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Take-Over Legislation in Hungary

Abstract. In the first part of the paper, the author provides an extensive analysis of the take-over regulation of 1997, the first of this kind in Hungarian law. The author examines the relationship of take-over and antitrust law pointing out the ambiguities of the regulation of 1997. The second part of the paper is dedicated to the recent Hungarian take-over regulation of 2001, containing more strict and detailed rules at the same time increasing the regulative competence of the government agencies considerably. The paper concludes on a note of doubt concerning the reasonableness of such an powerful extension of state regulation.

The relationship between the rules of company law and securities law governing the acquisition of shares of Hungarian public companies is an important problem of legal dogmatics. Since the acquisition of shares is an issue essentially governed by company law, the decision of the legislator both in 1997 and in 2001 to include the rules concerning take-over into securities law (thus rigidly separating them from the rules of company law) must be considered unreasonable.

It is argued that the fundamental problematic of the new regulation is that the purport and the signification of the take-over legislation receded in the process of recent legislation to give way to the prevalent and unjustifiably omnipotent requirements of rigour and „restoration of order“. The author, however, admits that the Hungarian legislation has adopted rules very similar to other European jurisdictions.

Keywords: take-over, antitrust law, company law

Take-over legislation is a comparatively recent development in Hungarian law. Until the mid-1990s the issue of take-over legislation had not been assigned particular importance, however, with the increasing significance of the stock exchange and, consequently, of public companies limited by shares (hereinafter referred to as companies), it gained momentum in Hungarian law. As a result, in parallel with framing of the new Act on Business Associations (hereinafter referred to as Companies Act), the first law, which considered the principles of the European Union Directive 13, under elaboration and discussion at the time and rejected in the middle of 2001, was drafted. Law

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enforcement, apart from some relevant litigation cases, practically did not take place. At the end of 2000 and the beginning of 2001, however, the issue overrode the professional scope and was given publicity in connection with the case of Borsodchem Co. Ltd., as further in the paper I will revert back to that.[1] The case also delivered a number of lessons and revealed problems of legislation and law enforcement, besides, undoubtedly, boosting the process of the revision of regulations in the relevant field.

I. The Regulation of 1997

1. Primarily, it is the *notion* itself that should be clarified. In terms of take-overs, an "enterprise" is construed as a business association, a *public company*. Take-overs do not cover either the acquisition of shares of a private company or of a stake in a limited liability company, even if the respective transaction results in a one-person company. That could imply an issue in antitrust law (see definition below), but does not pose a problem of take-over legislation. Although the effect of the regulation of 1997 was not confined to quoted companies, it explicitly covered public companies, the majority of which are quoted at the stock exchange, however, in principle, public operation is not necessarily subject to official quotation at the stock exchange.

A further notional element consists in the proportion of shares to be acquired, which has been limited at a rate of 33 per cent under 1997 statutes, and as I will point out, this rate didn't change under 2001 regulations, apart from relevant exceptions.

Before revising the underlying principles of the 1997 regulation, I will look into the question whether and why the specific regulation is necessary, i.e., in what way the regulation of "take-over" relates to the regulation of the so-called *acquisition of control*, commonly known as antitrust law on the one hand, and *competition law* on the other hand.

Concerning competition law, the crucial issue from the point of view of take-over and antitrust legislation to be highlighted is that neither antitrust law, nor take-over legislation can aim at gratuitous prevention of acquisitions of company stakes. The objective of state regulation, however, and Hungary is not peculiar in that respect, is the sustention of control over and transparency of corporate structure and the acquisition of stakes.

[1] See below in Part 1.4.

Antitrust regulation has limited justifiability in case of private enterprises, which therefore remain relatively irrelevant to the following exposition.

The primary and substantive role of the (antitrust) regulation of *acquisition of control* consists in the protection of minority shareholders' interests in associations, which poses a complex and manifold problem. Thereby, certain facilities that make information on acquisitions of various proportions accessible for minority shareholders are legally guaranteed. That objective of publicity in antitrust law is specified under Paras. (1) and (2) of Art. 292 of Companies Act on notification liability, the neglect of which is sanctioned by the reduction of voting rights. The facts of control acquisition (significant holdings over 25 p.c., majority holdings over 50 p.c., and direct controlling interests over 75 p.c.) are stated in the framework of the Companies Act as ideal models of the way voting rates and the decision-making mechanisms are related in the association. A further legal instrument is provided by granting minority shareholders the right to sell their shares under given conditions on the one hand,[2] or exercise specific minority rights if they retain their membership in the association, on the other hand.[3] These legal instruments are supplemented by guaranteed protection for creditors, which gained momentum under Para. (3) of Art. 292 and Art. 296 of Companies Act. According to the principle of shifting responsibility, the provisions concerning the protection of creditors establish the direct responsibility of the acquirer under given conditions.

With respect to the above mentioned facts, the limit of 33 p.c. specified under the *take-over* regulation of 1997 does not seem justifiable in the first approach, which, however, reveals the implementation of a distinctively different legislative purpose and the application of according instruments. As a matter of fact, the purpose of antitrust regulations is that minority shareholders and creditors of the association are notified about the acquisition of a specific proportion of shares, so that according decisions could be made in the event of the acquisition of majority holdings or direct controlling interest. Being aware of the acquisition, minority shareholders may opt for selling their shares to the acquirer. Pursuant to creditor protection, however, minority shareholders may also determine the scope of operation of the acquired control, i.e. the limits beyond which the principle of company law, stipulating that members are not held responsible for debts in specified forms of associations, is ineffective. On the grounds of take-over statutes (as

[2] See Act CXLIV of 1997, Para. (1) of Art. 295 of Companies Act.
[3] Para. (3) of Art. 295 of Companies Act.

expounded below), the buyer is obliged to make a public offer to the shareholders of the association for their shares.[4] The public offer shall be implemented in a manner and on condition that both the association and, although that aspect is usually not referred to, its management are protected, whereas elements of creditor protection are completely neglected by take-over regulation. The consideration of the aspect of creditor protection points to basic differences between antitrust law, which also covers transactions following the acquisition of shares, on the one hand, and the 1997 regulation, which confines the scope of take-over regulation to the transaction of the public offer, the completion of which concludes the case from the legal point of view, on the other hand.

With regards to the underlying causes of take-over regulation, the most frequently mentioned factor is the publicity of the company. The operation both in case of a quoted and a non-quoted public company presupposes a wide scope of holders and the consequent fragmentation of company stock, which, furthermore, implies the potential control of the company owing to a relatively minor share. Of course, what is at stake is the assertion of the level, so as the regulation should not impede, restrain or prevent transfer of shares, which would contradict the structure and the role of a company limited by shares. The optimal solution is taking a middle course, which shall facilitate the achievement of goals favoured from the viewpoint of legal policy without hindering free movement of capital or the realisation of investments. The problem is not specific to Hungarian law, all countries that intend to settle the problem encounter this specific regulatory dilemma.

Another problem is the relationship of take-over regulation to *competition law*. While antitrust law, as mentioned above, seeks to protect minority shareholders' rights and creditors' interests, competition law purports to maintain fairness of business and competition. Take-over regulation, however, concerns both fields, when, on the one hand, it protects minority shareholders, on the other hand, applies its own legal instruments to protect companies and prevent cases that present so-called hostile take-overs, which is a function similar to that of competition law.

2. In retrospect, the exposition of the development of take-over legislation in Hungary will also focus on the relationship of *company law* to *securities law*. The fact that Act VI of 1988, i.e. the first Act on Business Associations, avoided the definition of that relationship is down to several reasons,

[4] See Part 1.7. below, on the potential collision of rules concerning acquisition of control and take-over.

primarily, that at the time of making the law, companies limited by shares were not considered as a major field subject to company law. Although, companies limited by shares were established at the time, the majority sprang up as the outcome of the transformation of large state-owned companies and the number of owners was comparably limited even after privatisation. Furthermore, the operation of these companies was private, whereas the first Companies Act confined the terminological distinction of public and private formally to the foundation of the company, thereby constructed public operation as the principal case and misinterpreted both the situation and the foreseeable trends. The 1988 regulation also limited the scope of antitrust statutes, by providing for legal proceedings exclusively in the event of acquisition of control of a Hungarian company limited by shares by another Hungarian company limited by shares.[5] Such regulation, however, was unreasonable in 1988 and the following years in view of the situation in Hungary.

Accordingly, the first Act on Securities (hereinafter referred to as A.S.) didn't cover take-overs, nor did Act VI of 1990, although it provided for publicising securities and shares. The take-over issue was accentuated as a consequence of the development of European legislation on the one hand, and the change of Hungarian circumstances in the second half of the 1990s on the other hand.

The Companies Act of 1997, as it is known, revised the regulation of companies limited by shares substantively, and instituted profound changes in the field of antitrust law by significantly extending its personal effect. The relationship between the law on shares and law on securities, however, remained unsolved or became even more problematic. Unexpectedly, with reference to alleged or real interests of legal policy, the law on securities preceded the Companies Act under elaboration, and provided for several issues, in an objectionable way, which would be subject to the regulation of shareholders' rights, i.e. the Companies Act.[6] After Act CXI of 1996,

[5] The Supreme Court made an attempt at an interpretation *propter legem* by the purported extention of the term of "companies limited by shares" to foreign "corporations" on the part of the acquirer, which as a concept could be construed logical, but could not be not inferred from the text of the law, therefore it confronted with the resistance of both theory and lower courts, expressed in e.g. one of the rulings of the Court of Budapest.

[6] Considering the limited scope of this paper, without further exposition let me refer to the fact that the Companies Act bans the transformation of dematerialised shares into printed shares under Para. (7) of Art. 22 of A.S., while it practically disallowed the establishment of public companies, and prescribed the transformation

i.e. the Act on Securities, had taken effect on 1st January, 1997, the makers of the Companies Act were confronted with a *fait accompli* and the primacy of securities law was unquestionable in the codification process of company law. Another implication was that the passing of the Companies Act made amendments to A.S. necessary, since take-over regulation was contained by the latter (see Arts 94–94/H of A.S.), whereas doctrinal, structural and substantive considerations would have justified its integration into the regulation of shareholders' rights, i.e. the Companies Act.[7]

3. The basic principle prescribed under Art. 180 of Companies Act, concerning both bearer and registered shares, is that shares are *freely transferable*. Which fully complies with the principle that a company limited by shares is an explicitly capital-based, not a person-based form of association and, motivated by the aspect of mobility, securities as the exclusive form of association representing membership rights shall be issued to members. Notwithstanding, the Companies Act contains *restrictive* provisions. Art. 200 provides for pre-emptive, repurchase and purchase rights and purchase obligations concerning shares, Art. 201 specifies that the memoranda of private companies may confine the scope of transferable shares and categories of shares to specific persons, while Art. 202 allows for protection from hostile take-overs of private companies. According to a comparative analysis of the rule of the Companies Act and A.S., the transfer of public company shares under Art. 180 of Companies Act is feasible exclusively under the regulation of A.S. Which implies that the acquisition of shares under the limit of 33 p.c. is circumscribed under the Companies Act, however, the acquisition of shares surpassing that limit as specified by A.S. shall comply with the regulation of A.S. Under Para. (3) of Art. 94/H of A.S. of 1997, the violation of these rules incurred the *nullity* of the transfer of shares.

The *regulation* was provided under Para. (1) of Art. 94 of A.S., which made the acquisition through direct or indirect transfer of voting shares of

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of bearer's shares into registered shares in case of private companies under Para. 3 of Art. 231 of A.S.

[7] According to judgement of the author of that article, this proposition is still valid. Since issues of the conditions of share transfer are covered under the regulation of 2001, it should have been integrated into the Companies Act. As far as the relationship between securities law and company law is concerned, the second part of this paper will point out that it has not changed, the amendments to the A.S. under Act L of 2001 and the new draft law on capital markets are close to ignoring the viewpoints of both the Companies Act and company law.

a public company in excess of 33 p.c. subject to *public offering*. The text definitely implied that the acquisition of non-voting preference shares was not a matter of consideration with respect to the limit of 33 p.c. The acquisition of shares, not pursuant to transfer, but other ways, e.g. inheritance, was not covered by A.S. According to the provision of Para. (2), the proportion of shares of a company in excess of 33 p.c. is subject to public offer, which shall cover a further proportion of 50 p.c. of voting shares and convertible bonds if the company issued any. In other words, according to the statute, the acquirer of 33 p.c. of the shares can expect to be liable to buy a proportion of 83 p.c. of the company shares in case the public offer is accepted.

The 1997 regulation included another crucial element, when it stated that making a public offer was mandatory only once, i.e. following the acquisition in excess of the limit of 33 p.c., since, according to the general rules of the Companies Act concerning the transfer of shares, the buyer, who later wished to increase the rate of control of 33 p.c., could do so without making a public offer. The rule was not stated *expressis verbis* under A.S., but, implicitly, the intention was obvious according to Para. (1) of Art. 94.[8] On the other hand, since the application of take-over rules was person-based, if the first buyer wished to transfer the acquired proportion of shares in excess of 33 p.c. to another person, who thereby transgressed the limit of 33 p.c. through the respective transaction, the new buyer was liable to make a public offer.[9]

4. The text of Para. (1) of Art. 94 of A.S. includes reference to the requirement of consideration of both direct and indirect transfer of shares upon the assertion of control, which exceeds the limit of 33 p.c. Para. (5) basically amended the previous rule by stating that shares indirectly held by the offerors need to be considered upon the calculation of the level of control as specified under Para. (1). That particular issue is worth thorough examination, since the existence or non-existence of indirect stock, at least formally, was a crucial point in the Borsodchem Co. Ltd., case referred to in the introductory part of the paper, furthermore, the formulation of the draft law left some room for improvement. Then again, the new regulation brought into effect in the summer of 2001 elaborates in detail on that point, making radical amendments, as further expounded in Part II.

[8] Commentary on the Companies Act includes an according statement, in: *Társasági törvény, cégtörvény* (Companies Act, Act on Firms) Sárközy, T., 2nd revised edition, Budapest, 2000, 569.

[9] Commentary on the Companies Act, 570.

I will start with the interpretation of the letters of the law. If, according to other conditions and the proportion of acquired shares, the necessity of making a public offer shall be asserted, i.e. whether the proportion was under or over the 33 p.c. limit, then the calculation shall concern not only the shares acquired directly by the respective person, but the shares acquired indirectly and those to be acquired and directly or indirectly in the future. The primary problem was posed by the fact that A.S. in this part didn't define the term of *direct acquisition of shares*. Point 36 of Para. (2) of Art. 3 of A.S., however, provided a definition of the term of *indirect interest* under the interpretative provisions. Accordingly, indirect interest is constituted by a share of holding in an enterprise or a share of voting and holding rights of the original enterprise, or by the voting and holding rights of another enterprise, the calculation of which shall be made as specified under Appendix 4 of Act on Credit Institutions (hereinafter referred to as A.C.I.).[10] Owing to the definition, the calculation of the indirect acquisition of shares, not circumscribed in A.S., became feasible. Appendix 4 of A.C.I., referred to under the passage "Calculation of indirect interest" in A.S., specifies the calculation method of the proportion of indirect interest as follows: the share of holding in the "intermediate enterprise" circumscribed under Point III/12 of Appendix 2 of A.C.I. (defined as another enterprise in A.S.) shall be multiplied by the share of holding or voting rights of the intermediate enterprise in the original enterprise. With the following example, I will model the scheme above. If a person intends to acquire a share of 20 p.c. in a public company (i.e. original enterprise), whereas the given person owned a share of 50 p.c. in an enterprise (i.e. intermediate enterprise), which held a share of 30 p.c. in the original enterprise, according to the rules, that person will own an indirect share of 15 p.c.. That proportion shall be added to the direct share of 20 p.c., which makes up a total share of 35 p.c. Since the proportion of acquired shares surpasses the limit of 33 p.c. in that case, making a public offer is mandatory.

Appendix 4 of A.C.I., however, *narrowed* the scope of application of rules concerning the acquisition of indirect interest in two respects. It stipulated in one respect that the holding or voting rights under the rate of 25 p.c. in the intermediate enterprise shall be ignored, in another respect, that a share of holding in an intermediate enterprise through more than one enterprise shall not be considered. As for the implications of these two rules applied to the example above, it follows that if the share of

[10] See, Act CXII of 1996 on Credit Institutions and Financial Enterprises.

holding in the intermediate enterprise is only 20 p.c. instead of 50 p.c., it shall be ignored, even if the share of holding of the intermediate enterprise is higher than 30 p.c., for instance 50 p.c. The explanation is obvious and makes both the purpose and meaning of the regulation understandable: what is at stake is not a matter of quantities, but a matter of the quality of *control* the buyer will exercise through the intermediate enterprise in the company to be acquired. Which, furthermore, explains the second rule mentioned above. The rule of the A.C.I., apparently and explicitly, broke the links of enterprises by taking exclusively *one intermediate enterprise* into consideration. If further enterprises, even one-person enterprises, interpolate, they shall be ignored, therefore indirect ownership of shares shall not be taken into consideration from the viewpoint of the 33 p.c. limit.

With respect to the above, the case of Borsodchem Co. Ltd., is worth paying attention. As it is publicly known, Borsodchem Co. Ltd., is a public company with quoted shares, and a proportion of its shares was acquired by Russian and Austrian companies at the end of the year 2000. The Hungarian Financial Supervisory Board (hereinafter referred to as Supervisory Board), allegedly upon the incentive of the company, however, quite justifiably, conducted investigation with the intention to reveal if any of the shareholders had exceeded the 33 p.c. limit. If that had been the case, a public offer should have been made with special respect to Para. (3) of Art. 94/H of A.S., which states *expressis verbis*, that any agreement on transfer of shares shall be nullified in the event of violation of rules concerning the public offer transaction.

The investigation revealed that Russian and Austrian companies, which acquired the shares, hadn't exceeded the legal limit, and the context was irrelevant to the case of the indirect transfer of shares prescribed in A.S. or A.C.I.. As a matter of fact, Appendix 4 of A.C.I., referred to above, apparently stipulates that the concerted acquisition of shares by distinct parties otherwise unrelated, or if the organisational alliance between them doesn't present a case defined under A.S. and A.C.I., shall not qualify as indirect transfer of shares. The Supervisory Board stated explicitly that, although, substantive legal offence hadn't been perpetrated in the transaction of the acquisition of Borsodchem Co. Ltd., shares, the transaction violated the spirit of the law, which (would have) served as a basis for intervention. No argument is necessary for the indefensibility and unlawfulness of the statement above, which reminds me of an age-long doctrine recognised by every citizen in democratic states constituted on the rule of law, that exclusively the presentation of a legal case may incur sanctions in the event of statutory interdiction.

An interpretation *propter legem* wouldn't offer solutions, whereas the amendment of the statute on the basis of the constitution, finally realised under Act L of 2001, certainly could. Nevertheless, the consequences of the effective law and the way it affects public companies raise further concerns.

5. According to Para. (2) of Art. 94/B of A.S., at the request of the offeror and preceding the announcement of the offer, the board of company directors shall provide the necessary *information* on the operation of the company as a basis for definition of the terms of the offer. In practice, this provision led to serious problems and the collision of interests, because, on the one hand, the offeror obviously demands sufficient information for the elaboration of the offer, on the other hand, the boundary between the information reasonably demanded and the trade secrets of the company was ambiguous. In other words, the regulation does not make a clear-cut distinction between the data to be provided and the data that shall be or must be exempt from this obligation. Underlying the issue is the dilemma that no publicly accessible data needs to be requested from the company, and again, publicly inaccessible data, i.e. trade secrets, cannot be demanded until the offeror has acquired holding in the company, since the potentiality that the offeror is a competitor, cannot be ignored. The dilemma has remained unsolved both by the secrecy agreement applied in such case and the rule of Para. (3) of Art. 94/B of A.S., according to which the data obtained shall be treated and used according to regulations concerning trade and securities secrets. Neither could Para. (2) of Art. 94/A of A.S. supply remedies by obliging the buyer to publicise its conceptions on corporate policy and the future operation of the company to be acquired, or, if the buyer was an economic organisation, to compile an information brochure on its former business activities.

An array of problems emerged concerning the application of the provision above. On the one hand, A.S. didn't specify the stage the offeror had to publicise the information at. According to the legal context, publication was due at the time of making the public offer, consequently after the information had been obtained from the company to be acquired. Which logically follows, since the elaboration of corporate policy on the part of the offeror is unfeasible without sufficient information. On the other hand, and obviously inconsistently with the law-maker's underlying purpose, the term of "business association" was once again introduced, which, in the Companies Act, had already proved inapplicable to foreign companies, which were not definable as business associations according to Hungarian law.

No argument can be made for the requirement of the provision of information on the company to be taken over or for the motives of the regulation except that the public operation of the company confers both rights and obligations. While the take-over regulations above have been formulated to protect the shareholders' rights, confidential data of the company thereby could become public. In such cases the risk lies in the fact that, upon the assertion of the purported take-over, the competitor may request the board for and get access to data, whereas that competitor is later entitled to decline to make an offer without consequences. The rule of A.S. of 1997 did not supply remedy for the problem.

6. The text of the law left no doubts about the transaction of the offer. It had to be made for all shareholders and bondholders, and all the offerees had equal rights to decide whether to accept or turn down the offer (Paras. (3) and (4), Art. 94 of A.S. of 1997). The content and the elements covered by the offer were meticulously defined under Para. (1) of Art. 94/A of A.S. The quotation of the offer price regulated under Points a) and b) of Art. 5 of A.S. is crucial in case the respective share is not registered. According to the rules concerning the transaction, the offeror shall simultaneously notify both the Supervisory Board and the board of directors (Para.1. of Art. 94/B. of A.S.) about the offer. The authority of the board of directors was restricted for a period between 30 and 60 days provided for the acceptance of the public offer, since it was not entitled to make any decisions that could interfere with the transaction. The A.S. included two modelling cases: even if the board of directors is entitled to, it shall not decide to increase the registered capital or to acquire company shares. Of course, the ban applies to the shareholders, therefore rights related to the ordinary meeting were not affected.

7. The Hungarian Financial Supervisory Board was given an extended field of authority over public offering and the transaction of the take-over. As mentioned above, the offer was reported by sending the material to the Supervisory Board. Under Para. (1) of Art. 94/C of A.S., the Supervisory Board was entitled to prohibit the acquisition of shares and notify the board of directors accordingly within 15 days of receipt of the report, if the offer didn't comply with legal requirements. If the Supervisory Board, however, didn't make a statement within the specified period of 15 days, that incurred acknowledgement of the report.

A further authority of the Supervisory Board was that if the offer concerned unregistered shares, the equivalent of which was not quotable under Point b) of Para. (5) of Art. 94/A,[11] the Supervisory Board was entitled to quote the equivalent of the shares within the 15-day-period granted for the supervision of the report.

Finally, the question concerning the relationship between the take-over rules exposed above and antitrust law is still unanswered, since the A.S. didn't provide explicit rules on the relationship. The still effective Para. (2) of Art. 295 of Companies Act provides minority shareholders may offer their shares for purchase to the acquirer of majority holding or direct controlling interest, however, the rule shall not apply if the majority holding or direct controlling interest is acquired through a take-over as specified in A.S. The exemption is relevant exclusively under Para. (1) of Art. 295 of Companies Act, other antitrust law regulations shall certainly apply. Therefore, if the offeror has acquired a proportion of shares in excess of 50 p.c. as a consequence of a public offer, i.e. has acquired majority holding under the Companies Act, relevant antitrust regulations shall be applied after completion of the take-over procedure, such as, Para. (3) of Art. 295, under which the specified limit of 10 p.c. to 5 p.c. for minority shareholders was decreased, or Para. (1) of Art. 296 on creditors' rights.

Parallelly, if the offeror acquired a share in excess of 50 p.c. or 75 p.c. in a public offer transaction, the provision of Para. (1) of Art. 295 of Companies Act was ignored. The exemption concerned exclusively that particular provision of the Companies Act, other antitrust regulations were applied. Therefore, under the provisions of the Companies Act, if the offeror had acquired 65 p.c. of the company shares before a further acquisition of 11 p.c., then, as explained above, the public offer transaction was unnecessary upon the acquisition of 11 p.c., whereas the increase in acquisitions from majority holding to direct controlling interest had to be disclosed. In that case, the status of minority shareholders was specified under Para. (1) of Art. 295, and creditors' rights were provided under Paras. (2) and (3) of Art. 296 of Companies Act.

[11] According to the provision, the offer price in case of unregistered shares shall not be under the average price quoted by the stock exchange for a period of 180 days preceding the date of the public offer.

II. Take-over Regulation under Act L of 2001

1. As an outcome of the Borsodchem Co. Ltd., case, both the financial circles and the press called for the urgent and overall revision of securities law. Before actual legislative work started in 2001, the prospect of the establishment of a so-called unified Act on Capital Markets including the fields of securities law, stock and commodity exchange, investment funds, and the comparatively small, nevertheless significant field of take-over rules, had already been discussed for a long time. The significance of the latter had been apparently demonstrated by the amendment of take-over regulations in line with tax regulations, fee and other financial rules under A.S., even before the new Act on Capital Markets was drafted. As a consequence of the amendments, Chapter XIV/A. of A.S. ceased to have effect and was replaced by new provisions, i.e. Arts. 94–94/O. Specific provisions defining the sphere of authority of the Supervisory Board were also amended with respect to the new law.[12] Simultaneously, certain regulations of the Companies Act concerning public companies were modified in view of the objective of harmonising the Companies Act with the new law.[13]

I need to remark finally, that while this paper is written, the draft of Act on Capital Markets has already been introduced to the parliament, as the outcome of an endeavour to broadly and meticulously regulate the entire fields of securities law, commodity exchange and investment funds under a single act.[14] The rules are embodied in a highly detailed Code of 435 Sections, while the Third Chapter (Arts. 65–80), substantively incorporates the rules of Act L. of 2001 (hereinafter referred to as A.S. of 2001), which regulate the field of take-over, that is, according to the text of the law, the acquisition of shares in a public company.

2. A major change was introduced as far as legal terminology is concerned. While A.S. of 1997 discussed the take-over of a company, A.S. of 2001 covered *acquisition of control*. Before dealing with the crucial and far-reaching substantive demarcation, I have to point out that the *acquisition*

[12] See, i) of Art. 123; Para. (5) of Art. 128; Para. (3) of Art. 133; Para. (1) h) of Art. 136; Points a) and f) of Para. (3) of Art. 136; Para. (2) a) f) and l) of Art. 137; Para. (3) of Art. 137; Para. (1) of Art. 142; Para. (2) of Art. 143 of A.S. of 2001.

[13] See, Para. (6) of Art. 51; Para. (3) of Art. 229; Para. (4) of Art. 295 of Companies Act.

[14] Completion date of the present paper is 10th November, 2001.

of control meant to be regulated by A.S. of 2001 has other reference basis than the *acquisition of control* in Chapter XVI. of the new Companies Act. Unprecedented rules have been introduced into Hungarian law by A.S. of 2001, which extends the scope of regulation in an extraordinarily broad manner. The application of the term of *take-over* would not be proper with respect to the law-maker's intention, because there is more at stake, however, antitrust law had already "reserved" and institutionalised the term of *acquisition of control*. Therefore, the "not perfectly in place" terminology of A.S. of 2001 is slightly bewildering.

3. The differences from A.S. are obviously intentional and conceal serious, substantive incongruities. According to the definition of Para. (1) of Art. 94 of A.S. of 2001, the term of "*acquisition of control*" covers the acquisition of holding or voting rights guaranteeing participation in decision-making at the shareholder's assembly of the company. That covers both the enforcement of purchase and redemption rights, or of a dated purchase agreement related to voting shares, and the exercise of voting rights on the basis of using or beneficial rights. The same conditions apply, in case the control hasn't been acquired owing to directly coherent behaviour, but owing to other circumstances, i.e. inheritance, legal succession or the decision of the shareholders' general assembly, which modifies either the proportional number of votes concerning voting rights or the reinstatement of voting rights.

According to Para. (2), acquisition of control covers any *agreement between the shareholders*, pursuant to which, on the one hand a shareholder is granted electing or recalling rights concerning the majority of the members of the board of directors or supervision, on the other hand the parties undertake unified control of the company.

Rules of Paras. (1) and (2), are amended under Para. (3), which states that upon the assessment of the case and the rate of the acquisition of control, both *direct and indirect* acquisitions and these of next of kin shall be considered and added up. According to Para. (4), acquisition of control shall be established if it isn't the outcome of a transaction by related parties as specified under Para. (3), but the consequence of the *concerted action of unrelated parties*.

Para. (5) broadens the scope further, and provides, in compliance with preceding sections, that the exercise of a shareholder's right on behalf of a third party is considered a voting right. According to Para. (6), non-resident third parties are exempted from the effect of the rule above, if they register not as a shareholder's proxy, but as a shareholder (residents are not covered by the exemption) into the stockholders' register.

The law-makers' intention is apparent in view of the meticulous definition, besides acquisition through transfer of shares, other share acquisition cases also have to be regulated and controlled in case of public companies. An even more fundamental step is the extension of the regulation to cases that don't concern devolution of the ownership of shares, but *an agreement between shareholders on the management of the company*. That endeavour is not peculiar to Hungary, almost all European countries with that kind of regulation, including the EU regulation attempt, have dealt with the concept.[15]

The logical consequence of bringing the above case under the effect of the law is that several statutes had to be incorporated into the law, so that it was capable of regulating the case that was obviously more complex than a "mere" acquisition of control by purchase of shares. As an example, without asserting a claim for completeness, I refer to Para. (3) of Art. 94/C providing that a public offer is mandatory for all parties to the shareholders' agreement, unless the parties consent to appointing a party. Therefore, the party denouncing the right to appoint a member of the board of directors or supervisors for the benefit of another shareholder, *ad absurdum*, shall have to make a public offer. Besides, the agreement on the person of the public offeror, shall not exempt other parties concerned from the responsibilities related to public offer.

4. Para. (3) of Art. 94 of A.S. of 2001 concerns not only direct but *indirect* acquisition of control. Beyond formal congruence with preceding rules, a major difference has been established concerning the scope of reference of the term "indirect interest".

Under point 36 of Para. (2) of Art. 3 of A.S. of 2001, rendering definitions, the scope of indirect holding or control has been remarkably extended. Reference to the A.C.I. was avoided, a definitely beneficial decision with respect to editing, therefore two rules regarding the case above have expired. One of these rules provided that the share of holding below 25 p.c. is ignored or not taken into consideration in case the owner holds a share in the intermediate enterprise through more than one enterprise. However, A.S. of 2001 states that assessment of the rate of indirect holding and indirect interest of the acquirer shall be made by multiplying the higher rate of voting or holding rights of the acquirer in the intermediate enterprise by higher the rate of voting or holding rights of the intermediate enterprise in the respective company. In case the rate of voting or holding rights in the

[15] See, e.g. Clause 1 of Chapter 5 of the draft of EU Directive 13, withdrawn.

intermediate company is in excess of 50 p.c., it shall be considered as a whole ownership.

As a consequence of the omission of the rules under Appendix 4 of A.C.I., the issue of *how many links of interest* in intermediate companies should be taken into consideration remains ambiguous under A.S. of 2001. Although, the currently standard interpretation of taking one link into consideration can be inferred from the definition, the omission of the preceding rule confers a message, which might be directive in interpretation. Rejection of the rule of consideration of “one link” results ultimately in the requirement of considering several links of interest, which poses the problem of where to set a limit. The law evades the definition therefore further problems will arise. A likely interpretation of the reference to a share over 50 p.c. is that such a share of holding or voting rights shall be considered not indirect but direct interest, which suggests the likely interpretation again, that all links of indirect interest shall be considered.

A further issue is the regulation of *the share of voting and holding rights* stipulating that the larger proportion should be considered. Disregarding the fact that the intermediate company may take any organisational form, provided that a party has no or a different share of voting rights from that of holding rights in the respective enterprise, that party may participate in decision-making with the voting rights, not with the holding rights. Possession of holding rights but no voting rights does not grant the right to participate in decision-making. The rationale underlying that particular regulation of A.S. of 2001 can be challenged, which the law itself also seems recognise when it provides a further rule. The requirement of making a public offer under Para. (2) of Art. 94/C is subject to the acquisition of a 25 p.c. share, in contrast with the main standard. Reasonably, the regulation in that case provides exclusively for voting rights and does not refer to the share of holding rights.

5. A further, very essential change is the assertion of the standard share from the viewpoint of take-over or acquisition of control. With respect to the above, the only determining standard specified by previous rules was the 33 p.c. limit. A.S. didn’t construe these as subject to the issue of take-over and provided no rules concerning acquisitions under the 33 p.c. limit. The regulatory concept underlying A.S. of 2001, as relevant from the above, is fundamentally different. Art. 94/B. of A.S. of 2001 provides that an acquisition of control up to a share of 5 p.c., then every further acquisition of a share of 5 p.c. shall be reported both to the Supervisory Board and the board of directors of the respective company within two calendar days

following the date of acquisition. Similar reporting obligations pertain to the *decrease* of interest of an equivalent rate. Para. 9 of Art. 94/B. allows for the memorandum of the company to extend the reporting and disclosure obligation to "an increase or decrease of interest at a rate of 2 p.c." That rule, apart from the fact that the assertion of an acquisition of control at a rate of 2 p.c. is rather peculiar, does not specify whether the reporting liability is applicable to each case of increase or decrease in acquisition at a rate of 2 p.c. or it concerns the lowest limit, exclusively. The latter supposition is justified by the text, the former is supported by the context, and more likely. According to my knowledge, this rule concerning the rates of both 5 per cent and 2 per cent is unique with respect to the European Union regulations, none of which supplies us with precedence of such rigour.

The introduction of the five-per-cent rule incurred crucial changes in the *structure* of the regulation. The acquisition of a share of 5 p.c. shall not imply the requirement of making a public offer, which is still confined to an acquisition of a share in excess of 33 p.c. under the normative rule of Para. (1) of Art. 94/C.[16] However, each time an acquisition of a share of 5 p.c. is made under the limit of 33 p.c. reporting shall be mandatory within an extremely rigorous and short period, the neglect of which, like all offences, is sanctioned by a fine imposed by the Supervisory Board according to Point (m) of Para. (2) of new Art. 143 of A.S. of 2001. The value of the fine is fixed between the broad limits of amounts of 500 thousand and 100 million HUF. Since rules concerning fines have not changed in other respects, according to Para. (1) of Art. 143, the conditions and basis of imposition of the fine are subject to the discretion of the Supervisory Board. A further and ultimate sanction of the neglect of reporting liability, not subject to discretion, is the withdrawal of the exercise of membership rights in the company until compliance with the reporting liability.

The most fundamental change incurred by the new regulation is that the former focus on making a public offer pursuant to an intention of acquisition of 33 p.c. has shifted to the *requirement of* the practically incessant *provision of information* to the Supervisory Board, since the reporting liability pertains to a relatively minor change in the status of shares of public companies and is extended to shareholders' agreements. According to the rule of Para. (6) of Art. 94/B., the reporting liability pertains upon the

[16] See, Part 6 below on the exemption under Para. (1) of Art. 94/C of A.S. of 2001.

acquisition of a rate of 50 p.c. control, whereas the disclosure liability is pursuant to the event of reaching the limits of 75 p.c. or 90 p.c. control. Which, on the one hand, provides evidence that the reporting liability in each event of the increase of control by 5 p.c. shall be construed separately from the requirement of making a public offer in the event of exceeding the 33 p.c. limit. On the other hand, the rule above severed another link with the Companies Act, in the framework of which an acquisition of control of 75 p.c. is construed as the upper limit with respect to antitrust law. Furthermore, Para. 8 of Art. 94/B., which bans the exercise of membership rights in the event of delay is applicable exclusively to the reporting liability, shall not concern the neglect of the disclosure liability, which, again, exemplifies that the law-maker attached great and exclusive importance to the provision of information to the Supervisory Board.

Nothing is more revealing as to the rigour of the regulation than Para. 7 of Art. 94/B, which extends reporting and disclosure liabilities to agreements between shareholders that project the acquisition of control *at a later date*. The text of the regulation explicitly asserts that reporting and disclosure liabilities pertain to any, indefinitely postponed, foreseeable acquisition under specific conditions. As for deadlines, the date of the agreement shall be authoritative, and reporting liability shall be complied with within two calendar days of conclusion of the agreement disregarding holidays and disclosure shall also be initiated.

Para. (4) of Art. 94/B of A.S. 2001 specifies what the report shall *state*. Accordingly, the name(s) of the acquirer or of the parties to the agreement, data on the location of the headquarters, the company registry code, the rate of control and definition of the relationship as specified in Para. (2) of Art. 94 shall be stated. Simultaneously, the acquirer or each party to the agreement shall proceed to disclose the report, implying that besides the Supervisory Board, the public shall also be notified about, formerly confidential, agreements between shareholders of the company. Concerning the media of disclosure, Art. 94/A provides that agreements shall be announced in the company and stock exchange journals and on web-sites.

6. The transaction of *public offer* is regulated under Art. 94/C and the subsequent articles. The primary change concerns rates, since, whereas the limit of 33 p.c. remains normative, making a public offer for the acquisition of control in excess of 25 p.c. shall be mandatory, if no other party possesses voting rights, directly or indirectly, in excess of 10 p.c., except for the party intending to acquire control in the company.

It is to be regretted that the text is inaccurate, again, concerning the case when the party, who intends to acquire control, does not possess voting rights in excess of 10 p.c. either (for the time being). The text presumably implies that in that specific case the 25 p.c. limit is ultimately disregarded with respect to the acquirer, with or without a share of 10 p.c.. However, that should have been unambiguously and literally formulated in the text.

The new rule of Para. (2) of Art. 94/C follows from the extension of the term of acquisition of control. In the standard case, when the acquirer intends to buy a certain amount of shares, a public offer shall be made upon the permission of the Supervisory Board under Para. (1). Notwithstanding, under Para. (1) and further paras. of Art. 94, several other types of buyer behaviour and cases are specified as acquisition of control, Para. (2) of Art. 94/C, with reference to these cases, provides that the fact of acquisition of control completed in an according manner shall be reported, disclosed, and at the same time, the public offer shall be made within 15 days following the date of reporting the acquisition. This rule applies to cases when acquisition of control is not the consequence of the acquirer's directly coherent behaviour, but results from the enforcement of purchase or redemption rights, or the completion of a dated agreement. The same rules apply to acquisition according to a shareholders' agreement or an investigation conducted by the state receiver syndicate.

According to A.S. of 1997, besides voting shares, convertible bonds, if any, issued by the company *shall be subject to a public offer transaction*. On the other hand, according to the regulation of 1997, the offer shall concern a minimum of 50 p.c. of the shares. However, A.S. of 2001 has made amendments to both of the above rules. On the one hand, it does not cover bonds, the text, emphatically and consistently, refers to shares, therefore, convertible bonds shall be disregarded from that aspect. On the other hand, under Para. (1) of Art. 94/F, public offers shall not be confined to a proportion of 50 p.c. of voting shares, however, they shall be made to cover *all voting shares and all holders of voting rights*. Which, in view of the above, implies the potential that a share acquisition above the 25 p.c. limit isn't feasible unless the acquirer purchases 100 p.c. of the shares, since the offer must concern the whole amount of shares.

As a matter of fact, according to a more professional and accurate rendition, Para. (2) of Art. 94/K of A.S. of 2001 has incorporated the provision of Para. (5) of Art. 94/H of A.S. of 1997. Accordingly, on condition that the offeror has acquired more than 90 p.c. of the company shares as a consequence of a public offer transaction and fully complied with the liability of payment of the equivalent, the offeror shall be legally due *purchase rights* for the shares not yet acquired within thirty days following the date of reporting to the Supervisory Board. In such cases, furthermore, for the benefit of other shareholders, a *purchase liability* applies under Para. (5) of Art. 94/K of A.S. of 2001, since at the request of the holders of the rest of the shares, it is the acquirer's obligation to buy their shares, basically in accordance with the provision of Para. (1) of Art. 295 of Companies Act.

7. Before entering upon an exposition of the detailed rules of the public offer transaction, I have to refer to the fact that A.S. of 2001 imposes different sanctions in the event of a share acquisition, which *violates the rules of the public offer*. As expounded above, A.S. of 1997 nullified such transfers of shares, which was ignored by the amendment of 2001. According to the recent Art. of 94/L of A.S. of 2001, if the acquisition of shares was implemented in a manner different from that specified by the rules of the public offer, membership rights in the company shall not be exercised. The acquirer shall be liable *to alienate* voting shares in excess of a rate of 33 p.c. or 25 p.c., respectively, within 60 days. Membership rights unrelated to shares subject to the alienation liability shall be exercised exclusively after compliance with that liability. As a matter of fact, denouncing the radical nullity sanction on the part of the law-maker is remarkable, however, what may have accounted for that specific amendment were presumably practical reasons and, as an underlying consideration, incongruity with the effective rules of transfer of shares. According to the new settlement, transfer of ownership of shares implemented in compliance with relevant and effective rules shall be construed as valid, whereas the acquirer that violates these rules shall be subject to sanctions and face the risk of alienation liability.

8. Effective rules of a public offer *transaction* differ from preceding A.S. regulations since they are more specific and provide for issues not covered by the rule of A.S. of 1997. What is of major practical importance, however, poorly constituted in the preceding regulation, is the accurate specification of the binding substantive elements of the offer under Para. (2) of Art. 94/D. A significant aspect of the new regulation is that besides its provision for the requirement that the offeror submits a public statement on the conceptions concerning company policy,[17] under Para. (4) of Art. 94/D of A.S. of 2001 there is a reference to Appendix 8, which specifies

[17] See, comments on the rule in Part 1.5.

the aspects the operation plan to be submitted should cover, i.e., the content and the media of publication, which had not been regulated under Para. (2) of Art. 94/A of A.S of 1997. *Inter alia*, the plan should include details on the foreseeable effects of the acquisition on the employees, and if the offeror wishes to alter the profile of the company significantly, an explanation on the objectives and reasons underlying the decision shall also be given.

The rules concerning the report on the economic activity of the acquirer, which was not provided for under A.S. of 1997, are more relevant to my argument. The new regulation settles the terminology problem of “business association” by highlighting that related rules include foreign companies. On the other hand, this section of Appendix 8, tellingly, is a lot more specific than the provision on the operation plan, which, again, supports the view that information on the acquirer is of primary importance from the point of view of the Supervisory Board and the government. Let me refer to the requirement of submission of a report on the acquirer’s company history, on leading officials and the members of the supervisory board, on all agreements, whatever, between the acquirer, including controlling parties in the acquirer, and the company, on the one hand, or, provided that they might affect the public offer, leading officials of the company, on the other hand.

Concerning the requirement of appointing an external expert for the transaction of the public offer, there is no modification with respect to preceding rules. According to A.S. of 1997, the external expert could be an investment company, whereas A.S. of 2001 extends the scope by specifying that party as a *distributor* that, under Para. (5) of Art. 94/D, shall take *responsibility*, jointly with the offeror, for the truth value of the report on the offeror’s economic activity, which obviously complicates the distributor’s situation. Which, also, may appear as a major snag in case of less familiar foreign investors, since both the distributor and the offeror shall be held liable for damages incurred by the submission of a misguiding report or the concealment of information. Another issue is, of course, who is damaged and in what way, since the liability of attestation of damages lies with the injured party under Hungarian law, and a further ambiguous point is what the term of the injured party covers.

The regulation specifies the appendices to be attached to the request for the approval of the offer under Para. (6) of Art. 94/D, which shall justify the offeror’s possession of the equivalent of the shares subject to the offer (funds, state bonds issued either in Hungary or an OECD member state, a bank guarantee issued by a credit institution based in Hungary or an OECD state).

A statement on an agreement on the offeror's person shall also be submitted, if the acquisition of control is transacted upon a shareholder's agreement and the offer is not made jointly by the parties to the agreement. Furthermore, purchase and repurchase agreements shall also be included in the appendices provided that the acquisition of control is made with reference to these.

The new regulation specifies a peculiar arrangement on the information to be provided for the offeror by the company. As pointed out above, the regulation of 1997 (Para. (2) of Art. 94/B), obliged the company to provide information, and compliance with the requirement was not exempt from problems considering the respective circumstances. The new regulation does not contain such a requirement, Para. (1) of Art. 94/H stipulates that in the event of provision of information by the board of company directors at the request of the offeror, the acquired data shall be treated according to the rules pertaining to the confidentiality of bills and notes on the one hand, and the prohibition on insider dealing, which is a new element, on the other hand. Accordingly, the provision and the quality of information shall be made dependent on the decision and the discretion of the board of directors. The significance of these changes can hardly be estimated in the first approach. On the one hand, they manage to ward off the apparent danger of release of trade secrets to a potential competitor, on the other hand, they can be assessed to model a legal policy, which expresses the intention to reinforce and benefit the existing structure of companies and demonstrates its non-preference for new investments.

However, Para. (3) of Art. 94/H stipulates that the board of directors shall respond actively by *giving an opinion* on the offer and publicise it at the same place where the offeror's operation plan and report on its economic activity are displayed for inspection by the shareholders. The recent Appendix 9 of the law specifies the aspects according to which expert opinion shall be given. The opinion shall contain a statement on the support or objection of the board of directors concerning the offer, and include any member's dissent with an explanation. The board of directors has legal entitlement to employ, at its own cost, an independent financial expert for the assessment of the offer. In that case the expert opinion shall be publicised and made available for the shareholders in compliance with the above.

9. As for the specific rules of a public offer transaction, the following points will be accentuated:

Under Paras. (1) and (2) of Art. 94/E, no changes have been made to *expiry dates*, the Supervisory Board shall make a decision within 15 days of the date of submission of the offer. In case the board does not respond, the offer shall be considered approved. This rule has been amended by the provision of a peremptory term of 5 days by the Supervisory Board, on condition that the request is incomplete, therefore, subsequently completed requests shall be processed within 5 days.

Under Para. (5) of Art. 94/E, the maximum period of the decision-making procedure on the offer was reduced from 60 days to 45 days.

As a logical consequence, Para. (7) of Art. 94/E includes a new provision, according to which neither the offeror, nor the parties to the share acquisition agreement or the business association, in which the parties above hold a share in excess of 25 p.c., *shall transact* transfer, alienation or debit of shares subject to the public offer in the approval period. Neither shall the distributor make a bill of sale concerning the respective shares during that period. In both cases, the transfer of shares subject to the offer are, of course, exempted.

10. A binary amendment has been made to the way of setting the *offer price*. On the one hand, in contrast with the 90-day-period specified under the 1997 regulation, under Para. (1) of Art. 94/G of 2001 the average price of 180 days preceding the date of the offer shall be considered. This rule is, however, amended by the requirement of considering both the highest price stated in any agreement on the transfer of shares between the offeror and related parties during the above period, and the highest price and charge demanded in the agreement on purchase or repurchase. The offer price can't fall short of the highest price listed above. In case the equivalent of the shares can't be set according to the rules specified by the law, Para. (2) of Art. 94/G provides that the offered equivalent can't fall short of the price formed according to the calculation method specified in the offer and approved by the Supervisory Board.

11. The preceding regulation failed to answer several questions concerning the transaction of the *transfer of shares*. According to Art. 94/I of A.S. of 2001, the statement concerning the acceptance of the offer shall not be withdrawn, furthermore, the offeror shall purchase all the shares covered by the accepted offer, unless offeror would acquire control that does not exceed 50 p.c., in the event of which the right to resist included in the offer applied. The agreement on the transfer of shares shall be uniformly concluded on the last day of the acceptance period, unless the offeror has arranged for a competition supervision procedure. In the event of which, under Para. (1) of Art. 94/D, the disclosure of the offer submitted to the Supervisory Board for approval shall include the details of the arrange-

ment for a competition supervision procedure, as a consequence, the agreement on the transfer of shares shall be concluded on the date of permission following competition supervision under Para. (5) of Art. 94/I.

Concerning the *payment of the equivalent*, the regulation, quite reasonably, specifies extremely rigorous rules. On the one hand, payment of the equivalent shall be made within 5 working days of the date of conclusion of the agreement on the transfer of shares. On the other hand, in the event of delayed payment of over 30 days, besides stating a claim for interest on default payment, the offeree may cancel the agreement. According to a specific rule, the cancelling party shall report the cancellation to the Supervisory Board within two working days. The regulation does not specify the consequences the neglect of such reporting liability may incur, nor does it state compliance with reporting liability as a criterion of the effectiveness of cancellation. Nevertheless, Para. (8) of Art. 94/I provides that irrespective of cancellation or a claim for interest on default payment, the Supervisory Board may sanction the offence of rules concerning payment, which basically implies the imposition of a fine under Art. 141. The offeror, however, shall report compliance with the payment liability, or its failure and the underlying reasons, to the Supervisory Board within two calendar days after expiration of the payment period under Para. (1) of Art. 94/K.

12. Finally, I cannot fail to mention that the new regulation also provides for the institution of *counter-offer* under Art. 94/J, with no changes to preceding rules. The period specified for the opportunity to make a counter-offer has been shortened by 5 days. Since the new regulation stipulates that the offer shall cover all shares, the attractive aspect as a condition for the acceptance of the counter-offer is confined to the price. Nothing has changed in that respect, the price in the counter-offer is considered more attractive if the stated equivalent is at least 5 p.c. higher in HUF.

13. Whereas the preceding rules didn't foreclose *voluntary offer* as a potential, the new regulation explicitly institutionalises it under Art. 94/N, applicable under the above rules with specific and according exemptions. As such, the provision of Art. 94/F specifies as requirement that the offer shall cover all shares, while Art. 94/H provides a rule concerning the liability of the board of directors to give an opinion and employ an independent financial expert. Furthermore, the rules of counter-offer are inapplicable, since making a counter-offer is foreclosed in the event of a voluntary public offer.

14. As mentioned in the introduction of this part, Act L of 2001 *amended the regulations of the Companies Act* in several respects. The amendments are meant to harmonise with the regulations concerning acquisition of control and logically follow from the rules propounded above. Para. (3) incorporated into Art. 229 of Companies Act is of particular importance, since the rule of Para. (2) of Art. 229 had allowed that the memorandum of a public company defined the highest rate of voting rights exercised by a shareholder with respect to registered shares. According to the recently incorporated regulation, the specific stipulation of the memorandum shall lose its effect, if the acquirer purchases shares in excess of 50 p.c. through a public offer transaction. The rule of this act, however, according to Para. (6) of Art. 82 of Act L of 2001, shall not concern the effective memorandum regulations for the time being, in as much as the rule of Para. (3) shall not be applied until the last day of the fifth year following the the date of enactment of the international agreement on Hungarian accession to the EU.

According to Para. (4) of Art. 295, introduced as a new rule into the antitrust regulations of the Companies Act, in the event of acquisition of majority holdings or direct controlling interest in a public company, the value of the shares offered for purchase shall not fall short of the equivalent defined according to the rules concerning the acquisition of shares through a public offer transaction. In other words, with respect to a public company, the “market value” as specified under Para. (1) of Art. 295 is construed as effective according to the amendment of the new rule of Para. (4).

The amendment that annuls Para. (1) of Art. 292 of Companies Act is somewhat ambiguous. The text annulled specified the requirement of reporting both an acquisition of significant or majority holdings and of direct controlling interest, including a statement on “the form and rate of control”, to shares, and extend to limited liability companies, therefore, the the registry court. Antitrust regulations of the Companies Act concerning the controlled company cover both public and private companies limited by underlying reasons for the annulment of the requirement of “inclusion of a statement on the form and rate of control” as a consequence of the amendments to financial law are not clear. Since the law specifies registration as mandatory, regulation of the contents of the registration statement would only be proper.

In other respects, the regulations of the Companies Act haven’t been revised, therefore, the antitrust provisions shall apply according to the rules of A.S. of 1997.

15. *Effect*. After the exposition of the recent regulations above, I will finally discuss the issue of the effect of the new provisions, which, according to my

viewpoint raises grave *concerns in view of constitutionality*, when they implicitly mean to introduce the statute with retroactive effect. The starting point is clear and right, in as much as the amended regulations of A.S., according to Art. 82 of the closing provisions of Act L of 2001, are applicable to acquisition of control following 18th July, 2001, i.e. following enforcement of the law. If transactions of take-over of a company had commenced before the law took effect, they shall be conducted according to preceding rules.

However, Para. (2) of Art. 82 states that if, before its entry into force, liabilities of reporting, disclosure or public offer as specified by A.S. of 2001 had not been established by effective law, the obligor shall be liable to report and disclose the form and rate of its existing control, according to the new rule, within 60 days of the date of enforcement of the law, practically by mid-September of 2001. A detailed explanation is presumably not necessary to point out that here a subsequently issued statute defines the existing control as acquisition of control, which, consequently, binds the shareholder to procedures (reporting and disclosure), which were legally not provided for at the time of the acquisition.

Furthermore, I need to refer to Para. (3) of Art. 82, which stipulates that if the holder had acquired shares in excess of 25 p.c. or 33 p.c. before Para. (3) took effect, and in compliance with preceding law hadn't made a public offer, then the rate of that control can be increased exclusively under effective rules of public offer transaction. The provision above is problematic from a further aspect. If the acquisition of control was not subject to a public offer transaction, which may have motivated the acquisition of shares under specific circumstances, and the acquirer could expect to increase that stake under effective rules at the time of the acquisition, then the new regulation, with retroactive effect, ultimately prohibits the transaction formerly legal and specifies rules that the acquirer could not take into consideration.

Para. (4) of Art. 82 stipulates a requirement that after its enforcement public companies amend their memoranda at their first ordinary meeting, i.e. at the spring annual meeting of 2002 at the latest, unless their memoranda regulations are in compliance with the new rules. The provision exempts memorandum regulations concerning the limit of the offer and the calculation of the minimum amount of offer price, which shall be harmonised with effective law by 30th June of 2004. A further exemption concerns the later application of the recent Para. (3) of Art. 229 of Companies Act expounded above.

16. *Conclusion.* The assessment of a recently enforced statute is by no means a simple, however, a rather risky undertaking, since the primary standard

of assessment is the application capable of evaluating positive and negative effects of the law. The evaluation is further complicated by the fact that professional (economic, financial) arguments are considerably intertwined with political concerns. However, I can hardly evade posing the question.

It is a mere fact that both the European Union and the member states are making remarkable efforts to settle the issue of take-over regulation. The real dilemma is obviously constituted by the problem of locating the ruling boundary the regulative transgression of which would incur disturbance in the operation of major registered companies with significant share in the economy of the respective country, and thereby, regulation is construed as more damaging than yielding. In this respect, the case of Hungarian law is peculiar in the sense that the recent one and a half or two years of the Budapest Stock Exchange would justify loosening stiff rules, instead of setting new barriers. What is seen as a problem is that both the intention and the meaning of the regulation of acquisition of control seem to have tarnished in the process of law-making, whereas rationality has been outstripped by an effort to comply with the pervasive and ominous standard of rigorous rules and “order”, although the majority of the rules established are not unfamiliar to European practice. There are, however, severe risks entrapped in the mechanical import of technical procedures, particularly in an area in the intersection of economy and law. The following years to come will either prove of disprove the concerns exposed above.