[*Efficient Takeovers Rules for Efficient Capital Markets:*]

The Mandatory Bid Rule: Comparison, Analysis and European Policy Assessment

I. Introduction.

Mandatory bid rules – i.e. rules which provide that a person who acquires a certain percentage of the voting shares (or the control) of a listed company is required to make a mandatory offer to buy all (or sometimes just part of) the remaining shares in the company at an established price – are rather controversial in the legal and economic literature. They are prevalently diffused, and therefore discussed, in Europe, and, in particular, as widely known, it is since 1989 that the European Community is trying, without succeeding because of the lack of political agreement on the matter, to enact a Thirteenth Directive on take-overs bids, comprehensive of a mandatory bid rule.

After comparing European regulations as far as mandatory bids are concerned and analysing their functioning, this paper aims to assess the European policy on the matter and to sketch what would be the best legal framework in this respect. In Chapter II, therefore, I will briefly summarize the different legal rules on mandatory bids presently in force in the fifteen Member States of the European Community, as well as, for the sack of comparison, in some other highly developed countries (mainly, the US). In Chapter III, I will analyse how mandatory bid rules work in different ownership structures – basically, in the presence of a controlling shareholder, and, on the contrary, where the ownership is dispersed – and their economic rationale in such different contexts. In Chapter IV, I will consider the findings of the High Level Group of Company Law Experts chaired by Professor Winter on takeover bids and the related provisions of the latest proposal of a Thirteenth Directive published by the European Commission and try then to assess

the European policy on mandatory bids, delineating what would be an ideal legal framework thereon in the European context. Finally, Chapter V concludes.

II. Comparison.

A. EU Member States.

Comparative studies on mandatory bid rules in Europe have already been published in the recent past (e.g. Skog 1995, Wymeersh 1992 and 1998). However, in the last few years some changes in the regulations have occurred and new laws have also been enacted. What follows is, therefore, an updated overview on the mandatory bid rules in effect in the EU: at present, thirteen Member States have enacted a mandatory bid rule, whilst Luxembourg and the Netherlands have not.

United Kingdom

The British City Code on takeovers and mergers has been the first regulation to impose, in 1972, the mandatory bid [1]. The Code is a set of rules issued and administered by the Takeover Panel – a private body whose membership is very wide, including representatives of all the institutions active in the City of London [2]. The Code does not have the force of law [3], but its enforcement is nevertheless extremely effective. A breach of the City Code – when it does not indirectly constitute a criminal or a civil offence (e.g. misleading the public, or market abuse) – may lead to public censure from the Panel, which has sensible effects on the market [4], or to stronger sanctions not only applicable to the offending party herself (order to remedy the breach or exclusion from the UK securities market), but also to her financial

[1] See Johnston 1980, p. 91.
[2] See Lee 1992, p. 134.
[3] This was considered a problem for the case of the eventual approval of the Thirteenth Directive on take-over bids, as it required that its provisions would be legally enforceable (see Gower's 1992, p. 705), but the latest drafts of the Directive should have overcome it, admitting the supervision of private bodies recognized by national laws (see *infra* IV.A).
[4] See Lee 1992, p. 136.

advisers on the transactions in question (who could even be disqualified from carrying on business in the UK). In practice, therefore, even if it might be possible that, in very particular circumstances, the offending party could be immune from the decisions of the Panel, it will be very likely that she would anyway employ advisers in London that would be members of one of the associations composing the Panel or, at any rate, subject to its authority. And, in extreme situations, it is probable that the Courts or the Financial Markets Authority could now intervene to enforce a decision of the Panel [5].

From another point of view, then, as the Code is 'soft law', its particular status implies that, on the one hand, both its letter and its spirit must be observed (which makes easier to catch up with possible attempts to circumvent its provisions), and that, on the other hand, the Panel can relax its rules without excessive formalities, when it would appear necessary or opportune [6]. The system is, therefore, deemed to be very successful, being not only effective, but also very flexible.

As far as mandatory bids are concerned, Rule 9 of the City Code [7] provides that any person – or group of persons acting in concert – who acquires shares in a listed (but sometimes even not listed) company [8], resulting to hold *30%* or more of its voting rights [9], is required to make an offer to buy *all* the remaining shares of such a company. The offer must be in cash or be accompanied by a cash alternative at no less than, for each class of shares the offeror has bought, *the highest price* paid by the

[5] However, there have been (rare) cases in the past in which the Panel was not able to enforce its decisions against some 'outsiders' (see, e.g., the take-over of St. Piran Ltd in 1974, reported by Farrar's 1991, p. 637).
[6] See, e.g., [Braunholer 2001].
[7] See City Code, July 2002 version.
[8] See City Code, Introduction, par. 4, p. A8. The Code applies to companies considered by the Panel to be resident in the UK, the Channel Islands or the Isle of Man, which are (or were) listed or the shares of which are (or were) publicly traded, having regard to certain parameters.
[9] In the 1972 version of the Code, the threshold was 40% (but in particular circumstances 30%; see Johnston 1980, p. 91). Lowered to 30% in 1974, the threshold has not subsequently changed, even though it has been sometimes proposed to further lower it to 25% or even 20% (see Skog 1995, p. 973).

offeror for shares of that class during the offer period and within 12 months prior to its commencement (Rule 9.5) [10]. The offeror must anyway offer to buy all the outstanding shares of any class in the company, both voting and non voting, independently of whether it bought shares in each class or not, and the offers for different classes of shares must be 'comparable' (and the Panel must be consulted in advance on that) [11]. In addition, an offer must be made also when a person, or group of persons acting in concert, holding not less than 30% but no more than 50% of the voting rights in a company acquires additional shares which increase his percentage of the voting rights (so called 'creeper rule') [12].

The rationale for these rules is normally considered to be twofold. Firstly, the Code 'is designed principally to ensure fair and equal treatment of all shareholders in relation to takeovers' (Introduction) – generally, by any offeror (General Principle 1) and particularly where someone acquires the control of the company (General Principle 10). The philosophy of the Code is that the premium for control must be shared by all shareholders equally and it does not permit, therefore, that an extra-premium could be paid only to a major shareholder [13]. Secondly, it is believed that when a new person acquires the control of a company, shareholders should be given the change to sell their shares (so called 'exit' right), as they might not like to remain

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[10] In particular circumstances, the offeror can apply for an adjusted price, asking the Panel to be waved from the highest price (Rule 9.5b). Sometimes it is also possible that the 'highest price' could not be found, because there were no cash acquisition in the relevant period. In this case, the Panel will agree with the offeror a 'fair price' (See Weinberg & Blank 1999, p. 4249). Finally, as generally provided for by Rule 6.2, if the offeror purchases shares at above the offer price, it shall increase its offer to not less than the highest price paid for the shares so acquired.
However, the potential bidder can try to escape the obligation to bid applying with the Panel for a waiver, making firm arrangements for the placing of a number of shares sufficient to reduce its holding to below 30% (note 6 on Rule 9.1).

[11] See Weinberg & Blank 1999, p. 4253. The offer must also be extended to the holders of any class of voting non-equity capital in which the offeror holds shares.

[12] This rule changed during the years and previously it was possible to buy small percentages (1 and then 2%) of shares in any period of twelve months (see Johnston 1980, p.96 and Weinberg & Blank 1999, p. 4240).

[13] See Weinberg & Blank 1999, p. 4239, Lee 1992, p. 137, Farrar's p. 636. However, while the Code treats control as an asset of the company, reflected in the value of each share, British courts have always ruled – in relation to both the valuation of shares and the compulsory acquisition of shares under Part XIIIA of the Company Act – that control belongs to controlling shareholders, enhancing only the value of a controlling block of shares.

in the company under the new controller [14]. And this not only, when someone builds up a controlling block of shares, leaving the remaining shareholders as a powerless minority, but also when the company was already before controlled by another controlling shareholder [15].

However, there are some exceptions to these rules. Even though they are strongly discouraged, partial bids to exceed over the threshold of 30% are possible, but only with both the consent of the Panel (Rule 36.1) and the approval of the offer by shareholders holding over 50% of the voting rights not held by the offeror and persons acting in concert with him(Rule 36). Shares tendered in excess must be accepted by the offeror from each shareholder in the same proportion ('scaling down'; Rule 36.7) and very strict restrictions to the purchase of shares before, during and after the offer also apply (Rules 36.2 and 3) [16]. Dispensations from the obligation to make an offer may also be granted by the Panel in particular circumstances, as in the case of an inadvertent mistake, of an issue of new shares in order to rescue a troubled company, of an acquisition of shares pledged as security for a loan, and of an enfranchisement of non voting shares, as well as where more than 50% of the voting rights in the company are held by a third person [17]. Furthermore, the Panel would normally waive the obligation to make an offer, if an independent vote at a shareholders' meeting approves the issue of new securities as consideration for an

[14] See Weinberg & Blank 1999, p. 4237, Lee 1992, p. 137, Farrar's 636.
[15] The acquisition of control by way of a private deal is normally regarded rather suspiciously in the UK; in addition, whereas the former controllers may be individuals, the new ones are usually companies with the consequence that the acquired company becomes subjugated to the interests of the group (see Weinberg & Blank 1999, p. 4237, and *infra*).
[16] The consent of the Panel will not normally be granted if the offeror has acquired shares in the offeree company selectively or in significant numbers during the previous 12 months or when the offer could reasonably be in contemplation (Rule 36.2), as well as it may not purchase shares neither during the offer period, nor afterwards, for a further period of 12 months (Rule 36.3).
[17] See Notes on Dispensation under Rule 9.1 and Weinberg & Blank 1999, p. 4254.

acquisition or a cash subscription causing the reaching of 30% or in cases involving the underwriting of an issue of shares (so called 'whitewash') [18].

Doubtless, one of the most problematic area in the context of Rule 9 is of course the definition and application of the notion of 'persons acting in concert' [19]. And problems may also arise when control is acquired or consolidated indirectly, for example securing control of a holding company which controls the target company: in such cases, an offer must usually be made if the target company is the main asset of the holding company or the main purpose of the acquisition of the holding company is to secure control of the target (so called 'chain principle') [20].

Finally, the rules governing non-mandatory offers will apply to mandatory bids too: an offer document must be posted by the offeror, the target directors must give advice to shareholders, etc. [21]. In addition, as generally provided by Rule 31.4, also a mandatory bid must remain open for at least further 14 days after the offer has become unconditional as to acceptances (Rule 9.5). According to rule 10 of the Code, then, it must be a condition of any offer for voting equity share capital that the offeror would result to hold more than 50% of the voting shares in the company [22], but mandatory bids may conditional *only* upon such a condition (Rule 9.3) and, if necessary, upon the allowance by the competent competition authorities (Rule 9.4).

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[18] See Note on Dispensation n. 1 under Rule 9.1.

[19] See Weinberg & Blank 1999, p. 4243, Lee 1992, p. 138. There is a general definition of persons acting in concert in the Code (Definitions) by means of rebuttable presumptions, as well as particular guidelines as far mandatory bids are concerned (notes on Rule 9). Each of the persons acting in concert have normally the obligation to make the offer (Rule 9.2). However, as the mere holding of shares does not oblige to make an offer (Johnston 1980, p. 270), acting in concert without buying shares is not sufficient to impose the launch of a mandatory bid.

[20] See Weinberg & Blank 1999, p. 4243 and City Code note 7 on Rule 9.1.

[21] See Weinberg & Blank 1999, p. 4247.

[22] As far as mandatory bids are concerned, if the offer does not succeed, the offeror could be compelled by the Panel to sell the shares exceeding the 30% threshold or to make a new offer (see notes to Rule 9.3). This is supposed to be a further protection of minority shareholders, should not even the highest price paid by offeror an acceptable price; but the actual utility of such a provision has been deemed illogical (see Weinberg & Blank 1999, p. 4250) and, practically, it could result in the minority blocking a transfer of control, even though the offeror is paying to it the same price *per* share, it has paid to the past controlling shareholder.

France

In France, the basic structure of the present regulation on mandatory bids was introduced in 1989 [23]. Some relevant changes then occurred in the following years, and the current rules may now be found in the General Regulations of the *Conseil des Marches Financieres* (CMF) [24], the public body which supervises take-over bids, together with the *Commission des operations de bourse* (COB) [25].

Article 5.5.2 of the General Regulations provides that when a person – or a group of persons acting in concert [26] – comes to hold more than *one-third* of a listed company voting securities or voting rights, such person is required to file a proposed tender offer for *all* the company's voting shares (and for any securities giving access to its voting securities or voting rights) [27]. An offer must also be filed when a person (or group of persons), holding not less than one-third but no more than one-half of the voting rights in a company acquires additional shares, increasing her percentage of the voting rights of more than 2% within a 12 months period (Article 5.5.4). Moreover, where more than one-third of the voting rights in a company have been acquired (or consolidated) indirectly, coming to control its holding company, an offer must be made as well, if the target company constitutes 'an essential part' of the assets of the holding company (Article 5.5.3).

Originally, the 1989 version of the French mandatory bid required to bid only for two-thirds of the voting capital, in consideration of the diffused fear of making

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[23] Loi n. 89-531 (2.8.1989). See Skog 1995, p. 989.

[24] Title V (Orders of 5.11.1998, 18.12.2000 and 15.11.2002), of the General Regulations of the CMF, established under Law 597/1996, of 2.7.1996.

[25] Basically, the CMF is in charge of supervising public tender offers in general and the COB of overseeing information and transparency in particular.

[26] The notion of 'acting in concert' is provided for by article L.233-10 of the Commercial Code. The General Regulations, in particular, provides also that, when actions in concert (and variations in the composition of the group of persons acting in concert) do not alter significantly the situation of the company, there is no requirement for a tender offer (Art. 5.5.5.).

[27] In particular, the Ministry of Economy, Finance and Industry has provided that, in practice, the offer must be made when 33,5% of the voting rights in the company are acquired.

acquisitions overly expensive. However, since the beginning such a solution appeared to be very unsatisfactory and was strongly criticized, so that, in 1992, the law was changed, requiring the offeror to bid for all the remaining shares [28]. And this is, moreover, consistent with the general rule which provides that, aside from exceptions, any public tender offer in France must be for all the equity securities in the company (Article 5.1.1).

As far as the price of the bid is concerned, the offer must be drawn up in terms that the CMF can declare it *acceptable* (*'recevable'*), and normally this is interpreted in the sense that it should have reasonable chances to be accepted [29]. The rule is, in fact, a specification of a general provision applicable to every tender offer, the terms of which must always be vetted by the CMF (Article 5.1.9). A cash consideration is not, anyway, expressly required.

Generally speaking, the rules governing non-mandatory offers apply also to mandatory bids, if appropriate, but the latter cannot be conditioned upon the actual acquisition of a minimum number of securities (whilst an antitrust condition may be set out) [30]. At least one financial institution must then be appointed as 'sponsor' of the offer (5.1.4), and an offer document must be prepared by the offeror, to be vetted by the COB (5.1.12).

However, an important exception to such rules is possible, when a 'standing market offer' (*'mantien de course'*) procedure, provided for by Chapter IV of Title V of the General Regulations, is applicable. The 'standing market offer' is probably the most remarkable peculiarity of the French discipline: in practice, when a block of securities carrying the majority of a company's capital or voting rights is acquired (Article

[28] See Skog 1995, p. 990.
[29] See Skog 1995, p. 991.
[30] See Article 5.5.2, second period, and Articles 5.1.3.1-3.

5.4.1), the acquirer, after disclosing a limited amount of information, may simply place an order on the market for a period of at least ten trading days to buy all the securities offered for sale *at the same price per share* at which the block has been bought (Article 5.4.2) [31]. The procedure is, therefore, much quicker and less expensive than a 'normal' offer [32], but the CMF can invoke the application of the ordinary rules if, either: (i) the equality between the price paid for the block and the price offered to other shareholders could be compromised; or (ii) the block or blocks are acquired from persons previously not holding the majority of the voting rights (Article 5.4).

In between the general procedure and the standing market offer procedure, finally, stands a third procedure, called 'simplified procedure', that, according to the General Regulations, may be used in special circumstances, the most relevant of which is when a person, following an acquisition, comes to hold one-half or more of a company's capital and voting rights [33].

No partial offer is possible in France, but in particular cases the CMF may waive the obligation to make the mandatory offer (i.e. gratuitous acquisitions, issues of new shares in order to rescue a troubled company, mergers or asset contributions approved by the general meeting, reductions of capital, prior holding of 50% of the voting rights in the company by the applicant or a third party and transfers within the same group, pursuant to Article 5.5.7, as well as small, less than 3%, and temporary, for no more than 6 months, exceeds of the one-third threshold, pursuant to Article 5.5.3.1).

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[31] The CMF may authorize a lower price, in presence of a guarantee clause or a deferred payment.

[32] See Wymeersh 1992, p. 351. An analogue procedure is also known in Belgium (see, *infra*,).

[33] See General Regulations, Ch. III. There is a slight difference among the presupposition of the mandatory bid and the requirements of the special procedures: Article 5.5.2 (mandatory bid) refers to the company's voting securities *or* voting rights, Article 5.4.1 (standing market offer) to the company's capital *or* voting rights and Article 5.3.2.b (simplified procedure by the holder of legal control) to the company's capital *and* voting rights.

Finally, if the obligation to make the offer is not fulfilled, the voting rights relating to the shares exceeding the one-third threshold cannot be exercised and the COB can demand the courts to force the not complying shareholder to launch the offer [34].

Germany

In Germany the mandatory bid has been introduced only very recently, with the *Wertpapiererwerbs- und Ubernahmegesetz* of December 2001 (the 'German Takeover Act'), in force since the 1st of January 2002 [35]. Previously, some rules of best practice had been adopted, but they were always of limited application [36].

The German Takeover Act applies to companies seated in Germany, the shares of which would be traded on regulated markets within the EES and its application is supervised by the German federal authority overseeing financial services, the *Bundesanstalt fur Finanzdienstleistungsaufsicht* (the 'BAFin').

Pursuant to articles 35.1 and 29.2 of the Act, any person coming to hold *30%* or more of the voting capital of a company (the 'control threshold') is required to bid for *all* the remaining [voting] shares in the company. Consistently, any offer to buy more than 30% of the voting shares in a company must be addressed to its entire [voting] capital (Article 32).

The counter-value of the bid must be a *'fair consideration'*, taking into account the market price of the shares and the prices previously paid by the offeror to buy shares in the company (Article 31.1). And, pursuant to the guidelines on mandatory bids

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34 See Skog 1995, p. 991.

35 For an English summary of the Act, see Int. Fin. L.R., March 2002. Such an act has been enacted after the failure to reach an agreement on the Thirteenth Directive by European Parliament in July 2001.
The following overview of the German law is mainly based on Steinheur 2002 (Italian text).

36 See, ultimately, the Takeover Code 1995 prepared by the *Borsensachverstandigenkommission* (see www.codex.de).

adopted by the Ministry of Finance [37], a fair consideration should be represented by *the highest price* paid by the offeror within 3 months prior to the commencement of the offer, and, anyway, no less than the weighted average of the market price of the shares within the same period [38]. No cash consideration is in principle required, but possible securities offered in exchange must be listed within the EES and the offer must be in cash, where the offeror has bought so more than 5% of the shares in the company within the previous 3 months (Article 31.3.1) [39].

[action in concert and creeper rule]

Where the control of a company have been indirectly acquired, coming to control its holding company, an offer must in general be made (Article 30 and 35.1), but the BAFin may wave such obligation in certain circumstance, as, according to the Ministerial guidelines, when the book value of the stock in the subsidiary represents no more than 20% of the balance-sheet assets of the parent.

No later than four weeks after its reaching the control threshold, the offeror must transmit the offer document to the BAFin, which then indicates what must be the minimum content of the offer prospectus (Article 11). As also for non-mandatory offers, the offer must no less than 4 weeks and no more than 10, but – if the offer succeeds – shareholders who have not tendered their shares, can accept it within an extended period of 14 days (16.2).

Also in Germany, no partial bid is possible, but exemptions may be granted by the BAFin, in particular circumstances (restructuring of a troubled company, temporary

[37] See *WpUG-Angebotsverordnung* 27.12.2001 on www.bundesanzeiger.de).

[38] However, if, either during the offer or within 12 months after it, the offeror buys shares at a higher price than that of the offer, it is obliged to offer to pay such a price to the generality of the shareholders (Article 31.4).

[39] The offer must be in cash also if the offeror buys cash more than 1% of the shares during the offer period (Art. 31.3.2).

acquisition, and where actual control of the company is not acquired; Article 37) [40]. In addition, shares coming from gratuitous acquisitions or restructurings within the same group do not count in order to assess if the control threshold has been reached. The most important exemption from the obligation to make an offer is, however, provided for by Article 35.3 of the German Takeover Act, pursuant to which the offer should not be launched when the control threshold is reached as a result of a voluntary bid addressed to all the voting shares in the company, provided that such a bid would already meet all the requirements a mandatory bid would have had to respect in the same situation, to avoid possible elusions.

Italy

In 1991, Italy enacted for the first time a mandatory bid rule [41]. An offer had to be made, when a person acquired the 'control' of a listed company: no presumptive threshold of control was established, and the existence of factual control had to be defined in the single cases by the Italian financial markets regulator (CONSOB) [42]. The offeror had to bid for a number of shares equal to the number of those previously acquired to obtain the control, offering no less than the average of the prices paid so far to buy shares in the company [43].

However, such rules – and in particular the 'case by case' assessment of the possible acquisition of control – proved to be rather unsatisfactory and seven years later a completely new discipline came into force, within a broader reform of the legislation in the financial sector under the *Testo Unico sull'intermediazione finanziaria* of 1998 (the

[40] Detailed provisions on the exemptions are provided for by the *WpUG-Angebotsverordnung* 27.12.2001.
[41] Legge 18.2.1991, n. 149.
[42] Commissione Nazionale per le Società e la Borsa.
[43] See Skog 1995, p. 992.

'Italian Consolidated Financial Services Act') [44]. As far as mandatory bids are concerned, the Italian Consolidated Financial Services Act applies to companies seated in Italy, the shares of which would be traded on Italian regulated markets, and its application is supervised by CONSOB, which has also the power to enact secondary regulations thereon (the 'CONSOB Regulations') [45].

Pursuant to article 106 of the Italian Consolidated Financial Services Act, any person – or group of person acting in concert (article 109) [46] – who, as a result of purchases for a consideration, comes to hold more than *30%* of a company's voting capital, is required to make an offer to buy *all* the remaining voting shares in the company within 30 days. , at a price no lower than *the arithmetic mean* of the weighted average market price in the last 12 months and the highest price paid in the same period for the purchase of shares. In particular, the adoption of such a criterion to fix the price is aimed to allowing investors to exit the company in case of change of control at a 'fair' (but 'discounted') price, without making acquisitions overly expensive and thereby reducing the contestability of corporate control [47]. Securities listed in the EU may then be offered in exchange, but only in the same proportion in which such consideration was paid in the transactions carried out in the last 12 months [48].

In addition, an offer must be made when persons holding more than 30% but less than 50% of a company's voting capital increase their holding (of more than 3% in

[44] Decreto Legislativo 24.2.1998, n. 58.

[45] The relevant CONSOB Regulation on mandatory bid is CONSOB Regulation 11971/1999 (subsequently modified in many occasions).

[46] Article 109 of the Italian Consolidated Financial Services Act establishes a series of non-rebuttable presumptions in particular cases (e.g. between parties of shareholders' agreements: to avoid elusions an offer must be made also when some of the persons acting in concert have bought shares within the 12 months before the conclusion of the agreement. However, the mere holding of shares overall exceeding the threshold by parties entering in a shareholder agreement does not trigger the obligation to launch an offer. Also, slight modifications of the parties in the agreement do not normally trigger such an obligation, as well: see Costi 2000, p. 91).

[47] CONSOB Regulation 11971/1999, article 47. In addition, such securities cannot be evaluated more than their weighted average market price in the last 12 months.

[48] See Pagano, Panunzi and Zingales 1998, p. 152, whose opinions have also been endorsed by CONSOB. See also *infra*.

the a period of 12 months) [49], and when more than 30% of a company's voting capital is acquired indirectly, coming to control a (holding) company, the assets of which consist prevalently of securities in the first company [50]. Moreover, an offer has to be launched (at a price set out by CONSOB) where a person, or group of persons, comes to hold more than 90% of the voting capital in a company (*'offerta residuale'*), unless she decides to restore a sufficient free float within 4 months (article 108), such a kind of mandatory bid performing the function carried on by compulsory sell-out rights in other legal systems (see *infra*).

A (second and mandatory) bid has not to be launched, however, when more than 30% of the voting capital of a company is acquired as a result of a (first) offer addressed to all the holders of voting shares in the company (article 106.4). But, even though such an offer exempts, in practice, the offeror from the application of the mandatory bid rule, the Act does not require that it necessarily fulfils the price requirements provided for mandatory bids [51].

Furthermore, under the Italian Consolidated Financial Services Act, a partial bid – but anyway addressed to no less than the 60% of a company's voting capital – is possible with the consent of CONSOB, provided that in the previous twelve months the offeror has not bought shares in the company exceeding 1% of the voting capital, and that a majority of independent shareholders approves the offer (article 107) [52].

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[49] Article 106.3.b of the Act and article 46 of CONSOB Regulation 11971/1999.

[50] Article 106.3.a of the Act. Article 45 of CONSOB Regulation 11971/1999 provides, in particular, that an offer must be made if *either* the book value of the stock in the subsidiary represents more than one-third of the balance-sheet assets of the parent (and exceeds also the value of any other fixed asset), *or* the value attributed to such stock represents more than one-third, and constitutes the principal component, of the price in the purchase of the parent shares).

[51] Securities can also be offered as consideration, provided that they would be listed on regulated EU markets (CONSOB Regulation 11971/1999, article 47.2).

[52] In such a case, for a period of twelve months the offeror may not buy shares in the company exceeding 1% of the voting capital or operate a merger.

Exemptions from the obligation to bid are, then, provided for in particular circumstances (such as rescues of troubled companies, transfers within the group, non-voluntary acquisitions, temporary acquisitions, and mergers and divisions approved by the general meeting and based on effective industrial needs, as well as when legal control is held by a third party) [53].

Finally, if the obligation to make the offer is not fulfilled, the voting rights attached to the whole stock owned by the offending party may not be exercised, and the shares exceeding the 30% threshold must be sold off within 12 months (article 110) [54].

Belgium, Luxembourg and the Netherlands

In Belgium the rules concerning mandatory bids are to be found in the *Arrete royal relatif aux offers publiques d'acquisition et aux modifications du control de societes* of 1989 (the 'Belgian Law') [55]. According to its provisions, any person, who, through a private transaction, acquires shares in a listed company coming to hold the *control* of such a company, must launch an offer to buy *all* the remaining shares in the company, provided that a premium (so called 'overprice') has been paid in the transaction (i.e. if the price per share agreed in the private deal is above the current market price of the shares) [56]. The price of the offer must be at least as high as the highest price paid to acquire the control of the company, so that all the company's shareholders could benefit from the possible payment of a control premium [57].

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[53] Article 106.5 of the Act and article 49 of CONSOB Regulation 11971/1999.

[54] In Italy, however, the interaction between CONSOB and the courts, civil or administrative, in administering the mandatory bid rule and the related sanctions is a very problematic issue: important decisions of CONSOB have recently been judicially challenged and then overruled by the courts, which in many cases may not have the necessary expertise to deal with these kind of matters.

[55] The Belgian Law was enacted on November the 8th 1989, under the *Loi relative a la publicite des participations importantes dans le societes cotees en bourse et reglement les offers publiques d'acquisition* of 1989.

[56] See Wymeersch 1992 (b), p. 354.

[57] See Wymeersch 1992 (b), p. 354.

Complementary to such a rule is, the, a further provision under which no partial offer that may result in the offeror holding more than 10% may be launched (and, should this in some way happen, the offeror would be bound to bid again. Offering to buy all the shares in the company) [58].

Finally, it is worth to be noted that also in Belgium a standing market offer procedure (*mantien de course*) akin to the French one is provided for by the Belgian Law, under which the obligation to make the offer is deemed to be fulfilled also when the new controlling shareholder has simply placed an order on the market to buy all the securities offered for sale at the due price, for a period of at least fifteen days [59].

As far as Luxembourg and the Netherlands are concerned, then, as already foresaid, neither of them have yet enacted a mandatory bid. Luxembourg's stock market is, anyway, very small and, also, both Luxembourg and the Netherlands are traditionally reluctant to impose burdens on companies operating in their jurisdictions. The Netherlands, in particular, is one of the countries in which the opposition against the mandatory bid rule has been very strong [60].

Spain and Portugal

In Spain the *Real Decreto 1197* of 1991 (the 'Spanish Takeover Law') has repealed the previous legislation enacted in 1984 [61]. Its application is administered by the *Comision Nacional de Mercado de Valores* ('CNMV').

According to Article 1 of the Spanish Takeover Law, a mandatory bid has to be launched in the following three situations: (i) any person, who intends to acquire

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[58] See Skog 1995, p.992.
[59] See Wymeersch 1992 (b), p. 351.
[60] Together with Sweden: see Wymeersch 1998, p. 1197 and *infra*.
[61] The *Real Decreto 11971* of 26.7.1991 is issued under article 60 of *Ley de Mercado de Valores*, n. 24 of 28.7.1984.

more than 25%, but less than 50% of a company's voting capital, is obliged to do so making an offer to buy at least 10% of the shares in the company (*par.* 3); (ii) the holder of more than 25%, but less than 50% of a company's voting capital, who intends to increase its holding of more than 6% within a period of 12 months, is obliged to do so making an offer to buy, equally, at least 10% of the shares in the company (*par.* 4); (iii) any person, who intends to acquire more than 50% of a company's voting capital, is obliged to do so making an offer addressed to a number of shareholders sufficient to permit the offeror to acquire at least 75% of the shares in the company (*par.* 5). The price is suggested by the offeror, but has to be approved by the CNMV, which is, in general, in charge of vetting the offer document the offeror has to file (article 17). If the tendered shares exceed the number of shares the offeror has offered to buy, the shares must be accepted on a pro-rata basis [62].

The relevant thresholds take also into account possible 'indirect interests' (i.e. shares hold by connected persons), and an offer must be made when they are indirectly surpassed, as well (article 3). In certain circumstances, then, the CNMV may waive the obligation to launch the offer, and particular rules apply, where the offeror intends to amend the company's articles of association and in case of de-listing [63].

As far as Portugal is concerned, a mandatory bid rule has been introduced in the *Codigo dos valores mobiliaros* (the 'Portuguese Securities Code') [64]. Pursuant to its article 187, any person – or group of persons acting in concert (article 20) – who comes to hold more than *one third or one-half* of a company's voting rights [65], is mandated to

[62] De Cardenas 1991, p. 23. See also Skog 1995, p. 993.
[63] De Cardenas 1991, p. 23.
[64] The relevant provisions of Code have been introduced in [1998].
[65] However, the one-third threshold could be opted-out by the articles of association of publicly held companies the shares of which are not listed on a regulated market. Particular rules on its application are, then, set out by article 188.

launch a tender offer for *all* the remaining shares in the company [66]. The price of the offer must be the *highest between*: (i) the highest price paid by the offeror in the preceding 6 months; (ii) the average market price in the same period. Though, if the competent authority – the *Comisao do Mercado de Valores Mobiliarios* (the 'CMVM') – understood that the price might result to be unfair (being either too high or too low), it could decide to misapply such a rule and appoint an independent auditor to fix a fairer one (article 188). Finally, in the case of failure to fulfil the obligation of making a mandatory bid, in addition to the express provision for civil liability (stated by article 193), article 192 freezes not only the voting rights, but also the dividends relating to the shares which exceed the relevant thresholds.

Scandinavian Countries

In Denmark, the Danish Securities Trading Act 1995 (now consolidated in the Consolidated Securities Trading Act 2001) [67] provides that a mandatory bid should be launched when a person, after the (direct or indirect) acquisition of shares in a listed companies, comes to *control* the company, holding (or anyway controlling) the majority of the voting rights in the company or, at any rate, being entitled to appoint and remove the majority of the company's directors (article 31.1). The offeror must offer to buy *all* the remaining shares, in any class, on financial terms identical to those of the previous acquisition (i.e. at *the highest price* paid), sharing any possible premium for control [68]. Noticeable is, by the way, the fact that, as a result of the chosen definition of control – corresponding to the Danish definition of group for

[66] The (potential) offeror will anyway be able to avoid such duty, if, in the 5 days after its exceeding the threshold, it bounds itself to sell the exceeding shares within 120 days (article 188).
[67] *Lov om vaerdipapirhandai mv.* n. 1072 of 20.12.1995 and Consolidated Act 168 of 14.3.2001.
[68] See Clausen and Sorensen 1998, p. 44.

accounting and company law purposes – the obligation to make the offer is normally going to arise when more than 50% of the voting rights are acquired, and not when actual control is held, as under the rules of best practice previously adopted by the Copenhagen Stock Exchange (which referred to approximately 42% of the voting rights) [69].

In Sweden, on the contrary, there has always been a strong opposition to the enactment of a mandatory bid rule [70]. At present, takeovers in Sweden are not regulated by statute: some rules on takeover are, however, issued by the Stock Exchange Committee of Trade and Industry (NBK) in the form of Recommendations, but they do not deal with mandatory bids [71].

Finally, in Finland the 1989 Act n. 495, provides that when more than *two-thirds* of a company's voting capital is acquired, a mandatory offer for *all* the remaining shares should be made, at a price no less than the *average market price* of the previous two months. Such an high threshold and its coincidence with the capital requirements necessary to amend the company's articles of association, however, may allow to think that this rule – like the Italian *offerta residuale* – could perform in Finland the function carried on by compulsory sell-out rights in other countries [72].

Austria, Ireland and Greece

In Austria the *Ubernahmegesetz* of 1998 (the 'Austrian Takeover Act') [73] provides that a person, or group of persons acting in concert, having acquired *factual control* (i.e. 'dominant influence') on an Austrian listed company is required to bid for *all* the

[69] See Clausen and Sorensen 1998, p. 39.
[70] See Skog 1995, p. 1000 and, also, Bergstrom and Hogfeldt 1997, p. 377.
[71] See Clausen and Sorensen 1998, p. 29.
[72] The coincidence is remarked by Skog 1995, p. 998.
[73] The Austrian Takeover Law is in force since 1.1.1999. Its application is administered by the Austrian Takeover Commission (*Ubernahmekommission*).

securities in the company (article 22). In addition, Austrian listed company may also decide to establish in their articles of association that a mandatory offer should be launched, when more than 20% of the voting capital would be acquired (article 27). The price of the offer should be at least as high as the average market price in the preceding *6* months and not more than 15% below the highest price paid by the offeror in the preceding *12* months (26.1), thereby permitting a slight discount with respect to the price paid to acquire control.

As far as Ireland is concerned, in 1997 the Irish Takeover Panel assumed responsibility on Irish bids from the UK Panel, under the Irish takeover Panel Act 1997. A part from that the Irish Takeover Panel – unlike its UK homologous – is a governmental body, its Takeover Rules (and in particular the rules on mandatory bids) substantially mirror the ones in the British City Code [74].

Finally, in Greece a mandatory offer should be made when more than *50%* of the voting rights in a company are acquired and the offeror must offer to buy *all* the remaining voting shares in the company [75]. [The price of the offer must be set out in the offer prospectus prepared by the offeror and vetted by the competent authority, the Hellenic Capital Market Commission [76].]

B. Other Countries.

For the sack of comparison, I will now briefly consider: (i) some relevant provisions in force in the United States, even though in the US no mandatory bid rule has been enacted at the Federal level (although two states have adopted it); (ii) the mandatory bid rules enacted by two other European countries – members of the EFTA but not

[74] See Takeover Rules 2001 and Clarke 1999. As far as mandatory bids are concerned, the relevant provision of the Irish Takeover Panel Act is article 8.3, which actually delegates the fixture of almost all the discipline to the Panel's Regulations.
[75] See article 5 of the Capital Market Commission Rule 195/2001, [under article 19.2 of the 2733 Act of 1999].
[76] See article 9 of the Capital Market Commission Rule 195/2001.

of the EU – Norway and Switzerland. Finally, as far as the East-European states are concerned (in view of the EU enlargement), it might be relevant to note that some of them have also enacted some sort of mandatory bid rule (Hungary, for example) [77].

United States

It is widely known that, by and large, in the United States corporate law is regulated by the legislations of the single states, whilst the federal authorities are in charge of securities law.

As far as state regulations are concerned, the adoption of mandatory bid rules is not very common in the US. Only few states enacted some sort of mandatory bid rule, usually called 'shareholder demand statute', within the second generation of state anti-takeover statutes (e.g. Maine, Utah and Pennsylvania). But in those cases the aim was prevalently to make takeover bids more difficult, rather than enhancing investor protection or enforcing shareholder equality [78].

Under the Pennsylvania statute, for example, any individual or group acting in concert acquiring shares in a company capable of exercising 30% or more of the votes for electing directors (then 20%), should notice to all remaining shareholders their entitlement to receive the 'fair value' of their shares in cash, i.e. the market price of the shares the day prior to the beginning of the transaction, plus the control premium [79].

[77] In Hungary, the *Securities Act* requires the application of a special tender offer procedure when more than 33% of a company with diffused ownership is going to be acquired and the *Company Act* provides for a sell-out right when more than 50% of the shares in a company would be acquired.
[78] See Hackl and Testani 1988, p. 1193 and Skog 1995, p. 1000.
[79] Hackl and Testani 1988, p. 1207.

In addition, in certain situations, some other state rules, such as those on 'fair price' [80] or those on appraisal and the *Weinberger* principle in Delaware [81], may have effects similar to those of mandatory bids rules. But, at least in principle, the acquisition of control in the US is normally only subject to the market rules [82].

Nor the federal legislation does not provide for a mandatory bid rule. In particular, under the Williams Act 1968, which modified the Securities Exchange Act 1934, partial bids are perfectly possible and no obligation follows the acquisition of the control of a listed company. Though, the presence of some rules on transparency and equal treatment is worth to be noted.

When an offer is launched, an offer document must be filed, giving a comprehensive disclosure of the information relevant to the offer, under the supervision of the federal regulator of the financial sector, the Securities and Exchange Commission ('SEC') [83]. The offer must be made available to all shareholders (all-holders rule) [84], and remain open at least 20 business days (and acceptance can be withdrawn until its expiring date) [85]. If the tendered shares exceed the number of shares the offeror has offered to buy, the shares have to be accepted on a pro rata basis ('pro rata rule'), but any single shareholder may opt to tender its shares only if all of them are going to be acquired ('all-or-none rule') [86]. As far as the price is concerned, the bidder has to pay the same price to all shareholders and if the offeror purchases shares at higher price than that of the offer, it must pay such a price also to the other shareholders,

[80] These are rules that require that any business combination must be recommended by the board and approved by a large majority of independent shareholders (see Easterbrook and Fischel 1991, p. 187-190, and Hackl and Testani 1988, p. 1207).
[81] See Coffee 1996, p. 364.
[82] See Bebchuck 1994, p. 958.
[83] So called Schedule TO (Tender Offer Statement): see Tonello 2002, p. 219.
[84] See Braunholer 2001, p. 309 and note 17.
[85] These rules – the former usually called the '20days rule' - aim to facilitate competing bids (see *infra*).
[86] See s. 14(d)8 of the Securities Exchange Act 1934.

included those who have already accepted the offer [87]. Finally, the offer must be in cash or be accompanied by a cash alternative [88].

Norway and Switzerland

In Norway, the rules on takeovers are contained in the Securities Trading Act 1997 [89], under which the obligation to make a mandatory bid arises when *40%* of the voting rights in a listed company are acquired (article 4.1) [90]. The offer must be for *all* the remaining shares, voting and non-voting, at no less than the highest price paid by the offeror in the previous six months (or, were it lower than the market price, at the market price itself; article 4.10).

Finally, in Switzerland the Federal Act on Stock Exchanges and Securities Trading of 1995 [91] provides that when more than 33,1/3% of a company's voting capital is acquired [92], a mandatory offer to buy *all* the remaining shares in the company should be launched (32.1). The offered price must be at least as high as the market price and not more than 25% below the highest price paid by the offeror in the preceding 12 months (article 32.4), thus allowing the bid to be made at a discount with respect to the price paid by offeror to acquire the control of the company [93].

III. Analysis.

A. Takeovers, Efficiency, and the Mandatory Bid Rule.

As I have pointed out in the preceding Chapter, there are many different kinds of mandatory bid rules. Almost any country I have examined has its own rules on

[87] See s. 14(d)7 of the Securities Exchange Act 1934.
[88] See Tonello 2002, p. 225.
[89] *Lov om verdipapirhandel* n. 79, 19.6.1997.
[90] See Clausen and Sorensen 1998, p. 41. However, the acquirer can avoid such obligation selling down the exceeding shares within 4 weeks.
[91] Federal Act 24th of March 1995.
[92] The companies' article of association are, however, allowed to rise the threshold to 49%.
[93] See Ferrarini 2001, p. 23.

mandatory bids and slight changes in the regulations may bring to completely different results in practice, as well as to different theoric reconstructions of the rationale for such regulation. However, what is common to *any* kind of mandatory bid rule is that it acts as a constraint to the compulsory bidder, binding it to offer to buy, sometimes, more shares than it would otherwise have bought and, very often, at a higher price than that it would have offered in the absence of such a rule. And, of course, it may very well be possible that the offeror would be forced to bid both for more shares and at a higher price than he would have been willing to do. An immediate consequence of this is, obviously, that, in every case in which the mandatory bid rule forces the compulsory bidder to make an offer the content of which diverges from that of what would have otherwise been the optimal offer for the bidder – i.e. precisely in any case in which the rule matters and does the work it has been designed to do – it makes the considered takeover more expensive. In turn, this necessary reduces the overall number of acquisitions which are likely to take place [94]. And, for such a reason, the mandatory bid is, thus, hardly reconcilable with what is called the 'neoclassical' approach to takeovers.

The 'neoclassical' view

Beginning from Manne (1965), in fact, neoclassical scholars look at takeovers as a fundamental device to assure the efficiency of the market for corporate control. They start from the point that, in countries like the US – which in the course of the time have developed high-quality securities markets and an effective separation between

[94] See, e.g., Ferrarini 2001, p. 23.

ownership and control [95] – the market price of the shares of a company tends to reflect its managerial efficiency [96]. In such a situation, if a company is poorly managed – i.e. if it makes a return not as good as it could be under better managers – the market price of its shares declines (in general or even only with respect to that of other companies of the same kind) [97]. As a consequence, the company becomes an attractive target for possible hostile bids by those who may believe that they could manage it more efficiently and revitalize it [98]. In such a way, thus, takeovers play a very important role in the corporate system, as they allow at the same time the displacing of poor mangers and their substitution with better ones. In addition, the mere threat of possible hostile takeovers is also considered to be very important, as it would act, *ex ante*, as a powerful incentive for all managers to work well and hard (being even friendly deals, for example, negotiated against a backdrop of the hostile bid possibilities) [99]. A well functioning market for corporate control, therefore, both gives to companies' managers the right incentives towards efficiency and, when this is not enough, intervenes and substitutes inefficient managers with (at least in theory) better ones [100]. This being the neoclassical view, it obviously follows that any possible constraint imposed to the bidder is seen as a disturbance in the market for corporate control, as it might prevent such a bidder from taking a poorly managed company over and managing more efficiently it, as well as it also reduces the number of takeovers and the consequent threat.

[95] See Roe 1996, p. 645, according to whom, the Us financial system evolved in such a way due to the lack of strong financial institutions, which was, in turn, due to historical reasons ('path dependence').
[96] See Manne 1965, p. 112.
[97] See Manne 1965, p. 112.
[98] See Manne 1965, p. 113.
[99] See Gordon 2002, p. 3.
[100] See Manne 1965, p. 113.

Under this kind of approach, therefore, mandatory bid rules tend to be considered damaging and their enactment undesirable. In fact, the main objective of the mandatory bid – normally deemed to be the protection of minority shareholders, by means of either imposing the control premium sharing, or allowing investors to exit the target company (even though this is not completely exhaustive of its scope) [101] – aims, in the end, to affect the distribution of wealth among the different parts involved in a takeover, improving the position of minority shareholders. Such a distributive objective, however, is deemed to be irreconcilable with allocative efficiency, as it necessarily results in the decreasing of the number of takeovers and in the correlative sub-optimal functioning of the market for corporate control. And this, it has been said, not only with an overall negative effect, but also, ultimately, with a negative effect for the minority shareholders themselves [102].

Anti-takeover law and the debate on takeover efficiency

The neoclassical view prevailed and the favour for takeovers continued to be very strong until the 1980s takeover boom in the US under Reagan presidency [103]. But after that big wave of extremely aggressive bids some doubts begun to be cast on the real efficiency of the system: in the aftermath, many bids proved to have been value destroying and, above all, in most cases the gains to shareholders of both the target and the bidder (where present) seemed to come, eventually, at the expenses of the

[101] See *supra* par. II.A. as far as the UK City Code is concerned. As we will see, however, in certain circumstances the scope of the mandatory bid rule goes also beyond investor protection: see *infra* III.C.
[102] See, e.g., Bergstrom and Hogfeldt 1997, p. 377.
[103] At the beginning of the 1980s took place, for example, the famous academic debate on the case for facilitating competing tender offers between Easterbrook and Fischel, on the one side, and Bebchuck, on the other side (see Easterbrook and Fischel 1991, which includes most of the arguments set out by the authors on the matter in previous papers, and Bebchuck 1982(a) and (b). Basically, Bebchuck sustained that an offer should have lasted a time long enough to facilitate competing bids and create an auction able to maximize both target shareholders and social wealth, whilst Easterbrook and Fischel were worried that in such a way prospective acquirers would have been discouraged to search for takeover targets and this would have brought to a decrease of the number of takeovers. US law, by the way, has gone with the former approach, as the '21days' rule and the right to withdrawal before the offer closing date prove (v. *supra* II.B).

companies' stakeholders. Meanwhile, since the early 1980s some US states had already begun to enact some sort of anti-takeover legislation: a 'first generation' of anti-takeover statutes had been struck down for unconstitutionality, but, a 'second generation' had followed introducing restrictions on acquirer's voting and merger rights, as well as 'fair' price requirements, and, in few cases, as told (v. *supra*), mandatory bid rules [104]. In addition, the courts of many states proved to be keen on allowing directors to engage in defensive tactics with a wide discretion, enabling them to contrast an offer, issuing, for example, the so called 'poison pills' [105]. As a consequence of that, in the US the number of takeovers has decreased as rapidly as the academic debate on takeover law flourished (reaching, in particular, an extraordinary intensity on the admissibility of post-bid defences) [106].

In fact, on the one hand, there are scholars still sustaining that anti-takeovers laws are deeply damaging and that they have been adopted because of the pressure of powerful groups of interest or the legislators' misinformation [107]. On the contrary, other scholars affirm that it does not seem that takeovers really lead to efficiency and many studies have been published aimed to analyse the post-bid performances of companies involved in takeovers [108]. In short, there is a certain agreement on the fact that takeovers are good (at least *ex post*) for the target shareholders, but is very controversial whether or not they would have positive effects for the bidder

[104] See, e.g., Romano 1992, p. 27.

[105] See, e.g., Bebchuk and Farrell 1999, p. 76. Poison pills take normally the form of an issue of new shares at a discount to dilute the capital of the bidder and, therefore, would hardly be acceptable in Europe, as they would probably violate corporate law principles, stock exchange regulations and companies' best practices (see Ferrarini 2001, p. 14).

[106] See Ferrarini 2002, p. 10. In particular, there are two models competing as far as defences against hostile takeover are concerned: the American model which, as said, allows the board of directors to contrast the offer with a wide discretion, even though under the scrutiny of the courts, and the UK model (so called 'passivity rule'), which requires the board to remain neutral, without engaging in any defence which has not been previously authorized by the general meeting.

[107] See, e.g., Romano 1992, p. 3, and for mandatory bids in particular Wymeersh 1992(b), p. 360.

[108] See Franks and Mayer 2000, p. 8, who report some recent studies on the US and the UK. As far as the UK is concerned, the main research findings lead to think that takeovers may be good for shareholders in general (but mostly for the the target's shareholders), and that hostile takeovers may be even more profitable, even though their targets do not seem to be under-performing companies (on this point see, in particular, very recently Agrava and Jaffe 2003).

shareholders and be, in general value maximising [109]. In particular, it has been suggested that when the bidder accrues gains from a takeover, it may do so expropriating value from the companies' stakeholders, i.e. bond holders, consumers and, mostly, employees, with regard to whom a new management would be able to breach a long term commitment implied in the labour contract, sacking them [110].

As always, when the matter is so highly controversial, a definitive answer is not easy to be given, and, above all, this is not the task of this paper. Probably, however, neither an unreserved promotion, nor a stringent curtailment of takeovers are desirable [111], and, in particular, the ownership structure in continental Europe should suggest to consider cautiously the benefits one can expect to come from the contestability of corporate control [112]. But, in the end, it seems that it is not from the general doctrine on takeovers that one can rely to assess whether or not the enactment of a mandatory bid rule should be considered desirable and, eventually, on what terms.

Approaching the problem considering the impact of private benefits of control

Instead, a more useful analysis of the mandatory bid rule appears to be possible looking at it in the light of the literature which has analysed the extraction of private benefits from control [113]. In fact, it is clear that, to a certain extent, a company's controlling shareholder can capture private benefits at the expenses of minority

[109] For a detailed analysis of value maximising and not value maximising explanation for takeovers see, e.g., Romano 1992, p. 6 et seq.
[110] See Schleifer and Summers 1988 and, more recently, Deakin, Hobbs, Nash and Slinger 2002.
[111] See Burkart 1996, p. 10 and Siciliano , p. 348.
[112] See, e.g., La Porta et al. 1998. In particular, probably due to the presence of strong professional investors, neither capital markets as good as the American ones nor an alike separation between ownership and control, has been developed by continental Europe, so that the disciplinary effect of takeovers could seldom operate (see Roe 1999, p. 649).
[113] Beginning with Grossman and Hart 1988 and Harris and Raviv 1988, many studies have emphasized the importance of private benefits of control: see, e.g., Zingales 1995, La Porta et al. 1999 and 2000 [*rif. in qdf p. 44*].

shareholders using control to divert value from the company to itself [114]. The salaries of managers and directors, intra-group transfers, the appropriation of corporate opportunities are just examples of means which can be exploited to do so and no legal rule could possibly prevent such an exploitation, if it does not exceed a certain degree of magnitude. However, even though for such a reason the phenomenon is going to be necessarily present everywhere, its incidence may vary very much from country to country. It is, for example, very low in the US, a little higher in the UK [115] and very high in Italy [116], on the grounds of studies based on the relationship between the size of the block and the premia over market price in sales of blocks of shares or on the spread between the value of voting and non-voting shares in particular circumstances.

And considering the impact of private benefits on corporate matters is crucial to understand both the mechanics of control transactions and the need for protection of minority shareholders. In particular, in fact, securities regulation – and especially the mandatory bid rule – is sometimes used to cope with problems that company law alone is not able to solve, intervening at least when control is transferred or simply acquired to protect minorities. Therefore, there seems to be a strict correlation between the degree of minorities protection and the need for a mandatory bid, as the better the former, the less the latter. And this seems consistent to the fact that in the US, where the protection of minority shareholder is extremely high [117], just few states

[114] Bebchuk 1995, p. 962.

[115] See Bebchuk 1995, p. 962, note 5, who reports that some researches have found that controlling shares are traded at about 4% above the market price in the US (1989 research) and at about 13% more in the UK (1990 research).

[116] Zingales 1994, p. 125, who estimates controlling shares in Italy to be worth an extraordinary 82% more than the market price. A recent Italian research, however, has demonstrated that the enactment of the Italian Consolidated Financial Services Act has reduced the impact of private benefits of about 25%, on average, improving the protection of minorities, in particular by requiring a very high consensus to adopt a special resolution in a listed company (See Linciano 2002).

[117] Franks and Mayer 2000, p. 20.

have enacted a mandatory, whilst almost every European country has its. Correlatively, an alternative to the mandatory bid rule is normally considered the general enhancement of the rights of minorities [118], especially within the corporate group, so that in some countries (e.g. Germany) the traditional approach to this kind of problems was to deal with them under the law of groups [119].

To conclude, thus, the following analysis will be mainly based on law and economics studies examining the mandatory bid rule taking into account the impact of private benefits on the acquisition and transfer of control, as well as on the legal literature concerning the protection of minorities through the same mandatory bid rule. Such an analysis will be in particular divided into two parts, the first considering the situation in which a company's control is already held by an existing shareholder or group of shareholders, and the second dealing with the role of the mandatory bid in dispersed ownership contexts.

B. The Operation and Economic Rationale of the Mandatory Bid Rule in the Presence of a Controlling Shareholder.

In the presence of a controlling shareholder – or of group of shareholders, who, acting in concert, hold together control of a company – transactions concerning the transfer of control are likely to be concluded outside the stock markets, by means of a private deal between the controller and the acquirer [120]. If an agreement is reached it obviously means that, at that particular moment, the acquirer evaluates the company in its hands more than the present controller does, and, in the absence of the mandatory bid rule, they are going to share such a 'surplus' (only) between them. On

[118] See Ferrarini 2001, p. 23 and Pagano, Panunzi and Zingales 1998, p. 156.
[119] See Hopt 2002, p. 34. See, also, Wymeersh 1992(b), p. 365.
[120] On the parties' incentives to conclude a private deal see *infra*, [but it may be foresaid that the acquirer has a strong interest in conclude a sale, rather than making an offer on the market, with the risk of getting involved in an auction.]

the contrary, when a mandatory bid rule is in place, it forces the acquirer to buy – and the vendor to tag along with its – also all (but sometimes just part of) the shares held by minority shareholders, either at the same price or at a discount, depending on how the mandatory bid rule is shaped. And the obvious consequence is, therefore, that at this time the surplus that the acquirer is confident to make has to be divided among a larger group of people, benefiting also minority shareholders. But what are the reasons to impose such a rule ? Different explanations have so far been offered and I will try to summarize them hereafter.

Equal treatment of shareholders

The first ground on which the enactment of mandatory bid rule is usually justified is on the basis principle of equal treatment of shareholders, even though on this point there has been a some misunderstanding. In fact, in the EU member states, pursuant to the Second Company Law Directive, national *company laws* generally provides that all holders of securities in a company who are in the same position should be treated equally. But, such a principle requires normally only that the *company's bodies* (mainly the directors) would treat shareholders equally: it does not affect in any way the relationships between shareholders or even more, between shareholders and third parties (as it is conceptually the acquirer), and, therefore, it could not justify the mandatory bid rule [121].

On the contrary, most European states have also enacted a very different principle of equal treatment in *securities law*, to ensure fair and equal treatment of all shareholders *in relation to takeovers*, and the British City Code, for example, is designed to enforce it

[121] See Pagano, Panunzi and Zingales 1998, p. 153, Skog 1995, p. 1005 and Hopt 1992, p. 179.

in particular where someone acquires the control of the company (see *supra*). The purpose of such rules – which in practice provide for legal duties of capital markets participants towards each other, to protect minorities from significant information asymmetries and position advantages [122] – is clearly that of enhancing the confidence of investors in the fair working of financial markets [123].

From this point of view, therefore, the enactment of a mandatory bid rule may be justified to foster the trust of investors in financial markets, thereby promoting their development [124]. In turn, this is deemed to reduce the cost of capital, with beneficial effects on allocation [125], probably able to overcome the consequent disincentives for firm owners to go public, with an overall positive result at least in the long term [126].

Finally, as a consequence of what stated above, were this the rationale for the mandatory bid, it would have to provide for a bid for all the (remaining) shares in the company at the same price, i.e. the highest price paid by the offeror (which presumably will coincide with the price paid to acquire control), as does, for example, the British City Code (v. *supra*).

Control premium sharing

Another ground on which the mandatory bid rule is then justified is on the basis of the doctrine of the sharing of the premium for control, which is, in practice, an

[122] See Hopt 1992, p. 179.

[123] See Skog 1995, p. 1007. For such a reason, thus, very efficient and developed capital markets, as the American ones, do not need too strong provisions on equal treatment (even though, as pointed out *supra*, the Williams have introduced some rules on equality and fairness in takeovers also in the US).

[124] See Siciliano, p. 347. However, according to a different opinion (Easterbrook and Fischel 1991, p. 144), this would be far from true, as, even though minority shareholders could benefit ex post from an equal treatment rule, *ex ante* they would on the contrary chose not to apply such a rule, because they would prefer the application of unequal distribution, which assures overall superior returns, and then diversify their investments. In fact, such an opinion is expressly based on the fact that, in dispersed ownership contexts, investor have in the end equal probabilities to be on the winning and on the loosing side, as they are likely to hold shares in both the companies involved in the takeover. But, probably, in continental ownership structures investors would in most cases be the losers (being the benefits accrued in many cases by the controller themselves or by unlisted companies connected to them).

[125] See Burkart 1996, p. 16.

[126] See Shleifer and Vishny 1996.

extension principle of equal treatment of shareholders, and is analogously consistent with a mandatory bid rule providing for an offer at the same price paid by the offeror to acquire the control of the company.

Such a doctrine, originally formulated by Bearle and Means in the 1930s, is based on the proposition that control is a corporate asset which thus belongs to the shareholders as a whole and, as a consequence, the premium paid to acquire it should be shared amongst the all of them [127]. As told (see *supra*), this is also the philosophy adopted by the British City Code, even though its fundament is extremely controversial and it has never been applied in England outside takeovers [128].

And, in fact, the 'corporate asset doctrine' not only seems to lack of any legal justification (being not embedded in any national company law neither in Europe nor in the United States), but is even less justifiable from the economic point of view, considering that: (i) as far as the seller of control is concerned, it may deprive it from something it may have paid for [129] and, in any case, it reduces its incentives to transfer control [130]; (ii) as far as the acquirer is concerned, it may be forced to share a premium, which reflects the value that the acquirer itself is going to add to the company [131], as well as based on a potential surplus the risk of the actual realization of which is going then to be carried only by the acquirer [132].

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127 See Skog 1995, p. 1009.

128 And also in the US, despite the famous case *Perlman v. Feldman* going in that direction, the courts have then refuse to follow the corporate asset doctrine (see Skog 1995 p. 1010, Coffe 1996, p. 360 and Farrar's 1991, p. 636).

129 However, it is clear that every form of protection of minorities represents a cost for the controlling shareholder, so that any intervention in this filed could be criticized on similar grounds.

130 See Pagano, Panunzi and Zingales 1998, p. 154.

131 See Pagano, Panunzi and Zingales 1998, p. 154.

132 See Easterbrook and Fischel 1991, p. 135. However it seems to me that both the last remarks could be equally true also when the surplus should be shared only with the seller of control. In fact to capture part of the surplus that the bidder is confident to make is a prerogative of the holder of the target's control, whoever it be: the corporate asset doctrine simply assigns it to a larger number of people. Finally, the risk of failure could be anyway considered in the sharing (here as well, irrespectively of the counter party).

In addition, the control premium sharing clearly discourages the firm owners to go public, and is also deemed to lead, ultimately, towards a dispersed ownership structure (remarks that, by the way may be, to a certain extent, valid also for the mandatory bid rule in general).

To conclude on this point, therefore, on the one hand, it does not seem that the sharing of the premium for control could actually be justified on the basis of both the legal and economic doctrine, and, on the other hand, it would not anyway suggest much more than the equal treatment principle would do alone.

The right of exit

A third rationale of the mandatory bid rule can be found in the 'right of exit' doctrine. This doctrine starts form the assumption that bidders may be either good or bad, in the sense that some of them may increase the value of the target company, while, on the contrary, some others may plunder it, extracting massive private benefits. In such a situation, it may seem right to allow minority shareholders to chose if they want to stay in the company or leave, when a new controller comes. In fact, it has been sustained, when a change of control occurs, the former controlling shareholder breaks an implicit contract between it and the minority shareholders, who have invested in the company upon the 'condition' that it was in charge of managing it [133]. But, even if this argument seems perhaps a bit extreme, it is true that the change of control clearly represent a risk for minority shareholders, who, if the new controller is unwanted, might not have a satisfactory exit on the market, very much because of the company is now controlled by it [134].

[133] See Pagano, Panunzi and Zingales 1998, p. 155.
[134] See Skog 1995, p. 1012.

However, this approach has been criticized as establishing a 'presumption of bad faith', with the suggestion of limiting its application only to the cases in which the bidder is a group [135]. But if the bidder seems a good one, the minority shareholders themselves will probably decide to keep their shares. Moreover, if it is true that, at least in the British experience, the exit right was also justified on the basis of the fact that the control seller would have probably been a family, whilst the acquirer would have been likely a company, and therefore a more dangerous subject, able to extract larger private benefits [136], it is also true that nowadays almost all the parties involved in a takeover – both the bidder and the seller – are normally companies.

And, in general, allowing shareholders to leave the company when the controller changes may simply serve very well the purpose of enhancing the trust of investor, I have mentioned above (see *supra*). In fact, even though it is not alternative to a mandatory bid at equal terms (see, e.g., the City Code, *supra* , which provides for an exit at the best conditions, i.e. those granted to the control seller), the exit rationale does not require strictly an offer at the same price paid to acquire a company's control, as the equal treatment principle and the control premium sharing doctrine would. Rather, it seems more correct from this perspective, that the price of the bid would reflect the value of the company *at the moment in which control is transferred*, setting aside the possible share of surplus added by the bidder itself that the control seller might have been able to capture [137]. As a result, a certain degree of investor protection is anyway assured, but the disincentives to go public and to transfer control are lower.

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[135] See Wymeersh 1992(b), p. 357-8.
[136] See Weinberg and Blank 1999, p. 4237 (see also *supra* note).
[137] See Pagano, Panunzi and Zingales, p. 155.

However, what is critical is doubtless to assess the company's value, without relying exclusively on the market price of the shares which could be a not reliable indicator (depending on the quantities traded, the market mood, etc.), as well as easily manipulated [138]. This necessarily leads to some sort of comprise, like those reached by Italian Consolidated Financial Services Act, the Austrian Takeover Act, and the Swiss Federal Act (see *supra*), which seem to have taken this way [139].

Finally, also the exit rationale – as the equal treatment principle [140] – would require the bidder to make an offer for *all* the remaining shares in the company, giving to minority shareholders the possibility of demobilize their entire investment.

Efficient and inefficient sales of control

Finally, and particularly important, the mandatory bid rule may also serve the objective of selecting between efficient and inefficient transfers of corporate control, discouraging the latter and permitting the former. This kind of approach to the question of control transfers has been developed in the American literature [141], by means of a comparison between the US model, in which, as said, at least in principle the acquisition of control is normally only subject to the market rules, and the UK model, which have adopted mandatory bid rule.

In particular, the clearest and most useful analysis on this point has been completed by Bebchuk [142]. According to him, the controller's identity is the key element of control transactions, being crucial its ability to create value in the target company and

[138] See Pagano, Panunzi and Zingales, p. 155 and 158.
[139] See Ferrarini 2001, p. 23.
[140] In theory, this would be required also by the control premium sharing doctrine, but some legislation claiming to pursue that objective admitted also partial offers, as a form of compromise (e.g. the Italian 1991 mandatory bid, see *supra*).
[141] See Elhaunge 1992, Coffee 1996, and, from the MBO perspective, Hermaline and Schwartz 1996. See also, in Italy, Enriques 2000, p. 7.
[142] See Bebchuk 1994 and also Bebchuk and Zingales 1996.

its attitude to extract private benefits from it. And this, because the value that the controller expects to flow to him from the controlling shareholding (W) and the magnitude of the private benefits it expects to extract from the company (B) are the determinants of any control transaction.

In fact, *in the absence of the mandatory bid rule*, a control transaction can occur if, and only if, the aggregate of W and B for the new controller (WBn) is bigger than the same figure for the existing controller (WBe). But while efficient transactions are only those in which the expected value for the new controller (Wn) is bigger than that for the existing controller (We), it may very well be possible that a transaction may be carried on just because the new controller is going to extract more private benefits (Bn), than the existing controller (Be), being equal Wn and Wb or even Wb higher than Wn [143]. It is therefore possible that a privately optimal transfer would be not socially optimal, not only because the control of the company may go to a worse controller, but also because heavier externalities may be imposed on minority shareholders (as the new controller is going extract more private benefits from the company). In addition, even where Wn is bigger than We, a potential socially efficient transaction might not occur, were Bn enough smaller than Be (with double disadvantage for minority shareholders) [144]. But, given the fact that private benefits are very low in the US, this may not create overly concern.

On the contrary, *where a UK-like mandatory bid rule is in place*, no inefficient transaction is able to pass as the new controller cannot rely on future private benefits (Bn=0) and, therefore, Wn should necessarily be bigger than We. However, it is conversely possible that such a rule may block also efficient transactions, as a transaction can

[143] See Bebchuk 1994, p. 963.
[144] See Bebchuk 1994, p. 966.

occur if and only if Wn is bigger than We plus Be, so that if Be is big enough no transaction occurs even where Wn is bigger than We (also in this case with disappointing effects on minority shareholders) [145].

But, as Bebchuk actually points out, there may be some correctives to such rules able to achieve better results [146]. And, in particular, as far as the mandatory bid is concerned, a vote of independent shareholders accepting to reduce the price of the offer or the approval of a regulatory body to do so may solve the problem, allowing an efficient transfer to pass, by means of a discount able to annul the impact of Be. As I will consider more in depth later on (see *infra*), however, the main problem for a similar solution would be that neither minority shareholders nor a regulatory body would probably have enough information to assess correctly the size of Be and, therefore, the amount of the discount.

But, to conclude, the above mentioned approach seems, in any case, able to suggest a further justification for the enactment of a mandatory bid rule [147], providing at the meantime very useful indications to assess on what terms do so, in order that it would really be beneficial.

C. The Operation and Economic Rationale of the Mandatory Bid Rule in the Absence of a Controlling Shareholder.

In the absence of an existing controlling shareholder the operation of the mandatory bid rule is indeed quite different. When control of a publicly held company is acquired on the market, in fact, the mandatory bid rule does not have in principle any direct effect on the price of the offer (except that in the case in which the legislation

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[145] See Bebchuk 1994, p. 971.

[146] See Bebchuk 1994, p. 981, who sketches some correctives for the market rule.

[147] It has however to be said that Bebchuk concludes his paper affirming the superiority of the market rule on the mandatory bid rule, even though he admits that neither of the two is perfect (p. 974), and that, as said, both could be corrected to reach an optimal result (p. 981). It must be noted, however, that he actually considers the problem from the point of view of the US, where, as already mentioned, private benefits of control are very low.

may impose a minimum 'fair' price, as, for example, it is in Germany: see *supra* , but also *infra*) [148]. On the contrary, the main effect is on the number of shares the offeror is going to bid for, i.e., normally, 100% of the shares in the company.

Such a result may, however, be achieved by means of different regulatory approaches. Some countries (e.g. Belgium) have chosen to enact, in addition to the mandatory bid rule, also an 'all share rule' providing that offers for a number of shares exceeding a certain threshold should be for all the shares in the company [149]. Other countries rely, on the contrary, just on the mandatory bid rule (as were control acquired through a partial tender offer, a subsequent mandatory full offer should be made at least at the same price, so that the offeror is clearly induced to bid for all the shares since the beginning) and sometimes a 'preventive' voluntary offer for all the shares is provided for as an exemption from the mandatory bid rule (e.g. in Germany and Italy). In the end, anyway, the gross result of such different provisions is the same: the offer must be for all the shares in the company.

But, in the absence of a transfer of control, what is the ratio for imposing such a result ? To answer this question, I will first start from the justifications I have listed in the preceding paragraph with respect to control transactions and then consider some problems concerning specifically partial bids.

The right of exit (again)

Clearly, there is no room in this context for the application of neither the control premium sharing doctrine (because there is no premium), nor for the efficient and inefficient sales doctrine (because there is not a single sale of control).

[148] See, e.g., Hoffmann-Burchardi 1999, p. 18.

[149] See Wymeersch 1992(b), p. 110, who recognizes the complementarity between mandatory bid rule and all shares rule but, by the way, criticizes full bids as leading towards companies de-listing.

Though, the equal treatment principle may operate also in this case, to prevent the acquirer to buy shares selectively, from holders of shareholdings pivotal to get the control [150]. But, to reach this scope, a rule which requires the offeror to address its offer indistinctly to all the holders of shares in the company and then to accept the tendered shares on a pro rata basis (as e.g. in the US), may be perfectly sufficient, without any need to force the offeror to bid for all the shares in the company.

On the contrary, there seem to be much more reasons to apply the right of exit rationale also in this context. In fact, when the control of a previously publicly held company is acquired on the market, the company shareholders thereby become minority shareholders and therefore victims of the extraction of private benefits from the company by the new controller (their situation being, at least in theory, even worse than that in which minority shareholders already subjects to someone's control find themselves, when it transfers the controlling shareholding to a new controller). And not only forcing the bidder to make a full offer may allow minority shareholders to exit the company, if they do not wish to remain in it, but also is a powerful disincentive from the acquisition of control by people aiming to exploit the company, extracting it massive private benefit from it [151].

In addition – as the smaller is the shareholding attributing control, the more externalities the controller imposes to minority shareholders extracting private benefits from the company and the bigger its post-takeover moral hazard – the regulation should not only provide for a full bid but also facilitate, if possible, a wide acceptance of the offer and the consequent acquisition by the bidder of a large

[150] See Zingales 1995, who demonstrates that a significant portion of the value of voting shares derives from the possibility that they become pivotal when someone is seeking to get control of the company. In such a way, allowing selective acquisition would deprive the excluded shareholders of this value, which otherwise would be reflected in the price of a bid addressed indistinctly to all the holders of shares (no matters if it is partial).

[151] See Pagano, Panunzi and Zingales 1998, p. 161.

shareholding [152]. The problem, however, is that in these cases the price of the offer (on which of course depends the number of acceptances) is necessarily left to the discretion of the offeror, who may very well seek to achieve, by a careful assessment of the price to offer, the least shareholding necessary to acquire the kind of control it needs [153]. Nor rules requiring that the exit price should anyway be no lower than an average market price (see e.g. the German Takeover Act) seem able to have a significant impact in this respect – as it is quite difficult that an offer would be launched at a price lower than the market price – except that where the rule would consider the market price over a particularly long period of time (which, by the way, would probably be hardly justifiable), even though they may sometimes serve the purpose of avoiding elusive operations.

Pressure to tender (and free-riding)

What is normally considered one of the most problematic aspects of partial bids is the possible excessive 'pressure to tender' that the bid may create [154]. In fact, in particular cases, if the offeror offers to buy a fraction of the target's outstanding capital (say just over 50%) upon the condition of receiving a correspondent number of acceptances, the offerees may find themselves in the position of being substantially forced to accept the offer. And this, because if shareholders have reasons to think that the value of the company would decrease under the new controller or that it is going to extract massive private benefits, and believe that there is some chance of the raid succeeding, it will be better for them to sell their shares – sometimes even if the

[152] See Burkart, Gromb and Panunzi 1998, p. 173.
[153] Which could be factual or legal control, but also sometimes something more as it may be necessary to pass a special resolution the controller needs. And, in fact, it has been noted that, for this reason, rules requiring supermajority votes for the approval of special resolution may better achieve the objective of moving towards larger controlling shareholding (see Burkart, Gromb and Panunzi 1998, p. 187; cfr also *supra* note).
[154] [See, e.g., Bagnoli and Lipman 1988].

offer valued the shares less than their previous market price – to avoid remaining locked in the company. As a result, therefore, shareholder may be under pressure to accept exactly those kind of offers that it would be privately (for them) or even socially optimal to refuse. And this, unless a particular shareholder may believe that his own decision would have a material effect upon the offer likelihood of success [155].

First of all, clearly, a straightforward solution to this problem can be to ban all partial bids which may result in the offeror having control in the company, setting out an 'all shares' rule [156]. However, also a less drastic alternative is possible, that is to allow shareholders to escape the pressure is simply possible to separate their right to accept the offer from the right to approve implicitly it, which is embedded in the acceptance. In practice, in fact, shareholders may be given the possibility of marking the acceptance form twofold, so that they 'vote' against the offer, but accept it in the case it succeeds [157]. Moreover, a further alternative is then the solution adopted, for example, by the City Code (see *supra*), which – in addition to allowing partial bids only with the consent of the Panel (which almost exclude the possibilities of coercion) and conditionally to the reaching of at least 50% – provides (for both full and partial bids) that if an offer succeeds shareholders who have not tendered their shares, can change their mind and accept the offer within 14 days [158]. And a similar provision is also set out in the German Takeover Law (see *supra*).

Finally – to mention a problem which has created great concern between neoclassical scholars – partial bids, associated with high levels of private benefits (so called

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155 See Yarrow 1985, p. 7.

156 Also banning at least *conditional* partial bids could be a possibility, even though there would still be some inefficiencies; see Yarrow 1985, p. 9.

157 This is the solution adopted in Italy for partial bids by CONSOB Regulation 11971/1999 (article 48).

158 See Weinberg and Blank 1999, p. 4065 and Johnston 1980, p. 254.

'optimal dilution') [159], have been suggested as a possible solution to the 'free-riding' problem (i.e. the problem of the failure of value maximizing takeovers due to the fact that too many shareholders do not accept the offer, as, thinking they are not pivotal for its success, they decide to remain in the company to benefits of the increasing of value the bidder is expected to create) [160]. But, normally, such a problem is actually better solved providing for the right of the bidder to compulsory acquire minority holdings after the bid, provided that some conditions are satisfied (so called compulsory acquisition right or CAR), which strengthen the pressure to sell [161].

IV. European Policy Assessment.

A. European policy.

A first proposal for a European directive on takeover bids – inclusive of, among other things, a mandatory bid rule – was presented by the European Commission in 1989. Its aim to achieve detailed harmonization in that field was, however, considerably ambitious, and, after some amendments in 1990, its way was interrupted due to the strong opposition it had encountered [162].

In 1996, therefore, the Commission issued a new proposal limited to set out a common framework for European takeover bids, which was then amended in 1997. In June 2000, the Council unanimously adopted its common position, but the European Parliament proposed some amendments, and the ensuing conciliation procedure ended up in June 2001. Nevertheless, in July 2001 the European

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159 See, e.g., Molin 1996.

160 See Grosmann and Hart 1980.

161 See Bukart, Gromb and Zingales 1998, p. 185 and Yarrow 1985, p. 10. CARs are provided for by, for example, the English Company Act 1985 (s. 429 and 430) when a full bid has been accepted by more than 9/10 of the offerees. The acquisition takes place at the same terms of the previous offer (see Weinberg and Blank 1999, p. 5025). See also in Italy article 111 of the Consolidated Financial Services Act (CAR at an appraisal value, when 98% of the shares is held), in France article 5.7.1 of the General regulations of the CMF (no more than 5% of the capital for an indemnity) and in Germany article 327 of the *AktienGesetz* (95% and price set by the offeror, but subject to the court review).

162 See Commission proposal 538/2002 General Considerations, p. 2 .

Parliament rejected the compromise text, expressing 273 votes for and 273 votes against it. Such a rejection was justified mainly on the basis of the fact that the adoption of a 'passivity rule' to freeze defences against hostile takeovers was unacceptable, in the absence of a 'level playing field' for European companies [163]. In addition, there were complaints also about the lack of a level playing field with the United States, and the protection of employees of companies involved in takeover bids was deemed to be insufficient [164].

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Despite of such a failure, however, the Thirteenth Directive has remained a critical issue on the European agenda. It is still included in the Financial Services Action Plan set out by the ECOFIN in 2000 and is deemed to represent a crucial condition for the development of Pan-European securities markets. In September 2001, therefore, the Commission, in view of the drafting of a new proposal, set up a group of experts chaired by Professor Jaap Winter, with the task of preparing a report on some issues relating to takeover bids, which was then published in January 2001 [165].

The report contains a set of recommendations on three main issues: the need for a level playing field for European companies with regard to company law rules which may be exploited to create pre or post bid barriers against hostile takeovers [166]; the

[163] In fact, as long as some national company laws allowed voting caps, multiple voting, and other similar pre-bid defences, the enactment of a passivity rule would have made the control of companies seated in other European countries unequally more contestable (see, e.g., Ferrarini 2001, p. 8 and 2002, p. 4. See also *infra*).

[164] See Commission proposal 538/2002 General Considerations, p. 2.

[165] See *Report of the high level group of company law experts on issues relating to takeover bids*, 10 January 2002.

[166] See Report, p. 18. In fact, not only, as earlier mentioned, voting caps, multiple voting and similar devices may allow the use of defensive tactics which may cause the failure of the bid, but also may prevent a successful bidder to acquire subsequently control of the company through its general meeting. The report suggests to solve this problem, applying the principle 'one share on vote' for any share in any class in meetings called to approve defensive measures or, after the bid, to remove/appoint directors, if the bidder has acquired more than 75% of the company's capital (so called 'break-through rule'). It has, however, been noted that, as a result of these provisions, firm owners would probably simply decide to go

price for mandatory bids; and squeeze-out and sell-out rights after a takeover bid [167]. As far as the price for mandatory bids is concerned, in particular, the report recognizes that, as actually noted in Chapter II, there are significant differences on the matter amongst European national legislations and that, therefore, there is a strong need for harmonization, to achieve a European-wide predictability of the price of mandatory bids [168]. For the same reason – and also because it should be fixed in the middle of extremely complex transactions, which demand fast decisions – it is then important to avoid as much as possible the involvement of courts in the determination of the price [169].

The Report expressly endorses the principle of equal treatment and, in particular, the doctrine of control premium sharing and, therefore, suggests that an 'equitable price' for mandatory bid should necessarily coincide with the highest price paid by the offeror in a period varying from 6 to 12 months [170]. However, the reports recognizes also the need for some flexibility, and accepts that in particular circumstances (e.g. collusion, financial distress of the target company, etc.) the price could be determined applying substitutive criteria, recommending that the national competent authorities would give in advance the most complete information there on [171]. Finally, it is deemed crucial that the offer would begin no later than 30 days after the acquisition

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for other control structures, as pyramids or cross-shareholdings, which would be outside the scope of the proposed rules and which are, anyway, very difficult to fight (see Ferrarini 2002, p. 6 and Enriques 2002, p. 110).

[167] See Report, p. 54. In the group opinion, squeeze-out rights (also called freeze-out rights or CARs, see *supra* III.C) and sell-out rights should indicatively apply when the bidder comes to hold between 90 and 95% of the target's capital.

[168] See Report, p. 47-49.

[169] See Report, p. 48.

[170] See Report, p. 50. The rules on price determination should in particular apply on a class by class basis, where relevant, adopting specific rules when the has not bought shares in any class (p. 51). In addition, no purchase at a higher price should be made possible during the offer and for a certain period after it (p. 51-52).

[171] See Report, p. 50-1. Substitutive criteria may be, for example, the average market value or the liquidation value of the company.

of control, as the more the time goes on, the less is reasonable to refer to the price paid by the offeror [172].

The October 2002 proposal of the Commission

In October 2002, the European Commission has published a further proposal for a European directive on takeover bids. The proposal is designated to apply to tenders offers having as their object listed securities in a company governed by the law of a member state (article 1) [173] and, as its predecessors, is aimed to harmonize the national legislations in this respect and to protect minority shareholders [174]. Pursuant to its article 3, in particular, all holders of securities in the same class have to be treated equivalently and must especially protected in the event of a change of control. As a matter of fact, however, the proposal does not follow entirely the recommendations of Winter report, even though it does retain, at least in principle, almost all its suggestions as far as the price of mandatory bids is concerned [175]. Pursuant to article 5 of the proposal, in fact, any person – or group of person acting in concert, i.e. people cooperating on the basis of any possible kind of agreement aimed to secure control of the company (article 2.1.d) and the bidder's subsidiaries (article 2.2) – who, directly or indirectly, comes to hold, as a result of an acquisition, a *specified percentage* of voting rights in a company conferring her its control, is required to make as early as possible a bid for *all* the remaining voting securities in the

[172] See Report, p. 51.
[173] Member states could, however, decided to extend the application of the Directive also to unlisted companies (some national regulations, for example, apply provide for the application of the mandatory bid rule to companies the shares of which were previously listed or are (or were) anyway publicly traded: see *supra* II.A.
[174] See Commission proposal 538/2002 General Considerations, p. 2. The application of the directive may be differed by the member states for no more than 3 years (article 18). It is then provided for the use of the comitology procedure (art. 17), on which see, e.g., Ferrarini 2002.
[175] Also the recommendations concerning freeze-out and sell-out rights are in principle followed, whilst the ones have been considered more cautiously.

company, at an *equitable price*. The highest price paid by the offeror to acquire securities in the preceding 6 or 12 months 'shall be regarded as an equitable price', although, in particular circumstances – e.g. collusion, financial distress, etc. – the price can be adjusted, onwards or downwards, on the basis of clearly predetermined principles set out by the national competent authorities, which can also lay down alternative criteria to calculate the price in these cases (average market price, break up value of the company, etc.; par 4). However, an offer has not to be made, when control has been acquired as a result of a full voluntary bid (par. 2).

Both the percentage deemed to confer control and the period of time relevant for the determination of the price are basically left to the discretion of member states (par. 3), which may also decide to provide for further protection for investors (par. 7), extending for example the offer to non-voting securities too (10th 'whereas'). The consideration offered by the bidder should be in principle represented by liquid securities, but, where it does not consist of securities admitted to trading on a regulated market, it is only optional for member states to require a cash alternative (which is however mandatory if in the 3 months preceding the offer, or during it, the bidder has bought shares for cash; par. 5). As generally laid down for any public tender offer, then, the bidder has to draw up an offer document containing all the necessary information (article 6), while the definition of the discipline of conditions is committed to the national measures of implementation (article 12). Finally, member states should designate one or more competent authorities to supervise the application of the directive (article 4) [176], trying to avoid as much as possible any

[176] Basically, the competent authority should be that of the state where the securities are listed (on the problem of the choice of the competent authority in cross-border financial markets see in particular Fox 1997 and 1999 and Ferrarini 2002).

litigation on takeover bids [177], and provide for effective, proportionate and dissuasive sanctions to ensure the directive enforcement (article 16).

B. Assessment.

Also considering its troubled history, it is not sure, and maybe not even probable, that the Thirteenth Directive would be enacted in the near future. Furthermore, the present text of the proposal has necessarily been the result of some compromises and an eventual definitive draft could easily be that of even bigger. However, the mandatory bid rule has not been the directive most controversial issue, so far, and, at least from the academic point of view, an assessment of the proposal in its respect may perhaps be of some interest, and may in any case represent a good starting point to delineate an ideal legal framework for mandatory bids in the European context. This paragraph, therefore, moving from the latest Commission proposal, considers the most important questions concerning mandatory bids, in the light of the previous findings of this paper.

The control threshold

The basic elements a mandatory bid rule has to set out are the moment in which the obligation to make an offer arises, the quantity of shares the offeror should offer to buy and the price of the offer. In principle, there are two different ways to lay down *when* a bid must be launched, that is to make reference to the achievement of factual control or, instead, to fix a presumptive threshold for its acquisition. The former, is clearly more straightforwardly consistent with the rationale of the mandatory bid, whatever it would be, as in any case the change (or acquisition) of control is the event

[177] See Commission proposal 538/2002 Explanatory Memorandum, p. 7.

which justifies the triggering of the obligation to bid (v. *supra* III.B and C). And this is the way that, for example, the Belgian Law and the Austrian Takeover Act have chosen (v. *supra* II). But the application of this kind of criterion has often demonstrated to be rather inconvenient, mainly because it results in a complex system, which ultimately leans on the discretion of a regulatory body and necessarily lacks of predictability [178]. For such a reason, therefore, the Italian legislator abandoned such a criterion in 1998 and went for a fixed threshold (v. *supra* II).

The fixed threshold, on the contrary, establishes *a priori* a rebuttable or more frequently un-rebuttable presumption of the achievement of control when a certain percentage of a company's voting capital is acquired [179]. And this is the way almost all the countries I have considered and also the Commission proposal have chosen (see *supra* II and IV.A). This kind of solution is, in fact, simpler and its results are quite easily predictable (even though some uncertainties relating to the way in which calculations are made fatally remain in any system) [180]. However, the main problem in this case is actually to decide what a threshold to fix. More than 50% is obviously too high a threshold for a listed company (even though chosen e.g. in Greece), but, as seen, a wide range of options is possible – 30% in UK, Germany and Italy, for example, one-third in France and Portugal, 40% in Norway – mainly depending on the average ownership dispersion on the relative markets. As a matter of fact, though, even in the same country any threshold under 50% necessarily results in being too

[178] And, as noted by the Winter report (p. 51), transaction involving the triggering of the mandatory bid need a clear normative framework to rely on (see *supra* IV.A). In addition, as already said, the report – at least in principle followed on this point by the Commission proposal (see *supra* IV.A) – considers that it is crucial that a mandatory bid would be launched as soon as possible after the acquisition of control (possibly no more than 30 days after it) and the eventual ascertainment that control has been factually obtained might sometimes take too much time.

[179] Some regulations, by the way, provide that the potential offeror could escape the obligation to make a bid, did it promise to sell enough shares to bring its holding back to below the relevant threshold (e.g. the British City Code and the Norwegian Securities Trading Act).

[180] See Wymeersch 1992(b), p. 353.

high or too low with respect to some particular companies. As a consequence, exemptions are usually provided for the latter case (i.e. when control has not been acquired in practice) [181], whilst there seems to be no way to get over the problem in the former (i.e. when control is actually acquired without exceeding the threshold), rather than coming back to the factual control test as an additional criterion [182].

Another issue to be considered when a fixed threshold is laid down is how to deal with purchases made by who would hold a number of shares exceeding the relevant threshold, but not 50% of the voting capital [183]. Clearly, such purchases may strengthen his control (even though he was actually deemed to control the company already before, as well as the strengthening of control may very well happen also above the 50% threshold) [184] and usual solutions are to forbid any acquisition in such circumstances (City Code), or limit the number of shares one could acquire, in a certain period (e.g. France and Italy) or at all.

Coming to the Commission proposal, finally, at a European level the question is actually even more complicated, as the threshold would have to apply with regard to even more different ownership structures. The solution adopted by the proposal, which leaves the fixture of the relevant percentage to national legislators (see *supra* IV.A), appears therefore to be sharable. No provision, however, considers the problem of purchases between the relevant percentage and 50%, which could eventually be dealt with by the implementation measures.

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[181] See *infra* note .

[182] However, a possible solution could eventually be found [- making the other way around -] in corporate governance rules, as it could be reasonable to establish under those rules that no one could, for example, appoint the majority of directors, if he does not hold a number of shares in the company which exceeds the mandatory bid threshold (e.g. by means of a list voting system).

[183] This could be, e.g., possible if they already held the shares when the mandatory bid rule has been enacted (see e.g. 9th 'whereas' of the proposal), if after a full bid the controller has sold some shares, if an acquisition has been exempted, etc..

[184] Reaching the percentage necessary to pass a special resolution could in fact be even more important than increasing the one's shareholding between, e.g., 30 and 50%, and sell-out rights usually apply only where far larger shareholding are held.

The quantity of shares

Consistently with the findings of this paper, almost all the national legislations (except the Spanish) provide for, at least in principle, a *full* mandatory bid. In fact, the equal treatment principle (but only in the presence of a controlling shareholder), the control premium sharing doctrine and the exit rationale require that the offeror should offer to buy *all* the (remaining) shares in the company (see *supra* III.B and C). Also, no exceptions are in theory consistent with them and for this reason some countries, as, for example, France and Germany, do not admit partial bids under any circumstances (see *supra* II.A).

Different are, on the contrary, the conclusions deriving from the efficient and inefficient sales of control theory, which would support the provision for a full partial bid in principle, with the possibility for either the company's shareholders or a regulatory body to approve or consent a partial bid, when the strict application of the mandatory bid would prevent the success of a bid which could instead benefit minority shareholders [185]. The British City Code and the Italian Consolidated Financial Services Act, for example admit partial bids – for no less than, respectively, 50 and 60% of the voting capital, anyway [186] – but require both the approval of independent shareholders and the consent of the Panel or of CONSOB (while other provisions are also laid down to avoid elusions; see supra II.A). Setting aside for a moment the problem of who may be in the better position to take that decision (see *infra*), it can be noted that in such cases is thereby possible to reduce the overall

[185] This may, for example, possible if Wn plus Bn is less than We plus Be, because Wn is bigger than We, but Bn is smaller than Be (see *supra* III.B for references).

[186] A minimum percentage may be required not only to show the commitment of the bidder, but also to limit the possible exploitation of private benefits, the less being their impact, the bigger the controller's shareholding.

bidder expenditure, so allowing to pass a (deemed) positive bid, that would have been stopped, had the offer had to be full [187]. However, the same result could normally be achieved, accepting to reduce the price of the mandatory offer (see *infra*).

Finally, partial bids may be banned to avoid the problem of the 'pressure to tender', but, as mentioned (see *supra*), such a result may also be achieved extending the offer period if the disliked offer succeeds [188].

To conclude on this point, therefore, the case against partial bids is not particularly strong, provided that some conditions are respected, and in particular circumstances they may actually be beneficial. Though, not even the case for them is so strong, if an alternative solution to the problem of the efficient and inefficient sales of control theory is provided for, as, for example, suggested in the following paragraph. Also, the prohibition of partial bids may be justified by the sack of simplicity, as, in the end, even where allowed they are actually not very much used in practice. The Commission proposal, thus, not providing for the possibility of partial bids (see *supra* IV.A), might not be overly questionable from this point of view (but see *infra*).

Finally, according to the Commission proposal, the obligation to bid does not include *non-voting securities*, even though member states can decide to provide for that (see *supra* IV.A). Also many national regulations do not require to bid for non-voting securities (mainly to avoid that offers could become overly expensive), but some others do (see *supra* IV.A). Under the equal treatment principle such an exclusion can be actually justified sustaining that such a principle is deemed to operate on a class basis and also the control premium sharing doctrine is consistent with this approach,

[187] In practice, shareholders can thereby 'buy' for themselves a new controller, paying *de facto* to the existing controller a part of the price to make the control transaction succeed.

[188] [As said, this is the solution the city Code went for. An extension of the offer period is also provided for by the German takeover Act, but, as in Germany no partial bid is possible, such a provision appears questionable in a full bid context, where it can anyway allow to avoid the recourse to squeeze-out or sell-out rights. However the same rule applies to full bids also in the UK.]

as control belongs in fact only to voting securities. On the contrary, the exit rationale demands that holders of non-voting securities could leave the company too, if a disliked controller takes control of it. Equally, the efficient and inefficient sales theory would require that the new controller would not in principle be able to extract private benefits from non-voting shareholders, in order to prevent inefficient transfer of control (see *supra* III. B and C). The Commission proposal appears, therefore, to be questionable on this aspect on the basis of the last two grounds.

The price of the bid

The price of the offer is the crucial element of a mandatory bid rule and the one that more reveals what its rationale actually is. As said (see *supra* III.B), according to the equal treatment principle and the control premium sharing doctrine the offer price should be exactly the same price the offeror has paid to acquire control. This is the way taken, for example, by the British City Code, which refers to the highest price paid by the bidder in the preceding 12 months. Such a criterion has doubtless the advantage of being in principle very simple, but has some inconveniences, as well [189]. First, it may sometimes happen that no price is actually paid (e.g. control is acquired because a new issue of shares), so that it becomes necessary to apply an alternative criterion (e.g. average market price, assumed value of the shares, etc.). Second, some 'adjustment' is also necessary when there is more than one class of shares and no significant purchase have been made in one or more classes (as said the City Code require for instance that in such a case the price should be 'comparable'). Third, the

[189] It might be thought that this criterion could encourage the acquisition of control on the market, by means of a tender offer that also the existing controller could accept, being the price paid to it at any rate the same. This would be good for shareholders, as competing bids may be launched and the offered price increase, but very much because of this possibility the acquirer will anyway prefer to conclude a private deal to avoid being involved in an auction.

highest price paid has no particular meaning in the absence of a control transaction. Some national legislations, as the German Takeover Act, make, however, reference to the higher between the highest price paid *and* the average market price of the shares, but similar provisions, where not simply deemed to avoid elusions, go a bit further than the equal treatment principle. In practice, in fact, they provide for additional protection in favour of minority shareholders, assuring anyway the payment of a 'fair' price, in the (very improbable) case of offers below the market price (see *supra* III.C).

On the contrary, according to the exit rationale, the price of the bid has not to be necessarily as high as the highest paid by the bidder, but should only reflect the value of the company at the moment in which control is transferred. As said, did the market price always reflect exactly the value of the shares, it could then be possible to make reference simply to that of such a moment, but the national legislations going this way – e.g. the Italian, Austrian and Swiss – have deemed necessary to consider also the highest price paid, applying a discount with respect to it (see *supra* III.B).

As far as the efficient and inefficient sales of control theory is concerned, the bid should be in principle launched at the same price paid by the offeror to acquire control, but with the possibility for the company's shareholders or a regulatory body to admit a lower price. The highest price, in fact, would cut out inefficient transfers (and provide for a certain predictability: the offeror would anyway know that it should not pay more than that to acquire control), whilst a 'discount' would be possible – reducing the bidder expenditure and allowing the offer to pass – when this would seem to be advantageous for minority shareholders [190]. The problem is, however, that neither minority shareholders nor a regulatory body has often enough

[190] As in the case of partial bids, shareholders could in practice 'buy' for themselves a new controller, paying a price of the discount to make the control transaction succeed if Wn is bigger than We and Bn is smaller than Be (see *supra* III.B).

information to take such a decision properly. In principle, in any case, the choice should be given to the ones in the better position to decide, i.e. to who is likely to have more information, that is probably, in not highly developed market, a regulatory body (in France, e.g., the CMF, who should asses if the price of an offer is 'receivable', may sometimes take this these kind of decision). On the contrary, in the presence of very sophisticated professional investors the choice could be given to them, as, being endemic the possibility of mistakes, it would be better that it would be the shareholders themselves to make any of them (see *supra* III.B) [191].

Coming to the Commission proposal, it seems to follow the recommendations of the Winter report and, as said (see *supra* IV.A), provides – consistently with its endorsement of shareholder equality and control premium sharing – that the 'equitable price' of the offer should normally coincide with the highest price paid by the offeror in the preceding 6/12 months [192]. However, the wording of the proposal in this respect, as well as with regard to possible price adjustments, seems to leave some room for possible deviations from this general principle in the course of its eventual implementation. In addition, there would anyway be different rules on price adjustment in each member state [193], so that the overall result could be that of

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[191] Obviously in this case shareholders could be given the possibility to approve the offer, even if they do not want to accept it. However, not even in the European most developed market, the UK, a similar rule is provided for[, but under the City Code the Panel can adjust downward the price considering 'the attitude of the target's board' towards the offer: note 3.b on Rule 9.5]. As told, though, partial bids with the same function are possible under the City Code (see *supra*).

[192] There does not seem to be any reason, however, to leave the choice of the length of the relevant period to the member states, instead of setting out a common rule.

[193] The hypothesis suggested by the proposal as possible cases in which a price adjustment should be reasonable are prices manipulation, fraudulent agreement between vendor and acquirer, exceptional events and rescue of troubled companies. The last one, actually, is normally considered as a cause for *exemption* by national regulations (see *supra* II.A), but the proposal does not provide expressly for other exemptions rather than a preventive full offer. This might be because the proposal leaves to implementation measures the definition of the rules on the calculation of the shares to be included in the (potential) controlling shareholding, for the purpose of assessing the exceeding of the relevant threshold – as they may depend very much on the different characteristics of legal systems - and some cases for exemptions, therefore, could be covered under those rules (e.g. excluding gratuitous or involuntary acquisitions). However, at least some provisions in this respect would probably have been necessary laid down, avoiding possible discrepancies on such an important matters. The treatment of mergers is, for example, very important - the best approach probably being to require the approval of independent shareholders (applying to the vote to pass the merger also a special quorum for this purpose), which could be also a good solution as far as the rescue of troubled companies is concerned. It would then be advisable to provide for

reducing significantly the predictability of the pricing system. And actually – if different rules are thus ultimately possible and given the fact that some member states have not endorsed the equal treatment principle, but, with some possible reason, provide just a softer right of exit (see *supra*) – it could have been better to consent expressly the adoption of only a minimum standard rule, assuring minority shareholders the right of exit and allow the countries willing to do so, to provide for further investor protection. Finally, as no partial bids are possible – if 'beneficial bid' of the type considered just above are not going to be somehow included under the particular circumstances under which a price adjustment is provided for – the enactment of a similar mandatory bid rule will probably prevent a number of efficient control transfers.

Further considerations on some other aspects

The Commission proposal is also quite criticisable with respect to the requirements demanded for the *consideration* that should be offered by the bidder (see *supra* IV.A). In fact, an only optional cash alternative if securities offered are not admitted to trading on a regulated market seems to provide for too low a degree of protection. The equal treatment principle would have at least required to offer non-cash consideration only in the same proportion in which such a consideration would have been paid in the transactions carried out in the period preceding the offer (as, e.g., in

an exemption where there would be another shareholder holding a bigger stock, to attenuate the problem of 'controller entrenchment' that a mandatory bid threshold below 50% may cause, as it confers to the controlling shareholder a competitive advantage as no one else can acquire as many shares as it already has (on this point, for instance, the German solution seems better that the Italian and British ones: see *supra* II.A).
As for the preventive offer, finally, it would be advisable that implementation measure would endorse the German approach, providing that the fulfilment of the same requirements set out for mandatory bid, rather than the Italian overly relaxed one, which leaves open the room for elusions (see supra II.A).

Italy; see *supra* II.A) [194]. Instead, the right of exit would have required a cash alternative under any circumstances, as laid down, for example, in the British City Code and also in the US regulation (see *supra* II.A and B).

The Commission proposal provides simply that an offer should be made when control is directly or *indirectly* acquired (see *supra* IV.A) and implementation measures would probably have to deal more in detail with this question, which is, actually, an extremely problematic issue. On the one hand, in fact, easy elusions of the mandatory bid rule must be avoided, but on the other hand the great diffusion of pyramids makes this very difficult [195]. Different criteria have been adopted by member states regulations in this respect (see *supra* II.A), but no one seems actually able to solve the problem *a priori* and the involvement of a discretionary assessment of the single case by a regulatory body seems irremediably necessary.

Another critical issue is, then, the *action in concert*, which the Commission proposal defines as cooperation under any sort of agreement and within the members of the same corporate group (see *supra* IV.A) [196]. Such a definition is actually not very wide (it does not include, e.g., the directors of the bidder or of its subsidiaries), but whatever being the presumption laid down [197], to prove its existence could anyway be very difficult in practice. Also here there is, therefore, a trade-off between the need to

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194 Such a requirement, however, cannot operate with regard to voluntary preventive full offers and in these cases the Italian law requires simply that EU listed securities should be offered in exchange. Unfortunately it is thereby possible to transform a full bid in a partial bid, offering in exchange securities listed *ad hoc* in a newco used to launch the bid.

195 Stock pyramids are very diffused because they enable a controlling shareholder to maintain a complete lock on a company's control, holding ultimately even very small percentage of its cash flow rights, with the possibility of extracting massive private benefits, creating very large agency costs (see Bebchuk and Triantis 1999). However, pyramids could also be sometimes justified by real organizational reasons and making a distinction is very difficult (see Ferrarini 2000). The Winter report, for example, judges very negatively stock pyramids (being also pyramids a mean of bypassing the break-through rule) and recommends that no more than one company within a group would be admitted to listing (see report p. 39 and also Enriques 2002, 112). Finally, it has been noted that the enactment of a mandatory bid rule may push towards even more pyramidal structures (Bebchuk and Zingales 1996, p. 27).

196 See the 7th whereas of the proposal.

197 See, e.g., note as for the presumptions provided for by the City Code [and note for Italy, etc.].

avoid elusions and, in this case, the right of defence [198], but is surely advisable that adequate inspective powers would be given to the competent authorities [199].

The Commission proposal provides that an *offer document* containing all the necessary information should be published (see *supra* IV.A). No option for the simple placement of an order on the market to buy all the remaining securities in the relevant company – like the French and Belgian *mantien de course* – is therefore contemplated. A similar procedure has actually the advantage of reducing the costs involved in mandatory bids, but does not enable shareholders to take a proper decision on whether leave the company or not. The Commission approach in this respect can thus in principle be shared.

As for the discipline of conditions, the Commission proposal leaves its definition to member states (see *supra* IV.A). In this respect, national regulations normally provide that no condition could be applied to mandatory bids (with the relevant exception of the City Code, however; see *supra* II.A) and it is very likely that this would be the most common rule under eventual implementation measures [200].

Finally, as far as the *enforcement* of the mandatory bid rule is concerned, the Commission proposal limit itself to require that member states would laid down adequate sanctions (see *supra* IV.A). As seen, in fact, a wide range of sanctions is applied in the different member states regulations, which very often provide for the

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198 No national regulation, by the way, considers the simple conclusion of a shareholder agreement among shareholders jointly holding a number of shares exceeding a relevant threshold, or anyway conferring them control, sufficient to trigger the application of the mandatory bid, if no acquisition of shares by any of the parties (see, e.g., Wymersh 1992(b), p. 351). Even though there would be the lack of price to make reference to, however, this does not seem actually justified as the conclusion of a similar agreement is simply one way of achieving control (see Easterbrook and Fischel 1991, p. 152) and at least the exit rationale would require the making of an offer.

199 See the 14th whereas of the proposal.

200 As said, the City Code not only consent, but also compulsory requires that a mandatory offer should be conditioned upon the achievement of at least 50% of the company's [voting] capital. Such a rule represents a further guarantee for investors that the offer would be serious and can also serve the purpose of reducing the impact of possible extraction of private benefits. However, the problem of what to do if the 50% is not reached is difficult to solve satisfactory and for this reason it could seem reasonable to leave the introduction of a similar rule to member states' discretion.

suspension of voting rights attaching to the exceeding shares or to the whole shareholding, but also fines, freezing of dividends and even a court order to force the launch of the offer in France or the advisers' disqualification in the UK (see *supra* II.A). And actually the choice of remedies depends very much on a single country's company law [201], civil procedure or maybe property rules. Also in this regard therefore the proposal approach is sharable.

V. Conclusion.

This paper aimed to consider the problems related to the enactment and application of mandatory bid rules from the European Community point of view. First of all, in Chapter II I have summarized the different legal rules on mandatory bids presently in force in the fifteen Member States of the European Community and, for the sack of comparison, in some other highly developed countries. Chapter III, then, I have analysed the operation and economic rationale of mandatory bid rules in different ownership contexts (in particular, either in the presence or in the absence of a controlling shareholder). In Chapter IV – moving from the findings of the Winter report of January 2002 and from the latest Commission proposal for a Thirteenth Directive – I have attempted to assess the European policy on mandatory bids and to delineate what would be an ideal legal framework thereon in the European context. As a result, having regard in particular to the basic element of a mandatory bid rule, the solutions provided for by the latest Commission proposal can be generally shared as far as the determination of both the control threshold and the quantity of shares the offeror should offer to buy is concerned, whilst there is some cause for concerns

[201] For example, a massive suspension of voting rights can cause serious problems if company law requires particular quorum based on the company's capital to pass special resolutions, making their adoption practically impossible.

with respect to the price of the offer. Finally, some other aspects of the proposal may also be criticisable (e.g. the rules on the consideration offered by the bidder).

[*27.3.2003*]