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Editorial

Time for a Makeover for EU Takeovers?

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According to Wikipedia, the definition of ‘takeover’ is quite straightforward: “In business, a takeover is the purchase of one company (the target) by another (the acquirer, or bidder).” However, the political debate over the regulation of takeovers has been anything but simple. The ability for outsiders to purchase a company – especially if it is against the will of the company’s management and employees – has a highly symbolic meaning for the different philosophies of corporate governance. According to the shareholder value approach, takeovers are key mechanism for increasing efficiency, and hostile takeovers the ultimate weapon for removing incompetent or self-serving management. Shareholder value advocates thus support what they call an ‘open market for corporate control’. This means: regulations which make it easy for companies to be bought up, in part by prohibiting management from blocking takeovers of their company with defensive measures. In contrast, for the stakeholder philosophy, takeovers (in particular those of the hostile variant) force managers to focus on short-term share price and frequently lead to workforce reductions and worsened working conditions. In the interests of sustainable companies, stakeholder advocates therefore want laws that let managers take defensive measures against hostile bids and give workers a ‘voice’ or even veto right in the takeover process.

These differences in opinions have been reflected in the controversial history of the EU Directive 2004/25/EC on takeover bids, which is currently under review. A first draft for a directive on takeover bids was produced in 1974 at the request of the Commission. However the differences between the ‘UK Takeover Board’ and ‘Continental European’ approaches were so great that an actual proposal was not made by the Commission until 1989. A complicated legal history with numerous proposed amendments, revisions and the rejection of a recast ‘compromise’ second Draft by the European Parliament in 2001 led to the appointment of a High Level Group Company Law Experts (the so-called ‘Winter Group’) to make recommendations for a European approach to takeover bids and company law. The two reports that came out of this group in 2002 and the European Commission’s 2003 Action Plan on Company Law and Corporate Governance are seen by many as milestones in the development of a neoliberal approach to corporate regulation in Europe. The underlying philosophy of the 2004 Takeover Bids Directive is that, as a whole, takeovers enable needed restructuring and improve the efficiency of the European economy, and should thus be promoted. Although some proposals (notably from the European Parliament) included much stronger rights for employee information

and consultation, the 2004 Takeover Bid in effect gives the shareholders in the ‘target’ company the final say over accepting or rejecting the takeover bid.

Some eight years after its passage, the Takeover Bids Directive is currently being reexamined. Earlier this year, the Commission published a Communication emphasizing the success of the Directive and downplaying the need for fundamental revision. Although this Communication ostensibly was based on the results of an external study led by Marccus Partners on the functioning of the Directive, on closer reading the study can be seen as considerably more critical. In a number of years covered by the study, planned job losses exceeded anticipated job creation by a factor of 10:1 or more following a takeover. The study dryly states that “...economic analysis shows that there is no clear evidence that the Directive promotes economic efficiency“, thereby questioning the basic philosophy underlying the Takeover Directive. The study also notes the weakness of both the formal worker rights to information as well as the frequent non-observance of these rights. Interestingly enough, in a few countries (Belgium, Estonia, France and the Netherlands) the transposed legislation gives workers somewhat stronger rights during takeovers in the form of consultation. The critical attitude toward takeovers on the part of the ETUC and worker representatives surveyed was also prominently noted in the study.

The European Commission has promised to publish a Communication on Company Law and Corporate Governance in the next month or so, which is supposed to include information on specific legislative initiatives and a detailed roadmap. Regarding revision of the Takeover Directive, the Commission would be well advised to take note of the critical conclusions of the Marccus Partners study as well as the evidence submitted by the ETUC and others. A revision would be an opportunity to strengthen worker involvement rights during the takeover process. Another needed improvement is to impose substantial penalties when the acquirers do not fulfill their promises for employment and production sites after the takeover (currently this is not the case, as painfully shown by the takeover of Cadburys in the UK). In line with the promise of social Europe, a revision of the Takeover Directive would be needed to enable a better balance between the rights of shareholders and the protection of workers as key stakeholders in the company.

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