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REGULATION OF TAKEOVER BIDS IN THE EC AND THE US:

The case of national interests as defensive tactics
against unfriendly cross-border takeover bids

Thesis to obtain the LL.M
degree at the European
University Institute,
San Domenico di Fiesole;

Submitted by:
Serge Gijrath
Bertelmanplein 12 II
1075 LR Amsterdam
The Netherlands

Under the supervision of:
Professor Gunther Teubner

Firenze, September 1989

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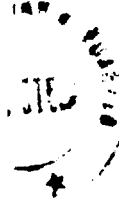
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List of Abbreviations

AA	Ars Aequi
AG	Die Aktiengesellschaft
Am. Journ. Comp. L.	American Journal of Comparative Law
BB	Der Betriebs Berater
Bell. J. of Econ.	Bell Journal of Economics
Bol. Estud. Econ.	Boletin de Estudios Economicos
Bus. Law.	The Business Lawyer
Calif. L. Rev.	California Law Review
CFIUS	Committee on Foreign Investment in the US
C.F.R. Sec.	Congressional Federal Rules Securities
C.M.L.R.	Common Market Law Reports
C.M.L.Rev.	Common Market Law Review
Cmdnd.	Command (Paper)
Col. L. Rev.	Columbia Law Review
COM	Commission of the European Communities
Comm.	Chambre Commerciale
Comp. Lawy.	The Company Lawyer
Cong. Rec.	Congressional Record
Corp. L. Rev.	Corporate Law Review
DB	Der Betrieb
DG	Directorate-General
EC	European Communities
E.C.R.	European Court (of Justice), Reports of the
ED.	Editor
EEC	European Economic Community
ESOP	Employee Stock Ownership Plan
EuGH	Europäisches Gerichtshof
EUI	European University Institute
Eur. Aff.	European Affairs
Eur. Comp. L. Rev.	European Competition Law Review
Eur. L. Rev.	European Law Review

Fed. Reg.	Federal Register
Fed. Sec. L. Rep.	Federal Securities Law Reports
FRG	Federal Republic of Germany
F. Supp.	Federal Supplement
FT	Financial Times
FTA	Fair Trading Act
Harv. L. Rev.	Harvard Law Review
IHT	International Herald Tribune
Inst. Inv.	Institutional Investor
Int'l. Fin. L. Rev.	International Financial Law Review
Intl. Lawy.	The International Lawyer
Int. Trade Rep.	International Trade Reporter
J. L. & Econ.	Journal of Law and Economics
J. Pol. Econ.	Journal of Political Economy
Journ. of Bus. Law.	Journal of Business Law
Journ. of Econ. Persp.	Journal of Economic Perspectives
Journ. of Financ.Econ.	Journal of Financial Economics
L. Ed. 2d	Law Edition, second
Mich. L. Rev.	Michigan Law Review ,
MMC	Mergers and Monopolies Commission
MNE	Multinational Enterprise
NBER	National Bureau of Economic Research
NJB	Nederlands Juristenblad
NV	De Naamloze Vennootschap
NYSE	New York Stock Exchange
OECD	Organisation of Economic Cooperation and Development
OFT	Office of Fair Trading
OJ	Official Journal of the EC
Prob. Econ.	Problèmes Economiques
RDC/TBH	Revue de Droit Commerciale Belge/ Tijdschrift voor Belgisch Handelsrecht
Rev. de la Banque	Revue de la Banque

Riv. Soc.	Rivista delle Societa
SEC	Securities Exchange Commission
SER	Sociaal-Economische Raad
Stan. L. Rev.	Stanford Law Review
TVVS	Tijdschrift voor Nederlands Ondernemingsrecht
UK	United Kingdom
U. Pa. L. Rev.	University of Pennsylvania Law Review
USA	United States of America
U.S.C. Sec.	United States Code Securities
Va. L. Rev.	Virginia Law Review
VEH	Vereniging voor de Effectenhandel
Wisc. L. Rev.	Wisconsin Law Review
WOR	Wet op de Ondernemingsraden
W.T.	The World Today
WuW	Wirtschaft und Wettbewerb
Yale L. J.	Yale Law Journal
ZGR	Zeitschrift für Unternehmens- und Gesell- schaftsrecht
ZHR	Zeitschrift für das Gesamte Handelsrecht und Konkursrecht
ZIP	Zeitschrift für Wirtschaftsrecht

Table of Cases

BelgiumSociété générale de Belgique et Sodecom/Cerus:

- Ordonnances du Tribunal de Commerce: 19 janvier 1988, 20 janvier 1988, 9 février 1988, 18 février 1988, 21 RDC/TBH 512 (1988), pp. 535ff;
- Arrêt de la Cour d'Appel: 1 mars 1988, 21 RDC/TBH 512 (1988), pp. 512 - 534;

European Communities

Cremonini, Case 815/79, E.C.R. 3583 (1980);

Europemballage Corporation and Continental Can Co. Inc. v. Commission, Case 6/72, E.C.R. 215 (1973);

Hauptzollamt Bremerhaven v. Massey-Ferguson, Case 8/73, E.C.R. 897 (1973);

Hoffman La Roche and Co. A.G. v. Commission, Case 85/76, E.C.R. 461 (1979);

British American Tobacco Company Limited and R.J. Reynolds Industries inc. v. Commission of the EC, supported by Philip Morris Inc. and Rembrandt Group Limited, Cases 142/84 and 156/84, 4 C.M.L.R. 24 (1988);

Van Gend en Loos v. Nederlandse Administratie der Belastingen, Case 26/62, E.C.R. 1 (1969)

Simmenthal II, Case 106/77, E.C.R. 629 (1978);

Walt Wilhelm v. Bundeskartellamt, Case 14/68, E.C.R. 1 (1969);

United States

Amanda Acquisition Corporation v. universal Foods Corporation, et. al., US Court of Appeals, 7th Cir., Nos. 89-1581, 89-1712, May 24 1989, 1341 Fed. Sec. L. Rep. 92811 (1989)

Am. Revlon, Inc. v. Mac Andrews & Forbes Holdings Inc., 506 A.2d 173 (Del. 1986);

CTS Corp. v. Dynamics Corp. of America, 481 US 69 (1987);

Hanson Trust PLC v. ML SCM Acquisition Inc., 781 F.2d 264 (2d. Cir. 1986);

Herald Co. v. Seawell, 472 F.2d 1081 (10th Cir. 1972);

James Edgar v. MITE Corp. and MITE Holdings Inc., 457 US 624 (1982), 73 L Ed 2d 269, 102 S ct 2629;

Moran v. Household International Inc., 500 A.2d 1346 (Del. 1985);

Pike v. Bruce Church Inc., 397 US 137 (1970);

Plessey Co. PLC v. General Electric Co. PLC, 628 F. Supp. 477 (D. Del. 1986);

Smith v. van Gorkom, 488 A.2d 858 (Del. 1985)

Unocal v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985);

1. INTRODUCTION

"The Commission considers that in general takeover bids can be regarded as a positive factor which provides a mechanism for the market to select the most competitive firms and could stimulate the process of reorganization of European companies which is indispensable in order to face up international competition".

The above statement,¹ indicating a liberal stance towards takeovers, is perhaps not altogether justified in the case of cross-border takeovers in the Communities. This thesis will contend that certain extra regulation with regard to the institutional design of the prospective procedural arrangement of takeover bids in the EC might be required if the reorganization goal is to be pursued.

Although in 1974 the Commission of the EC had already appointed Professor Pennington to prepare a draft of an eventual Proposal for a Council Directive on the Regulation of Takeover Bids in the EC,² no action whatsoever was taken in this respect for several years, until the issue reappeared in the White Paper in 1985.³ The final version of the EC Takeover bid Proposal was only adopted by the Commission on 22 December 1988.⁴ The EC Proposal does

1. INFORMATION MEMO, "Takeover Bids, Clear rules for the single market", Spokesman's Service, Commission of the EC, Brussels, 22 December 1988, p. 2;

2. PENNINGTON, Report relating to takeover bids and other bids, Commission of the EC, XI/56/74, Brussels (Pennington Report);

3. COMMISSION OF THE EC, "Completing the Internal Market" (The White Paper), COM (85) 310, Brussels (1986), Annex p. 29;

4. PROPOSAL for a Thirteenth Council Directive on Company Law concerning takeover and other general bids, COM(88) 823 final, OJ No. C 65/8, Brussels (1989);

not explicitly distinguish between friendly and unfriendly takeovers.⁵ It has been argued that European corporate reality does not face unfriendly takeover attempts.⁶ The Takeover bid Proposal offers a broad definition of takeover bids: friendly offers are also included.⁷ As capital movements are gradually being liberalized, it is likely that the number of takeover bids is going to increase.⁸

5. An unfriendly takeover can come off against the will of the management of the target corporation. The bidder tries to acquire a controlling interest by addressing all individual shareholders to tender their securities in the corporation. Ousting of management is one of the most probable explanations for takeover bids, see EASTERBROOK, FISCHER, "The Proper Role of a Target's Management in Responding to a Tender Offer", 94 Harv. L. Rev. 1161 (1981). The market of corporate control can best be viewed as a major component of the managerial labour market, see MANNE, "Mergers and the market for corporate control", 73 J. Pol. Econ. 110 (1965). The capital market thus serves as a corrector, when internal mechanisms break down, the premium that is being offered to the target's shareholders over the market price is what persuades them to tender. See JENSEN, RUBACK, "The Market for Corporate Control: The Scientific Evidence", 11 Journ. of Financ. Econ. 5 (1983); BEBCHUCK, "The Case for Facilitating Competing Tender Offers", 95 Harv. L. Rev. 1028 (1982); GILSON, Law and Finance of Corporate Acquisitions, Mineola NY (1986);

6. In particular German authors, see e.g. OTTO, "Übernahmeveruche bei Aktiengesellschaften und Strategien der Abwehr", 29 DB Beilage 12 (1988); Otto claims that these attempts were practically unknown in Belgium and the Federal Republic of Germany until de Benedetti launched his bid for la Générale; See also PELTZER, "Hostile Takeovers in der Bundesrepublik Deutschland?", 10 ZIP 69 (1989), especially p. 72; Cf. however, Wall Street Journal 22/5/89, on Veba's hostile quest for Feldmuehle conceding that unfriendly takeovers are possible in the FRG under certain conditions; For Italy see VIGLIANO, "Hostile Takeovers in Italy", 7 Int'l. Fin. L. Rev. 11 (1988);

7. See point 9., TAKEOVER BID PROPOSAL, supra note 4, p. 4; Although this conclusion does not follow from the definition offered there as such, it can be deduced from e.g. Art. 14 or Art. 10 (1) (m);

8. See INFORMATION MEMO, supra note 1, p. 1; GARCIA-ECOHEAGA, BARSUTO, GONZALES ESTEBAN, "Fusiones y Adquisiciones I", 43 Bol. Estud. Econ. 227 (1988), p. 232;

Given the increase of the number of takeover bids the need for harmonization becomes apparent. Harmonization as such within the Communities of takeover bids will be difficult, as practice and regulation vary largely between the Member States. For example, practice in the FRG is heavily influenced by its corporate structure, with the two-tier board, the group of companies structures, the relatively small number of publicly held corporations and the role of banks in financing the corporation.⁹ In the UK, on the other hand, takeover bids appear rather frequently, owing to a very open securities market and a widespread corporate ownership. Although these conditions are true for the Netherlands as well, unfriendly takeover bids are seldom launched there, owing to the heavily armed corporations,¹⁰ which engage in several defensive techniques at a time.¹¹ Regulation of the phenomenon is done in

9. See PELTZER, *supra* note 6; GRUSON, MEILICKE, "The New Co-Determination Law in Germany", 32 *Bus. Law.* 571 (1977), pp. 577-580;

10. The Dutch Civil Code actually contains several provisions allowing certain defensive measures, e.g. Art. 82 jo. 87 Book 2, Dutch Civil Code;

11. Defensive tactics are methods used by corporations to thwart uncalled for takeover bids. There is a whole range of these tactics, and constantly new ones are being invented and implemented. See ARANOW, EINHORN, *Developments in Tender Offers for Corporate Control*, New York (1977) pp. 193-206; Distinction should be made with *ex ante* tactics, usually of a more general nature and implemented with shareholders' approval; these make the potential launching of a bid less attractive; *ex post* tactics are aimed at a specific bidder at the time of a bid; There is a load of literature assessing these tactics, see e.g. GORDON, "Ties that Bond: Dual Class Common Stock and the Problem of Shareholder Choice", 76 *Calif. L. Rev.* 3 (1988); HONEE, "Beschermingsconstructies", 66 *NV* 154 (1988); DAWSON, PENCE, STONE, "Poison Pills Defensive Measures", 42 *Bus. Law.* 423 (1987); GORDON, KORNHAUSER, "Takeover Defense Tactics: A Comment on Two Models", 96 *Yale L. J.* 295 (1986); BRADLEY, ROSENZWEIG, "Defensive Stock Repurchases", 99 *Harv. L. Rev.* 1377 (1986), to name but a few...

various ways: statutory rules, such as in France and Spain, voluntary codes of conduct, such as in the Netherlands and the United Kingdom, which has a very sophisticated system of self-regulation, or monitoring in practice, such as in Belgium.¹² By and large, the rules laid down in the various regulatory instruments aim at ensuring market transparency and fair dealing, and equal treatment of the involved parties. These are also the basic aims of the EC proposal, which tries to lay down a minimum standard.

Next to disclosure and equal treatment matters, another feature of takeovers is the possible anti-competitive effects they might have. As the Commission clearly states, this is a question of Competition Policy, and not to be regulated in a Takeover bid Directive.¹³ This question will mostly be left aside in this thesis, although reference to merger control at times might prove necessary.

There is however one question that is not being regulated in the Takeover bid proposal, but one that could require some regulatory action, as it is possibly relevant to the furthering process of European Integration: The case of national interests in the event of a so-called cross-border unfriendly takeover attempt. The

12. See PENNINGTON, supra note 2, pp. 5-8;

13. See INFORMATION MEMO, supra note 1, p. 1; PENNINGTON, supra note 2, Introduction p. III;

problem is two-fold: First, with the rise of cross-border bids, an equal rise of nationalistic popular opposition is likely to come about;¹⁴ although European Integration is the talk of the day, business cultures are still far apart in the Member States, so that investment by certain other Member States is still looked upon with suspicion. Second, no clear (legal) definition exists of national interests, with regard to corporate takeovers. National interests could serve as an additional (while unclear and vague) instrument to stop an unfriendly (cross-border) takeover bid. However, certain issues may well be raised at the event of a takeover bid originating abroad which are of a more general concern; it is not altogether certain which constituent could invoke such an interest legitimately; whether this should be for example a corporate actor or a regulator.

This thesis will deal with national interest issues in the context of takeovers. The idea is that a monitoring agency on the Community level would have to be instated, in order to review objectively, whether national interests may be invoked legitimately in certain unfriendly bid battles. Although the same contention might hold for friendly offers, this thesis is focused on the unfriendly bids, since it is more likely that in such cases an

14. E.g. the contention "What's good for General Motors is good for America" , The Economist, 21-27 February 1988; : "The national interest is almost always a bad argument for stopping takeovers"; See also GLASZ, "Halen Beschermingsconstructies 1992 ?", TVVS 163 (1988), p. 167, who warns us about emerging nationalism with regard to foreign takeover attempts, regardless of the bidder's country of origin (which then includes inter Community bids);

unreal use of the argument will be made. However, before the question of legitimacy of the national interest can be dealt with it is useful to make a statement regarding the identity of the appropriate regulator to define such an interest.

The practice and regulation in the United States is very relevant for our purposes: not only does American literature deal extensively with takeovers and related matters, but there is also an interesting feature to be observed, which is the opposite of what is happening in the EC: regulation is being carried out more and more on a state level, instead of on the federal level.¹⁵ Which are the differences in attitudes towards the regulation of takeover bids in the EC in comparison with the US?

In chapter 2, an attempt will be made to point out what could constitute a national interest. To illustrate the issue in the takeover context, this part will contain a case where a Belgian

15. See: BUXBAUM, HOPT, "Legal Harmonization and the Business Enterprise," in: CAPPELLETTI, SECCOMBE, WEILER EDS., *Integration Through Law*, Vol. 4 Berlin/New York (1988), p. 130: "[...]not only are recent state efforts to participate in regulation of hostile tender offers even closer to the traditional state corporation law agenda, but by drawing hostile fire from federal Supremacy Clause and Commerce Clause preemption concepts they have drawn this entire area of state securities regulation into the vortex of the division of powers in a federal system"; Although the EC are by no means considered here as a federal analogy of the US, it is interesting to note what kinds of conclusions can be drawn from this fact. Is the Commission of the EC trying to arrogate to itself regulatory powers that should be left to the Member States? Is regulation required to ensure that capital movements are effectively liberalized?

Court approved of actions by a corporation to thwart an unfriendly cross-border bid. The corporation's course of action was partly justified by the Court on the ground that a legitimate national interest was at stake.

In chapter 3, some comments will be offered regarding the regulation of takeover bids in the EC and certain Member States, in particular the United Kingdom and the Netherlands. How (if at all) are national interests protected?

Chapter 4 will offer a view into the regulation of takeover bids in the United States. Next to the fact that there simply exists a good deal of regulation in this field in the United States, the description of the rules in the US is relevant for this thesis in order to see, whether a federal approach to the regulation of takeovers in the EC is equally justified.

Finally, chapter 5 will combine the conclusions to be drawn from chapters 3 and 4, and refer to the relevance of a federal approach. It will also contain a suggestion for further regulation.

2. NATIONAL INTERESTS AND TAKEOVER BIDS

2.1. Transnational corporations and regulations

Cross-border bids occur more and more often in the interdependent system of transnational corporations. There is no agreed definition as to what would constitute a transnational corporation.¹⁶ According to Grewlich, there is no basic difference between the notions of 'multinationals' and 'transnationals'.¹⁷ The word transnational better conveys the idea that enterprises under this classification operate from their home bases across national borders. Corporate integration can be seen as the international integration of activities by and within transnational enterprises.

One reason for increasing takeover activity is the increasing globalization of world markets.¹⁸ Because of this, activities

16. See e.g. UNITED NATIONS, Centre on Transnational Corporations, Survey of Research on Transnational Corporations, New York (1977); the OECD refrains from defining the MNE: OECD, Guidelines for Multinational Enterprises, Paris (1986); According to Dunning, Transnational Corporation is the UN nomenclature for MNE's, DUNNING, "Multinational Enterprises in the 1970's: An Economist's Overview of Trends, Theories and Policies", in: HOPT ED., European Merger Control, Berlin/New York (1982), p. 16;

17. GREWLICH, Transnational Enterprises in a New International System, Alphen a/d Rijn (1980), p. 35;

18. For extensive research on the several possible motives for (unfriendly) takeovers, see: JENSEN, "Takeover controversy: analysis and evidence", pp. 314-357; ROLL, "Empirical Evidence on Takeover Activity and Shareholder (Footnote continues on next page)

such as efficient reallocation of a corporation's assets on the international plane,¹⁹ penetration of a foreign market,²⁰ owing to the saturation of merger possibilities on the national market resulting from high levels of concentration, or the securing of a market position in an emerging trade bloc, will lead to cross-border takeover bids.

Although deregulation is perceived as another reason for increased takeover activity²¹, as regards national interests, the desire for regulation -or at least some form of legal protection- emerges. There are various approaches to regulation and the question is highly entangled with economic theory. The laissez-faire approach finds a fundamentally competitive market economy where state intervention is undesirable; in a cost-benefit analysis on the other hand, the approach will vary, as certain market transactions (takeovers) may result in both welfare gains and

(Footnote continued from previous page)

Wealth", pp. 241-253, both in: COFFEE, LÖWENSTEIN, ROSE-ACKERMAN EDS., *Knights, Raiders and Targets: The Impact of the Hostile Takeover*, New York (1988);

19. MULDUR, *Probl. Econ.*, 14/9/88, p. 22 : "L'acquisition d'entreprises étrangères ou autochtones n'est pas une dépense inutile des ressources internes d'un pays; c'est au contraire un moyen de réallocation productive des actifs de sociétés sur le plan international";

20. SÜNNER, "Takeovers, made in the USA", 32 AG 276 (1987), "mit denen das Eindringen in fremde Märkte unternommen werden soll oder der auch nur dazu dienen soll, zyklische Schwankungen des eigenen Unternehmens auszugleichen und die Unternehmensergebnisse zu verstetigen";

21. See OECD, *Competition in OECD Countries 1986-1987*, Paris (1988), p. 2; Also JENSEN, *supra* note 18, pp. 317-318, who offers empirical evidence as to this rise, in certain industrial sectors, e.g. oil & gas;

losses.²²

Two main theories of economic regulation may be distinguished: 1) the 'public interest' theory, which holds that regulation is supplied in response to the demand of the public for correction of inefficient or inequitable market prices, and 2) the 'capture' theory, which holds that regulation is supplied in response to the demands of interest groups struggling among themselves to maximize the income of the members.²³ Both theories, as they are not necessarily mutually exclusive, play a large role in the national interest question.²⁴ The public interest theory will be dealt with more extensively below.²⁵ The capture theory, although it will not be referred to any further as such, serves as a starting point for the fourth chapter on the US.

In the takeovers field, we find some sort of regulation in three areas: first, where information is perceived as inadequate and

22. ROWLEY, "Antitrust and Economic Efficiency", in: OGUS, VELJANOVSKI, CENTO, *Readings in the Economics of Law and Regulation*, Oxford (1984), p. 222ff;

23. POSNER, "Theories of Economic Regulation", in: OGUS, VELJANOVSKI, CENTO, *ibid.* p. 240ff; Also: STIGLER, "The Theory of Economic Regulation", 2 *Bell J. of Econ.* 3 (1971), who insists that economic regulation serves the private interests of politically effective groups; PELTZMAN, "Toward a More General Theory of Regulation", 19 *J. of L. & Econ.* 211 (1976), in particular the Comment, HIRSCHLEIFER, *id.*, p. 241: regulators themselves constitute an interest group and there is competition between different regulatory agencies; This clarifies why takeover regulation comes from so many different sources...

24. This will be seen more clearly when we deal with the economic theory of federalism, which could fit under both headings, see *infra* pp. 90ff;

25. See *infra* para. 4.4.;

the process as touching upon public objectives: rules raising the cost of an acquisition and shifting risks upon the bidder, second, where the process is perceived as involving wealth transfers: rules defining the circumstances under which target management may engage in transactions/behavior to defeat an unfriendly takeover attempt. The sources at which these rules can be found, are mainly Securities Regulation, general Corporation laws and, - particularly in the US-, judicial interpretations of fiduciary standards applicable to decisions of corporate managers.

The third group, though some overlap might occur, is largely disregarded by both regulators and academics: where the process is perceived as having possible disruptive effects on national interests: rules aimed at prohibiting or deterring foreign acquisitions.

2.2. Protecting National Interests

Various instruments may be employed for this purpose:

- prohibition, or required authorization by law; such a law would have to: 1) prevent the possibility of bids by a foreign com-

pany,²⁶ 2) prevent foreign ownership of national corporations,²⁷ 3) limit foreign holdings of voting rights to a certain threshold,²⁸ or 4) require administrative authorization in certain cases;²⁹

If the law does not expressly state prohibitions or requirements for foreign holdings, c.q. ownership, there is always the possibility that the corporation itself could include certain:

- prescriptions or prohibitions in its articles of association, these could be: 1) aimed directly at foreigners,³⁰ or 2) not

26. This e.g. the case in Sweden, see inter alia: "Bassett plays the Rowntree takeover tune", FT 4-5/2/89, p. 9;

27. e.g. in France; in Switzerland the "Lex Friedrich", which limits foreigners' rights to buy property in Switzerland. This would amount to preventing a foreigner from buying a Swiss corporation which has more than half of its assets in real estate, see: "Swiss bid code riddled with contradictions", FT 6/5/88; in Mexico, the former Foreign Investment Law 1973, which set a limit of 49 % foreign ownership of all companies established in Mexico;

28. again Switzerland, albeit in this case the provision is not specifically applicable to foreigners, but also to nationals;

29. e.g. in the US (see also infra pp. ?), the so-called Exon-Florio provision; conversely in Mexico, where the Foreign Investment Law established a national commission of foreign investments that had the authority to allow 100 % foreign ownership, where the investment was determined to be in the national interest; Also: GARCIA-ECOCHÉAGO, BARSUTO, GONZALES-ESTEBAN, supra note 8, p. 235 table 5, which provides a list of limitations in the law and other structural limitations against foreign takeovers in several countries, including some EEC; The authors found no direct limitations in the laws of Spain, Italy and the Netherlands. With regard to the FRG and the UK the Merger Control authorities are mentioned. Only French law used to have a direct prohibition with regard to foreign acquisitions of more than 20 %, which now only extends to non-EEC countries. Political resistance is identified as the major structural limitation;

30. The provision e.g., that registered shares may only be kept by nationals (applied by Nestlé, FT 6/5/88, the holding of golden shares by the government, see infra p. 53, or, -more specifically related to a possible motive for takeovers: the market for corporate control-, the provision that (Footnote continues on next page)

directly aimed at foreigners, because equally applicable to nationals;³¹

It is more difficult to come up with a workable definition of what could possibly constitute a national interest. One attempt to define those interests presents two sides: there is a national concern, where there are anti-competitive effects (as said in the introduction, we will leave this mostly aside in this thesis), and where there are costs to be borne by the community as a whole, rather than by the merged firm. Here, one should think specifically of regional labor redundancies, arising after a takeover.³²

It still remains a vague concept. The group mentioned above will be referred to hereafter as 'stakes': they include various different interests at a national (federal) level, such as protection of the national economy, including national employment, or objectives of industrial policy; the argument for instance, that

(Footnote continued from previous page)

members of the Board of Directors shall be nationals of the state of incorporation (although it is not sure whether they would see to the actual protection of national interests);

31. This supposedly would be the explanation for the extensive system of defensive measures in the Netherlands, originally established to prevent an unfriendly takeover by a foreign party, see e.g. Rapport van de Commissie Beschermingsconstructies, aan het Bestuur van de Vereniging voor de Effectenhandel, Amsterdam (1987); maintaining the national interest came first, it is argued;

32. See: WEINBERG, BLANK, on Takeovers and Mergers, 4th ed., London (1979), pp. 8-12;

banks should not be owned by foreigners because they are instruments of national monetary policy. Stakes may vary largely, however, nor is it entirely clear what would be the direct effect thereupon of a takeover. Stakeholders may vary as well: they could be employees of the target, who are in a weak bargaining position at the time of a takeover.

Another reference to national interests, although in this context we should think more of a European interest, is to be found in a statement of the Commission of the EC of 22 March 1988 (concerning concentration control):³³

"As progress is made towards achieving the unified single market, national instruments (of concentration control) would not only prove to be increasingly ineffective: there would also be a damaging risk to the internal market if they were used to favour national champions rather than the interests of the Community as a whole."

If the Commission has its reservations as to the favoring of national champions in the context of concentration control, it should probably have the same fears in the field of takeover bids. This is because, as has been said before, albeit not always leading to distorting concentrations, an attempt to stop a merger at the time of such a bid might be equally motivated by the will to favor a national champion. An example that springs to mind first, and which we will treat below 3, is the Belgian Société Générale. Another example could be a national 'flag-state carrier' airline

33. EXPLANATORY MEMORANDUM, amended proposal for a Council Regulation on the control of concentrations between undertakings, COM(88) 97 final, Brussels (1988), p. 4;

company, the shares of which are publicly held for more than 50 %.³⁴ A potential takeover of such a champion might give rise to considerable popular opposition, not only where a foreseeable effect on the national economy will be perceived (stake), but even because the champion is being seen as having a symbolic value to the nation in which it is incorporated.³⁵

Probably the least debatable national interest, given the current state of international affairs, is where the target is of strategic interest to the country of incorporation. A takeover of such a target could definitely impair national security.³⁶ This argument is employed in American federal anti-takeover legislation,³⁷ but has also been advanced recently in the EC, by the British Plessey Corp., when confronted with an unfriendly takeover bid by GEC (British/American) and Siemens (German).³⁸ We have now identified at least three groups of national interests in relation to unfriendly cross-border takeovers: stakes, symbolic,

34. E.g. British Airways, after its privatisation in 1988; See: *The Economist*, (4-10/2/89), p. 18; Another example: the contention: "What's good for General Motors is good for America", "The national interest is almost always a bad argument for stopping takeovers", *The Economist*, (21-27/2/89);

35. MULDUR, supra note 19, p. 21, speaks in this context of the fear of loss of the national identity;

36. Id.; Muldur has identified two groups of national interests: "Symboles et Stratégiques"; As to strategic interests, see also: *The Economist* (21-27/2/88), p. 19;

37. See infra p. 67;

38. See: *FT* (9/1/89), p. 1: "Raising the prospect of a highly politicised struggle over the issue of British high technology and defence assets falling into foreign hands." It must be added here, that Plessey has not left any means unemployed, to try to stop the takeover;

and strategic. Maintaining a competitive national market is a possible fourth group, but this group will be left aside in this thesis.

On a Community level, only indirect reference is made to national interests. The Treaty of Rome contains both prohibitions on discrimination on nationality grounds, such as Article 7,³⁹ Article 52,⁴⁰ relating to the freedom of establishment, or Article 67,⁴¹ relating to free movement of capital. However, the Treaty also contains certain provisions that point at the possibility to defend national interests: Art. 56⁴², whereas a

39. Art. 7 EEC reads as follows: "Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. The Council may, on a proposal from the Commission and [in cooperation with the European Parliament], adopt, by a qualified majority, rules designed to prohibit such discrimination."

40. The relevant part of Art. 52 reads: "Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be abolished by progressive stages in the course of the transitional period. Such abolition shall also apply to restrictions on the setting up of agencies, branches, or subsidiaries by nationals of any Member State established in the territory of any Member State." (...)

41. Art. 67 : "1. During the transitional period and to the extent necessary to ensure the proper functioning of the common market, Member States shall progressively abolish between themselves all restrictions on the movement of capital belonging to persons resident in Member States and any discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested. (...)"

42. The relevant part goes: "1. the provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health. (...)"

possibility to defend security interests may follow from Art. 223 (1) (b).⁴³

A definition of national interests, in the case of an attempted foreign takeover could be: concerns that transcend the corporation which is the target of an unfriendly cross-border bid. The question then arises who is the best decisionmaker on such national interests? A line must then be drawn between identifying which interests concern a larger entity than the corporation (define the national interest), and establishing which actor can invoke legitimately such an interest against the foreign bidder. The whole issue seems to be closely intertwined with theories of sovereignty of states. Does the interest at stake concern the nation? We will investigate this below on the basis of the economic theory of federalism. The next paragraph, however, serves to illustrate 1. what is perceived as an example of a national interest (as set out above) in one of the EC Member States and 2. why establishing a supra-national decisionmaker on legitimacy of an invoked national interest is required.

43. Art. 223 (1) (b): "1. The provisions of this Treaty shall not preclude the application of the following rules:
(...)

(b) Any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not, however, adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes. (...)"

2.3. Tender is the Knight: De Benedetti and La Société Générale

The difficulty in assessing the importance of this case lies in the fact that the actual rationale for wanting to stop the De Benedetti takeover was surrounded by a whole spectrum of corporate tactics to thwart the bid. The underlying argument, however, was made clear by the Press: that la Générale should remain in Belgian hands.⁴⁴

The facts, briefly stated, are as follows: on January 17, 1988, the French Cerus corporation (held by De Benedetti), having acquired an 18 % stake on and outside of the stock exchange, launched a takeover bid for La Générale. The same day, this was officially communicated to the Commission Bancaire, a Belgian takeover monitoring agency. In the night of 17/18 January, the Société Générale increased its capital, by issuing authorized capital.⁴⁵ This poison pill, if sufficiently subscribed to, would significantly diminish De Benedetti's voting stake. On January 18, Cerus filed a petition to obtain an injunction prohibiting this capital augmentation. Arguing that the augmentation had already taken

44. See inter alia: FT: 19/1/88, 19/2/88, 20/2/88, 17/3/88, 25/4/88; The Economist, 23/1/88, quoting Eyskens that la Générale was a lever of (Belgian) Economic policy;

45. See also: PHILLIPS, "The Battle for la Générale", , Inst. inv. 94 (1988);

place the previous night, Cerus filed a second unilateral petition, on the 19th, to block the new stock held by Sodecom, a subsidiary of La Générale, which had subscribed to the augmentation. The Commercial Chamber of the Brussels Court held, in the first of two rulings, that such augmentation was unacceptable, and suspended the rights attached to the new shares in the second.⁴⁶ Two other rulings were delivered, on February 9 and 18, 1988.⁴⁷

The decisions were appealed, and on March 1, 1988, the Cour d'Appel delivered a decree establishing that systematic stock exchange purchases are not the same as a takeover bid, and issued the following ruling as to the means used by La Générale, to fend off Cerus/De Benedetti:⁴⁸

1. the use of authorized capital, combined with augmentation thereof may be legitimate when taking into account corporate interests; 2. abolition of preferential shareholders' rights is justified to maintain a widespread shareholders' group; 3. newly created titles may be subscribed by a subsidiary, if the autonomy

46. Ordonnances du Tribunal de Commerce: Comm. Bruxelles, 19 janvier 1988, 21 RDC/TBH 512 (1988), p. 535; Comm. Bruxelles, 20 janvier 1988, 21 RDC/TBH 512 (1988), p. 538;

47. Comm. Bruxelles, 9 février 1988, 21 RDC/TBH 512 (1988), p. 540; Comm. Bruxelles, 18 février 1988, 21 RDC/TBH 512 (1988), note, p. 566, relating to capital augmentation of shares of subsidiaries of La Générale; The Commercial Chamber acknowledged the role of these industrial corporations in defending national interests: "(...) rappelons-le, sont avant tout des sociétés industrielles et de service avant d'être des "holdings", de préparer l'échéance 1992, de veiller au maintien de l'emploi et de maintenir un secteur énergétique (...) exemplaire, vital pour notre économie nationale." (p. 567);

48. Arrêt de la Cour d'Appel, 1 mars 1988, 21 RDC/TBH 512 (1988), pp. 512-534;

of that subsidiary is not fictitious and if the subsidiary is not being employed against the law; 4. procedural flaws either in the augmentation of capital decision, or the determination of that augmentation, do not necessarily make those decisions null and void, where a regularization is thinkable.

This appeal decision thus authorized ex post all measures taken by La Générale to keep De Benedetti from control, making his experiment in the nascent world of continental unfriendly takeovers a rather expensive experience.

This case demonstrated the necessity for a set of clear rules in the field of takeovers; and it propelled the European Parliament to urge the Commission finally to come with its proposal.⁴⁹

The most interesting aspect of this case for our purposes however, is the following consideration presented by the Cour d'Appel:⁵⁰

"Rien n'empêche en outre le conseil de tenir compte de la politique industrielle de la Belgique et de l'emploi: la loyauté confédérale et les dispositions de l'Acte Unique (Dutch text: "EEG-verdrag = Treaty of Rome") n'imposent pas, de lege lata, au conseil de s'abstenir de telles considérations (Dutch text: "nationale belangen = national interests")

This part of the decision was delivered in response to an argument by a jointly interested party, de Jode.⁵¹ The argument in

49. JOINT RESOLUTION, on takeover bids by the European Parliament, OJ 68/76 (1988);

50. See Comm. Bruxelles, 21 RDC/TBH 512 (1988), p. 513;

51. Ibid., pp. 521ff;

effect asserted that La Générale had violated norms of European Law, in particular Articles 7 and 52 EEC,⁵² by increasing its capital. Before analyzing the contention of de Jode, the Court established that the formulation of economic principles, or the most desired economic structure, should be left to the organs of the corporation. It then went on to find that under Belgian law, no limits are placed on the competence of directors to increase the corporation's capital, as long as they take into account the enterprise interest in so doing. They also must consider directives of the general shareholders' meeting (i.c., the last shareholders meeting had taken place on September 8th, 1987: interestingly, the Board had tried on that occasion, to push through a capital augmentation, but had failed to do so, cf. p. 546). The Court went on to say that an augmentation of capital was the only means under Belgian law to fend off an unfriendly takeover bid running counter to the enterprise interest, even though such a course might constitute "détournement de procédure", when aimed exclusively at the bid.

The intent of the augmentation allegedly was to maintain a widespread group of shareholders, all in the enterprise interest. This stated rationale seems questionable, especially in light of the several white knights the Société Générale called upon. In February (that is, before the March 1 ruling), several friendly

52. For English Text of these provisions see respectively, supra notes 39 and 40;

camps held significant stakes.⁵³ This circumstance ran counter to the decision made in the shareholders' meeting of September 8, 1987, not to allow any shareholder to exert preponderant influence.

In deciding whether the Société Générale sufficiently had considered the enterprise interest, the Court examined certain declarations of La Générale. The Court's findings here, while crucial, can only be considered ill-advised: according to the Court's findings,⁵⁴ the Société Générale had wanted to reckon with the interests of Belgium and its industrial policy. This kind of concern, the Court asserted, was completely legitimate, given that economic policy on the European plane was still made largely by way of national mechanisms. Thus, a Belgian corporation, when elaborating its business strategies, could consider national interests, especially those relating to employment or industrial development. It must be noted that La Générale may be considered unusual, due to its control of a considerable number of Belgian corporations.⁵⁵ However, the point remains that the Belgian Court deemed the defense of national interests a legitimate goal for any Belgian corporation, regardless of its size...

Those corporations most likely to be the target of takeover bids are the very large ones, with a widespread shareholders' group.

53. See eg. FT 12/2/88;

54. Comm. Bruxelles, 21 RDC/TBH 512 (1988), p. 523;

55. It controlled 1.261 corporations worldwide at the beginning of 1988, according to: PHILLIPS, supra note 45, p 94;

According to the Court, such a corporation, to the best of its ability, should always attempt to keep foreign investors from influencing national policies. The Court's position might at first sight suggest a liberal stance as to the identity of the national economic policy maker: i.e. this role is left to the corporation; However, one could argue instead, that the national economic policy maker will usually be a constituent of the (government) executive, and not of the corporation. If this turns out to be the case, many different (industrial) economic policies, all advanced by the various large corporations, potentially would come into force within one country. However, even were these policies to be left to large corporations, it would still remain unexplained why also small corporations should be guardians of national interests. Nor is it altogether certain, that the economic policy of a target company is more suitable than the prospective policy of a bidder. In fact, an unfriendly takeover bid is often launched simply because the bidder feels that he is better able efficiently to exploit the target's assets.⁵⁶

Of special importance, the Brussels Appeal Court argued, was that the appreciation by the Board of those interests would be reasonable, even if this appreciation eventually revealed itself erroneous. The Court thus allowed the directors a considerable amount of latitude in establishing the enterprise interest and the

56. Because the shares are undervalued and because it becomes interesting to offer a premium, see references supra note 5;

interest of Belgium. Such considerations in themselves are laudable; nevertheless, the potential for abuse exists. In particular, directors might stretch their discretion in order to secure their own positions, when confronted with a prospective unfriendly takeover. Of course, the Court posited the solution to this problem: the general national interests and the enterprise interest would have to transcend the private interests of the directors.⁵⁷ The directors' behavior could never contravene any tenet in the Single Act, not even the policy of creating the internal market, for the reasons cited previously: La Générale's policy was sound. Does this assertion not perhaps entail a judgment on economic principles/structure, and thus to be avoided by a judge, as the Court itself set out at the beginning of the case?

The Court in essence held that no direct effect could be given to any provision of the Treaties that incited the Member States to give way to their confederal loyalty (?). Articles 7 and 52 EEC were not violated, the Court said. The fact that Cerus had been a French corporation, had played no role at the augmentation of the capital although the Board had stated clearly that La Générale should remain in Belgian hands. This last contention seems to contain a paradox: a Belgian corporation is entitled freely to

57. Comm. Bruxelles, 1 RDC/TBH 512 (1988), p. 523; Cf. business judgment rule, infra note 95, as was established, inter alia, in Unocal, infra note 97; the burden of proof lies with the plaintiff;

defend national interests and thus keep out any bidder, including even a Belgian one. La Générale did not discriminate on the basis of nationality, although it not only withdrew the preference connected with the shares held by Cerus, but also ensured that the capital increase was placed with some white knights, its subsidiaries (which happened to be Belgian controlled). Indeed, the Court repeatedly emphasized that a widespread group of shareholders was paramount to the enterprise interest, even though at the time the ruling was delivered, few parties held large blocks of shares.

The case was not referred to the EC, for the simple reason that there would be no competence under the Treaties.⁵⁸

The Belgian Court did not detect unreasonableness in the balancing of capital augmentation with enterprise interests. It is extremely unlikely that a Community organ would have reached the same conclusion. A remark by a European MP may serve to illustrate this:⁵⁹

"Beyond our nationalities and our national interests, we are capable of speaking the same language which is the language of European Integration, harmonization of law, and company integration at Continental level".

Consistent EC policy in this matter would have necessitated that fair weight would be given to the promotion of competitiveness. As later became clear, La Générale had not been run efficiently,

58. See DEBATES European Parliament, OJ Annex No. 2-361 (11/2/88), p. 213: Clinton-Davis asserts that: "no approach has been made to the Commission;"

59. Cf. GAWRONSKI RESOLUTION, Doc. B 2 - 1737/87, OJ Annex No. 2-361;

prior to the takeover bid (nor had there been a fair representation of national interests on the Board, which consisted completely of French-speaking aristocrats). De Benedetti's tender offer probably woke the dormant directors (albeit to find a white knight to protect them). But neither the directors of La Générale, nor the Brussels Court of Appeals can be considered the right actors to balance both the national public interest and the enterprise interest with the use of (other) defensive tactics. Allegedly, the augmentation of capital had been made subordinate to the real 'higher aims'; however, the real reason for the augmentation was to dilute the Cerus holding, and to keep the directors safely in their seats. The Board of Directors can hardly be judged to have been to scrupulous arbiters of crucial national interests within the course of one night. A decision on such short notice can not, without further justification, be judged a reasonable one. The Court should not have reversed the two rulings of January 19 and 20 of the Commercial Chamber of the Brussels Court, on the grounds offered.

That it is not to say that a stand is taken here on the interest of La Générale or of de Benedetti; it should suffice to conclude here that a neutral arbiter is required where takeover bids are launched by one Community actor, whether private or corporate, for a corporation in another Member State. Because then there exists a more realistic opportunity to weigh other specific interests

than those of shareholders without the likelihood that the weighing of those interests will lead to the forcing into a weaker position of the foreign bidder. A national court in the country of origin of the target just is not the right institution to weigh these matters.

3. REGULATION OF TAKEOVER BIDS IN THE EC

3.1. Introduction

Cross-border takeovers are becoming more frequent within the EC. On the whole, 1986/87 (the last year for which community data are available in this respect) showed a 45 % increase in Community operations; because this figure is not broken down into mergers and friendly takeovers on the one hand, and unfriendly takeovers on the other, no significant conclusions may be drawn from the data for our purposes.⁶⁰

In this chapter, the regulation of takeover bids in the EC will be examined more closely, with specific reference to national interests. A short analytical excursion will be made into the law of some Member States, to illustrate the varying national attitudes *casu quo* rules in this field. The underlying thesis is, that national interests as defensive measures are likely to endanger the economic integration process. To this effect, a few actual cases will be discussed briefly.

3.2. National Interests and the Enterprise Interest

The phenomenon of greatly differing business cultures among the Member States explains why attitudes towards unfriendly takeovers

60. See for data: Seventeenth Report on Competition Policy, Brussels (1988) pp. 227ff;

vary, and also why the EC are posed with substantial technical problems. In order to determine the right decisionmaker on the content of a national interest, and on its legitimacy, the national interest -as abstract as this interest is- may alternately be viewed on the level of the corporation, or on a more public level. Here a short remark will be made on the national interest under the legal theory of the enterprise interest, i.e. the social interest of the enterprise in itself.

(We will deal with the public interest approach below).

In this theory, the 'corporate actor' is seen as an autonomous system of actions, directed at the social function and performance of the corporation in itself.⁶¹ Its aim is to act in the interest of society as a whole, an interest which strengthens the corporate actor and its autonomy against the several partial internal interest groups (directors/shareholders/employees).⁶² The difficulty in the area of unfriendly takeovers emerges not so much in the social function concept of the enterprise, but rather where we are forced to identify the individual actions in the takeover process.⁶³ It is not difficult to argue that a national interest, such as securing employment, -or even symbolic value of the corporation-, coincides with the enterprise interest. It is

61. See: TEUBNER, "Unternehmensinteresse - das gesellschaftliche Interesse des Unternehmens 'an sich' ?", 149 ZHR 470 (1985), pp. 470-472: "(...) das Unternehmensinteresse [ist] darauf gerichtet, solche Organisationsstrukturen zu schaffen, die eine optimale Abstimmung von gesellschaftlicher Funktion und gesellschaftlichen Leistungen des Unternehmens ermöglichen." [emphasis in original];

62. Cf. TEUBNER, "Enterprise Corporatism: New Industrial Policy and the 'Essence' of the Legal Person", 36 Am. Journ. Comp. L. 130 (1988);

63. Ibid., p. 134;

difficult however, to perceive the role of the corporate actor at the time of the takeover bid. Various independent mechanisms are in force: the bid tries to pass the directors, by addressing itself immediately to the shareholders; it affects the employees, and the enterprise itself (e.g. organizational structure), but the involvement of these constituents is indirect. It would be inherently paradoxical then, to leave the actual defense of the national interest to the directors, whose position is being threatened, or to the shareholders, who are unlikely to be objective when balancing price and interest, or to the employees, who are placed on a side-track. A takeover bid threatens the autonomy of the enterprise (even when the bidder is an autonomous corporation itself). The problem of the national interest also encroaches onto the autonomy of the enterprise and shifts the prospective decision on the desirability of continuation of the existing organizational scheme away from the enterprise, to place it at a supra-enterprise level.

3.3. Community Law regarding takeovers

If we reason from the premise, that a supra-state judgment of national interests is required, the question then arises: is this adequately dealt with in the EC?

3.3.1. Foundations/Aims of the Takeover bid Proposal

In the early seventies, the British professor Pennington presented a report to the Commission of the EC, regarding takeover and other bids;⁶⁴ the proposal emanating from this report was tabled in December 1988.⁶⁵ It is important to realize, that the regulation proposal is concerned solely with takeover bids. The proposal aims at a Directive in the framework of harmonization of Company Law; its legal basis therefore is art. 54 (3) (g) EEC.

The need for harmonization relating to takeover bids basically arose out of two completely different causes: on the one hand, the fact that in business practice, this form of financial operation, *casu quo merger*, was becoming increasingly the normal state of affairs (cf. the takeover wave at the end of the sixties) with the possibilities of fraud or unfair trade practice arising therefrom; on the other hand, as Professor Pennington acknowledged,⁶⁶

64. PENNINGTON, *supra* note 2;

65. TAKEOVER BID PROPOSAL, *supra* note 4;

66. Cf. PENNINGTON, *supra* note 2, Introduction I-III;

the various ways in which this problem was regulated, - if regulation was in force at all -, in the Member States. Consequently, as a practical necessity, a basic need for harmonization existed under art. 54 of the Treaty of Rome.

The causes for the indefinite postponement of the proposal are not clear,⁶⁷ although it seems that the situation in practice is largely to be seen as the driving force behind the proposal.⁶⁸

It goes beyond the scope of this thesis, to present here an extensive technical analysis of both the Pennington Report Model Directive and the Takeover bid Proposal. It is useful however, to take a closer look at the legal-political foundations and the aims underlying the proposal, after which several articles of the Takeover bid Proposal will be examined.

Along with a more general harmonization objective, the legal-political foundations of the Draft Directive are three-fold: 1. the necessity of ensuring equal treatment of all shareholders,⁶⁹ 2. the necessity of ensuring the transparency of activities relating to the (pre) bidding procedure, and 3. the necessity of taking into account interests of other involved parties, such as target employees.⁷⁰

67. "Material Constraints" was one reason for such delay, offered by Commissioner Narjes in response to a parliamentary written question by Sir Peter Vanneck, of 10 March 1983, Written Question No. 2325/82, OJ No. C 189/23, Brussels (1983);

68. This would explain why the proposal was finally reanimated in 1987, at the time of another takeover wave and the Big Bang in stockmarkets;

69. Which is actually expressly stated in the Commentary and regulated in Art. 3, See TAKEOVER BID PROPOSAL, supra note 4;

70. Id.;

The goals addressed by the proposal parallel these foundations: the explanatory memorandum and the article-by-article commentary clearly mention the aims, "to afford shareholders and other interested parties equivalent standards of protection before the law in all Member States"⁷¹ and "to inform those chiefly concerned by the operation of its consequences",⁷² the latter statement being made with regard to employees. If these aims are well-considered and if they are supported by an acknowledgement of the most important perspectives in force in the Member States, the elaboration in the directive of the protection of employees appears to be rather weak, as will be seen below.⁷³

3.3.2. The Proposal

Re-initiation of a proposal concerning takeover bids came about after a Resolution was passed in the EP.⁷⁴ By way of this Resolution, the Parliament called upon the Commission finally to submit the proposal, while specifically mandating that there be no discrimination between Community citizens and firms. Interestingly, this Resolution arose at the time of the battle for the Société Générale, which led to some commotion in the EP.⁷⁵

71. Ibid., Explanatory Memorandum para 2, p. 2;

72. Ibid., Commentary Art. 19, p. 19;

73. Cf. BEHRENS, Rechtspolitische Grundsatzfragen einer europäischen Regelung für Übernahmeangebote, 4 ZGR 433 (1975), p. 437;

74. JOINT RESOLUTION, supra note 49;

75. See in particular Docs. B 2-1737/87 and 1760/87;

The Final draft, adopted by the Commission on December 22 1988, most likely will not survive in its current form.⁷⁶ In treating the Draft, a distinction will be made among those provisions relating to disclosure matters, those relating to conflicting interests and those relating to monitoring.

3.3.2.1. Disclosure Matters

Art. 10 of the proposal sets forth disclosure requirements as to the contents of the offer document.⁷⁷ These are minimum prerequisites, and Member States may decide that additional information has to be made available. The named requirements seem to draw heavily from those in the City Code on Takeovers and Mergers; for instance, Art. 10 (1) 1 requires publication of the intentions of the bidder regarding, inter alia, the target's employees.⁷⁸ This rule suggests that the proposal must take into account somewhat the employees' interests immediately at the occurrence of a bid,⁷⁹ although it is not at all certain whether shareholders

76. For this thesis, the Draft as it stood on February 19th 1989, the date of its publication, shall be considered to be "the Law". In an interview of May 23rd with Ms. Basaldua, attached to DG XV of the Commission and in charge of the proposal, I was informed that as of that day, the proposal was going through the first reading in Parliament and that an advice had been submitted by the Economic and Social Committee (see below);

77. Art. 11 points out how, and where the offer document should be published;

78. Cf. General Principles 15-18 of the City Code; Besides this, Art. 10 (1) 1 also requires information regarding composition of the Board and prospective assets' use, whereas Gen. Princ. 15 demands "the long term commercial justification for the proposed offer" in addition to everything else;

79. See TAKEOVER BID PROPOSAL, supra note 4, p. 11;

would be influenced by such information; if the effects on employment would be negative but the shareholders' premium very large, public opinion would have to influence the shareholders to the extent that they would not tender, which is unlikely to happen in reality.

Art. 7 deals with the procedure prior to publication: the offer document must be communicated to the competent supervisory authority (see below) and the target board, Art. 7 (3).⁸⁰ In order to retain an open and orderly securities market, Art. 7 (1) requires the immediate publication of the intention to launch a bid.⁸¹

Of special interest is the provision in Art. 14 (1), stating that the target board must draw up a detailed report giving its views on the bid and setting out arguments for and against acceptance.⁸² According to the Commentary, this provision is aimed mainly at friendly takeovers.⁸³ One of the weaknesses of the proposal is highlighted here: it does not explicitly distinguish between friendly and unfriendly takeovers. Obviously, if the bid is unwelcome to the target board, it will do anything in its power to fend off the bid. To "legalize" the possibility of the target

80. Cf. the Pennington Model Directive, Art. 4, which sets out a seven days window;

The period for acceptance, should be stated in the offer document and may not be less than four, not more than ten weeks, Art. 12; Cf. the Williams Act and the City Code;

81. Cf. PROPOSAL for a Council Directive coordinating regulation on insider trading, COM(87) 111 final, OJ C 153/8, Brussels (1987);

82. Cf. Gen. Princ. 17 (2) of the City Code, which speaks of "advising" and merely requires disclosures of target shareholdings in the bidder;

83. Commentary, pp. 16-17;

board offering "its views" could constitute needless encouragement for the target to exert undue influence upon its shareholders under the guise of a required report.⁸⁴ It would be more logical to distinguish more plainly between unfriendly and friendly takeover bids under this heading.

The mentioned articles⁸⁵ show that openness is the name and disclosure the game; however, less thought seems to have been given to the usefulness of certain disclosures.

3.3.2.2. Conflicting Interests

As the Pennington Report asserted on several occasions, the competition aspects of a takeover are an entirely different matter and therefore should not be regulated by the proposal at consideration.⁸⁶ Pennington ignored the fact, however, that other aspects, such as public (national) interest may play a role in certain takeover bids. Art. 13 (d) of the Takeover bid Proposal provides somewhat enigmatically that a bid may be withdrawn "where the necessary judicial or administrative authorization is not obtained...", and then refers to merger control authorization.⁸⁷

84. At any rate, target boards in unfriendly takeover battles always try everything to persuade their shareholders, the public etc. that the takeover is bad, (see the GEC/Plessey battle for a fine example of this). The fact, that the Board is supposed to act in the best interests of the company, Commentary p. 17, does not detract anything from the doubtfulness of Art. 14;

85. Also dealing with disclosure is Art. 18, publication of the result of a bid;

86. See e.g. PENNINGTON, supra note 2, Introduction III, para 77, etc.;

87. Art. 13 deals with permitted withdrawals of takeover bids;

At any rate, it means that a national authority is just as able as a Community authority to refuse authorization. This Article is of quintessential importance for our argument, as will be demonstrated in chapter 5.

The proposal also tries to balance corporate actors' interests. Launching a bid becomes mandatory as soon as 33 1/3 % of the voting rights in a certain corporation have been acquired, although Member States may fix a lower threshold, Art. 4; the ratio here is shareholders' protection, as may be seen from Art. 3;

With respect to Art. 8, the Commentary notes that managers must act in the interests of the company. Yet, Art. 8 (a) clearly is aimed at protecting shareholders' interests: it prohibits poison pills, or at least the issuance of securities carrying voting rights without shareholders' approval after an Art. 7 (1) disclosure.⁸⁸

Although protection of employees' interests is a fundamental objective, according to the Commentary, Art. 19 only states briefly that the target board must communicate certain documents, such as the offer document (which may be found in a national newspaper anyhow) to any existing workers' representatives. The delineated role of the employees can hardly be less passive than that of their counterparts in American takeover battles. When we

88. It is unlikely that this provision will survive, as it stands today; If Art. 8 could have consequences for Dutch practice it is noteworthy that several triggering measures still would be permitted; e.g. the issuance of certain options in respect of unissued shares (cf. rule 21 sub (b) City Code); Meanwhile, Dutch corporations e.g. strongly oppose Art. 8; Source of information: private conversation with Mr. D. Cross of the Amsterdam Stock Exchange, on May 23, 1989;

compare the final Draft with Pennington's Model Directive, the Draft seems to be little more than a weakness bid.⁸⁹ At least in Pennington's Draft the board was to present a written explanation of the bid document to its workers within seven days after the bid had been launched, as well as its opinion on the prospective takeover and its consequences, within fourteen days. Furthermore, the Board was compelled to discuss it with the employees ('representatives'), Art. 13 A of Pennington's Model Directive. Then too, workers retained the right to express their opinions on the matter in written (not very earthmoving competences). Why are these not found in the present version of the proposal?

The preamble asserts that the drafters took the Social Policy of the Community into account, but except for two rather insignificant references to employees, no further steps are taken to secure their interests in the case of a takeover.⁹⁰ The Takeover bid Proposal is markedly shareholder- and transparency- minded.

3.3.2.3. Monitoring

The most severe flaw of the proposal lies in its failure to provide a Community-level supervisory authority. In an

89. Cf. PENNINGTON, supra note 2, paras. 98-100;

90. Although workers' representatives do have some rights under the Council Directive of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, 77/187 EEC OJ No. L 61/77, Brussels (1977);

Information Memo of last December⁹¹ the Commission stated that takeovers promote integration. However, in the case of a cross-border takeover bid, a national authority would be competent, and then only to ensure that the technical demands regarding the bidding procedure, as set out in the Directive Proposal, were to be put into effect.

In addition to relegating the matter of installing a national supervisory authority to the discretion of the Member States, Art. 6 of the proposal (which deals with the supervisory authority) also leaves it to the Member States to decide what kind of supervisory authority should be installed; as for example, in the UK the Takeover Panel, in the Netherlands the Stichting Toezicht Effectenverkeer,⁹² in France the Commission des Operations de Bourse,⁹³ in Belgium the Commission Bancaire, in the FRG the Bundeskartellamt???. Is it likely that these varied bodies, which are not only defending various interests but also rather specialized, will effectively screen even the disclosure requirements? Not to mention those varied other interests.

Of paramount importance is the fact that these authorities most likely will work from a national point of view and consequently will make it more difficult for a bidder from another Member State, to redeem his bid.

91. INFORMATION MEMO, supra note 1; relevant quotation in text;

92. See BESLUIT Minister van Financien, "Toezicht Beurswezen", Den Haag (1989);

93. PROJET DE LOI, Ministère de l'économie, des finances et du budget, "sur la sécurité et la transparence du marché financier", Paris (1989);

Moreover, as mentioned previously, a national supervisory authority would in theory only be competent in matters set out in the Directive. As will be demonstrated, a gap might exist here: even if transparency interests are defended, and even if there are no anti-competitive effects, a takeover might infringe on other interests. These interests are perceived to be national issues, as was illustrated in chapter 2 by the description of a the de Benedetti procedure, involving a bidder from another Member State.

The Takeover bid Proposal was discussed in a meeting of the Economic and Social Committee of the EC, on 17 April 1989.⁹⁴ According to the Committee, the most glaring weakness of the proposed Directive is the lack of punitive measures, but more importantly:⁹⁵

"(...) the failure to provide for Community-level supervision and overall responsibility, as might reasonably have been expected."

The Commission is not in favor of this argument.⁹⁶ Two factors help explain this lack of enthusiasm: (1) the current proposal is for a directive, thereby leaving its legal elaboration to the Member States and (2) it will be very difficult, to produce a uniform non-compromise text, which recognizes the need to monitor other than competition interests at a Community level.

94. See: WORKING DOCUMENT, of the Section for Economic, Financial and Monetary Questions on the Proposal for a Thirteenth Council Directive on Company Law concerning Takeover and Other General Bids, R/CES 376/89 - SYN 186 hm Brussels (1989);

95. Ibid., p. 2;

96. As I was informed in a private communication, by Mr. Fransisco Drago, Rapporteur of the Economic and Social Committee;

3.3.3. Related Community Law and Court Decisions

The Community's competence in the field of takeovers arises first and foremost in the context of Articles 85 and 86 EEC.⁹⁷ Neither of these specifically applies to takeovers; only the merger control regulation, if adopted, would establish direct competence in this field. The Continental Can case, prohibiting a takeover on the basis of Art. 86,⁹⁸ contains the only formal decision adopted by the Communities. It held that this article applies only when one of the companies concerned has a dominant position;⁹⁹ there must be substantial effects on competition. In the Court's opinion, the problem with regard to Art. 86 EEC was whether, on its own, it was an adequate instrument of merger control.¹⁰⁰ Because the Commission was not allowed to grant an exemption to those takeovers (mergers), which although they came

97. Art. 85 (3) EEC provides for exemptions to the rule of Art. 85 (1), which states that "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market (...)" shall be prohibited as incompatible; Art. 86 EEC gives some examples of abuse of dominant position within the common market, which shall be prohibited as incompatible "in so far as it may affect trade between Member States";

98. Case 6/72, Europemballage Corporation and Continental Can Co. Inc. v. Commission, E.C.R. 215 (1973);

99. I.e. prevention of effective competition in the relevant market, because a company enjoys position of economic strength and is able to behave independently from its competitors (and customers/consumers), Case 85/76, Hoffman La Roche and Co. A.G. v. Commission, E.C.R. 461 (1979), p. 520;

100. Cf. KLUWER ED., Merger Control in the EEC, Deventer (1988), pp. 239ff;

under the Art. 86 prohibition, would prove nonetheless to be in the Community interest, for instance because such takeover would bring benefits relating to employment or would be essential for regional development. This restriction made it impossible for the Commission to take these factors into account in attempting to promote the Community interest.¹⁰¹

In the Philip Morris case, the Court found that Art. 85 may be applicable to acquisitions.¹⁰² As one of the essential considerations the Court stated that an agreement whereby one company acquires a shareholding in a competitor can fall within art. 85, where it is shown that the acquisition of such shareholding can have the effect of restricting competition. This occurs both when the interest acquired is a minority interest, and where the investing company acquires legal or de facto control over the commercial conduct of the other company. The Court did not address the particular difficulties of applying this article to unfriendly takeover bids. Upon closer scrutiny, such an application would seem possible in a strictly legal sense, but completely

101. That the Commission was willing to do so may be deduced inter alia from statements in e.g. the Tenth Report on Competition Policy (1980), point 21;

102. Cases 142/84 and 156/84, British American Tobacco Company Limited and R.J. Reynolds Industries inc. v. Commission of the EC, supported by Philip Morris Inc. and Rembrandt Group limited, 4 C.M.L.R. 24 (1988); See FEENSTRA, "Fusiecontrole door de EEG na het Philip Morris arrest", 66 NV 2 (1988); FINE, "The Philip Morris judgement: Does Article 85 now extend to mergers?", 8 Eur. Comp. L. Rev. 4 (1987); KORAH, LASOK, "Philip Morris and its aftermath - merger control?", 25 C.M.L.Rev. 333 (1988); RIESENKAMPF, "Auswirkungen des Urteils EuGH vom 17.11.1987 ('Philip Morris')", 38 WuW 465 (1988);

impracticable in reality.¹⁰³

The interpretation of paragraph 31 might lead to the conclusion that Art. 85 would apply when there is an agreement¹⁰⁴ and where parties remain independent; However, analogous to art. 85, those parties must be deemed to be 'undertakings'. Consequently, this provision would apply to an investor company, but not to single shareholders. This seems to be the view of the Commission. Moreover, it would be practicably impossible to trace all original sellers of the shares, when those agreements would be declared null and void ex Art. 85 (2).

Of prime importance is whether Community interests override national interests. First, it must be remembered that concurrent jurisdiction exists in the field of merger and takeover control. Concurrent jurisdiction in the EC was established in the Walt Wilhelm v. Bundeskartellamt case.¹⁰⁵ The parallel application of national and Community law is possible as long as the application of national law does not imperil the full and uniform application of Community law: Community law takes precedence where there is a

103. See KLUWER, supra note 100, pp. 275-279; Cf. in this respect para. 31 of the Philip Morris case; "Since the acquisition of shares of Rothmans Inc. was the subject matter of agreements entered into by companies which have remained independent after the entry into force of the agreements, the issue must be examined first of all from the point of view of Art. 85";

104. even in the case of a friendly bid, doubts as to the existence of an agreement prevail: the Board of the target (undertaking) could e.g. independently advise the shareholders to tender to the bidder; in this case, there would be no agreement;

105. Case 14/68, Walt Wilhelm v. Bundeskartellamt, E.C.R. 1 (1969);

conflict. However, the Commission has also asserted that no objection is permitted to a prohibition on the basis of stricter national law.¹⁰⁶ At any rate, under the proposed Merger Control Regulation, concurrent jurisdiction applies. This is not the case for the Takeover bid Proposal.

The Merger Control Proposal¹⁰⁷ will not receive detailed analysis here. Suffice it to say, the Regulation will encompass concentrations with a Community dimension, even if they do not fall within the scope of Articles 85/86.¹⁰⁸ The Merger Control Proposal foresees in the prior notification of concentrations (Art. 4), but does not compel suspension of a notified takeover bid, provided that the acquirer does not yet exercise the voting rights attached to the shares in question.¹⁰⁹ This means that no

106. See Tenth report on Competition Policy (1980), point 155; On the other hand, Commission officials have argued that Community law overrides. According to HORNSBY, "National and Community Control of Concentrations in a Single Market: Should Member States be Allowed to Impose Stricter Standards?", 13 Eur. L. Rev. 295 (1988); Hornsby concludes that Community supremacy in this field is weak on both legal and political grounds;

107. AMENDED PROPOSAL for A Council Regulation (EEC) on the control of concentrations between undertakings, COM (88) 734 final - revised version, OJ C 22/06, Brussels (1989);

See inter alia: SUTHERLAND, "The New Proposals of the Commission on Concentration Control", Eur. Aff. 46 (1988); KORAH, "The Control of Mergers under EEC Competition Law", 8 Eur. Comp. L. Rev. 3 (1987);

108. The Community dimension is determined on turnover consideration grounds, so that e.g. not every cross-border bid would fall per se under the scope of the Regulation. The Commission then has the power, ex Art. 8 (1) Regulation, to decide whether a concentration with a Community dimension is compatible with the common market;

109. Cf. TAKEOVER BID PROPOSAL, supra note 4, Art. 13 (d);

decisions are made by the bidder about the target corporation, as long as the concentration issue has not been settled.

The Merger Control Proposal does not clarify the issue, simply because, from the perspective of this thesis, anti-competitiveness is not necessarily the stake. At any rate, it still is possible that that target of an unfriendly bid will try to exploit the competition question as a defensive measure.¹¹⁰ The original Merger Control Proposal did contain an exemption in Art. 1 (3) for mergers "which are indispensable to the attainment of an objective which is given priority treatment in the common interest of the Community"; this provision thus left more space to take into account interests other than competition, such as stake interests. It has not survived in the current proposal.¹¹¹ The revised proposal somewhat enigmatically provides in the preamble (points 27-28) that, although in principle national legislation is preempted by the regulation, Member States may take appropriate

110. The legal strategy to refer a bid to national or Community competition policy authorities, in order to thwart the bid; The conclusions as to this tactic is that directors should put such arguments directly to shareholders: LOFTHOUSE, "Competition Policies as Take-over Defences", Journ. of Bus. Law 320 (1984);

111. Cf. Art. 2 (3) of the Merger Control Regulation Proposal; Meanwhile, the Commission is of the opinion that the provision of employment falls under the Art. 85 (3) exemption, if it is deemed to improve general conditions of production; See: WRITTEN QUESTION No. 1765/88, of David Martin, OJ No. C 180/74, 17 July 1989, Brussels (1989); Mr. Martin wanted to know, whether the Commission provides measures for the protection of regional markets, with specific reference to extra-Community takeovers. The answer offered gave the employment example, after relentlessly having repeated once again the aims of the Merger Control Proposal and the Takeover bid Proposal;

measures to protect legitimate interests "other than those pursued by this Regulation". Here, the Commission may take into consideration national interests. Consequently, the question remains: who should determine whether these interests are legitimate? According to the Commission, national interests must be "sufficiently defined and protected by domestic law" and must be compatible with the other provisions of Community law. In any case, the Commission does not establish through the proposed Regulation the power to decide these specific interests at Community level, nor is this done, as has been argued above, by the Takeover bid Proposal; it leaves the question as to their legitimacy to the discretion of the Member States ('authorities).

The Council Directive 77/187 and the Tenth Council Directive contain additional rules. The first directive is concerned with employees' rights. It provides in Art. 4 (1), that a transfer of a company does not in itself constitute dismissal. However, it goes on to state that changes in the workforce are justified for economic, technical or organizational reasons. Where does that leave us with regard to protection of employees at the completion of a takeover bid? (Needless to say here, there is no adequate provision, dealing with the active involvement of employees at the time of a takeover threat. Only Art. 6 (1) sets forth certain information to be disclosed, such as the reasons for transfer, the legal economic and social implications, and measures envisaged in

relation to employees).¹¹² The Tenth Council Directive (proposal) concerns cross-border mergers, and although it explicitly brings under its scope takeovers (Art. 3 (1)), it does not clarify the issue. Art. 10 (1) states that the law of the Member States, if requiring preventive judicial or administrative supervision, shall apply to the involved companies (the law of the company to be acquired takes precedence. Thus the Member States may once more implement nationalistic rules which may run counter to the Integration goal).¹¹³

112. COUNCIL DIRECTIVE 77/187, supra note 90;

113. PROPOSAL, for a Tenth Council Directive based on Art. 54 (3) (g) of the Treaty concerning cross-border mergers of public limited companies, COM (84) 727 final, OJ No. C 23/11 Brussels (1985);

3.4. Regulation of takeovers in certain Member States

3.4.1. Developments regarding takeovers in the UK

The relevance of British regulation and practice in this field is clear: a highly active market¹¹⁴ and, more important for our purposes, an extraordinary means for the protection of national interests.

The first striking aspect of the British system is that regulation is extralegal, in the form of self-regulation by the City Panel, manifested in The City Code on Takeovers and Mergers (City Code), a code of conduct.¹¹⁵ Generally speaking, the aims of the City Code are shareholder equality and openness of procedure. It echoes aspects of the Williams Act, in that both require extensive disclosure, a minimum duration for offers and pro-rata

114. There are many reasons for this: sophisticated financial mechanisms being one of the most eminent: due to the complexity and awkwardness of corporate statute law in relation to mergers, many transactions, though intended as such, are being structured as takeover bids, which can be executed more simply and quickly in the UK; DEMOTT, supra note 66; DE ANGELIS, "L'Evoluzione della Disciplina delle Offerte Pubbliche di Acquisito in Gran Bretagna", Riv. Soc. 6 (1986);

115. PANEL ON TAKEOVERS AND MERGERS, *The City Code on Takeovers and Mergers*, London (1988); Recently, the City Panel stressed its discontent with the Takeover bid Proposal which, according to the Panel, lacks flexibility and might lead to costly litigation. The regulator needs broad discretion and this discretion should not be susceptible to litigation, as otherwise litigation might be employed as a defensive measure. The Panel feels it is functioning adequately, it even provides consultation in advance, see: THE TAKEOVER PANEL, *EC Directive on the Conduct of Takeovers, General Comment by the Panel on Takeovers and Mergers*, London (1989);

acceptance of oversubscribed partial bids.¹¹⁶ However, these partial bids require Panel approval.¹¹⁷ In contrast, a particular difference with the American situation is that under the British rules anyone who (in concert) has acquired 30 % or more of the shares is obliged to bid for the remaining shares at the highest price, paid for the (part of) the stake already held.¹¹⁸ This practice rule has been followed by the Commission in its proposal, Art. 4. Another rule with no counterpart in the Williams Act is that all bids must first be put to the target's board or the advisers, who then must obtain "competent independent advice".¹¹⁹

Possibly the most important feature of the City Code is the larger role it allows shareholders to play. The Code provides in rule 21 that the shareholder meeting must approve any defensive measure which the target board tries to mount in response to the bid. The board is forbidden, *inter alia*, to enter into contracts "otherwise than in the ordinary course of business"; this rule reappears in substantially the same form in Art. 8 of the Takeover

116. FRAZER, "Regulation of Takeovers in Great Britain", in: COFFEE EDS., supra note 18, p. 438;

117. City Code, Rule 36, cf. the Takeover bid Proposal, Art. 4 (3); See also DEMOTT, "Comparative Dimensions of Takeover Regulation", in: COFFEE EDS., supra note 18, p. 408: shareholders may tender, and yet vote against the transaction itself;

118. Ratio again is that with 30 %, effective control may be administered. See also: VOOGD, *Statutaire Beschermingsmiddelen bij Beursvennootschappen*, Deventer (1989), pp. 335-347;

119. Rule 1 note 78; See: DEMOTT, supra note 117, p. 409; This requirement seems to have been followed by Art. 7 (3) of the Takeover bid Proposal;

bid Proposal.¹²⁰

In the UK, there are many other sources of takeover regulation.¹²¹ If the takeover is likely to affect the public interest (specifically competition), the UK Secretary of State and Industry may refer a bid to the Merger and Monopolies Commission (MMC), after advice of the OFT. A ground other than effects on competition is to be found in the concerned provision of the FTA 1973: "(...) maintaining and promoting the balanced distribution of industry in the UK (...)"¹²². However, under this provision the MMC are required to take into account "all matters which appear to them in the particular circumstances to be relevant".¹²³

The British confectionery manufacturer Rowntree tried to achieve such a referral on public interest grounds, when confronted with a bid last year by Nestlé, the Swiss food company.¹²⁴ In this case, strong public pressure for government intervention existed. It was argued that Rowntree was a historical British asset.¹²⁵ This is an example of the symbolic national interest argument, but was

120. Whereas under the City Code, this requirement applies as soon as a bid might become imminent, Art. 8 of the Proposal requires this conduct only after publication of the intention, Art 7 (1);

121. For an overview, see VOOGD, supra note 118, pp. 335-338;

122. Fair Trading Act 1973, Sec. 84 (1);

123. See: KLUWER, supra note 100, p. 208; The MMC would thus examine novel features too. However, especially under the 'Tebbit doctrine', see VOOGD, supra note 118, p. 337, the MMC seemed to restrain their competences almost solely to cover those mergers which affect competition; See also: "How not to make Merger Policy", *The Economist*, 14/5/88, p. 39;

124. For details see: MORTON, "Out-smartied", 7 *Int'l Fin. L. Rev.* 24 (1988);

125. See: "A Brandstand View of British Chocolate", *The Economist*, 30/4/88, p. 69;

not dealt with by the Secretary of Trade and Industry. It was coupled with insubstantial arguments of regional interests, and interestingly, the reciprocity issue: Rowntree was not able to launch a similar bid for Nestlé under Swiss corporate practice. The bid was not referred eventually, as it was determined that the impact on UK competition was the key criterion.¹²⁶ Under the Takeover bid Proposal, the EC Member States are allowed to prohibit a takeover bid from a third country, especially where Community nationals do not benefit from reciprocal treatment for acquiring shares by takeover bids in that third country.¹²⁷ Nevertheless, a country is free to stipulate whether or not reciprocity is required.

A stronger argument against the Nestlé bid was put forward in the Economist¹²⁸, which asserted that under UK competition law, it was impossible for Rowntree to conduct a friendly merger with Cadbury Schweppes, a fellow British confectioner, at that same time confronted with an unfriendly foreign bid, as the combined market share would then lead to a UK dominant position. It was thus conceded that the frame of reference for any merger should be a European one.

126. See FT 4-4/2/89, with regard to another example of the reciprocity argument.

127. See INFORMATION MEMO, supra note 1, p. 3;

128. "Storm in a chocolate cup", The Economist, 28/5/88, see also MORTON, supra note 232;

Another example of national interests is provided by the Ferruzzi case: the MMC eventually blocked two separate takeover attempts (by Ferruzzi-Italian and Tate & Lyle-British) for S & W Berisford (which controls British Sugar), on competition restriction grounds.¹²⁹ Ferruzzi's bid met strong opposition, essentially on nationalistic/political grounds. The Ferruzzi company advanced the argument that the public policy exception of Art. 56 EEC (Art. 52-58 being applicable in this case), could only be invoked where Community, rather than national, interests were at stake. It would therefore contravene EC law to prohibit Ferruzzi from proceeding with the bid, when Tate & Lyle did not face a similar prohibition.¹³⁰ The MMC did not deal with this argument in its recommendation. The argument has been advanced however, that there would be more ground to block the Tate & Lyle attempt, than the Ferruzzi bid, since the former would most certainly have led to the creation of a virtual monopoly in the UK sugar market, whereas this would be less sure in the latter case.¹³¹ The point remains, that an ex-post Community scrutiny might have been useful and that it might have led to another conclusion as to the acceptability of the Ferruzzi attempt.

129. See: Tate and Lyle plc and Ferruzzi Finanziaria SpA and S & W Berisford plc - A report on the existing and proposed mergers, *Cmd. 89* (1987);

130. Apparently, Ferruzzi feared that public opinion in the UK would impede its attempt and it was not sure, whether the same would be the case for the Tate & Lyle attempt;

131. See KLUWER, *supra* note 100; HORNSBY, *supra* note 106, pp. 314-316;

As noted at the beginning of this paragraph, the British do possess a special device to protect national interests, i.e. British Control restrictions, in which the government wishes to ensure that enterprises, which are determined to be of a national interest are reserved for British ownership.¹³² It is likely that these restrictions will not survive under EC law.¹³³ However, these provisions in the articles of privatised companies usually are entrenched by special rights attached to a so-called golden share,¹³⁴ held by the Treasury solicitor on behalf of the British government.¹³⁵ It is more difficult to maintain that such a share would be contrary to EC law, as so many derogations are embedded in the Treaty of Rome. Moreover, a golden share does not discriminate only against foreign bidders. It is more likely to be challenged under equality of shareholders' grounds.

Having examined UK practice, it is striking to see how much of this is being put in the Takeover bid Proposal (that is, except for referral to a special authority on public interest grounds, such as a national interest). Such a referral however, will

132. See EMMERSON, "EC Takeovers: golden shares and British Control", 7 Int'l. Fin. L. Rev. 11 (1988); They usually prevent acquisitions of holdings of more than 15 or 25 % by non-British citizens;

133. EMMERSON, *ibid.*, p. 12ff, who argues on the basis of articles 85 (1), 52 and 67 respectively of the Treaty of Rome;

134. The golden share generally provides that certain alterations to the articles may not be made without the consent of its holder;

135. Such as Jaguar, Rolls Royce, Britoil; See VOOGD, *supra* note 118, p. 340 note 90. In case of Britoil the UK government used its golden share to obtain important concessions from British Petroleum...

probably not succeed, despite a public interest rationale. Nevertheless, sec. 84 (1) (d) of the FTA 1973 does leave room for protection of the national employment stake.

3.4.2. Developments regarding takeovers in the Netherlands

The relevance of Dutch practice regarding takeovers is two-fold: first, in the debate regarding curtailing the existing legally valid scale of defensive tactics; second, in the rules regarding rights of employees.

1. In an annex to its annual report of 1985, the Association of the Dutch Stock Exchange (Vereniging voor de Effectenhandel, further: VEH) for the first time voiced its doubts with regard to the prevailing opinion in Dutch business.¹³⁶ That opinion had asserted that a corporation should not fall in other hands against its will (i.e. against the will of its Board of Directors).¹³⁷ On the basis of this report and annex, a commission "Defensive Tactics" was installed in order to review inter alia whether "these arrangements made by stock exchange quoted corporations,

136. See generally on VEH: CROSS, "Vereniging voor de Effectenhandel, haar positie en regelgevend beleid", 38 AA 25 (1989);

137. BARON VAN ITTERSUM, "De Aandeelhouder, Beschermingsconstructies en de Effectenbeurs", not published (1987);

are acceptable...".¹³⁸

Netherlands law does not contain provisions regarding maximum allowed voting rights by foreigners in Dutch corporations. This does not mean, however, that national interests have not been protected under Dutch law; indeed, quite the contrary is true. The cornerstone of the practice regarding defensive tactics has been identified as being an attempt to ensure the national identity of Dutch corporations.¹³⁹ Indeed, Dutch Company law has recognized, either explicitly or implicitly, the possibility of some rather original defensive tactics, to be employed by corporations, irrespective of the event of a takeover threat.¹⁴⁰ The

138. RAPPORT, supra note 31, p. 6;

139. Ibid., p. 8;

140. Although we cannot engage in a thorough analysis here, it is interesting to look at these typically Dutch "instruments": 1. Priority shares, which place e.g. the right of binding recommendation for nomination of Directors in the hands of their holders, cf. Art. 133 (3) Book 2 of the Dutch Civil Code, or the right to decide on share issuance; note that these shares are then usually placed with a foundation, set up for these purposes, the Board of which consists of Directors and Board members of the corporation! 2. Preference shares, cf. Artt. 80, 96, 105 Book 2; again, these shares are placed with a foundation, whose statutory objective often is promotion of independence and continuity of the corporation; actually, these shares limit shareholders' voting rights, the legal basis is Art. 118 Book 2; 3. Certification, the shares are held by an "Administration Office", which issues bearer shares, that have no voting rights attached! The most radical infringement on shareholders' voting rights are the so-called non-convertible certificates, a permanent disconnection of the right to exert control, as these cannot be changed back into "normal" shares; 4. Joint or National Holding: the shares in the corporation or an important stake are placed in this holding, which by itself issues shares; 5. lastly, the "structure" corporation, see e.g. BUYS "Overname: goedschiks of kwaadschiks", *TVVS* 283, (1988), who contends that this structure was actually never set up as a defensive tactic. In this case, many important decisions are taken by the supervisory board, instead of the general (Footnote continues on next page)

sense of these constructions is, that a company should not be taken over if this takeover would harm the enterprise interest.¹⁴¹ The advantage of such provisions over legal regulations, which would restrict foreign ownership, is that they make no distinction between national and foreign shareholders, so that no discrimination exists, when corporate tactics are being employed. However, upon closer analysis of the actual goal of these provisions, discrimination against the interests of foreigners definitely appears to be an objective. Maeijer openly acknowledges that national interests should be calculated, especially where the enterprise can be considered vital to the national economy.¹⁴² These arguments are unconvincing where they are sustained by an untenable nationalistic attitude.

(Footnote continued from previous page)

meeting, such as the appointment of Directors (which would make an unfriendly takeover ineffective). This regime is mandatory for certain types of large corporations;

See generally: RAPPORT, supra note 31, pp. 12-24, HONEE, supra note 11;

141. MAEIJER, "Beursoverval op Beschermingsconstructies", NJB 517, (1988), mentions "the interest of the corporation and its connected enterprise, which is more than just the shareholders' interest" explicitly referring to employees' rights in this context. According to him, shareholders should not decide over the heads of the directors, who is to govern the corporation, a position which is completely contrary to that of his Anglo-American colleagues (and some Dutch);

142. MAEIJER, *ibid.*, p. 519; Cf. GLASZ, supra note 14, p. 168; RIETKERK, "Bestuursonvriendelijke overneming: countervailing power", 66 NV 45, (1988) does not agree, basing his arguments on economic analysis of takeovers; BRENTJENS, "Beschermingsconstructies, een ondernemersvisie", 66 NV 81 (1988) hides his true motivation to promote defensive tactics behind a blunt statement on national interests: "It is important for the Netherlands to maintain a strong national industry with international ramifications [after 1992]. We have built this up in the past."

Meanwhile, the VEH was forced to retreat somewhat after it tried to curb the excessive use by Dutch corporations of defensive tactics in 1988.¹⁴³

Thus, despite the many arguments offered for the current situation, the Dutch takeover market remains extremely closed to unfriendly bidders. No empirical evidence is offered in Dutch literature as to whether this is good or bad, and only popular arguments are put forward.

2. The core of regulations regarding employees' rights in takeovers is consultation of workers' representatives before the important decisions are being taken, thereby adding greater weight and legitimacy to their advice.¹⁴⁴ This points at a significant

143. See: "RAPPORT van de Vereniging voor de Effectenhandel inzake de toepassing van Beschermingsconstructies", Amsterdam (1988), in which the VEH wanted to go beyond the advice of the commission "Beschermingsconstructies"; the commission had argued for independence of the directors of the foundations which hold preference shares, as well as the directors of "Administration Offices", see supra note 248. The VEH wanted to go further: with relation to issuance of preference shares: no more than 50 % of the put out capital should be issued without shareholders' approval; Next to this, it wanted to counter cumulation of statutory defensive tactics: not more than one permanent construction (see above) next to preference shares. On January 5th 1989, after a lot of pressure from business groups, the VEH withdrew its recommendations;

144. To be understood here also as trade unions; the reasons that trade unions should be consulted are: - not all corporations have a Board of workers' representatives (see: Wet op de Ondernemingsraden), - the important legal consequences for the employees of the target, after its acquisition by the bidder, - the sectoral consequences as the acquisition might lead to reorganization of branches of industry and trade unions are organized by sector; See: BLOEMARTS, "Onvriendelijke Overnemingen; De Positie van Vakbeweging en Ondernemingsraad", 66 NV 54 (1988); UNIKEN VENEMA, "De (Footnote continues on next page)

difference in the role of employees in the Netherlands, in comparison with the US and the EC (proposal).

Although in principle the relevant rules relate to 'merger talks', certain competences can be inferred from the elaboration of these rules. Art. 20 of the Dutch Merger Code of Conduct (further quoted as the SER-fusiecode), refers to rights of trade unions in the case of an unfriendly takeover bid.¹⁴⁵ The bidder must inform the trade unions about his plans before he sets the price he will offer for the shares. This communication must include: 1. the motives for the takeover, 2. the expected social, economic and legal consequences, and if they are foreseeable, 3. the measures to be taken in relation thereto, Art. 20 (1) jo. Art. 18 (3) SER-fusiecode. On the basis of Art. 18 (4) (jo. Art. 20 (1)), the trade unions must be allowed to offer a detailed opinion

(Footnote continued from previous page)

Medezeggenschap van Werknemers ingeval van fusies door openbare biedingen op aandelen", VAN VENNOOTSCHAPPELIJK BELANG, Opstellen aangeboden aan Prof. Mr. J.J.M. Maeijer, Zwolle (1988);

145. BESLUIT van de Sociaal-Economische Raad van 21 november 1975 tot vaststelling van de Fusiegedragsregels 1975; These rules relate to required conduct when preparing or making a public takeover bid. Interestingly, the Commentary states that shareholders' interests are not protected, in the case of a tender offer, to be understood here as a partial offer for (a certain class of) shares, although employees' rights are in such a case! See: Fusiegedragsregels-Commentary, SER, (6th ed. 1988), p. 11; This gave rise to a big controversy in the unfriendly Audet-VNU offer in 1988, see inter alia: GLASZ, supra note 14, p. 166;

from the perspective of the employees at a special meeting.¹⁴⁶ Moreover, ex Art. 18 (5) the trade unions have a right further to be informed on request. Of course, the said rules only come into play where the bidder is a corporation, although this is not expressly said in the SER-fusiecode. Art. 20 (2) provides that the bidder must inform the target of its intention at least seven days in advance.¹⁴⁷ The target board then immediately must inform the trade unions, in accordance with the provisions of Art. 18 (3)-(5) set out above. It must obtain the advice of the trade unions before it announces publicly its views on the bid, or to its shareholders.

Because the trade unions will be informed at various stages from both sides (they are, contrary to the 'Boards of workers' representatives, not linked with a certain corporation), the entities providing information most likely will not disclose everything, so that the facts are not 'matched'.¹⁴⁸ However, a sanction exists for non-compliance with the SER-rules, namely public reprimand or (weaker) statement. Moreover, a further sanction that is not explicitly mentioned in the SER-fusiecode, but can be deduced, is

146. Art. 18 (4) sets out in detail what could be discussed at such a meeting, inter alia the foundations of future social policy. However, as BLOEMARTS, supra note 144, argues, because there is no deliberation with the target it will be impossible to inform them adequately of the possible consequences as the bidder's board itself lacks the necessary information;

147. Cf. Art. 4 (2) SER-fusiecode, which relates to procedure: in case of an unfriendly bid a written communication and invitation to negotiate within 7 days of its receipt is required; See also Art. 6 (1) (c) in conjunction to this requirement;

148. See Art. 21 SER-fusiecode; Cf. BLOEMARTS, supra note 144, p. 56;

rather effective: The VEH can instruct its members not to participate in the realization of the bid by the offeror; and the offeror cannot realize his bid without the assistance of stock-brokers (members of the VEH)!¹⁴⁹

The rights of the Boards of Workers' Representatives are of a more limited character. The Act on Boards of Workers' Representatives (further: WOR) relates to the internal decision-making process of the concerned enterprises; The bidder is under a duty to ask the advice of the Workers' Board on his intention to make a bid.¹⁵⁰ The target Board is not required to ask its Board of Workers' Representatives for advice, since they have no intention to merge voluntarily.¹⁵¹ One may be able to deduce from the scope of the law that when the target Board must consult its Workers' Representatives if it were planning to advise positively on the bidder's offer¹⁵², there would be no reason not to require this if the target Board would want to advise against the bid.

Arguing that employees must be able to influence the decision-making, Bloemarts pleads for a scale of defensive tactics in order to enforce the bargaining position of the target's Board of

149. See: BAKELS, OPHEIKENS, "Schets van het Nederlandse Arbeidsrecht", Deventer (1986), p 154;

150. Art. 25 (1) (b) WOR: since it is a decision on "financial participation (controlling stake) in another enterprise";

151. Cf. ART. 25 (1) (a) WOR. According to UNIKEN VENEMA, supra note 144, p. 369, this would be different when a bid would be made after a situation of "durable cooperation";

152. Cf. hitherto Art. 9 (2) SER-fusiecode;

Directors.¹⁵³ The converse, however, may hold true: the fact that defensive tactics are rusted in the system, may enable the the target to take a stronger stand against a takeover bid. At any rate, the rationale, offered for defensive tactics in Anglo-American countries, i.e. defending shareholders' interests, thus becomes something else in the Netherlands. Bloemarts' thesis is based on the premise that in case of an unfriendly takeover bid, the interest of the enterprise (and its employees) is subordinated to shareholders' interests. The legal rules and, more importantly, defensive tactics, consequently allow employees in the Netherlands to play a more active role in a takeover (although it must be added that the final decision remains with the shareholders). Thus defensive tactics might protect national employment.

Nevertheless, Bloemarts wants to go further: he defends more extensive, explicit rights for employees and a longer period of consultation, which would enable the target Board better to deliberate with, *inter alia*, its workers. An elaboration of these extensive and explicit rights would prove to be very useful, but the argument for extending the consultation period is double-edged: what is the use of this further step, but to lessen the heat of a hectic takeover procedure?

153. BLOEMARTS, *supra* note 144, p. 57;

4. REGULATION OF TAKEOVER BIDS IN THE USA

4.1. Unfriendly takeovers in the USA

On the one hand, the US have been traditionally a country, where takeovers were facilitated by the law, business practice and even public opinion. On the other hand, aversion to unfriendly takeovers has grown any time there have been takeover waves. As one American put it:¹⁵⁴

"there has thus far been no economic, political or legal consensus (...) as to whether hostile corporate takeovers (...) are good, and therefore should be facilitated, or are bad, and therefore should be able to be strongly resisted or even prevented by a board of directors."

Meanwhile, 1988 has been a record year for the takeover industry in Wall Street. 3.310 takeovers succeeded, of which 30.3 percent were unfriendly (as against 24.8 percent of the total in 1987). The sum of money involved in these takeovers (in 1988) was 282.4 billion dollars, the highest amount ever.

In 1988, 325 foreign corporations acquired American corporations for a total amount of 54.8 billion dollars, which is an increase of 30 percent in comparison with 1987, when 46.3 billion was spent by foreigners. Biggest investors are the British (20.7 billion

154. LANDAU, "The federal and state roles in regulating United States business corporations", in: SYMPOSIUM Katholieke Universiteit van Brabant, Harmonisatie van vennootschaps- en effectenrecht: ervaringen en vooruitzichten in Europa en de Verenigde Staten, Deventer (1988);

dollar in 1988), followed by the Japanese (10.4 billion dollar; an increase of 1,000 percent in comparison with 1987!) and the Canadians (9.9 billion dollars).¹⁵⁵

In looking at the US more closely the question that should be kept in mind constantly is: who would be the best suited decision-maker on a presumed national interest in case of an unfriendly takeover from a foreign bidder? But this foreign bidder within a federal state also may be an out-of-state bidder, that is to say when for example a corporation in Delaware launches a bid for a corporation in Illinois.

American regulation, like its British counterparts, focuses largely on procedure and leaves little space for the consideration of other interests, than those of shareholders. The question whether these interests otherwise are accounted for will be dealt with below.

4.2. US Law regarding takeovers

4.2.1. The Federal legislator

In 1968, tender offers were first regulated at a federal level by the Williams Act, applicable to tender offers for securities of

155. Source: IDD Information Services Inc., January 4th 1989, Reuter News, in: NRC/Handelsblad, January 5th 1989, p. 7;

companies registered with the SEC under the Securities and Exchange Act of 1934. The Williams Act added Sections 13 (d), (e), and 14 (d), (e), (f) to the Securities Act.¹⁵⁶ Prior to the enactment of the Williams Act a bidder could make a bid, without informing any party about its purposes. Perhaps due of the absence of regulation, the 1960's saw some rather nasty examples of surprise company raiding.¹⁵⁷

One of the basic motivations for the Williams Act was:¹⁵⁸

"(...) full and fair disclosure for the benefit of investors and to permit both the (...) offer[or] and the management of the [target] company (...) an equal opportunity to fairly present their positions."

In short, the Act caused bidders to bear risks that before could be allocated to target shareholders, but the bidders still maintained considerable discretion in structuring acquisitions.¹⁵⁹

The disclosure requirements are to be found in Sections 13 (d), requiring information (prior to the bid) to be filed within 10 days of acquisition of 5 % or more of a company's shares, and 14 (d), requiring information contemporaneous to the announcement of

156. See 15 U.S.C. Sec. 781; 78 m (d)-(e), 78 n (d)-(f); DIETRICH, *Die Tender Offer im Bundesrecht der Vereinigten Staaten*, Berlin (1977), pp. 353-357, for text of these provisions; see for recent tender offer reform, inter alia reducing the filing period requirement, GOELZER, MILLS, GRESHAM, SULLIVAN, "The Role of the U.S. Securities and Exchange Commission in Transnational Acquisitions", 22 *Intl. Lawy.* 615 (1988), p. 628-630;

157. DIETRICH, *ibid.*, p. 127;

158. Introductory Note to proposed Regulation 14 D, in: BRUDNEY & CHIRELSTEIN, *Corporate Finance Cases & Materials*, Mineola NY (1979), p. 729;

159. E.g. conditioning the realization of a bid on the amount of shares tendered, or on the availability of financing for the transaction, DEMOTT, *supra* note 117, p. 405;

the bid. Basically, they include number of shares owned, identity of the owner, purpose of the acquisition and source and amount of funds.¹⁶⁰ Regarding Sec. 13 (d) it should be noted that current rules allow the acquirer to buy as many additional shares as he can in the 10 day window between the time the 5 % filing barrier is reached and the time of the filing.¹⁶¹ Sec. 14 (d)¹⁶² also requires the offer to be kept open for a specified minimum period (currently fixed at 20 days). Further, if the bid is partial, - i.e. for less than all of the target's shares-, it may not be on a first come first served basis, instead the bidder should accept shares that oversubscribe the offer on a pro rata basis.¹⁶³ The Williams Act contains no provisions that large acquisitions should

160. 17 C.F.R. Sec. 240, 13d-102, 14d-3 (1987)/Schedules 13 D and 14 D; Both must be delivered to the SEC and 14 D to target shareholders as well;

161. This rule allows buyers to acquire shares that average 13.9 % of the target firm, according to JENSEN, "Takeovers: their causes and consequences" in: VARIAN, SHLEIFER, VISHNY (ET. AL.), "Symposium on Takeovers", 2 Journ. of Econ. Persp. 21 (1988), p. 44;

162. 17 C.F.R. Sec. 240.14d-3 (1987);

Disclosure under Schedule 14D-1 covers the following matters: 1) Info about the offer, including expiry date, offering price, withdrawal rights, proration; 2) trading history of the security; 3) Info about the offeror and its officers, directors, partners, controlling persons, including employment histories and involvement in violations of securities laws; 4) Past contracts, transactions and negotiations with the target; 5) Source and amount of funds or other considerations used in the offer; 6) Purpose of the offer and plans of the offeror after acquiring securities to effect extraordinary corporate transactions; 7) Holdings of the offeror and its principals in that company; transactions in the target company's securities in last sixty days; 8) Terms of any contracts, understandings, or relationships with respect to the target's securities; 9) Persons the offeror has retained to assist the offer; [10) In case of exchange offer: financial information about the offeror;]

163. 17 C.F.R. Sec. 240.14d-5, 14d-7 (1987); Cf. TAKEOVER BID PROPOSAL, infra pp. 69ff;

be made by general offer, but as soon as a tender offer has been announced, regular market purchases by the bidder are no longer allowed. Sec. 13 (e) and 14 (e) authorize SEC to make rules to prevent fraudulent, deceptive or manipulative practices in connection with purchases of its own stock by the issuer and statements by the bidder of material facts required by the disclosure rules respectively.¹⁶⁴ Finally, Sec. 14 (f) foresees disclosure by the target when adding persons to its Board of Directors, if faced with a (potential) bid.¹⁶⁵ The provisions of the Williams Act apply to a foreign takeover attempt of a US corporation. They do not apply when a US corporation offers for the shares of a non-listed foreign corporation. However, when a foreign entity is engaging in a takeover of another entity the Williams Act might apply.¹⁶⁶

According to data assembled by Romano, in the period 1963-1987 more than 200 bills were introduced in Congress with relation to corporate takeovers.¹⁶⁷ Interestingly, no less than 49 of these

164. 17 C.F.R. Sec. 240.13e-4, 14e-2 (1987); See: FREY, CHOPER, LEECH, MORRIS, supra note ?, p. 1241, SEC is allowed to make rules "in public interest or for the protection of investors";

165. 17 C.F.R. Sec. 240.14f-2 (1987); Other provisions (relating to fraud) are to be found in 17 C.F.R. Sec. 240.10b-5, 13, 16 (1987);

166. This will depend on the extent to which conduct takes place in, or affects, the US and US investors, this was considered by a Delaware Court in Plessey Co. PLC v. General Electric Co. PLC, 628 F.Supp. 477 (D. Del. 1986); relating to non-US bidders who do not use the US mail or interstate commerce, in the takeover process;

167. ROMANO, "The Future of Hostile Takeovers: Legislation and Public Opinion", Working Paper # 86, Yale Law School, unpublished (1988), pp. 16-17/table 2; she excluded bills directed exclusively at acquisitions of banks;

(of which 5 were introduced in 1987) were concerned with regulation of stock and asset acquisitions by foreigners. Romano asserts that (most of) these bills may just have been motivated by xenophobic feelings unrelated to efforts at regulating takeovers, since they are most often introduced to stop an unfriendly foreign takeover in progress.¹⁶⁸ The recently enacted Omnibus Trade and Competitiveness Act of 1988, in which the bill for a "Hostile Foreign Takeover Moratorium Act"¹⁶⁹ was combined by conference, contains some provisions relating to foreign takeovers of US companies.¹⁷⁰ It enables the President of the US to block certain takeovers on national security grounds¹⁷¹, on recommendation of CFIUS. This section, also known as the Exon-Florio provision (after its authors), is somewhat broader than the previous authority of CFIUS; before, the committee was able just to review "the investments in the United States which, in judgment of the committee, might have major implications for the United States' national interests", but it had no power to block a proposed transaction, even if it determined the deal could harm US national

168. ROMANO, *id.*, pp. 27-28; Romano shows an interesting correlation between actual takeover threats by foreign (i.c. Canadian) acquirers and the introduction at a federal level of bills sponsored by senators of the affected states;

169. 133 Cong. Rec. S7073 (1987); This proposal was to impose a six-month moratorium on unfriendly tender offers by foreign entities if the consideration offered was to be financed by debt, GOELZER, MILLS, GRESHAM, SULLIVAN, *supra* note 63, p. 630; The proposal was not added to my knowledge;

170. See: FT 25/1/89, p. 3;

171. Previously, the administration had powers to block foreign takeovers of television stations and nuclear power plants and the president could stop a takeover if it violated antitrust laws or in case of a national emergency;

interests.¹⁷² So, at least the current rule establishes a blocking authority by the US president (on advice of CFIUS) when a strategic interest is at stake. It remains to be seen, how broadly this provision will be interpreted. Although Congress tried to include the additional ground of adverse effects on 'essential commerce' this proposal did not make the final version of the Omnibus Act.¹⁷³

Whereas opinions of learned American authors differ from being moderately against, to strongly in favor of, takeovers, it is likely that the Democratic majority in Congress will extend screening of this activity. Senator Proxmire¹⁷⁴ recently stated that he sees an important role for the federal government in regulating takeovers, as he feels that strong competition and antitrust enforcement will encourage industrial efficiency more

172. See THE BUREAU OF NATIONAL AFFAIRS INC., "Foreign Investment", 6 Int. Trade Rep. 121 (1989);

173. The [modified] version was preferred to a proposal requiring foreigners holding 5 % or more of any US property with assets of \$ 5 million or more to register with the commerce department; cf. Sec. 13 (d) Williams Act, which applies to domestic and foreign investors, Statement of J. Grundfest Commissioner of the SEC, May 8, 1986, in GOELZER, MILLS, GRESHAM, SULLIVAN, supra note 63, p. 631; Note however, that the 5 % disclosure bill, also known as the Bryant Bill, is likely to pass through Congress again this year. Under the new HR 5, there would be restricted access to such information to authorized persons in the Commerce Department and General Accounting Office, designated state agencies, congressional committees and subcommittees, and researchers approved by the secretary of commerce;

174. Senator Proxmire of Wisconsin, SYMPOSIUM (COFFEE, DAVIS, MACEY, PROX-MIRE ET. AL.), "What's right and wrong about Hostile Takeovers ?", in: Wisc. L. Rev. 353ff (1988);

than 'merger mania'.¹⁷⁵

4.2.2. Court decisions

There are two important Supreme Court decisions dealing with the federalism value, where takeover regulation was considered as a fundamental aspect of corporate governance and therefore traditionally an area of state corporate law regulation. In Edgar v. MITE¹⁷⁶, the US Supreme Court struck down an Illinois first generation tender offer statute on Commerce Clause grounds. The statute subjected all bids for Illinois companies with substantial assets to notification and registration with the Illinois Secretary of State. The definition of an Illinois company applied to any company, of which 10 % or more of the stock was held by an Illinois shareholder (or if other conditions were met).¹⁷⁷ The concurring judges considered the statute invalid because it instituted a direct restriction on interstate commerce and because its local benefits were outweighed by the burdens it imposed on

175. He states inter alia: "Contests for corporate control bear on the national economy" (...) and: "The fact is that government cannot, and should not, stand by and let these so-called 'free market' forces work their will." PROXMIRE, SYMPOSIUM, *ibid.*, p. 363;

176. 457 U.S. 624 (1982); also JENNINGS, BUXBAUM, *Securities Regulation - Cases and Materials*, 5th ed., St. Paul (1987);

177. See: COFFEE, "Regulating the Market for Corporate Control: a critical assessment of the Tender Offer's role in Corporate Governance", 84 *Col. L. Rev.* 1145 (1984), p. 1268;

interstate commerce.¹⁷⁸ In this case, the Court seemed to place the nationwide securities market beyond the regulatory reach of individual states.¹⁷⁹ In CTS Corp. v. Dynamics Corp. of America, the Supreme Court offered a rather different perspective on takeovers and their regulation, when it abandoned the protected status of takeovers under federal law.¹⁸⁰ After asking itself the question, whether the invoked second generation Indiana statute (that barred bidders from acquiring control of target companies unless target shareholders affirmatively voted to transfer such control¹⁸¹) stood as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, the Court upheld it against both Commerce Clause and Supremacy Clause challenges. In this case, the Court found that there was no unconstitutional regulation involved, as the Indiana statute allowed a bidder to acquire the shares without hindrance. However, the CTS

178. See Edgar v. MITE Corp., supra note 176, pp. 640-646: Chief Justice Burger and Justices White, Stevens and O'Connor: Justice Powell concurred only on the last ground; Cf. Pike v. Bruce Church Inc., infra p. 83, note 223;

179. See BUXBAUM,HOPT, supra note 15, noting that although they might be dressed in securities regulation policy of 'full disclosure', enlightened laissez-faire principles still might exist and be appropriate in the field of takeovers; Also: COFFEE, supra note 177, that it was unlikely the Court would be persuaded by appeals to federalism in this context, but see CTS !;

180. 481 U.S. 69 (1987); See for an extensive treatise on this case: LANGEVOORT, "The Supreme Court and the politics of Corporate Takeovers: A Comment on CTS Corp. v. Dynamics Corp. of America", 101 Harv. L. Rev. 96 (1987);

181. The practical effect of this statute was to prevent tender offerors from assuming immediate control of tendered shares; it was unlike the Illinois statute of MITE, in that it was styled purely as a corporate law provision applicable only to firms incorporated in Indiana, and that it vested all power on target shareholders, LANGEVOORT, *ibid.*, pp. 97-98;

decision provided a net contrast to MITE by the former's skepticism about the virtues of tender offers.¹⁸² In his comment on CTS, Langevoort concludes that the real interest of the Indiana statute was the protection of local businesses from the rigors of the interstate market for corporate control by claiming shareholders interests.¹⁸³ The latest development, third generation takeover statutes, is likely to be screened in the near future by the Supreme Court. Recently, a Wisconsin statute has been challenged under both Supremacy and Commerce Clause in a US Court of Appeals.¹⁸⁴ This statute postpones post offer transactions (often the reason to make the bid), unless the target's board has agreed with the transaction in advance.¹⁸⁵ As it does not attempt to regulate the bidding process, and as it is neutral between

182. Justice Powell: "There is no reason to assume that the type of conglomerate corporation that may result from repetitive takeovers is (...) more management efficient or otherwise beneficial to shareholders." 481 U.S. 69, p. 83 note 13;

183. This conclusion was drawn from the following facts: the Indiana Law of Corporations presumably applied to all corporations chartered there. The statute in question however, only applied to 1) Indiana businesses with principal office or substantial assets in Indiana and 2) a certain concentration of shareholders in Indiana. So protection of shareholders (the predicate for the statute's validity) was doubtful, because it denied 'protection' to shareholders of Indiana corporations when principal activities and assets of a firm happened to be elsewhere, LANGEVOORT, supra note 180, pp. 106-107;

184. Amanda Acquisition Corporation v. Universal Foods Corporation, et. al., US Court of Appeals, 7th Cir., Nos. 89-1581, 89-1712, May 24 1989, 1341 Fed. Sec. L. Rep. 92811 (6-7-89);

185. The bidder must wait three years after buying the shares to merge with the target or acquire more than 5 % of its assets, 1341 Fed. Sec. L. Rep. 92811;

interstate/intrastate commerce (regulation of internal affairs of Wisconsin corporations) the statute has been upheld.¹⁸⁶

MITE and CTS dealt more with takeover regulation as such, where the making of corporate law historically had been the prerogative of the chartering state, except in unusual circumstances. The Court reasoned from the assumption, that corporate law is necessarily extraterritorial in its impact.¹⁸⁷

However, courts also engage in screening defensive measures by incumbent managers/directors. Here, the central question would be the extent to which the courts will defer to the decision of the corporation's managers, as an exercise of their discretionary business judgment¹⁸⁸, to defend against an actual or prospective takeover bid.¹⁸⁹ It is important here to realize the difference: tactics to thwart an actual bid (ex post) will mostly be employed without shareholders' consent. Whereas ex ante tactics, which

186. It is noteworthy that the US Court of Appeals strongly rejects the Wisconsin State Law and anti-takeover state legislation as a whole, as stated by Judge Easterbrook in his opinion, 1341 Fed. Sec. L. Rep. 92812, 92819;

187. LANGEVOORT, supra note 180, p. 104;

188. The business judgment rule presumes that a director acts in good faith when making business decisions, Smith v. van Gorkom 488 A.2d 858 (Del. 1985), p. 873. Good faith consists of two elements here: 1) a director must take action with honest belief that such action is in the best interest of the corporation, 2) a director must make decisions for rational business purposes;

189. JOHNSON, SIEGEL, "Corporate Mergers: Redefining the Role of Target Directors", 136 U. Pa. L. Rev. 315 (1987) suggest replacement of the business judgment rule by the fairness test, because of the inherent conflict of interest for managers. EASTERBROOK, FISCHER, supra note 5, reject the business judgment rule altogether in case of an unfriendly takeover, whereas JENSEN, supra note 161, p. 42 finds the whole rule obviously incorrect as a description of human behavior as it would be too altruistic;

may be stated in advance are usually implemented with shareholders' approval, and of a more general nature. In Unocal Corp. v. Mesa Petroleum Co.¹⁹⁰, the Delaware Supreme Court held that the directors of a target corporation properly exercised sound business judgment in responding to an unfriendly two-tier bid with a self tender by the target for its own shares that excluded the unfriendly bidder from participation.¹⁹¹ It acknowledged however, that the business judgment rule provided only weak monitoring of directors' loyalty and it transferred the initial burden of proof from the plaintiff to the target board.¹⁹² Johnson criticizes the Unocal tests (demonstration of impediments to corporate policy and effectiveness; good faith; reasonable investigation;) as being superficial. the only substantive aspect is that the director fulfills his duty of care, which is easily met by devoting time and attention to making the decision.¹⁹³ Later that year the same Court upheld a corporation's flip-in provisions, relating to rights triggered in the event of a tender offer for 30 % of the

190. 493 A.2d 946 (Del. 1985), analysed by JOHNSON, SIEGEL, *ibid.*, p. 329ff; HERZEL, SHEPRO, "Ups and Downs of US Takeover Defense", 9 *Comp. Lawy.* 84 (1988), p. 85;

191. Two-tier bids are bids involving a cash offer for the majority of the target's shares at a premium (the 'front end'), coupled with an announcement of the bidder's intent, if successful, to acquire the remaining interests in the firm upon less favorable terms by merger ('back end'); these bids may give rise to a 'prisoner's dilemma', see: LÖWENSTEIN, "Hostile Takeovers: A Remedy of First Resort or Last Resort?", 52 *Rev. de la Banque* 12 (1988); a self tender is made by a company in order to purchase its own shares, see: BRADLEY, ROSENZWEIG, *supra* note 11;

192. Cf. Hanson Trust PLC v. ML SCM Acquisition, Inc. 781 F.2d 264 (2 d. Cir. 1986), in New York State the burden of proof has not been shifted;

193. JOHNSON, SIEGEL, *supra* note 189, p. 338;

company's shares or actual acquisition of 20 % of its shares by one single entity or group in Moran v. Household International Inc.¹⁹⁴ The Delaware Court ruled that the business judgment rule, as construed in Unocal, also applied to director's adoption of a defensive tactic ex ante, i.e. to ward off future offers. In fact, the Court stated in Moran that ex ante tactics deserve greater protection than do ex post tactics, as the last are instituted under pressure of a bid. Lack of pressure, the Court believed, would increase the likelihood that directors would exercise reasonable judgment.¹⁹⁵ Finally, the Revlon¹⁹⁶ case states that lock-up options¹⁹⁷ are not necessarily improper, but that the business judgment rule does not protect their adoption when breakup of the company appears to be inevitable. These three cases thus show, that although being subject to judicial review, directors in the US retain reasonable discretion when applying defensive tactics, either ex ante or ex post.

194. 500 A. 2d 1346 (Del. 1985); Flip-in provisions dilute the bidder's holding and voting power in the target, by permitting rights holders, except the bidder, to purchase shares and/or debt of the issuer at a bargain price, prior to, or regardless of, a subsequent takeover; See: DAWSON, PENCE, STONE, supra note 11;

195. Moran, ibid., p. 1350;

196. Am. Revlon, Inc. v. Mac Andrews & Forbes Holdings Inc., 506 A. 2d 173 (Del. 1986);

197. Options granted to a bidder at a favorable price on authorized but unissued shares, in some cases exercisable only if a rival bidder gains control of the target;

4.2.3. The State Legislator

American corporations are incorporated under state law. Yet, the constitutionality of state legislation, also in the area of takeovers, is frequently being challenged under the Supremacy and Commerce Clauses of the US Constitution (we saw this in 4.2.2.). In almost every state, corporate statutes are of an 'enabling' nature; the elaboration is left to the discretion of the actors involved, namely the shareholders, although the Board of Directors is by no means to be excluded here.

Meanwhile, since the CTS decision, many states have adopted several 'fresh' anti-takeover statutes.¹⁹⁸ Most takeover-related bills try to make acquisitions more difficult. The question that most literature focuses upon, is not whether these statutes are in accordance with federal law, but whether they represent sound law making. Opinions on this matter vary largely. Professor Romano holds and proves that these state anti-takeover statutes are enacted at the behest of one powerful constituent; she rejects the feasibility that they would have been supported by a broad coalition of various interest groups, such as labor or local

198. See also: Appendix, Second Generation Takeover Laws, in: SYMPOSIUM, supra note 81, pp. 524ff; Cf. third generation statutes, such as in Wisconsin, supra p. 37; SARGENT, "Do the Second-Generation Takeover Statutes Violate the Commerce Clause?", 8 Corp. L. Rev. 3 (1985);

interest.¹⁹⁹ Romano uses complicated regression analyses to look for support for both "coalition" and "powerful corporation" hypotheses. On the basis of specific research of the politics behind a Connecticut anti-takeover statute (enacted at the behest of the AETNA Life & Insurance Company) and anecdotal evidence from other states, she finds the second hypothesis more likely to influence anti-takeover legislation. The regression analyses include statistical analysis of the likelihood of a state to enact a takeover statute based on the existence of a variety of factors within the state, such as number of union members and domestically incorporated unfriendly bidders.

Macey argues that most states are particularly ill-suited to provide socially desirable takeover legislation because the parties with the greatest stake in achieving efficient legal rules are systematically underrepresented in the political process.²⁰⁰ Both Romano and Macey concede, that the problem of takeovers should be addressed at the corporation's level rather than at a state level. However, in the latter part of the eighties, a persistent support for anti-takeover legislation across the states is to be found. Even Delaware, which is considered the most liberal of American incorporation's states, has enacted anti-

199. ROMANO, "The Political Economy of Takeover Statutes", 73 Va. L. Rev. 111 (1987);

200. MACEY, "State Anti-Takeover Legislation and the National Economy, in: SYMPOSIUM, supra note 174, pp. 467ff;

takeover statutes after CTS.²⁰¹

Opposed to Romano and Macey are Davis and Coffee. Davis analyzes some Wisconsin legislation to stress that Romano's findings are not necessarily the universal case. He then deals with three justifications of state takeover legislation: 1. protection of target shareholders, 2. broader forms of market failure and 3. protection of non-shareholder constituencies. Davis concludes, that states have a legitimate interest in protecting local stakeholders in the corporation against discriminating effects of a takeover.²⁰² It is this point that was made by Coffee as well. In analyzing the justification for state regulation, he states that takeovers would be more palatable if stakeholders' interests were taken into account as well.²⁰³ So, according to these writers the only plausible case for state regulation is the need to protect local non-shareholder interests against wealth redistribution effects of takeovers.

But, state regulation as we saw is by no means uncontested. Besides, it is imperfect in that it is likely to concentrate upon

201. HERZEL, SHEPRO, *supra* note 190, p. 85;

202. DAVIS, "Epilogue: The Role of the Hostile Takeover and the Role of the States", in: *SYMPOSIUM*, *supra* note 174, pp. 491ff; Conclusion at p. 522;

203. COFFEE, "The Uncertain Case for Takeover Reform: An Essay on Stockholders, Stakeholders and Bust-Ups", in: *SYMPOSIUM*, *supra* note 174, pp. 435ff; Interestingly he includes corporate management as a stakeholder and advances corporate directors as mediators between shareholders and stakeholders. In comparison with earlier work of his on the matter of takeovers, this contention to me seems to be contradictory. Just the market for corporate control would exclude the incumbent manager as a mediator...

in-state issues and possible losses and ignore out-of-state gains. We will elaborate on this below.

4.3. A closer look at the role of Employees

To allow employees' interests to be taken into account requires a flexible approach in the US. As these interests are almost diametrically opposed to the shareholders' interests, it remains difficult to point out the proponents of a more social approach to takeover bids which goes beyond traditional shareholders' interests.

The idea of corporate social responsibility²⁰⁴ would justify management discretion in preventing socially wasteful takeovers. In Herald Co. v. Seawell²⁰⁵ it has even been established that directors could have an obligation to consider the interests of non-shareholder constituencies in making corporate decisions, even at the expense of shareholders' interests. Perhaps the merits of this case were atypical²⁰⁶ or it is too outdated, because it

204. As defined by ENGEL, "An Approach to Corporate Social Responsibility", 32 Stan. L. Rev. 1 (1979), pp. 5-6: "the obligations and inclinations of (...) corporations organized for profit, voluntarily to pursue social ends that conflict with the presumptive shareholder desire to maximize profit."

205. Herald Co. v. Seawell, 472 F. 2d 1081 (10th Cir. 1972);

206. DAVIS, supra note 202, p. 521: "While the court stated that the duties of the directors were three-fold -to the shareholders, to the employees and to the public, (...) - the fact that the discussion turned in part upon the relationship between a newspaper and the community it serves limits the opinion's applicability";

still remains fairly difficult to find a hard-core proponent of this notion in American literature.²⁰⁷

There is a difference between the effect of takeovers on employment, and the role of employees on the takeover stage. Let us take a closer look at the first issue. According to empirical data, assembled by NBER, wages and employment of firms involved in takeovers on the whole actually increase.²⁰⁸ But, appearances can be deceptive. Both Romano and Macey misuse the findings of this report. Romano finds no empirical evidence of a systematic greater job loss of acquired firms, than in absence of a takeover.²⁰⁹ Macey even thinks that overall national employment remains unaffected.²¹⁰ Both are wrong in this respect. Takeovers have led to elimination of jobs, according to a Senate report. Actually, the creation of new jobs in recent years was largely due to small firms, who have made up for more than 80 % of new

207. Opponents on the other hand, such as GILSON, "A Structural Approach to Corporations: The Case against Defensive Tactics in Tender Offers", 33 *Stan. L. Rev.* 819 (1981), p. 863, argue that this would mean that management should then have the unrestrained discretion to determine how much corporate capital should be devoted to purposes management deems socially justified. According to Gilson this is a political decision, not a corporate nor an economic;

208. See: BROWN, MEDOFF, "The Impact of Firm Acquisitions on Labor", in: AUERBACH ED., *Corporate Takeovers: Causes and Consequences*, NBER Project Report, Chicago (1988);

209. ROMANO, *supra* note 167, p. 40;

210. MACEY, *supra* note 200, p. 479: besides this, he makes a rather bold statement: Major national unions and other elements of organized labour in the US are voicing opposition to state anti-takeover statutes, *id.* p. 478; But, labour leaders have as a matter of fact criticized the effects of unfriendly takeovers at a national level, see DAVIS, *supra* note 202, p. 498;

jobs.²¹¹ These firms were not necessarily the target of takeovers. The NBER report was limited to the research of acquisitions between small firms. Although it found no job loss for those small firms, it must be taken into account then that this finding might have been offset by job creation before the bid, or job creation by other small firms. Moreover, since no large firms were investigated it remains difficult to make a statement about overall employment. It is likely that acquisitions of those large firms relatively will have an impact on employment which is greater than the impact the smaller ones would have. Besides, no data on out-of-state acquisition of in-state firms were included in the findings!²¹² The NBER research was restricted in other ways: It only dealt with one state, namely Michigan; therefore, no conclusions on national employment on the basis of this report are justified. Moreover, it did not apply to unfriendly takeovers in particular, rather to acquisitions in general; it also made a distinction between three types of acquisitions: the most relevant for our purposes being described as: "Firm A purchases firm B and (at least initially) absorbs (most of) firm B's workers

211. See: PROXMIRE, *supra* note 174, p. 360;

212. So, if Macey bases his conclusion on this report in that an in-state effect might have been found, and while no research on effects on the national employment has been conducted, his argument seems to be seriously flawed;

(...)"²¹³ Also, even with regard to this last group, none of the Fortune 500 firms were included in the research.²¹⁴ Consequently, the use of this empirical material is of limited and restricted scope. More research on overall effects is necessary in order to make general statements.

An interesting finding regarding public opinion is presented by Romano: approximately 40 % of the public believes that employees of an acquired firm will lose, either money or their job.²¹⁵ The concern of legislators, according to her, is then in accordance with the perception that takeovers reduce jobs.

Let us now look closer at the role of labor. Organized labor has explicitly stated its concern on the impact of takeovers on workers.²¹⁶ If one accepts the proposition that employees are worse off, then Romano's data highlight a deficiency in the procedures leading to legislation: in 25 % only of the 77 hearings conducted in Congress in 1963-1987 on takeover-related bills, a

213. BROWN, MEDOFF, supra note 208, p. 11; And, the findings for this group were employment growth of 2 %, BUT reduction of wages with 4 %; this is again ignored by Romano and Macey; surely, there is some effect on overall wealth?

214. See: Comment by Carliner, BROWN, MEDOFF, ibid., p. 27; It is just this cluster of corporations that has been playing the leading role in the takeover play, PROXMIRE, supra note 174, p. 360;

215. ROMANO, supra note 167, table 10; this table contains data of six polls: between 42 and 71 % of the interviewees in these polls in fact saw a negative result for employees. According to Romano this perception can be explained by the "availability heuristic" problem, id. p. 40, sic;

216. BROWN, MEDOFF, supra note 208, pp. 9-10: "Workers and their unions have a vital interest in the corporate takeover issue. Corporate mergers, takeovers (...) often have serious effects on jobs, wages and working conditions.";

union member was heard as a witness.²¹⁷ A limited role for employees in the making of takeover legislation does not necessarily mean that they actually play a limited role in takeovers generally. Employees are not forced to stay behind the scenes. In applying the nexus of contract theory once more, Coffee sees an indication of employees joining the negotiations at the time of a takeover. He finds a general movement towards employees seeking a greater role on the takeover stage.²¹⁸ The example he uses contains an ex post voicing of opinion by the labor factor. There are also the so-called Employee Stock Ownership Plans;²¹⁹ these amount to a possibility for employees to gain more influence ex ante. Although one might argue that those ESOP's have been created as a defense, the employees as allies of management, it remains to be seen whether this would always be the case (see TWA above for instance). Yet another step further lies the conception of employee=shareholder: shares individually held by the employees of the corporation. It is felt that this form of profit sharing would increase overall productivity of the US economy.²²⁰

217. ROMANO, *supra* note 167, table 5;

218. COFFEE, "Shareholders versus Managers: The Strain in the Corporate Web", in COFFEE EDS., *supra* note 18, pp. 112-113; in reaching this conclusion he uses the 1985 Icahn and Texas Air Corp.'s quest for control for TWA as proof. The unions then chose for Icahn, in spite of the Board of Directors' initial preference for Texas Air. In fact, the unions made large wage concessions; they presumably believed these would be less drastic than wage cuts and lay-offs they anticipated Texas Air would impose on them, if gaining control of TWA;

219. See ARANOW, EINHORN, *supra* note 11, pp. 197-199;

220. COFFEE, *supra* note 218, pp. 112-113;

But for our purposes, the most important result of employees as shareholders is the enfranchisement of employees in corporate voting at the time of a takeover.

4.4. Public Interest: National/Local Interest

The attribution of roles under this heading poses one difficulty: the actors are abstract, perhaps invisible, though by no means impeded from exerting an influence on the whole. As we saw before, public interest objectives are those which would probably be pursued by regulatory measures if they were not being promoted voluntarily.²²¹ One good example of a public interest was presented by Justice Powell, in Edgar v. MITE:²²²

"Inevitably there are certain adverse consequences in terms of general public interest when corporate headquarters are moved away from city and state."

Without explicitly stating so, Justice Powell offers an insight into different sorts of a national public interest. He is referring to a local interest (city;state). Next to this interest, or rather: on a larger scale, there exists the national interest (e.g. when headquarters would be moved to Japan). In a federal

221. See supra para. 2.1.;

222. Edgar v. MITE Corp., supra note 176, p. 646 (Powell, J., concurring); See also the accompanying footnote, referring to employment, but also to loss of community benefits, such as charity paid by the corporation;

state, there is a difference between a national (federal) and a local (state) interest. The protection of local interests was more or less legitimized in Pike v. Bruce Church Inc., where it was established that:²²³

"Where the state regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."

It is this concept, which many authors oppose, the strongest opponent being Macey. He thinks state laws are "extremely costly devices for providing job protection for inefficient top level managers of poorly run firms and for keeping jobs in particular regions at the expense of more productive workers in other regions".²²⁴ Romano is also opposed to what she conceives as special interest state regulation.²²⁵

Do these opinions tell us something about national interests' opinions ? Takeover legislation was and is mostly motivated by the need to protect shareholders from the inability to mount a collective response to an unfriendly bid, and -much less so- the need to protect workers from losing their jobs. The regulatory national interest of protecting shareholders is not defensible: could they not be protected better by self-regulation, either in

223. Pike v. Bruce Church Inc., 397 US 137 (1970), p. 142;

224. See MACEY, supra note 200, p. 471;

225. ROMANO, supra note 199; see also COFFEE, supra note 203, p. 437, he provides an example of an opposite local interest: the New York Securities Industries' opposition to takeover-related legislation, in which labor's support apparently was more visible;

the form of SEC's regulations, or even self-help, the amendment of the articles of association? The protection of national employment on the other hand, would fall under national (industrial) policy and therefore amount to a national interest, in case of cross-state (and not left to the state of the target) or cross-border bids; in case of in-state bids it would thus be local. Whether this sort of interest can be advanced in a legally valid way will be answered more extensively in part 5 below. But, a remark should be made here regarding the authors opposed to local job protection. They should then be equally opposed to national job protection. The theory of takeovers is in line with the general economic theory of international trade, with a flexibility of the labor factor.²²⁶ If national takeovers were favorable for the national economy, as is maintained, would international takeovers be equally favorable for the world economy and therefore lead to a global wealth increase? Unfortunately, things are more complicated, although as said before, Romano thinks foreigner takeover-related legislation might be motivated by just xenophobic perceptions.²²⁷

The public interest in the national security is easier to perceive. This has in fact been the motivation of some anti-takeover

226. See for an explanation on International Trade Theories e.g.: WINTERS, *International Economics*, 3rd ed., London (1985); especially the theory of comparative advantages and neo-classical trade theory, pp. 15ff;

227. See supra pp. 66-67, and notes 167-168;

legislation.²²⁸ Probably, the public interest argument of stopping takeovers on 'symbolic' grounds is not unknown in the US (we looked at a European example of such a presumed interest above in chapter 2). This type of legislation would likely be disguised.

We have now re-examined national interests set out in part 2 under the public interest heading. A distinction is to be made between job protection as a local and as a national interest. This distinction would equally hold for protection of symbolic interests, on a state (local) or federal (national) level. As stated above, a local strategic interest in the US seems rather unlikely.

But, even where a public interest is clear, whether national or local, the question whether this should give rise to regulation is another one, to be dealt with as well in part 5 below.

4.5. Who is the most suited decisionmaker on National Interests?

The question posed here requires a normative judgment, and a distinction must be drawn among 1. decisions concerning which

228. See supra para. 4.2.1.; Recently this provision was first used by the US government to block temporarily the takeover of General Ceramics Inc., by a Japanese Chemicals producer. Among Ceramics' products were beryllium ceramics, used in electric circuits that can be the components of nuclear weapons, IHT 19/4/1989, p. 15;

national interests must be protected, and 2. decisions regarding the legitimacy of an invoked interest.

Let us first summarize some of the findings in this part on rules/role correlation. In reality, much of the rulemaking in the US takes place at the state level, especially since the 1987 CTS case. Nevertheless, Congress is also quite active in legislating on the subject of takeovers, though perhaps on a more general level.²²⁹ Finally, the SEC has no formal authority, but de facto it has some rulemaking power.²³⁰ Courts screen state laws on federalism grounds.

As for the roles, interesting findings emerge. With regard to federal legislation, we can look once more to Romano's table 5.²³¹ In no less than 60 % of the takeover bill hearings, target management was heard. This contrasts sharply with the percentage of witnesses representing the Stock Exchange (5 %), shareholders (3 % only) and labor (25 %, as said above). On top of this, table 5 provides us with another clue: The extent to which regulators are star actors on the takeover stage in reality is much larger in comparison with the role of corporate (and interest groups) actors, than one might expect: Federal government was heard in 81 %

229. See: ROMANO, supra notes 167 and 199;

230. Cf. in this context the statement made by David S. Ruder, chairman of the SEC, who advocated SEC authority to preempt state regulation of takeovers before the US Congress, see: ROMANO, supra note 167, p. 4;

231. Ibid.;

of the hearings, Members of Congress in 42 % and state or local government in 30 % of the cases. A prospective research could combine these data with data on state regulation, because as set out above, perceptions with regard to this latter regulatory form seem to vary. All agree that management's influence on the making of state anti-takeover regulation is paramount. But, where some writers find a broad coalition of promoters of the said regulation (management with labor, community), Romano thinks the danger of such regulation is precisely that it is made with support of management of only one powerful corporation in that state.²³² So of the corporate actors, the role of management on a federal and state level is relatively largest.²³³ Although the shareholders' position would look weakest (cf. the hearings %), we must not forget that at least they are far more powerful than employees in the takeover play. They control their shares! (the need for regulation arose here because, inter alia, market intransparence and impossibility of collective response, as we saw). Employees, on the whole play a passive role, and though this fact is being obviated by the statement that takeovers do not affect employment directly or completely, the empirical data hereto are unconvincing.

232. ROMANO, supra note 199;

233. In fact, Romano found that besides corporate management and business groups, on the state level the next most active promotor of regulation is the local bar association; their interest being profits from future litigation!, ROMANO, supra note 167, p. 6;

As to national (public) interest, no empirical research has been conducted on this argument in the US as of yet, so we must be careful in assessing its impact on regulation.

We must also be careful in determining the best decisionmaker on which interests are national, and the decisionmaker on the legitimacy of a national interest. To start with the latter, the legitimacy question: the idea of a national interest of itself connotes a nationwide issue. It would therefore definitely not be smart to leave it to management's discretion, who might discover here yet another possibility to attract public opinion in order to stop an uncalled for (foreign) takeover. Nor are shareholders the suitable entity to be the protector of a national interest. Why should they care if 'their' corporation were to be taken over by a foreign bidder, if they would receive a maximum premium for their shares ? Employees may have a legitimate stake in the outcome of the bid, their role in steering this outcome seems negligible. They are somehow not able to emerge from behind the scenes and thus not the best prospective protectors of the abovementioned interests.

With relation to the question which actor should decide on what the national interests are we saw that the legislator at various levels plays a large role in the regulation of takeovers as it is. While the question of regulation is an open one, if the case for it is accepted, the nature of the national interest (it concerns

the nation) means that the legislator should be the central actor in such regulation. Self-help is not appropriate, the definition of the national interest should lie with the legislator. The federal legislator, not the state legislator, is the most suited decisionmaker on the national interests that merit regulatory protection. This is most obvious in the case of a strategic interest, where the national security is involved. But also for the so-called symbolic interests or stakes this proposition would probably hold, namely where the national interest exists to respond to a market failure. To explain this, we have to take a closer look at economic theory of federalism.²³⁴ The symbolic and stake interests stem from externalities produced by a foreign takeover.²³⁵ The externalities in this case are either loss of prestige (symbolic), or loss of jobs (stake). The foundation of the thesis that the national government should have actual decisionmaking power in these cases lies in the need of correction of these market failures. The national government is the most suited intervener, because the remedies to the externalities that affect the mentioned interests fall most closely within its competence. After all, the federal legislator is the only actor that

234. Adapted from: ROMANO, *ibid.*, pp. 9-16; Market failure: when resources are allocated inefficiently because an activity produces externalities or when a commodity or service is a public good;

235. Externality: when the activity yields benefits or costs to individuals or firms other than the actor, and those third parties cannot be excluded from enjoying the benefits or bearing the costs, ROMANO, *ibid.*, p. 10;

would be accountable to all citizens, so if the externality affects them all, or many, the federal actor should make the rules as to who has to bear the costs, or to whom accrue the benefits, that originate from the externality. Thus, for national interest cases federal rulemaking is to be preferred.²³⁶ It will be necessary however, to take a clear stand on what these national interests are since the problem of competitive regulation arises where those interests are seen as 'local'.

The actual judgment on the legitimacy of an invoked national interests at the time of a takeover should be left to an independent supra-state (federal) agency. Again it is clear why the corporate actors are not the suited decisionmakers. The directors are likely to abuse such an offered instrument and use it as an additional argument to thwart the unfriendly bid. The shareholders are likely to ignore the interest. The employees are placed on a side-track. An independent agency (such as e.g. SEC), on the other hand, could see to it that defensive measures are not being misused by corporations, even though courts are able to engage in checking this, as well.

236. Cf. the Romano data, supra pp. 90ff, asserting the influence managers exert upon federal takeover legislation; this influence would then have to be restricted;

5. MONITORING DEFINED NATIONAL INTERESTS

5.1. Divergent attitudes compared

It is perhaps not altogether justified to compare the Takeover bid Proposal with the Williams Act. As regards content the Proposal sometimes goes further than the Williams Act; e.g. the requirement of launching a full bid after having reached a certain threshold (compare this with the British City Code) or disclosure requirements relating to the opinion on the prospective takeovers of target directors. In the US, the federal executive has some power to block foreign takeovers on the ground of national interest. In the EC it is left to the Member States to decide on national interests, and on the reciprocity issue; a single supra-national policy with regard to national interests does not exist.

The Takeover bid Proposal will be a compromise directive. Community decisionmaking is still restrained by institutional voting mechanisms which allow Member States to exert a disproportionate influence on the factual contents of most legal instruments in the EC. However, if this is the case the insertion of national interests grounds in the Proposal might prove to be accomplished in an easier way.

Both the Williams Act and the Takeover bid Proposal lay down a minimum standard of desired conduct with regard to corporate takeovers. As was demonstrated in the previous chapters, member

states of both the American federation and the European Communities actively engage in regulating takeovers. The difference lies in the corporate systems. It is not misplaced to view the US as one uniform system,²³⁷ where takeovers occur on a nationwide scale, albeit the center of gravity of activities in this respect lies within the various states in which the large firms are incorporated. Competition amongst the states exists in the field of takeover regulation, which sometimes highlights negative attitudes towards unfriendly takeovers in general and sometimes a liberal stance towards this market for corporate control.

The situation in the EC is completely different; it is not a matter of competing national systems but of largely differing national traditions in this respect. In the UK, takeovers are accepted as a form of corporate restructuring on at least the same scale as in the US. The regulatory instruments offer a flexible and effective scheme of reviewing takeovers. Takeover bids may be balanced with interests other than those involved in competition. In the Netherlands on the other hand, strong opposition towards the whole unfriendly takeover phenomenon has led to a firmly-embedded system of anti-takeover measures. Next to this, other interests, such as the interests of employees who are granted a larger role, are taken into account. This is done, as in the UK, by way of self-regulation, but relating to different issues.

237. American law equates the shareholders' interests with the enterprise interest (and the interests of society as a whole), see BUXBAUM, "Market Liberalization and Institutional Ownership, Comparative Reflection on Corporate Governance", Salzburg Seminar paper, not yet published (1989);

The relevant point relates to whether the national regulations in the EC in the field of takeovers (with specific reference to the UK and the Netherlands in this thesis) are likely to be overruled by Community action, when those regulations either infringe upon the rights of other Community nationals (including companies) or run counter to provisions of the Treaty of Rome. The only way to monitor such actions in the current configuration at Community level is through the decisions of the EC Court of Justice, since the Takeover bid Proposal does not propose another supra-national screening authority. Can the US federal system in this respect be transferred to the European constellation?

5.2. Takeover bids and Federalism

As was shown in paragraphs 4.2.1.-4.2.3., the regulation of takeover bids and related topics is an amalgam of federal and state law in the US.

From a constitutional viewpoint it is the dormant Commerce Clause, or more specifically, its interpretation by the Supreme Court and the use made of it by Congress which serves to delimit states' competences to regulate takeover bids.²³⁸ With a proposal

238. As to the Commerce Clause, see BUXBAUM, HOPT, supra note 15, pp. 40ff, the criterion being to what extent state regulation purports to regulate interstate commerce. Or from the opposite federal point of view: "After all, the more that previously intrastate commerce is recharacterized as interstate commerce, the more frequent the occasion for challenging state involvement in the remaining space under the dormant Commerce Clause", id., p. 42;

for a (supra-national) directive existing in the EC, a connection arises. Does the Treaty of Rome override Member States' takeover statutes in the same way federal law overrides state law in the US?

Let us briefly return to Edgar v. MITE and CTS, and third generation takeover statutes.²³⁹ The situation with regard to state takeover statutes remains unresolved to a great extent, where third generation statutes now modify the dormant Commerce Clause or Supremacy question; these statutes might again be reversed by a possible future Supreme Court judgment. It is doubtful to what extent the competition between the federal legislature and state legislature on the one hand, and the screening of state legislature by the Supreme Court, in a federal light, on the other, contributes to legal security as to takeover regulation.²⁴⁰

The MITE case is relevant in this respect, since it involved the most explicit example of a state regulation, with effects outside the boundaries of that state.²⁴¹ In fact, the Act, by virtue of its breadth, allowed the Illinois Secretary of State to block a nationwide tender offer.²⁴² The Supreme Court was concerned

239. See supra, pp. 69ff.; as is most eloquently asserted in BUXBAUM, HOPT, supra note 15, p. 47, within both a philosophy exists, that the Commerce Clause be institutional rather than personal protection or economic philosophy, what happens is that "...courts are involved in articulating policy which the legislature may confirm, modify or overrule."

240. See also ROMANO, supra note 167;

241. 457 U.S. 624, p. 641: "The Illinois Act (...) directly regulates transactions which take place across state lines, even if wholly outside the state of Illinois."; See BUXBAUM, HOPT, supra note 15, p. 42, as to the occasions for challenging state involvement under the scope of the dormant Commerce Clause;

242. 457 U.S. 624, p. 643; The Secretary of State was competent to call a hearing on certain aspects of the bid, after notification thereof in order to decide on its registration;

firstly with a possible clash of the Act with the Williams Act, and then went on to investigate the legislation under the Commerce Clause, on the basis of a two-part test:

(1) does the state statute regulate evenhandedly to effectuate a legitimate local public interest and are its effects on interstate commerce only incidental?

(2) is the burden imposed on interstate commerce not excessive in relation to the putative local benefits?²⁴³

The Court answered both questions in the negative. It is not useful here to speculate as to what the European Court of Justice would have decided in a similar case, a possible example being the decision in De Benedetti-Société Générale. Probably, the ECJ would not even have progressed to dealing with second question, as under its competences it will only test marginally whether Treaty provisions are met. If we compare the decision of the Belgian Court of Appeals in the De Benedetti example²⁴⁴ with the Unocal decision,²⁴⁵ which transferred the burden of proof with regard to business judgment relating to the use of defensive tactics to the directors of the target, an interesting finding emerges. The Belgian Court conceded in the former case that there are no limits, under Belgian law, on directors' discretion to use these tactics as long as they consider the enterprise interest. To allow the directors to consider this is perfectly legitimate; it

243. See: VAN ROEYEN, "Annotation, Validity under Commerce Clause of Federal Constitution, of State Statutes regulating Securities Transactions - Federal Cases", 73 L. Ed 2d 1454 (1984); Cf. BUXBAUM, HOPT, supra note 15, p. 50;

244. Supra notes 46 and 47;

245. Supra note 190;

is one of the major differences in attitude between the European and American business cultures. The flaw lies in the determination of this consideration. In Unocal it was decided that a lack of pressure would increase the likelihood of reasonable judgment. In the De Benedetti case the decision to augment the capital was taken under the pressure of an unexpected takeover bid, during the course of one night! The Belgian Court found this capital increase decision to be sound policy of La Générale and did not think the decision contravened any provisions of European Law. It was argued that the capital increase did contravene European Law. No competence currently exists to overrule such a decision of a national court on a European level.²⁴⁶

Corporate decisions relating to cross-border bids are thus not likely to be screened in the current configuration. This gap could be overcome by prospective regulation. The Takeover bid Proposal though, as it stands, actually offers the potential of exact comparable situations as in the American cases under consideration: prior notification (to inter alia a national supervisory authority) and registration, legislated from the federal (Community) level, and therefore not likely to be overruled as running counter to European Law (and Integration). However, in the Benedetti-case, even if this constitutes a single

246. Except the preliminary ruling ex Art. 177 EEC, which is not required in this instance and was not requested by the Brussels Court. Cf. also Art. 170 which could allow the Italian government to bring the matter before the Court of Justice arguing that Belgium had failed to fulfil a Treaty obligation;

example, a decision was taken by the board which definitely contravened European Law. The Takeover bid Proposal does not offer a possibility of second opinion.

The definition as to where notification and registration of cross-border bids should take place is largely left to the involved Member States. It is therefore very likely that Member States will compete for authority by means of defining, when a takeover bid is to be considered for registration in that State. The national authorities of certain of these Member States might then impose stricter standards, depending upon the extent of national public opposition to the takeover phenomenon. Moreover, nowhere does there exist a prohibition on conducting national hearings to e.g. "adjudicate the fairness of the offer"²⁴⁷, or more likely, its compatibility in connection with national attitudes *casu quo* interests.

Of course in the US, in later cases, such as CTS, the Supreme Court did uphold state regulation against the Williams Act. It should not be forgotten, however, that the kind of regulation screened in that case solely involved intrastate commerce, and was not constructed so as to have the same sweeping extra-territorial effects as the Illinois Act (though some academics might argue that the Indiana Statute did the same under a different guise). The chances are that the Supreme Court, if asked to adjudicate in the Amanda case, will uphold the Wisconsin Statute on the grounds

247. Cf. 457 U.S. 624, p. 639;

that there is no frustration of Williams Act objectives, and no more than an incidental effect upon interstate commerce.

Taking into account the role of a federal court, it is probably not the forum most suited to decide on whether a state, where it is regulating more than the internal affairs of a corporation, has a legitimate local public interest to uphold.²⁴⁸ This is not a question which relates to the federal issue and should thus be left to the discretion of an independent regulatory agency, as it is in this case, the example being the SEC, under compliance with federal rules/policies in this respect.

Whether a Commerce Clause analysis is equally applicable to the EC remains a vexed question: We are not dealing with a federal form, not even to a rudimentary degree. As was argued²⁴⁹, the answer depends upon the degree to which persons affected by national legislation are able to claim that Treaty provisions are being violated (if not implemented by e.g. regulation). The jurisprudence with regard to direct applicability of Treaty provisions²⁵⁰, coupled with a preemptive effect of directives against national regulations, even "to the extent that these would be incompatible with Community basic principles"²⁵¹ only suggests federal competence within the European Court of Justice to the

248. See supra p. 95;

249. See BUXBAUM, HOPT, supra note 15, pp. 41ff; See also: EULE, "laying the Dormant Commerce Clause to Rest", 91 Yale L. J. 425 (1982);

250. Case 26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen, E.C.R. 1 (1963);

251. Case 106/77, Simmenthal II, E.C.R. 629 (1978), p. 644; Cf. Case 815/79, Cremonini, E.C.R. 3583 (1980), p. 3607; See: TIMMERMANS, "Die Europäische Rechtsangleichung im Gesellschaftsrecht", 48 RabelsZ 1 (1984);

extent that it may decide upon interstate commerce issues (free movement issues).²⁵²

The constitutional basis for Community harmonization legislation in the field of company law is Art. 3 h EEC jointly with Art. 100. Art. 100 A could serve as the basis rather than of Art. 100, since the Takeover bid Proposal is mentioned in the Single Act; consequently, a qualified majority would suffice to determine the text of the final directive.²⁵³ However, even if the Proposal in its current form harmonizes various national rules regarding disclosure in corporate takeovers it does not add to either negative integration or positive integration,²⁵⁴ simply since it does not provide for supra-national monitoring.

Within the federal regulatory scheme, the question has another dimension: the corporation's freedom to function in a national market has become a derivative right, dependent upon what the federal government decides about an appropriate legislative division between itself and the member states.²⁵⁵ This concept is more difficult to transfer to the European scene, as the process is turned round from the American federal experience. Whereas in the US the federal government was -originally meant to be-

252. cf. BUXBAUM, HOPT, *supra* note 15, p. 41;

253. *Ibid.*, pp. 203ff;

254. To be understood here respectively as removal of discrimination and the formation and application of coordinated common policies in order to fulfil economic and welfare objectives other than the removal of discrimination; see PINDER, "Positive integration and negative integration, some problems of economic union in the EEC", 24 *W.T.* 88 (1968); also EHLERMANN, "The Internal Market Following the Single European Act", 24 *C.M.L.Rev.* 361 (1987);

255. See: *Ibid.*, p. 44; also: BUXBAUM, "Federalism and Company Law", 82 *Mich. L. Rev.* 1163 (1984) ;

delimitated by the American Constitution, the EC Commission is delimitated by existing national legislation: it is easier to instigate regulation in the Community in fields where the Member States have not yet been actively legislating. It is not apparent which is the case with takeover bids; thus there may be barriers, where a strongly developed regulatory scheme exists for example in the British system, but for the rest the rules are scattered hither and thither in the other Member States, and thus fewer barriers may exist.

The other question in this context is, whether a directive is the right instrument for the regulation of takeover bids. Takeovers which may lead to a merger which might have anti-competitive effects, are dealt with in the EC Merger-regulation. Because stronger Community intervention seems to be required here. It must be kept in mind that even for legal harmonization, the directive being albeit the most appropriate instrument, the Commission also has the power under Art. 235 EEC to enact regulations.²⁵⁶ Although utter prudence in determining which is the best instrument is called for, the problems which beset the directive are not insignificant; a two-stage legislative procedure, i.e. national enactment after acceptance on the Community level, and possible overly specific drafting.

The problem with the Takeover bid Proposal thus remains, whether meaningful harmonization will take place, when after the lowest

256. Case 8/73, Hauptzollamt Bremerhaven v. Massey-Ferguson, E.C.R. 897 (1973), p. 907; See as to instruments of harmonization: ABELTSHAUSER/PIPKORN, "Zur Entwicklung des Europäischen Gesellschafts- und Unternehmens-Rechts", EUI Working Paper 85/167, Florence (1985);

common denominator for disclosure has been enacted and its' observance is required, the elaboration and monitoring is left to the national authorities, however inherent such features are to the meaningful operation of the directive.

5.3. The need for a supra-national Supervisory Board

The essential shortcoming of the proposed EC directive is that it does not solve in any way the prospective raising of interests at the time of cross-border bids, which may be anchored in national law. This also happens in the US, as was demonstrated by the emergence of a phenomenon similar to European national interests of invoked state local interests. As Romano showed,²⁵⁷ there exists a good deal of state anti-takeover legislation, aimed at preventing (out-of-state) unfriendly bids. This legislation is enacted at the behest of one powerful constituent, directors. Both state legislation and directors' actions are screened by US Courts.²⁵⁸ In the former case the extent of the extra-territorial effect of the legislation under scrutiny is monitored at a federal level, and in addition the legitimacy of the invoked interest. This last issue should be left to the discretion of an independent supra-state agency, which will be possessed of a better developed expertise in that field. With regard to directors' actions, these are tested under the business judgment rule. Directors

257. Supra pp. 75ff;

258. See supra para. 4.2.2.;

fulfil their duty of care by devoting time and attention to the making of the decision (to use a defensive tactic). This sort of screening could also be left to the same sort of independent agency, comprised of members representing various interest groups. Nevertheless, American courts are able to engage in a more thorough screening of corporate takeovers, both on a federal and on a state level. The European Court of Justice does not possess clearly outlined competences with regard to screening Member States' anti-takeover legislation. The preemptive issue still is in flux. Moreover, a citizen may not sue a Member State before this Court for a failure to observe the Takeover bid Directive. Instead, the intricate route of trying to lobby at government level in the Member State of the bidder to file suit, must be followed. Next to the fact that the Communities do not possess adequate monitoring instruments, - and this is the point around which the issues under scrutiny in this thesis revolve -, the European Communities are currently in transition. If the Internal Market goal is to be reached by 1993 many obstacles must still be overcome. However, the goal of an Internal Market also is met by national(istic) opposition. The unfriendly takeover, if it involves other issues than competition, offers an excellent opportunity for any regulatory or judicial body in a given Member State to allow the directors of a corporation to advance baseless arguments, when their corporation is faced with an unfriendly cross-border bid. This was demonstrated by the De Benedetti case. When advanced in such a manner, these points against the prospective interstate takeover only serve to protect the position of

these directors, because they are not related to the underlying motivation for the bid, which is in fact to gain control and exploit the target's assets in a more efficient manner.

This is not to say that issues, which may be considered to be of national interest, do not play a role at the time of an unfriendly (or friendly for this matter) bid. Indeed, it was previously argued that these interests may exist and some suggestion was made as to their nature. Moreover, they are sometimes discounted in the legislation of Member States. These issues are likely to arise during the bidding stage, which is to say, before an actual merger decision takes place. However, they stand to be abused in the unfriendly takeover game, if their advancement is made dependent upon the actions of corporate constituencies or national authorities. They do merit being taken into account by a neutral constituent.

It is at this point that the paradox of the Takeover bid Proposal, as it stands, emerges. If the goal of harmonization is to promote competition,²⁵⁹ and if it is introduced under the White Paper; if the social dimension of the Internal Market is to be taken into account, then why does the Proposal not solve the problem of a possible national abuse of interests other than competition to bolster inefficient national corporations? At the same time it leaves the screening of such interests entirely to the discretion of national authorities, which are even less likely than a Community institution to be neutral against the in-state

259. See supra note 1;

target and the out-of-state bidder. It is conceivable that such a policy will simply hamper the full realization of the Internal Market.

This thesis essentially purports to propose two matters:

- The possibility of the legitimate existence of certain national interests at the occurring of cross-border (unfriendly) takeovers ought to be recognized in a Community instrument, preferably the Takeover bid Proposal. If this is not done a regulatory gap will emerge. Those takeovers involving interests which are not covered by the current Merger Control Proposal will be left out in the cold. A reference to national interest may be made under Art. 13 (d) or 13 (f)²⁶⁰ of the Takeover bid Proposal. The remainder of the article ought to be amended to the extent that it leaves too much discretionary power to national authorities. Even if it is the case that it is accepted, that such an attitude is justified in the area of merger control, this does not entail that the same would hold true for national interests. As has been argued, they need to be defined at a supra-national level, either in the Takeover bid Proposal, or in the policy declarations of the Commission.

A suggestion as to what could constitute a national interest in case of an unfriendly cross-border bid was made in chapter 2.

260. Withdrawal because of: "(...) exceptional circumstances and with the authorization of the supervisory authority, giving reasons, where the bid cannot be put into effect for reasons beyond the control of the parties to the bid";

- Art. 6 of the Proposal, i.e. the monitoring provision, ought to be amended. A supra-national board could be instated, replacing the numerous national authorities. This board could be completely independent from Community institutions, or e.g. introduced by Commission delegation. It could be modelled on the British Take-over Panel but with additional powers that now fall under the MMC. The Community Takeover Supervisory Board would be charged with both the screening of the technical requirements as introduced by the current Proposal (Art. 6 (2)), and in addition the screening of national interests advanced at the time of an unfriendly takeover. In other words, it would have to decide whether such interests in casu may be invoked legitimately. The Supervisory Board should consist of takeover experts, who are chosen or appointed on a transnational basis and who represent various interest groups, such as the corporate actors and trade unions but also regulatory actors such as stock exchange members. In order that such a Board could function in an efficient and rapid manner the works should be delegated on a day-to-day basis to an executive committee, which should be allowed even to conduct an investigation of national interests possibly at stake at a certain takeover bid on its own initiative. The findings of the committee -to be reported to the Board- should then culminate into a binding recommendation with which both parties, but especially the bidder, should comply. If the Supervisory Board would advance a fair and balanced argument against the takeover taking place, e.g. because it would endanger national security, or -still more debatable- because it would endanger the employment in a given industrial sector, the

parties to the bid should be informed that the takeover would not be allowed to proceed. The leverage of the Board would consist of being able to refuse to further register the bidder's filings.

If the abovementioned institution thus would be formalized on a Community level two purposes would be met:

- a) A fair balancing of national interests with Community interests (this would be especially important if the case for concurrent jurisdiction in national interest were to be accepted), and
- b) A supra-national self-regulatory scheme of screening interests of other constituencies than shareholders.

The aim of equal protection of all parties²⁶¹ would thus be achieved.

5.4. Conclusion

In this thesis, no plea is made as to whether unfriendly takeovers should be stimulated or prevented by European regulation. It has only been argued that an equal standard is required with regard to the monitoring of unfriendly takeover bids involving different Member States. If no supra-national authority is competent to decide on the legitimation of national interests, the White Paper goal of restructuring the European corporate landscape

261. Which is advanced in the TAKEOVER BID PROPOSAL, see supra p. 33;

will not be met and clashes arising out of the dichotomy of arguments inherent to unfriendly takeovers might lead to expensive litigation which in turn will boil down to bad decision making.

Finally, nothing has been said as to whether the same would hold true for screening world-wide cross-border takeovers. A free trade proponent would probably not allow the consideration of national interests at any stage; a strong proponent of national sovereignty would probably oppose the installment of a supra-national authority. However, this matter is less urgent since it does not arise in the Internal Market context and will be left to further discussion.

Literature: Books

ARANOW, EINHORN, Developments in Tender Offers for Corporate Control, New York (1977)

AUERBACH ED., Corporate Takeovers: Causes and Consequences, NBER Project Report, Chicago (1988);

BAKELS, OPHEIKENS, Schets van het Nederlandse Arbeidsrecht, Deventer (1986);

BRUDNEY & CHIRELSTEIN, Corporate Finance Cases & Materials, Mineola NY (1979)

BUXBAUM, HOPT ED., "Legal Harmonization and the Business Enterprise, Corporate and Capital Market Harmonization Policy in Europe and the U.S.A.", in: CAPPELETTI, SECCOMBE, WEILER EDS., Integration Through Law, Europe and the Federal Experience, Vol. 4, Berlin /New York (1988)

COFFEE, LÖWENSTEIN, ROSE-ACKERMAN EDS., Knights, Raiders and Targets: The Impact of the Hostile Takeover, New York (1988);

DIETRICH, Die Tender Offer im Bundesrecht der Vereinigten Staaten, Frankfurt am Mainz (1975);

FREY, CHOPER, LEECH, NOYES, MORRIS, Cases and Materials on Corporations, 2nd ed., Boston (1977);

GILSON, Law and Finance of Corporate Acquisitions, Mineola NY (1986);

GREWLICH, *Transnational Enterprises in a New International System*, Alphen a/d Rijn (1980);

HOPT ED., *European Merger Control, Legal and Economic Analyses on Multinational Enterprises, Volume I*, Berlin/New York (1982)

HUSSON, *La Prise de Controle d'Entreprises, Motivations, consequences et freins*, Paris (1987);

JENNINGS, BUXBAUM, *Securities Regulation - Cases and Materials*, 5th ed., St. Paul (1987)

KLUWER ED., *Merger Control in the EEC, A survey of European Competition Laws prepared by the Brussels offices of...*, Deventer, Antwerp, London, Frankfurt, Boston, New York (1988)

OGUS, VELJANOVSKI, CENTO, *Readings in the Economics of Law and Regulation*, Oxford (1984);

SYMPOSIUM, Katholieke Universiteit van Brabant, *Harmonisatie van vennootschaps- en effectenrecht: ervaringen en vooruitzichten in Europa en de Verenigde Staten*, Deventer (1988);

VAN VENNOOTSCHAPPELIJK BELANG (VAR.), *Opstellen aangeboden aan Prof. Mr. J.J.M. Maeijer*, Zwolle (1988);

VOOGD, *Statutaire Beschermingsmiddelen bij Beursvennootschappen*, Deventer (1989);

WEINBERG, BLANK, *on Takeovers and Mergers*, 4th ed., London (1979);

WINTERS, *International Economics*, 3rd ed., London (1985);

Literature: Articles and Symposia

ABELTSHAUSER & PIPKORN, "Zur Entwicklung des Europäischen Gesellschafts- und Unternehmensrecht", EUI Working Paper no. 85/167, Florence (1985)

BARON VAN ITTERSUM, "De Aandeelhouder, Beschermingsconstructies en de Effectenbeurs", Vereniging voor de Effectenhandel, unpublished (1987);

BEBCHUCK, "The Case for Facilitating Competing Tender Offers", 95 Harv. L. Rev. 1028 (1982)

BEHRENS, "Rechtspolitische Grundsatzfragen einer europäischen Regelung für Übernahmeangebote", 4 ZGR 433 (1975)

BLOEMARTS, "Onvriendelijke Overnemingen; De Positie van Vakbeweging en Ondernemingsraad", 66 NV 54 (1988);

BRADLEY, ROSENZWEIG, "Defensive Stock Repurchases and the Appraisal Remedy", 99 Harv. L. Rev. 1377 (1986);

BRENTJENS, "Beschermingsconstructies, een ondernemersvisie", 66 NV 81 (1988);

BUREAU OF NATIONAL AFFAIRS INC., THE, "Foreign Investment", 6 Int. Trade Rep. 121 (1989);

BUXBAUM, "Federalism and Company Law", 82 Mich. L. Rev. 1163 (1984);

BUXBAUM, "Market Liberalization and Institutional Ownership, Comparative Reflection on Corporate Governance", Salzburg Seminar Paper, unpublished (1989);

BUYS, "Overname: goedschiks of kwaadschiks", TVVS 283 (1988);

CHEUNG, "The Contractual Nature of the Firm", 26 J. Law & Econ. 1 (1983);

COFFEE, "Regulating the Market for Corporate Control: a critical assessment of the Tender Offer's role in Corporate Governance", 84 Col. L. Rev. 1145 (1984)

CROSS, "Vereniging voor de Effectenhandel, haar positie en regelgevend beleid", 38 AA 25 (1989);

DAWSON, PENCE, STONE, "Poison Pill Defensive Measures", 42 Bus. Law. 423 (1987);

DE ANGELIS, "L'Evoluzione della Disciplina delle Offerte Pubbliche di Acquisito in Gran Bretagna", Riv. Soc. 6 (1986);

EASTERBROOK, FISCHER, "Corporations as Contracts", Unpublished Stanford University Draft (1988);

EASTERBROOK, FISCHER, "The proper role of a Target's Management in Responding to a Tender Offer", 94 Harv. L. Rev. 1161 (1981)

EHLERMANN, "The Internal Market Following the Single European Act", 24 C.M.L.Rev. 361 (1987)

EMMERSON, "EC Takeovers, Golden Shares and British Control", 7 Int'l. Fin. L. Rev. 11 (1988);

ENGEL, "An Approach to Corporate Social Responsibility", 32 Stan. L. Rev. 1 (1979);

EULE, "Laying the Dormant Commerce Clause to Rest", 91 Yale L. J. (1982);

FEENSTRA, "Fusiecontrole door de EEG na het Philip Morris Arrest", 66 NV 2 (1988);

FINE, "The Philip Morris Judgement: Does Article 85 now extend to Mergers?", 8 Eur. Comp. L. Rev. 4 (1987);

GARCIA EGOICHEAGA, BASURTO, GONZALES ESTEBAN (ET. AL.), "Fusiones y Adquisiciones I", 43 Bol. Estud. Econ. 227 (1988);

GILSON, "A Structural Approach to Corporations: The Case against Defensive Tactics in Tender Offers", 33 Stan. L. Rev. 819 (1981);

GLASZ, "Halen Beschermingsconstructies 1992?", TVVS 163 (1988);

GOELZER, MILLS, GRESHAM, SULLIVAN, "The Role of the U.S. Securities and Exchange Commission in Transnational Acquisitions", 22 Intl. Lawy. 615 (1988);

GORDON, "Ties that Bond: Dual Class Common Stock and the Problem of Shareholder Choice", 76 Calif. L. Rev. 3 (1988);

GORDON, KORNHAUSER, "Takeover Defense Tactics: A Comment on Two Models", 96 Yale L. J. 295 (1986);

GRUSON, MEILICKE, "The New Co-Determination Law in Germany", 32 Bus. Law. 571 (1977);

HERZEL, SHEPRO, "Ups and Downs of US Takeover Defense", 9 Comp. Lawy. 84 (1988);

HONEE, "Beschermingsconstructies", 66 NV 154 (1988);

HORNSBY, "National and Community Control of Concentrations in a Single Market: Should Member States be Allowed to Impose Stricter Standards ?", 13 Eur. L. Rev. 295 (1988);

JENSEN, "Takeovers: their causes and consequences", in: VARIAN, SHLEIFER, VISHNY (ET. AL.), "Symposium on Takeovers", 2 Journ. of Econ. Persp. 21 (1988);

JENSEN, MECKLING, "Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure", 3 J. Fin. Econ. 305 (1976);

JENSEN, RUBACK, "The Market for Corporate Control: The Scientific Evidence", 11 Journ. of Financ. Econ. 5 (1983)

JOHNSON, SIEGEL, "Corporate Mergers: Redefining the Role of Target Directors", 136 U. Pa. L. Rev. 315 (1987);

KORAH, "The Control of Mergers under the EEC Competition Law", 8 Eur. Comp. L. Rev. 3 (1987);

KORAH, LASOK, "Philip Morris and its aftermath - Merger Control ?", 25 C.M.L.Rev. 333 (1988)

LANGEVOORT, "The Supreme Court and the Politics of Corporate Takeovers: A Comment on CTS Corp. v. Dynamics Corp. of America", 101 Harv. L. Rev. 96 (1987);

LOFTHOUSE, "Competition Policies as Take-over Defences", Journ. of Bus. Law 320 (1984);

LÖWENSTEIN, "Hostile Takeovers: A Remedy of first Resort or last Resort", 52 Rev. de La Banque 12 (1988);

MAEIJER, "Beursoverval op Beschermingsconstructies", NJB 517 (1988);

MANNE, "Mergers and the market for corporate control", 73 J. Pol. Econ. 110 (1965);

MORTON, "Out-smarted", 7 Int'l. Fin. L. Rev. 24 (1988);

MULDUR, Probl. Econ. 14 septembre (1988);

OTTO, "Übernahmeversuche bei Aktiengesellschaften und Strategien der Abwehr", 29 DB Beilage 12 (1988);

PELTZER, "Hostile Takeovers in der Bundesrepublik Deutschland?", 10 ZIP 69 (1989);

PELTZMAN, "Toward a More General Theory of Regulation", 19 J. of L. & Econ. 211 (1976);

PHILLIPS, "The Battle for la Générale", Inst. Inv. 94 (1988);

PINDER, "Positive integration and negative integration, some problems of economic union in the EEC", 24 W.T. 88 (1968);

RIESENKAMPPFF, "Auswirkungen des Urteils des EuGH vom 17.11.1987 ('Philip Morris')", 38 WuW 465 (1988);

RIETKERK, "Bestuursonvriendelijke overneming: countervailing power", 66 NV 45 (1988);

ROMANO, "The Future of Hostile Takeovers: Legislation and Public Opinion", Working paper No. 86, Yale Law School, unpublished (1988);

ROMANO, "The Political Economy of State Takeover Statutes", 73 Va. L. Rev. 111 (1987);

SARGENT, "Do the Second-Generation Takeover Statutes Violate the Commerce Clause?", 8 Corp. L. Rev. 3 (1985);

STIGLER, "The Theory of Economic Regulation", 2 Bell J. of Econ. 3 (1971);

SÜNNER, "Take-overs, Made in USA", 32 AG 276 (1987);

SUTHERLAND, "The new Proposals of the Commission on Concentration Control", Eur. Aff. 46 (1988);

SYMPOSIUM (COFFEE, DAVIS, MACEY, PROXMIRE ET. AL.), "What's right and wrong about Hostile Takeovers?", Wisc. L. Rev. 353 (1988);

TEUBNER, "Unternehmensinteresse - das gesellschaftliche Interesse des Unternehmens 'an sich'?", 149 ZHR 470 (1985);

TEUBNER, "Enterprise Corporatism: New Industrial Policy and the 'essence' of the Legal Person", 36 Am. Journ. Comp. L. 130 (1988);

TIMMERMANS, "Die europäische Rechtsangleichung im Gesellschaftsrecht, Eine integrations- und rechtspolitische Analyse", 48 RabelsZ 1 (1984);

VAN ROEYEN, "Annotation, Validity under Commerce Clause of Federal Constitution, of State Statutes regulating Securities Transactions - Federal Cases", 73 L. Ed 2d 1454 (1984)

VIGLIANO, "Hostile Takeovers in Italy", 7 Int'l. Fin. L. Rev. 11 (1988);

Literature: Documents/Reports

AMENDED PROPOSAL for a Council Regulation (EEC) on the control of concentrations between undertakings, COM(88) 734 final - revised version, OJ No. C 22/06, Brussels (1989);

BESLUIT, Minister van Financien "Toezicht Beurswezen", Den Haag (1989);

BESLUIT, van de Sociaal-Economische Raad van 21 november 1975 tot vaststelling van de Fusiegedragsregels 1975, Den Haag (1975);

COMMENTAAR, SER-Fusiegedragsregels, zesde editie, Den Haag (1988);

DEBATES European Parliament, OJ Annex No. 2-361, Brussels (1988);

DIRECTIVE, Council, on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, 77/187/EEC, OJ No. L 61, Brussels (1977);

DIRECTIVE, Third Council, of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning Mergers of Public Limited Liability Companies, 78/855/EEC, OJ No. L 295/36, Brussels (1978);

INFORMATION MEMO "Takeover Bids, Clear rules for the single market", Spokesman's Service, Commission of the EC, Brussels (1988);

JOINT RESOLUTION on Takeover bids by European Parliament, OJ No. C 68/76, Brussels (1988);

OECD, Guidelines for Multinational Enterprises, Paris (1986);

OECD, Competition in OECD Countries 1986-1987, Paris (1988);

OPINION of the Economic and Social Committee on the Proposal for a Tenth Council Directive based on Article 54 (3) (g) of the Treaty concerning Cross-border Mergers of Public Limited Companies, COM(84) 727 final, CES 780/85, Brussels (1985);

PANEL ON TAKEOVERS AND MERGERS, The City Code on Takeovers and Mergers, London (1988);

PENNINGTON, Report relating to takeover bids and other bids, Commission of the EC, XI/56, Brussels (1974);

PROJET DE LOI, Ministère de l'économie, des finances et du budget, "sur la sécurité et la transparence du marché financier", Paris (1989);

PROPOSAL for a Tenth Council Directive based on Article 54 (3) (g) of the Treaty concerning Cross-border Mergers of Public Limited Companies, COM(84) 727 final, OJ No. C 23/11, Brussels (1985);

PROPOSAL for a Thirteenth Council Directive on Company Law concerning takeover and other general bids, COM(88) 823 final, OJ No. C 65/8, Brussels (1989);

PROPOSAL of 25 May 1987 for a Council Directive coordinating regulations on insider trading, COM(87) 111 final, OJ No. C 153/8 Brussels (1987);

RAPPORT van de Commissie Beschermingsconstructies, aan het Bestuur van de Vereniging voor de Effectenhandel, Amsterdam (1987);

RAPPORT van de Vereniging voor de Effectenhandel inzake de toepassing van Beschermingsconstructies", Amsterdam (1988);

REPORT, on the existing and proposed mergers, Tate and Lyle plc and Ferruzzi Finanziaria SpA and S & W Bersiford plc, Cmnd. 89, London (1987);

REPORT, Seventeenth, on Competition Policy, Brussels (1988);

REPORT, Tenth, on Competition Policy, Brussels (1980);

TAKEOVER PANEL, EC Directive on the Conduct of Takeovers, General Comment by the Panel on Takeovers and Mergers, London (1989);

UNITED NATIONS, Centre on Transnational Corporations, Survey of Research on Transnational Corporations, New York (1977);

WHITE PAPER, Commission of the EC "Completing the Internal Market", COM(85) 310, Brussels (1986);

WORKING DOCUMENT, EC Economic and Social Committee, of the Section for Economic, Financial and Monetary Questions on the Proposal for a Thirteenth Council Directive on Company Law concerning Takeover and Other General Bids, R/CES 376 - SYN 186 hm, Brussels (1989);

WRITTEN QUESTION of Mr. David Martin, No. 1765/88, OJ no. C 180/74 Brussels (1989);

WRITTEN QUESTION, of Sir Peter Vanneck, No. 2325/82, OJ no. C 189/23, Brussels (1983);

