Sustainable Corporate Governance and the Takeover Bids Directive

Winter, J.W.

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*Jaap Winter**

Introduction

The takeover bid for a company listed on a stock exchange as a result of which the bidder can acquire control over the company, connects the ownership and governance of companies to the operations of capital markets and connects company law to securities market law. Different concepts and views on what companies are about, what the roles and powers of shareholders and boards in companies should be, how capital markets should operate and be regulated and how all of this relates to the project of the single EU market, came to a clash when Member States sought to reach agreement on a Takeover Bids Directive. The Takeover Bids Directive that was ultimately adopted in 2004 (EU 2004/25/EC) bears the signs of that clash. On the core of the matter: how freely can shareholders decide on the merits of an offer and to what extent can boards of a target company frustrate an offer, the compromise reached has the nature of a stand-off. Article 12 allows Members States to decide for themselves whether they wish to impose two core rules of the Directive, the board neutrality-rule (article 9) and the break-through rule (art. 11). The ultimate decision of the Council and Parliament was not to harmonise this core issue and accept a fragmented market for corporate takeovers in the EU.

Since the days the Takeover Directive was adopted the concerns of the world have fundamentally changed. Societal concerns (growing level of inequality in terms of wealth, opportunities and exposure to risks; degradation of communities after moving production to lower cost countries; human rights) and ecological concerns (climate change, environmental damage, degradation of biodiversity) have become pressing and demand urgent attention. The European Commission has consulted on an initiative of a regulatory intervention that would further embed sustainability in the corporate governance framework and is to publish a first proposal in or after the summer of 2021 (Sustainable Corporate Governance Initiative). This is part of the wider EU Green Deal agenda, which also includes a review of the Non-Financial Reporting Directive (EU 2014/95/EU) to strengthen disclosure of sustainability-related matters. None of these societal and ecological concerns were part of the considerations that lead to the Takeover Bids Directive. The ability to acquire control over the company by offering to buy shareholders' shares at a premium without the consent of the board, may have an impact on the ability of the board to further societal and ecological interests. A takeover bid creates a context in which shareholders' interests in direct financial gain may be opposed to a responsibility of the company to wider society. This begs the question what to do with

1. This contribution is based on an article published in France, Directive OPA et gouvernance d'entreprise durable, forthcoming in Bulletin Joly Bourse 2021.

* Jaap Winter is professor of Corporate Law, Corporate Governance and Behaviour at Vrije Universiteit Amsterdam.

the no-harmonisation-compromise of 2004. Is it enough that Member States can basically decide for themselves how to strike the right balance? Is there a need for renewed harmonisation at EU level, but now with these societal and ecological concerns in mind?

In this contribution I will set out to describe what the clash of concepts and interests was that shaped the Takeover Bids Directive as it stands (par. I). I will then give a short overview of the new societal and ecological concerns that need to be addressed urgently and of the proposals that have been made to ensure that corporate law and corporate governance address these societal and ecological concerns (par. II) In par. III I will return to the Takeover Bids Directive: could and should the Takeover Bids Directive also address these societal and ecological concerns, and how?

Rolf Skog has actively participated in most if not all of the discussions on European company law and specifically on takeover bids in the last few decades. These discussions are entering into a new phase in which the needs of society and our planet will challenge those who study and practice company law to consider how company law can and should contribute, and how we may have to change some of its core tenets in order to do so. Although I am not sure Rolf will agree with my conclusions, I hope this contribution will stimulate his thinking and spark new, valuable contributions from him to the debate.

I The Takeover Bids Directive, what was it all about?

The various proposals for a Takeover Bids Directive, the first having been published in 1989, all take as a core premise that facilitating successful takeover bids throughout the EU would be beneficial for economic development in the EU. A takeover bid is a means for the bidder to create wealth by exploiting synergies between its existing business and the target company. Companies need to grow to an optimal scale to make use of the internal market, which will further the integration of the internal market. This also allows them to better compete on global markets. To the extent that Member States would continue to allow frustration of takeover bids by management, this would create artificial barriers to entry to parts of the internal market and result in suboptimal use of the internal market. This is reflected in recital (3) of the Directive:

> It is necessary to create Community-wide clarity and transparency in respect of legal issues to be settled in the event of takeover bids and *to prevent patterns of corporate restructuring within the Community from being distorted by arbitrary differences in governance and management cultures*.[2]

A second reason for seeking to facilitate takeover bids in the EU stems from core corporate governance concepts, in particular the agency theory. In this theory shareholders who run the ultimate risk of the company are the principals. Managers are agents whose corporate actions determine the ultimate outcomes for principals. In the agency theory managers agents who act rationally and in their self-interest do not necessarily advance the interests of shareholders as principals. Seen through the lens of the agency theory, corporate law mechanisms serve to solve the tensions inherent in the principal-agent

2. See Jeffrey Gordon, An American Perspective on Anti-Takeover Laws in Europe, in: Ferrarini, Hopt, Winter, Wymeersch (eds), Reforming Company Law and Takeover Law in Europe, Oxford University Press, 2004, p. 546.

relationship, for example by giving shareholders rights to appoint and dismiss their agents.[3] Takeover bids serve as a means for shareholders to discipline their managers. If the managers are performing poorly or are unable to take advantage of wider opportunities the share price will generally underperform in relation to the company's potential. A bidder may offer a premium on top of the underperforming share price to the company's shareholders on the assertion that it can do a better job in realising the company's potential. A takeover bid as a threat to underperforming management helps allocating resources efficiently.

These two core concepts were the drivers of a proposal for a Takeover Directive providing that the management of a company could not frustrate a takeover bid without explicit authorisation by the shareholders given at the time of the offer, the board neutrality rule. When this proposal was brought to a final vote in the Council and then the Parliament in 2001 however, a new concern had arisen. This concern is related to the core distinction between corporate governance models that exist in Europe and that follows from the ownership distribution of listed companies. In some markets, notably the UK, Ireland and the Netherlands, most listed companies are characterised by distributed ownership: no single shareholder or group of shareholders owns sufficient shares to be able to exercise control over the company. In most continental Member States however, the dominant model for listed companies is one of concentrated ownership. Often, this concentrated ownership allows for more control than would be proportionate to the financial interest through an enormous variety of control enhancing mechanisms.[4] These mechanisms typically work as a pre-bid defence mechanism: they are already in place before any bid is announced or immanent and would make acquiring control over the company by a bidder very difficult or impossible, unless the controlling shareholder(s) is(are) willing to depart from its(their) control. In 1998 Germany abandoned control enhancing mechanisms (with the notable exception of the specific governance arrangements in the Volkswagen Act), in the expectation that other Member States would do so as well. By accepting the board neutrality rule while other Member States continued to allow for disproportionate control mechanisms, German companies would be more vulnerable to takeover bids than companies in other Member States. This lack of level playing field would drive economic nationalism.[5] This concern drove Germany to vote against the proposed Takeover Bids Directive in the Council in the spring of 2001, as the only Member State and therefore not enough to stop it. But the level playing field argument also became a core dividing argument in European Parliament. Parliament in the summer of 2001 voted down the Takeover Bids Directive with tying votes, 273 against 273. Some called it: the clash of capitalisms.[6] The European Commission then set up the High Level Group of Company Law Experts to suggest a way out of this level playing field problem. The High Level Group proposed to do so by introducing a second rule next to the board neutrality rule, the so called break-through rule. The bidder

3. R. Kraakman, J. Armour, Paul Davies, Luca Enriques, Henry Hansmann, Gerhard Hertig, The Anatomy of Corporate Law, 3rd edition 2017, Oxford University Press.

4. See F. Barca, M. Becht, The Control of Corporate Europe, Oxford University Press 2001.

5. Gordon, supra fn 1, p. 546.

6. H. Callaghan, M. Hoepner, European Integration and the Clash of Capitalisms: Political Cleavages of Takeover Liberalisation, Comparative Europan Politics, 2005 vol 3, p. 307–332.

who as a result of the bid has acquired 75% of risk-bearing capital should be able to break-through pre-bid defensive mechanisms that would otherwise frustrate the bidder in the exercise of control. Both post-bid defences and pre-bid defences would thus be neutralised by the Directive, creating a level playing field that would allow for takeovers to happen successfully across the EU.

The Commission included the break-through rule (with a more limited scope than envisaged by the High Level Group) in the next proposal of the Directive. This however was not quite the level playing field that most Member States were looking for. Under the new proposal in all Member States the scope for economic nationalism would be challenged by potentially successful takeover bids. In a compromise ultimately mastered by the Portuguese Presidency, a new article 12 was introduced in the Directive, allowing Member States to opt-out of application of the board neutrality rule (article 9) and break-through rule (article 11) on the condition that they would facilitate that individual companies in their jurisdiction could voluntarily opt back into application of either or both of these rules. An elaborate system of grandfathering. Thus the Directive does not provide for a level playing field for takeover bids in the EU: Member States can decide for themselves whether boards of companies can frustrate takeover bids and whether pre-bid control enhancing mechanism can continue to frustrate a bidder from acquiring control. The result is well known: many Member States opted out of application of both article 9 and 11. Some Member States initially imposed the application of in particular article 9 on their companies, but later changed their mind. France is an example: it originally adopted article 9 in its law but made use of its right to opt-out in 2014 by adopting the *Florange Act*.

One final reflection on the conceptual context of the Takeover Bids Directive. The Directive is clearly focused on protecting the interests of shareholders: (i) to ensure they are well informed in case of a bid (article 6) and generally on defensive measures (article 10), and (ii) to protect them, through the mandatory bid for an equitable price in case a party has crossed a threshold of de facto control (article 5) and by sell-out rights (article 16). The focus on the interests of shareholders not only follows naturally from the nature of a takeover bid as an offer extended to shareholders to buy their shares, but also fits in the dominant frame at the time of the agency theory and its corollary of the shareholder value concept: the goal of the company being to maximise the current value of the shares.[7] In this concept of shareholder value maximisation, defensive measures against a takeover bid may be relevant to solve the coordination problems of individual shareholders who have to judge at what price to tender their shares.[8] But they should not go further, shareholders should ultimately be able to decide on the merits of the bid as the general principle under article 3 (1) (c) of the Takeover Bids Directive states. This general principle, however, has been effectively dismantled by the opt-out regime of art. 12, but still shows the conceptual origin of the Directive.[9]

7. See the contributions of Ferrarini, Davies and Kirchner on the new concept of shareholder value as a standard for corporate conduct in: Hopt, Wymeersch (eds), Capital Markets and Company Law, Oxford University Press, 2003.

8. Guido Ferrarini, Shareholder Value and the Modernization of European Company Law, in: Hopt, Wymeersch (eds), Capital Markets and Company Law, Oxford University Press, 2003, p. 242.

9. Jaap Winter, Directive OPA et gouvernance d'entreprise durable, Bulletin Joly Bourse 2021/….. [forthcoming].

Besides shareholders, only one other stakeholder merits attention in the Directive, employees. It does so with a very light touch. In the offer document the bidder must state its intentions with regard to the future of the business of the offeree company and, in so far as it is affected by the bid, the offeror company and with regard to the safeguarding of the jobs of their employees and management, including any material change in the conditions of employment, and in particular the offeror's strategic plans for the two companies and the likely repercussions on employment and the locations of the companies' places of business, article 6 (3) (i). Similarly, the board of the offeree company must draw up and make public a document setting out its opinion of the bid and the reasons on which it is based, including its views on the effects of implementation of the bid on all the company's interests and specifically employment, and on the offeror's strategic plans for the offeree company and their likely repercussions on employment and the locations of the company's places of business. The board must also communicate its opinion to employee representatives or employees themselves. When the board receives a separate opinion from the employee representatives on the effects of the bid on employment, that opinion shall be appended to the board's document, article 9 (5). This is as far as the Directive goes in terms of stakeholders' interests: only the interests of employees are considered, and the only mechanism foreseen is that the bidder and the board of the offeree company must make their intentions and views on the impact of the bid on employees public. The interests of wider society, in particular societal and ecological concerns I mentioned above, were out of scope when the Directive was drafted and adopted, and probably thoroughly beyond the imagination of those involved in the conception of the Directive.

II New societal concerns and sustainable corporate governance

Times have changed and new concerns have emerged and taken a strong foothold in our collective societal awareness. These concerns are both societal and ecological. The societal concerns include concerns over growing inequality in terms of incomes and assets, opportunities and access to education and health care, exposure to health risks and other hazards, precarious work for example in the new digital platform economy, neglect of basic human rights and the degradation of societal communities when work is moved to states where employment is cheaper. These concerns lead to social unrest, destabilise societies and give rise to populist political parties and leaders. At the same time we are becoming aware of the growing ecological concerns that we are in fact destroying and exhausting our planet, pushing our climate to a temperature rise with fossil fuel based CO2 emissions that will fundamentally affect life and societies, degrading biodiversity and soil quality by tearing down jungles in the Amazon and Borneo and use of fertilizers and massive environmental damage by industrial waste dumps, and much, much more. This may be due to typical human behaviour of societies exhausting their resources and then moving on to other places.[10] But the realisation is sinking in that now there is no other place for us to go to. We must fundamentally change our ways in order to maintain a livable planet Earth.

10. See Jared Diamond, Collapse, Penguin Books 2011.

There is a growing consensus that many of these problems are caused by the way we have organised our capitalistic society, and within that, by how business is being conducted and product and capital markets operate.[11] Business and the way markets define and reward success may not be responsible for all these societal and ecological problems, but without doubt they are major contributors to the problems we are facing. It is no surprise then that calls are made to enhance the responsibility of companies in society.[12] In the conceptual understanding of company law by academics and practitioners, this societal responsibility, however we phrase it and whatever its precise scope, has disappeared out of sight as a result of the dominant paradigm that has shaped the discourse on companies and their role in society over the last decades. Milton Friedman's assertion in 1970 that the only obligation of boards of companies was to make profits for its shareholders has dominated company law thinking and practice since. Remuneration systems have been geared up to align the financial interests of directors with the interests of shareholders. Executive remuneration has proven to be a powerful driver of corporate conduct. In this paradigm the costs in society of the efforts of the company to produce profits are deemed to be externalities, not part of the responsibility of the company unless regulation forces companies to explicitly take them into account. This causes a disconnect between companies and society: it suggests that companies can go about their own business and pursue their own goals of financial gain for shareholders regardless of the costs to society, until the government imposes rules that restrict companies from doing so. Zingales describes how Friedman's assertion should be seen as a theorem instead of as a doctrine triggering a religious reaction. As a theorem, it should be asked: under what conditions is it socially efficient for managers to focus only on shareholder value maximization? First, Zingales writes, companies should operate in a competitive environment, which he defines as being both price and rules takers. Second, there should be no externalities (or the government should be able to address perfectly these externalities through regulation and taxation) and third, contracts are complete, in the sense that we can specify in a contract all relevant contingencies at no cost.[13] It is clear that in any event the second and third conditions are not met and in all likelihood can never be met. In other words, in real life, Friedman's core tenet does not make sense, it suggests a separation between companies and societies that simply does not exist. The Covid-19 crisis provides ample proof that this disconnect is an illusion, business and society are intricately connected. Many companies depend on governments to get through the crisis caused by the pandemic and the lockdown measures that try to restrain it. At the same time, business is needed to come up with solutions to deal with the crisis, by producing protecting gear and vaccines (with heavy government support). Disconnecting business from society by maintaining that the sole responsibility of business is to generate financial returns to shareholders,

11. See for example Paul Mason, Postcapitalism (2017), Kate Raworth, Doughnut Economics (2017), Mariana Mazzucato, The Value of Everything (2018) and Mark Carney, Value(s) (2021) to name just a few of an expanding series of analysis of the destructive effects of modern day capitalism.

12. See Colin Mayer, Prosperity, Oxford University Press (2018).

13. Luigi Zingales, Friedman's Legacy: From Doctrine to Theorem, in: Milton Friedman 50 Years Later, publication of the Stigler Center at the University of Chicago Booth School of Business, 2021, p.128–135, available at https://promarket.org/category/friedman50/

is unsustainable.[14] In light of the societal and ecological problems we are facing, we can no longer afford business to continue to create and aggravate these problems, but need business to contribute to solving these problems. This requires that companies need to open up for other interests than those of shareholders.

Understanding that companies have a bigger responsibility in society has a further consequence that is relevant to company law and corporate governance. Traditionally in company law the relevant stakeholders that to some extent are in scope beyond shareholders were those who had a direct relation with the company, in particular employees and creditors. Creditors for example have certain rights in transactions affecting the share capital of the company, following from the Second Company Law Directive on Capital Maintenance. They also have some company law protections in legal mergers and divisions that may affect the ability of the company to pay its debts. Employees have information rights and in some jurisdictions co-determination rights relating to the board of directors. These rights are to some extent protected when for example a European Company is set up or companies merge across borders. But that is as far as stakeholder involvement goes in current company law and corporate governance. The new societal and ecological concerns that have emerged however clearly show that the company's conduct impacts others beyond those who have a direct, contractual relationship with the company. Indirect stakeholders in communities in which the company operates, but also people and communities in wider society are affected by the conduct of the company. As a result, new ways of stakeholder engagement are being developed to engage also with these stakeholders, for example by engaging with representatives who can credibly represent these indirect stakeholders.[15] This raises the question to what extent company law and corporate governance arrangements should widen the stakeholders scope and also include these indirect stakeholders.

Various proposals have been made to address these concerns by making changes to company law and corporate governance arrangements. Some of these relate to making explicit the purpose in society to which the company seeks to contribute. This is a central concept in the work of Colin Mayer.[16] The French Loi Pacte (nr 2019-486) in 2019 introduced the ability for companies to include in their articles of associations a purpose (raison d'être), article 1835 of the Code Civil. Companies can also take a step further by turning into a société a mission, adding societal or environmental objectives to its mission, the execution of which needs to be verified by an independent outside firm, article L.210-10 of the Code Commerce. A group of Dutch company law professors has proposed to extend the legal duty of directors to ensure that the company conducts itself as a responsible corporate citizen, to allow companies to expressly state its societal purpose and to introduce an explicit duty to report in the annual accounts on the impact the company has on the social and natural capital it employs for its business

14. Colin Mayer, Leo Strine, Jaap Winter, 50 years later, Milton Friedman's shareholder doctrine is dead, Fortune 13 september 2020, https://fortune.com/2020/09/13/milton-friedman-anniversary-business-purpose/

15. See for example the report on stakeholder engagement by Global Compact Network Netherlands: Stakeholder inclusion as accelerator for sustainable development goals (2021), https://gcnetherlands.nl/stakeholder-inclusion/

16. Colin Mayer, Firm Commitment, Oxford University Press 2013 and Prosperity, Oxford University Press 2018, and his contribution in this Festschrift, The Governance of Corporate Purpose.

activities.[17] Extending the duties of directors to explicitly take into account interests of stakeholders, including indirect stakeholders and interests of society at large, is also part of the proposals the EU Commission is considering in its Sustainable Corporate Governance Initiative. The Commission's intention has met substantial criticism as it is partly based on a report of EY on directors' duties and sustainable corporate governance that is heavily criticised.[18] Whatever the criticism on the EY report, this does not take away the need to urgently answer the question to what extent and how company law should address urgent societal and ecological concerns. One question is whether an enhanced sustainability framework should be regulated as a matter of company law or should be included in corporate governance codes. Some favour the code approach in order to avoid a legalistic approach and risk of personal liability for directors, others argue that this approach leaves too much scope for opportunistic behaviour precisely because there are no clear consequences. I myself believe director duties should be extended explicitly in company law. I call this the societal duty of directors. In light of the urgency of the societal and ecological problems we can no longer afford opportunistic behaviour from companies and need companies to actively contribute to solve these problems. In order to make this change, directors of companies must abandon the amoral context created by the exclusive shareholder value focus and explicitly take on responsibility for balancing the various interests involved, including the more indirect interests related to societal and ecological concerns. This raises further questions on the validity of board resolutions and director liability in case of a clear breach of this societal duty of directors. It also requires further development and enhancement in corporate governance practices, dealing for example with board composition and decision making and executive remuneration.[19] The Commission is considering to provide rules on executive remuneration in light of the responsibility of directors to take societal and ecological concerns into account. A further element could be to require boards to set up specific societal responsibility committees of non-executive directors, in line with obligations to set up audit committees and remuneration committees. Impact reporting is clearly on the agenda of the Commission when considering to review the existing Non-Financial Reporting Directive. This may also have effects on shareholders and the way they take their investment decisions and make use of their rights within the company. Many institutional investors today state that their investment and governance decisions are guided by ESG criteria. It is questionable however if they are able to stick to their ESG policies when the pressure is on, as the recent Danone case in France may indicate. After Danone turned into a société a mission activist investors started to challenge the CEO Emmanuel Faber and the board because of lagging financial performance. The board gave into the pressure by letting go of the CEO who had taken an active stance against the focus on short term shareholder interests and taken the lead in making Danone a société a mission. Faber himself suggests that the board of Danone was not fully aligned with the new societal

17. J.W. Winter and 24 co-authors, Naar een zorgplicht voor bestuurders en commissarissen tot verantwoorde deelname aan het maatschappelijk verkeer, Ondernemingsrecht 2020/86.

18. See https://ecgi.global/content/sustainable-corporate-governance#resources

19. Jaap Winter, Addressing the Crisis of the Modern Corporation: The Duty of Societal Responsibility of the Board, available at https://ssrn.com/abstract=3574681 and Towards a Duty of Societal Responsibility of the Board, European Company Law 2020/5, p. 192–200.

objectives of Danone.[20] But behind this is also the realisation that a substantial number of institutional investors would probably back the activist investors, regardless of their stated ESG commitments. In order to strengthen the resilience of institutional investors they could be required to explicitly include societal and ecological objectives into their investment decision making process and account for how they have executed on these objectives. Finally, proposals are being made for companies to set up societal advisory councils, in which specific stakeholders or interest groups may be represented to advise the board on aspects of societal and ecological concerns.[21] Some companies already have set up these councils, such as BASF[22] and Unilever.[23] Other, indirect stakeholders thus make an entrance into the governance arrangements of the company.

III Back to the Takeover Bids Directive

In the discussion on the responsibility of companies for societal and ecological concerns and whether and how to adapt company law and corporate governance arrangements in order to facilitate and enforce this responsibility, an eerie silence engulfs the Takeover Bids Directive. In a takeover event, the conflict between immediate financial gains for shareholders and concerns about wider societal and ecological impact emerges most clearly. Although some have criticized the Takeover Bids Directive early on from taking a too narrow market perspective, including a poorly substantiated theory of a market for corporate control,[24] revising the Directive in light of the current societal and ecological concerns is not yet part of the mainstream debate and is not part of the EU Commission's Sustainable Corporate Governance Initiative, as far as I can see. As I have explained above, none of these societal and ecological concerns are in scope in the current Directive. Indirectly however, it could be argued that Member States, by allowing their listed companies not to be subject to the board neutrality and break-through rule, also may allow boards to defend against takeover bids that favour the interests of shareholders to the detriment of the interests of other stakeholders and wider societal and ecological concerns. Whether this is the case of course depends on the duties of directors under the specific Member State's company law. But in a sense, it could be said that including article 12 in the Directive has at least prevented that across Europe a market for corporate control was established based to a large extent on financial gains that are offered to target company shareholders. The current societal and ecological concerns may give Member States renewed justification for allowing boards of companies to defend against takeover bids.

20. Interview Financial Times May 7, 2021.

21. Florian Möslein, Karl Engsig Sorensen, Sustainable Corporate Governance: A Way Forward. ECGI Law Working Paper nr 538/2021.

22. https://www.basf.com/who-we-are/sustainability/management-goals-and-dialog/stakeholder-dialog/stakeholder-advisory-council.html

23. https://www.unilever.com/planet-and-society/sustainability-reporting-centre/our-sustainability-governance/

24. Beate Sjafjell, Companies, Society and the Environment, Towards a Sustainable, European Company Law: A Normative Analysis of the Objectives of EU Law with the Takeover Directive as a Test Case, 2009, available at https://ssrn.com/abstract=1356542 . The book of which this is the introductory chapter, provides an early plea for introducing sustainable development as a normative objective for global development.

But is that all there is to it? Is this the right balance between the need to address the urgent societal and ecological concerns and the original objectives of the Directive of facilitating the optimal use of the internal market by takeover bids and disciplining management? One could speculate about an alternative regime for takeover bids in Europe, for example one in which companies with explicit purpose clauses in their articles of association and that have their impact reporting independently certified can defend against takeover bids and those who have not cannot. Protection against too much exposure to financially driven capital markets would be possible for companies who convincingly adopt a sustainable corporate governance and business practice. Companies who shy away from this societal responsibility would remain vulnerable for takeover bids under this regime. It would be interesting to discuss such a regime and variations to it and more broadly how to balance societal responsibility with the functioning of the capital market. If ESG investing turns out to be more than simply green washing by institutional investors, a different balance of capital markets and sustainable governance and business practice should be possible.

But regardless of these speculations, it seems unlikely that the Commission is willing to open up the can of worms of the article 12 compromise in the Directive that leaves the choice on whether to allow for defence against a takeover bid to Member States. The matter is so wrought by conflicting views on the role of markets and national interests within the single EU market that it is inconceivable for the time being to reach agreement on an alternative regime. But that does not mean that takeovers and the ability to make them successfully or to defend against them, are not affected by the discussion about sustainable corporate governance and the changing perspectives on the responsibility of business. The Takeover Bids Directive does not exist in a vacuum. Its application and in particular the question what should guide a board are embedded in company law. If company law in the EU would be harmonised following the Sustainable Corporate Governance Initiative to explicitly include a societal duty of directors, this would impact the conduct of the board of both the bidder (if European) and the offeree company. Both boards would have to consider broader concerns for our society and our planet beyond the immediate financial concerns for shareholders when deciding to make an offer and deciding to accept or reject and defend against it. It would follow and would be in line with the current set-up of the Takeover Bids Directive that the board of the bidder in the offer document should set out what the consequences of the bid are for matters of societal and ecological concern, beyond the consequences of the bid for employment and employees. Article 6 (3) of the Takeover Bid Directive should be amended accordingly. Similarly, the board of the offeree company should set out in its public opinion of the bid what it sees as the consequences of the bid for matters of societal and ecological concern, to which end article 9 (5) of the Directive should be amended. Furthermore, it could be required that a societal advisory council is to be set up by the bidder and/or the target company, which expresses its views on the bid and that this is included in the offer document and/or added to the opinion of the board of the offeree company. The public information of the bidder and the board of the offeree company and their societal advisory boards on how the bid impacts matters of societal and ecological concern should help investors to make an informed choice on whether to tender their shares in light of their own ESG commitments. This could also facilitate a public debate on how investors make those choices in light of their own stated commitments.

A final question lingers. Concerns that companies express about societal and ecological impact are regularly met with cynicism. There is a sense that much of this is only talk and little walk, that there is a lot of 'greenwashing' to cover up that business continues as usual. This raises an important question in the context of takeover bids. What should happen if the bidder or the offeree company only produce flimsy or outright incorrect analyses of societal and ecological objectives and achievements to either support the offer or the defense against it? Without any evidence that indeed these objectives have been taken seriously by the bidder or the board of the offeree company in the past? The supervisory authority has a role to play when reviewing the offer document for approval, article 6 Takeover Bids Directive. Currently, there is no formal role for the supervisory authority in reviewing the opinion of the board of the offeree company. Where the information relating to societal and ecological concerns becomes more relevant in the judgement the board makes and the choices investors have to make, there is a growing need for the supervisory authority to review the quality of the information provided in order to prevent that investors are provided with a misleading presentation of affairs. This can be compared to the review by the SEC of proxy statements in which a listed company details the matters to be voted upon at the general meeting, pursuant to Section 14 of the US Securities Exchange Act of 1934. There is much to say for introducing this role for the supervisory authority in ensuring that information provided by the bidder and the board of the offeree company pertaining to matters of societal and ecological concern is accurate and not misleading. This assumes that supervisory authorities are able to assess the information required. It is clear that this capacity needs to be developed, but that is also true for all other players in the governance of companies. Boards, investors and supervisory authorities alike will have to learn to assess information on societal and ecological concerns if these concerns are to be taken seriously and acted upon, within and outside the context of takeover bids. This will require an emerging practice and regulation of impact reporting and verification.