The Genesis of the Takeover Directive

Law Working Paper N° 770/2024
May 2024

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ECGI Working Paper Series in Law

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For useful feedback we would like to thank participants in the ECLE Workshop "Twenty Years of the Takeover Directive," Stockholm, October 12-13, 2023. The authors are also grateful to Manne Airaksinen, Peter Doralt, Ilkka Harju, Noel Hinton, Stilpon Nestor, Miceal Ryan, Karel Van Hulle and Martin Winner for their comments on an earlier draft.

Abstract

Thirty years passed between the publication by Prof. Robert Pennington of a report for the European Commission containing a draft directive on takeover bids and the adoption of the Directive 2004/25/EC on Takeover Bids. This paper explores the various proposals put forward during this time and the manner in which both the nature of the Directive and its provisions changed. It examines the Commission's 1989 and 1997 proposals and the Council's 2000 Common Position focusing on: the General Principles; the determination of the supervisory authority and applicable law; the mandatory bid rule; and the board neutrality rule. The paper proceeds to identify the various contentious issues which emerged in the subsequent conciliation process, the political difference that influenced the discussions and the compromises that were reached in order to arrive at the joint text approved by the Conciliation Committee in June 2001. Very unusually, this proposal was rejected by Parliament on July 4th 2001 and the paper describes the lead-up to this 273 tied vote and the fraught atmosphere in the Chamber. It reviews the steps taken by the Commission to move forward and meet the concerns of Parliament including by the establishment of a High Level Group of company law experts to advise on the next draft. The 2002 Proposal which ensued responded with a number of changes most significantly the break-through rule. This led to a period of very intense negotiations and drafting with compromise proposals being introduced in March, April and May 2003. The paper explains how the controversial ideas of optionality and reciprocity were introduced and how a further compromise proposal was put forward reflecting many of the amendments agreed at COREPER. This final period involved an intensification of lobbying, political maneuvering and consensus building. Ideological debates became intertwined with economic debates and practice with theory. The paper concludes by noting the rather unenthusiastic reception from Member States and commentators and the obvious disappointment of the Commission at what it perceived as a watered down proposal.

Keywords: Directive 2004/25/EC; Takeover; Board Neutrality Rule; Frustrating Action; Reciprocity; Break-through Rule

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1. Introduction

One of the defining characteristics of a market economy is that corporate earnings prospects are crucial to the allocation of equity capital. Equity finds its way to industries and companies with the best prospects. But earnings prospects also create an incentive for players in the economy to seek out information about companies and to realize the economic value of this knowledge by influencing company operations.

In terms of the decision as to how the company's resources are best used, only the shareholders who control the company are guaranteed the opportunity to put their views and objectives into action and to profit by the value of the information they have gathered. Control therefore has an economic value, and the role of the stock market is to transfer resources to the person who values them the most, i.e. to facilitate a change in control. Such a change can be carried out through a series of open market purchases, through negotiated block transactions or through an offer to the shareholders to tender their shares – a takeover bid. Hence, takeovers are simply a species of corporate control transactions.

In a takeover bid, the bidder can come into contact, at low cost and in a short time, with shareholders, even in companies with very large and widespread shareholder bases. Thus, it is not surprising that takeover techniques originated in countries where such ownership structures are common, primarily the UK and US, where takeovers first gained acceptance as a way of gaining control of listed companies already in the 1950s.

Takeover regulation in Europe was introduced first in the UK. The first version of the UK Takeover Code was introduced in 1968 following public and political concern in the wake of a number of controversial takeovers and calls for the introduction of clearly formulated rules.[1] The imposition of hard law by a state regulator was avoided by the market´s players in the City agreeing to introduce such rules and to establish a self-regulatory body – the Panel on Takeovers and Mergers – to update, implement and oversee compliance with these rules.

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[1] David Kershaw, *Principles of Takeover Regulation*, pp.88-101 (Oxford University Press, 2016)

2. The Proposals for a Takeover Directive

The UK rules on takeovers were unique in Europe for some time. In most other European countries takeover bids were still so rare that the introduction of special regulations was not considered to be unnecessary.[2] However, in the early 1970's the European Commission, anticipating that takeovers were likely to become more prevalent, explored the need for harmonized takeover legislation. This reflected a concern that although abuses and unfair practices occurred in connection with takeover bids, a considerable difference in standards existed between Member States some of which had national legislation, codes or professional rules whereas others had no regulation of any kind.

The Pennington Report 1974

The Commission appointed company law professor Robert Pennington, a UK company law expert to draw up a draft directive for takeover bids. He opined at the outset that because of the need to protect private interests during takeovers, legislation was needed to lay down "precise substantive rules and prescribe[e] a fairly detailed procedure". The emphasis of the draft, which was presented in 1974, was on restraining abuses and malpractices and protecting 'private interests' specifically 'shareholders and bondholders'.[3] It was strongly influenced by the UK Takeover Code and similarly based on the principle of equality of treatment of all shareholders in a target company. It suggested rules dictating: the proceedings before the publication of the offer document; the obligation to make a general offer; the offer document and publicity; the period for acceptance and the conclusion of a general bid; the conduct of the parties to a general bid; and civil and penal liabilities.

Although the Pennington draft was discussed with Member States' representatives, there was limited interest and after a number of years the entire project was put to one side.[4]

The Commission's 1989 Proposal

During the latter part of the 1980s, European stock markets became more active and the number of takeover offers increased dramatically.[5] Markets also saw a move from the traditional takeover negotiated between the acquirer and the target company's management to a takeover offer made directly to shareholders. This offer was often

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[2] Erik Berglöf and Mike Burkart, European takeover regulation, 18 *Economic Policy* 171.

[3] Pennington R., *Report on Takeover and Other Bids* (1974) COM Doc XI/56/74.

[4] Rolf Skog, Does Sweden Need a Mandatory Bid Rule? A Critical Analysis, SUERF Studies, No. 2 (1997) available at https://www.econstor.eu/bitstream/10419/163434/1/suerf-study-02.pdf.

[5] Rolf Skog 'The Takeover Directive-an endless Saga?' (2002) 13 EBLR 301 at p.302

preceded by little or no prior negotiations with management or it occurred after negotiations had proved unsuccessful. At this time, there was also an increase in cross-border corporate takeovers with foreign firms often vying for control of companies in other countries through public takeover bids. [6] These changes gave rise to renewed debate on the conditions for company takeovers in Europe. In a common market where companies were entitled to freedom of establishment in any Member State and where capital supposedly flows freely across national borders, it was clear that significant differences emerged amongst Members States' perspectives on takeovers. Some Member States, such as the UK favoured allowing free markets take their course whereas others had in place complex institutional and legal obstacles capable of impeding the acquisition of corporate control. [7]

In 1985, the Commission published a white-paper on the completion of the internal market in which it identified the need for a directive to harmonize Members States' rules on takeover bids and it promised to present a proposal in 1987.[8] That year, the Commission circulated for discussion a preliminary draft proposal for a Directive on Takeover and Other General Bids. The proposal's Explanatory Memorandum noted that although the frequency of takeovers varied greatly from one Member State to another, "their importance is growing with the gradual liberalization of capital markets".[9] It was envisaged that the directive would not set out an exhaustive set of rules but would rather provide a minimum level of protection for target shareholders.

In Takeover regulation, as in many other areas of regulation, industry events can have an immediate and significant impact on political receptiveness to reform. One such event was the launching of a bid in January 1988 by the Italian businessman Carlo de Benedetti for a controlling shareholding in the giant Belgian holding company Société Générale de Belgique. This started what became one of Europe's most controversial takeover fights of the decade.[10] Société Générale de Belgique, was described not only as "one of the most significant companies in the Belgium economy", having assets valued at nearly one-third of the total Belgian economy, but as a "source of national pride".[11] Although ultimately the bid was blocked by an alliance of investors led by Compagnies Financieres de Suez of France which acquired a 51% majority[12], the battle for the company described as "la vieille dame," galvanised the Commission's plans for a directive. [13] Pressed by the European

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[6] Ibid.

[7] Ibid.

[8] COM White Paper COM (85) 310 final.

[9] Ibid at p.5.

[10] Marco Ventoruzzo, Europe's Thirteenth Directive and U.S. Takeover Regulation: Regulatory Means and Political Economic Ends, 41 *Texas International Law Journal* 171 at p.203 (2006).

[11] Barbara White, Conflicts in the Regulation of Hostile Business Takeovers in the United States and the European Union, 9 Ilus GENTIUM 162 at p.180 (2003).

[12] Paul Montgomery, The End of the Battle in Belgium, New York Times June 25, 1988.

[13] Rolf Skog, Does Sweden Need a Mandatory Bid Rule? A Critical Analysis, SUERF Studies, No. 2 (1997).

Parliament, the Commission in January 1989 presented a complete proposal for a Thirteenth Directive on company law concerning takeover and other general bids.[14]

Although at this stage there was still no agreement that a European directive was necessary, the 1989 proposal kicked off an intense debate on the form any such directive would take. A number of Member States believed that a directive should take the form of a limited set of basic principles upon which national rules could be based allowing Member States discretion as to the details. Moreover, there was sharp criticism of individual provisions in the proposed directive.

One of the Member States most highly critical of the proposal was UK, which feared it would have to abandon its self-regulation in favor of legislation. UK was also highly critical of certain details of the proposal. The British criticism was especially difficult for the Commission given that the UK Takeover Code had served as the model for the takeover regulations that by then gradually began to take shape across Continental Europe.[15] It had also been carefully scrutinised by the Commission when formulating the proposed directive.

In January 1990, a substantially amended proposal was approved by the Parliament.[16] In September 1990, the Commission issued an amended proposal reflecting a number of amendments proposed by the Parliament, Member States and the Economic and Social Committee.[17]

In June 1991, the negotiations were suspended and by the end of the year the Commission announced it would prepare yet another draft to respond to criticism raised and to reflect the principle of subsidiarity introduced by the Maastricht Treaty.[18] It was clear too that a significant number of Member States including Germany and the UK saw the benefit in a framework directive which would allow them to retain many of their existing regulations and traditions.[19] By contrast, right up until the time the Directive was passed, a small number of Member States including Italy maintained their preference for a greater level of harmonization at EU level.

The Commission's 1997 Proposal

In February 1996, the long heralded new proposal was published[20] and it too was amended in late 1997 taking into account comments made at the first reading in

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[14] [1989] OJ C64/8; COM (88) 823 final; Bull EC Supp 3/89.

[15] Rolf Skog 'The Takeover Directive-an endless Saga?' (2002) 13 EBLR 301 at p.303.

[16] [1990] OJ C 38/41.

[17] [1990] OJ C 240/7; COM(90) 416 final. See Vanessa Edwards, The Directive on Takeover Bids – Not Worth the Paper It´s Written On? 1 European Company and Financial Law Review 416 (2004) at p.428

[18] Rolf Skog 'The Takeover Directive-an endless Saga?' (2002) 13 EBLR 301 at p.303.

[19] Vanessa Edwards, The Directive on Takeover Bids – Not Worth the Paper It´s Written On? 1 European Company and Financial Law Review 416 (2004)

[20] [1996] OJ C 162/5; COM (95) 655.

Parliament.[21]. This latter proposal differed in several respects from the 1990 version. Firstly, it was shorter and less detailed involving a proposal for a "framework directive", containing few detailed provisions but five general principles Member States would have to follow in their national takeover rules. A number of provisions in the 1990 proposal had been replaced by a general requirement that Member States adopt rules in these areas, but without being overly prescriptive as to their material content.

A second distinction was that Member States could choose to implement the Directive either in the traditional manner by enacting a law or by government decree, but also through self-regulation. Article 1 thus referred to "mechanisms or arrangements established by organizations officially authorized to regulate the markets" as well as regulations and the recitals referring to supervision by "self-regulatory bodies". Similarly, Article 4.1 provided that the national competent authorities appointed by Member States to supervise bids could include "associations or private bodies". This change was designed by the Commission to reduce UK opposition to the directive by facilitating the continued role of the UK Takeover Panel as competent authority.[22]

Based on the 1997 proposal, intense negotiations started within the Council to reach a "common position". Representatives from national Governments and takeover or securities regulators discussed each provision in the proposal and in many cases disparate views emerged. Often participants advocated for a position consistent with their own existing rules or legal systems to ensure fit and perhaps to avoid unnecessary disruption. Often too, shared experiences allowed the drafters to identify and provide for textual amendments to create a more effective proposal and to reflect different national contexts. A Council Working Party considered many amended proposals in 1998[23] and 1999 culminating in a revised joint compromise proposal of the Commission and the Presidency in May 1999 and an amended proposal before Council in June 1999. When the settlement arrived at the ministerial level for ratification, however, Spain announced that it opposed the directive and the text noted

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[21] COM (97) 565 final, 10 November 1997.

[22] See Blanaid Clarke, "Takeover Regulation: Through the Regulatory Looking Glass" (2007). Comparative Research in Law & Political Economy. Research Paper No. 18/2007 available at https://ssrn.com/abstract=1002675. The UK Government had expressly acknowledged the advantages of the UK Takeover Panel's system of regulation including: flexibility, speed and certainty in decision-making; principles-based regulation; involvement of City stakeholders in rule development; and a consensual approach to regulation amongst those involved in the markets (DTI, Company Law Implementation of the European Directive on Takeover Bids, A Consultative Document (January 2005) para.2.11.)

[23] "In October 1998 Member States failed to agree on the proposal during a three-day meeting of which one senior delegate was reported as saying 'The word shambles would be gracing it with a clarity of purpose that it didn't have'. *Financial Times,* 9 October 1998. (cited in Vanessa Edwards, The Directive on Takeover Bids – Not Worth the Paper It´s Written On? 1 European Company and Financial Law Review 416 (2004) at p.428.

that the Spanish delegation was keeping at that stage a general political reservation on the proposal. To no one's surprise Spain's problem had less to do with public takeover bids than its recurring claim to recover sovereignty of Gibraltar.[24] This gave rise to concerns amongst some Member States that as the UK had been relatively luke-warm in respect of the introduction of a directive, it might be slow to reach out to resolve the political dispute. Indeed, it took a year of bilateral discussions between Spain and the UK and pressure from other Member States for a common position to finally be agreed upon by all Member States on 19 June 2000 under the German presidency of the Council.[25] Although the Commission was not legally required to do so, it accepted this common position on 26 July 2000.

3.The Council's 2000 Common Position

The proposed directive negotiated by the Council bore a strong resemblance to the Commission's 1997 proposal but having taken into account Member States' interventions and demands for clarification, the text had become a little more comprehensive and detailed.

The Scope of the Directive

Article 1 provided that the coordination measures prescribed by the Directive should apply to Member States' "laws, regulations, administrative provisions, codes of practice or other arrangements of the Member States, including arrangements established by organisations officially authorised to regulate the markets …relating to takeover bids for the securities of a company governed by the law of a Member State, where such securities are admitted to trading on a regulated market within the meaning of Article 1(13) of Council Directive 93/22/EEC". This linguistically challenged provision, which remains largely unchanged, meant that the directive would apply not only to takeover rules taking the form of both hard law i.e. legislation and government regulations, but also soft law i.e. self-regulatory codes such as the UK Takeover Code. This was of utmost importance not only to the UK but also for Sweden which has a self-regulatory system very similar to the UK system,

As the Directive applies to takeover bids for companies with shares traded on regulated markets, its application is not dependent on the nationality of the bidder or whether it is an individual or a legal entity.

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[24] The question arose in the context of designating and communicating with a Gibraltar competent authority. Eventually an agreement was reached between Spain and the UK, and it was understood that contact with any future authority in Gibraltar could be via a Post Office Box system.

[25] Common Position (EC) No 1/2001 [2001] OJ C 23/1.

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General principles

Obviously inspired by the UK Takeover Code, Article 3 included six General Principles:

(a) all holders of shares of the target company of the same class shall be given equal treatment;
(b) the shareholders of the target company shall be given sufficient time and information to reach a properly informed decision on the bid;
(c) the board of the target company shall act in the interests of the entire company and not deny shareholders the opportunity to decide on the merits of the bid;
(d) false markets shall not be created in such a way that the prices of the company's securities rise or fall in an artificial manner
(e) a takeover bid may be announced only after the offeror has ensured it has the resources to fulfil the bid; and
(f) a takeover bid may not hinder the target company from conducting its affairs for longer than reasonable.

As Member States would be obliged to respect these Principles in their national takeover regulation, they would become important to the interpretation of more detailed provisions not only in the Directive, but also in the national rules implementing the Directive. Although deliberately broad, only Principle (c) was considered controversial by the Member States. After lengthy debates as to the extent to which a broader stakeholder approach should be included in the Directive as opposed to a shareholder primacy approach, the reference to acting in the "interests of the company" in Principle (c) was agreed. It was understood that this would allow Member States to adopt either a broad or narrow interpretation of the term depending on their chosen national approach. This degree of flexibility was confirmed in the European Court of Justice's subsequent decision 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.[26]

Supervisory authority and applicable regulation

Much time was spent debating Article 4 dealing with supervisory authority and jurisdictional issues. If the target company is listed only in the Member State where

- [26] *Audiolux SA e.a v Groupe Bruxelles Lambert SA (GBL) and Others and Bertelsmann AG and Others* Case C-101/08, par.51. See Blanaid Clarke, EU Takeover Regulation as a Means of Safeguarding the Interests of Employees: Re-opening Pandora's Box" chapter in Helmut Siekmann (editor) *Festschrift for Theodor Baums* (Mohr Siebeck, May 2017).

it has its registered office, the authority competent for supervising the bid would be that of that Member State and the rules applicable would be the rules of that Member State as well. Where the shares of the target company are listed both in its home Member State and in another Member State or only in another Member State, the decision as to the competent supervisory authority and the applicable law was clearly more complicated. This turned out to be one of the most difficult problems to solve in the negotiations. It was agreed finally that if the shares are listed in more than one Member State, the authority competent for supervising the bid would be that of the Member State where the shares were first listed. If the shares are listed only in another Member State, then the competent authority would be that of that Member State. In both cases there is a split when it comes to applicable rules and jurisdiction is shared. Matters relating to the consideration and "matters related to the bid procedure" including information on the offeror's decision to make a bid, the offer document and the disclosure of the bid would be dealt with in accordance with the rules of the Member State of the competent authority. By contrast, for matters relating to information to be provided to the target's employees and in "matters related to company law" including the mandatory bid and defensive measures by the target's board, the applicable rules and the competent authority would be those of the Member State in which the target company has its registered office. Concerns were voiced at the time that distinguishing between matters related to "bid procedure" and "company law" might not always be straightforward and the Directive itself provided no mechanism to manage a dispute between parties or supervisory authorities in this regard.

Mandatory bids

The "mandatory bid" rule is a key provision in the UK Takeover Code which obliges a person who acquires shares representing 30 per cent of the voting rights in a company to make a bid for the remaining shares. A mandatory bid provision was also included in the 1989 proposed directive, but it encountered stiff opposition from several Member States. The concern was that while mandatory bids might perhaps be the right kind of minority protection in Member States where companies typically have diversified ownership, it may not be appropriate in those where ownership is more concentrated.[27]

Over time, however, opposition to this part of the proposed directive gradually subsided as a growing number of Member States added their own rules on mandatory bids to their takeover regulation and as the proposed mandatory bid provision was refined. The 1989 Proposal had required a bid to be made when a person aims to acquire securities, which when added to their existing holdings would give a percentage of the voting rights in a company "which may not be fixed at more than 33 1/3 %". Article 5 in the Common Position clarified that mandatory bids would

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[27] Rolf Skog 'The Takeover Directive-an endless Saga?' (2002) 13 EBLR 301 at p.307.

only be required if control was obtained and it allowed Member States to determine the percentage of voting rights which confers "control". In response to concerns that the mandatory bid provision would be triggered in inappropriate circumstances, Article 5(2) stated clearly that if control is obtained through a voluntary bid to all shareholders, there would be no obligation to make a second bid. Similarly, recital 6 clarified that the obligation to make a bid would not apply to those controlling holdings already in existence at the time the Directive was introduced.

Article 5 did not mandate the price that has to be offered for securities in a mandatory bid, only that it be "equitable". Benefitting from the UK's experience of such bids, it did however contain a new provision, agreed by a majority of Member States in 1999, to the effect that a mandatory cash alternative would be included in Article 5.

Frustrating actions by the target company

The most controversial aspect of takeovers and takeover regulation is the discretion afforded to the board of the target company to take actions to frustrate a takeover bid thus denying shareholders an opportunity to consider the offer. A takeover has consequences for the board and management of the target company. Once completed, changes in the board and management frequently ensue, particularly in the event of a hostile bid. The likelihood of this occurring gives rise to a potential conflict of interest and creates a risk that the board or management may take certain actions to impede takeover bids they do not support.

To eliminate this risk of such frustrating, or defensive actions, the UK Takeover Code provides that, if a bid has been made or the board of the target company has reason to assume that a bona fide bid is imminent, the board may not take any measures intended to undermine or frustrate the bid or its acceptance without the approval of the general meeting given after the offer is made. The proposed Directive adopted the same principle.

4. The European Parliament's viewpoint

The Council's common position was submitted to Parliament for a second reading and in December 2000, Parliament approved the common position with eighteen amendments to the proposed directive.[28]

One of the most important changes required by Parliament was that the board of the target company be given extensive opportunity to frustrate unwanted takeover bids. This position was made forcefully by the rapporteur of the Parliament, the German conservative MEP Klaus-Heiner Lehne.

At the time of the negotiations, relatively few large German corporations were listed, and amongst those that were, ownership structures were highly concentrated. Takeover bids were rare and seen by many as "a foreign, undesirable element in

[28] [2000] OJ C 232/168.

German business, particularly in the event of hostile bids by foreign bidders for German companies. [29] One such controversial bid was that of the UK telecommunications company, Vodafone AirTouche, for Germany's Mannesmann in the fall of 1999. The fact that the Vodafone bid eventually succeeded only served to bolster the opinion that corporate boards should be given considerable freedom to defend their companies against hostile takeovers.

It was against this background that a number of large German companies became intensely involved in Parliament's response to the proposed takeover directive, and it was said that "the rapporteur, in practice, became a spokesman for VW, BASF and other large German companies" who were keen to avoid the risk that, they too would become the subject of a hostile bid and end up in foreign hands.[30] These companies viewed Council's proposal to give shareholders the ultimate decision-making right on defensive actions as a "crazy idea".

5. The conciliation process

As early as January 2001, the Council, under the Swedish presidency, clearly stated that the amendments proposed by Parliament could not be accepted without modifications.[31] This triggered the process of "conciliation" between the Council and Parliament provided for in the Treaty to arrive at a compromise. Through this process, which commenced informally in March 2001 and formally on April 10 2001, an agreement was gradually reached point by point on the proposed directive. This involved Parliament dropping some of its demands, others being met by relatively simple means, and others requiring substantial concessions by the Council following intense internal deliberations.[32]

Finding common ground on the issue of defensive actions proved particularly challenging. As noted, the common position stated that such actions could only be taken with the approval of the general meeting after a bid had been made public. By contrast, the Parliament's conciliation delegation, controlled by the rapporteur, argued that the general meeting should be permitted to authorise the board in advance of any bid being made to take such defensive actions. It has been reported that Council's opposition on this issue "raised the ire of the German business community" which intensified its lobbying efforts and attempted to create a rift on the Council.[33] At a meeting on April 23, representatives of Volkswagen, BASF and other companies, together with labour union representatives, issued their demand for changes to the proposed directive directly to the German Chancellor Gerhard

[29] Rolf Skog 'The Takeover Directive-an endless Saga?' (2002) 13 EBLR 301 at p.308

[30] Ibid.

[31] Rolf Skog 'The Takeover Directive-an endless Saga?' (2002) 13 EBLR 301 at p.308.

[32] Ibid.

[33] Ibid.

Schröder.[34] Two days later, Germany's deputy representative to the EU notified the Swedish Presidency that Germany no longer backed the common position. and its future support rested on shareholder approval for frustrating actions being eliminated from the relevant provision, Article 9, or that the entire article being removed from the directive. [35] This was a highly unusual turn-around given the involvement of the German Presidency in January-June 1999 in reaching the compromise and it provoked an immediate response from other Member States on the Council. The secretary to the UK Takeover Panel opined that the change proposed "depriving the directive of any real purpose"[36] and not only the Member States that so vociferously pushed for shareholders' sovereignty but also those that traditionally took a more relaxed stance toward defensive actions took exception to the German approach. It was felt that Germany was "overstepping the rules by rejecting the Council's common position after a year of highly sensitive negotiations and it was de facto taking sides with Parliament".[37] As the Council held to its convictions, Germany became isolated in the Council. The Parliament's conciliation delegation also maintained its position and it used the conflict to push even harder in conciliation negotiations to allow boards to take frustrating actions with the support of prior authorization.

In accordance with the Treaty, the conciliation process was required to conclude by June 6 and failure to reach an agreement by that time would lead to the rejection of the proposed directive. Although negotiations in May did not lead to a breakthrough, a final conciliation session was scheduled for the evening of June 5 in Luxembourg. Whilst at the outset, agreement seemed unlikely with Parliament accusing the Council of an unwillingness to compromise, a few hours into June 6 and assisted greatly by the active mediation of the Commission officials, agreement was reached.[38] A division emerged in the parliamentary delegation with the rapporteur, Mr Lehne, being in the minority.

Whilst in reaching this agreement, the Council made a number of concessions to Parliament on a number of points, Article 9 remained unamended. The board of a target company would not thus be permitted to take any defensive actions without the express approval of the shareholders after a bid had been presented. However, Member States would be allowed to postpone the application of Article 9 for one

[34] Klaus Hopt suggests that it is likely that Chancellor Schröder, hailed as "the automobile chancellor" had previously made aware of this contentious issue by Volkswagen´s chief executive Ferdinand Piech with whom he had developed very close ties whilst he was a member of Volkswagen's supervisory board. See Klaus Hopt, Takeover regulation in Europe – The battle for the 13th directive on takeovers, 15 Australian Journal of Corporate Law 1 (2002) at p.10.

[35] Rolf Skog 'The Takeover Directive-an endless Saga?' (2002) 13 EBLR 301 at p.309.

[36] Vanessa Edwards, The Directive on Takeover Bids – Not Worth the Paper It´s Written On? 1 European Company and Financial Law Review 416 (2004) at p.426.

[37] Rolf Skog 'The Takeover Directive-an endless Saga?' (2002) 13 EBLR 301 at p.309.

[38] Ibid.

year after the Directive's implementation deadline. Other compromises included extending the implementation period from three years to four; additional safeguards for employees in the target company in the form of informational rights; and an undertaking by Frits Bolkestein, the Internal Market Commissioner, to establish an expert group to review three key areas of contention in Parliament: (i) the definition of the 'equitable price' for shareholders in the event of a mandatory bid; (ii) the right of the majority of shareholders to acquire the shares of minority shareholders after a successful bid and (iii) the equal treatment of shareholders in Member States. It was agreed the expert group would submit a report in March 2002 and the Commission would respond with a proposal to address the suggestions made in this report.

The conciliation process was thereby complete and a joint text approved by the Conciliation Committee was published on June 19. All that remained then was for Parliament in plenary to vote (by a simple majority) on the matter "something most observers, based on compromises on other directives, expected to be little more than a formality".[39]

6. Parliamentary vote

The proposed Takeover Directive was important to corporate ownership and influence with major and immediate financial implications. The German business community was thus unwilling to give up the fight and made use of the period before the vote on July 4 to lobby elected officials.[40] Skog explained that:

> "Convincing a majority of the MEPs to reject the results of more than ten years of work and abandon the conciliation agreement was no simple matter, however. Saying no to the directive would most certainly cast a shadow over Parliament for a long time to come. The strategy therefore was to create displeasure also with other aspects of the proposed directive than the regulation of frustrating actions."[41]

Supporters of the vote too sought to persuade parliamentarians to support their cause and both sides engaged in concerted efforts to vote "correctly." The day before the vote, the party groups met. It became evident that differences in opinion, or what has been described as 'a clash of capitalisms'[42] between the 'liberal market economies'[43]

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[39] Ibid.

[40] Ibid.

[41] Ibid at p.309-310.

[42] Callaghan H. and Höpner M. 'European Integration and the Clash of Capitalisms: Political Cleavages of Takeover Liberalization' 3 Comparative European Politics 307 (2005).

[43] Hall P. and Soskice D. (eds.): *Varieties of Capitalism. The Institutional Foundations of Comparative Advantage* (Oxford: Oxford University Press, 2001).

such as the UK and the ‘coordinated market economies’[44] such as Germany,[45] split both the conservative and socialist camps and that the vote would therefore be “free”.[46]

When the vote was taken, the President of the Parliament, Madame Fontaine read the results: 273 votes in favour, 273 against and 22 abstentions. A further 58 missed the vote. After some initial confusion about the exact meaning of a “yes” and “no” vote[47], it became clear that, by the smallest possible margin, the proposed Directive had not received the simple majority it needed. Parliament had rejected the conciliation compromise and the proposed directive. There was some discussion as to whether Madame Fontaine, who had not voted, should have exercised her vote to sustain the conciliation procedure. Her response was her actions were “in line with those of all the presidents before me, who always used the sensible rule of only voting in extremely exceptional circumstances, and not on problems that have divided Parliament to this extent.”[48] Concerns with the text were aired by parliamentarians and even many of those who supported the proposal acknowledged that “this directive will not win any prizes”.[49] One Parliamentarian explained the vote on the basis that “nervousness led to a retreat into protectionism, which shattered the fragile agreement that had been reached in conciliation. The German MEPs found that many Netherlands, Spanish and Italian colleagues gradually came to support their strategy of rejection”.[50] This view was supported by media reports that Italy feared their companies would be taken over by French stated-owned companies and especially Electricite de France and the Italian European Affairs Minister was quoted as stating “The Italian government changed its position in reaction to the aggression of EDF”.[51] Other reports suggested that “German MEPs, in essence on a government whip, voted against, and that a group of Spanish MEPs switched sides after being offered support for increased fishing subsidies.”[52] The Commission itself explained the

[44] Ibid.

[45] Jackson G. and Miyajima H. ‘Varieties of Capitalism, Varieties of Markets: Mergers and Acquisitions in Japan, Germany, France, the UK and the USA’ *RIETI Discussion Paper* Series 07-E-054.

[46] Rolf Skog ‘The Takeover Directive-an endless Saga?’ (2002) 13 EBLR 301 at p.310. Despite this concession, it is noteworthy that the Liberal Democrat Group voted as one.

[47] Even after the initial vote, confusion reigned as due to a technical slip up, the official record initially stated 273 for, and 272 against (European Parliament, Verbatim report of proceedings, 4 July 2001 – Strasbourg available at https://www.europarl.europa.eu/doceo/document/CRE-5-2001-07-04_EN.html.)

[48] Ibid.

[49] Ibid Maaten, Manders, Mulder, Plooij-van Gorsel, Sanders-ten Holte and Wiebenga in writing.

[50] Ibid Bourlanges in writing.

[51] David DeRosa ”Europe steps backwards by axing takeover rules” (July 8 2001) Bloomberg.

[52] Vanessa Edwards, The Directive on Takeover Bids – Not Worth the Paper It´s Written On? 1 European Company and Financial Law Review 416 (2004) at p.427.

defeat as motivated by three main political considerations: ”(1) rejection of the principle whereby, in order to take defensive measures in the face of a bid, the board of the offeree company must first obtain the approval of shareholders once the bid has been made, and this until such time as a level playing field is created for European companies facing a takeover bid; (2) regret that the protection which the directive would afford employees of companies involved in a takeover bid was insufficient; (3) the failure of the proposal to achieve a level playing field with the United States.”[53] Commissioner Bolkestein described the outcome as the frustration of “Europe’s broader interests…by certain narrow interests.”[54]

7. Re-starting the procedure

The rebuff by Parliament was an obvious blow to the Commission and only on one prior occasion had the Parliament rejected a conciliation agreement.[55] The effect of Parliament’s decision was to return the issue of a European takeover directive to the Commission. Despite what must have been a difficult task for the Commission in generating enthusiasm for re-initiating the legislative process, it had little choice. As was noted, whilst the practical importance of the takeover directive may have been debatable, its symbolic value was huge and both the Council and the Commission had emphasized the vital role the directive played in efforts to realize the vision of an internal market.[56] The directive, which formed part of the Financial Services Action Plan,[57] had been identified by the Council at a special meeting in Lisbon as a priority for the integration of European financial markets.. Thus, in July 2001, Commissioner Bolkestein announced his intention to present a new draft directive.

The High Level Group

In September 2001, Commissioner Bolkestein made good on this promise and established a High Level Group of seven company law experts, chaired by Dutch law professor Jaap Winter to advise the Commission on the next draft. The establishment of such a group to consider company law harmonization in this context had been flagged by the Commission in advance of the final vote in July. In January 2002, the

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[53] Explanatory Memorandum OJ C 45 E/1.

[54] Press Release, European Commission, Commission Regrets Rejection of Takeovers Directive by the European Parliament (July 4, 2001).

[55] The conciliation agreement on the proposal for a Directive on the legal protection of biotechnological inventions, COM (1988) 496 in 1995. See See Rolf Skog, The takeover directive, the “breakthrough” rule and the Swedish system of dual class common stock, 15 European Business Law Review 1439 at p.1441.

[56] Rolf Skog ‘The Takeover Directive-an endless Saga?’ (2002) 13 EBLR 301 at p.310.

[57] COM(1999) 232 final, 11 May 1999.

High Level Group presented its report to the Commission.[58] It proposed that European company law should aim to create a level playing field for takeover bids and should be guided by two principles.

The first principle was that the ultimate decision on a takeover bid must be taken by the shareholders. The board of the target company should express its views and advise the shareholders, but it should not be entitled to decide on the fate of the bid. No defensive measures should be taken without the approval of the general meeting and this approval could not be given in advance. This was a welcome message to most Member States, but not to Germany which in January 2002 had introduced takeover legislation permitting the general meeting to give an authorisation to the board to take defensive measures in the case of a future bid. The German law went even further than this, allowing the management to take defensive measures with the approval by the supervisory board.[59]

The second principle was that there ought to be proportionality between the ultimate economic risk and control, at least in the context of takeovers. For this purpose, the High Level Group proposed a "breakthrough" rule which would come into effect once a bidder had made a bid for all the shares of a listed company and reached a certain threshold of ownership of the "risk-bearing" capital as a result of the bid.[60] The threshold should be fixed by the Member States, thereby allowing them to take into account the relevant majority requirements in their company laws. It should not, however, be set at a percentage higher than 75 per cent. A bidder acquiring the relevant percentage of risk-bearing capital would be allowed to exercise a corresponding share of voting rights at a general meeting of shareholders. In other words, the rule would "break through" or neutralise provisions in the articles of association on e.g. voting caps or multiple voting shares.

The High Level Group also addressed the concerns expressed in Parliament that the introduction of a prohibition on frustrating action in Article 9 would create an unlevel playing field between the EU and the United States.[61] It acknowledged that boards of American companies generally do have a broad discretion to introduce defensive devices under the business judgement rule and that many individual states have enacted laws specifically permitting the board to consider other interests than shareholders' interests. However, it took the view that the American approach would be less beneficial to the development of efficient integrated capital markets in Europe.[62]It also opined that the prohibition proposed "would not give American

[58] Report of The High Level Group of Company Law Experts on issues related to takeover bids, Brussels, 10 January 2002.

[59] Theo Baums, The regulation of Takeovers under German Law,15 European Business Law Review 1453 (2004) at 1457.

[60] The proposed rule was inspired by rules in Italian but also French and German law, see p. 30 footnote 4 in the report.

[61] Theo Baums, The regulation of Takeovers under German Law,15 European Business Law Review 1453 (2004) at 1458.

[62] Blanaid Clarke, Takeover Regulation – Through the Regulatory Looking Glass, 3 CLPE Research Paper 18/2007 at pp 22-23. Available at https://ssrn.com/abstract=1002675

companies an unfair advantage when trying to exploit the European internal market by taking over European companies, as compared with the conditions which apply to European companies exploiting the American market by taking over American companies".[63] However, it concluded that if political concerns persisted, the benefit of the application of Article 9 could be restricted to listed European bidders bidding for other listed European companies "to the extent this would not violate international agreements and could practically be enforced"[64].

The European Court of Justice Decisions on Golden Shares

On 4 June 2002, three decisions were rendered by the European Court of Justice ("ECJ") in relation to actions initiated by the European Commission against Portugal, France and Belgium in respect of their golden share regimes.[65] These shares were held by the three Member States to give their governments greater control over acquisitions and transfers of shares in certain of their domestic prized companies or sectors. The ECJ found that both Portugal and France had violated the freedom of movement of capital under the EC Treaty. Klaus Hopt, a member of the High Level Group, noted that these decisions were consistent with the Group's report and its recommendation that the breakthrough rule apply to golden shares. The decisions thus helped "in doing away with cross-frontier barriers by national laws and restrictive state rights".[66]

Hopt also observed that following the ECJ's decisions, Commissioner Bolkestein announced that he would present the next draft of the Directive in July 2002, but that Chancellor Schröder intervened with the president of the Commission, Romano Prodi to ensure the process would not interfere with the upcoming German elections and as a tesult the new draft was postponed until October 2002.

8. The 2002 Directive Proposal

[63] Report of The High Level Group of Company Law Experts on issues related to takeover bids, Brussels, 10 January 2002, p. 42.

[64] Ibid p.8.

[65] COM v Portugal; COM v French Republic; COM v Belgium, cases C-367/98, C-483/99 and C-503/99. At this time, the Commission planned to initiate an action against Germany in respect of its Volkswagen statute which gave the Federal government and the Land of Niedersachsen a veto against a majority acquisition while holding only 20% of the shares. The action was not launched however until 2005 and only in 2007 did the ECJ rule that the provisions violated the Treaty's free movement of capital guarantees (Case C-112/2005).

[66] Klaus Hopt, Takeover regulation in Europe – The battle for the 13th directive on takeovers, 15 Australian Journal of Corporate Law 1 (2002) at p.14.

Having considered the arguments, the Commission on 2 October 2002 adopted and submitted a new Directive proposal.[67] This text was drafted by Karel Van Hulle, head of the Company Law unit, with contributions from the High Level Group.[68] It sought to accommodate the concerns expressed by Germany whilst retaining the support of the other Member States. Unusually the College of Commissioners held a formal vote on the adoption of the proposal and one French Commissioner (Pascal Lamy, Trade) and both German Commissioners (Günther Verheugen, Enlargement, and Michael Schreyer, Budget) voted against it whilst the Belgian Commissioner (Philippe Busquin, Research) abstained. [69] The proposal appeared to take account of the objections to abolishing dual voting rights and the German Commissioners were reported to be particularly concerned by the proposal's failure to tackle the problem of multiple voting rights discussed further below.[70]

The proposal was similar in many ways to the proposal agreed in June 2001 pursuing the same objectives, retaining the same scope and including many of the same provisions. It retained for example the prohibition in Article 9 on frustrating actions by the target unless it has the prior authorisation of the general meeting of shareholders for the purpose. It did however contain a number of important differences, including: a definition of "equitable price" in the event of a mandatory bid; a new article on employee information and consultation in response to concerns voiced by certain members of Parliament regarding protection of employees of the target and bidder; a sell-out right; a procedure for revision of the provisions; a three year transitional period for complying with Article 9; and greater disclosure in companies' annual reports of the defensive structures and mechanisms that could hinder the acquisition and exercise of control over the company by an offeror.

The Breakthrough Rule and Multiple Voting Rights

One of the most contentious changes however related to the break-through rule. Based on the High Level Group report, but without adhering to it in detail, the Commission introduced in Article 11 a "mini breakthrough rule" with a view to increasing the number of takeovers in the EU by eliminating these corporate governance arrangements which might otherwise impede takeovers.[71]Its effect would be for example to allow a bidder who following a takeover bid had obtained a specific percentage of the votes in a target company to call a general meeting in the

[67] Proposal for a directive of the European Parliament and of the Council on takeover bids, 2 October 2002, COM (2002) 534, [2003] OJ C45/1.

[68] Karel Van Hulle, Aktuelle Entwicklungen im europäischen Gesellschaftsrecht in Europäisches Wirtschafts- und Steuerrecht (2000) pp. 521-526 and Karel Van Hulle, Does the EU have a role to play in company law?" in Mette Neville and Karsten Engsig Sørensen (Eds.), The regulation of companies. A tribute to Krüger Andersen, Copenhagen, Forlaget Thomson, 2003, 29-36.

[69] Vanessa Edwards, The Directive on Takeover Bids – Not Worth the Paper It´s Written On? 1 European Company and Financial Law Review 416 (2004) at p.428.

[70] Ibid.

[71] Report of the High Level Group of Company Law Experts on Issues Related to Takeover Bids, p 29.

target company to appoint a new board without being hindered by voting caps in the company's articles of association that might otherwise limit the number of votes each shareholder could cast at that meeting. Provided that the offeror had obtained sufficient votes in the target company to amend the articles of association, such restrictive provisions would "cease to have effect" at the first general meeting after the bid completed. The idea behind the Commission's proposed rule was to "break through" pre-bid defences that would work to isolate a company and entrench management in a takeover situation.

In this draft, Article 11 did not include securities carrying double or multiple voting rights. This reflected a fierce debate which had taken place on this subject amongst Member States. In the Nordic countries, multiple vote shares had always been permitted and were frequently used by listed companies. Sweden, Finland and Denmark argued in this context that there was no empirical data suggesting that multiple vote share structures prevent takeovers[72] This was acknowledged by the Commission and it also accepted that the suppression of such rights, especially without compensation, would in some legal systems give rise to constitutional problems and possibly necessitate constitutional amendments.[73] Ireland was one of the Member States which harboured such a concern in light of constitutionally protected property rights and which entered scrutiny reservations compatibility with the property rights enshrined in the European Convention on Human Rights.[74] The likely complexities involved in giving effect to the breakthrough rule were also raised and the need to clarify how compensation would be calculated and by whom it would be paid.

Germany argued that Article 9 on post-bid defensive measures should be made less restrictive, to accommodate the German model which allowed authorisation of defensive measures against future takeover bids. It also proposed that the breakthrough rule in Article 11 should be expanded to include multiple vote share structures. This attitude to including multiple voting rights was shared by many other Member States including the UK, Austria and the Netherlands. Similar signals were given by the rapporteur, Klaus-Heiner Lehne, in late 2002. He opined that the ownership problem could be resolved by a system of compensation and that a level playing field for takeovers could not exist when multiple vote share structures were permitted in some Member States but not in others.[75]

The Level Playing Field

The issue of a lack of level playing field between the EU and the United States continued to be a focus point of discussion in 2002. The Commission questioned whether there was strong evidence that EU companies were at a disadvantage. It also queried whether even if this were proven to be the case, the Directive would be the appropriate place to address such reciprocity issues.

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[72] See Rolf Skog, The takeover directive, the "breakthrough" rule and the Swedish system of dual class common stock, 15 European Business Law Review 1439.

[73] COM (2002) 534, [2003] OJ C45/1.

[74] Council Legal Services was subsequently able to provide comfort on this point.

[75] Vanessa Edwards, The Directive on Takeover Bids – Not Worth the Paper It´s Written On? 1 European Company and Financial Law Review 416 (2004).

9. The 2003 Negotiations and Proposal

After listening to Germany and other Member States, Greece, which took over the presidency of the Council from Denmark at the start of 2003, concluded that the Commission's proposal would not gain the support of a large enough majority in the Council and would not be accepted by Parliament.[76]

In February 2003, the situation changed abruptly, however, and it was reported that the UK had "struck an informal deal" with Germany in its campaign to include multiple voting rights in the prohibited defensive measures.[77] It was claimed that the UK had withdrawn its support for the Commission proposal and aligned with Germany in return for Germany agreeing to oppose a proposed directive giving more rights to temporary agency workers.[78]

March 2003 Proposal

A compromise proposal was tabled by the Greek Presidency in February 2003 with a view to building consensus around the outstanding issues including the correct balance to strike between articles 9 and 11. It included amendments which had been suggested by the Danish Presidency as well as a small number of new amendments. Following discussions in the Working Party, on 4 March 2003, the Presidency presented a revised directive proposal but also circulated a non-paper setting out a possible compromise for Articles 9 and 11 which it reserved the right to put forward at a later stage. The latter expanded Article 11 to include multiple voting rights; specified in a recital that compensation would be left to Member States; introduced a fallback clause stating that the breakthrough rule would apply in any event where the bidder holds at least 75 per cent of the securities; and exempted newly listed companies for the first five years after listing on an EU regulated market.

Three days later, the Presidency published a revised compromise proposal in which Article 9 was unchanged but Article 11 was amended to taking account of the aforementioned compromise proposal. The latter, as envisaged by the High Level Group's proposal, had been extended to include dual class common shares.[79] A definition of "multiple voting securities" as "securities included in a *distinct and separate class* and carrying more than one vote" was introduced in Article 2 with the effect that the particular French system of loyalty shares, where voting rights are tied to seniority rather than classes of shares, would no longer be affected by the Directive. Hence, the French opposition disappeared. The Rapporteur, Klaus-Heiner

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[76] Rolf Skog, The takeover directive, the "breakthrough" rule and the Swedish system of dual class common stock, 15 European Business Law Review 1444.

[77] Francesco Guerrera and Birgit Jennen, Germany and UK in Joint Bid to Toughen EU Takeover Rules, Financial Times 3 February 2003.

[78] Vanessa Edwards, The Directive on Takeover Bids – Not Worth the Paper It´s Written On? 1 European Company and Financial Law Review 416 (2004).

[79] Article 11(3) was amended to include the sentence "Multiple voting securities shall carry one vote only at the general meeting which decides on any defensive measures in accordance with Article 9."

Lehne opined that Member States could "offset the inclusion of multiple voting rights by appropriate compensation for the additional value"[80] and the recitals specified that the matter of compensation would be left to Member States.

The Nordic Member States, that had previously signalled their support in principle for the Commission's proposal, heavily opposed the extension of the "breakthrough" rule to cover multiple vote shares.[81] In sum they argued that the right of companies to issue dual class shares is an important part of their right to determine their own financial structure and that the extended "breakthrough" rule would: create considerable uncertainty as to the value of an investment in high vote shares thus limiting the financing opportunities available to companies; be detrimental to the corporate governance system promoting rather than restraining management entrenchment; and would encroach on the property rights of the owners of high vote shares and give rise to complicated questions of compensation. Finally, it was argued that there was no evidence of takeover activity being adversely affected by the existence of multiple classes of shares carrying different voting rights.

Other changes included in this proposal related to the consideration to be offered in a mandatory bid. An amendment to Article 5 defined the equitable price to be paid by reference not only to the price paid by the offeror or a concert party for the same securities in the previous six to twelve months but also during the bid itself. It also provided that Member States could allow a cash consideration as an alternative in all cases. Changes were also introduced to the triggers in Articles 14 and 15 for squeeze-out and sell-out rights.

April and May 2003 Proposals

Discussions continued and in early April 2003 a revised Presidency compromise proposal was tabled. This included a new requirement to disclose in the offer document the compensation offered for the rights which might be removed as a result of the breakthrough rule and details on the method to be used in determining such compensation and how it should be paid. Given that there was still intense debate in the Working Party on how both these particulars would operate in practice, this was an important but complex matter which Member States would have to resolve in due course. A new provision was added to Article 5 providing that if the offeror or a concert party acquires securities during the bid at a higher price that the one already offered, this would be considered to be the equitable price and a revised offer would be required. This draft was followed by a further proposal by the Greek Presidency in early May.

Despite this apparent progress, discussions remained deadlocked.[82] The three outstanding issues identified at this time were: (a) the relationship between Articles 9 and 11 and including compensation payable under the breakthrough rule; (b) the

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[80] Committee on Legal Affairs and the Internal Market 11 March 2003.

[81] See Rolf Skog, The takeover directive, the "breakthrough" rule and the Swedish system of dual class common stock, 15 European Business Law Review 1439 at p.1444-1445.

[82] Jan Christensen, The New Draft Takeover Directive – a Breakthrough for Levelling the Playing Field in Europe?, in Mette Neville and Karsten Engsig Sørensen (eds) The Regulation of Companies (2003) 201 at p.214.

need to amend the general derogation clause in Article 4(5); and (c) the level playing field with the United States. In relation to the latter, Germany had suggested removing from the scope of the Directive takeover bids made by offerors established outside the EU or by their EU subsidiaries. Other jurisdictions including the UK and Austria supported this idea.

By May, in a change of position, Germany rather than seeking the inclusion of multiple voting rights among prohibited measures, proposed the removal of Article 9. Although reported to have the support of the United Kingdom, the Netherlands and (in return for the removal of the proposed restrictions on multiple voting rights) the Nordic countries, Germany did not have the support needed to override the Commission opposition to its proposal.[83]

The month of May might also be described as a turning point in the Directive. On 15 May, the Portuguese delegation suggested in COREPER a very complicated, compromise to take account of the differences in company law in the Member States while simultaneously offering a harmonized solution. It proposed introducing provisions allowing opting-in and opting-out of Articles 9 and 11. Member States would be permitted to require the application of Articles 9 and 11 but if they decided not to do so, companies would be allowed to either: apply Articles 9 and 11; or not apply Articles 9 and 11. Though perhaps a pragmatic suggestion in the sense of overcoming intransigence among the Member States, this controversial proposal set in train discussions which would eventually lead to a degree of optionality which undermined one of the key aims of the Directive.

In June, the Portuguese delegation, at the request of the Greek Presidency, Member States and the Commission provided a more detailed version of the optionality plan. Describing it as a "market-oriented solution", it was presented as a possible benchmark for defensive measures. It allowed Member States options with respect to their own national laws; allowed companies choices within the framework provided by the Directive and applicable national laws; and ensured transparency of choices and regimes. On the issue of the level playing field, the proposal was described as acknowledging the concerns of companies about their vulnerability to preserve their existing defensive measures, whilst creating an incentive to those who wish to be open to the prospect of a takeover where they operate in a fair environment to progressively abolish defensive devices. In order to provide such an incentive, the proposal also included a reciprocity provision under which Member States could disapply bans on defensive actions without shareholder approval where the bidder came from a jurisdiction such as the United States where poison pills were permitted. Despite encouragement from the Commission, the Portuguese proposal was not tabled by the Greek Presidency on the basis that it would defeat the whole purpose of the Directive. Instead of providing for a level playing field and greater integration of the EU capital markets, it would lead to even greater disparity and opacity. This proposal was the subject of intense discussions in COREPER in the following months with a view to simplifying the options and dealing with practicalities such as the ability of companies opting in to opt back out and the application to subsidiaries of companies from the aforementioned jurisdictions.

[83] Vanessa Edwards, The Directive on Takeover Bids – Not Worth the Paper It´s Written On? 1 European Company and Financial Law Review 416 (2004)

November 2003 Proposals

On 21 November, the Italian Presidency presented a further compromise proposal to Council reflecting many of the amendments agreed at COREPER. It contained parliamentary scrutiny reservations by a number of Member States including the UK and also general reservations by other Member States including Sweden. The article on optionality arrangement was simplified. It allowed Member States to reserve the right not to require companies to apply Articles 9 and/or 11 but where Member States availed of this option, they were required to give companies a reversable option, to be taken at a shareholders' meeting, to apply them. The reciprocity provision was reformulated too to make it clearer that Member States in their national law may exempt companies which apply Articles 9 and/or 11 from applying them if they become subject to an offer launched by a company, or a subsidiary of a company, which does not apply the same articles as they do. At the last minute, Sweden managed to insert a 'review clause' requiring the Commission to examine the Directive five years after the deadline for implementation, and if necessary, propose revisions.

A piece in the influential Lex Column in the Financial Times three days later was scathing of the proposed Directive. It commenced: "A fruit ripened as slowly as the European Union's planned takeover directive ought to taste unusually sweet. Alas, 14 years of deliberations have produced a sour, shriveled thing, replete with the rancid overtones of political horse-trading". [84] The German Government were criticized for being "consistently wrong" and the UK Government for "pawn[ing] its residual integrity by trading its vote on this grubby compromise for German backing over the rights of temporary workers". There were reports too that the same week that the United States was stepping up contacts with all EU governments to complain that making it harder for US companies to pursue hostile bids in Europe would create the perception of "Fortress Europe".[85]

Despite this reception, the proposal with its compromise text was adopted by Council on 26 November 2003 with unanimous agreement pending the European Parliament's first reading opinion and with the abstention of Spain on a general approach. France reportedly supporting Germany, even though it fully intended to apply the provisions in Article 9 and 11 and hence had no interest in their being made optional, in return for German assistance in negotiations on the common agricultural policy.[86] The Commission stated that it was not in a position to support the text.[87]

The following day, the Parliamentary Committee responsible adopted the Rapporteur Klaus-Heiner Lehne's report amending the proposal under first reading and accepting the Council's view as to the need for optionality.[88] On 16 December

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[84] Financial Times 24 November 24 2003.

[85] Daniel Dombey "US warns of wider trade rift with EU" Financial Times 24 November 2003.

[86] Vanessa Edwards, The Directive on Takeover Bids – Not Worth the Paper It´s Written On? 1 European Company and Financial Law Review 416 (2004)

[87] C/03/337 15141/03 (Presse 337) 26/27 November 2003.

[88] Legislative Observatory "Company law: takeover bids" 2002/0240(COD) - 27 November 2003.

2003, Parliament adopted a resolution drafted by Klaus-Heiner Lehne accepting agreement on the compromise agreements. While the resolution was adopted by 321 votes to 219, there seemed little cause for celebration. Parliaments own summary noted that "members generally agreed that the directive as now amended represented little progress towards a genuine level playing field on takeovers in the EU, but most also supported the rapporteur's position that 'half a loaf is better than none' and that it was time to 'put an end to this never-ending story'."[89]This view was not shared by everyone. In a speech in January 2004, Commissioner Bolkestein referring expressly to the Directive stated:

"Deals between Member States to neutralize the impact of reforms render all our efforts useless. This is a self-defeating strategy which may preserve some short term political interests, but only at the longer term's success".[90]

The Council, confirming its approval of the amendments proposed by the European Parliament adopted the Directive on 30 March 2004 and on 21 April the Directive was signed by the Presidents of Parliament and Council just over 15 years after the first proposal was published.

Conclusion

A total of 30 years passed between the publication of the Pennington Report and the adoption of the Directive. During this time, there were periods of intense debate and progress and periods of apathy and inaction. In the last five to six years, the negotiations, lobbying, political maneuvering and consensus building became more intense. Ideological debates became intertwined with economic debates and practice with theory.

The fact that agreement was finally reached might be seen as a positive outcome – notwithstanding perhaps the reservations identified above. Around the table at the Council Working Party meetings, which the authors were privileged to attend, discussions stretched from very detailed practical issues, such as the possibility of organising an extraordinary general meeting in an appropriately sized venue at short notice to approve defensive actions, to high-level debates. The latter included theoretical discussions as to whether the Directive constituted a "company law" Directive and whether the "interests of the company" included the interests of employees. A number of other corporate law academics including Professor Peter Doralt, then Head of the Austrian Takeover Commission, enriched these debates with their insights and perspectives. It should however be acknowledged that many participants considered that the balance on occasion was not always correct and that excessive time was spent earlier on in the Directive's life cycle on academic discussions rather than in negotiating the Commission's proposals. Of course, many of the participants in these meetings, whether at or beside the table, were the senior

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[89] Legislative Observatory "Company law: takeover bids" 2002/0240(COD) - 16/12/2003

[90] Address at ELDR Seminar "Reviving European Growth" at the European Parliament 8 January 2004.

staff at the national takeover regulators, including the UK Takeover Panel, and these individuals brought a depth of experience and expertise which contributed greatly to the final text of the Directive. Finally, the key role played by the Commission representatives in reaching a consensus deserves recognition. Particularly in the final stages following the introduction of the Portuguese compromise, Commission officials played an increasingly important role. Karel Van Hulle for example was invited by the Italian presidency in Coreper to participate directly in the negotiations with the deputy representatives. This very unusual step reflected both the complexity of the issues to be agreed but also of the determination of the relevant parties to bring matters to a conclusion in as efficient a manner as possible.

Much time was spent during the drafting process on provisions which were anticipated to be likely to lead to problems in implementation. These included discussions on: how differences of interpretation of "matters relating to company law" and "matters relating to the bid procedure" might cause problems for the operation of shared jurisdiction transactions (Article 4); the practical workings of the breakthrough rule and the calculation of the appropriate compensation which might arise (Article 11); and the manner in which the optionality arrangements might apply to US bidders (Article 12). In retrospect, these issues have not given rise to problems in interpreting or implementing the Directive. One provision which has worked better than expected is the requirement to establish a contact committee to facilitate harmonized application of the Directive "through regular meetings dealing with practical problems arising in connection with its application" (Article 18). ESMA's Takeover Bids Network, recently renamed the "Shareholder Transactions Working Group", became an excellent forum for representatives from the national competent authorities to meet once or twice a year to exchange supervisory experiences and discuss developments in the application of the Directive. This Network has provided transparency and useful guidance on how Member States assess shareholder cooperation and acting in concert. By bringing together supervisors from different jurisdictions in this way, real cooperation and idea exchanges give rise to an increased likelihood of harmonization and greater ease in coordinating cross border takeovers.

The complexity of the matters involved in this Directive, the political differences it exposed, and the disparate considerations to be included suggests that there would be little appetite amongst Member States to reopen the Directive. It is submitted that arriving at a consensus in the current divisive political climate would be likely to be even more problematic.

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