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A LOOK AT THE DEBATE ABOUT THE TAKEOVER DIRECTIVE

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Abstract

The takeover directive has laid the basis for a better organisation of takeovers in Europe, also by introducing better coordination of the procedure in cases of multi-state takeovers. But the provisions of the directive dealing with designating the competent authorities have to be updated taking into account the changes in the regulatory system in Europe (ESMA coordination), in the trading patterns and the changed perspectives in company law. Differently from the concepts followed at the end of the previous century, there is more understanding these days as to the role played by stable shareholders. This leads to a better analysis of the issues of private benefits of control that should best be avoided on a permanent basis, and not only at the moment of a control acquisition. As a consequence, the obligation to mandate a bid in case of crossing a certain threshold should be mitigated by insuring that the new controlling shareholder can obtain no private benefits. For other, open bids, the usefulness of the takeover technique is widely recognised and should be supported as the ultimate disciplining instrument. However the takeover is not the most efficient disciplining mechanism, and other instruments should be supported as well. Finally, the debate on defensive techniques will probably not be avoided. It is proposed to reposition this debate in terms of the overall decision-making mechanism in company law and allow the general meeting to ultimately decide which direction the company should take. Differently from proxy solicitation as a disciplining instrument – with whom this proposal is affiliated – here the decisions are to be adopted in light of a firm offer and with full disclosure, so the shareholders will know what will be the financial consequence of their decision.

Dealing with takeovers often results in a dilemma , one being obliged to take account on the one hand of the necessary flexibility, the risk of entrenchment, irresponsible conduct and abusive private benefits, and on the other, create stability and innovation, responsible ownership, supporting the long term growth. This balance will only be struck in an appropriate way by dealing not only with the technical case of takeover bids, but should include the wider legal, financial, social context in which business activity is undertaken. One can hope that the European regulators will be open to take this into consideration.

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A look at the Debate about the Takeover Directive
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The revision of the takeover directive of 21 April 2004, 2004/25 about 20 years after its adoption, stands before us. This is 20 years after adoption, and barely 5 years after its final date of implementation. Is there enough new material to proceed to an in depth revision? Or should it be a mere clean up of the imperfections left in the Directive, especially dealing with the numerous blanks that where left behind? From a pragmatic point of view the latter position can be defended, as anyone who has lived through the original drafting will still remember the traumas that the adoption of this directive left behind.

One should however be aware that work on a takeover directive did not start in 2003 but goes back to the mid 1970s, (the Pennington report for those who still remember) and that effective preparation took place in the 1990s and early 2000s, so that the directive essentially reflects the ideas of the last decades of the 20th century. Therefore revision of the directive cannot be limited to the technical updating of it, but should attempt to take account of the evolutions that have taken place since then. This paper aims at pointing at some of these changes, also mentioning some elements where the ongoing financial crisis will have an influence.

Therefore the time has come to reopen some of the core debates, and it seems unlikely that these will be avoided in any case.

1. The changed environment,

The financial markets have changed substantially since the late 1990s: most striking is the interconnection between markets, the springing up of new execution venues, being MTFs, OTFs, or other trading mechanisms, and the rise of the institutional investors. This may at least necessitate the adoption of a wider definition of the scope of a future directive, extending the present notion of "admission to trading on a regulated market" to trading on publicly accessible trading venues. As a consequence, trading will take place in several jurisdictions other than that of the primary listing, leading to an increase of multistate transactions and diversity of jurisdictions concerned, and likely to call for more robust decision-making in a cross-border context. This point will be developed later.

By way of a general principle the take-over directive contains several principles dealing with the equal and fair treatment of the parties involved. This requirement has to be further implemented in the royal decrees adopted on the basis of the directive. The target company shareholders need the strongest protection: therefore they have to be treated in an "equivalent" – not equal – way. They have to dispose of sufficient time and be informed about the consequences on the target company's employment, the labour conditions and on the different location of the target company's activities. The board of the target company has to act in the interest of the company as a whole, not privileging any group of shareholders . And the bidder and other related parties have to avoid that false markets are created resulting in artificial price increases[1]

[1] see article 9 of the directive, implemented in the RD-1of 27 April 2007

Mostly, the acquisition of control not only takes place by buying shares, but also by acquiring derivatives that give access to shares[2]: these are the high profile cases of hidden ownership that took place in VW, Continental or the French Hermes shares, and other important companies where one party accumulated contracts for difference on the underlying shares that did not have to be disclosed as not being acquisitions. This technique has falsified one of the fundamental understandings in our markets for corporate control, i.e. that control will not be acquired surreptitiously. Traditionally this matter should be part of the transparency directive where it is dealt with more explicitly[3].

Another substantial factor of change relates to the supervisory system that has considerably changed after 2011, I refer here to the creation of a European regulatory and - in some fields - supervisory body, the European Securities and Markets Authority (ESMA). Although the ESMA regulation does not include the takeover directive 2004/25 among its core competences, it mentions that 'the authority shall also take appropriate action in the context of take-over bids, clearing and settlement and derivative issues"[4] One can understand this wholesale reference as an indication that the position of ESMA will further have to be defined in the forthcoming directives and regulations as projects have been already tabled in all two of the three mentioned topics[5]. The precise impact of the institutional change will be briefly mentioned later.

The most fundamental evolution however relates to company law - including corporate governance - itself. The 2004 directive was conceived in times where the company paradigm mainly was based on the dispersed ownership model, whereby individual shareholders being unable to exercise power, the management mainly dominates the company, and the takeover instrument was needed to discipline that management[6]. Conversely, the concentrated ownership model was disfavoured and the takeover directive contains some provisions reducing the blockholders' or controlling shareholders' power: these are the provisions about the board's neutrality, the breakthrough rule, and the ineffectiveness of restrictions on the transfer of shares as far as the bidder is concerned[7]. Most of these rules have in practice not been very effective due to

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[2] On 14 September 2011 ESMA has launched a call for evidence on empty voting, including hidden ownership, building further on the Commission's work in this field (ec.europa.eu/internal_market/securities/docs/transparency/directive/com-2010-243_en.pdf). See also the statement of the European Corporate Governance Forum, 20 February 2010, at /ec.europa.eu/internal_market/company/docs/ecgforum/ecgf_empty_voting_en.pdf; on empty voting and similar subjects see: David Skeel, Behind the Hedge, LEGAL AFF., Nov.–Dec. 2005, at 28, 29–30 (emphasizing that Perry's economic incentives were diametrically opposed to the interests of other Mylan shareholders—the more overpriced the acquisition, the more Perry would have profited due to its stake in King). For thoughtful and extensive analysis of the new vote buying techniques, see generally Henry T.C. Hu & Bernard Black, The New Vote Buying: Empty and Hidden (Morphable) Ownership, 79 S. CAL. L. REV. 811 (2006); Marcel Kahan & Edward B. Rock, Hedge Funds in Corporate Governance and Corporate Control (Univ. of Pa., Inst. for Law & Econ. Research Paper No. 06-16, 2006), available at http://ssrn.com/abstract□919881.

[3] The transparency directive, art.10 (b) deals with an empty voting case in some instances; but the threshold is too low to be useful in the takeover context. A revised proposal is expected for the end of 2011.

[4] Art. 1 (3) Esma Regulation1095/2010 of 24 November 2010, OJ 15 December 2010.

[5] See EMIR proposal (on [OTC] derivative transactions, central counterparties and trade repositories) and Clearing and Settlement proposals (see ; Enhancing Safety of European financial markets: common rules for CSD and securities settlement, /europa.eu/rapid/pressReleasesAction.do?reference=IP/11/29&format=HTML&aged=0&language=en&guiLanguage=en)

[6] Gilson R, Controlling Shareholders and Corporate Governance: Complicating the Comparative Taxonomy, Aug 2005, ECGI - Law Working Paper No. 49/2005, calls attention to this shift in academic analysis and mentioning the IMF's and World Bank preferences for the dispersed ownership model in the 97-98 Asian financial crisis, and in other later actions.

[7] Art. 9 to 12, Takeover directive

the opt-out clauses of article 12[8]. Since then much has changed: the corporate governance movement was still in its infancy and its ideas are almost entirely absent from the directive. The financial crisis has shaken our belief in several aspects of the prevailing thinking of the late 1990s: the efficient market hypothesis is put into doubt or at least is not the only explanation theory put forward. The capture of boards by the management was originally aimed at by appointing independent directors, but results have remained elusive, if not worse. At the same time, the position of the CEO has been weakened[9]. New forms and techniques of monitoring have been investigated and sometimes applied, especially by relying on significant shareholders (private equity) or by empowering institutional and professional investors (stewardship). The role of the shareholder as part of the company decision making process has come to the forefront by strengthening his legal position or facilitating the exercise of his vote (shareholder rights directive) and the beneficial influence of block holders and even controlling shareholders as elements of growth, stability and long-term investment are being rediscovered.[10] All these elements are likely to have a profound influence on the revision of the takeover directive.
When outlining a new takeover regime, this overall setting should be taken into account without remaining focused on one single factor like the control premium or private benefits of control[11]. A new regime should strive the strike a balance between flexibility including contestability and stability and long-term value creation, including in terms of human capital. In the future the sustainability objective will have to be added.

2. The types of takeovers in the directive.

The fundamental structure of the directive is based on the existence of two main types of takeover bids that have quite different regulatory features: the open *voluntary* type[12] and the *mandatory* bid. These two types correspond to different objectives: the first one is a technique for the integration of different shareholders, whether with the agreement of the target company or not, and is in that sense a regular commercial transaction, although also taking place off-market. A specific but important feature is that it may allow the company shares to be auctioned to the highest bidder at a price which is freely determined and reflects offer and demand on the share market. The directive is mainly concerned with ensuring that the transaction can take place in a fair and transparent way, with full disclosure so that investors can make a reasoned choice. Rather few bids present an aggressive or unsolicited character: in practice, it happens frequently that these are open and voluntary bids taking place on a consensual basis, the former block holders in the target voluntarily tendering their shares within the bid. Economically, these transactions come down to an economic merger, an alternative technique to the more complicated legal merger. Once the company is put into play and in case the target board disagrees, the takeover rules become fully operational. In the

[8] See Commission staff, Report on the implementation of the Directive on Takeover Bids, SEC(2007) 268 21 February 2007, http://ec.europa.eu/internal_market/company/docs/takeoverbids/2007-02-report_en.pdf noting that some states even strengthened their antitakeover provisions; See further the analysis by Davies, P.L., Schuster, E.Ph., Vande Walle de Ghelcke, E., The takeover directive as a Protectionist Tool ? http://ssrn.com/abstract=1554616

[9] See Ed Rock E. and Kahan, M. , Embattled CEOs, http://ssrn.com/abstract=1281516
[10] See Gilson, R, nt 5, mentions that insulation from market pressures may lead support longer term investment to the extent that this is in line with technological developments (p 35)
[11] See Burkart, M. and Panunzi, F., Takeovers, ECGI - Finance Working Paper No. 118/2006, http://ssrn.com/abstract=884080

[12] article 4 especially Para 2, directive for the voluntary bid aimed at acquitting control.

European approach[13] the board is held to neutrality, expressing a fundamental distrust of the board that is supposed to pursue entrenchment in its personal interest, and does not strive at maximising shareholder value, as in the case in US especially Delaware law.

The mandatory bid is technically comparable but presents quite different characteristics. It is only applicable to companies with statutory seat in Belgium and with securities traded on the Belgian market[14]. It is based on the idea that someone acquiring a high percentage of shares in a listed company, is obliged to extend an offer to all shareholders, and eventually to take over the entire company, avoiding that he would abuse his dominant position in his own interest. This percentage is defined by the directive as ranging between 30%[15] and 50%[16]. Often control is acquired by the bidder acquiring control as part of this bid, or upon acquiring a block of shares from a previous controlling block holder, but also by accumulating a sufficient block in the market or even by other forms of obtaining a control position – e.g. through acting in concert – all leading to the same outcome i.e allowing him to launch a mandatory bid.[17] According to the RD-1[18] , in a public take-over bid, voluntary or not, the bidder intends to acquire all shares of the target company.
The wider application rule may raise some questions with respect to its justification, to its scope and the rules of application of the requirement, and finally as to its wider externalities. Many of these objections have several times been analysed and described before the controlling rule was introduced as a Europe-wide obligation[19]. Many years after its introduction, these arguments remain valid, but actual practice has in fact continued to consider the mandatory bid as the most powerful instrument for establishing control, mandating the bid for all shares thereby getting full ownership of the target company shares. One could wonder why such as drastic mechanisms has been imposed.

[13] Followed by most EU member states, 14 out of 27 did not opt out of the neutrality rule, while 5 added to the rule the reciprocity feature; 8 did opt out thereby rendering the neutrality rule inapplicable, some with an opt-in for companies, what none did. see P. Davies, nt. 7.
[14] Article 4 para 1, 2e. Or admitted to a multilateral trading facility. Unlisted companies with their principal market in Belgium, but not listed will also be submitted to the L. with respect to the proposed remuneration, and the bid procedure as part of a mandatory bid a mandatory bid
[15] Under the Belgian law, the bid is mandatory if a person, directly or indirectly holds 30percent of the shares of a Belgian company, art 5,1; also article 51, RD . The percentage is based on the shares held by that person, directly or by the persons acting jointly with him, of for the parties acting for these persons ('by common consent") in which case the holders will be jointly liable if they hold more than 30%(article 50, para 4 RD 1,) .

[16] for the shares admitted to the multilateral trading facility, Directive art 5 ,2nd; article 5 , 3.the Belgian law
[17] In some cases, the mere control may also lead to *a bid obligation : art51.para4eRD 1xxxx*
[18] article 3(1)
[19] See E. Wymeersch, Mandatory takeover bids: a critical view, in K.J. Hopt and E. Wymeersch (Ed), European takeovers, law and practice, 351-368, 1992; The Takeover Bid Directive, Light and Darkness http://ssrn.com/abstract=1086987; S.M. Sepe, Private sale of corporate control, Why the European mandatory bid rule is inefficient http://www.unisi.it/lawandeconomics/simple/043_Sepe.pdf; L. Enriques, The Mandatory Bid Rule in the Takeover Directive: Harmonization Without Foundation? (2004) 4 European Company and Financial Law Review; SSRN, 702461, and Harmonisation as Rent-seeking? In: G. Ferrarini a.o. (ed.) Reforming Company and takeover Law in Europe, 2004, 767, argues that not the shareholders, but the controlling shareholders and the directors, and the advisers to the companies, including the supervisors are the real beneficiaries of this rule. See J. Lau Hansen 'When Less Would be More: The EU Takeover Directive in its Latest Apparition' (2003) 9 The Columbia Journal of European Law; B. Sjäfjell 'The Golden Mean or a Dead End? The Takeover Directive in a Shareholder versus Stakeholder Perspective' in: S.M. Bartman (ed European Company Law in Accelerated Progress, Kluwer Law International, 2006; M.J. Sillanpaää 'Enhancing Shareholders' Equality by a Takeover Bid Rule in the Articles of Association' in Law under Exogenous Influences, M. Suksi (ed) (Turku, Turku Law School, 1994); R. Skog Does Sweden Need a Mandatory Bid Rule? A Critical Analysis (Stockholm, Juristförlaget, 1995): J. Schans Christensen, Contested Takeovers in Danish Law: A Comparative Analysis based on a Law and Economics Approach, Copenhagen, 1991, pp. 226-231. Since the enactment of the directive, criticism has been muted.

The rule applies to all companies with listed shares, irrespective whether the equity is widely dispersed or held by one or a few controlling shareholders. It applies at a higher threshold (50%) for shares traded on multilateral trading facility. No account is taken of the number of votes held, but only of the number of securities.[20] Reportedly the mandatory bid rule aims at avoiding the controlling shareholder to take advantage of the control premium, being the difference of the price actually paid and the normal value of the equity, usually the pre-bid market price[21]. As the bidder would otherwise pocket that premium, it would be legitimate that all shareholders would be entitled to it in practice by giving all shareholders the right to receive an offer at the same full price. The first justification is the protection of the remaining shareholders; they all are entitled to leave and this at the full price.
The ambit of the rule has been defined in a very broad way. Although other cases have been mentioned under national law, the usual cases are the following four.

The rule applies not only to private transfers of control, but also to bidders acquiring shares on the market, or from a number of larger shareholders, none of which could aspire to exercise control. Hence, in this case no premium is paid, and control is not acquired, but "created" through accumulation. The control premium which the bidder has paid will benefit the remaining shareholders, and may benefit the bidder in later share transactions. Equal treatment will in this way be achieved.

Why the bidder is now bound to bid for all shares is not linked to the transfer of a control premium, but to the fact that he will acquire full control where often there was none before[22]. This may be objectionable, but would be limited by company law restrictions; his control position may open the way to private benefits of control, e.g. in terms of remuneration as for freely taking business initiatives. He will be freed from the burdens of related party transactions and other conflicts of interest issues. The real beneficiary may be the company who will have a uniform, and hopefully better management than the previously divided board. At least the law should not prevent that outcome; it may be one of the motives for acquiring all shares.

A comparable situation occurs when a control position is the result of a number of shareholders acting together to influence the future of the company[23]. These shareholders will be obliged to launch a mandatory bid for all shares, what often de facto means that they will not enter into such an agreement[24], and that the stability of the company may suffer. Different other cases of acquisition of control may trigger the bid obligation: a capital increase, even a merger although these are usually exempted.

There is also a question of defining the threshold, in most jurisdictions around 30% or 1/3rd: in practice, parties often hold 29,9% in order to avoid a bid. But it is unclear whether they cannot

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[20] Article 5 L. And therefore no account is taken of the double voting rights. Double voting rights can be cancelled
[21] The premium is also defined as the difference between the price per share paid by the acquirer and the price quoted in the market the day after the sale's announcement. See Dyck, A and Zingales, L, Private Benefits of Control: An International Comparison, http://ssrn.com/abstract=296107

This approach is more adapted to control acquisition in a dispersed market.

[22] The directive, article 5 declares the rule applicable to acquisition of shares leading to control, without mentioning a specific threshold, what was left to the Member states. Concert action is also expressly mentioned.
[23] See according to the UK definition of "Board Control seeking" as the core criterion, see Takeover Panel, practice note 26, 9 September 2009; /www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/PS26.pdf
[24] Or hide it, or frame the agreement in such a way that it does not entail binding obligations, but merely the engagement to talk to each other.

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exercise control under that level, but only from 30,01%. Whether that makes a difference in practice, is difficult to verify.

The usual hypothesis is the one in which a controlling shareholder, or minority block-holder sells his block for a considerable premium, and leaves all the remaining shareholders in the cold. The control premium stands financially for several components: usually these are considered to be due to future private benefits of control, which the seller can receive as the buyer considers that he too will be able to extract them from the firm. This two-sided aspect explains why the rule also applies when no premium is paid to the selling shareholders, e.g. in case of concert action. But apart from these benefits, the premium may also stand for whether an opportunity value – it is difficult to put one's hand on a large block without upsetting the market – or a justified remuneration for the control function, being taking the day-to-day responsibility for the management or exercising the monitoring function that can be expected from him, while on the basis of his direct access to the information, his reaction to ongoing developments will be much faster. Moreover it may also stand for bearing the risk of a not-diversified portfolio, Therefore not all elements in the control premium can be considered objectionable, or are to be shared with the other shareholders.
Mere agreements between shareholders acting in a concerted way will also lead to a bid obligation if they reach the mentioned thresholds.

The consequences of the rule are considerable: the acquirer is obliged to bid for all shares, in several jurisdictions at the highest pre-bid price, in other at an average pre-bid price. His financing needs will be considerably higher, while the bidder will be restricted in committing more funds once the firm has come under his control. These factors may even lead to freezing the control block, if no bidder is willing to pay an excessive premium proposed by the seller, to be multiplied over all shares.

Block holders will often not agree to transfer their block beforehand: they may commit to tender their shares –avoiding to agree to a binding transfer - in the later bid, leaving the room for further improved or counterbids. Hence these bids are fully contestable control transactions; competing bids are happening in some cases.

The mandatory bid is the take-over bid launched by a strong majority holder allowing him to acquire all the shares held by the other, smaller shareholders parties, resulting in full control by the bidder. From that moment he will freely decide on the future of the company and its relations to the company's related parties. Therefore all shareholders will prefer to tender their shares.

Application of the take-over regulation

The Belgian take-over regulation is applicable to the public bids, voluntary or mandatory, on securities with voting rights issued by Belgian companies , part of which are admitted to a Belgian regulated securities market, or a multilateral trading facility designated by the King [25]. It also applies to squeeze-out bids, as mentioned in article 7:82 Companies act.

Public bids on Belgian companies
The application to shares issued by Belgian companies, but being traded on markets in other Member States, the rules on the prospectus, and on other information including advertising, information for the employees and about company law matters, and the rules on the thresholds in case of mandatory bid are subject to

[25] Article 4 para 1.

Belgian law [26]

The Belgian take-over law is completed by two Royal decrees both dated 27 April 2007, the first on of the Public take-over bids ("RD 1") the second on the Public Squeeze out bid ("RD 2") .

Exemptions from the take-over law

The take-over law exempts certain transactions from its application :

- are not considered public bids, the bids on securities exclusively held by qualified investors in the sense of *regulation 2017/1129*
  offers addressed in Belgium to less than 150 persons other than qualified investors
  bids for securities with a nominal amount of at least 100.000 euro per security[27]
  the communication by a qualified intermediary that the securities under management are the subject of a public take-over bid, to allow them the present the securities to the foreign bid. This exemption also covers the acceptance by the bidder[28]
  The take-over law does not apply to public bids on companies organised to invest the publicly collected financial means with a view of risk spreading, such as UCITS. The actions of the company to avoid considerable differences between the stock market value and the intrinsic value are also exempted from the application of the law [29]. The central banks of the Member States are also exempted[30].

3. Private benefits of control

The mandatory bid rule has now been firmly anchored in our market practices and in the share evaluations, and it would be very difficult to reverse it. But it should not be taken for granted. It is understandable that people would object that the bidder gets access to considerable private benefits, and that he would be able to receive these on the back of the shareholders. But whether the remedy for that evil is the mandatory bid is far from sure: is this not fighting a real evil with the wrong weapons?

As far as the "private benefits of control" are concerned, one should further analyse the extent to which they constitute a valid basis for the mandatory bid rule. The control premium covers more than private benefits[31], that only relates to the extraction of benefits due to conflicts of interest situations, in which the controlling party is advantaging itself over the other parties. As stated above, not all benefits flowing to controlling shareholders or block holders are the result of abusive conduct: some will especially represent the normal remuneration of the control function in the company, other stand for an illiquidity premium. Therefore, one does not see why a full bid for all shares is needed when control is acquired that would *not* lead to private benefits, e.g. in jurisdictions where private benefits are reported to be very low to negligible[32]. In other words,

[26] Article 4 para 3.
[27] This exemption of not applicable to the public take over bids on these securities;
however bids for debt securities for less than 50.000 euro are not considered public if these have been issued before 31 December 2010
[28] article 6 para 4 L
[29] article 7 L.
[30] Article 7 L.
[31] See on that subject the distinction proposed by Gilson, nt.5, between efficient and inefficient controlling shareholders, depending on whether their added value exceeds the private benefits, and aimed at introducing a wider assessment base than mere private benefits.
[32] Gilson, nt. 5, based on earlier work of Tattiana Nenova and Dyck and Zingales,nt. 1 compares three legal systems

when effective procedures are available to avoid this type of benefits, e.g. in company law, or in the corporate governance code, the motivation for the mandatory bid may be weakened[33] One could add the cases of long standing controlling shareholders, e.g. old industrial families concerned about their reputation[34], which would consider private benefits contrary to their philosophy or ethics or where the presence of numerous family members would exclude one of the families take advantage of its leading position. Moreover there is no obvious *direct* relationship between private benefits and control transactions: controlling shareholders will have been able to enjoy their private benefits obviously without much controversy, and this long before their full control, and sometimes also after the takeover. But once the control block is being sold[35], the private benefits all of sudden become controversial, and should be shared with all shareholders in the bid. If the premium is paid for the higher returns the buyer will achieve as a consequence of his reorganisation of the firm, there is no reason why the tendering shareholders should benefit from the premium from the outset, while his later efforts will benefit all shareholders, especially those that stayed on board, or which have never been realised. The problem is not the control transaction, but the private benefits that are facilitated as a consequence of the control transaction.

As mentioned above, not all private benefits are illegitimate, but only those that are the result of the possibility of a shareholder to take advantage of his powerful position to direct company advantages to himself, his family or the group he directs. There may be private benefits of this type at the level of the board, the management, but the most important ones relate to the shareholders, often in the context of a group of companies. Whether real or perceived private benefits can flow to any of these parties can be attributed to the absence of a solid legal regime for related party transactions and other conflicts of interest situations, but are not the only factors influencing the propensity to limit the grant of private benefits. According to Dyck and Zingales[36], an alert press[37], tax compliance – especially on transfer pricing - and enforced competition rules were also very – if not more - important drivers explaining considerable differences between jurisdictions in this respect[38]. One could argue that if such a system applied, private benefits would largely disappear. In some jurisdictions there are considerable restraints on private benefits or related party transactions; there may be ethical restraints, or legal rules submitting related party transactions to strict conditions, both in terms of pricing and of economic justification. But the overall situation in the different Member states is very diverse, and the effectiveness of the existing provisions may

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where private benefits presented significant differences depending on the quality of the law. In terms of difference to market price, the private benefits were reported as being 1% in Sweden, 29% in Italy and 36% in Mexico. In terms of the control block premiums, the figures were respectively 7%, 37% and 34%.

[33] and replaced by other mechanisms, protecting the other shareholders

[34] This element is mentioned by Coffee, J., The Rise of Dispersed Ownership; The Role of Law in the Separation of Ownership and Control, ssrn 254097 ; Stulz, R. and Williamson, R. 2001, "Culture, Openness and Finance," NBER working paper 8222 (9April 2001) analyses a predominant characteristic for explaining a country shareholders' and creditors' rights: 'a country's principal religion helps predict the cross-sectional variation in creditor rights better than a country's openness to international trade, its language, its income per capita, or the origin of its legal system."

[35] Or is the result of the position of the related parties, who will not obtain the benefits of the control position

[36] See Dyck and Zingales, nt 1

[37] Also underlined by Gilson, R, nt,5 at p.33.

[38] Dyck and Zingales, nt. 1 found that the average level of private benefits differ substantially across different legal families. "Private benefits are highest in former communist countries (34 percent), then countries with a French code (21 percent), and countries with a German, English, and Scandinavian code seem to have the lowest level of private benefits (11, 6 and 4 percent)". But this conclusion was further refined as many factor influence the possibility of reaping private benefits; among these "a high level of diffusion of the press and a high rate of tax compliance were identified as the most important institutional factors" (p.38)

need to be evaluated. Therefore, the private benefits issue and its alternatives should be further discussed.

To the extent that private benefits are the core justification for the mandatory bid rule, it is more than excessive to require that all shares have to be acquired because there is a fear of private benefits. It would be more intelligent to restrict these benefits and this as a permanent requirement, not limited to the cases of a transfer of control. As the private benefits will disappear for the buyer of control, he will be less inclined to including the present value of the benefits in the offer price, and the seller will have to accept that fact the more easily as he did not get them either. Therefore the restriction on private benefits should be imposed as a permanent discipline, not as a one-off restriction at the moment of a control transaction, triggering numerous unintended consequences for several parties concerned..

The conclusion of this analysis should be that the automaticity of the mandatory bid should be limited to cases where a controlling block is acquired – hence no mere control transactions - , but could be waived if strong evidence is produced and guarantees offered that the control acquirer will be held to strict rules on related party transactions, the latter having to be better defined. The legal basis could be found in the company provisions on conflicts of interest, preferably strengthened by internal instruments – such as charter provisions, codes of conduct including corporate governance techniques – and supervisory guidance from the market supervisors[39] along with appropriate disclosures to the shareholders. The securities supervisor should be put in charge of determining whether these conditions are met, and if so may waive the mandatory character of an eventual bid[40].

The issue of the related party transactions and more generally of the way of dealing with conflicts of interest largely exceeds the subject of takeover bids, but is a general company law concern that also manifests itself as a core issue in the field of groups of companies where much of the hotly debated issues flow from the existence of intragroup transactions concluded among related parties. Therefore, it is urgent that work be started on this topic, for which several models have been developed in the Member states, some more relying on a difficult to enforce general fiduciary duty, others on internal procedures allowing for objective decision making by the board and approval by the general meeting or by the not-conflicted shareholders in the general meeting[41]. An alternative that has been suggested is the approval of the transaction by a special committee of the shareholders. The two main concerns are: is the transaction in the interest of the company, and secondly are the conditions of the transaction fair and at arm's length. Whatever the approach followed it should allow to largely eliminate the negative effects of related party transactions, and this on an ongoing basis and not only in case of control transactions. Provided this approach is successful, one could also reduce the scope of the mandatory bid obligation.

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[39] See infra about the role of ESMA. nt.3.

[40] See for the waiver: art 4 (5) Takeover directive. This rule is severely criticised by Papadopoulos, Th., The Mandatory Provisions of the EU Takeover Bid Directive and Their Deficiencies, Law and Financial Markets Review-LFMR, Vol. 1, No. 6, pp. 525-533, November 2007

[41] For an analysis of three systems see: Conac, P-H, Enriques, L, Gelter,M, Constraining Dominant Shareholders' Self-Dealing: The Legal Framework in France, Germany, and Italy, European Company and Financial Law Review, Vol. 4, No. 4, 2007, http://ssrn.com/abstract=1532221; see further: Bianchi, M. ,Bianco M, and Enriques, L., Pyramidal Groups and the Separation Between Ownership and Control in Italy, January 2006, ECGI - Finance Working Paper No. 118/2006, http://ssrn.com/abstract=293882; Italian Consob has adopted detailed "Regulations containing provisions relating to transactions with related parties" , see http://www.consob.it/mainen/documenti/english/laws/reg17221e.htm;

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Recommendations

On the basis of the foregoing analysis, following recommendations can be made
- there is a strong need of developing robust rules on related party transactions and conflicts of interest. This topic does not belong in this directive, but is a general company law subject aiming at protecting minority investors. It should apply on a permanent basis, and not merely receive attention in case of a change of control; it should be based on disclosure, expert evaluation and approval by whether independent directors or by the AGM.
- some transactions could usefully be excluded from the mandatory bid rule: these are mere market transactions, or concert agreements, where no control premium is involved
- if no private benefits of control are involved – whether on the basis of strict regulation, or a strong showing of actual practice – the mandatory bid requirement could be waived by the competent authority (see art. Art 4.5)
- pre-bid transfer commitments should be declared unenforceable, urging parties to realise the transaction through a open, voluntary and contestable bid.

2. Multistate transactions

One of the original purposes of the Directive consisted in putting an end to the confusion that existed with respect to takeovers that took place in several jurisdictions. The solution adopted was the traditional 'home state rule', whereby the company's registered office determined the supervisory competence if listed in that market, even if most of the trading takes place in other EU markets. In case of listing in another jurisdiction but not in the jurisdiction of the company's registered office, the supervisory authority of the place of trading will be competent [42], but will necessarily have to take account of the legal regime of the state where the registered office is located. This solution adopted is even less convincing in case of "admission to trading" in several jurisdictions, in which case the place of first admission to trading will prevail, or in case of simultaneous admissions in multiple jurisdictions, the state upon the choice of the issuer on the first day of the trading of its shares. All these "conflict of law" rules are based on a political compromise, but are far from the economic realities that would logically be based on the volume of trading. This may result in unfortunate outcomes when trading is concentrated in one state with a large expertise in takeover matters, while competence is attributed to another state without any significant experience. The same applies with respect to the expertise of the law courts in said jurisdiction.

The criteria used in the directive also fall short of modern practices: trading is increasingly scattered over several trading platforms and trading techniques, whereby volume rapidly shifts from one market to another, leaving the initial moment of "admission" as not necessarily the most significant. Moreover, can the place of trading be determined if most of transactions take place in an electronic trading platform, that is not necessarily located in any specific place and may be owned by a non-EU financial firm? Usually, competence is attributed on the basis of the location of the firm that organises the trading venue, but this may be controversial and could seriously disturb contested takeovers. Also the absence of rules relating to trading – or listing – in a third country have not even been mentioned: a reference to cooperation agreements in the directive

[42] art 4 (2) (b), Takeover directive, but see article 12 para 6, L, for the equivalence of the prospectus

could be expected to have clarified this additional element of complexity, but this is only applicable to the prospectus.
My suggestion would be to replace these criteria, that looked simple and efficient in the 1990s, by a more cooperative approach, essentially giving precedence to the principal place of trading where the strongest public interest can be expected to be pursued, while also involving the other markets. For the other markets, cooperation agreements, under the oversight of ESMA, could insure the necessary cooperation.

The directive refined its approach with respect to multistate takeovers by splitting the competence between the market jurisdiction and the company jurisdiction[43]. This split was presented as a neat one: the bid procedure normally went to the market related rules and supervisory authority of the place of listing, while the enterprise aspects – including importantly the company law aspects – went to the registered office "authority". Essential aspects such as the percentage of voting rights for defining "control", the derogations of the bid obligation, or generally "matters relating to company law" were put under the guidance of the jurisdictions of the state where the company has its registered office, but it is unclear who will decide on bid related matters. This might result in companies choosing for their place of choosing their registered office[44]. For the prospectus an equivalence test has been provided [45]

Whether in that jurisdiction there was a supervisory authority in charge of matters relating to " company law " is far from sure, while that jurisdiction might not extend to companies listed exclusively in another state. Indeed in many jurisdictions there is no authority competent for company law matters, except the courts. All this certainly would have required a strong cooperation culture, especially as cultures are still quite different among Member states[46]. Since then matters have changed. The markets supervisory authorities indirectly also decide on company law matter under the authority of the courts.

Recently, ESMA has received wide powers for the coordination of the action of the national supervisory authorities[47]. In case a bid concerns shares not only listed but also traded in several jurisdictions that may each have a legitimate interest as to the fair and orderly development of the bid, ESMA would normally be the point of contact where common positions would be elaborated on the basis of cooperation duty of the national supervisors concerned. One could consider that in case of multistate offers, a college of supervisors[48] would be created under the leadership of the authority of the market where the largest trading takes place, within which college coordinated standpoints would be coordinated and adopted in common. These decisions could be considered precedents for later decisions and made public for the guidance of market practitioners. Moreover, in case no agreement could be achieved, the mediation powers of ESMA will usefully come into play, and lead to a binding decision for all national authorities involved[49]. This more cooperative approach would imply a rethinking of the scheme underlying present article 4, as all jurisdictions with a sufficient share of the trading would be involved.

More importantly for the future development of the rules on takeovers, in the fields identified in the future directive, the directive should confer powers to ESMA to develop regulatory standards[50]

43 see article 6 (2)of the directive
44 see the choice for the Dutch legal system as the place of registration
45 Article 12, para 6, and article 20 L.
46 Art 4 (4) mentions cooperation but does not expressly refer to the matters mentioned here.
47 Art. 31, Esma regulation, nt.3.
48 Art,21, esma regulation, nt.3.
49 Art. 19 and 20, Esma regulation, nt.3.
50 Art.10, Esma regulation, nt. 3.

that, after endorsement by the Commission, could bring clarity in the numerous items that have been left open in the directive or that will need interpretation in the very rapidly moving field of takeover bids. In the past, the Commission has not made use of the powers conferred to it by article 6 referring to the comitology procedure referred to in article 18, which dates back to the pre-CESR times. In the future one can expect ESMA adopting proposals for further interpretation of the future directive's provisions contributing to fair and orderly markets. One could refer e.g. to article 13 where the Member States were invited to develop at that time national – and not-harmonised - rules governing the conduct of bids – such as the lapsing of bid, revision of bids and competing bids -, a matter for which high level common standards might usefully be enacted as the rules and practices in one state might affect bids for companies in other states, while confusion would result in case of multistate bids[51].

But perhaps more importantly and beyond strict regulation, one should especially mention the powers of ESMA to develop guidance and recommendations[52]. It is well known that the takeover area is one of rapid and unpredictable developments and with considerable difficulty to establish general rules of a binding nature. Better coordination by way of guidance to market practitioners would make the takeover procedure more predictable, or at least clarify the attitude that supervisors are likely to adopt, what is essential with respect to the strong conflictual nature of the takeovers. This could apply to individual decisions of national authorities e.g. in the field of derogations, where divergent practices – or even regulations - exist. But actual practice will reveal that close follow-up on emerging and today unknown issues will be of great help to all parties involved. Although not binding in the legal sense, these recommendations would have a moral value having been adopted by the competent authorities in the EU. These recommendations could usefully inspire national authorities confronted with new issues, as is already the case today with the exchange of case law, or with an ESMA group exchanging experiences in this field.

These different arguments plead for giving ESMA a central role in the development of future, more precise rules and recommendations in the takeover field, along with a coordinating action in individual cases.

Some will object that under their national supervisory structure, the bodies in charge of overseeing takeovers are not member in ESMA: this is the case in several Member states, such as the UK, Austria, Sweden… In fact the regulation on ESMA contains an express provision taking into account that hypothesis by stating that for these specific matters, the national body in charge of takeovers will take part in the ESMA decision-making.[53]

Recommendations

The formal competence of ESMA in the future directive should be made explicit in the ESMA regulation

Blanks in the present directive should be covered, whether by Commission regulation, by Regulatory Technical Standards or by guidance and recommendations.

For multistate transactions, coordination should take place within a college of supervisors, involving all jurisdictions where trading takes place, while the role of ESMA as coordinator and if needed mediator has to be stipulated in the future directive

[51] But it may be discussed and in which fields and to what degree of detail these Regulatory Standards would go, as many takeover and assimilated transactions are purely national. Priority should be given to multistate transactions where differences in practice or interpretation may have a negative impact on ongoing bids. For a more interventionist view: Papadopoulos, Th., nt. 25.

[52] Art 16, Esma Regulation

[53] See art.40 (4) and (5) of the Esma regulation.

The competence of ESMA for international matters could be extended to agreements e.g. on procedures or exchange of information in relation to third countries[54].

3. The takeover bid as a disciplining instrument

One of the traditionally strongly stressed advantages of takeover bids, especially those of the unsolicited type, is the threat a bid exercises on the incumbent management or on the board, and therefore the disciplining pressure exercised on them. Even without a specific threat, boards can be expected to be sensitive to the risk of unsolicited bid and take corrective action long time in advance. A board receiving signals about an impending bid will normally get very nervous and attempt to thwart the bid, especially as long as the bid has not officially been announced. Indeed the directive rules relating to defensive tactics only start to apply with the official announcement of the bid[55]. But the disciplining effect is abrupt, limited to a specific signal from the markets that is often difficult to distinguish from market rumours, and these rumours are not always often taken very seriously by the incumbent board and management. To act on a vague signal involves a considerable risk for the target locking in shareholder value. As a consequence many companies have preferred to take protective action outside the bid context, and the legislation of several Member states has been generous in offering defensive techniques[56]. This leads to entrenchment by boards, and block holders, that may be detrimental to the interest of the company or of all shareholders[57]. The question is not: should management be disciplined, but is this the best way to achieve the objective of disciplining management

The topic of remuneration is a good example of an attempt to discipline management and board conduct that has evidently not yielded very convincing results. In this field, self-regulation has failed and hard regulation is not evidently optimal. Indeed in 2010 and notwithstanding the stricter and stricter regulations in the banking sector, remunerations have increased substantially, by 26 % according to some sources. And the renewed attempts to impose even stricter rules in the CRD IV is likely to increase the pressure for other ways to circumvent the fundamental concerns that are ultimately the level of remuneration and less its structure.

Therefore the issue is: what can be done if we want better and stronger disciplining of management and board, what alternatives do we have that are less dramatic than a full takeover bid, also are less expensive, and would be more effective in terms of outcomes?

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54 Art. 33, Esma regulation

55 art 9. 2 Takeover directive, but Member states may be stricter by declaring the rule applicable once the bid is "imminent". See Take Over Panel, 6 Aug 2004 "Put up or Shut up" and no intention to biod Statements.

56 See for an overview of Control enhancing mechanisms, ISS, Report on the proportionality Principle in the European Union, 18 May 2007

57 The entrenchment of boards has a negative effect on the company's share evaluation. This is amply evidenced in the studies by L.Bebchuk (esp. Bebchuk, L., Cohen, A., and Ferrel, A., What Matters in Corporate Governance? http://ssrn.com/abstract=593423; also Bebchuk L. and Cohen, A., The Costs of Entrenched Boards

http://ssrn.com/abstract=556987) dealing with the US staggered boards, the latter being rarely met in Europe. Although the principle would also apply to European companies with respect to fully entrenched boards, the stronger position of the shareholders, and their ability to dismiss the board might lead to a dife3rent analysis. The existence of control enhancing mechanisms would probably be the more significant factor of entrenchment. But these authors also mention the long term benefits that may flow from a better and more stable board, as thit may induce management to make efficient long term investments, or avoid anti-takeover action that would divert them from pursuing the right business objectives. So nothing is unidimensional in this subject.

In the past several techniques have been tried: disclosures have been imposed, e.g. on remuneration, but the outcome has been the opposite of what was intended, i.e. in considerable increase of pay[58]. The presence of independent board members has been mandated, initially as a minority, nowadays often a majority of the board, but their effectiveness has not been overwhelming in the financial crisis. Moreover their independence has often been considered more important than their knowledge and expertise. The introduction of the audit committee and other corporate governance instruments has certainly strengthened the position of companies and their returns[59]. New attempts were made more recently by trying to actively involve the shareholders, as the ultimate guardians of the corporate interest: indeed they bear the ultimate risk of wrong decisions and therefore could be expected to be the most interested party in seeing the decisions conforming to their interests, what is supposed to be standing for the company's interest. But here the difficulty is first to determine who are the shareholders – would they include the high frequency traders, or those with empty positions? -, and how to mobilise them, as for most of them share ownership is a matter of mere investment, not of entrepreneurship. Several initiatives have been put forward to activate the equity holders interest, allowing e.g. institutional investors to vote on the basis of a record date – and not of their actual holding-, or making proxy voting or electronic voting more flexible. Mandatory voting, with disclosure of the positions taken, identification of the shareholder throughout the multi-layered securities depositary structure, flexibility in the proxy mechanisms are being discussed or considered. Ambitious engagement initiatives were undertaken in the UK[60] to insure that asset managers – described as "stewards" - that are held to a fiduciary duty towards the beneficiaries in their asset management activity would more actively enter into dialogue and monitor the companies in which they invested theirs clients' moneys. It is still too early to evaluate these efforts – are they mere "gentle, harmonious exchanges of views" -, but it interesting to mention that they point to the creation of stronger ownership nuclei – even as low as 1 to 3 % - that are absent in the UK companies where highly dispersed ownership has been the rule what tipped the power balance strongly in favour of management. Moreover, stronger engagement would allow the world of the financial shareholders to reconnect with the industrial world, as trust has been damaged.

Some have been playing with the notion of a "shareholder committee" as is known in the Swedish "remunerations committees" composed of significant shareholders, and to a certain extent also in the Netherlands. Shareholder committees would be composed of significant shareholders – not block holders in the traditional sense- that take a deep interest in the company's long term welfare and could have their voice heard or even decide on certain matters such as conflicts of interest, appointment of auditors or of independent directors. All these efforts view to establish stronger links between shareholders and the company's leaders, create a better informed, more stable long-term relationship that would allow well informed continuous management monitoring and may

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[58] The role of remuneration advisers should be mentioned here as they may have had a more direct impact on this type of competition among managers. Idem about the publication of antitakeover defenses.

[59] With respect to the contribution made by different corporate governance instruments to better return, see Gompers, P., Ishii, J., and Metrick, A., Corporate Governance and Equity Prices, http://ssrn.com/abstract=278920; Aggarwal, R, Erel, I, Stulz, R and Williamson, R, Do U.S. Firms Have the Best Corporate Governance? A Cross-Country Examination of the Relation Between Corporate Governance and Shareholder Wealth http://ssrn.com/abstract=954169, ECGI - Finance Working Paper No. 145/2007; Brown, L. and Caylor, M., Corporate Governance and Firm performance http://ssrn.com/abstract=586423

[60] See: Financial Reporting Council: The UK Stewardship Code, July 2010; see Cronin, Ch. and Mellor, J, An investigation into Stewardship, engagement between investors and public companies: Impediments and their resolution, FGRE and CEPS, June, 2011

contribute to formulate long term policies. One can expect this action to support better run companies, that are less dominated by adventurous managers, are more productive, engage in longer term projects what is supposed to be beneficial to the shareholders. Therefore it is essential that the conditions under which this stewardship action can be developed be clearly spelled out, indicating the borderlines with full legal or de facto control., but also with the action of activist investors.

As a disciplining mechanism a takeover – at least in its aggressive form of an unsolicited bid - is the most extreme and most aggressive one and clearly a case of a breakdown of any dialogue. But in terms of disciplining management's action, it is also the most expensive, unpredictable and very risk prone one for both target and bidder[61]. Therefore, it is useful to point to alternative instruments that may be equally if not more effective as being specifically targeted to identified shortcomings of the target's company structure or management.

Activist investors play more or less this role as far as disciplining management is concerned, their intervention being mostly focused on specific, short time issues on which they want the company to act, but not on controlling the business, sitting on boards or even less on taking it entirely over or running it themselves. Not all activists act in an aggressive way: some merely address the company's governance, e.g. by requiring an under-performing CEO to leave, change the composition of the board by including more expertise, or dispose of certain assets that may constitute a burden on the market evaluation of the shares. In some cases activists made demands for splitting up the company or prohibiting a merger to the dismay of several of its stakeholders. Whether that was justified or not depends on the merits of the individual case[62], but at least constitutes an example of external disciplining that is equally powerful as a takeover bid, but more targeted and easily realisable. The reaction of companies to activist shareholders is usually very negative, but their role is prophylactic: therefore it is commendable to better define and streamline their activity, rather than curbing it entirely as seems to be considered in some jurisdictions.

Usually, the reaction of the shareholders to these more aggressive initiatives is crucial, what constitutes a return to the original company scheme, where the last word belongs to the shareholders. Activist action in the US often results in a takeover[63], with considerable profits if it succeeds. But one should distinguish: in case of a takeover, shareholders react individually without much if there is no organised dialogue among them. Each acts out of his individual financial position, not looking at the collective interest or the interest of the company as such. This sharply contrasts with the original company scheme, where decisions are taken after collective deliberation in the general meeting, or at least after an exchange of views may have taken place. Both techniques of decision-making present affinities as resulting in the same outcome but are fundamentally different as based on collective v. individual decisions, In the Belgian law

So the argument that takeovers are needed for disciplining management has only relative value, relates to takeover as a disciplining instrument of last resort, not the preferred one and should be considered in the broader context of other external monitoring instruments. More attention should be paid to these instruments and the legal conditions under which they can take place.

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[61] The absence of any pre-bid due diligence is undoubtedly a major risk for he bidder.

[62] In cases of splitting the company one often sees that the market valuations of the part is higher than the previous value of the integrated business

[63] Schor, M, and Greenwood, R, Investor Activism and Takeovers, http://ssrn.com/abstract=1003792, indicating abnormal return for companies ultimately taken over, but not for the failed attempt.

4. Anti-takeover defences

The most controversial articles of the directive are the much-discussed articles 9 to 12. These have been the result of a difficult negotiation that ultimately ended in a miserable compromise that had little substance and was even counterproductive at least if one looks at the later assessment by the Commission e.g. on the Board Neutrality rule. It is not clear whether it would be advisable to revise these articles, as the price may be that the revision of the entire directive will be blocked for a long time. The board neutrality rule has survived better that expected. Moreover the present equilibrium – which is essentially a free for all – has not frequently prevented takeovers to take place, the case of state intervention excepted. It is unclear whether it has urged management to act like in the US, i.e. activate the defences to better protect the shareholders financial rights and improve shareholder value.

But the intellectual debate should at least take place.

Some have proposed a system that would be based on a mandatory board neutrality rule, with on opt-out for companies individually, probably with a supermajority[64]. Whether that would allow the controversy to be solved can be doubted: targets could still adopt pre-bid defences, making any neutrality purposeless. In companies with controlling block holders, the outcome is likely to be defensive, while in the companies with dispersed ownership, the outcome will be known in advance: institutional investors are very unlikely to vote for an opt-in that might seriously damage the return on their portfolios.

There are essentially three types of provisions in the directive that deal with antitakeover defences: the board neutrality rule, the breakthrough rule and the restrictions on voting rights and on the transfer of shares[65]. Each of these provisions can be waived in whole or in part by the national legislator, leading to considerable diversity among the national regimes. This would prevent the emergence of a market for corporate control. The Commission 2007 inventory of implementation concluded that the neutrality rule remained applicable in most jurisdictions that had introduced it before although some had removed it, while the breakthrough rule was almost never[66] adopted by any state and obviously no data are available about the restrictions on voting rights and share transfers[67]. The famous compromise therefore resulted in what could be expected, i.e. a standstill, or even a regression. However later evolutions in the member states should be taken into account and the report which the Commission has ordered with Marccus advisors will certainly contain interesting data. Moreover the economic context has considerably changed with the financial crisis making national governments much more sensitive to takeover by firms from other jurisdictions, even within the EU, leading some governments to active interventions in the takeover market. Although there are no figures available but one would not be astonished to learn that more takeover have been thwarted by – mostly informal - government intervention than by anti-takeover

[64] see P. Davies, nt.7. A similar, but more generally applicable proposal was formulated by Hertig,G., and McCahery, J.A., Company and Takeover Law Reforms in Europe: Misguided Harmonization Efforts or Regulatory Competition?, August 2003, ECGI - Law Working Paper No. 12/2003 ;http://ssrn.com/abstract=438421 who proposed to allow companies to opt-in the takeover directive, or to opt for national law.

[65] Respectively art.9 (20, art.11 (4) and art 11(4)

[66] Estonia excepted

[67] See the proportionality study, nt. 38.

defences[68]. Moreover some Member states have adopted formal legislation that would subject takeovers by foreign interest to government authorisation These actions have divided the market for corporate control much more than any private antitakeover mechanism. One expects this evolution also to be investigated in the abovementioned Marccus report. Indeed, there is a fear that we are engaged in the wrong discussion, as the real issues are political and do not fit in the present discussion about the reform of the takeover directive or of company law.

The neutrality rule art.9(2)as it has been adopted in a considerable number of Member states serves to avoid boards protecting themselves ("entrenchment"), but does not clearly state that its purpose is to protect the shareholders. It only mentions that the board can seek alternative bids as a defensive mechanism. The experience especially from the US indicates that the use of defensive techniques may strongly contribute to improving the position of the shareholders not only in triggering alternative bids, but also especially in exacting better conditions from the bidder. Therefore it seems logical that the mere exception to 'seeking alternative bids' should be broadened to any other technique allowing to board to take action that likely to improve the financial condition of the shareholders. This formulation - which is the expression of the fiduciary duty of the board as is the prevailing view in the US - should make it clear that entrenchment by the incumbent board should be avoided, but not to the point that it would be detrimental to the shareholders.

With respect to the so-called other – especially pre-bid -defences, the debate should be repositioned from a market perspective – each shareholders deciding for himself whether or not to tender his shares – to a company perspective, according to which the future of the company is to be decided by a vote of the shareholders, hence a collective decision in the AGM. What seems contrary to one of the fundamental concepts of company law is that decisions about the final destiny of the company are not taken by the shareholders, duly and fully informed. Many will answer that the "shareholders" in a takeover situation are short-term traders, hedge funds and other speculators to whom the traditional investors have sold once the bid has been announced. This argument may be true but does not change the fundamental point that the shareholders, whoever they are, should make the final determination. It would change a series of individual decisions whether or not to tender the shares, by a collective one, achieved in the context of a well established procedure, with full disclosure and if possible with due debate. This approach would also eliminate some of the "anomalies" in company law, according to which a legal merger or – in some jurisdictions - a transfer of a substantial part of the assets are subject to a formal decision of the general meeting after a more or less elaborate procedure has been followed, while in case of a takeover the company's supreme body is not involved.

In that perspective antitakeover mechanisms could be adopted and would serve to delay the bid procedure but in any case the outcome would be subject to a supermajority vote of he shareholders[69]. By way of a practical proposal one could think at a 2/3 or ¾ majority, the usual thresholds for charter changes in balance with the 30% trigger for mandatory bids. It means that when a new block-holder enter the company, he may be held to the takeover, but the other shareholders will decide whether he is accepted or not by lifting whatever antitakeover devices that they have decided upon. The shares held by the bidder would be excluded, eliminating this other source of conflict of interest.

[68] see the blocking of the French Sanofi takeover by Swiss Novartis; the attempts to block the takeover of Danone by US Kraft, although no offer was ever launched; more recently the Italian blocking of a Parmalat takeover by French Lactalis, terminated only after a French-Italian political agreement
[69] Comp. significant asset transactions would also require a supermajority vote.

Once one accepts that the shareholders should play an important role in the outcome of the takeover, one should also ensure that they could effectively take part in the vote. Hence the idea already expressed in the directive[70] that the restrictions on the transfer of shares, or on voting rights should not be applicable to these decisions. Whether In these cases the "one share, one vote" rule should be declared applicable is open for debate; member states may adopt rules that might mitigate this principle, but should in any case ensure that the decision is taken at a general meeting. It goes without saying that this would require an adaptation of the takeover procedure and especially allow for a more flexible calendar; on the other hand, work should be undertaken to make the organisation of a general meeting more efficient, but this is the subject of another work stream.

This proposal is submitted for discussion in the hope that it will avoid a new deadlock on these matters but allow the discussion to be replaced where it belongs, i.e. that ultimately it is for the shareholders to decide. They should decide about the future development of the company, that this after a transparent en open debate. But some difficult additional questions will be raised to which no ready answer is available. Would the rule apply to all bids, or only to those where defences have come to light? And would mandatory bids also be included? In principle all bids should be covered as the fundamental issue about the company's future is posed in voluntary bids as well as in mandatory bids.
The subject submitted to the AGM should be on the company's future, and on the basis of that on the defences as these have been put to work. If the motion if adopted, defences will come to an end. Most difficult is the issue of the majorities: if, as proposed one would admit that pre-bid transactions to the bidder would be unenforceable, or limited to a certain percentage, one could admit that all shareholders, including the bidder would be entitled to vote, and that 75% of the votes cast should agree with the new orientation of the company. This would bring the decision in line with a merger, or a sale of all assets[71] In case of a mandatory bid, the rules would be the same, what would mean that the controlling shareholder cannot sell the company on his own, but only with the consent of a vast majority of co-shareholders. One will notice that the proposal comes close to the breakthrough rule: indeed there are clear similarities, the main differences being that the ultimately the decision is not adopted by shareholders individually, but as part of a collective decision making process.

But anyone who has been engaged in the field of takeover will certainly understand that new ideas may not necessarily receive much attention. The discussion should be started.

Conclusion

The takeover directive has laid the basis for a better organisation of takeovers in Europe, also by introducing better coordination of the procedure in cases of multi-state takeovers. But the provisions of the directive dealing with designating the competent authorities have to be updated taking into account the changes in the regulatory system in Europe (ESMA coordination), in the trading patterns and the changed perspectives in company law. Differently from the concepts followed at the end of the previous century, there is more understanding these days as to the role played by stable shareholders. This leads to a better analysis of the issues of private benefits of control that should best be avoided on a permanent basis, and not only at the moment of a control acquisition. As a consequence, the obligation to mandate a bid in case of crossing a certain threshold should be mitigated by insuring that the new controlling shareholder can obtain no private benefits. For other, open bids, the usefulness of the takeover technique is widely recognised

[70] art 11.2 and 3.
[71] At least in certain jurisdictions.

and should be supported as the ultimate disciplining instrument. However the takeover is not the most efficient disciplining mechanism, and other instruments should be supported as well. Finally, the debate on defensive techniques will probably not be avoided. It is proposed to reposition this debate in terms of the overall decision-making mechanism in company law and allow the general meeting to ultimately decide which direction the company should take. Differently from proxy solicitation as a disciplining instrument – with whom this proposal is affiliated – here the decisions are to be adopted in light of a firm offer and with full disclosure, so the shareholders will know what will be the financial consequence of their decision.

Dealing with takeovers often results in a dilemma[72], one being obliged to take account on the one hand of the necessary flexibility, the risk of entrenchment, irresponsible conduct and abusive private benefits, and on the other, create stability and innovation, responsible ownership, supporting the long term growth. This balance will only be struck in an appropriate way by dealing not only with the technical case of takeover bids, but should include the wider legal, financial, social context in which business activity is undertaken. One can hope that the European regulators will be open to take this into consideration.

Addendum

A significant legal case: CMB- Euronav [73]

Not developing here the very complex transactions relating to this deal, the court case dealt with the question whether the take-over transfer price should include the pre-bid sum paid to the new owners of their shares. Euronav, a major Belgian shipping company located in Antwerp- Belgium, now called CMB.TECH Frontline. Four World Capital, an investment advisory firm , held 2,41% in Euronav. Frontline Nordic tried to merge with Euronav but without success. It was a co-shareholder of Euronav, along with the Saverys family which was controlling shareholder. They considered to merge, but that failed.

Euronav has invoiced too low prices for tankers 9500 million too low
while terminating the arbitration is also an exceptional favour
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[72] A similar dilemma but limited to the balance between entrenchment and protection of shareholder rights and is mentioned in Becht, Marco, Bolton, Patrick and Röell, Ailsa A., Corporate Governance and Control (October 2002). ECGI - Finance Working Paper No. 02/2002. Available at SSRN: http://ssrn.com/abstract=343461
[73] See it Legal opinion on the application of this rule (**See FSMA legal opinion FSMA_Opinion_2019_02)**

Euronav sold for 2,35 billion USD tankers to Frontline . As a consequence a mandatory bid became due, the Saverys holding more than 59% of the Euronav shares, triggering the mandatory bid obligation on the Euronav shares in the hands of Frontline.In December CMB sells a subsidiary to Euronav, what leads to the crossing of the 30% threshold for 17,68 being: 18,43 minus 0,57 USD, the latter being a dividend pay-out. As a consequence Frontline sought a take-over at the bid price with in addition the benefits Frontline had received before the bid and in addition to the sales price, for an amount of 0,52 USD/share.

The bid had to be launched by Euronav Capital, holding 2,41% in Euronav . As a compromise settlement Euronav sold 24 tankers to Frontline for 2,35 billion. This agreement was terminated, what led to an arbitration procedure.

Euronav sought to buy these shares as part of the bid and crossed the 30% thrshold, against a transfer price 17,689 USD arguing that the agreed price of 18,43 should be reduced by 0,57 being the dividend of o,57 per share) the shareholders had in the meantime received on their Euronav shares, as they would equally have received the bid price from CMB

Euronav contested the inclusion in the bid price of said amount, on the basis of the following reasoning: the Belgian regulation contain the rule that the take-over price should be the bid price paid in the control acquisition and that no changes may be acceptable unless these have been authorized by the FSMA, and only on the gronds expressed in the regulation, none of which would be applicable here. This is referred to as the power of the FSMA for "reasoned derogation" if it deems this is justified according to article 55, RD -1. However, FSMA had not adopted any derogatory decision. This competence to increase the bid price is only attributed by an administrative decision of the FSMA, eg on the basis of the indications mentioned in article 55, none of which were applicable. The court found that in the absence of an FSMA decision, it could not intervene in the administrative decision making of the FSMA, and that therefore it not decide to increase the bid price with 0,57 per share .

In its ruling of September 6, the court rejected most of the claims as inadmissible and did not order CMB or FSMA to increase the bid price. Only FSMA, said the Court, retains discretionary authority to decide whether such a price increase is warranted. CMB announced that it will pay the full amount in case the FSMA determines that an adjustment of the price is appropriate and would direct to include in the price the 0,52 USD in accordance with the Market Court finding. The mentioned regulatory conditions for the price increase, art. 55, have not been discussed in the Court's decision. This might have resulted in a bid price of 12,66 per share, where that day the price at the NYSE was 15,19 [74]

The Court decided that it cannot impose a higher bid price as the claimant has no subjective right. This related to an administrative position of the FSMA, not to a subjective rights claim.
The Court could only address the FSMA to bring the case before the FSMA again.
As a consequence the claims before the Markets Court were dismissed.
The Court dismissed the Frontline claims on 6th December 2024 not receivable or not justified and that these amounted to 0,52 USD per share. It did not impose to increase the bid price, as this is a discretionary competence of the FSMA. "If the FSMA considers that the bid price should be increased by 0,52 USD , as called for in the Court decision, the CMB have to will pay this increase to all shareholders who have tendered their shares in a regular way, in accordance with the conditions to be determined with the rulemaking authorities both in the EU and in the US".

[74] See https://www.hellenicshippingnews.com/euronav-belgium-market-court-ruling-update/

CMB states that an increase of the initial bid price with 0, 52 USD to the Euronav shareholders since March 2024, could result in a adapted bid price of 12,66 USD, to be compared with the closing price of the shares on the NYSE, being USD 15,19.[75]
FourWorld further introduced a demand for an integrated solution to the strategic and strategic deadlock in the negotiation with Euronav, including the mandatory bid of CXMB on the Euronav shares, and the take-over Euronav subsidiary CMBTECH,NV by Euronav . CMB considers these claims as unfounded and will litigate the matter in the first halve of 2026

The FSMA was further invited to change its appreciation but referred to the regulatory provision:
The decision applies the mandatory bid requirements applicable to parties' action in a concert agreement and holding more than 30% of the shares of the target company, no one of them crossing the threshold, are individually held to launch a mandatory bid after the first acquisition by one of them of shares from a non-concert party and this within 3 years from entering in the concert agreement;(article 51, para 7 , 1e , RD -1) But if one of them obtains the control (eg at 30%), that party only will be held to launch the bid (article 50 para 4). The FSMA is of the opinion that the bid obligation also applies to the parties who hold 30% of more of the voting shares . If there is no acquisition of shares by any of them, there will be no bid obligation, even if they agreed to a concert action. The bid obligation is only applicable from the listing of the shares

In its ruling of September 6, the court rejected most of the claims of not admissible and did not order CMB or FSMA to increase the bid price. FSMA retains discretionary authority to decide whether such a price increase is warranted. CMB announced that it will pay the amount in case the FSMA determined that an adjustment of the price is appropriate and would direct the increase of the price with 0,52 USD in accordance with the market court finding. The regulator's conditions for the price increase have not been discussed. This might have resulted in a bid price 0f 12,66 per share, comparable to the price in NYSE was 15,19 [76]
There is no information available of the further developments in this case

[75] -Het Hof oordeelde echter dat de prijszetting van de verkoop van bepaalde schepen door Euronav aan Frontline bijzondere voordelen ten gunste van Frontline inhield. Het lijkt onduidelijk of deze aan de grond lagen van de prijstoeslag, of een andere berekening
[76] See https://www.hellenicshippingnews.com/euronav-belgium-market-court-ruling-update/

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