Does Sweden Need a Mandatory Bid Rule?

A Critical Analysis

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1 Introduction

The highest ranking decision-making body of the corporation is the annual meeting.[2] The meeting decides on questions concerning the company's organization, which means, among other things, that it selects the company's board of directors.[3] The meeting's decisions are made by a vote of the shareholders, whose voting rights are correlated to the rights conferred by the shares they hold.[4]

The decision of the meeting is normally determined by the opinion that receives more than half of the votes cast. In the case of an election, the party chosen is the candidate who receives the most votes.[5] A shareholder whose shares represent more than half of the voting rights of all the shares in the company can thereby decide sovereignly as to who should make up the board of directors. It is often said that a shareholder with more than half of the voting rights of all the shares in a company controls that company.

In practice, though, control is often achieved with less than half of the total voting rights. This applies primarily to companies with a large number of shareholders, many of whom do not take part in meetings.

Thus, a shareholder without a majority of the voting rights may still be able to cast a majority of the votes at the annual meeting and can thereby be said to have effective control of the company.[6]

If a shareholder acquires enough shares to give him control of a company without acquiring all of the shares, other shareholders are also affected by the acquisition. When the controlling shareholder is expected to have a positive influence on the company, the value of the other shareholders' interests will rise. If not, the value of their shares will decrease. The latter situation is made worse for the other shareholders if they have seen those who already sold out to the acquirer receive a higher price than the market would indicate, i.e. a takeover premium.

Considering the importance a change in control can have on other shareholders, it has been suggested that in such instances they be offered the opportunity to get out of the company under the same terms that were offered to shareholders who sold out to the controlling shareholder. Looked at from another angle, anyone who acquires a controlling holding should be obligated to offer to buy the remaining shares in the company under the same conditions as applied to the controlling block; the acquirer should be forced to extend a *mandatory bid*.

This proposal is inspired by conditions outside Sweden. Twenty-five years ago a mandatory bid rule was first introduced in the British stock market. With the British rule as a model, similar regulations have since been adopted in several other European countries. Britain's rule has also served as a basis for the EU Commission's proposal for a Thirteenth Company Law Directive on public takeover bids, in which it has been proposed that Member States be obligated to introduce mandatory bids in connection with a change in control of listed companies.

This article lays the groundwork for a discussion of mandatory bids in the Swedish stock market, in part by clarifying the EU Commission's proposals as well as foreign experiences, and in part by examining the arguments in favor of mandatory bids. The article only treats the question of general bids which carry the force of law or are otherwise compulsory. I will leave for another discussion the question of what opportunities shareholders have, and should have, to introduce a mandatory bid rule in a company's by-laws.[7]

2 The City Code on Takeovers and Mergers

The model for the EU Commission's proposal and the mandatory bid rules that have already been introduced by several Member States is Great Britain's City Code on Takeovers and Mergers, which is issued by a coalition of institutions in the British securities market called the Panel on Takeovers and Mergers.[8]

The code was established in the 1950s and '60s against the background of several highly publicized takeovers in the British stock market, which spawned demands from several sources to improve the situation for the shareholders of target companies.[9] Legislative measures had been gathering support, but proved unnecessary when the market's players, under the leadership of the Bank of England, agreed to regulate themselves and establish an institution to oversee compliance with the rules.[10] The code was issued for the first time in 1968, the same year the Panel went to work. It has since been revised and expanded several times.[11] The basic version used today was issued in the fall of 1991.

The code applies to public takeover bids for and changes in control of publicly listed and unlisted public companies established in Great Britain (including the Channel Islands and Isle of Man) and the Republic of Ireland. Under certain conditions, it also applies to bids to acquire shares in private companies.[12] Its applicability is not dependent on the nationality of the acquirer or whether the acquirer happens to be an individual or a legal entity.[13]

The purpose of the code is to guarantee all shareholders fair and equal treatment in connection with corporate takeovers.[14] It contains ten general principles, which more or less explain acceptable practice in takeovers, as well as forty more detailed rules which can be considered further elaborations of the general principles.[15] Basically, the code regulates the actions of an acquirer prior to the public announcement of a takeover bid, the contents of circulars issued to the shareholders (whether by bidder or target) and the opportunities available to the target company to defend itself against a hostile takeover.

Because of the importance a change in control can have on a company's shareholders and the weak protection offered minority shareholders in the previous U.K. Companies Act[16], a mandatory bid rule was introduced in the original version of the takeover code for those who obtain 'effective control' of a company. 'The philosophy underlying the rule is that if effective control is obtained through the acquisition of shares, the principle of equal treatment of shareholders requires that all shareholders should have the opportunity to obtain the price per share paid for that control and that they should have the opportunity to get out of the company if they do not like what has happened,' the Panel wrote in its report for its operating year 1991.[17]
Mandatory bids were originally limited to situations where an acquirer obtained effective control by buying shares from the company's officers. The sellers were obligated to ensure that the acquirer made a corresponding bid to other shareholders.[18] The Panel determined what it felt constituted effective control from case to case.

A few years later, in 1972, a general bid was added to the rule for anyone who obtained a shareholding representing at least 40 percent of a company's voting rights.[19] These two different criteria for mandatory bids – effective control and 40 percent – led to problems in their application and uncertainty among market players, particularly as the Panel until then had treated a shareholding of around 30 percent as sufficient for effective control.[20] For that reason, both rules were merged in 1974 into a single one, according to which anyone who acquires shares representing at least 30 percent of the voting rights in a company must also offer to acquire the remaining shares; this wording still remains in effect today.[21] 'The figure of 30% was chosen because it was considered that, in most cases, this would represent effective control; experience has generally confirmed this to be so,' the Panel wrote in commenting on the rule.[22]

Since investors with even small shareholdings can also exercise influence 'unacceptably disruptive to the management of the company,' demands have been made in recent years to reduce the threshold for mandatory bids to 25 or perhaps 20 percent.[23] The Panel has rejected this notion, however, maintaining that the arguments that were presented fall outside its jurisdiction.[24]

The obligation to extend a bid to other shareholders generally is not dependent on how the holding was obtained. The obligation naturally arises if the threshold is passed through the direct purchase of the shares in question, but it also arises, for example, through the conversion of other securities to shares.[25] It does not matter, either, whether the acquirer obtained his holding in a single transaction or successive purchases of small blocks, or whether the acquisition was made in the market or not.[26] Dispensation from the mandatory bid rule can be granted by the Panel in certain situations, however.[27]

The mandatory bid rule applies not only in cases where a shareholder passes the 30-percent threshold, but also if he holds between 30 and 50 percent of the voting rights and increases that holding by at least one percentage point within a 12-month period (creeping control). This rule was introduced in 1974, and in 1976 the limit was raised to two percent, where it remained until recently. In March 1993, it was again reduced to one percent to 'best serve the interests of the shareholders'.[28]
In determining a shareholder's voting rights in a company, his own shares are added with those held by others with whom he is 'acting in concert.'[29] The expression 'acting in concert' used in the Code refers to 'persons who, pursuant to an agreement or understanding (whether formal or informal), actively cooperate, through the acquisition by any of them of shares in a company, to obtain or consolidate control of that company.'[30] The aim is to prevent a shareholder from concealing the actual size of his holding by acquiring shares in the names of one or more nominees (warehousing).[31]

The Code also contains a list of natural persons and legal entities who are presumed to be acting in concert, as well as a number of notes in which the Panel reviews common 'control situations' and how they relate to this concept.[32] Despite these notes, new situations continually arise in which the Panel must decide as to the applicability of the rule. In fact, the single aspect of the mandatory bid rule which generates the most questions for the Panel is that of persons acting in concert.

If a mandatory bid arises in the case of several persons who, according to the Code, are acting in concert and together obtain a holding with 30 percent of the voting rights, the obligation rests primarily with the person in the group who, through his acquisition, has caused the group's aggregate holding to pass the 30-percent limit. If this person is not a 'principal member' of the group, the obligation may instead rest with the person or persons who are regarded as principal member(s).[33]

An offeror who passes the threshold for a mandatory bid must immediately announce his intentions publicly. In his disclosure, he must include an assurance from his financial adviser or other independent source that he, the acquirer, has the financial resources to implement an acquisition of all the shares in the company.[34] If it is later shown that in spite of this, the acquirer cannot implement the acquisition, the person who originally provided the assurance may himself be forced to finance it.[35]

The bid to the other shareholders must be conditional on the offeror increasing his total holding to more than 50 percent of the voting rights in the company.[36] If not enough shareholders declare themselves to be willing to accept the offeror's bid to raise his total share of the voting rights to at least 50 percent, he can choose to either acquire the shares that were offered to him or keep only his original holding. Regardless of which alternative he selects, he is prohibited from acquiring enough shares over the following 12-month period to again warrant a mandatory bid.[37] The bid cannot be made conditional on a figure higher than 50 percent, although a lower one is naturally acceptable. If a bid is required because the offeror initially obtained more than 50 percent of the voting rights, his bid to the remaining shareholders generally has to be unconditional.[38]

The bid to the other shareholders must 'be in cash or be accompanied a cash alternative at not less than the highest price paid by the offeror or any other person acting in concert with (him) for shares of that class within the preceding 12 months.'[39] If the shares were acquired for anything other than cash, the value of the compensation must be determined by an independent assessment.[40] If the mandatory bid affects shares of different classes, the prices offered should be 'comparable' and the Panel must be consulted before the bid is extended.[41] In other respects, a mandatory bid applies the same rules as a regular takeover bid, according to the Code.[42]

The mandatory bid rule today primarily targets the acquirer, i.e. the person who reaches the threshold requiring him to make a bid to the other shareholders. In some instances, however, it also applies to the seller – namely, if the shares are bought from directors of the target company. The latter group is forced in such instances to make the sale conditional on the acquirer fulfilling the obligations under the mandatory bid rule (shut-out bid).[43]

If a mandatory bid arises, the person or persons involved may neither nominate anyone for a board directorship nor vote for their shares in the target company until the bid to the other shareholders is made public.[44]

As already mentioned, the takeover code is a form of self-regulation. In its introduction it is noted that: 'The code has not, and does not seek to have, the force of law.'[45] This does not mean that its rules are not widely respected, though.[46] Failure to comply with them would not only cause the parties involved to risk their reputations,[47] but, by way of sanction, they would also be deprived of future opportunities to 'take advantage of the facilities of the securities markets in the United Kingdom.'[48] On the other hand, the Panel cannot force anyone to abide by the rules of the code by taking legal action. This issue has not yet come to a head, however.

3 EU Commission Proposals

Great Britain's rules on company takeovers through public buyout offers were unique in Europe for some time. In most Continental European nations, public bids were still so rare in the early 1980s that special regulations were thought to be unnecessary.

Then, during the latter part of the 1980s, activity in European stock markets increased dramatically – and so did the number of public takeover bids. In more and more countries where takeovers were traditionally based on negotiations between the acquirer the company's management, bids were targeted directly at the shareholders – in some cases with no prior negotiations at all, in others after negotiations proved unsuccessful.

In the 1980s, cross-border corporate takeovers increased as well. Whereas takeovers had previously been primarily between domestic companies, it then became more common for foreign firms to try to wrestle control of companies in other countries through public takeover bids.

The rising tide of acquisitions – and particularly cross-border acquisitions – led to widespread debate on conditions for company takeovers in Europe, particularly within the EU. In a common market where companies are free to establish themselves in any Member State they choose and where capital supposedly flows freely across national borders, there proved to be significant differences in Members States' positions regarding public takeovers. While some countries were willing to let market forces free, others had complex institutional and legal obstacles to those who wished to gain control of a company in this manner.

It was against this background that the EU Commission at the end of the decade presented a proposal for a Thirteenth Company Law Directive, the main purpose of which was to harmonize Member States' regulations regarding public takeover bids.[49] The Commission had actually begun working on this question much earlier, however.

3.1 The Pennington Report 1974

Back in the early 1970s, the EU Commission appointed the British professor in corporate law Robert Pennington to draw up a report with a draft directive for public takeover bids.[50] The draft, which was presented to the Commission in 1974, was strongly influenced by the British Takeover Code. Like the Code, it suggested rules dictating the actions of an acquirer prior to the announcement of the bid, the contents of the circulars issued to the shareholders, the defensive measures available to the target company, and so on.[51]

Pennington also suggested that Member States be forced to introduce a mandatory bid rule, which, according to the proposal, would be called for (a) if a natural person or legal entity obtains a shareholding representing at least 40 percent of the total voting rights in a company, (b) if a shareholder within the span of 12 months acquires shares representing at least 20 percent of the total voting rights, or (c) if a shareholder has pledged to acquire enough shares to obtain a voting majority in the company.[52]

According to Pennington, this rule was a compromise between British, French and Belgian regulations in the area, all of which aimed to '...ensure that the remaining shareholders are treated equally as favorably as those shareholders who sell their shares by private negotiation or on a stock exchange, and also to enable the remaining shareholders to dispose of their shares if they find that a controlling or near controlling holding is vested in one shareholder.'[53]

The three mandatory bid thresholds were motivated in the first instance by the fact that the acquirer generally obtains effective control of the company, in the second that he has manifested his intention to gain control of the company, and in the third that he must be considered as being in the process of acquiring legally binding control of the company.[54]

Thus, mandatory bids would not be dependent on the way in which the shares were acquired or whether a holding was obtained through a negotiated transaction of a block of shares, successive acquisitions on the market, or a partial acquisition bid.[55]
The bid to the other shareholders must be in cash or be accompanied a cash alternative at a price corresponding to the highest price paid by the controlling shareholder for the shares in question over the preceding 12 months.[56]

Pennington also proposed that Member States be required to appoint a special authority to oversee compliance with the rules.[57]

The Pennington Report and the accompanying draft directive were discussed for a couple of years with representatives of the Member States. It was evident, however, that interest in such a directive, which addressed questions that were still relatively obscure at the time for most Member States, was very limited, and eventually the entire project was forgotten.[58]

3.2 The Commission's Draft Directive 1987

Ten years later, plans for a directive were again put forth. In a white book on the completion of The Internal Market presented by the Commission to the Council of Ministers in 1985, the need to harmonize Members States' rules on takeover bids was stressed. The Commission promised a directive proposal in 1987 and, looking ahead, predicted that one could be adopted by 1989.[59] As planned, a draft – though not a complete proposal – was ready by 1987.[60] The road to a final directive proved to be considerably longer than the Commission had anticipated, however.

Like the Pennington proposal, the Commission's draft directive contained a requirement that Member States introduce a mandatory bid rule,[61] although its rule differed from Pennington's in several important respects. First, the Commission recommended a significantly higher threshold for mandatory bids. While Pennington suggested one-third of the voting rights, the Commission recommended either one-half or two-thirds. Which of the two would ultimately be selected was left for further discussion. Secondly, the Commission recommended a mandatory bid only if the critical threshold was passed as a result of a public takeover bid. Pennington, on the other hand, had proposed that it apply to every holding of a certain percentage of voting rights, regardless of how it was acquired.

In contrast to the Pennington proposal, the Commission's draft also did not regulate the price that had to be offered for the shares in the target company. It could not be lower than a certain percentage of the price paid in the initial bid, but what percentage that would be was left to further negotiation.[62]

Despite that Member States were undoubtedly much more inclined to discuss the Commission's directive plans this time than they had been in the mid-1970s, the draft directive was widely criticized on several grounds and the Commission's plans again appeared to amount to naught.[63]

3.3 The Commission's Directive Proposal 1989

The situation changed overnight, however, when the Italian businessman Carlo de Benedetti in January 1988 extended a bid for a controlling shareholding in the Belgian holding company Société Générale de Belgique (SGB), thereby starting one of Europe's most controversial takeover fights of the decade.[64] SGB, which directly or indirectly controlled nearly 1,300 companies around the world, was estimated to have assets corresponding to around one-third of the total Belgian economy. 'La vieille dame,' as the company was respectfully known, was something of a national institution, and the fight for the grand dame struck an emotional chord among Belgians.

The battle for SGB put a fire under the Commission's directive plans. At the urging of the European Parliament[65], the previous draft directive was quickly revamped and in January 1989 the Commission presented a completed proposal for a Thirteenth Company Law Directive, the general purpose of which was to create in all Member States a basic level of protection for shareholders whose shares are the target of a public takeover bid.[66] Based on the principle that all shareholders in the same position should be treated equally,[67] the directive proposal included rules on, among other things, the structure of takeover bids, the actions of the target company during the bid period, and acceptance deadlines for existing shareholders.

The obligation of Member States to introduce a mandatory bid remained one of the principal provisions of the directive.[68] 'To guarantee equal treatment of all shareholders, the directive fixes a threshold at which there is an obligation to launch a takeover bid. Besides, in order to protect minority shareholders and to avoid purely speculative partial bids the directive ensures that the offeror must make a bid concerning all shares of the company.'[69]
In its details, though, the mandatory bid rule was again changed. Among the differences was the threshold for the bid. While the Commission's draft two years earlier had recommended mandatory bids for shareholdings representing half or two-thirds of the voting rights, it now proposed that the threshold be permitted not to be higher than one-third of the voting rights of all shares in the company.[70] In determining the maximum limit, the Commission noted that one-third of the voting rights 'is that from which the offeror may exercise a blocking minority.'[71]

3.4 The Commission's Revised Directive Proposal 1990

The Commission's directive proposal was presented to the Council of Ministers, which circulated it for comment to the Economic and Social Committee[72] and the European Parliament[73] in the spring of 1989. Both supported a mandatory bid requirement for Member States but had opinions on the detailed wording of the rule.[74] The Council of Ministers discussed the proposal in December 1989, after which it was returned to the Commission for revision. In September 1990, the Commission presented a revamped (and still current) proposal for a Thirteenth Company Law Directive.[75]

As proposed at present, the directive is intended to apply to bids to acquire shares that can be traded in an organized market – in practice primarily listed shares.[76] After five years, however, the Commission may propose to the Council of Ministers to extend the area of application to shares in other companies as well.[77]

The mandatory bid rule comes up again in art. 4, point 1:

'*Any person who as a result of acquisition by himself or by a referred to in pragraph 2 holds securities which added to any existing holdings give him a percentage of the voting rights in a company which may not be fixed at more than one-third of the voting rights existing at the date of acquisition shall be obliged to make a bid to acquire all the securities of the company.*'[78]
Thus, the threshold for the mandatory bid remains the same as in the previous proposal, i.e. anyone who obtains one-third of the voting rights in the company must extend a bid in accordance with the directive. In determining an acquirer's voting rights, his own holdings are added to the voting rights of the securities held by other persons or companies in their own names but on the acquirer's behalf, of companies controlled by the acquirer, and by persons acting in concert with the acquirer.[79]

The point in time at which a mandatory bid is required is determined by an objective criterion: when an individual actually owns a certain holding in the company. But due to the 'minimal nature' of the directive, Member States may apply a stricter, subjective criterion, by which a bid is necessary at an earlier point, when an acquirer is on the verge of buying enough shares to exceed the limit.[80]

According to the proposal, Member States may admit dispensations from the mandatory bid rule in their national legislation for certain situations stipulated in the directive. The first is if the shares were acquired without compensation, for example, through inheritance. Secondly, the directive does not require a mandatory bid if the acquirer pledges to merge with the company in question. The same also applies if the acquirer obtained his shareholding through a split-up (fission). To prevent a mandatory bid when the threshold is exceeded coincidentally or perhaps unintentionally, exceptions may also be made for acquisitions that raise the voting rights of a holding to no more than three percent over the stipulated limit for mandatory bids, if the acquirer at the same time pledges to sell as many shares as necessary to reduce his holding below the limit within one year. Another case that may be exempted from a mandatory bid is if the target company had already been controlled by the acquirer or by another company that is controlled by – or controls – the acquirer. This also applies if the target company, notwithstanding the acquirer's holding, is still controlled by another shareholder who declares in writing that he is not willing to accept the acquirer's bid. In the latter situations, control is not considered to have changed hands. Finally, an exception may be made in cases where the acquirer was already a shareholder in the company and reaches the limit in question by exercising his preferential rights to new shares in a new issue in the target company.[81]

In addition to the exceptions thereby offered to Member States, dispensation from a mandatory bid may also be granted by the supervisory authority in each Member State responsible for ensuring compliance with takeover regulations.[82]
Compared with the British Takeover Code, the current directive proposal leaves certain very important questions unanswered in terms of mandatory bids.

First, the proposal does not contain any provisions similar to the Code's rule that calls for mandatory bids not only when a shareholder passes the voting right threshold, but also if a shareholder with between 30 and 50 percent of the voting rights increases his holding by at least one percentage point within a 12-month period.[83]

Secondly, the proposal does not stipulate the price or other terms the acquirer must offer other shareholders for their securities. Nothing is mentioned, either, about whether the acquirer may make his bid conditional on obtaining a specific share of the voting rights in the company. The failure of the proposal to mention this in practice makes it possible to circumvent a mandatory bid, which has been strongly criticized, particularly by the British.[84] The directive has little chance of being adopted without an addendum on these points.[85]

For Member States that currently do not have mandatory bid rules, it is particularly interesting that the proposal also does not mention what happens in the case of shareholders who already hold more than one-third of the voting rights in a company should a mandatory bid rule be adopted. Are they then obligated to extend a takeover bid to the other shareholders? The answer is probably no, since the rule refers to ‘acquisitions’ of securities.[86] But what happens if such a shareholder increases his holding following the introduction of mandatory bids? The directive proposal does not address this, but by all indications mandatory bids are not intended to apply at any level other than one-third of the voting rights.

Finally, it should also be noted that the directive does not mention sanctions. In other words, it would be up to each Member State to decide for itself how a national mandatory bid rule should be sanctioned.

3.5 Will the Commission’s Proposal be Adopted?

Will the proposal for the Thirteenth Company Law Directive be adopted in its present form by the Council of Ministers? Indications are, it will not. The proposal was presented in the 1980s at a time of substantial takeover activity around Europe. Today, the number of takeovers is significantly lower and interest in the Thirteenth Company Law Directive has declined for that reason. In addition, Member States have strongly objected to several significant points in the proposal.

First, some are highly critical of a mandatory bid rule. Germany and the Netherlands refuse to accept the proposal in this regard. Should it be adopted despite their objections, both countries, like Belgium and others, oppose setting one-third of the voting rights as the only limit for bids.[87]

Secondly, Great Britain has protested against the requirement that Member States appoint a supervisory authority, as called for in the directive. Despite that this authority’s power can be delegated wholly or in part to individual associations, responsibility for compliance with the regulations will ultimately rest with the appointed authority. The British Takeover Panel is not an authority *per se*, and is not subordinate to one. Its decisions can only be appealed to a court of law to a limited basis. Since Great Britain’s request to retain this arrangement has not been accepted, British interest in the directive proposal is very limited today.[88]

The proposal has also been strongly criticized by individual organizations in the Member States. In Germany, for example, the federation of industries, banking association and a number of other business organizations, in a joint statement, strongly opposed harmonization efforts in this area, particularly criticizing the mandatory bid rule.[89] The European federation of industries and employers, Union des Confédérations de l’Industrie et des Employeurs d’Europe, UNICE, has expressed a similar sentiment.[90] Also, the European banking federation, Federation Bancaire, in a letter to the Council of Ministers regarding the directive proposal in general and the mandatory bid rule in particular, stated that it feels that each Member State should decide for itself how large a shareholding should warrant a mandatory bid and how large a percentage of the remaining shares the bid should encompass.[91] What is more, support for the Commission’s proposal is by no means unqualified in countries that already regulate mandatory bids. In Denmark, for example, the Ministry of Industry several years ago appointed a ‘Börsudvalg,’ a stock exchange committee, to oversee activity on the Copenhagen Stock Exchange. The committee was also responsible for reviewing and commenting on the proposal for the Thirteenth Company Law Directive from the standpoint of the stock market. Its conclusion reflected two opposing views: one encouraging and supporting the Commission’s efforts and another, more restrictive view that the directive should apply exclusively to friendly takeover bids. The former opinion was primarily that of organizations and government agencies with ties to the financial markets, the latter that of the Danish council of industries, Dansk Industri, among others.[92]

The EU Commission has not ignored this criticism, as indicated by the press release published after the so-called Edinburgh Meeting in December 1992, in which it came to the conclusion that portions of the directive proposal, which at present is in the hands of the Council of Ministers ‘tend to go into excessive detail in relation to the objective pursued’ and that it plans to revise them so that ‘they establish general principles to be given more detailed form by the Member States.’ One of the directive proposals mentioned in particular is the Thirteenth Company Law Directive.[93]

Of course it is not possible to predict what changes in the proposal may be made. It is obvious, though, that the Commission’s prospects of getting the proposal passed by the Council of Ministers would increase significantly if the mandatory bid rule were abandoned. Opposition would decrease greatly in Germany and the Netherlands, and perhaps an opening would be created for a compromise with Great Britain.[94]

4 Current Regulations in Selected Countries

Great Britain's rules pertaining to public takeover bids were in a class for themselves in Europe for some time. No other country had as much experience in public takeovers and no other had established such comprehensive legislation in the area. As time has passed, however, ethical codes, stock exchange rules and legislation on public takeover bids have been adopted in other countries as well. A common denominator for all of them is that they are based on the principle of equal treatment of the shareholders in the target company. In several countries, though not all, this principle has in turn served as the basis for some form of mandatory bid when a shareholder obtains a holding of a certain size in a publicly listed company.

In this section, the focus is on current regulations in this regard primarily in the larger EU nations most closely affected by the Commission's directive plans, although also in the EFTA nations. Finally, a brief summary is provided of current regulations in the United States.

4.1 The EU Nations

Nations with mandatory bid rules

Among the EU's Member States, the country that today has the most extensive regulations on public takeover bids, after Great Britain, is France. By all indications, France is also currently the biggest (and perhaps only) backer of the EU's harmonization efforts in this area.

The first company takeover through a public bid in France took place in the mid-1960s, and in the early 1970s securities laws in this area began to take shape.[95] A gradual increase in the number of company acquisitions and attempted acquisitions through public takeovers during the 1980s led the French legislature in 1989 to add to the existing French Companies Act a special law on 'la sécurité et á la transparance du marché financier' as well as to reform securities regulations.[96]

According to the new rules, a mandatory bid is called for if someone acquires more than one-third of the share capital or voting rights in a listed company through acquisitions on the official market ('côte officielle') or the so-called secondary market ('second marché'). The same applies if a shareholder with between one-third and one-half of the share capital or voting rights of a company increases his holding by at least two percentage points or obtains an absolute majority of the shares or voting rights within the span of one year.[97]

In determining an acquirer's holding relative to these thresholds, his own holding is added to the shares of affiliated persons with whom he is acting in concert ('d'action de concert') to gain control of the target company. Which combinations are necessary is determined *in casu* by one of the two supervisory authorities of the stock market, Conseil des bourses de valeurs (CBV).

In contrast to Great Britain, France's mandatory bids were originally designed such that a person who reaches the threshold for a bid is obligated to extend it not for all the remaining shares, but only for as many as would raise his total holding to at least two-thirds. This was obviously a compromise between Commission des opérations de bourse (COB), the other supervisory authority, which wanted to follow the British example and apply the mandatory bid to all of the remaining shares, and legislators, who feared this would cause many major corporations, after a change in control, to be forced to leave the stock market. This, in turn, would deprive the public of attractive investment opportunities. In support of the 'two-thirds solution,' it was also claimed that the more extensive obligation would be easier for asset-rich foreigners to handle than domestic acquirers, and thus run counter to national interests.

The balance between these opposing interests was also reflected in a speech to the national assembly by French Minister of Finance Pierre Bérégovoys: 'I mediated between two opposing trends. I noticed that French companies that planned to acquire international firms hoped for minimal regulation in order to avoid retribution in other countries ... On the other hand, I noticed that French companies that feared they themselves would be attacked hoped for the maximum protection ... I tried to find a level in-between.'[98]

The government's compromise solution was strongly criticized by the market, however, and in May 1992 mandatory bids were extended to encompass all of the remaining shares in the target company.[99]

Dispensation from mandatory bids may be granted by CBV if, for example, the shares were acquired without compensation, if the threshold was passed by less than three percentage points and the acquirer pledges to reduce his holding, or if the acquirer controlled the target company prior to reaching the limit.[100]

The price and the other terms the acquirer offers the other shareholders must be acceptable ('recevable') to CBV,[101] which is interpreted legally as meaning that the bid must have a reasonable chance of being accepted by all of the shareholders.[102]

Of final note as regards sanctions, in France a person who exceeds the threshold for a mandatory bid and fails to tender one to other shareholders may not exercise his voting rights for the 'excessive' portion of his shareholding.[103] Furthermore, COB can turn to the courts to force the acquirer in question to extend a bid to the other shareholders.[104]

Another European nation that established rules on public takeover bids early on was **Belgium**. Back in the mid-1960s, the Belgian banking commission, Commission bancaire, was authorized to draft a set of rules dictating how public bids were permitted to be extended and the information requirements of the offeror. The banking commission fulfilled its responsibility through decisions *in casu*, which were released to the public over time in the commission's annual reports. Following de Benedetti's bid for Société Générale in 1988[105], however, demands quickly rose for legislation, and about a year later a comprehensive set of regulations was introduced on public takeover bids.[106] The new rules contained two provisions of interest in this context. First, they forbid partial takeover bids that would cause the offeror's holding to exceed more than 10 percent of the share capital of the company. If that is the case, the bid must encompass all of the shares in the company.[107] Secondly, anyone who obtains 'control' through anything other than a public takeover bid and in the process pays a higher price for the shares than the current market price – i.e. a control premium – must offer to acquire all of the shares in the company under the same terms as the controlling interest.[108] The obligation of the mandatory bid rule can also be met if the controlling shareholder maintains a standing buy order on the stock market at a corresponding price for at least fifteen days.

In **Italy**, the Milan Stock Exchange back in 1971 issued a code of ethics regarding public takeover bids.[109] However, it did not contain any provisions on mandatory bids and, in practice, played a very limited role in Italian business circles. In fact, it met with considerable criticism and was recently replaced by compulsory rules on public takeover bids. As part of these new rules, a form of mandatory bid was introduced.[110]

In contrast to the EU Commission's proposal, mandatory bids in the Italian stock market are not tied to a specific percentage of the voting rights fixed by law. Its rules are based on individual, ongoing assessments by the Italian stock exchange authority, Commissione nazionale per le societá e la borsa (CONSOB), of what it considers a sufficient share of the voting rights of each publicly listed company to constitute control of that company and that certain obligations rest with those who intend to acquire such a share of the voting rights. First, the rules state that a controlling interest acquired on the market may only take the form of a public bid. Secondly, anyone who makes such an acquisition through a negotiated transaction outside the market is forced to extend a public bid for an equal portion of the share capital, at a price not lower than the weighted average price paid during the preceding 12 months. Thirdly, and finally, anyone whose shares represent at least half of the holding that is considered necessary for control and who increases that holding by one-fifth or two percentage points must extend a bid for the remaining shares in the company.[111]

In **Spain**, public takeover bids are so rare that special rules were not introduced until 1984.[112] According to current rules, a form of mandatory bid may be called for at three different thresholds for shareholdings in a publicly listed company. First, anyone who intends to acquire enough shares to raise his holding to at least 25 percent of the share capital must implement the acquisition through a public takeover targeted at holders of at least 10 percent of the company's shares. This also applies to anyone who holds at least 25 percent of the share capital and intends to increase his holding by at least six percentage points within the period of one year without thereby reaching 50 percent of the share capital. Finally, anyone who intends to acquire enough shares to raise his holding above 50 percent of the share capital must implement the acquisition through a public bid large enough that, if it is accepted without exception, it would give him at least 75 percent of the share capital.[113]

The last EC nation with mandatory bid rules is **Denmark**, which introduced a general recommendation in 1979 as part of the code of ethics of the Copenhagen Stock Exchange.[114] In the new rules that went into effect in 1988, the provision is formulated as a requirement: 'In connection with transactions that directly or indirectly result in the transfer of a shareholding that legally or in actuality provides control of a listed company, the acquirer must give all shareholders the opportunity to sell their shares under identical terms.'[115]

A controlling shareholding in this case may represent less than 50 percent of both the share capital and voting rights of all of the shares in the company. What is important is that the holding provides an opportunity to steer decision-making in the company. 'Control will typically manifest itself as ability to choose several of the members of the board of directors,' the board of the stock exchange states in a comment to this rule.[116] From recent years' experience, the exchange appears to be 'moving toward a level of around 40-42%.'[117]

Mandatory bids come into play regardless of whether control is obtained through an acquisition on the market or a public takeover bid. It does not matter, either, what form of payment was made for the shares.[118] However, as indicated by comment by the exchange's board of directors, mandatory bids are not intended in the case of acquisitions 'through inheritance,' for example. Legally, exceptions are made for acquisitions 'which occur coincidentally or as the result of another transaction.'[119]

The acquisition should 'directly or indirectly' result in control. The latter means, among other things, that an acquisition of a parent company under certain circumstances can result in a mandatory bid to minority shareholders in a listed subsidiary.[120]

The rule applies to acquisitions by both natural persons and legal entities and to 'more than one person, who cooperate to obtain control of a company.'[121] It does not apply, however, to situations where two or more persons who already own shares in the company start a cooperation and thereby obtain control without further acquisitions.

If an institutional shareholder which is limited in terms of the size of the shareholdings it may hold in individual companies due to other rules is obliged to make a mandatory bid, it must instead sell enough shares that it no longer holds a controlling interest.[122]

The requirement to offer other shareholders 'identical terms' in principle means that the price must be the same for minority shares as for the shares in the controlling block. If the company has two classes of shares (with differentiated voting rights, for example), both of which are listed on the stock market, and a premium is paid in excess of the current market price for the high-vote shares, holders of the other shares must be offered the same premium percentage-wise relative to the price of their shares. If only the low-vote shares are listed and the acquirer obtains a majority of the voting rights by acquiring the unlisted high-vote shares, the price he must offer for the low-vote shares generally has to be at least 50 percent of that he paid for the high-vote shares.[123]

Dispensation from mandatory bids may be granted by the board of the stock exchange if 'special conditions make them applicable.'[124] Dispensation requests are very rare, however.[125]

Countries that lack mandatory bid rules

The largest of the EU's Member States that do not have any mandatory bid rules whatsoever are Germany and the Netherlands.

In **Germany**, public takeover bids, especially hostile ones, are rare. There are no laws on the subject to speak of and the business community strongly opposes the proposal for the EU's Thirteenth Company Law Directive.[126] Representatives from business and the stock market formulated some general guidelines for public takeover bids at the end of the 1970s. These guidelines dictate that holders of shares of the same class are to be treated equally, but they do not require that anyone who acquires or in any other manner obtains a certain portion of a company's shares must extend a bid for the remaining shares. In practice, the guidelines are of very little significance.[127]
The Netherlands does not have any rules on mandatory bids, either. Public bids are regulated by the so-called Merger Code established by the Social and Economic Council in the early 1970s, but which does not contain any rules on mandatory bids.[128]

Lastly are **Portugal**, where as of 1986 the acquisition of shares representing more than 20 percent of the voting rights in a listed company may only be made in the form of a public bid, but where the bid does not have to cover more than the portion of the voting rights which are being sought,[129] and **Greece**, which has no rules whatsoever regarding public bids.[130]

4.2 The EFTA Nations

Among EFTA nations, Norway and Finland have had mandatory bid rules for several years. Recently, a form of mandatory bid was also introduced in Switzerland. Austria, on the other hand, has no rules on mandatory bids.

In **Norway**, a mandatory bid rule was introduced by the Oslo Stock Exchange in 1984. In brief, it stated that anyone who, following negotiations with the board of directors of a listed company, offers to buy the holdings of one or more of the company's shareholders, is obligated to extend a corresponding bid to holders of the remaining shares in the company.

As of the spring of 1990, this rule has been incorporated into Norway's securities laws and is now such that anyone who, through an acquisition, owns listed shares representing at least 45 percent of the total voting rights in a listed company must extend a takeover bid to holders of the remaining shares in the company. Furthermore, the acquirer's own holding must be added to the shares belonging to family members, companies in which he has a dominant influence, and those who the acquirer 'is under contract with or with whom he otherwise has an understanding.'[131]

A mandatory bid must encompass all of the remaining shares in the company, but can be made conditional on the acquirer obtaining enough shares to represent at least two-thirds of all the voting rights.

The bid must be in cash, unless the parties involved can agree otherwise. The price offered must be at least as high as the highest price the acquirer paid for his shares during the preceding six-month period or the price he paid in connection with the bid, whichever was higher.

As soon as a mandatory bid rule was introduced, however, the Norwegian government realized that its rules would eventually have to be re-evaluated and further discussed.[132] Two years later, in 1991, proposed changes in the rules were presented to the government.[133] They were not adopted, however, and today no changes are at hand.

In **Finland**, a mandatory bid rule was included in the securities law that went into effect in the fall of 1989.[134] The rule, which legally does not characterize them as mandatory bids, but rather as compulsory redemptions, is worded such that anyone who acquires shares representing more than two-thirds of the voting rights of all the shares in a listed company or the equivalent of an OTC company is obligated to offer to buy its remaining shares. If the acquirer is a company, its own shares are added to those owned by other companies in the same group. The choice of two-thirds of the voting rights as the threshold for mandatory bids was motivated by the fact that a holder at this level is felt to be able to push through changes in the company by-laws at shareholders' meetings.

In this case, the mandatory bid is a redemption at the 'current price,' by which is meant the average value of publicly listed bid prices over the most recent two-month period.

The Finnish banking inspection board may grant dispensations from mandatory bids if a shareholding is considered temporary and its purpose is not to exercise a dominating influence on the company.

Finland's so-called Securities Market Commission in 1991 proposed a series of changes and clarifications of the mandatory bid rule.[135] The government supported the commission's proposals and the central bank was expected to decide on the matter in 1993.[136]

Finally, as regards **Switzerland**, it can be noted briefly that a form of mandatory bid was included in the takeover code issued by the Swiss stock exchanges in 1989.[137] The code requires anyone who, through a partial takeover bid, obtains a total shareholding corresponding to more than half of the voting rights in a listed company to acquire all the shares that are offered to him as a result of the bid.[138] At present, a proposal for new securities legislation is being discussed in Switzerland, with the majority of those who researched the matter recommending that a mandatory bid at one-third of the voting rights of a listed company be written into law, in accordance with the EC's directive proposal.[139]

4.3 The United States

In looking at conditions in the United States, a distinction must be made between corporate law on the one hand and securities law on the other. American corporate law is a state concern, while securities law is for all intents and purposes federal.

A couple of states have added mandatory bids to their laws in recent years. The reasons for their doing so are different than in Europe, though. Extensive takeover activity in the U.S. during the 1980s created pressure on legislators to put a damper on hostile takeovers by changing and supplementing existing corporate laws. As a result, a rising number of states introduced one or more anti-takeover statutes in order to protect companies from unwanted takeover attempts.[140] In two states, Maine and Pennsylvania, these statutes included mandatory bids. In Maine the bid applies at 25 percent of the voting rights and in Pennsylvania at 20 percent.[141]

The primary federal securities laws are the Securities Act and the Securities and Exchange Act, both of which were enacted in the 1930s. They contain a long list of regulations, the aim of which is to protect the public vis-a-vis the securities market, but they do not contain any rules regarding mandatory bids.[142]

5 The Debate on Mandatory Bids in Sweden

The question of mandatory bids was first debated publicly in Sweden as a result of a number of highly publicized takeovers in the late 1960s and early 1970s. The restructurings and takeover activity of the 1960s were reflected very little in the stock market, but the media's interest in changes in control and public takeovers rose quickly and a much more critical analysis of major dealings on the stock market began to occur. Among the most notable cases were Gränges' acquisition of Svenska Metallverken in 1969, Nordiska Kompaniet's acquisition of Turitz in 1970 and, not least of all, Svenska Tändsticksaktiebolaget's acquisition of Tarkett in the same year.[143]

In its coverage of these and other acquisitions, the media began to call more frequently for uniform rules for the actions of the acquirer. Sven-Ivan Sundqvist, a noted business columnist at the Stockholm daily Dagens Nyheter, was among those who called for the introduction of mandatory bids in Sweden along the lines of those in Great Britain.[144]

The lack of uniform rules was also criticized by representatives of the business community, which led the Stockholm Chamber of Commerce and the Federation of Swedish Industries to commission the Swedish Industry and Commerce Stock Exchange Committee to analyze how information is released to the public in connection with company mergers and acquisitions. Clearly influenced by the British takeover code, the Stock Exchange Committee presented a series of recommendations regarding public takeover bids in 1971.[145] Their purpose was to ensure that shareholders receive sufficient information to make a knowledgeable decision regarding takeover bids. As far as the material content of the bids was concerned, the Committee only mentioned the importance that all holders of the same classes of shares be treated equally. The recommendations did not mention mandatory bids.

During the 1980s, takeover activity in the swedish stock market rose to a record level. In all, nearly 140 companies were acquired by public bids during the decade, more than three times as many as in the 1970s. New players and practices grabbed the attention of the market. The public, through the media, watched as several takeover bids turned into open battles for control between different groups of shareholders and sometimes between shareholders and managements.[146] All the while, the media frequently reiterated its demands for a mandatory bid rule in connection with large share acquisitions in listed companies.[147]

Several members of parliament also called for new rules for the stock market, including mandatory bids in the case of large-scale share acquisitions. In 1986, Bengt Silfverstrand, a Social Democrat, moved to establish legislative measures to 'alleviate the obvious disparities that today increasingly characterize the Swedish stock market.' One of the measures that was recommended was a legal obligation for those who take over 30 percent of the shares of a company to 'buy other shareholders' shares at the same price.'[148]

The Standing Committee on Laws sent the proposal to a number of government agencies and business organizations for deliberation, although an overwhelming majority were opposed to it. Most notable among those who rejected it completely were the Federation of Swedish Industries and the Swedish Employers Confederation, which claimed, among other things, that a mandatory bid rule would raise the cost to acquire a controlling interest and thereby disrupt ownership dynamics. A similar view was expressed by the Swedish Bankers Association, which felt that a mandatory bid would raise the cost of restructuring the industrial sector and cause far too many companies to de-list from the stock market. The Bar Association also opposed the proposal, pointing out that public bids would probably decline if a mandatory bid was introduced and that this would be disadvantageous to shareholders. The Swedish Securities Dealers Association rejected the idea of a mandatory bid at a 30-percent level, but felt that there could be justification for a bid at 50 percent, i.e. when a group relationship is established. The board of directors of the Stockholm Stock Exchange noted in its reply that the benefits of a mandatory bid must be weighed against the risk of unintentionally strapping existing ownership and structural patterns; the board requested further information. The Swedish Shareholders Association considered it impossible to legislate such a change, and the Swedish Association of Share Investors did not even bring up the question of a mandatory bid in its reply.[149] The only group to which the proposal was referred for consideration that favored the proposal was the Swedish Bank Inspection Board, although it too asked for an analysis of the system's consequences before it was introduced.[150]

The Standing Committee on Laws subsequently recommended that the bill be rejected, partly because it did not feel that the parliament should prejudice the government's view of the proposal of the Leo Commission and the conclusions of the Committee on Stock Ownership and Efficiency.[151]

In its bill presented in February 1987 based on the Leo Commission's proposals, the government did not mention a mandatory bid rule, however,[152] and the Committee on Stock Ownership and Efficiency was not to make its position on mandatory bids clear for another three years.

In the same year that the Leo bill was presented, 1987, the question of a mandatory bid rule was again taken into consideration by the Standing Committee on Laws after both Liberal Party Leader Bengt Westerberg, among others,[153] and Liberal Party M.P. Christer Eirefelt, among others,[154] moved to have it discussed. In light of the risk that 'small investors are put at a disadvantage' in major takeovers, both proposed that a shareholder who exceeds 30 percent (of the voting rights) of a company should be forced to tender a bid for the remaining shares under the same terms. They felt that such a rule would particularly suit Sweden 'since it could correct some of the lopsidedness in the prices of 'influential deals' created by voting right differentiations.' However, the Committee again recommended to reject the proposals, this time in deference to the work of the Securities Market Committee.[155]

In 1989, the Securities Market Committee presented its report, Värdepappersmarknaden i framtiden ('The Future of Securities Markets'), in which it referred, among other things, to the risks that many 'perhaps otherwise desirable changes in ownership' would never come about if the acquirer risked having to buy all or a large part of the shares in a company and concluded that 'the overwhelming argument at present is strongly against the introduction of legislated mandatory bids.'[156]

The Committee on Stock Ownership and Efficiency, which assessed the question in its 1990 report, Företagsförvärv i svenskt näringsliv ('Swedish company acquisitions'), did not find it necessary from its standpoint, either, to introduce a mandatory bid rule in Sweden, since 'such a regulation would raise the costs of changes in corporate control and lessen the incentive to revitalize and develop which is necessary to businesses.'[157]

Bengt Westerberg was among those who again raised the question in a proposal in 1991,[158] although this time as well it was rejected by the Standing Committee on Laws. The Committee stated that the matter was now in the hands of the Company Law Committee and therefore did not find it necessary for any new initiatives from the Parliament.[159]

6 Discussion

Should a mandatory bid rule be introduced in Sweden? In light of the EU Commission's proposed Thirteenth Company Law Directive and Sweden's application for membership in the EU, the question may seem moot, and even more so from purely national considerations. If the directive is adopted in its present form, mandatory bids will be required of Member States. However, as mentioned above, the Commission's directive proposal is still subject to revision, and it is not out of the question that the Commission may abandon the mandatory bid requirement. So, there is good reason not to simply assume that mandatory bids will be an inescapable consequence of Sweden's adaption to the rules of the EU. Instead, arguments for and against them should be analyzed and an attempt should be made to understand the effects such a rule could have on Swedish business.

In a closer examination of the proposals for a mandatory bid rule which would carry the force of law or otherwise be compulsory and which have resulted in several countries in the introduction of such a rule, at least three arguments can be discerned: *that* all shareholders should be treated equally in connection with a change in controlling ownership, *that* all shareholders should share in any control premium that is paid out, and *that* all shareholders should have the right to sell their interests in a company in the event of a hostile takeover. In this section, these arguments are discussed individually. The reader will note, however, that they overlap and it is only with some difficulty that they can be kept apart.

6.1 The Requirement That All Shareholders Be Treated Equally

A common *raison d'etre* for a mandatory bid requirement is that all shareholders should be treated equally. 'The principle of equality of treatment for shareholders requires that all shareholders should have the opportunity to obtain the price per share paid for (that) control,' the Takeover panel writes in a comment on the mandatory bid rule in Great Britain cited above.[160] The same reasoning can also be found in the EU Commission's proposal: 'To guarantee the equal treatment of all shareholders, the directive fixes a threshold at which there is an obligation to launch a takeover bid.'[161]

The principle of equal treatment of shareholders is repeatedly mentioned as a fundamental principle of company law. In the EC's Second Company Law Directive, it is expressed as follows: 'shareholders in the same position should be treated equally.'[162] In Germany, the principle was written into law in 1978 as a direct result of the EC directive, although it had been regarded for some time prior to that as a fundamental principle.[163] In France, the principle of equality has not been explicitly expressed in the Companies Act, although it is seen as a fundamental assumption of company law. In the Swedish Companies Act, the principle is considered to be couched in chap. 3 § 1 ('All shares shall carry the same rights in the company...') and is complemented by the general clauses in chap. 8 § 13 and chap. 9 § 16.[164] Similar provisions can also be found in the company laws of the other Nordic nations.[165]

At first glance, the demand for equal treatment referred to in support of mandatory bids appears to be based on the principle of equality in company law. However, a closer inspection shows that this cannot be the case and, to the extent that such reference is made,[166] it can only be explained as a misunderstanding of the essence of this fundamental principle.

The fundamental principle of equality requires that corporate entities treat all shareholders equally. If a company has shares with different rights, holders of the same classes of shares should be treated equally. The principle of equality pertains to the relationship between the company and its entities on the one hand and the shareholders on the other. It does not concern the relationship among the company's shareholders or between existing shareholders and a prospective shareholder in the company. Such an interpretation of the principle is far from obvious.[167]
In Germany, there has been a discussion for some time of the burden of loyalty (Treupflicht) a controlling shareholder should have in relation to the company and its other shareholders.[168] This obligation, which can be said to be a further elaboration of the principle of equality[169], has been recognized in practice.[170] The debate has been whether this obligation can be used to support the notion that anyone who acquires enough shares to obtain control of a corporation should be obligated, if requested, to also acquire the remaining shares in the company. The answer, however, has been no.[171] Germany's debate on this question is reflected to some extent in the EU's efforts to harmonize capital markets,[172] although as far as I can discern has not been considered with regard to a mandatory bid rule.[173] The need for mandatory bids simply cannot be drawn from the fundamental principle.

The principle of equal treatment used to support mandatory bids is a principle of equal treatment in connection with public takeover bids in the stock market[174] – a principle developed through an interplay between market players, marketplaces and various supervisory agencies apparently mainly in order to maintain public confidence in the market. The principle is applied to a varying degree from one country to another through voluntary codes of ethics, stock exchange rules and, to some extent, public takeover laws.

But how far does this principle of equality – of perhaps what we should call securities law – stretch? Does it imply that anyone who acquires a certain percentage of the shares of a publicly listed company is obligated to also acquire the remaining shares? Experiences outside Sweden would suggest the contrary. Rules on public takeover bids apply the principle of equal treatment regardless of the country, yet these same countries have not all reached the conclusion that a mandatory bid rule should apply to their market.[175]

In Sweden, the principle is expressed in the Swedish Industry and Commerce Stock Exchange Committee's recommendations on public takeover bids. The principle implies, among other things, that all holders of shares with identical terms are to be offered identical compensation per share in connection with a public bid.[176] The Committee's recommendations are also contained in the listing agreement between the Stockholm Stock Exchange and the companies whose shares are listed on the exchange.[177] Thus, the recommendations are legally binding for listed companies and, in the event they are violated, may result in a de-listing of the company or a fine.[178] As in Germany and the Netherlands, however, the Committee, as indicated above, has not assumed that the principle of equal treatment warrants a mandatory bid for those who obtain control of a corporation without acquiring all its shares.[179] The recommendations did not mention mandatory bids when they were first issued in 1971 and such a rule was not added in the revised version issued in 1988.[180]

6.2 The Requirement to Share Control Premiums

Another argument for mandatory bids closely associated with equal treatment is that all shareholders in a company in which a shift in control takes place should share in any control premium that is paid. This is done by requiring the person who acquires enough shares to obtain control of the company to offer other shareholders the same price in principle for their shares as he paid for those in the controlling block.[181] This reasoning ties in with a now outdated and rather questionable theory of American legal doctrine, i.e. that the right to decide how a company's resources are to be utilized is an asset belonging to the company and, thus, to all its shareholders in proportion to their holdings ('The Corporate Asset Doctrine'). Anyone who obtains control of a company by acquiring less than all of its shares and pays for that control by buying the shares at a premium, should therefore be forced to make a corresponding offer to the holders of the remaining shares. In this way, the latter are ensured of their fair share of the value of the controlling interest in the company. The theory was introduced in *Berle & Means*' famous book, 'The Modern Corporation and Private Property', in the early 1930s[182] and won some acceptance in legal doctrine.[183] Berle himself, as well as a number of other authors, also later found support for the theory in the often cited case of *Perlman v. Feldman* from 1955.[184] However, the fact is that it was never widely accepted by the American courts or legislature.[185]

On the basis of Berle and Means's theory, the American professor William Andrews suggested in a much noted article in 1965 that an 'equal opportunity rule' – or, one might say, a form of mandatory bid – should be introduced in the U.S. stock market. 'Whenever a controlling stockholder sells his shares, every other holder of shares of the same class (should be) entitled to have an equal opportunity to sell his shares, or a pro rata part of them, on substantially the same terms,' Andrews wrote.[186] The U.S. Congress took a small step toward a regulation along these lines when in 1968 it adopted the so-called Williams Act on takeovers as part of the Securities and Exchange Act.[187] However, a mandatory bid rule was never adopted then or any time since at the federal level, and, as noted, only two states have mandatory bid rules in their company law legislation.

Berle & Means's theory of control as an asset belonging to the company did not win much support in Europe, either.[188] In Germany, the question of the right of all shareholders to share in the so-called Paketzuschlag has been discussed as relates to the loyalty of the shareholders to the company. As already noted, though, this has not been felt to warrant forcing anyone who accumulates a controlling interest to extend a similar offer to other shareholders in order to share with them a control premium.[189] In the Netherlands, which, like Germany, does not have a mandatory bid rule, the courts have not accepted that the control value in a shareholding must be shared equally among a company's shareholders.[190] France and Belgium opposed the payment of control premiums in connection with the sale of large shareholdings at a relatively early stage, although their rules do not indicate a general acceptance of 'The Corporate Asset Doctrine'.[191] The same appears to be the case in Great Britain, notwithstanding the explicit position expressed in the Takeover Code.[192]

In Sweden, the theory of control as an asset belonging to the company attracted very little attention and has not been used at all as an argument in favor of a mandatory bid rule.

6.3 The Right to Get Out of a Company in the Event of a Change in Control

The main argument in favor of a mandatory bid rule is not to be found in the principles of either company law or securities law. It lies instead in the requirement that a company's shareholders should have the opportunity to sell their interests in the event of a change in control of the company. The remaining shareholders 'should have the opportunity to get out of the company if they do not like what has happened,' the Takeover Panel writes.[193]

Similarly, as support for a mandatory bid rule for its Member States, the EU Commission suggests that the purpose of the proposal is to 'protect minority shareholders and to avoid purely speculative partial bids.'[194] A change in control, it feels, puts the value of the shares at risk, because of which those shareholders who were not able to sell out to the controlling shareholder should be offered the opportunity to get out of the company under the same terms as those who did so initially.
A change in control naturally does not prevent unhappy shareholders from selling their shares on the market, but, in this context, the opportunities of doing so are felt to be less than satisfactory: 'Although the stock market may serve as a means for some shareholders to realise their shareholding, if any significant numbers sought to do so, they would clearly not be able to sell their shares without causing the market price to fall and in any event, unless the purchaser is prepared to buy further shares in the market, there will in most cases not be other buyers of significant numbers of shares for the very reason that the company is under the effective control of the bidder.'[195]

This argument has been widely criticized for being based on an unfounded assumption that a change in control typically is detrimental to the company's other shareholders and, in any event, for it being illogical to require the controlling shareholder to extend a mandatory bid until it has been proven that harm has actually been incurred. 'In short, there is no reason to presume that, upon transfer of control, the new controlling shareholder will behave differently from his predecessor. His conduct will be subject to the same judicial and administrative checks and scrutiny as his predecessor's. Therefore, there is no obvious reason to grant special protection to minority shareholders,' writes the Belgian professor of company law Eddy Wymeersch in a critical review of mandatory bid rules.[196] It should be noted here that the British takeover code was established in light of, among other things, the weak protection of minority shareholders afforded by the British Companies Act at the time.[197]

Wymeersch also points out the inconsistency of guaranteeing shareholders the opportunity to get out of a company if someone obtains effective control of it, while traditionally minority shareholders have not been afforded a similar right in cases where the controlling shareholder obtains, for example, 50, 67 or 75 percent of the voting rights of the company, which is even more significant in terms of decision making: 'This absence of specific minority protection in cases where one would expect it the most sharply contrasts with the extensive protection afforded under the mandatory bid rule.'[198]

The requirement to be able to get out of a company in the event of a hostile change in control has also been brought up in legal doctrine in light of the obligation many countries enforce upon a parent company of a group to buy out minority shareholders under certain circumstances. Some authors suggest that mandatory bids are in effect a variation or further elaboration of this obligation.[199] However, since this obligation typically does not apply until the parent company obtains 90 or 95 percent of the shares in the subsidiary, thereby often nullifying most minority rights[200], this argument has been refuted by noting that a mandatory bid that is required at one-third of the voting rights and encompasses not only the parent company but also other shareholders, including individuals, 'wohl über das angestrebte Ziel hinausschiessen.'[201]

Is there any empirical support for the argument that other shareholders are at a disadvantage if a change in control does not encompass all of the company's shares? One way to try to answer this is to study the trend in the market price of a company's share in connection with a change in ownership. The results of several studies both in and outside Sweden which have used this method have shown the opposite to be true; acquisitions of major shareholdings, including controlling interests, generally lead to a rise in share prices.[202] Obviously some negative price reactions occur, but the studies do not support the notion that other shareholders are systematically put at a disadvantage in connection with the acquisition of a controlling interest. After reviewing the changes in share prices in association with all of the major block transactions (104 transactions) involving at least 10 percent of the voting rights in listed Swedish companies in 1984-1988, *Sandström* states that 'there is no support for the hypothesis that control of the companies is acquired in order to exploit the other shareholders... Naturally, there may be individual exceptions, but on average shareholders receive greater wealth.'[203]

Could it be said then that essentially a mandatory bid means nothing to shareholders other than an opportunity whereby those who are displeased with a change in control can get out of the company, while others who choose to may stay? Can't Swedish companies live with such a rule in the same way they do in Great Britain and many other countries? This is a common argument, particularly from the mass media. It brings us in the final analysis to the question of the costs of a mandatory bid.

The concept of mandatory bids originated in Great Britain. The ownership structure of Britain's major corporations is distinguished by a low degree of concentration compared with other European countries. Its structure is more like that in the U.S. than in Continental Europe or Sweden.[204] The mandatory bid threshold stipulated in the takeover code (30 percent of the voting rights) is an attempt by the Panel to define how large a shareholding is typically required to obtain effective control of a listed British company based on Britain's ownership structure.[205] Ownership structures differ in other countries, and our description of current regulations in these countries clearly shows how they have attempted to shape other models to express the concept of control in terms of voting rights.[206] There is no doubt, either, that, for example, Germany's opposition to the EU Commission's proposal to force Member States to accept mandatory bids at no higher than one-third of the voting rights is due in part to the significantly more concentrated ownership structure of major German companies in comparison with their British counterparts.[207]

The ownership structure of listed companies in Sweden is very concentrated, as it is in Germany. On average, the largest shareholder holds 49 percent of the voting rights and the five largest together average 74 percent. In about three-fourths of all listed Swedish companies, there is currently one shareholder or shareholder group whose percentage of the voting rights exceeds what the EU Commission has proposed as the limit for mandatory bids, i.e. one-third of the voting rights of all the shares. A comparison over time also shows that the concentration is continuing to rise, pushing the level for effective control upwards.[208]

This highly concentrated ownership structure is also reflected in the proportion of the voting rights customarily represented at the annual meeting, which in turn affects how large a share of these rights is necessary to exert effective control. An analysis of the companies whose shares are listed on the Stockholm Stock Exchange's so-called A list at the beginning of 1993 (excluding companies in which shareholders are limited as to the number of voting rights they may vote at the meeting by stipulations in law or company by-laws) shows that an average of 78 percent of the voting rights were represented at annual meetings in the spring of 1992. Thus, an average of 39 percent of the voting rights of these companies was necessary to exercise effective control. In one-fifth of the companies, 90 percent or more of the voting rights was represented at the meeting, thus making the limit for effective control 45 percent or higher. Only in a handful of companies was the share of the voting rights represented 60 percent or less, so that the limit for effective control was less than the 30 percent proposed by the EU Commission for mandatory bids.[209]

Several studies also show significant block trading in listed Swedish companies. *Sandström* identifies a total of 104 deals involving 64 different companies during the period 1984-1988 in which each entailed a shareholding of at least 10 percent of the voting rights.[210] In around half of these deals, the acquirer thereby gained at least 30 percent of the voting rights and became the company's largest shareholder.[211] In another study, *Boman & Sköldebrand* identified a total of 180 acquisitions during the period 1985-1990 that gave the acquirer a shareholding of at least one-third of the voting rights in the company.[212] On average, the acquisitions led to a holding of 51 percent of the voting rights. In two-thirds of the cases, the acquirer subsequently did not add to his share of the voting rights, while in the other one-third he later offered to acquire the remaining shares.[213] [214]

The question of the costs that would result from a mandatory bid rule to a great extent is one of how such a rule would affect the gradual build-up of, and trading in, controlling blocks, and how it would affect ownership structures.

If we start with the first question and look at it from the standpoint of a potential acquirer, obviously a mandatory bid rule could raise the cost of gradually building up a controlling interest or directly acquiring one, and in some cases make it impossible. In addition to the premium that the acquirer normally would be prepared to pay for a controlling interest in a situation where there were no mandatory bids, he must add the cost of having to offer other shareholders a corresponding premium for the remaining shares in the company as well as the greater risk inherent in a more concentrated shareholding.[215] Even if the acquirer finds that he can bear these costs, the acquisition of the controlling interest will be more expensive than otherwise would have been the case. If he finds the costs too high, he won't make the acquisition. Schans Christensen accurately describes Denmark's mandatory bid rule: 'Rule 7 forces the acquirer to undertake to purchase shares that he, on the basis of his own personal financial interests, otherwise would not wish to. Of course, the potential acquirer can refrain from buying the shares, but thereby also pass up the opportunity to acquire a business he saw a benefit in owning.'[216] A similar argument is presented by a number of other authors.[217]

If we look at this instead from the perspective of a controlling shareholder who wants to sell his holding, a mandatory bid rule would obviously limit his alternatives. A potential acquirer might find it impossible to take over the shareholding if it is so large that buying it would force him to extend a mandatory bid on corresponding terms for the remaining shares. This could also occur with the potential sale of a smaller holding, since the determining factor is whether the holding that is sold, together with the acquirer's other holdings, pushes him past the limit for a mandatory bid. A controlling shareholder may also find it impossible based on personal considerations to split up and sell the controlling holding in smaller parts, since he may then wind up with a shareholding that is too small to permit control yet too large to suit a diversified stock portfolio.[218] Basically, large shareholdings, including controlling holdings, become less liquid as a result of mandatory bids.[219]

How does this affect ownership structures? One likely consequence is that a mandatory bid rule will lead to a slower rate of change in ownership. In the slightly longer term, it could also lead to fewer large shareholders in individual companies and, thus, weaker ownership. The balance of power will shift to the benefit of management.[220]

Another aspect worth mentioning in this regard is the risk of sapping the stock market. A mandatory bid rule naturally will not totally stop either the accumulation of controlling holdings or changes in such holdings through block trades, but as they are built up or changes in control take place forcing mandatory bids, there are strong reasons to assume that the companies in question will be forced to de-list from the market.[221] If it is considered valuable to have large companies list their shares on the market, thereby creating a degree of pluralism in ownership structures, mandatory bids are costly to society as well.[222]

7 Conclusion

During the past decade, proposals have been made to introduce a mandatory bid rule in the Swedish stock market, whereby anyone who obtains a certain percentage of the voting rights of a listed company would be forced to extend a takeover bid for the remaining shares in that company. The proposal is modelled on the British Takeover Code, which has long applied a mandatory bid rule in the case of major share acquisitions in public companies.

The EC Commission has also used Great Britain's rule in its ongoing effort to harmonize company law, proposing that Member States be required to introduce a mandatory bid rule whereby anyone who obtains one-third of the voting rights of a listed company would, as proposed, be forced to extend a takeover bid for its remaining shares. The Commission's proposal has been rejected by some Member States, however, and chances are it will never be accepted by the Council of Ministers. The question of whether mandatory bids should be introduced in the Swedish stock market should therefore be evaluated on its own merits, without consideration to adapting to the laws of the EC.

The answer is not to be found in any legal principles. Essentially, it is a question of balancing the effect that a mandatory bid rule would have on companies' ownership against the risk that changes in control could adversely affect other shareholders.

The efficient use of resources by businesses is essential for economic growth and social welfare. This requires constant supervision to ensure that businesses' resources are utilized as well as possible for their particular purpose at a given time and that they are allocated and reallocated to companies and production units that meet a need.

A company's shareholders play an important role in this process. Earnings potential creates an incentive for existing and prospective shareholders to seek information about a company's future opportunities and to realize the economic value of this information by influencing the company's operations via its shareholders' meeting.

If there are differences in opinion as to how the company's resources are best used, only the shareholder who controls the company is guaranteed the opportunity to put his opinion into action and profit by the value of the information he has gathered. Control therefore has an economic value. The role of the stock market is to transfer resources to the person who values them the most i.e. to facilitate a change in control.

Mandatory bids would raise the cost of changes in control and reduce the incentive shareholders have to gain new information about future business opportunities. The risk of the inefficient use of business resources would also rise as a result.

This has to be balanced against the risk that a change in control is a detriment to other shareholders. There is no doubt that some such changes reduce the value of the holdings of other shareholders, but there is no empirical evidence that such changes systematically disfavor them. On the contrary, studies conducted both in Sweden and elsewhere indicate that the result is typically the opposite, that other shareholders benefit from these changes. The risk that a new controlling shareholder will use his position to harm the other shareholders in some way should therefore be countered not with restrictions that complicate changes in ownership *per se*, but with traditional minority protection rules in company legislation. Demands for a general, mandatory bid rule should therefore be rejected.

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