

# Re-Addressing the Harmonisation of European Takeover Law post-Brexit

Orientation away from the UK approach towards the US?

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## Abstract

The EU Takeover Directive from 2004 has attempted to harmonise Takeover Law within the European Union. The UK's legal framework governing takeovers served as somewhat of a role model for it. Therefore, Brexit gives rise to the question as to whether the Directive could undergo a reform within the foreseeable future. This paper aims to re-address the harmonisation of European Takeover Law post-Brexit by examining how UK and US Takeover Law could potentially influence its reform. It will be made apparent how the UK's role in European Takeover Law suggests that Brexit might actually lead to its reform, which is most likely going to drive the respective legal frameworks further apart. Another significant finding concerns the comparability of the US and EU governmental system, which indicates that the foreseeable development of European Takeover Law could be prone to issues which appear in the US. In order to overcome several difficulties that European Takeover Law will face, the paper makes two recommendations. With regard to a regulatory reform at the current state of research, the EU should take a neutral approach by providing companies with an optional framework governing Takeover Law. In order to determine which provisions are desirable for the creation of shareholder value, it is submitted that further research in this field should be encouraged.

**Keywords:** EU Takeover Directive, Company Law Harmonisation, UK Takeover Law, Brexit, Mandatory Bid, Non-Frustration Rule, US Corporate Law, Takeover Defences

## A. Introduction

The harmonisation of Takeover Law within the European Union (hereinafter: EU) has been a widely discussed topic since the 1970s. After several failed proposals by the European Commission, the European Takeover Directive<sup>1</sup> (hereinafter: the Directive) was finally adopted in 2004 as a means of such harmonisation. The withdrawal of the United Kingdom (hereinafter: UK) from the EU provides an opportunity to review the level of harmonisation achieved and to give an outlook on how the landscape of European Takeover Law could change within the foreseeable future. These developments will be assessed throughout this paper by carrying out a systematic analysis of several important factors. First of all, an analysis of the Directive's historical development is carried out. As a next step, the role of the UK for EU Takeover Law will be illustrated in order to comprehend the potential consequences of its withdrawal from the EU (hereinafter: Brexit). A further section will be dedicated to the analysis of Takeover Law within the United States of America (hereinafter: US), in order to consider the question whether it would be suitable as a role model for the potential

1 Directive 2004/25/EC of the European Parliament and of the Council on Takeover Bids (EU Takeover Directive) [2004] OJ L 142/12.

reform of EU Takeover Law. Based on those findings, a qualitative assessment of the question how EU Takeover Law should be regulated in the future is carried out.

## B. Development of the European Takeover Directive

### I. The legislative procedure

The idea for a harmonised European Takeover Law first came about in the European Economic Community (hereinafter: EEC). Reportedly, in the early 1970s, the European Commission appointed *Professor Robert Pennington* as Special Adviser of the EEC to draft the first version of the Directive for Takeover Bids.<sup>2</sup> This resulted in the Commission's 1974 'Report on Takeover Offers and Other Offers'.<sup>3</sup> The report contained general explanations and recommendations regarding the history of takeover bids and their regulation, extensive analyses of the Member States' existing laws and practices, as well as a first suggestion for a draft Directive.<sup>4</sup> The further analysis shows that the nine EEC Member States at the time were relying on different ways to deal with takeovers. Some of them already regulated takeovers by law, others had certain codes of conduct in place and some did not regulate takeovers at all.<sup>5</sup> The UK's unique law and practice concerning takeover bids plays an outstanding role in the report, considering its analysis is positioned at the top of all legislations and is by far the most extensive.<sup>6</sup> One of the conclusions of the 1974 report was that takeover bids require 'legislation which lays down precise substantive rules and [...] a fairly detailed procedure'.<sup>7</sup> This necessity was again picked up over a decade later, when the Commission addressed the European Council with its White Paper on the completion of the internal market.<sup>8</sup> In this communication, the Commission 'clearly declared the link between corporate mobility and the harmonisation of takeover bids'.<sup>9</sup>

In the beginning of 1989, the Commission finally came up with the 'Proposal for a Thirteenth Council Directive on Company Law concerning takeover and other general bids'.<sup>10</sup> This proposal, however, was not perceived with a lot of approval by the involved parties.<sup>11</sup> The problems that arose with this first proposal were mostly connected to the nature of the draft Directive, which the Commission itself later analysed

2 *Papadopoulos*, International and Comparative Corporate Law Journal 2008/6, p. 18.

3 *European Commission*, Report on Takeover Offers and Other Offers, Document XI/56/74, 1974.

4 *Ibid.*

5 *Mukwiri*, European Business Organization Law Review 2020/2, p. 258.

6 *European Commission*, Report on Takeover Offers and Other Offers, Document XI/56/74, 1974, pp. 8–29.

7 *European Commission*, Report on Takeover Offers and Other Offers, Document XI/56/74, 1974, II.

8 *European Commission*, Completing the Internal Market, White Paper, Milan, 28–29 June 1985, COM(85) 310 final.

9 *Papadopoulos*, International and Comparative Corporate Law Journal 2008/6, p. 19.

10 Proposal for a Thirteenth Council Directive on company law concerning takeover and other general bids [1989] OJ C 64/8.

11 *Papadopoulos*, International and Comparative Corporate Law Journal 2008/6, p. 19.

as imposing ‘very detailed rules on the Member States’.<sup>12</sup> The UK’s biggest concern was that the Commission’s shift towards strict compulsory legislation could endanger its unique system governing takeovers, which was mostly based on self-regulation in order to avoid litigation and delays during a takeover.<sup>13</sup> Giving the takeover rules force of law could have resulted in more frequent tactical litigation creating an obstacle to takeover bids which goes against the UK’s main principles.<sup>14</sup> Furthermore, the Government was not pleased by the idea of its supervisory body, the Takeover Panel, losing the flexibility to change takeover rules and to give decisions.<sup>15</sup>

In 1996, the Commission then proposed a new and streamlined Takeover Directive<sup>16</sup> amongst the revision of numerous other proposals as a ‘demonstration of the Commission’s pragmatic approach to ensuring respect for subsidiarity’.<sup>17</sup> The principle of subsidiarity was a new criterion which the Commission had to take into account after the completion of the Maastricht Treaty in 1993, which changed the fundamentals of European integration.<sup>18</sup> This Treaty is also known as the Treaty on European Union (TEU),<sup>19</sup> which is still the basis of EU law. Art. 5 TEU states that, under the above-mentioned principle of subsidiarity, the EU shall act only outside of its exclusive competences, if and so far as its objectives cannot be sufficiently achieved by the Member States themselves. In order to meet this requirement, the 1996 proposal contained fewer detailed provisions and could rather be seen as a framework Directive.<sup>20</sup> This character can be found on the one hand when looking at the five General Principles laid out in the proposal,<sup>21</sup> and on the other hand when taking into consideration the wording of the proposal stating that ‘Member States shall ensure that rules are in force which satisfy the minimum requirements’ of the Directive.<sup>22</sup> Thus, Member States were given a much wider discretion than previously.<sup>23</sup> The proposal was discussed by EU institutions and Member States for years, including several amendments and a conciliation process, until finally being rejected by the European Parliament in 2001.<sup>24</sup> The reasons for this rejection, which resulted from an unprecedented

12 *Monti*, Streamlined Proposal for Takeovers Directive, Press release IP/96/120 of 7 February 1996, available at: <[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_96\\_120](https://ec.europa.eu/commission/presscorner/detail/en/IP_96_120)> (26/4/2021).

13 *Knudsen*, European Law Journal 2005/4, p. 509.

14 *Papadopoulos*, International and Comparative Corporate Law Journal 2008/6, p. 20.

15 *Edwards*, ECFR 2004/1, p. 420.

16 Proposal for a 13th European Parliament and Council Directive concerning Takeover Bids [1996] OJ C 162/5.

17 *Monti*, Streamlined Proposal for Takeovers Directive, Press release IP/96/120 of 7 February 1996, available at: <[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_96\\_120](https://ec.europa.eu/commission/presscorner/detail/en/IP_96_120)> (26/4/2021).

18 *Wessels*, International Affairs 1994, p. 445.

19 Consolidated Version of the Treaty on European Union (TEU) [2016] OJ C 202/1.

20 *Skog*, EBLR 2002/4, p. 302.

21 Proposal for a 13th European Parliament and Council Directive concerning Takeover Bids [1996] OJ C 162/5, Art. 5 para 1.

22 *Ibid.*, Art. 5, para 2.

23 *Skog*, EBLR 2002/4, p. 302.

24 *Papadopoulos*, International and Comparative Corporate Law Journal 2008/6, p. 22 f.

tied vote,<sup>25</sup> are numerous, however, once again, the UK played a special role in this process.

First of all, further concerns were raised in regard to the danger of excessive litigation which could hinder the success of takeovers.<sup>26</sup> The Directive's self-regulation clause<sup>27</sup> did not satisfy the UK's expectations of how the independence of its supervisory authority should be preserved. The UK Takeover Panel therefore claimed that the proposal did not meet the requirements of the principles of subsidiarity and proportionality and argued against its adoption, until certain amendments were made to mitigate the British concerns.<sup>28</sup> Further discrepancies came up regarding the practical implementation of the non-frustration rule<sup>29</sup> (hereinafter: NFR). The NFR was included in this proposal to ensure that shareholders get to decide whether or not they want to sell their stocks by requiring directors to request shareholder approval before taking any action that could potentially frustrate a bid.<sup>30</sup> The main argument of the opposition to the Directive was that the NFR would leave European corporations at a disadvantage compared to US firms which were able to employ defence strategies against hostile takeovers.<sup>31</sup> This shows how differing national interests can 'constrain attempts to advance agendas of structural change'.<sup>32</sup>

Some scholars prematurely labelled the rejection of the 1996 proposal as the 'ultimate defeat of the Directive'.<sup>33</sup> Yet, in October 2002, the Commission began its final attempt to push for the adoption of their newest Takeover Directive Proposal.<sup>34</sup> It stresses once more that it is considered 'essential to provide a European framework for cross-border takeover bids'.<sup>35</sup> In order to do so, the Commission mainly focused on suggestions that could help to overcome dissent amongst Member States and finally adopt the Directive.<sup>36</sup> An analysis requested by the European Parliament therefore labelled the proposal as 'highly inconsistent'.<sup>37</sup> One key aspect of the proposal still appearing as controversial as ever was the NFR. Therefore, the so-called 'Portuguese compromise' suggested to give companies the choice whether or not to apply the provision.<sup>38</sup> This idea was then extended into an opt-out provision for Member States

25 *Edwards*, ECFR 2004/1, p. 427.

26 *Papadopoulos*, *International and Comparative Corporate Law Journal* 2008/6, p. 21.

27 Proposal for a 13th European Parliament and Council Directive concerning Takeover Bids [1996] OJ C 162/5, Art. 4 para 5.

28 *Edwards*, ECFR 2004/1, p. 423.

29 Proposal for a 13th European Parliament and Council Directive concerning Takeover Bids [1996] OJ C 162/5, Art. 8 lit a).

30 *Papadopoulos*, *International and Comparative Corporate Law Journal* 2008/6, p. 21.

31 *Cioffi*, *LAW & POLICY* 2002, p. 384.

32 *Ibid.*, p. 388.

33 *Ibid.*, p. 356.

34 Proposal for a Directive of the European Parliament and of the Council on takeover bids [2002] COM 534 final (2002/0240(COD)).

35 *Ibid.*, p. 3.

36 *Papadopoulos*, *International and Comparative Corporate Law Journal* 2008/6, p. 27.

37 *Dauner Lieb/Lamandini Reinier*, *The New Proposal of a Directive on Company Law Concerning Takeover Bids and the Achievement of a Level Playing Field*, European Parliament Working Paper, 2003, p. 38.

38 *Edwards*, ECFR 2004/1, p. 430.

concerning the NFR and the so-called breakthrough rule.<sup>39</sup> In the end, it was deemed to be due to this compromise that an agreement was finally found which resulted in the passing of a ‘watered-down’ Directive.<sup>40</sup>

## II. Implementation across Member States

Member States were given until 20 May 2006 to transpose the Directive into national law by adopting the necessary laws, regulations, and administrative provisions.<sup>41</sup> Whether the Directive was successful or required revision was to be examined by the Commission five years after the transposition date.<sup>42</sup>

In this context, the Commission published a report concerning the application of the Directive in 2012.<sup>43</sup> Its introduction summarises the Directive’s prevailing objectives and principles.<sup>44</sup> The fundamental criteria for evaluating the success of the Directive’s implementation are legal certainty and transparency, the protection of shareholders and other stakeholders as well as the facilitation of takeover bids.<sup>45</sup> In order to carry out this evaluation, the Commission looked at several areas of the Directive, some of which have shown defects that need to be addressed.

### 1. Optional Arrangements

The NFR<sup>46</sup> as adopted in the Directive obliges an offeree company’s board to obtain shareholder authorisation before taking any frustrating action in relation to a bid, other than seeking alternative bids. The breakthrough provisions<sup>47</sup> embody a ‘one share one vote’-principle aimed at the optimal redistribution of rights following a takeover.<sup>48</sup> Prohibitions of takeover defences, such as the NFR and the breakthrough provisions, play a key role in the facilitation of takeovers.<sup>49</sup> However, since those rules were rendered optional, their ratio of application is of significant interest. The Commission Report has found the NFR to be transposed by as many as 19 Member States, whereas only three Member States have transposed the breakthrough provisions which are meant to neutralise pre-bid defence strategies.<sup>50</sup> Furthermore, a reciprocity

39 *Papadopoulos*, International and Comparative Corporate Law Journal 2008/6, p. 28.

40 *Edwards*, ECFR 2004/1, p. 430; *Knudsen*, European Law Journal 2005/4, p. 519; *Papadopoulos*, International and Comparative Corporate Law Journal 2008/6, p. 28.

41 *Ibid.*, Art. 21 para 1.

42 EU Takeover Directive, Art. 20.

43 *European Commission*, Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Application of Directive 2004/25/EC on takeover bids (Commission Report on Takeover Directive), Brussels, 28/6/2012, COM(2012) 347 final.

44 *Ibid.*, paras 3 and 4.

45 *Ibid.*

46 EU Takeover Directive, Art. 9.

47 EU Takeover Directive, Art. 11.

48 *Papadopoulos*, International and Comparative Corporate Law Journal 2008/6, p. 53.

49 *Mukwiri*, European Law Review 2013/6, p. 834.

50 Commission Report on Takeover Directive, para 7.

exemption to apply optional provisions has been put in place by 13 Member States.<sup>51</sup> These statistics could lead to the conclusion that the key provisions of European Takeover Law are far from identical across Member States. The Commission, however, does not draw this conclusion. The implementation of the NFR is seen as a relative success<sup>52</sup> and in relation to the nearly non-existent transposition of the break-through provisions it is argued that there are already sufficient possibilities to break through takeover defences.<sup>53</sup> This way of playing things down can be argued against. Takeovers generally have the potential to have significant effects for several different types of stakeholders – ranging from shareholders over managers to employees and creditors.<sup>54</sup> However, legislation that allows firms to implement takeover defence strategies technically makes hostile takeovers impossible, which can be highlighted by looking at the US, for example.<sup>55</sup> The dispute among economists and legal scholars revolves around the question of which of the two systems is desirable. Many scholars argue that takeover defences are devices of management entrenchment that lead to firms working less efficiently and the reduction of shareholder value.<sup>56</sup> Allowing takeover bids, in contrast, is deemed to have a disciplining effect on managers and generally to increase share prices, which is also referred to as the ‘market for corporate control’.<sup>57</sup> On the other hand, it may be brought forward that takeovers increase the incentives for investor short-termism, which might then lead to the reduction of long-term investments and efficiency.<sup>58</sup> Which of the two very different approaches actually is favourable is a decision based on fundamental views concerning policies, economics and the law and will be further assessed at a later point of this paper. However, the success of the Directive can only be measured by the objectives Member States have agreed upon, such as legal certainty and the facilitation of takeover bids.<sup>59</sup> Whether these objectives have actually been fulfilled has to be questioned. The statistics provided in the Commission report itself suggest that the number of takeover bids in the EU since the transposition of the Directive remained too low to calculate its economic impact.<sup>60</sup> This can certainly be perceived in a way that the preconditions for a takeover landscape which facilitates takeover bids and gives incentives to make such bids has not been achieved. Furthermore, the legal nature of the optional provisions can be perceived more as recommendations, which reduces the efficacy of the aspired har-

51 Ibid.

52 Ibid., para 19.

53 Ibid., para 11.

54 *Nyombi/Mortimer/Rhidian/Zouridakis*, IBLJ 2015/2, pp. 173 ff.

55 *Carpenter*, Northwestern Journal of International Law & Business 2016, p. 572.

56 *Papadopoulos*, International and Comparative Corporate Law Journal 2008/6, p. 50; *Payne*, ECFR 2011/2, p. 163; *Carpenter*, Northwestern Journal of International Law & Business 2016, p. 572; *Habersack*, ECFR 2018/1, p. 22.

57 *Clarke*, Journal of Business Law 2006, p. 357; *Robinson*, ICCLR 2012, p. 293; *Habersack*, ECFR 2018/1, p. 13.

58 *Johnston*, The Cambridge Law Journal 2007/2, p. 422; *Habersack*, ECFR 2018/1, p. 16; *Cole*, Journal of Business, Entrepreneurship and the Law 2019, p. 40.

59 Commission Report on Takeover Directive, para 3.

60 Ibid., para 12 and Annex, figure 2.



monisation effect.<sup>61</sup> The flexibility given to Member States in terms of implementing the Directive leads to a variety of rules across nations or groups of nations that makes the system much more complex and does not create legal certainty.<sup>62</sup>

The Commission's conclusion does not provide a comprehensive account of these backlogs, but rather whitewashes the situation, suggesting leaving the respective provisions unchanged for the time being.<sup>63</sup> This can only be explained by taking into account the fact that these provisions were the most controversial amongst Member States and delayed the adoption of the Directive by years.

## 2. Mandatory Bid Rule

In relation to some points, the Commission actually did acknowledge that there are rules which could 'merit some clarification in order to improve legal certainty'.<sup>64</sup> Some of those defects came up in relation to the Mandatory Bid Rule<sup>65</sup> (hereinafter: MBR), which is meant to support the goal of minority shareholder protection. It obliges a shareholder who has gained control of a company to make a bid at the equitable price to all shareholders of the same class at the earliest opportunity. A major part of the criticism towards this provision came from a group of highly reputable European Company Law Experts (ECLE), which directly responded to the Commission report.<sup>66</sup>

Since the term 'acting in concert' is relatively open to interpretation, any kind of cooperation could present a risk of having to launch a mandatory bid, which is why the Commission proposed to clarify this concept on an EU level in order to provide more legal certainty.<sup>67</sup> The group of ECLE stated that a certain amount of uncertainty is unavoidable since there are many jurisdiction-specific aspects that mean an approach of maximum harmonisation for this concept would be inappropriate.<sup>68</sup> Their preferred approach would have been to create national procedures that facilitate a so-called 'pre-clearing' of transactions in order to make it clear whether the latter could result in the obligation to launch a mandatory bid.<sup>69</sup> Despite this particular proposal, the Commission put their original idea into effect and published a statement through the European Securities and Markets Authority in 2014, which was drawn up together with

61 *Ferrarini/Miller*, Cornell International Law Journal 2009, p. 315.

62 *Zwecker*, Tulane Journal of International and Comparative Law 2012, p. 245.

63 Commission Report on Takeover Directive, para 26.

64 *Ibid.*, para 21.

65 European Takeover Directive, Art. 5.

66 *European Company Law Experts (ECLE)*, The Application of the Takeover Bids Directive (Response to the European Commission's Report), November 2013, available at: <<https://europeancompanylawexperts.wordpress.com/the-application-of-the-takeover-bids-directive-response-to-the-european-commissions-report-november-2013/>> (26/4/2021).

67 *Ibid.*, para 23.

68 *Ibid.*, para 2.

69 *Ibid.*



national supervisory authorities in order to give a clear ‘White List’ of activities, which can be engaged in without being classified as ‘acting in concert’.<sup>70</sup>

Furthermore, it was noticed that there is ‘a wide variety of national derogations to the mandatory bid rule’.<sup>71</sup> Regarding such national derogations to the MBR, it is not always clear how minority shareholder protection is secured in situations of change of control.<sup>72</sup> The ECLE agrees with this observation and proposes that the European Securities and Markets Authority should collect a list of such derogations and provide public access thereof.<sup>73</sup> Such an initiative, which would at least increase transparency and give affected parties an overview of national derogations, has not been taken up to now.

Lastly, the Commission Report came across a possibility for bidders to exploit the exemption to the MBR in cases when control is acquired through a voluntary bid.<sup>74</sup> Using this exemption, it would be possible to buy an amount of shares just under the mandatory bid threshold and to then launch a voluntary bid for a low price, which would basically deprive shareholders of their ‘fair chance to exit the company’ whilst receiving a control premium.<sup>75</sup> The Commission proposed to tackle this deficiency through bilateral discussions with the concerned Member States in order to discourage the use of such techniques.<sup>76</sup> According to the ECLE, this hesitant approach was not an adequate way to find a consistent solution.<sup>77</sup> The only way to address this issue would be to change the rules of the Takeover Directive in a way that is applicable in all Member States – and if not, there is no real reason for bilateral communications with the Member States.<sup>78</sup>

This serves as another example of potential complications within the process of harmonisation within the EU. Whereas the critics support their own beliefs and point out certain areas where the law might need to be changed, the Commission in reality often faces problems implementing such changes.

### C. The UK as a Key Driver for European Takeover Law

The UK’s takeover regime has a long history and can be seen as the key driver for the development of the Directive. This has already been outlined above with reference to the Commission’s first ‘Report on Takeover Offers and other Offers’ from 1974, which gave the impulse to harmonise Takeover Law on a European level – with a

70 *European Securities and Markets Authority*, Information on shareholder cooperation and acting in concert under the Takeover Bids Directive, Public Statement, 20/6/2014, ESMA/2014/677-REV.

71 Commission Report on Takeover Directive, para 24.

72 Ibid.

73 *European Company Law Experts (ECLE)*, Response to the European Commission’s Report, para 3.

74 Ibid., para 25.

75 Ibid.

76 Ibid.

77 Ibid., para 4.

78 Ibid.

major influence of the UK's regime governing takeover bids.<sup>79</sup> Big parts of the Directive, such as the highly controversial MBR and NFR, have been shaped by the exemplary model of the UK Takeover regime.<sup>80</sup>

### I. Outline of UK Takeover Law

The UK's takeover regime, which forms a relatively unique system for the supervision of takeovers, mainly revolves around the UK Takeover Code.<sup>81</sup> There are several characteristics to it which explain why the UK's system is so unique. The Code was initially a result of self-regulation, which made it a body of 'soft law' without statutory force.<sup>82</sup> This self-regulation originated in the City of London, where several developments showcased the need to regulate takeover bids. First of all, multiple merger and takeover waves in the UK between the 1920s and 1960s transformed the UK's corporate economy with the result of a wider separation of ownership and control and the rise of so-called institutional investors.<sup>83</sup> This new phenomenon brought up the question whether its regulation might be necessary and led to the issuing of the 'Notes on Amalgamations' in 1959, which can be seen as the first attempt at self-regulation of City institutions.<sup>84</sup> Finally, after the threat to regulate takeovers by statute was brought up repeatedly by the UK's government, the Issuing Houses Association reconvened the 'City Working Party' which was meant to solve existing issues through self-regulation.<sup>85</sup> The first version of the Code was then drafted by the so-called 'drafting committee' in 1968, which contained the rules that gave the 'Panel' the power to supervise the Code's administration and take decisions regarding its application.<sup>86</sup> This Panel is further divided into several bodies with different responsibilities, which work independently in order to ensure 'its constitutional legitimacy by adhering to the principle of separation of power and principle of fair trial'.<sup>87</sup> Up to now, the constitution of the Panel still reflects its historical development, since the members of the Panel are mainly financial market experts representing the major stakeholders in the corporate world.<sup>88</sup>

Apart from the written provisions in the Code, UK Takeover Law is also partly influenced by Common Law principles.<sup>89</sup> The self-regulated nature of the Code, for example, gave rise to the question whether the Panel's decisions are subject to judicial

79 *European Commission*, Report on Takeover Offers and Other Offers, Document XI/56/74, 1974, p. 8–28.

80 *Mucciarelli*, ECFR 2006/4, p. 409; *Johnston*, The Cambridge Law Journal 2007/2, p. 460; *Schuster*, The Modern Law Review 2013, p. 531.

81 The Takeover Code 2016.

82 *Schuster*, The Modern Law Review 2013, p. 529, 531.

83 *Johnston*, The Cambridge Law Journal 2007/2, p. 426.

84 *Ibid.*, p. 432.

85 *Ibid.*, p. 442.

86 *Ibid.*

87 *Lee*, EBLR 2017/6, p. 832.

88 *Ibid.*

89 *Kershaw*, ICLQ 2007/2, pp. 282 ff; *Kershaw*, Principles of Takeover Regulation, p. 324.

review. In the case *R (Regina) v Panel on Takeovers and Mergers ex parte Datafin plc*, Lloyd LJ emphasises that if ‘the body in question is exercising public law functions, or if the exercise of its functions have public law consequences, then that may [...] be sufficient to bring the body within the reach of judicial review’.<sup>90</sup> As a result of the strict principles set out in this case, however, the British courts normally only intervene with contemporary Panel decisions retrospectively and by declaratory means.<sup>91</sup> This precedent forms an important part in the UK’s takeover regime, which is designed to avoid shareholder litigation, since legal disputes during the process of a takeover are likely to cause delays, thus increasing transaction costs and legal uncertainty.<sup>92</sup> These aspects and the independence of the Takeover Panel were some of the key criteria which needed to be preserved in order for the UK Government to agree to the Directive.

Finally, Part 28 of the UK Companies Act<sup>93</sup> includes the Takeover Panel and its rules. The authority of the Takeover Panel is thereby clarified, giving it a statutory basis and resolving the Takeover Code’s ‘democratic deficiency problem’.<sup>94</sup>

## II. The origins of NFR and MBR

The NFR evolved in connection to the ever more frequent appearance of takeover defences in the UK and was codified in the first UK Takeover Code in 1968.<sup>95</sup> The NFR has largely retained its wording up to now and is regarded as the most important and ‘crowning’ provision of the latter.<sup>96</sup> Sometimes it is also referred to as the ‘board neutrality rule’,<sup>97</sup> which can be misleading since the provision does not actually require the board to remain neutral, but rather to refrain from any frustrating action until the general meeting of shareholders was able to decide on a bid.<sup>98</sup> For that reason, throughout the course of this paper, the term NFR will be used. The need for an NFR became clear in the 1950s, during the so-called ‘boardroom revolution’, when UK managers started to construct increasingly complex schemes in order to defend their company against unwanted hostile takeover bids.<sup>99</sup> Examples for such takeover defences used in the UK ranged from asset lock-up schemes over simple share issues to asset/share exchanges.<sup>100</sup> However, powerful investors in the UK started to see a more

90 *R (Regina) v Panel on Takeovers and Mergers ex parte Datafin plc* [1986] EWCA Civ 8 [1986] 2 All ER 257 (Lloyd LJ).

91 *Ogowewo*, Journal of Business Law 2007, p. 611.

92 *Knudsen*, European Law Journal 2005/4, p. 509; *Papadopoulos*, International and Comparative Corporate Law Journal 2008/6, p. 20; *Lee*, EBLR 2017/6, p. 835.

93 UK Companies Act 2006 (c 46).

94 *Lee*, EBLR 2017/6, p. 831.

95 *Johnston*, The Cambridge Law Journal 2007/2, p. 442.

96 *Robinson*, ICCLR 2012, p. 292; *Kershaw*, Principles of Takeover Regulation, p. 323.

97 *Nyombi/Mortimer/Rhidian/Zouridakis*, IBLJ 2015/2, p. 161; *Okotume*, ICCLR 2018/4, p. 301.

98 *Papadopoulos*, International and Comparative Corporate Law Journal 2008/6, p. 42.

99 *Johnston*, The Cambridge Law Journal 2007/2, p. 428.

100 *Kershaw*, Principles of Takeover Regulation, p. 325.

profitable turnover from companies under the threat of hostile takeovers.<sup>101</sup> Therefore, the NFR was included amongst the General Principles of the first UK Takeover Code accompanied by a more detailed provision.<sup>102</sup> It can be seen in the *Pennington Report* that the UK was the only country within the EEC that had such a provision in place.<sup>103</sup> This explains why scholars widely agree that the Directive's NFR 'envisages the UK model of the regulation of takeovers at European level'.<sup>104</sup> Today, the NFR is still enshrined in General Principle 3 and Rule 21.1 of the UK Takeover Code. It is, however, noteworthy that the UK's NFR applies once 'the board of the offeree company has reason to believe that a bona fide offer might be imminent'.<sup>105</sup> It has been stated by the Panel's Code Committee that the threshold for a potential offer to become 'imminent' has always been a relatively low one.<sup>106</sup> There is only a small time-frame in which defensive action can be taken, right after the emergence of rumours about the bid and before its 'imminence' sets in.<sup>107</sup> This is a much stricter approach than the one pursued by the version of the NFR which can be found in the Directive. The wording of the latter refers to the publication of the bid, whilst mentioning that a stricter way to transpose the Directive would be to make the NFR applicable once a bid becomes imminent.<sup>108</sup> Regarding this and the fact that the NFR is part of the Directive's optional arrangements, it is clear that the UK's takeover defence prohibition goes much further than the EU's current standard of harmonisation.

The MBR was first introduced to the UK Takeover Code in the early 1970s<sup>109</sup> and is still present in its current version.<sup>110</sup> According to the UK's MBR, any person who carries – together with concerting parties – 30% or more of a company's shares carrying voting rights, or between 30 and 50% of such shares and acquires additional shares carrying voting rights, has to extend their offer to all remaining shareholders. This rule embodies the Code's first General Principle of shareholder equality and the protection of minority shareholders.<sup>111</sup> The MBR is a noteworthy step away from Common Law principles in UK Company Law, where the equal treatment of shareholders is ensured through fair treatment instead of identical treatment.<sup>112</sup> Furthermore, the value of controlling shares is deemed to be higher than that of non-con-

101 *Johnston*, The Cambridge Law Journal 2007/2, p. 442.

102 *Ibid.*, 443.

103 *European Commission*, Report on Takeover Offers and Other Offers, Document XI/56/74, 1974, pp. 18, 26.

104 *Papadopoulos*, International and Comparative Corporate Law Journal 2008/6, p. 42.

105 The Takeover Code, r 21.1 (a).

106 *Takeover Panel*, Review of Certain Aspects of the Regulation of Takeover Bids, PCP 2010/2, p. 73.

107 *Kershaw*, Principles of Takeover Regulation, pp. 323 f.

108 EU Takeover Directive, Art. 9, para 2, subpara 2.

109 *Johnston*, The Cambridge Law Journal 2007/2, p. 422; *Schuster*, The Modern Law Review 2013, p. 531.

110 The Takeover Code 2016, r 9.1.

111 *Johnston*, The Cambridge Law Journal 2007/2, p. 446; *Payne*, ECFR 2011/2, p. 149; *Schuster*, The Modern Law Review 2013, p. 533.

112 *Eg Mutual Life Insurance Co of New York v Rank Organisation Ltd* [1985] BCLC 11.

trolling shares in Common Law.<sup>113</sup> Yet, it needs to be highlighted that the UK's idea of an MBR was one of the few controversial provisions that survived from the *Pennington Report* until the final version of the Directive without being rendered optional.<sup>114</sup>

### III. Lessons to learn from UK Takeover Law

#### 1. Intrinsic Inconsistencies

Directors' duties were originally developed from Common Law principles<sup>115</sup> before they were codified in Part 10 of the UK Companies Act 2006.<sup>116</sup> One of these principles is the so-called proper purpose doctrine, which obliges the director of a company to 'only exercise powers for the purposes for which they are conferred'.<sup>117</sup> This rule mostly concerns the use of corporate power regarding fundamental rights of shareholders, such as their right to vote or decide on the sale of their shares.<sup>118</sup> It is therefore also known as the 'Common Law's non-frustration rule'.<sup>119</sup> In several decisions, courts have ruled and confirmed that directors are entitled to give their advice regarding a takeover but not to have the final decision whether an offer should be accepted or not.<sup>120</sup> If the interference with this fundamental shareholder right is the substantial or primary purpose of a director's action, the proper purpose doctrine is breached.<sup>121</sup> Such a breach could only be justified if the threatening economic damage to the company was severe enough.<sup>122</sup>

Another provision states that it is a director's duty to act 'in the way he considers, in good faith, would be most likely to promote the success of the company'.<sup>123</sup> However, this subjective *bona fide* approach could lead courts to a different assessment of a takeover defence than the objective test of the proper purpose doctrine.<sup>124</sup> Therefore, some argue that the proper purpose doctrine is the superior provision which defines the scope of application of s 172 of the Companies Act,<sup>125</sup> whereas others see the duty

113 *Short v Treasury Commissioners* [1948] AC 534.

114 *Schuster*, *The Modern Law Review* 2013, p. 532.

115 *Mukwiri*, *ICCLR* 2018/9, p. 281.

116 UK Companies Act 2006 (c 46), ss 171–177.

117 *Ibid.*, s 171 (b).

118 *Kershaw*, *Principles of Takeover Regulation*, p. 308.

119 *Ibid.*, p. 324.

120 *Hogg v Cramphorn Ltd* [1967] Ch 254; *Howard Smith v Ampol Petroleum Ltd* [1974] 1 All ER 1133.

121 *Howard Smith v Ampol Petroleum Ltd* [1974] 1 All ER 1133; *JKX Oil & Gas Plc v Eclairs Group Ltd* [2014] EWCA Civ 640, para 24.

122 *Howard Smith v Ampol Petroleum Ltd* [1974] 1 All ER 1133; *Cayne and Another v Global Natural Resources* [1984] 1 All ER 225; *Criterion v Stratford properties* [2002] EWHC 496 (Ch).

123 UK Companies Act 2006 (c 46), s 172.

124 *Mukwiri*, *ICCLR* 2018/9, p. 285.

125 *Ogowewo*, *Journal of Business Law* 2007, p. 599.

to act in good faith as the ‘core duty’ of UK Company Law.<sup>126</sup> This internal clash showcases that some Common Law principles embodied in the Companies Act are not consistent and not finalised.<sup>127</sup>

Yet, as we have already seen above, the instances in which the decisions of the Takeover Panel end up in UK Courts are highly restrictive. Therefore, only the Panel’s rulings can be referred to in order to assess the current state of the law. In contrast to the inconsistency in Common Law, the Panel is much clearer and also more stringent. It stated in *Consolidated Gold Fields Plc* that the purpose or intention of the board of directors is irrelevant for the assessment of whether or not the NFR has been breached, since this is ‘ultimately an objective test’.<sup>128</sup>

However, the lack of judicial assessment regarding the interrelation of the NFR and directors’ duties under Common Law leaves some uncertainty. Even within its country of origin, the NFR is not set in stone. This can be taken into account when considering its abolishment through a reform of EU Takeover Law.

## 2. The Risk of Shareholder Primacy

Furthermore, the approach of UK Takeover Law is perceived as shareholder-centric. This can be identified in most of its provisions and is commonly referred to as ‘shareholder primacy’.<sup>129</sup> It means that the interests of shareholders are usually considered first, whilst other stakeholders have no formal say in the decision about a takeover and their interests are only taken into account to a lesser extent, such as through certain disclosure requirements.<sup>130</sup> This principle is often justified by risk-related arguments. The shareholders own the stock of a company and are the primary risk bearers since they have no safeguards for their investments other than the performance and value of the company.<sup>131</sup> Furthermore, being faced with a takeover bid, shareholders lack control and power to coordinate their behaviour if a company’s shares are distributed amongst numerous unrelated minority shareholders.<sup>132</sup> These disadvantages can be countered by shareholder-friendly provisions such as the MBR and NFR. Moreover, many argue that takeover defences do not actually serve the purpose of protecting the company’s best interest, but rather as a means of management entrenchment.<sup>133</sup> The agency costs resulting from those defences can be avoided by giving shareholders the right to decide on the merits of the bid through provisions such as the NFR.<sup>134</sup> Another aim of this is to empower the shareholders to discipline the board of directors and

126 *Davies/Worthington*, p. 595.

127 *Robinson*, ICCLR 2012, pp. 304 ff.

128 *Takeover Panel*, Consolidated Gold Fields Plc (1989/7), p. 12.

129 *Robinson*, ICCLR 2012, p. 292; *Nyombi/Mortimer/Rhidian/Zouridakis*, IBLJ 2015/2, p. 161; *Lee*, EBLR 2017/6; *Okotume*, ICCLR 2018/4, p. 309.

130 *Payne*, ECFR 2011/2, p. 165.

131 *Nyombi*, International Journal of Law and Management 2018, p. 169.

132 *Mucciarelli*, ECFR 2006/4, p. 410.

133 *Papadopoulos*, International and Comparative Corporate Law Journal 2008/6, p. 50; *Payne*, ECFR 2011/2, p. 163; *Habersack*, ECFR 2018/1, 23.

134 *Nyombi/Mortimer/Rhidian/Zouridakis*, IBLJ 2015/2, p. 169.

enforce corporate governance.<sup>135</sup> This idea is referred to as the ‘market for corporate control’, which uses the threat of a hostile takeover to maximise company performance and shareholder value.<sup>136</sup> Since a hostile takeover puts the jobs of a company’s directors at risk, they will try to avoid being replaced by maintaining a high share price which makes the company unattractive for potential predators.<sup>137</sup> Even though shareholders are generally seeking to make profits from their investments, one must distinguish between different types of shareholders. The UK’s corporate world has seen a significant rise in institutional shareholders since the 1960s, whilst individual share ownership fell from 54% to about 12% until 2016.<sup>138</sup> Most of those institutional shareholders are hedge fund managers trying to secure quick profits for their clients instead of making more sustainable investments for the sake of long-term value creation.<sup>139</sup> The origin of this phenomenon of ‘short-termism’ is deemed to be the UK Takeover Code’s shareholder-centric approach and the NFR, which ‘forces management to focus on the generation of short-term shareholder value’.<sup>140</sup> Therefore, a number of scholars argue that the principle of shareholder primacy is the reason for ‘short-termism and value-destructive opportunistic behaviour’.<sup>141</sup> There is, however, one problem with this conclusion that even leads critics of the principle of shareholder primacy to be hesitant about regulatory reform. Even though there is some empirical evidence from other jurisdictions, the lack of UK-based studies on the implications of shareholder primacy on value-creation and company performances leaves a big gap in research literature.<sup>142</sup> This is an important finding which can be transferred onto EU level. Even though there is some data on the economic effect of takeovers and short-termism which will be assessed later on, there are no sufficient sources on the basis of which EU Takeover Law could be reformed. As the Directive was examined, its economic impact could not be calculated due to the small amount of underlying data.<sup>143</sup> This ‘lack of economic evidence’ was even considered a reason not to propose amendments to the Directive since it could not be justified empirically.<sup>144</sup>

An incident which showed some negative implications of short-termism and actually led to a minor reform of UK Takeover Law was the *Kraft Cadbury Affair*.<sup>145</sup> It

135 *Johnston*, The Cambridge Law Journal 2007/2, p. 449; *Robinson*, ICCLR 2012, p. 293; *Lee*, EBLR 2017/6, p. 845; *Habersack*, ECFR 2018/1, p. 13.

136 *Robinson*, ICCLR 2012, p. 293.

137 *Habersack*, ECFR 2018/1, p. 13.

138 Office for National Statistics, Ownership of UK Quoted Shares: 2016, 29 November 2017, para 6, available at: <<https://www.ons.gov.uk/economy/investmentpensionsandtrusts/bulletins/ownershipofukquotedshares/2016#share-held-by-individual-holds-steady-after-years-of-decline>> (26/4/2021).

139 *Nyombi/Mortimer/Rhidian/Zouridakis*, IBLJ 2015/2, p. 164.

140 *Johnston*, The Cambridge Law Journal 2007/2, p. 422.

141 *Nyombi/Mortimer/Rhidian/Zouridakis*, IBLJ 2015/2, p. 179.

142 *Ibid.*, p. 180.

143 Commission Report on Takeover Directive, para 12.

144 *Ibid.*, para 26.

145 *Moeller*, Case Study: Kraft’s Takeover of Cadbury, Financial Times, 9 January 2012, available at: <<https://www.ft.com/content/1cb06d30-332f-11e1-a51e-00144feabdc0>> (26/4/2021).



resulted in more detailed provisions that removed some tactical advantages of offerors.<sup>146</sup> *Tsagas* argues that this can be seen as an opportunity to follow the UK's example and introduce more detailed provisions on a European level in order to enhance the minimum harmonisation standard set by the Directive.<sup>147</sup>

However, the improvement of research standards appears to be the most pressing issue. The UK's experience has shown that a growing tendency towards institutional investors and short-termism could be identified, yet there are no sufficient grounds for a major reform. In order for the EU not to get stuck in a similar position of unclarity, it is important to assess the Directive's economic impact. This can be done through interdisciplinary research undertaken by academics as well as European and national agencies.

#### IV. Opportunities post-Brexit

Brexit was one of the most covered news topics of the last years within Europe, since the outcome of the British referendum in 2016 ended up with 52% of the votes in favour of the UK leaving the EU.<sup>148</sup> The respective procedure for the withdrawal of EU Member States is provided for in the Treaties.<sup>149</sup> However, since the UK is the first Member State to make use of the procedure, the withdrawal took a lot longer than expected.<sup>150</sup>

Yet, the UK's relation to the EU Takeover Directive is one of the few areas where there is legal certainty. In 2006, the UK adopted the Interim Implementation Act<sup>151</sup> before ultimately implementing the Directive through Part 28 of the UK Companies Act.<sup>152</sup> As we have seen above, this led to the Takeover Code being given a statutory footing and democratic justification. After the transition period provided for in the withdrawal agreement ended, EU legislative acts including the EU Takeover Directive ceased to apply within the UK from 31 December 2020 onwards.<sup>153</sup> Whereas one might think this could once again lead to a lack of democratic justification for UK Takeover Law, the UK Houses of Parliament already approved the Takeovers (Amendment) (EU Exit) Regulations 2019, which came into force on exit day and amended Part 28 of the UK Companies Act 2006.<sup>154</sup> The particular amendments that were made largely serve to clarify and to appreciate the circumstances that the UK

146 *Fornasari*, *The Company Lawyer* 2017/3, p. 84.

147 *Tsagas*, University of Oslo Faculty of Law Legal Studies Research Paper Series 2012, p. 49.

148 *Edgington*, *Brexit: All You Need to Know about the UK Leaving the EU*, BBC News of 13 July 2020, available at: <<https://www.bbc.co.uk/news/uk-politics-32810887>> (26/4/2021).

149 TEU, Art. 50.

150 *Edgington*, *Brexit: All You Need to Know about the UK Leaving the EU*.

151 The Takeovers Directive (Interim Implementation) Regulations 2006, SI 2006/1183.

152 UK Companies Act 2006 (c 46) ss 942–992.

153 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (EU-UK Withdrawal Agreement) [2019] OJ C 384 I/01, Art. 126.

154 The Takeovers (Amendment) (EU Exit) Regulations 2019.

will no longer be an EU Member State – the impact of the amendments is not deemed to be significant which is why the act is not even accompanied by an impact assessment.<sup>155</sup> The Code Committee published its Response Statement to a consultation in regards to the UK's withdrawal from the EU in 2019.<sup>156</sup> Even though this communication was published before the withdrawal agreement, including the transition period, was agreed upon, these possibilities were taken into account and the amendments to the Code set out in the Response Statement will come into effect following the end of the transition period.<sup>157</sup> As it could be expected, the amendments to the Code partly serve the same function as the amendments to the Companies Act, with references to the Directive being removed.<sup>158</sup> Other than that, many references and definitions will be amended in a way to specifically mention the Code's applicability in the UK only.<sup>159</sup>

Those amendments can easily be explained by the UK's role for the Directive and vice-versa. As it was highlighted in connection to the legislative procedure, as well as the origin of some of the Directive's most well-known provisions, the UK was the key driver for the Directive. *Johnston* analysed that its contents 'were modelled almost entirely on the provisions of the City Code'.<sup>160</sup> Apart from the implementation of the Directive giving the UK Takeover Code a statutory basis, a material change was not required and actually never took place. The effect of the Directive's implementation mainly consisted of 'freezing some of the Code's most important provisions'.<sup>161</sup> Even though they might now be available for revision, their historical origin in the UK makes it seem unlikely that Brexit could become a trigger for a fundamental reform of UK Takeover Law. In fact, a set of amendments to the Code's conditions to offers and the offer timetable will come into force on 5 July 2021,<sup>162</sup> which is likely to strengthen the position of shareholders and the role of the Takeover Panel even more.

However, taking into consideration the amount of criticism the Commission had to face because of several British concerns, it can be assumed that Brexit will lead to less opposition for the Commission and thus more legislative flexibility. Therefore, the timing appears to be perfect to rethink the approach to EU Takeover Law and consider its reform. Up to now, there have been no signs of such a reform within the EU. The Directive provided room for a potential revision, which could have been

155 Ibid., Explanatory Note.

156 *Takeover Panel*, The United Kingdom's Withdrawal from the European Union (RS 2018/2).

157 Ibid., para 1.18.

158 Ibid., Appendix B. These amendments can mostly be found in the Introduction to the Code.

159 Ibid., Appendix B – Appendix 6. For example, the Code now refers to the *UK Societas* instead of the *Societas Europea* and to UK multilateral trading facilities and UK regulated markets. The applicability of the Code to offers for 'shared jurisdiction companies' has also been revoked with reference to the fact that the applicability of the Code was only extended as part of the implementation of the EU Takeover Directive. (para 3.12).

160 *Johnston*, The Cambridge Law Journal 2007/2, p. 448.

161 Ibid.

162 *Takeover Panel*, Conditions to offers and the offer timetable (Instrument 2021/1).

proposed by the Commission after its examination.<sup>163</sup> This examination by the Commission has already taken place and the results were published.<sup>164</sup> However, as we have seen in the respective section, only minor steps to improve the harmonisation standards have been taken, whereas the Directive was generally deemed to be sufficient. Since this examination, the Commission did not assess the Directive's success any further or propose any amendments. Yet, this does not mean that a reform of European Takeover Law is not desirable *per se*. Amongst scholars, calls for the amendment of European Takeover Law do exist.<sup>165</sup> Obviously, there is a wide variety of opinions, of which only some proposals can be elaborated on throughout this paper. Whereas some academics propose to orientate further towards the UK,<sup>166</sup> other views label the EU's provisions against takeover defences as a failed project and propose a comparison with jurisdictions that allow takeover defences, such as the US.<sup>167</sup> Other scholars advocate for an even more optional and neutral approach to EU Takeover Law.<sup>168</sup> Despite the Commission not having shown any initiative so far, these are some of the possibilities of reform that need to be further analysed.

## D. Orientation towards the US?

### I. US Takeover Law on a Federal Level

Takeover Law in the US is regulated on a federal level as well as by states separately. Federal takeover regulation stems from the adoption of the Williams Act in 1968.<sup>169</sup> It established the fundamental rules for takeover offers and follows a neutral policy approach, aiming at the creation of a level playing field for targets and bidders.<sup>170</sup> This is done mainly through certain rules regarding disclosure requirements and shareholder equality.

If a bidder is looking to acquire 5% or more of one class of a company's securities, they must file a statement with the US Securities and Exchange Commission (hereinafter: SEC).<sup>171</sup> This statement has to include a set of information including the bidder's background, source of funds, extent of existing share ownership, plans for the target, antitrust problems and other information relevant for the offeree shareholders.<sup>172</sup> Information about the bid must be shared with the SEC, the target company

163 EU Takeover Directive, Art. 20.

164 Commission Report on Takeover Directive.

165 *Enriques*, EBLR 2011, p. 623; *Tsagas*, University of Oslo Faculty of Law Legal Studies Research Paper Series 2012; *Hopt*, European Business Organization Law Review 2014/2, p. 143; *Habersack*, ECFR 2018/1, p. 1; *Mukwiri*, European Business Organization Law Review 2020/2, p. 253.

166 *Tsagas*, University of Oslo Faculty of Law Legal Studies Research Paper Series 2012.

167 *Nyombi*, International Journal of Law and Management 2018; *Mukwiri*, European Business Organization Law Review 2020/2, p. 253.

168 *Hertig/McCahery*, ECFR 2006/4, p. 341; *Enriques*, EBLR 2011.

169 Williams Act 1968 – amending the Securities Exchange Act 1934, 15 U.S.C. § 78a f.

170 *Ferrarini/Miller*, Cornell International Law Journal 2009, p. 304.

171 Securities Exchange Act 1934, 15 U.S.C. § 78n(d)(1).

172 *Ibid.*, § 78m(d).

and its shareholders.<sup>173</sup> Furthermore, target shareholders have the right to withdraw their shares throughout the whole bid period.<sup>174</sup> The discrimination or favouring of certain shareholders is prohibited, which means all shares must be purchased at the same price.<sup>175</sup> All of these provisions on federal level actually show some similarities with European Takeover Law. Specifically, the principles of equal treatment of shareholders and the aim to give shareholders sufficient information to decide on the bid appear to be existent in both legislations. However, most key provisions from the Directive do not exist in the US, which explains why it is still seen as a very different legal framework. There is no equivalent of the MBR or any kind of takeover defence prohibition to be found in the US.<sup>176</sup> Regarding the fact that both the MBR and the NFR originate from the UK, this gives rise to the question whether US Takeover Law could be the new role model for a potential reform of the Directive after Brexit.

### 1. The Predominance of Delaware

Apart from federal legislation, US Takeover Law is mainly shaped by the legal practice within states, which is constitutionally limited to a certain extent. The US Constitution prohibits any state actions that unduly burden interstate commerce.<sup>177</sup> US companies generally have the right to choose their state of incorporation and do not need to stick to the state they are located at – a choice which basically depends on the question of which State Law the company wants to be applicable to its conduct.<sup>178</sup> This choice is made in favour of Delaware more often than not – in 2019, 89% of US public companies were incorporated in the state on the East Coast.<sup>179</sup> Therefore, Delaware State Law is known to be the *lingua franca* for US Takeover Law.<sup>180</sup> The US does not know an equivalent to the UK Takeover Panel or the EU's national supervisory authorities – resolutions to takeover issues are dealt with on a 'courtroom-based' system.<sup>181</sup> Traditionally, more and more firms started choosing Delaware as their state of incorporation since its legal practice was deemed to be ideal in order to maximise company performance and value.<sup>182</sup> Another factor in favour of Delaware is the expertise of its courts.<sup>183</sup> Scholars from the field of US Takeover Law describe it in such a way that the high amount of Delaware incorporations triggered certain network-effects which anchors Delaware's dominance to this day.<sup>184</sup> Lawyers as well as investors were most

173 Ibid., § 78n(d)(1).

174 Ibid., § 78n(d)(5).

175 Ibid., § 78n(d)(7).

176 Commission Report on Takeover Directive (n 84) para 13.

177 *Edgar v. MITE Corp.* [1982] 457 U.S. 624, 630.

178 *Broughman/Fried/Ibrahim*, Journal of Law & Economics 2014, p. 865.

179 *Delaware Division of Corporations*, Annual Report Statistics, available at: <<https://corp.delaware.gov/stats/>> (26/4/2021).

180 *Broughman/Fried/Ibrahim*, Journal of Law & Economics 2014.

181 *Nyombi*, International Journal of Law and Management 2018, p. 141.

182 *Broughman/Fried/Ibrahim*, Journal of Law & Economics 2014, p. 866.

183 *Carney/Shepherd/Shepherd Bailey*, Harvard Business Law Review 2012, p. 124.

184 *Broughman/Fried/Ibrahim*, Journal of Law & Economics 2014, p. 866.

likely to come across Corporate Law from their home state and Delaware, which means they are typically only familiar with the law from exactly those two states.<sup>185</sup> Delaware Corporate Law recently came under increasing criticism from academics. It was highlighted that the quality of the law and the courts' decisions have declined in the last decades, with deficiencies being pointed out specifically in connection to rules governing the liability of directors and mergers and acquisitions.<sup>186</sup> With regard to the above-mentioned fact that US Takeover Law does not contain a provision like the MBR, it is worth mentioning that most states, including Delaware, follow the so-called 'market rule'.<sup>187</sup> Under this regime, the premium is only paid for the acquisition of control and minority shareholders are not entitled to benefit from it, since non-controlling shares are deemed to be of a lower value.<sup>188</sup> Regarding certain written provisions, Delaware General Corporation Law contains strong restrictions on the acquisition of shares. The Delaware Takeover Statute was adopted in 1988 and amended § 203 of Delaware General Corporation Law. This statute became known as one of the so-called 'business combination acts'.<sup>189</sup> It excludes stockholders that have acquired 15% or more of a company's shares from pursuing its takeover for a period of three years unless it was approved by the target board of directors and an affirmative vote of two thirds of the remaining shareholders.<sup>190</sup> *Shapiro and Shapiro* have therefore questioned the constitutionality of Delaware Takeover Law.<sup>191</sup> They recently shared the opinion that this provision might not be in congruence with the Williams Act and potentially a violation of the US Constitution since it foreclosed a 'meaningful opportunity' for hostile bidders to make a successful tender offer.<sup>192</sup>

Without the need to further assess the provision's constitutionality, the conclusion can be drawn that the dominant Delaware Corporate Law adopts an anti-takeover position, which is contrary to the findings about European Takeover Law, which has the aim to facilitate takeovers.

## 2. US Law and Takeover Defences

The perception of the desirability of corporate takeovers seems to be very different to the one in EU Takeover Law. On this note, it has to be mentioned that the biggest restrictive impact on takeovers in the US does not come from Federal or State legislation, but rather from the legal practice which makes use of a wide variety of takeover defences.<sup>193</sup> In case directors do not want to negotiate a merger or acquisition, an offeror could directly address the target shareholders with a hostile takeover bid.<sup>194</sup>

185 *Carney/Shepherd/Shepherd Bailey*, Harvard Business Law Review 2012, p. 124.

186 *Ibid.*

187 *Habersack*, ECFR 2018/1, p. 30.

188 *Ibid.*

189 *Oesterle*, Delaware Journal of Corporate Law 1988, p. 879.

190 Delaware Code, Title 8 Chapter 1 General Corporation Law § 203 (a) (3).

191 *Shapiro/Shapiro*, Delaware Journal of Corporate Law 2014, p. 77.

192 *Ibid.*

193 *Oesterle*, Delaware Journal of Corporate Law 1988, p. 885.

194 *Lee*, EBLR 2017/6, pp. 841 ff.

A defence strategy could now be implemented for several reasons, either the company needs to be protected from an unwanted bidder whose intentions are undesirable for the target company, or the directors fear to be replaced after an acquisition.<sup>195</sup> This is why takeover defences are often understood solely as management entrenchment devices.<sup>196</sup> However, Delaware case law holds a ‘modified business judgment rule’<sup>197</sup> in place, which requires directors to show that the takeover bid presented a danger to their firm’s corporate policy and effectiveness after a reasonable investigation in good faith.<sup>198</sup> Furthermore, any takeover defence strategy has to be somehow reasonable regarding the gravity of the posed threat.<sup>199</sup> Thus, even though takeover defences are commonly used in the US, there are some legal thresholds for their legality, other than what is often displayed in Europe.

The only takeover defence known from the US which would theoretically be available despite the NFR is the so-called ‘white-knight defence’.<sup>200</sup> The white knight is a strategic partner of the target company who puts in a competing offer which might be more suitable for the target’s long-term strategy or useful in order to secure the highest price possible.<sup>201</sup> This search for an alternative bidder, however, does not fall under the category of frustrating action.

The most common frustrating action used by US boards is the ‘poison pill’.<sup>202</sup> This strategy is put in place through a ‘shareholder rights plan’ which can be triggered when an offeror passes a certain threshold of share ownership.<sup>203</sup> Once this is the case, the remaining shareholders are allowed to purchase shares at a discount, through which the bidder’s share volume is effectively diluted and the takeover fails.<sup>204</sup> This takeover defence becomes even more powerful in combination with the use of ‘staggered boards’, meaning that a company’s board is not elected at the same time as a whole, but separately over years, which prevents hostile bidders from gaining board majority.<sup>205</sup> The influence of these takeover defences can be proven empirically – not one hostile takeover of companies that have ‘poison pills’ and ‘staggered boards’ in place was successful since 1996.<sup>206</sup>

All in all, this shows how US Takeover Law and the respective legal practice impede takeovers. Whether this ultimately leads to economic benefits or disadvantages for shareholders is debatable, however, one argument that *Chen* makes has to be high-

195 Ferruzzi, ICCLR 2019/5, p. 274.

196 Papadopoulos, International and Comparative Corporate Law Journal 2008/6, p. 50; Payne, ECFR 2011/2, p. 163; Carpenter, Northwestern Journal of International Law & Business 2016, p. 572; Habersack, ECFR 2018/1, p. 22.

197 *Kirchner/Painter*, American Journal of Comparative Law 2002/3, p. 452.

198 *Chef v. Mathes* [1964] 199 A.2d 548.

199 *Unocal Corp. v. Mesa Petroleum Co.* [1985] 493 A.2d 946.

200 Mucciarelli, ECFR 2006/4, p. 408; Kershaw, ICLQ 2007/2, p. 268; Habersack, ECFR 2018/1, p. 20.

201 Ferruzzi, ICCLR 2019/5, p. 292.

202 Cole, Journal of Business, Entrepreneurship and the Law 2019, p. 40.

203 Kershaw, ICLQ 2007/2, p. 273.

204 *Kirchner/Painter*, American Journal of Comparative Law 2002/3, p. 452.

205 Ferruzzi, ICCLR 2019/5, p. 283.

206 Carpenter, Northwestern Journal of International Law & Business 2016, p. 572.

lighted in this context. Even though shareholders are the true owners of corporations, their rights in US Takeover Law are not sufficient to ensure that they truly take part in the decision about a takeover bid, which is mostly left with directors.<sup>207</sup>

## II. Suitability for the Reform of EU Takeover Law

It also has to be considered whether the structure of the legal framework would theoretically be suitable to become a role model for the reform of EU Takeover Law. First of all, the work of *Ferrarini* and *Miller* is worth mentioning in this context, since it has shown several similarities of the governmental systems. Both the US and the EU are associations of states which can be seen as ‘a large sovereign entity with power to set binding rules within its borders’<sup>208</sup> whereas the Federal States and Member States are ‘smaller entities [...] that have sovereign authority to establish rules applicable within their borders not inconsistent with those set forth by the larger entity.’<sup>209</sup> Furthermore, they attempt to explain certain legislative motivations within these entities. Whereas in larger entities both takeover bidders and targets are equally relevant, they would usually try to adopt a balanced approach to Takeover Law.<sup>210</sup> The legislation in smaller entities, however, mostly affects the targets located in this entity, which results in more target-friendly legislation within smaller entities.<sup>211</sup> These ideas go along with the findings from above. Both EU Takeover Law and US Federal Takeover Law attempt a relatively balanced approach with minimum requirements, whereas Delaware and UK Law contain much more detailed provisions. This is not disproved by the fact that Delaware and UK Takeover Law could not be more different, which is more due to the question how target-friendliness is understood in the respective legal culture. From a systemic point of view, even though there are certain differences between the US and the EU, their governmental structure is at least comparable.

One phenomenon which has been shown to be a result of those different attempts at takeover legislation within smaller political entities is the potential migration of corporations to their favoured entity – specifically in the case of the majority of US firms incorporated in Delaware. This observation is also known as a consequence of ‘state competition’.<sup>212</sup> There are several downsides to it which have been analysed by US Corporate Law scholars for decades. *Romano*, for example, highlighted the danger of Delaware getting into a hostage-like situation through its growing reliance on franchise taxes from the high number of Delaware corporations.<sup>213</sup> This was also reported more recently by *Hamermesh*, who drew the conclusion that interstate competitive threats lead to the tendency of states like Delaware to maintain their business-friendly

207 *Chen*, National Taiwan University Law Review 2007/2, p. 111.

208 *Ferrarini/Miller*, Cornell International Law Journal 2009, p. 302.

209 *Ibid.*

210 *Ibid.*

211 *Ibid.*, p. 303.

212 *Romano*, Cardozo Law Review 1987/4, p. 709.

213 *Ibid.*, p. 722.



legislation and case law whilst being less responsive to political crises.<sup>214</sup> Since States become more and more dependent on the goodwill of 'their' corporations, additional legislation is most likely to emerge sporadically through Federal Law.<sup>215</sup> A similar development within the EU has been feared by scholars since the beginning of the 21st century and the harmonisation of Company Law was seen as the solution in order to avoid it.<sup>216</sup> However, more recently, *de Luca* has argued that the potential emergence of a 'European Delaware' is not too unlikely,<sup>217</sup> mainly due to the freedom of establishment enshrined in the EU Treaties.<sup>218</sup> One of the Member States with the potential to fulfil that role was deemed to be the UK, which was mostly attractive to smaller companies because of its low financial incorporation hurdles.<sup>219</sup> With the freedom of establishment ceasing to apply after Brexit, the incentive for EU companies to incorporate in the UK will, however, no longer exist. *Charny* noted in 1991 that Dutch Corporate Law, which offers the rare option for managers to control large amounts of voting shares through company-owned trust, shows signs of jurisdictional competition within the EEC.<sup>220</sup> With regard to the implementation of harmonised EU Company Law provisions, *de Luca* stated that the Netherlands are still trying to take the most business-friendly position by not going further than the minimal requirements of Directives.<sup>221</sup> One popular example of a company which was attracted by the Dutch approach on Company Law was the newly formed *Fiat-Chrysler Automobiles N.V.* in 2013, which chose the Netherlands for their incorporation despite being a joint venture of an Italian and a British company.<sup>222</sup> Even though the dominance of Delaware is a lot more visible and recognised, these factors lead *de Luca* to the conclusion that the Netherlands are a European jurisdiction which might at least have the potential to become the EU's Delaware.<sup>223</sup>

## E. Qualitative Assessment

### I. Standard of Harmonisation

The harmonisation of European Takeover Law was identified as an objective within the European legal order long time ago. It was first recommended by the *Pennington* report,<sup>224</sup> and later picked up by the European Commission in a White Paper which

214 *Hamermesh*, Columbia Law Review 2006, p. 1752.

215 *Ibid.*

216 *Enriques*, EBLR 2004, p. 1259.

217 *de Luca*, p. 88.

218 Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2007] OJ C 326/47, Art. 49–55.

219 *de Luca*, p. 89.

220 *Charny*, Harvard International Law Journal 1991, p. 429.

221 *de Luca*, p. 89.

222 *Ibid.*

223 *Ibid.*

224 *European Commission*, Report on Takeover Offers and Other Offers, Document XI/56/74, 1974.

acknowledged harmonisation as an aim of upcoming legislative proposals.<sup>225</sup> After several proposals for a Directive were in discussions for more than a decade and national opposition led to them becoming less and less concrete, the final version only applied ‘minimum requirements’ which were meant to harmonise EU Takeover Law.<sup>226</sup> Due to all the compromises that had to be made on the way to it, scholars did not take a long time to label it as a ‘watered-down’ and insufficient attempt at harmonisation.<sup>227</sup> Throughout the years after the Directive’s adoption, its implementation across Member States showed several deficiencies, yet, the Commission only acknowledged some of them in its examination and overall tried to present the outcome of the Directive as successful. However, if true harmonisation is seen as the aim, this result cannot be supported. The research of *Gelter* and *Enriques* amongst others has shown that the Directive’s goal has not actually been fulfilled, since many Member States resisted harmonisation and some even moved in the opposite direction than intended.<sup>228</sup>

Embracing the stand that the Commission’s harmonisation attempt for EU Takeover Law was unsuccessful, we need to consider what can be done in the future. In the past, scholars were relatively hesitant in terms of their expectations regarding potential legislative changes, mainly due to the fact that several Member States did not move closer towards the Directive’s optional provisions over the course of 30 years.<sup>229</sup> One event which could lead to its reform – as it has been highlighted throughout this paper – is Brexit. This argument is supported by *Enriques*, even though he acknowledges at the same time that it might also lead to more resistance against harmonising measures within continental Europe.<sup>230</sup>

Yet, apart from the question whether the EU without the UK would be more open for the reform of the Takeover Directive, it is important to clarify one hypothesis: whether the examined absence of true harmonisation can actually be qualified as a ‘lack’ of harmonisation. This would only be the case if more harmonisation than the current minimum requirements in place is truly desirable. In this context, specific attention needs to be given to the principle of subsidiarity once again. As it was explained in the beginning, this principle is part of the reason why the Directive had to stick to minimum requirements only. The absence of true harmonisation can thus only be seen as a lack of harmonisation if a qualitative analysis shows that the goals of EU Takeover Law can only be fulfilled by more detailed provisions on EU level instead of individual legislation within the Member States. Therefore, the key provisions of the Directive and its economic impact need to be revisited.

225 *European Commission*, Completing the Internal Market, White Paper, Milan, 28–29 June 1985, COM(85) 310 final.

226 EU Takeover Directive, Art. 3.

227 *Edwards*, ECFR 2004/1, p. 430; *Knudsen*, *European Law Journal* 2005/4, p. 519; *Papadopoulos*, *International and Comparative Corporate Law Journal* 2008/6, p. 28.

228 *Gelter*, ECGI Law Working Paper 2017, p. 33; *Enriques*, ICLQ 2017, p. 771.

229 *Mukwiri*, *European Company Law* 2016, p. 186; *Mukwiri*, *European Business Organization Law Review* 2020/2, p. 275.

230 *Enriques*, ICLQ 2017, p. 771.

## II. Justifiability of Key Provisions

An important step within the assessment of the Directive is to consider whether the existence of some of its key provisions is still justifiable to this day. Specifically, the MBR and NFR, which both originate from the UK and are not present in different jurisdictions like the US, will be examined.

### 1. Mandatory Bid Rule

The MBR is one of the Directive's more controversial provisions. Even though it did not have to be rendered optional in order to make the cut, it has initially been criticised for the absence of a uniform control threshold.<sup>231</sup> However, the implementation by Member States has shown that most countries follow the British example of a 30% control threshold, others have it at 33% or one third and only few exceptions apply a 50% threshold.<sup>232</sup> As we have seen earlier, the MBR serves the protection of minority shareholders. The opinions on whether it is a necessary and even effective tool to fulfil this aim are divided.

Firstly, it can be argued that the decision-making process for shareholders should be as undistorted as possible.<sup>233</sup> This becomes problematic when they face the 'pressure to tender', which comes into play when shareholders are faced with a bid and, due to their inability to coordinate themselves with other shareholders, do not know whether to hold on to their shares or not.<sup>234</sup> In this case, value-increasing bids are more likely to fail and value-decreasing bids are more likely to succeed.<sup>235</sup> The MBR takes away this pressure from shareholders, giving them the security of knowing that a succeeding bid will need to be extended to the rest of the shareholders anyway, thus they can decide freely. Another argument for the MBR is that it gives minority shareholders the chance to exit the company at a fair price without being trapped in a situation of oppression through the newly controlling shareholder.<sup>236</sup>

On the other hand, *Habersack* argues that the MBR applies over-protective standards to minority shareholders, which would usually be protected from exploitation by the rules of General Company Law.<sup>237</sup> Furthermore, it is questioned whether the MBR actually benefits shareholders, since it makes the acquisition of a company more expensive and therefore many potential value-increasing takeovers might never take place.<sup>238</sup> *Schuster* counters this argument with his empirical research, showcasing that

231 *Edwards*, ECFR 2004/1, p. 434; *Papadopoulos*, International and Comparative Corporate Law Journal 2008/6, p. 31.

232 *Hopt*, European Business Organization Law Review 2014/2, p. 173.

233 *Payne*, ECFR 2011/2, p. 149.

234 *Mucciarelli*, ECFR 2006/4, p. 411.

235 *Ibid.*

236 *Payne*, ECFR 2011/2, p. 150.

237 *Habersack*, ECFR 2018/1, p. 34.

238 *Mucciarelli*, ECFR 2006/4, p. 420; *Payne*, ECFR 2011/2, p. 145, 151; *Habersack*, ECFR 2018/1, p. 34.

the acquisitions prevented by the MBR are mostly inefficient transactions which could not be prevented by other investor protection rules.<sup>239</sup>

After all, the debate can be narrowed down to the question as to whether the overall economic efficiency of takeovers or the protection of minorities is more important.<sup>240</sup> The MBR comes with a whole set of legislative difficulties attached to it which require constant revision, and it is by no means enough to only look at the minimum rule contained in the Directive.<sup>241</sup> However, it has to be noted that, with the adoption of the Directive in its current version, the Member States have agreed to put a focus on minority shareholder protection which is assisted by the MBR amongst other provisions. As long as this consensus exists, the MBR remains justified, even if it might need to be remodelled in detail.

## 2. Non-Frustration Rule

As was outlined before, the NFR originates from the UK Takeover Code and had to be rendered optional within the Directive in order to overcome disagreements. It is meant to serve the Directive's principle to give shareholders the opportunity to decide on the merits of the bid.<sup>242</sup>

Within the analysis of the UK's role for EU Takeover Law, it has already been outlined how the NFR is usually justified by its proponents. Whereas takeover defences are seen as a device for management entrenchment, a shareholder-friendly takeover regulation has to take into account that shareholders are the owners of the stock in question and have to bear the risks coming with the share ownership. Furthermore, the openness to hostile takeovers is meant to discipline managers through the 'market for corporate control'.

However, as the Commission's examination of the Directive's success has shown, the NFR has only been implemented in 19 Member States.<sup>243</sup> This complication with the acceptance of the NFR is seen to be due to the broad variety of takeover laws and practices within the EU, which could only be harmonised to a relatively small degree.<sup>244</sup> In some jurisdictions, the absence of the NFR would reportedly make no difference because of similar existing rules,<sup>245</sup> whereas others put completely different provisions in place.<sup>246</sup> In light of the resistance that some Member States have shown towards the NFR for more than 30 years and recent national protectionist tendencies, *Mukwiri* sees the withdrawal of the UK from the EU as a potential for reform, but fears that it could only lead to the 'end of history' for the NFR.<sup>247</sup>

239 *Schuster*, The Modern Law Review 2013, pp. 562 ff.

240 *Hopt*, European Business Organization Law Review 2014/2, p. 190.

241 *Ibid.*, pp. 189 f.

242 EU Takeover Directive (n 1) Art. 3 para 1 c).

243 Commission Report on Takeover Directive, para 7.

244 *Mukwiri*, European Business Organization Law Review 2020/2, p. 258.

245 *Nyombi/Mortimer/Rhidian/Zouridakis*, IBLJ 2015/2, p. 162.

246 *Gelter*, ECGI Law Working Paper 2017, p. 33; *Enriques*, ICLQ 2017, p. 771.

247 *Mukwiri*, European Business Organization Law Review 2020/2, p. 274.

Ultimately, the question whether takeover defences or their prohibition through rules such as the NFR are more desirable comes down to the question as to which approach to Takeover Law an entity wants to take. The UK's approach with the NFR, which is optionally applicable within the EU as well, can be seen as a shareholder-rights approach, under which the decision of whether or not to sell shares should always lie with their owner. The US approach which makes takeovers nearly impossible through defence strategies is rather based on a practical idea to improve shareholder-value through the strengthening of long-term investments. These different approaches, however, contain certain hypotheses which need to be validated through research.

Yet, the research literature on the impact of takeover and takeover defences on shareholder value is highly controversial in itself. There are certain strands which see the NFR as a value-destructive provision since it incentivises short-termism.<sup>248</sup> Several studies have shown a link between short-termism and the focus of managers on quick profits, which results in less investments in research and development, thus, less innovation.<sup>249</sup> However, the most successful corporate acquisitions are deemed to be those that consider strategic decisions consciously in order to ensure future revenue growth and long-term value.<sup>250</sup> This argument is adopted by some American scholars, which see the advantages of the US legal practice containing takeover defences in the fact that directors can focus on long-term value creation. Recently, this was identified by the empirical research of *Bhojraj, Sengupta* and *Zhang*, which presented evidence that firms with takeover defences in place tend to experience higher valuations and stock returns than other companies.<sup>251</sup> However, as previously mentioned, these results are not uncontested. Other scholars argue that the implementation of takeover defences by companies which makes hostile takeovers practically impossible significantly reduces shareholder-value by depriving them of any opportunity to profit from value-increasing acquisitions.<sup>252</sup> This argument has also been supported by the extensive work of *Bebchuk*, who fights against the 'myth' that the insulation of boards serves companies' long-term values.<sup>253</sup> He has shown that long-term benefits do not necessarily require boards to be free from any pressure and claims that shareholder engagement and arrangements to facilitate it are beneficial for shareholders both short- and long-term.<sup>254</sup>

This shows once again how important it is to carry out further research in this field. Both shareholder-right based and shareholder-value based approaches could be reconsidered if there was reliable empirical proof of what type of takeover legislation

248 *Johnston*, The Cambridge Law Journal 2007/2, p. 422; *Nyombi/Mortimer/Rhidian/Zouridakis*, IBLJ 2015/2, p. 161; *Cole*, Journal of Business, Entrepreneurship and the Law 2019, p. 36.

249 *Baums*, in: Prentice/Holland (eds.); *Lazonick/O'Sullivan*, Economy and Society 2000, p. 13.

250 *Bekier/Bogardus/Oldham*, McKinsey on Finance 2001/1, pp. 2 f.

251 *Bhojraj/Sengupta/Zhang*, Journal of Accounting and Economics 2017, p. 158.

252 *Carpenter*, Northwestern Journal of International Law & Business 2016, p. 572.

253 *Bebchuk*, Columbia Law Review 2013, p. 1637.

254 *Ibid.*, pp. 1686 f.

actually benefits the economy and value development. If it turns out to be in favour of the availability of takeover defences, shareholders within the EU might want to be attributed the right to give the decision on a bid to the directors, which is currently not the case. A final decision about whether the NFR is still justified can only be taken once its economic assessment can be evaluated.

### III. Policy Recommendation

Finally, it is important to look at the potential ways forward for European Takeover Law and what approach to its reform might be considered. One way to reform the Directive would be to increase its minimum requirements and implement more detailed provisions after the model of the UK. This idea for reform was presented in 2013 by *Tsagas*, who suggested that the EU should use the UK's negative experiences with the Takeover Code to its benefit and improve certain technical subject matters of the Directive.<sup>255</sup> However, changing political realities do not make it seem reasonable to pursue this idea for reform. In the meantime, Brexit has become an overwhelming topic within the EU and the way forward for the remaining Member States does not appear to be further towards the UK. This has been highlighted in particular by *Mukwiri*, who states that the UK's departure as an influencing Member State within the EU is most likely to be the end for any endeavours to generate more consensus towards the EU Takeover regime following the UK model.<sup>256</sup>

Yet, if the tendencies within the EU go further away from the UK, there is a potential to look for a new role model for Takeover Law. In this regard, the example of the US has been analysed, which has a takeover regime in place which is completely contrary to the approach in the UK and the EU. In regard to its structure and the interplay between federal laws and state laws, it has been shown that there are certain similarities between the US and the EU. The question is whether EU Takeover Law is materially close enough to its equivalent in the US in order to pursue its approximation. Key provisions like the MBR and NFR, for example, could not be further away from the US system. However, in his comparative research, *Carpenter* calls for EU Takeover Law to become more open to takeover defences following the example of US legal practice.<sup>257</sup> Yet, looking at the system as a whole, others highlight that the US courtroom-based approach makes the decision-making process inflexible and long, which is implemented more efficiently by national supervisory authorities within the EU.<sup>258</sup> Whether a development away from the UK and further towards the US is desirable remains to be seen. It has to be noted that the withdrawal of the UK from the EU definitely gives rise to more potential for such a development. Especially the fact that the controversial NFR is part of the Directive's optional arrangements is significant in that context. Even without any changes to the Directive, Member States

255 *Tsagas*, University of Oslo Faculty of Law Legal Studies Research Paper Series 2012, p. 49.

256 *Mukwiri*, European Business Organization Law Review 2020/2, p. 274.

257 *Carpenter*, Northwestern Journal of International Law & Business 2016, p. 547.

258 *Nyombi*, International Journal of Law and Management 2018, p. 141.

could step away from the provision and initiate developments further towards the US. However, as noted before, a recommendation for one system or the other can only be based on empirical research and economic assessment.

In this regard, one interesting policy recommendation has been made by *Enriques*, who calls for a neutral approach to EU Takeover Law.<sup>259</sup> This idea is based on a concept which was voiced shortly after the adoption of the Directive by *Hertig* and *McCahery*.<sup>260</sup> Their argument was that EU Takeover Law should take a more flexible approach through more wide-spread use of optional rules.<sup>261</sup> At first sight, this idea seems to be contradictory, since the use of optional arrangements was one of the most criticised aspects of the Directive. However, taking into account all the deficiencies to the Directive analysed within this paper, the neutral approach becomes a very convincing idea. It is proposed to establish a legal options framework which consists of default and menu provisions that EU based companies can opt out of and opt into.<sup>262</sup> Now, it could be argued that this results in less harmonisation. However, it has already been evidenced that the standard of harmonisation in EU Takeover Law is relatively low and it is not entirely clear whether it is necessary to increase this standard. At least, the neutral approach gives European companies the choice on which rules should be applicable to them – this increases shareholder engagement and thus the protection of shareholder rights.<sup>263</sup> Another major benefit of this is the fact that it deals with the problem of state competition. It has been highlighted that the EU's systemic similarities to the US are an indication for the potential establishment of a 'European Delaware'. Scholars have analysed that such a situation of state competition can lead national policymakers to follow an unfavourable protectionist approach. Especially in the aftermath of Brexit, this could become a growing problem for EU Takeover Law. The neutral approach could deal with this problem by ruling out the ability of Member States to engage in protectionist behaviour.<sup>264</sup> Furthermore, it is a good way to circumvent the dilemma surrounding the question whether it increases shareholder value to facilitate or hamper takeover activity. At the current state of research, this question can simply not be decided, which means shareholders should be entitled to decide what approach they prefer.<sup>265</sup> In case one approach proves to be more beneficial economically, the market will indicate it, and companies can still decide to change their view.

All in all, it can be concluded that the neutral approach seems to be the most recommendable idea to reform EU Takeover Law. Even though it does not increase the standard of harmonisation, it contains solutions for numerous existing problems and such that might arise in the aftermath of Brexit.

259 *Enriques*, EBLR 2011.

260 *Hertig/McCahery*, ECFR 2006/4, p. 341.

261 *Ibid.*, p. 361.

262 *Ibid.*, p. 351.

263 *Enriques*, EBLR 2011, p. 632.

264 *Ibid.*

265 *Ibid.*, p. 639.



## F. Concluding Remarks

As it has been shown throughout this paper, harmonisation of laws in the EU can be difficult due to political discrepancies. The debate about the harmonisation of EU Takeover Law was constantly accompanied by disparate national policy agendas, which ultimately led to a compromised Directive with only minimum requirements. The degree of harmonisation achieved is limited, especially by the optional provisions and the possibility to apply national derogations to the Directive. The Directive's examination has shown several deficiencies of which only some were acknowledged by the Commission and even fewer were tackled in a convincing way. Overall, it has been highlighted that the Commission displays the Directive as more successful than an objective view reveals.

Since the UK Takeover Code served as an exemplary basis on which the Directive was modelled, an analysis of the UK's system promises insights into ideas that could be applied on a European level. First of all, the historical origin of certain provisions contained in the Directive was highlighted. Brexit means that the country of origin to these provisions leaves the EU, which could become a key event for the future development of EU Takeover Law, since it comes with newly gained potential for reform. Whether such a reform would lead further towards the UK's system is questionable. However, there are certain lessons to learn from the UK's experience with their takeover regime, mainly with regard to the link between a strict NFR and increased short-termism by institutional investors. This has especially surfaced after the *Kraft Cadbury* acquisition, which ultimately led to a technical reform of the UK Takeover Code that could be taken into account on EU level as well.

As an opposite approach to the UK and current EU systems, the main components of US Takeover Law have been outlined. Certain key provisions like the MBR and NFR do not exist under the US system, which actually contains contrary rules to them. A particular aspect of US Corporate Law is the state competition debate, which surrounds the fact that the state of Delaware has traditionally attracted lots of corporations, which now creates certain network effects. Even though Delaware's Corporate Law is criticised, the sheer amount of US corporations in Delaware still attracts most new incorporations to the state. This analysis is of special importance since research has revealed structural similarities between the policy-making in US and EU Corporate Law. This leads to the conclusion that the EU is, despite its opposite approach to Takeover Law, relatively comparable to the US and by no means immune to the issues faced by the US. Even though an actual 'European Delaware' might not exist yet, it has been shown that certain Member States of the EU like the Netherlands have shown similar tendencies to attract corporations, which needs to be taken into account for the potential reform of EU Takeover Law.

Brexit will most likely lead to the legislative isolation of the UK from the EU and the remaining Member States are not expected to follow the UK's approach to Takeover Law further. In light of a potential reform, principles from the Treaties need to be taken into account, such as the principle of subsidiarity. Therefore, it will be especially important to increase research in regard to the effects of the Directive. It

needs to be sufficiently evidenced how takeover rules affect the economy, only on these grounds may it be decided whether takeover-friendly or anti-takeover provisions are desirable. Currently, there is no academic consensus, and the Commission has not assessed the Directive's economic impact up to now. Therefore, it is unlikely that the Commission will be able to draw up a completely harmonised framework with significant material changes. A shift towards the US is only likely if Member States take such initiative and influence the Commission to revise the Directive. The qualitative assessment of this paper has shown that the reform towards a 'neutral approach' might be the most desirable according to the current state of research. Giving companies an optional framework for Takeover Law at hand could overcome substantive difficulties. Especially after Brexit, it will be important to prevent state competition within the EU. Furthermore, the current incapability to determine the 'perfect' approach to Takeover Law in order to increase shareholder value should be dealt with by giving the decision back to the shareholders through more optional provisions.

Finally, this paper shall be concluded with a call for further research. Regulatory reforms of Takeover Law need to be based on reliable empirical sources. Therefore, the current state of research concerning the impact of Takeover Law on shareholder value and the economy should ideally be extended.

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