UNIVERSITY OF CYPRUS

DISSERTATION

The Directive 2004/25/EC: Are the optional principles of "Board Neutrality" and "Break Through" leading towards Takeover Efficacy in the European Market?

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Supervisor: Dr. Thomas Papadopoulos

NIKOLETTA ZODIATOU

Department of Law

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Abstract:

This paper will examine the two core optional provisions of the Directive 2004/25/EC[1] on Takeover Bids as implemented in 2004 after years of negotiations. The Board Neutrality Rule under Article 9[2] of the Directive, aims to limit the power of the target company's managerial board to use defensive measures against a potential bid and places the decision making authority in the hands of the shareholders[3]. Further on, there will be a discussion on the Breakthrough Rule, Article 11[4] of the takeover Directive which aims to enable the bidder to break through any rights already held by shareholders or other individuals which may form an obstacle towards achieving the takeover of the desired company[5]. It remains up to the Member States' discretion if those two principles will be implemented in their national laws, a right given to the Member States under Article 12[6] of the Directive which will be further criticized as to the impact it imprints on the entire Takeover Directive, as well as, how the optionality provision affects the effectiveness of the takeover regulation and consequently the development of a Harmonized European Union and the internal market overall. In this analysis, it will be evaluated to what extent the two principles facilitate the Directive to achieve its main objectives and put on the spot the gaps and weaknesses of the optional provisions as proven by their performance. Lastly, reference will be made to the US System to provide an overview of the similarities and differences takeover bids have in the two most influential markets in the world.

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[1] DIRECTIVE 2004/25/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL 2004.
[2] ibid
[3] J Mukwiri, 'The End Of History For The Board Neutrality Rule In The EU' (Springer Nature 2019)
[4] ibid
[5] Rolf Skog, *The European Union'S Proposed Takeover Directive, The "Breakthrough" Rule And The Swedish System Of Dual Class Common Stock* (Stockholm Institute for Scandianvian Law 1957-2009)
[6] ibid

The long way to the Directive 2004/25/EC, a historical background:

Years of negotiations and the unsuccessful proposals:

The journey to the implementation of the Directive 2004/25/EC was a road filled with ongoing debates, negotiations and unfortunate efforts. The idea behind a creation of a Directive that would regulate Takeover Bids across the European Union and the Member States, goes way back when the first attempt was made, in the 1970s, where the European Commission with a proposal on the table, aimed towards the implementation of a set of rules that would provide legal certainty, by protecting the shareholders from unforeseeable threats and malfunctions in case of a takeover.[7] Therefore, the creation of a bundle of rules was necessary in order to set out guidelines and boundaries to the takeover procedure, operated either by an individual or a company, aiming in this way to gain the control of the targeted company.

Attempt one: The Proposal of 1989:

As mentioned above attempts to create a proposal towards a regulation of takeover bids, begun in the early 1970s, by Professor Robert Pennington who was then appointed to create a report on the desired directive as an attempt to draft a piece of legislation that would govern the operations and transactions that take place as part of the procedure of the Takeover Bid[8]. The subject report as drafted by Pennington was mainly based on the United Kingdom's regulation, the "Takeover Code".[9] Unfortunately, the first attempt of a takeover directive was swiftly rejected after several discussions by the European Commission and Parliament as it

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[7] Thomas Papadopoulos, *The European Union Directive On Takeover Bids: Directive 2004/25/EC* (International and Comparative Corporate Law Journal, Vol 6, No 3, pp 13-103, 2008 2008)
[8]J Mukwiri, 'The End Of History For The Board Neutrality Rule In The EU' (Springer Nature 2019)
[9] The Takeover Panel 1968.

lacked preciseness in laws that regulated cross boarder takeover bids, which at that set time was not a commonly occurred transaction[10].

Nonetheless, the conversation sparked again later on, when the subject of a takeover bid directive came up in the discussions and reports regarding the Internal Market. The European Commission in 1987, had created a report in regards to a Takeover Directive but swiftly became subject of heavy and negative criticism that caused the report to be never formally seen by the public eye[11].

The European Commission caused several disputes and reactions by the Member States as with the final version of the 88' proposal, suggested the implementation of Mandatory Bid. Amongst the Member States that stood against this suggestion was the United Kingdom. The opposing Member States argued that the European Union should make efforts to create an atmosphere of a level playing field for takeovers.[12] Other Member States like Germany did not manage to get on board with the specific proposal as their national law was prioritized one of the main reasons being that a similar Mandatory Bid rule as minority shareholders in Germany are already protected under german company laws. The 1989 proposal was a failed attempt and heavily frowned upon by the majority of European countries.

Attempt two: The Proposal of 1996:

In what can be considered as a second attempt at a proposal for a Takeover Bid Directive, it took place ten years later after the first failed proposal. In the year 1996, the European Commission proceeded to create a draft of a directive, taking into consideration the comments that the previous failed proposal received. Not only that, but the European Commission also involved the Subsidiarity principle as introduced by the Maastricht Treaty.

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[10] Andrew Johnston, 'CAMBRIDGE LAW JOURNAL' (2007) 66 The Cambridge Law Journal
[11] Thomas Papadopoulos, *The European Union Directive On Takeover Bids: Directive 2004/25/EC* (International and Comparative Corporate Law Journal, Vol 6, No 3, pp 13-103, 2008 2008)
[12] Frank Wooldridge, 'The Recent Directive On Takeover-Bids' (2004) Volume 15 European Business Law Review.

It was expected that this version of the proposal would be enhanced and upgraded from a harmonization tool to a legal frame work by including several general principles[13]. However, unfortunately, it lacked provisions that were high in preciseness that could actually become an implemented Directive of the European Union and the Member States had they not contained a handful of loopholes.

The European Commission submitted the proposal. Amid the agreement of Common Position in 2000, the European Parliament and European Commission faced a deep and heated debate upon a specific principle that was incorporated in the proposal. The subject principle is that of Board Neutrality for which the Parliament was heavily opposed to, and indeed, remains a sensitive topic from a political perspective until today[14]. Essentially, the principle of board neutrality forces the board members to stay neutral, unable to perform or express any dislike, disapproval, and non – consent towards the execution of the takeover. The scope of the board frustrating the takeover is nonexistent. The question of whether a committee should carry such power will be analyzed further on.

Despite that, when the conciliation procedure was finalized and the principle was maintained, the European Parliament rejected the proposal once again by means of votes, which took place on July 4th in 2001. The decision for the 1996 proposal's rejection was made based on three factors[15]:

1. Major concerns and drawbacks were explained that the proposal failed to offer a level playing field that would entertain a connection between the United States of America and the European Union. The reason behind this, which was considered a difficult part of the proposal, is that it would oppose several obstacles to the process of a

[13] Vanessa Edwards, 'The Directive On Takeover Bids – Not Worth The Paper It'S Written On?' [2012] European Company and Financial Law Review.
[14] J Mukwiri, 'The End Of History For The Board Neutrality Rule In The EU' (Springer Nature 2019)
[15] Sabine Ebert, 'European Company On The Level Playing Field Of The Community' (2021) 14 Eur. Bus. L. Rev. 183 (2003) Kluwer Law International.

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takeover of a European based company by a US one. Such obstacles would be prohibiting factors for a Takeover between the two continents.

2. No provision was incorporated in the proposal that would act as a protective shield for the employees of the company that is taken over, as well as the forced neutrality of the board of directors in situations when a takeover bid was not favorable towards directors and the rest of employees.
3. Uneven Corporate governance across the Member States of the European Union.

Most Members of the European Parliament did not vote based on party affiliation, which is how it is usually done, but instead gave their vote based on their country's association which is what pushed this proposal of the edge and became an additional failed attempt towards the implementation of a Takeover Bid Directive[16].

The third time is a charm: The final and successful proposal of 2002.

The European Commission, upon the last rejected proposal of 1997, has proceeded to allocate the task of drafting the proposal for a Takeover Bid Directive to the expertise of a group that consisted of a number of the highest-level legal experts. In charge of which, was Professor Jaap Winter, who was the member that considered the obstacles that occurred due to the previously proposed rules being too generic in efforts of being pan European[17].

The draft as created by the appointed legal team, was finalized and submitted by January of the same year and it ensured to include necessary provisions that were previously introduced by the two prior attempts. This in fact, included the controversial principle that neutralizes the Board, nonetheless, it reckoned that the principle would disrupt the desired level playing field sought to be provided with the implementation of the Takeover Directive. The principle would manage to prohibit companies' boards in Member States where the rule of "one share

[16] ibid
[17] European Commission, 'Proposal For A Directive On Takeover Bids Frequently Asked Questions'

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one vote" applies from adopting non authorized defense mechanisms.[18] However, this would not be the case for countries where different structures are in place. For example: shares are entitled to multiple rights when voting, shares that are nonvoting, and shareholders holding the special power to appoint or remove members of the board. On that basis, the team of legal experts, introduced the parliament to the Break through Rule which acts as the green light of the bidder to literally break through structure and rights, as well as Association Articles and other core binding company documents, that have the power to form an obstacle to the takeover, even frustrate the bid.[19]

The October 2002 proposal which was created on the basis of the January proposal was introduced to the European Parliament and was thereon approved on April 21st of 2004. The positive outcome – approval of proposal – occurred upon further negotiations and compromises which allowed "opt out" and "reciprocity" to be included in the Directive, with which, the Member States are granted further freedom of choosing whether provisions that are not compulsory will be adopted in their national laws[20].

An insightful look into the procedure of the Takeover Bid:

The Takeover Bid Directive of 2004/25/EC[21], seeks to regulate the procedure, aiming to provide a level of harmonization towards the Member States of the European Union. A 'takeover' is basically an offer made to the company of interest, to purchase all or a major part of shares, in order to gain its control. If such an offer is made by one company to another, upon completion of the takeover, the companies, are considered to be subsidiaries. The control of the newly acquired company is being handled by the offeror company, which

[18] De Luca, N. (2017). *European Company Law: Text, Cases and Materials*. Cambridge: Cambridge University Press. doi:10.1017/9781316875469

[19] Thomas Papadopoulos, *The European Union Directive On Takeover Bids: Directive 2004/25/EC* (International and Comparative Corporate Law Journal, Vol 6, No 3, pp 13-103, 2008 2008)

[20] ibid

[21] DIRECTIVE 2004/25/EC OF THE EUROPEAN PARLIAMENT AND THE COUNCIL 2004.

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gains the authority to, let go of the existing members of the managerial board of the company, and appoint new members. The offeror will also have the power to restructure the company at their discretion[22]. Another possible scenario of a takeover is the union of companies by the means of share exchanges between the shareholders, the so called merger. This is done by the shareowners of each company, exchanging their assets, in return of assets of the other company. Control is thereafter combined and the entities are merged.

Nonetheless, it is very important to distinguish that there is a fine line that makes a takeover and a merger two different things. A takeover achieves the gather of control of the target company, and that is done either immediately or later on by it lies completely in the hands of the acquirer. In a situation where the companies undergo a merge which consists of the two companies becoming unified, the shares in this scenario, will be divided between the shareholders of both companies therefore the subject of control becomes more complex as it is not clear what will happen after the merging of the companies[23].

Another major distinction is that a takeover is usually frowned upon and not well received by the board of the target company, whilst in a merge situation, it must be clear that both boards accept and wish for the procedure to be executed and it is usually carried out with greater ease.

Where the bidder is facing trouble convincing the board to consent to the takeover, then what usually happens is the bidder moves on to the next step, which is the direct approach of the shareholders[24]. By emphasizing the benefits, the current shareholders will acquire with the takeover, the possibility of getting them on board with the idea of selling their shares increases.

[22] Maul S, and Kouloridas A, 'The Takeover Bids Directive' [2019] German Law Review
[23] Martynova M, and Reeneboog L, *Advances In Corporate Finance And Asset Pricing* (Elsevier)
[24] ibid

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It is argued that for a successful future of the company after a takeover bid, the plan must involve removing the existing board and replacing it with new directors, as instructed by the new shareholder. The law also has to be designed to encourage, and control what changes are able to be made in the managerial board upon the establishment of the new acquirer[25].

In general, a Takeover can be characterized as the technique which is able to reconstruct a corporate entity. But with this comes the absolute need for a regulation that will be able to control the boundaries to which the operations of a takeover are allowed to expand to.

Defense Mechanisms and basic principles:

The board of the target company will not necessarily be content with the takeover of the company as their positions are in jeopardy and their future in the company is held in the hands of the new acquirer that will control the structure of the company as mentioned above. Here, defense mechanisms enter the picture. The so called ‘’poison pills ‘’which cover a vast range of defensive options prevent the company from being taken over[26]. These strategic defenses are acted by the board of the company prior, during, or after the takeover occurs to prevent the situation from progressing[27]. “Spin-offs” is the defensive method with which the company sells some of its most valuable assets in hopes of the bidder withdrawing the takeover[28], Lock Up defense provides alternative purchasing options instead of the company’s shares, such as equity or a partial selling of the company so that it prevents from losing the control but still providing an important role to the ‘white knight’. Another interesting defense mechanism is called the Green Mail. The goal of Green mail is to prevent a behavior that might seem aggressive as it constantly purchases shares of the company to

[25] Palmer B, 'Corporate Takeover Defense: A Shareholder's Perspective.'
[26] Towers S, 'Poison Pills: Defending Against Takeovers/Stockholder Activism And Protecting Nols'
[27] Paulo Camara, *Defensive Measures Adopted By The Board: Current European Trends* (2000)
[28] Cusatis P, *Restructuring Through Spinoffs* (Journal of Financial Economics 1992)

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eventually achieve the takeover or impulsively insist on the takeover taking place[29]. In greenmail scenario A – aggressively purchasing shares- the company may attempt to put a price on the bidder in hopes to stop progressing the situation. Scenario B of green mail has the bidder taking over the company so as to force the target company to repurchase the shares at a much greater price leaving the bidder much wealthier[30].

Having the above said, we can understand the need for a Directive that will protect the best interests of the shareholders, from a board that wishes to use the above and more defense techniques to avoid losing control and being financially disturbed by takeovers. Therefore, it is mandatory for the Member States to follow basic principles. Firstly, the principle that covers the treatment towards the targeted shareholders, where the Directive states that they should receive treatment of an equal level, as well as allowing a reasonable amount of time to the shareholders to make an informative decision for the potential takeover[31]. Having that said, in order to make the best decision, the shareholders need to have all relevant information in their hands so the bidder shall make clear any information that concerns the takeover prior to the decision making of the members.

The Takeover Directive also foresees the actions of the board to be taken, having as a priority the shareholders' best interests as they are the most at risk in a takeover scenario. What is expected, is that the company is equally treated by the board any measures the board takes to be made in good faith. In that sense, the Directive prohibits any false markets that act as a security of the target company and produce results that are non truthful and realistic as an increase or decrease in prices would lead to a conclusion that is false[32].

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[29] Freeman, R. E., Gilbert, D. R., & Jacobson, C. (1987). The Ethics of Greenmail. *Journal of Business Ethics*, *6*(3), 165–178.
[30] ibid
[31] MCCAHERY J and others, 'THE ECONOMICS OF THE PROPOSED EUROPEAN TAKEOVER DIRECTIVE' (CENTRE FOR EUROPEAN POLICY STUDIES 2003)
[32] ibid

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Moreover, the Directive Incorporates principles in regards to the bid and bidder. A takeover bid shall be made in a manner, that does not disturb, or affect the target company and shall be made at a reasonable time. The bidder prior to the announcement of his intention to place a takeover offer it is mandatory to ensure that there is a consideration available to provide which could take the form of cash[33].

The Directive 2004/25/EC[34] concerns companies whose securities are licensed under a regulating market – in Cyprus the authority responsible for the licensed market is the Cyprus Securities and Exchange Commission[35]- , however, it must be considered that a company may be regulated in more than one Member State. It should be noted, that the subject Directive does not cover takeover bids that are created by companies themselves to invest in their existing capital. Also, public offers made by the central bank of a Member State are not regulated by Directive 2004/25/EC according to Article 1 Paragraph 2[36].

Article 9:The Board Neutrality Principle

The Principle of Board Neutrality is found under Article 9 of the Takeover Bid Directive[37]. It has been heavily influenced by the Takeover Regulation as issued by the United Kingdom and has been modified to fit the European framework. The function of the Board Neutrality principle aims to achieve the prevention of the target company's board, to take any actions that would jeopardize the process of a takeover bid. This applies from the very moment a bid is placed, nonetheless, it is up to the discretion of each European Member State to whether Article 9 will be adapted[38]. Board Neutrality is also known as the "Non- Frustration Rule", which it indeed makes a more realistically representative name for the nature of the principle,

[33] Clerc C and others, *A Legal And Economic Assessment Of European Takeover Regulation* (Marccus Partners and Centre for European Policy Studies 2012)
[34] DIRECTIVE 2004/25/EC OF THE EUROPEAN PARLIAMENT AND THE COUNCIL
[35] 'Επιτροπή Κεφαλαιαγοράς Κύπρου |' (*Cysec.gov.cy*, 2021)
[36] DIRECTIVE 2004/25/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL 2004
[37] ibid
[38] J Mukwiri, 'The End Of History For The Board Neutrality Rule In The EU' (Springer Nature 2019)

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considering that the targeted board is able to act upon the takeover, and the principle aims put a limit to this power[39]. The board uses its power to prevent a takeover bid and is able to find the solution in a white knight which takes the form of different defense techniques that were briefly explained above. However, if a white knight is to come to the rescue of the board, it still remains up to the shareholders' discretion to allow the defense to take place and how the situation will be furtherly handled. The final decision is up to the shareowners upon the formal announcement of the bid so they are in a position to make an informed decision. Whilst for a majority of Member States, it is mandatory that shareholders have the total control of how a takeover bid is handled, the managerial part of the company is still allowed to act against the takeover prior to the decision of the shareholding body[40]. In this manner, the term "Non Frustration Rule" is more applicable to the nature of this principle as the board is left powerless in frustrating the takeover bid prior to the general meeting of the shareowners who ultimately have the final say[41]. It should also be noted that Article 12 of the same Directive[42] makes board neutrality optional which has been criticized heavily, however it will be a topic analyzed further on in the paper.

It is important to examine the power that the board holds in a Takeover Bid procedure. This authority of the board is stated under Article 9(2) of the Directive 2004/25/EC:

"During the period referred to in the second subparagraph, the board of the offeree company shall obtain the prior authorisation of the general meeting of shareholders given for this purpose before taking any action, other than seeking alternative bids, which may result in the

[39] Mucciarelli, Federico M., White Knights and Black Knights: Does the Search for Competitive Bids Always Benefit the Shareholders of 'Target' Companies? (June 15, 2006).

[40] Pálsson Þ, *Do The Board Neutrality Rule And The Breakthrough Rule Provide For A Level Playing Field In Takeovers In The EU?* (FACULTY OF LAW Lund University)

[41] Habersack, M. (2018). Non-frustration Rule and Mandatory Bid Rule – Cornerstones of European Takeover Law? . European Company and Financial Law Review, 15(1), 1-40.

[42] DIRECTIVE 2004/25/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL 2004

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frustration of the bid and in particular before issuing any shares which may result in a lasting impediment to the offeror's acquiring control of the offeree company"[43]

The provision states that an authorization arising from the general meeting of the company's members is mandatory, as the board could act upon the takeover bid's frustration. Ultimately this leads us to understand that the Directive directs the responsibility of deciding on the company's future on its shareholders, alongside the defense mechanisms that the shareholders will decide whether to allow to be used to fight off the bid[44].

The subject principal acts as the protective guardian of the shareholders in accordance with Article 44(2)[45]. This is the reason why the board's power has been limited. We can also view it from the perspective that the fact that the board is able to defend the company from a takeover could be is also there to pursue a change of decision of the shareholders. Having an impact on the consideration of the takeover bid, is definitely a role that is important as it can plot to twist the plans of the shareholding body and this does not always portay the best option for the shareholders[46]. The board usually acts in the early stages when the bid is placed, as this is the timeframe laid down in by provision 9(6)[47].

Further on, Article 9 leaves room to the target company to issue new shares in response to takeover bids, so in that way it discourages the bidder from proceeding with the offer, which could actually push the bidder away long-term making it impossible for him to get to the level of equity to which the company has leveled up to[48]. Upon the general meeting as conducted by the company's shareholders, there is the possibility to increase the timeframe to which the board may decide on the increase of the capital which applies for up to five years,

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[43] ibid

[44] Gerner-Beuerle, Carsten, Kershaw, David and Solinas, Matteo (2011) Is the board neutrality rule trivial? amnesia about corporate law in European takeover regulation. European Business Law Review, 22 (5). pp. 559-622. ISSN 0959-6941

[45] DIRECTIVE 2004/25/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL 2004

[46] Nyombi, C. (2015) 'A critique of shareholder primacy under UK takeover law and the continued imposition of the Board Neutrality Rule', International Journal of Law and Management, vol. 57 pp.235-264

[47] Ibid

[48] Papadopoulos, Thomas. (2013). Cyprus Company Law: Board Neutrality and Breakthrough in Takeovers.

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however, the board loses such authority the moment that the bid has been already placed and publicly announced. The shareholders are the only authorized persons of the company that are eligible of deciding which defensive measures will be allowed and therefore issuance of new shares is based on their decision[49].

Some Member States do not grant to the general meeting the power to proceed with a capital increase. However, if the optional Article 9 is adopted by the Member State then the Directive provides such authority to the Member State to gain back this right. In general, if we take a look back and see the aims of the Directive 2004/25/EC [50], to a big extend it is considerate of the shareholders' rights and protections and we can say without a doubt that the ideology of the directive has been based and drafted on those manners.

This given, current shareholders are able to use the securities that are introduced by the company's board of directors. However even if the increase of capital as a defensive technique poses as a model which will be suggested by the board, it is worth to mention, that the board does not desire that the minority shareholders will actually express a desire to use this method of defense. [51]This is primarily based on the fact that it does not provide a sustainable level of certainty as to the success of the defense method. There is no actual guarantee that the newly issued shares will be purchased by the takeover bidder as other natural or legal entities may approach those shares with the intention of purchase and therefore the increase of capital will be a fruitless attempt and a powerless defense mechanism against the bid[52].

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[49] Gerner-Beuerle, Carsten, Kershaw, David and Solinas, Matteo (2011) Is the board neutrality rule trivial? amnesia about corporate law in European takeover regulation. European Business Law Review, 22 (5). pp. 559-622. ISSN 0959-6941
[50] Ibid
[51] Puziak M, and Martyniuk M, *Defensive Strategies Against Hostile Takeovers. Th E Analysis Of Selected Case Studies* (Journal of International Studies, Vol 5, No 1, 2012, pp 60-69)
[52] Howel 'Companies' Capital and creditor protection under the Czech Law-living on the edge of shopping forum' (2005) EBLR 1415

Moreover, the third paragraph of Article 9, considers the scenario where there has been an intention by the target company to publish new shares and shortly after there was an announcement of a takeover bid being offered. It creates an uncertainty us to if and when should the shares still be issued after the announcement of a takeover bid.

"As regards decisions taken before the beginning of the period referred to in the second subparagraph of paragraph 2 and not yet partly or fully implemented, the general meeting of shareholders shall approve or confirm any decision which does not form part of the normal course of the company's business and the implementation of which may result in the frustration of the bid."[53]

As this is falls outside the scope of the company's usual operation the general meeting held by the shareholders will have to decide whether the issuance will be finally carried out or be completely withdrawn[54]. Since the issuance of new shares withholds information considered to be confidential it is not possible to merely postpone the procedure of the issuance when the takeover bid will be publicly announced.

However, it is later on stated in the Directive under the same article, that apart from the issuance of shares, there could be another kind of operations of the company that fall outside the scope of the target company's normal actions and activities, that could form an obstacle towards the takeover bid[55]. For that reason, operations of this nature should be controlled and limited by the shareholders. Nonetheless, this should be done so in a matter that will not interrupt the board from carrying out usual activities that are part of the normal business flow of the company.

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[53] DIRECTIVE 2004/25/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL 2004

[54] Pálsson Þ, *Do The Board Neutrality Rule And The Breakthrough Rule Provide For A Level Playing Field In Takeovers In The EU?* (FACULTY OF LAW Lund University)

[55] Papadopoulos, T. (2013). Cyprus Company Law: Board Neutrality and Breakthrough in Takeovers

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Those rare operations that are not part of the usual business activity of the company may cause a drawback from the takeover offer. But it is important to bring some of those low-key operations on the spot for the purposes of their identification[56]. Few of them were mentioned earlier in this paper such as poison pills, lock ons, whites knights etc.

The list however does not end there. Another common technique is that of anti- trust litigation as well as strategic acquisitions and share buy backs increase the number of defenses that the board has up their sleeve. The litigation technique refers to taking action in form of a litigation procedure which is known to be a procedure high in cost and extremely time consuming which is effectively the enemy of the takeover bidder[57]. How this defense works, is by suing the bidder which could potentially be a natural person or a legal entity and is as common to use this defense as one third of the takeovers that occurred from 1962 to 1980. [58]The most commonly seen accusations from the target company to the bidder is that of violation or fraud. The board considers the defense technique successful, if it causes serious delays to the takeover bidder and by this way it welcomes other bidders to join the interest of takeover and in fact they end up offering competitive bids so that the initial bidder is further challenged. Another successful outcome from this defense technique, - viewed from the board's perspective- is considered to be the motivation of the bidder, to increase the price of the bid he placed in hopes that the target company will by this way, consent to the takeover and do not proceed with litigation[59]. This technique has is questionable as to its fair foundation.

Another defense technique is that of acquisitions and divestitures which a restructure of the company's assets that are used to make the bidder reconsider his decision. This is a rather

[56] separation of Ownership and Control," *Journal of Law and Economics,* June 1983, p. 301, and also "Agency Problems and Residual Claims," *Journal of Law and Economics,* June 1983, p. 327.
[57] Tachmatzidi I, 'Takeover Defenses In The United Kingdom' (2021) Volume VI, Issue 4, 2018 International Journal of Economics and Business Administration
[58] ibid
[59] ibid

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interesting technique as what it does is actually sell the assets that the bidder is interested in, in order to purchase assets that the bidder is disinterested or assets that will cause anti trust legal issues so that the bidder is not longer willing to insist on the takeover bid and withdraws his offer[60].

The last defense mechanism that will be mentioned for the purposes of understanding what is the power of the board to prevent a takeover from happening is that of liability restructuring. By creating voting securities, the amount of shares can be increased to what the bidder has initially required[61]. This is carried out by providing these voting securities to trustworthy to them people, that in the time of need will jump in and use their rights to the boards favor. Repeating a purchase of shares is also a way of carrying this defense out, as the shares available to the public will now be reduced and the takeover bidder will not be able to have as much shares as needed to gain the full control of the company[62].

Nonetheless it is clear that the directive works in favor of the shareholders which is also reflected in Article 9(4)[63], which states that the general meeting by the shareholders held for the consideration of the takeover offer, must be carried out shortly after the bid has been announced. The reasoning behind this is that a decision needs to be made with regards to the defense measures and what role will those potentially have in the takeover bid. According to the Directive "the meeting does not take place within two weeks of notification's being given[64]."

The Directive was also drafted in a manner that would allow the board to express their concerns arising from the takeover, which will be addressed to the public and the

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[60] 'Defense Mechanism A Set Of Procedures Used By A Target Company To Prevent A Hostile Takeover'

[61] Tachmatzidi I, 'Takeover Defenses In The United Kingdom' (2021) Volume VI, Issue 4, 2018 International Journal of Economics and Business Administration

[62] ibid

[63] DIRECTIVE 2004/25/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL 2004

[64] ibid

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representatives of the offeror company. In this way the offeror will be able to accordingly respond to those statements and concerns, and be aware of where the board of the target company stands in regards to the takeover[65]. Based on Article 9 paragraph 5[66], the offeree board of directors may transfer this opinion to the employees giving them the opportunity to prepare a document addressing their own opinions, predictions amid takeover, and concerns of their own future of the company and of the company itself[67]. If done so before the document of the board is published, it may be added to it so there is a fuller picture of how the directors and employees perceive the takeover and the consequences this will bring upon its completion. The fifth paragraph of Article 9[68] basically allows for an emotional defense mechanism, as it could potentially work as an influencing factor upon the shareholders and perhaps become the reason why they may no longer be interested in proceeding with a takeover bid.

What we can understand from the drafting of Article 9 is that indeed it is written in favor of the protection of a target company's shareholders. However, we cannot ignore the concerns surrounding this provision as Article 12[69] enters the picture which causes a twist to a well written plot. Article 12, carries the power of optionality of the application and implementation of the provision by the Member States[70]. The problematic aspects of the provision that potentially could jeopardize the effectiveness of the directive and the influence on the companies will be analyzed further on.

65 Papadopoulos, T. (2013). Cyprus Company Law: Board Neutrality and Breakthrough in Takeovers
66 DIRECTIVE 2004/25/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL 2004
67 Blanaid Clarke, *The Role Of Employees In The Takeover Bids Directive* (Takeovers with or without worker voice: workers' rights under the EU Takeover Bids Directive 49)
68 DIRECTIVE 2004/25/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL 2004
69 ibid
70 Payne J, 'Time To Make The Board Neutrality Rule Mandatory In The EU' (*Oxford Law Faculty*)

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The problematics functions of the Board Neutrality

There is the main issue that accompanies the board neutrality principle that has been a heated topic due to the complexities it causes. Article 12 of the Directive states as follows:

"Member States may reserve the right not to require companies as referred to in Article 1(1) which have their registered offices within their territories to apply Article 9(2) and (3) and/or Article 11."[71]

It is therefore made clear that amongst other articles of the directive, Article 9 is also optional. Further on, the article reads, that if a company decides to adopt the provision it shall be done so through the general meeting of the shareholders who will grant authority of this provision to be implemented. Having this done, "….the decision shall be communicated to the supervisory authority of the Member State in which the company has its registered office and to all the supervisory authorities of Member States in which its securities are admitted to trading on regulated markets or where such admission has been requested"[72]. However what needs to be considered with this given flexibility as provided by Article 12, is that the meaning and goal of Article 9 is completely demolished. Not making Article 9 a mandatory provision equals the loss of that specific article's goal. It makes corporate mobility and restructure impossible, as the Member States are not forced to implement board neutrality[73]. The result of this, is a major disappointment and drawback of takeover bidders and will eventually lead to the decrease of takeovers in total if the response of the Member States towards article 9, is not a positive one[74]. What enhances this complexity, is the fact there is not a clear timeframe in which the board is not allowed to act. What we are told from the directive is that there is a small leeway, at the beginning stages of the takeover bid. It lacks

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71 DIRECTIVE 2004/25/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL 2004

72 ibid

73 Payne J, 'Time To Make The Board Neutrality Rule Mandatory In The EU' (*Oxford Law Faculty*)

74 Gatti, Matteo, Optionality Arrangements and Reciprocity in the European Takeover Directive. European Business Organization Law Review (EBOR), Vol. 6, pp. 553-579, 2005,

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preciseness, as to the exact period of time that the board is allowed to act and when exactly neutrality begins[75].

In addition, the directive could provide further details as to which business activities are considered to be out of the ordinary for the companies. The lack of definition, of what is perceived as hidden or unusual activity that potentially is used as a defense mechanism avoid and drive away the unwanted bidder, is the source of complexity and misunderstanding[76]. With the current way that the provision is written it leaves room for Member States to give their own interpretation and evidently this would drift away the main goal of the directive which is the harmonization of the European Union in regards Takeover Bids. Instead a recommendation, is that during a takeover bid situation in a company where is observed that the board leans towards doing activities considered unusual for the specific company, that a general meeting called where the shareholders shall consider whether this is indeed out of the ordinary[77]. The impreciseness could cause a serious issue to the shareholders as trying to fit defensive techniques into a company's activity is an action able to shift create a fuss and complicate the role of the shareholder in the company. It is also a matter of causing delays. Having to assemble a general meeting prior and amid the unusual activity merely to have the shareholders decide what sort of activity is this and whether or not it shall be terminated it is a time consuming process. In case it has been approved prior to the announcement of the takeover bid, it would need another general meeting after the announcement of the bid to approve its continuity[78]. This was indeed considered during the drafting of the first submitted proposal for a takeover directive where Professor Pennington referred to usual transactions must be concluded, however was later on excluded from the next proposal.

[75] De Luca, N. (2017). *European Company Law: Text, Cases and Materials*. Cambridge: Cambridge University Press
[76] ibid
[77] Papadopoulos, T. (2013). Cyprus Company Law: Board Neutrality and Breakthrough in Takeovers
[78] Ridgway G, 'EU Takeover Directive: The Finishing Touches?'

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On another perspective, it has been Easterbrook and Fischel's argument that the optionality power provided through article 12 also leaves room for those defense mechanisms to take place and possibly achieve their goal[79]. Moreover, in their argument, it is made clear that this flexibility disrupts the benefits that could occur both to the shareholders and society and that any techniques created as a prevention measure of a company takeover facilitate severely to the reduction of welfare. It is also their opinion that board neutrality should be mandatory in full, meaning that decision making in regards to the response on offers shall not concern even to a minimum the board of directors[80]. Henry Manne has also participated in the conversation of Article 9 and similar to the previous two names mentioned, also is his raw and unfiltered belief that takeover bids should be left to be decided on people who actually hold shares in the company and not the company's managers to have a say or even ways of disrupting their decision[81]. It is therefore clear that had article 9 not need to be accompanied by Article 12 of optionality, it would make a tremendous positive impact on both an economic and legal aspect.

A Non- level playing field, the causes:

One of the main objectives of the writers of the 2000 proposal was the directive to lay a ground of a level playing field. The neutrality of the board is activated the time that the board is made aware of the bid placement there the members of the board are able to act at "an earlier stage[82]" until the bid is publicly announced. Isn't this however leading to a road that is far away from a playing field due to the lack of precision in this provision? We need to consider this: Member States differ to the way they will implement this provision. Therefore, the question is, what happens when a Member State perceives the timeframe when the board

[79] Lipton M, 'Takeover Bids In The Target's Boardroom: A Response To Professors Easterbrook And Fischel' [1980] 55 N.Y.U. L. Rev. 1231 (1980)
[80] ibid
[81] Armour, John and Skeel, David A. Jr., "Who Writes the Rules for Hostile Takeovers, and Why? The Peculiar Divergence of US and UK Takeover Regulation" (2007). Faculty Scholarship at Penn Law. 687
[82] DIRECTIVE 2004/25/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL 2004

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is allowed to act against the takeover, to start at an earlier stage, from a Member State, that perceives the neutrality to begin later on?[83] This should be food for thought as several companies in several Member States may have time advantage so that hostile directors and the boards in general are able to develop defensive techniques to fight against the takeover bidder. The consequence of this unclarity results in a perfect and multi aspect inequality. The little time gap that there is makes the Member State "A" – who applies board neutrality at the earliest stage- to be more vulnerable than member state "B"– who applies neutrality a few steps later - , creating a negative impact also on the shareholders of the company and of course facilitating in collapsing the much desired European harmonization of the Member States[84].

As far as White Knights are concerned, the competitive bids are highly desired by the board. The White knights is a defensive technique that provides power to the board at a stage in the takeover bid procedure where article 9 would prohibit anything but neutrality for the board[85]. This power is provided to the board as it is beneficial for the shareholders. Having competitive bids in the picture is on the one hand practical for the board of directors due to the time delays it causes to the initial takeover bidder to complete the transaction and gain full control of the company, but during this, new bidders with higher prices may appear in the meantime, that the shareholders would be hard to ignore[86]. At that point, we must consider whether this measure could actually be characterized as defensive or helpful towards the completion of the takeover of the company. However, it is not as beneficial as it may seem for the shareholders. A bidder to achieve the desired outcome, could use several ways to get the consent of the shareholders and complete the takeover. Most common way is to exercise

[83] Papadopoulos, T. (2013). Cyprus Company Law: Board Neutrality and Breakthrough in Takeovers
[84] ibid
[85] Thakur M, 'What Is White Knight?'
[86] Mucciarelli, Federico M., White Knights and Black Knights - Does the Search for Competitive Bids Always Benefit the Shareholders of 'Target' Companies?. European Company and Financial Law Review, Vol. 3, No. 4, 2006

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pressure, in this way the decision the shareholders will make, may not be the best for their interests[87]. Nonetheless it is more often seen than not, that shareholders may lean towards the first takeover bid in fear that they would lose the price offered. Alternative bids, may not reach those initially offered numbers, then miss out on the price of the bid and be left with minority shares that are undervalued, mainly due to the fact that other's shareholders decisions are not known to them, meaning that the shareholders as a group do not follow a synchronized way of thinking when it comes to the takeover bid[88]. This results in the company's shareholders to make a decision whether it is worth having the risk of low valued shares – if the takeover bid happens- and the price of the bid as the goal is that the bidder purchases those shares. However, as mentioned earlier it is not an easy decision to be made as it happens under the pressure placed on the shoulders of the shareholders. The only thing available to be predicted, to evaluate the risk and ultimately later on base their decision, is that the shareholders consider their state amid the takeover bid.

The exception of White Knights on the board neutrality as provided by Article 9 of the Directive, has a serious negative impact of the shareholders best interest. This is because there is no way to identify which members are indeed white – in favour of the shareholders – or not so considerate and intend to act in good faith. In case when the competing bid as introduced by the managerial board is neither in favour of the shareholders nor does it suggest a market alternative it is then clear that falls way outside the scope of the principles of the concept of white knights[89]. Hence each alternative bid should be closely examined to try and identify as much information as possible about it and the reason it is offered. It would be beneficial towards the shareholders, if the directive incorporated the subject exception as it

[87] Bebchuk, Lucian A., The Pressure to Tender: An Analysis and a Proposed Remedy

[88] Jennings, R. H., & Mazzeo, M. A. (1993). Competing Bids, Target Management Resistance, and the Structure of Takeover Bids. *The Review of Financial Studies*, *6*(4), 883–909

[89] ibid

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currently is, leaves room for both white and black Knights to enter the picture[90]. It is because of the existence of the Mandatory Bid rule, - found under Article 5(2) of the Directive[91]- that shareholders of the minority are able to be offered protection, and this is due to the fact that a bid which is mandatory, is not allowed to have a lesser price than the highest price which obtained the securities as provided from the bidder at a time prior to the mandatory bid, which indeed serves as shareholders protection[92]. Had this not been established, the board of directors would have been able to provide guidance to the shareholder exercising pressure on him to sell the shares he holds in order to secure the bidder that the board consents and approves of.

A view from the perspective of Article 12:

"Where Member States make use of the option provided for in paragraph 1, they shall nevertheless grant companies which have their registered offices within their territories the option, which shall be reversible, of applying Article 9(2) and (3) and/or Article 11, without prejudice to Article 11(7)."[93]

The existence of Article 12 is what makes it possible for the Board Neutrality Principle to exist as it provides the choice to Member States of the European Union to decide whether or not the adaption of Article 9 is an action they wish to implement[94]. However as seen above in the provision provided by the Directive in Article 12, a decision to follow Article 9 – as well as Article 11- requires a certain procedure. The procedure that the directive refers to, is that of a hosting a general meeting whose purpose will be to decide for its implementation[95]. If

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[90] Mucciarelli, Federico M., White Knights and Black Knights - Does the Search for Competitive Bids Always Benefit the Shareholders of 'Target' Companies?. European Company and Financial Law Review, Vol. 3, No. 4, 2006

[91] DIRECTIVE 2004/25/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL 2004

[92] Humpe C, 'Understanding The Current Rules And Regulations Around Takeovers By Overseas Buyers'

[93] DIRECTIVE 2004/25/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL 2004

[94] Armour J, Ring W-G (2011) European company law 1999–2010: renaissance and crisis. Common Mark Law Rev 48:125–174

[95] Papadopoulos, Thomas, Legal Aspects of the Breakthrough Rule of the European Takeover Bid Directive. TAKEOVER REGULATION: A LEGAL APPROACH, Icfai Books, Icfai University Press (IUP

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decided to do so, then procedural rules apply that further make the modification of the Articles of Association of the company mandatory.

Optionality of the subject Article occurred mainly due to the lack of agreement between the Member States. What article 12 ultimately achieves is to enhance freedom of establishment to each Member State which is a concept that the European Union at most circumstances seeks to maintain. Nonetheless, there is significantly heated debate in consideration of Article 12 as to the extent to which freedom of establishment through the subject provision could subsequently negatively affect the main goal of the directive which is the protection of the rights and interests of the shareholding company of the desired target company[96].

How would companies and shareholders benefit from an obligatory board neutrality:

In assessing who is more appropriate to make such a decision on a company's takeover we come to one conclusion, and that is the shareholders of a company. Being the most economically affected by the situation they shall be the sole factors able to decide how their financials will be used and the risks they enter shall be entered on their own free will. Whilst a takeover situation indeed affects also the board and the employees, the impact it makes on them is more on a personal level[97]. A board reacts to a takeover because of fear of the unknown. A successful takeover equals many changes to take place at the company specifically as far as structure and employees are concerned[98]. Bearing in mind that the board to an extent, acts based on emotional factors on the subject matter, makes it the board the least appropriate group of individuals to be allowed to have an impact on a takeover decision, when the shareholder's financials are put on risk.

[96] Mukwiri, J. The End of History for the Board Neutrality Rule in the EU. *Eur Bus Org Law Rev* 21, 253–277 (2020).
[97] Andrew Johnston. (2007). Takeover Regulation: Historical and Theoretical Perspectives on the City Code. *The Cambridge Law Journal*, *66*(2), 422–460
[98] Dewhirst, H. D., & Wang, J. (1992). Boards Of Directors And Hostile Takeovers. *Journal of Managerial Issues*, *4*(2), 269–287.

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There has been comparison between the Delaware model – US model that incorporates the board of directors in the decision making of the company's takeover – with the UK model which has been a major influence for the European Takeover Bid Directive, and does not allow a board to have any right of opinion in a takeover[99].

On more rare occasions, it has been recommended that amendments to the body of shareholders, may facilitate in the enhancement of the argument that the board should remain included in the process. This is based on the idea that, in companies where there are plenty of short – term shareholders, the decision that they will conclude on, may not be in favor of the future of the company and turn out to be harmful.[100] Whilst this concern also conquered the UK, it was not enough to convince that the UK model should undergo modifications and give certain powers to the board of directors. It is however a truthful and realistic statement, that shares bought just the time before the placement of a bid, are more likely to pursue the selling of those newly acquired shares. Nonetheless if those were purchased from shareholders who were long term holders of the shares who purposely initiated to sell those shares than wait for the takeover bid to perhaps succeed it is obvious that the long term shareholders have made a post – bid decision to sell those to the new potential shareholder[101]. But still, if this is the case, it remains an issue that it should be solved by the hands of the shareholders of the company and not the board who will have a conflicting role in this situation.

In Delaware, the regulations allow the board to have an opinion in regards to whether a bid would be for the better or worse future of the company[102]. Their decision is based not only on the best interest of the shareholders but also the interests of stakeholders. Nonetheless in order to provide such authority to the board it is also a matter of trust, that they will make a

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[99] Litowitz D, 'Public Mergers And Acquisitions In The United States: Overview'
[100] *TAKEOVER REGIMES: A COMPARISON BETWEEN THE UK AND THE US* (Practical Law)
[101] ibid
[102] Theobald T, *Hostile Takeovers And Hostile Defenses: A Comparative Look At U.S. Board Deference And The European Effort At Harmonization*

decision that excludes their personal preferences and the only factors that play a role in the decision making are the interests of the two parties previously mentioned and to fight bids unsuitable for the company's welfare[103].

Another argument against Article 12 and in favor of having an obligatory board neutrality per Directive, is on the grounds of understanding the necessity of ensuring a highly functional market for corporate governance and control within the European Union[104]. There is no doubt that takeover bids represent corporate governance in the sense that the company will have a shift, control - wise when it has been transferred to the hands of another shareholder. When there is a decrease in the share value due to the malfunctions of the managerial department of the company, the board of directors it is the best opportunity for the best interests of a company for the takeover to happen, and a shareholder enters the picture, by dealing with target shareholders and being in the position to restructure the company, remove managers who do not act in favor of the company and instead are more selfishly driven, and appoint people who are able to hold the company to a level of high functionality and financial success.[105] It is therefore a major set back to try and limit takeovers from happening especially when this will save the performance and profit of the company. This should be pursuit with keeping defensive tactics performed by the directors to an extent so we can observe the positive impact this will have on European Markets competitiveness[106].

It is therefore clear that Board Neutrality, being subject to optionality comes with a fair share of negative consequences, that drift away the company from achieving the best outcome, as well as the shareholders who are heavily impacted. However, from a realistic perspective, there shall not be any expectations that such modifications to the Directive are likely to

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[103] ibid

[104] Aktas, Nihat and Croci, Ettore and Simsir, Serif Aziz, Corporate Governance and Takeover Outcomes (April 28, 2015)

[105] ibid

[106] MCCAHERY J and others, 'THE ECONOMICS OF THE PROPOSED EUROPEAN TAKEOVER DIRECTIVE'

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happen in the near future as so far there are numerous of solutions that acted as suggestions to improve the European market that have been rejected[107]. There was a proposal to make article 12 non effective on article 9, and transform optionality of the board neutrality to a mandatory provision, and keep the option of opting out only when the general meeting of the members seems fit to do so. Schuster and others who suggested this what seems to be a high functioning amendment to the directive, wish to see the protection towards shareholders be increased, a proposal that was unfortunately not well received by the Commission as there was no conversation on the matter[108].

Article 12 makes mandatory for each member state to allow an abundance of times a company can opt in and opt out Article 9 , making it flexible to apply board neutrality according to the takeover situation the company undergoes. A member state who wishes to not adopt Board Neutrality, but within the member state there are companies who wish to adopt the Non Frustration Rule they will have to perform a special legislation procedure to be able to adopt those rules[109]. Member States who do not implement Article 9 have then divided the internal companies into a couple of categories. First being those who undergo the legislation procedure to opt in the board neutrality rule and second category within which there are the companies who are being regulated on this matter by national legislation[110].

What could have been done more efficiently considered in the drafting of the Directive is to give a motivation to the companies that belong to Member States who opted out of Board Neutrality, to implement the Article 9. Article 12 could be perhaps become stricter as to the flexibility which offers to the Member States. After all, it is a matter of enhancing the harmonization between the Member States within the European Union to achieve higher

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[107] Papadopoulos, T. (2013). Cyprus Company Law: Board Neutrality and Breakthrough in Takeovers

[108] Davies, Paul L. and Schuster, Edmund-Philipp and van de Walle de Ghelcke, Emilie, The Takeover Directive as a Protectionist Tool? (February 17, 2010). ECGI - Law Working Paper No. 141/2010

[109] Mukwiri, J. The End of History for the Board Neutrality Rule in the EU. *Eur Bus Org Law Rev* **21,** 253–277 (2020)

[110] Papadopoulos, T. (2013). Cyprus Company Law: Board Neutrality and Breakthrough in Takeovers

levels of productivity and efficiency in the European Internal Market. Opting in and out on Board Neutrality is, without doubt, a provision that should be made obligatory in all Member States and exceptions of this shall be subject of consideration within the body of shareholders in the company's general meeting[111]. Especially when it is clear that giving the boards too much power will use it solely for their benefit and not for the best interest of the company in general. This does not necessarily mean diminishing optionality entirely. But we should take measures that lead us towards a piece of legislation that will support and facilitate the harmonization of the countries regulated by European Law, so that we achieve a more stable and powerful economic and legal framework.

Board Neutrality Harmonisation of the Member States

By the above analysis on Article 9 coming hand in hand with the optionality provision in Article 12 we witness a European framework where there is a significant lack of harmonization as companies have the chance to decide to opt in and out of board neutrality which drifts us apart from a unified regulatory takeover system[112]. For the Takeover Bid Directive, and all the other legislation drafted by the European Union the goal has always been to create a legally harmonized environment for the Member States so that national legislation is limited and all Member States are regulated by the same pieces of legislation. Arguments support that exhaustive harmonization is preferrable to minimum harmonization so greater results are achieved by prioritizing making European rules obligatory, and limiting the power of the Member States to override the European laws with national laws[113]. An exhaustive harmonization is not just a matter of legal perspective, it also has a political point of view which the reason why an exhaustive harmonization is not always applies to the regulations created by the European commission. Most often harmonization takes the form of

[111] ibid
[112] Tsagas G, 'EU Takeover Regulation: One Size Can't Fit All'
[113] Mukwiri, Jonathan (2013) 'Free movement of capital and takeovers : a case-study of the tension between primary and secondary EU legislation.', European law review., 38 (6). pp. 829-847

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partial, minimal and optional providing in this way plenty of flexibility and power upon the Member State to decide whether or not to adopt those laws[114].

Complete harmonization requires the replacement of national law with obligatory European ones whilst a minimum harmonization consists of a blend of European and national laws. However national laws are not overruled by the European ones and there is optionality to implement those or disregard them[115]. Amongst others one of the main goals of Directive 2004/25/EC, is to enhance the single market by enhancing freedom of establishment in regards to the capital, across the European Union. Takeovers are considered to be powerful sources for the flow of the single market but the weak effort to harmonise the takeover directive has weakened the market itself with the optionality that prevents takeovers from flourishing in the European market[116]. Freedom of establishment of capital is being isolated resulting in the limitation of expansion of the single market.

It is obvious that Article 12 of the Directive creates a multi-level tension. First being the above-mentioned complexity of established harmonization. Second one is the dilemma that is caused between rules that are permissive and rules that are prescriptive due to the freedom of optionality. Lastly the high tension between mandatory and optional provisions.

However this disruption of Harmonization was generated by the disagreement of Member States on Article 9. Taking as example of this situation the position that Germany held in this procedure[117]. Article 12, board neutrality – and other Articles of the Directive- optional acts as a form of compromise based on the variety of corporate structures across the European Union. Main reason for this, is that a fair number of Member States have takeover bids

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[114] ibid

[115] Humphery-Jenner M, 'The Impact Of The EU Takeover Directive On Takeover Performance And Empire Building' (2012) Vol. 18, No. 2, 2012, pp 254-272 Journal of Corporate Finance,

[116] Papadopoulos, T. (2010). Harmonization of takeovers in the internal market: an analysis in the light of EU law [PhD thesis]. Oxford University, UK.

[117] Mukwiri, J. The End of History for the Board Neutrality Rule in the EU. *Eur Bus Org Law Rev* **21,** 253–277 (2020).

regulated under capital markets law instead of company law[118]. Germany being one of those Member States, did not consent in implementing the board neutrality principle of the takeover directive. More specifically in the last proposal in 2001 made for the implementation of the takeover directive German government stated that they would not follow the regulation, unless Article 9, is completely banned and takeover frustration was not subject to the consideration of the shareholders of the targeted company. In fact at the coalition held at the European Parliament, it was a voted tie and ended up rejecting the provision from becoming mandatory as by the majority of Member States, it was not well received to be regulated under company law instead of capital market law[119]. It is a fact that countries that regulate takeovers under this field of law the companies that belong to those jurisdictions have a managerial board closely acquainted with shareholders, therefore their impact is indeed significant when it comes to the decision making of a takeover bid.

The same opinion towards takeover bids is also held by France, as well as, Italy. Their markets are mostly ownership focused and equity markets are on a lower level[120]. In contrast the United Kingdom hosts a more liquid equity market, having more legal entities listed compared to any other location and this is the reason why Takeovers are more active and flourished in a likewise regulated Member State where Board Neutrality is part of the legislation that is obligatory[121]. We can therefore come to a clear conclusion that a corporate diverse environment such as the European Union, hosting different kinds of corporate structures, a mandatory Article 9 would not be welcomed by everyone and the only way to

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[118] Knezovic A, and Culjak M, *THE IMPACT OF A TAKEOVER BID ON THE CAPITAL MARKET EFFICIENCY* (Journal of Economics 2021)
[119] Waddington N, *The Europeanisation Of Corporate Governance In Germany And The UK* (2004)
[120] *Implementation Of The Takeover Directive In Italy* (Cleary Gottlieb Steen & Hamilton 2008)
[121] Nyombi C, *UK Takeover Law And The Board Neutrality Rule* (Wildy, Simmonds and Hill Publishing 2017)

consent to and therefore incorporate it in the Takeover Directive was to accompany it by Article 12[122].

Nonetheless, to reach a level of legal certainty it is crucial to maintain some rules that are prescriptive. However, this is where the challenge appears. A solution must be found where a prescriptive rule will fit in an approach laid down by the Directive which is more permissive because of the optionality rule. A possible answer to this is to seek for a solution in case law. In general, national courts have the habit of viewing European treaties as a tool which limits the Member States national legislation in light of maintaining a unified system that would, - to an extent – take into consideration the national laws.[123] However, thus far, it has been proven through case law, that several measures have the ability to restrict freedom of capital movement which is provided under the Treaty on the functioning of the European Union. Therefore, choosing not to implement Board Neutrality could be portrayed as a prohibition on free capital movement as well as breach of Article 63 of the TFEU. For a closer analysis on this matter, It is important to examine the tension between minimal and exhaustive harmonizing of the European Union.

Considering that a main goal of the Directive is to smooth the path of takeover bids taking into consideration by maintaining the freedom of dealing, voting on the company's securities and prohibiting actions that could cause frustration of the takeover bid. After all a Directive of Takeovers, aims to make the operation as functional as possible, that is the reason why is it mainly based on the protection and favor of the shareholders and maintaining the board as less involved in the procedure as possible. However, in creating such a directive there is a choice to be made based on how much the European Commission wants the directive to be successful: are we making an effort towards total harmonization or minimum? Unfortunately,

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[122] DIRECTIVE 2004/25/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL 2004
[123] Papadopoulos, T. (2013). Cyprus Company Law: Board Neutrality and Breakthrough in Takeovers

for the takeover bid directive to succeed maximum harmonization is required as minimum harmonization is in the takeover's favor especially within the European internal market[124]. It is therefore clear, that minimum harmonization is inappropriate for such a heated topic of the internal market. Nonetheless the Directive was implemented with minimum harmonization levels due to the optionality measure which creates conflict between takeover and capital movement within the internal market of the European Union.

The European Union is built and exists for harmonizing a multi-national environment evidently minimum harmonization does not represent the foundation of the European Union. The diversity that exists due to different corporate structures of the Member States makes it difficult to be well received by all of them. Even if the Directive was destined to create safeguards with an exhaustive harmonization mechanism the diversity has prevented Article 9 from being European wide established and would facilitate the procedure. However, this shows that the Directive was created as an attempt for harmonization.

As a measure of harmonization, the Directive failed in its mission to harmonize European Takeovers and align them with the internal market. It was observed by the European Commission that a considerable amount of Member States were hesitant to adopt a Takeover Directive but this swiftly changed with the application of Article 12 as their approach was based on protecting their already implemented measures that allows the board to have an influence on takeover bid decisions[125].

Moreover, there is an obvious tension between mandatory provisions and optional provisions which needs to be further considered. The Directive seeks to reinforce the single market by facilitating free movement of capital amongst the European Union. One method for ensuring

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124 Mukwiri, Jonathan (2013) 'Free movement of capital and takeovers : a case-study of the tension between primary and secondary EU legislation.', European law review., 38 (6). pp. 829-847

125 Gatti, Matteo. (2005). Optionality Arrangements and Reciprocity in the European Takeover Directive. European Business Organization Law Review. 6. 553 - 579.

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free movement of capital, is to facilitate cross-border capital flows within the single market[126]. To prevent frustrating takeover bids and facilitate free movement of capital, takeover rules must be consistent with movement of capital rules. A fundamental freedom laid down in TFEU[127], the free flow of capital is reinforced by the board neutrality rule described in Article 9 of the Directive, but deemed illusory by the Article 12 allowing it to become optional. The application of Article 12 of the Directive by some countries and not by others results in a tension between law and regulation within the European Union and a sense of discrimination in terms of defensive actions against takeovers that are identified as hostile[128]. Therefore, we land to the conclusion that to enhance the single market takeovers are without doubt more efficient when implementing obligatory instead of optional laws.

Therefore, in terms of having a clear picture of if Article 9 along with Article 12 affect European Harmonization, the answer would inevitably be positive. By having an optionality provision, directly puts the Directive in a secondary place giving in this way the initiative to national legislation[129]. Article 12 is paradox against Article 63 TFEU[130] creating in this means a highly uncertain legal concept for the Member States of the European Union. Those jurisdictions that choose to limit capital movement by taking the advantage that Article 12 will not be justified. According to the Court, a Member State cannot invoke the uncertainty of its legal position, and the possibility of recourse under the Treaty, to justify failing to fulfill an obligation[131]. In a case of this nature, the Court has stated that it should be a liability of the institutions of the Community, not to act as the representatives of the Member States and to instruct them on the measures they must implement to provide protection for the free

[126] Steen Knudsen, Jette. (2005). Is the Single European Market an Illusion? Obstacles to Reform of EU Takeover Regulation. European Law Journal

[127] THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION 2012

[128] Geidi Jallai A, *The European Takeover Bids Directive And Its Applicability In The Business Groups With Pyramid Ownership Structure* (2012)

[129] Clarke B, 'The Takeover Directive: Is A Little Regulation Better Than No Regulation?' (2009) 15 European Law Journal

[130] THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION 2012

[131] Papadopoulos, T. (2013). Cyprus Company Law: Board Neutrality and Breakthrough in Takeovers

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movement of goods.[132] Hence, it is highly likely that the Court of Law, will find that Member States should not adopt measures that are ineffective in protecting free movement of capital despite Article 12 of the Directive of Takeover Bids. Article 63 TFEU is mandatory[133], whereas Article 12 of the Directive is optional, so it should be to the Member States to eliminate the conflict between the two.

Board Neutrality evidently is a powerful tool for the enhancement of the single market of the European Union, encouraging in this way the flow of takeovers to occur and keep the freedom of dealing to grow. It is very unfortunate that because of the diversity of the Member States this provision has not been made mandatory as it would have brought some very pleasant results on a financial and legal note.[134] Boards of Directors of the company should remain focused on their managerial duties and leave the matter of takeover up to the shareholders to decide who are directly involved and at risk in certain situations when they are facing a hostile takeover. Article 12, complexes the situation and creates a fuss, as to the roles that each individual has at a company. The board should be given authority to have a voice in takeovers as far as this is for the best interests of the company's shareholders. Personal likings and preferences shall not be a factor to base such serious decisions on therefore it is my strong belief that an Article as beneficial on many aspects as Article 9 should have the power to become obligatory without any room of exceptions and exhaustive harmonization be executed through the Directive 2004/25/EC[135].

[132] ibid

[133] THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION 2012

[134] Mukwiri, J. The End of History for the Board Neutrality Rule in the EU. *Eur Bus Org Law Rev* **21,** 253–277 (2020

[135] ibid

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The Break through Rule – Article 11

The Breakthrough Rule is provided under Article 11 of the Directive 2004/25/EC[136], and aims to regulate the activities that a company is allowed to do and not do whilst the company deals with a takeover bid, giving this a managerial attitude during the time prior to the bid and the time after. The two options given through the Article 11 allow for the targeted company to either fight against the takeover or take it as it comes, or, to rephrase, either maintain the status quo or motivate the enhancement of the market competition[137]. However, the Optionality Rule is also known as provided under Article 12 of the Directive, same as with Article 9 of Board Neutrality enables the Members States to decide on the implementation of Article 11 the Breakthrough Rule, and companies are able to opt in and opt out according to the needs of the situation they are dealing with at that given time.

To get a clear understanding of the Breakthrough Principle it is important to discuss what the aim of its incorporation into the Takeover Bid Directive is. The breakthrough rule comes with a level of the risk of the takeover which is handled by the shareholders of the target company identifies and equals the amount of control that the shareholders will have, meaning that the bigger shares a shareholder holds he will have an equally strong opinion that will have the greatest impact on the decision making[138]. Discussions regarding the matter support that a shareholder's power is determined on the input he provided for the company's success by being the holder of the risk capital or alternatively the holder of cash flow rights, then his opinion will prevail in the takeover decision. Hence, the Breakthrough Rule supports the easy flow of the takeover by ensuring that when there are either property or contractual rights becoming obstacles towards the completion of a placement of a takeover bid that is legitimate, then the active rights are literally going to be broken through and put aside so that

136 DIRECTIVE 2004/25/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL 2004

137 Malbert P, 'Make It Or Break It: The Break-Through Rule As A Break-Through For The European Takeover Directive?' [2003] SSRN Electronic Journal

138 Papadopoulos, Thomas. (2008). Legal Aspects of the Breakthrough Rule of the European Takeover Bid Directive.

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takeover can be carried out smoothly. The idea of breaking through property or contractual rights provides a form of freedom and encouragement to the shareholders to act upon their discretion without having to consider any possible violation or breach of contract that may be in place at that given time and place[139].

" One share one vote"

This principle stands for the equation of: on the one hand for the freedom of the company's shareholders, and on the other hand, promoting the concept of takeover bids. Article 11 paragraph 2 of the Takeover Bid Directive, expressly states:

"Any restrictions on the transfer of securities provided for in contractual agreements between the offeree company and holders of its securities, or in contractual agreements between holders of the offeree company's securities entered into after the adoption of this Directive, shall not apply vis-à-vis the offeror during the time allowed for the acceptance of the bid laid down in Article 7(1)"[140]

The above provided Article 11 paragraph 2, as well as the following paragraph on the Directive, eliminate any prohibitions regarding transfers of voting rights as well as the transfer of securities that should otherwise be protected under the Articles of Association of the target company as well as any binding agreements that in other situations would have restrictive powers upon certain activities.[141] In a situation where the company is processing a takeover bid, such rights or securities will not be applicable vis a vis through out the time frame where the offeree would accept the subject potential bid[142]. Emphasis should be placed

[139] Skog R, 'Takeover Directive, The Breakthrough Rule And The Swedish System Of Dual Class Common Stock' (2004) 15 Eur. Bus. L. Rev. 1439 (2004) Kluwer Law International

[140] DIRECTIVE 2004/25/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL 2004

[141] Khachaturyan A, *THE ONE-SHARE-ONE-VOTE CONTROVERSY IN THE EU* 1

[142] Hill, Jennifer G., Takeovers, Poison Pills and Protectionism in Comparative Corporate Governance

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on the fact that agreements referred to under paragraph 2 and 3 of the Directive concern agreements that became effective after the implementation of the Directive 2004/25/EC[143].

Moreover, the principle also releases any prohibitions in regards to any rights that the shareholders may have that would have to do with the board[144]. More specifically, removals and appointments from and to the board are allowed to be performed during the time when the shareholders decide on the takeover however this is only applicable in the case where the bidder gains control of more than 75% of the voting capital according to the fourth paragraph of the Break Through Article 11[145]. On that note, the bidder – with more than 75% on the voting capital – has the right to conduct a general meeting with the company he plans on taking over to establish his powerful position in regards to the control of the company.[146]

On another note, the Directive sought to take care of the contractual party that is on the other side of the agreement that will be affected by the establishment of the breakthrough rule. In case of damage due to the breach or omission of a contractual term then, the affected party will be provided a compensation of equitable nature[147]. This applies in the cases of the two exceptions as they were provided in the Directive. The first exception of breaking through refers to the principle losing its power, when having to deal with voting rights to which a compensation is provided, on the basis of having pecuniary advantages according to the sixth paragraph of the breakthrough rule[148]. The following exception of the breakthrough principle, applies when the company deals with Golden Shares, that are legal and which are held by Member States of the European union.

[143] ibid
[144] *CMS Guide To Mandatory Offers And Squeeze-Outs* (CMS 2017)
[145] Papadopoulos, Thomas. (2008). Legal Aspects of the Breakthrough Rule of the European Takeover Bid Directive.
[146] ibid
[147] Cargill T, 'Takeover Directive: Finally Agreed'
[148] Bartman S, *The EC Directive On Takeover Bids: Opting In As A Token Of Good Corporate Governance* (Center for European Company Law)

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All of the above will be further discussed in detail below, and take a closer look at the Break Through Principle and highlight the efficiencies and deficiencies that were observed with the application of the rule ever since it was established. Similarly, to Board Neutrality, the Break Through Rule will be assessed in light with Article 12 which makes this provision optional for the Member States to decide whether or not they will adopt it[149]. Through the analysis, it will be evident that unfortunately, the break through rule does not facilitate the development of a level playing field of takeover bids and a part of the responsibility for the disappointing performance is placed on the optionality rule of Article 12.

Implications of the breaking through principle. Are we leading towards a level playing field or creating obstacles?

To provide an answer to the question, we need to examine the principle closely and with attention to detail, starting with the paragraph of the article that refers to the restriction release of security transfers which are incorporated in the company's Articles of Association. A main concern of the breakthrough rule is that it lacks preciseness, as to the specific terms of a contractual agreement that they will be broken through[150]. This widely interpreted provision, leaves room for interrupting activities contractually binding, that have little or no impact upon the takeover and would not cause an issue in the continuance of their performance mid takeover[151]. There may be a perception that prohibiting restrictions imposed by shareholders in their agreements, is too broad since it could catch usual market transactions, such as preemptions and option rights, and sale contracts with deferred settlements[152]. Financial transactions that are included in the normal activity of the company, may be subject to the Break Through and in fact have no important impact upon the takeover

[149] DIRECTIVE 2004/25/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL 2004

[150] Berglöf E, 'European Takeover Regulation' (2003) 18 Economic Policy
[151] ibid
[152] Hill, Jennifer G., Takeovers, Poison Pills and Protectionism in Comparative Corporate Governance

procedure. Therefore using Article 11 for those, is not useful as they would not create an obstacle anyway. One downside, may be the lack of access to financial tools, during the occurrence of takeover bids, which could prevent the integration and advancement of European capital markets[153]. Another issue is, irrevocable undertakings to accept the bid which leads the way to a restrictive field where submissions of competitive bids that could potentially be a greater fit for the shareholders are now impossible to achieve. A binding undertaking, is usually used in what can be considered as friendly bids, where the offeror and the takeover bidder consent to the takeover, or in cases when there are hostile takeovers where the successful bidder is selected after a takeover bid contest in which the offerors compete to obtain the shares and gain the control of the target company[154]. Nonetheless, a potential suggestion for the Directive as specifically the breakthrough rule in this aspect, is to make it clear that financial structures must be left out as they do not have a negative impact on the takeover, in fact those have either a friendly approach or are completely neutral and harmless towards to the takeover.

Pyramid Structures and Cross Holdings: What are they and how do they affect takeovers?

Pyramids refer to a kind of corporate control, that develops a structure, with which one company becomes the shareholder of another company and in turn holds several shares in a third company creating a chain. On the top of the pyramid, is the control of the corporation, and as it lowers down, there are the stakes as the outright control of the chain[155]. Those ultimately work in favor of the person located at the top of the pyramid, the shareholder. This happens at the expense of shareholders belonging to the minority. However, this works against the shareholders placed on the very bottom of the pyramid as their voting rights are now weaker. Low cash flow is the way that makes this possible. Proportionality plays an

[153] Papadopoulos, Thomas. (2008). Legal Aspects of the Breakthrough Rule of the European Takeover Bid Directive
[154] ibid
[155] Papadopoulos, Thomas. (2008). Legal Aspects of the Breakthrough Rule of the European Takeover Bid Directive

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essential role in this scenario, whereas it enables for the top shareholder to obtain significant control of voting[156]. What has been recommended is that the situation of pyramids is dealt with in isolation and restriction of stock exchange of holding companies who were created with merely one purpose: to hold those shares and support the pyramid[157]. The Directive failed to incorporate this measure; however, the possibility of including this measure in the future is not at zero percent as it is a matter that frequently occurs[158].

On another note, an additional activity, that has slipped from the principle of the break through rule is that of Cross Shareholding. Cross holding describes a situation, where there is a sole public traded company acting as the holder of a number of shares of another company of the same category whose shares are those that we describe as cross holding as those are the shares being held on behalf of the first company[159]. An example of cross holding, is also known as the Waren Buffet's Berkshire Hathaway Strategy of Investment[160]. This strategy works by committing to an investment of numerous publicly traded firms. By December of 2019 this technique gained shares in companies like Apple -in which owns 72 billion dollars' worth of shares and 5.5% of the company in total, the Bank of America even Coca Cola for BRK-A[161].

Usually, the companies involved in this cross shareholding structure, commit to agreements by which the companies involved own shares of one another, and are in a position to exchange directors and members of the board for the sake of defensive voting for their shares in a union.

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156 Becht M, and Mayer C, 'Corporate Control In Europe' (2002) 112 Dans Revue d'économie politique

157 Geidi Jallai A, *The European Takeover Bids Directive And Its Applicability In The Business Groups With Pyramid Ownership Structure* (2012

158 ibid

159 Geidi Jallai A, *The European Takeover Bids Directive And Its Applicability In The Business Groups With Pyramid Ownership Structure* (2012)

160 Bloomenthal A, 'Warren Buffett's Investing Strategy: An Inside Look' >

161 ibid

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A step forward towards a more enhanced perspective of cross shareholding, we find the companies which are controlled by themselves and another company. In this type of companies if there is a takeover to happen it must be ensured that it will happen to both companies given the category they fall within[162]. This is done, by connecting the shares of company A to company B and the unification of board nomination executed by cross rights. It is questionable why there is no such provision in the Directive, that is able to maintain control of crossed companies and such provision shall be incorporated into the existing Article 11 of the breakthrough principle. More so, as these oppose a threat towards key principles of the Directive, none other than proportionality and the rules that protect and regulate the decisions able to be made by the shareholding body of the company[163].

There is a major wave of inequality that goes through the target company. With cross holding taking place and voting rights being held by people who do not have any direct impact nor the best interest of the company on mind, it is unfair the amount of power they hold with their votes to form an intervention to that company's takeover[164]. This is however affecting the takeover bidder as well. With the corporate connection in place, there is no other option than to proceed with the takeover of company B. There is a possibility that enables this to become the main reason why a bidder would take a step back and withdraw his intentions on taking over in general of the specific company. Highly and negatively impacted by this, is also the corporate control market who is being prevented from developing and strengthening. This also takes away the freedom of bidding from the potential bidder, as there is no option left for him to consider, other than being forced to bid on both companies when in fact, he is only interested in gaining the control of one of them[165]. There is no doubt that the bid, will eventually fail and the blame is only placed on this rather defensive formation and the

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[162] Yasuhir A, *Cross Shareholding And Initiative Effects* (RIETI Discussion Paper Series 04-E-017 2021)
[163] ibid
[164] Papadopoulos, Thomas. (2008). Legal Aspects of the Breakthrough Rule of the European Takeover Bid Directive
[165] ibid

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financial damage that this would be for the bidder. One of the many of directive's main objectives is the empowering of the freedom to establish in a lively and competitive market. There might be a possible way within which, those activities may be prevented, and that is through the principle of breaking through. Suppose cross holding ends up being perceived as an extraordinary right, as this is defined under paragraph four of the subject article of the breakthrough rule[166]. In that case, there might be a possibility of exercising control and restriction over it. Under Article 10, paragraph 1 of the Directive[167], it is stated that pyramid formations of companies must be informed and communicated, which will also be beneficial for the company's ranking.

Types of Agreements that are broken through:

Exploring the scope of the Break through Rule, it is worth mentioning the agreements that the rule can Break through, for the sake of the takeover completion and the best interest of the company's shareholders.

Firstly, comes the Syndical Agreement. This is a contractual agreement that takes place between the company's shareholding body and can subsequently be breached by Article 11[168]. This specific agreement aims to gather a group of the company's members to create the agreement to enhance their voting techniques or patterns so that they gain more voting power within the company, which consequently results in the development of within a company[169]. This happens through the shareholders that belong to the category of the minority as they agree, that during the general meeting, they will only vote in favor of the opinion of the majority of the shareholders, or even wholly give up their rights to vote using this proxy that is impossible to revoke. In this way, at the conduction of the general meeting, the

[166] Clift B, 'The Second Time As Farce? The EU Takeover Directive, The Clash Of Capitalisms And The Hamstrung Harmonization Of European (And French) Corporate Governance*' (2008) 47 Journal of Common Market Studies
[167] DIRECTIVE 2004/25/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL 2004
[168] ibid
[169] Bruckmuller M, 'Public Takeover Regime'

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representatives will vote on behalf of the members that made the syndicate agreement, so that the proxy person will project a vote which will represent the majority. However, with this, we can observe that there is a limitation in regards to the shareholder's freedom with which they have the power to make an informed choice for the future of the takeover bid and thereafter the control of the company[170]. In this sense, we can observe that the two principles under Article 9 regarding the board neutrality as well as Article 11. the break through principle are being heavily violated merely by the existence of agreements of this nature that diminish the respective opinion of each shareholder – either belonging to the minority or majority-, unifies them and the voice of the majority of the shareholder prevails affecting in this way the proper way to operational decision making and proportionality[171].

On another perspective, it has been argued that, limiting rights of voting established in the articles of association of the company or within binding agreements does not stand as an obstacle against the one share one vote based on the fact, that those do not have any direct influence on the actual shares but instead on the actual shareholder[172]. The shareholder is unable to cast any additional percentage of the total shares that all the shareholders together are able to cast. However, this situation stands against the main objective of the principle of proportionality, as that was introduced by the writers of the Directive as the amount of control that the shareholders have in the company shall be a reflection of the level both of risk as well as the reward that they receive in return[173]. As a result of voting rights limits, it is very clear that in practice the rule of 'one share, one vote' is infringed, since the maximum percentage is usually the same for all shareholders, regardless of their shareholdings. Therefore, the ownership of more shares that could be cast would be pointless from the

[170] Papadopoulos, Thomas. (2008). Legal Aspects of the Breakthrough Rule of the European Takeover Bid Directive
[171] ibid
[172] Berglöf, E., & Burkart, M. (2003). European takeover regulation. *Economic Policy*, *18*(36), 171-213.
[173] Bennedsen, M., & Nielsen, K. M. (2004). The impact of a break-through rule on European firms. *European Journal of Law and Economics*, *17*(3), 259-283.

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standpoint of the pure voting power. The breakthrough rule is also useful for preventing circumvention techniques and legislation aimed at countering them[174]. The breakthrough rule would eliminate the need for putting a prohibition on directors, who use false names or strawmen to avoid laws that limit the voting rights of large shareholders[175]. By disarming the laws regarding voting rights, the breakthrough rule simplifies the situation.

Despite the power of the Article 11 it is important to note that the principle is not able to infringe all the prohibitions of the principle of proportionality[176]. There are specific categories of securities that do not undergo any infringement. The Article 11 is written with an obvious lack of preciseness and leaves plenty of room for exceptions to escape the breakthrough force, and which could oppose potential threats to the bidder.

<u>Types of shares which form obstacles for the takeover bid:</u>

There are several types of shares that could potentially avoid the takeover bid. One of them is called non voting shares. The issue with these shares, is that the Directive does not support an approach that would be beneficial to the takeover, meaning that no voting shares adhere to the rule of proportionality and be given sufficient authority at both meetings handled by the offeror and the rest despite whether they are in compliance with the offer or they are not[177]. Also, it is sufficiently difficult to consider a non vote equal to a voting restriction to be overruled under paragraph three of the break through article. This makes the principle inapplicable to non voting shares due to the restriction provided under Article 2(1)[178] where the meaning of securities is described as solely those who carry voting rights within the company. Further, the breakthrough rule does not apply to non voting shares because it does

[174] ibid
[175] Jonas, Andrew EG. "The scale politics of spaliality." (1994): 257-264.
[176] Mülbert, P. O. (2003). Make it or break it: the break-through rule as a break-through for the European takeover Directive?. *ECGI-Law Working Paper*, (13).
[177] Ferrarini, G. (2006). One Share–One Vote: A European Rule?.
[178] DIRECTIVE 2004/25/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL 2004

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not specify how many votes they should receive if they are not of the same class as voting shares, leaving them without any rights from the offeror amid the break through meeting neither the offeror is able – or any other person, friendly towards the takeover – to use votes in relation to those share as it would be considered a defense technique[179]. In that sense, it is clear that companies that maintain certain voting shares on the authority of the board as well as creating non voting equity to third parties are untouchable to the principle of breakthrough rule. Ultimately, what this achieves, is to make it difficult for the potential takeover bidder to gain the control of the desired company and could be argued that such shares have the ability to permanently deprive the takeover of the company in a present or future time. Member States such as in Belgium and France, within which it is not allowed to issue shares of this kind, have created a different route to achieve the same outcome[180]. What the procedure carries is issuing share certificates and the existing non voting shares are being transferred to an independent administrative source who will be responsible for executing the rights voting rights in the best interest of the company. What happens next, is that the shareholders obtain a proof of holding the shares maintaining in this way their proprietary rights. However, what the future holds for those rights remains relatively uncertain and the reason for this is that it completely relies on the hands of the third administrative party and during the time when they are using those exercising rights they must prioritize the welfare of the company[181]. Nonetheless, this stands against the Article 3 paragraph 1[182], as the specific technique is an obstacle for takeovers and becomes worse of an issue, when the target company is forced to repurchase the prior issued non voting profit certificates at a much higher price as expected. Also, another threat that non voting shares impose, is their securities that consists of an

[179] Bennedsen, M., & Nielsen, K. M. (2004). The impact of a break-through rule on European firms. *European Journal of Law and Economics*, *17*(3), 259-283.

[180] ibib

[181] Skog, R. (2004). Takeover Directive, the Breakthrough Rule and the Swedish System of Dual Class Common Stock, The. *Eur. Bus. L. Rev.*, *15*, 1439.

[182] DIRECTIVE 2004/25/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL 2004

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equitable risk provided by means of allowing the participation and enjoyment of profits made.

Another type of shares, are those that are defined as securities of a separate class to whom more than one vote applies. The breakthrough rule seems to also miss out on the time gap voting securities. This shares category are fully emancipated when a given period of time has passed, and the break through rule has no impact upon them, since the classification of the shares remains the same[183]. This works as a defense measure against the takeover bid, as It guarantees that In this case, the offeror's shares are weakened, otherwise a four year period must pass upon which the shares will then be able to become enfranchised[184]. However, rather than adhering to formalities like the requirement for different classes of shares, the breakthrough rule should make a significant effort to eliminate the potential for certain shares to thwart the takeover process. By preventing recourse to any pre-bid system, regardless of the share class, the Break Through rule aims to prevent violation of the proportionality principle. The result of this is severe inequality, in regards to the treatment of different classes of shares that evidently impact as well the takeover bid interrupting also in this way the level playing field. The Directive is structured in a way that allows defensive techniques, that are developed by some European countries and restrict other defensive techniques that also are developed by Member States[185]. This exception welcomes Member States with laws that allow changes of this nature transferring from single to dual class of shares, and at the same time maintaining irregular voting rights, making the European union take a step back

[183] Goergen, M., Martynova, M., & Renneboog, L. (2005). Corporate governance convergence: evidence from takeover regulation reforms in Europe. *Oxford Review of Economic Policy*, *21*(2), 243-268.
[184] Berglöf, E., & Burkart, M. (2003). European takeover regulation. Economic Policy, 18(36), 171-213.
[185] Ipekel, F. (2005). Defensive Measures under the Directive on Takeover Bids and their Effect on the UK and French Takeover Regimes. European business law review, 16(2).

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from enhancing the freedom of establishment and regulating corporate control within the European market[186].

The problem flourishes through Article 11, which unfortunately is not at a place where is able to control those non share instruments. It is certain that there are plenty of ways in which the avoidance of a national restriction in regards to non voting share rights, is possible. Even if the Member State proceeds to limit the scope of exceptions of the break through principle by restricting non voting shares, the boards are still able to retain their position[187]. However, the real source of those existing gaps and lee ways are caused due to impreciseness of the principle of breakthrough under Article 11 considering that was not based on the impact of those types of shares. Similarly, the board neutrality rule which is an optional provision due to the mis agreement of the Member States, it is the same situation that applies in the scenario of Article 11 since the Member States and the diversity in corporate structures within the European Union[188].

The equitable compensation of those affected by the break through

Another interpretational issue arises from the fifth paragraph of the subject article, which foresees the equitable compensation which protects the shareholders, whose rights have been overruled by the break through provision by being eligible to be compensated. Based on the discretion of the Member States, shareholders whose rights have not to effect anymore because of the break through principle then the equitable compensation will be provided to the persons affected with a procedure laid down by the Member State in which the target company is located[189]. The writers of the Directive have made sure, that it is not always up to the bidder to provide this compensation, in fact, this shall remain a rare occurrence, and the

[186] ibid
[187] Ferrarini, G., & Miller, G. P. (2009). A simple theory of takeover regulation in the United States and Europe. *Cornell Int'l LJ*, *42*, 301.
[188] ibid
[189] Papadopoulos, T. (2008). Legal aspects of the breakthrough rule of the European takeover bid directive.

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question remains open to whom the compensation will be given. It remains unclarified whether this will be addressed to the offeror or not, also, on which standards is this compensation will be processed[190]. The bidder, is favored to avoid being responsible for the equitable compensation as otherwise it could be a drawback to the takeover and could also go against the protocol one of the human rights[191]. If we take into consideration the third article of the break through rule, we will observe that in order for the offeror to be aligned with this provision he needs to ensure prior to placing the bid that he is in the position to provide compensation, and in this way the company's capital will be safe and the bid financed. It is also made clear under the sixth article of the directive that the document displaying the takeover bid, shall mention the equitable compensation when certain rights will be revoked and by what means the compensation will be carried out[192]. This is beneficial for both bidders and shareholders. For the bidder is beneficial as this will allow him to become better prepared in the planning of the next steps. As for the shareholders, it will be a facilitating factor for the decision they are called to make and are able to make the relevant calculations and be aware of the amount of compensation entitled to them. However, since the technique of quantification, is a subject handled by each Member State separately and differently, there will be different outcomes for each Member State so there is nothing predictable about a compensation[193]. The problem of lack of harmonization rises again, as there is no unified system to the compensation that will be eligible to be given to those who will suffer the breaking through of their rights. The takeover directive has opted out of creating a calculation, that would determine how a compensation will be considered. Had this been implemented, shareholders and bidders would be able to be a part of a level playing field, within which they could feel stability and certainty with fewer possibilities of risks. However,

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[190] Belin, J. (2017). To breakthrough or not-A study in economic efficiency.

[191] European Convention on Human Rights.

[192] Belin, J. (2017). To breakthrough or not-A study in economic efficiency

[193] WHITLOCK, T. (2014). *The Board Neutrality and Breakthrough Rules in Europe-A Case for Reform* (Doctoral dissertation, Durham University).

this is not the only issue that needs to be contemplated, as the way in which compensation is incorporated in a contract is still subject to be considered[194]. For shareholders who consent to a takeover bid, they do not qualify to receive any form of equitable compensation and the person bidding, is unable to become aware of the capital that the bid itself will require failing in this way for his actions to align with the third paragraph of the sixth article as well as article 3 paragraph one of the Directive. Nonetheless, what this achieves, is to reveal this inconsistency and inner conflict that the provisions in the directive have upon each other. There is no way for article 6 and article 3 to be fulfilled at any given time before the official announcement of the outcome of the takeover bid[195].

There are further problematic aspects, that enhance the instability and uncertainty of the principle of Break Through. There is significant confusion, as to when is the appropriate time that the compensation will take place, through the means of adjudication or arbitration. Timing plays a significant role in the success of the takeover, as if compensation happens to be delayed meaning at the time or prior to the publication of the bid, then, there is a high chance, that the takeover will be affected as those procedures are time consuming[196]. If the takeover of the company is regulated under the Directive 2004/25/EC, then the stocks of the company are all found in the stock exchange therefore, subject to the variations that occur within the stock market and a delayed calculation of compensation will have an effect on the shares. A decrease, in the share price means, that the shareholders will end up disappointed, as by they do not have another option other than accept the bid or alternatively hold on to shares of low value. In the meantime, the board has the gift of time to find the defense mechanism and act on it.

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[194] Papadopoulos, T. (2008). Legal aspects of the breakthrough rule of the european takeover bid directive.
[195]ibid.
[196] Rickford, J. (2004). Emerging European Takeover Law from a British Perspective, The. *Eur. Bus. L. Rev.*, *15*, 1379.

A good question, is what happens to those Member States who at first did not implement the breakthrough rule but ended up changing their minds. In this case, then the compensation is affected. A closer look at the optionality provision of the directive, tells us this will be decided upon the company's general meeting and thereafter proceed with the amendments necessary, as far as special rights and share classes are concerned which are the most likely to be affected by the principle considered to be violations of the rule of proportionality[197]. The classes of shares that will be impacted, they require special resolutions, and such thing constitutes the extinction of the equitable compensation as those rights will be amended subject to the decision making.

The downside to this, is the fact that whilst the Directive of takeovers exists to give an overall boost to the bidder to attempt the takeover it does leave important factors unconsidered. It remains unclear what the ending looks like for the members that did not provide their consent in the general meeting, hosted for the purposes of the special class of shares and consequently remain unprotected by the equitable compensation rule which is said to be applicable to all holders of rights[198]. Also left behind unprotected, are the rights which have been broken through and do not belong in the class rights of the share owners. Contracts that prohibit any transferring of those shares, do not essentially include shareholders as the parties of a contract of this nature. Nonetheless, protection and compensation is still offered to those involved and affected as they also held rights similar to those of the shareholders. However, since they are not in fact shareholders the only way to claim a compensation is going through a typical judicial procedure which will take a significant amount of time[199]. That said, it could be to the advantage of the directive itself and the encouragement of takeovers provide ease of compensation to right holders beyond the shareholders.

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[197] Goergen, M., Martynova, M., & Renneboog, L. (2005). Corporate governance convergence: evidence from takeover regulation reforms in Europe. *Oxford Review of Economic Policy*, *21*(2), 243-268.
[198] Oppelaar, H., & Kaarls, A. (2005). EU Rules Threaten Dutch Corporate Defences. *Int'l Fin. L. Rev.*, *24*, 31.
[199] ibid

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The main problem however, arises from the optionality of Article 11, which sparks the conflict and the dysfunctions of the directive interrupting in this way a total harmonization of the European Union. Optionality, is the eliminator of anything good that could have been accomplished through Article 11 as well as Article 9[200]. Mainly this is true, because with article 12 the directive goes against its own morals that seek to protect the shareholders by not restricting methods of defense against the takeover. Instead, if the principle was made mandatory for all Member States the shareholders would then be able to make decisions on the bid and aid and also stand by the bidder to fight back at defense methods used upon him to avoid the takeover[201]. Even if optionality is not the sole problematic area of the principle, it would have achieved more still having the deficiencies it has by being mandatory rather than optional. The bigger picture here is that Article 11, fails to promote a level playing field for takeovers. Aside from the optionality, plenty of corporate as well as share structures, interrupt the smooth application of the provision, and the wide possibilities of interpretation of the rule lead us to have different versions due to the different ways of applications that each Member State will execute. It is obvious then, that the Member States that opt in the breakthrough rule as it does not interfere with their corporate financial structures due to impreciseness and loopholes of the article[202].

[200] Enriques, L., Gilson, R. J., & Pacces, A. M. (2014). The case for an unbiased takeover law (with an application to the European Union). *Harv. Bus. L. Rev.*, *4*, 85.
[201] Wymeersch, E., & CESR, S. S. (2008). The Takeover Bid Directive Light and Darkness. *Proprietà e controllo dell'impresa. Il modello italiano, stabilità o contendibilità? Atti del Convegno di studi (Courmayeur, 5 ottobre 2007)*, *22*, 153.
[202] Skog, R. (2002). The Takeover Directive–an Endless Saga?. *European Business Law Review*, *13*(4).

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European Takeover System Vs. American Takeover System:

It is worth making an overview comparison of two of the most powerful markets globally the European and the American in order to get an understanding on the effectiveness of the European and potential weaknesses that may be identified in comparison with the US takeover regulation. But how effective have the two systems proven to be in the protection of their shareholders and value maximization of the takeover?

Taking into consideration the beneficial aspects that come along with a takeover, a regulatory system shall be built to its support and encouragement of takeover increase, always having in mind the risks that accompany a takeover and the share owners that are most likely to be affected if a bid is not the most fitting for the target company. A takeover regulation shall also aim to prohibit a clash of interests between minority and majority shareowners, conflicts between the managerial aspect of the company and the majority of shareholders, and provide limits in the restructure coercion. All those aspects mentioned both EU and US have successfully incorporated into their regulation to an extend. What makes the two systems different, are firstly the circumstances in the United States appear to be more facilitating towards the issuance of a tender offer when compared to the European Union[203]. The EU has created higher standards that need to be satisfied including a company's control being obtained by corporations in order to place an offer for the total of that company's shares, consequently, the price of takeover is increased and the bidder is now hesitant to proceed. The bidder in the US, however, is able to proceed with an offer that is interested in as many shares as preferred. However, the gap between the two systems is a small one as bidders usually aim for a total takeover of a company[204].

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[203] Ferrarini, G., & Miller, G. P. (2009). A simple theory of takeover regulation in the United States and Europe. *Cornell Int'l LJ*, *42*, 301.
[204] Magnuson, W. (2009). Takeover regulation in the United States and Europe: an institutional approach. *Pace Int'l L. Rev.*, *21*, 205.

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The next difference refers to the Board of the target company. Evidently, a board in a US company has more freedom to apply defense techniques to try to fight the takeover of a company. A limit on the defensive measure obtained by a US board is for the defense to not be excessively repressive. Defensive measures in the American system are handled by the court and shareowners themselves do not have to provide their consent[205]. The process in the EU is obviously significantly different. As discussed earlier in this paper a defensive measure that is able to cause the frustration of the takeover, is not allowed. In the occasion where such action takes place is only upon the consent of the shareholders which is given in the general meeting hosted for this specific reason. As far as defenses that take place prior to the bid those are disregarded due to Article 11 of the Directive 2004/25/EC[206]. Consequently, the EU gives less power to the board in comparison with the US system which incorporates in the regulation the business judgment rule, which means that the possibilities of a takeover bid succeeding are greater than in the US.

Another gap regards the time, at which the general meeting will be conducted in the European Union as it may take time to be actually hosted, and the decision of whether the defensive measure will be adopted or not is consequently delayed. In the US system, on the other hand, it is argued that since there is no such need for shareholder authorization it could shareholder wealth is less protected and there is very minimal evidence that the counter argument prevails[207].

So far it is clear the European tactics encourage the takeover and at the same time protect the shareholding body of the company compared to the US. The issue that will be discussed next concerns the minority of shareholders, for whom in both systems there are rules that guarantee the enjoyment of a part of the company's control premium paid by the person

[205] ibid

[206] DIRECTIVE 2004/25/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL 2004

[207] Kirchner, C., & Painter, R. W. (2000). European Takeover Law–Towards a European Modified Business Judgment Rule for Takeover Law. European Business Organization Law Review (EBOR), 1(2), 353-400.

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acquiring the company[208]. The US regulations do not force the bidder to purchase all the shares, instead, the bidder is able to make negotiations with the majority of shareowners to come to a conclusion in regards to the control and the role the minority will have[209]. However it is not a common situation as a bidder in the US usually aims to buy all company's shares, making this another factor that makes European Union and United States systems not too different.

Similar to the European Break through Rule which has been argued to compromise the main objective of the directive which is the harmonization of the Member States in the EU takeover provisions also exist in the US; however they take the form of case law and court decisions.[210] In the EU there has been heavy criticism and hesitation of the adoption of this principle and not many Member States have sought to adopt it.

With the brief comparison of the two powerful systems, it is clear that the European Union has made a more sufficient effort towards protecting the shareholders and empowering the market with the encouragement of takeovers. The US regulation provides excessive power to the board to restrict the takeover from happening by having very few limitations on the use of defensive methods. As a result, the shareholders' wealth is decreased and with the lack of a mandatory bid, the minority of shareowners are left at high risk. Whilst the EU system has been proven more spot-on the main objective of such regulation, the Directive was based on political aspects and the consideration of national interference with the European Union law. On the other hand, the US takeover regulations were built by judges that are politically independent and highly educated to perform such a task. Whilst the overall European Directive is focused on the shareholders' protection and takeover growth in the market, the

[208] ibid

[209] Ventoruzzo, M. (2005). The Thirteenth Directive and the Contrasts Between European and US Takeover Regulation: Different (Regulatory) Means, Not So Different (Political and Economic) Ends?. *Bocconi Legal Studies Research Paper*, (06-07).

[210] Ferrarini, G., & Miller, G. P. (2009). A simple theory of takeover regulation in the United States and Europe. *Cornell Int'l LJ*, *42*, 301.

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United States system was built with a better moral approach and was not politically influenced[211].

Takeovers during a pandemic crisis:

Currently, in the year of 2021, there is the fear of an increase of hostile takeover bids within the European Union due to the pandemic crisis that is a world wide concern, as companies are more economically vulnerable than any other time, and bidders are encouraged to take advantage of the situation and gain control without carrying a financial burden[212]. There is a significant crisis of the markets world wide that was one of the consequences of the pandemic. This has led the European authorities to become more concerned for foreign bidders making moves of hostile takeovers due to the decreased stock prices, that according to many arguments, oppose as the right moments from a bidder's perspective to achieve corporate restructure by gaining control of the desired company[213]. He also added that the European Commission as well as the European Member States need to take appropriate measures in order to protect strategic assets. Overall a pandemic is expected to leave a significant negative impact on the economic aspect of the European Union, with German estimations to exceed the five hundred billion euros worth of damage[214]. The European Commission has provided further protective guidelines in early 2020, to facilitate with the maintenance of assets and be as little affected as possible by the health and market crisis the world is going through. The guideline has as main focus the protection of European established companies from foreign investors. Ursula Von Der Leyen has stated that in order to overcome the situation Member States must be encouraged to adopt the guidelines in order

[211] ibid

[212] Wyckaert, M. (2020). Takeover Bids in Europe in Times of a World-wide Pandemic Threat: A Delicate Balance Between the Fundamental Freedoms and the Protection of Europe's and the Member States' Strategic Assets. *European Company and Financial Law Review*, *17*(3-4), 353-362.

[213] Enriques, L. (2020). Pandemic-Resistant corporate law: how to help companies cope with existential threats and extreme uncertainty during the covid-19 crisis. *European Company and Financial Law Review*, *17*(3-4), 257-273.

[214] Genschel, P., & Jachtenfuchs, M. (2021). Postfunctionalism reversed: solidarity and rebordering during the COVID-19 pandemic. *Journal of European Public Policy*, *28*(3), 350-369.

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to maintain a welcoming attitude of European open market towards bidders outside the EU, however during this crisis the "openness is not unconditional"[215]. In order to have more control over takeovers at a vulnerable time for the European economy, there is a need to have answers to all questions and information relating to the investors that want to make a move, according to Phil Hogan, Commissioner for Trade[216]. The European Union is ready to apply stricter measures of control of the investors by adopting mitigating measures and to enhance this protection, fourteen Member States have already in place FDI screening techniques and encourage Member States that lack FDI screening tools to get onboard the soonest so we can achieve maximum protection and avoid hostile takeovers. Also since October of 2020, the commission suggested cooperation between European countries for the FDI screening and foreign acquisitions are now subject to the European FDI screening, which is enforced and active under the regulation[217].

While there are several measures taken to protect the rather sensitive European market, the European Commission remains alert and ready to handle the situation furtherly if there is a necessity to do so according to how the situation progresses.

[215] European Commission, 'Coronavirus: Commission Issues Guidelines To Protect Critical European Assets And Technology In Current Crisis' (2020).
[216] ibid
[217] Wyckaert, M. (2020). Takeover Bids in Europe in Times of a World-wide Pandemic Threat: A Delicate Balance Between the Fundamental Freedoms and the Protection of Europe's and the Member States' Strategic Assets. *European Company and Financial Law Review*, *17*(3-4), 353-362.

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Conclusions:

Coming to a conclusion, this paper supports that a mandatory Board Neutrality Rule would give a significant boost for a more harmonized European Union, and a well-regulated Takeover System that will empower the internal European market. However, a reform of the Directive 2004/25/EC will not be considered at the time being and it is hopeless to anticipate any form of amendments to happen in the Directive and especially the Board Neutrality Principle[218]. The Member States back in 2002 did not show a willingness to have the rule enforced as it went against their national interests, making the directive formed with the intention of political satisfaction. The European Commission's The Report in 2012, discussed possible measures to reach the much desired level playing field[219]. Article 20 of the Directive suggests that, the European Commission shall observe and monitor the progress of the directive and if deemed necessarily make the appropriate changes[220].

The 2012 Report also stated, that a number of Member States adopted Board Neutrality Principle whilst fewer got onboard with the Break through Rule, nonetheless, it was the European Commission's argument that this hesitation to adopt optional provisions did not become an obstacle to takeover bids in general[221]. Whilst the following year in 2013 the European Parliament stated that even if Article 9 was endorsed by most Member States defense measures prior to and amid the takeover still occurred, however, we must consider that 2013 was a critical time for the European economy due to the financial crisis. The parliament added that if any rules were created during this time would not be long lasting as they would be formed with an abnormal foundation of the economic crisis that took place at

[218] Papadopoulos, Thomas, The European Union Directive on Takeover Bids: Directive 2004/25/EC (2008). International and Comparative Corporate Law Journal, Vol. 6, No. 3, pp. 13-103, 2008

[219] Hopt, K. J. (2014). European takeover reform of 2012/2013—time to re-examine the mandatory bid. *European Business Organization Law Review (EBOR)*, *15*(2), 143-190.

[220] DIRECTIVE 2004/25/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL 2004

[221] Hopt, K. J. (2014). European takeover reform of 2012/2013—time to re-examine the mandatory bid. *European Business Organization Law Review (EBOR)*, *15*(2), 143-190.

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that period of time, and suggested that the commission should keep an eye on how the circumstances progress and act accordingly[222].

As far as Article 9 is concerned, this paper supports, the need for the rule to become mandatory despite the political sensitivity on the topic. An attractive proposition was made by Enrique[223] as well as Davies Schuster and Ghelcke[224] suggesting to make board neutrality a default provision and providing the companies and not the Member States the flexibility to opt out according to each company's discretion. Having this option addressed to each company personally instead of the Member State will enhance the harmonization since the takeover system would become more unified. Boards shall not exceed the scope of exercising their managerial responsibilities to take measures to affect the decision making of the shareholding body[225]. As the Directive aims for the protection of the shareholders' interests, it is a provision that in case the commission and parliament decide to make mandatory there will be a significant improvement in the market and encouragement towards the increase of takeovers in the European Union.

Unfortunately, the Break through Rule has not been well received by the majority of Member States[226]. The flaws that come with the principle cannot be overlooked as this is a provision in the Directive, that is wide enough to be misinterpreted and misused, achieving in the end to become the cause of more outstanding issues. Similarly, to the above position for board Neutrality, this paper argues that the principle shall not be eliminated, instead, it should be

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[222] ibid

[223] Enriques, L., Gilson, R. J., & Pacces, A. M. (2014). The case for an unbiased takeover law (with an application to the European Union). *Harv. Bus. L. Rev.*, *4*, 85

[224] Habersack, M. (2018). Non-frustration Rule and Mandatory Bid Rule–Cornerstones of European Takeover Law?. *European Company and Financial Law Review*, *15*(1), 1-40.

[225] Mukwiri, J. (2020). The end of history for the board neutrality rule in the EU. *European Business Organization Law Review*, *21*(2), 253-277.

[226] Geidi Jallai A, The European Takeover Bids Directive And Its Applicability In The Business Groups With Pyramid Ownership Structure (2012)

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upon the discretion of the companies whether the rule will be adopted or not[227]. This would achieve greater harmonization, in the European Union since for the time being, there is not much motivation for the European countries to force the companies to adopt the breakthrough rule when the majority of them disregard the rule.

The Directive is in need of further reforms and amendments and reconsideration of how the optionality provision shall be applicable to Member States. It must become the main goal of the Commission, to meet the expectations that the European Union sets out, focusing more on constructing a takeover tool, that will make the European market more robust and less on satisfying political matters and interests of the member states. The optionality of both rules discussed in this paper, is the main reason why the directive did not perform as well as expected in terms of further encouragement of investors to pursue takeovers. Harmonization is not achieved to a satisfactory level for the corporate control in the European market as initially planned by the European Commission. The Takeover Directive has not achieved the desired level of harmonization in the European Union. Despite the years of negotiations for a takeover tool that would regulate the European market, there is still plenty of room for improvement as to the efficacy of the directive and the further development of a European level playing field.

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