

The Mandatory Bid Rule

The Rise to Prominence of a Misconception

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The proposal for a directive on takeover bids that was put forward by the European Commission on October 2nd, 2002 has been met with considerable opposition and has triggered a fierce debate that has cast the very survival of the proposal in doubt.¹ On one part of the proposal, however, that of the necessity of making the mandatory bid rule a binding feature of European law, there appears to be a tacit agreement between the Council and the European Parliament and the different constituencies they represent, and hence an eerie silence prevails.²

This paper is written as a, probably quixotic, attempt to assail the unity that surrounds the mandatory bid rule and point out that the rule is as worthy of opposition as the other bits and pieces of the directive proposal that are currently the obsession of politicians, business people and academics. It is highly likely, though, that it is too late. In the Nordic countries, all except one have introduced the rule in their legislation without any directive requiring it, and in the sole country where the legislators have not been persuaded to introduce the rule, that of Sweden, it has been introduced by a so-called voluntary code drawn up by a private business committee and made binding on all listed companies by way of the standard listing agreement used by the country's only stock exchange.³ Other

^{*} This paper builds on earlier papers written in Danish and English on the same subject, mainly *Hvad skal vi med tilbudspligt? Den er bare til besvær* [Who Needs the Mandatory Bid Rule? It's Just a Nuisance] printed in L. Bo Langsted (Ed.), *Selskabers Kapital* [The Capital Of Companies], pp. 124 – 145, Jurist- og Økonomforbundets Forlag (1999), and *When Less Would Be More: The EU Takeover Directive In Its Latest Apparition*, 9 Columbia J. of European L. 275 (2003).

¹ Commission of the European Communities, *Proposal for a Directive of the European Parliament and of the Council on Takeover Bids*, COM (2002) 534 final (October 2002).

² The rule obliges a bidder to extent an offer to buy all outstanding shares of a listed company upon taking over the control of the company. The threshold that constitutes control may differ significantly, *see* footnote 3 below on Nordic law.

³ The rules vary within the Nordic countries. In Finland, the threshold for control that triggers the mandatory bid obligation is 2/3 of the votes of the listed company. In Iceland, the threshold is 50 pct. In Norwegian law and in the Swedish recommendation the threshold is 40

European countries have also introduced the rule. Nonetheless, a directive would oblige all European countries to introduce the mandatory bid rule, including the new member states of Central Europe, and with its well-known petrifying effect a directive would make the process irreversible, making the prospect of the Lisbon declaration of a more vigorous and competitive European Union seem even more unlikely.⁴

1 What's at Stake?

Takeovers are of considerable importance to the overall functioning of a market economy. It is not the takeovers as such, that is, the control transactions that they entail, but a much more fundamental issue that is at stake. It is arguable that the unprecedented wealth of our part of an otherwise poor world is due to the existence of a legal system that registers entitlements and facilitates their transfer from one holder of a certain legal position to another by way of an agreement between the two parties.⁵

First of all, by registering entitlements and making them transferable, it becomes possible to utilise capital much more effectively. You can live in your house and at the same time raise money by way of a mortgage.⁶

Secondly, the transactions involving entitlements will, as will transactions involving physical goods, result in the use of money and thereby in the creation of comparable prices. Money is nothing more than an index of value, as pawns of exchange often without any inherent value of their own they are useful because they facilitate transaction by providing a common denominator or representation of value that is superior to transactions based on barter. If NN has a cow but wants a horse, he can only engage in a transaction in the lucky incident that the owner of the horse may want a cow. But introduce money and NN may sell his cow to anybody and use the money to buy the horse from somebody else. Because money are normally expressed numerically, an exchange involving money, even an offer to enter into a transaction, will inadvertently create an important piece of information, that of a price. Thus, a price will tell what value a certain good or entitlement has to its holder, if you want to acquire it in a transaction with him. The pricing mechanism is a formidable instrument of control. In the words of Friedrich von Hayek, "The

pct. In Denmark, the threshold may be as low as 1/3, if the bidder is thought to have effective control. On the various rules, see J. Lau Hansen (ed.), *Nordic Financial Market Law*, DJØF Publishing, Copenhagen (2003).

⁴ The European Council held a special meeting on 23-24 March 2000 in Lisbon to agree a new strategic goal for the Union in order to strengthen employment, economic reform and social cohesion as part of a knowledge-based economy. Among other things, it was agreed to pursue efficient and integrated financial markets, including adopting the long-standing proposals on takeovers and related subjects. The conclusions can be found at "http://europa.eu.int/european_council/conclusions/index_en.htm".

⁵ For a presentation of this idea that is as eloquent as it is convincing, see H. de Soto, *The Mystery of Capital. Why Capitalism Triumphs in the West and Fails Everywhere Else* (2000).

⁶ In the United States, up to 70 per cent of the credit new businesses receive comes from using formal titles as collateral for mortgages, cf. H. de Soto, *The Mystery of Capital* (footnote 5), Bantam Press, Black Swan edition (2001) at 86.

marvel is that in a case like that of a scarcity of one raw material, without an order being issued, without more than perhaps a handful of people knowing the cause, tens of thousands of people whose identity could not be ascertained by months of investigation, are made to use the material or its products more sparingly; that is, they move in the right direction.”⁷ Thus, where transactions are based on voluntary transfers of money, the observable prices will provide useful information that enables a more efficient use of resources. Where transactions are provided in the absence of prices, there is often a lack of information that results in a waste of resources. The inevitable demise of the planned “price-less” economy of socialism was foreseen by Ludwig von Mises already in the beginning of the 1920s,⁸ but the same failure is often observable in modern market economies where large entities, be they state owned or part of a huge conglomerate, can make transfers without adequate pricing.

Thirdly, by facilitating the transactions of private persons, the legal system provides the foundation of private ownership and economic autonomy of its citizens. Decision-making is thus possible at a far lower level than in a planned economy. Although the individual citizens often operate without the vast information available to government agencies, the informational benefit of the pricing system helps them make decisions that are reasonably efficient. In fact, experience shows us that even with a superiority of information and relying on the help of modern technology, government officials cannot hope to fulfil the special and often precarious preferences of the citizens.⁹

On these basic observations, takeovers merit special consideration. They are a case in point, where private parties engage in a transaction of entitlements using the pricing system. We have reason to expect that a takeover is only instigated if the bidder believes that to acquire the shares granting control is worth the price paid. A transaction will only occur, if the bidder is willing to pay more than the current shareholder believes the shares are worth at present.¹⁰ That, we may assume, indicates a belief on behalf of the bidder that he can profit more from his investment than is possible under the prevailing distribution of control over the company. In sum, takeovers should lead to the most efficient use of the bundle of resources that the company represents, as should always be the case when goods and entitlements are the subject of a voluntary transaction.¹¹

⁷ Quoted from D. Yergin & J. Stanislaw, *The Commanding Heights. The Battle Between Government and the Marketplace that is Remaking the Modern World* (1998) at 143.

⁸ L. von Mises, *Socialism* (1922).

⁹ This observation was most famously made by F. von Hayek in his *The Road to Serfdom* (1944) that was a thinly veiled warning against the planned economy of the socialist system. As with von Mises’ observation on the importance of a pricing system, it is equally well placed in a market economy, where not only state owned enterprises but also huge private enterprises may move the decision making process upward to the detriment of those effected by the decisions.

¹⁰ It is safe to ignore the cases where transactions are founded on an urgent need for cash, as they are probably infrequent.

¹¹ This observation is traditionally referred to as a part of the Coase Theorem, based on R. Coase, *The Problem of Social Cost*, 3 J. of L. & Econ. 1 (1960), where he argued that in the absence of transaction costs, the initial distribution of property rights is irrelevant to produce the economically most efficient outcome. It should be noted that transaction costs covers,

Furthermore, since a takeover would normally lead to a change of management, because present management was deemed incapable of extracting the extra potential profits, the mere possibility of takeovers may serve as a threat to discipline incumbent management. This is of special importance in companies with dispersed shareholdings, because the shareholders are unlikely to exercise any discipline due to their fragmented holdings and prevented by the costs entailed, but may accept an offer made by a bidder aiming at becoming a dominating shareholder. Naturally, where dominant shareholders are the norm, such as is the case in the Nordic countries, the disciplining effect of takeovers is less pronounced. It should not be overlooked, though, that the perceived beneficial effect of takeovers stems from the notion of a dominant shareholder. It just so happens that some countries are fortunate enough to have dominant shareholders even in the absence of takeovers. The fact that dominant shareholders may prove to be a problem on their own, notably vis-à-vis minority shareholders, should not be ignored. That, however, is not a problem connected with takeovers and should be dealt with by company law on its own merits.

Takeovers are thus necessary and beneficial, at least in theory. In practise, it is not unheard of that takeovers are less than successful. Often it would seem that takeovers are not based on sound expectations of increased profitability of the target company but on a bloated and eventually unwarranted self-confidence. Nevertheless, takeovers are no different from other transactions whereby private persons engage in the transfer of goods or entitlements for money, and our experience also tells us that on the whole the outcome of this activity is still rather efficient despite the inherent fallibility of humans.

Finally, there is yet another problem associated with takeovers that has nothing to do with a lack of rationality, on the contrary, it is very rational indeed, and that is the takeover of a competitor to reduce the overall level of competition. That problem, however, is better dealt with by competition law, which is a legal discipline in its own right.

Thus it suffices to leave this introductory part by assuming that society will on the whole benefit from takeovers and that we should not try to interfere with the voluntary transfer of shares granting control that signifies a takeover except for the special cases mandated by competition law.

2 The Twin Roots of the Rule

The [not then] mandatory bid rule, as it appears in the proposed directive, is mainly of British descent, but also, as examined below, has an interesting ancestry to German law, that in combination cause each of these country's to be its staunchest proponents. Thus, both the British and the Germans like the rule, but this is due more to coincidence than to a shared philosophy.

among many other things, the cost of being adequately informed. To negate such an important factor is a bold step even for an economist, but it does help to show that a lack of efficiency is not caused by what at first hand may look like externalities but is in fact a problem of transaction costs.

In British law, the mandatory bid rule dates back to the early days of the City Panel on Takeovers and Mergers.¹² When the Panel was set up in 1968 it carried a mandatory bid rule that was limited to acquisitions made from the company itself; it was later expanded in 1972 to cover all who acquired effective control.¹³ It would appear that to the British, the rule is about fairly dividing the takeover premium among all shareholders rather than leaving it with a few. *We woz robbed*, would be the outcry of the typical British investor, if a dominant shareholder was allowed to sell his or her control block at a premium to the market price, apparently because it is believed that this control premium somehow belongs to all the shareholders.

To the Germans, the rule is all about exit. This is a way to ensure that the minority shareholders can escape the company once control of the company has been gathered in one hand and the company's independence is likely to be compromised. To fully understand this perception of the takeover as a threat, regard must be had to the general structure of German company law. Reading the German act on public companies, the Aktengesetz (AktG), makes it evident that its concept of corporate governance is quite different from that of most other legal systems. The managers in a German public company are entrenched and act as a separate company organ, the management board (the *Vorstand*), which, according to the AktG, is exclusively empowered to manage the company.¹⁴ The supervisory board (the *Aufsichtsrat*) is just that: a supervisory board.¹⁵ Although it is responsible for hiring the managers and supervising their work, and even though the articles of the company can grant the board decision-making power on certain specified topics, the AktG expressly prohibits the members of the supervisory board from taking over management.¹⁶ The general meeting of shareholders (the *Hauptversammlung*) also has only limited powers. The relevant provision of the AktG on the role of the general meeting makes this clear by listing the specific powers available.¹⁷ The list is exhaustive, which

¹² The Panel was introduced in 1968 to ward off government interference and possible legislation after a rash of unfortunate cases of abusive takeovers. On the background of the rule, see R. Skog, *Does Sweden Need a Mandatory Bid Rule?* (1995) at 10 – 17.

¹³ Effective control was originally thought to be 40 per cent, later reduced to the current threshold of 30 per cent. The low threshold should be viewed as a consequence of the prevalence of dispersed shareholdings in the British capital market.

¹⁴ See AktG § 76(1).

¹⁵ On the role of the supervisory board in German law, see Klaus J. Hopt, *The German Two-Tier Board: Experience, Theories, Reforms* in K. J. Hopt et al. (eds.), *Comparative Corporate Governance: The State of the art and Emerging Research* (1998) (emphasizing the supervisory board's position as a substitute for public supervision by state authorities and serving mostly as a "relationship board").

¹⁶ See AktG § 111(4): Maßnahmen der Geschäftsführung können dem Aufsichtsrat nicht übertragen werden (the supervisory board cannot assume managerial power).

¹⁷ See AktG § 119(1) (the powers listed are: election of the members of the supervisory board, except those to be appointed by the employees according to the laws on co-determination; the allocation of profits recorded in the annual accounts; giving discharge to the members of the supervisory board and the management board when approving the annual accounts; appointment of the public accountants; changes to the articles of association; measures to increase or decrease the share capital of the company; appointment of special investigation into the affairs of the company; and the dissolution of the company).

stands in stark contrast to most other jurisdictions in which the shareholders in the general meeting have all the residual powers that are not expressly denied to them by law.

The reason behind this structure of German corporations law is a deeply felt distrust of capitalism; that power should emanate from capital. So fundamental is this attempt to isolate management from the possible corruptive influence of shareholders that the AktG introduced a special Part III on company groups (*Verbundene Unternehmen*), when it was recast in 1965. With this special regulation, the AktG tries to come to terms with the fact that companies within a group are often managed as one economic entity, with the major decisions being made by the parent company as the main shareholder. The gist of this special regulation of company groups is to allow such shareholder domination but only if the parent company assumes the financial liability towards the controlled company and its minority shareholders and creditors. In lieu of the right granted to the dominating shareholder to control the company, minority shareholders are granted certain rights vis-à-vis the dominating shareholder, among others the right to be bought out at a fair price.¹⁸ This right of redemption is indistinguishable from the mandatory bid and operates in the same context, that of a control transfer.¹⁹ Thus, the elaborate design of these provisions of group law (*Konzernrecht*) serve to allay fears that the existence of a dominant shareholder, such as a parent company, may compromise the integrity of the dominated company that would subject minority shareholders and creditors of the company to an unacceptable risk. Before leaving German law, it should be noted that a new act was recently passed regulating takeovers, which introduces the mandatory bid rule in the context of takeovers.²⁰ Since a provision to redeem minority shareholders was already a feature of group law, it is surprising that it was not introduced earlier, but was only known in voluntary recommendations that had little effect. It could be argued, however, that the real purpose of the new act is to provide a setting that could cloak the German opposition to another part of the proposed directive on takeover bids, namely the controversial article 9 that would prevent the management from frustrating a bid and which consequently runs counter to the German desire to isolate management from the possibly corruptive influence of shareholders and keep the fate of the company in the hands of the former rather than the latter.²¹ By introducing the familiar and unthreatening mandatory bid rule, Germany would appear favourable towards

¹⁸ This would follow from the parent company entering into a contract of control (*Beherrschungsvertrag*) with the dominated company.

¹⁹ In Finnish law, the mandatory bid rule is known as *an obligation to redeem shares* (inlösningsskyldighet). There is no practical difference between dressing the obligation of the new controlling shareholder to buy the shares of the minority as a public bid or as a right of redemption on behalf of the minority. The difference is probably more mandated by the choice of legal discipline, where the mandatory bid rule reflects the use of financial market law, whereas a right of redemption reflects the use of company law.

²⁰ The *Wertpapiererwerbs- und Übernahmegesetz* (WpÜG) of 20 December 2001.

²¹ See for a related view J. N. Gordon, *An American Perspective on the new German Anti-Takeover Law*, *Die Aktiengesellschaft*, Vol. 12, December 2002 (arguing that the law should be viewed as part of a negotiating strategy in regard of the proposed directive on takeover bids).

the new regulation of takeovers discussed at the European level, while at the same time making sure that the centrepiece of German corporate governance, that of management entrenchment, prevails.

As we have seen, the conception of the takeover could hardly be more different in Germany and in the United Kingdom; one seeing the takeover as an angst provoking scenario that necessitates the protection of minority shareholders by providing them with an escape route, the other as something too good to be preserved for the lucky few, but they happen to lead to the same result: an obligation on the new controlling shareholder to extend his offer to the minority shareholders.

3 What's the Problem?

The problem is, of course, that the mandatory bid rule will reduce the incentive to launch takeovers. It is a legally induced transaction cost that will effect the decision making of the otherwise autonomous market players. As we have reason to believe that takeovers that are entered into voluntarily at a price freely negotiated by the relevant parties are on balance a benefit to society that will increase the efficient use of our limited resources, the problem is not one to be taken lightly. It is not as if Europe is already a hotbed of highly efficient business and labour initiatives; we are not as the Lisbon declaration made clear.²² If the Lisbon declaration is not to become just another reminder of the irrational exuberance of a bygone era, we should refrain from spreading the mandatory bid rule and rethink the merits of the rule where it has already been introduced.

It is easy to see the detrimental effect of the mandatory bid rule. The rule compels the bidder to buy more shares than the bidder needs to acquire control and to buy these unneeded shares at inflated prices. It is like obliging an art collector to buy a mediocre painting from an artist at an unwarranted high price simply because the collector bought an excellent painting from the same artist a few days before. This is a waste of the bidders' resources and consequently must be expected to deter some bidders from embarking on a takeover.

A rational takeover is instigated when the bidder believes that the benefit (B) of acquiring control will be higher than the price (P_c) of buying the shares (S_c) necessary to wield control. The benefit is the expected yield of the control block of shares after acquiring control. The mandatory bid rule would increase the total costs (C_t) of acquiring control by obligating the bidder to incur the extra cost (P_m) of buying the shares of the minority (S_m), thus the total control cost is $C_t = P_c + P_m$, where in the absence of the rule it would be the lesser $C_t = P_c$.

This use of mathematical symbols is not to feign a scientific certainty about the proposition but simply to state the logical observation that some takeovers are never done irrespectively of a mandatory bid rule, because it would not pay even to acquire control ($B < P_c$), and some takeovers will be done regardless of the rule, because the expected benefit is great enough ($B > C_t$). But the introduction of a mandatory bid rule raises the total costs ($C_t > P_c$), and

²² See footnote 4 on the Lisbon declaration.

consequently some takeovers that would have been launched in the absence of the rule ($B > P_c$) will not be initiated, because it no longer pays ($B < C_t$).

It is no argument that the rule would not increase the costs of the bidder, because the bidder would simply keep the total costs equal to the price he would have paid for the control block in the absence of the rule ($C_t = P_c$) by offering less for the control block of shares (S_c) in order to pay for the additional shares of the minority (S_m), thereby paying an equal price (P_e) for all the shares ($P_e = P_c/S_c + S_m$). The price that would be paid for the control block of shares in the absence of the rule combines the prevailing market price that reflects the expected yield of the shares under current management and, in order to induce the seller to sell, a premium (Q_c). Considering that the minority shares often outnumber the control block as witnessed by the low thresholds used in connection with the mandatory bid rule of somewhere between 30 – 50 per cent, we know that $S_m > S_c$. Thus, the equal price (P_e) would be half or less than the price paid in the absence of the rule (P_c), which would be inadequate to induce any of the existing shareholders to sell, as it would probably be well below the market value of their shares.²³ Consequently, the bidder would have to pay the market price and a premium for all shares, not simply divide the lower price of the control block among them and the rule would indeed have led to an increased price of the takeover. And it is a poor argument that the bidder would always be willing to pay this higher price, because the benefit of owning all shares of the company would outweigh the extra costs of buying them, as this neglects not only that the financial capabilities of the bidder is challenged considerably but also and more importantly that his risk if the expected benefits of a turnaround fails to materialise is greatly increased as well. There is no way around it: the mandatory bid rule will serve as a disincentive to takeovers.

No only does the mandatory bid rule cripple the market for control, in doing so it also obliterates the value of control to the existing control holders. When the incentive to buy a control block is diminished, the value of a control block is reduced because few buyers can afford to buy it and thereby trigger the mandatory bid obligation.²⁴

Besides making rational transfers of control more difficult and in the process destroying the value of control to the control holders, the mandatory bid rule also creates an artificial push for concentrated ownership. Outside the United Kingdom and the United States, capital markets are notoriously small and illiquid. As the legislators both nationally and in the European Union come up with ever more onerous listing obligations on disclosure, auditing and governance, fewer companies find it worthwhile to remain listed. The mandatory bid rule, by forcing the control holder to buy up as many shares as possible, reduces the liquidity of the company's market capitalisation and makes the

²³ It is not theoretically impossible that the equal price could be higher than the market price, but that would require the expected benefit of a turnaround to be enormous, which must be considered highly unlikely.

²⁴ A Danish empirical study has documented that the introduction of the mandatory bid rule in Danish law has levelled the price difference between shares with multiple voting rights (known as A-shares) compared to single vote shares (B-shares), see K. L. Bechmann & J. Raaballe, *A Regulation of Bids for Dual Class Shares. Implication: Two Shares - One Price*, Copenhagen Business School, Inst. for Finansiering, Working Paper 2000-5, May 1, 2000.

decision to de-list even more appealing. This is not exactly what the already thin European capital markets need.

It is strange that the proposed directive, which sets as its main purpose to increase takeover activity within the EU, features the mandatory bid rule, which is detrimental to takeovers. The centrepiece of the proposal is thus self-defeating. Naturally, this is only strange insofar the rule is not carried by considerations that would justify and outweigh this detrimental effect. Sadly, there is no such justification, as we shall see.

4 The Lack of Justification

4.1 *The Illusive Control Premium*

The mandatory bid rule as a feature of the regulation of takeovers has its most direct origin in British law.²⁵ The British conception could be described as an attempt to give a good answer to a moot question. If the control premium realized in takeovers is considered as an asset that belongs to the company and thus to all shareholders, then the mandatory bid rule could be viewed as a way of making sure that the premium is shared among the shareholders. Unfortunately, it is not really efficient in this respect, but what is surely much worse is the fact that the control premium is not an asset of the company at all.

The fallacy is probably derived from the law of trusts, where benefits flowing from the trust should be equally distributed between the trust beneficiaries.²⁶ The ubiquitous misconception that shareholders are somehow the owners of the company has probably brought about this misplaced conclusion. Shareholders are, of course, only owners of their shares, not of the company. This particular misconception was probably brought about because shareholders in most jurisdictions outside that of Germany are considered the ultimate decision makers and has a residual claim to the company's assets upon liquidation. These rights do not, however, mandate the conception of the shareholders as owners of the company in any meaningful sense, because shareholders do not have the unrestricted control associated with ownership.²⁷

In fact, the takeover premium is not flowing from within the company but reflects a market transaction involving financial instruments, *in casu* shares with voting rights. The limited liability company is characterized by an isolation of its

²⁵ See Section 2 *supra*.

²⁶ Applying the law of trusts to corporations such as the limited liability company is not unusual in the Anglo-Saxon company law tradition. The seminal work of A. A. Berle & G. C. Means, *The Modern Corporation and Private Property* (1932), was also influenced by this tradition of equity; see W. W. Bratton, *Berle and Means Reconsidered at the Century's Turn*, 26 J Corp. L. 3 (2001). Berle & Means introduced the notion of control as an asset of the company that was later expanded by W. Andrews, *The Stockholder's Right to Equal Opportunity in the Sale of Shares*, 78 Harv. L. Rev. 505 (1965). For the extensive critique of these theories, see R. Skog, *Does Sweden Need a Mandatory Bid Rule?* (footnote 12 *supra*) at 44 – 47.

²⁷ It is probably the same misconception that has led to the primitive adulation of the principle of one share-one vote, which equally fails to appreciate the wide variety of rights available to the holders of securities issued by a company in respect of governance and economic rights. See J. Lau Hansen, *When Less Would Be More* (introductory footnote) at 284 – 286.

internal economic affairs from the external sphere of its shareholders. The shareholders contribute capital and receive shares in return. The shareholders have no direct ownership of the funds contributed to the company. Instead, they have full ownership of their shares, that is, they can sell their shares at will, and if they do decide to sell, they can do so without affecting the assets of the company. The so-called control premium arises in relation to a transaction of shares, that is, in the external sphere, but it has no bearing on the assets of the company.

The confusion can probably be explained by the idea that the value of shares reflects the value of the company to a lesser or greater extent. However, the value of shares is determined not only by the economic prospects of the company but also by external factors related to the market in which the shares are traded. The value of a share is not only determined by the rights it carries but can be affected by the market context. If a shareholder is short of control by just one share, he may offer to buy such a share at a higher price than other investors would be willing to pay, because to them the share is just another share. Once the shareholder has acquired the extra share at a high price and has achieved the intended control, he may not want to buy any more shares, not even at a discount from the market price. Thus, in a market setting many factors can affect the price of a share.

At the root of the fallacy lies the concept of the control premium (Q_c), that is, the premium above the market price that the bidder may be willing to pay to get a control block. Most markets for shares in company A will have two different prices for any one share at any given time: the shareholders' asking price at which they would be willing to sell a share (P_a) and interested investors' bidding price at which they would be willing to buy a share (P_b). At equilibrium point, the sellers want a higher price than the buyers are willing to offer ($P_a > P_b$). In any other circumstance ($P_a < P_b$), there will be transactions until this equilibrium sets in. It is rare that investors share a homogenous opinion of prices. Most often, the sell-side will display different asking prices ($P_{a1} < P_{a2} < P_{a3}$, etc.), and the same would be the case for the buy-side ($P_{b1} > P_{b2} > P_{b3}$, etc.). Transactions will occur first among the bid and ask prices that are, respectively, the highest or lowest, that is, bidding price (P_{b1}) and asking price (P_{a1}) are more likely to be taken up than the other prices set by the other investors. The difference between the bid and ask prices and between the various bid and ask prices displayed at any single time and the fact that these prices change from time to time reflect the heterogeneous expectations of the investing public. A shareholder cannot normally expect to get the same price that another shareholder was paid in a different transaction because that would depend on whether other investors are willing and able to make an identical offer, which is often not the case. Nobody should feel cheated by learning that the shares they sold yesterday are now selling at a higher price because the market is rising, no more than they should feel any guilt by discovering that they have sold in a falling market.

Transactions entailing a transfer of control are no different. If a bidder wants more shares than the shareholder with the asking price (P_{a1}) offers to sell, the bidder will have to increase his bid to cover the next asking price (P_{a2}) and so on. If the bidder wants to buy up shares to obtain a control block, the offering price must be equal to or higher than the current asking price. If the bidder

further wants to ensure that many shareholders take up the offer, the offer has to be substantially higher. This difference between the price offered to obtain control (P_c) and the prevailing asking price (P_{a1}) is the control premium ($Q_c = P_c - P_{a1}$). The difference between the prevailing market price and the price offered for the control block of shares reflects the bidder's anticipation that company A will improve its performance under his or her control. The improved performance warrants higher profits in the future and thus a higher return on the investment. If other market participants share this expectation, they too will increase their evaluation of the shares of the company and they too would be willing to pay a higher price. The control premium is thus not connected to the bidder and the bidder's position as a controlling shareholder as such, but to the changed expectations that the transfer of control has provoked. Such fluctuations in the market's price mechanism is not a distinct feature of takeovers but happens all the time, whenever circumstance change that may affect the expected yield of the company's securities.

Naturally, the bidder's willingness to pay a higher price than the market price to obtain control may not entirely be based on his expectations of increased profits of the company but may be caused by his intent to obtain private benefits that are indeed a feature of the internal affairs of the company. That situation, however, is not a distinct feature of takeovers but is a common problem of company law having to do with the problem of the risk of abuse by controlling shareholders and should be dealt with in that context.²⁸ Here it would suffice to say that control is not an asset belonging to the company; it belongs to the shareholder who paid for it.

So not only is the control premium not derived from the internal affairs of the company but simply displays a market transaction taking place outside the company, even judged by its own pretences the mandatory bid rule is inefficient. Imagine a bidder who has obtained control of a company by acquiring three blocks of shares in three separate transactions (T_1 , T_2 and T_3). For the sake of simplicity, each block of shares represents 10 per cent of the total stock of shares outstanding, and all shares in the target company carry identical voting rights. The prices paid (P_1 , P_2 and P_3) were subsequently increased in each new transaction ($P_1 < P_2 < P_3$) reflecting the different asking prices in the market. Upon reaching 30 per cent of the votes, the mandatory bid rule would oblige the bidder to make an offer to all of the remaining shareholders for their 70 per cent of the shares. The offer price would be (P_3), arguably because that price carries a premium that belongs to all the shareholders. One would be inclined to ask, that if this is the case, why is there no obligation on the bidder to offer a similar compensation to the minority shareholders involved in the first two transactions, where the compensation would be ($P_3 - P_1$) for transaction (T_1) and ($P_3 - P_2$) for transaction (T_2)? If it is really contended that the takeover premium in some strange way belongs to the company and thereby to all shareholders, then it is sadly inefficient only to give the remaining minority shareholders a part of it rather than to call on the new controlling shareholder to account in respect of all minority shareholders, past and present, that has relinquished control to him. In following this line of reasoning to show its inadequacy, we should not lose

²⁸ See Section 4.2 *infra*.

sight of the basic fact that the premium cannot meaningfully be seen as a property belonging to the company. What if the shareholder, Mr. X, has just bought his minority shares from the Mr. Y, a long time shareholder of the company, at the time of the third transaction (T_3)? Mr. X would have paid a market price somewhat below the price paid by the bidder (P_3) and yet, a few days later he would be delighted to learn that the bidder was now obliged to offer him, and not Mr. Y, the higher price (P_3) because of the mandatory bid rule. What is the fairness of that?

Finally, the concept of control as an asset of the company and henceforth an asset belonging to all shareholders is conceptually flawed insofar as most versions of the mandatory bid rule allow for price differentiation reflecting different voting rights. If control really was an asset of the company, no share should be able to transfer more control than the other shares and no shareholder should be able to profit from such a transfer of asymmetric control, and yet it is accepted in most cases. The very existence of vote differentiation is living proof to the fact that the complexity of the financial instruments issued by companies defies this primitive notion of control as something that cannot be traded.

4.2 *The Risk of Abuse*

It is not only in the special corporate governance regime of Germany that the mandatory bid rule, or similar obligations to redeem minority shareholders upon acquiring control, are founded on the fear factor. And indeed, it is an inherent problem of company law that whoever is in control may abuse their position to unjustly enrich themselves. That goes for managers, employees, and shareholders whether they are majority or minority shareholders.²⁹ But exactly because this is a tried old concept of company law, it is a mistake to frame it in the context of takeovers. National company law is either fit to prevent such abuses or it is not; takeovers have nothing to do with it. So it is not to downplay the importance of fine tuning company law to prevent possible abuses, but it makes no sense to connect this protection with the occurrence of a takeover.

In fact, to connect minority protection with the incident of a takeover may even work to make the protection of minority shareholders less efficient. Given that takeovers are not that frequent, not even in the United States, surely it is better to protect shareholders at all times by limiting the extent to which dominant shareholders can abuse their powers. Connecting the availability of exit to the acquisition of control is insufficient if protecting shareholders is the objective, for example are involuntary transfers of control such as inheritance

²⁹ Yes, even shareholders who are not in possession of control, that is: minority shareholders, may abuse whatever rights they are granted by company law. In Danish law, a court case some years ago established that a shareholder in a private limited company that had been set-up to facilitate a joint venture was in fact abusing her rights by not voting in favour of a proposition to increase the share capital of the company, when Danish law had recently increased the legal minimum of share capital and the failure to increase the capital led to the dissolution of the company. The court found her refusal to be caused by her dissatisfaction with the joint venture. *See* Ugeskrift for Retsvæsen 1999.1080, decision by the Western Appeal Court in the Docotech-case.

not covered and usually a transfer of shares is necessary, which leaves out situations where two shareholders enter into an agreement to control the company. A few examples may prove the inadequacy of the mandatory bid rule as an instrument of protection for investors.

Case 1. The controlling shareholder, Mr. X, who has steered the company with a firm hand for generations and is widely credited for its success, feels the coming of old age and decides to sell his shares to his protégé, Mr. Y, whom he believes is most fit to run the company as it has been done for years. Although there is no change in the business of the company, there has been a transfer of control and the shareholders must be offered to sell their shares to Mr. Y.

Case 2. The same scenario as in case 1, except that Mr. X suddenly dies without having made any arrangements in respect of his shares, so they are left to his irresponsible playboy of a son, X Jr. There has not been a transfer of control in the meaning of the mandatory bid rule, which normally excludes transfer by inheritance, and consequently the grieving shareholders are not offered to sell their shares to Mr. X Jr.

Case 3. Shareholders X and Y each own 20 per cent of the shares. One day, Mr. X, who is eager to enjoy his remaining years in the sun and wants to leave the country, sells his shares to Mr. Y. Mr. Y now controls 40 per cent and effectively controls the company. There has been a transfer of control and the mandatory bid rule would apply.

Case 4. The same scenario as in case 3, except that before Mr. X departs for his hacienda in Spain he enters into an agreement with Mr. Y empowering the latter to vote on his behalf. In most jurisdictions, there would be no obligation on Mr. Y to make a mandatory bid as there has not been a transfer of control instituted by a sale of shares.

Even if protection is due in the context of a takeover, then surely it is wrong to aim at the shareholders of the target company. Empirical research is ambiguous as to whether takeovers further economic efficiency, but a consistent observation would seem to be that the bidder often overpays in its eagerness to clinch the bid, which is reflected in an increase in the share price of the target company and a decrease in the share price of the bidder. Thus, if protection is needed at all, it should be offered to the hapless shareholders of the bidder, for example by making the launch of a bid subject to shareholder approval.

And yet, strangely as it seems, the concept of the takeover as something threatening to the shareholders lives on even with a conspicuous absence of rational explanation. When some years ago the Danish Minister of economic affairs was called by a Parliamentary committee to justify the inclusion of the mandatory bid rule in Danish law, she replied by referring to the history of the rule and its ubiquitous use in Europe. The following paragraph captures the gist of the statement well:

Hertil vil jeg gerne bemærke, at tilbudspligten blev indført i dansk børsret via Kommissionens henstilling 77/534/EØF. Den daværende handelsminister anmodede Københavns Fondsbørs om indførelse af tilbudspligt i de børsretiske

regler. I Danmark er det således siden 1977 lagt til grund, at der er et behov for at sikre minoritetsaktionærene i tilfælde af ændring af kontrollen over et børsnoteret selskab.

[To this (the critique of the mandatory bid rule) I would like to remark that the mandatory bid rule was introduced in Danish financial market law by the Commission's recommendation 77/534/EEC. The Minister of trade at that time requested that the Copenhagen Stock Exchange introduced it in its ethical rules. Thus, since 1977 Danish law has assumed that it is necessary to protect the minority shareholders in case of a transfer of control in a listed company]³⁰

Nowhere in the Minister's statement was it made clear just what this assumption was based upon and why the provisions in Danish law designed to prevent abuse by dominant shareholders that we rely on daily to protect minority shareholders would fail so miserably following a takeover. Despite the wide use of the argument that takeovers are particularly apt to spur abuse, one is still found wanting an explanation of why this is so.

Maybe an explanation of sorts is to be found in the line of reasoning expressed mainly in American academic papers that deal with the foreign, and apparently conspicuous, phenomenon of the dominant shareholder. The explanation is sound insofar as it is based on realistic principles of *quid-pro-quo*. A shareholder would not, the argument goes, pay a higher price to obtain control of the company unless compensated by private benefits, that is, benefits extracted from the company that are not made available to the other shareholders. However, this is not the only explanation for a takeover premium, indeed, it is a rather unlikely explanation as it presupposes the absence of provisions in company law that would prevent such selective rent seeking by dominant shareholders.

Furthermore, it neglects the purpose of voting rights in the financial arrangement involving the issue of shares by a company. Voting rights and the control they may entail are best viewed as security offered to investors by the company in order to induce them to make the investment at a better price than without such security. In this respect, voting rights are no different from financial security, such as a mortgage or a floating charge offered to secure a loan arrangement. The security arises from the right to control the company, that is, to direct the way the company goes about its business. It is a practical observation that different companies fare differently doing their business, and even one company may fare differently from one time to another. International Business Machines was a blue chip behemoth at one time, then a near-extinct relic of a bygone era a decade later, only to re-emerge as a business leader the next decade. In such a versatile world of constantly changing business circumstances, there is a great difference between having control to secure your investment and to be without. It is true that the minority shareholder has the benefit of diversification offered by investing in different companies, but he is nonetheless at the mercy of the companies in which he invests. As the American investing public has found out recently, it is extremely costly to invest in

³⁰ Translation by the author. Parliamentary Bill L 150, Annex 20, The Committee on Business Affairs, Parliamentary session 1998-99 (1. session).

companies that lacks dominant shareholders to discipline managers, especially in a reward-culture that has long rid itself of the shackles of basic decency. Rather than to see the value of control in the unlikely access to private benefits, it should be seen as the price of security and, especially in control transactions, as a reflection of the expectation that new management can improve the financial prospects of the company. It is no surprise, nor is it sinister, that a shareholder in control of the company would value his shares higher than a shareholder without. Your risk as a shareholder is considerably reduced when it is you, and not the management, that is in control. As is the case with the glass of water that depending on the point of view can be either half-full or half-empty, it may be that it is not the dominant shareholder who pays a higher price for the shares that wield control, but the minority shareholder who pays an inferior price for their shares to compensate for the lack of it. The explanation of private benefits seems highly unlikely in industrialised countries with a reasonably modern company law regime.

4.3 *The Exit Argument*

Somewhere in between the argument that the control premium should be fairly distributed and the argument that takeovers carry a particular risk of abuse is a separate argument that is as equally flawed as is its two neighbours. It is the argument that minority shareholders should be protected against the change of control itself by being offered a right to exit the company. The only way to make this argument hold is by ignoring company law as it stands today and the unrelenting advance of the majority principle that brought the present law about.

The argument is most closely related to the argument that a transfer of control is in some way detrimental to minority shareholders. As such, it can be dismissed by the same line of argument pertaining to that proposition discussed above.³¹ However, it differs by not relying on any actual abuse being required; it is the mere change of control that is considered objectionable. In this, it is more akin to the argument that control somehow belongs to all shareholders and should not be traded.³² This particular nature of the argument warrants that it is discussed on its own.

Apparently, the gist of the argument is that the transfer of control constitutes a change of circumstances not foreseen by the minority shareholders, who may have made their investment in reliance on the present control holder, and faced with these drastically changed circumstances, the minority shareholders should be offered an exit. Remarks made in respect of the mandatory bid rule would support this understanding of the rule's rationale.

In Danish law, the Copenhagen Stock Exchange tends to put it this way:

... de væsentligste hensyn bag reglerne om købstilbud er, at der normalt ved et majoritetsskifte skabes så markant ændrede vilkår og udsigter for det pågældende

³¹ See Section 4.2 supra.

³² This line of reasoning was dismissed in Section 4.1 supra.

selskab, at minoritetsaktionærerne skal have mulighed for at komme ud af deres investering.

[... the most important considerations behind the rules on mandatory bids are that the transfer of control will normally create so markedly changed conditions and prospects for the company that minority shareholders must be offered the possibility of disposing of their investment.]³³

As the argument is closely related to the two aforementioned arguments, it is no surprise that it is defeated by a combination of arguments already advanced against the two.

First of all, the argument is wrong in presuming that minority shareholders rely on the present distribution of control. Company law has seen the steadfast advance of the majority principle that has completely eroded the influence of the minority on the governance of the company. In Nordic company law, that is significantly identical due to a shared history and a tradition of legal co-operation, a change of the company's objective as stated in its articles originally required the consent of all shareholders. Later, it was reduced to require the backing of a super-majority, and in the reform of the early 1970s, the law reached its present state whereby any article including the article stating the business objective of the company can be changed by a qualified majority of 2/3 of the votes casts and 2/3 of the share capital represented at a general meeting. Note, that there is no quorum requirement. Thus, a shipping company can be turned into a bakery against the will of a substantial part of the shareholders. The composition of the board is even more clearly in favour of the majority principle. All the Nordic countries except Iceland apply the majority principle, whereby a shareholder with a controlling block of votes can control every seat that is available for the shareholders to fill. The minority shareholders have no influence whatsoever. An example may illustrate this.

Case 5. Company A is a parent company of several companies, one being the small and relatively unimportant company B that makes widgets. The new CEO of company A decides to make an aggressive turnaround of company B, changing its articles of association, completely reorganizing the company and replacing its management to pursue a boom or bust endeavour to become a market leader in widgets. There has been no transfer of control and consequently the horrified minority shareholders are not offered to sell their shares to company A.

Secondly, even supposing that minority shareholders ought to be protected from experiencing a change of the business orientation that they relied on when investing, it would make more sense to protect them only when the circumstances actually changed, irrespectively of whether a takeover took place. In this case, a mandatory bid would only be warranted if, and whenever, the business orientation of the company changed, that is, if the business objective in the articles was materially amended, or if the composition of the board was

³³ Translation by the author. This particular statement was published by the CSE in the annual series of decisions and statements, *Afgørelser og udtalelser*, 1997, decision 2.1. A similar wording is used in other cases.

significantly changed. Whether a transfer of control preceded this would be irrelevant. If minority shareholders ought to be protected from the exercise of control, then surely they should be so at all times. The fact that the company law of most countries does not extend this kind of protection to minority shareholders ought to prove that the argument is insufficient to justify the mandatory bid rule.

Considering that it is very rare for company law of any jurisdiction to provide minority shareholders with direct influence on the control of the company, it is difficult to discern how this particular misconception has arisen. Perhaps the root is to be found in the concept of shareholder equality. There is, of course, no such thing as shareholder equality. *Shares* are equal, that is, insofar as they are of the same class, but whether *shareholders* are equal depends on which shares they hold. To suggest that shareholders should be equal in the governance of the company is a misconception indeed.³⁴

5 Is Takeover Regulation all bad?

Not at all. Takeovers concern the issue of control involving some of the largest and most important businesses in our economy. It is of paramount importance that takeovers are conducted, as far as it is possible to provide by legislation, in a rational and calculated manner. This would warrant considerable disclosure obligations both on the bidder explaining the content of his bid and on the target company explaining what the bid will mean for the company, and the necessary time to digest the information provided by disclosure. So rules on disclosure and time-limits for the bid is reasonable and helpful. As more and more businesses operate across borders, it would be sound to delineate competing national jurisdictions to avoid bureaucratic infighting in case of international takeovers.

It may even be justified to tinker with the bid process itself. It is often argued that the front-end loaded bid, that is, a bid where a higher price is offered to the shareholders that accept the offer first and a lower price is offered to the latecomers, is coercive. It is, however, questionable whether this kind of bid really is that pervasive; after all, it is not that different from all the other time-limit offers that we experience in most shops, such as department store sales and in telemarketing that all urge us to buy now or regret later. If sufficient protection of minority shareholders is in place, which we already noted was a separate question altogether, then the coercive effect should not be serious. However, as takeovers do involve considerable sums, it may be justified to treat these offers different from that of groceries and home appliances. To avoid the alleged coercive effect of the front-end loaded bid, public bids could be required to offer the same price to all shares of the same class. This would also serve to make the bid more expensive, but as it does not rule out that the bidder may negotiate in private and buy shares at a higher price before the public bid is made, nor does it prevent the bidder from making a partial bid, the detrimental

³⁴ In the Swedish command paper, *Aktiebolagets organisation*, SOU 1997:22 at 287, the argument that the mandatory bid rule is somehow justified by the principle of equality is dismissed as a *misuppfatning* [a misconception].

effect is probably insignificant. Equally, it may be justified to require equal treatment if a public partial bid is made, because the bidder by making a public bid has indicated that he does not attach any importance to who takes up his offer and consequently should not be expected to resent an obligation to buy equally from all interested shareholders if the bid was overly successful. Such minor requirements cannot be expected to seriously effect the decision to launch a takeover, as is a very real risk with the mandatory bid rule.

In sum, there are perfectly good reasons for adopting a directive on takeover bids in order to harmonise the more important features of European law in this respect. It is just unfortunate that the proposed directive carries the mandatory bid rule that would be counterproductive to the overall goal of promoting the business efficiency of the European Union.³⁵

6 What Went Wrong?

It is undeniable that the mandatory bid rule has been successful in the legislative arena. It is less obvious why that is and at least problematic whether a mandatory bid rule yields positive social welfare benefits. A basic observation would be that it is one of these unhappy cases where it is easier to advance an idea that it is to repudiate it. Especially for politicians it appears to be almost impossible to stand up to a proposition when it is dressed up as a remedy to promote fairness, protection of the little guy and equality, even when a closer inspection would serve to expose its lacking justification. It is probably for the same reason that politicians, who surely must know better, fail to promote international free trade and prefer to espouse mercantilist ideas that have been discredited for centuries.

It is even conceivable that the populist need to dodge the unpleasant debate is not altogether unwelcome by politicians. After all, the purported efficiency of takeovers is the increased profitability following the transfer of control and the introduction of new management. This may sound nice and clean in theory, but in practise, it often translates as down-sizing and rationalisation whereby registered voters lose their jobs in droves. It is difficult to point at the new jobs created by a viable market economy, or by free trade, but it is very easy to identify those who lost their jobs in the process. The former crowd only shows up in the statistics, the latter on prime-time television. It is questionable just how interested European politicians are in furthering takeovers and perhaps this explains the remarkable success of the mandatory bid rule.³⁶

³⁵ The European Shadow Financial Regulatory Committee, which deserves its name as it shadows the official European Committee and comprises leading academics, has also expressed its regret that the mandatory bid rule is part of the directive proposal, *see* European Shadow Financial Regulatory Committee, *Statement No. 13 on Takeover Bids in Europe* (February 2, 2002) (available at "<http://www.ceps.be/Research/ESFRC/040202.php>").

³⁶ In the Norwegian command paper, NOU 1985:33 at 84, it was explicitly recognised that the mandatory bid rule would dampen takeover activity, which was welcomed. In all fairness it should be pointed out that a later command paper, NOU 1996:2 at 104, does not support this view. The mandatory bid rule, however, is still a part of Norwegian law.

In the American legal debate, it has long been established that special interest groups often spur legislation more than ideology alone.³⁷ It is possible to point out at least two interest groups who will profit from the mandatory bid rule. The first group is the institutional investors, such as pension funds. They are often required by law to be minority shareholders, and as the mandatory bid rule provokes a windfall whereby minority shareholders are offered a higher price than the market would otherwise offer, the support from the institutional investors is to be expected. The second group is the financial service industry. In Europe, where ownership of shares tends to be concentrated, a control transfer from one dominant shareholder to another can be carried out at little of the costs normally associated with a market transaction, such as search and trading costs, because dominant shareholders are easily identifiable and quite often know each other. But the mandatory bid rule necessitates the launch of a full public bid, requiring the assistance of a host of financial intermediaries. What is transaction costs to the bidder, is a most welcome source of revenue to the financial service industry. Although times are bad following the excesses of the dot-com bubble, it is questionable whether the financial service industry really needs this kind of government subsidisation.

7 Do-it-yourself

Apparently, the mandatory bid rule is popular. It has been argued here that its appeal is unwarranted, however, in a democracy the popular will carries the day. But even if this is so, it is still possible to strike a happy compromise. Rather than having a mandatory legislation telling everybody what to do, people should be able to decide on their own. If shareholders really like the mandatory bid rule, why not simply insert the rule in the articles of the company? As all shareholders are bound by the articles of the company in which they hold shares, any bidder who acquired the stipulated threshold of control would then be required to make the mandatory bid to the other shareholders, and this obligation would be as enforceable as if it was mandated by legislation. But exactly because it is not a statutory provision, the companies with shareholders that did not support the rule could go without.

Would it work? Probably yes, in Finland, where the mandatory bid rule has the form of an obligation to redeem and the threshold is rather high at 2/3 of the votes, it is not unusual for companies to have a mandatory bid rule with a lower threshold mandated by their articles of association.³⁸ It is not unlikely either that shareholders may favour not to have the rule in the articles of their company. Although the rule would provide minority shareholders with a windfall, it also reduces the chance that a control transaction may occur, and as minority

³⁷ A rightly famous contribution was R. Romano, *The Genius of American Corporate Law*, AEI Press (1993) who argued that disclosure obligations was not so much designed to help the lay investor as it was a special help to financial analysts and to auditors and lawyers: "The regulatory regime subsidizes the former's search effort, and its administration is an employment act for the latter", at 95 – 96.

³⁸ See on Finish law, J. Lau Hansen (ed.), *Nordic Financial Market Law* (footnote 3 supra).

shareholders have no influence on the running of the company, the prospect of a takeover may be the only way to ensure an efficient management taking over.

A less autonomous solution would be the one chosen in Sweden, where the Stockholm Stock Exchange has made a reference in its listing agreement to the recommendations made by a private business committee.³⁹ This is a less flexible solution, because all companies listed at the exchange is faced with either approving the rule or listing somewhere else. As the Stockholm Stock Exchange happens to be the only stock exchange in Sweden, the inflexibility becomes worrying because the Swedes are left much as if the rule had been passed by law, when in fact it has only been decided on by a committee that is outside the political system and as such unaccountable.

8 Conclusion

The mandatory bid rule is popular, but not for the right reasons. The rule serves as a disincentive to takeovers and as such reduces economic efficiency. The justifications offered in favour of the rule are at closer inspection unwarranted, as they are either unrealistic or based on one or more misconceptions. The prevalence of the rule seems more to be due to its support by special interest groups, notably institutional investors and the financial service industry, who stand to gain by the inefficiencies of the rule. It is left in place, and sometimes even endorsed by politicians who despite their public rhetoric often tacitly approves of the reduced takeover activity that the rule entails. The best thing would be to leave the decision to the shareholders themselves. If they want the rule, it should be inserted in the articles of the company. To place the rule in a directive, as has been done in the pending proposal for a directive on takeover bids, would be to harm the already struggling European economy at a time, when we seriously need to further efficiency to maintain our high level of welfare.

³⁹ See on Swedish law, *ibid.*