

Chapter 1

The role of employees in the Takeover Bids Directive

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1. Introduction

This chapter focuses on one aspect of the ‘public interest’ dimension of the Takeover Bids Directive 2004/25/EC (‘the Directive’), namely its application to employees.¹ It examines the perceived conflict in the Directive between safeguarding the interests of shareholders and promoting the interests of the employees. Such a conflict reflects the difference between continental and UK/Irish approaches to takeover regulation and the impact of each in the formulation of the Directive. *The Takeover Bids Directive Assessment Report* (Marcuss Partners and CEPR 2012) produced by Marcuss Partners and the Centre for European Policy Studies for the European Commission on the application of the Directive (‘the Marccus Report’) evaluates the Directive through such a prism and makes an important contribution to our understanding of this relationship.

One of the seminal questions in corporate governance posed by Berle and Means in 1932 is ‘in whose interests should the company be run?’ (Berle and Means 1991: Chapter 5). This addresses a strategic issue in respect of the company’s ongoing operations and has given rise to a very substantial corporate social responsibility literature. In the context of takeover regulation, a similar issue arises in relation to what Bebchuk terms ‘game-ending decisions’ (Bebchuk 2005: 895): whose interests are relevant in determining the manner in which any takeover will be conducted? Examining the Directive, some provisions such as a requirement that all shareholders must be treated equally are clearly aimed at shareholder welfare. Others, such as a requirement to notify employees of the offerors’ intentions regarding employment, are intended to improve employee

1. This chapter builds on a number of my earlier papers, including ‘The Takeovers’ Directive – A Meaningful Contribution to Stakeholders Rights in Europe’ (2013); ‘Directors’ Duties in a Changing World: Lessons from the Cadbury Plc Takeover’ (2010); ‘The Takeovers Directive – Is a Little Regulation Better than No Regulation?’ (2009); and ‘Takeover Regulation – Through the Regulatory Looking Glass’ (2007).

welfare. While one might examine, as the Marccus Report does, the extent to which the Directive has more of the former than of the latter, the main question that arises from such an exercise is whether the interests of these constituents are addressed sufficiently. However, the issue becomes more complicated if we consider that a number of constituents merit consideration in the Directive and there is a conflict – or a potential conflict – between their various interests. Before addressing these issues, this chapter examines the background to the Directive in order to give some insight into the manner in which these interests were viewed by the legislators and the Member States.

2. Background to the Directive

The need to harmonise European legislation on takeovers was identified in the 1970s and the European Commission invited Professor Robert Pennington, a UK company law expert, to prepare a report on takeovers. Using the UK Takeover Panel's takeover rules – the 'City Code' – as a blue print, Pennington's 1974 report (Pennington 1974) reflects the shareholder value perspective that dominated UK corporate law at that time (Amour and Skeel 2007: 1730). Despite making some provision for information of employees, the emphasis of his proposal was on restraining abuses and malpractices and protecting 'private interests', specifically 'shareholders and bondholders'. The European Commission published a proposal for a Thirteenth Council Directive on Company Law concerning Takeover and Other Bids in 1989,² with an amendment in 1990.³ These early proposals, which were clearly aimed at harmonising the rules across Member States, also relied heavily on the City Code. However, it soon became clear that reaching a consensus on the detail proposed would be problematic in light of the significant differences in Member States' capital markets, corporate governance regimes and political cultures.

After consultation with Member States, it was decided that a framework directive would be a more appropriate instrument and an amended proposal was introduced in 1996,⁴ with further amendments being made in 1997 and 1999 following intense negotiations at the Working Council

2. [1989] OJ C 64/8.

3. [1990] OJ C 240/7.

4. [1996] OJ No. C162/5.

and Commission levels. After intensive efforts, in 2001 the European Commission put the agreed text before the European Parliament.⁵ This contained a set of General Principles with which Member States were required to ensure compliance. These principles concerned ensuring equality of treatment for all shareholders; protecting minority shareholders; providing sufficient time, information and opportunity to shareholders to make a decision on the bid; requiring directors to act in the interests of the company; ensuring an efficient market; and providing an appropriate timetable for the bid. It also contained a smaller number of substantive rules, most of which reflected rules in the City Code and which Member States were required to respect through detailed implementing rules. These provisions constituted minimum requirements for EU takeover regulation as Member States were permitted to lay down additional conditions and provisions more onerous than those of the Directive for the regulation of bids (Article 3(2)). In addition, Member States were authorised to allow for derogations from the rules (Article 4(5)). This represents the same broad structure as the current Directive.

In the European Parliament, debate centred on the desirability of the board-neutrality rule (in a two-tier system, both the management board and the supervisory board), the lack of harmonisation of the 'equitable price' to be paid in the case of a mandatory bid and the adequacy of employee protection. There seems little doubt that the hostile takeover of Mannesmann by the British company Vodafone in 2000 influenced the debate and concern was expressed that the proposal threatened the independence of German companies and their system of codetermination. German trade unions, for example, expressed opposition to 'the importation of Anglo-American forms of law, governance and economic organization'. The proposal was seen as a means of redirecting both power and income from employees to shareholders (Cioffi 2001) in a manner that threatened 'the stakeholder preferences of many Member States and European firms' (Clift 2009: 63). A tied vote ensued in Parliament and the proposal was accordingly rejected. Despite this setback, the impetus to reach agreement on a directive remained. Such legislation was deemed necessary by the European Council to facilitate the pan-European restructuring that it was felt would contribute to making Europe the most competitive economy in the world by 2010.

5. [2001] OJ No. C 23/1.

The Commission established a High Level Group of Company Law Experts, chaired by Jap Winter ('the Winter Group') to present recommendations for resolving the matters raised by the European Parliament. The ensuing report was published in early 2002 (High Level Group 2002). It concluded that, among other things, employee protection provisions were adequate and that any further concerns for the interests of employees should be addressed by specific legislation providing for information and consultation of employees and for their protection in the event of a bid leading to restructuring. The Winter Group suggested that any European company law regulation aimed at creating a level playing field for takeover bids should be guided by two principles: (i) shareholder decision-making and (ii) proportionality between ultimate economic risk and control. In relation to the former, it noted that 'in the event of a takeover bid the ultimate decision must be with the shareholders' (High Level Group 2002: 2). It endorsed the board neutrality rule in respect of proposed actions that might frustrate a bid and also suggested a rule that allows the offeror to break through pre-existing company law mechanisms and structures that might frustrate a bid. A further proposal for a directive was introduced in 2002, taking broad account of the Winter Report's recommendations. In order to overcome the continuing lack of consensus, a compromise proposal by the Portuguese Presidency was subsequently accepted, rendering the board neutrality rule and the breakthrough rule optional for Member States and also allowing Member States to adopt a reciprocity rule. The Directive was finally adopted in 2004.

Eight years after its introduction, and in fulfilment of a requirement in the Directive, the Commission undertook an examination of the Directive in light of the experience acquired in applying it.⁶ This led to the commissioning of the aforementioned Marcus Report and a subsequent communication from the Commission (European Commission 2012) on the application of the Directive ('the Commission Report'), which was published with the Report. Both shed further light on the shareholder primacy/corporate social responsibility debate in Europe in this context.

6. Article 20. The scope of this examination was not defined, although Article 20 provides that it must include a survey of the control structures and barriers to takeover bids that are not covered by the Directive.

3. The value of takeovers

The underlying premise of the Commission's approach to takeover regulation would seem to be that takeovers are generally positive and should be encouraged, subject to ensuring an adequate level of protection for shareholders throughout the EU. The Winter Group addressed this matter and concluded that 'in the light of available economic evidence, the availability of a mechanism which facilitates takeover bids is basically beneficial' (High Level Group 2002: 19). It cited three reasons for this: the exploitation of synergies, the opportunity to sell at a premium on market price and, finally, the market for corporate control. It stated categorically that 'such discipline of management and reallocation of resources is in the long term in the best interests of all stakeholders and society at large' and that these views 'form the basis for the Directive' (High Level Group 2002: 19). Callaghan and Höpner note that the many caveats to the market for corporate control 'barely entered political discourses on the directive' (Callaghan and Höpner 2005: 312). The Winter Group have been criticised somewhat unfairly for failing to analyse this economic evidence in greater depth. The Winter Report is a concise 68 page document (excluding appendices) and the distinction and scholarship of the authors, who included professors Klaus Hopt and Jonathan Rickford – representing the common law and the civil law perspectives, respectively – provide sufficient assurance that these issues were well understood. The authors were given a different mandate, however, and a shorter time to produce their report.

The Marccus Report consists of a more expansive 368 pages (excluding appendices) and provides significant analysis of the objectives of the Directive and whether they have been achieved and also more generally, broader corporate governance issues and the implications of takeover regulation.⁷ It constitutes a wonderful mine of information and case studies for researchers and public policymakers in this respect. It adopts a more nuanced position on the value of takeovers, noting that 'the impact of takeovers on the economy is complex and not necessarily straightforward' (Marccus Partners and CEPS 2012: 29). While referring

7. Chapter 4, for example, sets out a very detailed economic study reviewing the economic foundations of takeover regulation, the rationales for takeover regulation and incentives that drive actors to behave in certain ways and regulators to use the tools defined in more detail by the Directive.

expressly to the two classic rationales to promote takeovers – allocative efficiency and the ‘disciplinary effect’ of the market for corporate control – it also highlights the negative externalities that takeovers may generate, due to free-riding, agency conflicts and pressure to tender. It acknowledges that there are conflicting views regarding whether the mandate of the management should be shareholder-oriented or company-oriented; in other words, whether it should maximise shareholder value or protect firm-specific investments and the long-term value of the company as a whole. With the benefit of being able to examine the specific experience of Member States implementing the Directive, the Marccus Report was able to provide more detailed economic analysis. It concluded that this analysis shows that there is ‘no clear evidence that the Directive promotes economic efficiency’ (see the Schenk contribution in this publication). Although in theory free movement of capital is an element of overall economic efficiency, it stated that the necessary conditions of rational behaviour, fully informed agents and the absence of transaction costs are not always met. In addition, it identified the existence of negative externalities, giving the example of takeovers creating a disincentive for firm-specific investment in human capital. It concluded that ‘takeovers can both increase or decrease shareholder value’ (Marccus Partners and CEPS 2012: 18–19).

4. The objectives of the Directive

The objectives of the Directive, as described in its recitals, are:

- (i) to provide legal certainty on the takeover bid process and Community-wide clarity and transparency with respect to takeover bids;
- (ii) to protect the interests of shareholders, in particular minority shareholders, and of employees and other stakeholders through transparency and information rights, when a company is subject to a takeover bid or change of control; and
- (iii) to reinforce the freedom for shareholders to deal in and vote on securities of companies and prevention of management action that could frustrate a bid.

There appears to have been a degree of confusion in respect of the second of these. While the Commission’s Communication describes the second objective as stated above, curiously the Marccus Report lists it as the

‘protection of the interests of shareholders, in particular minority shareholders, employees and other stakeholders, when a company is subject to a takeover bid for control’ (Marccus Partners and CEPS 2012: 60). Although it states that this is ‘as described in its recitals’, it is a much broader description and a less accurate description of the objectives set out in the recitals. Recitals 13 and 23 of the Directive refer to employees but they do so only in the context of information rights.⁸ While the Directive may facilitate Member States’ taking the necessary steps to achieve the objective set out in the Commission Report, it does not deal with the broader objective.

This perhaps explains in part the level of dissatisfaction with the Directive reflected in the survey conducted for the Marccus Report, which used the broader list of objectives in its survey instruments to solicit the views of all stakeholders (Marccus Partners and CEPS 2012: Annex 2). In explaining their dissatisfaction, employee representatives opined that ‘the Directive does not sufficiently protect employees against the risk of change in working conditions or redundancies after the takeover’. While this might fall within the very broad objective set out for them, it does not fall within the scope of what the Directive, as described by the Commission, sought to achieve. It is not perhaps surprising, therefore, that the employee representatives were unhappy with the Directive because it clearly has not made significant improvements to the lot of employees during a bid. That said, in terms of the more modest objectives of improving transparency and information rights, the Directive may be viewed more positively.

5. Shareholder orientation

The Marccus Report opines that a mapping of changes introduced in respect of the Directive show that the legal system is more ‘shareholder oriented’ as a result, although it conceded that determining whether a system is more or less ‘shareholder oriented’ is subject to debate. In arriving at this finding, it categorises the mandatory-bid rule (Article 5), the board-neutrality rule (Article 9), the squeeze-out rule (Article 15) and the sell-out rules (Article 16) as being in the interest of shareholders.

8. Similarly, the only references to employees in the body of the Directive (Articles 4.2(e), 6.1, 6.2, 6.3(i), 8.2, 9.5, 10.1(e), 10.1(k) and 14) are in the context of information and consultation rights.

Those jurisdictions described as more shareholder-oriented were those that had introduced or clarified these rules.

The squeeze-out rule is considered attractive for potential offerors as it allows them to make a bid knowing that if they are successful they will be able to acquire all the company's shares, including those held by reluctant or apathetic shareholders. It thus increases the number of bids. The sell-out rule provides shareholders with an exit at a fair price where the same level of control is acquired. The mandatory-bid rule is often considered a shareholder-oriented rule as it permits all shareholders to benefit from the control premium. However, knowing that an acquisition of a basic level of control requires the acquirer to make a general offer for all the remaining shares in circumstances where it might have no interest in doing so clearly reduces the number of control-acquiring transactions. In this sense it may reduce the number of offers made to majority shareholders. It is submitted that the correct description of the rule is one that may not favour all shareholders but is designed – as the Directive expressly acknowledges – to protect minority shareholders.

The Marccus Report categorises the board-neutrality rule (Article 9) as benefitting shareholders as it confers decision-making power over the deal upon them and withdraws it from the board. Although defences may result in higher bid prices being negotiated for shareholders, it assumes they are stakeholder-oriented on the basis that incumbent directors are described as more likely to take into account the interests of employees, creditors and local communities with whom they have worked for years. Sjäffjell has argued that the board-neutrality rule significantly reduces the extent to which employees' interests may influence the outcome of the bid despite the information procedures in the Directive. This is also the assumption made in the mapping exercise (Marccus Partners and CEPS 2012: 64). However, against this it might be argued that directors may feel themselves more closely aligned to the interests of shareholders in circumstances where they have financial incentives, such as a significant shareholding or stock options in the company or bonuses tied to a takeover. Bebchuk has also questioned our confidence in directors' altruistic motives, arguing that 'if we expect management to be an imperfect agent for shareholders, we can expect management to be an even less reliable agent for stakeholders' (Bebchuk 2004: 80). One might also challenge the assumption made in the mapping exercise that if the offer is successful, the main objective of the new directors may be more short-termist, ensuring that the company generates enough cash to repay

the acquisition price paid by the offeror. While clearly there would be an attempt to rationalise operations if efficiencies are being sought, apart from egregious cases of asset stripping, it might seem more likely that the new owners would be interested in achieving long-term sustainability. This would be in the interests of all stakeholders. That said, it certainly seems the case that shareholders may be less likely, given the premium and liquidity offered, to concern themselves with the fate of employees. Sjøfjell describes this as ‘a fundamental incoherence’ in the Directive between the board-neutrality rule and the general principle, discussed below, that the board is required to act in the interests of the company as a whole (Sjøfjell 2010).

The Winter Group rejected the argument that allowing the board to frustrate a takeover bid can be justified as a means to help take into consideration the interests of stakeholders. It supported its view by noting the costs of defence mechanisms, the significant conflict of interests, the existence of specific rules in fields such as labour law or environmental law to protect stakeholders and its strong belief that shareholders are entitled to decide whether to tender their shares and at what a price (High Level Group 2002: 2). This discussion, however, highlights one of the circumstances in which the regulation of takeovers may face a trade-off between conflicting interests. While the Marccus Report correctly notes that the usual presumption that the interests of employees and shareholders are contradictory may not always be accurate in practice (Marccus Partners and CEPS 2012: 347), it acknowledges that ‘the tension between stakeholder and shareholder interests and its link with long-term value creation and firm-specific investments is therefore of the utmost relevance in takeover regulation’ (Marccus Partners and CEPS 2012: 347). It describes the search in the Directive for a balance between the predominance of the non-frustration model and shareholder supremacy, on one hand, and its acknowledgment of the role of employees in the takeover process, on the other.

6. Stakeholder orientation

While it is clearly in the public interest that the Directive operates effectively in order to achieve the positive economic effects referred to above, it is worth considering the treatment of employees separately. Employees have a range of valid concerns about the effect of a takeover on their lives. The Marccus Report indicates that these include the high

risk of redundancy, potentially negative changes in working conditions, poorly organised consultation and information processes and the absence of appropriate enforcement mechanisms when offerors do not act in the manner they have indicated (Marcus Partners and CEPS 2012: 19).

Traditionally in the United Kingdom, takeover regulation has involved considering the interests of shareholders almost exclusively among other stakeholders. The City Code prior to the introduction of the Directive referred to employees only to the extent of requiring the offeror to include a statement in the offer document indicating: its intentions regarding the continuation of the business of the offeree and its subsidiaries; its intentions regarding any major changes to be introduced in the business, including any redeployment of the fixed assets of the target and its subsidiaries; the long-term commercial justification of the offer; and its intentions with regard to the continued employment of the employees of the offeree and of its subsidiaries (Rule 24.1). In practice, this was satisfied by the inclusion of a boiler-plate statement to the effect that the employees' existing contractual rights would be respected. Given that this did not confer additional rights over and above existing legal entitlements, this was not particularly significant. The General Principle in the City Code at that time was worded differently from the current version and referred more narrowly to the duty of the board when giving advice to shareholders to consider 'the shareholders' interests, taken as a whole, together with those of employees and creditors' (General Principle 9).

The continental European idea of corporate social responsibility and the stronger position of employees in corporate affairs embedded in many of the Member States' political economies would envisage a greater role for employees in the takeover process. Stemming from this, the 1996 draft of the current General Principle 3(1)(c) stated that: 'the board of the offeree company is to act in the interests of the company as a whole.'⁹ The following year, the wording of that Principle was changed and there was an express reference to employees. It imposed a duty on the board of the offeree 'to act in all the interests of the company, including employment'.¹⁰ This was not well received as in addition to the awkwardness of the term 'employment', a concern was expressed – particularly by the United Kingdom and Ireland – that this would 'provide fertile ground for litigation because it is cast in very general terms'. The Council Working

9. COM/95/0655 FINAL - COD 95/0341 OJ C 162 6/6/1996, Article 5(c).

10. COM/97/0565 final, OJ C 378 13/12/1997, Article 5(1).

Party in 1998 suggested reverting to ‘the company as a whole’ and deleting the reference to ‘including employment.’ This change was explained on the basis that it was no longer necessary as Article 9(1)(b) required the board of the offeree company to give its opinion on the possible effects of the bid on employment.¹¹ While this of course assumes a very narrow interpretation of the original duty, the change was accepted by the Presidency and a modified Presidency proposal reflecting this wording was issued in December 1998. The new text now reflected in General Principle 3(1)(c) is thus stated: ‘the board of an offeree company is to act in the interests of the company as a whole’. Interestingly, a further amendment which had been suggested was to give the employees of the offeree company or their representatives a voice in decision-making on bids. The Commission rejected this on the basis that it had ‘no place in these provisions’. It stated that ‘only the holders of securities can decide whether or not to sell them and they are therefore the only parties concerned by it’ (European Commission 2001).

The categorisation of General Principle 3(1)(c) as shareholder- or stakeholder-oriented depends on the meaning of the phrase ‘the interests of the company as a whole’. A common law lawyer would be inclined to interpret this as meaning the interests of shareholders, which would give the Principle a shareholder orientation.¹² However, the Marccus Report argues that the phrase is necessarily broader than that and requires a broad analysis considering the company as a representative of the interests of all of its stakeholders (Marccus Partners and CEPS 2012: 37 and 104). It notes that, in addition to employees, this could include local communities,¹³ creditors, contracting parties and the environment (Marccus Partners and CEPS 2012: 104). This would give a certain degree of flexibility to Member States in their interpretation of the Principle. It would also mean that the significance of the Principle vis-à-vis employees now depends on national law. Member States are likely to be influenced by their own legal, political and cultural environments. It thus seems likely that Member States favouring a stakeholder approach to company law may be inclined to adopt a broad interpretation of the term and those favouring a more shareholder-oriented approach to adopt a narrower definition. This view is supported by case law from the European Court

11. In the Statement of the Council’s reasons for the Common Position adopted by it - 8129/00 ADD 1 22/5/2000.

12. See, for example, *Greenhalgh v Arderne Cinemas Ltd* [1951] Ch. 286.

13. Local communities are addressed in the Article 6(3)(i) and Article 9(5) requirements to disclose information on the ‘locations of the company’s places of business’.

of Justice which indicates that the General Principles must be viewed as ‘guiding principles’ for the implementation of the Directive by the Member States and not as independent General Principles of Community law.¹⁴

This case law also means that the General Principles do not thus give rise to directly enforceable rights and that it is also up to Member States to determine how they should be enforced. The Marccus report raises the possibility of an alternative approach, which would involve drawing up a list of all stakeholders that would have directly enforceable rights under the Directive. It concludes, however, that it would be difficult to design an appropriate mechanism that would allow all categories of stakeholders to make their voice heard and that ultimately ‘the simplest concept remains the company interest concept (at least for stakeholders who are outsiders)’ (Marccus Partners and CEPS 2012: 106).

If a broad pluralistic interpretation is adopted of General Principle 3.1(c), there may be occasions where the interests of the two parties conflict and the offeree board will be placed in the difficult position of attempting some sort of balancing exercise between shareholder and stakeholder rights or where one party’s interest will be preferred. This is one of the reasons why, as noted above, certain Member States resisted attempts to include a specific reference to employees in the text of the General Principle itself. As the Directive is silent on the method by which conflicts between such groups might be resolved, Member States will be responsible for determining what is permitted or prohibited. Again, this suggests that Member States are likely to fall back on familiar approaches continuing the existing differential treatments between Member States. It will also be open to individuals accepted by these decisions to challenge in the European Court of Justice whether the General Principle has been correctly implemented in national law, but as the case law referred to above suggests, this will not be an easy task.

A similar balancing act may be required in respect of the second part of Article 3 (1)(c), which provides that the offeree board ‘must not deny the holders of securities the opportunity to decide on the merits of the case’. The board-neutrality rule discussed above is based on this part of the Principle. Interestingly, the Marccus Report opines that Member States

14. *Audiolux SA e.a v Groupe Bruxelles Lambert SA (GBL) and Others and Bertelsmann AG and Others* Case C-101/08, par. 51.

that have adopted the board-neutrality rule, such as the United Kingdom, tend to consider that this rule ‘should override all other concerns’, although their legal systems ‘formally acknowledge’ that the board should not act contrary to the company’s interests (Marccus Partners and CEPS 2012: 105). This, it claimed, is justified by Member State’s belief that the company’s interests (taken as a whole) are best served by the disciplinary effect of the market for corporate control, which leads to better-managed companies and a reduction in the cost of capital, both of which ultimately serve the interests of all stakeholders. By contrast, Member States that have not adopted the board-neutrality rule, such as Germany, ‘emphasise the board’s duty to defend the company’s interest, and pay less attention to the consequences this may have on shareholders’ rights’ (Marccus Partners and CEPS 2012: 105). In these jurisdictions, ‘the overriding duty to protect the company’s interests is deemed to best serve the interests of all shareholders, at least in the long run’ (Marccus Partners and CEPS 2012: 105).

In addition to the General Principle, certain other provisions in the Directive provide rights to employees. While these rights are often described as ‘consultation rights’, they are more correctly described as ‘information rights’; there is an exchange of information, but there is little sense of discourse or debate with a view to influencing the offeror. The offeree’s shareholders receive the information and may of course factor it into their judgement of the offer, but there is no opportunity on their part to consult the employees. Article 6(3)(i) of the Directive provides that the offeror must include in the offer document

the offeror’s intentions with regard to the future business of the offeree company and, in so far as it is affected by the bid, the offeror company and with regard to the safeguarding of the jobs of their employees and management, including any material change in the conditions of employment, and in particular the offeror’s strategic plans for the two companies and the likely repercussions on employment and the locations of the companies’ place of business.

Article 9(5) deals with the offeree’s responsibilities and requires its board to set out

its opinion of the bid and the reasons on which it is based, including its views on the effects of implementation of the bid on all the company’s interests and specifically employment, and on the

offeror's strategic plans for the offeree and the likely repercussions on employment and the locations of the companies' place of business as set out in the offer document.

The majority of Member States have transposed the Directive's requirements without imposing further information requirements. There is some criticism in the Marccus Report of the use of boiler-plate disclosures, which is described as 'a circumvention', together with untimely communications of the relevant information (Marccus Partners and CEPS 2012: 248). There is also an issue of genuine uncertainty based on information asymmetry, a problem exacerbated in the case of a hostile takeover offer.

Employee representatives have sought improved consultation and information rights and have argued that a no-dismissal rule similar to that contained in the Transfer of Undertakings Directive 2001/23 should apply on the basis that both transfers of undertakings and takeovers involve similar economic effects (Marccus Partners and CEPS 2012: 356). However such provisions are not commonplace in other major non-EU jurisdictions,¹⁵ where the protection of employees in terms of information, as well as their involvement in the bid, appear to be extremely weak. At most, they found that an offeror is sometimes obliged to disclose in the offer documents its intention regarding the offeree's employees and the effect of the bid on the latter.¹⁶ In no such jurisdictions is the offeree's board otherwise required to inform or consult with employees about the bid (Marccus Partners and CEPS 2012: 101). In the United States, for example, the protection of employees in takeover transactions is not normally directly addressed by US federal securities laws or State corporation statutes or law, although some protective measures are set out in various federal and State laws.

Within the EU, a number of Member States have treated the Directive as a minimum standard and have introduced further informational or consultative requirements. For example, in Ireland, further informational requirements have been introduced relating to the long-term commercial justification for the bid and the offeror's intentions regarding any redevelopment of the fixed assets of the offeree and its subsidiaries. This

15 The Review included Australia, Canada, China, Hong Kong, India, Japan, Switzerland, Russia and the United States.

16. This would be the case, for example, in Australia, Canada, China and Hong Kong.

is based on similar provisions in the City Code. In the Netherlands, the board is required to explain why, if applicable, it disagrees with the works' council's opinion regarding a takeover. The works councils also have a consultation right rather than merely an information right. In France, the works councils have meeting rights. In Germany, where a codetermination system is in place, the employees' delegates on the supervisory board directly participate in the public statement made by the offeree company's supervisory board. In the United Kingdom, the offeree is responsible for paying any costs reasonably incurred by the employee representatives in obtaining advice to ensure their opinion is accurate. A party who makes a post-offer undertaking must comply with its terms for the period of time specified in the undertaking and the Panel may require the appointment of an independent supervisor to monitor compliance with the undertaking.

In its Communication, the Commission indicated an intention to pursue its dialogue with employee representatives with a view to exploring possible future improvements. It also stated that it will investigate further Member States' experience of the provisions of the Directive which require disclosure of the offeror's intentions as regards the future business of the company and its employment conditions and the view of the offeree company's board on this, as well as disclosure of information concerning the financing of the bid and the identity of the offeror (Marcus Partners and CEPS 2012: 11).

7. Conclusion

An expectation that the Directive should offer substantial protection to employees will not be met. What it does offer is a reasonable opportunity for employees to have their voices heard, but it does not ensure that those voices will be factored into the ultimate game-ending decision. In that sense, the Directive is correctly viewed as shareholder-oriented.

Whether this situation needs to be revised remains a moot point. The Winter Report noted that the provisions in the Directive were adequate and that any further concerns for the interests of employees should be addressed by specific legislation providing for information and consultation of employees and for their protection in the event of a bid leading to restructuring (High Level Group 2002: 16). More recently, a number of European company law experts adopted a similar stance, opining that no further legislative action is required, on the basis that the

existing informational requirements ‘in addition to national provisions’ are sufficient (Böckli *et al.* 2013). They make a distinction between the acquisition and the operational restructuring, noting that any further protection would not be justified by the public offer and the resulting acquisition of control as such, but by any restructuring or reorganisation that may follow a successful offer, which is beyond the remit of the Takeover Bids Directive (Böckli *et al.* 2013: 14). They advise that questions of the appropriate level of protection of employee rights in the EU should be addressed in a wider context and should not be taken up specifically for one type of transaction, such as takeover bids. This is a particularly important point given that the Directive covers ‘takeover bids’ but does not extend to mergers, transfers of undertakings or acquisitions by way of schemes of arrangement. This might be part of a larger debate which needs to be had concerning the role of stakeholders in companies and the manner in which a long-term sustainable accommodation can be achieved. Such an accommodation must encourage and incentivise shareholders and protect their investments, but it must also recognise that employees, too, have interests that deserve protection and cannot be ignored.

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