**InfPreventa: UK Country Report**

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## Introduction

This Report summarises the research undertaken by the UK research team as part of the *Infpreventa* project on information and consultation across Europe. Whilst the previous *Informia II* project had focussed principally on EWCs, the remit of *Infpreventa* has been broader, insofar as a range of other mechanisms for information and consultation (I&C) have been examined across several countries.

There is a distinct European tradition of embracing employee information and consultation as part of business planning, wherein the main goal is to promote consensus building and democratic involvement among the social partners. In recent years, the linkages between employee involvement and the need to manage and anticipate change at organisational level have been further elaborated within the EU-level policy discourse. Corporate restructuring is an important element of the process of change, and in this context particular emphasis has been placed on the involvement of the EU-level social partners in order to anticipate risk and involve employees in the long-term strategy of the company. In the case of the UK, the research team decided to focus on one particular aspect of corporate restructuring, namely takeovers. There are obvious reasons for this focus in the UK context, as the UK stands out in terms of both the high level of takeover activity and also the relatively high level of hostile takeovers.

The report firstly outlines the broad sweep of I&C provisions in the European context, covering the major directives as well as other directives which contain I&C provisions. It then focuses specifically on the issue of takeovers in the UK context, considering the impact of the Takeover Directive as well as the operation of the UK City Code on Takeovers. Recent amendments and revisions to these provisions are assessed, and some of the current debates concerning further reform are summarised. The report then presents a case study of a UK takeover in the airline industry - the IAG acquisition of BMI. This is an interesting case as it is one where the regulations had little impact, with neither the Code nor the Directive playing any role. Rather, it highlights the importance of existing historical employment relations structures and processes, whilst also suggesting that the criteria for identifying transactions that fall within the remit of the Code might need to be addressed.

## European-level Information and Consultation Provisions

Employee participation in organisational decision-making takes many different forms across the member states of the European Union, though broadly it occurs at two levels: first, at the sub-board level, through joint consultation committees, works councils and union and worker delegates; and second at board level, through employee board-level representation (EBLR). Though the distinction may not always be entirely clear – for example, in Germany many employee board-level representatives are also works councillors – it is clear enough to serve as a basis for analysing

attempts by the EU to create a floor of statutory rights to employee participation as part of its strategy for its European social dimension.

Attention in recent years has tended to focus on four principal EU directives:

- European Works Council Directive (94/45/EC), 22 September 1994;
- European Company Statute Directive (2001/86/EC), 8 October 2001;
- Information and Consultation of Employees Directive (2002/14/EC), 23 March 2002; and
- EWC recast Directive (2009/38/EC), 6 May 2009.

Whilst the 1994 and 2002 Directives provide for rights to information and consultation at sub-board level, the ECS Directive provides for EBLR, along the lines of arrangements which have already existed in many countries since the early 1970s, or even earlier (Gold, 2010; Gumbrell-McCormick and Hyman, 2010).

Some observers have interpreted the cumulative effect of these directives as the creation of an EU-wide participatory 'space' (Kluge, 2004), while the ETUI has argued that they can be seen as positive steps towards greater harmonization of EU labour legislation (ETUI-REHS, 2007), a matter of particular significance for countries like the UK and Ireland where there were hitherto no statutory rights regulating these areas (Hall and Purcell, 2012; Doherty, 2008). Certain commentators have even suggested that EWCs, at least, begin to transcend national systems to form a distinctive EU-level model in itself (Lecher et al., 1999; 2001; 2002).

Much empirical work has now been carried out into the operation and impact of the three principal directives: EWCs (Waddington, 2012); ECS (Cremers et al., 2013); and ICE (Van Wanrooy, 2011; Hall and Purcell, 2012). Given that this report focuses on domestic sub-board level practice within the UK, it is helpful to provide a brief summary of the operation of the ICE regulations since they came fully into force in 2008. The following section therefore summarises the main conclusions of the study by Hall and Purcell (2012) of 25 organisations which had recently engaged with the regulations.

With a few notable exceptions, the limited promise of the regulations in the UK has borne even more limited results. The authors identify six key features of the consultation process as evaluative criteria for their analysis: the *stages* of involvement in management decisions; the *scope* of decisions involved; the *level* at which consultation takes place; the *extent* of direct and representational involvement in the organisation, and their relationship; the *capacity* of employee representatives for collective voice; and the presence of a *'culture of cooperation'* to underpin the consultative process. The combination of these features leads to their distinction between 'strong' and 'weak' forms of consultation. They simplify practice into a stark contrast between 'active consulters', managers who seek serious discussion and resolution of differences, and 'communicators', managers who are concerned principally to inform employees about decisions that have already been taken (though some managers also allow consultation arrangements to become defunct). They then analyse a selection of eight case studies – four of active consultation, three of communication and one that was allowed to die off – amongst their sample of 25.

They demonstrate that cases of active consultation involve provision by management of facilities, time off and encouragement of informal contacts amongst representatives, sustaining a culture of autonomy and self-determination. Most of all, they involve the willingness of senior managers to take 'big business issues to the staff council and discuss them before a final decision had been announced' (p.158). This contrasts starkly with the communicator cases, which are characterised by 'the unwillingness of management to step back from unilateral decision-making' (p.159). However,

the authors conclude that this unwillingness stems less from a decision to restrict influence but rather from 'a perception that the proper purpose of consultation is to listen and respond to the views of staff with the aim of improving communications…' (p.159). As a result, these communicator cases tended to get 'bogged down in small-scale housekeeping matters' (p.159).

The authors' overall conclusions are bleak. They allude to the paradox that lies at the very heart of discussions about consultation: '…while [joint consultation] is often seen as a means of creating co-operative and constructive relationships between management and employees … in practice employers are, for the most part, lukewarm and trade unions ambivalent' (p.160). The difficulty centres on the observation that employers do, in fact, promote consultation – the difficulty is that their perception of consultation is different from that of the unions, focusing on 'improving communications' rather than specifically on early discussion of strategic issues. As the authors themselves point out, employers continue to prefer top-down direct forms of communication than any other, as WERS 2011 has since made clear. While the incidence of joint consultation has declined in multi-site organisations between 2004 and 2011, the incidence of direct communications has burgeoned: 80% of workplaces now have all staff meetings (75% in 2004), while 66% hold team briefings (up from 60%) (Van Wanrooy, 2012). It would, indeed, appear that 'little has changed in the conduct or scope of consultation despite the implementation of the ICE regulations' (p.159).

Less well documented is the impact of a range of more limited or partial Directives covering specific areas of industrial relations where information and consultation remains important. These Directives include:

- Collective redundancies (75/129/EEC), 17 February 1975
- Collective redundancies (98/59/EC), 20 July 1998
- Transfer of undertakings (77/187/EEC), 14 February 1977
- Business insolvencies (80/987/EEC), 20 October 1980
- Health and safety at work 'framework' (89/391/EEC), 12 June 1989
- Transfer of undertakings (2001/23/EC), 12 March 2001
- Takeover bids (2004/25/EC), 21 April 2004
- Cross-border mergers directive (2005/56/EC), 26 October 2005

Many of the information and consultation rights enshrined in these Directives are ad hoc, in that they are triggered by an event initiated by the employer requiring the observance of fair procedures in a particular context (such as redundancies, a transfer of undertakings or a merger or acquisition), with possibly no ongoing impact on the employment relationship itself (Gospel et al., 2003). Indeed, it was partly the ad hoc nature of these Directives which eventually culminated in the adoption of the ICE Directive referred to above which does, of course, establish general rights to information and consultation to be exercised during the normal course of employment, without reference to any specific events.

However, despite the fact that these instruments do not include any provisions for a process of consultation and participation, they are still significant as they 'provide access to employees to information concerning their conditions of employment and provide the basis for the development of collective bargaining' (Koukiadaki, 2011: 604).

The role of the EU in legislating for information and consultation has therefore been broad, but it is striking that the rights to information consultation across these measures vary to a striking degree, particularly in relation to the strength of the rights themselves.

Article 2 of the 1998 collective redundancies directive requires employers to open consultations with workers' representatives 'with a view to reaching agreement', while Article 2.2 requires consultation to cover 'ways and means of avoiding collective redundancies or reducing the number of workers affected, and mitigating the consequences'. Hence unions have the right to table their own alternative plans to those proposed by employers, who are then required to respond and adjust their plans accordingly, a process that has been compared with collective bargaining (Reed, 2014). Consultation in the ICE directive shall also – according to Article 4.4(e) – take place 'with a view to reaching an agreement on decisions within the scope of the employer's powers referred to in paragraph 2(c)', which paragraph itself covers 'decisions likely to lead to substantial changes in work organisation or in contractual relations…' Article 9(1) states that these provisions shall be 'without prejudice to the specific information and consultation procedures set out in article 2 of Directive 98/59/EC [collective redundancies] and article 7 of Directive 2001/23/EC [transfer of undertakings]. By contrast – though specifying areas over which the employer must consult – the Takeovers Directive does not specify any intention to reach agreement: employee representatives in the target company have the right only to append a written opinion to the offer document, which the employer may or may not take into account.

**Information and Consultation in Takeovers**

Relatively little research has been conducted into the impact of the Takeover Bids Directive, in comparison with other directives. This report focuses on its implementation and influence on the conduct of takeovers in the UK, with specific reference to disclosure of information to employees (consultation is not mentioned in the Directive). The report considers the relationship between the Takeover Directive and the existing UK City Code on Takeovers and Mergers, drawing upon interviews conducted with members of the UK Takeover Panel, as well as with academics and trade unionists with experience of recent developments in this area.

<u>The Takeover Directive</u>

A first draft of a directive on takeover bids was produced in 1974 at the request of the Commission. However, the differences between the 'UK Takeover Board' and 'Continental European' approaches were so great that an actual proposal was not made by the Commission until 1989. A complicated legal history with numerous proposed amendments, revisions and the rejection of a recast 'compromise' second Draft by the European Parliament in 2001 led to the appointment of a High Level Group of Company Law Experts (the so-called 'Winter Group') to make recommendations for a European approach to takeover bids and company law. The two reports that came out of this group in 2002 and the European Commission's 2003 Action Plan on Company Law and Corporate Governance are seen by many as milestones in the development of a neoliberal approach to corporate regulation in Europe.

The underlying philosophy of the 2004 Takeovers Directive is that, as a whole, takeovers enable needed restructuring and improve the efficiency of the European economy, and should thus be promoted. Although some proposals (notably from the European Parliament) included much stronger rights for employee information and consultation, the 2004 Takeovers Directive in effect gives the shareholders in the 'target' company the final say over accepting or rejecting the takeover bid.

The directive's main implications for employees are the board's duty to inform the employees about all the companies involved in the takeover bid, and the right of the employees or their representatives to draft an opinion on it. Consultation of the employees must take place on the basis of the relevant national provisions, especially those deriving from other directives, for example, the

European works council directive, the collective redundancies directive, the SE directive and the framework directive on consultation and information. However, significant room remains for strengthening employee rights during the takeover process. An external implementation study carried out for the European Commission, which was published in 2012, also supports this conclusion.

As Vitols (2012) outlines, according to the 'shareholder value' approach, takeovers are a key mechanism for increasing efficiency, and hostile takeovers the ultimate weapon for removing incompetent or self-serving management. Shareholder value therefore advocates support for what they call an 'open market for corporate control'. This means regulations that make it easy for companies to be bought up, in part by prohibiting management from blocking takeovers of their company with defensive measures. By contrast, those who adopt a 'stakeholder' philosophy view takeovers (in particular those of the hostile variant) rather differently: they force managers to focus on short-term share price and frequently lead to workforce reductions and worsened working conditions. In the interests of sustainable companies, stakeholder advocates therefore argue for a strengthening of regulations to let managers take defensive measures against hostile bids and to give workers a 'voice' or even veto right in the takeover process. We consider some of these arguments below.

## The Regulation of Takeovers in the UK

Levels of takeover activity in the UK are still very much at the high end of the scale. The most useful analytical literature, that looks to explain high and low levels of takeover activity, sets out a 'varieties of capitalism' (Hall and Soskice, 2001) framework. It suggests that wider industrial and financial practices, regulation and business culture are the significant factors influencing takeover activity.

This approach marks out two distinct poles on which advanced capitalist economies have developed: LMEs and CMEs. Liberal Market Economies (LMEs) are typified by the USA and UK, and include Ireland, Canada, New Zealand and Australia. LMEs, in general, are more market oriented, favour greater deregulation, weaker union rights and employee protections, and smaller welfare states. Takeover activity in these countries tends to be higher. Coordinated Market Economies (CMEs) are typified by Germany and Japan, and also include Austria, South Korea, Sweden, Norway, Finland, Denmark, Belgium, Holland and Switzerland. In general, they have denser networks of cross-shareholding, strong employee associations, stronger trade unions, works councils and employee protections, coordinated wage setting across industry sectors, and collaborative training schemes. In effect there is a more collaborative and consensual form of decision-making around industrial policy at both the individual firm and large economic level. Here, takeover activity tends to be lower.

In the UK takeovers are regulated by a mix of UK and EU law and regulation. The City Code on Takeovers and Mergers, administered by the Takeover Panel, is the main repository of rules governing the process, and focuses on fairness for the target's shareholders. The Office of Fair Trading (OFT) and Competition Commission (CC) – merged in 2014 into the Competition and Markets Authority (CMA) – are the regulatory bodies tasked with assessing the competition impact of takeovers. These regulatory bodies are primarily guided by goals of protecting shareholders and presenting a regulated rule-based environment for takeover activity (the Panel), and the promotion of competition through the prevention of monopolies in market sectors (the CMA).

The City Code on Takeovers and Mergers comprises six General Principles and 38 Rules, designed to ensure that target shareholders are treated fairly and not denied the opportunity to decide on the merits of a bid, and that they are afforded equivalent treatment by a bidder. The Code is issued and

administered by the Panel on Takeovers and Mergers. The Panel is an historically self-regulatory City body that acquired statutory designation as the supervisory authority to carry out various regulatory functions in relation to takeovers under the Companies Act 2006.

The UK is, by comparison to other jurisdictions, the most liberal system in regulating takeovers worldwide. The Code is not about the economic usefulness of takeovers generally, nor does it allow for the Panel to assess the specific financial or commercial merits of an individual takeover. The characteristic aspect of the Code is the 'shareholder primacy' norm it endorses, which is reflected in the strict non-frustration principle encompassed in Rule 21 of the Code. This rule prohibits target directors from taking any defensive measures against a bid without obtaining prior shareholder approval once a bid has become imminent. Prior to the Cadbury reforms (see below) the Code provided for a 'light regulatory touch' in terms of regulating employee information and consultation rights.

Impact of the Takeovers Directive on UK Company Practice

The Takeovers Directive placed the Takeover Panel on a statutory basis in 2004, taking effect in 2006. Since its establishment in 1968 and until 2006, the Panel had been an unincorporated association, that is, a self-regulatory body. Compliance with its Code was voluntary. The Takeovers Directive required the UK government to grant it a statutory basis, along with extra powers and duties to formulate and enforce rules in line with the terms of the Directive in relation to takeovers and similar transactions.

From the outset, the Panel was concerned that these changes might undermine the way it worked, particularly its core values of speed, flexibility and certainty – the ability to respond quickly, adapt rules to the situation and ensure compliance with rulings. Increased litigation was also a concern, as the Panel's approach to regulating takeover bids is to avoid use of the courts and resolve disputes itself, in contrast with the US approach, where every bid is litigated. However, with the collaboration of the (then) Department of Trade and Industry, the Panel has managed to maintain its traditional approach, though its extra, statutorily based enforcement powers have proved helpful in dealing with the increasing number of overseas bidders who understand procedures laid down in law.

Though the Panel has never had to invoke these powers, in the words of one of its members: 'The fact that we have them and we're written in law and we can go to court to take action against someone if they don't comply with our rules makes, I'm sure, conversations much shorter than they used to be about "What happens if I don't do what the Takeover Panel has said?"'

Information and consultation under the Takeovers Directive

From the outset, the Takeover Panel's Code had required offerors, in their offer document, to provide information about their intentions towards the workforce and the business, and the changes they envisaged. However, as a result of the Directive the Panel had to amend its rules to comply with the specific terms of the Directive, which – with respect to disclosure of information – can be found principally in Articles 3, 6, 7, 8 and 9. Article 3.1(b) of the Directive specifies that: 'The board of the offeree company must give its views on the effects of implementation of the bid on employment, conditions of employment and the locations of the company's places of business.'

The Panel agreed that, despite its attempts, this was an area in which it was difficult for bidders and targets to give meaningful statements:

> You know, it's rather like when you move into a house [and think] what am I going to do to it when I've lived there for six months – you know, you don't know exactly what you're going to do on the day you walk in. And they say 'I can't give a very detailed description of what I'm going to do because I need to have a snoop around, do my due diligence, do a review.' And then ditto […] the offeree board then comments on the offeror's statements, and, in a way, if the offeror doesn't give a very clear statement, it's difficult for the offeree to comment, and in the event, the offeree might say, 'Well, actually, you know what,' just to continue with the house analogy, 'I'm the vendor of the house – how do I know what you're going to do when you move into my house? You've got your own plans, your own budget, your own strategic intentions and what have you, so how can I, as the vendor, say what…whether I think your intentions are reasonable or not'.

While the Panel attempts to persuade offerors to give meaningful statements, it admits that there are practical limitations to what offerors are prepared to disclose. The real question is disclosure in good faith. Little change was required to the Code as it had already contained a provision requiring the offeree to comment on the effect of the implementation of the offer on the company's interests, including specifically employment and strategic plans. Nevertheless, the Panel's sanctions are limited to censure of one form or another, and exclude the power to fine, so – for the UK to comply with the Directive's requirement for sanctions (Article 17) – criminal breach, which covers misleading information provided 'recklessly or intentionally', was inserted into section 9.5.3 of the Companies Act and made enforceable by the Department of Trade and Industry (not the Takeover Panel). No breaches, however, have yet taken place.

The Code required major amendment with respect to information to employees, an area that had hitherto been missing. Article 6 of the Directive homes in more specifically on informing employees and their representatives. Article 6(1) states: 'As soon as the bid has been made public, the boards of the offeree company and of the offeror shall inform the representatives of their respective employees or, where there are no such representatives, the employees themselves.' Article 6(2) makes a similar stipulation with respect to the subsequent offer document. Article 6.3(1) elaborates that the offer document itself must state (amongst other provisions) the offeror's intentions with respect to: 'the safeguarding of the jobs of their employees and management, including any material change to conditions of employment, and in particular the offeror's strategic plans for the two companies, and the likely repercussions on employment and locations of the companies' places of business.'

Article 8, on disclosure, specifies that 'disclosure of all information and documents required by Article 6' must be carried out in a way that they are 'both readily and promptly available' to holders of the company securities and to the employees or their representatives.

Article 9.5 provides that: 'The board of the offeree company shall draw up and make public a document setting out its opinion of the bid', adding significantly that: 'The board of the offeree company shall at the same time communicate that opinion to the representatives of its employees […] Where the board of the offeree company receives in good time a separate opinion from the representatives of its employees on the effects of the bid on employment, that opinion shall be appended to the document.'

Finally, Article 10, which – amongst other issues – covers employee share schemes is not within the Panel's remit as it focuses on disclosure in the company's annual report under the terms of the Companies Act, designed to inform the market about the sort of provisions that might be relevant in the event that a bid were to be made.

As a result of these Articles (excluding 10), the Takeover Panel had to amend its existing rules, as informing specifically employees and their representatives was new. As the Panel pointed out, the Directive actually required two provisions. The first was to ensure employees were aware of a takeover, requiring the disclosure of information that was 'readily and promptly available', which could be disseminated through email or the intranet. The second was the right of employee representatives to append their own opinion to the offeree's document and so acquire a voice in the takeover process, provided they submitted it 'in good time' to the board of the offeree company. Rule 25.9 of the Takeover Code implements this right, adding that the trustees of any of the offeree company's pension funds may also append their opinion, and – in case the opinion is not received 'in good time' before publication of the offeree board's circular – it must be promptly published 'on a website' which must itself be announced 'via a RIS [regulatory impact statement] that it has been so published'.

A third provision, added by the Panel (and not covered by the Directive) was the requirement imposed on the offeree company to reimburse the reasonable costs of the employee representatives in preparing an opinion (the background to this we return to below). However, it needs to be pointed out too that there is no requirement on the offeror to ensure that employees and their representatives have actually had a chance to make known their views, or to evaluate or comment on the opinion.

Between 2006 and 2011, there were only three cases where an employee representative's opinion had been appended to an offer document. The Marccus review of the Directive noted at 102 that in countries such as the UK, employee representatives were rarely informed in line with the Directive (Marccus Report, 2012: para. 102). However, in the single year to 18 September 2012, this figure had risen to 18, with respect to ten separate offers (Tsagas, 2015: forthcoming), a point we return to below.

Overall, the Panel evaluated the current provision of information to employees as a positive advance over what it had been in the days prior to the Directive: while provision to specify the offeror's intentions for the future business had always been covered, what was new under the Directive was provision to submit a copy of the offer document officially to the offeree employees. However, the Takeover Panel does not monitor implementation of this provision, though it has never received notification of malpractice.

Impact of the Kraft Takeover of Cadbury

It is worth looking at employee information and consultation rights under the UK Takeover Framework before and after the takeover of Cadbury Plc. Despite the role of the Directive, it is generally agreed that it was the takeover of Cadbury by Kraft in 2010 that 'prompted the reform of the UK takeover rules arguably towards a more detailed, target company and stakeholder friendly model' (Tsagas, 2015: forthcoming, n.p.; see also Tsagas, 2012). This represented something of a deviation from the 'shareholder primacy norm' endorsed by the UK City Code on Takeovers and Mergers.

The aim was to improve the offer process and to take more account of the position of persons who are affected by takeovers in addition to offeree company shareholders. The Kraft/Cadbury case study merits special attention insofar as it questioned the UK's 'open market for corporate control' on a variety of aspects concerning the duties of the parties involved in the takeover bid, as well as on issues of disclosure and stakeholder protection related to the takeover process itself.

The controversy surrounding the Kraft/ Cadbury takeover centred at the very start of the offer period when Kraft announced that – because of economies of scale – it would keep open Cadbury's factory at Somerdale, which Cadbury had already declared would close. Although the Somerdale factory was already in process of being closed down, with its plant being shipped to Poland where its manufacturing capacity was to be transferred, Cadbury was unable to comment meaningfully on Kraft's statements as it did not have access to its strategy. Shortly after the offer opened, Kraft followed up with an announcement that the Somerdale factory would close after all, even though it had held out in its offer the prospect that it would keep it open.

The Takeover Panel investigated the case, and concluded that it was not sufficient for Kraft to hold a subjective belief about the future of the factory, but needed a reasonable basis for holding that belief. According to the Panel, Kraft had not had a reasonable basis for its belief because it did not know the extent of the closure process. The Panel censured Kraft publically for making that statement because it lacked a reasonable basis for doing so. As one of our Panel interviewees commented: 'Which is a big deal…'

This was the last occasion the Panel had issued a censure, which happens infrequently. In the aftermath, the Chairman of Cadbury expressed concern that the playing field of that bid had been tilted too far in favour of the offer against the offeree and wanted action to limit short-term investors' operations during the course of a bid.

The Cadbury takeover forced various reviews of the current regulatory structure, including by the Takeover Panel (2011), the Department for Business, Innovation and Skills (BIS, 2011; 2012), and the equivalent Select Committee in the House of Commons (HoC, 2010), as well as acting as a spur to the Kay (2012) and Cox (2013) reviews.

UK Takeover Panel Consultation Exercise (2010)

In 2010, in response to the outcry following Kraft's takeover of Cadbury, the Panel reviewed the Code and began an open consultation, the broadest ever undertaken by the Panel, involving the gathering of opinions, preparation of proposals, further consultations and then making amendments to the Code. The TUC and Unite the Union both submitted evidence. The Panel took 57 submissions, 14 of which were allowed to remain anonymous.

New amendments were published in July 2011 (Takeover Panel, 2011). These offered offeree companies greater protection against extended 'virtual bid' periods, prohibited deal protection measures and inducement fees, broadened the basis on which company boards could make recommendations on offers, increased transparency around offer-related fees and bid financing, required greater 'recognition of the interests of offeree company employees'. In effect, the changes were designed to protect offeree companies slightly more than had previously been the case. As the Panel, at the time of these amendments (2011), made clear: 'The code is designed principally to ensure that shareholders in an offeree company are treated fairly... [it] also provides an orderly framework within which takeover bids may be conducted'.
In the Panel's view, the key problem was that the affected parties were not hearing about a proposed takeover early enough, which led it to introduce the concept of an offer period, which starts when the very first announcement is made about the possibility of an offer. Before 2011, shareholders always received notification of an offer, but since the 2011 changes, employees and their representatives are notified too, with an alert that they have the right to append an opinion on the potential impact on employment to the offeree's statement. In addition, as also noted above, the offeree company is required to reimburse the reasonable costs of the employee representatives in preparing an opinion:

> So, we've done everything we can to give the employees the right to exercise their voice. It is just a right to get your voice heard, so to speak, but we feel we've done everything we can to give the employees the opportunity to exercise that right. (Takeover Panel interview)

It should be pointed out that, when directives are implemented, the UK government opposes 'gold-plating', that is, adding extra provisions. So when the Panel implemented the employee information provisions outlined above in the Directive, it did the bare minimum, no more than what the Directive required. However, the consultation revealed three reasons why employee representatives were failing to append opinions: lack of knowledge, lack of time and lack of expertise. For these reasons, the Panel did go beyond the terms of the Directive – while informing employees of the offer and their right to append an opinion were requirements of the Directive, the Panel went further in 2011 in ensuring, first, that employees were notified of the right, *at the early stage*, to have the opinion appended, and second that offeree employees should be reimbursed for any reasonable costs incurred in verifying the offer document.

The early stage of notification has also helped to resolve an important issue. Many offers are known as 'recommended offers', where the two parties agree. In such case there is no separate offer document to which the offeree company can respond – they are both contained in the one document. In those circumstances, employee representatives do not receive the offer document until its publication, and so are unable to append an opinion in advance. To deal with this situation, the Code gives representatives more time because they receive the information about the possible offer at the very first announcement stage. Furthermore, if they do not manage to submit their opinion to the offeree board in 'good time', meaning in time for it to be included with the offer document, then the offeree board must publish it on a website and make an announcement on the Regulatory News Service that it has done so.

So, Rule 2.12a requires the distribution of the announcement that commences the offer period not only to shareholders but also to employees. Rule 2.12b requires the offeror and offeree company to circulate the terms and conditions of the offer to shareholders and employee representatives, which constitutes a firm offer announcement (for example, Pfizer never made a firm offer announcement for Astra-Zeneca in June/July 2014, as it merely released series of possible offer announcements). A firm offer announcement occurs when the parties are committed to proceed, in which case it must be made readily and properly available to employees. Rule 2.12d states that when the offeree company circulates the terms of and conditions to its employee representatives about the possible offer, it must draw their attention to Rule 25.9, which specifies their right to append an opinion. Here, the Panel had a concern that employee opinions might be used as a vehicle by the offeree company for making points that it felt it otherwise could not for fear of offending the Panel (for example on profit forecasts). For this reason, opinions are restricted to employment matters.

According to the Panel, the UK is the only member state that has taken the extra step to ensure employees and their representatives are aware that offer has been made, and is properly understood and operated. However, it viewed these amendments as enhancing existing rules rather than introducing new ones, adding that – since the end of the Cadbury case in 2011 – 'it's been a pretty benign M&A world since then', and there has not been sufficient activity to assess the amendments. In particular, it was unable to comment on the effectiveness or otherwise of the opinions appended to offerees' statements by employees or their representatives, as it did not monitor them.

The ETUC, TUC and Unite the Union had submitted evidence to the public consultation exercise with recommendations that the Panel was unable to accept. In the words of one of the Panel members: 'It wasn't within our gift to do that. They wanted to change the complete system here'.

The structure of the participation of employee representatives already existed in the previous regime, however the changes arguably facilitate a more timely and costless process, as the Code now provides that: (i) targets are responsible for costs incurred by representatives in verifying and publishing their opinion, and (ii) target must publish the opinion on the internet whenever it is received during the offer process. However, according to Davis et al (2013), 'it is debatable how much difference such measures will make. The need for recognition of employee interests and requests for greater transparency are neither enforced for either the Panel or many shareholders'.

Distinction between Mergers and Takeovers

The Panel covers mergers and takeovers. Its starting point is to decide whether the companies involved are ones which can be regulated – for example, whether it is a public company incorporated or listed in the UK. In addition, because the primary function of the Panel is to protect shareholder interests, the principal question is whether shareholders in a certain company are being made an offer for their shares. If so, the Panel will be involved. If, by contrast, it is the Takeover Code company that is responsible for the acquisition, it is not the Takeover Code company's shareholders who are getting an offer made for it, then it falls outside the Panel's remit.

There are, accordingly, situation where the Panel is not involved. In 2010, BA and Iberia created a new company – the International Airline Group (IAG) – to make offers for both companies at the same time. Though BA and Iberia were roughly the same size, BA was slightly bigger, so, in that case, the Panel accepted that BA was in fact the company doing the acquiring rather than the company being acquired, which is why BA/Iberia was not one subject to the Panel's rules. With a new company, it is difficult to identify definitively who is acquiring and who is being acquired, but having consulted the parties and their advisors, the Panel accepted that BA was not being acquired, and that therefore the Code did not apply. In addition, if the number of shareholders is very small – as in the BMI case analysed below – the acquisition may also fall outside the Panel's remit.

However, in a merger, and where the company being acquired is covered by the Code, then the Panel will be involved. So, for example, Dixons/ Carphone was a proper merger, with each company about the same size. But, as far as the Panel is concerned, there is always one company – the offeror – that is doing the acquiring, and one the other – the offeree – that is being acquired, and the Panel's responsibility is to look after the shareholders in the offeree company as well as the provisions relating to employees in the offeree company.

The Cross-Border Mergers Directive (2005/56/EC) has been invoked only once in the UK, in the case of the recommended merger between Greencore Group plc (based in Ireland) and Northern Foods plc (based in the UK), which was announced in November 2010, both in the convenience foods sector. However, the deal fell through in January 2011, when Ranjit Singh Boparan – a poultry entrepreneur – made a successful bid for Northern Foods. According to the Panel, a planned cross-border merger involves quite a complex procedure, for which reason – in recommended deals – the more common, simpler procedure in the UK is to use a Scheme of Arrangement under the Companies Act (also covered by the Panel).

Takeover Panel Review (2012)

In 2012 the Code Committee undertook a review of the operation of the amendments to the City Code following their implementation, subject to the level of bid activity during that period.

In relation to the disclosure by offerors and offeree companies in relation to the offeror's intentions regarding the offeree company and its employees, Panel Statement 2012/8 provides that, there has been an improvement in the quality and detail of disclosures of intention made by offerors under Rule 24.2 and by the boards of offeree companies under Rule 25.2.

In relation to the changes introduced to improve communication between the board of the offeree company and the offeree company's employees, and to enable employees to be more effective in providing their opinion of the effects of an offer on employment though the adoption of Rule 2.12 and Rule 25.9, the following points are made in the Review. As stipulated, in the year ended 18 September 2012, a total of 18 employee representatives' opinions were published in respect of ten separate offers. Out of these opinions, nine employee representatives' opinions were appended to offeree board circulars in respect of five offers in accordance with the first sentence of Rule 25.9. This, according to the review, represented a significant increase over the period which followed the introduction, in May 2006, of the right for employee representatives to have their opinions appended to offeree board circulars. Furthermore, employee representatives' opinions in respect of a further five offers were published on a website in accordance with the second sentence of Rule 25.9 after they were received by offeree companies following the publication of the offeree board circular.

According to the Takeover Panel these figures are evidence that the 2011 reforms have gone a considerable way towards achieving their objectives of improving communications between offeree companies and their employee representatives and of enabling employee representatives to be more effective in providing their opinion on the effects of an offer on employment. Tsagas (2015) thus concludes that:

> the new rules on employee consideration arguably improve the quality of disclosure by offerors and offeree companies in relation to the offeror's intentions regarding the offeree company and its employees … The enhanced disclosure in the offer document may potentially encourage greater caution to be exercised when making significant concrete plans for the target company ... The revision of the UK takeover rules also aimed to provide greater recognition of the interests of the offeree company employees not only by improving disclosure requirements, but also by improving the ability of employee representatives to make their views known ... The improvement regarding the timeline and process observed for employees' involvement in the takeover process helps facilitate an objective and accurate exchange of information, which may well allow for a better assessment on the impact that the bid will have on employment.

<u>EU Commission Review (2012)</u>

In 2012 the Takeover Bids Directive was re-examined, and a study concluded that it had not led to any major changes in member states' legal frameworks, as similar rules were either already in place or being introduced (Marccus Partners, 2012). Nevertheless, the EU Commission's own review, published subsequently, summarises concerns over the operation of the provisions of information disclosure to employees contained in the Directive. It states:

> The External Study shows that representatives of employees are not satisfied with how the Directive safeguards the interests of employees. They mention that the required information is not always given in time, or is inadequate, and that takeover offers have a significant

> impact on working conditions and redundancies. Moreover, after the bid, there is no control over whether the offeror will do as he stated in the information disclosed in the offer procedure. This is however not regulated by the Directive (European Commission, 2012: para. 20).

Overall, the Commission identified several areas that required clarification, though at the time of writing (November 2014) no progress has been made. It stated that it would 'pursue dialogue with employee representatives with a view to exploring possible future improvements', particularly over 'disclosure of the offeror's intentions as regards the future business of the company and its employment conditions and the view of the offeree company's board on this' (European Commission, 2012: para. 27).

Proposals for Further Reform

Despite the Takeover Panel and Commission reviews, there remains considerable concern over the takeover regulatory regime in the UK. UK takeovers remain more common, more likely to be hostile, and more likely to succeed, than in any other major economy in the world. More significantly, there is considerable evidence that a significant proportion of takeover activity is neither beneficial to the creation of long-term shareholder value nor to the UK industrial base, economy and society as a whole. As both the recent Kay (2012) and Cox (2013) reviews conclude, financial activity, including takeover activity, has become increasingly short-termist in nature, and misaligned takeovers can inhibit more responsible forms of capitalism from developing.

The nature of shareholding in the UK has changed significantly over the last two decades, divorcing shareholders from companies in the long-term. Takeover activity is thus increasingly driven by short-term profits and arbitrage rather than long-term investment and the development of companies. In 1991, UK pension funds and insurance companies, which are traditionally long-term investors, held *over half* (52.1%) of UK shares. Individuals held 19.9% and foreign investors only 12.8%. By 2010, this situation had been almost reversed, with pension and insurance funds holding only 13.7%, individuals 11.5% and foreign investors 41.2% (and rising). Existing company law and regulation remains focused on maximising shareholder value above other factors. However, 'the exclusive focus on 'shareholder value', usually in the short-term, has been detrimental to the long-term interests of companies, employees, consumers and the wider economy' (Davis et al, 2013).

In terms of proposals for further strengthening the provisions concerning takeovers, there is a view among some stakeholders that the Code is also a relatively weak instrument in terms specifically of affording employees meaningful rights to information and consultation. As Tsagas (2015) notes, critics would argue that the reforms are not in fact an improvement towards the better regarding employees' rights but qualify as 'mere window dressing of what is otherwise the accepted norm of shareholder primacy in the UK'. The problem in the way in which the UK legal framework on takeover bids had been constructed was arguably that it prompted target directors to set the company's independent future and long-term continuity aside and support bids which are merely beneficial to certain shareholders with short-term investor horizons. The Cadbury takeover highlighted, among others, the importance of considering the long-term implications of a takeover bid, especially in relation to firm-specific investments and stakeholders' rights.

The TUC argues that the general ICE framework, as well as specific directive concerning collective redundancies, provide a far stronger set of I&C principles, since they emphasise the concept of 'consultation with a view to reaching agreement'. The takeover code, in contrast, merely allows for the opportunity to express an opinion, which can be taken into account but doesn't need to be taken into account, and there is no formal obligation on the employer to consider this opinion. The TUC

argues for a duty to consult when takeovers occur, which would significantly change the nature of the consultation over takeovers because there would have to be preliminary consultation with the workforce and their representatives:

> 'We need a new settlement on information and consultation in Europe … Core to any definition of consultation has to be consultation with a view to reaching agreement, in all forms of EU directive, because it should be akin to negotiation' (TUC interview).

Similarly, the ETUC (2012) argues for a complete rethinking of the provisions on workers' rights, with a view to bring the Directive in line with the rest of the Community acquis. The Directive contains very weak provisions on workers' rights and a revision of the Directive is clearly required, with a view to change the current shareholder value model into a broader stakeholder approach. In particular, the ETUC calls for a clear reference to Directive 2001/23/EC on safeguarding of employees' rights in the context of transfer of undertakings, as well as more effective sanctions on employers who infringe the Directive. Although offerors are required by the takeover directive to provide information on their 'intentions with regard to the future business of the offeree company', including employment levels and conditions, these stated intentions are frequently not fulfilled in practice, and there are no effective sanctions for this non-fulfilment.

The ETUC (2012) considers that:

> the only way to guarantee the respect of the obligations contained in the Directive is to provide that the legal effects of the takeover should be suspended until all the obligations have been adequately fulfilled. This should be the case in particular in instances of serious violations of employees' right to information and consultation.

Moreover, the ETUC argues that the takeover directive should grant employee representatives a right to expertise, the cost should be borne by management, and only employees' representatives should be able to select the most appropriate experts.

In the UK context, a number of broader measures have also been suggested in various reviews, and by journalists and critics (Hutton, 2010; HoC, 2010; Kay, 2012; Cox, 2013). They engage with the larger questions around making finance work better for industry, the wider economy and society. Some measures are weaker and more specific. They amount to putting more grit in the financial machine generally and helping to 'rebalance' the economy. Others require rather more sweeping reforms of company law and industrial relations. Such measures tie into the larger thrust of policy developing around the notions of 'responsible capitalism' (Davis et al, 2013) and the 'sustainable company' (Vitols and Kluge, 2011).

**Evaluation**

This study so far reveals two sets of challenges facing employees and their representatives involved in takeovers. The first is the operation of the Directive itself, such as discovering the offeror's intentions with respect to the target company. The second is the patchy coverage of the companies that may be investigated by the Takeover Panel, as our case studies reveal below (e.g. BA/Iberia, BMI/Lufthansa).

**Case study**

Our research focused on the European airline industry which, according to Coface, the French export credit agency, is heading towards a further round of mergers and acquisitions (Wall, 2014). An

earlier wave of mergers in the last five to ten years – linking Air France with KLM, BA with Iberia and Lufthansa with Swiss Air – failed to raise levels of profitability sufficiently in the context of a variety of challenges across the sector, including overcapacity, industrial action and intensifying competition from low-price airlines on short-haul flights and from newer entrants, such as Qatar Airways, on long haul. According to a report published by Coface, this competition 'is already undermining the entire European air transport industry a little more every day'. The report adds that 'the emergence of the EU super players will make it possible to confront the foreign competition' (Wall, 2014).

Indeed, in the USA, the top five airlines – United, Delta, American Airlines, Southwest Airlines and US Airways – accounted for 82% of domestic seating capacity in 2012, compared with 68% in 2008 (Parker, 2013). By contrast, in Europe, the top five airlines – Lufthansa, Air France-KLM, International Airlines Group (IAG), Ryanair and easyJet – accounted for only 52% of capacity across the EU in 2012, compared with 41% in 2008. These figures reveal that market concentration has increased, but lags well behind US levels. Furthermore, profitability is lower too, with European airlines having a combined net margin of 0.3% in 2012, compared with 2.3% for US carriers (Parker, 2013).

Given the likelihood of further mergers and acquisitions across the European airline sector in the foreseeable future, our case study focuses on the acquisition by IAG of BMI from Lufthansa, a transaction which was approved by the EU Commission in March 2012. International Airlines Group (IAG) is the holding company of British Airways, Iberia and Vueling, and is the third largest airline group in Europe, based on revenue. Following opposition by Virgin Atlantic to IAG's acquisition of BMI, IAG agreed to give up certain landing slots at London Heathrow.

British Midland International (BMI) Group had itself been taken over by Lufthansa in November 2009, and consisted of *BMI Mainline* (integrated into BA at the end of end October 2012); *BMI Regional* (sold to Sector Aviation Holdings in May 2012 and continues to operate); and *Bmibaby*, which closed down in September 2012. IAG had never wanted BMI Regional or Bmibaby, only BMI Mainline, the London Heathrow operation.

There had been only three shareholders of BMI: Michael Bishop, its Chairman, who held a controlling 50% + 1 share stake of BMI; Lufthansa, which held 30% minus 1 share stake; and SAS Airlines, which held the remaining 20%. In October 2008, Michael Bishop had sold his 50% + 1 share stake to Lufthansa for an undisclosed sum (reportedly about £318m). Lufthansa assumed full control of BMI in November 2009 when it bought out the SAS share.

The acquisition had not been referred to the Takeover Panel, on the grounds that Article 2(a) of its Code did not apply. This Article proclaims: 'The Code is designed principally to ensure that shareholders in an offeree company are treated fairly and are not denied an opportunity to decide on the merits of a takeover and that shareholders in the offeree company of the same class are afforded equivalent treatment by an offeror.' The Deputy Director General of the Panel stated: 'We see ourselves … very simply [as] … there to regulate the passing of corporate control in essentially widely held public limited companies …. If there's only a handful of shareholders, there isn't really a broad constituency that we're here to protect' (interview: June 2014).

The legal framework was provided by the Transfer of Undertakings Directive and the UK TUPE Regulations (the 'Transfer of Undertakings (Protection of Employment) Regulations 2006', as now amended by the 'Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014'. The TUPE regulations apply to organisations of whatever size and protect employees' rights when their organisation transfers to a new employer. Employers are required to inform and consult employees through 'appropriate' elected representatives, who are likely to be trade union representatives. This meant that the unions involved, including the British

Airline Pilots' Association (BALPA) and Unite the Union, had to rely on their own organisation within BA and BMI when negotiating terms and conditions for their members through established TUPE procedures, with no support from the Takeover Directive or the UK Takeover Code.

BA's intentions towards BMI were either to integrate BMI Mainline into its own operations or – its preference – to keep it as a separate stand-alone airline at London Heathrow (as a form of 'BA-lite'). By contrast, BALPA's strategy was to ensure integration of BMI, with its pilots fully assimilated into the BA bargaining unit. BALPA was completely opposed to the formation of a 'BA-lite' competitor that could be used to beat down terms and conditions at BA. Indeed, when BA had taken over Iberia through IAG, IAG had set up Iberia Express as a means to pressurise pilots in Iberia Mainline, a precedent that BALPA was determined to avoid with BMI. BALPA threatened industrial action if BA were to pursue BA-lite, to which BA responded by demanding that integration of BMI would require £10m in savings over four years, which BALPA felt constrained to accept, to be delivered in stages (75% fulfilled at the time of writing, with the final tranche due on 1 January 2015).

The issues facing BALPA in process of securing BMI integration into BA included negotiating the seniority principle within the merged airline (that is, the fusion of BA/BMI pilot promotion ladders), compromise agreements (where the seniority principle proved impossible to implement) and pensions (including compensation for loss of pensions).

These issues were negotiated through the existing procedures within the company, which consist of:

- *Company Council*: forum for BALPA and senior management;
- *National Sectional Panels* (NSPs): NSPs represent bargaining units for different job categories, e.g. Pilot NSP, Cabin Crew NSP and Engineering NSP;
- *BA Forum*: an inter-union body consisting of the national officer from each union in BA, e.g. BALPA, GMB and Unite for company-wide joint union consultation and negotiation on certain issues with its Chief Executive Officer, Chief Financial Officer and Human Resources Director (there are no lay union representatives).

Negotiations involving BALPA fell into two phases, phase one (finalised before the official acquisition) and phase two (agreed after the acquisition). Phase one, delivery of £10m savings, focused on the BA National Sectional Panel, while phase two covered remaining details, such as the integration of seniority lists. However, there was a separate challenge too, the negotiation of collective redundancies at BMI Mainline involving the closure of three BMI bases.

From the point of view of information and consultation, the most serious difficulty facing the unions to start with was that neither they nor BA/BMI management were allowed to work together – or consult – till after the acquisition for fear of allegations of price-fixing and collusion. The consequences for information and consultation *pre-acquisition* were that, until April 2012, BA union representatives could speak only to BA management and BMI reps could speak only to BMI/ Lufthansa, with separate meetings and only 'behind the scenes' unofficial cooperation. This resulted in a one-sided dimension to consultation: BA reps knew what they wanted (integration) but BMI reps were left uninformed and unable to admit to what they might know unofficially. These requirements for confidentiality led to fragmentation in the union's bargaining position, and contributed to the abolition of the BMI final salary pension scheme without consultation with the pilots affected and to limited compensation for loss of pension entitlements.

After April 2012, *post-acquisition* joint consultation took place involving BA/BMI management and union reps. From then on, BALPA was satisfied with the outcomes: 'I would say, in terms of the quality of the information that we got from BA, I have to say we couldn't … really criticise BA' (BALPA

Research Officer, May 2014). Outstanding issues were resolved, such as integration of the companies, the £10m savings, pensions and redundancies. Redundancies amongst BMI Mainline pilots were all voluntary and handled through early retirement, transfer from regions to London Heathrow or short periods of unpaid leave (though this eventuality was never invoked). However, while BMI Regional was sold on, IAG failed to find a buyer for BMI Baby, which had to stop trading. BA were unable to absorb its 150 pilots who felt like 'a little pawn in a game of chess between IAG and Lufthansa, and they were the sacrifice' (BALPA Research Officer, May 2014).Some found jobs with Norwegian at Gatwick but others were made redundant and were left feeling aggrieved.

As noted above, no reference was made to either the UK Takeover Code or the EU Takeover Directive during the acquisition. BALPA's success at BA in defending its members' interests was based on its high level of membership (90% density in BA); its well-organised representatives; its strategy, to achieve integration, backed by threat of industrial action (which was taken seriously by BA); its willingness to compromise over BA's savings plan; its direct access to the BA CEO and CFO through the BA Forum; and – arguably – the personalities involved. BALPA stressed that the current BA CEO and CFO are both negotiators, which created a different dynamic from the days of the former CEO, whose style had been much more autocratic. The principal challenges with respect to information and consultation occurred during the pre-acquisition phase, on grounds of confidentiality.

Seniority and pensions were specific issues for the pilots, but there was no joint strategy with GMB or Unite over redundancies. Overall, each union dealt separately with the specific issues confronting its own membership. Furthermore, the various European works councils (EWCs) were not involved. The Lufthansa EWC played no role in the acquisition; BMI had been taken over by Lufthansa only in 2009, and BMI union representatives had apparently not yet been involved in its EWC. 'I had my ear pretty close to the ground, and I don't remember, on any occasion, the BMI guys saying, "Oh, we've been in contact with Lufthansa and they told us this"' (BALPA Research Officer, May 2014). BA also has a EWC that does not yet cover Iberia or Vueling, though an IAG EWC is currently being organised. 'In relation to the BMI deal … I don't recall any information [processed through the BA EWC]… so no, it didn't feature' (BALPA Research Officer, May 2014). Finally, BMI itself had no EWC.

**Conclusions**

Neither the Takeover Code nor the Takeover Directive played any role during the IAG acquisition of BMI, the legal framework for which was application of the TUPE regulations. This was because the acquisition fell outside the provisions of the Code as it involved so few shareholders. BALPA handled the acquisition based on its own strength within BA (90% density, backed by threat of industrial action) and the willingness of both sides to negotiate – BA did not achieve BMI as a stand-alone airline, but on the other hand BALPA had to make £10m savings by way of concession. Pre-acquisition, BALPA faced its most serious challenge on grounds of commercial confidentiality, which prevented it from representing its members in both BA and BMI in a co-ordinated manner. Eventually, BMI Baby was arguably sacrificed for the 'greater good' of BA and the other two BMI airlines, Mainline and Regional.

The conclusion reveal two sets of challenges facing employees and their representatives involved in takeovers. First, certain aspects of the operation of the Takeovers Directive itself require scrutiny, such as clarifying the offeror's intentions with respect to the target company and strengthening the significance of appending the employee representatives' opinion to the offer document. The opinion currently does not open a genuinely consultative process with the offeror. Indeed, a far stronger definition of 'consultation' could be inserted, along the lines of that adopted in the redundancies and ICE directives. Second, the criteria for identifying transactions that may be investigated by the

Takeover Panel may themselves be problematic, as both the BA/Iberia and IAG/ BMI acquisitions fell through the net, the former because it was decided that the offeree was Iberia, a Spanish company not covered by the Code, and the latter because BMI had too few shareholders to qualify for investigation.

More broadly, our report has considered ongoing concerns regarding the effectiveness of the regulation of takeovers in the specific area of information and consultation of employees. The UK City Code remains a relatively weak instrument in terms of affording employees meaningful I&C rights. Johnston (2014) refers to this as 'flimsy protection', as shareholders will invariably focus exclusively on the premium being paid for their shares, and the recent Commission review gave insufficient attention to serious reform as this would 'strike at heart of shareholder value / managerial passivity'. The Marccus Report noted that in countries such as the UK, employee representatives were rarely informed in line with the Directive, and the Takeover Panel noted that it is very difficult for employee representatives to produce an opinion on an approved bid. Whilst the recent reviews, described above, have improved this situation, Johnston (2014) concludes that better employee protection probably depends on a 'renewed managerialism', wherein companies would be able to opt to take more adequate defensive measures against hostile takeovers.

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