

Chapter 4

European company law and the Takeover Bids Directive – the need for a change

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1. Introduction

European directives undergo a review at regular intervals (usually every five years). A review enables policymakers to decide whether the instrument is fulfilling its assigned objectives and whether legislative changes should be envisaged.

The Commission published its report on the review of the Takeover Bids Directive in June 2012.¹ The European Parliament reacted in a Resolution adopted in March 2013.² The conclusions of this process are unclear. While neither the Commission nor the European Parliament call for the Takeover Bids Directive to be revised in the immediate future, they are not fully satisfied with its functioning. Both institutions list key issues that would merit clarification (such as acting in concert, national derogations to mandatory bid rule, the board neutrality rule and employees' rights). The Commission prefers to handle these points via the non-legislative route (for example, infringement proceedings or communications, as well as bilateral discussions). The European Parliament proposes to come back to the issue when economic activities in the EU return to a more even keel.

The ETUC participated in the review process and expressed strong dissatisfaction with the Takeover Bids Directive. Despite having a significant impact on working conditions throughout Europe, the Directive's provisions on workers' rights are very weak. The European trade union movement has called unequivocally for a revision of the text. The starting point for a revision should be to change the current shareholder model that is emblematic of today's European company law into a broader stakeholder approach (Section 2). This means in particular

1. COM (2012) 347 final.
2. 2012/2262 (IN1).

that the provisions on workers' rights need considerable strengthening (Section 3).

Both the Commission and the European Parliament noted these concerns and the Commission intended to pursue its dialogue with employee representatives with a view to exploring possible future improvements. Three years later, we are still waiting for Godot.

2. Shareholder vs stakeholder

The 'competitiveness of the European economy' is a central point of concern in European company law. The EU is pursuing a regulatory competition agenda based on minimal requirements at EU level. The purpose is not to propose a harmonised approach to what should define a European company, but to increase business mobility at all costs. National company laws, where they provide for fairness and social justice, are under fire from EU law and pressure is increasing towards more regime competition among national company laws to attract companies. We might describe this as the 'European Delaware effect'.

This whole approach to EU company law is dominated by shareholder ideology, which claims that a company is the private domain of shareholders and that workers are merely a factor of production.

The Takeover Bids Directive is a typical illustration of this deregulatory approach. In the words of the Commission,

the purpose of the Takeover Bids Directive in facilitating takeover activity through efficient takeover mechanisms required the removal of some of the main company-related obstacles permitted under national company law; these obstacles meant that takeovers could not be undertaken on equal conditions in the different Member States.³

The view according to which takeovers improve the efficiency of the European economy can be challenged. However, the Takeover Bids

3. Report on the implementation of the Directive on Takeover Bids, Commission staff working document SEC (2007) 268.

Directive gives no or little consideration to the long-term interests of the company and its stakeholders.

The recent Commission proposal for a directive on a single-member private limited liability company ('the SUP') is another illustration of the minimalist approach promoted by European company law.⁴ The Commission proposes to abolish the principle of a substantial capital base and to introduce simplistic registration requirements. One of the announced objectives of this initiative is to enable companies to pick and choose the regime (national or European) that suits them most.

This deregulatory agenda is also creating damaging inconsistencies within the EU legal order. Achievements with regard to one EU instrument – very often following long compromise processes at EU level – are called into question in subsequent ones. For instance, the key achievements of the SE Directive on employees' involvement⁵ were significantly diluted in the 2005 cross-border merger Directive.⁶ In their quest for the 'lightest regime', companies are not only able to pick and choose national laws; they can also put EU instruments in competition with each other.

The Takeover Bids Directive was adopted following a series of groundbreaking instruments on workers' rights to information and consultation. However, the Directive does not draw inspiration from them and merely contains a meagre, ineffective provision on a right to information. The transfer of undertakings Directive⁷ is a cornerstone of EU labour law, involving and protecting workers in case of a change of employer. But the Takeover Bids Directive does not foresee its application in case of share sales.

The ETUC is calling for a radical change of policy with regard to European company law and the Takeover Bids Directive is as good a place as any to start. A company is a community. Workers' interests should be placed on the same footing as shareholders; they need to have a right to exercise 'voice' within the firm.

4. COM (2014) 0212.

5. Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees.

6. Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies.

7. Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

3. ETUC proposals for revision of the Takeover Bids Directive

Takeovers on the whole must be regarded critically in relation to their impact on stakeholders and the economy. The main benefactors of takeovers tend to be the shareholders in the company being taken over and the top managers of the acquiring company.

These benefits do not appear to be shared by employees and society as a whole, however. Takeovers frequently involve significant decreases in employment levels and working conditions. One of the key motives for many takeovers is cost reduction through reducing employment and benefits – such as wages and pension benefits – increasing work intensity and reallocating production to ‘cheaper’ sites. Research on the employment impact of takeovers also shows that, on average, employment declines in a 2–3 year period after the takeover.

Although not yet systematically investigated, the high levels of debt taken on to finance many takeovers – for example, for very large private equity takeovers (so-called ‘mega buyouts’) – should also be mentioned as a major cause for concern. The financial pressure on highly leveraged companies to meet interest payments during crisis conditions may lead to greater reductions in employment and investments (such as research and development) compared with companies with lower debt levels.

The ETUC does not support further liberalisation of the current legal framework, in particular with regard to hostile takeovers. Adequate defensive mechanisms must remain in place. With regard to the board neutrality rule, it should be clarified that the board of the offeree company must act in the long-term interest of the company and its stakeholders.

Most importantly, a complete rethinking of the provisions on workers’ rights is urgently needed, with a view to bring the Directive in line with the rest of the Community *acquis*.

First, the Takeover Bids Directive must contain a clear reference to Directive 2001/23/EC on safeguarding of employees’ rights in the context of transfer of undertakings. Directive 2001/23/EC is one of the cornerstones of European labour law. According to this instrument, a transfer of undertakings does not in itself constitute valid grounds for dismissal. This means that unless dismissals can be motivated for economic,

technical or organisational reasons not connected to the transfer, rights and obligations arising from an employment relationship shall be maintained after the transfer. Information and consultation regarding the proposed transfer must also be carried out beforehand.

Currently, workers who are the subject of a transfer in which the legal personality of the company has not been changed – which is the case in share sales – do not benefit from the protection of Directive 2001/23/EC. The ETUC has repeatedly called for a uniform application of this Directive to all workers in the EU. It is absurd that workers in a similar situation should be treated differently depending on whether or not their company is listed.

Secondly, proper consultation rights must be introduced. Workers' 'voice' during a takeover bid is extremely weak. Currently, employee representatives can express their opinion, and this opinion is supposed to be forwarded by management to the shareholders of the offeree company. However, only the shareholders in the 'target company' have the right to decide on whether or not to accept the takeover offer. These shareholders will typically not share the interests of employees in the long-term sustainability of the company. Instead, they have every incentive to 'cash in' on the premium in the takeover bid and to 'exit' the company by selling their shares.

A specific right to consultation must be introduced in the Takeover Directive. 'Consultation' should be understood as the establishment of a meaningful dialogue between employee representatives and both the offeror and the offeree, with a view to reaching an agreement on the proposed measures. It is very important that this dialogue take place before any decision is finalised and that both existing management and the acquiring company are involved.

Improved rights to information and consultation must go hand in hand with adequate sanctions. Currently, the Takeover Bids Directive relies on the Member States to determine effective, proportionate and dissuasive sanctions for the infringement of the Directive. This provision is clearly insufficient and has failed to guarantee proper implementation.

The Directive contains obligations to inform employee representatives about certain aspects of the bid, in particular with regard to the repercussions for employment. Although offerors are required by the

Takeover Bids Directive to provide information on their ‘intentions with regard to the future business of the offeree company’, including employment levels and conditions, these stated intentions are frequently not fulfilled in practice and there are no effective sanctions for non-fulfilment.

The Takeover Bids Directive also foresees that the rules on information and consultation contained in other EU instruments, such as the European Works Council Directive, must be applied. However, these obligations are frequently not respected in practice.

The ETUC considers that the only way to guarantee compliance with the obligations contained in the Directive is to provide that the legal effects of the takeover be suspended until all the obligations have been adequately fulfilled. This should be the case in particular in instances of serious violations of employees’ right to information and consultation.

A final demand refers to the right to expertise. In order to provide a valuable and well informed input, employee representatives often need to have recourse to expertise because of the complexity of questions surrounding bids for takeovers. Experts can be specialists – lawyers, economists and so on – depending on the subject matter. Experts can also play a monitoring and supporting role. In this regard, experts can be trade union representatives.

The Takeover Directive should grant employee representatives a right to expertise. The cost should be borne by management and only employee representatives should be able to select the most appropriate experts.