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EXCLUSION OF US-HOLDERS IN CROSS-BORDER TAKEOVER BIDS AND THE PRINCIPLE OF EQUALITY IN TENDER OFFERS

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ABSTRACT

To avoid the cumulative application of takeover regulation of more jurisdictions, it is common practice to exclude from the offer shareholders resident in countries adopting extraterritorial conflict rules. Among such countries, the most significant case is that of US securities regulation: according to US case-law, in order to avoid the application of US takeover regulation and anti-fraud provisions, bidders should completely exclude any publicity of the offer in the US or to US resident and consider acceptances from US residents as void.

However, such restrictions could be at odds with the principle of equal treatments of target's shareholders, provided for by the EU Takeover Directive. In the paper, I argue that only restrictions to dissemination could be reconciled with the equality principle. On the contrary, restrictions to acceptance represent a clear violation of such principle, which can be admitted only if the cumulative application of US law would make the offer unfeasible.

JEL Codes: K22; K33

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Keyword: nonevent, market efficiency, small investors' trading, small caps

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I. – Cross-border tender offers and choice-of-law rules

Globalization has removed most of the barriers to cross-border investments and acquisitions and, nowadays, big corporations act as global players in the world-economy arena. However, even in an era of free movement of capital, national borders still place obstacles to M&A transactions. Big corporations, indeed, think "global", but face a very insidious and "local" risk: that more jurisdictions claim to be competent to regulate the same transaction, which would then become more expensive or even impossible. Such risk of cumulative application of the law of more countries emerges dramatically in tender offers for shares of big corporations that are widely held by citizens of all over the world.

Tender offers are typically launched by a firm (hereinafter, the "bidder") who intends to acquire a significant stake or the majority of a company (hereinafter, the "target") whose shareholders are widely dispersed[1]. Such transactions involve a number of constituencies of the target company, whose interests are often conflicting one another when placed in front of a takeover attempt. Three kinds of relations or agency problems emerge in a tender offer contest: between directors and shareholders[2], between controlling and not-controlling shareholders and between the bidder and target's shareholders[3].

Such relations might be regulated by general company law, as is the case for matters related to internal affairs of the target, to which its *lex societatis* applies[4]. Among such company law matters, we should mention the rules on defensive measures of target's board, which regulate the conflict of interests between directors and shareholders. However, tender offer proceeding[5] and transparency and information requirements are regulated often with special rules, other than company law, developed explicitly to regulate such issues (hereinafter, "takeover regulation").

In many jurisdictions, choice-of-law rules for takeover regulation are formulated as unilateral rules, which establish under which circumstances national law applies[6]. Choice-of-law criteria depend on goals and rationale underpinning each takeover regulation, pursuant to the law of a specific country. If the goal to regulate the securities market prevails, then national law applies only if target's shares are listed or traded on a national stock exchange. By contrast, if the main goal of the legislation is investors' protection, then the *lex fori* applies whenever a significant amount of target's shareholders is resident on the national territory[7].

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[1] Otherwise, the bidder would probably purchase the envisaged majority shareholding directly from its owner.

[2] A typical conflict of interests emerges between shareholders and directors in hostile tender offers: the former are interested in maximizing tender offer's price, while managers and directors risk to lose their job if the offer succeeds.

[3] DAVIES, *The notion of equality in European takeover regulation,* in Payne (ed.) Takeovers in English and German law, 2000, 1.

[4] The application of target's company law has the advantage to grant all shareholders to be treated equally: KRONKE, *Capital market and conflict of law*, Collected courses of The Hague Academy of International Law, 2000, 324.

[5] The rules on tender offer proceeding comprehend matters such as the powers of a regulatory authority, the timing of the offer or the rules for competing bids.

[6] GARCIMARTÍN ALFÈREZ, *Cross border listed companies,* Collected courses of The Hague Academy of International Law, 2007, 147.

[7] KRONKE, supra note 4, 327 et. seq. ; RYNGAERT, *Cross-border takeover regulation : a transatlantic perspective, ECFR* (2007) 436 et seq.

The choice-of-law conundrum for takeover regulation is complicated by the fact that shareholders of widely held target companies are usually spread in many countries, not only in the country of incorporation or in the country of the stock exchange. Each country that is somehow in relation with the tender offer could consider himself as competent to regulate and supervise the tender offer's timing and proceeding[8], which increases the risk of conflict of laws and jurisdictions.

This work will focus on the risk of cumulative application of US and EU takeover regulation. US securities law has a broad "extraterritorial" scope of application and applies whenever US residents hold target's shares. A common practice to tackle such risk of cumulative application of many regulations is to exclude from the offer all shareholders of countries that follow extraterritorial criteria of application. Such exclusion, however, raise a number of legal issues and its compatibility with the general principles of takeover regulation in the EU appears to be doubtful.

II. - Conflict of law rules in the Takeover Directive

The Directive 2004/25/CE (hereinafter, the "Takeover Directive") provides for choice-of-law rules aimed at avoiding conflict of laws and jurisdiction throughout the EU. In addition to such rules, Member States should recognize in own jurisdiction offer documents approved by the competent authority of other Member States[9].

However, the scope of application of the Takeover Directive is limited only to tender offers aimed at purchasing the control of companies based in a Member State[10], *"where all or some of those securities are admitted to trading on a regulated market"*[11] (hereinafter "takeover bids"). Therefore, to other tender offers, no uniform choice-of-law criterion applies in the EU and both positive and negative conflict of law and jurisdiction can still emerge[12].

The first question tackled by the Takeover Directive is to establish which national authority is competent to supervise the launch and the proceeding of a Takeover bid. The Takeover Directive provides for a general rule, according to which the authority competent to supervise the bid shall be that of the Member State where the target company has its registered office, providing that its securities are admitted to trading on a regulated market of the same Member State[13].

However, if target's securities are not admitted to trading on a regulated market of the country of incorporation, other rules apply to establish the competent authority: (1) if target's securities are traded on a regulated market of a Member State different from the country of incorporation, the authority of the country of the regulated market is competent to supervise the bid[14]; (2) if target's securities are traded in more than one regulated market, the authority prevails of the country where such securities were first

[8] On the different choice-of-law options for takeover regulation see: KRONKE, supra note 4, 323 *et seq.*; PORTALE – TOMBARI, *Opa transnazionale e decentramento delle strutture di governance, BBTC,* 2002, 298; GARCIMARTÍN ALFÈREZ, *Cross border listed companies*, supra note 6, 137 *et seq.*
[9] Article 6(2) Takeover Directive.
[10] Article 2(1)(a) Takeover Directive.
[11] Article 1(1) Takeover Directive.
[12] See: SIEMS, The rules on conflict of laws in the European Takeover Directive, ECFR (2004) 461 et seq.
[13] Article 4(2)(a) Takeover Directive.
[14] Article 4(2)(b) Takeover Directive.

admitted to trading[15]; (3) if target's securities were admitted to trading on more regulated market at the same time, but not in the country of incorporation, target company should elect the competent authority within the first trading day[16].

As regarding the applicable law, the Takeover Directive follows a general principle of coincidence between competent authority and takeover regulation. Therefore, if target's securities are traded in a regulated market of the country of incorporation, company law and takeover regulation will coincide[17]. On the contrary, if target's securities are not traded on a regulated market of the country of incorporation, takeover regulation follows the law of the country where target's shares were first admitted to trading, independently from the residence or the nationality of shareholders[18].

III. - Extraterritorial application of US tender offer regulation

Even if the Takeover Directive applies, tender offers for widely held companies can raise the risk of cumulative application of US law.

The main goal of US takeover regulation, provided for by the Williams act 1968[19] that amended the Securities Exchange Act 1934, is investors protection and such goal is pursued through rules on the offer proceeding, disclosure requirements and anti-fraud provisions. As the rationale of US securities regulation is investors protection, its choice-of-law rules are based on a universalistic and extra-territorial philosophy[20], pursuant to which US law is to be followed by every tender offer that involves US resident, unless a specific exception applies.

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[15] Article 4(2)(b) Takeover Directive.

[16] Article 4(2)(c) Takeover Directive.

[17] As regarding public companies, in practice, the registered office coincides always with the applicable company law, whatever connecting factor is chosen by Member State for company law matters (*ie:* even in countries which follow the "real seat theory"). See: SCHÖN, *The mobility of companies in Europe and the organizational freedom of company founders*, in *ECFR*, 2006, 139.

[18] If the target company is not listed in the country of the registered office, takeover regulation and company law diverge, as the Takeover Directive provides for different connecting factors for procedural matters and company or labour law matters: "*matters relating to the consideration offered in the case of a bid, in particular the price, and matters relating to the bid procedure, in particular the information on the offeror's decision to make a bid, the contents of the offer document and the disclosure of the bid*" are regulated by the law of the country of the competent authority; on the contrary, to "*matters relating to the information to be provided to the employees of the offeree company and in matters relating to company law, in particular the percentage of voting rights which confers control and any derogation from the obligation to launch a bid, as well as the conditions under which the board of the offeree company may undertake any action which might result in the frustration of the bid*", the law of the country of incorporation applies. See Article 4(2)(e) Takeover Directive. However, the characterization of a specific topic as a matter of "company law" or "takeover regulation" appears sometimes unclear, as is the case for "squeeze-out" and "sell-out" or for the opinion of target's board on the takeover bid. As regarding board's opinion, for instance, see: MÜLBERT, *Umsetzungsfragen der Übernahmerichtlinie – Erheblicher Änderungsbedarf bei den heutigen Vorschriften des WpÜG*, in *NZG*, 2004, 638 (company law); *VON* HEIN, *Zur Kodifikation des europäischen Übernahmekollisionsrecht*, 2005, 561 (takeover regulation). Another "company law" matter is the mandatory bid rule: EBENROTH – WILKEN, *Kollisionsrechtliche Einordnung transnationaler Unternehmensübernahmen*, 90 *ZVglRWiss*, 1991, 242.

[19] Pubb L. No. 90-439, §§ 2-3, 82 Stat 454 (1968), as amended.

[20] FISCH, *Imprudent power: reconsidering U.S. regulation of foreign tender offers*, *NW U. L. R.*, 1993, 527; CHOI – GUZMAN, *Internalization of securities: the dangerous extraterritoriality of American securities law*, in 17 *NW J. Int'l l. & bus.*, 1996, 207 et seq.; BAUM, *Globalizing Capital markets and possible regulatory responses*, Basedow/Kanda (eds.) *Legal aspects of globalization*, The Hague, 2000, 87.

Many US takeover rules of the Williams Act apply to every tender offer made either "directly or indirectly, by use of mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise"[21]. However, the level of investors' protection depends on whether securities are "registered" on a securities exchange, pursuant to Section 12 of the Securities Exchange Act[22]. We should distinguish then two different set of rules that have different scopes of application. Disclosure requirements provided for by Section 14(d), and related rules[23], of the Securities Exchange Act apply only to tender offers for securities registered on a US exchange (hereinafter, "registered securities"). On the contrary, anti-fraud provisions and related disclosure rules, provided for by Section 10(b) and Section 14(e) of the Securities Exchange Act and related rules[24], apply to all tender offer directed to "US holders".

Therefore, even if only a small amount of target's shares are in hand of US resident and the tender offer is essentially a foreign one, bidders might be required to comply with US tender offer regulation or anti-fraud provisions and face the risk of US litigation[25].

IV. - Exclusionary offers

If the amount of US shareholders is small and unnecessary to the success of the offer, in order to avoid application of US law, it is common practice to exclude US residents from the offer[26]. Therefore, high standard of investor's protection provided for by US law has counterproductive effects, as US holders are deprived of the opportunity to sell their shares. In order to facilitate the inclusion of US holders from cross-border tender offers, SEC adopted in 1999 some exemptions from the application of US law to tender offers on shares of "foreign private issuers"[27], based on the level of US interests involved in a tender offer[28]. Such exemptions, nonetheless, do not cover anti-fraud provisions and US litigation, which could be always applied to foreign tender offers involving US holders.

The question arises as to whether, and under which circumstances, bidders can avoid application of US law simply by excluding US holders from the offer. To answer this question, we should bear in mind that US courts apply two kinds of "tests" to establish whether US law applies. The first one is a "conduct test", according to which US courts

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[21] Section 14(a) Securities Exchange Act 1934.
[22] Section 12(a) Securities Exchange Act 1934.
[23] Regulation 14D Securities Exchange Act 1934.
[24] Rule 10b-5 and Regulation 14E Securities Exchange Act 1934.
[25] See: SEC Cross-Border Tender Offers, Business combinations and rights offerings, Release No. 33-7611 (November 13, 1998) [63 FR 69136]
[26] Similarly, tender offers exclude resident and citizen of countries, such as Japan, Australia or Canada, which share with the US the same "extraterritorial" philosophy.
[27] Securities Exchange Act 1934, Rule 3b-4(c).
[28] S.c. "Tier 1" and "Tier 2" exceptions. Tier 1 exception is triggered if not more than 10% of target's securities are US holders and if the bidder grants to such US holder equal treatment as to offer conditions. If Tier 1 exception applies, the offer is exempted from most US tender offer rules, but anti-fraud and anti-manipulation provisions, as well as civil liability, continue to apply (Rule 13e-3(g)(6), 13e-4(h)(8) and 14d-1(*c*) Securities exchange act 1934). Tier 2 exception is triggered when US holders are more than 10% but less than 40% of target securities. In this case, only few of the US takeover rules do not apply. Rule 14d-1(d) Securities exchange act 1934. See: LANDER, *Rules for cross-border tender offers, exchange offers and business combinations,* 36 *Int'l L.*, 2002, 237 *et seq.*

have subject matter jurisdiction if the transaction or the conduct occurred in the US[29]. As alternative, courts follow a broader "effect test", according to which US law apply whenever a transaction produces effects in the US or on interests of US residents[30]. Courts sometimes apply such tests cumulatively, with the consequence that application of US law is triggered if either the transactions produces relevant effects in the US or the conduct occurred in the US[31]. As regarding the application of US takeover regulation and anti-fraud provisions, two decisions deserve to be mentioned, both applying the "effect test".

In *Plessey Co. plc v. General Electric Co. Plc,* the District Court of Delaware provided for some guidelines to establish whether tender offer restrictions can exclude the jurisdiction of US courts as regarding the application of procedural rules of the Williams Act. The British company *General Electric* launched a tender offer on shares of another British company, *Plessey,* a minimal amount of which (1,6%) were held by US resident. To avoid the application of US law, the bidder restricted the dissemination of the offer document, which explicitly stated that "*the Offer is not being made directly or indirectly in, or by use of the mails or by any means or instrumentality of inter-state or foreign commerce or of any facilities of a national securities exchange of, the U.S.A.*"[32]. In addition, the Form of Acceptance stated: "*No Form of Acceptance which is received in an envelope postmarked in, or which otherwise appears to GEC or its agents to have been sent from, the U.S.A. will be treated as valid*". The court, therefore, held that due to an "effect test" US takeover regulation do not apply to such an exclusionary offer. More recently, in *John Labatt v. Onex,* the District Court of New York held that US securities law did not apply because the tender offer "neither solicits nor will accepts tenders by US shareholders"[33].

The second decision that should be mentioned is *Gold Field v. Minorco,* where the Second Court distinguished *Plessey* on the basis that the case at stake was one of anti-fraud provision, not of takeover regulation. *Minorco* was a Luxembourg company holding almost 30% of shares of the British company *Gold Field.* A limited amount (2,5%) of target's shares were held by US residents, mainly through nominee account in the UK or American Depository Receipt. The offer was explicitly not disseminated in the US, but the document was sent to British nominees, which were required by their regulation to forward such documents to US shareholders. In addition, *Minorco* would have accepted tenders from US resident as long as the acceptance was not sent from the US territory. The Second Circuit, reversing on this point the district court, held that US securities law applies as the *Minorco* tender offers produced substantial and foreseeable effects for US citizens and the bidder knew that the British nominee had to forward the offer

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[29] *Leasco Data Processing Equipment Corp. v. Maxwell* 468 F.2d 1326 (2d Circ. 1972).

[30] *Shoenbaum v. Firstbrook* 405 F.2d 200 (2d Cir . 1968). See PINTO, *The internationalization of the hostile takeover market: its implications for choice of law in corporate and securities law*, 16 *Brookl. J. int'l l.*, 1990, 67; CHOI – GUZMAN, supra note 20, 218 *et seq.*; FISCH, supra note 20, 541 *et seq.*

[31] KARMEL, *Transnational takeover talk – Regulations relating to tender offers and insider trading in the United States, the United Kingdom, Germany and Australia*, 66 *U. Cin. L. Rev.*, 1998, 1133 *et. seq.*

[32] In addition, the offer document set forth that "copies of this document, the Form of Acceptance, the Listing Particulars and any related offering documents are not being mailed or otherwise distributed or sent into the U.S.A., including to [target's] shareholders with registered addresses in the U.S.A."

[33] *John Labatt Ltd v. Onex Corp., LBT,* District NY 1995, 890 F. Supp. 235 *et seq.* (at 245)

documents to their clients and nonetheless did not exclude acceptances from US holders[34].

We can argue that US courts, following an "effect test", deny application of US takeover regulation and anti-fraud provisions under two conditions: (i) that the bidder explicitly exclude the dissemination of the offer document and of whatever notice or information to US residents; (ii) that the bidder considers as void any acceptance coming from US holders. Conversely, pursuant to the rule in *Minorco*, if the bidder does not avoid any dissemination of the offer to US residents and US holders can validly tender their shares, US anti-fraud provisions apply. Therefore, a potential bidder that does not want to carry the risk to apply US law or to face US litigation should: (i) prohibit and avoid any communication or publicity regarding the offer in the US, included press releases and internet accesses; (ii) provide that acceptances should represent that the tendering person is neither a US holder, nor is acting on behalf of a US holder; (iii) do not consider as valid any acceptance from US holders (or on behalf of US holders).

V. - Exclusionary offers in UK, Germany and Italy

Exclusionary offers are common practice in International market and are admitted by many jurisdictions. In the following pages I will point out as example the case of three jurisdictions, England, Germany and Italy. In the former, based upon self-regulation, only restrictions to the dissemination are explicitly admitted; in Germany, takeover regulation allows both restrictions to acceptance and restrictions to distributions; by contrast, Italian takeover rules do not tackle the issue of exclusionary offers, but nonetheless such restrictions are commonly authorized by the competent authority.

1. The City code on takeover and mergers

The City Code on takeover and merger of the London stock exchange[35] allows not disseminating the offer documents to foreign shareholders resident outside the EEA[36]. Such restrictions to dissemination, however, are admitted only if the cumulative application of a foreign law would "*result in a significant risk of civil, regulatory or, particularly, criminal exposure for the offeror or the offeree company*" and only if the bidder does not have at disposal a less restrictive measure[37].

The bidder is exempted if (a) less than 3% of the share capital is in hand of non resident in the EEA, or (b) is authorized to do so by the panel *"where it would be proportionate in the circumstances to do so having regard, notably, to the cost involved, any resulting delay to the*

[34] *Gold Field v- Minorco* (2nd Circuit) 271 F.2d (1989). See also: *SEC v. Berger* (2nd Circuit) 322 F.3d 187, at 192 (2003); *E.ON v. Acciona* (South. District NY) 468 F. Supp. 2d 559 at • (2006).

[35] Such possibility was introduced recently as part of the implementation of the takeover Directive.

[36] According to General Rule 8(1), the offer document should be made readily and promptly available "to the holders of securities at least in those Member States on the regulated markets of which the offeree company's securities are admitted to trading". In addition, pursuant to Rule 30.3 of the Code, the offer document should be posted to all shareholders of the target company, independently from their residence or nationality.
The Panel stated that: "the requirements in Article 8(2) must be interpreted in the light of the general principles in Article 3, particularly Article 3(1)(a), which requires equivalent treatment for all shareholders, and Article 3(1)(b), which requires that shareholders must have sufficient time and information to enable them to reach a properly informed decision on the bid" .

[37] "[U]nless they can avoid such exposure by making minor amendments to the information being provided or documents being sent, published or made available […]".

transaction timetable, the number of registered shareholders in the relevant jurisdiction, the number of shares involved and any other factors invoked by the offeror or the offeree company"[38].

Therefore, the City Code admits only restrictions to dissemination, not restrictions to acceptances. Exclusionary offers need to be justified and must be proportionate to the risk of cumulative application of foreign law. The area of admitted justifications is broad and covers both legal risks, such as civil liability or the impossibility to reconcile all applicable rules, and high costs of cumulative application of foreign law, as compared to the amount of foreign shareholders.

2. German takeover law

Pursuant to §24 of the German takeover law (*WpÜG*), the supervisory authority (BAFIN) can authorize the bidder to exclude from a cross-border tender offer target's shareholders in relation to their residence or nationality[39].

Such restrictions can be authorized only if, without the exclusion, the bidder would need to comply with the law of another country outside the European Economic Area and "if for this reason it is unreasonable [*unzumutbar*] to expect the bidder to make an offer to all holder of securities".

The question arises in which cases the cumulative application of the law of other countries is "unreasonable" pursuant to § 24 *WpÜG*. BAFIN provided for an answer when it authorized the exclusionary mandatory bid of Unicredit on HBV's shares. BAFIN held that if "*the foreign regulations provide the bidder with the option of exemption or relief, BaFin considers it reasonable to expect the bidder to make an offer in accordance with German law*"[40]. Therefore, the offer document of Unicredit did not exclude Australian and American "sophisticated" shareholders, as the tender offer to them was "*only subject to simplified procedural regulations in this respect*".

Nonetheless, it is still debated among legal scholars under which circumstances exclusionary offers can be authorized if foreign law does not provide for simplified requirements or exemptions, or if such exemptions or relieves do not apply to the specific case. More precisely, some legal scholars held that restrictions are admitted only if the application of foreign law would make the offer impossible, as the timing or disclosure requirements of German and foreign law are not compatible[41]. Other scholars, on the contrary, justify exclusionary offers also if the application of foreign law would make the offer more expensive or simply more difficult[42].

3. Italian takeover law

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[38] Note on Rule 30.3 City Code on Takeovers and Mergers

[39] In 2005 BAFIN authorized the mandatory exclusionary offer of *Unicredit* on *HVB*'s shares, whose offer document excluded shareholders resident in Japan, USA and Australia from the offer and stated explicitly that the offer will be not disseminated or advertised in such countries and that acceptance from shareholders resident in such countries will be considered as void. See Angebotunterlage p. 2.

[40] Bafin Yearbook 2005, p. 175 (English version).

[41] OECHSLER, § 24, n. 4, Ehricke – Ekkenga – Oechsler (eds.), *WpÜG Kommentar*, München, 2003; VON HEIN, *Zur Kodifikation des europäischen Übernahmekollisionsrecht*, supra note 18, 562.

[42] VERSTEEGEN, § 24, n. 20, *Kölner Kommentar zum WpÜG*, Köln, 2002; STREHL, *Cross-border tender- und exchange offer*, Berlin, 2005, 151.

Despite Italian law does not provide for any explicit allowance to exclusionary offers, the Italian supervisory authority has often authorized them. However, it is not clear whether only exclusions to the dissemination of the offer are admitted, or also exclusions to the acceptance of foreign residents.

The distinction between restrictions to acceptances and restrictions to dissemination emerged clearly in the opposite case, when foreign tender offer documents excluded Italian residents[43]. In this regard, CONSOB has clearly stated that, pursuant to Italian law, Italian residents, who have knowledge of the offer despite the restriction to distribution, can nonetheless tender their securities[44].

Such decisions seem to be related to the scope of application of Italian law, rather than to the limit to exclusionary offers under Italian takeover regulation. The rationale behind such decisions is that, pursuant to Italian law, security holders which are resident in Italy can accept the offer (and banks authorized in Italy cannot refuse to transmit the acceptance to the bidder) even though Italian takeover regulation does not apply and the bidder does not need to submit the tender offer document to CONSOB.

Of course, this raises many problems whenever the applicable takeover regulation does not agree upon this and allows restrictions as the acceptances, not only restrictions as to the dissemination of the offer.

V. - The principle of equal treatment and the mandatory bid rule

The question arises as to whether restrictions to dissemination and restrictions to acceptance are compatible with the general principle of equal treatment provided for by the Takeover Directive as well as by national takeover regulations of EU Member States. Pursuant to the Takeover Directive, "*all holders of the securities of an offeree company of the same class must be afforded equivalent treatment*"[45].

The principle of equality tackles the relation between the bidder and target's shareholders and aims at preventing choices distortion, which might emerge whenever the bidder offers a higher price to selected shareholders[46]. This means that bidders should make the same offer to all holders of the same class of securities and cannot discriminate among them within a tender offer.

Beside such general principle of equality "within the bid", many national takeover regulations and the Takeover Directive provide for a mandatory bid rule, according to which any change of control through partial bids or private transactions triggers the duty to launch a cash tender offer for all outstanding shares. In case of private transactions of control, minority shareholders can sell their shares to the new control shareholder; in addition, if the control was purchased with a partial bid, the mandatory bid rule limits the pressure to tender produced by such bids and by "two tier" bids. To understand the functioning of the mandatory bid rule and its impact on shareholders' interests, we should pay attention to the price of the bid. Pursuant to the Takeover

[43] Italian Tender Offer rules have extraterritorial application, as they apply to all tender offers that are addressed to at least 100 Italian residents. See: CONSOB, DEM/4001931 del 13-1-2004, in www.consob.it and MUCCIARELLI, *L'attuazione della direttiva opa nell'ordinamento italiano,* Giur. comm., 2008, 453.
[44] See: CONSOB, DEM/7085669, 24.9.2007 and DEM/9034174, 16.4.2009.
[45] Article 3(1)(a) Takeover Directive.
[46] DAVIES, The notion of equality, (nt. 2) 5.

Directive, the mandatory bid should be launched at the highest price paid for target's shares during a period of 6 to 12 months prior to the bid. We can argue, therefore, that one of the rationale behind the mandatory bid rule, as provided for by the Takeover Directive, is equal treatment of all shareholders as regarding the distribution of the control premium[47].

VII. Are exclusionary offers compatible with the Takeover Directive?

As I have pointed out in the former paragraph, takeover regulation of some Member States, such as England and Germany, explicitly allow exclusionary offers, but only if authorized by the regulatory authority and under specific and limited circumstances. On the contrary, other Member States do not provide for any specific rule but, nonetheless, national supervisory authorities commonly authorize exclusionary offers (as is the case in Italy).

In both cases, the question arises as to whether restrictions to the dissemination and restrictions to acceptances are compatible with the principle of equal treatment "within the bid" and with the mandatory bid rule. We should bear in mind that pursuant to article 3 of the Takeover Directive, Member States cannot derogate the general principle of equality among shareholders "within the offer"[48].

To answer such questions, we should analyze separately the case when the bidder restricts only the dissemination of the offer, from the case when the bidder, in addition, restricts also the group of persons who can validly accept the offer. Both restrictions discriminate shareholders, adopting as distinctive criterion their residence or nationality, but they produce different effects on shareholders' interests.

a) In case of simple restriction to the dissemination, the bidder does not advertise the offer into specific countries. Obviously, shareholders resident in such countries are treated *in practice* worse than other shareholders are. However, a mere restriction to dissemination does not prohibit shareholders resident in excluded countries to tender their shares. In case of restrictions to dissemination, the tender offer is addressed to all holders of the same class of securities, but the bidder simply does not advertise the offer into specific countries with the aim to avoid application of its law.

We can argue that restrictions to disseminations do not represent a formal violation of the equality principle, but a restriction, which damages the interest of some shareholders to have knowledge of an offer. The offer, at least theoretically, is addressed also to shareholders from excluded counties. Therefore, national legislations that admit restrictions to disseminations do not violate Article 3 of the Takeover Directive, as they provide for an answer to a practical problem.

b) By contrast, in case of restriction to acceptances, shareholders resident in excluded countries cannot tender their shares, even if they have knowledge of the offer. In practice, this means that the tender offer is not extended to such shareholders, notwithstanding the fact that they are owner of the same class of securities, which are

[47] On the possible rationales of the mandatory bid rule see: ENRIQUES, *The mandatory bid rule in the Takeover Directive: harmonization without foundation?, ECFR,* 2004, 440.
[48] Article 4(5) Takeover Directive.

object of the bid. This represents a clear violation of the equality principle, according to which the same offer should be made to all holders of the same class of securities.

In addition, when placed to a mandatory bid, restrictions to acceptance violate also the mandatory bid rule, as the bidder treats differently fellow-shareholders with specific nationalities or residence. As we have seen above, the mandatory bid rule is aimed (at least in part) at distributing the control premium to all shareholders, so the question arises: why should US (or Australian, or Canadian) shareholders be treated differently from other shareholders?

Such discrimination is not based on a formal difference between classes of shares, but upon nationality or residence and, hence, is in contrast with the equality principle provided for by the Takeover Directive[49].

We can consider restrictions to acceptance as compatible with the Takeover Directive only under very limited circumstances: that is to say, only if the cumulative application of a foreign law would make the launch of the tender offer impossible[50] and the bidder does not have at disposal a less restrictive mean[51].

VII. – Conclusions

As we have seen, to avoid the cumulative application of takeover regulation of more jurisdictions, it is common practice to exclude from the offer shareholders resident in countries adopting extraterritorial conflict rules.

Among such countries, the most significant case is that of US securities regulation. According to US case-law, in order to avoid the application of US takeover regulation and anti-fraud provisions, bidders should completely exclude any publicity of the offer in the US or to US resident and consider acceptances from US residents as void.

However, such restrictions could be at odds with the principle of equal treatments of target's shareholders, provided for by the EU Takeover Directive. In the former pages, I have argued that only restrictions to dissemination could be reconciled with the equality principle. On the contrary, restrictions to acceptance represent a clear violation of such principle, which can be admitted only if the cumulative application of many regulations would make the offer unfeasible.

A grey area of uncertainty emerges for potential bidders, which face two opposite risks, as restrictions to acceptances often violate the equality principle, but simple restrictions to dissemination are not sufficient to exclude the application of US anti-fraud provisions and litigation. To avoid such uncertainty, the more convenient solution is in the hands of the EU policy maker: to amend the Takeover Directive, by introducing clear limits to exclusionary offers and clarifying the scope of application of the equality principle.

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[49] VON HEIN, supra note 18, 561.

[50] VON HEIN, supra note 18, 562.

[51] For example, the bidder could launch two separate offers, at the same conditions: the first offer is addressed only to US resident and is launched according to US takeover regulation, while the second offer is addressed to all other shareholders according to the applicable law of the market. See, for instance, tender offer launched by RFS Holding BV on shares of ABN Amro BV (July 2007): www.consob.it