

***Information and consultation  
during takeovers in the UK:  
the IAG/BMI case***

**Chris Rees and Michael Gold  
Royal Holloway University of London**

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# Directive on Takeover Bids (2004)

- First draft in 1974 at request of the Commission
- Differences between the 'UK Takeover Board' and 'Continental European' approaches
- Proposal made by the Commission in 1989
- Complicated legal history with numerous proposed amendments & revisions
- European Commission Action Plan on Company Law and Corporate Governance in 2003
- Milestones in the development of a neo-liberal approach to corporate regulation

2004 Takeovers Directive - takeovers enable needed restructuring and improve the efficiency of the European economy, and should thus be promoted

2012 Directive re-examined, and Commission published a Communication emphasizing the success of the Directive and downplaying the need for fundamental revision

But,

- weakness in formal worker rights to information
- frequent non-observance of these rights

Strong arguments for reform – TUC and ETUC positions

# Our research questions

To what extent has the Directive been effective in providing for worker and trade union input into corporate restructuring processes? Specifically, how have the following Articles of the Directive been implemented?

Art 3.1 (b) and Art 6.3 (i) - intentions of offeree company regarding employment, conditions of employment and locations of offeror company

Art 8.2 - disclosure of information to employees and/or their representatives of both offeree and offeror companies

Art 9.5 - disclosure of document of board of offeree company to the bid to employee representatives and/or employees and their right to provide a separate 'opinion' on the bid, to be attached to the document

Art 10.1 (e) - information on employee share schemes, if these were in place

- How did the Directive impact upon the Takeover Code in the UK?
- Have the revisions to the Takeover Code in the UK, in light of the Kraft/Cadbury case, allowed for improved information and consultation during the takeover period?
- How far have unions taken advantage of the new provisions?

# Position of the UK Takeover Panel

Directive on Takeover Bids (2004):

- Put the Takeover Panel on a statutory basis
- Takeover Code provisions adapted to meet the requirements of the Directive
  - information must be made 'readily and promptly available'
  - employee reps must be allowed to append an opinion to the offer document

Review of the Takeover Code (2011):

- Followed the Kraft/Cadbury case (after promising to keep Cadbury's Somerdale factory, near Bristol, open, Kraft backtracked and said it would close the plant)
- Bidding firms now required to give more information about their intentions towards the firm after the takeover (including repercussions for jobs and assets like factories)
- Employees now informed at an early stage of their right to append an opinion
- Offeree company to reimburse costs of employee representatives preparing a circular

# Position of the ETUC and TUC (1)

- Serious weaknesses in the Takeover Code
- An opinion may be taken into account, but it does not have to be considered
- Underlying principle should be 'consultation with a view to reaching agreement' (cf. I&C in redundancies and ICE Directives)
- There remains considerable concern over the takeover regulatory regime in the UK

Current provisions support a 'shareholder value' approach:

- takeovers a key mechanism for increasing efficiency
- hostile takeovers a weapon for removing incompetent or self-serving management
- advocates an 'open market for corporate control'
- regulations facilitate companies being bought up and prohibit management from blocking takeovers of their company with defensive measures

## Position of ETUC and TUC (2)

Need to shift to a more 'stakeholder' philosophy on takeovers:

- Takeovers 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, regulations need strengthening to allow managers to take defensive measures against hostile bids and to give workers a meaningful 'voice' or even veto right in the takeover process

By way of illustration of the challenges, we present the IAG/BMI case study...

# Airline sector

USA: top five airlines – United, Delta, American Airlines, Southwest Airlines and US Airways – accounted for 82% of domestic seating capacity in 2012 (68% 2008)

Europe: top five airlines – Lufthansa, Air France-KLM, International Airlines Group (IAG), Ryanair and easyJet – accounted for 52% of capacity across EU in 2012 (41% 2008)

Profitability lower too, European airlines having a combined net margin of 0.3% in 2012, compared with 2.3% for US carriers (Parker, 2013)

# Acquisition by IAG of BMI from Lufthansa (March 2012)

Acquisition by IAG of BMI from Lufthansa was approved by the EU Commission in March 2012.

- International Airlines Group (IAG): holding company of British Airways, Iberia and Vueling (formed January 2011) - third largest airline group in Europe, based on revenue
- Lufthansa Group: largest group in Europe, by revenue
- British Midland International (BMI): taken over by Lufthansa November 2009, acquired by IAG March 2012



# BMI

BMI Group consisted of:

- *BMI Mainline* (integrated into BA end October 2012)
- *BMI Regional* (sold to Sector Aviation Holdings in May 2012 and continues to operate)
- *Bmibaby* closed down in September 2012

(IAG had never wanted BMI Regional or Bmibaby, only BMI Mainline, the LHR operation)

# **BA's intentions towards BMI**

BA to integrate BMI Mainline into its own operations or keep it as a separate stand-alone airline at LHR ('BA-lite')

British Airline Pilots' Association (BALPA) strategy: to ensure integration and BMI pilots covered by the BA bargaining unit - a BA-lite competitor would be used to beat down terms and conditions at BA (IAG had set up Iberia Express to pressurise pilots in Iberia Mainline)

## **BA's response to BALPA**

Integration to cost pilots £10m in savings over four years – agreed by BALPA to deliver in stages (final tranche on 1 January 2015)

BALPA threatened industrial action if BA were to pursue BA-lite.

## Details of integration

*Issues facing BALPA:*

- Seniority principle – necessary to merge BA/BMI promotion ladders
- Compromise agreements
- Pensions (including compensation for loss of pensions)

*Issues facing BA HR:* to negotiate agreement without disruption

# Challenges facing BALPA

- Phase 1: delivery of £10m savings (agreed before official acquisition)
- Phase 2: remaining details, e.g. integration of seniority lists (agreed after acquisition)
- Separate challenge: collective redundancies at BMI Mainline (closure of three BMI bases)

*BA/BMI management and unions not allowed to work together – or consult – till after the acquisition for fear of allegations of price-fixing and collusion*

# Consequences for I&C (1)

Until April 2012, BA reps spoke to BA, and BMI reps spoke to BMI/ Lufthansa – separate meetings with only ‘behind the scenes’ unofficial cooperation

One-sided nature of consultation: BA reps knew what they wanted (integration) but BMI reps were in the dark (and couldn’t admit to what they might know unofficially)

- BMI final salary pension scheme abolished without consultation with pilots affected
- Limited compensation for loss of pension entitlements

Hence issues of confidentiality

## Consequences for HRM (2)

After April 2012, joint consultation took place involving BA/BMI management and union reps:

‘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 dealt with (integration, £10m savings, pensions, redundancies – though BMI pilots aggrieved for loss of pensions)

# External environment

No reference to the UK Takeover Code or EU directives during the acquisition

BALPA's success at BA based on:

- High level of membership (90% density in BA)
- Well-organised reps
- Strategy – integration, backed by threat of industrial action (taken seriously by BA)
- Compromise over BA's savings plan
- Direct access to CEO and CFO through the BA Forum
- Personalities: Keith Williams (BA CEO) and Nick Swift (BA CFO) both negotiators, hence different dynamic from days of former CEO, Willie Walsh

However, problems at BMI pre-acquisition on grounds of confidentiality



## Possible future reforms?

- Marccus and Partners Report (2012) focused on economic arguments for addressing the social costs of takeovers
- Commission (2012) took no notice as these arguments questioned shareholder value and raised issues of structural reform

# Exercise of rights by employees

- Marccus Report observes employee representatives were seldom informed in line with the Directive in the UK and elsewhere (para. 102)
- Takeover Panel observed it was hard for employee reps to respond to an approved bid with an opinion – Code now states that the target company must inform employees of right to circulate opinion at earliest opportunity

# The Commission's response

(COM (2012) 347 final)

- Commission omits impact on employees from list of market failures, only those affecting shareholders
- Directive 'working satisfactory'
- Commission will continue dialogue with employee reps to seek greater protection for employees with regard to 'changes in work conditions and job availability' – likely to be confined to I&C changes
- Commission favours I&C, presumably because it does not impinge on market for corporate control
- However, I&C is not sufficient to prevent market failure because employees must still rely on shareholders rejecting the bid

# Conclusions

- Aspects of the operation of certain Directives, like the Takeovers Directive, require clarification
- Issues of confidentiality
- Definition of ‘consultation’ (cf. directives on collective redundancies and information and consultation):
  - ‘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 directives, because it should be akin to negotiation’ (TUC interview)
- Above all, what is a ‘good company’? In whose interests do companies operate? Narrowly shareholders, or more broadly other stakeholders?

# Acknowledgement

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