The Collapse of the European Union Directive on Corporate Takeovers: The EU, National Politics, and the Limits of Integration

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Discussion Paper

John W. Cioffi*

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I. Introduction

The twelve-year process of debating, amending, and garnering support for and opposition against the 13th Directive on Takeover Bids is now over. An unusual coalition of Christian Democrats and Social Democrats killed the Directive in the European Parliament. The defeat of this effort was effected by a broad political backlash led by managerial and labor interests against the adoption of Anglo-American "shareholder capitalism," a mode of economic organization that favors shareholder interests in the governance of firms and the economy as a whole. The rejection of the Directive may represent the end of an agenda for the harmonizing of company law and the uniform regulation a common market for corporate control in the European Union. It certainly delays the completion of the much-vaunted Financial Services Action Plan for a single unified market in financial services in Europe by 2005 and may require a substantial reconsideration of what this unified market will look like in the end. For a number of reasons, considered below, the Takeover Directive may constitute the high water mark of an attempt to import neo-liberal governance structures into Continental Europe.

The extraordinary interplay of domestic and EU politics and the fractiousness of EU political actors and institutions triggered by the Takeover Directive prompts a wide range of questions central to the future of political and economic development in Europe. These issues can be examined at three broad levels of analysis. The first level of analysis focuses on the intense political struggle over the Takeover Directive provides a window into the domestic politics of economic and legal reform at the level of the member states. To answer why this Directive failed when initiatives in so many other areas, ranging from financial services to data privacy, have not generated such broad opposition requires an analysis of the domestic interest group politics in the member states. Second, the collapse of the Takeover Directive indicates changes in the allocation of policymaking power and regulatory capacity in Europe. What does the failure of such an important EU initiative indicate about agenda setting and policy making in the EU, particularly with respect to the balance of power between the Commission, the European Parliament, and the member states? The third level of analysis concerns the practical repercussions and implications of the failure of the Directive and compels consideration of a advanced continental economy without a basic mechanism of corporate and sectoral restructuring and a mode of corporate governance and capital reallocation that has come to

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* Assistant Professor, University of California, Riverside, Department of Political Science and Research Associate, Berkeley Roundtable on the International Economy.

occupy a central place in the technology-driven American political economy. Conversely, the collapse of the dot.com-fueled stock market bubble over the past eighteen months may call into question the oft-assumed necessity of embracing Anglo-American models of finance and corporate governance as a precondition of commercializing new technologies and ratcheting up the pace of technological and economic innovation in Europe.

The discussion that follows hypothesizes that the failure of the Takeover Directive, and with it the creation an American-style market for control complete with hostile takeovers, represents a substantial shift in (though not a breakdown of) EU governance patterns, but will not seriously impede European economic and technological development. The failure of the Takeover Directive and the apparent continued paralysis in the harmonization of European company law does indicate that institutional and economic development in European countries and the EU as an entity will follow a different path from that traveled by the United States (or, for that matter, in the United Kingdom) since the early 1980s. The institutional structures at the national and EU levels will generate distinctive comparative advantages (and disadvantages) for European economies, *vis a vis* the United States, and will create different policy challenges. Three propositions derived from the evolution, denouement, and analysis of the Takeover Directive are advanced to provoke and facilitate discussion of the current status of company law and the prospects for corporate restructuring across Europe[1]:

(1) The EU Commission's push to adopt a Takeover Directive activated cross-cutting political cleavages in European national polities and has interposed national politics as a significant constraint on neo-liberal trends in EU policymaking and the construction of an integrated European market economy along liberal market lines.

(2) The failure of the Takeover Directive reveals the emergence of multiple power centers within the EU that threaten to complicate and diminish the EU's capacity to formulate, enact, and implement policies to promote the restructuring of markets and economic modernization. The medium to long term implications of this development may be political deadlock that prevents Europe from creating an integrated market with attendant economies of scale, and the shift from established sectors to those base on new technologies.

(3) The consequences of the Takeover Directive's failure should not be overstated: a significant market for corporate control already exists in Europe, competitive product markets drive innovation and adjustment, and the substantial and ongoing harmonization of securities market regulation is sufficient to allow substantial corporate and sectoral restructuring, the formation of risk capital, and its reallocation to more productive uses. Rather, the true significance of the failure of the Takeover Directive Europe's development of a distinctive model of capitalism that likely will embody and encourage policy preferences and competitive strategies divergent from those characteristic of the American model of capitalism.

[1] Note that these propositions are framed in hypothetical fashion to raise the salient issues and provoke discussion. As the following discussion will indicate, they are not intended to state propositions of fact or a set of mutually consistent theses.

II. Background

The harmonization of company law, of which a common takeover code is a central component, has been on prominent agenda item of the EU for nearly thirty years. The first formal incarnation of the recent Takeover Directive proposal dates back to 1989 as amended in 1990.[2] The original draft proved too detailed and prescriptive, as the number of specific features magnified conflicts over the proposal among member state governments, interest groups, and within the European Parliament. The Commission sought to avoid a complicated legislative battle by presenting a more general framework for the draft Takeover Directive in 1996 and a further amended draft version in 1997.[3] The Council unanimously adopted a common position on the draft Directive in June 2000 and Commission accepted that common position in July 2000. Sent to the European Parliament in September 2000, the Parliament approved the draft Directive with fifteen amendments in December 2000. The Commission and Parliament disagreed on a number of amendments drafted to allow greater managerial latitude in adopting defenses against hostile takeovers and greater consultation rights of employees of the target company.[4] As a result, the Commission and Parliament initiated a conciliation process to resolve the impasse. In the meantime, the Lisbon meeting of the European Commission identified the Takeover Directive a policy priority for the increased competitiveness of the EU economy. With less than a day to the expiration of a treaty imposed deadline, the Commission and Parliament agreed to a common position on the Directive on June 6, 2001, and formally submitted the draft Directive for the required bare majority vote of approval by the European Parliament. This vote constituted a watershed event in economic and corporate governance on the Continent, but it was not to be the major advance toward EU policymaking and market harmonization envisioned by its drafters and its backers within the European Commission.

The draft Directive was the clearest and most far-reaching attempt to introduce Anglo-American concepts of shareholder value, and shareholder capitalism generally, into the European political economy. And for this reason, the Directive became one of the most divisive pieces of legislation to ever come before the European Parliament, sparking fierce opposition and unusual alliances that reveal the substantial social and political differences between Anglo-American neo-liberalism and the legacies of Continental statist and corporatist political economic institutions. The principles articulated in the Directive would have made takeovers much easier. By far the most controversial provision and the lightning rod of opposition, Article 9 of the draft imposed a requirement of "neutrality" on directors and senior managers in responding to a hostile takeover bid.[5] This would have prohibited corporate boards and managers from adopting

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[2] *See* Thirteenth Council Directive on Company Law Concerning Takeover Bids, OJ C 64, 14.3.1989, p. 8; European Commission's Amended Proposal, 10 September 1990, OJ C 240, 26.9.1990, p. 7.

[3] Second Proposal for a Thirteenth Directive on Company Law Concerning Takeover Bids, OJ C 162, 6.6.1996, p. 5; Third Amended Proposal, OJ C 378, 13.12.1997.

[4] This indicates the novel politics and structural dynamics of efforts to reform European economies: the counterattack against a stringent piece of neo-liberal legislation, the Takeover Directive, combined an embrace of quintessential American anti-takeover defenses and an extension of codetermination rights—a quintessential European and social democratic form of corporate governance

[5] Article 9 provided:

poison pills and other defensive measures without shareholder approval and would have prohibited the solicitation of shareholder approval in advance of a hostile bid. The fight over Article 9's neutrality duties eclipsed provisions, contained in Articles 3 and 10, requiring equal treatment of all shareholders of a target corporation and member state implementing legislation containing mandatory bid rules compelling an offer for all outstanding shares of a publicly trade firm when the acquirer's holdings exceeded a specified level. This controversy shifted the political debate from the improvement of European corporate governance and securities markets, which the equal treatment and mandatory bid requirements would have advanced, to one over the economic and social desirability of hostile takeovers. Despite the indications of deep-seated opposition in the European Parliament, the Council rejected a substantive amendment loosening the restrictions on defenses and agreed only to an extension of the phase-in period for the provision from four years to five.

The anticipated benefits of the draft Directive should not be blithely dismissed. The draft Directive would have increased both securities market liquidity and the capacity for corporate restructuring throughout Europe. Europe would have begun to create the structural conditions for more potent and relentless market pressures to force economic restructuring at the firm, sectoral, and national levels. The Takeover Directive would have created more powerful market and governance forces to break up conglomerates in favor of increased concentration and specialization through increased mergers and spin-off transactions. This would have helped sectors to consolidate and rationalize on a European basis. The draft directive also would have helped to increase the attractiveness and thus the development of European equity markets by shifting rents to shareholders. This would have been good news for technology-intensive sectors, requiring venture and risk capital with access to deeper and more liquid equity markets than Europe has been able to provide historically.[6] The recent takeover of Telecom Italia netted insiders (who themselves had launched a successful takeover of the company only a few years before) an 80% premium for their controlling block of shares without any benefit to the remaining minority shareholders who will have to bear the increased risks of leverage incurred to finance the acquisition. It is precisely this sort of inequitable rent stripping by insiders that the Directive was to have eliminated. In the absence of protective rules, Continental stock markets have been and are likely to remain less attractive and developed than those of the United States and the United Kingdom.

The neo-liberal approach to corporate governance, and to hostile takeovers in particular, embodied in the draft Directive also must be weighed carefully and comparatively. The perceived deficiencies of American shareholder capitalism were not lost upon the politicians and

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Obligations of the board of the offeree company

Member States shall ensure that rules are in force requiring that:
(a) after receiving the information concerning the bid and until the result of the bid is made public, the board of the offeree company should abstain from any action which may result in the frustration of the offer, and notably from the issuing of shares which may result in a lasting impediment to the offeror to obtain control over the offeree company, unless it has the prior authorization of the general meeting of the shareholders given for this purpose;
(b) the board of the offeree company shall draw up and make public a document setting out its opinion on the bid together with the reasons on which it is based.

[6] However, as Eliot Posner argues in another discussion paper in this series, Europe has developed a venture capital industry and technology intensive securities markets with surprising speed and success.

interest groups throughout the European Union. First, takeovers have, at best, a mixed record as a mechanism of corporate and economic restructuring and as a disciplinary mechanism in corporate governance. The empirical record on the efficiency-enhancing benefits of takeovers at the firm and macroeconomic levels does not support the rather expansive claims of proponents. Takeovers and much of the policy and legal infrastructure of shareholder capitalism arguably reflect rent seeking rather than an agenda for economic competitiveness (despite the rhetoric to the contrary). The draft Directive threatened to bring to Europe many of the less desirable side-effects of American capitalism and the hostile takeovers of the 1980s: excessive leverage, downsizing, diversion of capital from long-term strategies and investment to short-term profits and returns, and growing income inequality between holders of capital and wage earners, and between senior managers and ordinary employees.

Second, by the time the Directive reached the European Parliament the American boom in the American stock markets and the high technology sector had collapsed and was threatening to bring the entire economy into recession. The economic boom of the 1990s had animated the push for more finance friendly policies and regulatory regimes at the national and EU levels throughout the decade and these efforts reached their apotheosis in the Takeover Directive. European policy elites, public and private, had been preoccupied with adopting structural features of the American economy that were perceived as facilitating extraordinarily robust economic growth and technical innovation. The Takeover Directive was regarded as a means of increasing market discipline over managers, expanding the financing capacity of securities markets, and speeding the restructuring of European industry. The wreckage of the dot.com crash cast considerable doubt over the utility of shareholder capitalism and increased shareholder power as a means of promoting faster, stable, and equitable economic growth. The end of the American boom left critics of the neo-liberal model of capitalism with ammunition to attack the export of this economic model to Europe. Accordingly, they attacked the draft Directive's emphasis on empowering finance capital to maximize returns as an engine of economic and social destabilization and an inappropriate mechanism to restructure the economy.

These concerns were shared throughout much of Europe and as such they sparked a European debate on the desirability of hostile takeovers and any legal reforms that would encourage them. However, by June of 2001 the majority of EU member state governments had approved the draft Directive, as had the European Commission. The political opposition that killed the Directive began in Germany and grew to shift the balance of power in the European Parliament against the measure. An examination of the German politics of takeovers is necessary to explain this sequence of events.

A. German Politics

Two factors drove the ultimate rejection of the Takeover Directive by the German government and German members of the European Parliament: interest group politics and its intensification by the vulnerability of German corporations created by domestic governance reforms enacted in Germany *prior* to the consideration of the Directive in its final form. Mounting opposition and the weakening of the government's resolve in support of the measure came as a shock to other European governments, especially those of Sweden (holding the EU presidency at the time) and the United Kingdom (the Directive's biggest proponent). The

German government had been a strong proponent of the measure.[7] German Chancellor Schroeder's tax reforms were deliberately designed to encourage takeovers and restructuring by lowering the tax barriers to corporate sales of cross shareholdings that protected German companies from hostile bids. In fact, the proposed German takeover law, still under reconsideration, was modeled on the draft Directive. Only a few weeks from completion of the political process, the German government shifted its position to oppose the Directive, generating accusations of betrayal from other EU governments.[8]

First, and most generally, domestic politics reasserted themselves because of the direct and inherent threat posed to vested economic interests by takeovers. Managers reportedly led by those of DaimlerChrysler, Volkswagen, BASF, and several German chemical companies saw the directive as a threat to their own positions and that of German corporations generally.[9] Volkswagen was a particularly effective lobbyist.[10] Lower Saxony owns one fifth of VW shares, and politicians at the state ("Land") level had no desire to see shareholder pressure induce job cuts or plant closures. They were even more opposed to legal changes that might make VW vulnerable to a takeover in a consolidating global automobile sector. In short, they did not want to see what happened in the American car industry (*i.e.*, downsizing and Chrysler-style takeovers) repeat itself in Germany. More broadly, the hostile takeover of Mannesmann by the British Vodafone had steeled opposition to takeovers across a broad swath of German interest groups and voters. Indeed, far from heralding the beginning of a wave of domestic and cross-national hostile takeovers in Germany, the 1998 Mannesmann takeover remained a unique event.[11] The German industrial unions were adamantly opposed to the importation of Anglo-American forms of law, governance, and economic organization. Organized labor saw the Takeover Directive as a means of shifting both power and income from employees to shareholders, as had been the case in the United States and United Kingdom since the 1980s. However, German unions are far more politically and economically powerful than their American, British, and French counterparts. German managers and labor thus formed a potent coalition across class and ideological lines to oppose the Directive.[12]

Second, the opposition was intensified by the sequence of domestic corporate governance reforms in Germany that had the effect of rendering German corporations particularly vulnerable to takeovers under the terms of the Directive.[13] Germany outlawed golden shares and

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[7] *See* "Takeovers? Nein!" *The Wall Street Journal Europe*, REVIEW & OUTLOOK (Editorial), May 30, 2001, available on Westlaw, 2001 WL-WSJE 21829756; "Takeover Troubles," *The Economist* (May 10th 2001); Gledhill, Dan, "The Thing Is... Hostile Takeovers," *The Independent – London*, December 17, 2000 (Business Section), available on Westlaw, 2000 WL 29496281.

[8] *See* Hargreaves, Deborah, "Germany Backs out of EU Corporate Takeover Accord," *Financial Times*, May 1, 2001; Krause, Klaus Peter, "Shareholders May Soon Have the Right to Block Takeovers in Advance," *Frankfurter Allgemeine Zeitung*, May 8, 2001.

[9] *See* "Takeovers? Nein!" *The Wall Street Journal Europe*, REVIEW & OUTLOOK (Editorial), May 30, 2001, available on Westlaw, 2001 WL-WSJE 21829756; Simonian, Haig, "Berlin Bows to Pressure," *Financial Times*, May 2, 2001.

[10] *Id.*

[11] *See* "Hostile Bids Give Way to Millennium Sensitivities," *The Financial News*, June 11, 2001, available on Westlaw, 2001 WL 12506312.

[12] Simonian, Haig, "Berlin Bows to Pressure," *Financial Times*, May 2, 2001.

[13] *See* Oxford Analytica, "EUROPEAN UNION -- Takeover Tensions," *In Perspective , The Analytica Weekly Column*, May 24, 2001.

differential share voting rights in 1998 (under the Control and Transparency Law) and in 2000 passed a far-reaching tax reform law ("Steuerreform") intended to erode cross-shareholding. While prohibiting most defenses to hostile takeovers undertaken by managers and corporate boards, the Takeover Directive would have *allowed* both golden shares and cross-shareholding to shield those companies with such ownership structures. Golden shares eliminate the need for alternative defense mechanisms by vesting control in the minority holding them. Cross-shareholdings perform a similar defensive function by taking a large number, and sometimes a majority, of shares out of "play" and away from the threat of a tender offer. (They also destroy the value and financing utility of equity by reducing the turnover of shares and therefore the liquidity of investments and by precluding a market for control that benefits all shareholders.) This left German firms asymmetrically vulnerable to takeover threats from firms based in France, Italy, and the Netherlands where golden shares are common, and Italian firms within protective webs of cross-shareholdings and ownership "cascades." Ironically, the draft Directive also would have placed far more stringent restrictions on takeover defenses than any state in the United States.[14] American firms, by far the world's most savvy and experienced in M & A activities, have greater latitude under state corporate law to adopt poison pills and other defenses prohibited under the draft Directive. Thus, German firms would have been threatened with takeover by American firms better suited by their financial and governance structures, hard won tacit knowledge of the offensive and defensive techniques of takeovers, and well-developed relations with financial institutions specialized in takeovers and related financial activities. The (remarkably belated) realization of how mismatched German corporations might be under the draft Directive mobilized broad-based opposition and induced the German government's shift against the directive.

In the Commission, the Germans were pressed by other member state governments into signing on to the Conciliation Committee draft after being outvoted initially by 14-1. The Germans tried to kill article 9 outright and, failing that, then proposed a blanket *prospective* consent for any and all future poison pills and other defenses.[15] The Commission also rejected this proposal in the Conciliation Committee. The opposition then moved to the European Parliament, which was then faced with a stark choice between a neo-liberal takeover framework and an outright rejection of the draft Directive and twelve years of work.

B. EU Politics

Following the conciliation procedure in late May and early June, the Germans continued to attack the draft Directive. German Christian Democrat Klaus Heiner Lehne was both the

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[14] *Cf.* "Shopping around in Europe," *The Economist* (Global Agenda), June 6, 2001; Betts, Paul and Deborah Hargreaves, "No Way In," *Financial Times*, May 2, 2001. An additional irony is that many commentators complained that Germany's Daimler-Benz enjoyed just such an advantage in takeover protections when it acquired Chrysler in 1998, and that the protected position of German firms had allowed them to be aggressive acquirers of other European companies during the late 1980s and early 1990s when European industry experienced a consolidation wave in anticipation of the pan-European market created by the Maastricht Treaty and the Single Market Act of 1992.

[15] This shareholder consent would have been approved in a resolution voted on at any annual general meeting of the shareholder and would then operate indefinitely to authorize management and directors to adopt anti-takeover defenses. *See* Krause, Klaus Peter, "Shareholders May Soon Have the Right to Block Takeovers in Advance," *Frankfurter Allgemeine Zeitung* (English Edition), May 8, 2001.

rapporteur for the Directive and the leader of the opposition to it. Lehne, hailing from the area near Mannesmann's home base in Dusseldorf, argued that the draft Directive failed to address the remaining substantial differences among the company laws of different countries and that these variations would confer unfair advantages in an ensuing struggle for economic power through corporate control. Though the fear was significantly overstated, he also argued that German and other European corporations would be at a disadvantage against better defended American firms in an international market for corporate control.[16] While Lehne emphasized that the Takeover Directive would put *German* companies at a competitive disadvantage against other European and American companies, he framed his arguments in terms of a broader reallocation of corporate and economic power that would operate unequally across EU member states. These arguments resonated with European Parliament members from a number of member states.

In the European Parliament, only the liberals supported the Conciliation Committee compromise as a united block (the fifty-two MEPs affiliated with the Liberal, Democrat and Reform parties).[17] The two major parliamentary blocks, the Party of European Socialists (the Social Democrats with 181 members) and the European People's Party (the Christian Democratic block with 232 members), both split along national lines. Two issues stressed by Lehne predominated.[18] First, the draft Directive left "golden shares" intact and permitted their continued deployment and use (as has a recent preliminary opinion of a Advocate General of the European Court of Justice). This share structure, common in France and the Netherlands, would give firms possessing it a strategic advantage in the market for control.[19] This was especially worrying to firms in Italy and Spain under takeover threat from French companies—some recently privatized and endowed by the government with golden shares. Second, the fear of cross-national takeover threats from American firms and financial institutions raised by German representatives was reportedly widely shared across Europe. The opposition block used these two asymmetries to undermine support for the draft Directive in the European Parliament.

Finally, the draft Directive was perceived as posing a direct threat to national sovereignty in a core area of political economic organization. Corporate governance links capital markets, labor relations, and the internal adjustment capacities and comparative advantages of national economies in a complex institutional framework. Company law mediates all these relations by

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[16] Apparently, the countries continuing to support the Directive by and large believed they would gain more within Europe than they would lose to any American encroachments on their national firms. However, the fear of attack from imperviously entrenched and defended American firms substantially misstated the state of American law in the most important corporate law jurisdictions. In Delaware in particular, takeover defenses are permitted, but fiduciary duties prevent them from *completely* blocking takeovers. In practice, they can delay and improve the premium paid for a controlling stake and this has led to the virtual disappearance of hostile takeovers in the United States since the 1980s. In this light, it is arguable that the United States has struck a reasonable balance with respect to hostile takeovers by making them difficult, but not impossible, and that the Takeover Directive failed to strike a similar reasonable balance. That argument, however, was not advanced in the battle over the Takeover Directive.

[17] *See* Hong, Victorya, "Vote on European Takeover Law Heats Up," *The Daily Deal*, Monday, July 2, 2001, available on Westlaw, 2001 WL 20235168.

[18] *Id.*

[19] For an account of the manipulation of share and ownership structures to ward off threats of takeover in the Netherlands and a provocative comparison with Delaware law allowing opinion pills, *see* Raghavan, Anita, "Deals & Deal Makers: Netherlands Remains Cool to Investors' Concerns," *The Wall Street Journal*, December 22, 2000, available on Westlaw, 2000 WL-WSJ 26620875

supplying the framework of rules within which competing interests are recognized and, to the extent possible, reconciled. The Takeover Directive threatened to impose a substantial change in the duties of managers and directors, on the one hand, and the rights of shareholders, on the other. Thus, it would have disrupted these complicated and potentially contentious relationships and the distinctive balance of interests worked out at the national level over the post-war period. The longer-term implications of the draft Directive posed a threat to German and Dutch codetermination, which endow employees with a significant institutionalized voice in corporate governance, would have been significantly circumscribed by the draft Directive's neutrality requirements in takeover situations when the interests of shareholders and employees would come into sharpest conflict. Further, the neo-liberal governance structures and practices heralded in the Takeover Directive threatened the EU's more corporatist countries with significant economic and political disruption. This threat was most pronounced in countries where corporatist structures and practices of negotiation pervaded the firm itself.[20] These countries, including Germany, the Netherlands, and Austria, have well-developed institutional arrangements underpinning stable, long-term linkages between capital suppliers and industrial firms, and a more negotiated and consensual form of firm governance based on tripartite relations among management, capital, and employees. From the vantage point of organized labor, social democrats, and many Christian democrats, the neutrality provision was not neutral at all, but a decisive shift in the legal framework of corporate governance in favor of shareholder interests and neo-liberal shareholder capitalism. Conversely, even in the United Kingdom, the source of the most unequivocal political support for the Takeover Directive, there were criticisms that the measure's imposition of more uniform legal standards would *weaken* shareholder protections under British corporate governance rules and derogate from the country's sovereignty.[21]

By a tied vote of 273 to 273 (with 22 abstentions) the European Parliament rejected the draft Directive in the final form adopted by the Conciliation Committee.[22] A block of MEPs comprised of both Christian democrats and social democrats, largely from Germany, the Netherlands, Austria, Spain, and Italy embraced Lehne's position.[23] Opponents argued that there would be no "level playing field" in the market for corporate control at the European or international levels and that the Conciliation Committee's draft failed to address these concerns.[24] MEPs also stressed their resentment of and opposition to the inflexible attitude often shown by Council and Commission in the conciliation process (and thereby flexed their own institutional muscles).[25]

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[20] Hence, Scandinavian countries such as Sweden, where corporatism is manifest at the national and sectoral levels and less evident within the firm, did not display the same levels of hostility towards the Takeover Directive as did Germany, the Netherlands, and Austria.

[21] Tringham, Melanie, "Bid Battles Under Attack," *The Times of London*, December 21, 2000, available on Westlaw, 2000 WL 28139519 (noting that opposition to the draft Directive increased in the UK in response to German and EU Parliament attempts to amend it to allow freer use of defensive measures).

[22] EU rules required a bare majority in the European Parliament for adoption of the Directive.

[23] Unfortunately, at the time of this writing, a breakdown of the voting in the European Parliament was not available.

[24] *See* Klaus- Heiner Lehne (EPP-ED, D), "Takeover Agreement Rejected After Tied Vote," Report on takeover bids - proposal for a 13th Council directive (Press Release), Doc.: A5-0237/2001 (Procedure: Codecision procedure (3rd reading), Debate: July 3, 2001, Vote: July 4, 2001).

[25] *Id*.

III. Three Propositions for Discussion: Implications of the Failure of the Takeover Directive and the Future Prospects for European Corporate Governance

The failure of the Takeover Directive raises a wide array of critically important issues. The politics of the Takeover Directive battle cast light on the substantial political economic differences among Continental European countries, and between these countries and the liberal market economies led by the United States and the United Kingdom. Further, these politics reveal the political and economic tensions and cleavages within Western European countries and within the EU over the phenomenon of economic liberalization and globalization. The splits opened in the struggle over the draft Directive may indicate the opening of a new phase in the EU's institutional development and in European attitudes towards the organization of the economy and the mechanisms fashioned for its governance. Of the many issues raised by these considerations, only a few can be dealt with here.

(1) The EU Commission's push to adopt a Takeover Directive activated cross-cutting political cleavages in European national polities and has interposed national politics as a significant constraint on neo-liberal trends in EU policymaking and the construction of an integrated European market economy along liberal market lines.

The cooperation of Social Democrats and Christian Democrats in both Germany and in the European Parliament suggests that the Takeover Directive failed because it threatened a range of economic and ideological interests and thus triggered opposition from across the political spectrum. A combination of interest group politics and ideology appears to have driven the debate in the European Parliament. A coalition of managerial interests with close ties to the Christian Democrats and labor interests represented by Social Democrats saw their (usually divergent) interests threatened by the empowering of equity capital in corporate governance.[26] These constituencies may be favorably disposed to other forms of economic modernization, including financial market development and improved securities regulation, but they were resistant to conferring as much power and influence to finance capital as contemplated by the Takeover Directive. Both interest groups saw the Takeover Directive as a threat to the job security of managers and employees alike. They also viewed it as contrary to the long-term corporate planning and (relatively) egalitarian norms characteristic of European variants of capitalism. Accordingly, rejection of the draft Directive constituted a rejection of has been identified as American "short-termism" and the massive shifting of rents and wealth to holders of financial assets in the United States since the early 1980s. This interest group politics suggests why the EU has been quite successful in advancing securities law reform, but has been paralyzed in its attempts to harmonize company law. More developed securities markets may sharpen economic pressures on firms, but such policy efforts seek to perfect capital markets rather than extend the market to corporate control itself. They therefore do not fundamentally reallocate power within the firm or the economy as a whole. A more cynical view, however, is that European managers wanted a balance between takeover facilitating rules and permissible defense

[26] This is only a crude sketch of the interest group politics and representation. There are many managers with close ties to Social Democrats as these parties have moved towards the center during the 1990s. Most notably, Volkswagen, where Schroeder once had been a supervisory board member as the premier of Lower Saxony, has close ties to the German Social Democratic party and the government in Berlin. Likewise, some Christian Democrats had ties to organized labor (or at least did not want to unduly antagonize the labor movement).

mechanisms that would, as in the United States, command greater rents for senior executives through golden parachutes and stock options. In this view, managerial opposition to the Takeover Directive does not indicate rejection of the American model, but a desire to emulate it more perfectly.

The political breakdown of consensus on the Directive produced fractures along largely national lines.[27] These lines separated the Germans, Dutch, Austrians, Spanish, and Italians, from the British, Irish, French, Swedes, and Danes. The division between these country groupings appears to have hinged on the perception of how threatening more liberal takeover rules would be to powerful organized interests, namely incumbent managers and labor. These interest groups in the former group of nations perceived takeovers as a far greater threat than those in the second.

These divisions, and thus the outcome of the struggle over the Takeover Directive, can be most readily explained through an institutional analysis focusing on a few political and structural variables: (1) the most prevalent anti-takeover defenses in a given country, (2) the effect the proposed Takeover Directive would have had on these defenses, and (3) the presence and strength of codetermination as a component of the national corporate governance regime.

European firms tend to fall within nationally distinctive corporate structures that exploit different characteristic defense mechanisms. French, Dutch, and Italian firms commonly used golden shares, management-friendly voting trusts, and "ownership cascades" to insulate themselves from shareholder pressure and takeover. Golden shares have been particularly common in France where the government created these protective arrangements as part of its privatization program to prevent the transfer of domestic economic control to foreign industrial and financial interests. German firms have been protected historically by cross-ownership networks and occasionally by golden shares, but golden shares were outlawed in 1998 and most observers in and out of business anticipate that recent tax reforms will quickly erode cross-ownership structures as firms seek to extract and use the capital long locked within them. German managers felt at a strategic disadvantage in terms of protective share and ownership arrangements because of recent domestic policy reforms. In contrast, the French would benefit from the continued legality of golden shares. Press accounts indicate that the prevalence of these golden shares in various public utilities sectors raised serious concerns in Spain and Italy, where newly privatized French utilities firms have been seeking to launch bids from behind their protective share structures.

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[27] The managerial and labor elites identified in the foregoing discussion as hostile to the draft Directive were nationally, not regionally, defined. Further, the sub-national regions where support for the Directive and the adoption of a more finance-driven form of capitalism would be particularly strong are those with substantial financial centers that would benefit from such a legal and economic regime. However, these regions, such as London, Paris, and Frankfurt, are too few and too small to have driven the politics of the Takeover Directive's initial embrace by the EU and its ultimate rejection. There is some evidence of supra-national regionalism. The voting in the European Parliament reflected a core group of Germanic countries comprised of Germany, the Netherlands, and Austria opposed to the draft Directive. Conversely, the UK's intense advocacy and Ireland's consistent support for the passage of the Takeover Directive indicates a supra-national Anglo-Irish block in favor of more neo-liberal corporate governance and the institution of finance capitalism in Europe.[27] Yet, these national groupings cannot explain the close division of the vote on the Takeover Directive or the national breakdown of opposition and support.

German and Dutch firms also operate under a regime of relatively powerful firm-level codetermination structures that serves as another line of defense against hostile takeovers.[28] Codetermination fulfills a significant—and increasingly important—representational function that turns managers and employees into "insider" allies against outside pressures exerted by would-be raiders, acquirers, and minority shareholders. However, as shown by the Mannesmann takeover, codetermination does not provide an absolute defense against takeover. Well-developed codetermination institutions do confer important benefits to labor (and to the operation of the firm) and labor fought to preserve them against the threat posed by the Takeover Directive. The Directive's neutrality requirement was seen as imposing a form of "shareholder primacy" under which directors and managers would be legally bound to refrain from taking action on behalf of non-shareholder constituencies in the face of a takeover bid. While the presence of codetermination may be viewed as a proxy for a strong domestic labor movement, the domestic political and economic strength of organized labor is not the critical factor here. Scandinavian countries have even stronger labor movements and institutions, but less developed versions of codetermination, and they came out in favor of the Takeover Directive (perhaps because labor's interests could be protected through other means in the national labor relations system). Consistent with the more important role codetermination plays in their labor relations systems, labor organizations in Germany and the Netherlands vigorously opposed the draft Directive, presumably because codetermination plays a greater role in labor relations because it would have been directly and deliberately weakened these institutions.

British firms, operating under a takeover code already prohibiting most defensive tactics and having no experience with codetermination, were adapted to conditions of constant takeover threat as contemplated by the Takeover Directive. As a result, their best defense against takeover has been to maintain high share prices. With firms having little to lose from the draft Directive, and with traditionally powerful British financial institutions and interests having much to gain, British politics was shaped by its liberal market structure and favored the expansion of that structure across Europe. This policy preference follows from the dominant position of market-driven financial institutions in the British political economy at the expense of labor and the manufacturing sector generally. British managers have adapted to this environment—frequently by withdrawing from competitive manufacturing sectors—and thus did not form a defensive coalition with labor against the Takeover Directive.[29]

In contrast to the United States, poison pill defenses are unusual in Europe. To date, there has been little reason to adopt them. European capital markets (with the exception of the London Stock Exchange) have been relatively undeveloped, shareholders quiescent, fiduciary duties weak and poorly enforced, and other defensive mechanisms prevalent and effective. This situation has begun to change throughout Europe during the 1990s. Developments in many securities markets increased pressures from shareholders (especially British and American institutional investment funds) for higher returns and greater managerial accountability. With their traditional defenses outlawed or eroding due to legal changes and facing increasing pressure

[28] Employee representatives on corporate supervisory boards are typically hostile to takeovers because they fear that such deals will result in greater pressures on wage and employment levels. Strong works councils may help ward off takeovers by making more difficult to push the risks and transition costs of takeovers onto the workforce.
[29] The absence of a labor-management coalition also reflects the historically adversarial and conflict-ridden relationship between these groups that has precluded cooperative and competitive economic adjustment in the United Kingdom.

from shareholder constituencies, German managers wanted the option to adopt American-style poison pill defenses. One can reasonably speculate that Spanish and Italian managers under threat from French firms apparently felt similarly.

This analysis suggests that the institutional and legal environment of the firm powerfully shapes interest group politics. In other words, the structure of the corporate firm constitutes the interests of the individuals and groups taking part in its activities. One perspective is that the dramatic and disruptive impact of takeovers mobilizes *both* managerial and labor interests in concert and made this area of company law a particularly explosive policy domain. If true, the Takeover Directive debacle may be a passing episode in which unusually powerful and intense domestic interests broke through politics as usual in Brussels. Another view, however, is that the EU, after a long process of successfully advancing European legal harmonization and economic integration, has found itself reaching the limits of its own legitimacy in the pursuit of neo-liberal policies. From this perspective, popular opinion and interest group politics at the national level are increasingly mobilized and effectively expressed in EU politics. The first casualty of this shift was the Takeover Directive. The broader implications of this view include an EU more frequently deadlocked over attempts to further integration and legal harmonization, a more modest EU policy agenda, and more fractious, but also potentially more democratic, politics in Brussels. Which view turns out to be more accurate will turn on both the political development within the member states and the institutional dynamics of politics within the EU itself. Of course, these two perspectives are stylized hypothetical poles. The politics and policy situation in Europe and the EU is most likely somewhere closer to the middle. Opposition to EU policies and legislation is, and will continue to be, in part situation specific and that triggered by the Takeover Directive was unusually fierce because of its potential adverse impact on both managers and employees. Yet even this more limited view of the political collapse of the Takeover Directive describes a distinctively neo-corporatist political coalition common in Continental politics and at variance with the American and British political situations and a limitation on EU policy making that will channel the European political economy into its own unique developmental trajectory.[30]

(2) The failure of the Takeover Directive reveals the emergence of multiple power centers within the EU that threaten to complicate and diminish the EU's capacity to formulate, enact, and implement policies to promote the restructuring of markets and economic modernization. The medium to long term implications of this development may be political deadlock that prevents Europe from creating an integrated market with attendant economies of scale, and the shift from established sectors to those base on new technologies.

Does the failure of the Takeover Directive indicate that the European Commission, and perhaps even the European Council, have lost power and influence to shape the policy agenda and that the European Parliament and the European Court of Justice have gained power as a result? The answer to this question will in large part determine the ultimate significance of the failure of the Takeover Directive. Together with its leading role in the collapse of the Delors Commission, the rejection of the Takeover Directive suggests that the European Parliament has emerged as a more potent force in EU politics and now policy making. The rise of the

[30] This issue is discussed in connection with Proposition 3, *infra*.

Parliament represents a further fragmentation of political and institutional power in an already unwieldy institutional architecture. From this development flow the implications that policy making process will become more difficult and lengthy, legislation will be subject to an additional veto point, and the capacity of the Commission and the Council to fashion coherent and far-reaching policy initiatives will likely decline. Paradoxically, this very fragmentation of power and the governance and policy problems likely to follow from may place the European Court of Justice in a more powerful and authoritative position in reforming Europe's economy. These institutional dynamics reduce the likelihood of adopting divisive and unpopular legislation, but increase the chances that EU legislation will be construed by the ECJ in ways that advance European integration and legal harmonization.

The rejection of the Directive and the evident resentment of MEPs towards the Council and Commission that contributed to it reflect an enduring shift in the balance of power within the EU? The European Parliament may well become the institutional channel of choice for populist politics and the articulation of domestic interests in the EU. This would turn the proffered justifications for the EU institutional structure on their head. The European Parliament was supposed to be the forum for pan-European interests, while the Council was ostensibly the body devoted to national interests. The repercussions of this evident change with respect to structural allegiances and the evolution of EU institutions and governance are unclear, as are the implications of changes in the organization and representation of interests in the European Parliament. However, this issue will become more important following EU institutional reforms that will make national delegation sizes in the Parliament more proportional to national population. This reform exchanged increased German representation as a proportion of the European Parliament for continued German-French voting parity in the Council of Ministers. The central role German Parliamentary delegates played in killing the Takeover Directive may be a harbinger of legislative battles to come.

This increased activism and changed composition of the European Parliament also promises to trigger a battle among member states over the proper role, power, and responsibilities of EU institutions. The incentives created by the institutional reforms suggest that Germany should favor granting more power and an increasingly active role to the European Parliament where it's representatives will have greater sway. France has an incentive to retain as much power and authority in the Council as possible where it has maintained parity with Germany. The likely outcome is only a *modest* reallocation of power to the Parliament. This outcome is likely for three reasons. First, the German government will be wary of supporting a substantial shift of power to the Parliament where the opposition Christian Democrats, as is the case now, hold the majority of German representation. Second, the difficulty of translating preferences into collective action in a legislature, particularly one divided by ideological *and* national lines, limits the effectiveness of that body as a vehicle for advancing policy agendas. Finally, to the extent that the German government and political elite along with other European elites remain committed to an integrating Europe, as seems to be the case for the foreseeable future, there will be a disincentive to disperse policy making power in ways that make pursuit of that agenda more difficult.

Although (and perhaps because) the European Parliament is unlikely to take on a substantially more active and autonomous role in EU governance and policy formation, the

European Court of Justice (ECJ) is likely to continue its steady accumulation of power and influence. The increasing separation of powers and conflict among EU institutions will strengthen the role of the European Court of Justice. This is particularly true in the knotty area of company law and corporate governance, where the Parliament, on the one side, and the Commission and Council, on the other, are in conflict. Where such conflicts exist, the ECJ can stake out a position somewhere between the two opposing views and render an interpretation of EU treaties that imposes the court's policy preference without fear of the other institutions colluding in overriding its ruling. Already in 1998, the ECJ, apparently frustrated by the EU's failure to harmonize company law despite nearly thirty years of effort, has already moved to require "*mutual recognition*" of company law regimes, *i.e.*, member states must allow corporations chartered elsewhere in the EU to do business unimpeded (except for some narrow exceptions to prevent fraud and other illegality).[31]

To the extent that the Takeover Directive would have allowed flexibility in implementation, it would have encouraged just such competitive lawmaking as jurisdictions sought to placate managers and shareholders (the two groups with the most influence over the legal situs of the corporation). Competition among countries for incorporations would have diminished political, and thus democratic, control over the governance of nationally based corporations and, ultimately, the substantive content of company law and corporate governance. The failure of the draft Directive may induce increased activism by the ECJ or it may scare off the Court given the obvious political divisiveness of these issues. The opacity and autonomy of the ECJ decisionmaking leaves this an open question until future decisions are actually issued by the Court.

(3) The consequences of the Takeover Directive's failure should not be overstated: a significant market for corporate control already exists in Europe, competitive product markets drive innovation and adjustment, and the substantial and ongoing harmonization of securities market regulation is sufficient to allow substantial corporate and sectoral restructuring, the formation of risk capital, and its reallocation to more productive uses. Rather, the true significance of the failure of the Takeover Directive Europe's development of a distinctive model of capitalism that likely will embody and encourage policy preferences and competitive strategies divergent from those characteristic of the American model of capitalism.

A. Less Than Meets the Eye?

The political push for the expansion of securitized finance by the EU and European governments during the 1990s was in large measure inspired by the example of the American

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[31] *See Centros Ltd v Erhvervs- og Selskabsstyrelsen*, ECJ, March 9, 1999, C.21/297 (preliminary opinion of the full court). This ruling creates a "constitutional" structure very similar to the mutual recognition of corporations chartered under state law in the United States in order to ensure a single integrated market. Thus, this ruling raises the prospect of a market for charters as companies use the jurisdiction with the most congenial company law for incorporation, and will likely generate market pressures in the EU to adopt company laws favoring managerial and shareholder interests akin to the "Delaware effect" in the United States. The ECJ rendered this ruling despite the fact that it was fairly clear that EU treaty provisions guarantying the free movement of enterprises did not constitute a self-executing agreement to harmonize or permit the circumvention of national company law. That the ECJ would construe EU treaties to create market pressures to harmonize the law indicates that the Court with a pro-harmonization and pro-integration agenda will mediate increased conflicts and deadlock between the Parliament and the Commission and Council.

economy and the role of stock markets in the technology boom. The failure to approve the Takeover Directive thus can be seen as a repudiation of the American model of capitalism and corporate governance. British critics in particular have argued that the rejection of the Takeover Directive represents a backsliding into allegedly antiquated forms of economic organization and protectionism. However, the consequences of the Takeover Directive's failure should not be overstated. Europe has changed substantially over the course of the decade and is not nearly so uncompetitive and technologically backward as critics often contend. A significant market for companies and corporations already exists in Europe. Indeed, European firms struck merger deals worth over one trillion Euros in 2000. Competitive product markets drive innovation, adjustment, and investment without the harsh, and often excessive, discipline of a market for control. Further, the substantial and ongoing harmonization of securities market regulation is sufficient to allow substantial corporate and sectoral restructuring, the formation of risk capital, and its reallocation to more productive uses. Indeed, the EU may be unwittingly developing a hybrid model of capitalism that adopts some of the institutional features contributing to the dynamism of the American economy while avoiding the features that have led to damaging financial and structural adjustment excesses at the firm and macroeconomic levels.

Critics of the European political economy often argue that its laws are poorly designed to improve the availability of risk and venture capital, the restructuring capacity of sectors and firms in the wake of technological upheaval and financial volatility, and the development and commercial exploitation of new technologies. Europe certainly has significant economic problems regarding slow growth and high unemployment, but these problems are due more to problems of monetary policy, welfare state policies, and an anti-entrepreneurial bias (especially in bankruptcy law). None of these problems are likely to be addressed by company law reform and corporate takeovers. On the other hand, Europe's record in developing finance and new technologies is admirable. European economic development during the 1990s does not indicate technological and economic stagnation. Europe's lead in wireless technologies, its many internationally competitive manufacturing firms, and the many accounts of large scale corporate restructuring indicate that the criticisms of "Eurosclerosis" have been somewhat overblown. It is likely that the American and European models of capitalism possess different relative merits. It may well be true that the more market-driven and flexible American economy and the institutions that constitute it are better suited to producing breakthrough technologies and exploit short-term production and commercialization strategies. The European economies, particularly the more corporatist countries, historically have excelled at the incremental improvement of product design and production processes. The current cycle of technological innovation has not yet produced compelling evidence that this historical pattern has been broken. Indeed, the vast wealth created in the American boom of the 1990s followed the plummeting stock prices and manufacturing weakness in the United States indicate that this is a more extreme version of past cycles in which American producers begin as lead innovators but are hobbled by institutional disadvantages and steadily lose ground to foreign competitors.

In addition, the legal infrastructure of European finance has been transformed at the EU and national levels during the 1990s. Legal harmonization and increased regulatory oversight of the financial markets have increased the attractiveness of equity financing to investors and issuers alike. These changes should confer aggregate economic benefits by increasing the supply of risk capital and improving the efficiency of capital reallocation to higher value uses. These

benefits will likely exceed any anticipated from the adoption of a more liberal legislative approach to hostile takeovers. Indeed, the American experience suggests that takeovers destroy value in the majority of cases and that cross-national mergers fare even worse. Further, the emphasis on increasing the utilization of equity and other forms of securitized finance as a key component of improving competitiveness has fared poorly in the past year as stock values have collapsed, particularly in the technology intensive sectors, markets, and indices, and the global economy is threatened with the first financially driven recession since the 1930s.[32]

B. Trouble in the Consensus Economy?

Given the substantial progress on the transformation of European finance already accomplished and the modest economic benefits of takeovers, the more important implications of the emerging model of European corporate governance and political economy may be political. The changes in finance and financial institutions that have swept across Europe during the past decade have both shifted more power to suppliers of capital and their interests. Securities law reforms have improved transparency and narrowed the scope of managerial discretion in financial and organizational decisions. At the same time, the growth of shareholding and the movement of traditional banks into securities related business encouraged the creation of a shareholders class and the reformation of national financial sectors. This may well represent one component of an emerging tension between increasingly securitized finance with interests in maximizing returns and shorter time horizons, and a coalition of managers and labor that favors established practices and institutions, the security provided by stable organizational and financial relations, and consensual governance that protects their interests.

National political economies have evolved over the course of the post-war era, and remained substantially intact during the post-cold war period. The institutional arrangements that define these national economies evolved to mediate economic conflict and link firms, finance, and labor markets. The rapid change in European finance and financial markets coupled with the retention established institutional features such as codetermination, sectoral wage bargaining, cross-shareholding networks, and golden shares fundamentally changes the dynamics of these linkages and the relationships among managers, employees, and shareholders in firm governance. Just as more statist and neo-corporatist forms of firm and sectoral governance fashioned reasonably complementary relationships among these actors and their interests, the introduction of increasingly liberal and marketized financial structures and practices may introduce more conflictual political and economic dynamics and reduce the overall systemic functionality of European political economies.

Takeovers will probably return to some extent during the next economic and stock market upswing, as corporate stock becomes, once again, an attractive and effective transaction currency that obviates the need to raise expensive takeover financing. American and European financial firms are already building up their M&A staffs on the Continent, and especially in

[32] A far more important and beneficial area for legal reform in Europe would be a thorough liberalization of bankruptcy law, which remains excessively protective of creditors and punitive to debtors. This discourages entrepreneurial activity and the founding of new firms. This is a sharp and crucially important distinction between the American and European legal and economic arrangements that receives far less attention than it should and rarely surfaces in corporate governance debates.

Germany, in anticipation of this development.[33] Takeovers are thus likely to continue, will probably grow more common, and will continue to attract the attention of the public and policy makers. There will be legal responses to the consequent pressures exerted on firms and interest groups by takeovers.

The failure of the Takeover Directive makes it almost inevitable that there will be more significant legislative, regulatory, and judicial responses to takeovers as the politics of corporate governance and takeover law now returns to the domestic policy arena. The question then is what will be the source of this law and what constraints do different political actors face in trying to fashion it? Left-wing, pro-management, and nationalist political forces will each likely support more protectionist and anti-shareholder/finance laws and policy responses allowing greater latitude in adopting defenses. In the immediate wake of the rejection of the EU's Takeover Directive, the German cabinet has just approved a national takeover statute that subjects takeover bids to greater formal and mandatory regulation, but is more permissive than the EU measure with respect to defensive measures. The era of odd political bedfellows and unusual political coalitions is not over yet. Further, the politics will not be as muted as in the United States where the political left and organized labor were effectively moribund by the mid-1980s. Labor and the center-left political parties will have a far greater say in Europe and will drive a harder bargain with managerial interests than was the case in the U.S. in the 1980s and early 1990s.

Conversely, European courts may become more active in the protection of shareholders and thereby act as an institutional counterweight to legislative impulses to protect corporate incumbents. In light of the EU's failure to adopt the Takeover Directive, a broad and by now well-established trend towards some form of shareholder capitalism at the level of the member states may induce greater governance activism by *national* courts. In particular, national courts may seek to develop stronger doctrines of fiduciary duties in order to protect minority shareholders and provide guidance for the adjudication of takeover battles in the future—with or without an EU law. These trends are already in evidence. French courts are developing company law and fiduciary duty doctrines to protect minority shareholders. German courts and regulators are using new securities law and regulations to protect shareholder interests and improve the accuracy and timeliness of disclosures of material information to the capital markets.[34] Such a move by Continental courts, however, would require substantial judicial innovation and case-by-case lawmaking that conflicts with the civil law tradition.[35] The civil law constraints of legal tradition and institutional legitimacy suggest that judicially driven corporate governance reform will tend towards modest, not radical, breaks with prior practice. It also portends that the liberalization of company law in Europe likely will require legislative and regulatory action to make up for the absence of more activist courts capable of addressing market and governance failures through case law and case specific adjudication.

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[33] *Cf.* Kissling, Elise, "Merger Wonderland," *Frankfurter Allgemeine Zeitung*, July 4, 2001.

[34] However, Germany and other countries with strong codetermination laws are structurally constrained form strengthening fiduciary duties to shareholders since the legal obligations of corporate directors, and to some extent managers, runs to both shareholders and employees. This leaves the disclosure and anti-fraud provisions of the securities laws as the most powerful legal mechanism for the protection of shareholder interests.

[35] Unlike common law systems, the civil law tradition does not recognize courts and case law as legitimate and authoritative sources of law.

C. Potential Conflicts with the United States

Finally, the European turn away from hostile takeovers and policies supporting an active market for corporate control may trigger policy conflicts with the United States in such areas as antitrust, financial market law, and the conduct of cross-border mergers and acquisitions. Europe's legal environment reduces pressures, incentives, and opportunities for mergers and acquisitions and thus for sectoral consolidation. For a variety of reasons—including the absence of a market for control—extensive networks of smaller firms have been more common and important in Europe than in the United States. The continued shielding of European firms from the most extreme takeover pressures will tend to preserve this form of economic organization. In contrast, the strong structural predisposition of the American economy towards merger-driven sectoral consolidation places the United States on a different organizational and developmental track that has already begun to run afoul of European competition policy. The conflict between American and EU authorities over merger-related market concentration is therefore not an episodic phenomenon brought to the fore by isolated transactions such as GE's failed bid to acquire Honeywell, but a structurally generated feature of US-EU relations that should persist.

Another set of conflicts between the EU and United States concerns cross-border takeovers. This essentially replicates the European debate over a "level playing field" for hostile takeovers on the international level. The conflict over comparative exposure to foreign takeover bids also constitutes the mirror image of European worries over their potential vulnerability of firms to takeover by American companies protected by legal defense mechanisms. After the failure of the Takeover Directive, American managers may sense their own vulnerability to tender offers by European firms.[36] The advanced industrial countries may be entering a period in which market and political pressures impel them towards two conflicting regulatory equilibria: one characterized by stronger anti-takeover defenses in which dominant nationally-based firms are protected against foreign takeover and one by legal frameworks facilitating takeovers in which there is a reasonably level playing field for international mergers and takeovers. Tensions over which equilibrium should and will prevail will likely pit the United States (and, within the EU, the United Kingdom) against the EU in the development of company law and securities regulation. In this respect, the battle over the Takeover Directive reveals the European domestic and EU politics over takeovers, but not its resolution at the level of international politics. Just as American interest groups have used international negotiations to seek legal reforms they could not obtain through domestic politics, the European financial sector and political elites, including the European Commission may seek to use international negotiations as an alternative route to reform takeover law. Thus, international treatment of takeovers and mergers and acquisitions may provide the culmination of a process through which liberalization has been achieved by relocating policymaking at higher and higher levels. Just as financial market reform has come largely through EU legislation, having been blocked by domestic politics for years, the politics

[36] Some commentators sounded this alarm following the 1998 acquisition of Chrysler by Daimler Benz. Arguments reminiscent of those made when Japanese firms went on an acquisition spree in the United States in the 1980s were leveled against Germans who could acquire the cream of America's corporations while defended against takeover. The irony, of course, is that Daimler proved to be a much stronger and profitable company and Chrysler has become a substantial burden on it in the years since the acquisition.

swirling around corporate takeovers may create the international policy conflict necessary to shift the debate to an arena more amenable to advancing liberalization of takeover rules.

Conclusion

The overview here has identified three layers of analysis implicated by the failure of the EU Takeover Directive. First, the politics of the collapsed effort to liberalize the European market for corporate control reflects a potentially substantial change in the political relationship between the European Union and its member states. It appears that the high water mark of the neo-liberal policy agenda has been reached and oppositional forces have mobilized to an extent not seen in the prior fifteen years of EU economic integration. The limits of this agenda have been set by the resurgence of domestic politics—and political opposition—in EU policymaking. This transformation implies a second set of changes in the internal politics of the European Union. The European Commission has been the institutional engine of integration policy and strategy during the 1980s and 1990s. Now, that leadership role, at least with respect to core areas of economic policy, appears to be facing greater constraints and competition from the Council and, more importantly, from the European Parliament. These are the institutional avenues through which revitalized domestic politics will make themselves felt at the EU level. However, increased tensions among the Council, Commission, and Parliament raise the likelihood that the European Court of Justice will play an increasingly important and active role in shaping the legal and policy terrain of the EU as it mediates disputes among the other organs of EU governance. These tensions and frictions among institutions will impose significant hurdles on EU policymaking and reduce the chances that bold and potentially divisive policy agendas will be pursued and adopted in the future. Finally, the EU's recent confrontation with limits of neo-liberalism does not entail the failure of economic integration or modernization as whole—or even in substantial part. However, it does suggest an era of more divisive and conflictual politics within the EU and internationally as the institutional and juridical differences among advanced industrial countries becomes a flashpoint for battles over the prevailing structure of the European and global economies.