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Cremers, Jan; Vitols, Sigurt

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Conclusion

An analysis of workers' rights under the EU Directive on takeover bids

Jan Cremers and Sigurt Vitols

The chapters in this book cover much ground and indicate significant variation between countries regarding the strength of the rights that workers have in takeover situations. The company case studies also indicate wide variation in the degree to which workers can defend their interests in such situations. Despite this heterogeneity, some common themes and general conclusions can be drawn.

1. The Takeover Bids Directive is based on an incorrect economic premise

As reviewed in the Introduction and in Chapter 1 of this book, a major assumption underlying the Takeover Bids Directive is that takeovers are, on the whole, positive for the economy and employment. On that basis, it is in the interests of Europe to encourage takeovers and the restructuring activity they involve. This premise supposedly provides a key justification for the existence of this Directive.

However, in the reviews of studies on the impact of takeovers on employment and value creation, presented in the chapters by Schenk and Pendleton, no hard evidence can be found for a naturally occurring positive contribution to the economy and the labour market. Many, if not most takeovers appear to result in a net reduction in value creation and employment losses, at least in the short run. These negative effects are strongest in the case of 'hostile' takeovers. Therefore, it can be concluded that the optimistic view of the economic benefits of takeovers underlying the Takeover Directive must be qualified, reconsidered and rethought.

The wavelike nature of takeovers, with the bulk of takeovers taking place in the 'speculative' phase of the financial market cycle, indicates the strong connection between takeovers and exuberant financial markets. It appears that companies are strongly motivated to emulate their peers and

that executives under such circumstances have an incentive to build up corporate empires rather than to pursue the genuine goals of the firm. The logic of many takeovers appears to be driven by the logic of financial markets, rather than the long-term interests of firms and their stakeholders.

The deviation from reality of this key assumption indicates the necessity for taking a fresh look at the Directive and its justification. First, a much more cautious attitude should be taken towards takeovers and the desirability of encouraging them, particularly in the case of hostile takeovers. A less critical view of takeover defences should be taken. Secondly, the rights of stakeholders (including workers) to protect themselves from the negative effects of takeovers should be strengthened.

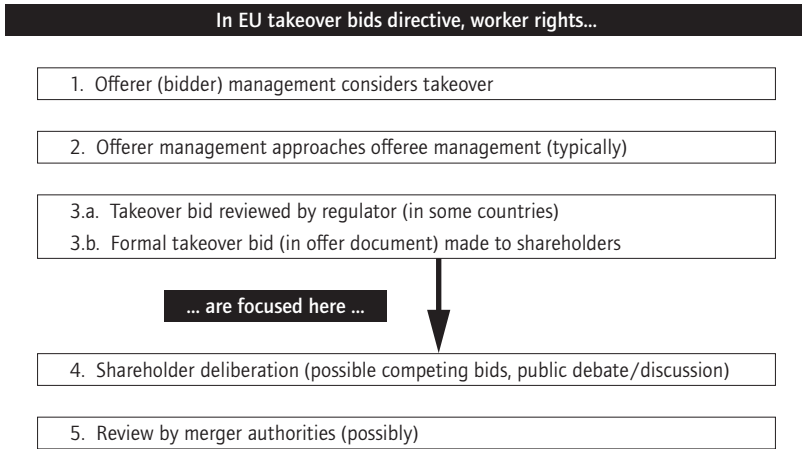
2. Worker rights in the Takeover Bids Directive come too late in the process

As discussed at length in this book, the Takeover Bids Directive requires management to inform workers in the target company once the takeover bid has been made; specifically, they are entitled to receive a copy of the offer document, which among other items has to include the anticipated repercussions of the takeover on employment and production locations. Furthermore, workers have the right to append their opinion to the opinion that the management of the target company is supposed to send to their shareholders (see Figure 1).

However, through the company case studies we can see that these information rights are triggered at a late stage of the process. The key features of the takeover bid have already been decided by the time the offer document is made public and are difficult to influence at this stage. Furthermore, workers' opinion on the merits of the bid may have little impact on the shareholders' final decision, as shareholders in the target company (particularly financial investors) generally have a stronger incentive to 'cash out' by accepting the large premiums typically involved in takeovers than to resist an offer that is not in the long-run interests of the company.

Through the country and company case studies in this book we see that workers in countries with strong works councils (for example, the Netherlands) and/or board level employee representation (for example,

Figure 1 Stages in the takeover process



Denmark, Sweden, Norway) are better able to intervene at an early stage of the takeover process. Early information, consultation and codetermination mean being involved before management makes a final decision, that is, at a stage when workers can still have a significant influence on the decision. Several of these stronger national rights, however, cannot be derived from the Takeover Bids Directive.

A more challenging situation is where a transfer of ownership is agreed between the controlling shareholders of two companies and management is completely bypassed. The reality in such cases is that takeovers are effectively a ‘done deal’ before the formal takeover bid has been made. The chapter on Austria, for example, shows that worker representatives have only used their right of opinion once. Although Austria is a somewhat extreme example because most listed companies have a controlling shareholder, many other European member states, including the most advanced, have seen a significant rise in concentrated (institutional) shareholding over recent decades. In other words, even in countries where workers have strong rights, labour law typically is limited to the relationship between workers and management, not between workers and investors.

Workers should be involved at an early stage in the takeover process, when discussions within the bidder company or between the potential bidder and management of the target company are developing. This right

should not be limited to the worker–management relationship but should also apply to potential owning shareholders/investors. This would allow workers to better protect their interests by giving them greater influence in the takeover process.

3. Worker rights in the Takeover Bids Directive neglect workers employed by the acquiring company (bidder)

Worker rights in the Directive are focused on workers in the target company, specifically on allowing workers in the target company to append an opinion to the report that managers send on to shareholders in the target company. However, employment and economic impacts are frequently more negative in the acquiring company than in the bidder company. Workers in the acquiring company should therefore have strong involvement rights at an early stage in the takeover process.

4. Confidentiality requirements should be revised to respect labour law

The country framework analyses show that in some countries (Netherlands, Finland) there is an explicit conflict between the timing requirements in securities law and rights in labour law regarding information on takeovers. Frequently, securities law or corporate governance rules see this as ‘insider information’ which should be treated with confidentiality. Two of the company case studies (Denmark and Finland) showed that worker board-level representatives did not share their early knowledge of impending takeovers with other worker representatives; this was due to fears about legal liability for passing on confidential information.

As described in the Introduction to this book, however, there are plenty of illustrations of provisions in labour law that allow worker representatives to effectively coordinate with other worker representatives. One example is the transferring of confidentiality requirements to other worker representatives receiving the information, for example, in the case of European Works Councils. Confidentiality requirements need to be revised so that they do not restrict the exercise of worker rights.

5. Worker rights in the Takeover Bids Directive lack effective sanctions

The country studies show that there is a massive difference between the penalties imposed for breaching securities law and labour law. The substantial penalties that can be imposed for violating aspects of securities law stand in stark contrast with the minimal or non-existent penalties for not respecting commitments made on employment or production location in takeover bids.

Perhaps the best known case, the Kraft/Cadbury takeover treated in Chapter 16, shows that the Takeover Bids Directive lacks effective sanctions when the bidder violates explicit promises regarding employment and production in the bid document. Also, statements in the bid document are often quite vague, stating for example that management 'does not anticipate' negative impacts on employment. In the United Kingdom, after the Cadbury situation, trade unions and other stakeholders have demanded that management statements on takeover impacts must be specific and should be legally binding for a set period after the takeover.

6. Merger regulations do not adequately take into account the impact on workers/worker rights

Merger authorities also have a say in allowing or disallowing takeovers. However, the merger rules in the EU and in many Member States are focused on the competition impact (market shares, market prices) of mergers but not on their broader economic impact. Workers and other stakeholders may have a right to attend hearings and express their opinion, but issues such as employment impact are not allowed to play a role in the merger authorities' decisions. Since mergers that are big enough to require approval by the authorities are, however, likely to have a more significant economic impact outside the competition domain, the decisions of merger authorities should explicitly consider a merger's impact on systemic issues such as economic stability, employment and ESG factors. Besides, in a fair number of cases, the authorities require merging parties to apply so-called remedies before allowing the merger to pass, again with a view to competitive effects only. The competition effectiveness of such remedies has recently been questioned, however. For employees, remedies mostly imply that the merging parties have to spin-

off subsidiaries, thus potentially disrupting, and diminishing, employee engagement. Consequently, the use of remedies must be reconsidered.

7. A well-balanced revision of the Takeover Bids Directive is sorely needed

In summary, the six points listed above constitute a strong critique of the Takeover Bids Directive and an argument for its revision. The analysis of country legal frameworks and actual cases of company takeovers show that the balance of power in corporate governance and company law is tipped too much in the direction of shareholder power. This is not in the long-term interests of companies nor of the European economy and society in general. Company law and corporate governance in the area of takeovers – as well as in other areas – needs to be revised to create a better balance between the interests of shareholders, workers and other stakeholders. The positive experiences, based on more extensive national workers' rights, that can be found in some of the contributions of this book can serve as guidelines for a progressive revision that introduces a timely and early warning, a more serious effort to consult workers from both the acquirer and the target company, a rights-based involvement of workers and the introduction of effective and dissuasive sanctions.