**The Regulation of Takeover Bids in the UK (2006-17): An Evaluation of Provisions for Employee Involvement**

**Abstract**

This article evaluates the provisions for information disclosure to employees contained in the UK Takeover Code, following the implementation of the Directive on Takeover Bids (2004/25/EC) in 2006 and further amendments resulting from the Kraft/Cadbury takeover in 2010, among other developments. It contrasts information and consultation (I&C) provisions across other EU Directives on employment relations and emphasizes that the Takeover Bids Directive restricts itself to information disclosure, allowing employees merely to append their opinion to the offeree board circular. Detailed analysis reveals that very few opinions have actually been given over the past twelve years (2006-17 inclusive), and of these almost one third complain about lack of information. These empirical findings highlight the weakness of the UK provisions, and the article concludes by proposing areas where further regulatory reform might strengthen I&C in the takeover process.

**Keywords**

Employee participation, European Union, information, labour relations, takeovers

**Introduction**

The impact of takeovers on the lives of those workers affected has recently been explicitly recognised by the European Union (EU) in its *European Pillar of Social Rights*, which was proclaimed unanimously by the EU institutions in November 2017. Paragraph 8(b) states:

Workers and their representatives have the right to be informed and consulted in good time on matters relevant to them, in particular on the transfer, restructuring and merger of undertakings and on collective redundancies. (European Commission, 2017: 16)

A significant element of the ‘transfer, restructuring and merger of undertakings’ results from takeover activity by companies operating across member states. Such activity is regulated by the EU Takeover Bids Directive (2004/25/EC) the legal provisions of which – as noted below – have been widely researched. However, the impact of its provisions on the information and consultation (I&C) of employees has barely been evaluated in comparison with those contained in other EU directives. This article attempts to redress the imbalance by evaluating its provisions on I&C in the United Kingdom (UK), a country which is particularly affected by cross-border takeover deals. Over the period 2001-07, the UK had ‘the greatest number of completed deals’ across the EU-15, 33 per cent of the total (Campa and Moschieri, 2008: 10), while over the period 2000-14 the UK had 20% of the total number of takeovers by EU/EEA country, compared with France (13%) and Germany (12%) in second and third place respectively (Cremers and Vitols, 2016b: 15).

The Takeover Bids Directive requires both offeror and offeree companies to inform employees or their representatives that a takeover bid has been made and that the subsequent offer document has been published. It requires the offer document to state the offeror’s intentions with respect to employment matters, with the disclosure of all information to be made ‘readily and promptly available’. The Directive also requires that, when the offeree company publishes its opinion of the bid, it communicates this to its employees or their representatives, and gives them the right to append their own opinion on the effect of the bid on employment to the offeree board’s circular. The UK Takeover Code subsequently added that the offeree company must also *inform* them that they have this right.

The article begins by contrasting I&C rights across the principal employment and company law directives, revealing that those contained in the Takeover Bids Directive are restricted to information disclosure, with no provision for consultation. It examines the way in which the takeovers regime in the UK is regulated, with particular regard to the impact of the Directive and the Kraft/Cadbury takeover in 2010. The article analyses all the employee opinions given since 2006 under the terms of the UK Takeover Code, before drawing some broad policy-oriented conclusions which suggest several areas where further regulatory reform might be considered in relation to improving employee involvement in the takeover process.

**Methods**

The authors conducted a literature survey of the relevant area, including the annual reports and statements issued by the UK Takeover Panel in the reference period covered (2006-17 inclusive). Outstanding issues were then clarified at a background briefing with members of the Takeover Panel Executive and at a semi-structured interview with the policy officer at the Trades Union Congress (TUC) responsible for corporate governance. The lead author subsequently carried out a content analysis of all 42 employee opinions appended to UK offer documents or offeree board circulars or published on a website since 2006, the year in which revisions were introduced to the Takeover Code. Key terms were coded and recorded manually, and collated in order to compile the Tables on which analysis is based. The research did not cover opinions given by the trustees of pension funds, a right introduced only in 2013.

The authors adopt a stakeholder approach towards corporate governance, arguing that ‘a company’s management should manage in the interests of the company and, in that regard, take account not only of shareholder concerns but also of the concerns of workers and other groups involved with the company’ (Heuschmid, 2012: 115). This argument is justified principally by the evidence (reviewed below) that many takeovers lead to poor economic outcomes and job losses, in the course of which the interests of the employees covered in the UK are considered at too late a stage, if they are considered at all. Broader discussions that examine the complex but generally positive relationship between employee involvement and company performance – which also help to justify the authors’ approach – may be found elsewhere (for example, Davies, 2015; Summers and Hyman, 2005).

Information and consultation of employees in EU directives

In the European Union (EU), workers’ rights to information and consultation within the undertaking are guaranteed under Article 27 of the EU Charter of Fundamental Rights, which became legally binding across member states in December 2009 when the Treaty of Lisbon came into force:

Workers and their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and conditions provided for by Union law and national laws and practices. (*Official Journal*, 2010: 397)

These rights to I&C have been described as ‘some of the most fragmented rights in the entire EU legislative corpus’, scattered as they are over more than 25 directives (Schömann, 2012: 213). Nevertheless, it is possible to identify four Directives that lay the foundations for the general rights to I&C of workers across the member states:

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

Whilst the EWC and ICE Directives provide for rights to information and consultation at sub-board level, the ECS Directive provides, under certain circumstances, for employee board-level representation along the lines of arrangements which have already existed in many countries since the early 1970s, or even earlier (Gold, 2010). Much empirical work has now been carried out into the operation and impact of these four Directives: EWCs (Waddington, 2012); recast EWCs (Jagodzinski, 2015); ECS (Cremers et al., 2013); and ICE (Hall and Purcell, 2012). Less attention has been given to the impact of a range of more limited or ‘contextual’ Directives covering specific areas of industrial relations where information and consultation remains important. These Directives include:

* Collective redundancies (98/59/EC), 20 July 1998, which consolidated Directive 75/129/EEC and Directive 92/56;
* Transfer of undertakings (2001/23/EC), 12 March 2001, which consolidated Directive 77/187/EEC and Directive 98/50;
* Health and safety at work ‘framework’ (89/391/EEC), 12 June 1989, since complemented by a wide range of more targeted directives on health and safety;
* Takeover bids (2004/25/EC), 21 April 2004.

Two further directives which affect workers’ rights in the course of business restructuring do not contain any provisions on information and consultation. The Directive on business insolvencies (2008/94/EC), which consolidated Directive 80/987/EEC, focuses on worker protection by requiring each EU member state to set up a ‘guarantee institution’ to pay workers’ outstanding wages but places no duties on employers, while the Directive on cross-border mergers (2005/56/EC) governs the nature of information and consultation processes in the newly-formed company post-merger but not during its formation.

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 takeover bid), with possibly no ongoing impact on the employment relationship itself (Gospel et al., 2003). Indeed, it was partly the *contextual* nature of the Directives on redundancies and transfers which eventually culminated in the adoption of the ICE Directive, which does establish general rights to information and consultation to be exercised during the normal course of employment, without reference to any specific events. Nevertheless, these contextual Directives remain 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 rights to information and consultation across these measures vary considerably, particularly in relation to the strength of the rights themselves. Article 2 of the 1998 collective redundancies Directive, for example, requires employers to open consultations with worker 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. As Blanpain (2014: para. 1934) notes: ‘This is a very strong form of consultation, which is very close to collective bargaining’. A similar definition of consultation may be found in Article 7(2) of the 2001 transfer of undertakings Directive, which requires the transferor and transferee to consult worker representatives in good time, also ‘with a view to reaching agreement’. 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 itself covers ‘decisions likely to lead to substantial changes in work organization 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]’. Of course, even with such a ‘strong’ definition of consultation ‘there is no *obligation* to reach an agreement and it may be difficult in practice to demonstrate that the employer has approached the negotiations without any intention of agreeing’ (Davies, 2012: 222-3).

**The Takeover Bids Directive and the UK takeover regime**

By contrast, the Takeover Bids Directive merely requires the boards of both offeror and offeree company[[1]](#endnote-1) to *inform* employees or their representatives of the bid, rather than affording any meaningful form of *consultation*, and to ensure that the offer document outlines any implications for employment and that the offeree board circular includes the board’s views on those implications. In particular, employee representatives in the offeree company have the right to append a written opinion to the offeree board circular which may, or may not, be taken into account. Consultation of employees takes place on the basis of relevant national provisions, especially those deriving from other directives, such as those governing EWCs, collective redundancies, ICE and the European company.

Studies of the Takeover Bids Directive have tended to focus on its legal provisions. Some, for example, have argued that the Directive has not sufficiently opened up the ‘market for corporate control’ (Edwards, 2007), while others have criticized it for having gone too far in that very direction (Horn, 2012; Johnston, 2009). Further research has contrasted the application of the Directive across 12 member states of the EU and EEA (Cremers and Vitols, 2016c) but, again, from a legal perspective. By contrast, our analysis is based upon an examination of the actual opinions appended to offer documents or offeree board circulars or published on a website, revealing their origins as well as the types of issues and concerns raised by employee representatives.

Commentators who have analysed the complex history of the Takeover Bids Directive (Cremers and Vitols, 2016b) and its general implications for employees (Clarke, 2016) have highlighted the fundamental issue that has dogged its development ever since its first draft, published in 1974: the contrast between the ‘shareholder value’ approach towards takeovers adopted in the UK and the ‘stakeholder’ approach associated with the co-ordinated market economies of continental Europe (Hall and Soskice, 2001). The *shareholder value approach* views takeovers as a key mechanism for increasing corporate efficiency and hostile takeovers as the ultimate weapon for removing incompetent or self-serving management (Vitols, 2012). Advocates support 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. Company law and the takeover regime in the UK embody this approach: Section 172 of the Companies Act 2006 makes acting in the interests of shareholders a statutory duty for directors, while the principles embodied in the Takeover Code ‘operate to ensure optimum shareholder value and to minimise directors’ self-interested, or even other stakeholder-interested obstructions to a takeover’ (Talbot, 2013: 172). It is, arguably, for this reason that employee rights are restricted to appending their opinion, a point we return to in the discussion.

By contrast, those who adopt a *stakeholder approach* view takeovers, particularly those of the hostile variety, rather differently, highlighting how they force managers to focus on short-term share price and frequently lead to workforce reductions, poorer working conditions, as well as changes to pension provisions. Employees may also endure successive changes to their employer as takeovers lead to divestments of parts of the enlarged company, and suffer insecurity as established work relationships are undermined. As Pendleton (2016: 71) notes: ‘Takeovers disrupt the implicit contracts (the mutual expectations of how employment is managed) between companies and their employees, with acquiring owners reneging on the deals, norms and expectations established under the previous regime’. Moreover, shareholder value, which is also generated by cutting costs, encourages managers to bargain hard with employees, outsource work wherever possible, casualize the workforce and sell off non-core businesses. In the interests of fostering more sustainable companies, stakeholder advocates therefore argue for strengthening regulations to allow managers to take defensive measures against hostile bids and to give workers genuine influence over the decision: ‘Workers should be involved at an early stage in the takeover process, when discussions within the bidder company or between the potential bidder and management of the target company are developing’ (Cremers and Vitols, 2016a: 245).

Nevertheless, the underlying philosophy of the 2004 Takeover Bids Directive is very much in line with the shareholder value perspective, namely that, as a whole, takeovers facilitate corporate restructuring and improve the efficiency of the European economy, and hence should be promoted. Although some proposals (notably from the European Parliament) have included stronger rights for employee information and consultation, the 2004 Takeover Bids Directive in effect gives shareholders in the ‘target’ company the final say over accepting or rejecting the takeover bid (Clarke, 2016).

In the UK, takeovers are regulated by a combination of the Takeover Code, the Takeover Panel, the Companies Act 2006 and the Financial Services and Markets Act (FSMA) 2000. The Takeover Code (‘the Code’), which is issued and administered by the Takeover Panel, is the main repository of rules governing the process and focuses on fairness for the target company’s shareholders. It is 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. Over recent years, the Code has been amended several times in line with the requirements of the Takeover Bids Directive, as well as in light of the Kraft/Cadbury takeover and a further subsequent review of its effectiveness by the Panel, as we discuss below. Commentators have pointed out that ‘practice will have to show whether [revisions of the regulations] have resulted in a significant strengthening of workers’ rights in takeover situations’ (Cremers and Vitols, 2016b: 28) and whether they ‘help facilitate an objective and accurate exchange of information’ (Tsagas, 2016: 239). This article accordingly examines the information disclosure aspects of the regulations over 12 years of operation, and offers an assessment of the extent to which they are likely to have strengthened workers’ rights in the UK.

*Amendments to the Code following the Directive*

The primary significance of the Takeover Bids Directive for the UK is that it resulted in the Takeover Panel being given a statutory underpinning in 2006, though it remains an unincorporated association. Since its establishment in 1968 and until 2006, the Panel had been a self-regulatory body. As such, compliance with its Code was voluntary. The Takeover Bids Directive required the UK government to grant it extra powers and duties to formulate and enforce rules in line with the terms of the Directive (though until April 2017 it had not exercised its enforcement powers).[[2]](#endnote-2)

When the Directive was enacted into UK legislation in May 2006,[[3]](#endnote-3) the Code required major amendment with respect to information to employees. Article 6 of the Directive focuses on informing employees and their representatives about the bid, the offer document and the offeror’s intentions regarding employment, amongst other matters. Article 8 specifies that ‘disclosure of all information and documents required by Article 6’ must be carried out in such a way that they are ‘both readily and promptly available’ to holders of the company’s 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’.

As a result of these Articles, the Takeover Panel had to amend its existing rules, as informing specifically employees and their representatives was a new development requiring two new provisions. The first was to ensure that employees were *aware* of a takeover, requiring the disclosure of information that was ‘readily and promptly available’, which as a matter of practice could be disseminated through e-mail or the internet. The second was the right of employee representatives to append *their own opinion* on the effect of the bid in employment to the offeree board’s circular and so acquire a voice in the process, provided they gave it ‘in good time’ to the board of the offeree company. (Further amendments made later are analysed below.)

However, 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. The Panel’s sanctions are limited to censure of one form or another, and do not include 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 953 of the 2006 Companies Act. No prosecutions have taken place to date.

*Amendments to the Code following the Kraft/Cadbury case and Panel review*

Despite the role of the Directive, it is generally agreed that it was the takeover of Cadbury by Kraft in 2010 that ‘prompted a reform of the UK takeover rules, arguably towards a more detailed, target company and stakeholder friendly model’ (Tsagas, 2016: 225). This represented something of a deviation from the shareholder value approach previously endorsed by the Code. The aim was to improve the offer process, including the provision of greater recognition of the interests of employees of the offeree company.

The Kraft/Cadbury case questioned the UK’s ‘open market for corporate control’ on a variety of aspects concerning the duties of the parties involved in a takeover bid, as well as on issues of disclosure and stakeholder protection relating to the takeover process itself. The controversy surrounding the takeover began at the very start of the offer period when Kraft announced that – because of economies of scale – it believed it would be in a position to keep open Cadbury’s factory at Somerdale, which Cadbury had already declared would shut. Although the factory was already being shut down, Cadbury was unable to comment meaningfully on Kraft’s statements as it did not have access to Kraft’s strategy. Shortly after the offer closed, Kraft followed up with an announcement that the factory would shut 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, rather it needed a reasonable basis for holding that belief. The Panel censured Kraft publicly for making its statement because it lacked such a reasonable basis (Takeover Panel, 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 it had ever undertaken. Amendments to the Code were published in July 2011 (Takeover Panel, 2011). They offered offeree companies greater protection against extended ‘virtual bid’ periods, prohibited deal protection measures and inducement fees, clarified the basis on which company boards could make recommendations on offers, increased transparency around offer-related fees and bid financing, and required greater ‘recognition of the interests of offeree company employees’ (Takeover Panel, 2011: para. 1.3d). As the Panel 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’ (Takeover Panel, 2011: para. 1.6).

In the Panel’s view, one problem was that the affected parties were not hearing about a proposed takeover early enough. When it initially implemented the employee information provisions outlined in the Takeover Bids Directive, it had done no more than the minimum required, as noted above. However, the 2010 consultation exercise revealed that employee representatives were failing to append opinions because of lack of knowledge, lack of time and lack of expertise. As a result, the Panel introduced three provisions, which took effect from 19 September 2011 and went beyond the Directive. First, it required the offeree company to *inform* the employee representatives of their right to append an opinion (Takeover Panel, 2011: para. 8.9; implemented by Rule 32.1b). Second, it stipulated that, where any 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 Information Service] that it has been so published’ (Takeover Panel, 2011: 8.12; implemented by Rule 25.9). And third, the Panel required the offeree company to *reimburse the reasonable costs* of the employee representativesin preparing an opinion (Takeover Panel, 2011: 8.12; implemented by Rule 25.9, Note 1).

Introduction of an earlier stage of notification has also helped to resolve an important issue. Many offers are ‘recommended offers’, where the offeror and the offeree company have agreed the takeover. In such cases there is no separate offer document to which the offeree company can respond as the offer document and the offeree board circular are contained in the one document. In these circumstances, employee representatives do not receive the combined 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, and not only at the firm offer 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 combined document, the offeree board must publish it on a website and make an announcement on a Regulatory Information Service that it has done so.

Hence Rule 2.11(a) of the amended Code requires the distribution of the announcement that commences the offer period not only to shareholders but also to employees. Rule 2.11(b) 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 (by contrast, Pfizer never made a firm offer announcement for Astra-Zeneca in June/July 2014, as it merely released a 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 promptly available to employees. Rule 2.11(d) states that when the offeree company circulates the terms and conditions to its employee representatives about the possible or firm offer, it must draw their attention to Rule 25.9, which specifies their right to append an opinion.

In 2012 the Code Committee undertook a review of the operation of the 2011 amendments. It concluded that trends in the submission of employee opinions appeared to indicate that the 2011 reforms had gone a considerable way towards achieving their objectives to improve communications between offeree companies and their employee representatives and to enable employee representatives to be more effective in providing their opinion on the effects of an offer on employment (Takeover Panel Code Committee, 2012; see also Tsagas, 2016).

An external study of the Takeover Bids Directive, also in 2012, 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). The EU Commission’s own external study subsequently summarized concerns over the operation of the provisions on 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 [sic] stated in the information disclosed in the offer procedure. This is however not regulated by the Directive (European Commission, 2012: para. 20).

It added 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). We return to these points below in the discussion in the light of significant amendments made to the Code in December 2017 (subsequent to the period of analysis covered in this article).

**Evaluating the impact of revisions to the Code on information disclosure**

The Takeover Panel, then, has made various amendments to the Code over the years as a result of both the Takeover Bids Directive and its own consultation exercises, with a view to protecting offeree companies as well as facilitating employee representative input into the takeover process. In terms of the latter, this section evaluates the number and content of employee opinions appended to offer documents or offeree board circulars or published on a website, contrasting two key periods: from implementation of the Directive to the revision of the Code (2006-2011) and post-revision (2011-2017). This allows us to examine the effect of the 2011 changes on the volume of opinions given.

*Trends in the submission of opinions*

Table 1 reveals that overall very few opinions have been given. In the 12 years (2006-2017), there were 1,077 firm offer proposals registered by the Takeover Panel, of which only 28 (2.6%) were accompanied by at least one employee opinion.

Table 1: Trends in takeovers / submission of employee representatives’ opinions

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Year** | **Number of firm offer proposals (Takeover Panel)** (a) | **Number of takeovers for which one or more employee opinions was given** | **Total number of separate employee opinions given** | **Number of pension fund trustee opinions** (b) |
| 2006 (c) | 151 | 1 (0.7%) | 3 (2.0%) | N/A |
| 2007 | 144 | 0 | 0 | N/A  |
| 2008 | 134 | 0 | 0 | N/A  |
| 2009 | 104 | 0 | 0 | N/A  |
| 2010 | 90 | 1 (1.1%) | 1 (1.1%) | N/A  |
| 2011(d) | 94 | 5 (5.3%)(all Sept-Dec.) | 5 (5.3%) | N/A  |
| 2012 | 80 | 10 (12.5%) | 21 (26.3%) | N/A  |
| 2013 | 60 | 2 (3.3%) | 2 (3.3%) | 2 (3.3%) |
| 2014 | 43 | 3 (7.0%) | 3 (7.0%) | 2 (4.7%) |
| 2015 | 64 | 1 (1.6%) | 1 (1.6%) | 6 (9.4%) |
| 2016 | 61 | 3 (4.9%) | 4 (6.6%) | 1 (1.6%) |
| 2017 | 52 | 2 (3.8%) | 2 (3.8%) | 1 (1.9%) |
| **Total** | 1,077 | 28 (2.6%) | 42 (3.9%) | 12 (1.1%) |

Notes to Table 1: (a) sources for the numbers in this column are the Annual Reports of the Takeover Panel. The reader should note that the statistics in the Annual Reports refer to years ending on 31 March; calendar years have been retained to facilitate presentation; (b) the right for pension scheme trustees to give an opinion on the effect of the offer on the pensions scheme(s) was introduced only in May 2013; (c) EU Directive on Takeover Bids took effect in the UK on 20 May 2006 (endnote 1); (d) the amended Code took effect in the UK on 19 September 2011.

The total number of opinions given over the 12 years was 42 since some proposals were accompanied by multiple opinions, but even this represents only 3.9% of the total number. However, it may be significant that 26 of these 42 opinions (62%) bunch in a period immediately following the implementation of the amended Code in September 2011 until the end of the following year, 2012 (i.e. a period of only 16 months). This implies that publicity surrounding the amended Code may have heightened awareness of the new provisions, leading to the increased take up that subsequently subsided.

*Origin of the opinions*

Twenty-five of the 42 employee opinions (60%) originated from representative forms of employee participation (trade unions, works councils or European works councils), while the remaining 17 (40%) originated from direct forms (employee representatives, employee councils/forums and so on) (Table 2).

Table 2: Body giving opinion

|  |  |  |
| --- | --- | --- |
| **Character of body** | **Name** | **Number** |
| Trade union | Unite (incl. TGWU) (UK) | 5 |
|  | Accord (UK) | 1 |
|  | USDAW (UK) | 1 |
|  | Dreher Breweries Trade Union (Hungary) | 1 |
|  | ICF (untraceable) | 1 |
|  | NUM (South Africa) | 1 |
|  | Sole Workers’ Union (Peru) | 1 |
|  | Union of Professionals of Cade-Idepe-Chile (Chile) | 1 |
|  | USW (Canada) | 1 |
|  | ‘Recognized unions’  | 1 |
| Statutorily-based employee body | Works council | 5 |
|  | European works council | 5 |
|  | Swedish TU committee | 1 |
| Company-based employee representatives or group | Employee representatives | 6 |
|  | Elected reps | 2 |
|  | Staff reps | 1 |
|  | Focus groups | 1 |
|  | Employee council / committee / group committee | 6 |
|  | Managers’ forum | 1 |
| **Total** |  | 42 |

Unite, formerly the Transport and General Workers’ Union, gave five, and then Accord, USDAW, Dreher Breweries Trade Union (Hungary), ICF, NUM (South Africa), Sole Workers’ Union (Peru), Union of Professionals of Cade-Idepe-Chile (Chile), United Steelworkers’ Union (Canada) and one non-specified ‘recognized union’ each gave one. Employee representatives were more likely to specify how they had attempted to involve workers in gathering their views, through staff briefings, surveys and focus groups. This is presumably because such representatives, by their very nature, do not form part of the organizational representative structures on which unions rely.

*Concerns expressed in opinions*

The concerns expressed in employee opinions focused principally on redundancies (16 cases) and pensions (10), though relocation, maintenance of the company’s brand image and preservation of terms and conditions also featured amongst other miscellaneous issues (Table 3).

*Table 3: Concerns expressed in employee opinions*

|  |  |
| --- | --- |
| **Concern** | **Number** |
| Redundancies | 16 |
| Lack of information  | 13 |
| Pensions | 10 |
| Relocation  | 5 |
| Brand image | 3 |
| Terms and conditions | 3 |
| Organizational integration | 2 |
| Excessive debt | 1 |
| ‘The future’ | 1 |
| Loss of control to outside UK | 1 |
| Management style | 1 |
| Reduction of employment opportunities | 1 |
| Broadly supportive (with reservations) | 19 |
| Demands/ requests | 15 |

Nineteen opinions broadly supported the takeover, though often with reservations. These generally included requests for reassurances over the continued growth of the company, maintenance of workforce numbers, the creation of greater opportunities for employees and the retention of current management teams. In some cases reservations were expressed as a hope, for example that the offeror company would recognise union activity as an asset.

Thirteen (just over 30% of the total) complained that employees did not have enough information on which to base a genuinely considered view. A typical comment was that of a union representative who, having spoken to the personnel department, stated that she simply did not know whether the proposed takeover (Xstrata) would be good or bad for employees: ‘There is no factual evidence to base an opinion on’. In another opinion (Amec Foster Wheeler), the union listed 19 questions to which it required answers covering issues like respect for current collective agreements, pension benefits, intentions with respect to future businesses, and the effects of restructuring.

*Demands/ requests*

Fifteen opinions took the opportunity to make further demands or requests (Table 4).

*Table 4: Demands / requests*

|  |  |
| --- | --- |
| **Offeree company** | **Nature of demand / request** |
| Cadbury | Unite: Appeal to shareholders to reconsider takeover on grounds of changes to management style, excessive debt and control of the company when outside UK. Demands 5-year guarantees on no site closures, compulsory redundancies, terms and conditions and pensions |
| Xstrata(four sets of demands) | USW: protection of members’ rights and union’s bargaining rights; German works council: given no EWC, demands meetings with employee reps from other countries to discuss merger; NUM (SA): assurances to protect jobs; ICF: maintenance of conditions, pay, pensions and bonuses; Sole Workers’ Syndicate (Peru): in favour of merger *(no demands)* |
| Prologic | Prologic employees: Consultation over relocations, voluntary redundancies, help in finding alternative employment |
| Umeco | Employee representatives: statement on jobs |
| Britvic | EWC: further information on ‘merits of transaction’, including possible redundancies |
| Sportingbet | Employee representative: further information on future business plans, assessment of redundancies on service provision |
| CSR | Works council: information and early consultation |
| Friends Life | Unite: consultation to be full/ meaningful |
| TSB | Accord, Unite: joint discussion required on key issues, including union rights |
| SABMiller (two sets of co-ordinated demands) | Dreher Breweries Trade Union: sell the central/ eastern European businesses to a ‘responsible buyer’ committed to employment existing agreementsEWC (assisted by EFFAT): broadly similar demands, but expanded |
| Dee Valley | Employee Forum and Unite (joint): reference to the Competition and Markets Authority for review |
| **Total** | 15 |

Unite, in the Kraft/Cadbury takeover, lodged an appeal to shareholders to reconsider the takeover on the grounds of change in management style, excessive debt and loss of control of the company outside the UK. In the Xstrata case, while the Peruvian union was in favour, the four other employee representative bodies demanded protection of their members’ rights and their own bargaining rights among other issues. At SABMiller, the Hungarian union and EWC made broadly similar demands as separate opinions. In five other cases, unions or works councils requested further information, consultation or joint discussions on key issues like redundancies and union rights.

Dee Valley was the only case where employee representatives took the matter further. The Employee Forum and the Unite branch jointly raised objections to the takeover by Severn Trent Water with the Competition and Markets Authority (CMA), the regulatory body responsible in the UK for assessing the competition impact of takeovers. However, the CMA subsequently cleared the acquisition for implementation (CMA: 2016).

*Multiple opinions*

In 23 of the 28 takeovers where at least one opinion was given, the union, works council or employee representatives gave only one opinion to cover the general view. In the five remaining cases they gave multiple opinions: two at SABMiller, three at Hardys & Hanson, four at Britvic, and five each at Xstrata and Logica (Table 5).

*Table 5: Multiple opinions*

|  |  |  |
| --- | --- | --- |
| **Offeree company** | **Number of opinions** | **Bodies submitting opinions** |
| 23 companies | 1 each (i.e. 23 in total) |  |
| Hardys & Hanson (2006) | 3 | T&GWU (representing two bargaining units); Managers’ Forum |
| Xstrata (2012) | 5 | United Steelworkers (Canada); NUM (South Africa); works council (Germany); Sole Workers’ Syndicate (Peru); ICF (untraceable) |
| Logica (2012) | 5 | EWC; French works council; UK employee council; Swedish TU works council; Danish works council |
| Britvic (2012) | 4 | EWC; separately: UK, Irish and French opinions (also represented on EWC) |
| SABMiller (2015) | 2 | EWC; Dreher Breweries Trade Union |
| **Total**: 28 | 42 |  |

At Dee Valley, the employee forum gave an opinion that integrated a statement from the company’s Unite branch endorsing the forum’s rejection of the bid on grounds of threats to employment, which therefore did not count as a multiple opinion. However, at Hardys & Hanson, the (then) TGWU represented two separate bargaining units, while the Managers’ Forum gave its own opinion. At Xstrata – one of only two takeovers involving unions on a global scale (the other being Amec Foster Wheeler) – there was clearly lack of agreement over prospects, with views varying from welcoming to suspicious, from concern over lack of information to demands to maintain terms and conditions. At both Britvic and Logica, the EWC gave a general opinion which was supplemented by national representatives on the EWC (French, Irish and UK in the case of Britvic) or national level works or trade union councils (Danish, French, Swedish and UK in the case of Logica).

At Logica, the EWC acknowledged the potential of the takeover but criticized lack of detail and possible damage to company morale. Danish representatives concurred with the EWC, while the French and Swedish representatives were positive. The UK employee council reported that some employees polled had criticized the lack of information, while others had been concerned at possible redundancies. At Britvic, views were even more divided: the EWC was concerned at the proposed loss of jobs, the Irish welcomed the move, the UK expressed ‘cautious optimism’, while the French opposed the takeover on grounds of redundancies, internal restructuring and lack of information about future investment. These cases reveal that takeovers may have varying implications for different groups of employees across different countries, so worker opinion is likely to be fragmented. In all cases, multiple opinions were given through representative forms of participation (such as unions and EWCs), rather than direct forms.

**Discussion and conclusions**

In broad terms, takeovers in the UK remain more common, more likely to be hostile and more likely to succeed than in any other EU member state (Cremers and Vitols, 2016b). More significantly, there is considerable evidence that much takeover activity merely creates short-term gains for shareholders in the target company (Schenk, 2016). As both the Kay (2012) and Cox (2013) reviews concluded, financial activity in the UK, including takeover activity, has become increasingly short-term in nature, and misaligned takeovers can inhibit more responsible forms of capitalism from developing.

We have discussed the ‘shareholder value’ perspective that characterizes the UK takeover regime. As Davis et al. (2013: 5) argue, this ‘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’. The way in which the UK legal framework on takeover bids has evolved has, arguably, prompted target directors to set the company’s independent future and long-term continuity aside and support bids which merely reflect short-term investor horizons. As such, ‘the prevailing view in common law jurisdictions that large corporations should be run in the interests of their shareholders, subordinating the claims of employees, reaches its apotheosis in takeover regulation’ (Johnston and Njoya, 2014: 400-401). It is therefore not surprising that the Directive and the Code restrict the rights of employees and their representatives to information disclosure and giving an opinion.

Nevertheless, the implementation of the Takeover Bids Directive and further changes following reviews of the Kraft/Cadbury case have certainly led to important improvements in the provision of information to employees involved in a takeover. Over and above the requirements of the Directive, the Takeover Code now ensures: (i) that employees must be informed of their right to append an opinion to the offeree board circular; (ii) that the offeree must promptly publish the opinion ‘on a website’ if it has not been received ‘in good time’ before publication of the offeree board’s circular; and (iii) that the offeree company is responsible for costs incurred by representatives in verifying and publishing their opinion. However, our analysis suggests that, despite the various revisions to the Code, there remain areas of concern in relation to the lack of effective employee rights to *consultation*.

We have shown that the Code, in line with the Directive, merely allows employees or their representatives the opportunity to express an opinion, which may be taken into account, but not necessarily, as there is no formal obligation on shareholders to do so. Shareholders would have to weigh up the offeror company’s plans for employees against receiving a premium over the current market price. Hence the information disclosure provisions in the Takeover Bids Directive remain significantly less robust than those in other Directives which encourage stronger forms of consultation ‘with a view to reaching an agreement’. Furthermore, our detailed empirical review of all the opinions given over the 12-year period 2006-2017 confirms that the Code remains a weak instrument even in terms of affording employees meaningful rights to information. Opinions were given in only 28 of the 1,077 firm offer proposals registered by the Takeover Panel (2.6%), involving a total of 42 separate opinions (3.9%), given multiple opinions in some cases. Our analysis also distinguished between the pre- and post-review periods (2006-11 and 2011-17 respectively). The two specific changes following the Panel review – namely (i) the requirement for employees to be made aware of their right to append an opinion at an early stage, and (ii) the stipulation that offeree employees should be reimbursed for any reasonable costs incurred in doing so – appear to be associated with a spike in the submission of opinions immediately following implementation of the amended Code. However, a causal link is not established and the publicity surrounding the amended Code may in itself have raised awareness of the right to submit an opinion and thus encouraged an increased take up.

It is also impossible to know whether the tiny number of opinions given over the 12 years reflects a basic lack of awareness of the right to append an opinion, approval of the takeover proposal, or resignation that little or no notice would be taken of the opinion in any case. It is true too that the number of firm offer proposals itself fell markedly over this period which naturally reduces the number of opportunities to give an opinion. Further research following up specific cases would be needed to answer these questions. What our data do confirm is that, although 19 opinions (just under half) broadly supported the takeover with reservations, a further 13 (just under a third) complained about lack of information on which to base a view. Other significant concerns and requests raised related to the threat of redundancies, the implications of the takeover for pensions and the possibility of relocation, as well as trade union rights.

We therefore suggest that certain aspects of the operation of the Code require further scrutiny, despite the challenges they present. First, there is a solid case for employees in the offeree firm to have stronger rights to information and consultation concerning the intentions of the offeror firm, especially at the early pre-takeover stage, as well as with the new management team in the immediate post-deal period. The TUC argues that a ‘duty to consult’ when takeovers occur would significantly change their nature 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)

In the event of a transfer of undertaking, employees have – as noted above – rights under Article 7(2) of Directive 2001/23/EC to information about the implications of the transfer, and must be consulted ‘with a view to seeking agreement’ in the event that the new employer ‘envisages …measures in relation to the employees’. However, as Johnston and Njoya (2014) note, a transfer of control by means of a *share purchase* or *takeover* was excluded from the ambit of these I&C rights at the behest of the UK (with concerns that it would interfere with share pricing on stock markets and discourage mergers), and although the right of employees to express their opinion on a takeover bid was strengthened in 2011, the value of this right depends on shareholders taking account of employee interests: ‘This might be conceivable if a large proportion of the company’s shares were held by long-term, UK based institutional investors, but as the share registers of UK companies become increasingly globalised, this becomes less likely as investors with global reach and limited jurisdictional commitments concentrate on benefits that accrue in direct, financial terms. Accordingly, employees have few, if any, meaningful rights to voice in the event of a takeover’ (Johnston and Njoya, 2014: 406). Significant challenges therefore confront the TUC proposal, though a step forward might involve the right for employee representatives to select their own experts when dealing with takeovers, with the costs borne by management (ETUC, 2012).

A second area for scrutiny centres on the provision of more effective sanctions on employers who infringe the Takeover Bids Directive. Although offerors are required by the Directive to provide information on their ‘intentions with regard to the future business of the offeree company’, including information on safeguarding jobs and changes in conditions of employment, these stated intentions are frequently not fulfilled in practice, and there are no effective sanctions for this non-fulfilment:

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. (ETUC, 2012: 204)

The challenge here is that the offeror company may genuinely not know how its plans will evolve over the short- and medium-term, which will clearly constrain the value of the information that can be disclosed to employees and their representatives. It is therefore important to establish ways to clarify ‘good faith’ by ascertaining as far as possible the offeror’s intentions with respect to the target company. The Code Committee has specified that ‘any statement of intention by an offeror should be as detailed as is possible’, in particular disclosing the ‘fundamental business rationale for seeking to acquire the offeree company’ (Takeover Panel, 2011: para. 7.8). However, in its review, while acknowledging certain improvements, the Committee commented that it was ‘disappointed that, in many cases, disclosures have been general, and not specific, and that, for example, a number of offerors … have sought to satisfy the requirements of Rule 24.2 by stating that their intention is to undertake a review of the offeree company’s business following completion of the takeover’ (Takeover Panel Code Committee, 2012: para. 7.2).

Subsequent to the period of analysis covered in this article, the Takeover Panel, following public consultation, announced changes to the Code with effect from 8 January 2018 to strengthen statements of intention (Takeover Panel Code Committee, 2017). The changes now require the offeror, when announcing a firm intention to make an offer, to include its intentions towards the offeree on a variety of *specific* issues, such as the continued employment of employees and any material changes in conditions of employment or the balance of skills and functions of the workforce, pension schemes and strategic plans, among others. These requirements, at this earlier stage in the takeover process,[[4]](#endnote-4) are designed to give employee representatives a greater chance of submitting an opinion in time, and hence giving the target board more time to take it into account when forming their own opinion (Takeover Panel, 2017(a), para. 2.24; implemented by Rule 2.7). Two further rules are also worth highlighting as they focus on failures to fulfil statements of intention: existing Rule 19.6(b) of the Code requires an announcement if a party deviates from its stated intentions, while new Rule 19.6(c) requires a confirmation as to whether a party has or has not taken the actions it stated. Though no unions responded to the consultation, these moves will clearly be welcome to employees and their representatives, though their practical effects on employee involvement in the process remain to be seen.

Overall, our analysis confirms that the UK Takeover Code remains a relatively weak instrument in terms of affording employees meaningful rights to information disclosure, since the ‘shareholder value’ approach embodied in both the Directive and the Code does not consider the economic utility of takeovers from a social angle, nor does it allow an evaluation of the employment merits of individual takeovers. The Takeover Panel has gone some way to attempt to protect employee rights by integrating provisions on information disclosure from the Directive into the Code and subsequently adding further refinements following its own review process. Although these are now ripe for further scrutiny, a shift in the balance of power towards workers’ interests in the UK through a ‘stakeholder’ approach would require far more sweeping reforms of company law and industrial relations, though it is worth underlining the important point that: ‘Society has political choices that it can make about the underlying dynamics of a market economy. How companies are governed is one of those choices’ (Talbot, 2013: xviii). Such reforms, if chosen, would dovetail with the larger thrust of policy developing – within major institutional and legal constraints – around the notions of ‘responsible capitalism’ (Davis et al., 2013), the ‘sustainable company’ (Vitols and Kluge, 2011) and the reform of corporate governance under consideration by the current UK government (BEIS, 2017). However, they stretch well beyond the remit of any reform that could be undertaken by the Takeover Panel alone.

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1. A takeover bid is ‘a public offer (other than by the offeree company itself) made to the holders of the securities of a company to acquire all or some of those securities, whether mandatory or voluntary, which follows or has as its objective the acquisition of control of the offeree company in accordance with national law’ (Art. 2.1(a) of the Directive). The offeree company is ‘a company, the securities of which are the subject of a bid’ and the offeror is ‘any natural or legal person governed by public or private law making a bid’ (Arts. 2.1(b) and 2.1(c) respectively of the Directive). [↑](#endnote-ref-1)
2. In April 2017, the Takeover Panel initiated legal proceedings against Mr David King in relation to Rangers International Football Club (Takeover Panel, 2017b). [↑](#endnote-ref-2)
3. EU Directive on Takeover Bids (2004/25/EC), 21 April 2004, was implemented in the UK through The Takeovers Directive (Interim Implementation) Regulations 2006, which took effect on 20 May 2006. These Regulations were later replaced by Chapter 1 of Part 28 of the Companies Act 2006, which took effect on 6 April 2007. [↑](#endnote-ref-3)
4. Before January 2018, these statements of intention had only to be included in the offer document which, under Rule 24.1, must be published within 28 days of the firm offer announcement. [↑](#endnote-ref-4)