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# TAKEOVER REGULATION AS A WOLF IN SHEEP'S CLOTHING: TAKING U.K. RULES TO CONTINENTAL EUROPE

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## I. INTRODUCTION

Aesop was an optimist. In his cautionary fable that inspired the famous admonition about a wolf in sheep's clothing, the predator wolf intentionally dons a sheep's fleece in order to sneak up on a lamb. The wolf's disguise, it turns out, is so effective that he ends up being mistaken for a real sheep and being killed by another wolf. According to Aesop, even the most effective fraud can turn against its perpetrator, and justice can be served.<sup>1</sup> The results are not always so salutary with other clandestine predators, including legal rules that appear aimed at protecting vulnerable groups, but instead provide valuable tools to be exploited by predators. The thesis of this Article is that some of the takeover regulations that have proven so successful at protecting minority shareholders in the United Kingdom (U.K.) and have been incorporated into European takeover regulation, may operate in Continental systems as a deceptive guise that ensures protection for entrenched controlling shareholders.

In a recent and insightful work, John Armour and David Skeel address the reasons why takeovers in the U.K. and in the United States of America (U.S.) are regulated so differently. More specifically, their work demonstrates how historical events and the economic, legal, and political

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1. In the Gospel, Matthew also warns, "Beware of false prophets, which come to you in sheep's clothing, but inwardly they are ravening wolves." *Matthew 7:15* (King James).

climate—particularly the role of lobbying groups—in the U.S. and the U.K. have affected both the content of substantive takeover rules, and the processes through which they are created and enforced.<sup>2</sup>

As these works describe, in the U.K., acquisition of a set threshold of the voting shares (thirty percent) requires the buyer to launch a mandatory tender offer on all the outstanding shares at the highest price paid for those shares. No laws or regulations of this sort are provided under U.S. law at the federal level, even if some states provide for “best-price rules” whose effects are similar to the U.K. mandatory bid rule.<sup>3</sup> Similarly, the British “City Code” imposes a ban on directors’ actions that might frustrate a hostile bid without shareholder approval, which contrasts starkly with the relative freedom that U.S. directors have to resist a hostile acquisition.<sup>4</sup>

Armour and Skeel explain these differences by pointing to the fact that, notwithstanding the widespread ownership structure that both systems have in common, the role of institutional investors in the U.K. as shareholders and as an organized group influencing the policy makers, is absent in the U.S. Instead, in the U.S., direct investment by small and disorganized shareholders is more common. Armour and Skeel also examine why corporate directors and managers, in the context of American federalism, have a more effective role than their British counterparts in shaping takeover rules.

The most original part of their contribution underlines the importance of the rule-making process in determining the substantive regulatory outcome. In this respect, Armour and Skeel juxtapose British “coerced self-regulation, made under a clear governmental threat of intervention”<sup>5</sup> favored also by the geographical proximity of the major actors in the City, with the U.S. legislative and case-law processes, which are largely derived

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2. John Armour & David 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 (2007); see also Marco Ventoruzzo, *Europe’s Thirteenth Directive and U.S. Takeover Regulation: Regulatory Means and Political and Economic Ends*, 41 TEX. INT’L L.J. 171, 184 (2006) (discussing the differences with further bibliographical references).

3. See Stephen M. Bainbridge, *State Takeover and Tender Offer Regulations Post-MITE: The Maryland, Ohio and Pennsylvania Attempts*, 90 DICK. L. REV. 731, 748 (1987).

4. See Lucian A. Bebchuk and Allen Ferrel, *A New Approach to Takeover Law and Regulatory Competition*, 87 VA. L. REV. 111, 140 (2001). The only constraints on U.S. directors are those flexible limits set by fiduciary duties and the business judgment rule. The adoption of a neutrality rule inspired by the British approach, even if just as an opt-in provision, is advocated by some American scholars as a way to increase investors’ protection. See Lucian A. Bebchuk and Allen Ferrel, *A New Approach to Takeover Law and Regulatory Competition*, 87 VA. L. REV. 111, 140 (2001). Contra Jonathan R. Macey, *Displacing Delaware: Can the Feds do a Better Job Than the States in Regulating Takeovers?* 57 BUS. LAW. 1025 (2002) (opposing Bebchuk’s and Ferrel’s proposition).

5. Armour & Skeel, *supra* note 2, at 1764.

from litigation and judge-made rules.<sup>6</sup> Combining these and other elements, they conclude that, in the U.K., coordinated and influential institutional investors were able to promote a private takeover regime particularly favorable to minority investors. The pillars of this regime are the mandatory bid and the non-frustration rule. In the U.S., by contrast, incumbent directors and managers were able to obtain more leeway to resist takeovers thanks to a number of factors ranging from U.S. federalism that (borrowing the image used by Armour and Skeel) amplifies the voice of corporate managers to the lesser impact of institutional investors' lobbying efforts on the development of case-law.

The story told by Armour and Skeel is not only well grounded and convincing from an historical perspective, it is also consistent with modern public-choice models that analyze the role of lobbying groups in determining the level of investors' protection in different jurisdictions, such as the one recently proposed by Bebchuk and Neeman.<sup>7</sup>

But, therein lies the rub. If it is true that the U.K. approach to takeovers favors institutional investors in systems with a significant degree of dispersed ownership structure, why would the essential pillars of this approach be spontaneously adopted, well before the Thirteenth Directive, in several continental European countries that have concentrated ownership structures? In these systems, entrenched controlling shareholders and the associations representing their interests are among the most influential pressure groups in the political arena, and institutional investors play a comparatively less relevant role. In this context, Armour and Skeel's analysis leads to additional questions: Who are the lobbying groups that promoted this legislation? Or, is it possible that the legislatures were merely particularly attentive to the need of protection of minority investors? Why were countries such as France and Italy among the first, dating back to the 1990s, to embrace the British regime when they have otherwise been slower in legislative protection of minority investors?

The answers to these questions are both consistent with and contrary to Armour and Skeel's analysis. They are apparently contrary to their more specific thesis that the presence or absence of effective lobbying by institutional investors is in large part what accounts for (or at least what accounted for as between the U.S. and the U.K.) whether minority-friendly takeover reforms were adopted. A direct application of their analysis would predict that in Continental systems that lack such active institutional investors, the pillars of U.K. takeover regulation would not be adopted. Instead, the opposite is true. These "minority-friendly" rules were adopted

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6. *Id.* at 1776.

7. Lucian A. Bebchuk & Zvika Neeman, *Investor Protection and Interest Group Politics* (Harvard John M. Olin Center for Law, Econ. and Bus., Discussion Paper No. 603, 2007), available at <http://ssrn.com/abstract=1030355>.

in Continental systems, even before such rules were imposed by the European Union. Still, the story in Continental Europe is consistent with Armour and Skeel's larger narrative about the role of the relevant actors in effectuating substantive legal changes. As will be demonstrated, with some small but meaningful adjustments, instead of protecting minorities, these takeover rules in systems with widespread ownership structures might serve the interests of the most important economic actors and pressure groups in those countries—strong block-holders.

The larger moral of this tale, therefore, brings a new twist to the existing debate over legal transplants. That debate considers how well a transplanted legal institution may be adapted to function as intended in its new environment, with the underlying reasoning being that a naïve legislature attempted to import a rule without fully considering how the rule would function in the different legal, social and political framework.<sup>8</sup> This article instead considers the more cynical possibility of whether, in the rush toward European harmonization, notions of good corporate governance can be manipulated to turn rules against their own purposes.<sup>9</sup>

In Aesop's fable, the effectiveness of the contrivance was limited because of the fortuitous intervention of another predator. Corporate raiders cannot, however, dismantle the effects of anti-takeover rules in disguise.

This Article proceeds as follows. First, I offer a brief outlook on the ownership structures prevailing in continental Europe and, more precisely, in some countries used as benchmarks for the discussion. Part III will

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8. Beyond events in Europe, this issue is directly relevant to the U.S. debate on takeovers. Several U.S. scholars have argued in favor of the adoption of rules inspired by the British experience, such as the non-frustration action rule. See Lucian Arye Bebchuk & Allen Ferrell, *A New Approach to Takeover Law and Regulatory Competition*, 87 VA. L. REV. 111, 140 (2001) (discussing the benefits of choice-enhancing federal intervention in takeover law); Lucian Arye Bebchuk & Allen Ferrell, *On Takeover Law and Regulatory Competition*, 57 BUS. LAW. 1047 (2002) (responding to critiques of their previously cited article). But see Jonathan R. Macey, *Displacing Delaware: Can the Feds Do a Better Job Than the States in Regulating Takeovers?* 57 BUS. LAW. 1025 (2002) (criticizing the position of Bebchuk and Ferrell as well as their analysis and characterization of Delaware law); Stephen J. Choi & Andrew T. Guzman, *Choice and Federal Intervention in Corporate Law*, 87 VA. L. REV. 961 (2001) (praising the choice-enhancing aspects of Bebchuk and Ferrell's position while critiquing the weaknesses of their position); Roberta Romano, *The Need for Competition in International Securities Regulation*, 2 THEORETICAL INQUIRIES L. 387, 507 n. 307 (2001) (stating that there is no data indicating that the rule preferred by Bebchuk and Ferrell has made U.K. firms more valuable than Delaware firms); Robert Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. CHI. L. REV. 1103, 1157-64 (2002) (criticizing the political assumptions behind Bebchuk and Ferrell's position).

9. See Bebchuk & Neeman, *supra* note 7, at 30 (predicting that "[i]nvestor protection will be lower when public officials setting the level of investor protection assign a relative high weight to contributions from interest groups in their objective function").

provide some evidence concerning the adoption of mandatory bids, board neutrality, and the breakthrough rule in Europe before the Thirteenth Directive, and its effect on takeover dynamics. Part IV takes a closer look at the how some countries have implemented that directive. The thesis there is that the Directive represented an occasion to tune the U.K. approach even more to the defensive needs of entrenched controlling shareholders. Part V will discuss a case study—specifically, the adoption of the Thirteenth Directive in Italy. Italy represents an excellent test for the thesis advanced in this work because, particularly if compared with the U.K., its listed corporations have a very concentrated ownership structure and institutional investors are relatively weak and strongly related to banking institutions which might be less concerned with investors' protection. Nonetheless, Italy complied with the British approach well before the enactment of the Thirteenth Directive. Part VI will consider, with some empirical evidence, the effects on the Italian market for corporate control of the adoption of these rules.

## II. SAME RULES, DIFFERENT EFFECTS: OWNERSHIP PATTERNS IN THE U.K. AND IN CONTINENTAL EUROPE

Mandatory bid, the best price rule, board neutrality, and breakthrough provisions, which represent the entire panoply of what is considered to be effective takeover regulation, might have very different effects when applied in systems with concentrated ownership instead of dispersed ownership. This hypothesis has been largely overlooked, especially in the public debate, notwithstanding the fact that it is quite intuitive.<sup>10</sup>

Consider mandatory bids. In very broad terms, this rule provides that when a bidder acquires a set threshold of voting shares of a listed corporation (let's say 30 percent), it must launch an offer on all the outstanding shares at an equitable price. Now imagine how this rule would apply in a system with a very dispersed ownership structure in which, for example, the average participation necessary to have *de facto* control of a corporation is ten percent. In that context, a raider can easily succeed in a hostile acquisition without triggering the mandatory bid. If the current

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10. One important work that has promoted this thesis is by Goergen, Martynova and Renneboog, in which they argue that similar regulatory changes in corporate governance might have different, sometimes opposite effects in different countries. More specifically, the implementation of the Thirteenth Directive on takeovers, whose basic features are largely consistent with U.K. takeovers regulation, might lead to either more dispersed or more concentrated ownership, depending on the initial state of the system in which it is introduced. See Marc Goergen, Marina Martynova & Luc Renneboog, *Corporate Governance Convergence: Evidence from Takeover Regulation Reforms*, (European Corporate Governance Inst., Working Paper No. 33/2005, April 22, 2005), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=709023](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=709023).

controlling shareholder holds ten percent of the voting shares, it might be sufficient to acquire, for example, eighteen percent to be in the driver's seat. And this can be done with a partial tender offer, by buying shares on the market, or by negotiating blocks of shares outside the market with qualified minority shareholders. In any case, by not exceeding the thirty percent threshold, no mandatory bid is required on all the shares.

The important implication is that, in a system with widespread ownership, the real goal of the mandatory bid is not so much the one of protecting minority investors from *any* change in control, but rather from a change in control *when* the resulting ownership structure of the corporation is characterized by the presence of a large block-holder. The importance of this protection is that a new large block-holder weakens the potential disciplining role of the market. In other words, mandatory bids provide a fair exit to shareholders when a change of control takes place that is not easy to reverse.

Compare the same rule in a system in which the ownership structure is concentrated, and the largest shareholders typically hold a percentage higher than the threshold triggering the mandatory bid. In that context, the practical effect of the rule is that whoever aims at obtaining control must be ready to buy all the outstanding shares. Needless to say, rendering the acquisition more expensive might help the controlling shareholder to fend off an undesired suitor.<sup>11</sup>

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11. See Rolf Skog, *Does Sweden Need a Mandatory Bid Rule? A Critical Analysis* (Société Universitaire Européenne de Recherches Financières 1997), available at <http://www.suerf.org/download/studies/study2.pdf>; see also Beate Sjøfjell, *The Golden Mean or a Dead End? The Takeover Directive in a Shareholder versus Stakeholder Perspective*, 22 (Sept. 23, 2005) (unpublished paper presented at Centre for European Company Law September 23, 2005 conference) (on file with The University of Pennsylvania Journal of Business Law), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=866184](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=866184). Sjøfjell observed that, with respect to some Nordic countries:

[A]n interesting possible explanatory contribution lies in the lobbyism of persons in control in companies (powerful managers or directors, or controlling shareholders) against national legislators for a mandatory bid rule, to make competing acquisitions of control more expensive and thereby less likely to happen. This may be part of the explanation for the introduction of the mandatory bid rule in Sweden, after strong opposition from leading academics in the field. It could also be an explanation for Finnish companies such as Nokia in their articles of association voluntarily adopting a lower threshold than the high legislative one.

See also Luca Enriques, *The Mandatory Bid Rule in the Proposed EC Takeover Directive: Harmonization as Rent-Seeking?* in REFORMING COMPANY AND TAKEOVER LAW IN EUROPE (Guido Ferrarini et al. ed., 2004) (including corporate managers and block-holders as "interest groups" that might gain from a mandatory bid rule, since the rule makes hostile bids more expensive). But see Erik Berglöf & Mike Burkart, *European Takeover Regulation*, 18 ECON. POL'Y 171, 196 (2003) (explaining that a mandatory bid rule creates an

In a similar vein, the board neutrality rule can also lead to dramatically different consequences depending on the ownership structure of the corporation. This rule provides that when a tender offer is launched, the directors of the target corporation cannot initiate or continue any action that might frustrate the success of the offer without obtaining the approval of the shareholders' meeting. Once again, when the ownership structure is widespread, and the real agency problem is between directors and managers as against relatively dispersed shareholders, required approval by shareholders' meeting empowers the investors. This is especially true if—as Armour and Skeel show to be the case in the U.K.—organized and competent institutional investors, able to make informed decisions, are present and actively participate in the shareholders' meeting.

Conversely, when the ownership structure is concentrated and there are strong controlling shareholders, the real agency problem is not between directors and managers, on the one hand, and dispersed equity investors, on the other, but rather between majority and minority shareholders. A resolution of the shareholders' meeting in that context does not really address the crucial issue. More simply, when there is a controlling shareholder holding more than forty percent of the voting shares, a defensive measure against a hostile bid voted by the shareholders' meeting is unlikely to resolve the inherent conflict of interest between incumbent, entrenched controllers able to extract private benefits from the corporation and minority investors that might welcome a value-maximizing bid.

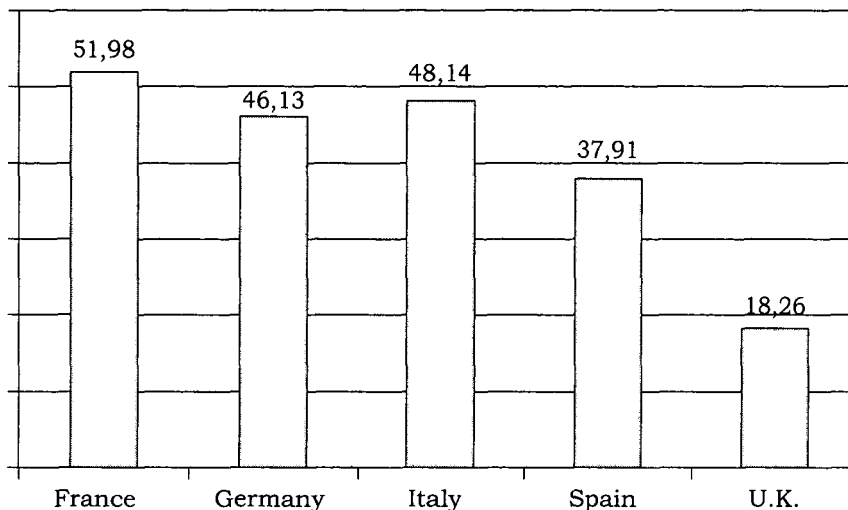
While these themes with specific references to selected European legal systems will be explored in more detail below, this sketch gives some form to the basic intuition that the same takeover rules might have different or even opposite effects in different markets. Against this backdrop, it is also helpful to have a brief refresher on the most common ownership structures in five major European countries. Figure 1 represents the average shareholding of the largest shareholder in France, Germany, Italy, Spain, and the U.K.

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environment where the rival will only take control of the company if small shareholders are also paid a premium).



Figure 1 - Average largest shareholder (%)

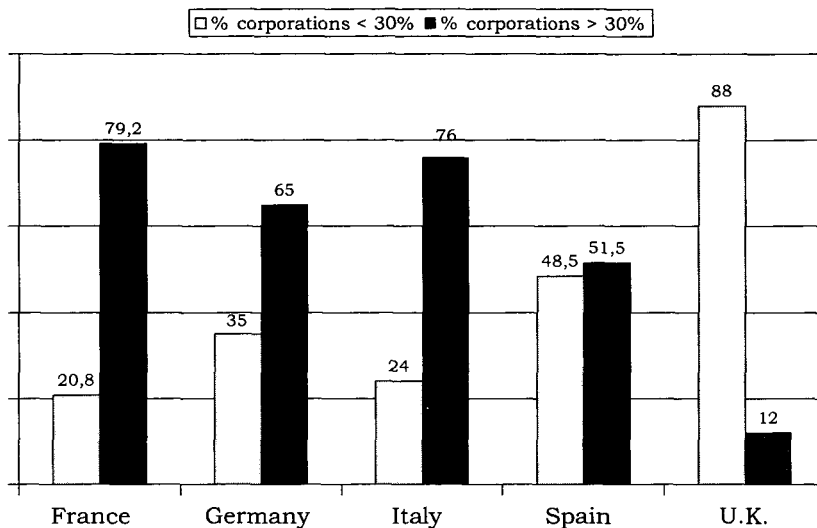


Source: Van der Elst (2004)

As this chart illustrates, and as is well-known, the U.K. presents a clearly unique ownership structure in Europe. The difference and its potential effects are even more striking if we consider, as will be discussed later, that in most European systems, and in particular those considered in Figure 1, the threshold triggering the mandatory bid is set at around thirty percent (33.3 percent in France). What might be less intuitively obvious, but is critically important, is that as a general proposition only British corporations can be taken over *without* a compulsory tender offer on all the shares. In contrast, to acquire control over a continental European corporation, either through a friendly or a hostile mechanism, the buyer must be ready to buy all the shares.

This conclusion is confirmed, and even more evident, if we consider the percentage of listed corporations that, in every country, is controlled with a participation that is greater or lesser than thirty percent, as illustrated in Figure 2.

Figure 2 - Ownership concentration



Source: Van der Elst (2004)

As the chart clarifies, corporations controlled with less than thirty percent of the voting capital are the vast majority in the U.K., while the opposite is true in continental Europe.

Turning now to the qualitative composition of the shareholders, we can assess the role played by institutional investors. In the U.K., institutional investors such as mutual and pension funds are a significant force; in the other countries considered, however, either families or other private corporations make up the lion's share.

Table A - Ownership by Investor Type (source: FESE 2007)

	Individual Investors	Public Sector	Foreign	Financial Enterprises	Non-financial Enterprises
France	6%	11%	39%	29%	15%
Germany	15%	7%	21%	15%	42%
Italy	26%	10%	13%	23%	28%
Spain	23%	3%	33%	17%	24%
U.K.	14%	1%	33%	50%	2%

As Table A illustrates, financial enterprises, including collective investment vehicles, represent across the Channel approximately fifty

percent of the shareholders of listed corporations.

A similar picture is provided by the following data in Table B, which enumerates the largest and second largest shareholders among the most relevant listed corporations:

Table B—Largest Shareholders Top 100 Corporations (source: Kirchmaier, Grant 2006)		
	Largest Shareholder	Second Largest Shareholder
France	family (37)	institutional (24)
Germany	family (36)	institutional (42)
Italy	family (30)	institutional (31)
Spain	corporate (27)	institutional (31)
U.K.	institutional (81)	institutional (86)

The same phenomenon can also be identified with respect to the allocation of assets managed by institutional investors. For instance, in Italy and France in 2004, equity funds accounted for approximately twenty percent of the total number of investment funds. The percentage was higher in Spain (slightly above thirty percent) and in Germany (approximately forty percent). These numbers were significantly and consistently lower than in the U.K., where assets allocated to equity funds amounted to seventy percent of the total assets collectively invested.<sup>12</sup>

Ownership structures in the United Kingdom differ both in terms of concentration and with regard to the role played by institutional investors.<sup>13</sup> Obviously, these are not the only elements that might explain the ability of institutional investors to influence the policy makers and obtain a certain degree of investor protection. Many other variables might interfere. If, however, we assume that the pillars of the British approach are particularly favorable to minority investors in systems with widespread ownership structures, as Armour and Skeel conclude, then it should be puzzling how that approach emerged spontaneously in jurisdictions characterized by concentrated ownership in which institutional investors are much less present. Before turning to that specific question, it is worth briefly considering whether and how that approach emerged in those systems.

12. ASSOGESTIONI, GUIDA ITALIANA AL RISPARMIO GESTITO—2005 FACTBOOK, 90, available at [www.assogestioni.it](http://www.assogestioni.it).

13. Mara Faccio & Larry H. P. Lang, *The Ultimate Ownership of Western European Corporations*, 65 J. FIN. ECON. 365 (2002) (analyzing ownership and control trends of corporations in Western European countries).

### III. THE ADOPTION OF THE U.K. APPROACH TO TAKEOVERS IN SOME EUROPEAN COUNTRIES PRIOR TO THE XIII DIRECTIVE

As noted, several continental European systems adopted some form of the British approach before this was required by the European Union. This part describes those national developments, putting them in an economic, historical, and political context.

The U.K. led the way to the mandatory bid. This measure was not immediately introduced with the Takeover Code of 1968, but in 1972 in response to a defensive acquisition of shares by the shareholders of a corporation targeted by two rival bids. In reaction to this event, the Takeover Panel, the self-regulatory body administering takeover rules, required that any bidder purchasing forty percent or more of a corporation's shares should launch a tender offer on all the outstanding shares. In 1974 the threshold was lowered to the current level of thirty percent.<sup>14</sup>

France followed suit in 1989. Law 89-531 established a mandatory tender offer on all the outstanding shares, as well as other securities or rights that might convert or attribute a voting equity stake, triggered by the acquisition of one-third of the voting shares.<sup>15</sup> Until recently, French law did not provide a best-price rule equivalent to the one contained in the Takeover Code. The French authority responsible for the promulgation and enforcement of takeover rules, the French Conseil des Marchés Financiers (which replaced the Conseil des Bourses des Valeurs), used to require "that the compulsory offer price be at least as high as the highest target share price during the period over which the share acquisitions giving rise to the compulsory offer requirement were made."<sup>16</sup>

Austria is also an interesting example. The Wien Börse AG, founded in 1771 under Empress Maria Theresa, is one of the oldest European stock exchanges but one of the smallest in terms of capitalization.<sup>17</sup> The corporations listed on this market generally have a concentrated ownership structure, and the share of collective investors is around 14.5 percent of the

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14. Armour & Skeel, *supra* note 2, at 1764.

15. David J. Berger, *A Comparative Analysis of Takeover Regulation in the European Community*, 55 LAW & CONTEMP. PROBS. 53, 66 (1992).

16. Charles M. Nathan, Michael R. Fischer & Samrat Ganguly, *An Overview of Takeover Regimes in the United Kingdom, France and Germany*, 1400 PLI/CORP 943, 978 (2003).

17. With a capitalization of approximately 121,800 million euro in August 2006, the Austrian stock exchange is slightly smaller than the Greek and Denmark ones, and represents approximately one-fifth of the London Stock Exchange. See Commission Staff, *Report on the Implementation of the Directive on Takeover Bids*; Commission of the European Communities, *Report on the Implementation of the Directive on Takeover Bids*, available at [www.europa.eu](http://www.europa.eu).

equity capital, significantly below that of the U.K.<sup>18</sup> Since the 1999 *Übernahmegesetz* (“Takeover statute”), any entity obtaining a controlling interest in a corporation must launch a bid on all the outstanding shares. The statute provided for a rebuttable presumption that holding thirty percent of the voting rights, including if such ownership is attained by acting in concert with others, represents a controlling interest. The mandatory tender offer had to be launched at a price not lower than the average market price of the relevant securities over a period of six months preceding the acquisition of the controlling interest, and in any case not lower than fifteen percent below the highest price paid or promised by the bidder in the twelve months preceding the triggering event.<sup>19</sup>

It is relevant for our purposes to note that in the years before the enactment of the Takeover statute there had been two attempted, albeit unsuccessful, hostile takeovers of Austrian listed corporations: one in 1997 over *Krems Chemie AG* and one in 1998 over *VOEST Alpine Eisenbahnsysteme AG*. After the adoption of the statute, since 2006, there have been no overtly hostile takeover attempts.<sup>20</sup> The absence of formally hostile takeovers implications does not always provide an accurate picture of the market for corporate control because apparently friendly acquisitions might be conducted under the threat of a hostile offer. Nevertheless, it is significant that after the adoption of the “British-style” mandatory bid, overtly hostile takeovers have vanished from Austria.

Italy is another paradigmatic case. The first takeover statute was enacted in 1992, and it provided that any entity that intended to acquire, or had acquired, a controlling interest in a listed corporation should launch a tender offer. The tender offer could be partial, because the law only required it to be extended to the percentage of shares that would grant control, and the price of the offer could be freely set by the bidder. There were two major problems with this approach. First, for every listed corporation, it was necessary to indicate the controlling threshold, which could vary even overnight. Second, the mandatory offer was not on all the outstanding shares, and therefore an exit was not granted to all shareholders.

Also in light of these issues in 1998 a new comprehensive statute on financial markets regulation (so-called *Testo Unico della Finanza*, hereinafter also “T.U.F.”) profoundly reformed takeover rules. The new approach followed, with respect both to mandatory bids and defensive measures by the target corporation, the U.K. regulatory structure. In particular, pursuant to Article 106 of the T.U.F., any entity that acquired

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18. FESE, *Share Ownership Structure in Europe*, February 2007.

19. Scott V. Simpson et al., *The Future of Takeover Regulation in Europe*, 1575 *PLI/CORP* 725, 765 (2006).

20. *Id.* at 756.

thirty percent of the full voting (“ordinary”) shares of a listed corporation would be obliged to launch a tender offer on all the remaining full voting shares. The price for the bid was to be no lower than the average of the average market price of the twelve months preceding the acquisition, and the highest price paid by the bidder in the same period of time. The same piece of legislation also introduced a non-frustration rule (Article 104 of the T.U.F.), which provided that once a bid had been launched the directors of the target corporation could not initiate or continue any action that might frustrate the bid without shareholder approval. This rule forbade them, for instance, from increasing its costs for the acquirer without the approval of shareholders representing at least thirty percent of the capital entitled to vote. Later I will take up the dynamics of hostile takeovers in Italy following these legislative innovations. But for now it is important to simply point out that there was a spontaneous convergence toward the British approach throughout Europe before the Directive 25/2004/CE.

The different path followed by Spain does not negate this general trend. Until the recent Law 6/2007 of April 12, 2007, which implemented the XIII Directive, the Iberian monarchy adopted an elaborate and complicated system that had evolved through the years. The first regulation was introduced with the Real Decreto 1848/1980 of September 5, 1980, and the last amendments were contained in the Real Decreto 432/2003 of April 11, 2003. Instead of describing the system in detail here,<sup>21</sup> it is worth noting that the threshold triggering a mandatory offer was set at a percentage lower than thirty percent. The basic framework of the regulation provided that the acquisition or the intention to acquire twenty-five percent of the voting shares of a listed corporation was sufficient to mandate a tender offer. However, the mandatory offer could be compelled in many other cases. In particular, if five percent participation was acquired and, with that ownership the buyer could appoint a certain number of directors, that indicated a significant influence on the governance of the issuer. Spain did not, however, apply the “one-hundred percent rule,” in the sense that the law only required a partial bid (on at least ten percent of the outstanding shares). While this approach clearly made hostile tender offers less expensive as compared to the British Takeover Code, it also set the threshold of the mandatory (partial) bid at a particularly low level with respect to the average controlling participation.

Germany represented for many years an exception to the Continental European convergence toward the U.K. system. Germany was in fact a quite strong opponent of the adoption of the XIII Directive and, in particular, of its non-frustration rules.<sup>22</sup> German opposition, however, was

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21. See LA SOCIEDAD COTIZADA 605 (Fernando Vives & Javier Pérez Ardà eds., Marcial Pons 2006) (providing further analysis).

22. See John W. Cioffi, *Restructuring “Germany Inc.”: The Politics of Company and*

not based on resistance to the British approach generally, but instead a more immediate concern that an uneven playing field would develop in Europe that might have made German corporations more vulnerable to hostile acquisitions from bidders located in other countries. Despite these concerns, even before the approval of the XIII Directive, Germany did enact a new takeover law in 2002 (the Wertpapierwerbs und-Übernahmegesetz or “WpÜG”, followed by secondary regulation contained in the so-called WpÜG-Angebotsverordnungs), which shared the basic pillars of that regulation. According to the new rules, the acquisition of a thirty percent participation, in the absence of a different de facto controlling shareholder, would trigger a mandatory tender offer on all of the outstanding shares.<sup>23</sup>

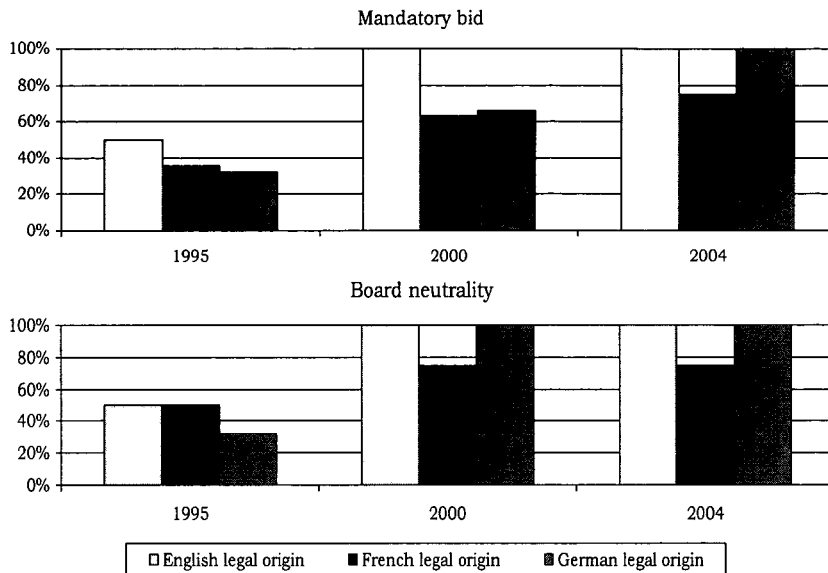
These various examples illustrate a trend that can be seen throughout Europe. Figure 3 illustrates the percentage of European systems from English, French, and German legal origins that have adopted two pillars of the British *Takeover Code* in some form or other: the mandatory bid and the passivity rule. The chart demonstrates that from 1995 to 2004, meaning *before* the necessary implementation of the XIII Directive, there has been a steady increase in the number of continental European countries that have spontaneously adopted this approach.

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*Takeover Law Reform in Germany and the European Union*, 24 LAW & POL’Y 355 (2002) (discussing reactions to the German company law reformation from various stakeholders).

23. An overview of the 2001 takeover statute in English can be read in JOHANNES ADOLFF ET AL., PUBLIC COMPANY TAKEOVERS IN GERMANY (Verlag C.H. Beck 2002) and in GABRIELE APFELBACHER et al., GERMAN TAKEOVER LAW: A COMMENTARY (Verlag C.H. Beck 2002). For a discussion of possible implications of the German approach, in which the title itself clarifies the author’s position, see Jeffrey Gordon, *An American Perspective on the New German Anti-Takeover Law*, European Corporate Governance Inst. Working Paper No. 02/2002), available at [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=336420](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=336420).

Figure 3 - Percentage of countries that have adopted the rule

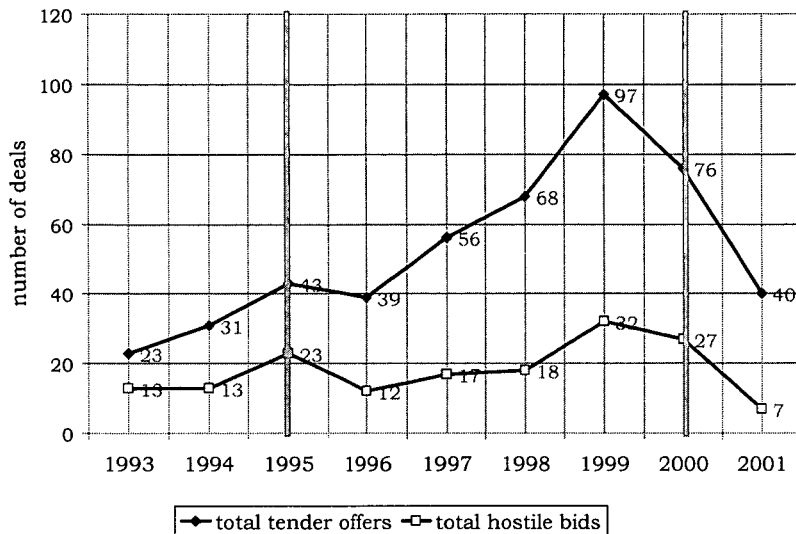


Source: Goergen et al. (2005)

If the adoption of these rules would have an effect on the market for corporate control and, in particular, would enhance the chances of a value-maximizing change of control, either friendly or hostile, one could expect an increase in the takeovers and mergers and acquisition activity following their enactment. Of course, numerous complex variables affect acquisitions, including some macroeconomic determinants that are independent from the local regulatory framework. It is, however, reasonable to question whether these rules actually favor takeovers if their enactment does not seem to correspond with takeover activity. To that end, Figure 4 indicates the number of takeover announcements in Europe from 1993 to 2001.



Figure 4 - Takeover announcements in Europe

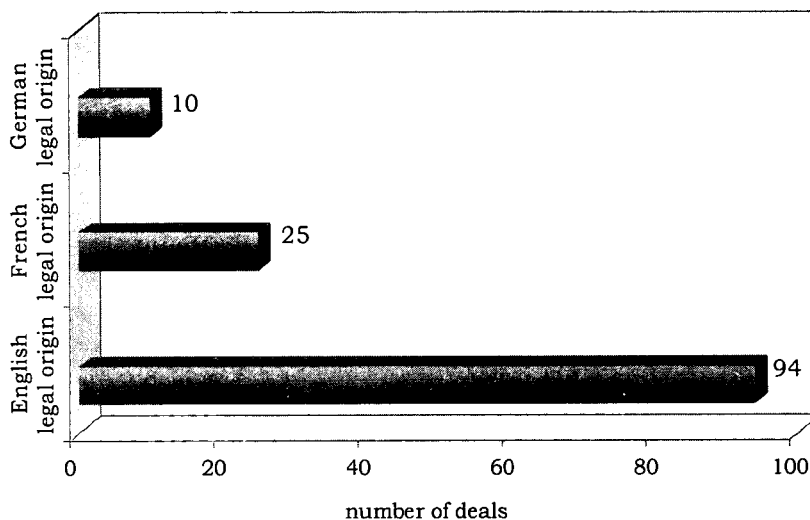


Source: Martynova, Renneboog (2006)

Just looking at the total number of takeovers, this snapshot from the late nineties, during a so-called “takeover wave,” does not seem to positively correlate with the rise of a regulatory framework similar to the pro-takeover British approach. The same is true, and even more so, for hostile takeovers. In Figure 3, the years 1995 and 2000 have been highlighted as benchmarks to mark the growing adoption of the mandatory bid rule and the passivity rule. Even this simple and rough comparison suggests that the takeover wave of the nineties was independent from the converging of the regulatory framework. Moreover, even further convergence toward the British regulatory model after 2000 was not followed by an increase, but rather by a drop, in the number of both friendly and hostile takeovers.

This conclusion is even more striking if we break down the data by country. Figure 5 indicates that the vast majority of hostile deals took place in the U.K., which once again suggests that the adoption of the pillars of the British approach to takeovers, in continental Europe, did not have a significant effect on the contestability of corporate control.

Figure 5 - Hostile Takeover Announcements in Europe 1993 - 2001



Source: Martynova, Renneboog (2006)

#### IV. AN OVERVIEW OF HOW THE TAKEOVER DIRECTIVE HAS BEEN IMPLEMENTED

It is not within the scope of this Article to analyze either the substantive content of the Thirteenth Directive, or the numerous and articulated issues concerning its implementation in the individual Member States. As mentioned in the introduction, I will instead use one country, Italy, as a case study. With respect to the overall European landscape, however, the more general point is that, in many Continental European countries, the adoption of the Takeovers Directive has been—to some extent—used as an opportunity to reduce the contestability of corporate control or as an occasion to introduce new rules and regulations that might strengthen the defensive barriers of national enterprises.

Scholars and policymakers have already argued that the implementation of the Directive might, in many respects, hinder a pan-European market for corporate control in many respects.<sup>24</sup> It is useful at

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24. See Commission of the European Communities, *Report on the Implementation of the Directive on Takeover Bids*, (Commission Staff Working Document, Brussels, February 21.02.2007), available at [http://ec.europa.eu/internal\\_market/company/takeoverbids](http://ec.europa.eu/internal_market/company/takeoverbids)

this point to review the highlights of those arguments.

First, with respect to the mandatory bid rule, whose adoption is neither optional nor subject to reciprocity, in adopting the Directive, most States will have increased the minimum price at which the tender offer should be launched, which as will be discussed later is also the case with Italy. This price increase raises the overall cost of a change of control, in particular when connected to a hostile acquisition. This element might affect the efficiency of the market for corporate control.

Secondly, implementation of the board neutrality rule and of the breakthrough rule has not increased the contestability of corporate control, but has instead probably lowered it. According to the European Commission's Report on the implementation of the Directive, as of February 2007, among the fourteen Member States where the Directive had been implemented, board neutrality was already provided for in some manner in thirteen States (either at the statutory level or through self-regulation). Therefore, it was not an innovation brought by the Directive. Additionally, in five out of these thirteen States, board neutrality had been made subject to reciprocity according to Article 12 of Directive 2004/25/CE, whereas the same requirement was strictly mandatory before the Directive. According to the Commission itself, this development "will very likely hold back the emergence of an open takeover market, rather than promote it."<sup>25</sup>

Based on these observations, it is now possible to add two important European countries, Spain and Italy, which have adopted the Directive after the issuance of the above-mentioned Report. Notably, both countries opted for reciprocity with respect to board neutrality and breakthrough rules.<sup>26</sup>

In addition, all the Member States that did not provide for mandatory board neutrality before the Directive decided to implement it only on an

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/index\_en.htm (concluding that a "large number of Member States have shown strong reluctance to lift takeover barriers . . . . The number of Member States implementing the Directive in a seemingly protectionist way is unexpectedly large.") For commentary on the Report in Italian, see Andrea Angelillis & Chiara Mosca, *Considerazioni sul recepimento della tredicesima direttiva in materia di offerte pubbliche di acquisto e sulla posizione espressa nel documento della Commissione Europea*, 52/5 Riv. Soc. 1106 (2007). Doubts about the capability of the Directive to create an active market for corporate control in Europe have been expressed by, among others, Matteo Gatti, *Optionality Arrangements and Reciprocity in the European Takeover Directive*, 6 EBOR 552 (2005). For criticism of the Directive, as was expressed at an early stage of the drafting of the final version of the Directive, in particular because reciprocity would have hindered the market for corporate control, see Marco Becht, *Reciprocity in Takeovers*, ECGI Law Working Paper 14/2003, available at .

25. Report, *supra* note 24, at 6.

26. See respectively Article 104-ter of the Italian Testo Unico della Finanza, and Articles 60-bis, Par. 2 and 60-ter, Par. 4 of the Spanish Ley 24/1988 of July 28, 1988, as amended by the Ley 6/2007 of April 12, 2007.

optional basis pursuant to Article 12 of the Directive, with the single exception of Malta. Similarly, very few Member States have imposed the breakthrough rule on their national corporations, providing for its application only on an optional basis.

Therefore, in several Member States, there is a sort of double level of protection for corporations. First, board neutrality and/or breakthrough rules are optional and the shareholders' meeting of the issuer can decide whether or not to introduce them in the bylaws. Second, even when this option is invoked, the actual application of the rules is subject to reciprocity. For instance, this is true in the case of Spain with respect to the breakthrough rule (Article 60-ter of the *Ley del Mercado de Valores* 24/1988).<sup>27</sup>

It should also be observed that, together with the implementation of the Directive, some Member States have also adopted "collateral measures" that might help raise barriers to hostile takeovers. For example, with the same statute that implemented the Thirteenth Directive, *Loi n° 2006-387* of March 31, 2006, the French legislature introduced a new type of poison pill in the form of free warrants (*bons de souscription*), which can be issued to existing shareholders. In case of a tender offer, these warrants give the right to subscribe new shares at a significant discount to the investors that have not tendered their participation.<sup>28</sup> The shareholders' meeting approval of this measure can also decide which offers will trigger the rights (for example, only hostile bids) and can also delegate, within a defined framework, the authority to issue the warrants to the board of directors.

Without analyzing here the regulation of these new instruments, nor discussing their compatibility with either the Directive or other European law principles such as the free movement of capitals set forth by Article 56 of the EC Treaty,<sup>29</sup> it is worth noting that, once again, the implementation

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27. This legislative technique raises the question of its compatibility with Article 12 of the Directive. According to one interpretation, reciprocity would be allowed only when board neutrality and breakthrough are mandated by the state, as it is in the U. K. rather than when the state does not impose them, and single corporations are to voluntarily opt-in these provisions. Besides these hermeneutic problems, however, it is clear that the general picture is one of higher protections for incumbents.

28. See Martin Arnold & Tobias Buck, *French 'Poison Pill' Strategy May Breach EU Rules*, FINANCIAL TIMES, Feb. 21, 2006, [http://us.ft.com/ftgateway/superpage.ft?news\\_id=fto022120061334518086&page=1](http://us.ft.com/ftgateway/superpage.ft?news_id=fto022120061334518086&page=1); Martin Arnold & Tobias Buck, *French Use of 'Poison Pill' Strategy Pushes EU Takeover Rules to Limit*, Feb. 22, 2006, FINANCIAL TIMES; Shearman & Sterling LLP, *Implementation in France of the Takeover Directive and the New French Poison Pill* (Apr. 6, 2006), [http://www.shearman.com/ma\\_040606/](http://www.shearman.com/ma_040606/).

29. For an extensive interpretation of Article 56 of the European Treaty, and a discussion on the potential "horizontal application" of the "freedom of capitals" principle also among private parties, see Philippe Vigneron & Philippe Steinfeld, *La Communauté Européenne et la Libre Circulation des Capitaux: les Nouvelles Dispositions et Leurs Implications*, 32/3-4 CAHIERS DE DROIT EUROPÉEN 401, 430 (1996).

of the Directive has been used by some European legislatures as an occasion to introduce new and powerful protections for incumbents.

#### V. A PARADIGMATIC CASE-STUDY: ITALY

For the reasons described above, Italy provides a representative and helpful example of the phenomenon under examination. This country presents, with respect to the ownership structure of listed corporations and to the financial actors most able to influence the regulatory process, features almost opposite to the United Kingdom. Controlling shareholders, often an individual or a family, usually own significantly more than thirty percent of the voting shares. Institutional investors have a growing, but still marginal, role when compared to their counterparts in the U.K., as described above.<sup>30</sup> Moreover, they tend to be quite passive when it comes to corporate governance.<sup>31</sup> Notwithstanding this contrasting factual background, Italy adopted the British approach to takeovers in 1998, when it introduced both the mandatory bid and the non-frustration rule, together with an embryonic form of breakthrough rule concerning shareholders' agreements.

Have these rules fostered the market for corporate control? Did they really protect minority shareholders, or did they entrench existing incumbents? Do the changes recently introduced by the XIII Directive make hostile acquisitions easier or more difficult? Has the implementation of the European legislation been used to perfect barriers to unfriendly bids?

There is no single, clear-cut answer to all of these questions. Instead, using the Italian example, I will examine whether the existing empirical data suggests that the analysis provided by Armour and Skeel comparing the U.S. and the U.K. extends to the development of takeover regulation in continental Europe. To this end, I will examine three takeover rules: mandatory bids, board neutrality, and the breakthrough rule. I will also consider takeover activity and resulting ownership structures.

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30. See discussion above.

31. Marcello Bianchi & Luca Enriques, *Corporate Governance in Italy After the 1998 Reform: What Role for Institutional Investors?* 43 CONSOB—QUADERNI DI FINANZA (2001), argued that there was room for institutional investors' activism in Italy, basing their conclusion on elements such as the average voting participation held by these investors, the degree of concentration in the industry that might affect coordination problems among investors, and their investment strategy. The authors also point out, however, potential limitations to activism due to conflicts of interest of mutual funds belonging to banking groups and to the ownership concentration of the issuers in which they invest. The few existing empirical analysis confirm a relatively low level of activism. See also Alessandro Cortese & Paola Musile Tanzi, *Investitori istituzionali e corporate governance. Forme di attivismo e modalità di realizzazione*, Giuseppe Airoidi & Giancarlo Forestieri (editors), CORPORATE GOVERNANCE. ANALISI E PROSPETTIVE DEL CASO ITALIANO, Milano: Etas Libri (1998), 131 ff.

A. *Mandatory bids.*

As discussed above, in light of the average stake of the controlling shareholder, in Italy as well as in other European jurisdictions, a change of control rarely occurs without triggering the obligation to launch a tender offer. Before the implementation of Directive 2004/25/CE, Italian law provided that whoever acquired more than thirty percent of the full-voting shares should launch an offer on those shares at a set price.<sup>32</sup> The price was the arithmetic average between two elements: the average weighted market price of the twelve months preceding the triggering event and the highest price agreed upon by the bidder in the same period for the same shares. The rule's purpose is to ensure minority shareholders a fair price based on market conditions taking into account the highest price paid by the bidder, i.e. a price that includes the premium for control. With this formula, only part of the premium for control was granted to minority shareholders. This price rule attempted to protect minority shareholders while reducing the overall cost of the takeover for the bidder.

Implementing the Directive, the Italian legislature has introduced the "best-price rule" provided for by Article 5 of the Directive. The new text of Article 106 T.U.F. establishes that the price offered should not be less than the highest price paid by the bidder in the twelve months preceding the (communication of) the acquisition of the triggering threshold.

Consider some important recent takeovers that have occurred on the Italian market before the implementation of the Takeover Directive, sometimes involving foreign bidders, and what the minimum price of the tender offer would have been if the new rules had already been adopted.<sup>33</sup>

A first example is the takeover that occurred in November of 2006 of the insurance company Toro by its competitor Generali.<sup>34</sup> The highest price paid by the bidder was equal to 21.20 euro, and the average market price was 15.36 euro. The minimum price at which, theoretically, the offer on all the outstanding shares had to be launched according to the pre-

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32. More precisely, the rule requires thirty percent of the shares granting a voting right concerning the appointment or removal of the directors, although no listed corporations issued these types of limited voting shares.

33. Concerning methodology, as in any case when one plays "what if . . ." with past events, it could be argued that, if the new rules were already in place when these transactions occurred, the dynamics of the market prices and the behavior of the parties involved would have been different. Therefore, assuming all the variables are equal, applying the new minimum price rule is not correct. This observation is undoubtedly well-grounded. The point of this simulation, however, is not to predict exactly what would have happened with a different regulatory framework, which is an impossible task, but, rather to provide an idea of the possible effects of the new rules looking at actual cases.

34. The prospectus of the tender offer, from which the information reported in the text is taken, is available on the website of the Italian Stock Exchange Commission at [www.consob.it](http://www.consob.it).

Directive rule was, therefore, 18.28 euro. Applying the new best-price rule after the Directive the offer could not be made for less than 21.20 euro per share. Considering the number of the existing outstanding shares (63,205,726), the difference in the overall (potential) minimum cost of the acquisition would have amounted to approximately 185 million euro or about sixteen percent more than the corresponding figure applying the previous rules.

A similar analysis could be conducted with respect to the takeover of the Italian bank Antonveneta by the Dutch bank ABN (March 2006), which was linked to the scandal that led to the resignation of the former governor of the Italian Central Bank, Antonio Fazio.<sup>35</sup> Using the same methods of calculation, the overall minimum (potential) cost of the acquisition would have been 246,000,000 euro higher than before the XIII Directive.<sup>36</sup> While the cost of a takeover is not the only driver in the market for corporate control, especially when liquidity abounds on financial markets and in light of the capital gains that the bidder would be able to enjoy after the acquisition, such significant differences can undermine the economic feasibility of a takeover.

The two tender offers mentioned, however, might be considered only partially exemplary of the problem, because in both cases the bidder, independently from what the law would have required, voluntarily decided to offer to all shareholders not only a price higher than the minimum, but one equal to the highest price paid. In other words, the bidders anticipated the rule set forth by the Directive and, as a result, made their proposals more attractive.

There are, however, many cases in which the bidder did not, or could not, follow a similar strategy, including two interesting examples concerning both “small” and “big” offers. First, there is the acquisition of the Dada Corporation by RCS, one of the most important Italian publishing corporations which published the premier Italian newspaper, *Corriere della Sera*, which took place in December 2005. The second example involves the takeover of Edison SpA by the French energy colossus EDF in October 2005, which also attracted international attention. In the first case the bidder offered the then minimum legal price of 12.75 euro per share, versus a minimum price that would have resulted from the Directive’s rule of 14.30 euro. Similarly, EDF offered 1.86 euro per share instead of 2.18. This would have meant a difference of approximately 11 million euro and 417 million euro, respectively. Notwithstanding the different scale of the two transactions, in the RCS/Dada case the acquisition would have cost an additional 12 percent and for EDF/Edison an increase of 17 percent.

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35. See *Year-End Accounts. Antonio Fazio, governor of the Bank of Italy, resigns. About time*, THE ECONOMIST, Dec. 20, 2005.

36. Data are again available on the prospectuses available at [www.consob.it](http://www.consob.it)

Not only do the new rules make bidders pay more in terms of minimum price, but the number of shares that they must be ready to buy can also be significantly higher, thus increasing the overall consideration paid for the target. Before the implementation of the Directive, Article 106 T.U.F. simply required that the mandatory tender offer be extended to all the full voting shares or, more precisely, to the shares attributing the right to vote for the nomination and removal of directors (in brief, ordinary shares). Thus, the offer should have been made to, all but only to, the shares that would count for the determination of the triggering threshold.

This rule has changed with the introduction of European legislation. Now it is compulsory to launch an offer on *all* the voting shares, including limited voting shares that only vote in extraordinary shareholders' meetings or only on specific issues. If, for example, a corporation has issued one hundred ordinary, full-voting shares and eighty preferred shares with limited voting rights, (for example, permitting voting only on amendments of the bylaws), before the implementation of the Directive, any entity that acquired thirty-one shares of the former category had to be ready to buy the remaining sixty-nine. Now the bidder must also offer to acquire, additionally, the eighty preferred shares. Considering that the minimum price for the offer on these shares might be different, and usually lower, than the one paid for full-voting shares, it is clear that this difference might further increase the overall cost of a takeover significantly, especially when hostile.

Such a conclusion is particularly true in a system, like the Italian one, where the use of limited voting shares is a common practice (thirty-five percent of listed corporations have outstanding limited voting shares), even if their capitalization is relatively low (accounting for approximately seven percent of the overall market capitalization in Italy), because these shares are often quoted at a discount to full-voting shares.<sup>37</sup>

The above analysis underlines that the bidder should be ready to pay a very high consideration in order to acquire control of a listed corporation after the implementation of the Takeover Directive. In contrast, the distinct ownership structures in the U.K. mean that the mandatory bid will be triggered for virtually any change of control, which constitutes a potentially powerful protective mechanism for existing incumbents that want to resist a hostile bid. This is, of course, the other side of the coin of minority shareholder protection. The new rules are intended to treat small investors better, at least on paper. The question, however, is to what extent this ostensibly better treatment will actually deter, rather than foster, takeovers.

One last point to consider is that the mandatory bid might appear

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37. EMILIO BARUCCI, *MERCATO DEI CAPITALI E CORPORATE GOVERNANCE IN ITALIA* 97, (Carocci 2006).



favorable to minority shareholders in the case of a friendly acquisition where the existing controlling shareholder sells its participation, or a significant part thereof, to an acquirer. In such a scenario, the same price per share recognized by the seller must be offered to all of the shareholders. However, the parties will take this element into account in their negotiations, thus raising as a preliminary issue whether the new rule might also deter friendly takeovers.<sup>38</sup>

*B. Prohibition of directors' controlled frustrating actions*

Together with the mandatory bid mechanism, the non-frustration prohibition—also called “board neutrality” or the “passivity rule”—is the landmark difference between U.S. and U.K. approaches to takeovers. The degree of freedom enjoyed by American directors in structuring and deploying pre- and post-bid defenses, with the only substantive limitation being their fiduciary duties, is unknown in the U.K. and in those European countries that have adopted the U.K. approach. The non-frustration prohibition of the General Principle 3 of Rule 21 of the U.K. Takeover Code prevents directors from either adopting or setting into motion most post-bid defenses. It also requires an explicit vote by the general shareholders' meeting. Extensive debate exists whether greater leeway in resisting a takeover—as is the case in the U.S.—favors shareholders.<sup>39</sup> However, with a caveat that will be discussed later, it cannot be denied that board neutrality and shareholder choice in the U.K. were perceived and introduced as protections against directors' and managers' conflicts of interest in a takeover contest. This purpose is confirmed in the legislative history of the provision.

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38. There is a subtle but interesting issue worth mentioning. If we carefully compare the old and new versions of Article 106 T.U.F. with respect to the minimum price of the mandatory bid, it is stated that the “highest price *agreed upon*” by the bidder (albeit in the calculation of the average) shall be taken into account first. This formula was intended to uphold the spirit of the law, i.e., when the seller and the buyer agree upon a certain price, the latter pays after the launch of the tender offer, not before it. The reference to prices (actually) paid and (simply) agreed upon was meant to avoid this possible objection. The new text refers simply to the highest price “paid” by the bidder, providing, however, that Consob can require that a higher price be offered, with a motivated decision, if the bidder, or subjects acting in concert with it, have agreed upon a price higher than the one paid. Notwithstanding this possible “correction” by Consob, the fact that the law now only refers to “paid” prices might affect the ability of the bidder, in a friendly offer, to pay a different price to minority shareholders and to the former controlling shareholder.

39. Thus, the inventor of the “poison pill” should be enlisted among advocates of managers-controlled takeover defenses as a protection for shareholders. Martin Lipton, *Corporate Governance in the Age of Finance Corporatism*, 136 U. PA. L. REV. 1 (1987); *c.f.* FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 162 (Harvard University Press 1991).

A recent and insightful analysis, however, questions whether this rule is truly important or merely illusory.<sup>40</sup> David Kershaw persuasively argues that in the very jurisdiction where the non-frustration rule developed, most takeover defenses would also require shareholder approval in the absence of this rule. General company law principles, he argues, end up requiring the same. More precisely, Kershaw concludes that “in the absence of the non-frustration prohibition not only would post-bid, directors-controlled ETDs [takeover defenses] require pre-bid shareholders consent but when made available there is limited scope to use them for entrenchment purposes”.<sup>41</sup>

To the extent that this theory is well-grounded in the U.K., even without a detailed analysis of corporate law in civil law systems, it is fair to say that in countries such as Italy, a similar conclusion would be even more justified. In these systems, the extent and relevance of the competences of the shareholders’ meeting versus the directors are even broader than in common law systems. Under Italian law, notwithstanding the fact that the 2003 reform entrusted directors with much more significant powers especially with respect to the financial structure of the corporation, the shareholders’ meeting still retains significant powers on deciding or authorizing most corporate actions that might be used as defenses in a hostile takeover context.<sup>42</sup> The issuing of option rights to subscribe or acquire the target’s shares at a discount, as well as most business combinations (e.g., mergers, spin-offs, contributions in kind), are used to increase the corporation’s capital. These examples, among others, are all subject to shareholders’ approval independent of the passivity rule. Of course, this does not necessarily imply that the rule is not useful. In particular, its application calls for a “re-approval” of pre-bids decisions *vis-à-vis* the actual tender offer. Thus, it is possible to downgrade the potential impact of the passivity rule on the distribution of corporate powers in the Italian system.

Independent of the scope of the non-frustration rule, the crucial point

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40. David Kershaw, *The Illusion of Importance: Reconsidering the UK’s Takeover Defence Prohibition*, 56 INT’L & COMP. L.Q. 267 (2007).

41. *Id.* at 306.

42. See Marco Ventoruzzo, *Experiments in Comparative Corporate Law: The Recent Italian Reform and the Dubious Virtues of a Market for Rules in the Absence of Effective Regulatory Competition*, 40 TEX. INT’L L.J. 113, 130 (2004) (extending a similar observation to several civil law systems for Spain); Ignacio Lojendio Osborne, *La Junta general de accionistas*, in Guillermo J. Jiménez Sánchez (editor), *DERECHO MERCANTIL*, Ariel (2006), at 344; Maurice Cozian, Alain Viandier, Florence Deboissy, *Droit des Sociétés*, LexisNexis Litec (2006), at 223 ff.; see also Gerhard Wirth, Michael Arnold, Mark Greene, *CORPORATE LAW IN GERMANY*, Beck (2004), at 117 ff.; Marc Löbbe, *Corporate Groups: Competences of the Shareholders’ Meeting and Minority Protection—The German Federal Court of Justice’s Recent Gelatine and Macrotron Cases Redefine the Holz Müller Doctrine*, 5 GERMAN L.J. 1057 (2004).

is that determining at shareholders' meetings whether defenses in systems where the most important agency problem is between controlling shareholders holding a majority of the shares and minority investors may not be in the best interest of the minority shareholders.

Needless to say, such a rule is better than nothing. The fact that a defense must be approved (or re-approved) by the shareholders' meeting implies several important advantages for minorities. First and foremost, it has the advantage of increasing the transparency of the adoption of a frustrating action. In fact, even if a defense adopted unilaterally by the directors would also be subject to specific disclosure obligations if it involved price-sensitive information,<sup>43</sup> passage through the shareholders' meeting allows organized minorities to discuss the measure and to obtain further information from the directors. In addition, the existence of a shareholders' meeting resolution creates at least the potential for legal action, such as challenging the resolution. It may create the potential for obtaining a preliminary injunction from the court inhibiting the adoption of the defense. The resolution might be challenged, for instance, on the grounds that the majority shareholder has a conflict of interest or that it is exercising its power in an abusive manner. Even if sustaining claims of this type would be very difficult, it is at least less improbable than if the decision were taken only by the directors.

In addition, in light of these issues, it is also possible for a controlling shareholder to approve a defensive measure in the post-bid context. When a controlling shareholder holds forty percent or more of the voting shares, opposition by institutional investors can be virtually impossible. In other words, in a market with a very concentrated ownership structure, to entrust the shareholders' meeting with the approval of takeover defenses might be, to invoke another fable involving predatory animals, like letting the fox guard the henhouse. This fable, however, comes with an additional, mischievous twist.

Italian law clearly states that prior authorization at a shareholders' meeting, when permissible, does not preclude directors' liability for the actions that they carry out.<sup>44</sup> When a defensive measure is actually decided and adopted at a shareholders' meeting, such as in the case of issuing new shares, the directors simply "execute" the shareholders' decision. In these circumstances, it might be more difficult for a potential plaintiff to allege that directors breached their duties of care or loyalty.<sup>45</sup> Systems that

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43. According to Article 114 T.U.F.

44. T.U.F. art. 104 spells this out with specific respect to the adoption of takeover defenses by the directors after the shareholders' meeting authorization, a rule set forth, in general terms, by C.C. art. 2364.

45. See, e.g., Corte app., *Tobor immobiliare v. Oliani*, November 5, 1991, in GIUR. IT. I, 2, 384 (1992); and Corte app., *La Gaiana v. Società italiana industria zuccheri*, GIUR.

implement the non-frustration rule do not generally rely on directors' liability to discriminate between lawful and unlawful defenses, as the U.S. system does. Particularly in that context, the shareholders' resolution might reduce the already slim chances that minority shareholders have of recovering, through a civil action, the damage they suffer as a result of a non-value maximizing defense.<sup>46</sup>

With respect to the implementation of the Takeover Directive in Italy (but also in other continental European countries), there is one last point to make concerning reciprocity. It is broadly known that the non-frustration principle set forth by Article 9 of the Directive, together with the breakthrough rule that will be discussed in the next part, encountered significant political opposition at the E.U. level. Passage of the Directive was ultimately the result of a compromise that provided for an opt-out and a reciprocity clause applicable to both the non-frustration principle and the reciprocity clause. Article 12 of the Directive, in fact, allows member states to opt-out from these two provisions. If states do opt out, however, it provides that the states' national corporations must be allowed to adopt either one or both rules in their bylaws. The same Article 12 also provides that member states can subject the application of both the non-frustration rule and the breakthrough rule to reciprocity. In other words, even if these rules are adopted, they are not applicable if the tender offer is launched by a "company which does not apply the same" rules "or by a company controlled, directly or indirectly, by the latter."

As mentioned above, several continental European countries that, before the Directive, provided for a mandatory non-frustration rule with no exceptions whatsoever, took the occasion of the implementation of the European legislation to add a reciprocity requirement. This was the approach, for instance, in France, Spain, and Italy. Clearly enough, reciprocity further limits the protective strength of the non-frustration rule, to the extent that it has one.

In addition, Spanish law explicitly provides that reciprocity, and therefore the suspension of the non-frustrating principle, only applies when the (hostile) offer is launched by an entity not subject to (or not controlled by an entity that is subject to) the same rules, and *whose domicile is not in Spain*.<sup>47</sup> Italian and French law do not make a similar distinction.<sup>48</sup> In

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COMM. II, 730 (1988).

46. For discussion of the potential civil liability of the shareholders for their voting in the shareholders' meeting and a comparative analysis, see FABRIZIO GUERRERA, *LA RESPONSABILITÀ "DELIBERATIVA" NELLE SOCIETÀ DI CAPITALI*, Giappichelli (2004).

47. Article 60-*bis* paragraph 2 of the Ley de Mercado de Valores, as modified by the Ley 6/2007 of April 12, 2007.

48. See C. COM. art. L. 233-33, which states:

Les dispositions de l'article L. 233-32 ne sont pas applicables lorsque la société

these countries, therefore, reciprocity might have an even broader scope of application, because it can also be invoked against national bidders.

In light of these elements, it is difficult to say that the non-frustration rule, as adopted in Italy and amended with the implementation of the XIII Directive, resolved the inherent conflict of interest between controlling and minority shareholders, empowering the market for corporate control.

### C. *The Breakthrough Rule*

Extensive literature exists regarding the breakthrough rule set forth by Article 11 of Directive 2004/25/CE,<sup>49</sup> which I will not recount here in detail. In brief, the rule is designed to neutralize some typical pre-bid defenses, such as shareholders' agreements limiting the free transferability of shares or restricting voting rights, or bylaws clauses that have similar effects.<sup>50</sup> These provisions, which are either contained in the bylaws of the

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fait l'objet d'une ou plusieurs offres publiques engagées par des entités, agissant seules ou de concert au sens de l'article L. 233-10, dont l'une au moins n'applique pas ces dispositions ou des mesures équivalentes ou qui sont respectivement contrôlées, au sens du II ou du III de l'article L. 233-16, par des entités dont l'une au moins n'applique pas ces dispositions ou des mesures équivalentes. Toutefois, les dispositions de l'article L. 233-32 s'appliquent si les seules entités qui n'appliquent pas les dispositions de cet article ou des mesures équivalentes ou qui sont contrôlées, au sens du II ou du III de l'article L. 233-16, par des entités qui n'appliquent pas ces dispositions ou des mesures équivalentes, agissent de concert, au sens de l'article L. 233-10, avec la société faisant l'objet de l'offre. Toute contestation portant sur l'équivalence des mesures fait l'objet d'une décision de l'Autorité des marchés financiers.

Dans le cas où le premier alinéa s'applique, toute mesure prise par le conseil d'administration, le conseil de surveillance, le directoire, le directeur général ou l'un des directeurs généraux délégués de la société visée doit avoir été expressément autorisée pour l'hypothèse d'une offre publique par l'assemblée générale dans les dix-huit mois précédant le jour du dépôt de l'offre. L'autorisation peut notamment porter sur l'émission par le conseil d'administration ou le directoire des bons visés au II de l'article L. 233-32 ; dans ce cas, l'assemblée générale extraordinaire des actionnaires statue dans les conditions de quorum et de majorité prévues à l'article L. 225-98.

Under Italian law, T.U.F. art. 104, in the relevant part, provides that board passivity and breakthrough rules do not apply when the tender offer is promoted by "chi non sia soggetto a tali disposizioni ovvero a disposizioni equivalenti, ovvero da una società o ente da questi controllata. In caso di offerta promossa di concerto, è sufficiente che a tali disposizioni non sia soggetto anche uno solo fra gli offerenti".

49. For a brief description of the rule, and additional bibliographical references, see Ventoruzzo, *supra* note 2.

50. In the relevant part, Article 11 of the directive 2004/25/CE provides that:

2. Any restrictions on the transfer of securities provided for in the articles of association of the offeree company shall not apply vis-à-vis the offeror during the time allowed for acceptance of the bid laid down in Article 7(1).

target corporation or in a separate agreement, do not apply when a mandatory bid is launched. By the same token, under the breakthrough rule, mechanisms typically empowering controlling shareholders, such as multiple-voting shares, permit only one vote per share in a shareholders' meeting that is called to decide on defensive measures under the board passivity rule. Special powers granted by the bylaws are also neutralized if the bidder acquires more than three-quarters of the capital carrying voting rights.

Once again, the point here is not an analytical interpretation of the breakthrough rule, but rather a consideration of its possible effects on the

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Any restrictions on the transfer of securities provided for in contractual agreements between the offeree company and holders of its securities, or in contractual agreements between holders of the offeree company's securities entered into after the adoption of this Directive, shall not apply vis-à-vis the offeror during the time allowed for acceptance of the bid laid down in Article 7(1).

3. Restrictions on voting rights provided for in the articles of association of the offeree company shall not have effect at the general meeting of shareholders which decides on any defensive measures in accordance with Article 9.

Restrictions on voting rights provided for in contractual agreements between the offeree company and holders of its securities, or in contractual agreements between holders of the offeree company's securities entered into after the adoption of this Directive, shall not have effect at the general meeting of shareholders which decides on any defensive measures in accordance with Article 9.

Multiple-vote securities shall carry only one vote each at the general meeting of shareholders which decides on any defensive measures in accordance with Article 9.

4. Where, following a bid, the offeror holds 75% or more of the capital carrying voting rights, no restrictions on the transfer of securities or on voting rights referred to in paragraphs 2 and 3 nor any extraordinary rights of shareholders concerning the appointment or removal of board members provided for in the articles of association of the offeree company shall apply; multiple-vote securities shall carry only one vote each at the first general meeting of shareholders following closure of the bid, called by the offeror in order to amend the articles of association or to remove or appoint board members.

To that end, the offeror shall have the right to convene a general meeting of shareholders at short notice, provided that the meeting does not take place within two weeks of notification.

5. Where rights are removed on the basis of paragraphs 2, 3, or 4 and/or Article 12, equitable compensation shall be provided for any loss suffered by the holders of those rights. The terms for determining such compensation and the arrangements for its payment shall be set by Member States.

6. Paragraphs 3 and 4 shall not apply to securities where the restrictions on voting rights are compensated for by specific pecuniary advantages.

contestability of control. This rule might represent a significant blow to some of the most important control-enhancing systems put in place by entrenched shareholders.

Article 11 of the Directive is, however, not mandatory. Member States can opt out, leaving corporations free to opt in if the market values such a measure. This is, as mentioned above, the other well known compromise that was necessary to adopt the Takeover Directive.

Not surprisingly, most European states have opted out of this rule. This is the case, for instance, in France, Germany, Spain, and the U.K. Corporations can opt in, of course, but in that case reciprocity is usually required, with the only exception being the British rules, which provide that if a corporation decides to adopt the breakthrough rule, the absence of reciprocity does not make the rule inapplicable.

Italy, interestingly enough, has opted into the breakthrough rule, although subject to reciprocity. But what is the real effect, in terms of threat to the entrenched positions of controlling shareholders, of the adoption of the rule? To answer this question, it is necessary to consider the most common and relevant control-enhancing mechanisms, or "CEMs", used by major corporations in Italy. A report commissioned by the European Commission has recently been published regarding the proportionality principle in Europe.<sup>51</sup> The study analyzes CEMs, which are legal devices used to alter the proportionality between the equity investment of a shareholder and his actual controlling power within the corporation. Rather than a general definition, the Report describes CEMs as follows:

Some of these CEMs are used to allow existing blockholders to enhance control by leveraging voting power (diversions related to the One share, One vote principle and pyramid structures). Other CEMs can function as devices to lock-in control (priority shares, depository certificates, voting rights ceilings, ownership ceilings, and supermajority provisions). Other mechanisms are represented by particular legal structures adopted by EU companies (partnerships limited by shares), are related to privatisation processes (golden shares and the influence of the State), or are coordination devices such as shareholders agreements, for example.

Some of these mechanisms are diversions structurally organized by companies (multiple voting rights shares), while others are organized by

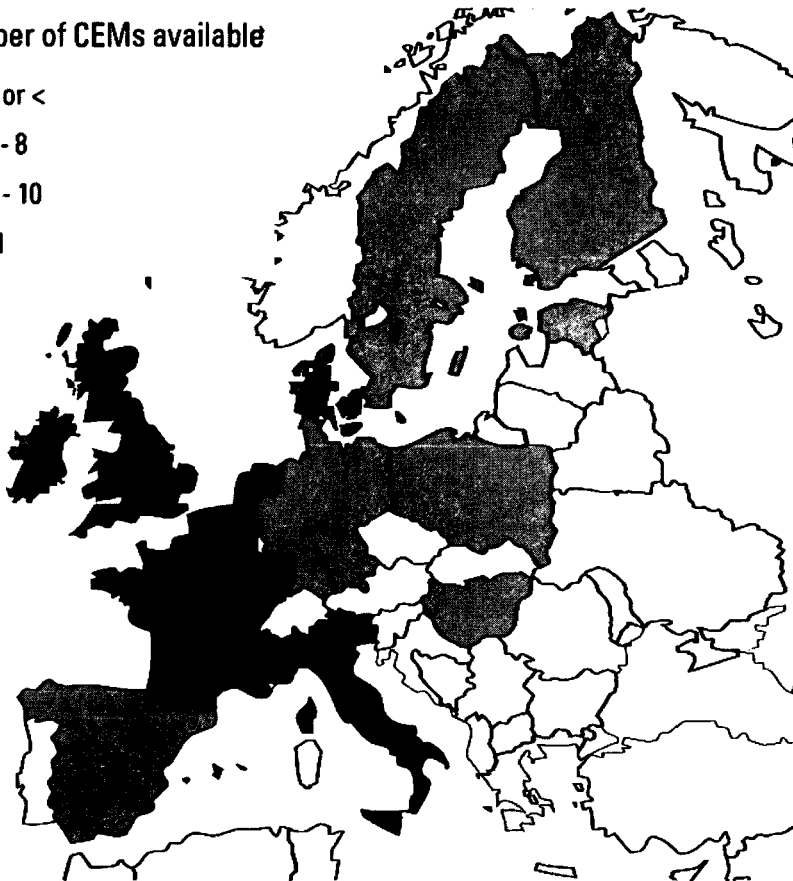
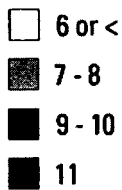
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51. *Report on the Proportionality Principle in the European Union*, INST. SHAREHOLDER SVCS., SHERMAN & STERLING, & EUR. CORP. GOVERNANCE INST. (May, 18 2007), available at [http://ec.europa.eu/internal\\_market/company/docs/shareholders/study/final\\_report\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/shareholders/study/final_report_en.pdf). (reporting the effects of the proportionality principle in member states of the European Union.)

shareholders (voting pacts, pre-emption pacts).<sup>52</sup> Thirteen different types of CEMs have been examined in sixteen European countries, from Belgium to the U.K., as well as in some non-European jurisdictions. For every country, statistics concerning the diffusion of CEMs among listed corporations are provided. The overall picture is that deviations from the proportionality principle are widespread in all legal systems, as Figure 6, reproduced from the cited study, shows:

Figure 6 – Diffusion of CEMs in Europe and Beyond

Number of CEMs available



Source: ISS, Sherman & Sterling and ECGI (2007)

While there is not a perfect correlation, it is clear that CEMs generally overlap with the most typical pre-bid defenses that might be dismantled by

52. INST. SHAREHOLDER SVCS., SHERMAN & STERLING, & EUR. CORP. GOVERNANCE INST., *supra* note 51, at 5.



the breakthrough provision. According to this Report, some of the CEMs adopted by a sample of twenty large Italian corporations, and particularly relevant for the present discussion, are indicated in Table 3.

Multiple voting right shares	0	Voting rights ceilings	2
Non-voting shares without preference	0	Ownership ceilings	6
Non-voting preference shares	6	Golden shares	4
Pyramid structures	9	Shareholders agreements	8

It is also worth noting that several of the most prevalent CEMs and pre-bid defenses are not neutralized by the breakthrough rule. This is the case of non-voting shares with preference, because a specific provision of Article 11, paragraph 6, of the Directive, which is replicated in the Italian legislation, provides that the rule “shall not apply to securities where the restrictions on voting rights are compensated for by specific pecuniary advantages.” Pyramid structures, which cannot be simply defined as a takeover defense, but surely allow a leverage effect that facilitates shareholders’ entrenchment, also remain unscathed by the breakthrough rule.<sup>53</sup>

Shareholders’ agreements, important protection devices, are probably the most significant example of CEMs that would be neutralized by the breakthrough rule. Once again, however, this provision, at least in the case of a mandatory tender offer, was already provided for by the Italian legislature *before* the enactment of the Takeover Directive. Since 1998, Article 123 T.U.F. provides the right of withdrawal in order to tender shares from all shareholders’ agreement in case of a mandatory bid. In addition, it should be kept in mind that the real and effective disincentive for the members of a shareholders’ agreement not to turn their backs on the other members and to tender their shares does not have much to do with the risk of being sued for breach of contract. Instead, it has been shown to rest on social norms and the potential consequences of a similar treason in a system with significant cross-shareholdings and interlocking directors.

53. *But see* Stefano Mengoli, Federica Pazzaglia & Elena Sapienza, *Is It Still Pizza, Spaghetti and Mandolino? Effect of Governance Reforms on Corporate Ownership in Italy*, last revised March 18, 2008, available at <http://ssrn.com/abstract=966085> (indicating that pyramids have recently been decreasing).

In addition, reciprocity should also be considered. As mentioned, if the bid is launched by an entity that is not subject to the breakthrough rule, or controlled by an entity not subject to it, the neutralization provision would not be applicable in any case.<sup>54</sup> Because most European countries have opted out of the breakthrough provision, it is likely that, in the case of a takeover of an Italian corporation by a foreign corporation, the breakthrough rule will not apply.

Moreover, even when the breakthrough rule applies, in light of how it has been regulated in Italy, it might provide an additional disincentive for hostile takeovers. Article 11, paragraph 5, establishes that when a shareholder loses a right as a consequence of the application of the breakthrough rule, for instance when a preemptive right provided for by a shareholders' agreement is neutralized, then "equitable compensation shall be provided." The terms for this compensation must be regulated by the individual Member States. According to Article 104-bis, paragraph 5, T.U.F., under Italian law equitable compensation must be paid by the bidder if the offer is successful.

Under this rule, the implication is that the consequences of the neutralization of CEMs used by the controlling shareholder should be born by the acquirer of the corporation. Not only does this rule increase the overall cost of the tender offer, but it also grants to the existing controlling shareholders a cause of action through which anti-takeover litigation might be initiated. In this respect, it seems to weaken the very goal of the breakthrough rule by making entrenched shareholders less vulnerable to the market for corporate control.<sup>55</sup>

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54. The only exception are shareholders' agreements in the case of a mandatory bid, from which, pursuant to Article 123 T.U.F., it is always possible to withdraw independently from the rules applicable to the bidder in order to tender the shares.

55. When this article was already in page-proofs, the Italian government enacted a decree that, if approved by the parliament, will significantly affect takeover regulation. In the light of the recent financial crisis, and the current bear market, the legislature grew concerned that Italian corporations might become subject to attacks from hostile bidders, in particular foreign ones. In order to avoid this and protect national enterprises and their controlling shareholders, on November 29th, the government opted out of both board neutrality and breakthrough rule. Consequently, as it happens in Germany and the Netherlands, listed corporations can opt in one or both rules, but if they do not the directors appointed by the majority enjoy more freedom in adopting defensive measures against an unwelcome bidder, and bylaws can more effectively provide for stable pre-bid defenses. This possible regulatory innovation does not affect the soundness of the analysis conducted in this article. More specifically, it remains true that both the passivity rule and the breakthrough rule, in the Italian context – as well as in other systems with concentrated ownership structures – did not significantly increased the number of hostile acquisitions fostering a more active market for corporate control. In a way, this partial reform, confirms the underlying thesis that if there is a concrete fear of hostile takeovers, especially by foreign bidders, local policy makers change the rules in order to further protect local incumbents.

## VI. EMPIRICAL EVIDENCE REGARDING TAKEOVERS

To recap briefly, Armour and Skeel's explanation of the divergent developments of U.K. and U.S. takeover regulations emphasizes the definitive role played by institutional investors in the U.K. The role of institutional investors cannot, however, explain adoption of the pillars of the U.K. approach—mandatory bids and the non-frustration principle—in continental European legal systems characterized by a concentrated ownership structure and relatively weak institutional investors. This leaves open the question of what forces might have led to the adoption of those provisions. The above analysis has shown, initially, that mandatory bids with strong block-holders may actually protect incumbents by making the acquisition of control more expensive. Similarly, the board neutrality rule, in a system where the controlling shareholder holds a significant participation interest (often exceeding fifty percent of the voting shares), does not really subvert the power of the incumbents to resist hostile takeovers. Instead, it may actually favor the adoption of defenses that have fewer risks in terms of liability for the directors.

Given these conditions, even if institutional investors are not the primary actors, the public choice account that Armour and Skeel give for divergent approaches in the U.S. and U.K. seems coherent with the developments in continental Europe. The evolution of takeover regulation appears to favor the subjects more likely to exercise a significant political influence on the rule-making process; but in this instance, it is the entrenched controlling shareholders who exercise it.

While this answer seems intuitive, the question remains whether there is empirical or anecdotal evidence to support these intuitions. Consider once again the Italian case. The pillars of what we have defined as the U.K. approach, now adopted by the European Union, were introduced in 1998. What has happened in terms of takeover dynamics, and in particular hostile takeovers, since then? Did the market for corporate control register significant developments?

Before looking at numbers, consider the response of the Italian Ministry for Economy to the drafted legislation implementing the XIII Directive to the Parliament in 2007:

I would like to underline some statistical data. First of all, the acquisitions of Italian listed corporations by foreign subjects and vice-versa are roughly equivalent. The empiric evidence of the last seven-eight years indicates that, more or less, we buy abroad as much as foreigners buy in Italy. There are some important Italian firms have been bought by foreign subjects (Antonveneta

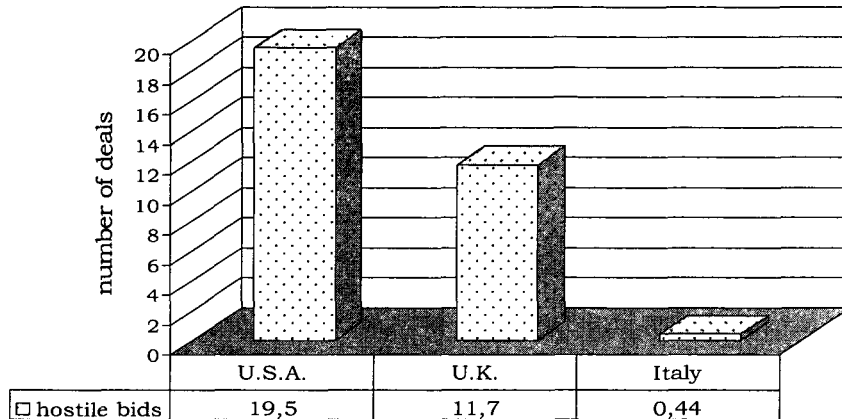
and BNL), as well as foreign enterprises (Endesa or Gitec in the USA) acquired by main actors of the Italian economy. In addition, I want to remark an often overlooked issue. Hostile takeovers, non-friendly acquisitions are extremely rare. Down memory lane we can recall Olivetti-Telecom, or Generali-INA, but from 1999 to present days there have been *very few relevant hostile deals*. Of course some apparently friendly offers were initiated as non-friendly, I do not want to deny that, but the important cases are a very limited number. If, in addition, we consider hostile bids from foreign corporations, it is even more difficult to find relevant precedents . . . . *The issues of the passivity and break-through rules, and of the level-playing field with the other legal systems must be protected, but in these years it did not cause significant hostile cross-border takeovers on Italian targets, and frankly not even the other way around.*<sup>56</sup>

Actual data on hostile bids confirm this statement. In the period 1993-2001, for instance, there were 79 domestic and 13 cross-border hostile tender offer takeovers in the U.K. These numbers alone exceed the combined number of all the hostile bids that occurred in seven of the most important European economies: Austria (0 domestic, 3 cross-border), Belgium (0 either domestic or cross-border), France (13 domestic, 1 cross-border), Germany (2 domestic and 1 cross-border), Italy (3 domestic and 1 cross-border), Portugal (0 either domestic or cross-border), and Spain (7 domestic, 0 cross-border). The comparison with Italy is quite striking. As Figure 7 shows, the annual average number of hostile takeovers in the U.S., U.K. and Italy across the 1990s illustrates this point:

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56. Massimo Tononi, Vice-Sec'y of State for Econ. and Fin.,, *available at*: [http://new.camera.it/\\_dati/lavori/stencomm/06/audiz2/2007/0725/s010.htm](http://new.camera.it/_dati/lavori/stencomm/06/audiz2/2007/0725/s010.htm) (speech to the Parliamentary Commission illustrating the drafted legislative decree implementing the takeover directive).

Figure 7 - Average number of hostile bids per year



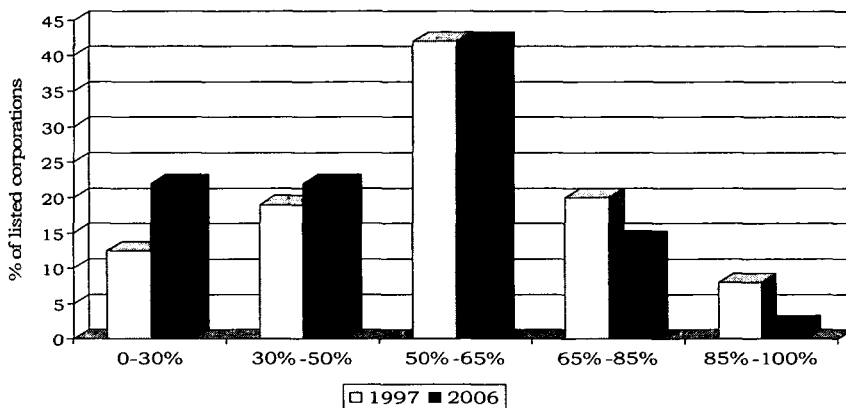
N.B.: U.S.A. and U.K. average over 1995-2003;  
Italy over 1993-2001

Sources: Elaboration from Armour & Skeel (2006), and Martynova, Renneboog (2006)

With respect to Italy, this evidence is consistent with the likely preferences of the most influential actors in a system characterized by concentrated ownership structure and relatively weak institutional investors. If we consider the evolution of the ownership structure of Italian corporations, comparing 1997 (the year before the enactment of the first takeover regulation following the U.K. approach) with 2006, the picture that emerges shows that the ownership concentration is still very significant (Figure 8). Additionally, there has been what might be called a “threshold attraction” effect, meaning an increase in the number of corporations controlled with a percentage between thirty and fifty percent of the voting shares.<sup>57</sup> For reasons that we have previously analyzed, this effect can be interpreted to suggest that, in light of the mandatory bid and the structure of the passivity rule, holding more than thirty percent is sufficient to ensure a stable control, for the reasons that we have previously analyzed. It may also be true that there are an increased number of corporations with a more widespread ownership structure where the majority shareholder holds less than thirty percent, but nothing comparable to the U.K. situation.

57. Ventoruzzo, *supra* note 2, at 216.

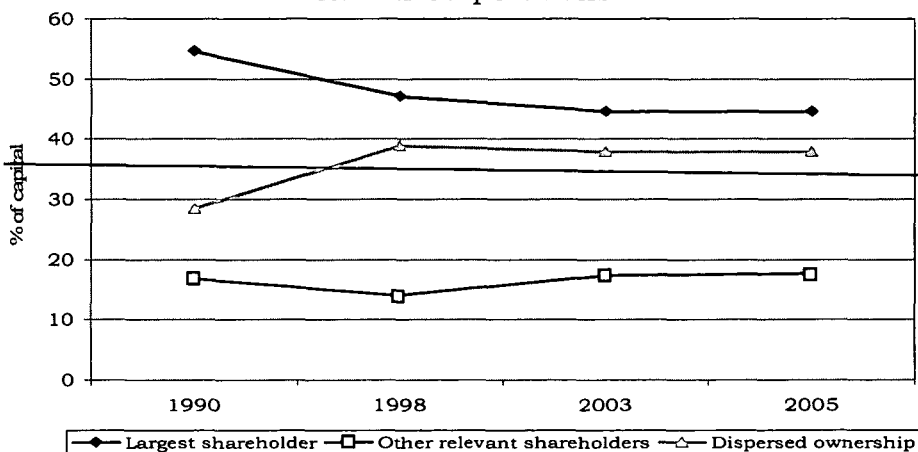
Figure 8 - Share ownership of controlling shareholder(s) in Italy



Source: Consob (2007)

Also, looking at the qualitative evolution of the ownership structure (Figure 9), it appears that the new rules have not significantly affected the relative weight of large block-holders on the one hand, and institutional investors and dispersed shareholders, on the other hand.

Figure 9 - Evolution of Ownership Structure of Italian Corporations



Source: Bianchi, Bianco (2006)

As with other data presented above, this data confirms that rules similar to the British rules, when applied in a different context, do not ensure the same results, but may instead have an opposite (and undesirable) effect.

## VII. CONCLUSION

The analysis in this article bears out both intuition and some comments by Goergen, Martynova and Renneboog, who postulated that “similar regulatory changes may have very different effects within different corporate governance systems. For example, while in some countries the adoption of a specific takeover rule may lead toward more dispersed ownership, in others this same rule may further reinforce the blockholder-based system.”<sup>58</sup>

In sum, the three pillars of U.K. takeover regulation and of the XIII Directive, the mandatory bid, the non-frustration rule, and breakthrough rule, could act as wolves in sheep’s clothing when they cross the Channel.

This article raises new challenges for European legislators in terms of crafting legislation. On the one hand, such legislation must provide for a level of harmonization that will facilitate development of a single European market. On the other hand, it cannot ignore the historical and economic distinctions between jurisdictions that will affect how well the rules work to promote their intended aim.

Legislatures and judiciaries are not perfect. Moreover, they are not—and, to some extent, should not be—completely immune to the lawful activities of lobbying groups.<sup>59</sup> What becomes unacceptable, however, is when rules that protect incumbents are either erroneously or intentionally presented as designed to benefit minority investors.

This conclusion does not imply a completely negative judgment on either the U.K. approach as adapted to continental European jurisdictions, or on the XIII Directive, notwithstanding the minimum harmonization that it provides. As already mentioned, there are several advantages for minorities deriving from both the mandatory bid rule and the passivity rule, especially in case of a friendly acquisition that might exclude non-controlling shareholders from benefiting from the market for corporate control. In addition, the very fact that Europe has finally adopted a common regulatory framework has historic and legal relevance that should not be underestimated, even with its significant differences and potentially diverging effects.<sup>60</sup> Now, more than ever, scholars, policy-makers and

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58. Goergen, Martynova & Renneboog, *supra* note 10, at 29.

59. See Bebhuk & Neeman, *supra* note 7, for a model on this possible influence.

60. As pointed out by Gatti, *supra* note 24, at 560, notwithstanding the shortcomings of

practitioners have adopted a common language and discuss very similar problems concerning takeover regulation. A better awareness on the crucial issues in this field is already emerging from this shared cultural humus.

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the limited harmonization, the approach followed by the directive might be considered a sound second best, according to which Member States must “clearly state their positions on the board neutrality rule and the BTR,” and “decide whether or not to enact the reciprocity clause.”



