Briefing paper for Unite the union

Reform of the UK’s regulations on mergers, takeovers and shareholders for the longer-term

February 2018

www.acuityanalysis.org
About Acuity Analysis

Acuity Analysis was formed in 2017 and our purpose is to develop and strengthen democratic structures in the workplace. We do this by providing trade unions with high-level research and analyses to support them in their struggle to rebalance the power between labour and capital in the workplace.
## Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Key points from the research</td>
<td>5</td>
</tr>
<tr>
<td>Introduction</td>
<td>6</td>
</tr>
<tr>
<td>An historic overview of the British regulatory regime for merger and takeovers</td>
<td>8</td>
</tr>
<tr>
<td>UK regulations for mergers and takeovers</td>
<td>10</td>
</tr>
<tr>
<td>The City Code on Takeovers and Mergers</td>
<td>13</td>
</tr>
<tr>
<td>Shortcomings of short-termism</td>
<td>15</td>
</tr>
<tr>
<td>The case for a longer-term approach in the UK</td>
<td>20</td>
</tr>
<tr>
<td>Cadbury takeover by Kraft</td>
<td>26</td>
</tr>
<tr>
<td>ARM takeover by Softbank</td>
<td>28</td>
</tr>
<tr>
<td>Comparison with other European systems</td>
<td>29</td>
</tr>
<tr>
<td>Control Enhancing Mechanisms</td>
<td>32</td>
</tr>
<tr>
<td>Recommendations for change</td>
<td>39</td>
</tr>
<tr>
<td>Further supporting evidence</td>
<td>44</td>
</tr>
</tbody>
</table>
Key points

1. The M&A regime in the UK appears to encourage shareholders to drive up the price of their stake only to the point at which they are able to make a profit from the sale.

2. Research shows that short-term transactions create very little value the businesses concerned and destroy value associated with wider economic stakeholders.

3. There is overwhelming evidence to demonstrate that long-term companies fare better for society, employment, their shareholders and in the long-term interests of the business more generally.

4. Decades of a non-interventionist approach by the UK government, combined with the narrowing of the public interest test have undermined the British business environment.

5. UK regime makes listed companies particularly susceptible to hostile takeovers as a result of the low incidence of Control Enhancing Mechanisms within listed firms.

6. The availability of a wide range of tools is already enshrined in UK company law and all listed firms are free to introduce them as they see fit, to manage the control exerted by their present and potential future investors.

7. Companies in countries like France and the Netherlands make frequent use of a mixture of CEMs to provide long-term shareholder investment and to reduce the risk of hostile takeovers.

8. Companies tend not to introduce CEMs to protect the business because, in too many instances, board members are keen to cash-in when the opportunity arises.
**Introduction**

This report has been written to provide Unite the union with an overview of the UK regulations for shareholders and companies in the context of mergers and takeovers and, in particular, hostile takeovers of UK listed companies. In addition, it provides a critique of the UK’s regulatory regime, using recent cases to illustrate the shortcomings of our current system. The report includes a comparative analysis of European and other country M&A frameworks, and an examination of various Control Enhancing Mechanisms that are at the disposal of company boards in their work to promote long-termism among their shareholders and senior management. The report concluded with a set of recommendations for companies and the UK government to restrict the ability of short-term agendas to drive the country’s business community and their investors.

The report provides the union with ideas and proposals to once again pick up the debate and drive change through our regulatory system, by influencing British business, politicians and the media. This work is crucial in recognising the millions of workers whose labour generates the profits that are repackaged as dividends, bonuses, legal and financial fees and too often offshored as untaxed income for the very few at the top.

Over the past three decades, the vested interests of the boards and shareholders of listed companies have narrowed the scope and direction of the debate: away from discussions about the true purpose of an economy and instead justifying the rewards for the few that our current system provides. The perceived wisdom and accompanying obsession with free-markets and religious-like faith in the virtues of competition, at any cost, must be reconfigured to widen to scope of influence to ensure the voice of everyone with an interest can influence the enormous shifts in power, that we all help to create.

As is the case in the US, and in contrast to the national systems of most other EU states, the regulatory framework for shareholders in the UK is market-based and is fixated on protecting and enforcing shareholders’ rights. In the EU elsewhere (and in Asia), the rules governing shareholders is referred to as the Block-holder system and is focused more on the protection of stakeholders. Although the latter tends to exist in economies with concentrated company ownership (the rest of Europe), and less dispersed ownership than is the case in the UK, there is no excuse for failing to adapt our current approach to shareholder and M&A regulation.

As a consequence of the UK’s obsession with competition, no matter the cost, the protection of shareholder interests is the prime concern of the British system. In fact, the system’s focus is so narrow that references to employment within the UK merger regulatory system are noticeable only in their absence. Despite regular statements of action and public consultations for the system’s reform by successive governments, little has changed. This fixation for preserving competition endures, no matter the degree of public outrage or the brutal consequences on employment.
There is a long list of mergers and takeovers involving British companies which have destroyed jobs and provided little, if any, long-term benefits to either party to the deal, yet, even those with the power to amend the UK’s merger and takeover laws regulations and who support reform, changes to the regime have time and again systematically failed to broaden the remit of the system beyond the preservation of the status quo.

Our very perception of what constitutes a shareholder is typically narrow and superficial. Notwithstanding the legal definition, the very term ‘shareholder’ is misleading and disingenuous. In fact, our narrow definition of shareholder is frequently criticised in the associated academic literature, and as such, there is a genuine need for rethinking our application of the term to include all actors with a legitimate dependency on the success or otherwise of a business. Thus, actors such as supply-chain companies, employees, consumers and communities should all be considered shareholders and, in the context of a takeover enquiry, ought to be included as legitimate parties to the transaction.

However, widening the definition of shareholders only becomes necessary if the interests of these investors are considered to be contrary to the interests of the wider stakeholders. Actually, the argument for suggesting these two groups have a common interest is relatively obvious.

Finally, a number of the recommendations in this report are possible to implement without any additional legislation or even the slightest reform to the UK’s regulatory framework. It just takes the will and a determination by our government to acknowledge the shortcomings in our decades old approach to this area of British business.
Historic overview of the UK regulations

Historically, company ownership in the UK has been dispersed going back to the nineteenth century stock exchange rules that specifically required a large allotment of shares to be floated on the market, following an IPO. Family ownership in the UK declined from 1945 through acquisitions and the rise of institutional investors, such as pension funds, increasing their investments in equity. The UK therefore has historically tended to be characterised by a greater dispersal of ownership than other European countries and this accounts for the variation in approaches of national regulatory systems.

Additional influence of other factors such as the tax regime that subsidised occupational pension funds, by offering favourable tax treatment to payments received as dividends. Thus, the UK’s less concentrated company ownership influenced our current system and much of the divergence from that of our European neighbours can be accounted for in this way.

Reform came in the 1990s and took the current preference for self-regulation over legislation, and so the Cadbury Code was published in 1993 which advocated the separation of the roles of CEO and Chair in an attempt bolster shareholder power in holding management to account.

This ‘hand off’ approach by the UK government continues to this day and even extends into the realm of company boards. There are few restrictions place by the law for structuring a British company board, instead companies are expected to conform to corporate governance standards or else explain why they do not. In line with the British approach to this area of regulation, it is accepted that the market is the best judge of these things and so, naturally, the market will favour, or not, companies that behave in a certain way and any poor decisions will simply be reflected in lower share prices through market forces.

Ironically, it was the Labour government, under Tony Blair, that generated a legislative framework for mergers and takeovers so focused on the preservation of competition and nothing else. Parliamentary-Under Secretary of State, Melanie Johnson, stated in Parliament at the time of the passing of the Enterprise Act 2002, that, “[the Labour government will introduce] two core changes to the merger regime. The first is to depoliticise the merger regime by removing Ministers from the vast majority of decisions. The second is to replace the broad public interest test with a competition test.”¹ The government at the time placed greater emphasis on providing more certain and predictable outcomes for business than widening the scope of the public interest test to incorporate factors other than simply competition.

Generally, UK governments consider that, “the economy is best served if mergers are assessed solely on the basis of their effect on competition. Competition provides a spur for businesses to be more

¹ House of Commons Standing Committee B, 25 April 2002 cc 293-4
productive, innovative and efficient, and better able to provide long-term sustainable employment and better products and services for consumers." In respect of introducing amendments to the Bill, to take into account these wider interests, "would allow the authorities to take some account of the employment and regional effects of mergers .... Adding new factors into the test will create barriers to restructuring. I recognise, of course, that mergers can have short-term adverse regional and employment impacts."

Such comments provide the recent past, and present, political environment of mergers and takeovers in the UK. Every assessment of such a transaction is based on one factor: preserving free markets.

The Labour government may have indeed been correct that the UK’s merger and takeover regime would reflect those in other parts of Europe, but assuming that by replicating the regulatory framework in these countries the British system will therefore provide similar results, completely ignores the influence of the role played by labour market regulations and employment relations in these other member states.

---

2 House of Commons Standing Committee B, 25 April 2002 cc 293-4
3 Ibid
UK regulation of mergers and takeovers

The main sources of regulations in the UK are the Enterprise Act 2002 (including the ‘public interest test’ update in 2008); the City Code on Takeovers and Mergers (revised 2011); Companies Act 2006; and the Competition Act 2006.

The Enterprise Act 2002, as amended, sets out the regulatory framework for preserving competition while the City Code on Takeovers and Mergers, administers the procedural aspects of the transaction itself, with a view to protecting shareholders. Naturally, the UK’s regulatory system is interconnected with the Takeover Bids Directive (2004/25/EC) and the latter is dealt with in the comparative section of this paper.

The Enterprise Act 2002 marked a watershed in regulatory practice of mergers and takeovers by establishing a narrower public interest test. Prior to the 2002 Act, the Fair Trading Act 1973 provided for a much broader public interest test, which included a role for government to:

- promote the interests of consumers, purchasers and other users of goods and services in the United Kingdom in respect of the prices charged for them and in respect of their quality and the variety of goods and services supplied;
- promoting, through competition, the reduction of costs and the development and use of new techniques and new products, and of facilitating the entry of new competitors into existing markets;
- maintain and promote the balanced distribution of industry and employment in the United Kingdom;

The references in the above to prices, quality and variety of goods and services, the distribution of industry and the inclusion of employment within the scope of competition policy neatly illustrate the extent of the shift in the UK’s approach in this area over the past three decades. Today, our competition regime is administered by the Competition and Markets Authority (CMA), itself created from a merger between the former Competition Commission and the Office of Fair Trading. The role of the CMA is to investigate a proposed takeover if it is considered that the transaction may lessen competition. A crucial aspect of the work of the CMA, and a key characteristic of the British system of corporate regulation, is the lack of political involvement in its work.

The statutory provisions for the regulation of takeovers stems from the Enterprise Act 2002, which is in large part responsible for codifying what we recognise today as the set of provisions governing the UK’s approach to takeovers. The Act permits the government to intervene in a proposed takeover only if public interest concerns arise, such as national security, media quality, plurality and standards, and financial stability. The latter category was introduced as a result of the financial crisis in 2008, by virtue
of the powers contained in the 2002 Act that permit a government to introduce additional public interest consideration and is the only time such an additional has been made.

Additional regulatory oversight is provided by the Takeover Panel through its administration of the Takeover Code. The purpose of Code is to ensure shareholders are treated fairly and have sufficient information on which to base their decision in a takeover situation. The remit of the CMA is solely limited to ensuring that takeovers do not result in a lessening of competition. Employment is mentioned once in the CMA’s official text relating to the body’s remit, but only in that,

“The CMA will also not act upon explicit non-competition concerns based on legitimate public policy issues outside the CMA’s remit, such as protection of UK employment and environmental issues, among others, unless required to do so pursuant to an intervention notice issued by the Secretary of State. In all cases, the question for the CMA is whether the transaction might be one that creates the realistic prospect of a substantial lessening of competition.”

It’s not as though the UK’s membership of the EU, arguably one of the fiercest supporters of free-markets, completely restricts our government from introducing other considerations, such as the impact on employment, within the jurisdiction of the current regulatory regime. Indeed, the French regulatory framework includes such provisions.

The key issue here is that of member states’ legal capacity to introduce caveats or specific criteria through which to legitimise wider notions of anti-competitiveness. The European Directive on Mergers, a related abstract of which is reproduced below, provides some, albeit small, leeway for member states to protect their national interests, whilst remaining committed to open markets and fair competition across the bloc.

“Forthemselves, the exclusive application of this Regulation to concentrations with a Community dimension is without prejudice to Article 296 of the Treaty, and does not prevent the Member States from taking appropriate measures to protect legitimate interests other than those pursued by this Regulation, provided that such measures are compatible with the general principles and other provisions of Community law.”

---

4 Mergers: Guidance on the CMA’s jurisdiction and procedure, 6.14 (CMA, January 2014)
5 EC 139/2004 on the control of concentrations between undertakings (EC Merger Regulation)
6 Article 19 EC 139/2004
Voluntary notifications

The law in the UK does not insist that all proposed takeovers are notified to the CMA – it is a purely voluntary requirement (quite in keeping with the ‘hands off’ and ‘self-regulatory’ approach of the UK takeover regulations). This is contrary to most other mature economies around the world and testament to the UK government’s ‘hands off’ approach to the regulation of capital and labour more generally.

The UK’s opposition to introducing a statutory obligation on business to notify the public authorities of a potential merger or takeover is at odds with the legal framework that exists in most of the world’s mature economies. In fact, the “adoption of mandatory pre-merger competition notification regimes in jurisdictions throughout the world .... [has been] ... “Perhaps one of the most successful exports from the United States”.

Only mergers or takeovers that meet one of these two criteria fall within the scope of UK regulations:

1. **Turnover test** – if the UK turnover of the company to be acquired exceeds £70 million per annum; or
2. **Share of supply test** – if the share in the supply of goods or services of a particular description is created or enhanced in the UK or a substantial part of the UK (the “share of supply” test)

In instances where the CMA has not been notified, yet the turnover threshold is met, the CMA has no power to impose sanctions on either the target or offer company. If the CMA considers it appropriate (on the grounds that a merger may result, or has resulted, in a significant lessening of competition) then it may insist on an in-depth (Phase 2) investigation, undertaken by an independent panel.

After the transaction has become unconditional and made public, the CMA is able to refer the case for investigation within a four-month time period, providing a strong argument for merger notifications to be made mandatory. Even if the CMA investigation determines that competition will be lessened, or has been, its power to suspend or annul the merger process have yet to be tested in the British courts. As expected from a regime purely focused on the competition aspect of M&A regulation, the only sanction available to the CMA is to forbid any further share transactions until its enquiries are complete.

---

The City Code on Takeovers and Mergers

The Code is the key authority for governing mergers and takeovers in the UK. The Code is self-regulated by the Panel, which is, as are its organs, (almost entirely) comprised by people whose employment is based within the City of London – and so the Panel, the Code’s enforcer, is controlled by (mostly) men, whose interests (financial and personal) lie in the preservation of the current regulatory regime. The Code therefore is often criticised for its natural tendencies to preserve and maintain the status quo and the ‘bubble’ from which its authority is derived has little understanding of the wider implications of the City’s activities on employment, the environment and other important aspects of British society.

The Code focuses exclusively on preserving the rights of shareholders and the free-market. The following points are taken from the General Principles of the City Code and clearly demonstrate the Code’s objectives, which are to ensure...

- equivalent treatment of shareholders – especially for minority holders
- sufficient time and information for shareholders to make an informed decision
- the board of the offeree company acts in the interests of the company as a whole
- the buyer’s board does not deny shareholders the opportunity to decide the bid’s merits
- false markets are not created, artificially affecting share prices or distort the market
- offeror must announce bid only after ensuring it can fulfil in full any cash consideration
- buyer does not hinder a target company in its affairs for longer than is reasonable

It is notable that there is no mention of protecting employment, the impact on communities or even ensuring that society is not adversely affected by mergers and takeovers. The focus of the UK’s regulatory regime is clear – competition must not be adversely affected, free-markets must prevail and shareholders must be protected.

The Kay Review into UK equity markets and long-term decision making

Professor John Kay’s review into market short-termism and the relationships between company owners and fund managers was commissioned by the Tory-Lib Dem coalition government and was preceded by others of a similar nature, most notably in 2001 by Lord Myners, commissioned by the last Labour government. The enquiry was prompted by a range of issues of concern, but for the purposes of this paper the highly contentious hostile takeover of Cadbury by Kraft, the previous year, widened its scope to include the impact of short-termism in the context of mergers and takeovers. The review took place at a time when the portion of the shares of listed company held by individuals had dropped from over half of the company in the 1960s, to 11.5 per cent. In tandem with the rise of institutional investors and asset managers has been the growth of short-termism and a narrow definition of whose interest business should serve.
Professor Kay pointed out that “Our rules seem to be extraordinarily permissive, and one might sit back for a moment and ask whether it is actually in the benefit of the economy and society, and why we have concluded that we want to make it so much easier to take over companies than elsewhere.”\(^8\) However, and despite a greater emphasis on the Opinion of employees of the target, the expression of the workforce will be limited in its scope and influence: regardless of the content of such a statement by the target workforce in the Opinion, the relevance of the text is only as influential as the law requires – thus, a short-term thinking shareholder (if they read the Opinion at all), is unlikely to voluntarily give consideration to the views of the workforce if the Opinion goes against what they perceive as their own interests in the transaction. Without reform of the structural shortcomings of the UK’s takeover regulations, any document written from the viewpoint of the workforce will simply fail to trump shareholders’ own interests arising from the transaction.

\(^8\) The Kay Review of UK Equity Markets and Long–Term Decision Making, HC603 (July 2013)
Shortcomings of short-termism

The short-term demands of investors put senior management under pressure to deliver higher returns and at a quicker pace.

This short-term approach is not helped by activist shareholders who are often opportunistic, and, while some literature highlights the positive impact this group has on encouraging firms to consider environmental and ethical issues in their corporate governance and business strategies, there is evidence to suggest that many of these individuals pursue a myopic approach to the wider interests of businesses, their workers and local communities.

It was the fund managed by activist investor Nelson Peltz which triggered the sale of Cadbury Schweppes’ drinks business in 2007 that opened the way to its subsequent hostile takeover by Kraft. Peltz is one of a number of high profile activist investors that have influenced significant transactions over the past two decades.

Today’s average share is bought and sold within eight months (or within one annual accounting period), as the length of time investors are prepared to wait for their profit diminishes, year on year.

Although their patience is decreasing, investor’s appetite of for profit is increasing, as the amount of cash through dividends or buybacks climbs, as the graph below reveals.
However, the more cash distributed as dividends does not necessarily translate into value for investors, as the following demonstrates.

It is perhaps ironic that, despite the constant declaration by CEO’s of listed companies that they are primarily driven to provide shareholder value, the reality is that over the past two decades annual shareholder returns have been dropping year on year (see graph above).

So stark is the decrease that today’s typical shareholder can expect their return on investment at the same level as it was in the 1980s. That is, the real return on equities has not increased over the past
20 years – during the same period through which company executives have been constantly harping on about rewarding their shareholders.

So, what has happened?

Over the last 20 years, or throughout the period in which companies have been ‘focusing on rewarding their shareholders’, a significant portion of shareholder return can be attributed to falling interest rates and not, as companies would have us believe, from growth.\(^9\)

The previous periods during which companies provided shareholders with such a low return on equities, equal to the returns provided by government bonds, was in the 1920s and 1930s.

While the current UK government and supporters of free markets, many of these on the right of the Conservative party and who also support a hard Brexit, tend to argue that the country’s current regulatory regime for business produces clear, tangible benefits for shareholders, company executives, consumers and workers alike, it is very clear that this is anything but the reality.

![R&D expenditure as a percentage of GDP](image)

*Source: OECD statistics*

Overall, the UK’s current regulatory environment and the resulting short-term attitude of much of the business community, produces an economy that fails to recognise the importance of long-term investment in such essentials as research and development and in fixed assets, such as machinery and technology, as both graphs here illustrate.

\(^9\) “UK Business, what’s wrong? What’s next? Creating value for tomorrow’s shareholders and society through a focus on purpose, value, relationships and the long term”, Tomorrow’s Company (2016)
In 2007, British companies paid out £54bn in dividends to their shareholders (expected to rise to £95.5bn in 2018). In the past twenty years, the amount paid to shareholders has increased by 57%, and in 2017, shareholders received a whopping return of £94.4bn.

This extraordinary rise in shareholder returns is set against a backdrop of dropping levels of investment, which have fallen from 11% of revenue in 1997 to 8% in 2014. Investment in R&D in the UK is lower than that in the Euro-zone (1.6% of GDP in the UK; 2.1% of GDP in the Euro-zone).

There is ample evidence to suggest that shareholder focused corporate governance has a negative impact on investment decisions. Several studies, in turn, showed that firms are less willing to invest in R&D when pressured to prioritise shareholder returns via share buybacks and higher dividends; listed

---

10 Graham et al (2005); Ljungvist (2012); Belloc (2012)
firms are less responsive to changes in investment opportunities; significant trade-offs between shareholder protection and stock market values on one hand, and innovation on the other; and finally a study that revealed a correlation between shareholder protection and lower innovation.

**Post-takeover performance**

There is plenty of empirical evidence that refutes the claims that business interests are not always served by long-term business strategies. In its 2016 report, “Measuring the economic impact of short-termism”, the McKinsey Global Institute, a consultancy often regarded as being synonymous with the more aggressive varieties of capitalism and shareholder return, evidenced how short-termism fails businesses and in fact damages competition in liberal economies. The report is based on a dataset of 615 large and mid-cap US listed companies in the period 2001-2015, using its own index for identifying and isolating ‘long-term companies’ and measuring their relative performance. The report’s conclusions would make even the most ardent supporters of short-term capitalism blush and recant.

**Growth**

- Significantly higher growth in the revenue of long-term companies (47% on average)
- Revenue of long-term firms is less volatile than that of their short-term equivalents
- In the same period, profits in long-term companies grew by 81 per cent more on average.

**Investment**

- Investment by long-term firms was higher between 2001 and 2014 (50% more spent on R&D)
- Short-term firms cut R&D during the financial crisis, but long-term firms continued investing
- Long-term firms’ annual investment rate, 2007-2014 grew by 8.5% vs. 3.7% for short-termers.

**Financial performance**

- On average, long-term firms grow steadily over time.
- Between 2001 and 2014, capitalisation of long-term firms grew by more than $7bn
- Long-term firms also provide their shareholders with better pay-outs
- Long-term firms more affected by financial crisis, but recovered quicker.

**Employment**

- Between 2001 and 2015, long-term companies created 12,000 more jobs
- If this figure was extrapolated upwards, the US economy would have grown by about $1tn more than it did and created more than five million additional jobs between 2001 and 2015
The case for a longer-term approach in the UK

One way to encourage a more long-term based approach to shareholder decisions on potential mergers and takeovers would be to modernise the way businesses are measured. For instance, only tangible investments are included in the financial metrics of a company’s performance but there are good reasons for amending this system of evaluation to include non-tangible, or intangible, investments too.

More information on what counts as an ‘intangible’ investment is provided in the appendices of this report. However, the graph below shows the financial aspect of such investments, all of which is ignored within the information published by companies, and therefore absent in the decision-making process of shareholders when it comes to considering the long-term implications for their investment of a bid.

In fact, the significance of intangible investments for British businesses is huge, neatly illustrated by the graph below.
Much research has previously examined the source of short-termism among board members, shareholders and their intermediaries, using interviews with individuals from these groups. The research findings are as interesting as they are worrying. The research concluded that, “managers were almost more dedicated to the pursuit of shareholder value than the fund managers they were meeting”\(^{11}\)

In addition, emphasis on ‘shareholder value’ was made by senior managers in order to strengthen their own authority to push through contentious decisions regarding restructuring.

The researchers also found that although senior managers were able to distinguish between long-term and short-term, in practice the distinction between the two, in terms of shareholder value, was unclear.\(^{12}\) The same research reported that both shareholders and senior managers blamed each other for the short-term pressures they experienced. In addition, the research findings suggested that CEOs are open to influence by the financial rewards for targets provided in their contracts. Additional evidence from research in the US, demonstrated that listed companies have become “less willing to invest in R&D when they come under pressure to prioritise shareholder returns through share buy-backs and higher dividends.”\(^{13}\) Furthermore, a 48-country study\(^{14}\) analysed the relationship between shareholder protection and innovation, as measured by investments in R&D and patenting activity, and concluded

\(^{11}\) Roberts et al., 2006.
\(^{13}\) Graham et al. (2005) as cited in Deakin, S
\(^{14}\) Belloc’s research made use of the World Bank and CBR indices on shareholder protection (2012)
that, “a high level of legal shareholder protection is correlated with a higher level of stock market capitalisation, but a lower level of innovation activity.”\textsuperscript{15}

While this report aims to provide the union with recommendations for reform, it is very clear that companies are already granted the capacity to provide more influence to their long-term shareholders, by virtue of the Companies Act 2006. Indeed, many of the things that have been done in terms of giving preferential status to long-term shareholders could take place now in the UK under the Companies Act 2006, but the situation is that companies decide not to introduce that form of provision within their articles of association. The powers are there already. The issue is not so much to do with whether the legislative framework exists; it is more a matter of culture. One of the interesting aspects of UK businesses is that we tend to have a broader shareholder base than, say, companies in Germany.

The CBI agreed broadly with Lord Mandelson’s recommendations but made the point that raising the voting threshold from 50.1% to two thirds of the shares might not by itself make much difference if the bid was recommended and, if it was not, the aggressor could fire the board, unless the rules for directors’ appointments were also changed.”\textsuperscript{16}

A comprehensive and qualitative study\textsuperscript{17} used interviews from individuals involved in hostile takeovers of utility and manufacturing companies, found that:

- boards generally focused on short-term shareholder returns when evaluating bids
- the board did so partly because of legal advice that this was required by the Takeover Code
- Interestingly, at the time of the study, a provision in the Code that required boards to consider the impact of bids on jobs was regarded by those directors and adviser interviewed as irrelevant
- Non-executive directors preferred to attempt to sell a bid by emphasising shareholder returns, rather than reject a bid that would result in the company being broken up.

**Hostile takeovers**

Hostile bids are more likely in the UK, relative to the size of our listed market, and are much more likely to lead to a change of management. A study examining the impact of hostile takeover bids in the period 1991 to 2005 found this type of takeover was more likely to fail than succeed in the UK and US, countries with a preference for focusing on shareholders, rather than stakeholders, as is the case in Germany and France.


\textsuperscript{17} The 2002 study focused on 15 hostile takeovers and was based on interviews with executives, non-exec directors, institutional investors and legal advisers. (Deakin, Hobbs, Nash and Slinger).
Hostile takeover bids more likely to fail than succeed in the UK and US

<table>
<thead>
<tr>
<th>Country</th>
<th>No. of bids</th>
<th>Success rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>France</td>
<td>18</td>
<td>67%</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>176</td>
<td>42%</td>
</tr>
<tr>
<td>USA</td>
<td>332</td>
<td>22%</td>
</tr>
<tr>
<td>Germany</td>
<td>6</td>
<td>83%</td>
</tr>
</tbody>
</table>

A further sign is anecdotal evidence that some individuals are now choosing to sit on the boards of private equity owned companies, rather than listed companies. These individuals often cite the burden of compliance, governance and process being the reason.

**Short-termism is ...**

- Nearly 90% of company directors and executives say they feel most pressured to demonstrate strong financial performance within a period of two years or less.
- 65% of executives and directors say short-term pressure has increased in the past five years.
- Over half of executives and directors within companies without a strong long-term culture say their company would delay a project to hit quarterly targets, even if it sacrificed some value.

**Short-term decisions encouraged by a system measuring performance over same timescale.**

Unilever’s CEO recently made the point that companies could simply cut the terms and conditions of their workforce and research and development to drive up their share price in order to prevent a hostile takeover. Put another way, the UK’s system for regulating takeovers currently denies the CEO of a multinational company (a company that invests and creates added value wider than simply paying out dividends to its shareholders) a form of defence against a hostile and short-term oriented bidder. Is this the system we really want? The message that the current system sends to large companies is that in this country, there is little interest in trying to preserve employment, quality and competitive sectors and businesses.

**The role of pension and hedge funds**

Short-term gains for shareholders have been reported by several studies that examined the role of hedge funds. The research found abnormally positive returns for shareholders during the period of time of a disclosure of the acquisition of a 5% stake in a target company. A further study, between 1993 and 2006, concluded that share transactions that led to a takeover within the following 18 months produced very significant rewards for shareholders. Additional research contradicted some of the previous findings by evidencing declining profitability and earnings the year following the event, with no

---

19 A large-scale US study, utilised a dataset of 1,000 interventions made by activist hedge funds between 2001 and 2006
20 Greenwood and Shor (2009)
21 Klein and Zur (2009)
subsequent recovery. Finally, other research found negative impact on profitability and returns on assets immediately following the intervention of hostile hedge funds.\textsuperscript{22}

Pension funds were once widely considered to be long-term investors and favoured by many businesses as institutions that could be considered a source of support for companies in the event they become a target of a hostile takeover. However, it was US pension funds that helped tilt the balance away from Cadbury’s board and towards success of the Kraft bid. It is widely understood that the rise of short-term thinking pension funds, once considered one of the longest-term investors, is a result of the growth in life expectancy compounded by the miserable outlook for many future generations of pensioners – retirees who once upon a time were members of a final salary pension scheme that was closed in the last decade due to the short-term demands on companies to avoid filling scheme deficits that only appeared due to successive recessions, that were themselves a result of short-termism and lucrative pension holidays by the companies themselves.

Today, pension funds are among the most excitable and aggressive investment institution in the world – a chart topped no doubt by the voracity and short-termism of CalPERS, the Canadian Public Employees’ Retirement Scheme, (the short-term approach of which is amply evidenced by the complex tax-limiting structures used by the owners of Gatwick Airport Limited, in which CalPERS are a large shareholder). This group of investors is hotly followed by the California State Teachers’ Retirement System. A system creates, and indeed favours, such an absurd short-term outlook needs to be thoroughly examined for its contribution to our economy.

The conclusion of a US study into the impact of a takeover in terms of management roles, found that pension funds are more likely than mutual funds to replace fund managers after poor performance over the short-term (identified for the purposes of the study as up to one year). In addition, other work found that the fiduciary duties of pension fund trustees, make them more likely to replace managers who fail to meet them. The regulatory environment in which companies operate and the associated regulations governing shareholders and the fiduciary duties of company directors has created an economy that exists to feed the short-term expectations of investors and senior company executives at the cost to wider stakeholders and society generally.

\textsuperscript{22} Brav et al (2008)
Financing takeovers

In addition to having a common owner following the takeover, both Cadbury and Kraft shared a secret even before Kraft’s bid was put to the target’s board: Chromium Suchex LLP. Chromium Suchex is the owner of Chromium Acquisitions, the legal entity at the heart of the accounting methods used by both Cadbury and Kraft to remove virtually any tax liabilities. The truth is, Cadbury was far from the ethical, Quaker-inspired company of its forefathers and did very little to contribute to the UK’s tax revenue. By taking on massive debt, via Chromium, Cadbury was able to offset any profits the company made against the significant interest payments for servicing this debt.

Analyses by several organisations, reveal just how much Cadbury relied on accounting engineering to avoid paying any UK tax on its profits made by its workforce in this country. Although this technical process was utilised prior to the Kraft takeover, the accounting tricks involved, although perfectly legal, go to heart of what drives many hostile acquisitions and, in turn, just as many rejections by target boards.

It is worth noting that Cadbury shareholders did not reject the earlier offers by Kraft through some ethical principles or their desire to sell their shares only to long-term investors. They rejected the initial offer, and succumbed to a later, most enriching proposal by Kraft, simply on the grounds of self-interest.

A paper by KPMG states that, “The principal advantage of [using] debt [to finance takeovers] is the potential tax-deductibility of [the] interest ... the payment of a dividend does not give rise to a tax deduction....[and] Another potential advantage of [using] debt is the deductibility of expenses, such as guarantee fees or bank fees in computing trading profits for tax purposes.” It goes on to state that, “Where a UK target company with trading losses is acquired (whether directly or by the acquisition of its immediate or ultimate parent company), it may use those losses against its own future trading profits.” The only limitation to this last rule is that in order for a company to offset its losses (even if incurred by the parent company), there can be no “major change in the nature or conduct of its trade 3 years before and 3 years after the date of acquisition.”

The advice from KPMG to potential bidders, if “the purchaser intends to undertake a major rationalization of the trade or wishes to inject elements of its own trade into the target ... [is] ... to wait until at least 3 years have passed from the date of acquisition.” The guidance in the KPMG paper is in line with other professional consultancies and in no way breaches any UK laws. However, the treatment of these transactions by the tax authorities in the UK does indicate a key area for reform if we are to shift the short-term nature of British takeover regulations to the longer-term.
**Cadbury takeover by Kraft (2010)**

The post-Cadbury reform to the City Code included the shortening of the time period in which a bidder must either up their offer or walk away: the so-called ‘put up or shut up’ rule. The reform reduced this time period to 28 days, however, this may have been a rather hasty response to Cadbury acquisition by Kraft.

Cadbury shares held by short-term investors, such as hedge-funds, stood at around 5% at the point Kraft made its opening bid. It took only 44 days before these shareholders were able to acquire nearly a third of the target company’s stock, so a 28-day window may be an insufficient period of time in which such a frenzy of share transfers could achieve a similar outcome under the reformed Code.

However, the reform means that target shareholders have only 28 days to decide if their long-term interests are served by agreeing to sell their shares to the bidder, effectively regulating for the long-term by shortening the period for decision making. Surely one of the more oddest ways to engender long-term thinking.

The Chromium entities that were directly linked to Cadbury, ensured that any profits passed up to them, from the confectioner (or rather from the chocolate maker’s UK workforce), were immediately offset by the costs of financing intra-company loans between the two companies. The value of the ‘dividends’ paid from Cadbury to Chromium Suchex LLP was in the region of £750m per year – not a bad tax-free income. If only listed companies were obliged to disclose such group structures to representatives of the workforce.

It is difficult to imagine why Cadbury shareholders could have been so eager to sell their shares, when the annual rewards they received as dividends were so lucrative. One assumes that the value of annual shareholder dividends means little when an offer is made that provides a definite windfall that even shareholders considered long-term acquiesce.

- Cadbury shareholders began selling when share price increased by 40%, after the Kraft bid.
- Sale of almost a third of Cadbury shares within 44 days of initial Kraft bid - by investors looking for a quick profit
- These investors were not interested in the long-term and were only interested in quick profits
- Cadbury workforce had a more genuine interest in the company, but their voice was insufficient
- The power of the new shareholders determined the fate of the company and its workforce
- Ultimately, the company was acquired when the share price of the target reached the point at which Cadbury shareholders could sell and those shares could be acquired by investors purely interested in the potential profit from the shares
- Thus, Cadbury shareholders were also acting in the short-term.
What would have made a difference?

- It is possible that the increased offer from Kraft may have emerged even if its own shareholders were unable to purchase Cadbury shares and, by driving the price higher, benefited from their ownership of both companies’ shares.

- However, had this group of investors been unable to purchase Cadbury shares during the offer period, perhaps Kraft’s final offer would have been insufficiently off the mark that the Cadbury board may have defended the takeover.

- Whatever the theories, one aspect of the saga is clear: if all transfers of Cadbury’s shares, during the period of time from Kraft’s initial bid until Cadbury agreed to the takeover, had been prohibited then the Cadbury shareholders would have been unable to sell their shares and the new, short-term, investors would have been unable to influence the process.
**ARM Holdings takeover by Softbank (2016)**

ARM had been a highly successful technology company, based in Cambridge and employing 4,000 people. The Japanese firm, Softbank, paid just over £24bn for ARM, in what was then the biggest acquisition of a European technology firm. The transaction took barely two weeks, far quicker than most acquisitions of this size, and the deal was clinched with the Japanese firm paying a 43% premium for ARM shares.

Shortly after sealing the deal, Softbank CEO made legally binding commitments to the British Prime Minister and Chancellor of the Exchequer to maintain ARM’s HQ in the country. Six months later, in Spring 2017, Softbank sold a 25% stake in ARM to a fund created by Softbank’s founder and CEO, with the majority of the fund financed by Saudi Arabia’s Public Investment Fund.

- ARM CEO announced that the deal was an “offer for ARM shareholders that delivers future value today” – short-termism surely?

- The Chancellor of the Exchequer, Philip Hammond, then praised the merits of the deal by stating, “ARM founders will testify, this is the greatest place in the world to start and grow a high-tech business”. And no doubt the ARM Chief Executive and company’s Chief Operating Officer will be more than happy to endorse anything after their combined £33m windfall.

- Despite the de-politicisation of the competition rules, as a result if the Enterprise Act 2002, the UK government was still able to relinquish its responsibility to promote the long-term interests of the country, which rumours suggest was about emphasising that ‘Britain is still open for business after the referendum vote on Brexit’.

**What would have made a difference?**

- If the ARM board had been unable to personally profit from a takeover (enforcement of the principle of board neutrality) then their influence to accept the premium price by Softbank would have been minimal.
Comparison with other European systems

The evolution of the modern regulatory framework for mergers and takeovers across Europe only really began in 1968 due to the UK’s introduction of its City Code on Takeovers and Mergers. However, the majority of European states only began regulating these activities in the 1980s and, even then, mainly relied on voluntary codes to monitor and regulate such activities. It wasn’t until the late 1990s that most European states began the reform process eventually produced a comparable system to that of today’s.

However, the proposal to harmonise the rules governing takeovers at the European Union level was originally conceived in 1989, but disagreement among member states prevented a draft text reaching the European Parliament. Further talks took place, but two aspects of a second proposal remained unresolved, leading to its rejection of a second draft by the European Parliament in 2001. These disputed sections related to a) board neutrality; and b) the lack of employee protection. Finally, a third proposal was agreed in late 2002 and the Directive was formally adopted in April 2004 and the usual two-year national transposition period followed.

All EU member states, except the UK, insist that the country’s relevant national public authority be notified of all proposed mergers and takeovers. Even EEA members, Norway and Iceland, demand that all potential offers be notified to the relevant national competition authority. A merger or takeover cannot be completed if the relevant authority has not been notified and its consent granted in most EU states. In the UK, the investors of a listed company will be of a range of sizes, with around a fifth of investors holding more than 20% of the stock in the average company.

Whilst all the national systems for regulating this area of corporate activity in EU member states are in line with the provisions laid out in the European Directive, the national systems of most other countries all cover several key points:

- Mergers and takeovers that meet specific criteria will be investigated by the public authorities to ensure the transaction will not adversely affect the functioning of the market. However, the definition of situations that contravene this principle vary.

- Specific thresholds are set for triggering a mandatory notification relating to changes in the size of the stake held in a company by a shareholder.

- A shareholder must make an offer to all other shareholders once their stake reaches a specific threshold within a company.

---

23 The provisions on board neutrality required approval by the shareholders before the target board could take any defensive actions against a hostile bid.
Specific voting thresholds need to be met in order for significant changes to be made to a business – e.g. acquiring or disposing of assets and mergers and takeovers.

The following country examples serve to highlight the divergent approaches for regulating control and management decisions. In Belgium, shareholders often prefer to be a majority shareholder, or at least a ‘reference’ shareholder, in order to be able to remain in control of their company. When, at a certain point in time, these shareholders are no longer able to provide the company with the necessary financial means to support its growth, they tend to prefer to sell, rather than see their stake diluted by a new stakeholder that has taken control of the company.

In Denmark, the ‘controlling influence’ definition contains alternative tests, including majority thresholds on voting rights and board seats. Thus, the ‘effective control’ test requires a qualitative assessment of, for example, shareholders’ agreements and shareholder structure. Another feature of Danish corporate law is the use of voting ceilings and voting rights differentiation. Voting rights differentiation is often found in combination with a Danish foundation’s ownership of a majority stake. This combination gives companies access to capital through the stock market, while at the same time shielding them from takeovers. Examples of such companies include AP Møller, Mærsk and Carlsberg. There are only a few business sectors for which mergers require clearance from the Danish authorities, and the financial sector is one.

In relation to limiting the scope for tax avoidance measures, by applying the country’s disputed ‘beneficial owner doctrine’. In this way, the tax authorities are able to argue that dividends and interests, paid without tax deductions to holding companies in the low tax countries, are subject to tax, as their holding companies are not the beneficial owners of the Danish subsidiaries.

A totally different regime to the one in the UK exists in the Netherlands, in which the following notification requirements must be adhered to for merger and takeover transactions:

Notification must be…
- made to the respective party’s Works Council, in order for the workers’ representatives to provide advice (which must be taken into account by the parties);
- provided to the relevant trade unions so as to obtain the views of the trade unions on the proposed transaction;
- provided to the Netherlands Competition Authority for obtaining merger clearance (unless the EU Directive applies).

As for public and M&A transactions it should be noted that the Netherlands has adopted the opt-out arrangements provided for in the EU Takeover Directive. As a consequence, companies that are registered in the Netherlands may in principle apply defensive measures to ward off a takeover bid...
The Dutch Works Councils Act

This law provides the Works Council with the right to take advice on a number of important proposals by management. The following proposed management decisions require prior advice from the works council:

a. transfer of control over an enterprise or a part thereof;
b. establishing, takeover or disposal of control over another enterprise, establishing, changing of long-term cooperation with another enterprise or a financial participation in another enterprise;
c. termination of the activities of the enterprise or of a significant part of the activities;
d. reduction, extension or change of the enterprise’s activities;
e. significant change in the organisation of the enterprise or in the attribution of powers and authorities in the enterprise;
f. entering into a significant credit facility on behalf of the enterprise;
g. the providing of significant financial facilities or security to other enterprises;

A critical part of this process is the obligation on management to request the advice of the Works Council, before taking a decision. The management must also state the likely consequences that would arise for the employees from the proposed decision, and it state the measures that the management will take in the context of these consequences. Should the company have taken the decision before the advice from the Works Council has been provided, the decision will be considered to be in violation of the statutory provisions. If the decision of the company does not match the view of the Works Council, then management must justify its decision to the Works Council within one month. During this period, the Works Council may lodge an appeal through the relevant court, which may order management to undo any part of the decision already executed.
Control Enhancing Mechanisms (CEMs)

There are a number of ways through which shareholders can increase their control over a company, without holding the corresponding stake in a company’s equity. All of the following CMEs are perfectly permissible within the rules of the European Union but are utilised to a lesser or greater degree by EU member states. Perhaps surprisingly, most German companies (estimated at around 75%) do not use CEMs at all, and none offer multiple voting shares. This situation is possibly linked to the employment legislation and relations in that country (see below).

The practice of using CEMs in companies in Ireland varies from company to company and there appears to be no national trend. The decline of the use of CEMs is observable in some EU countries. Large Italian companies have tended historically to make use of CEMs, and there are a relatively high number that make use of three of more of these mechanisms. However, CEM usage appears to be in decline among newly listed firms in Italy.

In Sweden, almost 80% of large companies make use of one or more CEMs, with multiple voting shares and pyramid structures widely used. In contrast, an estimated 70% of UK companies make no use of CEMs, and in the small number of cases in which a company makes use of one, it is almost invariably the non-voting preference share. A similar situation exists in the United States, although 20% of companies do offer two classes of shares and 0.2% provide long-term investors (defined as those holding shares for four years) with multiple votes in return for their loyalty.

The table below shows the CEMs available in selected EU member states, plus Australia, Japan and the US. As explained later in the report, despite the variety of CEMs available in most EU states, their application in some, including the UK, is significant for its absence.

<table>
<thead>
<tr>
<th>Country</th>
<th>Multiple voting share rights</th>
<th>Non voting shares</th>
<th>Non-voting pref. shares</th>
<th>Pyramid shares</th>
<th>Priority shares</th>
<th>Voting rights ceilings</th>
<th>Ownership ceilings</th>
<th>Golden shares</th>
<th>Shareholder agreements</th>
</tr>
</thead>
<tbody>
<tr>
<td>BE</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>DE</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>DK</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>FI</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>FR</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>IE</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>IT</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>?</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>LU</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>?</td>
<td>?</td>
<td>?</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>NL</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>PL</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>SE</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>SP</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>UK</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>AU</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>JP</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>?</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>USA</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>
**Multiple voting rights**

Typically, shares held in a company are accorded equal voting rights and so to increase a shareholder’s voting power would require a corresponding increase in equity. However, granting multiple voting rights to specific shareholders is considered a useful method of reducing investment short-termism.

Governments in both **Italy**\(^{24}\) and **France**\(^{25}\), recently adopted laws that allow listed companies to assign additional voting rights to shareholders who have owned their shares for a specified period of time. In **France**, the law was introduced specifically as an anti-hostile takeover measure and provides that, unless the company’s by-laws state differently, shareholders who have owned (and registered their ownership with the authorities) shares for 24 months are to be granted double voting rights. The law reverses the previous situation in **France** that if two-thirds of shareholders agreed, a company’s by-laws could be amended to provide double-voting rights. Thus, the Florange Law provides an opt-out system for companies rather than the previous opt-in arrangements.

Less than a third of **French** companies have no CEM in place, while nearly half make use of three or more. Multi-voting shares are present in around 60% of all **French** listed companies and, because the extra votes provided by such shares are removed upon their sale or transfer, the continuous shift of power among shareholders is recorded in monthly figures published by companies under **French** law.

Other provisions in the law strengthen the role of Works Councils and allow boards of listed firms to take defensive action against hostile takeover bids without the requirement for prior shareholder approval to do so. The latter measure alters one of the more fundamental concepts in company law of ‘board neutrality’, which was established to ensure company boards remained neutral in order to prevent directors from protecting their own vested interests within a target company. The law is contentious, and a number of high profile **French** companies have already amended their by-laws and removed the statutory presumption of multiple voting rights under the law.

Company law in the **Netherlands** also provides for multiple voting rights and the measure is used widely by listed companies such as ABM Amro, Heineken, ING, Reed Elsevier and Unilever. A recent development was the attempt by the listed company DSM to introduce double-dividend rights to shareholders who had held their shares for at least three years. The **Dutch** courts rejected the proposal as it was contrary to the principle of ‘one share – one vote’.

Companies in **Sweden** appear to make use of multiple voting rights more than other member states and many of those with household names operate under this principle, including Electrolux, Ericsson, etc.

---

\(^{24}\) Legislative Decree no. 6 in 2003 (effective from August 2004) modified by Decree no. 91/2014

\(^{25}\) The Florange Act was adopted in March 2014 following the hostile takeover of steel company Arcelor by rival Mittal in 2006, and takes its name from the French town faced with hundreds of job losses as a result of the merger.
H&M, Scania and Securitas. All of the companies mentioned here grant a multiple of 10 voting rights per share under this measure.

In Denmark, Carlsberg makes use of multiple voting shares, with an ordinary/multi-vote ratio of 2:20. However, a ratio of 1:10 is most common in Danish firms. CEMs are less frequently used in Finland, with 60% of firms having no control mechanisms and the remaining tending to use just one CEM. Despite the low usage of CEMs, multi-voting shares are used most often. However, the most important company decisions require a shareholder vote and this process does not take into account the advantage conferred by multi-vote shares.

The graph below shows the incidence of usage for this CEM: note the UK’s low rate of use, compared to our competitor countries, France, Sweden and the Netherlands.

![Graph showing incidence of usage for a certain CEM across different countries. The UK has the lowest rate of use compared to France, Sweden, and the Netherlands.]

The likely explanation for the low utilisation rate of multiple voting rights in German companies is, at least in part, to be connected to the strength of the supervisory council’s right of veto in such circumstances. In contrast to France, Germany has recently moved away from using weighted voting, but it is likely that the presence of workers’ directors on the supervisory board and the board’s powers of veto makes it more difficult for bidders to achieve board approval, and the legislative support for the German Works Council provides a greater degree of protection for employees confronted with a merger or takeover.

Non-voting shares (without preference)

Shares that carry no voting rights for their holders often provide additional rights to dividends to compensate investors. However, this particular CEM refers to such shares but without the compensatory element (no vote and no preferential dividends). This CEM is not so widely available, but is an option for companies in the UK, France, Italy, Australia, Japan and the US.

As can be seen in the graphic below, a significant majority of companies in the UK do not make use of CEMs at all. In terms of comparing the UK with its competitors, the majority of companies in France,
Italy, Sweden, Spain and the Netherlands make use of CEMs. Once again, the low numbers of German companies making use of CEMs is likely to come down to the fact that the German system of corporate governance has at its disposal several tools unavailable in other member states (Supervisory Board, relatively powerful Works Councils and overall employee protection mechanisms). Thus, additional control mechanisms are perhaps considered unnecessary in the German context.

Non-voting preference shares
This type of share confers no voting rights for its holder but provides for compensation as a result, in the form of preferential dividends. This CEM is widely used in the UK, Germany and Italy although there is variation in the definition country by country. For example, in the UK preference shares are non-voting, whereas in the Netherlands, preference shares are voting shares. Although widely available as an CEM, this mechanism is used rarely in most EU states. In a recent analysis, carried out on behalf of the European Commission, the companies in the UK sample were found to use this CEM far more widely than any other member states (in 50% of UK cases, compared to 30% in Italy and Ireland and either 5% of cases or in none for the other EU states).

In contrast with most other EU states, there are very few restrictions placed on the use of non-voting preference shares in the UK. In a number of member states, such as France, Germany, Spain and Italy, the holders of these shares are prohibited from owning stock above a specified threshold. Elsewhere, holders of this type of share may still be entitled to vote on specific, significant issues (Belgium and Luxembourg) or, if the shareholder meets certain conditions, the right to vote may be reinstated (Belgium, Germany, Spain and Luxembourg).

Pyramid structures
Control over an entity is often held directly by shareholders owning stakes in equity of a company. However, control can also be exercised indirectly, through another entity and this process can be replicated many times through a chain of companies and the longer the chain, the greater the control relative to ownership.

Although available in the UK, Ireland, Finland and in Denmark, this mechanism is rarely, if ever, used by companies and there are a number of technical restrictions on the use of this CEM, for example there are specific provisions regulating this approach in national states’ company legislation.

Companies in Belgium make use of this CEM, often in combination with shareholder agreements, providing a robust anti-hostile takeover defence mechanism. In Belgium, these two CEMs are the most widely used.

Priority shares
Granting specific privileges for holders of a certain type of share can provide certain shareholders with additional powers, such as the right to veto, regardless of the portion of equity owned by the
shareholder. The use of priority shares is relatively greater in the UK, the Netherlands and France and the holders’ powers can vary from company to company, for example, the right to nominate specific individuals to the board or the right to veto decisions at general meetings. Most commonly found in the Netherlands, this CEM is rarely used elsewhere, despite it being widely available as a tool for limiting shareholder control.

**Voting rights ceilings**
This type of CEM is common throughout the EU, save for the Netherlands and Belgium and restricts shareholders votes to a maximum, regardless of the portion of equity or number of shares they own. This mechanism is often used in co-operatives where, regardless of the number of shares held, all members are entitled to one vote each. There are restrictions for the use of this control mechanism which, along with its usage, varies between countries. The Danish firm, Danisco, makes use of a voting ceiling, which limits votes at 7.5% of the total share capital.

**Ownership ceilings**
Used in relation to share transfers, an ownership ceiling prevents potential investors from taking a stake above the ‘ceiling’ in a company. The use of this CEM tends to be found more in the UK and Italy but is used across the former EU15 member states. It is introduced through the company by-laws or through shareholder agreements.

**Golden shares**
This type of share is issued to the government or public authorities which carry special rights, beyond the usual privileges by holders of priority shares. They allow the state to control a company to an extent that is in excess of the usual proportionality rule, in terms of equity held. Typically, a golden share allows a government to block takeovers and veto management decisions. Of the countries in which this mechanism is available, very few states actually use it and the study referred to previously found it most common in Hungary, followed by Italy and Poland.

**Shareholder agreements**
These can be formal or informal agreements between shareholders to form alliance and are most common in Italy and Belgium. However, they are available in all European countries and in Japan, Australia and the United States.

Some national systems restrict their usage, for example in Belgium, Germany and Luxembourg, agreements must not be contrary to the interest of the company. In the case of the UK, Denmark, Ireland, France and Finland, there must be no infringement with the independence of directors’ principle and are time restricted in some states, such as Italy (maximum duration of three years) or are only valid for a limited time period (Luxembourg). Shareholder agreements and multiple voting shares are the most common form of CEM in Danish companies, possibly a reflection of the large number of
Danish companies with significantly large shareholders (defined as shareholders with more than a 20% holding).

In France, shareholder agreements constitute the second most widely used CEM which, in general, involves a mutual investment by two separate entities with an agreement that neither party will increase their respective share in the other, usually for a specified period of time.

Overall frequency of each CEM

The graph shows the most common CEMs in a recent study for the European Commission. Multiple voting rights are the second most frequently used CEM in European companies and yet are estimated to be used by around only 10 per cent of UK companies.
Companies with no CEM in EU member states

Interestingly, of those companies that have only recently been recently listed in the EU, 72 per cent have no CEM whatsoever. Whether this suggests that CEMs are going out of fashion, as the short-term nature of Anglo-Saxon capitalism is extended across more countries is unknown. But the lack of interest among newly listed companies will certainly become an influential factor in mergers and takeovers in the coming years.

The table below summarises the most popular CEMs in European Union member states.

<table>
<thead>
<tr>
<th>Country</th>
<th>First CEM</th>
<th>Second CEM</th>
<th>Third CEM</th>
</tr>
</thead>
<tbody>
<tr>
<td>BE</td>
<td>Pyramid structure</td>
<td>Shareholders’ agreements</td>
<td>/</td>
</tr>
<tr>
<td>DE</td>
<td>Pyramid structure</td>
<td>Non-voting preference shares</td>
<td>/</td>
</tr>
<tr>
<td>DK</td>
<td>Multiple voting rights</td>
<td>Voting right ceilings</td>
<td>/</td>
</tr>
<tr>
<td>EE</td>
<td>Pyramid structure</td>
<td>Golden shares</td>
<td>/</td>
</tr>
<tr>
<td>FI</td>
<td>Multiple voting rights</td>
<td>Voting right ceilings</td>
<td>/</td>
</tr>
<tr>
<td>FR</td>
<td>Multiple voting rights</td>
<td>Pyramid structure</td>
<td>Shareholders’ agreements</td>
</tr>
<tr>
<td>GR</td>
<td>Pyramid structure</td>
<td>Ownership ceilings</td>
<td>/</td>
</tr>
<tr>
<td>HU</td>
<td>Pyramid structure</td>
<td>Golden shares</td>
<td>Voting right ceilings</td>
</tr>
<tr>
<td>IE</td>
<td>Non-voting preference shares</td>
<td>/</td>
<td>/</td>
</tr>
<tr>
<td>IT</td>
<td>Shareholders’ agreements</td>
<td>Pyramid structure</td>
<td>Ownership ceilings</td>
</tr>
<tr>
<td>LU</td>
<td>Pyramid structure</td>
<td>Golden shares</td>
<td>/</td>
</tr>
<tr>
<td>NL</td>
<td>Multiple voting rights</td>
<td>Depositary certificates</td>
<td>Pyramid structure</td>
</tr>
<tr>
<td>PL</td>
<td>Multiple voting rights</td>
<td>Voting right ceilings</td>
<td>Golden shares</td>
</tr>
<tr>
<td>SE</td>
<td>Multiple voting rights</td>
<td>Pyramid structure</td>
<td>Cross-shareholdings</td>
</tr>
<tr>
<td>SP</td>
<td>Voting right ceilings</td>
<td>Pyramid structure</td>
<td>/</td>
</tr>
<tr>
<td>UK</td>
<td>Non-voting preference shares</td>
<td>/</td>
<td>/</td>
</tr>
</tbody>
</table>
Recommendations for change

Despite the commitment in their last election manifesto (2017), the Conservative government has been expectedly silent on any proposed reforms of the regulatory framework. Although the revisions in late 2017 of the City Code on Takeovers and Mergers did include provisions for the enforcement of pre-offer promises made by the bidder in its efforts to woo the target’s board and shareholders, and the granting of powers to the government to freeze the merger process if further scrutiny is required, these changes leave the Code narrowly focused on shareholders and the impact of a takeover measured solely in terms of its effect on competition.

However, provisions concerning strategic sectors, despite the government’s rhetoric on introducing an industrial strategy that worked for everyone and not just the short-term interests of a few, remain untouched as does the aspects of the Code pertaining to the Public Interest test.

All in all, the Code remains focused purely on the rights, and enforcement thereof, of shareholders and preoccupied with the preservation and promotion of free-markets. Issues that were the source of public disquiet and political and media criticism, i.e. employment and short-termism, have been conveniently ignored by the party of business and short-term government.

This does not mean that potential solutions to the key drivers of short-termism in this country’s business community are not forthcoming. On the contrary, many, many proposals have been tabled in publications, in Parliament and across the business community, that could, if enacted by a forthcoming Labour administration, remedy the decades old shortcomings and failings of a system that hitherto has looked no further than the bottom-line in its pursuit of profit.

The following section describes some of the concrete steps that could be taken to remedy the failings outlined in this paper. Naturally, the volumes of literature dedicated to providing remedies to the problems outlined in previous research, have provided ample material from which the following recommendations for change are either based or from which the following have been influenced. Given the historic context of the UK’s regulatory system, amendments to specific parts of the legislation will require separate revisions to corresponding laws elsewhere in the country’s statue books.

1. **Amending a company’s articles of association**

   Despite the recent law change in France, companies are not required to publish their Articles of Association. Rather interestingly, UK companies already have a wide degree of flexibility to introduce most CEMs in their Articles, yet most never take advantage of this legal provision, except for instances in which companies make use of preference votes.

   Under UK law, a company’s Articles of Association can legally limit the powers of shareholders by differentiating the type of shares and the specific powers/restriction the shares confer. For example, if a public company, at the IPO stage of its proposed listing, agrees Articles of Association
specifically restricting the powers of those shareholders having owned their shares for less than two years, as per the French ‘Loi Florange’, these provisions would be legally binding. This is one way of restricting the influence of ‘short-term’ shareholders. However, such an agreement must be made before the company is listed, as such provisions are not binding retrospectively – i.e. a shareholder cannot be bound by provisions restricting their powers of voting if introduced once they have acquired a shareholding.

2. **Obliging the board to provide more information to shareholders**

Improving the quality and breadth of information provided to shareholders, about an offer from a bidder, ought not only to improve the quality of decision making but also to broaden the range of factors taken into consideration by shareholders when confronted with an offer to sell their shares. One potential weakness in this approach is the extent to which shareholders will actually use this additional information, going beyond the current requirements when making their decision to sell.

3. **Prohibiting share deals prior to mergers and takeovers**

Preventing the purchase of shares prior to a merger or takeover could reduce the more short-term or opportunistic behaviour. Those investors who are keen to make a quick profit by using the weight of their newly enlarged shareholding to force through a sale will be unable to do so, which may diminish the influence of short-term shareholders and also reduce the likelihood of a successful hostile takeover bid. However, the challenge with this approach is determining the point in time, ahead of a proposed merger or takeover, at which the acquisition of shares ceases to be permitted.

Prior to an offer being made public, there is often a long period of time during which the media speculate, and public rumours circulate, within and beyond the companies involved, and so identifying the most appropriate and practical trigger-point would be difficult. Identifying a precise moment at which a rumour or news story has sufficient weight that it then evolves into fact would be virtually impossible and, if inappropriately triggered, this provision could have consequences for investors, the business itself and possibly further afield.

“In the UK the takeover panel also considered disenfranchising new shareholders following the Cadbury takeover. As these proposals, designed to encourage long term shareholder ownership, have the effect of diminishing the power of risk-arbitrageurs, it is conceivable that they will in fact encourage more shareholders to sell early during an offer period to maintain selling pressure on the Board; exacerbating not correcting the alleged problem.”

---

27 “Takeovers with Resistant Boards, Political Pressure and Risk-Arbitrageurs”, Ordonez-Calafi, G. Thanassoulis, J. University of Warwick (January 30, 2016)
In the 19 weeks that Kraft campaigned to takeover Cadbury, a quarter of the target’s shares were traded, providing ample evidence of the need for reform in this area.

4. **Banning directors from financially benefiting from mergers and takeovers**
   A profound conflict of interest arises regularly across the business world involving directors and the financial rewards offered by a merger or takeover. Removing this dilemma would be a big step in the right direction to reduce the potential for opportunistical and short-term behaviour. Prohibiting directors from gaining financially from a merger or takeover would be one obvious way to reduce the influence of personal enrichment in such decision making.

5. **Offering the workforce of the bidder and target company more participation**
   In a number of other EU countries (namely France, the Netherlands and in Germany) there is a legal obligation on management to genuinely inform and consult with representatives of the workforce. The equivalent regulations in the UK are weaker and deny the courts the power to reverse any decisions made in breach of employment law in this area. A new system, fit for purpose within today’s economy, should be created as part of a widening of the definition of stakeholders with an interest in the outcome of mergers and takeovers.

6. **Extending remit of TUPE to cover share transfers**
   By extending TUPE provision to cover share transfers, workers and their representatives will be provided with protection in these circumstances. Currently these transactions are excluded from the provisions of TUPE.

7. **Prohibiting certain investment vehicles from being used in mergers and takeovers**
   Preventing hedge funds or private equity from being used to finance mergers and takeovers and prohibiting short-term investment vehicles, such as hedge funds, from having a say in mergers and takeovers. Formulating a definition of what constitutes a short-term investment vehicle may prove problematic.
8. **Increasing threshold for shareholders to agree to a merger or takeover**

To accept a takeover offer for a UK listed company, the target’s shareholders must vote. The UK regulations stipulate that, for the agreement to be binding, a simple majority of all shareholders of the target company must vote to accept the offer, on a turnout of at least 75 per cent of shareholders.

For example, if a company has 100 shareholders, all with equal voting rights, in order for an offer to be accepted by the shareholders, then:

- 75 shareholders must vote.
- Of that number, 38 need to accept the offer.

Increasing the proportion of shares needed to back a takeover from to two-thirds will make it harder for takeovers to succeed without the bidder convincing a greater portion of shareholders it is in their interests to sell their shares. Thus, the bidder will need to engage with a greater number of shareholders, large and small, and provide a compelling argument for their support – because they cannot remain silent and rely on larger investors to secure the deal without running the risk of an insufficient turnout. This would complement the recommendation to prohibit share transfers during the offer period because even if some transfers took place prior to the cut-off date, it is unlikely that a sufficient quantity of transfers could result in enough support for the deal to go through.

9. **Obliging institutional investors to disclose their past voting records**

If institutional investors were to disclose their voting records as an ongoing process, shareholders of future target companies may be informed sufficiently to evaluate the likelihood of the future impact for jobs and the wider economy at the point of an offer from a bidding company. Likewise, pension scheme trustees (trade union trustees), for example, will be able to take a view on the voting record for these institutions.

10. **Extend provisions in the Enterprise Act, that relate specifically to ‘Strategic sectors’**

This provision, in terms of government intervention, could be extended to include more sectors of the economy in which the ownership of assets could be considered strategic. The UK regulations already permit the application of such a test in the energy sector, which is carried out by the regulator, Ofgem and the same goes for the regulation of the UK’s water supply, courtesy of Ofwat.
11. Reforming the tax benefits for businesses

Reform the aspects of the UK’s tax regime that apply to mergers and takeovers to encourage business that favour the long-term. Change the UK’s tax system so it is geared towards rewarding long-term investors and corporate decisions that are in the long-term interests of the business.

A new tax regime could tackle the short-term nature of pre-sale dividends. In specific circumstances sellers may wish to realise some of the value of their investment as income and they do so under UK law as a pre-sale dividend. Although such dividends may already be subject to UK tax, this is set at a low level (in some cases nil) and this action enables sellers to avoid higher tax liabilities when the sale of their company goes through. The pre-sale dividend obviously reduces the proceeds from the sale and therefore any gain made on the sale, which is likely to be subject to a higher rate of tax.
Further supporting evidence

Dividends paid to shareholders of UK listed companies is increasing all of the time.

<table>
<thead>
<tr>
<th>Dividends Paid £bn</th>
<th>Q1</th>
<th>Q2</th>
<th>Q3</th>
<th>Q4</th>
<th>Full Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>£11.4</td>
<td>£20.3</td>
<td>£17.1</td>
<td>£12.7</td>
<td>£61.6</td>
</tr>
<tr>
<td>yoy</td>
<td>20%</td>
<td>1%</td>
<td>10%</td>
<td>7%</td>
<td>8%</td>
</tr>
<tr>
<td>2009</td>
<td>£12.7</td>
<td>£15.4</td>
<td>£15.7</td>
<td>£9.9</td>
<td>£53.7</td>
</tr>
<tr>
<td>yoy</td>
<td>11%</td>
<td>-25%</td>
<td>-8%</td>
<td>-22%</td>
<td>-13%</td>
</tr>
<tr>
<td>2010</td>
<td>£13.7</td>
<td>£14.1</td>
<td>£16.9</td>
<td>£9.3</td>
<td>£54.1</td>
</tr>
<tr>
<td>yoy</td>
<td>8.4%</td>
<td>-8.1%</td>
<td>8.1%</td>
<td>-6.4%</td>
<td>0.8%</td>
</tr>
<tr>
<td>2011</td>
<td>£14.2</td>
<td>£15.0</td>
<td>£19.5</td>
<td>£11.6</td>
<td>£61.4</td>
</tr>
<tr>
<td>yoy</td>
<td>3.6%</td>
<td>13.6%</td>
<td>15.2%</td>
<td>24.8%</td>
<td>13.5%</td>
</tr>
<tr>
<td>2012</td>
<td>£17.2</td>
<td>£21.3</td>
<td>£21.7</td>
<td>£12.8</td>
<td>£73.0</td>
</tr>
<tr>
<td>yoy</td>
<td>20.9%</td>
<td>32.8%</td>
<td>11.1%</td>
<td>10.5%</td>
<td>18.9%</td>
</tr>
<tr>
<td>2013</td>
<td>£12.8</td>
<td>£23.3</td>
<td>£22.9</td>
<td>£13.8</td>
<td>£72.9</td>
</tr>
<tr>
<td>yoy</td>
<td>-26.4%</td>
<td>9.6%</td>
<td>5.7%</td>
<td>7.3%</td>
<td>-0.2%</td>
</tr>
<tr>
<td>2014</td>
<td>£27.8</td>
<td>£23.4</td>
<td>£23.2</td>
<td>£13.7</td>
<td>£88.1</td>
</tr>
<tr>
<td>yoy</td>
<td>116.8%</td>
<td>0.3%</td>
<td>1.3%</td>
<td>-0.4%</td>
<td>21.0%</td>
</tr>
<tr>
<td>2015</td>
<td>£13.3</td>
<td>£26.7</td>
<td>£24.6</td>
<td>£14.8</td>
<td>£79.4</td>
</tr>
<tr>
<td>yoy</td>
<td>-52.2%</td>
<td>14.2%</td>
<td>5.8%</td>
<td>8.3%</td>
<td>-9.9%</td>
</tr>
<tr>
<td>2016</td>
<td>£14.1</td>
<td>£29.5</td>
<td>£25.0</td>
<td>£16.8</td>
<td>£85.5</td>
</tr>
<tr>
<td>yoy</td>
<td>6.3%</td>
<td>10.2%</td>
<td>2.0%</td>
<td>13.4%</td>
<td>7.6%</td>
</tr>
<tr>
<td>2017</td>
<td>£15.4</td>
<td>£33.4</td>
<td>£28.5</td>
<td>£17.0</td>
<td>£94.4</td>
</tr>
<tr>
<td>yoy</td>
<td>9.7%</td>
<td>13.5%</td>
<td>7.3%</td>
<td>7.1%</td>
<td>10.5%</td>
</tr>
<tr>
<td>2018e</td>
<td>£15.6</td>
<td>£33.3</td>
<td>£29.5</td>
<td>£17.6</td>
<td>£95.9</td>
</tr>
<tr>
<td>yoy</td>
<td>1.3%</td>
<td>-0.4%</td>
<td>3.3%</td>
<td>3.1%</td>
<td>1.6%</td>
</tr>
</tbody>
</table>
Too much money is leaving listed firms which means less is available to re-invest.

In the US, figures show just how far listed companies are prepared to go to satisfy their shareholders – to such an extent that by 2014, a whopping 95% of net income from listed companies was going straight the back door in the form of dividends to their shareholders.

The graph below shows the level of dividends paid out quarterly to the shareholders of UK listed companies. Ignoring the payment of special dividends, the trend is clear – a larger portion of net profit generated by workers is leaving British listed companies than ever before, and this trend is continuing.
Investment in intangible assets

Measuring investment in intangible assets would help shareholders properly assess a company in the long-term.

Investment in specific intangible assets by UK companies, by sector

(£billions)

Specific data for itemised spending on intangible investments by UK companies

<table>
<thead>
<tr>
<th>Year</th>
<th>Purchased Software</th>
<th>Own-account Software</th>
<th>Mineral Exploration</th>
<th>Artistic Originals</th>
<th>Research and Development</th>
<th>Design</th>
<th>Branding</th>
<th>Organisational Capital</th>
<th>Training</th>
<th>Financial Product Innovation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1997</td>
<td>5.6</td>
<td>7.8</td>
<td>1.1</td>
<td>4.6</td>
<td>0.7</td>
<td>7.9</td>
<td>7.5</td>
<td>9.5</td>
<td>17.7</td>
<td>0.4</td>
</tr>
<tr>
<td>1998</td>
<td>5.6</td>
<td>7.8</td>
<td>0.7</td>
<td>4.6</td>
<td>10.5</td>
<td>8.7</td>
<td>8.5</td>
<td>11.4</td>
<td>19.6</td>
<td>0.4</td>
</tr>
<tr>
<td>1999</td>
<td>5.6</td>
<td>9.1</td>
<td>0.4</td>
<td>5.1</td>
<td>11.7</td>
<td>9.0</td>
<td>8.8</td>
<td>12.2</td>
<td>21.1</td>
<td>0.4</td>
</tr>
<tr>
<td>2000</td>
<td>5.8</td>
<td>9.0</td>
<td>0.4</td>
<td>5.4</td>
<td>12.0</td>
<td>9.2</td>
<td>10.3</td>
<td>13.7</td>
<td>22.9</td>
<td>0.6</td>
</tr>
<tr>
<td>2001</td>
<td>5.6</td>
<td>10.6</td>
<td>0.4</td>
<td>5.4</td>
<td>11.3</td>
<td>9.9</td>
<td>11.5</td>
<td>14.9</td>
<td>24.6</td>
<td>0.6</td>
</tr>
<tr>
<td>2002</td>
<td>5.5</td>
<td>10.3</td>
<td>0.4</td>
<td>5.4</td>
<td>12</td>
<td>10</td>
<td>12.1</td>
<td>16.1</td>
<td>25.4</td>
<td>0.6</td>
</tr>
<tr>
<td>2003</td>
<td>4.9</td>
<td>10.9</td>
<td>0.4</td>
<td>5.5</td>
<td>11.9</td>
<td>10.3</td>
<td>12</td>
<td>17.3</td>
<td>26.7</td>
<td>0.6</td>
</tr>
<tr>
<td>2004</td>
<td>5.3</td>
<td>10.9</td>
<td>0.7</td>
<td>5.4</td>
<td>12.1</td>
<td>10.5</td>
<td>12</td>
<td>17.6</td>
<td>28</td>
<td>0.7</td>
</tr>
<tr>
<td>2005</td>
<td>6.3</td>
<td>11.1</td>
<td>1.8</td>
<td>5.5</td>
<td>14</td>
<td>11.9</td>
<td>11.7</td>
<td>19.2</td>
<td>29.1</td>
<td>0.9</td>
</tr>
<tr>
<td>2006</td>
<td>6.5</td>
<td>11.9</td>
<td>0.6</td>
<td>5.5</td>
<td>14.5</td>
<td>11.6</td>
<td>12.7</td>
<td>19.8</td>
<td>31</td>
<td>0.9</td>
</tr>
<tr>
<td>2007</td>
<td>7</td>
<td>12</td>
<td>0.8</td>
<td>5.9</td>
<td>16.9</td>
<td>12.6</td>
<td>13.2</td>
<td>20.3</td>
<td>33.2</td>
<td>1.2</td>
</tr>
<tr>
<td>2008</td>
<td>7.3</td>
<td>12.4</td>
<td>0.9</td>
<td>5.7</td>
<td>18.2</td>
<td>13.2</td>
<td>13.5</td>
<td>21.3</td>
<td>32.7</td>
<td>1.3</td>
</tr>
<tr>
<td>2009</td>
<td>6.3</td>
<td>12</td>
<td>0.8</td>
<td>5.7</td>
<td>18.1</td>
<td>12.8</td>
<td>13.3</td>
<td>20.5</td>
<td>32.2</td>
<td>1.4</td>
</tr>
<tr>
<td>2010</td>
<td>6.9</td>
<td>12.1</td>
<td>1.1</td>
<td>5.8</td>
<td>16.5</td>
<td>13.1</td>
<td>13.6</td>
<td>21.1</td>
<td>31</td>
<td>1.4</td>
</tr>
<tr>
<td>2011</td>
<td>7.9</td>
<td>12</td>
<td>1.1</td>
<td>5.8</td>
<td>17.2</td>
<td>13.1</td>
<td>13.8</td>
<td>22.4</td>
<td>26.9</td>
<td>1.7</td>
</tr>
<tr>
<td>2012</td>
<td>9.4</td>
<td>12.2</td>
<td>1.3</td>
<td>5.8</td>
<td>16.9</td>
<td>13.6</td>
<td>14.1</td>
<td>22.4</td>
<td>29.7</td>
<td>1.7</td>
</tr>
<tr>
<td>2013</td>
<td>9.7</td>
<td>12.4</td>
<td>1.3</td>
<td>5.9</td>
<td>18.3</td>
<td>14.1</td>
<td>14.6</td>
<td>24</td>
<td>29.6</td>
<td>1.5</td>
</tr>
<tr>
<td>2014</td>
<td>10.7</td>
<td>12</td>
<td>0.8</td>
<td>5.7</td>
<td>18.5</td>
<td>14.3</td>
<td>15.1</td>
<td>23.8</td>
<td>30.7</td>
<td>1.9</td>
</tr>
<tr>
<td>2015</td>
<td>8</td>
<td>12.2</td>
<td>0.8</td>
<td>5.7</td>
<td>19.2</td>
<td>14.7</td>
<td>15</td>
<td>24.9</td>
<td>31.8</td>
<td>1.7</td>
</tr>
</tbody>
</table>
Use of Control Enhancing Mechanisms

Number of CEMs in European companies

- No CEM: 4%
- 1 CEM: 12%
- 2 CEMs: 27%
- 3 CEMs: 31%
- > 3 CEMs: 56%

Number of CEMs in European recently listed companies

- No CEM: 6%
- 1 CEM: 21%
- 2 CEMs: 6%
- 3 CEMs: 1%

Number of CEMs in European large companies

- No CEM: 1%
- 1 CEM: 15%
- 2 CEMs: 31%
- 3 CEMs: 48%
- > 3 CEMs: 1%
Briefing paper for Unite the union

www.acuityanalysis.org