Restructure of European Takeover Regulation

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Abstract

This paper will discuss mainly about the Takeover Directive in Europe and the endeavor of the latter in order to create a general regulatory when dealing with the takeovers of companies that operate in each Member State. This Article focuses in determining an equivalent transaction for all this companies due to the protection given to minority shareholders and to the bidder as well. Additionally, this approach will be fulfilled by the incorporation of mandatory bid rule and squeeze-out directive by each Member State as this will make possible the protection of the interest of a target company shareholder and the interest of the bidder as well.

Keywords: Takeover Directive, Member State, Mandatory Bid Rule, Squeeze-out rule, bid.

Introduction

It was advocated that Takeover Directive is designed to show the European effort in terms of a common regulatory for takeovers (Moloney, 2008, 136). It refers to an equal treatment by offering more protection to minority shareholders and the bidder as well. Hence, two of the most important components of this Directive are mandatory bid rule (MBR) and squeeze-out right. Thus, if a Member State implement both of this rules it will be helpful, in case of a takeover, since by adopting Mandatory Bid Rule, the interests of a target company shareholder will be protected and on the other hand, by adopting squeeze out rule, the interest of the bidder will be protected as well. This will arise as a conclusion firstly by analyzing mandatory bid rule, secondly squeeze out rule and thirdly by stating the benefits of these two rules.

Mandatory Bid Rule

Mandatory bid rule is the rule applied to listed companies in Member States that has adopted the Takeover Directive and it may be referred to as a substitute for minority shareholder protection. As Schuster refers to mandatory bid rule, it occur when an acquirer of a controlling stake in a listed company makes an offers to other shareholders, to buy out the minority stakes they held, with the same price as the consideration that was received by the incumbent controller (Schuster, 2013, 529-563). Additionally, even the Commission's current draft directive held for an obligation from the party who has acquired control to make an offer to all remaining shareholders at an "equitable price". Indeed, the recommendations of the Winter Report[1], now defines the equitable price as the highest price paid by the bidder during the 6 or 12 preceding months. Consequently, the "price rule' as some scholars state is the key

[1] Winter Report, Article 5(4).

reason for the mandatory bid rule, which may be called even 'equally opportunity rule' (Bebchuck, Lucian & Hart, 2001, 85). Accordingly, the bidder has to treat all shareholders equal by making the same offer with the same price to everyone for their shares.

Romano states that corporate takeovers can create value by different tools such as initially by replacing management, which is inefficient, and additionally by realizing synergies (Romano, 1987, 111-199). Thus, since Mandatory bid rule is one out of four components of this directive the same result will be achieved if Member States implement it, by preventing inefficient control transfer, when proper rules to protect minority shareholder misses. The transaction done by the two parties when this rule is enforced will create value because these two parties are better off than before because the value is enhance by increasing the aggregate wealth of both parties of the deal without referring to efficiency. The scenario for this to happen in practice is as follows: buyer having the power of cash, so he makes a decision by choosing between shares or cash by ending up in the conclusion that is better to have the shares instead. On the other hand, seller follow the same line of thought, by choosing after making a balance with himself, that it is better to have the money, which in his point of view are worth more.

The Commission considers the mandatory bid rule to be fundamental in order for minority shareholders to gain protection, since it impose a duty toward the one who will gain control of the company (when it is listed), to make an offer to all of them, in order to acquire the residual shares according to Article 5(1) of TOD. Hence, it promotes the idea that in case of the shares being sold, all other shareholders will be protected against a possible expropriation from the new acquirer. So, the bidder, which acquires a block of controlling shares from the seller, will offer the same opportunity even to other shareholders. The idea following is that in case when the bidder pays a premium to the blockholder, it means that other shareholders will benefit from it as well, by requesting the blockholder to share with them that premium. So, the latter will be shared with the target shareholder and as a result they will be protected, and it is the implementation of Mandatory Bid Rule that realizes that. *Burkart* and *Panunzi* follow the same line of thoughts by countering that is true that bids, that are against the collective interests of the shareholders, or if the offered bid price exceeds the post-takeover minority share value; then the bid will be deterred by a mandatory bid rule (Burkant & Panunzi, 2003, 15).

According to *Burkant* and *Panuzi* in their article '"Mandatory Bids, Squeeze-out, Sell-out and the Dynamics of the Tender Offer Process", the mandatory bid rule has an effect only if competition by the incumbent constrains the acquirer from making a bid below the pre-takeover share value, by providing in this way a further shareholder protection, since the rule never simultaneously secures a bid premium (Burkant & Panunzi, 2003, 10). On the other hand, Bebchuk stated that when firms have a sole dominant shareholder, this rule eliminates inefficient control transfer at the cost by discouraging more efficient control transfers (Bebchuk, 1994, 965).

Another important benefit and of main importance for target shareholder is the existence of an economic rationale for letting them to participate in the takeover gains as advocated from *Burkant* and *Panuzi* (Burkant & Panunzi, 2003, 22). Moreover, La

Porta believed that by anticipating the possibility of a takeover premium, a rational investor is willing to pay more for the shares or to invest in shares (La Porta, 1999, 471-517). What it means is better minority shareholder protection in takeovers that has beneficial ex ante effects:
It reduces the cost of equity capital, it increases the attractiveness for firms to be listed, and it ultimately encourages entrepreneurial activity.

Squeeze out rule

Article 15 of Takeover Directive introduces a squeeze-out rule. As Clers points out, the main idea of squeeze-out is the protection of the bidder from shareholders' free-riding and the instruments that make possible to overcome this problem, by having in this way a positive impact on the volume of takeovers (Clers, 2012, 193). The offeror will have an interest in obtaining full control and because of that, this rule is of considerable economic importance. It is presumed that the price that is being offered and accepted for everyone else (all of other shareholders) to be the right one, so the bidder should not offer the premium to the shareholder that do not want to sell his share.
Simultaneously, most Member States grant majority shareholders the right to buy out remaining minority shareholders by allowing the offeror that has obtained the larger stake in the company to acquire the shares left. This may thus vary in relating with the applicable threshold and the price that is going to be offered. *Bebchuk* and *Kahan* advocate that it provides that the bidder that owns 90 percent of the equity capital can constrain minority shareholders to sell their shares at the price offered in the preceding takeover bid (Bebchuk and Kahan, 2000, 295-315). Thus, they continue by pointing out that this right to buy out minority shareholders can be exercised only after the threshold has been reached through a tender offer. Notwithstanding, Member States may apply a higher limit achieving until 95.
This rule is percept to increase takeover facility because it makes possible for the bidder to avoid costs and risks caused by minority shareholders as *Clers* points out (Clers, 2012, 191). In this rule fair price is important as well and serves as a protection of minority shareholders in its Article 15.2 and 15.4 of TOD.

Benefit of these two rules

From the analyze made above it can be seen that Mandatory Bid Rule and Squeeze-out rule are two of the main components of Takeover Directive. The former deals with the protection of minority shareholder considered as the target company shareholder and it take care of their interest. Whereas, the latter pledge the interest of the bidder in case when a transaction is done and the offeror has gained the majority of the shares by protecting him from shareholders' free-riding.

Conclusions

As a result, both of these rules make a protection: the first one in the interest of the target company shareholder and the second in the interest of the bidder.

Mandatory Bid Rule held for an obligation from the party who has acquired control to make an offer to all remaining shareholders at an "equitable price" and the most important part of it is that it generates value.

Squeeze-out rule, on the other hand, achieve a protection of the bidder from shareholder' free-ridding by offering a price that is accepted from everyone else to be the right one.

So, in conclusion European Takeover Directive, containing these two important rules, by requesting Member State to implement it, harmonize better the interest of two parties in one transaction by protecting in depth their interest achieving in the end a better approach in case of a transaction being done.

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