

Levelling the playing field for whom? The European Takeover Directive and the European Marketisation Project

*Draft version – please do not cite.
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**Bastiaan van Apeldoorn
Laura Horn**

Afdeling Politicologie
Vrije Universiteit Amsterdam
De Boelelaan 1081
1081 HV Amsterdam
The Netherlands

EB.van.Apeldoorn@fsw.vu.nl
L.Horn@fsw.vu.nl

www.arccgor.nl

PRESENTED AT THE ANNUAL CONFERENCE OF THE INTERNATIONAL
STUDIES ASSOCIATION (ISA),
HONOLULU (HAWAII), 1-5 MARCH 2005

Abstract

The harmonisation of company law on the European level constitutes an integral element of the European integration project. Along the lines of product and capital market integration, the push for European takeover regulation has been strongly advanced by the Commission to create a 'level playing field' for certain business interests. The parameters of this Directive endorse the primacy of 'shareholder value' vis-à-vis management and, consequently, various other stakeholders and advance the development of a European market for corporate control. The contested nature of the Takeover Directive, the process regarding its rejection in the European Parliament in 2001 and the follow up Directive proposals have been the subject of much academic interest, in political economy as well as in company law and economic literature.

However, these discussions have so far lacked an in-depth analysis of how the Takeover Directive as part of broader European integration project implies a marketisation of the European socio-economic order. As we will argue in this paper, despite the Commission's disappointment about the compromise form, the Takeover Directive indeed serves to advance the emergence of a European market for corporate control. Although its central features have been subject to political concessions, it constitutes none the less a stepping stone towards the increased deepening and liberalisation of European capital markets and the European marketisation of corporate control. Only by setting the directive in a historical context and by mapping it within the framework of the broader project of neo-liberal market restructuring can we begin to make sense of the driving forces behind this attempt to deepen the commodification of the European political economy

This paper has been written as part of a research programme entitled 'The Transnational Political Economy of Corporate Governance Regulation' funded by the Netherlands Organisation for Scientific Research. The programme has started in April 2004 and has in the meantime resulted in the creation of the Amsterdam Research Centre for Corporate Governance Regulation (ARCCGOR, www.arccgor.nl), established within the Department of Political Science of the Vrije Universiteit Amsterdam.

1. Introduction

When after 14 years of political bargaining between the Commission, Member States, and the European Parliament the Takeover Directive was finally adopted at the end of 2003, it did not generate much enthusiasm. The *Financial Times* commented that ‘the watered-down EU takeover directive is a missed opportunity for open markets’ (Dombey 2003). The responsible Commissioner, Frits Bolkestein (of internal market affairs), for whom the Takeover Directive had been one of the main priorities within his portfolio, even went as far as claiming that he would have rather had no directive than this one (Bolkestein 2003a).

Contrary to these sentiments, however, we will in this paper argue that the final European Takeover Directive, albeit diluted (from the point of view of the Commission), still represents a significant step in the attempt, mainly initiated and pushed by the Commission, to develop an *EU-level regulatory framework aimed to promote the development of a European market for corporate control*. In our interpretation, these attempts fit with a broader *European marketisation project* as carried out at the level of supranational and transnational socio-economic governance. In fact, seeking to promote a European market for corporate control or a takeover market arguably represents the most advanced phase of this project inasmuch as it turns the corporation as producer of commodities *itself into a commodity* (Fitch 1971: 166, see also Windolf 1994: 81). As this commodification empowers mobile shareholders by increasing their exit option, or, in other words, as making the market to the arbiter means turning shareholders into those who decide the fate of a company, this project can also be interpreted as creating a European *shareholder capitalism* (cf. van Apeldoorn 2001).

To the extent that the present outcome of the takeover saga can be regarded as a relative failure from the viewpoint of its proponents, we suggest that, when put within a longer historical perspective and the broader political context of the European integration project, this should rather be looked at, if we may be excused the metaphor, in terms of a battle lost within a war that one might quite well yet win. It is this longer-term project of creating a regulatory framework conducive to the marketisation of corporate control in the EU, as part of a broader project of creating a more market-based regime of corporate governance in Europe, that this paper intends to shed light on.

A starting point for our analysis is that straightforward integrationist explanations, i.e. along the lines that the Takeover Directive merely follows the logic of spillover (from the internal market) - a logic internalised as it were by the Commission as a policy entrepreneur - will not suffice. It is not a sufficient explanation, as it does not account for the particular socio-economic content of the directive. A full account of this will have to await more thorough empirical research than we as yet have been able to undertake. However, a first step toward this is to seek to interpret what we are actually dealing with here. What is the content of the final takeover directive and to which extent does this reflect the Commission’s broader agenda with regard to corporate governance reform, and what in fact is the nature of this agenda?

The core of our argument is that what the Commission has presented as an attempt to create a level playing field in the area of cross-border takeovers has in fact less been about creating fairness in terms of equal conditions, but rather – as part of the EU’s broader liberalisation project - about creating regulatory conditions favourable to the further development of a market where there was none before, that is, a market in which the commodities are the firms themselves. This marketisation of corporate control was in fact already taking place when the Takeover Directive was still being discussed. Hence, we should not overestimate the importance of this particular piece of European regulation. Nor do we argue that this process is exclusively driven by the European integration process in general. But the integration process and the evolving socio-economic governance regime of the EU do play a significant role - it is this role that thus far has hardly received any systematic attention in the literature. Indeed, in the corporate governance literature, regulation is often taken as an explanatory variable (e.g. Roe 2003) but only rarely as something that in itself needs to be explained.

This paper is organised as follows. In section 2, we will put the concept of the market for corporate control in a critical political economy perspective. We will argue that this market represents a commodification of corporate control with potentially wide-ranging consequences for different varieties of capitalism, and, more generally, constitutes, across these varieties, a fundamental transformation of capitalism. In section 3, we will see how this marketisation of corporate control fits with a broader European integration project aiming at the deepening of the marketisation of European socio-economic order. Section 4, then, presents an extensive analysis of the case of the Takeover Directive as key step in this European project.

2. The Market for Corporate Control: a Critical Political Economy Perspective

The issue of corporate control is at the heart of what has now come to be known as corporate governance, that is, those practices that define the power relations within the company (primarily between owners, managers, and workers) and the way, and to which purpose, it is run. In fact, it goes to the heart of the debate on the nature of capitalism inasmuch as *private* ownership and *therefore* control over the means of production can be seen as the defining feature of a capitalist market economy. Although uncontroversial in the 19th century, this alleged link between private property and power has increasingly been challenged throughout a large part of the 20th century. The debate on corporate control goes back at least to Berle and Means who in their classic study *Modern Corporation and Private Property* (Berle and Means 1991 [1932]) advanced the thesis that with the rise of the modern corporation, or joint-stock company, ownership has been separated from control as the former had come into the hands of countless small shareholders unable to overcome their collective action problems, and control shifted to a new class of professional managers (see for classical work in particular Burnham 1975; Chandler 1977; Dahrendorf 1959).

Here it is important to note that the managerialist thesis often implicitly presupposed that capital markets were underdeveloped and that there was no active market for corporate control. Because, if there are such markets, dispersed share ownership (liquidity) in fact may lead to control based, in the famous terminology of Hirschman (Hirschman 1970), on the power of *exit* rather than on *voice* as in the case of voting power exercised at the Annual General Meeting (that is the type of control that Berle and Means rightly saw as dependent on the concentration of ownership in the hands of one or few large blockholders). The *indirect* control exercised through the market is of a different nature, and serves a different purpose, than the *direct* control exercised by blockholders. Nevertheless, this *market control* can be equally constraining and equally defining of the way a corporation is governed. This is definitely the case when a so called full *market for corporate control*, that is, a takeover market, has developed, in which shareholders can exit *en masse* and thus hand-over control to a new owner and a new management.

A market for corporate control can be defined as a market in which control over a corporation (in the sense of a majority of vote-carrying securities) can be bought through a variety of methods, ranging from open market purchases to negotiated share swaps (Bittlingmayer 1998). The share price here then becomes a disciplinary device vis-à-vis management inasmuch as '[t]he lower the stock price, relative to what it could be with more efficient management, the more attractive the take-over becomes to those who believe that they can manage the company more efficiently' (Manne 1965: 113). From the point of view of neo-classical agency theory (Fama 1980; Jensen and Meckling 1976), the market for corporate control is thus viewed as the external control mechanism *par excellence* to ensure the protection of shareholder interests, aligning managerial strategies with the latter (Jensen 1993). In the market for corporate control, the evaluation of company performance takes place purely on financial criteria - in the case of a takeover, 'shareholders are not asked to evaluate complex alternative business plans for the company. Rather, they need only assess who is offering a higher value for their shares' (Pound 1993: 1018). From this perspective any technical or structural barriers to takeovers are thus perceived as detrimental to shareholder interests, and to undermine the efficient allocation of capital.

Analytically a distinction can be made between capital markets and markets for corporate control (Höpner 2003b: 104 ff). In practice, however, the two strongly overlap (Windolf 1994). In both cases we can speak of a market-based mode of control or at least influence over the corporation. Even in the absence of the takeover threat as the ultimate sanction, e.g., because of certain anti-takeover defences within the company's legal structure, investors may still obtain leverage over the firm's management through the threat of exit and submit the performance of firms to monitoring by the capital market and thus to market control (Höpner 2003b: 105).¹ We thus argue that capital markets and markets for

¹ Next to the threat of being replaced, managers may have other good reasons to care about the share price, such as that their own financial interests are tied to it through e.g. stock options (cf. *ibid.*: 139-148), or because the company's credit ratings depend on it; or because keeping the share price high is just held to be a standard of good corporate governance that managers have internalised, conditioned by the competitive environment in which they operate. Another important reason is formed by the reverse of the takeover threat, which is the desire to take over

corporate control, whereby the development of the former is also a necessary condition for the emergence of the latter, together form an integral part of the process we describe as a *marketisation* or *commodification of corporate control*. Marketisation here has to be understood in the sense that the market-based mode of control, that is control by ‘outsiders’ who are mobile and can ‘vote with their feet’ by selling their shares, is being strengthened. Shares then become property titles that not only give the right to a dividend but also to (potential) control over a firm’s governance. With the active trade in these property titles, (partial) control thus becomes a commodity in itself. However, and this remains an important conceptual difference with equally important substantive implications, it is only with the market for corporate control that the firm *as a whole* becomes a commodity (Windolf 1994: 90). It is thus that we will regard the market for corporate control as the most advanced and far-reaching form of the marketisation of corporate control.

2.1 The Marketisation of Corporate Control and the Transformation of Capitalism

How could we conceptualise the meaning of such a possible shift towards a marketisation of corporate control? What would it imply for the nature of capitalism in general? Who loses and who benefits? To start with the latter, within the literature the issue of markets for corporate control and of corporate governance more broadly is usually defined in terms of the relations between shareholders (owners) and managers (e.g. La Porta et al 1999; Shleifer and Vishny 1996). Thus the market for corporate control could be viewed in terms of a power shift in which owners wrestle back control from the managers through the market mechanism. Yet it would be too simplistic to say that with the rise of a market for corporate control, shareholders win and managers lose - what the latter group may lose in decision-making autonomy over the firm, they may win in terms of financial compensation and career mobility. An even more important reason why a mere dichotomy between managers and shareholders as a model of corporate governance is too simplistic is that we have to distinguish between different types of shareholders, and that it is one type that is particularly empowered by the marketisation of corporate control.

A useful distinction that is often made within the literature is that between *committed* capital having a *strategic* interest and *liquid* capital having a mere *financial* interest (Jackson 1998). Committed capital usually takes the form of large and stable blockholders (whether families, the state, or other corporations such as banks) who exercise their power through *voice*, often directly by sitting on the (supervisory)

other companies, whether hostile or through ‘friendly’ acquisitions - the distinction between the two is often hard to draw in practice Schwert, William. 2000. Hostility in Takeovers - in the Eyes of the Beholder. *Journal of Finance* 55 (6).. Inasmuch as this is done through so called equity swaps, the share price becomes an ‘acquisition currency’: the higher it is, the easier a company can expand in this way. Of course, the latter does imply the existence of a market for corporate control as such even if the company itself may not be exposed to it.

board. Committed capital is thus bound to a particular firm and a particular set of institutionalised social relations that make up that firm. This in turn gives managers, and, under certain conditions, workers, some power vis-à-vis these owners. From the perspective of workers, having stable large block owners that are ‘insiders’ to the firm means that one has owners with whom can talk, negotiate, etc. Here, the social relations between capital and labour are still embedded in social interaction, whereas in the case of a pure shareholder capitalism they are completely market-mediated. The latter is thus typical of a situation where ownership takes the form of liquid capital, that is, dispersed ownership of mobile investors who exercise control through *exit*. This exit power may in fact become linked to voice when ownership becomes sufficiently concentrated again, as is the case with the modern phenomenon of institutional investors. However, in contrast to traditional large blockholders, this new type of owners do not possess any *loyalty* to the firm in which they have placed part of their investments ((Höpner 2003a: 99). Their interest merely concerns the financial return or *shareholder value* as the current discourse has it (see Rappaport 1986).²

Summing up, in terms of shareholder-manager relations, it is in particular the (now increasingly transnational) mobile shareholders with no commitment to the firm who would win from a marketisation of corporate control. Most empirical studies confirm that shareholders of target companies profit through a large premium put on their shares as a result of a takeover bid (Bittlingmayer 1998: 28). The evidence on the financial gains for the bidder company however is less unambiguous (Franks and Mayer 1996), thus undermining the efficiency argument that is often made in defence of the takeover market. Some have argued that what is generally taking place in the takeover market is ‘the transfer of wealth from stakeholders to shareholders’, hence redistribution rather than productivity gains (Höpner and Jackson 2001: 11). In this context, De Jong has shown that in a corporate governance regime characterised by the absence of a market for corporate control, a higher share of net added value is being paid to employees and other stakeholders, while in comparison to this in corporate governance regimes which, like the Anglo-Saxon model, sustain a market for corporate control, about three to four times the share of net added value is being paid to shareholders (de Jong 1997: 18).

Hence, where the main winners appear to be mobile investors, labour interests appear to be clearly on the losing side. This should not just be understood in financial terms but also with reference to the different kind of social relations implied in a fully marketised system of corporate control, that is, what it means for the embeddedness of the firm and the power position of employees within that social institution. As Höpner and Jackson argue, ‘the widening influence of ‘the market’ places issues outside the bounds of negotiation by stakeholders’ (Höpner and Jackson 2001: 9). In general terms, then, one can interpret the commodification of corporate control as a disembedding force in the Polanyian sense (Polanyi 1957). By turning corporations into, as Polanyi called it, ‘fictitious commodities’, the social

² As Marx already recognised in the late 19th century, the creation of the joint-stock company, results in the ‘[t]ransformation of the actual functioning capitalist into a mere manager, in charge of other people’s capital, and of

relations that make up the embeddedness of the firm as a social institution are put under strain. In fact, under the logic of the market, ‘no arrangement or behaviour should be allowed to exist that might prevent the actual functioning of the market mechanism on the lines of the commodity fiction’ (Polanyi 1957: 73).

Interpreting the creation of a market for corporate control in terms of commodification also allows us to put it in a historical perspective of the evolution of capitalism; to view it as the creation of yet a new market (next to the markets for goods, labour, and land) where there was none before (cf. Windolf 1994). As indicated, the marketisation of corporate control can be associated with the rise of a financial perspective within capitalism, and arguably with that of a particular segment of the capitalist class. It is however not only a power shift *within* the capitalist class that we are dealing with here, since this shift in itself is inextricably bound up with relations between capital and labour as well. One way of understanding this is to view the issue of the marketisation of corporate control as a transformation in the organisation and distribution of property rights – but acknowledging that property rights constitute a social relationship, providing ‘rights, entitlements and obligations not only in relation to an object itself but also in relationship to other individuals’ (Roy 1997: 11), and thus (potential) control over people and over the processes which condition their lives. This of course applies *a fortiori* for markets of corporate control where such control over people is precisely the object being bought and sold. This then turns the market for corporate control into a new phase in the evolution of capitalism as a process of the *deepening commodification of social relations*.

Whereas capital markets, albeit to varying degrees, have developed from the late 19th century onwards, markets for corporate control have started to emerge only in the final decades at the end of the last century, first in the USA and in the UK, and even only much more recently in continental Europe. Let us briefly examine this history.

2. 2 The Rise of the Market for Corporate Control and Varieties of Capitalism

Examining the history of the marketisation of corporate control, we can observe the important role played by public regulation. Although markets for corporate control cannot be directly created by regulation since they ultimately depend on the actions of private actors, public regulation and public policies can play a crucial role in either enabling and encouraging or, on the contrary, constraining and stifling their development. If we seek to explain how, historically, markets for corporate control have in fact for a long time failed to emerge, as well why, in recent decades, they have been strongly developing, understanding the role of politics and policy is critical. This is not to say of course that the causality cannot be the other way around as well: that, market forces can create pressures for regulatory change,

the capital owner into a mere owner a mere money capitalist’, whose profit becomes ‘completely separated from its

the latter responding as it were with a time lag, codifying new practices. However, we reject the notion that changes in corporate governance regulation can simply be reduced to anonymous market pressures selecting the most efficient arrangements (see e.g. Hansmann and Kraakman 2001). To the extent that market developments influence the regulation concerned, this is always a process mediated by politics. Indeed, 'the market' and 'market actors' are themselves not apolitical.

In the US, the rise of managerialism was enabled not only by the dispersion of ownership but also by the growth of state law protecting firms from hostile takeovers from the 1930s onwards (Roe 1994). The resulting absence of a market for corporate control was in fact a crucial element in the kind of regulated or organised capitalism that emerged in the wake of the New Deal, in the US but also transnationally throughout the advanced capitalist world (cf. Polanyi 1957). What Van der Pijl has dubbed the era of 'corporate liberalism' (van der Pijl 1984) was one in which the modern corporation became the central organisation of capitalist society (cf. Roy 1997) and one relatively detached from the property-owning bourgeoisie, indeed giving space to a relatively autonomous managerial class.

The fact that managers were shielded from the discipline of the capital market was also characteristic of the development of West-European capitalism (see Shonfield 1965), making the post-war decades, according to some, the 'heyday of managerial capitalism' (Dore, Lazonick, and O'Sullivan 1999: 109). In fact, in continental Europe, what the 'varieties of capitalism' literature has dubbed 'coordinated' (Hall and Soskice 2001) or 'non-liberal' (Streeck and Yamamura 2002) market economies, the absence of markets for corporate control has been critical for the development of these types of capitalism (Höpner and Jackson 2001; Streeck 2001). It was, however, in these economies not so much pure managerialism that reigned, since, in fact, the dispersion of share ownership did not take place nowhere near the same degree as across the Atlantic and in the UK. Large firms continued to be controlled by large blockholders (constituting committed and strategic capital in the form of families, banks, etc.), owning a controlling minority (or often even a majority) of the shares (van Apeldoorn 2001). This tended to produce an organised capitalism centred around a stable coalition between these blockholders, managers, and, to varying degrees, workers (see also Rhodes and Apeldoorn 1998).

European capital markets remained underdeveloped precisely because firms were in the secure hands of committed blockholders. Thus, legislation to create this insulation from the capital market was less of a necessity than in the US. It can be argued that in European political economies, certain *structural* impediments (Gilson 1992: 181) to the marketisation of corporate control were in place - as for instance the concentration of ownership, often through constructions like cross-shareholdings, pyramids, and multiple voting rights, or the strategic interdependency with banks. These were part and parcel of a certain socio-economic configuration or 'variety of capitalism' reflecting but also constituted by a certain legal and regulatory framework (see e.g. Lütz 2000).

function in the actual production process' (Marx 1991: 567-68).

In sum, the post-war era on both sides of the Atlantic - in spite of important differences – was one in which capital was *bound* to nationally embedded and regulated production. All of this may now be in the process of unravelling given that, since the closing decades of the large century, the market for corporate control has finally been woken from its long sleep. In the US, the early years of the Reaganite liberalisation offensive saw a wave of deregulation with respect to (corporate) finance, and crucially the striking down of all state-level anti-takeover laws by the Supreme Court in 1982 (*Edgar versus Mite case*). This, in combination with technical innovations in the financing of takeovers and acquisitions, produced the huge takeover boom – witnessing the rise of so called corporate raiders, heroes according to the champions of free markets, villains in the eyes of the critics – in the 1980s (Blair 1993; Henwood 1998). Around the same time a similar phenomenon could be observed in the UK, where the market for corporate control has since developed even more strongly (Barca and Becht 2001). This period also saw the rise of the phenomenon of so called ‘shareholder activism’, with unhappy shareholders clamouring for their ‘rights’ (basically their right to a ‘good’ financial return) vis-à-vis management (see Useem 1993). This role was later on partly picked up by so called institutional investors, that is, mutual and pension funds, investment and insurance companies (on a capitalism increasingly dominated by institutional investors, see Windolf 1994). All of this resulted in what could be described as a ‘revolt’ on the part of formerly passive owners, and the concomitant rise of shareholder value as the new ideological paradigm for corporate governance (Lazonick and O’Sullivan 2000). All of this is now associated with what is called the ‘un-coordinated’ market economy of the Anglo-Saxon countries premised on the primacy of shareholders, with the market for corporate control functioning to underpin this primacy. Corporate governance here simply refers to ‘how investors get the managers to give them back their money’ (Shleifer and Vishny 1996: 4). Any management focus on other ‘stakeholders’ such as, for instance, employees poses a potential threat to this cash flow and has hence to be avoided.

In continental Europe, developments in the 1990s indicate that here too a market for corporate control is emerging (Höpner and Jackson 2001; Lannoo 1999; Lannoo and Khachatryan 2003). The volume of unsolicited takeover bids in the EU has been increasing steadily, and the number now actually surpasses the number of takeovers in the US (Wells and Saigol 2004). Europe too has seen the rise of its own shareholder activists and US-style corporate raiders (such as the Swiss billionaire Martin Ebner in the 1990s). Data on ownership of Europe’s largest firms in the 1990s also show a significant rise in the proportion of institutional investors, with in particular US mutual and pension funds – which used to be more domestically focused - diversifying internationally (OECD 1998). Within companies in which these financially oriented owners collectively hold a large part of the capital, foreign funds do not only exercise a degree of control over the management, they are in some cases also in the position to decide the company’s fate when it is subject to an attempted hostile take-over (OECD 1997: 45). Concomitant to the rise of institutional investors there has been a relative decline of traditional large blockowners, above all of the state as owner with the privatisation waves of the 1980s and 1990s (see van Apeldoorn 2001). Although, in spite of these changes, the ownership structures of European big business for now

continues to show a large presence of blockholders (compared to the UK and the US), there are also indications that these too are increasingly adopting a *financial* rather than a *strategic* perspective as they are experiencing the pressures, respectively the temptations, of the capital market (van Apeldoorn 2001). All of this may be seen as indicative of a tendential rise of a shareholder capitalism even within continental Europe, thus potentially destabilising or ‘disembedding’ these political economies normally taken to be representative of the so called stakeholder model – with the stable coalitions of stakeholders now precisely being threatened by the marketisation of corporate control (cf. Höpner 2003).

In creating the conditions for this European shareholder capitalism to emerge, we claim that a critical role, both directly and indirectly, is played by the process of European integration, which, since the end of the 1980s has been driven by a by and large neo-liberal marketisation project. It is this project that we will turn to in the next section.

3. The European Marketisation Project

What is the role played by the EU and the integration process in the marketisation of European corporate control, and what explains the form and content of this role? In approaching this question we adopt a *transnational* perspective (van Apeldoorn 2004; van Apeldoorn, Overbeek, and Ryner 2003). This implies that we look at the EU as a transnational and multi-level polity (cf Hooghe and Marks 2001) in which the institutional intergovernmental and supranational governance structures are crucially embedded within a transnational political economy and a transnational civil society. In contrast to neo-functional approaches, we do not, however, see this transnational society as a by-product of an autonomous and self-expanding integration process but as a more autonomous set of social structures shaping as much as being shaped by the integration process, and moreover critically embedded within a global political economy (cf van Apeldoorn, Overbeek, and Ryner 2003). The latter is seen as being transformed by far-reaching processes of transnationalisation, of which the European political economy is part and parcel. Whereas the traditional agenda of integration theory has mainly concerned itself with explaining the *form of integration* (as in intergovernmentalism versus supranationalism), we are here more concerned with the socio-economic *content* of the integration process, or its underlying social purpose (ibid, and van Apeldoorn 2002). As argued elsewhere, the latter can then be interpreted as the outcome of the political and ideological struggles of rival transnational social forces operating within not only the European but often also the global political economy, such as globalising capital, and in fact often mediating between global and European processes (van Apeldoorn 2002).

We may also look upon the social purpose of the integration process in terms of an integrated political *project*, by which we understand ‘initiatives and propositions which, as pragmatic responses to concrete national and European problems, conceptually and strategically further the process of socio-economic, societal and institutional restructuring’ (Bieling and Steinhilber 2002: 41, our translation).

Within the European arena such a project may be seen as reflecting a particular configuration of transnational social and political forces, the agency of which also plays a constitutive role in articulating this project ideologically. Inasmuch as such a project succeeds in generating consent on the part of both dominant and subordinate groups (or social classes) in society we may refer to it in Gramscian terms as a ‘hegemonic project’ (Jessop 1983).³ Employing the concept of a project in terms of a relatively coherent programme should not be taken to imply that there are no contradictions within the project, nor that a priori one could expect a smooth implementation of the project. Any project is itself always the outcome of political contestation of politico-ideological struggles between rival social forces (and not the construction of any particular group of people). Subsequently, once formulated, a project also becomes itself an object of contestation, facing challenges and resistances which it may or may not successfully withstand or incorporate.

It is from this perspective that Van Apeldoorn (2002) has interpreted the European integration process of the 1990s as an increasingly neo-liberal project supported and to extent propagated by globalising European capital (in particular through the transnational business elite forum, the European Round Table of Industrialists). This project has become manifest in the whole internal market programme, within monetary union, and with efforts to promote the commodification of European labour markets in the name of ‘competitiveness’ (ibid.). Although we cannot as yet demonstrate empirically that the same social forces have also been active in shaping the content of EU regulation in the area of corporate governance, and in particular the development of a European market for corporate control, we would suggest that there is a strong ideational and programmatic fit with the other elements of European socio-economic governance of which we do have more substantial empirical knowledge (the fact being that corporate governance regulation is as yet a little studied aspect of European governance). We will thus argue that the attempts of the EU – including the takeover directive – to promote the development of a European market for corporate control are part and parcel of a broader, integrated, European marketisation project. This, we would suggest, provides at least an important beginning of an explanation. It is only from this perspective that we can start to make sense of the Commission’s drive for the marketisation of European corporate governance.

3.1. Financial Market Integration and the Marketisation of European Corporate Governance

The European project of market liberalisation can only be understood in the context of the global capitalist restructuring process that has taken place since the 1970s and that has engendered a deepening of the transnationalisation of capital. Focusing on financial liberalisation in particular, the European drive to integrate capital markets only makes sense in a global context. The collapse of the Bretton Woods

³ Cf. the notion of ‘comprehensive concepts of control’ as employed by the Amsterdam group of neo-Gramscian IPE scholars (see, e.g., Overbeek 2004).

system was accompanied by a world-wide financial deregulation wave in which finance became once more detached from the real economy and liquid capital gained a new transnational mobility and hence exit power. The globalisation of capital markets, in conjunction with the globalisation of capital markets, leads to a competition between firms to suit the interests of transnationally mobile investors (Jackson 1998, Rhodes and Apeldoorn 1998: 413). Though crucial as a context, globalisation or global restructuring is at the same time also partly constituted by the European regionalisation process, and the political choices made therein. Here the choices made have in fact reinforced and amplified the globalisation process though the political project of market liberalisation that has defined the socio-economic content of the integration project from the late 1980s onwards (van Apeldoorn 2002).

Financial market integration has in fact been an integral part of the single market programme – launched by Single European Act (SEA) – from the start. Under the heading of the freedom of services, the Second Banking Directive of 1988 was the most important step in radical liberalisation of the European banking sector on the basis of mutual recognition (Tsoukalis 1993). Similar directives were adopted for the insurance sector (see Story and Walter 1997: 262 - 266), which of course is also a major player on the capital (stock) markets. The resulting restructuring of the European banking sector, which has been further accelerated in the wake of the birth of the euro (see also below), must be seen as having directly contributed to an increasing re-orientation of financial intermediaries towards the world market, thus moving away from their traditional role within Europe's national varieties of capitalism and concomitant regimes of corporate governance (for the German case, see Höpner 2003). With regard to the freedom of capital, crucially, another 1988 directive, achieved the full liberalisation of capital movements.

The speed with which financial market integration was implemented was at first rather impressive, helped along by the 'Europhoria' in the second half of the 1980s. Yet, it was only in the second half of the 1990s that the neo-liberal project fully took shape and rose towards hegemony, at least at the level of the European elite discourse (Bieling and Steinhilber 2002: 43). As Van Apeldoorn (2002) has argued, the neo-liberal project first needed to neutralise the challenges posed by alternative transnational projects, in particular that of a supranational social democracy as promoted by the Delors Commission, and a neo-mercantilist project promoted by those sections of European industry that wanted to use the internal market as a protected home market in the face of growing global competition. Neo-liberal forces also needed to overcome the crisis of confidence in the relaunched European integration process that beset the Community in the early 1990s in the context of an economic recession and the troubles regarding the ratification of the Maastricht Treaty, as well as growing social unrest in the face of rising mass unemployment (cf Van Apeldoorn 2002: 161ff; Bieling and Steinhilber 2002: 45). Furthermore, in spite of the earlier progress made, the integration of European capital markets was far from complete - there were still too many differences in national regulation constituting NTBs, whereas earlier directives turned out to be ineffective (Story and Walter 1997). At the same time, the creation of EMU, the success of which was far from certain at the time, was expected to deepen capital market integration provided the

right regulatory environment (see also Bieling and Steinhilber 2002: 48-49). The single currency was expected to lower the transaction costs for cross-border trade in stocks and bonds and thus to lead investors to diversify their portfolios across the Eurozone, promoting the development of a pan-European capital market (Lannoo 1999; OECD 1998).

It was then in this context that a reinvigorated neo-liberal project in form of a number of new initiatives has been undertaken by the European Union to accelerate and complete the creation of the single financial market. This project, in tune with the broader neo-liberal marketisation project, started with the Cardiff Council of 1998, which called for the Commission to develop an action plan for removing the remaining obstacles to an integrated financial market (Bieling and Steinhilber 2002). This followed a proposal to the Council from the Competitiveness Advisory Group, a transnational group of 'experts' and representatives from labour and above all from transnational business, which was created in 1995 following an initiative of the ERT (Van Apeldoorn 2002: 175-6). The CAG, like the ERT in one of its reports (ERT 1998), argued that financial market integration not only promoted efficiency of resource allocation but also would enhance the flexibility and the competitiveness of the European economy (Bieling and Steinhilber 2002: 49). The *Financial Services Action Plan* (FSAP), which the Commission subsequently started to implement, turned financial market integration into one of the EU's top priorities (European Commission 1999).

The FSAP was approved by the Council at the Lisbon summit of March 2000, which in itself marked another key step in the development of the EU's marketisation project, with financial market integration being an integral part of the comprehensive socio-economic agenda adopted in the Portuguese capital. The Lisbon strategy, proclaiming the goal for the European Union to become the 'the most competitive and dynamic knowledge-based economy in the world by 2010' (European Commission 2000), articulates the goal of competitiveness with that of 'social cohesion, but in a way of making the latter subordinate to the exigencies of the former as defined by what could be called a neo-liberal competitiveness discourse underpinning the neo-liberal integration project and widening its appeal across different social forces' (see Van Apeldoorn 2002: 173-80; Van Apeldoorn 2003). Although the Lisbon 'reform process' has recently come under much criticism because of the lack of progress with respect to implementation, we maintain that at the level of formulating an elite policy discourse, and an integrated programme that could muster the consent within European transnational civil society, and that could thus carry the project of neo-liberal European socio-economic governance forward, Lisbon has been and still is rather successful. Moreover, the implementation of the Lisbon agenda is not lagging equally behind in all areas. Thus in the spring of 2004, some 70 directives had been adopted under the Lisbon process, mainly in the area of the internal market. Although transposition of these directives has been lagging, most progress has in fact been made in the area of financial market integration under the heading of the FSAP (see European Commission 2004: 13). Thus, what the then internal market Commissioner Frits Bolkestein considered to be 'the core of the Lisbon strategy' thus far remains in tact. Bolkestein also

clearly illustrated how for him this core was bound up with the goal of competitiveness, articulating this in turn with the creation of a European shareholder capitalism.

Without a fully integrated financial services and capital market in Europe we shall be unable to release the economic opportunities that will underpin the Union's new competitiveness. Because the cost of capital will remain too high and the yields on assets unnecessarily low. The availability of pan-European risk capital will be sub-optimal and the attractiveness of IPO's limited. (Bolkestein 2000).

In other words, integrating financial markets is about 'sufficiently rewarding' holders of liquid assets. It is thus about redistribution from shareholders to 'stakeholders', though at the same time the claim is upheld that financial market integration 'will lead to a higher quality of life for all European citizens. A large, more liquid capital market in Europe will create investment, more growth, more innovation, more jobs and higher incomes' (ibid).

The Lisbon summit was followed by the installation of a transnational 'expert group', or so called Committee of Wise Men, on the regulation of European securities markets under the chairmanship of banker Alexandre Lamfalussy. Another important development, underling the role of transnational actors, has been the founding in 2001 of a private pressure group from the ranks of European transnational capital with the explicit purpose to promote the integration of Europe's financial markets. The European Round Table of Financial Services (EFR), comprising the heads of 13 of Europe's largest banks and insurance companies (amongst which Allianz, AXA, Deutsche Bank, and ING), headed by the founding Chairman of the ERT, Pehr Gyllenhammar, has since played quite a pro-active role in keeping the EU on the desired track.⁴

An increasingly central element of the Commission's overall strategy towards (financial) market integration is the promotion of market-driven corporate governance reform in the European arena. Apart from the Takeover Directive, which we will discuss in the next section, an important step in this area was made when, at the Nice summit of 2001, after 30 years an agreement had finally been reached to introduce a European Company Statute, offering the possibility to set up a so called *Societas Europaea* (SE) under a single set of rules applying through the EU. This will not only stimulate the further transnational restructuring of European industry through cross-border M&As, but is also envisaged by the Commission to contribute to more 'transparency regarding ownership and management structures' as well as to serve 'as an important step towards (market-driven) emergence of corporate governance patterns' (European Commission 1999: 4).

The Commission's 2003 Action Plan for 'Modernising company law and enhancing corporate governance' is partly based on a report from the same group of company law experts which has, as we shall see, played a critical role in the development of the Takeover Directive (High Level Group of Company Experts 2002), and frames its plans for corporate governance reform in

⁴ On the EFR, see Paul Betts 'A Champion for Europe's Banks and Insurers', *Financial Times*, February 8, 2002, p. 12, see also their website: www.efr.be

the same notions of competitiveness and efficiency which also underlie its agenda for capital market integration:

A dynamic and flexible company law is essential for deepening the internal market and building an integrated European capital market. [...] An effective approach will foster the global efficiency and competitiveness of business in the EU [...] and will help to strengthen shareholder rights (European Commission 2003a).

The Commission sees itself in a key position for this reform agenda. 'Corporate Governance systems in the EU must all move towards higher standards [...] Our challenge is to lead the debate in the European Union and beyond, and to adopt the right policy approaches to the different issues' (Bolkestein 2004a). It has recently set up the European Corporate Governance Forum, a discussion platform for investors, companies and regulators, to 'promote greater convergence within the European Union towards best corporate governance practice' (ibid). What this 'best practice' entails, however, is essentially based on criteria and selection mechanisms detached from public control. Rather, it is a market-driven process subjugating company law and corporate governance regimes to apolitical market forces, which ultimately do not take any other interests than the market participants' in account.

In the next section, the case of Takeover Directive serves as an illustration for the Commission's crusade for the deepening and opening of European capital markets, in particular with regard to its plans for corporate governance reform. Drawing on our conceptualisation of the market for corporate control and the European integration project in the preceding sections, we shall analyse the underlying thrust behind the Commission's push for the directive, and assess in how far this has found an expression in the Takeover Directive.

4. Towards a Marketisation of European Corporate Control – the Takeover Directive

With the adoption of the Takeover Directive on April 21 2004, the 'endless saga' (Skog 2002) of the European Takeover Directive, albeit far from having come to an end, has moved on a decisive step in its political and legislative development. Reactions to the final compromise form of the directive, however, have at best been mixed. While the Frankfurter Allgemeine Zeitung dubbed it a 'European minimal solution everyone can live with' (Financial Times Deutschland 2004), Frits Bolkestein, Commissioner for the Internal Market and one of the driving forces behind the Takeover Directive, did not make any efforts to hide his disappointment about the compromise that had eventually been agreed upon by the Council and approved by the European Parliament on December 16, 2003.

I am not going to pretend that I am pleased with this agreement. Nor am I going to be hypocritical by pretending that the version of the Directive agreed today represents a step forward for EU competitiveness or for the integration of EU capital markets. [...] If the Council continues to take decisions like this one, the European Union will never reach its target of becoming the most competitive economy in the world by 2010 (European Commission 2003b).

In this section, we will analyse the content of the Takeover Directive and evaluate whether Bolkestein was justified (from his perspective) in his completely negative assessment of this (not necessarily final) outcome of the struggle around the Takeover Directive. While a comprehensive account of the legislative history of the directive would, of course, be out of place here, it is nevertheless crucial to set the Takeover Directive in both its historical setting as well as in its position in the broader economic integration project within the European Union. The somewhat ambiguous features of the Takeover Directive will serve as departure point for our analysis of whether it makes a case in point for the increased marketisation and the shift towards shareholder priorities in the EU. This, we argue, constitutes part of a distinct political project - marketisation 'by reducing the role of the state in economic decision-making, by decentralizing such decisions to the level of the firm, and by subjecting such firm-level decisions to a neutral, transnational standard of the share price' (Gordon 2003: 2). To identify the Takeover Directive as part and parcel of this project enables us to repoliticise the discussion over its features and potential outcomes, and most of all the actors involved in pushing and contesting it.

Any discussion of the Takeover Directive means to be writing on a moving target since its implementation period has just started and won't be finished until May 2006. Thus, speculation on the potential end results of the Takeover Directive would be rather futile. Nevertheless, a first evaluation of the very features of the Takeover Directive facilitates an analysis of in how far it could contribute to the emergence of a market for corporate control in the European Union. Among the inherent characteristics of this market is the fundamental reliance on the principle of shareholder decision-making and transparency, as embodied in the OECD Principles of Corporate Governance.

Markets for corporate control should be allowed to function in an efficient and transparent manner. The rules and procedures governing the acquisition of corporate control in the capital markets [...] should be *clearly articulated and disclosed* so that investors understand their rights and recourse. Transactions should occur at transparent prices and under fair conditions that *protect the rights of all shareholders* according to their class (OECD 2004: 36, emphasis added).

Following a brief overview on the evolution of the Takeover Directive, in this section we will look at the impetus behind the Commission's push for the Takeover Directive. By evaluating this thrust against the final compromise form, we will discuss in how far the Directive actually contributes to the Commission's drive for a marketisation of European corporate control.

4. 1. History and Legislative Developments of the Takeover Directive

The concept of a European Takeover Directive appeared as early as in 1974 when the Commission assigned Robert Pennington to review takeover legislation in Europe and to draw up a first draft directive for takeover bids. Nearly a decade later, the Commission included a takeover directive in the medium-term objectives of the 1985 White Paper (European Commission 1985: 89). These early attempts of the Commission, however, did not meet with much enthusiasm from the Member States, since takeovers were clearly not an issue. This only changed in the late 1980s, when the first high-profile takeovers were

staged in Europe (Skog 2002), supporting the thrust of the Commission for harmonizing European takeover regulation. The first draft for a takeover directive was presented in 1989 and in revised and amended form in 1990. These early proposals were still ‘aimed at achieving detailed harmonisation in the field of takeover bids at a time when economic circumstances were propitious’ (European Commission 2002: 2). In response to the introduction of the subsidiarity principle in 1992 and the growing criticism of the ‘one size fits all’ approach of company law harmonisation, the Commission then presented another revised draft proposal in February 1996 as a ‘framework directive.’ This proposal marked a shift towards more leeway for member states in transposition of the directive into national law. Still, the 1996 proposal was subject to further amendments to incorporate the opinion of the Economic and Social Committee and the EP. During these negotiations, the Commission announced the Financial Services Action Plan (European Commission 1999) in which it made it quite clear that the Takeover Directive was of immediate importance for the further integration of the European single market. After the United Kingdom and Spain had solved their tensions over the status of Gibraltar, the Council adopted a common position on the proposal. The EP, however, proposed a considerable number of amendments that were not approved of by the Commission. Only after a conciliation procedure, which ended just in time before the deadline given by the EP procedures, an agreement was reached on June 6, 2001. The compromise proposal was rejected by a tied vote, with 273 MEPs against and 273 MEPs in favour of the directive (with 22 MEPs abstaining).

The European Parliament based its rejection of the 2001 draft proposal on three main political objections. The first and main point of objection pertained to the board neutrality rule,⁵ which the EP rejected on the grounds that, due to the diversity of company and securities law structures in Europe, there was no ‘level playing field’ for takeover bids.⁶ As Martin Höpner’s analysis of the 2001 vote reveals, this objection was particularly coming from German MEPs – 99% of them voted against the proposal (Höpner 2003a: 10). This cross-party position is of particular interest when taking into account that the Takeover Directive was meant to be introduced by the Commission as a means to advance (neo-liberal) market restructuring – but rather than on ideological lines, it was ultimately defeated by national interests.

The irony of the battle of the Takeover Directive was that Germany did *not* switch its position on the Takeover Directive because it was hostile to economic modernization and liberalization. Rather, it was *because domestic reforms had already liberalized the legal structure of corporate governance* to a significant degree and other member states had not undertaken similar steps. (Cioffi 2002: 388, emphasis in original)

⁵ Art 9 of the Takeover Directive – in case of a takeover bid, the board of the target company is not authorized to take any defensive measures to frustrate the bid (apart from finding an alternative bidder or ‘white knight’) unless the general meeting of shareholders has approved of those measures.

⁶ Companies in Member States which, for instance as in Germany, had introduced the ‘one-share, one-vote’ principle were disadvantaged by the board neutrality rule (i.e. abstention from any technical defences) vis-à-vis companies which still had dual- or multiple-voting rights serving as structural takeover barriers.

Regarding the other objections of the EP, the insufficient employee protection afforded by the draft proposal to employees involved in a takeover bid was criticised, as well as the proposal's failure to tackle the issue of a level playing field with the US (European Commission 2002: 2). Frits Bolkestein reacted with great disappointment and frustration to the proposal's rejection.

I am very disappointed that the EP has not been able to ratify the agreement approved by its delegation last month, despite the tremendous efforts made by the Commission and the Council to meet the Parliament's concern. Twelve year's of work have been wasted by today's decision. [...] It is tragic to see how Europe's broader interests can be frustrated by certain narrow interests (European Commission 2001b)

However, the Commission, was not willing to give up on its ambitions for a takeover directive and set up a High Level Group of Company Experts (HLG) to deal with some of the EP's objectives, in particular the lack of the level playing field.⁷ The mandate of the HLG was clearly defined in terms of substance – how to ensure the existence of a level playing field in the EU concerning the equal treatment of shareholders across member states; the definition of an 'equitable price' to be paid to minority shareholders and the right for a majority shareholder to buy out minority shareholders (High Level Group of Company Experts 2002: 1).

Whereas the board neutrality and the mandatory bid rule⁸ can be identified as post-bid mechanisms, with its proposal of a 'breakthrough rule,' the HLG for the first time in the legislative history of the takeover directive tackled the question of pre-bid barriers, that is, structural rather than technical impediments (as discussed in section 2). 'This was 'the first time that the traditional differentiation between company law and capital markets law is overcome by taking into account pre-bid barriers.' (Dauner-Lieb and Lamandini 2003: 266) Jaap Winter, the chairman of the HLG, even contends that 'many features of the draft directive have been driven much more by capital market concepts than by company law thinking [...] The reach of capital market law over subjects that traditionally fall within the realm of company law is expanding' (Winter 2004: 106) To break through pre-bid barriers was perceived as a means to achieve a level playing field.

Based to a large extent on the HLG report from January 2002, the Commission presented its new proposal on October 2, 2002. However, the draft proposal, unlike that of the HLG, did not provide for an inclusion of dual and multiple voting rights in the breakthrough rule.⁹ The new proposal met with intense criticism from the European Parliament, which commissioned its own expert group to assess the

⁷ According to the HLG, takeover bids cannot be undertaken with the same expectation of success in the different member states and shareholders in member states do not have equivalent opportunities to tender their shares. This is what is generally referred to as the 'lack of a level playing field' (High Level Group of Company Experts 2001:18)

⁸ Now Art 5 of the Takeover Directive – a bidder reaching a certain threshold of control is required to make a mandatory bid for all the remaining shares at an 'equitable' price. This measure is supposed to provide minority shareholder protection by increasing their exit option and maintaining a certain share price certainty.

⁹ The Commission's argument not to include multiple voting rights in 2002 proposal was that 'it can be argued that securities with multiple voting rights form part of a system for financing companies and that there is no proof that their existence renders takeover bids impossible. The same applies to securities with double voting rights, which may make for a stable shareholder base. Moreover, the suppression of such rights, especially if no compensation

provisions of the Commission on the basis of whether a level playing field would be established (Dauner-Lieb and Lamandini 2002). Calling the HLG's break-through rule a 'thoughtful attempt to create a sufficiently level playing field also in respect to pre-bid techniques, albeit leaving these mechanisms and structures in place unless a general takeover bid is made and has become successful,' they criticised the Commission for providing only for a 'mini breakthrough rule' in the proposal (Dauner-Lieb and Lamandini 2002: 21). Another point of objection by the EP was that employee's rights were still not sufficiently accounted for in the proposal. This point had been raised in several EP committees, yet the Commission rejected any amendments regarding employee participation or more extensive employee information and consultation. As a member of the EP's employment and social affairs committee contends, 'the good news is that the new proposal for the first time explicitly recognizes the effects on employment and restructuring from a takeover [...] The bad news is that the rights for employees and their representatives are formulated too restrictive. There should be information in advance, timely consultation and a serious taking into account of the advice of employee representatives' (European Parliament 2003: 65).

The Council's position on the proposal was also far from unanimous. Bolkestein opposed a compromise solution agreed upon by the majority of the Council and complained that 'the positions taken by some Member States governments are astonishing. Some are protectionist and defensive. Others are even backtracking on what they were previously willing to sign up for' (Bolkestein 2003b). Despite the Commission's objection, though, the proposal was heavily altered in the Council, most notably including the 'Portuguese compromise' which rendered the key provisions of the board neutrality rule (Art 9) and the breakthrough rule (Art. 11) optional (Simpson, Berkner, and Corte 2004). After the EP approved of the compromise directive on December 16 2003 with 329 MEPs voting in favour and 219 MEPs against the proposal (with 9 abstentions), Chris Huhne, one of the EP rapporteurs on the Takeover Directive, expressed his relief that a final agreement had been reached.

This is not anyone's ideal takeover directive, but we cannot let the best be the enemy of the good. Although it will do little to create a level playing field, it will provide important protection for minority shareholders and this will encourage cross-border ownership of shares. (Huhne 2003)

The Takeover Directive, subject to an immense amount of political negotiation and compromise, thus came into force on May 20 2004. In the course of its development, it changed from a very concrete proposal on takeover regulation to a 'framework directive' with an optionality clause that allows member states to retain a certain degree of latitude for applying their own national laws. Frits Bolkestein and most observers from a market-liberal perspective seem to be most disappointed by these developments – one observer even called the Takeover Directive a 'non-event' (Godden 2004). To understand this frustration about the compromise Directive, we first have to recognize the thrust behind the Commission's push for takeover regulation in the European Union. Only then can we evaluate the actual content and potential

were provided, would in some legal systems give rise to questions of a constitutional nature that could jeopardise or at least delay for a long time the adoption of the directive' (European Commission 2002: 9)

results of the directive in terms of in how far they actually indeed constitute ‘a significant step in the right direction’ (Winter 2004: 112) towards furthering a European market for corporate control.

4.2. The Commission’s push for the Takeover Directive

As mentioned above, the volume of unsolicited takeover bids in the EU has been steadily increasing in the last years – in 2003, both the volume and the total number of takeovers in the EU were higher than the respective figures in the US (Wells and Saigol 2004). The Commission’s enthusiasm for a European Takeover Directive partly stems from this new reality of corporate practices. Yet, while it has been argued that corporate scandals like Enron or Parmalat have contributed to a great extent to policy makers’ determination for corporate governance reform, including takeover legislation (see f.ex. Skog 2002), plans for a Takeover Directive have been around already at a time when takeover legislation was not of much importance to most European policy makers.

Rather than just a response to economic developments in the European and global economy or a functional spill-over pertaining to the inevitable logic of the Single Market development, corporate governance regulation, and the Takeover Directive in particular, has to be seen as part of a distinct political project to further the marketisation of European corporate control. Alexander Schaub, Director General of the Internal Market, states this point most clearly.

The growing importance of corporate governance on the political agenda is not just a response to the recent wave of scandals in the US and in Europe. *First and foremost it is a key component of a strategy to boost business’ competitiveness and to foster efficiency in a modern economy* (Schaub 2004, emphasis added).

The Takeover Directive constitutes an inherent part of this strategy to restructure and liberalise the European markets – it is supposed to ‘facilitate the restructuring of the financial industry [...] and mark an important milestone in the emergence of an open market in EU corporate ownership’ (European Commission 1999). The Commission has repeatedly expressed its belief in the efficiency of the market for corporate control, or, as Frits Bolkestein puts it, a market where ‘the good can take over and improve the bad’ (Bolkestein 2003b). This is clearly based on, as we have argued above, a neoclassical economics view of the disciplining and efficient role of takeovers.

Companies must be exposed not just to the scrutiny of their owners but also to that of the wider market. New management may be needed to improve the overall efficiency and thus real investor returns. Even what is sometimes seen as the menace of takeovers offers a valuable discipline to firms and their management (Bolkestein 2002).

Already in the FSAP the impetus behind the Commission’s push becomes obvious, namely the ‘much-needed legal underpinning for protection of minority shareholders and a *more rationalised organisation* of corporate legal structures in the single market’ (European Commission 1999: 9, emphasis added). This is reaffirmed in the 2002 proposal for the Takeover Directive: ‘alongside the general objectives of integrating European markets in line with the FSAP and undertaking harmonisation conducive to

corporate restructuring, it sets out to strengthen the legal certainty of cross-border takeover bids in the interests of all concerned and to ensure protection for minority shareholders in the course of such transactions' (European Commission 2002: 3).

It appears that the thrust behind the Commission's agenda is very much focused on the interests of investors and other market participants rather than also taking other stakeholder interests into account. 'Investors and consumers want more choice, greater liquidity and lower business costs within a sound prudential framework. They want to buy and sell across frontiers with one set of uniformly enforced common rules' (European Commission 2000). The Commission's take on the notion of the 'level playing field' has to be seen within this context. The concern about the 'lack of a playing field' in the EU originated in the European Parliament rather than within the Commission itself (European Commission 2002: 4) – whereas the EP was worried that, as mentioned above, the diversity of structural and technical takeover defences would put certain companies (and Member States) at disadvantage in case of a takeover bid, the Commission was more concerned about the market-opening attributes of a level playing field for takeovers. 'A more 'level playing field' for takeovers in Europe would enhance the EU's economic health by allowing better use of resources. This is precisely why this proposal is at the core of European economic reform' (Bolkestein 2003c).

These underlying principles behind the Commission's push for a European market for corporate control are not only apparent in the provisions of the various draft proposals, but also in the form of governance promoted by the Commission. The increasing reliance on market forces (e.g., best practice, benchmarking etc.) to induce a process of convergence on a more self-regulated and investor-oriented model plays an important role within this agenda: 'convergence is important for investors who want to be sure that they will get the same level of protection in any jurisdiction' (Schaub 2004).

Also, the involvement of the HLG indicates a shift towards private actors' agenda- and policy choice setting. The HLG, as transnational and 'neutral' private actor, had a crucial impact on the legislative development of the Takeover Directive. Although the group's mandate was well-defined, the mandate's terms of reference did not 'specify any guidelines with respect to the measures that might be considered in order to create a level playing field. By choosing particular guidelines, [...] the Group made fundamental policy decisions of its own choosing' (Mülbert 2003: 5). Notably, the suggestions of the High Level Group (HLG) did not deal with two of EP's concerns of the EP, namely the level of employee protection and the issue of a level playing field with the US. Rather, it introduced significant changes to the discussion of takeover regulation and company law in the European Union – according to its chairman Jaap Winter, the group meant 'basically to point out a new direction for the future development of company law in the EU' (Winter 2004: 98). This shift in the mode of corporate governance regulation towards the involvement of transnational private actors can be seen as an integral element within the Commission's framework for the restructuring of European markets.

4. 3. The Takeover Directive – Overview of Key Features

To facilitate an assessment of in how far the compromise form of the 2004 Directive meets the agenda of the Commission, in this section we will provide a brief overview of its main features. For this purpose, we shall focus on the elements pertaining to (minority) shareholder protection, the level playing field and disclosure and transparency provisions as key aspects for a market for corporate control. In addition to that, the provisions for employee protection will be discussed with regard to the Commission's orientation towards the interests of shareholders. Since the recent Takeover Directive has been modified to reach a political consensus, it is also worth examining in how far the various provisions are actually characterized by this compromise.¹⁰

4.3.1 (Minority) Shareholder Protection

With regard to shareholder protection, the Takeover Directive entails several provisions to ensure an 'adequate level of protection for holders of securities'. Whereas the mandatory bid rule had been a matter of controversy in earlier proposals, apart from the definition of the threshold beyond which a mandatory bid for the remaining securities of a company has to be staged, and which is now to be determined by the Member States, it constitutes one of the less controversial points in the 2004 Directive. As Klaus Hopt argues, the 'rationale for a mandatory bid is the fact that such a rule gives an early exit option to the shareholders who fear to end up with a majority shareholder having control or exercising it to their detriment in the future' (Hopt 2002: 34). The 'equitable price' to be paid for securities under a mandatory bid is outlined in the Directive, yet ultimately left to the Member States authority. This also applies to the squeeze-out and sell-out right (Art 15/16). A bidder crossing a threshold of 90% of all capital carrying voting rights of a company can require the remaining shareholders to sell their shares for the 'equitable price'. At the same time, remaining shareholders can require a bidder crossing that threshold (which can be increased by member states to 95%) to buy all their remaining shares at an 'equitable price.' While squeeze-out and sell-out more or less balance each other in terms of (minority) shareholder and bidder rights, the mandatory bid is definitely a step towards increased shareholder protection by offering an increased exit option for shareholders.

Far more controversial than the other provisions for shareholder protection is the board neutrality rule, which was also one of the major break-up points for the 2001 draft proposal in the EP. The HLG has not made any significant changes to the concept of board neutrality, but rather concentrated on the notion of the level playing field to ensure that the board neutrality would find agreement. Arguing that 'in the event of a takeover the ultimate decision must be with the shareholders' (High Level Group of Company Experts 2002: 2) the board neutrality rule is supposed to guarantee that

¹⁰ All references in this section refer to the 2004 Takeover Directive (EC2004/25/EC) if not stated otherwise.

only the shareholders as bearers of the residual right can decide on whether to accept a bid or not. The board neutrality thus sustains one of the most important aspects of the market for corporate control – the primacy of shareholder decision-making.

4.3.2. The Breakthrough Rule - Break on Through to the Level Playing Field?

In order to meet the EP's concerns about the lack of a level playing field, the HLG has introduced the so called Breakthrough Rule regarding voting restrictions, dual/multiple voting rights and various other structural barriers to takeovers – yet, against the HLG's suggestion the Commission did not include dual and multiple voting rights into its 2002 proposal.¹¹ After strong criticism from both the Council and the EP multiple voting rights now form part of the structural barriers that can be broken through in case of a takeover. The breakthrough rule was hailed as an innovative approach to the deadlock between the different structures of company law and the need to find a politically viable compromise for the Takeover Directive .

On first inspection, these extraordinary, awkward measures are simply substitutes for the contestability that would naturally arise from diffuse, rather than concentrated, public ownership. On further examination, they offer an evolutionary path away from patterns of concentrated ownership towards the diffuse ownership of shareholder capitalism (Gordon 2003: 4)

Art 11 provides that, once a bidder has reached 75% of the capital carrying voting rights, no restrictions on voting rights (e.g., voting caps) or any other extraordinary rights of shareholders (f.ex to appoint or remove a board member) shall apply. Dual and multiple voting rights are subject to the 'one share one vote' principle at the first general meeting, where the successful bidder has the right to amend the company's 'articles of association' and to remove or appoint board members.¹² Also, during the time of the bid, any restrictions on voting rights do not apply (and or dual/multiple are also subject to the 'one share one vote' principle) at the general meeting during which the defensive measures mentioned in Art 9 are decided on. If applied, the breakthrough rule thus brings about a *temporary level playing field*. The HLG did not see the necessity for offering any compensation for shareholders with multiple voting rights, arguing that 'the loss of these rights would be the result of a public policy choice made by the EU and the member states in order to create a level playing field for takeover bids across the Union' (High Level Group of Company Experts 2002: 5). The Commission, aware that this might lead to even more controversy and the threat of increased litigation, included a provision for compensation to be set by the Member States (which was also advocated by the Council and the EP). The breakthrough rule constitutes a crucial element in the new Takeover Directive.

¹¹ With Sweden, Denmark and Finland having a large amount of multiple voting rights around, the Commission was hoping to find support for its proposal. On the other side, countries like Germany where the 'one share one vote' principle had already been introduced, were in favour of including multiple voting rights in the breakthrough rule.

In general terms, the goal of the break-through rule is the same as the overall rule of the Takeover Directive – to *transform control of listed EU firms into a commodity available for purchase* throughout (and outside) the EU (Coates 2003: 3, emphasis added).

4.3.3 Disclosure and Transparency Provisions

The Takeover Directive makes extensive and far-reaching provisions for disclosure and information rules, for companies involved in a takeover bid as well as on a general level for companies listed on a market in a Member State of the EU. Under Art 6, the bidder has to provide the target board and employees with information on the bid - amongst other things on his 'intentions with regard to the future business of the company' and the financing of the bid. On the other hand, once a bid has been launched, under Art 9 the target board has to draw up a document stating its opinion on the bid (this is not part of the optional arrangement for Art. 9). Art 10 requires all companies listed on markets in Member States to present a document to the AGM which is to contain a wide range of information on the company which under many national laws does not have to be made transparent now (e.g. voting classes, voting caps, pyramid holding structures, golden parachutes etc).

4.3.4 Here's the Catch: Optional Arrangements

As indicated, under the 'Portuguese compromise,' reached in the Council under the Italian presidency and accepted by the EP, both the board neutrality and the breakthrough rule have been made optional (Art 12).¹² This optional arrangement provides that member states can opt in or out Art 9 and/or 11 when implementing the Takeover Directive. If a member states decides not to opt in, however, it still has to grant any company which has its registered office within it the option of applying Art 9 and/or 11. This decision is made by the general shareholder meeting and can be revoked in the same way. If a member state decides to opt in, Art 9 and/or 11 applies to all companies which have their registered office in that member state. Art 12 (3) provides for the so called 'reciprocity rule,' under which member states can exempt companies which apply Art 9 and/or 11 from applying Art 9/11 if they are subject to a bid from a bidder who does not apply the same articles they do.

As Maul and Koulouridas argue, 'the optional system provides for considerable flexibility for both member states and their companies. Especially the reciprocity clause, once chosen to be applicable in a member state, provides an additional incentive for companies to opt in and apply Art 9 and 11' (Maul and Koulouridas 2004: 360). Neither the HLG nor the Commission advocated the optionality scheme, but, in

¹² This means that a successful bidder who has crossed the 75% threshold can substantially change the company without any chance for labour to be part of the process. While (minority) shareholders have the chance to sell their shares and exit, labour thus has to stick with the new owner /controlling shareholder.

¹³ The Portuguese delegation suggested the compromise version which was finally accepted. See Council documents 9103/03, 10023/03 and 10603/03 on the Council's discussion about various compromise proposals

contrast to Frits Bolkestein's reaction, Jaap Winter supports the element of competition that the provision introduces to the legislation.

The option for member states not to impose Art 9 and 11 on their companies can be seen as an elaborate system of grandfathering. The A-regime [i.e. the opt-in model, BvA/LH] sets the benchmark. Companies are not forced into the benchmark; *the system relies on market pressure* to provide incentives to elect the A-regime. This may still prove to be a significant step in the right direction with little or no negative side effects. (Winter 2004: 112, emphasis added)

There are, however, serious potential problems pertaining to the reciprocity rule, most of all the lack of a level playing field with the US and other non-EU bidders. There has been strong critique from US observers on the 'pitiable compromise' (Lindstrom 2004) of the Takeover Directive. It is feared that US bidders may be at a disadvantage when it comes to making bids on European companies. 'This compromise [Art 11 opt in/out] may be used by member states to introduce nationalistic barriers against cross-border takeover attempts [...] European bidders may be favoured over US bidders that by definition cannot apply Article 9 and/or Article 11 (Simpson, Berkner, and Corte 2004).

4.3.5 Employee Protection and Other Issues

Rather than increasing the consultation rights of employees, the Takeover Directive merely provides for the employees' right to add their opinion on the bid to the opinion document of the target board and to be provided with the same information as the general public. Although, as mentioned above, there have been demands from various committees of the EP to increase workers' rights in the Takeover Directive, the Commission refused to take these into account on the basis that employee participation 'does not have a place in the decision-making process during a takeover bid' (European Commission 2001a: 5). This, it argued, was the sole right of the shareholders.

Given its meagre provisions on employee rights, the Takeover Directive received mixed opinions from trade unions. ETUC argued prior to the proposal's approval by the EP that

it is not acceptable that only shareholders can decide about the future of a company. It is even less acceptable that the workforce and other stakeholders are not even properly informed or consulted in time. This new directive, if adopted without workers' rights, would be another step further away from the European Social Model (ETUC 2003).

The DGB, on the other side, approved of the compromise form. The only problem it anticipated was that the general shareholder meeting was to decide on whether a company is to opt in Art 9 and/or 11, which leaves no scope for employees to participate in the decision-making process (Deutscher Gewerkschaftsbund 2003).

Art 20 of the Takeover Directive provides for a revision of the directive five years after the implementation period, thus from May 2011 onwards. Now that such controversial elements like the breakthrough rule have been introduced on the European regulatory agenda – albeit still under the

optional arrangement¹⁴ - there is a chance that the controversy around these measures wears out and they might be fully incorporated in a revised Takeover Directive. As Wooldridge has pointed out with regard to the revision article, 'such examination might well result in proposals that the directive's ambit be extended, and that the options granted by Art 11a should no longer be applicable' (Wooldridge 2004: 157). Even Bolkestein, despite his frustration about the compromise Takeover Directive, expressed his hope that 'at some point in the future the EU will be able to agree a more ambitious and more meaningful Directive to facilitate takeovers under clear and transparent conditions throughout the Internal Market' (Bolkestein 2003a).

4.4. Conclusion: Setback or Stepping Stone?

As we argue, the compromise directive, albeit not quite the far-reaching instrument for the marketisation of European takeover regulation that the Commission envisaged, will have a considerable impact towards advancing a market for corporate control in Europe.

There are various features of the Takeover Directive which do not fall under the optionality arrangements, such as the transparency and disclosure articles, the mandatory bid rule and the bid information duty by both the bidder and the target company. This contribution to the emergence of a market for corporate control in Europe should not be underestimated (Maul and Koulouridas 2004: 366).

In particular the disclosure and transparency rules will be conducive to advancing the emergence of a market for corporate control. Under legislation compelling companies to reveal possible barriers to takeovers (e.g., pyramid holdings, golden parachutes etc), market forces will work more 'effectively' inasmuch as the shares of these companies would not get a 'good corporate governance' discount (as for instance, mentioned by the McKinsey Global Investor Study).¹⁵ As Maul and Koulouridas argue, 'transparency and disclosure is considered, beyond any doubt, as a cornerstone of the effective operation of capital markets and the market of corporate control' (Maul and Koulouridas 2004).¹⁶

Regarding the concept of a level playing field, the optionality agreement will most likely lead to different implementations of the Directive in Member States. The Commission has been very candid about its opinion on this:

The Commission notes with regret that the directive as finally adopted is in fact below the level of ambition of the compromise text on the table in 2001. [...] the optional arrangements in Art 12 are made reversible leading to uncertainty in the market about the behaviour of companies in terms of

¹⁴ Actually, multiple voting rights, for instance, were included *because of* the optional arrangement. When the Takeover Directive is being revised, it might well be that the optionality is reduced or taken out completely, in which case the provision on multiple voting rights would in turn come into full force

¹⁵ The 2002 McKinsey global investor survey maintains the importance of good corporate governance by arguing that 78% of European investors say they are willing to pay a premium for 'a well governed company'. For more information and Mc Kinsey's definition of well-governed company see <http://www.mckinsey.com/client-service/organization-leadership/service/corp-governance/pdf/GlobalInvestorOpinionSurvey2002.pdf>

¹⁶ On this, see also Berglöf and Burkart (2003: 205): 'Disclosure of ownership and control is critical to the market for corporate control and for monitoring the activities of controlling shareholders'

defensive measures. *This is clearly not a satisfactory situation and will not contribute to achieving the goals of the Lisbon agenda.* (European Commission 2004, emphasis added)

Yet, as we have pointed out above, the Commission's underlying thrust is geared towards market-opening and market-enhancing measures rather than the levelling of the playing field. As Jaap Winter contends, 'the primary focus of the EU's involvement in company law should be to establish company law that facilitates efficient and competitive business across the EU, rather than focusing on harmonisation in order to create similar protection for shareholders and third parties for the sake of it' (Winter 2004: 108). Thus, although the Commission maintains that 'by far the most regrettable example of the emasculation of an FSAP measure has been the unfortunate Takeover Bids Directive' (Bolkestein 2004b), the Takeover Directive, within the framework of the FSAP, does at least to some extent advance the opening and integration of the market for corporate control. Where it still allows for national diversity, the Dutch finance minister Gerrit Zalm forecasts, 'market forces will automatically lead to some kind of convergence of best corporate governance practices, which is already emerging' (Zalm 2004). Although we doubt the automatic nature of this process, the Takeover Directive does set up a regulatory framework which will enable market forces to put pressure on companies to select an 'investor friendly' takeover regime.

The thrust of the Commission to further the marketisation of European companies might have been dampened by the political compromises, yet the Takeover Directive still represents a stepping stone in the direction of the subjugation of corporate control to the market.

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