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European Takeover Reform of 2012/2013 – Time to Re-examine the Mandatory Bid

Klaus J. Hopt*

* Professor (em.) and Director at the Max Planck Institute for Comparative and International Private Law, Hamburg. This article goes back to the first Christian Wilde Memorial Lecture on European takeover law held by the author on 7 June 2012 at the Bucerius Law School in Hamburg. Later, the German version of this lecture was incorporated into a book on European takeover law: K.J. Hopt, *Europäisches Übernahmerecht* (Tübingen 2013). The English version is based on parts of this book and has been updated and changed for an international audience. The Application Report of the European Commission of 28 June 2012 and the External Study commissioned by the European Commission have been taken fully into account in the hope that this article will contribute to discussions raised by the Commission about the legal position and practice of takeover law in the European Union and Member States.

Abstract

The Thirteenth Directive on Takeover Bids of 2006 has to be revised on the basis of experience gained in the five years of its application. This revision includes an examination of the control structures and barriers to takeover bids for those bids that do not fall within the scope of application of this Directive. On the basis of an examination carried out by Marccus Partners and the Centre for European Policy Studies, the Commission published an Application Report on 26 June 2012, to which the European Parliament responded favourably in its Resolution of 21 May 2013. This has provoked highly controversial discussions in various Member States and beyond. This article carries out a comparative, theoretical and policy analysis of European takeover law, incorporating not only the Thirteenth Directive but also commonalities and differences in takeover law in the Member States as regards the European market for corporate control, with an emphasis on the mandatory bid. While many economic opinions regard the mandatory bid as a mistake (it makes takeovers more expensive), the vast majority of academics and practitioners believe that the mandatory bid as an early exit option plays an irreplaceable role in the protection of minorities, and recent economic theory holds that mandatory bids are beneficial. The objection that the economic costs of the mandatory bid could be saved through improved protection of minorities after the takeover or in groups of companies is unrealistic. There is a whole range of special reform issues regarding the mandatory bid which fall partly within the remit of the European Commission and partly within that of the national legislatures. These issues include: the control threshold; opting up and opting out; low balling and creeping in; exercising control on the basis of a voting agreement; exemptions from the mandatory bid; and share price calculation.

Keywords: takeover regulation, mandatory bid, reform of the 13th European Directive, Application Report of the European Commission of 2012, control threshold, options, low balling and creeping in, derogations, acting in concert.

1. Revision of the Thirteenth Directive on Takeover Bids

The Takeover Bids Directive of 21 April 2004, also called the Thirteenth Directive on Company Law,[1] applies minimum harmonisation[2] to solve important aspects of problems concerning takeover bids, such as investor protection via information and mandatory bids, the duties of management, and supervision by national authorities, provided that all or some of the affected securities are admitted to trading in a regulated market. Member States retain responsibility for all other takeover rules. Member States have also retained option rights regarding the particularly critical issue of defensive measures against takeovers and continue to exploit these options to protect companies at home. The following discussion focuses on the *revision* of the Takeover Bids Directive which is due in 2013. On 26 June 2012, the European Commission published a Report on the Application of Directive 2004/25/EC on Takeover Bids in Member States (hereinafter 'the Commission Application Report'),[3] together with a comparative law and economics External Study by Marccus Partners.[4] Some of the issues are also dealt with in the Action Plan of the European Commission of 12 December 2012 on European company law and corporate governance.[5]

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[1] Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, *OJ* 2004 L 142/12 of 30 April 2004.

[2] This means that Member States may adopt stricter national rules, such as for the protection of minority shareholders or employees (gold plating). Examples can be found in the price rules, see section 3.2.7 below.

[3] European Commission, Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Application of Directive 2004/25/EC on takeover bids, Brussels 28 June 2012, COM(2012) 347 final, available at: <http://ec.europa.eu/internal_market/company/docs/takeoverbids/COM2012_347_en.pdf>. As regards the content of this Application Report, see section 1.3.1 below. See also European Parliament, Resolution of 21 May 2013 on the application of Directive 2004/25/EC on takeovers bids, see section 1.3.2 below for more details.

[4] Takeover Bids Directive Assessment Report, commissioned by the European Commission and published on 28 June 2012, available at: <http://ec.europa.eu/internal_market/company/docs/takeoverbids/study/study_en.pdf>. The report is only available in English and is referred to as the 'External Study'. The External Study contains, in Ch. 4, an Economic Study (hereinafter referred to as the 'CEPS External Study' so as to differentiate between the two in terms of strict facts and economic theory). For more information, see section 1.2.1 below.

[5] European Commission, *Action Plan: European Company Law and Corporate Governance – A Modern Legal Framework for More Engaged Shareholders and Sustainable Companies*, Brussels, 12 December 2012, COM(2012) 740/2. Cf. the comment by K.J. Hopt, 'Europäisches Gesellschaftsrecht im Lichte des Aktionsplans der Europäischen Kommission vom Dezember 2012', 42 *Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR)* (2013) p. 165.

In the narrow sense, European takeover law is the law of the Takeover Bids Directive *de lege lata* and *de lege ferenda*. In the wider sense, this paper addresses the transposition of the Directive into national laws, basic *similarities and differences of national takeover laws* of select Member States that are particularly important for takeovers, and the *future of a European market for corporate control*.

1.1 Corporate takeovers as a regulatory problem

1.1.1 *Basic terminology and procedural and protection problems for public takeover bids*

Companies can grow in two ways: either by organic growth based on sound market performance, or externally by takeover of another company. The latter is particularly important today. Takeovers are mainly carried out by means of an agreement between two companies on the basis of a resolution of the general meeting of shareholders. Legally, this constitutes a merger or other type of transformation of the company; from an economics perspective, we speak of private control transactions or mergers and acquisitions (M&A).[6] The largest M&A markets are the USA, the United Kingdom and Canada; Europe, Germany and France each have a considerable share of cross-border takeovers (with differences between inbound and outbound targeted takeovers).

Instead of by agreement between two companies, corporate takeovers can also take place by means of a *public takeover bid* by a company (bidder) to the shareholders of another company (target company). The shareholders of the target company then decide for themselves – normally without a general meeting of shareholders – whether or not they wish to accept the takeover offer. Public takeover bids are particularly important in the USA,[7] the United Kingdom,[8] and France and Belgium in continental Europe, and are now also gaining significance in Germany and other EU Member States. Growth in takeover activity occurs in strong

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[6] For a description of the procedure during a corporate takeover, including many contractual and other sample documents, see A. Fabritius, in K.J. Hopt, ed., *Vertrags- und Formularbuch zum Handels-, Gesellschafts- und Bankrecht*, 4th edn. (Munich 2013) I.K.1-24.

[7] M. Martynova and L. Renneboog, 'The Performance of the European Market for Corporate Control: Evidence from the Fifth Takeover Wave', 17 *European Financial Management* (2011) p. 208, at p. 210.

[8] Table in CEPS External Study, *supra* n. 4, at p. 284; takeovers in the UK usually constitute about half of all takeovers in the EU, ibid., at p. 285. The UK Takeover Panel Annual Report 2010-2011 reports only on cases in which the Panel has been involved. According to R. Veil, 'Administration von Übernahmeverfahren – Regulierungsstrategien und Aufsichtskonzepte', in J.A. Kaemmerer and R. Veil, eds., *Übernahme- und Kapitalmarktrecht in der Reformdiskussion* (Tübingen 2013) p. 27, at p. 33, there are normally more than 100 takeovers per year, but only a few involve mandatory bids; the estimate is only 5%

waves that reflect general economic and financial cycles[9] and tend to converge due to increasing international and global integration.[10] In Germany, a total of 42 public takeover offers were made between 1 January 2010 and 30 June 2011, 2 of which were simple offers to purchase, 27 were voluntary takeover bids and 13 were mandatory bids.[11] Examples of recent spectacular takeover bids in Germany[12] have been UniCredit/Hypo-Vereinsbank (2005), Porsche/Volkswagen (2007), Schaeffler/Continental (2008), Deutsche Bank/Deutsche Postbank (2010),[13] and ACS/Hochtief (2010), and the envisaged bid for a merger of Deutsche Börse AG and NYSE Euronext Inc.[14] that failed in 2012 due to antitrust issues.

Public takeovers throw up a range of *procedural and protection issues*. In summary, these concern the following conflict situations. The main focus is on the *target company* itself; if the bid comes as a surprise to the company and is not previously negotiated, as often happens, the company will normally defend itself against the bid. There must be clear rules for this and the procedure may not take too long so that the target company, when it has successfully fought off the bid, can quickly resume its normal business activities. The *management board and supervisory board of the target company* (in the two-tier board system as in Germany;

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9 See Application Report of the Commission, *supra* n. 3, Annex Fig. 1: Evolution of Takeovers in Europe Since 2003, and Fig. 2: Number of Intra-EU Takeover Deals 2003-2010, with peaks in 2007 and troughs in 2004 and 2009; both illustrations are taken from the CEPS External Study, *supra* n. 4, at pp. 284-285. More basically, see M. Martynova, 'Takeover Waves: Triggers, Performance and Motives', ECGI Finance Working Paper No. 097/2005; Martynova and Renneboog, *supra* n. 7, as well as *infra* n. 19.

10 Previously, there were three basic historical models of corporate control: shareholder orientation as in the USA, the UK and other Anglo-Saxon countries; company orientation as in Germany and the Netherlands; and mixed as in France, Belgium and Spain. See also E. Wymeersch, 'Unternehmensführung in Westeuropa', *Die Aktiengesellschaft* (1995) p. 299, at p. 305 et seq., with figures from the UK, France, Belgium and Spain; see also 'The Regulation of Takeover Bids in a Comparative Perspective', in R. Buxbaum, G. Hertig, A. Hirsch and K. Hopt, eds., *European Economic and Business Law* (Berlin/New York 1996) p. 291, at p. 294 et seq. These models are now converging. But still, see External Study, *supra* n. 4, at p. 81: shareholder-oriented (UK), company-oriented (Continental Europe) and management-oriented (USA).

11 These 42 takeovers are listed in C. Seibt, 'Übernahmerecht: Update 2010/2011', *Corporate Finance Law (CFL)* (2011) p. 213, at p. 214 et seq.

12 For these and other 'key transactions', see C. von Bülow, '10 Jahre WpÜG – eine kritische Bestandsaufnahme', in P. Mülbert, R. Kiem and A. Wittig, eds., *10 Jahre WpÜG: Entwicklungsstand – Praktische Erfahrungen – Reformbedarf – Perspektiven* (Frankfurt 2011) p. 9, at p. 24 et seq.

13 One of the few cases that has been the subject of a court dispute. Dismissing an action, Court of 1st Instance (*Landgericht*) Cologne, *ZIP* (2012) p. 229.

14 The core of the merger plan was an exchange offer under takeover law by the new Alpha-Beta Netherlands Holding N.V. to the shareholders of Deutsche Börse AG, in conjunction with a reverse triangular merger with NYSE Euronext Inc. For an overview of this incredibly complicated chronology, see Seibt, *supra* n. 11, at p. 227. See also Prohibition Order of the European Commission of 1 February 2012; see also the summary of the European Commission, *Europäische Zeitschrift für Wirtschaftsrecht (EuZW)* (2012) p. 123.

collectively referred to as 'management') are also affected, as are the shareholders and company employees. When a hostile takeover is successful, the directors usually lose their jobs and will therefore defend 'their' company – and their jobs – against the takeover. The *shareholders* must consider whether they wish to remain with the company if there is a new majority shareholder, or whether they wish to cash in their investment and invest elsewhere. This latter possibility is denied to them if the Management decides to defend against the takeover without asking for their opinion. The *employees* run the risk that the new majority shareholder will follow its own interests in integrating the company into the new group and will restructure and lay off staff. Therefore, the employees usually side with management. *Other stakeholders*, such as the municipality, county or state, may also be indirectly affected if the takeover leads to facility closures, restructuring or even relocation of the head office.

1.1.2 *The economic theory of takeover bids*

In addition to the effect on the interests of individuals and various groups, public takeover bids also have a *specific economic function.* This arises in the *market for corporate control*,[15] where the competition for control of companies is played out. There is some evidence that a functioning market for corporate control will tend to improve the allocation of resources tied up in companies and promote structural transformation of the economy. This applies not only at national but also at European level and internationally. Therefore, the European Union must have an interest in a functioning European takeover market.[16] This is countered by the self-interest of individual Member States that are in favour of outbound targeted takeovers but seek to insulate their own national companies through protectionism. The latter conflict explains why the Community has been moving towards a European takeover law since 1970 but why the European Directive on takeover bids did not come about until 2004 and even then in a very watered-down compromise form.

The economic theory of takeover bids has been highly developed in the USA and cannot be set out in full here.[17] Just a few important issues for the legal regula-

15 On the market for corporate control, see K.J. Hopt, 'Takeover Defenses in Europe', 21 *Columbia Journal of European Law* (2014/15) (forthcoming).

16 For an American point of view, see J. Gordon, 'American Experience and EU Perspectives', in G. Ferrarini, K. Hopt, J. Winter and E. Wymeersch, eds., *Reforming Company and Takeover Law in Europe* (Oxford 2004) p. 541, at p. 546.

17 The best introduction is still R. Romano, 'A Guide to Takeovers: Theory, Evidence and Regulation', in K. Hopt and E. Wymeersch, eds., *European Takeovers – Law and Practice* (London 1992) pp. 3-48; see also R. Romano, 'A Guide to Takeovers: Balancing Competing Concerns', 9 *Yale Journal on Regulation* (1992) p. 119. For the development of the takeover theory since H.G. Manne 'Mergers and the Market for Corporate Control', 73 *Journal of Political Economy* (1965) p. 110, see S.M. Davidoff, 'Takeover Theory and the Law and Economics Move-

tion of the market for corporate control are briefly addressed in this paper, namely: (1) competing explanations of why takeovers happen; (2) the positive and negative effects of takeovers on the various parties involved, including the attendant antitrust and protectionism issues; (3) the 'pressure to tender problem'; and (4) the economy in general. The economically divisive central problems regarding the handling of control premiums and the assessment of barriers to takeover bids are dealt with in detail below.[18]

1.1.2.1 The market for corporate control

Economic theories as to why there is such an active market for corporate control greatly differ.[19] On the whole, it is presumed that it produces increases in value, particularly greater operational and financial synergies,[20] as well as a reduction in agency costs[21] as a result of new improved management and exploitation of actual or perceived market inefficiencies. As previously stated, according to this view, a functioning market for corporate control requires allocation of resources tied up in companies and structural transformation of the economy. The assumption in another theory – that takeovers for profit take place at the cost of taxpayers, bondholders, employees and consumers – is unlikely according to empirical findings. But reasons other than value increase are also put forward, such as diversification, empire building by management, free cash flow at the bidder, and managerial hubris. There are always relevant examples of these in takeover practice but no general theory may be deduced from them.

However, it is correct that, in practice, takeover bids are not always economically efficient. Referring to the External Study, the Commission states the reason to be that 'the conditions of rational behaviour, fully informed market participants and

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ment' (4 April 2011), available at <http://ssrn.com/abstract=1802733>. Recently, in detail, CEPS External Study, *supra* n. 4, Ch. 4: Economic Study.

[18] For control premiums, see section 3.1.2 below.

[19] See Romano, *supra* n. 17, at pp. 4-27; M. Martynova and L. Renneboog, 'A Century of Corporate Takeovers: What Have We Learned and Where Do We Stand?', 32 *Journal of Banking & Finance* (2008) p. 2148, see Table 'Six Takeover Waves in the US': takeover profitability, at p. 2152 et seq., also available at: <http://www.ssrn.com/abstract=880379>. Summary of empirical investigations in B. Betton, B. Espen Eckbo and Karin S. Thornburn, 'Corporate Takeovers', in B. Espen Eckbo, ed., *Corporate Takeovers, Modern Empirical Developments*, Vol. 1 (Elsevier 2010), p. 3. On a disputed economic assessment of mandatory bids, see section 3.1.2 below.

[20] Romano, *supra* n. 17, at p. 7 et seq.; M. Goergen and L. Renneboog, 'Shareholder Wealth Effects of European Domestic and Cross-border Takeover Bids', 10 *European Financial Management* (2004) p. 9, available at: <http://www.ssrn.com/abstract=513539>; M. Humphery-Jenner and R. Powell, 'Firm Size, Takeover Profitability, and the Effectiveness of the Market for Corporate Control: Does the Absence of Anti-takeover Provisions Make a Difference?', 17 *Journal of Corporate Finance* (2011) p. 418; Martynova and Renneboog, *supra* n. 7. But see also *infra* n. 24 for an overall positive balance.

[21] See section 1.1.2.2 below.

absence of transaction costs are not always met'.[22] Takeover bids usually lead to share price rises at the target company and, though to a lesser extent, share price decreases at the bidder,[23] but for aggregated profits and losses of shareholders involved the balance is usually significantly positive.[24] Share price losses for bidders are generally explained in that the bidder pays the controlling shareholder (or the shareholders) of the target company the private benefits of control[25] over and above the value of the shares but with a high level of uncertainty about the economic success of the takeover. In many cases, takeovers turn out, in retrospect, to be an economic misjudgment,[26] because often not only the organisational difficulties of the takeover are underestimated, but also the actual integration of the two companies and their corporate cultures. This is even more pronounced for cross-border takeovers than for purely domestic transactions. However, despite all information and experience gathered, it is extremely difficult to recognise ex ante in which cases this will happen, and we remain subject to the discovery processes of the markets.

In macroeconomic terms, these findings support the idea of national and international *rules* to ensure *open, well-functioning markets for corporate control*. These include rules against restrictions on competition – antitrust and merger control legislation – as well as regulations against excessive ring-fencing of companies that

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[22] Application Report of the Commission, *supra* n. 3, at p. 2, no. 12, taken from the External Study, *supra* n. 4, at p. 18: Key Result 6. Cf. Donald C. Langevoort, 'The Behavioral Economics of Mergers and Acquisitions' (16 October 2010), available at: <http://ssrn.com/abstract=1692777>.

[23] J.M. Barry and J.W. Hatfield, 'Pills and Partisans: Understanding Takeover Defenses', 160 *University of Pennsylvania Law Review* (2012) p. 633, at p. 695, with further evidence; Martynova and Renneboog, *supra* n. 19, at p. 2153 et seq.; Goergen and Renneboog, *supra* n. 20; S.B. Moeller, F.P. Schlingemann and R.M. Stulz, 'Firm Size and the Gains from Acquisitions', 73 *Journal of Financial Economics* (2004) p. 201.

[24] Martynova and Renneboog, *supra* n. 19, at p. 2164; Martynova and Renneboog, *supra* n. 7; Betton, et al., *supra* n. 19, at pp. 115 and 120; S. Sudarsanam, *Creating Value from Mergers and Acquisitions: The Challenges*, 2nd edn. (Prentice Hall 2010), at p. 656 et seq. More support for these arguments from J. Armour and D.A. Skeel, 'Who Writes the Rules for Hostile Takeovers, and Why? – The Peculiar Divergences of U.S. and U.K. Takeover Regulation', 95 *Georgetown Law Journal* (2007) p. 1727, at p. 1740, also available as ECGI Law Working Paper 73/2006, at p. 15 et seq. Alternative interpretation by A. White, 'Reassessing the Rationales for the Takeover Bids Directive's Board Neutrality Rule', 5 *European Business Law Review (EBLR)* (2012) p. 789, at p. 794 et seq.

[25] On private benefits of control, see section 1.1.2.3 below.

[26] This circumstance, which can often be seen in practice, is now confirmed by new long-term studies, such as U. Malmendier, E. Moretti and F.S. Peters, 'Winning by Losing: Evidence on the Long-Run Effects of Mergers' (April 2012), Working Paper: 'Winners in merger contests (USA, 1985-2009) underperform losers by 50 per cent over the following three years', but the authors are very careful in drawing consequences; U. Malmendier and G. Tate, 'Who Makes Acquisitions? CEO Overconfidence and the Market's Reaction', 89 *Journal of Financial Economics* (2008) p. 20; see also Martynova and Renneboog, *supra* n. 19, at p. 2164, but they are careful due to the particularly serious issue of causality problems in long-term studies.

erect barriers to takeover bids and foreclose national markets by way of protectionist measures.

1.1.2.2 Principal-agent problems in company takeovers

Corporate takeovers present three underlying principal-agent problems: between the shareholders and the management of the target company, typically in non-controlled companies; between the minority and majority of shareholders in controlled companies; and, finally, in general between the shareholders and the employees and other creditors.[27] The first conflict specified arises above all if an inefficient management remains in position by using defensive measures and makes an exit for shareholders impossible. The second conflict occurs if a bidder buys control of the target company and the minority may fear that it will lose out in the future and therefore wishes to exit the company – preferably participating in the control premium provided by the bidder but at least at a fair price. The third conflict arises if the interests of employees or other creditors are ignored during the takeover. Under takeover law, these principal-agent problems are addressed through *rules* that make clear what barriers to takeover bids and defensive measures are permissible or prohibited (first conflict),[28] rules allowing an immediate exit at a reasonable price for the value of the share, instead of at a later date to be determined, depending on jurisdiction, by uncertain subsequent group protection laws (second conflict),[29] and rules to protect employees[30] and other

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[27] R. Kraakman, J. Armour, P. Davies, L. Enriques, H.B. Hansmann, G. Hertig, K. Hopt, H. Kanda and E.B. Rock, *The Anatomy of Corporate Law*, 2nd edn. (Oxford 2009), at p. 35 et seq.

[28] In companies with dispersed shareholder structures, there is a conflict of objectives between the protection of shareholders and that of employees. The former are interested in a takeover, the latter are usually critical of a takeover bid since they fear rationalisation measures. Thus, employees and unions represented in the target company usually support their management.

[29] For mandatory bids, see section 3 below.

[30] Participation for *employees* exists in countries with employee participation via the board or supervisory board (see also *infra* n. 73). Certain special takeover-related participation rights of employees may be problematic and are not usually included in takeover laws. Takeover-related protection of employees is usually ensured by means of transparency: see M. de Vos and J. Heynen, 'Employee Participation and Takeovers under EC Law', in Van Hooghten, ed., *infra* n. 48, p. 89 et seq. Under the UK Takeover Code, employee representatives have the right to give their opinion on the takeover bid. The target company must pay for the publication and for the costs reasonably incurred by the employee representatives in obtaining advice required for the verification of the information contained in that opinion. Cf. Rule 25.9 as revised in 2011 and Rule 2.12 as revised in 2011. For a revision of the Directive in light of employee interests, see B. Sjafjell, 'The Core of Corporate Governance: Implications of the Takeover Directive for Corporate Governance in Europe', 22 *EBLR* (2011) p. 641; *idem*, *Towards a Sustainable European Company Law – A Normative Analysis of the Objectives of EU Law, with the Takeover Directive as a Test Case* (Alphen aan den Rijn 2009); see also B.J. Clarke, 'Directors' Duties in a Changing World: Lessons from the Cadbury Plc Takeover', 7 *European Company Law* (2010) p. 204; *idem*, 'Reviewing Takeover Regulation in the Wake of the Cadbury Acquisition: Regulation in a Twirl', *Journal of Business Law* (2011) p. 298.

creditors,[31] particularly transparency rules and perhaps also rules about guarantees or even participation (third conflict).[32]

1.1.2.3 Special protection problems in takeover bids

During takeover bids, shareholders who are not controlling or block shareholders are particularly vulnerable in various ways. Apart from the collective action problem, it may be that they feel coerced into accepting the takeover bid on an individual basis, although it would be in the interests of all shareholders to turn down the offer (*pressure to tender*).[33] This is the case because, when there are no corresponding rules, bidders can make partial bids or two-tier bids (the first bid at a higher price than the second). There is also the danger that if the takeover bid is successful, the shareholders who do not accept it will be at a disadvantage in the market (due to *lack of liquidity* of the remaining free shares) or within the company, as the successful bidder might abuse its power of control (certain *private benefits of control*).[34] Assistance could be provided by prohibiting partial bids, providing for mandatory bids, prolonging the period for acceptance, and instituting transparency rules for conflicts of interest and protection of minorities.

1.1.2.4 External corporate governance by the market for corporate control

Of particular actual and regulatory interest, not only for the above-mentioned principal-agent conflicts but at a more general level for the economy, is the effect that takeovers, particularly hostile takeovers,[35] tend to have on control over management

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[31] B.B. Francis, I. Hasan, K. John and M. Waisman, 'The Effect of State Antitakeover Laws on the Firm's Bondholders', 96 *Journal of Financial Economics* (2010) p. 127.

[32] Generally on the effect of the issue of the direction of the company and behaviour of the management on shareholder value or on the interests of the company, see (too) briefly the External Study, *supra* n. 4, at p. 76; for more detail, see CEPS External Study, *supra* n. 4, at p. 342 et seq. Cf. R. Kraakman, et al., *supra* n. 27, at p. 29 et seq., for further evidence; P. Hall and D. Soskice, eds., *Varieties of Capitalism: The Institutional Foundation of Comparative Advantage* (Oxford and New York 2001).

[33] With respect to the coordination issues 'free riding' and 'pressure to tender', see CEPS External Study, *supra* n. 4, at p. 275 et seq. On free-riding, see S.J. Grossman and O.D. Hart, 'Takeover Bids, the Free-rider Problem, and the Theory of the Corporation', 11 *The Bell Journal of Economics* (1980) p. 42. Squeeze-out is a measure against free-riding, and sell-out a solution to pressure to tender. The mandatory bid also eases the pressure to tender.

[34] The private benefits of control discussed in economic theory may also include advantages for the controlling shareholder that are useful for other shareholders as well (value-creating versus value-expropriating). Cf. section 3.1.2.2 below, n. 119.

[35] Friendly and hostile takeovers are difficult to distinguish in practice. When a takeover can no longer be avoided, the target company's management is usually cooperative. Therefore, the difference does not apply to regulation and is not used internationally for this purpose.

(though not necessarily in a specific case).[36] The prospect of losing their job at the target company as a result of a hostile takeover bid is an incentive for management to ensure higher share prices by improved management of the company, thereby making a possible takeover (too) expensive. Internal corporate governance by the supervisory board, by the general meeting of shareholders, through duties and liability of the management and by other institutions and measures is not sufficient, especially not for companies with dispersed ownership where the shareholders are not in a position to exercise sufficient control over management. This has to be supplemented by external corporate governance by market mechanisms, particularly the market for corporate control.[37] In contrast, it is generally accepted that protection of the bidder's shareholders from takeover bids that could endanger the bidder company is sufficiently safeguarded under general company law.[38]

1.1.2.5 Summary

Even if the general importance of takeovers and the market for corporate control is recognised, it is nevertheless a difficult and uncertain task to make statements about the specific cause and effect of takeover rules. This particularly applies to the Takeover Bids Directive, as it was not transposed into Member States' law until 2006/2007, and it is not really possible to isolate the effects of the Directive from those arising from the crisis in the financial markets. Nevertheless, we can identify trends.[39]

1.1.3 *The source of regulation: the City Code on Takeovers and Mergers*

In Europe and for European takeover law, the regulation in this field is derived from that of the UK. The UK's non-statutory *City Code on Takeovers and Mergers* has been in place since 1967 and, even after the transposition of the Takeover Bids Directive into UK law, is still administered by the non-governmental *Panel on Takeovers and Mergers*. This regulatory model was copied by several European states even before the adoption of the Directive in 2004, partly in terms of content and procedures and partly in terms of regulation by means of a voluntary code, such

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[36] For more detail, see K.J. Hopt, *Europäisches Übernahmerecht* (Tübingen 2013), at p. 84 et seq.

[37] Ibid.

[38] For more detail, see P. Davies and K.J. Hopt, 'Control Transactions', in Kraakman, et al., *supra* n. 27, p. 225, at p. 232. Furthermore, the United Kingdom and the Netherlands (since 2004) have rules that shareholders of the bidder company must be consulted before a takeover bid once a certain threshold has been reached. This reform proposal of the EU was made by J. Winter at the Conference on International Takeover Regulations, Vienna, 9 September 2011.

[39] See, with caution, CEPS External Study, *supra* n. 4, Ch. 4, on the effect of various rules (such as MBR, BNR and BTR), Table on p. 322, on the effect on competitiveness, p. 323 et seq., and on employment markets, p. 342 et seq., for a summary see pp. 357-358.

as in Switzerland,[40] and, with a substantial phased delay,[41] in Germany.[42] The Directive itself, while not adopting the idea of a code,[43] has, in many respects, copied the British regulatory approach to takeovers. Today, British practices and regulation of takeovers have considerable influence in Germany and other countries. Typical British clauses – such as the bidder strategy of low balling[44] and various deal protection measures – have been adopted and have been the subject of jurisprudential discussion in Germany, and the latest 2011 reform of the Takeover Code, with its restriction on inducement fees and similar clauses, is being watched closely in Germany.[45]

1.2 The 2004 European Directive on takeover bids and its implementation

1.2.1 *The Thirteenth Directive and its revision*

The Directive on takeover bids of 21 April 2004, also called the Thirteenth Directive on Company Law,[46] its long-standing history since 1970, its content, settled only by painstaking compromise, and its implementation – in Germany, in the Securities Acquisition and Takeover Act of 20 December 2001[47] – have been covered in great detail in the body of academic literature[48] to which reference is made here.

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[40] Takeover Code of Swiss Stock Markets, 1 September 1989, and the Swiss Commission for Regulation.

[41] On the reasons behind the sluggish development of the takeover market and its regulation in Germany, see K.J. Hopt, 'European Takeover Regulation: Barriers to and Problems of Harmonizing Takeover Law in the European Community', in Hopt and Wymeersch, *supra* n. 17, p. 165: as to institutional and structural factors (capital markets, banking, disclosure and transparency), see p. 167 et seq., and regarding technical legal factors (corporation law, law of groups, labour representation on corporate boards, merger control), see p. 170 et seq.

[42] Securities Acquisition and Takeover Act (WpÜG), 14 July 1995, printed in *ZIP* (1995) p. 1464.

[43] Under pressure from the British, the possibility of voluntary self-regulation is retained in the Directive, see Preamble, Recital (7): 'Self-regulatory bodies should be able to exercise supervision.'

[44] See section 3.2.3 below.

[45] K.J. Hopt, 'Stand der Harmonisierung der europäischen Übernahmerechte – Bestandsaufnahme, praktische Erfahrungen und Ausblicke', in Mülbert, et al., *supra* n. 12, p. 42, at p. 60 et seq. for further details.

[46] See *supra* n. 1.

[47] H.-D. Assmann, T. Pötzsch, U.H. Schneider and U. Bosch, eds., *WpÜG*, 2d edn. (Cologne 2013).

[48] Ferrarini, Hopt, Winter and Wymeersch, eds., *supra* n. 16; see also the commentary by J. Wouters, P. Van Hooghten and M. Bruyneel, 'The European Takeover Directive: A Commentary', in P. Van Hooghten, ed., *The European Takeover Directive and Its Implementation* (Oxford 2009) p. 3 et seq., as well as 21 extensive country reports in this volume; for a more cursory approach, see S. Maul, D. Muffat-Jeandet and J. Simon, eds., *Takeover Bids in Europe – The*

Now, there is a *revision* of the Directive that, according to Articles 20 and 21, must be implemented no later than five years after the date of implementation, i.e., 20 May 2006. The revision provision is a soft sunset clause, by which the Commission ensured that the rules would be revised after it had failed to achieve its original aim of ensuring a level playing field for takeovers in Europe.[49] The reassessment of the experience gained in applying the Directive, including a 'survey of the control structures and barriers to takeover bids that are not covered by this Directive'[50] was made on the basis of a comparative law and empirical study[51] mandated by the Commission to Marccus Partners[52] – the legal arm of the Mazars Group, one of the largest British accounting firms – in conjunction with the Centre for European Policy Studies (CEPS) in Brussels. This External Study is 367 pages long, even without its Annexes, and was published together with a Commission Report[53] on 28 June 2012. The Report examines takeover laws in 22 of the 27 Member States of the EU[54] and a number of non-Member States, such as Switzerland, the USA and Australia.[55] France, Germany, Italy, Spain and the United Kingdom are highlighted as 'Main EU Jurisdictions'.[56]

1.2.2 *The implementation of the Thirteenth Directive after the Commission Staff Working Document*

This study was preceded by, to name but a couple of the most important documents, the Commission Staff Working Document on the Implementation of the Takeover Directive, dated 21 February 2007,[57] and a survey by Davies, Schuster and van de

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Takeover Directive and Its Implementation in the Member States (Freiburg 2008); J. Mukwiri, *Takeovers and the European Legal Framework* (London and New York 2009); T.G. Papadopoulos, *EU Law and the Harmonization of Takeovers in the Internal Market* (Alphen aan den Rijn 2010); M. Menjucq, 'The European Regime on Takeovers', 5 *European Company and Financial Law Review (ECFR)* (2006) p. 222; C. Mosca, 'The Takeover Bids Directive: An Opportunity for Europe or Simply a Compromise?', 28 *Yearbook of European Law* (2009) p. 308.

49 Hopt, *supra* n. 45, at p. 43, with evidence of sunset clauses.

50 Article 20(1), sentences 1 and 2 of the Directive.

51 External Study, *supra* n. 4.

52 Coordinators: C. Clerc and F. Demarigny, both from the Paris branch; cf. the abridged version of this study in book form by C. Clerc, F. Demarigny, D. Valiante and M. de Manuel Aramendía, *A Legal and Economic Assessment of European Takeover Regulation* (Brussels/Paris 2012).

53 See section 1.3.1 below.

54 Except for Bulgaria, Latvia, Lithuania, Malta and Slovenia.

55 Listed in the Application Report of the Commission, *supra* n. 3, 2, no. 6, fn. 4, and no. 13, fn. 15.

56 External Study, *supra* n. 4, at p. 53. Cf. also the surveys by Clifford Chance, *A Guide to Takeovers in the United States* (New York 2010), *A Guide to Takeovers in the UK* (London 2011) and *A Guide to Takeovers in Germany* (Frankfurt 2012).

57 Commission Staff Working Document, *Report on the Implementation of the Directive on Takeover Bids* (Brussels, 21 February 2007), SEC(2007) 268 (hereinafter 'Commission Staff

Walle de Ghelcke of 2010.[58] The results of the Commission Staff Working Document and the Davies survey have been discussed in more detail elsewhere.[59] The Commission correctly protests that 'the number of Member States implementing the Directive in a seemingly protectionist way is unexpectedly large'.[60] Davies reiterates that improvements to the prohibition of frustrating action (Article 9, in conjunction with Articles 11 and 12) were noted in only 2% of the combined European capital markets, no changes were noted in 61% of the markets, the provisions in this field had been watered down in 37% of the markets, and there had been a significant movement away from bidder-friendly regulation.[61] On the other hand, contrary to the Commission's pessimistic assessment, the Working Paper includes evident successes of the Directive, which are being underestimated by academic literature and public opinion but which the Commission has now acknowledged; these concern mandatory bids (Article 5), general principles, the rules governing information, procedures, supervisory bodies, and squeeze-outs and sell-outs.[62]

1.3 The Application Report of the European Commission of 28 June 2012

1.3.1 *The Application Report of 28 June 2012*

The Application Report of the Commission of 28 June 2012[63] lists the objectives of the Takeover Bids Directive: legal certainty; protection of the interests of shareholders, in particular minority shareholders, and of employees and other stakeholders through transparency; facilitation of takeover bids; and reinforcing the single market, by enabling free movement of capital throughout the EU.[64] The Commission states that the Takeover Bids Directive has not led to major changes in

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Working Document'). On this, see K.J. Hopt, 'Obstacles to Corporate Restructuring: Observations from a European and German Perspective', in M. Tison, H. de Wulf, C. van der Elst and R. Steennot, eds., *Perspectives in Company Law and Financial Regulation* (Cambridge 2009) (Essays in Honour of Eddy Wymeersch), p. 373, at p. 378 et seq.

58 P. Davies, E.-P. Schuster and E. van de Walle de Ghelcke, 'The Takeover Directive as a Protectionist Tool?', in U. Bernitz and W.-G. Ringe, eds., *Company Law and Economic Protectionism* (Oxford 2010) p. 105, also available at: <http:/ssrn.com/abstract=1554616>.

59 On the Commission Staff Working Document and the study by Davies, et al., see Hopt, *supra* n. 45, at pp. 43-47.

60 Commission Staff Working Document, *supra* n. 57, at p. 10. On this and other protectionist tendencies in Member States, see Hopt, *supra* n. 45, at pp. 46-47.

61 Illustrated by Davies, et al., *supra* n. 58, at p. 155.

62 Application Report of the Commission, *supra* n. 3, 2, nos. 9 and 10; External Study, *supra* n. 4, at p. 18; this assessment can also be found in Hopt, *supra* n. 45, at pp. 45-46; E. Wymeersch, 'The Takeover Directive, Light and Darkness', at p. 14, available at <http://ssrn.com/abstract=1086987>.

63 See *supra* n. 3.

64 Application Report, *supra* n. 3, 1, no. 3.

the legal framework of the Member States included in the External Study, because similar rules already existed or were in the making at national level prior to the adoption of the Directive.[65] The Commission found that 19 Member States had transposed the board neutrality rule, which it regards as a 'relative success',[66] but only 3 Member States[67] had implemented the breakthrough rule, and half of the Member States had made use of the option of the reciprocity clause.[68] Following the External Study and further research, the Commission recognises improvements and specifies in this respect supervision, general principles of the Directive, disclosure rules, the mandatory bid rule, and squeeze-out and sell-out rights. It also notes the statements by employee representatives that the Directive does not sufficiently protect employees against the risk of change in working conditions or redundancies after takeovers. The Directive has had little effect with respect to the use of defensive measures. Notwithstanding the existence of the Directive, a large number of defensive measures are used in Europe, mostly pre-bid defences. In the opinion of the interested parties, there are 'sufficient possibilities to break through defences even though most Member States have not transposed the breakthrough rule'.[69] Only 18.1% of listed companies in the Member States included in the study have pyramid structures, while 3.5% have cross-shareholdings,[70] which is not surprising in light of the shareholder structure for block holdings. Both are common, but they are weak defensive mechanisms. Other possible barriers to takeover bids, such as sector-specific regulations, co-determination procedures and employee share ownership, do not create 'strong or unjustified obstacles'[71] and are not addressed further.

1.3.2 *The Commission's five issues and the reaction of the European Parliament of 21 May 2013*

On the basis of these facts, the Commission raises a number of questions, concludes that the rules introduced by the Directive are, in general, 'working satisfactor[il]y' and suggests five measures to improve legal certainty for the parties concerned and the effective exercise of (minority) shareholder rights:[72] (1) clarification of the concept of acting in concert, perhaps by way of guidelines from the Commission and/or

65 Ibid., 2, no. 6. This finding applies to the most important though not all Member States, but fits in with the conclusions that no major changes have taken place.

66 Ibid., 3, no. 19, following on from the External Study, *supra* n. 4, at p. 35; this lists 15 Member States out of 22 examined.

67 Estonia, Latvia and Lithuania.

68 Application Report, *supra* n. 3, 2, no. 7.

69 Ibid., 2, no. 11.

70 Ibid., Annex, Fig. 4, with reference to the External Study, *supra* n. 4, at p. 48.

71 Application Report, *supra* n. 3, 2, no. 14.

72 Ibid., 4, nos. 21-28.

the European Securities and Markets Authority (ESMA); (2) further investigation of derogations from the mandatory bid rule and other measures where applicable, such as infringement procedures against Member States; (3) measures against low balling or creeping in, such as bilateral discussions with the affected Member States or Commission recommendations. However, the board neutrality rule and the breakthrough rule (Articles 9 and 11) can, for the moment, remain optional rules (4). The Commission will pursue its dialogue and will conduct further research regarding the protection of employee rights (5).[73]

In its Resolution of 21 May 2013, the European Parliament approved the Application Report but stressed the following issues: importance of a level playing field for takeover bids in Europe; supervision by the Member States' authorities, but with coordination efforts of ESMA; more detailed analysis of the concept of 'acting in concert'; more information on the national derogations from the mandatory bid rule; importance of board neutrality and the breakthrough rule; and, in particular, more attention to employee rights. The European Parliament is aware of the decline of takeover bids during the economic downturn and asks the Commission to closely monitor the developments in the market for corporate control and prepare a new assessment of the Directive when takeover activities return to a more regular volume.[74]

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[73] Under the Directive, the *protection of employees* (see *supra* n. 30) is ensured through information, e.g., Articles 6(2) and (3) and 8(2), and through the opinion of the management board and supervisory board of the target company. Cf. High-Level Group of Company Law Experts, *Report on Issues Related to Takeover Bids*, Brussels, 10 January 2002, Ch. 1, Section 5: Level Playing Field Between the EU and the USA (also in Ferrarini, Hopt, Winter and Wymeersch, *supra* n. 16, p. 825, at p. 867 et seq., Annex 2) available at: <http://ec.europa.eu/internal_market/company/docs/takeoverbids/2002-01-hlg-report_en.pdf>, Ch. 1, Section 2.1: 'Shareholders should be able to decide for themselves and stakeholders should be protected by specific rules (e.g. on labour law or environmental law).' Individual Member States go beyond this, for instance, by granting the Works Council a right of consultation as in France, Belgium and the Netherlands, or even a right to listen to the bidder, as in France and Belgium, see External Study, *supra* n. 4, at p. 102. Article 3(2)(c) moreover states that the management body of the target company 'must act in the interests of the company as a whole'; on this stakeholder-oriented approach, see K.J. Hopt, 'Comparative Corporate Governance: The State of the Art and International Regulation', LIX *American Journal of Comparative Law* (2011) p. 1, at p. 28 et seq. Besides this, normal rights of co-determination, cooperation, protection and information arising from general employment law also apply. Regarding the strengthening of employee rights in the United Kingdom after the takeover of Cadbury by Kraft, see External Study, *supra* n. 4, at p. 103 et seq., particularly with respect to a minimum 12-month commitment of the bidder to its statements; see also UK Takeover Code Rule 19.1, Note 3, and Takeover Panel Code Committee, Review of the 2011 Amendments to the Takeover Code, 2012/8, 26.11.2012, para. 7. Employee protection during takeovers is also provided outside the European Union, but usually via information requirements in the offer document, see External Study, *supra* n. 4, at p. 114 et seq., including a table. On the protection of employees through the right of consultation during takeovers, see *supra* section 1.1.2.2, n. 30.

[74] European Parliament, Resolution of 21 May 2013, *supra* n. 3.

2. Basic issues concerning regulation of company takeovers

2.1 European or national takeover law?

In 1863, Bismarck told the Upper House of the Prussian Parliament that politics is the art of the possible. Science is not politics, and it looks for correct answers. Regardless of the dispute between the European Union and the Member States, this throws up two issues for European takeover law: firstly, is takeover law best dealt with at European or Member State level, or should it be divided between the two? Secondly, independent of the regulatory level, who should make the decisions about takeovers: the (European or national) legislature or the affected parties (the shareholders themselves, or management on their behalf)? The latter is an issue relating to the mandatory or non-binding nature of takeover law.

2.1.1 *Takeover law between European and national regulation*

With respect to the first question, i.e., the level at which takeover law should be regulated, the prevailing opinion under current company law is that, in principle, with regard to the European Union decentralised rules are usually better than centralised ones, suggesting that company law as a whole should not be harmonised at European level.[75] The reason is that decentralised rules can compete with each other (competition between legislatures or regulators) and that competition leads to experimentation and discoveries (competition as a discovery process). If during this competitive process one solution turns out better, this leads to the desired imitation effect, and, vice versa, legislatures and regulators that stick to old rules tend to feel pressure to change or at least justify their position.[76] In contrast, centralised rules also have advantages: e.g., information about the content and application of uniform rules is more accessible to parties, thus lowering transaction costs. Also, there is consensus in the capital markets, at least after the financial crisis, that centralised rules are better, at least in principle. This has led to a wide degree of harmonisation of European capital markets law, which is now being taken even further with the revision of the pertinent Directives (e.g., the Markets in Financial Instruments Directive, the Market Abuse Directive and the Transparency Directive) to the extent that they are to be replaced by Regulations. Takeover law falls in between company law and corporation law, as demonstrated by the original term that is no longer technically correct: the Thirteenth Company Law Directive. This corresponds to a

[75] European Company Law Experts (ECLE), 'Response to the European Commission's Consultation on the Future of European Company Law' (May 2012), para. 5(d), available at: <http://www.ecle.eu> and at <http://ssrn.com/abstract=1912548>.

[76] Cf. the controversy in the 1990s over whether this competition is a race to the bottom (example: the management-friendly corporation law of Delaware) or to the top, leading to the best result from an economic perspective and from the viewpoint of shareholders.

fine-tuned division of competences and tasks between the European Union and Member States: neither exclusive European regulation of takeover law, perhaps by way of a Regulation as is sometimes demanded,[77] nor an effective retransfer of powers back to Member States, which has also been discussed.[78]

2.1.2 *Practitioner expectations*

This seems to meet the expectation of practitioners, as shown by the Survey Report on the Reform of the EU Takeover Directive and of German Takeover Law of November 2011.[79] According to this Survey Report, a significant majority of around 55% are in favour of amending the Directive in order to achieve further harmonisation of European takeover law (substantive law as opposed to procedural law). It is interesting to break down this survey by data origin. More than 80% of institutional investors and 75% of investment bankers and financial advisers are in favour of further harmonisation. Half of company representatives are in favour, but 64% of legal advisers do not consider reform necessary. These differences in preference for greater or less centralisation stem from the different interests of the various professional groups: high levels of interest in investment and financial circles, moderate levels of interest in the commercial field (probably showing further differences between large companies and small and medium-sized companies, as well as among cross-border and companies that primarily operate in a purely national context), and low levels of interest among legal advisers, who are happy with the status quo and their domestic laws. The additional question of whether further steps are necessary to achieve a level playing field in the EU is revealing. A majority (61%) responds that this is necessary as well, with 83.3% of institutional investors and 71.4% of investment banks but only a minority of legal advisers and union representatives agreeing. The latter is, in any case, predictable due to the above-mentioned employees' distrust of takeover bids. As to the question of whether harmonisation requires amendment to the Directive or a Recommendation of the Commission or even a code, a clear majority of 81.6% is in favour of amending the Directive. The same question was not posed with respect to the alternative of a

[77] See section 2.2.2.1 below.

[78] Evidence in Hopt, *supra* n. 45, at p. 49; recently, J. Lau Hansen, 'The Directive on Takeover Bids: Unwanted Harmonisation of Corporate Law', in H.S. Birkmose, M. Neville and K. Engsig Sorensen, eds., *The European Financial Market in Transition* (Alphen aan den Rijn 2012) p. 29 et seq. The arguments brought forward for a retransfer of powers to the Member States are very heterogeneous: partly they favour legislative competition, or promote decentralisation and subsidiarity, or underline the advantages of option rules (see section 3.2.2 below), or they are specific arguments against individual harmonisation candidates.

[79] Freshfields Bruckhaus Deringer, *Reform of the EU Takeover Directive and of German Takeover Law. Survey Report*, November 2011 (hereinafter 'Survey Report'): survey of 375 selected experts; on this, see C. Seibt, 'Reform der EU-Übernahmerrichtlinie und des deutschen Übernahmerechts', *ZIP* (2012) p. 1 (hereinafter 'Expert Poll').

Regulation on takeover bids, as is proposed in regard to European capital markets law, nor with respect to full European harmonisation. The logic of a level playing field, particularly equal competitive conditions, would favour a Regulation, as in European antitrust law.[80]

2.1.3 *Takeover issues appropriate for regulation at European level*

Mention should also be made of the list of issues regarding takeover law recommended for European harmonisation (in the order as listed):[81] (1) further mandatory bid for purchases of between 30% and 50% (low balling, creeping in); (2) increased transparency of stakebuilding (particularly inclusion of cash-settled swaps/contracts for difference and similar financial instruments) and harmonisation of deterring sanctions in case of rule violation (particularly loss of voting rights and high fines); (3) expanding the mandatory bid rules (definition of controlling stake, calculation of minimum bid price, definition of exemptions to be allowed); (4) harmonisation of the prohibition of frustrating action;[82] (5) definition of acting in concert (also possibly by ESMA rulemaking); (6) ease of share-for-share transactions; (7) introduction of a put-up or shut-up rule in accordance with the reform of the UK City Code on Takeovers and Mergers of 19 September 2011; (8) recognition of deal protection agreements; and (9) harmonisation of takeover bid-related squeeze-out. Further reforms desired by practitioners concern the scope of the Directive (place of registration of company statutes/registered administrative office), supervisory jurisdiction and applicable law (Article 4), transmission of information to the bidder and competitive bidders during due diligence and general unsettled questions regarding the relationship between the Takeover Bids Directive and the Market Abuse Directive.[83] There are also further suggestions, for example, disclosure of inducement

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[80] No comment is made here on the appropriateness of statutory measures to create a level playing field. The term itself and its meaning are the subject of much economic debate due to the fact that it tends to cancel out competition between legislators and regulators, see section 2.1.1 above.

[81] The order of preference or specification is different in the English version (Survey Report, *supra* n. 79, at p. 15, as in this text) and the German version (Expert Poll, *supra* n. 79).

[82] 'Board neutrality rule and prohibition of frustrating actions (in particular (a) prohibition of company law instruments allowing takeover bids to be frustrated, such as multiple voting rights, golden share schemes, and (b) national interest test regulation)', Survey Report, *supra* n. 79, at p. 15, no. 4.

[83] J. Meyers, 'Agenda Items for the Revision of the European Takeover Bid Directive', in C. Van der Elst, H. De Wulf, R. Steennot and M. Tison, eds., *Van alle markten: Liber Amicorum Eddy Wymeersch* (Antwerp and Oxford 2008) p. 693; on insider law, ibid., at p. 703 et seq.; M. Nelemans and M. Schouten, 'Takeover Bids and Insider Trading' (August 2012), available at <http://ssrn.com/abstract=2147360>, also in S.M. Bainbridge, ed., *Research Handbook on Insider Trading* (Cheltenham, UK 2013) p. 449; K. Lorez, *Insider Dealing in Takeovers. Developments in Swiss and EU Regulation and Legislation* (Zürich 2013); K.J. Hopt, 'Übernahmen, Geheimhaltung und Interessenkonflikte: Probleme für Vorstände, Aufsichtsräte und Banken', *ZGR* (2002) p.

fees, exclusion of directors with conflicts of interest from the opinion of the target company board pursuant to Article 9, requiring the board to seek independent advice in such a situation. With respect to derivatives, greater transparency could be created pursuant to Article 10, and as to the mandatory bid pursuant to Article 5, it is suggested not to require a purchase of shares, but to let suffice 'an interest in shares' as per Rule 9 of the City Code.[84] Moreover, a lack of clarity about cross-border takeovers arises from the relationship between the Takeover Bids Directive and the Prospectus Directive.[85] In line with the Takeover Bids Directive, consideration should also be given to whether, and if so, to what extent, the law governing corporate groups should be harmonised, an issue which the European Commission has mentioned as a candidate for reform in its Action Plan of 2012.[86]

2.2 Mandatory or non-binding takeover law?

2.2.1 *Support for the principle of mandatory takeover law*

Significant differences of opinion also exist as to the second fundamental issue posed above: binding law or autonomy of company statutes, possibly supported by non-binding provisions? The prevailing opinion in academic circles is that, in principle, there should be mandatory takeover law either at European or national level, the reasons being investor protection and, where relevant for takeover-bid purposes, protection of employees and creditors. Added to these protection reasons can be the effects of takeovers on the (national or European) takeover markets, and in particular the loss of trust of minority shareholders and investors affected by unregulated takeovers including frustrated takeovers; these externalities favour legislative intervention. As regards takeover procedures and supervision, mandatory law is, in any case, preferable due to the aspects of necessary legal certainty and implementation, quite apart from the possibility of regulatory arbitrage that may result from international private and procedural law in takeover bids. The majority of practitioners

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333, at p. 336 et seq.; see also OECD, *Conflicts of Interest and the Market for Corporate Control*, 16-17 April 2008. This issue is supposed to be addressed during the reform of the Market Abuse Regulation (MAR); on this, see Council of the European Union, 31 October 2012, 15707/12, Presidency Compromise, Recitals (12a), (13) and (14a), Article 5(28): definition of stakebuilding, Article 6(2): protracted process, Article 7a(3a): inside information obtained through due diligence of a company in view of a possible merger or public takeover, and Art. 12(3): delay in publication in case of a protracted process. The version is still the subject of intense debate.

[84] B. Clarke, 'Reinforcing the Market for Corporate Control', 22 *EBLR* (2011) p. 517.

[85] J. Von Lackum, O. Meyer and J.-A. Witt, 'The Offering of Shares in a Cross-Border Takeover', 5 *ECFR* (2008) p. 101.

[86] European Commission, Action Plan, *supra* n. 5, 4.6. On this, see K.J. Hopt, 'Konzernrecht: Die europäische Perspektive', 171 *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht (ZHR)* (2007) p. 199; European Commission, *Report of the Reflection Group on the Future of EU Company Law*, Brussels, 5 April 2011, ch. 4, p. 59 et seq.

agree, according to the assessment of the Survey Report discussed above.[87] The importance of takeover law for the protection of investors and minority shareholders is given highest priority by these practitioners, followed by the aims of (external) corporate governance and control of management.

2.2.2 *Economic objections*

Objections have been raised by economists and law and economics scholars who proffer market arguments in favour of the Directive retaining options and reciprocity solutions and who would even like to see these provisions expanded. This alternative solution actively promotes competition between legislative and regulatory bodies and respects the diverging conditions in the different countries (path dependency).[88] So long as the proponents of this view oppose reform of the Takeover Bids Directive, they also take into account that the option rights of Article 12 lie with Member States and not with the affected parties. The pithy buzz phrase is 'neutral takeover law'[89] that neither promotes nor hinders takeovers but leaves everything to the markets. This argument is supported by the advice that, empirically speaking, it is hard to tell whether or not a specific takeover will benefit the common good. Companies themselves are in the best position to judge this.

This approach is best explained in the 2012 paper by Enriques, Gilson and Pacces.[90] It puts forward three arguments: (1) takeover law should be uniform and should eventually be European Union law; (2) in order to minimise political resistance from Member States and companies, the provisions of such European takeover law should only apply to new companies (regulatory dualism); (3) it should have practically no mandatory provisions, but should leave it to the individual companies to decide their own rules for takeovers, either in their company statutes or through resolutions of the general meeting of shareholders. This autonomy of company statutes or the general meeting of shareholders should apply in particular to mandatory bids and the prohibition of frustrating action. All three arguments are challenged.

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[87] Expert Poll, *supra* n. 79, at p. 4.

[88] J.A. McCahery and E.P.M. Vermeulen, 'Does the Takeover Bids Directive Need Revision?', in *Festschrift für Klaus J. Hopt*, Vol. 2 (Berlin and New York 2010) p. 2189, at p. 2201; E.P.M. Vermeulen and J.A. McCahery, 'The Case Against Reform of the Takeover Bids Directive', 22 *EBLR* (2011) p. 541, at pp. 543 et seq., 550 and 557.

[89] L. Enriques, 'European Takeover Law: Designing a Neutral Approach', in *Festschrift für Klaus J. Hopt*, *supra* n. 88, p. 1789.

[90] L. Enriques, R.J. Gilson and A.M. Pacces, 'The Case for a Neutral Takeover Law in the European Union', preliminary version (April 2012), which is an elaboration of the thesis of Enriques, *supra* n. 89, and was presented in Tilburg on 4 December 2011 and at the Oxford Takeover Conference on 20 April 2012; the presenter was L. Enriques and the respondent K.J. Hopt.

2.2.2.1 The full harmonisation theory

The demand for an eventual European takeover law, namely full harmonisation by way of Regulation or Directive, is problematic, as outlined above, for theoretical and practical reasons. A multi-level solution, as has been the case until now, seems preferable. For reasons of subsidiarity, the burden of proof always lies with those promoting full harmonisation. However, it should be noted that for the authors of the above-mentioned paper, full harmonisation is only a means to an end in order to force Member States to recognise autonomy of company statutes or the general meeting of shareholders.

2.2.2.2 The regulatory dualism theory

The regulatory dualism theory[91] is not new but it involves transitional law, though with the special feature that existing cases permanently retain their privileged status (grandfathering clauses). This is obviously to appease opposition from those who have vested rights – here, existing companies but also Member States. However, the authors' expectation that the new system will slowly replace the current system is doubtful. This premise leaves open under what conditions this will actually be the case and, if so, how long it will take. One cannot help but think back to Keynes' view on the argument that antitrust law is unnecessary because, in the end, cartels always fall apart of their own volition: 'In the long run, we are all dead.' Above all, such an improvement presupposes in this case that the shares of the old and the new companies in the market will correctly value the different rules, which can only be presumed for perfect markets. It is also hard to accept that companies that profit from the old rule will not recognise the cunning of the new one. In fact, the opposite is true: they will lobby to obtain management and defensive-friendly rules in the markets from legislators and regulators.

2.2.2.3 The theory of complete autonomy for company statutes and general meetings of shareholders

The third theory, favouring complete autonomy for company statutes and general meetings of shareholders, is also questionable because it makes shareholder and minority shareholder protection fully subject to the majority's power. Subsequent resolutions of the general meeting of shareholders would certainly be illegal since the existing rights of individual shareholders and the minority may not be encroached upon without their approval. But clauses in the original company statutes,

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[91] R.J. Gilson, H. Hansmann and M. Pargendler, 'Regulatory Dualism as a Development Strategy: Corporate Reform in Brazil, the United States, and the European Union', 63 *Stanford Law Review* (2011) p. 475, with reference to the general theory of Mancur Olson.

whereby a mandatory bid or other protective measures are to be excluded, are dubious as well.[92] Real or perceived market efficiency is not readily preferred over protection of shareholders and minority holdings.[93]

2.3 Key areas of European takeover law and overview of further analysis

A look at British takeover law and its reception[94] in many countries in Continental Europe and the rules and regulatory history of the Takeover Bids Directive reveal *three core problems* of regulating public takeover bids, which are examined below from the point of view of European takeover law: the mandatory bid in conjunction with the squeeze-out and sell-out; the prohibition of frustrating action in conjunction with permissible defensive measures; and the breakthrough rule.[95]

This is not to say that transparency rules, procedural provisions and – independently of mandatory bids – squeeze-outs and sell-outs are not important. Many general studies have already been carried out[96] on *transparency and disclosure*, in conjunction with corporate governance and corporate governance codes, especially for capital markets and takeover law, in particular in the context of the discussion about the revision of the Transparency Directive. The corresponding takeover rules have often been examined functionally in connection with the numerous capital markets disclosure requirements prescribed under European law. *Acting in concert* is addressed (in Germany the term is defined in the same way under both takeover and capital markets law) because it is a key problem for the mandatory bid and the subject of one of the three reforms considered by the Commission.

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92 See also CEPS External Study, *supra* n. 4, at p. 287. For a different and more special approach – whereby Article 9 is only optional – which is in favour of the possibility to opt out from a general prohibition of frustrating action, see Davies, Schuster and Van de Walle de Ghelcke, *supra* n. 58, at p. 158 et seq.

93 This addresses a highly complex and controversial problem that touches on basic issues of law and economics and cannot be discussed in any detail here, namely whether or not the legislature is entitled to purport to know better and to determine what is best for shareholders (presumption of knowledge) or to guide the decision of the shareholders into a particular direction in their own interest. See the discussion on liberal paternalism in R. Thaler and C. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (New York, et al. 2009).

94 K.J. Hopt, 'Company Law Modernization: Transatlantic Perspectives', 51 *Rivista delle Società* (2006) p. 906.

95 Similarly, CEPS External Study, *supra* n. 4, at p. 289. On the anti-frustration rule, see Hopt, *supra* n. 36, at pp. 69-105; on supervision, *idem*, at pp. 106-117, and Hopt, *supra* n. 15.

96 Generally, for example, S. Grundmann, W. Kerber and S. Weatherill, eds., *Party Autonomy and the Role of Information in the Internal Market* (Berlin 2001). Especially in the context of takeovers, see K. Engsig Sorensen, 'Disclosing Barriers to Takeovers', in Birkmose, Neville and Engsig Sorensen, *supra* n. 78, at p. 69 et seq.; also, External Study, *supra* n. 4, at pp. 45 et seq., and 245 et seq., and CEPS External Study, *supra* n. 4, at p. 295 et seq. Also, M. Schouten, 'The Case for Mandatory Ownership Disclosure', 15 *Stanford Journal of Law, Business & Finance* (2009) p. 127.

3. The Mandatory Bid

3.1 No need for a fundamental revision of Article 5 of the Directive

3.1.1 *Two unrealistic reform proposals: repealing Article 5 or retaining it with complete autonomy of company statutes*

Article 5 of the Directive prescribes a *mandatory bid rule* (MBR) for Member States. *Two basic reform proposals* have been made regarding this provision*:* either Article 5 should be repealed in its entirety or at least severely curtailed;[97] or the rule should be retained but only as a non-binding norm with full discretion being left to the general meeting of shareholders of the (target) company or in the company statutes.[98] Both proposals are unrealistic. On the one hand, Article 5 follows the example of the British Takeover Rules, the source inspiration for the Takeover Bids Directive. The mandatory bid has been anchored in the British Rules since 1972, has been tested in many hundreds of cases,[99] and is fully accepted in the City: it 'has worked extremely well and fairly' with 'complete acceptance of it throughout the UK commercial and financial community'.[100] On the other hand, many jurisdictions in continental Europe already followed the British model and had introduced mandatory bids long before the Takeover Bids Directive of 2004, including France, Belgium, Italy, Switzerland, Austria, as well as – since 1995 – Germany, initially in a voluntary takeover code.[101] This rule is now fully established in all 27 Member States as a consequence of the Takeover Bids Directive. However, according to the External Study, mandatory bids are relatively rare (5%[102]) in relation to all takeover bids but this does not apply to Germany: the share of mandatory bids as a percent-

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[97] E. Wymeersch, 'A New look at the Debate About the Takeover Directive', in *Festschrift für Hommelhoff* (Cologne 2012) p. 1375, at p. 1378 et seq., and *Revue Trimestrielle de Droit Financier* (2012) p. 78.

[98] According to proponents of a neutral takeover law, see section 2.2.2 above.

[99] Already in 1990 there was talk of in excess of 500 mandatory bids; see P. Lee (of the Takeover Panel), 'Takeover Regulation in the United Kingdom', *Europäisches Wirtschafts- und Steuerrecht (EWS)* (1990) p. 241, at p. 243.

[100] Already in 1970, ibid. This evidently still applies today; see comments by Veil, *supra* n. 8: good to excellent. In greater detail, N. Jennings, 'Mandatory Bids Revisited', 5 *Journal of Corporate Law Studies* (2005) p. 37.

[101] C. Bolle, *A Comparative Overview of the Mandatory Bid Rule in Belgium, France, Germany and the United Kingdom* (Baden-Baden 2008).

[102] CEPS External Study, *supra* n. 4, at p. 289. For the United Kingdom, C. Crawshay, 'Mandatory Bids in the U.K.', in R. Veil, ed., *Übernahmerecht in Praxis und Wissenschaft* (Cologne 2009) p. 83, at p. 89: there are around 10 mandatory bids per year and between 100 and 300 friendly takeover bids. According to H. Merkt, 'Das übernahmerechtliche Pflichtangebot in der Reformdiskussion', in *Festschrift für Eberhard Schwark* (Munich 2009) p. 529, at p. 533, the share in the United Kingdom is around 7% and that in Austria 17%.

age of all bids in Germany is 42%.[103] Back in 2007, the Commission already established that the conditions for a mandatory bid – namely the control threshold not governed by Article 9 – varied between Member States and that there were also differences in the application of the mandatory bid rule, particularly in the statutory derogations from mandatory bids and the discretion of the respective supervisory authorities to grant *ad hoc* exemptions.[104] But this does not, in itself, call into question the continued existence of Article 5 and, in practice, this provision is seen as an improvement;[105] the External Study carried out for the European Commission revealed that 90% of those questioned viewed the mandatory bid rule of Article 5 as helpful.[106]

3.1.2 *Economic criticism of the mandatory bid*

However, this does not mean that the mandatory bid – regardless of the regulatory level – is undisputed at the legal and political level; the opposite is true.[107] There was already hefty *criticism of the mandatory bid* before the Directive was adopted, particularly from economists[108] and the USA.[109] In the USA, the usual method of

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103 Merkt, ibid., at p. 533, who correctly links the differences to the differing shareholder structures. The more widespread the companies with controlling shareholders, the lower the number of mandatory bids. Regarding the fact that the number of exemptions from mandatory bids is very high, see section 3.2.6 below.

104 Commission Staff Working Document, *supra* n. 57, 2.2.1, at p. 9 et seq., with Annex 2 (Conditions triggering the obligation to make a mandatory bid) and Annex 3 (Derogations provided at the level of law, derogatory powers of the supervisory body/authority).

105 Wouters, Van Hooghten and Bruyneel, *supra* n. 48, at p. 75: the mandatory bid is 'one of the Directive's main achievements' and 'increases legal certainty for practitioners'.

106 External Study, *supra* n. 4, at p. 117.

107 Comprehensive overview of German discussion in Merkt, *supra* n. 102, at p. 532.

108 J.A. McCahery and L. Renneboog, *The Economics of the Proposed European Takeover Directive* (CEPS 2003), at p. 52 et seq.; M.C. Burkart and F. Panunzi, 'Mandatory Bids, Squeeze-out, Sell-out and the Dynamics of the Tender Offer Process', in Ferrarini, Hopt, Winter and Wymeersch, eds., *supra* n. 16, p. 737; L. Enriques, 'The Mandatory Bid Rule in the Proposed EC Takeover Directive', in Ferrarini, Hopt, Winter and Wymeersch, eds., *supra* n. 16, p. 767 et seq., at p. 794: currently the 'lesser evil'. See also E. Wymeersch, 'The Mandatory Bid: A Critical View', in Hopt and Wymeersch, *supra* n. 17, p. 351; as regards Sweden, see R. Skog, *Does Sweden Need a Mandatory Bid Rule? A Critical Analysis* (Stockholm 1995), at p. 27 et seq.; concerning Denmark, see J. Lau Hansen, 'When Less Would Be More: The EU Takeover Directive in Its Latest Apparition', 9 *The Columbia Journal of European Law* (2003) p. 275, at p. 289 et seq.

109 R. Romano, 'The Political Economy of Takeover Statutes', 73 *Virginia Law Review* (1987) p. 111; S.M. Sepe, 'Private Sale of Corporate Control: Why the European Mandatory Bid Rule Is Inefficient', Arizona Legal Studies Discussion Paper 10-29 (2010). For a differing view, see L.A. Bebchuk, 'Efficient and Inefficient Sales of Corporate Control', 109 *Quarterly Journal of Economics* (1994) p. 957, in comparing the US 'market rule' and the 'equal opportunity rule' in other countries. Another positive view can be found in M. Ventoruzzo, 'Europe's Thirteenth Directive and U.S. Takeover Regulation: Regulatory Means and Political and Economic Ends', 41 *Texas International Law Journal* (2006) p. 171, at p. 214; on the legal position in the USA, see J. Berick and T. Shropshire, 'The EU

seizing control is the merger, appraisal rights are rare and a control share cash-out corresponding to the mandatory bid is found in only a few individual states, such as Maine, Pennsylvania and South Dakota,[110] even though there the best-price rule also has, to a certain extent, a similar effect.[111] This criticism of the mandatory bid has later been extended, repeated and given new emphasis on the basis of the pending revision.[112]

There are four main economic objections to the mandatory bid. (1) Mandatory bids constitute artificial interference in the market for corporate control. This market functions effectively also without mandatory bids. Bidders can raise the bid price over the share price such that it corresponds exactly to the control premium of the controlling shareholder of the target company, and this price need not be shared with the minority shareholders. (2) Mandatory bids make takeovers more difficult because they make takeovers more expensive and therefore discourage potential bidders and competitive bidders. This applies in particular to countries with structures for controlling shareholders but – due to the prohibition of two-tier bids at different prices – also to countries with free-float structures. The consequence is that desirable takeovers do not take place and that control blocks are perpetuated. This is at the expense of the shareholders and weakens the market for corporate control. (3) The protective function of mandatory bids is not achieved. Mandatory bids can be circumvented by means of off-market block transactions and structural measures such as mergers, as well as by way of voluntary lower bids at a strategically chosen favourable time (low balling, creeping in). (4) Mandatory bids are only intended for listed companies, which is a possible reason for company founders and controlling shareholders to avoid stock market listing. This harms the investing public and the market for corporate control.

However, all four objections can be countered by the following convincing legal and economic arguments.[113]

Takeover Directive in Context: A Comparison to the US Takeover Rules', in Van Hooghten, ed., *supra* n. 48, p. 103 et seq.; see also External Study, *supra* n. 4, at pp. 122 and 174.

[110] According to these statutes, where someone acquires control of a company or a block of 20% (Pennsylvania), 25% (Maine) or 50% (South Dakota), minority shareholders have a cash-out right at a 'fair price', see External Study, *supra* n. 4, at pp. 122 and 174.

[111] Rule 14-d10 Sec. Exch. Act of 1934 as revised in 2006. This rule does not apply during a merger.

[112] L. Enriques, 'The Mandatory Bid Rule in the Takeover Directive: Harmonization Without Foundation', 1 *European Company and Financial Markets Law Review* (2004) p. 440; A.M. Pacces, *Featuring Control Power* (Rotterdam 2007), at pp. 664 et seq., 670 et seq. and 768 et seq.; idem, *Rethinking Corporate Governance: The Law and Economics of Control Powers* (London and New York 2012), at p. 338 et seq.; McCahery and Vermeulen, *supra* n. 88, at p. 2195 et seq.; Wymeersch, *supra* n. 97; Lau Hansen, *supra* n. 78.

[113] C. Bolle, *supra* n. 101, at pp. 31 et seq. and 279 et seq.; P.L. Davies, 'The Notion of Equality in European Takeover Regulation', in J. Payne, ed., *Takeovers in English and German Law* (Oxford 2002) p. 9; Davies and Hopt, *supra* n. 38, at p. 252 et seq. A recent, clear and eco-

3.1.2.1 The role of rules of the game

Corrective interference in markets by the legislature does not necessarily distort markets but can make sense and may sometimes even be necessary as rules of the game. The shift in control from an old to a new majority shareholder is not always desirable. The mandatory bid ensures that the new party will only make an offer if the takeover still makes sense for the bidder despite the mandatory bid. This sets the bar higher than if there were no mandatory bid, but tends to prevent inefficient takeovers.[114]

3.1.2.2 Near-market conditions for early exits at a fair price

It is correct that mandatory bids make *takeovers more expensive* and *may prevent some efficient takeovers*.[115] However, this effect varies depending on shareholder structure, it being weaker if there is full free float than if shareholder blocks have to be bought out. This means that the investing public misses out on certain opportunities as a result of the mandatory bid. On the other hand, it is also correct that a mandatory bid enables minority shareholders to make an *early exit* at the time control is transferred, either at the same price as the old controlling shareholder, or, at least, at a fair price to be determined. The claim that a mere change of control alters nothing for minority shareholders is not correct. It is quite possible that the new shareholder will run the company less well than its predecessor, will fail to meet the interests of the target company and its shareholders during the integration of the target company into the new group, or may even take drastic actions such as *looting* or even dismantling the company. In view of these risks, the mandatory bid gives each individual minority shareholder[116] the option to decide by itself or with the assistance of an adviser whether it wishes to remain in the company as a share-

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nomically argued statement in favour of the mandatory bid, which expressly does not put forward equality and fairness arguments but promotes growth in synergies, may be found in E.-P. Schuster, 'The Mandatory Bid Rule: Efficient, After All?', 76 *Modern Law Review* (2013) p. 529. Similarly, H. de La Bruslerie, 'Equal Opportunity Rule vs. Market Rule in Transfer of Control: How Can Private Benefits Help to Provide an Answer?', 23 *Journal of Corporate Finance* (2013) p. 88, cf. also at p. 106: 'The exit option given to outside shareholders is a tool to curb possible future private expropriation.'

[114] Davies, et al., *supra* n. 58, at p. 106, note 4; Davies and Hopt, *supra* n. 38, at p. 254; see also Bebchuk, *supra* n. 109, at p. 968 et seq.; M. Kahan, 'Sales of Corporate Control', 9 *Journal of Law, Economics and Organization* (1993) p. 368.

[115] Survey results of the External Study, *supra* n. 4, at p. 184. For this reason, even before the Directive raised the issue of the mandatory bid, in Sweden and in Finland there were already calls from block shareholders and management for such a construct. See External Study, ibid., at p. 123 et seq.

[116] On the issue of non-binding takeover law, which would also encompass the mandatory bid rule, see section 2.2.2.3 above.

holder under new management or to exit the company and invest elsewhere. This protection *applies ex ante*.[117] It protects shareholders in particular since, internationally, the legislative thresholds for danger of self-interested behaviour are set at varying levels[118] and since corresponding minority rights can only be exercised in the group at a later time during the course of long-term proceedings and with an uncertain outcome. This is not recognised by those who wish to leave the takeover market to the free forces of supply and demand and who disregard the contestability of control power by potential hostile takeovers, as the protection of minority shareholders allegedly can or could be ensured in a different way.[119] Therefore, the mandatory bid was described, already many years ago, not as an alternative to group law but functionally as a means to exercise control over group integration.[120] Countries that do not have mandatory bids or any other sort of protection at the early stage of group integration rely on *ex post* minority protection under group law, or on other rules, as in the USA,[121] whose content is mostly less favourable and whose implementation is, in any case, more elaborate and uncertain for minority shareholders.

The mandatory bid is also a *particularly market-oriented solution.* Risks and opportunities of the target company under the new control are estimated by the affected parties themselves – not by management, not by the general meeting of shareholders, but by each individual shareholder in the market. The mandatory bid has the effect that the most varying interests of shareholders and ex ante estimations

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[117] Not recognised by the CEPS External Study, *supra* n. 4, at p. 291, which mentions ex post protection.

[118] These are not identical to the private benefits of control discussed in economic theory, which also include the advantages of the controlling shareholder that benefit other shareholders as well (value-creating versus value-expropriating). There is a great deal of law and finance literature discussing these issues; see A. Dyck and L. Zingales, 'Private Benefits of Control: An International Comparison', 59 *The Journal of Finance* (2004) p. 537: in the country list included there (cf. control premiums, Calculation Table II at p. 551; institutional variables, Table VIII at p. 580) the rankings range from 1% (USA, United Kingdom), 2% (France), up to 37% (Italy), 38% (Austria) and 65% (Brazil); all figures are also mentioned briefly in the External Study, *supra* n. 4, at p. 124. A recent contribution worthy of merit is Pacces, *supra* n. 112, at p. 273. See also CEPS External Study, *supra* n. 4, at p. 273.

[119] This is the central argument put forward by Pacces, ibid., *passim*, summarised at p. 768: 'When control is entrenched and non-controlling shareholders are protected from expropriation, unequal treatment of shareholders is preferable to the mandatory bid.' Yet both these preconditions are not self-evident. At least with respect to European takeover law account must be taken of the fact that there are 28 Member States with great differences in supervisory authorities and courts; see *infra* n. 128.

[120] Davies and Hopt, *supra* n. 38, at p. 253, pose further arguments, including that the mandatory bid is an answer to the coordination problem of minority shareholders as against the bidder, because there is no ex ante certainty as to whether or not the offer is generally beneficial.

[121] In the USA, those who acquire a controlling block shareholding require the authorisation of the company's board for certain transactions for a period of three to five years. Cf. also External Study, *supra* n. 4, at p. 110.

of the consequence of a takeover are aggregated into a market-oriented assessment of the takeover bid. There is one more issue: the investing public, which can be sure of having such an early and individual exit opportunity during public bids, will be more likely to make an investment in such a company. Therefore, the mandatory bid strengthens the investing public's trust in the capital markets.[122] Even if the substantive effects of this growth in trust cannot be measured exactly, they must be taken into account in an economic analysis to counter the burdening of the takeover bid process by the mandatory bid rule.

3.1.2.3 Circumvention argument

As always, the circumvention argument is weak. Circumventions are a question of content and reach of the rules and their implementation. If mandatory bids are to be avoided through block transactions, the legislature must seek a corresponding regime which need not necessarily be the same as that for public takeovers. The French legislature has done just that.[123] If there is to be no differential treatment of public takeover bids and structural measures such as mergers, the legislature should follow the Austrian example for the coordination of the two applicable rules.[124] If low balling is to be prevented, reference can be made to the recent revision of British takeover law.[125]

3.1.2.4 Relevance for company start-ups and stock-exchange listings

The fourth argument is not convincing either. Company start-ups and stock-exchange listings involve highly complex decisions that depend on a variety of considerations. It is highly unlikely that the existence of a mandatory bid rule will be pertinent for such decisions. But even if it did play a role, the above-mentioned effect – that an exit possibility supports the decision to invest – would have to be taken into account.

3.1.2.5 Summary

In summary, on the one hand, the mandatory bid makes takeovers more difficult but, on the other hand, it carries significant advantages as protection during group

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[122] On the relevance of trust of shareholders in the capital markets, see N. Moloney, 'Confidence and Competence: The Conundrum of EC Capital Markets', 4 *Journal of Corporate Law Studies* (2004) p. 1.

[123] A. Viandier, *OPA, OPE et autres offres publiques*, Vol. 2, 4th edn. (Paris 2010): Garantie de cours, nos. 2300 et seq.

[124] C. Diregger, S. Kalss and M. Winner, *Das österreichische Übernahmerecht*, 2nd edn. (Vienna 2007), at p. 109 et seq.

[125] See section 3.2.3 below.

integration in that it grants minority shareholders early protection (*ex ante protection*)[126] that they would not have[127] under protection norms that apply later or require the launch of legal proceedings, such as under German group law (*ex post protection*). Therefore, the arguments that the economic costs of the mandatory bid can be saved through better protection of minority shareholders after the takeover or in the group are not convincing.[128] If these arguments are not convincing and the empirical effects of the losses for the takeover market, of the advantages for the protection of minority shareholders and of the ratio of the two effects are not conclusive,[129] then it will be the role of the legislature to decide on a solution, and, in the opinion presented here, that solution is the mandatory bid.

3.2 Reform issues concerning the mandatory bid in detail

Even if there are good reasons not to fundamentally reform Article 5 of the Directive, the mandatory bid is nevertheless surrounded by a whole range of specialised reform issues that lie partly within the remit of the European Commission and partly within that of national legislatures; for example, in Germany, it would involve reforming the Securities Takeover and Acquisition Act (WpÜG). These reform issues include: (1) the control threshold; (2) opting up and opting out; (3) low balling, creeping in; (4) exercising control on the basis of a voting agreement; (5)

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[126] This is a functional statement. There are two reasons for the mandatory bid in the United Kingdom: early exit and equivalent treatment, P. Davies and S. Worthington, in *Gower and Davies, Principles of Modern Company Law*, 9th edn. (London 2012), at pp. 28-46, and 1067 et seq. A further aim of the mandatory bid may be to maintain the integrity of the election process, cf. also *supra* n. 120. For a discussion of the purposes, see also G. Psaroudakis, 'The Mandatory Bid and Company Law in Europe', 7 *ECFR* (2010) p. 550, at p. 551 et seq.

[127] Gower and Davies, ibid., at pp. 28-46 and 1067.

[128] See section 3.1.2.2. For further details, see CEPS External Study, *supra* n. 4, at pp. 291 and 281, n. 326; for greater detail, see Pacces, *supra* n. 112, at pp. 661 et seq., 682 et seq., 699 et seq., and 703 et seq., regarding fiduciary duties that consistently view the American model as superior to the British model. See also Wymeersch, *supra* n. 97, at p. 1385 et seq., for rules about conflicts of interest and self-interested transactions within a group (related party transactions, private benefits of control), such as disclosure, involvement of experts, and control by the board or supervisory board and perhaps by the general meeting of shareholders. The further suggestion to exempt from the mandatory bid those private control transactions that do not give any 'private benefits', ibid., at p. 1385 et seq., is practically difficult to implement with legal certainty; how would a supervisory board establish this under Article 4(5) of the Directive? On the exemptions from the mandatory bid and the corresponding wide discretion of supervisory authorities, see section 3.2.6 below.

[129] E. Berglöf and M. Burkart, 'European Takeover Regulation', 36 *Economic Policy* (2003) p. 173, at p. 195 for takeover defences and at p. 196 for the mandatory bid rule. Cf. also M. Burkart, D. Gromb, H.M. Mueller and F. Panunzi, 'Legal Investor Protection and Takeovers' (1 April 2011), available at: <http://ssrn.com/abstract=1854367>. Improved investor protection may improve the efficiency of the takeover results if external financing is taken into consideration.

derogations from mandatory bids; and (6) price calculation. As stated above,[130] the Commission intends to deal with no more than three reform problems, namely (3) and (5), and the reform considerations regarding acting in concert that extend beyond the mandatory bid (see section 3.3 below). The following analysis addresses these and other reform proposals in systematic order.

3.2.1 *The control threshold*

Article 5 of the Directive does not define 'control threshold', but, instead, Article 5(3) allows Member States to determine the percentage of voting rights which confers control for the purposes of paragraph 1 and the method of its calculation. Member States have set very different control thresholds, the result being that the level of minority interest protection envisaged in the Directive is curtailed considerably.[131] Most countries follow the British lead with a control threshold of 30%;[132] in others, it is 33% or one third.[133] Spain and Denmark have an alternative threshold (30% and 50%) and require actual acquisition of control. Some countries have significantly different thresholds:[134] the Czech Republic and Estonia require actual control, linked to the assumption that a purchaser has control if it holds 50% of the company's voting rights by way of a holding company or an agreement, or if it controls the majority of members of the board of directors. Denmark and Spain link both criteria – the control threshold and actual control: in Denmark, this is 50% of the voting rights of a holding company or an agreement, or control of the majority of the members of the board of directors or control over the company; Spain requires 30% of the voting rights or appointment of over one half of the members of the board of directors within a 24-month period. These differences are not just numerical; 30% or one third for actual control can mean something quite different depending on the country because the local majorities for shareholders' general meetings vary greatly. A bidder may or may not find that 30% is sufficient to exercise actual control over the general meeting of shareholders.[135]

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130 See section 1.3.2 above.

131 Preamble, Recital (9) of the Directive.

132 As in Belgium, Germany, Finland, France, since the reform of 22 October 2010 (previously 1/3), Ireland, Italy, the Netherlands, Austria, Sweden, the Czech Republic, the United Kingdom and Cyprus, see External Study, *supra* n. 4, at p. 128 et seq. A second stage is envisaged by Finland (50%), Poland (66%) and Portugal (50%), ibid.; on the second control threshold, see section 3.2.3 below. Despite countries having the same control threshold, there may still be differences in calculation, such as regarding the allocation of voting rights (see section 30 of the WpÜG, thus incorrect or at least unclear in the External Study, *supra* n. 4, at p. 132).

133 Greece, Luxembourg, Poland, Portugal, Rumania, Slovakia, Hungary, ibid.

134 Ibid.

135 Cf., with case studies, J. Grant, T. Kirchmaier and J.A. Kirshner, 'Financial Tunneling and the Mandatory Bid Rule', 10 *European Business Organization Law Review (EBOR)* (2009) p. 234.

For this reason, there is a growing demand to equalise the different levels of protection by developing a definition of control within the meaning of Article 5, preferably by drafting a new Article 5(3) or by amending the takeover laws of the Member States. In contrast, according to the above-mentioned Survey Report,[136] a large majority of those questioned (71.4%) remain in favour of retaining the 30% threshold in section 29(2) of the WpÜG. Other thresholds[137] received less than 20% support of each group surveyed. In light of the very different constellations of shareholders' general meetings in German companies, the proposal to define control under German law by means of an additional material definition of control[138] based on attendance at shareholders' general meetings received no support because for two reasons this would lead to considerable legal uncertainty: attendance at the general meeting of shareholders would have to be seen in conjunction with the amount of free float of shares, and the company could influence the level of attendance by targeted investor relations.[139] There was a material threshold in Austria, but it was repealed in favour of the formal 30% as part of a wider reform.[140]

In fact, a material control threshold creates considerable uncertainty of determination, which would make buying shares much more difficult, particularly if the buyer is close to the 30% threshold. Before each share purchase, the buyer would then have to determine the attendance at the general meeting of shareholders of the target company. This uncertainty would add to that created in combination with the control threshold for the relevant shareholding based on the acting in concert.[141] The uncertainties would increase exponentially if shares of companies from other Member States are purchased and the buyers have to take up enquiries in those countries. This undermines the view that such a material control threshold rule should be prescribed at European level.

3.2.2 *Options (opting up and opting out)*

Even if there is a fixed control threshold, as is the case in most Member States, the issue is whether or not it should be made flexible so that individual companies could *amend their control threshold* on the basis of the *autonomy of their company*

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136 Survey Report, *supra* n. 79, at p. 25; Expert Poll, *supra* n. 79, at p. 7, there 71.3%.

137 25%, 35% and 50%, ibid.

138 Sepe, *supra* n. 109, at p. 20 et seq.: actual control in the target company or average actual control in the respective country; sympathising, CEPS External Study, *supra* n. 4, at p. 292: dynamic threshold; see also A. Cahn, 'Der Kontrollbegriff des WpÜG', in Mülbert, et al., *supra* n. 12, p. 77, at p. 107, stating that at a quite considerable number of companies, attendance at general meetings of shareholders is below 60%, on this ibid., at p. 94 et seq.

139 Discussion Report in Mülbert, et al., *supra* n. 12, at p. 108.

140 The reasons were not that there had been unfavourable experiences with the material control threshold, they were far more complex. On the earlier and current control thresholds, see Diregger, Kalss and Winner, *supra* n. 124, marginal notes 179 et seq.

141 See section 3.3 below.

statutes – either upwards or downwards – by *opting down and opting up*, as recently suggested by CONSOB in Italy,[142] or by *opting up and opting out*, as under Swiss takeover law. In Switzerland, company statutes may increase the control threshold from 33⅓% up to 49% of voting rights (opting up)[143] and may even opt out entirely from the mandatory bid (opting out).[144] However, opting out may not lead to a disadvantage within the meaning of Article 706 OR (*Schweizerisches Obligationenrecht*). Such disadvantage occurs if rights are removed from shareholders in an improper way or if there is an inequality of treatment or disadvantage that is not justified by the purpose of the company.[145] However, it is not entirely clear what this means in practice. A removal of rights might be considered improper if a takeover bid is already planned and, in this respect, the minority has concrete expectations that are disappointed by *ad hoc* changes to the company statutes. There is also inequality of treatment of minority shareholders by the majority shareholder whenever there is no mandatory bid. Article 706 OR does not make clear either how the company's purpose is supposed to justify the exclusion. One might have to consider cases in which the company's purpose may necessitate a special position for the majority shareholder with respect to financing and the control premium. Nevertheless, recent decisions of the Swiss Takeover Board have provided some substantiation, particularly with respect to the supply of reasonable information to shareholders about all relevant circumstances and, in particular, if there is a pending relevant future transaction.[146]

From a legal policy viewpoint, rules that follow the Swiss example and extend freedom over company statutes to takeover law are interesting for all those already arguing for non-binding takeover law. All relevant details in this respect have al-

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[142] This was suggested for new companies by the Italian CONSOB (*Commissione Nazionale per le Società e la Borsa*) on 25 July 2011, down to 25% and up to 35%.

[143] Article 32(1), sentence 2, BEHG (*Bundesgesetz über die Börsen und den Effektenhandel*); K. Hofstetter and E. Schilter-Heuberger, in R. Watter and N.P. Vogt, eds., *Börsengesetz, Finanzmarktaufsichtsgesetz*, 2nd edn. (Basel 2011), Article 32 BEHG, marginal note 58 et seq., at p. 149; U. Schenker, *Schweizerisches Übernahmerecht* (Bern 2009), at p. 538. Cf. also M. Glatthaar, R. Bernet and J. Luginbühl, *Swiss Takeover Law* (Zürich 2013).

[144] Article 22(2) and (3) BEHG; Hofstetter and Schilter-Heuberger, *supra* n. 143, Article 32 BEHG, marginal note 18 et seq.; Schenker, *supra* n. 143, at p. 530 et seq.; H. Peter and P. Bovey, *Droit suisse des OPA* (Bern 2013), nos. 446 et seq. It is notable that the statutory amendments mentioned in Article 22(2) and (3) may be made by the general meeting of shareholders by simple majority and without an attendance or majority requirement, see R. Tschäni, J. Ifflad and H.-J. Diem in Watter and Vogt, *supra* n. 143, Article 22 BEHG, marginal note 23 at the end.

[145] Tschäni, Ifflad and Diem, ibid., Article 22 BEHG, marginal note 18 et seq.; on the dispute about the possibility of a renewed opting-in after having opted out, ibid., Article 22 BEHG, marginal note 28 et seq.

[146] For the details on the new policy adopted by the Swiss Takeover Board since October 2012, see Peter and Bovey, *supra* n. 144, nos. 469 et seq.; see also, briefly, External Study, *supra* n. 4, at p. 168.

ready been outlined above.[147] In Switzerland, some academic commentators see this flexibility as a significant advantage compared to the European Directive.[148] Reports from practitioners suggest that 24 per cent of the Swiss companies listed on the SWX (59 of 236 issuers) have opted out of the practice and 6 per cent (13 of 236 issuers) have opted up.[149] Nevertheless, opting out is more rare in Switzerland than one might have expected in light of the controversial history of the rule. Above all, none of the companies listed on the SMI Index have an opt-out clause and only one has an opt-up clause.[150] Evidently, such clauses that remove minority rights are not welcome on the capital markets,[151] which supports the above-mentioned assessment of the relevance of investor trust in fair market conditions,[152] even though no negative effects have been identified with respect to share prices.[153] This is also confirmed by the above-mentioned Survey Report, according to which a significant majority rejects the idea of autonomy in company statutes as regards a lower or higher control threshold (71.3%), and this is particularly pronounced among investment banks (89.3%).[154] The minority that supports the introduction of autonomy in company statutes includes company representatives (39.3%), academics (35.7%) and legal advisers (27.3%). All this corroborates the view about a uniform fixed control threshold, particularly at European level. This is because in that case the investing public, for which the existence of a mandatory bid rule can be important, as outlined above, would not have to make enquiries about special provisions in the company statutes of foreign companies. Standardisation in this respect would lower transaction costs and be advantageous for cross-border investment.

3.2.3 *Low balling and creeping in (reform consideration of the Commission)*

There is in particular dispute on whether by a timely voluntary takeover bid one can legally avoid a mandatory bid (*low balling*, *creeping in*[155]). Article 5(2) states that

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147 See section 2.2.2.3 above.

148 Hofstetter and Schilter-Heuberger, *supra* n. 143, Article 32 BEHG, marginal note 149; K. Hofstetter, 'One Size Does Not Fit All: Corporate Governance for "Controlled Companies"', 31 *North Carolina Journal International Law and Commercial Regulation* (2006) p. 597, at pp. 636 et seq. and 646 et seq.

149 Peter and Bovey, *supra* n. 144, no. 447.

150 Ibid., this one company is the Swatch Group AG; Tschäni, Ifflad and Diem, *supra* n. 144, Article 22 BEHG, marginal note 22.

151 Apparently different for *Borsa Italiana*, *supra* n. 142.

152 See section 3.1.2.2 with n. 122 (Moloney).

153 Schenker, *supra* n. 143, at p. 532.

154 Survey Report, *supra* n. 79, at p. 26, which addresses only the issue of a lower control threshold; Expert Poll, *supra* n. 79, at p. 7.

155 The definitions are unclear and disputed. Low balling and creeping in are often used synonymously. If a differentiation is to be made, low balling should be used for the attempt by the

where control has been acquired following a voluntary bid to all the holders of securities for all their holdings,[156] the obligation to launch a (mandatory) bid shall no longer apply. This is in principle appropriate[157] but does not solve the issue of avoidance. In its Application Report of June 2012, the Commission states that it views such avoidance as a breach of European treaties and is considering intervention, perhaps in the form of infringement procedures.[158]

As experience of Member States shows, low balling and creeping in can mostly be countered by two measures. *Additional control thresholds* can be introduced, requiring the bidder to make a new mandatory bid if during a certain period after the takeover it exceeds the voting rights threshold of 30% (only up to 50%).[159] Though there are differences in the details, such additional control thresholds exist in various Member States, i.e., Austria, Italy, Finland,[160] as well as France, following the reform of 22 October 2010, for example, if the shareholding or voting rights are increased by at least 2%[161] (up to a limit of 50%) over the next 12 months.[162] The second measure would be the introduction of a *minimum percentage of shares* which the bidder must reach if the takeover is to proceed, such as 50% in the United Kingdom.[163] This minimum percentage rule is not linked to the mandatory bid but applies in general and is intended to counter the building of unwelcome control blocks of shares by institutional investors. The Netherlands recently followed the English lead in this matter. Such a rule was also proposed in France, but did not become law.

In contrast, bidders in Germany and other countries have the possibility of slightly exceeding the 30% threshold by issuing a voluntary takeover bid at a time that suits them, thereby avoiding a later, costly mandatory bid. This low-balling

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bidder, where possible, to exceed the 30% mandatory bid threshold as cheaply as possible; creeping in should be used when it comes to the question whether a second mandatory bid must be submitted. Creeping in can also be used for acquisitions up to 30%, creeping on for acquisitions up to 50% and definitive legal control for acquisitions from 50%.

[156] This means that the bid has been made in accordance with Article 5(2) of the Directive to all holders of securities for all their holdings.

[157] J. Tyrolt and C. Cascante, 'Pflichtangebotsbefreiung durch Übernahmeangebot und Mindestpreisregelungen', in Mülbert, et al., *supra* n. 12, p. 110, at p. 111 et seq.

[158] See section 1.3.2 sub (3) above.

[159] Comparative evidence in External Study, *supra* n. 4, Table, at pp. 129-130.

[160] As regards Austria, see Diregger, Kalss and Winner, *supra* n. 124, marginal note 218 et seq. See Expert Poll, *supra* n. 79, at p. 7; Tyrolt and Cascante, *supra* n. 157, at p. 142.

[161] Except for France and Austria. The threshold in Italy and Greece is 3%; in the United Kingdom, it is one share, External Study, *supra* n. 4, at p. 127; Tyrolt and Cascante, *supra* n. 157, at p. 142.

[162] Loi no. 2010-1249 du 22 octobre 2010 de régulation bancaire et financière, J.O. no. 247 du 23.10.2010, p. 18984, available at: <http://www.journal-officiel.gouv.fr/frameset.html>; Hopt, *supra* n. 45, at p. 65.

[163] Takeover Code Rule 9.1. Takeover bids and mandatory bids may only be completed if the bidder holds more than 50% of the voting rights in the target company at the end of the process. See also External Study, *supra* n. 4, at pp. 127 and 146.

strategy and the related creeping in have repeatedly been applied with varying success in Germany since 2007 (e.g., Porsche/VW; Deutsche Bank AG/Postbank AG; ACS S.A./Hochtief AG; Volkswagen AG/MAN SE).[164] In Germany, this has resulted in a call for statutory intervention. According to the Survey Report, a clear majority (60%) supports a rule along the lines of those in France and Austria, namely a renewed mandatory bid if there is a further purchase of more than 2% of voting rights in the target company within a 12-month period.[165] Proponents include investment banks, companies and trade unions, whereas 83% of institutional investors are against the proposal, with there being an even split of opinions in academia.

If the mandatory bid is to be regarded as important for the protection of minorities whilst retaining its positive image in the capital markets, a solution must be found that prevents mandatory bids from being circumvented by low balling and creeping in. No satisfactory solution has yet been found, but it will involve either the inclusion of a secondary control threshold or greater transparency.

Another control threshold would provide a clear solution that has already been tried out successfully in other countries, specified above.[166] However, there are many objections.[167] Above all, a secondary control threshold would increase the burden on bidders and reduce the danger of an unwelcome takeover bid, a reason spurred by the discussions that arose in the context of the ACS/Hochtief bid in 2010.[168] This effect would have to be taken into account in the assessment of defensive measures by the management board (which is not to say that a strong mandatory bid rule and a consequent prohibition of frustrating action would balance each other out economically). This issue has been addressed above.[169] It is also important to underline that another control threshold could have different effects in Member States, depending on shareholder structures and other takeover bid-related parameters such as fixed control thresholds, or depending on the rates of attendance at the general assembly.[170] As with all numerical limits, the objection that the *de minimis* threshold of 2% and the 12-month period are arbitrary is less convincing, if *de minimis* and time limits are set at all. In light of the large number of such derogations, especially in Germany,[171] the introduction of a second control threshold would be much less serious than might seem at first glance.

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164 Seibt, *supra* n. 11, at p. 214 et seq., with list of cases and other information.

165 Survey Report, *supra* n. 79, at p. 27; Expert Poll, *supra* n. 79, at p. 7.

166 See *supra* notes 173 et seq. Supported by, for example, Merkt, *supra* n. 102, at p. 545.

167 Von Bülow, *supra* n. 12, at p. 38 et seq., and, following him, the vast majority in the discussion. On the alternative solution, following the British rule not to allow any additional purchases that would exceed the 30% threshold but not reach the 50% threshold, see section 3.2.3 above, n. 159.

168 Section 1.1.1 above.

169 Sections 3.1.2.4 and 5 above.

170 Listed in S. Kalss, 'Creeping-in und Beteiligungstransparenz', in Kaemmerer and Veil, *supra* n. 8, IV.4.

171 Section 3.2.6.

Consideration should also be given to the alternative of a takeover bid-related transparency and disclosure solution[172] whereby bidders only have corresponding disclosure obligations; in individual cases of gradual increase in holdings, this can lead to a continuous share price adjustment.[173] However, this need not take place and will be dependent on market efficiency. It moreover offers minority shareholders much less protection than a mandatory bid.

Even if it were decided to introduce a second control threshold, a revision of the Takeover Bids Directive would have to be awaited. As stated earlier, the Commission intends to take action against low balling, but (only?) by means of bilateral discussions with affected Member States or through Commission Recommendations.[174] It is therefore unlikely that the Commission will decide to introduce a second control threshold into Article 5 of the Directive in addition to the above-mentioned Member State rules. It is very doubtful that the Commission will confirm this, but if it does, it will be up to the Member State legislatures to decide on one of the two solutions, provided this is still permitted under the reformed Transparency Directive.[175] In that case, Member States themselves would not be able to introduce further notification thresholds between 25% and 50%. The situation would only be different if a derogation for takeover law were included in a reform of the Transparency Directive or the Takeover Bids Directive.

3.2.4 *Stake building and exercising control on the basis of a voting agreement*

Furthermore, one may wonder whether mandatory bids should still be solely dependent on a bidder's acquisition of shares, including the associated voting powers. Actual control can also be gained in other ways. This article does not address gaining control by *stake building*,[176] which has its own highly controversial and multi-faceted problems regarding capital markets and their disclosure obligations that go far beyond mandatory bids. This includes the issue of the legal attribution of share blocks that the company interested in gaining economic control acquires by other indirect means, such as by purchasing shares through a bank that holds the legal

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[172] In general, see R. Veil, in R. Veil, ed., *Europäisches Kapitalmarktrecht* (Tübingen 2011), § 16 *Beteiligungstransparenz* (transparency of investment), § 19 *Übernahmerechtliche Publizität* (takeover-related disclosure).

[173] Tyrolt and Cascante, *supra* n. 157, at p. 142 et seq.

[174] See section 1.3.2 above.

[175] Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013 amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements …, *OJ* 2013 L 294/1. See also Mazars, *Transparency Directive Assessment Report*, on acting in concert, at p. 108 et seq., available at: <http://ec.europa.eu/internal_market/securities/docs/transparency/report-application_en.pdf>.

[176] C. Seibt and B. Wollenschläger, 'Europäisierung des Transparenzregimes, Der Vorschlag der Europäischen Kommission zur Revision der Transparenzrichtlinie', *AG* (2012) p. 305, at p. 311 et seq.

title, possibly with an agreement that the company is not permitted to exercise any influence over the voting rights of those shares (*staggered settlement*),[177] or by buying derivatives. Rules including the latter can be found in the United Kingdom, Italy and Spain,[178] as well as, following the latest reform outlined above, Germany.

We should also recall the alternatives already discussed, i.e., reforming Article 5 on mandatory bids and not requiring the purchase of shares but allowing an 'interest in shares' to suffice, as under Rule 9 of the British City Code, or, as in Switzerland, introducing a rule aimed at abuses.[179] The discussion is still in full swing and is not addressed here.[180] Mention should also be made of the reform suggestion to make the possibility of *exercising control on the basis of a voting agreement* equivalent to control gained through purchase of shares. This is a preferable option since for minority shareholders the control by the majority shareholder and not how the majority shareholder gains that control is relevant. However, there are other types of control, such as that based on economic dependency, which here and in other legal contexts (such as group law), quite rightly, cannot be regarded as equal to gaining control through share purchase due to their diversity, the associated legal uncertainty and their rapid variability. Additionally, in contrast to the purchase of shares, no control premium is paid for binding voting agreements, though remuneration is possible in individual cases. There is no unequal treatment of minority shareholders, as targeted by the mandatory bid. From a legal policy view, this means there are no compelling grounds for a mandatory bid in case of control based on a voting agreement, not under national law and certainly not on the basis of a revision of the Takeover Bids Directive.

3.2.5 *Consultation, financing, bank guarantee*

Additional ways of securing mandatory bids, such as through rules for mandatory involvement of an independent consultant on the bidder side, as is the case in Switzerland,[181] financing of the bid, or provision of a bank guarantee by a financial institution, as under French law,[182] have not yet been included in minimum harmonisation but might very well be considered in the reform discussion.

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[177] Seibt, *supra* n. 11, at p. 229, with reference to Schaeffler/Continental, in which Metzler and Sal. Oppenheim private banks were involved to ensure that Schaeffler was never able to buy 50% or more of the shares in Continental AG, as approved by BaFin.

[178] External Study, *supra* n. 4, at p. 38.

[179] Clarke, *supra* n. 84. Cf., more generally, Ferrarini, 'Equity Derivatives and Transparency: When Should Substance Prevail? ', Festschrift für Klaus J. Hopt, *supra* n. 88, p. 1803.

[180] On the Commission Proposal, Commercial Law Committee of the German Bar Association, 'Opinion', *NZG* (2012) p. 770; Seibt and Wollenschläger, *supra* n. 176.

[181] Examination of the bid by an independent body, Art. 26 et seq. Takeover Regulation; D. Gericke and K. Wiedmer, *Kommentar Übernahmeverordnung (UEV)* (Zürich 2011), Art. 26 et seq. Fairness opinions are often sought in American practice; see section 3.2.6, n. 207 below.

[182] Art. 231-13, I du Règlement Général; Viandier, *supra* n. 123, no. 1072 et seq.

3.2.6 *Derogations from mandatory bids (reform consideration of the Commission)*

The Commission Staff Working Document of 21 February 2007 criticises that Member States have allowed many derogations from mandatory bids.[183] In its Application Report, the Commission addresses this as a another area of concern and wishes to investigate the issue further in order to take such steps as may be required, not necessarily further harmonisation, but perhaps infringement procedures.[184] These derogations are in part included in national statutory takeover provisions and are in part derived from powers conferred on competent supervisory authorities. In some Member States, shareholders can also agree to derogation with a whitewash procedure,[185] as in the United Kingdom, Ireland, the Netherlands and Spain.[186] For the first – statutory – derogation, Member States may rely upon Article 5(3) of the Directive, whereby they are free to set the control threshold. The second possibility follows from the wording of 'pricing' under Article 5(4).[187] Mention should also be made of the general provision of Article 4(5), whereby Member States may allow derogations or may empower competent supervisory authorities to make such derogations. Meanwhile, the External Study[188] commissioned by the European Commission has uncovered many such derogations. As well as purely technical derogations,[189] statutory derogations include provisions to protect the bidder, the controlling shareholder or the target company, as well as derogations to protect creditors (securing claims) and other affected parties. The first type of derogations can concern cases in which there has been no material change of control, such as the accidental exceeding of the control threshold, inheritance, existence of a larger shareholder[190] or a restructuring within a group,[191] cases in which the thresh-

183 Commission Staff Working Document, *supra* n. 57, at p. 10 and details in Annex 3.

184 See section 1.3.2 above.

185 For details on whitewash in the United Kingdom, see City Code, Appendix 1 (Whitewash Guidance Note). Such a decision would be void in Germany pursuant to Section 241(3) of the German Stock Corporation Act (AktG), but a recommendation of the general meeting of shareholders would be possible under exemption proceedings pursuant to Section 37 of the German Takeover Act (WpÜG).

186 External Study, *supra* n. 4, at p. 140 et seq., Summary Table at p. 152, no. 2. This is the case in most large non-EU states, namely in regard to capital increases, during major restructuring and when gaining control, ibid., at p. 41.

187 Compare EFTA Court, Case E-1/10 (*Periscopus*), 10 December 2010; H. Krause, '*Periscopus* and Clear Criteria in European Public Takeover Legislation', *ECFR* (2011) p. 70; T. Papadopoulos, 'Acquisition of Corporate Control and Clear Criteria in the Adjustment of the Mandatory Bid Price' (24 March 2013), available at: <http://ssrn.com/abstract=2238603>.

188 External Study, *supra* n. 4, Summary Table at p. 152 et seq.

189 Such as for public joint investments that do not fall within the mandatory bid rules, Application Report, *supra* n. 3, 3, no. 17.

190 Cf. External Study, *supra* n. 4, at p. 143.

191 Including the question under what conditions it involves 'acting in concert' when group members carry out transactions among themselves, Application Report, *supra* n. 3, 3, no. 17.

old is exceeded only minimally, or, as in Italy, financial derivatives. Other types of derogation may involve restructuring takeovers, mergers and other corporate contractual arrangements (such as the British schemes of arrangement),[192] takeovers by foundations, and derogations for the protection of special state interests, such as the gaining of control as a result of the sale of securities by the state. In this context, the question also arises whether it is permissible to exclude foreign shareholders, such as from the USA, from a mandatory bid, as is the case in many Member States (in Germany, pursuant to Section 24 WpÜG). This can make sense for the bidder due to the very high associated costs, but poses legal problems because the Directive does not recognise such derogations and reference can only be made to Article 4(5).[193]

These derogations and exemption procedures play a special comprehensive and numerically predominant role in supervision practice related to takeover bids.[194] It is reported that in Germany, between 2002 and 2007, 85 mandatory bids were made and 433 exemptions were granted, while the Federal Financial Supervisory Authority (BaFin) rejected only 4% of applications for exemptions.[195] The derogations are therefore of considerable importance for achieving the aims of the Directive. From a legal policy point of view, the least problematic of the statutory derogations are those where there is no material, or at least only a temporary, placement-related change of control, including simple intra-group restructuring. Restructuring takeovers could also be privileged by a derogation as economically beneficial,[196] although experience with derogations due to restructuring, such as restructuring mergers under antitrust and merger control laws, is not especially encouraging. Therefore, BaFin is correct in taking a restrictive approach.[197] Many other derogations impact on the protection of minorities and on functions that are inherent to mandatory bids. Therefore, the correct approach would be for the Commission not to rely only on bilateral negotiations with individual Member States which are making use of one or more derogations or practices that apparently infringe EU law, but to aim for uniform EU regulation of derogations. In the Survey Report, a majority of 54.5% support retention of the current rules applicable in Germany, but this must

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192 Schemes of arrangement are mainly to be found in the United Kingdom, Ireland and former Commonwealth countries. The Takeover Code is applicable, in principle subject to the exceptions in Appendix 7. See also External Study, *supra* n. 4, at p. 172 et seq.; R. Bork, 'The Scheme of Arrangement', *International Insolvency Law Review (IILR)* (2012) p. 477.

193 J. von Hein, 'Zur Kodifikation des europäischen Übernahmekollisionsrechts', *ZGR* (2005) p. 528, at p. 560 et seq. See also External Study, *supra* n. 4, at p. 98: exclusionary bids.

194 External Study, *supra* n. 4, at pp. 122, 139-155, with meticulous listing and categorisation of over 35 different exemptions. On the statistics for Germany, including tables, see Seibt, *supra* n. 11, at p. 233.

195 Merkt, *supra* n. 102, at p. 536.

196 Survey Report, *supra* n. 79, at p. 28; Expert Poll, *supra* n. 79, at p. 8.

197 On the restructuring exemption under BaFin procedures, see Seibt, *supra* n. 11, at p. 235 et seq., including restructuring with dual-trustee structures.

be considered with care since the question asked did not differentiate between statutory fixed derogations and a mere expansion of official discretion, or between European or national regulations. Therefore, it is possible that inclusion of these issues would have produced different answers.

3.2.7 *Share price calculation*

Article 5(4) of the Directive contains two provisions concerning pricing in a mandatory bid: the equitable price is the highest price that the bidder (or persons acting in concert with him/her) has paid for the same securities, over a period, to be determined by Member States, of not less than six months and not more than twelve months before the bid. The price may not be less than the price paid by the bidder for previous purchases made after the bid was made public and before the offer closes for acceptance. Supervisory authorities may only derogate from this rule in circumstances and in accordance with criteria that are clearly determined (Member State option). There is also an option under Article 5(5) regarding the type of consideration (securities, cash or a combination of both). Both options were highly controversial when the Directive was in the process of being adopted, and represent a compromise solution.

As a consequence of these options, the rules governing pricing, and share price adjustment in particular, vary greatly between Member States and are a prime example of gold plating.[198] In Germany, there is intensive discussion about whether or not these rules are correct and about the practical problems they may cause. The German differentiation between a deadline of six months for considering prior share purchases and a deadline of three months for taking into account domestic stock market prices makes sense, but is not self-evident internationally.[199] Issues under dispute include: whether the link with historical share prices is correct as this opens up possible avoidance strategies;[200] whether the taking into account of prior, parallel and subsequent purchases made by all persons acting in concert with the bidder and their subsidiaries goes too far;[201] the significance of the average percentage increases in the bidder's original offer price (bid jumps, about 10%);[202] and much more.[203] The German rule, whereby off-market purchases by the bidder within one year of publication of the bid documentation may be relevant for con-

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198 See *supra* n. 2.

199 External Study, *supra* n. 4, at p. 158.

200 Von Bülow, *supra* n. 12, at p. 36 et seq., and discussion, at p. 73. But the stock market price is still a market valuation, even if not always accurate. Also, there are problems with valuations made in other ways. As a last resort, BaFin would be called upon to assess the price, but this was not envisaged by the legislature and BaFin does not want this responsibility.

201 Tyrolt and Cascante, *supra* n. 157, at p. 126.

202 Seibt, *supra* n. 11, at p. 217.

203 Ibid., at p. 224 et seq.

sideration, is little known in other countries but can also be found in Belgium and Switzerland. In contrast, the rule whereby consideration of shares that are not of the same class[204] is to be calculated separately is similar to that in most other Member States.[205] Rules about the involvement of independent experts or about seeking a *fairness opinion* are in place in other Member States, such as in France[206] and Belgium. Some Member States – like Belgium and Finland – always require a cash component, not only in the cases described in Article 5(5) of the Directive.[207] Another type of rule existed in Switzerland until 2013, whereby the bid price at least had to correspond to the average share price of the last 60 days and was not required to be the same price paid by the bidder for shares of the target company in the last twelve months, but could be up to 25% less; an independent expert had to be included in the evaluation if the market was not liquid. This allowed for discounts for block premiums.[208] However, the Swiss Takeover Board recently suggested a revision of this rule by keeping the criterion of the average share price but abolishing control premiums or at least restricting them, and the legislator followed this suggestion and revised the rule.[209] Then there is the differential treatment of price adjustments by supervisory authorities, an option under Article 5(4) which has mostly been applied by Member States in different ways.[210] International corporate practice indicates that valuation of shares, governed by differing rules in various Member States, creates particular difficulties in cross-border takeovers.

The Survey Report concludes that a significant majority (almost 90%) considers taking account of historical share prices to be correct, but for a period of three months (48%) and not six months as mainly supported in academia.[211] Although it appears important for the provision to have some flexibility, there is dispute over the extent of supervisory authorities' mandatory or discretional power to intervene. All this indicates that the numerous issues of share price calculation should be left to Member States – in Germany, cooperation with supervisory authorities has gen-

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204 Article 3(1)(a) of the Directive expressly states that all holders of the securities of an offeree company 'of the same class' must be afforded equivalent treatment.

205 External Study, *supra* n. 4, at p. 99: 'post-bid top-up clause', 'class struggle'; for a legal comparative view regarding the latter, see also at p. 110.

206 G. Giuliani, 'La réforme des offres publiques d'acquisition', *Revue de Droit Bancaire et Financier* (2006) p. 55, at p. 58 et seq.

207 External Study, *supra* n. 4, at pp. 96 and 156 et seq. Fairness opinions are also common in US practice, ibid., at p. 113, and *supra* n. 181.

208 Article 32(4) BEHG; Hofstetter and Schilter-Heuberger, *supra* n. 143, Article 32 BEHG, marginal notes 110 et seq., and 112; on block premiums, see marginal note 149.

209 Swiss Takeover Commission, *Kontrollprämie*, Letter to the *Eidgenössische Finanzdepartement* (Zürich, 21 January 2011), with substantial data and different reform proposals. Art. 32(4) was amended by the law of 28 September 2012. For details, see Peter and Bovey, *supra* n. 144, nos. 352 et seq.

210 External Study, *supra* n. 4, at pp. 159 et seq. and 180.

211 Expert Poll, *supra* n. 79, at p. 8.

erally resulted in practical solutions[212] – and not be tackled by revising the Directive.[213] Convergence in share valuation would be desirable, but this matter is not exclusive to takeover bids and must be seen in a more general context.

3.3 Acting in concert (reform consideration of the Commission)

According to the definition in Article 2(1)(d) of the Takeover Bids Directive, *persons acting in concert* means 'natural or legal persons who cooperate with the offeror or the offeree company on the basis of an agreement, either express or tacit, either oral or written, aimed either at acquiring control of the offeree company or at frustrating the successful outcome of a bid'. This initially rather harmless definition has far-reaching consequences. With mandatory bids, this raises the question of whether or not a bidder company has reached the control threshold, either by purchasing shares itself or through attribution of share purchases made by *persons acting in concert*.[214] There is a similar provision, though with a different definition, for notification requirements in Article 10(a) of the Transparency Directive of 15 December 2004.[215] The term is also used in the Financial Sector Holdings Directive of 5 September 2007 and substantiated in its Level 3 Guidelines.[216]

Implementation varies greatly between Member States, with respect to both acting in concert and burden of proof and presumption rules, as well as the resulting legal consequences.[217] Some Member States stick closely to the definition in the Directive, e.g., the United Kingdom, Austria, Italy, the Netherlands and Denmark. Others have incorporated elements of the definition provided in the Transparency Directive, e.g., Germany, France, Belgium, Spain and Sweden. Germany uses the

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[212] As estimated by Tyrolt and Cascante, *supra* n. 157, at p. 145.

[213] Contra J. Winter, lecture at the Conference of International Takeover Regulations, Vienna, 9 September 2011.

[214] Psaroudakis, *supra* n. 126.

[215] Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, *OJ* 2004 L 390/38 of 31 December 2004. The definition in Article 10(a) states: '[V]oting rights held by a third party with whom that person or entity has concluded an agreement, which obliges them to adopt, by concerted exercise of the voting rights they hold, a lasting common policy towards the management of the issuer in question.' The reform of the Transparency Directive (22 October 2013) (see *supra* n. 175) leaves Article 10(a) unchanged.

[216] Directive 2007/44/EC of the European Parliament and of the Council of 5 September 2007 amending Council Directive 92/49/EEC and Directives 2002/83/EC, 2004/39/EC, 2005/68/EC and 2006/48/EC as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of holdings in the financial sector, *OJ* 2007 L 247/1 of 21 September 2007. According to the text of the Level 3 Guidelines 'persons are "acting in concert" when each of them decides to exercise his rights linked to the shares he acquires in accordance with an explicit or implicit agreement made between them'.

[217] Application Report, *supra* n. 3, 3, no. 16; External Study, *supra* n. 4, at p. 132 et seq.

same definition for takeover bids and notification requirements. In other countries that have carried through a reform – such as Belgium in 2007 and France in 2010[218] – the definitions have produced numerous problems and reforms.[219] Uncertainty has also been registered in Austria,[220] while Switzerland has an extensive case history of difficult definitional issues.[221] In Sweden, the presence of four or five large shareholders on the nomination committee of a public limited company leads to uncertainty as to whether such cooperation already amounts to acting in concert.[222]

In the United Kingdom, the problem was addressed by the publication of a long Practice Statement[223] from the Panel on Takeovers and Mergers in 2009, in which it interprets acting in concert very restrictively. The preconditions are: (1) an application by shareholders to consider a 'board control-seeking' resolution or threaten to do so; and (2) after an agreement to that effect has been reached, those shareholders acquire interests in shares such that the shares in which they are interested together carry 30% or more of the voting rights in the company (or, if they are already interested in shares carrying 30% or more of the voting rights of the company, they acquire further interests in shares). The Panel is open to discussions about the issue and states: 'In practice, "board-control seeking" resolutions are rare.'[224] The Italian regulation contains a negative list of types of agreement[225] that do not constitute acting in concert: when resolutions are challenged or there is an effort to launch procedures to assert liability against executive bodies; when candidates are nominated for less than half the number of seats on the executive board or as minority representatives; or where resolutions are proposed regarding the remuneration of executive bodies, related-party transactions or 'authorisations in connection with directors' non-compete obligations and defensive measures'. Above all, the Panel looks at each case on an individual basis and applies its wide discretion accordingly.

[218] For Belgium, see X. Dieux and J. Legein, 'Questions relatives à la notion de concert en droit belge', *Forum Financier/Droit bancaire et financier* (2012) p. 143. For France, see Law no. 2010-1249 of 22 October 2010. On this reform of takeover law in France, see Hopt, *supra* n. 45, at p. 65, and most recently, T. Bonneau and A. Pietrancosta, 'Acting in Concert in French Capital Markets and Takeover Law', *Revue Trimestrielle de Droit Financier* (2013) p. 17, with extensive case law.

[219] For France, see Viandier, *supra* n. 123, nos. 1410-1569 with important decisions.

[220] M. Winner, 'Acting in concert im österreichischen Übernahmerecht', lecture, Hamburg, 20 May 2011.

[221] Hofstetter and Schilter-Heuberger, *supra* n. 143, Article 32 BEHG, marginal notes 33 et seq.; Schenker, *supra* n. 143, at p. 477 et seq. Also, R. Tschäni, 'Die Gruppe im Übernahmerecht – "Are we really all one?"', in R. Tschäni, ed., *Mergers & Acquisitions VI* (Zürich 2004) p. 179.

[222] R. Skog, lecture at the Conference on European Takeover Regulation, Oxford, 20 April 2012.

[223] UK Takeover Panel Practice Statement No. 26 of 9 September 2009 on Shareholder Activism.

[224] Ibid., under 1.6. On policy questions, see also Gower and Davies, *supra* n. 126, at pp. 28-44 and 1064 et seq.

[225] External Study, *supra* n. 4, at pp. 137 and 175.

One fundamental problem for both takeover law and capital markets notification law is whether it makes sense to have the same definition. The German legislature believes it does not and in the recent reform has stuck to this against the advice of academia and practitioners. BaFin takes the same view.[226] Other Member States go even further and use the definition of acting in concert not only for share transactions but also for mergers, or at least apply certain rules of takeover law.[227] Due to the different functions and legal consequences in takeover and notification law – mandatory bids on the one hand and mere notification sanctions on the other[228] – the better solutions such as in Switzerland[229] and the United Kingdom[230] support the idea of separate definitions.

Further problems associated with acting in concert result, on the one hand, from interests of corporate governance and sustainability in the capital markets requiring active long-term shareholders,[231] and, on the other hand, from the fact that when these shareholders become involved, they risk sanctions up to and including triggering a mandatory bid for acting in concert. This is taken into consideration by the above-mentioned 2009 Practice Statement of the Takeover Panel and a new regulation from the Italian CONSOB. According to the latter, there is no acting in concert if the agreement is made between less than half of the members of the executive board.[232] The dividing line between mere exchange of innocuous information and acting in concert is blurred and easy to breach. There is also the problem of attribution issues in group matters. Finally, the allocation of the burden of proof is relevant,[233] and this may be more important than the definition itself.

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226 Von Bülow, *supra* n. 12, at p. 21.

227 The latter is the case in Austria: Diregger, Kalss and Winner, *supra* n. 124, marginal notes 57 et seq. and 214; on acting in concert, see marginal notes 42 et seq.

228 Notification law concerns prior transactions, takeover law concerns gaining control or changing control. For companies, the threat, in individual cases, of exceeding the notification threshold (such as the five per cent threshold) may be worse than the threat of a mandatory bid, which is relevant only in special controllable circumstances.

229 Hofstetter and Schilter-Heuberger, *supra* n. 143, Article 32 BEHG, marginal note 39.

230 On 6 February 2011, the FSA's Guidance on concert party arrangements for the control of UK banks and other financial industry entities came into force. It is not clear how this Guidance relates to the treatment of acting in concert by the Takeover Panel; see H. Smith, 'Financial Regulatory Developments', 5 *Law and Financial Markets Review* (2011) p. 224, at pp. 241 et seq. and 242-243.

231 European Commission, Action Plan *supra* n. 5. See Wymeersch, *supra* n. 88, at p. 1582 et seq. The lack of a definition for acting in concert is mostly (48%) seen as a hindrance to cooperation between shareholders, External Study, *supra* n. 4, at p. 176; see also Report of the Reflection Group on the Future of EU Company Law, *supra* n. 86, at p. 46 et seq.: long-term ownership. Making reform proposals, but sceptical, see J. Winter, 'Shareholder Engagement and Stewardship: The Realities and Illusions of Institutional Share Ownership', available at: <http://ssrn.com/abstract=1867564>.

232 External Study, *supra* n. 4, at p. 135.

233 For example, in France, Cour d'appel de Paris, 2 April 2008, Sacyr c. Eiffage, No 07/11675.

According to the answers to the questions posed by the External Study, 64% of the respondents think that a clearer definition of the rules in the Directive would be useful, whilst the majority of supervisory authorities prefer administrative guidelines, at both EU level (86%) and Member State level (100%), although opinions on how the rules should be structured vary greatly.[234] In contrast, according to the Survey Report, the majority (54.1%) consider the current rules governing acting in concert to be adequate, particularly institutional investors (83.3%) and legal advisers (81%), significantly fewer investment banks and about half of company representatives.[235]

Therefore, the Commission intends to strengthen the definition under Article 2(1)(d), based on the answers to its questions about acting in concert in two Green Papers, and has confirmed so in its Action Plan on European Company Law and Corporate Governance of 12 December 2012.[236] This step by the Commission was expected, not least because it is in line with its efforts to promote long-term investments and commitments from investors.[237] It is also one of the few non-politicised reform issues and may allow the Commission to score a small, concrete success.

4. Thematic Summary

1. According to a sunset clause, the Thirteenth Directive on Takeover Bids must be revised on the basis of experience gained in the five years of application since its adoption on 20 May 2006. On the basis of an examination carried out by Marccus Partners and the Centre for European Policy Studies, the Commission published an Application Report on 26 June 2012, to which the European Parliament, in its Resolution of 21 May 2013, responded favourably. The Application Report has provoked very controversial discussions. This article takes these discussions as a

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[234] External Study, *supra* n. 4, at p. 175 et seq., also Table at p. 177.

[235] Survey Report, *supra* n. 79, at p. 33; Expert Poll, *supra* n. 79, 1, at p. 9. On the difficult problems of evidence, using the ACS/Hochtief takeover as an example, see Seibt, *supra* n. 11, at p. 229.

[236] European Commission, Action Plan, *supra* n. 5, 3.4. In 2013, the Commission worked closely with the competent national authorities and ESMA to develop guidance in order to increase legal certainty regarding the relationship between investor cooperation on corporate governance issues and the rules on acting in concert. However, it aims to draw up a sort of white list for institutional investors in order to promote shareholder activism, instead of including legal definitions into the Transparency and Takeover Directives. See already the Application Report, *supra* n. 3, no. 16, and Feedback Statement, Summary of Responses to the Green Paper on the EU Corporate Governance Framework, 15 November 2011.

[237] Commission Communication, 'Single Market Act' (April 2011), COM(2011) 206 final; express reference is made to this Communication by the Commission in its Application Report, *supra* n. 3, 4, no. 23. This concern of the Commission can be found throughout the Action Plan, *supra* n. 5.

basis to carry out a comparative survey of European takeover law, incorporating not only the Thirteenth Directive but also commonalities and differences between takeover law in the Member States as regards the European market for corporate control, in particular the mandatory bid.

2. The success or failure of the implementation of the Thirteenth Directive is assessed very differently. According to its Staff Working Document of 21 February 2007, the Commission is disappointed. The compromises in the Directive as regards options and reciprocity rules have tended to result in a move away from bidder-friendly rules. Yet the mandatory bid (Article 5) has mainly been a success, as have the other rules regarding general principles for supervision, disclosure and transparency, procedures, squeeze-out and sell-out. However, it cannot be ignored that the danger of protectionism has increased considerably.

3. Public takeovers throw up a range of procedural and protection problems. Affected parties are, on the one side, the target company, its board(s) and supervisory board, the shareholders of the target company, employees and other stakeholders, and, on the other side, the bidder company and its shareholders. Public takeover bids also have a special economic function over and above their different individual and group interests. They take place in the market for corporate control, where the competition for control over companies takes place. There is some evidence that a functioning market for corporate control tends to improve allocation of resources tied up in companies and promotes structural change in the economy.

4. In Europe and for European takeover law, regulation in this field is derived from that in the United Kingdom. The UK non-statutory City Code on Takeovers and Mergers has been in place since 1967 and, even after the transposition of the Takeover Bids Directive into UK law, is still administered by the non-governmental Panel on Takeovers and Mergers. This regulatory style was copied by several European states even before the adoption of the Directive in 2004 and has had a considerable influence on the Directive.

5. The legal policy debate focuses on the extent to which takeover law should be regulated at European level. Whilst some object to further Europeanisation or even demand re-nationalisation, others argue for greater harmonisation. There is a whole catalogue of regulatory demands from academia and practice.

6. Debate is also ongoing about whether takeover law should be mandatory or non-binding. Economists are sceptical about statutory regulation and demand a ‘neutral’ takeover law with full autonomy of corporate articles of association and general meetings of shareholders. This is contrasted with legal policy considerations, which resulted in the Directive, namely protection of minorities, opening of markets and legal certainty.

7. While economic opinions in particular regard the mandatory bid as a mistake (it makes takeovers more expensive), the vast majority of academics and practitioners in Europe believe that the mandatory bid as an early exit option plays an irreplaceable role in the protection of minorities. The objection that the economic costs of the mandatory bid could be saved through improved protection of minorities after the takeover or in the group is unrealistic.

8. There is a whole range of special reform issues regarding the mandatory bid that fall partly within the remit of the European Commission and partly within that of the national legislatures. These issues include: (a) the control threshold; (b) opting up and opting out; (c) low balling and creeping in; (d) exercising control on the basis of a voting agreement; (e) exemptions from the mandatory bid; and (f) share price calculation. It remains to be seen how the European and Member States legislatures will deal with these reform issues.