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THE NEED FOR DIRECT STATE REGULATION IN THE CONTEXT OF THE 'TAKEOVER CODE' FOR CORPORATE CONTROL IN THE UK*

'Birleşmeler ve Devralmalar için İlke Kararları' Çerçevesinde Birleşik Krallıkta Şirket Kontrolü Amacıyla Piyasaya Doğrudan Devlet Müdahalesi İhtiyacı

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Öz

Birleşmeler ve Devralmalar için İlke Kararları ve Devralmalar Paneli, Birleşik Krallık'ta halka açık şirketlerin dahil olduğu birleşme ve devralmaların kontrolünde önemli bir role sahiptir ve birleşme ve devralmaların düzenlenmesinin ayrılmaz bir parçasıdır. İlgili yasa ve panel Birleşik Krallık'ta pay sahiplerinin çıkarlarını korumaya, pay sahiplerinin bağımsızlığını tesis etmeye ve devralma süreçlerinde şeffaflığı teşvik etmeye hizmet eder. Bu nedenle, bir şekilde devralma süreçlerine dahil olan teşebbüslerin, "Devralma ve Birleşmeler için İlke Kararları"na uyması gerekmektedir. "Devralma ve Birleşmeler için İlke Kararları" uyarınca, Devralmalar Paneli, kuralların gözetimi ve uygulanmasında önemli bir rol oynamaktadır. Ancak son dönemde Birleşmeler ve Devralmalar için İlke Kararları ve Devralmalar Panelinin başarısı çokça eleştirilmektedir. Bu makale,

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Devralma Paneli ve Kurallarının tarihsel gelişiminin, temel kurallarının ve mevcut uygulamasının kendi kendini düzenleme (piyasa düzenlemesi) başarısızlığını gösterip göstermediğini eleştirel bir şekilde değerlendirmektedir. Çıkarılan sonuç ise, kurumsal kontrol için piyasanın doğrudan devlet düzenlemesine ihtiyaç duymakta olduğudur. Bu sebeple Birleşmeler ve Devralmalar için İlke Kararlarının niteliğinden kaynaklanan sorunların çözümünde bizzat Panelin kararlarından, mevzuattan ve akademik yorumlardan yola çıkarak tavsiyeler aranmaktadır.

Anahtar Kelimeler: Rekabet Hukuku, Birleşme ve Devralmalar, Piyasa Düzenlemesi, Birleşme ve Devralmalar için İlke Kararları

Abstract

The Takeover Code (formally the City Code on Takeovers and Mergers) and Panel are integral to the regulation of mergers and acquisitions (M&As) and have a substantial role in controlling mergers and acquisitions which involve publicly traded companies in the UK. They serve to safeguard the interests of shareholders, maintain the integrity of shareholders and promote transparency in takeover processes in the UK. Therefore, undertakings somehow involved in takeover processes and bids must adhere to the Takeover Codes' rules. In line with the Takeover Code, the Takeover Panel plays a crucial role in overseeing and enforcing the rules of the Takeover Code. However, the success of the Takeover Code and Panel is argued a lot lately. This article critically evaluates whether the historical development, substantive rules and current practice of the Takeover Panel and Code demonstrate a failure of self-regulation (market regulation). As a result, the need for direct state regulation of the market for corporate control is found. Thus, the remedy to the problem arising from the nature of the Takeover Code is searched in line with the Panel decisions, statutes and academic commentary.

Keywords: Competition Law, Mergers and Acquisitions, the Takeover Code and Panel, Corporate Control, Self-Regulation

INTRODUCTION

An operative and profitable market is important for both developed and developing economies. Fundamentally, takeovers[1] shift corporate governance from underperforming managements and loss-making firms to efficient management and profit-making firms. A takeover becomes hostile if the consent is received or any kind of communication from the board directors of the offeree company is made.[2] A takeover is also called external corporate control,[3] one of the most useful instruments in corporate governance. This beneficial change in corporate control causes significant economic developments based upon more effective capital investments along with a better allocation of assets under a new management team.[4]

The system also gives notice to poorly managed firms to act more efficiently. Usually, poorly managed firms' share prices tend to be lower than they should be, and therefore they become potential targets for takeover bidders.[5] In brief, good management is all about efficiency gains and a better functioning market. It is of vital importance not only for companies and individuals but also for the wealth of the country.[6] It is also worth mentioning that bankruptcy and total closure are not desirable if a functioning takeover system is available.[7]

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1 The term 'takeover' is commonly used when one company (offeror) acquires a majority or the whole of the shares of another company (offeree) from its shareholders in exchange for cash and/or securities. Stephen Girvin, Sandra Frisby and Alastair Hudson, *Charlesworth's Company Law*. London: Sweet & Maxwell, 2010, 782.

2 Alexandros Seretakis, "Hostile Takeovers and Defensive Mechanisms in the United Kingdom and the United States: A Case Against the United States Regime," *Ohio State Entrepreneurial Business Law Journal* 8, (2013): 248-283, 253.

3 Definition of Market for Corporate Control, Available at: <https://www.econlib.org/library/Enc/MarketforCorporateControl.html> last modified: 12 September 2023; Lucian Bebchuk, Alma Cohen, Allen Ferrell, "What Matters in Corporate Governance?" *The Review of Financial Studies* 22, no. 2 (2009), 783-827.

4 Daniel R. Fischel, "Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offer," *Texas Law Review* 57, no. 1 (1978): 1-46, 5.

5 Fischel, Efficient Capital Market Theory, 7.

6 Henry Manne, "Mergers and the Market for Corporate Control," *Journal of Political Economy* 73, (1965): 110-120, 119.

7 Manne, Mergers and the Market for Corporate Control, 19.

On top of that, the market for corporate control needs a regulatory framework to some extent. A regulatory framework defines the specific rules for takeover events and clarifies controversies around such events, or at least tries to do so. The corporate control mechanism engages a takeover before and after the initial bid. At this point, targets and bidders must be aware of what they need or are obligated to do. For instance, target boards are occasionally unwilling to withdraw from their positions; thus, they adopt defences and influence shareholders, if necessary, to reject a bid. On the other hand, bidders try to overcome obstacles and acquire shares as cheaply as possible to gain executive powers in a company. Between bidders and target boards, which appear to be highly determined in their goals, shareholders may be squeezed and thus need protective measures. As mentioned before, there is no doubt why takeovers should be regulated. The crucial point here is how they should be regulated.

The purpose of this paper is to evaluate whether the UK approach to takeover regulation was successful in the 20th century and, if it can in any way be understood as a failure, how much state intervention is needed. Historical developments, the concerns of the UK market and government policy, and substantial rules in UK takeover regulation, namely the "non-frustration rule" and the "mandatory bid rule" in the City Code on Takeovers and Mergers,[8] will be helpful when demonstrating why the self-regulation approach was taken and whether it has been successful. Also, current takeover events, amendments,[9] and reforms will set a course for the interpretation of future conduct. At this point, it should not be forgotten that reforms may also lead to overregulation. Along with the advantages and disadvantages of each path, the British self-regulation scheme has been a success story that cannot be seen elsewhere. Surely, there may also be aspects of this regulation that have become incompatible with today's needs. However, saying that self-regulation should be abandoned and applying a state-regulation approach must be avoided. Britain's self-regulation on takeovers is a pre-eminent

8 It will be referred to as `the Takeover Code` or `the Code` throughout the paper.

9 To foster corporate restructuring and capital market integration, the European Commission has repeatedly attempted to introduce Europe-wide takeover regulation but has encountered strong resistance. Erik Berglöf, Mike Burkart, Tito Boeri and Julian Franks, "European Takeover Regulation," *Economic Policy* 18, no. 6 (2003): 171-213.

success, and if there are any weak points to the regulation, reforms with minimal distortion to its unique structure should be made.

I. THE TAKEOVER CODE AND PANEL

A. Structure of the Code and Panel

For many years, without any state interference, the Code has regulated takeover events, and the Panel, which is also independent, has enforced the rules of the Code in the UK.[10] As a result, the Code and the Panel have become prominent examples worldwide.[11] The self/market-controlled regulatory body in the UK has been described by the Financial Times as one of the City's "most respected institutions".[12] The unique aspect of UK takeover regulation is the marketplace's power in the regulatory body. They pay the Panel, staff the Panel, make the rules, and comply with their own rules.[13] The Panel has been careful not to use the State's enforcement powers in all the years since it was formed.[14]

This regulatory framework changed slightly in 2006 after the implementation of the EU's Takeover Directive.[15] Article 4 of the Directive requires Member States to form a supervisory authority in takeover regulation and enforce regulation through a state-sanctioned body.[16] Consequently, the Government gave this duty to the already existing self-regulatory body in the UK. After the implementation, the Takeover Panel had governmental support and is now a state body.[17] However,

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10 Brian E Rosenzweig, "Private Versus Public Regulation: A Comparative Analysis of British and American Takeover Controls," *Duke Journal of Comparative & International Law* 18, (2007): 213-237, 216.

11 David Kershaw, "Corporate Law and Self-Regulation," *LSE Law, Society and Economy Working Papers* 5, (2015): 1-42, 12.

12 David Kershaw, *Principles of Takeover Regulation*. Oxford: Oxford University Press, 2016, 114; `Happy Birthday to the Panel` 27 March 2008, Financial Times.

13 Kershaw, *Principles*, 112.

14 Kershaw, *Principles*, 112.

15 Wan Wai Yee, "Enforcing Public Takeover Regulation: Reconciling Public and Private Interests," *Singapore Academy of Law Journal* 31, (2019): 285-307, 288.

16 Directive 2004/25/EC of The European Parliament and of The Council Of 21 April 2004 on Takeover Bids (EU Takeover Directive), Article 4.1.

17 Kershaw, Corporate Law and Self-Regulation, 15.

the Panel and the Government desire to ensure the *modus operandi* of the Takeover Panel.[18] This means that the Panel would be likely to continue its operations as a self-regulatory independent body, and the state intervention would be minimal. Therefore, before the implementation, the Panel had access to enforcement powers over market regulators, such as licensing sanctions which were regulated by the Board of Trade.[19] However, these theoretical powers were never used, and when they are exercised they should not overshadow the success of the self-regulation.[20] To sum up, the Code and the Panel have been shown to be a great *sui generis* success, and some other jurisdictions (such as Brazil) have tried to replicate this system.[21]

Most recently, the UK exited the EU at the end of 2020. After the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union, which entered into force on 31 January 2020, the initial rules of the Takeover Code ceased to apply in the UK and a need for change has arised one more time.[22] Consequently, amendments for the Takeover Code and Companies Act were published.[23]

B. Rules Governing the Code and Panel

Today, the Takeover Code consists of 38 main rules (428 pages of rules and guidelines for these rules).[24] At first glance, it might seem to be quite long, but since the creation of the Code in 1968, lots of amendments have been made to make the regulations fast, fluent, and up to date. For this reason, any non-UK takeover regimes, mainly state-regulated ones, might be seen as insubstantial and even

18 Kershaw, *Principles*, 113.

19 Kershaw, *Principles*, 113.

20 Kershaw, *Principles*, 113.

21 Kershaw, *Principles*, 113.

22 Isidora Tachmatzidi, "Comparative Analysis of Takeover Defenses in Strong and Weak Economies: The Paradigm of the UK and Greece," *European Research Studies Journal* 22, (2019): 254-264, 258.

23 The United Kingdom's withdrawal from the European Union, Instrument 2019/3; The Takeovers (Amendment) (EU Exit) Regulations 2019, SI 2019/217.

24 The City Code on Takeovers and Mergers (The Takeover Code) (Amended, 20 February 2023) Available at: <https://www.thetakeoverpanel.org.uk/wp-content/uploads/2023/02/The-Take-Over_Bookmarked_20.2.23.1.pdf?v=20Feb2023> last modified: 12 September 2023.

incomplete when compared to this fearsome and detailed Code.[25] The Takeover Code consists of some important fundamental rules. It has six general principles which provide the basis and spirit of the Code.[26] These principles also reflect the Takeover Directive.[27] In addition to core principles, it has 38 main rules and 9 appendices. These rules will not be examined here individually, but a few important ones are worth mentioning at this point.

One of the underlying rules is Rule 21 of the Code,[28] which concerns restrictions on frustrating actions. Generally known as the "non-frustration rule", prevents a target board's actions in limiting shareholder rights and ensures information equality. Rule 21 shows that takeover regulation lies heavily on the protection of shareholders.[29] The regime of the UK regarding takeovers has embraced a shareholder-centred approach and the consent of shareholders is required before taking any defensive measure in the UK.[30] As a result, the board neutrality rule or the non-frustration principle, as referred to in the UK, is treated as a central element of the Takeover Code.[31]

Other substantive rules, such as the mandatory bid rule,[32] the regulating announcement processes,[33] the equal pricing rule,[34] and the put-up or shut-up rule,[35] all of which were generated from the spirit of the Code (core principles),[36] provide a functional takeover regime. Over the past 50 years, the marketplace has discussed these rules and tried to make them more responsive and applicable to

25 Kershaw, Corporate Law and Self-Regulation, 14.

26 The Takeover Code, Introduction, Section B.

27 EU Takeover Directive, Article 3.1.

28 The Takeover Code, Rule 21.1.

29 John Armour and David A. Skeel, "Who Writes the Rules for Hostile Takeovers, and Why? The Peculiar Divergence of US and UK Takeover Regulation," *Georgetown Law Journal* 95, (2007): 1727-2007, 1736.

30 Armour and Skeel, *Who Writes the Rules*, 1737.

31 Rojina Thapa, The Non-frustration Rule after the Brexit *Business Law International* 22, no. 2 (2021): 203-218, 207.

32 The Takeover Code, Rule 9.

33 The Takeover Code, Rule 2.4.

34 The Takeover Code, Rules 6, 9 and 11.

35 The Takeover Code, Rule 2.6.

36 The Takeover Code, Introduction, Section B.

new events. Even though there have been many changes, the substance of the rules has not altered much.[37]

Compared to other regulations (mainly traditional state regulations), one of the advantages of being self-regulatory is that it gives the takeover regime the ability to respond to new events quickly. The Panel can address takeover events extremely quickly with no delay at all.[38] The underlying reason for this is that regulators are closely connected to the activity and the marketplace.[39] Being close to the market gives the Panel the ability to respond to questions, concerns and needs as quickly as possible. The British standpoint is that if the state were to regulate takeover activities, then the inability to understand the marketplace's needs occurs, along with slower and costlier rulemaking and litigation processes due to obsolete takeover rules. In self-regulation, there is no such liability to approach, get the attention of and inform the executive of the state[40], which could take weeks or even months. State regulators tend to follow market trends a little bit behind. Bureaucracy, legislation and amendment processes, the number of institutions which discuss amendments, and even litigation barriers make regulators fall behind on current issues.

On the other hand, self-regulation provides for a much faster process than other regulations.[41] As stated, this makes self-regulation the best alternative to state regulation.[42] It should not be forgotten that, theoretically, a state-regulatory body could obtain these advantages too. Market participants could staff it, litigation could be restricted to some extent, and trends in the market could be followed.[43] However, all of these facts do not overcome the success of the UK's self-regulated takeover regime.

As a matter of fact, by not having any state burden, the role of lawyers is much less important in self-regulation. In state regulation, where litigation is important

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37 Andrew Johnston, "Takeover Regulation: Historical and Theoretical Perspectives on the City Code," *Cambridge Law Journal* 66, no. 2 (2007): 422-460, 446.

38 Armour and Skeel, *Who Writes the Rules*, 1744.

39 Kershaw, *Principles*, 114.

40 Kershaw, *Principles*, 114.

41 Kershaw, *Principles*, 114.

42 Kershaw, *Principles*, 114.

43 Kershaw, *Principles*, 115.

and lasts for a long time, parties spend enormous amount of money for expenses and lawyers earn huge amounts of money because they inherently stay at the centre of takeover regulations.[44] On the contrary, members of a self-regulatory body, in this case in the UK, are people from financial institutions, banks, and large companies. Generally, they are business and finance experts. Due to the lack of litigation in this area, and as a conscious decision at the beginning, a lawyer's role is very limited.[45] The Panel is not legally oriented but is business oriented which is an important signpost of the Anglo-Saxon law system.[46] Thus, its executive was chosen from financial institutions and staffed by secondments from these institutions which all belong to the City[47] firms. An implication could be made here. UK takeover regulation culture is shaped depending highly upon the tradition of the City, and this is unprecedented. This fact makes changes hard for other states which might seek to implement similar rules, since these traditions can hardly be replicated. Correspondingly, this deep-seated culture in UK takeover regulation is a natural barrier for state-oriented changes in regulation.

Another point where self-regulation makes a difference is the Panel's flexible approach and trustworthiness. The Panel is well aware of changing dynamics in the market and business in the City. Thus, it could adjust itself for events, tailor appropriate regulatory changes, and could manage concerns coming from both parties in a possible dispute.[48] The awareness of the Panel comes from its active engagement with the parties in the market. To be more precise, market actors see the Panel as `one of us`.[49] This thought basically leads market actors to trust the regulator. As a result, market actors can share their concerns with the regulator

44 Kershaw, *Principles*, 114.

45 Armour and Skeel, *Who Writes the Rules*, 1745.

46 Armour and Skeel, *Who Writes the Rules*, 1745.

47 City of London, widely referred as the City, is a local governmental district in London. Traditionally, it is the financial capital of the old world. City of London comprises participants such as the London Stock Exchange, Lloyd's of London, Bank of England including over 500 banks, the Alternative Investment Market, Aviva, BT Group, Quilter, Prudential, Schroders, Standard Chartered, Unilever and many other financial institutions, Magic Circle law firms, namely Allen & Overy, Freshfields Bruckhaus Deringer, Linklaters and Slaughter & May, as well as Ashurst LLP, DLA Piper, Eversheds Sutherland, Herber Smith Freehills, Hogan Lovells and others.

48 Armour and Skeel, *Who Writes the Rules*, 1745.

49 Kershaw, *Principles*, 115.

comfortably. Of course, from a different point of view, this may not happen in every case. The takeover market has a rapid development rate and innovations, or rule changes can be unclear, even if the regulator itself may not absorb the substance of changes in the first place. Thus, there will be always complaints about the operations of the regulator from market actors whose position is or seems to be disadvantaged.[50] Whatever the situation is, this argument can be applicable to every regulation which suffers from that kind of situation, and thus it is unlikely to be a failure for the UK's takeover regulation.

C. Success of the Code and Panel

Findings up to now show that the market listens to needs, discusses, regulates and amends the rules by itself. These facts also support the existence of compliance benefits in the market. Constituencies in the market rule for themselves, thus it is logical to think that they comply with their own rules.[51] In other words, representatives of a community are rule-makers, and communities inherently encourage compliance and loyalty. The Code and Panel try to ensure adequate compliance levels and incentives for investment banks to comply, simply because the self-regulatory system cannot be sustainable otherwise. Adequate compliance can be achieved through listening to the financial interests of the market.[52] Arguments against benefits derived from compliance gather around rule abuse and rent seeking. Commentators severely criticise the structure and draw attention to potential dangers. Unfortunately, interests in the market are generally pointed in the same direction as the interests of the most important actors in the market. This leads people to think that the biggest investors who control the regulatory body may rule however they intend to and exclude other interest groups from outcomes and benefits.[53] It is inescapable to avoid this idea, since in time the regulatory body may gradually evolve into a rent seeking society. However, different actors with different interests would likely bring balance to some extent

50 Kershaw, *Principles*, 115.

51 Kershaw, *Principles*, 116.

52 Kershaw, Corporate Law and Self-Regulation, 26.

53 Kershaw, *Principles*, 116.

and would minimise the negative effects.[54] Also, it is probable that effective state regulation could overcome concerns and potential dangers. It is true that after the implementation of the EU Takeover Directive the Panel has become a statutory authority, and if it is used correctly, it may naturally refute any underlined criticism. Even so, without any state powers, negative effects or concerns can be eliminated. How they can be eliminated will now be discussed.

The self-regulator alone must completely `own` the regulatory space.[55] It will strengthen its position and power, end the need for the state, and ensure compliance with its rules.[56] If the Panel stays in the background and shares its competence with other parties (market actors), then the market actors may try to overturn certain rules for their own interests, and may thus claim power in the regulatory space.[57] To keep the state and market actors away from distorting its spirit and to ensure its position in the power domain, the self-regulator needs substantive rules. These rules will be safeguards of its existence and power. UK takeover regulation has two important `keystone` rules, which are the non-frustration and mandatory bid rules. The non-frustration rule originates from limiting the defensive tactics of a target board.[58] It is argued that its effect is overstated, since section 171(b) of the Companies Act 2006 provides a limitation on directors' power in a company. Section 171(b) states that:

"A director of a company must—

(b) only exercise powers for the purposes for which they are conferred." [59]

This duty is alternatively called the proper or improper purpose doctrine.[60] Having common-law roots, the proper purpose doctrine prevents defensive actions by a director; or, to be clearer, it hinders the power of directors. Thus, the existence of the non-frustration rule may seem irrelevant in terms of importance at first glance. However, without this keystone rule, authority would definitely shift

54 Kershaw, *Principles*, 116.

55 Kershaw, Corporate Law and Self-Regulation, 27.

56 Kershaw, Corporate Law and Self-Regulation, 27.

57 Kershaw, Corporate Law and Self-Regulation, 27.

58 Kershaw, *Principles*, 110.

59 The Companies Act 2006 c 46, Section 171(b).

60 Kershaw, *Principles*, 308.

to the courts.[61] It is clear that the question of whether or not defences exist in the regulatory space, and the impact on timing and the bidding process, will be in the hands of courts which interpret the proper purpose doctrine.[62] Courts will push the Panel to the background in this sense, and the Panel's autonomy in controlling the game rules in the market will be weakened.[63] In this context, the non-frustration rule is the safeguard of the Panel and one of the main sources of its *sui generis* success. The background to the Panel's sensitivity on this rule comes from that point.

As in the case of the previous rule, the mandatory bid rule is also crucial for the regulator. Before observing this rule, it is important to note that the mandatory bid rule does not mean there are `mandatory bids` in the regulatory space.[64] The mandatory bid rule is a principle which prevents a bidder buying a large bulk of the shares of a company at a premium price, and others from smaller shareholders more cheaply.[65] Rule 9.1 of the Code states that if a bidder gains 30% of the voting shares in any one offer, it has to make a bid for all voting shares.[66] In a sense, the bidder is independently able to decide on whether to offer a bid. It makes all offers within or without the scope of Rule 9.1 voluntary.[67] The mandatory bid rule is important, because it ensures that voluntary bids are tightly regulated, otherwise the Panel would be forced to bend other rules in the Code in order to reduce the costs of voluntary bids, which would be detrimental. Without the mandatory bid rule, the costs of the incremental acquisition of control of target companies would

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61 Kershaw, *Principles*, 308.

62 Kershaw, Corporate Law and Self-Regulation, 28.

63 Kershaw, Corporate Law and Self-Regulation, 28.

64 Kershaw, Corporate Law and Self-Regulation, 28.

65 Sarah Worthington, *Sealy & Worthington's Company Law*. Oxford: Oxford University Press, 2016.

66 The Takeover Code, Rule 9.1. These areas are exclusively regulated by the Code. The Companies Act 2006 sections 943 and 944 explanatory notes paragraph 1182 states that: "The Panel is given the power to make rules in relation to takeover regulation. The rule-making power is broadly drawn to ensure that the Panel can continue to make rules on the range of matters presently regulated by the City Code on Takeovers and Mergers. The following provisions are included… *matters related to the protection of minority shareholders, mandatory bid and equitable price (Article 5), contents of the bid documentation (Article 6.1 to 6.3), time allowed for acceptance of a bid and publication of a bid (Articles 7 and 8), obligations of the management of the target company (Article 9)* and other rules …"

67 Kershaw, Corporate Law and Self-Regulation, 28.

be much lower than the costs of voluntary bids, which are controlled by a powerful code.

The two keystone rules of the Code lie in the centre of self-regulation of the market for corporate control in the UK.[68] Due to their significance, the regulator aims to protect them at all costs.[69] The problem is, outcomes derived from these rules might be unexpected. In some instances, the interests of the market and the rules may clash. There is the argument that if the rules worsen the situation, then they cannot be relied upon.[70] This is because the efficiency of the Panel and its rules would be subject to questioning. Troublesome events and even more troublesome reforms which have led people to question the legitimacy of the Code and the Panel will be examined in further detail in this paper.

D. Success No More?

The previous sections draw a framework for the success of the self-regulatory body in the UK. However, people have started to see the Code and the Panel as old-fashioned now. Criticism around the Code and the Panel is that they may not fully meet today's needs.[71] It is said that innovative changes and modifications are needed in the area. Every day, more people think that its success is now only nostalgia.[72] Some commentators argue that the current practices of the Panel show its inability to overcome some `critical` hostile takeovers for specific sectors. In other words, the UK has had unique problems regarding hostile takeovers, especially overseas ones.[73] These takeovers by non-UK companies of UK companies seems to be the weak point of the current self/market regulated body in the UK. Given the considerable number of concerns regarding these takeovers, the Panel made some reforms, which even raised more concerns. In a sense, the structure shift in the Panel after the implementation of Takeover Directive

68 Kershaw, Corporate Law and Self-Regulation, 28.

69 Kershaw, Corporate Law and Self-Regulation, 29.

70 Kershaw, Corporate Law and Self-Regulation, 29.

71 Michael R Patrone, "Sour Chocolate: The U.K. Takeover Panel's Improper Reaction to Kraft's Acquisition of Cadbury," *International Law & Management Review* 8, (2011): 63-86, 65.

72 Kershaw, *Principles*, 114.

73 Kershaw, *Principles*, 114.

strengthened the opposition's hand, since the Panel now has state powers originating from that and Companies Act 2006.[74] The Competition and Markets Authority has also jurisdiction to review a transaction either where the UK turnover of the company being acquired exceeds £70 million or where the merging companies will together supply more than 25 per cent of a particular good or service in the UK.

However, these issues and concerns reflect the UK's regulatory past. The argument is that takeover regulation emerged in response to the need for regulation in the 1950s and 1960s.[75] In other words, the Code and the Panel traditionally belong to that era and are limited to controlling the type of transactions which belong that time.[76] The UK market is not the same now as it was then. Some argue that attitude of the Panel is outdated, and the needs of 1960s London have changed significantly.[77] The rules of the Code must cover today's issues. In a sense, the Code should extend beyond its limits. If not, then it shall be changed.

However, to evaluate why the self/market regulated body might now be insufficient, history and the creation process should be mentioned. Otherwise, it would not be wise to evaluate and recommend any amendment or any kind of state intervention in the regulatory space. From the historical context and previous events, the emergence of a takeover regulation solved by a self-regulatory method can be understood. The foundation for self-regulatory authority in the UK basically reflects the passive position of the government and the cultural and traditional character of the City of London.[78] After 1968, when the Code itself came into force, and with the help of a self-regulatory structure, fast and flexible amendments occurred. This brought several advantages, which have already been discussed, to the regulatory framework, until some recent hostile takeover events. Why takeover regulation emerged and how it is reflected today will now be examined in turn.

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74 The Companies Act 2006 c 46, Part 28, Chapter 1, Section 942.

75 Kershaw, *Principles*, 117.

76 Kershaw, *Principles*, 117.

77 Kershaw, *Principles*, 117.

78 Stephen Kenyon-Slade, *Mergers and Takeovers in the US and UK*. Oxford: Oxford University Press, 2011, 505.

II. THE NEED FOR A TAKEOVER REGULATION

A. Situation before the Code

In order to understand why the self-regulatory method was chosen for the UK's takeover regulation, the British political style, the management of the City of London and their expectations should first be analysed. To start with, the British political style was the antithesis of an interventionalist government, which could be seen in the ideas of Bentham and Mill.[79] This meant that the British government had a passive and neutral approach to any problems which arose.[80] Moreover, it did not try to anticipate and dissolve problems in advance. This was one of the most explicit examples of a pragmatic approach, and thus it shaped the characteristics of the old British political style.[81] Consequently, the unwillingness of the state to interfere directly in takeover regulation had significant effects on 1950s takeover events. Instead, the idea back then was to interfere indirectly by ensuring that parties could reach agreements or could organise themselves to solve their conflicts, thus creating an active and healthy marketplace.[82]

Regarding this context, the self-regulatory structure of the takeover market is usually considered as political disarmament.[83] What this means is that the state leads market actors to regulate themselves, but also threatens them to regulate properly in order for the state not to interfere. In 1967, for instance, the government noted that if the City were to be unable to solve conflicts in a hostile takeover, they would be forced to step in.[84] Additionally, the government, media and the City had a common view that a takeover problem was the City's own problem, and the City should therefore solve such problems. The media's role here is to create a communication link between the concerns of the government, the public and the City.[85] This was one of the main reasons that self-regulation emerged in the UK.

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79 Kershaw, *Principles*, 68.

80 Kershaw, *Principles*, 68.

81 Kershaw, *Principles*, 68.

82 Kershaw, *Principles*, 68.

83 Kershaw, Corporate Law and Self-Regulation, 16.

84 Financial Times, "What the New Bid Panel Needs to Do," LEX (21 September 1967).

85 Kershaw, Corporate Law and Self-Regulation, 17.

Secondly, the management of the City of London and other participants in the City had a huge influence on UK takeover regulation, as mentioned before. To be exact, they had an idea of a "traditional self-regulation right" for themselves.[86] This cultural background generally comes from personal connections and the homogenous structure of the participants of the City.[87] These people all had broadly the same educational background, the same concerns and the same interests. As a matter of fact, they would like to regulate in the direction of their own needs, and inherently comply with their own rules.

This area of the City is called the "Square Mile", and geographically it is the financial and historical centre of London. The Bank of England, the London Stock Exchange and all other important financial institutions and merchant banks are located in the Square Mile. In particular, the Bank of England and the London Stock Exchange sit in the centre of this traditional self-regulation.[88] Having no state regulation does not mean that there was an absence of authority, however.[89] They regulate the capital market, they listen to needs in the market, and they ensure that the Government and the City understand each other.[90] The Chairman of the Stock Exchange expressed that this was an informal type of control.[91] Hostile takeover events in the 1950s led to the emergence of the Code and Panel. Thus, the self-regulation method of the City's participants led to a non-state body of rules in the takeover regime, which is now called the Takeover Code.

B. Creation of a Self-Regulation

A palpable need for takeover regulation emerged in the 1950s in the UK. It is necessary to bear in mind that the 1950s was a post-World War era, in which a huge economic flourish occurred. Several factors, which are stated respectively by

86 Kershaw, *Principles*, 70-71.

87 Kershaw, *Principles*, 71.

88 Kershaw, *Principles*, 71.

89 Kershaw, *Principles*, 72.

90 Kershaw, *Principles*, 72.

91 David Kynaston, *The City of London. Volume IV: A club no more 1945-2000. London:* Pimlico Press, 2002, p 442.

Johnson, could be helpful in explaining the shift in takeover processes.[92] The first one was due to the Companies Act 1948.[93] This act forced companies to share their data of earnings publicly, in accordance with the new accounting standards.[94] This requirement enables potential bidders to investigate target boards with ease.[95] Additionally, Richard Roberts states that because of paper rationing, shareholders were out of reach from direct approach before the 1950s.[96] Also, British industry had seen structural changes. The heavy industry products of the industrial revolution era were replaced by light industry products and suchlike.[97] Also, changes in retailing, consumption, tax burdens and inflation showed the gap between efficient and inefficient companies explicitly.[98] When these factors came together, hostile takeovers became easy in the eyes of potential bidders.

The very first successful bid belonged to Mr. Charles Clore. There was a tender offer which was sent directly to the shareholders.[99] This move was found to be offensive, and actually it was an unexpected move for the City and the target board of shoe retailer J. Sears & Co.[100] Moreover, it raised concerns. The target board was surely unwilling to lose their position, but shareholders affirmed the tender offer and the target board could not make any moves to frustrate it. Despite his promises of value creation, the bidder was not one of the City's participants, and the City was opposed to this action and believed that his move was harmful.[101]

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92 Andrew Johnston, "Takeover regulation: Historical and Theoretical Perspectives on the City Code," *Cambridge Law Journal* 66, no. 2 (2007): 422-460, 427.

93 The Companies Act 1948 (11 & 12 Geo.6 c.38).

94 Johnston, Takeover regulation, 427.

95 Brian R. Cheffins, "Mergers and the Evolution of Patterns of Corporate Ownership and Control: The British Experience," *Business History* 46, (2004): 256-284, 270; Les Hannah, "Takeover Bids in Britain before 1950: An Exercise in Business 'Pre-History'," *Business History* 16, (1974): 65-77, 70.

96 Johnston, *Takeover regulation,* 427; and Richard Roberts, "Regulatory Responses to the Rise of the Market for Corporate Control in Britain in the 1950s," *Business History* 34, (1992): 183-200, 186.

97 Johnston, Takeover regulation, 427.

98 Johnston, Takeover regulation, 427.

99 John Armour and David A. Skeel, "Who Writes the Rules for Hostile Takeovers, and Why? The Peculiar Divergence of US and UK Takeover Regulation," *Georgetown Law Journal* 95, (2007): 1727-2007, 1757.

100 Armour and Skeel, *Who Writes the Rules*, 1757.

101 Armour and Skeel, *Who Writes the Rules*, 1757.

In the same year, another hostile bid was proposed by Mr Harold Samuel for Savoy Hotel Ltd. His intention was to change a hotel which Savoy Hotel Ltd. owned into office suites.[102] However, as a defensive tactic, "the Worcester Scheme" was arranged.[103] This scheme had 6 parts.[104] Primarily, a new company (Worcester) was quickly established, and it bought one of the Savoy group's hotels, namely The Berkeley. Later, this entity leased The Berkeley back to the Savoy group, and one of the requirements in the leasing arrangement was that the building should be used as a hotel. This requirement would last for fifty years, and the Savoy group would not have any rights to comment for fifty years. However, this arrangement was made without shareholders' knowledge, and no opportunity was given to comment on the bid.[105] Therefore, the action taken was highly controversial, and at first glance it could not be understood whether it was legitimate.[106] For this reason, Mr. E. Milner Holland Q.C. was appointed by the Board of Trade in order to investigate the conduct of the target board.[107] The outcome was in favour of the shareholders. There is no doubt that the only injured party in this case was the shareholders. Their thoughts on the bid were denied.

Also, in the British Aluminium takeover event in 1958, the target board's shareholders were alienated by the target board. There were two bidders in the event, and the target board rejected one bid and accepted the other without shareholders' consent.[108] The rejected company tried to reach the shareholders directly, and the other company tried to buy undervalued shares from shareholders.[109] This event clearly shows that regulatory protection for shareholders was highly needed. As mentioned before, as a third party between strong target boards and bidders, shareholders and their rights are likely to be ignored.

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102 Laurence C. B. Gower, "Corporate Control: The Battle for the Berkeley," *Harvard Law Review* 68, no. 7 (1955): 1176-1194, 1180.

103 Gower, The Battle for the Berkeley, 1179.

104 For detailed information; Gower, *The Battle for the Berkeley*, 1179-1180.

105 Jonathan Mukwiri, "The Myth of Tactical Litigation in UK Takeovers," *Journal of Corporate Law Studies* 8, (2008) 373-383, 374.

106 Armour and Skeel, *Who Writes the Rules*, 1757.

107 Armour and Skeel, *Who Writes the Rules*, 1757.

108 Armour and Skeel, *Who Writes the Rules*, 1758.

109 Armour and Skeel, *Who Writes the Rules*, 1758.

Later, when Mr. Core (the shoe retailer) made high profits along with several benefits for shareholders in the late 1950s, the view on hostile takeovers was changed. City participants sought to regulate this area, because takeovers in general were very profitable for companies and rewarding for the British economy. To prevent any kind of unwanted activity in takeover events, and for the protection of shareholders, the first attempt came from the Bank of England, along with other banks and institutional investors.[110] The first attempt was Notes on the Amalgamations of British Businesses (1959).[111]

In 1967, a battle broke out between two bidders who wanted to acquire Metal Industries Ltd. This provoked the same concern as the British Aluminium event.[112] Notes was not a disaster; it was well-received, but it lacked mechanisms for enforcement and adjudication.[113] In other words, these principles were insufficient for shareholder protection.[114] Thus, this and a need for "real" regulation led to a revision in the Notes. As a result, in March 1968, the City Code on Takeovers and Mergers came into force, and the Panel was established. Until 2004, the non-statutory Code and Panel operated. In 2004, the European Parliament adopted the EU Takeover Directive. Rules in the Directive, such as the mandatory bid rule and the non-frustration rule are inspired by the Takeover Code. Thus, no significant changes were made in the Code when implementing the EU Takeover Directive in 2006. Since then, the Takeover Code and the Panel have continued to operate effectively in the UK takeover market.

C. Concerns related to Current Events

In the previous sections, the history and substantive basis of the Code and the Panel have been discussed. Many countries, especially in Europe, have been influenced by the substantive rules of the Code, and have designated their own

110 Kershaw, *Principles*, 79.

111 Herein after referred to as 'Notes' or 'the Notes'.

112 Kershaw, *Principles*, 79.

113 Armour and Skeel, *Who Writes the Rules*, 1759.

114 Armour and Skeel, *Who Writes the Rules*, 1759.

rules similarly.[115] This alone shows the success of takeover regulation in the UK. UK takeover regulation handles takeovers/mergers professionally, and it ensures the continuum of transactions in the market. The problem occurs here. Especially after the implementation of the Directive, the new "formal" status of the Code necessitates it to ensure the UK's long-term economic development and well-being, since it is now a statutory advisor and authority.[116] The state regulator has a duty to gather information about the economic, social and political effects of a takeover.[117] On the other hand, a self-regulator is unlikely to consider long-term implications and only focus on takeover transactions.[118] However, economic consequences and further implications might be immensely important for social well-being and the economy. The argument is that, in the UK, the regulator must consider these broader issues, not only events. Yet, the Panel avoids investigating takeover events further, and it does not take such broader responsibilities.[119] This manner can be seen in the successful Kraft Inc.-Cadbury Plc. takeover event, and the aborted hostile Pfizer Inc.-AstraZeneca Plc. takeover event.[120]

In both events, US companies desired to acquire UK companies which were of utmost importance to the UK economy. According to economic development, these events brought some concerns. First, it was somewhat easier to acquire UK companies than other companies around the world.[121] The openness of UK champions[122] created outrage in the UK. For instance, after the takeover, Kraft could not keep its promises and announced the closure of a chocolate factory in the UK where approximately 400 people worked. Disappointment in the Kraft takeover event caused scepticism about Pfizer's similar promises later on. In the wake of the bid for AstraZeneca, Pfizer wrote a letter to the Prime Minister of the UK in order to reduce the fever of concerns, and they stated that they would retain

115 Brazil (the LSA - Lei 6.404 of 15 December 1976), EU Takeover Directive, and individual EU states as examples.

116 Kershaw, *Principles*, 117.

117 Kershaw, *Principles*, 118.

118 Kershaw, *Principles*, 118.

119 Kershaw, *Principles*, 117.

120 Kershaw, *Principles*, 117.

121 Kershaw, *Principles*, 118.

122 Internationally famous, top, leading national companies.

research and development, investments, and jobs.[123] However, the enforceability of these promises was ambiguous.

The exposure and vulnerability of UK companies to overseas takeovers are mainly derived from the throttled defences of target boards; the non-frustration rule is the main component here.[124] Thus, the optimality of substantive rules was criticised after these two events, and voices were raised in the argument for reforms.[125] However, exposure of UK companies is not the only issue which merits discussion. In theory, overseas takeovers may not be harmful at all. If they are controlled correctly, many investments will flow to the country. Thus, this situation can create new job opportunities and new markets, along with more competitiveness. Kershaw indicates these possibilities and asks questions. Firstly, are there any economic benefits to having more national companies?[126] Secondly, is there a benefit which stems from the location of a company's headquarters, such as jobs, R&D and investment (the headquartering effect)? According to Kershaw, the state regulator must investigate and analyse these issues further.[127]

In these individual takeover events, the Panel intended to maintain its self-regulatory structure and protect its substantive rules. This can be seen in their responses to the takeover events. The Panel expressed that they were "not responsible for competition policy or wider questions of public interest, which are the responsibility of government and other bodies."[128] However, there was heavy pressure on the Panel to reform its rules and structure. Moreover, the Panel is formally a state body, and the pressure focused on this point. A state authority should not ignore its role in the broader effects of its own rules.[129] Otherwise, the

123 Linklaters LLP, Open for Business – Takeovers of UK companies and the involvement of the UK Government, 2014, 3, Available at: <www.linklaters.com/pdfs/mkt/london/140616_Open_For_Business_Memo.pdf> last modified: 12 September 2023.

124 Kershaw, *Principles*, 118.

125 Kershaw, *Principles*, 119.

126 Kershaw, *Principles*, 118.

127 Kershaw, *Principles*, 118.

128 Takeover Panel, "Review of Certain Aspects of the Regulation of Takeover Bids," (PCP 2010/2), para.1.5; Available at: <http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/PCP201002.pdf> last modified: 12 September 2023.

129 Kershaw, *Principles*, 119.

legitimacy of regulation would be damaged. More than that, the Panel is experienced in takeover regulation, so it would not be logical to expect other inexperienced state bodies to investigate takeovers.[130] Kershaw adds that passing the buck here is just same as avoiding responsibilities.[131] In the end, the Panel avoided its "responsibilities" and showed that it is still a self-regulator.

The independent self-regulatory identity of the Panel renders it overresponsive to public concerns.[132] Not only a state body but also a self-regulator's validity is linked to public concerns. Events that create public outrage might be dangerous for a self-regulator's effectiveness and functionality. Unfortunately, the Panel's status anxiety may result in mistakes. Thus, the concept of "hard cases make bad law" appears. It is a phrase which means that the law is for common situations, and some extreme cases might not be suitable for generalised rules.[133] Thus, trying to regulate the space for extreme cases might be detrimental in general. Arguably, the hard cases make bad law phenomenon can be seen in the response of the Panel after the Kraft-Cadbury takeover event.[134] Commentators argue that the responses to the Kraft-Cadbury event have made all takeovers more difficult.[135]

D. Reforms

In order to scatter reform pressure on its substantive rules, the Panel agreed on some reforms to the Code. Some key changes were made to the rules, but not to the non-frustration rule itself. The changes made were in potential offerors identification, the put up or shut up rule, deadlines, prohibition on deal protection arrangements, increased engagement with representatives, disclosure of financing

130 Kershaw, *Principles*, 119.

131 Kershaw, *Principles*, 119.

132 Kershaw, *Principles*, 120.

133 Phrases.org.uk, definition, "hard cases make bad law," Available at: <http://www.phrases.org.uk/meanings/hard-cases-make-bad-law.html> last modified: 12 September 2023.

134 Kershaw, *Principles*, 120

135 All discussions, Kershaw, *Principles*, Chapters 4, 5, 7 and 11.

arrangements and other insignificant matters.[136] To be more explicit, the reforms offered enhanced protection for target boards and strengthened target boards' position, and increased transparency on disclosure. The reforms after the Kraft-Cadbury takeover in 2010, and the implementation of the post-offer undertakings regime in 2014, will not be framed individually, but as they have a bearing on the scope of this paper, their outcomes will be discussed.

Firstly, note 3 on Rule 19.1 of the Code was one of the major changes.[137] In 2015 it was changed one more time, so it is now called Old Note 3. It states that the bidder would be bound to its statements whether it intended to or not to take any action after the end of the offer period for at least 12 months.[138] It was a direct response to the Kraft-Cadbury takeover. As mentioned before, after completion of the takeover, Kraft backtracked and announced the closure of Cadbury's factory in Keynsham, UK.[139] Under the influence of pressure, the Panel used a very exceptional enforcement power and publicly censured Kraft.[140] Additionally, Old Note 3 was set. According to Kershaw, this is a good example of "hard cases make bad law".[141] Substantially, Old Note 3 attempted to reduce the detrimental effects of takeovers for stakeholders. This rule was important for major takeovers which could capture public attention and could help in getting deals done, but for "low-profile" takeovers it was actually detrimental. It forced companies to be less informative than before. The intention was decent, but in practice this provision

136 Takeover Panel, "Review of Certain Aspects of the Regulation of Takeover Bids," (PCP 2010/2) Available at: <http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/PCP201002.pdf> last modified: 12 September 2023; Takeover Panel, "Review of Certain Aspects of the Regulation of Takeover Bids, Proposed Amendments to the Takeover Code," (PCP 2011/1) Available at: <http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/PCP201101.pdf> last modified: 12 September 2023; Takeover Panel, "Response Statement by the Code Committee of the Panel Following the Consultation on PCP 2011/1," (RS 2011/01) Available at: <http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/RS201101.pdf> last modified: 12 September 2023.

137 The Takeover Code, note 3 to rule 19.1, 2011-2015, "Old Note 3".

138 Kershaw, *Principles*, 171.

139 Kershaw, *Principles*, 172.

140 Kershaw, *Principles*, 172.

141 Kershaw, *Principles*, 172.

was not a useful tool. Therefore, after Pfizer's attempt for AstraZeneca, this rule was changed for a more functional one.[142]

Another major reform was the put up or shut up rule.[143] Before the reform, the put up or shut up rule was generally asked by the Panel and was issued for 6 to 8 weeks.[144] In this time frame, the bidder could announce that they would make an offer or could announce that they would give up. After the changes, the put up or shut up period has been reduced to 28 days, and it starts automatically.[145] This is an instrument which empowers the target against the bidder, and forces the bidder's hand. Thus, it changed the balance of power deeply, and enhanced target boards' resistance to takeovers. The reason behind it was also the Kraft-Cadbury takeover, as it highlighted the vulnerability to hostile takeovers and the weak position of target boards. However, 28-day period is inadequate where a bid requires external finance, since it is hard for bidders to obtain commitments.[146] This change not only impedes extraordinary hostile takeovers, but also affects all takeovers. Unarguably, it is another clear example of the Panel's overreaction to requests for reform.

Moving on to another major reform, there is the prohibition on deal protection agreements. The difference between the above reforms and deal protections is that it is not an overreaction, but more a product of misdiagnosis. Richard Godden, an M&A partner at Linklaters LLP, has stated that:

"The use of deal protection measures has become absurd in recent years. While I understand the counterarguments made by those opposing the ban, the Panel has made a sensible case for their abolition. It could even be argued that the current reliance on these measures runs counter to the General Principles and the spirit of the Code".[147]

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142 The Takeover Code Rule 19.7 and 19.8.

143 The Takeover Code Rule 2.6.

144 Kershaw, *Principles*, 175.

145 Kershaw, *Principles*, 176.

146 Kershaw, *Principles*, 176.

147 Orlando Fernandez, "Proposed Changes to the Takeover Code," *Practical Law Company Online* (2011) Available at: <https://ca.practicallaw.thomsonreuters.com/9-504-4872?transitionType=Default&contextData=(sc.Default)&firstPage=true> last modified: 12 September 2023.

As Godden argues, changes are needed in deal protections. The problem occurs here. There was no direct relevance between political and public concerns after the takeover event and deal protections itself.[148] Moreover, prohibition on deal protections was presented as a tool for reducing the tactical advantage of bidders, just like other changes.[149] As discussed above, target board disempowerment was mainly related to the non-frustration rule, and the optimality of this rule was contradictive. According to Kershaw, the connection between the prohibition and the reform proposal is unclear.[150] He adds that the Panel might have used these hostile takeover events and reform proposals as an opportunity to change the rules on deal protections which existed before the Kraft-Cadbury takeover event.[151] Certainly, the Panel has the power to change its rules and is independent. The problem is that if the justifications for its actions are out of proportion, such as introducing deal protection prohibition as a response to target board protection in terms of the openness of UK companies, then the success of the Panel as an arbiter would be doubtful.[152]

III. THE NEED FOR STATE INTERVENTION

It is hard to interpret whether the Takeover Code and Panel is a success or a failure. As discussed above, when the Code and its substantive rules were first introduced, investors and the City of London optimised the benefits of hostile takeover. Non-statutory regulation of takeovers was a remarkable success at that time. As Kershaw states, the dominance of national investors, the homogeneity of City participants, and the absence of a fund management industry brought a high performance to regulation.[153] In a homogeneous environment where the openness of UK companies was not an issue, there were no problems. Conversely, today the City and the market have grown too much. Armour and Skeel have demonstrated that, in the 1980s, national institutions had 60% of the total shares, and overseas

148 Kershaw, *Principles*, 223.
149 Kershaw, *Principles*, 224.
150 Kershaw, *Principles*, 225.
151 Kershaw, *Principles*, 225.
152 Kershaw, *Principles*, 225.
153 Kershaw, *Principles*, 349.

owners had only 4-5% of shares in the UK.[154] The pattern of ownership has changed remarkably in the last 30 years. Armour and Skeel's study shows that overseas ownership had increased to over 30% by 2004.[155] The "traditional" relationship between individuals in the City is nearly gone as a natural consequence, and the level of compliance is lower for both domestic and for international investors.

However, the Code and the Panel are well-fitted to the market and can still successfully deal with common transactions in the market. Even the latest reforms, which are examples of the "hard cases make bad law" phenomenon, cannot alter this truth. Kershaw suggests the abolition of the non-frustration rule, state intervention in strategic industries, disenfranchising shareholders and an increased acceptance threshold.[156] The main problem with the optimality of rules and the Panel is around the openness of UK companies to non-UK companies, and the limited defences of target boards. Extraordinary takeovers (such as a non-UK company's bid for a UK champion), which are highly rare, is the real reason. The only need is an accurate reform in takeover regulation aimed only at "high-profile" takeover events.

State intervention in the regulatory space would be unlikely to expel all political and public concerns today. To be more precise, reforms should be made with minimal distortion to the self/market controlled regulatory body. The recommended change should not be state intervention. For instance, state intervention in `strategical industries` would bring more controversy. The main idea is that the Government should block hostile takeovers in order to protect national champions.[157] As an example, the French Government usually intervenes in hostile takeovers to guide or to prevent them.[158] The main problem here is the `strategic industry` concept. For instance, the defence industry and national security concerns are likely to be a strategic sector for the UK.[159] However, if the government intends to enhance its power, like in France (Pepsi Co.'s bid for

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154 Armour and Skeel, *Who Writes the Rules*, 1769.

155 Armour and Skeel, *Who Writes the Rules*, 1769.

156 David Kershaw, "Hostile Takeovers and the Non-Frustration Rule: Time for a Re-Evaluation," *LSE Legal Studies Working Paper* 19, (2016): 1-50, 42.

157 Kershaw, *Principles*, 362.

158 Kershaw, *Hostile Takeovers*, 43.

159 Kershaw, *Hostile Takeovers*, 45.

Danone, and Yahoo's bid for Dailymotion), there would not be any mechanism to prevent such intervention.[160] The government could say that there is a strategic importance and benefit for the economy in any sector.[161] As a result, the `strategic sector` concept would likely lose its distinctive character and usefulness in protecting economy. As discussed above, Cadbury is a confectionery company, and AstraZeneca produces pharmaceuticals. If the government intervened in these areas and stated that these were strategical industries, it would have gained an uncontrolled power on takeover regulations. Additionally, this uncontrolled power could influence all possible takeovers, cause fear and have detrimental effects on the economy. The UK Government was aware of these dangers, thus withstood pressures and did not directly intervene in takeover events or did not tried to make laws to provide wider powers to itself.[162]

Secondly, granting the regulatory powers and enforcement powers of the Panel to a state regulatory body would not be wise either. Every single regime has its own experiences, precedents and unique solutions. Thus, another structure might not be compatible with the UK's needs, even it is far superior to the UK's. Abandoning the self/market controlled structure and the implementation of a direct state regulation rule would mean losing success of this *sui generis* structure. For instance, it would not be wise to open the litigation route for takeovers in the UK. It is a highly unfamiliar process for the UK and would likely mess up everything. In the US, litigation is usually, and target boards benefit from it.[163] It is a settled rule there, and they are experienced in it.[164] On the other hand, the UK is a stranger in this field, since its regulation is business oriented. In the UK, as stated in many parts in this paper, self/market controlled regulation gives speed and flexibility to the regulated space. These advantages should not be abandoned.

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160 In France, the Government has the power to block takeovers in 'strategic sectors'. The French Industry minister reportedly 'warned off' Yahoo from taking over French video streaming company Dailymotion and in response to PepsiCo's bid for Danone in 2005; see J. Guthrie, "Heseltine's view on takeovers harks back to 1990s," (2 May 2014) Financial Times. 156.

161 Kershaw, *Hostile Takeovers*, 46.

162 Kershaw, *Hostile Takeovers*, 46.

163 Thomas Hurst, "The Regulation of Tender Offers in the United States and the United Kingdom: Self-Regulation versus Legal Regulation," *N.C.J. Int'l L. & Com. Reg.* 12, (1987): 389-416, 390-391.

164 Hurst, The Regulation of Tender Offers, 391.

IV. CONCLUDING REMARKS

Takeovers are important in many respects. First, they are an opportunity for extension for businesses. Takeover means new opportunities and markets for products. It is also an important motive for company management teams. Poorly managed companies can turn into companies which make high profits. New management teams could also focus on better investments, better allocation and use of resources. In a sense, the performance of companies will rise. Well-managed companies also provide benefits to the country's economy. To sum up, takeovers are an effective way of external corporate control and can be beneficial.

The UK's system was based upon self-regulation. When the Code was first enacted, it was very well welcomed by everyone. When compared to other regulations, which were generally state based, slow, cumbersome and costly, the UK's system was regarded as an immense success. Over the years, the system has seen several changes. The reason behind it was to establish a more functional system; the same objective still exists today. A few events which created great public and political concern showed that UK takeover regulation had fallen slightly behind in the globalised free market, but failure is an unlikely result. It is logical to discuss the substantive rules and principles of the Code. Rules are static in general, and every single rule, especially the capital and market related ones, will definitely need some sort of reform in time.

At this stage, government can take the task to reform takeover regulation. However, Kershaw's abovementioned studies examines and argues what history have shown is that the state regulation is a slow process and cannot meet today's needs as adequately as self-regulation. If another reform is needed in the future, changing it by legislation will be much more painful than it is today. A self-regulator is more responsive and flexible. Another point might be state intervention into regulation. However, a self-regulator together with state intervention would create controversies and would make everything messier. Without state intervention, everything seems certain and clear. When all of these findings are combined, it can be stated that the UK's self/market controlled regulation was a success and should remain as it is. Rare "high-profile" takeovers cannot affect this result. More convenient and solution oriented reforms for high-profile events, regardless of sector, conducted by the Panel in cooperation with the

government to some extent as a consultatory body would take the pressure away from the Takeover Panel, would satisfy objectors, and most importantly would bring regulation up to date. Otherwise, all liability would be on the Code Committee and Hearings Committee of the Panel, which follow procedures for considering amendments and carrying out rule-making functions regarding the Code.

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