

Takeovers with or without worker voice: workers' rights under the EU Takeover Bids Directive

ETUI series - Workers' rights in company law

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Edited by Jan Cremers and Sigurt Vitols

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Jan Cremers and Sigurt Vitols

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Preface

This book is the first in a new European Trade Union Institute (ETUI) series about workers' rights in company law. It takes a closer look at the workers' participation rights laid down in EU law on company takeovers, with a view to better equip trade unions and employee representatives to make use of those rights in practice.

The research was initiated under the umbrella of the European Workers' Participation Competence Centre (EWPCC), which was set up in 2008 at the European Trade Union Institute to support workers' representatives in European companies. Its activities are funded by the remuneration received by employee representatives on the boards of European Companies (SE), which is then transferred to the European Workers' Participation Fund.

From the outset, the EWPCC has sought to promote workers' participation in company decision-making, especially across different levels in multinational companies. Participation rights are laid down in as many as 35 different pieces of EU legislation, ranging from employment law to health and safety protection legislation to company law. It soon became apparent that employees and their representatives across Europe needed closely targeted support to make use of those rights, and particularly to navigate the cross-border dimension of workers' participation processes, inputs and outcomes.

That some key participation rights are laid down in company law, rather than the more familiar employment law, poses a particular challenge to industrial relations researchers and trade unions. Company law has foci and motivations that are completely different to those of employment law.

The members of GOODCORP, the ETUI's network of corporate governance and company law experts, have taken on the task of venturing into this previously uncharted territory in order to identify and assess the workers' participation rights embedded in company law.

The EU Takeover Bids Directive is designed to create a basic legal framework for company takeovers in Member States. One of its goals is to protect stakeholders' rights in the course of company takeovers. As stakeholders, employees and their representatives have rights to information and consultation about a bid to take over the company; in some cases, national law secures more far-reaching rights and means of involvement and influence. Examining the precise rules and specific company case studies for twelve EU Member States, this book provides a unique look at the ways in which workers' participation is – or could be – an influential force in company takeovers. It further explores how the information and influence gained can inform trade unions' and employee representatives' strategies, both at the local level as well as across borders.

The EWPC is built on the conviction that workers' participation is a key vehicle for trade union presence and activism at the company level; this arguably holds even more truth at the cross-border level, since it is here that involvement rights can be strategically combined. This book can be seen as a successor to the Sustainable Company book series produced by the GOODCORP network of academic and trade union experts on corporate governance. The analysis and policy prescriptions presented here go beyond mainstream economic analysis and corporate reasoning. With this work, we hope to contribute to the ability of trade unions and workers' representatives to make good use of their participation rights at all levels of the company, in order to strengthen their capacity to secure genuinely European responses to cross-border challenges.

I am very grateful to the editors of this volume and to the members of the ETUI's GOODCORP network for their valuable and insightful contribution to better understanding workers' participation rights and practice.

Aline Hoffmann

Coordinator, European Workers' Participation Competence Centre
at the European Trade Union Institute

Introduction

Jan Cremers and Sigurt Vitols

This book presents the results of a study of workers' rights in company takeover situations in Europe. Technically speaking, takeovers represent an attempt by an external party to acquire or extend a controlling interest in a company whose voting shares are listed on a public exchange.¹ This external party can be a company, a financial investor, an individual or other type of entity. Since 2000, more than 11,000 company takeovers have taken place in the countries currently in the EU/EEA.²

Takeovers are extremely important for workers because a change in ownership typically leads to restructuring in the firm, which involves measures such as replacement of leadership, changed working conditions, increased work intensity and/or mass redundancies. Even when the workers' objective working situation does not change, takeovers can cause considerable stress and loss of motivation and trust in management due to lack of information and uncertainty about the outcome. When the acquiring party is another company, such measures frequently affect the workforce of the acquiring company as well as that of the target. From a stakeholder point of view, it is therefore crucial that workers have strong rights to receive timely and full information about the planned takeover and to intervene at an early stage of the takeover process to protect their interests.

In recognition of the impact of takeovers on workers, legislators at both the national and European levels have defined rights for workers and their representatives to information, consultation and participation in decision-making in takeover situations. At the national level, these rights are typically embedded in a catalogue of rights for worker representation

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1. Note that the word 'takeover' is often used in a broader sense to refer also to the acquisition of a controlling interest in a private company, not just in publicly-traded companies. In this book we are specifically interested in situations covered by the EU Takeover Bids Directive.
 2. This figure is based on our own analysis of Thompson One data.

bodies. At the European level, the main instrument for defining rights for workers specifically in takeover situations is the EU Takeover Bids Directive (2004/25/EC), which was passed over a decade ago. The European Works Councils Directive (94/45/EC, recast 2009/38/EC) and the Information and Consultation Directive (2002/14/EC) also define general rights for workers in restructuring situations, including takeovers.

This introduction explains the background to and summarises the results of the study presented in this book. A primary focus of the study is the EU Takeover Bids Directive (hereafter referred to as the ‘Takeover Bids Directive’, the ‘Takeover Directive’ or simply ‘the Directive’), which was the first piece of legislation regulating takeovers at the European level. A key theme of this study is that the basic rights defined for workers in takeover situations by this Directive do not allow workers to defend their interests adequately in such situations. In many European countries, national legislation and industrial relations institutions provide more effective protection by involving workers at an early stage and defining stronger rights for consultation and participation in takeover situations. The importance of national legislation and practice results in wide variation across countries in the actual rights that workers have. The review of the implementation of this Directive in 2012 provided an opportunity for strengthening worker rights through revision, but the European Commission and European Parliament declined to take this opportunity.

The next section of the introduction summarises the economic and political context for firm restructuring, of which takeovers are an important type. The third section discusses two different conceptual approaches to regulating takeovers, namely the ‘shareholder’ as opposed to the ‘stakeholder’ approach, and shows that the EU Takeover Bids Directive clearly falls in the ‘shareholder’ camp. The fourth section of the introduction discusses the intent of the study and the final section summarises the chapters in the book.

Why are takeovers important? The economic and political context

Although most takeovers go unnoticed by the public at large, some takeovers have received intensive press coverage. This is particularly the case where the takeovers are contested (for example, ‘hostile’ takeover

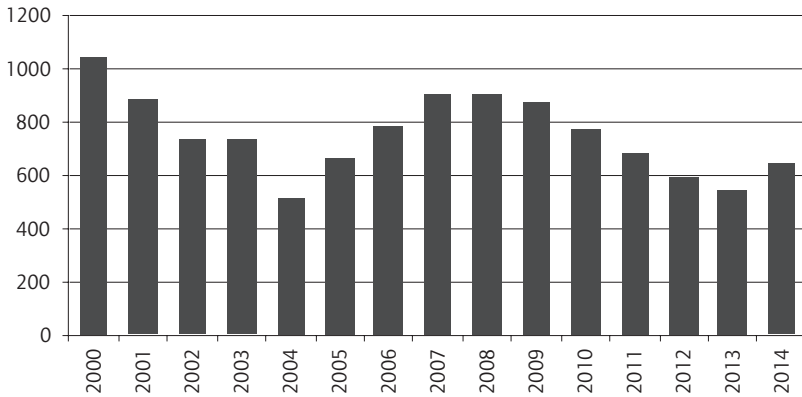
attempts that are resisted by the management and workforce of the target company), where prominent firms are involved and where the potential consequences for workers are large. In the United Kingdom, for instance, an extended takeover battle for Cadbury in 2009–2010 and the subsequent closure of a major plant in breach of promises made by the bidder company caught the public's eye, ultimately leading to a revision of UK takeover rules (for an analysis see the chapter by Georgina Tsagas in this volume). The prolonged takeover fight for the German telecommunications and engineering firm Mannesmann by the UK firm Vodafone in 2000 also was headline news for months in Germany, a country in which hostile takeovers were practically unknown (Höpner and Jackson 2006). In the United States, waves of hostile takeovers – most prominently in the 1980s – have led to the portrayal of 'corporate raiders' in Hollywood movies such as *Wall Street*.

Apart from some of the spectacular takeovers that were first and foremost the work of so-called 'activist' speculator groups (and which provoked sharp reactions: for instance, the leader of the German Social Democratic Party sparked a debate on financial capitalism in 2005 by referring to private equity firms as 'locusts'³) the drivers for takeovers can be manifold (see the chapter by Andrew Pendleton in this volume). Mergers and takeovers can be motivated by resource seeking, whether in the form of natural resources, cheap labour, know-how or capital. The driving force behind expansion can be a search for new markets; later the strategy may shift to restructuring and/or closure. Most of the related restructuring and relocation is cost driven, whether it takes the form of an efficiency operation, a synergy effort or a rationalisation of the production process. The example of several large conglomerates shows the strategy of asset seeking via economies of scale in a broad range of economic sectors (energy, water, BTP, waste management and so on) and with a range of activities (production, concessions, operational and facility management, maintenance and so on), including internal competition. At the same time, there is a clear divergence on the operational side, with a concentration at the top of the production chain on the core business, while operations are outsourced and externalised to dependent services, supply industries and subcontractors. This process of outsourcing and

3. The German Social Democratic Party in its programmatic debate in 2005 referred to 'irresponsible swarms of locusts that measure success in quarterly intervals, suck out the substance and let companies go bankrupt when they have finished eating' (SPD 2005: 18).

dependent subcontracting sometimes becomes an aim in itself (leading to ‘cost reduction’ by minimising labour costs), even if there are no objective economic reasons and the restructuring as such does not necessarily imply layoffs. However, in many sectors of the economy across the EU large enterprises dominate the scene, on which many SMEs are dependent. This means that the restructuring of the larger companies potentially has a much greater effect on employment than is indicated by direct job losses.

Figure 1 EU/EEA member countries, number of takeovers 2000-2014



Source: own calculations based on SDC Platinum data

Takeovers have become common events in Europe, with more than 11,000 since 2000. The number of takeovers varies from year to year, with takeover activity being particularly high during ‘speculative’ phases of the financial cycle, such as the high-tech bubble in 1998–2000 and the run-up to the financial crisis in 2005–2007 (see Figure 1). The number of takeovers also varies widely across countries and is not entirely explained by country size. Factors such as the number of companies listed on the stock market and how ‘shareholder-friendly’ the regulatory environment is also play a role (see Table 1). The United Kingdom, for example, has more than three times as many takeovers as Italy, which is roughly the same size in terms of population.

Table 1 Number of takeovers between 2000-2014, by EU/EEA country

Country	Number of takeovers	Country	Number of takeovers
Austria	208	Latvia	36
Belgium	207	Liechtenstein	1
Bulgaria	121	Lithuania	76
Croatia	57	Luxembourg	47
Cyprus	81	Malta	8
Czech Republic	83	Netherlands	376
Denmark	309	Norway	655
Estonia	41	Poland	650
Finland	192	Portugal	219
France	1,472	Romania	117
Germany	1,380	Slovakia	18
Greece	298	Slovenia	60
Hungary	126	Spain	584
Iceland	64	Sweden	846
Ireland	112	United Kingdom	2,238
Italy	620	TOTAL	11,302

Source: own calculations based on SDC Platinum data

Shareholders vs stakeholders and the EU Takeover Bids Directive

The engagement and involvement of the different stakeholders within the company has completely shifted in the past three decades. The introduction of free movement principles in the European Union created an attractive open market for businesses. Along with the removal of the internal borders in Europe, the Member States and the European Commission started to work out an unrivalled deregulation agenda. At the start there was at least lip service to a corporate governance model with a well-balanced division of power between the different stakeholders. Capital owners, management and labour cooperated in a productive environment and kept the real economy going. But this engagement and involvement of the different stakeholders within the company has been eroded in the past three decades.

The globalisation of an important part of the business environment has brought spectacular takeovers, mergers and demergers, and financial market liberalisation has created a global field for gain. A key question in

this development is nowadays where and in whose hands the power centre lies in a company, as the connection between ownership relations and the management structure has been loosened. Activities of financial investors and groups of so-called ‘activist’ shareholders have further separated ownership from the risks taken. Modern managers who job-hop to the places with the best bonuses have replaced the classical entrepreneur at the top of the firm. The board of directors, the supervisory board or council of commissioners, site and country management, works councils, trade unions and shareholders are part of a power struggle for corporate control that can even lead them into the courtroom. The interaction inside companies between capital owners, management, corporate owners, employees and their representatives and other stakeholders will probably diverge within the different market strategies developed. The results can be changing coalitions and a great variety of opportunities and limits for real worker involvement in decision-making processes.

In terms of company law and financial regulation, the distribution of rights between the different parties involved in takeovers is a highly controversial matter in both academic and public policy debates. At one extreme, the ‘shareholder’ (or alternatively ‘shareholder value’) approach, which typifies mainstream economic thinking, views takeovers in a favourable light, seeing them as a major driver of economic ‘efficiency’ (Jensen and Meckling 1976; Jensen 1988). According to this view, which gives primacy to financial ownership, a so-called ‘open market for corporate control’ is desirable because it allows a company to be acquired by a new owner who can do a better job of running the firm and creating more value. Furthermore, the threat of a hostile takeover is held to be the ultimate mechanism for disciplining underperforming management, as a new owner could replace the managers of the acquired company. This theoretical perspective generally sees the impact of takeovers on workers as positive, because the new entity is supposed to be a more efficient and competitive employer.

The stakeholder approach, however, takes a fairly critical view of takeovers. It emphasises the short-term orientation of many shareholders, who typically have the sole right to decide on whether or not to accept a takeover bid, and the disruption of implicit contracts with stakeholders such as workers that takeovers often involve (Horn 2012; Johnston 2009; Sjäfjell 2009). For the stakeholder view, the hostile takeover is a symbol of unbridled financial capitalism, particularly in the case of highly

leveraged takeovers when target companies are loaded with so much debt that regular investments become compromised, ultimately leading to ‘restructuring’ and employment losses. This perspective also sees many ‘friendly’ takeovers as being driven by a financial logic of ‘cashing out’ over the short to medium term rather than a concern for the long-term survival of the firm through investment in skills and innovative products and services. In those terms – as illustrated by many of the case studies in this book – stakeholders (employees, the region, even local management) may come into conflict with speculators.

The question of how takeovers should be regulated is thus a very controversial and politically divisive issue, because the question is which party ultimately has the right to decide who the owner of a firm is. Although proposals for a European takeover directive date back to the 1970s, this issue has been regulated only recently at the European level, through Directive 2004/25/EC on takeover bids. Two issues that have been particularly controversial are the extent to which companies are allowed to take steps to discourage takeovers (‘takeover defences’) and workers’ rights in the takeover process. Academic analyses have typically contrasted an ‘Anglo-Saxon’ approach, which restricts both takeover defences and the rights of workers, with a ‘continental European’ approach, which allows such defences and grants workers more ‘voice’ in such situations. After a hung vote in the European Parliament in July 2001 on a proposed Takeover Directive, the European Commission later that year appointed a High Level Group of Company Law Experts (frequently referred to as the ‘Winter Group’ after its chair Jaap Winter) to analyse the issue and come up with a solution to the impasse. Subsequent to the publication of two reports by the group, the Commission proposed a new Takeover Directive in 2002, which was adopted – in modified form – two years later as Directive 2004/25/EC of 21.04.2004.

The 2004 European Directive on takeover bids (2004/25/EC) in principle served two main purposes: the Directive had to coordinate the (national) safeguards that member states require of listed companies traded on their markets and it had to protect the interests of shareholders in case of takeover bids or change of control.⁴ The Directive gave guidance on how to proceed with takeover bids and established general principles that had to be complied with. Special attention was paid to minority shareholders.

4. See Chapter 1 by Clarke in this volume for a more detailed analysis of the Directive.

The minimum requirements established by the Directive include, for instance, the designation of a national supervisory authority with competences to monitor takeover rules and procedures. According to the Directive, mandatory information to the shareholders of the offeree has to be listed in an offer document and the content of this document is prescribed in a long and detailed item list with minimum requirements (Article 6). The item list includes some basic information on social issues, including repercussions for and safeguarding of jobs, any material change in employment conditions and change of production locations. Other articles regulate such matters as the obligations of the board of the offeree company, restrictions on the transfer of securities and restrictions on voting rights once the process has started. The Directive includes optional arrangements for member states related to the lawful application of defensive measures and barriers. The worker involvement enshrined in the Directive is low profile. It is clear that the legislator at that time (and in this area) did not see the workforce as a crucial stakeholder. Besides, there is some inconsistency in the text of the Directive, notably where there is a link with 'insider information' (see below).

It is worth examining both the recitals and the articles of the text. A Directive has to be transposed into national law and normally the national legislator limits implementation to the articles of a Directive. The recitals have more limited value, but they do serve to explain the spirit of the envisaged legislation and can give some guidance (for instance, to judges) in cases of dispute and conflict. In Consideration 13 it is said that 'appropriate information' has to be provided to workers and their representatives concerning the terms of a bid, by means of the offer document. The meaning (and scope) of the term 'appropriate' is neither defined nor made operational in the articles of the Directive. Consideration 23 refers to disclosure of information (and consultation) according to relevant national provisions and the relevant EU legislation (like the EWC Directive and the 2002 general framework Directive on information and consultation). It is explicitly said in this Consideration that national provisions concerning disclosure before an offer is launched are permitted to the workforce of the offeror: 'Member States may always apply or introduce national provisions concerning the disclosure of information to and the consultation of representatives of the employees of the offeror before an offer is launched'.

In the recitals it is said that these provisions have to be in line with the rules of Directive 2003/6/EC on insider dealing and market manipulation. Given the fact that, in several Member States, it is considered to be unlawful

to give any information to the workforce before the launch of a bid, it is interesting to analyse the extent to which the European legislator has prescribed such a restricted policy. The 2003 Directive on insider dealing gives plenty of space for (different) national interpretations. It defines insider information as 'information of a precise nature which has not been made public' and forbids the acquisition or selling of shares by people who have access to inside information because of their employment. Disclosure of information by insiders is forbidden except in situations where disclosure 'is made in the normal course of the exercise of his employment, profession or duties'. If disclosure takes place every informed person is bound by confidentiality.

One could very well argue here that, in countries that have a national regulatory frame of industrial relations with strong worker involvement (whether through board-level representation or work councils enshrined in legal acts, or both), the interpretation of recital 23, in combination with the 2003 Directive on insider dealing, justifies the duty to inform worker representatives at the earliest possible stage. Several national and European legal acts formulate the obligation for the management of a company to inform the workforce in a timely manner on issues of major concern.

The right to act as workers representative can partly be found in other parts of the *acquis*. For instance, based on the European Works Council (EWC) Directive, an EWC has the right to ask for an extraordinary meeting with the management (both of the offeree and the offeror) based on 'exceptional circumstances'. The EWC Directive gives (in the subsidiary requirements) the EWC consultation rights in case of substantial changes and so on. Directive 2002/14/EC (the Information and Consultation Directive) provides arguments for enhanced rights at an early stage (Article 4.2. a, b and c) and speaks about 'such time, in such fashion and with such content as are appropriate to enable, in particular, employees' representatives to conduct an adequate study and, where necessary, prepare for consultation' (Article 4.3.). Directive 2002/14/EC also settles in fact the non-problem of confidentiality for insider information provided at an early stage in Article 6.1:

Member States shall provide that, within the conditions and limits laid down by national legislation, the employees' representatives, and any experts who assist them, are not authorised to reveal to employees or to third parties any information that, in the legitimate interest of the undertaking or establishment, has expressly been

provided to them in confidence. This obligation shall continue to apply, wherever the said representatives or experts are, even after expiry of their terms of office. However, a Member State may authorise the employees' representatives and anyone assisting them to pass on confidential information to employees and to third parties bound by an obligation of confidentiality.

Finally, it is appropriate to refer to the information and consultation section in Chapter III of the 2001 Transfer of Undertakings Directive (2001/23/EC). This Directive guarantees that rights apply during a legal transfer or a merger. Article 7 of this Directive specifies a list of items that both the transferor and the transferee have to inform their respective employees about. Transferor and transferee must give such information in good time, before a transfer is carried out. Where measures are envisaged in relation to the employees, workers' representatives have to be consulted in good time 'with a view to reaching an agreement' (Article 7.2). The information must be provided and consultations take place in good time before the change in the business (Article 7.3). Although the Transfer of Undertakings Directive does not apply to a takeover that is only based on the acquisition of shares (the transfer of securities), the outcome for the workforce might be the same. Thus, one would expect some consistency in the EU legislation.

Notwithstanding the other parts of the *acquis* and the openings in its recitals, the ambition is less obvious and manifest in the articles of the Directive on takeover bids. Article 6 of the Takeover Directive, which regulates the mandatory information concerning bids and introduces the offer document, prescribes that the boards of the offeree and the offeror shall communicate the offer document to the workers once the document is made public. Article 8 broadens this duty to workers' representatives in all countries where the offeree company is permitted to trade securities. And Article 9 gives the workers' representatives the right to receive the board's opinion of the bid. If received 'in good time' a separate opinion from the workers' representatives on the effects of the bid shall be appended to the board's opinion. Finally, a separate Article 14 says that the Directive shall be without prejudice to existing national and EU rights on information, consultation and, if provided, codetermination. However, the sentence formulated in Consideration 23 (namely that it is lawful to introduce or apply national provisions concerning the disclosure of information before an offer is launched) does not show up in the Directive's core articles.

Assessing the impact of the Directive: the GOODCORP study

The impact of the Directive on takeovers in Europe has been a matter of debate. Some Member States already had ‘shareholder’-oriented takeover regulations in place prior to the passage of the Directive, notably the United Kingdom. For other Member States, however, the implementation of the Directive (in many cases a mere ‘copy–paste’ into national legislation) led to significant changes in or even the first-time establishment of a takeover regulatory regime.

Both the shareholder value and the stakeholder perspectives have taken issue with the Directive. For shareholder value advocates, the Directive did not go far enough to create a so-called ‘open market for corporate control’ through stronger restrictions on takeover defences (Edwards 2007; Davies *et al.* 2010). Specifically, the Directive does not require Member States to implement the so-called ‘board neutrality rule’, which would require the board of a target company to get permission from shareholders to take defensive measures once a takeover bid has been made (Article 9). The Directive also does not oblige Member States to apply the ‘breakthrough rule’ (Article 11), which requires the application of the ‘one share–one vote’ principle to shareholder voting on defences once a bid has been made. Finally, the Directive authorises Member States to implement a ‘reciprocity rule’, which allows companies to ignore any ‘board neutrality’ and ‘breakthrough’ rules in place if the bidder comes from a jurisdiction that does not impose these requirements on its own companies. Thus, according to this viewpoint, the Directive made too many concessions to the ‘continental’ model to create what they regard as a truly ‘open’ market for takeovers and thus should be revised to strengthen shareholder power.

From the stakeholder perspective, however, the passage of the Directive represents a clear victory for the shareholder paradigm in European company and securities law (Horn 2012; Johnston 2009; Sjøfjell 2009). In particular, the decision on whether or not a bid gets accepted is clearly placed in the hands of the shareholders of the target company, to the exclusion of workers or the management of the target company. As will be detailed later on in this introduction and in the rest of this book, although some provision is made for ‘worker voice’ the rights granted to workers are fairly weak and in no way challenge the rights of shareholders to make the decision. In some instances, existing rights and practices in

labour law and industrial relations, which also come into play in takeover situations, have been ‘trumped’ by securities and company law, for example, the requirement of confidentiality. Significantly, shareholder value advocates have not complained about worker rights being too strong in the Directive.

Although the external study on the implementation of the Directive picked up many of the criticisms and complaints of trade unions in its final report (Marcuss Partners and CEPR 2012), the European Commission declined to take up the task of significantly revising the Directive. In its Report to the European Parliament, Council and other EU bodies, the Commission argued that the financial crisis starting in 2007/2008 had led to a significant reduction in the number of takeovers, thus making it difficult to evaluate the impact of the Directive in practice (European Commission 2012). Although action was needed on a number of points, such as ‘concertation’, the way forward would best be found through further discussions. The Commission acknowledged the workers’ representatives’ complaints about the Directive and pledged to initiate a dialogue with trade unions. According to the ETUC this promise has not yet been honoured – at the time of publication of the present volume – more than three years after the publication of the Communication (see Séverine Picard in this volume). It should also be noted that, even though takeover activity certainly decreased after reaching a peak in 2008 in Europe, in no way did takeovers disappear, as a minimum of 500 have taken place every year since then (see Figure 1).

Given the importance of takeovers for workers, the ETUI’s GOODCORP network of academic and trade union experts on corporate governance and company law in 2013 decided to conduct its own detailed study of the issue of worker rights during takeovers. The study had three aims:

- to map workers’ rights in Europe to information, consultation and codetermination during takeover bids; this varies from country to country, not only because the EU Takeover Bids Directive was implemented differently in different countries (in some cases going above and beyond what was required by the Directive), but also because regulations on takeover bids may have pre-existed implementation and industrial relations regulations and practices may also play a role;
- to gather evidence regarding the extent to which these rights are in fact respected and utilised in practice; and

- to identify which rights are particularly effective for the protection of workers' interests during takeovers, as this experience might inform demands for revision of the Directive.

In order to carry out this investigation members of the GOODCORP network were commissioned to conduct a series of case studies of national regulations on takeover bids and of specific cases of takeovers. Furthermore, a set of studies on cross-cutting issues including the underlying rationale of the Directive and the economic and employment impact of takeovers were commissioned. The ongoing work and results of these efforts were discussed at the regular twice-yearly GOODCORP meetings over the past couple of years. The reports are now published as the chapters in this book and the main results summarised in the conclusion. The remainder of this introduction briefly introduces these chapters.

The first section of the present volume contains chapters on 'transversal' issues that cut across national boundaries. Chapter 1 by Blanaid Clarke provides a legal analysis of the Directive and the role that employees play in it. An examination of the background and underlying rationale of the Directive indicates that legislators recognised that workers' interests can be affected by takeovers and made an effort to provide some protection, namely rights to specific types of information about the projected impact of the takeover. However, the author concludes that these rights are completely inadequate to protect workers' interests; they are limited to information and do not extend to decision-making on the outcome of the takeover bid, which are granted to shareholders.

Hans Schenk, in the next chapter, critically analyses the economic rationale underlying the Directive, which makes the assumption that takeovers on the whole have a very positive economic impact. A review of the relevant statistical studies shows that this assumption does not hold in reality, as takeovers generally only create short-term wealth for the shareholders of the target company. Most takeovers take place during the 'euphoric' stage of merger waves and are motivated more by the 'perverse' motivations of managers than by long-term economic logic, such as pre-empting being taken over by another firm. The results of these studies call into question the rationale of the Directive that takeovers should be encouraged.

Chapter 3, by Andrew Pendleton, continues in this vein by examining the evidence on the employment effects of takeovers, which also are supposed

to be positive, according to the underlying rationale of the Directive. Econometric studies, however, show a fairly mixed picture, as results seem to vary based on the methodology used as well as the specific time period and sample of firms examined. On the whole there is disagreement on the net employment impact of takeovers; it is clear from these studies, however, that many, if not most takeovers involve job losses, at least in the short run. This suggests that workers should receive stronger rights in order to influence the outcomes of takeovers or discourage potentially 'bad' takeovers to better protect their interests during the takeover process.

The final chapter in Section 1, by Séverine Picard, outlines the European Trade Union Confederation's (ETUC) critical analysis of the Takeover Bids Directive and the scant attention paid to workers' rights in company law. In the review process of the functioning of the Takeover Directive the ETUC expressed its criticisms, as many takeovers are detrimental to workers' interests and workers' rights in the Directive are weak. The ETUC thus demands the strengthening of workers' rights in takeover situations through a revision of the Directive.

Section 2 of the book contains twelve chapters on national legal frameworks regulating takeover bids in each country, in alphabetical order based on country name. Industrial relations and labour law frameworks are also summarised insofar as they are relevant for takeovers. Nine of these chapters also include one or more case studies of takeovers. In Chapter 5 Helmut Gahleitner argues that the worker protections provided in the Austrian legal framework on takeover bids are inadequate because they come too late in the process. Because most public companies in Austria have a majority owner, controlling owners frequently strike a deal 'behind the scenes' to transfer ownership, before the public announcement of the bid is made. In this situation the works council's right to issue an opinion on the takeover is, for all practical purposes, rendered irrelevant. The case study he examines – the 2007 takeover of Böhler-Uddeholm – is atypical, as one of the few hostile takeover situations in Austria. In this type of situation, workers' representatives were able to form a coalition with others to oppose a bid by a private equity 'investor' and support a 'white knight' bid by Voestalpine, another Austrian company.

In the following chapter Guy van Gyes analyses the Belgian legal framework, which goes above and beyond what is required by the EU Takeover

Bids Directive by giving the Belgian works council in the target company the right to meet with the bidder management. This reinforces the strong position works councils enjoy in Belgium. However, this right does not apply in cases where the bidder is not from Belgium. This weakness is illustrated by the case study, the takeover of the Belgian telecommunications company Telenet by the US company Liberty Global.

In Chapter 7 Laura Horn analyses Denmark, where in most cases a strong system of social partnership in companies is protected from the pressures of hostile takeovers through ‘closed’ ownership structures at most listed Danish firms. An analysis of a ‘deviant’ rare case of an unsolicited offer – the 2012 takeover of the Danish company Thrane & Thrane (T&T) by the British aerospace and defence electronics group Cobham – shows what can happen when the largest owner does not hold a majority of shares. This type of situation could become more frequent as dispersed ownership structures become more common. Employee representatives on T&T’s board were also advised not to pass on the information they had about the bid to other employees due to fear of disclosure of ‘inside’ information.

The next chapter discusses another case where workers’ representatives on the board did not share their information with other workers’ representatives for more than a year after discussions started between managements; here Maria Jauhiainen analyses the takeover of the Finnish steel producer Rautaruukki by the Swedish steel company SSAB in 2014. This case also shows that the rules regarding confidentiality of information need to be clarified for and better understood by employee representatives on boards. Secondly, as European Commission competition authorities required the companies to divest parts of their operations before the takeover could go ahead, the case illustrates that European competition policy requirements on the bidding and/or target companies can significantly magnify the impact of a takeover on the workforce.

Udo Rehfeldt in Chapter 9 analyses the French Florange law, which was passed in 2014 as a response to the closure of two blast furnaces by the steel group ArcelorMittal, which was originally formed through a hostile takeover of European companies by the Indian steelmaker Mittal. The main goal of the law is to oblige a company that plans to close a plant to search for a new investor who would maintain operations. But it also attempts to discourage hostile takeovers by giving double voting rights to

long-term shareholders and by allowing the board of the target company to take defensive measures without approval from shareholders. Given that the French implementation of the EU Takeover Bids Directive also requires the bidder to meet with the works council of the target company France is thus a case where takeover legislation is particularly stakeholder-friendly.

In Chapter 10 Christos Ioannou looks at Greek takeover legislation and summarises a case study of a takeover of a Greek bank in the wake of the financial crisis. Prior to implementation, the EU Takeover Bids Directive represented a (small) step forward for workers in the sense that they previously had no formal rights to be informed about takeover bids and/or to issue an opinion to target shareholders. A case study of the takeover of the Greek Geniki Bank in 2012 shows that even these minimal rights were bypassed because the normal takeover procedure was not followed by the Greek government. However, the trade union involved was able to successfully use EU labour law to get its most important demands fulfilled in the takeover process.

The next two chapters illustrate cases where workers were able to build coalitions with other forces and mobilise against takeover bids perceived as unfavourable to them. In Chapter 11 Kevin O'Kelly analyses another country, Ireland, where the implementation of the Takeover Bids Directive in theory created new, if weak, rights for workers in takeover situations. The right to express an opinion on the takeover offer, however, has rarely been used in Ireland. An analysis of three bids by the Irish discount airline Ryanair for the former Irish flagship carrier Aer Lingus shows that workers were successfully able to ward off these hostile bids by forming a coalition with other parties concerned about the impact of such a takeover on workers and consumers.

In the following chapter Robbert van het Kaar and Jan Cremers examine the takeover framework in the Netherlands. The implementation of the Takeover Bids Directive in that country was also 'cut and paste' when it came to worker rights. However, works councils in the Netherlands enjoy strong statutory rights, including the right to be consulted by management at an early stage in restructuring situations, such as takeovers. This right to early consultation appears to conflict with the takeover legislation's requirement for confidentiality and the timing of information disclosure. By joining forces with other interests, workers were able to successfully mobilise against an attempt by hedge funds to

take over and split up the Dutch conglomerate Stork and support a takeover by a ‘friendlier’ party.

Chapters 13 and 15 provide analyses of the framework of laws and rules applying to takeovers in two Nordic countries, Norway and Sweden. As in other countries, there is a strong divide between securities and financial market law, on one hand, and company and labour law, on the other. In the Nordic model, rules agreed by the social partners are especially important for workers’ rights in takeover situations. The chapter on Norway, authored by Bernard Johann Mulder, highlights the importance of Basic Agreements concluded between trade unions and employers. The chapter on Sweden, written by Erik Sjödin, shows that there is a general obligation in the Codetermination Act for management to consult with workers before there are significant changes in operations. This includes an obligation for a bidding company to consult with its own workers before the bid is launched. This right, however, does not extend to consultations between the target company’s workers’ representatives and the bidder.

In Chapter 14 Janja Hojnik describes the legal framework for takeovers in Slovenia, where rights defined under the Workers’ Participation Act are much stronger than the information rights granted under national Takeover Law. A survey of seven chairs of works councils in Slovenian companies that have recently been taken over shows that companies for the most part have been complying with requirements under company law to provide information to workers. However, most of the survey participants expressed the feeling that they lacked the necessary means to significantly influence the outcome of the takeover. As a result, they had not used the right to express an opinion on the takeover bid to shareholders.

Georgina Tsagas in Chapter 16 analyses UK takeover legislation and its revision after the controversial takeover of the British confectionary and beverage company Cadbury. The UK takeover framework is frequently cited as the archetypical model of a ‘shareholder oriented’ system which has influenced the EU Takeover Bids Directive and been adopted (at least in part) by many other European countries. The 2010 takeover of Cadbury by the US based company Kraft, in which promises made in the offer document to keep a key production site open after the takeover were not kept, showed the weaknesses of the UK takeover framework, for example, the lack of penalties for not keeping employment commitments made in

the offer document. British takeover regulation has been revised in a more stakeholder-oriented direction, in part due to outcry over the Cadbury case, but practice will have to show whether these changes have resulted in a significant strengthening of workers' rights in takeover situations.

Overall, the country and company case studies are fairly heterogeneous; nevertheless a number of common themes emerge. First, the case studies illustrate the importance of workers' representatives' concerns about employment and working conditions in many takeover situations. Although the national implementation of the EU Takeover Bids Directive did represent a 'step forward' for workers in jurisdictions where no specific takeover-related rights existed for workers, nevertheless the most prevalent of these rights is the right to receive information about the takeover bid, including anticipated employment impacts. Substantive rights to influence the outcome of the takeover, if they exist at all, are embedded in pre-existing industrial relations and labour law regimes, particularly in the right to consult with management before key decisions are made. The analysis of national legal frameworks and the case studies indicate that revision of takeover legislation in the direction of a much more stakeholder-oriented approach is necessary if workers' interests are to be better protected in takeover situations. These common themes and key conclusions are discussed in greater detail in the concluding chapter of the book.

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Part 1

Economic and workers' rights issues in takeovers

Chapter 1

The role of employees in the Takeover Bids Directive

Blanaid Clarke

1. Introduction

This chapter focuses on one aspect of the ‘public interest’ dimension of the Takeover Bids Directive 2004/25/EC (‘the Directive’), namely its application to employees.¹ It examines the perceived conflict in the Directive between safeguarding the interests of shareholders and promoting the interests of the employees. Such a conflict reflects the difference between continental and UK/Irish approaches to takeover regulation and the impact of each in the formulation of the Directive. *The Takeover Bids Directive Assessment Report* (Marcuss Partners and CEPR 2012) produced by Marcuss Partners and the Centre for European Policy Studies for the European Commission on the application of the Directive (‘the Marccus Report’) evaluates the Directive through such a prism and makes an important contribution to our understanding of this relationship.

One of the seminal questions in corporate governance posed by Berle and Means in 1932 is ‘in whose interests should the company be run?’ (Berle and Means 1991: Chapter 5). This addresses a strategic issue in respect of the company’s ongoing operations and has given rise to a very substantial corporate social responsibility literature. In the context of takeover regulation, a similar issue arises in relation to what Bebchuk terms ‘game-ending decisions’ (Bebchuk 2005: 895): whose interests are relevant in determining the manner in which any takeover will be conducted? Examining the Directive, some provisions such as a requirement that all shareholders must be treated equally are clearly aimed at shareholder welfare. Others, such as a requirement to notify employees of the offerors’ intentions regarding employment, are intended to improve employee

1. This chapter builds on a number of my earlier papers, including ‘The Takeovers’ Directive – A Meaningful Contribution to Stakeholders Rights in Europe’ (2013); ‘Directors’ Duties in a Changing World: Lessons from the Cadbury Plc Takeover’ (2010); ‘The Takeovers Directive – Is a Little Regulation Better than No Regulation?’ (2009); and ‘Takeover Regulation – Through the Regulatory Looking Glass’ (2007).

welfare. While one might examine, as the Marccus Report does, the extent to which the Directive has more of the former than of the latter, the main question that arises from such an exercise is whether the interests of these constituents are addressed sufficiently. However, the issue becomes more complicated if we consider that a number of constituents merit consideration in the Directive and there is a conflict – or a potential conflict – between their various interests. Before addressing these issues, this chapter examines the background to the Directive in order to give some insight into the manner in which these interests were viewed by the legislators and the Member States.

2. Background to the Directive

The need to harmonise European legislation on takeovers was identified in the 1970s and the European Commission invited Professor Robert Pennington, a UK company law expert, to prepare a report on takeovers. Using the UK Takeover Panel's takeover rules – the 'City Code' – as a blue print, Pennington's 1974 report (Pennington 1974) reflects the shareholder value perspective that dominated UK corporate law at that time (Amour and Skeel 2007: 1730). Despite making some provision for information of employees, the emphasis of his proposal was on restraining abuses and malpractices and protecting 'private interests', specifically 'shareholders and bondholders'. The European Commission published a proposal for a Thirteenth Council Directive on Company Law concerning Takeover and Other Bids in 1989,² with an amendment in 1990.³ These early proposals, which were clearly aimed at harmonising the rules across Member States, also relied heavily on the City Code. However, it soon became clear that reaching a consensus on the detail proposed would be problematic in light of the significant differences in Member States' capital markets, corporate governance regimes and political cultures.

After consultation with Member States, it was decided that a framework directive would be a more appropriate instrument and an amended proposal was introduced in 1996,⁴ with further amendments being made in 1997 and 1999 following intense negotiations at the Working Council

2. [1989] OJ C 64/8.

3. [1990] OJ C 240/7.

4. [1996] OJ No. C162/5.

and Commission levels. After intensive efforts, in 2001 the European Commission put the agreed text before the European Parliament.⁵ This contained a set of General Principles with which Member States were required to ensure compliance. These principles concerned ensuring equality of treatment for all shareholders; protecting minority shareholders; providing sufficient time, information and opportunity to shareholders to make a decision on the bid; requiring directors to act in the interests of the company; ensuring an efficient market; and providing an appropriate timetable for the bid. It also contained a smaller number of substantive rules, most of which reflected rules in the City Code and which Member States were required to respect through detailed implementing rules. These provisions constituted minimum requirements for EU takeover regulation as Member States were permitted to lay down additional conditions and provisions more onerous than those of the Directive for the regulation of bids (Article 3(2)). In addition, Member States were authorised to allow for derogations from the rules (Article 4(5)). This represents the same broad structure as the current Directive.

In the European Parliament, debate centred on the desirability of the board-neutrality rule (in a two-tier system, both the management board and the supervisory board), the lack of harmonisation of the 'equitable price' to be paid in the case of a mandatory bid and the adequacy of employee protection. There seems little doubt that the hostile takeover of Mannesmann by the British company Vodafone in 2000 influenced the debate and concern was expressed that the proposal threatened the independence of German companies and their system of codetermination. German trade unions, for example, expressed opposition to 'the importation of Anglo-American forms of law, governance and economic organization'. The proposal was seen as a means of redirecting both power and income from employees to shareholders (Cioffi 2001) in a manner that threatened 'the stakeholder preferences of many Member States and European firms' (Clift 2009: 63). A tied vote ensued in Parliament and the proposal was accordingly rejected. Despite this setback, the impetus to reach agreement on a directive remained. Such legislation was deemed necessary by the European Council to facilitate the pan-European restructuring that it was felt would contribute to making Europe the most competitive economy in the world by 2010.

5. [2001] OJ No. C 23/1.

The Commission established a High Level Group of Company Law Experts, chaired by Jap Winter ('the Winter Group') to present recommendations for resolving the matters raised by the European Parliament. The ensuing report was published in early 2002 (High Level Group 2002). It concluded that, among other things, employee protection provisions were adequate and that any further concerns for the interests of employees should be addressed by specific legislation providing for information and consultation of employees and for their protection in the event of a bid leading to restructuring. The Winter Group suggested that any European company law regulation aimed at creating a level playing field for takeover bids should be guided by two principles: (i) shareholder decision-making and (ii) proportionality between ultimate economic risk and control. In relation to the former, it noted that 'in the event of a takeover bid the ultimate decision must be with the shareholders' (High Level Group 2002: 2). It endorsed the board neutrality rule in respect of proposed actions that might frustrate a bid and also suggested a rule that allows the offeror to break through pre-existing company law mechanisms and structures that might frustrate a bid. A further proposal for a directive was introduced in 2002, taking broad account of the Winter Report's recommendations. In order to overcome the continuing lack of consensus, a compromise proposal by the Portuguese Presidency was subsequently accepted, rendering the board neutrality rule and the breakthrough rule optional for Member States and also allowing Member States to adopt a reciprocity rule. The Directive was finally adopted in 2004.

Eight years after its introduction, and in fulfilment of a requirement in the Directive, the Commission undertook an examination of the Directive in light of the experience acquired in applying it.⁶ This led to the commissioning of the aforementioned Marcus Report and a subsequent communication from the Commission (European Commission 2012) on the application of the Directive ('the Commission Report'), which was published with the Report. Both shed further light on the shareholder primacy/corporate social responsibility debate in Europe in this context.

6. Article 20. The scope of this examination was not defined, although Article 20 provides that it must include a survey of the control structures and barriers to takeover bids that are not covered by the Directive.

3. The value of takeovers

The underlying premise of the Commission's approach to takeover regulation would seem to be that takeovers are generally positive and should be encouraged, subject to ensuring an adequate level of protection for shareholders throughout the EU. The Winter Group addressed this matter and concluded that 'in the light of available economic evidence, the availability of a mechanism which facilitates takeover bids is basically beneficial' (High Level Group 2002: 19). It cited three reasons for this: the exploitation of synergies, the opportunity to sell at a premium on market price and, finally, the market for corporate control. It stated categorically that 'such discipline of management and reallocation of resources is in the long term in the best interests of all stakeholders and society at large' and that these views 'form the basis for the Directive' (High Level Group 2002: 19). Callaghan and Höpner note that the many caveats to the market for corporate control 'barely entered political discourses on the directive' (Callaghan and Höpner 2005: 312). The Winter Group have been criticised somewhat unfairly for failing to analyse this economic evidence in greater depth. The Winter Report is a concise 68 page document (excluding appendices) and the distinction and scholarship of the authors, who included professors Klaus Hopt and Jonathan Rickford – representing the common law and the civil law perspectives, respectively – provide sufficient assurance that these issues were well understood. The authors were given a different mandate, however, and a shorter time to produce their report.

The Marccus Report consists of a more expansive 368 pages (excluding appendices) and provides significant analysis of the objectives of the Directive and whether they have been achieved and also more generally, broader corporate governance issues and the implications of takeover regulation.⁷ It constitutes a wonderful mine of information and case studies for researchers and public policymakers in this respect. It adopts a more nuanced position on the value of takeovers, noting that 'the impact of takeovers on the economy is complex and not necessarily straightforward' (Marccus Partners and CEPS 2012: 29). While referring

7. Chapter 4, for example, sets out a very detailed economic study reviewing the economic foundations of takeover regulation, the rationales for takeover regulation and incentives that drive actors to behave in certain ways and regulators to use the tools defined in more detail by the Directive.

expressly to the two classic rationales to promote takeovers – allocative efficiency and the ‘disciplinary effect’ of the market for corporate control – it also highlights the negative externalities that takeovers may generate, due to free-riding, agency conflicts and pressure to tender. It acknowledges that there are conflicting views regarding whether the mandate of the management should be shareholder-oriented or company-oriented; in other words, whether it should maximise shareholder value or protect firm-specific investments and the long-term value of the company as a whole. With the benefit of being able to examine the specific experience of Member States implementing the Directive, the Marccus Report was able to provide more detailed economic analysis. It concluded that this analysis shows that there is ‘no clear evidence that the Directive promotes economic efficiency’ (see the Schenk contribution in this publication). Although in theory free movement of capital is an element of overall economic efficiency, it stated that the necessary conditions of rational behaviour, fully informed agents and the absence of transaction costs are not always met. In addition, it identified the existence of negative externalities, giving the example of takeovers creating a disincentive for firm-specific investment in human capital. It concluded that ‘takeovers can both increase or decrease shareholder value’ (Marccus Partners and CEPS 2012: 18–19).

4. The objectives of the Directive

The objectives of the Directive, as described in its recitals, are:

- (i) to provide legal certainty on the takeover bid process and Community-wide clarity and transparency with respect to takeover bids;
- (ii) to protect the interests of shareholders, in particular minority shareholders, and of employees and other stakeholders through transparency and information rights, when a company is subject to a takeover bid or change of control; and
- (iii) to reinforce the freedom for shareholders to deal in and vote on securities of companies and prevention of management action that could frustrate a bid.

There appears to have been a degree of confusion in respect of the second of these. While the Commission’s Communication describes the second objective as stated above, curiously the Marccus Report lists it as the

‘protection of the interests of shareholders, in particular minority shareholders, employees and other stakeholders, when a company is subject to a takeover bid for control’ (Marccus Partners and CEPS 2012: 60). Although it states that this is ‘as described in its recitals’, it is a much broader description and a less accurate description of the objectives set out in the recitals. Recitals 13 and 23 of the Directive refer to employees but they do so only in the context of information rights.⁸ While the Directive may facilitate Member States’ taking the necessary steps to achieve the objective set out in the Commission Report, it does not deal with the broader objective.

This perhaps explains in part the level of dissatisfaction with the Directive reflected in the survey conducted for the Marccus Report, which used the broader list of objectives in its survey instruments to solicit the views of all stakeholders (Marccus Partners and CEPS 2012: Annex 2). In explaining their dissatisfaction, employee representatives opined that ‘the Directive does not sufficiently protect employees against the risk of change in working conditions or redundancies after the takeover’. While this might fall within the very broad objective set out for them, it does not fall within the scope of what the Directive, as described by the Commission, sought to achieve. It is not perhaps surprising, therefore, that the employee representatives were unhappy with the Directive because it clearly has not made significant improvements to the lot of employees during a bid. That said, in terms of the more modest objectives of improving transparency and information rights, the Directive may be viewed more positively.

5. Shareholder orientation

The Marccus Report opines that a mapping of changes introduced in respect of the Directive show that the legal system is more ‘shareholder oriented’ as a result, although it conceded that determining whether a system is more or less ‘shareholder oriented’ is subject to debate. In arriving at this finding, it categorises the mandatory-bid rule (Article 5), the board-neutrality rule (Article 9), the squeeze-out rule (Article 15) and the sell-out rules (Article 16) as being in the interest of shareholders.

8. Similarly, the only references to employees in the body of the Directive (Articles 4.2(e), 6.1, 6.2, 6.3(i), 8.2, 9.5, 10.1(e), 10.1(k) and 14) are in the context of information and consultation rights.

Those jurisdictions described as more shareholder-oriented were those that had introduced or clarified these rules.

The squeeze-out rule is considered attractive for potential offerors as it allows them to make a bid knowing that if they are successful they will be able to acquire all the company's shares, including those held by reluctant or apathetic shareholders. It thus increases the number of bids. The sell-out rule provides shareholders with an exit at a fair price where the same level of control is acquired. The mandatory-bid rule is often considered a shareholder-oriented rule as it permits all shareholders to benefit from the control premium. However, knowing that an acquisition of a basic level of control requires the acquirer to make a general offer for all the remaining shares in circumstances where it might have no interest in doing so clearly reduces the number of control-acquiring transactions. In this sense it may reduce the number of offers made to majority shareholders. It is submitted that the correct description of the rule is one that may not favour all shareholders but is designed – as the Directive expressly acknowledges – to protect minority shareholders.

The Marccus Report categorises the board-neutrality rule (Article 9) as benefitting shareholders as it confers decision-making power over the deal upon them and withdraws it from the board. Although defences may result in higher bid prices being negotiated for shareholders, it assumes they are stakeholder-oriented on the basis that incumbent directors are described as more likely to take into account the interests of employees, creditors and local communities with whom they have worked for years. Sjäffjell has argued that the board-neutrality rule significantly reduces the extent to which employees' interests may influence the outcome of the bid despite the information procedures in the Directive. This is also the assumption made in the mapping exercise (Marccus Partners and CEPS 2012: 64). However, against this it might be argued that directors may feel themselves more closely aligned to the interests of shareholders in circumstances where they have financial incentives, such as a significant shareholding or stock options in the company or bonuses tied to a takeover. Bebchuk has also questioned our confidence in directors' altruistic motives, arguing that 'if we expect management to be an imperfect agent for shareholders, we can expect management to be an even less reliable agent for stakeholders' (Bebchuk 2004: 80). One might also challenge the assumption made in the mapping exercise that if the offer is successful, the main objective of the new directors may be more short-termist, ensuring that the company generates enough cash to repay

the acquisition price paid by the offeror. While clearly there would be an attempt to rationalise operations if efficiencies are being sought, apart from egregious cases of asset stripping, it might seem more likely that the new owners would be interested in achieving long-term sustainability. This would be in the interests of all stakeholders. That said, it certainly seems the case that shareholders may be less likely, given the premium and liquidity offered, to concern themselves with the fate of employees. Sjøfjell describes this as ‘a fundamental incoherence’ in the Directive between the board-neutrality rule and the general principle, discussed below, that the board is required to act in the interests of the company as a whole (Sjøfjell 2010).

The Winter Group rejected the argument that allowing the board to frustrate a takeover bid can be justified as a means to help take into consideration the interests of stakeholders. It supported its view by noting the costs of defence mechanisms, the significant conflict of interests, the existence of specific rules in fields such as labour law or environmental law to protect stakeholders and its strong belief that shareholders are entitled to decide whether to tender their shares and at what a price (High Level Group 2002: 2). This discussion, however, highlights one of the circumstances in which the regulation of takeovers may face a trade-off between conflicting interests. While the Marccus Report correctly notes that the usual presumption that the interests of employees and shareholders are contradictory may not always be accurate in practice (Marccus Partners and CEPS 2012: 347), it acknowledges that ‘the tension between stakeholder and shareholder interests and its link with long-term value creation and firm-specific investments is therefore of the utmost relevance in takeover regulation’ (Marccus Partners and CEPS 2012: 347). It describes the search in the Directive for a balance between the predominance of the non-frustration model and shareholder supremacy, on one hand, and its acknowledgment of the role of employees in the takeover process, on the other.

6. Stakeholder orientation

While it is clearly in the public interest that the Directive operates effectively in order to achieve the positive economic effects referred to above, it is worth considering the treatment of employees separately. Employees have a range of valid concerns about the effect of a takeover on their lives. The Marccus Report indicates that these include the high

risk of redundancy, potentially negative changes in working conditions, poorly organised consultation and information processes and the absence of appropriate enforcement mechanisms when offerors do not act in the manner they have indicated (Marcus Partners and CEPS 2012: 19).

Traditionally in the United Kingdom, takeover regulation has involved considering the interests of shareholders almost exclusively among other stakeholders. The City Code prior to the introduction of the Directive referred to employees only to the extent of requiring the offeror to include a statement in the offer document indicating: its intentions regarding the continuation of the business of the offeree and its subsidiaries; its intentions regarding any major changes to be introduced in the business, including any redeployment of the fixed assets of the target and its subsidiaries; the long-term commercial justification of the offer; and its intentions with regard to the continued employment of the employees of the offeree and of its subsidiaries (Rule 24.1). In practice, this was satisfied by the inclusion of a boiler-plate statement to the effect that the employees' existing contractual rights would be respected. Given that this did not confer additional rights over and above existing legal entitlements, this was not particularly significant. The General Principle in the City Code at that time was worded differently from the current version and referred more narrowly to the duty of the board when giving advice to shareholders to consider 'the shareholders' interests, taken as a whole, together with those of employees and creditors' (General Principle 9).

The continental European idea of corporate social responsibility and the stronger position of employees in corporate affairs embedded in many of the Member States' political economies would envisage a greater role for employees in the takeover process. Stemming from this, the 1996 draft of the current General Principle 3(1)(c) stated that: 'the board of the offeree company is to act in the interests of the company as a whole.'⁹ The following year, the wording of that Principle was changed and there was an express reference to employees. It imposed a duty on the board of the offeree 'to act in all the interests of the company, including employment'.¹⁰ This was not well received as in addition to the awkwardness of the term 'employment', a concern was expressed – particularly by the United Kingdom and Ireland – that this would 'provide fertile ground for litigation because it is cast in very general terms'. The Council Working

9. COM/95/0655 FINAL - COD 95/0341 OJ C 162 6/6/1996, Article 5(c).

10. COM/97/0565 final, OJ C 378 13/12/1997, Article 5(1).

Party in 1998 suggested reverting to ‘the company as a whole’ and deleting the reference to ‘including employment.’ This change was explained on the basis that it was no longer necessary as Article 9(1)(b) required the board of the offeree company to give its opinion on the possible effects of the bid on employment.¹¹ While this of course assumes a very narrow interpretation of the original duty, the change was accepted by the Presidency and a modified Presidency proposal reflecting this wording was issued in December 1998. The new text now reflected in General Principle 3(1)(c) is thus stated: ‘the board of an offeree company is to act in the interests of the company as a whole’. Interestingly, a further amendment which had been suggested was to give the employees of the offeree company or their representatives a voice in decision-making on bids. The Commission rejected this on the basis that it had ‘no place in these provisions’. It stated that ‘only the holders of securities can decide whether or not to sell them and they are therefore the only parties concerned by it’ (European Commission 2001).

The categorisation of General Principle 3(1)(c) as shareholder- or stakeholder-oriented depends on the meaning of the phrase ‘the interests of the company as a whole’. A common law lawyer would be inclined to interpret this as meaning the interests of shareholders, which would give the Principle a shareholder orientation.¹² However, the Marccus Report argues that the phrase is necessarily broader than that and requires a broad analysis considering the company as a representative of the interests of all of its stakeholders (Marccus Partners and CEPS 2012: 37 and 104). It notes that, in addition to employees, this could include local communities,¹³ creditors, contracting parties and the environment (Marccus Partners and CEPS 2012: 104). This would give a certain degree of flexibility to Member States in their interpretation of the Principle. It would also mean that the significance of the Principle vis-à-vis employees now depends on national law. Member States are likely to be influenced by their own legal, political and cultural environments. It thus seems likely that Member States favouring a stakeholder approach to company law may be inclined to adopt a broad interpretation of the term and those favouring a more shareholder-oriented approach to adopt a narrower definition. This view is supported by case law from the European Court

11. In the Statement of the Council’s reasons for the Common Position adopted by it - 8129/00 ADD 1 22/5/2000.

12. See, for example, *Greenhalgh v Arderne Cinemas Ltd* [1951] Ch. 286.

13. Local communities are addressed in the Article 6(3)(i) and Article 9(5) requirements to disclose information on the ‘locations of the company’s places of business’.

of Justice which indicates that the General Principles must be viewed as ‘guiding principles’ for the implementation of the Directive by the Member States and not as independent General Principles of Community law.¹⁴

This case law also means that the General Principles do not thus give rise to directly enforceable rights and that it is also up to Member States to determine how they should be enforced. The Marccus report raises the possibility of an alternative approach, which would involve drawing up a list of all stakeholders that would have directly enforceable rights under the Directive. It concludes, however, that it would be difficult to design an appropriate mechanism that would allow all categories of stakeholders to make their voice heard and that ultimately ‘the simplest concept remains the company interest concept (at least for stakeholders who are outsiders)’ (Marccus Partners and CEPS 2012: 106).

If a broad pluralistic interpretation is adopted of General Principle 3.1(c), there may be occasions where the interests of the two parties conflict and the offeree board will be placed in the difficult position of attempting some sort of balancing exercise between shareholder and stakeholder rights or where one party’s interest will be preferred. This is one of the reasons why, as noted above, certain Member States resisted attempts to include a specific reference to employees in the text of the General Principle itself. As the Directive is silent on the method by which conflicts between such groups might be resolved, Member States will be responsible for determining what is permitted or prohibited. Again, this suggests that Member States are likely to fall back on familiar approaches continuing the existing differential treatments between Member States. It will also be open to individuals accepted by these decisions to challenge in the European Court of Justice whether the General Principle has been correctly implemented in national law, but as the case law referred to above suggests, this will not be an easy task.

A similar balancing act may be required in respect of the second part of Article 3 (1)(c), which provides that the offeree board ‘must not deny the holders of securities the opportunity to decide on the merits of the case’. The board-neutrality rule discussed above is based on this part of the Principle. Interestingly, the Marccus Report opines that Member States

14. *Audiolux SA e.a v Groupe Bruxelles Lambert SA (GBL) and Others and Bertelsmann AG and Others* Case C-101/08, par. 51.

that have adopted the board-neutrality rule, such as the United Kingdom, tend to consider that this rule ‘should override all other concerns’, although their legal systems ‘formally acknowledge’ that the board should not act contrary to the company’s interests (Marccus Partners and CEPS 2012: 105). This, it claimed, is justified by Member State’s belief that the company’s interests (taken as a whole) are best served by the disciplinary effect of the market for corporate control, which leads to better-managed companies and a reduction in the cost of capital, both of which ultimately serve the interests of all stakeholders. By contrast, Member States that have not adopted the board-neutrality rule, such as Germany, ‘emphasise the board’s duty to defend the company’s interest, and pay less attention to the consequences this may have on shareholders’ rights’ (Marccus Partners and CEPS 2012: 105). In these jurisdictions, ‘the overriding duty to protect the company’s interests is deemed to best serve the interests of all shareholders, at least in the long run’ (Marccus Partners and CEPS 2012: 105).

In addition to the General Principle, certain other provisions in the Directive provide rights to employees. While these rights are often described as ‘consultation rights’, they are more correctly described as ‘information rights’; there is an exchange of information, but there is little sense of discourse or debate with a view to influencing the offeror. The offeree’s shareholders receive the information and may of course factor it into their judgement of the offer, but there is no opportunity on their part to consult the employees. Article 6(3)(i) of the Directive provides that the offeror must include in the offer document

the offeror’s intentions with regard to the future business of the offeree company and, in so far as it is affected by the bid, the offeror company and with regard to the safeguarding of the jobs of their employees and management, including any material change in the conditions of employment, and in particular the offeror’s strategic plans for the two companies and the likely repercussions on employment and the locations of the companies’ place of business.

Article 9(5) deals with the offeree’s responsibilities and requires its board to set out

its opinion of the bid and the reasons on which it is based, including its views on the effects of implementation of the bid on all the company’s interests and specifically employment, and on the

offeror's strategic plans for the offeree and the likely repercussions on employment and the locations of the companies' place of business as set out in the offer document.

The majority of Member States have transposed the Directive's requirements without imposing further information requirements. There is some criticism in the Marccus Report of the use of boiler-plate disclosures, which is described as 'a circumvention', together with untimely communications of the relevant information (Marccus Partners and CEPS 2012: 248). There is also an issue of genuine uncertainty based on information asymmetry, a problem exacerbated in the case of a hostile takeover offer.

Employee representatives have sought improved consultation and information rights and have argued that a no-dismissal rule similar to that contained in the Transfer of Undertakings Directive 2001/23 should apply on the basis that both transfers of undertakings and takeovers involve similar economic effects (Marccus Partners and CEPS 2012: 356). However such provisions are not commonplace in other major non-EU jurisdictions,¹⁵ where the protection of employees in terms of information, as well as their involvement in the bid, appear to be extremely weak. At most, they found that an offeror is sometimes obliged to disclose in the offer documents its intention regarding the offeree's employees and the effect of the bid on the latter.¹⁶ In no such jurisdictions is the offeree's board otherwise required to inform or consult with employees about the bid (Marccus Partners and CEPS 2012: 101). In the United States, for example, the protection of employees in takeover transactions is not normally directly addressed by US federal securities laws or State corporation statutes or law, although some protective measures are set out in various federal and State laws.

Within the EU, a number of Member States have treated the Directive as a minimum standard and have introduced further informational or consultative requirements. For example, in Ireland, further informational requirements have been introduced relating to the long-term commercial justification for the bid and the offeror's intentions regarding any redevelopment of the fixed assets of the offeree and its subsidiaries. This

15 The Review included Australia, Canada, China, Hong Kong, India, Japan, Switzerland, Russia and the United States.

16. This would be the case, for example, in Australia, Canada, China and Hong Kong.

is based on similar provisions in the City Code. In the Netherlands, the board is required to explain why, if applicable, it disagrees with the works' council's opinion regarding a takeover. The works councils also have a consultation right rather than merely an information right. In France, the works councils have meeting rights. In Germany, where a codetermination system is in place, the employees' delegates on the supervisory board directly participate in the public statement made by the offeree company's supervisory board. In the United Kingdom, the offeree is responsible for paying any costs reasonably incurred by the employee representatives in obtaining advice to ensure their opinion is accurate. A party who makes a post-offer undertaking must comply with its terms for the period of time specified in the undertaking and the Panel may require the appointment of an independent supervisor to monitor compliance with the undertaking.

In its Communication, the Commission indicated an intention to pursue its dialogue with employee representatives with a view to exploring possible future improvements. It also stated that it will investigate further Member States' experience of the provisions of the Directive which require disclosure of the offeror's intentions as regards the future business of the company and its employment conditions and the view of the offeree company's board on this, as well as disclosure of information concerning the financing of the bid and the identity of the offeror (Marcus Partners and CEPS 2012: 11).

7. Conclusion

An expectation that the Directive should offer substantial protection to employees will not be met. What it does offer is a reasonable opportunity for employees to have their voices heard, but it does not ensure that those voices will be factored into the ultimate game-ending decision. In that sense, the Directive is correctly viewed as shareholder-oriented.

Whether this situation needs to be revised remains a moot point. The Winter Report noted that the provisions in the Directive were adequate and that any further concerns for the interests of employees should be addressed by specific legislation providing for information and consultation of employees and for their protection in the event of a bid leading to restructuring (High Level Group 2002: 16). More recently, a number of European company law experts adopted a similar stance, opining that no further legislative action is required, on the basis that the

existing informational requirements ‘in addition to national provisions’ are sufficient (Böckli *et al.* 2013). They make a distinction between the acquisition and the operational restructuring, noting that any further protection would not be justified by the public offer and the resulting acquisition of control as such, but by any restructuring or reorganisation that may follow a successful offer, which is beyond the remit of the Takeover Bids Directive (Böckli *et al.* 2013: 14). They advise that questions of the appropriate level of protection of employee rights in the EU should be addressed in a wider context and should not be taken up specifically for one type of transaction, such as takeover bids. This is a particularly important point given that the Directive covers ‘takeover bids’ but does not extend to mergers, transfers of undertakings or acquisitions by way of schemes of arrangement. This might be part of a larger debate which needs to be had concerning the role of stakeholders in companies and the manner in which a long-term sustainable accommodation can be achieved. Such an accommodation must encourage and incentivise shareholders and protect their investments, but it must also recognise that employees, too, have interests that deserve protection and cannot be ignored.

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Chapter 2

The Takeover Bids Directive's flawed economics jeopardises our wealth

Hans Schenk

1. Introduction

The European Union's Takeover Bids Directive endeavours to facilitate takeover bids 'through reinforcement of the freedom to deal in and vote on securities of companies and the prevention of operations which could frustrate a bid' (EC 2012: 2). Innocent as this objective may seem, it appears to be based on highly questionable theoretical assumptions and assessments of the empirical evidence. As a consequence, the Directive allows plenty of room for perverse takeovers, and more generally lubricates a system that frequently destroys wealth rather than creating it. It therefore jeopardises our wealth. The argument follows from two key issues: the first is the inadequacy of the Directive's underlying theory of the market for corporate control; the second is the empirical evidence on the performance of mergers and acquisitions, including takeovers. This evidence suggests that most takeovers in the domain for which the Directive has been issued are economically undesirable, so that a regulatory framework that discourages those takeovers would be more efficient than the current Directive. I will discuss some of the characteristics of such a framework in the last section before summarising the paper.

2. The theory of the market for corporate control

The term 'market for corporate control', coined for the first time by Marris (1964), refers to the process by which ownership and control of companies is transferred from one group of investors and managers to another. The theory assumes that share prices reflect the quality of company management or, more generally, the relative 'quality' of a firm. According to Marris, if the valuation ratio of a firm is low, it is probable that a raider would put a higher value on that firm than the market does. Thus, the theory claims that if executives do not endeavour to maximise the valuation ratio of the company a takeover bid will eventually follow. With

low prices lingering, watchful bidders would recognise a good acquisition opportunity, buy the company and replace or decrease the status of its incumbent management. By implication, the performance of the target firm would benefit. Manne (1965) concluded that, as executives would like to secure their jobs, the market thus would be disciplining executive behaviour. For fear of being fired, 'as within three years of an acquisition, half of all managers at targets are out of work' (Easterbrook and Fischel 1996: 162), every member of the company's management would do his or her best to maximise shareholder returns. The latter is assumed to derive directly from the extent to which executives succeed in bringing the company's assets to full fruition.

If correct, this theory would require a market for takeovers that is free from artificial hurdles, in particular hurdles that have been erected by the target firm to prevent its takeover by another, supposedly more efficient, firm. This is what the Directive tries to accomplish. In the words of a study commissioned by the European Commission (EC) to support the ongoing review of the Directive: 'A well-functioning market for corporate control is part of a continuous auction process around the company's value. As a consequence, the regulatory framework *must create the conditions to stimulate takeovers* over time, and so lower costs of capital' (Marccus and CEPS 2012: 274, italics added).¹

This idea is naïve for two reasons, however. First, it does not recognise the possibility of what I would call 'functional cheating'. By this I am not referring to Enron-like fraudulent activities (see Froud *et al.* 2004), but rather to actions through which executives try to paint a picture of their performance that extends beyond their 'real' performance. Indeed, boosting the valuation ratio by earnings management or off-balance activities, or by actions that directly please investors, has become common practice, particularly favouring pay-outs through cash dividends or stock repurchases over real investment. Stock repurchases in particular have taken an important position in firm policy, frequently totalling substantially more than dividend pay-outs (Skinner 2008).² It is now even

1. Marccus Partners is a subsidiary of the management-consulting firm Mazars and the Centre for European Policy Studies is a Brussels-based think-tank.

2. In the United States, firms spent a staggering USD 900 billion on stock repurchases in 2007 alone (*New York Times*, 21 November 2011, based on data from Dealogic). The total fell somewhat in the wake of the financial crisis, but returned to as high as USD 450 billion in 2011. In Europe, share buybacks have been on the rise as well and now account for hundreds of billions of euros (von Eije and Megginson 2008; Masouros 2013).

common for firms to borrow for dividends or stock repurchasing.³ Obviously, such policies lead to short-termism.⁴

Secondly – and perhaps more importantly for the current argument – the theory does not recognise perverse behaviour, that is, behaviour that is (by implication or explicitly) focused on subverting the mechanism that is at the heart of the theory. Although the Directive endeavours to reduce firms' possibilities for installing or using anti-takeover devices, it does not take into account that some such moves appear to be regular moves when done pre-emptively, that is, long before a takeover bid has even been announced to the target firm. In other words, firms may use takeovers as a headlong rush forward. If pointed at a potential acquirer this may be in the form of a 'pac-man' defence, meaning that the firm undertakes a takeover of the potential acquirer when an upcoming takeover bid is suspected or seen as a possibility. The plain fact is that pre-emptive takeovers cannot be distinguished from 'regular' takeover activity.⁵ The evidence on merger and acquisition performance, to be discussed further below, suggests that *many* takeovers have some of these protective elements, either purposively or embedded in firm strategy.

It is important to note that the theory of the market for corporate control assumes so-called 'market efficiency'. The market for corporate control is therefore, necessarily, assumed to be populated by 'smart' and 'not-so-smart' investors, firms and decision-makers. The smart are able to search the market for promising investment opportunities and the not-so-smart will try to protect their assets from a takeover once such a search has zoomed in, or is about to zoom in on them (in the parlance of the Directive, 'post-bid' or 'pre-bid'). Unfortunately, practice is not always loyal to theory. There is no way in which one can distinguish between the

3. For example, during the first and second quarters of 2014, Apple bought back approximately USD 23 billion in shares, which it funded, for tax avoidance reasons, with USD 17 billion in loans, despite having available approximately USD 150 billion in cash reserves. Approximately USD 12 billion of the buy-back was done from an investment bank, which essentially shorts the stock by borrowing shares (typically from its clients), which it then delivers to Apple for a fixed, upfront price. Over the term of the buy-back agreement, the investment bank then seeks to buy shares to replace those it has borrowed. See, for example, appleinsider.com of 25 April 2014.
4. The same reasoning would apply to the arguments of agency theory. Linking executive remuneration to share performance – which, following Jensen and Meckling (1976), is seen by agency theory scholars as a means to discourage executives from focusing on their own rather than shareholders' interests – is even likely to encourage functional cheating.
5. In a similar vein, Sjäfjell (2009: 383) has noted that if the pac-man defence is used as a 'pure business strategy, independent of the acquirer's', then it would fall outside the scope of the Directive.

smart and the not-so-smart, except if their relative prices are assumed to be an indicator of this. Especially over the past fifteen years, it has become abundantly clear, however, that the way in which the prices of firms develop – the prices one has to pay in order to obtain their shares – is one of the fuzziest processes in the economy and certainly not an efficient one (for example, Akerlof and Shiller 2009).

The theory's riposte would be that, ultimately, 'the market' will punish firms that cook their books or pursue perverse takeover strategies, but again this presumes market efficiency. More particularly, and keeping in mind that by far most takeovers take place during acquisition waves, firms that undertake perverse takeovers can restructure by selling off acquired entities when takeover popularity decreases, thus forestalling eventual punishments by 'the market' in the longer run. The evidence suggests that perhaps as many as five out of every ten acquisitions are unwound in the time that lapses between two merger and acquisition peaks (Schenk 2006). Clearly, these are not the takeovers that we would want to see encouraged.

3. Empirical evidence on the performance of takeovers⁶

The basic assumption behind the theory of the market for corporate control, as we have seen, is that once a bidder has acquired an undervalued firm, he would engage in corporate restructuring with a view to bringing about an increase in the value of the target firm. It is sometimes argued that hostile takeovers outperform friendly acquisitions as the former benefit from greater clarity of purpose, better pre-bid planning, clearer identification of sources of value creation, employment of superior management and optimal exploitation of a target's assets (Sudarsanam 2010). It is important to note, however, that the term 'hostile bid' is not set in stone. In the economics literature it is most often used to describe offers that have been resisted by the target's board, as

6. Technically speaking, a takeover requires a public bid for (a controlling part of) the shares of a target firm. Such a bid may come as a surprise or after negotiations with the target firm's management. It may be hostile or friendly (see main text). In any case, if successful, it will end up in some sort of merger between the acquiring firm (or investor) and the target firm. Since most 'mergers' by far are in fact acquisitions (approximately 90 per cent) – which implies that one party acquires the ownership of another party – most performance research has simply focused on the aggregate category of mergers and acquisitions (M&As).

opposed to 'friendly bids' that are implemented with the approval of the target's management. However, the board of the offeree firm might have a good reason for rejecting a bid even though it is privately considering the bid as a welcome development, for example simply because it is soliciting a higher price than offered, either from the original bidder or any other bidder (as was the case with Vodafone's USD 181 billion bid for Mannesmann in 1999–2000⁷ and has been the repeated reaction of AstraZeneca to Pfizer's USD 118 billion bid in early 2014). Thus, in practice it is difficult to judge whether a bid is really 'hostile' or 'friendly'. Many takeovers contain elements of both.

What, then, does the literature say on the economic performance of takeovers? By now, this literature has become fairly voluminous, with many thousands of mergers, acquisitions or takeovers having been assessed. Table 1 (p. 56) provides a quick overview of the most common findings, but we will discuss the most important studies here as well.

The performance of mergers, acquisitions or takeovers can be measured by tracking any effects on the share price as a dependent variable (usually done in so-called event studies and resulting in estimates of so-called abnormal returns, that is, returns that deviate upwards or downwards from the standardised normal returns). In Table 1, these studies are summarised in column 1. Performance can also be tracked by measuring effects in real terms, such as profits, productivity or market share, which is usually done in so-called accounting studies (column 2 in Table 1). Column 3 summarises a third type in which effects on ratios of market and real variables are measured. Event studies typically assume that the share price (thus, the shareholder or market value of the firm) is a reflection of real performance expectations among investors. Real value studies are, obviously, closer to the true effect but more laborious to carry out, which is why by far the most merger performance studies are event studies.

The early US empirical literature supported the theory of value enhancement by takeovers. Jensen and Ruback (1983) provided a review of studies looking at short-term abnormal returns to takeovers following tender offers, covering the period 1958–1981. The evidence indicated that,

7. Mannesmann, indeed, succeeded in increasing Vodafone's bid from €240 to €353 per share (*Wall Street Journal*, 4 February 2000).

Table 1 General characteristics and findings of idealised merger and acquisition performance studies

	Type of study		
	Event studies	Accounting studies	Combination studies
Methodological focus	Effects on shareholder value (market value)	Effects on real business variables, for example, profits over sales, EBITDA, return on investment (ROI), firm productivity, market share, registered patents	Effects on ratios between market value and real business variables, for example, market-to-book value (Tobin's Q)
Acquisition effect studied	Cumulative abnormal return (CAR) around event (merger announcement or consummation), typically immediately around event (a few days to a week), sometimes extending towards a longer time horizon (in a few cases extending towards multiple years)	Pre- and post-acquisition (ratio and nominal) comparisons, sometimes for several years, in a few cases to more than a decade post-acquisition	Pre- and post-acquisition ratio comparisons, sometimes averaged over several years
Counterfactual proxy	Cumulative normal returns	Matched non-acquiring control group	Matched non-acquiring control group
Findings on short-term effects	Target CAR increases substantially, Acquirer CAR increases marginally or breaks even	No noticeable effects	Because market value increases marginally or breaks even, non-substantial effects on ratios between market value and real variables
Findings on medium- to long-term effects	Acquirer CAR decreases substantially (target has been delisted)	Acquiring firms underperform control group substantially	Because market value decreases substantially, substantial effects on ratios between market value and real variables

overall, tender offers generated significant positive returns for target shareholders (around 30 per cent) and smaller positive returns for the bidding firm owners (around 4 per cent). Further evidence suggested that opposition by management can bring additional value to target shareholders, but only if the bid eventually succeeds. If the takeover is unsuccessful, the target's owners appeared to suffer 11.7 per cent losses ten months after the initial bid. Jensen's and Ruback's conclusion was that managerial action against takeovers should be curtailed. Jarell, Brickley and Netter (1988) confirmed these findings, looking at an even

larger sample of transactions from 1960 to 1980. However, they already noted that winners of bidding contests could suffer significant stock price declines as often as they enjoyed increases in returns. More recently, Bhagat *et al.* (2004) investigated a comprehensive sample of tender offers over a period of 40 years, from 1962 to 2001. By using the customary short-term assessment window of a few days around the takeover announcement they showed that the average return to the target shareholders had been a statistically significant 30.01 per cent, while the average bidder enjoyed 0.18 per cent. The authors concluded that both friendly and hostile takeovers improve value for shareholders.

Turning back to Europe, studies of UK takeover activity showed similar results: there are large gains for target shareholders around the announcement dates and moderate or zero returns to bidders. Higson and Elliott (1998), looking at a period of three months before and after takeovers completed between 1975 and 1990, reported 38 per cent and 0 per cent abnormal returns for the acquired and the acquirer, respectively. For the seven years between 1993 and 2000, Goergen and Renneboog (2003) calculated a 29 per cent increase for the target shareholders using a window of 60 days before and after the acquisition. Goergen and Renneboog also looked at tender offers in continental European countries (Germany, Austria, France, Benelux, Switzerland) and found a 15 per cent and 1 per cent increase for target and bidder shareholders, respectively.

Although these studies seem to provide encouraging results for the proponents of the theory of the market for corporate control, it should be noted that all of them concentrate on (very) short-term effects, commonly of less than one week post-announcement and only very rarely extending to a few months, which still qualifies as a short-term assessment. Looking at long-term consequences brings to light different and disturbing results. According to Mueller (2003: 178), 'Evidence that M&As destroy wealth can ... be found in the event study literature, if one examines the returns to the acquirers over a sustained period after the M&As occur'. Mueller quotes a large number of studies that estimated abnormal returns over five-year post-announcement periods for the 1950s, 1960s, 1970s and 1980s. Positive results were obtained only for the 1970s and these were not statistically significant. Andrade *et al.* (2001) confirmed that long-term event studies measuring abnormal returns over three to five years following merger completion cast doubt on traditional short-window findings. Martynova and Renneboog (2005: 23) also provide a review of the empirical literature

indicating a 'decline in [relative] share prices several years following the transaction'. Obviously, long-run performance studies are fraught with difficulties, as much 'noise' has to be filtered out. Andrade *et al.* (2001) challenge the precision of long-term abnormal returns estimates because tests of such returns are inevitably joint tests of stock market efficiency and a model of market equilibrium. Zhao *et al.* (2008) cite authors arguing that stock returns become positively cross-correlated in large samples, causing mis-specified test statistics. However, the short-term methodology does not lack criticism either. For example, it is possible that investors are not able to assess quickly enough the full impact of the corporate transaction, and wealth-effect analysis over a few days brings flawed results. More importantly, however, they are much more likely to suffer from the effects of so-called 'animal spirits' (Akerlof and Shiller 2009).

A follow-up study of 155 European takeovers between 1997 and 2001 by Martynova *et al.* (2006), investigates the long-term performance of merged companies. The authors look at EBITDA, a measure of profitability in which earnings are calculated before interest, taxes, depreciation and amortisation. To capture only the effect of the takeover and account for company differences in size, they divide cash flow by, first, book value of assets and, second, sales. To adjust for possible industry trends, the authors compute the difference between the merged company's cash flows and the cash flows of peer firms that have not gone through an acquisition. Median profitability of the three years prior to the takeover is compared with median profitability over the three years subsequent to the merger. The results show that the profitability of the combined entity decreases significantly after the merger. More importantly, the study tries to differentiate between tender offers and negotiated deals, and shows that a firm created as a result of the former is likely to experience the worst deterioration in performance, thus indicating that non-negotiated takeovers have a negative effect on long-term company profitability.

The study also shows that many takeovers concern well-performing targets, which one would not expect on the basis of the market for corporate control theory. Moreover, both acquiring and target firms significantly outperform the median peers in their industry prior to takeover. Referring to a number of previous studies, Burkart and Panunzi (2006) confirm that only a few hostile takeovers are targeted towards poorly performing or troubled firms. The more relevant motive for unfriendly bids would be the size of the target. Mueller (2003: 176) notes that 'every study which has regressed the gains to the acquiring

companies' shareholders onto the gains to the targets has found a negative relationship, which is inconsistent with a synergies-creation hypothesis and the market-for-corporate-control hypothesis'. A team at Erasmus University Rotterdam split up a sample of 100 European mergers and acquisitions undertaken during the fifth takeover wave (with the rising tide between 1995 and 2000) into year-cohorts and calculated abnormal returns for 400 post-merger days for each of the cohorts. The study revealed that only the 1995 cohort generated shareholder wealth. All other cohorts destroyed wealth, the most recent cohort performing worst, saddling the acquirers' owners with an average cumulative loss of almost 25 per cent (see Schenk 2006). Similarly, in a study of about 12,000 (American) acquisitions from 1980 to 2001, Moeller *et al.* (2004) found that while shareholders lost throughout the sample period, losses associated with acquisitions after 1997 were 'dramatic'.

Dickerson *et al.* (1997) found for a panel of almost 3,000 UK-quoted firms that acquisitions undertaken during the period 1948–1977 had a systematic detrimental impact on company performance as measured by the rate of return on assets. Not only was the coefficient on acquisition growth much lower than that on internal growth, but there appeared to be an additional and permanent reduction in profitability following acquisition as well. More specifically, for the average company, the marginal impact of becoming an acquirer was to reduce the rate of return relative to non-acquirers by 1.38 percentage points (in the year of the first acquisition). Taking all subsequent acquisitions into account, acquiring firms experienced a relative reduction of 2.90 percentage points per annum. Because the mean return across all non-acquiring firms was 16.43 per cent, this translates into a shortfall in performance by acquiring firms of 2.9/16.43, which is around 17.7 per cent per annum.

Gugler *et al.* (2003) demonstrate that from most studies it can be inferred that if takeovers *do* show profit improvements, these are usually either not merger-specific or due to the creation of additional market power rather than efficiency. The lack of merger-specificity has, perhaps, been most clearly demonstrated by a large number of real merger effects studies in the banking industry (which we will not discuss here, see Schenk 2006). Finally, a meta-analysis in which 93 studies involving more than 200,000 mergers and acquisitions were jointly investigated showed just negative results except for those amalgamations that were assessed for very short post-acquisition windows (King *et al.* 2004). Adding a few newer studies in their review, Tuch and O'Sullivan (2007) conclude that

mergers have an insignificant impact on shareholder wealth in the short run, but produce overwhelmingly negative returns in the long run.

The evidence, in short, suggests that it is unlikely, to say the least, that the market for corporate control works in the way assumed by the Directive. At best, economic returns are positive only in the very short run, motives might be flawed and long-term consequences might be dire for the merged firms (and, given the recurrent size of the phenomenon, also for the economy as a whole). Because during an acquisition wave, receiving (target) shareholders quickly after the takeover become acquiring shareholders themselves, thus joining in with bad acquiring performance results, it is likely that negative effects permeate throughout an economy, as long as takeover incidence is sufficiently large. In this respect, it is quite embarrassing that most takeovers occur during acquisition waves and that such waves thus far have all ended up in recessions or worse (Schenk 2005).

Although the main point is that mergers, acquisitions or takeovers do not occur in the manner presumed in the Directive, it is still worth looking at the causes of this economic misfortune. It appears that in particular the payment of transfer premiums is a cause of trouble (for example, Sirower 1997), particularly when market values have already become inflated as a result of antecedent acquisition incidence; thus after an acquisition wave has set itself in motion.⁸ The problematic aspects of mergers would therefore seem to be particularly worrisome when listed firms are concerned, precisely the domain for which takeover regulation has been developed. Second, it appears that the larger the firms involved are, the less likely it is that economies of scale (or more generally, synergies) will be realised. Of course, all this begs the question of why such firms would undertake such acquisitions at all?

This is not the place to discuss merger theories (for this, see Schenk 2006) in detail, but Mueller (2003), for example, has suggested that the pattern found would support the hypothesis that takeovers are fuelled by speculation, which he suggests is particularly eminent during periods of business euphoria. Schenk (1996) has suggested that the lion's share of takeovers are done for 'minimax-regret' reasons; in other words, takeovers occur mainly because firms prefer the lower regret attached to 'sharing

8. Notice that the takeover process would come to a virtual standstill if acquirers were not prepared to pay takeover premiums.

acquisition failure with others' to the higher regret of 'having forgone advantages that peers have enjoyed'. In other words, if some peer firm has carried out an acquisition with uncertain, but potentially advantageous results, other firms are likely to undertake a similar acquisition just to avoid regretting not having done so if it turns out that the first mover's takeover was successful. In order to distinguish the latter type from wealth-seeking acquisitions, such triggered acquisitions have been identified as 'purely strategic' (Schenk 2006). Obviously, both explanations connect well with the perverse takeovers discussed above. The difference is only a methodological one: the perversity of a takeover is defined by it not being in conformity with what mainstream economics would define as 'normal', while a purely strategic takeover is a positive explanation of the occurrence of takeovers that do not seem to be motivated by economic gains. Of course, there is no a priori reason to expect real firms to behave like the hypothetical firm of efficient market theories; after all, the behaviour of firms is a matter of empirical evidence, not one of theoretical presumption.

4. Implications for the Directive

The evidence we have discussed suggests that the creation of economic wealth would be jeopardised by any regulation that harbours a pro-merger, acquisition or takeover bias. Because it appears that most mergers destroy – or at least do not create – wealth, certainly during acquisition waves, and because by far most takeovers occur during such waves, a regulator's presumption should be against rather than in favour of takeovers. The Takeover Bids Directive 2004/25/EC was built on the idea that mergers, acquisitions and takeovers are effective means of creating wealth. Therefore, it cannot possibly be effective in a world that is not in essence compliant with its justificatory theory of the market for corporate control: in other words, the real world.⁹

9. Notice that the European Union's Merger Control Regulation (MCR) 4064 of 1989, amended as Regulation 139 of 2004, is built on the same naïve foundations. It was adopted to prevent mergers, acquisitions or takeovers that are likely to hurt the consumers' interest, not to prevent amalgamations that may hurt the economy. The MCR assumes that firms would undertake mergers in the pursuit of profits, either by strengthening market power (which we would not like) or by creating synergy (which would be beneficial to economic efficiency). Mergers that do neither are assumed to be impossible, at least in a structural sense, because these would not serve the postulated economic interests of the parties involved. From the main text, it can easily be derived that this idea builds on market efficiency theories as well (for elaboration, see Schenk 2006). Unfortunately, the EU's population and its politicians have wrongly been led to believe that the EC's regulatory system also protects the economy against destruction of wealth creation processes.

Consequently, amending the Directive would amount to much more than matters of application, consistency, technique or execution, which thus far have made up the lion's share of assessment analyses. Most importantly, the Directive must abandon its basic idea that firms should not be allowed to protect themselves against takeover. This idea shows itself most strongly in Articles 9 and 11 of the Directive, Article 9 (the 'board-neutrality rule') requiring that any post-bid defences should be explicitly approved by the general shareholders' meeting (thus could not be arranged unilaterally by the target company's board) and Article 11 (the 'breakthrough rule') enabling a bidder to break through pre-bid defences (for an elaborate discussion, see Nenova and Schenk 2011). In a somewhat similar vein, Enriques (2010: 15) argues that the European Commission should adopt a neutral approach, namely 'neither subsidizing nor hampering takeover activity'. Instead, he recommends allowing individual firms to choose which rules they would like to implement, or to give the board a chance to exercise veto power on hostile bids, making the use of other defensive measures redundant. Kirchner and Painter (2000: 50) have argued that 'Europe could, and should adopt its own version of the modified business judgment rule' as used in the United States. This would entail that target firm directors be allowed to block a takeover, on condition that they act in good faith after reasonable consideration that the takeover would be a significant risk to the company.

However, both suggestions leave open the possibility that potential target firm managements would *not* take protective measures, even though these would be warranted from the point of view of economic wealth creation. For example, target managements might act upon the prospect that they themselves would benefit from an acquisition, which, in fact, happens frequently (in contradistinction, again, to what the theory would predict).¹⁰

Thus, we would need a guarantee against target managers and shareholders squandering, for some reason, the firm's assets. At the same time, however, the Directive should not provide a safe harbour for incompetent

10. See, for example, Hartzell *et al.* (2004). Sometimes it is argued that executive pay effects dominate merger rationales. Indeed, Bodolica and Spraggon (2009) show that no matter what the performance outcome, executive pay always goes up after an acquisition (as does the likelihood of obtaining paid supervisory board memberships in other firms). In itself this might seem a sufficient explanation for exuberant merger activity. However, we would then need a theory of pay volatility that is consistent with takeover volatility. Such a theory, thus far, does not exist.

managements. Similarly, it should also to some extent protect the right of ownership that is so central to our societies. Evidently, setting up a Directive that runs with the hare and hunts with the hounds is not an easy task; but, then, nobody ever said that it was. However, once the correct principle is embraced, the rest will be a matter of juridical fine-tuning.

In this sense, it will be important to recognise the special role of the firm's employees. For, ultimately, employees have a longer-term interest in the firm's success than both managers and shareholders. This is because shareholders can exit the company by just selling their shares, which is precisely what they do very frequently. As Bolton and Samama (2012) have shown, there has been a secular trend towards shorter and shorter holding periods of stocks by shareholders. For example, for stocks listed on the NYSE, the average holding period decreased from eight years in the 1960s to approximately one year by 2005. Consequently, it is justified to ask whether the owners of listed firms – the sort of firms for which the Directive has been designed – can still properly be regarded as owners of a firm rather than owners of equity.

The firm's top managers almost always have severance arrangements that allow easier exit as well. For example, Rau and Xu (2013) find that at around 68 per cent of S&P 1500 firms had explicit severance contract terms in 2004 and that this proportion was much higher than was apparent from earlier studies. Moreover, many executive contracts include ex ante exit arrangements in case of a takeover. For workers, exiting the company and finding another job is much more difficult as it is likely that they have accumulated firm-specific skills, whereas redundancy compensation is usually very modest at most. Seen in this light, it almost goes without saying that the idea that shareholders are the only residual claimants in a firm and therefore should be adorned with full discretionary powers is unworldly, especially if, as Zingales (2000) has argued, we are living in a world in which human capital has become the firm's most important asset. Therefore, an efficient takeover regime must aspire to fairly balance all the major interests involved, especially those of employees.

Obviously, this currently is not the case. In some member states, employees (or their representatives, in some cases the unions) do have some say in strategically important matters. For example, the Dutch system of worker representation entitles employees to speak out against or in favour of management decisions through its works council.

However, this only goes so far as to allow the works council to submit advice to management. Management may simply reject such advice. If so, the works council may file an appeal against the management decision with the Amsterdam court (in its so-called Enterprise Chamber). This court may find that the management decision lacks fairness, upon which it may instruct management to uphold or even rescind its decision.¹¹ The Dutch case, however, currently represents perhaps the most advanced that can be found in business practice. Nevertheless, it can be regarded as only a first step towards implementing the consequences of recognising that employees share in residual gains and risks to a significant extent, in particular in the area of takeover.

In any case, an efficient system of takeover regulations would include full acceptance of defensive mechanisms *and* a significant role for workers in all decision-making pertaining to such mechanisms. The following two options would seem to merit further discussion. First, works councils could be given the right of assent (as, in the Netherlands, they already have in the domain of working conditions) and/or the right to nominate or appoint members of the non-executive or supervisory board. Such board members could be given blocking powers in the case of takeover. Second, as Oostwouder and Schenk (2014) have suggested, an efficient approach to takeover regulation would amount to adding an independent Special Administrative Entity to corporate governance, as indeed some Dutch firms have already done in the past in the form of a foundation (in Dutch: ‘Stichting Administratiekantoor’).¹² The company’s shares would be placed with this intermediary vehicle. In turn, the Entity would issue so-called certificates of shares that could be sold privately or be quoted on public exchanges. Under normal circumstances the holders of certificates would be granted the authority to vote at the general shareholders’ meeting. However, under special circumstances, such as a takeover, the Entity would have the authority to withdraw such voting rights. Because of its independent status, the Entity would subsequently be well placed to decide on the modalities of the special circumstances.

11. In quite a few cases the court has spoken in favour of works councils’ demands, yet works councils do not easily go to court because that may cause polarisation in their relationship with management.

12. Oostwouder and Schenk made this suggestion for the case of ABN Amro bank. The bank was the target of a successful takeover by a consortium of Royal Bank of Scotland, Banco Santander and Fortis, valued at approximately USD 98 billion (70 billion euros at the time) in 2007. Soon after the merger, and just before the financial crisis erupted, all parties contracted ‘acquisition indigestion’, ultimately leading to government bailouts of ABN Amro and RBS and a break-up of the newly formed bank.

Which circumstances would be seen as 'special' would typically be defined in the Entity's charters. From this chapter it follows that takeover bids would certainly have to be included, and possibly 'outgoing' acquisitions as well. An advantage of the Oostwouder-Schenk option is that it would allow the holders of certificates a normal assessment of the incumbent management's performance so that it cannot be used to offer a safe haven to management. It should be noted that the Oostwouder-Schenk option would not suffice to reject takeover bids indefinitely. At least according to current Dutch law, once a would-be acquirer has succeeded in acquiring the majority of certificates, it could also demand structural voting rights in the general shareholders' meeting, thus surpassing the Entity's power.

The terms of the Entity's independence should be laid down in the Directive. One can easily imagine that these terms would be similar to those that are currently defined in Germany's codetermination system or the Netherlands' Social and Economic Council. The composition of the latter is one-third representatives of employers, one-third of representatives of labour and one-third independent experts. At the level of the firm, this could be mirrored by a similar tripartite composition of the Entity's board. Shareholders as well as employees would be given the right to appoint two-thirds of the board, thus doing justice to their interests, especially the workers' long-term interest in the sustainability of the firm, while independent members would offer effective protection against partisan behaviour.

5. Conclusion

The biggest flaw of the Takeover Bids Directive is its most basic assumption, namely, that the market for corporate control is economically efficient in the sense that takeovers are an efficient means to increase economic wealth. A brief review of the empirical literature on merger performance demonstrated that most acquisitions fail to create economic wealth, except when performance effects are measured as short-term (target) shareholder wealth. If takeovers do not create *shareholder* wealth, they do not make sense from a shareholders' point of view. If they do not create *economic* wealth, they do not make sense from the wider perspective of economic progress. Obviously, from a regulator's perspective it is the latter that counts. It is a rather awkward twist of theory that economic wealth creation is assumed to be identical to

shareholder wealth creation (except in cases that would be likely to be blocked for competition reasons), and that shareholders would never undertake (or vote in favour of) acquisitions that do not create shareholder wealth. Takeovers that do not create shareholder wealth are simply assumed to be impossible (at least in a structural sense), just as it was assumed for quite some time – on the basis of similar theoretical assumptions – that financial innovations, and the operation of financial markets more generally, could only be beneficial to our economies. Obviously, *some* financial innovations can be beneficial. Similarly, *some* takeovers may create wealth. But a regulatory system that presumes such effects to be the normal result surely misses the point. Such a system can be legitimised only on the basis of biased economics and therefore jeopardises our wealth.

True, the European Commission notes that ‘although takeover bids promote economic efficiency in theory, this is not always the case in practice because the conditions of rational behaviour, fully informed market participants and absence of transaction costs are not always met’ (EC 2012: 4). But this rather appears to be a note in passing, made to suggest that the Commission has given various *a contrario* arguments ample consideration while actually proceeding with business as usual.

It is therefore very unfortunate that the European Commission has so firmly set its agenda on encouraging takeover activity across Member States. Rather one would wish that takeover policy would discourage acquisitions in such a way that only really promising instead of speculative or ‘purely strategic’ takeovers would be the standard. While such a new policy would allow the European Union to ensure better management of companies, decrease market volatility, help mitigate recession risk and contribute to better economic performance, this is easier said than done. This chapter has argued, however, that alternative regulatory specifications are possible. For example, empowering employees or adding a Special Administrative Entity charged with independent decision-making on takeovers would be instrumental in limiting takeover predilections in our economies, as well as takeover euphoria during merger waves. Obviously, a combination of the two would be even better.

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Chapter 3

The employment effects of takeovers

Andrew Pendleton

1. Introduction

Corporate takeovers involve the reallocation of assets between owners and the restructuring of resources within and across firms. A fundamental assumption behind the EU Takeover Bids Directive is that these adjustments are potentially beneficial to the economic health of nations because they facilitate the more efficient and effective utilisation of resources. However, there are potential costs to takeovers: benefits for some stakeholders may be counter-balanced by losses for others. In particular, employees may suffer from employment or wage reductions, as well as changes to pension provisions or work patterns and intensity. They may endure successive changes to their employer as takeovers may subsequently lead to divestments of parts of the enlarged company. More generally, they may suffer insecurity in so far as takeovers disrupt established norms and patterns of work relationships.

An influential perspective, arising in response to the takeover boom in the United States in the 1980s, has argued that takeovers can involve a 'breach of trust' by companies in relation to their employees (Shleifer and Summers 1988). Takeovers disrupt the implicit contracts (the mutual expectations of how employment is managed) between companies and their employees, with acquiring owners reneging on the deals, norms and expectations established under the previous regime. This may facilitate a wealth transfer from employees to shareholders. In other words, employees pay for the takeover and for the gains secured by shareholders with employment reductions and wage and benefit cuts. In this perspective, takeovers do not create economic wealth, but reallocate it between stakeholders.

There is an extensive literature on takeovers in the academic finance and economics literature in the United States and to a lesser extent in the United Kingdom, reflecting the relative prevalence of takeovers in these

countries. More recently, a European literature has begun to emerge in response to the growth in takeover activity in mainland Europe. The primary concerns of this literature have been the wealth and performance effects of mergers: what are the effects of takeovers on the share prices of targets and acquirers? What are the longer-term effects of takeovers on the accounting performance of the combined company? Although there is a wide range of findings, the evidence suggests that the shareholders of target firms secure a takeover premium but there tend to be insignificant or even negative effects on the long-term share returns of the acquirer. Similarly, studies of profitability tend not to find positive effects of takeovers on profitability (see Martynova and Renneboog 2008; Cosh and Hughes 2008).

The literature on the effects of takeovers on workers is much smaller, although clearly the impact of takeovers on corporate performance will have implications for employees. The primary focus of this literature has been on employment changes and demand for labour. Although there is considerable diversity between academic studies, the balance of the literature suggests that the overall net effect of takeovers on employment is negative. Within this, though, the picture is more complex, with some studies finding that some takeovers are followed by employment growth. The literature suggests that the nature of takeovers, the characteristics of the target and acquiring companies and the motives for takeovers are related to the variance in employment effects.

2. The theory of takeovers

The dominant view in finance and economics (shared by many policymakers in liberal market economies) perceives takeovers as reallocations of resources aimed at enhancing efficiency. The classic statement of this can be found in Manne (1965). He perceives the market for corporate control as a means of reallocating assets and resources to their most efficient users. The agency perspective on takeovers, derived from Manne's views and developed by Jensen (1986), sees takeovers as a form of discipline on corporate managers, forcing them to use resources efficiently or face takeover and possible job-loss.

The disciplinary role is seen most clearly in the case of hostile takeovers, where a rival management mounts a bid in opposition to the wishes of the incumbent management. Implicit in the notion of disciplining inefficient

managers is that incumbent managers have incentives of various sorts to look after workers in terms of higher wages or inefficient levels of employment. On this basis a takeover is likely to lead to reductions in wages or employment or both. This view of takeovers is most clearly identified with Shleifer and Summers (1988), who viewed hostile takeovers in particular as facilitating breaches of implicit contracts between firms and workers by new management teams, leading to employment and wage loss. For this reason, much of the literature tests whether hostile takeovers are more likely to lead to employment reductions.

A variant of the efficiency view of takeovers highlights their potential to lead to scale-economies through the removal of duplicated activities, such as production facilities and head office administration (Lehto and Bockerman 2008). Takeovers might also be aimed at reducing over-capacity in a sector. The logic of these motives for takeovers is that employment reductions are highly likely in the immediate aftermath of the transaction. Employment reductions will likely be concentrated among those activities where duplication or over-capacity is most extensive. Against this, it might be argued that the more efficient use of resources will lead to competitive success and employment growth in the longer run.

Other motives for takeover include the generation of synergistic gains from adding complementary resources that allows the combined firm to produce more effectively, as well as more efficiently, and possibly to widen the scope of its activities. This might include vertical acquisitions of supply chain activities, as well as horizontal acquisitions of similar producers. Takeovers may also be aimed at 'buying' entry to a new market. The effects on employment are likely to be complex and highly dependent on the nature of the synergies aimed for and achieved. Vertical acquisitions typically add to the range of the combined firm's activities. There may well therefore be a positive effect on employment. In the case of horizontal acquisitions, synergies may include some rationalisation of duplicated activities, thereby leading to employment reductions. Some of the literature tests the employment effects of related acquisitions, predicting that employment falls are more likely after related acquisitions because of the rationalisation effect. If the synergies turn out to be substantial, however, longer term employment growth might be anticipated.

When very large firms are involved, related acquisitions can lead to increased market power. Indeed, this may be an important motive for the

takeover. In this case the combined firm may be able to benefit from price increases, the results of which may be partially shared with employees in terms of higher wages or employment. A neoliberal critique of this view, however, would claim that market power leads to inefficiencies, which in time may be corrected by the disciplining effects of the market for corporate control.

A different – and long-standing – strand of literature suggests that takeovers can result from empire-building by managers (Marris 1964). This literature notes the greater discretion acquired by managers with the separation of ownership and control as industrial capitalism has developed and suggests that managers may exploit this to pursue their own interests. Given that high salaries, perks and status are strongly associated with organisational size, there is an incentive for managers to achieve one-off substantial growth in firm size through mergers and acquisitions. Although there is no clear prediction on employment growth – over and above the employment growth achieved by combining firms – this perspective would suggest at least that employment reductions are unlikely after acquisitions.

However, one variant of this argument suggests that managers often ‘bite off more than they can chew’ in mounting takeovers (Roll 1986). Because of an over-estimation of their own capabilities – ‘hubris’ – they mount ill-judged or over-priced takeovers. This kind of takeover seems to be found especially at the tail-end of takeover booms (Martynova and Renneboog 2008) and tends to reflect a ‘herding’ instinct as managers mimic – and attempt to ‘out-do’ – the takeover activity of others. Workers pay for this mistake subsequently with job cuts when the combined firm is forced to adjust. The takeover of ABN-AMRO by the Royal Bank of Scotland (RBS) in 2007 is a prime example of this kind of takeover. RBS, along with two other banks, is believed to have over-paid for part of ABN-AMRO by a very considerable margin and this deal led directly to the collapse of RBS.

3. Methodologies

The primary approach to the analysis of employment changes arising from takeovers is the ‘event study’, whereby changes in employment or in demand for labour – controlling for the level of output – are recorded after the merger or acquisition takes place. Typically, data on employment – typically drawn from company accounts – are used from up to five years before and up to five years after the transaction.

This provides a conceptually straightforward approach but it is not without its limitations. First, these data rarely contain information on the composition of employment or the quality and character of employees, so the picture of employment change is arguably a somewhat crude one. Second, such data rarely contain clear-cut information on the motivations for the takeover, so explanations of variations in employment change can be difficult to generate. Studies circumvent this by using various proxies for takeover objectives, but divergent results often arise. Third, the appropriate time frame for recording employment change is not theoretically clear and it might be that the full effects of takeovers on employment need to be recorded in the longer term. Against this, it becomes progressively more difficult to attribute employment changes to takeovers and to fully control for other influences on employment, the more distant observations become from the data of the transaction. Having said this, the evidence suggests that a significant element of employment changes that appear likely to be associated with the takeover take place within a year of the event.

Some other studies use lay-off announcements surrounding the data of the transaction as an indicator of employment effects. However, it is a somewhat imprecise indicator as the scale of lay-offs may not be as great as is announced and they may be counter-balanced by unobserved employment growth.

A general issue facing event studies is that of the counter-factual: what would have happened to employment if the transaction had not occurred? To deal with this, several studies provide a control group of similar firms not undergoing a merger or acquisition. Matching procedures for the control group have become more sophisticated over time with recent studies using propensity score matching to select control group firms and difference-in-difference methods to isolate the impact of a merger or acquisition.

Finally, several studies use panel data – repeated observations over a period of years – derived from plant rather than company level. These studies record what happens to employment in plants that change ownership during the period relative to those that do not and thereby provide a richer picture of the effects of ownership change. They can identify what happens to plants that are divested after takeovers take place (and whose employment effects tend to be unobserved in company-level studies because they drop out of the picture). A corollary of this

approach, however, is that a wider definition of ownership change is used than in those studies that draw on takeover data from listed companies.

4. Employment effects

Two issues have predominated in the literature: one, what is the effect overall on employment of mergers and acquisitions; two, what factors are associated with employment reductions (or growth)?

Inevitably, there is some diversity in the literature in terms of employment effects, although most studies find that employment reductions are widespread after takeovers. Lehto and Bockerman, using matched establishment-level data from Finland, found that ‘almost all changes in ownership lead to employment losses’ (2008: 113). Domestic takeovers have negative employment effects in all sectors. The overall finding mirrors those of one of the first US studies of takeovers, also using establishment-level data, that those establishments changing owners between 1977 and 1982 experienced negative effects on employment especially in auxiliary rather than production plants (Lichtenberg and Siegel 1992). More recently, Maksimovic *et al.* (2011) report that, within the United States, acquirers sell 27 per cent and close 19 per cent of the plants of target firms within three years of the takeover.

Against this, McGuckin and Nguyen (2001), using plant-level data for the entire US manufacturing sector from 1977 to 1982, found that ownership change is followed by employment increases, except in the largest plants. Meanwhile, a study of 117 tender offers in the United States in 1975–1984 found no significant change in combined employment over a three-year period (Denis 1994). A more recent study of 235 mergers and acquisitions in the UK listed sector in 1990–2000 found that around 55 per cent of cases experienced employment reductions whilst 45 per cent experienced employment growth in the three years after the transaction (Kuvandikov *et al.* 2014a). A feature of this study is that it restricted observations to companies undertaking one-off transactions during the three-year period to ensure that any employment growth was due to organic growth rather than further acquisitions.

5. Features of the transaction

Given the diversity of the evidence, it is fruitful to examine the influences on employment change. There is a wealth of evidence related to the features of the transaction and, to a lesser extent, the characteristics of the companies involved.

5.1 Hostile takeovers

Hostile takeovers are those that are initially opposed by incumbent management in the target firm. These takeovers have been widely predicted to have more adverse effects on employment than agreed takeovers because they are often explicitly aimed at restructuring the target firm and hence are likely to breach implicit contracts with the workforce. They are often viewed to be aimed at exerting discipline on an under-performing target firm, though this motive may be less important or widespread than is often thought (Franks and Mayer 1996). A further reason for anticipating negative effects on employment is that the takeover premium is typically larger in contested takeovers, and cost reductions and efficiency improvements may be necessary post-takeover to recoup this cost.

The evidence mainly supports these suppositions. Denis (1994) found that hostile takeovers were followed by a 17 per cent decrease in employment, partly achieved by divestitures, even though overall takeovers displayed no significant change in employment. In a UK study of 442 mergers, Conyon *et al.* (2002) found that hostile takeovers have larger falls in employment – though output increases – leading to a reduction in labour demand twice as large as that seen in friendly takeovers. They found that the impact of hostile takeovers was concentrated in larger firms. A counter-example is that of Beckmann and Forbes' study of 62 UK takeovers, which found that job loss is greater in friendly than in hostile takeovers. They attribute this to the differential timing of takeovers: hostile takeovers are more likely to occur when the economy is doing well. Kuvandikov *et al.* (2014a) found no relationship between hostile takeovers and employment change.

Hostile takeovers seem to have become less common in the United States and the United Kingdom since the takeover boom of the 1980s, possibly as a result of corporate governance reforms in these countries (Holmstrom

and Kaplan 2001). However, hostile takeovers have become more prevalent in mainland Europe due to a combination of factors, including greater dispersion of ownership, the growth of listed sectors, liberalisation of capital markets and some limited adoption of ‘shareholder value’ ideology (Martynova and Renneboog 2008). More generally, the barriers to takeovers in mainland European countries have declined in recent years due to institutional changes, as exemplified by Vodafone’s takeover of Mannesmann in Germany (Höpner and Jackson 2001).

5.2 Bid premia

Research on takeovers has established that target firms’ share price rises when a takeover bid is announced and that target firm shareholders secure a rise in value of around 20–30 per cent (see Schenk in this volume). By contrast, the impact of takeovers on the share price of the acquirer is much smaller. Because the acquirer and its shareholders pay a premium for the transaction, there is a cost to them. The breach-of-trust hypothesis predicts that this cost will be recouped from other stakeholders, such as employees. It has therefore been predicted that employment reductions are more likely when the bid premium – the increase in target share price attributable to the takeover – is larger. There is limited evidence on this issue but Krishnan *et al.*’s findings are consistent with this (2007). However, in a direct test of the breach of trust hypothesis, Beckmann and Forbes (2004) found that only a very small element of the bid premium can be related to subsequent employment reductions.

5.3 Related transactions

Employment reductions and reductions in labour demand appear to be more likely in related takeovers because the latter are often motivated by a concern to achieve benefits from elimination of duplicated activities. In a study of 136 mergers and acquisitions in the United States in 1989–1993, including some of the largest at the time, O’Shaughnessy and Flanagan (1998) found that related acquisitions are more likely to lead to lay-offs because of economies of scale, synergy and elimination of inefficient management practices. Similarly, Krishnan *et al.* (2007), in their study of 353 M&A transactions involving larger firms in 1992–1998, found that relatedness affects the probability of workforce reductions after

the transaction. Conyon *et al.* (2002) found that the reduction in labour demand in related takeovers is more than twice that of unrelated takeovers (19 per cent vs 8 per cent). Kubo and Saito (2012) in a study of 111 listed firm mergers in Japan in 1990–2003 found that related mergers are more likely to reduce employment. Kuvandikov *et al.* (2014a), however, found that related transactions are not more likely to reduce employment.

5.4 Cross-border transactions

There have been several recent European studies of the employment effects of cross-border mergers and their size relative to domestic transactions. Two opposing predictions can be made about employment effects. On one hand, new foreign owners may feel less compulsion to adhere to implicit contracts and may be less swayed by local political or community opposition to redundancies or plant closures. On the other, the informational and economic costs of mounting cross-border takeovers are higher and this may deter foreign acquirers from making riskier acquisitions. They may also be more motivated by considerations of securing market share than achieving efficiencies.

Although there are some well-known cases of plant shutdowns after acquisitions by foreign companies – such as Kraft’s takeover of Cadbury – the bulk of the evidence tends to support the second prediction. Bandick and Karpaty (2011) found positive employment effects of foreign acquisitions in Swedish manufacturing, with employment of skilled labour increasing more than that of unskilled labour. This is more pronounced in Swedish firms that are not part of Swedish multinationals. Contrary to this, however, Hittunen (2007) found that foreign acquisitions decrease the share of highly educated workers in Finnish establishments 1988-2001.

Balsvick and Haller (2010) found that plant-level employment and wages increase after foreign acquisitions in Norway. They found that foreign acquirers pick large, high performing plants, and suggest that this is consistent with foreign takeovers occurring to gain access to local markets. Lehto and Bockermann have more nuanced findings in that they found adverse employment effects of cross-border mergers are much less in services than in manufacturing. They observed, consistent with Bandick and Karpaty, that foreign acquirers take over domestic firms with

high levels of human capital. In the United States, O'Shaughnessy and Flanagan (1998) also found that lay-offs are less likely in cross-border mergers and acquisitions because they tend not to be motivated by rectifying inefficiencies.

Recent evidence to the contrary, however, indicates a negative impact of foreign takeovers on employment in German manufacturing enterprises in 2007–2009 (Weche Gelbücke 2012), although an explanation for this finding cannot be developed with the data used. There are few comparative studies of takeovers but the results so far are provocative. Gugler and Yurtoglu (2004), in their study of 646 transactions, found that labour demand falls in European companies after takeovers but not in the United States. They argue that flexible labour markets in the latter mean that takeovers provide less of a shock to firms. In other words, they are less likely to need mergers or acquisitions to bring about employment change.

5.5 Finance

M&A transactions are typically financed by shares, cash or a combination of the two. Where cash is used, the acquirer typically takes on debt to resource the transaction because of limited cash and liquid assets (Faccio and Masulis 2005). It has been predicted that the extent of leverage, either in the transaction or that held by the acquirer more generally, will have adverse effects on employment after the takeover. This is consistent with the idea, popularised by Michael Jensen, that debt forces managers to increase efficiency by restricting their access to free cash flow. There is some evidence to support this prediction: Krishnan et al (2007) and Kuvandikov *et al.* (2014a) found that levels of leverage increase the probability of workforce reductions post-takeover.

5.6 Size of the transaction

In most takeovers the target is smaller than the acquirer and the probability of being taken over diminishes with firm size. Both Krishnan *et al.* (2007) and Kuvandikov *et al.* (2014a) found that the smaller the difference in size between acquirer and target, the greater the likelihood that employment will be reduced. Similarly, Maksimovic *et al.* (2011) found that the probability of post-takeover divestitures increases with the

size of the target relative to the acquirer firm. These results are consistent with the view that larger acquisitions are more problematic to ‘digest’. Also, larger takeovers may be driven by managerial hubris or a desire to implement large-scale industry restructuring rather than by a concern to achieve more incremental increases in the range or extent of corporate activities.

5.7 Timing

The timing of takeovers may well impact upon employment change, though this has not been systematically investigated. Takeovers occurring towards the end of takeover booms appear to be more likely to be driven by herding effects and managerial hubris (Martynova and Renneboog 2008), with the result that these takeovers are less successful. That they occur shortly before steep falls in stock markets and economic recession is also not conducive to successful outcomes. The evidence suggests that abnormal returns – the performance differential attributable to the takeover – tend to be lower for takeovers towards the end of the takeover cycle (Harford 2005) and it may be that this subsequently imposes greater pressure for employment contraction. In the extreme case, large ill-judged takeovers taking place shortly before a recession may lead to very substantial post-takeover restructuring.

5.8 Characteristics of target companies

A dominant perspective within the economics literature suggests that acquirers target under-performing firms so as to reallocate resources to more efficient users (Manne 1965). Restructuring is therefore likely to occur after takeovers. On this basis relatively poor performance of target companies prior to takeover is expected to predict employment reductions after the transaction. The evidence supports this contention, with a range of studies finding that relatively poor productivity or financial performance is associated with adverse employment change post-takeover (Coucke *et al.* 2007; O’Shaughnessy and Flanagan 1998; Krishnan *et al.* 2007).

Kuvandikov *et al.* (2014a) found that executive ownership in the acquiring firm has a strong bearing on whether employment grows or falls post-takeover. They argue that loss aversion induces managers with ownership

stakes to select takeovers of firms with better past performance. In these cases employment is more likely to grow after the takeover.

6. Conclusions

Much of the literature finds that takeovers have adverse effects on employment, though equally there is evidence of employment growth in some cases. Recent literature has attempted to identify determinants of employment change after a takeover, using various characteristics of takeover transactions and the firms undertaking them as predictors. It seems likely that managerial motives for takeovers are likely to affect employment outcomes, but the reliance on accounting data in the literature means that managerial motives are rarely directly observed. Nevertheless, it seems reasonable to conclude that large-scale takeovers arising from managerial hubris are likely to have more adverse effects on employment than smaller-scale takeovers aimed at securing access to new markets or integrating parts of the supply chain. Although the findings from the literature are inevitably somewhat diverse, taken together they do enable reasonable predictions to be made about the kinds of takeovers that pose a particular risk to employment.

A limitation of the literature is that it is often difficult to judge whether employment reductions involve job transfer or job destruction. The former will usually be less damaging than the latter, though the adverse effects of the former on workers should not be under-estimated. The plant-level studies give a better indication of employment consequences, although they are not immune from uncertainty concerning the nature of employment reductions. Ideally, more qualitative information on employment change would be sought, but collection and integration of this with large-scale statistical data will be challenging.

Finally, it is worth returning to the argument that takeovers involve a transfer of wealth from employees to shareholders. Few studies have attempted to fully test this proposition but the evidence has not been supportive. Beckmann and Forbes (2004) argue that takeovers lead to 'equal misery': both employees and shareholders suffer wealth losses, while Kuvandikov *et al.* (2014b) found that employees and shareholders share returns (or losses). It is possible that the 'breach of trust' perspective is specific to certain times and places. It was developed in the context of the 1980s takeover boom in the United States, involving the

dismemberment of conglomerate firms, leveraged buy-outs and hostile takeovers. Large-scale restructuring and employment reductions often followed takeovers with these characteristics. Subsequently, these kinds of takeover have been less in evidence in the listed sector in the United States and the United Kingdom. However, a similar phenomenon may be widely observed today among private equity acquisitions in the United States and Europe (see Gospel *et al.* 2014) and it may be that labour is especially at risk of wealth transfer in this kind of transaction.

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Chapter 4

European company law and the Takeover Bids Directive – the need for a change

Séverine Picard

1. Introduction

European directives undergo a review at regular intervals (usually every five years). A review enables policymakers to decide whether the instrument is fulfilling its assigned objectives and whether legislative changes should be envisaged.

The Commission published its report on the review of the Takeover Bids Directive in June 2012.¹ The European Parliament reacted in a Resolution adopted in March 2013.² The conclusions of this process are unclear. While neither the Commission nor the European Parliament call for the Takeover Bids Directive to be revised in the immediate future, they are not fully satisfied with its functioning. Both institutions list key issues that would merit clarification (such as acting in concert, national derogations to mandatory bid rule, the board neutrality rule and employees' rights). The Commission prefers to handle these points via the non-legislative route (for example, infringement proceedings or communications, as well as bilateral discussions). The European Parliament proposes to come back to the issue when economic activities in the EU return to a more even keel.

The ETUC participated in the review process and expressed strong dissatisfaction with the Takeover Bids Directive. Despite having a significant impact on working conditions throughout Europe, the Directive's provisions on workers' rights are very weak. The European trade union movement has called unequivocally for a revision of the text. The starting point for a revision should be to change the current shareholder model that is emblematic of today's European company law into a broader stakeholder approach (Section 2). This means in particular

1. COM (2012) 347 final.
2. 2012/2262 (IN1).

that the provisions on workers' rights need considerable strengthening (Section 3).

Both the Commission and the European Parliament noted these concerns and the Commission intended to pursue its dialogue with employee representatives with a view to exploring possible future improvements. Three years later, we are still waiting for Godot.

2. Shareholder vs stakeholder

The 'competitiveness of the European economy' is a central point of concern in European company law. The EU is pursuing a regulatory competition agenda based on minimal requirements at EU level. The purpose is not to propose a harmonised approach to what should define a European company, but to increase business mobility at all costs. National company laws, where they provide for fairness and social justice, are under fire from EU law and pressure is increasing towards more regime competition among national company laws to attract companies. We might describe this as the 'European Delaware effect'.

This whole approach to EU company law is dominated by shareholder ideology, which claims that a company is the private domain of shareholders and that workers are merely a factor of production.

The Takeover Bids Directive is a typical illustration of this deregulatory approach. In the words of the Commission,

the purpose of the Takeover Bids Directive in facilitating takeover activity through efficient takeover mechanisms required the removal of some of the main company-related obstacles permitted under national company law; these obstacles meant that takeovers could not be undertaken on equal conditions in the different Member States.³

The view according to which takeovers improve the efficiency of the European economy can be challenged. However, the Takeover Bids

3. Report on the implementation of the Directive on Takeover Bids, Commission staff working document SEC (2007) 268.

Directive gives no or little consideration to the long-term interests of the company and its stakeholders.

The recent Commission proposal for a directive on a single-member private limited liability company ('the SUP') is another illustration of the minimalist approach promoted by European company law.⁴ The Commission proposes to abolish the principle of a substantial capital base and to introduce simplistic registration requirements. One of the announced objectives of this initiative is to enable companies to pick and choose the regime (national or European) that suits them most.

This deregulatory agenda is also creating damaging inconsistencies within the EU legal order. Achievements with regard to one EU instrument – very often following long compromise processes at EU level – are called into question in subsequent ones. For instance, the key achievements of the SE Directive on employees' involvement⁵ were significantly diluted in the 2005 cross-border merger Directive.⁶ In their quest for the 'lightest regime', companies are not only able to pick and choose national laws; they can also put EU instruments in competition with each other.

The Takeover Bids Directive was adopted following a series of groundbreaking instruments on workers' rights to information and consultation. However, the Directive does not draw inspiration from them and merely contains a meagre, ineffective provision on a right to information. The transfer of undertakings Directive⁷ is a cornerstone of EU labour law, involving and protecting workers in case of a change of employer. But the Takeover Bids Directive does not foresee its application in case of share sales.

The ETUC is calling for a radical change of policy with regard to European company law and the Takeover Bids Directive is as good a place as any to start. A company is a community. Workers' interests should be placed on the same footing as shareholders; they need to have a right to exercise 'voice' within the firm.

4. COM (2014) 0212.

5. Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees.

6. Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies.

7. Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

3. ETUC proposals for revision of the Takeover Bids Directive

Takeovers on the whole must be regarded critically in relation to their impact on stakeholders and the economy. The main benefactors of takeovers tend to be the shareholders in the company being taken over and the top managers of the acquiring company.

These benefits do not appear to be shared by employees and society as a whole, however. Takeovers frequently involve significant decreases in employment levels and working conditions. One of the key motives for many takeovers is cost reduction through reducing employment and benefits – such as wages and pension benefits – increasing work intensity and reallocating production to ‘cheaper’ sites. Research on the employment impact of takeovers also shows that, on average, employment declines in a 2–3 year period after the takeover.

Although not yet systematically investigated, the high levels of debt taken on to finance many takeovers – for example, for very large private equity takeovers (so-called ‘mega buyouts’) – should also be mentioned as a major cause for concern. The financial pressure on highly leveraged companies to meet interest payments during crisis conditions may lead to greater reductions in employment and investments (such as research and development) compared with companies with lower debt levels.

The ETUC does not support further liberalisation of the current legal framework, in particular with regard to hostile takeovers. Adequate defensive mechanisms must remain in place. With regard to the board neutrality rule, it should be clarified that the board of the offeree company must act in the long-term interest of the company and its stakeholders.

Most importantly, a complete rethinking of the provisions on workers’ rights is urgently needed, with a view to bring the Directive in line with the rest of the Community *acquis*.

First, the Takeover Bids Directive must contain a clear reference to Directive 2001/23/EC on safeguarding of employees’ rights in the context of transfer of undertakings. Directive 2001/23/EC is one of the cornerstones of European labour law. According to this instrument, a transfer of undertakings does not in itself constitute valid grounds for dismissal. This means that unless dismissals can be motivated for economic,

technical or organisational reasons not connected to the transfer, rights and obligations arising from an employment relationship shall be maintained after the transfer. Information and consultation regarding the proposed transfer must also be carried out beforehand.

Currently, workers who are the subject of a transfer in which the legal personality of the company has not been changed – which is the case in share sales – do not benefit from the protection of Directive 2001/23/EC. The ETUC has repeatedly called for a uniform application of this Directive to all workers in the EU. It is absurd that workers in a similar situation should be treated differently depending on whether or not their company is listed.

Secondly, proper consultation rights must be introduced. Workers' 'voice' during a takeover bid is extremely weak. Currently, employee representatives can express their opinion, and this opinion is supposed to be forwarded by management to the shareholders of the offeree company. However, only the shareholders in the 'target company' have the right to decide on whether or not to accept the takeover offer. These shareholders will typically not share the interests of employees in the long-term sustainability of the company. Instead, they have every incentive to 'cash in' on the premium in the takeover bid and to 'exit' the company by selling their shares.

A specific right to consultation must be introduced in the Takeover Directive. 'Consultation' should be understood as the establishment of a meaningful dialogue between employee representatives and both the offeror and the offeree, with a view to reaching an agreement on the proposed measures. It is very important that this dialogue take place before any decision is finalised and that both existing management and the acquiring company are involved.

Improved rights to information and consultation must go hand in hand with adequate sanctions. Currently, the Takeover Bids Directive relies on the Member States to determine effective, proportionate and dissuasive sanctions for the infringement of the Directive. This provision is clearly insufficient and has failed to guarantee proper implementation.

The Directive contains obligations to inform employee representatives about certain aspects of the bid, in particular with regard to the repercussions for employment. Although offerors are required by the

Takeover Bids Directive to provide information on their ‘intentions with regard to the future business of the offeree company’, including employment levels and conditions, these stated intentions are frequently not fulfilled in practice and there are no effective sanctions for non-fulfilment.

The Takeover Bids Directive also foresees that the rules on information and consultation contained in other EU instruments, such as the European Works Council Directive, must be applied. However, these obligations are frequently not respected in practice.

The ETUC considers that the only way to guarantee compliance with the obligations contained in the Directive is to provide that the legal effects of the takeover be suspended until all the obligations have been adequately fulfilled. This should be the case in particular in instances of serious violations of employees’ right to information and consultation.

A final demand refers to the right to expertise. In order to provide a valuable and well informed input, employee representatives often need to have recourse to expertise because of the complexity of questions surrounding bids for takeovers. Experts can be specialists – lawyers, economists and so on – depending on the subject matter. Experts can also play a monitoring and supporting role. In this regard, experts can be trade union representatives.

The Takeover Directive should grant employee representatives a right to expertise. The cost should be borne by management and only employee representatives should be able to select the most appropriate experts.

Part 2

Case studies of national legal frameworks and company takeovers

Chapter 5

The Austrian Takeover Act – an instrument for worker participation?

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1. Introduction

Two significant institutional features of Austria's political economy that are highly relevant for takeovers are (i) the concentrated ownership of listed Austrian companies and (ii) the strong system of worker involvement through works councils and board-level employee representation. The first feature in most cases reduces the effectiveness of protections for workers provided by the EU Takeover Bids Directive, because takeover deals in Austria are typically arranged 'behind the scenes' by the majority shareholders of the companies involved. In practice, a deal between an offeror and the controlling shareholder of the offeree company is frequently completed before the offer is announced and before the formal takeover process starts in accordance with the Takeover Act. It thus becomes difficult for a works council to influence a takeover procedure once it has been launched. On the other hand, a strong system of worker involvement through works councils and board-level employee representation makes it possible for workers to be involved in the takeover process when this is not the case.

The Austrian case thus illustrates the weaknesses of the protections for workers provided by the EU Takeover Bids Directive in many cases, because the owners of companies are not obliged to inform or consult with workers while deals are being made between controlling shareholders. However, the case study presented (Voestalpine's 2007 takeover of Böhler-Uddeholm) is typical for this country, because it is one of the only two cases known to the author in which worker representatives issued an opinion on the bid document. It is also one of the few cases of hostile takeovers in Austria. It illustrates the role worker representatives can play in influencing the outcome of takeover attempts in situations in which a 'behind the scenes' deal has not been made, through building coalitions with other relevant actors.

2. Key elements of the Austrian Takeover Act

Since 1 January 1999 the Austrian Takeover Act has been applicable to listed Austrian companies. The Act contains principles and rules for voluntary and mandatory takeover bids. In 2006, the European Directive 2004/25 on takeover bids was implemented through the Takeover Act of 2006. The Austrian Takeover Commission has 12 members and fulfils the tasks specified in the Act. The Commission is an independent body responsible for supervising the offer procedure and deciding whether a mandatory bid has to be made. Members of the board have only limited means to intervene because of the ‘neutrality’ clause.

This section provides an overview of the most important aspects of the Austrian Takeover Act.

2.1 Change of control

The 2006 Takeover Act incorporated a new definition of ‘controlling interest’. A change of control is generally presumed to have taken place if more than 30 per cent of the voting stock of a target or offeree company is directly or indirectly held by an individual or legal entity. A bidder (or parties acting in concert) who acquires a controlling interest in a target company is obliged to launch an offer to all other shareholders of the target company to purchase their shares (a so-called ‘mandatory bid’). Since 2006 the Takeover Act contains a so-called ‘safe harbour rule’. This means an acquisition of voting rights not exceeding 30 per cent will in no case trigger a mandatory bid.

2.2 Minimum purchase price of the bid

The Takeover Act (§26) contains two pricing rules: the price of a mandatory bid or of a voluntary bid to acquire a controlling interest shall not be less than the price paid by the offeror – and any parties acting in concert with them – for any shares of the offeree company purchased within the preceding 12 months before the announcement of the bid. The price shall correspond at least to the average market price of the offeree shares during the six-month period prior to announcement of an intention to make an offer. A mandatory offer should be in cash, but shares may be offered as an alternative to a basic cash offer.

2.3 Minimum content of the bid

§7 of the Takeover Act sets out minimum requirements for offer documents. From the employees' point of view the following information in the offer document is important:

- The offeror must state their intentions regarding the future business of the offeree company and, insofar as it is affected by the bid, of the offeror company with regard to the safeguarding of the jobs of their employees and management, including any material change to employment conditions. It must also lay out its strategic plans for the two companies and the likely repercussions on employment and the locations of the companies' place of business.
- The Takeover Commission must check the offer documents before the offer is published. The Commission also checks whether the information provided and the offer price are in compliance with the Act. The Takeover Commission may prohibit the publication of the offer document if it determines that the bid or the offer documents are not in conformity with the law.

2.4 Statement of the offeree management and supervisory board, and of the works council

Before publication, the offeror has to submit the offer documents to the management board and the supervisory board of the offeree company. The offeror and the management board of the offeree company must immediately inform their respective works councils and transmit the offer documents upon receipt. Moreover, the management of the offeree company has to inform its works council of the possibility of making a statement and of the planned time of the announcement of the takeover bid.

According to §14 of the Takeover Act the management board and the supervisory board of the offeree company shall publish a response to the bid immediately after publication of the offer documents. The response shall contain, in particular, an assessment of whether the consideration offered and the other terms of the bid take adequate account of the interests of all shareholders. Furthermore, based on the strategic planning of the offeror regarding the offeree company, it should assess what the

probable effects of the bid would be on the offeree company, especially with respect to employees (jobs, working conditions and the fate of locations), to creditors and with regard to the public interest. Should the management board or supervisory board be unable to give a final recommendation, they must in any case outline the arguments for accepting or rejecting the bid, highlighting the most important features.

The management board must publish its response, together with any response of the supervisory board and works council, within ten exchange trading days of publication of the offer documents, but at the latest five exchange trading days prior to expiry of the acceptance period.

2.5 Prohibition of attempts to prevent takeovers and the obligation of neutrality

The management board and supervisory board of the offeree company may not take measures to deprive their shareholders of the opportunity to make a free and informed decision on the bid. Shareholders must approve defensive measures taken to discourage bids. Only the search for other competing bids is allowed without the express approval of shareholders.

2.6 Publication of the outcome of the bid

The period for accepting the bid shall be not less than two weeks and no longer than ten weeks after the publication of the bid documents. The result of the bid has to be published by the offeror. In certain cases – for example, mandatory bids – the acceptance period is prolonged by three months from the day of the announcement.

3. Statistical data on and functioning of takeover bids¹

As of December 2013 the Takeover Commission had dealt with 57 takeover bids. In 45 cases there was a change of control. In 19 of those cases the offeror made a voluntary offer to acquire a controlling interest

1. For more information: www.takeover.at; Wolf Theiss: Takeovers of public companies in Central and South-eastern Europe, p. 23ff. http://www.wolftheiss.com/tl_files/wolftheiss/CSC/Guides/Wolf_Theiss_Guide_to_Takeovers_of_Public_Companies_in_Central_and_Southeastern_Europe.pdf, downloaded on 11.3.2014.

and in 26 cases the offeror obtained a controlling interest and had to make a public offer.

Most of the companies listed on the Vienna Stock Exchange are controlled by a majority shareholder, a core shareholder or a syndicated group of shareholders. This means that hardly any Austrian public companies have a large free float (the number of small shareholders is low). This also applies to the acquired companies. A typical takeover situation in Austria is organised like this: the offeror and the controlling shareholder of the offeree company negotiate the acquisition and the deal is already completed before the offer is announced. Often this happens before the management board or supervisory board of the offeree company is informed. The offeree company thus gets a new controlling shareholder regardless of the outcome of the takeover bid. The mandatory takeover gives all shareholders the choice either to stay in the offeree company with the new controlling shareholder or to leave the company on the same terms as the old core shareholder. Because the package price that the old controlling shareholder get from the offeror is normally higher than the market price, the small shareholders typically accept the offer.

In other words, it often does not make sense for the works council to make a statement on the takeover because de facto the company already has a new controlling shareholder. After a review of all takeover bids in Austria since 1999 by the author it was possible to identify only two cases where works councils utilised this right. This first was Voestalpine/Böhler-Uddeholm, in which the (European) Works Council issued an opinion. The second was in 2014, when the Mexican mobile phone company America Movil launched a public takeover bid to the shareholders of Telekom Austria. In this case the works council of Telekom Austria made use of the right to express an opinion.

4. Case study: Voestapline's 2007 takeover of Böhler-Uddeholm

4.1 The Böhler-Uddeholm group

Böhler-Uddeholm was formed in 1991 as a result of a merger between the Austrian company Böhler and the Swedish firm Uddeholms AB. Initially, it was a state-owned enterprise. In 1995 the government, represented by the Österreichischen Industrie Holding AG (ÖIAG), started to reduce the

size of its shareholding via an IPO (initial public offering). In 2003 ÖIAG sold the remaining 25 per cent of shares it held, thus Böhler-Uddeholm became a fully privatised enterprise. The new controlling shareholder was an Austrian private investor group that initially held 25 per cent of the shares of Böhler-Uddeholm. In the year of acquisition (2007) it held around 21 per cent of shares through BU Industrieholding GmbH.

The Böhler-Uddeholm group became a worldwide leader in specialty steel and materials with a focus on four divisions: high-performance metals, welding consumables, precision strip and special forgings. Böhler-Uddeholm was one of the most important Austrian industrial companies, employing approximately 14,300 employees worldwide and generating sales of more than 3 billion euros in 2006.

4.2 Takeover attempt by CVC Capital Partners

In 2007 it was announced that the core shareholder of Böhler-Uddeholm, BU Industrieholding GmbH – which was owned by the Austrian private investor group – was interested in selling its shares.² In March 2007 the British private equity fund CVC Capital Partners confirmed talks with the core shareholders and informed the public that CVC was considering making a takeover offer. The financial investors also announced that CVC was interested in a long-term investment but would make a takeover offer only if the management of Böhler-Uddeholm gave its approval. On 21 March 2007 CVC said it had reached an agreement with BU Industrieholding GmbH to buy its stake.

The attempt by CVC to buy Böhler-Uddeholm prompted criticism at the highest levels in Austrian politics. It was said that a takeover of Böhler-Uddeholm by CVC would be catastrophic for the company and not in the interests of Austria. The works council of Böhler-Uddeholm also expressed its concern and stressed that the workforce was worried about the long-term future of the company. It was feared that, after a resale of Böhler-Uddeholm by CVC, there could be a hostile takeover or filleting of the group. Böhler-Uddeholm's CEO Claus Raidl, one of the most respected managers in Austria, said he needed some time to analyse the position paper received from CVC, the prospective new owner. Over the

2. All documents are available at the homepage of the Austrian Takeover Commission: www.takeover.at; see also: <http://www.voestalpine.com/group/de/konzern/>

next few days the intended takeover was a leading topic in the media and in the background various people were looking for an alternative solution.

4.3 Böhler-Uddeholm's CEO rejects a takeover by CVC – a 'white knight' is presented

A week later, on 28 March 2007, Böhler-Uddeholm's CEO Raidl told the controlling shareholder, BU Industrieholding GmbH, that it should not accept the offer; any deal with CVC would fail to create a sustainable shareholder structure for Böhler-Uddeholm and was not in the interests of the company. The British private equity fund was stunned. One day later, on 29 March, BU-Industrieholding GmbH (represented by Rudolf Fries), Böhler-Uddeholm CEO Claus Raidl and a new investor, Voestalpine (represented by CEO Wolfgang Eder) announced in a joint press conference an 'elephant wedding' in the Austrian steel industry.

Voestalpine agreed with the shareholders of BU Industrieholding GmbH to acquire their holdings, thereby indirectly owning almost 21 per cent of the shares of Böhler-Uddeholm, as BU Industrieholding GmbH's business purposes were limited to the holding and management of Böhler-Uddeholm shares. In addition, Voestalpine launched a voluntary public takeover bid to the shareholders of Böhler-Uddeholm at 69 euros per share. Its 'white knight' bid thus shelved the offer by private equity firm CVC Capital Partners, whose offer had sparked fierce political resistance.

For decades Voestalpine and Böhler-Uddeholm had operated under the umbrella of the nationalised industries. After the breakup of this umbrella in the early 1990s they went separate ways. Voestalpine group, today a fully privatised enterprise with significant employee ownership, is a leading European processing group with its own steelmaking facilities and its registered office in Austria. The group is divided into four divisions – steel, railway systems, automotive and profile form – and employs about 26,000 employees worldwide. In the fiscal year 2005/06, the Voestalpine group generated revenues of 6.5 billion euros. It has production and distribution companies in 31 countries worldwide. The group's holding company, Voestalpine AG, has been listed on the Vienna Stock Exchange since 1995. In 2007 the major shareholders of Voestalpine were:

- Raiffeisenlandesbank Oberösterreich Invest GmbH & Co OG: 15 per cent

- Voestalpine employee shareholding scheme: 10.3 per cent
- Oberbank AG: more than 5 per cent
- Axa Group

BU-Industrieholding GmbH strongly welcomed the takeover by Voestalpine as a ‘great industrial solution for Böhler-Uddeholm’. Also Böhler-Uddeholm CEO Claus Raidl was satisfied with the solution found after the turmoil surrounding the takeover plans by CVC saying ‘Voestalpine and Böhler-Uddeholm live in a common world, we have a partner who understands our business’. In 2007/8 the created group generated 10 to 11 billion euros in sales and employed almost 40,000 people worldwide.

4.4 Offer document published on 26 April 2007

On 26 April 2007 Voestalpine AG published a voluntary public takeover bid to all shareholders of Böhler-Uddeholm. Voestalpine offered Böhler-Uddeholm shareholders 69 euros a share ex dividend 2006. The average share price of Böhler-Uddeholm shares within the six months preceding the announcement of the intention to launch the bid was 57.33 euros per share. The bid price per share was therefore 20.4 per cent higher than the average price and corresponded to the purchase price of 69 euros per share received by BU-Industrieholding GmbH.

The takeover bid was conditional upon Voestalpine AG reaching a shareholding of more than 50 per cent of Böhler-Uddeholm AG’s voting stock and obtaining the relevant merger control approvals.

The offer documents contained the following main points regarding the impact of the takeover on the offeree company and on employment and business locations of the offeree company:

- Voestalpine planned that the Böhler-Uddeholm group should retain all company names, corporate designations and trademarks after the takeover;
- the Böhler-Uddeholm group and its management would be preserved as an Austrian stainless steel group with a global presence and the head office would be maintained for this part of the group; and

- Voestalpine planned to integrate Böhler-Uddeholm in its current structure into the group as its fifth division. There were no plans to close or transfer sites following the acquisition of a majority of the shares in Böhler-Uddeholm, nor were there plans to reduce the workforce after the envisaged takeover.

4.5 The management and supervisory boards of Böhler-Uddeholm recommend acceptance of the takeover bid

The management board and the supervisory board emphasised that Voestalpine AG's takeover bid did not lead to a deterioration in the current position of employees (jobs, working conditions and the fate of the locations), of customers and creditors, as well as of the public. Both welcomed the assured preservation of market profile, the maintenance and development of the four divisions, the continuation of policy regarding capital expenditures and acquisitions, as well as the preservation of Böhler-Uddeholm as an Austrian speciality steel group with a global presence.

4.6 Statement of the European Works Council

The Austrian works council of Böhler-Uddeholm handed over the task of dealing with the takeover to the European works council (EWC). The EWC issued a comprehensive opinion stressing that the offeree company had a strong corporate culture that manifested itself in a fair and efficient operational partnership between owners, management and employee representatives. Although synergies would be created by the merger, closures were not expected. The project was evaluated positively because the offer documents, management board and supervisory board stressed in their statements that there were no plans to close or transfer sites or to reduce the workforce following the acquisition of a majority of the shares in Böhler-Uddeholm. The EWC also welcomed plans for the Böhler-Uddeholm group to retain all company names, corporate designations and trademarks after the takeover. The EWC was confident that the Böhler-Uddeholm group would remain an independent unit. Although there was no statement in the offer regarding the future cooperation between the worker representatives of Böhler-Uddeholm and Voestalpine, the EWC pointed out that the works councils of both companies had a strong corporate culture and were interested in balancing conflicts of interest. Based on these arguments the EWC had no objection to the merger.

4.7 Voestalpine increases the bid price and is successful in taking over Böhler-Uddeholm

On 19 May 2007 Voestalpine increased its initial bid price by 4 euros (around 5.8 per cent) from 69 euros to 73 euros ex dividend 2006 ('Increased Bid Price'). Within the acceptance period the free float sold 33.7 per cent of the equity capital of Böhler-Uddeholm to Voestalpine. Considering the Böhler-Uddeholm shares acquired indirectly through BU Industrieholding GmbH (20.9 per cent), Voestalpine secured a share of approximately 54.6 per cent of Böhler-Uddeholm's aggregate equity capital. Thus the condition of Voestalpine AG reaching a holding of more than 50 per cent of Böhler-Uddeholm AG's voting stock was fulfilled and the takeover was successful.

In 2008 Voestalpine held more than 90 per cent of Böhler-Uddeholm shares. The remaining shareholders were bought out through a squeeze-out and as of 23 June 2008 Böhler-Uddeholm was no longer listed on the Vienna Stock Exchange. Böhler-Uddeholm is today completely integrated into the Voestalpine group and has changed its name to Voestalpine Edelmetall GmbH.

At present the Voestalpine group consists of 500 companies and has locations in more than 50 countries on five continents. In the business year 2012/13, the group reported revenue of 11.5 billion euros and an operating profit (EBITDA) of 1.45 billion euros. It has around 46,400 employees worldwide. The largest shareholders are still the Austrian bank Raiffeisenlandesbank Oberösterreich Invest GmbH & Co OG (14.96 per cent) and the Voestalpine Employee Shareholding Scheme (14.4 per cent).

5. Conclusions

The Austrian case illustrates the weakness of the workers' rights provided by the EU Takeover Bids Directive, which are focused mainly on the right of workers' representatives to state an opinion on the takeover bid. Since 1999, Voestalpine/Böhler-Uddeholm has been one of only two takeover attempts in which the works council (in this case the EWC) issued an opinion on the bid. It appears that the possibility of making a works council statement within the takeover procedure has no impact on the process. This is because most companies listed on the Vienna Stock Exchange are controlled by a majority shareholder, core shareholder or

syndicated group of shareholders. In the event of a takeover, the deal is usually completed before the offer is announced and before the formal takeover process starts in accordance with the Takeover Act.

This shows that it is important that workers' representatives be involved earlier in the takeover process. Critical statements regarding a takeover attempt have to be made at an earlier stage, because in the formal takeover procedure a new controlling shareholder de facto usually already exists when the formal bid is made. Therefore it makes more sense for the works council to be able express an opinion as soon as rumours about a possible takeover are on the market.

The Voestalpine/Böhler-Uddeholm case, which is atypical of Austria due to the hostile nature of the initial takeover bid, shows that workers' representatives can have an important influence on the takeover process in cases in which a deal has not been struck between controlling shareholders for a transfer of ownership. This can be done in such situations through forming a coalition with other relevant interests, such as the management of the target company and the government. In this case an initial approach made by the private equity firm CVC was opposed by such a coalition. A 'white knight', the Austrian company Voestalpine, was recruited and its alternative bid successfully implemented, in part due to the support of the works councils of both the target and the 'white knight' companies.

Chapter 6

Information and consultation rights of employee representatives in Belgium in public takeovers

Guy van Gyes

1. Introduction

In Belgium, trade unions play a strong role in collective bargaining and workers enjoy relatively strong rights of information and consultation through local works councils. Works councils have specific rights to information and consultation, dating back to the 1970s, which include the right to be consulted before final decisions are made by management. In the case of takeovers, the Belgian works council in the target company also has a right to meet with the bidder management. This goes above and beyond what is required by the EU Takeover Bids Directive.

The case examined here – the takeover of the Belgian telecommunications company Telenet by a foreign firm – nevertheless illustrates that substantial problems exist regarding the protection of workers during takeovers. First, even though the works council was concerned about the possible impact of the takeover bid on employment, its options for defending workers' interests were limited because the bidder firm already controlled a majority of shares in the company. Second, the case shows the need for additional trade union expertise to better advise workers' representatives on how to act in such situations.

2. Key elements of the takeover legislation

The Law of 1 April 2007 (M.B. /B.S. 23 May 2007) and the complementary Royal Decree of 27 April 2007 implemented the EU Directive on Takeover Bids (Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids). On 1 September 2007 the new law on takeover bids took effect. The public takeovers legislation constitutes Belgium's first new legislation on public takeovers in 18 years. The main objectives of the legislator were to implement the Directive and to modernise the takeover procedure.

The previous legislation from 1989 was adopted in response to the limitations of the ‘soft’ regulations that were previously in place. The legislative activity in 1989 was triggered by a ‘hostile’ attempt by the Italian Benedetti to take over Generale Holding. The 1989 rules already included an information and consultation procedure for employees. The 2007 Act adds important and stronger information and consultation mechanisms for the workforces of the ‘bidder’ and ‘target’ companies.

In comparison with the 1989 legislation the information and consultation rights are no longer restricted to an (existing) works council and to the employees of the target company. Combined with information and consultation rights contained in other acts it is obligatory to inform the workforce before a decision is taken.

In this section we briefly introduce the key elements of the Belgian takeover legislation after the changes related to the Takeover Directive (van Gerven 2007; De Cordt *et al.* 2007).

2.1 The control authority

In the aftermath of the banking crisis, the financial regulatory authority was restructured and split up. Regulatory authority in relation to the Belgian takeover law went to the newly created FSMA (Financial Services and Markets Authority), established on 1 April 2011. The FSMA’s status is that of an autonomous public institution. This means that it was established by law and that it carries out independently the tasks in the general interest entrusted to it by Parliament. The FSMA is solely responsible for monitoring the application of the new law and its implementing decrees. The powers given to the FSMA are far-reaching: it can impose fines, non-compliance penalties and even prison sentences when it establishes that there have been infringements of the new law and its implementing decrees.

In 2012 the FSMA handled five takeover cases (all voluntary); three of them resulted in a squeeze-out. To monitor compliance, the FSMA can also demand that it be given all information, documents or papers that it considers necessary to carry out its supervisory task. Its particular features include the following:

- *Broader scope.* Only listed companies are subject to the rules relating to mandatory bids under the Public Takeovers Legislation. But it is worth noting that the voluntary takeover legislation also applies to public non-listed companies, which are subject to a takeover bid of a public nature.
- *Jurisdiction.* Under the previous legal regime, any offer initiated in Belgium was subject to Belgian law, without prejudice to the nationality of the target or to similar offers launched in other countries. This proved to be very difficult to implement in practice, with different regulators controlling simultaneous offers made in different jurisdictions. Pursuant to the Directive, public takeovers are regulated by the supervisor of the jurisdiction in which the target company has its registered office if its shares are admitted to trading on a regulated market in that country. The Public Takeovers Legislation incorporates this principle.

2.2 Mandatory or voluntary bids

In contrast with the previous law, the new law defines the term ‘public takeover bid’ as ‘a bid addressed to the shareholders of the target company in order to acquire all or some of their securities, regardless of whether the bid is voluntary or mandatory’ (Article 3§1.1°).

As of 1 September 2007, a person or a company that, either alone or in conjunction with third parties, directly or indirectly acquires more than 30 per cent of the voting securities issued by a target company admitted to a regulated market must make a bid for all securities giving access to voting rights. An indirect acquisition of control can also give rise to a mandatory takeover bid.

There are exceptions to the obligatory takeover bid:

- in the context of a voluntary takeover bid;
- in case of a transfer between affiliates;
- if there is another larger shareholder, or if a third party has control of the company;
- in case of a capital increase of a company in financial difficulty (Article 633, Companies Code);

- in the context of a capital increase with preferential rights, decided by the shareholders' meeting;
- in case of a merger decided by a majority that does not include the entity holding more than 30 per cent of the securities;
- if the limit is exceeded by no more than 2 per cent, on condition that the securities above the threshold are transferred within 12 months and that the voting rights linked to the securities above the threshold are not exercised;
- in case of a gift or transfer of securities as a consequence of inheritance law or matrimonial property law;
- if the acquisition is made at no cost by a public foundation that falls under Law of 27 June 1921;
- in the context of a fixed takeover of shares or a sale of a bond to the extent that the securities above the threshold will be transferred within 12 months and the voting rights linked to the securities above the threshold will not be exercised;
- if the offeror intends to carry out a certification, to the extent that this occurs with the cooperation of the target company and that the certificates can, under all circumstances and without restriction, be traded for a period of three years after the acquisition (Article 52 of the Royal Decree). Certification is, briefly explained, a legal procedure by which somebody transfer the profits and incomes of the company assets he or she holds to somebody else, but keeps all other property rights of the assets (Belgian law of 15 July 1998).

2.3 Information requirements

All shareholders of the target company must be sufficiently informed and have enough time to consider the bid. The first formal step related to a (voluntary) public takeover is to inform the FSMA. A bidder must notify the regulator of its intention to launch a public takeover bid before it is launched by providing the FSMA with a takeover notice and a file that contains a draft prospectus, draft press releases and other relevant documents for the examination of the prospectus. The file will also include an independent expert valuation report in case of a (voluntary) takeover launched by a controlling shareholder on the securities of the target it does not yet own. The FSMA will then, according to the law, make this notification public on the day following the filing; however, it can suspend the publication for ten working days when it suspects regulatory violations. This notification does not already mean that the FSMA accepts

that the public bid can proceed. On the same day, it will also inform the target, the relevant stock exchange and the bidder itself.

The FSMA has ten business days following receipt of the draft prospectus and relevant documentation to request – if necessary and on reasonable grounds – additional information. The FSMA may also ask the bidder to include additional information in the prospectus.

A ‘put up or shut up’ principle introduces the possibility for the FSMA to ask any party intending to launch a public takeover bid to make its intentions public. If it appears from these declared intentions that the party is not planning to make a bid, then it may not do so for the following six months, unless a change can be justified by extraordinary circumstances. These circumstances will be evaluated by the FSMA.

The offeror must draw up in advance a prospectus in either Dutch or French and submit it for approval to the FSMA. The prospectus must state the conditions of the bid and all information so the affected shareholders can come to a ‘grounded’ judgement. In this regard the law stipulates some minimal data requirements. The prospectus will be published only after approval by the FSMA.

The prospectus to be prepared by the bidder must comply with the document structure appended to the Royal Decree on Public Takeovers. It shall contain at a minimum the conditions of the offer and the information which, with regard to the bidder, the target, the targeted securities and the nature of the consideration in case of an exchange offer, are necessary for securities holders to assess the proposed offer. This information must in principle be presented in a way that is easy for retail investors to analyse and understand.

The prospectus itself is to be announced in Belgian newspapers or, more generally, available to the public in selected financial institutions or in an electronic form on the website of the bidder and of the investment banks involved. However, if requested by a holder of the securities, a hard copy should be provided.

2.4 Statement of the board of the target company

In line with the French case, in the context of a public takeover bid, the board of directors of the target company should draw up a response after receiving the bid expressing its comments and opinion. This company response must be published in the same way as the prospectus and must be supplemented if any important new developments occur. The regulations resulting from implementation of the Directive represent a considerable increase in the duties of the board of directors of the target company. The board of directors of the target company intervenes twice during the drafting of the prospectus:

- (i) after having received the draft prospectus from the FSMA, the board of directors of the target company must indicate within five business days whether it is of the opinion that the prospectus contains gaps or misleading information;
- (ii) within five business days following receipt of the prospectus approved by the FSMA, the target's board has to submit to the FSMA a draft response document to the prospectus for approval.

The response document prepared by the target must contain the following information:

- comments on the prospectus;
- disclosure of any statutory clauses that limit the transfer or acquisition of shares in the target, as well as preference rights granted to certain persons in case of sale of shares; and
- a nuanced opinion on the offer. This opinion concerns, in particular, the impact of the offer on the interests in the company, including its shareholders, its contractual parties and its personnel; it also details the board's opinion on the strategic plans of the bidder and any implications for the results of the company, as well as the employment and the locations of the target. The opinion shall also mention the number of securities held by the board members and the persons whom they represent, together with the position they will take on the offer.

As with the prospectus, the response document must contain an indication confirming that it has been duly approved by the FSMA and that this approval does not contain any opinion on or quality appraisal of the FSMA on the offer. It shall also clearly indicate who is responsible for its content.

The language rules mentioned above that are applicable to the prospectus also apply to the response document (French/Dutch, with exceptions possible). The final version of the response document, duly approved by the FSMA, must be released by the target; alternatively, it can be appended to the prospectus prepared by the bidder.

2.5 Prohibition of attempts to prevent takeovers and obligation of neutrality

The principle of ‘neutrality’ stated in the Takeover Directive implies that the board of the target company is required not to take any defensive measures upon being notified of the takeover bid. Belgium has, however, used the opt-out option not to apply the mandatory provisions provided by the Takeover Directive on board neutrality (Article 9) and the breakthrough rule (Article 11). Protective measures are thus still possible, unless the company itself decides to integrate the rules of the Directive in its articles of association (‘opt-in’).

3. The role of employee representatives

As soon as a takeover bid has been disclosed to the public, the boards of directors of the target company and the bidder shall inform the employee representatives (or the employees, if there are no representatives) (De Schryver 2008; Van Kerrebroeck 2010). Moreover, the employee representatives shall be informed when the prospectus is made public. The board of directors of the target company shall inform the employee representatives of its opinion regarding the bid. The works council of the target can add its view of the bid to the opinion of the board of directors.

The works council of the target may consult the board of directors of the bidder – no later than ten days following the start of the acceptance period – regarding the financial and industrial background of the bidder, as well as the repercussions the public offer may have on the employment and activities of the target.

Besides the articles in the Belgian public takeover law, the provisions of Collective Labour Agreement No. 9 of 9 March 1972 and especially the Royal Decree of 27 November 1973 act as a kind of background/framework legislation. Among the different types of economic and financial informa-

tion employers have to provide, occasionally information is needed to permit workers to keep abreast of new events. Takeovers are explicitly mentioned in the regulation. When the information is related to a management decision, the works council has to be informed before the decision is taken.

New in the revised legislation of 2007 is the special provision that information (notification and prospectus) has to be provided not only to the employee representation of the target company, but also to the employee representation of the bidder company. When there is no official representation, it has to be communicated to the employees.

In Belgian social law a kind of hierarchical rule is recognised in this respect. When one of the 'higher' bodies of employee representation is absent, the authority goes to a 'lower' body. The hierarchy is as follows: works council, committee for prevention and protection at work which has assigned works council duties, union delegation, committee for prevention and protection at work without works council duties and, finally, employees.

It is not clear whether European works councils (EWCs) have to be informed and consulted. Legal opinion states that they should be involved when a multi-country element is part of the case (for example, a Belgian target with an EWC). A second question is, who has to be informed first? Some experts give preference to the Belgian works council. Others are more nuanced and again stress the international character of the case.

Workers' representatives are informed of the moment of notification to the FSMA and the publication of the prospectus. The representatives of the target are also informed about the (possible) reply by the board of the target company. For the rest, the Act also provides that the works council must also receive a copy of the prospectus when the document is released. The board of the target company shall also send its own opinion on the terms of the bid to its own employee representation (works council).

On one hand, Article 8 of the Royal Decree on Takeovers prohibits any announcement of a public offer before the publication of the notice of takeover by the control agency the FSMA. Should the bidder – prior to this publication – already inform his employee representation that they will launch a public offer (thereby asking for confidentiality from the representation)? Doctrine answers this question affirmatively referring to the (general) Royal Decree on the economic-financial information and

consultation rights of works councils. It states that ad hoc information on economic and financial matters should be communicated to the works council if possible before the execution of the decision ‘on which it is reporting’ (De Schryver 2008).

3.1 Any form of consultation?

Unless otherwise adopted unanimously by its members, the works council of the target company invites the governing body of the bidder to a hearing, so that they get detailed information on the strategic plans of the bidder (‘information on the industrial and financial policy of the bidder’) and its impact on employment and the establishments of the company. The governing body of the bidder may designate to this end an internal or external representative. It is not required that a director of the company appear in person at this hearing.

However, in the event of non-appearance of representatives of the governing body of the bidder before the works council, the bidder cannot exercise the voting rights attached to shares acquired in the context of the bid at a general shareholders’ meeting of the target company. The bidder has to be invited at least three days before the hearing. The hearing has to be organised within ten days after the start of the acceptance procedure (introduced at the controlling agency the FSMA). Prospectus bids are published and archived by the FSMA. The opinion of the works council is provided in an annex.

When the board of directors of the target company receives in good time an opinion from the works council about the bid and in particular about the employment consequences, this point of view will be annexed to the board’s reply to the prospectus. If no unanimity can be reached within the works council between the different factions of the employee side (for example, between the representatives of the white-collar and blue-collar unions or between the trade unions ACV-CSC and ABVV-FGTB), the points of view of the different factions will be annexed to the document.

3.2 Sanctioning

General sanctions and possibilities for claims exist for ‘misleading’ information in the prospectus, but this is focused on persons selling

shares. There has been no example to date of sanctions in court cases related to non-compliance with the information and consultation rights of works councils.

Sanctions also exist in relation to general information duties with regard to ad hoc economic restructuring (including takeovers). In the literature they are considered 'weak', especially for multinationals. Existing cases of claims are related to plant closures and not to informing or consulting in good time (*cf.* Renault case at the end of the 1990s).

4. Case study: Telenet

Telenet is a Belgian telecommunications company and the biggest cable service provider in Belgium. It specialises in the network supply of broadband internet, fixed and mobile telephony services and cable television to customers in Flanders and Brussels. With the Yelo application, Telenet is venturing into the supply of convergent mobile services. It also provides professional communication services to businesses in Belgium and Luxembourg. Telenet is based in Mechelen, with contact centres in Herentals, St Truiden and Aalst, and regional sites across Flanders to provide technical support. The US company Liberty Global (LGI) is the main shareholder of Telenet; at the end of 2012 LGI owned 50.1 per cent of Telenet shares. By the end of 2012 Telenet's workforce comprised 2,133 employees, with a total turnover of 1.48 billion euros. Telenet is listed on Euronext Brussels and included in the Bel 20 index.

Trade unions – the white-collar sector federations LBC-NVK and BBTK – represent employees at the company, especially in the works council. In the works council a local list of professional and managerial staff is also represented. Unions or employees do not have a seat on the management boards. However, employees – especially higher management – of Telenet own 0.02 per cent of the shares, and when including the warrants they own 1.7 per cent of total share capital.

4.1 The takeover

Liberty Global, which is controlled by telecommunications billionaire John Malone, already owned just over 50 per cent of Telenet at the

beginning of the process. In September 2012 the US company announced that it was preparing a bid of 35 euros a share for the Telenet shares it did not already own. Public announcement of the main terms and conditions of the offer was done by the regulator the FSMA on 6 November of that year. The regulator approved the bid on 11 December 2012. Liberty Global set the condition that it receive offers for delivery of a total of at least 95 per cent of the company for the bid to proceed; at that level the buyer could force out any remaining shareholders through a squeeze-out and delist Telenet.

The bid – a voluntary and conditional offer in cash pursuant to the Law of 1 April 2007 on public takeover bids – was officially done by Binan Investments. The Dutch company is, indirectly, a wholly-owned subsidiary of LGI. The bidder did not own any other assets than 56,844,400 shares (including 94,827 Liquidation Dispreference Shares) of Telenet. Holding these shares is its only ‘activity’. LGI, a US company, is the largest international cable company, with television, broadband internet and telephony services in 14 countries, primarily in Europe and Chile. As of mid-2013, LGI’s consumer brands include Virgin Media, UPC, Unitymedia, Kabel BW, Telenet and VTR.

For years Liberty Global aspired to full ownership of Telenet, but it had been put off by the price of such a deal, which would be more than 2 billion euros. Because the deal would be financed mainly through debt, more favourable credit markets, which made the deal more affordable, convinced the company that the time was right to finally make its move. On the one hand, it wanted a bigger part of the dividends Telenet pay every year to the shareholders (partly financed through borrowing). On the other hand, the major shareholder declared that it wanted a bigger say in how the free cash flow (and profits) of the company was used (not only by paying a dividend). Furthermore, it claimed there would be efficiency and economy-of-scale opportunities if Telenet was a full part of LGI’s developing European platform, for example by investing in future infrastructure innovations or buying network hardware (for example, set-top boxes). LGI’s focus is on growth of share value, to be used, among other things, to obtain more capital to finance investment and new takeovers.

At the time of the announcement, it was expected that the bid would be a fairly simple takeover deal. However, the bid quickly encountered opposition. The disputes focused on financial issues, mainly on how much

the cable company was worth. From a business strategy perspective the discussion centred on bidder's plans for a local company that was doing well.

It is important in this regard to know the origins of the company. The story of Telenet began in October 1994. The Flemish government, led by Minister-President Luc Van den Brande, wanted to develop a second telecommunications network alongside the historical incumbent Belgacom. To this end, an existing (foreign) operator was approached to develop and manage the network in partnership with Flemish groups and the Regional Investment Company of Flanders (GIMV). Local municipalities were also involved in establishing the company; at that time 35 per cent of the shares were held by a consortium of municipalities and today 30 per cent are still publicly owned (including 30 golden shares by the financing municipalities). These institutional investors/shareholders came to expect this recurrent stream of dividends every year.

At the foreground of these debates were the rising tensions between the local management, the other minority shareholders and the bidder. The announcement of the bid came as a surprise to the Telenet management, as they were engaged in share buy-back activities. As required by the Royal Decree, Telenet's board of directors appointed an independent expert to value its securities subject to the intended offer and to comment on LGI's bid. This independent appraisal – done by Lazard – came up with a valuation of the company of between 37 and 42 euros a share. Liberty Global quickly followed with a sharply worded release of its own, saying it disagreed with the Lazard valuation and was sticking with its original offer. It brought in another independent expert – the Boston Consulting Group – to contradict the value claims. Publicity about these reports interfered with the preparations to make the bid official. Trading of Telenet shares on the Stock Exchange was suspended for a couple of days by the regulator.

In the end, LGI obtained 58 per cent of the shares at the mid-term evaluation date in January 2013 and dropped the 95 per cent minimum acceptance condition. For this reason, the offer was not followed by a squeeze-out. In the following months, the top management of the Telenet company resigned or was replaced. In particular, the resignation of the Dutch CEO Duco Sieckinghe, who had just been granted the prestigious 'Manager of the Year' title in Belgium in 2011, received attention in the Belgian media.

4.2 Information and consultation of employees

As soon as a takeover bid has been disclosed to the public, the board of directors of the target and the bidder shall inform the employee representatives of their respective companies (or the employees if there are no representatives). The employee representatives shall be informed when the prospectus is made public. There is legal debate about the proper timing of information disclosure, specifically whether it should be before or after the bid has been disclosed to the public, as the (general) Royal Decree on economic-financial information and consultation rights of works councils states that ad hoc information on economic and financial matters should be communicated to works councils 'if possible before the execution of the decision'.

This 'theoretical' question has not played a role in the Telenet case. Plans about the bid were already made public informally by the media in September, although the official bid started later. At any rate, the works council was already informed about the whole issue in September. The consulted body was the national works council (there was no EWC at the company). The union representative who was interviewed, however, seriously questioned whether employee representatives of the bidder company were informed (as required by Belgian law). No clear view existed on the presence or absence of union and/or employee representation in the American parent company of the bidder (LGI). Furthermore, the case could also involve a discussion of who constitute the relevant employee representation in this case (as also in many others), as the financial relationships are based on a series of mainly financial companies, holdings or structures that do not always employ people and/or have employee representation. In theory the bid was made by a Dutch holding company (Binan Investments) for a Belgian holding company (Telenet Group Holding).

In practice, the process was organised in accordance with the approach embodied in the law: the works council of the 'subsidiary' Telenet was the informed and consulted employee representative body and the consultation was organised with a representative of LGI. 'As planned' means:

- a representative of LGI came to the works council to explain the public bid;
- there were no breaches of confidentiality;

- the works council formulated an opinion and this opinion was included in the official public bid document.

The opinion concluded with a reference to the valuation dispute, specifically that the works council was surprised by the different share valuations and even more so because the numbers were interpreted differently by the many specialists and analysts. It also stated that ‘as the works council we do not wish to give an opinion on the offer itself’. This neutral or non-positive opinion was argued and amended with a series of questions and comments regarding:

- the absence of any guarantee with respect to local ownership, social responsibility, employment in Belgium and the consequences for the current employees;
- the fact that the bidder completely failed to take into account the remarks from the Telenet management’s October long-range plan;
- the lack of clarity on planned investments in the network, products and customer service; and
- the lack of clarity on future intentions with regard to maintaining Telenet’s position as a market leader in innovation.

In this regard reference was made to the bidder’s approach of opting for a rather standard formulation of the impact on personnel: ‘The Bidder recognises the contributions made by the management team and employees of Telenet to the company’s success. The Bidder does not currently anticipate any material change in the working conditions or employment policies of Telenet.’

5. Conclusions from a trade union perspective

Procedurally, everything regarding the takeover bid was organised and implemented as prescribed by law. One has to take into account also that the bidder was already the majority shareholder of the company. Further evaluation of the case from the workers’ perspective contains four main elements:

- (i) Even basic legal knowledge and expertise on this type of case is missing in the trade union. The usual practice in the event of restructuring is to consult other trade union officials for orientation, but for this type of case this knowledge is not available, even in the

- well-structured and well-developed organisational structures of a Belgian trade union. Hiring of external guidance seems almost inevitable (certainly with the more complicated cases).
- (ii) This is all the more necessary because, on one hand, employees have shares (and are looking for advice) and on the other hand trade unions are consulted by the media to give their opinion on the public bid. It is, in other words, also important for the image of the union to have an expert opinion on such cases.
 - (iii) The whole process is perceived as something of a higher-level playing field of financial markets and strategies. An opinion on possible dangers could clearly be made, for example, concerning the manner in which LGI would use debt leveraging and its possible effects on the financial liability and investment capacities of Telenet; or the greater integration of Telenet in the multinational's activities with possible outsourcing or delocalisation of certain activities, services and jobs. One could not, however, imagine or strategically envision how the proposed financial transaction could be influenced or used to encounter the formulated dangers.
 - (iv) The whole story taught the union that it needed a more proactive strategy to develop a transnational union representation for Telenet within the LGI multinational. This was probably the biggest effect on union representation work in the company.

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Chapter 7

Worker participation rights under the EU Takeover Bids Directive: a deviant Danish case

Laura Horn

1. Introduction

Due to the historically and institutionally specific ownership structures in the Danish economy, takeovers – in particular, unsolicited ones – are not very common. Dispersed ownership is still fairly rare, with most listed corporations essentially being held by a foundation (*fond*). Such foundations are separate legal entities with their own board of directors and specific statutes and objectives. Dual class shareholding is common, whereby the foundation holds the ‘A’ class shares and other shareholders own the ‘B’ class shares with weaker voting rights attached. This works as a structural defence against takeovers. NovoNordisk, Mærsk, Carlsberg and Vestas are examples of Danish companies with a foundation ownership structure (see, for example, Thompson 2014).

This chapter provides an overview of key aspects of workers’ rights in Danish takeover legislation, focusing on the implementation and revision of the Directive on takeover bids (2004/25/EC). Following a discussion of the broader legislative context, the case of the Thrane & Thrane takeover by Cobham in 2012 will be used to illustrate some of the core dimensions of worker participation rights. The relevant bodies of law are the Danish Securities Trading Act and the Public Companies Act (here in particular Chapters 4, 10 and 15), supplemented by the Executive Order on Takeover Bids. The Danish Takeover Order specifies principles and rules for voluntary and mandatory takeover bids. The latest amendment came into force on 1 July 2014. Rules are administered by the *Finanstilsynet* (the Danish equivalent of the Financial Services Authority, or FSA).

Under the initial transposition of the information and consultation provisions of the Takeover Directive in May 2006, employee representatives have the opportunity to be involved in discussions of takeover bids at two levels: at board level or at the level of employee

representatives or codetermination committee. These provisions mirror the opportunities already existing prior to the Takeover Directive (Knudsen 2006).

2. Employee information and consultation in Danish corporate governance

Workplace cooperation, which is strongly influenced by the Scandinavian model of social partnership, is (along with collective bargaining) a core element of Danish industrial relations. The 1973 Act on Employee Representation established the right of employees in public limited companies or commercial foundations with more than 35 employees, on the basis of a vote among all employees, to elect two or more members to the board of directors, representing at least one-third of the seats on the board. Most Danish companies with a public listing indeed have employee board members. These essentially have the same rights and obligations as the other members of the board of directors.

In addition to the board-level employee representatives, the main channels of workplace representation are the shop steward (*tillidsmand*) and the co-determination committee (*medarbejderudvalg*), which consists of an equal number of employee and management representatives. The codetermination committee's focus is on issues such as training, working conditions and implementation of job restructuring, and it is a good example of the generally consensual, social partnership-type approach to decision-making. In addition to the sectoral cooperation agreements, the obligation to inform and consult employees is stipulated in the Act on Information and Consultation of Employees (*Lov om information og høring af lønmodtagere*, No. 303 of 2 May 2005), as an implementation of Directive No. 2002/14/EC (the Information and Consultation Directive).

Moreover, the Danish corporate governance code (*Anbefalinger for god selskabsledelse*) states:

The company's investors, employees and other stakeholders have a joint interest in stimulating the Company's growth, and in the company always being in a position to adapt to changing demands, thus allowing the company to continue to be competitive and create value. Therefore, it is essential to establish a positive interaction not

merely between management and investors, but also in relation to other stakeholders.¹

The corporate governance code also contains a specification that ‘in the view of the Committee, employee representatives are not independent’, which has been discussed critically by employee representatives and labour lawyers (echoing similar debates about the role of employee board representatives in other European jurisdictions). Furthermore, it states that ‘pursuant to the Companies Act, members of the supreme governing body elected by employees are subject to the same responsibilities as members of the supreme governing body elected by the general meeting’.

3. Worker information and consultation in case of a takeover

A takeover offer must be approved by the Danish FSA. Under the Takeover Order one of the minimum requirements for information in the offer document is a description of the offeror’s future plans for the target company, including employment. As soon as the takeover bid has been made public, the boards of the offeror and the offeree/target companies have to submit the document to their respective employee representatives or, where there are no such representatives, to the employees themselves (Article 13(6)).

Under Article 14(1) of the Executive Order, upon receiving the offer document, the board of the target must prepare a document containing an opinion on the bid, including its views on the effect of the implementation of the bid on all of the company’s interests, specifically employment, and on the offeror’s strategic plans for the target company and their likely repercussions for employment and the locations of the company’s places of business as set out in the offer documents. This document is to be communicated immediately to employee representatives, or otherwise to the employees directly. The offeror is not required to consult its own employees or the employees of the target company regarding the tender. According to Article 14(3), if the employees of the target company decide to put together a separate opinion on the effects of the offer on employment, this statement must be published by the

1. Available at <http://corporategovernance.dk/file/522921/anbefalinger-for-god-selskabsledelse-2013-senest-opdateret-november-2014.pdf>, latest update November 2014.

target company's management, and forwarded to the FSA and to the market on which the shares are admitted to trading.

The offeror must immediately disclose an acquisition of the controlling shareholding (Article 4(1)), and following the acquisition announcement, the boards of the offeree and the target company must immediately inform their respective employee representatives, or the employees themselves (Article 4(5)). Overall, there seems to be little focus on information and consultation rights in the broader debate about corporate governance in Denmark, with somewhat parallel structures between the development of a corporate governance code and the Executive Order on Takeovers, and the existing provisions in the area of industrial relations.

4. The 2012 Thrane & Thrane case

In 2012 there was a takeover of the Danish company Thrane & Thrane (T&T) by the British aerospace and defence electronics group Cobham.

T&T is a manufacturer of equipment and systems for global mobile communications based on satellite and radio technology (Satcom). The company was founded in 1981 by the brothers Lars and Per Thrane. It is headquartered in Kongens Lyngby, to the north of Copenhagen and in close vicinity to the Danish Technical University. T&T also has a manufacturing and distribution facility in northern Jutland (Aalborg). At the time of the takeover in 2012 it had around 600 employees in total, located in Denmark, the United States, Norway, Sweden, China and Singapore, with a global network of distributors. Cobham (plc) is a British aerospace and defence manufacturer based in Dorset. Founded in 1934, it is the fifth largest defence company in the United Kingdom. In 2014, it listed its pre-tax profits at 288 million pounds and employs more than 10,000 people worldwide. Cobham's main activities are still in defence contracting, but the company is increasingly looking to diversify towards commercial markets.

Prior to the takeover Cobham and T&T had worked together in the Satcom market, and Cobham had approached the T&T board prior to the bid. T&T's share price had been around DKK 200 in summer 2011, giving rise to speculation about potential takeover attempts. On 27 February 2012 T&T announced that they had received an expression of interest to acquire a majority of shares (an unsolicited takeover) from a third party. This first

bid was unanimously rejected by the board. This was also the first time the employees were informed about the takeover attempt. The offer was withdrawn by Cobham on 12 March 2012, following the decision by the T&T board not to recommend accepting the bid. It was only on this day that the identity of the bidder (Cobham) was revealed. The initial bid had been set at DKK 420 per share. In the context of the unsolicited offer, the board commissioned a strategic review of the company. Its main business strategy was to focus on highly qualified employees, as well as strong technological and commercial capabilities.

Cobham came back with a renewed bid in April 2012, still at DKK 420 and initially with a shareholding in T&T at 2.9 per cent. Amid tensions between the board and several shareholders about what position to take on the bid, the chairman of the T&T board resigned on 16 March 2012. In May 2012, the offer was revised to DKK 435 per share, 48 per cent above market value. The increase in the offer price was justified by the value of a dividend that would otherwise have been declared in June 2012. By Easter 2012, Cobham had built up 25.6 per cent of T&T shares, while Lars Thrane, the company co-founder, held 24 per cent. The company's strategic review was published, but in the meantime several institutional investors (among them, Jupiter Asset Management and Maj Invest) decided to sell their shares and voting rights to Cobham in April 2012. This development made it more difficult for T&T to enter into cooperation with companies other than Cobham, if it wished to do so.

While the board initially rejected the bid, it changed its position after these developments. It appears that the changes in shareholdings did not leave much strategic leeway for the T&T board (including the employee representatives), and many shareholders had publicly voiced their disagreement with Lars Thrane. On 3 May, the T&T board unanimously (with the exception of Thrane) decided to recommend to the shareholders to accept the revised offer. Due to his significant shareholding in the company and the resulting potential conflict of interest, Lars Thrane did not participate in the board statement/recommendation.

On 5 May 2012, Cobham announced that it held 50.05 per cent of the voting rights. By 22 May, it held 90 per cent of all shares, so a mandatory offer ('squeeze out') was made. The transaction was completed on 19 June 2012 and the company was delisted from the Danish stock market. Thrane & Thrane is now integrated into Cobham Satcom.

5. Conclusion

The Thrane & Thrane takeover is interesting for several reasons. Given that takeovers, in particular hostile ones, are rare in Denmark, there was substantial media coverage in the Danish (and UK) financial press, as well as in the broader Danish media. The founder of the company fought hard against the takeover, arguing that it would lead to a reduction of the company's value and a decrease in technological innovation. As one of the leading high-tech satellite/radio companies in Denmark, the takeover attempt by a British defence company was portrayed as 'foreigners' taking over a Danish company. Lars Thrane accused Cobham of trying to take the production of satellite systems out of Denmark. The offeror, however, had promised to relocate the R&D and management responsibilities for their combined Satcom systems to Lyngby. According to Cobham, the rationale for the takeover bid was the highly complementary nature of products and strategies, and the plan to build on T&T supply chain arrangements outside Denmark.

The public debate about the takeover also touched on the risk for potential loss of jobs. Cobham had in their revised offer guaranteed to 'honour existing contractual commitments relating to conditions of employment' and to 'retain the employment of the senior management team on terms similar to their existing arrangements', without providing more details. Following the completed takeover, there were indeed around twelve engineering jobs that vanished in the Danish company. In 2014, however, Cobham decided to move parts of its US R&D activities to Denmark, arguing that development and production are more competitive there. This also has to do with the fairly flat Danish wages for highly educated employees, compared with, for example, those in the United States. The production/warehouse site has been moved to a larger facility in Pandrup, just north of the previous facility in Aalborg. In the aftermath of the takeover, it appears that the integration of T&T into Cobham Satcom has met some of the general challenges of takeovers and acquisitions, with the former T&T employees reporting a significant drop in satisfaction with their new management.

But of more particular interest here is that the T&T takeover also sheds light on the nature of worker and employee information and consultation in Denmark in a case of dispersed shareholding, that is, a 'deviant case' compared with the majority of ownership structures in Denmark. As of May 2012, there were approximately 4,235 T&T shareholders. The

‘standard’ practices of worker information and consultation in Denmark in a takeover case, as described above, play out in characteristic ways in a situation in which there is an owner with a significant shareholding, but otherwise dispersed shareholding.

During the takeover, all information and consultation provisions in the Executive Order were complied with. The T&T board had informed the employee representatives of the respective bids, namely the first bid that had been rejected and the renewed bid in April 2012. Workplace organisation seemed rather weak at the company headquarters, as the shop steward (*tillidsmand*) was located at the production site. Of particular interest here are the employee representatives on the company board. There were two representatives, one from the company headquarters in Lyngby (from the engineers) and one from the production/warehouse facility in Jutland.

There was no statement on the offer from the employee side; it is also moot whether it would have made much difference, given the tensions between board and shareholders. Hence the consultation dimension was fairly limited because the employees did not exercise their right to express an opinion on the bid, and more importantly because the employee representatives on the board were broadly aligned with the management’s initial position against the offer. This points to the broader discussion about the role of employee representatives on the board (which is a debate that has come increasingly to the fore in Denmark in the past decade). One of the employee board representatives argued that ‘when you’re an employee representative, you also have to make sure that the shareholders get what they ask for.’ Asked about the usual ways in which employee representatives were integrated into the overall board, he mentioned that board meetings were generally well prepared and constructive, but that there were also some decisions that had clearly been taken in advance. Moreover, it appears that the two employee representatives did not actually communicate much with each other because they did not ‘share the same ... strategic values.’ The employee representative from the engineering side of the workforce appeared more interested in maintaining the company’s edge in technological innovation, stating that he felt he had more in common with the company founder than the other employee representative, while the representative from the production site was more protective of employment as such. As board members, the employee representatives were not allowed to disclose sensitive information regarding the takeover proceedings. Having been approached

by colleagues for more information on developments, the respondent sought legal advice and was advised not to make any statements regarding the situation. The T&T employees hence only received the mandatory amount of information published according to the Executive Order. Given that there seems to have been some fragmentation among the different groups of workers in the company, stronger coordination and concertation might have led to a more pronounced position on the part of the workforce vis-à-vis the takeover bid.

Overall, in a system that is still characterised by social dialogue also at the shop floor level, it seems that a takeover situation with a retrenched board and dispersed shareholding constitutes a break in these practices and leads to a situation in which workers have little leeway to go beyond the minimum information and consultation rights. The fact that the bid was unsolicited also meant that at the management level there was no previous (informal) discussions that could have filtered through to the employees, as can be the case in the rather informal channels in the Danish employee information and consultation context. There are no provisions for 'early involvement/warning' in the legal framework. In the case of an unsolicited takeover attempt the provisions in the Act on Employee Information and Consultation keep employee representatives on the board from sharing information on the grounds of a confidentiality obligation (§7), and could also mean that management is not obliged to comply with information and consultation requirements if the information could harm the company's functioning or the company itself (§5).

The developments outlined above include several of the issues highlighted in this study, including fairly vague statements about employment impact and workers not using their right to state their opinion on the bid. The T&T takeover might have been a rather specific case, in particular because it was in the high-tech sector, but given the increasing pressure to move towards dispersed ownership models, the question arises of how the Danish model will cope if there are more and more takeovers of this kind, without allowing for more options for workers to make their voices heard in a context in which the standard social partnership channels do not apply.

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Chapter 8

Takeovers in Finland: the case of SSAB's bid for Rautaruukki

Maria Jauhiainen

1. Introduction

Finland has fairly strong worker rights; about three-quarters of the workforce are trade union members and about 90 per cent are covered by collective agreements. Particularly strong obligations exist regarding co-operation between workers and management, including the obligation to inform workers about the possible impact of restructuring. As described in this chapter, the implementation of the Takeover Bids Directive has resulted in few additional rights for worker representatives on top of what they already had. Most of the rights Finnish workers have in takeover situations are pre-existing general rights outside the sphere of takeover regulations.

The case analysed here – the takeover of the Finnish steel producer Rautaruukki by the Swedish steel company SSAB in 2014 – illustrates a number of important points. First, even though negotiations between the managements started at least a year before the formal takeover bid was launched, this information did not reach the workforces of either company beforehand. This shows that the rules regarding confidentiality need to be clarified for and better understood by employee representatives on boards. Secondly, as is frequently the case with mergers and acquisitions involving companies in the same sector, the European Commission competition authorities required the companies to divest parts of their operations before the takeover could go ahead. This shows that European competition policy requirements on the bidding and/or target companies can significantly magnify the impact of a takeover on the workforce.

2. Legal bases for takeover bids

In Finland there are few legal provisions that regulate takeover bids. One is the Finnish Securities Markets Act (SMA), which applies to tender offers for securities issued by companies with their registered offices in

Finland and that are publicly traded in Finland on a regulated securities market. The Finnish Companies Act applies to cross-border mergers; the guidelines from the Finnish Financial Supervision Authority (FSA) are also fairly important in these situations. If the securities are traded publicly in a country¹ other than Finland, only the provisions of the SMA related to disclosing information to employees and certain selected legal issues generally apply.

There are also regulations in the Act on Cooperation within Undertakings (334/2007) that apply to matters affecting the personnel covered by cooperation negotiations (companies that employ more than 20 persons), which are caused by the transfer of the undertaking to another location or by other, similar changes in the business operations that will affect the personnel. These are supposed to be dealt with in cooperation negotiations, but only if these matters have an impact on the personnel. These matters can include changes in duties, working methods, arrangements of work and work premises, transfers from one duty to another, but not matters that are anticipated to result in termination of employee contracts or temporary lay-offs; this is part of the Finnish model of industrial relations.

Prior to the commencement of the cooperation negotiations the employer must provide the employees or the representatives of the groups of workers concerned with the information necessary for dealing with the matter and the employees or representatives have to have an opportunity to familiarise themselves with it. The employer is considered to have fulfilled his duty to negotiate if he has followed the provisions set out in the act in the spirit of cooperation to obtain consensus. An employer or representative of the employer who intentionally neglects or violates the set provisions shall be subject to a fine for violation of the cooperation obligation.

According to the Act on Cooperation within Finnish and Community-wide Groups of Undertakings (335/2007) the European Works Council (EWC) must be informed in particular about the structure of the community-

1. Common Legal Framework for Takeover bids in Europe, General director Dirk Van Gerven, (Finland, Mikko Heinonen and Klaus Ilmoinen), p. 72 and SMA, Section 1: '... The provision of Chapter 2, Section 6b as well as Chapter 6, Section 3(2), Section 4(3), Section 6, Section 9(2), Section 10 and Section 15-16 shall apply to a company and its shareholders also if the corporate-law registered office of the company is in Finland and its share is subject to trade corresponding to public trade in a state other than Finland.'

wide undertaking or group of undertakings, its economic and financial position, development prospects and its production and sales. Informing the EWC and consultation with it concern, in particular, significant organisational changes and mergers, including takeovers. The central management, a controlling undertaking or a representative of an undertaking or operational unit thereof that intentionally or negligently fail to observe or violate the set provision shall be subject to a fine for violation of the cooperation obligation of a group of undertakings. However, such cases have never been tried in Finland. These issues can also be brought to the Cooperation Ombudsman,² who supervises these two laws.

In addition, a more detailed self-regulatory recommendation on the procedure to be applied in takeover situations called the 'Helsinki Takeover Code' was published in 2006 by the Finnish Central Chamber of Commerce (FCCC). The FCCC can also issue statements in individual cases upon application. The Helsinki Takeover Code does not take the rights of the employee presentation into account, rather the contrary. It says that:

A member of the board of the directors of the target company may have a special connection to the offeror, for example as an employer or as a member of the board. Such connections may create an assumption that the member of the board in question is not unconstrained by undue influences to participate in the consideration of the bid in the target company. For example an employee position may create a relationship of dependency with the offeror. To avoid conflicts of interest, *under no circumstances* shall a[n] [employee] member of the board participate in the decision-making regarding the bid, both on the board of the offeror and the target company.³

It also says that the offeror shall make public information on the takeover bid immediately after the offeror has reached a decision on the matter. And after the decision is made public, it shall, without delay, be communicated to the employees' representatives or, where there are none, to the employees of the target company and the offeror.⁴

2. The Act on the Cooperation Ombudsman, 216/2010.

3. Helsinki Takeover Code, 2014, p. 25.

4. Helsinki Takeover Code, 2014, p. 41.

There is a discrepancy between the SMA and the other laws mentioned here, because according to the law and legal praxis – for example, the *Fujitsu-Siemens case*⁵ – the employees or their representatives must be informed and consulted before the final decision is made so that they can still have some influence on the matter. One of the main reasons for this is the fear of a confidentiality breach regarding insider information. However, the Cooperation Ombudsman gave a statement in 2013 which said that dealing with insider information or insider secrets shall not allow the company to omit the information and consultation procedures as laid down by law.

It should be noted that in the case study examined here, the Swedish bidding company SSAB decided to observe the Helsinki Takeover Code (from the FCCC) voluntarily.

2.1 Information and notification requirements in the takeover procedure

Pursuant to the Finnish Decree⁶ the tender offer document must contain the following information:

- the future position of the management and personnel, such as the continuity of jobs and material changes in the conditions of employment;
- equivalent information must also be given on the acquirer and the position of its management and personnel as far as the tender offer has any influence on them;
- information on strategic plans as far as the offeree company and acquirer are concerned, as well as on their probable effects on the employment and the locations of the company's office;
- remuneration of board members or the management of the offeree company;

5. C-44/08 ECJ, where it was stated that the employees or their representatives must be informed and consulted according to the Act on Cooperation within Undertakings before the final decision is made by the company.

6. The Decree is based on the Directive amending the Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and the Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issues whose securities are admitted to trading on a regulated market.

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- a statement from the offeree company's board of directors regarding the tender offer and a possible separate statement by the employee representatives; and
 - information on which national law will govern the contracts concluded between the acquirer and the holders of the offeree company's securities.

When the tender offer has been published, the employees of the offeree and the offeror companies shall be notified (SMA 11:13 §). In accordance with the SMA, the representatives of the employees of the company have the opportunity to give a separate statement on the effects of the offer on employment in the company (SMA 11:13 §), which should be appended to the board's statement to shareholders. The tender offer has to be valid from three to ten weeks and this would also be the appropriate time slot for, for example, EWC negotiations.

The normal confidentiality regulations apply here (SMA 11:29 §) and generally in the due diligence investigation, the target is also allowed to disclose certain insider information to a potential bidder. The appropriate procedure on the involvement of employees is also mentioned.

2.2 The Swedish Act on Public Offers on the Stock Market⁷

According to the Swedish Act on Public Offers on the Stock Market, an acquirer with residence in Sweden shall inform its employees of the given public offer and of the offer document, and the information must be provided as soon as the bid and the offer document have been published (4:1 §).

The board of the company shall inform its employees of the tender offer and of the offer document and of its recommendation to shareholders with respect to the bid (4:2 §) and this information shall also be submitted to unions representing workers (4:3 §). This information should also be provided directly to workers (4:3 §) if there are no employee representatives that have been elected or otherwise chosen.

7. Reference to Sweden is made because the bidder company in the case study examined here is registered in Sweden. See the chapter on Sweden in this publication for further information.

3. Case study of the Rautaruukki takeover

Rautaruukki was a steel manufacturer based in Finland with approximately 8,700 employees. It was active in the production and distribution of (mainly carbon) steel and in the supply of steel products for the construction industry. It was established in 1960 and its main shareholder – with a 39.7 per cent stake – was Solidium, the Finnish state-owned investment fund. SSAB was – before the merger – a steel manufacturer based in Sweden. It had approximately the same number of employees (8,700) and was involved in the same activities as Rautaruukki. It was created in a three-way merger in 1978 by Domnarvets Jernverk, Norbottens Järnverk and Oxelösunds Järnverk. Its largest investor was a holding company called Industrivärden (Handelsbanken being one of the main owners). SSAB and Rautaruukki have been the clear market leaders in their respective home countries for the distribution of flat carbon steel products, and directly or indirectly control a large majority of the distribution in Norway, which led to antitrust issues, as we will see later on.

In January 2014 SSAB agreed to buy Rautaruukki for USD 1.6 billion. This was a response to a prolonged downturn in demand that has forced Europe's smaller players to cut costs and deal with idle capacity. Steel consumption in the European Union fell by about 4 per cent in 2013 and was around 30 per cent below the 2007 peak when world consumption, by contrast, rose by about 3 per cent in 2013 and was some 20 per cent higher than in 2007.

The combined losses for both companies had been more than 400 million euros (USD 542 million) in the previous five quarters. Rautaruukki chairman Kim Gran said that he initiated negotiations soon after being appointed to the company's board in 2012; in other words, Rautaruukki itself was involved in negotiations early on. The sale was deemed successful because the shares of both of the companies soared after they announced the all-share deal (Rautaruukki shares rose by 34 per cent and SSAB A-shares by 13 per cent).

The exchange of Rautaruukki shares for new SSAB stock began in early May 2014. The merged company has its primary listing in Stockholm, but there also is a secondary listing in Helsinki. The new name for the whole company is now SSAB, but the name Rautaruukki will also remain in use (the exact details of its use will be decided in the future).

3.1 The bid and its estimated effects

The combined market capitalisation of the two companies increased considerably as a result of the bid. Part of the takeover plan is to cut the combined workforce of more than 17,000 by about 5 per cent, mostly in Sweden and Finland, to help lower costs by up to 1.5 billion euros. The aim is to focus the new business on specialty steel products, where profits are less volatile than in commodity carbon steel. The new company will have its largest facilities in Sweden, Finland and the United States. The combined annual production capacity will be 8.8 million tonnes, but the new company is still small compared with, for example, ArcelorMittal, which can produce 119 million tonnes. Solidium (the Finnish state) will be the biggest investor in the new company by number of shares, but Industrivärden (Sweden) will lead in terms of number of votes.

3.2 Antitrust issues

The companies did not expect any major antitrust issues, but early on in the takeover process some references to stainless steel maker Outokumpu's 2012 acquisition of ThyssenKrupp's Inoxum unit were made by some analysts, who warned of possible complications in the process. The combined market share of SSAB and Rautaruukki in the Nordic region was very close to the Commission's preferred limits and it was feared beforehand that if the competition authorities stepped in, SSAB would cancel the whole deal instead of agreeing to sell some of its key assets.

Nevertheless, on 15 July 2014 the European Commission cleared the acquisition of Rautaruukki by SSAB, but only upon the fulfilment of a number of conditions. The approval required the divestment of five businesses in Finland, Sweden and Norway, because the Commission had concerns that the merger would significantly reduce competition on the markets for certain carbon steel products in the Nordic countries, as well as for stainless steel and profiled steel construction sheets (for roofing), especially in Finland. The required divestments were designed to address these concerns.

The Commission was originally concerned that the transaction (as initially notified) could have allowed the merged entity to raise prices in the Nordic countries in the absence of sufficient competition from imports from continental Europe and for the distribution of stainless steel. The

combined entity would become more than three times larger than its only sizable remaining competitor in Finland for stainless steel, the BE Group. The Commission's investigation also concluded that in Finland the transaction (as initially proposed) would have created a player three times larger than its sole remaining nationwide competitor (Weckman, which produces, for example, roofing products). The Commission was therefore concerned that the remaining players would have been unable to sufficiently constrain the merged entity from raising prices.

In order to address those concerns, SSAB committed to divest:

- a steel service centre in Sweden, together with a number of consignment stock and ex-mill sales contracts in Sweden;
- a steel service centre in Finland, together with a number of consignment stock and ex-mill sales contracts in Finland;
- SSAB's 50 per cent share (owned through SSAB's subsidiary Tibnor) in two Norwegian-based joint ventures acting as a steel service centre and distributor, Norsk Stål and Norsk Stål Tynnplater;
- SSAB's distribution subsidiary Tibnor Oy in Finland;
- SSAB's construction business Plannja Oy, in Finland.

SSAB also committed to ensure that another flat carbon steel producer will own a stake in the first and third businesses listed above after their sale. These businesses would therefore be in a position to serve as a route to market for another producer, who could establish and develop a direct presence in the Nordic countries (in addition to competing with the combined entity at the distribution level).

The Commission concluded that the transaction, as modified by these divestment commitments, would not raise any more competition concerns. The whole deal was finally completed on 29 July 2014.

3.3 Situation of the workforce and information and consultation

As already mentioned, part of the takeover plan is to cut the combined workforce of more than 17,000 by about 5 per cent, mostly in Sweden and Finland. This cut refers to the workforce after the divestments required by the Commission have been made.

As of early 2015, one of the abovementioned steel service centres was already sold in the city of Naantali in Finland. This was preceded by the transfer of a couple of shop stewards based in Oulu to this unit, which is situated 536 km away. One of the reasons behind this could be that certain shop stewards are seen as 'difficult' in the eyes of the management, raising troublesome questions or contesting the employer's decisions and because their employment contracts cannot be terminated according to the normal procedure pursuant to the Employment Contracts Act (55/2001). In other words, this could be seen as an easy way to get rid of them. This is an illustration of how badly the company has managed the whole situation when it comes to the workforce.

A further illustration of this is a strike on 12 May 2014, when the Finnish Development Minister and the Minister who is responsible for State Ownership Steering, Pekka Haavisto, was about to visit the Rautaruukki factory in the city of Raahе (near the city of Oulu) in Finland. The visit was intended to get him acquainted with the site – the first and even now one of the biggest Rautaruukki sites in Finland – and its workforce. This whole visit was also cancelled due to the strike. About 1,000 employees were involved in the action, because they felt that they had not been adequately heard during the intended sale and that the company should have stayed state-owned.

Otherwise the national and local workforces are waiting for the Co-decision (Sweden) and Cooperation (Finland) negotiations to take place, when the plans for the collective redundancies are further clarified. Usually the companies in these countries are more likely to follow the local and national information and consultation processes⁸ mentioned before in this chapter than the transnational ones (e.g. EWC), but even in these cases (takeovers or cross-border mergers) the processes do not happen at a right time, which would be before the final decision is made.

In Rautaruukki there is no employee representation on the board of directors (or elsewhere in the company for that matter, although it is explicitly allowed by Finnish law). In SSAB, however, there are two employee representatives on the board. They were told about the coming bid as early as 2013, but they never disclosed any of this information to the other employees due to concerns about confidentiality and disclosure

8. The local information and consultation procedures pursuant to the Act on Cooperation within Undertakings (334/2007).

of insider information. It seems that the abovementioned Helsinki Takeover Code was followed to the letter here.

In Rautaruukki and in SSAB the workforces heard about the bid when it became public in January 2014 for the first time, as required by the Directive, but in neither of the companies did worker representatives issue separate statements to shareholders regarding the bid offer. Hence there were no talks between the employer and the employees at this stage (no Swedish Co-decision Law (MBL) or Finnish Cooperation negotiations).

The tender offer should be valid from three to ten weeks, and this would have been the right time slot for EWC negotiations (from January to mid-March 2014, before the final decision was made). However, the bid with its projected effects on employment in both countries was never dealt with in either the Rautaruukki or the SSAB EWCs, although the matter at hand was definitely of a transnational nature. In neither of the EWC agreements are there provisions for situations like this (adaptation clauses in cases of changes in the company structure). Rautaruukki's EWC agreement is from 2005 and SSAB's agreement is even older, from 1996. The SSAB EWC has existed only on paper, as it has not had any EWC representatives or any meetings in recent years and hence there would not have been anyone to inform and consult. The Rautaruukki EWC has been more active, but still no action was taken by the management to follow the right procedures.

Now both parties are working together in order to establish a new EWC for the merged company and even the employer has been positive about the establishment of a new EWC for both companies. The first meeting regarding the EWC took place in July 2014, when the Special Negotiating Body (SNB) was established. After that there was one meeting in November and two meetings in December 2014. Both old agreements have been terminated and a totally new one is being negotiated. On 3 December the company supplied the employee negotiators with a very poor EWC agreement as their own proposal and the employees responded with the Finnish trade unions' best EWC model agreement. After that there have been exchanges of different types of EWC agreements, but nothing has been signed yet. The employee representatives still remain positive about the outcome of the negotiations and they are hoping for at least a good compromise. The countries involved in Europe are Finland, Sweden, Norway, the United Kingdom, Spain, Portugal, Italy, Poland, Romania, the Netherlands, Denmark, Lithuania, Latvia, Estonia, Ukraine

and Belarus. Outside Europe SSAB operates in the United States, Canada, Russia, Singapore, South Africa, Australia, Chile and China (24 countries altogether).

4. Conclusions

All in all it seems that the companies tend to regard these types of situations – takeover bids or cross-border mergers – as matters that have nothing to do with the employee representatives, but rather something that the company decides totally on its own. This becomes clear most remarkably from the Helsinki Takeover Code – which the companies usually follow – where it is bluntly stated that ‘under no circumstances must any employee participate in decision-making regarding a takeover bid’. Unfortunately these things have not yet been contested by Finnish employees or their organisations.

It also seems that the information and consultation procedures according to the EWC law – and even the national cooperation procedures – are for the most part neglected. The national cooperation negotiations will be followed by companies generally only when people are being made redundant or laid-off temporarily (Chapter 8), but not when other types of changes are happening in or to the company (Chapter 6), even though this should also be done.⁹ The reasons behind this are likely to be the lack of trust – which sadly often hinders the well-functioning information and consultation procedures between Finnish companies and their workforce – and the probability of insider information and secrets being disclosed in these processes. It seems that fears about sanctions for breaches of insider information are much stronger than fears about sanctions for breaching employee rights, which – it must be said – are fairly vague.

Another noteworthy thing here is that even though the European Commission set quite harsh requirements for divestments, these requirements had no impact on the company's plans regarding how many people will be made redundant in the future, even though they are bound to happen automatically. It could have been expected that the European Commission would also protect the workforce – not only the welfare of

9. The cooperation negotiations pursuant to the Act on Cooperation within Undertakings (334/2007) and the negotiations according to Chapter 6 and Chapter 8 (lay-off and redundancies).

the European companies with regard to antitrust issues – and it would have been very much appreciated if the Commission had also commented on this issue when announcing the requirements for divestments and maybe even laid down some other requirements regarding it. Unfortunately that was not done.

Chapter 9

Worker participation rights under the EU Takeover Bids Directive: the case of France

Udo Rehfeldt

1. Introduction

Prior to the implementation of the 2004 EU Directive on takeover bids, some participation rights for workers had already been introduced in France as part of the Law on New Economic Regulations of 15 May 2001. The 2004 Directive was transposed in France by the Takeover Bid Law of 31 March 2006. This law stipulated that the offeror must give information not only to the offeree's works council, but also to its own works council.

Subsequent to implementation, considerable debate over takeovers has taken place in France. This was spurred in particular by the violation of employment and production location guarantees made by the steel producer ArcelorMittal in the wake of its formation through a hostile takeover of Arcelor by the Indian company Mittal. In 2012 ArcelorMittal, in violation of an agreement with the trade unions, announced that it would close two blast furnaces in Florange (Lorraine). The ensuing public outcry led the Socialist candidate for President, François Hollande, to promise to strengthen the rights of workers in takeover situations, should he be elected.

The ensuing legislation, which was passed almost two years after his election, was named the 'Florange Law' due to the public prominence of these closures. Worker participation rights were reinforced by the Florange Law, officially entitled the 'law to give a new impetus to the real economy'. It gave the offeree's works council a true consultation right on strategic plans of the offerer and their impact on employment and production sites. In addition it enhanced the rights of company boards to introduce defensive measures without the prior approval of shareholders and attempted to strengthen the role of long-term shareholders in corporate governance.

2. Key elements of the French takeover legislation

2.1 The control authority

Public takeovers are regulated by the Financial Markets Authority (*Autorité des Marchés Financiers*, or AMF), which is an independent public authority created in 2003 by the Financial Security Law through the merger of three pre-existing institutions. The AMF has regulatory powers to protect investments, to ensure investor information and to support the proper functioning of financial markets. The AMF's president is nominated by the President of the French Republic for a non-renewable term of five years. From 2008 to 2012 its president was Jean-Pierre Jouyet, a former State Secretary who was nominated by President Sarkozy and who is now general secretary of the President Hollande's office. Under his very political mandate, the AMF's financial resources and sanctioning powers were reinforced.

The president is assisted by a Board with 16 members. Half of them are nominated by the Ministry of Finance, the rest by the two chambers of Parliament, the Council of State, the Court of Cassation, the Court of Audit, the National Bank and the Economic and Social Council. They are professionals chosen for their financial and legal expertise and experience. There is also an Academic Advisory Board composed of scholars from universities, business schools and banks.

The AMF's main rules on takeovers are set out in Book II, Title III of the AMF General Regulation. It defines the rules and procedures for the acquisition of a listed company. Key principles are equal treatment, transparency and fairness in the bidding process. The AMF has the power to declare (or deny) the conformity of a bid with the legal and regulatory provisions.

2.2 Procedures for voluntary and mandatory bids

Public offers take the form of a cash tender offer (*offre publique d'achat*) or an exchange offer (*offre publique d'échange*). There are three procedures for public offers:

- (i) the standard procedure, which applies where the offerer holds less than 50 per cent of the share capital or voting rights of the offeree;

- (ii) the simplified procedure, which applies, with a shorter timetable, where the offerer already holds, directly or indirectly, 50 per cent or more of the offeree's share capital and voting rights, or where it wishes to acquire up to 10 per cent of the offeree's share capital and voting rights;
- (iii) the public buyout offer and squeeze-out procedure.

The offer timetable is set in each case under the supervision of the AMF. The standard offer acceptance period generally lasts 25 trading days but it can be extended if competing bids are launched.

Offers are mandatory if individuals or legal entities that come to hold (alone or in concert, directly or indirectly) more than 30 per cent of a listed company's share capital or voting rights. In this case they must immediately inform the company and file a tender offer with the AMF. An offerer must extend its offer to any listed subsidiary if the offeree company holds more than 30 per cent of the capital or voting rights of the subsidiary and if the subsidiary constitutes an essential asset of the offeree company. Mandatory tender offers also apply to persons who own between 30 per cent and 50 per cent of a listed company's share of capital or voting rights and increase that holding by 1 per cent or more within a period of less than twelve months. Before the Florange law, this acquisition 'speed limit' was fixed at 2 per cent. Under certain circumstances, the AMF can authorise exceptions for mandatory bids.

The Florange Law of 2014 introduced a mandatory minimum acceptance threshold. If the offerer does not reach at least 50 per cent of the capital or voting rights at the closing of the offer period, it lapses automatically. In this case the shares held by the offerer before filing the bid are deprived of voting rights for the portion exceeding 30 per cent if the mandatory bid was triggered by the crossing of the 30 per cent threshold. If the offerer exceeded the 1 per cent acquisition limit, their shares are deprived of voting rights for the portion exceeding the offeror's holding before launching the bid.

2.3 Information requirements

The investment bank acting as sponsor on behalf of the offerer must file the draft offer prospectus with the AMF. The sponsor must guarantee that the offeror's commitments are irrevocable; it must also set out the draft

terms of the public offer in a letter to the AMF that defines the offeror's objectives and gives information about the proposed price and conditions. In particular, it must state whether the offer was announced in advance of its filing and whether the consultation of the offeree's works council has already been initiated.

If a person's shareholding in a listed company crosses (either by exceeding or going below) the thresholds of 5, 10, 15, 20, 25, 30, 33.3, 50, 66.7, 90 or 95 per cent of that company's share capital or voting rights, the person must inform the company within four trading days of doing so, stating the total number of shares and voting rights it holds. If the company is listed on a regulated stock market, it must also inform the AMF within four trading days. The AMF then discloses this information to the public. If a person crosses the 10, 15, 20 or 25 per cent thresholds it must also inform the company and the AMF, within five trading days, of its objectives for the following six-month period, in particular regarding whether it acts alone or not, whether it intends to continue to purchase shares or not and what its planned strategy is with regard to the offeree.

2.4 Defensive action on the part of the board

The Takeover Act of 31 March 2006, which transposed the Takeover Directive, applied the board passivity rule of Article 9. This part was, however, reversed by the Florange Law of 29 March 2014, which removed the rule according to which delegations of powers granted to the board of directors by the shareholders' meeting were suspended during the offer period. The board of directors of the offeree company is now authorised to take defensive action without shareholder approval, provided that this action is not contrary to the corporate interest of the offeree. A shareholders' meeting can decide otherwise, however.

In order to prevent a hostile takeover, a company can now increase the power of friendly shareholders, for example by limiting voting rights or concluding shareholders' agreements. It can also offer discounted shares to existing shareholders in order to dilute the offeror's stake in the company. This measure, designed to make the offeree company unattractive to the offeror, was developed in the 1980s by US companies fighting takeovers and is referred to as a 'poison pill'. The Florange law now also allows the distribution of free shares to its employees up to 30 per cent of its capital (previously limited to 10 per cent).

In order to reinforce the position of long-term shareholders, the Florange law gives double voting rights to shareholders who commit themselves to keep the share for a minimum of two years, on condition that this commitment is registered. Before, this was possible only if there was a formal vote approving this by the shareholder assembly and if this right was integrated into the company's statute.

2.5 Sanctions

Failure to make the required disclosures results in the shares exceeding the relevant threshold being deprived of voting rights. The Commercial Court may also decide that all or part of the shares be deprived of voting rights for a maximum of five years, following a motion from the AMF, the company's chair or any of its shareholders. This also exposes shareholders to administrative sanctions by the AMF, as well as a criminal fine of 18,000 euros.

Failure to fulfil the obligations to file a mandatory bid will result in the shares exceeding the relevant thresholds being deprived of voting rights. It could also lead to financial penalties.

3. Worker involvement

If the offeror has a French works council, its CEO must convene a meeting to inform it concerning the content of the offer and its potential impact on employment. This must happen within two trading days following the publication of the offer, or following the announcement of the offer in case the offeror has asked the offeree to start its works council consultation immediately.

After the offeror has filed the offer documents with the AMF, the offeree's CEO must immediately convene a meeting with its works council, indicating whether it is a friendly or a hostile bid. If the takeover bid is made public before its filing with the AMF, the offeror can request that the offeree convenes its works council within two business days of the announcement. The works council can decide to question the offeror at a subsequent works council meeting, which must take place within one week after the filing of the draft offer with the AMF and before the shareholder meeting is convened. At this hearing the works council has

the right to be assisted by any person of its choice; the offerer must present its industrial and financial policy and strategic plans for the offeree company, as well as their impact on employment, business sites and the location of the decision-making centres. The works council can also decide to appoint an accountant as an expert at the expense of the offeree. Within three weeks after the filing of the offer, the expert must deliver a report that assesses the offeror's strategic plans and its impact. Within one month of the filing of the offer, the works council must meet to examine the expert's report and deliver its opinion on the bid. If the works council believes it has not received sufficient information, it can ask the president of the competent civil court, who must rule within eight days, to enjoin both the offerer and the offeree to provide the requested information. This procedure does not extend the one-month period for the works council to render its opinion.

The offeree must wait until the end of the consultation period with the works council to file its draft response prospectus with the AMF, which must include the report of the expert appointed by the works council and the opinion of the works council. These documents are released on the AMF's and the offeree's websites. Afterwards, the AMF makes its decision of compliance, which is published together with the response prospectus on its website.

The offerer must send the approved offer prospectus to the offeree's works council no later than three calendar days following its publication. If the bid is successful, the offeror must thrice (after six, twelve and 24 months) report to the works council on the fulfilment of its commitments and on the impact of its strategy on employment, location of business sites and decision-making centres.

4. The Florange Law 2014

The 'Florange affair' was the historical background for the so-called 'Florange Law', which was drafted in April 2013 and finally voted on in February 2014. The name is a reference to the closure of two blast furnaces in Florange (Lorraine) in 2012 by the ArcelorMittal steel group, as a result of a hostile takeover of Arcelor by the Indian steel company Mittal in 2006. Arcelor, headquartered in Luxembourg, was itself the result of a merger between Sacilor, a former nationalised French company, the Spanish Arcelera and the Luxemburgish Arbed. Together

with the management of Arcelor, the trade unions and governments of the three countries were opposed to the takeover bid by Mittal, although it finally succeeded.

With the goal of renewing cooperation with the unions, ArcelorMittal had signed a European framework agreement with the European Metalworkers Federation in November 2009. In this agreement it promised to preserve all the temporarily suspended plants and to ‘use all possible means to maintain the workforce’. Despite these promises, because of a severe drop in steel demand, Arcelor again suspended the operation of several plants in 2011, including the two blast furnaces in Florange.

The Florange case raised much political debate about the closure of a site that was profit-making. During his presidential electoral campaign, candidate François Hollande visited Florange in February 2012 in order to support the mobilisation of the ArcelorMittal workers against the planned closure. During a speech to the striking workers from the top of a trade union van, he promised that, once elected, he would pass a law which would prohibit the closure of competitive plants. This promise was afterwards transformed into proposal number 35 of his electoral programme; here he announced that, in order to ‘dissuade shareholder motivated dismissals’, he would make dismissals more costly for companies that pay dividends to their shareholders and give workers the possibility to appeal to the courts for this purpose.

After Hollande’s election in May 2012, his proposal was transformed into law, but with such a delay that it came too late to change the fate of Florange. In October 2012 ArcelorMittal announced the definite closures of the two blast furnaces, together with 629 job cuts out of a total workforce of 2,500 employees in Florange. The Socialist Minister of Industry, Arnaud Montebourg, tried to find investors to buy the Florange plant, but did not succeed within the two months that the company gave him for that search. His alternative plan for a temporary nationalisation of the Florange plant was opposed by the Prime Minister, who preferred to negotiate an agreement with ArcelorMittal; this was signed on 30 November 2012. Through this agreement the government accepted the closure of the blast furnaces, but ArcelorMittal committed itself to keeping the rest of the Florange site open and to invest 180 million euros for its modernisation. There would be no compulsory dismissals; 621 jobs would be cut on a voluntary basis (namely through early retirement and internal mobility) within the framework of a collective agreement negotiated with

the trade unions. The majority union CFDT and the CGC-CFE agreed on this despite the opposition of two minority unions CGT and FO.

The main goal of the Florange law is to oblige companies that plan to close a plant to find a new investor in order to maintain the activity and employment of the site. But it also has two secondary aims: to reinforce the position of stable long-term shareholders in order to prevent hostile takeovers, and to protect companies against ‘creeping’ takeovers. These aims were also part of the recommendations of the Gallois Report, presented to the French Prime Minister in November 2012 by the former CEO of the French-German company EADS (now Airbus), Louis Gallois. This report suggested a national ‘pact for the competitiveness of French industry’ in order to reinforce the profitability of big French industrial companies and to ensure their long-term sustainability by protecting them from short-term financial constraints.

The law’s long gestation can be explained by a series of political difficulties. The bill was presented by the Socialist group of the National Assembly and not by the government in order to circumvent the obligation of consultation with the social partners. Since the 2007 law on the ‘modernisation of social dialogue’, the government has the obligation, before any legislative initiative in the field of labour law, to consult the social partners and to give them the opportunity to negotiate a collective agreement on the proposed subject that will ultimately serve as a basis for legislation. As the employers’ organisations were firmly opposed to any legislation to prevent plant closures, the government saw no need to use this procedure and encouraged a parliamentary initiative. Surprisingly, however, it was the CFDT union that formally opposed such an initiative – in October 2012 – and threatened to leave the opening negotiations with the employers on a ‘pact on competitiveness’, which the government had previously initiated. The CFDT announced its intention to include this subject in the negotiations. Therefore the government asked the Socialist Party to suspend its initiative until the end of the negotiations between the social partners. These ended on 11 January 2013 in an agreement on employment security which was signed by three of the five nationally representative unions and which was ultimately, according to a promise by President Hollande, transformed into law on 14 June 2013. Both the agreement and the law contained an article on the obligation of the employer, in case of a plant closure, to inform the works council about his efforts to find a new investor; in case of success, the employer must provide information on the conditions offered to the candidates, which

the works council can examine with the help of its legal accountancy expert (Article 14 of the agreement, Article 12 of the law). There are, however, no sanctions in case of non-compliance with this obligation. This result did not satisfy the Socialist Party, which therefore presented its own draft on the subject on 30 April 2013.

From the beginning both the right wing and the extreme left parties were opposed to the draft, the former because it went too far, the latter because it did not go far enough. The draft was only supported by the Socialist, the Green and the Left-Radical parties, which were then part of the coalition government. These parties had a large majority in the National Assembly, but not in the Senate, where the Left Front (Communists and Left Party) blocked adoption by voting together with the right-wing opposition. According to the Constitution, in such a stalemate situation the National Assembly and the Senate must find a negotiated compromise through a joint commission. But this compromise also failed, so that the law could only be adopted through a final vote by the National Assembly, which took place on 24 February 2014.

The law contains a series of measures to ensure the long-term sustainability of the company. It reinforces the position of long-term shareholders and abolishes the neutrality principle for the board in case of a takeover bid, which had been introduced into French legislation in 2006. In order to prevent creeping takeovers, the initial draft lowered the threshold of shares above which an investor must make a compulsory takeover bid from 30 per cent to 25 per cent. This threshold had already been lowered from 33 per cent to 30 per cent in 2010. In its final version, the law kept the threshold at 30 per cent.

In case of a takeover bid, the offeree's works council must now be consulted before the offeree board gives its opinion about the bid. The works council has the right to formulate an opinion, which must be published together with the opinion of the offeree board and the report of the works council expert. The final law dropped the possibility for the works council to call for a mediator who would be appointed by the government and would make a public report on the strategic and employment impact of the bid.

The Constitutional Court declared several articles of the law unconstitutional on the grounds that they infringed upon the freedom of entrepreneurship and the fundamental right to private property.

Consequently, it cancelled several essential articles of the law, namely those that established penalties in case of non-compliance with the procedure of seeking an investor. The articles concerning the information rights of the works council in case of a takeover bid, whose constitutionality was also challenged by the right-wing parties, were not struck down, however.

5. Conclusions

France has one of the more stakeholder-friendly takeover regimes in Europe. This was already the case before the passage of the Florange Law in 2014, as the offeror was obligated to meet with both its own works council (if it had one) and the works council of the target company (if requested). French works councils thus had rights above and beyond what was required in the EU Takeover Bids Directive. The passage of the Florange Law further enhanced this by considerably strengthening the rights both of the works councils and of the board to oppose hostile takeovers.

The background of the Florange Law was the closure of two blast furnaces by the steelmaking giant ArcelorMittal. Three facts in particular influenced the public debate surrounding this law. One was the fact that ArcelorMittal was formed by a hostile takeover of European steel companies by the Indian company Mittal, despite the opposition of employees, management and governments. A second fact was that the blast furnaces were closed even though they were profitable. This fed into the third fact, which was the perception by the general public that companies were increasingly being influenced by short-term financial considerations, in part due to pressures from institutional investors.

Although the primary goal of the Florange Law is to require companies to seek a new owner before closing down a plant, it contains a number of provisions directly relevant to takeovers. Specifically, it grants double voting rights to long-term shareholders and allows the board of a target company to implement defensive measures against takeovers without the approval of shareholders. It makes strategic alliances between management and employees possible in order to ensure the long-term sustainability of a company against purely financially motivated strategies. Finally, it strengthens the position of the works council of the target company by laying down a consultation right vis-à-vis its own

board; the board must hear the works council before publishing its opinion on the bid. As this is a new development, however, it remains to be seen to what degree the relevant actors will make use of these new legal instruments.

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Chapter 10

Worker involvement and the EU Takeover Bids Directive in the Greek banking crisis

Christos A. Ioannou

1. Introduction

The Takeover Bids Directive (also known as the Takeover Directive or the 13th Company Law Directive, 2004/25/EC, adopted 21.04.2004) has been transposed in Greece by means of Law 3461/2006, ‘Transposition into National Law of Directive 2004/25/EC on public takeover bids’. As there were no specific rights for workers during takeovers in Greek law prior to implementation of the Directive, this resulted in some new, albeit relatively weak rights, specifically the right to be notified once the takeover bid has been made and for worker representatives to append their own opinion to the opinion that the board of directors of the target company sends to its shareholders. However, trade unions in Greece have other information and consultation rights in such situations, particularly those resulting from the implementation of the EU Transfers of Undertakings Directive.

In practice there have been few cases in which union representatives have been active in the process of a takeover bid. However, the transfer of Société Générale’s Greek subsidiary Geniki Bank to Piraeus Bank in October 2012 in the context of the consolidation of the Greek banking sector provides an interesting case of worker involvement. Workers’ rights stemming from the Takeover Bids Directive were not triggered because there was no public bid due to special circumstances. However, the relevant trade union was able to utilise other information and consultation rights in support of its strategy to protect workers’ interests during the transfer of ownership to a different bank.

2. Key elements of Greek takeover legislation

The standard procedure for transposing EU law in Greece is the publication of a Presidential Decree. In that sense the transposition of the Takeover Bids Directive by means of a law is an exception. The main

reason for this is that previously existing legislation had to be amended and harmonised. This is frequently observed in the areas of Greek company law and corporate governance legislation (the latter did not exist in Greece prior to 2000).

The transposition of the Directive altered and improved the previous regulatory regime that was defined by decisions of the Hellenic Capital Market Commission. The Capital Market Commission remained the competent authority to supervise compliance with the law that transposed the Directive and the application of the procedure of the bid in general. Prior to the transposition, takeover bids were regulated by a Decision (No. 2/258/05.12.2002) of the Hellenic Capital Market Commission.

The Hellenic Capital Market Commission has a seven-member board of directors that is entrusted with the following tasks: the design of general policy, the introduction of rules and regulations, the granting and revoking of licenses, the imposition of sanctions, the drafting of the annual budget, the management of the Commission's operations and decisions on personnel matters. The Minister of the Economy and Finance appoints the chair and the two vice-chairs, following the consent of the competent committee of the Greek Parliament. The other four board members are selected by the Minister of the Economy and Finance.

The improvements introduced through the transposition of the directive concern the protection of minority rights, the obligation for clarity and transparency, the preconditions of a mandatory bid, the relaxation of requirements for a voluntary bid, the standards of the offer document, the introduction of civil liability for the redaction of the offer document and, indeed, the information rights of worker representatives. Prior to the transposition of the directive there were no direct rights for workers' representatives in any step of the takeover process.

The Hellenic Capital Market Commission is the focal point for disclosure in the process of takeover bids. Each public announcement concerning the bid shall be communicated without delay to the Capital Market Commission. It is also supposed to be made public on the website of the Athens Stock Exchange, on the Daily Official List Announcements section of the Athens Stock Exchange and on the website of the person or company making the announcement, where such a website exists.

Disclosure of the bid and notification to the Capital Market Commission are subject to strict procedural and content requirements. Before being made public, any decision to launch a bid must be transmitted in writing to the Capital Market Commission and the board of the offeree company. At the same time the offeror shall submit to the Capital Market Commission and to the board of the offeree company a draft of the offer document. The announcement shall contain, at a minimum, the information required by the Directive.

When a voluntary bid is launched for the acquisition of a company's securities, the offeror is obliged to acquire all securities offered, unless the offeror has previously defined a maximum number of securities that they have undertaken to accept. The offeror can also define a minimum number of securities which shall be offered to them as a condition for completing the takeover.

A bid must be launched (mandatory bid) when the offeror acquires and holds more than the threshold of one-third of the total voting rights of the offeree company. The offeror is obliged to launch a bid, within a 20-day time period from the acquisition, for all securities of the offeree company, which involves an equitable and fair consideration. The same obligation arises when a party holding between one-third and one-half of total voting rights of the offeree company acquires securities of the offeree company representing more than 3 per cent of the total voting rights of the offeree company.

Breakthrough provisions apply to restrictions on the transfer of securities arising from the articles of association of the offeree company. The holders of rights removed due to the breakthrough provisions shall receive equitable compensation for any loss suffered by them. Breakthrough provisions do not apply where the Greek state holds securities in the offeree company, which confer special rights to it.

3. Worker representatives' rights

Transposition in Greece does not grant workers' representatives any rights above and beyond what is required by the Directive. In the text of Law 3461/2006 the reference to the rights of worker reps is fairly minimalistic. However, on many other aspects and provisions of the Takeover Bids Directive provisions, the transposition law is very detailed

and specific. This is not the case with regard to the workers' representatives' rights. Here the Law only incorporates the wording of the Directive. The same applies with regard to the content of the offer document.

In the transposition Law 3461/2006 there is no reference and specification as to which workers' representatives are informed (trade union, European Works Council and so on). Therefore this can be inferred only by reference to the labour law provisions for workers' representatives in other items of labour legislation.¹

In a nutshell the company's 'primary level' (enterprise-based) unions have been the most important form of employee representation in Greece. They have clear legal rights covering information, consultation and negotiation. The law also provides for a works council structure. But in reality, works councils have been found only in a few companies, and where they exist, they work closely with the local company union.

It does not appear that workers' representatives, if they disagree with the opinion of their management, use their right to publish a different opinion on the offeree document.² The author has examined a small sample of opinions of offeree companies and found that all of them included the standard information that 'Company employees have not expressed an adverse opinion on the offer'. Although in the case of disagreement on the part of the employees, expressed by their workers' representatives, their opinion should be incorporated into the offeree company document, there is no evidence that this (either to have a disagreement expressed and published as part of the offeree company report, or in a separate action) has happened in the small sample of takeover bids looked at by the author.

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1. The de jure and de facto priorities and hierarchies that apply in the Greek labour law are described in <http://www.worker-participation.eu/National-Industrial-Relations/Countries/Greece/Workplace-Representation>
 2. Article 15 of the Transposition Law 'on the opinion of the offeree company' para 4 is, again, word for word the text of the directive that states that 'The board of the offeree company shall at the same time communicate that opinion to the representatives of its employees or, where there are no such representatives, to the employees themselves. Where the board of the offeree company receives in good time a separate opinion from the representatives of its employees on the effects of the bid on employment, that opinion shall be appended to the document'.

4. Case study of the takeover of Geniki Bank by Piraeus Bank in 2012

Geniki Bank was founded in 1937 and was a state-run bank until 2004, when it was privatised. It was acquired by the French bank Société Générale as part of an expansion drive into southeast Europe. In 2012 Geniki Bank, as part of the European Société Générale network, was one of 22 banks in Greece and had a network of 104 branches (out of a total of 3,629 branches in the Greek banking sector) and had 1,391 employees (of the total 57,006 employees in the banking sector of Greece). The privatisation was justified by the government within the framework of attracting foreign investment and the assumption that the new private management would modernise the bank.

In mid-October 2012 Piraeus Bank, one of Greece's leading banks, announced the acquisition of Geniki Bank from Société Générale. This case study examines worker involvement in the process of Piraeus Bank's acquisition of Geniki Bank by focusing on whether and how the provisions of the EU Takeover Bids Directive have been implemented.

It appears that worker involvement rights have been, to a certain extent, put on hold because of the specific conditions prevailing in Greece. Greece was trying to accelerate the consolidation of its banking sector and draw most of the total 50 billion euros of international funding earmarked for recapitalising the country's four biggest lenders.³ In this context, banking sector consolidation evolved under the specific conditions set by the IMF, ECB and EC (the 'troika') Memorandum because of the country-specific conditions for which a special legal regime was introduced by means of Law 4021/2011 on 'Enhanced surveillance and consolidation of credit institutions – Regulation of financial issues – Ratification of the Framework Convention of the European Financial Stability Fund and its amendments and other provisions'.

In this process, under way since 2012 to recapitalise four core banks and restructure smaller banks and cooperatives through mergers and resolutions, came the deal for Piraeus Bank to acquire Geniki Bank. This was a

3. Piraeus Bank, the country's fourth-largest bank, kicked off the process of acquisitions and mergers in summer 2012 by agreeing to acquire the healthy assets of ATE Bank, a lossmaking state bank.

deal already approved by Greece's international creditors (the troika, who were regulating all aspects of the Economic Adjustment Programme for Greece, including banking sector consolidation). Société Générale agreed to sell its Greek subsidiary Geniki Bank for 1 million euros to Piraeus Bank and provide the loss-making lender Geniki Bank with 444 million euros in fresh capital. Société Générale agreed to inject 281 million euros into Geniki Bank and to subscribe to 163 million euros of bonds that would be convertible into Piraeus shares or tier one capital. For Société Générale the sale was to result in a net loss of 100 million euros, which was to be incorporated into Société Générale's third-quarter 2012 results.

Because of the special legal regime introduced by Law 4021/2011 on 'Enhanced surveillance and consolidation of credit institutions – Regulation of financial issues – Ratification of the Framework Convention of the European Financial Stability Fund and its amendments and other provisions', the formal procedures provided by the EU Takeover Bids Directive were bypassed, at least with regard to the sale of the Société Générale share in Geniki Bank and the acquisition of this share by Piraeus Bank. However, the provisions of the Directive, as transposed by Law 3461/2006, were to be applied with regard to the acquisition of shares from minority shareholders of Geniki Bank (that is, not owned by Société Générale) in March 2013.

In this case it is important to examine how Geniki Bank employee representatives secured their information and consultation rights despite the lack of a public bid. The conditions under which the takeover took place required special actions by the trade union. We examine these actions in their chronological order, drawing on union archives and public press reports.

On 29 August 2012 the CEO of Geniki Bank announced discussions between Société Générale and Piraeus Bank on a possible takeover of his bank by Piraeus Bank. On 30 August 2012 the Geniki Bank company trade union wrote to the CEO that management had an obligation to inform the employee representatives on developments and especially on employment prospects in the bank according to the provisions of PD 240/2006 (transposition of the Directive 2002/14/EC). They requested that the banking sector trade union federation OTOE be allowed to attend the meeting.

On 3 September 2012, in the context of the ongoing negotiations between Société Générale and Piraeus Bank, and after the immediate reaction of the Geniki Bank company trade union and the banking sector federation OTOE, a meeting between management and trade unions took place. The CEO gave assurances that labour rights at Geniki Bank were not to be challenged. The union had set as its first priority the security of the jobs of the employees.

On the question of whether the takeover by the Bank of Piraeus might be accompanied by layoffs, the CEO replied that Geniki Bank had no such intention, but that they could not control the conduct of the bank that was to acquire Geniki Bank and would have managerial power in future. This was an issue to be discussed with and decided by the Paris headquarters of Société Générale.

The French management of Geniki Bank expressed the view that, even after the takeover, the bank would continue its autonomous operations. Furthermore, the search process for potential buyers would take several months and, in any case, both the current and the new management would continue to respect labour rights as part of normal operations.

The trade union decided on a consultation with the management to have full and complete information on relevant developments. The management of the bank forwarded the union views to Société Générale headquarters in Paris, where discussions were conducted with each prospective buyer. The union side also stressed their intention to exploit all the possibilities offered by EU law to guarantee labour rights.

In the period between the announcement of the possible takeover and the meeting with the bank management, between 30 August and 2 September 2012, internal divisions in the union arose. A minority of trade union executive members argued that they needed to gather before the meeting with management and decide a different plan of action, for example, to go on strike against the transfer of the bank ownership. However, the majority challenged this position by arguing (see union executive statement of 31 August 2012) ‘what decisions can we discuss with colleagues before the positions and responses of the management for the potential sale of Geniki to Piraeus? To decide on strikes? What to decide if we are sold or not sold by the owner bank? What do they propose? To act against the discussed transfer of ownership? The basic and essential issue for us ... is to ensure all of our labour rights’.

In the period 4–9 September 2012, following the information meeting with the CEO and after being officially informed about the talks in Paris, the trade union undertook a public campaign aimed at the parliament and the political parties. This campaign stressed the need for the fulfilment of the following conditions for allowing the sale of the bank to happen:

1. ensuring employment for all employees in Geniki Bank;
2. ensuring contributions to the bank pension fund; and
3. ensuring the maintenance of all labour and insurance rights.

The union sent a letter to Société Générale (Paris) in support of these demands (see Annex I). The attempts to secure information and consultation rights for employee representatives also led to a letter from the Geniki Bank trade union board to the EWC of Société Générale (see Annex II).

Furthermore, on 4 October 2012 the company union sent a letter to the CEO calling for management to follow the provisions of the information and consultation directives as transposed in Greece. In the letter, the union underlined that

under the intense pressure of these developments, there is the imperative requirement and there are statutory rights of all the 1500 employees of the bank to be informed in a timely and valid way about both the future of the bank and the implications for their jobs. Therefore we invite you to a meeting ... This is a legitimate exercise of the corresponding rights and your obligations arising directly from the Presidential Decree 178/02, which provides for 'measures for the protection of employees' rights in the case of transfers of undertakings, businesses or parts of undertakings' in Article 8.1 which provides:

1. The transferor and the transferee shall be required to inform the representatives of their employees affected by a transfer to the following points:
 - a) the date or proposed date of the transfer,
 - b) the reasons for the transfer,
 - c) the legal, economic and social consequences for workers of the transfer,
 - d) provision regarding employees.

The transferor must disclose such information to employees' representatives in good time before the transfer takes place. The transferee must disclose such information to employees' representatives in good time, and in any event before his employees are directly affected by the transfer as regards their conditions of employment and work.

Furthermore, there is a corresponding obligation arising from the provisions of Presidential 240/2006 'establishing a general framework for informing and consulting employees,' according to Directive 2002/14 /EC. With reference to the abovementioned provisions of the law your obligation to provide information about the event, the terms and conditions of the transfer and the corresponding constitutional and statutory obligation of our Association for protection and guarantee the interests of workers and members we ask you to inform us about the developments taking place in the bank and directly affecting the working status and future of hundreds of workers. For this reason we invite you to set a meeting with us and instantly fulfil your legal obligations where this would involve legal representatives of OTOE.

This invitation was followed by meetings with the CEO, the deputy CEO and the legal advisors of both sides. In these meetings, according to union records, the CEO was invited to clarify the Geniki Bank intentions with regard to safeguarding jobs in the event of a transfer of the bank from Société Générale to Piraeus Bank. The reference by the CEO to the European law on business transfers was considered to be a positive commitment.

Some days later, on 19 October 2012, Société Générale and Piraeus Bank announced their agreement on the transfer of Geniki Bank. The same day the Geniki Bank union addressed a letter to the OTOE banking employees' federation, inviting their support and mobilisation with regard to the new owner of the bank and reiterating its three basic and essential demands.

On 22 October 2012 the Geniki Bank trade union formally addressed the CEO of Piraeus Bank, calling for an emergency meeting with regard to these three essential demands. Successive meetings took place and the new owners of the Geniki Bank assured the labour side that there would be no redundancies and that Geniki Bank was to continue its autonomous activities, that is, there would be no merger with Piraeus Bank in the

months to come. As the transfer was to be concluded by December 2012, the trade union became very supportive of the deal.⁴

Not surprisingly given this background, when on 1 March 2013 Piraeus Bank had to follow the provisions of Law 3461/2006 by means of public takeover bid in order to acquire the shares of minority shareholders in Geniki Bank, the union fully supported the bid. The trade union had exercised their rights, as provided by the national Transposition in National Law of the Directive 2004/25/EC on public takeover bids.

5. Conclusions

The implementation of the EU Takeover Bids Directive into Greek law represented a small step forward for workers insofar as no specific formal rights for workers in takeover situations existed beforehand. However, whereas on many aspects and provisions of the Takeover Bids Directive transposition the text of Law 3461/2006 is detailed and specific, the reference to the rights of workers' representatives is minimal, as the Law only incorporates the Directive word for word. In practice there have not been many cases where union representatives were active in takeover bids.

The transfer of Société Générale's Greek subsidiary Geniki Bank to Piraeus Bank in October 2012 in the context of the consolidation of the Greek banking sector is a case where, because of specific conditions, the formal procedures provided by the EU Takeover Bids Directive, as far as workers' representatives' rights are concerned, were bypassed. The company trade union had to mobilise and utilise EU labour law on information and consultation rights in the context of company ownership transfers. This case study explains how Geniki Bank employee representatives secured their information and consultation rights despite the lack of a public takeover bid. The use of these rights were an important part of the trade union's strategy for protecting important workers' interests during the transfer of ownership to a new owner.

4. The President of the trade union participated in the General Assembly of shareholders on 14 January 2013 and addressed the shareholders by underlining that 'I wish at this point to say that the acquisition of General Bank by the Group of Piraeus bank was for me and my union and for the employees a salvation'. Later, in February 2014, the trade union supported fully and publicly the initiative of the Piraeus Bank to launch a 1.75 billion euros share capital increase.

Annex I Letter from the Geniki Bank trade union board, 11 September 2012

Athens, 11 September 2012

To the CEO of GenikiBank

Mr. F. Tyrcot

Mr CEO, in this letter we request the transfer to the management of Société Générale, our views and opinions for the case of the possible sale of the Geniki Bank on three key issues, analysed in the letter attached.

Athens, 11 September 2012

To the Administrative Board of SOCIÉTÉ GÉNÉRALE

We have been informed by the announcement of the Geniki Bank CEO of negotiations with the Bank of Piraeus on the possible sale of the Geniki Bank.

There has been a first meeting of our union and of our Federation OTOE, with Mr Tirko, where we raised substantive issues relating to employees and he in turn gave us some answers which were clarifying and informative, but on substantive issues referred us to decisions of the Société Générale management.

For this reason, with this letter we want to raise our concerns directly on the effects that may arise for employees because of the possible sale of the Geniki Bank to Piraeus Bank.

In any negotiations we invite you to support the following three essential issues:

- 1 Ensuring employment for all employees in General.
- 2 Ensuring contributions to the bank pension fund.
- 3 Ensuring all labour and insurance rights.

At the same time we ask that you give us the opportunity to meet you at your offices in Paris, our side accompanied by the President and General Secretary of OTOE, to discuss and analyse them and to pass on your answers on these matters.

The Geniki Bank trade union board

Annex II Letter from the Geniki Bank trade union board, 27 September 2012

Athens, 27.09.2012

To: European Works Council Société Générale

Colleagues,

During the recent period, especially after the recent circular-update by the CEO of Geniki Bank Mr François Turcot, intense speculation has developed regarding a possible sale of Geniki Bank, member of Group Société Générale, to Piraeus Bank. As you can see, the debate has already boosted the uncontrolled circulation of information, rumors and scenarios regarding the possible consequences of such a sale for the business prospects of the Bank, but particularly on employment and insurance relations, even the employment level itself.

Under these circumstances, our Association, having the responsibility to provide reliable and secure information to the employees of the Bank, and charged with a constant concern for the protection of labour and social security rights and employment, is not intended to be limited to the role of commentator on the relevant literature, but intends to seize every opportunity that provides a national and Community legal framework for the right to information and consultation (Directive 2009/38/EC, as incorporated into Greek law by Law. d 4025/2012. 49 et seq).

In this context, because the effects of major organisational change, mergers and any form of modifications in the structure of the group companies always acquire transnational dimensions and are therefore prime objects of the right to information and consultation of European Works Councils, the right should be exercised at the right time so that workers' representatives can express their opinions when necessary. We therefore need to examine the issue in the context of the European Works Council operations.

For this reason we shall call as soon as possible to make the necessary arrangements for the European Works Council to look into this issue. In this context, and in order to exercise effectively the right to information and consultation, we ask that our Association be represented at the European Works Council in accordance with the relevant provisions of its founding agreement and Directive 2009/38/EC.

The Geniki Bank trade union board

Chapter 11

Implementation of the Takeover Bids Directive in Ireland

Kevin P. O'Kelly

1. Introduction

Directive 2004/25/EC provides employees in both the company making a takeover offer and the company that is the target of the bid with the right to information and consultation; the employees of the target company and/or their representatives also have the right to give an opinion on a proposed takeover of their enterprise.

The Directive was adopted by the Council in 2004 and came into force in May 2006. It was transposed into Irish legislation by Statutory Instrument 255, 2006. In particular, the Instrument transposed the relevant parts of the Directive into the Irish Takeover Panel Rules and other articles of the Directive directly into Irish company law. The rights of workers to be informed about the bid and to express an opinion on it in theory represent an improvement on the pre-Directive legislation. However, the right to express an opinion has had little practical application up to now.

To demonstrate the application of the Directive in Ireland, this chapter presents a case study on the three offers Ryanair made for control of Aer Lingus between 2006 and 2011.

2. Key elements of the Irish Takeover Panel Act

Prior to the setting up of the Irish Takeover Panel in 1997, the UK Takeover Panel acted on behalf of Irish business in the event of takeover bids. The Irish Takeover Panel was established as a limited company by the Takeover Panel Act 1997. In the 2006 transposition of the EU Takeover Bids Directive (2004/25/EC) the bulk of the 1997 legislation continued to apply. The national transposition, Statutory Instrument 255 of 2006, designates the Panel the competent authority for the purpose of

Article 4.1 of the Directive. Thus, the Panel continues to have the extensive powers formulated under the 1997 Act to make rulings and give directions, to hold hearings, to summon witnesses and to require production of documents and other information, where appropriate in the discharge of its statutory functions.

The board of the Panel consists of seven members, appointed by:

- the Consultative Committee of Accountancy Bodies, Ireland;
- the Law Society of Ireland;
- the Irish Association of Investment Managers;
- the Irish Banking Federation;
- the Irish Stock Exchange;
- the Governor of the Central Bank has the powers to appoint the Chairperson and Deputy Chairperson of the Panel.

There are no representatives of trade unions or workers.

In holding hearings into takeover bids, the Panel has quasi-judicial powers. It has the powers, rights and privileges of the High Court to require the attendance of witnesses and to examine them under oath. It can compel the production of relevant documents. A summons signed by a director of the Panel is considered the equivalent of any formal judicial process for enforcing the attendance of witnesses and requiring the production of documents.

A witness before a Panel enquiry is entitled to the same immunities and privileges as if they were a witness before a Court. Any witness who obstructs the work of the Panel, gives evidence that they know to be false or does not believe to be true or who doesn't produce relevant documents when requested by the Panel to do so is considered to have committed an offence and can be referred to the High Court for a judicial review.

One of the fundamental objectives underlying the general principles of the takeover rules is to prevent the board of target companies from taking action without shareholder approval and to disregard their interests. This applies to both hostile and recommended bids. Directors, advisors, employees and former employees of the Takeover Panel are bound by secrecy regarding information they have, until the Panel formally makes such information public.

3. Workers' rights

Statutory Instrument (SI) 255, 2006, amends the Takeover Panel Act, 1997, and transposes Directive 2004/25/EC into Irish legislation. The Schedule to the SI amends the relevant parts of the Takeover Panel Rules. Under the pre-Directive legislation there was no reference at all to representatives of trade unions or workers and there was no requirement in the 1997 legislation to inform employees of either the offeror or offeree companies when a takeover bid was made.

The notification methods do not differ between voluntary and mandatory offers. With regard to the Directive articles related to employee rights, these are amended as follows:

- The 1997 Takeover Panel Rule 24.1 (d) dealt with the offeror's intentions with regard to the continued employment of the employees of the offeree and its subsidiaries, but not in such detail. In line with Articles 3.1 (b) and 6.3 (i) of the Directive, Rule 24.1 covers the impact of the bid on employment (strategic plans and 'their likely repercussions on employment'), conditions of employment (intentions with regard 'to safeguarding the employment of the employees and management of the offeree and of its subsidiaries, including any material change in the conditions of employment') and the locations of a company's places of business.
- The disclosure of information to employees and/or their representatives of both the offeror and offeree companies (Article 8.2, and Article 9.5). New Rule 2.6 (c) and (d) states that, after publication of an announcement, both the offeror and the offeree shall make that announcement or a circular summarising the terms and conditions of the offer readily and promptly available to the representatives of their respective employees or, where there are no such representatives, to the employees themselves. In case a circular summarising the terms and conditions of the offer is sent to shareholders or employee representatives or employees, the offeree shall make the full text, under Takeover Panel Rule 2.5, of the announcement readily and promptly available to them.
- In the event of a revised offer, the provision of the revised offer document to employees and/or their representatives is covered by an amendment to Rule 32, by inserting a new sub-section 6 that

says that, when any revised offer document is despatched to shareholders of the offeree, both the offeror and the offeree shall make that document readily and promptly available to the representatives of their respective employees or, where there are no such representatives, to the employees themselves. In a similar way a response circular containing an opinion on a revised offer shall be made readily and promptly available to employee representatives or, where there are no such representatives, to the employees themselves.

- The right of employees of the offeree company and/or their representatives to give an opinion on the offer (Article 9.5) is covered by an amendment to Rule 30 by the insertion of sub-section 3. The offeree board shall append to its opinion on the offer to the shareholders of the offeree (the first response circular) a separate opinion from the representatives of its employees on the effects of the offer on employment, provided such an opinion is received in good time before the despatch of that circular. The offeree shall make this first response circular readily available to the offeree’s employee representatives or, where there are no such representatives, to the employees themselves. In the event of a revised offer, the attachment of the opinion of the employees’ and/or their representatives to a response circular from the offeree company is covered in a similar way.

Articles 10 and 11 of the Directive (with the exception of Article 11.5 concerning compensation for holders of securities and voting rights), including Article 10 (e) on information regarding a ‘system of control of any employee share scheme where the control rights are not exercised directly by the employees’, have not been included in the amendments to the Takeover Panel Rules, but are transposed directly into company law.

4. Case study – takeover bids by Ryanair for Aer Lingus

Aer Lingus, the ‘flag-carrier’ airline of the Irish State, was set up by statute in 1936 and operated as a commercial State-owned company until September 2006, when the government decided on an Initial Public Offering (IPO) of the company shares. However, the government decided to retain 25.1 per cent of the equity in state ownership. As part of the

agreement with the trade unions, employees would receive a shareholding of 14.2 per cent, to be held in an Employee Share Ownership Trust (ESOT), which was established to administer this employees' equity in the company on behalf of the workforce.¹ The trade unions' Central Representative Council (CRC) estimated that in 2012 some 10 per cent of the shares were still held by individual staff members and retirees.²

On flotation, the Irish Airline Pilots Association (IALPA) pension fund purchased 2.2 per cent of the available shares and Ryanair, a rival Irish airline, snapped up some 16 per cent of the shares, quickly increasing its holding to over 26 per cent.

Founded in 1985, Ryanair successfully pioneered the low-cost/low-fare business model. In the year ending September 2014, it carried 83.8 million passengers, through some 1,600 routes in 30 countries across Europe, including flights from Ireland to twelve airports in Great Britain. Its shareholding increased, in stages, to 29.82 per cent by July 2008. The Aer Lingus board and management have consistently maintained that the minority shareholding of close to 30 per cent by Ryanair is a form of commercial harassment and that it has a 'detrimental effect' on the company's commercial strategy and operations.

4.1 First bid

Shortly after the flotation, Ryanair launched a bid to buy Aer Lingus on the basis, according to its CEO Michael O'Leary, that it was a unique opportunity to form an Irish airline. He envisaged that this 'new' airline would carry over 50 million passengers a year. On the same day Aer Lingus rejected Ryanair's takeover bid. There were immediate concerns with the bid, as it would mean little competition on the Dublin–London route, one of the busiest in Europe.³

1. The ESOT ran into financial difficulties when the Aer Lingus share price fell in 2007/08. As a result, the company injected 25.3 million euros into the ESOT funds as a full and final payment to the Trust. This covered the ESOT's existing borrowings. The Trust was wound up in December 2010, and its remaining shares in the company (then 12.5 per cent of the Aer Lingus share capital) were distributed to 4,700 current and former employees.
2. However, these employees did not exercise the voting rights vested in their shares, as only 171 employees cast votes at the 2011 company AGM.
3. For the Ryanair offer see <http://www.ise.ie/app/announcementDetails.aspx?ID=1311919> For the Aer Lingus rejection see <http://www.ise.ie/app/announcementDetails.aspx?ID=1312507>

The European Commission expressed its concerns that such a takeover and the merging of the two airlines would reduce consumer choice and result in increased fares. In December 2006, Ryanair withdrew its bid, but stated its intention to launch another bid after the European Commission had finished its investigations. The Commission finally announced its decision, in June 2007, to block the bid on competition grounds, saying that the two airlines controlled more than 80 per cent of all European flights to and from Dublin airport.⁴

4.2 Second bid

In December 2008, Ryanair launched a second takeover bid for Aer Lingus, making an all-cash offer of 1.40 euros per share, valuing the company at approximately 748 million euros. In making the bid, Ryanair said that Aer Lingus, as a small, standalone regional airline, had been marginalised and bypassed as most other EU flag carriers consolidate. Its intention was for the two airlines to operate separately and its plans for Aer Lingus would result in 1,000 new jobs.

Again, Aer Lingus rejected the offer and advised its shareholders not to respond, stating that the company was in a strong financial position with total cash reserves of 1.3 billion euros and net cash of 803 million euros. It noted that the Ryanair offer valued the company at 525 million euros, thus seeking to acquire control of this 1.3 billion euros cash balance. The government also considered that the Ryanair offer undervalued the airline and reiterated its concerns that such a merger would have a significant negative impact on competition in the industry and on Irish consumers.⁵

The CRC, which includes all trade unions representing the 3,500 strong Aer Lingus workforce, sent an 'open letter' to all shareholders, including the government, setting out its arguments against acceptance of the offer. These were:

- the undervaluation of Aer Lingus and poor value for shareholders (which included the ESOT);

4. See <http://www.rte.ie/news/2013/0227/369827-aer-lingus-ryanair>

5. For the Ryanair offer see <http://www.ise.ie/app/announcementDetails.asp?ID=2035516>)

For the Aer Lingus rejection see <http://www.ise.ie/app/announcementDetails.asp?ID=2053562>)

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- concerns about Ryanair controlling 80 per cent of air traffic out of Ireland, which would result in higher fares for the travelling public and serious consequences for Irish aviation policy;
 - the impact on collective bargaining, taking into consideration the fact that Ryanair's track record showed a blatant disregard for the rights of workers to join and be represented by a trade union. Furthermore, Ryanair would use its position to force down conditions of employment in the aviation sector in general;
 - the lack of credibility of the commitment in the offer document to create 1,000 new jobs, noting that in its first bid it promised to cut 1,000 jobs in Aer Lingus;
 - the CRC did not believe that the European Commission would approve the bid.⁶

The offer was finally rejected by a majority of the other shareholders, combining the government's, the ESOT's and IALPA Pension Fund shareholdings and the shares of other like-minded investors, which came to in excess of 45 per cent of the equity. Ryanair withdrew its offer on 30 January 2009. Following this failed second bid Ryanair stated that another bid was very unlikely.

4.3 UK Competition Commission investigation

Aer Lingus management and board had a continuing concern that the 29.82 per cent Ryanair stake was an impediment to the normal day-to-day commercial operations of the company. This unease was shared by the UK Office of Fair Trading (OFT) as there was the possibility that the shareholding could be a constraint on competition on twelve overlapping routes between Ireland and the UK. In October 2010 the OFT announced that it had instigated an examination of this shareholding. In its submission to the OFT examination Aer Lingus outlined its commercial concerns.⁷ Aer Lingus submitted that Ryanair's continual (since 2007) blocking of the disapplication of pre-emption rights amounted to material influence over its commercial policy relevant to its behaviour in the

⁶. *An Open Letter to the Shareholders of Aer Lingus* Aer Lingus CRC, 22 December 2008.

⁷. *Completed Acquisition by Ryanair Holdings plc of a minority interest in Aer Lingus plc*, UK Office of Fair Trading ME/4694/10, (OFT reference document to the UK Competition Commission) 5 July, 2012.

marketplace. By doing so, the company argued, Ryanair was denying Aer Lingus one of the normal mechanisms available to listed companies to raise fresh capital.

In July 2011 the case was referred to the UK Competition and Markets' Authority, which undertook to assess whether the shareholding had resulted in a merger situation, and if so, if such a merger had resulted or could result in a substantial lessening of competition. The Competition Commission ruled in August 2013 against Ryanair and ordered it to divest its shareholding in Aer Lingus down to 5 per cent.⁸

4.4 Third bid

In May 2012, the Irish government stated that it would sell its 25.1 per cent stake in Aer Lingus at an appropriate time. This was part of the requirements imposed by the Troika (European Commission, European Central Bank and the International Monetary Fund): the government is required to sell state assets as a condition of the financial 'bail-out'. Notwithstanding its earlier stated intention not to make a third bid for Aer Lingus, Ryanair announced it would, after all, do so, this time valuing Aer Lingus at 694 million euros. Again, Ryanair stated that, if successful, it would operate the two airlines separately.

The Aer Lingus board rejected this third offer and advised its shareholders not to take any action in relation to the bid. In its detailed document rejecting the offer, the company pointed out that any offer from Ryanair was unlikely to be concluded due to (i) the 2007 decision of the European Commission to block the first Ryanair bid on competition grounds, which was still relevant, and (ii) the UK Competition and Markets' Authority's ruling after its investigation of Ryanair's minority stake in Aer Lingus. Furthermore, the statement said that the Aer Lingus board believed that

8. The UK Supreme Court rejected the Ryanair appeal and referred the case to the Competition Appeals Tribunal, which heard the case in February 2014 and, in its judgment on 7 March 2014, rejected all the Ryanair arguments. The company then appealed the Appeals Tribunal ruling to the UK Court of Appeal. This court upheld the original CAT ruling that the company should reduce its Aer Lingus equity holding to 5 per cent, but it added that Ryanair must get written agreement from the Competition and Markets' Authority to sell any of its shareholding, thus giving the regulator a final say on who can purchase the shares. Ryanair again appealed this Court of Appeal judgment to the UK Supreme Court.

the offer undervalued the company, given the airline's profitability and balance sheet, including cash reserves in excess of 1 billion euros (as of end-March 2012).

With regard to the future of Aer Lingus staff, Ryanair stated in its bid document that it expected to continue to safeguard the existing employment rights of the management and employees in accordance with statutory requirements. However, it also stated that Ryanair would help Aer Lingus to increase the productivity of its staff through a mixture of efficiency increases and growth.

The Aer Lingus rejection document stated that its board believed that Ryanair would seek to impose significant changes to Aer Lingus' existing arrangements, cutting payroll costs and unit costs, having an adverse effect on the terms and conditions of employment for existing employees.⁹ In February 2013, the European Commission published its decision prohibiting the third bid.¹⁰

4.5 Opinion of employee representatives

In line with the requirements of Statutory Instrument (SI) 255, 2006, the Aer Lingus board and management formally informed the employee representatives (CRC) of the Ryanair offer. For the third bid the CRC set out its objections in a detailed opinion, which was appended, as envisaged by Article 9.5 of the Takeover Bids Directive and the Rules of the Takeover Panel, to the formal rejection of the offer by the Aer Lingus board. In preparing the staff response to the Ryanair offer, the CRC sought and got legal and political advice from a number of sources, including a number of Irish MEPs, in particular Emer Costello MEP. When requested by the CRC, the European Commission, DG Competition, clarified a number of aspects of the Council Merger Regulation (EC No. 139/2004) and the Council Regulation implementing the Mergers Regulation (EC 802/2004). In particular, it confirmed that the CRC could be granted, on application, third-party status, and then could be invited to attend any

9. For Ryanair offer see <http://www.ise.ie/app/announcementDetails.aspx?ID=11267949>
For Aer Lingus's rejection see <http://www.ise.ie/app/announcementDetails.aspx?ID=11268702>

10. Ryanair appealed this European Commission ruling to the European Court of Justice.

public hearings to give its opinion on the impact of the takeover, if the European Commission was to proceed with such hearings.

The CRC opinion included such issues as:

- the financial strength of Aer Lingus with net cash reserves of almost 500 million euros;
- the undervaluation of the company in the offer, including the value of the 23 landing/take-off slots in London Heathrow Airport (LHR);
- the continued relevance of the anti-competitiveness issue that concerned the European Commission;
- doubts about the credibility of Ryanair's stated intentions for Aer Lingus, including its intention to lease the LHR slots, as stated in its 2007 offer document.

Also, the CRC expressed concerns about, first, the Ryanair plans for staff and collective bargaining arrangements and, second, future staff pension entitlements. With regard to the first, the CRC expressed scepticism about the Ryanair statement in the offer document that it would increase the number of pilots, cabin crew and engineers employed by Aer Lingus, as there was no information in the bid documents as to how this would be achieved. Nor did the CRC believe that Ryanair would

respect and safeguard the existing employment rights of the management and employees ... in accordance with statutory requirements. It is widely known that Ryanair does not recognise trade unions for collective bargaining purposes and has a history of opposing trade union recognition. The history of Ryanair's actions towards employees at Buzz following its 2003 takeover would cause concern to Aer Lingus workers.¹¹

11. *Aer Lingus Staff Should Reject This Ryanair Offer* CRC, August, 2012. Interestingly, Aer Lingus management had legal advice from a UK legal firm, hired to assist it in drafting the rejection document, not to engage with staff during the takeover period. Consequently, all formal meetings between the CRC and management were suspended and no formal assistance was given by Aer Lingus management to the CRC in the preparation of its opinion. It is unclear why this recommendation was given or what was the legal basis for this advice.

The CRC opinion drew attention to the existing flexible working relations between staff and management in Aer Lingus that had contributed significantly to its ability to adapt to the much-changed circumstances in the Irish aviation sector over the past three years. According to the CRC opinion, Ryanair would undo much of this good work if the takeover went ahead. The second significant staff concern with any takeover of Aer Lingus – the future of the pension schemes – had already been expressed by the CRC. The opinion noted that there was no information in the bid document about Ryanair’s intentions regarding the Aer Lingus pension schemes, and indeed that in the past Ryanair had threatened to sue Aer Lingus if any additional funds were injected into the pension fund. Finally, the opinion stated that, from a staff point of view, the offer document was highly selective.

5. Conclusion

Directive 2004/25/EC was transposed into Irish legislation by Statutory Instrument (SI) 255, 2006. This was a straightforward transposition of the Directive and its relevant articles were incorporated in the Rules of the Irish Takeover Panel. Under the Directive, employee representatives have a legal right to receive the offer document and give an opinion when a takeover offer is made by appending its formal view to any rejection document. The legal provisions do not go beyond those contained in the Directive and there are no ‘enhanced rights’ to information in the Statutory Instrument.

These rights do represent an improvement over the pre-Directive situation, but to date they seem not to have played a major role in takeover situations in Ireland. In the case of the third Ryanair offer, the employee representative body of Aer Lingus, the CRC, drafted a formal opinion that was appended to the rejection document from the Aer Lingus Board. However, the Takeover Panel did not see this opinion when the rejection document was submitted to the Panel, as required by its Rules. In fact, this is the only occasion known to the Takeover Panel that a formal employee opinion has been prepared for attachment to a rejection document.

However, the Aer Lingus CRC played a significant role in putting together a ‘coalition’ of shareholders to vote down any possible takeover by Ryanair. This coalition included the ESOT’s 14.2 per cent, the Irish State’s 25.1 per cent, the IALPA pension fund’s 2.2 per cent and a number of

corporate and individual shareholders who opposed the Ryanair bids. This illustrates the role that worker representatives can play in discouraging negative takeover bids from completion, when joining forces with other relevant actors.¹²

12. After two unsuccessful bids by the International Airlines Group (IAG), the Irish Government accepted the third IAG bid and agreed to sell its shares in May 2015. Ryanair also sold its shares, as did other shareholders, and the sale of Aer Lingus was completed in September 2015.

Chapter 12

Implementation of the Takeover Bids Directive in the Netherlands

Robbert van het Kaar and Jan Cremers

1. Introduction

The Dutch case is particularly interesting because of the strong position of works councils within Dutch companies, including in restructuring situations. Implementation of the Takeover Bids Directive in the Netherlands did not lead to new worker rights above and beyond what was required. However, the general legislation on workers' involvement – the Works Council Act (WOR) – includes several articles relevant to takeover situations. The WOR prescribes that companies – a target company and the bidder, if Dutch – have to seek the advice of the works council in relation to major corporate decisions, such as entering into a transaction. For decisions regarding a change of control over the company a mandatory advice procedure applies (WOR, Article 25). The works council is bound by confidentiality. If a works council is not consulted in accordance with the WOR rules, this can endanger or delay the execution of the decision. If a management's decision conflicts with the works council's advice or if the management has not properly informed it, a works council can ask the Enterprise Chamber of the Amsterdam court to block the decision (Article 26).

Usually, the central management of a target company will inform the works council and look for its support for a deal. Similarly, the trade unions are notified in case of acquisitions as prescribed by the so-called 'merger code'. Once an offer is launched the workers' representatives (including the trade unions) have to be informed and consulted about the offer. An examination of the case of Stork, which was the target of two takeover bids, shows that works councils in the Netherlands can have a substantial influence on the outcome of such bids.

2. Key elements of Dutch takeover regulations

Up until the 2000s public offers were dealt with on the basis of self-regulation with supervision by a non-statutory regulator. In 2001 a statutory body responsible for the supervision of public offers was created, the Authority for the Financial Markets (AFM). Its main responsibilities are the review and approval of offer documents and the monitoring of compliance with the rules. The AFM is supposed to ensure that public offers are publicly announced in good time.

The Takeover Bids Directive has been implemented in a number of different acts, including the Companies Act (Book 2 of the Civil Code) and the Securities Act (Financial Supervision Act, FSA, and the Decree on Public Offers). Implementation has not led to changes in the existing laws on worker involvement. The legislation entered into force on 28 October 2007. Implementation brought the previous rules in line with the minimum requirements of the Directive. The position of the AFM, as the supervisor of the offer process, was confirmed and strengthened.

Other important provisions were already to be found in the Decree on Public Offers, the Works Council Act (WOR) and the SER merger code (SER-*fusiegedragsregels*). Both the WOR and the merger code contain clauses on confidentiality: works council members and union officials are obliged to keep the information they are given confidential. The standard rules in securities legislation (Articles 10 and 27 of the Decree on Public Offers) stipulate that employee representatives may be informed only when the offer is made public. Target companies with a registered seat in the Netherlands are supposed to communicate their intention to issue an offer to the employee representatives, or if there are none, to the employees, as soon as this intention has been made public. This is too late for employee representatives to be able to have meaningful influence and therefore contradicts the general Dutch worker involvement legislation, which requires that employees be informed and consulted at an early stage.

It has been debated whether securities law, more specifically the rules on insider information and insider trading, is violated when employee representatives receive information before the intention to issue an offer is made public. The majority view before the securities legislation entered into force was that securities law allows persons that, pursuant to their function, are involved in the bidding process to be informed earlier than the general public, on condition that they keep this information

confidential. Because works councils definitely have a role in the bidding process, they are entitled to timely information (as required in the WOR and the merger code). However, the transposition of the takeover Directive unambiguously contradicts this: employees may receive the information only when the (intention to) bid is made public. It can be argued that the postponement of information and consultation until the moment the offer is made public is a violation of Article 14 of the takeover Directive, which states that the Directive shall be without prejudice to existing worker rights.

3. The role of employee representatives

3.1 General information and consultation rights related to takeovers

Every undertaking with 50 employees or more is obliged to set up a works council with a range of information and consultation rights. The WOR provides the works council with three main types of rights: information rights, consultation rights and approval rights. Management must consult the works council on all major issues, including plans to sell all or part of the company or to take over other companies. On these issues the employer must seek the views of the works council and delay taking action for at least a month if the works council disagrees with the proposal. During this period the works council can appeal to the Enterprise Chamber (*Ondernemingskamer*) of the Court of Appeal in Amsterdam. When the employer has neglected their information and consultation duties, or has taken insufficient account of the interests of the employees, the court may block the decision and even undo the steps taken to implement the decision. There are several examples of mergers and takeovers that were blocked in this way (however, none of these involved listed companies).

Since 2010, the right of the works council to speak at the general meeting of shareholders of public limited companies (both listed and unlisted) on some major management decisions, including mergers, takeovers and divestment, either taken by or to be approved by the general meeting, has been enshrined in the Civil Code. However, there are no sanctions against non-observance and the general meeting of shareholders is completely free to ignore the expressed views. It is unclear to what extent works councils make use of this right.

In large companies a supervisory board appoints and dismisses management and approves major management decisions. Works councils have special nominating rights for one-third of the seats of supervisory boards. Members of the supervisory board are supposed to act in the interest of the company and the undertaking as a whole (also in case of mergers and takeovers). They may not act as representatives of partial interests, be it the interests of shareholders, banks or employees. As neither employees of the company nor trade unionists dealing with the company can be nominated, and nominees are often not familiar with employees' day-to-day concerns, this indirect representation of employees at supervisory board level is not always effective.

3.2 Trade unions: merger code and right of inquiry

In the case of acquisitions (or mergers) that involve at least 50 employees, the SER merger code applies. This code is not hard law, but rather a code of conduct (soft law). At an early stage of the negotiations, trade unions must be informed and consulted, both on the decision as such and on the foreseen consequences for the employees. When the employer concerned does not comply with their information and consultation obligations, the unions can lodge a complaint with the SER Merger Conflicts Committee (*Geschillencommissie Fusiegedragsregels*).

In addition, both shareholders and unions can request the court to order an investigation into companies when there are serious doubts about the soundness of their policies. The arrangement covers both public and private limited companies. The first step is to complain to the board (executive and supervisory board) about the policy of the company and give them a reasonable amount of time to change it. When there is no change in policy – which is usually the case – a request to start an investigation can be filed at the Enterprise Chamber of the Amsterdam Court. When the request is granted, the court appoints one or more investigators, depending on the complexity of the issue. The request – and the court's assignment to the investigators – can refer to all or part of company policy, for a longer or shorter period. When requested, the investigator's assignment can also cover related companies (subsidiaries, parent company and so on).

Since the revision of the law in 1994, the court can – if a request is made to that end – take far-reaching measures to correct the state of affairs in

the company, even before an investigation has started. These measures may include dismissal of one or more members of the executive board or the supervisory board; temporary appointment of one or more members of the executive or supervisory board; temporary deviation from the articles of association; and declaring certain decisions of the executive board void. The report of the investigators is the basis for the verdict of the court, whether there was mismanagement in the company or not. In case of mismanagement, the court can – but is not obliged to – take several measures, including the ones mentioned.

Most of the cases involve small private limited companies. However, from the end of the 1990s, the right of inquiry was applied to another type of conflict, namely those involving issues of corporate governance. In one such case, a listed real estate company defended itself against a hostile takeover by an Australian company. The court ruled that the defensive measure taken was a case of mismanagement. Although part of the ruling was nullified by the Supreme Court, this court agreed that the lavish golden parachute created by the management of the real estate company for its own members could be considered mismanagement. Although this case was started by shareholders, it might also have been initiated by the unions. Other important cases were Stork (see section D) and ABN AMRO. In the Stork case (in early 2007), the court on the one hand forbade the use of defensive measures by the executive board against hedge funds and on the other hand rejected the supervisory board dismissal demanded by these hedge funds. In the ABN AMRO case, the court made the controversial ruling that, once the executive board has publicly stated that the company is open to a public bid, it should try to maximise shareholder value. The Supreme Court later overruled this verdict and stressed that in all circumstances the stakeholder approach has to be followed. In both cases the unions and the works council successfully requested from the court that they be considered an interested party.

3.3 Information and consultation of works councils with regard to public offers

As far as the decision to launch a public offer is concerned, at first sight there are no problems with regard to the position of the works council of the bidder. If the bidder is based in the Netherlands the advice of the works council must be sought. Information and consultation should take place before the public announcement of the offer. We have already noted

that, according to the FSA and the Decree on Public Offers, the information may be given no earlier than the moment the offer is made public. In the legislative process, the government has tried to solve the tension between securities law and worker involvement rights by stating that the validity of the offer should depend on a meaningful consultation process with the works council. This would, according to the government, result in sufficiently meaningful consultation, albeit at a somewhat later stage than in the case of types of mergers and takeovers other than public offers.

The position of the works council in the target company is fundamentally different. The main problem is that the decision to accept or refuse the offer is not taken by the (executive board of the) company itself, but by individual shareholders. There is in principle no legal right for the works council to block decisions of these shareholders, or a right to be informed and/or consulted on their intentions: information and consultation rights can be implemented only vis-à-vis the executive board. Only in very special circumstances is it conceivable that a major shareholder will have information and consultation obligations (there is one court ruling to this effect). Although this is first and foremost true for mergers that take place through share transactions – as opposed to transfers of undertaking or legal mergers – the problem is especially present in case of public offers, due to the dispersed ownership of shares (with the added complication that some 80 per cent of the shares in Dutch listed companies are held by parties outside the Netherlands).

The question remains what the rights of the works council are with regard to the position the executive board of the target company takes towards the bidder. There appears to be a consensus that the works council has the right of advice whatever the opinion of the executive board of the target company is (support, opposition or neutrality). This would imply that decisions of the executive board of the target company may be challenged in court by the works council. It remains to be seen what the effect of a court decision in favour of the works council would be: the court decision only affects the stance of the executive board, not the decision of the shareholders to transfer their shares. A court ruling in favour of the works council will have much more effect when the bidder has made the offer conditional on the support of the executive board of the target company; then the works council of the target company effectively influences the continuation of the bidding process itself. In practice, a works council usually sides with its own management.

3.4 Information and consultation of works councils with regard to a hostile public offer

The central issue in case of a hostile public offer is whether the executive board of the target company takes defensive measures against the bid (such as suspending voting rights for shareholders or issuing new shares). In principle, the works council of the target company has the right of advice with regard to measures taken by the executive board to have an effect on the transfer of ownership of the company. This includes the use of defensive measures in case of a hostile takeover. Thus the works council of the target company may either support or oppose defensive measures taken by the executive board (or choose to be neutral). The main example is the issuing of new shares to a 'white knight' in such an amount that the white knight actually gains control. In practice, the works council usually supports the defensive measures, joining forces with the management and supervisory board of the target company. This happened in 2007 at Stork. A recent example is KPN, where defensive measures were taken to fend off the Mexican tycoon Carlos Slim.

The SER merger code explicitly takes account of hostile public offers (that is, a public offer without the consent of the executive board of the target company). The bidder shall uphold the information and consultation rights of the trade unions in case of a hostile offer in the same way as in the case of non-hostile offers. According to the Code (Articles 5.2 end 5.3), the bidder must notify the target company of the intention to launch the offer at least 15 days ahead of the actual offer and the executive board of the target company has to inform and consult the unions in the same way as in other types of mergers. Again, these provisions are in violation of the securities legislation that implements the takeover Directive and will be abolished in the near future.

The SER merger code specifically takes account of takeovers by way of the gradual acquisition of shares. Article 6 stipulates that the information and consultation procedures should as much as possible be conducted as in the case of a 'normal' merger, takeover or acquisition.

Mention should be made of the duty to notify the crossing (both ways) of a number of thresholds of shareholding (3, 5, 10, 15, 20, 25, 30, 40, 50, 60, 75 and 95 per cent, see Article 5:39 Wft) to the Financial Markets Authority. As this information is made public, employees, works councils and unions are able to get information on the build-up of portfolios of shares by parties at an early stage.

4. The Stork case – a plaything for 'activist' funds

4.1 Some basic information

Stork N.V. machinery was founded in 1865 and was long seen as one of the most innovative and progressive firms in the Netherlands. As early as 1881 the firm started a company pension fund and two years later an early type of workers' representation (a *kern*). In the late 1960s a period of restructuring started as heavy industry declined, at national and global level; total employment decreased from 26,000 in 1968 to 12,000 in 1983. The firm made a remarkable come-back by shifting to 'light' industrial production: engineering and supply for aviation and space travel, as well as food systems and technical services. By 2007 the group had evolved into a large company with over 80 subsidiaries. The total workforce reached 13,300 employees spread over four divisions (textile print machinery, chicken slaughter machinery, aviation technology and technical services). Although the Stork group had a strong decentralised company culture, with four divisions that could not be placed under the same common denominator, the whole group functioned with one 'identity' with a long entrepreneurial history and tradition.

Stork had a two-tier governance structure with an executive board and a supervisory board. Based on the WOR extensive information and consultation through the works council system was created after the Second World War. The WOR rights, including codetermination, were executed by the central works council for issues involving the entire group, by unit works councils at the level of the strategic business units and by works councils for the individual subsidiaries. The trade unions had a strong position in the company and were recognised as the competent partner that negotiated terms and conditions of employment through well-established collective bargaining processes. The strength of workers' involvement was demonstrated in the 1970s as the closure of two ironworks was successfully blocked by industrial action.

4.2 Description of the process

In 2006 the company, which was listed on the Amsterdam Stock Exchange, came under heavy attack from two so-called 'activist' hedge funds that had started with a participating interest in 2004 (Centaurus and Paulson). Centaurus and Paulson demanded the break-up of the

conglomerate. The funds wanted the company to concentrate on aerospace activities and to sell off the other divisions. For all other important stakeholders the idea of splitting up the group and concentrating only on the aerospace operations was seen as a betrayal of the aims of the founding fathers and not in the interest of all stakeholders, including workers and customers.¹ The management decided not to respond to this demand and this decision was backed not only by the supervisory board but also by the works council and the trade unions. But when the demands of the hedge funds were tabled at the extraordinary general meeting of shareholders on 12 October 2006, it became clear that a large majority of the shareholders present did not agree with the position of the board ('no selling of divisions'). Further consultations between Stork management and the two funds failed to result in an agreement. The hedge funds reacted by calling for another extraordinary general meeting of shareholders. One of the points on the agenda that they wanted to table was a vote of no confidence in the leadership of the group. The management response was to issue new preferential shares to a foundation, with the primary goal of preserving the independence and continuity of the company. The hedge funds' response was to call for an inquiry procedure in which they demanded the reversal of the share issue (or at least a ban on any voting rights awarded to the new shares) and the dismissal of the supervisory board that had taken the lead in this action.

In January 2007, the Enterprise Chamber of the Amsterdam Court of Appeal had to rule on the dispute between the two hedge funds and the Stork group. The hedge funds asked the court to deprive the Foundation (the owner of the preferential shares that had been established as a defence wall) of its voting rights. Stork's works council and the trade unions sided with management in defending the company against a takeover that would probably lead to a break-up. The works council asked the court to suspend the voting rights of the hedge funds; the trade unions defended the supervisory board against dismissal.²

Neither of the two main parties to the dispute achieved a complete victory; the court granted to a certain extent the request submitted by the hedge funds by reversing the share issue and prohibiting the defensive wall, but the demand to dismiss the supervisory board was rejected. According to the court, this would have been a too radical change in the group's

1. <http://www.orinformatie.nl/?subject=news&id=126>
2. Largely based on van het Kaar (2007).

strategy. Instead of a dismissal of the supervisory board, the court added three members to this body with the task of mediating between the conflicting parties through consultations and negotiations. The trade unions and the workers considered that the court's verdict constituted support for the view that defines a company as a community of different stakeholders who all have to be involved in important decisions, and not primarily as a shareholder vehicle. Legal experts and analysts regard the proceedings as a test case in relation to the increased rights of shareholders: 'the Enterprise Chamber intervened with immediate measures mostly to preserve the status quo and allow for an orderly process of debate and conflict resolution' (Beckum *et al.* 2010). Since 2004 the rights of shareholders had been extended to the prerogative to dismiss the supervisory board members; the court made clear that there were certain limits to this right.³

Soon after this decision the British investor Candover stepped into the race. A first effort in the summer of 2007 to acquire a majority of the shares failed. One owner of a substantial part of shares (32 per cent, later on extended to 43.5 per cent), the Icelandic food machinery group Marel was interested in the food division and refused to accept the bid. Centaurus and Paulson also evaluated the offered share price as too low. The works council had been informed and had rendered positive advice on the planned transaction as 'a good step to allow Stork to continue with its strategy'.⁴ During two months of negotiations with the executive board and the supervisory board, including the three extraordinary supervisory board members appointed by the court, agreement could be reached over a takeover by Candover that was fully and unanimously supported on 28 November 2007. The hedge funds that had raised the level of participation to 33 per cent of the shares backed the intended offer.

In a joint press release by Stork and the investor it was said that the Stork central works council had been informed and requested to review the intended offer.⁵ A guarantee was given that existing rights would remain in place, including employee codetermination, existing social plans and collective agreements, and that there would be no negative employment

3. <http://www.fnvformaat.nl/jurisprudentie/jurisprudentie-verdieping/enqu%C3%AAAterecht/uitspraak-twijfel-aan-juist-beleid>

4. Intended recommended cash offer of EUR 47 per share for Stork, 26 June 2007, <http://hugin.info/130797/R/1135429/212877.pdf> and recommended cash offer, 10 August 2007, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aZDmtIk.hkoY>

5. Offer for Stork, Candover Investment, press release, 28 November 2007.

consequences. The supervisory board and the executive board spoke of a constructive dialogue that had led to an agreement and recommended the deal to the last shareholder meeting held on 5 January 2008. The central works council delivered a positive opinion on the acquisition that was declared unconditional on 17 January 2008. Soon after, Stork was delisted from the stock market. The chicken slaughter division was sold and the other entities continued as separate companies.⁶

4.3 Evaluation

The coalition of the executive board, the supervisory board, the trade unions and the central works council strengthened the involvement of workers' representatives in the whole process before the takeover took place. However, this coalition could not prevent the partial break-up of the group. The trade unions that organised strike actions in September 2007 against a split of the group were satisfied with the fact that there would be no negative employment effects. But, although the 'activist' shareholders did not get their way, the unions together with the founders' family regretted the outcome of a complicated and long fight over the ownership of the group. A spokesperson of the family referred to a wall painting in the old office, which dated back to 1892, that symbolised the start of the social welfare system in the Netherlands with the statement: 'Jointly we act, no struggle, but cooperation'.

The first attacks by the hedge funds were countered with all possible means. The central works council, together with the concerned unions, signed up as interested party in the court case that was initiated by the hedge funds, which was meant to break down the defence wall. The hedge funds realised after this move that the works council was a stakeholder that could not be ignored. The funds approached the works council for an exchange of views as they formulated a vote of no confidence in the executive and the supervisory board. The planned bid by Candover in June 2007 received more positive acceptance from the council. But the threat of a complete break-up remained. Although the implementation of the Thirteenth Directive entered into force on 28 October 2007 and the

6. The acquisition of Stork Food Systems by Marel received positive advice from the Stork works council in 2008. In 2011 Candover sold the other divisions to the British private equity company Arle Capital that already had shown interest in 2008. The separate divisions are Stork Tech Services, Fokker Technologies and Stork BV.

Dutch legislator had decided not to apply the new legislation to pending cases, the intended offer was presented to the central works council. The legal basis was Article 25 of the Works Council Act. In accordance with the procedure to obtain the central works council's advice on the sale of the food division, Stork and Marel had discussions with the central works council as part of the advice process. The results of the deliberations were laid down in a covenant.

In general terms the consultation rights of workers are too weak to completely block this kind of turbulent hostile activity. However, the solid position of the trade unions and works councils made it possible to influence the process to a more positive outcome than the hedge funds and activist shareholders had in mind. The protests in a broad coalition with the use of all juridical means combined with workers' voice made it possible to counter the attack. In hindsight the works council is happy about the de-listing: it has brought an end to the risks of hostile takeovers. The attacks by the hedge funds led to a complicated fight that demanded all the energy of the works council members ('a lot of fuss that had nothing to do with the core business of the company').⁷

5. Concluding remarks

With regard to takeovers and acquisitions in general, the works council in particular has strong information and consultation rights that are enshrined in the Works Council Act. Trade union rights have no legal status, but are contained in a 'soft law' code of conduct (which is presently under revision).

In the case of public offers, the situation is more complicated. After the implementation of the takeover Directive, it is against the law to notify the works council and/or the unions of takeover intentions before the public announcement of these intentions. The legislator did not consider it problematic that these new rules are contrary to the existing legislation on worker involvement because the agreement in principle between the bidder and the target company can be made conditional on the required involvement of the works council and/or the unions. In practice, however, the delay will make information and consultation less effective.

7. In an interview published in van Lammeren (2009).

Apart from this, the position of the works council of the target company is difficult. However, this is inherent in this type of acquisition, in which not the management of the target, but individual shareholders take the final decision. The work council can wield some influence, due to some statutory influence on the stance the management of the target company takes. This is especially important in the case of hostile takeovers.

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Chapter 13

Worker involvement during a public takeover: the case of Norway

Bernard Johann Mulder

1. Introduction

In Norway, the EU Takeover Bids Directive is implemented by, in particular, Chapter 6 of the 2007 Securities Trading Act.¹ Regulations on takeover bids are also issued through self-regulation by the Norwegian Corporate Governance Board through the Norwegian Code of Practice for Corporate Governance.² Mergers of public limited companies are not regulated by the public takeover rules, but rather by the 1997 Public Limited Liability Companies Act.

A takeover may be carried out as an acquisition of the target company's shares or of all or most of its assets. There are, in principle, no foreign investor restrictions in Norway. In the takeover situation both parties – both the bidding party (offeror) and the target company (offeree) – in the transaction are obliged to inform and discuss the transfer or acquisition of business with their employees' elected representatives as early as possible. This is stated in Chapter 8, Section 8-2 of the 2005 Act relating to Working Environment, Working Hours and Employment Protection. The employees affected by the takeover shall be informed by their employer as early as possible. Neither the employee representatives nor the employees can block a takeover from being concluded, however.

When assets are transferred, but not, *nota bene*, when shares are transferred, the employees at the transferor may be subject to transfer if the conditions for a legal transfer or a merger according to the Transfer of Undertaking Directive (2001/23/EC) are met.

1. See http://www.finanstilsynet.no/archive/stab_pdf/01/04/10200042.pdf for an unofficial translation into English.

2. For an English version of the code <http://www.nues.no/filestore/Dokumenter/Anbefalingene/2012/2012-10-23CodeofPracticeforCorporateGovernance.pdf>

2. Key elements of the takeover legislation

2.1 Legislation

Public takeovers are regulated primarily by Chapter 6 of the 2007 Securities Trading Act.³ These provisions for the most part implement the Takeover Bids Directive (2004/25/EC) into Norwegian legislation. Moreover, in this context, also the 2007 Securities Trading Regulation,⁴ the 2007 Stock Exchange Act,⁵ the 2004 Competition Act,⁶ the 1997 Private Limited Liability Companies Act⁷ and the 2005 Act relating to Working Environment, Working Hours and Employment Protection⁸ might be of some relevance for the takeover bid situation. Regulations on takeover bids are also issued through self-regulation by the Norwegian Corporate Governance Board, namely by means of the Norwegian Code of Practice for Corporate Governance.⁹ Mergers of public limited companies are not regulated by the public takeover legislation, but by the 1997 Public Limited Liability Companies Act.¹⁰

The legislation on takeover bids applies to takeovers of Norwegian companies listed on a Norwegian regulated market, that is, the Oslo Stock Exchange (Chapter 6, Section 6-23 of the 2007 Securities Trading Act). Norwegian rules will also apply to Norwegian target companies that have their shares listed on a regulated market of another European Economic Area (EEA) state. Furthermore, the rules apply in cases involving the shares of foreign companies that have their shares listed on the Oslo Stock Exchange, but not in their home country.

The Financial Supervisory Authority (in effect, the Oslo Stock Exchange) may decide how these rules shall apply in cases where a Norwegian company has shares both in Norway and in a state outside the EEA, and

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3. See http://www.finanstilsynet.no/Global/English/Laws_and_regulations/Securities_market/Securities_Trading_Act.pdf for an unofficial translation into English.
 4. http://www.oslobors.no/ob_eng/Oslo-Boers/Regulations/Acts
 5. http://www.oslobors.no/ob_eng/Oslo-Boers/Regulations/Acts
 6. <http://www.konkurransetilsynet.no/en/legislation/The-Competition-Act-of-2004>
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 8. <http://www.arbeidstilsynet.no/lov.html?tid=78120>
 9. For an English version of the code <http://www.nues.no/filestore/Dokumenter/Anbefalingene/2012/2012-10-23CodeofPracticeforCorporateGovernance.pdf>
 10. http://www.oslobors.no/ob_eng/Oslo-Boers/Regulations/Acts

to companies registered outside the EEA but with shares listed in Norway (Chapter 6, Section 6-23, para. 3 of the 2007 Securities Trading Act). Further details may be given in regulations issued by the Ministry (Chapter 6, Section 6-23, para. 2 of the 2007 Securities Trading Act).

The Takeover Bids Directive has a rather complicated choice of legal rules, laid down in Article 4 of the Directive. These rules differ between financial market law and securities law, on one hand, and company law and labour law, on the other (Article 4.2.e of the Directive, *cf.* Chapter 6, Section 6-23 of the Securities Trading Act). In matters regarding the bid itself, the choice of law shall be dealt with in accordance with the rules of the European Economic Area (EEA) state of the competent authority.¹¹ For company law and labour law matters, the competent authority and applicable rules shall be those of the EEA state in which the offeree company has its registered office.

2.2 Supervision

There are several regulatory and supervisory authorities. The Financial Supervisory Authority¹² is the governmental supervisory authority for the financial markets. The Financial Supervisory Authority is responsible for the supervision of the regulation on takeover bids (Chapter 15, Section 15-1, of the 2007 Securities Trading Act; *cf.* Article 4.1 of the Takeover Bids Directive). The Oslo Stock Exchange¹³ is the authorised exchange for stocks and other equity instruments (see the 2007 Stock Exchange Regulations). The Norwegian Competition Authority¹⁴ is responsible for the supervision, implementation and enforcement of competition law (Chapter 8 of the 2004 Competition Act). The Register of Business Enterprises¹⁵ is responsible for company registration of both domestic companies and foreign enterprises in Norway, including local branches.

11. The 28 EU Member States and the EFTA Member States Iceland, Lichtenstein and Norway (but not Switzerland).

12. <http://www.finanstilsynet.no/en>

13. <http://www.oslobors.no>

14. <http://www.konkurransetilsynet.no/en>

15. <http://breg.no/english>

2.3 Procedure

The rules on takeovers distinguish between voluntary and mandatory offers, but the abovementioned Norwegian rules shall apply irrespective of whether the bid is mandatory or voluntary (Chapter 6, Section 6-19, para. 1, of the 2007 Securities Trading Act). Voluntary bids will also in some other cases be regarded as equal to a mandatory bid (Chapter 6, Section 6-1, para. 5 of the 2007 Securities Trading Act).

A voluntary offer for a company listed on the Oslo Stock Exchange must immediately be notified to the Oslo Stock Exchange and the target company, and the target company and the bidder company must inform their employees (Chapter 6, Section 6-19 of the 2007 Securities Trading Act). The Oslo Stock Exchange makes the notification public.

The offer document must be filed with and approved by the Oslo Stock Exchange before it is published. The bid shall be launched within a reasonable period after the decision to launch a voluntary bid is taken. Once approved by the Oslo Stock Exchange, the offer document must be distributed to all shareholders of the target company and also be made known to the employees of the target company. The target company is obliged to cooperate with the bidder company to facilitate distribution of the offer document, irrespective of whether the bid is hostile or recommended, mandatory or voluntary. There are no particular restrictions on the content of a voluntary offer. A mandatory offer must be unconditional (Chapter 6, Section 6-10 of the 2007 Securities Trading Act).

2.4 Statement by the board of the target company

The board of the acquirer is required to issue a public statement on the offer not later than one week before the day the offer period expires (Chapter 6, Section 6-16 of the 2007 Securities Trading Act).

The board of the acquirer has a general duty to act in the best interests of the company and its shareholders. The board may not take any action that could confer on certain shareholders or other parties an unfair advantage at the expense of the shareholders of the acquirer. According to Chapter 6, Section 6-17 of the 2007 Securities Trading Act, the board or CEO in the target company may not make decisions in regard to (i) issuance of shares or other financial instruments by the company or by a subsidiary,

(ii) merger of the company or subsidiary, (iii) sale or purchase of significant areas of operation of the company or its subsidiaries, or other dispositions of material significance to the nature or scope of its operations, or (iv) purchase or sale of the company's shares.

3. Role of employee representatives in legislation

The rules on takeover bids concern mainly financial market law, securities law and company law. To some extent, however, the legislation also contains rules on employee involvement in a takeover situation. Accordingly, the boards of the offeree company and of the offeror company shall *inform* the representatives of their respective employees or the employees themselves, where there are no such representatives, as soon as the bid has been made public (Article 6.1 of the Takeover Bids Directive (2004/25/EC)).

After the offer document is made public, the boards of the offeree and of the offeror company shall *communicate* the document to the representatives of their respective employees or to the employees themselves, where there are no such representatives (Article 6.2 of the Directive). Such document shall, according to Article 6.3.i of the Directive, state – among other things – the offeror's intention with regard to safeguarding the jobs of the offeree's employees, including any material change in the conditions of employment and the likely effect on employment and the locations of the companies' places of business. Furthermore, Article 9.5 of the Directive stipulates that the board of the offeree company shall communicate to the representatives of its employees – or to the employees themselves, where there are no such representatives – an opinion on the bid and the reasons on which this opinion is based, especially on the effects on employment; the board is supposed to draw this opinion up and make it public. Finally, Article 14 of the Directive prescribes that the Directive shall be without prejudice to the national rules on employee involvement, in particular those adopted pursuant to the European Works Council Directive (2009/38/EC, previous 94/45/EC), the Collective Redundancies Directive (98/59/EC), the SE Directive (2001/86/EC) and the Information and Consultation Directive (2002/14/EC).

According to Chapter 6, Section 6-13, para. 2, subpara. 13, of the 2007 Securities Trading Act, an offer document shall state what significance the

implementation of the bid will have for the employees (*cf.* Article 6.3.i of the Directive). The offeror and the offeree shall, after the takeover supervisory authority has approved the bid, make the bid known to their employees (Chapter 6, Section 6-14, para. 3, of the Act). The board of the offeree company shall make public a statement setting out its opinion of the bid and the reasons on which it is based, including the effects on employment and the locations of the company's places of business (Chapter 6, Section 6-16, para. 1, of the Act, *cf.* Article 9.5 of the Directive). To this opinion, a separate opinion from the employees on the effects of the bid on employment shall be appended to the statement if the board receives it in good time (Chapter 6, Section 6-16, para. 1, *in fine*, of the Act).

4. Role of employee representatives in collective agreements

Rather than being authorised in the legislation on takeover bids, worker involvement is regulated mainly by other rules, including both legislation and legally binding collective agreements. Collective bargaining is carried out at different levels, central, sectoral and local. The Basic Agreements between trade unions and employers' associations specify the principal goals and lay down negotiation procedures, including information, cooperation and codetermination. The Basic Agreements are collective agreements between the national employers' organisations and the national union confederations which set the framework for bargaining on employment conditions. They cover both the private and public sectors. The Basic Agreement between the Norwegian Confederation of Trade Unions (LO) and the Confederation of Norwegian Enterprise (NHO) constitutes the model of the Basic Agreements. The latest is valid for the period 2014–2017 and contains – in Chapter IX – rules on information, cooperation and codetermination.¹⁶ Additionally, the Basic Agreement contains a Cooperation Agreement, which regulates the activities of the different coordinating bodies.

Chapter IX of the Basic Agreement between LO and NHO stipulates the management's obligation to discuss with the shop stewards as early as possible any reorganisations of operations and matters of company law

¹⁶. An English translation of the former Basic Agreement between LO and NHO can be found at: <http://www.fellesforbundet.no/Fellesforbundet/Lønns-%20og%20arbeidsvilkår/Hovedavtalene/Hovedavtalen%20LO-NHO%202010-2013%20Engelsk.pdf>).

(Chapter 9, Section 9-4 and Section 9-5). In Chapter 9, Section 9-6, the obligation for the enterprise to allow shop stewards to present views before any decision is adopted is laid down, as well as management's obligation to inform the shop stewards of the reasons for and effects of its actions. Shop stewards also have the right of information regarding company accounts and financial matters (Chapter 9, Section 9-7).

Where there is a change in ownership of limited companies, the shop steward shall be informed under some conditions (Chapter 9, Section 9-10): management shall inform the shop steward if the buyer of the shares acquires more than 10 per cent of the company's share capital or shares representing more than 10 per cent of the votes in the company, or if the buyer becomes the owner of more than one-third of the share capital or of shares representing more than one-third of the votes.

If plans for expansion, cutbacks or restructuring may have a significant impact on employment in several enterprises within the same group of companies, the group management shall, at the earliest opportunity, discuss these issues with a coordinating committee of shop stewards (Chapter 9, Section 9-12). According to Chapter 9, Section 9-13 contact meetings shall – except when otherwise agreed between the parties – be held between the board of directors of the enterprise and the shop stewards whenever so requested by either party in enterprises owned by companies (limited companies, cooperative societies and so on). Sanctions for the breach of rules are laid down in Chapter 9, Section 9-14. Such breaches can be subject to fines.

Through the Basic Agreements the parties have a far-reaching possibility to deviate from rules set in legislation. Basic Agreements cover almost all of the public sector but only about half of the private sector. Legislation applies instead to the part of the private sector not covered by Basic Agreements.

Chapter 8 of the 2005 Act relating to Working Environment, Working Hours and Employment Protection and so on contains working rules on involvement that mainly implement the Information and Consultation Directive. There is an obligation for the employer to provide information concerning issues of importance for the employees' working conditions and to discuss such issues with the employees' elected representatives. However, this applies only to undertakings regularly employing at least fifty employees. Thus, approximately half of the undertakings in the

private sector are not covered by general information and consultation rules. Moreover, Chapter 15, Section 15-2 of the 2005 Act implements information rules according to the Collective Redundancy Directive, and Chapter 16, Section 16-5 of the 2005 Act implements information rules in the Transfer of Undertakings Directive.

Rules on board-level employee representation are laid down in Chapter 6 of the 1997 Limited Companies Act and in Chapter 6 of the 1997 Public Limited Companies Act. In both public limited companies and limited companies with more than thirty employees, a majority of the employees can demand the election of one of the board members and of an observer (Chapter 6, Section 6-4, para. 1). In a company with more than fifty employees, a majority of the employees can require the appointment of representatives constituting up to one-third and at least two of the board members (Chapter 6, Section 6-4, para. 2). If the company has more than two hundred employees, the employees shall, in addition to what is stated in para. 2, elect one board member or two observers. Under certain conditions, the company can instead establish a corporate assembly (Chapter 6, Section 6-35). The general assembly elects two-thirds of the corporate assembly members and the employees elect one-third.

5. Conclusion

Takeover bids concern primarily financial market law, securities law and company law. However, although takeovers may influence employment relations and employees' and trade unions' involvement, neither the Directive nor the Norwegian implementation rules pay much attention to this influence. The matters regarding worker involvement dealt with in the Takeover Bids Directive and the Norwegian implementation rules (Chapter 6 of the Securities Trading Act) concern decisions made by someone other than the employer, namely the owner(s).

The worker involvement rules in the Takeover Bids Directive and the Norwegian implementation legislation are not very far-reaching; they are limited to giving the employees' information as soon as the bid has been made public, to communicate the offer document to the employees after it has been made public; to make the bid known to the employees and to append to the company's opinion statement on the takeover a separate opinion from the employees. Therefore, one has to rely on general EU and national labour law rules on workers involvement, although from a

Scandinavian labour law perspective, EU law in this field does not contribute very much. Thus, the rules on worker involvement in Norway during takeovers are to be found mainly in the collective agreements between the labour market parties.

Chapter 14

An analysis of worker involvement rights under the Slovenian Takeover Act

Janja Hojnik

1. Introduction

The Takeover Bids Directive was implemented in Slovenian legislation by the Takeover Act, which entered into force on 11 August 2006. The Act, which has been amended seven times so far, is a faithful implementation of the Directive's provisions concerning information of workers during a takeover procedure. But the level of workers' general rights to involvement in the decision-making of companies guaranteed by the Slovenian Workers Participation Act is higher than that provided by the Takeover Act, which is concentrated mainly on information rights and transparency. The general Workers Participation Act grants workers much more than the simple right to be informed; they also have strong consultation and codetermination rights. On the basis of the Takeover Act, workers have almost no possibility in practice to influence decisions made during takeover procedures. Furthermore, even if they do obtain certain commitments from the bidding company in terms of future employment developments, there are no legal mechanisms to remedy any breach of such commitments.

A survey among works council presidents of seven companies that have recently been involved in a takeover reveals that a majority expressed their satisfaction with the information offered to the workers' representatives during the takeover procedures. This information flow was usually in line with the legal requirements, although it has seldom exceeded them. In general, management informed workers regularly about employment levels after the takeover. The submission of written statements of workers' representatives in response to a takeover bid is not a regular practice. Workers' representatives state that they do not have much influence on decisions or the flow of events. It can therefore be concluded that the existing regulation on worker rights to be informed about a takeover does not provide sufficient guarantees in terms of protection from the risk of changes in working conditions and redundancies. Instead, they are mostly

passive observers of procedures and changes whose predominant aim is to satisfy shareholders' interests.

2. Key elements of Slovenian takeover legislation

The first legislation in this area of company law was adopted in 1997, only four years after the passage of the Companies Act in Slovenia. The law was based on the British City Code on Takeovers and Mergers. In this respect Slovenia's adoption of this model preceded similar changes in some of the states with long traditions of corporate law that had previously acted as its main role models for corporate legislation, for example, Austria and Germany (Kocbek *et al.* 2006). The EU Takeover Bids Directive was implemented by the Takeover Act (*Zakon o prevzemih; ZPre-1*), which entered into force on 11 August 2006 and has been amended seven times.¹ Many key principles were derived from the EU Takeover Bids Directive, such as equal treatment of holders of securities, ensuring informed decisions, securing the interests of the company as a whole and protecting the employees of relevant companies. In accordance with Article 4, the bid procedure shall apply to public companies and joint-stock companies not listed on the market if they have at least 250 shareholders and a share capital of at least 4 million euros on the last day of the year before application of the Takeover Act.

The Takeover Bids Directive only regulates takeover bids for voting securities of companies when at least some of the companies' securities are admitted to trading on the regulated markets. However, national law may extend application of the Takeover Directive to bids on unlisted securities. This was the case also with Slovenian Takeover Act (Knapič M *et al.* 2012).

2.1 Regulatory authority

The Takeover Act is administered and enforced by the Securities Market Agency (*Agencija za trg vrednostnih papirjev*, hereafter ATVP). This was established by and operates under the Securities Market Act and acts as

1. *Zakon o prevzemih (ZPre-1)*, Ur.l. RS, št. 79/2006, 1/2008, 68/2008, 10/2012, 38/2012, 56/2013, 25/2014 and 75/2015.

a regulatory and supervisory authority under both the Takeover Directive and the Prospectus Directive. The ATPV is a legal entity under public law in charge of supervising the market for financial instruments. It was founded on 13 March 1994 and its tasks and competencies are defined by the Market in Financial Instruments Act.

The ATPV is independent in implementing its tasks and responsibilities. It is financed by taxes and fees paid by the participants in the financial market. The National Assembly approves its annual accounts and financial plan, while the lawfulness, purpose, economic and efficient use of the ATPV's funds are supervised by the Court of Auditors. The ATPV Council is responsible for adopting the rules of procedure and implementing regulations issued by the ATPV and decides on licences, approvals and other individual matters. The director, appointed by the National Assembly at the proposal of the government, represents the ATPV. The ATPV mission is to maintain a safe, transparent and efficient market in financial instruments. By exercising control over the brokerage companies, banks involved in investment transactions and services, management companies, investment funds, mutual pension funds, public companies and public limited companies governed by the Takeovers Act and performing other regulatory tasks, it strives to create a level playing field for efficient financial market operations.

The ATPV may request reports and information, or carry out a review of the operations of persons suspected of having breached the obligation to make a takeover bid. Supervision is performed prior to making the bid, during the bidding procedure and after publishing the decision announcing the bid results. The ATPV exercises oversight through (i) regular supervision of the status in the share registers of the companies to which the Takeover Act applies, (ii) monitoring of transactions (by the Central Securities Clearing Corporation - KDD) with the shares of public limited companies to which the Takeover Act applies, in the period concerned, (iii) monitoring of the ownership structure of persons who are involved in concerted action, (iv) acquiring reports and information from persons who are subject to supervision and (v) cooperation with foreign supervisory bodies and domestic institutions.

The ATPV issues authorisations and approvals related to takeovers, decides on the suspension of voting rights and files charges in the event of violation of the provisions of the law regarding the suspension of voting rights. Furthermore, the ATPV shall keep a register of resolutions adopted

by the general meetings on the application of defensive mechanisms and resolutions implementing reciprocity.

The offeror needs to publish the takeover intention, takeover bid, any changes in and cancellation of the bid, as well as the outcome of the bid in a daily newspaper circulated throughout Slovenian territory. The agency requires that the offeror make an explicit statement of their intention within 24 hours of receipt of the ATVP's request if it is evident from the situation on the capital market that the offeror intends to take over a company, particularly if there is an agreement between two persons to take over a company; if the price of a security on the regulated market increased significantly and it could therefore be assumed that a takeover bid will be made; or if the offeror set the price of a takeover bid that has not yet been published.

The ATVP may request the offeree company's management to make an explicit statement that they know about the takeover intention within 24 hours of the receipt of the agency's request. Within 24 hours after receipt of the request, the offeror and the offeree company's management shall notify the ATVP of the contents of the statement on the takeover intention and publish it.

2.2 Mandatory and voluntary takeover bids

According to Article 12 of the Takeover Act a takeover bid shall be made by the offeror achieving the takeover threshold of one-third of shares with voting rights. A renewed bid shall be made by the offeror after having acquired a 10 per cent share of voting rights (additional takeover threshold) after the completed successful takeover bid procedure. The obligation of making a renewed bid shall cease when the offeror that has already made a successful bid acquires at least 75 per cent of the offeree company's total voting shares (final takeover threshold).

According to Article 13 of the Takeover Act, a bid may also be made by an offeror that has not yet achieved a takeover threshold prior to the announcement of the intended bid. The Act provides that the object of the takeover bid shall be all of the offeree company's securities that are not held by the offeror. The effective date of the accepting party's statement of acceptance of the bid is deemed to be the date when the contract for sale of the entire amount of securities in question has been concluded.

2.3 Required information

According to Article 19 of the Takeover Act the takeover bid needs to include information about securities for which the bid is made. The Act prohibits other conditions except resolutive and suspensive conditions provided in the Act.² If the prospectus includes false information or lacks essential information that might influence the acceptance decision to be made by holders of the securities, the persons who prepared it or took part in its preparation shall be jointly and severally liable to the holders of securities for damages if they knew or should have known that the information was false. After the takeover bid has been announced, the offeror may amend it only by offering a higher price or a more favourable conversion rate or setting a lower successful bid threshold, if there is one.

2.4 Takeover bid procedure and notification

Prior to announcing its bid, the offeror shall notify its takeover intention to the ATPV, the offeree company's management and the authority responsible for the protection of competition and shall publish its intention on the same day. The offeree company's management is obliged to notify the agency of any arrangements or negotiations with the offeror – or alternatively that there are no such ongoing arrangements or negotiations – within two business days after the publication of the intention. If the offeror waives their takeover intention after the publication thereof, they are not allowed to make another takeover bid for up to one year after such a waiver unless the waiver is approved by the ATPV. The deadline for accepting the bid and eventual competitive bids is 60 days from the date of publication of the first bid. The time allowed for acceptance of the bid may not be less than 28 and not more than 60 days from the publication of the bid and not shorter than the ultimate deadline. The expiration of the time allowed for acceptance may in certain circumstances be extended, but not beyond expiry of the deadline. Prior to the announcement of the bid, the offeror needs to obtain an authorisation from the ATPV (Article 32 of the Takeover Act) and the offeree company's management is obliged to publish and substantiate its opinion on the bid within ten days of its announcement.

2. In this context a condition is suspensive if the obligation may not be enforced until the uncertain event occurs. A condition is resolutive if the obligation may be immediately enforced but will come to an end when the uncertain event occurs.

Offerors that are individuals, members of the offeror's management board and supervisory board and members of the offeree company's management and supervisory authorities are obliged, prior to expiry of the time allowed for acceptance of the bid, to send to the ATVP either information about all securities transactions carried out by themselves, their immediate family and legal entities in which they have a majority holding or a share of voting rights in the twelve months prior to the beginning the time period allowed for acceptance of the bid, or alternatively, a statement that neither themselves nor the other entities noted above have carried out such transactions.

2.5 Restrictions on actions of the offeree company

The offeree company's general meeting may adopt a resolution amending its articles of association binding the offeree company to observe the rules of derogation from applying defensive mechanisms from Article 49 of the Act. The resolution derogating from applying defensive mechanisms is valid only subject to the consent of holders of securities entitled to appoint and to discharge members of the management or supervisory board, in so far as such rights are defined by the offeree company's articles of association. The offeree company's general meeting may repeal the resolution restricting application of defensive mechanisms at any time.

3. Workers' involvement during takeover procedures

The Takeover Act closely implemented the provisions of the Directive concerning workers involvement in decision-making. The first provision relevant for workers is Article 24 of the Takeover Act concerning the takeover intention. This states that prior to announcing the takeover bid the offeror shall notify their takeover intention to the ATVP, the offeree company's management and the authority responsible for the protection of competition and shall publish their takeover intention on the same day. Additionally, it is provided that the offeree company's management and the offeror shall notify employee representatives or, in their absence, the employees of the offeree without delay. In this respect the Slovenian Takeover Act exceeds provisions of the Directive, which only starts with the publication of the actual bid. This right to be informed on a potential takeover before the actual bid is published is important for employees, as it ensures that employees are among the key stakeholders of the company

and that they have a legitimate interest in any relevant event related to it. Offerors who achieve the takeover threshold shall comply with their obligations concerning the announcement of the takeover intention within three business days of the day they achieve this threshold.

Furthermore, Article 28 of the Takeover Act, which provides details about the prospectus, states that the offeror shall announce their bid simultaneously with the publication of the bid document (prospectus) not later than within 30 days and not earlier than within ten days after the announcement of the takeover intention. The prospectus must include all the necessary information so that holders of securities can make appropriate decisions regarding the acceptance of the bid. This information includes the offeror's intention regarding future operations of the offeree company, as well as of the offeror company (if the latter is affected by the bid); regarding the protection of jobs of their employees and management, this includes any change in terms of employment and strategy for both companies and possible consequences for employment and the company's registered office.

Article 33 of the Takeover Act, which concerns the availability of the prospectus, requires that the offeror send the prospectus and the announcement thereof to, among others, the offeree company's management. The latter and the offeror shall deliver immediately a free copy of the prospectus to employee representatives or, if there are none, to the employees themselves.

Article 34 of the Takeover Act provides details about the opinion of the offeree company's management. It states that the offeree company's management is obliged to publish and substantiate its opinion on the bid within ten days of its announcement. The opinion on the takeover bid must include, among other things, an assessment of potential effects of the bid on the implementation of the offeree company's interests, particularly employment, and an assessment of the offeror's strategic plans regarding the offeree company and their possible consequences for employment and sites of operation, as laid down in the prospectus. The offeree company's management is obliged to communicate its opinion about the bid simultaneously with its announcement to employee representatives (or, if there are none, to the employees themselves). It is then stated that, if the offeree company's management receives a separate opinion from employee representatives about the effects of the bid on employment, it shall attach this opinion to its own opinion on the bid. The

Act states that if the management's or employees' opinions on the bid contain false or misleading information, the persons involved shall be jointly and severally liable to holders of securities for damages if they knew or should have known about the false or misleading nature of such information.

Finally, Article 72 of the Takeover Act states that a fine of between 4,000 and 40,000 euros shall be imposed on any legal person, sole proprietor or self-employed person in case they fail to transmit their opinion on the takeover bid simultaneously with its publication to the employee representatives, or, in their absence, to the employees themselves.

The level of workers' involvement in company decision-making laid down in the Slovenian Workers' Participation Act is therefore much higher than the level provided by the Takeover Act, which concentrate mainly on information rights and transparency. The Workers' Participation Act guarantees workers much more than a simple right to be informed; they also have strong consultation and codetermination rights. According to the WPA (Article 2) workers have rights to: initiate proposals and receive a response to these proposals; obtain relevant information; give their opinion and receive a response; consult with the employer; codetermination; and veto employer's decisions; along with other forms of participation, if agreed between workers' representatives and the employer. On the other hand, on the basis of the Takeover Act workers have almost no practical possibility to influence decisions made during a takeover procedure; even if they do achieve certain commitments from the takeover company in terms of future employment developments, there are no legal mechanisms to remedy any breach of such commitments.

4. Workers' involvement in takeover procedures in practice

In order to obtain information about application of the rules reviewed above on worker involvement in decision-making during takeover procedures, the author carried out a practical exercise. First, an inquiry was sent to the members of the Slovenian works councils association, using the association's internet mechanism for contacting its members. This inquiry concerned whether addressees (presidents of works councils in the relevant companies) had been involved in a takeover during their last term in office. Ten presidents of works councils responded positively.

The works councils' presidents of these companies were then asked the following questions:

- (i) Did you receive information about the takeover? Did you receive information above and beyond what is provided in the offer document?
- (ii) Did the offerees say that there were going to be employment losses and plant shutdowns or did they usually say 'no negative employment effects are foreseen'?
- (iii) What have the workers' representatives actually done with the information? Did they formulate their own opinion, which was supposed to be sent to the shareholders, or take other kinds of informal action?

Their responses can be summarised as follows:

- From a textile company: the responding works council president was not in post at the time the takeover took place; as this was a large textile company employing many people from the poorest Slovenian region the takeover was followed closely by the media (as well as the government). Workers were therefore well informed about the takeover, not only by the new owner. Many employees lost their jobs, but were then re-employed outside the company; however, further dismissals are now taking place.
- From a graphics company: the works council president said that workers had been well informed during the whole takeover procedure; the management informed them regularly on the market situation and expressed their opinion about the whole issue. The works council was given a promise that no major dismissals would take place. After the takeover the workers' representatives asked for a personal meeting with the new owners, which took place in the form of a two-hour meeting at which the new owners presented their vision for the company. After this meeting the works council organised a workers assembly at which all the workers met the new owners and received the required information. The works council did not submit its own opinion, as allowed by law.

- From a company producing electrical and mechanical equipment: the president of the works council stated that the takeover was not completely concluded, that some decisions had been made recently and that the works council was preparing a written response.
- From a telecommunications company: the president of the works council said that workers got all the relevant information about the changes in ownership structure, because the decisions had been taken at the general assembly where workers' representatives were present. This information was forwarded to the works council. No promises about keeping the existing workforce were made and workers had not formally reacted to any decision that had been made.
- From a bookstore company: the president of the works council had been informed on legally-required issues during the takeover procedure. She felt that they had no influence over management decision-making. An oral promise had been given that there would be no dismissals, and at that time (four years ago) this promise was fulfilled; dismissals occurred only later due to the economic crisis. The works council did not write a response to the management's decision on the takeover; it had two meetings with the management and worker' representatives were interested mainly in financial participation issues.
- From a financial consortium: they had sold two of their subsidiaries to a Czech rubber company. The works council president said that workers' representatives (the works councils of the two companies, as well as a trade union) had been included in the relevant procedures in accordance with the law. They had been informed about the takeover and had participated in a joint consultation between the workers' representatives and the management of the Slovenian company. The former put forward some demands that had been accepted to certain degree – for example, that no major dismissals should take place in the next three years and that development and production should be kept in their locations in Slovenia for at least another ten years. Communications between management and workers' representatives were both oral and written. The workers' representatives had not been in direct contact with the offeror.

- From an insurance company: the president of the works council said they had been well informed by the supervisory board, in which there are two workers' representatives. The bid included a calculation of cost reduction, which indicated a workforce approximately 10 per cent smaller; however, no precise figures were presented and the management said dismissals would take place only if other means (transferring workers to other workplaces or retirement) do not suffice. Workers' representatives had not made any written responses. The company is now part of a holding company and workers' representatives are concerned about not having a works council at the level of the holding, where all relevant decisions are made. In this respect amendments to the Slovenian Workers Participation Act are foreseen to deal with this matter.

5. Conclusion

It can be concluded that a majority of works council presidents included in the study expressed satisfaction with information offered to the workers' representatives during the takeover procedures. The information flow was usually in line with the legal requirements and seldom exceeded them. In part this was the case because of the economic importance of some of the companies under takeover, which attracted media attention and consequently information for the general public on details of the takeover.

Management normally informed workers regularly about employment levels after the takeover. Written statements of workers' representatives are not a regular practice. Works council presidents several times expressed the feeling that they lacked influence upon decisions and the flow of events. An exception to this is a financial consortium that sold two companies to a Czech company, where workers' representatives made some demands regarding the preservation of jobs and branches in Slovenia for several years in the future, which seem to have been respected by the management of the new company. It is important to emphasise that workers' involvement in the decision-making process is much stronger in companies in which workers' representatives sit on the boards.

In general it may be concluded that the existing regulation on workers' rights to be informed about takeovers does not provide sufficient guarantees to workers in terms of their protection from the risk of changes

in working conditions and redundancies. Instead, they are mostly passive observer of procedures and changes, which are mainly carried out to fulfil shareholders' interests.

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Chapter 15

Worker involvement and the EU Takeover Bids Directive: the Swedish case

Erik Sjödin

1. Introduction

In the Nordic countries the social partners are particularly strong and most workers are represented by trade unions. Agreements negotiated between the social partners are particularly important for defining workers' rights in takeover situations.

EU legislation on takeover bids applies only to companies whose shares are traded on regulated markets (stock markets). In Sweden there are two regulated markets, the OMX Nordic Exchange Stockholm and the Nordic Growth Market (NGM). The Takeover Bids Directive (2004/25) has been implemented primarily in a specific act 'Lagen (2006:451) om offentliga uppköpserbjudanden på aktiemarknaden' (Stock Market Takeover Bids Act, the 'Takeover Act'), and also through self-regulation issued by Näringslivets Börskommitté: the 'Takeover Rules'. The Swedish Corporate Governance Board now administers the Takeover rules.¹ A takeover bid is defined by the Directive as

a public offer (other than by the offeree company itself) made to the holders of the securities of a company to acquire all or some of those securities, whether mandatory or voluntary, which follows or has as its objective the acquisition of control of the offeree company in accordance with national law.²

The Financial Supervisory Authority supervises the application of the Takeover Act and the Swedish Securities Council interprets the Takeover Rules and oversees compliance with good practice on the securities market.³ The obligations to inform the employees according to the

1. See www.corporategovernanceboard.se

2. For an overview of the Swedish legislation see Stattin (2011).

3. See <http://www.aktiemarknadsnamnden.se>

Takeover Act are complementary to the general system of employee involvement.

2. Key elements of Swedish takeover legislation

The Financial Supervisory Authority (SFSA) is responsible for the supervision of the Takeover Act. It is a government agency that supervises public offers and monitors the companies that operate on the Swedish financial market. The SFSA is responsible for assessing and approving offer documents and all other relevant documentation. The offeror shall inform the SFSA of an intended takeover bid and within four weeks prepare an offer document, which is to be given to the same authority. In the Financial Instruments Trading Act (*Lagen (1991:980) om handel med finansiella instrument*) there is a specific provision concerning the offer document (Chapter 2a, Section 2). There it is stated that the document shall contain the offeror's view on the future and also their intentions with respect to the company's employees and management, including each material modification of the terms and conditions of employment and the strategic plans for the company, including the locations where the company conducts business.

There is a register administrated by the SFSA through which offer documents are accessible. Registered and approved offer documents from 31 October 2006 onwards may be accessed through the register.⁴

The Securities Council, which interprets the Takeover Rules and oversees compliance with good practice on the securities market, is a private body inspired to a great extent by the UK Panel on Takeovers and Mergers. Its representatives come from various private organisations. Since the implementation of the Takeover Act, the Council has certain statutory powers; for instance, it can give rulings of interpretation or grant exemptions from requirements of the Takeover Rules.

3. Workers' involvement during takeover procedures

Chapter 4 of the Takeover Act concerns information rights for employees. The Act requires the offeror to inform the representatives of their own

4. See <http://www.fi.se/Register/Prospektregistret>

employees when the bid is made public. The Act also obligates the board of the offeree company to inform their employees.

The information shall be provided to the employees' representatives. It shall also be provided to employees who are not represented by any trade union (Chapter 4, Section 3). Although it is not stated explicitly, the employees' representatives are normally the trade union with a collective agreement with the company. In general, the majority of companies whose shares are traded on regulated markets have collective agreements. There are no further obligations on how the information shall be provided and in the *travaux préparatoires* it is stated that it is sufficient if the information is provided on a notice board.⁵

The obligation to inform the employees is different for the offeror and the offeree company. The offeror's obligation applies in all cases when it makes a public takeover bid. The offeror shall (according to Chapter 4, Section 1) inform the employees regarding a launched takeover bid and the offer document and the information shall be provided as soon as they are made public.

As soon as the bid is made public, the board of the offeree company shall (according to Chapter 4, Section 2) inform its employees of the takeover bid, the offer document and its recommendations to the shareholders with respect to the takeover bid. In the Takeover Rules there are some requirements concerning what information should be provided.

The obligation in the Takeover Act differs in many ways from employers' general obligations found in the Codetermination Act.⁶ The presence of a collective agreement seems to be irrelevant both for the obligation to inform and for the question of who should be informed. There are no particular details on how the information should be provided and there is no obligation that this information has to be in writing.

According to the Act, the Swedish Financial Supervisory Authority (SFSA) may order a company to comply with the legislation. Such an order may be combined with a fine (Chapter 7, Section 6). The SFSA has, to the knowledge of the author, never issued such an order. The enforcement mechanisms are thus of a public-law nature and disconnected from the

5. Prop. 2005/06:140, p. 108.

6. lagen (1976:580) om medbestämmande i arbetslivet.

general industrial relations strategy for enforcement that normally applies to labour law in Sweden.

Takeover bids are primarily a question of company law and the interests of the employees are not given much attention in the legislation. In the Swedish *travaux préparatoires* it is stated that the motives behind the obligations in the Codetermination Act and those in the Takeover Bids Directive are different. The provisions of the Codetermination Act aim at providing the employees with a real influence over the employer's activities. The right to information in the Takeover Bids Directive has another motivation. The questions that the employees are informed about concern matters in which a party other than the employer takes the decision.⁷

3.1 Self-regulation: takeover rules

According to the law on securities, a stock market shall have rules on takeovers supplementing the legislation on takeover bids mentioned above. These rules were developed by Näringslivets Börskommitté (NBK) and aim at the application of good practices on the Swedish stock market. The Swedish Corporate Governance Board administers the rules and is currently responsible for developing them.⁸

The Swedish Securities Council is responsible for interpreting the rules. It may be mentioned that the rules changed status from 'recommendations' to rules in 2003. The Takeover Rules do not have any far-reaching regulations concerning the provision of information to the employees in either the offeror or the offeree company. The only explicit mention of employee representatives is found in Section II.19. A Swedish offeror must inform the trade unions – and the employees not organised in a trade union – of the takeover bid and the offer document as soon as the bid and the offer have been announced. The provisions require the board of the offeree company to inform the relevant trade unions – and unorganised workers – of the bid and present the board's opinion about the bid to the employees. An opinion has to be presented two weeks before the end of the bid's period of acceptance and shall contain an assessment of the impact of the bid, especially on employment.

7. Prop. 2005/06:108, p. 55.

8. The Takeover Rules may be accessed at <http://www.corporategovernanceboard.se/takeover-rules>

The second paragraph requires the board to attach any opinion from the employees' representatives on the effects of the bid on employment to the public response statement made by the board. The (deviating) opinion has to be received in reasonable time prior to the announcement of the response. The provisions are a copy of the Directive's Article 9.5. In the *travaux préparatoires* to the Swedish act implementing the Directive it was stated that this was something that the legislator assumed would be done through self-regulation.⁹

There appears to be no obligation to inform the employees that they have an option to present their own opinion and that this shall then be attached to the board's opinion. The takeover rules for a regulated market are something that are not used regularly in the daily activities of the local trade union representatives, and it is unclear to what extent they are familiar with this possibility. It is also something that has to be presented within a specific time limit.

According to the Takeover Rules there is some form of two-way communication between labour and management. The way this exchange of opinions is to be undertaken, however, deviates from the regular form of interaction through 'negotiations'. This exchange of views, however, is not something that may be considered as consultations, as defined in for instance Article 2.j, Directive 2001/86.

3.2 General obligations on information and consultation in a takeover situation

The specific provisions that implemented the Takeover Bids Directive have been described above. The extent of further obligations on employee involvement in connection with a takeover bid is debated. And the obligations described here differ between the offeror and the offeree company. It should be stated that the obligations are not a result of implementation of the Takeover Bids Directive, but rather of the previously existing regulation of employee involvement in Sweden.

One general comment is that there are no possibilities for the employees in the offeree company to demand information and consultation with the offeror. The Codetermination Act is applicable to the relationship between

9. Prop. 2005/06:108 p. 108.

the employer and the employees. According to Section 11 of the Codetermination Act, the employer is obligated to initiate consultations with the trade unions before any significant change of their activities. A prerequisite for the application of Section 11 of the Codetermination Act is that the company is bound by collective agreement.

There is a rather broad consensus that there is an obligation for the offeror to initiate consultations with the relevant trade unions in accordance with Section 11 before a takeover bid. The takeover of another company is considered to be a significant change of the offeror's activities. One could say that, under the Codetermination Act, an offeror that is bound by a collective agreement may be required to negotiate a possible bid before the launch with the trade unions in case of significant changes to the offeror's own business. Consultations in accordance with Section 11 shall take place before a decision is taken.

In accordance with Section 21 of the Codetermination Act, information that is provided may be confidential. The extent of the confidentiality obligation is decided through negotiations between the employer and trade union. If they cannot reach agreement the Labour Court may decide. It is stated explicitly that trade union representatives who receive confidential information may disclose this information to members of the executive of the relevant trade union, who in turn are also bound by confidentiality (see Section 22 of the Codetermination Act).

For the offeree company the situation is different. There is no general obligation to initiate consultations according to Section 11 of the Codetermination Act. The question is not regarded as occurring in the context of the relationship between employer and employee.

If the takeover is connected to changes foreseen by the new owner, and if those changes themselves may be regarded as a 'significant change of the employer's activities' there is an obligation according to the Codetermination Act to initiate consultations with the employee representatives. Apart from the employer's obligations to initiate consultations in accordance with Section 11, consultation may also be initiated by workers' representatives, namely trade unions with collective agreements. It appears that the employee representatives in both the offeror and the offeree company may demand negotiations under Sections 10 and 12 of the Codetermination Act. Breaches of the Act are sanctioned with damages, economic as well as punitive (see Sections 54–55 Codetermination Act).

In Sweden employees have a right to appoint members of the board in limited companies, if the company has more than 25 employees on average and a collective agreement. The rules on employee board-level representation will not be affected as long as the company has a collective agreement. The new owners have no say on whom the employees appoint as their representatives on the board.

4. Conclusions

The main provisions on the information and consultation of workers' representatives about a (possible) takeover bid are defined in two legal instruments: the Takeover Act and the Codetermination Act. Obligations to inform the employees are different for the offeror and the offeree company. Some provisions on the involvement of employees are also found in the Takeover Rules.

There is a fairly broad consensus that there is an obligation for the offeror to initiate consultations with the relevant trade unions in accordance with the Codetermination Act, as a takeover of another company is considered to be a significant change of the offeror's activities. A prerequisite is that the company is bound by a collective agreement.

For the offeree company the situation is different; there is no general obligation to initiate consultations based on the Codetermination Act. However, if the takeover is connected to changes foreseen by the new owner, and if those changes themselves may be regarded as a 'significant change of the employer's activities', there is an obligation to initiate consultations with the employee representatives. The Takeover Act states that employees of target companies have to be informed by their own management and have the right to formulate their own opinion on the effects of the bid on employment. The fact that the employees of a target company have the option to present their own opinion, and that this shall then be attached to the board's opinion, is not well known and therefore, it is difficult to state what practical relevance it has.

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Chapter 16

Worker involvement and the EU Takeover Bids Directive: the case of the United Kingdom

Georgina Tsagas

1. Introduction

The takeover of Cadbury by Kraft in 2010 prompted a reform of the UK takeover rules, arguably towards a more detailed, target company and stakeholder-friendly model. The Code Committee responsible for the reform concluded that a number of changes to the UK City Code on Takeovers and Mergers should be proposed to improve the offer process and to take more account of the position of persons who are affected by takeovers in addition to offeree company shareholders. The Kraft/Cadbury case study merits special attention insofar as it questioned the United Kingdom's 'open market' for corporate control with regard to a range of aspects concerning the duties of the parties involved in the takeover bid, as well as issues of disclosure and stakeholder protection related to the takeover process itself.

The reform process began in June 2010 with the issuance of a preliminary consultation paper on key aspects of UK takeover regulation by the Code Committee of the Panel.¹ One of the proposals to amend the takeover rules on which the consultation sought views included requiring bidders to provide more information in relation to the implications and effects of the bid in the offer document and greater rights for employees (Takeover Panel 2010a). The Code Committee responded to the Consultation Paper and set out the Committee's conclusions in relation to the principal issues

1. On 1 June 2010, the Code Committee published a public consultation paper (Takeover Panel 2010a), in which it sought views on various suggestions for possible amendments to the Code without setting out any specific proposals or drafting amendments to the Code. The topics addressed were: acceptance condition thresholds; the 'disenfranchisement' of shares acquired during an offer period; disclosures in relation to shares and other securities; the contents of offer documents and offeree board circulars; advice, advisers and advisory fees; protection for offeror company shareholders; the 'put up or shut up' regime; 'virtual bids' and the offer timetable; inducement fees and other deal protection measures; and substantial acquisitions of shares.

consulted upon (Takeover Panel 2010b).² According to the review of the Takeover Panel Code Committee, a variety of factors had in recent times enabled offerors to obtain a tactical advantage over the offeree company (Takeover Panel 2010b: 4–5). The Code Committee of the Panel accepted that (i) it had become too easy for ‘hostile’ offerors to succeed and that (ii) the outcome of offers, and particularly hostile offers, may be unduly influenced by the actions of so-called ‘short-term’ investors (Takeover Panel 2010b: 3). The Committee therefore intended to ‘bring forward proposals to amend the Code with a view to reducing this tactical advantage and redressing the balance in favour of the offeree company’ (Takeover Panel 2010b: 3) and concluded that ‘a number of changes should be proposed to the Code to improve the offer process and to take more account of the position of persons who are affected by takeovers in addition to offeree company shareholders’ (Takeover Panel 2010b: 3).

This chapter will provide an analysis and critique of employee information and consultation rights under the UK Takeover Framework prior to and after the takeover of Cadbury Plc. Section 2 will refer to the shareholder primacy norm endorsed by the UK City Code on Takeovers and Mergers. The deviation from the norm prompted by the 2011 reforms will also be referred to. Section 3 will address employees’ rights under the Code and refer to the 2011 regulatory reforms. Section 4 will refer to the conclusions of the review of the amendments to the Code which were implemented by the Code Committee in 2012. Section 5 provides some conclusive remarks on the reforms. The conclusions drawn will reflect on whether the reforms are in fact an improvement regarding employees’ rights or whether they qualify as mere window dressing in relation to what is otherwise the accepted norm of shareholder primacy in the United Kingdom.

2. Key elements of UK takeover legislation

The United Kingdom, by comparison with other jurisdictions, has the most liberal laws on takeovers in the world (Kay 2012: 13). Public takeovers in the United Kingdom are regulated by the City Code on Takeovers and Mergers (henceforth, the Code). The Code’s main objective is to regulate the way in which takeovers are conducted and ensure that

2. This statement constitutes the Code Committee’s response to the Consultation Paper and sets out its conclusions in relation to the principal issues consulted upon.

shareholders are treated fairly and not denied an opportunity to decide on the merits of a potential bid (General Principle 3). The Code is not about the economic usefulness of takeovers generally, nor does it allow the Panel to assess the specific financial or commercial merits of an individual takeover.³ The characteristic aspect of the Code is the norm of shareholder primacy it endorses, which is reflected in the strict non-frustration principle encompassed in Rule 21 of the Code. The rule prohibits target directors from taking any defensive measures against a bid without obtaining prior shareholder approval once a bid has become imminent.

Prior to the Cadbury reforms, the Code provided for a light regulatory touch in terms of regulating employee information and consultation rights. Elaborate provisions on disclosure and information rights of employees were introduced in the Code largely due to the implementation of the EU Takeover Directive in the United Kingdom. A discussion of employees' rights within a takeover context in 2010 was prompted by a controversy over Kraft's statements regarding the future of Cadbury's Somerdale factory and employment therein. In the aftermath of the deal Kraft revised its initial plans and did not follow up on the undertaking to keep the factory open, cutting 400 jobs. Kraft's failure to meet that commitment resulted in distrust towards Kraft, but also towards takeovers and their social implications in general. In response to Kraft's decision to ignore its undertaking, the Takeover Panel issued a statement of public criticism against Kraft, which found the latter in breach of Rule 19.1 of the Code (Takeover Panel 2010a).⁴ Kraft's decision not to keep the Somerdale factory open was also condemned in the House of Commons, which found that Kraft's actions had undoubtedly damaged its reputation in the United Kingdom and its relationship with Cadbury's employees (House of Commons 2010: 10–11). In general, other problems identified by the Takeover Panel following the Kraft/Cadbury takeover were that, during recommended bids, employee representatives had no time to express their views and also, because the target board had no obligation to disclose to the public any opinion it may have received from employee representatives, it was difficult for the latter to collate information on the likely effects of the bid on all divisions within the bid timetable. In response to such concerns the Takeover Panel put forward recommenda-

3. See Introduction of the Code.

4. Note that the breach of Rule 19.1 of the Code refers to Kraft's failure to prepare its documents on its intentions with the highest standards of care and accuracy.

tions on, among other things, improving employees' right to be informed, improving the timing of information and requiring the target board to inform employee representatives at the earliest opportunity of their right to circulate an opinion on the effects of the bid on employment.

A series of reforms of the UK regulatory framework were introduced in 2011 on the basis of the Code Committee's conclusion that 'a number of changes should be proposed to the Code to improve the offer process and to take more account of the position of persons who are affected by takeovers in addition to offeree company shareholders' (Takeover Panel 2010b: 22). The reform process concerning employees' rights focused on, among other things, improving the provisions that regulate the disclosure requirements set out in the offer document, the process via which employees' become involved in the takeover process and the a priori enforcement of a bidder's intentions for the target company. The rationale underlying these reforms was that the disclosure of accurate information may be the means by which more sound takeovers can succeed, in the sense that the interests of shareholders, as well as other stakeholders affected by the takeover bid, will be well thought-out by shareholders interested in the value of such information. The exchange of accurate information was considered important for the protection not only of target shareholders' interests, but also those of other constituencies involved in the takeover process.

The Kraft/Cadbury deal is evidence that the shareholder primacy norm in a takeover context does not come without costs. The facilitation of takeovers by restricting managers' ability to block a bid can disrupt the business of well-functioning companies (Lipton 1987: 18–20) and encourage short-termism over long-term shareholder value (Wachter 2003: 823). The problem with the way in which the UK legal framework on takeover bids had been constructed was arguably that it prompted target directors to set the company's independent future and long-term continuity aside and support bids that benefit only certain shareholders with short-term speculative horizons. The takeover highlighted, among other things, the importance of considering the long-term implications of a takeover bid, especially in relation to firm-specific investment and stakeholders' rights. The following section will take a closer look at the reforms introduced to the Code regarding disclosures by offeror and offeree companies concerning the offeror's intentions as they affect the offeree company and its employees, as well as the rights of employee representatives during the takeover process.

3. Workers' involvement: the 2011 regulatory reforms

As mentioned at the outset of the chapter, following the Kraft/Cadbury case study, a series of concerns were brought forward regarding the protection that the Code affords employees during the takeover process. One concern was that, during recommended bids, employee representatives had no time to express their views. According to the provisions of the UK Code, the offer timeline commences with the announcement of a bid. From the announcement of the bid the bidder has, according to Rule 24.1 of the Code, a 28 day maximum time period, the end of which may be labelled 'Day 0', to send the offer document to the target shareholders and persons with information rights and to make it available to target pension scheme trustees and target and bidder employees. According to Rule 25.1(a), which is normally relevant only in the context of a hostile acquisition, the target has 14 days from Day 0 – 'Day 14' – to publish a response circular. According to Rule 31.1 of the Code, 'Day 21' constitutes the earliest first closing date.⁵ In recommended bids, however, the firm offer announcement and the offer document are usually published on the same day. The target board's circular is then effectively combined with the offer document, which subsequently allows no time for the employee representatives to produce a circular expressing their views. The target board also has no obligation to make public any circular that it may have received from employee representatives, which makes it difficult for the latter to collate information on the likely effects of the bid on employment within the bid timetable.

One of the aims of the takeover law reform process was to provide greater recognition of the interests of the offeree company employees by (i)

5. An indicative offer timeline for an acquisition of a company is as follows: According to Rule 31.4 of the Code, *Day 35* is the first date on which the offer may close assuming that the offer has been declared unconditional as to acceptance on *Day 21* and, according to Rule 31.8 of the Code, the last date for settlement of consideration if the offer made was wholly unconditional on *Day 21*. In the context of a hostile bid, Rule 31.9 of the Code provides that *Day 39* is the last date for the target board to release new information and Rule 32.1 of the Code provides that *Day 46* is the last date for a revision of the offer and for the bidder to release new information if the offer includes shares in the bidding company. Finally, *Day 60*, according to Rule 31.6 of the Code, is the last date for the offer to become or to be declared wholly unconditional as to acceptances. Note that following *Day 60*, Rule 31.4 provides for *Day 74* upon which the offer may be closed. Assuming that the offer became unconditional as to acceptances on *Day 60*, Rule 31.7 provides for *Day 81*, which is the last date for the offer to go wholly unconditional; assuming that the offer became unconditional as to acceptances on *Day 60* and Rule 31.8 of the Code provides for *Day 95*, which is the last date for settlement of consideration if the offer is wholly unconditional on *Day 81*.

improving the quality of *disclosure* by offerors and offeree companies in relation to the offeror's intentions regarding the offeree company and its employees; and (ii) improving *the ability of employee representatives to make their views known* (Takeover Panel 2011: 2). Overall, improvements to the rules were considered necessary insofar as they: facilitate the passing of information on the bid to employees at the earliest opportunity, better facilitate the process and time arrangements through which employees make their views known and financially assist employee representatives and employees in obtaining advice for the verification of the information contained in the employee representatives opinion and in publishing their opinion. The quality of disclosure by offerors and offeree companies in relation to the offeror's intentions regarding the offeree company and its employees was arguably improved through the reform of the disclosure requirements encompassed in the offer document (Rules 24.2 and 24.3). The accuracy and adequacy of information published by the bidder was considered important in this respect, insofar as it assists the target board and other interested parties in complying with their own obligations and, most importantly, in providing meaningful information to shareholders and employees (Takeover Panel 2010: 20). Proposals on enhancing the ability of employee representatives to make their own views known focused on improving communications between the board of the offeree company and the offeree company's employees, and enabling representatives to be more effective in providing their opinion on the effects of an offer on employment (Takeover Panel 2011a: Section 8). Respondents to the Public Consultation Paper 2010/2 believed that improving communication would enable the employee representatives to be more effective in providing their opinion on the effects of the offer on employment and, in doing so, facilitate a better understanding of the implications that the offer may have for the interests of the offeree company employees (Takeover Panel 2010: 21).

The reforms concerning the protection of employees' rights can be categorised in terms of the following three thematic areas: 1. *Disclosure* by offeror and offeree companies in relation to the offeror's intentions regarding the offeree company and its employees; 2. *process* undertaken in relation to informing employee representatives, namely the passing on of information, the employees' opinion on the offer and the costs incurred; and 3. *factors* that the target board may take into account when observing its advisory role.

3.1 Disclosure

3.1.1 Additional disclosure requirements and a negative statement requirement (Rule 24.2)

One of the general principles of the Code is that target shareholders must be given sufficient information and advice to enable them to reach a properly informed decision on the offer (General Principle 2). Rule 23.1 of the Code provides that shareholders must be given sufficient information and advice to enable them to reach a properly informed decision as to the merits of an offer; that such information must be available to shareholders early enough to enable them to make a decision in good time; and that no relevant information should be withheld from them. The primary sources for the required information are the formal announcement of the offer and the bidder's offer document sent to all the shareholders. Constituencies other than the shareholders of the target company may also have an interest in the information contained in the offer document. The content of the offer document is regulated by Rule 24 of the Code.

Amendments were introduced to the Code in order to improve the quality of disclosure by offerors and offeree companies in relation to the offeror's intentions regarding the offeree company and its employees (Takeover Panel 2011: 79). The amendments were made on the basis that any statement of intention by an offeror should be as detailed as possible in view of the fact that the offeror must have a fundamental business rationale for seeking to acquire the offeree company; this should be disclosed as fully as possible (Takeover Panel 2011: 80–81). The Code Committee also clarified that statements of a general nature were unlikely to be acceptable in the context of a recommended offer where the offeror has had an opportunity to undertake full due diligence (Takeover Panel 2011: 80–81). The new Rule 24.2 of the Code regulates in detail the content of the offer document in terms of the intentions regarding the offeree company, the offeror company and their employees.⁶ The new elements of the rule are that more importance is attached to the disclosure

6. (a) In the offer document, the offeror must state its intentions with regard to the future business of the offeree company and explain the long-term commercial justification for the offer. In addition, it must state:

- (i) its intentions with regard to the continued employment of the employees and management of the offeree company and of its subsidiaries, including any material change in the conditions of employment;
- (ii) its strategic plans for the offeree company, and their likely repercussions on employment and the locations of the offeree company's places of business;

of the bidder's intentions with regard to the future business of the offeree company and to an explanation of the long-term commercial justification for the offer. The rule also introduces the requirement that the bidder disclose his intentions with regard to the maintenance of any existing trading facilities for the relevant securities of the offeree company. Another new and interesting element of the rule is the concept of the bidder's negative statement, in the sense that the bidder is now required to make a statement if he has no intention to make any changes in relation to the matters described under (a) (i) to (iii) of Rule 24.2 or if he considers that its strategic plans for the offeree company will have no repercussions on employment or the location of the offeree company's places of business. The Code Committee has introduced these changes on the basis that the ability of the offeree company board and other interested constituencies to comply with their own obligations, and to provide meaningful information to the offeree company shareholders and employees, depends on the accuracy and adequacy of the information published by the offeror in accordance with its own obligations (Takeover Panel 2010b: 20).

With particular reference to the revised Rule 24.2, the Code Committee observed that:

The Code Committee believes that any statement of intention by an offeror should be as detailed as is possible on the basis of the information that is known to the offeror at the time it is made. The Code Committee acknowledges that it might be legitimate for a hostile offeror which has not had an opportunity to undertake full due diligence on the offeree company to state that it will undertake a review of the offeree company's business once it has obtained control of the company. However, the Code Committee believes that the offeror must have a fundamental business rationale for seeking to acquire the offeree company, which it should disclose as fully as

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- (iii) its intentions with regard to any redeployment of the fixed assets of the offeree company; and
 - (iv) its intentions with regard to the maintenance of any existing trading facilities for the relevant securities of the offeree company.
 - (b) If the offeror has no intention to make any changes in relation to the matters described under (a)(i) to (iii) above, or if it considers that its strategic plans for the offeree company will have no repercussions on employment or the location of the offeree company's places of business, it must make a statement to that effect.
 - (c) Where the offeror is a company, and insofar as it is affected by the offer, the offeror must also state its intentions with regard to its future business and comply with (a) (i) and (ii) with regard to itself.

possible. The Code Committee also considers that statements of a general nature are unlikely to be acceptable in the context of a recommended offer where the offeror has had an opportunity to undertake full due diligence. (Takeover Panel 2011b: par 7–8)

3.1.2 Adherence to undertakings for at least a year (Rule 19.1, Note 3)

Rule 19.1 of the Code requires that each document or advertisement published, or statement made (undertaking entered into) during the course of an offer is to be prepared with the highest standards of care and accuracy and the information given to be adequately and fairly presented. According to the Panel, Kraft backed out of its prior commitment because it did not observe sufficiently high standards of care and accuracy in the information communicated to the target shareholders in its offer regarding its prospective business plans for Cadbury.⁷ The standard of care for published documents to be observed in the takeover process remains unaltered in the latest version of the Code. The Kraft/Cadbury deal highlighted that there is a legal gap with regard to the enforcement of the bidder's intentions concerning the target's assets and employees after the successful bid is complete in the event that the bidder fails to comply with his initial statement. The Code Committee therefore introduced a new rule, Note 3 to Rule 19.1,⁸ which imposes adherence to statements (undertakings) for at least a year or other specified period which is provided for by the bidder.

The Code Committee considered that if a statement of intention is specified to apply for only a very short period, readers of the statement will be able to draw their own conclusions regarding the offeror's intentions in the longer term (Takeover Panel 2011b: 83). The Code Committee, however, made it permissible for the offeror or offeree company to be released from this requirement if there has been a material change of circumstances (Takeover Panel 2011b: 83). Therefore, as an exception to the rule, the Code provides that the Panel may allow for dispensation from the obligation to follow up on the statements outlined in the offer document where there is a material change of circumstance (Note 3 to Rule 19.1).

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7. Takeover Panel (2010), whereby the Panel applied an objective and a subjective test to Kraft's statement, thus holding the company accountable for breach of Rule 19.1 of the Code.
 8. Note 3. Statements of intention: 'If a party to an offer makes a statement in any document, announcement or other information published in relation to an offer relating to any particular course of action it intends to take, or not take, after the end of the offer period, that party will be regarded as being committed to that course of action for a period of 12 months from the date on which the offer period ends, or such other period of time as is specified in the statement, unless there has been a material change of circumstances.'

3.1.3 Disclosure obligations in relation to the publication, content and display of documents (Rules 24.1 and 25.1)

Rule 24.1 of the Code now makes clear that the offer document should, at the same time that it is sent to the shareholders of the offeree company, also be made readily available to employee representatives and that on the day of publication the offeror must also publish the offer document on a website. Rule 25.1 of the Code provides that, at the same time that the board of the offeree company sends a circular to the offeree company's shareholders, it must make it readily available to employee representatives and that on the day of publication it must publish the circular on a website.

3.2 Process

3.2.1 Passing of information to employee representatives at an earlier stage (Note 6 to Rule 20.1)

Concerning improving the passing of information to employee representatives, a new Note 6 to Rule 20.1 was added, which makes clear that the Code does not prevent information from being passed on in confidence by an offeror or offeree company to their respective employee representatives or employees, provided that the requirement for secrecy under Rule 2.1 is respected.

3.2.2 Offeree companies should inform employee representatives of the right to give an opinion on the offer (Rule 2.12(a) and (d) – announcement of the offer) (Rule 32.1(b) – revised offer document)

Concerning the obligation of the offeree companies to inform employee representatives of the right to give an opinion on the offer, the rules were revised so as to require that: (i) an announcement of a possible offer must be made readily available by the offeree company to its employee representatives (Rule 2.12(a)); (ii) the offeree company must, at the same time, inform the employee representatives of their right to have an opinion on the effects of the offer on employment appended to the offeree board's circular (Rule 2.12(d)); and (iii) the offeree company must similarly inform the employee representatives of their right to have an opinion appended to any offeree board circular published in relation to a revised offer (Rule 32.1(b)).

Regarding Rule 2.12(a) of the Code, improvements were made on the basis that the previous version of the Code provided employee representa-

tives and employees of both the offeror and the offeree company were notified under former Rule 2.6 when an announcement of a firm intention to make an offer had been made under former Rule 2.5 of the Code. However, if an offer period began before an announcement had been made under Rule 2.5, there were no provisions to guarantee that employees were informed at this earlier stage. Also, regarding Rule 2.12(d) it is important to note that following the implementation of the Takeover Directive provisions were added to the Code requiring the target company to append to any circular sent to shareholders any opinion it receives from its employee representatives on the effects of the offer on employment.

3.2.3 Publication of the employee representatives' opinion and responsibility of the offeree company for costs (Rule 25.9, Note 1 to Rule 25.9, Rule 32.6(b), Rule 30.4(b))

The previous regime already provided for employee representatives' participation in the process of a takeover. The new provisions however arguably facilitate a more timely and costless process, as the Code now provides that: (i) targets are responsible for costs incurred by representatives in verifying and publishing their opinion, and (ii) targets must publish the opinion on the internet whenever it is received during the offer process.

Concerning the process of publication of the employee representatives' opinion and the responsibility of the offeree company for costs incurred, Rule 25.9 now better regulates the obligation of the board of the offeree company to append the employee representatives' opinion to its circular (also see Rule 32.6(b)). Rule 25.9 specifically provides that:

The board of the offeree company must append to its circular a separate opinion from its employee representatives on the effects of the offer on employment, provided such opinion is received in good time before publication of that circular. Where the opinion of the employee representatives is not received in good time before publication of the offeree board circular, the offeree company must promptly publish the employee representatives' opinion on a website and announce via an RIS that it has been so published, provided that it is received no later than 14 days after the date on which the offer becomes or is declared wholly unconditional.

Employee representatives should now be informed at an earlier stage of their right to have their opinion annexed to the target board's circular (Rule 25.9). The target will also be responsible for costs incurred by employee representatives in verifying and publishing their opinion and for any costs reasonably incurred by employee representatives in obtaining advice in order to verify the information contained in their opinion (Note 1 on Rule 25.9).

3.3 Factors

The directors of the target company must provide their advice on the merits of the bid and ensure that there is equality of information both for the target company shareholders and for competing bidders (Rule 20). The target company is under the obligation to produce a document containing relevant information on the offer and disclose the board's view on the effects of implementation of the offer on the company's interests, in particular with regard to employment, and the board's views on the offeror's strategic plans for the target and their likely repercussions on employment and the locations of its place of business (Rule 25.2). The information provided to target shareholders must be sufficient to enable them to take a view on the offer (Rule 23). Target directors are also under the positive duty to request independent financial advice on the merits of the bid, the substance of which should be communicated to its shareholders (Rule 3.1). The target board's circular will include, among other things, the substance of the advice given to the board of the offeree company by the independent advisor (Rule 25.2(b)).

Prior to the 2011 revision of the Code, target boards were not precluded from advising against a hostile bid on the grounds that the bid would be 'contrary to a long-term strategy of building up the company's business in a particular way'. However, as Deakin and Singh explain, the board had to nevertheless be cautious in stating such views because it was still under a legal duty to objectively and clearly report on the financial merits of the bid in question (Deakin and Singh 2008: 11). As Deakin and Singh point out, even though directors were in fact in a position to advocate that a hostile bid was contrary to the company's long-term planned strategy, they were nevertheless bound to provide an objective financial assessment of the bid in their opinion (Deakin and Singh 2008: 11). The aim of the Panel was to revise the rules, in order to strengthen the position of the target company compared to that of the bidder, and specifically to address

the concern that there was a perception under the Code that the board of the target was bound to consider only the offer price when giving its opinion on an offer.

The Code was amended to provide for an additional interpretive text to Rule 25. Note 1 on Rule 25.2 of the Code now clarifies that the Code does not limit the factors that the target may take into account in giving its opinion on the offer. The note makes clear that the target board is not required by the Code to consider the offer price as the determining factor, nor is it precluded by the Code from taking into account any other factors which it considers relevant. The Code Committee of the Takeover Panel specified that the amendment constituted a statement of fact and did not impose any obligations on the boards of offeree companies, as the duties of directors remain a matter for company law and not the Code (Takeover Panel 2011b: 58–59).

3.4 2012 Takeover Panel Review

In 2012 the Code Committee undertook a review of the operation of the amendments to the Code following their implementation (subject to the level of bid activity during that period). In relation to disclosure by offerors and offeree companies on the offeror's intentions regarding the offeree company and its employees, Panel Statement 2012/8 provides that there has been an improvement in the quality and detail of disclosures of intention made by offerors under Rule 24.2 and by the boards of offeree companies under Rule 25.2. It notes, however, that the Code Committee was disappointed that, in many cases, disclosures had been general, and not specific, and that, for example, a number of offerors – including offerors that have secured a recommendation from the offeree company board – had sought to satisfy the requirements of Rule 24.2 by stating that their intention is to undertake a review of the offeree company's business following completion of the takeover (Takeover Panel 2012: 17). The Code Committee pointed out that, if an offeror that had made general, non-specific disclosures under Rule 24.2 of its intentions regarding the offeree company and its employees subsequently takes an action, such as making a significant number of employees redundant, to which it had not referred in the offer document, the Executive would then investigate whether:

at the time that the offer document was published, the offeror had in fact formulated an intention to take that action. If the offeror had

formulated such an intention but had not disclosed this, and had instead restricted itself to a general statement, the Code Committee understands that the Executive would be likely to consider this to be a serious breach of the Code. (Takeover Panel 2012: 18)

In relation to the changes introduced to improve communication between the board of the offeree company and the offeree company's employees, and to enable employees to be more effective in providing their opinion of the effects of an offer on employment through the adoption of Rule 2.12 and Rule 25.9, the Review raises the following points. In the year that ended 18 September 2012, a total of 18 employee representatives' opinions were published in respect of 10 separate offers. Out of these opinions nine employee representatives' opinions were appended to offeree board circulars in respect of five offers in accordance with the first sentence of Rule 25.9. This, according to the Review, represented a significant increase over the period which followed the introduction of the right for employee representatives to have their opinions appended to offeree board circulars (Takeover Panel 2012: 19). Furthermore, out of all the opinions, nine employee representatives' opinions (in respect of a further five offers made) were published on a website in accordance with the second sentence of Rule 25.9 after they were received by offeree companies following the publication of the offeree board circular (Takeover Panel 2012: 20). According to the Review, the figures are evidence that the 2011 reforms have gone a considerable way towards achieving their objectives of improving communications between offeree companies and their employee representatives and of enabling employee representatives to be more effective in providing their opinion on the effects of an offer on employment (Takeover Panel 2012: 20).

4. Conclusion

The Kraft/Cadbury case study has shown that certain important aspects of the takeover process were not effectively or sufficiently dealt with by the UK framework regulating takeover bids. Improving the provisions on the disclosure and facilitation of information between parties involved in and affected by the takeover may well guarantee that takeovers that undermine stakeholders' interests and corporations' long-term growth will be subject to a higher level of scrutiny. The new rules on employee consideration arguably improve the quality of disclosure by offerors and offeree companies in relation to the offeror's intentions regarding the

offeree company and its employees. The disclosure of the bidder's intentions regarding the future business of the offeree company and regarding the long-term commercial justification for the offer, may help shareholders, as well as other stakeholders, to obtain a better understanding of the characteristics and subsequent value of the bid. Shareholders interested in information concerning the bidder's motives for the launch of the bid, as well as his future plans with regard to the business of the target and employees, may well help interested shareholders potentially reflect on the impact that the bid will have on other constituencies and make a more informed decision about the merits of the bid. The importance attached to the *accuracy of the statements* made with regard to the bidder's business intentions is reflected in the revised rules. The new rule imposes a condition on the bidder to include a negative statement in the offer document, i.e. indicating that he has no plans in relation to the matters outlined in the relevant rule. The enhanced disclosure requirements of the offer document may result in greater caution being exercised when making significant concrete plans for the target company. In the case of Kraft/Cadbury, however, one could argue that Kraft was unaware of the developments concerning the Somerdale factory, as it had limited information concerning the business of the target when undertaking the due diligence for the takeover. The target board is not required by law to disclose privately held information on the target company's business, so that Kraft only became privy to information on the factory after the takeover was successfully completed. It is also important to note that the closure of the Somerdale facility was already on Cadbury's own agenda, so it would have been realised even in the event that Cadbury had remained independent. The efficacy of the newly introduced rule should therefore be reflected on with caution.

The revision of the UK takeover rules aimed to provide greater recognition of the interests of the offeree company employees, not only by improving the disclosure requirements, but also by improving the ability of employee representatives to make their views known. The new rules allow for employee representatives and employees to receive information about the offer *at an earlier stage*. The improvement regarding the timeline and process observed for employees' involvement in the takeover process may help facilitate an objective and accurate exchange of information. These improvements may well enable a better assessment of the bid's impact on employment overall.

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Conclusion

An analysis of workers' rights under the EU Directive on takeover bids

Jan Cremers and Sigurt Vitols

The chapters in this book cover much ground and indicate significant variation between countries regarding the strength of the rights that workers have in takeover situations. The company case studies also indicate wide variation in the degree to which workers can defend their interests in such situations. Despite this heterogeneity, some common themes and general conclusions can be drawn.

1. The Takeover Bids Directive is based on an incorrect economic premise

As reviewed in the Introduction and in Chapter 1 of this book, a major assumption underlying the Takeover Bids Directive is that takeovers are, on the whole, positive for the economy and employment. On that basis, it is in the interests of Europe to encourage takeovers and the restructuring activity they involve. This premise supposedly provides a key justification for the existence of this Directive.

However, in the reviews of studies on the impact of takeovers on employment and value creation, presented in the chapters by Schenk and Pendleton, no hard evidence can be found for a naturally occurring positive contribution to the economy and the labour market. Many, if not most takeovers appear to result in a net reduction in value creation and employment losses, at least in the short run. These negative effects are strongest in the case of 'hostile' takeovers. Therefore, it can be concluded that the optimistic view of the economic benefits of takeovers underlying the Takeover Directive must be qualified, reconsidered and rethought.

The wavelike nature of takeovers, with the bulk of takeovers taking place in the 'speculative' phase of the financial market cycle, indicates the strong connection between takeovers and exuberant financial markets. It appears that companies are strongly motivated to emulate their peers and

that executives under such circumstances have an incentive to build up corporate empires rather than to pursue the genuine goals of the firm. The logic of many takeovers appears to be driven by the logic of financial markets, rather than the long-term interests of firms and their stakeholders.

The deviation from reality of this key assumption indicates the necessity for taking a fresh look at the Directive and its justification. First, a much more cautious attitude should be taken towards takeovers and the desirability of encouraging them, particularly in the case of hostile takeovers. A less critical view of takeover defences should be taken. Secondly, the rights of stakeholders (including workers) to protect themselves from the negative effects of takeovers should be strengthened.

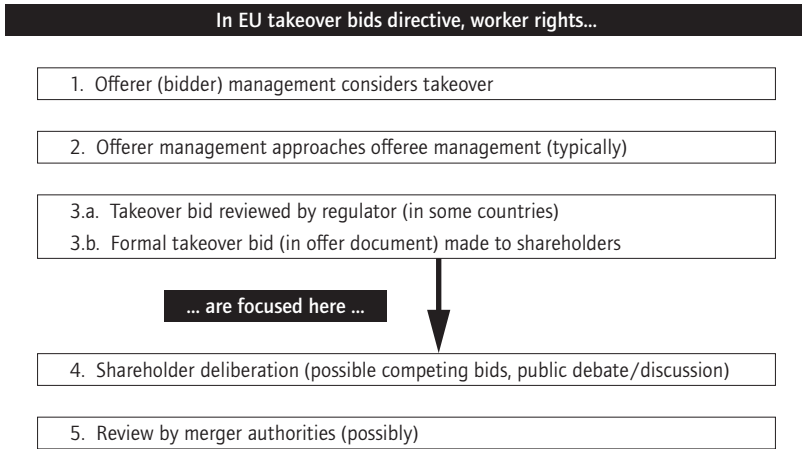
2. Worker rights in the Takeover Bids Directive come too late in the process

As discussed at length in this book, the Takeover Bids Directive requires management to inform workers in the target company once the takeover bid has been made; specifically, they are entitled to receive a copy of the offer document, which among other items has to include the anticipated repercussions of the takeover on employment and production locations. Furthermore, workers have the right to append their opinion to the opinion that the management of the target company is supposed to send to their shareholders (see Figure 1).

However, through the company case studies we can see that these information rights are triggered at a late stage of the process. The key features of the takeover bid have already been decided by the time the offer document is made public and are difficult to influence at this stage. Furthermore, workers' opinion on the merits of the bid may have little impact on the shareholders' final decision, as shareholders in the target company (particularly financial investors) generally have a stronger incentive to 'cash out' by accepting the large premiums typically involved in takeovers than to resist an offer that is not in the long-run interests of the company.

Through the country and company case studies in this book we see that workers in countries with strong works councils (for example, the Netherlands) and/or board level employee representation (for example,

Figure 1 Stages in the takeover process



Denmark, Sweden, Norway) are better able to intervene at an early stage of the takeover process. Early information, consultation and codetermination mean being involved before management makes a final decision, that is, at a stage when workers can still have a significant influence on the decision. Several of these stronger national rights, however, cannot be derived from the Takeover Bids Directive.

A more challenging situation is where a transfer of ownership is agreed between the controlling shareholders of two companies and management is completely bypassed. The reality in such cases is that takeovers are effectively a ‘done deal’ before the formal takeover bid has been made. The chapter on Austria, for example, shows that worker representatives have only used their right of opinion once. Although Austria is a somewhat extreme example because most listed companies have a controlling shareholder, many other European member states, including the most advanced, have seen a significant rise in concentrated (institutional) shareholding over recent decades. In other words, even in countries where workers have strong rights, labour law typically is limited to the relationship between workers and management, not between workers and investors.

Workers should be involved at an early stage in the takeover process, when discussions within the bidder company or between the potential bidder and management of the target company are developing. This right

should not be limited to the worker–management relationship but should also apply to potential owning shareholders/investors. This would allow workers to better protect their interests by giving them greater influence in the takeover process.

3. Worker rights in the Takeover Bids Directive neglect workers employed by the acquiring company (bidder)

Worker rights in the Directive are focused on workers in the target company, specifically on allowing workers in the target company to append an opinion to the report that managers send on to shareholders in the target company. However, employment and economic impacts are frequently more negative in the acquiring company than in the bidder company. Workers in the acquiring company should therefore have strong involvement rights at an early stage in the takeover process.

4. Confidentiality requirements should be revised to respect labour law

The country framework analyses show that in some countries (Netherlands, Finland) there is an explicit conflict between the timing requirements in securities law and rights in labour law regarding information on takeovers. Frequently, securities law or corporate governance rules see this as ‘insider information’ which should be treated with confidentiality. Two of the company case studies (Denmark and Finland) showed that worker board-level representatives did not share their early knowledge of impending takeovers with other worker representatives; this was due to fears about legal liability for passing on confidential information.

As described in the Introduction to this book, however, there are plenty of illustrations of provisions in labour law that allow worker representatives to effectively coordinate with other worker representatives. One example is the transferring of confidentiality requirements to other worker representatives receiving the information, for example, in the case of European Works Councils. Confidentiality requirements need to be revised so that they do not restrict the exercise of worker rights.

5. Worker rights in the Takeover Bids Directive lack effective sanctions

The country studies show that there is a massive difference between the penalties imposed for breaching securities law and labour law. The substantial penalties that can be imposed for violating aspects of securities law stand in stark contrast with the minimal or non-existent penalties for not respecting commitments made on employment or production location in takeover bids.

Perhaps the best known case, the Kraft/Cadbury takeover treated in Chapter 16, shows that the Takeover Bids Directive lacks effective sanctions when the bidder violates explicit promises regarding employment and production in the bid document. Also, statements in the bid document are often quite vague, stating for example that management 'does not anticipate' negative impacts on employment. In the United Kingdom, after the Cadbury situation, trade unions and other stakeholders have demanded that management statements on takeover impacts must be specific and should be legally binding for a set period after the takeover.

6. Merger regulations do not adequately take into account the impact on workers/worker rights

Merger authorities also have a say in allowing or disallowing takeovers. However, the merger rules in the EU and in many Member States are focused on the competition impact (market shares, market prices) of mergers but not on their broader economic impact. Workers and other stakeholders may have a right to attend hearings and express their opinion, but issues such as employment impact are not allowed to play a role in the merger authorities' decisions. Since mergers that are big enough to require approval by the authorities are, however, likely to have a more significant economic impact outside the competition domain, the decisions of merger authorities should explicitly consider a merger's impact on systemic issues such as economic stability, employment and ESG factors. Besides, in a fair number of cases, the authorities require merging parties to apply so-called remedies before allowing the merger to pass, again with a view to competitive effects only. The competition effectiveness of such remedies has recently been questioned, however. For employees, remedies mostly imply that the merging parties have to spin-

off subsidiaries, thus potentially disrupting, and diminishing, employee engagement. Consequently, the use of remedies must be reconsidered.

7. A well-balanced revision of the Takeover Bids Directive is sorely needed

In summary, the six points listed above constitute a strong critique of the Takeover Bids Directive and an argument for its revision. The analysis of country legal frameworks and actual cases of company takeovers show that the balance of power in corporate governance and company law is tipped too much in the direction of shareholder power. This is not in the long-term interests of companies nor of the European economy and society in general. Company law and corporate governance in the area of takeovers – as well as in other areas – needs to be revised to create a better balance between the interests of shareholders, workers and other stakeholders. The positive experiences, based on more extensive national workers' rights, that can be found in some of the contributions of this book can serve as guidelines for a progressive revision that introduces a timely and early warning, a more serious effort to consult workers from both the acquirer and the target company, a rights-based involvement of workers and the introduction of effective and dissuasive sanctions.

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