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ARTICLE

The End of History for the Board Neutrality Rule in the EU

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Abstract
This paper argues that the failed attempt to introduce a mandatory board neutrality rule into EU takeover law was an object lesson that it is difficult to enact rules that are contrary to the corporate law cultures of the majority of the Member States. It provides an account of key factors that prevented enacting a mandatory board neutrality rule in the EU: varying takeover laws and practices; conflicting management and shareholder interests; divide between exhaustive and minimum harmonisation; and varying market orientation models. It argues that as long as there are varied national corporate laws, most EU corporate law rules are bound to remain categorised as optional, unimportant, or avoidable.

Keywords Takeover directive · Takeovers · Minimum harmonisation · Board neutrality rule · Capital market models · Corporate law

1 Introduction

The board neutrality rule neutralises the power of the board of the offeree company during takeover bids by prohibiting such board from taking any action that would result in the frustration of the takeover bid.[1] The rule, due to its controversial history, was adopted in the Takeover Directive as an optional provision. As a result of this optionality, a number of EU countries have sought reforms that restrict foreign takeovers. Such an attitude suggests that we have come to 'the end of history' for the board neutrality rule in the EU.[2] A few examples of this will suffice. It was reported in 2014 that France 'appropriated new powers to block foreign takeovers',[3] in 2017

[1] See Art. 9(2) of the Takeover Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids [2004] OJ L142/12.

[2] The phrase 'the end of history' in the title of this paper is borrowed from an article by Hansmann and Kraakman (2001), p 439, which had been borrowed from a book by Fukuyama (1992).

[3] Chu (2014); also reported in a BBC article: Yueh (2014).

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that Germany 'approved a measure to make it easier for the state to veto takeovers of certain firms by foreign investors',[4] in 2017 that Italy passed a law to end the 'open approach to foreign acquisitions',[5] and in 2017 that France and the Netherlands sought to restrict foreign takeovers.[6] This paper contextualises these attitudes in the context of the history of the board neutrality rule.

The history of the board neutrality rule in the regulation of EU takeovers can be traced back to the 1970s and is characterised by attempts to introduce into other Member States the corporate culture of the UK. The adoption in 2004 and the implementation in 2006 of an optional board neutrality rule in the Takeover Directive marked the beginning of the end of history for the board neutrality rule in the EU. The 2007 and 2012 reports of the European Commission and the 2013 report of the European Parliament suggested that the plans to revive the failed attempt to introduce a mandatory board neutrality rule into EU takeover law had since been confined to history. In drawing an object lesson from this history, this paper echoes the words of Luca Enriques: '[…] most EC corporate law rules can be categorized as optional, market-mimicking, unimportant, or avoidable'.[7]

This paper argues that the failed attempt to introduce a mandatory board neutrality rule into EU takeover law is an object lesson that it is difficult to enact rules that are contrary to the corporate law cultures of the majority of the Member States. It provides an account of key factors that prevented enacting a mandatory board neutrality rule in the EU: varying takeover laws and practices; conflicting management and shareholder interests; divide between exhaustive and minimum harmonisation; and varying market orientation models. It argues that the optionality of the board neutrality rule in the Takeover Directive was caused by these key factors, and the varying choices made by Member States in implementing the optional board neutrality rule were merely the fruition. Having traced the history that sought to introduce the board neutrality rule into EU takeover law, from the 1974 Commission report that first sought to introduce into EU law the corporate culture of the UK, through the 2004 Takeover Directive with its optional board neutrality rule, to the 2007 and 2012 Commission reports and the 2013 report by the European Parliament on the implementation of the Takeover Directive, it concludes that as long as there are varied national corporate laws, most EU corporate law rules are bound to remain categorised as optional, unimportant, or avoidable.

The objective of this paper is to reassess, using a historical analysis, key factors that hindered the achieving of maximum harmonisation of regulatory intervention in EU takeovers. The key factors reassessed include corporate governance concepts such as managerial and shareholder primacy and market models, factors through which the paper contextualises the likely end of history for the board neutrality rule in the regulation of takeovers in the EU.

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[4] Hall (2017).

[5] Vagnoni (2017).

[6] See 'European takeover rules merit a sceptical response', *Financial Times*, 16 June 2017.

[7] Enriques (2006), p 2.

The paper proceeds in the following way. Section 2 provides an overview of EU company law harmonisation, noting that its future remains uncertain. Section 3 examines the differing takeover laws and practices that prevailed in Member States in the 1970s and that led up to the adoption of the Takeover Directive, ascertaining what effect they had on adopting an optional as opposed to mandatory board neutrality rule. Section 4 discusses the effect that company law theories had on the process of adopting the Takeover Directive with an optional board neutrality rule. Section 5 addresses the legal basis of either exhaustive or minimum harmonisation measures with regard to the Takeover Directive—observing that while the Directive on takeovers had aimed at exhaustive harmonisation, the legal basis of the Takeover Directive in Article 50 of the Treaty on the Functioning of the European Union (TFEU) (ex Article 44 TEC) did not envisage exhaustive harmonisation. It also examines how the manner in which some Member States implement the optional board neutrality rule destroyed any glimmer of hope to achieve exhaustive harmonisation of takeover laws in the EU—observing the correlation between market orientation models and Member States' choices. Section 6 considers the question: what can the Commission do to achieve exhaustive harmonisation? The last section makes concluding remarks.

2 Overview of EU Company Law Harmonisation

The current EU legislative framework for company law is based on minimum harmonisation, having failed to achieve full harmonisation due to diverse national company laws. Giving a few examples of minimum harmonised EU company laws will suffice. The Tenth Company Law Directive (2005/56/EC) harmonised the basic requirements on the procedures of cross-border mergers of limited liability companies. The Eleventh Company Law Directive (89/666/EEC, as amended by Directive 2012/17/EU on registers of companies) harmonised basic disclosure requirements for EU companies setting up branches in other Member States and in non-EU countries. The Twelfth Company Law Directive (2009/102/EC) harmonised the basic requirements for forming a single-member private limited liability company. The 'Thirteenth Company Law Directive', as it was first termed, and later known as the Takeover Directive (2004/25/EC), harmonised the basic requirements for the conduct of takeovers in the EU. Directive 2017/1132/EU simply consolidates six previous Directives (Directive 82/891/ECC; Directive 89/666/ECC; Directive 2005/56/EC; Directive 2009/101/EC; Directive 2011/35/EC; and Directive 2012/30/EU) into a single text for accessibility and certainty.

This minimum harmonisation framework is not a result of legislative choice, but of failing to harmonise multiple and divergent national rules in the EU. The view taken in this paper is that, 'in essence, harmonization involves replacing the multiple and divergent national rules on a particular subject with a single EU rule'.[8] After decades of striving for but never achieving full harmonisation, EU legislators have

[8] Barnard (2010), p 624.

settled for minimum harmonisation in EU company law, characterised by giving 'choice' to Member States through optionality provisions to accommodate divergent national rules. Optionality has tended to entrench diverse national rules. For example, the Fourth and Seventh Directives, governing accounting, included so many options that they allowed the Member States to largely leave their own accounting cultures as they were.[9] This is most evident in takeover law.

EU company law harmonisation efforts in the 1990s sought to create a level playing field, making company law rules equivalent throughout the EU. A level playing field was hard to achieve given the divergent national company laws in the EU. Member States were often unable to agree. As a result, the early efforts of seeking to fully 'harmonise company law was stalled by the need to reconcile fundamental differences in approaches to corporate governance'.[10] These same differences stalled the adoption of the Takeover Directive for over 30 years until the core provisions (Articles 9 and 11) were made optional in the final text of the Takeover Directive. By 2003, the EU approach to harmonisation had changed from focusing on a level playing field to concentrating on competitiveness of business. Interestingly, the Commission was of the view that 'some company law rules are likely to be best dealt with, and updated, more efficiently at national level, and some competition between national rules may actually be healthy for the efficiency of the single market'.[11] Rather than aim at creating a level playing field, EU legislators have to assess the impact of company law measures on business. It is argued here that the change of approach was a result of failure to harmonise divergent national rules, coupled with EU interests giving way to national interests.

The legal basis for harmonisation of EU company law is contained in Article 50(2)(g) TFEU. This Article requires EU institutions, acting by means of directives, to particularly attain freedom of establishment 'by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms […] with a view to making such safeguards equivalent throughout the Union'. This harmonisation objective is most seen in EU takeover law. Whereas takeovers belong to securities regulation in most Member States, the EU deals with takeovers under company law.[12] The popular view is that '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'.[13] This overview of company law harmonisation treats takeovers as part of EU company law.

Harmonisation of takeover laws is vital in providing an efficient EU market for corporate control and facilitating corporate restructuring. The EU law regulating

[9] Gelter (2017).

[10] Armour and Ring (2011), p 129.

[11] European Commission, Communication from the Commission to the Council and the European Parliament: Modernising company law and enhancing corporate governance in the European Union—A plan to move forward, 21 May 2003, COM(2003) 284, para. 2.2.

[12] Mukwiri (2013a), p 832; Wymeersch (2004), p 150.

[13] Hopt (2014), p 159; see also Wymeersch (2004), p 150.

takeovers is contained in the Takeover Directive.[14] Prior to the Takeover Directive, there were different corporate governance patterns across the EU with numerous and far-reaching barriers to takeover bids that were lawful and applied in various Member States.[15] This created a lack of level playing field in the EU market for corporate control. It required harmonisation, which 'in essence, […] involves replacing the multiple and divergent national rules on a particular subject with a single EU rule'.[16] Harmonisation was an objective of the Takeover Directive, which was stated in terms of making 'safeguards *equivalent throughout the Community*',[17] and these safeguards would 'prevent patterns of corporate restructuring within the Community from being distorted by arbitrary differences in governance and management cultures'.[18]

The Commission had intended to achieve maximum harmonisation by removing barriers to takeover bids through the UK model of the board neutrality rule during takeovers. After 30 years of political unwillingness to agree on the board neutrality rule,[19] the Takeover Directive was watered down to minimum harmonisation. The problem with this minimum harmonisation Takeover Directive was that it permitted corporate structures and defensive measures that were liable to frustrate takeover bids and create obstacles to free movement of capital. That the Commission conceded to such a takeover law regime signalled to Member States that the Commission was becoming weak and unlikely to call for radical future takeover law reforms. Agreeing to the optional board neutrality rule in adopting the Takeover Directive paved the way for the demise of exhaustive harmonisation of EU takeover laws. It also entrenched the lack of political will and national economic interests. Achievement of exhaustive harmonisation in EU takeovers is unlikely in the near future, as recent reports suggest that the Commission has put reforming EU takeover law on hold.

Four basic reasons for harmonisation of national rules were identified in the Opinion of AG Trstenjak of 2 June 2010 in *Idrima Tipou v. Ipourgos Tipou*.[20] First, facilitation of freedom of establishment: specifically '[…] in the case of companies, they can and will in fact exercise their right of establishment only if there is a harmonised legal environment'. Second, 'a further impetus for legal harmonisation is the realisation that decisions on location should be taken in the interest of the European Union economy as a whole'. Third, 'the approximation of national legal orders is intended to ensure that competitive conditions are as equal as possible for undertakings in

[14] Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids [2004] OJ L142/12.

[15] For a list of takeover barriers in Member States prior to the Takeover Directive, see Winter (2002), Annex 4.

[16] Barnard (2010), p 624.

[17] Recital 1, Takeover Directive (emphasis added).

[18] Recital 3, Takeover Directive.

[19] The 'board neutrality rule' is contained in Art. 9 of the Takeover Directive, which prohibits boards from taking any action to frustrate a takeover bid without shareholders' approval.

[20] Case C-81/09 *Idrima Tipou AE v. Ipourgos Tipou Kai Meson Mazikis Enimerosis*, judgment of 21 October 2010, ECLI:EU:C:2010:622, para. 30.

the European Union'. Fourth, 'the existence of comparable legal environments helps to ensure that cross-border investments by undertakings and members are made for the benefit of economic and social development in the European Union'. These four basic reasons for company law harmonisation align well with the early EU approach of seeking to create a level playing field. However, due to the national differences that could not be reconciled or removed, EU company law harmonisation has been reduced to minimum harmonisation characterised by optional provisions. One such example is the adoption of the Takeover Directive. The optionality in core provisions was not a matter of choice on the part of the Commission, but rather a compromise. The EU legislators had no 'choice' but to give 'choice' to Member States. Thus, EU interests gave way to national interests.

3 Harmonising Against Varying Takeover Laws and Practices

3.1 Diverse EU Takeover Laws and Practices

Prior to the adoption of the Takeover Directive, there prevailed different takeover laws and practices in the EU. These differing prior laws and practices had a profound effect on the choices some Member States made, especially with regard to the optional board neutrality rule. In the 1970s, before the proposal for a Takeover Directive, in different Member States, takeovers of listed companies were regulated by law, or by Codes having no force of law, or there were no comparable laws and practices.[21] For example, at that time, in Italy and the Netherlands, takeovers were regulated by Codes that had no force of law, save that they were enforced by professional sanction. In France, Belgium and Luxembourg, takeovers were regulated by law. In the UK, they were partly regulated by law but mainly by the City Code on Takeovers and Mergers that had no force of law save that it was enforced by professional sanction. In Germany, Denmark and Ireland, there were no comparable laws or Codes regulating takeovers.

In Germany, in the 1970s, there were no clear laws or practices regulating takeovers of listed companies. Until the mid-1990s, public takeover bids did not play an important role in Germany.[22] A voluntary Takeover Code (*Übernahmekodex*) was introduced in 1995, but proved to be ineffective.[23] It did not provide for any sanctions, and not all companies signed a voluntary declaration of adherence.[24] As public takeovers increased, there were calls within Germany to replace the voluntary Takeover Code by a mandatory German Takeover Act.[25] It was 'all change' after the 2000 successful hostile takeover of Mannesmann (a German company) by Vodafone Airtouch Plc (a UK company). The legislator felt that the level of investor protection

[21] European Commission, 'Report on Takeover Offers and Other Offers' (1974, Document XI/56/74).

[22] Elst and Steen (2007), pp 213–242.

[23] Vitols (2005), p 390.

[24] Lohner and Schumann (2014), p 5.

[25] Weber (2000), p 51; Weber and Schimmelschmidt (2000), p 264.

provided by the Takeover Code was insufficient and introduced the Takeover Act.[26] The Takeover Act was drafted in 2000 and enacted in 2002.

The takeover landscape in Germany averts hostile takeovers. Daniel Komo and Charlotte Villiers summarise the takeover landscape in Germany,[27] observing that, unlike in the UK, takeovers in Germany have quite a short tradition. The traditional structure of the German economy, 'Deutschland AG' or 'Germany Incorporated', is characterised by banks that hold large shares in major German companies and are traditionally not willing to sell to hostile bidders. The powerful employees' and trade unions' representatives on supervisory boards deter hostile bidders. In 1991, Deutschland AG averted the takeover of Continental by Pirelli. But in 2000 Deutschland AG finally gave way to a takeover when Vodafone took over Mannesmann. Fearing that other German companies could also be taken over by hostile bidders, 'Germany withdrew its political support for the European Union's proposal for a 13th Directive on takeover bids. At the end of 2000, German delegates in the European Parliament made their own proposal for a directive including the right of the target board to frustrate bids and employee protection at the change of management.'[28] Fast forward to 2004, the Takeover Directive was adopted with optional provisions for Member States, allowing them to opt out of the rule against target boards taking actions that may frustrate bids; Germany opted out.

In the Netherlands, 'for a long time, the supervision of the conduct of public offers was done on the basis of self-regulatory rules with an oversight by a non-statutory regulator'.[29] It was not until 2001 that the non-statutory Code was transformed into statute law, under a statutory regulator. The corporate landscape in the Netherlands is characterised by administrative offices owning large voting blocks in Dutch companies. These large blocks, controlled by administrative offices, 'are used widely by Dutch corporations as anti-takeover devices; their prevalence presumably explains the absence of hostile takeovers in the Netherlands'.[30] It was for the protection of Dutch companies that the Netherlands did not favour the board neutrality rule in the proposed Takeover Directive. The Netherlands opposed the EU proposal for a Takeover Directive, fearing that its companies would be subject to hostile takeovers.[31]

The stance against hostile takeovers in the Netherlands is not confined to history and shows no signs of relenting. In July 2017, the newspapers reported that the Dutch economic affairs minister was pursuing economic protectionism in proposing measures to block foreign hostile takeovers and hindering the ability of foreign companies to pursue takeover bids in the country.[32] The renewed stance against hostile takeovers came in the wake of two Dutch companies, Akzo Nobel and Unilever,

[26] Lohner and Schumann (2014), p 5.
[27] Komo and Villiers (2009), pp 195–197.
[28] Komo and Villiers (2009), p 195.
[29] Brauw et al. (2008), p 312.
[30] Jong et al. (2002), p 205.
[31] Hopt (2002), p 9.
[32] Marriage (2017).

resisting takeover attempts by US companies. It was in 2012 that the European Parliament, discussing ways of strengthening the single market, condemned economic protectionism, expressing 'its concern that the re-emergence of economic protectionism at national level would most probably result in fragmentation of the internal market and a reduction in competitiveness, and therefore needs to be avoided'.[33] This was 5 years ago, yet the Netherlands proposes economic protectionism—this suggests that EU takeovers are likely to return to diverse laws underpinned by national protectionism.

In the UK, the conduct of takeover bids in public companies has, since 1968, been regulated under the City Code on Takeovers and Mergers and supervised by the Panel on Takeovers and Mergers.[34] Hostile takeovers in the UK are said to be traceable back to the 1950s.[35] Historically, as observed by Armour and Skeel, in London, City professionals—in particular, institutional investors—avoided the need for *ex post* litigation by developing a body of norms, which eventually gave rise to the City Code on Takeovers and Mergers. These norms were enforced by reputational sanctions, such as the threat of exclusion from the London Stock Exchange, which ensured that contentious issues were resolved *ex ante* without the need for court involvement. Armour and Skeel rightly observe that, as such, the historical UK's self-regulatory system was driven by the preponderance of institutional investors in the marketplace and a regulatory framework that trusted them to govern themselves.[36] In the UK, the system that prevailed in 1970s, a period when the Commission began to consider an EU law on takeovers, was that of self-regulation, and the operation of the City Code on Takeovers and Mergers, and of the Panel, was without force of law until 2006 when the UK implemented the EU Takeover Directive.

3.2 Model of UK Takeover Law and Practice

With such a diverse spectrum of laws and practices, or lack thereof, prevailing across the EU in the 1970s, adopting a harmonised directive on takeover laws was bound to be difficult. Where the EU's and individual Member States' interests often conflict, it was difficult to have harmonised laws that would appeal to all Member States. Nonetheless, 'the Takeover Directive aims at harmonization on the EU level of the law and practice of the Member States in relation to public offers to take over companies'.[37] As early as 1974, the European Commission, through the then special adviser to the EEC, Professor Robert Pennington, set out to examine the various

[33] European Parliament, 'Delivering a single market to consumers and citizens' [2011] OJ C 161E, p 84, para. 6; European Parliament, 'Financial, economic and social crisis: Recommendations concerning the measures and initiatives to be taken (mid-term report)' [2012] OJ C 70E, p 19, para. 127; and European Parliament, 'Governance and partnership in the single market' [2012] OJ C 296E, p 51, para. 21.

[34] Mukwiri (2009), p 5.

[35] Armour and Skeel (2007), p 1727.

[36] Armour and Skeel (2007), p 1731.

[37] Bernitz (2010), p 192.

laws and practices of Member States in relation to takeovers in the EU with a view to proposing steps for their harmonisation.[38] Regarding the various laws and practices of Member States examined in the 1974 Pennington report, it was concluded that 'British law and practice is undoubtedly the most developed in this field because of the longer experience of takeover and other bids in the United Kingdom'.[39] Based on that conclusion, the Commission set out to model the Directive on the UK's City Code on Takeovers and Mergers, and to introduce the board neutrality rule into EU law.[40] The literature provides an account of the difficulties the Commission encountered in the process of adopting the Takeover Directive.[41]

The task of harmonising divergent laws and practices of Member States was not made easier by the aim of introducing a mandatory board neutrality rule, modelled on the UK's City Code, into the Takeover Directive. One problem observed in the literature was that the draft Directive was highly ambitious, its aim being to introduce into some Member States the corporate culture of the UK, and that therein lay the problem.[42]

But the introduction of a board neutrality rule modelled on the UK's City Code was not arbitrary. In 1974, Professor Robert Pennington recommended a mandatory board neutrality rule, stating that 'the directors of the offeree company and collaborators with it shall not do any act or enter any transaction which is likely to frustrate a general bid or an intended general bid of which they are aware unless the act or transaction has previously been expressly approved by a general meeting of the offeree company'.[43] In 2002, a High Level Group of Company Law Experts, led by Professor Jaap Winter, recommended a mandatory board neutrality rule, stating that 'the board should not be able to frustrate or block a takeover bid and thereby deprive shareholders of the opportunity to tender in such a bid'.[44] Despite the adviser and experts recommending a mandatory board neutrality rule, the Commission failed to convince all Member States, and the rule was made optional in the final Directive.

4 Harmonising Against Conflicting Management and Shareholder Interests

4.1 Who Should Decide on Unwanted Takeover Bids?

The question regarding the board neutrality rule is: who should decide on whether to take defensive action against unwanted takeover bids: managers or shareholders?

[38] European Commission, 'Report on Takeover Offers and Other Offers' (1974, Document XI/56/74).

[39] European Commission, Document XI/56/74, p 8, para. 12.

[40] For a critical evaluation of the board neutrality rule contained in the UK's City Code, see Kershaw (2016).

[41] See Mukwiri (2009), pp 9–10.

[42] O'Neill (2000), p 175.

[43] European Commission, Document XI/56/74, p 2, para. 2(d).

[44] European Commission, 'Report of the High Level Group of Company Law Experts on Issues Related to Takeover Bids', Brussels, 10 January 2002, p 20.

The simple answer to this question lies in the ownership of shares, i.e. the things subject to a takeover. In English law, 'the shares or other interest of a member in a company are personal property'.[45] Ordinarily, as personal property, shares are owned by shareholders, who have the right to sell and therefore should decide on defences frustrating the sale of shares. A takeover is a transaction between the bidder (legal or natural person) and the shareholders of the company for the purchase of shares in the company. The takeover involves a change of identity of the holders of the shares in the company, leaving the company intact. As it leaves the company's legal status unaffected, takeovers should not be the concern of company managers, and the decision to frustrate a takeover should be left to the share owners. In the course of the company's ordinary business activities, decision-making lies with the board. As takeovers are about selling shares and not about selling the company, the owners of those shares should decide whether to tender or reject an offer for their shares. Thus, in the UK, the board neutrality rule seeks to ensure that the board does not interfere with property rights of share owners.

However, the simple answer did not help in introducing a mandatory board neutrality rule, or in preventing the end of history for the board neutrality rule, in the EU. This simple answer based on share ownership was or is not accepted because the narrow question which the board neutrality rule answers is often confused with the broader question as answered by corporate governance theories. The debate on the board neutrality rule often confuses the broader question of whose interest the company should manage (thus the shareholder primacy theory versus the stakeholder theory of corporate governance—or both shareholder and stakeholder theories versus an entity maximisation model[46]) with the narrow question of who should decide whether or not to tender shares to a takeover bidder (thus share owners versus the board of the offeree company). Accepting that takeovers are about share owners selling their personal property, the board neutrality rule answers the narrow question. But it is worth examining two broad views on the board neutrality rule.

4.2 Shareholders Deciding on Takeover Defences

The first broad view favours shareholders deciding on defensive measures. This is the view taken by Easterbrook and Fischel.[47] They argue that market prices for shares reflect the value of the company assets as deployed by the incumbent managers. They argue that the fact 'that the bid occurs at a premium over the market price indicates that revamping the target's structure or management would generate private and, in all likelihood, social gains'. Easterbrook and Fischel argue that managerial defensive measures 'frustrate the achievement of these gains'. 'Consequently managers should remain passive and let investors decide whether to tender'. Having made the argument that, 'if takeovers are beneficial to both shareholders and society, any strategy designed to prevent tender offers reduces welfare', Easterbrook

[45] Companies Act 2006, s. 541.
[46] See Keay (2008), pp 663–698; Mukwiri (2013b), pp 217–241.
[47] Easterbrook and Fischel (1991), pp 171–174.

and Fischel reach this 'Conclusion: Managers should leave to shareholders and rival bidders the task of "responding" to offers'. Easterbrook and Fischel make convincing economic arguments in favour of shareholders taking the decision on whether to accept an offer from bidders.

Henry Manne takes the view that it is for shareholders, not managers, to decide on whether to tender their shares.[48] Shareholders, in takeover situations, Manne argues, have 'both power and protection commensurate with their interest in corporate affairs' and 'the power to sell their votes at a premium'. Manne states that a fundamental premise of takeovers is that the share index measures the efficiency of management—the essence of the argument is this: the lower the share price index, relative to what it could be with more efficient management, the more attractive the takeover becomes to bidders who believe that they can manage the company more efficiently. Manne argues that, given that courts are loath to second-guess managers' decisions or remove them from office, 'only the take-over scheme provides some assurance of competitive efficiency among corporate managers and thereby affords strong protection to the interests of vast numbers of small, non-controlling shareholders'.

The abovementioned first view would favour a mandatory board neutrality rule for EU takeovers. It was the preferred option for the Commission in the run-up to the adoption of the Takeover Directive, but it was made optional due to lack of agreement between Member States. In its 2007 report, the Commission assessed the effect of an optional board neutrality rule and concluded that anti-takeover devices make takeovers more difficult or costly and consequently entrench management and render companies immune to unfriendly raiders.[49]

4.3 Management Deciding on Takeover Defences

The second view favours managers deciding on defensive measures. A fundamental premise of this view is that corporations exist to create wealth for society. Margaret Blair gives a few points in support of this view.[50] Blair observes that the idea of socially responsible companies was popular from the 1960s to the early 1980s, with social activists being in support of policies giving managers more defences against takeovers. Blair argues that the idea of corporations having a social purpose beyond maximising shareholder return survives—it is for managers to maximise the total wealth of the enterprise, to consider the effect their decisions have on all of the company's stakeholders. Employees, Blair argues, make firm-specific investments by way of human capital, which should be protected by managers. A firm's employees are much more likely to be motivated to find new ways to innovate or to cut costs if they are confident that they will share in the wealth created and that shareholders will not expropriate such wealth from them. Blair's basic argument is that

48 Manne (1965), pp 112–113, 117.

49 European Commission, 'Report on the implementation of the Directive on Takeover Bids' (Brussels, 21 February 2007), SEC(2007) 268, para. 2.

50 Blair (1995), pp 202, 262–277.

decision-making, even in takeovers, should be deferred to managers, who are better placed to protect all stakeholders.

In support of managers deciding on defensive measures, Shleifer and Summers examine the effect of hostile takeovers (takeovers that are not recommended by managers). They argue that hostile takeovers facilitate opportunistic behaviour at the expense of stakeholders,[51] and that takeovers which limit managers' ability to take defensive measures have the effect of redistributing wealth from stakeholders to shareholders instead of creating wealth. Shleifer and Summers' basic argument is that, because hostile takeovers breach trust between the company and stakeholders, managers should be able to take defensive measures to protect stakeholders—their argument runs as follows: by implicit contracts, employees invest human capital, doing the job well, trusting that their productivity will be rewarded by the loyalty of managers; a hostile bidder who is not committed to upholding those implicit contracts comes along, removes managers, and then expropriates rents from stakeholders; when hostile acquirers cut jobs, takeover premia are gained at the expense of stakeholders.

4.4 Effect of Shareholder Versus Management Decision-Making

The above overview reveals a conflict between management and shareholder interests: 'a conflict between the directors and their interest to perpetuate their presence in their office and the shareholders and their interest to maximise their wealth'.[52] It also reveals that exhaustive harmonisation regarding takeover defences was bound to fail considering the varying views. The abovementioned different views show how challenging it can be to answer the seemingly narrow question of who should decide on defensive measures. On the one hand, shareholders should decide; after all, they own the shares. But takeovers may well have the effect of shareholders exploiting other stakeholders who have contributed to the corporation's wealth, especially if jobs are cut and factories are closed after a takeover. It may sound plausible to take the view that managers should have the ability to protect long-term interests of the company and resist short-term interests of shareholders willing to tender their shares. But on closer scrutiny, 'it is, however, rather a different thing to justify precluding the shareholders from selling their stock at a large immediate profit on the ground that in the long run that will be good for them. While one might of course say that, many people would find it disturbing to put such a result on the basis that directors know what is better for shareholder than they themselves do.'[53]

Besides the foregoing, there is contentious debate on whether takeovers play a disciplining role. Alfred Rappaport argues that takeovers have changed the attitudes and practices of managers, as they represent the most effective check on management autonomy ever devised.[54] Easterbrook and Fischel state that hostile

[51] Shleifer and Summers (1998), pp 34–42.

[52] Barboutis (1999), p 14.

[53] Allen (1992), p 275.

[54] Rappaport (1990), p 96.

takeovers are responses to the failures of managers to seize business or profitable merger opportunities; and that managers must attempt to improve the firm's performance, which leads to higher share prices and reduced chances of takeovers.[55] In their study, Franks and Mayer, using different benchmarks, found little evidence that hostile takeovers are motivated by poor performance prior to bids, and hence they rejected the view that hostile takeovers perform a disciplinary role.[56] Armour and Skeel argue that a key mechanism for rendering managers accountable to shareholders is the market for corporate control: namely, by posing the threat that if the managers fail to maximise the share price, the company may become an acquisition target.[57] Andrew Johnson states that the constant threat of takeover has a positive effect on share prices generally, as the markets reflect this constraint on managerial discretion and because, under threat of takeover, incumbent management tends to behave in a manner remarkably similar to successful bidders.[58]

It is argued here that the above company law theories had a profound effect on the process of adopting the Takeover Directive with an optional board neutrality rule. In the process of adopting the Directive on takeovers, regarding the question of who should decide on defensive measures, an argument in favour of employees' rights during takeovers was presented to the Commission. The Commission rejected a proposed amendment to include in the Takeover Directive a provision that employees should have a voice in the decision-making on bids. According to the Commission, employees 'have no place in these provisions […] only the holders of securities can decide whether or not to sell them and they are therefore the only parties concerned by it'.[59] Similar arguments were considered and rejected by the High Level Group of Company Law Experts. In particular, the experts considered the argument that allowing managers to decide on defensive measures alleviates shareholders' pressure to tender and protects employees. The experts argued that these managerial 'claims to represent the interests of shareholders or other stakeholders are likely to be tainted by self-interest'.[60]

It was against this spectrum of divided opinions on the question of who should decide on taking defensive measures that a provision in favour of shareholders was inserted in the Takeover Directive. Article 9 of the Takeover Directive is based on the recommendation of company law experts that the ultimate decision on whether to tender shares and at what price must rest with the shareholders. This is the cornerstone for the market of corporate control involving takeovers, for 'a market for corporate control cannot operate where company law allows management to take defensive action which delays or prevents prospective takeovers'.[61] To the extent that a single EU board neutrality rule does not affect the allocation of managerial

[55] Easterbrook and Fischel (1991), p 173.
[56] Franks and Mayer (1996), p 163.
[57] Armour and Skeel (2007), p 1727.
[58] Johnston (2007), p 422.
[59] European Commission, COM(2001) 77 final, p 5, para. 3.1.4.
[60] Winter (2002), p 21.
[61] Johnston (2007), p 450.

decision-making power in the course of the company's ordinary business activities, the strict board neutrality rule as proposed by the EU was justified.[62] Moreover, 'from a supranational perspective, takeover regimes which permit defensive measures and pre-bid structures that depart from proportionality are obstacles to free movement of capital because they distort patterns of cross-border investment from what they would be in the absence of those rules'.[63] Issues of 'proportionality' apart, in theory, it is for shareholders to decide whether to tender or reject an offer; in practice, given that the board neutrality rule remains optional, the board may decide on defensive measures.

5 Harmonising Against EU Harmonisation and Market Orientation Models

5.1 EU Harmonisation Models: Minimum Versus Exhaustive Harmonisation

So far, the discussion in this paper has examined normative issues affecting the choice regarding the nature of a board neutrality rule. There are also prescriptive EU law issues that may have affected the adoption of harmonised EU takeover laws. Legal harmonisation is vital in order to prevent individual Member States from using their legal systems to erect or maintain barriers to market access with a view to protecting their own enterprises from takeovers.[64] As regards EU takeovers, exhaustive harmonisation is preferable to minimum harmonisation, for otherwise it is difficult to achieve effective harmonisation in the EU. The difference between exhaustive and minimum harmonisation is explained by the setting of EU rules beyond which national rules cannot surpass or below which national rules cannot fall. Thus, 'the distinctive feature of fully harmonising secondary legislation is that the Member States may neither surpass nor fall short of the relevant stipulations of Community law'.[65] Harmonisation 'remains a sensitive matter both legally and politically', which perhaps explains why 'the EU has experimented with different types of harmonization measures—exhaustive, optional, partial, minimum, [and] reflexive'.[66]

In the context of this paper, exhaustive harmonisation is where diverse national rules are replaced by uniform mandatory EU rules, and minimum harmonisation is where there is a mixture of EU rules set at a threshold below which national law cannot fall and EU rules that Member States are free to opt into or opt out of. One of the stated objectives of the Takeover Directive is: 'Reinforcing the single market,

[62] Hertig and McCahery (2003), p 199.
[63] Johnson (2010), p 164.
[64] Hopt (2002), p 8.
[65] Case C-160/08 *European Commission v. Federal Republic of Germany*, ECLI:EU:C:2010:230—Opinion of Advocate General Trstenjak delivered on 11 February 2010, ECLI:EU:C:2010:67, para. 107.
[66] Barnard (2010), p 624.

by enabling free movement of capital throughout the EU.'[67] As vehicles of capital, takeovers are at the heart of the single market. Minimum harmonisation is not appropriate for areas that are at the heart of the single market.[68] Exhaustive harmonisation of the Takeover Directive failed when core provisions were made optional. These optional provisions of the Takeover Directive do not maximise the reinforcement of the single market and do not enable free movement of capital throughout the EU.

Arguably, the Directive aimed at exhaustive harmonisation, yet its legal basis in Article 50 of TFEU (ex Article 44 TEC) did not envisage even minimum harmonisation. The preamble to the Takeover Directive states: 'Having regard to the Treaty establishing the European Community, and in particular Article 44(1) thereof.' In other words, having regard to freedom of establishment, which is what Article 50(1) of TFEU (ex Article 44(1) TEC) is all about. Then, the first recital of the Takeover Directive refers to Article 44(2)(g) TEC (Article 50(2)(g)) as its legal basis: '[…] to coordinate certain safeguards […] with a view to making such safeguards equivalent throughout the Community'. In the Treaty, paragraph (g) refers to 'coordinating to the necessary extent the safeguards'. It has been argued that Article 50(2)(g) (ex Article 44(2)(g) 'offers a legal basis for measures aiming at co-ordination "to the necessary extent" but no legal basis for approximation (harmonization) of laws'.[69] While Article 50(2)(g) may not provide a legal basis for harmonisation, it is argued that the Commission aimed at exhaustive harmonisation.

Two seemingly conflicting views are embedded in the Takeover Directive. First, there is the view that the scope of the Directive is limited to the 'co-ordination' of laws and does not extend to their harmonisation. This view is derived from Article 1(1) of the Takeover Directive, which states: 'This Directive lays down measures coordinating the laws […] of Member States […] relating to takeover bids for the securities of companies governed by the laws of Member States'. In *Periscopus AS v. Oslo Bors ASA and Erik Must AS*,[70] it was, convincingly, submitted by the Norwegian Government that 'according to Article 1(1), the Directive provides for the coordination, not the harmonisation, of national laws relating to takeover bids'. Second, there is the view that the Directive envisioned 'harmonisation' of laws. It is a view read in Recital 29 of the Takeover Directive, which mandates the Commission to 'facilitate movement towards the fair and balanced harmonisation of rules on takeovers in the European Union'. This view can also be found in Article 19, which provides for setting up a contact committee with the function 'to facilitate, without prejudice to Articles 226 and 227 of the Treaty, the harmonised application of this Directive through regular meetings dealing with practical problems arising in connection with its application'. It is suggested here that the seemingly conflicting

[67] European Commission, Application of Directive 2004/25/EC on takeover bids, COM(2012) 347 final (Brussels, 28 June 2012), para. 1.3.
[68] Dougan (2000), p 860.
[69] Bernitz (2010), p 191.
[70] Case E-1/10 [2010] EFTA.

views are a result of the mismatch between what the Commission originally set out to do and what it achieved by way of compromise.

Notwithstanding the doubt cast on the legal basis in Article 50(2)(g), the Commission stated that the aim of the Directive was 'to harmonise national rules on takeover bids'.[71] That the Commission aimed at exhaustive harmonisation is evident from the first recital of the Takeover Directive. Arguably, only by exhaustive harmonisation could those safeguards (see Recital 1 of the Takeover Directive) be made 'equivalent throughout' the EU. It seems that the Commission was careful in the choice of wording of Article 50(2)(g) in the first recital, but the actual Treaty wording refers to 'coordinating to the necessary extent', which some have argued envisages only a minimum level of protection throughout the EU.[72] Exhaustive harmonisation is also evident in the third recital of the Takeover Directive, which seeks 'to prevent patterns of corporate restructuring within the Community from being distorted by arbitrary differences in governance and management cultures'. It is difficult to see how 'arbitrary differences in governance and management cultures' in the diverse laws and practices of Member States can be prevented from distorting 'corporate restructuring' other than by exhaustive harmonisation of EU takeover laws. But while the Commission had aimed at exhaustive harmonisation, the Takeover Directive was adopted as a minimum harmonisation instrument.

The problem with minimum harmonisation, particularly as it makes the board neutrality rule optional, is that it does not create a level playing field for takeovers and therefore fails to facilitate free movement of capital across the EU. Moreover, such an 'optionality device ends up setting forth (or, better, tolerating) a Babel-like system for takeover defences around the various national legislations'.[73] Optionality led to the demise of exhaustive harmonisation.

The final version of the Takeover Directive left the contentious areas, one of which being Article 9 (board neutrality rule), optional for Member States. As is well known, the Commission succeeded in adopting the final version of the Takeover Directive only after the Council and the European Parliament had agreed not to harmonise target companies' defensive tactics, the only politically hot issue in the Directive proposal and one that had led to the European Parliament's rejection of the earlier proposal.[74] Given that a mandatory board neutrality rule was not compatible with corporate structures in the majority of EU states, the agreement between the Commission, Council and Parliament, to abandon enacting a mandatory board neutrality rule, provides an object lesson that it is difficult to enact rules that are contrary to the corporate law cultures of the majority of the Member States. Given its optional provisions and the manner in which it was implemented, the Takeover Directive resorted to 'minimal harmonization' of takeover procedures.[75] This new position of minimum harmonisation that gives choice to Member States was

[71] European Commission, COM(2001) 77 final, p 5, para. 3.1.4.

[72] For reference to this discussion see Wolff (1993), p 21.

[73] Gatti (2005), p 567.

[74] Enriques (2006), p 24.

[75] Elst et al. (2007), p 22; Elst and Steen (2007), p 215.

a natural result of the original aim of exhaustive harmonisation having been frustrated by disagreements and compromises. ‘Not surprisingly, legislators have tended to introduce choice for Member States or private parties when they have found it difficult to make headway with resolving a conflict.’[76] Commenting on the final version of the Takeover Directive, the then Chairman of the UK’s Takeover Panel stated that the Takeover Directive was ‘hardly a triumph for harmonisation since the contentious areas remain a matter for Member States to decide for themselves’.[77]

5.2 Market Orientation Models

After adopting the Takeover Directive with the optional board neutrality rule, any hope of exhaustive harmonisation lay in how Member States would implement that option. When implementing the Directive, some Member States opted out of Article 9, pursuant to Article 12, while others opted into Article 9 but implemented the reciprocity rule in Article 12(3). These implementing regimes further destroyed any glimmer of hope of achieving exhaustive harmonisation of takeover laws in the EU. In trying to understand this last blow to any hope of exhaustive harmonisation, a normative argument can be made that there is a correlation between a Member State’s capital market model and that Member State’s choice of implementation of the optional Article 9 of the Takeover Directive. First, it is argued that the board neutrality rule is a protection in dispersed share structures rather than in concentrated share structures, which may explain the implementation choices. Second, it is argued that the UK’s liberal market economy is the basis for why the UK favours the board neutrality rule; and third, there is a correlation between a state’s capital market model and its choice for Article 9. It is argued that coordinated market economies are unlikely to favour a board neutrality rule, while liberal market economies are likely to do so. In making the argument, the UK and Germany are compared, and France is explored.

First, one possible explanation why the UK favours the board neutrality rule while Germany does not is that the rule is a protection in dispersed share structures in the former and in concentrated share structures in the latter. The regulation of EU takeovers is arguably all about protection of shareholders. But the tool, the board neutrality rule, which was proposed to protect shareholders, was not favourable to all EU share ownership structures. The board neutrality rule neutralises management power and empowers shareholders, thus offering protection. In concentrated share ownership structures, the block-holding majority is often in a position to influence management and needs no legal protection against management. In such structures, the effect of the board neutrality rule is to neutralise not only management powers but also the ability of the block-holding majority to influence management. In dispersed share ownership structures, shareholders tend to suffer from a lack

[76] Hertig and McCahery (2006), p 119.

[77] Scott (2004), p 8.

of collective ability to influence management and therefore need legal protection against management.

In dispersed structures, the effect of the board neutrality rule is to neutralise management powers whilst empowering shareholders. In dispersed ownership structures such as the UK, the effect of the board neutrality rule is to empower dispersed majority shareholders. In concentrated share ownership structures such as Germany, the effect of the board neutrality rule is to constrain concentrated majority shareholders. In dispersed share ownership structures, the main concern is expropriation of the interests of all shareholders by management. In concentrated share ownership structures, the main concern is expropriation of the interests of minority shareholders by management. In the dispersed structures, the board neutrality rule empowers all shareholders, while disempowering management. In concentrated structures, the board neutrality rule empowers minority shareholders, while disempowering both management and majority shareholders. Arguably, harmonising the board neutrality rule with its effect of disempowering concentrated majority shareholders was bound to be rejected by economies whose markets have concentrated share ownership structures.

Second, another explanation why the UK favours the board neutrality rule can be found when comparing the capital models and their effect on the rule. The capital models of the UK and Germany are perhaps best compared in the work of Sigurt Vitols, who distinguishes between 'coordinated market economies' (CMEs), such as Germany, and 'liberal market economies' (LMEs), such as the UK.[78] Vitols observes that, Germany, a CME, has 'non-market' institutions, which not only allow for inter-firm coordination, but also regulate the interaction between shareholders and managers, between employees and firms, and among top managers. Vitols observes that, in the UK, an LME, markets play a much more significant role not only in influencing inter-firm relationships but also in regulating interactions between the actors mentioned above. In addition, he observes that the UK is characterised by dispersed ownership, which is generally solely interested in high return on shares (share value maximisation), while Germany is characterised by concentrated ownership with a strategic (rather than purely share value maximisation) motivation for ownership and with actors pursuing a mix of financial and strategic goals.

Third, another possible explanation is the correlation between capital market models and the board neutrality rule. With the capital models of Germany (CME) and the UK (LME) in mind, two arguments can be made about the board neutrality rule: first, CMEs are unlikely to favour a board neutrality rule, as managers would prefer the ability to take defensive measures to protect employees and other stakeholders. Second, LMEs are likely to favour a board neutrality rule, as this may discipline managers or facilitate the market for corporate control where dispersed shareholders may sell their shares. The manner in which the UK and Germany implemented the Takeover Directive simply reflects their LME or CME orientation.

Other takeover regimes, France for example, are not products of an LME or CME orientation. Bob Hancké explains the economic model in France as one based on a

[78] Vitols (2001), p 337.

complex network of elite corporate managers, a configuration that differs from both the German associational model and the Anglo-Saxon market model of economic coordination.[79] These elites are educated at the *grandes écoles* and then follow a top management career path into the state system and the government and then into large companies. Hancké explains that the privatisations in the 1980s and 1990s grafted themselves upon this elite network and created a protective circle of core shareholders recruited from the elites, which gave elite managers more autonomy from the state while protecting the company against takeovers.[80] However, French corporate structures are moving toward an LME as the elite networks are disintegrating.

Arguably, the way in which France implemented the Takeover Directive reflects its largely elite network orientation. A mutual relationship of respect and trust seems to exist between a circle of core shareholders recruited from the elites and the elite managers in large companies. In such a mutual relationship, a board neutrality rule offers no difficulty to elite managers, nor does opting out pose a threat to elite shareholders. Thus, in implementing the Takeover Directive, France not only chose to opt into Article 9, but also implemented the reciprocity rule in Article 12. Article 12(3) of the Takeover Directive exempts companies from applying Article 9 if they become the subject of an offer launched by a company that does not apply the same board neutrality rule. In France, in the case of an offer launched by several offerors, the neutrality obligation imposed on the offeree board will lapse if any of the offerors is not subject to a neutrality rule.[81] Unlike the choice favourable to either CME or LME models, the Article 12(3) reciprocity choice is halfway house (allowing the offeree to use defences against the offeror without opting out of Article 9) for an elite corporate governance network.

It is accepted that the LME/CME divide in the EU is getting more and more blurred, and so this factor may not be impossible to overcome in future EU harmonisation projects. But for the Takeover Directive, the role of this LME/CME divide cannot be ignored. Further, the manner in which the Takeover Directive was implemented by some Member States seems to extinguish any glimmer of hope of exhaustive harmonisation of EU takeover laws. It also marks the end of history for the board neutrality rule in the regulation of EU takeovers. In its report on the implementation of the Takeover Directive, the Commission found that 'a large number of Member States has shown strong reluctance to lift takeover barriers'.[82] Arguably, the exhaustive harmonisation of EU takeover laws failed when in the final text of the Takeover Directive core provisions such as the board neutrality rule were reduced to optional provisions. The Commission seems powerless to reverse the lawful choices of Member States that have 'shown strong reluctance to lift takeover barriers' by opting out of the board neutrality rule. It raises the question: what can the Commission do?

[79] Hancké (2001), p 313.

[80] Hancké (2001), p 320.

[81] Martin et al. (2010), p 118.

[82] European Commission, 'Report on the implementation of the Directive on Takeover Bids' (Brussels, 21 February 2007), SEC(2007) 268, para. 3.

6 The Future of EU Takeover Law Harmonisation

6.1 What Can the Commission Do for Takeover Law?

What would be the outcome if the Commission were to start all over again, this time with the agenda of reforming EU takeover law and making Article 9 of the Directive mandatory? It would require deliberately ignoring the LME/CME divide as discussed above. Removing the optionality of the board neutrality rule and achieving a level playing field across the EU is unlikely to happen in the near future, as a reform of takeover law remains on hold.[83] This is partly due to the shrinking market for corporate control in the aftermath of the global financial crisis. In the run-up to the adoption of the Takeover Directive 2004/25/EC it was clear that achieving a level playing field in the regulation of takeovers in the EU with varying national interests required mandatory rather than optional rules. Due to a lack of political will, the core provisions of the Takeover Directive, i.e. Articles 9 and 11, were made optional, much to the disappointment of the Commission. But recent reports seem to suggest that the Commission is holding back and has taken a default position of complacence.

In its 2002 report on the Draft Proposal for a Takeover Directive, the Commission considered it 'essential' to have a 'European framework for cross-border takeover bids', which, to the Commission, was 'a key condition for withstanding international competition and developing a single capital market'.[84] To facilitate 'international competition and develop a single capital market', on the recommendation of the High Level Group of Company Law Experts (2002),[85] the Commission sought to embed into the Takeover Directive two core provisions—the board neutrality rule and the breakthrough rule. Due to disagreement among Member States seeking to protect their national interests, these core provisions were made optional for Member States in the final version of the Takeover Directive. The Commission was disappointed, as reflected in the statement made by Commissioner Frits Bolkestein, that such a Directive without Articles 9 and 11 would not be worth the paper it was written on.[86]

In its 2007 report, the Commission was further disappointed with how the Takeover Directive was being implemented. The manner of implementation meant that many defences remained in the systems of some Member States. The Commission was concerned that 'these defences may prevent change of control over companies or make a takeover more difficult or costly. As a consequence, they entrench management and/or certain incumbent shareholders and render companies immune to unfriendly raiders.' The Commission found that a number of Member States showed

[83] Mukwiri (2015), pp 186–187.

[84] European Commission, 'Proposal for a Directive of the European Parliament and of the Council on takeover bids' (Brussels, 2 October 2002), COM(2002) 534 final.

[85] European Commission, 'Report of the High Level Group of Company Law Experts on Issues Relating to Takeover Bids' (Brussels, 10 January 2002).

[86] European Commission, Memo 113 (Brussels, 21 May 2003).

'strong reluctance to lift takeover barriers' in opting out of core provisions, which meant a continued lack of a level playing field and anti-takeover defences.[87]

In its 2012 report, the Commission seemed to have become somewhat complacent about taking steps to achieve a level playing field. As the Takeover Directive was adopted back in 2004 with core provisions made optional under Article 12, one remedy lay in revising the Takeover Directive under Article 20. Article 20 requires the Commission to assess the working of the Directive and if necessary propose revising the Directive 5 years after 20 May 2006. In its 2012 report, the Commission found that many Member States had opted into Article 9 while few had opted into Article 11, but it was convinced that this had not been a major obstacle to takeover bids in the EU. With that view, the Commission decided that, 'in light of this and considering also the lack of economic evidence available to justify changing the situation, it does not, therefore, seem appropriate at this stage to propose to make the optional articles of the Directive mandatory'.[88]

In its 2013 report on the application of Directive 2004/25/EC on takeover bids, the European Parliament endorsed the seemingly complacent approach taken by the Commission. It noted that, whilst the majority of Member States had transposed Article 9, both pre-bid defences (e.g. pyramid structures or golden shares) and post-bid defences (e.g. white knight or debt increase) still existed in the Member States. The European Parliament took the view that, 'as the market for corporate control has steadily been shrinking during this period of financial crisis, the assessment on whether and to what extent further harmonisation measures should be introduced with regard to takeover bids would be distorted'. As such, the European Parliament recommended that the Commission simply keep monitoring 'the market for corporate control and prepare a new assessment on the application of the Directive when takeover activities return to a more regular volume'.[89]

The decision taken by the Commission in its 2012 report and endorsed by the European Parliament in its 2013 report seems to be one resulting from complacence. But the reality of the matter is that it took over 30 years of political haggling to adopt a watered down Takeover Directive with core provisions made optional much to the disappointment of the Commission. It would be a big stretch for the Commission to revisit the optional provisions and win back those Member States that in 30 years could not be persuaded to opt for a mandatory board neutrality rule. Call it complacence, but the underlying political history, national interests, and the steadily shrinking market for corporate control during the global financial crisis have meant that reforming the Takeover Directive to achieve a level playing field has been put on hold.

[87] European Commission, 'Report on the implementation of the Directive on Takeover Bids' (Brussels, 21 February 2007), SEC(2007) 268, paras 2.1.1 and 3, respectively.

[88] European Commission, 'Application of Directive 2004/25/EC on takeover bids' (Brussels, 28 June 2012), COM(2012) 347 final, para. 4.26.

[89] European Parliament, 'Report on Application of Directive 2004/25/EC on takeover bids' (2012/2262(INI)) of 25 March 2013, paras. 23 and 24, respectively.

6.2 The Future of EU Company Law Harmonisation

Brexit has raised questions about the future of EU company law, especially as the Takeover Directive was modelled on UK law and practice. The number of companies in the 27 EU Member States trading in the UK is reportedly larger than that of UK companies trading in the 27 EU Member States, and it is argued that the 'high figures are evidence of the attractivity of UK law due to its greater flexibility, its lower minimum capital requirements and the absence of employees' participation on board level'.[90] With many companies in the 27 EU Member States trading in the UK, Brexit is likely to have an impact on the future of EU company law harmonisation in general. Gelter and Reif observed that in areas related to capital markets, the UK model became the driving force of EU harmonisation from the 2000s onwards; in areas such as takeover law and financial reporting, EU law generally adopted UK models; and they argue that it is likely that the UK would have had the same impact if it had not been an EU member.[91] Arguably, the UK is likely to continue influencing the development of EU company law after Brexit. But the fact that while inside the EU the UK's call for a board neutrality rule was not heard by the majority of the EU Member States for over 30 years before the adoption of the Takeover Directive and thereafter, suggests that when the UK exits the EU, while outside the EU its call for re-introducing a board neutrality rule will not be heard either. One impact of Brexit on the future of EU company law harmonisation is that it is likely to mark the end of history for the board neutrality rule.

7 Conclusion

This paper has addressed the normative and prescriptive issues that were bound to affect and continue to affect harmonisation of takeover laws in the EU. It has examined varying takeover laws and practices that prevailed in the 1970s when the Commission first began the process of adopting EU law on takeovers, leading up to the adoption of the Takeover Directive. It has been argued that these differing prior laws and practices had a profound effect on the choices some Member States made, especially with regard to the optional board neutrality rule.

The paper has also discussed the effect that company law theories, with particular focus on manager versus shareholder decision-making primacy, had on the process of adopting the Takeover Directive with an optional board neutrality rule. Turning to prescriptive EU law, it observed that the Directive on takeovers had aimed at exhaustive harmonisation, yet the legal basis of the Takeover Directive in Article 50 TFEU did not envisage even minimum harmonisation. It is no wonder then that while the Commission had aimed at exhaustive harmonisation, the Takeover Directive was adopted as an optional harmonisation instrument.

[90] See Hellwig (2017), p 258.
[91] Gelter and Reif (2017), p 1416.

Furthermore, the paper has examined how the manner in which some Member States implemented optional provisions further extinguished any glimmer of hope for exhaustive harmonisation. This was bound to happen, and the paper has argued that the choices made correlated with the different capital models that underpin the corporate governance structures of the Member States.

As to what can be done or what else the Commission can do to bring about exhaustive harmonisation of EU takeover laws, the paper falls short of simply saying: nothing can be done. It is concluded here that as long as there are varied national corporate laws, most EU corporate law rules are bound to remain categorised as optional, unimportant, or avoidable.

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