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The Defensive Measures Provisions of the Takeover Directive: From Ambition to Resignation to Distrust

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Abstract

This paper examines the defensive measures provisions of the EU Takeover Directive of 2004 in the light of the changing policy orientation of both the EU Commission and the Member States towards the role of takeovers in relation to industrial policy. It is part of a series marking the 20th anniversary of the Takeover Bids Directive and put together.by the European Company Law Experts (ECLE) Group (https://europeancompanylawexperts.wordpress.com). For useful feedback we would like to thank participants in the ECLE Workshop "Twenty Years of the Takeover Directive," Stockholm, October 12-13, 2023. In a first part, the paper analyses the history of the Directive from its adoption to the present day, in three phases. In the first phase the Commission had high expectations about the role of takeovers, especially those unwelcome to incumbent management, in promoting both the integration of the Single Market and the overall competitiveness of EU companies in relation to the rest of the world. When, therefore, it proved impossible to secure Member State acceptance of the Board Neutrality Rule (BNR) and the Breakthrough Rule (BTR) except on an optional basis, the reaction of the Commission was one of extreme disappointment, as the initial exercise by the Member States of their options fell short of the Commission's vision. The Commission promised to return to the issue at an early moment. However, it never did so. The disagreements among the Member States on the value of hostile takeovers continued and so the Commission's attitude of disappointment turned to one of resignation and acceptance that the optional arrangements of the Directive were not realistically open to re-negotiation. However, in principle the Commission retained its view of the value of unwanted takeover bids for the promotion of industrial policy. In a third phase, the Commission developed a mistrust of this value, as demonstrated by its adoption of policies which hindered the contestability of corporate control, such as the promotion of dual class shares and greater public interest scrutiny of proposed takeovers. These changes reflected similar moves at Member State level, for example, in France, where the initial BNR was removed and tenure voting rights made a default from which companies needed to opt out. In the second part, the paper analyses the significance of the Commission's failure to meet its goals. First, the paper examines the arguments that the BNR is trivial because other mechanisms operate effectively to require shareholder consent for defensive measures, ie the BNR is unnecessary. This argument can be based on the provisions of general corporate law or on shareholder structure. The paper rejects the argument based on general corporate law. The argument based on shareholder structure has greater salience, but it also demonstrates the limitations of the BNR. A controlling shareholder position constrains managerial autonomy but does not necessarily make control of the company more contestable, if private benefits of control are not tightly regulated. Second, the paper analyses the argument that the BNR is (or would be) ineffective because, in the light of failure of Member States to implement the BTR, effective pre-defences will be available to potential targets. There is substantial weight in this argument, though the weight varies from Member State to Member State. Moreover, recent developments at both EU and Member State level have strengthened it, especially when coupled with greater freedom for companies to reincorporate into states friendly towards pre-bid defences.

Keywords: European Takeover Bids Directive, Board Neutrality Rule, Breakthrough Rule, Pre-bid Defences, Reincorporation, Contestability of Control

JEL Classifications: K22, L52, O25, P48

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In the second part, the paper analyses the significance of the Commission's failure to meet its goals. First, the paper examines the arguments that the BNR is trivial because other mechanisms operate effectively to require shareholder consent for defensive measures, ie the BNR is unnecessary. This argument can be based on the provisions of general corporate law or on shareholder structure. The paper rejects the argument based on general corporate law. The argument based on shareholder structure has greater salience, but it also demonstrates the limitations of the BNR. A controlling shareholder position constrains managerial autonomy but does not necessarily make control of the company more contestable, if private benefits of control are not tightly regulated.

Second, the paper analyses the argument that the BNR is (or would be) ineffective because, in the light of failure of Member States to implement the BTR, effective pre-defences will be available to potential targets. There is substantial weight in this argument, though the weight varies from Member State to Member State. Moreover, recent developments at both EU and Member State level have strengthened it, especially when coupled with greater freedom for companies to reincorporate into states friendly towards pre-bid defences.

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I. The Failure of the Ban on Defensive Measures at EU Level

When the Commission in 2007 came to review the implementation of the Takeover Directive,[1] which had been adopted finally in 2004, it was upbeat about the economic benefits to be gained from a free market in corporate control. Its first sentence stated: "The long-awaited Takeover Bids Directive – the result of more than 20 years of work – was intended to be one of the main pillars of the economic reform boosting Europe's competitiveness." It endorsed both the disciplinary benefits of the threat of takeovers (keeping management up to the mark) and the scale-enhancing value of actual takeovers. A free market in corporate control would promote both the creation of the single European market and the competitiveness of European companies in the wider global markets. In highly positive introductory paragraphs, it put the argument as follows:

> The Commission's proposal was based on the assumption that takeovers offer a number of benefits for companies, investors and ultimately for the European economy as a whole. Takeovers may be efficient drivers of value creation. They facilitate corporate restructuring and consolidation and provide a means for companies to achieve an optimal scale, a precondition for competing effectively on an integrated European market as well as on the global market. They help in disseminating good management practices and technology, and thus improve the quality of management and corporate performance. Furthermore, takeovers discipline management and stimulate competition. Such transactions are also beneficial for investors, allowing them to obtain a better return on their investments.
>
> The aim of the Commission's proposal was to help exploit such benefits at European level and to promote integration of European capital markets by creating favourable conditions for the emergence of a European market for corporate control: efficient takeover mechanisms, a common regulatory framework and strong rights for shareholders, including minority shareholders.[2]

Although a footnote[3] acknowledged that these benefits could not be claimed for every single takeover, the balance of advantage was presented as being overwhelmingly in favour of the market for corporate control, for "in the long run, takeover facilitation is in the best interests of all stakeholders and the company". In so doing, the Commission largely adopted the

[1] Commission Staff Working Document, *Report on the implementation of the Directive on Takeover Bids*, SEC(2007) 268.
[2] Ibid 1.1.
[3] Ibid fn 2.

arguments developed by the High Level Group of Company Law Experts, which it had asked to produce a report to shed light on issues related to pan-European rules for takeover bids and subsequently on key priorities for modernising company law in the European Union.[4]

Turning to the implementation of this vision as far as company law was concerned, what was needed was "the removal of some of the main company-related obstacles permitted under national company law" and the "key" provisions[5] of the Directive to achieve this, were the board neutrality rule (BNR) and the breakthrough rule (BTR). The former would prevent the management from using its powers to discourage the bidder from putting its offer to the shareholders or the shareholders from considering it on its merits unless the shareholders themselves agreed to these steps; the latter would prevent the distortion of shareholder voting in relation to takeovers through departures from the "one share, one vote" (OSOV) principle. In other words, the Directive aimed at creating a level playing field for takeover bids guided by the two overarching principles of shareholder decision-making and of proportionality between risk-bearing capital and control.[6] On the one hand, Article 9 of the Directive, setting the "obligations of the board of the offeree company", provides that, during the takeover bid period, "the board of the offeree company shall obtain the prior authorisation of the general meeting of shareholders given for this purpose before taking any action, other than seeking alternative bids, which may result in the frustration of the bid and in particular before issuing any shares which may result in a lasting impediment to the offeror's acquiring control of the offeree company". On the other hand, Article 11 makes bylaw and contractual restrictions on the transfer of securities and departures from OSOV unenforceable against a bidder seeking acceptances from the target's shareholders or facing a resolution in the target's shareholder meeting to permit target management to take defensive action, and automatically dismantles these defences, as well as those concerning the appointment or dismissal of members of the board of directors or management board, when the bidder comes to hold after a successful bid the number of securities that would enableit to amend the target company's articles of association if OSOV applied.

One notable feature of the rationale articulated in the Commission's 2007 review is its movement beyond the traditional goals of harmonisation of national laws and the protection of shareholders (though those elements are clearly there) to embrace the broader goals of enhancing the efficiency of European industry. The many draft versions of the Directive and, indeed, the Directive itself referred only to the traditional rationales,[7] as was perhaps appropriate for a Directive proposed under Art 44(2)(g) EC (now Art 50(2)(g) TFEU). However, from an early stage there was some positive reference to the economic benefits of takeovers. Thus, the Explanatory Memorandum to Commission's proposal of 1995, which eventually led to the adopted Directive, stated that "takeovers may be viewed in a positive light

[4] Report of the High Level Group of Company Law Experts on Issues Related to Takeover Bids, Brussels, 10 Jan. 2002: "In the light of available economic evidence the Group holds the view that the availability of a mechanism for takeover bids is basically beneficial. Takeovers are a means to create wealth by exploiting synergies and to discipline the management of listed companies with dispersed ownership, which in the long term is in the best interests of all stakeholders, and society at large".
[5] Ibid 1.1.
[6] Report of the High Level Group of Company Law Experts on Issues Related to Takeover Bids, op. cit.
[7] Directive 2004/25/EC, Preamble (1); and generally N Moloney, *EC Securities Regulation*, 1st ed 2002, p 819.

in so far as they contribute to the expansion and reconstruction of European companies, which indispensable in order to meet international competition".[8] By the time the Takeover Directive was adopted, however, the broader rationale had become predominant in the Commission's eyes, so that the Directive was indeed regarded as one of the "the main pillars of the economic reform boosting Europe's competitiveness".

Jonathan Rickford, a member of the Commission's High Level Group of Company Law Experts,[9] writing in a personal capacity in 2004,[10] attributed this shift in the hierarchy of rationales underlying the Directive to the decisions taken at the European Council meeting in Lisbon in early 2000. In the Presidency's Conclusions of that meeting, making "rapid progress on the long-standing proposals on takeover bids" was identified as one of four steps to be taken to "accelerate completion of the internal market for financial services".[11] In Rickford's analysis, "Restructuring EU industry, flexible redeployment of resources within the Union and the openness of financial markets and reduction of the costs of capital demanded regulation of the market in corporate control" so as make takeover transactions "free from interference by self-interested company management and by member state governments animated by a desire to maintain local national control of corporate resources". Given this expansion of rationale, it is not surprising that the Directive, which began life in 1995[12] as a proposal for a 13th Directive in the company law harmonisation series, had lost that affiliation when a revised version of it was proposed by the Commission in 2002.[13]

In contrast to the ambitious description of the Directive's aims, the implementation Working Document was downbeat about the Directive's actual achievements in relation to its "key" provisions. The lack of a political majority on the issue of reducing the defensive capacity of companies targeted by a hostile bid was one of the main stumbling blocks preventing the European Parliament from adopting the European Commission's ambitious proposal in July 2001. Such was the Commission's disappointment with the ultimate proposal of the Council that it almost gave up the whole text, with the European Commissioner for the Internal Market declaring that the proposal, stripped of its imperative content on anti-takeover defences, was no longer worth the paper it was written on. Agreement among the Member States could be reached only on the basis of a last-minute compromise, first proposed by Portugal and then taken up by the Italian Presidency, watering down the board neutrality and breakthrough rules. Through a complex system of so-called optional arrangements (Article 12), Member states were permitted not to require companies incorporated in their jurisdictions to comply with these provisions, although states were required to give companies the power to opt into these

[8] COM/95/0655 final, Explanatory Memorandum, para 6.
[9] See its Report on a Modern Regulatory Framework for Company Law in Europe, 2002.
[10] Jonathan Rickford, "The Emerging European Takeover Law from a British Perspective" [2004] *European Business Law Review* 1379. The quotations below are from p 1380.
[11] Lisbon European Council 23 and 24 March 2000, *Presidency Conclusions*, para 21 (available at www.europarl.europa.eu/summits/lis1_en.htm). *Adde*, Report of the High Level Group of Company Law Experts on Issues Related to Takeover Bids, op. cit.: "An important goal of the European Union is to create an integrated capital market in the Union by 2005. The regulation of takeover bids is a key element of such an integrated market".
[12] Above n 8.
[13] COM (2002) 534 final.

provisions by a shareholder vote, where the Member State had not made them mandatory.[14] Moreover, a Member State could choose to make available to an opting in company a further option, i.e. to relieve the company from the operation of the BNR and BTR if the bidder (inevitably from another state) was not subject to the relevant provision (or its equivalent) - the so-called "reciprocity" exception.[15]

II. The Directive's Immediate Impact

The upshot of the above developments in the EU's legislative process was, as the Working Document put it, that "the ultimate impact of the Directive therefore depends largely on the modalities of its implementation in the Member States and on the extent to which they will use the exemption provided for in the Directive".[16] So, what did the Member States actually do?

According to the data collected by Davies, Schuster and Von der Walle,[17] 16 of the 27 member states surveyed (which included the UK at that time) had an unqualified[18] BNR before the Directive was adopted, some adopting it during the long period during which the Directive was under negotiation.[19] Only one of these member states (Hungary) took advantage of the Directive's final outcome to remove entirely a previously unqualified BNR. Of the remaining 15, 9 member states had an unqualified BNR in place both before and after the adoption of the Directive, i.e. they did not make use of the freedom given by the Directive to downgrade their commitment to target management passivity. These were: Austria, Bulgaria, Czech Republic, Estonia, Ireland, Lithuania, Slovakia, Sweden and the United Kingdom.

However, the six states which downgraded their BNR to some degree were almost counterbalanced by five member states (Cyprus, Finland, Latvia, Malta and Romania) which introduced an unqualified BNR after the adoption of the Directive.[20] This does not look like a major reduction, overall, in the defensive orientation of the member states. On paper, the Directive could even appear as a move in a bidder friendly direction since all member states were now required to offer their companies the possibility to opt into the BNR. Practically, however, such opting back by companies is unheard of, since the option was designed in such a way as to place the burden of action on those proposing to opt back in (ie in most cases against the wishes of the incumbent management).

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[14] Takeover Directive Art 12.

[15] Art 12.3. In fact, Member States interpreted this permission more broadly. See text attached to n 22 and 25 below.

[16] Above n 1, 1.1.

[17] P Davies, E Schuster and E van de Walle de Ghelcke, *The Takeover Directive as a Protectionist Tool ?* ECGI Law Working Paper 141/2010, Table 2.

[18] That is, one without the reciprocity exception.

[19] Ironically, the impact of the Directive might have been greater had the Commission dropped its proposal rather than accepted the optional arrangements and the reciprocity exception, proposed at the end of the legislative process in order to secure the necessary level of Member State agreement. The states with newly introduced BNRs might have stuck with them and those with long-standing BNRs might not have introduced the reciprocity exception because its legality was still in doubt.

[20] No member state seems to have move from no BNR to a BNR subject to the reciprocity exception.

However, the position looks less good from the Commission's point of view when one considers the uptake by member states of the newly legitimised reciprocity exception. This exception was aimed particularly at out-of-state bidders (but not necessarily from outside the EU) and was thus likely to undermine the integrationist objectives of the Commission's initial proposals. The Commission's view was that the reciprocity exception "may hold back the emergence of an active takeover market, as opposed to the original objective of the Directive".[21] Five member states, including two major economies, moved from an unqualified BNR beforehand to one incorporating a reciprocity exception afterwards: France, Greece, Portugal, Slovenia and Spain. At least for out-of-state bidders this was a potentially significant change for the worse. Moreover, most Member States which made use of the so-called "reciprocity" exception did not confine it to situations where companies chose to opt back into the BNR but made it available also in cases where the BNR was mandatory. This was the case, notably, in France, where concerns were voiced as to the validity of this decision on the grounds either that national law contravened the provisions of Article 12 of the Directive, or because the broader interpretation of the availability of the reciprocity exception contravened the provisions of the Treaty on the free movement of capital in Europe. However, France was not alone in adopting this interpretation of the Directive.[22]

In fact, in those Member States which showed interest in it, the dominant interpretation was the French one, so that the reciprocity exception was interpreted as being generally available to Member States. Some people thought this provision, as broadly interpreted, would encourage countries (both within and without the EU) to adopt the board neutrality and breakthrough rules, in order to make it easier for their companies to make foreign acquisitions, but there is no evidence that the reciprocity option had this impact.

Furthermore, the central failing of the Directive from the Commission's point of view was its failure to secure a BNR across the EU. Thus, 5 states did not have a BNR before the Directive was adopted and remained in that position afterwards. These were Belgium, Denmark, Germany, Luxembourg and Poland – a significant group of countries, including the EU's largest economy. As to the BTR, this turned out to be a complete failure. No member state appears to have adopted it entirely, even those, such as the UK, which remained committed to an unqualified BNR. This is surprising, since the presence of an unqualified BNR would seem to provide potential target companies with strong incentives to put in place pre-bid defences.[23]

The mix of options available to Member States and national companies, outlined above, appears as an unprecedented way of conceiving European law applicable to companies, a sign of the defeat of top-down harmonisation, leaving the last hope of harmonisation to the goodwill of member states and/or companies, navigating the constraints of market forces.

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[21] Above n 1, 2.1.3.

[22] See not. A. Maréchal, A. Pietrancosta, *Transposition de la directive OPA : des incertitudes entourant le recours à la "clause de réciprocité"*, Lexbase Hebdo n° 189, 10 nov. 2005 et Bull. Joly Bourse, 2005.797 § 203 ; *adde*, J. Winter, "EU Company Law at the Cross-Roads" in G. Ferrarini, K.J. Hopt, J. Winter and E. Wymeersch (eds.), *Reforming Company Law and Takeover Law in Europe*, 2004, 17 et s.; P. Werdmuller, "Compatibility of the EU Takeover Bid Directive Reciprocity Rule with EU Free Movement Rules", *Business Law Review*, Mars 2006, p. 64. Other states which adopted the same approach were Greece, Portugal, Slovakia and Slovenia.

[23] We discuss the BTR in more detail in §IV.B below.

Retrospectively, the EC's proposed ban on defensive measures appears paradoxically limited and overly optimistic. Limited in scope, because only the defences activated during the takeover period were strongly controlled, leaving out of reach the very many and varied defences operating ex-ante, in a dissuasive mode. Overly optimistic, because of underestimation of national resistance, linked to the variety of national rights, cultures and ethos.[24] A dramatic example of this type of resistance was the successful opposition in 2001 of German MEPs, essentially organised by the German government, to the then version of Takeover Directive on the grounds that it contained a mandatory BNR. The result of the European Parliament vote was a breach of convention, because the text on which the Parliament was voting had been agreed in the conciliation procedure between Council and Parliament representatives, i.e. at the very end of the Union's legislative process, and the convention was that the Parliament as a whole supported the compromise agreed by its representatives.[25] The underlying reason for this sudden change of position on the part of Germany was the hostile bid for the German company Mannesmann launched by the British bidder Vodafone in 1999 and successfully completed in the following year and fears that more hostile bids would succeed, despite the dominance of controlling shareholders in large German companies.

III. The Longer-Term

Potentially as important as the immediate transposition failings, the Directive failed to secure a guarantee that controls over defensive measures, as they existed once member states had implemented the Directive, would not be weakened in the future. On the contrary, the options to introduce the reciprocity exception or remove the BNR entirely were not, according to the Directive, time-limited choices which member states had to make within a specific period after the Directive was adopted by the EU. Those options continued to be available to member states into the indefinite future. France made use of them so as to move in stages from its pre-Directive position of having an unqualified BNR, through the introduction of the reciprocity exception, to abandonment of the BNR. At the end of the day, therefore, the two largest economies in the EU, Germany and France, ended up with no BNR, even of a qualified type.

In France, as a result of the initial transposition law no. 2006-387 of 31 March 2006, the choice was made to apply the provisions of Article 9 of the Directive on a mandatory basis, but with an exception for reciprocity.[26] To give substance to this reciprocity exception, the French legislator decided to authorise expressly the issue of share warrants ("bons de souscription d'actions" or "BSA") by the board of directors or the management board. Such board action was conditional on a delegation of authority from an extraordinary general meeting of shareholders, acting, however, under the more lenient conditions of quorum and majority of an ordinary general meeting, given within the 18 months preceding the filing of the offer. These

[24] See J. Mukwiri, "The End of History for the Board Neutrality Rule in the EU" (2020) 21 *European Business Organization Law Review* 253.

[25] This episode is described in Vanessa Edwards, "The Directive on Takeover Bids: Not Worth the Paper it's Written On?" (2004) 1 *European Company and Financial Law Review* 426-7.

[26] See A. Pietrancosta, "Loi n° 2006-387 du 31 mars 2006 relative aux offres publiques d'acquisition : des « options » françaises", RTDF, n° 1, juin 2006, p. 5.

so-called "offer warrants", "dilutive warrants", "patriotic warrants" or "Breton warrants" were inspired by the famous "shareholder rights plans", colloquially known as "poison pills", developed and widely used across the Atlantic. Essentially, by threatening a considerable dilution of its financial and voting stake, which would result from the exercise of share warrants at a knock-down price, the aim is to force the bidder to negotiate the terms of its takeover bid with the management of the target company. The French defence differs significantly from the American model, in particular because of its legislative, rather than judicial, origin; because of the ex ante decision power given to the shareholders' meeting rather than exclusively to the board of directors; and because of its active principle, which is not based on the immediate issue of stock options to shareholders as dividends nor on discrimination against the would-be bidder.

The real break, however, came with Law 2014-384 of 29 March 2014, known as the "Florange" Act.[27] Reversing the initial decision to transpose Article 9 of the Directive, it abolished the special limit on the defensive powers of directors, arising out of the need for them to obtain the prior authorisation of the general meeting of shareholders before taking any action likely to frustrate the bid. Introduced by a simple parliamentary amendment, which also dispensed with the need for any impact analysis, this reform, which took France further away from the European standard, was driven by the desire of its promoters to protect French companies, notably strategic ones, from foreign appetites. Such companies were seen as "particularly vulnerable to unsolicited takeovers such as hostile or creeping takeovers" because of their "fragmented capital and low stock market valuation". More generally, the promoters of this reversal displayed a certain mistrust towards the benefits of the takeover mechanism itself, which would favour shareholders' short-termism and be "harmful to employment and the development of our industry."[28] They clearly defended an orientation towards another path, more proactive and engaged, more interventionist and overtly "patriotic", that the recent financial crisis had helped fuel.[29] Parliamentary work insisted indeed on the need to fight against French deindustrialization, caused by the prominence of finance over the real economy; to end the "*diktat of financial performance*", which forces managers "*to focus on today's dividends rather than tomorrow's investments, jobs and exports*". This political orientation reflected the promoters' simplistic state of mind and limited knowledge of the field, where the complexity of the matter should, on the contrary, lead to a more politically agnostic approach.[30]

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[27] See A. Pietrancosta, "The latest reform of French takeover law: the 'Florange' act of March 29, 2014" , RTDF, 2014/3, p. 42.

[28] *Rapport n° 1283 de la Commission des affaires économiques sur la proposition de loi visant à redonner des perspectives à l'économie réelle et à l'emploi industriel (n° 1037) par C. Valter* enregistré le 17 juillet 2013, p. 24.

[29] See *e.g. Investir dans l'avenir, Une politique globale de compétitivité pour la France* , rapport de MM. Louis Schweitzer et Olivier Ferrand, Fondation Terra Nova, juillet 2012 ; Rapport d'information n° 737 de MM. Jean-Michel Clément et Philippe Houillon, déposé en conclusion des travaux de la mission d'information sur la transparence de la gouvernance des grandes entreprises, en février 2013 ; Louis Gallois, *Pacte pour la compétitivité de l'industrie française, Rapport au Premier ministre*, 5 nov. 2012; Jean-Louis Beffa, *La France doit agir*, Seuil, 2013.

[30] See *e.g.* J. M. Fried, "The uneasy case for favoring long-term shareholders" (2015) 124 *Yale L J* 1346; Lucian Bebchuk, Alon Brav, Wei Jiang, "The Long-Term Effects of Hedge Fund Activism" (2015) 115 *Columbia Law Review* 1085; Francois Brochet, George Serafeim, Maria Loumioti, "Short-Termism: Don't Blame Investors" (2012) 90 *Harvard Business Review* no. 6, June 2012; Woochan Kim, "Value of Shareholder Activism: Evidence from the Switchers" (2009) 15 *Journal of Corporate Finance* 505; Alexandre Allegret-Pilot, "Should long-term shareholders be favored?" Université Paris 1, Mémoire Master2 Droit financier, June 2014. On takeover law

In addition, this revised policy legitimised a series of additional restrictive provisions, of which probably the most important was the setting of a default rule of double voting rights for all shares listed on a regulated market, that are fully paid and registered in the name of the same shareholder for at least two years without discontinuity (tenure voting rights).

However, if the board of directors – or, in a two tier-board system, the management board, after authorization of the supervisory board – of a target company is therefore relieved of the specific obligation not to take decisions aimed at frustrating the offer without prior shareholder approval, this defensive power is not without its limits. First, its use is limited where the law confers exclusive authority of the general meeting of shareholders. It follows, primarily, that the target board of directors may not, on its own, take the initiative of modifying the articles of association. In addition to the exclusive authority provided by law, the general meeting of shareholders may find itself empowered by way of soft law, especially when it comes to fundamental changes in the company. The most important example results from the AFEP-MEDEF French corporate governance code that, following an invitation of the French securities regulator,[31] recommends consultation of the shareholders' meeting before a disposal is contemplated, in one or more transactions, concerning at least half of the company's assets (Article 6.4).

The second general limitation comes from the requirement that the use of defensive measure does not hurt the corporation's interest. Since defensive measures may be designed to make the target company less attractive to the bidder, this explicit reminder of the necessary compliance with the interest of the company is quite understandable, even if such compliance is mandated for all corporate decisions. In a takeover context, this reservation was in fact imposed by the Directive, which establishes as a guiding principle the obligation for "the board of the offeree company" to "act in the interests of the company as a whole".[32] The "PACTE law" of 22 May 2019 confirmed this general requirement, which is now enshrined at the heart of company law, in article 1833 of the French Civil Code, which states that: "The company is managed in its corporate interest, taking into consideration the social and environmental stakes linked to its business". The only problem - and it is a major one - is the lack of legal certainty concerning the substantive content of the company interest concept,[33] aggravated by the PACTE Act.

In addition to these limitations laid down in French corporate law, one should take into consideration limitations provided for in French securities regulation. There comes immediately to mind the general principle referred to in Article 231-3 of the AMF General Regulation, according to which: "To allow an offer to be conducted in an orderly fashion in the best interests of investors and the market, the parties concerned shall respect the principles of free interplay of offers and counter-offers, equal treatment and information for all holders of the securities of the persons concerned by the offer, market transparency and integrity, and fairness of transactions and competition." The AMF decided not to repeal this principle despite the Florange Act, as it views it as the implementation of Article 3.1.c of the TOD, providing that "the board of an offeree company must act in the interests of the company as a whole and

specifically: Luca Enriques, Ronald J. Gilson, Alessio M. Pacces, "The Case for an Unbiased Takeover Law(with an Application to the European Union)" (2014) 4 *Harvard Business Law Review* 85.

[31] AMF, Position-recommandation DOC-2015-05, 15 June 2015.

[32] Dir. OPA, art. 3.1 c). V. A. Pietrancosta et J.-F. Prat, "Offres publiques et droit des sociétés" in *Les offres publiques d'achat*, Litec, 2009, sous la dir. de G. Canivet, D. Martin, N. Molfessis, LexisNexis, Litec, 2009, n° 318.

[33] See previous note and see further the discussion in §IV.A(i) below.

must not deny the holders of securities the opportunity to decide on the merits of the bid". It is not the least interesting aspect of Veolia's takeover bid for Suez that it tested the possibility of invoking these principles to limit the defensive capabilities of a target company.[34] In a public statement issued on 2 April 2021, the AMF rejected the argument that these principles had to be set aside to give full effect to the reversal operated by the Florange Act.[35] It reiterated the authority of these principles and took the view that they were undermined by the combination of defences put in place by the target company, based on the creation of an irrevocable Dutch foundation originally intended to protect certain essential assets, and plans to sell assets to a prospective rival bidder. The AMF's statement led the parties involved to come together and put an end to their legal dispute, so that no judicial response was provided to the question of the articulation between the defensive capacity of the target companies' directors and compliance with the general principles of takeover bids. Nor did this settlement allow us to measure the effectiveness of friendly agreements between companies ("accords d'amicalité"), whereby one of them undertakes in advance not to initiate a takeover bid without the agreement of the target's board of directors. In the Veolia/Suez case, Suez obtained an initial summary judgment prohibiting Veolia from making a bid[36], but this judicial decision was revoked a few days later for lack of territorial jurisdiction[37]. On the substance, what Suez considered to be a genuine friendly agreement was analysed by Veolia as a mere declaration of intent, as such subject to change according to circumstances. In another famous litigious takeover case, Scor and Covea put an end to their dispute by means of a settlement agreement, of 10 June 2021, containing a standstill agreement that forbade Covea to increase its participation in the share capital of Scor and to launch a takeover on Scor's shares. It is currently difficult to measure the practical effectiveness of such a defence, which depends on whether the AMF, as an administrative authority, is able or obliged to prevent a takeover bid prohibited by a private law contract from being initiated.

Both before and after the Florange Act, hostile takeover bids remain relatively infrequent on the Paris stock exchange, although they are not non-existent and give rise to high-profile stock market and legal battles.[38] Between 2010 and 2021, seven transactions have been identified in France, including three between 2015 and 2021. The Florange Act has not led to a proliferation of ex ante defences, however, but undoubtedly increased the threat of post-bid reactive measures,[39] as the Veolia/Suez case has shown.

Despite the removal of the legislative BNR, French companies are free to reintroduce it in their articles of association, but few have done so. When this procedure is used, the reintroduction is carried out on an ad hoc basis in the context of general meeting resolutions relating to delegations of power or authority, stipulating that all or some delegations may not be used

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[34] See Alain Pietrancosta, "Droit des OPA - Affaire Veolia c/ Suez : de la contestation des principes généraux du droit des OPA comme limites aux moyens défensifs des sociétés cibles" *Revue de Droit bancaire et financier* n° 5, Septembre 2021, dossier 25.

[35] *Suez-Veolia : Communication de l'AMF*, 2 avril 2021; *adde, Précisions sur le rôle de l'Autorité des marchés financiers dans le cadre de l'offre publique initiée par Veolia sur Suez*, AMF, 18 mai 2022.

[36] Trib. com. Nanterre, Ord. réf., 8 févr. 2021 RG n° 202100163.

[37] Trib. com. Nanterre, Ord. réf., 23 févr. 2021, RG n° 2021R00167.

[38] See not. Nestlé/Perrier in 1992 ; Auchan/Docks de France in 1996 ; Promodès/Casino-Rallye, Artémis-AGF-Ifil/Worms et Cie Agnelli-Allianz/AGF in 1997 ; BNP/Paribas-Société générale et TotalFina/Elf Aquitaine in 1999 ; Sanofi-Synthelabo/Aventis in 2004 ; Mittal/Arcelor in 2006 ; Eiffage/Sacyr in 2007 ; H. Partners Distribution/Du Pareil au Même, Groupe Open/Sylis ou Gemalto sur Wavecom in 2008 ; SiegCo/Valtech in 2009 ; AS Online Beteiligungs GmbH/SeLoger.com ou Jacquet Metals/IMS in 2010; Gecina/Foncière de Paris in 2016; Vivendi/Gameloft in 2019; Veolia/Suez in 2021.

[39] See O. De Vilmorin et A. Berdou, "Des offres publiques d'acquisition "made in France" ? Retour sur la loi n° 2014-384 du 29 mars 2014 visant à reconquérir l'économie réelle", Dr. sociétés 2014, étude n° 10, spéc. n° 13 ; J. Deege, "Défenses anti-OPA" *Dict. Joly Bourse*, 2020, n° 046.

during the takeover bid period. There has therefore been no increase in the number of authorisations and financial delegations granted by the general meeting to the administrative and management bodies that can be used during a takeover bid. The "bons Breton" have not been very successful. The situation is different where double voting rights are concerned, with many companies electing to revert to a one-share-one-vote system through the articles of association, where a major shareholder (often the French State), which benefits from double voting rights, has not prevented this. The fact remains that double voting rights have increased steadily since 2007 for large listed companies, rising from 58.5% to 73.5% in 2020, although more often than not offset by the introduction of a voting rights cap, which has also risen within the CAC 40 from 16.5% in 2007 to 21.5% in 2020. For non-controlled companies, which are said to represent about two thirds of the listed companies included in the SBF 120 index, the real defences lie elsewhere. While some defences are losing ground, such as multi-listing of shares, aimed at complicating the law applicable to the takeover bids, or transforming the company into a limited partnership with shares ("sociétés en commandite par actions"), which is under attack from outside shareholders, others are making progress, such as contractual change-of-control clauses, employee and "reference" shareholding and, more recently, the possible instrumentalisation of the adoption of "raison d'être" or the "mission company" label.

Italy, also, shows the BNR rules being altered to cope with changing governmental views of the vulnerability of national companies. In Italy, however, the changes occurred during the relatively brief period between 2007 and 2010, after which they have remained stable. The initial choice in 2007 was to maintain pre-Directive BNR, but now with a reciprocity exception, which, following the French example, was viewed as an available choice even where the BNR was mandatory.[40] The credit crisis created concerns at the legislative level that Italian companies were vulnerable to opportunistic bids and the BNR was made optional on an opt-in basis (and the reciprocity option was continued).[41] Under the current law, introduced in 2010, the BNR remains optional but now on an opt-out basis. Thus, the default is that the BNR applies (with the reciprocity option) unless the shareholders decide otherwise. Putting the default this way around (and contrary to the arrangements contemplated in the Directive) makes it more likely the matter will come before the general meeting, given the presence in many Italian companies of management who are beholden to blockholders. In 2011 the Review of the Takeover Directive's implementation commissioned by the EU reported that nine companies had opted out of the default rule, including two substantial ones, Fiat SpA and Banca Carige SpA.[42]

IV. Does it Matter?

The above argument has been that the implementation of the provisions of the Directive on takeover defences did not achieve the objectives the Commission had for them and subsequent

[40] Article 104 Consolidated Financial Services Act No. 58 of 1998 (CFSA) (2007 version)

[41] Articles 104 (1), 104*bis* and 104*ter* CFSA (2008 version).

[42] CEPS, European Commission, Marccus Partners, *The Takeover Bids Directive: an Assessment Report*, 2011, p 190.

developments at Member State level have moved national laws further away from those objectives. Despite this limited impact of its key provisions – and the statement (even threat) in the implementation review that "the Commission will analyse the reasons why Member States are so reluctant to endorse the fundamental rules of the Directive" and that "in the light of this evaluation, the revision of the Directive scheduled for 2011 may, if necessary, be brought forward."[43] –, the Commission apparently decided not to grasp this nettle again. When the (non-accelerated) Review of the Directive was published in 2011, it concluded that "the debates that led to the optionality of Articles 9 and 11 of the Directive have not faded away. There is no clear consensus on how to move on the optionality and reciprocity issues and, generally speaking, there seems to be little appetite to change these rules."[44] And, since then, the Commission has been content to leave the options in place.[45] In Brussels, disappointment thus made way to resignation.

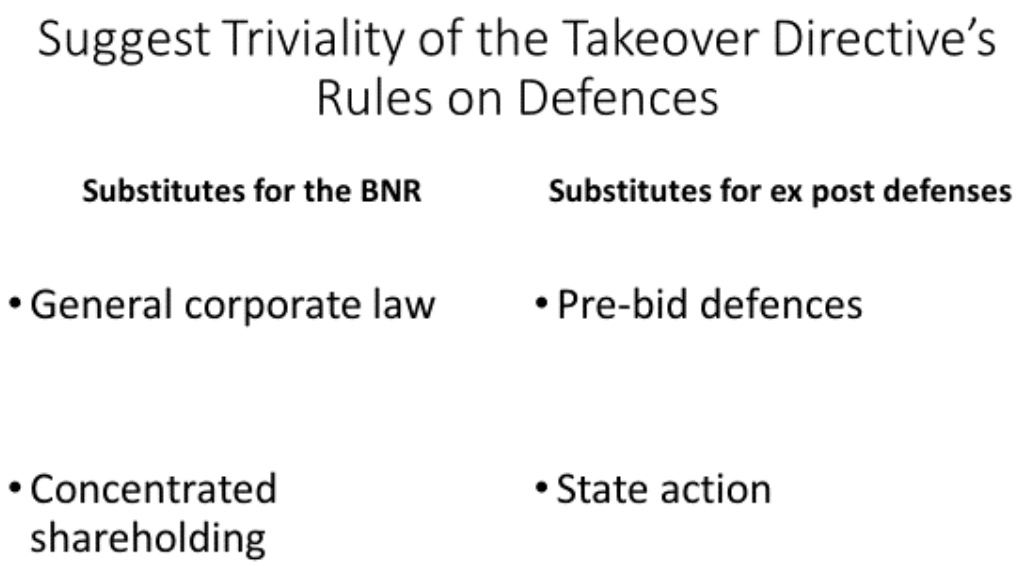
Is the resulting situation a matter for concern from the point of view of the objectives of the Commission? There are two types of argument which can be advanced as to why the BNR is not an important provision, though these two types operate in very different ways. The first set of arguments suggest the BNR is unimportant because other mechanisms exist which perform the same function. This first set of arguments contains two sub-arguments, which are not mutually exclusive. One sub-argument refers to legal rules which, it is suggested, perform the same function as the BNR, even if the particular jurisdiction contains no BNR. The second sub-argument bases itself on the shareholder structure in a jurisdiction, arguing that concentrated shareholder structures can act functionally as a BNR.

The second set of arguments suggests that, even in the presence of a BNR, defensive measures are available to target management which the BNR does not catch. This argument also comes in two forms, one referring to the availability of pre-bid defences (so that the BTR is relevant here), the other to restrictions on takeovers which states may impose.

Thus, the first set of arguments proposes that the BNR is *unnecessary*: states which have a BNR do not need it and those which do not need not put one in place. The second set of arguments proposes that the BNR is *ineffective*: states which introduced a BNR have not in fact adopted a rule which significantly constrains target management and those which have not would be wasting legislative time and effort in introducing one. Figure 1 set out the arguments in graphical form.

[43] Working Document (above n 1) *Conclusion*.
[44] *The Takeover Bids Directive Assessment Report*, "Key Takeaways" para 4. The Report is available on op.europa.eu/en/publication-detail/-/publication/67501b75-7583-4b0d-a551-33051d8e27c1. It was carried out for the Commission by a French law firm and the Centre for European Policy Studies.
[45] Commission, *Application of Directive 2004/25/EC on Takeover Bids*, COM(2012) 347 final, para 26.

Figure 1



We consider each set of arguments in turn. In both cases we argue that it is difficult to accept that the substitute mechanisms operate effectively over all EU member states, and will continue to do so, but also that in many member states the defensive measures are currently a matter of limited policy salience.

A. Substitutes for the BNR

(i) General corporate law

The first sub-argument that the BNR is unnecessary turns on an analysis of national corporate law systems which purports to find rules in those systems which do the job of a BNR, whether or not that system contains an explicit BNR.[46] Necessarily, these are rules whose content is different from a BNR – otherwise they could simply be relabelled – but whose operation, either alone or in conjunction with other rules of the national system, require post-bid shareholder approval of defensive measures. Although authors taking this line are correct to point out the importance of analysing the national law constraints on target management in the absence of a BNR, as we have indicated above in relation to France after the *Loi Florange*,[47] and that it is erroneous to suppose that target management can take whatever defensive action they like in

[46] An important example of this style of analysis is C Gerner-Beuerle, D Kershaw and M Solinas, "Is the board neutrality rule trivial? Amnesia about corporate law in European takeover regulation." (2011) 22 *European Business Law Review* 559.
[47] See text attached to nn 31-37.

the absence of a BNR, the strong argument that the BNR adds nothing to national corporate law is impossible to sustain across the EU.

The triviality proposition can be challenged on a number of grounds. Even assuming general corporate law does cover, in one way or another, the same substantive ground as the BNR, the latter may be more effective, for two reasons. The first relates to the *visibility* of the BNR as compared to rules derived from general corporate law. The BNR is a simple rule (a prohibition), which is both general (covering all post-bid defences) and specific (confined to takeovers) whose relevance to and impact on takeover defences is easy to discern.[48] It is likely therefore to have a bigger impact on the decisions of target management and the advice given to boards by their lawyers than national corporate law rules. Relevant national rules are likely to cover only certain defences (for example, rules requiring shareholder consent of share issues) or, if general, not focussed on defensive tactics in the round. For example, the answer to the question of what fiduciary duties permit target management to engage in by way of defensive measures may be far from clear. It has been argued that the BNR is trivial in the UK because the fiduciary duty of directors not to act for an "improper" purpose does the same job. However, there is only one decision,[49] at a low level, in which this doctrine was applied to defensive measures before the general law was overtaken by the BNR embodied in the UK Takeover Code. To be sure, the court held the defensive measure (issuance of new shares) to be void in that case, but this was an example of a non-coercive bid where there was a strong suggestion of managerial entrenchment. How a future court would have applied the improper purposes doctrine where the bid was coercive and/or the directors acted to promote a stakeholder value is anybody's guess.[50]

In Germany, which has not adopted the BNR and which does not insist on shareholder primacy and where a number of defensive measures explicitly require at least ex ante shareholder approval, the argument that the BNR is unnecessary across the board raises an unsettled issue about the scope of a controversial doctrine of German company law. The *Holzmüller*[51] decision of the Germany's highest civil court raises the issue whether shareholder consent is needed in general for defensive measures in Germany, so that the directors cannot take defensive measures unilaterally. Although the German Stock Corporation Act appears to confine shareholder consent to the specific situations identified in that Act,[52] the *Holzmüller* decision

[48] See K.-J. Hopt, 'Takeover Defenses in Europe: A Comparative, Theoretical and Policy Analysis', (2014) 20 *Columbia Journal of European Law* 249. At the margin there may be debates about what the BNR covers but these are not core problems. Neither the UK nor Sweden, with strong BNR, regards the rule as requiring target management to open the books to due diligence investigation by the bidder. In Spain, after some debate, for the target to initiate litigation was held not to fall within the rule, whereas the contrary has been held in the UK (though vigorous participation in regulatory proceedings is acceptable under the UK rules).

[49] *Hogg v Cramphorn* [1967] Ch 254.

[50] For an expanded version of this critique, see P Davies "Control Shifts via Share Acquisition Contracts with Shareholders" in J Gordon and W-G Ringe (eds), *The Oxford Handbook of Corporate Law and Governance*, 2018 at 557-8. That there is some flexibility in the proper purposes doctrine is demonstrated by the later decision in *Gaiman v National Association of Mental Health* [1971] Ch 317 – charitable company permitted to use a provision in its articles of association to require the resignation from membership of Scientologists, who were feared by the incumbent directors to be seeking control.

[51] (1982) BGHZ 83, 122.

[52] Especially § 119 AktG.

creates the risk that any managerial decision of sufficient magnitude will be subject to shareholder approval, even if there is no express legislative requirement to this end. However, *Holzmüller* itself was a decision about a corporate restructuring and its application to takeover defences is uncertain. The fact that the German Takeover Law[53] legitimises supervisory board approval for takeover defences proposed by management might be taken to indicate to the courts that it is not appropriate to add shareholder approval to the statutory scheme through judicial development.

The uncertainty of the law is especially strong in those jurisdictions which do not straightforwardly identify the interests of the company with those of the shareholders. The problem is exacerbated by the trend towards broadening the notion of company interest through references to corporate purpose, social and environmental considerations, or introduction, as in France, of new concepts such as "*raison d'être*" or "*société à mission*".[54] In France, the recent Veolia/Suez takeover case illustrated the difference that can exist between a blunt system of board neutrality and a defensive system only subject to the general limits of managers' powers.[55] The necessary consideration of social and environmental issues, and *a fortiori* of a *raison d'être* or a *mission*, as part of the decision-making process substantially increases the defensive room for manoeuvre of the target company's directors/managers and considerably raises the burden of proof of possible mismanagement for those supporting the bid.

The second reason relates to the *enforcement* of the rules. Breaches of corporate law rules are adjudicated typically by the courts which proceed slowly, especially if appeals are possible, and sometimes conclude long after the circumstances giving rise to the bid have passed. Even if the courts seek to mitigate this problem by developing interlocutory remedies, this may not fully solve the problem of the strategic use of litigation to delay progress on an offer.[56] A bidder may not wish to revive its bid even after the legal position has been clarified in its favour, because the commercial situation has changed against it in the meantime. For example, a shareholder friendly to the target management may have increased its stake in the company substantially. By contrast, Article 4 of the Directive contemplates that the BNR should be enforced by a specialist regulator and one capable of acting quickly, often in real time, and gives Member States a wide freedom to constrain appeals from the takeover regulator to the courts.[57] This means that enforcement of the BNR is likely to be more effective than enforcement of general corporate law, even if the latter covers the same ground as the former.

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[53] §33(1).

[54] See A. Pietrancosta, *Codification in Company Law of General CSR Requirements: Pioneering Recent French Reforms and EU Perspectives*, European Corporate Governance Institute - Law Working Paper No. 639/2022, Available at SSRN: https://ssrn.com/abstract=4083398 or http://dx.doi.org/10.2139/ssrn.4083398.

[55] See above text attached to n 34.

[56] One way of tackling this problem would be to set a maximum time limit for the courts to rule in a takeover context. In France, this method was adopted by Act No. 2014-1662 of 30 December 2014 regarding appeals brought against takeover bid approval decisions, issued by the Autorité des marchés financiers, in order to combat the drift and instrumentalisation of stock market litigation, particularly harmful to the attractiveness of the Paris financial centre (C. mon. fin., art. L. 621-30).

[57] Art 4.5 suggests that real time operation by the regulator is required. The provisions on appeals were designed in particular to protect the modus operandi of the UK Takeover Panel.

Moreover, quite apart from these procedural advantages of the BNR, it is far from clear that, across the EU, general corporate laws always contain rules functionally equivalent to the BNR, so that the presence or absence of a BNR is a significant characteristic of a national corporate law system. In fact, it is clear that some jurisdictions give target management significant leeway to reject an unwelcome bid. This opens up the possibility that companies from other jurisdictions seeking strong takeover defences will reincorporate, through one mechanism or another, in the Member State offering this possibility. A ban of post-bid defensive measures across all Member States, it might be argued, is a precondition for a fully effective BNR in any one State.

The law of the Netherlands, an important jurisdiction for re-incorporations from other EU countries as we see below, has been characterised as follows in relation to defensive measures.

"When faced with any approach or takeover proposal (whether recommended or hostile), the members of the managing board and the supervisory board have to consider the interests of all stakeholders (including all the company's shareholders (including minority shareholders), employees, customers, creditors and banks), and not only the interests of shareholders. The boards should act in accordance with the requirements of reasonableness and fairness towards all stakeholders involved in the target company. . . a Dutch target company that wants to oppose a takeover may choose to use certain defensive measures to reduce the likelihood of a hostile offer being made or being successful. . . Dutch case law suggests that the use of ad hoc defensive measures in the event of a hostile takeover is permitted, provided that the defensive measure is proportional, reasonable and temporary."[58]

In addition, Dutch law has accepted two effective and widespread forms of private ordering which create strong takeover defences. Both are linked to the establishment of a foundation (*Stichting*) whose board – the sole decision-making body of the foundation - is nominally independent of the target company's board but, it is to be anticipated, is well disposed towards the incumbent management. There are two core uses of the foundation. One is to separate the legal ownership of the shares from the economic interest in them by the use of depository receipts, the legal ownership (including voting rights on a hostile bid) being with the foundation and the economic interest with the investors. The second is to give the foundation, in case of the threat of a hostile bid or the arrival of activist shareholders, the right to call for issuance of a class of preference shares by the company.[59] The issue is without a premium and at a low nominal value, but extensive voting rights are attached to the shares, so as to swamp the voting position which the potential acquirer has assembled or might acquire.

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[58] Bonellierede, Bredin Prat, De Brauw, Hengeler Mueller, Slaughter and May, Uría Menéndez, *Guide to Public Takeovers in Europe*, 2016, pp 396, 398. To the same effect, C de Brauw and O Valk, "Netherlands" in A de Araoz (ed), *European Takeovers: the Art of Acquisition*, 3rd ed, 2022, 234-235.

[59] For an analysis of the preference share mechanism see L Chazen and P Werdmuller, *The Dutch Poison Pill: How is it Different from an American Rights Plan?* (available at corpgov.law.harvard.edu/2015/12/01/the-dutch-poison-pill-how-is-it-different-from-an-american-rights-plan/); and for both devices Houthoff, *The Dutch 'Stichting' an Effective and Flexible Tool In Global Structuring*, 2020 (available at www.houthoff.com/-/media/houthoff/publications/pdevries/houthoff-whitepaper---stichting.pdf). The preference share mechanism is a post-bid defence (even if put in place pre-bid) as, it is arguable, is the depositary receipt since the receipt-holder's right to vote is removed only once a hostile bid emerges.

Since in both cases the issuance of shares is involved, the consent of the general meeting is required for the issuance. This may seem to insert the shareholders into the decision-making on defensive measures, in line with the Directive's policy. However, it is doubtful whether ex ante shareholder approval operates as strongly to protect shareholder interests as approval given in the face of a bid. For the depository receipts shareholder approval needs to happen only once, when the shares are issued, and could be given via a clause in the articles inserted before the company came to the market via an IPO. The depository receipts can be publicly traded. For this to happen, voting rights need to be given to the holders of the receipts, but an exception to this requirement exists for hostile bids, where the foundation recovers the voting rights. For the warrants over the preference shares, normally issued only when a threat emerges, the consent of the shareholders is also required, but the shareholders are permitted to delegate the right to issue the shares to the board for periods of five years at a time, as with the French BSA. Again, the initial delegation decision can be given before the company comes to the market, so that the company has an initial protected period of five years – and more if the shareholders are agreeable.[60] It is normally enough to deter the bidder that the call right has been granted to the foundation, i.e. the foundation does not usually need to exercise it. More than half the companies listed in the Netherlands have preference share mechanisms in place.[61]

The main protection for the shareholders is the power of the courts (notably the Enterprise Chamber) to review the board's decisions according to the fiduciary standards described above. As indicated, these standards are favourable from a defensive perspective and there is some doubt about the scope of the Enterprise Chamber's review powers.[62]

We conclude that the Commission was correct to proceed on the basis that, if post-bid shareholder consent for defensive measures is the desired policy objective, incorporating a BNR into EU law would have advanced that policy to a significant extent. This would clearly be the case where national law endorses effective defensive measures, as in the Netherlands. But even where this is not so, leaving the issue to general corporate laws is a second-best policy, because general corporate laws are likely to be less impactful than the BNR and because their substantive coverage cannot be relied on to be comprehensive.

(ii) The argument from shareholder composition

Although the triviality argument, based on the view that general corporate law already prohibits effective defensive measures without shareholder consent, is difficult to accept across the board, it is still possible to argue that an unqualified BNR is of limited interest across the EU because the composition of the shareholder body means that no bid can succeed without shareholder consent irrespective of the presence of a BNR. This is most obviously so where a

[60] Within a group, it may be possible to erect an effective defence based on a foundation at a sub-group level, the requisite shareholder approval being given by the parent company.
[61] H Koster, "Mergers and acquisitions in the Netherlands: do listed companies need better defences?" (2021) 32 *International Company and Commercial Law Review* 166,
[62] For an example of the Chamber's intervention, see the LVMH and Gucci case, analysed by M Schoordijk, "Netherlands: company law – judicial enquiry" (1999) 10(8) ICCLR N59.

company has a de jure controlling shareholder or shareholder group. Moreover, in such a case the disciplinary function of replacing ineffective management is as well able to be discharged by the controlling shareholder as by an outside bidder, while a controlling shareholder can probably bargain effectively with the offeror in a scale-enhancing takeover without any help from specific takeover laws. In jurisdictions where controlling shareholders predominate, therefore, the presence or precise configuration of the BNR may be a matter of little importance. The OECD reports that, as of the end of 2022, in 7 EU member states (Lithuania, Estonia, Italy, Austria, Portugal, Poland and Belgium) at least 40% of listed companies had a single shareholder holding 50% or more of the equity[63] and the percentage where the top three shareholders held 50% or more was, of course, much higher (exceeding 60% in all these cases except Belgium).[64] Germany, France, Hungary and Slovenia were all close to the 40% figure and in all four cases the percentage of companies where the top three shareholders held 50% of the equity was itself in excess of 50%. Spain and Greece both appear as countries where the percentage for top three shareholders (holding 50% or more of the equity) was at or above 40% (with the figure for Greece being more than 70%), while Denmark and the Netherlands fall just below the 40%. To put the matter the other way around, the only EU or former EU member states in the OECD Table which had largely dispersed shareholdings at the end of 2022 were Ireland, Finland and the UK (all with a "top three" percentage of less than 20%).

It is important to be clear that the above statistics give an indication only of the typical level of concentration of shareholdings in a particular jurisdiction. Moreover, the picture is static: the Table itself does not indicate whether the trend in all or some jurisdictions is towards or away from greater concentration.[65] In addition, the Table does not demonstrate that even in highly concentrated jurisdictions there are no widely held companies. Even when control is de facto in the hands of a small group of shareholders, it may be possible for a bidder to prise one or more blockholders from the group and then make a public offer which gains sufficient acceptances to give the bidder legal control of the company. So, takeovers implemented against the wishes of the incumbent management may take place probably at some level in all EU jurisdictions. Such takeovers, even if rare, may have significant political consequences, as we saw above in relation to the takeover of Mannesmann by Vodafone[66] or raise difficult legal issues, as with Veolia's bid for Suez.[67] What can be said is that the prevalence of concentrated shareholdings across the EU reduces the salience of the BNR. If one looks at the takeover from an industrial policy point of view, as the Commission did in its review of the implementation

[63] See OECD *Corporate Governance Factbook 2023*, Figure 1.6. Strictly, from our point of view, the most relevant statistic is the percentage of voting rights held by the largest vote-holder. The Table may under-estimate the position of controllers in jurisdictions where departures from the one share, one vote principle are common. For example, Sweden appears in the Table as a more dispersed jurisdiction than the United States, but this may fail to take account of the widespread use of weighted voting shares in the former country.

[64] The top-three percentage is thought to indicate a situation where coordination of action among the largest shareholders comes at a low cost, so that they act as a unit in the face of a bid. The "top three" number is, of course, a rough proxy. One can easily of situations where the top three are at loggerheads with each other and, by contrast, where coordination is feasible among a bigger number of large shareholders.

[65] See W-G Ringe, "Changing Law and Ownership Patterns in Germany: Corporate Governance and the Erosion of Deutschland AG" (2015) 63 *American Journal of Comparative Law* 493 for evidence of such change in Germany.

[66] Above, text attached to n 25.

[67] Above n 35.

of the Directive,[68] side-lining incumbent management in order to promote takeovers becomes a less plausible policy in the presence of controlling shareholders, because (controlling) shareholders will decide on the takeover, with or without the BNR. In terms of this industrial policy pressing Member States to adopt a BNR is an unrewarding use by the Commission of its political capital or goodwill vis-à-vis the Member States when there are likely to be many alternative calls on that capital. "Resignation" on the part of the Commission in relation to the BNR becomes a rational choice. Instead, the core question becomes what the incentives of controlling shareholders might be to accept takeover offers, in the presence of private benefits of control, both financial and non-financial.[69]

B. Substitutes for post-bid defensive measures

(i) Pre-bid defences

As we have seen above, the argument that a mandatory BNR would give potential target companies a strong incentive to put in place pre-bid measures was recognised only after the unexpected defeat of the Directive in the European Parliament in 2000. The High Level Group of Company Law Experts,[70] to which the matter was referred, took the problem seriously and produced a wide-ranging mechanism to deal with it – the Breakthrough Rule. Before proceeding further, it is worth noting two limitations on the BTR, even in the form proposed by the High Level Group. First, it addressed only (some types of) structural defences and left transactional ex ante defences out of the picture. Moreover, transactional defences are more difficult to challenge under national law than ex post ones. If the pre-bid measure is an aspect of a transaction which has a commercial rationale, it will be more difficult to show that the measure constitutes a breach of duty than with a post-bid measure, where the timing of the transaction may give rise to suspicions. For example, the pre-bid issue of "poison debt" (debt which is repayable on a change of control of the borrowing company) can be presented as a protection for the lender (and, in addition, the issuance of debt, unlike shares, does not normally need shareholder approval). Or a joint venture arrangement (again not a transaction routinely requiring shareholder approval) may give the co-venturer a right to buy out the target company (or to be bought out by it) at a very attractive price if there is a change of control in the target. Of course, in the event, the other party, for commercial reasons, may decide not to exercise its contractual rights, but the prospect of exercise may be enough to deter the bidder or cause it to negotiate extensively with the incumbent management of the target.

Again, the target may hold onto, or acquire, a business which it believes will strengthen the competition arguments against the bidder, if it launches a bid. Or, where the target company sponsors a defined benefit pension scheme, which is in deficit, potential bidders may be put off

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[68] Above n 1.
[69] Below §B(i).
[70] Above n 4. See also J Arlen and E Talley, "Unregulable Defenses and the Perils of Shareholder Choice" (2003) 152 *University of Pennsylvania Law Review* 577.

by the risk of having to make substantial contributions to the scheme in the future. Knowing this, the target may be happy to continue to run the scheme at a deficit.[71]

All the above are transactional pre-bid defences. The opportunity to put one in place cannot be guaranteed to be available at any particular time, though, over time, such opportunities are likely to arise and management fearing a hostile bid is likely to take advantage of them as they present themselves or even seek to generate them. Nevertheless, incumbent management may feel more secure with a permanent, structural defensive arrangement in place, if only because it is likely to less restrictive of management's business freedom. Here one can see the second limitation on the BTR, namely, that its coverage of ex ante structural defences was incomplete. In particular, it did not deal comprehensively with controlling shareholders. This may seem logical since we have noted above that a controlling position is an effective substitute for the BNR so that, to this extent, the aims of the Directive were aligned with controlling positions. However, the issue of controlling shareholders reveals a policy dilemma underlying the Directive. In essence, if the policy is simply to side-line the board in a takeover, a controlling shareholder is a substitute for a BNR, no matter how that controlling position is created. However, if the policy is the more ambitious one of making control contestable, a controlling position raises difficult questions. This is because the controller, benefitting from private benefits of control, both financial and non-financial, may be unwilling to sell that controlling position at a price which is feasible for an efficient bidder, at least where a mandatory bid rule is in place, while sale to a bidder which will "loot" the company is hardly good policy.[72]

In any event, the EU legislator hardly has the political legitimacy to break up controlling positions, where the control is proportionate to the economic interests of the controller, but it could contemplate targeting controlling positions "artificially" created through control enhancing measures (CEMs), which is what the BTR proposal in fact aimed to do. Thus, the BTR emerged as a constraint on CEMs but, as proposed by the High Level Group, only on certain CEMs and, as proposed by the Commission, its range was even narrower. The Commission, fearing Member States would not accept such a deep intrusion into their corporate laws and practices, produced only a watered-down version of the Group's proposals for the legislative process. Confirming the Commission's predictions, even this version pleased none of the Member States, which, when optionality was introduced, were able to give effect to their views by not adopting it. However, in some jurisdictions limited examples of implementation of the breakthrough concept can be found. Spain has a targeted breakthrough rule which removes the cap on voting rights once the bidder has reached a 70% threshold.[73] In France, the stock market authorities have long advocated the suspension of any cap in the articles on shareholders' voting at the first post bid general meeting, in the event that the bidder holds a fraction of the capital or voting rights at least equal to that required to amend the articles of association and up to a limit of 75%, and this was made a requirement with the transposition of the Directive in France.[74]

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[71] "New powers for UK pension watchdog hit dealmaking", *Financial Times*, 27 December, 2021.
[72] Paul Davies, above n 50, ch 21.
[73] 115.2 Ley 3/2023, of 17 March, LMVSI.
[74] AMF General Regulation, art. 231-54.

Nevertheless, these limited occurrences of the breakthrough idea did not remove the significance of the big question generated by the failure of the BTR at EU level. Was it rational to place emphasis on the adoption of a BNR if there were no special restrictions on the adoption of pre-bid defences? To some extent, the answer to the question of whether incumbent management is in a position to take effective pre-bid defensive measures is a reprise of the question in relation to post-bid measures. As with post-bid defensive measures in the absence of a BNR, the scope for action pre-bid depends partly on the applicable legal rules and partly on the market reaction on the part of investors to pre-bid measures and to the financing needs of companies more generally. A notable example of market pressures is the UK whose rules have contained a strong BNR for the last half-century but at the same time are permissive in respect of pre-bid defences.[75] One might have expected in this situation a proliferation of pre-bid defences to have developed in that jurisdiction. They are not non-existent, but the notable feature of the UK position is how few pre-bid defences are routinely adopted. This is generally explained by the reluctance of the institutional shareholders to hold shares in companies which have adopted pre-bid defences, at least defences of a structural character. This explanation is consistent with that given for the presence of the BNR in the Takeover Code, ie the capacity of the institutional shareholders to bring their influence to bear on this non-legislative Code.[76]

As to legal mechanisms, they operate principally by enhancing the voting rights of one sub-set of shareholders or reducing the voting capacity of another set or by hindering the transfer of shares.[77] There are a number of related mechanisms by which this can be achieved. In general, they are mechanisms of private ordering.[78] Resort to them is often not strongly controlled by national law and the tendency since the Directive has been to relax such controls as exist. This is despite the fact that the standard law-and-economics analysis of CEMs is unfavourable to them, on the grounds that they increase the incentives of those whose control depends on CEMs to extract private benefits of control from the company, as compared with OSOV controllers, who have a larger economic stake in the company and thus derive a smaller benefit from benefit extraction.[79] However, contemporary policy analysis is more favourable, emphasising the monitoring benefits of controlling shareholders and suggesting that controllers are less swayed by short-term considerations than dispersed shareholders.[80] We do not need to investigate this debate in depth: the important point is that the swing in policy emphasis reinforces Member

[75] Even the much discussed UK ban on weighted voting shares issued by premium-listing companies was not introduced until 2014 and has been progressively relaxed subsequently.

[76] See P Davies, "Shareholders in the United Kingdom" in J Hill and R Thomas (eds), *Research Handbook on Shareholder Power*, 2015. The decline in the percentage of the UK market held by domestic institutions in recent years is likely to test in the future the robustness of this institutional shareholder orientation.

[77] See the text following n 6 above.

[78] We have already touched on the mechanisms which Dutch law offers above. See text attached to fnn 59-61.

[79] See L Bebchuk, R Kraakman and G Triantis, "Stock Pyramids, Cross-Ownership and Dual Class Equity: The Mechanisms and Agency Costs of Separating Control from Cash-Flow Rights" in R Morck (ed), *Concentrated Corporate Ownership*, 2000, p 445. We do not analyse cross-holdings in this paper on the grounds that they are not much used in Europe (in contrast, for example, with Asia). See M Faccio and L Lang, "The Ultimate Ownership of Western European Corporations" (2002) 65 *Journal of Financial Economics* 365, 378: "Cross-holdings are only marginally significant in Norway, Germany, and Austria (accounting for 2.27%, 2.62%, and 1.01% of cases respectively) but are insignificant elsewhere."

[80] See the discussion above of the debates surrounding the Loi Florange (text attached to nn 27-30).

States' reluctance to apply the BTR, even though this development thus undermines the aim of the Takeover Directive which was to facilitate transfers of corporate control.

A popular CEM is some form dual class share arrangement, whereby two or more classes of share with identical economic rights nevertheless have disparate voting rights (possibly including no votes at all) attached to them, either on all votes taken in the general meeting or on those likely to be of most interest to a hostile bidder, for example, a resolution to remove the current directors from the board.[81] In principle, the issuance of dual classes of shares is likely to require shareholder approval, as with any other share issuance. However, the need for independent shareholder consent for departures from OSOV in favour of the existing controllers can be avoided in various ways. Consent may be given before shares are offered to the public (when the future beneficiaries of the dual-class arrangement are likely to be in control of the company) or, post-IPO, while the existing management still has de facto control of the shareholder meeting, or the opportunity to do so may arise if the company needs funding which the market is unwilling to provide but the existing controllers will if their position is made secure through weighted voting.

A number of countries have restrictions or prohibitions on the issuance of dual class shares. However, the trend is towards their relaxation in the light of the global competition among exchanges for listings, at least at the IPO stage. Thus, the European Commission is currently seeking to shield from the ordinary play of the market for corporate control newly listed companies, through the use of multiple-vote share structures (MVSSs).[82] The recently adopted Directive[83] would require Member States to make the option of using MVSSs available to newly listed companies on Multilateral Trading Facilities (not Regulated Markets but wider than Growth Markets), subject to conditions. It appears, however, that on markets not covered by the Directive Member States may continue with any existing more generous provisions. The proposal may appear ironic considering the long-standing inclination of the Commission towards the OSOV, which it even considered at one point imposing it as a general requirement (not just in relation to takeovers) on all European companies listed in the EU, before changing its mind in the absence of a clear demonstration of the benefits of such generalised application.[84] This proposal only underlines the potential contradictions existing between an open market for corporate control and an attractive stock market for entrepreneurs, unwilling

[81] A Commission-sponsored study from 2006 suggests MVS were popular at that time in Sweden, Finland, France and the Netherlands: ISS, Shearman and Sterling and ECGI, *Report on the Proportionality Principle in the European Union* 2006, para 3.2.1. However, this study lumps together MVS and tenure voting arrangements (which we treat differently) and excludes non-voting equity shares from the MVS category, while we include them in MVS. In any event, as indicated below, MVS have subsequently become more widely available and probably more widely used.

[82] Proposal for a directive of the European Parliament and of the Council on multiple-vote share structures in companies that seek the admission to trading of their shares on an SME growth market, December 7, 2022, COM (2022) 761 final, 2022/0406 (COD).

[83] [INSERT CITATION WHEN AVAILABLE]

[84] Commission Staff Working Document, *Impact Assessment on the Proportionality between Capital and Control in Listed Companies*, Brussels, SEC(2007) 1705. See Alain Pietrancosta, "Propositions françaises et européennes pour ouvrir le vote multiple aux sociétés entrant en bourse", BJS janv. 2023, n° BJS201q7.

to lose their control as the result of an IPO. Their ability to overcome this entrepreneurial dilemma has made MVSSs popular throughout the world. There are, however, possible regulatory ways of reconciling those imperatives, of which the most popular is a sunset provision, so that the departure from OSOV is temporary, though not necessarily short-lived.

Functionally similar to, but treated as analytically separate from MVSSs, are tenure voting arrangements (or loyalty shares) whose development in France we mentioned above.[85] However, their attractions are by no means limited to French companies.[86] Italian companies in particular sought access to more favourable tenure voting arrangements than were then available in their home jurisdiction by taking the additional pre-bid defensive measure of reincorporation in a jurisdiction providing them, in this case the Netherlands. Belcredi et al.[87] argue that the Italian re-incorporators to the Netherlands (as opposed to those from other countries) are notable in being motivated by the easier availability of CEMs in that jurisdiction, especially tenure voting arrangements. They also argue that the tenure voting arrangements adopted upon reincorporation operated principally for the benefit of the existing controlling shareholders either by strengthening exist control positions or by allowing the maintenance of control whilst reducing the size of the economic stake in the company. Since, as we noted in §III A, the Netherlands also contains two effective post-bid defences, the possibility of the Netherlands becoming the destination of choice for companies seeking either pre-bid and post-bid defences must be high.[88]

Even without reincorporation, the adoption of tenure voting strengthens the position of existing controlling shareholders. Thus, Declercq et al.[89] argue that this was the main impact of the introduction of tenure voting in Belgium (rather than combatting short-termism or encouraging IPOs). Those Belgian companies which sought to take up the tenure voting arrangement when it became available were predominantly companies with existing controlling (or large) shareholders, whose votes in the general meeting were enough to secure its adoption. A similar development is reported in relation the Italian rules on tenured voting, i.e. a concentration of tenured voting in companies with controlling shareholders,[90] and in France. For France, this development has been assessed empirically as positive, on the grounds that tenure shares

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[85] See text attached immediately following fn 30. Tenure voting shares were excluded from the Commission's Proposal for a Directive on multiple vote structures and so may be freely adopted by Member States: see COM(2022) 761 final, Recital 5 and Art 2(b).

[86] Spain and the Netherlands should be added to the countries allowing tenured voting and a number of others are considering introducing it.

[87] See M Belcredi, L Favarzani and A Signori, *An Analysis of Italian Companies Moving Abroad* (available at: centridiricerca.unicatt.it/fin-gov-Cos%C3%AC%20non%20fan%20tutte%20final%20June%202023%20clean.pdf

[88] In this context it is important to note that the Netherlands is an incorporation theory state, so that a company seeking to reincorporate in that jurisdiction would not be required to move its headquarters there. The Commision-sponsored study also suggests that priority shares and depository receipts are much less available outside the Netherlands: above n 81, 3.2.5-6.

[89] S Declercq, J Delvoie, T Monnens and T Vos, "Loyalty Voting Rights in Belgium: Nothing More than a Control Enhancing Mechanism?" (2023) 20 ECFLR 27.

[90] C Mosca, "Should Shareholders Be Rewarded for Loyalty? European Experiments on the Wedge Between Tenured Voting and Takeover Law" (2019) 8 MICH. BUS. & ENTREPRENEURIAL L. REV. 245, 270-272 – albeit tempered by the need to avoid the mandatory bid obligation; E Bajo, M Barbi, M Bigelli and E Croci, "Bolstering family control: Evidence from loyalty shares" (2020) 65 *Journal of Corporate Finance* 101755.

indicate enhanced blockholder monitoring and enable financially constrained blockholders to retain control while reducing their economic exposure to the company.[91] However the academic debate on the utility of tenured voting arrangements is ultimately decided, it is clear that public debate has shifted towards emphasising the benefits rather than the costs of moving away from OSOV.

A third mechanism for separate voting rights from economic interests is the "pyramid". This is separation created by corporate structure rather than by unequal allocation of voting rights and so does not require a formal departure from OSOV, though this is functionally what is achieved. In a simple form of pyramid structure, an investor holds a controlling interest, say, 50%, in the top company and then creates one or more intermediate holding companies between the topco and the ultimate operating company (or companies). The intermediate subsidiaries are not wholly owned but have outside investors (in fact, their shares may be publicly traded), but so that the company immediately above holds a controlling interest in the intermediate company; and the ultimate intermediate company holds a controlling interest in the operating company. In this way, an investment in the topco can yield control of the operating company, even though the controller of the topco has only a small economic interest in the operating company. In a simple example, with 50% shareholdings and three companies in the group, the controller of the topco will have control of the operating subsidiary, but with only a 12.5% economic interest in it.

This form separation of economic and control rights used to be common in Italy[92], but Bianchi and Bianco noted in 2006 a decline in the incidence of pyramids and a growth in the proportion of listed companies held by coalitions of blockholders, bound together by formal or informal agreements.[93] Since then there appears to have an increase in the proportion of Italian listed companies with tenured voting arrangements. Consob identified 73 such companies (or about one third of the total) at the end of 2023, compared with only 6 which had adopted dual-class shares.[94] The effect, presumably, is to increase the control position of coalitions and to reduce the incentives of a large blockholder to sell out, except to an offeror approved by the coalition as a whole.

It is difficult precisely to estimate the availability, and use, of pre-bid defensive measures in Europe. However, it is possible to conclude that they are reasonably freely available. As far as transactional defences are concerned, i.e. instances where the defence is bundled into a commercial transaction the company has entered into, this is not surprising. A permanent pre-

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[91] F Belot, E Ginglinger and L Starks, *Encouraging long-term shareholders: The effects of loyalty shares with double voting rights* (available at papers.ssrn.com/sol3/papers.cfm?abstract_id=3475429).

[92] A Aganin and P Volpin, "The History of Corporate Ownership in Italy" in R Morck (ed), 2000, above n ??, at 365 suggest that pyramids were the result of large financing needs of Italian companies and under-developed capital markets – a view consistent with the decline in pyramids (see following note) and with the subsequent growth of Italian and European capital markets. The Commission-sponsored study from 2006 suggests that pyramids were also well used at that time in Belgium and Sweden: above n 81 , para 3.2.4.

[93] M Bianchi and M Bianco, *Italian corporate governance in the last 15 years: from pyramids to coalitions?* ECGI Finance Working Paper 144/2006.

[94] See www.consob.it/web/consob-and-its-activities/listed companies/mainen/issuers/listed_companies/voto_maggiorato_plurimo_lnk.htm?nav=true (site visited 11 December, 2023).

bid prohibition of equivalent breadth to the BNR would impose heavy costs on the efficient running of the company, through the need to seek frequent shareholder consent for transactions. The costs of such a rule would very likely exceed any benefits arising from controlling managerial entrenchment. So, defences which are off-shoots of running the company's business are not tightly constrained. At a minimum, it is likely to be necessary, but very difficult, to show that the defence was the main purpose of the transaction before a breach of duty by the directors could be shown.

Structural defences, by contrast, are easier to prohibit without impinging extensively on managerial freedom action, as is shown by the fact that some jurisdictions do prohibit specific examples of pre-bid defences, such as MVSSs. However, it is a separate question whether it is good policy to impose such prohibitions and to decide how widely to impose them. The Commission Study suggested that European states have been quite restrained in imposing legal prohibitions on pre-bid defences. It looked at 16 of the then member states and concluded that, typically, between 7 and 10 CEMs were available in those states, with the Netherlands being an outlier at the top of the distribution (11) and Greece an outlier at the bottom (6).[95] Actual use of CEM's in particular jurisdictions is a separate question but the study found that some CEMs were widely used across jurisdictions, notably pyramid structures, multiple voting rights and shareholder agreements.[96] Although the pattern of use of CEMs may well have changed since 2006, the availability of some pre-bid defences has increased since then, notably MVSSs, as probably has the propensity of companies to put in place pre-bid defences.

(ii) State Action

The final mechanism which can act as a substitute for defensive measures is appeal to a third party (usually a public authority) which has the power to block the bid which is regarded with disfavour by the incumbent management. This step has long been possible in relation to the competition authorities or regulators concerned with the assessment of whether a particular acquirer is a fit and proper person to be allowed into the industry in question. Not even the fiercest BNR jurisdictions have prohibited engagement with such regulatory authorities.[97] However, in recent years the chances of state intervention, which blocks unwelcome bids, have increased with the adoption by an increasing number of states of foreign direct investment screening measures (though it should be noted that such screening may also end up blocking takeovers which incumbent management favours). This trend has been furthered by the Covid pandemic which was thought to have generated a high level of uncertainty about the "true" value of shares in nationally important companies.[98] In 2019 the EU adopted a Regulation[99]

[95] Above n 81, Figure 3.1.
[96] Ibid, Figure 4.7.
[97] UK Takeover Panel, *BAT Industries*, Statement 1989/20.
[98] See L Enriques, "Pandemic Resistant Corporate Law" (2017) 17 ECFR 257 – though advocating the introduction of only temporary protections.
[99] Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investment in the Union. A later Regulation (EU) 2022/2560 on foreign subsidies distorting the internal market applies to acquisitions by

which encourages (but does not require) member states to introduce such a mechanism and the overwhelming majority of member states have now adopted such mechanisms.

For the same reason, the Regulation does not stipulate the design of the screening mechanism which member steps must adopt if they choose to do so. The Commission's powers are essentially powers to coordinate responses (from itself and other member states towards the member state applying the mechanism) if and when a national mechanism is applied to a particular offer. So, the mechanisms vary in design from one member state to another. However, the Regulation makes it clear that the Commission expects the national screening rules to apply only where issues of national security or public order are raised (though these are imprecise terms). The risk for a member state which strays beyond these areas is that its rules may be found to be in breach of the Treaty's provisions on free movement of capital.[100]

The upshot is that the competition and national security provisions have an episodic impact on takeover offers. It is probably not attractive for incumbent managers to rely on them rather than to seek to put in place defences which are under their own control. There may be some exceptional industries where the national security provisions operate more broadly, for example, defence, where the state is often the principal customer as well as a core financer, directly or indirectly, of the industry. Here, the fate of the company is probably in the hands of the state, no matter what the general takeover rules stipulate.

V. Conclusion

The Commission was clearly disappointed by its failure to secure the BNR as the uniform rule across the EU and, perhaps even more so, by the decision to leave the fate of the rule in the hands of the member states. This disappointment was based on the assumption, first, that the BNR was an effective rule for disciplining slack or incompetent management, for re-drawing the boundaries of the firm and for deepening the integration of the EU internal market. Second, it was assumed that no substitute legal mechanism for constraining defensive tactics existed at national level. Third, it was assumed that a body of shareholders existed to whom the putative bidder could appeal over the heads of the incumbent management.

In this chapter, we have argued that the second assumption was largely accurate: national law does not act as a perfect substitute for the BNR. Generally applicable corporate rules (for example, fiduciary duties) are much less precise than the BNR, whilst the transaction-specific rules leave gaps through which the bidder can squeeze, as well as often allowing ex-ante shareholder authorisation of defences. In addition, the BNR is more effectively applied than general corporate law rules. Consequently, the optional nature of the BNR in the Directive as ultimately adopted and the decisions of many Member States to take advantage of that optionality was a severe blow to the Commission's ambitions.

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subsidised foreign entities. The Commission has stronger powers under this Regulation which is, in effect, an expansion of its traditional competition jurisdiction.

[100] Art 65, TFEU.

The first assumption is more questionable, as the Commission came to realise during the legislative process. A BNR would have little disciplining effect if companies could take effective pre-bid defensive measures. Defensive measures embodied in pre-bid transactions were not controlled in the Directive and probably could not be. Pre-bid structural measures were partially addressed in the BTR but it suffered from the ultimate optionality compromise and, even more so, from the virtually uniform use by the Member States of the option to cast BTR into the darkness of irrelevance.

The third assumption was also questionable. Across the EU as a whole, controlling shareholdings were a common feature of the corporate landscape, and in those cases there was no real division between the board and shareholders over the sort of strategic issues hostile bid raise. However, the Directive simply left on one side the issue how far private benefits of control interfered with policy of making control contestable. Writing in the early 1990s, Professor Gilson argued for an "ecological" approach to takeover regulation which would justify the Commission's stance. He drew a distinction between technical, legal barriers to takeovers and structural ones (here meaning controlling shareholders whose control was based on OSOV). The focus, he argued, should be on technical barriers, so that companies were exposed to technological changes. Once that was done, structural barriers . . . will shift when technological change warrants it."[101] The BTR proposed by the High Level Group can be seen as having this aim, albeit only partially and unsuccessfully.

Equally crying out for explanation is the Commission's failure to seek to remedy the defects, as it saw them, in the Directive as eventually adopted. The Commission was prepared initially to return to the fray, but nothing significant in fact happened. We suggest that this is to be explained by a fundamental change in the Commission's political and economic analysis of its industrial policy after the Directive was adopted. The proposal for a Takeover Directive emerged during the great push for globalisation of business activities, in the last quarter of the last century and the first decade of this one. In a situation of strong inter-firm competition, both from within and without the EU, mechanisms for strengthening the competitiveness of EU companies were to be facilitated. Competitiveness was viewed as embracing not only technological and human resource capacity but also a functional and cost-reducing corporate law. The latter was then associated with shareholder primacy in corporate law, on the grounds that shareholders had the strongest incentives to maximise the operational efficiency of their companies.[102]

Shareholder primacy had its opponents even at the height of the globalisation trend. And these opponents had some important legal successes, such as the enactment in multiple states of the US of anti-takeover statutes which relieved boards of their fiduciary duties to the shareholders, in whole or in part, during takeovers, and the acceptance by the Delaware courts of the poison pill as a defensive technique (Delaware not having an anti-

[101] R Gilson "The Political Ecology of Takeovers" in K Hopt and E Wymeersch (eds) *European Takeovers*, 1992 at 68.

[102] Paul Davies, *Introduction to Company Law*, 3rd ed, 2020, pp 309-311.

takeover statute). In the EU the major success on the part of the opponents of shareholder primacy was the optionality of the defensive measures provisions in the Directive.

Since that time, as Enriques and Gatti argue in a later chapter in this book, the legislative steps at EU level have all been away from shareholder primacy and in favour of embedding existing control arrangements. The encouragement of dual class shares and of merger controls on national security grounds have been especially relevant for management seeking to defend against or pre-empt a bid. More generally, the Commission's (controversial) focus recently has been on the problem of short-termism, where the role of takeovers is ambiguous.[103] Why has this occurred? After all, the arguments against the BNR, such as the desirability of furthering shareholder commitment to the incumbent management's 'idiosyncratic vision', safeguarding local communities and their social capital, and retaining within the EU the skills and technology needed for a successful modern economy are not new and were deployed during the long legislative process leading up the adoption of the Directive. It seems likely that more fundamental changes this century have led to Commission scepticism about shareholder primacy and the role of takeovers in promoting it. One might mention the great financial crisis at the end of the first decade of this century, which undermined faith in markets; the re-emergence of geopolitical tensions which have made reliance on foreign suppliers appear more risky; the rise of climate change up the policy agenda, reduction of global warming often being seen as requiring companies to take action which will reduce their profits and so be opposed by investors - despite the uncertain counterbalance applied by ESG investing; and the emergence of new and more insistent methods for shareholders to apply pressure on corporate management - such as activist hedge funds – which have increased suspicion of shareholder primacy, while at the same time providing a substitute in part for the hostile takeover.

In short, although the defensive measures provisions of the Takeover Directive may appear as unfinished business, when measured against the Commission's original goals, they are likely to constitute finished business when viewed in the current policy context.

[103] See European Commission, *Study on Directors' Duties and Sustainable Corporate Governance, Final Report* at 3.1.1.1: "the use of M&A as an indicator of long-termism is questionable, as the literature suggests that certain acquisitions boost short-term performance at the expense of long-run value and are a sign of hyperactivity and too much attention to financial market issues by boards." Although the Report does not formally represent the views of the Commission, one is aware that a report which the Commission has initiated and funded will not contain anything which the Commission actively disagrees with.

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