

Resumen

Cross-border acquisitions, especially through hostile takeovers, represent one of the most dramatic consequences of growing economic integration in Europe and the United States. Professor Ventoruzzo's article focuses on the Thirteenth Directive of the European Union on Takeover Regulation-European legislation approved in 2004 and scheduled for implementation by Member States by the end of 2006. Earlier versions of the Directive were embroiled in political controversies that generated Member State antipathy toward harmonization of European takeover law. The final version represents a significant compromise and is striking for the flexibility it grants to Member States adopting its provisions. The European regulation imposes significant restrictions on the corporate raider and the target corporation. Under the Directive, raiders may generally acquire control only through a public offer on all outstanding shares at a fixed minimum price. Directors and controlling shareholders of target companies are restricted in the defensive measures they may employ to repel a hostile bid. The Directive grants individual states significant freedom in adopting and implementing the European rules and, in this respect, the Directive will greatly affect regulatory competition in Europe. Taking as its starting point U.S. rules and assumptions regarding takeovers, the article identifies and analyzes the fundamental features of the European approach to takeovers in a comparative and critical perspective, examining the causes and possible consequences of the discrepancies between the two systems.

Texto
I. INTRODUCTION

Building a European Union is among the most ambitious attempts at international and transnational governance.

1 Some optimistic projections foresee a more integrated European Union as challenging U.S. dominance of the world economy and even its political hegemony in world politics. As brazen as these predictions seem—especially after apparent setbacks in the attempted passage of a European constitution—there are signs that this prognosis may not be so far off, particularly in economic contexts. According to some indicators, the EU economy has surpassed the United States. Meanwhile, the size and health of the European market portends potentially greater gains for the future in relation to an over-indebted United States. In something of a surprise twist for many observers of corporate affairs, European multinationals dominate American corporations in numerous strategic industries, and European corporations are taking over American corporations at a higher rate than American corporations are reciprocating.

Cross-border acquisitions, especially through hostile takeovers, represent one of the most dramatic consequences of the growing integration, both within Europe and when considering the economic balance of power between the U.S. and the European industries. Given the importance of these developments, they should have induced intense focus on the regulatory differences between U.S. and European takeover regimes. Today, however, the single most important piece of legislation on European takeover law has received only scant comment in American legal scholarship.

Passage of the Thirteenth Directive of the European Union on Takeover Regulation, which was approved on April 21, 2004, and must be implemented by Member States before the end of 2006, is no minor event. Earlier versions were embroiled in arresting political controversies that generated significant Member State antipathy toward European regulation of the area. As a result, several earlier versions were rejected, causing many experts and observers to question whether any takeover directive would ever be adopted at the EU level. Also as a result of the political controversies, the final version of the Directive represents a significant compromise, most strikingly for the flexibility it affords Member States in adopting its various provisions. For all these reasons, final passage of the Directive represents a significant legislative accomplishment, worthy of attention not only for its substantive effect, but also for its contribution to the ongoing debate over the desirability of harmonization versus regulatory competition.

Consistent with prevailing European perspectives, but different from the U.S. approach, the core premises of the Thirteenth Directive involve significant restrictions on the freedom of both the raider and the target corporation. Under the Directive, corporate raiders are generally obliged to obtain control only through the launching of a public tender offer on all the outstanding shares, and in that effort, the minimum price they must pay is set by statute. Meanwhile, the directors (and/or the controlling
shareholders) of target companies are limited under the Directive regarding the
defensive measures that they can employ to repel a hostile bid. In the United States,
these restrictions are almost completely absent,13 as would seem in keeping with the
country’s more market-oriented approach to regulation of various categories of
economic activity.14 In the area of corporate takeovers, the stakes are high, the
motivations of both raiders and defenders are questionable, and the effects on the
market are hotly debated. A comprehensive understanding of the differences between
the major systems of the world holds important lessons for future national regulation
in both polities.

In contrast to U.S. rules and assumptions regarding takeovers, this Article identifies
the fundamental features of the European approach to takeovers from a comparative
and critical perspective. I examine the extent of and different explanations for the
discrepancies between the two systems-discrepancies that, in the next few years, will
play an important role in shaping the international takeover scenario and therefore the
cross-Atlantic economic landscape.

Takeover regulation is the body of rules of engagement under which duels for
corporate control must be conducted within a particular system. Unlike the rules
governing the duels of honor from yesteryear, takeover regulation is not, cannot, and
perhaps should not be neutral with respect to the outcome of the battle. Takeover
regulation ultimately determines in large part who remains standing on the field of
financial markets, and the choosing of champions depends on particular social and
political judgments. Even when corporate control is obtained through a friendly bid,
negotiated with and welcomed by the target corporation, the acquisition creates
certain conflicting interests and potential risks for the parties involved, including
directors, managers, shareholders, creditors, employees, providers, and clients.

As financial globalization marches forward, questions about the effects of takeovers on
various constituencies, as well as the health of the overall market, have become more
crucial. This concern is all the more important as the cross-border takeover activity
increases in both size and frequency.15 As many have observed, the economic and
political power of many listed corporations exceed that of some smaller nations.
Takeovers might be one of the mechanisms through which corporations grow in size
and through which they are penalized for inefficient behavior. For these reasons,
regulation plays a major role in molding the world economy, defining who is most
likely to control economic resources, and determining how minority investors-and
other corporate stakeholders such as employees, consumers and providers-are
treated by the market.

European and U.S. approaches to takeover regulation are strikingly different in their
content and even their philosophical approaches. The recently enacted Thirteenth
Directive represents an important step because, as it attempts to harmonize national
rules in Europe, it also confirms and exacerbates the divergence of the regulatory
paths followed by Europe and the United States in this area of the law. The
differences, which concern how an attack can be deployed, when and how a
corporation under siege can react, and what types of defensive measures they can
deploy, could be characterized as a question of whether it will be swords at dawn or pistols at dusk!16

To evaluate how different systems answer this question, the Article is organized in four parts. In Part I, I provide an overview of the fundamental issues raised by takeover activity and addressed by any national takeover regulation. In Part II, I analyze how the U.S. approach to takeover regulation addresses these concerns and, in Part III, I begin with an examination of the regulations of several European nations, which endeavors to explicate the "pillars" of regulation that distinguish the European and American systems. I then turn, in the latter sections of Part III, to address how these observations fit with the provisions mandated by the Thirteenth Directive. In Part IV, I discuss and compare the major features of takeover regulation and their possible implications, also in cross-border transactions.

Two common risks of comparative analysis are a tendency to overemphasize superficial differences and a temptation to evaluate one system as inherently superior to another. Through my analysis, I show that, even if manifested through different rules, the variation between U.S. and European takeover regulation is far less extreme than most scholars and experts presume, especially if, instead of looking at the means employed by the regulations (the specific rules adopted), we look to their ends: the underlying policy goals and the economic effects of the rules. In fact, when these regulatory regimes are viewed in light of their respective economic systems and accompanying prevailing ownership structures of listed corporations, and when measured in terms of their economic effects, the regulations might appear not to diverge so dramatically. Occasionally, the regulations even play a similar function of striking a balance between empowering corporate incumbents and protecting minority investors.

II. THE GENERAL FRAMEWORK

Extensive literature exists regarding the causes and consequences of takeovers, with particular attention focused on questions of whether an active market of corporate control is beneficial, and, if so, for which class of stakeholders.17 Even if most scholars have presumed the existence of a single, unitary answer, the truth is probably more complex, depending on numerous interrelated factors, many of which are country specific or related to the particular situation of the corporations involved. This Part proceeds on the counterrevolutionary assumption that there is no singular answer and that knowledge of the range of possible explanations is important background to understanding the resulting regulation.

A. The Basics of Takeover Regulation

The various theories regarding the causes of takeovers seem to be as numerous and diverse as the scholars who have considered the question. Roberta Romano categorizes the various explanatory accounts of the causes of takeovers as either value-maximizing or non-value-maximizing transactions.18 Value-maximizing explanations point out, for example, that takeovers might be prompted by:
prospective synergy gains; a drop in the market price of the shares caused by inefficient management of the corporation (accompanied by the belief that the market price will rise again once the corporation is properly managed); or the myopia of the financial markets, resulting in underpriced securities that an investor with a long-term investment horizon can conveniently buy at a discount. Non-value-maximizing theories, on the other hand, postulate that takeovers are manifestations of the desire of managers, directors, or controlling shareholders to reduce risk through diversification, or to aggrandize their corporate empire in order to extract private benefits at the expense of investors and other stakeholders.

Probably these different theories coalesce, rather than conflict, in explaining causes and consequences of takeovers. One or the other might prevail not so much in the abstract, but depending on the specific transaction considered.

Takeovers—and in particular hostile ones—seem to increase, at least in the short run, shareholders' wealth. Significant evidence exists to suggest that minority shareholders of a target corporation benefit from a successful takeover when the battle for control is fought "on the market." In an important study at the end of the 1980s, Michael Jensen demonstrated that in the decade from 1977-1986, capital gains realized by target firm shareholders amounted to approximately 44 percent of the total cash dividends paid to shareholders in the same period of time. More recent studies both confirm these empirical findings and reinforce their theoretical underpinnings. Together, these sources reinforce the theory that an active market for corporate control and tender offers favors minority shareholders.

Apart from the issue of short-term gains, the more important barometer may be the effect of takeovers on the overall value of the corporation. The question to ask, in other words, is whether takeovers maximize shareholders' wealth in the long-term. It is more difficult to provide a straightforward answer to this question since other events, unrelated to the takeover, can intervene in ways that make it difficult to isolate gains directly linked to the takeover.

On the other side of the transaction, empirical evidence suggests that, on average, the value of the bidding corporation is positively affected by the announcement of a takeover, even if less significantly than that of the target corporation. Notwithstanding this evidence, these results are by no means general. Existing shareholders sometimes suffer a prejudice from a takeover, as when the bidder offers an inadequate price for the shares of the target corporation, but still is able to squeeze out minorities. Shareholders might be forced to accept the proposed conditions, even if the price offered underestimates the value of the firm, for example through a so-called two-tier offer. In these situations, the interests of existing controlling shareholders, directors or managers can be aligned with those of minority shareholders in resisting the hostile offer. The potential conflicts of interests between these groups and other minority shareholders leads to the issue of the desirability of defensive measures adopted by directors or controlling shareholders. While substantial debate exists, law and economics scholars, particularly in the United
States, maintain that the inherent conflicts of interest that arise in the takeover context mean that defensive measures should be discouraged or, at least, strictly regulated.29

There are also economic actors for whom a successful takeover will necessarily have negative consequences, regardless of whether it has any positive effects for minority shareholders. For example, in a hostile takeover, the position of directors and existing managers, or shareholders holding a controlling participation, may be threatened. While this effect is desirable as long as it monitors their behavior, it might cause "short-termism."30 In addition, other stakeholders can be prejudiced by a change in control, such as employees and providers (e.g., in case of merger of the target and the bidder corporations and consequent exploitation of economies of scale). These particular actors' interests are not necessarily what should be protected through takeover regulation, but they are sufficiently important to be accounted for in any regulatory regime.

The fact that takeovers redistribute wealth suggests that the market for corporate control, and the body of rules governing it, are not politically neutral. More precisely, in every takeover a conflict of interest arises among who will be prejudiced by the success of the acquisition-this group includes subjects in control of the target corporation-and who will benefit from it. Takeover regulation addresses this conflict, defining a difficult balance between favoring takeovers and allowing the implementation of defensive measures when appropriate. Takeover wealth redistributions will be Kaldor-Hicks efficient as long as the gains exceed the losses.31

In cross-border transactions, the political considerations implicated by takeover regulation become more important but less clear because the different stakeholders are not all located in one jurisdiction and are not, therefore, subject to (and able to influence) the same policymakers. In this context, it is possible that most of the subjects that can be prejudiced by a takeover (i.e., the controlling shareholder and employees) are located in one state, and the subjects who can be advantaged from the success of the takeover are foreigners (i.e., the bidder, or potentially some minority shareholders if the corporation is listed on an international financial market). In this context, the legislature of the state of the target corporation has an incentive to allow defensive measures, regardless of whether they maximize the value of the firm, in order to favor its national constituencies or, more precisely, some of them (usually the ones that are politically influential).32

The fact that takeover regulation is not neutral holds special consequences in jurisdictions where corporate control is characterized by the presence of controlling shareholders owning either de facto or absolute control of the corporation. Controlling shareholders can entrench their positions to thwart possible hostile takeovers. The presence of strong controlling shareholders, more common in continental Europe, creates an inherent conflict of interest between majority and minority shareholders, such that even friendly acquisitions might damage investors and the reliability of financial markets. Imagine, for example, that the controlling threshold of corporation A is 35 percent of its outstanding voting shares, which are held by X, the de facto
controlling shareholder. Assume that the market price for the shares is 100, and that the premium for control might be reasonably set at 25 percent of the price of a single share. A potential acquirer, B, might be willing to buy A's participation at 125 per share. If A agrees to sell his participation in a private transaction, which is not reflected in the market, minority investors would never enjoy the takeover-driven capital gains. This type of distortion might alienate investors, resulting in weaker equity markets. In response to this scenario, well illustrated in European contexts, takeover regulation should also take into account this particular problem by providing rules for distributions to minority investors as (at least part of) the premium for control.

Arguably, shareholders could be considered agnostic with respect to whether takeover regulation favors bidding or target corporations. Theoretically, rules may be neutral from the particular perspective of minority investors because they hold diversified portfolios, which include shares of both bidders and target corporations. While coherent in theory, the practical reality of this hypothesized agnosticism is highly doubtful. First, most bidders are not listed, but are instead empty shells created explicitly for the purpose of conducting the takeover. Though often unlisted, bidders often participate through listed corporations, which are the ultimate beneficiaries of the successful takeover and also have minority investors. But the process for transferring gains from a subsidiary to a parent corporation is not particularly efficient. In addition, most individual investors do not have completely diversified portfolios. Instead, employee-investors, for example, have invested a significant amount of their financial surplus in the corporation for which they work, often through pension funds. Meanwhile, other particularly vulnerable and unsophisticated investors may be severely affected by a takeover.

The issues to be taken into account in takeover regulation are even more complex in cross-border acquisitions involving European and American corporations. The reason is that investors hold geographically unbalanced portfolios. For example, European investors tend to invest more in securities issued by European corporations, and American investors tend to invest in those issued by American corporations. The reasons for these apparent preferences are primarily linked to concerns about the cost of information. Whether these concerns are real or only perceived is not relevant. Even if they might eventually reallocate their portfolios in a less biased way, this simple fact and its implication for takeover regulation policy cannot be ignored.

In sum, takeover rules are not neutral. This simple observation and differences among systems shall be considered with great attention, because they can lead to unexpected, and sometimes undesired, results for policymakers, corporate leaders and investors.

B. Acquisition Techniques

In this section, I provide an overview of the most common techniques that a bidder can use to acquire control over a listed corporation. The first distinction that must be drawn, as previously mentioned, is the difference between hostile and friendly control.
transactions. This distinction, in turn, depends on whether control is supposed to change hands with or without the consent of the existing directors, managers, or controlling shareholders.

Common sense and empirical evidence suggest that hostile takeovers tend to have a more significant effect on the market price of the target's shares than friendly takeovers. This is true because implementation of defensive measures by the existing controlling group could adversely affect the value of the target corporation, especially in the medium-term. Imagine, for example, that the directors of the corporation, to resist a hostile bid, adopt a defensive technique known as "selling the crown jewels," which consists of selling (possibly to a related party) some important assets of the corporation. This transaction strips from the target corporation what attracted the bidder in the first place. While the directors in this scenario might succeed in repelling the attack, the expenses (including legal expenses) incurred to put in place the necessary defense might weaken-sometimes even fatally wound-the corporation. In such a situation, after a sudden but brief increase in market prices, the share price might drop to levels even lower than before the announcement of the takeover.

Friendly takeovers, on the other hand, might hide risks for minority shareholders. In a friendly takeover, for example, directors, managers, and controlling shareholders might accept a lower-than-optimal price per share, or the transaction can occur outside the market, through a private exchange of a block holding participation.

It is sometimes difficult to draw a sharp line between friendly and hostile takeovers, since many apparently friendly transactions are actually conducted under a more or less explicit threat of launching a hostile attack.

On the other hand, in terms of specific techniques used to obtain control, it is important to distinguish between open market transactions (when a bidder acquires listed shares on the stock exchange where they are negotiated), public tender offers and block purchases. Economically, these techniques have very distinctive features, which pose different problems for the parties involved. Open market transactions, for instance, might be extremely expensive for the bidding corporation if the market price of the shares spikes, which would present a potentially significant obstacle for completion of the takeover. These problems would be exacerbated if the control threshold is high and the acquirer creates a significant demand for the shares of the target. Meanwhile, a voluntary public offer, providing for a fixed price (above the current market price, but still advantageous for the acquirer) might set a cap on the increase of market price and limit speculation on the securities. More often than not, open market acquisitions and public offers are used as vehicles for hostile acquisitions, while privately negotiated block purchases with the existing controlling shareholders occur only in cases of friendly takeovers.

These distinctions will help to highlight what are some of the most striking distinctions that emerge from a comparative analysis of U.S. and EU approaches to takeover regulation. As briefly mentioned before, in the United States bidders are afforded...
significant freedom in choosing the acquisition techniques they find most expedient. In Europe, by contrast, a tender offer to buy all the outstanding voting shares at a fair price is compelled when certain thresholds (substantially representing control) are passed.

C. Defensive Measures

If we now focus on the target of a takeover, there is such a vast array of defensive measures that a target corporation or its directors or controlling shareholders can adopt to repel a hostile takeover that any list of such measures would necessarily be incomplete. Notwithstanding the potential for variety, the most pervasive methods involve issuing new shares; issuing shares with increased voting rights triggered by a hostile acquisition; purchasing a corporation's own shares; launching a counter-attack on the bidding corporation (the "Pac-Man defense"); soliciting a friendly offer from a "white knight" allied to the existing controlling group; selling, possibly to a complacent counterpart, strategic assets of the target such as a patent or a trademark that the bidder wishes to obtain through the acquisition (selling the crown jewels); offering benefits to shareholders that will not sell their shares to the bidder; amending the corporation's bylaws to introduce staggered board or other poison pills; providing golden parachutes—i.e., very high liquidation bonuses for directors and managers in cases of takeovers. The list could continue almost indefinitely, and extensive literature exists discussing the defenses adopted in corporate practice and their desirability.

Considering how these measures can be implemented, which corporate body has the power to adopt them, and their consequences, the list of defensive tactics is very heterogeneous. What these tactics have in common, however, is that they all raise the costs, or reduce the benefits, of the takeover for the bidding firm.

In order to organize such a broad topic, different taxonomies of possible defensive measures have been offered. Although all the proposed classifications overlap, present some arbitrary distinctions, and are not as sharp in practice as they might seem in theory, they are still useful for exposition purposes.

A first distinction that can be drawn is between: (1) defensive measures intentionally adopted by potential or actual target corporations to resist hostile acquisitions, and (2) those economic and legal barriers that do not affect a specific corporation (but rather affect all the corporations belonging to a given economic or legal system). Examples of those barriers are the degree of concentration of ownership of listed corporations, the efficiency and liquidity of financial markets, and the access to the credit market in order to finance hostile acquisitions.

Among defensive measures intentionally implemented by the target, an important distinction is the one between external and internal limitations to the adoption of a specific defense. External limitations define what would be, in the abstract, possible to do under applicable corporate laws in order to resist a takeover. In this respect, different systems have more or less restrictive standards, depending partially on the
degree of flexibility of corporate statutes and the room left to freedom of contract in corporate law.50 For example, a common defense tactic in the United States is for a target corporation to purchase its own shares. This strategy is subject to very few restrictions in most states' corporate statutes (with the exception of the requirement that a corporation use only funds legally available for distribution as dividends to shareholders)51 and thus can be readily decided on and implemented by directors. In most European countries, instead, according to the second Directive on Company Law,52 purchasing one's own shares is subject to more stringent limitations (for instance, only up to 10 percent of the outstanding shares can be bought); and the transaction must be duly authorized at a shareholders' meeting.53 More generally, in the United States, directors retain extensive powers to amend the bylaws of the corporation in comparison with civil law systems, where these powers are usually vested with the shareholders' meeting through mandatory rules.

If external limitations on the adoption of defensive measures define the actions that can be legally taken according to applicable corporate laws, under the label of internal limitations we should consider those specific rules that might define the freedom of action of the target corporation in resisting the takeover. As we will discuss, for instance, U.S. case law specifies the content of directors' fiduciary duties in a takeover context, therefore regulating their conduct vis-à-vis the conflict of interest between existing shareholders-interested in obtaining the highest price per share as consideration for their shares-and board members, interested in entrenching their positions and repelling the attack. Another example of internal limitation to defensive measures is one of the very pillars of the European approach, which will be extensively discussed in this Article: the neutrality rule provided for by Article 9 of the Directive and by most European states. According to this rule, after the announcement of a takeover, directors must refrain from undertaking any action that might hinder the success of the acquisition, unless the action is authorized by the shareholders.

In synthesis, external limitations to takeovers might be considered like the different weapons available to duelists in the market for corporate control, while internal limitations define the acceptable actions during the duel, such as the prohibition of shooting before a signal is given to the duelists.

As anticipated, the distinction between external and internal limitations to defensive measures is not the only possible one. It is possible to distinguish measures that can be adopted before the launch of a hostile takeover (such as the introduction of a poison pill in the bylaws at the time of the IPO,54 a measure which could be considered a fortification of the citadel in time of peace)55 and measures adopted and implemented once the takeover has been announced, such as issuing new shares. There is an obvious overlap between these two categories, since pre-established defenses often need some further action on the part of the directors or other subjects to be activated once the attack has been launched. Similarly, defenses that can usefully be adopted after the announcement of a hostile offer can also have a deterrent effect if adopted previously (e.g., acquisition of one's own shares can raise the market price of the shares, thereby making an acquisition more expensive).
Another common distinction is the one between defenses that can be freely adopted by the parties involved, and anti-takeover measures provided directly by the legislature, such as in the case of the U.S. anti-takeover statutes that will be discussed in Part II. For example, the legislature might prohibit merging a target corporation with a successful bidder for a given period of time after the takeover, at least without the approval of the deal by existing directors. This distinction can also be blurred, since most anti-takeover statutes contain opt-out provisions that the parties can freely adopt or reject, with the consequence that anti-takeover statutes can be more usefully described as only one of the elements concurring in defining what we have called external limitations to defensive measures.

This overview of possible defensive measures and their potential distinctions was intended to shed some light and provide for some order in a complex and somehow unstructured field. In our analysis of the differences between U.S. and EU takeover regulations, we will, however, focus on what we have defined as internal limitations to defenses adopted after the announcement of a hostile takeover, an important organizational distinction between the two approaches.

III. THE APPROACH TO TAKEOVER REGULATION IN THE UNITED STATES

In the United States, takeovers and their regulation have received significant, almost obsessive, attention from both economists and jurists in recent decades. Literally thousands of pages have been written to describe, prescribe, evaluate and criticize them. Given this wealth, if not over-abundance, of commentary, the sections that follow provide only a brief overview of the basic features and historical evolution of takeover regulation in the United States-features that are essential premises for understanding and distinguishing the European approach.

A. The Federal Framework

Takeovers are regulated both at the state and federal level, although each set of rules has a distinctive scope and purpose. In response to a wave of tender offers in the 1960s, federal regulation of tender offers was introduced with the Williams Act of 1968, which deals primarily with information in a takeover context. Under section 13(d) of the Williams Act, any substantial acquisition of shares that might lead to a takeover (so-called "street-sweep") triggers specific disclosure duties when certain applicable thresholds are satisfied, which are deemed to signal an attempt to obtain control over the issuer. In addition and most importantly for our purposes, section 14(d) of the Act provides that anyone intending to launch a "tender offer" shall publicly disclose this intent and inform investors of the terms and conditions of the offer so that they can make informed decisions about whether or not to accept it.

In addition to these general requirements, the target corporation is also subject to specific disclosure requirements. For example, its board of directors must publish an evaluation of the offer, or otherwise indicate publicly whether it considers it hostile or not. Notably, this is one area of convergence with European regulation. Virtually all European jurisdictions impose similar disclosure requirements, even if some important...
differences exist, and disclosure is also regulated at the European Union level.61

The Williams Act and the secondary regulation enacted by the SEC, as well as other federal regulations, center principally on disclosure, but they also regulate several substantive aspects concerning the actions of the bidder and the target during a takeover. First, federal regulation defines some of the basic rules of the game, such as the timing of the offer and the treatment of the security holders.62 Moreover, federal law imposes civil liability on those who provide false or misleading statements in connection with a takeover.63 Together, these provisions indirectly but substantially shape the actions of the bidder and of the target. Finally, some anti-takeover statutes enacted by individual states have been struck down on Supremacy Clause grounds as being inconsistent with the Williams Act. In this respect, federal law has also had a role to play in setting the boundaries of defensive measures at the state level.

B. State-Imposed Fiduciary Duties

Notwithstanding the foregoing federal incursions, the bulk of the regulation of defensive measures occurs at the state level. In the event of a takeover, an inherent conflict of interest arises between directors and managers, who seek to maintain their positions; and shareholders, who might benefit from the takeover. This conflict is primarily addressed through fiduciary duties imposed on corporate officers and directors by state law. Any adoption of defensive measures must be compatible with those duties, as interpreted in the relevant scenario of a takeover. An ex post liability-based constraint operates with all the potential hurdles involved in proving malfeasance.65 In this respect, the European regulation takes a significantly different ex ante approach, which precludes managers and directors from acting on a potential conflict of interest by precluding them from adopting any defense, unless it is explicitly authorized by a resolution of the shareholders.

Another consequence of the fact that defensive measures are regulated through state legislative and judicial decisions is that the issue becomes subject to regulatory competition among the individual states.66 Ideally, definitions of directors' duties in the context of takeovers should attempt to strike a balance between improper use of defenses to preserve directors' own positions and proper uses, such as the use of defenses to avoid a takeover predicated on an undervalued price.67 The definition of directors' duties should, in other words, seek an effectual balance between safeguarding essential freedom of action and curtailing its possible abuses.68

In this competitive context, the standards of conduct for directors of the target corporation have been primarily defined by a series of precedents of the courts of Delaware.69 While a full discussion of these precedents is outside the scope of this Article, a brief survey of the seminal cases is instructive. In the 1985 case Unocal Corp. v. Mesa Petroleum Co., the Delaware Court of Chancery held that defensive measures can only be taken when directors have reasonable grounds to believe that the takeover would result in prejudice to the corporation or its shareholders, and that the defenses shall be proportionate to the threat in order not to dilapidate the wealth of the corporation.70 This case was particularly significant because it represented a
recognition that the inherently self-interested nature of defensive measures required a difference balancing test from how fiduciary duties are evaluated in other contexts.71

In Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.,72 which was decided the same year as Unocal, Delaware courts further tipped the balance by holding that once directors understand that a takeover will be successful, their duty is simply to obtain the best price for the shareholders, which may be described as a sort of duty to "negotiate the surrender." Four years later, when the Delaware Supreme Court weighed in on the question in Paramount Communications Inc. v. Time Inc.,73 it relaxed the reins that had been tightened by the Court of Chancery in Unocal and Revlon. Paramount established the legitimacy of a set of so-called "just say no" defenses74 and provided some slack to directors by allowing them to oppose a tender offer by relying on factors other than a comparison between the market price and the offer price, particularly if the factors are part of a larger in-place business strategy.75

Subsequent cases in the 1990s once again engaged in a push-me-pull-you game of scrutinizing directors' actions, while at the same time expanding their potential to engage in defensive measures. In Paramount Communications, Inc. v. QVC Network, Inc.,16 Delaware courts built on the Revlon doctrine, holding that courts will apply enhanced scrutiny of a target board's actions, but only when the action is taken after the target board has placed the target corporation "up for sale."77 The QVC decision also made clear that, at a minimum, the duty of care implies an obligation to investigate alternatives.78 In Unitrin, Inc. v. American General Corp.79 meanwhile, the Delaware Supreme Court broadened the range of possible defensive actions that directors can adopt from the "proportionality" test set by Unocal to a less clearly defined "range of reasonableness."

Together, these precedents have been decried as resulting in an absolute expansion in the freedom of directors to adopt defensive measures in response to hostile takeovers.80 Some have argued that the dilution of restrictions on self-interested corporate management may be the product of a race to the bottom.81 On closer examination, it may reflect a difficulty in developing clear rules to govern at such a delicate intersection between protecting against management's self-interest and allowing legitimate strategic management decision-making. These cases might reveal, in other words, the limitations of fiduciary duties that must be interpreted and applied by courts on a case-by-case basis, given the blunt nature of the normative instrument.82

C. State Anti-Takeover Statutes

Another way in which state legislatures have influenced defensive measures is through their passage, beginning at the late 1960s, of anti-takeover statutes. These statutes were specifically designed to help resident or incorporated corporations fend off hostile attacks.83 The development of anti-takeover statutes can be broken down into several generations, based on the mechanisms they employ to protect resident corporations and the nature of challenges to them by foreign bidders attempting to acquire an out-of-state corporation.84
The first generation relied on disclosure requirements and a merit-based evaluation of the fairness of the bid, usually by a state authority, as a condition to acquire the corporation.85 These statutes have been struck down for violating congressional power under the Commerce Clause, or for being preempted by the Williams Act.86

A second generation of statutes, based on corporate governance principles, emerged in response to these rulings. The notion was that these statutes would avoid the constitutional conflicts of the previous generation because the internal affairs of corporations are within the competence of individual states. One of the first examples of this new approach was an Ohio statute prohibiting acquisition of an Ohio corporation unless the acquisition was pursuant to shareholder approval.87 Although this particular statute was deemed unconstitutional,88 the Supreme Court upheld the legitimacy of other anti-takeover legislation, some of which was not profoundly different from the Ohio statute. One of the most important decisions in this line is CTS Corp. v. Dynamics Corp, which denied the existence of an interstate "market for corporate control" protected by the Commerce Clause.89

The provisions of this second generation of anti-takeover legislation vary widely. Some states adopted, for instance, "best price" rules, which require a bidder to offer the highest market price in a given period of time in the absence of a specific approval of the offer by a supermajority of the shareholders.90 In other states, statutes allow directors to take into account the interests of employees and other stakeholders in deciding whether to resist a hostile takeover.91 This expansion in the range of legitimate considerations consequently broadened the range of permissible defensive measures available.

A third generation of anti-takeover statutes, enacted in the late 1980s, finally provided for statutory limitations to certain post-bid transactions, often necessary from a financial standpoint in order to complete an acquisition.92 The most common solution of the "business-combination statutes" is to prohibit a post-acquisition merger in cases of hostile takeovers for a certain number of years after completion of the tender offer, a limitation that might prevent leveraged buy-outs.

While the absence of a compulsory tender offer in the United States has arguably contributed to the rise of anti-takeover statutes,93 some of the poison pills used to block hostile takeovers rely on a compulsory bid, usually introduced through convertible preferred stock dividend plans. As one scholar has explained:

Under these plans, the board of directors, acting pursuant to its power under Del. G.C.L. § 151, would issue to the corporation's common shareholders a dividend of a new series of preferred stock, typically convertible into 50% of the equity of the corporation. This preferred stock possessed special redemption and conversion privileges designed, in large part, to deter two coercive takeover practices: partial tender offers which threatened shareholders who did not tender with permanent minority status in a corporation controlled by the bidder; and two-tiered tender offers which threatened shareholders who did not tender with a second-step transaction on
less attractive terms than those offered to shareholders in the tender offer.94

While seeking to protect against the same dangers as European compulsory tender offers, these provisions are initiated not by the legislature, but by the corporations themselves.

It is not necessary, for the purposes of this Article, to analyze specific examples of these statutes in detail. The primary purpose of this discussion is simply to highlight the competition among states to attract corporations or, more generally, to protect corporations connected with the state and their incumbents. This competition has resulted in state legislatures developing specific anti-takeover statutes that would broaden the ability of a corporation and its insiders to resist acquisition attempts. Both through anti-takeover statutes, and the development of specific doctrines concerning the duties of the directors of a target corporation, there has been a movement toward favoring freer use of defensive measures. This shift has been vigorously criticized by U.S. scholars, who for the most part advocate board neutrality or, at least, seem skeptical about the possible benefits of defensive measures.95

D. Conclusion

In reviewing takeover regulation in the United States, a few themes emerge. Efforts to fine tune the delicate balance between controlling managerial self-interest and flexibility still do not seem to have found an equilibrium. Those wary of management's incentives in takeover scenarios lament the demise of a market for corporate control,96 which has fallen victim to a race to the bottom by states to protect local corporations. Meanwhile, those who either question the viability of a market for corporate control97 or who doubt the efficacy of external controls on the market for corporate control,98 argue that defensive measures are a business decision that should be left to directors and protected from improper judicial scrutiny by the business judgment rule.

To some degree, takeovers in the United States remain unregulated. Compulsory bids are not required at the federal or state level,-even if, as noted earlier, some corporations have voluntarily adopted similar provisions to discourage partial takeovers. The fact that similar results are achieved through private means in the United States is consistent with the more general observation that U.S. regulation, much more than European regulatory strategies, relies both implicitly and explicitly on the role of financial markets.99 The absence of compulsory bids in the United States is most likely linked to the fact that it has robust financial markets that are generally considered to be relatively efficient and in which listed corporations have widespread ownership structures. By contrast, in Europe, the primary goal of the regulation is to protect dispersed shareholders from the risk that a controlling shareholder will sell her shares at a premium outside the market, or from the risk of harm to remaining prisoners of a corporation that has been taken over, who, by virtue of their situation, are unable to sell their shares at a reasonable price. Compulsory bids on all the outstanding shares are designed to reduce these risks, which are more likely to exist where equity markets are less developed and ownership structures are highly
concentrated.

In any case, the absence of a harmonized, mandatory rule concerning compulsory bids in the United States represents a striking difference from the European approach, which will be examined in the following part.

IV. THE EUROPEAN APPROACH TO TAKEOVER REGULATION

While European directives are rightly regarded as a form of top-down harmonization, in the context of takeovers, the final version of the Thirteenth Directive presents distinctive features. On the one hand, it capitalizes on a spontaneous, bottom-up harmonization among several individual Member States, whose regulation converged, as we will discuss, toward the U.K. model. On the other hand, it leaves very broad margins of freedom to Member States, so that it is a general common regulatory framework, more than a strictly harmonized set of rules. Both of these features were necessary preconditions, also from a political point of view, to passage of such a controversial directive.

A. The Founding Principles

This section boils down the complexities and the technical nuances of takeover regulation into the primary pillars that undergird the European approach to takeovers. Somewhat surprisingly given the existence of profound historical, legal and cultural differences among the several European countries, most of the takeover laws (in particular those of France, Germany, Italy, Spain and the United Kingdom, as well as the European Union's Thirteenth Directive) share a common overall structure. The parts of this structure upon which I shall concentrate are the compulsory tender offer and the restrictions on defensive measures. These are, for our purposes, the distinguishing features of takeover regulation in Europe. Needless to say, there are other important regulatory issues that will not be considered in this analysis, primarily because they are implemented in various manners across Europe, although the variance is relatively minor and the regulations further the larger overarching shared structure.100

Following the U.K. experience, most European countries required compulsory tender offers on all outstanding shares when a specified controlling threshold was acquired, converging toward a similar regulatory approach.101 There are two rationales for adopting a compulsory public offer regime. On the one hand, the technique is designed to favor the distribution of the controlling premium to a large group of investors. In the absence of an obligation to make a compulsory tender offer, controlling shareholders can sell a controlling participation in the company and thus "cash in" the premium for control. The premium for control is the difference between the market price for an individual share and the price of a share that includes participation in control.102 For example, the percentage difference between the prices of shares with higher voting rights and those with lower voting rights, or between ordinary share price and the price paid for a block that would provide control, is called the voting premium, which—according to some theories—is partially determined by the
possibility of extracting from the corporation the private benefits of control.  

The extent to which mandating a public offer ensures a broader distribution of the control premium depends on the quantity of shares that the bidder must offer to buy and the price at which the offer must be launched. These variables can be, and are, adjusted by legislatures to serve certain policy goals. For example, the higher the price of the compulsory offer, the greater the benefit for minority shareholders. But the cost of obtaining control is also greater and, consequently, takeovers may be discouraged.

A second goal of compulsory tender offers, which is related to the first but conceptually distinguishable from it, is to provide a fair opportunity for minority shareholders to exit in the event of an undesirable change in the controlling shareholder. This purpose is most evident in "subsequent" compulsory tender offers (as in the European approach I am discussing), in which offers on all outstanding shares must be launched after someone reaches a defined controlling threshold. Ensuring the possibility of exit for every shareholder who dissents from the acquisition rums on the percentage of outstanding shares that the bidder is required to offer to buy. Only an offer for all the outstanding shares allows every investor an unobstructed way out, without the need for pro-rata acquisitions.

A mandatory tender offer system also bears costs and benefits for the development of equity markets more generally, apart from the individual preferences of and price protection for individual minority investors. By ensuring that in any takeover a large number of shareholders will benefit from control premiums, compulsory tender offers strengthen financial markets by providing a systemic protection against exploitation of minority shareholders. On the cost side of the ledger, compulsory tender offer requirements also-almost inevitably-make takeovers more expensive. A bidder might be forced to purchase not only the percentage of shares necessary to control the corporation, but also an additional quantity of shares at a given price, which can exceed the market price. This possibility might discourage takeovers and cause stagnation in the market for corporate control. In addition to the financial expenditure necessary to acquire all the outstanding shares, the need to comply with a complicated body of regulations, which typically also require distributing a tender offer prospectus, increases the administrative and legal expenses associated with the takeover. In this respect, the existence of compulsory tender offer requirements operate similarly to defensive measures by protecting incumbent controlling shareholders and managers from the policing role of corporate raiders.

Even this general sketch suggests that, as a matter of policy, the introduction of compulsory tender offers lies at the edge of a very complex evaluation. These provisions may be particularly desirable in a market that is regarded as not particularly "thick" or efficient, meaning a market in which control of listed corporations is often transferred outside the market, through friendly transactions among insiders able to capitalize control premiums to the detriment of minority investors. This risk is particularly high in corporations with strong controlling shareholders and concentrated ownership structures, a condition present, to varying
degrees, in most continental European countries.104

The preceding discussion suggests that efficiency arguments are not the only ones driving the introduction of compulsory tender offers. The idea that the premium for corporate control belongs also, at least partially, to non-controlling shareholders relies on a particular idea of distributive justice and a specific political choice. Any sophisticated descriptive account, and clearly any normative account, of takeover regulation cannot ignore the socio-political motivations that inform this rule.105

The overall framework is even more complex, given the multi-jurisdictional aspect of the European and U.S. business environments. Resident subjects, including political actors, are able to influence regulatory outcomes. Even without overt lobbying efforts, their interests are naturally considered by policy makers. If there is a significant risk of takeovers initiated by outsiders, and if compulsory bids offer some degree of protection to the incumbent controlling residents, it is neither surprising nor necessarily undesirable that such instruments will also be adopted as a form of protectionism.106 Along the same lines, in the current European context, in most cross-border takeovers, the bidder is a foreign company, while both the controlling shareholders of a target national corporation, as well as its minority shareholders and its employees are, for the most part, political actors in the system in which the policy makers responsible for regulating the takeovers operate. In an increasingly integrated Europe, the implications of these dynamics should fade. In the meantime, however, this element of nationalism continues to have some force. If compulsory takeovers contribute to strengthen, at least in the short term, the economic positions of important immediate constituencies, policy makers will be inclined to adopt them.

The second founding principle of the European takeover regime deals with limitations to the defensive measures that a target company can implement to resist hostile acquisitions through public offers. An unfriendly acquisition raises a conflict of interest between the incumbents controlling the corporation and, in particular, the directors, as well as the shareholders. The U.S. system addresses this conflict of interest mainly through the fiduciary duties owed by the directors to the shareholders, holding them liable in cases of breach of their duties of loyalty or of care, as developed in takeover case law. On the contrary, the European approach freezes directors' powers once a public offer has been launched and requires any action that might adversely affect the outcome of the takeover to be approved by the shareholders. In addition, some poison pills that might not require any action from the directors, but still prevent the takeover and jeopardize the interests of minority shareholders, are temporarily neutralized through the so-called "breakthrough rule."

In brief, it might be said that the European approach directly empowers shareholders on the issue of defensive measures. The desirability of this approach must be considered in light of the peculiar ownership patterns that prevail in Europe, since it might be argued that Europe has simply replaced the conflict between directors and shareholders with that between controlling and minority shareholders.

B. Takeover Regulation in Some European States
The foregoing discussion describes the possible underlying rationales for the introduction of compulsory tender offers. This section turns to a more concrete examination of how these rules are constructed in some of the European countries that have adopted them. Following the example of the British experience with the City Code on Takeovers, several large European countries, such as France, Germany, Italy and Spain, have adopted compulsory tender offer rules.

1. Compulsory Tender Offer Rules

The origins of compulsory takeovers can be found in the British City Code, which is not a statutory provision but is mandatory in the sense that there are specific sanctions in the case of noncompliance. The Code provides that whoever acquires over 30 percent of the outstanding voting shares of a public corporation must launch a public offer on all the remaining shares at a price not lower than the highest price paid for the same shares in the last twelve months.

The first issue that such a provision raises is how the threshold should be calculated. As a theoretical matter, there is a real question of why a compulsory takeover should be triggered by a particular statutorily mandated threshold and not, as its rationale would seem to imply, by any transfer of control. A similar approach, impeccable in theory, was in fact followed by first-generation takeover statutes in some European countries, and it is not foreign to the Thirteenth Directive. Notwithstanding its theoretical elegance and initial flirtations with it, this approach presents major practical obstacles. First and foremost, the controlling threshold is not only different for virtually every corporation, but it is also subject to change within a specific corporation, even overnight. As a consequence, under any such rule, it would be necessary for any given corporation to determine, as often as possible and with some degree of certainty, the threshold of control that would trigger a mandatory public offer. This would, however, not only be practically almost impossible, but also raise extensive litigation, very damaging to the development of an efficient financial market.

The Austrian experience provides a helpful illustration. Austria's general Takeover Act of 1999, the "ÜbG," provided that the acquisition of a de facto controlling participation triggers a compulsory tender offer. The statute did not establish a fixed threshold, but subsequent secondary regulation enacted by the competent Takeover Commission provides that, for the purposes of the takeover compulsory offer, a shareholding of 30 percent is presumably a controlling participation. In Italy, the enactment of new regulation in 1998 (the Testa Unico della Finanza, a consolidated statute regulating takeovers), represented a very similar shift towards the fixed threshold approach. Given the practical problems in using de facto control, most legal systems have followed the Austrian scenario and have adopted a predetermined fixed threshold that is deemed to constitute presumptive control.

The economic function of the threshold in providing a reasonable presumption of control is demonstrated by one of the most important exemptions from the
compulsory tender offer. Acquiring 30 percent of voting rights, or for that matter any participation inferior to absolute majority, does not ensure the holder control of the corporation. This point is self-evident when someone else holds the absolute majority of the voting shares. It is usually provided, although with different approaches, that if another shareholder controls the corporation, no bid is mandated—regardless of whether the "magic threshold" has been passed. This exemption flows naturally from the underlying rationale for compulsory takeovers because control has not actually changed hands and no premium for control has been paid.

A comprehensive study comparing takeover regulations in Europe has demonstrated that the majority of European countries follow a similar approach, providing for a fixed threshold triggering the compulsory tender offer for all outstanding shares, even if the relevant percentage required varies. In Italy, Germany, Austria and the Netherlands, the threshold is fixed at 30 percent of the outstanding voting shares, exactly as in the British regulation. The threshold is set slightly higher in France (33 percent) and higher still in Sweden (40 percent). In Spain, the triggering threshold goes down to 25 percent of the outstanding shares, but Spain also does not require that the compulsory tender offer be on all outstanding shares. Under Spanish law, in fact, partial offers are mandated depending on the percentage of shares acquired.

Decoupling compulsory tender obligations from de facto control creates some anomalies. If the ownership structure of a corporation is dispersed such that de facto control exists at a percentage inferior to the fixed threshold, for example if actual control is 25 percent when the statutory threshold is 30 percent, acquisition of actual control, friendly or otherwise, does not require a public offer. The necessity of drawing and introducing a specific threshold results in a free zone in which actual control can be obtained without launching a compulsory public tender offer. Since every possible threshold implies that in certain situations, depending on the ownership structure, control could be acquired without launching a bid, the question becomes where the threshold should be positioned.

It might be hypothesized that jurisdictions with more concentrated corporate ownership structures would impose higher thresholds. A quick survey of the major European countries disproves this hypothesis. Instead we find that countries whose corporations have widespread ownership provide for thresholds very close to, if not higher than, the thresholds provided for by countries characterized by the presence of strong blocking controlling shareholders. In the former jurisdictions, it is conceivable that a significant number of acquisitions of control might occur without any obligation to launch a public offer.

A compulsory takeover regime is not as rigid as it might first seem. Even within the general framework of a compulsory takeover regime, both exemptions from and extensions of the obligation to launch a tender offer can vary significantly among different systems. A few examples will illustrate. We already considered above the popular exemption for instances when the mandated threshold is exceeded, but another shareholder retains control, possibly owning more than 50 percent of the
outstanding shares. In that instance, the compulsory offer can be excused. There are also exemptions for when the acquisition is temporary, or when the acquisition is part of an effort to turn around a corporation in financial distress, for example if creditor banks agree to convert their loans into shares. Other exemptions exist for when the threshold acquisition is simply the side effect of a merger or consolidation. In all these instances, in which usually some discretionary power is given to the agency or self-regulated body administering takeover regulation, imposing the compulsory tender obligation would hinder other economic goals deemed desirable by the legal system. Such goals might include turning around a corporation in dire straits, or allowing external growth, and possible efficiency gains, through a merger.

Conversely, there are situations that do not fall exactly within the basic rule described above, but in which a compulsory offer is nevertheless mandated. For example, a compulsory tender offer can be triggered when the shares of a listed corporation are acquired indirectly, through the purchase of an empty shell corporation that holds participation in the target corporation. It can also be triggered when a shareholder who already owns more than the relevant threshold increases its participation toward absolute control. Different countries have regulated these situations differently, either allowing regulatory agencies to make decisions in individual cases, or providing general rules in their statutes and secondary regulations. My point is not to engage in a comprehensive explanation of the minutia of these various exemptions and extensions, but instead to illustrate that the apparent rigidity of the rule is tempered by various provisions that allow particular circumstances to be taken into account.117

2. The Price of the Compulsory Tender Offer

A crucial element of the compulsory takeover is, obviously, its price. The price defines, almost mathematically, the balance between the protection of minority investors, on the one hand, and the contestability of corporate control.

Specific rules usually provide for a technique to calculate this price, taking into account several elements, of which market prices and the price paid by the bidder to acquire shares outside the market are the most important. Let's assume that the market prices do not (or, more precisely, only partially) reflect the control premium, but that the bidder bought, possibly not on the market, a significant percentage of shares for higher than the market price directly from important shareholders. This scenario is reasonably predictable since buying on the market at a sustained pace might not be possible or might result in a steep and uncontrollable rise in prices. The price at which the tender offer must be launched can vary between an average (calculated with different techniques) of market prices and these (higher) prices. A rule according to which the takeover is launched at the highest price paid for the shares in a given period of time preceding the acquisition that triggers the bid, implies that the entire maximum premium for control is offered to all minority shareholders.

Alternatively, at least theoretically, a rule according to which the tender offer is proposed at market prices, distributes no control premium to minority shareholders, who are themselves free to sell their shares on the market. Meanwhile, the third
possible alternative, designating an average between the two extremes, implies a partial diffusion of the controlling premium, mediated with the goal of not discouraging the market for corporate control.

A second important consideration in the calculation of the offer price is the time horizon to be considered in defining the prices used as inputs in that calculation. In this respect, the longer the time framework taken into account, the higher the risk of including prices that are unrelated to the current corporate situation. On the other hand, an average calculated based on a too short period of time is subject to speculation bubbles, which distort the real value of the shares and which could be averaged out if a more extended timeline is used.

How did the various European legislatures mediate these various considerations? In most jurisdictions, takeover regulation specifically determines how the minimum price of the offer should be calculated. In the United Kingdom, for instance, the tender offer price must be at least equal to the highest price paid for the same shares in the last twelve months.118 In France, even if "takeover regulation does not specifically address the method for determining the price at which a compulsory offer must be launched, the [Conseil des Marchés Financiers] requires 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."119

The Italian legislature, in Article 106 of the Italian Takeover Statute, adopted a compromise rule. The relevant provisions require that the tender offer be launched at the arithmetic average between the weighted market prices of the last twelve months, and the highest price paid by the bidder to acquire shares of the target corporation in the same period of time.121

There is more consensus among systems regarding the relevant time period, though that does not necessarily indicate that they have converged on the right answer. Italian law, as well as several other systems, set the relevant time period as twelve months. This seems like a very long interlude, which might allow the calculation to take into account quite outdated prices that are not very meaningful for the purpose of determining the fair value of the shares. Scholars have criticized this twelve month provision, arguing instead in favor of the German approach. In Germany, sections 4 and 5 of the WpUGAngebotsverordnung provide that the price of the tender offer shall not be inferior to the highest price offered by the bidder for the shares of the target corporation in the last three months preceding the announcement of the public offer, but in any case not lower than the average market price in the same period of time.122 This shorter period seems preferable to determine the fair value of the shares, especially if financial markets are relatively efficient and sufficiently thick.

3. Board Neutrality and the Breakthrough Rule

Most legal systems that mandate compulsory tender offers also impose a passivity or neutrality rule. Once again, the rule is inspired by the British model. The City Code's
General Principle 7 provides that:

At no time a bona fide offer has been communicated to the board of the offeree company, or after the board of the offeree company has reason to believe that a bona fide offer might be imminent, may any action be taken by the board of the offeree company in relation to the affairs of the company, without the approval of the shareholders in general meeting, which could effectively result in any bona fide offer being frustrated or in the shareholders being denied an opportunity to decide on its merits.123

Rule 21 enumerates specific defensive measures that cannot be adopted without shareholder consent, such as issuing previously authorized shares, selling assets of material value, or entering into important contractual relationships. The passivity rule applies, obviously, both in case of voluntary and of compulsory tender offers; and independently from the friendly or hostile nature of the bid.

Applying the passivity rule might raise several delicate problems of interpretation. It could be said that every action that might de facto frustrate the bid is prohibited from being adopted or at least implemented unilaterally by the directors, even if they received some pre-bid authorization from the shareholders' meeting. It is not, however, always easy to distinguish actions that might have this effect. In any case, the rationale of the rule is that the shareholders, as the primary recipients of the offer, shall decide on the adoption of any defensive strategy or tactic, only after the offer has been made and in the light of all the information available.

Even a casual glance at these rules makes clear that European takeover regulation has a radically different solution for the inherent conflict of interest between incumbent directors and managers and the shareholders than has been generated by U.S. courts and legislatures. In Europe, directors' duties toward the corporation and its shareholders are mandated in the takeover context, which reduces the opportunity for acting on self-interest. Moreover, the adoption of defensive measures is entrusted directly to the ultimate principals, meaning that shareholders themselves decide whether to resist or accommodate a bidder.124 A supermajority is usually required to approve a defensive measure, often equal to the threshold triggering the compulsory offer.125

Obviously, the very need to call and hold a shareholders' meeting might curtail the ability of a corporation to promptly react to unsolicited offers that underestimate its value and that would be value-decreasing for the investors. Exactly for this reason special rules might be provided concerning the calling of the meeting in a manner that minimizes the time usually required to convene this body.

The German approach, which is also followed in The Netherlands, presents a slightly different scheme that makes defensive measures comparatively easy to adopt.126 At first blush, the prohibition against actions inimical to the tender offer (Behinderungsverbot) provided for by section 33, 1 (1) of the Takeover Act, the WpUG, follows the U.K. approach and bans directors' defenses unapproved by the
shareholders' meeting. However, section 33, 1 (2) of the WpUG provides that the members of the managing board (the Vorstand) can also adopt defensive measures approved by the supervisory board (the Aufsichtsrat). While the members of this latter body, which is separately appointed at the shareholders' meeting, have some independence requirements vis-à-vis the members of the Vorstand, they are nevertheless directors who are appointed by the existing majority. As such, their interests can conflict with those of minority shareholders in opposing valuemaximizing hostile offers that might jeopardize their positions within the corporation. This potential for conflict is exacerbated when the members of the Aufsichtsrat are also appointed by the unions, as is required by statute in larger corporations. As a general matter, unions tend to oppose proposed acquisitions that might result in reorganizations and downsize the number of employees, regardless of the desirability of the offer from the shareholders' point of view.

In addition, in contrast to the strict neutrality rule followed in most continental European countries, under German law the shareholders' meeting can release a preliminary general authorization (Vorratsbeschliisse) to the directors to amend the corporate bylaws. In most civil law systems, this competence is reserved to shareholders' meeting, but it can be an effective mechanism for defensive purposes in case of a takeover attempt. Authorization before the bid is a sort of blank check to the directors, since it is given without information on the conditions of the bid.

A delicate but often overlooked issue concerning the passivity rule is the timeframe to which it applies. The crucial element that any policy maker should consider is at what moment precisely is the target's board of directors subject to the rule, such that its actions must be approved by the shareholders' meeting. This issue, in turn, implicates the question of what level of disclosure is required of the bidder before the passivity rule is triggered. If it is sufficient, for example, for a bidder to generally announce its intention to launch a hostile tender offer, without providing specific details concerning the conditions of the offer (such as its price, or the minimum amount of shares that she wants to obtain when a voluntary offer is conditioned on the acquisition of a certain percentage of the capital), the bidder is at an advantage, since it can effectively freeze its opponent without committing to any specific takeover plan. On the other hand, if the passivity rule applies only when every detail of the offer has been formally communicated and published in a prospectus, possibly several days after the initial general announcement, the window will allow directors of the target corporation to adopt some defenses without deferring to their shareholders' preferences as envisioned under the passivity rule. In this respect, different countries have, quite predictably, adopted different rules.

Under Italian law, for instance, the Stock Exchange Commission had at first interpreted the relevant regulation as pertaining to the first announcement of the intention to launch a takeover bid. The Italian judiciary (in particular, the Tribunale Amministrativo Regionale del Lazio and the Consiglio di Stato, special courts dealing with administrative law issues) struck down this interpretation. As a consequence, the Commission changed its own regulations, providing that the first announcement of the
intention to launch a takeover should be made when the offering statement is published. In this way there should not be a time gap between the two moments and there would no be ambiguities regarding the relevant period of time in which the passivity rule is applied. This solution, however, carries with it other problems. For example, with listed corporations, the intention to launch a takeover might be subject to disclosure obligations before the prospectus is deposited and published since knowledge of a takeover bid constitutes price-sensitive information that must be disclosed under relevant securities regulations.

C. The Thirteenth Directive on Takeovers

As noted in the introduction, passage of the Thirteenth Directive was by no means assured and its substantive content was deeply marked by its tortured history. These scars from the drafting and ratification process may not, however, necessarily be a badge of weakness.

1. The Long and Winding Road to Passage

Discussion of harmonized regulation of takeovers began in Europe in the late 1980s, partially as a consequence of one of the first attempts at a cross-border hostile takeover. In 1988, the Italian entrepreneur Carlo De Benedetti launched a hostile takeover of the Belgian corporation Société Générale de Belgique. The attempt was ultimately thwarted by an acquisition by a French white knight, but it highlighted the growing concern in Europe about an unregulated no-man's land in such a delicate field. In 1989, European authorities responded by elaborating a first proposal for a Directive on takeovers.

The proposal was probably premature given the political climate and it was turned down. The failure may have been predicted by anyone who considered that, at that time, most European countries had not introduced any domestic regulation regarding takeovers, meaning they obviously had no familiarity with or predisposition toward mandatory bids and rules restricting offerer and offeree conduct. In 1996, after further discussion, a proposal for a directive based on the principles set down by the British City Code was adopted. This proposal, which also received strenuous opposition, contained the two principle pillars of the U.K. approach: compulsory bids and board neutrality.

Once again, the call for intensifying the efforts to reach a common position and adopt a harmonized regulatory framework was, at least partially, prompted by an international acquisition that underlined the desirability of a shared regulatory framework. In 1999, a U.K. telecommunications corporation, Vodafone, successfully completed the hostile takeover of the German colossus Mannesmann. The battle over this important and strategic enterprise attracted significant political attention as the prime ministers of the two countries, Tony Blair and Gerhard Schroeder, intervened (according to some improperly) by commenting on the desirability and effects of the takeover. In June 2000, a common position for a harmonized regulation that might create a level-playing field was reached, but substantial
critiques had still been raised, especially against the neutrality rule.140

In July 2001, the proposal was presented to the European Parliament, but ended in a deadlock 273 to 273.141 For lack of a single vote, the proposal was rejected, mainly due to the opposition of the German members of Parliament.142 The German Takeover Act of 2002 had not yet been enacted, meaning that the pillars of the new regulation (compulsory bids and the passivity rule) were not then a part of German law.

Notwithstanding this foundering, the absence of a common approach was no longer sustainable. Around the same time, several national legislatures had spontaneously adopted rules that might put their corporations at a relative disadvantage in the event of a control contest with bidders located in other Member States. The absence of a leveled playing field encouraged persistence in the face of failed efforts to harmonize European takeover regulation.

To move the project forward, the High Level Group of Company Law Experts was appointed, which was composed of illustrious jurists from important European countries.143 These individuals were entrusted with the task of examining the unresolved issues of the legislative project. In the space of a few months, the Group issued a report endorsing the major provisions of the proposed Thirteenth Directive, including specifically the neutrality rule contained in Article 9 of the rejected text.144 The report clearly influenced the legislative process, though the increase in international merger and acquisition activity also highlighted the need for adoption of common rules throughout Europe.

Finally, a new proposal, based also on the results of the High Level Group's study, was presented to the European Parliament in October 2002.145 After extensive further discussion, the Thirteenth Directive was finally approved on April 21, 2004. The text that was adopted represents a positive innovation in terms of harmonization, but is in many ways a compromise that diluted previous projects by leaving significant regulatory freedom to national legislatures.146 Some commentators have even expressed doubts about whether the Directive effectively harmonizes the most important aspects of takeover regulation.147

EU directives must be adopted by Member States through the enactment of specific legislation within a set deadline. As a result, directives are directed to Member States, providing the principles of the rules that the latter should implement, usually through statute. The very nature of this lawmaking process implies some margin of flexibility on the part of the national legislatures, margins that can be broader or narrower. In the case of the Thirteenth Directive the European Parliament approved a text that leaves extensive leeway for Member States to opt out of its fundamental provisions, a circumstance that raises serious questions regarding whether it establishes a leveled playing field. Before discussing this issue, it is worth briefly considering the substantive content of the new European legislation.

2. The Pillars of the Directive
The Thirteenth Directive is a very complex piece of legislation, addressing several aspects of takeover regulation, from the information that should be disclosed, to instances when it is permissible to cash out minority shareholders; from the regulation of employees' rights, to the issue of regulatory competence for cross-border transactions. My analysis will focus on the pillars of the European approach: mandatory bids, board neutrality and the breakthrough rule.

Article 5(1) of the Directive requires compulsory offers when natural or legal persons, acting alone or in concert with others, acquire a certain threshold of ownership in the corporation's securities (meaning transferable securities of corporations carrying voting rights regulated by the law of a Member State and listed on a regulated European market). Specifically, if newly acquired shares:

added to any existing holdings of those securities of his/hers and the holdings of those securities of persons acting in concert with him/her, directly or indirectly give him/her a specified percentage of voting rights in that company, giving him/her control of that company, Member States shall ensure that such a person is required to make a bid as a means of protecting the minority shareholders of that company. Such a bid shall be addressed at the earliest opportunity to all the holders of those securities for all their holdings at the equitable price as defined in paragraph 4.149

Under this provision, the triggering event mandating the public offer is the acquisition by one or more persons acting together of a percentage of securities, and therefore voting rights, that give the bidder control over the corporation. The Directive neither defines control, nor provides, in contrast to the individual national legislation described above, a fixed threshold representing a presumption of control.

This very crucial element of takeover regulation is intentionally left to the discretion of Member States. According to paragraph 3 of Article 5:

The percentage of voting rights which confers control for the purposes of paragraph 1 and the method of its calculation shall be determined by the rules of the Member State in which the company has its registered office.

This is one of the many compromises that the harmonization process had to accept, which allows the individual national legislatures to adopt different provisions regarding the threshold of participation triggering the compulsory bid. While this seems like a failure of harmonization, as mentioned above, it might be considered a sound approach because threshold percentages might have very different implications in different systems depending on the concentration of the ownership structure of listed corporations. For example, a 30 percent threshold can significantly raise the cost of hostile takeovers in a system with very concentrated ownership, where most corporations are controlled by a shareholder (or group of shareholders) holding more than that percentage. Meanwhile, that same 30 percent can be significantly less relevant in a system where control can be easily acquired obtaining a lower percentage of shares. Thus, while it is true that harmonization in this respect is only...
partial, differences in firm ownership structures may suggest that different thresholds are appropriate to have analogous results in application of the rule in different economic contexts.

3. The Price of the Compulsory Tender Offer

Another crucial element of the compulsory bid is its price. Also in this respect the Directive is very flexible. Article 5, paragraph 4 provides:

The highest price paid for the same securities by the offerer, or by persons acting in concert with him/her, over a period, to be determined by Member States, of not less than six months and not more than 12 before the bid referred to in paragraph 1 shall be regarded as the equitable price.152

The price does not represent an average that takes into account, for example, market prices that are lower than the price paid for shares bought outside the marketplace. Instead, the price is simply determined by reference to the highest price paid, which means a price that, very likely, includes the entire premium for control. Such an approach, on the one hand, seems very favorable toward minority shareholders, but it creates the possibility that the price paid to the controlling shareholders can be lower than the one at which the bid must be launched. Imagine, for example, that A intends to reach a control participation of 40 percent of corporation X, buying it from the present controlling shareholder B, and launching a tender offer pursuant to the Directive. A might buy, at first, 25 percent of X from B for $15 per share, when market prices are at $13.60 per share. As a consequence of this transaction, market prices might go up to $16. In a second moment, A might buy the remaining 15 percent from B at $18.20, passing the critical threshold and therefore having to launch a public offer. The offer's price cannot be less than $18.20, which means that every single minority investor will receive a price that exceeds not only the market price, but also the average price per share paid to the controlling shareholder for the entire participation (i.e., $16.20).

This circumstance, while protecting minority shareholders from private friendly transactions from which they could be excluded, can also deter value-maximizing takeovers. This is the reason why, in some systems, the legislatures envisioned rules to determine a compulsory tender offer price that would allow minority shareholders to partake in only part of the control premium, mediating the highest price paid with market prices or other elements.153

Also with respect to this element, however, the Directive leaves significant freedom to Member States. The second section of paragraph 4 of Article 5, allows them to "authorise their supervisory authorities to adjust the price" particularly "in circumstances and in accordance with criteria that are clearly determined."154 The Directive provides a few examples of possible hypotheses, such as when the highest price paid was agreed upon by purchaser and seller, or when market prices have been manipulated or otherwise affected by extraordinary circumstances. According to this rule, Member States should not be able to introduce general provisions that allow the
tender offer to be launched at a lower price. They might, however, come up with a relatively extensive list of circumstances in which it is possible to adjust the price. While this circumstance creates the possibility for considerable divergence among national regimes, the different legislatures may have a disincentive to indulge this opportunity since the lower the minimum compulsory price, the easier it will be to bring forward a hostile takeover. As a consequence, national legislatures might be reluctant to lower this barrier that protects resident firms from cross-border takeovers, especially in the absence of reciprocity. Once again, the lack of complete harmonization may not result in significant national divergences.

4. Board Neutrality

With respect to board neutrality, as with most European countries, the Directive follows the British approach described above by mandating that the board remain neutral in its actions. The Directive also requires that the board of the target corporation publish a statement of its evaluation of the offer and its possible effects, including its effects on employment levels and on the relocation of company activities (article 9, paragraph 5). More precisely, when a bid is launched, whether it is voluntary or compulsory, the directors of the target corporation cannot take any action that might frustrate the bid and in particular—according to article 9(2)—issue "any shares which may result in a lasting impediment to the offerer's acquiring control of the offeree company." These actions can be pursued only via shareholder authorization.

Member States shall enact rules providing that a corporate board's passivity apply "at least" from the time when the information on the intention to launch a tender offer is made public according to article 6(1); a moment precedent to the publication of a complete document on the offer pursuant to paragraph 2 of article 6. Member States can, however, anticipate the initial moment in which the passivity rule starts applying, which can be set at the moment when the board of the target corporation "becomes aware that the bid is imminent." As discussed before, anticipating the application of the neutrality rule reduces the effectiveness of the target's defenses vis-à-vis a hostile takeover. This option can, once again, be unappealing to Member States with reference to cross-border takeovers, since it might weaken the position of the national corporations in resisting foreign suitors. It would therefore not be surprising if most legislatures will not opt for this extension of the period of time in which the neutrality rule applies.

Another delicate issue concerns the ability of the shareholders to grant prior authorization to adopt and implement certain defensive measures to the board in case of a takeover, at a time when no offer has been (yet) launched on the corporation. As discussed in the previous pages, the German Takeover Act of 2002 provided for a similar possibility—although mediated by several protections for minorities—through the Vorratsbeschlüsse.

In this respect, Article 9 of the directive requires a specific authorization given by the shareholders during the relevant period in which the offer is public as a condition for
the adoption of any defensive action. Paragraph 3 of this article establishes, in fact, 
that even with respect to "decisions taken before the beginning" of the offer, "and not 
yet partly or fully implemented, the general meeting of shareholders shall approve or 
confirm any decision which does not form part of the normal course of the company's 
business and the implementation of which may result in the frustration of the bid."161 
For example, therefore, if the shareholders' meeting has authorized the board to 
negotiate a merger before the initiation of a takeover, once an offer is in place, the 
board can no longer pursue the deal without an additional ad hoc permission from the 
shareholders' meeting. The rationale is, obviously, that in the light of the new 
circumstances, shareholders might have changed their minds on the desirability of the 
proposed merger.

The neutrality rule, however, is not applicable to actions that are "part of the normal 
course of the company's business."162 This notion presents some ambiguities, which 
might leave enough room to national legislatures, or to the parties involved in the 
contest, to let directors implement some actions that serve or have the effect of 
undermining the bid, relying only on a shareholders' decision given before the bid was 
public. In any case, the difficulty in distinguishing the corporation's "normal course of 
business" from extraordinary measures taken to frustrate a bid might lead to 
inefficient litigation.

5. The Breakthrough Rule

The neutrality rule deals with defensive measures that require the directors to take 
some specific actions to repel hostile offers. A corporation or its controlling 
shareholders can, however, adopt certain provisions designed to entrench control, or 
at least make a successful hostile offer much less likely to succeed, which can operate 
without any specific action when the takeover is initiated. Examples of such provisions 
include the issuance of dual-class share structures with multiple voting shares in the 
hands of a blockholder; shareholders' agreements that limit the free transferability of 
shares; supermajority requirements to approve the corporate transactions often 
required after a takeover (such as a merger); golden parachutes for directors or top 
executives triggered by events linked to an unwelcome change in control. Even the 
very existence of classes of shares with different voting rights can act as an 
impediment to takeovers. These measures share certain essential features and 
functions with U.S.-style poison pills, and when they are in place, the market for 
corporate control cannot fully play its policing role.

The European legislature, again following the examples of some national 
regulations,163 has provided for a "breakthrough rule." The rule is intended to 
neutralize some of these anti-takeover devices in the event of a hostile offer. In the 
European scenario, the rule has two major goals. The first and obvious purpose is to 
limit the ability of the controlling group to entrench its position and fend off efficient 
offers. More importantly, however, the purpose of this regulation is to create a 
leveled-playing field across Europe. The various systems of corporate law, regulated at 
the Member State level, provide for different rules concerning defensive devices. For 
example, some countries allow listed corporations to issue multi-voting shares, or for
shareholders to devise agreements limiting share transferability, which are either disallowed or regulated more stringently in other States. As a consequence, corporations subject to the laws of some Member States would be constrained by less significant "external limitations" (as we have defined them in Part I, paragraph C) to the adoption of defensive schemes. The breakthrough rule, therefore, was designed (and strongly supported by the High Level Group of Company Law Experts that inspired the final version of the directive) to mitigate, at least in the context of a takeover, these differences.

In the light of its potential effect on cross-border transactions, it is easy to understand why the Directive's breakthrough rule, found in Article 11, was one of the most delicate and strenuously debated aspects of the Directive's legislative process. It is also one of the provisions that received a lot of attention from both policy makers and scholars.

Article 11 provides for two different situations in which the breakthrough rule applies. The first is when a bid is made public. In this instance, any restriction on the transfer of securities or on the exercise of voting rights, either provided in the bylaws of the target corporation or in contractual agreements among shareholders, is rendered ineffective until the end of the offer. By way of example, a preemptive right enjoyed by shareholding members of the controlling group would be neutralized under Article 11. Instead of being bound to offer the shares to other shareholders before selling them to third parties, individual shareholders could tender them to the bidder without liability for contractual breach. Under Article 11, the launch of a tender offer, in other words, releases everybody from previous engagements in order to favor efficient share allocation.

In addition, after the offer has been completed, if it has been particularly successful (i.e., more than three quarters of the outstanding voting shares have been tendered), pursuant to paragraph 4 of Article 11, the offerer can call a shareholders' meeting to appoint new directors or to amend the corporate articles of incorporation and/or bylaws. In that event, no preexisting restrictions, such as voting caps, multiple voting rights, super-majority requirements, and the like, apply. This part of the rule is designed to sterilize those defenses that would operate ex post, once the new controlling shareholder steps in to reorganize the corporation or simply to replace its top executives. In contrast with U.S. law, the breakthrough principle can be seen as a device designed to curtail anti-takeover statutes and poison pills and related mechanisms that limit the market for corporate control.

Given their potential effects and the different regulatory approaches to takeovers generally, it is not surprising that European and U.S. approaches to regulating these devices are also markedly different. When corporations on different sides of the Atlantic enjoy more or less effective defenses depending on applicable national law, it is clear that the playing field for takeovers is not level.

6. Real Harmonization?
According to the rules described above, the implementation of the Thirteenth Directive by Member States would create a level playing field characterized by core fundamental elements: a provision for compulsory tender offers in case of acquisition of control that is presumed upon acquisition of a given threshold of shares, as defined by national legislatures; a strict passivity of the board of the target corporation, which shall obtain shareholder authorization before adopting (or implementing previously decided) defensive measures; a breakthrough rule neutralizing certain defensive devices such as share transfer agreements and voting limitations.

The irony of this supposed harmonization is that, as to two of the three features, the supposed imposition of new law by the European legislature is really a recommendation. Article 12 of the Directive states:

Member States may reserve the right not to require companies . . . which have their registered offices within their territories to apply Article 9(2) and (3) [encompassing the board passivity directive] and/or Article 11 [the breakthrough rule]. . . .169

In addition, even if Members States do not invoke Article 12 while simultaneously introducing or maintaining existing passivity and breakthrough rules, they can nonetheless:

exempt companies which apply Article 9(2) and (3) and/or Article 11 from applying Article 9(2) and (3) and/or Article 11 if they become the subject of an offer launched by a company which does not apply the same Articles as they do, or by a company controlled, directly or indirectly, by the latter, pursuant to Article I of Directive 83/349/EEC.170

In other words, a national legislature can condition the application of board neutrality and breakthrough provisions on reciprocity. Finally, even if Member States do not adopt the relevant provisions of Articles 9 and 11, they are required to grant their corporations the possibility to voluntarily implement the same.171

Article 12 provides therefore for three alternative major options for national legislatures. To summarize, Member States can:

(a) refuse to adopt either the board neutrality rules or the breakthrough rules, or both; in which case they still need to allow corporations to spontaneously comply with these provisions;

(b) adopt either the board neutrality or the breakthrough rules, or both, but subject their application to reciprocity, meaning that the rules would not apply if a foreign bidder is not subject to a similar prescription or prescriptions imposed by its national legislature;

(c) adopt the board neutrality rules or the breakthrough rules, or both, without any reciprocity condition.
Of these choices, alternative (b) might be a likely preference for countries that already have introduced a regulatory framework similar to the Directive's default structure. With this understanding of the range of options created by Article 12, it becomes clear why some scholars have argued that the Directive implements only a "soft harmonization." Based on this conclusion, they have argued that the final version of the Directive is decidedly less compelling than earlier versions, and some have gone so far as to decry, with particular reference to the reciprocity obligations, the Directive as a failure in the harmonization process.

While there is undoubtedly some truth to these criticisms, they are too extreme and they tend to overlook the positive developments ushered in by the Directive. For all its limitations, the Directive clearly establishes a common framework of rules that forces Member States to take an explicit position on the extent to which they are willing to create a leveled-playing field in the takeover context. The degree of reciprocity they ultimately insist on will signal the extent to which they accept limitations to defensive measures that can weaken existing (national) controlling shareholders. Secondly, the very fact that the Directive requires that all Member States confront similar issues will foster the creation of a more integrated market for corporate control, if for no other reason than that it clarifies similarities and differences among national regulations. As we will see in the concluding discussion, even in the United States, an optional neutrality rule is, in fact, considered by some leading corporate scholars to be an efficient solution to questions about optimal takeover regulation.

These potential benefits for minority shareholders and for the financial markets generally mean that the Directive might further foster economic integration within the Union, even if it does not prevent Member States from adopting some protective positions toward national corporations, thus limiting the contestability of corporate control throughout Europe. In this respect, interestingly enough, the Directive might open the door to regulatory competition among European jurisdictions with respect to takeovers. The point is particularly important because harmonization can be pursued also bottom-up, through the creation of a common framework that local policy makers can adapt to their specific goals.

It will be very interesting, in the next few months, to follow how the different European legislature will comply with the Directive. As one author states, presently "the only Member State that has taken a position thus far is the UK, which clarified that it will maintain the board neutrality rule and will opt out of the [breakthrough rule], without enacting any reciprocity provisions, all there is to do is wait and see what is going to happen after the big bang of May 20, 2006."  

V. ASSESSING THE DIFFERING APPROACHES

The foregoing analysis allows some conclusions on the differences between the U.S. and European approaches to takeovers, and some considerations on the possible developments of the European situation.

A. The Utility of Compulsory Tender Offers
The compulsory tender offer mandated under the European approach has no real comparable counterpart in the United States.176 As we have discussed, at least in some circumstances such as with concentrated ownership structures, the compulsory tender offer raises the costs of takeovers, especially hostile ones. In systems where controlling shareholders possess, on average, a threshold of shares superior to 30 percent, the compulsory tender offer might represent something akin to a statutory defensive measure.

On the other hand, the compulsory offer also allows for the possibility of, and perhaps even creates incentives for, control acquisitions negotiated outside the market. The benefits of these transactions would flow only to the controlling shareholders and minorities would gain nothing. These strategies might also preclude a fair exit for minorities after a change in control. Given the empirical evidence that successful hostile takeover offers yield higher returns to shareholders than friendly takeovers,177 it could be argued that a regulatory approach that discourages hostile bids, and instead forces friendly changes of control, undermines the market's overall efficacy since (some of) the higher gains associated with hostile takeovers are lost.178

There are still reasons to question this reasoning, particularly in the absence of meaningful empirical data. It is by no means certain that any, let alone a specifically quantifiable number, of hostile takeovers have been discouraged by the compulsory tender offer requirement. Similarly, it is not known what losses (of potential gains) minority shareholders would actually suffer in the absence of compulsory tender offers. In addition, compulsory tender offers also apply to white knights that might launch a counter offer in order to help the existing controlling shareholder. In this respect, compulsory tender offers also ensure that these particular defensive measures do not prejudice minority shareholders.

Meanwhile, in the context of cross-border takeovers, compulsory bid rules also serve to protect incumbents against hostile foreign offers (a result that is also reached by antitakeover statutes in the United States). For obvious reasons, the stakes for local policy interests of, for example, a Swedish takeover of a Spanish company are generally regarded as higher than if a Delaware company takes over one from Nevada. Thus, it comes as no surprise that the opposition of European Member States to the Takeover Directive was aimed more at the neutrality and breakthrough rules, rather than at the compulsory offer rule.

Considering the pros and cons of the compulsory bid, therefore, it can be argued that there are well-founded reasons to provide a similar rule as a protection for minorities and induce exchange of control transactions to pass through the market, thereby allowing minority investors to enjoy the connected capital gains. True, the compulsory takeover rule might also protect controlling shareholders and directors against hostile takeovers, but the protection offered seems to be of a milder sort than is provided by some U.S. anti-takeover statutes.

B. The Effects of the Board Neutrality and Breakthrough Rules
With respect to defensive measures, the latitude granted to directors of U.S. corporations in not similarly available in Europe. The board neutrality rule prevents directors from taking any action without the consent of the shareholders that might frustrate a hostile offer, and it usually requires a supermajority vote. It is conceivable that this approach could garner support among American scholars who criticize the inefficiency of defensive measures.179 Board neutrality, however, has very different implications in systems with concentrated ownership structures, especially when the controlling shareholder is able to extract private benefits from the corporation. In these systems, the real agency and conflict of interest problems are not between management and shareholders, but rather between controlling shareholders (who often are also directors or are strongly tied to them) and minority shareholders. Putting decision-making power in the hands of controlling shareholders, therefore, does not do much to resolve the inherent conflict.

For these reasons, the apparent advantages of the neutrality rule must be considered in light of the power of majority shareholders to approve virtually any defensive measure possible under the applicable corporate laws. Moreover, even if such measures hold significant disadvantages for minority shareholders, it is much more difficult to hold shareholders liable for a resolution taken in the general meeting. While not completely free from any responsibilities toward minority shareholders, controlling shareholders do not have fiduciary duties similar those of directors.

One potential counterbalance to the power of controlling shareholders is the possibility of an organized minority that could challenge the adoption of certain defensive measures. This check can be particularly effective in contexts that require amendments to the articles of incorporation or bylaws, such as issuing new shares, which in some jurisdictions in Europe requires a supermajority of two-thirds of the shareholders.180 In that scenario, minority shareholders holding, for example, a cumulative 20 percent of the shares (a scenario that is not so improbable given the growing presence of institutional investors),181 might effectively block the adoption of a defense by a controlling shareholder holding "only" 35 percent of the shares.

In addition, the very fact that the defensive measure must be brought to the attention of the shareholders' meeting, and therefore disclosed to the market, ensures a certain control over its fairness and reasonableness vis-a-vis the takeover, especially if compared with a situation in which the directors can independently adopt such a decision. By the same token, the requirement that a defensive measure be approved by the shareholders' meeting offers to the minority some specific remedies against unfair prejudices. Minority shareholders can, for example challenge the lawfulness of the resolution of the meeting in terms of "abuse of the majority,"182 which is a remedy that in some systems might be more effective than suing the directors for breaches of fiduciary duties.

Board neutrality is not a panacea against ill-motivated defensive measures. It does not unequivocally protect minority shareholders, especially in systems with concentrated ownership structures. It does, however, allow for more effective shareholder control in
a takeover context. In this respect, even when there is a strong controlling shareholder, such that neutrality loses part of its rationale, defensive measures in the United States are considerably easier to adopt and implement. Moreover, some American anti-takeover statutes are decidedly more protective of incumbents, setting forth conditions that are very difficult for a bidder to reach.

C. The "ThresholdAttraction " Effect

Another potential effect of the Directive is that the combination of the compulsory tender offer and board neutrality requirements might lead to something I define as the "threshold attraction." Compulsory tender offers are triggered by the acquisition of a significant threshold, for example 30 percent, of shares, and neutrality obligations require that defenses be approved by a similar percentage of shares. These circumstances create incentives for controlling shareholders to gravitate toward a participation not inferior to 30 percent. Below that threshold, in fact, they would lose the protection offered by the compulsory bid (de facto control of a corporation with 20 percent can be subject to takeover by a raider acquiring 25 percent of the shares without any public offer). In addition, holding less than 30 percent makes it harder to approve defensive measures.

Attraction towards 30 percent (or whatever the threshold is) can lead to more widespread ownership structures if the starting point, when the regulation is introduced, is very concentrated ownership structures in which the average controlling shareholder holds a participation significantly superior to 30 percent. This is because it is easier to control a corporation with a smaller investment, exploiting a higher leverage and being able to diversify with the resources not invested in order to hold control tightly. In these circumstances, in fact, lowering one's participation while remaining above 30 percent (for example, going from 45 percent to 32 percent) ensures relatively stable control, at least as compared to a system in which no compulsory offer is required. On the other hand, when introduced in systems characterized by a very widespread ownership structures, this approach might create an incentive to acquire more than 30 percent of the outstanding shares.183

D. The European Approach and Regulatory Competition

One final point, before some conclusive comparisons between the U.S. and European approaches, deals with regulatory competition. As discussed above, regulatory competition in the United States allows states to adopt standards concerning director obligations in the event of a takeover that are too lax according to prevailing views among American legal scholars.184 On the other hand, individual states have introduced protective anti-takeover statutes, which have also been criticized as inefficient.185

In Europe, harmonization is far from complete. With respect to defensive measures and the breakthrough rule, which might sterilize some poison pills, the Directive offers the possibility for Member States to opt out. Even those provisions that aren't optional, such as the introduction of compulsory tender offers, present significant
margins of regulatory freedom to Member States in that they retain the power to define the precise threshold triggering the bid and the means of calculating its minimum price. This approach could actually have salutary benefits if the preconditions for an efficient market for rules existed in Europe.

In this respect, as I have argued in a previous piece concerning corporate law reforms, more than a doubt can be cast. Notwithstanding the recent efforts made to integrate European systems with respect to securities regulation and corporate law, and notwithstanding the movement toward greater freedom of incorporation introduced by the well-known recent decisions of the European Court of Justice, Europe seems to remain far away from the conditions required for an efficient market for rules. While the optional nature of the Directive creates the opportunity for regulatory divergence, it is not likely as a practical matter that most European Member States will opt out of the board neutrality and breakthrough rules that they have already and spontaneously adopted. Such a reversal of course would not be very well received by some of their constituencies, particularly resident minority investors, who consider both rules to be beneficent. Moreover, opting out of either rule might induce a similar regulatory approach by other Member States. And, anticipating that their actions might trigger undesirable responses might make Member State legislatures reluctant to abandon the overall regulatory framework designed by the European Union, notwithstanding its optional nature, in order to favor greater integration among the individual countries. In this regard, the reciprocity clause becomes an important protection for wary Member States and will likely be adopted, at least for non-European takeovers. In this event, reciprocity provisions may make the Directive an important consideration for U.S. regulators and policymakers. For instance, a U.S. corporation that is not subject to the passivity rule would fall into the reciprocity exception and might not be able to exploit director passivity in order to complete a hostile takeover.

Some recent events suggest that fear of a more integrated market for corporate control in Europe, and concern that cross-border transactions will undermine resident corporations, may lead policymakers to a new wave or protectionism. If so, many countries may opt for eligible board neutrality and breakthrough rules. And a significant number of corporations will likely employ the options to entrench control.

It is interesting to point out that the European approach, precisely because of its optional nature, ends up resembling a recent reform proposal suggested for the United States. Bebchuk and Ferrel have argued that competition among states in regulating takeovers leads to inefficient solutions because states have an interest in protecting local corporations against discipline that might be imposed by an active market for corporate control. The distinctive feature of their proposal, and the aspect that makes it very close to the approach followed by the European Union, is that their proposed solution is not a mandatory federal regime, but rather an optional regime that individual states can adopt. Their rationale is that the federal legislature is not captured by the regulated subjects of one specific state and is therefore capable of enacting regulation that strikes a more proper balance between the interests of directors, managers and controlling shareholders and minorities. Bebchuck and Ferrel...
propose that shareholders be allowed to opt-in to the federal regime. In this way, shareholders would be able to signal their preferences for more or less protective regulation. Since this approach increases the regulatory options, they argue that it would increase the Pareto-efficiency of the system. The proposal has been criticized by other scholars who claim that it is simply an extension of theories that postulate the positive effects of regulatory competition. These criticisms ignore the effect of superimposing a federal regulator on what might otherwise be considered ad hoc regulatory competition. The European experience may allow some testing of how the presence of a "federal" regulator affects the regulatory competition mix.

Not only an optional neutrality rule, but also an optional breakthrough rule can function as an effective regulatory technique. In an article that preceded enactment of the final version of the Thirteenth Directive, for instance, after pointing out that "the benefits of the [breakthrough rule] would not clearly be greater than its costs," John Coates has argued, as a matter of policy and not political compromise, that:

[E]ven during the initial period of application of the [breakthrough rule], the [Directive on Takeover Bids] should provide an exemption from its application for companies that go public for the first time and include in their charters (with full disclosure) provisions opting out of the new takeover regime. So long as the disclosure system is working adequately, new investors put on notice as to the vulnerability (or lack thereof) of a firm to the takeover market should be presumed to be better positioned to weigh the costs and benefits of [dual class] structures.

The optional nature of the breakthrough rule seems to take into account this skepticism, allowing for some flexibility in the application of the rule and introducing in Europe a regulation that presents significant points of contact with the reform proposal of Bebchuk and Ferrel (discussed above with reference to defensive measures), one of the most interesting recent scholarly ideas concerning reform of the U.S. takeover market.

E. Comparing the Effects of the Two Approaches

The overview of takeover regulation offered in the previous pages clearly demonstrates that European and U.S. approaches to this subject matter diverge dramatically in their substantive rules. The European regime comprised of compulsory tender offers, board neutrality and breakthrough requirements is designed to ensure a direct role for shareholders in a hostile acquisition. The fairness of the transaction for all shareholders (the provision for an offer to all outstanding securities holders) represents an absolute value, pursued even if it makes hostile acquisitions more expensive and, possibly, less frequent, especially in systems characterized by strong controlling shareholders. On the other hand, once an offer has been launched, defensive measures adopted either before the offer or during the offer are discouraged if not sterilized, especially if the shareholders do not approve them.

The U.S. system favors a relatively less regulated regime. There are no uniform restrictions on the acquisition of shares similar to the compulsory tender offer, and
once a hostile takeover is launched, directors enjoy considerably broader freedom in
the adoption of defensive measures. Anti-takeover statutes create additional
protections for the incumbents against unsolicited acquisitions.

Even if their substantive provisions and underlying philosophies appear to be very
different, especially with respect to defensive measures, the economic effects of the
two systems might in fact be quite similar. As discussed above, board neutrality and
the necessity to approve defensive measures through a shareholders' vote, which
would represent a dramatic empowerment of minority shareholders in the United
States, does not have the same implications in systems where the primary agency
conflict arises between majority and minority shareholders. In both systems, not
surprisingly, local legislatures provide for some protections in favor of resident
corporations to protect their incumbents against hostile cross-border takeovers. The
primary difference is that in the United States, the subjects that are protected are,
mainly, the directors; while in Europe they are the controlling shareholders. This
difference, quite naturally, mirrors the basic distinctions between the most common
ownership structures in the United States and in Europe.193 In something of an ironic
twist, however, the respective systems have chosen to vest the primary power to
decide whether to welcome or resist the takeover in the very constituency that faces
the deepest conflict when confronting a proposed takeover. Yet entrusting directors in
the U.S. system and shareholders in European systems may simply reflect the
reasonable view that, in the takeover context, the decision must necessarily reside
with those most interested and competent, which in turn raises the question of how
best to protect against possible abuses.

These questions become all the more interesting not only in comparative but also in
cross-border contexts, where the two systems go, quite literally, head-to-head. At the
practical level, if a U.S.-based corporation attempts to take over a European
corporation, it might encounter rules that make the acquisition more expensive
because of compulsory takeover rules. A U.S. raider might also find less intense
resistance through defensive measures, but if the reciprocity clause has been
adopted, board neutrality might not apply in the case of a takeover launched by a U.S.
bidder that is not subject to similar restrictions.

Looking through the other end of the telescope, if a European corporation seeks to
take over a U.S. corporation, the absence of the compulsory tender offer provision, as
well as the more widespread ownership structure that it could encounter, might render
the acquisition less expensive. European corporations are likely, however, to face
defenses in corporate structures and managerial actions that are inconceivable in
Europe. The effects of this difference are particularly striking for friendly acquisitions.
In Europe, to acquire a controlling participation that is quantitatively in excess of
established thresholds, a public offer must be made on all the outstanding shares,
usually at a price not inferior to the best market price in the months preceding the
acquisition. This rule can render friendly acquisitions of listed corporations
significantly more expensive in Europe than in the United States.

It remains to be seen what European Member States will do with the regulatory
options provided in Article 12(3) of the Directive, which conditions the applicability of the passivity and breakthrough rules on reciprocity. If they adopt the reciprocity condition, their ability to resist a hostile offer from an undesired U.S. suitor can be significantly higher than might otherwise be expected, but it might not greatly hinder European cross-border takeovers.

VI. CONCLUSION

European Union takeover regulation was jump-started by high-level takeovers in Europe that underscored the need for harmonization. In a similar vein, it is not implausible that market forces will have important and substantial influence over how the individual Member States implement their options under the Directive. While it is true that controlling shareholders have substantial influence in systems that are characterized by concentrated ownership structures, it is also true that growing economic integration is weakening the ability of local potentates to resist cross-border takeovers.

One of the most striking examples of how the market forces and a harmonized regulatory framework are reshaping European markets is the recent odyssey of Banca Antoniana Veneta (Antonveneta). In the spring of 2005, this Italian bank became the target of a public tender offer launched by a Dutch bank, ABN Amro. The events, which hit the front pages of newspapers all over the world, lead to an institutional crisis in Italy as the Governor of the Central Bank of Italy, Antonio Fazio, was called on to resign in light of the attitude of the Bank toward this takeover.

The Antonveneta takeover story all started because the Italian banking sector is very attractive for foreign banks since Italian citizens are among the most frugal savers in Europe. ABN intended to launch voluntary tender offer in March 2005 to purchase the listed shares of Antonveneta. Another Italian bank, Banca Popolare Italiana (BPI, former Banca Popolare di Lodi), stepped in to launch a second offer. The CEO of BPI, Mr. Giampiero Fiorani, is a banker who-newspaper reports indicated-is closely related to Mr. Fazio. According to several commentators Mr. Fazio improperly favored BPI over ABN in order to prevent foreign control over an Italian bank and, indirectly, to avoid more intense competition in the Italian banking industry. Newspapers suggest that Fazio sped up the procedure to authorize BPI to acquire shares of Antonveneta, but slowed down the same procedure for ABN.

In the newspapers, some folklore might have been added to spice up the events, and the battle for control of Antonveneta has even been colored as a cultural war between the very Catholic Fazio and the Protestant Dutch of the Northern-European bidding bank. Telephone conversations between Mr. Fazio and Mr. Fiorani were taped by the inquiring prosecutors and made public in Italian newspapers in August. If the pair face trial, the conversations will likely be admissible in evidence against them.

Despite the peculiarities of this story and the apparently questionable efforts to fend it off, ABN's cross-border acquisition of Antonveneta was ultimately successful. As The Economist has noted:
With ABN Amro's victory, Italy has now seen the first foreign takeover of one of its big banks, something that Mr Fazio was apparently very keen to avoid (though he has denied any wrongdoing). That it is, after all, possible to overcome political resistance to a foreign takeover of an important Italian financial institution will provide some cheer to investors.194

At present it is not possible to evaluate the roles played by the parties involved. Surely enough, such a complex event can not be seriously discussed on the basis of newspaper headlines. What is interesting to point out, however, is that the reception of the Thirteenth Directive in all the Member States will likely make cross-border transactions like the Antonveneta affair all the more common. The effect of these takeovers will likely contribute towards fostering European integration and the emergence of stronger European players able to compete-or cooperate-more effectively with their American counterparts.

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