european corporate governance institute

ecgi

Death by a Thousand Cuts: The Hostile Bids Regime in Europe, 2004-2023

Law Working Paper N° 755/2024
March 2024

Luca Enriques
University of Oxford, European Banking Institute and ECGI

Matteo Gatti
Rutgers University

© Luca Enriques and Matteo Gatti 2024. All rights reserved. Short sections of text, not to exceed two paragraphs, may be quoted without explicit permission provided that full credit, including © notice, is given to the source.

This paper can be downloaded without charge from:
http://ssrn.com/abstract_id=4738087

https://ecgi.global/content/working-papers

european corporate governance institute

ECGI Working Paper Series in Law

Death by a Thousand Cuts: The Hostile Bids Regime in Europe, 2004-2023

Working Paper N° 755/2024
February 2024

Luca Enriques
Matteo Gatti

© Luca Enriques and Matteo Gatti 2024. All rights reserved. Short sections of text, not to exceed two paragraphs, may be quoted without explicit permission provided that full credit, including © notice, is given to the source.

Abstract

The E.U. Takeover Directive was passed twenty years ago with the main aim of fostering a single European takeover market. However, subsequent economic, political, legal, and corporate governance developments have hindered the Directive's goal of enhancing the European market for corporate control. This paper outlines the pro-market climate surrounding the Directive's inception, traces the subsequent changes in market dynamics and governance, and examines the legislative measures that have contributed to the current state of the market for corporate control in Europe. Despite the continued existence of hostile bids, their importance and impact has shrunk under the current environment. This trend has reduced firm dynamism and resulted in benefits for a select few (notably, corporate insiders and national politicians).

Keywords: Corporate Governance, Corporate Law, Market for Corporate Control, European Takeover Bids Directive, Hostile Takeovers, Mergers and Acquisitions, Takeover Defenses

JEL Classifications: D21, G30, G32, G34, G38, K22

Luca Enriques*
Professor of Corporate Law
University of Oxford, Faculty of Law
St. Cross Building, St. Cross Road
Oxford, OX1 3UL, United Kingdom
phone: +44 186 528 9751
e-mail: luca.enriques@law.ox.ac.uk

Matteo Gatti
Professor of Law
Rutgers University
123 Washington Street
Newark, NJ 07102, USA
e-mail: mgatti@law.rutgers.edu

*Corresponding Author

Luca Enriques* & Matteo Gatti**

Death by a Thousand Cuts:
The Hostile Bids Regime in Europe, 2004-2023

ABSTRACT

The E.U. Takeover Directive was passed twenty years ago with the main aim of fostering a single European takeover market. However, subsequent economic, political, legal, and corporate governance developments have hindered the Directive's goal of enhancing the European market for corporate control. This paper outlines the pro-market climate surrounding the Directive's inception, traces the subsequent changes in market dynamics and governance, and examines the legislative measures that have contributed to the current state of the market for corporate control in Europe. Despite the continued existence of hostile bids, their importance and impact has shrunk under the current environment. This trend has reduced firm dynamism and resulted in benefits for a select few (notably, corporate insiders and national politicians).

Keywords: Corporate Governance, Corporate Law, Market for Corporate Control, European Takeover Bids Directive, Hostile Takeovers, Mergers and Acquisitions, Takeover Defenses

JEL: D21, G30, G32, G34, G38, K22

I. INTRODUCTION

The E.U. directive on takeover bids (hereinafter, the Takeover Directive or the Directive)[1] lays out rules governing corporate control transactions and takeover bids (or tender offers) targeting E.U. listed issuers. Adopted in 2004 after a tortured process,[2] the Directive contained the stated goals of "establish[ing] minimum guidelines for the conduct of takeover bids and ensur[ing] an adequate level of protection for holders of securities throughout the Community."[3] One of the main goals of the harmonization effort was to facilitate takeovers as efficient drivers of value creation.[4] It is well-known that even the Directive as finally adopted moved very timidly in that direction. Our paper argues that further economic, political, legal and governance developments moved the needle further away from the goal of enabling the market for corporate control to allocate control rights in firms across the E.U. In particular, multiple pieces of legislation at both the E.U. and Member State level have (further) stifled the market for corporate control, and especially hostile bids.

The paper is structured as follows. Part II briefly describes the ostensibly pro-market climate in which the Directive came to be. Part III illustrates how the past 20 years experienced a series of changes, if not shocks, in markets, corporate governance, and the geopolitical and macroeconomic landscapes. Such changes contributed to abandoning openness to contestability

---

* Professor of Corporate Law, Faculty of Law, University of Oxford; Fellow Member, ECGI.

** Professor of Law, Rutgers Law School; Research Member, ECGI.

This paper 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) with a view to publishing a book collection. For useful feedback we would like to thank participants in the ECLE Workshop "Twenty Years of the Takeover Directive," Stockholm, October 12-13, 2023, and especially Paul Davies, Guido Ferrarini, and Edmund Schuster.

[1] Parliament and Council Directive 2004/25/EC On Takeover Bids, 2004 O.J. (L142). The Takeover Directive lays out rules governing corporate control transactions and tender offers for E.U. listed issuers. *See generally* CHRISTOPHE CLERC ET AL., A LEGAL AND ECONOMIC ASSESSMENT OF EUROPEAN TAKEOVER REGULATION (2012) (based on the study undertaken for the European Commission, Marccus Partners & the Centre for European Policy Studies (CEPS), *The Takeover Bids Directive Assessment Report* (2012)).

[2] For a history of the long process that led to the adoption of the Directive, see Blanaid Clarke & Rolf Skog, *The Genesis of the Takeover Directive* [_], (2023, manuscript on file with authors).

[3] Takeover Directive, Recital 25.

[4] Paul Davies & Alain Pietrancosta, *Defensive Measures* 1-2 (2023, manuscript on file with authors), (citing Commission Staff Working Document, *Report on the implementation of the Directive on Takeover Bids*, SEC(2007) 268 and noting how, in the mind of E.U. policymakers "[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").

of control (or any figment thereof) and made European companies ever more takeover-proof. A series of legislative measures at the E.U. or national level, which Part IV describes, was the legal counterpart to those changes. Part V evaluates this new ecosystem and finds companies' insiders, namely executives and significant shareholders, and national politicians as its main beneficiaries of a new corporatist governance ecosystem.

II. THE THEN: FOSTERING A PAN-EUROPEAN MARKET FOR CORPORATE CONTROL.

One of the main objectives of E.U. takeover legislation was the promotion of a unified market for corporate control across the continent, with a keen focus on ensuring a level playing field. To that end, policymakers initially considered facilitating takeovers, including hostile ones, as a key component.[5] Relatedly, contestability of corporate control was viewed as key to the Union's market integration and competitiveness.[6]

Indeed, the European Commission espoused the British model of takeover regulation, based on the core principle of board neutrality.[7] This approach emphasized the importance for shareholders to be the ultimate decision-makers on whether a takeover should succeed without facing undue interference from target company boards. However, this vision started to crumble early on.

Notably, in 2001, an earlier proposal of the takeover directive, which in its attempt to establish a harmonized takeover market in the vein of the British City Code imposed the board neutrality rule to all companies subject to the directive, famously failed to be approved by the European Parliament (in what was its first ever rejection of a directive).[8] The opposition to such a proposal was led by German lawmakers and that was no coincidence. Not only was Renan capitalism traditionally at odds with hostile takeovers,[9] but Germany had just "lost" to British

[5] *Id.* at 202.

[6] *See supra* note 4 and accompanying text.

[7] *See e.g.* Matteo Gatti, *Optionality Arrangements and Reciprocity in the European Takeover Directive*, 6 EUR. BUS. ORG. L. REV. 553, 561 (2005).

[8] *See* Clarke & Skog, *supra* note 2, at [__].

[9] Jonathan Mukwiri, *The End of History for the Board Neutrality Rule in the EU*, 21 EUR. BUS. ORG. REV. 253, 259 (2020).

mobile giant Vodafone one of its "national champions," telecommunications conglomerate Mannesmann, in what to this day is still the all-time largest M&A transaction globally.[10]

Following the 2001 debacle, the European Commission quickly set up a committee of experts chaired by Jaap Winter to seek common ground. One of the main findings was that due to different rules and principles of national company laws, companies in certain jurisdictions had a competitive advantage in defending against hostile bidders. The Winter Report recommended adoption of a rule that would override certain pre-bid defenses if the takeover offer received a minimum percentage of shares (the so-called break-through rule). This rule wasn't enough to bridge the existing gap and broker a deal. To get there, Member States acknowledged they agreed to disagree and that they could not pass anything ambitious: retaining their prerogatives over takeover policies was paramount for a sufficient number of them. The turning point came with the so-called Lisbon compromise, which, among other things, made two of the core provisions of the Directive proposal, namely the board neutrality and the break-through rules, optional for member states.[11] The compromise gave Member States the flexibility to keep establishing their principles and rules on takeover defenses.[12] This compromise left what was considered a crucial portion of takeover law effectively at the discretion of individual Member States. Importantly, while the Directive focused on takeover regulation, it became evident that state company laws continued to play a significant role in shaping the corporate landscape, with a number of governance rules untouched

---

[10] *See* Matteo Gatti, *Upsetting Deals and Reform Loop: Can Companies and M&A Law in Europe Adapt to the Market for Corporate Control?*, 25 COLUM. J. EUR. L. 1, 5 (2019).

[11] The board neutrality rule requires directors of the target to obtain a shareholders' authorization before adopting takeover defenses. The break-through rule eliminates certain pre-bid defenses if an offer wins a considerable amount of support. The board neutrality rule was so controversial that it sank an earlier version of the Directive at the European Parliament, and both rules ultimately came to life in a much softer version: each rule is optional for Member States to adopt it; if they do not, they are required to enable adoption at the company level. *See generally* Klaus J. Hopt, *Takeover Defenses in Europe A Comparative, Theoretical and Policy Analysis*, 20 COLUM. J. EUR. LAW 249 (2014); Paul Davies, Edmund Philippe Schuster & Emilie van de Walle de Ghelke, *The Takeover Directive as a Protectionist Tool?*, *in* COMPANY LAW AND ECONOMIC PROTECTIONISM 105 (Ulf Bernitz et al. eds., 2010); Gatti, *supra* note 7.

[12] Article 12 of the Directive, which endorses a proposal by the Italian Presidency in late 2003 to grant some flexibility to Member States and companies, allows Member States to opt out of the board neutrality rule and/or the break-through rule; at the same time, Article 12 requires member states that have opted out of Articles 9 and/or 11 to allow their companies to opt into such rules. See Council Directive 2004/25, art. 12, 2004 O.J. (L 142) 21 (EC); see also Commission of the European Communities, Commission Staff Working Document: Report on the Implementation of the Directive on Takeover Bids, at 3-5, SEC (2007) 268 (Feb. 21, 2007) (hereinafter Report on the Implementation of the Directive on Takeover Bids).

upon by the Directive playing a significant role in determining companies' contestability of control.[13]

Once the Directive was implemented, the new regulatory landscape appeared to be characterized by significant variation, with various countries that had made use of the options provided for by the Directive.[14] Of course, looming in the background of these policy choices were the opportunities presented by corporate migration, something the *Centros* case and its progeny, together with legislation on cross-border mergers and, more recently, seat transfers, made a new reality.[15] European freedom of establishment principles allow companies to relocate to countries with more favorable regulatory environments, further highlighting the complexity and fluidity of the European corporate governance landscape.

III. Death by a Thousand Cuts, Part 1: Market, Governance and Geopolitical Changes

In the twenty years following the adoption of the Directive, the law and practice in the European market for corporate control changed profoundly due to market dynamics (Section A), developments in corporate governance practices and priorities (Section B), as well as changes in the political and macroeconomic landscape (Section C).

A. Changes in the Market for Corporate Control

Several high-profile cross-border deals (both hostile and negotiated) generated upsets in national socio-economic circles that reinforced pressures towards an even less takeover-friendly legal environment than that resulting from the implementation of the Directive.

This is unsurprising. In fact, headline-making deals predate the Directive and it was one of the earliest cross-border takeover attempts, Carlo De Benedetti's failed tender offer for Société

[13] See, with specific reference to the UK, but with an analysis that can be extended to other jurisdictions, David Kershaw, *The Illusion of Importance: Reconsidering the UK's Takeover Defence Prohibition*, 56 INT'L & COMP. L.Q. 267 (2007). See also infra note 48 and accompanying text.

[14] Gatti, *supra* note 7; Davies, Schuster & van de Walle de Ghelke, *supra* note 11.

[15] Centros Ltd v Erhvervs-og Selskabsstyvelsen, Case C-212/97, 1999 E.C.R. 1459; Überseering BV v Nordic Construction Company Baumanagement GmbH, Case C–208/00, 2002 E.C.R. 9919; Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd, Case C–167/01, 2003 E.C.R. 10155. *See also* Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions PE/84/2019/REV/1 OJ L 321, 12.12.2019.

Générale de Belgique, which prompted European policymakers to look into takeover legislation.[16] Gucci's attempted takeover by French luxury conglomerate LVMH in 1999 signaled the adaptability of Dutch company law in protecting a target company.[17] Of course, it was the gigantic acquisition of Mannesmann by Vodafone that grabbed everyone's attention at the turn of the century and effectively resulted in German politicians killing the directive proposal in the famous tied vote of July 2001.[18]

After the Directive adoption, in the frothy-equity-market, low-interest-rate scenario of the pre-financial-crisis 2000s, cross-border activity intensified with massive and controversial deals creating profound and enduring effects on legal, regulatory, and market landscapes. These deals include Mittal-Arcelor, after which France passed the Florange law;[19] GE-Alstom, after which France extended the government's veto power on takeovers affecting French strategic interests in areas such as energy, transport, telecoms, and public health;[20] the acquisition of Endesa by ENEL, which displayed the inability of Spanish targets to defend effectively and resulted in Spain implementing the Takeover Directive with harsher conditions for bidders (the reciprocity principle, a loosened board neutrality rule, and a ban on partial tender offers, which in the past had facilitated creeping acquisitions);[21] the acquisition of Cadbury by Kraft, whose broken promise to maintain occupational levels and keep some factories open prompted new disclosure rules on, as well as enforceability of, so-called "post-offer undertakings."[22]

---

[16] Marco Ventoruzzo, *Europe's Thirteenth Directive and U.S. Takeover Regulation: Regulatory Means and Political Economic Ends*, 41 TEX. INT'L L.J. 171, 203 (2006); for a description of the Société Générale de Belgique takeover attempt, see John J. Duffy, *Financial Services Revolution Looms in Old World*, AM. BANKER (N.Y.), May 23, 1988, at 1.

[17] *See* Luca Enriques & Matteo Gatti, *Creeping Acquisitions in Europe: Enabling Companies to Be Better Safe than Sorry*, 15 J. CORP. LAW STUD. 55 (2015).

[18] *See supra* note 8 and accompanying text. *See also* Martin Höpner & Gregory Jackson, *Revisiting the Mannesmann Takeover: How Markets for Corporate Control Emerge*, 3 EUR. MGMT. REV. 142, 146 (2006).

[19] Gatti, *supra* note 10, at 7. For a brief description of the Florange law, see *infra* notes 64 and 65 and accompanying text.

[20] *Id.* at 7-8. Rumors of a potential acquisition of dairy products giant Danone by PepsiCo are said to have prompted the French legislature to implement the takeover directive in 2006 with a taxing provision for acquirers: at its discretion, the Autorité des marchés financiers (AMF, the French securities commission), may require a person who is believed to be launching a takeover bid to state if in fact s/he intends to proceed-any such statement must then be honored for six months. Guido Ferrarini & Geoffrey P. Miller, *A Simple Theory of Takeover Regulation in the United States and Europe*, 42 CORNELL INT'L L. J. 301, 319-20 (2009).

[21] Gatti, *supra* note 10, at 8.

[22] Paul Davies, Klaus J. Hopt & Wolf-George Ringe, *Control Transactions*, *in* THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH, 205, 209 (Reinier Kraakman et al. eds., 2017). In the 2011 reform of the City Code, the Panel promulgated additional wide-ranging rules: it severely limited break-up fees and it crystalized in a bright-line rule its "put up or shut" approach by fixing to a 28-day deadline the time a potential offeror has to announce either a firm intention to make an offer or that it does not intend to make an offer (in which case it

It wasn't just takeovers. In fact, hedge fund activism, a phenomenon that had been changing U.S. corporate governance profoundly, became prominent in Europe as well. Large issuers in various Member States soon became targets of activist campaigns, including AkzoNobel, ThyssenKrupp, TIM, and Pernod Ricard, all targeted by U.S. hedge fund Elliott, Ericsson, Volvo, and ABB, targeted by Swedish hedge fund Cevian Capital, Nestlé and CaixaBank, targeted by U.S. hedge fund Third Point Partners, and Repsol, targeted by U.S. investor Carl Icahn.

Activist campaigns question managers' strategies, including, often, as regards the question of whether the company should be sold (or merged), which can affect their tenure.[23] In fact, the market for corporate control and hedge fund activism are both substitutes for, and complements to, each other. The greater the pressure on executives, the greater managers' urge for insulation via market or political mechanisms.

B. Changes in Corporate Governance

The Takeover Directive was adopted in a period when the shareholder value maximization norm was at its apogee in Europe, leading many academic, policymaking and business circles to view takeovers, and hostile ones in particular, in a positive light. Times have changed. The late 2010s witnessed era-defining phenomena such as the advent of ESG investing and engagement,[24] as well as the reappearance of stakeholderism as a serious contender in the corporate purpose debate.[25]

---

will be prohibited for a six-month period to launch an offer on the same target). *See* THE TAKEOVER PANEL-CODE COMMITTEE, REVIEW OF THE 2011 AMENDMENTS TO THE TAKEOVER CODE (2012) (U.K.), www.thetakeoverpanel.org.uk/wp-content/uploads/2012/01/2012-8.pdf; Clarke, Blanaid Clarke, *Directors' Duties During an Offer Period-Lessons from the Cadbury Plc Takeover* 10, (UCD Working Papers in Law, Criminology & Socio-Legal Studies Research Paper No. 44/2011), ssm.com/abstract-1759953; Nick Rogerson, *A Perspective from the Market for Corporate Control of the Post-Cadbury Takeover Reform*, 38 BUS. L. REV. 21 (2017).

[23] Some in the activist hedge funds literature point to pressure to get M&A exits as one of the most consequential drivers of activism. *See* Goshen & Steel, *supra* note 29, at 457 (noting that "evidence suggests that the positive returns frequently attributed to hedge-fund activism are largely explained by activists' ability to force a takeover" and adding that "the primary value of hedge-fund activists, if any, is to act as an auctioneer for corporate raiders.")

[24] *Cf.* Elizabeth Pollman, *The Making and Meaning of ESG* (Eur. Corp. Governance Inst. Law Working Paper, No. 659, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4219857; Luca Enriques & Giovanni Strampelli, *The Dialogue Between Corporations and Institutional Investors: An Introduction*, *in* BOARD-SHAREHOLDER DIALOGUE: POLICY DEBATE, LEGAL CONSTRAINTS AND BEST PRACTICES (Luca Enriques & Giovanni Strampelli eds., 2024, Cambridge University Press).

[25] *Compare* COLIN MAYER, PROSPERITY: BETTER BUSINESS MAKES GREATER GOOD (1st Ed. 2018) *and* Leo E. Strine, Jr., *Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy: A Reply to Professor Rock*, 76 BUS. LAWYER 397 (2021) *and* Aneil Kovvali, *Stark Choices for Corporate Reform*, 123 COLUM. L.

In the context of takeovers, stakeholderism should justify non-shareholder-based defenses, but in practice that would matter in any given jurisdiction only under two circumstances: (i) the company in question must not be subject to board neutrality; and (ii) post-bid antitakeover defenses are effective tools to fend-off unsolicited bidders. With the important exception of the Netherlands, company laws of Member States make it hard to adopt devices that can readily defeat a bid.[26] Therefore, one could be tempted to conclude that embracing a stakeholder approach must have had little practical implications for the contestability of corporate control. However, that would miss the point: stakeholderism performs an expressive function, justifying opposition to takeovers by targets, incumbents more generally and policymakers. Various regulations and governance reforms become more palatable politically if no one is ready to oppose them from a shareholder-value angle because that angle is no longer broadly shared. In sum, as shareholder value maximization has receded as a guiding principle, many arguments to support pro-takeover policies have lost steam.

There is more: even for those who embrace the shareholder value maximization norm, it is debated whether favoring takeovers and contestability of corporate control ultimately benefits shareholders.[27] This view, pioneered by Henry Manne, strongly advocated by Frank Easterbrook and Daniel Fischel, and endorsed by many others[28] has been subject to renewed criticism in a series of articles by Zohar Goshen and various co-authors.[29] In their framework, disruptive entrepreneurs

---

REV. 693 (2023); *with* Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91 (2020) *and* Matteo Gatti & Chrystin Ondersma, *Can A Broader Corporate Purpose Redress Inequality? The Stakeholder Approach Chimera*, 46 J. CORP. L. 1 (2020) *and* Guido Ferrarini, *Corporate Purpose and Sustainability*, *in* SUSTAINABLE FINANCE IN EUROPE: CORPORATE GOVERNANCE, FINANCIAL STABILITY AND FINANCIAL MARKETS (Danny Busch et al. eds; 2021).

[26] Enriques & Gatti, *supra* note 17, at 80-86.

[27] There are countless empirical studies describing the wealth effects of takeover activity. For summaries of such studies, *see* Marina Martynova & Luc Renneboog, *A Century of Corporate Takeovers: What Have We Learned and Where Do We Stand?*, 32 J. BANK & FIN. 2148 (2008); B. Espen Eckbo, *Corporate Takeovers and Economic Efficiency*, 6 ANN. REV. FIN. ECON. 51 (2014)). Some studies have focused on data from takeover activity in Europe and reached findings that are in line with similar studies on the U.S. market: target shareholders experience gains, while the evidence for shareholders of buyers is mixed. *See* Marina Martynova & Luc Renneboog, *The Performance of the European Market for Corporate Control: Evidence from the Fifth Takeover Wave*, 17 EUR. FIN. MGMT. 208 (2011) (reporting on deal activity in the 1993-2001 period and finding that hostile deals are expected to create more value for shareholders, even though such value is to some extent already incorporated in the stock prices of buyer and target prior to the deal announcement).

[28] Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110 (1965); Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981); Lucian A. Bebchuk, *The Case against Board Veto in Corporate Takeovers*, 69 U. CHI. L. REV. 973 (2002).

[29] *See* Zohar Goshen & Assaf Hamdani, *Corporate Control and Idiosyncratic Vision*, 125 YALE L.J. 560 (2016); Zohar Goshen & Reilly S. Steel, *Barbarians Inside the Gates: Raiders, Activists, and the Risk of Mistargeting*, 132 YALE L.J. 411 (2022). Earlier critics expressed concerns during the takeover wave of the 1980s. *See* Martin Lipton, *Takeover Bids*

prefer keeping the company outside of the market for corporate control to better nurture their long-term idiosyncratic vision.[30] That is especially valuable for innovative companies, whose businesses are harder for markets to understand and price correctly,[31] and explains the wide success of dual class share structures in tech IPOs in the last 20 years, not only in the U.S., where Google (now Alphabet) was the trailblazer, but also, if perhaps less prominently, in Europe, Spotify and Just Eat being two examples out of many of E.U. companies going public with a dual class share structure. Note in this respect that European policymakers sought, but failed, to thwart dual class structures.[32] In fact, the European Commission later embraced an "if you can't beat them, join them" approach with the 2023 proposal for a directive requiring, however cautiously,[33] that Member States enable SMEs to go public with dual class shares under certain conditions.[34]

---

in the Target's Boardroom, 35 BUS. LAW. 101 (1979) ("Rather than forcing directors to consider only the short-term interests of certain shareholders, national policy requires that directors also consider the long-term interests of the shareholders and the company as a business enterprise with all of its constituencies in addition to the short-term and institutional shareholders"); Robert J. Haft, *Business Decisions by the New Board: Behavioral Science and Corporate Law*, 80 MICH. L. REV. 1, 5 (1981) ("There is growing recognition by the corporate establishment in America that its priorities should be reordered to achieve profit maximization in the long-term rather than in the short-term."); Louis Lowenstein, *Pruning Deadwood in Hostile Takeovers: A Proposal for Legislation*, 83 COLUM. L. REV. 249 (1983) (arguing that some takeovers are the product of short-term pressure by investors); Peter F. Drucker, *Corporate Takeovers—What Is to Be Done?*, 82 PUB. INT. 3, 12-13 (1986) (criticizing takeovers as "[t]hey force management into operating short-term"); Jeremy C. Stein, *Takeover Threats and Managerial Myopia*, 96 J. POL. ECON. 61 (1988) (same); Andrei Shleifer & Robert W. Vishny, *Equilibrium Short Horizons of Investors and Firms*, 80 AM. ECON. REV. 148 (1990) (same).

[30] *See generally* Goshen & Hamdani, *supra* note 29 (defending dual-class share structure on this basis) *and* Goshen & Steel, *supra* note 29 (arguing that Delaware law should extend the protection awarded to targets of a takeover also to targets of shareholder activism).

[31] *See generally* Goshen & Hamdani, *supra* note 29.

[32] First, the break-through rule is only optional and Member States, with minor exceptions, did not embrace it. Only Estonia adopted it (see CLERC ET AL, *supra* note 1, at 80), while since 1998 Italy has a so-called mini-breakthrough rule in place, under which parties to stockholder agreements, such as voting agreements and restrictions to sell, may terminate such agreements without penalty if they tender their shares to a pending takeover bid (see Art. 123, para. 3, Consolidated Decree on Financial Intermediation, as amended by Law Decree No. 148 of Oct. 16, 2017). Second, a subsequent initiative from the Commission aborted even before reaching the proposal stage. *See* European Commission, Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward 25 (2003) (proposing a study on the effects of establishing a European one-share-one-vote principle). The study was commissioned to ISS, ECGI and Shearman & Sterling: see Report on the Proportionality Principle in the E.U. (2007), available at https://www.ecgi.global/content/one-share-one-vote-2007 (one of us coordinated the legal scholar network that supported Shearman & Sterling in the preparation of the Comparative Legal Study).

[33] *See* ECLE, *The European Proposal to Open up Multiple-vote Share Structures to Listing Companies: A Simplification in Trompe l'Oeil*, OXFORD BUS. L. BLOG, Sept. 5, 2023, https://blogs.law.ox.ac.uk/oblb/blog-post/2023/09/european-proposal-open-multiple-vote-share-structures-listing-companies (noting that the Proposal requires member states to include a number of limitations to the issuance of dual class shares).

[34] 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, COM/2022/761 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0761.

C. Changes in Geopolitical Landscape and Macroeconomic Shocks

The Directive was proposed and negotiated in relatively quiet times from a geopolitical perspective. European optimism ran high in the 1990s with Member States working hard to meet the criteria for a single currency. True, the Directive was ultimately adopted not long after the 9/11 terrorist attacks and its optionality and reciprocity features suggest that Member States wanted to maintain remain in charge on policies affecting the control of their largest domestic firms.

Since then, geopolitical turmoil only worsened. Security concerns increased as terrorist attacks made victims in many European countries. The Schengen Treaty got suspended on several occasions[35] and the ideal of a truly open European market began to crumble.[36]

All the while, anti-E.U. sentiment started to grow in various Member States. Fueled by economic insecurity and channeling resentment against "the elites," this movement had its apogee with the Brexit referendum. In the 2010s economic nationalism (sometimes, but not uniquely, fueled by nativist movements) resurfaced as a crucial determinant of corporate governance.[37]

Macroeconomic shocks, in turn, gave politicians further justifications for yielding to policies protecting incumbents. The Financial Crisis and the Covid pandemic resulted in steep collapses of stock prices worldwide. Companies soon found out they were trading at fractions of what they were trading before and feared lower valuations could lead to unsolicited takeover attempts. Many protectionist interventions, as the next Part details, were passed in the immediate aftermath of the first of these crises,[38] while the second provided the occasion to broaden the scope of regulations limiting foreign direct investment for national security reasons.[39]

* * *

In short, the (relatively) pro-market and pro-E.U. climate that inspired the Directive, or at least its proposal,[40] proved ephemeral. In the new market-skeptic, nationalistic environment that established itself not long after, several measures directly or indirectly weakening the market for corporate control were enacted. We provide numerous examples thereof in Part IV.

---

[35] Sigrid Melchior, Pascal Hansens, Nico Schmidt, Amund Trellevik & Ingeborg Eliassen, *Dismantling Schengen – six months at a time*, EUOBSERVER, Sept. 9, 2022, https://euobserver.com/eu-political/156002.

[36] European Parliament, *At a glance (March 2016): The economic impact of suspending Schengen*, https://www.europarl.europa.eu/RegData/etudes/ATAG/2016/579074/EPRS_ATA(2016)579074_EN.pdf.

[37] *See generally* Mariana Pargendler, *The Grip of Nationalism on Corporate Law*, 95 IND. L.J. 533 (2020).

[38] *See infra* note 47.

[39] *See infra* Section IV.C.

[40] *See supra* note 4 and accompanying text.

IV. DEATH BY A THOUSAND CUTS, PART 2: CHANGES IN THE LAW

The forces described in Part III explain why, in the two decades following the adoption of the Takeover Directive, we have witnessed policy changes significantly departing from the original goal of fostering contestability in a Pan-European market for corporate control. In Section A, we describe changes to the takeover regime itself and to other financial markets regulations in the EU. In Section B, we discuss takeover-hostile changes in national company laws and describe the phenomenon of companies migrating to the Netherlands and other jurisdictions' reactions to it. Section C delves into the bolstering of legislation to tighten the requirements for foreign control of strategic assets.

A. Changes to Takeover and Financial Markets Laws

The very nature of the Directive as a framework directive with various options for Member States has given them much freedom on how to implement some of its crucial features. Famously, two cornerstones of the Directive, the board neutrality rule and the break-through rule, are optional for individual Member States.[41] While virtually all states opted out of the break-through rule,[42] when Member States implemented the directive only one third of them opted out of the board neutrality rule, including Germany, the Netherlands, and Belgium.[43] Over the years, other Member States joined the group of pro-incumbents countries. France, after offering a poison-pill-mimicking device in 2007 with the so-called Bons Bréton (rights to subscribe shares at a discount once the company becomes a takeover bid target),[44] abandoned the board neutrality rule in 2014.[45] Italy had done so at the height of the Financial Crisis[46] but then, after less than one year, reinstated it as a mere default.[47] Among large Member States the only jurisdiction that stayed loyal to the board

[41] *See supra* note 12.

[42] CLERC ET AL., *supra* note 1, at 15-16 (reporting that Estonia is the only jurisdiction that implemented the BTR).

[43] *Id*.

[44] *See* Code de Commerce, art. L233-32. These devices came short in mimicking a poison pill because they required shareholder approval and were actioned only in the event of a tender offer and not a creeping acquisition. *See* Enriques & Gatti, *supra* note 17, at 80-81, 89.

[45] *See infra* notes 64 and 65 and accompanying text.

[46] Art. 13, § 1, D.L. 29 November 2008, No. 185.

[47] Art. 1, § 3.a), D.Lgs. 25 September 2009, n. 146.

neutrality rule—it invented it after all—was the UK, which, however, later decided to opt out of the European Union altogether.

While one can debate the extent to which these statutory changes were ultimately consequential, given that to pass effective defensive measures most jurisdictions require shareholder approval as a matter of company law,[48] their *expressive*[49] significance cannot be understated: by departing from the board neutrality rule, Member States signal their unease with a dynamic market for corporate control.

In the meantime, at a time when hedge fund activists started campaigning in Europe, E.U. securities laws were amended to close the loopholes that the use of derivatives exposed in ownership transparency regulations. Hence, Directive 2013/50/EU amended the Transparency Directive to provide that long positions held via derivatives are to be counted in for the purposes of the ownership thresholds triggering disclosure obligations.[50] This change requires potential hostile bidders as well as activists to disclose their holdings, and hence *de facto*, if not *de jure*, make their intentions known to the public, prior to the timing that the use of derivatives permitted in at least some jurisdictions, like Germany, that failed to consider hidden ownership techniques for the purposes of holdings disclosures.[51] Earlier disclosure of takeover- or activist campaign-sensitive information, in turn, inevitably leads to a jump in share prices that makes further purchases more expensive for bidders and activists.[52] While the amendment was fully justified within the logic of ownership disclosure rules, at the margin it had a negative effect on the market for corporate control and corporate influence.

---

[48] Carsten Gerner-Beuerle, David Kershaw & Matteo Solinas, *Is the Board Neutrality Rule Trivial? Amnesia about Corporate Law in European Takeover Regulation*, 22 EUR. BUS. L. REV. 559 (2011); Matteo Gatti, *The Power to Decide on Takeovers: Directors or Shareholders, What Difference Does It Make?*, 20 FORDHAM J. CORP. & FIN. L. 73 (2014).

[49] *See* Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1650-51 & n.2 (2000) (arguing that "law influences behavior independent of the sanctions it threatens to impose[; it] … works by what it says in addition to what it does.").

[50] Article 13, 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC of 15 December 2004, as amended by Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013.

[51] Dirk A. Zetzsche, *Hidden Ownership in Europe: BAFin's Decision in Schaeffler v. Continental*, 10 EUR. BUS. ORG. REV. 115, 126 (2009). On hidden ownership, *see generally* Henry T.C. Hu & Bernard Black, *The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership*, 79 S. CAL. L. REV. 811 (2005).

[52] *See, e.g.,* William J. Carney, *Toward a More Perfect Market for Corporate Control*, 9 DEL. J. CORP. L. 593, 601 (1984).

Some Member States, in turn, engaged in "goldplating" by requiring holders of significant stakes to declare their intentions vis-à-vis the company.[53] Such rules' impact on the market for corporate control should be weaker than the corresponding U.S. rules', whose bite hinges upon the high risk of securities litigation they give rise to. That risk is much lower in Europe, given how comparably rare securities litigation is there. At the same time, the risk of administrative sanctions on the part of securities markets regulators is real.[54]

The Market Abuse Regulation ("MAR") of 2014 gave its contribution to the stifling of the market for corporate control by significantly increasing the risk of violating insider trading bans for a prospective bidder building a toehold. The rules are extremely unclear as to whether a bidder in the process of deciding whether to launch a takeover bid and a fortiori having decided to do so makes illegitimate use of the information relating to the prospective bid, if the bidder buys the target shares to build a toehold. Article 9(4) provides that, for the purposes of insider trading bans, "it shall not be deemed from the mere fact that a person is in possession of inside information that that person has used that information and has thus engaged in insider dealing, where such person has obtained that inside information in the conduct of a public takeover or merger with a company and uses that inside information solely for the purpose of proceeding with that merger or public takeover, provided that at the point of approval of the merger or acceptance of the offer by the shareholders of that company, any inside information has been made public or has otherwise ceased to constitute inside information." And then it adds, puzzlingly, that the quoted provision "shall not apply to stake-building." While Article 9(5) would appear to help the prospective bidder by clarifying that "the mere fact that a person uses its own knowledge that it has decided to acquire or dispose of financial instruments in the acquisition or disposal of those financial instruments shall not of itself constitute use of inside information," both the Belgian financial market regulator and the Italian highest court have excluded that this provision permits the prospective bidder's trading, if it has "knowledge of the decision to launch a takeover bid, and thus of the fact that in principle

[53] *See* Art. L 233-7, Code de Commerce, as introduced by *Ord. n° 2009-105 du 30 janvier 2009* (France) (disclosure of intentions due only if ownership stake is above 10 percent); Art. 120 Consolidated Decree on Financial Intermediation, as amended by Law Decree No. 148 of Oct. 16, 2017 (Italy) (same).

[54] For instance, the French AMF levied a €20m fine, later reduced to €18m by the Appeals Court, against hedge fund manager Elliott for irregularities in the ownership disclosure statements, including on its intentions. See SAN-2020-04 – Décision de la Commission des sanctions du 17 avril 2020 les sociétés Elliott Advisors UK Limited et Elliott Capital Advisors L.P., https://www.amf-france.org/fr/sanctions-transactions/decisions-de-la-commission-des-sanctions/decision-de-la-commission-des-sanctions-du-17-avril-2020-legard-des-societes-elliott-advisors-uk.

a premium will be paid over the market price."[55] In addition, Article 9(6) muddies the waters even further by stating that, no matter what the same Article says in its first five paragraphs, "an infringement of the prohibition of insider dealing set out in Article 14 may still be deemed to have occurred if the competent authority establishes that there was an illegitimate reason for the orders to trade, transactions or behaviours concerned."[56]

To be sure, that MAR prohibits prospective bidders' purchases of target shares may well not be the correct interpretation of the relevant (and highly obscure[57]) MAR provisions. However, the emphasis in MAR's preamble (24) on market egalitarianism as the rationale for insider trading rules, and, perhaps even more significantly, the use therein of language reminiscent of the European Court of Justice's opinions on insider trading cases[58] expose such trades to a significant risk of prosecution for insider trading.[59] Given how important pre-announcement stake building is for an active market for corporate control,[60] this uncertainty may well have an impact on the vibrancy of the E.U. market for corporate control.

A similar conclusion might even be reached as to whether a hedge fund in the process of starting an activist campaign against a target may purchase shares in the target to make a gain out of it.[61] Eventually, as we have seen, activist campaigns are launched in Europe, which means hedge fund managers are undeterred by any such broad interpretation of MAR provisions. And yet one cannot lightly dismiss the prospect of prosecutions against activists for market abuse. What is sure is that E.U. law prohibits trading by members of a wolf pack other than the hedge fund that will run the campaign.[62] If wolfpacks are as instrumental to the success of activist campaigns as some

---

[55] Financial Services Market Authority (Belgium), FAQ6, https://www.fsma.be/en/faq/6-may-offeror-still-buy-securities-offeree-company-during-preparation-takeover-bid-order; see similarly Corte di Cassazione - Sentenza No. 31507, 15 April 2021 (*Cremonini*).

[56] *See also* MAR's Preamble (31).

[57] *See* Alain Pietrancosta, *Brief Remarks on the Necessary Clarification of Market Abuse Prohibitions in Times of Shareholder Activism*, 2019 REVUE TRIMESTRIELLE DE DROIT FINANCIER 3, 6.

[58] *See* ECJ, 22 November 2005, Grøngaard and Bang, C-384/02, ECLI:EU:C:2005:708, para 33; ECJ, 23 December 2009, Spector, C-45/08, ECLI:EU:C:2009:806, para. 61.

[59] *See* Stefano Lombardo, *Some Reflections on the Self-insider and the Market Abuse Regulation – The Self-insider as a Monopoly-Square Insider*, 2021 EUR. COMP. FIN. L. REV. 2, 21-22 (concluding that there is uncertainty as to whether, more generally, "self-insiders" can be held liable for market abuse).

[60] *See e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *Auctions and Sunk Costs in Tender Offers*, 35 STAN. L. REV. 1, 15-17 (1982).

[61] *See* Pietrancosta, *supra* note 57, at 9-13 (discussing the point).

[62] *See id.* (conceding that this case is different and reporting that this is the UK Financial Services Authority's explicit position).

US legal scholars depict them,[63] this is, again, something that may well affect the intensity of hedge fund activism in Europe.

B. Changes in Company Laws and Corporate Governance Practices

National company laws experienced important changes since 2004, many of which were direct consequences of controversial acquisitions (rumored, attempted, or completed). France overtly changed course and took an antitakeover stance when it passed the so-called Loi Florange. To make good on a promise made in 2013 by President François Hollande to a vocal group of workers laid off as a result of the post-acquisition shutdown of a steel mill, the Florange plant of ArcelorMittal,[64] the French Parliament passed a law (aptly named the Florange law) that, among other things, introduced loyalty shares (also known as tenure-voting shares) as a default rule.[65]

Around the same time, the largest Italian manufacturing company, Fiat, and a leading trucks company, CNH, both controlled by the Agnelli family and managed by the same CEO, decided to reincorporate in the Netherlands, each in the occasion of a merger transaction involving two previously acquired U.S. companies.[66] The choice of the Netherlands for the two companies had much to do with an opinion issued only a few years earlier by a Dutch court, judging loyalty dividends as not contrasting with the principles of equality and fairness.[67] Despite the absence of Dutch companies with loyalty shares and the Dutch laws' silence on the same, Fiat's lawyers must have reasoned that, similarly, their issuance would be legal under Dutch corporate law. The

---

[63] *See generally* John C. Coffee, Jr., & Darius Palia, *The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance*, 41 J. CORP. L. 545, 549 & 562-68 (2016) (describing wolfpacks and their influence).

[64] Hollande had to deal with the fallout of a hostile deal that occurred seven years earlier during the presidency of Sarkozy. ArcelorMittal's employees were furious with French politicians for failing to sanction the series of unfulfilled commitments to employees by Mittal, a foreign company that famously took over Arcelor (a company incorporated in Luxembourg but headquartered in France) in early 2006. Gilbert Reilhac, *Hollande Returns to Face 'Betrayed' Florange Steel Unions*, REUTERS, Sept. 26, 2013, www.reuters.com/article/us-france-hollande/hollande-returns-to-face-betrayed-florange-steel-unions-idUSBRE98P0JH20130926; Steven Davidoff Solomon, *France Answers Hostile Bids with the Two-Vote Share*, N.Y. TIMES (May 19, 2015), www.nytimes.com/2015/05/20/business/dealbook/france-answers-hostile-bids-with-the-two-vote-share.html.

[65] *See* Loi 2014-384 du 29 mars 2014 visant à reconquérir l'économie réelle [Law 2014 – 384 Mar. 29 Aiming to Reconquer the Real Economy], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE, [JORF] [OFFICIAL JOURNAL OF THE REPUBLIC OF FRANCE] Mar. 27, 2014, p. 6227 (Fr.) (the law also abandoned the board neutrality approach and imposed hurdles for hostile bidders, like a minimum tender condition, and strengthened consultation rights with the workforce). *See* Pargendler, *supra* note 37, at 543.

[66] Marco Ventoruzzo, *The Disappearing Taboo of Multiple Voting Shares: Regulatory Responses to the Migration of Chrysler-Fiat*, 114 ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFT 192, 203-4 (2015).

[67] Hoge Raad Dec. 14, 2007, ECLI:NL:HR:2007:BB3523 (DSM).

reincorporation in the Netherlands combined with the issuance of loyalty shares allowed the Agnellis to retain control of the two companies after their merger with the U.S. subsidiaries.[68] Since then, another eight Italian firms followed suit and similarly chose Dutch corporate law to consolidate the control of the founding family via tenure voting.[69]

That was despite the Italian Government's attempt, in the summer of 2014, and hence even before the Fiat and CNH mergers were executed, to stop the migration of Italian firms to the Netherlands by introducing legislation that would allow companies to issue loyalty shares.[70] Leaving aside the fact that there might be other corporate law features that may have made the Netherlands attractive to Italian list firms, Italy's loyalty shares were not as attractive as the ones one could obtain in the Netherlands: first, the former could give no more than one additional vote per share (while, in the complete silence of Dutch law, no limit exists in the Netherlands); second, unlike under the Fiat model, loyalty shares do not operate retrospectively, that is, they must be held for two years once the charter amendment introducing tenure voting is adopted for the loyalty vote to be granted. Still, tenure voting shares proved popular among non-migrating Italian firms, with 69 listed firms that had tenure voting in their charters at the end of 2021.[71]

Corporate migration in the direction of the Netherlands has not been an exclusively Italian phenomenon. Belcredi, Faverzani and Signori report that thirteen companies out of the universe of E.U. listed companies with a capitalization higher than €1bn had reincorporated in the Netherlands from E.U. member states other than Italy between 2000 and 2021.[72] Only some of them did similarly introduce dual class share structures, but all of them made use of at least one charter provision strengthening, if not insulating, boards vis-à-vis shareholders.[73] Hence, their

[68] See the S.E.C. filing Merger of Fiat S.p.A. with and into Fiat Investments N.V. to be renamed Fiat Chrysler Automobiles N.V., at, 218 (https://www.sec.gov/Archives/edgar/data/1605484/000119312514265448/d704286d424b3.htm#toc).

[69] See Redazione Economia, *Le aziende italiane che hanno trasferito la sede legale in Olanda*, CORRIERE (Jul. 23, 2012), https://www.corriere.it/economia/finanza/23_luglio_12/aziende-italiane-che-hanno-trasferito-sede-legale-olanda-378ca424-1f14-11ee-bfca-f44c975a09c3.shtml.

[70] See Law Decree 24 June 2014, No. 91, as approved by Parliament with Law 11 June 2014, No. 116, Article 20.1, letter aa). Until January 2015, companies may approve charter amendments to introduce loyalty shares with a majority of the outstanding shares rather than with at least two thirds of the shares present at the relevant meeting. Id. Article 20.1-*bis*.

[71] See Consob, Report on Corporate Governance of Italian Listed Companies 15 (2022).

[72] Massimo Belcredi, Lara Faverzani & Andrea Signori, Così *non* fan tutte: *An analysis of Italian companies moving abroad* 19, Working Paper, Jun. 2023, https://centridiricerca.unicatt.it/fin-gov-Cos%C3%AC%20non%20fan%20tutte%20final%20June%202023%20clean.pdf.

[73] *Id.* at 20-21.

preference for the Netherlands was also to ascribe to its corporate law's tradition of insulating companies from the risk of hostile takeovers.[74]

The Netherlands also played a role in the (ultimately unsuccessful) defense of two prominent Paris-listed target companies, Luxembourgish Arcelor in 2006 and French Suez in 2020. Under the attack of, respectively, Mittal Steel and Véolia, the two companies set up a Dutch foundation, controlled by their boards, which were given shares in two subsidiaries, whose sale the hostile bidders had planned in order to avoid problems with antitrust authorities. The foundations' consent would be necessary to sell those subsidiaries, making it much harder for the bidders to proceed with their acquisition.[75]

Italy's reform of 2014 not only allowed already listed companies as well as companies at the IPO stage to adopt tenure voting, but it also abandoned a ban on multiple voting shares that had dated back from 1942. More precisely, it enabled non-listed companies to issue special classes of shares with up to three votes each and clarified that such companies could retain a dual class share structure when going public. After Italy, other European countries relaxed their bans on voting enhancement mechanisms. The UK revised its Listing Rules to allow companies with dual class shares to list on the LSE's Premium segment, albeit with several provisos that make the UK reform little attractive to companies large enough to consider a cross-listing. Belgium introduced tenure voting shares and multiple voting shares similarly to Italy, that is, with the latter only available to newly listed companies,[76] while Spain only allowed for tenure voting shares.[77]

To wit, as we anticipated in our previous work,[78] restrictions to the availability of post-bid defenses (not necessarily because of the board neutrality rule, but because inflexible company laws

[74] On Dutch governance's tradition of managerialism, see, e.g., Ariberto Mignoli, *Idee e Problemi nell'Evoluzione della "Company" Inglese*, 5 RIVISTA DELLE SOCIETÀ 633, 640-43 (1960) (tracking back Dutch managerialism to the Dutch East India Company) Abe de Jong, Joost Jonker, Ailsa A. Röell & Gerarda Westerhuis, *Reinventing Institutions: Trust Offices and the Dutch Financial System, 1690s-2000s* 11-24 (2020), https://ssrn.com/abstract=3719550 (documenting the use of the *administratiekantoren* and now of *stichtingen* as takeover defense tools). Gucci's successfully defeating the acquisition attempt by LVMH, which we mentioned *supra* text accompanying note 17, served as a powerful example of the flexibility that Dutch law offered to target companies.

[75] *See* Didier Martin, *L'incessibilité ou la cession d'actifs d'une société cible d'une offre publique est-elle possible et dans quelles conditions?*, 2021 REVUE DE DROIT BANCAIRE ET FINANCIER, Issue 5, Dossier 21, 1-2.

[76] Steven Declercq, Jeroen Delvoie, Theo Monnens & Tom Vos, *Loyalty Voting Rights in Belgium: Nothing More than a Control-Enhancing Mechanism?*, 20 EUR. COMP. & FIN. L. REV. 27 (2023).

[77] Article 3, §20, Ley 5/2021.

[78] *See* Enriques & Gatti, *supra* note 15, at 94 ("Oddly enough, a company may opt out of the market for corporate control discipline altogether via deviations from one share, one vote (which are in fact quite frequent in the EU), while it cannot do so partially via a poison pill, combined or not with a staggered board."). One may in fact argue

have historically not allowed U.S.-styled poison pills in most jurisdictions),[79] pushed companies to be even more takeover-proof by using the impenetrable barrier of dual class structures.

Finally, national Corporate Governance Codes have nudged companies in the direction of not using executive compensation packages to align managers' interests to shareholders' in the event of a takeover bid, a key element of U.S. corporate governance.[80] The French and Italian Corporate Governance Codes contain, respectively, the same or similar recommendations.[81] The German Corporate Governance Code puts a cap of twice the annual remuneration for severance payments[82] and even rules out "[c]hange of control clauses that commit to benefits in the case of early termination of a Management Board member's contract due to a change of control."[83] Similarly, a recommendation in the Dutch Corporate Governance Code appears to recommend that companies do not allow for the acceleration of stock options or stock grants in the event of a change of control.[84]

C. A Flurry of Foreign Direct Investment Controls Legislation

The European Commission has been shaping the landscape for foreign direct investment (FDI). The E.U. Screening Regulation[85] primarily seeks to harmonize and coordinate various FDI review mechanisms in Member States. While under such a framework the Commission may issue non-binding opinions on national FDI reviews, Member States still maintain the ultimate authority.

---

that the resurgence of dual-class share structures in the U.S. became more appealing after institutional investors waged a successful war against staggered boards, which are arguably a milder device (staggered board are devices for potentially contestable companies, while dual-class companies are structures for controlling shareholders to keep the company outside of the market for corporate control).

[79] *See id.* at 83-84 (describing some of the most cited obstacles to poison pills in Europe). *See also* Gatti, *supra* note 39, at 125-28 (explaining that these limitations stem from national company laws and not takeover regimes).

[80] *See* Marcel Kahan & Edward B. Rock, *How I learned to stop worrying and love the pill: Adaptive responses to takeover law*, 69 U. CHI. L. REV. 871, 896-99 (2002).

[81] See FRENCH CORPORATE GOVERNANCE CODE (2022), Recommendation 26.5.1, https://www.ecgi.global/node/10195; ITALIAN CORPORATE GOVERNANCE CODE 15 (2020), Article 5, Recommendation 27, available at https://www.borsaitaliana.it/comitato-corporate-governance/codice/codice.en.htm.

[82] GERMAN CORPORATE GOVERNANCE CODE 20 (2022), Recommendation G13, https://www.dcgk.de/en/home.html.

[83] GERMAN CORPORATE GOVERNANCE CODE, *supra* note 82, at 20, Recommendation G14.

[84] § 3.1.2, No. vi) and vii), Dutch Corporate Governance Code 40 (2022), https://www.mccg.nl/english ("Shares should be held for at least five years after they are awarded; [...] share options cannot be exercised during the first three years after they are awarded").

[85] Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, PE/72/2018/REV/1, OJ L 79I , 21.3.2019.

In fact, Member States and their authorities have implemented the Screening Regulation in different ways. Some require notification of all transactions involving non-E.U. investors, particularly in technology, manufacturing, and retail.[86] Variations exist among Member States regarding mandatory or voluntary filings, thresholds, and the definition of critical sectors.[87] The origin of investors plays a crucial role in risk assessments, with some countries having become more cautious about investments from specific nations, particularly China[88] and Russia.[89]

While blocking deals altogether on national security grounds is still relatively rare, FDI screening is growing in importance given its expansion to ever more sectors and transactions[90] and investors will have to go over multijurisdictional assessments to navigate parallel notification processes.[91]

Overall, while FDI reviews are inevitable in a world of intensifying geopolitical tensions, this type of measures (and the current variations among Member States) can hamper a genuinely free and open takeover market in Europe.

V. FOR WHOM HAS THE MOAT BEEN DUG?

Part IV reports many multifaceted protections that over the years incumbent boards and controlling shareholders or influential blockholders (collectively, insiders) of European companies have accumulated to keep unwanted acquirers or investors at bay. The result is greater insulation and stability for insiders, which has become possible with the support of national (and to some extent EU) politics. Over the last twenty years a pact between insiders and politicians has kept

---

[86] Tobias Heinrich, Tilman Kuhn, Orion Berg & Thilo-Maximilian Wienke, *Foreign direct investment reviews 2023: Europe*, WHITE & CASE INSIGHT (Mar. 20, 2023), https://www.whitecase.com/insight-our-thinking/foreign-direct-investment-reviews-2023-europe.

[87] *Id.*

[88] Mirko von Bieberstein & Lukas Nigl, *The evaluation of the German FDI Regime – Cornerstones of potential revisions revealed*, CLEARY GOTTLIEB (Sep. 6, 2023), https://www.clearytradewatch.com/2023/09/the-evaluation-of-the-german-fdi-regime-cornerstones-of-potential-revisions-revealed/.

[89] Heinrich, Kuhn, Berg & Wienke, *supra* note 86.

[90] von Bieberstein & Nigl, *supra* note 88 (discussing proposals to expand controls in Germany); CLEARY GOTTLIEB, CLEARY GOTTLIEB FDI NEWSLETTER, Aug.-Oct., 2023, https://client.clearygottlieb.com/84/2734/november-2023/global-fdi-newsletter---august-october-2023(1).asp?sid=d5ce453e-a217-4d2c-baff-c600e948e00c (describing expanded powers in Italy).

[91] Heinrich, Kuhn, Berg & Wienke, *supra* note 86.

shareholders out in the cold and fostered a legal, policy and governance environment averse to the efficient functioning of the market for corporate control.[92]

The rent-seeking nature of this environment is for everyone to see. On the one hand, the new ecosystem protects insiders: they can worry less about hostile bids. While these protections may have an upside if they help bolster the idiosyncratic vision of disruptive firms' founders, the increased agency costs for European businesses might become significant. After all, compared to its U.S. peers, European companies tend to be older, and hence less likely to be founder-led, and operate in more mature sectors. Arguably, companies in these sectors benefit from the spur of the market for corporate control even more intensely than other companies to avoid innovation-dilemma dynamics and incumbents' tendency to remain inert in the face of a changing market environment.

At the same time, the new ecosystem preserves and increases the clout of national politics: national government leaders and politicians have gotten themselves a seat at the table and now get to exchange favors with executives (both national and foreign). European politicians have eagerly reclaimed their role as the ultimate arbiters in control contests—a role that leaders from the previous generation had apparently relinquished in favor of a more market-oriented perspective, whether by wholehearted embrace or reluctant acceptance.

In assessing the implications of this new, corporatist and protectionist ecosystem, an essential question is whether investors are worse-off.

Ultimately, this question boils down to whether M&A activity, and hostile deals in particular, are beneficial to shareholders. Despite a multitude of studies, which tend to answer the question in the positive as far as target shareholders are concerned but are more ambiguous when they account for bidder shareholders as well, it is hard to come to a firm conclusion.[93]

Note that hindering hostile deals has implications on friendly deals as well. This is for two reasons: first, friendly deals are more expensive at the margin if investment screening regulations

---

[92] For the observation that the greater the presence of foreign investors, the stronger the political pressure towards investor unfriendly regulation, see Pargendler, *supra* note 37, at 537. As she suggests, it is plausible that voters support measures that keep firms under national owners for the same emotional reasons they support their national sports team. *See id.* at 538 ("At a basic level, domestic control can be a symbol of national power and pride that epitomizes nationalism irrespective of its effects on the economic well-being of citizens. Citizens may prefer domestic control for the same reason that they cheer for their national sports team").

[93] *See supra* note 27 and accompanying text.

apply. Second, friendly deals are often the result of an unsolicited approach by a prospective buyer: the threat of a hostile bid pressures the target company to sit at the negotiating table and is helpful to secure its acceptance on behalf of the shareholders. The less credible the threat of a hostile bid, the safer it is for the target to just say no.[94] As a result, the M&A market overall will weaken, making it harder for companies to undergo the restructurings that may be necessary for their survival at a time when technology is disrupting most industries.[95]

The hostile environment to hostile bids also affects the debate on dual class shares as well. If the chances of a shareholder value-creating hostile takeover are close to zero under the current governance, market and legal framework, what is the harm to investors of having a dual-class controlling shareholder? It may actually be better than one with 30/50% of the shares who is unwilling to make acquisitions in order to retain control. At the same time, if hostile takeovers are nigh on impossible, why would controlling shareholders fear losing control and go for dual class shares structures? Are there alternative reasons why controlling shareholders may prefer dual class shares?

Another question is whether workers and citizens in Member States benefit from a more interventionist political economy that makes deals (especially foreign ones) more difficult to complete. In M&A lawmaking, the alliance between incumbents and labor to thwart acquirers is as well-known as it is tight.[96] While such an alliance has proven to work for incumbents,[97] the record

---

[94] *Cf.* G. William Schwert, *Hostility in Takeovers: In the Eyes of the Beholder?*, 55 J. Fin. 2599, 2600 (2000) (noting that deals can change from hostile to friendly and vice versa); Gatti, *supra* note 48, at 98 (noting that "the absence of board vetoes increases M&A activity by forcing directors to consider acquisition proposals, which they would otherwise reject outright if they could veto the acquisition upfront").

[95] *Cf.* Ronald J. Gilson, *The Political Ecology of Takeovers: Thoughts on Harmonizing the European Corporate Governance Environment*, 61 FORDHAM L. REV. 161 (1992).

[96] Roberta Romano, *The Future of Hostile Takeovers: Legislation and Public Opinion*, 57 U. CIN. L. REV. 457, 458-65 (1988); *see* Mark J. Roe, *Takeover Politics*, *in* THE DEAL DECADE: WHAT TAKEOVERS AND LEVERAGED BUYOUTS MEAN FOR CORPORATE GOVERNANCE 321, 340-47 (Margaret M. Blair ed., 1993); Pargendler, *supra* note 37, at 535 (describing "the powerful domestic alliance between elite and labor interests in retaining local corporate control and the popular appeal of nationalist sentiment").

[97] Crucially, national politicians are lobbied intensely and often successfully by incumbent insiders who are threatened by takeover and seek to hamper the market for corporate control. *Cf.* Ferrarini & Miller, *supra* note 20, at 303 (theorizing that targets, as opposed to bidders, "are likely to expend significant resources lobbying for local rules that increase the costs of unwanted takeover bids"). For the EU, see Hopt, *supra* note 11, at 270 (citing Volkswagen lobbying then-Chancellor Schröder and the Wallenberg family lobbying other Member States). For the U.S., *see* Roe, *supra* note 96, at 340-47 (lobbying efforts by corporations resulted in the enactment of various anti-takeover laws throughout the United States, with Delaware adopting a mild approach to avoid the risk of federal intervention).

is not as good for the workers, at least judging from empirical evidence from the U.S.[98] In theory, fewer hostile takeovers, no matter how small the baseline originally was, could mean fewer lay-offs at the firm level. However, lay-offs could still occur because of internal restructurings or even friendly deals, which can be expected to decrease less than hostile ones. Besides, rather than relying on directors to protect employees against hostile bidders (as is the case, at least ostensibly, under US-styled constituency statutes[99]), lay-offs in European jurisdictions are typically regulated via employment law. Moreover, it is hardly settled that foreign ownership is more detrimental than domestic controllers for employees, consumers, and other stakeholders in the jurisdiction where the firm operates.[100] True, the overall framework we provide is only partially driven by repulsion against foreign buyers, yet this protectionist component has always been prominent in the policy debate[101] and regularly made good headlines.[102]

Something else was going on beyond employee protection: significant incumbent shareholders felt weak. In fact, despite the overall low number of hostile takeovers, anecdotal evidence suggests that, once launched, acquisitions attempts are hard to fend off in Europe, which over the years resulted in some existing de facto controllers losing control.[103] Not only did this

---

98 *See generally* Lucian A. Bebchuk, Kobi Kastiel & Roberto Tallarita, *For Whom Corporate Leaders Bargain*, 94 S. CAL. L. REV. 1467 (2021) (showing that directors of firms incorporated in state with constituencies statutes did not extract better terms for workers).

99 *See id.* at 1515-18 (providing evidence that "in almost all cases, despite the presence of risks to employment, corporate leaders did not negotiate for any limitations on the freedom of private equity buyers to lay off employees and thereby reduce employment levels").

100 *See* Pargendler, *supra* note 37, at 575-79 (evaluating arguments in favor and against and finding mixed evidence).

101 *See generally* Davies, Schuster & van de Walle de Ghelke, *supra* note 11, at 155 (arguing that the Takeover Directive implementation choices were "influenced by economic nationalism and a desire by Member States to preserve corporate headquarters and employing entities within their own territories."); Clarke, *supra* note 22, at 10 (mentioning that in the aftermath of the Cadbury takeover, there was some debate on the need to introduce protectionist measures to shield British companies from foreign acquisitions); Kershaw, *supra* note 13, at 42-47 (criticizing the desirability of a stronger governmental role to shield firms in strategic sectors); Hopt, *supra* note 11, at 276-78 (mentioning the protectionist trend that followed the Takeover Directive: "it cannot be overlooked that protectionism of the country's own economy and legal system is considerable and widespread." *Id.* at 277); Davis, Hopt & Ringe, *supra* note 22, at 239 (citing a "potential backlash against a perceived sale of strategic firms into foreign hands" as a chief driving factor of the political choices of a given jurisdiction when it comes to M&A legislation).

102 Michael Stothard, *Battle for Spanish Toll Road Operator Abertis Intensifies*, FIN. TIMES (Dec. 17, 2017), https://perma.cc/S8RC-VBD6 (mentioning France and The Netherlands as two nations uneasy with sell-side cross-border deals). In the most extreme cases, targets even get nationalized. *See* Gwyn Topham, *France Nationalises Strategic Shipyard to Thwart Italian Ownership*, GUARDIAN (Jul. 27, 2017), https://perma.cc/25YB-FMB2. Frank Dohmen, Dieter Hawranek & Janko Tietz, *Vulnerable to Attack: German Companies Fear Wave of Hostile Takeovers*, SPIEGEL ONLINE (Oct. 26, 2010), https://perma.cc/VG4A-MCTJ.

103 *See generally* Enriques & Gatti, *supra* note 17 (making this argument for creeping acquisitions); Gatti, *supra* note 10, at 33-36 (extending the argument to all hostile deals).

make calls to rein in takeovers easier to answer but also resulted in new rules that strengthened de facto controlling shareholders rather than boards, as the former were quick to use devices such as tenure voting to their advantage.

CONCLUSION

This paper chronicles the many lethal cuts that concurred to kill hostile takeovers as a viable corporate governance device. At the turn of the century, E.U. institutions were busy seeking to pass harmonized takeover rules that could promote a vibrant market for corporate control. According to the credo at the time, not only did takeovers help foster competitiveness and dynamism for E.U. firms and improve their governance, but they were also instrumental for the very goal of building a pan-European market. However, several factors, such as controversial deals, broader changes in corporate governance, and massive macroeconomic shocks pushed markets and policies in the opposite direction. While the Takeover Directive itself, a compromise among Member States, failed to create a level-playing field, the twenty years following its adoption witnessed a multifaceted sequence of policies and market developments that resulted in the progressive closure of the market for corporate control.

Of course, this is not to say hostile bids in Europe have disappeared altogether or will disappear anytime soon. There will always be some. Arguably though, they will be fewer under the current setting than one could have expected when the Directive was passed. Reasonable minds may differ on the overall effects of hampering a dynamic market for corporate control. What is beyond doubt is that corporate insiders, be they managers or de facto controlling shareholders, and politicians have, respectively, an easier life and a stronger grip on the private sector. It is unfortunate that, historically, this public-private convergence has meant rents for a few insiders and less dynamism among firms.

european corporate governance institute

about ECGI

The European Corporate Governance Institute has been established to improve *corporate governance through fostering independent scientific research and related activities.*

The ECGI will produce and disseminate high quality research while remaining close to the concerns and interests of corporate, financial and public policy makers. It will draw on the expertise of scholars from numerous countries and bring together a critical mass of expertise and interest to bear on this important subject.

The views expressed in this working paper are those of the authors, not those of the ECGI or its members.

www.ecgi.global

european corporate governance institute

ECGI Working Paper Series in Law

Editorial Board

Editor	Amir Licht, Professor of Law, Radzyner Law School, Interdisciplinary Center Herzliya
Consulting Editors	Hse-Yu Iris Chiu, Professor of Corporate Law and Financial Regulation, University College London
	Martin Gelter, Professor of Law, Fordham University School of Law
	Geneviève Helleringer, Professor of Law, ESSEC Business School and Oxford Law Faculty
	Kathryn Judge, Professor of Law, Coumbia Law School
	Wolf-Georg Ringe, Professor of Law & Finance, University of Hamburg
Editorial Assistant	Asif Malik, ECGI Working Paper Series Manager

https://ecgi.global/content/working-papers

european corporate governance institute

Electronic Access to the Working Paper Series

The full set of ECGI working papers can be accessed through the Institute's Web-site (https://ecgi.global/content/working-papers) or SSRN:

Finance Paper Series	http://www.ssrn.com/link/ECGI-Fin.html
Law Paper Series	http://www.ssrn.com/link/ECGI-Law.html

https://ecgi.global/content/working-papers