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EU Law and the Harmonization of Takeovers in the Internal Market

Thomas Gr. Papadopoulos

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Chapter 11

An Overview of the Takeover Bid Directive in the Context of the Internal Market

11.1 INTRODUCTION

The Takeover Bid Directive was the product of long-running legislative efforts by the European Commission. The quite different approaches to the regulation of takeovers existing hitherto in the Member States, as well as the differences between certain aspects of national company and capital market law, made harmonization of takeover bids a very difficult venture. Negotiations and efforts to adopt the Takeover Bid Directive lasted almost fifteen years. The first draft was presented in 1989. The regulation of takeovers at the EC level was considered to be a part of the 1992 internal market project.[538] An amended proposal was brought forward in 1990. After the 1992 Edinburgh European Council, the draft Takeover Bid Directive was examined in light of the principle of subsidiarity.[539] In 1996, the European Commission proposed a more streamlined Takeover Bid Directive, which was revised again in 1997.[540] Meanwhile, the 1999 Financial Services Action Plan called for the adoption of a Directive on Takeover Bids and stressed the benefits thereof for market integration and for the competitiveness of the EU. Although a conciliation procedure between the European Parliament and the European Council was successful and produced a compromise proposal, the European Parliament then rejected the proposal (with a tied vote)

538. J. Wouters, P. Van Hooghten & M. Bruyneel, 'The European Takeover Directive: A Commentary', in *The European Takeover Directive and its Implementation*, ed. P. Van Hooghten (Oxford: Oxford University Press, 2009), 3.
539. *Ibid.*, 3–4.
540. *Ibid.*, 4.

in July 2001.[541] This rejection of the European Commission's proposed Directive by the European Parliament led to the creation of the High-Level Group of Company Law Experts. This Group was formed to propose some viable solutions to the problems encountered in harmonization. A new proposal of the European Commission was presented in 2003; this took into account some of the recommendations of the High-Level Group of Company Law Experts. The Takeover Bid Directive was finally adopted on 21 April 2004.[542]

11.2 THE TAKEOVER REPORT OF THE HIGH-LEVEL GROUP OF COMPANY LAW EXPERTS

As mentioned above, the High-Level Group of Company Law Experts, headed by J. Winter, was established with a mandate to address outstanding issues.[543] The key proposals in its final Report were that (a) when a takeover offer succeeds to the extent of acquiring 75% or more of the risk-bearing share capital in the offeree company, the bidder should be entitled to control the constitution and the board of that company accordingly, notwithstanding any constitutional or structural provisions in the company that prevent the exercise of such control (the breakthrough provisions); (b) when a bidder acquires control, the price to be offered under the mandatory bid for the remaining shares should normally be the highest price paid by the bidder during a period of six to twelve months up to and including that in which control was acquired; and (c) when a bidder has acquired in excess of a threshold (to be set at between 90% and 95%) of the shares in the target, he or she should be entitled to buy out minority holders, and those minority shareholders should be able to require that their shares be bought at a fair price, which will be presumed to be the offer price when there is a 90% or more acceptance of the offer ('squeeze-out' and 'sell-out' rights).[544]

541. *Ibid.*. J. Mukwiri, *Takeovers and the European Legal Framework, A British Perspective* (London and New York: Routlege-Cavendish, 2009), 10.
542. J. Wouters, P. Van Hooghten & M. Bruyneel (n. 538), 5. M. Andenas, 'The New European Company Law', in *Liber Amicorum Guido Alpa, Private Law Beyond the National Systems*, ed. M. Andenas et al. (London: BIICL, 2007), 87. For an excellent overview of the Directive's provisions, see: B. Sjafjell, *Towards a Sustainable European Company Law* (AH Alphen aan den Rijn: Wolters Kluwer, 2009), 293–311.
543. J.S. Knudsen, 'Is the Single European Market an Illusion? Obstacles to Reform of EU Takeover Regulation', *ELJ* 11 (2005): 507, 518. The rest of the members were: J. Rickford (UK), J. Simon (France), K. Hopt (Germany), J.M. Garrido Garcia (Spain), J.S. Christensen (Denmark), G. Rossi (Italy).
544. V. Edwards, 'The Directive on Takeover Bids: Not Worth the Paper It's Written on?', *ECFR* 4 (2004): 416, 428. In 2002, after the publication of the Takeover Report by the High-Level Group of Company Law Experts, Internal Market Commissioner F. Bolkestein said: 'I commend the High Level Group of Company Law Experts on their swift, comprehensive and excellent work. We will carefully examine their recommendations with a view to submitting a revised proposal for a Directive on Takeover Bids in the Spring. This Directive is a key element in our drive to make Europe's economy the most competitive in the world by 2010 and

The establishment of a level playing field in the EU market in corporate control has long been vitally necessary, since only this could lead to market integration. The Takeover Report of the High Level Group of Company Law Experts has stressed that it is important that takeover bids be undertaken with a similar expectation of success throughout the EU, and that shareholders in the various Member States have corresponding opportunities to tender their shares in a takeover bid. It advises that any European company law regulation aimed at creating such a level playing-field for takeover bids should be guided by two principles: (1) shareholder decision-making, and (2) proportionality between risk-bearing capital and control.[545] The High Level Group of Company Law Experts proposed full disclosure of information about the capital and control structures of companies; shareholders' authorization to frustrate a bid, with such authorization to be granted on the basis of proportionality; a breakthrough of defensive mechanisms by a bidder acquiring 75% or more of risk-bearing capital; a breakthrough rule also applicable to 'golden shares'; non-transferability provisions of the target company not enforceable against the bidder; and pyramid structures, cross shareholdings, and circular shareholdings to be reviewed. With regard to the last recommendation, the High Level Group of Company Law Experts believes that the Commission should review the issue of whether pyramid structures, cross shareholdings, and circular shareholdings, including several listed companies (which would not be subject to the break-through rule), should be regulated generally, and also what adequate measures of protection for minority shareholders should be enforced in all Member States.[546]

The High Level Group of Company Law Experts also discussed various aspects of the equitable price that must be offered in a mandatory bid. It suggested that an equitable price is the highest price paid by a bidder prior to acquiring a controlling holding, that there should be a few exceptions possible in specific circumstances, and that the mandatory bid shall be made within thirty days.[547] Additionally, the High Level Group of Company Law Experts examined the squeeze-out and sell-out rights. The High Level Group of Company Law Experts recommended that the threshold for a squeeze-out should be set at 90%–95% of capital, that there should be the presumption that the bid price constitutes a fair price when the bid is accepted by shareholders holding 90% or more of the share capital on which the offer was made, and that the thresholds for the sell-out right and for the presumption of a fair price need to be the same, as in the case of the squeeze-out right.[548]

The 2002 proposal of the European Commission that led to the adoption of the Takeover Bid Directive did not completely follow the recommendations of the

the Commission will do its utmost to achieve an early agreement by Council and Parliament on the revised proposal.' IP/02/24.
545. Press release of the High Level Group of Company Law Experts (10 Jan. 2002), 2.
546. Press release of the High Level Group of Company Law Experts (10 Jan. 2002), 2–3.
547. Press release of the High Level Group of Company Law Experts (10 Jan. 2002), 3.
548. Press release of the High Level Group of Company Law Experts (10 Jan. 2002), 3–4.

Report of the High Level Group of Company Law Experts on Takeovers concerning the proposed breakthrough procedure, although it did provide for the un-enforceability of restrictions on the transfer of securities during the period for acceptance of the bid, and for the un-enforceability of restrictions on voting rights when a general meeting of shareholders decides on any defensive measures.[549] The proposal of the High Level Group of Company Law Experts on Takeovers that a bidder should not be required to offer compensation to the holder of shares carrying disproportionate voting rights, when the bidder reaches the breakthrough threshold after a general takeover bid and makes use of the breakthrough right, was not accepted.[550] According to the Winter Report, there should also be definitions of an 'equitable price' and the introduction of squeeze-out and sell-out rights after bidding.[551] The most important feature was that the board neutrality/non-frustration rule was maintained. Finally, the 2002 proposal sought to meet the European Parliament's concerns about employee protection by providing for national measures to govern the provision of information and consultation of representatives of the employees of both the target company and the bidding company.[552]

11.3 THE MANDATORY BID RULE (ARTICLE 5) AND THE SQUEEZE-OUT AND SELL-OUT RIGHTS (ARTICLE 15 AND ARTICLE 16)

Among the few obligatory substantial provisions of the Directive for Takeover Bids are the mandatory bid rule (Article 5), the squeeze-out right (Article 15), and the sell-out right (Article 16). The purpose of these provisions is to protect the minority shareholders according to the legislative base of the Directive (Article 44(2)(g) of the EC Treaty). However, the Directive provides for the possibility of evading the enforcement of these provisions, both when transposing the Directive into national law and, after implementation, when the parties to a bid are obliged to launch a mandatory bid. Additionally, the provisions themselves are characterized by many drawbacks, which reveal their weakness in contributing to the protection of shareholders and, by extension, to the freedom of establishment through takeover bids.

Article 5 contains detailed rules imposing the requirement of making a mandatory bid at an equitable price whenever a natural or legal person gains control of a listed company. The main problem is that this provision gives discretion to the Member States. This discretion does not have to do with adjustments of

549. F. Wooldridge, 'The Recent Directive on Takeover Bids', *EBLR* (2004): 147.
550. Although this proposal aimed at facilitating the bidder in financing his or her offer and encouraging aspiring investors to get engaged with takeovers, it was contrary to the constitutional rights of some Member States (a form of confiscation). There were also concerns about its compatibility with the First Protocol to the European Convention on Human Rights and the 'public interest' justification for restrictions. F. Wooldridge (n. 549), 148.
551. V. Edwards (n. 544), 429.
552. *Ibid.*

the regulation to the Member States' needs and idiosyncrasies, but rather with the waiver or not of the enforcement of the mandatory bid rule in individual cases. Thus, the minimum harmonization technique chosen by the Community legislature (Article 3(2)) is inconsistent with these provisions of the Directive, which allow for derogations even from the minimum safeguards of the Directive. National legislatures are not prompted to adopt further safeguards for minority shareholder protection but are, instead, given the possibility of evading the minimum protection standards of the Directive.

First of all, Article 4(5) states:

> Provided that the general principles laid down in Article 3 (1) are respected, Member States may provide in the rules that they make or introduce pursuant to this Directive for derogations from those rules: (1) by including such derogations in their national rules, in order to take account of circumstances determined at national level and/or (2) by granting their supervisory authorities, where they are competent, powers to waive such national rules, to take account of the circumstances referred to in (1) or in other specific circumstances, in which case a reasoned decision must be required.

Furthermore, Article 5(4), which is the specific provision granting the possibility of derogations to the mandatory bid rule, states:

> Provided that the general principles laid down in Article 3 (1) are respected, Member States may authorize their supervisory authorities to adjust the price referred to in the first subparagraph in circumstances and in accordance with criteria that are clearly determined. To that end, they may draw up a list of circumstances in which the highest price may be adjusted either upwards or downwards, for example where the highest price was set by agreement between the purchaser and a seller, where the market prices of the securities in question have been manipulated, where market prices in general or certain market prices in particular have been affected by exceptional occurrences, or in order to enable a firm in difficulty to be rescued. They may also determine the criteria to be applied in such cases, for example the average market value over a particular period, the break-up value of the company or other objective valuation criteria generally used in financial analysis. Any decision by a supervisory authority to adjust the equitable price shall be substantiated and made public.

In other words, Member States may allow their supervisory authorities to decide, case by case, that the Mandatory bid price should be adjusted, or that the mandatory bid rule does not apply at all in certain special circumstances, whether this is actually specified by the national rules or not ('other special cases').[553] Admittedly, unjustified or overuse of this power may constitute a breach of Article 3(1)(a) (protection of minority shareholders in case of control transfer), unless, of course,

553. L. Enriques, 'The Mandatory Bid Rule in the Takeover Directive: Harmonization without Foundation?', *ECFR* 4 (2004): 440, 443.

some other equivalent form of protection is provided.[554] Although the Directive provides explicitly for one category of derogation[555] (Article 5(2) – when control has been acquired following a 100% voluntary bid to all the holders of securities for all their holdings), there are possibilities for other categories of derogations granted by the Member States at the implementation stage, or by the supervisory authorities and the legislature at the bid stage. These derogations ought, however, to be interpreted narrowly.

This narrow discretion of the Member States and national supervisory authorities to the possible exemption is not only a result of the determination of the price by 'circumstances and in accordance to criteria clearly determined' and the relevant national 'list of circumstances' (Article 5(4) of the Directive). The general principle behind both Article 3(1)(a) of the Directive and Article 43 of the EC Treaty also dictates a narrow national discretion in granting the adjustment. When the national supervisory authority grants a derogation to the mandatory bid rule under Article 5(4) of the Directive ('the highest price paid for the same securities by the offeror, or by persons acting in concert with him/her, over a period, to be determined by Member States, of not less than six months and not more than twelve before the bid referred to paragraph 1 shall be regarded as the equitable price'), it has narrow discretion. A wide discretion would be incompatible with the general principle of Article 3(1)(a) (adjusting the price downwards without adequate justification does not protect 'the other holders of securities') of the Directive and the fundamental freedom of establishment (Article 43 of the EC Treaty (adjusting the price upwards without adequate justification could discourage bidders from exercising their freedom of establishment through a takeover bid). Furthermore, the European Commission, in its 2002 proposal,[556] justified the derogation provision by the need for flexibility in the financial markets and stressed that Member States shall 'authorize their supervisory authorities to adjust that price in circumstances and according to criteria that are clearly determined, by means of a reasoned decision that is made public'.

554. *Ibid.*, 443. K. Hopt discusses the issue of 'equivalence'in the framework of the German Company Law (and especially the law relating to groups of companies). He thinks that, within a developed capital market at any rate, a mandatory bid will be functionally superior to a solution based upon the law relating to groups of companies. K. Hopt (n. 296), 18–19. E. Wymeersch (ed.), *Groups of Companies in the EEC: A Survey Report to the European Commission on the Law Relating to Corporate Groups in Various Member States* (Berlin: Walter de Gruyter, 1993).

555. A Council and Commission statement entered in the minutes of the Council on the adoption of the Directive expresses the Council and Commission's agreement that national law may provide that, when control has been obtained following a voluntary bid made in accordance with the Directive, addressed to all holders of securities for at least 60% of their holdings, the obligation to launch a mandatory bid laid down in Art. 5(1) shall not apply, on condition that the offer has been approved by the majority of shareholders with voting rights, excluding from the calculation securities held by the offeror and by any shareholder who, alone or in concert, holds more than 10% of the voting rights. F. Wooldridge (n. 549), 151.

556. Proposal for a Directive of the European Parliament and of the Council on Takeover Bids, COM (2002) 0534 final [2003] *OJ* C45E/7.

Moreover, the mandatory bid rule is not fully comprehensive. This makes its implementation, and its protective function, more difficult. It is possible that the mandatory bid rule's scope will not include some cases of minority shareholder protection. For example, there is no reference to the treatment of acquisitions of control of companies controlling a listed company.[557] The minority shareholders of the listed company need protection from the new acquirers of the controlling company, who are also able to control the listed company. Another example is the possibility of partial bids. The omission of partial bids from the Directive is another negative factor as regards minority shareholder protection. Unfortunately, the Directive does not regulate these situations, not even with a general provision. Instead, it leaves their regulation to the discretion of each Member State.

The definition of 'concerted parties' in the Takeover Bid Directive diminishes still further the contribution of the mandatory bid rule to minority shareholder protection and, subsequently, to freedom of establishment. Article 2(1)(d) of the Directive defines 'concerted parties' as:

> natural or legal persons who cooperate with the offeror or the offeree on the basis of an agreement, either express or tacit, either oral or written aimed either of acquiring control of the offeree company or at frustrating the successful outcome of a bid.

Moreover, the mandatory bid rule (Article 5(1) of the Directive) includes concerted parties[558] in the acquisition of shares and the crossing of the mandatory bid threshold. However, Article 5(3) of the Directive again confers wide discretion upon the Member States:

> The percentage of voting rights which confers control for the purposes of paragraph 1 and the method of its calculation shall be determined by the rules of the Member State in which the company has its registered office.

Thus, the percentage of voting rights that confers control is defined by the Member States. This percentage of shares defines the acquisition of control according to Article 5(1) of the Directive. As a matter of fact, the acquisition of control defines the concerted parties (Article 2(1)(d) of the Directive). It is quite obvious that the definition of 'concerted parties' is based indirectly on the discretion of the Member States. Hence, Member States can influence the definition of 'concerted parties' through their power to define 'acquisition of control'. This discretion might well assist Member States in structuring the definition of 'concerted parties' in accordance with their own national protectionist standards. Again, this wide discretion of Member States is something very dangerous, because of the risk of national protectionism, which is all too common in the field of European takeovers.

557. L. Enriques (n. 553), 445. For a critical approach to the mandatory bid rule, see: J. Grant, T. Kirchmaier & A. Kirshner, 'Financial Tunnelling and the Mandatory Bid Rule', *EBOR* (2009): 233.

558. See also for an interesting case study: D. Zetzsche, 'Hidden Ownership in Europe: BAFin's Decision in Schaeffler v. Continental', *EBOR* (2009): 131–132.

The squeeze-out right[559] is described in Article 15 of the Directive, which states:

> Member States shall ensure that an offeror is able to require all the holders of the remaining securities to sell him/her those securities at a fair price.

This rule is aimed at allowing a bidder to gain 100% of the equity so as to simplify accounting and administration by removing the need to deal with minority shareholders (which can incur high costs).[560] The bidder knows in advance that, if he or she reaches the squeeze-out threshold, he or she will be able to exercise the squeeze-out right so as to apply a more efficient management regime. This encourages potential bidders. Hence, freedom of establishment can be promoted, because this measure aims at the protection of investors. Additionally, the protection of shareholders is promoted, because they will have a second chance after the first bid to sell their shares.

The Takeover Bid Directive requires Member States to institute sell-out rights,[561] based on fair pricing provisions[562] similar to those of Article 15 as regards squeeze-outs.[563] More specifically, 'Member States shall ensure that a holder of remaining securities is able to require the offeror to buy his securities at a fair price, under the same circumstances as provided for in Article 15(2).' The aim of this provision is to provide an exit for the remaining shareholders and, as a consequence, to protect them. Otherwise, the remaining shareholders could very easily be abused by the new controller, and the only exit for them would be by selling their depreciated shares at a low price on the market.

Nevertheless, this protection of the sell-out right is again diluted. The sell-out right is granted, according to Article 15(1), only when a bid is made to all the holders of the offeree company's securities, and for all of their securities. This can be either a voluntary or a mandatory bid.[564] Mandatory bids may turn out to be

559. M. Burkart & F. Panunzi, 'Mandatory Bids, Squeeze-out, Sell-out and the Dynamics of the Tender Offer Process', in *Reforming Company and Takeover Law in Europe*, ed. G. Ferrarini, K. Hopt, J. Winter & E. Wymmersch, 1st edn (Oxford: Oxford University Press, 2004), 753.
560. J. Grant, 'Takeover Regulation and the Balancing of Interests', in *European Takeovers: the Art of Acquisition*, ed. J. Grant, 1st edn (London: Euromoney Books, 2005), 48. For an overview of the economic rationale and of the legal framework of the squeeze-out right and the sell-out right: C. Van Der Elst & L. Van Den Steen, 'Opportunities in the M&A Aftermarket: Squeezing Out and Selling Out?' (2006) University of Ghent, Financial Law Institute Working Papers WP 2006-12, and C. Van Der Elst & L. Van Den Steen, 'Squeezing and Selling Out: A Patchwork of Rules in Five European Member States', *ECL* 4 (2007): 19–20, 25.
561. M. Burkart & F. Panunzi, 'Mandatory Bids, Squeeze-Out, Sell-Out and the Dynamics of the Tender Offer Process', in *Reforming Company and Takeover Law in Europe*, ed. G. Ferrarini, K. Hopt, J. Winter & E. Wymmersch, 1st edn (Oxford: Oxford University Press, 2004), 756.
562. See also: T. Kaisanlahti, 'When Is a Tender Price Fair in a Squeeze-Out?', *EBOR* (2007): 497–519.
563. J. Grant (n. 560), 50.
564. L. Enriques, 'The Mandatory Bid Rule and the Sell-out Right in the Takeover Directive: Harmonisation for its Own Sake?', in *European Takeovers: The Art of Acquisition*, ed. J. Grant, 1st edn (London: Euromoney Books, 2005), 123.

easily avoidable, depending on the choices made by Member States and national supervisory authorities.[565] The exercise of the sell-out right depends on the prior launch of a mandatory bid. The mandatory bid depends on the discretion of the Member States and the national supervisory authorities. Hence, the exercise of the sell-out right depends on this discretion, which renders the sell-out right ineffective. The Directive tries to protect the shareholders by conferring this right, but, simultaneously, it cancels this protection by making the mandatory bid rule and, as a consequence, the sell-out right easily avoidable. The exercise of the sell-out right will depend in each case on the national exceptions to the mandatory bid rule. It is obvious that this does not contribute to shareholder protection. This category of remaining shareholders is quite vulnerable, since it has no other effective disengagement possibilities. Furthermore, by setting a sufficiently low price for a voluntary bid for all the shares, the acquirer may succeed in holding securities representing less than 90% of the capital carrying voting rights and 90% of the voting rights in the offeree company, thus preventing minority shareholders from exiting the company by way of the sell-out right.[566] Unfortunately, this circumvention technique is not explicitly banned by the Directive. Undoubtedly, the value of the 'one share, one vote' principle is revealed at this point and could prevent the development of this type of circumvention.

11.4 THE NON-FRUSTRATION/BOARD NEUTRALITY RULE (ARTICLE 9)

The following parts of this chapter will analyse the three key rules of the Takeover Bid Directive: the non-frustration rule (Article 9), the breakthrough rule (Article 11), and the reciprocity rule (Article 12). These three rules constitute the core regulation of the takeover bid process. The first two rules (Articles 9 and 11) regulate the behaviour of the management of the target company during the pre-bid and post-bid period. The intended contribution of these Articles is watered down as a result of a complicated opt-in–opt-out system that renders their application optional. The reciprocity rule adds another component to this optionality regime. The reciprocity rule is nothing more than simply another opportunity to opt out. We will attempt to analyse this intricate system of substantive provisions, with their multi-layered mechanism of opt-ins and opt-outs, by explaining the basic provisions and identifying their defects.

The board neutrality or non-frustration rule characterizes the UK model of the regulation of takeovers at the European level. S. Bartman argues that the term 'non-frustration', rather than the term 'board neutrality' is correct, because the management of the company is not so much required to observe a neutral attitude towards a bid as it is forbidden to frustrate the bid before a general meeting of

565. L. Enriques (n. 564), 124.
566. *Ibid.*

shareholders has had the opportunity to express an opinion on it.[567] Additionally, the board of the bidder, according to Article 9(5) of the Directive, must draw up and make public a document setting out its opinion on the bid. Hence, the word 'neutral' is not suitable if the board of the target expresses its hostility or friendliness in the report – without, of course, taking any of the forbidden frustrating measures.

Article 9(2) of the Directive states that the prior authorization of a general meeting[568] of shareholders is required before any action[569] on behalf of the target's board, which could result in the frustration of the bid. The Directive clarifies that, in two-tier board structures, 'board' should mean both the management and the supervisory boards (Article 9(6)). The Takeover Directive rests on the principle that a takeover bid is made to the shareholders and, consequently, it is up to the shareholders to decide on defensive measures.[570] The Explanatory Memorandum of the Commission's 2002 Proposal states:

> Where control of the offeree company is at stake, it is important to ensure that its fate is decided by its shareholders. The authorization of the general meeting must therefore be given explicitly with a view to responding to a specific bid.[571]

Thus, the non-frustration rule is a way of protecting the interests of shareholders and fulfilling the aims of the legal basis of Article 44(2)(g) of the EC Treaty. The board of a company is permitted to seek alternative bids only to offer a wider and more competitive range of choices to the shareholders of the company.[572] Furthermore, the Directive states that:

> Such authorization shall be mandatory at least from the time the board of the offeree company receives the information referred to in the first sentence of Article 6(1) concerning the bid and until the result of the bid is made public or the bid lapses. Member States may require that such authorization be obtained at an earlier stage, for example as soon as the board of the offeree company becomes aware that the bid is imminent.

567. S. Bartman, 'Analysis and Consequences of the EC Directive on Takeover Bids', *ECL* 1 (2004): 5.
568. The period before the shareholder meetings is of great interest. See also: D. Zetzsche, 'Shareholder Interaction Preceding Shareholder Meetings of Public Corporations: A Six Country Comparison', *ECFR* (2005): 107–157.
569. See also: D. Van Gerven, 'Rules of Community Law Applicable to Takeover Bids', in *Common Legal Framework for Takeover Bids in Europe*, ed. D. Van Gerven (Cambridge: Cambridge University Press, 2008), 27–30, A. Dorresteijn et al., *European Corporate Law*, 2nd edn (The Netherlands: Kluwer Law International, 2009), 236, C. Kirchner & R. Painter, 'European Takeover Law: Towards a European Modified Business Judgment Rule for Takeover Law', *EBOR* (2000): 353, P. Mulbert & M. Birke, 'In Defense of Passivity: On the Proper Role of a Target's Management in Response to a Hostile Tender Offer', *EBOR* (2000): 445.
570. R. Skog, 'The Takeover Directive: An Endless Saga?', *EBLR* 13 (2002): 301, 307.
571. COM (2002) 534 final, 8. D.A. Wyatt & A. Dashwood (n. 46), 870.
572. However, there are strong arguments against the protective scope of the competitive bids. We will focus on this issue below in the part about the problems of the non-frustration rule.

This subparagraph of the Directive attempts to prevent the phenomenon of market manipulation and insider dealing, because, during this period, the circulation of some specific information is quite sensitive. This is also in conformity with the European legislation on market abuse.[573] Furthermore, the general principle of Article 3(d) prohibits the creation of false markets and artificial fluctuations in the market prices of a company's shares. It is obvious that all these provisions aim at protecting the shareholders from reductions in the prices of their shares as a result of unlawful activity.

Additionally, paragraph 2 of Article 9 mentions a particular way of permanently inhibiting a bid for the issuance of new shares. This defensive measure is stated expressly, because it can result in a permanent and irreversible barrier to the attempts of a bidder. The new shares can dilute the stake of the bidder, making it impossible for the bidder to ever reach the desired control level of the company's equity. This restriction also includes securities that confer the pre-emption right to subscribe to such securities, such as convertible bonds and warrants.

According to the Second Company Law Directive,[574] increases in capital are the responsibility of a general meeting of the shareholders. Nevertheless, according to Article 25(1) and (2) of the same Directive, the general meeting can delegate this power for up to five years to the board of the company. It is this delegated right to increase capital that the board of directors is to be deprived of under Article 9 of the Takeover Bid Directive, from the moment that the offeror has publicized his or her intention to make an offer.[575] The general meeting, which will decide on the authorization of defensive measures, is free to authorize the issuance of new shares, since the shareholders are the sole judges of the need for defensive measures. In Member States where the delegation of the right to increase capital deprives the general meeting of its right to do so, it is clear that Article 9 of the Takeover Directive enables the general meeting to regain this power.[576] The shareholders' pre-emption rights should be fully respected.[577] Hence, all the existing

573. Directive 2003/6/EC of the European Parliament and of the Council of 28 Jan. 2003 on insider dealing and market manipulation (market abuse) [2003] OJ L96/16.
574. Second Council Directive 77/91/EEC of 13 Dec. 1976 on coordination of safeguards, which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Art. 58 of the EC Treaty, with respect to the formation of public limited liability companies and the maintenance and alteration of their capital with a view to making such safeguards equivalent [1977] OJ L26/1. For an overview of the Second Company Law Directive, see: N. Moloney & T. Papadopoulos, 'EU Company Law', in *Law of the European Union*, ed. D. Vaughan, A. Robertson, & P. Eleftheriadis (Oxford: Oxford University Press, 2009), 115–318.
575. J.M.M. Maeijer & K. Geens (n. 515), 9.
576. J.M.M. Maeijer & K. Geens (n. 515), 9.
577. It is also alleged that the board can withdraw the pre-emption rights. However, this interpretation constitutes a defensive measure, because it can permanently impede the bidder from obtaining control. Only after the bid has been made public can the general meeting authorize a capital increase together with a withdrawal of pre-emption rights. This allegation could be found in J.M.M. Maeijer & K. Geens (eds) (n. 514), 10–11.

shareholders must be allowed to subscribe to the securities issued by the board.[578] The controlling shareholders and the bidder would normally subscribe to the new shares. However, it will not be certain that the minority shareholders will exercise their pre-emption rights, and this is exactly what the board of the company will be hoping.[579] In other words, a hostile board hopes that the minority shareholders will not exercise their pre-emption rights and that this capital increase will function as a potential defensive measure (a watering-down control). The stake of the bidder will be diluted, because it is not certain that all the new-issued shares corresponding to the pre-emption right of the minority shareholders will be bought by the bidder (some of them might be bought by other stakeholders, thus watering down the percentage of the bidder).

What about an issuance of shares that was decided upon before the launch of a bid? Should it be carried out during the bid period? Here we have the safeguard of Article 9(3), pursuant to which a general meeting of shareholders must approve actions that do not form part of the normal course of the company's business. In this way, if the board of the company has confidential information about a future bid, it will not be able to entrench its position by deciding to issue shares and executing the decision later, when the bid is made public. Shareholders' approval will be required. Furthermore, in addition to Article 9(3), Recital 16 of the Preamble is also relevant here:

> In order to prevent operations which could frustrate a bid, the powers of the board of an offeree company to engage in operations of an exceptional nature should be limited, without unduly hindering the offeree company in carrying on its normal business activities.

This provision obliges national authorities to interpret the issue of new shares during the bid period as incontrovertibly a defensive measure. However, the provision is not restricted solely to the issue of new shares. It also covers many other hidden defensive measures, which would be presented by a board as being part of the normal course of business. The underlying idea is to prevent a board from realizing material changes of the position of a target company, such as the sale of substantial assets or the acquisition of a new subsidiary.[580]

The main problem of the non-frustration rule, as aforementioned, lies in Article 12, which leaves the implementation of Articles 9 and 11 to the discretion of the Member States and of individual companies. Hence, the proclaimed aims of facilitating corporate restructuring and corporate mobility at the EU level are not fulfilled, because boards could still retain their power to frustrate bids and discourage investors. Furthermore, there is vagueness about what belongs to the

578. F. Ipekel, 'Defensive Measures under the Directive on Takeover Bids and Their Effect on the UK and French Takeover Regimes', *EBLR* (2005): 341, 347.
579. P. Lambrecht, 'The 13th Directive on Takeover Bids: Formation and Principles', in *Capital Markets in the Age of Euro – Cross Border Transactions, Listed Companies and Regulation*, ed. Ferarrini et al. (London: Kluwer Law International, 2002), 460.
580. V. Edwards (n. 544), 436.

normal course of a company's business. This could create cross-border problems, with each Member State trying to give its own separate definition.[581] Nor does the DD Directive stipulate when exactly the period during which the board is forbidden to act begins. It is possible that this discretion could lead to different periods applying in different Member States.[582] Moreover, there are objections to the argument that a competing bid enhances the position of shareholders and contributes to the protection of their interests.

The only action that a board is allowed to take during the bid period is to seek alternative bids. The potential alternative bidder is called a 'white knight'. This exception from the non-frustration rule is allowed because it enhances shareholders' opportunities by putting their shares up for auction. An alternative bid should definitely not be considered a defensive measure, because it embodies a second choice for shareholders that does not affect the conditions of the first bid at all.[583] Nevertheless, seeking an alternative bid could be detrimental to the shareholders' interests. After the launch of a takeover bid, shareholders face collective action problems, which may tempt them to accept the offer even though this is not in their collective best interest (the so-called pressure to accept the bid).[584] A competing bid could be coercive, compelling shareholders to accept the second bid even though the first bid seems to be more attractive.[585] The collective action problem derives from the fact that shareholders do not know about the decisions of the rest of the shareholders. This unavoidable lack of coordination of decision-making creates in shareholders the fear that they will lose the bid price and be left with under-priced minority shares. The mandatory bid rule mitigates the problem in some cases of two-tier or partial competing bids, but even then, not entirely (e.g., not in 100% public offers, which are exempted from the mandatory bid rule).[586] Shareholders compare the risk of holding minority undervalued shares, in the event of the bid being successful, with the price of the offer; hence the optimal *ex ante* strategy is to sell their shares to the bidder. It is obvious that the pressure to accept the bid does not always lead to the most value-enhancing choice. The shareholders

581. For more details: T. Papadopoulos, 'The European Union Directive on Takeover Bids: Directive 2004/25/EC [2008]', *Int'l Comp've Corp LJ* (2008): 13, 45–52.
582. For more details: *Ibid.*, 45–52.
583. F. Mucciarelli, 'White Knights and Black Knights: Does the Search for Competitive Bids Always Benefit the Shareholders of "target" companies?' (2006) Working Paper 8–9, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=910220>, accessed 21 Nov. 2006. (For another version of this paper see: F. Mucciarelli, 'White Knights and Black Knights: Does the Search for Competitive Bids Always Benefit the Shareholders of "Target Companies"?', *ECFR* 4 (2006): 408–425.)
584. F. Mucciarelli (n. 583), 3. L. Bebchuk, 'The Pressure to Tender: An Analysis and a Proposed Remedy', *Del J CL* 12 (1987): 911, L. Bebchuk, 'Toward Undistorted Choice and Equal Treatment in Corporate Takeovers', *HLR* 98 (1985): 1693.
585. F. Mucciarelli (n. 583), 3. There is an extensive analysis with numerical examples analysing the different combinations of higher and lower prices in two competing bids in the article of F. Mucciarelli (n. 583), 5–12.
586. See above, the deficiencies of the Mandatory Bid Rule.

cannot assess properly all the available bids, because they only take into account their potential post-bid situation as weak minority shareholders with under-valued shares. This exception of seeking an alternative bid does not distinguish coercive[587] competing bids from non-coercive ones: the Directive does not distinguish white knights from 'black knights'.[588] If the competing bid sought by the board is coercive, it is neither in the best interest of shareholders nor does it represent a simple market alternative. Therefore, a coercive defensive bid does not fit either of the rationales underpinning the white knight exception.[589] A coercive alternative bid therefore should be considered as a defensive measure. The white knight exception includes only non-coercive alternative bids. Each case of an alternative bid should be examined separately. This approach towards the white knight exception should be adopted, because the Directive does not allow only those alternative bids that are higher in price than was the first bid.[590] In the latter case, the shares really are put up for auction, but only as regards 100% voluntary bids to all holders of securities for all their holdings, because in all other cases, the bidder is obliged to launch a mandatory bid when he or she reaches the relevant control threshold (Article 5(2) of the Takeover Bid Directive). Thus, the minority shareholders are protected because of the existence of the mandatory bid provision, as well as because of the fact that the price of the mandatory bid cannot be less than the highest price paid for the same securities by the offeror during a specific period before the mandatory bid. This approach is compatible with the shareholders' protection rationale, because they are protected from this pressure to accept the bid. Otherwise, the board of the company could use this exception to guide the shareholders, through pressure to sell their shares, toward the offer of a bidder that they approve (and of course found) or toward the failure of the takeover in general.

The non-frustration rule (as well as the breakthrough rule) exists only because of the compromise of Article 12. Member States can opt out of Articles 9 and 11.[591] Paragraph 1 of Article 12 states that Member States may reserve the right not to require target companies to apply Article 9(2) and/or Article 11. However,

587. Coercive competing bids are bids that place pressure on the shareholders to accept them. In most cases, coercive competing bids are less attractive (with lower price) than other bids. The 'coerciveness' results from the fact that shareholders are obliged to accept this less profitable 'coercive' bid and reject the other more profitable public offers. The shareholders are led into this value-decreasing choice because they do not want to become minority shareholders with undervalued shares if the less attractive bid is successful. The shareholders prefer to sell their shares at a lower price rather than to find themselves 'trapped' as minority shareholders. Hence, they think that they will be secured from becoming minority shareholders, if they accept the less attractive bid. The less attractive takeover bid is coercive because it leaves no other choice to the shareholders other than accepting this bid and rejecting all others.
588. F. Mucciarelli (n. 583), 13.
589. F. Mucciarelli (n. 583), 13.
590. This 'higher price' solution is proposed by F. Mucciarelli (n. 583), 12.
591. Below, I will refer more extensively to the breakthrough rule and its opt-out.

according to the second paragraph of Article 12, where Member States opt out of Articles 9 and 11:

> 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).

The decision of a company to opt for either or both Articles should be made at the general meeting, and the applicable procedural rules are those for the amendment of the articles of association.

If the Directive had been adopted in its 2001 form, the non-frustration rule would have been obligatory. The optionality system was adopted, mainly in response to German objections, to secure the passage of the Directive through the European Parliament. The non-frustration/board neutrality rule is essential for the promotion of freedom of establishment at the European level. The boards of target companies will not be able to ruin the efforts of a potential investor to gain control of their companies. The fewer barriers that the board of a company can deploy, the more takeover bids that will be successful. The offeror company, by launching a successful bid and establishing itself in another Member State through the target company that it now controls, manages to penetrate new national markets. The market-making function of a non-frustration rule is obvious; this rule assists a company from one Member State in obtaining a controlling stake in a company in another Member State, leading to market integration. This clearly constitutes an exercise of the fundamental freedom of establishment (Article 43 of the EC Treaty). Additionally, reasons of equality would appear to favour the non-frustration rule, as it is unfair for some Member States to protect their companies by allowing defensive measures, while at the same time the companies of other Member States are made more vulnerable to takeovers because of the prohibition of defensive measures. Furthermore, the EC Treaty places corporate mobility among the main objects of European integration (Articles 2, 3(c), 14(2), 43 – especially (2), 44(2)(f), (g), and 48 of the EC Treaty).

The non-frustration rule respects the interests of shareholders by conferring on them the right to decide on the merits of a bid. The counter-argument, to the effect that the board of the company uses defensive measures in favour of the protection of shareholders from value-decreasing takeover bids, is not convincing. This is because of the risk that the board may be trying to entrench its own position by protecting the personal interests of its members and avoiding its replacement in case of a successful bid. It is also argued that, although the non-frustration rule is formulated quite broadly, to prevent all the kinds of conduct that can impede a takeover bid, this does not mean that all conduct incompatible with Article 9 of the Directive will also be incompatible with the right of establishment of a bidder (Article 43 of the EC Treaty).[592] For example, a prior authorization of a general meeting for the board, in advance of any bid being made, to adopt certain defensive

592. D.A. Wyatt & A. Dashwood (n. 46), 883–884.

measures to protect shareholders from inadequate offers infringes upon Article 9(2), but it may in fact serve shareholders' interests, because it increases the ability of the target company to negotiate a higher premium.[593] This kind of measure cannot be regarded as a restriction on the right of establishment (Article 43 of the EC Treaty), because it is a non-discriminatory activity by or on behalf of market operators to improve their market position vis-à-vis their competitors or their suppliers or customers, and it is not discriminatory conduct on the part of market operators and activities that restricts access to other market operators.[594] In the literature, there is a long-standing debate about which system of corporate governance better regulates the conduct of takeovers at the European level.[595] Furthermore, there are arguments about what the stance of a board should be during a takeover from a legal and economic perspective.[596] However, the European Commission has taken all these arguments into account, and it believes that the British model, with a non-frustration rule, should be adopted at the European level. The Council evidently has the same opinion, as it included the regulation of European takeover bids among the priorities of the Lisbon Agenda for the integration of the European Capital Market.

However, the Directive obliges opting-out Member States (Article 12(2)) to allow their companies to implement Articles 9 and/or 11 of the Directive, if they so wish. If a company of an opting-out Member State decides to opt in, it can nonetheless opt out again at a later stage. Only a general meeting of the company can make these decisions 'in accordance with the rules applicable to the amendments of the articles of association'. This implementation possibility for the companies of opting-out Member States mitigates the overall negative effect on European integration of the opt-out system. A Member State that opts out of these articles must enact special legislation that allows the willing companies to implement the rules. Hence, in a Member State that does not implement the non-frustration rule and/or the breakthrough rule, there has to be legislation for the implementation of these rules in voluntary cases. Two categories of listed companies will emerge within opting-out Member States; namely, opted-in companies applying the Directive and opted-out companies that are subject merely to national legislation regarding takeovers.[597] The companies of opting-out Member States could have an incentive to opt in. As was the case with creditworthiness and corporate governance, this arrangement will also give rise to a system of (national and international)

593. *Ibid.*, 884.
594. *Ibid.*
595. See for example: J. Payne (ed.), *Takeovers in English and German Law* (Oxford and Portland, Oregon: Hart Publishing, 2002), M. Gatti, 'Optionality Arrangements and Reciprocity in the Takeover Directive', in *European Takeovers: The Art of Acquisition*, ed. J. Grant, 1st edn (London: Euromoney Books, 2005), 107–108, and R. Kraakman et al. (n. 527), 157–191.
596. G. Bittlingmayer, 'The Market for Corporate Control (Including Takeovers)' *Online Encyclopedia of Law and Economics,* 725–771, <http://encyclo.findlaw.com/5640book.pdf>, accessed 21 Feb. 2007.
597. S.M. Bartman (n. 567), 6.

comparison and rating on the market.[598] The opted-in and opted-out status may, subsequently, lead to a certain ranking on the securities market, similar to the degree of creditworthiness.[599] Many companies that need liquidity will try to present themselves as open to potential investors on the European and global capital markets. The disclosure obligation under the Directive with regard to the internal control structure (Article 10) and the current protection regime (Article 11(4)) are of great importance here.[600] If any significant differences in prices occur between opted-in and opted-out companies, which are in other respects very similar companies, the latter will sooner or later find themselves under pressure to apply the voluntary regime as well.[601] This will lead to a boost in the market for corporate control, because listed companies will be discouraged from applying defensive measures. This element meets the need for empiricism in the field of European company law.[602] Takeover legislation will be harmonized from the bottom up.[603]

11.5 THE BREAKTHROUGH RULE (ARTICLE 11)

The High Level Group of Company Law Experts set out two basic principles. The first principle was that of shareholder decision-making, which is reflected in the general principle of Article 3(1)(c), and in the non-frustration rule of Article 9 of the Directive. This principle is directly related to the shareholder protection rationale. The second principle is the proportionality principle.[604] According to this principle, the degree of risk/reward that the shareholders are prepared to accept should determine the degree of control to be exercised by shareholders. Thus, the greater a shareholder's stake in the company in terms of his or her exposure to the company's success or failure through his or her holding in the risk-capital or general cash-flow rights, the greater his or her voice should be in determining the

598. S.M. Bartman (n. 567), 6. The Rating Agencies play an important role in providing an incentive for companies to implement these optional provisions. The Rating Agencies assess the creditworthiness of governments and corporations, as well as particular issues of securities as a guide to investors, for example, AAA for the best risks and D for firms that have either defaulted or are expected to default. The most important rating agencies are in the US (Standard and Poor's, Moody's Investor Service, Fitch Investor Service, Dominion). See P. Wood, 'Handout: Introduction to the Course of Global Comparative Financial Law', Degree of Magister Juris, University of Oxford, Acad. Year 2005–2006, 9.
599. S. Bartman, 'Crack the OOC Code!', *ECL* 3 (2006): 162, 163.
600. S.M. Bartman (n. 567), 6.
601. S.M. Bartman (n. 567), 7.
602. D.A. Wyatt & A. Dashwood et al. (n. 46), 874–875.
603. S. Bartman (n. 599), 163.
604. P. Mulbert, 'Make It or Break It: The Break-Through Rule as a Break-Through for the European Takeover Directive?', in *Reforming Company and Takeover Law in Europe*, ed. G. Ferrarini, K. Hopt, J. Winter & E. Wymmersch, 1st edn (Oxford: Oxford University Press, 2004), 717.

manner of its control.[605] This principle is expressed in the breakthrough rule. It aims at the facilitation of takeover activity and requires that when contractual and property rights are exercised in ways that inhibit takeover bids, these rights should be overridden.[606] Thus, the breakthrough provision embodies an enhanced, idealized, and even paternalistically imposed freedom of shareholders based on a defined optimal redistribution of rights.[607] This could also be called a 'one share, one vote' principle. Here we come again to the necessary balancing of partially conflicting rationales: the shareholders' protection rationale and the takeover promotion rationale. Article 11 of the Directive lays down that any restrictions on the transfer of securities or voting rights provided for in the articles of association of the offeree company, in contractual agreements between the offeree company and the holders of its securities, or in contractual agreements between holders of the offeree company's securities shall not apply vis-à-vis the offeror during the time allowed for acceptance of the bid (paragraphs 2 and 3). The Directive covers only contractual agreements entered into after the adoption of the Directive. The Directive expressly states that 'Multiple-vote securities shall carry only one vote each at the general meeting of shareholders which decides on any defensive measures in accordance with the Article 9.' Restrictions on the transfer of securities or on voting rights and any extraordinary rights of shareholders concerning the appointment or removal of board members are prohibited if the bidder obtains 75% or more of the voting capital of the target company (paragraph 4). The 'one share, one vote' principle is implemented, and multiple voting rights are declared inactive 'at the first general meeting of shareholders following closure of the bid, called by the offeror in order to amend the articles of association or to remove or appoint board members' (paragraph 4). The bidder has the right to convene a special post-breakthrough meeting so as to strengthen his or her controlling position in the target company (paragraph 4).[608] However, the Directive itself provides for two exceptions to the breakthrough rule. First, the breakthrough rule does not apply when restrictions on voting rights are compensated for by 'specific pecuniary advantages' (paragraph 6). Neither does it apply to legal 'golden shares' held by Member States.[609]

605. J. Rickford, 'The Emerging European Takeover Law from a British Perspective', *EBLR* (2004): 1379, 1385.
606. J. Rickford, 'Takeovers in Europe: Shareholders Decisions and Open Markets: A UK Perspective', in *European Takeovers: The Art of Acquisition*, ed. J. Grant, 1st edn (London: Euromoney Books, 2005), 67.
607. J. Rickford (n. 605), 67. See also: J. Coates IV, 'Ownership, Takeovers and EU Law: How Contestable Should EU Corporations Be?', in *Reforming Company and Takeover Law in Europe*, ed. G. Ferrarini, K. Hopt, J. Winter & E. Wymmersch, 1st edn (Oxford: Oxford University Press, 2004), 677–709.
608. See also: D. Van Gerven, 'Rules of Community Law Applicable to Takeover Bids', in *Common Legal Framework for Takeover Bids in Europe*, ed. D. Van Gerven (Cambridge: Cambridge University Press, 2008), 32. See also: L.A. Bebchuk, 'Reply. Letting Shareholders Set the Rules', *Harv L Rev* (2006): 1784.
609. See para. 7, 'where Member States hold securities in the offeree company which confer special rights on the Member States which are compatible with the Treaty, or to special rights provided for in national law which are compatible with the Treaty or to cooperatives'.

After objections from the European Parliament, and contrary to the suggestions of the High Level Group of Company Law Experts, a provision was included in the Directive concerning equitable compensation. This compensation is to be given when loss is suffered by the holders of special rights that are overridden (paragraph 5).

The breakthrough rule is deficient in two respects: as regards the substance of the rule and as regards the optional character of Article 11.[610] Both deficiencies are results of the political compromise to which the Directive owes its existence. The objectives of the proportionality principle are not fulfilled, and, as a result, takeover activity in Europe is not encouraged. Hence, obstacles to the freedom of establishment of legal persons still remain. As was already mentioned above, the breakthrough rule facilitates the activities of bidders by overriding disproportionate corporate structures. It prohibits any pre-bid defensive structures that might be deployed by a board so as to make it impossible for a bidder to finally obtain control. This facilitation of the activities of bidders should mean that takeover activity in Europe will increase, and cross-border mobility and the establishment of companies will be promoted. However, the deficiencies referred to above will frustrate the accomplishment of this aim to a great extent.

The breakthrough rule is called a 'mini-breakthrough' because it allows the breakthrough of some, but not all, of the restrictions that infringe upon the proportionality principle.[611] I contend that it is necessary to examine which categories of securities have survived the implementation of the breakthrough rule. It is obvious that there are many exceptions to the rule because of its narrow scope. The categories of securities that are outside the scope of the rule constitute obstacles to any potential bidder. These categories of securities that fall outside the scope of the breakthrough rule could inhibit the integration of the EU market in the realm of corporate control. Only a fully comprehensive breakthrough rule that covers all the securities constituting barriers to takeover activity will ever be able to contribute to an effective exercise of the freedom of establishment (Article 43 of the EC Treaty).

The first problem is created because of the text of the Directive itself. Article 2(1)(g) defines' multiple-voting securities' as 'securities included in a distinct and separate class and carrying more than one vote each'. Ceiling or time-lapse voting securities are not covered by the breakthrough rule. These shares are fully enfranchised after a specific holding period and are not covered because, while the voting rights will vary from time to time, according to the contingency of the duration of a holding, they remain of the same class.[612] This kind of share is

610. J. Rickford (n. 6054), 1389–1390. For more details: T. Papadopoulos (n. 581), 54–68.
611. J. Rickford (n. 605), 1389. However, there are questions as to whether certain categories of securities or types of company fall within the scope of the breakthrough rule. One example is the partnerships limited by shares. It seems that the corporate structure of partnerships limited by shares is covered by the Directive (this is particularly common in France, Italy, and Germany).
612. J. Rickford (n. 606), 69.

very common in France. The defensive aim of this kind of share is to discourage any potential bidder by ensuring that the offeror acquiring such a share obtains a diluted control right unless he or she is able to wait for up to four years for the shares to be fully enfranchised.[613] The requirement that shares comprise part of a distinct and separate class excludes an important category of shares from the scope of the breakthrough rule. The scope of this rule should be determined by the aim of negating the potential of certain shares to inhibit the takeover process, and not by formalities such as the requirement for different classes of shares. The breakthrough rule aims at preventing recourse to any pre-bid system of shares, which violates the proportionality principle, regardless of the class of the shares. It is unfortunate that the European Commission, the defender of freedom of establishment and corporate mobility, confirms this exception from the breakthrough rule.[614] Nevertheless, multiple-voting shares in separate classes are undoubtedly covered by the breakthrough rule. These kinds of shares are often found in Scandinavian Member States and sometimes in the UK. Thus, we have the side-effect that multiple-voting shares, which have exactly the same result of obstructing the course of the bid, are treated differently only because they belong to different classes. Furthermore, this creates inequality and does not level the playing field among the EU countries. France[615] has managed to exclude its own structures from the breakthrough rule without even opting out of the relevant provision. The argument that the harmonization of European company law should respect the idiosyncrasies of national company law and provide flexibility at the implementation stage is not convincing in this case. It is clear that the Directive tolerates the defensive structures available in some Member States (e.g., French ceiling shares) while prohibiting defences available in other Member States (e.g., Scandinavian dual-class shares).[616] Such states have not been able to effectively advocate their national interests in the Council. This exception also provides the incentive for companies, where national company law allows such changes, to move from dual- to single-class share structures while retaining disproportionate voting rights. The market for corporate control and the freedom of establishment cannot benefit from this diversified approach of the breakthrough rule to pre-bid defences.

Another category of shares that evades the application of the breakthrough rule is that of non-voting shares. Furthermore, in those Member States where the issuing of non-voting shares is prohibited, alternatives with the same effect are inevitably sought.[617] One alternative technique that has the same result as non-voting shares involves certificates for shares or non-voting depository receipts for shares. The shares are transferred to an independent administration office, which

613. *Ibid.*
614. Commission Proposal of 2 Oct. 2002 and Explanatory Memorandum [2003] *OJ* C45E/9.
615. For the implementation of the Takeover Bid Directive by France, see: F. Carle, 'Are French Listed Companies Takeover-Proof?', *ECL* (2007): 154.
616. U. Bernitz, 'The Attack on the Nordic Multiple Voting Rights Model: The Legal Limits under EU Law', *EBLR* (2004): 1423.
617. J.M.M. Maeijer & K. Geens (eds) (n. 515), 15.

manages the shares and exercises the voting rights in the interests of the company. The shareholders receive certificates in return for their shares and retain the proprietary rights arising from the shares.[618] This financial technique is the norm in the Netherlands, France, and Belgium.[619]

Another alternative to non-voting shares is securities that are not shares but nonetheless carry equity risk through a right to participate in profits (such 'enjoyment rights' are common in Germany).[620] The breakthrough rule undoubtedly does not cover these corporate instruments, which are not even shares. From these examples, it appears that there exist numerous means of avoiding or circumventing a national prohibition on non-voting shares. Boards can still entrench their positions even in cases in which a Member State tries to limit the exceptions to the breakthrough rule by prohibiting non-voting shares. I believe that these loopholes exist because the Directive does not designate the scope of the breakthrough rule by the effect of certain types of shares (i.e., the frustration of the bid), but by a specific requirement (i.e., to which category of shares it belongs). The Takeover Bid Directive gives emphasis to a formality (the category of shares) and does not take into account the substantive effects on the EU market in corporate control (the frustration of the bid). As mentioned above, this is probably a result of political opportunism in the legislative process, whereby some Member States have managed to exempt their national company share structures but others have not.

Another deficiency of the breakthrough rule is that it does not cover some categories of very effective pre-bid defences. Pyramid structures are not covered by the breakthrough rule. Pyramids are a form of corporate control structure whereby a company holds shares in another company, which in turn holds shares in another one.[621] Control of the corporation at the top of the pyramid combines with the stakes all the way down to achieve outright control of the chain.[622] Collectively, these are 'tunnelling' devices, inter-company dealings whose terms benefit the controlling shareholder at the top of the pyramid, often at the expense of minority shareholders.[623] Thus, the voting rights of the shareholders of the company at the bottom of the pyramid are diluted. The proportionality principle is distorted, because the controlling shareholder at the top of the pyramid can gain voting control of the company at the bottom of the pyramid by having disproportionately low cash-flow rights. The High Level Group of Company Law Experts recommended dealing with pyramids separately by not allowing stock exchange listing for holding companies whose sole activity was to hold shares in other listed companies.[624] This measure was not adopted by the Takeover Bid Directive, but it

618. J.M.M. Maeijer & K. Geens (eds) (n. 515), 15.
619. See an analysis of the national legislation at this point in J.M.M. Maeijer & K. Geens (eds) (n. 515), 15.
620. J. Rickford (n. 605), 1379.
621. J. Grant (n. 527), 15.
622. *Ibid.*
623. *Ibid.*
624. J. Winter, 'The Good, the Bad and Ugly of the European Takeover Directive', in *European Takeovers: The Art of Acquisition*, ed. J. Grant, 1st edn (London: Euromoney Books, 2005), 27.

is possible that it will be adopted in future legislation relating to securities and stock market regulation.

Furthermore, the breakthrough rule does not apply to cross-shareholdings. Cross-shareholdings are defensive arrangements whereby two companies buy stakes in each other and senior managers/owners sit on each other's boards and vote their shares together defensively.[625] 'Double-headed' companies constitute an advanced form of cross-shareholding. These corporate associations adopt a double corporate form but ensure that takeovers must be of both companies. This may be done by linking shareholdings in one company to shareholdings in the other, or coordinated, and sometimes entrenched, control may be assured by conferring cross-rights of board nomination and special, often preferential, share structures.[626] I propose that there should be a provision in the Directive stating that cross-shareholdings are in fact covered by the breakthrough rule. This is because cross-shareholdings infringe upon both of the principles (proportionality and shareholder decision-making) advocated by the High Level Group of Company Law Experts. The fact that one company interferes so extensively in the takeover of another company is negative for the shareholders of the target company, because a third party weakens their voting rights. It is also obviously negative for the bidder, who must bid for both companies rather than for only one of them because of these sophisticated corporate links. This aids neither the integration of the market for corporate control nor the creation of economies of scale. Bidders should be able to bid for their companies of preference and should not be pressed to bid for additional corporate bodies. This pressure can lead to unsatisfactory results: failure of a bid because of this defensive structure, withdrawal of a bid because of the incapability of financing a bid for both connected companies, or a value-decreasing situation because of the takeover of two companies, one of which the bidder does not really want. As a result, the freedom of establishment through a vibrant market for corporate control is not promoted, and there remain ways available for avoiding the minimum shareholder protection safeguards of the Directive. However, the possible cross-rights of board nomination in 'double-headed companies' are probably covered by the current form of the breakthrough rule, because they can be regarded as extraordinary rights within the meaning of Article 11(4). The only obligation is that, according to Article 10(1)(c)), pyramid structures and cross-shareholdings must be included in the information that is to be disclosed pursuant to this Article. This disclosure of information concerning the defensive structures of pyramids and cross-shareholdings could be crucial for the creditworthiness and ranking of the companies.

Additionally, Article 11(4) prohibits the exercise of extraordinary rights of shareholders at a general meeting for the amendment of the articles of association or for the removal or appointment of members of the board, following the

625. J. Grant (n. 527), 15.
626. J. Rickford (n. 605), 1392.

acquisition of 75% or more of the capital carrying voting rights.[627] These private 'golden shares' involve distortions of the proportionality principle, which are not related to direct restrictions on voting rights. The voting rights of the rest of the shareholders are distorted indirectly. Although the shareholders do not lose their rights to cast their votes, these are watered down as a result of the decisive role of these extraordinary rights in the appointment or removal of board members. Hence, it is obvious that the application of the proportionality principle is also undermined. It is useful to make reference to these extraordinary, priority shares. In companies with this category of shares, the exercise of some rights by a general meeting remains valid only if approved by the priority shareholders. Moreover, the general meeting may only exercise its rights upon the proposal of the priority shareholders.[628] This kind of extraordinary share is found in several continental European countries, and it is provided for by the articles of association of a target company. Article 11(4) does not state the appointment or removal of board members as the sole category of shares having extraordinary rights. Thus, we may conclude that all privileges conferred by the articles of association that distort the proportionality principle are undermined. This interpretation facilitates the exercise of the freedom of establishment (Article 43 of the EC Treaty) through a successful takeover bid.

The most important deficiency of the breakthrough rule is an 'external' one and derives from Article 12. The potential beneficial effects of the breakthrough rule have been tempered by the fact that Member States are allowed to opt out of the rule.[629] Between a defective breakthrough rule, with the deficiencies and weaknesses mentioned above, and an optional defective breakthrough rule, I suggest that the former be chosen. An optional breakthrough rule permits the deployment of pre-bid defences, which will probably permanently impede the takeover of a company. This does not really protect the interests of shareholders, who should, according to the principles of the Takeover Report, be the ultimate decision-makers on takeover issues. A non-optional breakthrough rule is genuinely able to protect the interests of shareholders by giving them the power to decide on the merits of a bid and to facilitate the bidder in his or her acquisition efforts by prohibiting pre-bid defensive tactics. One might also argue that a non-optional breakthrough rule could perform these tasks, even allowing for the fact that the breakthrough rule, in its current form, is not comprehensive, allowing many defensive structures to evade the application of the rule, even if it is watered down in practice by inconsistencies and ambiguities. It is quite obvious that a mandatory defective breakthrough rule is better than an optional defective breakthrough rule, because at least it constitutes a rule of some sort! The effects of the optionality

627. This provision states that the extraordinary rights shall concern 'the appointment or removal of board Members provided for in the articles of association of the offeree company' (delegation rights).
628. J.M.M. Maeijer & K. Geens (eds) (n. 515), 18.
629. F. Ipekel (n. 578), 345.

regime, analysed above in the non-frustration rule context,[630] apply to the breakthrough rule context too.

The breakthrough rule does not establish a level playing field for takeover bids at the European level for two reasons. The first is that the rule is optional both for Member States and companies (Article 12). The second is that, whether the rule is implemented on a mandatory or voluntary basis, there remain many share and corporate structures that evade its application, and there are also many ways of interpreting certain facets of Article 11[631] that can lead to inconsistencies. Thus, the breakthrough rule, in addition to its many deficiencies, is optional. Both of the reasons for the lack of a level playing field have to do with the political nature of this area of European company law, which is characterized by protectionist and mercantilist ideas. S. Bartman alleges that courts should interpret the scope of application of the Directive as widely as possible when judging protection devices that may not be covered by the Directive when it is read literally.[632] However, we should not neglect the fact that the Takeover Bid Directive is a political compromise, which tries to balance completely different mentalities of takeover regulation. The deficiencies and the opt-in–opt-out system of the Directive create a faulty incentive. It is a fact that many Member States will implement the breakthrough rule not because they intend to promote the freedom of establishment, but because they know in advance that their national corporate and financial structures infringing upon the proportionality principle are not covered by the breakthrough rule.

11.6 THE RECIPROCITY RULE (ARTICLE 12)

The reciprocity rule is found in Article 12(3):

> Member States may, under the conditions determined by national law, exempt companies which apply 9(2) and (3) and/or Article 11 from applying Article 9(2) and (3) and/or Article 11 if they become the subject of an offer launched by a company which does not apply the same Articles as they do, or by a company controlled, directly or indirectly, by the latter, pursuant to Article 1 of Directive 83/349/EEC.

Hence, the reciprocity rule is nothing more than a possibility granted to the companies by their Member States. Paragraph 5 of the same Article gives the

630. See above, on the deficiencies of the non-frustration rule.
631. Substantive deficiencies of Art. 11. Some of these issues are: syndical agreements, ceiling or time lapse voting shares, non-voting shares, pyramid share structures, cross-shareholdings, preference shares, proxies, extraordinary rights, multi-jurisdictional cases, equitable compensation.
632. S. Bartman, 'The EC Directive on Takeover Bids: Opting in as a Token of Good Corporate Governance', in *European Company Law in Accelerated Progress*, ed. S. Bartman (The Hague: Kluwer Law International, 2006), 3.

procedural conditions for the application of the reciprocity rule when it is granted by a Member State:

> Any measure applied in accordance with paragraph 3 shall be subject to the authorization of the general meeting of shareholders of the offeree company, which must be granted no earlier than 18 months before the bid was made public in accordance with Article 6(1).

Hence, the decision-making process for the application of the reciprocity rule has two levels: a legislative application by Member States and, subsequently, an individual application by the relevant companies.

However, the reciprocity rule[633] of the Takeover Bid Directive is very unclear because of its lack of a fixed and invariable basis. The provisions with respect to which the company is allowed to reciprocate are not always the same, as these depend on the method of application of the first two paragraphs of Article 12 by the offeree and the offeror company. The multiple levels of the reciprocity rule and the opt-in–opt-out provisions can create some quite complicated situations and subsequent interpretative dilemmas, which are closely related to the promotion, or not, of freedom of establishment.

In a Member State that has opted out of Articles 9 and/or 11, the board of a target company that has opted into either or both of these Articles may frustrate a bid by another company registered in that same Member State that has not opted in, but it may not frustrate a bid by a company registered in that same Member State that has opted in or by a company registered in any other Member State that is subject to the relevant Articles, either because the relevant Member State has not opted out, or because, although the relevant Member State has opted out, the bidder has opted in.[634] This appears to be a quite complicated outcome, which does not contribute to legal certainty. This reciprocity regime may lead to a bid from a company in the same Member State being subject to Articles 9 and/or 11 while a bid from a company registered in another Member State is not, which might seem to amount to indirect discrimination on grounds of nationality, contrary to Article 43 of the EC Treaty.[635] Yet any such difference in treatment is not, in truth, by reference to the Member State of registration of the company, but by reference instead to differences in the legal regimes that may be applicable in different Member States and, indeed, within the same Member State – differences, moreover, which reflect not only Member State choices, but also the choices of individual companies.[636] Therefore, a potential bidder could evaluate the full effects of the takeover bid if he or she knows in advance the legal framework to which the target company is subject, based on the exercise of the optional

633. For an interesting analysis, see: M. Becht, 'Reciprocity in Takeovers', in *Reforming Company and Takeover Law in Europe*, ed. G. Ferrarini, K. Hopt, J. Winter & E. Wymmersch, 1st edn (Oxford: Oxford University Press, 2004), 647–675.
634. D.A. Wyatt & A. Dashwood (n. 46), 882–883.
635. *Ibid.*
636. *Ibid.*

rights.[637] This evaluation on behalf of the bidder seems to be difficult because of the complex outcome of the optionality and reciprocity regime.

Nevertheless, the reciprocity rule presents one positive aspect with regard to the promotion of the freedom of establishment (Article 43 of the EC Treaty). The reciprocity rule creates an unintended incentive for those EU listed companies that want to be players (offerors) in consolidating markets rather than targets (offerees) to apply Articles 9 and 11 voluntarily.[638] Only then will the companies obtain immunity when they bid for other companies, which will not be able to opt out of these two ground rules (provided, of course, that the reciprocity rule is available in their jurisdiction). Thus, companies that want to be bidders on the takeover market rather than targets must first accept the takeover facilitating rules as being applicable to them.[639] Since every target company may be a (potential) acquirer in the various phases of its existence, it may be wise, for the sake of desirable or even necessary expansion, to assume the status of an opted-in company.[640] This helps the promotion of freedom of establishment by liberalization of the market for corporate control through the removal of post-bid and pre-bid takeover defences.

11.7 A FEW COMMENTS ON THE NON-FRUSTRATION/ BOARD NEUTRALITY RULE (ARTICLE 9), THE BREAKTHROUGH RULE (ARTICLE 11), AND THE RECIPROCITY RULE (ARTICLE 12)

Takeovers are a means for investors to create synergies between existing businesses and target companies, because many European companies will need to grow to an optimal size (and, therefore, invest by means of takeover bids), while the financial markets should benefit as well from more liquidity.[641] It is well-known

637. S. Maul, D. Muffat-Jeandet & J. Simon, 'Introduction, Cross-Border Transactions', in *Takeover Bids in Europe*, ed. S. Maul, D. Muffat-Jeandet & J. Simon (Freiburg: Memento Verlag, 2008), 1.
638. J. Winter, 'The Good, the Bad and Ugly of the European Takeover Directive', in *European Takeovers: The Art of Acquisition*, ed. J. Grant, 1st edn (London: Euromoney Books, 2005), 28. Firms that subsequently become takeover targets make acquisitions that significantly reduce their equity value, and firms that do not become takeover targets make acquisitions that raise their equity value. M.L. Mitchell & K. Lehn, 'Do Bad Bidders Become Good Targets?', *J Pol Econ* (1990): 372–398. Moreover, very large companies aere not often the target of takeover bids and would therefore be relatively unrestrained by the market in corporate control. This will give them the possibility of not applying the optional provisions of the Takeover Bid Directive, because they can play only the role of the offeror company. Nevertheless, some financial techniques have enabled companies to overcome traditional barriers in the financial markets and to acquire very large offeree companies. R.A. Chatterjee, 'The Financial Performance of Companies Acquiring Very Large Takeover Targets', *Appl Fin Econ.* (2000): 185–191.
639. J. Winter, 'We All Want to Go to Heaven but Nobody Wants to Die', *ECL* 1 (2004): 4, 4.
640. S.M. Bartman (n. 567), 7.
641. COM (2002) 534, 35.

that takeover bids are a very important source of external growth, which is vital for EU corporations that are seeking to penetrate new markets and to become more competitive at the global level against non-EU corporations.[642] Although the Takeover Bid Directive does not promote takeover bids as such, the minimum harmonization of some of the rules that govern takeover bids (e.g., the mandatory bid rule) will contribute to the improvement, to a certain extent, of the competitive position of companies in Europe.[643] The mere possibility that companies could be taken over even against the will of their boards is something positive for the private enterprise system, because takeovers eliminate inefficient companies or exercise pre-emptive pressure on boards to ameliorate their performance.[644] The proclaimed aim of the Takeover Bid Directive was to promote cross-border takeovers by providing minimum harmonized conditions for conducting successful cross-border takeover bids and by establishing a level-playing field in the European market for corporate control. Thus, cross-border corporate mobility and corporate restructuring were also to be promoted, with the intention being to facilitate the fundamental freedom of establishment of companies (liberalization of the market for corporate control). Harmonization was necessary because there were legal, economic, and structural differences among the Member States with respect to defensive measures that could be put into operation to fight hostile takeover bids, so that companies in some Member States were better protected than were companies in other Member States.[645] This legal diversity was the ideal environment for national protectionism to flourish within the market for corporate control. The Takeover Bid Directive was supposed to reduce these differences in several ways, without compromising the competitiveness of EU companies in relation to companies of third countries.[646] However, the reduction of legal diversity in the EU market in corporate control is by no means an indisputable fact, because of the optionality and the reciprocity regimes.

642. S. Grundmann, *European Company Law, Organization, Finance and Capital Markets* (Antwerpen: Intersentia, 2007), 492–493, 573, 592.
643. COM (2002) 534, 35. It is quite interesting to refer here to the argument against harmonization of takeovers, which maintains that harmonization on corporate governance matters does not enhance the economic system and in fact disrupts the equilibria that constitute the basis of our economic welfare. This is so because harmonization, apart from the level-playing field rationale, does not always take into account essential elements of social consensus, such as the defensive mechanisms in a takeover. A level playing field could not be established for those societal issues. Harmonization does not consider thoroughly essential elements of social consensus (sometimes shown by the co-determination model) which justify the social role of private business enterprises. Hence, regulatory competition is the optimal method of regulating takeovers and of promoting competition among enterprise structures. E. Wymeersch, 'The Regulation of Takeover Bids in a Comparative Perspective', in *European Economic and Business Law*, ed. R. Buxbaum et al. (New York: de Gruyter, 1996), 321.
644. E. Wymeersch (n. 643), 306–307.
645. COM (2002) 534, 35. K. Byttebier, 'Protective and Defensive Measures Against Hostile Takeovers', in *Further Perspectives in Financial Integration in Europe*, ed. E. Wymeersch (Berlin-New York: de Gruyter, 1994), 181–192.
646. COM (2002) 534, 35.

Although the primary objective of these Articles is to protect shareholders by conferring on them the possibility of deciding on the merits of a bid, neither this multi-layered opt-in–opt-out system nor the reciprocity rule contributes to this aim. It amounts to 'harmonized' legal diversity and multi-formity. Hence, there are three levels of regulatory competition available in the market for corporate control: competition among national company laws, competition among the individual legal regimes of domestic companies, and competition among the individual legal regimes of domestic and other EU registered companies. The choices that the opt-in–opt-out system, combined with the reciprocity rule, offer to Member States and to companies can result in numerous combinations. Hence, the Takeover Bid Directive makes sixteen different legal regimes available to Member States. The available legal regimes can be dramatically increased through decisions at the company level.[647,648] The significance of multiple options in a harmonization measure is that they place in doubt the extent to which the harmonization in question is worthy of the name, and they might be said to imply that the objective of achieving solutions at the European level has overshadowed the aim of promoting cross-border business activity.[649] This is not to question the area of harmonization as regards takeover bids or European company law, but rather the method of harmonization, which provides so many totally different options. Moreover, the argument that different standards should co-exist and compete is more convincing in the case of tradeable goods and services than it is in that of company law

647. Pursuant to Art. 12 of the Takeover Bid Directive, each Member State must make four choices in connection with the non-frustration and breakthrough rules. Each Member State must decide: (1) whether or not to implement the non-frustration rule, (2) whether or not to implement the reciprocity clause in relation to the non-frustration rule (which, if not opted into by the Member State, can always be opted into at the company level), (3) whether or not to implement the breakthrough rule, and (4) whether or not to implement the reciprocity clause in relation to the breakthrough rule (given that, like the non-frustration rule, if the breakthrough rule is not implemented by a Member State, it can always be opted into at the company level). Given these four binary choices, and all the possible combinations thereof, theoretically the Takeover Directive gives Member States the possibility of choosing from among sixteen different regimes. The actual number of possible combinations increases dramatically if two more possibilities are added: (1) where a Member State has opted out, making opt-ins at the company level with regard to choices about the non-frustration rule and/or the breakthrough rule (Art. 12(2)); and (2) where a Member State has adopted the reciprocity clause, deciding, again at the company level, whether or not to exploit reciprocity (Art. 12(5)) M. Gatti, 'Optionality Arrangements and Reciprocity in the Takeover Directive', in *European Takeovers: The Art of Acquisition*, ed. J. Grant, 1st edn (London: Euromoney Books, 2005), 104.

648. M. Gatti questions whether the opt-in–opt-out system of the Directive is superior to an easier and functionally equivalent one in which a Member State that does not impose the board neutrality rule as mandatory would be required to set such a regime as the default rule but with the possibility for companies to opt out of it. This proposed system, if compared with the opt-out–opt-in mechanism of Art. 21(1) and (2), is more pro-freedom of establishment, and has the virtue of clearly signaling to the market which issuers intend to depart from the pro-shareholders standard provided for by the board neutrality rule. M. Gatti (n. 647), 110.

649. D.A. Wyatt & A. Dashwood (n. 46), 871–872.

legislation, because it comprises package deals.[650] The only positive thing is that, because of the Directive, at least now we know in advance the content of these regimes and do not have twenty-seven national takeover regimes, which can be completely unpredictable and perhaps arbitrary. However, the number of available legal regimes is still quite high and does not provide legal certainty, nor does it combat the psychological obstacles to cross-border corporate establishment. Furthermore, the biggest problem is that the degree of flexibility resulting from the optionality and reciprocity regimes has provided Member States with several ways to evade imposing strict regulation on takeover defences.[651] This is definitely not compatible with the general principles of the Directive and especially with the general principle of Article 3(1)(c). However, opting out of Article 9(2) does not suspend or create an exception to the application of the general principle laid down in Article 3(1)(c) of the Directive, and this general principle might be read as aiming in part to ensure that opting out of Article 9(2) remains compatible with Article 43 of the EC Treaty.[652] This general principle in Article 3(1)(c) provides protection of the shareholders' rights in cases of opt-outs from Article 9(2). Otherwise, without the guarantee and the overarching protection of this general principle, the conduct of a board might well run the risk of infringing upon the freedom of establishment. An example of this kind of infringing behaviour, according to D.A. Wyatt, would be the break-up of a company by the board, without the authorization of a general meeting, when the acceptance of a bid by the shareholders and the success of the takeover are considered imminent.[653] The general principles might be characterized as a corrective to the deficiencies of the opt-in–opt-out and reciprocity arrangements.

11.8 SUPERVISORY AUTHORITY AND APPLICABLE LAW

Article 4 determines the authority that is to supervise the conduct of takeover bids, as well as the applicable law that will regulate the several aspects of a takeover bid. Each Member State must designate an authority or authorities to supervise those aspects of bids that are governed by the Takeover Bid Directive and to ensure that parties to takeover bids comply with the rules made pursuant to this Directive.[654] All those authorities should cooperate[655] with one another (Recital 5 of the

650. G. Wolff (n. 310), 20.

651. M. Gatti (n. 647), 104.

652. Article 3(1)(c) of the Takeover Bid Directive states that 'the board of an offeree company must act in the interests of the company as a whole and must not deny the holders of securities the opportunity to decide on the merits of the bid'. D.A. Wyatt, A. Dashwood et al. (n. 46), 884.

653. D.A. Wyatt, A. Dashwood et al. (n. 46), 884.

654. See also: D. Van Gerven, 'Rules of Community Law Applicable to Takeover Bids', in *Common Legal Framework for Takeover Bids in Europe*, ed. D. Van Gerven (Cambridge: Cambridge University Press, 2008), 10–14.

655. Article 4(4) states that the supervisory authorities of the Member States for the purposes of this Directive and other authorities supervising capital markets, in particular, in accordance with

Preamble). In accordance with Article 4(1), Member States are to designate the authority or authorities competent to supervise bids for the purposes of the rules that they make or introduce pursuant to this Directive. The authorities thus designated must be public authorities, associations or private bodies recognized by national law, or public authorities expressly empowered for that purpose by national law. Member States shall inform the Commission of those designations, specifying any divisions of functions that have been made. They shall ensure that those authorities exercise their functions impartially and independently of all parties to a bid.

The possibility that, in addition to public authorities, associations or private bodies recognized by national law could supervise takeover bids was inserted into this Article of the Takeover Bid Directive because of some UK concerns about the preservation of the special status of the self-regulatory body, the Takeover Panel.[656] It was in the UK that national takeover regulation first emerged, and the UK was also the most shareholder-protective state in Europe, as a result of several highly publicized takeovers that provoked demands for improvement of the situation for target company shareholders. The UK market players (the Bank of England, the British Bankers Association, the Institute of Chartered Accountants, the London Investment Banking Association, the Confederation of British Industry, the Association of British Insurers, and the National Association of Pension Funds) agreed to regulate themselves, and this led to the adoption of the UK Takeover Code in 1968 and the creation of a self-regulatory body, the Takeover Panel.[657] These UK organizations and their members decided to develop this self-regulatory regime so as to impose discipline on the market in corporate control, by which they are significantly affected. The UK feared that the shift towards a harmonized legislative system would create problems for its active self-regulated takeover market with the creation of obstructive litigation and delays.[658] The main

Directive 93/22/EEC, Directive 2001/34/EC, Directive 2003/6/EC, and Directive 2003/71/EC of the European Parliament and of the Council of 4 Nov. 2003 on the prospectus to be published when securities are offered to the public or admitted to trading, shall cooperate and supply each other with information wherever necessary for the application of the rules drawn up in accordance with this Directive and in particular in cases covered by para. 2(b), (c) and (e). Information thus exchanged shall be covered by the obligation of professional secrecy to which persons employed or formerly employed by the supervisory authorities receiving the information are subject. Cooperation shall include the ability to serve the legal documents necessary to enforce measures taken by the competent authorities in connection with bids, as well as such other assistance as may reasonably be requested by the supervisory authorities concerned for the purpose of investigating any actual or alleged breaches of the rules made or introduced pursuant to this Directive.

656. R. Skog (n. 570), 301. The examination of the UK Takeover Code falls outside the scope of this book. I will refer to the UK Takeover Code only where it has inspired the European legislature. For an extensive analysis of the UK Takeover Code see: G. Stedman, *Takeovers*, Longman Commercial Series, 1st edn (London: Longman, 1993) and S. Kenyon-Slade, *Mergers and Takeovers in the US and UK: Law and Practice*, 1st edn (Oxford: Oxford University Press, 2004).
657. R. Skog (n. 570), 301.
658. J.S.Knudsen, 'Is the single European Market an Illusion? Obstacles to Reform of EU Takeover Regulation', *ELJ* 11 (2005): 507, 509. See also for a more extensive and well-founded

objections of the UK concerned the fact that the takeover rules would be given the force of law, and that there would be more delays as a result of more frequent litigation, which could put an end to particular takeover bids (the English courts, under the then-current City Code regime, practised self-restraint and discouraged tactical litigation). Moreover, the UK government alleged that the Takeover Panel would also lose its flexibility to adjust the takeover rules and to give rulings on issues arising in the course of a bid.[659] The British criticism was especially troublesome for the Commission, since the UK Takeover Code had served as a model for the Commission's proposal, and also for the various takeover regulations that by then had gradually begun to be promulgated across Continental Europe.[660]

Finally, the European Commission took into account the UK concerns and formed the Directive's provision on the supervisory authorities in such a way that the special status and powers of the Takeover Panel could be preserved.[661] Recital 8 of the Takeover Bid Directive's Preamble stresses that, in accordance with general

analysis: S. Kenyon-Slade & M. Andenas, 'The Proposed Thirteenth Directive on Takeovers: Unravelling the United Kingdom's Self-Regulatory Success?', in *E.C. Financial Market Regulation and Company Law*, ed. S. Kenyon-Slade & M. Andenas (London: Sweet & Maxwell, 1993), 149–188. M. O'Neill, 'When European Integration Meets Corporate Harmonization', *Comp. Law.* 21 (2000): 173, 175–176. For an early consideration of the Code: A. Johnston, *The City Take-Over Code* (Oxford: Oxford University Press, 1980) and N.S. Poser, *International Securities Regulation* (Toronto: Little Brown & Company, 1991). Furthermore, see for a comparison between the two systems of regulation, self-regulatory/private regulation and statutory/public regulation, and their analysis (arguments in favour and against each system of regulation): B. Pettet, 'Private versus Public Regulation in the Field of Takeovers: The Future under the Directive', *EBLR* 5 (2000): 381. For an extensive critical analysis of the self-regulatory takeover regime of England, one of the most advanced in the world, see: G. De Minico, 'A Hard Look at Self-Regulation in the UK', *EBLR* (2006): 183, P.L. Davies, *Gower and Davies' Principles of Modern Company Law*, 7th edn (London: Sweet & Maxwell, 2003), 704, D. Kershaw, 'The Illusion of Importance: Reconsidering the UK's Takeover Defence Prohibition', *ICLQ* 56 (2007): 267. For an interesting comparison between England's self-regulatory, standards-based system and the US's more formal, rules-based system see: B.E. Rosenzweig, 'Private versus Public Regulation: A Comparative Analysis of British and American Takeover Controls', *Duk. J. Comp. Int. L.* 18 (2007): 213. See also a very interesting article on disputes and litigation in takeover bids: T.I. Ogowewo, 'Tactical Litigation in Takeover Contests', *JBL* (2007): 589–619. For a critical approach to General Principle No. 7 of the UK Takeover Code (shareholders should decide the outcome of a takeover bid), which was the basis of the non-frustration rule of the Takeover Bid Directive, see: A. Dignam, 'The Globalisation of General Principle 7: Transforming the Market for Corporate Control in Australia and Europe?', *Legal Studies* 28 (2008): 96–118.

659. V. Edwards (n. 544), 420. Securities arbitration is another very flexible method of alternative dispute resolution: S. Ware, 'What Makes Securities Arbitration Different from Other Consumer and Employment Arbitration?', *U Cinc LR* 76 (2008): 447, J.Gross & B. Black, 'When Perception Changes Reality: An Empirical Study of Investors' Views of the Fairness of Securities Arbitration', *J Disp Res* (2008): 349., B. Black & J. Gross, 'Making It Up as They Go Along: The Role of Law in Securities Arbitration', *Card LR* 23 (2002): 991, J. Johnson & E. Brunet, 'Substantive Fairness in Securities Arbitration', *U Cinc L.*76 (2007).
660. R. Skog (n. 570). 303.
661. See also Recital 7 of the Directive's Preamble, which states that self-regulatory bodies (such as the UK Takeover Panel) should be able to exercise supervision.

principles of Community law, and in particular the right to a fair hearing, decisions of a supervisory authority should, in appropriate circumstances, be subject to review by an independent court or tribunal. However, Member States should be left to determine whether rights are to be made available for assertion in administrative or judicial proceedings, either in proceedings against a supervisory authority or in proceedings between parties to a bid. This latter part of Recital 8 was deemed to satisfy the UK concerns with regard to judicial intervention into the Takeover Panel's proceedings. In addition, Article 4(6) states that this Directive does not affect either the power of the Member States to designate judicial or other authorities responsible for dealing with disputes and for deciding on irregularities committed in the course of bids, or the power of Member States to regulate whether and under which circumstances parties to a bid are entitled to bring administrative or judicial proceedings. In particular, this Directive does not affect the power which courts may have in a Member State to decline to hear legal proceedings and to decide whether or not such proceedings affect the outcome of a bid. The Directive also does not affect the power of the Member States to determine the legal position concerning the liability of supervisory authorities or concerning litigation between the parties to a bid (Article 4(6)). Therefore, litigation before UK courts, which causes delays and could be responsible for irreversible damage to the takeover process, will continue to be infrequent.

Article 4(2) circumscribes the national authorities that are competent to supervise the conduct of takeover bids within the framework of the internal market. The authority competent to supervise a bid is to be that of the Member State in which the offeree company has its registered office, if that company's securities are admitted to trading on a regulated market in that Member State (Article 4(2)(a)). If the offeree company's securities are not admitted to trading on a regulated market in the Member State in which the company has its registered office, the authority competent to supervise the bid shall be that of the Member State containing the regulated market where the company's securities are admitted to trading. Moreover, if the offeree company's securities are admitted to trading on regulated markets in more than one Member State, the authority competent to supervise the bid shall be that of the Member State containing the regulated market to which the securities were first admitted to trading (Article 4(2)(b)). Additionally, if the offeree company's securities were first admitted to trading on regulated markets in more than one Member State simultaneously, the offeree company is to determine which of the supervisory authorities of those Member States shall be the authority competent to supervise the bid by notifying those regulated markets and their supervisory authorities on the first day of trading. If the offeree company's securities have already been admitted to trading on regulated markets in more than one Member State and were admitted simultaneously, the supervisory authorities of those Member States shall agree which one of them shall be the authority competent to supervise the bid. Otherwise, the offeree company shall determine which of those authorities shall be the competent authority (Article 4(2)(c)). Member States shall ensure that the decisions on the national competent authorities responsible for the supervision of cross-border bids are made public (Article 4(2)(d)).

The Takeover Bid Directive also contains a provision on the role of the national competent authorities during the takeover process. Article 4(5) states that the supervisory authorities shall be vested with all the powers necessary for the purpose of carrying out their duties, including that of ensuring that the parties to a bid comply with the rules made or introduced pursuant to this Directive. Provided that the general principles laid down in Article 3(1) are respected, Member States may provide, in the rules that they make or introduce pursuant to this Directive, for derogations from those rules: (1) by including such derogations in their national rules, so as to take account of circumstances determined at the national level, and/or (2) by granting their supervisory authorities, where they are competent, powers to waive such national rules to take account of the circumstances referred to in (1) or in other specific circumstances, in which case a reasoned decision is required. Furthermore, Recital 6 of the Preamble states that, to be effective, takeover regulations should be flexible and capable of dealing with new circumstances as they arise and should, accordingly, provide for the possibility of exceptions and derogations. However, in applying any rules or exceptions laid down or in granting any derogations, supervisory authorities should respect certain general principles. These principles are found in Article 3 of the Takeover Bid Directive and contain certain very important safeguards. These principles play an overarching role. They cover all the provisions of the Takeover Bid Directive, and all the implementing measures of the Member States must comply with them. As a matter of fact, the national competent authorities are also bound by these general principles when they are exercising their supervisory duties.

As regards the applicable law, Article 4(2)(e) states that in the cases referred to in Article 4(2)(b) and Article 4(2)(c) mentioned above, matters relating to the consideration offered in the case of a bid (in particular, the price), and matters relating to the bid procedure (in particular, the information on the offeror's decision to make a bid), the contents of the offer document and the disclosure of the bid shall be dealt with in accordance with the rules of the Member State of the competent authority. In matters relating to the information to be provided to the employees of the offeree company and in matters relating to company law, in particular, the percentage of voting rights that confers control and any derogation from the obligation to launch a bid, as well as the conditions under which the board of the offeree company may undertake any action that might result in the frustration of the bid, the applicable rules and the competent authority shall be those of the Member State in which the offeree company has its registered office.

11.9 INFORMATION FOR AND CONSULTATION OF EMPLOYEES' REPRESENTATIVES

The European Parliament asked for better protection of employees working for companies involved in takeover bids. The Takeover Bid Directive sought to meet the European Parliament's concerns about employee protection by providing for

national measures to govern the provision of information and consultation of representatives of the employees of both the target company and the bidder.[662] The Takeover Bid Directive does not introduce new consultation rights for employees. It does, however, specifically refer to the various Community measures that have already been adopted in this area.[663] The Preamble of the Takeover Bid Directive emphasizes this requirement for information and consultation of employees' representatives. Recital 13 of the Preamble demands that the holders of securities be properly informed of the terms of a bid by means of an offer document. Appropriate information should also be given to the representatives of the company's employees or, failing that, to the employees directly. Recital 17 of the Preamble calls on the board of an offeree company to make public a document setting out its opinion of the bid and the reasons on which that opinion is based, including its views on the effects of implementation on all the company's interests, and specifically on employment.

The Takeover Bid Directive refers explicitly to the already existing Community legal framework of employees' information and consultation. As far as the information for and the consultation of employees' representatives is concerned, Article 14 stipulates that the Takeover Bid Directive shall be without prejudice to the EU rules relating to information and to consultation of representatives, and that, if Member States so provide, co-determination with the employees of the offeror and the offeree company shall be governed by the relevant national provisions, in particular, those adopted pursuant to Directives 94/45/EC, 98/59/EC, 2001/86/EC, and 2002/14/EC.[664] Moreover, Recital 23 of the Preamble mentions all these Community legal instruments on the information and consultation of employees that also apply to the area of takeover bids: the disclosure of information to and the consultation of representatives of the employees of the offeror and the offeree company should be governed by the relevant national provisions, in particular, those adopted pursuant to Council Directive 94/45/EC, on the establishment of a European Works Council, or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees;[665] Council Directive 98/59/EC, on the approximation of the laws of the Member States relating to collective redundancies;[666] Council Directive 2001/86/EC, supplementing the statute for a European Company with regard to the involvement of employees;[667] and Directive 2002/14/EC of the European Parliament and of the Council, establishing a general framework for informing and

662. V. Edwards (n. 544), 429.
663. Proposal for a Directive of the European Parliament and of the Council on Takeover Bids (Explanatory Memorandum, Legislative Financial Statement, Impact Assessment Form) COM (2002) 534 final, *OJ* [2003] 45E/1-17.
664. See also: C. Barnard, *EC Employment Law*, 3rd edn (Oxford: Oxford University Press, 2006), 743.
665. [1994] OJ L254/64. Directive as amended by Directive 97/74/EC ([1998] OJ L10/22).
666. [1998] OJ L225/16.
667. [2001] OJ L294/22.

consulting employees in the European Community[668] – a joint declaration of the European Parliament, the Council, and the Commission on employee representation. In addition to these Community legal instruments applying to takeover bids, Recital 23 of the Takeover Bid Directive's Preamble explicitly gives the opportunity to employees or to their representatives to express their opinions on the impact of a takeover bid. It states that the employees of the companies concerned, or their representatives, should be given an opportunity to state their views on the foreseeable effects of the bid on employment. Additionally, Recital 23 of the Preamble also refers to an EC securities regulation legal instrument connected to the information and consultation framework. Without prejudice to the rules of Directive 2003/6/EC of the European Parliament and of the Council, on insider dealing and market manipulation (market abuse),[669] Member States may always apply or introduce national provisions concerning the disclosure of information to, and the consultation of representatives of, the employees of the offeror before an offer is launched (Recital 23).

The obligation for information for employees is also included among the general principles of Article 3. Article 3(1)(b) states that, when it advises the holders of securities, the board of the offeree company must give its views on the effects of implementation of the bid on employment, the conditions of employment, and the locations of the company's places of business. Taking into account the overarching role of the general principles, the inclusion of this information requirement among the general principles shows the interest of the European legislature. The European legislature took into account the concerns of the European Parliament and decided to confer the status of a general principle of the Directive on the requirement for information for employees. Furthermore, according to Article 6(1), as soon as the bid has been made public, the boards of the offeree company and of the offeror shall inform the representatives of their respective employees or, when there are no such representatives, the employees themselves. When the bidder drafts the offer document, he or she is also obliged to inform the employees about the various aspects of the takeover bids. Article 6(2) states that Member States shall ensure that an offeror is required to draw up and make public in good time an offer document[670] containing the information necessary to enable the holders of the offeree company's securities to reach a properly informed decision on the bid. Before the offer document is made public, the offeror shall communicate it to the supervisory authority. When it is made public, the boards of the offeree company and of the offeror shall communicate it to the representatives

668. [2002] OJ L80/29.
669. [2003] OJ L96/16.
670. The Takeover Bid Directive allows a European passport to be granted for the offer document of a takeover bid. When a bidder possesses a European passport, the offer document can be circulated freely in the internal market and without re-approval being required in other Member States where the offeree company's shares are accepted. D. Van Gerven, 'Rules of Community Law Applicable to Takeover Bids', in *Common Legal Framework for Takeover Bids in Europe*, ed. D. Van Gerven (Cambridge: Cambridge University Press, 2008), 4.

of their respective employees or, when there are no such representatives, to the employees themselves. The Takeover Bid Directive also determines the minimum content of this offer document and includes explicitly the provision of information on the business plans of the offeror as regards the offeree company and the offeror company. It shall state, at the very minimum, the offeror's intentions with regard to the future business of the offeree company and, insofar as it is affected by the bid, the offeror company, and with regard to the safeguarding of the jobs of their employees and management, including any material changes in the conditions of employment, and, in particular, the offeror's strategic plans for the two companies and the likely repercussions on employment and the locations of the companies' places of business (Article 6(3)(i)). The Takeover Bid Directive also stresses the importance of the effective disclosure of these documents required by Article 6. Article 8(2) states that Member States shall provide for the disclosure of all information and documents required by Article 6 in such a manner as to ensure that they are both readily and promptly available to the holders of securities at least in those Member States containing the regulated markets to which the offeree company's securities are admitted for trading. The disclosure must be made to the representatives of the employees of the offeree company and the offeror or, when there are no such representatives, to the employees themselves.

Not only must the board of the offeror company disclose its intentions on the future of employment in the target company, but also, the board of the offeree company can express its point of view on the bid and its various terms concerning employment. According to Article 9(5), the board of the offeree company must draw up and make public a document setting out its opinion of the bid and the reasons on which it is based, including its views on the effects of implementation of the bid on all the company's interests and, specifically, employment, as well as its views on the offeror's strategic plans for the offeree company and their likely repercussions on employment and the locations of the company's places of business as set out in the offer document. The board of the offeree company must at the same time communicate that opinion to the representatives of its employees or, when there are no such representatives, to the employees themselves. When the board of the offeree company receives in good time a separate opinion from the representatives of its employees on the effects of the bid on employment, that opinion shall be appended to the document (Article 9(5)). While the board neutrality/non-frustration rule of Article 9 does allow the board of the target company to take any defensive measures against the bid without the prior authorization of a general meeting, it gives the board an opportunity to influence the decision of the shareholders to reject the bid or to get the necessary permission from the general meeting to frustrate the bid through this document expressing its opinion. If the arguments of the company's board against the bid are well-founded and substantiated, the shareholders will probably be convinced, provided that they trust the board of their company. Then, the bid can be probably rejected or frustrated.

11.10 TRANSPOSITION OF THE DIRECTIVE

In 2007, the European Commission published a report on the implementation of the Takeover Bid Directive by the Member States.[671] Internal Market and Services Commissioner C. McCreevy, commenting on this Report, declared that:

> Too many Member States are reluctant to lift existing barriers, and some are even giving companies yet more power to thwart bids. The protectionist attitude of a few seems to have had a knock-on effect on others. If this trend continues, then there is a real risk that companies launching a takeover bid will face more barriers, not fewer. That goes completely against the whole idea of the Directive.[672]

As far as the mandatory bid is concerned, Member States enjoy discretion and could determine the length of the pre-acquisition period (six or twelve months), the threshold triggering the takeover bid, how the price for the securities to be bought is reached, and whether the consideration could be a cash offer or a transfer of securities (which can influence the total sum of the bid and the consideration to be acquired).[673] The threshold above which control is deemed to have been acquired is defined at the national level. If the threshold is set lower than it was before the implementation of the Directive, the protection of minority shareholders will be strengthened. The introduction of the mandatory bid rule in Member States that did not have such a provision previously constitutes a huge step toward effective protection of minority shareholders.[674] Nevertheless, the European Commission's Report found that the Member States had taken advantage of the various deficiencies of the mandatory bid rule at the implementation stage. It states that Member States had widely used the flexibility provided by the Directive to derogate from the Directive's provisions so as to maintain their exceptions from the mandatory bid rule. Some of these exceptions are necessary to ensure that this obligation applies only when the holding actually confers control, while others are more far-reaching. Furthermore, in some Member States, supervisory authorities seem to have extensive powers to grant exceptions to the rule. Exceptions and wide-ranging discretionary power can undermine the effectiveness of the protection provided by such a rule.[675]

According to this Report, most of the Member States decided to apply the board neutrality/non-frustration rule: eighteen Member States in total now impose the board neutrality rule. However, the board neutrality obligation is not new in any of these Member States, except one. Five of these Member States have introduced

671. Commission Staff Working Document, Report on the Implementation of the Directive on Takeover Bids, SEC (2007) 268.
672. IP/07/251.
673. S. Maul, D. Muffat-Jeandet & J. Simon (n. 637), 3.
674. Commission Staff Working Document, Report on the Implementation of the Directive on Takeover Bids, SEC (2007) 268, 9.
675. Commission Staff Working Document, Report on the Implementation of the Directive on Takeover Bids, SEC (2007) 268, 9.

the reciprocity exception, which may inhibit the emergence of an active EU market in corporate control, contrary to the original objective of the Directive.[676] No Member State has decided to implement the board neutrality rule where it was not (fully) applied before implementation, except for Malta.[677] Some Member States had no strict board neutrality obligation before the implementation of the Directive. All these Member States have decided to introduce the rule only on a voluntary basis, in conformity with the optionality system of Article 12, again, except for Malta. The rules on board neutrality/non-frustration, compared to previous or existing rules, will therefore remain almost the same. Although these Member States do not impose a strict board neutrality rule, the discretion of management as regards the use of post-bid defences is quite restricted.[678]

Most of the Member States have not adopted the breakthrough rule on a mandatory basis. They have made it optional for companies. Therefore, its impact on the EU market in corporate control will be quite restricted. Only the Baltic countries (Estonia, Latvia, and Lithuania)[679] have implemented the breakthrough rule on an obligatory basis. None of the other countries oblige their companies to apply this provision in full. Consequently, a mere 1% of listed companies in the EU will apply this rule on a mandatory basis.[680]

The reciprocity rule of Article 12 has certainly been implemented by the majority of Member States, most of which have allowed companies to reciprocate against a bidder not subject to the board neutrality and/or breakthrough rules.[681] Reciprocity in general does not contribute to the integration of the EU market in corporate control, however, and does not facilitate the exercise of the freedom of establishment by the offeror company, because it allows the target company to opt out of the two key provisions of the Directive, Articles 9 and/or 11. This decision of the Member States to implement the reciprocity rule was made as a result of certain level-playing-field considerations. Those Member States that implemented the non-frustration and/or the breakthrough rule were afraid that, without reciprocity, there would be no level playing field between themselves and those countries that do not apply these rules. It is not hard to grasp that Member States were afraid of regulatory competition and of seat transfers to jurisdictions opting out of the non-frustration and/or the breakthrough rule.[682] The European Commission's Report

676. Commission Staff Working Document, Report on the Implementation of the Directive on Takeover Bids, SEC (2007) 268, 6.
677. Commission Staff Working Document, Report on the Implementation of the Directive on Takeover Bids, SEC (2007) 268, 7.
678. Commission Staff Working Document, Report on the Implementation of the Directive on Takeover Bids, SEC (2007) 268, 7.
679. See: G. Lisauskas & E. Laurairyte, 'Baltic Takeover Practices Already in Line with EC', *I FL Rev.* (2004): 43, T. Klauberg, 'Rules on Takeover Bids in Latvia', *EBL Rev.* (2005): 1474.
680. Commission Staff Working Document, Report on the Implementation of the Directive on Takeover Bids, SEC (2007) 268, 7.
681. Commission Staff Working Document, Report on the Implementation of the Directive on Takeover Bids, SEC (2007) 268, 8.
682. *Ibid.*

also found that reciprocity is considered to be an incentive for companies that have acquisition plans to apply the rules of the Directive voluntarily so as to be able to benefit from the liberal regime abroad. However, the Report admits that this argument is undermined by the fact that any company's decision to voluntarily apply the board neutrality or breakthrough rule remains reversible.[683]

683. Commission Staff Working Document, Report on the Implementation of the Directive on Takeover Bids, SEC (2007) 268, 8–9.