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– Basic Issues Surrounding the TOD‘s Transposition –

Law Working Paper N° 794/2024
August 2024

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Abstract

The Directive 2004/25/EC on takeover bids was enacted on 21 april 2004. Both the Directive and later the Member States – in their national transpositions – had to adapt to the variety of capital markets, corporate governance regimes, and differing degrees of stakeholder/shareholder orientation in the European Community of the early 2000s. Due to its conception as a framework Directive, Member States had the discretion to balance the interests of the different stakeholders, to frame an adequate national regime for the takeover market and to entrust a body with supervision of the takeover process. Surprisingly, Member States transposed the mandatory bid rule with little variation in the definition of control, with thresholds varying narrowly in nearly all Member States, between 30 per cent and a third. Also concerning the supervisory authority and concerning squeeze-out and sell-out rights, the transposition of the Directive had a harmonizing effect. Therefore, the occasionally encountered opinion that the Takeover Directive was a failure is plainly incorrect. However, as a result of Member State discretion in transposing the Directive, the overall picture is mixed and harmonization is far from complete. Vested interests and lobby work were simply too strong. Member States vary not only in their legislative approach concerning the offeree's defence measures, but also in respect of derogations and deviations from the mandatory bid rule. In order to balance the interests of different stakeholders, the defence measures of the target company are of crucial importance. While in the late 1990s the board neutrality rule was dominant on the continent, Germany, France and Italy – the largest economies – altered their takeover regimes and now favour a more flexible approach, in France and Italy even after the initial transposition of the Takeover Directive. A growing number of Member States later changed their initial transposition of the Takeover Directive's breakthrough rule. In a future reform of the Takeover Directive it should be taken into account that the markets for corporate control have changed dramatically since the 2010s. Today shareholder activism, ETFs and passive funds that are incapable of tendering the shares of the target company during the offer period have a significant impact. Mandatory takeover bids have become rare; usually voluntary takeover bids take place in which the bidder and the board of the target company agree on modalities later presented to the shareholders. This increasingly leads to a serious danger of conflicts of interest and insider dealing. Most economically important takeover transactions are P2P transactions aimed at taking the target company private. The consequence is a further reduction of listings with problems for the stock exchanges. Private equity plays an ever increasing role in the transactions. The takeovers take much longer than formerly, up to 12 months, due to various regulatory agencies and proceedings involved. Addressing these problems might lead to a rather different regulatory landscape both in Europe and in the Member States as well as in the United Kingdom.

Keywords: Takeover, Takeover Directive, TOD, stakeholder, shareholder, capital markets, European Union, United Kingdom, corporate governance

JEL Classifications: D21, G32, G34, G38, K22

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Abstract

The Directive 2004/25/EC on takeover bids was enacted on 21 april 2004. Both the Directive and later the Member States – in their national transpositions – had to adapt to the variety of capital markets, corporate governance regimes, and differing degrees of stakeholder/shareholder orientation in the European Community of the early 2000s. Due to its conception as a framework Directive, Member States had the discretion to balance the interests of the different stakeholders, to frame an adequate national regime for the takeover market and to entrust a body with supervision of the takeover process.

Surprisingly, Member States transposed the mandatory bid rule with little variation in the definition of control, with thresholds varying narrowly in nearly all Member States, between 30 per cent and a third. Also concerning the supervisory authority and concerning squeeze-out and sell-out rights, the transposition of the Directive had a harmonizing effect. Therefore, the occasionally encountered opinion that the Takeover Directive was a failure is plainly incorrect. However, as a result of Member State discretion in transposing the Directive, the overall picture is mixed and harmonization is far from complete. Vested interests and lobby work were simply too strong. Member States vary not only in their legislative approach concerning the offeree's defence measures, but also in respect of derogations and deviations from the mandatory bid rule.

In order to balance the interests of different stakeholders, the defence measures of the target company are of crucial importance. While in the late 1990s the board neutrality rule was dominant on the continent, Germany, France and Italy – the largest economies – altered their takeover regimes and now favour a more flexible approach, in France and Italy even after the initial transposition of the Takeover Directive. A growing number of Member States later changed their initial transposition of the Takeover Directive's breakthrough rule.

In a future reform of the Takeover Directive it should be taken into account that the markets for corporate control have changed dramatically since the 2010s. Today shareholder activism, ETFs and passive funds that are incapable of tendering the shares of the target company during the offer period have a significant impact. Mandatory takeover bids have become rare; usually voluntary takeover bids take place in which the bidder and the board of the target company agree on modalities later presented to the shareholders. This increasingly leads to a serious danger of conflicts of interest and insider dealing. Most economically important takeover transactions are P2P transactions

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aimed at taking the target company private. The consequence is a further reduction of listings with problems for the stock exchanges. Private equity plays an ever increasing role in the transactions. The takeovers take much longer than formerly, up to 12 months, due to various regulatory agencies and proceedings involved. Addressing these problems might lead to a rather different regulatory landscape both in Europe and in the Member States as well as in the United Kingdom.

Survey

I. Introduction

The Takeover Directive (TOD) of 2004[1] applies to listed companies having both their headquarter and listing in the European Union[2] and coordinates the law of the Member States relating to takeover bids for securities of companies. Initially titled as the 13th Company Law Directive, the first proposals for the Takeover Directive date back to the 1980s, when a takeover wave emerged first in the US[3] and then Member States began to implement mostly voluntary takeover codes based on self-regulation and the European example of the UK Takeover Code.[4] The European Commission presented its first proposal for a Directive[5] in 1989,[6] a second proposal 1996,[7] and the third proposal based on recommendations of the Winter-group[8] in 2002.[9] In the 1990s, Member States began to enact mandatory legislation on takeovers and kept doing so in the early 2000s,[10] when the takeover of Mannesmann by Vodafone changed the German attitude towards regulating takeovers and influenced the formulation of the Takeover Directive at European level.[11]

Both the Directive and later the Member States – in their national transpositions – had to adapt to the variety of capital markets, corporate governance regimes, and differing degrees

[1] Parliament and Council Directive 2004/25/EC On Takeover Bids, 2004 O.J. (L142).

[2] Art. 1 (1) TOD.

[3] Concerning Section 203 Delaware General Corporation Act Practicing Law Institute, see The New Delaware Takeover Statute, 1988; as early as the 1960s, the Williams Act 1968, provided for full disclosure of corporate equity ownership of securities under the Securities Exchange Act of 1934.

[4] The City Code on Takeovers and Mergers was first drawn up in 1969; P. Davies, *The Regulation of Takeovers and Mergers* (London: Sweet & Maxwell, 1976), p. 37; see also A. Johnston, *The City Take-Over Code*, (Oxford: Oxford University Press, 1980).

[5] See Commission Recommendation 77/534/EEC concerning a European code of conduct relating to transactions in transferable securities, 1977, supplementary principle 17 (equal treatment of shareholders after a change of control).

[6] Commission, 'Proposal for a Thirteenth Council Directive on Company Law concerning takeover and other general bids', COM(88) 823 final (Mar. 3, 1989); see K.J. Hopt/E. Wymeersch (eds.), *European Takeovers* (London: Butterworths, 1992); N. Basaldua, 'Towards the Harmonization of ES-Member States' Regulations on Takeover Bids: The Proposal for a Thirteenth Council Directive on Company Law' (1989) 9 *Northwestern Journal of International Law and Business* 487.

[7] Commission, 'Proposal for a 13th European Parliament and Council Directive, 96/C 162/05, on company law concerning takeover bids', COM (95) 635 final, (Feb. 7, 1996).

[8] Report of the High Level Group of Company Law Experts, on Issues Related to Takeover Bids, Brussels 10 January 2002.

[9] Commission, 'Proposal for a Directive of the European Parliament and of the Council on takeover bids', 2003 C 45 E/01, (Oct. 2, 2002).

[10] See T. Baums/G. Thoma (eds.), *Takeover Laws in Europe*, loose-leaf, second delivery (Cologne: RWS, 2003); for the German Takeover Act, see also M. Peltzer/E. Voight (eds.), *Wertpapiererwerbs- und Übernahmegesetz*, German Securities Acquisition and Takeover Act, German-English Text, (Cologne: Otto Schmidt, 2002).

[11] B. Clarke/R. Skog, in this book, Chapter 1.

of stakeholder/shareholder orientation in the European Community of the early 2000s.[12] The Directive is to be seen in the context of the 1999 Financial Services Action Plan[13] and the Report of the High Level Group of Company Law Experts (chairman Jaap Winter) of 2001; and later the 2003 EU Company Law Action Plan referred to integrated financial markets and improved shareholder rights while remaining sensitive to social and environmental performance in view of long-term sustainable growth.[14] Due to its conception as a framework Directive, Member States had the discretion to balance stakeholder interests and to frame an adequate national regime for the takeover market.

Core elements of the Takeover Directive deal with capital markets, company law and corporate governance issues.[15] The mandatory bid rule and the requirements for bids (information, supervision) are building blocks of the European capital market and to be attributed to securities law. Especially corporate governance issues were controversial during the discussions on the Directive;[16] the authority to make the decision to accept or to frustrate a bid is fundamental to company law in each Member State and is subject to ongoing discussions in the Member States. Such authority might be granted either only to the shareholders[17] or also or solely to the board by allowing takeover defences. The final form of the Takeover Directive that was adopted abstained from providing a uniform rule and preserved the discretion of the Member States by restricting itself to minimum harmonization, and even this only in parts of the Directive. In its transposition, Member States may choose to go beyond minimum harmonization, an approach often referred to as gold-plating.

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[12] Generally, Gelter EU Company Law Harmonization between Convergence and Varieties of Capitalism, in H. Wells (ed.), *Research Handbook on the History of Corporate and Company Law* (Cheltenham: Elgar Publishing 2018); see also ECGI Law Working Paper 355/2017; stressing market forces, M. Ventoruzzo, ‘Europe's Thirteenth Directive and U.S. Takeover Regulation: Regulatory Means and Political and Economic Ends’ (2006) 41 *Texas International Law Journal* 171, 220.

[13] Commission, Implementing the Framework for Financial Markets: Action Plan, Brussels, COM(1999) 232 final, 1999.

[14] Commission, Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward, Brussels, COM (2003) 284 final, 2003, p. 3; concerning squeeze out and sell-out rights, p. 21.

[15] S. Grundmann, ‘The Structure of European Company Law: From Crisis to Boom’, (2004) 5 *European Business Organization Law Review* 601, 633, describing organizational law as for the first time being closely linked to capital market law.

[16] See, inter alia, C. Kirchner/R. Painter, ‘European Takeover Law - Towards a European Modified Business Judgement Rule for Takeover Law’, (2000) 1 *European Business Organization Law Review* 353 as compared to P. Mülbert/M. Birke, ‘In Defense of Passivity – the Proper Role of a Target's Management in Response to a Hostile Tender Offer’, (2000) 1 *European Business Organization Law Review* 445.

[17] Report of the High Level Group of Company Law Experts on Issues Related to Takeover Bids in the European Union, 2002, p. 20: principle of shareholder decision making.

The goal of the Takeover Directive is Community-wide clarity and transparency in respect of the legal issues to be settled in the event of takeover bids.[18] The Directive aims at minority shareholder protection when control of the company is acquired,[19] which is to be achieved through a mandatory bid at a fair price and sell-out rights.[20] The mandatory bid rule as well as squeeze-out and sell-out-rights are mandatory minimum standards. This does not include the vibrantly discussed board neutrality rule, which is not mandatory in the United States, but which is very much so in the UK.[21] The board neutrality rule and extending employee participation beyond other European legislative Acts are subject to full Member State discretion as mandatary provisions in national legislation. For Member State transposition of the Directive, besides traditional law principles and economic consequences, also the wider implications of the implementation of a takeover regime are to be reflected. The core issue for Member States in transposing the Directive is to balance the interests of the different stakeholders.

Several basic issues concerning the transposition of the Takeover Directive will be discussed in this contribution. First of all, Member States have to decide on the legal structure for the transposition and supervision of takeover bids (infra II). Member States have to choose the adequate legal instrument for the transposition. This might be inclusion into an existing Securities Act or a separate Takeover Act. Concerning the mandatory bid (infra III), there is no choice for Member States in principle, but Member States have to define a control mechanism which triggers the mandatory bid and, very important for the capital market, the pricing of the mandatory bid. Under the current version of the TOD, it is left to the Member States to design the mandatory bid and to implement a general framework for voluntary and mandatory bids (infra IV). The TOD is applicable only to mandatory bids; Member States have to frame the general information given by the bidder and the time allowance for a bid.[22]

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[18] Recital 4 TOD. On the regulatory and agency problems of control transactions, see P. Davies/K.J. Hopt/W.G. Ringe, 'Control Transactions', in R. Kraakman et al. (ed.), *The Anatomy of Corporate Law*, 3 ed., (Oxford: Oxford University Press 2017), ch. 8.

[19] Recital 9, sentence 1 TOD.

[20] On the economic theory behind mandatory bids, K.J. Hopt, 'European Takeover Reform of 2012/2013 – Time to Re-examine the Mandatory Bid', (2014) 15 *European Business Organization Law Review* 143 at 148 et seq., 167 et seq.

[21] K.J. Hopt, 'Takeover Defenses in Europe: A Comparative, Theoretical and Policy Analysis', (2014) 20 *Columbia Journal of European Law* 249 at 254 et seq., 258 et seq.; on the economic theory behind the board neutrality rule, idem at 261 et seq., 263 et seq.; idem, *Europäisches Übernahmerecht* (Tübingen: Mohr Siebeck 2013), p. 69 et seq., 73 et seq.

[22] Recital 14 TOD.

Despite being a building block for the European capital market, uniform rules are mostly lacking. This is also true for worker participation (information and consultation of worker representatives)[23] at the target company. The Directive foresees a choice for Member States as to how and in parts whether to implement core corporate governance principles, such as the board neutrality rule and the breakthrough rule (infra V), and it foresees squeeze-out and sell-out rights (infra VI).

II. General aspects of transposing the TOD into national law

A. Transposition and scope of the TOD (Arts. 1, 2)

1. Transposition of the Takeover Directive (Art. 21 TOD: until 2006)

The transposition of the Takeover Directive was subject to an external study[24] by the European Commission.[25] The Takeover Bids Directive Assessment Report ("Assessment Report") was published in 2011 and comprised a total of then 22 Member States,[26] which accounted for 99 per cent of the market capitalization of EU listed companies.[27] The Assessment Report focused on five main EU jurisdictions,[28] in alphabetical order France, Germany, Italy, Spain and United Kingdom; the Report is the central reference for this article. Despite Brexit, this entry will not be restricted to the four biggest Member States (France,[29]

[23] Recital 23 TOD.

[24] The Takeover Bids Directive Assessment Report, 2011, undertaken by Marcuss Partners and the Centre for European Policy Studies (CEPS) for the European Commission (MARKT/2010/10/F). On the Assessment Report, K.J. Hopt, *Europäisches Übernahmerecht* (Tübingen: Mohr Siebeck 2013), p. 16 et seq.

[25] Art 20 TOD. Revision of the Directive five years after the transposition date is prescribed in Art. 21 TOD.

[26] The United Kingdom later left the European Union.

[27] Assessment Report, 2011, p. 3.

[28] Assessment Report, 2011, p. 24 (scope and definitions).

[29] On the initial transposition, see I. Urbain-Parleani, 'The Implementation of the Thirteenth Directive 2004/25, Country Report on France', in T. Baums/A. Cahn (eds.), *Die Umsetzung der Übernahmerichtlinie in Europa* (Berlin: De Gryuter, 2006), p. 3.

Germany,[30] Italy,[31] Spain[32]) but will also address the United Kingdom[33] as the role model for TOD as well as certain selected Member States such as Austria and Poland[34] and some Nordic countries (Sweden).[35] But at the same time it should be realized that Brexit has considerably changed the importance of the City Code on Takeovers and Merges as a source of regulation and as a model for regulatory practice.[36]

As is usual, some Member States transposed the Directive with some delay and not within the timeframe.[37] While Art. 21 TOD foresaw that Member states were to bring into force the laws, regulations, and administrative provisions necessary to comply with TOD no later than 20 May 2006, six Member States transposed the Directive in 2007[38] and a further two in 2008.[39] However, when the Takeover Bids Directive Assessment Report was published

[30] D.A. Verse 'Selected Issues in German Takeover Lar. Mandatory Bids, Minimum Pricing Rules', in H. Fleischer/H. Kanda/K.S. Kim/P. Mülbert (eds.), *German and East Asian Perspectives on Corporate and Capital Market Law: Investors versus Companies* (Tübingen: Mohr Siebeck, 2019), p. 143. Takeover Directive Transposition Act 8 July 2006, Federal Gazette 2006 I 1426; on the discussion, see C.H. Seibt/K.J. Heiser 'Analyse der EU-Übernahmerichtlinie und Hinweise für eine Reform des deutschen Übernahmerechts' (2005) *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 200; for legal texts, see T. Stohlmeier (ed.), *German Public Takeover Law*, 3 ed. (The Hague: Wolters Kluwer, Law & Business, 2015).

[31] On the discussion, see G. Ferrarini, 'Implementing the European Takeover Directive in Italy: Requirements and Options', in T. Baums/A. Cahn (eds.), *Die Umsetzung der Übernahmerichtlinie in Europa* (Berlin: De Gryuter, 2006), p. 101.

[32] N. Alcalde/I. Pérez-Soba, 'Has the EU Takeover Directive Improved Minority Shareholder Protection? The Spanish Evidence' (2016) 17 *European Business Organization Lar Review*, 261.

[33] D. Kershaw, *Principles of Takeover Regulation* (New York: Oxford University Press, 2016).

[34] T. Regucki, 'Polish Takeover Regulation', (2024) 25 *European Business Organization* 385.

[35] For specific country reports from a practitioner's perspective, see P. Van Houghten (ed.) *The European Takeover Directive and its implementation* (New York: Oxford University Press, 2009); S. Maul/D. Muffat-Jeadet/J. Simon (eds.), *Takeover bids in Europe* (Freiburg: Memento, 2008); D. Van Gerven (ed.), *Common Legal Framework for Takeover Bids in Europe*, Volumes I and II (Cambridge: Cambridge University Press, 2008 and 2010). On the discussion in Sweden, see R. Skog, 'The Takeover Committee's proposal for the implementation of the EC Takeover Directive in Swedish Law', in T. Baums/A. Cahn (eds.), *Die Umsetzung der Übernahmerichtlinie in Europa* (Berlin: De Gryuter, 2006), p. 53; on the implementation, see the translation of Canter, Swedish Takeover Rules, 2007.

[36] On the City Code on Takeovers and Mergers as the source of regulation by the 2004 Takeover Directive, see K.J. Hopt, 'European Takeover Reform of 2012/2013 – Time to Re-examine the Mandatory Bid', (2014) 15 *European Business Organization Law Review* 143 at 153 et seq.

[37] See Commission Staff Working Document, 'Report on the implementation of the Directive on Takeover Bids', SEC(2007) 268 (Feb. 21, 2007).

[38] Assessment Report, 2011, p. 25: Belgium, Cyprus, Italy, Netherlands, Slovakia and Spain.

[39] Assessment Report, 2011, p. 25: Czech Republic

in 2011, all Member States included in the report[40] had transposed the Takeover Directive.[41] Since Art. 20 TOD foresaw the examination of the Takeover Directive five years after transposition (2006), this article may build on the published Assessment Report from 2011 as well on other comparative studies and national reports.

With initial takeover rules and by transposing material law provisions of the Takeover Directive, Member States were framing the market and the supervisory bodies. Some Member States transposed the Directive in various legislative acts.[42] The Assessment Report stated in 2011 that transposition of the Directive was complete,[43] but it did not examine in detail whether the transposition was in line with and covered every respect of the Directive. Only the Finnish Code was questioned as an adequate transposition due to its non-binding nature,[44] although Art. 1 TOD explicitly mentions Codes of Best Practices. Due to the often vague language of the Directive, the Assessment Report assumes some gaps,[45] especially concerning takeover bids affecting more than one (Member) state. The commission reflected on the external study and considered reforms,[46] but it did not immediately propose changes to the Directive.[47]

The Takeover Directive, which was first discussed as the 13th Company Law Directive,[48] covers company law but also securities law (material securities law and supervisory law) and labour law (worker participation). In transforming the Takeover Directive, Member States adjusted or introduced at national level a special Takeover Act (as

[40] Assessment Report, 2011, p. 24 (scope and definitions), p. 25 (transposition dates): Austria (2006), Belgium (2007), Cyprus (2007), Czech Republic (2008), Denmark (2006), Estonia (2008), France, Germany, Greece, Hungary, Ireland (all 2006), Italy (2007), Luxembourg (2006), Netherlands (2007), Poland (2005, complete transposition 2022), Portugal (2006), Romania (2005), Slovakia, Spain (both 2007), Sweden, UK (both 2006).

[41] Assessment Report, 2011, p. 25; on the countries comprised, p. 24, including 22 countries of the then European Union; not covered were Latvia, Lithuania, Bulgaria, Slovenia, Malta; Croatia was not yet an EU member (joined in 2013); the UK later left the European Union.

[42] Providing examples from the French and Italian takeover regulation, Assessment Report, 2011, p. 58; for Germany infra IV.3.

[43] Assessment Report, 2011, p. 25, 58.

[44] Assessment Report, 2011, p. 58.

[45] Assessment Report, 2011, p. 92.

[46] Commission, Report, 'Application of Directive 2004/25/EC on takeover bids', COM(2012)347 final (June 28, 2012).

[47] Proposal by K.J. Hopt, 'European Takeover Reform of 2012/2013 – Time to Re-examine the Mandatory Bid', (2014) 15 *European Business Organization Law Review* 143.

[48] Transposition also in company law in the Netherlands, R. van het Kaar/J. Cremers 'Implementation of the Takeover Bids Directive in the Netherlands' in J. Cremers/S. Vitols (eds.), *Takeovers with or without worker voice* (Brussels: ETUI, 2016), p. 181, 182, and in Belgium.

in Austria, Germany, Ireland and Sweden) or a Takeover Code (United Kingdom and Sweden); adopted the takeover rules in the general securities law (France, Italy, Netherlands, Poland and Spain); or adopted national company law (Czech Republic, Netherlands).[49] In the UK and in Sweden, the Takeover Code, as the classical piece of self-regulation, maintained its central position.[50] In most Member States, in addition to central pieces of legislation (e.g. a Takeover Act or general securities law), administrative acts were also adopted by ministries, supervisory agencies or private supervisory bodies.

2. Scope of the Directive (Art. 1)

According to Art. 1 TOD,[51] the Directive applies to takeover bids for securities of companies which are admitted to trading on a regulated market in one or more Member States for companies which are governed by the laws of a Member State. Both the headquarters and the listing have to be in the European Union; the Assessment Report portrays this as one of the few gaps of the Directive.[52] Since the focus of the Takeover Directive is on the European Union, not the national market, transposition focusing on the national market may result in further gaps for cross-country listings. Also other Member States are to be covered by national transpositions; therefore, difficulties arise when Member States transpose the Directive by referring to a special corporate governance regime such as the German two-tier board system, which has a supervisory board and a management board for defence measures.[53]

Although the focus of the Takeover Directive is on the capital market and most Member States transposed the Directive in the general securities law, it might be appropriate to extend the scope of national transpositions also to EU companies having non-EU listings. This is relevant not only for listings in the US.[54] The Assessment Report referred to Swiss companies

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[49] In Estonia, also the board neutrality rule is transposed in securities law, A. Nirgi/S. Papp, 'Estonia' in D. Van Gerven (ed.), *Common Legal Framework for Takeover Bids in Europe*, Volume I (Cambridge: Cambridge University Press, 2008), p. 145, 159.

[50] However, the Takeover Panel became a state body, infra II.E.

[51] Article by Article Commentary of the Takeover Directive by S. Maul/L. Furtwengler in P. Kindler/J. Lieder, *European Corporate Law* (Baden-Baden: Nomos, 2021).

[52] Assessment Report, 2011, p. 92.

[53] Sections 1, 33 German Takeover Act. The European Commission usually confines itself to ensuring that the rules apply to the two-tier system as well without really taking into account its specificities. On convergence of the systems and remaining path dependencies, K.J. Hopt, 'Der Aufsichtsrat', (2019) *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 507.

[54] For German companies, Linde and BionTech should be named in this respect.

and questioned whether such companies listed in France that are said to have incorporated a mandatory takeover bid rule in their articles of association provide full protection due to enforcement issues for company's shareholders.[55] On the other hand, since securities listed in the European Union are covered, Member States which focus on their securities market irrespective of the origin of the listed companies have an incentive to include also non-EU companies listed in the Member State.

B. Initial Takeover Act versus adoption of existing rules

1. Pre-existing takeover regulation in most Member States

Most Member States – notably the bigger Member States (France, Germany,[56] Italy, Poland,[57] Spain and initially the UK) but also other Member States like Austria,[58] Ireland[59] and Sweden[60] – had already regulated takeovers before the Takeover Directive was adopted.[61] The core concept of the Directive, the mandatory bid rule, was enacted in all larger Member States (with the exemption of the Netherlands, infra III.1) while differences in takeover-defence regulations remained untouched by the Directive and subject to almost free Member State regulation. The Takeover Directive mirrors the variation of pre-existing takeover regulation in Member States with its own variations and exemptions. A comparative survey was undertaken before the Austrian Takeover Act was introduced in 1998;[62] alongside the takeover regimes of European Countries accessible in English,[63] there were in addition

[55] Assessment Report, 2011, p. 92.

[56] See J. Adolff/B. Meister/C. Randell/K.-D. Stephan (eds.), *Public company takeovers in Germany* (Munich: C.H. Beck, 2002); G. Apfelbacher/G. Barthelmess/T. Buhl/C. Dryander (eds.), *German Takeover law* (Munich: C.H. Beck, 2002); J. Payne (ed.) *Takeovers in German and English Law* (Oxford: Hart, 2002).

[57] T. Regucki, 'Polish Takeover Regulation', (2024) 25 *European Business Organization* 385, 390-392

[58] S. Kalss, 'The Austrian Law in Public offers and Takeovers, (2000) 1 *European Business Organization Law Review* 479.

[59] B. Clarke, *Takeover and Mergers law in Ireland* (Dublin: Round Hall Sweet & Maxwell,1999).

[60] R. Skog, 'The Takeover Committee's proposal for the implementation of the EC Takeover Directive in Swedish Law', in T. Baums/A. Cahn (eds.), *Die Umsetzung der Übernahmerichtlinie in Europa* (Berlin: De Gryuter, 2006), p. 53, 54-55: NBK takeover rules and statements of the Swedish Securities Council (self-regulation).

[61] All countries other than Poland are covered in T. Baums/G. Thoma (eds.), *Takeover Laws in Europe* (Cologne: RWS, 2003).

[62] P. Doralt/C. Nowotny/M. Schauer (eds.), *Takeover-Recht* (Vienna: WUV Service Fachverlag, 1997).

[63] English translations (2003): T. Baums/G. Thoma (eds.), *Takeover Laws in Europe* (Cologne: RWS, 2003). (Austria, Belgium, Denmark, France, Germany, Greece, Finland, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, United Kingdom, and also Switzerland).

practitioners guides which gave an easily accessible overview on the takeover law landscape in the European Union.[64]

2. Adaptations and newly introduced takeover regimes

Since most Member States introduced takeover rules during the discussions on the Takeover Directive, the vast majority simply had to revise existing legal regimes. From the Member States covered by the Assessment Report, only three (Cyprus, Luxembourg, Greece) had no takeover regulation before transposing the Directive.[65] The centrepiece of the Takeover Directive binding the Member States, the mandatory bid rule (Art. 5 TOD), had been enacted in most Member States, but it was not seldom modified by enacting the Takeover Directive.[66] However, there had been no mandatory bid rule in the Netherlands.[67] Towards the board neutrality rule, there were different approaches before the adoption of the TOD in Member States. During the initial transposition of the Takeover Directive, most states adhered to their previous approach, but later, with France and Italy, important Member States changed the rules for the boards of target companies (infra V.2).

In some countries, there was a gradual transposition[68] of the Takeover Directive.[69] Nevertheless, according the Assessment Report, all national transformation was compliant with the Directive, with some concerns expressed on Finland's partially non-binding[70] rules on takeovers.[71] Another Member State with incomplete initial transposition was Poland.[72] The two-threshold system of the mandatory bid adopted under Polish law was clearly incompatible with the Directive (see III.1 below). Moreover, the initial silence of the Polish legislature on board neutrality could not be regarded as a full and proper implementation of

[64] 'A Practitioner's Guide to Takeovers and Mergers in the European Union, City & Financial Publishing', 3 ed., (London: City & Financial Publishing 2001).
[65] Assessment Report, 2011, p. 25, 62.
[66] Assessment Report, 2011, p. 64-66, 121-163.
[67] Assessment Report, 2011, p. 66.
[68] Assessment Report, 2011, p. 58.
[69] On the impact of the Directive on national law, see also the country reports in J. Grant, *European Takeover: The Art of Acquisition* (London: Euromoney Books, 2005).
[70] Assessment Report, 2011, p. 58, 91 (addressing the Helsinki Takeover Code in more detail) and 93 (revision of the Finnish system announced); see Securities Markets Act 14 December 2012.
[71] On Finland, see V. Kajala, 'Takeover Rules at the Intersection of Company Law and Securities Law', in *Festschrift in honour of Rolf Skog* (Stockholm: Norstedts Juridik, 2021), p. 687, and the Helsinki Takeover Code 2022.
[72] T. Regucki, 'Polish Takeover Regulation', (2024) 25 *European Business Organization* 385, 394-396. Referring to circumvention, Assessment Report, 2011, p. 91.

the Directive.[73] The opt-in model for board neutrality was formally introduced in Poland in 2009 (but could not play any role as the option was linked to the second threshold of 66% of votes when control was already acquired by the bidder). Full implementation of the Directive occurred in Poland only in 2022.[74]

3. Gold-plating versus minimum standards

In the context of the Takeover Directive, and in light of more ambitious proposals on the harmonization of the European takeover law,[75] most scholars – at least when the Directive was adopted – called for gold-plating the European minimum harmonization. In the Assessment Report, Art. 3.2 (b) TOD, which explicitly allows for more intensive national regulation, is referred to as permitting such gold-plating.[76] This can be contrasted with the growing emphasis on over-regulation generally. In other contexts, such as the European Structural and Investment Funds, which provides a total investment of 731 billion Euros fostering socio-economic convergence, territorial cohesion, social Europe and a smooth green and digital transformation, gold-plating is associated with extra requirements and administrative burden.[77] Due to the concept of a framework Directive, Member States have considerable discretion in transposing the Directive. Member States using their discretion have to balance interests and find practical solutions for companies, their stakeholders and financial markets. Gold-plating might aim to prevent circumventing the principles of the Takeover Directive by similar actions to gain or foster control of a company.

Since the UK permits schemes of arrangement also for restructuring the member structure and therefore gaining control of a company, the UK Takeover Code contains also a section on schemes of arrangement.[78] In Sweden, the Takeover Code applies also to

[73] See the earlier contribution of M. Bobrzynski/ K. Oplustil/M. Spyra in S. Maul/D. Muffat-Jeadet/J. Simon (eds.), *Takeover bids in Europe* (Freiburg: Memento, 2008), No. 2750, in no. 2751 referring to a draft law.

[74] T. Regucki, ‘Polish Takeover Regulation’, (2024) 25 *European Business Organization* 385, 409-410 (critical of the 50 per cent threshold, infra III.B.1).

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

[76] Assessment Report, 2011, p. 96 names dual thresholds, content of the offer document and rights of employees as examples.

[77] 4th Meeting of the High Level Expert Group on Monitoring Simplification for Beneficiaries of ESI Funds, 16.11.2016, Interim Report on Gold-Plating.

[78] In detail see Jennifer Payne, in this book, Chapter 14.

mergers.[79] Furthermore, some Member States introduced a mandatory bid rule not only in terms of acquiring, but also as regards fostering control. Various Member States introduced not only a threshold for acquiring control but also additional circumstanced triggering the obligation to publish a public offer. Some Member States introduced two thresholds (for example 30 and 50 per cent); others refer to the acquisition of a certain percentage of voting shares. Concerning company law, the board neutrality rules in UK are applied also during a scheme of arrangement,[80] and in Sweden they apply during a merger. Germany gold-plated in respect of worker participation,[81] going beyond mere information pursuant to Art. 15 TOD and general German board-level co-determination.

C. Definitions and general principles (Arts. 2, 3 TOD)

1. Limited number of definitions

The Takeover Directive contains a small number of definitions, these including the bid, a takeover bid, offeree company, persons acting in concert, securities, parties to a bid, multiple voting securities (Art. 2 (1) TOD); as regards to acting in concert, Art. 2 (2) TOD refers also to Directive 2001/34/EC (later revised by the Transparency Directive). Member States may not deviate from the definitions in the Takeover Directive but may extend their scope. The German Takeover Act defines bids according to the definition of the Directive (voluntary and mandatory) but also in general for the acquisition of securities. The acting in concert definition lacks clarity[82] and is furthermore not coherent in the TOD and in the Transparency Directive, relevant in situations potentially resulting in the duty to issue a mandatory bid. With the definition on multiple voting, the Takeover Directive deviates from the "one share, one vote" rule.[83]

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[79] G. Nyström/R. Ohlsson/E. Sjöman/R. Skog, *The Swedish Takeover Code, an annotated commentary* (New Yotk: Infroma Law from Routledge, 2017).

[80] See Payne, in this book, Chapter 19.

[81] On works councils, see Section 106 (3) No. 9a and Section 109a Works Councils Act.

[82] Assessment Report, 2011, p. 62.

[83] On dual class shares in Sweden and takeovers, R: Skog; 'The European Union's Proposed Takeover Directive: the "Breakthrough" Rule and the Swedish System of Dual Class Common Stock', (2004) *Scandinavian Studies in Law* 293; altering the European approach concerning dual class shares recently the final compromise concerning a Directive on multiple-vote share structures, 14 February 2024, Interinstitutional File 2022/0406(COD).

2. General principles in Art. 3 TOD

Member States have to decide whether and how to transpose the general principles mentioned in Art. 3 TOD,[84] which might be classified as company law and securities law principles, with only some referring to the specifics of a takeover bid. According to Art. 3 (2) TOD, Member States are to ensure compliance with these principles. They must ensure that the minimum requirements set out in the Directive are observed, and they may lay down additional conditions and provisions more stringent than the TOD for the regulation of bids. When general principles of Art. 3 (1) are respected, Member States may derogate in order to take account of circumstances determined at national level.

General principles attributable to company law are the principles of equal treatment[85] and acting in the interest of the company as a whole. The board of an offeree company must act in the interests of the company as a whole,[86] this includes the protection of other stakeholders.[87] General principles attributable to securities law on the whole concern not creating a false market[88] and having sufficient resources for the proposed action. The offeror is permitted to announce a bid only after ensuring that he or she can fulfil the bid in cash or other types of consideration.[89] That means that national legislatures might require a guarantee being provided by the offeror.[90]

In addition, there are two principles for the specific situation of a takeover. There should be sufficient time for a properly informed decision on the bid, and the board of the offeree company should be hindered only as long as necessary. Sufficient time and notice provided to the holders of the securities of an offeree company should enable them to reach a properly informed decision on the bid.[91] The offeree company must not be hindered in its

[84] For an international comparison, see Assessment Report, 2011, p. 107-108. There are no such principles in the German Takeover Act.

[85] Art. 3 (1) (a) TOD; for general company law, see ECJ Case C-101/08, *Audiolux SA e.a. v. Groupe Bruxelles Lambert SA and others* [2009], along with the note by F.M. Mucciarelli, 'Equal treatment of shareholders and European Union law', (2010) *European Company and Financial Law Review* 158; in Germany, see the general rule in the Stock Corporation Act (Section 53a, equal treatment of shareholders), in Poland the similar general rule was enacted in the Code of Commercial Companies (Art. 20).

[86] Art. 3 (1) (a) TOD, in Germany, there is no specific rule but one finds a common understanding in company law.

[87] Art. 3 (1) (c); Assessment Report, 2011, p. 104-106

[88] Art. 3 (1) (d) TOD.

[89] Art. 3 (1) (e) TOD.

[90] Assessment Report, 2011, p. 100; bank guarantee, French law; in Germany, as regards cash, Section 13 (1) 2 Takeover Act.

[91] Art. 3 (1) (b) TOD.

affairs for longer than is reasonable by a bid for its securities.[92] There is a cross-reference to Art. 7 TOD (time allowed for acceptance); Art. 7 (1) mentions this principle and if implemented allows extensions of the ten week-period as the longest period mentioned for normal circumstances.

D. General considerations for Member States in transposing the Takeover Directive

In transposing or adapting national takeover regulations, Member States set national legal conditions for a takeover market within the framework of the Takeover Directive. The main legal provisions have different implications concerning the facilitation of takeovers. While in terms of its overall effects the mandatory bid rule is making takeover bids more costly and is therefore negative for the takeover market, board neutrality and the breakthrough rule tend to facilitate takeover bids. Member States and the European Union itself have an interest in ensuring that adequate takeover markets are in place for transforming established businesses and to allow innovators to achieve scale at a fast pace. In framing national takeover markets, taking account of other jurisdictions, such as the US, is necessary due to global competition and the relevance of takeover for resilient and sustainable national economies.

In transposing the Directive and adopting national takeover law to more recent legal developments, Member States also have to balance the interest of employees and other stakeholders.[93] Member States differ in their approach towards employee participation in corporate boards and the powers of works councils. Various corporate governance regimes are in place.[94] Taking national interest into account led some Member States to a less takeover-friendly regulation after the initial transposition of the Directive. Especially Member States which incorporated the mandatory bid rule but not the board neutrality rule tend to have a hostile takeover environment and have to reflect on other means to enhance the consolidation of established businesses and accelerate the growth of innovators.[95]

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[92] Art. 3 (1) (f) TOD.

[93] Generally, Gelter EU Company Law Harmonization between Convergence and Varieties of Capitalism, in H. Wells (ed.), *Research Handbook on the History of Corporate and Company Law* (Cheltenham: Elgar Publishing 2018); see also ECGI Law Working Paper 355/2017.

[94] Critical of harmonization, J.L. Hansen, ‘The Directive on Takeover Bids: Unwanted Harmonisation of Corporate Law’ in Birkmose et al (eds.), *The European Financial Market in Transition* (Alphen aan den Rijn: Kluwer Law International, 2012), p. 29.

[95] On such choices, see also M. Gatti, ‘Optionality Arrangements and Reciprocity in the European Takeover Directive’, (2005) *European Business Organization Law Review* 553.

E. Supervisory authority (Art. 4 TOD)

The Takeover Directive concedes more freedom concerning supervisory authorities than in the field of substantive law.[96] Member States are to designate the authority or authorities competent to supervise bids for the purposes of the rules which they make or introduce pursuant to this Directive, Art. 4 (1) 1 TOD. The authorities thus designated must, according to Art. 4 (1) 2 TOD, be either public authorities, associations or private bodies recognized by national law or public authorities expressly empowered for that purpose by national law. Until now, all Member States designated authorities based in the respective Member States[97] and not joint or European authorities as is done for banking supervision. This is a second best approach given the aim of the Takeover Directive to contribute to a European capital market. The Takeover Directive indeed allows for a common or even a European supervisory authority, something which has not yet been erected and therefore is until now only a theoretical possibility and not a real option for Member States.[98] ESMA already has a limited role, having harmonized to some degree national practices concerning acting in concert, based on the co-operation provision in Art. 4 (4) TOD.[99]

Currently, most Member States rely on a public body such as supervisory authority, be it a separate body,[100] the general financial supervisory authority[101] or even the central bank. A private body exists in two of the most active European capital markets, in Sweden and in the UK. In the UK as well as in Ireland, there is a Takeover Panel. The Irish Takeover Panel is regulated in the Takeover Panel Act[102] and issues takeover rules.[103] The Irish Takeover Panel is a public company, but private associations nominate directors.[104] In Austria, the Takeover

[96] M. Winner, 'Übernahmerecht – Die europäische Perspektive' in R. Veil/H.C. Grigoleit/M. Habersack (eds.), *Öffentliche Unternehmensübernahmen* (Tübingen: Mohr Siebeck, 2022), p. 135, 145

[97] In the UK, the Takeover Panel is a state body resulting from the transposition of the Takeover Directive, D. Kershaw, *Principles of Takeover Regulation* (Oxford: Oxford University Press, 2016), 3.02, p. 66; A. Johnston, 'Takeover Regulation: Historical and Theoretical Perspectives on th City Code', (2007) 66 *Cambridge Law Review* 422, 447.

[98] N. Moloney, *EU Securities and Financial Markets Regulation*, 4 ed. (Oxford: Oxford University Press, 2024), p. 56-57.

[99] Proposal to strengthen the role of ESMA in the takeover-context: K.J. Hopt, 'European Takeover Reform of 2012/2013 – Time to Re-examine the Mandatory Bid', (2014) 15 *European Business Organization Law Review* 143, 161.

[100] S. Kalss, 'The Austrian Law in Public offers and Takeovers, (2000) 1 *European Business Organization Law Review* 479, 506.

[101] Germany: Section 4 German Takeover Act; Poland: Section 77a-77c of the Act on Public Offering.

[102] Irish Takeover Panel Act, 1997.

[103] Irish Takeover Panel Act 1997, Takeover Rules 2022 ("Takeover Rules").

[104] Section 6 Irish Takeover Panel Act.

Commission is a public body, but it is equipped with nominees of private institutions. In Sweden, supervisory authority was given in principle to the Financial Supervisory Authority (Finansinspectionen), a public body, but according to the Act on Public Takeover Offers on the Stock Market, Finansinspectionen[105] has delegated certain duties to the Swedish Securities Council,[106] a private body. Such split authority between Finansinspectionen and the Swedish Securities Council is presumably efficient, given the activity on the Swedish financial and takeover market. Generally, Member States have to assign supervisors sufficient powers.[107] Since the enactment of the Takeover Directive, the role of the supervisory agencies and the relevance, also timewise, of the various regulatory procedures have gained much more importance than before. Enforcement has become a major concern.[108]

F. Reform issues not or not fully taken up by the Takeover Directive

Numerous reforms mentioned by the Commission or put forward in the discussion have not yet been taken up: [109] (1) extensions to the mandatory bid (definition of the controlling majority, calculation of the minimum price, more clarity on the exceptions); (2) further mandatory offers for acquisitions of between 30 and 50% (low-balling, creeping in); (3) acting in concert; (4) simplification of share exchanges; (5) more harmonization of board neutrality and the break-through rule; (6) recognition of deal protection agreements; (7) harmonization of takeover squeeze-outs; (8) greater transparency of voting/share ownership (in particular for cash-settled swaps/contracts for difference and similar financial instruments) and harmonization of the sanctions for violations of the law (in particular the loss of voting rights and high fines); and (9) introduction of a "put up or shut up" rule along the lines of the reform of the UK City Code on Takeovers and Mergers of 19 September 2011.

Other reform requests from practice have concerned, for instance, the scope of application of the Directive (registered office/administrative headquarters), the supervisory

[105] Finansinspectionen's Regulatory Code; Finansinspectionen's regulations regarding operations on marketplaces, FFFS 2007:17, Chapter 14.

[106] See R. Skog/E. Sjöman, 'The Swedish Securities Council: A Takeover Panel, and More', (2014) *European Company and Financial Law Review* 1; Chapter 7, Section 10 Swedish Takeovers Act (FFFS 2006:451).

[107] Assessment Report, 2011, p. 92.

[108] On takeover and securities law enforcement, P. Davies/K.J. Hopt/W.G. Ringe, 'Control Transactions' (Oxford: Oxford University Press 2017), ch. 9.2; P. Agstner, 'EU Takeover Regulation: Some 'Hot'Research Topics', (2024) SSRN.

[109] See K.J. Hopt, *Europäisches Übernahmerecht* (Tübingen: Mohr Siebeck 2013), p. 24 et seq., with further references.

body and the applicable law (Art. 4), the disclosure of information in the context of due diligence as extended to the bidder and to co-bidding bidders and, more generally, unresolved questions about the relationship between the Takeover Directive and the Market Abuse Directive, at least as regards disclosure of inducement fees, exclusion of directors with conflicts of interest in the opinion of the board pursuant to Art. 9, ambiguities in cross-border takeovers as to the relationship between the Takeover Directive and the Prospectus Directive; and, finally, issues relating to the law of corporate groups.

III. Mandatory bid triggered by acquiring control

A. The concept of the mandatory bid rule

The mandatory bid rule is supposed to protect minority shareholders, in conjunction with the fair pricing of mandatory bids.[110] Most EU-countries had a pre-existing mandatory bid rule,[111] while the mandatory bid rule was introduced by transposing the Directive in Cyprus, Luxembourg and in the Netherlands.[112] The mandatory bid rule is not a European peculiarity, despite the fact that federal US securities law does not impose such an obligation on shareholders of listed companies. There are similar provisions in some US states[113] and also in the other countries[114] dealt with in the Assessment Report,[115] notably in China,[116] India,[117] Japan[118] and Switzerland.[119]

[110] Recital 9 TOD. Cf. , K.J. Hopt, 'European Takeover Reform of 2012/2013 – Time to Re-examine the Mandatory Bid', (2014) 15 *European Business Organization Law Review* 143 at 166 et seq.; on the economic theory of the mandatory bid with its pros and the cons, K.J. Hopt, *Europäisches Übernahmerecht* (Tübingen: Mohr Siebeck, 2013), p. 33 et seq.

[111] Assessment Report, 2011, p. 64-66: 19 of 22 countries comprised in the study (among them Germany) previously had such a rule. See the earlier Commission Recommendation (77/534) of 25 July 1977, based on the Pennington Report, Report on Takeovers and other Bids, doc.XI/56/74-E.

[112] Assessment Report, 2011, p. 64, 66; on p. 27 and 67, also Germany is named (falsely).

[113] N. Andronikos, 'A US lawyer's perspective on the EU Takeover Directive', in D. Van Gerven (ed.), *Common Legal Framework for Takeover Bids in Europe*, Volume I (Cambridge: Cambridge University Press, 2008), p. 61, 2.46, 57.

[114] For Asian perspectives, see U. Varottil/W.Y. Wan (ed.), *Comparative Takeover Regulation, Global and Asian Perspectives* (Cambridge: Cambridge University Press, 2018).

[115] Assessment Report, 2011, p. 163-166.

[116] See W. Cai, 'The Mandatory Bid Rule in China', (2011) 12 *European Business Organization Law Review* 653.

[117] Security and Exchange Board of India (SEBI), 'Substantial Acquisition of Shares and Takeovers Regulations 2011', LAD-NRO/GN/2011-12/24/30181 (last amended on 6 Mar. 2017).

[118] See J. Lee, 'The Current Barriers to Corporate Takeovers in Japan: Do the UK Takeover Code and the EU Takeover Directive Offer a Solution?', (2017) 18 *European Business Organization Law Review* 761.

[119] Art. 135 Financial Market Infrastructure Act.

Some Member States implemented a mandatory bid only shortly before the Takeover Directive was adopted. Among them were Sweden[120] and Germany, which in 2002 first introduced its binding Securities and Acquisition and Takeover Act (Takeover Act).[121] By contrast, the Netherlands and Luxembourg, two Member States with vibrant capital markets, introduced the mandatory bid rule for the first time when transposing the Takeover Directive.[122] The mandatory bid rule was altered by, inter alia, transposition of the Directive in the Czech Republic and Poland.[123] In the last years, critique of the concept behind the mandatory bid rule has been growing,[124] and it is stressed that the Takeover Directive did not create a level playing field in European capital markets.[125]

B. Acquiring control by a single bidder (Art. 5 (1, 3) TOD)

1. The concept of control in Art. 5 (1) and Art. 5 (3) TOD

Generally, there is discretion for Member States as to how to transpose the mandatory bid rule and in defining when control is acquired. According to Art. 5 (1) 1 TOD, a mandatory bid is required when control is acquired. According to Art. 5 (3) TOD, the percentage of voting rights which confers control for the purpose of Art. 5 (1) and the method of its calculation is to be determined by rules of the Member State in which the company has its registered office. Despite initial concerns,[126] harmonization was reached without prescribing a uniform threshold in the Takeover Directive since nearly all Member States introduced a threshold in the small range of 30 per cent up to a third. Without naming a specific threshold,

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[120] Critical of its introduction in Sweden, R. Skog, *Does Sweden Need a Mandatory Bid Rule? A Critical Analysis* (Stockholm: Juristförlaget, 1995).

[121] See D.A. Verse 'Selected Issues in German Takeover Law. Mandatory Bids, Minimum Pricing Rules', in H. Fleischer/W. Kanda/K.S. Kim/P. Mülbert (eds.), *German and East Asian Perspectives on Corporate and Capital Market Law: Investors versus Companies* (Tübingen: Mohr Siebeck, 2019), p. 143, 147-152.

[122] Assessment Report, 2011, p. 66.

[123] Assessment Report, 2011, p. 27, 64, 66; also later in 2022, see T. Regucki, 'Polish Takeover Regulation', (2024) 25 *European Business Organization* 385, 392-394.

[124] M. Habersack, 'Non-frustration Rule and Mandatory Bid Rule – Cornerstones of European Takeover Law?', (2018) *European Companyy and Financial Law Review* 1; J.L. Hansen, 'The Mandaory Bid Rule: Still Unnecessary, Unjustifiable and Inefficient After All These Years', in *Festschrift in honour of Rolf Skog* (Stockholm: Norstedts Juridik, 2021), page 509. On the UK D. Kershaw, *Principles of Takeover Regulation* (see n. 33), 8.43 (p. 255); see also the earlier contribution of L. Enriques, 'The Mandatory Bid Rule in the Takeover Directive: Harmonization Without Foundation?' (2004) *European Company and Financial Law Review* 440.

[125] M. Winner, 'Does the European Union have a mandatoory bid rule?', in *Festschrift in honour of Rolf Skog* (Stockholm: Norstedts Juridik, 2021), p. 1179, 1195.

[126] V. Edwards, 'The Directive on Takeover Bids – Not Worth the Paper It's Written On?' (2004) *European Company and Financial Law Review* 416, 439.

in Estonia a concept of actual control is implemented, while the only apparent outlier is Poland, which introduced in 2022 a 50 per cent threshold.[127]

A significant number of Member States implement a threshold of a third or of 33 per cent, most Member States implemented a 30 per cent threshold.[128] According to the Assessment Report, of the 22 surveyed countries, 12 Member States (Austria, Belgium, Cyrus, Czech Republic, Finland, France, Germany, Ireland, Italy, the Netherlands, Sweden and the United Kingdom) introduced a threshold of 30 per cent, while initially seven countries (Greece, Hungary, Luxembourg, Portugal, Romania, Slovakia and initially Poland) introduced a threshold of 33 per cent or of a third (33 1/3 per cent).[129] Three surveyed countries introduced a more complex threshold, by referring to actual control (Estonia)[130] or by a mixed approach featuring both a threshold (Spain: 30 per cent; Denmark: 1/3 of the voting rights) and the exercise of a controlling influence over the company. Since voting (and not necessarily also attendance) in general meetings rose, voting rights of 30 or 33 (1/3) per cent do not necessarily constitute a majority in the general meeting.

Some Member States implemented a second threshold of 50 or more per cent. Finland implemented thresholds of 30 per cent and 50 per cent, Portugal of 33 1/3 per cent and 50 per cent. Poland initially introduced thresholds of 33 per cent and 66 per cent (however, only exceeding 66% of the votes triggered the obligation of the bidder to offer the acquisition of all remaining shares in the company; exceeding 33% obliged the bidder to acquire merely up to 66% of shares). This model was clearly incompatible with the Directive and was replaced in 2022; now a single threshold of 50 per cent applies.[131] Another solution was adopted in Estonia, where actual control is required.[132] In Hungary, besides the generally used threshold of 33per cent, a lower threshold of 25 per cent applies, if no other shareholder in the target company holds at least ten per cent of the voting rights.[133] Thresholds lower than 30 per cent

[127] T. Regucki, ‘Polish Takeover Regulation’, (2024) 25 *European Business Organization* 385, 405-409.
[128] Assessment Report, 2011, p. 39
[129] Assessment Report, 2011, p. 38-39.
[130] A. Nirgi/S. Papp, ‘Estonia’, in D. Van Gerven (ed.), *Common Legal Framework for Takeover Bids in Europe*, Volume I (Cambridge: Cambridge University Press, 2008), p. 145, 150, 6.15.
[131] T. Regucki, ‘Polish Takeover Regulation’, (2024) 25 *European Business Organization* 385, 405-409.
[132] Assessment Report, 2011, p. 38-39.
[133] Section 68 (1) a) Hungarian Capital Markets Act, J. de Servigny/Z. Fekete, ‘Hungary’, in D. Van Gerven (ed.), *Common Legal Framework for Takeover Bids in Europe*, Volume I (Cambridge: Cambridge University Press, 2008), p. 214.

are implemented in some US states[134] and internationally in Australia, Canada and India. Member States generally foresee the same threshold for all companies, but in Italy, there is a different threshold for SMEs, subject also to the articles of association of the SMEs.[135]

2. Corporate governance of the bidder

Unlike the Company Law Directive for mergers,[136] the Takeover Directive contains no rules concerning the authority of the board or the general meeting to issue a bid. Therefore, the corporate governance regime and general principles of company law in the Member States apply as long as no special provisions are in place. The general rule sees power vested in the board in the one-tier system or in the management board in the two-tier system, subject to the consent of the supervisory board. In the UK, a substantial transaction representing 25 per cent of the *gross assets, market value, profits or gross capital* requires a resolution of the general meeting.[137] In Germany, the Holzmüller-rules were not applicable in the Bayer/Monsanto case, which for its part resulted in heavy losses for shareholders of the offeree company Bayer, who were not involved in the decision but would likely have rejected the acquisition.[138]

C. Acquisition of control by acting in concert (Art. 5 (1)TOD)

Control must not be acquired by a single person. Acting in concert (Art. 5 (1) TOD) is one of the hot spots not only in takeover law but also in securities law as a result of the Transparency Directive.[139] The concepts in the Takeover Directive and in the Transparency Directive differ. The Takeover Directive defines acting in concert as aiming to acquire control of the company (Art 2 (1) (d) TOD), and the acting in concert-provisions aim to prevent circumventing the mandatory bid-requirement through the collective action of persons who do not by themselves exert control, holding less than 30 per cent. By contrast, the Transparency Directive’s Art. 10 (a) focuses on an agreement which obliges a concerted exercise of voting

[134] 15 Pennsylvania Consolidated Statutes §§ 2543 (a), 2544 (right to receive payment).
[135] Art. 106 I-ter Consolidated Law on Finance.
[136] Art. 93 Company Law Directive.
[137] FCA Listing Rules 10; on the effects M. Becht/A. Polo/S. Rossi, ‘Does Mandatory Shareholder Voting Prevent Bad Acquisitions’, (2016) 29 *The Review of Financial Studies* 3035.
[138] With proposals concerning the German Stock Corporation Act and the German Corporate Governance Code, K.-D. Stephan/C. Strenger, ‘Die Zuständigkeit der Hauptversammlung bei Strukturveränderungen – ein anlassbedingter Vorschlag’, (2017) *Die Aktiengesellschaft* 346, and J. Redenius-Hövermann/C. Strenger, ‘Zur Akzeptanz des Deutschen Corporate Governance Kodex in DAX-40’ (2023) *Zeitschrift für Wirtschaftsrecht* 2121, 2128.
[139] See J. Garcia de Enterria/M. Gargantini, in this book, chapter 8.

rights. The Commission mentioned in the Revision of the Directive acting in concert as the first topic for a reform[140] and called for a clarification of the concept of acting in concert at EU level. Later, ESMA issued a statement on acting in concert.[141]

According to the Assessment Report, the UK and Italy, as primary jurisdictions, followed the definition in the TOD while France, Germany and Spain, also as primary jurisdictions, added the concept of the Transparency Directive.[142] Among the other jurisdictions covered, eight Member States were identified as operating under the definition of the Takeover Directive,[143] six Member States operated under the approach adding the concept of the Transparency Directive,[144] while three were labelled as intermediates.[145] Acting in concert is dealt with in detail in another contribution[146] and was subject to court decisions, inter alia, in Germany[147] and Austria.[148]

D. Increase of shareholdings and a second threshold

Various Member States introduced rules requiring a (second) mandatory bid[149] if the offeree company acquires "more" shares; according to the Assessment Report, this is to deal with low price bids used to acquire control.[150] This might be the acquisition of a single share as in the United Kingdom, or of 0.05 per cent (Ireland), 2 per cent (Austria, France), 3 per cent (Greece) or 5 per cent of voting rights (Italy),[151] and formerly five and ten per cent of

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[140] Commission, Report, 'Application of Directive 2004/25/EC on takeover bids', COM(2012)347 final (June 28, 2012), no. 23.

[141] ESMA Public Statement, Information on shareholder cooperation and acting in concert under the Takeover Bids Directive, 20 June 2014, last update 8 January 2019, ESMA 2014/677-REV; see also J. García de Entería, 'Reflecting on concerted action in relation to mandatory takeover bids: Shareholder agreements and the concerted exercise of voting rights', available at https://ssrn.com/abstract=4343791; D.W. Puchniak/U. Varottil, 'Rethinking Acting in Concert: Activist ESG Stewardship is Shareholder Democracy', ECGI Law Working Paper No 731/2023.

[142] Assessment Report, 2011, p. 134.

[143] Austria, Cyprus, Denmark, Hungary, Ireland, Luxembourg, Netherlands and Slovakia.

[144] Belgium, Finland, Poland, Portugal, Romania and Sweden.

[145] Czech Republic, Estonia and Greece.

[146] J. Garcia de Enterria/M. Gargantini, in this book, chapter 8.

[147] BGH, 13.12.2022 – II ZR 14/21, BGHZ 235, 295 (Postbank); report from V. Sander, 'Aktuelle Rechtsprechung des II. Zivilsenats des BGH zum Kapitalmarktrecht', (2024) *Wertpapier-Mitteilungen* 141, 142-145.

[148] ECJ, Case C-605/18 (Adler Real Estate).

[149] Supra III.B.1, K.J. Hopt, 'European Takeover Reform of 2012/2013 – Time to Re-examine the Mandatory Bid', (2014) 15 *European Business Organization Law Review* 143, 177.

[150] Assessment Report, 2011, p. 355

[151] Assessment Report, 2011, p. 127, 130.

voting rights (Poland, until 2017 when the rule was repealed).[152] Various Member States introduced a second threshold triggering a further mandatory bid.[153]

E. Pricing of mandatory bids (Art. 5 (4, 5) TOD

Art. 5 headlines the notion of an equitable price in its title and mentions it in Art. 5 (1) (2). The general principle[154] of owing an equitable price is subject to more concrete provisions in Art. 5 (4), (5) TOD. The bidder has to offer the highest price paid for the same security by the offeree or by persons acting in concert.[155] Whether the offeror has to offer cash or a cash alternative[156] is subject also to some discretion of the Member States. Cash is to be offered when at least 5 per cent of the voting rights were acquired by cash.[157] Member States may provide that a cash consideration must be offered, at least as an alternative, in all cases[158] and may prescribe further instruments intended to protect the interests of the holders of securities.[159]

Member States have to set a reference period of not more than twelve but at least six months for the highest price paid by the offeror before the bid.[160] According to the Assessment Report, most (former) Member States refer to a twelve-month period (inter alia, Austria, Belgium, France, Ireland, Italy, Spain, United Kingdom), but some refer to a six-month period (Finland, Germany, Greece, Portugal).[161] Member States may also introduce additional criteria for determining the "equitable price" (Art. 5 (4) (2) (3) TOD)[162] and allow for an adjustment of the price by the supervisory authority.[163]

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[152] T. Regucki, 'Polish Takeover Regulation', (2024) 25 *European Business Organization* 385, 391, 415-416.

[153] Assessment Report, 2011, p. 129: Finland, Poland (until 2022), Portugal.

[154] Not mentioned in Art. 3 TOD, supra II.C.2.

[155] Art. 5 (4) TOD. On the attribution of a part (80 per cent in Brazil) of the control premium to common shareholders, J.C. Coffee, Jr., 'Racing Towards the Top?: The Impact of Cross-Listing and Stock Market Competition oon International Corporate Governance', (2002) 102 *Columbia Law Journal* 1757, 1809.

[156] Art. 5 (5) TOD.

[157] Art. 5 (5) (3) TOD.

[158] Art. 5 (5) (4) TOD.

[159] Art. 5 (6) TOD.

[160] Art. 5 (4) (1) (1) TOD. Reform proposal by J.W. Fedderke/M. Ventoruzzo, The Biases of an "Unbiased" Optional Takeovers Regime: The Mandatory Bid Threshold as a Reverse Drawbridge, ECGI Law Working Paper 304/2016, p. 30.

[161] Assessment Report, 2011, p. 157.

[162] Assessment Report, 2011, p. 157-159.

[163] Assessment Report, 2011, p. 159-162.

F. Exemptions and derogations

1. Acquiring control following a voluntary bid (Art. 5 (2) TOD)

The Takeover Directive sets standards for the pricing and the processing of takeover bids. However, the TOD is applicable only for mandatory bids, and if a voluntary bid resulted in the acquisition of control, under Art. 5 (2) TOD, the offeror has no obligation to issue a mandatory bid.[164] Therefore, Member States have an incentive to set uniform rules for mandatory and voluntary takeover bids concerning not only their submission and processing, but also as regards the pricing of the bid. Such voluntary takeover bids must comply with six general principles.[165]

2. Other exemptions and derogations

Member States may grant their supervisory authorities the power to waive national rules.[166] Therefore, there might be exemptions determined by supervisory authorities.[167] Furthermore, and also subject to a ruling of the European Court of Justice,[168] supervisory authorities can adjust prices.[169] Such a derogation might also be laid down in the national rules.[170] Member States have laid down so-called white wash-procedures for exemptions decided by shareholders.[171] The Assessment Report identifies as well technical exemptions,[172] the protection of creditors[173] and also specific situations[174] when a real change of control has taken place.[175] Other exemptions protect the offeror or controlling shareholder if there is no real change of control.[176] In the Report on the application of the Directive, the Commission

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[164] In Germany, Section 35 (3) Takeover Act.

[165] D. Van Gerven, 'Rules of Community law applicable to takeover bids', in D. Van Gerven (ed.), *Common Legal Framework for Takeover Bids in Europe*, Volume I (Cambridge: Cambridge University Press, 2008), p. 16, 1.20; this requirement is not waived.

[166] Art. 4 (5) (2) (ii) TOD. See for the initial transposition, Commission Staff Working Document, 'Report on the implementation of the Directive on Takeover Bids' SEC(2007) 268 (Feb. 21, 2007), p. 15-16.

[167] Assessment Report, 2011, p. 140, in Germany Section 37 Takeover Act.

[168] See ECJ Case C-206/16, *Marco Tronchetti Provera SpA and Others v. Commissione Nazionale per le Società e la Borsa*, opinion of the advocate general, no. 22; second case concerning TOD, Directive 2004/25/EC.

[169] Art. 5 (4) (3) TOD, V. Edwards, 'The Directive on Takeover Bids – Not Worth the Paper It's Written On?' (2004) *European Company and Financial Law Review* 416, 433.

[170] Art. 4 (5) (2) (i) TOD. See Commission Staff Working Document, 'Report on the implementation of the Directive on Takeover Bids' SEC(2007) 268 (Feb. 21, 2007), p. 15-16.

[171] Assessment Report, 2011, p. 140.

[172] Assessment Report, 2011, p. 141.

[173] Assessment Report, 2011, p. 147-148.

[174] Assessment Report, 2011, p. 148-152.

[175] Assessment Report, 2011, p. 144-147.

[176] Assessment Report, 2011, p. 142-144.

mentioned *acting in concert* and *the mandatory bid rule* as topics for reform;[177] in their second and third reform proposal, the Commission discussed derogations and exemptions from the mandatory bid rule.[178]

IV. Submission and processing of a bid

A. General information on bids (Arts. 6, 8, 10 TOD)

While in the US there is a federal SEC rule on tender offers,[179] there are not yet any harmonized transparency provisions in the European Union. Nevertheless, transparency was increased by the transposition of the disclosure regime of the Takeover Directive.[180] According to Art. 6 (1) TOD, the decision to make a bid is to be made public without delay; according to Art. 6 (2) TOD, there has to be an offer document; the information that is to be contained in the offer document is subject to Art. 6 (3) TOD; and rules on the application of Art. 6 (3) TOD are subject to Art. 6 (4) TOD. According to Art. 8 (1) TOD, Member States are to ensure that the bid is made public. The offer document has to be in the form of a prospectus in accordance with the Prospectus Directive.[181]

In Germany, general information requirements apply not only to mandatory bids pursuant to Art. 5 TOD but also to voluntary bids.[182] A bid is defined as voluntary or mandatory bid for securities;[183] special rules exist for bids having the objective of acquiring control of the offeree company.[184] According to the definition in Art. 2 (1) (a) TOD, a "takeover bid or bid shall mean a public offer (…) made to the holders of the securities of a company (…) which follows or has as its objective the acquisition of control of the offeree company in accordance with national law." Therefore, only mandatory bids are included in the Directive.

[177] Commission, Report, 'Application of Directive 2004/25/EC on takeover bids', COM(2012)347 final (June 28, 2012), no. 23, 24. For acting in concert, supra III.C.

[178] See R. Skog/E. Sjöman, 'No Rule, Just Exemptions?', (2014) *European Company and Financial Law Review* 393.

[179] Regulation 14E.

[180] Commission Staff Working Document, 'Report on the implementation of the Directive on Takeover Bids' SEC(2007) 268 (Feb. 21, 2007), p. 10.

[181] D. Van Gerven, 'Rules of Community law applicable to takeover bids', in D. Van Gerven (ed.), *Common Legal Framework for Takeover Bids in Europe,* Volume I (Cambridge: Cambridge University Press, 2008), p. 23, 1.35.

[182] Section 10 German Takeover Act.

[183] Section 2 (1) German Takeover Act.

[184] Sections 29-39 German Takeover Act.

B. Time allowance for acceptance and notice by the offeree's board (Arts. 7, 9 (5) TOD)

The time allowed for the acceptance of the bid should be regulated,[185] according to Art. 7 (1) TOD for a period of no less than two and no more than 10 weeks, roughly in line with the international timeframe.[186] For specific cases, there might be deviating rules in national law, Art. 7 (2) TOD. During the period determined by the time allowance, the board neutrality rule applies, thus hindering the board of the target company from frustrating the bid.[187] The board of the offeree company is required to make public a document setting out its opinion of the bid.[188]

C. Worker participation (Art. 14 TOD) and stakeholder interests

Protecting employees[189] is not mandatory according to the Directive, which names as a general principle the interest of the company as a whole but does not define specific consequences for boards and shareholders in the takeover context. The specific provision in Art. 14 on worker participation is drafted as enabling legislation, simply mentioning several Directives[190] and leaving improvements to the Member States. In terms of relevant Member State legislation, works councils vested with consultation rights[191] are to be mentioned since no specific co-determination was introduced at board level in the takeover context. Germany, in transposing the Directive, strengthened the works council of the offeror company[192] and also later introduced provisions concerning the works council of the target company.[193] Beyond the disclosure of information, consultation and even co-decision rights are also possible.

Some Member States introduced stakeholder-oriented reforms while transposing the Takeover Directive.[194] A number of Member States explicitly mention the interests of the employees that are to be taken into account by the boards in the takeover context. In the US, 30 states have adopted constituency statutes that, at least in the context of a change of control

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[185] Recital 14 TOD.
[186] Assessment Report, 2011, p. 111.
[187] Art. 9 (2) TOD, for the transposition infra V.
[188] Art. 9 (5) TOD.
[189] Assessment Report, 2011, p. 61, noting that the Directive recognized the need to protect employees.
[190] 94/45/EU, 98/59/EC, 2001/86/EC, 2002/14/EC.
[191] Assessment Report, 2011, p. 102.
[192] Section 10 (5) Takeover Act, new sentence.
[193] Section 106 (3) No. 9a and Section 109a Works Councils Act.
[194] Assessment Report, 2011, p. 28.

transactions, allow (and in some cases require) the board to consider the effects on the target's employees and other stakeholder.[195] The study conducted for the Commission portrayed employee protection outside the EU as extremely weak,[196] with employee representatives in the EU being nevertheless critical concerning the level of employee protection in the EU, as mentioned not only in the Assessment Report but also in the Report of the Commission.[197]

V. Defence measures of the offeree (target) company

A. Board neutrality rule (Art. 9 TOD)

1. Concept and implementation of Art. 9 TOD

In balancing the interests of different stakeholders, defence measures adopted by the target company are crucial and highly controversial both in economics and in political discussions, with the UK and the US being the widely observed models for and against the board neutrality rule and other defence measures.[198] The Takeover Directive favours unhindered decisions being made by the shareholders of the target company in line with the UK model and therefore imposes in Art. 9 (2), (3) TOD the board neutrality rule. With Austria, Cyprus, Czech Republic, Estonia, France,[199] Greece, Ireland, Italy,[200] Portugal, Romania, Slovakia, Spain, Sweden and the UK, the majority of countries included in the Assessment Report have at least initially incorporated the board neutrality rule in their national takeover regime.[201] In most of these countries,[202] there was a pre-existing board neutrality rule; only three survey countries newly introduced a board neutrality rule when transposing the Directive (Cyprus, Finland and Greece).[203] Besides these countries, also Belgium applies the board neutrality rule.[204] Corporate governance systems in most Member

[195] N. Andronikos, 'A US lawyer's perspective on the EU Takeover Directive', in D. Van Gerven (ed.), *Common Legal Framework for Takeover Bids in Europe*, Volume I (Cambridge: Cambridge University Press, 2008), p. 66, 2.70 (Pennsylvania and others).

[196] Assessment Report, 2011, p. 101

[197] Commission, Report, 'Application of Directive 2004/25/EC on takeover bids', COM(2012)347 final (June 28, 2012), no. 27; for employee representatives, Assessment Report, 2011, p. 356.

[198] On the market for corporate control and external corporate governance, K.J. Hopt, 'Takeover Defenses in Europe: A Comparative, Theoretical and Policy Analysis', (2014) 20 *Columbia Journal of European Law* 249 at 261 et seq.

[199] On the current legal regime, see V.B.

[200] On company opt-out, infra V.A.2.

[201] Assessment Report, 2011, p. 42, 191. For later developments in France and Italy, see V.B.

[202] Assessment Report, 2011, p. 191.

[203] Assessment Report, 2011, p. 42

[204] Now Art. 7:152 Belgium Companies and Associations Code, initially Art. 557 Companies Code.

States which introduced the board neutrality rule share two features, a one-tier board and the absence of co-determination at board level.

With a co-determined supervisory board, Austria does not fit into the current scheme in terms of both features, while Finland applies some co-determination. Nevertheless, the Austrian example fits into path dependency and was in line with then-existing German legal doctrine. When Austria introduced its Takeover Act in 1998, also Germany followed the board neutrality rule.[205] The voluntary Takeover Code by the German Exchange Experts Commission (Börsensachverständigenkommission) built on the UK City Code[206] and foresaw that the board of the target company may not take any measures that run counter to the interest of the holders of the securities in taking advantage of the tender offer.[207] The notes accompanying the governmental draft of the initial Austrian Takeover Act therefore referred not only to the proposal for a 13th Directive and the City Code, but also to the then-existing German Takeover Code.[208] The proposed Austrian board neutrality rule was also in line with the at the time new Swiss Exchange Act[209] and stated that the interests of the employees, the creditors and the public are also to be taken into account by the organs of the offeree company.[210] Since Austrian companies typically had controlling shareholders, academia supposed that management generally would not try to prohibit a takeover bid.[211]

[205] Referring to the board neutrality rule as a "Stillhaltepflicht" and as the majority view in academia, T. Baums, 'Notwendigkeit und Grundzüge einer gesetzlichen Übernahmeregelung', in R. von Rosen/W.G. Seifert, *Die Übernahme börsennotierter Unternehmen* (Frankfurt am Main: Deutsches Aktieninstitut, 1999), p. 165, 175; referring to it as "allgemein anerkannt" (universally accepted), Hirte/Schander, 'Die Organpflichten bei Unternehmensübernahme', in R. von Rosen/W.G. Seifert, *Die Übernahme börsennotierter Unternehmen* (Frankfurt am Main: Deutsches Aktieninstitut, 1999), p. 341, 348.

[206] S. Schuster/C. Zschocke (eds,) *Übernahmerecht Takeover Law* (Frankfurt am Main: Knapp-Verlag, 1996), p. 23; for the text, see also 'Der neue Übernahmekodex der Börsensachverständigenkommission', (1995) *Zeitschrift für Wirtschaftsrecht* 1464.

[207] Art. 19 Takeover Code, naming as such measures (among others) resolutions with respect to the issuance of new securities, a substantial change in the assets or liabilities of the target company, and the conclusion of agreements outside the scope of ordinary business activity. Takeover Code of the Exchange Expert Commission at the Federal Ministry of Finance of July 14, 1995, printed in S. Schuster/C. Zschocke (eds,) *Übernahmerecht Takeover Law* (Frankfurt am Main: Knapp-Verlag, 1996), p. 75, 95, 97.

[208] P. Doralt/C. Nowotny/M. Schauer (eds.), *Takeover-Recht* (Vienna: WUV Service Fachverlag, 1997), with comparative reports, p. 207, 257; for the German report, see Mayer, page 27. For Belgium, see P. Doralt/C. Nowotny/M. Schauer (eds.), *Takeover-Recht* (Vienna: WUV Service Fachverlag, 1997) with comparative reports, p. 207, 257,

[209] Art. 29 BEHG (Bundesgesetz über die Börsen und den Effektenhandel); see A. Tuczka in P. Doralt/C. Nowotny/M. Schauer (eds.), *Takeover-Recht* (Vienna: WUV Service Fachverlag, 1997), p. 125.

[210] Art. 12 Austrian Takeover Act; see for the notes accompanying the governmental draft, P. Doralt/C. Nowotny/M. Schauer (eds.), *Takeover-Recht* (Vienna: WUV Service Fachverlag, 1997), p. 207, 257,

[211] P. Doralt in P. Doralt/C. Nowotny/M. Schauer (eds.), *Takeover-Recht* (Vienna: WUV Service Fachverlag, 1997), p. 1, 10.

2. Opting out of the board neutrality rule on the basis of Member State takeover regulation

Not explicitly mentioned in the Directive is opting out of the board neutrality rule on the basis of Member State takeover regulation. A company opt-out as a result of passivity was introduced in Italy.[212] In Italy, it is up to the general meeting to decide on board neutrality and (if preferred) to waive the board neutrality rule, which is the general principle in Italy. Such a solution has widespread and growing support in academia and is described as a default board neutrality rule for companies.[213] Such a rule is endorsed by US[214] and European scholars from Germany,[215] the UK[216] and Belgium.[217]

B. Defence measures allowed by Member States (Art. 12 TOD)

1. Allowance of defence measures by Member States

A significant proportion of Member States opted out of the board neutrality rule (Art. 12 (1) TOD) by not introducing the board neutrality rule in their jurisdiction. Recital 21 of the Takeover Directive acknowledged existing differences in Member States' company law mechanisms and structures. This refers to different company law traditions. According to the Assessment Report, there is not board neutrality rule in Belgium,[218] Denmark, Germany, Hungary, Luxembourg, Netherlands, Poland[219] or (later) also in France.[220] In Germany, the Netherlands, Denmark, Luxembourg, Hungary and France, the rejection of the board neutrality rule as general concept correlates to board level employee representation. The majority of countries which did not introduce the board neutrality rule as a general concept (Germany, Netherlands, Denmark, Luxembourg, Hungary) foresee board level co-

[212] Assessment Report, 2011, p. 28, footnote 18, p. 59, with the history of Italian takeover regulation.

[213] Generally promoting choices for companies, G. Hertig/J.A. McCahery, 'Company and Takeover Law Reforms in Europe: Misguided Harmonization Efforts or Regulatory Competition?' (2003) 4 *European Business Organization Law Review* 179, 204.

[214] L. Enriques/R.J. Gilson/A.M. Pacces, 'The Case for an Unbiased Takeover Law (with an Application to the European Union)', (2014) 4 *Harvard Business Law Review* 85, 122.

[215] M. Habersack, 'Non-frustration Rule and Mandatory Bid Rule – Cornerstones of European Takeover Law?', (2018) *European Company and Financial Law Review* 1, 28; K.J. Hopt, *Europäisches Übernahmerecht* (Tübingen: Mohr Siebeck 2013), p. 103-105.

[216] P. Davies/E.-P. Schuster/E. van de Walle de Ghelcke, 'The Takeover Directive as a Protectionist Tool?', in U. Bernitz/W.-G. Ringe (eds.), *Company Law and Economic Protectionism* (Oxford: Oxford University Press, 2010), p. 105.

[217] E. Wymeersch, 'A New look at the Debate about the Takeover Directive', *Festschrift in honour for Peter Hommelhoff* (Köln: Dr. Otto Schmidt Verlag, 2012), p. 1375, 1396.

[218] On Belgium, supra V.A.1.

[219] Assessment Report, 2011, p. 193

[220] Loi Florange, 3 LOI n° 2014-384 du 29 mars 2014 visant à reconquérir l'économie réelle, modification of Art. L233-32 Code de Commerce.

determination of at least a third of the board members.[221] Other Member States relaxed the neutrality, too, in transposing the Directive.[222]

Currently Austria is the only Member State with a dual board structure and mandatory co-determination at board level, having opted for the board neutrality rule. France introduced a co-determination system after transposing the Takeover Directive and subsequently switched from a mandatory board neutrality rule to reciprocity and in the end rejected the board neutrality rule.[223] Highlighting employee interests, the Assessment Report cited the concept of team production,[224] stating that shareholders should be disincentivized from "unduly extracting team production value". Also the European Commission in its Report stressed that employee representatives are not satisfied with the application of the Takeover Directive.[225]

Abstaining from introducing the board neutrality rule correlates with a restricted authority of the general meeting and its exclusion from running the affairs of the company. When Germany switched from its traditional concept of the general meeting as the supreme body of the company by introducing the Stock Corporation Act 1937, there had also been some comparative research beforehand.[226] Owing especially to a monograph authored by Zahn on business leadership,[227] the current German doctrine of excluding the general meeting from managing the company[228] might be seen as an adoption of traditional US stock corporation law principles;[229] Zahn referred to Ballantine on Corporations, identifying the

[221] A. Conchon, Board-level employee representation rights in Europe, Fact and trends, (Brussels: ETUI, 2011).

[222] Assessment Report, 2011, p. 191

[223] Highlighting the French reform as a "grip of nationalism", M. Pargendler, 'The Grip of Nationalism on Corporate Law', (2020) 95 *Indiana Law Journal* 533, 543

[224] Assessment Report, 2011, p. 32.

[225] Commission Report, 'Application of Directive 2004/25/EC on takeover bids', COM(2012)347 final (June 28, 2012), no. 20.

[226] Generally, but not covering this aspect, W. Hallstein, *Die Aktienrechte der Gegenwart* (Berlin: F. Vahlen, 1931).

[227] J. Zahn, *Wirtschaftsführertum und Vertragsethik im neuen Aktienrecht* (Berlin: De Gruyter, 1934). Later HSBC -Trinkhaus manager Zahn was invited by the then CEO of Munich Re, who presided over the Academy for German Law's section on stock corporations, which was asked to present its findings in the preparations of the Stock Corporation Act 1937.

[228] Now Section 119 (2) German Stock Corporation Act.

[229] On the Stock Corporation Reform in the 1930s, see W. Schubert et al (ed.), 'Protocols of the Committees of the Academy for German Law 1933-1945' (Akademie für Deutsches Recht, Protokolle der Ausschüsse), Volume 1, Stock Corporation Law (Ausschuss für Aktienrecht), (Berlin: De Gryuter, 1986), p. XLVII.

board and not the general meeting as the supreme body of the corporation.[230] Similarly, Dutch company law gives board discretion more weight and, similar to the majority view in Germany, does not accept even advisory resolutions of the general meeting.[231]

Additionally, the allowance of defence measures can be discussed as a protectionist tool;[232] but also in the US, there is no board neutrality rule. In France, the Loi Florange swept away the board neutrality rule to protect French companies from hostile takeovers.[233] In Germany, the Takeover Act 2001 is seen as a reaction on the cross-border takeover of Mannesmann by Vodafone.[234] The German government's reaction was to change its view on the issue of board neutrality.[235] This was a protectionist reflex, but it was also inspired by the facts of the Mannesmann takeover, being an international takeover – first hostile and later friendly – in which the board of the target company created value for its shareholders by prompting the offeror to increase the offer through its actions and defence measures.[236]

2. Option for companies to opt in

In Germany, even without the provision in the Takeover Act, it is highly unlikely that the power to implement a board neutrality rule could be attributed to the general meeting. The same is true for the Netherlands. Contrary to the current understanding of the powers of management and the general meeting in Germany and in the Netherlands, the High Level

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[230] J. Zahn, *Wirtschaftsführertum und Vertragsethik im neuen Aktienrecht* (Berlin: De Gruyter, 1934), p. 90, footnote 3, referring to H. Ballantine, 'On Corporations', (Chicago: Callaghan 1927), p. 319.

[231] S. Cools, 'Climate Proposals: ESG Shareholder Activism Sidestepping Board Authority', in T. Kuntz, *Reserach Handbook on Environmental, Social and Corporate Governance* (Cheltenham: Edward Elgar Publishing, 2024), p. 138.

[232] U. Bernitz/W.-G. Ringe (eds.), *Company Law and Economic Protectionism* (Oxford: Oxford University Press, 2010; K.J. Hopt, 'Takeover Defenses in Europe: A Comparative, Theoretical and Policy Analysis', (2014) 20 *Columbia Journal of European Law* 249 at 254 et seq.; idem, *Europäisches Übernahmerecht* (Tübingen: Mohr Siebeck 2013), p. 69 et seq.

[233] M. Rohwoldt/D. Starke, 'The role of governments in hostile takeovers – Evidence from regulation, anti-takeover provision and government interventions', (2016) 47 *International Review of Law and Economics* 1; M. Lutter/W. Bayer/J. Schmidt, 'Europäisches Unternehmens- und Kapitalmarktrecht', 6 ed., (Berlin: De Gryuter, 2018), no. 28.124.

[234] P. Mülbert, 'Entwicklung des Übernahmerechts. Betrachtung aus der Perspektive der Wisenschaft', in R. Veil/H.C. Grigoleit/M. Habersack, Öffentliche Unternehmensübernahmen (Tübingen: Mohr Siebeck, 2022), p. 3; M. Habersack, 'Verhinderungsverbot und Pflichtangebotsregel – Eckpfeiler des europäischen Übernahmerechts?', (2017) 181 *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht* 603, 605.

[235] W. Underhill/A. Austmann 'Defence Tactics' in Payne (ed.), *Takeovers in English and German Law*, (Oxford: Hart, 2002), 87, 96; critical of the traditional approach, C. Kirchner/R. Painter, 'European Takeover Law - Towards a European Modified Business Judgement Rule for Takeover Law', (2000) 1 *European Business Organization Law Review* 353.

[236] The granting of appreciation awards to the CEO was later the subject of a criminal trial, M. Roth, 'Outside Director Liability: German Stock Corporation Law in Transatlantic Perspective', (2008) 8 *Journal of Corporate Law Studies* 337, 343.

Company Law Experts Group, featuring a Dutch chairman and a German expert, called for shareholder decision-making as the general principle.[237] In the stricter sense, decisions by the shareholders are secured by a mandatory board neutrality rule; however, it has been maintained that the authority of the shareholders to implement the board neutrality rule also constitutes a shareholder decision, even if (regularly) the board neutrality rule is not implemented in practice. But this neglects the fact that an opting-out rule, which has been recommended in legal literature, is much more favourable to the shareholders than an opt-in rule which is difficult to achieve.[238]

At a minimum, options for companies to opt in as regards the board neutrality rule or the breakthrough rule are to be implemented into national law and, according to Art. 11 (2) TOD, are subject to a decision of the general meeting. Hence there was a new rule in the German Takeover Act as a result of the transposition[239] The duty of neutrality is optional also for Danish companies; it is up to the general meeting to decide on the board neutrality rule.[240] In the Netherlands, the opt-in by the company has to be laid down in the articles of association.[241] In Poland, the legislature was initially silent on board neutrality, which could not be regarded as a full and proper implementation of the Directive.[242] In the end, the option for companies to opt in – in favour of neutrality – in the articles of association was introduced. Thought the rule plays no practical role, Polish legal commentators have attempted to derive a duty to abstain from measures frustrating the bid from the general duty of loyalty owed by board members and the duty to abstain from decision-making in a conflict of interest situation.

3. Authority and discretion for defence measures

As for the corporate governance of the bidder,[243] the Takeover Directive is silent on the authority and discretion for defensive measures. The powers and duties of directors are

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[237] Report of the High Level Group of Company Law Experts on Issues Related to Takeover Bids, Brussels 10 January 2002, p. 20.

[238] Supra V.A.

[239] Section 33a German Takeover Act.

[240] J. S. Christensen in S. Maul/D. Muffat-Jeadet/J. Simon (eds.), *Takeover bids in Europe* (Freiburg: Memento, 2008), no. 1140.

[241] S. F. G. Rammeloo in S. Maul/D. Muffat-Jeadet/J. Simon (eds.), *Takeover bids in Europe* (Freiburg: Memento, 2008), no. 2531.

[242] M. Bobrzynski/K. Oplustil/M. Spyra in S. Maul/D. Muffat-Jeadet/J. Simon (eds.), *Takeover bids in Europe* (Freiburg: Memento, 2008), No. 2750.

[243] Supra III.B.2.

subject to common or specific provisions in Member State law. Director duties in takeover situations are subject to general principles of company law, namely the duty of loyalty and the duty of care. In the US, a modified business judgment rule is applied to defences in takeover situations.[244]

C. Breakthrough rules on certain defence measures (Art. 11 TOD)

The breakthrough rule (Art. 11 TOD)[245] aims at limiting pre-bid defences by neutralizing such rules.[246] In its substantive provisions, there are restrictions on transferring securities[247] and restrictions on voting rights. Restrictions on voting rights[248] can be enacted in the articles of association, they can be contractual agreements or they can be multiple-vote securities. The "one share, one vote" principle is thus a default for companies if the breakthrough rule is enacted by the Member State.[249] Member States may opt-out of the breakthrough rule,[250] which all Member States except Estonia[251] did.[252] The breakthrough rule was partially transposed in Italy and France.[253] Consequently, the provision for a breakthrough rule was not evaluated as successful in the Assessment Report.[254]

VI. Further company law provisions in the TOD and their relevance for takeovers

A. Squeeze-out (Art. 15 TOD)

According to Art. 15 (2) (1) TOD, Member States are to ensure that an offeror is able to require all the holders of the remaining securities to sell these securities to him at a fair

[244] On the European discussion of US principles, see C. Kirchner/R. Painter, 'European Takeover Law - Towards a European Modified Business Judgement Rule for Takeover Law', (2000) 1 *European Business Organization Law Review* 353, 364-372, 382-400.

[245] With material provisions in Art. 11 (2)-(4) TOD.

[246] Art. 11 (4) TOD deals with an offeror holding 75 per cent of the voting rights following a bid; Art. 11 (5) foresees equitable compensation when rights are removed.

[247] Art. 11 (2) TOD.

[248] Mentioned in Art. 11 (3) TOD.

[249] L. Enriques/R.J. Gilson/A.M. Pacces, 'The Case for an Unbiased Takeover Law (with an Application to the European Union)', (2014) 4 *Harvard Business Law Review* 85, 119.

[250] Art. 12 TOD. For France I. Urbain-Parleani, 'The Implementation of the Thirteenth Directive 2004/25, Country Report on France', in T. Baums/A. Cahn (eds.), *Die Umsetzung der Übernahmerichtlinie in Europa* (Berlin: De Gryuter, 2006), p. 3, 10-11.

[251] Assessment Report, 2011, p. 195; no case reported.

[252] Member States which allow an opt in also allow reciprocity, Assessment Report, 2011, p. 196.

[253] Assessment Report, 2011, p. 195.

[254] Assessment Report, 2011, p. 355

price.[255] However, Art. 15 (2) (2) reduces the scope of that right dramatically in that it explicitly prescribes that such a right is to be introduced by the Member States in only one of the following two situations: the offeror holds securities representing 90 per cent of the capital carrying voting rights or 90 per cent of the voting rights in the offeree company in the moment of the bid or following the acceptance of the bid.[256] As far as this "acceptance test" is concerned, Member States may not impose a higher threshold. Additionally, Art. 15 (2) (2) (a) TOD contains an "ownership test" and foresees a squeeze-out where the offeror holds securities amounting to not less than 90 per cent of the voting rights. This threshold can be raised to 95 per cent.[257]

The wording of the squeeze-out provision lacks clarity, Art. 15 (2) (2) might be understood in the sense that Member States are permitted to provide a squeeze-out takeover. Such clarity is needed for properly balancing the facilitation of business opportunities and protecting outside shareholders. US bidders are generally not bound by a board neutrality rule and companies may conduct freeze-out mergers with a simple majority. Hinting at US freeze-out mergers and calling for a transatlantic level playing field, German lawyers recommend a squeeze-out at the fair price paid for the bid if the bidder reaches 75 per cent of the shares,[258] with this standard being based on the threshold for intercompany-contracts under German Konzernrecht. For a genuinely level playing field in transatlantic capital markets and so as not to overshoot the requirements of the German Konzernrecht, a simple majority may be sufficient and adequate. By allowing a freeze-out merger with a simple majority in Weinberger v. UOP,[259] US company law facilitates the integration of acquired companies. If European innovators are to find an equal playing field also in the European Union, post-bid integration has to be de-bureaucratized dramatically, but it might rest to some degree on the authority of the Member States.

In transposing the Takeover Directive, Ireland removed the provision that allowed a squeeze-out with an 80 per cent majority also in the takeover context. This provision applies

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[255] Tables for squeeze-out and sell-out are found in the Assessment Report, 2011, p. 230-236; see also C. van der Elst/L. van den Steen, 'Balancing the Interests of Minority and Majority Shareholders: A Comparative Analysis of Squeeze-out and Sell-out Rights', (2009) *European Company and Financial Law Review* 391.

[256] Art. 15 (2) (2) (b) TOD.

[257] Art. 15 (2) (3) TOD.

[258] See infra VI.C.

[259] 457 A.2d 701 (Del. 1983); see also infra IV.C.

now only if a company is not subject to the Takeover Directive.[260] Specific provisions for squeeze-out in a takeover situation were newly introduced in Cyprus, Czech Republic, Germany, Greece, Luxembourg, Slovakia and Spain to transpose the Takeover Directive.[261] In line with the TOD's general rule,[262] most Member States introduced a 90 per cent threshold for both sell-out and squeeze-out.[263] Some Member States (Belgium, France, Germany, Italy, Luxembourg, Netherlands, Poland and Slovakia) introduced a 95 per cent requirement for at least some squeeze-outs.[264] Art. 15 TOD does not hinder Member States from implementing several squeeze-out rules in national law. Frequently, there are also squeeze-out provisions so as to allow consolidation of membership also outside of the takeover context. In Germany, three squeeze-out regimes exist: in the Stock Corporation Act, in the Merger Act and in the Takeover Act. Squeeze-out in Germany was pre-existing in general stock corporation law, then introduced into the Takeover Act in transposing the TOD and later implemented also in the Merger Act. The situation is similar in Poland, with three squeeze-out regimes: for private joint stock companies, for groups of companies in the Code of Commercial Companies and for takeovers in the Act on Public Offerings.

Squeeze-out rights independent from takeover bids[265] are also frequently enacted by Member States for listed companies in other situations, for non-listed companies and for other forms of business associations. Germany enacted its first squeeze-out rule with the German Takeover Act in 2001 in the German Stock Corporation Act,[266] and it introduced squeeze-out and sell-out rights in the takeover situation when transposing the Takeover Directive in 2006. In Austria there is a separate Squeeze-out Act[267] for stock corporations and close corporations; *takeovers are not regulated in the Austrian Takeover Act*.[268] In Germany, there is a threshold of 95 per cent in the Takeover Act, but one of 90 per cent in the Merger Act (UmwG). In the Czech Republic, there is a threshold of 90 per cent in Commercial Code.[269]

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[260] M. Green/K. Ryan, 'Irlelan', in D. Van Gerven (ed.), *Common Legal Framework for Takeover Bids in Europe*, Volume I (Cambridge: Cambridge University Press, 2008), p. 250, no. 10.67.

[261] Assessment Report, 2011, p. 64-66.

[262] Art. 15 (2) (2) TOD.

[263] Assessment Report, 2011, p. 221

[264] Assessment Report, 2011, p. 221.

[265] Assessment Report, 2011, p. 225-226.

[266] Sections 327a-327f German Stock Corporation Act.

[267] Member of a Company Exclusion Act (Gesellschafter-Ausschlussgesetz).

[268] See F. Khol/T. Berghammer, 'Austria', in D. Van Gerven (ed.), *Common Legal Framework for Takeover Bids in Europe*, Volume I (Cambridge: Cambridge University Press, 2008), p. 91.

[269] P. Kasik/V. Pihera, 'Czech Republik', in D. Van Gerven (ed.), *Common Legal Framework for Takeover Bids in Europe*, Volume I (Cambridge: Cambridge University Press, 2008), p. 143, 5.39

In Poland, the Code of Commercial Companies law prescribes a general threshold of 90% (the articles of association can lower it up to 75% for a squeeze-out in a subsidiary belonging to a group of companies) and one of 95% for public companies (in- and outside the takeover context).

B. Sell-out (Art. 16 TOD)

The introduction of a sell-out right was at least in the takeover situation new in Belgium, Cyprus, Czech Republic, Estonia, Germany, Greece, Luxembourg, Netherlands, Slovakia and Spain;[270] or, for example, in Germany it was a novelty as such in company law, since no sell-out rights had been included in the German Stock Corporation Act. The sell-out right is laid down in the German Takeover Act; also in the Czech Republic sell-out is included in the Takeover Act and not in the Commercial Code like squeeze-out.[271] The sell-out right is a protection mechanism for the members (shareholders) and securities holders of the offeree company. In most Member States, it is a specific feature in takeover situations and is seldom provided for outside of takeover-situations.[272] In Poland, the sell-out right applies both in- an and outside the takeover context and was introduced prior to the transposition of the Directive[273]. The Code of Commercial Companies grants a sell-out right to shareholders of private joint stock companies as well as to shareholders of subsidiaries which belong to a group of companies.

C. Other post-takeover issues: incorporating elements of a freeze-out merger?

The playing field for bidders, shareholders, boards and capital market participants is not restricted to the subject matter of the Takeover Directive; rather, it also bears upon other fields of law which interact with explicit takeover regulation. Such interaction may also be decisive for the efficiency of national takeover regimes. The early critique of the European mandatory bid rule as too costly for (hostile) bidders[274] maintains that post-bid rights of the bidder have to be taken into account and might be necessary to provide adequate positions to bidders, shareholders and boards. A recent proposal for the reform of both the German

[270] Assessment Report, 2011, p. 64-66.

[271] P. Kasik/V. Pihera, 'Czech Republik', in D. Van Gerven (ed.), *Common Legal Framework for Takeover Bids in Europe*, Volume I (Cambridge: Cambridge University Press, 2008), p. 143, 5.40

[272] Assessment Report, 2011, p. 226.

[273] Section 83 of the Act on Public Offering.

[274] L. Enriques, 'The Mandatory Bid Rule in the Takeover Directive: Harmonization Without Foundation?' (2004) *European Company and Financial Law Review* 440.

Takeover Act and the Takeover Directive highlights interdependences and the need for benefits following the duty of bidders to issue a mandatory bid.

A leading German practitioner[275] recommends changing Section 39a German Takeover Act (the German takeover squeeze-out) and in parallel the TOD so as to allow the bidder to acquire all outstanding shares after acquiring 75 per cent of the shares at the fair price according to the TOD.[276] That would allow a one-step post-bid approach for such takeovers. Until now – and based on German Konzernrecht and the corporate governance system – after a successful takeover, a bidder which has acquired at least 75 per cent of the shares enters into an inter-company agreement (control agreement combined with a profit and loss absorption agreement), which is typically followed by a delisting of the target company and a squeeze-out of the remaining outside shareholders if one of the thresholds (at least 90 per cent) is reached. A better approach might be to have this occur in one step.

Facilitating a post-bid squeeze-out of up to 24.99 per cent of the shares would create more favourable circumstances for bidders. However, taking the argument of a transatlantic level playing field serious, one has to admit that even such a rule falls short of Weinberger v. UOP.[277] Furthermore, it also sets harder hurdles than German Konzernrecht for an inter-company agreement. Such agreements have to be decided by the general meeting with a majority of three-quarters, but not of the share capital, only of the capital represented at the general meeting. Hence, allowing a squeeze-out with a simple majority of the share capital might be a more adequate means of counterbalancing the mandatory bid and the restrictions of defence measures. Such an approach would allow faster consolidation of acquired companies and therefore set better conditions for European stock corporations, allowing them to obtain leading positions in future technical disruptions and transformations.[278]

VIII. Conclusion and outlook

In transposing the Takeover Directive, Member States – within the framework of the Takeover Directive – had to balance the interests of the different stakeholders and to entrust a

[275] C.H. Seibt, 'Deutschland braucht eine Reform des Übernahmerechts, (2023) *Neue Zeitschrift für Gesellschaftsrecht* 1197.

[276] See also C.A. Krebs, 'Freeze-Out Transactions in Germany and the U.S.: A Comparative Analysis', (2012) 13 *German Law Journal* 941, 978.

[277] 457 A.2d 701 (Del. 1983).

[278] Citing digitalization and the green transposition, see also C.H. Seibt, 'Deutschland braucht eine Reform des Übernahmerechts, (2023) *Neue Zeitschrift für Gesellschaftsrecht* 1197.

body with supervision of the takeover process. Surprisingly, Member States transposed the mandatory bid rule with little variation in the definition of control, with thresholds varying narrowly in nearly all Member States, between 30 per cent and a third. Also concerning the supervisory authority and concerning squeeze-out and sell-out rights, the transposition of the Directive had a harmonizing effect. Therefore, the occasionally encountered opinion that the Takeover Directive was a clear failure is plainly incorrect. However, as a result of Member State discretion in transposing the Directive, the overall picture is mixed and harmonization is far from complete. Vested interests and lobby work were simply too strong. Member States vary not only in their legislative approach concerning the offeree's defence measures, but also in respect of derogations and deviations from the mandatory bid rule.

In order to balance the interests of different stakeholders, the defence measures of the target company are of crucial importance. History shows different and evolving approaches to the board neutrality rule, which was the topic subject to the most heated debated before an agreement on the Takeover Directive could be reached. While in the late 1990s the board neutrality rule was dominant on the continent, Germany, France and Italy – the largest economies – altered their takeover regimes and now favour a more flexible approach, in France and Italy even after the initial transposition of the Takeover Directive. A growing number of Member States later changed their initial transposition of the Takeover Directive's breakthrough rule. But more flexibility should not be confused with a plea for non-binding takeover law; in principle, meaningful takeover law at the European level should be mandatory.[279]

Overall, in transposing the Takeover Directive, a one-stop approach is not suitable and ongoing monitoring is needed to provide an effective national takeover regime. In assessing the current legal regime, there might be a case for rebalancing the facilitation of business opportunities and the protection of outside shareholders, at least at the level of Member State laws. US companies can conduct freeze-out mergers with a simple majority. If European innovators are to find an equal playing field in the European Union, post-bid integration has to be de-bureaucratized considerably. The framework Directive gives discretion the Member

[279] K.J. Hopt, 'European Takeover Reform of 2012/2013 – Time to Re-examine the Mandatory Bid', (2014) 15 *European Business Organization Law Review* 143 at 162 et seq., with a discussion on the economic objections and refuting the theory of complete autonomy for company statues and general meetings of shareholders.

States and allows ongoing adaptions to current developments, yet it also may be subject to a revision initially postponed in the 2010s.

In a future reform of the Takeover Directive, the focus should remain not solely on the legal and regulatory problems discussed so far, such as the mandatory bid and the board neutrality rule; instead it should also be realized and taken into account that the markets for corporate control have changed dramatically since the 2010s, certainly in Germany but also over the Continent.[280] Today shareholder activism, ETFs and passive funds that are incapable of tendering the shares of the target company during the offer period have a significant impact. Mandatory takeover bids have become rare; usually voluntary takeover bids take place in which the bidder and the board of the target company agree on modalities later presented to the shareholders. This increasingly leads to a serious danger of conflicts of interest and insider dealing. Most economically important takeover transactions are P2P transactions aimed at taking the target company private. The consequence is a further reduction of listings with problems for the stock exchanges. Private equity plays an ever increasing role in the transactions. The takeovers take much longer than formerly, up to 12 months, due to various regulatory agencies and proceedings involved. Addressing these problems might lead to a rather different regulatory landscape both in Europe and in the Member States as well as in the United Kingdom.[281]

[280] Seibt, 10 Theses on German Takeover Practice, lecture given at the Max Planck Institute for Comparative and International Private Law in Hamburg in March 2024.

[281] See also P. Davies/K.J. Hopt/W.G. Ringe, ‘Control Transactions’ (Oxford: Oxford University Press 2017), ch. 8.5, in particular concerning the different regulatory environments, political economy considerations and regulatory uncertainty.

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