Ramifications of the European Commission's Directive on Takeover Bids*

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This text extends an earlier initial analysis and study of the projected Directive, published in September 2003.
The views expressed in the text do not necessarily reflect those of the other discussants in the debate.
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Summary

Launched in 1974, the idea of harmonizing public takeover bid legislation found its first expression in 1985 in a draft Directive. This early draft was rightly rejected in July 2001. Bolstered by 30 amendments, a second version of the Directive was adopted on December 16, 2003.

The initial objective of the Directive was to promote a common framework for cross-border takeovers, to facilitate corporate restructuring and to protect minority shareholders. In the interim between the rejection of the early draft and the adoption of the second proposal, three contentious articles generated extreme tension: the neutrality of the board of directors in the event of a takeover bid, restrictions on transfers of securities and multiple voting rights, and consultation with workforce representatives.

The amendments adopted on these questions by the legal affairs committee of the European Parliament weaken the content of the Directive. It is left to EU member states to decide whether or not to apply the articles on the neutrality of the board of directors and on the exercise of multiple voting rights in the event of a public bid. With this optional feature comes an unpublished "reciprocity" clause. Nevertheless, the spirit of the Directive is unaltered: no article was withdrawn.

One question has not received adequate consideration in this debate: should takeover bids be encouraged? Takeover bids are one of the constitutive principles of a mode of capitalism propelled by the dynamics of financial markets. In economics, theoretical studies of public bids have been complemented by econometric analyses and field research. These show that public bids do not contribute to economic growth. Over the last 30 years, more than two-thirds of public bids have led to a decrease in business productivity and have contributed to a reduction in the overall economic growth rate. In light of this fact, should a Directive on Takeover Bids comply with financial logic, to the detriment of industrial logic? Research indicates that, on the contrary, safeguards necessary to protect firms from the instability of finance should be constructed.

Introduction

According to the terms of the European Commission, the Directive on Takeover Bids, adopted on December 16, 2003[1], continues the series of laws aimed at constructing a European financial area, in which the financial markets of the European Union would be harmonized[2]. In its 1985 White Paper on the completion of the internal market, the Commission announced its intention to draft a thirteenth Directive “dealing with the company law of takeover bids”. The European Council of Lisbon placed this Directive, which is part of the Financial Services Action Plan, amongst the priorities for the integration of European capital markets by 2005. The ruling assumption of the objectives of the Directive is the homogenization of the rules of competition, that is, the creation of a level playing field, within the European Union, in order to promote a common framework for cross-border takeovers. It involves the strengthening of the legal security of these transactions for the benefit of all parties concerned, the facilitation of corporate restructuring, and the protection of minority shareholders.

Hasty readers might see in this Directive just one of the stages on the path to the completion of the European single market. However, several of the articles display the Directive’s originality. Applied literally, they might spell a rupture in the corporate legal framework of the European Union. Political scientists and economists marvel at the length and transformation of an undertaking that, according to its own authors, the amendments of November 2003 have deprived of

1 321 votes for, 219 votes against, 9 abstentions.

2 Translator’s note: the French terms “société”, “social” and variants have been translated as “company”, “corporate”, and so on. For a US reader, the term “corporation” might be a more familiar synonym for “company”. Both “company” and “corporation” are, in the course of the paper, differentiated from the “firm” or “business” or “enterprise”, which are used to translate the French term “entreprise”. The words “société” and “entreprise” correspond approximately to the German words “Gesellschaft” and “Unternehmen”. The difference probably reflects the specific evolution of continental European capitalism and its legal representation. See Zumbansen (2004). The expression “public takeover bid” is almost always abbreviated to “takeover bid” or “bid”.

its meaning. What is the history of this Directive? What are the assumptions that have prevailed in the working out of the Directive? What are the objectives of its supporters, and what criticisms have its detractors made? The text that follows proposes to answer these questions, before presenting a theoretical reading of the issues involved. A study of the content of the Directive precedes an examination of the form and substance of its arguments, inviting one to reinterpret those arguments within an historical perspective.

Under the Macroeconomic Microscope: The Key Articles of the Directive

1. The Fruit of Ripe Reflection

The project of the harmonization of legislation on public takeover bids is nearly 30 years old[3]. The first European Commission report on takeover bids was drawn up in 1974. Eleven years later, a white paper evoked the necessity of deepening the internal market through the harmonization of European legislative regimes. In 1989, a first draft Directive was put forward by the European Commission. Parliamentary criticism led to a revision, which was nevertheless abandoned in 1991. A new draft was presented in 1996, and it was embellished by 20 Parliamentary amendments the following year. In 1999, the Commission for the Internal Market approved the draft of the Directive, conditional on the resolution of a dispute between Spain and the United Kingdom over the supervisory authority for bids in Gibraltar. This matter was resolved in 2000, but the second reading of the Directive revealed disagreements between the Parliament and the Commission. A revised version of the draft, prepared by a conciliation committee, was rejected by 273 votes to 273 votes in 2001. A new proposal was submitted to the Commission in 2002. This proposal was the object of 33 amendments, of which 30 were accepted by the Legal Commission on 27

3 A detailed chronology of the Directive is presented in the annexe.

November 2003. The Parliamentary vote took place on 16 December 2003.

The Directive has 20 articles. The first four articles present the field of application, definitions and general principles, as well as the monitoring authorities. Articles 6, 7 and 8 bear on the information, period of acceptance and publication of the takeover bid. They require that the information on the securities market concerned be made public so as to reduce the risks of a false or rigged market and insider transactions. According to Article 10, quoted companies must publish information on any interference mechanisms relating to potential bids. Shareholders must vote on these structural measures and defence mechanisms every two years. The core of the Directive is contained in Articles 5, 9, 11 and 13. These articles concern:

- minority shareholder protection and the mandatory bid;
- the rule of neutrality of the board of directors;
- the suspension of restrictions on the transfer of securities and voting rights;
- consultation with employee representatives.

These will be the object of detailed presentation below. The Directive concludes with two articles, the content of which has been less bitterly discussed. Article 14 results from an amendment of the European Parliament, and sets out the matter of "mandatory sale". A shareholder owning a certain percentage of the stock of a company following a takeover bid can force any remaining minority shareholders to cede their stock in return for compensation. Finally, in symmetric fashion, Article 15 sets out the matter of "mandatory purchase": following a takeover bid, any minority shareholders can force the majority shareholder to purchase their stock.

Minority Shareholder Protection and the Mandatory Bid

According to Article 5, any bid to purchase a takeover target firm must apply to all shareholders at the same equitable price. In order to guarantee the best price for minority shareholders, the equitable price is held to be the highest price paid for shares by the bidder, or persons operating jointly with the bidder, over a period of six to 12 months preceding the offer. In this way, transactions involving just the bidder and blockholders are prevented. This rule strengthens the rights of minority shareholders. It also renders the organization of a takeover bid more restrictive and may perhaps discourage certain takeover projects. The bidder must be in a position to acquire all the shares in one go and at the same price.

Advocates of this article assert that purely speculative bids can thereby be avoided. Its opponents, who believe in market efficiency, fear lest it bring a reduction in the number of takeovers aimed at improving productivity. "Imperfect financial markets" might stop bidders from purchasing 100 per cent of the equity capital. Among its consequences, Article 5 would outlaw a bidder from acquiring a sufficient percentage of the equity capital in order to get to know the firm better, with a view to a possible takeover[4].

Insofar as this rule makes impossible any bid restricted to blockholders with a view to restructuring a firm and improving its productivity, minority shareholders must choose between their rights and their financial interest. The article makes impossible any share transfer that damages their portfolios, and it reduces the number of exchanges that might improve the composition of those portfolios[5]. The effect of the mandatory bid on ownership structure is not neutral: in the case where shareholders buy all the equity available, the mandatory bid fosters concentration of ownership and the reduction in the number of shares freely exchanged. Thus, this principle stands in opposition to the efforts of certain countries to promote wider share ownership.

The Neutrality of the Board of Directors

According to this rule included in Article 9, the board of a company subject to a bid must call a general shareholder meeting in order to obtain authorization to act with any purpose other than seeking alternative offers that could lead to the frustration of the bid. Thus, the directors can neither increase the equity capital, nor make any big acquisitions, nor sell any significant percentage of the asset,

4 See Bergström (1997).

5 See Bebchuk (1994).

without prior shareholder approval.

The main justification of this rule is the protection of shareholders against the entrenchment of the management of the firm. It derives from microeconomic corporate theories of the principal-agent relation[6]. The directors of a firm, considered as agents, are bound to act in the interests of their principals, the shareholders. The launch of a hostile takeover bid is described as a case in which the interests of the agents are in opposition to those of the principals. Directors confronted with this kind of situation cannot maximize the value of the equity, since their position and the associated modes of remuneration are in play. In particular, they are inclined to structure the firm so that its stock market value is reduced, their eviction is difficult, or the firm is less attractive to the bidder. In this manner, they can diversify the firm according to the specific knowledge that they possess about its activity[7]. They can also buy counter or anti-bid assets, in order to create set-ups complicating any takeover transaction (lack of competition [monopoly], complicated equity capital structure). The neutrality rule purports to remedy this problem by increasing the control that principals enjoy over their agents during the bid period.

The most fundamental objection to the neutrality rule bears on the embargo binding directors in relation to their obligations to stakeholders who are not shareholders. Opponents of this article suggest that the general board meeting should authorize initially the board of directors to undertake any such steps without convening a new general board meeting, so that directors can discharge their obligations. In such a circumstance, the authorization should be renewed annually or every two years. Article 10 partially vindicates these opponents. The question is all the more pointed, because shareholder gains in a takeover bid do not result from efficiency gains in the management of the assets, but from resource transfers made to the detriment of the firm's long-term employees, suppliers and

6 The principal-agent theory, sometimes called agency theory is part of the theory of contracts. In situations where two individuals have an interest in collaborating, the theory enables one to analyse the systems of incentives which can guarantee to the principal that the result of the agent's action corresponds to the prescribed objective.

7 See Edlin and Stiglitz (1995).

clients[8]. In this connection, defenders of the firm's stakeholders underline the rights that these parties acquire by making career-long investments in the firm. Proponents of the model of the firm as a nexus of contracts oppose this viewpoint. Their main thesis lies in the fact that employees are already protected by the very terms of the contract that they sign with the firm, leaving residual rights to shareholders.

The argument which presents shareholders as residual claimants does not hold if some residual element falls outside the contracts of employees, suppliers and other stakeholders. For then, as soon as stakeholders make specific investments, the value of which is, in all probability, minimal outside the firm, "[their] claims to ownership of the firm are just as valid as those of shareholders and perhaps even more so"[9].

As regards the rule that would mandate the calling of an emergency general meeting, its organizational difficulties give rise to concerns shared by the most zealous defenders of minority shareholders. To seek shareholder approval while a bid is underway is practically impossible, because the time required to call such a meeting is too long. These problems are exacerbated by shareholder response times — structurally longer — and by problems of co-ordination among the players involved. The rule of neutrality implies that no action that might hinder a takeover bid should be embarked upon during the bid period. The impossibility of having recourse to certain defence mechanisms poses various problems. In the first place, it may entail unjustifiable interference in the normal running of the firm. Some of the measures outlawed during bid periods are not necessarily methods of defence designed to cause the bids to fail. Acquisitions and disposals can increase the value of the firm, also for the shareholder. Equally, defensive actions against bids can allow other bidders to intervene and to bid up the price. Shareholders cannot take on the task of judging bids, if they delay their decision whether or not to sell their shares. Defensive actions can contribute to improving co-ordination by accentuating the negotiating power of the directors

8 See Deakin, 1997: 124.

9 See Blair, 1995: 239; Deakin and Slinger, 1997: 131.

relative to the bidders.

Restrictions on Share Transfer and Voting Rights

Article 11 of the Directive bears in a very precise way on "the breakthrough rule on share transfer restrictions and voting rights". The breakthrough rule concerns specifically the question of multiple rights, which, according to company directors, rewards and encourages shareholder stability. Within some national legal frameworks, the bidder may circumvent the measures around the principle of one share—one vote, once he or she has acquired 75 per cent of the equity of the target company. The breakthrough measures of the Directive are aimed at ceilings on voting rights, shares with differentiated voting rights, shares with multiple voting rights and share transfer restrictions. The applicability of this rule is thus limited to "the period of acceptance of the bid". The rule has as its objective to render impossible cases in which the bidder owning a significant percentage of the risk-bearing capital of a firm cannot gain control of the firm, because minority shareholders enjoy multiple rights. The article would facilitate the success of hostile bids; the acquisition of a majority holding would suffice in order to achieve effective control.

If the assumptions of microeconomics were valid and agents did not have, for example, wealth constraints, the breakthrough rule would ensure an optimal allocation of corporate control. The rule "leaves the incumbent with no other possibility than to compete if he wants to retain control. Hence, provided that rival and incumbent can finance bids equal to their valuation of the entire firm, the party with the higher valuation prevails"[10]. This principle is no longer valid if blockholders are subject to financial constraints.

Critics denounce the constraint that this rule causes to weigh on the freedom of action of firms and their shareholders in their respective activities. Article 11 has heavy consequences for the ownership structure of firms in the countries of the European Union. The rule would affect the internal organization

10 See Berglöf and Burkart (2003).

of firms, beyond the period of acceptance of the bid. The text of the Directive limits application of the breakthrough rule to this period. In the case of shares with differentiated voting rights, can such a limitation be imposed? Neutralization would lead to the disappearance of differentiated voting structures, which are particularly common in Scandinavia. Other undesirable consequences might result from the efforts of blockholders to neutralize the breakthrough rule.

Can the rule prevent the separation of voting rights from capital holdings in firms that decide to list on the stock market? Those firms will choose capital configurations that will allow them to escape the principle. The slippery slope from differentiated rights structures to pyramid structures would be a direct consequence of the rule in its present incarnation[11]. Blockholders could increase their holding in the firm above the 25 per cent threshold, thereby ensuring that no bidder could acquire more than 75 per cent of the holding. Danish researchers assert on the other hand that this option is accessible to only very few firms in Europe because of treasury constraints[12]. The validity rule may also redefine the financial takeover options of minority shareholders who own more than 25 per cent of the capital. Under the impact of Article 11, a certain number of firms will experience restrictions in the opportunities to increase capital. The rule may thus increase the cost of new financing or limit availability.

The interaction between Article 11 and the article on mandatory bids may be conflictual. By allowing small shareholders to enjoy any gains following a takeover, the bid shuts down the market in the exchange of controlling interests. It increases thereby the cost for the bidder, making the takeover more difficult[13]. The breakthrough rule has the opposite effect. It allows bidders to bring their actions to a successful conclusion without paying a premium to the controlling shareholders. The combination of the rules on mandatory bids and validity invites controlling shareholders to abandon the firm overall, ceding power to omnipotent company directors of firms with diversified shareholder bases.

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11 See Bebchuk and Hart (2002).

12 See Bennedsen and Nielsen (2002).

13 See Berglöf and Burkart (2002).

Informing and Consulting Employee Representatives

The Commission adopted by a large majority a recommendation aiming to make these procedures an obligatory stage prior to any takeover bid. This recommendation is related to Article 9, which anticipates that defensive measures will be taken by the body of shareholders. It is possible that the opinion of employee representatives on possible repercussions of a takeover may not be taken into account if the board of directors does not enjoy a sufficient margin for manoeuvre. For the opinion of the body of stakeholders in the firm to be taken into account, it is necessary that both the opinion of the directors be heard as well as the opinion of shareholders, according to a logic that is principally financial[14].

2. Objections and Amendments

Opposition to the draft Directive focuses on five points: the neutrality of the board of directors in the case of a takeover, restrictions on share transfer and multiple voting rights, employee representative consultation, and reciprocity relative to the legislation of the United States. The first three points have been the object of amendments, which, unlike the fourth, have been adopted. The fifth point has not yet been anchored in the texts. Nonetheless, it has contributed to the federation of heterogeneous opposition against the draft.

The United States/Europe Asymmetry

Takeover legislation in the United States is largely a federal matter. The Williams amendment of 1968 made compulsory the publication of information which served to increase the cost of the purchase transaction. Bids must reveal the strategic choices of the bidders. If takeover premia increased starting in the mid 1970s (Nathan, O'Keefe; 1989), this was countered in the 1990s by the deployment of the anti-takeover defence arsenal first in the United States and

14 The case of the English factory Rover is an example of the importance of employee consultation in the event of a takeover bid: the sale in 2000 of the business by BMW to Phoenix, a consortium of employees, was made possible by the failure to respect the rules on consultation.

then in Canada. Several strategies can be set in motion, amongst which recourse to classified boards, recourse to a white knight, judicial relocation of a firm (to Maryland or Delaware, for example), the pac-man (swallowing up of the acquirer by its takeover target), greenmail (purchase of share blocs held by the bidder), poison pills (shareholders rights plans), and the super-majority vote are the most widely represented in US corporate capital structures. The inequality of European firms relative to their US peers is highlighted by the defenders of the far less well-endowed European systems of protection. Of nearly 2000 US firms studied in 2003, 60 per cent have recourse to classified boards, 55 per cent have poison pills available, and 15 per cent use a "super-majority" voting system (IRRC, 2004). The installation of a harmonized takeover market, supposed to undo the protective mechanisms against hostile takeovers, thus opens wide the doors of the integrated space of the European Union, while US financiers already hold positions of strength in the heart of the City of London.

The November 2003 Amendments

No article has been censured or withdrawn in the amendment framework. The spirit of the Directive, as it has been voted, remains unchanged. It should nevertheless be recognized that the amendments adopted by the Commission weaken its content partially. For the most part, the revisions concern the neutrality of the board of directors in the case of a bid, share transfer restrictions and multiple voting rights, and employee representative consultation. Thus, it is left to member states to choose whether or not to transpose the articles on the neutrality of the board of directors and on the exercise of multiple voting rights in takeover bids into national law. To this elective character is added an unpublished clause of reciprocity, introduced on 16 April 2003, on the initiative of Germany. The clause allows the takeover target firm not to follow the principles of the Directive, if these are not in force in the country of the assailant. The elective character of Articles 9 and 11 make any prognostication difficult on takeover dynamics in the European Union. The question of the adoption or otherwise of these articles remains open. Where the organization of the control of capital is based on principles to which the two articles are in opposition, it is likely that the articles will be rejected. On the other hand, it is difficult to know how countries like France will react, where confusion persists over the issues of the Directive. It remains impossible to say whether hostile takeover bids will become the principal instruments for corporate acquisition.

The three amendments on informing and consulting employee representatives, although supported by the Economic Commission, were not retained by the Legal Commission, nor submitted to the European Parliament. Certainly, their scope exceeded that of the Directive on information and consultation, to the extent that their implications would alter the bid process. The modification that they would have brought to the law on takeover bids in the United Kingdom crystallized opposition and led, between 24 and 27 November, to the conclusion of alliances. In fact, bidders wishing to acquire firms in the United Kingdom must now commit themselves to respecting the rights of the employees of the target firms. Redundancies are in no way not forbidden after the purchase. Only takeover bid projects explicitly implying restructuring and redundancies necessitate compulsory consultation. Had these amendments been accepted, they would have brought about the systematic involvement of employee representatives in the very bid process. The possibility of launching hostile takeover bids would have been much reduced.

The Directive, Firms and Growth

3. Do Takeover Bids Contribute to Value Creation?

Is belief in the theoretical virtues of the market sufficient to defend the Directive? If one subscribes to neo-liberal assumptions, two performance criteria must be taken into account: on the one hand, growth in consumption, and on the other hand, the creation and maintenance of competitiveness in goods markets. It is astonishing to believe that growth in consumption comes from the mode of financing above all, given that neo-classical economics teaches that money supply is of little importance. Whether or not one subscribes to neo-liberal theses, the relevant question is whether markets are efficient. It is problematic to accept this as an *a priori* assumption and to stigmatize the lack of competition, due to the hiatus between the will of shareholders and the strategic management of the firm when in fact the market is not efficient. Whether a takeover threatens or is launched, it is not self-evident that a hostile takeover is the solution.

Many empirical studies (Jensen, 1988; Travlos, 1987; Vilalonga, 2000) show that corporate acquirers do not see their stock price climb more than 2-3 per cent. The price of acquired companies increases by an average of 30 per cent in a 30-day window. In the longer term of one to three years, the outperformance relative to the stock market is –15 per cent. As a whole, takeovers do not increase the productivity of firms, neither at the microeconomic level, nor at the macroeconomic level. More than two-thirds of takeover bids result in a decrease of business productivity and do not increase the underlying rate of growth (Ravenscraft and Scherer, 1987). In the great takeover waves in the United States during the 1960s, the idea of the conglomerate shaped investments: takeovers done within this conceptual framework subsequently destroyed value. In the 1990s, junk bonds were issued to finance an inverse movement of capital, designed to unbundle conglomerates and to reconstitute the capital according to the principle of core business. Analyses show that this too did not increase productivity, neither at the level of the firm, nor at the level of the general economy.

It would be more acceptable to lower one's guard in the face of a takeover bid if capital markets were continuously efficient. The period 1997-2000 in particular illustrates that market efficiency is relative. According to Fisher Black, a market is held to be efficient if fluctuations remain within a factor of 2 of the fair price (between half and double the price). If approximately 15 per cent of firms are continuously undervalued by a third, then that means there are good reasons to restructure, … or that the market is not really efficient.

It is hard to say exactly what the assailant and the target gain, but one thing is clear: the remuneration of the intermediaries is always guaranteed. In a time when capital risk taking is extolled, that does not lack a certain piquancy. In the automobile industry, choice is possible between the policy of Daimler which took control of Chrysler in a takeover, only to finish up three years later with a consolidated value identical to that of Daimler at the outset, and the policy of alliances, co-operation and joint investment, pursued for example by Renault and Nissan. The takeover bid is not the only method.

At the macroeconomic level, the notion of level playing field is in fact far less important than that of the stability of firms. The elimination of every impediment to takeover bids would amount in the end to the subjection of firms to instability. One must then raise the question of the safeguards necessary in order to protect firms from those initiatives produced by investment banks, but which do not yield any increase in the level of economic productivity. That does not mean raising thresholds to a level where the manager of a firm can do what he or she likes. It means that the totality of economic players should be taken into consideration, not exclusively the financial logic.

4. Questioning the Constitution of the Firm

The Directive touches a fundamental element in the constitution of a firm. An approach within the functionalist perspective, conceiving of firms as autonomous units which combine factors of production, allows one to avoid taking into account the different players who make up the firms. In Article 11, technical considerations underpin the notion of "breakthrough", which enables one to attack multiple voting rights, without anticipating the consequences of this breakthrough. Fiscal harmonization, for which, conversely, competition and diversity are considered virtues, is left out in the wilderness.

What is at stake is the choice of business model. Its constitution is profoundly anchored in historic, geographic and social customs. Neither Siemens nor Saint-Gobain is managed like Marconi. It is not certain that European parliaments are aware of the magnitude of a problem which has been presented to them in a highly technical form, while it involves very weighty structural elements.

The core of the problem consists in the volatility needs of financial capitalism, or more directly of an increasing number of financial institutions. The generation of increasing volatility is concomitant with the development of structures advocated by financial institutions. On the side of business, the inverse prevails. In an uncertain environment, in which firms take risks, the quest for stability never ceases. The two-class voting rights defence guarantees a modicum of stability. Shareholders who commit themselves to holding stock for a minimum of two years should be rewarded.

The perspective of the Directive on Takeover Bids opens up that of the Directive dealing with investment companies. The Directive on Investment Companies (DIC), currently under development, has the objective of allowing big investment companies and traders to capture a large mass of securities trading on the European financial market, principally the market in corporate and local authority securities. The issue for this Directive boils down to the trading of a large volume of wholesale savings with which these operators can play in an integrated financial space and which bestows upon them the power to make takeovers, according to short-term logic, but also according to investment strategies and strategies of organization of productive means. Thus, it certainly involves a market for corporate control. The change relative to national systems, in which each firm is integrated within a system of public and corporate control, is historic. The social and political dimensions of this mode of control are also absent and governed by market fashion. Within this framework, an attachment to the short term is the norm, and the critical decision principle becomes the notion of fair competition. It involves the "level playing field" in the takeover market. The investment companies of the City of London are already in the field.

Can these developments be countered by fighting battles over the rights to information and consultation? Information and consultation must be made possible in the bidder-company — that does not thereby undermine the rationale and it remains conditional on the possibility of confidentiality. In general, as in the case of Alsthom, transformations of firms' boundaries make it very difficult to put in place effective consultation mechanisms. Unions and workers of different countries must reach agreement, since events now happen in an integrated financial market going beyond the national frameworks. This does not mean militating for the preservation of national systems which are just as unproductive in many ways. It marks a transformation of the concept of corporate and public control.

5. The Firm versus the Company: Legal Differences

The debate on the Directive ignores the tension between two concepts: the company and the firm[15]. A company is defined as a moral person that unites shareholders. It is governed by a specific body of laws, *company law*. In contrast, a firm has no legal status. It is a working collective, creator of wealth and governed by commercial law and labour law. The dichotomy is of course artificial. What happens in the sphere of the company has an influence on the firm. This is true in the case of a takeover bid, when transfer of the corporate holdings of the company has consequences for the employment and the activity of its claimants. Inversely, the valuation of financial securities in the sphere of the company depends on real activity at the very least. To transcend this duality, there are two ways forward, which underpin distinct models.

Shareholder Sovereignty

In this paradigm case, the firm and its directors are at the service of the shareholders. The company overshadows the firm. This is how the relationship is understood in the report compiled after the rejection of the first draft in 2001 (Winter, 2002). In fact, two reports were complied: one, in January 2002, on the legislation on takeover bids, and the other, in November 2002, on company law, excluding takeover bids. The latter report asserts that company law must favour

15 These remarks are inspired largely by the contribution of Antoine Rebérioux to the debate, reproduced in (Rebérioux, 2003).

the efficiency and competitiveness of firms. Shareholders must be able to ensure that "the company is managed in their interests and that the managers be accountable for that management. According priority to wealth creation, shareholders are, in the opinion of the group, well-placed to play the role of critical observers, not only for themselves, but also, in normal circumstances, for all stakeholders". This reading contradicts the facts. The interest of the firm cannot be dissolved into the interest of the company. Amongst the numerous illustrations of this viewpoint, empirical work shows with the greatest clarity the transfer of wealth from the salaried employees of the target-firm towards the shareholders of the target-company (Deakin, 2003; Deakin and Slinger, 1997).

The Corporate Management Model and Employee Involvement

Company directors have a role of inclusion (integration) and intermediation as regards the interests of the different stakeholders, starting with the employees and shareholders. The board of directors is thus endowed with enlarged responsibilities. It must ensure the coherence of the firm and the company. This is the case in numerous European countries, for example Holland and France, via the concept of the "corporate" interest of the firm.

Involved is the putting in place of institutional arrangements that guarantee the inclusion of the viewpoint of employees in the decision processes, through rights to information, consultation and even co-management. A singular form of convergence is born between the company and the firm when employee representatives sit directly on the managing bodies of the company. The originality of the European control model is probably to wish to take into account this involvement of employees. The Thirteenth Directive points only in the direction of the model of shareholder sovereignty, which constitutes the theoretical framework of the text. Article 9, which remained unchanged in both drafts of the Directive and which is defended with vigour in the Winter Report, rules that directors must yield to the principle of neutrality. Therefore, they can no longer play their role of mediation and conciliation of interests. Furthermore, employee involvement is largely absent from the text, even if the second draft refers it to the Directives on labour law. Thus, the eviction of employees from the debate is complete, while even the directors can no longer valorize their viewpoint or intercede with shareholders. What role do consultation mechanisms have, if directors cannot draw conclusions from the insights thus obtained?

The Logic of Financial Capitalism Behind Regulatory Harmonization

If the authors of the Directive are to be believed, the harmonization of European finance within a single market should guarantee economic integration and thus bring new economies of scale. Economic integration would be a necessary pre-condition for political integration. The notion of integration carries within it the highly debatable strong assumption of the convergence of economies. Its advocates consider that variety within capitalism is only transitory, since in the end there is only one form of capitalism: the best, even if different models continue, according to context, to deliver equivalent economic performances. Observed diversity amongst the developed economies is merely the reflection of the failure of many to adopt the optimal model of the moment.

If one admits for the moment that harmonization is indeed necessary, then the question remains: which model should be preferred as a common framework? Should it be concerned with the protection of shareholders and the facilitation of hostile takeover bids? In that case, the equality between holders of shares and the diversified shareholder base must of necessity be disturbed. Further, sides must be taken between the dispute of control of the firm and the protection of minority shareholders.

Minority shareholder protection certainly fosters dispersion of ownership. However, dispersed ownership does not allow owners to evaluate conscientiously the long-term projects of the firm. Problems related to collective action prevent them from controlling company directors effectively. The decisions of firms with diversified capital are thus more sensitive to "short-termism" or bad management.

Why should hostile takeover bids be made easier? In the first place, this concerns the fight against entrenched directors, against whom the opposition of macroeconomic theories is trenchant. These theories highlight the problems of moral hazard in the principal-agent relation. They start from the fact that directors, appointed as agents by their principals, the shareholders, can dope their efforts with a view to maximizing the value of the stock. The threat of an acquisition bid might seem like a remedy to this moral hazard provided that it threatens the target-company directors to a sufficient degree. They might lose their jobs, were the hostile bid to take control of the firm in order to improve its management[16].

Two arguments work against the entrenchment of directors:

- The threat is less effective to the degree that the incumbent directors may receive financial compensation for the loss of their jobs from the new owners;
- Fear of a takeover bid can improve the management of the firm only if the bidders aim at a target whose performance is weak. In fact, many reasons, other than better management, motivate a takeover bid; among these are the strengthening of the entrenchment of the directors of the bidder-company, remuneration, diversification, or elimination of the competition. It is not enough to obtain good economic results in order to attract takeover bid threats.

Takeover bids threaten the long-term performance of firms. The argument of short-terminism and implicit constraints stresses the perverse effects of a liberalized takeover bid regime on the growth of firms. The pressure demanding the satisfaction of shareholders free of any attachment forces directors to turn away from certain productive investments. If the assumptions of perfect information applied, then restrictions on long-term investment would lead to an instantaneous fall in the share price when the discounted valuation is reduced. In

16 See Marris, 1963; Scharfstein, 1988; or Schmidt, 1997.

reality, the value of investments in research, labour relations, training, or trust building, can be difficult to assess in the short term and from the outside[17]. Directors under pressure to maximize the value of the stock tend to minimize the cost of these investments so that resources go towards bigger dividends. The idea that implicit constraints are tied up in the firm, that they entail investing in the workforce bolsters the possibility of greater security of employment. In the case where financial compensation after redundancy is insufficient, the increased probability of job loss associated with a takeover bid threat diminishes the incentives of directors and employees to invest in qualifications specific to the firm[18].

The history of takeover bids shows that they are the motor of wealth redistribution, not of wealth creation. The increase in shareholder gains is due not to the better management of new directors, but to the earnings transfer which takes place to the detriment of former employees, suppliers, and clients[19]. Other means exist, moreover, to resolve the problems of moral hazard and to promote business management efficiency, such as remuneration or shareholder litigation.

6. The Directive and Its Models

The London Financial Marketplace as Reference

The codes governing merger activities in the English system do not bear on the protection of the ownership rights of shareholders, but on the reinvention of these rights, within the perspective of the creation of a market in the control of capital. On this view, the control and ownership of firms should be freely exchangeable on the capital market. Therefore, a certain form of regulation is necessary in order to create deregulation and then to conceive a market in the control of capital. Since the 1960s, and even since the 1950s for certain forms, this regulation has been progressively enacted through texts devoted to hostile

17 See Deakin and Slinger, 1997: 132f; Stein, 1988.
18 See Knoeber 1986; Shleifer-Summers, 1988; Soskice, 1992.
19 See Deakin and Slinger 1997; Deakin, 2003.

takeover bids, in Great Britain as in the United States. These texts bolster the construction of the market for capitalist control. The fundamental idea driving this process is to dynamize the market players by the shock produced by a takeover bid. It involves therefore disciplining the directors of firm in an abrupt way.

Who are the shareholders? Legally, they own shares, but not the firm, although in Great Britain many institutional shareholders seem to think they do. This question has been the subject of lengthy legal argument. It is necessary to return to the dawn of the industrial revolution to identify the attributions resulting from the possession of shares. It gives clearly important voting and controlling rights. Yet, what are the ownership rights attached to shares? According to ancient legislatures like the House of Lords, directors have obligations only to the firm and not to the shareholders, with the exception of some highly particular situations. Consequently, the board of directors must act for the good of the firm overall, which includes all the beneficiaries, if its action creates value for the shareholders in the long term.

In Great Britain, revision of the code of company law resulted in the idea that the long-term value of shares should be "elucidated". This aim should be achieved mindful of the interests of the different eligible beneficiaries. In principle, this implies that the board of directors of a firm can refuse a hostile takeover bid. Thus it was until the 1950s. In the Great Britain of the 1930s and 1940s, boards of directors did not even advise shareholders of the occurrence of a takeover bid. Since then, not only is the board obliged to warn shareholders, but it must remain neutral throughout the procedure. The code expressly enjoins the neutrality of the board of directors. Therefore, it is not within the power of the directors of a firm to defend the productive community. On the contrary, they are supposed to defend the interests of shareholders and to act so that the latter receive the best financial profit possible.

Indeed therein lies all the interest of a takeover bid, which short-circuits the management team in order to address shareholders directly. The latter then disappear from the scene, unless they accept holdings in the new merged firm. It is then the task of the new management team to run the firm. It is generally held that the acquirer must extract benefits in order to pay the premium promised to shareholders, usually at least 20 per cent higher than the market price. In principle, this happens through managing the firm more efficiently. In reality, however, empirical studies show that it happens through asset disposals and workforce reductions.

The UK code was put in place with the design of representing the interests of shareholders, and more particularly the interests of minority shareholders. The entire set of principles of self-regulation was installed by the operators in London, mainly banks and institutional shareholders (Deakin *et alii*, 2002). Their assortment represents the financial interests of the City. It is not surprising that the interests of employees are not mentioned. Employees were unable to make their viewpoint heard at the moment of the formulation of the rules, which were born out of the crystallization of 40-year-old practices.

From the City Code to the Thirteenth Directive

The Thirteenth Directive takes its inspiration largely from the code of the City, even if it is not quite an exact copy. The principles of equal treatment for all shareholders and of the passivity of the board of directors were enshrined in the initial version prior to its amendment. The principle of equal treatment implies that ownership rights are not protected, but fundamentally reordered. A minority shareholder would probably be ignored in an unregulated system, whereas the principle of equal treatment implies that the acquirer should pay the same price for every share.

This is a mode of capital organization. It implies the absence of large blocks of capital, which are characteristic of continental capitalism. The enactment of the Williams Law in the United States and the adoption of the code in Great Britain have therefore transformed capitalism in these countries in a fundamental way. That is why today it is so different from the French or German models, whereas in the 1930s and 1940s, the similarities were great, at least as far as shareholder concentration went.

The Directive does not just concern the single market and harmonization of rules. It carries a specific and substantial vision of what those rules are supposed to be. The working group which was consulted for the revision of the draft rejected in 2001 was representative of the financial institutions alone. Non-financial firms were absent. The tension between financial institutions and non-financial organizations merits attention nonetheless. The debate was shifted onto technical issues, and the working assumptions were not debated. The Directive mentioned the other Directives that apply in the domain of employee consultation, as well as the different national laws which may exist. However, if one desires to solicit the opinion of employees when a takeover bid is launched, and not just when redundancies are imminent or when the transfer of activity happens, then the distribution of power between the different groups of beneficiaries is fundamentally altered.

From the study of US capitalism, it is evident that takeover bids no longer play a major role, because, notably, of the existence of the defensive arsenal described above. The poison pill should be conceived of as a legal contrivance, invented by lawyers in response to hostile takeover bids and similar to other laws that the acquirer is obliged to respect in similar cases. The technique of selling shares at reduced price to shareholders, thereby increasing the cost of the takeover, was made legally possible. The increasing rarity of hostile takeover bids followed on the slowdown of the motor of a movement which had stopped in the 1980s. After the wave of takeover bids, management teams no longer needed to be convinced of the importance of shareholder value, since a new generation of executives had taken control. Engineers who had managed a fair number of equipment industries were replaced by accountants and lawyers. This major change in the very definition of the conduct of business transformed the firm. It became an asset, the object of financial engineering. The possibility for these directors to avail of call options on holdings in the firm aligned their interest with the interests of shareholders and the stock market price. It is thus no longer useful to appeal to a hostile takeover bid, because shareholder value is the reason for the existence of the firm.

Within this framework, some directors use the metric of share value to measure their management. A sort of virtual conglomerate appears, in which employees can only recover holdings when the stock price collapses. It is not surprising that structures have been erected in which the accounting practices consist in sheltering any penalizing assets in fictive companies, so as to preserve the stock market price. Diagnostic analysis of this pathology is currently underway in the English-speaking OECD countries. At the level of the European Union, the draft Directive violates the legal frameworks of numerous member states, particularly in the area of legislation concerning decision making within company law. Takeover bids are perceived as beneficial, as a means of supplementary pressure on supposedly passive boards of directors. They constitute equally an instrument of profit which feeds the rise in the stock market price and hence the return on the shares. According to partisans of the Directive, the single European market is founded on the following elements: a zone of freely circulating goods, services, persons and capital, on the one hand, and a single monetary policy which favours cross-border synergies, on the other. These two achievements increase cross-border competitive pressure. The Directive thus presents itself as another step towards the deepening of the market by tearing down the barriers and national legal frameworks which limit the possibility of the successful conclusion of takeover bids beyond the borders of the member states.

The Dodges of the Directive

The Directive does not address certain corporate structures, such as foundations or partnerships, nor the golden shares that the State may hold in certain companies. On the whole, it leaves the public sector to one side. In countries where multiple voting rights do not exist, cascade structures enable one to organize equity capital with the help of minority co-operatives that cannot be touched by the new legislation. The Directive does not dismantle the models of control that are primordial in the structure of German and Dutch firms. Nor does it limit the customs and laws bearing on employee consultation.

Member states defend their positions at the Commission by protecting their legal specificities, which are assumed not to impede the Directive. France wishes to preserve its double voting rights, whereas the Nordic countries remain attached to their multiple voting rights. Supported by empirical studies, they affirm that these dispositions in no way discourage hostile takeover bids. This argument is consistent with the discursive register of the Commission. It both accepts the premises and validates the logic of the argument. The content of the Directive is the smallest common denominator shared by the principal negotiating initiators of the Directive.

Representatives of the three nations, the Netherlands, Germany and the England of the City have led this initiative, each defending the comparative advantages on their side. In the end, the German option was adopted both in 2001 and in 2003. The position has fluctuated depending on the changes of mind of successive governments regarding the legal model of the City (Betts, 2003; Callaghan, 2003), which left the issue of Dutch foundations to one side. During the 1990s, neither the *Bundesrat* nor the *Bundestag* judged necessary the harmonization of takeover bid legislation. Opposition from the Kohl government, most notably to the rule of neutrality, was momentarily suspended by the Schröder government, before the sale of Mannesmann catalyzed the inversion of opinion.

7. Locking in the Logic of Finance

The Three Pillars of the Directive[20]

- Deregulation of markets: deregulated negotiable securities markets constitute the structure of liquidity, which allows large capital flows back and forth. This involves making possible the instantaneous transformation of a bet on future dividends into immediate wealth.
- Concentration of collective savings in the hands of institutional managers: by enabling the shifting of financial volumes capable of provoking price movements, concentration organizes the strike force. Evolutions of price are the vectors of the power of finance, far

20 This section takes up the arguments of Frédéric Lordon presented in the debate.

more than the action of shareholders. The stock market price synthesizes the survival data of directors and determines in part corporate vulnerability or resistance to external assaults (Lordon, 2000).

• Transformation of capitalist control: this constitutes the other datum which determines corporate vulnerability. The old regime of the stabilization of ownership of capital is transformed, while crossholdings are undone and ownership of equity capital in the markets is released back into circulation. The transformation makes possible financial hegemony, to the extent that it guarantees the conditions of possibility of shareholder sanction.

In order that directors be sensitive to price variations, capital must be unlocked and must be able to circulate widely. Liberalization of the regime of capital control makes this possible. When mutual protections are neutralized or annihilated, vulnerability and, consequently, the subordinate state of management teams can be organized.

The unlocking to which the Directive may lead may be decisive in the transition to a certain economic model. Thus, its finalization will be the product of political decisions. A non-co-operative logic of mutual destruction is moreover inscribed in the very notion of a level playing field. Each player plays to preserve his or her competitive legal advantage and, in the event of failure, to destroy that of the other players. Game theory shows that this situation converges to a Cournot-Nash equilibrium, that is to say, a suboptimal equilibrium in which everyone loses and all competitive advantages are wiped out.

The Limits of Political Expression within Firms

In Articles 9 and 11, the principled arguments of the Commission appear with more force. Article 9 rules that the general meeting is in the final analysis the instance of all legitimacy. According to Article 11, the new configuration should resemble a democracy of shareholders[21]. Its principle is the following: one share,

21 See Dunlavy (2003) on the subject of shareholder democracy followed by plutocracy in the first half of the

one vote.

The prevailing logic behind these arguments is that of the shareholder viewpoint, which draws its strength from strongly coherent properties. Tactical discourse is therefore risky. In effect, it validates the assumptions of this logic. Once those premises are admitted, the consequences follow irresistibly. The limits of internal critique appear at the same time, that is to say, in the discussion which is exposed to the logic of its opponents. External critique is necessary ; shareholder-based logic must be countered by a different logic, informed by different principles. Towards this end, it is essential to return to some simple questions: what are the concrete results of shareholder government? What are the micro- and macro-economic stability properties of a growth regime dominated by the institutional forms of market finance? Articles 9 and 11 of the Directive pose the question of the sovereign instances of firms, their constitution, and at the heart of these instances, of the sharing around of political capacity. The Directive opines that one should exercise the greatest suspicion regarding the quality of the representation of shareholder interests by the board of directors, and that, on the contrary, the general meeting is the core source of legitimacy. One must possess the means to oppose this shareholder logic, that is to say, to contest that the firm be systematically grasped exclusively within the sole perspective of ownership rights. In other words, this viewpoint must be measured against other principles of legitimation, and if the need exists, to set them in conflict. An entirely different conception of the firm must be envisaged, no longer a company of shareholders, but a productive community. The idea is not new.

In a market where securities are perfectly tradable, it is not legitimate to claim simultaneously liquidity and full political capacity. Political capacity, that is to say, participation in sovereignty, the right to a vote on the register, cannot be compared with wealth-based participation. It is measured by the intensity of commitment of the stakeholders. The degree of commitment — a criterion of legitimacy — is a degree of investment, in the general sense of a personal

nineteenth century in the United States. For a very long time, the propensity of shareholders to influence the management of the firm was not proportional to their investment.

investment in an activity. The investment of shareholders, or the financial form of investment in a market universe where securities are perfectly liquid, is a weak degree of commitment. It is the most tenuous link that one can have with a firm, because it is the most easily reversed. Statistically, it is the least permanent link. Yet, the shareholder viewpoint claims strangely enough the greatest political capacity for this link. That is a contradiction.

For the most part, the investment of employees in their firm is different from that of shareholders. Some directors also invest more in the firm: their accomplishments take form over the long term. All these players, who invest in the firm in a non-financial form, are committed with an intensity and tenacity that have nothing in common with liquid wealth-based participation. It is the hierarchy of these commitments that should determine the distribution of political capacity within the firm. If politics consists in the relations that human beings create amongst themselves, then it is vain for firms to persist in the denial of the political dimension. They cannot escape that facet. Oriented towards objectives that are certainly economic, a firm remains a community with a political dimension, to the extent that it is a community of human beings united in their efforts and, in part, in their destinies. This contradictory and conflictual unity is a political theme which must be debated.

If firms are political communities, that is because they are organized around a "common matter". To call it a "public matter" (a *res publica*) would be excessive. A firm is a community with narrower boundaries and purposes. It involves a common matter: a *res communa*. If a firm is not a republic, it is nevertheless a "common weal". In one case as in the other, political philosophy raises the question of good institutions and allows generally that democracy is a desirable form of republic. Democracy is thus a desirable form of the "common weal". It still remains to make precise the form involved. The preceding argument on the distribution of political capacity can thus be summarized in the following formula: shareholder plutocracy is not entrepreneurial democracy.

The diversity observable in the developed economies would be the mere reflection of the failure of most of them to adapt to the optimal model of the moment. That economies should not be required to adopt a unique model (in the 1980s, Japan; in the 1990s, the United States) does not however mean that anything goes. If one starts from the principle that institutions play a role, not in isolation, but in concert, in the economy, then "national models" are conceivable, as a specific combination of complementary institutions. Complementarity translates the fact that each institutional arrangement in a domain is strengthened in its existence or operation by other institutional arrangements in other domains.

Under certain conditions, a labour market in which negotiations allow stable compromises can thereby promote the acquisition of a high level of staff training, while physical investment is facilitated by the close relations between banks and firms. In these conditions, the existence of lasting and proximate relations between firms and banks enables the implementation of long-term investment projects and facilitates in return the establishment of stable compromises in the labour market. Conversely, a flexible labour market which facilitates the mobility of personnel is complementary to a financial system which guarantees the reversibility of commitments and the liquidity of investments. The field of possible complementarities is extended to domains of innovation, education, systems of professional training, and so on (Amable, Barré and Boyer 1997). Consequently, only certain conceivable "national models" can exist, because most combine non-complementary, and even antagonistic institutional forms.

A hierarchy of institutions can be understood in two ways. The first concerns the very conception of institutional arrangements: the idea of hierarchy necessarily arises as soon as one particular institution takes into account in its conception the constraints and incentives associated with another institution. This definition can turn out to be difficult to employ if the interactions interlinking different institutional arrangements make it difficult to read unambiguously the different constraints that institutions place on each other.

A second definition turns out to be more operational: the transformation of a particular institutional arrangement (transformation of financial systems, modification of forms of competition…) can govern the transformation of other arrangements by suspending the complementarities that constitute some other given institutional configuration, thus necessitating transformations of the family of institutions overall. The opposition between a single model and national varieties allows one to identify historically the trends towards homogenization and the inverse trends, and this articulation drives the dynamic of capitalist economies. Diversity is viable if it allows growth rates to be achieved that are comparable, if not equal, from one country to another, whereas the configuration of the single model cannot be stable, if alone for simple reasons of comparative advantage.

The European Union benefits from the diversity of its economies. Maintaining the varieties of capitalism in Europe encourages competition and strengthens their complementary character, notably in the area of systems of production. Complementarities are structural too: the same rules can have different impacts from one country to another, and, in particular, from one ownership structure to another[22].

22 See Berglöf and Burkart, 2003: 175f, 205.

Conclusion

Takeover bids belong to the logic of a capitalism whose engine is the dynamics of financial markets. Microeconomists thus leave the floor to economists of the theory of institutions to calibrate the change that the Directive may entail. Economic history reminds one that financial deregulation is the cumulative product of political decisions that the adoption of the Directive may bring to completion, and not the result of market-endogenous mechanisms.

The finance-driven approach of the Directive proposes a monolithic reading of business. Several of its articles are inspired by the report which followed the rejection of the Directive in 2001 (Winter, 2002), according to which the company overshadows the firm in legal terms. This vision is in contradiction with the theoretical literature which teaches that the variety of forms of capitalism corresponds to the variety of forms of firms. To organize relations between directors, employees, subcontractors, consumers and local authorities, an infinite number of forms of business is imaginable. Thus, one can follow the incredible multiplicity of forms at work in countries enjoying strong growth, or in certain zones in the process of industrialization, where ownership rights remain fuzzy.

If large firm size is the secret of success, then the Europeans have lost in efficiency by amending this Directive. Conversely, if size does not matter, the promulgation of the Directive is bad, since it will not allow one to escape the destruction of capital just like that brought about by the "new economy" in the 1990s. The history of the four waves of mergers and acquisitions in the United States shows that all they achieved was very great liquidity. The elective character of Articles 9 and 11 makes it difficult to predict the level of takeover bid activity, which will henceforth be subject to this regulation. It is therefore impossible to say whether the Directive will encourage or discourage predation and an increase in the size of firms. Why level the playing field and homogenize the rules of competition? A country that does not dispose of a takeover bid mechanism will still have in its own fashion an entire series of regulations, which may have long-term properties. They are not judged on the instantaneous value of a liquid market, but on robust economic transformations. If takeover bids were to prove inefficient, the preservation of diversity would enable one to ensure not only performance, but also the reaction to changes in the global economy.

An analysis of the Swedish economy focused on the parameters of capital movements adjusted relative to financial results leads to two contradictory conclusions. It demonstrates that the economy can grow very rapidly, if all the "lame ducks" disappear when financial capital is reallocated instantaneously. If the least randomness appears, then this economy collapses. Conversely, under the assumption of moderate capital movements, the economy exhibits the magnificent property of growth rate stability. Why therefore adopt a law as a permanent regime? If shareholders, via liquidity, have the power to shape the share price, they must therefore determine the debt capacity. Entrepreneurs are thus already under fire from shareholders. It is desired to give shareholders in addition the right to orient strategic decisions, yet their commitment is merely short-term.

Therefore, the critique of the Directive presupposes first the critique of the conception of a firm as the exclusive property of its shareholders. Corporate relations with firms have, for each stakeholder, configurations that history has fashioned. Their analysis starts with the study of the different forms of capitalism, notably in their possible complementarities. The great stability of the organization of capital does not come from a single mode of organization, but from the diversity of its declensions which, according to social and economic evolution, share the market in different ways. Advocates of takeover bids imagine that if one is close to the optimum, the risk is zero. However, this proximity indicates to the contrary that a crisis is imminent. In such situations, only the investment banks exercise a risk-free activity. The financial logic structuring the Directive confuses the short term and the long term. By waking up somnolent shareholders, it believes itself to be contributing to the improvement of the efficiency of firms by redundancies and static gains. Yet, it is above all else technical progress and the search for better management that enable productivity gains to be achieved. Financial capital has not the patience necessary to direct the long technical change that enables improvements in performance. Over the long term, business management models that devote adequate resources to the improvement of the qualifications and equipment of the employees and researchers, deliver results incomparably superior to that of shareholder value.

Appendix

Chronology of the Directive

1974

European Commission Report on "takeover bids and other public purchase or exchange bids" (Comm. Doc. XI/56/74).

1977

Recommendation of the Commission on share transactions (ABI EC from 22 VII 1977, No. L 212/37).

1985

White Paper on the completion of the internal market, in which the Commission expresses its intention to draft a Directive harmonizing member-state law on takeover bids.

1988

January: a hostile takeover bid is launched by Cérus in order to acquire 30 per cent of the capital of Société Générale de Belgique. The failure of this bid owes much to the immediate issuance of new shares by Société Générale de Belgique.

21 December: adoption by the Commission of the proposal of "the thirteenth Directive on company law concerning takeover bids and mergers".

1989

19 January: the Commission presents a first detailed proposal to the Council.

28 September: the Economic and Social Committee gives its opinion.

1990

17 January: the European Parliament gives its opinion on the first reading.

10 September: the Commission adopts the amended proposal.

8 October: transmission of the modified proposal to the European Parliament.

1991

8 April: the proposal encounters opposition from numerous member states in the European Council. Some find it too detailed, others consider it useless. Winning a qualified majority appears difficult. The Commission abandons the proposal (Dauner Lieb, 2002, 1-2).

1992

December: in a declaration on subsidiarity to the European Council in Edinburgh, the Commission announces that it will revise the proposal.

1993

10 November: change of legal basis by the Commission.

1994

December: at the European Council in Essen, the Commission reaffirms its intention to relaunch the proposal. A consultation of member states is organized via a high-level questionnaire identifying the themes that should be included in any revised proposal (High Level Group of Company Law Experts, 2002).

1996

8 February: withdrawal of the old Directive proposal by the Commission and transmission to the Council of the new proposal of "the thirteenth Directive of the European Parliament and Council on company law concerning takeover bids".

1997

26 June: the European Parliament delivers its opinion on the first reading and proposes 20 amendments.

10 November: the Commission presents a new proposal whose modifications concern the introduction of employee rights to information in the case of a bid and the outlawing of any authorization of defensive measures prior to a bid. Any authorization of defensive measures by a general meeting of shareholders must be made during the period of the acceptance of the bid (Commission, 1997).

1999

1 May: change of legal basis by the Commission.

21 June: the Council for the Internal Market gives political assent to the Directive, with the exception of the question concerning the competent authority on takeover bids in Gibraltar. The Council asks Spain and the United Kingdom to settle this point in separate negotiations (Commission, 1999). Principal changes in the pre-draft of the Directive:

- all member states must have the mandatory offer rule adopted (in the preceding version, a member state could be dispensed from adopting the rule if its national legislation provided "at least equivalent means" for the protection of minority shareholders);
- introduction of the rule on neutrality: the board of directors of a takeover target company does not have the right to take defensive measures during the bid period, except with the prior authorization of a general meeting of shareholders convened for this specific purpose;
- concession to the opponents of the rule on neutrality: the board of directors of a takeover target has the right to increase the equity capital during the bid acceptance period if the general meeting of shareholders approves the capital increase less than 18 months before the offer (European Report, 1999).

7 December: the Council for the Internal Market examines an interim progress report from the Spanish and British delegations on the state of the negotiations concerning Gibraltar in the framework of the pre-draft of the Thirteenth Directive (European Report, 1999).

23 December: Vodaphone launches officially its takeover bid for the German company Mannesmann (see the in-depth analysis of the impact of this takeover bid proposed by M. Höpner, 2001).

2000

19 June: an agreement is reached on the question of Gibraltar. The Commission adopts a common position.

13 December: second reading of the Directive in the European Parliament, which reveals important disagreements between the Parliament and the Council. Principal criticisms of the Parliament:

- the proposal does not deal with de-listing and sale rights;
- the principle of neutrality of the board of directors is unacceptable;
- the equitable price in the case of the mandatory offer is poorly defined;
- the measures for the protection of employees in the target company are insufficient (Dauner Lieb, 2002, 1: 2).

2001

28 April: Germany withdraws its support for the common position (Hargreaves, 2001).

6 June: end of the conciliation procedure with the adoption of a compromise text adopted by the Conciliation Council. The principal novelties in the compromise proposal are:

- introduction of Article 15, giving four years to member states to transpose the legislation into national law, with the possibility of a further year to apply Article 9 (neutrality rule);
- in response to the necessity for better employee consultation, the compromise

text requires that the board of directors of the takeover target should publish a document outlining its view on the bid, including its assessment of the probable effects of a takeover and any possible relocations of employment and production. Employees must also be informed of the intentions of the acquirer regarding the continuance of the activity of the takeover target company (European Report, 2001).

4 July: the compromise text is rejected in a plenary session of the European Parliament. Three principal points justify the rejection. The Directive does not manage to create a level playing field within the European Union, since it excludes some modes of defence while permitting others. Insufficient protection is accorded to employees. The proposal does not manage to define conditions of competition (level playing fields) that do not disadvantage countries in the European Union relative to the United States.

September: the Commissioner Frederik Bolkestein sets up a High Council of Experts on Company Law to examine the objections advanced by the European Parliament.

2002

10 January: the High Council delivers its report (European Report, 2002).

26 June: Bolkestein delays the presentation of a pre-draft, originally expected in April, then on July 2, and finally after the September legislative elections in Germany (Guerrera, 2002; Handelsblatt, 2002).

2 October: the Commission submits a new Directive proposal (see:
http://euro.p.a.eu.int/eurlex/en/com/pdf/2002/com2002_0534en01.pdf).
The principal changes relative to the proposal of 2001 include:

- a procedure for de-listing and sale;
- a definition of the equitable price to be paid in the case of a mandatory bid;
- new rules tending to institute a series of conditions of competition (the

level playing field):

- a certain number of listed companies are obliged to reveal in their annual report their capital and control structures, as well as their defence measures.
Defensive measures must be examined by the general meeting of shareholders at least every two years;
- no restriction on transfer of securities in the articles of association and contractual agreements can be opposed against the bidder company during the authorized acceptance period. Any restriction on voting rights ceases to have effect when the general meeting of the takeover target company decides to take defensive action. The bidder has the right to convene a general meeting after a successful bid and to vote according to normal company law, without hindrance by the owners or by voting restrictions resulting from the articles of association. Furthermore, any special rights of shareholders to nominate or revoke board members cease to have effect from the first general meeting of shareholders following the closure of the bid;
- a revision clause is proposed. The Commission can, if necessary, propose the revision of measures concerning the conditions of competition (the level playing field) five years after implementation of the Directive;
- clarification of employee rights: the proposed Directive does not anticipate new rights to information or consultation for employees. Nevertheless, it mentions explicitly the necessity of applying the diverse measures anticipated by the Community in this domain (Commission of the European Communities , 2002).

2003

28 January: public session in the European Parliament (see: http://www2.euro.p.a.rl.eu.int/omk/sipade2).

2 February: the United Kingdom and Germany reach an agreement on the Directive concerning takeover bids. In exchange for British support in the search for a level playing field, Germany promises to support the efforts of the United Kingdom to bend the draft Directive on temporary work (see Guerrera, 2003; European Report, 2003).

12 February: Klaus-Heiner Lehne, one of the draft reporters in the Parliament, meets Bolkestein to discuss a proposal admitting that from 2010, multiple voting rights would be neutralized once a company was the object of a takeover bid. Lehne suggests equally including within the field of the draft Directive privileged shares without voting rights, share certificates and non-governmental shares with special rights.

3 March: according to the Competition Council, "no significant new element was presented during the debate, but the Council instructs COREPER, the Committee of Permanent Representatives of the Member States in the European Union, to work towards a compromise as a priority" (European Report, 2003).

6 March: Great Britain launches some proposals concerning the mandatory bid rule and amendment procedures: The Directive specifies that, in the case of a mandatory bid, the investor can choose to offer securities rather than cash; the United Kingdom is not satisfied with this measure, given that it does not sufficiently assure the protection of minority shareholders. The United Kingdom recommends the addition of a new clause, which would allow each member state to specify that a bid must include a proportion in cash. The United Kingdom wishes equally to limit the use of committees, so that the rules cannot be amended anew by the experts once they have been jointly approved by the European Council and Parliament. More exactly, the United Kingdom wishes to know the exact nature of the information that must be included in any future takeover bid document, so as to represent it in the body of the Directive, rather than to submit it to amendments by committee procedure, as recommended in the original draft of the Commission" (European Report, 2003).

12 March: the diplomats of the European Union discuss Lehne's proposal to strengthen the powers of governments to block takeover bids launched by companies outside the Union
(see: http://www.euro.p.a.rl.eu.int/meetdocs/committees/juri/20030324/488037). "The draft proposal indicates that the new code does not concern the rights of governments to reject the transfer of control of a firm under their jurisdiction to a firm that falls under the jurisdiction of a country outside the European Union. The European Commission is concerned with the legal validity of this clause. It pushes to have it put into an annexe rather than in the text of the Directive. Nevertheless, a certain number of governments led by Germany remarks that the code may disadvantage European companies and provoke a wave of takeovers by their North American competitors. They put forward that the new code would oblige European companies to dismantle a number of defence mechanisms and poison pills, which are widely used in the United States."

23 March: Christopher Huhne, reporter to the Committee on Economic and Monetary Affairs of the European Parliament, suggests pursuing the modifications of the compromise proposed by Lehne to avoid an impasse concerning multiple voting rights. "According to Huhne, one option would consist in allowing a much longer transition period, beyond 2010, for the progressive withdrawal of those rights. Another option would consist in preserving the rights, but forbidding firms to issue new rights once the takeover of control had come into force. [...] These two options might dilute the amendments proposed by Lehne, which wanted companies to have until 2010 to change their structure and adapt them to the new rules. As a concession, Lehne proposes that certain types of voting rights, such as the French double vote, should continue to be allowed. Although this was a retreat relative to a complete ban on multiple voting rights, Huhne was afraid that it would still be unacceptable to certain countries, and he had the Directive aborted" (Blum, 2003).

3 April: Lehne declares that an agreement on the Directive by mid-2003, under the presidency of Greece, is "more and more unrealistic". The quarrel over multiple voting rights pushes back the deadlines (DPA, 2003).

11 April: Lehne indicates that the European Parliament is ready to extend the transition period for multiple votes or even to accept some protection of existing rights to appease the Nordic countries. Sweden wishes this protection until 2020. By number of votes, the Nordic countries risk being placed in the minority at the Council of Ministers. Efforts to avoid this seem to originate in part from worries about the referendum in Sweden on the introduction of the euro (FAZ, 2003).

15 April: Finland proposes a compromise. Multiple voting rights will continue to exist, but their influence will be reduced to that of a single vote when there is a vote to block a takeover (Palser, 2003; Börsenzeitung, 2003).

16 April: the Finnish compromise is rejected after intense negotiations. Germany insists on the abolition of French double voting rights. In Brussels, certain voices accuse the German Government of tabling demands that condemn the Directive *a priori* (FAZ, 2003). Germany proposes the introduction of a reciprocity clause to protect European companies from takeovers by companies, notably in the United States, which benefit from anti-takeover defences, which the Directive aims to make illegal in the Union. Opponents of this reciprocity clause assert that the clause would violate the treaties of the WTO. (SZ, 2003).

14 May: opinion of the European Social and Economic Council. A majority of member states could adopt a minimal version of the Directive, without Articles 9 and 11 (Palser, 2003a; DPA-AFX, 2003).

16 May: Bolkestein threatens to use his veto on any sweetened version of the Directive not containing Articles 9 and 11. The unanimity of the Council of Ministers is nevertheless necessary in order to annul the veto of the Commissioner (Dombey, 2003; European Report, 2003).

19 May: five countries, including Spain, Italy, France and Ireland, come out against the minimal version of the Directive (Hagelüken, 2003). Portugal in its turn proposes a compromise, in which companies would be free to choose to apply Articles 9 and 11 or not (European Report, 2003; Plender, 2003; FAZ, 2003).

25 June: according to the bureaucrats of the European Union, an agreement on the Directive is improbable before autumn 2003. "At a working meeting on 20 June, the lines of division between member states were underlined by the first explicit demand by Germany to suppress Articles 9 and 11, which aim at limiting the use of certain defensive measures serving to drive off hostile bids. The member states are stymied, because there is no qualified majority in favour of the original proposal of the Commission, which contains those mechanisms, nor one in favour of the compromise solution proposed by Portugal, which would give companies the choice whether to apply those articles or not. Nor is there the unanimity necessary to force a passage through the legislation despite the opposition of the Commission", (European Report, 2003). During the summer, the draft Directive is withdrawn from the agenda of the meeting of the Council on 22 September.

20 November: the Committee on Economic and Monetary Affairs of the European Parliament proposes 33 amendments. Among these, amendment 5 leaves to each country the choice of whether to adopt Article 9 and Article 11 or not. In the case where a country decides not to adopt those articles, a firm is free to comply with them. According to the reciprocity rule, member states must leave to firms the possibility of not respecting the articles if they are attacked by companies whose defences use the principles of the two articles.

27 November: the Competition Council accepts the compromise containing the 33 amendments presented by the Italian presidency; the Legal Committee rejects the three amendments of Ieke van den Burg.

16 December: Vote on the Directive after the first reading.

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