Report, 2012, p. 152.

- The application of technical derogations that do not prevent the enforcement of the mandatory bid rule as stipulated under the Directive. Such regulation includes the exemption of certain offeree companies, for example, open-ended collective investment schemes. The foregoing companies do not fall within the scope of the Directive either.⁴³ Such regulation is applied by Hungary, the Netherlands, Romania and Italy.⁴⁴
- Exceptions reserved for the cases when there is no real change of control over the company. This category includes, for example, the case when the change of control over the company is only temporary, or the acquisition took place within the same company group, or “acting in concert” group.⁴⁵ The following states apply an exception from the mandatory bid rule in the case of the temporary change of control over companies: Austria, Italy, Belgium, Cyprus, Denmark, Estonia, the Netherlands, Portugal, Germany, France, Spain and Finland (provided that the derogation is approved by the Finnish FSA – supervisory authority).⁴⁶ In the case that there is no actual change in the ultimate controller of the company (Intra-group transaction), the mandatory bid rule does not need to be applied in Austria, Germany, Italy, Belgium, Cyprus, Denmark, Estonia, France, Finland, the Netherlands, Poland, the Czech

43 See COMMISSION OF THE EUROPEAN COMMUNITIES, 2012, p. 7.

44 See The Takeover Bids Directive Assessment Report, 2012, p. 152.

45 See COMMISSION OF THE EUROPEAN COMMUNITIES, 2012, p. 7.

46 See The Takeover Bids Directive Assessment Report, 2012, p. 152.

Republic, Romania, Luxembourg and Slovakia.⁴⁷ In certain member states it also constitutes an exception, if the transaction is implemented within the group of persons acting in concert group. This rule of exception is applied by Belgium, the Czech Republic, Luxembourg and – implicitly – Romania.⁴⁸

- Certain member states apply derogations also in order to protect the interests of the offeror or the controlling shareholder. Such cases include situations when the change of control over the company was not caused by a voluntary act, the acquisition was indirect, or followed a personal event, (such as inheritance).⁴⁹ The following states apply exceptions from the mandatory bid, if the change of control was not caused by a voluntary act: Austria, Italy, Belgium, the Czech Republic, Finland and Germany. In the event that – irrespective of the intention of the offeror – a change occurs in the number of shares, or the voting rights represented thereby, and this change results in change of control over the company, the following states apply derogation from the mandatory bid rule: Cyprus, Estonia, Finland, Ireland, France, Germany, the UK, Romania and Denmark. Moreover, in certain member states indirect acquisitions also constitute exceptions to the rule. In such cases an offeror acquires a holding company, which exercises control over the offeree company. The member states applying the derogation may provide exemption

47 See The Takeover Bids Directive Assessment Report, 2012, p. 153.

48 See The Takeover Bids Directive Assessment Report, 2012, p. 146.

49 See COMMISSION OF THE EUROPEAN COMMUNITIES, 2012, p. 7.

from the mandatory bid rule, if the primary purpose of the offeror's acquisition was to acquire a stake in the holding company, instead of acquiring control over the offeree company.⁵⁰ The derogation is applied in France, Belgium, Romania and Austria.⁵¹ The scope of exceptions resulting from a personal event includes, for example, inheritance, donation, marriage and divorce. If the acquisition of control over the company results from such personal event, no mandatory bid is to be launched in Austria, France, Germany, Italy, Belgium, Cyprus, the Czech Republic, Denmark, Estonia, Greece, Ireland, the Netherlands, Poland, Spain, Romania and Finland. If the transaction is implemented within the same family group, this also constitutes an exception from the rule in the case of Austria, Finland (provided that the derogation is approved by the Finnish FSA – supervisory authority) and France.⁵²

- Certain member states provide derogation from the mandatory bid rule, if such derogation is justified by the protection of creditor interests, for instance in situations where the acquisition is the consequence of an exercise of financial security by a creditor.⁵³ In such cases the derogation is provided, without any further requirements, by the national legislation of Cyprus, Denmark, Ireland, Poland and the UK. Belgium, Germany and Estonia provide such derogation in the case that the person acquiring the

50 See The Takeover Bids Directive Assessment Report, 2012, pp. 146 and 153.

51 See The Takeover Bids Directive Assessment Report, 2012, p. 153.

52 See The Takeover Bids Directive Assessment Report, 2012, p. 153.

53 See COMMISSION OF THE EUROPEAN COMMUNITIES, 2012, p. 7.

shares in the above manner sells its shares within a specific period of time.⁵⁴

- The laws of certain member states provide derogation from the mandatory bid rule for the purpose of the protection of the interests of other stakeholders, for instance in cases where the offeree company is in a financially distressed situation, or when control is acquired through a specific type of transaction.⁵⁵ Based on the foregoing, the following states provide derogation from the mandatory bid rule: Austria, France, Germany, Italy, Belgium, Denmark, Finland (provided that the derogation is approved by the Finnish FSA – supervisory authority), Greece, Ireland, the Netherlands, Poland, Portugal, Spain, the Czech Republic, Slovakia and the UK, if the offeree company is in financially distressed situation. Transactions deemed to be exceptions to the rule in certain member states include for instance mergers. The application of such derogation can be observed in the case of Germany, France, Italy, Belgium, Cyprus, Estonia, Greece (only intragroup), Spain, Portugal, Romania, Finland and Slovakia. Capital increase and capital reduction are also typical examples of such transactions. In the case of the foregoing transactions, the states providing certain derogation from the mandatory bid rule are primarily the UK, Belgium, Cyprus, Estonia, Finland (only rights issue), Greece, Ireland, Romania and France.⁵⁶

54 See The Takeover Bids Directive Assessment Report, 2012, p. 153.

55 See COMMISSION OF THE EUROPEAN COMMUNITIES, 2012, p. 7.

56 See The Takeover Bids Directive Assessment Report, 2012, p. 154 and KECSKÉS; HALÁSZ, 2013, pp. 444-452.

3. The principle of equal treatment in the Directive

One can consider the equal treatment of shareholders as a fundamental principle of corporate law. This is especially true in the field of takeovers, as during the course of these capital market transactions, the interests of minority shareholders can easily be harmed. For that reason the Directive sets forth (as a general principle)⁵⁷ that all holders of the securities of an offeree company of the same class must be afforded equivalent treatment;⁵⁸ moreover, if a person acquires control of a company, the other holders of securities must be protected.⁵⁹

The principle of equal treatment basically requires that the person acquiring control over the company is to ensure for the minority shareholders the possibility of exit from the company subject to conditions that are at least as advantageous as the conditions ensured during the acquisition of the share block providing control over the company. Based on the foregoing, the principle of equal treatment serves the protection of minority shareholders.⁶⁰

In their study Marc Goergen, Marina Martynova and Luc Renneboog set forth that the application of the principle of equal treatment may exert a significant influence over the ownership structure, where offerors are typically required to pay control premium to the blockholder holding an ownership share providing control over the company, which compensates such blockholder for the private benefits that may possibly be acquired through its control over the com-

57 Article 3, paragraph 1, point a of Directive 2004/25/EC.

58 HARVEY; NOURRY, 2008, p. 21.

59 EDWARDS, 2004, p. 432 and ENRIQUES, 2004, pp. 442-443.

60 GOERGEN; MARTYNOVA; RENNEBOOG, 2005, p. 12.

pany (private benefits of control). However, the mandatory bid rule (and the principle of equitable price) stipulates that the offer for all other shares of the company shall be made at least at the same price as the price paid to the blockholder exercising control over the company. Consequently, the offerors can offer a lower consideration for the controlling share block, and the implementation cost of takeover transactions also increases. This may result in the uncertainty of the intentions to bid. Since a lower consideration is offered for the controlling share block, blockholders will presumably be less willing to sell their share blocks, which may hinder the strengthening of takeover activity. However, in the long term the requirement of equal treatment may, to a certain extent, also further the creation of a less concentrated ownership structure, since it prevents the accumulation of larger share blocks providing control over the company. Nevertheless, the concentrated ownership structure will in all probability continue to exist. On the other hand, the application of the principle of equal treatment will practically have no effect on the dispersed ownership structure.⁶¹

4. Minimum level of consideration in takeover bids

It can be a problem of public corporations that dispersed shareholders tend to accept a bid even if it provides a lower consideration than their own valuation. They do that on the basis of the deliberation that following the acquisition of control of the company, they would be exposed to the jeopardy of freeze-out or of the self-centred actions of the bidder that might result in a business strategy that affects

61 GOERGEN; MARTYNOVA; RENNEBOOG, 2005, p. 12 and KECSKÉS; HALÁSZ, 2013, pp. 453-454.

them adversely. These small investors furthermore, are lesser able to advocate their own interests during the negotiations on the bid (the problem of collective action).⁶²

The Directive sets forth that member states must guarantee that an “equitable price”⁶³ prevails during the bidding. According to the Directive, the minimum level of equitable price is the highest price paid for the same securities by the offeror, or by persons acting in concert with him/her, over a period to be determined by member states, which shall be no less than 6 months and shall not exceed 12 months before the bid.⁶⁴ The essence of this regulation is to enable the determination of the true value of the share pursuant to recent changes in the share price. If, after the bid has been made public and before the offer closes for acceptance, the offeror or any person acting in concert with him/her purchases securities at a price higher than the offer price, the offeror shall increase his/her offer so that it is not less than the highest price paid for the securities so acquired.⁶⁵

The Directive sets forth in its principle on compensation that an offeror must announce a bid only after ensuring that he/she 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.⁶⁶

Pursuant to the Directive, on certain grounds, member states may authorise their supervisory authorities to adjust⁶⁷ the price indicated in the purchase offer, provided that they

62 RIBSTEIN, 1989, p. 83 and OESTERLE, 1985, pp. 53 and 61–63.

63 Article 5, paragraph 1 of Directive 2004/25/EC.

64 MAUL; MUFFAT-JEANDET, 2004, p. 229, EDWARDS, 2004, p. 433, MENJUCQ, 2006, p. 227 and ENRIQUES, 2004, pp. 443–444.

65 Article 5, paragraph 4 of Directive 2004/25/EC.

66 Article 3, paragraph 1, point e of Directive 2004/25/EC.

67 EDWARDS, 2004, p. 433 and MENJUCQ, 2006, p. 227.

justify and publish the adjustment, and that the adjustment is in conformity with the general principles laid down in Article 3 paragraph 1. The grounds of adjustment may be drawn up in a list.⁶⁸ The Directive only provides an illustrative list of the grounds on which the supervisory authorities may adjust the price that is to be paid for the securities of the minority shareholders. Such grounds can be for instance if the highest price was set by agreement between the purchaser and a seller, if the market prices of the securities in question have been manipulated, or if certain market prices have been affected by exceptional occurrences.⁶⁹ By implementing this provision, the community legislator authorises member states to alter a price that does not reflect the true market value and - for example - is the result of manipulation, in order to have the compensation match the real value of the securities. Thereby the provision promotes the general principle of the Directive, according to which 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 of the prices of the securities becomes artificial and the normal functioning of the markets is distorted.⁷⁰ Adjustment is also possible if the 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.

From a failsafe aspect it might be a subject of concern that prices can be adjusted not only upwards, but downwards as well pursuant to Article 5 paragraph 4 of the Directive. Therefore, one may criticise the deviation from the rule of “the highest price paid” on the basis that it may provide

68 ENRIQUES, 2004, p. 444.

69 Article 5, paragraph 4 of Directive 2004/25/EC.

70 Article 3, paragraph 1, point d of Directive 2004/25/EC.

an opportunity to plan transactions, in which the costs of acquiring control of a company can be minimised.⁷¹

5. Principal-agent problems in takeover transactions

Takeovers provide the shareholders of the target company with the possibility to obtain high premium in case of selling their shares. This, however, is not always true. The risk originates in the principal-agent problem, which is typical of public corporations (especially of the ones with dispersed ownership structure). This was pointed out for the first time by *Adolf A. Berle* and *Gardiner C. Means* in their landmark work, *The Modern Corporation and Private Property*. Pursuant to their line of thought, the separation of ownership from management in modern corporations creates a misalignment in the interests of shareholders and directors.⁷² For that reason it is necessary to approach the decision-making on accepting or rejecting the bid from the perspective of the conflict of interests.

The conflict of interest evolves on one hand between the bidder and the management board, and on the other hand between the management board and the shareholders.

If the management of the company is exposed to the jeopardy of takeovers, it will claim higher remuneration as a compensation for the insecurity deriving thereof. Risk of takeovers might increase the already present difference between the interests of the managers and the shareholders; therefore it might hinder the harmonisation of these interests by way of an incentive remuneration system. It is an interesting approach, according to which the openness

71 ENRIQUES, 2004, p. 446 and KECSKÉS; HALÁSZ, 2013, pp. 458-460.

72 MAGNUSON, 2009, p. 210.

of a company towards takeovers partly depends on if the increase of those *agency costs* that originate in the cementing of the management exceeds the cost of exposing managers to takeover-related risk. It is also a consequence thereof that the conduct of the management can be influenced by other alternative tools,⁷³ for example by a *golden parachute*, which is a very generous severance package, which is suitable for compensating the management in case of a takeover.⁷⁴ It is worth considering that directors can usually not count on keeping their job following the takeover, therefore they – most likely – would seize every available instrument to prevent that. Such a conduct would seriously hinder the acquisition of control of public corporations and may also cause harm to the company and its shareholders. Nevertheless in the European Union, Article 9 paragraph 2 of the Takeover Directive requires the prior authorisation of the shareholders' meeting for any action that may result in the frustration of the bid (in particular the issuing of new shares). This rule does not apply for the search for an alternative bid, a *white knight*. This is the so-called *neutrality rule*. However, this rule is not mandatory, opting out is possible.

One can observe another conflict of interest as well, namely the one between the shareholders and the management body of the company. We can examine that from the angle of the *principal-agent theory* as well. In case of a takeover, it is in the interest of the principal shareholders to ensure high share price and to sell their shares to the bidder with high return. On the other hand, the members of the agent management have a stake in keeping their jobs, which motivates them to frustrate the bid.⁷⁵

73 RIBSTEIN, 1989, p. 89.

74 RIBSTEIN, 1989, p. 90.

75 MAGNUSON, 2009, pp. 210-211.

In the European Union this is barred by the Takeover Directive, which (as a general rule) enforces the management to stay neutral in the lack of the prior authorisation of the shareholders' meeting. If the shareholders get a decent offer, they will not give their consent to countermeasures, as they do not have such personal ties to the company as the management. Nevertheless, it is interesting that the Directive makes it the task of the opposing management to prepare and publish a report on the bid's effects on the target company, on employment and on the bidder's strategic plans for the target company and their likely repercussions.⁷⁶ Although the management has to disclose its reasons as well, it is possible that objectivity shall not always be ensured.⁷⁷

6. Disclosure of defensive structures and mechanisms

Even the preamble of the Takeover Directive points out that in order to reinforce the effectiveness of existing provisions concerning the freedom to deal in the securities of companies covered by the Directive and the freedom to exercise voting rights, it is essential that the defensive structures and mechanisms envisaged by such companies be transparent and that they be regularly presented in reports to general meetings of shareholders.⁷⁸

Pursuant to the provisions of the Directive, member states must ensure that companies⁷⁹ publish detailed information on their corporate governance structure and

76 Article 9, paragraph 5 of Directive 2004/25/EC.

77 KECSKÉS; HALÁSZ, 2013, pp. 462-463.

78 Point 18 of the Preamble of Directive 2004/25/EC.

79 The disclosure obligation binds companies defined in Article 1, paragraph 1 of Directive 2004/25/EC.

applied defence mechanisms that may influence a bid.⁸⁰ Consequently, companies publish detailed information on 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.⁸¹ It is also necessary to introduce 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).⁸² Significant direct and indirect shareholdings (including indirect shareholdings through pyramid structures and cross-shareholdings)⁸³ within the meaning of Article 85 of Directive 2001/34/EC and the holders of any securities with special control rights and a description of those rights shall be also disclosed.⁸⁴ One must also publish the system of control of any employee share scheme where the control rights are not exercised directly by the employees.⁸⁵ It is also necessary to present any restrictions on voting rights, such as limitations of the voting rights of holders of a given percentage or number of votes, deadlines for exercising voting rights, or systems whereby, with the company's cooperation, the financial rights attaching to securities are separated from the holding of securities.⁸⁶ Any agreements between shareholders which are known to the company and

80 Article 10 of Directive 2004/25/EC.

81 Article 10, point a of Directive 2004/25/EC.

82 Article 10, point b of Directive 2004/25/EC.

83 Article 10, point c of Directive 2004/25/EC.

84 Article 10, point d of Directive 2004/25/EC.

85 Article 10, point e of Directive 2004/25/EC.

86 Article 10, point f of Directive 2004/25/EC.

may result in restrictions on the transfer of securities and/or voting rights within the meaning of Directive 2001/34/EC shall be presented as well.⁸⁷ It is compulsory to disclose the rules governing the appointment and replacement of board members and the amendment of the articles of association,⁸⁸ the powers of members of management or executive bodies,⁸⁹ and in particular the power to issue or buy back shares.⁹⁰ The publication must include any significant agreements to which the company is a party and which take effect, alter or terminate upon a change of control of the company following a takeover bid, and the effects thereof, except where their nature is such that their disclosure would be seriously prejudicial to the company (this exception shall not apply where the company is specifically obliged to disclose such information on the basis of other legal requirements).⁹¹ Any agreements between the company and its members of management or executive bodies or employees providing for compensation if they resign or are made redundant without valid reason or if their employment ceases because of a takeover bid, shall also be published.⁹² Member states shall ensure, in the case of companies the securities of which are admitted to trading on a regulated market in a member state, that the management or executive body presents an explanatory report to the annual general meeting of shareholders on the above matters.⁹³

87 Article 10, point g of Directive 2004/25/EC.

88 Article 10, point h of Directive 2004/25/EC.

89 EDWARDS, 2004, p. 436.

90 Article 10, point i of Directive 2004/25/EC.

91 Article 10, point j of Directive 2004/25/EC.

92 Article 10, point k of Directive 2004/25/EC.

93 Article 10, paragraph 3 of Directive 2004/25/EC and KECSKÉS; HALÁSZ, 2013, pp. 469-471.

7. The European rule prescribing the neutrality of the board of directors

There are two approaches in the centre of debates on *corporate governance* defences against takeovers. On one hand, those supporting the defence possibilities of the board of directors highlight that the small shareholders of a public corporation – due to their limited experiences and the problems of collective action⁹⁴ – are unable to make a well-founded decision with regard to the assessment of a takeover bid. For that reason, boards of directors should be authorised to adopt defence measures, as they are in a more suitable position to protect the shareholders and other stakeholders. On the other hand, the ones preferring the choice of shareholders consider that the boards of directors are self-interested with regard to the answer for a bid, so they should not be allowed to decide on the application of defence measures.⁹⁵

The rule prescribing the neutrality of the board of directors was implemented in the Directive so as to make takeovers fundamentally simpler. The defence measures of

94 The problem of collective action might serve as an explanation for the passivity of shareholders one can observe in the dispersed ownership structure. According to the theory, the vote of one shareholder can influence the decision-making of the company only to a minuscule degree. Organizing collective action would entail significant expenses to the small shareholders, whereas the benefits thereof would be universal within the company. For that reason, in the dispersed ownership structure, many shareholders regard the company and the decision-making of the shareholders' meeting with certain „apathy“. As it is not worth for him to spend much time or money on getting familiar with the propositions of the shareholders' meeting, he would simply vote along with the management. Should any problem emerge, the shareholder would apply the so-called classic Wall Street rule, namely sell his shares and leave the company. See GORDON, 1988, pp. 43–47, MANNE, 1964, p. 1427, WINTER, 1977 and HUTCHINSON, 2005, p. 1201.

95 BEBCHUK, 2002, pp. 974-975, 981-982 and 1025-1027.

the board of directors either frustrate takeovers or make them more expensive and time-consuming.⁹⁶ The neutrality rule – which is comprised in Article 9 paragraph 2 of the Directive – settles the matter by setting forth that from the time the board of the offeree company receives the information of the decision to make a bid and until the result of the bid is made public or the bid lapses, the board of the offeree company shall 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.^{97, 98} Until the authorisation, the board of directors is bound to remain neutral (except seeking alternative bids).⁹⁹ Therefore, for all defence measures (the Directive emphasises the issuing of new shares, which may result in a lasting impediment to the offeror's acquiring control of the offeree company) are conditional upon the prior authorisation, approval or consent of the shareholders. As regards decisions taken before receiving information of the decision to make a bid and not yet partly or fully implemented, the general meeting of shareholders shall approve or confirm any decision which does not form part of the normal course of the company's business and the implementation of which may result in the frustration of the bid.¹⁰⁰ Consequently, in this period the activities of the management are limited to the normal course

96 SJAFJELL, 2008, pp. 389–390.

97 Such authorisation shall be mandatory at least from the time the board of the offeree company receives the information of the decision to make a bid and until the result of the bid is made public or the bid lapses. Member states may require that such authorisation be obtained at an earlier stage, for example as soon as the management or executive body of the offeree company becomes aware of the intention to make a bid.

98 ZINSER, 2003.

99 ZINSER, 2003, MENJUCQ, 2006, pp. 229–230 and EDWARDS, 2004, pp. 435–436.

100 Article 9, paragraph 3 of Directive 2004/25/EC.

of the company's business and to seeking alternative bids. This is concordant to the general principle of the Directive that the board of an offeree company must 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.¹⁰¹ At first glance, this regulation puts European companies in connection with the prevention of takeovers in an adverse position compared to their American fellows, which are not bound by such rules. However, we should not forget that there are plenty of instruments in most member states of the European Union that a company may apply in order to prevent hostile takeovers. One can identify two categories of defence measures with regard to the timing of their application. The first type is applied when the bid has already been made. These are the so-called post-bid defences. Such are for instance share buy-backs and the issuing of new shares. In the lack of the authorisation of the shareholders' meeting, the neutrality rule blocks these. On the other hand, there are pre-bid defence measures as well. Such are for example share transfer agreements laid down either in the articles of association or separately, or the restriction of the exercise of control rights by setting forth the maximum of voting rights that may be exercised at the shareholders' meeting. The acquisition of control may also be hindered by shares carrying multiple voting rights. These methods are widely applied in Europe.¹⁰² For that reason, the possibility to apply post-bid defence measures would produce an insurmountable obstacle for the bidders.¹⁰³

101 EDWARDS, 2004, p. 432, MENJUCQ, 2006, p. 228 and Article 3, paragraph 1, point c of Directive 2004/25/EC.

102 See VAN HULLE, 2000/12, pp. 521-526 and COMMISSION STAFF WORKING DOCUMENT, 2007, pp. 4-5.

103 In Article 11 of Directive 2004/25/EC an attempt is reflected to restrict the application of defence measures prior to the bid by the so-called breakthrough rule. This - as we shall soon point out - was not very successful.

By comparing the community legislation on the conduct of the company's management or executive bodies with American theoretical viewpoints we can conclude that the European regulation fits the American intermediary theory, the *distributional approach* the most.¹⁰⁴

Until 2007 the neutrality rule brought no significant changes to 13 of the 14 member states that had implemented the Directive. Nevertheless, five of these member states apply the exemption that is based on *reciprocity*: France, Greece, Hungary, Portugal and Slovenia. Although in most of these countries shareholders must grant a separate authorisation in certain intervals (in every 18 months) for the adoption of defence measures based on reciprocity, they still lose the chance to reconsider the suggested defence measure during the bid period. For that reason, in these member states the *rule of reciprocity* may increase the likelihood of potential abuse by management to the detriment of the shareholders' interests. The application of exemption based on reciprocity supposedly also has an unfavorable effect on the emergence of an open market for corporate control in Europe.¹⁰⁵

On the other hand, the neutrality rule of the Directive was not applied by Belgium, Denmark, Germany, Italy, Luxembourg, the Netherlands and Poland.¹⁰⁶ The fact that only Malta of the member states that had not applied the strict board neutrality rule until the adoption of the Directive, decided to fully introduce it, indicates that member states are committed to maintain their own national regulation. Other member states, which previously had no strict board

104 The most prominent representatives of this theory are James J. Junewicz, Edward F. Greene, Lucian AryeBebchuk and Ronald J. Gilson. See JUNEWICZ; GREENE, 1984, BEBCHUK, 2002 and BEBCHUK, 1983.

105 See COMMISSION STAFF WORKING DOCUMENT, 2007, pp. 6-7.

106 See COMMISSION STAFF WORKING DOCUMENT, 2007, p. 12.

neutrality obligation in case of corporate takeovers, only introduced the rule on an optional basis.¹⁰⁷

Nevertheless, the Directive obliges the board of directors (management or executive body) of the offeree company to draw up and make public a document setting out its opinion of the bid and the reasons on which it is based, including its views on the effects of implementation of the bid on all the company's interests and specifically employment, and on the offeror's strategic plans for the offeree company and their likely repercussions on employment and the locations of the company's places of business.¹⁰⁸ The management or executive body 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, to the employees themselves.¹⁰⁹

8. Overcoming mechanisms that hinder takeovers: the breakthrough rule

Article 11, which certainly is the most disputed provision of the Takeover Directive, comprises the so-called breakthrough rules. These produce significant benefits for the bidders by overcoming mechanisms that hinder takeovers (which are particularly significant in continental Europe). According to this article, any restrictions on the transfer of securities provided for in the articles of association of the offeree company shall not apply vis-à-vis the offeror during the time allowed for acceptance of the bid. Any restrictions on the transfer of securities provided for in contractual agreements between the offeree company and

107 See COMMISSION STAFF WORKING DOCUMENT, 2007, p. 6.

108 Article 9, paragraph 5 of Directive 2004/25/EC.

109 Article 9, paragraph 5 of Directive 2004/25/EC and KECSKÉSZ; HALÁSZ, 2013, pp. 472-475.

holders of its securities, or in contractual agreements between holders of the offeree company's securities entered into after the adoption of the Directive, shall not apply vis-à-vis the offeror either. Also, restrictions on voting rights provided for in the articles of association of the offeree company shall not have effect at the general meeting of shareholders which decides on any defensive measures. Restrictions on voting rights provided for in contractual agreements between the offeree company and holders of its securities, or in contractual agreements between holders of the offeree company's securities entered into after the adoption of the Directive, shall not have effect at the general meeting of shareholders which decides on any defensive measures. Multiple-vote securities shall carry only one vote each at the general meeting of shareholders which decides on any defensive measures prescribed in Article 9 of the Directive. Furthermore, where, following a bid, the offeror holds 75 % or more of the capital carrying voting rights, no restrictions on the transfer of securities or on voting rights nor any extraordinary voting rights of shareholders concerning the appointment or removal of board members provided for in the articles of association of the offeree company shall apply at the first general meeting of shareholders following closure of the bid, called by the offeror in order to amend the articles of association or to remove or appoint board members.¹¹⁰ Then multiple-vote securities shall carry only one vote each.¹¹¹ However, it is not set forth by the Directive if the votes attached to the multiple-vote shares owned by the bidder should be added in when determining the threshold of 75%. With regard to the breakthrough rule, the matter of

110 EDWARDS, 2004, pp. 436–437, MENJUCQ, 2006, pp. 230–232, FERRARINI, 2006, p. 166 and Article 11, paragraphs 2, 3, 4 of Directive 2004/25/EC.

111 FERRARINI, 2006, p. 166.

equitable compensation set forth in Article 11 paragraph 5 does not seem clear either. The above provision of the Directive stipulates that if voting rights are affected by the breakthrough rule, equitable compensation shall be provided for any loss suffered by the holders of those rights.¹¹²

Pursuant Article 6 paragraph 3,¹¹³ it seems reasonable that the person acquiring the holding should pay, but in the lack of clear formulation, we cannot unequivocally establish that. The method of determining such compensation is not clear either. The Directive confers the resolution thereof to the competence of the member states. Consequently, the regulation of this issue shall vary from member state to member state, unless they leave this field unregulated and completely entrust the courts with resolving the matter.¹¹⁴

The purpose of the breakthrough rule is to eliminate several obstacles of takeovers, which are established prior to the bid. This is an effort of fundamental importance in order to establish a well-functioning, cross-border market of corporate control in the European Union. Therefore a shareholder, by acquiring at least 75% of the cash flow rights, shall be entitled to amend the articles of association (or any other corporate document of key relevance), to remove any impediments hindering the acquisition of control of the company, which were adopted by the shareholders of the target company prior to the bid.¹¹⁵ Such a shareholder will also be entitled to appoint a new managing body.

112 FERRARINI, 2006, p. 167 and EDWARDS, 2004, pp. 436-437. See also footnote 54.

113 Article 6, paragraph 3, point e of the Directive sets forth that the offer document shall include the compensation offered for the rights which might be removed as a result of the breakthrough rule laid down in Article 11(4), with particulars of the way in which that compensation is to be paid and the method employed in determining it.

114 SJAFJELL, 2008, p. 391.

115 MENJUCQ, 2006, p. 231-232.

In this regard, Sanford Grossman and Oliver Hart examined whether corporations should be required to apply the one share/one vote principle as a condition of stock exchange listing. They concluded that in some cases, the deviation from the 'one share one vote' principle can serve the shareholders' best interest, and may increase the total value of the company.¹¹⁶ The application of share classes of different voting rights may also bring forth certain advantages in the forming of a developed capital market. It can contribute to convincing the owner of a private corporation to get his company listed even if he were disinclined to do so for losing control of the company – even in spite of the expected benefits.¹¹⁷ Deviating from the 'one share one vote' principle could minimise their risk of losing control of the company. For example, *Oliver Hart* argues that such deviation does not harm the interests of minority shareholders, as those have already been taken into account at the time of determining the value of the securities, so a lower value is attached to their shares anyhow.¹¹⁸ Based on the above, the original shareholders have to bear the costs of deviating from the 'one share one vote' principle.¹¹⁹

On the other hand, the deviation from the 'one share one vote' principle may jeopardise the establishment of an active takeover market, as it enables that only a few dominant shareholders control the company. For that reason, in the lack of a breakthrough rule, it makes the acquisition of control of a company seriously complicated. The primary

116 GROSSMAN; HART, 1988, Number 1-2, FERRARINI, 2006, pp. 155–156, GOERGEN; MARTYNOVA; RENNEBOOG, 2005, p. 15.

117 MENJUCQ, 2006, p. 231.

118 GOERGEN; MARTYNOVA; RENNEBOOG, 2005, p. 15 and HART, 1988, pp. 467–476.

119 GOERGEN; MARTYNOVA; RENNEBOOG, 2005, p. 15. Cf. FERRARINI, 2006, p. 159.

function of the breakthrough rule is to neutralize the effects of deviations from the one share-one vote principle in the case of takeovers.¹²⁰ Corporate law recognizes several methods for deviation from the one share-one vote principle, and these methods have significant influence over the corporate governance structures of Continental Europe. Such methods include the introduction of share classes with different voting rights, the issuance of shares without voting rights, or the rule restricting the exercising of voting rights to a specific extent. The introduction of share classes with different voting rights and the issuance of shares without voting rights render it possible to separate voting rights exercised in the company from cash flow rights. The creation of indirect ownership structures (pyramid-structures) has similar effects. The advantage of the above referenced methods is that they enable the original owners of companies to maintain their control over the company following an initial offering, which advantage may increase willingness for stock exchange listing. By application of the above methods, companies whose owners were so far reluctant to list on the stock exchange due to their concerns about losing control over the company may also be listed.¹²¹ At the same time, the above methods have a significant effect on takeover trends. Since deviation from the one share-one vote principle (particularly the creation of shares classes with different voting rights) may provide control over the company to a small group of owners, in lack of an adequately formulated breakthrough rule, it can render the hostile takeover of a company practically impossible.¹²² The application of the breakthrough rule may eliminate the above

120 GOERGEN; MARTYNOVA; RENNEBOOG, 2005, p. 16.

121 GOERGEN; MARTYNOVA; RENNEBOOG, 2005, p. 15.

122 GOERGEN; MARTYNOVA; RENNEBOOG, 2005, p. 15.

described effect. The breakthrough rule practically enables the person acquiring a fraction of the equity in a company to break through the existing voting rules of the company. As result of the implementation of a breakthrough, practically the one share-one vote principle is applied in the company. Therefore, the breakthrough rule may enable a breakthrough even in the cases where the shareholder exercising control under the existing voting rules of the company does not support such breakthrough.¹²³ In the case of the concentrated ownership structure the breakthrough rule may facilitate the acquisition of control over companies, since it reduces the costs of successful takeovers.¹²⁴

However, the application of the breakthrough rule may have certain negative consequences. On the one hand, the breakthrough rule is contrary to the principle of shareholder decision making, as it overrides the provisions stipulated in the articles of association and the shareholder agreements in relation to the exercising of voting rights and the transfer of shares. On the other hand, while the application of the breakthrough rule clears the way for value-increasing takeovers, it also makes way for bidders that do not intend to enhance efficiency. These bidders could be neutralized primarily by the mandatory bid rule, as such rule increases the costs of successful takeovers. Moreover, the possibility of breaking through the existing voting rules of the company renders it more difficult for the shareholders to defend themselves against possible bids that do not enhance efficiency.¹²⁵

We should also highlight that the breakthrough rule fundamentally concerns restrictions that are based on relations of private law. Thus, its effects are narrowed down,

123 GOERGEN; MARTYNOVA; RENNEBOOG, 2005, pp. 16-17.

124 GOERGEN; MARTYNOVA; RENNEBOOG, 2005, p. 12.

125 GOERGEN; MARTYNOVA; RENNEBOOG, 2005, p. 12.

even in the sense pointed out by Professor *Klaus J. Hopt*, according to which it does not cover restrictions set forth by law.¹²⁶ Therefore – according to this argument – it should not have been applied to the German *Volkswagengesetz*, which protects *Volkswagen* auto factory from hostile takeovers.¹²⁷

Due to the controversial opinions on the breakthrough rule, most member states do not impose, but make it optional for the companies established in their territory.¹²⁸ The breakthrough rule is imposed in the Baltic states; Estonia, Latvia and Lithuania all apply it. Therefore in terms of market capitalisation, a mere 1% of listed companies in the EU apply this rule on a mandatory basis.¹²⁹

Nevertheless, the corporate law of some member states prohibits the application of defence measures that have been approved prior to the bid and may prevent the takeover of a company. Such is for instance, the prohibition of shares carrying multiple voting rights.¹³⁰ In these countries, companies are a lot more open towards hostile takeovers. Given that only a few member states intend to impose the application of the rule, its takeover-facilitating effect will depend almost exclusively on whether or not companies will apply the rule on a voluntary basis.¹³¹ This will obviously result in low efficiency, as the adoption of the rule will depend on the beneficiaries of shares carrying disproportionate or extraordinary voting rights.¹³²

126 MENJUCQ, 2006, p. 230.

127 One could challenge that regulation only on the basis of the judgements of the European Court of Justice of 4 June 2002 and 13 May 2003 on golden shares, and not on the basis of the Directive. See MENJUCQ, 2006, p. 230.

128 See COMMISSION STAFF WORKING DOCUMENT, 2007, p. 7.

129 See COMMISSION STAFF WORKING DOCUMENT, 2007, pp. 7 and 12.

130 See for instance Article 12, paragraph 3 of the Austrian *Aktiengesetz*.

131 See COMMISSION STAFF WORKING DOCUMENT, 2007, p. 7.

132 KECSKÉS; HALÁSZ, 2013, pp. 475-480.

9. Optionality of neutrality and breakthrough rules

The neutrality and breakthrough rules significantly facilitate the successful execution of takeovers in the European Union. Nevertheless, Article 12 makes optional the application of the provisions that protect the interests of the bidder. This Article authorises member states not to require companies which have their registered offices within their territories to apply Article 9 paragraphs 2 and 3 and/or Article 11.¹³³ Consequently, member states may get around the neutrality and breakthrough rules.

The Commission's report issued on June 28, 2012 and titled "Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Application of Directive 2004/25/EC on takeover bids (COM, 2012, 347)" sets forth that from the optional articles of the Takeover Directive the board neutrality rule is a relative success, as such rule is applied by 19 member states.¹³⁴ However, in 2012 the breakthrough rule – as we mentioned - was still applied only by three member states.¹³⁵ The foregoing indicates that the range of application of defensive measures against takeovers adopted following the bid significantly narrowed. On the other hand, at first sight the possibility of breaking through the defensive measures adopted prior to the bid and popular in the European Union is not sufficiently ensured. At the same time the Report also sets forth that the lack

133 SIEMS, 2004, p. 460, MENJUCQ, 2006, p. 232 and EDWARDS, 2004, p. 435.

134 Austria, Bulgaria, Cyprus, the Czech Republic, Estonia, Finland, France, Greece, Ireland, Italy, Latvia, Lithuania, Malta, Portugal, Romania, Slovenia, the Slovak Republic, Spain and the United Kingdom.

135 Estonia, Latvia and Lithuania.

of application of the optional rules does not seem to have been a major obstacle to takeover bids in the EU, since, as it was indicated, there are still sufficient possibilities to break through defenses against takeovers.¹³⁶

10. Reciprocity rule in the Directive

In order to ensure equal opportunities, the majority of member states apply the so-called reciprocity rule of the Directive,¹³⁷ which makes possible that companies, to which the *breakthrough* and *neutrality* rules are applicable (either due to the national legislation or to their own discretion), not apply these rules towards a bidder, which itself does not apply these rules.¹³⁸ It seems obvious that member states, which opened up their legal systems towards takeovers in order to establish a *level playing field*, reserve the right to apply the reciprocity rule towards member states or companies that do not apply Articles 9 and 11 of the Directive facilitating takeovers.¹³⁹ This provides the management with wider tactical opportunities against foreign bids, and is suitable for eliminating uneven competition between companies.¹⁴⁰

According to Professor Michel Menjucq, a fair question is if this rule has an extra community effect, namely if it is applicable to bidders, whose registered office is outside of the European Union. Although one cannot give an unequivocal answer, it would be interesting if the Directive, which attempts to establish a *level playing field*, did not enable

136 COMMISSION OF THE EUROPEAN COMMUNITIES, 2012, pp. 7 and 10 and KECSKÉS; HALÁSZ, 2013, p. 480.

137 See COMMISSION STAFF WORKING DOCUMENT, 2007, p. 8.

138 MENJUCQ, 2006, p. 232.

139 EDWARDS, 2004, p. 435 and MENJUCQ, 2006, pp. 232-233.

140 MENJUCQ, 2006, p. 235 and COMMISSION STAFF WORKING DOCUMENT, 2007, p. 8.

that, when *level playing field* does not exist with regard to companies outside of the Community.¹⁴¹ Another important matter is if this rule is applicable to bidders that are not listed on the stock exchange. Pursuant to the definition of the “offeror” under the Takeover Directive, the answer is indisputably yes. Furthermore, it is possible that the target company concurrently faces the bid of an offeror that applies the *neutrality* and *breakthrough* rules of the Directive, and the bid of an offeror that does not do so. There is no clear regulation as to how the *reciprocity* rule should be applied in such a situation. Consequently, it is possible that reciprocity shall be applied towards one bidder, and not towards the other one.¹⁴² Another questionable feature of the adopted regulation is that companies are allowed to change their previous decision.

Fear of the regulatory competition (*Delaware effect*) may be a ground for the application of the reciprocity rule, as companies would favour those member states that allow them a wider room for manoeuvre and due to them moving their registered seat into such countries, member states that not apply the principle of *reciprocity*, would be left in a disadvantageous position. Therefore, for member states it is a notable argument supporting the application of the *reciprocity principle* that thereby companies are provided with all the flexibility that the Directive offers.¹⁴³

The reciprocity rule is applied for instance by Hungary, France, Greece, Portugal, Slovenia, Germany, the Netherlands, Spain, Italy, Denmark and Belgium.¹⁴⁴

141 MENJUCQ, 2006, p. 233.

142 MENJUCQ, 2006, p. 233.

143 See COMMISSION STAFF WORKING DOCUMENT, 2007, p. 8.

144 See COMMISSION STAFF WORKING DOCUMENT, 2007, p. 12 and KECSKÉS; HALÁSZ, 2013, pp. 482-483.

11. Squeeze-out and sell-out rules

By exercising the so-called *squeeze-out* right, the bidder has the chance to remove minority shareholders and thereby eliminate risks and costs originating in their permanent presence. It is an efficient tool of acquiring the 100% ownership of a company and thus buying out all minority shareholders. It also prevents the arbitrary conduct of minority shareholders and enables that a larger portion of the returns of the takeover are allocated to the bidder, thus making the possibility of a takeover more attractive. For the above reasons, the application of the squeeze-out rule stimulates takeovers and makes a positive impact on the chances to change control of a company. In many member states the introduction of the *squeeze-out*¹⁴⁵ right was a consequence of the Directive, which hopefully will contribute to increasing the number of takeovers in the European Union.¹⁴⁶

Concurrently we must point out that the Directive obviously sets forth guarantees as well for the protection of minority shareholders. It also ensures that a minority shareholder sell its shares to the bidder for a fair price (sell-out) within 3 months as of the successful closing of the bid. As the securities of small shareholders are to be purchased for a fair price, the above rule provides ample protection compared to the scenario, in which they would be forced to sell their shares on a potentially illiquid market. This rule is suitable for reducing the pressure on the shareholders of the target company to offer their shares even to a bidder that

145 See, e.g., Spain, Luxembourg, Malta, Slovenia and Slovakia. COMMISSION STAFF WORKING DOCUMENT, 2007, p. 8.

146 GOERGEN; MARTYNOVA; RENNEBOOG, 2005, pp. 14-15 and 25-26, Table 2 and COMMISSION STAFF WORKING DOCUMENT, 2007, p. 9.

launches a bid not sufficiently attractive.¹⁴⁷ The right of sell-out reduces the amount of the return that is to be allocated to the bidder in case of a takeover, therefore it also reduces the number of value-increasing takeovers. In several member states,¹⁴⁸ *sell-out* rights were introduced as a result of the implementation of the Directive.¹⁴⁹

The 13th Company Law Directive stipulates already in point 24 of its Preamble that member states should take the necessary measures to enable an offeror who, following a takeover bid, has acquired a certain percentage of a company's capital carrying voting rights to require the holders of the remaining securities to sell him/her their securities. This means that the acquisition of shares providing a certain degree of control brings forth a call option on the remaining shares of the company. This point of the Preamble also includes the provision of the community regulation, according to which where, following a takeover bid, an offeror has acquired a certain percentage of a company's capital carrying voting rights, the minority shareholders should be able to sell him/her their securities, which the offeror is obliged to purchase. This rule creates a put option for the minority shareholders. The Directive comprises the detailed rules thereof in Articles 15-16, under the titles of 'The right of squeeze-out' and 'The right of sell-out'.

According to the 13th Company Law Directive, these rights only apply to the acquisition of the securities of a target company after a takeover bid, namely following a

147 BEBCHUK, 1987, p. 917.

148 See Austria, Belgium, Estonia, Germany, Greece, the Netherlands, Malta, Spain, Luxembourg, Slovakia and Slovenia. See COMMISSION STAFF WORKING DOCUMENT, 2007, p. 10.

149 GOERGEN; MARTYNOVA; RENNEBOOG, 2005, pp. 14-15, Table 2 and COMMISSION STAFF WORKING DOCUMENT, 2007, p. 10.

bid covering all the securities.¹⁵⁰ The preconditions of these rights are that the offeror holds securities representing not less than 90 % of the capital carrying voting rights and 90% of the voting rights in the offeree company, or that, following acceptance of the bid, he/she has acquired or has firmly contracted to acquire securities representing not less than 90% of the offeree company's capital carrying voting rights and 90% of the voting rights comprised in the bid.¹⁵¹ In the first one of the above cases, member states may set a threshold higher than 90% that may not, however, be higher than 95% of the capital carrying voting rights and 95% of the voting rights.¹⁵² Member states shall ensure that rules are in force that make it possible to calculate when the threshold is reached.¹⁵³

Based on the so-called *squeeze-out* right, the offeror may require all the holders of the remaining securities to sell him/her those securities at a fair price.¹⁵⁴ Thereby he/she shall be able to purchase the securities of the remaining minority shareholders by a unilateral statement at a fair price within three months¹⁵⁵ of the end of the time allowed for acceptance of the bid. The squeeze-out right is a suitable instrument for completing the takeover of a company, which makes the launch of a bid even more attractive. During the exercise of the squeeze-out right and the call option, one must pay a fair price for the securities, in other words, the price shall take the same form as the consideration offered in the bid or

150 Article 15, paragraph 1 and Article 16, paragraph 1 of Directive 2004/25/EC.

151 MENJUCQ, 2006, p. 227 and Article 15, paragraph 2 of Directive 2004/25/EC.

152 EDWARDS, 2004, pp. 427-428.

153 Article 15, paragraph 3 of Directive 2004/25/EC.

154 Article 15, paragraph 2 of Directive 2004/25/EC.

155 Article 15, paragraph 4 of Directive 2004/25/EC.

shall be in cash. Member states may provide that cash shall be offered at least as an alternative. The consideration shall be presumed to be fair if it equals at least to the amount set forth in the bid, or, in case of a voluntary bid, if the offeror has acquired securities representing not less than 90% of the capital carrying voting rights comprised in the bid through acceptance of the bid.¹⁵⁶

Pursuant to the Directive's provisions on sell-out right, member states shall ensure that a holder of remaining securities is able to require the offeror to buy his/her securities from him/her at a fair price under the same circumstances as provided for in the provisions on squeeze-out right.¹⁵⁷ As a result of the Directive's definition of securities,¹⁵⁸ the sell-out right does not apply to shareholders holding non-voting shares, whose cash flow rights may equally be affected by the takeover.

Member states may also provide that where the offeree company has issued more than one class of securities, the rights of squeeze-out and sell-out can be exercised only in the class in which the above-mentioned threshold has been reached.¹⁵⁹

12. Concluding remarks

In the beginning it was hard to forecast the effects of the Directive. Some of its provisions certainly meant a significant step towards establishing a higher level of protection for minority shareholders. On the other hand,

156 Article 15, paragraph 5 of Directive 2004/25/EC.

157 Article 16, paragraph 2 of Directive 2004/25/EC.

158 Article 2, paragraph 1, point e of Directive 2004/25/EC.

159 Article 15, paragraph 3 of Directive 2004/25/EC and KECSKÉS; HALÁSZ, 2013, pp. 483-485.

some other provisions could have indirect adverse effects. For instance, the rule prescribing the disclosure of anti-takeover defence mechanisms increases transparency, and thereby facilitates correct investment decisions, which can result in higher corporate governance standards and a more open market in the long term. Nonetheless, it can occur that the rule prescribing the neutrality of the board of directors as implemented by the member states may set back the establishment of the European market for corporate control instead of promoting it. The breakthrough rule, as currently implemented into the national laws, also seems unlikely to carry any kind of notable benefit in the short term.¹⁶⁰

However, a fundamental difference can be observed between the regulatory solutions of the United States and the European Union in terms of their orientation. In the United States the practice of the Delaware courts definitely rejected shareholder decision making in numerous significant decisions concerning takeovers and simultaneously emphasized the importance of directors in corporate management. However, in Europe the regulations rely on shareholder decision making to a much greater extent. For instance, British regulations, which are considered to be the point of departure in terms of the Takeover Directive, rejected the discretionary decision of the management in respect of the bid and gave prominence to shareholder interests (and decision making) in the regulation.¹⁶¹ According to foregoing approach, the management is prohibited from applying any defensive measures without the approval of the shareholders following the making of the takeover bid. Thus, for instance, the application of the poison pill is prohibited in the United Kingdom, while it is a popular defensive measure in the

160 See COMMISSION STAFF WORKING DOCUMENT, 2007, pp. 10-11.

161 ARMOUR; SKEEL, 2007, pp. 50-51.

United States.¹⁶² The Takeover Directive basically follows the above described approach by the (optional) introduction of the neutrality rule. The European regulation allocates a direct function to shareholders in the case of takeovers.¹⁶³ As a result of the restricted application of defensive measures, hostile takeovers may have a better chance to be successful. The foregoing is supported by the comparison between the United States and United Kingdom takeover activity. On the one hand, a larger proportion of takeovers were hostile in the United Kingdom than in the United States. During the period between 1990 and 2005 in the United Kingdom 0.85% of the notified takeovers were hostile, while in the United States 0.57% of takeovers were hostile. Consequently, although hostile takeovers are rather infrequent in both countries, they are still far more frequent in the United Kingdom. Moreover, 43% of hostile bids were successful in the United Kingdom, while in the United States only 24% of such takeovers were successful.¹⁶⁴

References

ARMOUR, John; SKEEL, David A. Jr. The Divergence of U.S. and UK Takeover Regulation. In: *Regulation*, v. 30, n. 3, pp. 50-59, 2007.

BEBCHUK, Lucian Ayre. Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law. In: *Harvard Law Review*, v. 105, n. 7, pp. 1443-1510, 1992.

BEBCHUK, Lucian Arye. The Case Against Board Veto in Corporate Takeovers. In: *The University of Chicago Law Review*, v. 69, n. 3, pp. 973-1035, 2002.

162 ARMOUR; SKEEL, 2007, pp. 50-51.

163 ARMOUR; SKEEL, 2007, pp. 50-51 and VENTORUZZO, 2006.

164 ARMOUR; SKEEL, 2007, p. 52 and KECSKÉS; HALÁSZ, 2013, pp. 487-488.

BERGSTROM, Clas *et al.* The Regulation of Corporate Acquisitions: A Law and Economics Analysis of European Proposals for Reform. In: *Columbia Business Law Review*, v. 1995, n. 2, pp. 495-524, 1995.

BICZI, Éva. Az új tőkepiaci törvény és a részvénytársaságok. In: *Cég és Jog*, v. 4, n. 6, 2002.

BURGIENÉ, Dovilė. Lithuania. In: *A Practitioner's Guide to Takeovers and Mergers in the European Union*. Great Britain, City & Financial Publishing, 2008.

CARY, William L. Federalism and Corporate Law: Reflections upon Delaware. In: *Yale Law Journal*, v. 83, n. 4, 1974.

CHEN, Dr. Li-Jiuan. The Defensive Measures in Case of Takeover under German Takeover Act and Delaware Corporate Law. In: *National Taiwan University Law Review*, v. 2, n. 2, pp. 93-114, 2007.

COMMISSION OF THE EUROPEAN COMMUNITIES. *Annex to the White Paper: Time Table for Completing the Internal Market by 1992*. Accessible at: <http://europa.eu/documents/comm/white_papers/pdf/com1985_0310_f_en_anexe.pdf>. Accessible at: 14 June 2010.

COMMISSION OF THE EUROPEAN COMMUNITIES. *Completing the Internal Market: White Paper from the Commission to the European Council*. Accessible at: <http://europa.eu/documents/comm/white_papers/pdf/com1985_0310_f_en.pdf>. Accessible at: 14 June 2010.

COMMISSION OF THE EUROPEAN COMMUNITIES. *Communication from the Commission to the Council and the European Parliament: Modernising Company Law and Enhancing Corporate Governance in the European Union- A Plan to Move Forward*. Accessible at: <<http://eur-lex.europa.eu/LexU>

riServ/LexUriServ.do?uri=COM:2003:0284:FIN:EN:PDF>. Accessible at: 24 February 2013.

COMMISSION OF THE EUROPEAN COMMUNITIES. *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Application of Directive 2004/25/EC*. Accessible at: <http://ec.europa.eu/internal_market/company/docs/takeoverbids/COM2012_347_en.pdf>. Accessible at: 13 January 2013.

COMMISSION STAFF WORKING DOCUMENT. *Report on the implementation of the Directive on Takeover Bids Report on the implementation of the Directive on Takeover Bids*. Accessible at: <http://ec.europa.eu/internal_market/company/docs/takeoverbids/2007-02-report_en.pdf>. Accessible at: 23 June 2010.

EDWARDS, Vanessa. The Directive on Takeover Bids. In: *European Company and Financial Law Review*, v. 1, n. 4, 2004.

ENRIQUES, Luca. The Mandatory Bid Rule in the Takeover Directive. In: *European Company and Financial Law Review*, v. 1, n. 4, pp. 440-457, 2004.

FERRARINI, Guido. One Share – One Vote: A European Rule? In: *European Company and Financial Law Review*, v. 3, n. 2, 2006.

GADÓ, Gábor. Társasági jogi reform Európában. In: *Magyar Jog*, v. 53, n. 6, 2006.

GOERGEN, Marc; MARTYNOVA, Marina; RENNEBOOG, Luc. Corporate Governance Convergence: Evidence From Takeover Regulation Reforms. In: *European Corporate Governance Institute (ECGI), Law Working Paper*, n. 33, pp. 2-34, 2005. Accessible at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=709023>.

GORDON, Jeffrey N. Ties that Bond: Dual Class Common Stock and the Problem of Shareholder Choice. In: *California Law Review*, v. 76, n. 1, pp. 3-85, 1988.

HARVEY, Neil; NOURRY, Alex. Takeovers and Mergers in the European Union – an Overview. In: *A Practitioner's Guide to Takeovers and Mergers in the European Union*. Great Britain: City & Financial Publishing, 2008.

HUTCHINSON, Harry G. Director Primacy and Corporate Governance: Shareholder Voting Rights Captured by the Accountability/ Authority Paradigm. In: *Loyola University Chicago Law Journal*, v. 36, n. 4, pp. 1112-1205, 2005.

JUNEWICZ, James J.; GREENE, Edward. F. A Reappraisal of Current Regulation of Mergers and Acquisitions. In: *University of Pennsylvania Law Review*, v. 132, n. 4, pp. 649-737, 1984.

JUVARA, Nicolo; SANTARELLI, Rocco. Italy. In: *A Practitioner's Guide to Takeovers and Mergers in the European Union*. Great Britain: City & Financial Publishing, 2008.

KECSKÉS, András; HALÁSZ, Vendel. *Stock Corporations - A Guide to Initial Public Offerings, Corporate Governance and Hostile Takeovers*. 1. ed. Budapest-Wien: HVG-ORAC – Lexis Nexis, 2013.

MAGNUSON, William. Takeover Regulation in the United States and Europe: an Institutional Approach. In: *Pace International Law Review*, v. 21, n. 1, pp. 205-240, 2009.

MENJUCQ, Michel. The European Regime on Takeovers. In: *European Company and Financial Law Review*, v. 3, n. 2, pp. 222-236, 2006.

MANNE, Henry G. Some Theoretical Aspects of Share Voting: An Essay in Honor of Adolf A. Berle. In: *Columbia Law Review*, v. 64, n. 8, 1964.

MAUL, Silja; MUFFAT-JEANDET, Daniele. *Die EU- Übernahmerrichtlinie (Teill). Die Aktiengesellschaft*, 2004.

MCGREGOR, Neil. Romania. In: *A Practitioner's Guide to Takeovers and Mergers in the European Union*. Great Britain: City & Financial Publishing, 2008.

OESTERLE, Dale A. Target Managers as Negotiating Agents for Target Shareholders in Tender Offers: A Reply to the Passivity Thesis. In: *Cornell Law Review*, v. 71, n. 1, 1985.

RIBSTEIN, Larry E. Takeover Defenses and the Corporate Contract. In: *The Georgetown Law Journal*, v. 78, n. 1, 1989.

SIEMS, Mathias M. Rules on Conflict of Laws in the European Takeover Directive. In: *European Company and Financial Law Review*, v. 1, n. 4, pp. 458-476, 2004.

SJAFJELL, Beate. Political Path Dependency in Practice: the Takeover Directive. In: *Yearbook of European Law*, v. 27, n. 1, pp. 387-404, 2008.

THE TAKEOVER BIDS DIRECTIVE ASSESMENT REPORT. Accessible at: <http://ec.europa.eu/internal_market/company/docs/takeoverbids/study/study_en.pdf>. Accessible at: 24 February 2013.

TUCHINSKY, Dmitry. The Takeover Directive and Inspire Art: Reevaluating the European Union's Market for Corporate Control in the New Millennium. In: *New York Law School Law Review*, v. 51, n. 3, pp. 690-718, 2006-2007.

VAN HULLE, Karel. Aktuelle Entwicklungen im europäischen Gesellschaftsrecht. In: *Europaisches Wirtschafts- und Steuerrecht*, 2000/12.

VENTORUZZO, Marco. Europe's Thirteenth Directive and U.S. Takeover Regulation: Regulatory Means and Political and Economic Ends. In: *Texas International Law Journal*, v. 41, n. 2, 2006.

WINTER, Ralph K. Jr. State Law, Shareholder Protection and the Theory of the Corporation. In: *The Journal of Legal Studies*, v. 6, n. 2, pp. 251-292, 1977.

WIST, Tarja; FAGERNAS, Tom. Finland. In: *A Practitioner's Guide to Takeovers and Mergers in the European Union*. Great Britain: City & Financial Publishing, 2008.

ZINSER, Alexander. Einneuer Anlauf: der jüngste Vorschlägeiner Übernahmerrichtlinie vom 2.10.2002. In: *Europaisches Zeitschriftfür Wirtschaftsrecht*, v. 14, n. 1, 2003.

Recebido em 20/05/2014.

Aprovado em 20/12/2014

András Kecskés

University of Pécs

Faculty of Law

Department of Business and Commercial Law

Pécs, 48-as ter 1.

7624 HUNGARY

E-mail: kecskes.andras@ajk.pte.hu

Vendel Halász

University of Pécs

Faculty of Law

Department of Business and Commercial Law

Pécs, 48-as ter 1.

7624 HUNGARY

E-mail: halasz.vendel@gmail.com