The EU Takeover Directive: Eight Years Later, Implementation But Still No Harmonization Among Member States on Acceptable Takeover Defenses

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I. INTRODUCTION

A hostile takeover is an acquisition made by a bidder (such as a company or an individual) that is against the will of the target company's management, usually done via a tender offer for the target's outstanding

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shares or a proxy contest.[1] Hostile takeovers can be profoundly beneficial to target companies in terms of improvement of resource allocation, synergistic gains for combining companies, holding management accountable for underperformance, and accurate market valuation.[2] There are risks to hostile takeovers, however, such as a misalignment between new management and shareholders or between majority and minority shareholders after the acquisition.[3] To protect shareholders and investors from these risks and to create the right incentives for takeovers, government regulators have to step in and create a level playing field. In the United States, the federal government regulates disclosures and timetables associated with hostile takeovers and tender offers under the Williams Act, while each state regulates the corporate governance implications of takeovers for companies incorporated within its borders under the internal affairs doctrine.[4] State corporate law is shaped by judicial opinions as well as by statutes, with Delaware at the forefront of corporate law development.[5] In Europe, at the federal level, hostile takeovers are regulated by the European Union's (EU) Takeover Directive, which was passed in 2004[6] and mostly modeled after the United Kingdom's City Code on Takeovers.[7] Each Member State of the European Union already had its own takeover regime and local company law but had to comply with certain mandatory provisions after the Takeover Directive was enacted.[8]

In many instances, a target's board of directors may have options available to it to resist a hostile takeover. For example, for a company incorporated in Delaware, the board of directors at target companies is able to issue special rights convertible to shares to all shareholders (except the bidder) in order to massively dilute the bidder's shares and make acquiring the company extremely expensive and cumbersome (assuming that the board's actions are reasonable in relation to the threat posed).[9] Furthermore, a hostile bidder might announce that it intends to acquire sixty percent of the target's outstanding shares, and any shareholder who does not tender his or her shares (e.g., the remaining

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1. THERESE H. MAYNARD, MERGERS AND ACQUISITIONS: CASES, MATERIALS, AND PROBLEMS 118 (2005).
2. William Magnuson, *Takeover Regulation in the United States and Europe: An Institutional Approach*, 21 PACE INT'L L. REV. 205, 235-36 (2009).
3. *Id.* at 236.
4. *Id.* at 212-14.
5. *Id.* at 214.
6. Council Directive 2004/25 (Takeover Directive), 2004 O.J. (L 142) 12 (EC).
7. *See* Magnuson, *supra* note 2, at 229.
8. *Id.* at 219.
9. *See infra* Part II.B.

forty percent) may later be stuck in a company controlled by the hostile bidder.[10] In Europe, on the other hand, the board of directors at target companies generally must remain neutral in the face of hostile takeover bids, and any defensive actions must be approved by a majority of the shareholders at a general meeting.[11] In addition, if a hostile bidder passes a certain percentage ownership threshold then it must make an offer for *all* of the remaining outstanding shares of a target's shareholders.[12]

This Comment will examine hostile takeover regulatory regimes at both the federal and state level, both in the United States and Europe, and the availability of takeover defenses for target corporations in each jurisdiction. Part II provides a summary of the regulatory landscape at the federal level in the United States and at the local state level in Delaware. Part III investigates European takeover regulation at the federal level contained in the EU Takeover Directive. Part III also investigates three paradigmatic Member States at the local state level: the United Kingdom, Germany, and Spain. Part IV analyzes the differences among the federal and local regimes and suggests possibilities underlying the different schemes and the benefits and disadvantages of each. Part V concludes the Comment by discussing implications for future takeover regulation and the effects it may have on other market actors.

II. U.S. TAKEOVER LAW AND A TARGET'S DEFENSES

A. *Federal Law: The Williams Act*

The Williams Act, enacted in 1968 as an amendment to the Securities Exchange Act of 1934, is the body of federal law that regulates hostile takeovers in the United States.[13] The Act established the basic ground rules for tender offers in the United States, with a stated goal of "neutrality" vis-à-vis acquirers and management.[14] An important objective of the Williams Act was to prevent bidders from engaging in "Saturday Night Specials," which is a colloquial term for tender offers that are available on a first-come, first-served basis, thereby pressuring

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10. *See infra* Part II.B.
11. *See infra* Part III.A.
12. *See infra* Part III.A.
13. Securities Exchange Act, 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (2006) (adding new §§ 13(d)-(e) and 14(d)-(f) to the Securities Exchange Act of 1934).
14. Guido Ferrarini & Geoffrey P. Miller, *A Simple Theory of Takeover Regulation in the United States and Europe*, 42 CORNELL INT'L L.J. 301, 304 (2009). According to the Act's sponsor, Senator Harrison A. Williams, the Act's purpose was "to make the relevant facts known so that shareholders have a fair opportunity to make their decision." S. REP. NO. 90-550, at 3 (1967).

shareholders to reach a quick decision about whether to tender their shares.[15] The Act's proponents argued that it would create a level playing field among bidders and targets by preventing bidders from using "blitzkrieg tactics" that were commonplace prior to the Act's passage, but in reality the new rules benefited managers because it gave more time to plan defensive tactics against a hostile bidder.[16]

There are several key provisions of the Williams Act that are worth noting. The Act's rules provided two new substantive provisions: the requirement of *disclosure* by the bidder as to its intentions and the establishment of guidelines on the *procedure* for completing a tender offer.[17] For example, under section 13(d), which regulates open market share purchases, if an acquirer obtains more than a ten percent interest (later amended to five percent in 1971[18]) in any class of equity securities registered under section 12 of the Exchange Act, it must disclose certain data such as background information, its source(s) of funding, the purpose of the acquisition, plans for changes to the target company (if any), the acquirer's current holdings, and other pertinent information.[19] Similarly, section 14(d) provides procedural guidelines for a tender offer: shareholders who have tendered their shares may withdraw them at any time while the bid remains open, the offer must remain open for at least twenty business days, and if more shares are tendered than the acquirer originally sought, it must purchase the remaining shares on a pro rata basis.[20] In addition to these disclosure requirements, the Act also confers certain protections on a target's shareholders, including permitting them to withdraw shares as long as the bid remains open, forcing the bidder to purchase all shares at the same price, and prohibiting the bidder from making false or misleading statements or omissions relating to the tender offer.[21] Although the Williams Act confers no express private right of action, courts have consistently found standing for targets, bidders, and shareholders to seek injunctive relief enforcing the statute and implementing regulations.[22]

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15. John Armour & David A. Skeel, Jr., *Who Writes the Rules for Hostile Takeovers, and Why?—The Peculiar Divergence of U.S. and U.K. Takeover Regulation*, 95 GEO. L.J. 1727, 1755 (2007).

16. *Id.*

17. Magnuson, *supra* note 2, at 213 (citing CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69 (1987)).

18. 15 U.S.C. § 78(m)(d) (2006).

19. Magnuson, *supra* note 2, at 213; 15 U.S.C. § 78(m)(d).

20. Magnuson, *supra* note 2, at 213; 15 U.S.C. § 78(n)(d).

21. Ferrarini & Miller, *supra* note 14, at 305.

22. Brian E. Rosenzweig, *Private Versus Public Regulation: A Comparative Analysis of British and American Takeover Controls*, 18 DUKE J. COMP. & INT'L L. 213, 227 (2007); Ferrarini

Most relevant, the Williams Act does not regulate the conduct of a target's board of directors in terms of their defensive actions in responding to hostile takeover bids, because "there was no governmental interest in regulating anti-takeover defensive measures."[23] The federal government's stance was to remain neutral in terms of the dichotomy between hostile bidders and incumbent managers and to protect investors by requiring at least minimum levels of disclosure.[24] This federal void largely left takeover regulation to the individual states, the most important of which is Delaware.

B. State Law on Takeover Defenses: Defer to Delaware[25]

State regulation of hostile takeovers largely consists of antitakeover statutes and corporation law (known in Europe as company law).[26] State antitakeover statutes go beyond the scope of the Williams Act and are aimed at protecting incumbent management and the local business community from hostile bidders.[27] These antitakeover statutes have been challenged in court for questions of constitutionality and for whether they were preempted by Congress under the Williams Act, and state

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& Miller, *supra* note 14, at 305 (citing Mobil Corp. v. Marathon Oil Co., 669 F.2d 366 (6th Cir. 1981); Weeks Dredging & Contracting, Inc. v. Am. Dredging Co., 451 F. Supp. 468 (E.D. Pa. 1978)). The U.S. Securities and Exchange Commission (SEC), the enforcer and administrator of the Williams Act, always has standing to bring lawsuits under the Act. It also may grant exemptions to a bidder in the form of "no-action" letters where it will not recommend enforcement in what may otherwise constitute a violation. Rosenzweig, *supra* note 22, at 227; Edward F. Greene, Andrew Curran & David A. Christman, *Toward a Cohesive International Approach to Cross-Border Takeover Regulation*, 51 U. MIAMI L. REV. 823, 834 (1997).

23. John Armour, Jack B. Jacobs & Curtis J. Milhaupt, *The Evolution of Hostile Takeover Regimes in Developed and Emerging Markets: An Analytical Framework*, 52 HARV. INT'L L.J. 219, 241 (2011); *see also* William B. Chandler III, *Hostile M&A and the Poison Pill in Japan: A Judicial Perspective*, 2004 COLUM. BUS. L. REV. 45, 49-50 (2004) (noting that because Congress has not shown interest in adopting regulations on corporate decision making and the SEC has not expressed interest in regulating takeover defenses, state courts are filling the void almost by default).

24. *See* Magnuson, *supra* note 2, at 213.

25. In addition to poison pills and homemade corporate governance defenses (discussed *infra*), U.S. companies may utilize so-called "deal protection devices" to defend already-signed agreements in the face of unsolicited takeover bids. Examples include "go-shop" or "no-shop" clauses in the merger agreement; high break-up or termination fees if the deal does not close; or "fiduciary outs" for the target's board of directors. *See* Albert O. "Chip" Saulsbury, IV, *The Availability of Takeover Defenses and Deal Protection Devices for Anglo-American Target Companies*, 37 DEL. J. CORP. L. 115, 146-50 (2012).

26. Rosenzweig, *supra* note 22, at 228.

27. *Id.* at 230. These laws "are known colloquially as shark repellents." *Id.* at 231 (internal quotation marks omitted).

legislatures have amended the laws to conform to subsequent federal legislation and judicial precedent.[28]

With respect to state corporation law, Delaware is by far the most prominent and influential state in the United States.[29] According to the Delaware Division of Corporations, more than 850,000 companies have incorporated in Delaware, including fifty percent of all publicly traded companies in the United States and sixty-three percent of Fortune 500 companies.[30] Section 141(a) of the Delaware General Corporation Law vests the power of management of the business and affairs of a corporation in its board of directors,[31] and Delaware case law establishes fiduciary duties that directors owe to shareholders and to each other.[32] The fiduciary duties may give rise to shareholder derivative lawsuits challenging the actions of the board of directors on the grounds that the directors breached those duties, resulting in some irreparable harm or economic loss to a class of shareholders.[33] In the context of hostile takeovers, a number of key Delaware decisions have shaped the way boards react to hostile bidders' acquisition attempts.[34]

1. Poison Pills

The shareholder rights plan, also known as the "poison pill,"[35] is one of the most effective takeover defenses used by companies incorporated in Delaware. A poison pill is a resolution undertaken by the board of directors that has the effect, when triggered, of diluting the acquirer's shares once the acquirer reaches a certain ownership threshold (usually ten or fifteen percent, but can be as low as five percent).[36] A company accomplishes this by issuing rights convertible into shares to its existing shareholders (except for the acquirer), usually at some predetermined

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28. *Id.* at 231-32 (discussing an Illinois antitakeover statute in Edgar v. MITE Corp., 457 U.S. 624 (1982); an Indiana antitakeover statute in CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69 (1987); and subsequent "freeze" statutes).

29. *Id.* at 228.

30. *About Agency*, DEP'T OF STATE, DEL. DIV. OF CORPS., http://corp.delaware.gov/aboutagency.shtml (last visited Mar. 5, 2012).

31. DEL. CODE ANN. tit. 8, § 141(a) (2011).

32. *See In re* The Walt Disney Co. Derivative Litig., 907 A.2d 693, 697-98, 751-52 (Del. Ch. 2005) (reaffirming the duties of loyalty and due care, and adding third duty of good faith to traditional fiduciary duties directors owe to shareholders). It should be noted that in contrast to German directors, directors of Delaware corporations owe no fiduciary duties to other stakeholders in the company, such as creditors or employees. *See infra* Part III.C.

33. Saulsbury, *supra* note 25, at 119.

34. *Id.* at 135.

35. Armour & Skeel, *supra* note 15, at 1734.

36. *Id.*

ratio, upon the acquirer reaching the threshold amount.[37] The Supreme Court of Delaware upheld the legality of the poison pill in *Moran v. Household International, Inc.*[38] The practical effect of the pill is to give the target's directors more time to consider the bidder's proposal or else grant the target's management more leverage in the negotiation for the sale of the company; however, poison pills can also effectively block the entire sale of the corporation if the target refuses to redeem the pill.[39] Indeed, when a hostile bidder is attempting to acquire a company with a shareholder rights plan in place, if it cannot successfully get the target's board to redeem the plan, it then faces the daunting task of waging a proxy contest to appoint members to the board to have them redeem the rights plan (which may be difficult in itself should the target have a classified or staggered board). Otherwise, it will have to abandon its bid altogether.[40]

2. "Homemade" Corporate Governance Defenses

Corporations may also "home-make" takeover defenses by structuring them into their corporate governing documents (such as the certificate of incorporation or bylaws), assuming that such practices are allowed in the state where they are incorporated.[41] One such defense is the classified or staggered board, where the members are elected during different years, serve multiyear terms, and can only be replaced when their terms expire (or by procedures articulated in the certificate of incorporation or bylaws).[42] One of the more common practices for utilizing a staggered board is to elect one-third of the directors annually, thus requiring a bidder to wait two election cycles before acquiring a majority and therefore control of the company.[43] This has the effect of making it extremely difficult for a hostile bidder to wage a proxy contest, appoint its own members to the board of directors, and gain control within a short time frame. For example, when Air Products and Chemicals attempted a hostile takeover of Airgas (which had a staggered board), it attempted to gain control of Airgas's board by amending the

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37. *Id.*
38. 500 A.2d 1346, 1348 (Del. 1985).
39. Guhan Subramanian, *Bargaining in the Shadow of Takeover Defenses*, 113 YALE L.J. 621, 629-30 (2003); Ferrarini & Miller, *supra* note 14, at 309.
40. Subramanian, *supra* note 39, at 627.
41. Ferrarini & Miller, *supra* note 14, at 308.
42. *Id.*
43. *Id.*

bylaws to move the annual shareholder meeting earlier in the year for the ostensible purpose of appointing its own members to the board.[44]

3. Standards of Review

Delaware courts have often granted directors considerable deference in their decision-making processes under the standard known as the Business Judgment Rule. This standard is a rebuttable presumption that a board of directors is acting on an informed basis, in good faith, and with an honest belief that their actions are in the company's best interests.[45] The courts have developed three heightened "intermediate" standards of review for cases when the company (1) wishes to preserve its independence (the *Unocal* standard), (2) responds to a hostile bid and it becomes inevitable that the company will sell itself or commit to a change of control transaction (the *Revlon* standard), or (3) engages in defensive conduct that intentionally infringes on the shareholders' right to elect a board (the *Blasius* standard).[46]

In *Unocal Corp. v. Mesa Petroleum Co.*, the Delaware Supreme Court upheld the validity of a self-tender offer (also known as a share repurchase) made by the board of directors that was higher than the competing offer by the hostile bidder, Mesa.[47] The court acknowledged for the first time that in the face of a hostile takeover the board of directors may be acting in its own best interests rather than for the corporation and its shareholders, and it therefore reasoned that a heightened standard was necessary (rather than the deferential Business Judgment Rule).[48] The court ultimately created a two-part test that placed the burden of proof on the incumbent board of directors to prove that the hostile offer was both reasonably believed to be a threat to corporate value and effectiveness and that the defensive actions were reasonable in proportion to that threat.[49]

In *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, the Delaware Supreme Court clarified that once the company is in "sale mode," the role of the director switches from protecting the company's

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44. *See* Steven M. Davidoff, *After Losing Vote, What's Next for Airgas?* N.Y. TIMES DEALBOOK (Sept. 16, 2010, 2:33 PM), http://dealbook.nytimes.com/2010/09/16/after-losing-vote-whats-next-for-airgas/.

45. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

46. Armour, Jacobs & Milhaupt, *supra* note 23, at 245; Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986); Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651 (Del. Ch. 1988).

47. 493 A.2d at 958-59.

48. Armour, Jacobs & Milhaupt, *supra* note 23, at 245 (quoting *Unocal*, 493 A.2d at 954).

49. *Unocal*, 493 A.2d at 955.

independence to auctioneering the company for the highest price for the benefit of the stockholders.[50] In the sale of the company (or in a change of control transaction), the burden lies with the board to prove that its actions were reasonable in terms of both process and price.[51] There is significant case law in Delaware that provides guidance for when *Revlon* duties apply, namely when there are multiple bidders and a sale of the company seems inevitable.[52] However, if a board's *Revlon* duties have not been triggered, it may still use defensive actions—provided that the defensive measures are reasonable in relation to the threat posed—and those actions will be evaluated under the *Unocal* standard.[53]

The final intermediate standard, which came from *Blasius Industries v. Atlas Corp.*, is the least deferential to the decisions of the target's board of directors.[54] In *Blasius*, the target's management refused to redeem the poison pill, so the bidder attempted a proxy contest whereby it would appoint new directors to the board, constituting a majority, who would then redeem the poison pill.[55] To defend against such a measure, the target board of directors appointed two more of its own members, thus denying the bidder the opportunity to appoint an absolute majority to the board.[56] The court found that these actions constituted an intentional interference with the shareholders' voting franchise and held that the actions would be invalidated unless the board could show a "compelling justification" for its actions.[57] The policy justification here is that the board of directors derives its power by virtue of appointment by the shareholders, so they may not obstruct shareholder franchise rights.[58]

III. EU TAKEOVER LAW AND A TARGET'S DEFENSES

A. *Federal Law: The EU Takeover Directive*

On April 21, 2004, the European Union passed the EU Directive on Takeover Bids (Takeover Directive) in an attempt to harmonize EU takeover law among its Member States by creating a level playing field

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50. 506 A.2d at 182.
51. Armour, Jacobs & Milhaupt, *supra* note 23, at 245-46.
52. Saulsbury, *supra* note 25, at 139-40.
53. *Id.* at 140.
54. *See* 564 A.2d 651 (Del. Ch. 1988).
55. *Id.* at 653-54.
56. *Id.* at 654-55.
57. *Id.* at 661-62.
58. Armour, Jacobs & Milhaupt, *supra* note 23, at 247.

for EU companies.[59] The Takeover Directive aimed to "coordinat[e] the laws, regulations, administrative provisions, codes of practice and other arrangements of the Member States, including arrangements established by organisations officially authorised to regulate the markets."[60] When the European Commission first introduced two rules in its 2002 Takeover Directive proposal relating to limitations on takeover defenses and curtailing certain agreements during a bid period, they were met with much skepticism in the subsequent debates in 2003.[61] As a result of the strong objections raised by the German delegation, the Member States reached an agreement known as the Portuguese Compromise, whereby the rules in question would be made optional, giving Member States the ability to "opt out" of either or both of the rules.[62] In the finalized 2004 EU Takeover Directive, these rules became known as the "Board Neutrality Rule" under article 9 and the "Breakthrough Rule" under article 11.[63] In addition, other important provisions and goals of the Takeover Directive include the "Mandatory Bid Rule" under article 5 and the "opt-out, opt-in," and reciprocity provisions (codifying the Portuguese Compromise) under article 12.[64]

1. The Board Neutrality Rule

Article 9 of the Takeover Directive outlines the principles of the Board Neutrality Rule.[65] The Board Neutrality Rule, whose aim is to eliminate board resistance to hostile takeovers, provides that during the bid period, a board of directors must obtain prior shareholder approval before adopting any postbid defensive measures.[66] The Takeover Directive prohibits "issuing any shares which may result in a lasting

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59. Scott V. Simpson et al., *The Future of Takeover Regulation in Europe*, *in* UNDERSTANDING COMPLEX FINANCIAL INSTITUTIONS 2006, at 725, 731 (PLI Corp., Law & Practice, Course Handbook Ser. No. B-1575, 2006).

60. Takeover Directive, *supra* note 6, art. 1(1).

61. *Id.* arts. 5, 12; Simpson et al., *supra* note 59, at 731-32.

62. Scott V. Simpson & Lorenzo Corte, *EU Directive Fails To Harmonize Takeovers*, INT'L FIN. L. REV. 15, 15 (Apr. 5, 2005), http://www.iflr.com/Article/2027907/European-overview-EU-Directive-fails-to-harmonize-takeovers.html.

63. *Commission Report on the Implementation of the Directive on Takeover Bids*, at 5 & nn.7-8, SEC (2007) 268 (Feb. 21, 2007).

64. Takeover Directive, *supra* note 6, arts. 5, 12; Simpson et al., *supra* note 59, at 734.

65. Takeover Directive, *supra* note 6, art. 9.

66. Matthias Köhler, *Blockholdings and Corporate Governance in the EU Banking Sector* 14 (Ctr. for European Econ. Research, Discussion Paper No. 08-110, 2009) (citing Takeover Directive, *supra* note 6, art. 9(1)). Examples of postbid defensive measures include share repurchases (self-tender) aimed to reduce the number of outstanding shares or issuance of new shares to increase the cost of the potential bid. *Id.*

impediment to the offeror's acquiring control of the offeree company";[67] in other words, poison pills are strictly forbidden. The board's only option that does not require prior shareholder approval is to search for an alternative bidder (also known as a "white knight").[68] With respect to decisions made by the board of directors taken before the bid period but not yet implemented, the Takeover Directive requires a general shareholders meeting to approve any action that is not part of the company's normal course of business but may result in frustration of the impending bid.[69] The Takeover Directive requires the target board of directors to act in the best interests of the company and not take any action that would have the effect of denying its shareholders the ability to evaluate the merits of a potential bid.[70]

2. The Breakthrough Rule

Article 11 of the Takeover Directive contains provisions that are meant to "break through" specific clauses in the articles of incorporation of a target, such as voting agreements between the target company and shareholders (or among the shareholders), that could have the effect of frustrating target shareholders from tendering their shares.[71] For example, if there are share transfer restrictions (such as irrevocable undertakings or shareholder agreements concerning lock-ups or rights of first refusal) in the articles of incorporation or "agreements between the target and [its] shareholders or among the shareholders," then those provisions will be considered unenforceable with respect to a bidder during the bid period.[72] Also, restrictions on voting rights are nullified and multiple voting securities count for just one vote at a general shareholder meeting to decide on the adoption of postbid defensive measures (unless the restrictions relate to the conferral of special rights, such as nonvoting preferred shares, and shareholders have been compensated for those special rights).[73] Finally, if a bidder has acquired seventy-five percent of the voting shares then he/she may call a general

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67. Takeover Directive, *supra* note 6, art. 9(2).

68. Köhler, *supra* note 66, at 14 (citing Takeover Directive, *supra* note 6, art. 9(1)).

69. Simpson & Corte, *supra* note 62, at 15 (citing Takeover Directive, *supra* note 6, art. 9(3)).

70. Ferrarini & Miller, *supra* note 14, at 313 (citing Takeover Directive, *supra* note 6, art. 3(1)(c)).

71. Simpson & Corte, *supra* note 62, at 15 (citing Takeover Directive, *supra* note 6, art. 11). While the Board Neutrality Rule focuses on postbid defensive measures, the Breakthrough Rule is meant to eliminate prebid defenses. Köhler, *supra* note 66.

72. Simpson & Corte, *supra* note 62, at 15 (discussing Takeover Directive, *supra* note 6, art. 11).

73. *Id.*

meeting where (1) any transfer or voting restrictions or right to appoint/remove directors no longer applies and (2) all shares carry one vote per share (presumably so the bidder can break up any remaining control positions in the company).[74] These provisions were somewhat controversial since they would preempt prior contractual and legal arrangements, but the Breakthrough Rule only applied to agreements that were entered into after the implementation of the Takeover Directive (May 20, 2006), and any shareholder who lost rights as a result was entitled to "equitable compensation."[75]

3. The Mandatory Bid Rule

Article 5 of the Takeover Directive, also known as the Mandatory Bid Rule, requires bidders who have acquired control of a company to "make an offer to all the holders of that company's securities for all of their holdings at an equitable price."[76] The individual Member States may determine the threshold percentage that constitutes control of a company that triggers the mandatory bid.[77] "Equitable price," which article 5 defines as "[t]he highest price paid for the same securities by the offeror" to any other consenting shareholders over a period of time, is also determined by the Member States.[78] The purpose of the Mandatory Bid Rule is twofold: to prevent controlling shareholders from selling private benefits of control to a third party at the expense of the minority shareholders and to protect minority shareholders by providing an escape hatch for those who do not wish to be a part of the surviving company (by cashing out their shares).[79]

4. The "Opt-Out, Opt-In" and Reciprocity Provisions

As part of the Portuguese Compromise, codified in article 12 of the Takeover Directive, the provisions in article 9 (the Board Neutrality Rule) and article 11 (the Breakthrough Rule) became optional.[80] If Member States do in fact opt out of either or both of those provisions,

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74. Ferrarini & Miller, *supra* note 14, at 314 (citing Takeover Directive, *supra* note 6, art. 11(4)).

75. Simpson & Corte, *supra* note 62, at 15 (citing Takeover Directive, *supra* note 6, art. 11); Ferrarini & Miller, *supra* note 14, at 314 (internal quotation marks omitted).

76. Ferrarini & Miller, *supra* note 14, at 312 (citing Takeover Directive, *supra* note 6, pmbl., art. 5(1)).

77. Takeover Directive, *supra* note 6, art. 5(1), (3).

78. *Id.* art. 5(4).

79. Ferrarini & Miller, *supra* note 14, at 312 (citing Takeover Directive, *supra* note 6, art. 5(1)-(4)).

80. Takeover Directive, *supra* note 6, art. 12(1).

then they must give corporations in those jurisdictions the opportunity to opt back in (a decision that must be made at a general shareholder meeting).[81] Along similar lines, if a bidder that is incorporated in the European Union but is not subject to the Board Neutrality Rule or Breakthrough Rule makes a hostile takeover attempt for a company that is subject to those rules, a Member State may exempt the target company within its borders from the applicable rules.[82] The purpose of these rules is to allow flexibility for all of the Member States in the European Union and to ensure that no Member State or company is disadvantaged as a result of its opting in or out of any of the Takeover Directive's provisions.[83] The irony of the complex structure of opt-out and opt-in rights is that it reduces the efficiency of the Takeover Directive's stated purpose to harmonize regulation in that it, in essence, turns requirements into "recommendations," or possibly creates standards around which Member States may coalesce.[84]

B. *Takeover Law in the United Kingdom*

In July 1959, the Governor of the Bank of England called on a group of merchant banks, institutional investors, large commercial banks, and the London Stock Exchange to create a code of conduct for the regulation of takeover bids.[85] By the fall, the committee had created the *Notes on Amalgamation of British Businesses* (*Notes*), which were a series of guidelines intended to "safeguard the interests of shareholders."[86] Although the *Notes* were generally successful (and amended at various points), they lacked influence on the U.K. takeover market because they lacked schemes for enforcement and adjudication.[87] As a result, the Bank of England reconvened a similar group in July 1967 to draft new tender offer rules known as the Takeover Code (Code), which it completed in March 1968.[88] The Code consisted of ten general principles accompanied by thirty-five specific rules (derived from takeover issues from the previous years with the *Notes* in place).[89] The main spirit of the Code was a general ban on actions meant to frustrate a hostile takeover

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81. *Id.* art. 12(2).
82. *Id.* art. 12(3).
83. Magnuson, *supra* note 2, at 223.
84. Ferrarini & Miller, *supra* note 14, at 315.
85. Armour & Skeel, *supra* note 15, at 1758.
86. *Id.* at 1759 (citing Editorial, *Take-Over Ethics*, TIMES (London), Oct. 31, 1959, at 7) (internal quotation marks omitted).
87. *Id.*
88. *Id.* at 1760.
89. *Id.*

bid (such as share issuances, large asset sales, or entering into an important contract) without prior shareholder approval.[90] In fact, the stated purpose of the Code is "to ensure that shareholders . . . are treated fairly and are not denied an opportunity to decide on the merits of a takeover."[91] Taking cues from the problems with the *Notes* from the previous years, a body of individuals was appointed to adjudicate disputes relating to issues with the rules enshrined in the Code.[92]

The Code is administered by the City Panel on Takeovers and Mergers (the Takeover Panel), which is composed of members appointed from various institutions, such as insurance companies, investment companies, investment management firms, accounting firms, investment banks, and pension funds.[93] The highest level is the Executive, which is a group of "employees and secondees from law firms, accountancy firms, corporate brokers, investment banks and other organisations" that are charged with supervision of the takeovers outside the actual Takeover Panel.[94] Members of the Takeover Panel are assigned to either the Code Committee (for reviewing or proposing amendments to the Code) or the Hearings Committee (for reviewing decisions of the Executive).[95] Appeals of the decisions of the Hearing Committee are heard by a Takeover Appeal Board, which is independent and often headed by former judges who are well versed in takeover law.[96] The defining features of the Code and its administration are its status as a self-regulatory body composed of market players and its flexibility, which allows for quick decisions by the Executive.

Of the Code's substantive rules, two are particularly salient. First, the Code requires that the board of directors of a target corporation obtain prior shareholder approval before taking any defensive actions that might frustrate a potential takeover bid.[97] This is equivalent to the Takeover Directive's Board Neutrality Rule, which was in fact modeled after the Code's rule.[98] Rule 21.1 is an example of a bright-line rule that forbids the board of directors from undertaking "any action which may result in any offer or bona fide possible offer being frustrated or in

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90. *Id.*
91. PANEL ON TAKEOVERS & MERGERS, THE CITY CODE ON TAKEOVERS AND MERGERS § A2(a) (10th ed., 2011), http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/code.pdf.
92. Armour & Skeel, *supra* note 15, at 1760.
93. PANEL ON TAKEOVERS & MERGERS, *supra* note 91, § A4(a)(iv).
94. *Id.* § A5.
95. *Id.* § A4(b)-(c).
96. *Id.* § A8(a).
97. *Id.* § I21.1-.1(a).
98. Ferrarini & Miller, *supra* note 14, at 313.

shareholders being denied the opportunity to decide on its merits"; a subsequent section specifically mentions the poison pill as one of the outlawed defenses.[99] If a company is considering taking a defensive action, it must first seek shareholder approval or at least consult with the Takeover Panel for guidance.[100] Second, the Code contains a mandatory bid rule where a bidder seeking to acquire thirty percent of the outstanding shares of a company must be able to finance the remaining shares and make an offer to all other shareholders at the highest price paid within the thirty percent block.[101] This is equivalent to the Takeover Directive's Mandatory Bid Rule.

The United Kingdom was one of the first Member States to comply with the Takeover Directive and amend its laws accordingly.[102] The Takeover Directive requires that Member States designate competent authorities for the supervision of bids and equip them "with all the powers necessary for the purpose of carrying out their duties, including that of ensuring that the parties to a bid comply with the rules made."[103] The Code is enforced by the Takeover Panel, which is self-regulating, so it needed statutory authority to comply with the Takeover Directive.[104] The United Kingdom enacted statutory backing for the Code in 2006 under section 943 of the Companies Act, designating the Takeover Panel as the official body authorized to enforce takeover rules in the United Kingdom.[105] Section 943 allows the Takeover Panel to impose sanctions (which it previously could not). Section 943 also put in place a statutory regime where the Takeover Panel is under the auspices of the United Kingdom's Financial Services Authority (FSA).[106] The Takeover Panel may request action by the FSA to enforce provisions of the Code, but the FSA has the authority to take action without a prior request from the Takeover Panel.[107] In addition, the Takeover Panel can continue to use one of its long-held practices of "cold shouldering."[108] The United

99. Saulsbury, *supra* note 25, at 141 (citing PANEL ON TAKEOVERS & MERGERS, *supra* note 91, § 21.1(a)-(b)(ii)-(iii)) (internal quotation marks omitted).

100. *Id.* at 141-42 (citing PANEL ON TAKEOVERS & MERGERS, *supra* note 91, app. § 3(1)).

101. Rosenzweig, *supra* note 22, at 224 (citing PANEL ON TAKEOVERS & MERGERS, *supra* note 91, § F9).

102. *See id.* at 218.

103. Takeover Directive, *supra* note 6, art. 4(5).

104. Rosenzweig, *supra* note 22, at 218-20.

105. *Id.* at 219 & n.53.

106. *Id.* at 218-19.

107. *Id.* at 219-20.

108. Generally defined as "the adoption of a rule by an organization that prohibits its members (or those entities it regulates in the case of [a] government body) from dealing with parties that have violated the rules of a different regulatory body." *Id.* at 218-19. "A *firm* must not act, or continue to act, for any *person* in connection with a transaction to which the *Takeover*

Kingdom already had its own versions of the Mandatory Bid Rule and the Board Neutrality Rule in place when the Takeover Directive was passed; it opted out of the Breakthrough Rule, but allowed U.K.-listed companies to opt in.[109]

C. *Takeover Law in Germany*

The unique case of Germany presents a set of corporate laws and norms that distinguish it from the rest of Europe. German company law mandates a two-tiered system of control whereby the board of directors is comprised of both a management board and a supervisory board.[110] The supervisory board, which is tasked with overseeing the conduct of the management board, "has broad information-gathering and intervention powers" to enforce its duties.[111] The supervisory board appoints the management board (which is generally comprised of officers of the company) and has the power to remove board members from office provided there are appropriate grounds for dismissal.[112] German company law has embraced the theory of "stakeholder capitalism" in the sense that various stakeholders in the company have seats at the board level—in fact, the supervisory board is legally required to contain a minimum number of employee representatives.[113] Unlike in the United States where a board of directors owes fiduciary duties only to shareholders, most legal scholars agree that the supervisory board's duty is to protect the interests of the entire firm (which would include other stakeholder constituencies, such as employees and creditors).[114]

German companies are regulated by the German Stock Corporation Act—the *Aktiengesetz* (AktG)—and the Securities Acquisition and Takeovers Act—the *Wertpapiererwerbs-und Übernahmegesetz*

Code applies . . . if the *firm* has reasonable grounds for believing that the *person* in question, or his principal, is not complying . . . with the *Takeover Code*." *Id.* at 219 (citation omitted) (internal quotation marks omitted).

109. Ferrarini & Miller, *supra* note 14, at 330-31.

110. Aktiengesetz [AktG] [Stock Corporation Act], Sept. 6, 1965, BUNDESGESETZBLATT, Teil I [BGBL. I] at 1089, last amended by Gesetz, Dec. 22, 2010, BGBL. I at 3400, art. 2(49), §§ 30-31, 76 (Ger.), *translated in Stock Corporation Act, Translation as at 1 December 2011*, NORTON ROSE, http://www.nortonrose.com/files/german-stock-corporation-act-2010-english-translation-pdf-59656.pdf (last visited July 13, 2012).

111. Theodor Baums & Kenneth E. Scott, *Taking Shareholder Protection Seriously? Corporate Governance in the United States and Germany*, 53 AM. J. COMP. L. 31, 54 (2005).

112. AktG Dec. 22, 2010, BGBL. I at 3400, art. 2(49), § 84 (Ger.).

113. Baums & Scott, *supra* note 111, at 55 (noting that at companies with more than 500 employees, one-third of the seats on the supervisory board must be held by employee representatives, and at companies with more than 2000 employees, one-half of the seats must be reserved for employee representatives).

114. *Id.*

(WpÜG)—which were enacted in 1965 and 2001, respectively.[115] The AktG and WpÜG contain certain provisions regulating voting rights and share disposition that are especially important in a takeover context. For example, the AktG has long prohibited the practice of issuing multiple voting shares, resulting in a one-share, one-vote approach and having the effect of disallowing a shareholder from controlling the corporation with less than a majority of shares owned.[116] In addition, the Control and Transparency Act of 1998 (which amended section 12 of the AktG) prohibited German companies from including voting caps in their articles of incorporation.[117] Voting caps limit the amount of voting rights that any particular shareholder or group of shareholders may own.[118] Finally, section 68(2) of the AktG empowers German companies to create share transfer restrictions where individuals may only transfer shares with the company's approval.[119]

German company law relating to takeovers was largely influenced by a particularly significant event that occurred in 2000—the hostile acquisition of the German telecommunications firm Mannesmann AG by the British mobile phone conglomerate Vodafone Airtouch Plc.[120] At the time of the acquisition, Mannesmann was the single largest company in Germany based on market capitalization.[121] As one scholar framed it, "German companies used to think of themselves as fortresses. . . . Then Vodafone-Mannesmann happened and . . . they were no longer predators

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115. *Id.* at 66-67; Ferrarini & Miller, *supra* note 14, at 321 & nn.170-71.

116. AktG Dec. 22, 2010, BGBL. I at 3400, art. 2(49), § 12 (Ger.); Ferrarini & Miller, *supra* note 14, at 322-23. In contrast, in the United States, state corporation statutes and the SEC allow public companies to have multiple classes of shares with disparate voting rights, often resulting in the founders or management effectively locking in control despite owning a minority of the total shares. For a further discussion of the American approach, see Stephen M. Bainbridge, *The Scope of the SEC's Authority over Shareholder Voting Rights* (UCLA School of Law, Research Paper No. 07-16, 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=985707.

117. Ferrarini & Miller, *supra* note 14, at 323 (citing Gesetz zur Kontrolle und Transparenz im Unternehmensbereich [KonTrag] [Control and Transparency Act] Apr. 27, 1998, BGBL. I at 786 (amending § 12) (Ger.)).

118. *Id.*

119. *Id.* In practice, these share transfer restrictions are used mostly by insurance companies, and the management board must approve the transfer (unless the articles of incorporation allow for approval by the supervisory board or a meeting of the general shareholders). *Id.* at 323 n.187.

120. Margaret L. Hanson, Note, *Merkels & Acquisitions* or *Locusts and Labor Law: What's Really "Plaguing" Cross-Border M&A in Germany?*, 2 BROOK. J. CORP. FIN. & COM. L. 197, 207 & n.84 (2007); *Vodafone Seals Mannesmann Deal*, BBC NEWS (Feb. 11, 2000, 5:02 PM), http://news.bbc.co.uk/2/ni/business/630293.

121. Hanson, *supra* note 120, at 207.

but potential preys."[122] The Mannesmann transaction triggered a German "backlash" that resulted in amendments to the WpÜG and a policy shift on Germany's stance toward takeover defenses generally and certain provisions of the Takeover Directive.[123] Germany had initially supported early drafts of the Takeover Directive's provisions limiting defensive measures, but opposed the final versions after the Mannesmann takeover (their stated motivation for the switch was to create a "transatlantic level playing field" for fear that European companies would be vulnerable to takeovers from foreign companies not subject to similar regulations).[124]

In the aftermath of the Mannesmann transaction, Germany's novel corporate board structure and its stakeholder capitalism system combined to result in an implementation of the Takeover Directive that was unique to Germany. Germany incorporated elements of the Takeover Directive in July 2006 by slightly amending the WpÜG, opting out of the Board Neutrality and Breakthrough Rules but allowing German companies to opt back in if they wished.[125] The acquisition of thirty percent of a company's outstanding shares triggers Germany's version of the Mandatory Bid Rule, requiring a bid for the remaining outstanding shares, unless there is another de facto controlling shareholder.[126] The Breakthrough Rule is largely irrelevant for German corporations: because multiple voting shares are not allowed in Germany, the need to "break through" them once a bid has been made is thus eliminated.[127] However, if a company's articles of incorporation included share transfer restrictions, then those would be "broken through" if the company had opted into the Takeover Directive's article 11.[128] German companies have the ability to opt in to the new Takeover Directive provisions, but may also opt out and be governed by the rules

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122. *Id.* (citing Bertrand Benoit, *Effects of Hostile Takeover Still Being Felt in Germany Vodafone-Mannesmann Case Study of a Clash of Ethos*, FIN. TIMES, Nov. 6, 2002, at 13) (internal quotation marks omitted).

123. Ferrarini & Miller, *supra* note 14, at 321 (citing Jeffrey N. Gordon, *An American Perspective on Anti-Takeover Laws in the EU: The German Example*, *in* REFORMING COMPANY AND TAKEOVER LAW IN EUROPE 542 (Guido Ferrarini, Klaus J. Hopt, Jaap Winter & Eddy Wymeersch eds., 2004)).

124. *Id.* at 321-22 (internal quotation marks omitted); Marco Ventoruzzo, *Takeover Regulation as a Wolf in Sheep's Clothing: Taking U.K. Rules to Continental Europe*, 11 U. PA. J. BUS. L. 135, 147-48 (2008).

125. Ferrarini & Miller, *supra* note 14, at 321 (citing Gesetz zur Umsetzung der Richtlinie 2004/25/EG des Europäischen Parlaments und des Rates vom 21 April 2004 betreffend Übernahmeangebote [Law Implementing European Union Takeover Directive], July 8, 2006, BGBL. I at 1426 (Ger.)).

126. Ventoruzzo, *supra* note 124, at 148.

127. Hanson, *supra* note 120, at 209-10.

128. *See id.* at 210.

of the WpÜG that allow for certain defensive measures in the face of a hostile bid. These measures include (1) taking actions that a "prudent and conscientious manager" would have taken in similar circumstances, (2) searching for a white knight, (3) taking actions approved by the target's supervisory board, and (4) taking actions approved by the shareholders of the target company that authorize the management board to frustrate a bid (which must also have been approved by the supervisory board).[129] These actions allowed under the WpÜG are somewhat limited compared to the options available to boards of directors in U.S. companies (e.g., poison pills are illegal in Germany[130]), but they do grant German directors greater flexibility to frustrate a hostile bid than the Takeover Directive itself allows.

D. Takeover Law in Spain

Spain passed a series of royal decrees relating to hostile takeovers, the first being Royal Decree 1848/1980 of September 5, 1980.[131] This law was amended in 1984, 1988, and again in 2003, but many of the regulations were significantly altered in 2007 once Spain complied with the Takeover Directive.[132] Per the 1988 amendments, the Spanish Securities Commission, or the *Comisión Nacional del Mercado de Valores* (CNMV), regulates hostile takeovers in Spain.[133] If a hostile bid is authorized by the CNMV, then the target's board is subject to a "passivity rule," meaning that directors become limited in their ability to take defensive measures.[134] In Spain, many companies are large, family-owned firms that are essentially protected from hostile takeovers due to

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129. *Id.* (citation omitted). Shareholders may authorize management to undertake defensive measures, such as the sale of a key asset or the issuance of shares to a third party, for a period of up to eighteen months. *Id.*

130. Baums & Scott, *supra* note 111, at 67.

131. José Pérez Santos, *Public Takeover Bids and Possible Means of Defence Under Spanish Law*, *in* DEFENSIVE MEASURES AGAINST HOSTILE TAKEOVERS IN THE COMMON MARKET 201, 201 (J.M.M. Maeijer & K. Geens eds., 1990).

132. *Id.*; Ventoruzzo, *supra* note 124, at 147.

133. Ferrarini & Miller, *supra* note 14, at 326-27 (citing Ley del Mercado de Valores [Stock Market Law] art. 60 (B.O.E. 1988, 18764) (Spain)).

134. *Id.* at 327 (citing Real Decreto 1197/1991 Sobre Régimen de las Ofertas Públicas de Adquisición de Valores [Royal Decree 1197/1991 on the Regulation of Public Takeovers] art. 14 (B.O.E. 1991, 19740) (Spain)). The law specifically outlawed three specific transaction types: (1) issuing shares, bonds, or other securities to underwrite/purchase former instruments (unless done to execute previous resolutions of a shareholder meeting); (2) trading shares of the target with the aim of frustrating the offer; and (3) selling or blocking assets in such a way that it frustrates/affects the offer. *Id.* at 327 n.219.

relatively large block ownership (making mounting a public hostile bid seem prohibitively expensive and less attractive).[135]

Prior to complying with the Takeover Directive, Spanish law tended to be somewhat neutral in terms of favoring bidders over a target board of directors. Some target board defenses were strictly prohibited while others were expressly allowed.[136] For example, the board of directors is allowed to search for a white knight and may take any actions that had been approved by the shareholders prior to the commencement of the bid.[137] With respect to postbid takeover defenses, it is unclear whether they could be undertaken even with the blessing of the shareholders, although some scholars believe that such actions would be allowed on the theory that the board is only prohibited from initiating takeover defenses on its own.[138] Prebid defenses are generally accepted under Spanish law, and voting caps are specifically allowed in Spain's Company Law—thirty percent of Spanish companies include voting caps in their articles of incorporation.[139] The purpose of voting caps is to make hostile takeovers more difficult because a bidder must be able to remove those provisions from the target's articles of incorporation in order to acquire a controlling share.[140] Multiple voting shares are forbidden, much like in Germany, for fear that they could be used by blockholders to "enhance corporate control."[141] In their articles of incorporation, Spanish companies may include supermajority provisions related to general shareholder meetings, making it more difficult for a bidder to gain control (by requiring it to pass a higher threshold).[142] Finally, shareholder-voting agreements are generally allowed under Spanish law if they have been adequately disclosed.[143] These have the effect of enhancing voting power and blocking any potential bids.[144]

Spain complied with the Takeover Directive by enacting Law 6/2007 of April 12, 2007.[145] The new law adopts the Board Neutrality

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135. *Id.* at 332-33 (citing Mara Faccio & Larry H.P. Lang, *The Ultimate Ownership of Western European Corporations*, 65 J. FIN. ECON. 365, 379 (2002)).

136. *Id.* at 327-28.

137. *Id.* at 327 n.219.

138. *Id.* at 327.

139. *Id.* at 328 (citing Fundación de Estudios Financieros, *Observatorio de Gobierno Corporativo de las Grandes Sociedades Cotizadas en el Mercado de Valores Español* 40 (Papeles de la Fundación, No. 14, 2005)).

140. *Id.*

141. *Id.*

142. *Id.* (citing Fundación de Estudios Financieros, *supra* note 139).

143. *Id.* at 328-29.

144. *Id.*

145. Ley del Mercado de Valores [Stock Market Law] art. 60-bis (B.O.E. 1988, 18764), *as modified by* Ley 6/2007 (B.O.E. 2007, 7787) (Spain).

Rule's provisions in article 9 of the Takeover Directive that require shareholders to approve all postbid takeover defenses.[146] The new law specifically does not adopt the Breakthrough Rule in article 11 of the Takeover Directive, but Spanish companies are allowed to opt into it by amending their certificate of incorporation during a shareholder meeting.[147] This is especially significant because Spain, unlike Germany, allows for voting caps in a company's articles of incorporation, and Spain's opting out of the Breakthrough Rule preserves these agreements during the bid period.[148] In addition, Spain has adopted the reciprocity principle; this means a hostile bidder that is not an entity subject to the same rules as a Spanish company (and is not incorporated in Spain) may suspend the Board Neutrality Rule contained in article 9 of the Takeover Directive.[149] Spain has a modified version of the Mandatory Bid Rule where companies must commence a tender offer if they acquire a certain threshold number of shares or gain the right to appoint a certain number of directors, but the tender offer does not have to be for all of the remaining outstanding shares—it must be for at least ten percent of them.[150]

IV. ANALYSIS

The United States and the European Union have very divergent methods for regulating hostile takeovers: the U.S. model tends to favor the board of directors and provide greater flexibility in terms of defenses to hostile takeovers, while in the European Union those same defensive decisions generally lie with the shareholders, not management. In the United States, a bidder could seek to acquire fifty-one percent of a company's outstanding shares and in the process may make a tender offer to any or all of the remaining outstanding shares if it so desires. A target's board of directors has the flexibility to implement takeover defenses such as the poison pill or share repurchases. On the other hand, in the European Union, the Mandatory Bid Rule now requires hostile bidders that acquire a threshold amount to offer to purchase all outstanding shares.[151] In addition, the Takeover Directive's Board Neutrality Rule requires that target boards do not take any actions that

146. Ferrarini & Miller, *supra* note 14, at 327.

147. Ley del Mercado de Valores [Stock Market Law] art. 60-bis, *as modified by* Ley No. 6/2007.

148. *Id.*

149. Ventoruzzo, *supra* note 124, at 161.

150. *Id.* at 147.

151. *Id.* at 139.

would frustrate a bid without prior shareholder approval.[152] The practical effect of these differences has been well documented. In the United States, targets are able to negotiate a higher premium over the prevailing share price because of the threat of defensive measures and the fear from the bidder that their takeover attempts will be thwarted.[153] In fact, the average per share price premium paid in merger and acquisition transactions in the United States exceeded those in the United Kingdom (which has a Board Neutrality Rule) by approximately six percent.[154]

One possible explanation for the differing strategies of regulation in the United States and within the varying European systems is different ownership structure. The theory posits that ownership in U.S. companies is more widely dispersed, so it makes intuitive sense for the power and decisions to lay with those who are "most interested and competent"—the board of directors.[155] In the European Union, on the other hand, ownership is concentrated in fewer hands, with many large companies owned by controlling blocks of shareholders.[156] Thus, it would make more sense for European corporate governance rules and takeover regulation to favor these larger shareholders over boards of directors. This theory has come under scrutiny, however, because there have been studies showing that ownership in the United States is actually highly concentrated and may in fact be more concentrated than in some European countries.[157] In addition, ownership structures were rarely cited in the reasons given for creating particular rules, and shareholders and boards should generally be equally interested in the success of a company (for profits and their jobs, respectively).[158]

Regardless of the reason for the divergence in takeover policy, does the availability of more robust takeover defenses in the United States lead to maximization of wealth for shareholders? The answer appears to be no, as studies have shown that defensive measures actually decrease shareholder value and are used primarily to further entrench management.[159] The Takeover Directive's requirement for a shareholder vote prior to any defensive measure, coupled with the Board Neutrality Rule for the target's board, lends credence to the theory that the EU approach is superior to the American way because it tends to facilitate

152. *Id.* at 141.
153. *See* Rosenzweig, *supra* note 22, at 235.
154. *Id.*
155. Magnuson, *supra* note 2, at 234 (internal quotation marks omitted).
156. *Id.* This is particularly true in Germany and Spain.
157. *Id.*
158. *Id.* at 235.
159. *Id.* at 237.

takeovers, which have been proven to be beneficial for target companies in many instances. The availability of takeover defenses in the United States might appear to be superior in granting management flexibility, but in many cases, the board is just delaying the inevitable sale or using blocking tactics against the hostile bidder, both of which have the effect of decreasing shareholder value.

In the European Union, the Board Neutrality Rule makes hostile acquisitions easier by limiting a target board's ability to raise obstacles to takeovers at the expense of the target's minority shareholders.[160] The effect that this has may ultimately depend on the ownership structure of the target—if the target has dispersed ownership with many shareholders, then the Board Neutrality Rule will likely enhance takeover efficiency.[161] If the target has large blocks of shareholders that control a significant portion of the company's stock, such as in Germany and Spain, the effect of the Board Neutrality Rule is harder to determine because the large blockholders could easily enact postbid takeover defenses at a general shareholder meeting; under these circumstances, the board may end up anything but neutral.[162] In the United States (both at the federal and state levels), obviously there is no Board Neutrality Rule, so a board generally has free rein to implement the takeover defenses it sees fit, assuming it does not act unreasonably and violate its fiduciary duties to its shareholders. In Delaware, the board's actions may be subject to differing standards of review—notably, the *Unocal*, *Revlon*, or *Blasius* standards—to ensure that it has acted properly.[163]

The Breakthrough Rule, which is aimed at prebid defenses (unlike the Board Neutrality Rule, which is aimed at postbid defenses[164]), would likely have a greater effect on EU-listed companies if more Member States had actually opted into it. Instead, most countries preferred to keep the status quo.[165] Only the Baltic States (Latvia, Lithuania, and Estonia) have opted in, and the Breakthrough Rule actually negatively affects the Scandinavian countries (Sweden, Norway, Finland, and

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160. Köhler, *supra* note 66, at 14.

161. *Id.*

162. *Id.*

163. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986); Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651 (Del. Ch. 1988).

164. *Commission Report on the Implementation of the Directive on Takeover Bids*, *supra* note 63, at 5 & nn.7-8.

165. Koen Geens & Carl Clottens, *One Share One Vote: Fairness, Efficiency and EU Harmonisation Revisited*, *in* THE EUROPEAN COMPANY LAW ACTION PLAN REVISITED: REASSESSMENT OF THE 2003 PRIORITIES OF THE EUROPEAN COMMISSION 163-64 (Koen Geens & Klaus J. Hopt eds., 2010).

Denmark) because companies incorporated there tend to have dual class voting structures with multiple voting shares, which would be "broken through" if the companies were to adopt article 11 of the EU Takeover Directive.[166] The United States does not have a functional equivalent to the Breakthrough Rule; however, state courts (e.g., Delaware) have the power to invalidate contractual agreements if they find that the agreements contradict management's fiduciary duties. For example, in *Omnicare, Inc. v. NCS Healthcare, Inc.,* NCS and Genesis signed a merger agreement and entered into certain deal protection devices to defend against potential subsequent bidders (eventually, Omnicare).[167] The Delaware Supreme Court found that these deal protection devices (voting agreements, coupled with a force-the-vote provision and the lack of a fiduciary out in the merger agreement) violated *Unocal* and as a result were invalid and unenforceable.[168] Thus, the court found a way to "break through" existing contractual agreements where the substantive federal law fell silent. If Congress were to enact a law similar to the Breakthrough Rule with corresponding opt-in, opt-out, and reciprocity options, it would not be likely that many states would opt in and force shareholders in companies incorporated within their borders to lose many of their prenegotiated contractual rights. If a state were to enact a law similar to the Breakthrough Rule, it is likely that future corporations would "vote with their feet"—in other words, decide to incorporate in another state with more favorable corporation statutes.

The Mandatory Bid Rule has been enacted in most EU Member States with thresholds set at or around thirty percent.[169] Its stated purpose is to protect minority shareholders, who may not be the first ones to tender their shares, and allow them to receive equitable compensation for their shares no matter if they tender first or last.[170] Some scholars have posited, however, that an unintended effect of the Mandatory Bid Rule is dispersed ownership because the Rule makes it unattractive to acquire a controlling stake in a company.[171] This would, in turn, lead to companies with dispersed ownership being listed on public exchanges and those with large block ownership becoming private instead (much like in the

166. *See id.* at 163-64. Many U.S.-listed companies have this multiple voting share structure as well. See discussion *supra* note 116.

167. 818 A.2d 914, 924-27 (Del. 2003); *see also* Saulsbury, *supra* note 25, at 147, 151.

168. *Omnicare*, 818 A.2d, at 939.

169. *Commission Report on the Implementation of the Directive on Takeover Bids*, *supra* note 63, at 13-14.

170. Geens & Clottens, *supra* note 165, at 153-54.

171. *Id.* at 154.

United Kingdom).[172] In the United States, where there is no Mandatory Bid Rule, bidders tend to structure tender offers in such a way that they incentivize target shareholders to tender sooner rather than later (so-called "structural coercion"), but once bidders become the majority shareholders, they owe a fiduciary duty to the target's minority shareholders.[173] The Williams Act does require bidders to compensate those shareholders who have tendered their shares but are outside the bidder's stated percentage acquisition threshold, albeit on a pro rata basis.[174] The Mandatory Bid Rule could potentially have a profound impact on activist shareholders such as hedge funds, private equity firms, and institutional investors who value control of a company. In certain circumstances, these entities might only be seeking to acquire a large block of shares, appoint members to the board of directors, and take the company in a direction that they feel would be the most profitable. The Mandatory Bid Rule could chill this type of activism because it would essentially compel large shareholders to make an offer for the entire company—an endeavor that many activist shareholders would not find attractive in each and every situation.

The fact that a Member State has the choice to opt in, opt out, and/or provide reciprocity to its corporations further muddles the picture of the Takeover Directive. A Member State or a corporation within its borders easily could put up barriers to a hostile bidder that is not subject to the same takeover rules (specifically the Board Neutrality Rule or the Breakthrough Rule), and the resulting protectionist behavior is exactly what the Takeover Directive attempted to fix.[175] Indeed, one commentator has suggested that to achieve full reciprocity, the Takeover Directive would have to take radical steps—forcibly convert blockholder-controlled companies into widely held ones and reintroduce the "one-member, one-vote" norm that was common in early nineteenth-century

172. *Id.*

173. *See generally*, Subramanian, *supra* note 39.

174. Securities Exchange Act, 15 U.S.C. § 78n(d) (2006).

175. There have been instances where a country's national government steps in to block a potential acquisition of a company, citing national interest or another nationalistic motive. For example, the Spanish government preferred Gas Natural to acquire Endesa, Spain's biggest electricity firm, over a German rival bidder, E.ON to "create a national energy champion and keep Endesa in Spanish hands." *How Not To Block a Takeover: Spain's Government Is the Big Loser in the Battle for Endesa*, ECONOMIST (Apr. 3, 2007), http://www.economist.com/node/8954103. Similarly, when the U.S. company PepsiCo was allegedly preparing to mount a bid for French Danone, the country's political leaders pledged to "defend France's interests." Franck Riboud, *France Flouts the Pepsi Challenge*, TELEGRAPH (July 24, 2005, 12:01 AM), http://www.telegraph.co.uk/finance/2919479/France-flouts-the-Pepsi-challenge.html (internal quotation marks omitted).

corporations.[176] Given the political landscape of the European Union, this is not likely. There is no functional equivalent of the opt-out and opt-in provisions and reciprocity in the United States, except perhaps when a derivative suit is brought in multiple jurisdictions and a judge chooses which state's corporation law should apply. But even in that scenario, it would be unusual to force a board to be neutral in the face of a hostile takeover or "break through" voting agreements among shareholders (unless a court found that the agreements violated federal or state securities laws). The practical effect of the opt-in reciprocity provisions in article 12, the byproduct of the Portuguese Compromise, is to render arguably the most important sections of the Takeover Directive into a series of recommendations rather than mandatory provisions for all Member States.

In its reports on the implementation and application of the Takeover Directive in the European Union, the European Commission seemed to acknowledge the ineffectiveness of some of the provisions.[177] The implementation report, written in 2007, hoped for better protection of minority shareholders as a result of the Takeover Directive, but noted that the Board Neutrality Rule may actually "hold back the emergence of a European market for corporate control, rather than facilitate it."[178] In addition, given the fact that most Member States opted out of the Breakthrough Rule, the Commission doubted that it "would bring any significant benefits in the short term."[179] In June 2012, the Commission released its paper on the application of the Takeover Directive and identified shortcomings in the legislation.[180] The results of the Commission's External Study showed that stakeholders felt the optional provisions had "little effect" on regulating the use of defensive measures (a high number of mostly prebid defenses are still used in Europe) and, overall, that the Takeover Directive did not have a significant impact on the number of takeover bids.[181] Indeed, the Commission expressly states that "the breakthrough rule was not so successful" and that "the Directive

176. Marco Becht, *Reciprocity in Takeovers*, *in* REFORMING COMPANY AND TAKEOVER LAW IN EUROPE 647, 653-54 (Guido Ferrarini et al. eds., 2004) (internal quotation marks omitted).

177. *Commission Report on the Application of Directive 2004/25/EC on Takeover Bids*, at 9-11, COM (2012) 347 final (June 28, 2012); *Commission Report on the Implementation of the Directive on Takeover Bids*, *supra* note 63, at 10-11.

178. *Commission Report on the Implementation of the Directive on Takeover Bids*, *supra* note 63, at 10.

179. *Id.* In fact, the Commission states, "The number of Member States implementing the [Takeover] Directive in a seemingly protectionist way is unexpectedly large." *Id.*

180. *Commission Report on the Application of Directive 2004/25/EC on Takeover Bids*, *supra* note 177, at 4.

181. *Id.*

is not very effective in regulating the use of defensive measures."[182] These statements are very telling because they came directly from the Commission itself and appear to be express admissions of the inadequacy of the law.

V. CONCLUSION

The EU Takeover Directive was a landmark piece of legislation when it was first passed in 2004, concluding over twenty years of negotiations among delegates from the various Member States. Although its attempt to create a level playing field in Europe is a laudable one, it ultimately failed due to political pressure from some of the more powerful Member States, most notably Germany. Legal scholars have commented on the Takeover Directive's failure to harmonize takeover regulation in Europe, especially given the Portuguese Compromise and the ability of Member States to pick and choose which regulations to follow.[183] Nevertheless, the Mandatory Bid Rule does standardize the laws in various Member States to some extent, although most Member States had similar laws in place prior to the implementation of the Takeover Directive.

In the United Kingdom, takeover defenses generally are not available for target companies, unless such actions are approved by shareholders first. In Germany, some takeover defenses are permitted but only on a very limited basis under the "prudent and conscientious manager" standard or given prior shareholder approval. In Spain, some takeover defenses are available to a target's management to ward off hostile bidders (some require shareholder approval, but others do not). In the United States, a target's board of directors generally may use a wide variety of takeover defenses against hostile bidders, assuming that they act in accordance with their legal fiduciary duties and reasonably under the appropriate standard (*Unocal*, *Revlon*, or *Blasius*). Generally, power is in the hands of the board of directors in the United States, but the balance of power shifts to the shareholders in the European Union. These different approaches to takeover defenses imply that foreign corporations may have an easier time acquiring a company in the United Kingdom than in the United States, Germany, or Spain, as illustrated by

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182. *Id.* at 8.

183. *See* Simpson & Corte, *supra* note 62, at 15 ("[R]egulatory arbitrage and national protectionism could continue to be a characteristic of cross-border takeovers in Europe in the post-Takeover Directive environment.").

U.S.-based Kraft's recent acquisition of British confectioner, Cadbury.[184] This may or may not be a good thing in the long term for shareholders at target firms in the United Kingdom and Europe, but studies have shown the positive effects that hostile takeovers can bring: synergistic gains, improvement of resource allocation, accountability for management underperformance, and accurate market valuation. The key question is whether facilitating takeovers in a U.K.-style fashion and directing the rest of the EU Member States to do the same will ultimately be beneficial for the European Union. When referring to the Mandatory Bid Rule, the Board Neutrality Rule, and the Breakthrough Rule migrating from the United Kingdom to continental Europe, one commentator suggested that these could in fact simply be "wolves in sheep's clothing," i.e., they will not bring about the changes they are expected to produce.[185] The legislation is still somewhat fresh, so it remains to be seen how takeover activity will be affected in Europe in the coming years or if the European Commission will take further steps to restructure the takeover market.

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184. Scott Moeller, *Case Study: Kraft's Takeover of Cadbury*, FIN. TIMES (Jan. 9, 2012, 7:55 PM), http://www.ft.com/intl/cms/s/0/1cb06d30-332f-11e1-a51e-00144feabdc.html.

185. Ventoruzzo, *supra* note 124, at 172.