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CHRISTIN M. FORSTINGER
TAKEOVER LAW IN THE EU AND THE USA
A COMPARATIVE ANALYSIS
(THE HAGUE-LONDON-NEW YORK : KLUWER, 2002)

By Julien Fouret[*]

Takeover Law in the EU and the USA - A Comparative Analysis [*Takeover Law*] is part of the *European Monographs* collection of Kluwer Publications. This collection covers a variety of European legal issues that are regulated at the continental level, and includes such topics as agriculture, the environment, fraud, monetary and financial integration, police cooperation and postal services.[1]

Forstinger published *Takeover Law* as a reaction to the failure of the EU directive on takeover law in 2002, and the work is both an account of the failed European directive as well as a comparison of the directive with the legal regime in the US. This study also gives suggestions for a future directive.

Ironically, since the publication of this book, the EU directive has been amended and was adopted by the European Parliament in December 2003. However, the book is nonetheless useful, as it offers both a theoretical and practical approach to analyzing the problem of takeover law. In fact, Forstinger's work is valuable in that it always introduces the theoretical approach to a problem, a theoretical analysis of the disposition and a scrutiny of the practical implications of such legislation.[2]

The value of Forstinger's analysis derives mainly from its intelligibility, as it could meet the needs of either a novice student or a seasoned lawyer in need of a concise approach to takeover law. Another strength of the book stems from the didactical method used by the author, which enables the reader to have an excellent overview of takeover law on two different continents.

The book is divided into seven parts, including an introduction and a short conclusion. The aim is to both convince regulators of future changes needed for the directive and also to offer a concise approach to this very complex branch of European law. However, the lack of index is a flaw, despite the existence of a very detailed table of contents.

The introduction serves a mainly terminological purpose and helps in understanding the main concepts of takeover law. Terms which could be ambiguous, such as *regulatory competition*, *corporate charter* or *takeover*, are defined and enable

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[1] For the list of the publications see the last 3 pages of the book, Christin M. Forstinger, *Takeover Law in the EU and the USA - A Comparative Analysis* (The Hague-London-New York : Kluwer – European Monographs n° 41, 2002) [*Takeover Law*].

[2] For example, after defining reflexive harmonization, the author analyzes the impact of such a harmonization on shareholders' rights and privileges, *Ibid* at 162 – 167.

the reader to understand the more complicated issues of takeover law.[3] Forstinger's motives in writing the book are explained on page three, where she asks: "Is unregulated competition, given the existing experience of US company law and takeover law, an alternative to harmonization of European takeover law, and if yes will it lead to more efficient answers for the Single European Market?"[4] Forstinger ultimately gives a solution to this question and urges regulators to use this analysis when drafting the future directive.

The second chapter deals with the relationship between takeovers and shareholders. The interest of this short chapter lies in its analysis of the economic tensions and interests alongside the legal issues, as well as in its explanation of takeover mechanisms.[5]

The third chapter compares US and EU company law: the regulation scheme in the US, state competition, is compared to the EU's real seat rule. It should be noted that Forstinger always deals with background and basic concepts of an issue before analyzing the contemporary and complex aspects.[6] This analysis is well rounded and allows for a description of the US mechanisms, the EU mechanisms and the case law. Finally, a concise comparison is made between the institutional differences of the two systems - a federal system and a more divided system with stronger domestic frameworks.[7]

The fourth chapter is not as necessary, and could be integrated into other chapters of the book. This is due to the fact that it only deals with US competition law; the comparative analysis, one of the strengths of the book, disappears. That is not to say the chapter is of no interest - the theories of company law in the US and explanation of the theories of state competition are relevant. However, these issues did not need to be given an entire chapter.

The fifth chapter tackles the heart of the matter, and the major interest of US legislation: takeover law under state competition. The introduction helps the reader to understand the basic issues of takeover law in relation to the problems of state competition and the competing interests of managers and shareholders.[8] Specifically, Forstinger identifies the lack of protection for target shareholders in the US and the complexity of both federal and state law regulations as the fundamental issues. In contrast, she explains that the EU has tried to harmonize their varying legislation. However, the failure of the 2001 directive encouraged Forstinger to examine different national legislations and to compare them in order to highlight differences amongst European states. To that end, the policies of Germany, England and Austria are all analyzed to emphasize differences in company law throughout the EU. The choice of Austria may not have been the most relevant legal scheme to analyze, especially when

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3 For the definitions see *Takeover Law*, *Ibid* at 3-5.
4 *Ibid* at 3.
5 *Ibid* at 10 – 12.
6 See of example the history of U.S. company law, *Ibid* at 15.
7 *Ibid* at 48-56.
8 *Ibid* at 70 –74.

taking into account the economic importance of other EU countries such as France, Italy and Spain.

Finally, the sixth chapter provides a scrutiny of perhaps the most interesting part of the book: the contrast between the US and EU systems of regulatory competition and harmonization. Forstinger suggests an option for the new system that should be included in the future directive: a reflexive harmonization, which would prevent the erosion of EU countries' domestic legal systems while "preserving their local diversity,"[9] but nevertheless providing these countries with a common minimum regulatory basis. Forstinger not only gives an interesting analysis of objectives which should be pursued in the directive, she also provides the reader with the main differences between the two systems and offers solutions for the EU considering the experiences, flaws and strengths of the US system.

A brief conclusion gives the book a recapitulation of the issues raised and the solutions suggested by Forstinger. Upon final analysis, Forstinger's work is certainly of interest to the reader, but not to the same degree as it was prior to the passing of the new EU directive. Instead of being a relevant doctrinal proposition for a future directive, it is now a doctrinal position which can offer valuable insight as to what *should* have been achieved. The author could thus consider doing either a second edition of this monograph or a new book on the reality of EU takeover law with the 2003 adoption of the directive: a true comparison *de lege lata* between the US and the EU.

Incorporating the new directive into another book or monograph would be a valuable exercise, as several key features of the directive are very interesting. For example, the directive now includes protections for minority shareholders, such as the obligation in article five that requires a company launching a takeover to pay an equitable price for the shares. In addition, the directive remains a compromise between the different positions in the EU regarding company law, as illustrated by the optional character of major dispositions such as defensive measures in article nine.[10] Forstinger could therefore comment on whether this type of option is as she envisioned the reflexive harmonization of takeover law or whether it is an ineffective solution.

The perspective offered by this book on European takeover law could also be complemented by studying the articles on shareholder protection, an example used plentifully in the book, or by contemplating the solutions given by this piece of regulation to the future articulation of the different domestic regulatory frameworks in the 15 European member states. Consequently, we look forward to the possibility of having such a book made available; for the present, Forstinger's *Takeover Law* is an excellent starting point.

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9 *Ibid* at 168.

10 See for an interesting analysis of the directive : « EP gives green light to takeover directive », online: EU Business – European Business <http://www.eubusiness.com/topics/SMEs/EUNews.2003-12-17.1751, and the analysis provided by the law firm Simons & Simons in « EU : Takeover Directive : Approval by Parliament » online : <http://realcorporatelawyer.com/pdfs/sstakeover.pdf>.