REGULATION OF COMPETITIVE TAKEOVER OFFERS OF PUBLIC LISTED COMPANIES IN THE U.K AND FRANCE

Thesis submitted for the Degree of Master of Laws LL.M

by

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DEDICATION

TO

THE GLORIOUS MEMORY OF MY FATHER AND OF ALL CHOUHADA (ONE AND HALF MILLION MARTYRS) WHO, TO HOLD UP INDEPENDENCE AND LIBERTY, LAID DOWN THEIR PRECIOUS LIVES DURING THE ALGERIAN WAR

1954 -1962

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ABSTRACT

The present thesis discusses an issue which has received less attention within the legal context than it perhaps deserves. Competitive offers, once relatively rare, are likely to be used increasingly by bidders as a means for external growth and expansion reflecting the recent internationalisation of markets. Since competitive offers are part of takeover processes as a whole, they cannot be considered in isolation or be kept distinct.

Chapter one considers the relationship between competitive offers within the scope of takeovers and other parallel techniques of acquiring control. This involves a consideration both of the aspects of control and motivation which appear as common dominators in any merger or takeovers practice.

Chapter two highlights the attitude of supervisory institutions in the field. Further details are given in the subsequent chapters. Chapter three considers both the legal and the extra legal requirements relevant to competitive offers. However, in the absence of specific rules governing competitive offers, the general rules shall apply. Chapter four discusses some of the protective measures for shareholders either before trading or once trading begins in their securities. As an additional protection chapter five looks at the directors' fiduciary duties.

Whilst there is widespread concern about defensive measures used by the target company's directors, there is less concern about the offensive tactics an offeror might use to overcome the offeree's obstacles. Therefore, chapter six focuses not only on the likely implications of any defensive devices but also on the offeror's

purchase techniques as well. However, in the present study both tactics are treated as an integral part of the whole operation of takeovers.

On the subject of competitive offers, the aim of the thesis is twofold: first, to analyse whether or not competitive offers are sufficiently regulated by the provisions of existing rules in both the U.K and France; secondly, it considers at what point shareholders involved are protected.

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ABBREVIATION

A.C	Appeal Cases (Law Reports)
A.C.L.R	Australian Current Law Review
A.L.J.R	Australian Law Journal Report
All.ER	England Law Reports
Am.J.Comp.L.	American Journal of Comparative Law
App Cas.	Appeal Cases Law Reports
B.C.C	British Company Cases
B.C.L.C.	British Company Law Cases
B.E.Q.Bull.	Bank of England Quarterly Bulletin
B.J.I.B.& F.L.	Butterworths Journal of InternationaL Banking and Financial Law
Bus. Law.	Business Lawyer
C. L. P	Current Legal Problems
C.L.R.	Cornell Law Review
C.M.L.R	Common Market Law Review
Calif. L.Rev.	California Law Review
C.W.Res.Law.Rev.	Case Western Reserve Law Review
C.L.J	Cambridge Law Journal
Co.Law	The Company Lawyer
Col.Law.Rev.	Columbia Law Review
Corp.Law.Rev.	Corporate Law Review
E.C.L.R.	European Competition Law Review
E.C.R.	European Court Reports
Eq.	Equity (Law Reports)
F.E.	Financial Executive

F.T.L.R	Financial Times Law Review
H.L	House of Lords
H.B.Rev.	Harvard Business Review
H.L. Rev.	Harvard Law Report
I.C.L.Q.	International And Comparative Law Quaterly
Int.Bus.Law	International Business Lawyer
J.B.L.	The Journal of Business Law
J.C.P.	Juris- Classeur Periodique
J.Pol.Eco.	Journal of Political Economy
J.W.T.L.	Journal of World Trade Law
L. S. Gaz.	The Law Society's Gazette
L.Q.Rev.	Law Quaterly Review
L.J Ch.	Law Journal Chancery
M.L.Rev.	Modern Law Review
Macq.	Macqueens' Scots Appeal Cases
MacGill L.J.	MacGill Law Journal
Man. Law	Managerial Law
Mich.Law.Rev	Michigan Law Review
N.B.Q.Rev.	Natwest Bank Quarterly Review
N.Y.L.Sch.L. Rev	New York Law School Law Review
N.Y.U.L.Rev.	New York University Law Review
N.L.J	New Law Journal
Pub.Rel.J.	Public Relations Journal
Q.B.	Law Reports Queens Bench Division.
Rev.Dr.Eur.	Revue de Droit European
Rev.Prat.Soc.	Revue Pratique Des Sociétés
Rev. Soc	Revue des Sociétés
Rev.Trim.Dr.Com.	Revue Trimestrielle du Droit Commercial

Rev.Eco.B.N.P	Revue Economique de la Banque National de Paris
S.I.	Statutory Instrument
S.L.Rep	Scottish Law Reporter
S.L.T	Scots Law Times
SC	Session Cases (Scotland)
T.L.R	Tulane Law Report
Tex. Law. Rev.	Texas Law Review
U.Pa.L.Rev.	University of Pennsylvania Law Review
Virg.J.Int'l.Law	Virginia Journal of International Law
W.L.R.	Weekly Law Report
Yale L. J.	Yale Law Journal

INTRODUCTION

In modern times, the takeover process, once relatively uncommon and, in broader terms, seen as unethical, has become a daily event. Increasingly frequently takeovers techniques and devices are becoming familiar to the financial community. Moreover, the regulator has taken extreme care to avoid tipping the balance of regulation either in favour of the target company's board of directors or to the advantage of offerors. Legal mergers and other alternative devices, in addition to being tax free, were generally allowed to proceed unless they were detrimental to competition and/or the public interest. Equally, the history of takeovers demonstrates also both its beneficial and detrimental aspects, thus it is subjected to various regulations. Whilst legal mergers and takeovers are governed by different provisions, both are subject to the unified Code of mergers control in so far as they adversely affect competition and other wider issues of the public interest.

Until recently, competitive offers or takeovers activity fell outside the ambit of most securities market regulations. This thesis, however, is a study of the competitive bid in the context of the legal phenomena of share mergers. The importance of the thesis is attributable to the following considerations. First, the recent increasing use of takeovers in several states. Second, save the wide range of disagreement over the desirability of facilitating or hindering takeovers activity, recent experience demonstrates that takeovers are contributing to the growth of selected companies to reflect the recent extension and development of markets beyond national territories. This trend is further encouraged by the implementation of projects like the progressive European Community's effort to complete the single or internal market. Finally, the implications of takeovers are often significant. Substitution of one set of control for another, for example, usually produces substantial policy changes of the target company. As a primary implication, there is a change of the controllers who may not share identical and common concerns, management methods, skills or opinions on the direction and policies of the company in question. In the light of the foregoing considerations, it seems most likely that, with the increasing tendency towards the internationalisation of markets in particular the European desire to implement the objective of a single market, any takeover attempt will inevitably prompt or induce various other rivals to enter the adventure. Indeed, this implies that barriers to takeovers should, normally, first be removed, or at least their deterrent effects could be reduced, by the implementation of future and specific provisions based on unified legislation. Nowadays, of course, many takeovers' attempts are either blocked or aborted before reaching the competitive stage. It is worthwhile to mention that in the absence of rivals, most takeovers are either agreed or contested. Sometimes, but relatively few, competitive offers for control of public listed companies are launched. Hence, whilst takeovers involve public (whether listed or unlisted) and private companies, both as offerors and offerees, the present thesis concerns listed public companies because, *prima facie*, their shares are freely transferable. It is this feature which, besides various other advantages be they economic, financial, commercial and/or, social, contributes to the development of competitive offers.

At the present time, competitive takeover offers are relatively few, and governments have not considered it necessary to enact detailed rules governing such particular situations either by legislation or extra legal regulation. Furthermore, because the offers in question are recent, they have yet to generate research or commentary. This study is intended to discuss whether the existing regulations contain sufficient provisions to deal with competitive offers, the focus will be on two E.E.C member states, the U.K and France, which have introduced rules relevant to takeover offers. The reasons for choosing the U.K and France as models or bases for the present discussion, relate to the following facts; (1) they possess the most developed takeover offers regulations; (2) they adopt different systems and policies toward the regulation of takeovers; (3) their regulations contain some specific provisions relating to competitive offers. Although it is still too early to see how this law will develop, it is also the intention of the present thesis to note some of the implications of the recent concern of the E.E.C for the regulation of takeovers.

With these preliminary considerations in mind, it is possible now to turn to the construction of the present thesis. The thesis consists of six chapters. The significance of the first chapter is that, as a matter of theory, it contributes to a better understanding of merger and takeover patterns. However, the emphasis is on share mergers since they are the most desirable methods for speedy expansion and growth. It begins by discussing the manner in which the relevant regulation deals with the variety of issues pertaining to takeovers and mergers. Additionally, it isolates and defines a number of concepts. Then it considers the main classifications under which mergers and takeovers may be subsumed. In considering such issues, this chapter will, first of all, discuss and assess the question of the definition of takeover offers. It sets out its main distinguishing characteristics as well as the major types of takeover. In this connection, the focus will be devoted to the discussion of a number of conflictual obstacles facing acquirers which, in the main, operate as barriers to takeovers. Discussion will also be devoted to one of the most common and vexed aspects pertaining to the concept of control and motivation for acquiring control and defeating unwanted offers. It also outlines some issues that are likely to render companies vulnerable to takeovers.

The second chapter discusses the supervisory institutions and their policy toward takeover activity. It will demonstrate their common similarities as well as differences. Stress will be on their effectiveness in policing the process of takeovers. Some factual background will be provided. The thesis will note the impact of the E.E.C harmonization plan on national supervisory bodies.

The fourth chapter will deal with the conduct of competitive offers. It begins by discussing the existing provisions governing competitive offers and conditions of making offers. Second, focus will be on the announcement of offers; the preparation of the offer document as well as circulars; their communication to shareholders involved, including display of documents and, most importantly, the effect of subsequent rival offers. These include legal and financial effects which a subsequent offer may produce, including consideration of the direct and post-effect on the target company.

Whilst chapter four stresses the major requirements, including the effects of any subsequent offer, the fifth chapter discusses shareholders' protection. First, it begins by considering information disclosure and its purpose. Furthermore, it discusses the various methods whereby information disclosure is circulated or released to shareholders whose shares are sought to be acquired. It stresses the role of the directors and their responsibility and also evaluates the kind of remedies available to reduce the likely detrimental effect on shareholders interests.

Information disclosure is designed, fundamentally, to present to public investors a certain minimum degree of transparency which, on the one hand, may enable them to identify the controllers of their company as well as the location of its key assets. On the other hand, it aims to detect the likely effect on the good performance of the stock market where the shares of the target company are traded. It is also of vital importance in chapter five to discuss what duties are owed by directors in the particular situation of competitive offers.

Takeover offers may be undertaken with the full knowledge and cooperation of the company being acquired. They may also be contested. In the latter situation, a battle of tactics and devices result. This thesis notes that some of the tactics are not exclusive to the target company to frustrate offers. They may, equally, be undertaken by offerors themselves against each other. Notably, the use of relevant regulations to deter offerors and appeals to the relevant Court may also arise in this context. Nowadays, it is becoming frequent that directors of the target undertaking may be unwilling to lose the control which offerors seek to obtain. Alternatively they may employ various tactics at their disposal to keep the independence of their company. Although varied, such tactics have become commonplace. Additionally, defensive or offensive tactics which are typically appropriate to one offer in one particular country may be wholly or partly inappropriate or even illegal in another. However, whilst there is presently widespread and growing concern about the kind of defensive measures that are used by the board of the target company against unwanted offerors, there is much less discussion about how far and what kind of strategy the offeror might use to gain control. The present thesis not only notes, but also stresses, the offeror's sophisticated techniques of circumventing the offeree's remedial or preventive manoeuvres. Hence, in situations where a friendly approach is rejected or where there is no answer at all by the target company directors or, where it is expected to be turned down, there are various techniques at the offeror's disposal to secure a position of control, or at least to become a substantial controller in the target company. As a preamble to its takeover strategy, the offeror may gradually begin buying on the market. He may also gain his battle of control through a proxy fight. But the success of both tactics assumes sufficient financial and other alternative support. Finally, the offeror tries to use the most popular and the quickest alternative i.e a takeover offer, in particular when resistance is expected. These activities both form the final concern of this thesis within the framework of the last chapter. It considers, first, the offensive tactics undertaken by offerors to avoid frustrating attempts to secure control. Second, it discusses the offeree's preventive and remedial defensive measures at its disposal. The impact on shareholders interests and, principally, the attitude of the relevant regulators are also considered. Both the offeror's and the offeree's tactics, for the purpose of this thesis, may be seen as one part of the whole operation which either involves the change of control or maintains the independence of the target company. Besides, the attitude of the relevant authorities is of paramount importance if shareholders' confidence is to be maintained.

CHAPTER ONE

TAKEOVERS AND MERGERS

SECTION ONE: DEFINITIONAL FRAMEWORK OF MERGERS AND TAKEOVER OFFERS

Mergers or concentrations[1] are complex phenomena and have long been the source of controversy. They give rise to confusion, uncertainty and conflicts. Furthermore, they have nowhere been defined as such. In other words, they have been given different definitions in different contexts. It is worth reiterating that this thesis concerns the competitive bid in the context of the legal phenomenon of share mergers.

Conceptually, regardless of fiscal and monetary implications, notably accountancy and other related issues, mergers of companies are dealt with within two major contexts. First, concentration of companies are analysed within the area of competition and, therefore, are subject to the provisions on the control of concentration. Second, as far as securities market regulations are concerned, concentration of companies is dealt with within the context of takeovers (share mergers) and legal mergers.[2]

1- The European Community uses the term "concentration" while in both the USA and U.K the most familiar expression is often restricted to "merger". Similar expressions include 'takeovers', 'amalgamation' acquisition' and 'fusion', 'combination' or 'consolidation'. See French D. and Saward H., A Dictionary of Management (New & Revised edn) (London, Pan Books Ltd.1984). For convenience, throughout this thesis the term concentration and merger are used interchangeably. Similarly, the problem also arises in respect of other terms like 'undertaking', 'companies', 'société', 'corporation' and so forth. See infra n. 5.

2- This distinction has recently been brought into existence by the E.E.C. proposed Directive on Takeover Bids And Other Bids, see infra n.14.

However, in the aggregate, both control of concentration and legal merger fall outside ambit of this thesis, but it would appear misleading if no discussion of these considerations were included, however brief. As a starting point for this chapter, it seems necessary to begin considering the definition of concentration laid down by the E.E.C's Regulation on the control of concentration, because it seems to incorporate common features relating to change, transfer or acquisition of control, be it effected by takeover offers, statutory amalgamation, contracts or by any other related arrangements. Second the focus will be to classify, in so far as they are classifiable, the various forms of concentration of undertaking and the interplay or compatibility of the various relevant regulations in the context. Thirdly detailed consideration will be devoted to takeovers or share mergers

1.1- DEFINITION OF MERGERS OR CONCENTRATION

The E.E.C regulation defines concentration between undertakings as:

> (1) A concentration shall be deemed to arise where: (a) two or more previously independent undertakings merge, or (b) one or more persons already controlling at least one undertaking, or one or more undertakings acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more undertakings. (2) An operation, including the creation of joint venture....(3) For the purpose of this regulation, control shall be constituted by rights, contracts or any other means which, either separately or jointly and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by: (a) ownership or right to use all or part of the assets of an undertaking; (b) rights or contracts which confer decisive influence on the composition, voting or decision of the organs of an undertaking. (4)

control is acquired by persons or undertakings which; (a) are holders of the rights or entitled to rights under the contracts concerned, or (b) while not being holders of such rights or entitled to rights under such contracts, have power to exercise the rights deriving therefrom.[3]

Within the context of this thesis, it is proposed not to use the term 'concentration' but 'merger' since the latter term is more familiar and can be widely drawn so as to cover a wide range of merger (in the more limited sense) and takeover activity. The Regulation excludes from the scope of its application the creation of joint ventures provided they are not intended to distort competition between undertakings.[4] The Regulation does not apply to credit institutions or other financial institutions or insurance companies provided that they do not exercise voting rights in respect of transactions and dealing in securities entered into for their own account or for the account of others or provided that they exercise such voting rights only with a view to preparing the sale of all or part of that undertaking[5] or of its assets or the

3- Council Regulation (E.E.C) No.4064/89 of 21 Dec.1989, on the control of concentrations between undertakings. (O.J. L.395/1 of 21.12.1989). For the background of this regulation since 1973, see Amended proposal for a Council Regulation (E.E.C) on the control of concentration between undertakings, COM (88) 97 Final (Brussels, 25th April.1988). This proposal has its origin in the 1973 Proposal for a Regulation on the control of concentration between undertakings (O.J. No C.92 of 31st Oct 1973), amended several times respectively in 1982 (O.J. C 36/3, 12.2 82), in 1984 (O J. C 51/8 23.2.1984), in 1986, (O.J. C 324/5, 17.12.1986) and in 1988 (O.J. C 130/4 of 18.5.88).

4- See Article 3.2 of the merger control regulation, supra n.3.

5- The expression "undertaking" is an E.E.C. term. For convenience, the terms; 'company', 'société' and 'undertaking' will be used herein after interchangeably. The term "undertaking", however, has been developed by the European Court to include almost all types of economic enterprises, firms or companies. In certain circumstances parent company and its subsidiaries are viewed as being a "single economic unit". See the Joined Case.6 & 7/73, Instituto Chemioterapico Italiano (I.C.I) and Commercial Solvent Corporation sale of those securities and that any such sale takes place within one year of the date of the acquisition.[6] It is equally important to mention that exemptions from the application of the E.E.C Regulation, extends to covers receivership involved in situations relating to liquidation, winding up, insolvency and the like.[7] What is interesting, for the purpose of this thesis, is that the E.E.C Merger Regulation is concerned with the question of voting control only, and only in so far as such rights are used to determine directly or indirectly the competitive conduct of an undertaking, and thus distort competition to which the aim of such regulation is directed, The important point for this thesis, is that this thesis deals with the legal aspects of acquiring such control by means of competitive takeover offers. This means that economic competition between undertakings may have little relevance to the context of this thesis.

In practice, merger can be effected between undertakings which carry out similar or dissimilar activities (at the same or different point in the production or distribution process) whether they are involved in activities of commercial, industrial or financial character. But, perhaps, the most relevant factor, for the purpose of implementing any objective appears through the change in control from one undertaking to another, be it by takeovers or by other parallel means as will be noted in the subsequent chapters.

(C.S.C) v. E.C.Commission, (1974) E.C.R, 223, at paras 37/2. Legally, the definition of "undertaking" within the concept of concentration does not appear in either articles 85 or 86 of the Rome Treaty as such but, it has been advanced by analogy with article 80 of the E.C.S.C Treaty of 1951.

6- Article 3.para 5, supra n.3.

7- Ibid, at para (b).

1.2- DEFINITION OF TAKEOVER OFFERS

A- LEGAL DEFINITION OF TAKEOVER OFFERS

It is generally agreed that the definition of a takeover offer is its most troublesome aspect. The term itself is full of dilemmas and paradoxes.[8] It is also important to mention that takeover offers or bids and their equivalent French offre publique d'achat (O.P.A.) or offre publique d'echange (O.P.E.) are phenomena which have an indeterminable philosophical meaning.[9] In general, the history of public offer regulation in France does not provide a clear basis for a definition of public offer as such. But what is clear is that article 69 of the Arrété Ministèrielle of 1973 confines the public offer definition to those operations which, after contemplation, the control of the target company might pass to the initiator, or the offeror's existing control might be increased. In 1973, certain limitations on the expression of public offer were imposed by the Arrété of 6th March 1973 relating to the Reglement Général de la Companie des Agents de Change. According to that regulation, public offers were limited to transactions conferring on the offeror an acquisition of at least 15% of the offeree's issued capital. Such a level might be reduced if the offeror already holds shares in the offeree company and the amount the offeror seeks to acquire will result in it holding more than the majority or the total of its share capital. Recently, the 1989 regulation of public offers adopted another minimum threshold of control but the phenomenon of public offer remains without definition. Presumably this could be explained by two factors: first, the French legislator considered it

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8- Cohen M.H, Tender Offer or Takeover Bids (1968)23 Bus Law. 611.

9- Ibid. See also The Developing Meaning of Tender Offers (1973)86 Harv.L.Rev 1250.

far better to leave definition to its relevant public institutions; second, it may have been set aside because the relevant regulation in France is in a state of transition and confusion.[10] Notably this is because of the public offer activity is still in the course of development and new means and new techniques of avoiding the difficulties created by this phenomenon are continuously being developed. In 1966 (the time the regulation relating to public offers was introduced), for example, the French regulator questioned whether or not a competitive offer could be subjected to the rules of "auction". While the competitive offer is a recent phenomenon, the auction traces its origins to the mid. 16th century, a time when most auctions were Court ordered sales imposed on debtors.[11]

In Britain, Section 428(1) of the Financial Services Act 1986 defines a takeover offer as:

> an offer to acquire all the shares, or all the shares of any class or classes in a company (other than shares which at the date of the offer are already held by the offeror), being an offer on terms which are the same in relation to all the shares to which the offer relates or, where those shares include shares of different classes in relation to all the shares of each class.[12]

The Panel on Takeovers and Mergers considers takeovers as being offers which include "takeover and merger transactions however

10- For an overall discussion see mainly, Bronner R., Bourse de Valeur, at para. 175 et seq in Encycolpedie Dalloz.Societes, 1978; Bezard P., Les Offres Publiques d'Achat (Paris, Masson, 1982); Loyrette J., Les Offres Publiques d'Achat (Paris, Dictionnaire, André Joly, 1971); Trochu M., Les Offres Publiques d'Achat (1967) Rev. Dr. Com 695; Malan F., Les Problemes Soulevés par les O.P.A (1970)J.C.P 2304; Boitard M., Les Offres Publiques d'Achat (1970) 13 Rev.Eco.B. Nat.Paris. p. 51.

11- Newsweek, the International Magazine, Sept.18th, 1989, p.43.

12- Financial Services Act, 1986, Sch. 12, substituted Sections.428-430 of the Companies Act 1985.

effected, including reverse takeovers, partial offers, court schemes and also offers by a parent company for shares in its subsidiary". Additionally, the Code on takeovers and mergers provides a definition of cash purchase where the consideration consists of a debt. It states that purchases for cash include contracts or arrangements where the consideration consists of a debt instrument capable of being redeemed in less than three years.[13]

One takeover offer which will be discussed within the scope of this definitional framework, is that which is commonly understood as an attempt to obtain *de jure* control of another company (target) usually exceeding 50 % of voting control or at least to occupy a position of *de facto* control. Whilst the City Code drew up a very broad definition, the F.S.A. emphasized the quantitative criteria of shares. Presumably, the F.S.A. seeks to cover questions of compulsory acquisition of shares held by the remaining minority of shareholders towards full integration of the acquired company. This might be true because provisions transferred to the F.S.A. were conceptually framed under the 1985 Companies Act to deal with such sorts of acquisitions.

At the Community level, takeover offers, as well as various other ancillary offers have been dealt with by the proposal for the thirteenth Council Directive.[14] This Directive defines a takeover offer as:

> an offer made to the holder of securities carrying voting rights in a company or convertible into securities carrying such rights (i.e., shares, convertible bonds, subscription rights, option and warrants) to acquire their securities for a consideration in cash or other

13- City Code, definition section, as amended in 1989

14- COM (88) 823 Final submitted by the Commission on 19.1.89, (89/ C 64/07) (Brussels, Feb.16th,1988); O.J. C 64/08 of 14.3.89.

securities, the purpose of the offer usually being to acquire control of the company or consolidate the offeror's existing control, and the offer being made conditional upon sufficient offerees accepting it to achieve the offeror objectives.[15]

The definition applies only to securities carrying unrestricted rights to vote at the company's general meeting. That is to say, securities without such features are irrelevant By contrast, the British self regulation relating to takeover bids appears much wider. Furthermore, as may be understood, the E.E.C definition covers companies whose shares are listed on the official list of the Stock Exchange, whereas both the British and the French regulations apply to listed and unlisted companies. It could, perhaps, be argued that the exclusion of companies whose securities are not listed on the official list of the Stock Exchange from the scope of application of the directive appear to be justified. First, the E.E.C. legislator seeks to cover a certain size of takeovers; and second, it left other sorts of takeover operations to the discretion of the national authorities. Then what matters for the purposes of the E.E.C. directive is the size of companies involved and the substance of an operation which involve an immediate change of control from one company to another. Specifically those operations which involve the change of control cross- border. Accordingly, sales and purchase of shares on or off the Stock market through various devices other than takeover bids are subjected to the disclosure directive instead.[16] Finally, one may add another consideration which may be relevant in this context, that the supervision of the relevant authorities, although vital, does

15- Ibid, at para 9.

16- COM (85)791 Final, 23.12.85, O.J. C 351/12 relating to information disclosure.

not appear in the definition. In conclusion, one should welcome this definition in the directive as an attempt to cover the most troublesome aspect within the definitional framework.

B- THEORETICAL DEFINITION OF TAKEOVER OFFERS

On a theoretical level, French authors as well as British academic writers have not, in the main, attempted to define the takeover bid. As regards the competitive offer, it appears that it has not been conceptualized so far.[17] It is worth highlighting that outside the European Community, particularly in the U.S.A. relatively few writers have attempted the definition of takeover offer as such.[18] As cited above, the few exceptions are those British or French textbook writers who have attempted to define takeovers without success. For instance, Weinberg defined a takeover offer as "a technique for effecting either a takeover or a merger".[19] Moreover, as to the distinction between friendly and opposed takeover offers, he states that if an offer is made through a takeover, the bid is frequently against the wishes of the directors of the offeree company. But if the directors of the target company favour such a bid, friendly takeover is identical to merger.[20] Does this mean that the takeover offer technique (procedure and requirements) can be appropriate for effecting both legal and share merger alike? If this is so, why the existence of the statutory

17- Pennington R.R, Company Law (4th edn.) (London, Butterworths, 1979) at Ch. 27 p. 802 , in particular p.806. In France, the confusion arises in relation to the distinction between "competitive offer" and "auction"..See supra n.10 & 11

18- The Developing Meaning of Tender Offer, supra n.9

19- Weinberg M.A and Blank M.V, Weinberg and Blank on Takeovers And Mergers (4th. edn.), at para 106, (London, Sweet and Maxwell 1979).

20- Ibid

scheme whereby a legal merger is carried out? As a matter of procedure, legally speaking, both transactions are quite distinct, although their ultimate effect may correspond. The interaction between legal merger and share merger (friendly takeover or merger by consent) has been explained by Professor Pennington and lately was incorporated in the E.E.C draft directive on takeovers and other bids, that friendly takeovers are often commercially and economically the equivalent of statutory merger.[21] By invoking the question of consideration in respect of offers, Weinberg recognised that for a takeover involving a listed public company, it is not possible to draw a clear distinction in effect between a cash bid and a share for share bid.[22] Presumably because nowadays, there exists no offer made without alternatives. Besides, the relevant British regulators always oblige offerors to introduce (only for an exchange offer) a cash alternative.[23]

Finally, in his report submitted to the E.E.C., Professor Pennington suggested that "the definition of a "general bid" must be determined by the types of transactions it is desired to regulate, and not by the inherent judicial character of a general bid for shares".[24] He has also pointed out that "the expression 'takeover bid' suggests that to come within it a bid must be one which, if successful, will result in control of the offeree passing to the offeror, or at least in the offeror acquiring control by assembling a holding of blocks of shares which together carry control".[25]

21- Pennington R.R, Report on Takeovers And Other Bids, (XI/56/74-E, 1974); COM (88) 834 Final p.3 para 6, supra n.14

22- Supra n.19

23- City Code, Rule 11. In cash offers, offerors are not obliged to offer an exchange of securities alternative offer.

24- The term "general bids" referred to covers takeover bids, consolidated bids and partial bids. See Pennington report at p.3, para 1, Supra n.21.

In France, the focus is on cash offers (offre publique d'achat). Most academic writers consider an offre publique d'achat (O.P.A.) as an operation whereby a person or undertaking makes an offer to another undertaking's shareholders (target) to purchase their shares, within a limited period of time, at a price substantially higher than the current market quotation of those shares, for the purposes of obtaining control, or reinforcing that control. The offeror's commitment is irrevocable, but conditional upon a minimum level of acceptance, unless the offeror already owned a substantial proportion of the voting rights control in the target.[26]

It is undeniably true that it is impossible to provide a perfect definition covering the whole issue of takeovers. Indeed, the great difficulties are apparent since the use of takeovers generates a wide variability of techniques, factors and implications. When it comes to questions of technique, they are varied and dependent largely on the strengths and weaknesses of the parties in offers. As to factors and implications they can only be assessed on a case by case basis. Take, for example the following elements involved, which will be taken into account throughout this thesis. They are;

(1) characteristics of the target company and the offerors;

(2) type of offers (complete or partial);

(3) the sort of consideration offered and the type of securities desired to be acquired in the target;

(4) the aspect of offers which may be domestic or international;

25- Ibid, at p.61 and 62 of the report.

26- Compare, for example, with: Loyrette J., Les Offres Publiques d'Achat, supra n.10, at p.65; Bezard P., Les Offres Publiques d'Achat, supra n. 10, at section one, p.14; Trochu M., Offre Publique D'Achat, supra n.10; Bronner R., Bourse de Valeur, at p.14, supra n.10; Lee W.L and Carreau D, Moyens de Defence a L'Encontre D'une Offre Publique D'Achat Inamicales en France, (1988) Receuil Dalloz, Chronique III, p.15.

(5) competent organs which closely monitor such operations, the involvement of the host country government; and

(6) the relevant place where takeovers are carried on (whether on or off the Stock Market), the size of companies and the number of offerors involved.

As for the implications, they may be legal, such as the change of control from one hand to the other; economic, principally where there is an adverse effect on competition and other wider issues of public interests; and social in respect of employees. For instance, dismissal or early retirement due to economic or commercial reorganization of the company.

In conclusion and at the risk of over simplification, two definitions of takeover offers may be suggested. One is narrow and assumes that to come within its scope of application, an offer can be limited to those involving *de jure* control, no matter whether such an offer is made to all shareholders, one class of shareholders, or classes of them. This definition is based on the assumption that an offer or (offers) confines the scope of their application to an acquisition of the majority of the voting rights control exceeding 50% effectively exercised at a general meeting of the target company. Hence, anything below that level is automatically excluded.[27] The other definition is broad and applies to *de jure* control as well as the acquisition of *de facto* control even if the *de facto* control confers on the holder the majority of control at a general meeting.[28] But in any definition the involvement of the

27- Even if the holder already occupied a position of *de facto* control and seeks to reinforce its control to below 50%. However, voting agreements are also excluded, because they are not the result of takeover offers.

28- Practically, control does not necessarily mean 51 % of the voting right control in a company. See infra section 3 of chapter.1

supervisory body is vital and should not be neglected [29]

As far as the competitive offer is concerned, which is discussed in detailed consideration in the subsequent chapters, it is always subsumed under the former definition which restricts its scope of application to acquisitions of *de jure* control. To emphasize, experience illustrates that wherever a competitive offer is involved, the change of control (50% or more) is inevitable i.e., immediate dependence of the target company on the successful rival is achieved. Besides, whether or not a competitive offer is involved, most securities market regulations lay down a triggering level (say 30%) after which any access places the holder under the obligation to make a general offer for the whole body of shareholders of the target company in which such proportion is held. The minimum level required to be attained is either 50% as in Britain or 2/3 of the voting rights (where an offeror prefers to limit his acquisition) in France.[30]

SECTION TWO: CLASSIFICATION OF MERGERS

Typically, irrespective of the size and the type of the companies involved, any classification of mergers may be divided into two distinct field of activities. One is the economic classification of merger, commonly known as horizontal, vertical and conglomerate.[31] The other is the legal classification of merger

29- See Trochu M., Offre Publique D'Achat, supra n.10

30- See infra, Ch.3.

31- A number of academic writers deal with such topics. See mainly, Hopt K.J, European Merger Control, Legal and Economic Analysis on Multinational Enterprises, (Vol.1), (Berlin & New York, Walter De Gruyter, 1982); Kay M., Company Mergers and The E.E.C (1978)J.B.L 88; Raybould D.M., Controlling Mergers Through Competition law (1983)4 Co.Law. 56; Brodley J.F, within the context of the securities markets known as legal merger and share merger. Both classifications will be outlined below in turn.

2.1- ECONOMIC CLASSIFICATION OF MERGERS

A- HORIZONTAL MERGERS

Horizontal mergers involve the combination of two or several undertakings at the same level in the production or distribution of goods or services, whether they compete with each other or not.[32] This does not imply the necessity of being at the same stage of development and prosperity. Just as it may take place within the food or services sectors, it may also be effected between companies within industry, for example the merger of two steel producers or between motor car manufacturers.

B- VERTICAL MERGERS

Vertical mergers involve the absorption of undertakings in the productive or distributive chains. Take, for instance, a merger between a manufacturer and a wholesaler or, a wholesaler with a

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Joint Venture And Anti-Trust policy (1984)95 Harv.L.Rev.1521; Potter C.L, Centralized European Merger Regulation: A Viable Alternative (1985)26 Virg.J.Int'l Law.219; Whish R., competition Law (London, Butterworths, 1985) (now 2nd.edit. 1989); De Rechmeont J. Les Concentrations d'Entreprises et la Position Dominante (Paris, Société de Journal Des Notaires et Des Avocats, 1971); Reynolds, Merger Control in The E.E.C, (1983)17 J.W.T.L 407; Pass and Sparks, Control of Horizontal Mergers in Britain (1980)14 J.W.T.L 135; O.E.C.D, Competition Policy And Joint Venture, (1986); Swann D. Competition and Consumer Protection , (London, Penguin Books, 1979).

32- As in the air transport sector, the merger between British Airways and British Caledonia. (The Independent, 12th Nov,1987). In the food market, the mergers between the Swiss undertaking, Nestlé; and the British undertaking Rowntree both chocolate manufacturers.(Times, May 17th, 1988).

retailer within the field of food, textiles,.or in any other field of business. Such a combination may also occur between a manufacturer, a wholesaler and a retailer in the same field of business or between a manufacturer and producer of the same product or goods.

C- CONGLOMERATE MERGERS

Conglomerate mergers involve a combination between undertakings whose activities are substantially different from each other and none of them compete with the other. For instance, a tobacco manufacturer predicts that the cigarette market may not in the long term be profitable, decides to diversify or to acquire new businesses other than tobacco, such as a combination with drink, perfume or food companies. Since conglomerate mergers involve companies with completely distinct or independent businesses, they are generally considered to be less likely to hamper competition. This would be so if no joint financial forces are undertaken in one field against competitors to deter new entry in the market.[33]

2.2- LEGAL CLASSIFICATION OF MERGERS

A- STATUTORY MERGERS

The statutory merger is a situation in which the shareholders of the target undertaking, after the completion of merger, will automatically be shareholders of the acquiring undertaking or of a new undertaking formed as a result.[34] The obvious consequences

33- Begg D, Fischer S, and Dornbusch R., Economics, (2nd.edn), Ch.6 at p.358 et seq. (London, MacGraw-Hill Book Company (U.K) Ltd.); Kay M., Conglomerate Mergers (1969)J.B.L 265.

34- U.K. Statutes: The Companies (Mergers and Divisions) Regulations, 1987 (S.I.1987, No.1991), introduced into Company Law in a self-contained of this kind of combination is that, as the operation involves undertakings but not individuals as such, after completion one becomes the acquirer while the other ceases to exist. The shareholders of the integrated undertaking or undertakings, as the case may be, become shareholders of the acquiring undertaking whether already existing or newly formed for that purpose. The transaction involves a universal transfer of assets and liabilities from the acquired to the acquiring undertaking. Ultimately the approval of shareholders as well as creditors of both parties to the transaction is unavoidable. Art 19, para 2 of the E.E.C third directive added another consequence of great significance that:

> ...no shares in the acquiring company shall be exchanged for shares in the company being acquired held either (a) by the acquiring company itself or through a person acting in his own name but on its behalf, or (b) by the company being acquired itself or through a person acting in his own name but on its behalf.

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section of the Companies Act.1985. The mergers and divisions in question may take place in the U.K. by means of compromises or arrangements governed by sections: 425-427 of the Companies Act 1985. These Regulations amend the Companies Act 1985 by inserting a new Subsection.427A and a new Sch.15A. These regulations implemented the E.E.C. Directive 78/855, cited below. Sections.428-430 of the Act relating to Compulsory Acquisition of Shares, forming Part XIII A of the Act have been amended and repealed by the Financial Services Act 1986, Sch.12. French Legislation: The Loi No.88-17 of 5th Jan.1988 relating to Fusions and Scissions des Sociétés Commerciales, modifying the Loi No.66-537. E.E.C Directives: Third Directive 78/855 of 9th Oct.1978 concerning Mergers of Public Limited Liability Companies (O.J L 295/36 of 20th Oct.1978); The Council Directive No.82/891/E.E.C. relating to the Divisions of Public Limited Liability Companies (OJ No.L 378/47 of 21st Dec.1982); Tenth Directive on International Mergers of Public Limited Companies (O.J. C 23 of 25th Jan.1985); This Directive, derived from the "Draft convention on international mergers" (Bull.13/73), was adopted by the Commission on 4th Jan. 1985. COM (84)727 of 8th Jan.1985; Opinion on the proposal, COM 75/671, OJ C 303/11, 26th.Sept 1985 and O.J. C 303/27 of 25th Nov.1985.

It is worth mentioning that the E.E.C. harmonisation directives in the field of statutory mergers provide two distinct kinds of definition. First, merger by acquisition; and second merger by the formation of a new company.

(1)- MERGER BY ACQUISITION

Article 3 of the directive provide that:

> Merger by acquisition" shall mean an operation whereby one or more companies are wound up without going into liquidation and transfer to another all their assets and liabilities in exchange for the issue to the shareholders of the company or companies being acquired of shares in the acquiring company and a cash payment, if any, not exceeding 10% of the nominal value of the shares so issued or, where they have no nominal value, of their accounting per value.[35]

(2)- MERGER BY THE FORMATION OF A NEW COMPANY

Article 4 provides that:

> Merger by the formation of a new company" shall mean the operation whereby several companies are wound up without going into liquidation and transfer to a company that they set up all their assets and liabilities in exchange for the issue to their shareholders of shares in the new company and a cash payment, if any, not exceeding 10%.of the nominal value of the shares so issued or, where they have no nominal value, of their accounting per value.

35- Compare respectively with French Loi No.66/537, Art.371 as amended by the Loi No 88-17, Art.1, supra n.34; and the British Companies Act 1985, Art.427.A, inserted therein by the Statutory Instrument No.1991 of 1987. With respect to the E.E.C. mergers' definition cited above, compare with French definition laid down by la Chambre Civile de la Cour de Cassation du 24.1.46 as "Le terme fusion suppose la reunion d'au moins deux sociétés pre-existantes, soit que l'une absorbe l'autre, soit que l'une et l'autre se confondent pour constituer une société unique" noted in (Dalloz 1946.146); (1973)26 Rev.Trim.Dr.Com. p.592, paras 27

The major difference in both the U.K and France concerning such a definition and the implementation of the E.E.C. directives in the field of mergers is that, in the UK, such mergers take place by means of compromises or arrangements. The scheme is prepared under the supervision of the court. The final draft of the scheme may not have effect unless a court sanction is received. In France, by contrast, fusion of sociétés may take effect by an administrative decision whereas the court's role becomes relevant in case of litigation or where the dissenting creditors petition the court. But it should be noted that proceedings before the court do not have a suspensive effect on the implementation of the transaction.[36] The E.E.C approach appears to reflect both concepts.[37] The harmonisation objectives in the field of company laws should not, normally, only be directed to collect the best business practice or

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36- For further reading in respect of statutory mergers, see mainly, Baudeu G., Protocoles et Traites de Fusion (Paris, Librairie Technique, 1968); Retail L., Fusion et Scission de Sociétés. Etude Juridique. Financière. et Fiscal. (4th edn.) (Paris, Sirey, 1968); Cheminade Y, Nature Juridique Des Sociétés Anonymes (1978) Rev.Trim.Dr.Com..p15; Martin G.J, La Notion de la Fusion.(1978) Rev.Trim.Dr.Com. p.12; Fusion et Scission in (Encyclopedie Dalloz, sociétés, 1978); Champaud C.L, Les Methodes de Groupement Des Sociétés, (1967) Rev.Trim.Dr.Com. at p.1003; Bejot M., La Protection Des Actionnaires Externes Dans Les Groupes de Sociétés en France et en Allemagne (Bruxelles Etab. Emile Bruylant, 1976). In Britain, though prominence is given to takeovers, statutory mergers is effected by means of compromises and arrangements, supra n.34. For further consultation, see notably, Pennington R.R., Company Law, (4th edn.) supra n.17; Palmer's Company Law, (24th edn.) (London, Stevens and Sons, 1987); Gore Brown F., Gore Brown on Company Law (44th edn.) (London, Jordans and Sons Ltd. 1986); Wooldridge F, Groups of Companies . The Law and Practice in Britain . France and Germany, (London, Institute of Advance Legal Studies, 1981); Gower L.C.B, The Principles of Modern Company Law, (3rd.ed.) (London, Stevens and Sons, 1969)

37- See generally, Art.2, 6, 16, 20 and 22 of the Third Directive, supra n.34

the member states' common existing rules, but also to focus on their conflicting aspects in the hope of eliminating areas of divergence. Presumably, conflicting matters or the divergence of rules may be eliminated through an adequate and continuous cooperation and understanding which the E.E.C. seeks to establish.

B- **TAKEOVER OFFERS** (SHARE MERGERS)

According to the E.E.C. proposal for a council directive on takeovers, the expression share mergers is used to denote various techniques whereby securities are bought and sold within or off the market place. However, takeover offers techniques often involve a change of control from one company to another. Perhaps the basic difference between statutory mergers and takeovers is that the former involves the disappearence of the target undertaking or, undertakings, whereas the latter usually involves the economic dependence of the target company.[38] Besides, under statutory merger, parties to the offer must be undertakings whereas in a takeover an offer may be made for the control of the target company either by companies or by individuals. Unlike takeovers, statutory mergers require the preparation of a merger draft, the approval of the general meeting of the merging companies and, ultimately, the authorisation of the relevant authorities (in due legal form) prior to merger being carried out. The use of takeovers, by contrast, does not have the protection of the representation and warranties made in statutory mergers. The acceptance or rejection

38- Distinction between statutory mergers and share mergers is incorporated into the E.E.C. proposal on the 13th Council Directive on Takeovers and Other Bids, COM (88)823 final, supra n.14 This directive is concerned with the practice of takeovers, known in France as "public offers" and in Britain as "takeover 'bids' or 'offers'".

of a takeover offer by the shareholders of the target company is based on voluntary and individual self determination but, in a statutory merger, the decision whether or not to approve the deal is by a majority of 2/3 or 3/4 at a general meeting of the merging companies.[39] Furthermore, legal merger is always effected tax free while cash takeover offers are not.

(1)- INTERNATIONAL AND NATIONAL TAKEOVER OFFERS

It cannot be disputed that there exist two major types of takeovers. One is international or cross-border. The other is domestic or national. This classification equally applies to legal mergers. International takeovers involve at least one or more overseas offerors for the control of a domestic targeted company. National takeovers are those which involve two or more locally resident companies, one of which will gain the majority of control of the other.[40]

Perhaps the most critical area in international takeovers today is direct investment. Some countries welcome it, such as Britain. Others impose rigorous conditions and restrictions such as fiscal and other monetary implications as well as political issues. The term investment consists of any investment made directly or indirectly, whether for the purpose of acquiring new ownership, reinforcing an existing acquisition or establishing a new branch of business in the

39- Statutory mergers of the type cited above are of predominant concern in France , supra.n.34 to 36

40- It is worthwhile to mention that national or international takeover offers may take one of the following forms. They may be agreed, contested or competitive. Gower states that "The choice of methods to be employed will sometimes be dictated by circumstances". Among the most obvious factors that are likely to decide what method is chosen when a choice is available are tax and stamp duty considerations. See Gower L.C.B., The Principles of Modern Company Law, p.631, supra n.36.

host country. Thus, international takeovers are not mere capital movement from one country to another. They contribute to the development of the host country.[41]

As they stand, both British and French regulations prohibit certain takeover offers involving mergers of competitors which are expected to have, after completion, an adverse effect on the public interest or competition. The criteria applied may vary. In some instances, the nationality of foreign offerors could have a very important bearing on the failure or success of offers, while in other situations many other characteristics of the foreign acquirer could have great implications on the probability of success. Take, for instance, the financial sector. Takeovers involving a target company operating in the financial sector, such as banks, can present special difficulties and may, as a practical matter, be impossible.[42] Take another example which is quite dissimilar to the former. This involves an aspect of management in engineering activities. In 1980, the United Kingdom's Monopoly and Mergers Commission investigated the takeover offer made by a USA offeror (Enserch Corporation) for the control of a British company (Davy Company). The M.M.C findings were on the grounds that Enserch Corporation could not prove that they could fit with the type of activities the target company operates. Therefore, it could not be a suitable owner of the British company. Moreover, the M.M.C concluded that

41- Earl P and Fisher F.G, International Mergers And Acquisitions (London, Euromoney Publication, 1986), Cooke T, International Law of Mergers And Acquisitions, (New York, Blackwell Inc,1988); Ffrench H.L, International Law of Takeovers And Mergers , Southern Europe, Africa and The Middle East (Quorum Books Ltd. 1987), Ibid (Asia, Australia and Oceania) (1986).

42- Earl & Fisher, International Mergers And Acquisitions, supra n.41, at p.30

the proposed chain of command from the USA to Great Britain would weaken the management of Davy (target). Finally, the takeover offer was disapproved, not because of the adverse effect on competition or the public interest, but it was solely on the ground of poor fitness with an overseas purchaser(Enserch).[43]

In conclusion, the tests which appears to be applied to disallow foreign acquirers of a locally resident company, other than competition and the public interest, seem to exhibit a wide range of variability and rests within the discretion of the relevant authority of the host country.

It is becoming customary in international takeovers that an overseas offeror, in order to have any local presence in the country in which it wishes to expand its business, frequently prefers a lack of majority control and to rely on the influence of its appointed nominees instead. This technique, however, is often viewed as a first-step toward majority ownership.[44] Nevertheless, it is time consuming and is costly. Finally, it could be argued that following the implementation of the project of the single market, competitive offers may attract or occupy the prime concern especially of those holding substantial percentage of voting right control in E.C companies.[45]

43- Ibid

44- Ibid, at p.28

45- Recently in the U.K, the D.T.I issued a consultative document seeking the views of the financial community as to which barriers pose the greatest problems for U.K companies within the E.C. See D.T.I, Barriers to Takeovers in the European Community, A Consultative Document (Jan.1990). The focus is directed, inter alia, to cross holding, unequal voting rights, proxy voting, identification of shareholders and poison pills.

(2)- FORM OF TAKEOVERS

As indicated above, there are two types of takeover offers. They may either be national or international. Both types may take one of the following forms of takeover offers; agreed (friendly offer), contested or competitive. The major criteria used to distinguish between an agreed, contested and competitive offer is solely based on the consideration offered, the reaction of the directors and on the number of offerors involved.

As regards the consideration offered, if an offer is made wholly or part in cash as a principal consideration, the offer is termed a cash offer. If the consideration is made in securities, the offer is called an exchange of share for share offer. However, wherever a competitive offer is made, offerors often prefer offering cash instead, whether or not alternatives are provided. The second criteria refers, in the main, to the reaction of the target board of directors. Competitive offers are almost always contested, in the sense that either the target company's board of directors resists any rival offeror or seeks another third party to outbid the unwanted offeror (for example, the fierce struggle between Guinness and Argyll for the control of Distillers).[46] Alternatively, the contest may be caused by competitors themselves against each other while the target company's board of directors remains neutral and, at the same time, convinces their shareholders to hold their shares (for example, the competition between the the two Swiss companies, Nestle and Suchard for the control of the UK company, Rowntree[47] in the U.K, and Primistère S.A and Z. Biderman for the control of Radar S.A holding in France[48]). In events such as these

46- See infra, Ch.6, footnotes 108 to 109.

47- See infra n.23 and 132/Ch3.

experienced shareholders often retain their stock until the latest possible date before the offer expires. Certainly, the main reason for such a delay is a financial one, i.e, to induce competitors to revise their price competitively. Finally, the third criteria relates to the number of offerors involved. An offer for the control of a target company may be made by one offeror, it may also be made by several bidders all of which seek to gain the majority of votes at the target company's general meeting. At present, the quantitative criteria is the major element to distinguish between a competitive and a single offer. The forms of takeover offers will be discussed below in turn.

(a)- CONTESTED OFFERS

Contested offers often result from the fact that directors of the target company, once they have decided to resist an offer, see the picture in a different light. The prospect for success of an offer is less predictable and shareholders uncertainty is greater. There are, however, several measures the opposition may undertake to discourage the offeror as well as to dissuade investors from making a hurried decision and refrain from selling their stock. In general, there are a number of aspects which may be considered by the target company's directors and implemented either prior to the announcement of potential offers or during the immediate period of the offer. Indeed, each measure, whether prophylactic or remedial,

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48- M.Z Biderman et Société Valeur c. Société Primisteres et Autres, Trib.de Com. de Paris , 28 Juillet 1986., Presidence de M.Grandjean, noted by Marchi J.P, (1986) Gaz.Pal.(Jurisprudence) at p.14; Trib Com.De Paris, 1re ch., 28 Juill.1986, noted in (Receuil Dalloz, p.305); Cour D'Appel De Paris (3e Ch.B), 18 Mars 1988, President de Lemontey M., noted in (1988) Gaz.Pal., at p.6 Jurisprudence.

has its own implications but both adversely affect offers against which they have been implemented.

The effects discussed above may be economic, financial, commercial, legal, social and psychological or emotional. In some other instances, directors may also invoke or trigger political aspects. The whole range of such aspects that directors may advance to their shareholders is aimed to frustrate an offer and to preserve their company's independence. Competitors (offerors), depending on their own financial resources, may also put forward a number of advantageous arguments in the hope of inducing either the directors of the target company to review their decision, or directly to induce shareholders to accept the proposal. They may promise, for example, not to cut jobs, to keep the management of the company (target), to preserve the initial headquarters of the target and that the target, after acquisition, would have its own board of directors. They may also argue that there should be no reduction in the level of participation or financial earning of investors. But these promises remain within the frame of uncertainties and probabilities.[49] If there are several competitors, the only alternative for rivals is to raise their price competitively or to propose other attractive considerations.

(b)- MUTUAL OR FRIENDLY OFFERS

In practice, not all mergers are the result of contested offers. An offer may also be the result of an agreed deal, where both parties involved prefer amicably to negotiate the proposal. The relevant authority, in order to protect shareholders interests, imposes upon their directors the primary responsibility of assessing

49- See infra, Section 3/Ch1 and Ch.6 respectively because both are closely related.

the transaction, shaping it, approving it, and finally presenting it to their shareholders for their ultimate acceptance or rejection. The exercise by directors of their position of representation and the use of their vast knowledge about the impact which such a deal may represent, are circumscribed by the fiduciary duty owed to shareholders.[50] Legally, in the presence of such a situation, the attitude of both the U.K. and French regulations differ radically. Whilst the British regulator's involvement is minimal, the French is more important. The French Commission des Operations de Bourse (C.O.B) requires both parties involved to submit to it, prior to any official announcement, a common information document (note commun) for scrutiny.[51] They must also send, within the same day, their offer draft to the Conseil des Bourse de Valeurs, specifying certain requirements.[52] The most important aspect in respect of agreed offers is the consent of parties in offers and the the supervision of the relevant authority. Both are vital.

(3)- CHARACTERISTICS OF TAKEOVER OFFERS

Typically, takeover offers begin with an offeror, usually a company, acquiring a majority of voting rights control, but not a 100% ownership, in what is then the target company. The kind of methods through which such control is obtained are takeover offers, private negotiation, market purchase or any combination of these. In most instances, acquisition of effective control or even a

50- See Ch.5 'Directors Fiduciary Duty'

51- C.O.B. decision générale of 25th July 1978, Rule B.2 (J.O.13th August, 1978) as amended by the Arrété. Amended by the 1989 Regulation, see infra Ch.3

52- Arrété of 7th August, 1978, Art 178 et seq, relating to public offer regulation as amended by the 1989 Arrété of Sept.28th., see infra n.73

significant interest in a company is merely a transitory step toward either majority of control or full ownership. Similarly, acquisition of majority control by a takeover offer is often followed within a short time by a compulsory acquisition and ultimately obtaining direct and full ownership. In other situations, if the acquirer is a parent company, the acquired company (target) may remain a subsidiary of the acquiring company for an extended period. If this is the case, the parent company operates the subsidiary through a board of directors composed of the parent company's nominees. However, the interplay between a takeover offer and compulsory acquisition has been made clear in Re National Bank Limited.[53] Plowman J refused to place any limitation on the term "arrangement". In that case the vital aspect of the scheme was the purchase by an outsider of all issued shares of the company. The dissentent minority challenged that it could only be effected through a takeover offer by using Section 209 of the C.A. 1948 (now sch 12 of the F.S.A.1986). He pointed out that section 206 and Section 20 involve quite different considerations and different approaches. By virtue of Section 206 an arrangement can only be sanctioned if the question of its fairness has first of all been submitted to the court. If it does come to the court, then the burden falls on the dissentent minority to prove the unfairness of the scheme.[54] But, since the burden of proof is placed on any applicant to prove otherwise, the question is how convincing proof should be? This remains questionable and an easy answer could not justifiable at all. The same question arises in Re Hellenic and General Trust Limited. Templeman J states that "the fact that an arrangement under Section 206

53- (1966)1 All ER 1006

54- Compare with the rule laid down in Foss v Harbolle (1843) 2 Hares rep. 461.

produces a result which is the same as a takeover under Section 209 is not necessarily fatal." Thus, albeit fulfilling nearly identical objectives, i.e, control, both transactions, whether or not one is ancillary to the other, remain distinct.[55]

Takeover offers may also be distinguished from other forms of market purchase notably, private deals and disposals as well as leveraged bids or reverse offers, including partial offers. In determining what characteristics may make it distinguishable, stress hereinafter will be on some of its major characteristics. The most noteworthy aspects of takeover offers appear to be that first, general takeover offers require that a certain minimum number of shares should be offered. Such a quantity is usually conditional upon the potential success of the intended offerors and clearly expressed in the relevant offer document. Indeed, it is becoming a rule that wherever an offeror seeks to acquire more than 30% of shares carrying voting rights, he must make a general offer to all shareholders of the target company or at least to all the holders of shares of a particular class or classes. Actually, this is a triggering level under most relevant regulation, the purpose of which is to provide investors with further safeguards. Correspondingly, if an offer is made conditional on acceptance being offered in respect of a stated minimum limit of shares, the offeror often reserves the right to waive any conditions introduced subsequently. Likewise, an offer is generally made irrevocable. This means that once an offer is publicly announced, the offeror cannot retract his commitment as to the continuity of his offer unless justifiable grounds are provided and the regulator considers them reasonable and convincing for

55- (1976) 1 WLR 123 at 127

such withdrawal. By contrast, the position of shareholders to whom the offer is addressed may vary from one country to another. The French regulator permits any shareholder to withdraw his offer at any time, including the last day of the offer. But in Britain shareholders of the target company can only use their rights to withdraw in particular circumstances. For example, where the original offer is promptly followed by a competitive offer and provided that the original offer is not declared unconditional as to acceptance.

Since the purpose of an offer is to acquire or facilitate the eventual acquisition of control (the level of which usually exceeds 51%) of the target company, only shares which entitle, or may eventually entitle, their holders to voting rights at general meetings of the target are relevant. Finally, a takeover offer which involves the change of control of the target company (whether or not competitively launched) generates various provisions of information disclosure. In consequence, misstatement, fraudulent or deceptive action entails civil and criminal proceedings. If a cash offer is made, the price for shares of the target company is frequently made substantially higher than the current market quotation of such shares. In most takeovers transactions the premium offered often exceeds 20% above the market price. To emphasize, in France, one study concluded that premiums always vary between 20% to 40% before an offer is announced and up to 100% or more during the offer period.[56]

56- See mainly, Loyrette J, Les Offres Publiques D'Achat, supra n.10, at p.110 -114

SECTION THREE: CONTROL AND MOTIVATION

It is generally agreed that takeovers are becoming the most frequent process involving the change of control from one company (target) to the successful offeror. But there is an ambiguous area where both control and purchase of shares are involved. The sellers are not controlling persons and the controllers are not the legal owners of shares.[57] This, perhaps, is the aspect that generates more controversies and is still at the point of development.[58] Moreover any motivation to acquire control may be frustrated by the desire, for example, to remain in control. Below it will be discussed, first, the vexed aspect of control and, second, the motivation to acquire control as well as to defeat offers.

57- Ibid, at 260

58- For an extensive analysis, see mainly Champaud Cl, Les Methods de Regroupement des Sociétés (1967) Rev.Trim Dr.Com., p.1003; Laviec J.P., Protection et Promotion des Investissements, (Press Universitaire de France, 1985), p.17; Flores G. & Mestre J, La Reglementation de l'Autocontrole (Commentaire de la Loi No. 85-705 du 22 Juillet 1985), (1985) Rev.Soc, p.775; Coffy de Boidefere M.J., L'Autocontrole dans les Sociétés Commerciales et la Loi du 12 Juillet 1985, (1987) Gaz Pal., Doctrine, p.4; Wooldridge F, The French Law Implementing The Seventh E.E.C. Directive (1988)9 Co.Law, p.63; Bejot M., La Protection des Actionnaires Externes Dans les Groups de Sociétés en France et en Allenmagne, p.61 (Bruxelles, Etablissement Emile Buylant, 1976); Wooldridge F., Groups of Companies, The Law and Practice in Britain, France and Germany supra n.36; Pickering M.A, Shareholders Voting Rights and Company Control (1965) L.Q.Rev, p.248; Hornsey G., some Aspects of The Law Relating to Company Control (1950)13 M.L.Rev, p.470; Boyle A.J, The Sale of Controlling Shares: American Law and Jenkins Committee, (1964)13 I.C.L.Q, p.185; Manne H.G., Some Theoretical Aspects of Shares Voting (1964) 64 Col.L.Rev, p.1427; Hill A., The Sale of Controlling Shares (1957)70 Harv.L.Rev, p.986; Berle A.A, "Control" in Corporate Law (1958) 58 Col.L.Rev, p.1212; Weinberg M.A & Blank M.V., Takeovers and Mergers, (4th ed.) Para 203 and 914, supra n.19; Farrar J.H, Ownership and Control of Listed Public Companies, Revising or Rejecting the Concept of Control, in Company Law in Change, Current Legal Problems, at p.39, (London, Stevens and Sons, 1987)

3.1- CONCEPT OF CONTROL

Basically, there appear three sorts of control; the control which is exercised during the company's usual business life (prior to any acquisition), control which is sought to be acquired when a company becomes vulnerable to takeover offers, and control by convention. Concerning the control of the subject of a takeover offer and control by convention, the distinction is great. As the former is purely an acquisition of voting rights,[59] the latter is simply a transfer, consolidation or concentration of voting rights in one or several hands. For example voting agreements between shareholders and voting trusts. This also applies to proxies and transfer of control in legal merger.[60] Hence the kind of control which is an essential element of a takeover offer principally relates to an acquisition of votes. The question here is twofold. Could it be assumed that the incentive for the acquisition of control is limited to an appointment or dismissal of directors?. How wide is the latitude of the controllers and what is the desire or motivation behind an acquisition of control?

59- The term "voting power", "controlling interest", "right over shares", and "voting control" or "controlling power" are hereinafter used in this thesis interchangeably both to describe the control and to denote the characteristics of shares that give such control.

60- One should not confuse between a transfer of control and acquisition of such control by a takeover offer. For further information, see Paillusseau J., La Céssion de Controle (1986)J.C.P, I.Doctrine,3244; Paillusseau J. and Contin R., La Céssion de Controle d'une Société, (1969) J.C.P (ed, CI), 87052, 87053; and (ed.G.I.), 2287; Cateron M., La Protection des Interets Des Actionnaires et La Prise de Controle des Sociétés par les Groupes Concurrents, (1969) Rev.Soc, p.143; Oppetit B., La Prise de Controle D'une Société au Moyen D'une Céssion D'Action, (1970) J.C.P, ed.G I, 2361.

A- MEANING OF CONTROL

As is stands, the expression "control" is complex to define. In addition, there are a wide range of techniques and devices whereby control can be secured as discussed above. It is worth reiterating that control may be obtained by purchase of shares on or off the Stock Exchange in a matter of days or over periods of time, it can also be secured by contracts, by arrangements entered into between shareholders or by proxies and voting trusts.[61] Thus control cannot fairly be attributed to, or derive from, mere ownership of a majority of votes in a general meeting. For economists, control may mean planning the company's long term strategy, allocating its resources, selecting products, market and technology in addition to other key decisions.[62] But for legal academic writers control means various things, the test of which is the legitimacy of decisions.[63] Hence, some argue that control means "the capacity to choose directors. As a corollary, it carries capacity to influence the board of directors and possibly to dominate it".[64] Whereas another writer pointed out that control "denotes the relationship which exists when an individual or group of individuals, who are clearly identifiable in

61- See Gower L.C.B., The Principles of Modern Company Law, p. 441-444 (London Stevens and Sons 1957), Ibid (edn 1969); Pickering, Shareholders Voting Rights and Company Control, supra n.58; Hornsey, Some Aspects of The Law Relating to Company Control, supra.n.58

62- Herman E.S., Corporate Control, Corporate Power (Cambridge University Press, 1981) reviewed by Werner W. (1983) Col.L.Rev 238.

63- Berle A.A, concludes that attainment of a position of control "may not be secured by bribery or by false representation or by inducing directors of the corporation whose control is sought to resign for a consideration. Properly it may not be secured by purchase of stock from previous controlling stockholders along with a companion understanding or agreement that directors resignations will be brought about. When control has been secured, its exercise must be "responsible", supra n.58 at p.1224

64- Ibid, at p. 1212

some respect or respects and who may themselves be incorporated, exercise powers of direction and dominion over the affairs of a company".[65] Looking at self regulation, in the view of the Panel administering the Code in the U.K, control means a holding, or aggregate holdings, of shares carrying 30% or more of the voting rights of a company, irrespective of whether the holding or holdings give *de facto* control.[66]

Referring to statutory definitions,[67] the French legislation incorporated an even wider definition of control. The French Code Commercial of 1966,. Article 355(1) indicates that a company should be deemed to have control of another company where it directly or indirectly holds a proportion of another company's capital conferring on it the majority of the votes at a general meeting of that company; it holds the majority of votes in that company pursuant to an agreement entered into with members of that company; and where by its position of having *de facto* control, it determines the decision-making process at a general meeting of that company.[68] Although varied and to a considerable degree homogeneous, both the theoretical and statutory definitions, appear to locate the control in the hand of those having the power to elect

65- Pickering M.A, supra n.58, at p.248

66- Originally the triggering level under the City Code was 40%. It was reduced to 30% in 1974. The Bank of England and the Confederation of British Industry (CBI) urged the government to lower the threshold at which offers trigger the obligation to make a general offer to all shareholders from 30% to 20%, The Times, February 27th, 1989, at p.2

67- The U.K Industry Act 1975, Part.II section 12 defines the circumstances involving the change of control of a locally resident company to foreigners; For tax purposes, the British Finance Act, 1940, Section 55(3), noted by Hornsey G., supra n.58 at p.471-473

68- Compare the French definition respectively with the U.K. Fair Trading Act 1973, as amended by the 1989 Companies Act, at Section 65; The E.C Joined Case 6 and 7/73, at para 32 (e), supra n.5.

the board of directors and to determine the future policy of the company. Moreover, since the control of companies cannot only be said to be derived from mere ownership of shares,[69] the above cited definitions of control remain incomplete and somehow unsatisfactory. This means that they appear to leave many questions open for resolution.

As regards the variability of the percentage of votes which entitle the holder to control the policy of or to elect the board of directors, neither the statutes, including extra legal regulation, nor academic writers, resolve the problem. Specifically, to determine at what point a substantial shareholder may control or occupy a position of *de facto* control.[70] To illustrate, in Britain, for instance, the Companies Act 1948 as well as the Insuring Companies Act 1974, Section 193 (1) (c) and Section 7 respectively regarded one third or more of the voting control as giving control. The Monopoly and Mergers Act of 1965 considers 25% of voting control as conferring the exercise of effective control.[71] The 1989 Companies Bill advocated a much lower level of 15% as the triggering level at which obligations to make general offers arise.[72] By contrast, the E.E.C. Directives and the French legislature consider one third of voting rights as giving *de facto* control.[73]

69- For example, there are various devices whereby a person, whether or not owning shares, may control a company and, thus be be able to elect its board of directors, notably by proxies, voting trust, voting agreements, or by other contracts, including incidental transfer of control such as by inheritance.

70- Legal or *de jure* control is usually referred to 50% or more of votes at the company general meeting.

71- The Panel on Takeovers and Mergers laid down 30%.

72- Following the adoption of the C.A 1989, such a recommendation appears to be omitted

73- See the French Conseil de Bourse de Valeur Regulation of 1989, No explanation can be given as to why an effective control cannot be located in one uniform level. Perhaps the more important question is why do almost all securities market regulators attempt to impose or fix such a minimum level and for what purpose?

Starting, for instance, from the characteristics of shares. As a matter of law, it is obvious that shareholders are entirely free to dispose of their rights at any time they wish to do so and to any buyer they choose. In one case Borland's Trustee v. Steel Brother and Co. Ltd., Farwell J. indicated:

> A share is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second. ....A share is not a sum of money...but is an interest measured by a sum of money and made up of various rights.[74]

However, as one may notice from to day compulsory acquisition practice, it used to be very difficult to force shareholders to disinvest involuntarily, because, at one time, the court viewed share ownership as a form of vested right that could

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Art.5.3.1, Ch.III, Arrété du 28 sept.1989, (J.O.Sept.30th, p.12309);.Article 4, para 2 of the E.E.C. proposal for a Thirteenth Council Directive on Company law relating to Takeovers and Other General Bids, requires that " To calculate the threshold..., the following must be added to the voting rights held by the offeror: (a) voting rights held by persons acting in their own name but on behalf of the offeror; (b) where appropriate, voting rights held by companies belonging with the offerer to the same group of undertakings ...; (c) voting rights held by persons acting in concert with the offerer; (d) where appropriate, voting rights held by directors of the offerer company", COM (88) 823 final, supra n.14; It is worthy of note that in the U.K, the Panel has already adopted a level of 30% after which a mandatory offer must be made. See Rule 9 of the Code.

74- (1901)1 Ch.279, 17 T.L.R.45; British and American Trustee and Finance Corp. v. Couper (1894) A.C 399, 10 T.L.R.415; Oakbank Oil Co v. Crum (1882)8 App Cas 65, 89 LT 537.

not be taken without consent. Since this attitude created barriers, it was replaced by the rule that permitted the majority to acquire compulsorily the remaining shares against a fair and equitable consideration.[75] Correspondingly offerors, when deciding to take over a target company, enjoy a wide range of freedom in the sense that they are not compelled to exercise the control being acquired for a specified purpose. In other words, control may be sought for various purposes which may or may not be in the best interests of the shareholders of the target company. As a corollary, the relevant regulation frequently compels the buyer, in particular in cases of exchange offers, to make more information disclosure to shareholders to whom the offer is addressed. It follows that offerors cannot escape from their proper obligations towards their

75- Acquisitions of minority shareholdings in a company and litigations which often arise therefrom are a vexed aspect. See, Weinberg and Blank, Takeovers And Mergers; (4th ed), supra n.19, at Ch. 20, Paras 2001-2005; Kolodney K., Protection of Minority Shareholders After a Takeover Bid, (1986)7 Co.Law, p.20; Weiss M.I, The Law of Takeovers And Mergers. A History Perspective, (1981)56 N.Y.U.L.Rev., 624; Corley R.N. Principles of Business Law, (13th edn.),(Prentice Hall, 1986). Generally, methods whereby a fair and reasonable value of the assets under challenge could be determined are; the value market method, the assets value method, and the investment or earning value method. The first type of valuation may set up the value of the shares on the basis of the price for which a share is selling or could be sold to a willing purchaser. But such a method is only relevant in the ordinary circumstances of the Stock Market i.e., it is irrelevant in case of recession or market fluctuation. The second method conveys solely a basic fact about the target company's net assets valued as they stand. Each share is calculated on a pro-rata basis of the net value of assets in the aggregate. The third and last method is based on a prediction of the company's future prospects and income compared with its previous earning record. Finally, to make a subsequent acquisition in order to secure fuller ownership of the acquired company binding on 100% of the shareholders of the offeree company, the acquirer must at least receive a 90% acceptance of its offer so that the remaining 10% of the minority shareholders could be obtained by invoking the compulsory acquisition procedure.

own shareholders. Yet, almost always the law lays stress on both aspects. Mention should also be made of the fact that those seeking control of a target company are more willing to pay a higher price on a per share basis than they would be willing to pay if the shares are voteless. The nature of the problem, therefore, appears to be compounded. On the one hand, it is not simply the purchase or sale of shares, but it is a question of "voting power" and "premium".[76] On the other, is the need to protect shareholders, be they a majority or a minority, against abusive market practice. While the latter is discussed in the subsequent chapters, in particular the fourth and fifth chapters, the former gave rise to growing concern about the need of some form of sharing premiums. For example, Berle considers that control is a "corporation asset" and advocated that any premium for the purchase of voting rights should be paid to the "corporate treasury".[77] Other commentators argue that since consideration was not paid for the shares but for control, it does not follow that the seller of a substantial block may appropriate for himself any premium that the offeror is willing to pay for control.[78] Shareholders should be given an "equal opportunity".

76- It is worth highlighting that sales at premium are lawful, and the shareholders are under no specific duties in selling their controlling block. Lord Russell of Killowen described a share thus " ...It is the interest of a person in the company, that interest being composed of rights and obligations which are defined by the Company's Act and by the memorandum and articles of association of the company. A sale of a share is a sale of the interests so defined, and the subject-matter of the sale is effectively vested in the purchaser by the entry of his name in the register of members", Commissioners of Inland Revenue v. Crossman & Others, (1937) A.C.26, at 66.

77- Discussed by Hill A., The Sale of Controlling Shares, supra n.58, at p.987; Lowenstein L, Pruning Deadwood in Hostile Takeovers: A Proposal For Legislation (1983) 83 Col.L.Rev, p. 249,, at p.249; Farrar J.H, Ownership and Control, supra n.58, at 39 et seq.

78- For an extensive analysis, see Alfred Hill. the Sale of Controlling shares, at p 986 et seq, Supra n.58

This would entitle the minority shareholders to sell their shares on the same terms as the controlling shareholders.[79] The opposite view suggests that if both propositions were to be in use, it would restrain transfers of control. On the one hand, if the premium must be paid to the "corporation treasury", shareholders may not be willing to sell their controlling block. On the other hand, if minority shareholders are given "equal opportunity", bidders may buy more shares than necessary, i.e, "possibly causing the transaction to become unprofitable".[80] Thus, it can be safely argued that the proposition which advocates equal opportunities could be the appropriate outcome.[81] Furthermore, it could be seen that unequal distribution of a premium will probably hinder shareholders interests and therefore distort the main principle of protection that the relevant regulation aims to preserve. Therefore, this could be the answer to the above question with respect to the various attempts to fix a certain level of shareholdings. This means that beyond such points whether 30% or 1/3, the so called triggering level, shareholders of the target company are given the opportunity to share the premium for any change of control. But since experience exhibits

79- Lowenstein L, Pruning Deadwood in Hostile Takeovers: A Proposal For Legislation, at p.265, supra n.77; Lipton M. Takeover Bids in The Target's Board Room, (1979)35 Bus Law. at p.101 and (1981)36 Bus Law, at p.1017

80- Easterbrook F.R & Fischel D.R, Corporate Control Transactions (1982) Yale L.J. p.698, at p.716-17; The Proper Role of a Target's Management in Responding to a Tender Offer (1981)94 Harv.L.Rev. p.1161

81- This is, perhaps, consistent with the current trend of takeover offers regulations in almost all countries, principally, UK and France and recently the E.E.C. proposal for a directive on takeovers. Sharing a common concern, they have formally bound any person interested in the control of a target company, once its holding exceeds the prescribed limit as discussed above, to make an offer to all shareholders at a higher price, including those who already accepted or transferred their shares, whether or not the whole body of shareholders is willing to sell its controlling block.

various instances in which a proportion of 15% or even less may enable the holder to exercise control, it appears that fixing a higher level, say one third, cannot sufficiently afford more safeguards or equal opportunities between shareholders involved. Hence an alternative appears to be that a percentage of 20% could cover a much wider group of shareholders.

B- TYPE OF CONTROL

Conceptually, there are two discernible approaches to control. One is a common law theory based on voting rights control. The other is a continental concept relating to dominant influence. Surprisingly, it should be pointed that most takeover offers regulations within the E.E.C. tend to adopt the former theory and evade the latter. Notwithstanding whether the control is secured by the purchase of shares or otherwise, in practice there exists two major types of control, legal or *de jure* control and effective or *de facto* control.[82] Briefly, on the one hand, Berle and Means classify "control" into five major categories: control through almost complete ownership; majority control; control through legal advice; minority control; and management control. The three former categories were regarded as legal, while the two remaining (minority control and management control) were deemed to be "factual" forms. On the other hand, Pickering describes the concept of control to include; proprietary control; control by constitutional means; inter member control arrangements; inter company control; and management contracts. Finally, Pickering pointed out:

82- Berle and Means, The Modern Corporation and Private Property, (revised ed 1968), at ch 5, noted by Farrar J.H., Ownership And Control of Listed Public Companies, supra n.58, at p.39; Pickering M.A, Shareholders Voting, supra n.58

> ...these different basic forms of control cannot always be sharply segregated and elements of various types, and either legal or *de facto* or a combination of both, may exist together in any one company. They are means of control and not ends in themselves.[83]

As far as both descriptions are concerned, the most relevant element or type of control within the competitive offer field is majority of control which, legally speaking, always refers to 51% of unrestricted voting rights. It is worth reiterating that the 51% level referred to in this context is an extra-legal requirement for an offer to be declared successful. This is vital and almost all Stock Market regulations adhere to the same principle that an offer should be made conditional as to the minimum level of acceptance.[84] In other word, the offer lapses.

3.2- MOTIVATION FOR TAKEOVERS

A- MOTIVATION TO ACQUIRE CONTROL

Thinking on the subject of motivation to acquire control as well as its likely implications has been far from unanimous. Desire to attain control may arise from, legal, commercial, economic and financial, (including social) considerations, taking into account factors such as recession, inflation and currency fluctuations.[85] In this respect, among the most common motives advanced are: the

83- Pickering M.A, supra n.58

84- Recently, the French regulator requires any offeror not to introduce any clause as to the minimum level of acceptance. See infra Ch.3

85- Research into motivations, in this context, concerns mergers between companies. For reading see Paillusseau J & Contin R, La Cession de Control D'une Société , supra n.60, Trochu M, Les Offres Publiques D'Achat , supra n.10; Weinberg M.A, Takeovers and Mergers (3rd edn) (London, Sweet & Maxwell, 1971), at p.307; Cooke T.E, supra n.41, at p.26; Goldberg W.H, Mergers. Modes. Motives and Methods (Gower 1983); O.E.C.D, Mergers Policies and Recent Trends in Mergers (1984).

desire to increase market power; a desire to diversify to spread risks and to reduce dependence on a single product, i.e, looking for new brands which have a reputation worldwide; a desire to achieve sufficient size to obtain economies of scale or greater financial strength; a desire to reap the profits often associated with a merger transaction or to obtain tax advantages; and the desire of managers to obtain greater prestige by acquiring more employees.

It is also important to mention that there are various other motivations namely, a desire to acquire an established company for an eventual expansion of business rather than to build up through internal effort. Accordingly, an acquirer may be motivated by the desire to obtain business in new territories, he may also be substantially concerned with the value of the target company's assets about which he believes that he knows better than the offeree's board their real value and the manner whereby they can be better or more profitably used. But the desire to acquire control may be frustrated by a number of factors including: the availability of finance and the legal, fiscal and monetary obstacles that still exist. Of relevance, too, in this context, is merger control which forms an integral part of competition policy within the European Community. One aspect in merger control on which there does appear to be some consensus is that the different categories of concentrations (horizontal, vertical and conglomerate) require somewhat different standards of treatment. Case law with respect to merger control frequently approaches the detrimental side of horizontal mergers with strictness in a particular market or markets. The major concern about the likely implication of horizontal mergers compared with vertical or conglomerate mergers comes from their ability to enhance and create a dominant position and thus to hinder competition. Two major factors are recognised as important for competition: the degree of concentration and barriers to entry.[86] However, while commentators express doubts as to the advantages and disadvantages which stem from mergers, their findings are inconclusive, merger control regulations have avoided reliance on any single fact as being determinant.[87]

B- MOTIVATION TO FRUSTRATE OFFERS

The reaction of the directors of the target company to offers, whether competitive or not, may be one of these alternatives: resist potential or actual competitors on the basis of inadequacy of terms; seek either a rescue which outbids the offerors or enter into merger negotiation with another friendly company other than the offerors pursuant to a merger plan; support one offer against the other and recommend their shareholders to accept it subsequently; or perform their duties and obligations in an impartial way. Eventually, as has been pointed out earlier, whether or not the directors of the target company respond to an offer in a negative or a positive manner, or stay neutral, the key decision to remain independent or to favour the change of control is frequently with the institutional shareholders as well as those holders of a significant percentage of shares carrying unrestricted voting rights.

86- O.E.C.D, Mergers Policies, at p.9, supra n.85.

87- See The U.K Fair Trading Act 1973 as amended, supra n.68; The French Loi No.77-806 du 19 Juillet 1977 Relative au Controle de la Concentration Economique et la Repression des Ententes Illicites et des Abus de Position Dominante as amended by Loi No.85-1408 du 30.12.1985, Art.6 (O.J. 31.12.85, No.15513); The E.C Regulation on The Control of Concentration, supra n.3.

As a matter of general practice within the takeover offers field, it is important to realize that most Stock Exchange regulations are intended to enhance self determination of shareholders. Hence shareholders self determination, whether or not to sell shares, assumes the availability of adequate information disclosure, the test of which is the materiality of information to the decision making process. Therefore, the directors are the unique party which bear the burden of satisfying the shareholders needs.[88]

Experience demonstrates that once offers are announced, the board of the target company may, and often does, decide at an early stage of the offer whether to oppose bids, to support one offeror against the other, remain neutral and await for a better deal, or act in an impartial way for the best interests of their own shareholders. Correspondingly, the board of directors, in their capacity as fiduciaries, are assumed to make their position clear in any situation. Actually, directors seem to be really in a dilemma. If they decide, for example, not to oppose offers which, in their assessment, are undesirable to the interests of their shareholders, they will be deemed to be in breach of their duties, whether or not shareholders rely on their judgements. Furthermore, if directors determine to recommend an offer which is, in fact, not beneficial to shareholders to whom it has been recommended, or oppose an offer which, normally, should be recommended, they will put themselves in breach of their duties. In this context, before setting out any arguments whether for or against directors' attitudes, there are some important factors which should be taken into account. These include whether the transaction is friendly or unfriendly; whether there are competing parties for the target company; whether the

88- See Ch.4.

transaction involves cash or securities, whether the banker represents the buyer, the seller or both, whether there is a difference of opinions within the board of directors. There is also a general variation in the form of takeover. First, where the offer is one consisting all or in part of securities; second, where the offer is one of cash for all the target company securities; and third where the offer is one of cash for a controlling block of the target shares. Bearing these variations in mind, the reaction of shareholders to directors' resistance often depends on the worthness of the consideration proposed and the outcome.

First, those who support directors' resistance argue that shareholders of the target company, as an unorganized body of individuals and institutions, cannot bargain effectively. It is only through their directors that they gain the power to negotiate. Individually, shareholders can only exercise the simple option of accepting or rejecting an offer. As members of a group of individuals who are forced to make individual decisions in a context where they do not know the decision others in the group will make, shareholders may be unable to make decisions that will best serve their collective self interest.[89] This means that a person's self determination is to some extent dependent on others and in some aspects he does not have the capacity of acting on the basis of his own assessment. Conversely, since shareholders are unorganized, especially where there are no links between them, they lack this power and the responsibility associated with it that can only be performed through their representatives. Besides, the inability of shareholders to make a collective decision may force them to ignore

89- Herzel L., Schmidt J.R And Scott J.D, Why Corporate Directors Have a Right to Resist Tender Offers, (1980)3 Corp.L.Rev, at p.111 and 115.

a host of interests,[90] notably the interests of employees.[91] As to the conflict of interests, it is argued that there is no justifiable grounds of separating bad intentions from good intentions when conflict of interests are present.[92] Others point out that it is reasonable for the directors of a target company to reject a takeover offer if their decision is justified on the ground of inadequate price, adverse impact on constituencies and doubt as to the quality of the offeror's financial resources or securities in an exchange offer. Furthermore, the directors' resistance to an offer often works in favour of and/or to shareholders advantages by: forcing the initiator to raise the price; forcing the offeror to engage in a negotiated deal on more favourable terms; attracting other offerors who will outbid the original initiator.[93] To a lesser extent, some others, in support of the above argument, assert that directors, by resisting an offer, can be viewed as engaging in a type of implicit negotiation to obtain a better deal from the initiator himself or from some other competitors. Second, the contrary view argues that any resistance by the directors or any strategy designed to prevent takeover offers reduces overall welfare and shareholders lose whatever premium over the market value the offeror proposed would have offered but for the resistance or the

90- Ibid.

91- The post implications of takeovers on employees' jobs seems to have insufficiently recognized. Moreover, the pattern of carreer employment within the field of takeovers appears to be altered in the sense that there is no insurance for workers to remain in job after completion of the offer.

92- Lipton M., supra n.76; It is argued that where a conflict of interest arises, it could be solved by appointing an independent committee. Such an option has been criticised on the basis of its difficulties. That is to say how an honest person with a linkage mechanism could be chosen.

93- Ibid.

prospect of resistance. In the view of those against directors' resistance, target company directors have a significant interest in preserving their companies' independence and thus preserving their salaries and status (their established position of prestige, power and fortune); the less effective they have been as managers, the greater their interest in preventing a takeover offer.[94] Easterbrook and Fischel advocate that since resistance to takeovers decreases shareholders gains, directors should be banned from using any defensive tactics to frustrate bona fide offers, including attempts to secure a white knight.[95] Still a third group of commentators argue that directors of a target company faced with an offer should remain neutral. The decision whether to block an offer, or to accept it, is a matter to be left for each shareholder to decide.[96] Others, additionally, indicate that directors' resistance to a takeover offer has only a marginal impact on the outcome of the company control contests.[97] Experience shows various instances where directors can do nothing to remain independent once a competitive offer has been made. "Realistically, the target choice is between ravishment by the hostile suitor or a hastily arranged shotgun wedding with the white knight."[98] Either way, the change in control is most

94- Penrose W., Some Judicial Aspects of Takeover Bids (1964)9 Jud.Rev, p128; Weiss M.I, Tender Offers And Management Responsibility (1978)23 N.Y.L Sch.L.Rev, p.445, at p.446; Steinbrink W.H, Management's Response to The Takeovers Attempt (1989)28 Case Wes.Res.L.Rev, p.882; Klink F.J, Management's Role in Recomending For or Against an Offer (1970) Bus Law, p.845.

95- Supra n.77.

96- This seems to be the present trend of almost all securities market regulations.

97- Coffee J.C., Regulation of the Market for Corporate Control; a Critical Assessement of the Tender Offer's Role in Corporate Control, (1984)84 Col.L Rev, 1149, Shareholders Versus Managers: The Strain In The Corporate Web (1986)85 Mich.Law.Rev, p.1

likely, if not automatically, to end with the dismissal of the target's directors. In other words, their previous position of power is jeopardized. Other commentators describe offerors as "profiteers", or "financiers" seeking only to satisfy their needs without due regard to the interests of the shareholders involved.[99] Finally, mention should also be made of those who argue that offers should be decided by shareholders in a general meeting. They state that, as a matter of logic, the alternative would be to enhance the powers of the board of directors by giving it not merely the right to defend against takeovers offers but the right to veto them.[100] This view would perhaps tend to bring legal merger and takeover offer decision making to a unified mechanism.

Whatever the substantive ground of the above cited comments, the French relevant authorities exercise a pervasive influence on each deal. This means that any transaction carried out without the French authority's approval is a violation of the regulation, i.e, the French approach seems more influenced by the tendency of dirigisme and administrative decision. By virtue of French Conseil de Bourse de Valeur's general regulations,[101] a target company's directors are required neither to act nor to respond to any offer either positively or negatively on their own initiative and desire, unless the relevant authorities have received a prior notification to that effect.[102] Finally, one may wonder about the inexplicable

98- Ibid, Regulation of The Market, at p.1175.

99- Penrose W., Some Judicial Aspects, supra n.94

100- Loweinstein L., Pruning Deadwood in Hostile Takeovers, at p.269, supra n.77.

101- Regulation of 7th August, 1978 relating to public offers as amended. See infra n.1/Ch.3.

102- Rule 9 and 10 of the C.O.B. decision générale of 25 July, 1978, require the directors of an offeree company to submit, within a period of 4 reasons as to why in France directors cannot freely and directly respond to offers as happens under the British system. One question may be relevant in the context is, does the French regulator's policy operate as a safeguard against defeat of the offer? The offeror's main assurance against defeat is in making a better offer which the target company shareholders consider reasonable. It is equally important to mention that offerors are not also protected against any subsequent competitive offer. Against what then are offerors protected? The most obvious protection, which is reflected in both the French and British systems, is solely against any fraudulent or deceptive opposition. This, in fact, is an indirect protection for offers whilst it is primarily designed to promote and preserve the interests of the target company's shareholders. As indicated earlier, the regulator may not protect initial offerors against competitors. Furthermore, in France, such litigation has not been initiated so far. By way of contrast, in Britain, such disputes are clearly illustrated in Lonrho plc v. Fayed and others.[103] In this case, the directors of Lonrho plc, challenged the subsequent rival offer made by Fayed for the control of the House of Fraser (House of Fraser Holding Ltd.) on the grounds of interference with Lonrho's right to bid for the House of Fraser. The learned judge said that in Hadmoor Productions Ltd. v Hamilton Lord Diplock recognised the existence of the tort of interference with a plaintiff's trade or business by unlawful means, but in that case protection was sought for "commercial expectations" and the facts were very different from the present case.[104] Pill J. considered that "the right of freedom to

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days, their opinion on the merit or risk of the proposal to the relevant authorities which will decide there upon. Amended by the 1989 Regulation, infra n.1/Ch.3.

103- Financial Times, July 22nd 1988; noted in Editorial (1988) J.B.L. 339.

bid is not a business asset in the sense advocated. The question is whether it is arguable that there is a legal right to bid which has been interfered with unlawfully". According to that case it was apparent that the sole purpose of Lonrho's complaint was to frustrate the rival offeror's chance of bidding and thus advancing its own interest. Consequently, because it was not substantive, the learned judge set the complaint aside. One may say that the learned judge's observation appear as primary guidelines upon which future cases will be decided.[105]

A related question is whether the board of directors has any right to defend the company at all? How much latitude ought directors have in the exercise of such opposition? In one case, in the U.K, the question was whether directors can validly issue shares, for instance, in order to defeat a takeover made by an asset strippers, a rival or an incompetent manager who would run the company.[106] In Cayne v. Global Natural Resources Plc., Magarry V-C stated:

> I cannot see why that should not be a perfectly proper exercise of fiduciary powers by the directors of [the company]. The object is not to retain control as such, but to prevent [the company] from being reduced to impotence and beggary, and the only means available to the directors for achieving this purpose is to retain control. This is quite different from directors seeking to retain control because they think they are better directors than their rival would be.[107]

104- (1983)1 AC 191.

105- See also the Guinness and Argyll litigation which ultimately balanced in favour of the former upon the basis of convenience. See Chapter 6 in particular the footnotes 110 to 111.

106- Compare with the U.K. Monopoly and Mergers Commission finding discussed infra n.17/Ch.3

107- (Ch.D, 12 August,1982),(Unreported case), noted by Mayson S.W., French D. & Rayan Chris, Mayson, French & Rayan on Company Law, at p.400, In another case, Buckley J indicated :

> My own view, is that the directors ought to be allowed to consider who is seeking control and why. If they believe there will be substantial damage to the company's interests if the company is taken over, then the exercise of their powers to those seeking a majority will not necessarily be categorized as improper. I think that directors are entitled to consider the reputation , experience or policies of any one seeking to takeover the company. If they decide on reasonable grounds, a takeover will cause substantial damage to the company's interests, they are entitled to use their powers to protect the company. That is the test that ought to be applied in this case.[108]

What is interesting in the light of the above discussion is that the directors' role has nowhere been framed or described in terms of limits. One may argue that it is not for the court to determine the scope of the directors role;[109] nor to "act as kind of a supervisory board over decisions within the powers of managements honestly arrived at."[110] But what seems serious is where directors benefit one group of shareholders at the expense of others, raise profit for themselves or mislead shareholders altogether to retain control. That is, perhaps, the core of the problem. This has been made clear in the authorities. In Howard Smith Ltd v. Ampol Petroleum Ltd., Lord Wilberforce stressed that:

> ...to define in advance exact limits beyond which directors must not

(edn.1988/89) (London, Blackstone Press Ltd). See also (1984)1 All ER 225.

108- Teck Corporation v. Millar, (1973)33 D.L.R (3rd) 288 (B.C.S.C); see Chapter.6; see another view in Dawson International plc (1988)4 B.C.C 305, at p.313

109- Richard Brady Franks Ltd v. Price (1937)58 C.L.R 112, at p. 139, 11 A.L.J 202, (1937)A.L.R 470

110- Howard Smith Ltd v. Ampol Petroleum Ltd.(1974)AC 821, (1974)2 W.L.R 689, (1974)1 All ER 1126, see infra Chapter 5 & 6

> pass is, in their lordships' view, impossible. This clearly cannot be done by enumeration, since the variety of situations facing directors of different types of a company in different situations cannot be anticipated ...Negatively, to exclude from the area of activity cases where the directors are acting sectionally, or partially: i.e, improperly favouring one section of the shareholders against others...for the court, if a particular exercise of it is challenged, to examine the substantial purpose for which it was exercised,....[111]

Whilst this case, in order to assess directors' actions, sets out the "substantial purpose" test, the following case focuses on the state of mind and motive. In Hindle v. John Cotton Ltd., Viscount Finlay indicated:

> Where the question is one of abuse of powers, the state of mind of those who acted, and the motive on which they acted, are all important, and you may go into the question of what their intention was, collecting from the surrounding circumstances all the materials which genuinely throw light upon that question of the state of mind of the directors so as to show whether they were honestly acting in discharge of their powers in the interests of the company or were acting from some by-motive, possibly of personal advantage, or for any other reason [112]

In a world where companies have already assumed international dimensions, it seems difficult to isolate good intentions from bad intentions. Nevertheless, the problem of intention, especially directors' improper motivations is a much debated question. It must be stressed, for example, that in Advance Bank of Australia Ltd v. FAI Insurance Australia Ltd. Kirdy P. recognised such difficulties and indicated another criteria to be relied on as well. He indicates:

111- Ibid, at p.835

112- (1919) 56 S.L.R 625 (H.L), at p. 630-1

Statements by the directors about their subjective intention, whilst relevant, are not conclusive of the bona fide of the directors of the purposes for which they acted as they did. In this sense, although the search is for the subjective intentions of the directors, it is a search which must be conducted objectively as the court decides whether to accept or discount the assertions which the directors make about their motives and purposes.[113]

3.3- VULNERABILITY

At some stage, controllers of a company may dispose of their controlling percentage of shares in whole or in part. The reasons for doing so vary. For instance, due to competitive pressure where such controllers could no longer sustain it, or for financial reasons either they become unable to raise the capital necessary for future growth and expansion, or because of the greater need to invest elsewhere in more readily realizable assets. So do these factors make companies potential candidates for takeover? Do there exist any other characteristics to render any company a candidate for takeover? In other words, what makes a company vulnerable to acquirers?

There are some examples or situations that may make a company a potential candidate for takeover. A company operating in an industry where its products have been under heavy demand from national and foreigners buyers (importers and exporters) alike. A company's securities are undervalued and potential acquirers pretend or expect to put them to better use and to raise profits as well. The company has sufficient plant, equipment, mineral or other valuable rights, patents or, licenses which may enable a potential offeror to enter a new business arena or to compete worldwide. A company may also be vulnerable to takeover

113- (1987) 12 A.C.L.R 118, at p.136-7

because share ownership is so widely dispersed. A company's good or bad management may also be an attractive element for acquirers. A company could also be susceptible to takeover if the political climate stands in an impartial position towards foreigners. Moreover, a company with a tax loss may be acquired because of the tax saving which will accrue to the acquiring company. In short, a company may be bought and sold because of the reputation of its products (brand names) and the value of its securities. As to brand names, it is almost invariably cheaper to buy the production and distribution facilities for a going product than to start from nothing. Indeed, it is always possible to build up a company's brand based on internal efforts as Lever has exhibited in Britain with the development of Whisk liquid detergent and Mars with its Trucker confectionary bar. But the risks, costs and time are always significantly higher.[114] In terms of costs, recent estimates demonstrate that current advertising and market costs for the promotion of a new brand in the U.K are between £7m. and £10m. in the first year.[115]

3.4- UNDER WHICH LAW THE REGULATION OF TAKEOVERS SHOULD BE CLASSIFIED

It is difficult to identify or locate the law under which the regulation relating to takeovers should be classified. There are complex interactions between company law, banking acts and stock exchange regulations and also with a number of other ancillary laws, notably taxation, commercial and industrial law. Insurance,

114- Buying is Smarter than Building, The Financial Times, 27th April 1988, p.22; Loyrette J., supra n.10, at p.147; Lee W.L and Carreau D, at p.15, supra n.26.

115- Ibid.

labour and competition laws as well as criminal and civil law may incidently or occasionally come into play.

In his report, Professor Pennington recognized the possible difficulties for an eventual attempt to identify the branch of commercial law under which takeover offers should be classified. He advanced pre-eminently the branch of company law.[116] Other studies exhibit the separation between company law and the law which tends to cover in the aggregate the securities market, i.e., capital market law.[117] A further group focussed on the nature of the contract entered into between sellers and buyers and advocated the mechanism of the private law of contracts.[118] At the moment there is no clear agreement on the point.

3.5- CONCLUSION

The preceding discussion was concerned with the definitional framework as well as the manner in which concentrations between companies are economically and legally classified. The picture that emerged was that each form of merger is not only distinct but also dealt with by different provisions. But the interactions and compatibility between the relevant regulations seems obvious. Whilst merger control regulation is concerned with the post effect of all types of concentrations, legal mergers and share mergers are a means to such concentrations. Furthermore, both legal and share mergers are concerned with the transfer and purchase of securities

116- Pennington R.R, Report on Takeover Bids..., supra n. 21.

117- See mainly, Buxbawn R.M. and Hopt K.J, Legal Harmonisation of Business Enterprises, (Vol.4) (Walter De Gruyter,1988) Ch.3 , at p 167-226

118- Ridge Nominees Ltd v.I.R.C (1962) Ch 376, (1962)All ER 1108, (1962)2 W.L.R 3; Davies P.L, The Regulation of Takeovers And Mergers, (London, Sweet and Maxwell, 1976). See also Pennington R.R, Company Law, Ch.27, p.824, supra n. 17

whereas control of concentration is designed to preserve competition and deter any harmful effects which result from share or legal merger.

Quite apart from questions of legal mergers and merger control discussed above, it is nowhere expressed in terms that a takeover offer has a specific definition. This is presumably because the methods available for effecting such a transaction are varied, for example, control of one company may be acquired by legal merger, a takeover offer (whether partial or complete) as well as by a reverse takeover offer.[119] Control may also be acquired or reinforced by compulsory offers or by leveraged offers[120] or, tender offers and other looting transactions.[121] It can also be secured by proxy machinery[122] and voting agreements and other

119- Reverse takeover offers exists where one or more private companies seek to acquire control of a public company whether or not listed on the Stock Exchange.

120- The term 'leveraged bid' refers more to the financing of the transaction than to the substance, because the purchasers equity investment is small, even nominal, compared with the total purchase price.. The financial resources, in this context, consist either of funds borrowed from a variety of institutional lenders, or of an agreement by the sellers to accept deferred payment. In a leveraged bid, it is often bankers who initiate the transaction and they almost invariably depend on selected managements to operate the acquired company. Yet bankers, insurance and other passive investors invest substantial sums in these leveraged buyouts. By the very nature of the operation, it is specially conceived and financed. Therefore it seems very likely to prevail once the single market is completed because of the higher value of the assets of the victim company and of ready fund or resources to complete the transaction.

121- Looting transactions or "top up arrangements" are devices whereby a person seeking to acquire control or substantial proportion of voting rights pays a premium to some investors in order to obtain control and obliterate the remaining claim. Such means are not tolerated under the U.K, City Code. See Rule 16 of the City Code. See also (1987)J.B.L.482.

122- Although they seem to serve identical purposes, takeovers and proxies are substantially different and distinct from each other. Proxies trading arrangements. The diversity of methods, for offerors, reflects a choice between alternatives which becomes more acute. It follows that any decision to make an offer becomes critical. However, the desire to acquire control may be frustrated by a number of factors, notably the desire to keep the target company independent.

Company law in both the UK and France recognize that the ultimate decisions with respect to the affairs of companies are intended to be entirely reserved to the shareholders in a general meeting through the use of their power of election and removal. A similar situation prevails in the case law which tends towards recognition of the separation of powers between the board and shareholders. On the basis of separation of powers between the board and shareholders, the shareholders are concerned themselves to decide on any key or significant change in the company's internal affairs such as the amendment of its constitution, while the board of directors through their appointed management run the day to day business. But it does not follow that directors are deprived of the right to make any business decision. Correspondingly, the extent to which the directors are permitted to bind their company to third parties is circumscribed within the scope of fiduciary duties.[123]

In modern times, thinking about coherent provisions for

contests are initiated by those who do not own controlling shares. They are typically started by individuals, not by companies, because 'the substance of the argument is over who shall have the privilege of managing someone else's money and, perhaps, the power to confiscate a portion of the profit stream', see Lowenstein L., Pruning Deadwood, in Hostile Takeovers, supra n.77.

123- See Ch.5.

investors' protection was further implemented in the takeovers field. Both systems of regulation, once again, consider shareholders to be the ultimate party determining the success or failure of offers by making rational decisions whether to retain their stock or to sell it to the offeror presenting the most advantageous consideration. Certainly, this can only be made where shareholders are concurrently supplied with all material facts about the offer, are given sufficient time to make a rational decision, without being pressured to make a hurried decision or denied an opportunity to decide on the merits or demerits of the offer. This is the common concern of both the U.K and French regulators, and the discussion of the supervisory bodies in the subsequent chapter stresses such aspects.

Again, it appears from the discussion in this chapter that the increasing amount of takeovers and legal mergers has not only triggered debate, but also the legislatures' intention to introduce an appropriate framework within which such activity is conducted. Focus is on two major aspects: the protection of shareholders and the transparency of the market. Both will be discussed in the fourth and fifth chapter of this thesis respectively. It worth highlighting that both the protection of shareholders and the transparancy of the market operate in favour of a host of interests principally, employees, creditors and consumers or the community at large. Related to this, reforms at Community level have inevitably contributed to the development of the national relevant laws and regulations in particular in areas not already covered by existing provisions.

CHAPTER TWO

SUPERVISORY INSTITUTIONS IN FRANCE AND THE UNITED KINGDOM

Both in France and the U.K securities market regulations lay down basic principles and rules which, whilst in the U.K for the most part have never been embodied in legal form, in France, the whole system is legally based. But if there are sufficient basic similarities to make a comparison possible, there are, equally, sufficient differences to make such a comparison interesting. Differences are found in the origin and development of financial, economic or commercial activities which the government tends to police within an appropriate and flexible legal framework. Bearing this in mind, both countries share the same objective, i.e, the protection of investors. This chapter will, first, discuss the French Bourse de Valeur; and second, the British regulatory organizations. For convenience and simplicity, a comparison will be summarised at the end of this chapter along with the conclusion. Such a comparison between both the Commission des Operations de Bourse (hereinafter called C.O.B.) and the Panel on Takeovers and Mergers will involve, both their policies and powers with respect to the regulation of takeover offers and the likely implications of the E.E.C proposal for a directive on takeovers and other bids. The discussion will illustrate how far the likely implementation of the E.E.C Directive will affect not only the form of the British self regulating body but, also will restrict any extension of the powers of C.O.B.

SECTION ONE: FRENCH PUBLIC INSTITUTIONS

Since the 1988 reform of the French Bourse de Valeur, various newly established institutions came into existence, notably the Conseil des Bourse de Valeurs (C.B.V.), the Société de Bourse Française (S.B.F), the Sociétés de Bourse (S.B.) another form of institution other than the S.B.F.; and l'Association Française des Sociétés des Bourse de Valeurs (A.F.S.B.V). It is worthy of note to mention that the status of the C.O.B. remains unaffected. Since the regulation of public offers is shared between the C.B.V. and the C.O.B., it is interesting to provide first an outline about the legal background of such newly formed institutions, and second to concentrate on the C.O.B. and the C.B.V. constitutions and jurisdictions.

1.1- LEGAL BACKGROUND AND REFORMS

The first step to reform took place in 1966.[1] In France, stockbrokers (Agents de Change) are essentially partnerships. They arrange deals and negotiate investors securities in the Bourse de Valeur on their own behalf.[2] They receive from investors agreed

1- Loi No. 66-1009 of 28th December, 1966 (D. 1967.30)

2- It is worth noting that there were seven Bourse de Valeurs operating independently and distinct from each other. These were located in France's major cities namely, Paris, Bordeaux, Lille, Lyon, Marseille, Nante and Nancy. Following the 1966 reform, the above cited Bourse de Valeur became branches of the main Bourse de Valeur which is situated in Paris. Operating alongside the domestic Bourse de Valeur in Paris, the International Stock Market was established in 1961, dominated by the foreign Stock Market institutions, these are Brussells, Luxembourg, Vienna, Madrid, Amsterdam, London, Germany, Italy, New York, Tokyo, Toronto, Johannesburg and Paris. The major concern of the International Stock Market is the promotion of the Stock Market, to provide a market place where members and members' organisations can conveniently execute transactions in listed securities, to fees against any transaction they execute.[3] The law of 28th December, 1966 gathered all those Agents de Change under the umbrella of one national company, i.e, the Companie Générale des Agents de Change. This company was placed under the regulation and the supervision of the Chambre Syndicale des Agents de Change.[4] Due to the increasing use of public offers and the growing concern about the need for greater investor protection, the C.O.B. was formed in 1967, specifically to control the sort of information made available to investors.[5]

The second reform, perhaps the most important, is that which took place in January 1988.[6] The consequences of such restructuring were, first, substitution of one set of dealers by another, i.e, the abolition of the status of Agents de Change and their activities and the creation of two sociétés; the Société de Bourse (S.B)[7] and the Société de Bourse Française (S.B.F).[8] The

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ensure that securities traded on the Stock Market have a certain degree of marketability which investors have come to expect. Another matter of concern involves the exchange of information between its membership and, especially, to the public investors. Finally, the International Stock Market's prime concern is to develop public offers, which have recently triggered the attention of governments and the financial community at large.

3- Huyck P.M., The French Capital Market: Institutions and Issues (1968)16 Am.J.Comp.Law., p.279

4- For further information on the Agent de Change see Receuil Dalloz, Agent de Change (Encyclopedie Dalloz, Societes, 1978); Huyck P.M., The French Capital Market: Institutions and Issues, supra n.3

5- Ordonnance No 67-833 of 28.9.67, (D.1967, 373), amended by Loi No.69-12 of Jan 1969, Loi No.70.1208 of 23.12.1970 (J.O. of 24.12.70, p.11891), Loi No 70.1283 of 31.12.70 (J.O 31.Dec p.12275), Loi No. 88-70 of 22nd Jan.1988, relating to the Bourse de Valeur, (O.J. 23.1.88 p.111); Loi No 89-531 du 2 Aout 1989 relating to Security and Transparance of the Financial Market (relative a la Securité et à la Transparence du Marché Financier), (J.O. 4 Aout, p.9822)

6- Loi No.88-70 of 22nd.Jan.1988, supra n.5; Arrété of 22nd.Sept.1988, relating to duties of the market institutions (J.O. 25 Sept. 1988 p.12196).

7- Art.1, 24 and 25 of the Loi 88-70, supra n.5 ; Arrété of 4th Jan., 1989 former is placed under the control of the latter. The Second consequence was the substitution of the Chambre Syndicale des Agents de Change by the Conseil des Bourse de Valeurs;[9] The third consequence was the introduction of an authorization system.[10] Accordingly, any Société de Bourse must, so as to carry out its activities, obtain a prior authorization directly from the C.B.V. To do so, the Société de Bourse must submit the draft constitution to the C.B.V. which contains sufficient guarantees in relation to the composition of its members and the amount of its capital. Under the new regulatory system, the major dealer for the Stock Exchange is the Société de Bourse. It is interesting to mention that, unlike the British Stock Market, the French Bourse de Valeur has long been kept in the hands of public institutions. That is to say, it was shared between the C.B.V., the C.O.B. and the Ministry of Economy. Thus, it is a matter of law,[11] whilst in Britain, control remains in the hand of the self regulating bodies.[12] Therefore, when discussing market structure and regulation of the various relevant institutions, notably those which monitor and supervise

(O.J. 6th Jan., 1989, p.224).

8 Established by Loi No.89-531 of 2nd.August 1989, supra n.5. By virtue of Art. 124 to 127 of the Loi 89-531, the S.B. and its membership are placed under the direct control of the S.B.F, which substituted the former "institution financière specialisé" that is, first, formed under the Loi No. 88-70 of 22nd Jan.1988, supra n.5

9- The C.B.V is a public institution endowed with legal personality, Art 5, Ch.2, Loi No.88-70, supra n.5

10- It, perhaps, corresponds to the British authorization system brought by the F.S.A.1986. See also Arrété of 22nd Sept.1988, Duties of the Institutions, supra n.6.

11- Bronner R, Bourse de Valeurs, (1978), supra n.10/Ch1

12- Traditionally, the creation of associations was encouraged by the Bank of England largely on a non statutory basis. See Page A.C., Self-Regulation: The Constitutional Dimension (1986) 49 M.L.Rev, p.141.

takeover offers activities, the distinction between the UK and French policies is obvious.

1.2- CONSEIL DES BOURSE DE VALEURS

A- ORGANISATION

The C.B.V. consists of ten members designated by election from the Sociétés de Bourse, a representative of the Sociétés de Bourse itself, employees' representatives, representatives of listed companies, and a representative of the government (Commissaire du Gouvernment) nominated by the Ministry of Economy. The Conseil elects from amongst its members a president. Decisions in relation to matters within its jurisdiction are taken by majority. However, appeals against decisions of the Conseil are within the competence of either the administrative or civil courts. But, if such appeals or judical review are granted, they may not prevent the decisions of the Conseil from taking effect.[13]

B- JURISDICTION

The primary role of the C.B.V. is to ensure that dealings in the relevant securities of a company, whether on or off the Bourse de Valeur, are fairly presented, reasonably executed and that shareholders involved are not misled or deprived of the opportunity of participation in decision-making. In addition to its authority over the Bourse de Valeur institutions and matters concerning admission, suspension of quotations and delisting securities from the official lists, the Conseil enjoys very wide discretionary power with respect to the control of public offers transactions. One of the major procedural requirements which the

13- Art 5, Ch 11, Loi No.88-70, supra n.5

C.B.V intends to enforce is that which traces its origin from the principle of administrative direction. To illustrate, any kind of public offer must be submitted through a bank representing the offeror; an offer document submitted for approval must contain sufficient information. On receipt of this document, the C.B.V., in addition to the suspension of quotation, informs concurrently the Ministry of Economy and the C.O.B. If neither the Ministry nor the C.O.B. opposes, the Council may approve such an offer. The C.B.V. decision of approval is announced in the official bulletin of the Bourse de Valeur. However, whilst the economic implications of an offer are a matter for the discretion of the Ministry of Economy,[14] information disclosure is monopolized by the C.O.B. This means that trading in the relevant securities of the target company may not start without obtaining both the C.O.B.'s visa and filing with the offer document a notification from the relevant authority of concentration. In the U.K., by contrast, the Panel is given predominance to administer its self regulation where any question of takeover offers arise. The British Stock Exchange involvement is limited to the extent that a matter of listing of securities is sought.

In the immediate period of an offer, shareholders willing to sell or transfer (exchange) their shares should authorize a dealer of their choice within a period which may not be less than twenty days (previously one month). Yet the shareholders concerned enjoy an absolute right of withdrawal at any time during the whole period of the offer. Both the timing of offers and the shareholders rights of withdrawal raise major points of differences. Both will be

14- Loi No.77-806 of 19th July 1977 relating to Control of Concentration. Amended by Loi No.85-1408 of 30.9.85 relating to Amélioration de la Concentration (J.O 31.Dec. p.15513) discussed later on. Finally, at the end of sale and purchase of shares operations, the Conseil centralises all shareholders' orders, whether relating to purchase and sale or those transferred on the basis of an exchange of securities. This task is conferred on a specialized department (Centralized Stock Clearing Department of the Bourse de Valeur). The Conseil ultimately announces publicly in the official journal the outcome of an offer, whether or not the intended offers were successful.

1.3- COMMISSION DES OPERATIONS DE BOURSE

It is worth reiterating that the Commission des Operations de Bourse (C.O.B.) was established in order to carry out two separate tasks. The first is to ensure against the permanent risks of malpractice and the second is to provide a coherent framework of statutory protection for investors' interests.[15]

A- ORGANISATION

C.O.B. was created in 1967 for the purpose of implementing most of the objectives sought to be accomplished by the French Government within the securities markets, i.e, protection of investors. Prior to 1967, the date in which the C.O.B. was installed, there was a committee which had power to monitor and supervise

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15- For further reading see, Guenot J., La Commission des Operations de Bourse, Commentaire, (1968) Receuil Dalloz. Sirey. p.139; Burgard J.J, La Commission des Operations de Bourse et la Bourse (1972)J.Finance:; Mahiu M., La Commission des Operations de Bourse du Droit Francais (1972) Rev.Prat.Soc. p.255; Guyon Y., Le Role de la Commission des Operations de Bourse Dans L'evolution Des Droit des Sociétés Commerciales (1975)28 Rev.Trim.Dr.Com., p.447); Leviec P., La Commission des Operations de Bourse et la Vie des Sociétés (1977) J.C.P., ed. C.I. 12350.; Broult R.B, Problem of Enforcement and Co-operation in the Multinational Securities: A French perspective (1987)9 U.Pa.L.Rev., p.453

the activities of the Bourse de Valeur, but it did not use these powers effectively and efficiently.[16] In its present form, C.O.B. is composed of a president chosen by the Conseil des Ministres; four members chosen by virtue of their experience and knowledge, two of whom are required to be chosen from a financial profession, (all appointed by the Ministry of Economy); and finally a representative of the Government (Commissaire du Gouvernement) who is entitled to request a second reconsideration of the matter laid before him, or any decision taken for that purpose. Most of the employees of C.O.B. are nominated by the President of the C.O.B. upon the Ministry's approval.

In order to carry out its function and duties, C.O.B. is organized into departments each of which carries a specific function. The Department of Stock Market activities is responsible for market inspection, investigations and surveillance. The Accounting and Financial Departments have very wide powers to conduct investigations concerning the financial records of a listed public company on any suspicious aspect. The Information Division controls and reviews any announced statement directed to public investors. The Legal Department is concerned mainly with violations of law. The Department of Research and Development of the Securities Market is responsible for development and promotion of the financial market.[17]

16- It was established in 1942 by the Loi of 14th February, 1942. See, Bronner, Bourse de Valeur, supra 10/Ch.1; Bezard P, Les Offres Publiques d'Achat, supra n.10/Ch.1; Guyenot J., La Commission des Operations de Bourse, Commentaire, supra n.15. The Committee was abolished in 1968 by Decret No. 68-23 of 3rd January 1968; (J.O. of 12.1.68) (D.1968,79).

17- Broult R.B, Problem of Enforcement and Co-operation in the Multinational Securities: A French Perspective, supra n 15.

B- JURISDICTION

It is quite clear that C.O.B.'s statutory authority derives from its origin in the 1967 Ordonnance.[18] C.O.B., in its capacity as the body having primary responsible for the protection of investors, enjoys very wide powers. It is entitled to impose regulations relating to matters within the scope of its jurisdiction, or add to, or delete from, the existing rules whenever it deems necessary. Its jurisdiction covers any kind of information, whether supplied by a public or private company.[19] Presumably, it also extends to cover organizations and private associations which have a certain minimum degree of contact and communication with public investors.[20] In addition, the 1989 Loi has broadened its authority.[21] Take, for example, the issue of visa. Previously, quite apart from the question of merger reference, the C.B.V. could approve and publish an offer while the C.O.B. was considering the offeror information document. The 1989 Loi and the subsequent C.B.V. and C.O.B. regulations state that an offer may remain pending until the visa is granted, even if the offer document complies with the requirements of the C.B.V. regulation.[22]

18- Ordonnance No 67-833, Art.1, supra n.5; Decret of 1968; Loi No.84-16 of 11 Jan.1984; and Loi No.85-134 of 14th Dec.1985 (J.O. 15 Dec. p.14598).

19- Ibid

20- Loi No.66-537, of 24th July, 1966 relating to Sociétés Commerciales (J.O.24 July, p.6402); Arrété of 6th July 1988 relating to Admission of Securities to Listing; The C.O.B. Regulation No.88-04 relating to Information to be Published by Public Companies Making Subscription Offers, (J.O. 14th July, p 9158); see also the C.O.B.'s provisions made in substitution to Sch. No 5 of the C.O.B. instruction relating to Note d'Information of 10th October 1970.

21- Supra n.5

22- Infra n.1/Ch.3.

C- POWERS OF CONTROL AND INVESTIGATION.

C.O.B.'s discretionary power in respect of disclosure of information is unlimited. Furthermore, C.O.B.'s power of decision is clothed in legal form. In situations involving an admission of securities on to the French official market or an offer to the public for subscriptions, C.O.B.'s role appears to be determinant. It covers not only those public companies which belong to the members states of European Community but also those undertakings of third states. This means that if a company seeks to offer its securities to the public or to apply for an eventual admission of its securities on the official market, or even deal on the open market, it must comply with C.O.B.'s requirements and instructions. A document "note d'information" established in advance by the C.O.B. must be completed and returned to it for a preliminary scrutiny.[23] In this connection, it is worth noting that even if an application for admission of securities has complied with the C.B.V. requirements, C.O.B. is still entitled to exercise its rights of opposition.[24] Opposition may be made if C.O.B. considers that such an application for admission will, if permitted, jeopardize the good performance of the market, be incompatible with investors' interests, or is inaccurate.[25]

C.O.B.'s powers of intervention in the affairs of companies in normal circumstances is less stringent compared with its firmness in situations involving the change of control from one company to

23- Ordonnance 67-833 of 1967, Art 3, supra n.5; Arrété of 6th July 1988 relating to the C.B.V..Regulation Générale (J.O. 14 July, p 9154)

24- The C.O.B. Regulation No.88-03 relating to right of opposition, Art 1, 2 and 3 (J.O. 14 July 1988, p 9158); Loi No 88-70 of 22 January, 1988. See, supra.n 5 and 20 respectively

25- Ibid

the other by means of a takeover offer or through other alternative techniques. For example, if misleading information or omitted facts, in an annual or quarterly financial report, are noticed during its circulation to shareholders concerned, the C.O.B. may request the board of directors of that company to review or correct any deficiency. If the company concerned refuses to comply with the C.O.B.'s decision, depending on the degree of distortion of information, the C.O.B. may or may not publish its findings. Where takeovers are concerned it is C.O.B.'s view that accurate information enables shareholders to whom an offer is addressed to make an informed and rational decision as to acceptance, and also, because accurate information is essential to avert the occurrence of various sorts of abusive and other insidious practices. Therefore, prior control over the information document and the deliverance of the visa have long been considered vital. Yet it still questionable whether that policy of dirigisme and restraints constitute a realistic deterrent to market abuses such as unfair dealings, fraud on the minority, or inequality of treatment between shareholders.

In addition to its disclosure power in respect of subscriptions, admission of securities and most importantly public offers, the C.O.B. is also empowered to supervise and investigate insider dealings and manipulations.[26] The need to protect investors and the need for effective provisions to keep their confidence in the market are the major reasons for the C.O.B.'s investigative power. Following the increasing use of public offers in France, as well as

26- Insider Trading was made a criminal offense in France by Loi of 20 December 1970, as amended in 1983 by the Loi No.83-1 of 3rd Jan.1983 (J.O. 4 Jan.1983). The provision of this Act impliedly covers market manipulations. It is worthy highlighting that the C.O.B. is not entitled to prosecute violations of law, but it is entitled to bring the matter before the court instead. See also chapter 5 in connection with insider dealing and directors fiduciary duties.

the trend away from the traditional method of fusion, which is characterized by the length of its procedure, to more sophisticated alternatives which enable an offeror to achieve swiftly its aim, a number of malpractices have emerged, such as insider dealings, speculation, rumours, manipulations and inaccuracy of information.[27] It is worthy of note that sales and purchases of shares within or outside the Bourse de Valeur are not free from risks. Additionally, not all purchases or sales of share operations trigger the attention of the relevant authority to initiate an investigation into share dealings. Abusive or suspicious conduct is the major justification to initiate an investigation to identify and locate such risks. Once an investigation is terminated, the C.O.B., being the first responsible public institution for the protection of investors' interests may either instruct those in violation of the law to refrain from doing so or to bring the matter before the Court for remedy.

Procedurally, the C.O.B. may start investigating matters which come to its attention on its own initiative or upon the recommendations of other competent authorities, i.e., the C.B.V. or the Ministry of Economy. The C.O.B. by means of a specific deliberation, mandates its qualified agents to conduct investigations and to obtain information it deems justifiable.[28] Thus, when a matter comes to C.O.B.'s attention through complaints, petitions or

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27- Loyrette J., Les Offres Publiques d'Achat., at p.202 et seq, supra n.10/Ch.1; Bezard P., Les Offers Publiques d'Achat. supra n.10 in Ch.1; Trochu M.; supra n10/Ch.1; O.P.A. où O.P.E., (1970) 13.Rev.Eco. de la Banque Nale de Paris., Chronique Juridique, p.51.

28- Art 5 of the 1967 Ordonnance as amended, see supra n.5. Loi No.88-70 of 22nd Jan, 1988 inserted Art 5A and B into the Ordonnance, (J.O. 23 Jan, 1988 p.1111).

claims by the public, or from any other source,[29] the C.O.B., depending on the degree of complexity and seriousness of the issue, at its first stage of inquiry, obtains information through a simple request. If it considers that the wrongdoer needs only a corrective measure, the C.O.B. may instruct him to refrain from carrying on his activities in violation of the regulation which would, if left, affect or have adverse consequences upon the investors interests. If the misconduct or violation of the regulation is committed by an intermediary such as a Société de Bourse or any of its membership,[30] the C.O.B. proceeds with disciplinary sanctions through the C.B.V. The sanctions imposed by the C.B.V. or the C.O.B. may be a warning, reprimand (censure); temporary or definite suspension of part of, or all, the activities and withdrawal of agreement (recognition), in addition to fine up to 5,000,000 F.F.[31]

In cases where the C.O.B., in respect of the matter before it, considers that such suspicious behaviour or malpractice needs further inquiry and scrutiny it may, by means of particular resolution (deliberation) for each company, mandate its qualified agents to carry out investigations.[32] By virtue of a such decision, investigators are entitled to obtain information useful for the purpose of the matter under investigation, enter into all premises, examine business records, minute books, and book-keeping. They

29- Local or foreign securities market regulators.

30- Loi No. 88-70, Art 8 and 9., supra n.5.

31- Ibid.

32- Ordonnance No.67.833, Art 5 (A) and (B), inserted therein by the Art 13 of the Loi No.88-70 of 22nd January, 1988, Supra n.5; The ability of the mandated person to investigate is granted to him by the C.O.B's President. It should be stressed that such decision to mandate agents has been qualified as identical to a judicial order. See Ducouloux-Favard, L'information et la Recherche Des Infractions Boursières in (1988) Receuil Dalloz. Sirey. Chron. XLIII, p.271

are also entitled to take copies or extracts thereof and make enquiries wherever this is deemed necessary. Consequently, any person who knowingly or recklessly furnishes false information, refuses to supply or deters the investigation may be subject to criminal and civil proceedings, or both, in addition to a fine.[33]. Finally, for the purpose of completeness of evidence, the investigators are also entitled to summon any person, group of persons or any other institutions' representatives involved expected to have or having information bearing on the question under inquiry, to come to a hearing to give testimony.[34] Once the report is completed, C.O.B.'s president decides on the likely proceedings. If the breach is serious, C.O.B. brings it before the court for an ultimate remedial order, or an appropriate disciplinary measure.

To sum up, three significant issues should be pointed out: first, C.O.B.'s decision to investigate is final and it is not subject to any appeal except on the ground of misunderstanding of facts or bad faith, a matter which is most unlikely to happen; second, C.O.B. during the currency of its investigations, and its findings, is not subject to the law of professional secrecy.[35] In other words, institutions which are being investigated may generally not exercise any professional privilege or claim immunity from the requirement to disclose certain information which C.O.B. considers useful. Finally, C.O.B. may instigate or recommend prosecution for wrongdoing by any company operating under its jurisdiction. It

33- Art 10 of the 1967 Ordonnance as amended by Art 14 of the Loi No. 88-70 of 22 Jan.1988, supra n.5, and Loi of 24th January 1984 (J.O. 25th January, 1984).

34- Loi No. 70-1208, supra n.5.

35- Loi No. 83.1 of 3rd January 1983, supra n.26.

cannot prosecute violations itself. C.O.B., after handing over the wrongdoing, continues to co-operate in the prosecution of the case. In criminal cases, the Court is required to seek C.O.B.'s opinion when conducting a prosecution of alleged insider trading and securities market manipulation.

In the UK, by contrast, the power to investigate is shared between the government and self regulation. On the one hand, although the powers vested on the S.I.B.[36] or the D.T.I.[37] are very similar to those given to the C.O.B., the S.I.B. in the U.K may not investigate the affairs of an S.R.O. or a person certified by R.P.B. unless the S.R.O has requested the S.I.B. to do so or where it, in the extreme case, appears to the S.I.B that those members were unable to investigate. By contrast, presently under the French 1967 Ordonnance, there exist no barriers to prevent the C.O.B. from investigating the Bourse de Valeur institutions. In addition to the D.T.I. and the S.I.B., where suspicious practice is noticed, the Stock Market may appoint an ad-hoc commission to investigate. Stock Exchange attention is either triggered by complaint, the company management, the Panel on Takeovers and Mergers, the financial institutions and in particular by the intermediaries involved. Unlike the appointment of an inspector by the C.O.B. in France, the designation of an ad-hoc committee by the Stock Exchange in Britain is a private decision. However, in both countries the vast majority of investigations are often either inconclusive or demonstrate no identifiable insider trading. Furthermore, publication of findings that are based on probability or uncertainty

36- Section 105 of the F.S.A, 1986, the S.I.B, is also entitled to delegate its power to an S.R.O's officer to carry out an investigation for violation of the regulation

37- Section 177 of the F.S.A.1986

may not be made public because of the fear of defamation actions. As a matter of routine, both the Stock Exchange and the Panel look at all suspicious share price movements, collecting information from intermediaries and asking them for details about their clients.

SECTION TWO: BRITISH INSTITUTIONS

It is well established that the British regulatory framework is shared between the government and the self-regulating associations. But the government's policy of resorting to, or encouraging, self regulating associations, although it traces its origin in history, still faces criticism.[38] This section provides a short outline about the legal background as well as the major reasons leading to the U.K. financial sector reform. Next, the authorization system or/and recognition of intermediaries. Then, focus will be on the jurisdictions of the Stock Exchange as well as the Panel on takeovers and mergers within the field of takeovers. Finally, and perhaps the most important point to consider is drawing a comparison between the French Commission des Operations de Bourse and the Panel, on the one hand, and pointing out the major implications of the E.E.C. proposal on takeovers and other bids upon both regulatory institutions on the other.

2.1- LEGAL BACKGROUND AND REFORM

The City of London Stock Exchange reform of 1986 was the result of an accumulation of events. Dealing in securities fraudulently and in an abusive manner led to the enactment of a

38- Gower L.C.B, Report on Investor Protection, (Cmnd 9125, 1984); Page A.C., Self-Regulation: The Constitutional Dimension, supra n.12, at p.141. See also infra n.111 & 112.

first statute in 1958, the Prevention of Fraud (Investments) Act.[39] Accordingly, intermediaries that were not members of the Stock Exchange were required to obtain a license from the then Board of Trade and to adhere to licensed dealer rules laid down by the D.T.I.[40] However, the majority of partnerships involved in the securities industry are exempt from the need to obtain a license because of their membership of the Stock Exchange or of one of the associations of dealers in securities recognised by the D.T.I., including groups of foreign houses.[41] By the beginning of 1980 such an approach proved inconsistent with respect not only to fairness and equality of treatment between the various firms involved in the securities industry, but also was not sufficient or flexible to cope with market changes and to meet investors needs in particular institutions, which tended to look for opportunities worldwide.[42] One notable deficiency concerning the protection of investors was that a number of firms operating in investment management, for instance, failed with substantial losses of money such as Norton Warburg[43] in February 1980 and Barlow Clows.[44] Pressure for an eventual change of the Stock Market came also

39- This Act, quite apart from imposing limitations on the distribution of circulars and other inducements to invest, makes it an offense for anyone to carry on or deal in the relevant securities unless he either is licensed or exempt from such a requirement.

40- Licensed Dealers.Rules,1960 (S.I.1960, No.1216), recently revised as the Licensed Dealers (Conduct of Business) Rules (S.I 1983/585)

41- Jackson D, Change in the Stock Exchange and Regulation of the City, (1985) B.E.Q.Bull. p.544

42- They were attracted by the internationalisation of savings flows which reflects in part specific policy measures such as the abolition of the Exchange Control Act in the U.K in 1979., see Jackson D., Change in the Stock Exchange and Regulation of the City, supra n.41

43- Ibid

44- Observer, 5th June, 1988

from a number of other reasons. First, conflict between the Stock Exchange regulation and the Restrictive Practices Act which ended with the government's decision to exempt the Stock Exchange from the Restrictive Practices Act,[45] subject to the abolition of fixed commissions.[46] Second, intermediaries were organized in terms of a strict separation of capacity between brokers and jobbers which had prevented flexible methods of carrying on business activities. Such a distinction between brokers and jobbers was removed and replaced by the so-called "single capacity" trading. This means that an intermediary, usually a company, becomes entitled to perform its functions both as principal (buying and selling securities on its own account) and as agents for its client (receiving orders to buy or sell securities for its client's account against commissions).[47] Moreover, ownership rules were real obstacles that prevented firms from acquiring a certain percentage of shareholdings exceeding 29.9%. Therefore, in order to permit member firms to organize themselves, in 1986 the Stock Exchange introduced its new membership regulation to allow an outsider company to own up to 100% ownership of a member firm (removing the previous ceiling of 29.9%.).[48] It is equally important to mention the desire to

45- The Stock Exchange was brought within the scope of the Restrictive Practices Act, by the Restrictive Trade Practices (Services) Order 1976. Due to the conflict, the O.F.T referred the Stock Exchange to the Restrictive Practices Court in 1979. See Jackson D., Change in the Stock Exchange and Regulation of the City, at p.546, supra n.41.

46- The minimum fixed commission was removed in 1984 and changed to negociable commission. See Jackson D., Change in the Stock Exchange and Regulation of the City, at 547, supra n.41.

47- See, Sir Nicolas Goodison, All Change at the Stock Exchange (1987) L.Soc.Gaz., p.17121; Freshfields, Securities Regulation in the U.K. (London, IFR Publishing Ltd. 1987); Lomax D.F., London Stock Market After the Financial Services Act (London, Butterworths 1987).

compete effectively and efficiently in parallel with foreign securities markets. Thus, changes which took place in the U.K, financial market following the passage of the F.S.A in 1986 reflect in part the above cited concerns along with the following reorganization of institutions.

Bearing in mind the abolition of the ownership rules as well as the previous distinction between brokers and jobbers, one of the major changes in the Stock Market resulted in a combination between various market institutions and dissolution of others. For example, the merger which took place between the old Stock Exchange and the International Securities Regulatory Organization (I.S.R.O.). This led to the creation of two distinct private companies; the International Stock Exchange of the U.K. and the Republic of Ireland Ltd, and the Securities Association Company Limited (T.S.A). The former as the recognized investment exchange (R.I.E.) and the latter as the self regulating organization (S.R.O.).[49] The second thing was that the Council for the Securities Industry, which was established in 1978, ceased to exist in October 1985.[50] Here, concern of the government white paper, Financial Services in the United Kingdom,[51] which gave effect to Professor Gower's Report,

48- See Wedgewood A.J, A Guide to the Financial Services Act 1986, (London, F.T.P. Limited, 1986); Jackson D, Change in The Stock Exchange and Regulation of the City, supra n.41

49- The F.S.Act, 1986 defines an S.R.O as:... a body (whether a body corporate or an incorporate association) which regulates the carrying on of investment business of any kind by enforcing rules which are binding on persons carrying on business of that kind either because they are members of that body or because they are otherwise subject to its control. Art 8 (1).

50- The C.S.I was set up on the initiative of the Bank of England, mainly as a supervisory and co-ordinating body. It has published codes of conduct and Rules notably, the rules governing substantial acquisition of shares which are presently incorporated in the City Code.

51- White Paper, Financial Services in the U.K. (1985) Cmnd 9432. See was the creation of a statutory regulatory body able to supervise the regulation of investment business in the U.K., i.e, the Security and Investment Board (S.I.B.).[52]

The basic distinction between the S.I.B. and S.R.O. or R.I.E., is that an S.R.O., including R.I.E., are based on a contractual relationship with its members who alone it can regulate using the mechanism of administrative disciplinary measures for breach of its internal code of practice.[53] The S.I.B. carries out two types of function. One is conferred on it by the Secretary of State on the basis of delegation of powers and in accordance with the provisions of the F.S.A.1986. In this respect, the S.I.B is called the "designated agency". The other function derives from its nature as a private limited company which enacts its own rules, regulates the conduct of its members and supervises their performance. It is also empowered, by virtue of its own regulation, to impose disciplinary measures for breach of rules. Equally the major features cited above apply to the Council of the Stock Exchange which, though remaining a self regulating body, has the backing of the law and any failure to comply with the regulation carries legal as well as disciplinary sanctions, for example, withdrawal of recognition.

The third aspect relates to the framework within which intermediaries are required to carry out their activities. The F.S.A.

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also notes in (1985)J.B.L. at p. 93 and 237

52- In the first instance, the proposition gave birth of two bodies namely, the S.I.B. and the Marketing and Investment Board latter called "M.I.B.O.C.". But, in order to avoid an overlapping or proliferation of powers, the S.I.B. and the M.I.B.O.C. merged into a new single board, i.e, S.I.B. For further reading see, Lomax D.F., London Stock Market After the Financial Services Act, supra n.47; White Paper, Financial Services in the U.K. (1985), supra 51

53- Page A.C., Self-Regulation: Constitutional Dimension, supra n.12

1986 introduced a system of recognition.[54] The F.S.A.1986 makes it a criminal offense for anyone to carry on investment business in the U.K without prior authorization. Two questions may arise. First, should it be assumed that the whole range of firms and organizations are required to obtain such recognition whether or not they are locally resident bodies, and second, which body is entitled to grant such permission?

In the U.K., first of all, the F.S.A.1986 lays down a general prohibition on anyone providing financial services without obtaining a prior authorization. The Act also provides various alternatives either with respect to exemptions of a certain type of activity from the general prohibition which is embodied in its provisions or in relation to facilities through which an authorization can be obtained. As regards the recognition requirements, any institution seeking to carry on investment business in the U.K. is required to obtain an authorization from the S.I.B., except for overseas applicants which submit their request directly to the Secretary of State in whom the power of recognition is vested. However, a member of an S.R.O. or an R.I.E. is not obliged to seek S.I.B. authorization. Under the F.S.A.1986, both organizations R.I.E. and S.R.O. are entitled to authorize investment businesses for their members, regulate their conduct and supervise their performance. They are also empowered, by virtue of their own regulation, to impose disciplinary measures for breach of their rules. But this

54- This can be seen from Art.3 of the F.S.A.1986. See also infra n.56. Article 3 of the F.S.A, 1986 stipulates that "no person shall carry on, or purport to carry on, investment in the United Kingdom unless he is an authorised person". Therefore, in order to carry out any sort of activities within the securities market, institutions have to have or seek a prior authorization, unless granted otherwise. Compare with the French Loi No.88-70 Relating to the Bourse de Valeur, supra n.5.

does not prevent the S.I.B. from exercising its delegated power. The S.I.B. to some extent may make rules which are directly applicable to all authorized persons, including their membership. Hence, the S.I.B.'s regulation concerning financial resources rules, cancellation rules, rules regarding the legal detention of clients' money and compensation fund rules are directly applicable to all authorized persons.[55]

Authorization, whether in France, or U.K, seems to ensure a basic means of control and contact. What matters for the regulator is to ensure an adequate and efficient protection to investors. For example, permission to carry out any kind of investment business needs some degree of qualifications and conditions to be fulfilled. An applicant must satisfy the relevant authority that it is able to police and regulate the admission as well as the conduct of its own members, and that its internal rules provide standards of adequacy and compliance. The standards of adequacy and compliance formula takes account of various factors notably, the nature of the investment business, the kind of investor likely to deal with them, the effectiveness of the organization of arrangements for enforcing compliance and the effect of any other sort of control to which its members are subject.[56]

As to the ways of authorization, in addition to the category of persons exempted by the F.S.A. provisions[57] there are several

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55- See, Lomnicka E.Z. & Powell J.L., Encyclopedia of Financial Law (vol.2) (London, Sweet and Maxwell 1987); Coopers and Lybrand, The Financial Services Act 1986. A Guide to The Act and The Issues for Management (London, Kegan Page Ltd, 1988); Freshfields, Securities Regulations in the U.K. supra n.46; Lomax D.F, supra n.47; Wedgewood A J., supra n.48.

56- Ibid

57- Section 36 to 46 of the Act exempt the following bodies: Bank of ways through which authorization to carry on investment business can be obtained. First, an authorization can be granted directly by the S.I.B.[58] Second, by seeking membership of one of their exempted bodies principally, the S.R.O., R.I.E., R.C.H. or the R.P.B.[59] Third, an authorization may also be obtained through an insurance company;[60] friendly societies;[61] operators and trustees of recognised schemes; and overseas R.I.E. or R.C.H. authorized in an E.E.C. member state which have received a certificate to carry on investment business in the U.K.[62]

However, the S.I.B. and/or, the Secretary of State, in respect of overseas organizations, reserves the right to revoke authorization for breach of rules or non-compliance with the national legislation or international obligations.[63] The S.I.B. may also intervene, wherever deemed necessary either to restrict the kind of investment business regulated by the authorized persons, impose disciplinary measures, or withdraw recognition from them.[64] It is worth reiterating that the S.I.B.'s authority which is transferred to it as a designated agency by the Secretary of State does not convert it into a statutory body. But it remains uncertain where and when the S.I.B could be deemed to be acting upon its own rules other than those transferred to it by the Secretary of State. In terms of a

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England, R.I.E., R.C.H. and R.P.B. in respect of anything done in their capacity as such which constitute investment business; overseas R.I.E. and R.C.H. (subject to prior notification and certificate); Lloyds and listed institutions;...etc.

58- Sect. 25-30 (Delegation) order 1987 (S.I.1987/942).

59- Sect 7, 8 and 9 of the Act.

60 -Insurance Company Act 1982; Sect 129 of the F.S.A.1986.

61- Sect. 24 of the F.S.A.1986 et seq

62-Sect.40 et seq of the F.S.A.1986.

63- F.S.A.1986, Sect.79-84 inserted therein by the Companies Act.1989

64- Freshfields, <u>Securities Regulation in the U.K.</u> Supra n.47

contrast between the U.K. designated agency and the French relevant authorities (C.O.B., C.B.V. or even the Société de Bourse Française), the S.I.B., regardless of the delegation of powers, is a private limited company. It is financed by fees imposed on investment businesses and S.R.Os. No public funds are involved. The French relevant authorities for their part, are established by statute which also determines the scope of their powers and their budget is governmental.

2.2- THE STOCK EXCHANGE COUNCIL[65]

The Stock Exchange of the United Kingdom and the Republic of Ireland came into existence following the merger and division of the U.K. domestic Stock Exchange and the International Securities Regulatory Organization.[66] The other body which was the result of the same combination is the Securities Association (T.S.A) which is also a private body.[67] At present, the status, immunity and functions of the competent authority is devolved to the Council of the Stock Exchange which continues to be responsible for the admission of securities as well as making rules on listing in accordance with the statutory provisions.[68]

The Securities Association's (T.S.A.), activities cover investment businesses in domestic and international securities dealt on the London Stock Exchange, options, gilt edged securities, financial

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65- See, Art.142(6) of the F.S.A, 1986. For further reading see mainly, Pennington R.R., Stock Exchange, the New Requirements (London, Butterworths, 1985).

66- The International Stock Exchange of the U.K. and the Republic of Ireland Limited Company, so-called "R.I.E"

67- See, supra n.41, 47 & 55

68- Gower L.C.B, Report on Investor Protection, Part 1, supra n.38; Lomax D.F., supra n.47.

futures, and corporate finance, international bonds including Eurobonds, investment management and advice. In addition to its legal responsibilities, the T.S.A., by virtue of the Act, is entitled to authorize investment businesses for its members, regulate their conduct and supervise their activities. It is also empowered, by virtue of its own regulation, to impose disciplinary measures either for a breach of its rules or violation of other bodies relevant rules.[69]

The Council is entitled to make its own rules, promulgate or delete from them as it sees fit. Besides, it imposes its own disciplinary sanctions such as warning, reprimand, suspension or imposition of conditions upon the listing of securities without which they cannot be traded on the Exchange and in the extreme case, withdrawal of membership. The Stock Exchange exercises the power delegated to it by the Act,[70] but in so far as it imposes additional requirements under its own rules or in exercise of its general power,[71] it does not act as a public authority exercising powers conferred by law. Ambiguity and uncertainty, in this respect, as in relation to the S.I.B., arise as to when the Council is acting upon its delegated authority and those of its own resources.

69- The R.I.E., in terms of numbers exercising their activities in the city of London Stock Market are, The International Stock Exchange of the United Kingdom and the Republic of Ireland ; the Association of International Bond Dealers (A.I.B.D.) with its head office in Zurich. The A.I.B.D. is involved in secondary market investment; the London International Financial Future Exchange Limited and the London Commodity Exchange, in addition to many other International Organisation such as the London Metal Exchange, the International Petroleum Exchange and the London Meat Exchange as well as the Baltic International Freight Future Exchange (B.I.F.F.E.X.). See further, Lomax D.F, supra n.47, at p.78 <u>et seq</u>

70- Part IV of the F.S.A 1986 which repealed Part III of the Companies Act 1985 (Com. Order, No.3, 1986).

71- Sect 142 Para 9 of the F.S.A.1986

Unlike the French C.B.V.,[72] the U.K Stock Exchange Council is not a statutory body. It is a private company with limited liability. One consideration which may also be relevant in this context is that while the French reform brought a simple and harmonious system, the UK has been characterized by the diversity of its self regulatory institutions. In terms of jurisdiction, both the U.K Stock Exchange competent authority and French institution (C.B.V.) enjoy almost corresponding powers. The British F.S.A 1986 enables the competent authority to refuse any listing application if it considers that, by reason of any matters relating to the issuer, the admission of the securities would be detrimental to the interests of investors; or in the case of securities already officially listed in another state, if the issuer has failed to comply with any obligations to which he is subject by virtue of that listing.[73] Both situations can only be challenged or be the subject of judicial review if the decision is clearly inconsistent with the law or based on an obvious and clear misunderstanding of the relevant facts.[74] In order to carry out its functions, the Council is entitled to delegate its powers to a committee or subcommittee, officer or servant of the authority.

As far as the regulation of takeover offers is concerned, while the French C.B.V. plays the principal role, the presence of the British Stock Exchange Council appears decisive only to the extent that a listing of a new securities is sought for the implementation of such offers. Yet, in the U.K, the rules and requirements affecting issues of

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72- The French C.B.V. was the result of a conversion of the Chambre Syndicale des Agents de Change (C.S.A.C) into a new statutory body presently known the C.B.V. See Loi No.88-70, supra n.5.

73- Sect. 144(3)(a) of the F.S.A 1986

74- Hahlo H.R & Farrar J.H, Hahlo's Cases and Materials on Company Law (3rd edn) (London, Sweet and Maxwell, 1987) p.576-602.

securities[75] are coming to be mostly regulated by statute.[76] If a listing of securities is sought, Section 144(2) provides that:

> without prejudice to the generality of the power of the competent authority to make listing rules .... require as a condition of the admissions of any securities of the official listing; (a) the submission to, and approval by, the authority of a document (in this Act referred to as "listing particulars") in such form and containing such information as may be specified in the rules; and (b) the publication of that document, or, in such cases as maybe specified by the rules, the publication of a document other than listing particulars".

75- Under the F.S.A.1986, "investment" which is the equivalent of "securities" means: shares and stock in the share capital of a company, debentures, including debentures stock, loan stock, bonds, certificates of deposit and other instruments creating or acknowledging indebtednesss, excluding cheques, bill of exchange, banknote, bank statements, savings accounts, insurance policies, leases or otherwise; govenment and public securities (loan stock, bonds); instruments entitling to share or securities (warrant or other instruments entitling the holder to subscribe for investments); certificates representing securities or other instruments which confer property right in respect of any invesment, any right to acquire, dispose of, underwrite or convert an investment, a contract and right (other than option) to acquire any such an investment otherwise than by subscription; units in a collective investment scheme, including shares in or securities of an open ended investment company; options to acquire or dispose of an investment, currency, gold or silver; future rights under a contract of the sale of a commodity or property of any other description under which delivery is to be made at a future date and at a price agreed upon when the contract is made; long-term insurance contracts in terms of business; rights and interests in investments. Sch.1, Part 1, Sect.1 to 11, of the Act. See also Sect 142, para 7.

76- Prior to 1984, listing of securities regulation was self regulating backed by the law. From January 1985, the rules governing fully listed securities have been changed, as part of the E.E.C harmonisation policy. Three directives, adopted by the council between 1979 and 1982, required member states to enact legislation concerning securities in all respects. These directives are: the "Admission Directive" O.J L79/279.; the "Listing Particulars Directive" O.J. L 80/390; and the "Interim report Directive O.J. L 82/121. See Pennington R.R, Stock Exchange, the New Requirements, at p.2 and 23, supra n.65.

The Act also lays down a guideline to determine what sort of information is required to be contained in the document.[77] This refers to the nature of the issuer of securities and the kind of investments involved, to the nature of the person likely to consider their acquisition, to any information available to investors and their professional advisers.[78] Notwithstanding changes of purposes, the competent authority often requires the following information to be included in the listing particulars:[79] information relating to a persons responsible for particulars[80] and the auditing account;[81] information concerning securities to which the listing particulars relates;[82] information regarding the issuer[83] and its capital;[84] information concerning the issuers activities;[85] assets and liabilities, financial position and profits and losses; the recent development and prospects of the issuer; and finally the information concerning administration, management and

77- Detail of the Act's guidelines are contained in the Stock Exchange (Listing) Regulations 1984 (S.I.84/716), discussed by Pennington, supra n.65,

78- Sect. 146(7) and Sect.147 (Supplementary Listing Particulars)

79- If the securities to which the listing particulars relate are newly presented by the issuer, as Professor Pennington pointed out, the listing particulars fulfil the function of a prospectus in inducing investors to subscribe, but if the securities are already listed or have been allotted to a holder who is seeking to dispose of them, the listing particulars are simply designed to induce other interested investors to purchase them from their existing holder. See, supra n.65

80- Sect.152 (1) to (9) of the Act identifies persons responsible for particulars.

81- Listing Regulation (S.I.1984/716), Sch.A Ch.1 and Sch.B. Ch.2, supra n.77

82- Ch. 2, Sch 1 and 2 of the Listing Regulation, supra n.77

83- The meaning of "issuer" is provided by Section 142(7) of the F.S.A. 1986.

84- Ch.3 of the Listing Regulation, supra n.77

85- Ch. 4 of the Listing Regulation, supra n.77

supervision.[86]

2.3- PANEL ON TAKEOVERS AND MERGERS

A- ESTABLISHMENT

As early as 1959, the Governor of the Bank of England formed a body known as the "City Working Party" for the purpose of considering and setting up a framework within which takeovers should be conducted.[87] In 1968 this body was replaced by the Panel on Takeovers and Mergers. The Panel was placed under the supervision of a newly established body in 1978, i.e., the Council for the Securities Industry (C.S.I.). After the passage of the Financial Services Act 1986, the Panel assumed its full powers and status.[88]

The City Code, which is administered by the Panel, is neither a source of law nor a statute, it is purely a measure of self discipline representing the collective opinion of those professionally concerned in the field of takeovers and mergers on a range of business standards.[89] In order to be swiftly adapted to changes in circumstances as well as to preserve its vital ethical suasion character, the Code is drafted in comparatively philosophical terms so as to make it difficult for its requirements to be avoided.[90]. Moreover it was thought impractical to devise the code rules in such detail as to cover all the various circumstances which arise in

86- Ch.5 to 7 of the Listing Regulation, supra n.77.

87- See Weinberg M.A, Takeovers and Mergers, (4th edn.), at Ch.12, para 1202, footnote 1, supra n.19/Ch.1

88- For an extensive analysis see Johnston A., The City Takeovers Code (Oxford University Press, 1980).

89- Ibid.

90- Panel answers to questions contained in the inquiry of the D.T.I, July 1974, noted by Weinberg, Takeovers & Mergers, (4th edn), at para 1229-30, supra n.19/Ch.1.

takeovers and mergers situations and, accordingly, persons who engage in such activities should be aware of the spirit of the Code as well as the letter.[91] It is interesting to mention that a parallel philosophy is reflected in both the French Code of Conduct which has been introduced by the C.O.B. in 1970 and the E.E.C. Code of Conduct of 1977.

The Panel was, at the time of its foundation, faced with two problems. One was with a determination of what its proper role should be. Should it intervene on its own initiative in the course of a takeover offer, wherever a breach of the City Code is noticed? Or should it confine itself to inquiry after the event had taken place? The former policy was chosen.[92] The second problem was whether it could implement a system of voluntary self discipline or should it submit to regulation by law enforced by officials appointed by the government. The City Working Party preferred for a number of reasons voluntary self discipline based on a Code and administered by its own sponsors.[93]

The Panel consists of three main organs, the Panel Membership, the Panel Executive, and the Panel Appeal Committee.[94] The Panel Membership consists of a chairman, two deputy chairmen, a non representative member nominated by the Governor of the Bank of England and a representative of the following bodies,[95] all of which are committed to support its activities - the Securities

91- See the City Code, introduction to general principles.

92- See supra n. 88 & 90.

93- See Page A.C., Self-Regulation and Codes of Practice, (1980) J.B.L. p.24, at p.26 and 103.

94- City Code, introduction p.A2; The Panel report of 31st March 1987.

95- Representative usually, but not necessarily a chairman. However, in respect of the membership some are represented by a vice chairman, others by their president whereas other are represented by a nominated person. See the Panel report 1987.

Association, the Stock Exchange, the Unit Association, The National Association of Pension Funds, The Association of Investment Trust Companies, The Association of British Insurers, The Confederation of British Industry, the British Merchant Banking and Securities Houses Association (with separate representation of its corporate Finance Committee), the Investment Management Regulatory Organization, the Financial Intermediaries, Managers and Brokers Regulatory Association, the Committee of London and Scottish Bankers, and the Institute of Chartered Accountants in England and Wales.

The Panel Executive, which is responsible for the administration of the Code, is composed of a Director General, a Deputy Director General, Secretaries including joint Secretaries, Deputy Secretary and ten assistant Secretaries. If it is alleged that the Panel has abused its power (acting outside its jurisdiction) in relation to any refusal of recognition or if the Panel ceases to recognise a person who is deemed to be entitled to obtain such a right, there is a right of appeal to the Appeal Committee. An appeal may also lie with leave of the Panel but no application for leave to appeal may be made to the Panel Committee itself.[96]

The Appeal Committee consists of a Chairman, who will normally have held high judicial office, and two members of the Panel, who were not involved in the decision under appeal. One of these members, so far as it is possible, will be a representative of the body to which the party concerned is affiliated. In all litigated cases, notice of appeal must be given within two business days of the decision in question. The Panel will normally suspend

96- The Panel usually refuses to grant leave to appeal against a finding of fact or against a decision concerning the interpretation of its Code.

publication in full of its findings during this time. If there is an appeal to the Appeal Committee, publication of findings as well as the initial decision are further suspended until after the final decision of that Committee. However, the Appeal Committee will rely substantially on the evidence already treated by the Panel as the first Court of Appeal, unless the Appeal Committee considers these may be material new evidence which could not reasonably have been presented to the Panel. In such a case, the Committee may either hear such evidence or remit the matter once again to the Panel for reconsideration. But, if the appeal is dismissed, the Panel findings are published subsequently. It is worthwhile mentioning that, following the passage of the F.S.A. 1986, especially after the Guinness affair,[97] the government was prompted by the desire to enhance the Panel's position with respect to breaches of the City Code.[98] Consequently, the City Code on Takeovers and Mergers is officially supported by the whole range of the securities market organizations notably, the S.I.B., the D.T.I. and the S.R.O. as well as the R.P.B. and R.C.H. The S.I.B., for instance, require a cold shouldering of those unwilling to comply with the City Code or co-operate with the Panel when it is conducting an investigation. The Panel is also entitled to receive restricted information obtained through the use of statutory powers.[99] Of utmost importance, the Court of Appeal, in dealing with the decisions of the Panel, recognised that they are treated as valid and binding until they are set aside by the Courts and so application for review should not be

97- Financial Times, 3rd August 1988, p.14; Regina v Panel on Takeovers and Mergers ex Parte Guinness PLC, (1988) 2 F.T.L.R, p.50 (C.A)

98- Statement of the Panel's Chairman of 23rd Sept. 1987, at p.3 in the Panel report of 31st March, 1987.

99- Ibid.

used as a tactic in the course of an offer. Therefore, the possibility of an application for judicial review will not hinder or restrain the working of the Panel and its Executive.[100]

B- JURISDICTION

The City Code applies principally to those who are actively involved in Stock Market operations in so far as they seek to obtain or reinforce their position of control in target companies.[101] However, the Code does not only apply to persons involved in takeover transactions as such, its scope of application extends to include all professional advisers. In terms of companies, the City Code applies to all listed and unlisted public companies, including some private companies in particular in respect of reverse takeover offers and those incorporated and resident in Eire, the Channel Islands and the Isle of Man if their shares are listed or dealt in on the International Stock Exchange.[102] However, while the identity and nature of the offerors and their place of incorporation are irrelevant, the whole focus is centered on target companies that are incorporated in the U K. and having their head office and place of central management here.[103]

Fundamentally, although the Panel's overall objective is to ensure that all shareholders are treated with fairness and equality and are enabled to make an informed decision on the merits or demerits of the offer, its central tenet, in practice, is to provide further safeguards for the inexperienced and small shareholders. In

100- Alexander R QC, Umpire or Policeman? Self Regulation or Statutory Enforcement? (1987)The Private investors, p.49.

101- See the City Code, introductory section.

102- Ibid.

103- Ibid.

other words, experienced, specifically professional, investors are in general "well able to look after their interests".[104] Furthermore, the Code is not concerned with the merits of a bid. That is for the shareholder. Nor is it concerned with the financial or commercial advantages or disadvantages of a takeover offer. These are matters for the company and its shareholders.[105] The Code is not concerned with those issues such as competition policy, which are the responsibility of the government. As regards the Panel's function, most works concerning the administration of the Code are dealt with by the Executive in a quite informal manner. That is to say that the Executive, through its consultative process, has in fact demonstrated its effectiveness and ability to cope with situations even if they are not covered by the letter of the Code and has solved problems while they still live rather than awaiting and taking remedial action subsequently.[106]

The Panel Executive, in addition to its day to day work relating to the regulation and the supervision of relevant dealing, is also entitled to conduct investigations into the alleged affairs either on its own initiative or upon a complaint by other concerned parties such as insider trading or other serious violations of the Code. In addition, the Executive is required to co-operate with other regulatory authorities,[107] whether in respect of mutual exchange of information[108] or concerning the conduct of investigation.[109]

104- Supra n.100

105- Supra 101

106- Supra 100

107- Bodies with which the Panel co-operation is required are; The Department of Trade and Industry (D.T.I.) the Stock Exchange, the S.I.B., the Recognised Professional Bodies, the Recognised Clearing Houses (R.C.H.), the S.R.O.s and the R.I.E. and the Bank of England, See the City Code, at section A.3.

108- Under the Companies Act 1985 and the F.S.A. 1986, and the Banking

Additionally, in order to ensure a high business standard within the market, the Panel may take disciplinary measures to curb violations of its Code. It may also report the offender's abusive conduct to the relevant organization or authority with which the offender is affiliated. In consequence, such an authority may impose or take a disciplinary action against those subject to its jurisdiction who do not appear likely to comply with the Code's standard of business conduct.[110] In extreme cases, the Panel's ultimate sanction, with the cooperation of the International Stock Exchange, is the withdrawal of the facilities of the securities market.

Finally, the above discussion shows that, although the Panel decision is not legally enforceable and has never been far from a number of criticisms, it is generally tolerated or accepted, whether expressly or impliedly by the financial community involved in takeovers and mergers activities.[111] Presumably, this means that the Panel's power derives, in the main, from the co-operation, assistance and understanding of its sponsors. Moreover, when it

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Act 1987, the Panel is becoming entitled to obtain and receive regulatory information the disclosure of which is restricted by statute, see the City Code on Takeovers and Mergers, 1988, section A.3.

109- The relevant authorities are required to co-operate and faciliatate the Panel investigation proceedings, whenever undertaken. See, Rule 12 of the S.I.B rulebook. It is worth highlighting that the Panel on takeovers has not been integrated into the the framework because, as it chairman pointed out, the F.S.A 1986 reform was intended to regulate the relationship between intermediaries and investors, whereas the Panel is concerned with the protection of shareholders in certain specific situations, notably takeovers and mergers. See supra n.100

110- The City Code's introduction

111- See Page A.C., Self-Regulation and Code of Practice supra n.93; Ferguson R.B, The Legal Status of Non-Statutory Codes of Practice, (1986)J.B.L. p.12; Bradley C., Harmonisation of Takeover and Merger Regulations within the E.E.C, (1986)7 Co.Law. p.131-32 comes to challenging the Panel's decision before the court, Professor Gower pointed out that "the court in any litigation that may ensue will treat the Code and the ruling thereon as prescribing fair and reasonable standards of conduct".[112] To put it more simply, the Panel has gained judicial recognition as well.[113]

SECTION THREE: CONCLUSION AND THE IMPLICATION OF THE E.E.C PROPOSAL FOR FOR A DIRECTIVE ON TAKEOVERS

Although both British and French takeover regulations are basically intended for the protection of investors interests, in particular those of the target company's shareholders, their regulatory systems differ radically. In Britain, generally speaking, self regulation prevails,[114] while in France the whole issue is a legal

112- Gower L.C.B, Review of Investor Protection: Part 1, para 9.13. supra n.38. See also supra n.51

113- Gething v. Kilner (1972)1 All ER 1166 at 1170, (1972)1 W.L.R.337. In Re St. Piran Ltd., Dillon J states "The words 'just and equitable' are wide general words to be construed generally and taken at their face value. The provision of the City Code [on takeovers and mergers] set out a code of conduct which has been laid down by responsible and experienced persons in the City as being fair and reasonable conduct in relation to companies which like St.Piran have obtained the benefit of a public quotation on the Stock Exchange. If the directors of a public quoted company or the principal shareholders in such a company choose to flout that code of fair and reasonable conduct and to ignore without good reason the consequent direction of the City Takeover Panel, and minority shareholders are injured by the withdrawal of the Stock Exchange quotation for the company's shares, then it seems to me that it could be very well be just and equitable in the natural sense of those words that the company should be wound up" Re St. Piran Ltd. (1981)3 All ER 270 at 277, (1981)1 W.L.R.1300.

114- Readers are referred to Page A.C., Self Regulation, The Constitutional Dimension, supra n.12; (1985) Cmnd 9432, supra n.51; (1980) Cmnd 7937; Gower L.C.B., Review of Investor Protection, supra n.38; Walker D., Regulation in Financial Market (1983)23 Bank.Eng.Quart.Bull., p.499; Hurst T.R, Self Regulation Versus Legal Regulation (1984)5 Co. Law., p.161; Ferguson one. The regulation with respect to sociétés commerciales for all practical purposes, is contained in the 1966 Loi des Sociétés Commerciales, and administrative regulations promulgated thereunder.[115]

In the ordinary course of business, under both regulations, any significant change in the company's internal affairs, for instance the amendment of its articles of association, increase or decrease of its share capital, including any election or removal of directors, is entirely reserved to the shareholders ultimate decision in a general meeting, whilst the board of directors, through their appointed managers and officers, run the day to day business. This does not mean that directors are deprived of the right to make any business decision. Correspondingly, the extent to which the directors are permitted to bind their company to third parties is circumscribed within the scope of fiduciary duties.[116] Such a philosophy with respect to investor protection was further enhanced in the takeovers field. Both the UK and French regulators consider shareholders, principally those of the target company, to be the ultimate party determining the success or failure of offers. Such a rational decision can only be made if shareholders are adequately informed. This is the main theme. It is worth highlighting that such a view is not exclusive to Britain or France, it reflects all securities

R.B., The Legal Status of Non-statutory Codes of Practices supra n.111; Peeters J., Re-regulation of the Financial Services Industry in the UK, (1988)10 U.Pa. Int'l. Bus Law, p.371

115- Loi No.66-537 of 24 July 1966 relating to Sociétés Commerciales, as amended; Loi No 89-531 of 2nd. August 1989 relating to Security and Transparency of the Financial Market (relative a la securité et la transparence du Marché Financier) (J.O. 4th Aout, 1989, p.9822), supra n.5 & 20.

116- Infra, Ch.5 'Directors Fiduciary Duties'.

markets regulations worldwide.

In terms of legal procedure, one of the most striking differences between UK and French takeover offers regulations relates to the rigidity of the provisions and the divergence of policies. In Britain, with the overwhelming belief in the free market, the regulator intends to leave parties in offers to contact each other (save question of notification) without interference to the extent that shareholders involved are fairly and equally treated. By contrast, in France, in addition to their continuous involvement in takeover offers operations, the C.B.V. and the C.O.B. prevent any intervention in the market, once the intended offer is notified to them, unless it is formally announced to the shareholders involved. Moreover, once a notification is made, the C.B.V. immediately suspends dealings in the target company's relevant shares.[117] Besides, as regards the regularity of offer documents or inaccuracy of information contained in the <u>note d'information</u>,[118] the relevant law in France confers a wide range of powers and discretion on both the C.B.V. and the C.O.B., either to refuse any application or to require further information to be supplied to it wherever this is deemed necessary. Such procedural restraints are not be found in the UK. What is obvious in the U.K., is that the Panel has developed a consultative system whereby

117- Suspension of quotations was considered in the UK to distort the free market, see Beevor A, <u>Practioner's Guide to the City Code on Takeovers and Mergers</u> (Surrey,W.M.C.Ltd.,1989)

118- Under the French regulation an offeror is required to submit two distinct documents. One for the C.B.V. for control of regularity and compliance. The other must be submitted to the C.O.B. containing information disclosure to be made public. Additionally, a draft document containing terms and conditions with respect to the offer is sent to the target company's board of directors for an ultimate acceptance or refusal.

uncertainty is removed. Furthermore, minor violations of the City Code may be solved while they are still live. However, if an offer is refused, the decision of the relevant authority in both countries is final. In France, the decision of the C.O.B. or the C.B.V., can only be challenged before the administrative court because of a flaw in the law or misunderstanding of fact. Parallel to this attitude, the Panel's decision can only be attacked through judicial review.[119]

Disclosure, which is both "informative" and "device",[120] is of profound importance in both the French and British regulations. Basically, it is "informative" in the sense that it provides investors with information so that they may reach an informed decision about the issues under consideration without resorting to lawsuits. Indeed, its significance is dependent largely on the standard of accuracy and availability of up dated and non complicated information, the test of which is materiality. It is a "device" where it is directed to deter or curb market abuses such as insider dealing.[121]

By way of further contrast, while the power of C.O.B. extends to cover the whole range of investment decisions, whether through takeovers, mergers or prospectuses and other related events, the Panel's jurisdiction covers only matters of takeovers and mergers. Prospectuses and others investment decisions are matters for the Company Act 1985 and the F.S.A.1986.

To put it into perspective, C.O.B. has two roles to play. One is concerned with information disclosure to investors of the

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119- R.v. Panel on Takeovers and Mergers, ex parte Datafin plc. (1987)2 W.L.R.699, (1987)1 All ER 564, (1987)B.C.L.C.104, (1987)Q.B. 815, noted in (1987)J.B.L 142; (1988) J.B.L.329

120- Hahlo, H. R.& Farrar, J. H., Hahlo's Cases and Materials on Company Law, (3rd. ed), p.179, supra n.74.

121- Infra, Ch.5.

company's ordinary life. The other is specific to takeover offers and other alternative techniques of share purchases or transfer. The powers of the British self regulatory body (Panel) are specifically limited to information disclosure in connection with takeovers and mergers. That is to say, information disclosure which is required by the law of prospectuses and other parallel methods of raising capital of the company fall outside its jurisdiction. Mention should also be made of its investigative powers. The investigative process may not be identical in principle. In short the power to investigate which, in France is wholly centred within C.O.B.'s. jurisdiction, in the U.K. is shared between the government and self regulation. On the one hand, although the power vested on the S.I.B.[122] or the D.T.I.[123] are very similar to those given to the C.O.B., the S.I.B. in the U.K may not investigate the affairs of an S.R.O. or a person certified by R.P.B. unless the S.R.O. has requested the S.I.B. to do so or where it, in the extreme case, appears to the S.I.B. that those members were unable to investigate. By contrast, under the French Ordonnance, there exist no barriers to prevent C.O.B. from investigating the Bourse de Valeur institutions. In addition to the D.T.I. and the S.I.B., where suspicious practice is noticed, the Stock Market may appoint an ad hoc commission to investigate. The Stock Exchange's attention is either triggered by complaint, the company management, the Panel on Takeovers and Mergers, the financial institutions and, in particular, by the intermediaries involved. A decision to appoint an inspector to investigate by the C.O.B. in France, is wholly clothed in

122- Sect. 105 of the F.S.A.1986. The S.I.B, is also entitled to delegate its power to an S.R.O's officer to carry out an investigation for violation of the regulation.

123- Sect. 177 of the F.S.A, 1986

legal form. The appointment of an ad-hoc committee by the Stock Exchange in Britain is a totally private decision which does not have the force of law. However, it is worth repeating that, in both countries the vast majority of investigations are often either inconclusive or demonstrate no identifiable insider trading. Furthermore, publication of findings that are based on probability or uncertainty may not be made public because of the fear of defamation actions.

Recently, at the Community level, a new proposal for a directive on takeovers and other bids has been submitted to the European Council for approval. The aim sought to be implemented by the proposal is twofold. One the proposal is directed to harmonise the existing regulations of the E.E.C. member states within the field. This implies that rules with respect to takeover offers should be at least clothed with a certain degree of legal form. The other is to enhance further the interests of investors and to curb market abuses which could not effectively be reduced without legal action.

Concerning the relevant bodies, it is submitted that rules to protect the interests of those affected by takeover offers are unlikely to be effective unless they are policed by an official regulatory body.[124] Further, although the designation of such a supervisory body is left to the discretion of the member states , the Commission stresses that the body likely to be designated must have sufficient power to monitor effectively and efficiently takeover offers activities. Furthermore, article 6 of the proposal provides several options that "the authorities thus designated may delegate all or part of their powers to other authorities or to associations or

124- COM (88) 823 final, at para 11, supra n.14/Ch.1.

private bodies". In addition, as a means of control and information disclosure, the Commission needs to be kept informed of such designations and/or of any delegation of power and that member states should specify all the division of functions that may be made.[125] The likely implication of such a proposal on the U.K self regulating associations notably, the Panel on Takeovers and Mergers, is that such a body should be integrated into a legal form. If its status is intended to be preserved, it may either be placed under the supervision of a new body clothed with legal power other than the S.I.B. or be placed under the direct umbrella of the Secretary of State. It is worthy of note to mention that the 1989 Companies Bill recommended an integration of the Panel into a regulatory framework.[126] As regards C.O.B., since it already has such legal power, it may not be affected by the E.C proposal compared with the British Panel on the City Code.[127]

The last point relates to the organization of the market. In Britain, the F.S.A 1986 confers very wide powers on the Secretary of State to establish a regulatory framework within which investment businesses are conducted. Most of his powers, nowadays, are in the process of transfer (delegation) to a designated agency set up for the purpose i.e., the Securities and Investment Board (S.I.B.). The S.I.B., which is a private limited company is at the centre of the regulatory structure. In France, the relevant law directly empowers C.O.B. and the C.B.V. including the

125- Article 6, para 1, of the proposal, supra n.14/Ch.1

126- What the Companies Bill 1989 suggested, with respect to the status of the Panel, was not adopted in the Companies Act, 1989. Presumably the integration of the Panel into a legal framework remains pending until the E.C. proposal for a Directive on takeovers is finalised.

127- Further comparison and implications will be indicated below wherever it seems necessary.

S.B.F, to police the market. Indeed, they depend largely on the Ministry of Economy as far as the hierarchy is concerned, but in relation to the supervision and regulation of the Bourse de Valeur they enjoy great discretion and freedom. A theme which is common to both the French relevant law[128] and the British F.S.A. 1986 concerns the power of recognition. Both legislators require anyone conducting investment business to be authorized persons. Consequently, the conduct of investment business without prior authorization is a criminal offense.[129] This authorization is presumed to be granted if a person is a member of a recognised organization, for instance, an S.R.O. in the U.K or Sociétés de Bourse in France. Like the French C.B.V., or the C.O.B., in Britain, the S.I.B., in the proper performance of its role, is empowered to call for information from any authorized investment business, an S.R.O., R.P.B., R.I.E. or R.C.H. as may reasonably be required for the exercise of its functions and powers. The S.I.B. is empowered, in appropriate cases, to revoke or suspend any authorizations or intervene to the extent that the protection of investors is required. Its power also extends to prohibit certain kinds of harmful transactions carried out or intended to be carried out contrary to the established rules. The S.I.B. may also impose restrictions on dealings. if investors are seriously and prejudicially affected. The ultimate remedy the S.I.B. may take is to apply for compensation schemes.[130]

Referring to the E.E.C. proposal on takeovers and other bids, it seems fairly certain that the E.C linkage mechanism in the field is at

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128- Loi No.66-537 relating to Sociétés Commerciales as amended; Loi No. 88-70 of 22nd Jan., 1988 and Loi No. 89-531, supra.n.5

129- Art.3 of the F.S.A,1986.

130- See Ashe T.M, The Regulation of Financial Services, (1987) L.Soc.Gaz., p.1392 its premature stage. Numerous alternatives have been offered by the Commission to deal with the organization relevant to police takeovers. Among the suggestions put forward is, first of all, there must be a supervisory body clothed with legal powers, responsible for the implementation of takeovers regulations. Second, on the basis of existing structures, the choice of the appropriate body to whom a delegation of power from the statutory body is left to the member state concerned. This means the proposal for a Directive leaves it, once a public authority is set up, to member states to designate any other appropriate body to perform such functions whether a public or private or a nationally or regionally organized body.[131] Third, since the intended takeover offer Directive should be complied with throughout the Community, a contact committee is proposed under the auspices of the Commission. The contact committee consists of representatives of the member states and representatives of the Commission.[132] The chairman is a representative of the Commission.[133] The contact committee's preliminary and major functions are (a) to facilitate the uniform application of the Directive through regular consultations on, in particular, practical problems arising in its implementation; (b) to ensure concerted action upon the policies followed by the member states in order to obtain reciprocal treatment for Community nationals and companies as regards the acquisition of securities of a

131- Art.6 of the E.E.C. proposal, supra 14/Ch1

132- Commission Recommendation of 25 July 1977 concerning a European Code of Conduct relating to Transaction in Transferable Securities (O.J. L.212/37 of 20.8.77); Article 21, para 2 of the proposal, supra n. 14/Ch1.

133- Somehow such proposition seems to be modelled on the previous French Commission Technique de Surveillance du Marché which existed in 1978. This institution was formed amongst the C.O.B. and the C.S.A.C.'s.membership.

company by means of a takeover bid; c) to advise the Commission, if necessary, on additions or amendments to the Directive.[134] Finally, the establishment of transitional bodies responsible for the implementation of the regulation of takeover bids formed by the Commission, both in order to make possible some degree of control over the national authorities, will have, once finalized, wide implications, not all of which will be discussed here. The major implication concerns questions of jurisdiction. The establishment of such a body will inevitably shift some of the powers from national supervisory bodies to the Communities in the field. In other words, the national supervisory bodies authorities will cover national takeovers whilst cross-border takeovers come within the E.C relevant supervisory body.

134- Article 21, para 1.

CHAPTER THREE
CONDUCT OF COMPETITIVE OFFERS

SECTION ONE: PROVISIONS GOVERNING COMPETITIVE OFFERS.

Under the French regulations, the technique of acquiring control of a company by making a competitive offer to acquire the desired level of shares at a fixed price in case of Offre Publique d'Achat (O.P.A) or, upon exchange of securities in case of Offre Publique d'Echange (O.P.E), is subjected to a standard procedure called "Normale".[1] The standard procedure applies to public offers involving an amount of shares representing at least 33.1/3% of the target company's relevant share capital. Such a percentage may be increased without incurring any obligation with respect to the making of a general offer if the transaction carried out comes within the scope of certain exemptions.[2] First, if the transaction results from either a disposal of securities free of charge, for example by inheritance, or as a result of legal mergers between companies. Second, the threshold beyond the prescribed level should not exceed 3% and the acquirer confirms that such a percentage would be reduced within 18 months of the acquisition (reclasser les titres ou les droits de vote acquis en excedent dans un delai de dix-huit mois). Third, the excess results from reduction of the equity share capital of the target company or of the voting

1- See both the C.B.V's Regulation, Arrêté of 28 Sept. 1989 (J.O.30 Sept, p.12301). Previously, Art. 193 of the C.B.V general regulation (arrêté of 7th Aug.1978); "Normale" procedure has for the first time been introduced and confirmed by the Ministry of Economy in 1970.; the C.O.B's Regulation No.89.03 and 89.02 (J.O.30 Sept.1989, p.12307 and 12309 respectively).

2- Ibid, Art. 5.3.6, at Ch.III, of the C.B.V Regulation of 1989. Previously, Art. 180.

rights control.[3] This equally applies in U.K. but, it is carried out under distinct forms and requirements.

Competitive offers made in accordance with the standard procedure, in France, have to comply with some conditions laid down by both the C.B.V. and the C.O.B.'s regulations.[4] However, if a competitive offer is concurrently made with the original offer, there seems no particular condition which should be observed by the rival offeror except with respect to the proposed consideration and timing.[5] Most of the conditions arise in connection with a subsequent competitive offer. The first condition is concerned with the appropriate time within which a competitive offer should be made. Art. 5.2.16 of the C.B.V. regulation of 1989, stipulates 10 days before the expiry of the original offer timetable. The second condition relates to the amount of consideration contained in the offer document. If the rival offer is made in cash, the price must be made at least 2% above the initial offer price.[6] The third condition is concerned with shareholders' acceptance. Under the C.B.V. regulation, a shareholder's acceptance (ordre de vente) ceases to be binding once a competitive offer is announced unless he decides to maintain it.[7] The fourth condition relates to the liberty of choice of the parties to an offer. According to the French rules, if an offer is promptly followed by a competitive one, the initiator is given the right of choice whether to withdraw completely his offer from the competition scene, to maintain his initial propositions or to outbid

3- Ibid, Art.5.3.6.

4- Supra n.1.

5- Art.5.2.26. Any amelioration is required to be significant. In order to determine how far the consideration offered is significant, it lies within the C.B.V's discretion. See Art.5.2.28 of the C.B.V. Regulation, supra n.1.

6- Ibid

7- Art.5.2.17 and 5.2.18 of the C.B.V Regulation, supra n.1

the rival offeror. However, the C.B.V informs the investors about the original offeror's ultimate decision.[8]

As regards notification of offers, the differences between the U.K and French Regulations appear to be that under the British City Code, an offer document must, in the first instance, be notified to the offeree's board of directors or to its advisers.[9] This also applies to competitive offers whether made contemporaneously or more or less subsequently. In France, as already discussed in the previous chapter, any offer must first be notified both to the C.B.V. and C.O.B. If the offer which is addressed to the authority is approved, the intermediary, usually a bank, sends it to the offeree board of directors for consideration. The board of the target company is also required to follow a corresponding procedure before circulating their views about the offer to their shareholders. Another distinction which seems relevant in the context relates to the provisions applicable to competitive offers. In the U.K, the rules contained in the City Code have a tacit application to competitive offers. The French regulations, by contrast, contain specific provisions which directly and expressly apply to competitive offers.[10] This equally applies to the E.E.C. proposed directive on takeovers and other bids.

8- Ibid. By contrast, under the British City Code, if an offer is followed by another competing offer for the control of the target company, the original offeror is not allowed to withdraw his offer only in exceptional circumstances where the Panel considers justifiable for such a withdrawal.

9- City Code, Rule 1.

10- Express provisions can also be found in the E.C proposal for a Directive on Takeovers and other Bids, see Art.20, supra n.14/Ch1.

SECTION TWO: CONDITION OF MAKING OFFERS

British law makes no explicit condition, nor does it provide specified clauses, for competitors to comply with except those concerning competition and the public interest or matter of legitimate national concern.[11] This is presumably because the regulation of takeover offers is totally left to be dealt with by the City Code rules and the Stock Exchange relevant provisions. Thus, it is quite obvious that any condition should be distinguished from self regulation in the field. The first set of provisions is contained in the City Code general principles which seek to ensure the highest business standard during the course of a takeover offer and, therefore, to provide a fair treatment and equal opportunity for all shareholders. The shareholders to whom the offer is addressed should be given sufficient time, advice and information to enable them to make an informed and rational decision. The information regarding an offer must be prepared with the highest standard of care and accuracy. However, these principles are, in the main, a codification of good standards of commercial behavior and they should have an obvious and universal application even to those matters which are not explicitly covered by the Code.[12]

The second set of provisions relates to the period of time within which a subsequent competitive offer should be announced. Under the City Code, as long as the initial offer is not declared unconditional as to acceptance, any competitor is entitled to make

11- Neither the Panel nor the Stock Exchange are concerned with the broad question of competition and the wider issues of the public interest. Those are matters of govenment concern. Nor is the Code concerned with the financial or commercial advantages or disadvantages of offers. These are left to the company and its shareholders. See the City Code introduction.

12- City Code, at introduction para 3.

an offer for the control of the target company at not less than the highest price proposed by the initial offeror. By contrast, according to French regulations, any competitor is subjected to some conditions. These are: a competitive offer should be made before the expiry of the initial offer's ordinary timetable (save wherever granted otherwise). If the consideration for the offer is made in cash, it must be at a higher price not less than 2% above the price originally offered by the other offeror.[13] Both the C.B.V and C.O.B. regulations require any offeror to delete any pre-condition as to acceptance. Instead he is allowed to limit his acquisition, together with shares already held, to an amount equivalent to 2/3 of voting rights control in the target company. In the U.K., under the City Code rules, if an offeror fails to attain a percentage of voting control above 50% in the target company, his offer lapses accordingly.

The third set of conditions is chiefly concerned with the renewal of offers and restrictions imposed thereupon. As a general rule, where an offer has been announced or posted, but has not become or declared wholly unconditional and has been withdrawn or has lapsed, bidders cannot renew their offers within 12 months of it lapsing or withdrawal.[14] The exception from that rule often rests with the relevant authority's discretion. An example will, perhaps, explain these rules. Hoylake, a United States company, made an offer for the control of B.A.T (British company). As a procedural requirement, the offeror must have a final clearance from the United States authorities. Because of administrative delay, Hoylake was worried that its offer might fail because it would not

13- C.B.V's Regulation, supra n.1.

14- This is reflected in both countries' regulations; See, for instance, City Code, Rule 35.

have obtained on time the required approval from the United States insurance regulators before the offer would have lapsed under the British City Code's normal timetable. The Panel, so as to maintain an orderly framework within which a takeover offer is conducted and to preserve not only the interests of parties to an offer but also its flexibility and adaptation to change in circumstance, said "The regulatory proceedings (in the U.S.) are most unlikely to be concluded within the timetable prescribed by the Code. This will have the effect that shareholders will not have a real opportunity to consider an offer on its merits".[15] Since takeovers are increasingly becoming international in nature, the Panel's decision is, indeed, vital. It is, thus, obvious that the Panel should consider the implications of its strict and burdensome timetable for offers involving foreign competitors or offerors generally. Consequently the Panel indicates that situations of the kind illustrated by Hoylake for the control of B.A.T, where the interaction of the Code and foreign regulatory processes fall to be considered, are likely to occur. In consequence, potential offerors are required to satisfy the host country's requirement.[16]

The fourth set of conditions are purely economic, political, or financial as the case under consideration may be.[17] Regarding the political issue, both the U.K and the French relevant laws confer on

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15- The Independent, 16th September, 1989, p.21.

16- "BAT to Appeal Against the Panel", The Panel statement, noted by Clare Dobie, City Editor, The Independent, Sept.16th 1989, at p.21

17- Take for instance the Kuwaiti's case which has been considered as a matter of "legitimate national concern", see House of Lords, Mergers Control, session 1988/89 (H.L.31), (H.M.S.O. 1988), at p.8; Consider also rival offers made by Standard Chartered Bank and Hong Kong and Shanghai Bank for the control of the Royal Bank of Scotland, an Edinburgh based financial institution, noted by D.M. Raybould, Controlling Mergers Through Competition Law, (1983) Co Law 56, at 61 the person responsible (Secretary of State in U.K or the Ministry of Economy in France) a wide range of powers to take into account various criteria other than those relating to competition. In Britain, for instance, during the investigation into Kuwait's shareholdings in B.P. (British Petroleum), the M.M.C. concluded that the government of Kuwait's 21.6 % threshold in B.P. could be harmful to the public interest. The M.M.C. findings were centred on the broader issue of what is called "legitimate national concern" which include a possible divergence of the national and international interests of the British Government and Kuwait's interests. That is, the passing of the British company to O.P.E.C. control.

As regards financial conditions, the most typical illustration of such a condition is that of the competitive offer involving the control of the Royal Bank of Scotland by Shanghai and Hong Kong and the Standard Chartered Bank. The target company controlled almost 50% of the Scottish banking sector and an English retail banking subsidiary, Williams and Glyns. As for the competitors, the Hong Kong and Shanghai are both bank giants in the world by Stock Market value, but 33% measured in assets,[18] with shipping and airline interests, and a subsequent expansion through the acquisition of a U.S. major bank. The Standard Chartered Bank is a London based international bank with interests in South Africa, the Middle East and Far East and recently California. Hence the M.M.C. concluded that the implementation of such an offer could harm the public interest. It was said that the London based international bank would harmfully affect "career prospects, initiative and business in Scotland which would be damaging to the public interests of the U.K. as a whole". Concerning the other overseas rival (Hong Kong & Shanghai), the

18- Ibid

M.M.C. stated that it would not only affect Scotland, but also "that transfer of ultimate control of a significant part of the clearing bank systems outside the United Kingdom would have the adverse effect of opening up possibilities of divergence of interests which would not otherwise arise." Apart from the issue of competition and the public interest, Part II of the British Industry Act contains provisions which enable the Secretary of State to exercise certain powers in the event of a change of control of a manufacturing company to a foreigner which appear to him to be of a special importance to the U.K. or of any substantial part of it.[19]

With reference to the "economic conditions" the different approaches adopted by those countries which do have a system of merger control were briefly outlined as follows:

> The merger control provisions themselves display a great deal of variety from country to country. The main differences arise as regards the criteria for defining or examining mergers (size and market share threshold), the standard by which a merger is considered desirable or undesirable (a straightforward competition test or wider public interest criteria of which competition is but one, though important, element among others such as trade, employment, environment, regional policy) and as regards procedure (judicial or administrative or some combination of the two, prior or post notification, procedure for advance clearance or approval of certain mergers). At the risk of over simplification, it is possible to divide the countries into those which rely entirely or predominantly on a competitive test (Canada, Germany,

19- S.13 of the British Industry Act,1975 if it appears to the Secretary of State that there is serious and immediate probability of a change of control of an important manufacturing company, and it appears to him that change of control would be detrimental to the interests of the United Kingdom or any substantial part of it, he may by order prohibit that change of control or make a vesting order. A vesting order is made by the Secretary of State with the approval of the Treasury, and directs the vesting of share capital or assets employed in the company in himself or nominees.

> Japan and the United States) and those which take a broader position requiring a case by case assessment of a variety of factors before determining whether a merger is acceptable or not (France, Ireland, New Zealand, Sweden, the United Kingdom and the E.E.C.). Australia has a mixed system comprising a prohibition of mergers leading to a strengthening of market dominance but a procedure for advance notification by the trade practices commission subject to a wide public benefit test.[20]

In France, the prime test is whether the merger will distort competition and, if so, whether its economic and social advantages outweigh its adverse effects on competitors. Apart from this, the question which arises is whether or not there exist other conditions to be observed. Under British relevant law, excepting competition or public interest tests, there would appear no provisions to prevent the implementation of merger between companies or to impose conditions thereupon.[21] Recently, such a position has expressly been reaffirmed by the Secretary for Trade and Industry who responded to those commentators who voiced concern on mergers control, in particular the questions of open regime; vulnerability of companies; reciprocity and the protection of national manpower. These questions arose directly from the competitive offer for the control of Rowntree, the British food manufacturer, made by the two Swiss rivals, Nestlé and Suchard Jacob, as well as from the D.T.I decision of merger clearance for Nestlé to proceed with its offer. In his statement, as regards the open system, the Secretary of State said "Britain has taken a lead in ensuring that it had an open regime and that artificial barriers were not set up".[22] Concerning British companies' vulnerability, he pointed out

20- O.E.C.D Report on International Mergers and Competition Policy in 1988, p.17.

21- See, DTI, Blue Paper on Mergers policy, (H.M.S.O, 1988) that "nothing in U.K. law prevented a company, with the consent of its shareholders, making itself bid-proof."[23] He also claimed that a number of companies in Britain had made themselves "bid-proof" through the amendment of their articles of association and shares structure, notably, the Great Universal Stores Company; P&O; Savoy Hotel and Trusthouse Forte.[24]

As regards reciprocity, the Secretary of State stressed that "There are no powers under Swiss law for the Swiss authority to block takeovers of industrial or commercial companies. There are no barriers to British firms taking over Swiss firms" Thus it would be unlikely for the U.K. to transmit a signal that it is protectionist on artificial grounds. Finally, it is quite interesting to note that, there is one consideration that may be relevant here is that with respect to foreign takeovers of U.K. companies, as was highlighted by the D.T.I blue paper on merger policies, 1988, the government's general policy towards inward investment by overseas companies in the U.K. economy is to welcome it.[25]

In France, the regulation with respect to foreign takeovers of French companies imposes various conditions. Such provisions vary depending whether or not the acquirer originates from an E.E.C. member state or from a non-E.E.C. candidate, and on the amount of shareholdings sought to be obtained. As it presently stands, the

22- Ibid.

23- The Times, May 26th, 1988; The Financial Times, 26th May, 1988.

24- But as far as listed public companies are concerned, the Stock Exchange is reluctant to grant or accept any restriction on listed shares because, if granted, this may distort the principle of free marketability of securities.

25- Supra n.20; See also Earl P. and Fisher G, International. Mergers And Acquisition, supra. n.41/Ch.1. The threshold of 20% has been reduced to 10%. See Loi 89-531, supra n.5/Ch.2.

French legislation laid down a 10% threshold (previously 20%) as a triggering level which, no matter how the percentage of shares is acquired, activates a more rigorous control.[26] If an acquisition involves a 10% or less of the equity share capital of a French company, prior permission from the Central Bank must be obtained.[27] But if the acquisition threshold exceeds 10% of the target company's share capital, more stringent conditions are imposed. Under the French Exchange of Control Act of 1966,[28] any person, usually a company, which seeks to acquire a substantial proportion of shares in the relevant share capital of a French target company must lodge with the Treasury Department an application for purchase along with a statement confirming that at least 80% of the equity share capital is owned by E.E.C. residents. Parties involved in such a transaction have to observe certain procedural requirements. The Ministry of Economy enjoys great discretion to approve, disapprove or remain indifferent. In addition, the Ministry may consult other relevant ministries as to the likely detrimental effects the transaction in question may entail. If a takeover offer involves foreign companies for the control of a French target company, and that is deemed to be of an important nature, the Ministry may impose further conditions on the proposed takeovers to be fulfilled. However, takeovers in France which boost or generate employment and produce other technological benefits in the field are allowed to proceed.[29]

26- Vacher-Desvernais A.and Monod J., Foreign Takeovers in France, (1985) Intl.Bus.Law, p.328

27- Banque de France, Note No 75 of September 20th, 1977. Noted by Vacher-Desvernais A.& Monod J., Foreign Takeovers in France, Supra n.26

28- Loi No.66-1008 of December 28th, 1966. By virtue of the Loi No.89-531 of 2nd August 1989, supra n.5 & 128/Ch.2. Such a threshold is reduced to 10%.

In addition, the French legislature provides a system for prior clearance. This means that purchase of securities in French target companies by any foreign company is subjected to the provisions of prior notification and clearance. Normally, where the Ministry of Economy does not respond within a one month period from the date the application is received, tacit permission is deemed to be granted and the purchase could be carried out. If that authority, within the prescribed period, requests additional information, another month will start as soon as the information under request is supplied.[30] However it should be acknowledged that in exercising prior control over the direct investment operation, the rules in both countries (U.K. and France) are not radically different as regards the supply of information. The following information must be provided: namely, information on investors (acquirers) notably the name and country of their residence; the name of the target company; the address of its registered office; list of shareholders and directors; amount of share capital, its activities; details of the shares sought to be purchased; copy of the most recent financial report; a list of subsidiary and affiliated companies either abroad or in the country of the target company. The authority in either country will normally expect a particular interest to accrue in the country in which the investment is sought.[31] In addition, the application should contain or include data concerning the funds to be provided for financing the purchase, modality of payment for shares, price

29- For further reading see, Vacher-Desvernais A.& Monod J., Foreign Takeovers in France, supra n.27.

30- Vacher-Desvernais A.& Monod J., Foreign Takeovers in France, at p.329, supra n.26.

31- See, for example in the U.K, D.T.I Blue Paper on Mergers Policy, supra n.21

per share, warranties and reasons for, and synergy to be derived from the investment. The later is considered in the light of present legal, commercial, economic, social and industrial policy.[32] Likewise, where the investment is carried out by way of public offer, various other conditions and provisions of compliance are imposed by C.B.V. and C.O.B. such as the conditions of receivability and visa.[33]

SECTION THREE: ANNOUNCEMENT OF OFFERS

Parties to a competitive offer cannot always control the negotiation process and its associated problems. Once the possibility of an approach becomes divulged, a period of uncertainty sets in for shareholders, employees, creditors of companies involved and their respective competitors.[34] It is in circumstances such as this that persons with privileged access to confidential information, other than those seeking control, begin making profits at the expense of unknowledgeable persons.[35] It is also particularly interesting to

32- For further reading see, Vacher-Desvernais A. and Monod J., Foreign Takeovers in France, Supra n.26; Weinberg M.A and Blank M.V, Takeovers And Mergers, (4th edn.),paras 1558-1575, supra n.19/Ch1

33- See French Institutions at Ch.2.

34- It is worthwhile mentioning that in France announcements of offers are entirely monopolized by both the C.B.V and C.O.B. In the U.K, by contrast, announcements of offers are left in the hand of parties to the offers themselves. Therefore, this section will discuss the U.K City Code requirements relating to an announcement of offers. However, the French requirement in the context will be noted wherever necessary.

35- Attorney General's reference (No 1 1988) H.L, April 13th, 1989. In the light of this case the appellant was informed by a merchant bank connected with a company that a take over bid for the company had been agreed and that the information was confidential. The appellant promptly bought 6000 shares in the company and made a profits of £3000. For further reading see The Independent, April 14th, 1989, at p.14 "Dealing on Unsolicited Tip-Off Broke Trading Law" note that rumours and speculative buying shares may well start before news about a potential offer is announced. In theory it seems clear that such negative aspects may be referred either to the offeror's inadequacy of security; to the press; market expectation, or to the leak of confidential "price sensitive information"[36] during the period of an offer.[37] But it is difficult to locate their real source in practice.[38] Evidently, rumours, speculation or even market manipulation could cause not only disruptions internally within the target company but also externally within the stock markets. During the period of a takeover offer some other phenomena may also come into play such as the phenomenon of "acting in concert"[39] and "associates"[40] as well as the practice of "warehousing" and "nominees".[41] It is

36- It is quite clear that genuinely "price sensitive" information is disseminated throughout the takeover offer period. Yet there is an important distinction between information that causes a movement of the share price at the time of potential offeror and that which is the result of market expectation or analysis of fact. Briefly, price sensitive information is commonly and largely used but, it has never been defined. Nevertheless, see the Joint Statement by The Stock Exchange and the Panel on Takeovers and mergers, (April 24th,1977), noted by Weinberg & Blank, Takeovers And Mergers, paras 27226 to 27236 (1979), supra n.19/Ch.1.

37- The City Code defines the period of an offer as "The period starting from the time when an announcement is made of a proposed offer or possible offer until the first closing date or, if this is later, the date when such offer becomes or is declared unconditional as to acceptance or lapses"

38- See Panel's annual report, 31st Marsh, 1988, p.7

39- Rule 9 and the definition section of the City Code. However, under the City Code whilst 'acting in concert' has particular relevance to mandatory offers, the aspect of 'associate' is dealt with by the provision of the Code within the context of disclosure of dealings. Compare with the French relevant provisions of the Loi No.66-537, Art 356.1.3 inserted by the Loi No.89.531, Art.18., supra n.5/Ch.2

40- Ibid. See also Rule 8 of the Code

41- See infra. Ch.6

obvious that each of these problems may form part of the whole operation which involves the change of control. Offerors frequently make their offers sequentially with several purchases coming close together to the formal offer, for instance by making a "dawn raid",[42] or using other techniques to induce directors or substantial shareholders to accept their offers prior to making a formal offer like the device of "prior commitments" known in Britain as a "shut-out offer".[43]

Evidently, regulators are becoming increasingly aware of the implications of the above cited malpractices and also of their unsettling effects whether on shareholders' interests or on the stock market. However, each legal system may view the matter differently depending on its seriousness and of the practice involved. Two different approach are, nowadays, in existence. While in France, prominence is given to administrative dirigisme, in Britain, the prevailing tendency is the "free market interplay" in the belief that the market is the best available place for determining the value of the company's relevant securities.[44] The Panel, which is the body closely involved in the regulation of takeover offers in Britain, is chiefly concerned with three major areas. First, the accelerated announcement of offers and the best quality of information which should not confuse or mislead shareholders to whom the offer is intended. Such information, in view of the regulators,[45] must be fairly presented, accurately prepared and reflect the purpose to which it relates. Second, to

42- Ibid.

43- See Johnston A., The City Takeovers Code, at p.77 and 99, supra n.88/Ch.2

44- See for Britain, House of Commons, Paper 298 of 1969 para 82.

45- See, The F.S.A.1986, Sect.146 paras 3.

prevent the creation of a false market before and during the period of the offer. Third to ensure the principle of equal treatment between shareholders involved. Under the City Code, two kinds of announcements are required. One is a premature announcement. The other is a formal announcement.

3.1- PREMATURE ANNOUNCEMENT

A- ANNOUNCEMENT OF POSSIBLE OFFERS

The chief aim of the Panel throughout the offer period is to maintain an orderly and fair conduct for takeover offers, to preserve the interests of the shareholders involved, and to enhance further their confidence in the market. The first step is to draw the attention of those involved in takeover offers to the seriousness of the operation. They then are often requested to seek legal or financial advice. Besides, as a preventive measure against unexpected infringements of the Code, the Panel always stresses the need for consultation at an early stage on any point of difficulty regarding the formulation of an intended offer, whether or not this relates to the interpretation of the Code.[46] It should also be noted that prior consultation is paramount, not only because it enables offerors to avoid breaching the regulation but also, as a primary advantage, it enables the Panel's executive to anticipate and correct possible infringements of the Code before being committed rather than imposing on the offender any remedial disciplinary measures.[47]

46- The Panel on many occasions reaffirmed that "interpretation of the Code in relation to particular takeovers should not be published without prior consultation with the Panel"; See, The Panel Statement on the Deemerger Corporation plc/Extel Group plc. April 23rd,1986, noted by Morse G., (1986) J.B.L.406 at 407.

Potential offers which are not immediately made public often entail rumours and speculations, including manipulation and insider dealing.[48] These aspects are generally due to the offeror's inadequacy of security prior to making an offer but, as a matter of securities market practice, the issue is wider than one of inadequacy of security. One might argue that those undesirable developments may be because of a company's vulnerability or because of the stock market's perceptive analysis of facts. Therefore, if a potential offer involves an unusual movement[49], particularly where any potential offeror is being named by the circulating rumours, the relevant regulator requires that the offeror should either deny publicly his intention to make an offer[50] or proceed with a prompt announcement to that effect.[51] The relevant regulation empowers the target company, the subject of speculation, to request the Stock Exchange for a temporary suspension of dealing in its shares. The offerors (whether potential or actual) are prevented, by virtue of the City Code rules, from detering the target company from such a request.[52] However, the Panel, to maintain the proper performance of the market and to stop the spread of those associated unwelcome events, does not require that potential offerors disclose their names or the outcome of their negotiations, but rather a general statement that talks are

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47- Panel's annual report, 31 March 1988. For criticism with respect to the Panel's unpublicized daily work, See, Johnston A., The City Takeover Code, p.42., supra 88/Ch.2

48- See Ch.5, Directors Fiduciary Duties and Insider Dealings.

49- The City Code, Note on Rule 2.2 provides that "A movement of approximately 10% should be regarded as untoward".

50- Panel statement on Argyll Group plc for the control of Distillers Group plc, Sept 10th,1985, noted by Morse G. (1985)J.B.L, 233.

51- Rule 2.3.

52- The City Code requirements.

taking place will suffice to fulfill the objective. Rule 2.4 provides that:

> ... until a firm intention to make an offer has been notified a brief announcement that talks are taking place (there is no requirement to name the potential offeror in such an announcement) or that a potential offeror is considering making an offer will normally satisfy the obligation under the rule.

The main point underlying this rule is designed primarily to prevent and stop the spread of rumours as well as speculation including side deals at profits (inside deals). It is argued that the City Code rules concerning an early announcement sometimes give rise to difficulties for both the offerors and the offeree's board of directors, especially when they are in the process of negotiation. The offerors may regard a pre-announcement as detrimental to their approach while they are still requesting further information. Their reasons may vary, for instance, they do not wish to trigger other competitors or be referred to the Monopoly and Mergers Commission at an early stage.[53] For the board of the offeree company, a prematurely announced offer, especially in certain doubtful circumstances relating to the process of negotiation, is regarded as operating against their shareholders best interests in particular where the process comes to an abortive end.[54] On the other hand, the Panel on Takeovers and Mergers, in the course of

53- Offerors sometimes do deliberately make a preliminary announcement for tactical reasons. See Johnston.A., The City Takeovers Code, p. 219, supra n.88/Ch.2; In such situations the attitude of the Panel is clear that, once a preliminary announcement is made, no offer can be withdrawn without a prior authorisation. See, The City Code Rule 2.7

54- Weinberg M.A and Blank M.V., Weinberg on Takeovers and Mergers, paras 1309 (4th edn), supra. n.19/ch.1

dealing with the problems of rumours, speculative buying shares and many other associated negative aspects, identifies some events which, wherever they are present, should be announced immediately. Accordingly, two sets of rules are provided by the Panel. The first set of rules focuses on the problems expected to arise prior to making an approach; and the second set of rules deal with such problems as arise during the currency of an offer.

B- ANNOUNCEMENT DURING A NEGOTIATION.

According to the City Code, announcements during a negotiation may take place: first, when a firm intention to make an offer is notified to the board of the offeree company, whether directly by the potential offeror or from a serious source; second, immediately upon an acquisition of shares which gives rise to an obligation to make an offer under Rule 9; third, when, following an approach to the offeree company, the offeree company is the subject of rumour and speculation or there is an untoward movement in its share price;[55] or fourth, when negotiations or discussions are about to be extended to include more than a very restricted number of interested people.[56]

The underlying purpose of an early announcement lies with the idea of balance of convenience between the interests involved and the expected detrimental effect as a result of delay. The Panel,

55- Under the City Code an announcement may also take place where "before an approach has been made, the offeree company is the subject of rumour and speculation or there is an untoward movement in its share price and there are reasonable grounds for concluding that it is the potential offeror's actions (whether through inadequate security, purchasing of offeree company shares or otherwise) which have lead to the situation". Rule 2.2 (d).

56- See the City Code, Rule 2.2.

therefore, insists that the balance of advantage resides in making an immediate statement which operates as an effective deterrent to such undesirable events.

C- RESPONSIBILITY FOR ANNOUNCEMENT OF OFFERS

(1)- OFFEROR'S RESPONSIBILITY

Rule 2.3 stipulates that:

> Before the board of the offeree company is approached, the responsibility for making an announcement can lie only with the offeror. The offeror should, therefore, keep a close watch on the offeree company's share price for any signs of untoward movement.

If the offerors are not intending to make an immediate announcement, the Panel requires to be consulted forthwith. Indeed, such a requirement may on occasion be very beneficial to shareholders to whom offers are intended. If there is no affirmation from the potential offeror, the Panel requires him to deny his intention. Consequently, the obvious implication following denial of an intention to make an offer may be that the City Code rules may deprive potential offerors who for one reason or other, are not willing to proceed with their offers at the time of rumours and speculation, of the opportunity to make another offer for the same company for a reasonable period (three months or more).[57]

(2)- OFFEREE'S RESPONSIBILITY.

According to the Code, there are two possible events which, wherever present, require an announcement as quickly as possible.

57- For Argyll Group plc, as a result of denial of intention, the agreed period was three to four months. See (1986)<u>J.B.L.</u> p.233; The City Code Rule 35 relating to restrictions following offers.

Firstly, where there are rumours, speculations or untoward movements in the target's relevant securities; and secondly, when discussions about an offer are expected to be extended to include quite a wide number of persons. In both situations the prime responsibility to announce is no longer with the offeror but it lies with the offeree's board and its advisers alone. Rule 2.3 provides that "Following an approach to the board of the offeree which may or may not lead to an offer, the primary responsibility for making an announcement will normally rest with the board of the offeree company". If there is an untoward movement, the target company is, by virtue of the relevant regulation, entitled to request the Stock Exchange to grant a temporary suspension. The offeror in this respect is prevented from deterring the offeree company action by either requesting the Stock Exchange for a suspension of dealing in its securities or from making a prompt announcement.[58]

One may conclude that practice illustrates that a considerable amount of speculations and rumours concerning a possible offer may occur. The Panel's attitude has always been to require that, whenever there is such a speculation or rumours, parties involved and their respective advisers should consider whether an appropriate announcement is required under Rule 2.2 of the City Code. However, the implication of the City Code with respect to potential or actual offerors are almost the same. A potential offeror who is not proposing to make an offer, for one reason or another, is required to issue a public statement denying his intention. As a consequence, this denial of intention will inevitably restrict him from making an offer for the same company for at least three

58- Rule 2.3 paras 2 and 3.

months or more.[59] Such restrictions equally apply to withdrawal of an offer without a good reason which the Panel considers justifiable. As regards suspension of dealings in the target undertaking's securities, unlike the French system, the British regulators prefer to keep the market unhampered. The main point is that the Panel empowers the target company to request the Stock Exchange suspension whenever it thinks fit but it never intervenes on its own initiative to do so. On the other hand the Stock Exchange appears reluctant (in respect of listed public companies) to grant a suspension of dealings in the target company's securities. Furthermore, even if it is permitted, the Stock Exchange will not generally grant a suspension for more than 48 hours.[60] In France, once an offer is submitted for approval, suspension of quotations is automatically taken by the relevant authority. This, in view of the French regulator, is considered vital.

3.2- FORMAL ANNOUNCEMENT OF OFFERS

A- ANNOUNCEMENT OF A FIRM INTENTION TO MAKE AN OFFER

The City Code, general principle 3 provides:

> "An offeror should only announce an offer after the most careful and responsible consideration. Such an announcement should be made only when the offeror has every reason to believe that it can and will continue to be able to implement the offer: responsibility in this connection also rests on the financial adviser to the offeror"

The basic nature of this provision is typically financial. But to some extent it is more general and it has a very wide range of implications. The question of how to form a firm intention to make

59- Rule 35.1; 35.2; and in particular Note (a) on Rule 35.

60- Note 1 on Rule 2.3 of the Code.

an offer is a more complex. Briefly speaking, offerors considering making offers always begin identifying the target company, studying the legal framework of the country in which the vulnerable company operates, in particular, the restrictions and tax implications.[61] National offerors are often familiar with such implications. Once a firm intention is formed, the offeror must also raise sufficient funds to implement its offer.[62] In this connection it is worthy of note that the responsibility for financial confirmation that the offeror is able financially to implement his offer in full lies also with the financial adviser of the offeror. Hence the financial information which is required to be disclosed in the offer document, including listing particulars, will not suffice. The vital point is that an offer document must contain a confirmation of a banker to that effect.

B- CONTENT OF AN ANNOUNCEMENT

Rule 2.5 of the Code lays down that when a firm intention to make an offer is announced, the announcement must contain:

> (i) the terms of the offer; (ii) the identity of the offeror; (iii) details of any existing holding in the offeree company. These include (a) which the offeror owns or over which it has control, (b) which is owned or

61- For further reading see mainly, Begg P.F.C, Corporate Acquisition And Mergers, at Ch.12, (London, Graham & Trotman Ltd., 1985); Weinberg and Blank, Takeovers and Mergers, Part 4, Ch16, Paras 1601-1962, supra n.19/Ch1; Earl & Fisher, International Takeovers and Mergers, Ch.7-8, supra n.41/Ch.1; Bird P.A, Accounting For Acquisition And Mergers, (1985)J.B.L 232

62- There are various methods through which an offeror may raise the necessary fund. These are: public offer; offer for sale; placing; and capitalization. Since such methods are outwith the scope of this thesis, readers are referred to the following writers: Pennington R.R, Company Law, (3rd. edn), Ch.8, p.203; (4th edn), Ch.6 p.137, supra n.17/Ch.1, Gower L.C.B, The Principles of Modern Company law, (1969), Ch.6, p.102, supra n.36 & 61/Ch1 controlled by any person acting in concert with the offeror, (c) in respect of which the offeror has received an irrevocable commitment to accept the offer, (d) in respect of which the offeror holds an option to purchase, (e) in respect of which any person acting in concert with the offeror holds an option to purchase; (iv) all condition to which the offer or the posting of it is subject; and (v) details of any arrangement including indemnity or option arrangements, and any agreement or understanding, formal or informal, of whatever nature, relating to relevant securities which may be an inducement to deal or refrain from dealing.[63]

Such details as should be contained in an announcement are by no means definite. Under the City Code there are various other obligations to be fulfilled namely, the obligation to post an offer document within the prescribed period; the obligation to disclose shareholdings; and the obligation to behave in an orderly manner in compliance with the relevant regulations.

SECTION FOUR: OFFER DOCUMENT AND CIRCULAR

4.1- OFFER DOCUMENTS

A- PREPARATION OF AN OFFER DOCUMENT

It is quite obvious that as far as an offer document is concerned, its preparation is the subject of various provisions, principally those of the F.S.A.1986, the City Code and the Stock Exchange. However, greater importance attaches to the problem of accuracy and fair presentation of information. Another crucial issue relates to the time as well as the relevance of information contained in documents.[64] The British City Code states that:

63- Under the French C.O.B Regulation, once a visa is granted, corresponding information is made available by the C.O.B to the shareholders of the target company. See C.O.B Regulation of 1989, supra n.1.

... any document or advertisement addressed to shareholders containing information or advice from an offeror or the board of the offeree company or their respective advisers must, as is the case with a prospectus, be prepared with the highest standards of care and accuracy".[65]

Rule 23.1 of the Code which is an amplification of general principle 5, indicates that such information must be adequately and fairly presented to shareholders involved. However, concepts which are difficult to define are "highest standard of care" and "fairness" of presentation of information. Moreover, the interpretation of such a words will ultimately be for the Panel on the City Code.

Concerning the amount of care to be taken during the preparation of an offer document, reference should be made first, to the statement of Lindly M.R. stated that "...the amount of care to be taken is difficult to define, but it is plain that directors are not liable for all the mistakes they may make, although if they had taken more care they might be avoided them...".[66]

The Panel states:

......in a normal circumstance, assuming good faith on the part of those involved, the Panel would simply require any deficiency to be made good, it would not lightly deprive shareholders of the opportunity to consider a bid on its merits if further information can

64- An offer document must include a statement in respect of the persons responsible for information contained in the document and also indicate where such a document is available for inspection. Corresponding requirements can be found in the C.B.V. and C.O.B. Regulations, supra n.1

65- General principle 5 of the Code. The ambit of the City Code Principles is, however, much wider. This may equally be noticed by reference to the French or the E.E.C Code of Conduct of 25th July 1977. (O.J No.L 212/37 of 20.8.77). But, perhaps, the surprising aspect appears to be that no Code of Conducts explained how question of care should be assessed.

66- Lagunas Nitrate Co. v. Lagonas Sydicate (1899)2 Ch.392 at 435, 15 T.L.R 436.

be given.[67]

But if an offer is made and offerors use diagrammes, charts and graphs or any other data, in the view of the Panel, they must be presented without distortion, the test of which is the materiality of fact.[68] If misuse of charts and diagrams is noticed the Panel may recommend corrections to be published within 48 hours.[69] In addition, the Panel urges parties to offers to take particular care to ensure fair presentation.[70] A similar concern was on the formulation of profits and dividends forecasts and assets valuation. In its statement, the Panel reaffirmed that the Code does not require profits forecasts to be correct provided they were prepared with due care.[71]

In referring back to the phrase "as is the case with a prospectus"[72] referred to in the Code, the leading case is the judgement of Kindersley V.C.[73] in terms which Page Wood V.C., in another case

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67- See Morse G., (1988) J.B.L. 323.

68- See further Kolodny K., Protection of Minority Shareholders After Takeover Bid, The U.K. and Ontario Compared, (1986)7 Co.Law. p.23, in particular footenote 60. The test adopted for materiality of facts in the circular is as follows : "an omitted fact is material if there is substantial likelihood that a reasonable shareholders would consider it important in deciding how to vote"

69- The Panel statement on John Finlan, a property and construction development group's offer for the control of Lincroft Kilgour; Lester D.J, Misleading Takeover Circulars (1985) 6 Co.Law., p.98.

70- Ibid.

71- Panel statement of February 12th, 1985 of Racal Electronic plc's offer for Chubb and Son plc, noted by Abrams C. (1985)6 Co.Law., p.232.

72- Unlike a prospectus, an offer document has nowhere been defined. S.744 of the U.K Companies.Act 1985 defines a prospectus as "any document notice, circular, advertisement, or other invitation, offering to the public for subscription or purchase any share in or debentures of a company". For more details see, Pennington R.R, Company Law, (4th Edition), p.219-255 , supra n.17/Ch.1.

described as a "golden legacy".[74] At present this is known as the "golden rule". The principle laid down by Kindersley V.C. is mainly directed to those responsible for the issue of prospectuses inviting persons to subscribe for, purchase shares in or debentures of a company, or for other purposes determined by the prospectus so issued. Kindersley V.C, indicated:

> Those who issue a prospectus, holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge the existence of which might in any degree affect the nature, or extent, or quality, of the privileges and advantages which the prospectus holds out as inducements to take shares.[75]

The court has been particularly strict in insisting that a prospectus must not contain information which is untrue or misleading or contains interpretations other than those officially given by the relevant authority which an investor may consider true.[76] The other common feature of all document is the problem of using ambiguous languages and statements.[77] In order to close

73- New Brunswick. Co. v. Muggeridge (1860) 1 Dr. & SM 363, 383.

74- Henderson v. Lacon (1867) L R 5 Eq. 249 at 262. See Gower L.C.B, The Principles of Modern Companies Law, p.325-6, supra n.36 and 61/Ch.1.

75- Supra n.73

76- This principle has received approval and support of various subsequent judicial decisions over the years, for a brief discussion, Powell J.L, Issues and Offers of Companies Securities: The New Regimes (London, Sweet & Maxwell, 1988), p.72 ; Pennington R.R., Company Law, (1979), p.219, Supra n.17/Ch1

77- A number of resolutions were set aside by the court because of a "Tricky" circulars. See Kaye v. Croydon Tramways Co. (1898)1.Ch.358; Tiessen v. Henderson (1899)1 Ch.861; Baillie v. Oriental Tel Co. (1915)1 Ch.503, Noted the gap, the City Code states that the language used in a document or advertisement should clearly and concisely reflect the positions being described.[78] Moreover, sources for any fact which is material to an argument must be clearly stated, including any detail to enable the significance of the fact to be assessed.[79]

B- CONTENT OF AN OFFER DOCUMENT

Both in the U.K and France an offer document must contain provisions specifying certain minimum standards of information.[80] Once an offeror has expressed his intention to make an offer, the offer document must contain, first and foremost, the following basic information[81]:

(1) DISCLOSURE OF OFFERORS INTENTION

Both countries' requirements, in this context, are common. Under the U.K City Code, for instance, Rule 24 stresses that an offeror seeking to acquire control of another company is required to reveal his intention regarding the target company's continuation of

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by Gower L.C.B., The principles of Modern Company Law, part 5 p. 443, supra n.36 and 61/ Ch1.

78 - City Code, Rule. 23.2 of the Code. See also supra n.79.

79- City Code, Rule. 23.2 not 2(a).

80- In practice, an offer document is almost always sent by a marchant bank acting on behalf of the offerors concerned or by an intermediary who is authorised person. Presumably, the reason underlying such policy lies in the fact that the governing body of the bank are better aware of the implication of the regulation in force.

81- It is important to emphasize the Panel Appeal Committee's view that "..information given at the time of a bid cannot be wholly divorced from pre-bid information which the shareholders have been given or ought to have been given", Statement of the Appeal Committee of the Panel on Leasco /Pergamon Press takeover offer, noted by Weinberg M.A, Takeovers and Mergers, (4th edn), para 1134, supra n.19/Ch.1

business and also to state any substantial changes sought to be undertaken including any redeployment of the fixed assets of the target. The offeror is also required to set out and plainly justify the long-term commercial strategy of the proposed offer and to give commitment on the continued employment and the offeree subsidiaries. In France, in addition to the disclosure of identity and characteristics relating to the initiator, an offeror must disclose his intention in respect of the industrial, financial and social policy for the future 12 months. The offeror is also required to disclose the significance of his offer.[82]

(2) DISCLOSURE OF FINANCIAL INFORMATION.

According to Rule 24.2 of the City Code, an offer document should contain at least the following major information regarding the offeror, the offeree and, whether the consideration is securities or cash. These are:

> (1) For the last 5 financial years for which the information has been published, turnover, net profit or loss before and after taxation, the charge or tax, extraordinary items, minority interest, the amount absorbed by dividends and earnings and dividends per shares; (2) a statement of the assets and liabilities shown in the last published audited accounts; (3) all known material changes in the financial or trading position of the company subsequent to the last published audited accounts or a statement that there are no known material changes; (4) details relating to items referred to in (1) above in respect of any interim statement or preliminary announcement made since the last published audited accounts; (5) inflation adjusted information if any of the above has been published in that form; (6) significant accounting policies together with any points from the

82- Art.7 para 2 and 4.of C.O.B Regulation provides that "....Ses intentions pour les 12 mois à venir relatives à la politique industrielle, financière et sociale des sociétés concerneés.....; La teneur de son offre." C.O.B Regulation No.89-03, supra n.1.

notes to the accounts which are of major relevance to an appreciation of the figures; and (7) where the offeror is a company, the names of its directors.

Where the offer involves the issue of unlisted securities Rule 24.10 requires an estimate of the value of such securities by an appropriate adviser which must be contained in the offer document and in any subsequent alternative addressed by the offeror. The offer should also reveal whether or not the offeror intends to resort to compulsory acquisition powers conferred on it by virtue of the Companies Act, 1985.[83] Finally, in case of a securities exchange offer, the offer document must indicate the amount of shares of the offeror which the offeror has redeemed or purchased during the previous 12 months ending with the latest practicable date prior to the posting of the offer document and the details of any such redemption and purchases, including dates and prices.[84] In France, corresponding requirements with respect to disclosure of financial information can be found in both the C.B.V and C.O.B. Regulations.

(3) DISCLOSURE OF SHARE OWNERSHIP

As originally introduced, both countries' relevant provisions would require disclosure of certain preliminary information pertaining to share ownership before a person acquires control, whether by cash or on an exchange of securities basis. The underlying reason for this requirement seems twofold. First, to identify the acquirers as well as their position of control or influence over the target company. Second, it is unlikely to leave

83- Companies Act 1985, Sect. 428 as repealed by the F.S.A.1986; Rule 24.9 of the City Code. Compare with the C.B.V and C.O.B requirements contained in the 1989 Regulations, supra n.1.

84- Rule 37.4 (b) of the Code.

shareholders involved unaware of any prior knowledge about the potential change of control of their company. Thus, both the U.K and France require an offer document to reveal information relevant principally to shareholdings of the offeror in the offeree company; the shareholdings in the offeror and in the offeree company; the shareholdings in the offeror and in the offeree company which any persons acting in concert with the offeror own or control; details regarding any arrangement or agreement.[85] When an arrangement exists with any offeror, with the offeree company or with an associate of any offeror or of the offeree company in relation to relevant securities, details of such arrangements are required to be immediately disclosed, whether or not any dealing takes place[86] In view of both the U.K and France regulators, if a person is party to an arrangement with an offeror or an associate of that offeror not only will this render such a person associate of that offeror but it is also likely to mean that such person is acting in concert with him.[87]

85- See the U.K City Code, note 6(b) on Rules 8.1 (dealings by parties and by associates for themselves or for discretionary clients); Rule 8.2 (dealings by associates for non-discretionary clients); and Rule 8.3 (dealings by 1% shareholders). Compare with Art.7 of the French C.O.B Regulation 1989 No.89-03, supra n.1

86- Ibid. For the purpose of the U.K. City Code, an arrangement includes any arrangement or understanding, formal or informal, of whatever nature relating to relevant securities which may be an inducement to deal or refrain from dealing.

87- See also Note 3 on Rule 9.1 (directors of company presumed to be acting in concert) and Rule 25.3 (shareholdings and dealings); See the French C.O.B. Regulation No.89-03 , Art. 7 and 4. See also Loi No 89-531 relating to Security and Transparency of the Financial Market, supra n.5/Ch.2.

4.2- TERMS AND CONDITIONS OF AN OFFER

A- TERMS OF AN OFFER

An offer document often states that the target undertaking's shares will be acquired free from all charges and encumbrances and together with all rights attached to them, including the right to receive benefits such as dividends, or any other distribution of income. Concerning the acceptance period, the offer, whether revised or not, shall not be capable of being extended nor of being kept open after the final day on which it is due to expire[88] unless it has previously become unconditional. However, the offerors may, and sometimes do, reserve the right, provided that permission is granted, to extend the offer to a later date deemed necessary.[89] Offer documents usually contain terms and conditions relating to the type of shares allocated to shareholders and rights thereupon.[90] However, wherever an exchange of securities offer is involved, further obligations are triggered, for example, the obligation to comply with the Stock Exchange Listing particulars.

B- CONDITIONS OF AN OFFER

Takeover offers are always made by means of an offer document, identical copies of which are sent to all shareholders concerned. But the policy of the relevant regulators towards the communication of such copies differs radically between U.K and

88- An offer is not allowed to exceed the 60th day after the day the offer was initially posted. Rule 30.1 & 31.6 of the City Code.

89- Ibid

90- In general, considerations which practically used to finance an offer, are; stock unit and cash, stock unit and convertible preference shares; cash plus convertible preference shares; all securities or all cash; ordinary shares and loan stock and the like.

France. According to the U.K City Code, copies of all documents bearing on an offer must be lodged with the Panel at the time of their issue. In France, no issue or communication of documents is permitted to be made without prior approval by the authority of the Bourse de Valeurs (both the C.B.V. & C.O.B.). Furthermore, the City Code seems to adhere to the policy that an offer document should always and invariably be made conditional upon obtaining the minimum level of the percentage of shares stipulated therein, which is 50% or more of the voting rights control in the target company.[91] In other words, the offer lapses if such a condition is not fulfilled. Alternatively the offeror involved is under no obligation to buy any excess. In France, the C.B.V. and C.O.B. regulations impose parallel conditions. Concerning the level of control, Article 5.2.2 of C.B.V. Regulation requires an offeror to acquire (together with shares already held in the target company) an amount of voting control equivalent to 2/3 (65%) of the target company's share capital.[92]

C- MERGER REFERENCE

Offerors seeking to acquire control of a target company are required to make it clear that the offer in question is conditional upon obtaining a mergers control clearance.[93] Additionally, a

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91- Rule 10 of the City Code provides that "it must be a condition of any offer for voting share capital which, if accepted in full, would result in the offeror holding shares carrying over 50% of the voting right of the offeree company that the offer will not become or be declared unconditional as to acceptance unless the offeror has acquired or agreed to acquire (either pursuant to the offer or otherwise) shares carrying over 50% of the voting rights attributable to (a) the equity share capital alone; and (b) the equity share capital and the non-equity share capital combined". No corresponding condition is provided in France.

92- See Art.5.2.2 of the C.B.V Regulation 1989.

93- In France, an authorisation from the competition authority is statement must also be included in the document in respect of whether or not such an offer is expected to be referred for investigation by the Monopoly and Mergers Commission. But, this does not mean that the offeror will escape from any obligation if its offer lapses as a result of a reference. Note 1 on Rule 9.4 provides that:

> ... if an offer lapses on reference to the M.M.C, the obligation under the Code will not be affected as in relation to acceptance which will cease to be bound. Accordingly, if a subsequent clearance is given, the offer must be reinstated on the same terms and at not less than the same price as soon as practicable. If the offer is prohibited, offerors cannot be allowed to proceed.[94]

In France, the relevant authorities stress that the announcement of an offer does not mean an approval with respect to control of concentration is granted. Consequently, the initiator of an offer is required to notify the Ministry of Economy (direction générale de la concurrence et de la consomation).[95]

D- RESERVATION OF THE RIGHT TO WAIVE ANY CONDITION

Offerors may, and often do, reserve the right to set aside any statement, waive any condition and discharge any responsibilities as deemed appropriate. Save with the consent of the Panel, the offer will lapse unless all conditions have been fulfilled within 21 days after the date on which the offer becomes unconditional. Accordingly, if the conditions specified in the offer document have not been fully implemented, the offeror reserves the right to discharge without prejudice, of any acceptance. Settlement of the

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required to be obtained beforehand. See C.B.V Regulation, 1989, Art. 5.2.10

94- See Rule 9 of the City Code.

95- C.B.V's Regulation,1989, Art.5.2.10.

consideration to which any target undertaking shareholder is entitled to under the offer will be implemented in full in accordance with the terms set out in the document. It is worthwhile mentioning that in France, where an offer is declared unsuccessful, a corresponding requirement relating to discharge of acceptance can be found in both the C.B.V. and C.O.B. regulations. If the conditions specified in the offer document have been fully implemented and there is an excess of acceptances, the offeror reserves the right either to accept the whole excess or to proceed with a reduction on a pro rata basis.[96]

4.3- KIND OF CONSIDERATION OF AN OFFER

In both the U.K and France the form of consideration offered in conjunction with an offer may be in cash, securities, or a combination of securities and cash.[97] The relative distinction between these three sort of considerations depends largely on various factors notably, taxation. For example, an exchange offer is always effected tax-free whereas a cash offer is generally taxed. Such forms of consideration will be discussed in turn.

A- CASH OFFER

Experience demonstrates that foreign offerors seeking to acquire a locally resident company often proceed with cash offers rather than offering an exchange of securities. This is because of legal, fiscal and monetary obstacles that still exist in many countries. Payment of a cash offer, depending on an arrangement, may also be deffered to a future time. This is called "deferred cash

96- Ibid.

97- See, for example, Art.5.2.3 of C.B.V. Regulation, 1989 offer". If a deferred cash offer is proposed and subsequently accepted by the target shareholders, such a device is viewed as borrowing the acquisition funds from the target company rather than from the bank.[98] One of the major implications of deferred cash offers is that, once shareholders of the target company receive cash at the deferred date and upon the agreed price at the date the contract is concluded, they cease to have any voting rights or interests either in the target company or in the acquiring company.[99] Second, the stamp duty becomes relevant once the full amount is received by the seller. This means that any sale of shares in a company for cash is an event which is potentially taxable and that tax liability in such a situation is generally deferred until the shareholder concerned receives his full amount in cash.[100] Hence, stamp duty is triggered whenever a shareholder obtains the deferred cash payments for his shares. Alternatively, if he agrees to accept new shares of the acquiring company in return for his holdings already transferred, he will normally be treated for tax purposes as a shareholder in the acquiring company and, therefore, will benefit from the available exemption. Finally, if potential offerors decide to offer cash for the shares of the target company, the obvious implication may be that directors, although their decision may suffice, are also required to obtain the approval of their shareholders in respect of raising the finance necessary for the implementation of the intended takeover in the company's general meeting.

98- Peter & Fisher, International Takeovers & Mergers, at p.38, supra n.41/ch.1

99- Ibid

100- Ibid

B- EXCHANGE OF SECURITIES' OFFER

Unlike the cash offer, a securities exchange offer is often assimilated economically and commercially to legal mergers.[101] Exchange offers give rise to problems of shareholders choice between alternatives. This is where some shareholders prefer cash instead. In this connection banks often intervene to provide a settlement.[102] But the question is if an offer document contains an option of a cash alternative, should the offeror be obliged to acquire shares at the same price as in relation to the terms of the offer or should it consider a cash alternative as a distinct and separate document from the offer document and purchase shares on the terms negotiated with the bank involved or to buy shares offered at the indicated price as in relation to the offer document. First of all, questions of qualification arise.

As regards qualification of the bank offer, Britman J. stated:

> it appears to me that the cash alternative can properly be described as a 'put option' exercisable against a third party, and that such 'put option' is a term which forms part of a scheme ...involving the transfer of shares...in a company to another company. Indeed it forms a most essential part of the scheme, because it is manifested from the offer document...[103]

Others argue that it quite clear that the underwritten cash offer is a separate offer made by the offerors' bank, to the shareholders in the offeree company. Weinberg pointed out that:

> Unless this is clear and the two offers are separate offers, then there

101- See chapter one of this thesis, Definitional Framework of mergers and takeover offers.

102- See, Begg P.F.C, Corporate Acquisition And Mergers,, supra n.61.

103- Re Carlton Holdings Limited - Worster v. Priam Investment Limited (1971)2 All ER 1082 at 108, (1971)1 W.L.R.918..

> is a danger that the underwritter cash offer will be treated as part of the main offer so that when the offeror comes to exercise its rights...it will have to make a comparable cash offer from its own resources to the offeree shareholders not withstanding that the underwritten arrangements are at an end.[104]

What matters for the shareholder, in fact, is to be treated fairly and at not less favourable terms in relation to those who preferred the exchange or cash alternative. Questions of distinction appear to have a little relevance. Thus, concerning the price consideration expressed in the underwriting document, it applies, subject to the type or characteristics of shares held, to all shareholders concerned on an equal footing.[105] Appendix 1(5) of the Code, in respect of underwriting and placing, provides that:

> ...in cases involving the underwriting or placing of offeree company securities, the Panel must be given details of all the proposed underwriters or placees, including any relevant information to establish whether or not there is a group acting in concert, and the maximum percentage which they could come to hold as a result of implementation of the proposals.

Rule 33.2 of the Code, grants the offeror the choice not to be bound to keep that alternative open in accordance with the main offer requirements. This rule states:

> ...where the value of a cash underwritten alternative provided by third parties is at the time of announcement, more than half the maximum value of the offer, an offeror will not be obliged to keep that alternative open in accordance with Rules 31.4 or 33.1 if it has given notice to shareholders in writing that it reserves the right to close it on a stated date, being not less that 14 days after the date on

104- Weinberg M.A. and Blank M.V., Weinberg and Blank on Takeovers And Mergers,(4th edn), Para. 1393, footnote 3, supra n.19/Ch1

105- Ibid, at paras. 1394-5,

which a written notice is posted, or to extend it on that stated date.

However, the most striking feature of this rule is that it seeks to establish a balance between the interests of shareholders and those of the underwriters. Furthermore, to keep an orderly market, Rule 33.2 urges the issuers of underwritten cash alternatives not to announce any notice between the time when a competing offer has been announced and the end of the resulting competitive situation.

4.4- OFFEREE COMPANY'S CIRCULAR

A- ISSUE OF A CIRCULAR

Once discussion between parties to the offer is terminated, the offeree directors issue a circular explaining their attitude to the proposal. For the shareholders, of course, there can be no doubt that both the offer document and circular are compiled and read together. If there is opposition, the directors who decided to resist an unwanted offer will doubtless produce and communicate their opposition through the means provided and the battle of circulars begins as a result. It is in such a situation that uncertainty about the proposed offer becomes manifest. It should be noted, however, that while in U.K, it would seem a circular requires no authentication, in France the authentication by the relevant supervisory bodies is vital and cannot be avoided.

Assuming the approval is granted, the offeree directors like the offeror, whether by virtue of the City Code provisions or the C.B.V regulation, are required to circulate their views about an offer in a prescribed form, the so called "circular", to their own shareholders. It is interesting to reiterate that, in the U.K. a circular issued by the target company directors recommending either acceptance or rejection of the offer is totally governed by the City Code. Apart from this, the question which may arise is whether the target company's directors have a power to refuse to accept an offer document if it is misleading, incomplete or worthless compared with the value of their company's securities. Actually, if an offer document is deemed to be misleading, the only role of the directors concerned is to report such anomalies to the competent authority for decision.[106] In the view of the regulators such anomalies should not be used as a ground for frustrating bona fide offers.[107] Consequently, if an offer document contains false statements, various civil and criminal proceedings may be taken against the persons responsible for it, principally the offeror. By the same token, if an offer document contains incomplete information or contains information other than that required to be provided, the question then is a matter of compliance which is the responsibility of the supervisory body to bring the action against the defaulter.

As regards civil and criminal liabilities, the U.K. F.S.A 1986 contains various provisions which deal principally with any person making false, misleading or deceptive statements, promises or forecasts. Such provisions are applicable if the circular is made dishonestly to defraud or deny the shareholders involved an opportunity to decide correctly on the merit of offers. This, indeed, may lead to civil or criminal proceeding depending on their actual or perceived effects.[108]

106- In France, both an offer document and circular are subjected to prior examination by the relevant authority. See for example, Art.5.2.5 to 5.2.7. of the C.B.V. Regulation.

107- In the U.K., the Panel requires that any anomaly be corrected and published within 48 hours.

108- See infra, Chapter 4 "Protection of Shareholders"

B- CONTENT OF A CIRCULAR

In addition to the requirements with respect to disclosure of share ownership,[109] by virtue of Rule 25.4 (a) and (b) and Rule 25.5 respectively, an offeree directors' circular must contain all relevant information as to directors service contracts entered into or amended within 6 months of the date of document or where such contracts have more than 12 months to run. Directors, in advising their shareholders on the merits or demerits of an offer, must also disclose any arrangement in relation to dealing in securities by or on their behalf of whatever kind. Finally, the offeree board's circular must indicate the amount of relevant securities of the offeree company which the offeree company has redeemed or purchased during the period commencing 12 months prior to the offer period and ending with the latest possible date prior to the posting of the offeror document. Such a circular must set out all relevant details of any such redemption and purchases, including dates and prices.[110]

4.5- COMMUNICATION AND DISPLAY OF DOCUMENTS

In fact, the U.K. involvement in the conduct of takeovers is radically different from the French one. While in France, an offer document is required to be sent, in the first instance, to the C.B.V., a copy of which is addressed to C.O.B. to exercise its prior control on the content, in Britain the offeror is entitled to communicate directly with the target company. Under the City Code, once a firm intention is publicly made, the offeror is obliged to send its offer document to the target company's board within a period of 28 days

109- Rule 25.3 of the City Code.

110- Rule 37.3 of the City Code

starting from the date the intention to make an offer is announced. It may also be notified to the target company's advisers. If the offer is made by an agent, the principal's identity must be disclosed. Provided that the board of the target company is satisfied that the offeror is, or will be, able to implement the offer in full, the directors of the offeree company are obliged to publish immediately a circular containing their advice and views on the merits or demerits of the proposals. But if an approach is made which may or may not lead to an offer, a premature announcement must be made by both the offeror and the offeree company.

Both countries regulations require that copies of the following documents must be made available for inspection at the place indicated in the offer document. Such copies should remain open for consultation throughout the period of the offer. These are: (1) The memorandum and articles of association of both the offeror and the offeree company; (2) Their published accounts for the preceding financial years, usually 5 years, prior to making the offer or be involved;[111] (3) Directors service contract entered into with the previous years otherwise than in the ordinary course of business;[112] (4) Statements of the financial advisers (confirmation) as well as those of the valuer of securities;[113] (5) The offer document; (b) The listing particulars approved by the Stock Exchange authority relating to the offeror;[114] (6) Any document

111- See respectively, the U.K Companies (Table A To F) Regulations 1985 ((S.I. No.805/1985) and the French Loi No.66-531 of 1966 as amended.

112- The City Code requirements as amended and C.O.B Regulation No.89-03 of 1989, supra n.1.

113- Ibid.

114- The Stock Exchange requirements. See also Part IV of the F.S.A 1986. relating to listing provisions.

evidencing an irrevocable commitment to accept an offer;[115] (7) Written consent of accountants, lawyers or financial advisers in respect of the offer or any other document whether or not made at the time the offer is formally announced.[116] (8) Where profits and dividends forecasts including assets valuation are announced, a report of the auditors or consultant accountant and the financial advisers scheduled with letters of consent as well as evaluating certificate must be joined and made available for consultation.[117] Finally, a copy or copies of each document on display must, on request, be made available by offeror or the offeree company to each other as well as to any rivals in accordance with the City Code requirements.[118]

SECTION FIVE- EFFECT OF SUBSEQUENT RIVAL OFFERS

5.1- LEGAL EFFECTS

A- WITHDRAWAL OF OFFERS

As a matter of general law in France and self regulatory practice in the U.K., once an offer is publicly announced, it becomes irrevocable. To illustrate, in the U.K. Rule 2.5 of the City Code requires that "the announcement of a firm intention to make an offer should be made only when an offeror has every reason to believe that it can and will continue to be able to implement the offer". In consequence, Rule 2.7 stipulates that:

> when there has been an announcement of a firm intention to make an offer, the offeror must, except with the consent of the Panel, proceed with the offer unless the posting of the offer is subject to the

115- C.O.B. and C.B.V requirements, supra n.1.

116- C.O.B and the City Code requirements.

117- The City Code, Rule 24 et seq.

118- See Rule 19.4 and 19.6

prior fulfillment of a specific condition and that condition has not been met".

As a protective measure against any breach of the relevant regulation, the offeror may sometimes include in its offer document provisions which enable it to escape from prejudicial obligations such as the withdrawal of its offer if a subsequent competitive offer is announced. This clause has been clarified and permitted by the City Code. Note 2 on Rule 2.7 provides that "An announced offeror need not proceed with its offer if a competitor has already posted a higher offer...". In France, if an offer is followed by a competitive offer, the initiator, by virtue of the C.B.V Regulation, is allowed either to proceed with his offer or to withdraw. In which case, the relevant authority bring to the attention of the shareholders concerned the initiator's final decision.

B- WITHDRAWAL OF ACCEPTANCE

There are various instances where shareholders' prior acceptance of an offer ceases to be binding. Notably, the offer lapses on a reference to the M.M.C., the withdrawal of a no extension statement, where the offer is unsuccessful as to acceptance, and if the initial offer is followed by a higher offer. In any of these cases the offer document must make it clear that, wherever any of the above cited circumstances arise both the shareholders and the offeror will thereafter cease to be bound by prior acceptance.[119] Apart from these exceptional factors cited above, normally, if a

119- Rule 12 of the Code; Rule 13 Note 2, as regards the invoking conditions, provides that "An offeror should not invoke any condition so as to cause the offer to lapse unless the circumstances which give use to the right to invoke the condition are of material significance to the offeror in the context of the offer...".

shareholder has already accepted the initial offer, he is legally bound to transfer his shares for the consideration stated therein. This is because the acceptance of an offer produces a binding contract between the seller and the buyer, and not merely create the possibility of such a contract coming into existence in the future.[120]

C- WITHDRAWAL OF DIRECTORS' STATEMENTS

Usually any offeror is categorically bound by the issue of any statement as to the duration of his offer.[121] It is equally important to mention that, technically, the issue of such a kind of statement may induce shareholders to whom the offer is intended, to make a pressured decision with respect to the sale of their holding. According to the City Code requirements, if an offeror has already issued a statement in respect of the duration of his offer and at the time of making the statement has not reserved the right to set it aside he is not allowed to introduce changes thereafter. The corresponding implications of the issue of the statements are: first, the offeror will be deprived of the right to extend his offer beyond the stated date in the statement; second, he cannot revise his offer even if his offer has not yet reached the amount of acceptance stated in the offer document. However, in most instances, offerors prefer reserving the right to withdraw a no extension statement because it solely operates to their advantage. Thus, if a competitive situation arises after a no extension statement has been made, the issuer, as Note 2 on Rule 31.5 provides, can choose not to be bound

120- Ridge Nominees Limited v I.R.C supra n.118/Ch.1; Pennington R.R, Compny Law, p.804 (1979), supra n.17/Ch1

121- Rule. 31.5 of the City Code.

by it and is to be free to extend, revise or withdraw his offer provided that first, notice to this effect is given as soon as possible (and in any event within 4 business days after the day of the announcement of the competing offer) and shareholders are informed in writing at the earliest opportunity; and second, any offeree shareholders who accepted the offer after the date of the no extension statement are given a right of withdrawal for a period of 8 days following the date on which the notice is posted. In France, there exist no corresponding provisions in the context as those contained in the City Code.

D- PRIOR COMMITMENTS TO ACCEPT AN OFFER

In the U.K, an offer is always conditional on the offeror receiving acceptance which, together with shares already owned, results in the offeror holding shares carrying more than 50% of the voting rights. In a competitive offer situation the question is whether prior commitments to accept an offer (the initiator's offer) remain valid? Admitting that where two or more companies make at the same time their offers competitively for the control of the target company, the shareholders to whom such offers are addressed, so as to preserve their liberty of choice, may defer accepting any offer till the latest possible time before the offers close. In consequence, if a shareholder accepts an offer as soon as it is made he cannot withdraw his acceptance.[122] But the matter, in question, is concerned with prior engagements which an offeror may collect to support his offer. In both countries prior commitments to accept an offer have long triggered the relevant authorities attention. In the U.K., the Board of Trade drew attention

122- Pennington R R , Company Law, (1979), p.804, supra n.17/Ch.1

to a practice whereby directors, pursuant to an agreement or understanding with the offeror to accept a bid, bind themselves not to recommend any subsequent competitive offer.[123] Since such a practice is deemed to be detrimental to the interests of shareholders, the Department of Trade requires parties involved in an agreement to provide the terms of any "provisional agreement", by which the target company's directors bind themselves to accept the offer.[124] The City Code requires that "References to irrevocable commitments to accept an offer must make it clear if there are circumstances in which they cease to be binding, for example, if a higher offer is made".[125] In France, a distinction should be drawn between acceptance of an offer where shareholders of the target company order their intermediaries to sell their shares to the preferred offeror and irrevocable commitment to accept offers. With respect to the acceptance of an offer, it does not generally gives rise to any difficulties.[126] As for prior commitments to accept an offer, the French relevant authorities consider them valid provided that such engagements are officially notified to C.O.B. in advance.[127] However, during the period of an offer, no agreement which may distort the performance of the Bourse, is allowed to be concluded.[128]

123- Jenkins Committee Minute 1577, noted by Weinberg, Takeovers and Mergers, paras 1129, supra. n.19/Ch1

124- Ibid

125- City Code, Rule 24.3 Note 5.

126- Acceptance of an offer can be withdrawn at any time during the period of the offer under consideration. See Art. 5.2.12 of the C.B.V's Regulation 1989, supra n.1

127- See, M.Z Biderman and others v. Primistère and others, supra n.48/Ch.1.

128- See, C.O.B Regulation No.89-03, Art.4, supra n.1

E- EFFECT OF HOLDING STATEMENTS

Rule 20 of the City Code stipulates that "parties to an offer must take care not to issue statements which, while not factually inaccurate, may mislead shareholders and the market and may create uncertainty". The scope of this rule is wide ranging. It extends to catch those potential offerors who, for tactical reasons, may issue statements setting out that they are considering making a competitive offer while the initial offeror is in the immediate period of its offer. Since such ambiguous statements are deemed to be undesirable for both the offeror and the offeree shareholders, the Panel requires that it is intolerable and unacceptable for such statements to remain ambiguous for more than a limited time, particularly in the later stages of the offer period.[129] In addition, the maker of this kind of a statement does not escape from the obligation to make a prompt announcement or denial of his intention. Failure to do so will inevitably entail serious consequences such as a delay of at least 3 months before making another offer for the target company.[130]

5.2- FINANCIAL EFFECTS

Although the financial implications of competitive offers on each other fall outside the scope of this study, a brief outline would appear necessary. Regardless of whether or not the subsequent competitor has been invited to participate by the target company's directors, there are various financial elements that competitors will prepare on the basis of what is already proposed by the initial offeror. In general, the potential competitor will consider the present value and future earning prospects of the target company,

129- Note 1 on Rule 20

130- Rule 35 of the Code.

and the nature and the amount of consideration proposed by the initial offer. Indeed, in this respect, frequently the offeror's financial adviser, usually a bank, accountant and auditors will assist him in his process of analysis. Equally, the offeror will seek to borrow or raise the necessary funds to implement his offer in full. The offeror may also consider the amount of outstanding securities of the target sought to be acquired compared with the original offeror's proposal. In addition to the implication on the market for the shares of the target once its offer is announced. Another consideration which is also vital relates to tax implications of any proposed transaction. Inevitably each element considered by the potential offeror will have great financial effects on the actual offeror. Naturally, most offerors, nowadays, raise sufficient funds to the extent that will enable them to implement their objective, i.e, gaining control. The problem of extra funds emerges where the initial offeror may not consider the likely effect of potential competitors. Besides, no-one can deny the burden of cost involved and time consumed for the initial offeror to reconsider his position in the light of the new situation. Take, for instance, Rowntree's case. The amount of the £2.3 billion Nestlé final offer was, in fact, dictated not by Nestlé nor even by Rowntree,[131] but by the dawn raid from Jacobs Suchard which induced and reactivated Nestlé. Comparing both competitors, Suchard and Nestlé, the former was far from matching the financial power and preparation of the latter rival. These were: turnover 6.1 (35.29 bn); net profits 265 m (1.8 bn); operating profits 471 (3.7 bn); cash flow 394 m (3.0 bn); net

131- Nestlé was, over one year, looking for a mutual deal, a method of achieving expansion and growth objectives. Until Suchard acted, Nestle had bought no Rowntree shares because it hoped to implement its friendly deal. See further The Times, April 27th 1988, p.25 & 27.

profit per share 530 (537); shareholders funds 1.1 bn (12.7 bn); sales 3.5 bn (2.8 bn) staff 16,000 (163,000).[132] It is worthy of note that the offer price, during the immediate period of the competitive offer, had reached 90% higher than that preceding the dawn raid and 52 % above its pre-October peak of 585 pence.[133] This, perhaps, may illustrate the financial implications of competitive offers on each other as well as the Stock Market reaction. Legally, however, the British regulator does not impose any financial conditions to be observed by a subsequent rival only in so far as those provisions concern the necessary funds to implement the intended offer in full and the condition that an offer must be made at not less favourable terms compared with the initial offer price. By contrast, in France, the relevant regulator requires that a competitive offer must exceed at least 2% of the original offer price at the time the competitive offer is made.

5.3- EFFECT OF A MERGERS REFERENCE

Like many takeover problems, the typical instance that has triggered attention has been when two offers are made more or less successively for the control of a target company, one of which merits reference for investigation whereas the other rival does not.[134] During the review of the previous procedure of merger control in the U.K, the government's major concern was to find an effective and flexible means to handle such problems wherever they might arise.[135] Accordingly, various alternatives or propositions have been advocated. One alternative to deal with the

132- Ibid.

133- Ibid

134- See D.T.I., Mergers Policy, Annex F, p.40, supra n.21.

135- Ibid.

problem, it is submitted, is that it would be for the government to abandon the current practice of ensuring, either by obtaining undertakings or by making orders, that the proposed mergers should not be allowed to go ahead while the investigation is in progress and to adopt measures of demerger in the event of an adverse finding by the Commission instead.[136] The other alternative for dealing with the problem is to impose a restraint on share dealing of the target company so long as one offer is under investigation.[137] Both propositions face criticism by those who prefer that all offers should be blocked until final clearance. One argument lays stress on the problem of the unfairness to the referred offeror, whose opportunity to implement his takeover transaction, if cleared by the M.M.C thereafter, is diminished or removed if a rival offer is successful in the meantime.[138] In addition, blocking one rival but not both will distort the good performance of the market for the control of the target company. Likewise, even in the absence of rivals, the fact that an offeror is referred to the M.M.C. would, in addition to delay, enable the target company extra time to organize its defenses successfully and, thus, allow it to defeat a bona fide offeror or at least to induce him to withdraw his interests.[139] It is worthy of note that under the City Code, even if an offer lapses on reference, the obligation to make an offer may not come to an end. That is to say, the offeror still has to proceed with his offer unless prohibited by the competition rules.

The government's position was made clear in the Companies Bill 1989. Clause 100 of the Bill, sub-section 14 (A) states:

136-Ibid, at p 40, para 3.
137- Ibid at para 5.
138- Ibid.
139- Ibid.

> ...where a merger reference is made under this section, it shall be unlawful, except with the consent of the Secretary of State under subsection (4C) of this section (a) for any person carrying on any enterprise to which the reference relates on having control of any such enterprise or any subsidiary of his, or (b) for any person associated with him or for any subsidiary of such a person, directly or indirectly to acquire, at any time during the period mentioned in subsection (4b) of this section, an interest in shares in a company if any enterprise to which the reference relates is carried on by or under the control of that company.

The Bill describes the circumstances in which a person acquires an interest in shares other than where such a person acquires an interest in pursuance of an obligation assumed before the announcement of a merger reference. These are:

> ...where (a) he enters into a contract to acquire the shares (whether or not for cash) (b) not being the registered holder, he acquires a right to exercise, or to control the exercise of, any right conferred by the holding of the shares, or (c) he acquires a right to call for delivery of the shares to himself or to his order or to acquire an interest in the shares or assuming an obligation to acquire such an interest.[140]

Yet, following the passage of the Companies Act 1989 none of the proposed solutions are adopted. As far as the French relevant regulations is concerned, the problem being outlined has neither been conceived nor implemented. This equally applies to the E.E.C. merger control code, presumably, because of the requirement of a mandatory prior notification.

5.4- PROCEDURAL EFFECTS

In the U.K., the City Code provides detailed rules governing the timetable within which an offer, whether or not competitive, should

140- Ss.(4f to k) of the U.K. Companies Bill 1989.

be finalized and implemented in full. The exemption, with respect to the timing of the offer eg, extension beyond the maximum timetable limit, is normally granted to the extent that, and only in exceptional circumstances, the Panel considers justifiable. Under the City Code, an offer document is required to be posted to shareholders concerned within a period of 28 days starting from the date the announcement of a firm intention to make an offer is publicly made. While the relevant period of an offer begins from the date the firm intention is announced, a more vital date is the day of posting the offer document. Once the document is posted, offerors have 60 days to fulfill their obligations. The offeror, after posting his proposal, has a period of 21 days to keep his offer open as to acceptance. He is also entitled to revise his offer within the prescribed timetable as many times as he wishes.

The question that normally should really be asked at the beginning is what effect a subsequent rival offer might have upon the initial offer timetable? It is true that any effect a rival offer may produce, in the context, is often dependent largely on the initial offeror's choice. Like the French regulation, the British City Code gives the initial offeror the opportunity of choosing either to accept the subsequent rival offer's new timetable and, thus, to reconsider its position accordingly, or to keep its original timetable. The former situation, in the case of a contested offer, would appear to give the target company another chance and sufficient time to organize its defenses. But with respect to the later situation, the question is how far the target company directors could discharge their previous obligations and restrictions? This remains unclear.

5.5- POSTERIOR EFFECT ON A TARGET COMPANY

One may wonder whether an expressed intention about the future of the target company binds the offeror or not. Experience has shown various instances where an offeror, after obtaining the majority of control in a general meeting of the acquired company, proceeds with early retirement or other proceedings so that the number of employees by one way or other is reduced to the desired level. There are other major effects: change in the business plan and operating policy of the acquired company such as purchasing, advertisement and pricing policy; change in the management; full integration of the target company or retention of its place as a subsidiary of the group; changes in the composition of assets and liabilities; dismissal of employment for technical or commercial reorganization; and finally, changes in capitalization and dividends policy of the acquired company.

CONCLUSION

In its present form, a competitive offer is always made in cash. Cash offers are entirely free from any government interference, particularly in Britain. This is apparently because of the belief that shareholders who sell their shares will no longer have a continuous interest in the acquired company (save wherever necessary when an offer involves an element of exchange of securities). But this does not mean that the competitive offer is left unregulated. Whether or not an offer involves a cash consideration, the most important provisions are those which maintain the interest of shareholders without unduly impeding legitimate offers. As far as information disclosure is concerned, such provisions are intended to ensure that neither offerors nor the directors of the target company mislead shareholders or deny them the opportunity of making an informed and rational decision. Therefore, a certain minimum standard of information disclosure is required to be concurrently made and fairly presented not only in the offer document but also throughout the period of the takeover offer. The major test of such information is accuracy and materiality. An aspect of takeover offers that most regulations stress is the shareholders right of withdrawal. But it is differently regulated. In Britain, for instance, shareholders of the target company are permitted to use their rights of withdrawal in specific circumstances. In France, by contrast, such a right may be used at any time during the offer period. It is also particularly vital to mention that the United Kingdom rules, with respect to the revised offer conditions, are not radically different from French legislation. Both regulations, for the purpose of ensuring equal opportunities, provide that if an offer (whether initial or competitive) is subjected to any revision during the offer period, the offerors concerned are obliged to pay the increased consideration even to shareholders who had already offered their shares. Additionally, in both states, the existing regulations contain provisions designed specifically to monitor the conduct of parties involved in takeover offers. Occasionally, the regulators do interfere in an offer so as to prohibit or restrict certain dealings which may seriously and prejudicially hamper investors interests, i.e., insider dealing, manipulations and other unruly market practices such as speculation and rumours.

CHAPTER FOUR

PROTECTION OF SHAREHOLDERS

The protection of shareholders is a vexed problem. The purpose of the present discussion is addressed to the protection of shareholders once trading in their securities start. Knowing that shareholders (institutional and ordinary) are in an unbalanced position of protection vis a vis each other, the first question in this chapter is to whom such protection is directed? This leads to consider first, what category of shareholders is better served or protected and those which need further protections? Since information disclosure and publicity are deemed to be the most important factors for the protection of shareholders, the question is whether reliance is on the amount of information publicly made available or on its materiality. Should there be any link between periodic information disclosure made in the ordinary course of business and those required to be made available in a particular situation such as a takeover offer. Another concern which may arise in the context is whether or not information disclosure contributes both to the development of the transparency of the market and the protection of shareholders. Finally, what kind of remedies are available.

In discussing information disclosure, concern will, first, be on the purpose of disclosure; second, on directors disclosure of interests; and third, on disclosure of share dealings. Then, the focus will be on the methods whereby information is released. Finally, this chapter will discuss the kind of remedies available to curb abusive practice within the market.

SECTION ONE: INFORMATION DISCLOSURE

1.1- PURPOSE OF DISCLOSURE

A significant feature underlying company law is that of disclosure and publicity. This fundamental aspect, legally speaking, operates against the theory of secrecy or confidentiality which may break investors' confidence within the market and produce distrust in directors. In other words, disclosure, in its essence, seems an effective safeguard for the interests involved. This means that the rules have not only prescribed the contents of disclosure, but have also imposed civil and criminal sanctions to curb insidious market practice. For companies generally, it is a statutory requirement that certain information should be made available to the public for inspection on a periodical basis.[1] However, not all information is required to be made available. There is still a certain amount of confidential information which, if disclosed, could hamper the whole company interests.

It is obvious that investors are plainly entitled to be adequately and fully informed and employees and creditors to be safeguarded but the relevant question is to what extent information disclosure should go? One study points out that disclosure consists of various extents.[2] These include the extent of required disclosure, whether in statutes regulating securities issues or in diverse other relevant provisions such as self regulations; the type

1- The Companies Act 1985 as amended, Sch.4; Morse G., Companies Consolidation Legislation, 1987, p.465 (London, Sweet and Maxwell, 1987); Sealy L.S, Cases And Materials on Company Law, p.431 (London, Butterworths, 1985).

2- Warner Grove, and Baillie, The Concept of Disclosure and Its Cost and Benefits, in Hahlo H.R and Farrar J.H , Hahlo's Cases And Materials on Company Law, (3rd edn.) p.179-407, supra n.74/Ch.2

of investors concerned and the nature of securities the subject of dealings; the dissemination of the disclosed information in a digestible form to those persons; the timing of the disclosure; and the kind of remedies available whether civil, criminal or disciplinary measures.[3] The true nature of the purpose which the disclosure requirement intends to ensure is the protection of (a) investors (individuals and institutions), be they a majority or minority against the abusive acts of those who are *de jure* or *de facto* in control; (b) employees be they shareholders or not; and (c) creditors of the target company. This, finally, implies protection of investors, creditors or employees, cannot be seen as entirely isolated issues. It should be seen as a whole if the confidence of all these groups is to be maintained.

1.2- DISCLOSURE OF INTERESTS IN SHARES

By virtue of sections 198-209 of the U.K. Companies Act 1985 (herein after C.A.1985), most kinds of interests in the relevant share capital of the company, whether beneficial interests, control of voting rights or disposal of such interests, must be notified to the company within two days (previously five days) following the day on which the obligation to make notification arises[4] by any person, or person acting in concert, holding 3% (formerly 5%) or more of the voting rights control.[5] The relevant provisions of the C.A.1985, extend to cover any interests, either arising from the acquisition or disposal of interests or which were the result of reduction in the percentage of notifiable interests subsequently

3- Ibid.

4- Section 202 (1) and (4), 206 (8) of the Companies Act 1989 (herein after C.A.)

5- Section 134 &199 (2) of the C.A.1989

made by statutory regulation, even if the holder did not acquire or dispose of any interests.[6] Moreover, interests which were attributed to a person by virtue of another person's interests other than those of concert parties are also governed by the provisions of the C.A.1985.[7] In order to keep a certain degree of transparency, the C.A.1985 empowers the target company to inquire into the holders' interests. However, it is possible to assume that the controllers[8] of the company could be unwilling to carry out such an inquiry on their own initiative, presumably because the disclosure of shareholdings will affect their position if so revealed.[9] Alternatively, Section 214 of the C.A.1985, entitles the holder of 10% of the voting power, whether aggregated or not, to compel the company to exercise its power conferred on it by the relevant statute.[10]

6- See the C A.1985 as amended by the C.A.1989.

7- See Section 202 (3) & Section 134 of the Companies Act 1985 as amended.

8- See the definition of the term "controller" in Section 105 of the Banking Act 1987; Section 207 (5) of the F.S.A.1986.

9- Arguably, the basic distinction between disclosure of an interest in shares and disclosure of share dealing lies in the fact that the former is required to be made to the company's board of directors and subjected to the approval of shareholders in a general meeting, if it is deemed necessary, whereas the latter needs to be made publicly available to the whole body of shareholders. Disclosure of holding and dealings by directors have been deemed as necessary to prevent the abuse of inside information whereas disclosure by other shareholders has been regarded to be required only to protect directors (and members and employees) against having their company taken over without their knowledge. See the Jenkins Report, Cmnd.1749 (1962), noted by Gower L.C.B, The Principles of Modern Company Law, p.389, supra n.36 & 61/Ch.1.

10- For further reading into the provision of the C.A,1989, see Ernst and Young, Guide To The Companies Act 1989 (London, Kogan Page Ltd. 1989); Morse G. and others, The Company Act 1989, Text and Commentary (London, Sweet and Maxwell, 1990).

Another consideration which may also be relevant in this context is that a company, in the performance of its inquiry power, is entitled to petition the court on the matter under inquiry.[11] But, the question is how long may the inquiry take? Apparently, the C.A.1985 had left the period of such notice to be determined by the company itself. The Stock Exchange regulation provides that non responding shareholders to whom the notice is issued must have 28 days warning notice before being deprived of the right to vote.[12] Some of the problems are demonstrated in two recent competitive situations in 1986. One was the control of the British Aerospace company " Westland plc". The other was Guinness for the control of Distillers plc. Both led the regulator to review the effectiveness the relevant regulation. The control of Westland was swiftly passed to the American consortium at the target company's general meeting through the help of Swiss nominee accounts holding 20% of Westland voting rights.[13] Such a threshold was only entered into the company register a week before the meeting.[14] As a result, the Stock Exchange felt obliged to tighten its rules on disclosure in particular as to the identity of shareholders hiding behind nominees accounts.[15]

At present, the Stock Exchange permits listed companies to introduce into their articles of association provisions to impose sanctions against the use of nameless accounts to avoid disclosure.

11- See the F.S.A. 1986, Sch.17; Insolvency Act 1986, Sch.6; The Independent, 21st Feb.1989, p.22.

12- Noted by the Economist, Remove The Mask of Nominees Accounts, vol.310, p.16 (Jan.21st.1989).

13- See House of Lords Commons Paper 176; Trade and Industry Committee Report on Westland Case, Session 1986/87 (H.M.S.O.1987).

14- Ibid.

15- The Independent, supra n.11.

Any person who does not disclose its identity within fourteen days (previously twenty eight days) will be disenfranchised,[16] in addition, to various restrictions on the transfer of shares under the provisions of the C.A.1985.[17] However, while the fourteen days applies to shareholdings of 0,25% or more of a company, the 28 days notice applies for less than 0,25% threshold.[18]

Concerning statutes, following Westland plc and Guinness plc affairs, there has been a growing concern about the need for a coherent statutory requirement that the standard of information disclosure should be improved. Such was the subject of the relatively recent House of Lords debate on the likely amendment to the C.A.1985. It has been suggested that the company be allowed to impose sanctions on the non-respondent shareholders after only seven days. Presumably such a recommendation is designed primarily to implement the E.E.C directives on disclosure of significant shareholders[19] under which the time limit allowed for notification by shareholders of significant dealings in shares is seven calendar days.[20] The House of Lords was opposed by the Stock Exchange which considers that seven days is not adequate for shareholders to be sufficiently informed and safeguarded. The chairman of the Stock Exchange argued that a "notice period of less than fourteen days would give inadequate protection for investors legitimate interests".[21] Only a few of these proposals have been incorporated in the C.A.1989. These include reducing the disclosed threshold to

16- Ibid

17- See Part XV of the C.A.1985 relating to the court orders in respect of restrictions on shares. See also Section 454

18- The Independent, supra n.11; The Economist, supra n.12.

19- COM 85/791 of 1985.

20- H.L.218, p.12, 16th report, session 1985/86, (July, 8th, 1986).

21- The Independent, supra n.11

3% and the timing for a notification of interests in shares from 5 days to 2 days. This, indeed, is a welcome effort for both the adequate safeguards of investors interests and the transparency of the securities market.

1.3- DISCLOSURE OF THRESHOLD

In determining whether or not a person may be able to control, or to influence the decision-making in the company's general meeting, various levels of control have been introduced.[22] What matters to investors is to know the controllers of their company and to be entirely aware of what influence a shareholder may have on it. For the regulator what matters is to provide an orderly framework within which dealings in shares are effected. This implies the existence of a deterrent provision to prevent uncontrollable shareholdings from taking place. It is worthy of note that while some levels are notifiable, others produce further implications notably, the obligation to make a general offer to all shareholders. It is equally important to mention that different levels of shareholdings confer varying rights namely, the right to pass a special or ordinary resolution, appoint nominees in the board of the company, or to petition the court to investigate the affairs of a company wherever an abuse or fraudulent action is noticed.

1.4- NOTIFIABLE SHAREHOLDINGS.

Under ordinary circumstances, an acquisitive company is perfectly entitled to build up a stake in another company through market purchases. But once its percentage exceeds 5%, the

22- See COM(85) 79 Final, supra n.16/Ch1; Begg P.F.C, Corporate Acquisition And Mergers, p.24- 26. supra n.61/Ch.3

purchaser must notify it to the relevant authority and the target company within a period of 5 days in Britain, and within 15 days in France. Under both French and UK laws any person (natural or legal) must disclose any fraction of voting control that it may have held in another company. In France, notifications of shareholdings are required to be made to the relevant authority to whom belongs the duty to inform public investors on any change.[23] Moreover, in extreme cases, the relevant public institutions, particularly C.O.B. has the legal power to compel those companies to disclose their holdings.[24] In Britain, the initiative is left to the company whose shares are at issue itself. The 1989 Companies Bill recommended that companies whose shares are in question should be empowered, wherever full disclosure is not made, to declare that the shares being held shall be subject to restriction under the Companies Act, Part XV within a period of 7 days notice. Another alternative is given to the holders of 10% or more to initiate an investigation.[25] Unlike the UK, the 10% threshold in France generates further restrictions. French law, in addition to information disclosure of ownership, imposes a prohibition on any shareholder from entering

23- Art 356 of the Loi No. 66-537 of 1966 as amended by the Loi No 84-148 Art 8, March 1st 1984; Loi No. 85.11 of Jan 3rd, 1985 Art 11 subsequently replaced by the Loi No 85 705 of July 12th 1985 Art 5. Then modified by the 1987 Loi No 87 416 Art 57 (June 17th 1987); and recently by the Loi No.89-531 of 2nd August 1989 relating to Transparency and Security of the Bourse de Valeur, supra n.5/Ch.2.

24- See Ordonnance 67-833, Loi No.88-70; and Loi No.89-531, supra n.5/Ch.2.

25- Section 442 (3)-3 (c) & Section 62 of the C.A.1989, confers wide discretion on the Secretary of State to appoint inspectors provided an application is made by members of the company sought to be investigated holding not less than 10% of the issued shares and the applicant may give security not exceeding £5000 for the payment of the costs of the investigation.

into reciprocal shareholdings. Such a prohibition does not extend to cover other forms of shareholders agreements such as circular and pyramiding shareholdings.[26]

As far as takeover offers are concerned, the C.B.V. and C.O.B. regulations contain provisions stipulating that during the immediate period of takeover offers any person, once the holding amounts to 0,50% must notify such holding to the relevant authority.[27] By contrast, the British City Code on Takeovers and Mergers states that once the total purchase of the voting rights amounts to 1% or more but less than 14.99%, the holder must notify that percentage on a daily basis. Recently, in Britain, the 1989 Companies Bill, clause 91 suggested certain restrictions on acquisitions. According to clause 91 of the Bill, any person shall not be allowed to increase his holding concurrently from 5% or more to 10% without these lapsing period of 10 days separating each purchase operation.[28] This restriction applies also to purchase of shares amounting to more than 10% but less than 15%.[29] However, no corresponding restrictions exist under the French law of 1966 and regulation promulgated thereunder.

As indicated earlier, whilst some levels are notifiable, others produce further implications notably, the obligation to make a general offer to all shareholders. An obligation to make an offer to all shareholders may arise once an acquisition of shares in the

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26-See Art 358 and 359 of the Loi No.66.537 of 1966 as amended by the Loi No.89-531, Art.18, supra n.23.

27- Article 22 of C.O.B 's Regulation No.89-03 of 1989, supra n.1/Ch3, abolished the following decisions and regulations: the Decision Génerale dated 27 Feb.1973, Decision Générale of 25/7/78 , Regulation No.86-01 of 1986 and No.88-01 of 1988.

28- Such a recommendation has not been incorporated into the C.A 1989

29- Ibid

target company exceeds certain specified percentages determined by the relevant regulation. In France, the relevant regulation set up a 1/3% (previously 15%) threshold as the minimum level beyond which any person (purchaser) is obliged to make a general offer to all shareholders in the target company. In the U.K, if any share purchase amounts to 30% the obligation to make a general offer is triggered.[30] The 1989 Companies Bill intended to reduce the 30% under rule 9 of the City Code to 15%, so that any excess in the shareholdings automatically obliges the holder to make a general offer for the remaining shares of the target company instead.[31] Such a level, if adopted, would afford shareholders more protection, i.e, the opportunity of sharing the control premium.[32]

Finally, one may note the potential implication of the 1/3% threshold which is introduced by the E.E.C proposed directive as well as by the French C.B.V. regulations. This, indeed, carries the ability to frustrate several decisions (merger, increase and decrease of capital, variation of rights attached to shares....) which, pursuant to the 1966 Loi provisions can only be effected by an extraordinary general meeting representing a 2/3 majority of shareholders. Under most company Laws a 50% threshold is the most significant level upon which an undertaking may be deemed either as an affiliated company or a controller in that company.[33] In takeover situations,

30- Rule 11.1 of the City Code states that wherever such percentage is attained, a cash offer or a combination of any other alternative must be made at not less than the highest price paid by the offeror or any person acting in concert with it during the previous 12 months before the obligation is invoked. However, such a requirement is not concerned with the question of mandatory offers under rule 9 of the City Code. They are distinct requirements.

31- Such a recommendation has not been incorporated in the C.A.1989.

32- See Section 1.3 in Ch.1 of this thesis.

in particular under the British City Code, a 50% acceptance condition is a crucial point as well. Additionally, most potential offerors regard a set of 51% shareholdings in a target company as a minimum level to be secured. Whilst in France there are no specific requirements, the British City Code makes an offer conditional upon obtaining such a level. If the condition being stipulated is not fulfilled the offer lapses and cannot be renewed for the same company within a period of 12 months. Finally, what appears from the above discussion may be that, first, what pretended to be a purchase and sale of shares was in substance a purchase of control. Second, as regards the variability of percentage of votes which entitle the holder to control the policy of or to elect the board of directors, it seems neither the statutes, including extra legal regulation, nor academic writers resolve the problem, in particular what percentage of shares may give *de facto* control.[34] Moreover, there appears to be no universal standard requirements in the context at all.

1.5- DISCLOSURE OF SHARE DEALING.

It should be acknowledged that the Panel's jurisdiction is limited to the extent that a question of takeover offers arises.[35]

33- Art 355 of the French Loi of 1966 states that if a company holds a proportion of voting rights in another company between 10 and 50%, the company holding such a proportion is deemed as a participating company. Conversely, if the percentage exceeds 50% of shareholdings in a company. the target company is regarded as dependent on the holder of such a percentage of the voting rights.

34- Legal or *de jure* control is usually referred to 50 percent or more of votes at the company general meeting.

35- For a historical view about the Panel on Takeovers and Mergers see, Johnston A., The City Code on Takeovers and Mergers, supra n.88/Ch.2.; Prentice D.D., Takeovers And The System of Self Regulation (1981) Oxford Journal of Legal Studies, 406 .

This appears from the Panel statement dated 27th August, 1969 which indicated:

> It must be made clear that the Panel possesses no general supervisory powers to ensure that directors of the public companies make full disclosure to their shareholders of all relevant matters. This is indeed a most important duty of directors and that it should have been continuously discharged becomes a matter of especial importance as soon as any question arises of an offer for shares. It is for this reason that under its constitution the city Panel's interest in the matter of disclosure is attracted whenever a question arises of a prospective offer, as well as during the course of negotiations about an offer or in the aftermath of an offer which has been made.[36]

The role of the Stock Exchange and its cooperation with the Panel on Takeovers and Mergers is vital. In addition to its principal activities relating to listing and delisting securities on and from the official list, the Stock Exchange plays a paramount role within information disclosure of share ownership. The Stock Exchange classifies acquisitions of interests and disposal into four main categories. Each transaction, depending on the threshold involved, requires certain minimum standards of information disclosure as well as publicity. Category 1, 2 and 3 require almost identical information.[37] Category 4, which involves the interests of one or more directors or substantial shareholders or their associates is the subject of stricter provisions which are slightly dissimilar than that

36- Noted by Johnston A, The City Takeover Code, p.61, supra n. 88/Ch2.

37- Stock Exchange (Listing) Regulation 1984 (1984 No.716). For further reading see mainly Weinberg and Blank, Takeovers and Mergers, Appendices, Paras 3050-3065, (1979), supra n.19/Ch1; Gower L.C.B , The Principles of Modern Company Law, Ch IV, p.291, supra n36 & 61/Ch1; Pennington R.R, Company Law, (3rd.edn.), Part IV. p.625-637 (London, Butterworths, 1973), The Stock Exchange (Listing) The New Requirements supra n.65/Ch.2. See also supra n.76 and 77/Ch2.

imposed on the above cited three categories.[38]

Class one transactions exist where the securities either acquired or disposed of amount to 15% or more. The Stock Exchange relevant department may, in certain exceptional circumstances or conditions, allow a higher percentage not exceeding 25%. However, if the threshold either acquired or disposed of exceeds the prescribed level of 25% or falls below 15%, the relevant authority treats each transaction in a different manner. Transactions which exceed 25% are classified under major class 1 transactions, whereas those acquisitions or disposals falling below 15% are classified into class 2 transaction. Class 2 transactions occur where the threshold, whether acquired or disposed of, is equal to or exceeds 5% but is less than 15%. A class 3 transaction requires neither publicity nor the approval of shareholders in a general meeting. Such a transaction is one where the amount of acquisitions or disposals does not exceed the 5% threshold.[39]

Class 4 transactions are substantially different from the above cited classes. This would be explained by the fact that the first three classes are calculated on the basis of the amount of assets either acquired or disposed of, but class 4 transactions are mainly ascertained by reference to the interests of one or more directors, substantial shareholders of the company or their respective associates in the transaction.[40]

38- Ibid. Weinberg and Blank, Takeovers and Mergers, Appendices, Paras 3050- 3065, (1979), supra n.19/Ch1; Pennington R.R., The Stock Exchange (Listing) The New Requirements p.127, supra n.65/Ch.2

39- Stock Exchange Admission to Listing, Section 6, Ch.1, Noted by Weinberg & Blank, supra n.19/Ch.1; Pennington R.R, supra n.65/Ch.2

40- The Stock Exchange, Admission of Securities to Listing, Section 6, Ch.1, noted by Pennington R.R., supra n.65/Ch.2; Weinberg & Blank, supra n.19/Ch.1.

A class 4 transaction exists if it satisfies one of these criteria:

(a) An acquisition or disposal of assets by the company or any of its subsidiaries from or to a director or substantial shareholder or an associate of either of them; (b) A transaction under which the company or any of its branches is about to or has taken an interest in another company where any interest or part of it has been attributed or is to be acquired by a director of a listed company or an associate of such a director; (c) A transaction one of whose principal purposes or consequences is the granting of credit or the making of a loan by the listed company or any of its subsidiaries to a director or substantial shareholder or to an associate to a such a director or substantial shareholder; (d) A takeover by a listed company or any of its branches the acceptance of which could result in a significant acquisition from a director or substantial shareholder of the listed company or from an associate of such a director or substantial shareholder; (e) The acceptance by a listed company or any of its subsidiaries of a takeover offer which would result in a significant disposal to a director or substantial shareholder of the listed company or to their respective associate.[41]

Additionally, the Stock Exchange regulation provides four common criteria to determine whether an acquisition or disposal qualifies as a class one, two, or class three transaction. First, the value of the assets to be acquired or disposed of compared with the whole assets of the subject company prior to such transaction. Second, the net profits attributable to the assets to be acquired or disposed of based on the most recent audited annual accounts or on a subsequent unaudited account (if there is a significant material difference) compared with those of the target company similarily ascertained. To determine the net profit, all charges must be deducted in anticipation other than taxation and extraordinary items. Third, where appropriate, the aggregate value of the

41- Ibid, Stock Exchange, Admission to Listing, Section 6, Ch.1, Para 6.1, consideration to be given or received compared with the total assets of the offeree company. Fourth, the relevant share capital to be issued or issued as a consideration compared with the issued equity share capital of the target company promptly prior to the acquisition.[42]

Concerning information disclosure, with respect to the above cited classes, the Stock Exchange requires companies involved to supply material information to the holder of securities so as to be able to construct an informed judgement on the offer. Yet, according to the Stock Exchange regulation, information to be supplied in conjunction with transactions 1, 2, and 3 should be made in a document other than the listing particulars. Six copies of such documents must be sent to the Stock Exchange companies' announcement office for publication as soon as practicable.[43] Each copy must contain at least the following minimum standard of information:

> (a) particulars of the assets acquired or disposed of; (b) a description of the nature of business activities of the target company whose assets are acquired or disposed of; (c) where appropriate, the aggregate value of the consideration and its components and any deferred payment; (d) the value of the assets disposed or acquired; (e) the benefit expected to occur to the company from the transaction; (f) details of any service contracts, the intended application of the proceeds of sale.[44]

Besides, the company concerned is also required to keep its

42- Ibid at Para 3.1 and 3.3. Compare with the City Code Note on Rule 21.

43- See Pennington R.R., The Stock Exchange (Listing) The New Requirements, supra n.65/Ch.2.

44- Section 6, Ch.1, Para 4.2 of the Stock Exchange Admission to Listing Regulation.

own shareholders daily informed as regards, inter alia:

> ...the names of persons holding, or will after the purchase or disposals be individually interested in 5% or more of the company's issued share capital as well as the amount of their interests; particulars of the consideration proposed and any variation in directors status; their interests in transactions entered into whether completed or remaining to be fulfilled at any time during or since the company's last financial year; each director's beneficial or other interests in shares or debentures of the acquiring company and other companies in the same group.[45]

By virtue of the Stock Exchange regulation, if an acquisition is a major class one that exceeds a 25% threshold, parties involved in a transaction must add further relevant information notably, the amount of the minority interests in its subsidiary and the approval of the transaction by passing an ordinary resolution at the shareholders general meeting. In furtherance to the above information, any transaction or agreement entered into by the company should be made conditional upon obtaining the approval of shareholders in a general meeting. Consequently, where a transaction is qualified as class 4 in which directors, substantial shareholders or their respective associates are deemed to have an interest, the Stock Exchange may not allow them to participate or cast their vote in such a meeting. In consequence, persons coming under such a restriction are required to affirm their position by issuing a statement expressing clearly that they may not vote at the meeting called for. It is worthwhile mentioning that an independent valuation of the assets disposed of or acquired will be required forthwith. The valuation statement, which is made by an independent expert and sent along with the document to the

45- Ibid, at Para 3.5.

shareholders, should certify and expressly confirm that the transaction entered into is fair and reasonable. Finally, this transaction may not have effect unless validated by the Stock Exchange.[46] Thus, the information disclosure, with respect to those specific transactions, the approval of shareholders in a general meeting, the valuation statement of an independent expert, and, most importantly the Stock Exchange prior control over the transaction are all designed primarily to provide further safeguards to the interests of shareholders involved and to ensure a certain level of share dealing's transparency.[47] Both points would appear to trigger the securities market regulators main concern in almost any country.[48]

Questions which may arise in the above context are, first, how far does the Stock Exchange regulation extend to monitor takeover offers; and second, whether the question of "voting control"[49] is treated in a detailed manner. As far as the first question is concerned one may argue that the Stock Exchange considers the issue of takeovers as incidental to its principal activities, because it (the Stock Exchange) is mainly concerned with the listing and delisting of securities on and from the official lists in addition to its role in and regulation of other auxiliary markets such as companies operating on the unlisted securities markets. But this does not mean that the takeover fields are left totally unregulated. Indeed the Stock Exchange, along with the cooperation of other institutions, i.e, the Securities and Investment Board (S.I.B.) and the Panel on

46- Ibid, at Para.6.

47- See Pennington, supra n.37.

48- Compare with French Regulation Admission of Securities to Listing 1989, supra n.20/Ch.2.

49- See, supra n.59/Ch1

Takeovers and Mergers, plays a crucial role not only in respect of information disclosure but also with respect to many other associated problems namely, insider dealings, nominees, acting in concert, and most seriously market manipulations. Concerning the second question, the Stock Exchange would appear not to be dealing with the matter of voting control in a detailed manner but rather generally. Presumably, as far as the protection of investors within the field of takeover offers of compatibility between its regulation and the Panel's rules and general principles as being correlative. Moreover, it seems in the opinion of the Stock Exchange that the administration of takeovers is probably far better left to the City Code which incorporates more provisions in the field as the two regulations are very much related. Hence in any offer, whether competitive or not, buying and selling shares carrying voting control is not, of course, without consequences. It may have an unsettling effect in the market and be sometimes detrimental to shareholders interests if not adequately supervised. Therefore, in order to ensure market transparency through a wide spread of information and, most importantly, the protection of investors' interests, rule 8 of the City Code contains the most detailed provisions relevant to disclosure of share dealing during the offer period.

Prima facie, as indicated above, one should determine the kind of information the shareholders involved need for making the right decision as to acceptance. A somewhat similar question arises in respect of cash offers. Should the parties to takeover offers bear similar obligations as in relation to exchange offers and, therefore, provide identical information to shareholders? The commonly accepted opinion amongst those involved in the financial market is that in a cash offer there is no need to provide full information to shareholders involved because they no longer, after receiving cash against their shares, have a continuing interest in both the acquirer and the target company.[50] But it seems that the issue is more complex and may need more other justifiable grounds. Yet, it remains debatable. Take for instance, the matter of deferred cash offer, does this consideration with respect to information disclosure, need identical treatment as in relation to an immediate payment, or be subsumed under the category of exchange offer?.

A deferred cash offer, by definition, is no more than a sophisticated version of exchange offer.[51] A cash deferred offer has, in fact, some common features with an exchange offer. According to the terms and conditions of a cash deferred offer, a shareholder who accepts such a form of consideration will receive a full cash payment to be effected at a future date and at a price agreed upon when the offer agreement is concluded. Hence, both offers, the exchange offer and the deferred cash offer, involve an exchange of securities during the relevant period of an offer. Furthermore, for tax purposes, an exchange offer is carried out tax free. As for deferred cash, the taxation authority applies the principle that a sale of shares in cash is an event which is potentially taxable.[52] But in exceptional circumstances such as this, the taxation law will not apply till the acceptor receives his full cash payment. Concerning the interests, whether pursuant to exchange offer or deferred cash offer, both shareholders will

50- Peter and Fischer, International Takeovers and Acquisitions, p.38, supra n 41/Ch.1.

51- Ibid.

52- Ibid.

benefit from the interests attached to their shares. However, the interests of those who agreed to receive cash payment after a period of time will inevitably cease to be paid immediately after a full payment of their transferred holdings.

Without going much further, one may assert that, with respect to the relevance of information disclosure in the context, each transaction should be treated on its merits. This, of course, may lead to the consideration that one may not analogize the situation of those receiving cash in hand following the transfer of their shareholdings and those who agreed to receive their full consideration (money against their shares) over a period of time. The latter group of shareholders appears to be more vulnerable to risk than in the case of share for share basis.

Practically, information about a potential change in control can be essential in any intended proposal to an informed decision. The change of control from one company to another brings with it the possibility of different operating results and different investment decisions. The shareholders to whom the offer is intended may not at any moment rightly predict, in the face of a tainted intention, the possible detrimental or beneficial effect following the change of control until the relevant facts are available to that investor.[53]

It could be argued that shareholders accepting a deferred cash offer are protected under the provisions of their contract but it does not make sense or follow that those groups of shareholders should not be covered by the disclosure requirements. Surprisingly, the present attitude of both the Panel and the Stock Exchange, concerning information disclosure, make it expressly clear that

53- In order to reduce the likely detrimental effect on shareholders interests, most securities market regulations intensified their requirements.

there is no obligation to disclose dealings of securities of an offeror offering solely cash.[54] Such a policy has been amplified by the City Code on Takeovers and Mergers, rule 8 of which provides that the disclosure is only required in the case of securities exchange offer.[55] Importantly, there appears no convincing evidence as to why not to assimilate them with those of an exchange offer and to be, therefore, treated on an equal footing. Finally, for the aim of safeguarding further the interests of inexperienced investors and enhancing their confidence, it may be advocated that shareholders involved in a deferred cash offer should be granted similar protection as in relation to shareholders involved in an exchange offer.

Under the City Code, there exists two types of disclosure. One is public. This means that any share purchase is promptly notified in writing or by telex to the Stock Exchange, the Panel itself and the press no later than 12 noon on the business day following the date of the deal.[56] The other needs no publication, the so-called "private". This type of information disclosure may exclusively be made to the Panel alone if an exempt fund manager is deemed to be involved with either party to an offer.[57] It may also be made to the Stock Exchange and the Panel respectively.[58] In essence, the later type of disclosure appears to ensure two crucial points; to diminish the lack of transparency notably, an accumulation of

54- The Panel on Takeovers and Mergers and the Stock Exchange joint statement, June 1987.

55- See the definition of securities exchange offer under the City Code, definition section.

56- Note (a) on Rule 8 of the City Code.

57- Note (b) on Rule 8 of the Code.

58- Ibid.

substantial undisclosed voting control; and to prevent what could have been harmful to the interests of shareholders if it is so disclosed. To put it into perspective, in spite of the greater interaction between public and the private disclosure, it seems, that private disclosure is more important for the authorities in regulating the conduct of intermediaries, thus protecting shareholders and ensuring transparency within the market.

The Panel, which is chiefly responsible for the good performance of takeovers, consistently emphasizes the need for prompt and detailed disclosure of dealings however effected by parties to takeover offers, associates or by those with a significant shareholdings.[59] The underlying objective is the promotion of two paramount principles. First, that all shareholders should, along with continuous advice, have sufficient information and adequate time to make an informed decision on the merits or demerits of the offer; and second that parties to takeover offers are warned in advance to use every endeavor to prevent the creation of a false market. Stringently the Panel, promptly after dealings in the relevant shares of the offeror or the offeree company, imposes an obligation on parties to takeover offers to notify in writing or by telex the Stock Exchange, the Panel and the press no later than 12 noon on the business day following the date of the transaction.[60] This equally applies in France However, considering the necessity of an accelerated disclosure, in the U.K, the Stock Exchange and the Panel impose a varying degree of strictness. The Stock Exchange regards a transaction which has taken place on the latest time of the business day as an early bargain for the next day whereas the Panel treats

59- Panel Annual Report, 1987 at p.7; and the 1988 report at p.5.

60- City Code, Rule 8 and notes Compare with the requirement of the French C.O.B. Regulation No.89. 01 of 1989, supra n.1/Ch.3

such a transaction as occurring on the former day and requires disclosure immediately before noon on the next day.[61] For example, in the view of the Stock Exchange authority, if dealing has occurred at the latest time, suppose of 25th, it is considered as an early deal occurred on the 26th and thus the disclosure is required to be notified on the 27th. But the Panel, in this respect, obliges parties involved to disclose their deal on 26th before noon instead. A matter which appears unusual between the two set of self regulations that may create an area of controversies.

Principally, the Panel specifies three categories of persons deemed to enter into dealings in the relevant shares of the offeree or of the offeror company at any time, either when they have reason to believe a bona fide offer is imminent or during the immediate period of the offer. For the purpose of disclosure, the following group of persons will inevitably bear a strict obligation in respect of disclosure of their dealings. These are (a) dealing by parties or by associates. for themselves or for the account of discretionary investment clients; (b) dealing by parties or by by associates for non-discretionary clients; and (c) dealing by 1% shareholdings (previously was 5%).[62] Exempt fund managers and exempt market makers may also be included within the above category.[63] Yet, no matter for whom the deal is made or about to

61- See Notes on Rule 8 of the City Code. Rule 7.3 states that "disclosure after 3.30 p.m. on a business day will be deemed to be disclosed on the next business day". This means that if the purchase is not disclosed by 3.30 p.m, the offeror concerned will have to wait one more day before starting its purchase operation. Consequently, any delay in relation to information disclosure relevant to share dealing may operate at the disadvantage of the offeror aim to gain a swift control over the target company.

62- See Rule 8.1, 8.2 and 8.3 of the City Code respectively.

63- Rule 7.2 of the Code.

be carried out, the City Code relevant rules require a daily public disclosure, except where exempt fund managers and market makers are permitted to disclose in a private manner.

As a procedural matter, public disclosure should be notified to the Stock Exchange directly by the parties involved in the transaction or through an agent acting on their behalf. Where appropriate, the content of notification bearing on the deal is published in the companies news service of the Stock Exchange and copies of such announcement are communicated to the Panel.[64]

Unlike public disclosure, private disclosure may only be made to the Panel wherever an exempt fund manager, if deemed to be connected with either party to an offer (associate), deals for the account of a discretionary client during the currency of an offer.[65] Rule 8.2 states that:

> except with the consent of the Panel, dealing in the relevant securities during an offer period by an offeror or the offeree company, and by any associates, for the account of non-discretionary investment clients (other than an offeror, the offeree company and any associated) must be privately disclosed.

Private disclosure should also be made in writing or by telex to the Stock Exchange Company announcement office. Identical copies are forwarded to the Panel. Unlike the public disclosure, private disclosure is not published.[66]

A related issue is the variety of means whereby such information is made available to the public, specifically, to the group of shareholders involved. It is becoming obvious in takeover

64- Note (a) & (b) on Rule 8.

65- Ibid.

66- Ibid.

situations and other alternate sale and purchase of securities techniques that enormous amount of advertisements,[67] formal and informal communications always take place, either before a potential takeover offer is announced or during the relevant period of offers.[68] Such contact may be made through advertisement campaigns, informal invitations, visits, meetings, as well as organized telephone campaigns. Parties concerned may also approach the press, television and radio interviews. Since such manoeuvres are likely to induce investors, this chapter will discuss first, how far release of information is allowed and the likely implications in case of failure to comply with the requirements relevant to takeover offers. Second will the kind of information be provided which a shareholder may need for making a rational decision as to acceptance. The question sought to be discussed below is, first, whether the kind of information required to be disclosed could serve both professional as well as ordinary

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67 The F.S.A. 1986, Section 57.2 defines the term 'Advertisement' to include "any advertisement inviting persons to enter or offer to enter into an investment agreement or to exercise any rights conferred by an investment to acquire, dispose of, underwrite or convert an investment or containing information calculated to lead directly to person doing so." While this definition may appear to be drafted in general terms, Section 207.2 brings more details as to what an advertisement is. By virtue of Section 207 (2) of the F.S.A. 1986, an advertisement means" every form of advertisement, whether in publication, by the display of notices, signs, labels, or show cards, by means of circular, catalogues, price list or other documents, by an exhibition of pictures or photographic or cinematographic films, by way of sound broadcasting or television, by the distribution of recordings, or in any other manner; and reference to the issue of an advertisement shall be construed accordingly." This description is broader than might be expected. Besides, the use of some loose terms such as 'in any other manner'.

68- Under both the U.K and French relevant takeover offer regulations, the offer period starts once an approach to a target company is made till the expiry of the intended offer. See, for example, the C.B.V.'s Regulation 1989 Art.5.2.1 para 3., supra n.1/Ch.3

shareholders; second, how intensive and material the information so disclosed should be.

SECTION TWO: RELEASE OF INFORMATION (METHODS)

2.1- LEGAL REQUIREMENT

According to Section 57 of the F.S.A,1986 any release of information must be made by an authorized person.[69] However, if a person, other than those authorized, seeks to issue an investment advertisement, he is entitled to do so provided the contents of such an advertisement have been approved by an authorized body.[70] Failure to comply entails serious civil and criminal liabilities.[71] In this respect, it could be asked why should an authorized person be exempted under the Act? Presumably the exemption of certain persons from the general prohibition contained is due to the fact that, on the one hand, such bodies are subject to certain standards of compliance dictated by the legislature and implemented by the supervisory body, principally the S.I.B. On the other hand, such standards of adequacy and compliance cannot be found or expected to be found in an ordinary person and/or if such advertisements are left in the hands of any person other than those authorized.[72]

69- See, supra, Ch.2 in connection with "Authorization Requirements".

70- F.S.A. 1986, Ch. III. See also Section 57.1.of the F.S.A. 1986. By contrast, under the French relevant regulation any kind of issue of advertisement bearing on public offers is not allowed unless approved by the C.O.B.

71- Section 57.5 and 57.3 respectively of the F.S.A. 1986. However, Section 58 contains various exemptions from the general prohibition of the Act in the field; see also Section 35 to 44 and Article 9 of the F.S.A. 1986 (Investment Advertisement) (Exemption) order, 1988. The exemption extends also to cover matter covered by Section 154 of the Act.

72- See Ashe M. and Counssell L., The New Advertising Investment regime (1989) Law.Soc.Gaz., p.23; Circus P., The Financial Services Act 1986, This also could explain the interaction between standards of compliance and the protection of investors. This, of course, leads to consideration of another point. Documents pertaining to purchase or sale of securities on or off the Stock Exchange may, as sometimes happens with respect to the issue of Listing Particulars, be issued in draft. Here questions of qualification and legal implication relating to the issue of such drafts arise. How far will these drafts bind persons to whom they are addressed?

Prima facie, under the F.S.A.1986, an unauthorized person issuing or causing to be issued an advertisement which has not been approved by an authorized person such as the Stock Exchange, will not be entitled to enforce any underwriting agreement, including those which have been entered into after the issue of any invalid advertisement. In consequence, any invitee can recover any money or property transferred to the issuer as a result. Yet, the option whether or not to cancel such a deal remains the right of the target person.[73] Concern has also been expressed in relation to the wide interpretation of the term "cause to be issued". It has been asked whether a preparatory act such as the accumulation of information and its analysis could constitute an investment advertisement. Further very difficult and pertinent questions were asked about whether knowledge is essential for a person to cause the issue of an advertisement.[74] The S.I.B, in its capacity as designated agency for the implementation of the Financial Services Act provisions, states that " if a business or a professional investor (who is not protected by the

The Advertising Aspects (1988) B.J.I.B.&F.Law., p.438; Chance C., Financial Regulation, Transitional Provision (1988) B.J.I B.& F.Law., p.538

73- F.S.A. 1986, Section 57.(5) To (10).

74- See Ashe and Counssell, p.24, supra n.72.

advertisement safeguards in the rules) passes on an advertisement he has received by way of business, this will be an issuing of that advertisement."[75] This has, indeed, somehow closed the gap. In case law, the concern indicated above has, to some extent, been mitigated. In one case, it was pointed out that "there must be some form of positive mandate or authority given for there to be causation".[76] As regards question of knowledge or the skill involved, the court pointed out an obvious legal fact. The court stated that "knowledge or prior authorization is not an ingredient in the offense of causing a prohibited act since the act is itself forbidden."[77] In another case, the court stressed that "a person cannot consent an act to be done unless he has knowledge of the fact."[78] It is equally important to mention another relatively new practice within the financial market whereby investors may be induced. This technique is called "Cold-Calling" or "Unsolicited Call."[79] Interestingly, the Act seems not to prohibit unsolicited calls as such but it renders any agreement, once challenged, capable of being voidable at the option of the callee.[80] Moreover, the F.S.A

75- Practice note to the S.I.B's Rule Book, para 7.01, noted by Ashe and Counssell, supra n.72, at p.23

76- Mcleod v. Buchanan (1940)2 All ER 179 (H.L)

77- Sapp v. Lang (1970)1 QB 518, noted by Ashe and Counssell, supra n.72.

78- Lovelace v. Directors of Public Prosecution (1954)1 W.L.R 1468

79- Section 56 of the F.S.A. 1986 defines "Cold Calling" as a "personal visit or oral communication made without express communication." This means that the provision of this section does not apply to written documents. But doubt remains as to how such oral aspects could be proved in case of violation. Corresponding problems could not be efficiently and effectively encountered pertaining to insider trading where unpublished information passes orally on tips to outsiders. See infra, at Ch.5 "insider trading and fiduciary duty".

80- Section 56 of the F.S.A. 1986; with respect to exemption, the Financial Services (Unsolicited Calls) Regulation,1987 provides various instances where the intended agreement could be deemed valid.

(Cancellation) Rules, 1988 as (Amended) provides the victim with a 'Cooling Off' period within which the callee or invitee may exercise his option as to withdrawal of acceptance.[81]

Finally what appears from the above discussion is that what is a matter for the legislature is, on the one hand, to cover as much as possible of practice within the financial market that is expected to hinder investors confidence. On the other hand, it is more important for the authority to ensure that such practice is conducted with a reasonable business standards. In this connection, it is interesting to note that the Financial Services Act requirements are not specifically intended for the regulation of advertisement made in conjunction with takeover offers. They are more general so as to cover the whole range of investment advertisements whether or not there are takeovers. Therefore, it could be somewhat misleading if any other self regulations requirements relevant to takeovers were to be set aside notably, the City Code.

2.2- EXTRA LEGAL REQUIREMENTS

It is worth reiterating general principle 5 of the City Code. It provides that any advertisement addressed to shareholders containing information or advice must be prepared with the highest standards of care and accuracy.[82] How effective is such a requirement? What is the attitude of the Panel administering the Code in the context? Regardless of the possible exemption of advertisement,[83] it is important to stress the implication of the

81- For further details, see supra n.72.

82- See also 3(b) on Rule 19.1 to 4 of the City Code.

83- Under the City Code categories of exempted advertisement are: (1) product of corporate image advertisements not bearing on an offer or potential offer. (2) advertisements confined to non controversial information about an offer for instance, reminders as to closing times of the

City Code note 3(b). Note 3.(b) indicates that "the making of a misleading statement is a serious matter. Once a misleading statement has been made, no subsequent correction can truly restore the status quo and redress the damage caused". In such circumstances, the Panel, in order to reduce the likely effect, has indicated that if, during the period of an offer, it becomes evident that a statement or advertisement so issued, was incorrect, or could possibly mislead or put shareholders to whom the statement was directed in a confusing state as the worthiness of an offer, the least the Panel may do is to require an immediate correction.[84] It is worthy of note that through the consultative system a vast majority of errors and, perhaps, misleading statements were corrected before reaching investors. This is consistent with the Panel's chairman's statement. In 1988 he stated that "the Panel system is designed to resolve an issue while it is live, and before irreversible action is taken, so that the takeover may go ahead on the right basis."[85] The real question is how the Panel polices the release of information through the media namely, television, radio

offer or the value of considerations (3) advertisements comprising preliminary or interim results and their accompanying statements, provided the latter is not used for argument or inventive concerning an offer. (4) advertisements which give information, the publication of which by advertisement is required or specially permitted by the stock exchange. (5) advertisement which communicate information relevant to holders of bearer securities, (6) advertisement bearing on tender offer under the SARs, those which relating to court schemes; and ultimately. (7) those advertisements which are published with the specific prior consent of the Panel. The Panel's consent, for example, might be granted if it were necessary to communicate with shareholders during a postal strike, or where material new information or significant new opinions do appear at the meeting which must be circulated to shareholders to keep them informed consequently. See Note 1(b) and 3 on Rule 19.

84- Note 3(e) on Rule 19 of the Code.; Alexander R., A Year in The Life of The Panel, Observer, June 5th 1988,.p.57,

85- Ibid.

interviews the press as well as meetings.

As regards the press, Note 2(a) and (b) on Rule 19 of the Code makes it clear that the prime responsibility with respect to press release is on the advisers.[86] The adviser should ensure at an early stage of an offer that parties involved are warned about the possible implications of the City Code in relation of what they may orally express when approaching journalists. In consequence any person interviewed is inevitably responsible for any incorrect or misleading statements[87] As a preventive measure, the Panel states:

> ...quotations in documents, circulars, or press advertisements of press comments should not be quoted unless the board is prepared, where appropriate, to corroborate or substantiate them and the directors responsibility statement is included.[88].

Concerning television and radio interviews, the Panel stresses particular areas on which comment should be avoided, for example, future profits and prospects, asset values and potential revision of offers.[89] Furthermore, the Panel also requires that anything which amounts to a confrontation between representatives of an offeror and the offeree company or between competing offerors should be avoided.[90] Where radio or television interviews are granted, the parties involved in offers should take particular care not to release fresh material in television or radio interviews or discussions.[91]

86- Note 2(a) and 7 on Rule 19. of the Code

87- Supra n.83. See also City Code, general principles

88- The City Code.Rules

89- Note 2(a) on Rule 19; Note 5 on Rule 19; Panel annual report of March 31st 1988, at p.8 and 9.

90- Supra n.84 & 86

91- Ibid

Additionally, parties involved would be wise to make it a condition that the sequence of the interview should not be broken by the interposition of comments or observations by others not made in the course of the interview and that transcript should be provided.[92] If any fresh information is made public as result of such an interview, shareholders must be kept informed accordingly.[93]

Concerns about the increasing use of telephone campaigns has also been expressed. According to rule 19.5, telephone campaigns through which shareholders are contacted are not tolerated to be conducted by persons other than the staff of the financial adviser.

Thus, the available safeguard for the investors interest so far highlighted, quite apart from the Panel's lack of legal power, is designed primarily to fulfill two basic aims. First, to ensure that transactions are fairly conducted; and second, to provide an effective relief where any kind of fraud or misrepresentation is noticed. Besides, the protection intended to be provided covers a host of interests namely, the interest of employees and to a large extent creditors. In short the Panel's attitude is wisely committed to a policy of equal opportunities for all shareholders not only to receive the premium following the change of control but also to have sufficient information and advice on time prior to getting involved. Furthermore, the Panel wishes to keep the market free, open and unhampered unless there are very significant facts or convincing proof to the contrary.[94] This trend, however, has been maintained over the years and is still at the heart of U.K Stock

92- Ibid

93- Supra n.83

94- Bid Machinery in Need of Overhaul, The Independent, October 26th, 1988.

Market regulation.[95] But this does not mean that the attitude of the legislature and the self regulation (Panel) with respect to breach of the regulation are alike. While the Panel imposes the disciplinary sanction at its disposal, the legislature provides civil and criminal penalties. Corresponding attitudes are reflected in the French regulation that a breach of the regulation is a violation of the law. Following the discussion of directors responsibility, will the relevant criminal and civil sanctions will be discussed.[96]

SECTION THREE: DIRECTORS RESPONSIBILITY

3.1- RESPONSIBILITY FOR THE ISSUE OF STATEMENTS

According to both the U.K City Code and French legal regulation, directors of the target company are obliged to circulate their views on the merits or demerits of offers, including any alternative forms of consideration offered, either at the same time the offer document is communicated to shareholders, or at any subsequent relevant time.[97] But, perhaps, the distinctive aspect appears to be that in the U.K, unlike an offer document, a circular made by the target company's directors does not require either prior permission or dispatch through an authorized network. But it does not follow that inclusion of any misleading or untrue facts are permissible. Directors who circulate false or incomplete statements might obviously find themselves liable for one or other of the general

95- Most securities market regulations basically rely on information disclosure and publicity.

96- It is worthwhile mentioning that of additional remedies, in the U.K there are the extra legal sanctions imposed by the self regulating bodies to secure compliance with their regulation and to preserve discipline over their members.

97- See Chapter 2 of this thesis,

offenses reformulated in the F.S.A.1986. Correspondingly, in France there have long been statutory offenses designed to deal with fraud whether or not pertaining to misrepresentation. Those who put out fraudulent statements are generally punished under the French Criminal Code.

In the view of the Panel, "once a misleading statement has been made, no subsequent correction can truly restore the situation and redress the damage caused.[98] Indeed, this attitude, in addition to its wide range of implications, triggered the relevance of other principles of law notably, the common law of fiduciary duties and misrepresentation. Yet the common test upon which directors may be deemed guilty of an offense is reaffirmed in the authority that directors may be liable for gross negligence but not for a mere error of judgement or misunderstanding of facts.[99]

In its statement on Baker and Gibson Group plc for the control of Dee Corporation plc., the Panel indicated that during the exchange of press-release and circulars, parties involved should be aware that:

> ...tendentious or extravagant statements should be avoided. Argument should be clear and not confuse shareholders. The purpose of the exchange between parties to a bid is to analyse and clarify the impact and implications of the information given. If there are competing views, provided information is available for analysis, it is for the shareholders to decide which of the arguments they prefer.[100]

98- Rule 23.2 of the Code; Note (vii)(b) on Rule 19.1-4 of the Code pertaining to directors duties and obligation toward both the offeree and the offeror's shareholders

99- See Turquand v Marshall (1969) 4 Ch App. 376; Re National Bank of Wales Limited (1899)2 Ch. 629; Lindly M.R.'s statement in Lagunas Nitrate Co v. Lagonas Syndicate (1899)2 Ch. 392 at 435., 15 T.L. 436.

100- Noted by Morse G (1988) J.B.L. 323

In both countries the relevant regulator's underlying policy in the context seems to enforce shareholders self determination which should remain dominant over all. Furthermore, the Panel and C.O.B. went farther and stressed that, in order to ensure the accuracy of information supplied as well as to avoid any confusion, the source for any fact which is material to an argument must be clearly stated, including any detail to enable the significance of the fact to be assessed. In the U.K. if offerors use diagrams, charts, graphs or otherwise, the Panel requires that they must be presented without distortion.[101] The language used in a document or, where appropriate, in a subsequent statement, should precisely and concisely reflect the position being described.[102] Additionally, any advice given by directors must not be contrary to their statements which are already circulated to shareholders, which while not factually inaccurate, may mislead shareholders and the market and may create a false impression among the financial community.[103] Again, it is interesting to note that whilst in the U.K directors are at liberty to issue any statement without the Panel's interference, in France, nothing is permitted to be made available to shareholders without C.O.B's approval. That to say, issue of statements otherwise than those approved by the C.O.B is unlawful.

101- Note 2(a) on Rule 23.2 of the Code

102- In Re Smith v. Fawcett Ltd, Green MR indicated that "...since shareholders have a prima facie right to transfer to whomsoever they please, this right is not to be cut down by uncertain language or doubtful implications". (1942)Ch.304 at 306, discussed by Gower L.C.B., The Principles of Company Law, Ch.8, p.392., supra n 36 & 61/Ch.1

103- City Code, Rule 20, compare with C.O.B. Regulation 1989, Art.3 and 6, supra n.1/Ch.3.

3.2- RESPONSIBILITY OF THE COLLECTIVE BOARD OF DIRECTORS

Directors who were not involved either in the preparation of a document or in the negotiation process may seek to avoid any potential liabilities which could arise therefrom. In the view of both the U.K and French regulators, whether express or tacit, it is essential to involve any directors, including officers, whether or not they contributed to or cooperated in the inclusion or issue of untrue statements or concealed facts. Therefore, the regulators reactions were to make the full board of directors individually and collectively liable for any prejudicial action consequently.[104] Eventually, this means that directors of the offeror and the offeree companies are placed under responsibilities to ensure, as far as they are reasonably able to do so, that the regulation is not violated. Practically and technically, financial advisers in this respect are regarded as having a special responsibility to ensure that all directors are aware of their responsibilities under under the relevant regulation.[105]

3.3- RESPONSIBILITY FOR MISREPRESENTATION

As has already been pointed out, the fundamental purpose of the regulator is to ensure to all shareholders involved an equal opportunity not only to participate in any offer but also to evaluate the merits of any competing offers. Besides, parties involved in

104- Whilst the preparation of offers documents or negotiations of offers may be delegated to a committee or an inner cabinet, the Panel requires the board as a whole to ensure that a proper arrangement exists to enable it to supervise any powers so delegated. Panel statement of July 30th 1987 as noted by Morse G. (1987) J.B.L. 480; See also the Panel annual report, March 31st, 1987, at p.8. Such a statement has been incorporated in the Code at Appendix 3.of 1988 as amended.

105- See the City Code requirements. See also directors duty to seek advice, discussed in Ch.5

offers are required to take care that statements are not made to mislead shareholders or to create false impressions on the market. If a false statement is issued, and the directors knew it to be false while acting within the scope of their authority, the action of misrepresentation lies against all directors. In Hedley Byrne it was held that if a misrepresentation is noticed there will be liability for negligent mis-statement so long as a "duty is owed by the maker to the recipient of the statement".[106]

As regards the offeree company's circular, Professor Gower pointed out:

> ...if there is a misrepresentation in the takeover circular, there may be an action for damages (either in deceit, under the Misrepresentation Act, or, conceivably, under Hedley Byrne and Co. Ltd. v. Heller and Partners Ltd), recession, or an action for breach of contract, and the same principles apply.[107]

In the absence of authority and a clear provision governing directors' misrepresentation in takeovers, Gower's approach to apply the principle pertaining to prospectuses to a takeover circular is probably correct.[108]

106- Hedley Byrne and Co. Ltd. v. Heller and Partners Ltd.(1964) AC 465; See also Derry v. Peek (1889)14 app cas 337. Both noted by Gower, The Principles of Modern Company Law, p.316, supra n.36 & 61/Ch.

107- Ibid at p.330.

108- In U.K, proceedings may be invoked by Section 47, Ch. V, Part I of the F.S.A. 1986 relating to regulations of conduct business; Section 173-178, in respect of insider dealings; and Section 200 to 202, Part X of the Act as regards false and misleading statements, prosecutions and offenses by bodies corporate, partnership and unincorporated associates.

SECTION FOUR: CRIMINAL AND CIVIL REMEDIES

In referring to civil and criminal remedies, the first and foremost question is what kind of punishment an offender (person who releases untrue or misleading information) may have in case of non compliance or deliberate breach of the relevant rules. First of all the Financial Services Act 1986 makes it a criminal offense for anyone to engage in an "investment business" unless it is an authorized person.[109] As far as "investment advertisement" is concerned, it is plain that the rules of all S.R.O, R.P.B and R.I.E, including R.C.H contain certain common core rules based upon the adequacy test corresponding to those of the S.I.B. rules to the effect that investors should not be misled. Thus in order to avoid any adverse consequences, great care must be taken to ensure that issue of investment advertisements do not contravene the rules. At this point, The Securities Association's (T.S.A) conduct of business rules provide that any institution or agency must take reasonable care to ensure that any regulated publication it undertakes must comply with the business standard rules. In doing so, the issuer concerned is under no higher duty than to take reasonable care.[110] This may mean that if a statement is false or untrue and the person to whom the investment advertisement is made suffered loss, he will not be entitled to recover damages if such issuer could prove that the advertisement is prepared with reasonable and due care. The question which may arise is how reasonable care should be. It is, therefore, absolutely vital not only to provide guidelines on the subject, but also to tighten the gap, particularly within such a

109- F.S.A. 1986, S 3.

110- Discussed by Ashe and Counsell, at p. 24 , supra n.72

sensitive area of business.

Surprisingly, an action performed in contravention of the S.I.B. or of the relevant S.R.O's rules may not lead automatically to prosecution as is the case in France where breach of the C.O.B regulation, for instance, is a contravention of the law itself. But breach of the self regulation rules could give rise to disciplinary sanctions such as suspension or withdrawal of authorization depending on the seriousness of the breach. There are other sanctions which include injunctions to stop further breaches, a public statement that the relevant rules were not observed or a restitution order in favour of those suffering or may have suffered damage as a result of a particular investment. Mention should also be made of civil remedies under section 62 of the F.S.A. 1986 which provides that if any loss results from the breach of the rules in force, the person affected is entitled to bring an action for damages accordingly. However, Section 62 gives rise to a growing concern. Whilst it was introduced to cover a wide range of investment business, the recent Companies Act 1989 limited its scope of application.

Concerning criminal consequences, section 47 of the Act makes it clear that any person who

> (a) makes a statement, promise or forecasts which he knows to be misleading, false or deceptive or dishonestly conceals any material fact; (b) recklessly makes (dishonestly or otherwise) a statement, promise or forecast which is misleading, false or deceptive, is guilty of an offense if he makes the statement, promise or forecast or conceals the facts for the purpose of inducing, or is reckless as to whether it may induce, another person (whether or not the person to whom the statement, promise or forecast is made from whom the facts are concealed) to enter or offer to enter into, or to refrain from entering or offering to enter into, an investment agreement or to

exercise, or refrain from exercising, any rights conferred by an investment.

According to this section, an omission which conceals material facts will constitute an offense if it wrongfully induces another person to enter into an investment agreement. Furthermore, it is an offense to engage in any device, practice, act or course of conduct with an intention to defraud, mislead or deceive other persons involved or by virtue of which they become involved. Most seriously, it is also an offense to advertise or distribute circulars pertaining to investment unless the issuer is a recognised person. However the Act specifically provides some measure of defenses for any convicted person in deception, fraud or otherwise to prove that his conduct would not be expected to create, at the time of the issue, any false or misleading impression. In this respect, Section 57.4 of the Act provides:

> A person who in the ordinary course of business other than investment business issues an advertisement to the order of another person shall not be guilty of an offense under this section if he proves that he believed on reasonable grounds that the person to whose order the advertisement was issued was an authorized person, that the contents of the advertisement were approved by an authorized person or that the advertisement was permitted by or under section 58.

Three defensive measures appear from the provisions of section 57.4. First, a person may not be deemed to be guilty if he can confirm with evidence that the person to whose order the advertisement was issued was an authorized person; second, the contents of the advertisement were approved by an authorized person; and third, the advertisement was permitted by or under section 58 of the Act. Finally, should noted that even if such defenses are provided, one may not interpret them otherwise. To be understood, one should take account of the wide implications of that section. This means that the interpretation of the section must not be understood by a simple reference to its literal meaning or on the basis of misunderstanding of the surrounding facts and circumstances.[111]

SECTION FIVE: SHAREHOLDERS' ACCEPTANCE AND THEIR RIGHT TO WITHDRAW

5.1- SHAREHOLDERS ACCEPTANCE

Under the general law of contract, every person is expected to have capacity to enter into a binding contract. There are, however, certain vulnerable categories of persons whose status, age or condition render them either wholly or partly unqualified to contract, for example, mentally disordered persons or infants. Yet such incapacity usually does not arise within the context of buying and selling securities on the Stock Market. This is especially so because such a transaction is generally carried out through an intermediary chosen by each party to a contract.[112] This equally applies to takeover offers.

In general, with respect to takeover practice, if a shareholder has already accepted the initial offer, he is legally bound to transfer his shareholdings for the consideration indicated in the offer document. Furthermore, since the offer document always contains a conditional clause, any shareholder's early acceptance will not bind the offeror.[113] But it does not follow that the offeree's shareholders

111- See, R v. Lawrence (1982) A.C 510, per Lord Diplock, at 526.

112- City Code, Appendix 4 "Receiving Agents" Code of Practice.

are totally deprived of the opportunity to accept other subsequent and more advantageous offers whenever they present. In some circumstances, previous acceptance ceases to be binding.[114] It is important to mention that nothing in law or in self regulation obliges shareholders to accept the proposal. Even if some or the majority of shareholders transfer their securities to the offeror, it still most likely that others will refrain from selling their stock in the target company after completion of the offer. This is so both because the offer document indicates the number of shares sought to be purchased, and because of the divergent interests of investors.

Nevertheless, assuming that acceptance conditions (50%), by one way or another, are attained, the more specific question which causes some concern lies in the effect of unregistered transfers as between offerors and sellers in deciding the success or failure of offers. In considering such a question, it is essential to keep in mind the nature of the transaction. It is, first, a transfer of personal rights from one person to another (the offeror). If the offer succeeds, the logical consequence will be a substitution of the previous set of controllers of the target company by a new controllers chosen by the successful offeror. What matter for the offeror for the success of his offer, is the transfer of such rights whether or not registered. What matters for the regulator is that

113- As a protective measure, offerors often expressly indicate in their offer documents that the offeror will buy the offeree's shareholders shares conditional on acceptance of the offer by the holders of (x) percentage of shares depending on the proportion of shares already owned by it in the target company.

114- Under the U.K City Code, for example, an acceptance ceases to be binding once a reference to the M.M.C is announced.

such right must legally be transferred. That is to say, they must be registered and it is only the legal transfer of rights which must be counted to determine the success or failure of an offer. This point seems to raise concern.[115] The relevant question is what is the position if there are registered and blank (unregistered) transfers of rights to an offeror during the latest time of the offer and such transfers are challenged by another competitor?. Could the first receiver of such rights be declared successful? In determining which transfer is valid for an offer to succeed, in case law it was held that any transfer cannot be deemed valid unless it is registered.[116] As to priorities, where there is a conflict between offerors, valid transfers prevail.[117]

In the U.K, problems which may often arise in connection with takeover offers relate to which shares are relevant in determining the minimum acceptance conditions. Rule 10 of the City Code states that any short selling will not be included in determining whether

115- Problems arise where the shareholders have been tempted by fraud in order to hand over blank transfers of rights so that the buyer may frustrate or discourage any rival to enter on to the competition scene. This equally applies to the practice of short selling where intended sales or acceptance of the offeree company's shares carrying unrestricted voting rights are made even though the seller/buyer has not yet exchanged the shares/consideration involved. Such a transaction may, of course, lead to a risk of double counting which might take place at the end of an offer. An offer could be declared unconditional even though the 50% of voting rights is not fulfilled. For further reading with respect to the latter form of sale see, (1988) J.B.L 164, 165 and 323; the C.B.I proposed that short selling should be banned during a takeover. The Independent, Feb.24, 1989, p.25. See further Morse G , (1986) J.B.L 317.

116- (1949) Ch.78, (1952) Ch. 499 C.A. See also Fry Re Chase National Executors and Trustee Corp. v. Fry (1946) Ch.312.

117- Shropshire Union Rlay v. R (1875) L.R.7 (H.L), 499, 115 L.J Ch 225, 175 L.T 392, 62 T.L.R 414, (1946)2 All ER 206; Guy v. Water Low Bros & Layton Ltd (1909) 2 T.L.R 515; Société Générale de Paris v. Walker (1885) 11 App Cas 20 (H.L), at p. 28

the acceptance condition is fulfilled under the Code. One might then ask which acceptance under the City Code can be counted toward fulfilling such an obligation. For the purpose of curbing abuses as well as inequality of treatment between shareholders, two major procedural requirements under the City Code need to be observed. First, both acceptance and purchase of shares must be valid so as to declare an offer successful; and second, valid acceptance and purchase should be made before the offer expires.

As to valid acceptance and purchase, under the City Code,[118] transfer of rights which may be counted towards fulfilling an acceptance condition must satisfy the following requirements:

> (1) acceptance must be from a registered holder or his personal representatives; endorsed on behalf of the Stock Exchange to the effect that documents of title have been delivered to the Stock Exchange and that shareholders who accepted the offer are entitled to become a registered holder. (2) certified by the offeree company's registrar or the Stock Exchange; (3) they are received by the offeror's receiving agent; and (4) the acceptance form must comply with the following standard (a) where the form constitutes a transfer, if it meets the criteria for the registration of transfers and (b) where the form does not constitute a transfer if it constitutes a valid appointment of some person as attorney to execute a transfer on behalf of the acceptor provided an appropriate evidence or representation certified by the authority is produced.[119]

Concerning share purchase, note 5 on rule 10 of the Code provides that any purchase of shares by an offeror or its nominees, including any purchase made by any person acting in concert with the offeror or its nominees, may only be permitted to be calculated in determining the level of acceptance set out in the offeror's

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118- The City Code, Note 4 on Rule 10,

119- The City Code requirements are not clothed in legal form.

relevant document towards fulfilling an acceptance condition if it is performed in accordance with these criteria:

> (1) The shares are registered in the offeree company's register of members in the name of the offeror or its nominee or in the name of the person acting in concert with the offeror or its nominees; (2) a transfer of the shares in favour of the offeror or its nominees executed by or on behalf of the registered holder in conformity with the above cited requirement of valid acceptance is delivered on or before the last time for acceptance and has effectively been received by the receiver; (3) talisman stock notes issued by the Stock Exchange in the name of the offeror or its nominee are delivered by or on behalf of the offeror before or on the last time the offer closes and the receiver has recorded them in the appropriate document.

As regards timing, Note 6 on Rule 10 states that in determining whether an acceptance condition has been fulfilled before the final closing date, only the following acceptance and purchases may be counted. These are:

> acceptance which meet the requirement of Note 4 on Rule 10 and which in addition either a) are accompanied by share certificates; b) are certified by the Stock Exchange and are from a registered holder or his representative; c) are evidenced by a certified transfer; and d) are certified by the Stock Exchange and the relevant certification is dated prior to the last day of dealing on the Stock Exchange before the expiry of the offer.

It appears from the above requirements that they are fundamentally designed to prevent parties in offers or any offeror to include shares otherwise acquired so as to gain swift control of the target company. In this respect, the Panel states:

> it is essential when determining the result of an offer under the Code that appropriate measures are adopted so that all parties to the offer

may be confident that the result of the offer is arrived at by an objective procedure which, as far as possible, eliminates areas of doubt.[120]

5.2- SHAREHOLDERS' RIGHT TO WITHDRAW

There is no doubt under both U.K. and French regulations that shareholders who accepted the original offer may withdraw their acceptance if a more favourable offer is announced. But the distinctive aspect between French and U.K regulations seems to be that while under French regulation, quite apart from any conclusion of prior agreements and provided that they are notified, shareholders are allowed to withdraw their acceptance at any time during the relevant period of the offer, under the British extra legal regulation, shareholders are permitted to use such a right only in special circumstance, for example, where a competitive offer is subsequently announced.

CONCLUSION

Dealing in the company's relevant securities on the Stock Exchange is to a considerable extent confusing in practice, a confusion that results from the fact that first, the Stock Exchange by its nature is speculative and, second, because of the increasingly permissible use of nominees accounts which reveal nothing about the true owner of the substantial shareholdings. Furthermore, an inefficient or inadequate information disclosure in the field may also contribute to the creation of confusion and uncertainty which both seems to distort not only the protection of shareholders but also the transparency of the market as a whole. The question which

120- The City Code, Appendix 4, supra n.112.

may arise first in this connection is whether the actual system of disclosure, along with the relevant authorities' commitment to the prevailing theory of the "free market" and/or "administrative dirigisme' could resolve the lack of transparency and be an effective deterrent to the creation of a false market and therefore, ensure a proper conduct of takeover offers. It seems from the above discussion that although information disclosure may contribute to better transparency of the market and reduce abuses, it remain uncertain whether all kinds of market practice are covered.

Concerning periodical information disclosure, for companies generally, whether public or private companies, listed on the Stock Exchange or not, it is a statutory requirement that certain sensitive information, mostly of a financial nature, should be made available for inspection on a periodic basis namely, accounting reports, balance sheets, profit and loss as well as directors' and auditors' reports. It is also paramount that full and accurate information about the ownership of companies is available to enable shareholders to know with whom they are dealing and to identify who is controlling their company. Besides, in the view of the regulators, whether in France or U.K, acquisitions of interests or disposals should be transparent and dealing in information should be widely spread to protect investors and to enhance their confidence within the securities market. Finally, the remaining question is whether or not disclosure information contained in an offer document alone fulfill the goal of protection (investors interest) that almost any regulator seeks to achieve. The answer to this question is negative. This is because information contained in an offer document which is dispatched to shareholders, at the time the offeror's firm intention to make an offer is officially and publicly communicated, is not an absolute standard of disclosure. It is true that an offer document contains some useful information which enables persons to whom the offer is addressed to form a preliminary opinion about offerors and their structured offers notably, the identification of each offeror, intentions and the amount of shares sought to be acquired as well as the percentage of shareholdings already owned in each other. But an offer document alone may remain far less efficient to satisfy shareholders needs and to ensure market transparency. Besides, the Stock Exchange requires that a listing particulars, which is mostly of a financial nature, be sent to shareholders in conjunction with the offer document. The latter (listing document) is also the subject of growing concern and debate on the way of improving the quality of information which should close the gap between the information provided during the company's usual business and that offered in takeovers documents where companies seek their shareholders support. Another question is whether compliance with the offer document including a listing particulars fulfills the offerors' obligations in respect of information disclosure. Certainly, it is not, because parties to takeover offers have continuous duties and responsibilities to perform and discharge which end with the expiry of the offer.

In order to set up an adequate disclosure system, a review would appear desirable with respect to two crucial points: the transparency of dealings in shares carry voting right of whatsoever kind and the protection of the interests involved. The

Panel's underlying concern within the disclosure field is the idea that shareholders should be treated fairly and kept fully informed and to ensure orderly conduct during takeovers including the prevention of a false market. Interestingly, the relevant authorities of most securities markets adhere to the same principle that dealings in the shares carrying voting control is an event which should be as transparent as possible. In Britain, the Panel, with the collaboration of the Stock Exchange and the Securities Investment Board, in the face of a growing number of domestic and cross-border takeovers involving the control of British companies, tends to ensure greater standards of transparency of share ownership. This tendency may also be seen in the light of the recent French Loi 89-531 of 1989. However, the British regulation along with France, in respect of information disclosure, is highly developed compared with many other E.E.C member states. But as far as the U.K provisions relevant to takeovers are concerned they would be much effective if such provisions were embodied in legal form. Indeed, this is consistent with the proposal of the E.E.C for the regulation of takeovers. The European Commission is in process of laying down and finalizing rules dealing with takeover offers of cross-border nature leaving, possibly, domestic takeovers to the discretion of the local government.

CHAPTER FIVE

DIRECTORS' FIDUCIARY DUTIES

The preceding chapter dealt with shareholders protection. The major focus was on information disclosure, the various means whereby information is released to the public, in particular the group of shareholders involved. Remedies were also briefly discussed. As indicated, an aspect that has received more attention and often stressed by the relevant regulator concerns information disclosure. Indeed, it was not only the available informative device whereby shareholders can be able to form an informed judgement about an offer and to make a self determined decision, but also it appears to be an additional means whereby the likely adverse effect of any potential or actual abusive practice is reduced. Again, it was also stated in the previous chapter that directors were the primary body who may give guidance as to worthiness of offers. They are also in a position, by virtue of their vast knowledge, skill and experience, to arouse shareholders' uncertainties. It is, therefore, of profound importance to discuss how far directors latitude ought to be. The following chapter discusses what duties are owed by directors in the performance of their particular functions pertaining to takeovers in which the potential change of control from their company to another is at issue. The general principle upon which such duties are based can be found in both countries the U.K. and France. Directors, once their jobs start, whether by contracts, elections or by any other agreement, are required to show the utmost good faith, care and skill toward the company in respect of their dealings (performance of functions).

However, whilst reliance in this chapter will be on the U.K literature, attention will be drawn to French reference wherever necessary.

The concept of fiduciary duties is a vexed and controversial aspect of company law. For example, directors are viewed as trustees.[1] It is also argued that directors in the performance of their function are agents.[2] This thesis is not concerned with such aspects. Controversies which arise as to whom such duties are owed will be outlined later in this chapter. It suffices to stress that these duties, except in so far as they depend on statutory provisions expressly limited to directors, apply equally to officers and shadow directors acting in a managerial capacity. Today, this is of paramount practical importance. Finally, while the purpose of this thesis is specific, one should, *prima facie*, distinguish between the directors' role in the course of the company's ordinary activity and their role where change of control is imminent. The role of directors in both situations is covered by the common law principle of fiduciary duties. Since the role of directors, in the performance of their functions, is framed within the scope of the fiduciary principle, the underlying questions to start with are: first, what

1- Romer G cast doubts as to whether directors are trustees. He said; "It has sometimes been said that directors are trustees. If this means no more than that directors in the performance of their duties stand in a fiduciary relationship to the company the statement is true enough. But if the statement is meant to be an indication by way of analogy of what those duties are, it appears to me to be wholly misleading." Re City Equitable Fire Insurance Co.,(1925) Ch.407, at p.426. For further reading see mainly, Sealy L.S, Fiduciary Relationship (1962) C.L.J.69; (1963) C.L.J.119, Directors as Trustee, (1967) C.L.J.83; Pennington R.R, Company Law., (4th edn), Ch.16, p.532, supra n.17/Ch1; Hahlo H.R and Tribilcock M.J, Hahlo's Casebook on Company Law (London, Sweet and Maxwell, 1977) p.426 et seq.

2- By Gower L.C.B, The Principles of Modern Company Law, (1969) Ch.23, p.515, supra n.36 & 61/Ch1 does it mean for a director to be a fiduciary in a particular situation such as a competitive offer? Another analogous question lies in the amount of information disclosure shareholders must have in order to make an informed and rational decision with respect to the sale of their shares. The latter question should also be read in conjunction with the previous chapter "Shareholders Protection". Thus, so far, various tests have evolved in the court, namely, the "best interests" formula; the "fairness test" and the "reasonableness criteria".[3] In the light of the above discussion, the discussion below will focus on first, to whom directors are fiduciaries; second, directors' duties to act in the best interest of shareholders; and their duties to consider employees' and creditors' interests. Stress will be on the directors duties of care and diligence. Concerning duties of care, discussion will be restricted to issues involving the preparation of profit and forecast. This discussion will consider whether or not advisers, including accountants and auditors, are under corresponding duties. As regards the duty of diligence, the issue of conflict of interests will be discussed. Consideration will be given to whether or not directors are under a duty to seek advice, particularly legal advice. Another practical point concerns directors' duties and insider dealing. This is left to be discussed to the last.

SECTION ONE: TO WHOM DIRECTORS ARE A FIDUCIARY

Regardless of whether or not a takeover offer is involved, it is commonly agreed that the directors' role is always performed

3- See, Mills v. Mills (1938) 60 C.L.R 150, 11 A.L.J 527; Teck Corporation v. Millar, supra n.109/Ch.1. For further consultation in respect of the meaning of "best interest" see, Davies P.(1988)J.B.L 65.

within the common law principle of fiduciary duties. In theory the scope of the fiduciary duties and the measure of their discharge has always been described in the light two discernible obligations; the duties of honesty and good faith; and the duty of care and skill. The related criteria by which the courts waive the requirements of directors' obligations and responsibilities is often referred to the above cited tests of "best interests", "fairness test" and "reasonableness test".[4] Correspondingly, the logical consequences for an aggravating breach of the relevant regulations may be civil, criminal or administrative in addition to the cost of the proceedings. The vital question is to whom directors are fiduciaries? Several judgements have advocated different opinions. Some have said that directors' fiduciary duties were considered to be owed to to the "company as a whole", the meaning of which was referred to the company's general body.[5] It follows that the company as a distinct legal entity has had little relevance. Others considered that directors owe fiduciary duties to the "existing shareholders".[6] Although implementing almost identical objectives, the former would appear more general compared with the latter which is more specific because, if narrowly interpreted, may exclude a host of other interests notably, the interests of employees and creditors. Still another judgement, albeit that it remains exceptional, was advanced that directors owe a fiduciary duty to the shareholders

4- See Teck Corporation v. Millar supra n.109/Ch.1, noted by Hahlo H.R & Trebilcock M.J, Hahlo's Casebook on Company Law, at p. 450-454, supra n.1.

5- Evershed MR said that " the phrase the 'company as a whole' does not ... mean the company as a commercial entity, distinct from corporators. It means the corporators as a general body. Greenhalgh v. Ardene Cinema Ltd.and Others (1951) Ch 286; (1950)2 All ER 1120.

6- Heron International Ltd. v. Lord Grade, (1983) B.C.L.C 244 (C.A);.Sealy L.S, Cases And Materials in Company Law, p.247, supra n1/Ch.4

individually.[7]

SECTION TWO: DUTY TO ACT IN THE BEST INTERESTS OF SHAREHOLDERS

The leading case, in the context of competitive offers, is Heron International Limited v. Lord Grade. It was held:

> ...where directors have decided that is in the interests of a company that the company should be taken over, and where there are two or more bidders, the only duty of the directors..., is to obtain the best price..., where the directors must only decide between rival bidders, the interest of the company must be the interest of the current shareholders.[8]

The question arises in relation to the interpretation of the expression "shareholders". Should the owner of unregistered shareholdings be covered by the scope of that terminology?. Another analogous question relates to the relevance of other involved interests namely, the interests of employees and creditors. Those classes of interests, if the term "shareholders" is narrowly interpreted, appear most likely to be excluded from the scope of this judgement. Naturally, one may argue that if such a judgement is widely interpreted it could therefore, extend to cover both employees' and creditors' interests. This is so because a distinction between shareholders and employees or between shareholders and creditors within the same company may sometimes rises difficulties.[9] Finally, should the directors be obliged to consider

7- Percival v. Wright [1920]2 Ch 421, 18 T.L.R 697; Allen v. Hyatt (1914)30 T.L.R (P.C).

8- Supra n.6. See also Hoffman J. in Re a Company No.008699, The Times, Jan 18th, 1986; (1986)J.B.L 77.

the long-term interests of their shareholders where the change of control is imminent? In Heron it was held that the target company's directors, in choosing the more beneficial offer, should balance the shareholders short-term interests against their long-term interests. Surely, the latter will largely be dependent upon, or lying with, the successful competitor.[10]

As regards the interests of directors and of their shareholders, the question which may arise in that connection is whether it is possible for the directors of the target company to act solely in the best interests of their existing shareholders? Should they consider at least concurrently their own interests? Where the directors are shareholders in the company of which they are directors,[11] the interaction of interests has plainly been made clear by Latham CJ who indicated:

> ...It must, however, be recognised that a general rule, though not invariably ... directors have an interest as shareholders in the company of which they are directors. Most sets of articles of association actually require the directors to have such an interest and it is generally desired by shareholders that directors should have a substantial interest in the company ..... Very many actions of directors, who are, shareholders, perhaps all of them, have a direct or indirect relation to their own interests. It would be ignoring realities and creating impossibilities in the administration of a company to require that directors should not advert to or consider in any way the effect of a particular decision upon their own interests as shareholders.[12]

9- In the light of the new investment development, if the term shareholders is widely interpreted, it may extend to cover not only investors, including directors, employees or creditors, but also consumers.

10- Supra n.6

11- As a condition, most company laws oblige the directors to a hold certain percentage of shares in the company in which they are employed.

12- Supra n.4

Certainly, no one would deny, nowadays, the existing interplay of interests between shareholders and directors. This is apparent since the promotion of shareholders' interests will, indeed, positively reflect and greatly improve the directors' interests. But, if the directors in their capacity as fiduciaries, no matter how, benefit at the expenses of shareholders, it would automatically be framed in term of abuse and more seriously, a breach of fiduciary duties and, therefore, be open to derivative actions.

As long as the relevant law entitles the directors to the opportunity of having shares in the company they manage, this gives them a position of power and control. Consequently, most company law and stock market regulations have progressively changed their provisions in order to protect shareholders, and by the same measure tighten the gap that has existed between shareholders and directors in the field of interaction of interests, therefore, constraining the directors to act in an impartial manner in particular when a competitive offer is at issue.

In France, directors of the company under the offer are becoming increasingly restricted to respond directly to any offeror's attempts. Alternatively they are obliged to present their arguments, whether in favour or against offerors, to the C.O.B. By contrast, in the U.K, the presence of the regulator, as long as investors interests are not impeded and the market is running in good performance, could not be noticed. It is worthy of note that in the U.S.A, directors of the target company, when change of control is imminent, are regarded as auctioneers charged with obtaining the best price for the shareholders to whom the offer is addressed.[13] According to that tendency a duty to be an auctioneer arises only if it is apparent that the change of control is inevitable which is not the case where the directors of the target company have determined to remain independent.[14]

SECTION THREE: DUTY TO CONSIDER THE EMPLOYEES' AND CREDITORS' INTERESTS

There is always an element of employees' interests in takeover offers operations which involve an immediate change of control from one company to another. For the shareholders, wherever a competitive offer is made, it is becoming standard that the directors are obliged to balance the shareholders short-term interests against their long term interests. The question then is simply that how far the scope of that approach may cover the employees' interests? By virtue of section 309 (1) of the Companies Act 1985, the target company's directors are obliged to have due regard to the interests of their employees in a similar manner as the interests of the company's member.[15] Assuming that the scope of this section extends to cover the interests of employees in a takeover offer situation, two duties arise. First, the duty to inform and, second, the duty to consult. The target company's duty to consult is owed to the recognised trade union whereas the duty to inform is placed on both the offeror and the offeree company. Remedies exist through a complaint to an industrial tribunal initiated by the recognised trade

13- Herzel L & Shepro R.W., Ups And Down of U.S Takeovers Defence, (1988) 9 Co.Law. p.85 at 88

14- See, supra, at Ch.6

15- The problem arises whether that section covers situations involving takeover offers or it is only enacted to protect employees interests where there is a transfer of undertakings as the E.C directive provides. Yet the matter remain open to questions.

union.[16] By contrast, in France, directors are obliged to inform as well as to consult the Syndicat des Travailleurs.

As a matter of fact, the directors of the target company often do consider employees' interests in a similar way as the shareholders interests.[17] Perhaps the sole difference lies with the consequences on employees' interests, if the target directors considered them on a short term basis while, normally, such interests should be considered on a long term basis. Of course, for the shareholders, where a cash offer is involved and accepted thereafter, there may not remain any further link or interest with the acquiring or the acquired company since their aim is achieved. But, if that approach suits shareholders who will not have any further continuous link with the company after it has passed out of control, it would inevitably have an adverse effect on employees' future jobs. In consequence, in addition to the equality of treatment between shareholders and employees, the legislator should, normally, seek another way of providing further protection for employees' long term interests.

In the light of experience, takeover offers may affect not only shareholders and employees, but may extend to affect a host of other interests,[18] such as the interests of creditors.[19] Hence, in

16- (1989) 31 Managerial Law, p.12. In France consultation with the Syndicat des Travailleurs is compulsory.

17- Pennington considers the employees interests as an imperfect obligation. Company Law, (5th edn.) p. 660 (London, Butterworths,1985). For other arguments, see Boyle A.J, Boyle and Bird's Company Law, (Jordans and Sons Ltd, 1985), p.593 et seq; Litster v. Forth Dry Dock Co Ltd (1989)1 All ER 1134. This case, nevertheless, covers unfair dismissal of employees resulting from a transfer of undertakings. Although it is directed to insolvency situations Litster may also extends cover takeovers and mergers operations.

18- The interests of consumers and at large the national concern may also be affected.

considering whether or not the interests of creditors should at least be taken into account where a competitive offer is imminent, the following case would appear as an appropriate guideline for the directors of the target company in respect of which interests should be balanced or advanced subsequently. Berger J. said:

> ...A classical theory that once unchallengeable must yield to the fact of modern life. In fact, of course, it has. If to day the directors of a company were to consider the interests of its employees no one would argue that in doing so they were not acting *bona fide* in the interests of the company itself. Similarily, if the directors were to consider the consequences on the community of any policy that the company intended to pursue, and were deflected in the commitment to that policy as a result, it could not be said that they had not considered *bona fide* the interests of the shareholders.
>
> I appreciate that it would be a breach of their duties for directors to disregard entirely the interests of a company's shareholders in order to confer benefit on its employees. But if they observe a decent respect for other interests lying beyond those of the company's shareholders in the strict since, then it will not, in my view, leave directors open to challenge that they have failed in their fiduciary duty to the company.[20]

Such a statement has left no doubt as to the inclusion of creditors' interests and by the same token closed the gap of interpretation that might be given otherwise.[21] Accordingly, it

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19- Whilst it is commonly accepted that creditors' interests are only relevant where the company is insolvent, Lord Diplock has advocated that " the best interests of the company are not exclusively those of the shareholders but may include those of the creditors" Lonrho Ltd v. Shell Petrolum Co.Ltd, (1980) 1 W.L.R 624 at 634

20- Teck Corporation v. Millar, supra n.109/Ch.1

21- It has been argued that when the political climate permits it, directors will need to balance the interests of various classes of members, the creditors and the employees. See further Morse, Company Consolidation Legislation 1987 , at general notes on section 309 to the Act in p. 272,.supra would be consistent to subordinate the interests of creditors with those of employees and shareholders as it is the case under statutory mergers, so that, in so far as possible, similar decisions will carry similar effects. Nevertheless, where certain obligations, in particular situations such as takeover offers, are not statutorily stipulated, it does not mean that they are left unframed. Indeed they are inevitably caught by the self regulation requirements. Thus, since it is still open to question whether creditors' interests are covered or not, the City Code on Takeovers and Mergers obliges parties to an offer to pay due regard to creditors' and employees' interests when formulating or giving advice to their respective shareholders. Regardless of whether or not the offer is accepted, under the provisions of the City Code, the board of the target company is required to give its views regarding the offeror's intentions in respect of the offeree company and its employees.[22] This is a vital requirement which may be adopted by future legislation.

SECTION FOUR: DIRECTORS' DUTIES OF CARE AND DILIGENCE

Whilst duties of care and skill arise in connection with the preparation of documents, circulars and profits and dividend forecasts, the duty of diligence and honesty come into play in cases involving conflict of interests. This section will consider first, the directors' duty of care and skill[23] and second, the duty of diligence and honesty in connection with directors' conflicts of interests.

n.1/Ch.4

22- City Code, Rule 25 as amended.

23- Duties of care and skill are described in details in the classic case by Romer J in Re City Equitable Fire Insurance Co Ltd, supra n.1

4.1- DIRECTORS' DUTY OF CARE AND THE ISSUE OF PROFITS FORECASTS [24]

In essence, directors' duties of care arise wherever they seek to communicate with shareholders to whom the offer is addressed. Such duties usually come into existence during the preparation of the offer document, circular, issue of subsequent statements, or within the context of an announcement of profits and dividends forecasts. Similarily, the duty of care arises wherever a subsequent revision of an offer or an introduction of an alternative is undertaken. In this connection, save wherever permitted, it may be that any mis-statement, omission, whether deliberately or carelessly made, in conjunction with an offer and communicated to shareholders concerned subsequently, may give rise to serious penalties. They may be criminal, civil, or administrative as the degree of the breach may be. Accordingly, directors, in their capacity as fiduciaries, are, by virtue of the relevant provisions and the common law principle, obliged to act with due care in relation to the affairs of the target company under the offer. Nonetheless, in order to discharge them from that obligation, Brightman J. pointed out that "Where a takeover offer has been made, the directors of the offeree company are under a duty to their own shareholders which includes a duty to be honest and not to mislead". Likewise, the Panel on Takeovers and Mergers considered offerors' obligations towards the shareholders of the offeree company and their obligations towards their own shareholders, to a greater or lesser extent, alike.[25] This means that the offeror is required to consider not only matters which affect its

24- Refer to the duty of care required for the preparation of document and circular discussed supra in Ch.3.

25- Gething v. Kilner (1972)1 W.L.R 337 at 341 & 342, (1972)1 All ER 1166 own shareholders interests, but also those matters which may affect the rights of shareholders of the target company.

In referring to the preparation of documents,[26] the City Code provides a general guideline that parties to an offer should prepare their respective documents with the highest standards of care and accuracy. In order to enable the shareholders to make an informed and rational decision, the City Code obliges directors to make available, in the offer documents, all relevant information and facts. That kind of information, in view of the Panel, should be fair, concurrently announced and reflect the purpose being described in the issue. However, the Panel, on many occasions, has expressed concern at the quality of a number of misleading circulars which were deemed to be inaccurately prepared and, thus, misleading. The inaccurate information referred to was the incorporation in the circular of unsatisfactory graphs and diagrames. Accordingly, the Panel, in addition to the issue of guidelines, has recommended the type of remedies that it will take.[27] For instance, concerning the use of diagrames and graphs or any other appropriate means to describe the matter under consideration, the Panel states that there is a duty on directors to take particular care in this respect to ensure accuracy and fair presentation.[28] In consequence, the Panel, in its capacity as supervisor, may institute sanctions wherever a breach of the relevant rules is committed namely, private reprimand, public censure, warning or reporting the offender's conduct to the D.T.I., the S.R.O. or the S.I.B. as the case

26- The term document is used in this context to denote an offer document and circulars.

27- See (1985) 6 Co.Law; Johnston A, The City Takeovers Code,.at p.56, supra n.88/Ch.2

28- Ibid

may be.

Returning to the preparation and the issue of profits and dividends forecasts and assets valuation, conscious of certain responsibilities imposed upon them by the common law principle, statutes and self regulations, the directors are required to prepare profits forecasts with due care. Technically, of course, although profits forecasts by their very nature are optional, they are regulated by the Panel City Code.[29] However the statutes deal with civil and criminal aspects (problems) arising from profits and dividend forecasts.[30] Whilst the City Code does not have the force of law, Section 47 of the Financial Services Act 1986, makes it a criminal offense for anyone to make "a statement, promise, or forecast which he knows to be misleading, false or deceptive"[31] In the case law, it appears that directors may not be liable for a mere judgement or misunderstanding of facts.[32]

As a matter of defensive tactics or inducement, the issue of profits forecasts often provides shareholders with the opportunity of comparing between the real value of their securities, under the offer, and the offeror's proposed price.[33] It is generally used where the offer is on a share for share basis to demonstrate that the greater value of the shares sought to be exchanged is much greater than the offeror is placing upon them. Such tactical assumptions and advanced arguments against or in favour of the offer may arouse shareholders uncertainty. Worse, it is uncertain

29- The City Code, Rules 28 and 29.

30- See in connection with the release of information in Ch.4

31- See directors responsibility in Ch.4

32- Turquand v. Marshal (1869)LR 4 Ch. app 376; Re National Bank of Wales Ltd. (1899)2 Ch. 629

33- Under certain circumstances, profits forecasts may not be material. For instance, where the offer is wholly made in cash. See supra n.35

whether such predictions could help an ordinary shareholder. If profits forecasts are issued by offerors, they demonstrate and emphasise further the prospects and financial strength of the offeror concerned. Consequently, shareholders may, in certain circumstances, be induced to make a hurried decision as to acceptance. The worse situation is where profit forecasts are concurrently issued by parties to offers to support arguments in a distorted and misleading way. Therefore, once the directors consider making a profit forecast, in the view of the Panel, the primary responsibility rests with the respective advisers. As a preventative measure, the Panel requires the adviser to any party to an offer to warn his clients of the care needed in making any forecasts or assumptions during the relevant period of an offer[34]. Furthermore, advisers are placed under a strict duty to examine and report on the forecasts. It is worthy of note that the Panel drew attention to some obvious implications which rest on the issue of profits forecasts that are made prior to an offer. The Panel considers such matters as relevant even if they are not specifically referred to in the document because of their perceived effects. This means that, if the profit forecasts were made shortly before the announcement of an offer, it is most likely to be taken as a basis by the financial community and, therefore, will become vital to be considered by the shareholders in making their rational decision. It is, therefore, important that any forecasts should be supported by as much objective information as possible to enable shareholders to form their judgement as to the reasonableness and reliability of the forecasts.[35] Rule 28 of the Code states that:

34- The City Code, Rule 28. 2 (c)

35- The Panel considers that where offers are wholly made in cash, the

> There are obvious hazards attached to the forecasting of profits: this should in no way detract from the necessity of maintaining the highest standard of accuracy and fair presentation in all communication to shareholders in takeovers. A profit forecast must be compiled with scrupulous care and objectivity by the directors, whose sole responsibility it is; the financial advisers must satisfy themselves that the forecasts have been prepared in this manner by directors.

From this rule, and also from what has been said above, it is clear that both parties to an offer and their respective advisers are firmly and collectively responsible for any defect in the preparation and issue of forecasts.

Concerning the duty of the financial adviser where he has reason to doubt the accuracy or incompleteness of information, the Panel, in its report for 1976, states that "When a financial adviser finds himself in such a difficult position and is faced with a situation where he thinks the Panel is being denied or misled, the Panel considers that his over riding duty is to the Panel".[36] Additionally, the C.B.I, in its capacity as membership of the Panel, has confirmed that the financial adviser should not be expected to shield a client who was endeavouring to mislead the Panel.[37]

Finally it appears that the Panel imposes a corresponding duty on auditors, accountants and valuers involved. Concerning the accountant's position, Rule 28.2 (c) para 2 of the City Code states that whilst an accountant has no duty and responsibility for any assumption, he will as a result of his review be in a position to

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issue of profits forecasts may have little relevance. but they are highly significant where offers involve an exchange of securities.

36- Panel report, July 1976, noted by Johnston A., The City Takeovers Code,, at p.106, supra n.88/Ch2.

37- Ibid

advise the company on what assumption should be listed in the document or circular and the manner in which it should be set out. He is also, by virtue of his influence, entitled not to allow any fact to be published which appears to be unrealistic, or one to be omitted which appears more relevant, without commenting appropriately in his reports. As regards auditors, it is interesting to lay stress on the statement of Lopes LJ who indicated:

> It is the duty of an auditor to bring to bear on the work he has to perform that skill, care and caution which a reasonably competent, careful, and cautious auditor would use. What is reasonable skill, care and caution must depend on the particular circumstances of each case. .He is entitled to assume that they are honest, and rely upon their representation, provided he takes reasonable care. If there is anything calculated to excite suspicion he should probe it to the bottom; but in the absence of anything of that kind he is only bound to be reasonable, cautious and careful.[38]

Although the above statement was said with respect to certain special circumstances of the company, i.e where it is insolvent or about to be insolvent and the role of auditors therein, it appears to have a universal application. Therefore, it could be extended to cover the auditors' role and duty in situations involving takeover offers, notably the issue of profits forecasts. As regards assets valuation,[39] the City Code, Rule 29.1 requires that "When a valuation of assets is given in connection with an offer, it should be supported by the opinion of a named independent valuer who has no connection with other parties to the transaction".[40] Accordingly, a valuer must be a

38- Re Kingston Cotton Mill Co (no.2), (1896) 2 Ch. 279. See also Re Thomas Gerrard & Sons Ltd. (1968) Ch. 455, (1967)2 All ER 525, (1967)3 W.L.R 84.

39- See supra n.75/Ch.1 relating to the various methods of valuation.

40- This rule is perhaps designed to prevent any possible conflict of interests.

recognised person or institution and should have post qualification experience and have knowledge of valuing the assets.[41] Thus, the opinion of the valuer on the value of assets must be included in the relevant document. Besides, such a document must incorporate the valuer's firm statement indicating that his consent has been given and not withdrawn to the publication of his valuation certificate.[42] One question, although it is perhaps the last in the context, may arise as to how far the above categories of persons (auditor, accountant, and valuer) should stand in a fiduciary position. The possible answer can be found in the statutes[43] and case law.[44] It has been shown in the authorities that the duties of the above group are to ascertain and state the accuracy of financial issues, accounting policies or valuation of assets brought to them. They are not bound to do more than exercise reasonable care and skill in making inquiries and investigations.[45]

4.2- DIRECTORS' DUTY OF DILIGENCE AND CONFLICT OF INTERESTS

Taking into account the economic, financial, commercial, and social interrelationship and structure of companies, it can be argued that it is difficult to determine what interests a director may have and to avoid situation where a conflict of interests is present

41- For further consultation, see the requirements of the City Code, Rule 29; J.E.B Fasteners Ltd v. Marks, Bloom & Co (1981)1 All ER 289; (1983)2 All ER 583, (1982)1 C.M.L.R 289

42- See the CA 1985, Section 103

43- See, for instance, the CA 1985, Section 237 relating to auditors' fiduciary duties and powers.

44- See Re London and General Bank (no 2) (1895) 2 Ch 673 (CA) per Lindly LJ.

45- Ibid

accordingly.[46] In the case-law, Roskill J. indicates that "It is an over riding principle of equity that a man must not be allowed to put himself in a position in which his fiduciary and his interest conflict".[47] Therefore the principle which directors are bound to observe in the performance of their role is that directors in their capacity as fiduciaries are required not to allow themselves to be in a position where there is a potential or actual conflict between their private interests and the interests of those whom they are bound to protect.[48] Article 94 of the Companies Act, table A, 1985 imposes an interdict on a director of a company from voting or casting his vote at any meeting of the directors or of a committee of directors on any resolution pertaining to matters in which he, or a person connected with him, has a material interest or duty which conflicts or may conflicts with the interest of the company.[49] The term "possibly conflict" as expressed by Lord Cranworth in Aberdeen Railway Co.v. Blaikie Bros,[50] gave rise to a number of interpretations. One case refers to

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46- See Herzel L. & Othrs, Why Corporate Directors Have a Right to Resist Tender Offers, supra n 89/Ch1; Lipton M., Takeover Bids inThe Target Board Room, supra n.79/Ch1

47- Industrial Development Consultant Ltd v. Cooley (1972) 2 All ER 162, (1972) 1 W.L.R 443; Regal (Hastings) Ltd. v. Gulliver (1967)2 AC 134; Aberdeen Railway Co.v.Blaikie Bros (1854)1 Macq 461 (H.L), (1854)23 L.T (OS) 315, (H.L), Guinness Plc. v. Saunders (1988)4 BCC 377 (CA), (1988) 2 All ER.940, (1988)1 W.L.R.863, (1988) B.C.L.C. 607

48- North-West Transportation Co Ltd. v. Beatty [1887] 12 App. Cas 589 (P.C), 3 TLR 789; In Aberdeen Railway Co.v.Blaikie Bros, supra n.47, Lord Cranworth LC stated "It is a rules of a universal application that no one, having [fiduciary] duties to discharge, shall be allowed to enter into engagements in which he has or can have a personal interest conflicting or which pssibly may conflict with the interests of those whom he is bound to protect".

49- Companies (Table A To F) Regulations (S.I.805/1985). For consultation see, Walmsley K., Butterworths Company Law Handbook (16th edn.) 1987 (London, Butterworths 1987) at Part III.

"a real sensibility of conflict". Lord Upjohn in Boardman v. Phipps. indicated:

> The phrase "possibly may conflict" [in the dictum of Lord Cranworth quoted above] requires consideration. In my view it means that the reasonable man looking at the relevant facts and circumstances of the particular case would think that there was a real sensible possibility of conflict; not that you could imagine some situation arising which might, in some conceivable possibility in events not contemplated as real sensible possibilities by any reasonable person, result in a conflict.[51]

According to the Companies Act 1985, directors who have or possibly may have an interest in the transaction which may conflict with those of their shareholders are under a duty to make an immediate disclosure of the nature of such interests. Additionally, giving any advice, views or otherwise on the transaction from directors whose interests are in conflict which may arouse shareholders uncertainty and significantly deter the proper conduct of the transaction may not be tolerated. As a matter of self regulation, the Panel recognised the likely or the possible conflict of interests in takeovers operations. It indicates that it is clear that the paramount duty of directors is to have due regard to the interests of the general body of shareholders including employees and creditors in the advice they give or decisions they take. They are not allowed to benefit their own interests or those of any special group or section at the expense of persons whose interests they are obliged to represent.[52] The Panel and its executive will

50- Ibid

51- (1967)2 AC 46, at 124. See also Queensland Mines Ltd v. Hudson (1978)52 A.L.J.R 399 (P.C), 18 ALR 1, 3 ACLR 176; Movitex Ltd v. Bulfield (1986)2 B.C.C 99, 403 ensure that those interests are not jeopardized, or that the shareholders who may rely on such advice are denied the opportunity to decide on the right offer.[53] To illustrate further, a general principle of the City Code states that:

> Directors of an offeror or an offeree company must always, in advising their shareholders, act only in their capacity as directors and not have regard to their personal or family shareholdings or to their personal relationship with the company....

As an example, the Panel identified three major situations where the conflict of interests is likely to exist. First, where there are cross shareholdings between parties in offers. Second, where there are a number of directors common to both companies. Finally where a person is a substantial shareholder in both companies involved.[54] Hence, if directors who are deemed to be involved seek to express their views on the merits or demerits of offers they are required first and foremost to set out and to explain to their respective shareholders the nature of the conflict. Rule 25 of the Code permits directors to express individually their views on the offer. While the possibility that a director may express his view from a combination of motives, or that he may be influenced by different desires and interests, the Panel provides two alternatives. One relates to those having a position of effective control over the company in which conflicts of interests arise. The other is concerned with the directors split in their views about the desirability or undesirability of the offer. Concerning the former

52- See The City Code general principle 9.

53- See mainly, Johnston A., The City Takeover Code, p. 209 et seq, supra n.88/Ch2

54- See further discussion in Ch.6

alternative, Note 1 on Rule 25.1 of the Code places directors who occupy a position of *de facto* control (below 50 %) under a strict obligation toward the minority shareholders. They are obliged to examine thoroughly and properly the reason and motivation behind the advice they furnish to their shareholders. The shareholders, additionally, must be put in possession of all relevant material facts which may affect their interests. However, although the decision of the controller might be final and should be accepted by the remaining shareholders, this does not mean that directors are exempt from making any disclosure. Indeed, they are under a duty to provide all fair and reasonable justifications so that they may discharge their obligations.[55] Where the board of directors is divided in their views on the merits or demerits of offers, in the view of the Panel, if the board is so divided, each group of directors should publish their views in a separate way so that shareholders will not be denied the opportunity to make the right decision or be placed in a dilemma.[56] Furthermore, under the City Code, if a director has a conflict of interests, he normally should not be joined with the remainder of the board in the expression of his view on the offer. In consequence, Rule 23.3 with respect to giving explanation or advice to shareholders states that the director involved must take any responsibility incurred on his own. Where the whole board of directors of the target company is in conflict, it is argued that if a majority of directors might be deemed to be personally interested in the transaction and their views may diverge, "a committee of independent directors, although not in theory

55- See the Panel's statement in the Coral case in 1971, noted by A. Johnston, at p. 209, supra n.88/Ch.2

56- See the City Code, Rule 25.1, Note 2 necessary, from a litigation stand point may be desirable".[57] But in today's takeovers practice, and in particular the present structure of companies and their relationships with each other, such a suggestion remains open to doubt as to how to find a neutral committee to perform such a role instead. Surely, where conflicts of interest are present, shareholders are, in fact, not without alternatives if they disagree with their directors views. They can sell in the market, refrain from selling and await a better offer or consideration. To conclude, the most effective remedy to conflict of interests problems is to encourage competitors. This may afford more choice for the target company's shareholders to sell their shares to the more advantageous offeror instead of being locked within a single offer or be placed in a dilemma where directors views diverge about the merits of such an offer.

SECTION FIVE: DUTY TO SEEK ADVICE

According to the City Code, Rule 3.2, the board of the target company is required to seek advice and, wherever necessary, independent competent advice. This equally applies to the offeror. In order to avoid any serious implication of violating the Code, the Panel recommends that parties to offers should obtain advice before offers are announced and also in the midst of the period of offers, including any advice on a potential revision of offers. This recommendation equally applies in France. However, the chief purpose of obtaining such advice is as to whether or not the making of the offer is in the best interests of shareholders to whom the offer is intended. Of course, the source from which advice may be

57- Lipton M., Takeover Bids in The Target Board Room, at p. 122 (d) and foot note 68, supra n.79/Ch.1.

obtained may vary. It may be obtained from financial institutions, usually banks. It may also be obtained from auditors, accountants, lawyers and frequently from the Panel itself in the U.K and C.O.B in France. The contribution of these bodies or persons is absolutely vital. In addition to giving advice, they may assist the offeror or the offeree company in the preparation of documents, and the presentation of concise and clear information to the shareholders concerned.

Generally, an adviser may give advice in various contexts. He may advise his client about the the manner of effecting a desired transaction, explain any relevant ambiguous issue of the regulation and give general advice on particular kinds of operation. For instance, an adviser may be involved in advising and assisting his client in the preparation of prospectuses, placing of assets, merger, purchase by the company of its own shares and more extensively in relation to takeovers.

The adviser's role varies in accordance with the type and kind of transaction involved. Where there is a possible conflict of interests, the Panel requires the board of the offeree company to obtain independent advice on the offer or proposal from the chosen stockholders and the substance of such advice must be made known to its shareholders, together with the board's views on the offer or proposals.[58] Although the requirement of having independent advice is more specific, objective and more constructive,[59] the issue which should, actually, be pointed out, as

58- Rule 15 (b) of the Code

59- The panel regards an adviser as disqualified if he is in the same group, or where he is deemed to be significantly interested in or has a financial connection with either the offeree or the offeror of such a kind as to create a conflict of interests.

far as the City Code is concerned, relates to the kind of advice an offeror or the offeree company should have in relation to any matter which is deemed to be unclear or might give rise to uncertainty and confusion. In its statement, the Panel explained the interaction between the sources from which advice may be obtained. That is to say, the advice given by the Panel and that which may be obtained otherwise, principally legal advice. The Panel states that:

> Given the emphasis laid down by the Code on the importance of the spirit as well as the letter of the Code and on the Panel itself as the proper source of interpretation, the seeking of legal advice cannot be regarded as a substitute for consultation.[60]

Correspondingly, seeking legal advice other than from the Panel could be to some degree inappropriate. In consequence, parties to an offer in doing so may find themselves in breach of the Code.[61] This means that since the Code is not statutory and seeking legal advice is by no means a substitute for the Code's interpretation that is based on the spirit and commitments, whether explicit or implied, of those involved in takeovers and mergers activities. In other words directors are not, in the context, under a legal or common law principle of fiduciary duties. Furthermore, whilst the Panel recommends parties to offers to consult their own advisers on the issues under their consideration and in the extreme situation to seek independent competent advice, presumably it does not also mean that financial advisers, accountants, auditors or lawyers have to abstain or abdicate their

60- Panel statement on Tuner and Newal plc/ AE plc, Oct. 17th, 1986, noted by Morse G. (1987)J.B.L. 140 et seq.

61- Ibid.

own judgement as to the proper application of the City Code rules. Therefore, once a conflict of interests, uncertainty or other area of doubt arises, an adviser should seek Panel guidance in advance. In this connection one may wonder how the Panel operates its advice machinery.

First of all it is worth reiterating that the Panel, in the performance of its role and duties, exercises an immense and effective power in advising, promulgating, amending and interpreting its code of practice. Such a power could also be distinguished from the involvement of the Code in takeovers practice. In order to keep the Code's flexibility, the Panel may waive or modify its rules as it sees practicable. Similarly, the Panel is also entitled to investigate, take actions or may report the offender's conduct to the relevant authority. But the Panel, in doing so, does not concern itself with the beneficial aspects of takeovers; that is a matter for shareholders to decide, neither does it consider the impact of such an offer on competition or the wider issues of public interest; these are the government's concern. The Panel is a regulator of the conditions under which an offer is conducted, not an arbiter of the offers themselves.[62] This statement highlights the Panel's attitude to the issue in question that its involvement in takeovers activities is to ensure the good performance of the process and to provide an orderly market within which takeover offers are contemplated.

In its capacity as regulator of specific activity in particular situations, the Panel acts as referee during the contest on any misunderstanding of interpretation of the Code and any implication

62- The Panel statement , 1988/2 of Jan. 28th, 1988 , noted by Morse G (1988) JBL 322 at 323 that might entail. This is consistent with the Panel chairman's statement that the Panel system seeks to resolve problems informally while they are live and before irreversible action is taken so that the offer may proceed on the right basis.[63] Since takeovers may involve one or a series of complex transactions, in particular where carried out on the Stock Exchange and the consequences may be equally complex, parties to offers, so as to avoid any violation, are generally urged to seek the Panel's guidance so that their offers may go in the right way.

SECTION SIX: INSIDER DEALING AND DIRECTORS' FIDUCIARY DUTIES

In essence, insider dealing generally takes place where a company is the subject of a possible takeover offer. To put it clearer, insider dealing, because of the increasing interdependence of companies including many other commercial, technical, financial or economic as well as family relationships, almost always occur a few hours or days before the announcement of offers. Take, for instance, the Geoffrey Collier affair in Britain. As a preventive measure, most British institutions possess and administer in-house regulations. These regulations often provide that employees should not deal in any securities to the prejudice of clients where the dealer, acting on his behalf, is in possession of privileged information "confidential and price sensitive"[64] about a particular

63- Robert Alexander's statement, Observer, June 5th, 1988, p.57

64- For further reading with respect to price sensitive information, see the Stock Exchange and the Panel on Takeovers and Mergers Joint Statement on The announcement of price sensitive matters, (1977) April 24th, noted by Weinberg & Blank, Takeovers and Mergers, at paras 27226 and 27235, supra n19/Ch1.

transaction such as a takeover.[65] Equally, such regulations require that all personal dealings should be carried out in accordance with in-house rules.[66] In violation of the above standard practice, Collier, who was the head of securities at bankers Morgan Grenfell, bought 50,000 shares in the target company, a company called A.E, through the American Branch of another broker in the name of Cayman Island Holding Co. only a few minutes before a takeover bid for such a target company was announced by a company for which Morgan Grenfell was acting.[67] In July 1987, Collier was convicted of insider dealing. In consequence he was fined £25,000 and given a one year suspended prison sentence and a bill for £7000 costs.[68] He, as a disciplinary measure, was expelled from Stock Exchange membership.[69]

65- S.I.B's regulation, for example, Rule 5.21 prohibits securities market firms from carrying out transactions as principal on its own account if one of its officers or employees come within the scope of the Companies Securities (Insider Dealing) Act, 1985. However, exemptions may be granted only and only if (a) the only reason why that officer or employee was so prohibited was because of his knowledge of the firms intentions, or (b) none of the officers or employees of the firm involved in effecting or arranging for the effecting of the transactions on behalf of the firm knew or ought to have known of the circumstances giving rise to that prohibition...; Corresponding provisions can be found in the T.S.A, r.750, the FIMBRA, r.4.24, the A.F.B.D, r. 5.17.7, and the I.M.R.O, Ch.IV, r.11.06. for further reading see mainly, Hannigan B., Insider Dealing (London, Kluwer Law Publishers, 1988), at Ch. 6, p.137.

66- For an extensive analysis see, Rider B.A.K and Ffrench H.L , The Regulation of Insider Trading (London, The Macmillan Press Ltd., 1979)

67- Collier, having delivered his advice to a client (Hollis) on a bid to be made the next day for a Company, called A.E, began dealing in the relevant securities of the target company on his own behalf prior to the announcement of the offer. See Collier Rise and Fall, the Independent, 2nd July, 1987. A corresponding case is discussed by Herzel L. and Katz L., Insider Trading: Who Loses, (1987)165 Lloyds Bank Rev., p.15.

68- Noted by King M. and Roell A., Insider Trading, (1988) Economic Policy 165, at p.167; Hannigan B., Insider Dealing, supra n.66

Trading in advance of the announcement of a takeover offer on the basis of confidential information, appears clearly detrimental to the interests of investors especially of those involved in the operation and unaware of it.[70] But it is uncertain whether dealings in the company's securities before a potential offer is announced could be deemed unlawful.[71]

Who is an insider? What sort of information may an insider discloses or refrain from disclosing? Should he disclose the percentage of shares so acquired or to reveal any profits made therefrom as well? Does the scope of the present regulations extend to cover manipulation? Finally should it be accepted that any person dealing too close to an announcement of a potential takeover offer be presumed to have knowledge of it? Such questions are all controversial and obviously it is not be possible to discuss such matters here in detail. It is equally complex to mention that insider dealing as it may be carried out directly by the person who is in possession of confidential information such as a person privy to the negotiation or who contributes in the decision to make a takeover offer. It may also be affected by other persons i.e., tippees and sub-

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69- Collier's case coincided with greater awareness of insider dealing which followed the passing of the Companies Securities (Insider Dealing) Act 1985. Since then the maximum penalty of two years imprisonment has been increased to 7 years by the passing of the Criminal Justice Act, 1987.

70- The contrary view of insider trading is expressed by Herzel L and Katz, supra n.67, at p.15.

71- Previously, in France, insider dealing action was not itself prohibited. Accordingly, an insider was perfectly at liberty to indulge in this type of activities, provided he discloses his transaction in accordance with Art.162.1 of the Loi No.66-537 (O.J. 24 July, p.6402). But if such a person (insider) did not fully disclose his transaction, and he was in consequence thereof convicted, the court were empowered to order the defaulter to refund his profit from the transaction. For further reading see, Rider and Ffrench, at p.74 and 198, supra n.66.

tippees.[72] Tippees' practice exists where any person who has knowingly obtained inside information from a person who, in the exercise of his function or involvement, noticed it. Sub-tippees are person who knowingly obtained inside information not directly by an insider but through other persons or chain of persons. For instance where "A" insider passes confidential information to "B" (tippee) and "B" communicates it to "C" sub-tippee and "C" circulates it to another person who exploits it at the appropriate time.[73] It is also important to mention that insider information may be domestically used or passed through territories. This might be to a considerable extent true, because of the present wide range of interdependence of companies' relationships. The later type of abusive trading is perhaps the most difficult situation to unearth. Worse is where such insidious behavior is contemplated across territories, it renders not only the national supervisory bodies powerless, but also it makes the issue more difficult to ascertain or investigate especially, in the absence of any cooperation or understanding between states.[74] Presumably because of obstacles that still exist, in particular with respect to foreign blocking and secrecy statutes which vary depending on the interest which the foreign country perceives in safeguarding information located within its jurisdiction. Blocking

72- The term "obtained" and "received" were the subject of the Court decision, see Attorney General's reference No.1 (1989), see The Independent, April 14th, 1989, at p.14. It is worthwhile to mention that the US supreme court has recently upheld a financial journalist's conviction. see Insider Dealing Judgement Upheld, Financial Times, Nov.17th, 1987; See X Ltd.v. Morgan Ltd & Others, The Independent 5th April 1990.

73- See Timetable of a Market Leak, The Times, 15th August, 1988; Rider and Ffrench, at p. 164 et seq, supra n.66.

74- Recently both the U.K and France, have introduced provisions relating to reciprocity. In Britain, see the 1989 Companies Act, Section 82. Compare with the French Loi No.89-539, supra n.5/Ch.4.

laws often represent an investment of national significance in certain types of information such that the government may prohibit or control its communication outside the territorial boundaries of the country. secrecy laws, in contrast, set up rights by which individuals can require others to maintain the secrecy of specific information.[75] In the light of the above outline it is worth highlighting that most securities market regulations, in order to diminish the likely detrimental effect on the interests of investors, introduces rules to deal with insider dealing. The.E.C. Commission for its part, as far as harmonisation between national laws of the member states are concerned, has proposed a directive dealing specifically with the problems created by abusive practices such as insider trading.[76]

In France, the problem of insider trading was traditionally dealt with by the provisions of the Criminal Code, Article 419 pertaining to general aspects. Article 419 of the Code Penal prohibits any person from circulating false rumours, or using a fraudulent device to create false impressions and therefore to affect the price of securities. But since the scope of such provisions against the increasingly wide use of abusive practice such as insider trading is limited, the French government introduced a new Loi specifically to prohibit insider trading.[77] Such was embodied in the 1966 Loi on Commercial Companies (Les Sociétés Commerciales)

75- Farrara R.A and Mackintosh J.T, Legal Representation, in the International Securities Market (1989)10 Co.Law, p.94

76- COM (87) III Final, (1987) O.J C 153/8; amended proposal COM (88) 549 Final (1988) O.J C 277/3; Dine J, The Insider Trading Directive, (1989)Law.Soc.Gaz., p.23; Tridimas T., Securities Regulation in The EEC, (Working Paper), (Institute of Advance Legal Studies), 6th July 1989.

77- Rider and Ffrench, at p.232 et seq, supra n.66.

and the Ordonnance No.67-833 of 28 September, 1967 relating to the establishment, functions and powers conferred on the C.O.B.[78] As it stands, the 1967 Ordonnance confers a wide range of powers on the C.O.B. to police securities market conduct and, most importantly, the protection of investors whether or not a public offer is involved. This Ordonnance, along with the 1966 Loi, additionally covers a wide range of persons who are deemed to have inside knowledge which is not publicly disclosed or give rise to suspicion pertaining to their dealings in the company's relevant securities. According to the 1966 Act on Commercial Companies (Sociétés Commerciales)[79] persons who by reason of their status, their involvement in technical, financial as well as commercial circumstances and operations of the company, or by virtue of their professional position or family relationships, make use, whether directly or through tippees, privileged information before the public become aware of it is convicted of insider dealing. Conviction of insider dealing carries a fine of the maximum monetary penalty of 10,000,000 F.F. If such a person has made a profit as a result, the amount of the fine may not exceed the profit tenfold. However, any monetary penalty is largely dependent on the seriousness of the

78- Art 485-1 refers the term "insiders" to include: chairman, directors and general managers (directeurs generaux) members of the conseil de surveillance, the directoire and those employees whom the C.O.B expects to have access to privileged information regarding the company's affairs. Besides, the provision of Art. 485.1 extends to cover parent companies, subsidiaries and affiliated companies as well as wives and minor children. Accordingly, in order to discharge from any liability, any person involved is required to disclose and report any acquisition of shares to the C.O.B for publication. Loi No.66-537 concernant les Sociétés Commerciales, supra n.71.

79- Art 162.1 of the Loi 1966 No 66-537, supra n.71,.as amended by the latest Loi No 89-531 of 2nd August, 1989 relating to transparency of the market, supra n 5/Ch2.

breach. Yet in case of sanction, the amount imposed upon the charged person is paid to the Treasury (Tresor Public).[80] Employees, including civil servants, if acting outside the ordinary performance of their functions, communicate privileged information to a third person who may exploit it, such employees may be charged or convicted of imprisonment varying between one month to six months in addition to fine of 10,000 F.F to 100,000 F.F or one of those sanctions as the case may be.[81] Discretion rests with the Tribunal de Grand Instance de Paris.[82]

Due to the growing concern voiced by the financial community, there was a considerable change in the government's attitude toward the legitimacy of insider dealing.[83] At the present time, the regulation of insider dealing in the U.K., although shared between

80- Art 9.1 of the Loi 89-531 of 2nd August, 1989 amending the Ordonnance 67-833 of 28 September, 1967, supra n.5/Ch2.

81- Art 8 inserted into the Ordonnance 67.833 Art 10.1, supra n.5/Ch2.

82- Art.11 of the 89.531 Loi inserted a new provision 12.2 into the ordonnance of 1967 No 67-833 establishing C.O.B.

83- As for the legality of transactions entered into, Section 8(3) of the Companies (Insiders Dealing) Act 1985, provides that "no transaction is void or voidable..." This does mean a breach of this Act results in a transaction being illegal under the civil law of contract. It is held that failure to disclose a material fact which might influence the shareholders' decision does not give the right to avoid the contract' per Lord Atkin in Bell v. Lever Bros Ltd. (1932) A.C , at 227, noted by Rider and Ffrench, at p.158, supra n.66. For an extensive discussion about insider dealing see mainly, White Robin C.A, Towards a Policy Basis for The Regulation of Insider Dealing, (1974) 90 L.Q.Rev., p.494; Morse G., Insider Trading, (1973) J.B.L.119; King and Roell, Supra n.68; Sugaman D.,(1981) 2 Co Law 13; Herzel L. and Katz L., Insider Trading: Who Loses, supra n.69; Rider and Ffrench, The Regulation of Insider Trading, supra n.66; Rider B A K, Insider Dealing (Jordan and Sons Limited, 1983); Mitchell Phil., Directors Duties and Insider Dealing (London Butterworths, 1982); Weinberg and Blank, Takeovers and Mergers (4th edn), at Ch 23, Paras 2301 et seq, supra n 19/Ch1; Johnston A, The City Takeover Code, at Part XIII, supra n.88/Ch2; Suter J., The Regulation of Insider Dealing in Britain (London, Butterworths, 1989).

the government and self regulations, is statutorily regulated.[84]. What is interesting to note, quite apart from questions of proof, is that while the Companies Securities (Insider Dealing) Act, 1985 focuses on individuals, self regulation places a restrain on member firms.[85]

Under the Insiders Dealing Act 1985 the manner in which insider trading is approached presupposes a certain degree of connection between the target company and the insider. According to the Act an insider pertains to a person connected with a the company who either "received" or "obtained"[86] unpublished price-sensitive information by virtue of his position or involvement and would reasonably be expected not to reveal it. How near a connection with a company should be established so as to convict of an insider of a criminal offense.

According to the Act a connected person includes directors of a company or related company, officers or employees of that company and any person who occupies a position involving a professional or business relationship, including any person having or may reasonably be expected to have access to confidential price sensitive information and which it would be reasonably to expect a person in his position not to disclose except for the proper performance of his duties and function.[87] In France, by contrast, with respect to the concept of "connection", Article 10.1 of the 1967

84- Before 1980 insider dealing was not a criminal offense in the U.K. For further discussion See, Morse G.K. and others, Companies Consolidation Legislation 1987., at p.596-97, supra n.1/Ch.4; Johnston A, The City Takeover Code, p.155, supra n.88/Ch2.

85- Supra n.64

86- Supra n.72.

87- The Companies Securities (Insider Dealing) Act 1985, Section 9 (herein after C.S.A)

Ordonnance on which the E.C proposed Directive for the Regulation of Insider Trading is modelled, distinguishes between principal and incidental or occasional insiders. The latter consists of persons who possess unpublished information 'incidental to the exercise of their profession or functions'. This reformulation of link or connection produced uncertainties. Commentators, in france, argue that the concept of connection is not necessary to establish a finding. In this respect, a taxi driver who incidentally obtains unpublished information overhearing a conversation between two directors should be considered in principle as an insider.[88] A Corresponding example in Britain relating to the person who informed his host at a wedding reception that he might be late as 'he was involved in merger negotiation'. The host on the ground of the release (whether deliberately or not) of such unpublished information made a profit of £1100. As he was entirely unconnected, he was not deemed as insider.[89]

When it comes to the question of duties both regulations remain silent.[90] Of utmost importance for the relevant authority is that a sufficient disclosure must be provided. But who must provide the information in question? According to the City Code, the duty and responsibility in respect of insider dealing rests with the whole board of directors of both the offeror and the offeree undertaking.

88- Gavalda C, Droits et Devoirs des Inities Dans les Societes par Actions: An Example de Collaboration Entre la C.O.B et la Justice Pénale (1976) Rev.Soc., p.589, at 597

89- See the Panel statement, Feb 11th, 1976, noted by Rider and Ffrench, at p.165, supra n.66.

90- See in U.K, for instance, Percival v. Right , supra n.7. In this case, the directors were held not to be in a fiduciary position, Professor Pennington argue that it is not justifiable. Pennington R.R, Company Law, supra n.17/Ch1

General principle 6 of the Code provides that "...all parties to takeover transaction must use every endeavour to prevent the creation of a false market in the securities of an offeror or offeree company". Additionally, it has stressed the vital importance of absolute secrecy which must be maintained prior to any announcement of an offer.

In order to prevent any leak of information which might be used at the expense of investors generally, in addition to the requirement of good faith and secrecy, the French authorities once an offer document is submitted to the C.B.V, suspends quotation. In the U.K, the Panel stresses the obligation of both parties involved in offers to keep "price sensitive information" secret. Besides, Rule 2.1 of the City Code stress that:

> all persons privy to confidential information, and particularly price-sensitive information, concerning an offer or contemplated offer must treat that information as secret and may only communicate it to another person if it is necessary to do so and if that person is made aware of the need for secrecy. All such persons must conduct themselves so as to minimise the chances of an accidental leak of information.

Equally, offerors' and offeree's advisers, accountants and any persons involved are all bound by the same duties and responsibilities for any leak of unpublished information. In relation to events prior to the announcement of an offer, the question whether the preventive measures bearing on secrecy could be deemed enough to preserve the good and orderly conduct of an offer. The Panel, however, did not stop at this level, but also required parties involved to make a preliminary announcement wherever it is regarded appropriate. According to the City Code, a pre announcement of an offer in particular price sensitive information which could be used by an insider at the expense of their investors, is required to be made when the target undertaking is reasonably confident that an offer would be made or when negotiations or discussions were about to be extended to embrace a wider group of interested persons. Pre-announcement might also be required when the target undertaking is the subject of turnover and speculative buying shares and also when following an approach to the offeree undertaking, there is an untoward movement in its share price. However, rumours and speculation may have serious consequences upon the target company's market price of its quoted securities. In this connection, the Panel considers that when there is no public explanation for this event and there has been no approach to the target company, it is likely that it is the act of a potential offeror either through inadequate security or through the purchase of shares, which have led to the resulted in a false market. For this and other reasons, under the City Code, the prime responsibility to make the appropriate announcement lies with the offeror and the offeree boards of directors.[91] Prompt announcement is required to be made when, following an approach to the offeree company, there is an untoward movement in its share price or when a potential offeror has been named in rumours. Rule 2.2(d) makes it clear that when, before an approach has been made, the offeree company is the subject of rumours and speculation or untoward price movement and there reasonable grounds for concluding that it is the potential offerors' activities (whether through inadequate securities, purchasing of offeree

91- Noted by Morse (1988) J.B.L 70; Panel's statement of 10th September, 1987. A movement of 10% in the absence of any explicable facts is deemed to be untoward., Rule 2.3 of the City Code.

company shares or otherwise) which have led to the situation. The offeror should, therefore, keep a close watch on the potential offeree company's share price for signs of any untoward movement. Taking into account the effect of rumours and speculation which cannot sometimes be avoided, at an early stage of an offer, the Panel stresses that the absence of a price rise, when other factors merit an announcement, does not justify failing to announce. In response to the arguments which might be advanced by an offeror that an announcement in such an event (when the proposals are still tentative) might in itself be misleading, the Panel warned them that this can be avoided by a proper explanation and that is not a justification for allowing existing uncertainty to continue.[92] Additionally, when prior to a firm intention to make an offer is notified, there is a discussion and talks about an offer, the Panel requires a brief announcement for that purpose should be made at the outset.[93] In addition, Note 1 on Rule 4.2 of the City Code restricts any person from dealing or procuring others to deal before the announcement of the offer, if the offeror has been supplied with confidential price sensitive information in the course of the offer discussion. A corresponding restriction in respect of dealings in the target company securities is placed on any person, not being the offeror, who is privy to confidential price sensitive information concerning an offer or contemplated offer. A similar prohibition applies to offerors who have been supplied with or received confidential price sensitive information in the course of a takeover discussion from whatever source.[94] In furtherance to such restrictions, the Code also prohibits persons who are privy to such

92- Ibid, at p.71.

93- City Code, Rule 24

94- City Code, Rule 4.

information from making any recommendation to any other parties as to dealing in the relevant securities or procuring others to deal.

Where, following a pre-announcement that talks and discussion are in progress, no dealings may be allowed to go ahead in the relevant shares of the target company whether by the offeror or any person privy to unpublished price sensitive information. Prohibition under this rule also extends to cover dealings which are presumed to be contrary to published advice furnished to shareholders by their representatives or financial advisers, when their intention is disclosed. However, although the Panel's decision lacks legislative power, if a breach of the Code is noticed, the Panel may have recourse to private reprimand or public censure or warning as the case may be. The Panel may also report the suspect to other regulatory authorities namely, the Department of Trade and Industry, the Stock Exchange, the S.I.B. or the relevant S.R.O. Depending on the degree of breach involved, penalties may be prosecution, withdrawal of recognition, cold shouldering the defaulter or to institute a temporary or definite suspension of listing.

Dealing with inside information by persons, legally speaking, may entail civil and criminal remedies. Unlike many other countries, for instance France, the British Government plainly made it clear both prior to the introduction of legislation and during the passage of the 1980 Companies Act, that the purpose of that provision was not to provide compensation for those who might be said to have suffered loss as the result of insider dealing.[95] Although there is no realistic basis as to why civil action was not

95- C.S.A.1980. For further reading see, Rider B.A.K, (1980)1 Co.Law., p.279.

accepted, in the view of the government the reasons why civil remedies have been put aside was that "civil remedies or proceedings are likely to be expensive, time consuming and an insufficient deterrent...".[96]

The second point, which is also controversial, concerns the exclusion of companies from the scope of insider dealing regulation. Following the omission of such issues, it has been argued that the distinction between individuals and companies is clearly open to abuse, for companies can, and often do, participate in insider dealing. Since other countries enacted legislation to cover this matter, it surely was not beyond the legislator to include companies with the scope of the relevant insider dealing regulation.[97] Yet, the government's chief aim was to exclude companies as such because they as legal entities cannot breach the regulation. Violation are always made by human beings whether or not acting for the account of such companies and therefore, would be liable for doing so since they are individuals such as directors, officers including shadow directors officers and employees. What is clear, however, is that the British legislature, in policing insider dealing, combine disclosure requirements and criminal sanctions.

In conclusion, it can be noticed that insider trading is a criminal offense in most legislations. As far as civil liability is concerned, while in Britain it is not an accepted measure,[98] in France the

96- Unlike the present statutes, the 1973 Bill made provision and proposed sanctions for both criminal and civil remedies. In the 1978 Bill a distinction was drawn between cases for which there were criminal sanctions and other deals for which there were civil remedies, the latter did not appears either in the 1980 Act nor in the 1985 Act. see Morse, Companies Consolidation Legislation, 1987, at p.596, supra n.1/Ch.4.

97- Jenkins Committee report (1962) Cmnd.1749; The Conduct of Companies Directors (Cmnd 7037); See Sugarman, supra n.83.

98- The contrary view is expressed by the Jenkins Committee. It states legislator regards civil remedies as part of the breach. Additionally, under the British Company (Securities dealing) Act, 1985, any contract entered into with an insider is valid in accordance with private law of contract. In France, although there appears no explanation on such an issue, it is implicitly deemed to be lawful as well. Accordingly, an explanation, normally, should be provided as to why such a contract of sale or purchase rests valid but not void or voidable. The E.E.C. in turn neither provides an explanation on the issue of penalties nor on the validity of a contract entered into with insiders. Art.11 of the E.C. Directive on Insider Dealing leaves the nature of offenses and determination of the appropriate penalties to the national authorities. That is to say the situation remains ambiguous.[99] Finally, it should be pointed out that the U.K relevant authorities effectiveness to encounter insider dealing is presently under threat. Commentators argue that Britain should have a legal supervisory body with a rigorous and wider legislative power similar to the US SEC or Corresponding to with the French C.O.B. The option would be to bring the power of the D.T.I, the S.I.B and the Stock Exchange under a uniform single body endowed with of legal power so that to resolve the problem of 'who does what, when and where'.[100]

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that a director 'who in any transaction relating to the securities of his company or any other company in the same group, makes improper use of a particular piece of a confidential information which might be expected materially to affect the value of those securities, should be liable to compensate a person who suffers from his action in so doing, unless that information was known to that person' Jenkens Report, (1962) Cmnd. 1749, at para 99(b).

99- Insider Dealing Case Collapses, The Gardian, 24th Jan, 1990; Blake A., The Proposed Crime of Insider Dealing (1978) Preston Law Rev. 39-48, noted in (1980)1 Co.Law.

100- Ibid.

CHAPTER SIX
OFFERORS' AND OFFEREE'S TACTICS

In the previous chapters discussion was on both the protection of shareholders and the directors' fiduciary duties. There are also other paramount and closely related matters concerning premature and formal announcement. The purpose of the announcement of offers as well as information disclosure is designed fundamentally to present to public investors a certain minimum degree of transparency which, on the one hand, enables the shareholders to identify the controllers of their company as well as the location of its key assets. and, most importantly, to detect the likely effect on the good performance in the relevant marketplace on the other. Generally, once offers are announced, parties to take over offers are placed under stringent provisions which are designed to ensure that shareholders to whom offers are made are fairly treated and accurately and concurrently informed. Sometimes, directors of the target undertaking may be unwilling to change control which offerors seek to obtain. Alternatively they may employ various tactics at their disposal to keep the independence of their company. Although varied, such tactics have become common place. Here, it is worth highlighting that the effectiveness of such tactics is dependent largely on the state of the target company, the dynamism of its directors as well as the collaboration and understanding of shareholders. Furthermore, any defensive technique that is conceived of and implemented either prior to an offer or at the time the offer is publicly announced is almost always adopted and improved in the light of all relevant facts and surrounding circumstances namely, legal, financial, economic, social and even political. But defensive or offensive tactics which are typically appropriate to one offer in one country may be wholly or partly inappropriate or even illegal in another. For instance, in the U.K., directors of the target undertaking may freely react to any offer whilst in France, they are much more restricted.

Whilst there is now widespread concern about the kind of defensive measures that are used by the board of the target company against unwanted offerors, there is much less discussion about how far and what kind of strategy the offeror might use to gain control. Hence this chapter will, first, examine the legal implications of the offeror's tactics employed to avoid the target company's defensive strategy and thus secure control. In this context, it is interesting to mention that the implications of the offeror's techniques may be legal, financial, economic and social, or any combination of these aspects. Second, this chapter will discuss both the preventive and remedial defensive measures of the offeree in the hope of frustrating unwanted offerors. In the light of this environment, this chapter will look closely at the attitude of the relevant regulator in the field.

SECTION ONE: OFFEROR'S TACTICS

1.1- OFFER CONDITIONS

Naturally, like the board of the target company, offerors may employ a strategy that is most suited to itself. As a preventive measure, a potential offeror tries to construct the terms of the offer to its advantage. Furthermore, in order to avoid any legal implications, the offeror almost always reserves the right to set aside any statements which are expected to be made during the immediate period of an offer. Nowadays, it is becoming customary that any offer is always made to shareholders conditional upon the amount of acceptance stated in the offer document. If the stated amount of acceptance is not reached, such conditions allow the offeror to discharge without prejudice from any binding obligations and responsibilities. The most common conditions contained in any offer document are those which enable the offeror to accept or not the amount of shares offered that exceeds the termed percentage level sought to be attained. Moreover, if the number of acceptance falls below the amount of shares sought to be purchased, the offeror may or may not accept the part of shares offered at all.[1] For tactical or financial reasons, the offeror may always prefer keeping the amount of shares received from shareholders. When a takeover climate permits, the holder may quickly consider making a swift purchase and thus increase its position of control. Thus the first implication in relation to the latter form of acquisition is that under the City Code as well as the 1989 Companies Bill, each further acquisition might be the subject of disclosure. Additionally, unlike the City Code, clause 91 of the Companies Bill 1989 advocated that "When a person has acquired more than 15% of the nominal value of the share capital of a company, he shall come under the obligation to make an offer for the remaining share capital of that company".[2]

1- For financial reasons offerors do often accept the proportion of shares being offered even though it is not satisfactory. Hence offerors may either consider a sale to the successful offeror at a premium or, keep such a percentage as investment in the offeror company.

2- Clause 91 of the Bill was not incorporated in the C.A.1989.

1.2- PRELIMINARY CONTACT OR APPROACH

When a potential offeror has determined that at least a part of its growth and expansion should be accomplished through takeover rather than internal effort, a takeover decision is vital. It should be made with full understanding of the implications. As pointed out, the board of the target company may oppose any takeover. They may also, depending on the state of their company, support or seek a buyer for the purpose. Nevertheless, offerors, whether potential or actual, often start their action by a mutual approach in the hope of getting the target company's recommendation. In situations where a friendly approach has been rejected or there is no answer at all by the target company's directors, or where it is expected to be turned down, the offeror has to find a more sophisticated means of circumventing directors' opposition. At this stage, there are various techniques to secure a position of control, or at least to enforce that control, albeit they are not wholly identical. As a preamble to its takeover strategy, the offeror may gradually begin buying on the market. He may also gain his battle of control through a proxy fight. But the success of both tactics assumes sufficient financial and other alternate support. Finally the offeror tries to use the most popular and the quickest alternative i.e takeover offer, in particular when resistance is expected. The question at issue is whether the offeror should launch its offer and wait for the end result? Should the offeror seek outside support to attain the desired objective? Should the offeror intervene in the market before as well as during the immediate period of the offer? Some of the following tactics which the offeror might employ in conjunction with its offer will be discussed below in turn. These include seeking financial support, collecting a prior commitment, making a dawn raid, buying from a warehouse, and inducing other parties to act in concert with it, including the publicity and advertising campaign. It is worthy of note that the strictness of the relevant regulation relating to such techniques vary greatly from one country to another, though all tactics form one component of the whole takeover operation.

1.3- COLLECTION OF IRREVOCABLE PRIOR COMMITMENTS

Perhaps one of the most delicate devices to secure a sufficient percentage of voting control is through the collection of prior commitments as to acceptance. Prior commitment to accept an offer is not a new method. It is often used by an offeror, either prior to making a formal offer or during the immediate period of that offer, to induce the holders of a substantial proportion of shares carrying unrestricted voting control to accept irrevocably its proposal.[3] At the beginning of 1970 irrevocable prior commitment to accept an offer technique was the subject of growing concern. Technically, the shut out offer appears to have a significant deterrent effect on potential competitors and shareholders. This is so where directors of the target company have determined, for whatever reason, to ensure that no competitive offer could be made or accepted even if it is made at a higher price. Such an understanding or agreement which is concluded by the directors of the vulnerable company would, indeed, harm substantially the interests of shareholders and the good performance and reputation of the market.

Prior to the City Code, a potential or actual offeror could obtain

3- In Britain, this method is known as " shut out offer". See Johnston A, The City Takeover Code., at p.77 and 99, supra n.88/Ch2 effective control simply by approaching financial institutions, substantial shareholders, or even directors without making a general offer to all the shareholders.[4] Besides, the holders of a significant percentage of the voting control in the target company could often make an alternative deal on much more favourable terms than were in practice offered to the rest of the shareholders.[5] In the light of experience which demonstrated the seriousness of such dealings, several rules were introduced in addition to the subsequent amendment of the then existing rules. These provisions were primarily designed to circumvent market malpractice. Accordingly, the Panel requires, nowadays, any potential or actual offeror, which has any reason to believe that it can implement its offer in full, to include, amongst other things, details of any existing holding in the offeree company in respect of which it has received an irrevocable commitment to accept its proposal. In addition, that offeror should also set out details in respect of which the offeror involved holds an option to purchase. Hence as a further requirement parties to an offer, especially offerors, are obliged to specify in what circumstances commitments to accept an offer will cease to be binding.[6] This has its origin in the Panel statement of 1971, which indicated, inter alia, that:

> ...when more than one party has made an approach to a board and seems to be contemplating a bid, no shut out bids should be allowed without all parties being aware that a potential competitive situation exists and being given an opportunity to make a statement to shareholders of the offeree company before the shut out is given."[7]

4- Ibid, at p.76

5- Ibid.

6- City Code, Rule 2.5

7- The Panel's note of practice no.7 of 1971, noted by Johnston A., at p.178, supra n.88/.Ch.2.

In France any agreement is deemed invalid unless notified to C.O.B. in advance.[8]

1.4- FRUSTRATION OF A POTENTIAL MERGER PLAN

It is possible to assume that bidders, whether financially supported by a banker or not, may buy or invest in a company which is most likely to be a potential rescuer. They may also effect substantial transactions by stealth in that company or in the the company with which a bidder in the short or long term may acquire (target). It is worth reiterating that the Panel policy relating to market purchase is generally understood to mean that where a potential offeror has not approached a target company and is thus not in possession of confidential information, such an offeror is regarded as any other ordinary market purchaser and should be permitted to deal in the shares in the prospective offeree company or in the shares of any other company. But once there has been some contacts, potential offerors or any person acting in concert with them are automatically precluded from dealing in the target company shares until the announcement of their firm intention to make an offer. The question of concern to which the ensuing discussion relates is how to frustrate a potential merger plan between the vulnerable company and a rescuer or be a substantial shareholder in the combined company?

A tactic which is often used by the target company to frustrate a potential offeror's action is through the search for a friendly third company. The third company may either outbid the initial offeror with the support of the offeree's board of directors or directly enter

8- See the effect of prior commitments to accept an offer discussed in Ch.1.

into a merger agreement with the target company by passing a resolution in a general meeting. Such was the defense taken by Travis and Arnolds (merchant builder) to defeat Meyer International's (timber giant) 213m. offer. The latter having already acquired 28% of Travis voting control, indicated that it intended to increase further its shareholdings. The directors of the target company had strongly rejected the Meyer offer and were instead recommending Sandel Perkins' 143m merger offer, another company which operates in the same field of business as the target. In order to discourage the third company and to circumvent the resistance of the directors of the target company,[9] the initial offeror's chairman pointed out that even though the proposed merger were to be approved by the holder of 50%, its company would inevitably occupy a position of strength in the combined structure. Therefore, the rescuer should consider and think again about the advantages of the merger before being implemented.[10] Finally one may argue that such a tactic is difficult to implement because it involves timing, cost and probability about who or which company might be a rescuer of a vulnerable company unless the acquirer is an insider.

1.5- DAWN RAID

The dawn raid is another technique to build up a sufficient percentage of voting rights control in the target company. The purchase is always swiftly carried out at a price significantly higher than the market price. Since this tactic is usually carried out before

9- Save question of disagreement between shareholders to whom the initial offer is addressed and their board of directors' recommendation for the third offer merger.

10- The Independent, 10th October.1988, p.25.

the offer is officially announced, the offeror's intention at that preliminary stage may not be revealed. Nonetheless it may be explained to the press as a mere investment. Take this instance. Before the fierce battle for the control of the British company Rowntree, a manufacturer in the food sector, one of the potential Swiss competitors (Jacobs Suchard) before making a formal approach, bought approximately 15% of the target company's (Rowntree) shares carrying unrestricted rights. The justification put forward to the press by that raider was that it had no intention to make an offer, provided someone else did first. However, the issue of the dawn raid is neither a new concept nor an improper tactic.[11] But, if left unregulated, it will inevitably hamper shareholders' interests. This is apparent from the fact that a dawn raid is an operation which may be achieved not only within a matter of hours, but also creates an ill informed market. This assumption implies that only a few (the well informed persons) will benefit at the expense of other ill-informed shareholders. Take another example, De Beers for the control of Consolidated Gold Fields. De Beers, after purchase of a significant undisclosed threshold in the target company (Consolidated Gold Fields), announced on 12th Feb, 1980 that it held either directly or indirectly 14% of the equity capital of the target company and that it was considering making another purchase to increase its position of control up to 25%. Indeed, following the announcement, the desired level was promptly increased in a matter of or less than a half an hour[12] on the same

11- The appearance of the practice of dawn raids was the subject of growing concern and debate. See Rider B.A.K, Concert Parties Ending in Dawn Raid, (1980)1 Co.law., p.218, Dawn Raids-Putting The City's House in Order (1980)1 Co.Law.,p.303

12- Sugarman D., Fair Market Versus. Unfeterred Market ...,(1980)1 Co day of the 12th.

The Stock Exchange's underlying policy at that time was that there was no justifiable improper conduct deriving from dawns raids practice.[13] The Department of Trade and Industry showed no intention to become involved with the regulation of " dawn raid " or market purchase. Those were matters considered to be far better left to the Stock Exchange and the Panel on Takeovers and Mergers with their intrinsic flexibility to circumvent any malpractice.[14] However, the Council for the Securities Industry (C.S.I.) considered the issue differently. It recommended its membership to refrain from participating in dawn raids.[15] Likewise, commentators regard dawn raids as distorting the principle relating to equal treatment and opportunity for all shareholders.[16] They have also been viewed as prejudicing investment judgements since a shareholder, faced with a higher offer price for their shareholdings to be accepted within a couple of minutes or hours, has no choice but to accept without seeking to know who the buyer is.[17] Other comments focus on the change of control in any potential takeover offer in favour of the purchaser. In most instances, a threshold between 25% to 30% of the voting rights in the target company, or even far less than that percentage threshold, can enable the holder

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Law. p.255; Chaikin D. Can The "Dawn Raids" Rule Really Make for Fairer Takeovers Tactics (1981)2 Co.Law., p.228.

13- Rider B.A.K, Concert Parties Ending in Dawn Raid, supra n.11, at p.218 and 304, (1981) 2 Co. Law, at p.2

14- A consultative document focussing on the disclosure of interest in shares. Published by the DOT on the 11th of August 1980. See also Cmnd.988, paras 23-25, July 21st, 1980.

15- C.S.I. statement of 7th August 1980, noted in (1981)1 Co.Law, p.303.

16- Supra n.12 and 14.

17- Sugarman D, Fair Market Versus. Unfeterred Market, p.255., supra n.12.

of a such proportion to exercise an effective control. It is worthwhile to mention that the issue of dawn raids was considered to involve the practice of acting in concert.[18] Accordingly, rigorous and specific rules have been introduced to deal with market raids. These rules have been embodied in the City Code rules governing substantial acquisition of shares (SAR'S).[19] A significant feature of the dawn raid provisions is, first, the period of the purchase should not exceed seven days. Second, for the purpose of the shareholders' protection, five days notice must be given to the Stock Exchange. The notice should, at least, contain the following relevant information: about the offeror and his future intention, the amount of shares intended to be acquired, and any concluded agreement or understanding between each other (the buyer and the seller) for the purpose. Hence the main restriction in the context is that the raider must not deal throughout the period of notice. Subsequently, the relevant rules were extended to cover, in addition to dawn raids, other associated problem principally concert parties. One of the fundamental objective the C.S.I. intend to achieve, in an effort to prevent disorderly swift market purchase, is, at least, to maintain the reputation and the integrity of the takeovers market. Similarily, such provisions are not only designed to reduce the speed of such market purchases but to ensure fairness of dealing, to secure a minimum standard of protection and to provide widespread information as to dealings. Hence, as far as market

18- Rider B.A.K, supra n.11, at p.304

19- The Rules governing substantial acquisition of shares (herein after SAR.), which came into force on 11/12/1980, had its origin in the C.S.I statement of 5th September and 3rd of October 1980 respectively. For further discussion, see Sugarman D, Fair Market Versus. Unfeterred Market p.303, supra n.12

information is concerned, in view of the C.S.I., the five days notice should be sufficient to allow the least informed investor an opportunity to participate in the deal.[20] However, the vital issue which triggered concern within the financial community was that the C.S.I, following the formulation of the SARs' rules, did not consider the market dealers' practice as well as the problem of selling short (selling shares you do not own) during the immediate period of purchase operation.[21] In 1985, after resuming its position, the Panel, introduced new provisions in the City Code to cover the category of market makers and fund managers.[22]

By virtue of the SARs' rules , in addition to the 5 days notice, a person or anyone acting in concert with him may not in any period of 7 days increase his shareholdings in a company if such acquisition, when aggregated with any shares or rights over shares[23] which he already holds, would amount to a percentage between 15% and 30% of the voting control of the target company.[24] Under the SAR's rules restriction on acquisition does not apply if the acquisition of shares carrying unrestricted rights made in the preceding 6 days with the acquisition about to be made on that day amounts to less than 10%.[25] In order to determine whether or not an acquisition of shares falls within the scope of the

20- See mainly, Rider B.A.K, supra n.11.

21- Ibid. See also Chaikin D., Dawn Raid Rule as a Practical Tests, (1980)2 CO.Law, p. 228

22- The Panel subjected both market makers and fund managers to the requirements of recognition and exemptions. The City Code, introduction.

23- Rights over shares are defined by the Code to include "any rights acquired by a person by virtue of an agreement to purchase shares or an option to acquire shares or an irrevocable commitment to accept an offer to be made by him." City Code's definitions.

24- Rule 1 of the SAR.

25- Notes on Rule 1 of the SAR.

SAR's restrictions, calculation must be made by reference to shares already held, shares about to be acquired in the same business day and any other already acquired shares on that day. Accordingly, if the aggregate acquisition is less than 10%, further purchase is allowed to be carried on. But where the aggregate acquisition exceeds 10%, purchase of shares may not be permitted unless such an acquisition is:

> (a) from a single shareholders if it is the only such acquisition within any period of 7 days; or (b) pursuant to a tender offer in accordance with Rule 4; or (c) immediately before the person announces a firm intention to make an offer (whether or not the posting of the offer is to be subject to a precondition) provided that the offer will be publicly recommended by, or the acquisition is made with the agreement of, the board of the offeree company, and the acquisition is conditional upon the announcement of the offer.[26]

The significance of the SAR's Rules reflects the idea that shareholders must be treated fairly and provided with equal opportunities and sufficient time to make a well informed decision as to acceptance and the target company should have sufficient time to consider its position in the light of such purchases. Like the City Code, the latest Companies Bill, 1989 recommended three triggering levels; 3%, 10% and 15%. Accordingly, any person seeking to acquire or has acquired share in the target company, is not allowed to increase the percentage level of his shareholdings beyond these percentage levels without 10 days separating the date of the first purchase and the subsequent acquisition.[27] The obligation to make a general offer for the remaining share capital of

26- Rule 2 of the SAR.

27- Recommendations of the Companies Bill of Jan.3oth 1989 contained in Clause 220A (1) were not incorporated in the C.A.1989.

the target company arises wherever the third triggering percentage level (15%) is exceeded.[28] Besides, any offeror, coming under the obligation, should make a statement of his intentions for the future management of that company.[29]

1.6- WAREHOUSING[30]

A- DEFINITION UNDER THE TAKEOVERS REGULATION

The term "warehousing"[31] is defined by the Panel as:

> the practice whereby a person or company (or a group of persons and, or companies) accumulates, without public disclosure, a substantial block of shares in a company with a view either to making a takeover bid or to selling the block to someone else who then makes a bid.[32]

Since the warehouser is able to avoid disclosure, it is possible for effective control of listed public companies to be obtained through such a body in a matter of days or hours. This would imply

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28- Ibid.

29- Ibid.

30 It is beyond the scope of the thesis to deal in detail with warehousing practices. For reading on the subject, see Rider B.A.K and Ffrench H.L, The Regulation of Insider Dealing, p.13 to 14, 176 and 273, supra n.67/Ch.5; Johnston A., The City Takeovers Code, supra n.88/Ch2, at p.69; Farrar J. H, Farrar's Company Law, (2nd.edn),(London Butterworths, 1988) at p.549; Weinberg & Blank, Takeovers and Mergers, (4th edn), supra n.19/Ch1, at paras 2373-2374 and 2379; Savage N. & Bradgate R., Business Law, (London, Butterworths, 1987), p.512; House of Commons, (H.C 176), (report on Westland case) (Session 1986/1987), paras 15-20; House of Lords, (H.L.218) (1985/86); Rider B.A.K, Insider Trading, (Bristol, Jordans and Sons Ltd. 1983), p.234

31- It is arguable that the expression of ' warehousing' is an American usage. See Johnston A. supra n.88/Ch2, at p.69

32- Panel's definition noted by Weinberg & Blank, Takeovers & Mergers, supra n.19/Ch1; Johnston A., The City Takeover Code, p.69, supra n.88/Ch2.

that the principle of fair treatment is distorted and the transparency of the market is potentially deterred. Hence, how far information disclosure should be used to resolve any problem is a matter for discussion.

B- WAREHOUSING-DISCLOSURE OF INTERESTS

It is true that the initial percentage of voting control that a warehouser accumulates before announcing his holding in the target company is a major element in determining the incentives for a takeover offer. Under the present relevant regulations, there exist two triggering percentage levels of disclosure of interests. One is legal which is provided by the Companies Act 1989, under which the amount of interest which should publicly be revealed is fixed at 3% or more of the relevant share capital of the target company. Below that level, the purchaser is not obliged to reveal his shareholdings. The other is extra legal and laid down by the City Code on Takeovers and Mergers.[33] Unlike the companies Act 1989, the City Code requires a person to disclose his interests once his shareholdings or his daily purchase amounts to 1%.[34] In France, the threshold required to be disclosed is equal or more than 0,005%, though takeover activities are less developed in comparison with Britain. In general, albeit there exist no perfect system, the regulatory mechanisms in both countries seem to work very harmoniously and in a compatible manner.

33- Apparently (whether or not compatible with each other) the former triggering percentage level is, in the main, concerned with directors disclosure of interests in shares, whereas the latter is directed to share dealings. Both levels are, perhaps, intended to ensure market transparency and, most importantly, the protection of investors involved.

34- Rule 8.3 of the City Code requires a daily disclosure of dealings during the offer period.

As regards the registration of interests acquired or transferred, the 1989 Companies Bill,[35] proposed that the target company whose shares have been acquired or disposed of should be entitled to oblige the holder to give particulars of the beneficial ownership of his past and present interest in any shareholdings greater than 0.05% of the total equity in its relevant shares capital.[36] Moreover, the company may also refuse the registration of transfer of shares where the instrument of transfer relates to a number of shares greater than 0.05, unless the name and address of the beneficial owner of the shares is disclosed.[37]

Concerning its powers of investigation, the 1985 Companies Act empowers companies to declare that the shares under inquiry shall be subject to the restriction dictated by Part XV of the C.A 1985 wherever full disclosure is not complied with. The1989 Bill suggested 7 days notice before imposing restrictions on shares.[38] But, the practical difficulty is that the companies involved are not, in the face of increasing development and complex share structures, able to trace the ownership or the beneficial owner of interests in their share capital. The reasons, of course, may vary. One of the the fundamental obstacles facing the company which is carrying out or about to launch its investigation process is due to the regulation itself, either, because such powers were not expressly made clear by the legislator, or because, very often, both the Panel and the

35- No amendments in the context were incorporated in the C.A.1989.

36- Para (c) intended to be incorporated into Section 211 of the Company Act 1985, by the Companies Bill 1989, clause 91. But such a recommendation was not adopted by the C.A. 1989

37- Clause 91, of the Companies Bill 1989, intended to insert Sub-section 1A into Section 183 of the C A 1985. This Clause was not incorporated.

38- Companies Bill 1989, Section 216.(A) was not incorporated in the C.A.1985.

Stock Exchange, where a takeover offer is involved, are reluctant to grant consent as to the use of such restrictions by the target company. This is especially so when a takeover offer is in progress. Therefore, the ultimate means for a company to identify the holders of its share capital is pursuant to a court order.

To conclude, first of all one might note that the relevant regulations (whether legal or extra legal) have not gone as far as distinguishing between the practice of concert parties, nominees and warehousing. They are treated, so long as disclosure requirements are concerned, by similar provisions. Presumably the regulator's underlying policy in avoiding such a distinction is that since these three phenomena are contingency-based, information disclosure is a significant deterrent and a good alternative to ensure both market transparency and the freedom of dealing as well as the protection of shareholders involved. Naturally, information disclosure serves three principal functions: first, it extends the boundaries of knowledge by making information available to all shareholders on an equal footing; secondly, the information so disclosed enables shareholders not only to know in whom control is vested, or about what is going on throughout the takeover offer, but also to enable them to reach an informed decision as to acceptance; and finally it entitles the target company to identify the beneficial owner as well as its present shareholders. But the objection is that the amount of information shareholders must have in order to make an intelligent and rational decision is a core problem about informed judgement as to acceptance. Unfortunately, the regulator is faced with great difficulties in formulating adequate guidelines necessary for determining the materiality of information to the decision making process. Indeed, the first problem here lies with the interpretation of what is material information? Correspondingly, parties to an offer, may sometimes disclose less information than they think they should disclose or provide only the information that is required to be disclosed.

Concerning the quality of information, it has been pointed out that:

> ...the long-term decisions of investors are similar in principle to the strategic decisions of management, but the present differences and the quality of information available to the two groups contributes to the perceived communications gaps between them.[39]

Experience has shown no connection between the quality of information provided in annual reports and the more comprehensive information provided in prospectuses and in takeover documents, where companies want shareholders' support.[40]

Registration of shares (whether bought or sold) appears vital. The relevant regulations impose a strict obligation on companies to keep an up to date register containing the information which is disclosed to them in respect of shareholdings acquired, disposed of or exchanged between inter connected companies. The register document is required to be made available for inspection at the company office. The chief reason behind registration is designed to ensure transparency and to enable members or other interested competitors to have an idea of what is in the register. As discussed

39- The Independent, May 17th 1988, p.24; The Independent, 10th October 1988, p.25 relating to 'price sensitive information'. See also, The Stock Exchange and the Panel joint Statement on price sensitive information, supra n.70/Ch.4

40- Ibid

above, the crucial and controversial point which attracted concern relates to the different requirements in respect of triggering percentage levels. Normally, irrespective of the interminable philosophical meaning of terms namely, "voting control", "voting interest", "voting power" and "voting right" or share interests so as to avoid areas of confusion or vagueness of the requirement in the subject, there should be some balance between the statutory provisions and the self regulatory requirements. In other words a less than 1% percentage standard level would appear appropriate and desirable.

SECTION TWO: OFFEREE'S DEFENSIVE TACTICS

2.1- PREVENTATIVE TACTICS

As discussed in the first chapter, a company may be acquired, not because of its vulnerability caused by the poor performance of its management, or because of a financial, commercial or economic crisis, but because of the mere dynamism of its directors, its characteristics i.e, the popularity and reputation of its brand worldwide,[41] in addition to its field of activities, or there may be other inexplicable motivations. Therefore, the question of vulnerability of a company to takeover offers appears to have no precise criteria. There is no doubt that the common desire of potential or actual acquirers is to construct companies of a size to compete with and to match the considerable extension of markets beyond the national territory so as to satisfy investors' worldwide needs. Evidently, the quickest ways of doing so is through the acquisition of companies rather than going through internal efforts

41- The Financial Times, 27th April 1988.

which involve a significant degree of risk, are time consuming and involve advertising costs.[42] However, what is said above does not mean that directors of the target company are left without alternatives to defend their company against predators. Indeed, they may adopt various anticipatory measures to render their company unattractive to takeover offers. Questions of constraint and prohibitions arise. For public listed companies, the Stock Exchange relevant authorities, for instance in Britain, are more often reluctant to permit any company, whether or not a potential target, to introduce any restrictions on its traded securities. Additionally, in both countries, internal changes in a company (whether or not being vulnerable to offers) such as reconstruction of capital or amendment of its articles of association, may not be allowed to be carried out without the approval of shareholders in a general meeting. Thus, knowing that there are a number of preventative and remedial defensive measures at the offeree board's disposal as well as legal or extra legal prohibitions and restraints, the ultimate question is how far directors of the vulnerable company could undertake such a defense and what are the responses or the attitudes of the relevant regulator.

A- CONCLUSION OF SERVICE CONTRACTS

In the ordinary course of business neither the relevant law nor self regulation could prevent directors from entering into service contracts with the company so long as these are not characterized by any aggravating or adverse detrimental effects on shareholders interests.[43] If a harmful effect is likely to take place in the future

42- One study in the U.K demonstrates that the advertising cost for new brands amount to 7m and 10m. during the first year. See Financial Times, supra n.114/Ch.1.

and such a contract is fraudulently validated in a general meeting, it is still difficult for the minority shareholders to challenge the substance of such a contract.[44]

Section 319 of the Companies Act 1985 requires that directors' contracts of employment for more than 5 years must be approved by a resolution of the company in a general meeting and, in the case of a director of a holding company, by a resolution of that company in a general meeting. Subsection 5 of section 319 stipulates:

> A resolution of a company approving such a term ...shall not be passed at a general meeting of the company unless a written memorandum setting out the proposed agreement incorporating the term is available for inspection by members of the company at (a) the company register office for not less than 15 days ending with the date of meeting and (b) the meeting itself.

The purpose of this section is threefold: first, it assumes that a resolution may not be passed which is either made in contravention of this section[45] or is a fraud on the minority.[46] Second, such a provision is designed to prevent abuse against directors and to ensure their future status, and jobs. Thirdly, it safeguards the

43- See respectively, the Companies Act 1985, Section.318 and 319; the Stock Exchange's Admission of Securities to Listing 1984, supra n.36/Ch.4; the City Code on Takeovers and Mergers 1988.

44- Apparently, because of the rule laid down in Foss v. Harbottle which provides that minority shareholders may initiate a derivative action pursuant to their rights vested in the companies only in exceptional circumstances, supra n.54/Ch.1. Discussed by Weinberg & Blank, Takeovers and Mergers, (4th edn), supra n.19/Ch1, at paras 2401-2402 and para. 212.

45- Section.319, Subsection.6

46- Fraud on the minority is viewed by the Jenkins Committe (Cmnd.1749/1962) as an act which in fact does not necessarily involve fraud in the technical sense. It may be sufficient if there is no conceivable benefit to the minority even through the controlling shareholders act without any intention to mislead or harm.

interests of shareholders by requiring a particular contract to be approved by resolution in a general meeting and to be open for inspection at the company's registered office. The question that arises is, should the directors be permitted to conclude contracts of services where they are determined to take action to deter any potential offer? In 1945 the Cohen Committee advocated that any service contract entered into within one year prior to an offer be deemed to have been made in contemplation of the offer unless ratified by the company in a general meeting before the offer is carried out otherwise the director involved loses his contractual rights.[47] The present regulation in both the U.K. and France calls for considerable disclosure requirements.[48] The City Code on Takeovers and Mergers imposes restrictions on directors entering a particular contract either where the board of the target company believes it is desirable to take action to frustrate a potential offeror or, in the belief of receiving a substantial amount of compensation for loss of office resulting from change of control.[49] Rule 21 of the Code stipulates that:

47- Cohen Committee report, para.92(3) and p.53, Cmnd 659 (1945). It is worthwhile to mention that the Cohen Committee's recommendation was neither adopted nor referred to in the Jenkins Committee report (1962) Cmnd 1749.

48- Supra at Chapter 4.

49- A corresponding requirements are dictated by C.O.B regulation of 1989. Art.4, for instance, stipulates that, once an offer document is submitted to the C.B.V, any agreement or contract which may be deemed to be harmful to investor interests or expected to distort shareholders decisions about the significance and the merit of such an offer, save where validated by the court, must be notified to the "conseil d'administration ou au directoire des sociétés concernés." Such contracts must also concurrently notified to the C.B.V and C.O.B. If so concluded, parties to contracts must promptly publish them to the public in a daily national financial newspaper.

During the course of an offer, or even before the date of the offer if the board of the offeree company has reason to believe that a bona fide offer might be imminent, the board must not, except in pursuance of a contract entered into earlier, without the approval of the shareholders in general meeting..., enter into contracts otherwise than in the ordinary course of business".[50]

Note 6 on Rule 21 of the Code clarifies further the Panel policy with respect to service contracts. It states that the Panel will not allow any action taken by the directors to amend, create or vary the terms of employment or enter into service agreements if such measures constitute an unusual or abnormal increase in the directors' emolument or a significant improvement in their terms of service. But the Panel will not prohibit any such improvement which derives from a genuine promotion or new appointment. In either case the Panel urges parties involved to be consulted in advance. Although one may not generalise on this matter of directors employment contracts or about their ethical reasoning or intentions at the time the terms of service contracts are structured and approved in a general meeting compared with the whole issue of takeover defense, it is difficult to assume the absence of any harmful impact on shareholders interests.[51] That is to say it may remain always open to doubt.

50- Rule 21 is an implementation of general principal 7.

51- Weinberg, pointed out that "One of the chief obstacles to shareholders seeking redress against the directors for the taking an action which he considered an improper defensive measure against takeover bids is the difficulty of establishing whether the motive behind the action was to protect the directors against the takeover bids or was some other quite legitimate factors". Weinberg, Takeovers and amalgamation Paras 2404, (2nd edn) 1967. Foss v Harbottle, supra n.54/Ch.1. See further Pennington R.R, Pennington's Company law (5th edn.) (London, Butterworths 1985.), Ch.18, p.724.

B- USE OF VOTELESS AND WEIGHTED SHARES.

Usually, takeover offers are made for the purchase of shares carrying voting control. In this the buyer is willing to pay more on a per share basis than he would be willing to pay if the shares were not part of the controlling stock. In order to render the target company less attractive to the bidders, the directors (wherever permitted to do so) may introduce into their company several restrictions relating to relevant share capital. The use of voteless shares, for instance, may induce any potential offeror to withdraw his interests. Therefore, it is one of the most preventive measures through which the interests of the controllers are preserved.[52]

A large number of companies have recently issued voteless shares by way of capitalization issues.[53] In consequence, the controllers are given the opportunity to realize part of their holding without even affecting or reducing their threshold.[54] Recently, the regulator expressed concern to provide adequate protection, in particular with respect to small investors by having rights adequately defined. If ordinary shares carry no voting control, restricted voting rights or weighted rights, they must be designated "no voting" or "restricted voting right" in the investment certificate.[55] However, despite the debate amongst those in favour of "non voting" shares, and those seeking to abolish such a class of shares,[56] it appears to be generally agreed that no body denies the

52- For the meaning of the term "controllers" see Section 207 (4)of the F.S.A 1986; Banking Act.1987, Section 105

53- Weinberg and Blank, Takeovers and Mergers, (4th edn), supra n.19/Ch.2, at para. 2427.

54- Ibid.

55- The Stock Exchange Listing regulation, supra n.36/Ch.4

56 Weinberg, (4th edn.), at paras 2429 et Seq, supra n.19/Ch1; The Jenkins Report (Cmnd 1749/1962) para 136; Companies Bill 1973, Clause 22.

serious implications of non voting rights upon potential offerors' interest in control. Apart from questions of investment, voteless shares, as far as change of control is concerned, are destructive defensive measures. This means voteless shares discourage offerors and operate as a safeguard against takeovers.

Directors might also consider making certain internal changes in the company articles of association, to render their company "bid proof" and, therefore, unattractive to potential offerors, by introducing provisions to enable them to weight their existing voting control[57]. Like French law, U.K. company law does not prevent companies from making themselves bid proof.[58] Indeed, several companies already use weighted or restricted voting rights.[59] There are also a variety of cases illustrating the use of restricted or weighted voting rights. Take for instance Bushell v. Faith[60] in which the company's articles of association incorporated a provision giving directors weighted voting shares.[61] Another company's articles of association also contained similar clauses relating to weighted voting rights, i.e. Rights and Issues Investments Trust Ltd. v Stylo Shoes.[62] As a matter of fact, double

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The 1978 Bill advocated a registration of such classes of shares. Pennington R.R, Takeover Bids in The U.K. (1969)17.A.M.J C.Law. p.159; Yoran A, Advance Defensive Tactics Against Takeover Bids (1973)21 A.M.J C.Law., p.531; Wooldridge F., Some Defences to Takeover Bids (1974) J.B.L 202.; Gower L.C.B, The Principles of Modern Company Law, supra n.36/Ch.1

57- Right and Issues Investment Trust Ltd. v Stylo Shoes, (1965) Ch.250, (1964)3 W.L.R 1077, (1964)3 All ER 628; Weinberg & Blank, Takeovers and Mergers, at para 2426, supra n.19/Ch1.

58- Wooldridge F., supra n.56, p.207; Bushell v Faith (1969)2 W.L.R 106 (H.L); The Times, 26 May 1988; The Financial Times, 26 May 1988.

59- Greenhalgh v. Ardene Cinemas Ltd. (1946) 1 All ER 512; Pickering M.A, Shareholders Voting Rights, supra.n.58/Ch.1.

60- Supra n.58.

61- Wooldridge, Some Defences to Takeovers, supra n.56.

votes or weighted voting rights control are designed to increase the likelihood of the successful acquisition of a target by one particular offeror and prevent or impede competing offers by other potential rivals. Accordingly, whether voteless or weighted shares, both have almost identical implications for acquirers' interests in control. Therefore any variation of such kinds of shares (voteless and shares carrying voting rights control) may increase or decrease the chance of an offeror obtaining control.

C- CROSS, CIRCULAR AND PYRAMID SHAREHOLDINGS

In order to establish firmly their position of control, the target company's directors may use various other alternatives all of which are solely designed to defeat any takeovers attempt namely, cross, circular and pyramidal shareholdings. A few decades ago such issues were considered by the Jenkins Committee.[63] This Committee demonstrated various situations where cross or circular shareholdings can be made not only to defeat any potential offeror but also to secure their removal from office. It pointed out:

> Where ... three companies (with a common board of directors or with boards which agree to act in concert) each has a holding of 26% of the ordinary voting shares of each of the other companies..., the board of directors of each company, with the association of the boards of the other companies, command a majority and therefore

62- (1965)Ch.250. Discussed by Weinberg& Blank, Takeovers And Mergers, Supra,n.19/Ch1; Wooldridge, Some Defence..., supra n.56. See also Bamford and Others v. Bamford and Others (1969) 2 W.L.R.1107; (1970) Ch.212; (1969)1 All ER 969.

63- The Jenkins Report (Cmnd 1749/1962). Shareholders in one company may also use similar sorts of arrangements to aggregate their voting control. See Greenhalgh v. Millar (1943)2 All ER 234. For further discussion see Pickering M.A, Shareholders Voting Rights, supra n.58/Ch1, at p.256

cannot be removed by the remaining shareholders

This argument denotes two situations: One is where there is an interlocking directorate. The other is through ownership arrangements. Any party to an agreement will be bound by the express terms of their arrangement.[64]

As regards both cross-holding and circular shareholdings between companies, The Jenkins Committee indicated:

> A similar situation arises in practice where two or more companies have substantial cross-holdings in each other even though these provide something less than majority. Then there is the so-called circular ownership: Company A holds 40% of the ordinary voting shares of company B, which holds 40 percent of the ordinary voting shares of company C which is in turn holds 40% of the ordinary voting shares of company A. The directors of all three companies, if they then act in concert, can in practice prevent the removal of any of them by the other shareholders.[65]

Another ingenious way of keeping off a potential offeror and enhancing the controllers' position is the use of interlocking holdings associated with the shareholders voting agreement. This may take the form of a "pyramid". It exists where companies begin establishing a chain, each of them with a substantial minority shareholdings in the other, but none of which is a subsidiary of the others. Such a technique is, in fact, solely undertaken for the

64- In France, the threshold is limited to less than 10%. Moreover, according to C.O.B regulation, except where permitted by legislation, any member to an agreement enjoys an absolute right to withdraw. Such an agreement, if entered into at the time where an offer is in progress, cannot be forced against the initiator. See Art.4 of the C.O.B Regulation No.89-03 of 1989, supra n.1/Ch3.

65- Weinberg & Blank, supra n.19/Ch1, at paras 2408; Pickering M.A, supra n.58/Ch1, p.248 et Seq.

purpose of reinforcing the position of control of the interested parties in the target company and therefore preventing any chance of sudden change or substitution of such control. Hence, the interested companies start entering into agreements with shareholders up to obtaining the majority of control.[66] The obvious aggravating effects of such a device appears principally to impede the increased use of takeovers. Besides it could be deemed to be an obstructing measure for even a potential member of any of the contracting companies to obtain or to reinforce his position of control.

It is obvious that these measures can be very effective if considered and effected at the time where there is no actual or potential offer at all. But where a takeover offer is imminent, the conclusion of such tactics appear far less effective and falling within the framework of prohibitions and restrictions. On the one hand, the relevant regulators prevent directors from taking any action likely to frustrate a bona fide potential offeror. On the other hand, since takeover offers, in particular competitive ones, involve a great deal of money the professional investor's decision has always been made on both financial and commercial grounds.[67] In other words, for the institutional shareholders, it is not expected from them that such a beneficial opportunity be left to directors to be frustrated unless there is convincing evidence that great profits are forthcoming from the intended resolution (entering into a chain of

66- Pickering, supra n.58, at p.265-267. See also Hadden T, Company Law and Capitalism, (2nd edn) (London, Weindenfeld & Nicolson, 1980).

67- It is generally agreed that the view of shareholders about the merits or demerits of offers is not always identical to their directors assessment or prediction. They, in fact, often advance their short term interests when facing rival offers.

circular and cross shareholdings).

In practice, the use of cross-holding, circular or pyramidal shareholdings tactics to defeat takeover offers and to establish firmly directors' positions of control, i.e safeguard further their job status, appears to create no difficulties, while it is, in fact, more complex and more ambiguous. In addition there are more obscure means of achieving the above tactic.[68]

At the present time almost all legislation in any developed country relies entirely on information disclosure of shares ownership so as to stop the spread of such devices. This is sometimes impossible to solve by a simple restrictive or prohibitive provision. Although the Jenkins Committee long ago recognized or predicted the potential detrimental impact on shareholders' interests and advocated that any remedial action would be too complex for adoption. It would be difficult, it is submitted, to determine which of two companies holding shares in the other short of control loses its voting rights.[69] The Committee therefore recommended an effective system to keep market transparency and to afford sufficient safeguards for the investors interests.[70] At the present time, in France, only cross shareholdings devices are restricted whereas circular or pyramiding shareholders fall beyond the scope of the 1966 Loi on Sociétés Commerciales.

C- PLACING ASSETS OUTSIDE CONTROL

Defensive measures of placing key assets[71] outside control

68- Sometimes it extends to enlisting the social relationships and friendships.

69- Jenkins report, paras 151-2, noted by Hadden T., supra n.66, at p.39; Weinberg & Blank, (4th edn.), supra n.19/Ch1, at paras 2406- 2407..

70- Ibid, Jenkins' report, at para 153.

71- For the purpose of the City Code the term "assets" mean fixed assets may preventively be used to reduce the likelihood of takeovers. But the typical period of implementing it is before a takeover offer is made.[72] There are several means whereby the placing of assets can be carried out. It can be made through an established share option scheme, a pension scheme such as proposals involving the application of pension funds surplus, a material increase in the financial commitment of the target company with regards to its pension scheme or a change to the constitution of the pension scheme.[73] There is no doubt that directors frequently, when they believe that a potential offer is coming soon, either on the basis of the company's vulnerability or other inexplicable circumstances, shed some of the vital and valuable assets of their company. Their main reason is to induce potential offerors to withdraw their interests. In this context, however, both the French C.O.B. and the British Panel on Takeovers and Mergers are firm. They place rigorous restrictions on the directors' discretionary power to use or displace the company's funds without seeking their shareholders approval in a general meeting. An especially important provision of the U.K City Code is that which prevents any action being taken by the directors which frustrates a bona fide offer where an offer is prematurely or formally announced without the approval of shareholders in a general meeting. This includes:

(a) issue of any authorized but unissued shares; (b) issue or grant

plus current assets less current liabilities. See Notes 2 (c) on Rule 21 of the City Code as amended.

72- When using such a method, directors must have entire confidence and be certain who their friends actually are. Furthermore such placing should be made in secret so as to avoid triggering bidders attention to the value of the assets at issue. See further Weinberg & Blank, Takeovers and Mergers, supra n.19/Ch1, at para 2442 et seq

73- Hogg v. Cramphorn Ltd and Others (1966) 3 All ER 420; (1966) 3 WLR 955, (1967)Ch.254; City Code Notes on Rule 21.

options in respect of any unissued shares; (c) create or issue, or permit the creation or issue of, any securities carrying rights of conversion into or subscription for shares; (d) sell, dispose of or acquire, assets of a material amount; (e) or enter into contracts otherwise than in the ordinary course of business".[74]

The typical situation is exemplified by the battle for the control of the Savoy Hotel Ltd,[75] the effect of which was to put Berkley Hotel outside control.[76] The question whether directors have a particular power which they purport to exercise or not may be determined in the light of the directors fiduciary duties.[77] This automatically leads to a consideration of two paramount questions. First, can directors' improper actions[78] be validated or turned down by the majority of shareholders in a general meeting so as to remedy directors' wrong actions.[79] Second, whether individual or

74- Rule 21 of the City Code. Note 2 on Rule 21 laid down three main criteria to determine whether or not a disposal or acquisition is of "a material amount" that "(a) The value of the assets to be disposed or acquired compared with the assets of the offeree company; (b) where appropriate the aggregate value of the consideration to be received or given compared with the assets of the offeree company; and (c) where appropriate net profit (after deducting all charges except taxation and excluding extraordinary items) attributable to the assets to be disposed of or compared with those of the offeree company". A relative value of 10% is deemed by the Panel as a material amount. But in the case of references to MMC a 15% rather than a 10% test would normally be applied". Note 4 on Rule 21.

75- Milner Holland report noted by Gower L.C.B. in (1955)68 Harv.L Rev. p.1776.

76- Based on the device of a sale and lease back of the hotel so as to hinder a potential offeror in which the directors action was thought as one for improper purpose.

77- See Ch.5 "Directors Fiduciary Duties".

78- Situations involving the determination of directors' improper purposes is likely to be sometimes very difficult to handle. See Smith Ltd v Ampol Petroleum Ltd (1974) AC 821 at 835

79- Weinberg noticed the difficulties to distinguish between actions taken by directors where the prime motive is to give commercial benefit to minority shareholders can start litigation if they consider such action is detrimental to their interests. The latter category seems unable to challenge directors' actions unless there is evidence beyond reasonable doubt as to directors' misconduct.[80] The former approach is becoming accepted nowadays.[81]

D- THE ISSUE OF NEW SECURITIES

Along with the creation of cross-holding, circular shareholdings and the use of non voting shares, weighted or restricted voting rights, as well as placing assets outside control, there are other analogous tactics designed to make actual or potential rival takeover offers more difficult to succeed. Moreover, they afford directors of the target company the ability to fight from a position of strength. The issue of shares in trusts, pension fund institutions, employees scheme or otherwise is one device which may have a wide range of implications on actual or potential offerors. The obvious consequence of the issue of new shares by the target company is to raise the financial cost of the offer against which it is skillfully executed. Legally the use of this tactic or device raises several questions and it is the subject of various cases. Take for

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the company and actions taken by directors which is aimed substantially at the protection of their own position of control or of those of the existing substantial shareholders, Weinberg & Blank, Takeovers And Mergers,(4th edn.), para. 2410, Supra n.19/Ch.1.

80- Hogg v. Cramphorn, supra n.73; Bamford v. Bamford, supra n.62; Foss v. Harbottle, supra n.54/Ch.1.

81 Previously directors failure to act bona fide was not apt for ratification. See Gower L.C.B., The Principles of Modern Company Law (3rd edn) at p. 566-67, supra n.36 and 61/Ch1. Such an approach was adopted by the British regulation and considered valid if directors seek prior approval of shareholders in a general meeting or is ratified thereafter. See Hogg v. Cramphorn, supra n.73.

instance, Hogg v Cramphorn Ltd.[82] In this case, the directors of the target company had issued shares with special voting rights to the trustees of a scheme established for the benefits of the company's employees in an attempt to defeat a takeover offer made by Baxter. It was held that though used for improper purposes, a majority in a general meeting of the company could ratify the issue of shares.[83] Take another case involving competitive offers for the control of R W. Miller (holding) Ltd. A competitive offer had been made by Howard Smith Ltd. and Ampol Petroleum Ltd. Ampol with another associated company (Bukships) owned 55% of Miller's shares which left Howard Smith Ltd. with no opportunity to obtain control. Fortunately, the directors of the target company favoured Howard's offer because of its advantageous terms against the likely detrimental effect if control would pass to Ampol. Therefore, Miller's directors proceeded with the issue of a substantial percentage of shares to Howard which rendered Ampol in a weak position. Consequently, Ampol's chance of obtaining control was significantly reduced. Miller's directors' action was challenged by Ampol on the ground that the issue of shares was invalid. In the course of his judgement, Lord Wilberforce indicated:

> ...It must be unconstitutional for the directors to use their fiduciary powers over the shares in the company purely for the purpose of destroying an existing majority, or creating a new majority which did not previously exist. ...Directors are of course entitled to offer advice, and bound to supply information relevant to the making of such division, but to use their fiduciary power solely for the purpose of shifting the power to decide to whom and what price shares are to be sold cannot be related to any purpose for which the power

82- Hogg v. Cramphorn Ltd, supra n.73.

83- Further notes on such case are made by Sealy L. S., Cases and Materials in Company Law (3rd edn), p. 275-76, supra.n.1/Ch4 over the shares capital was conferred upon theirs...[84]

However, in exceptional circumstances, an issue of shares may be made without the approval of shareholders.[85] For instance, where the issue of new shares is solely made for the purpose of raising the needed capital justified by the company's financial crisis. Equally where a purchase of shares is undertaken by a rescuer which would otherwise trigger the application of rule 9 of the Code. But such a purchase should only be taken as a remedy of last resort before determining the future of the company in question. But the exemptions under the City Code may not be generalised or interpreted otherwise. This tends to exclude any purchase of shares from a substantial shareholder other than from the company itself which is in need of rescue. Furthermore, a rescue operation may have its significance in the course of the company's ordinary course of business. This means that the Panel's permission is unlikely to be given where a competitive offer is announced or expected to be made soon. Similarly, any rescue operation, other than those cited above, should be expected to give rise to an obligation to make a general offer in accordance with the City Code's provisions.

2.2- REMEDIAL OR CORRECTIVE TACTICS

After the offer is launched, the offeror's main objective is to gain control through the use of various devices either those used in anticipation of the offer such as buying gradually on the market, by a " dawn raid" technique or, concurrently with his offer, by

84- Ibid, at p.279.

85- Weinberg & Blank, Takeovers and Mergers, supra n.19/Ch1, paras. 2411-2421.

collecting irrevocable commitments, buying on the market and so forth.

Resistance of determined directors may usually defeat an unwelcome offer. In fighting an unwanted offer, directors more often rely on loyalty of their shareholders, seek outside help, buy their company shares, enter into resolutions (split the stock, raise capital, put key assets into friendly hands, and announce dividend increases). The offeree's directors may also launch a publicity campaign criticizing the offeror and his terms. Directors often seek the help of the relevant authority to block the offer on the basis of several grounds notably competition and public interest. It is worthwhile to mention that some of the corrective techniques discussed therein will almost invariably require the approval of shareholders of the company in a general meeting.

Within the stock market, as soon as rumours start circulating, dealers begin buying and selling securities to profit from the less experienced and ill-informed investors because of the fear that the market share price will fall sharply accompanied by rumours of reference for investigation. This may not affect institutional investors. It is reasonable to assume that well minded shareholders frequently wait until the offer document is available to them. They are, after all, responsible for the funds of their investors and could not be expected to decide on the future of a company from simple speculation or rumours.[86]

The relevant regulators in both countries often stand in an impartial position neither hindering potential or actual offerors nor

86- Experience within the Stock Market has educated them that those who take advantage of a sudden selling opportunity usually lose out in the long term. See further The Independent, April 14th 1988, p.27.

favouring the target undertaking directors where they decide to take defensive action. They may only intervene when they reasonably believe that the rules are being infringed. Their main task, however, is to ensure transparency of share dealing and to afford more safeguards to the investors interests. In particular, those, to whom the offer is intended.

A- SEEKING OUTSIDE SUPPORT

Naturally, directors know most about the underlying value of assets and prospects of their company. Hence directors, when takeover offers are imminent for the control of their company, may employ the whole range of conceived defense in an effort to maintain the company's independence and, therefore, their position of control. If a competitive offer is successful change of control is inevitable. Furthermore, not all directors' defensive measures are allowed. Every directors' action is required to be referred to the consent of shareholders in a general meeting.[87] The strategy then is clear. Directors wishing to defeat an unwanted offeror have to convince their shareholders about the desirability of entering into a merger deal, seeking a rescuer who outbids the unsuited rivals,[88] or await until each competitors' document is communicated to them. In essence, the success or failure of the directors' determined strategy is, in fact, largely dependent on the device and their skill and speed in implementing it. In circumstances where potential offers are imminent, after which change of control is unavoidable, one alternative that might be adopted by the opposition is to work

87- City Code general.principle 7 and Rule 21.

88- Commentators often use the term "defensive merger" to denote both merger schemes and rescuer tactics. Actually both tactics are distinct from each other.

out preliminary merger negotiations with a friendly company. Conscious of the eventuality, the target company's board of directors may ask for a general meeting of shareholders to pass a merger resolution. As a practical matter, however, passing a merger resolution in such a situation may be less effective if at the time the competitive offer is announced a conflict of interest between shareholders and directors occur. Generally such conflicts often result from the divergence of view between directors and their institutional shareholders. These institutions in their capacity as a fiduciaries primarily serve the interests of their investors. In this connection, in order to meet their obligations, the institutions involved often balance their investors' commercial interests against any sentimental or emotional attachment to the company under the offer.[89] This has been evidenced in an offer involving the control of the Scottish and Newcastle (S&N) company. Following the S&N company's directors failure to win their shareholders support, one manager stated that "when you are investing other people's money there is no place for sentiment. The heart says that it would be nice to keep control of S & N in Scotland, but ultimately the decision will be made on commercial grounds".[90] Their support of the resistant directors may only be made to the extent that the merger proposition is financially and commercially based on more advantageous terms compared with what are actually offered. The other alternative is to seek a rescuer to outbid the initial offeror[91] or competitors as the case may be.

89- For further reading in relation to institutional investors see mainly, Manne H.G, The "Higher Criticism" of the Modern Corporation (1962)62 Colum Law Rev., p.399 at p.419 et seq.; Loweinstein L Pruning Deadwood in hostile takeovers, at p.297, supra n.77/Ch.1

90- The Elders' offer for the control of S & N Brewers. The Sunday Times, 23th Oct.1988, p.12.

91- Guinness and Argyll for the control of Distillers.

Take for instance, a recent example amongst several other publicized situations in the press. At the time of the competitive offer for the control of Rowntree which was launched by the two Swiss companies; Nestlé and Jacob Suchard, there was increasing market speculation on the future of the British confectionary and soft drinks group Cadbury Schwepps. The focus was on the US General Cinema as a potential offeror. As a protective measure against any sudden change of control, Cadbury (target) tipped Coca Cola as a possible "white night" against any potential offeror.[92]

Finally it is reasonable to argue that, apart from "merger plan", seeking a "white night" in the sense that it will outbid the initial offeror is preferable, whether or not the company directors support it. Since it creates a competitive climate, quite apart from directors' support, it is hardly to be considered as a defensive tactic, because in either case not only the shareholders benefit, but also the target company becomes dependent on one of the successful competitors.

B- SHAREHOLDERS COMMUNICATIONS

Where directors determine to remain independent, perhaps the most typical tactic, which is becoming common nowadays, is to communicate with the shareholders to urge them not to accept the proposed offer. This may be performed through various means: by phone calls, individual letters, or through newspapers. However, no matter how convincing the arguments contained in the target company's defense document, the most typical, though there are several other,[93] are the arguments concerning the inadequacy of

92- The Times, May 28 1988, p.25-36.

93- The Rowntree Company in its defence document stated that the business can be best developed in the interests of shareholders and employees as an independent group. The Financial Times, April 27th 1988; for the price being proposed; criticizing the offeror's intentions about the future of the company and its employees; that the company will be less profitable and jobs would be less secure if control would pass to the offeror. Such statements may arouse shareholders' and employees' uncertainty. Hence they may provide support and back their managements defensive action. But this is not always the case. In the most vulnerable public listed companies, nowadays, institutions are their major shareholders. These organs are, of course, very aware of their company's prospects and weaknesses. Therefore, they may not make a hurried decision on the merits or demerits of offers unless they are really convinced or satisfied that further benefits may be gained if the company remains independent. Legally, the provisions subjecting directors' statements to urge shareholders not to accept offers are contained in both countries regulations. In the U.K, for example, Rule 20 of the City Code relating to statements made by parties to offers stipulates that "Parties to an offer must take care not to issue a statement which, while not factually inaccurate, may mislead shareholders".[94] The purpose of such a rule is probably of a prophylactic nature. In this connection parties to offers are warned in advance not to issue statements which are untrue or ambiguous, whether attributable to the offeror or the offeree. Untrue statements are likely to have an unsettling consequence on the market and thus harm shareholders interests.

C- PRICE-RAISING DEVICES

Along with urging shareholders not to accept the offer and to

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Plaisly defence against GEC bid. The Times, August 7th 1989.

94- A similar requirement is contained in C.O.B's Regulation of 1989, Art.6 para 2 and Art.3 para 1, supra n.1/Ch.3.

await till the latest possible time prior to the expiry of the proposal,[95] directors of the target company may undertake various other sophisticated tactics to maintain the company's independence. The defensive tactics which remain at the directors' disposal include, dividends increase, stock split, capitalization issue and ultimately the purchase of the company's own shares. Mention should also be made of some other incidental defensive tactics especially where offers are launched by foreigners for the control of a domestic company such as seeking political support; trade union pressure and their shareholders loyalty. However, the prime concern of the regulator is reflected in the general principles. General principal 7 of the Code, for example, requires that:

> ...at no time after a bona fide offer has been communicated to the board of the offeree company, or after the board of the offeree company has reason to believe that a bona fide offer might be imminent, may any action be taken by the board of the offeree company in relation to the affairs of the company, without the approval of the shareholders in general meeting, which could effectively result in any bona fide offer being frustrated or in the shareholders being denied an opportunity to decide on its merits.[96]

This rule has further enhanced shareholders self determination. It also imposed a ban on directors to take any decision in respect of the company affairs which may frustrate an advantageous offer.

D- DIVIDEND INCREASES

Normally the method of announcement of dividend increases is almost always carried out in anticipation of an offer. But it is, in the

95- To avoid any binding agreement shareholders often delay their acceptance. Delay may also be made for financial purposes.

96- See also Note 3 on Rule 21.

extreme case, announced concurrently with takeover offers. While such a device may be effective to frustrate or to raise further the offeror's financial costs, it not always reliable that the company will keep its promise after defeating the unsuited offeror. As a practical matter, a company, whether or not faced with a takeover offer, proposing a dividend increase, assumes that it has sufficient funds to cover its proposition. The clear objection to on the change in dividend policy, which has seriously been questioned by commentators and the relevant authority, is where it is implemented concurrently with the announcement of takeover offers. The obvious consequences of dividend increases may not only render the company unattractive to potential offerors but also, if implemented during the offer period, induce the actual offeror to withdraw its interest. Additionally, as indicated earlier, announcing a dividend increase which is made otherwise than in the ordinary course of business seems to operate against the company's future growth and expansion. Furthermore, in the view of the regulator, it is expected to operate against the interests of shareholders and, therefore, violate the relevant rules.

E- MARKET PURCHASE TECHNIQUES

A company that has determined to remain independent usually has the choice of using various devices and techniques to keep off any unsuitable offeror. One of the alternatives at the disposal of the target company, however, is the redemption or purchase of its own shares. Defensive measures of such a sort almost invariably require the approval of shareholders of the target company in a general meeting. Certainly this is perhaps the first restriction on the directors' power to preserve the company from being taken over by outsiders. Under the City Code, if the target company's board of directors have decided to redeem or purchase the offeree company's securities, in particular when they know or ought to have known that a bona fide offer is forthcoming, they must not take any action without the approval of their shareholders.[97]

Normally, market purchases intended by unwilling targets assume that sufficient funds are at the disposal of the company seeking to purchase its shares. A corresponding alternative may be that if such companies are financially weak, they will inevitably seek outside fund support. This is usually provided through merchant banks, unit trusts, pension fund institutions and building societies. The most likely effect, under the City Code, upon those who are willing to purchase the target company's shares (the board of directors or any other substantial shareholders) is the triggering obligation to make a general offer once their holdings or any person acting in concert with them exceeds 30% of the voting right control at the general meeting of that company. Accordingly, Rule 37.1 of the Code stipulates that "when a company redeems or purchases its own voting shares, a resulting increase in the percentage of voting rights carried by shareholdings of the directors and persons acting in concert with them will be treated as an acquisition for the purpose of rule 9". In the light of this provision, which is, in fact, a second ban upon any person seeking to obtain a position of control, any person, subject to shareholders' approval, is free to purchase as many shares as he can, provided the triggering level of 30% is not attained. This, indeed, is one of the most fundamental features of the Code. Additionally, if a meeting is called for, the provision of the City Code obliges the target

97- Rule 37.3 (a)

company's directors to make available all material facts to their shareholders about the offer or any anticipated offer in the notice convening such a meeting.[98]

Finally if a market purchase operation is fruitless, it does not follow that the target company is deprived of the opportunities to use other alternatives namely, establishing a network of social or political communication with the company. The target company's directors may sometimes use the relevant regulation as an anti-takeover tactic, including instigating a lawsuit. Both devices will be considered below in turn.

F- TRIGGERING SOCIAL AND POLITICAL SUPPORT

As indicated earlier, one of the most commonly used defensive tactics by unwilling targets is the initiation of a communication campaign urging their shareholders to refrain from selling their shares to offerors. The basic argument of such attempts is that the long term profits to shareholders of not offering their shares exceeds any short term benefits which could be obtained. Typically, whilst professional and experienced shareholders often remain silent, directors of the target company, who are negatively responding to offers, generally emphasize that any poor performance is simply contingent; that the board of directors anticipate increased sales and profits; the offer entirely fails to recognize the current performance and the existing prospects of a highly successful company; the offeror ignored the underlying values of the business and its assets which include a particularly wide range of brand names whose reputation is worldwide, channel of distributions, markets. Finally, directors may also argue or

98- City Code, Rule 37.3 (a)

attract employees attention that if the offer succeeds it could cause huge job losses. Occasionally, opposition to offers may extend across the political spectrum. Take for instance, Elder's offer, an Australian Brewer, for the control of the Scottish and Newcastle Breweries, a British company based in Scotland. A Scottish National Party leader stated that Elder's offer must be resisted " by all sections of the Scottish Community. We must protect what is left of the basic core of our industrial base".[99] Recent history has illustrated that "Scotland had paid the price with Anderson Strathclyde, Bells, Britoil and Distillers, he pointed out, adding that "Scottish and Newcastle" must not be next".[100] Some other officials urged the government to refer such a bid to the Monopoly and Mergers Commission for an ultimate investigation. One conservative M.P indicated that the Elder's offer must be referred because it would have a "profound and wholly undesirable effect on competition in the brewing industries. It would be ludicrous for the bid not to be referred on competition policy grounds".[101] Likewise, another labour M.P said "The Government cannot stand aside and let this vital part of the Scottish economy be handed over to people on the other side of the world".[102] It should be noted, additionally, that the S.&N's reference to the M.M.C was also supported by a former Scottish Office Minister.[103] Corresponding political support was also expressed for the Rowntree's directors resistance.[104] What experience has shown, however, is that in most bid cases, in the absence of harmful effects on competition or the wider issues of public interests, although they arouse shareholders

99- The Glasgow Herald, Oct.18th, 1988

100- Ibid

101- Ibid

102- Ibid

103- Ibid ; The Independent, Oct. 22nd, 1988, p.19

104- The Times, 27th April and May 27th,1988 respectively.

and offerors uncertainty about the likely success, emotional or political support often proves inefficient and not effective as a means of defense.

G- USING THE REGULATION TO DETER OFFERORS ATTEMPTS

The regulatory regime in both countries is designed neither to prohibit nor to encourage takeovers, but to encourage fair competition instead. It is also set up to provide fair and equal treatment of shareholders. The market should be as transparent as possible and dealing in information should widely be disseminated to inspire investors' confidence and to encourage new participants. These are the prevailing policies in the marketplace. It is equally important to mention the weight and significance of the regulators' role in policing the takeovers process. Their basic mission is not to favour either party to offers, but by applying the principle of fairness to shareholders, they do not, in fact, constrain what each offeror or offeree can do. In the U.K, one of the ultimate defensive tactics the directors may use when facing a competitive offer is the relevant regulation itself so that offerors actions may be subjected to delay and presumably the offer will lapse accordingly.[105] Furthermore, the possibility of referring offers to the Monopoly and Mergers Commission or the E.E.C commission add further opportunities for delay so that offers are required to lapse under the City Code rules. Granting reference to the M.M.C for investigation, the worst factor for any takeover offer is uncertainty about the likely success of the referred offer.[106] However, nothing

105- Merger Control, 6th Report, Session 1988/89, (H.L.31), supra n.17/Ch.3.

106- In France, clearance relating to competition issues are required to be obtained and a notification is included in the offeror's offer draft arouses both shareholders' and offerors' uncertainty more than the referral decision. Such uncertainty may also extend to other stock market intermediaries. In case of reference, at the very least the offer will lapse until the clearance decision is obtained. Further, a ban is imposed upon offerors and any associates or persons acting in concert with them to purchase shares in the target company.[107] These obstacles will inevitably help the board of the target company to reconsider their fight in the light of new developments. Besides, sufficient time will be at their disposal to reconstruct their defensive measures or to work out a new suitor. It is worthy of note that there are various other obstacles that might face offerors in the host country or they may require prior clearance from its own country, notably the interaction between the regulation of the host country's and the offeror country's laws. Unlike Britain, the French regulators require every thing to be cleared beforehand. In other words an offer will not be declared receivable by the C.B.V. unless it is satisfied that all the requirements have been fulfilled or complied with, mainly C.O.B.'s visa and a positive confirmation from the competition authority. Finally, it should be noted that using the regulation to deter offerors is not exclusive for unwilling targets. It may also be adopted by offerors against each other. Take as example, Argyll Group plc and Guinness Company plc for the control of Distillers plc. The fact of litigation whether before the Court of Appeal,[108] or the Scottish court of Session[109] will below be outlined.

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beforehand. See the C.B.V and C.O.B. Regulation, supra n.1/Ch.3.

107- City Code, Rule 9.4, Notes 1 & 2;

108- Regina v. Monopoly and Merger Commission, ex parte Argyll Group plc, (1986)1 W.L.R. 763 (C.A); (1986)2 All ER 257, (C.A)

109- Argyll Group plc And Others v. The Distillers Company plc. (1986)1 C.M.L.R.763 (C.S); (1987) S.L.T.514

In the contest between Argyll Group plc and Guinness plc for the control of Distillers.plc, bidding was started by Argyll in december 1985, and Guinness made its offer in January 1986. Argyll's offer for the issued share capital of Distillers not already owned by Argyll was priced at 513p per share, thus valuing Distillers.plc at £1,864m.[110] Following the announcement of the rival Guinness plc's offer which was priced substantially higher, Argyll competitively revised its offer bringing per share value to 645p, thus evaluating Distillers at £2,343m. A further revision was announced in March 1986. However, a problem arose when Guinness was referred by the Secretary of State to the M.M.C for investigation. Furthermore, under the City Code, it is conditional that once an offer is referred to the M.M.C, such as that made by Guiness, it lapses. Moreover, pending such an offer, neither a fresh offer is allowed to be made nor any share purchase is permitted to be carried out. Meanwhile, while the other rival was entirely free from restrictions, Guinness, so as to avoid being locked in such a situation, accepted divestment proceedings. Consequently, the merger between Guinness and Distillers was cleared. What is interesting, in this context, was that Argyll as rival on the one hand faced bitter opposition on the other. In order to frustrate the Guinness and Distillers' merger, Argyll sought a judicial review, invoking in the first place, the M.M.C chairman's discretion, and in the second place arguing that "both the first Guinness offer and the revised

110- Argyll's original proposal was negatively recommended by the Distillers board. In January 1986, the board of Distillers decided that Argyll offer was likely to be accepted by the majority of Distillers shareholders, and accordingly start searching for an appropriate suitor so that Argyll offer could be turned down. Such was Guinness plc. Eventually, an agreement was reached between the boards as to the terms of such merger. see, supra n.110-112.

offer would, if implemented, have created merger situations. The proposal to create such a situation had never been abandoned. The second bid was merely a variation on the theme of the first".[111] This was argued without success. Then Argyll appealed to the Scottish Court of Session on the ground of violation of Art.86 E.E.C. Lord Jauncey applied the formula of the "balance of convenience", thus the motion was refused. He stated:

> It remains to consider the advantages to either party of granting or refusing interim interdict. If interim interdict is granted the way is likely to be clear for the Argyll bid to be accepted to proceed unopposed and be accepted. If I refuse interdict both bids remain open to the DCL shareholders. I am informed that the costs incurred by Guiness in connection with their bid have been enormous. If both bids proceed and that of Argyll is accepted they have lost nothing by not obtaining interim interdict. If both bids proceed and Argyll lose, their possible loss which will be sustained by Guinness in the event of their being prevented from presenting their offer to the DCL shareholders. ..In all the circumstances. ...., I conclude that the balance of convenience requires that Argyll's motion be refused.[112]

Since the likelihood of Argyll's success was significantly reduced, the above citation seems reasonable as far as the interest of shareholders is concerned as well as their rational decision on the merits or demerits of rival offers. But if the relevance of such a decision was mainly concerned with questions of economic concentration and it was accepted by the authority that there was no justifiable ground of distortion, due regard was not taken as to the legality of the agreements which were concluded between the board of directors of Distillers and Guinness. Nevertheless, the Guinness affair reveals several possible insidious and abusive practices principally, acting in concert, falsification of the company

111- Supra n.110, at p.768 para (E)

112- (1986)1 C.M.L.R 763, supra n.110, at p.769, para 11 documents and accountant records, theft and conspiracy to break anti fraud laws.[113] This particular question is still under investigation and cannot be discussed in this thesis.

113- The Guardian, 22nd March 1989, 24th March 1990, p.9. At the time of writting this thesis, the Guinness affair ended with convictions of four persons all of whom were found guilty of fraud, theft, and false accounting concerning an illegal share support operation during the takeover of Distillers company in 1986. See, The Glasgow Herald, August 28, 1990; The Independent, 28th August, 1990; The Times, August 28, 1990; The Scotsman 28, 1990; The Guardian, 28th August, 1990.

CHAPTER SEVEN: CONCLUSIONS

Although "takeovers" are becoming a well recognised subject in the securities market regulation, it is nowhere expressed in terms that it has a specific legal meaning. Moreover, the debate in both France and the U.K. did not extend to explore this aspect, presumably because the technicalities as well as the methods available for effecting such transactions are varied. For example, control of a company may be acquired by legal mergers, share mergers as well as by a reverse takeover offer. Control may also be acquired or be reinforced by one of several alternatives, by compulsory offers, by leveraged offers by tender offer or other looting transactions. It can also be secured by proxy machinery and voting agreements and other trading arrangements. In addition, for offerors, any diversity of methods remains a question of choice between alternatives. It is also seen that the offeror's motivation to acquire control of another company is often frustrated by the desire of the directors of the target company to remain in control. In this connection it must be stressed that neither the concept of control, nor the directors' role in responding for or against an unwanted offer, has been made clear. Concerning the regulation of competitive offers, whilst in the U.K. the provisions of the City Code seem impliedly applicable, in France, (and the relatively recent E.E.C Commission proposal for the regulation of takeovers and other bids), the relevant regulation contains some specific rules governing such a technique for acquiring control.

Both countries' securities market regulations lay down basic principles and rules which, whilst in the U.K. for the most part have never been embodied in legal form, in France, the whole system is a legal one. However, the most important provisions are those which maintain the interest of shareholders without unduly impeding legitimate offers. The form of institutions and the powers conferred on their respective supervisory bodies appear to differ radically. In Britain, generally speaking, self regulating bodies prevail whilst in France, the whole range of institutions are public, endowed with legal power. The regulation with respect to sociétés commerciales, for all practical purposes, is contained in the Code de Commerce, and administrative regulations promulgated thereunder. But in the U.K., because of the co-existence of various laws and extra-legal regulations covering or governing the same field of business, it is extremely difficult to draw a reference to any universal regulation.

Most stock markets' relevant authorities seem to adhere to the same principle that dealings in the offeree company or in the offeror's securities is an event which should be as transparent as possible. In Britain, the Panel, with the co-operation of the Stock Exchange and the Securities Investment Board, in the face of a growing number of domestic and cross-border takeovers involving the control of British companies, tends to ensure greater standards of transparency of share ownership. This tendency may also be seen in the light of the recent French Loi 89-531 of 1989. However, the British regulation along with the French, in respect of information disclosure, is highly developed compared with many other E.E.C member states. But as far as the U.K. provisions relevant to takeovers are concerned, it would seem more effective if they were embodied in legal form.

In terms of policy towards the market, one of the most striking differences between U.K. and French takeover offers regulations relates to the rigidity of their provisions and the divergence of policies. In Britain, with the overwhelming belief in the free market, the regulator tends to leave parties to offers without interference to the extent that shareholders involved are fairly and equally treated. Procedurally, in France, in addition to their continuous involvement in takeover offers operations, the C.B.V. and the C.O.B prevent any intervention in the market, once a notification about an offer is made. At this time, the C.B.V. immediately suspends dealings in the target company's relevant shares. Suspension of quotations in the U.K. is deemed undesirable because, it is argued, it will distort the free market as well to hinder innocent controllers' interests. In France suspension it is at the heart of the whole regulatory system. Furthermore, whereas in the U.K. suspension of quotation is left to the discretion of the target company, in France it is subject to a legal requirement and becomes automatic if an offer is notified. Against the background of an increase in abusive conduct which results from or is associated with takeovers practice, including delays which often result from investigation, it appears that many problems could have been avoided if the U.K. would consider once again the significance of such measures. However it could be a more effective deterrant to insider dealing, speculation as well as rumours if such a measure were a statutory requirement as it is in France.

Concerning jurisdiction and powers, the French C.O.B.'s jurisdiction extends to cover the whole range of investment decisions, whether through takeovers, mergers or prospectuses and other related events. By contrast, the Panel's jurisdiction seems to cover only matters of takeovers and mergers. Prospectuses and others investment decisions are matters for the Companies Act, 1985 as amended by the Financial Services Act 1986 and the Companies Act 1989. Mention should also be made of investigative powers. In the U.K., the S.I.B may not be entitled to investigate the affairs of another self regulatory body or any person certified by it unless it is requested or, where it appears to the S.I.B that those members were unable to investigate. Under the French relevant regulation it seems that there exist no barriers to prevent the C.O.B from investigating the Bourse de Valeur institutions. In addition, where a suspicious practice is noticed, the Stock Market or the Panel in the U.K. may appoint an ad-hoc commission to investigate. Unlike the appointment of an inspector by the C.O.B in France, the designation of an ad hoc committee by the Stock Exchange or the Panel is a private decision. However, the vast majority of investigations in the U.K. appear either inconclusive or demonstrate, for example, no identifiable insider trading. Furthermore, publication of findings that are based on probability or uncertainty may not be made public because of the fear of defamation and are not accepted by the courts as evidence for conviction. The courts require a proof beyond reasonable doubt for any criminal proceeding.

Reforms at Community level have inevitably contributed to the development of the national relevant laws and regulations, in particular in areas not already covered by their existing provisions. Recently, a new proposal for a Directive on Takeovers and Other Bids has been submitted to the European Council for approval. Apparently, the aim sought to be implemented by the proposal is twofold. First the proposal is directed to harmonise the existing regulations of the E.E.C. member states within the field. This implies that rules with respect to takeover offers should be at least clothed with a certain degree of legal form. Second is to enhance further the interests of investors and to curb market abuses which could not effectively be reduced without legal action. Concerning the relevant bodies, it is submitted that rules to protect the interests of those affected by takeover offers are unlikely to be effective unless they are policed by an official regulatory body. Further, although the designation of such a supervisory body is left to the member states' discretion, the Commission stresses that the body likely to be designated must have sufficient power to monitor effectively and efficiently takeover offers activities.

The likely implications of this proposal on the U.K. self regulating bodies notably the Panel on Takeovers and Mergers seem obvious. First and foremost, the proposal tends to bring such a body within a legal framework. However, according to the E.E.C proposal, if the status of the Panel is intended to be preserved, it may either be placed under the supervision of a new body endowed with legal power other than the S.I.B or be placed under the direct umbrella of the Secretary of State. It is worthy of note to mention that the 1989 Bill recommended an integration of the Panel into a regulatory framework. As regards the French C.O.B., since it already has such a legal power, it may not be affected by the E.E.C proposal. Furthermore, in order to secure the implementation of the Directive, numerous alternatives have been suggested by the E.E.C Commission. First, it is recommended that there should be a supervisory body clothed with legal powers responsible for the implementation of takeovers regulation. Second, the choice of the appropriate body, to whom a delegation of power is made, is left for the member state concerned. This means the proposal for a Directive leaves it, once a public authority is set up, to member states to designate any other appropriate body to perform such a function whether public or private, or a nationally or regionally organized body. Third, since the intended takeover offer Directive should be complied with throughout the Community, a contact committee is proposed under the auspices of the Commission. The E.E.C. Commission's approach to the problem of harmonisation seems fairly reasonable and flexible.

As far as information disclosure is concerned, such provisions are intended to ensure that neither offerors nor the directors of the target company mislead shareholders or deny them the opportunity of making an informed and rational decision. Therefore, a certain minimum standard of information disclosure is required to be concurrently made and fairly presented not only in the offer document but also throughout the period of the takeover offer. The major tests of such information are accuracy and materiality.

An aspect of company law, in respect of the shareholders position, is that both the U.K. and France recognize that the ultimate decisions with respect to the affairs of companies are, in fact, intended to be entirely reserved to the shareholders in a general meeting through the use of their power of election and removal. Correspondingly, the extent to which the directors are permitted to bind their company to third parties is circumscribed with the scope of fiduciary duties. Again, the philosophy with respect to investors' protection appears to be further enhanced in the takeovers field and both the U.K. and French regulators consider shareholders, principally those of the target company, to be the ultimate party determining the success or failure of offers. Besides, it must be stressed that most regulations emphasize the shareholders rights' of withdrawal. But it seems, nevertheless, differently regulated. In Britain, for instance, shareholders of the target company are permitted to use their rights of withdrawal in specific circumstances. In France, by contrast, such a right may be used at any time during the offer period. It is also particularly vital to mention that the U.K. rules, with respect to the revised offer conditions, are not radically different from French legislation. Both regulations, for the purpose of ensuring equal opportunities, provide that if an offer (whether initial or competitive) is subjected to any revision during the offer period, offerors concerned are obliged to pay the increased consideration even to shareholders who had already offered their shares.

Concerning disclosure and existence of links between periodical information disclosure and disclosure in particular situations, for example takeovers, it seems to have been given little importance. For companies generally, whether public or private companies, listed on the Stock Exchange or not, it is a statutory requirement that certain sensitive information, mostly of a financial nature, should be made available for inspection on a periodic basis namely; accounting reports, balance sheets, profit and loss as well as directors' and auditors' reports. It is also paramount that full and accurate information about the ownership of companies is available to enable shareholders to know with whom they are dealing and to identify who is in fact controlling their company. Besides, in the view of the regulators, whether in France or the U.K., acquisitions of interests or disposals should be transparent and that dealing in information should be widely spread to protect investors and to enhance their confidence in the securities market. Finally the remaining question is whether or not disclosure information requirements alone fulfill the goal of protection of investors' interest that almost any regulator seeks to achieve. The answer to this question is problematic. Nevertheless, at the moment information disclosure seems extensive and operates in favour of shareholders protection. However, the regulator, whether in the U.K. or France, must keep information disclosure under continuous review. Mention should also be made of the fact that information, contained in an offer document that is dispatched to shareholders at the time the offeror's firm intention to make an offer is officially and publicly communicated, is not an absolute standard of disclosure. It is true that an offer document contains some useful information which enables persons to whom the offer is addressed to form a preliminary opinion about offerors and their structured offers notably; the identification of each offeror, intentions and the amount of shares sought to be acquired as well as the percentage of shareholdings already owned in each other. But it remains far less effective in satisfying shareholders needs and in ensuring market transparency. Besides, the Stock Exchange requires a listing particulars, which is mostly of a financial nature, to be sent to shareholders in conjunction with the offer document. The latter (listing document) is also the subject of growing concern and debate on the way of improving the quality of information which should close the gap between the information provided during the company's usual business and that offered in takeovers documents where companies seek shareholders support. Finally, it could be argued that despite the unnecessary defect and disparities of legal systems, the protection afforded to shareholders seems extensive in both France and U.K.

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