Lawful circumvention of the jurisdiction of the Takeover Panel in UK takeovers

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This article examines the implications of using schemes as alternative to offers in effecting takeovers in the UK. It argues that the use of schemes undermines the jurisdiction of the Panel in supervising takeovers and disarranges the role of the rules that the Panel normally administers in protecting minority shareholders.

Introduction

Since 1968, takeovers in the UK have been supervised by the Panel on Takeovers and Mergers ("the Panel"), administering the laws contained in the City Code on Takeovers and Mergers ("the Code"). Until 2006, the Panel and the Code operated under self-regulation without force of the law. In 2006, part 28 of the Companies Act 2006 designated the Panel as the supervisor of takeovers and placed the Code on statutory footing. The primary means of effecting takeovers under the Code, supervised by the Panel, is by way of contractual offer bids ("offers"). The alternative means of effecting takeovers is by schemes of arrangement ("schemes"), under part 26 of the Companies Act 2006, which is supervised by the courts. Whilst the Code contains provisions for schemes, these only deal with preliminary matters, leaving the substantive matters of takeovers by schemes to be supervised by the courts.

Historically, the courts have preferred to confine the supervision of takeovers to the jurisdiction of the Panel, acknowledging that the Panel is "steeped in knowledge of their particular market,"[1] and respecting the "combined experience and expertise" of the Panel.[2] In recent years, there has been a rise in the use of schemes and the courts in effecting takeovers. This rise, and use, of schemes as "the structure of choice for effecting recommended bids" in the UK,[3] is not a new phenomenon. Practical aspects of using schemes are well explored in the literature.[4] But what is rarely explored about this phenomenon, and the overarching focus of this article, is the implication that the increased use of schemes undermines the jurisdiction of the Panel as the *de jure* supervisor of takeovers, while placing courts as *de facto* supervisor of takeovers in the UK. In so undermining the jurisdiction of the Panel, some provisions of the Code that would normally be administered by the Panel for the protection of minority shareholders, such as the

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[1] *R v Stock Exchange ex parte Else* [1993] Q.B. 534 at 552 per Lord Bingham MR.

[2] *R v Panel on Takeovers and Mergers ex parte Guinness* [1989] 1 All E.R. 509 at 544 per Sir Donaldson MR.

[3] J. Payne, "Schemes of arrangement, takeovers and minority shareholder protection" (2011) 11 JCLS 67, 68.

[4] For examples of the literature discussing practical aspects of schemes, see G. Tsagas, "Use and abuse of power in changes of corporate control: transfer schemes and shareholders' voting practices in unchartered waters" (2019) Journal of Business Law 282; Clifford Chance, "Schemes of arrangement: no surrender" (2019) 30 Practical law Company Magazine 78; Ashurst, "Schemes of arrangement: class composition and fairness" (2019) 30 Practical Law Company Magazine 47; Clifford Chance, "Schemes of arrangement: jurisdiction and class composition" (2019) 30 Practical Law Company 72; Ashurst, "Schemes of arrangement: dealing with missing shareholders" (2019) 30 Practical Law Company Magazine 46; P. Morrison, "Scheme meetings in global pandemic" (2021) 36 Butterworths Journal of International Banking & Financial Law 35; S. Horan, "Return of the transfer of scheme of arrangement in the UK" (2016) 31 Butterworths Journal of International Banking & Financial Law 15-19; J. Cotton and D. Klineberg, "Schemes of arrangement and the Takeover Code" (2008) 23 Butterworths Journal of International Banking & Financial Law 87.

mandatory bid rule ("MBR") and high squeeze-out threshold, are disarranged or bypassed, with the consequence of less protection for minority shareholders.

This article proceeds as follows. The second section is an overview of the choice between offers and schemes for effecting takeovers, drawing attention to the rise of schemes and how that undermines the jurisdiction of the Panel. The third section examines the high and the low thresholds under offers and schemes for squeezing out minority shareholders, arguing that circumvention of the high threshold not only undermine the Panel's jurisdiction but also provide less protection to minority shareholders. The fourth section observes that schemes avoid the MBR and circumvents the prohibition of financial assistance in public companies, which would have given greater protection to minority shareholders under the Panel's jurisdiction. The fifth section examines the jurisdiction of the courts and the Panel in takeovers, highlighting the business expertise of the Panel that is underutilised whenever takeovers are carried out by way of schemes overseen by courts. The sixth section discuss the need for reconciling offers and schemes in UK takeovers. The seventh concludes.

Choice of effecting takeovers by schemes or offers

Takeovers are acquisitions of shares in a company aimed at gaining control of the target company. The two common methods of effecting a takeover are by way of scheme or offer. The definition of a 'scheme' is not given in the Companies Act 2006, but can be understood as a statutory procedure by which a company may enter a "compromise or arrangement" with "(a) its creditors, or any class of them, or (b) its members, or any class of them."[5] This "language of the statute is so widely drawn that it is not apparent what the most common uses of the mechanism may be."[6] It is this wide statutory language that partly have afforded schemes to be commonly used for effecting takeovers as an alternative to using offers.

Although scheme takeovers are primarily governed by the statute, they are to a limited extent still subject to the Code.[7] However, schemes are firmly supervised by the courts under a statutory process. The supervision of schemes by the Panel under the Code is confined to preliminary matters. A scheme process is led by the target board at the request of the potential acquirer. The potential acquirer approaches the target board with an intention of a scheme.[8] If the board is in support and agree to recommend the scheme to shareholders, the scheme is announced, and a circular is sent to shareholders with 28 days.[9] If the board does not support the scheme, then in practice that ends the matter. Otherwise, the acquirer must consult the Panel before announcing a scheme that is not recommended by the board.[10]

Once the above preliminaries are satisfied under the Code, the remainder of the scheme is supervised by the courts. First, the company or any creditor of the company or a member of the company, makes an application to the court to "order a meeting of the creditors or class of creditors, or of the members of the company or class of members (as the case may be), to be summoned."[11] Second, the company or any creditor of the company or a member of the company, makes another application to the court to "sanction the compromise or arrangement … if a majority in number representing 75% in value of the creditors or class of creditors or members or class of members (as the case may be), present and voting either

[5] Companies Act 2006 s.895(1).
[6] P. Davies, S. Worthington and C. Hare, *Gower: Principles of Modern Company Law*, 11th edn (Sweet & Maxwell, 2021) para 29-001.
[7] Appendix 7 to the City Code on Takeovers and Mergers.
[8] Rule 2 of the Code, the put up or shut up rule, applies to Schemes as it does to Offers.
[9] Section 3 of Appendix 7 to the Code.
[10] Section 13 of Appendix 7 to the Code.
[11] Companies Act 2006 s.896(1).

in person or by proxy at the meeting … agree."[12] A scheme "sanctioned by the court is binding on (a) all creditors … or members … and (b) the company" and it "has no effect until a copy of it has been delivered to the registrar.[13] To the extent that substantive matters of schemes are supervised by the courts and not the Panel, any rise in the use of schemes engages the jurisdiction of the courts in effecting takeovers and underutilises the Panel.

Turning to the definition of an 'offer' under the Code, it is an invitation to buy shares "made to the holders of the company's securities to acquire those securities (whether mandatory or voluntary) which follows or has as its objective the acquisition of control of the company concerned".[14] Offers are firmly supervised by the Panel. Offers are led by the offeror. The offeror approaches the target board with either a firm offer or a possible offer.[15] This is followed by the announcement of an offer; from which time the offeror must publish an offer document within 28 days.[16] An offer document is often published as quickly as possible to increase the pressure on the target company in the case of a hostile bid or to reduce the risk of a competing bid in the case of a friendly bid. An offer is hostile if it is not recommended and opposed by the target board, and friendly if recommended by the board.

Historically, takeovers have been carried out by way of offers. Recent statistics show that schemes are increasingly used to effect takeovers. The LexisNexis Market Tracker Trend Reports on UK Public M&A have continued to show that schemes are the structure of choice among bidders. It is worth examining, albeit briefly, this trend in the last five years.

In 2021, of the 53 firm takeovers announced in 2021, 43 (81%) were structured as schemes and ten (19%) were structured as offer.[17] The report said, where a transaction was structured as an offer, there were usually compelling circumstances for this, such as the offer being hostile, the presence of a competing offer and/or the bidder having a large pre-existing shareholding in the target. In 2020, of the 42 firm takeovers announced in 2020, 29 (69%) were structured as schemes, 11 (26%) structured as offers and two (5%) as tender offers.[18] In 2019, of the 66 firm takeovers announced in 2019, 47 (71%) were structured as schemes and 19 (29%) as offers.[19] In 2018, of the 42 firm takeovers announced in 2018, 31 (74%) were structured as schemes and 11 (26%) were structured as offers.[20] In 2017, of the 47 firm takeovers announced in 2017 (25 for Main Market companies and 22 for AIM companies), 29 (62%) were structured as a scheme and 18 (38%) were structured by way of an offer.[21]

What the above statistics tell us is that schemes are now an established choice of structure for effecting takeovers in the UK. Yet, this use of schemes underutilises the Panel's jurisdiction, as schemes are supervised by the courts. The choice between offer and scheme depends on several factors that the potential acquirer does consider, having done their due diligence. Statistics have shown that the main factor for schemes as the structure of choice amongst bidders is the certainty of obtaining 100% control: a scheme, if approved by a majority in number representing 75% (in value) present and voting at the relevant meeting(s)

[12] Companies Act 2006 s.899(1).
[13] Sections 899(3) and 899(4) Companies Act 2006.
[14] Section 3(b) of the Introduction to the Code.
[15] Rule 1 of the Code.
[16] Rule 24 of the Code.
[17] D. Lewington, S. Ali, W. Beasley, J. Altink-Thumbadoo, and S. Ofili, "Market Tracker Trend Report: UK Public M&A in 2021" (LexisNexis 2021) p 3.
[18] W. Beasley, D. Lewington, J. Altink-Thumbadoo, and A. Chohan, "Market Tracker Trend Report: Trends in UK Public M&A in 2020" (LexisNexis 2020) p 13.
[19] J. Altink-Thumbadoo, D. Lewington, W. Beasley, and J. Bakshi, "Market Tracker Trend Report: UK Public M&A in 2019" (LexisNexis 2019) p 7.
[20] H. Abboud and D. Lewington, "Market Tracker Trend Report: Public M&A report in 2018" (LexisNexis 2018) p 5.
[21] J. Hayden and E. Davies, "Market Tracker Trend Report: Trends in UK Public M&A deals in 2017" (LexisNexis 2017) p 3.

and sanctioned by the court, will be binding on all a target's shareholders, giving the bidder full control at an earlier stage than an offer, with no possibility of minority shareholding.[22]

In takeovers by way of offers, the route to 100% control is cumbersome. Firstly, the offeror is required to meet the minimum acceptance of shares carrying over 50 per cent of the voting rights in the target company to continue in the takeover process.[23] The control of the target company is deemed to pass at the 50 per cent threshold. Counting from the last day on which an offer document had to be posted, if by day 60 the offeror has not achieved the minimum level of acceptances, the offer would lapse.[24] For bidders interested in 100% control of the target, the 50% acceptance condition in offers is a deal breaker. Acceptance condition does not apply to schemes. The uncertainty of meeting the acceptance condition informs the choice for schemes as alternative to offers. Secondly, the offeror must first obtain 90% of the shares before they can squeeze out the minority – discussed further below.

Another consequence of the rise of schemes underutilising the Panel's jurisdiction, is that the role of norms that are normally generated by use of offers is lost. Offers fortifies corporate governance norms that enhance managerial accountability. One such norms is the disciplinary effect of hostile takeovers.[25] Of course this is not a legal matter, but normative. The idea of "disciplinary" is where the takeover is aimed at disciplining incumbent directors, by seeking control to replace them with more efficient directors. In contrast, there is the idea of "synergistic" takeovers, aimed at economies of scale, by seeking to work with incumbent to exploit synergies and not to oust them. It is said, "disciplinary takeovers are likely to be hostile, whereas synergistic takeovers are likely to be friendly."[26] Arguably, a 'disciplinary' takeover can only be 'hostile', and the structure of choice for a 'hostile' takeover is only by way of offers. A scheme can be 'hostile,' but in practice "there has never been a hostile bid implemented by a scheme".[27] Arguably, a scheme, in practice, can only be friendly. As schemes are nowadays the structure of choice amongst bidders, it follows that bidders are no longer 'hostile' but 'friendly' to managers, and therefore the idea of discipling managers to maximise share value is confined to theory. Increased use of schemes suggests a decrease in 'hostile' takeovers which would have been effected by offers under the Panel's jurisdiction.

That there has been a decline in hostile offers, is shown by statistics for the last five years. In 2021, of the 53 firm announcements, three were hostile, but only one was successful in that hostile form.[28] It was suggested that whilst bidders are willing to go the hostile route from time to time, we should not expect them to be as commonplace as they have been in the past.[29] In 2020, of the 42 firm announcements, only one was hostile.[30] It is was suggested that, limited deal protection measures will drive some bidders towards more rigorous due diligence and away from hostile bids.[31] In 2019, of the 66 firm announcements, four were hostile, but all were unsuccessful in that hostile form, which underlines the difficulty of bidders acquiring control without the target board's recommendation.[32] In 2018,

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[22] J. Hayden and E. Davies, above n 21, p 4.
[23] Rule 10 of the Code.
[24] Rule 31.6 of the Code.
[25] For the original idea of disciplinary takeovers, see H.G. Manne, "Mergers and the Market for Corporate Control" (1965) 73 Journal of Political Economy 110.
[26] R. Morck, A. Shleifer, and Robert W. Vishny, "Characteristics of Targets of Hostile and Friendly Takeovers" In Alan J. Auerbach, *Corporate Takeovers: Causes and Consequences* (University of Chicago Press, 1988) p 127.
[27] J. Hayden and E. Davies, above n 21, p 3.
[28] D. Lewington and others, above n 17, p 32.
[29] Simon Allport, quoted in D. Lewington and others, above n 17, p 32.
[30] W. Beasley and others, above n 18, p 16.
[31] Dominic Ross, quoted in W. Beasley and others, above n 18, p 16.
[32] J. Altink-Thumbadoo and others, above n 19, p 13.

of the 42 firm announcements, three were hostile (unsurprisingly, structured as contractual offers rather than schemes given the practical issues of being able to implement a scheme without the support of the offeree).[33] In 2017, of the 47 firm announcements, six were hostile (unsurprisingly, structured as contractual offers rather than schemes).[34]

What the statistics of declining 'hostile' offers tell us is not just the decline of the resulting 'disciplinary' takeovers, which by nature are normally hostile, but also by implication a loss of a key tool for protection of minority shareholders. Schemes popularity suggests that mangers are friendly to the bidders who would have disciplined them using 'hostile' offer tool. Schemes promote self-regulation by managers of target companies. Managers manage companies unaffected by 'disciplinary' effect of 'hostile' offers, as these are uncommon, and they self-regulate by recommending schemes. The process of schemes starts with the bidder's approach, protected by secrecy rules under the Code,[35] where bidders negotiate with managers for a takeover. Most likely during the approach, the directors would know that this takeover by way of scheme is not about disciplining them but squeezing out the minority from a well-managed company. It is unclear what incentives the managers have in recommending schemes to aid bidders who no longer use hostile offers to discipline them. But as discussed below, it is more favourable to use schemes than offers to effect takeovers when the transaction is funded by debts. The high threshold in offers for squeezing out minority shareholders, the MBR in offers, and the prohibition of financial assistance in public companies, do not incentivise effecting debt funded takeovers by offers. The use of schemes, which in turn underutilise the Panel's jurisdiction, help to circumvent these disincentives.

Thresholds under offers and schemes for squeeze outs

Under the Panel's jurisdiction, to protect non-controlling shareholders, who are normally minority shareholders, the law contained in the Code requires that "if a person acquires control of a company, the other holders of securities must be protected."[36] While a high squeeze-out threshold would give high protection to minority shareholders, the law provides both a high threshold under offers and a low threshold under schemes. For potential takeover bidders who desire the certainty of obtaining 100% shares of the target, the high threshold under the offer route is a deal breaker in favour of schemes. A scheme is a preferred choice because, proceeding down the scheme route obviates the need to undertake a squeeze-out procedure, which leads to a lengthening of the timetable in the context of a contractual offer and can result in dissenting shareholders holding an acquisition up even further.[37] In the law providing the high and low threshold, acquirers have choice of which to use in squeezing out minority shareholders. This lawful circumvention of the high threshold not only undermine the Panel's jurisdiction but also provide less protection to minority shareholders.

For takeovers made by way of offers, the offeror has a statutory right to compulsorily buy all the shares, thereby squeezing out the minority, if the statutory threshold is met. To force the remainder of shareholders to sell, the offeror must have, by virtue of acceptances of the offer, acquired or unconditionally contracted to acquire not less than 90% in value of the shares to which the offer relates and 90% of the voting rights carried by the shares to which

[33] H. Abboud and D. Lewington, above n 20, p 9.
[34] J. Hayden and E. Davies, above n 21, p 8.
[35] Rule 2(1) of the Code requires all those involved in the discussion for an offer to keep sensitive information secret prior to formal announcement of an offer.
[36] General Principles 1 of the City Code on Takeovers and Mergers.
[37] A. Cain, quoted in J. Hayden and E. Davies, above n 21, p 5.

the offer relates.[38] Under takeover offers, the successful bidder must exercise its squeeze-out right within three months after the last day on which the offer can be accepted.[39]

If the bidder has struggled to meet the threshold but come very close to the 90% threshold, if there be untraceable shareholders who have not yet accepted, as the case is likely to be in public companies with dispersed share ownership, the offeror may consider including such shareholders in the count towards the 90% threshold.[40] In theory, even when the offeror has met the required 90% threshold without the untraceable shareholders, there may remain uncertainty. The minority shareholder who receives a notice from the offeror may apply to the court on grounds that the price is unfair.[41] But the minority's contention for a fair price should not be a deal breaker to cause the potential offeror who desires to acquire 100% of the target shares to prefer the scheme route. In practice, it is likely that the minority's contention for a fair price would fail, and therefore the potential bidder should be content to take the offer route. But as the statistics have shown, bidders prefer the scheme over the offer route.

The courts have historically shown great reluctancy to allow the minority shareholder to thwart a squeeze out right of a bidder who has acquired 90% of the target shares. The courts have said that "where the statutory majority have accepted the offer, the onus must rest on an applicant to satisfy the court that the price offered is unfair."[42] The courts have continued to say that "the onus of showing that the offer price is unfair falls on the dissenting shareholder, and it is a heavy one. He has to show that it is unfair and not merely that it is open to criticism."[43] In spite the courts having shown that there is "a heavy" burden for the minority shareholders to surmount, potential bidders see the possibility for the minority to invoke statutory provision on price fairness as cause for uncertainty. It is argued here that bidders prefer the scheme not because the offer route may fail due price fairness litigation, but because the scheme route in comparison provides certainty for 100% control of the target.

For takeovers made by way of schemes, the threshold for squeezing out the minority shareholders is imbedded in the same threshold for sanctioning the scheme. Under the scheme, if a majority of 75% voting in their respective class meetings agree a scheme, the court may sanction the scheme, and a scheme sanctioned by the court is binding on all the shareholders including the dissenting minority, the scheme being effective once a copy of the order of court is delivered to the registrar.[44] In effect, the scheme provides a low threshold of 75% for squeezing-out minority shareholders. It is one of the reasons why bidders desiring the certainty of obtaining 100% shares of the target prefer the scheme over the offer route.

Here is the argument to be made that it is unfair to minority shareholders under a scheme to have their shares compulsorily purchased upon the acquirer attaining the low 75% threshold, whereas their counterparts under an offer are protected by the high 90% threshold. It is true that the "courts have rejected the argument" and on that court's "view, the lower threshold in a scheme is countered by the fact that the court needs to sanction the scheme."[45] The court's view is questionable. In *Re National Bank Ltd*, the court gave two reasons.[46]

First, that "the legislature has not seen fit to impose any such limitation." This is questionable. As it will be argued further below, either the legislature did not foresee the popularity of using schemes to effect takeovers or could not have intended a compulsory takeover under schemes to be at a lower threshold than provided for under offers. Second,

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[38] Companies Act 2006 s.979(2).
[39] Companies Act 2006 s.980(2).
[40] Companies Act 2006 s.986(9) and s.986(10).
[41] Companies Act 2006 s.986(1).
[42] *Re Press Caps* [1949] Ch 434 at 446 per Wynn-Parry J.
[43] *Shanda Games Ltd v Maso Capital Investments Ltd* [2020] B.C.C. 466 at 478 per Lady Arden.
[44] Companies Act 2006 s.899.
[45] J. Payne, above n 3, 72; *Re National Bank Ltd* [1966] 1 W.L.R. 819; *Re TDG plc* [2009] 1 B.C.L.C. 445.
[46] [1966] 1 W.L.R. 819 at 829 per Plowman J.

that a scheme "can only be sanctioned if the question of its fairness has first of all been submitted to the court." That reasoning is questionable. It ignores that both the low 75% and the high 90% thresholds are open to the court's scrutiny. Let us suppose the court's scrutiny of the scheme approved at 75% majority gives a levelling up protection equal to the 90% threshold in offers. Under offers, after 90% threshold is reached, the court can still scrutinise the offer if the dissenting minority shareholder make an application,[47] which scrutiny of the already high 90% threshold would give greater protection than that of low 75% in schemes.

As more market participants circumvent the jurisdiction of the Panel by using schemes instead of offers, the less minority shareholders will be protected, given the different thresholds (90% and 75%) for squeezing out the minority. With the popularity of schemes, the only real protection for minority shareholders in a scheme is if the minority may veto the approval of the scheme. This depends on the available number of classes of shares. If there are many classes of shares, it is likely that minority shareholders may veto the approval of the scheme. Failure to reach the 75% threshold in one class meeting would end the scheme. But where there are few classes of shares, it is unlikely the minority would veto the scheme.

Thresholds are both shield for, and sword against, minority shareholders. It is a shield in as far as it protects the minority from being forced out against their will until a threshold is reached. It is a sword in as far as it enables the minority to be forced once the threshold is reached. A high squeeze-out threshold is more of a shield than a sword, conversely, a low squeeze-out threshold is more of a sword against than a shield for minority shareholders.

For a minority shareholder faced with the sharp sword of the low 75% threshold under the scheme, his plight is dire. He cannot tell the bidder to follow the offer route with a 90% shield. The law's response to their plight is indifferent. The law's response is best played out in *Re TDG plc*.[48] In the case, a takeover was by way of a scheme and the minority being squeezed-out at 75% threshold instead of the 90% if it had been by offer. The minority argued in court that directors did not explain why this matter was by way of a scheme and not by way of offer where "compulsory acquisition would not arise until the 90% threshold had been crossed." Giving the law's response, the court said, "that matter is not something that has to be explained to a shareholder. What the shareholder is being asked to do is to say 'yes' or 'no' to the proposal. It is not for the independent Directors to explain why one particular legal route is being adopted rather than another legal route. In any case …. the scheme of arrangement in this case has become an entirely conventional, indeed much used, route. No particular opprobrium is to be attached to this scheme because the arrangements are being handled by this statutory method, rather than by another possible statutory method."

The law's response, and what the court said to the minority shareholder in *Re TDG plc*, is simply that the law provides the bidder with a choice of two routes: squeeze-out at a low or high threshold. If the bidder desiring 100% shares of the target considers that certainty is best achieved by using a low 75% scheme threshold instead of a high 90% offer threshold, the matter need not be explained to the minority shareholder. As was said in *Re TDG plc*, how the different "the squeeze-out provisions might have operated on the facts of this case" was "besides the point" and what matters is that "the provisions of the statute have been complied with" under the scheme.[49] As said in *Re TDG plc*, as attested by statistics, schemes are now conventional. Statistics have clearly shown that bidders are circumventing the 90% threshold in preference to 75% threshold, for why incur time and cost to attain 90% when you can squeeze at 75% low level. The law that gives two opposing thresholds, not only incentivises bidders to avoid the offer route under the Panel's jurisdiction in preference to the scheme route under the courts, but also leaves the minority shareholders less protected.

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[47] Companies Act 2006 s.986.
[48] [2008] EWHC 2334 at paras [23-24].
[49] [2008] EWHC 2334 at paras [34, 36].

Mandatory bid and financial assistance in takeovers

Moreover, schemes avoid the MBR and circumvent the prohibition of financial assistance in public companies, which would have given greater protection to minority shareholders under the Panel's jurisdiction. The MBR provides that where a person acquires an interest in shares in a company, which carries 30% or more of the voting rights of the company, then such person must make an offer to acquire all shares in the company.[50] The MBR is mainly applicable to takeovers effected by way of offers, which falls under the Panel's jurisdiction. It is true that, in schemes, as the acquirer always acquires 100% of the target if they are successful, the need for MBR drops away. But therein lies the issue, that the use of schemes instead of offers evades the MBR that would have protected minority shareholders from opportunistic acquirers. Although a mandatory bid can be satisfied by a scheme, the process is restricted, it cannot so be done without the prior consent of the Panel.[51]

The point to keep in mind is that use of schemes circumvents the Panel's jurisdiction, which jurisdiction applies the MBR, which MBR protects minority shareholders. The MBR is generally taken to give protection to minority shareholders, but protection from what? As noted by Kershaw, an answer typically given in response by others to this question is "protecting minority shareholders from possible future exploitation by the new controller of the target company."[52] In so protecting, as the typical answer goes, the MBR prevents the bidder taking control without offering the minority an opportunity to leave at a fair price of their shares if they wish to leave. Thus, it is a "dramatic example of unilateral exit right."[53]

The typical rationale of the MBR as a minority shareholder protection is questionable if all it does is provide an exit strategy. It essentially concedes that company law protection is inadequate hence minority beware and consider taking the exit offer and leave. One would think that the MBR essentially helps the bidder who desires 100% target shares, as it basically entices by the premium offered the minority to leave. Yet, statistics show that bidders prefer using schemes instead of offers and avoid triggering the MBR.[54] It is argued that the reason for this avoidance is the MBR serves other rationales besides the exit right.

One rationale for the MBR is that it "may eliminate opportunistic acquirers, as it forces the offeror to pay a premium to gain control."[55] This is related to the rationale of the MBR preventing inefficiency. In a study by Schuster, it has been "shown that mandatory bids prevent inefficient control transfers, where minority shareholder protection rules provide inadequate protection."[56] The MBR forces out both opportunistic and inefficient buyers.

Beyond dividends that are enjoyed in common with others in dispersed share ownership, an acquirer who becomes a block shareholder and thus gains control of the company may also gain private benefits of control. For example, they may use their block shares to vote in a way that controls the board and influences the direction of the company for their private benefit. It is fair to the minority to exit if they do not want to be unequal with the new block shareholder who in addition to dividends extracts private benefits of control without sharing such benefits with the minority shareholders. For opportunistic acquirers who are interested in gaining private benefit of control upon mere crossing over the minimum

[50] See Rule 9 of the City Code on Takeovers and Mergers.
[51] Section of Appendix 7 to the Code on Scheme of Arrangements.
[52] D. Kershaw, *Principles of Takeover Regulation* (Oxford: OUP, 2018) 249.
[53] P.L. Davies, "The Notion of Equality in Corporate Takeovers" in J. Payne, *Takeovers in English and German law* (Oxford: Hart Publishing, 2002) 22.
[54] See for example, D. Lewington and others, above n 17, p 17.
[55] J. Mukwiri, "Takeovers and incidental protection of minority shareholders" (2013) 10 ECFR 432, 442.
[56] E. Schuster, "The mandatory bid rule: efficient, after all?" (2013) 76 MLR 529, 552.

control threshold, the MBR forces them to put their money where their interest is. The MBR requires them to sow a premium in buying the remaining shares to reap private benefits. The MBR prevents buyers who do not have all the cash to pay for all the shares in the target company. This is also the argument in favour of the MBR about efficiency, in that those without cash to pay for all the remaining shares in the target company are deemed inefficient. If they lack capital power to buy all the shares, the MBR prevents them reaping from where they have not sown. This speaks in favour of the Panel's jurisdiction that applies the MBR.

Granted, there could be some acquirers who are not wealthy to pay the control premium, who could have efficiently directed the company, but who are prevented by the MBR. For as Enriques observed, there is "a broad consensus in the literature that, while obviously ex-post minority shareholders are better off with a mandatory bid rule in place, ex ante the rule inevitably reduces the number of value-increasing control acquisitions."[57] But that should not be a good reason to circumvent the Panel's jurisdiction, for such acquirers may consider the timing of their acquisition to avoid triggering the MBR, and instead seek consent from the Panel to make partial offers. To avoid making MBR illusory, the Code restricts the use of partial offers. Although partial offers are rare, the Panel, in exceptional circumstances, allows partial offers.[58] As recent as, for example, in 2019, there were two successful partial offers, which had "the benefit of enabling a shareholder to increase its holding through the 30% threshold without requiring it to make an offer for the whole."[59] If by a partial offer the MBR would be made illusory, the Code restricts the acquisition to only the number of shares exceptionally approved by the Panel. Thus, the Code prevents persons circumventing the MBR by ignoring the conditions of partial offers approved by the Panel.

But the question remains: for those purely inefficient or opportunistic acquirers, who could not make an offer for all shares, how could they be said to circumvent the MBR by effecting the takeover by way of schemes, considering that if they lacked funds for the offer, they still would lack funds to pay for all shares under the scheme? In other words, if they could not raise the money under the offer, how do they raise money under a scheme? It is argued that the answer partly lies in the use of target assets to fund for the takeover and circumventing the rule against financial assistance in public companies, all of which the offer route under the Panel's jurisdiction in effect restricts and the scheme under the jurisdiction of the courts in effect allows. To discuss this, we start with the rule against financial assistance.

The statutory rule against financial assistance states that, "where a person is acquiring or proposing to acquire shares in a public company, it is not lawful for that company, or a company that is a subsidiary of that company, to give financial assistance directly or indirectly for the purpose of the acquisition before or at the same time as the acquisition takes place."[60] The predecessor provision,[61] applied to both public and private companies. The current rule in the Companies Act 2006 does not apply to private companies. But as stated by the Court of Appeal in *Chaston v SWP Group plc*, "the general mischief, however, remained the same, namely that resources of the target company and its subsidiaries should not be used directly or indirectly to assist the purchaser financially to make the acquisition."[62]

The learned editors of *Gower* succinctly describe how acquirers circumvent the rule against financial assistance in takeovers: "if the target company were a public company at the time of its acquisition, it could nevertheless give financial assistance after the acquisition,

[57] L. Enriques, "The Mandatory Bid Rule in the Takeover Directive: Harmonisation without Foundation" (2004) 1 ECFR 440.
[58] Rule 36 of the City Code on Takeovers and Mergers.
[59] T. Matthews, quoted in J. Altink-Thumbadoo and others, above n 19, p 17.
[60] Companies Act 2006 s.678(1).
[61] Companies Act 1985 s.151.
[62] *Chaston v SWP Group plc* [2003] B.C.C. 140 at [1] Per Arden LJ.

provided it had by then been re-registered as a private company. This step is commonly taken in private equity buy-outs."[63] As the law prohibits public companies from giving financial assistance for their acquisition, inefficient acquirers who do not have all the cash that the MBR demand, will aim at re-registering the company as a private company to circumvent both rules. "Consequently, where a public company is taken over and then re-registered as a private company, it may give financial assistance by way of reducing or discharging the liabilities of the (new) parent incurred for the purpose of the acquisition."[64] If the acquirer use debt in financing a takeover, intending to discharge debt liability by target assets, both the lender and acquirer would want to be sure of financial assistance, yet the offer encumbered with the likes of acceptance condition and high squeeze-out threshold, is not a sure route. A sure way of reaching the threshold of de-listing and re-registering is by way of a scheme.

The use of debts is consistent. Statistics over past five years reveal an increased use of debt financing for takeovers, albeit unclear as to how much of those debts are leveraged on target assets. But suffice to highlight the consistently high usage of debts. In 2021, the financing of 50 out of 53 takeovers involved a cash element, of which 66% were partly debts and 18% wholly debts.[65] In 2020, the financing of 38 out of 42 takeovers involved a cash element, of which 53% were partly debts and 21% wholly debts.[66] In 2019, the financing of 55 out of 66 takeovers involved a cash element, of which 62% were partly debts and 13% wholly debts.[67] In 2018, the financing of 39 out of 42 takeovers involved a cash element, of which 55% were partly debts and 33% wholly debts.[68] In 2017, the financing of 38 out of 47 takeovers involved a cash element, of which 47% were partly debts and 27% wholly debts.[69]

But the acquisition of target companies in Leveraged Buyouts ("LBO") financed with debt collateralised by target assets is well observed in the literature. In their 2007 report, the European Central Bank observed that, "the expected success of a prospective LBO project is conditional on the future cash-flow generating capacity of the target company. From this point of view, "ideal" targets for LBOs have traditionally been identified in mature industries which generate high and steady cash flows and which have deployable assets that can easily be pledged as collateral ... Based on loan volume and deal count [in 2006], France, UK and Germany remain the most active EU countries in the LBO industry."[70] What is not well observed in the literature is the implications of lawful circumvention of the law in LBOs.

LBO circumvents the MBR by using schemes, which, as already argued, the use of schemes is underpinned by underutilising the Panel's jurisdiction. It is double circumvention of both financial assistance prohibition and MBR. Under the Panel's jurisdiction, if acquirer were to cross the MBR threshold, they would have to launch a takeover by way of offer, and the scheme would normally not be open to them. One of the roles of MBR is to prevent those without adequate finance to control the target company. In recommended takeovers, the management bypass this minority protection role of MBR by agreeing with the acquirer to implement the takeover by way of a scheme. In the absence of a competition or rival offerors, the unsuspecting shareholders may see the small premium as adequate and would not inquire or ever know how much more they could have sold their shares. The unsophisticated minority shareholders may not inquire into the financial sources of the bidder, to evaluate the implication of loans that will later have to be paid by the target

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[63] P. Davies, S. Worthington and C. Hare, above n 6, para 17-043.
[64] P. Davies, S. Worthington and C. Hare, above n 6, para 17-050.
[65] D. Lewington and others, above n 17, p 32.
[66] W. Beasley and others, above n 18, p 36.
[67] J. Altink-Thumbadoo and others, above n 19, p 35.
[68] H. Abboud and D. Lewington, above n 20, p 25.
[69] J. Hayden and E. Davies, above n 21, p 27.
[70] ECB, Large banks and private equity-sponsored leveraged buyouts in the EU (April 2007) 13, available at <https://www.ecb.europa.eu/pub/pdf/other/largebanksandprivateequity200704en.pdf> (accessed 30 June 2022).

company through assets stripping. They would not see this in the lenses of either MBR or financial assistance prohibition rule, and how both are circumvented, and how much more their shares would sell if there was a bidder who did not rely on this double circumvention.

As discussed elsewhere, back in the 1960s, in the UK, the authorities accepted hostile takeovers as a means of disciplining managers. To escape being disciplined, managers became active, not in running companies, but in buying and selling companies, as more money was made that way than in operating companies.[71] A scheme feeds that trend. A scheme circumvents the Panel's jurisdiction with its rules that prevents asset stripping. The question asked by the Chair of the Foreign Affairs Committee is: "when do several small takeovers amount to the capture of a whole sector and what can we do to stop it?"[72] The answer to this hard question lies in affirming the Panel's jurisdiction, discussed below.

Jurisdiction of the courts and the Panel in takeovers

The split jurisdiction of supervising UK takeovers, with schemes under the courts and offers under the Panel, resulting in courts as *de facto* supervisor of takeovers, was neither intended nor envisioned by the legislature, and historical insights suggest that even the courts never envisioned they would oversee day to day takeovers than the Panel. As already observed above, schemes are the preferred method of effecting takeovers, and the supervision of schemes falls in the jurisdiction of the courts. To contextualise the extent courts are *de facto* supervisor of takeovers in the UK, it suffices to look at the 2019 statistics. It is a fact that: hostile, mandatory, partial, and competing offers are very rare nowadays, which all falls in the jurisdiction of the Panel. With that in mind, it was said in 2019, "if hostile offers, mandatory offers, partial offers and competing offers (which are traditionally structured as contractual offers) are excluded, the proportion of transactions structured as schemes is even more pronounced with 94% of such transactions being structured as schemes."[73] The Panel's role in schemes is inconspicuously given under the Code.[74] The courts' role in sanctioning schemes is prominently given under the Act.[75] With statistics showing the Panel supervising only 6% and courts supervising 94% in 2019, the courts are *de facto* supervisor of takeovers.

The legislative history of schemes is well rehearsed in *Re Savoy Ltd*[76]. Schemes were only originally available where a company was subject to actual winding up. This later changed. The first statutory provision for a scheme was in the Companies Act 1862, which applied to "any arrangement entered into between a Company about to be wound up voluntarily, or in the course of being wound up voluntarily, and its Creditors."[77] This was recast in the Joint Stock Companies Arrangement Act 1870, which applied the scheme to companies "in the course of being wound up" and to "the creditors of such company, or any class of such creditors."[78] It was in the 1900 Act that members were added to the list, which stated that a scheme "shall apply not only as between the company and the creditors, or any class thereof, but as between the company and the members, or any class thereof."[79] The

[71] J. Mukwiri, "Protectionism and the EU market for corporate control: Is it possible to get the best of both worlds?" (2018) 15 ECFR 308, 337-338.
[72] Foreign Affairs Committee, 'Red light: The FCO's role in blocking foreign asset stripping in the UK inquiry' (8 April 2020), at <https://committees.parliament.uk/committee/78/foreign-affairs-committee/news/114802/red-light-the-fcos-role-in-blocking-foreign-asset-stripping-in-the-uk-inquiry> (accessed 30 June 2022).
[73] J. Altink-Thumbadoo and others, above n 19, p 7.
[74] Appendix 7 to the City Code on Takeovers and Mergers.
[75] Companies Act 2006, part 26.
[76] [1981] Ch 351, 358-359.
[77] Companies Act 1862 s.136.
[78] Joint Stock Companies Arrangement Act 1870 s.2.
[79] Companies Act 1900 s.24.

strict requirement for a scheme to apply "in the course of being wound up" was dropped by the 1907 Act, which stated that a scheme "shall apply to a company which is not in the course of being wound up, in like manner as it applies to a company which is in the course of being wound up."[80] Soon afterwards, section 120 of the Companies (Consolidation) Act 1908 brought these changes together into one cohesive legislative form which resembles the modern scheme.[81] Section 120 of the 1908 Act gave power to the court, where a compromise or arrangement is proposed between a company and its creditors or its members, to order class meetings, and if three-fourths at the meetings agree, to consider sanctioning the scheme, and if sanctioned, the scheme would bind all creditors or members and also the company.[82]

Initially, and for many years, schemes were not used for effecting a takeover. Schemes were used for compromises with creditors and for arrangements with members when the company is in financial difficulties, or as alternative to winding up. It was initially doubted that the legislature had intended schemes would be used for takeovers. This was later settled in 1917 in *Re Guardian Assurance Comp.*[83] The Guardian Company desired to acquire all the shares in Reliance Company. The shareholders of Reliance desired a consideration of part cash and part shares in the Guardian. A deal, which was in effect a takeover, was structured as a scheme between the Guardian and shareholders of Reliance. Having had the requisite meetings and approvals, the court was asked to sanction the scheme under section 120 of the Companies (Consolidation) Act 1908. The trial judge, Younger J, refused to sanction the scheme on the ground that section 120 necessarily involved some dispute or difficulty to be resolved by a compromise or arrangement, and that there was none shown to him in the case. On appeal, Warrington LJ, sanctioning the scheme, ruled that the scheme, though not a "compromise," was an "arrangement" within the section, and that there was no ground for limiting the meaning of the word "arrangement" to something analogous to a compromise. Thus, the way was fully paved for schemes to be used to effect takeovers.

The use of "offers" to effect takeovers was a newcomer. Unlike schemes, offers were initially unsupervised, and outside the jurisdiction of courts. The use of offers started in the early 1950s, which emerged due to several factors that are beyond the scope of this article.[84] One factor that led to the emergence of offers, it is argued, was the unsurmountable control of schemes by target boards, which prevented hostile takeovers. Due to the dispersed nature of the UK shareholding, with shareholders lacking collective action, schemes have always been led by target boards. It has always been that a takeover has to be friendly to be effected by a scheme. Target boards in 1950s were in much control that predators would not launch hostile schemes, and friendly offers did not incentivise boards enough to give way. The only way forward for any bidder seeking to use offers was to circumvent the target board's control.

Partly due to this state of things, the first hostile offer emerged in 1953. An account of this newcomer is here derived from the work of Richard Roberts.[85] At the time, offers were targeted to publicly quoted companies. Roberts notes that the working definition of this newcomer was "offers made over the heads of the Boards concerned." That the first of the sensational takeover by way of an "offer" was Charles Clore's bid for J Sears & Co, the parent company of the shoe shop chain-store Freeman Hardy & Willis, in the spring of 1953. Roberts notes that the bid was conducted over the heads of the Sears board by mailing offer

[80] Companies Act 1907 s.38.
[81] P. Morrison, "Cross-border schemes of arrangement: rationalising one basis for jurisdiction" (2019) Journal of Business Law 185, 192-193.
[82] Companies (Consolidated) Act 1908 s.120.
[83] [1917] 1 Ch 431.
[84] For a detailed factors on the emergence of takeovers effected by offers, see A. Johnston, "Takeover regulation: historical and theoretical perspectives on the City Code" (2007) 66 Cambridge Law Journal 422.
[85] R. Roberts "Regulatory Responses to the Rise of the Market for Corporate Control in Britain in the 1950s" (1992) 34 Business History 183.

documents direct to shareholders, a tactic hitherto impossible. Roberts notes that the Bank of England saw "offers" as a threat to macro-economic management since they undermined adherence to the government's policy of dividend restraint. That bidders were simply out to realise non-taxable capital gains through the manipulation of share prices and property assets, a sort of peacetime profiteering. Thus, the Bank's sympathies plainly lay with the "victim companies" and takeovers by way of offers were regarded as against the national interest.

Although unwelcome in 1950s, the unsupervised offers were gaining favour with bidders. Andrew Johnston explains the opportunity that bidders saw as too good to pass up. Shares were very cheap compared to the assets that companies had under their control, and if a bidder could gain control of the company and liquidate that surplus value, he could realise large profits; the hostile takeover was the mechanism through which bidders pursued such strategies; and having acquired control of the general meeting, the bidder replaced incumbent conservative management with someone who would maximise the returns generated by the company's assets.[86] The target boards fought on with unfair practices of defensive measures that frustrated takeover offers. This unsupervised market of takeovers by offers had to be regulated. In 1959, the Bank of England issued Notes, but these were inadequate to protect minority shareholders; the Panel was set up in March 1968 to self-regulate takeover offers.[87]

Arguably, by 1968 there was split jurisdiction for takeovers, friendly takeovers by way of schemes statutorily supervised by the court, and mostly hostile takeovers by way of offers supervised by the Panel. With schemes binding dissenting minority shareholders, bidders wishing to quickly acquire 100% of the target, fancied launching hostile takeovers by way of schemes. But there were doubts as to whether a scheme could be used to effect a hostile takeover, where the target board were opposed to the deal or/and did not approve. This was settled in 1981 in the case of *Re Savoy Ltd*.[88] The applicant, Trust House Forte Ltd ("Forte"), who held some shares in the respondent company, the Savoy Hotel Ltd ("Savoy"), wished to gain control of Savoy by means of a scheme. The board of Savoy opposed the takeover bid. Seeking to effect a hostile takeover, bypassing the board, Forte applied to the court to order the class meetings for the scheme. The application was dismissed. Whether there was any point in ordering class meetings and thereafter consider sanctioning the scheme, depended on the answer to the question: does the court have jurisdiction to sanction a scheme that does not have the approval of the company? Having referred to relevant cases, Nourse J concluded that "the court has no jurisdiction to sanction [a scheme of] arrangement … which does not have the approval of the company either through the board or, if appropriate, by means of a simple majority of the members in general meeting."[89] This limitation on the scheme jurisdiction may have forestalled use of schemes for takeovers.

The Panel's self-regulation jurisdiction was placed on a statutory footing by Part 28 of the Companies Act 2006, which Part 28 in the pre-Brexit era implemented the EU Takeover Directive.[90] The scope of the Panel's jurisdiction was derived from the Takeover Directive, which Directive did not apply to schemes as methods of effecting takeovers. In effect, Part 28 in designating the Panel as the supervisor of takeovers, confined the Panel's jurisdiction to offers, not schemes. As noted by the Panel in the 2005 Consultation Paper (which related to the implementation of the Takeovers Directive), a scheme of arrangement is not subject to the requirements of the Takeovers Directive. Paragraph 3.3.1 of the 2005 Paper stated: "the Directive (Article 2.1(a)) applies only to public, control-seeking "offers" (whether mandatory

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[86] A. Johnston, above n 84.
[87] J. Mukwiri, *Takeovers and the European Legal Framework: A British Perspective* (London: Routledge, 2009).
[88] [1981] Ch 351.
[89] [1981] Ch 351, 365-366 per Nourse J.
[90] Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids.

or voluntary). This would not capture, for example, a scheme of arrangement under section 425 of the Companies Act 1985."[91] As Part 28 was implementing the Takeover Directive, arguably it did not designate the Panel to supervise schemes, but only offers (takeover bids). This is one of the loopholes that law has created. Whilst Part 28 designated the Panel for offers, Part 26 of the same 2006 Act consolidated and confirmed the courts for schemes.

But if the reading of Part 28 is correct, that it confines the Panel to offers, not schemes, how can we explain the claim that takeover schemes are subject to the Code? Arguably, by 2007 the Panel started to realise the rising conflict in supervising takeovers where increasingly takeovers were effected by use of schemes supervised by the courts, thus avoiding the Panel's jurisdiction, yet disarranging the takeover rules contained in the Code. In feeble efforts to manage the supervision of takeovers, the Panel's Code Committee, in 2007, before the 2006 Act came into force, consulted on amending the "Code as it applies to a transaction regulated by the Code which is implemented by way of a scheme of arrangement effected under section 425 of the Companies Act 1985." It noted that "there has been a significant increase in recent years in the use of schemes of arrangement in order to implement transactions which are regulated by the Code and the aim of the proposals in this PCP is to codify for the first time the application of the Code to such schemes."[92] It is then that a "Schemes Appendix" was introduction into the Code. As noted above in the second section of this article, the Panel and the Code only deals with the preliminaries matters of schemes, and the substantive matters of takeovers schemes are supervised by the courts.

The language of Part 28 amended post-Brexit still, arguably, confines the jurisdiction of the Panel to offers. Section 943(7) says, "In this section "takeover bid" includes a takeover bid within the meaning given by paragraph 20(1) of Schedule 1C."[93] Turning to paragraph 20(1) of Schedule 1C, we read: "… 'takeover bid' means a public offer made to the holders of the securities of a company to acquire some or all of those securities, whether mandatory or voluntary, which follows or has as its objective the acquisition of control of that company, but does not include cases where the offer is made by the company itself."[94] The language is a recast of the definition in Article 2(1) of the Takeover Directive, which "public offers" the Panel already acknowledged does not capture a scheme of arrangement.

But the law is clearly conflicted as to the jurisdiction of supervising takeovers. Arguably, the law gives the Panel a broad jurisdiction to supervise all methods of effecting takeovers or control transactions. Yet, the same law gives the court powers to supervise schemes that effect takeovers or control transactions. The 2006 Act designates "the Panel … to have the functions conferred on it … do anything that it considers necessary or expedient for the purposes of, or in connection with, its functions."[95] The 2006 Act requires that "the Panel must make rules … in connection with the regulation of (a) takeover bids, (b) merger transactions, and (c) transactions that have or may have, directly or indirectly, an effect on the ownership or control of companies."[96] Arguably, such transactions affecting control of companies include schemes takeovers. The same 2006 Act states that, where a scheme is "proposed between a company and (a) its creditors, or (b) its members," the court may "order

[91] The Panel on Takeovers and Mergers, Consultation Paper: the implementation of the Takeover Directive: Proposals relating to amendments to be made to the Takeover Code (PCP 2005/5 Issued on 18 November 2005) – available at <https://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/pcp200505.pdf>.

[92] The Panel on Takeovers and Mergers, Consultation Paper issued by the Code Committee of the Panel: Schemes of Arrangement (PCP 2007/1 Issued on 11 June 2007) – available at <https://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/pcp200701.pdf>.

[93] Companies Act 2006 s.943(7).

[94] Companies Act 2006, para 20(1) Schedule 1C.

[95] Companies Act 2006 s.942.

[96] Companies Act 2006 s.943.

a meeting" and later "sanction" the scheme.[97] The Code affirms that the statutory functions of the Panel are to "supervise and regulate takeovers."[98] The same Code acknowledges the courts' jurisdiction in schemes and states that the offeror must announce both the outcome of "each court-convened meeting" and "court sanction hearing."[99] While the law designates the Panel as *de jure* supervisor of takeovers, the same law facilitates the practice of the courts as *de facto* supervisor of takeovers as shown by popularity of takeover by schemes.

The issue is whether the legislature or the courts envisioned that the Panel's jurisdiction in supervising takeovers would be eroded by the popularity of schemes supervised the courts. In *Else Ltd*, the Court of Appeal said, given "the highly sensitive and potentially fluid financial market … the courts will not second-guess the informed judgment of responsible regulators steeped in knowledge of their particular market."[100] Schemes were originally designed for restructuring near-insolvent companies, which arrangement was deemed to require court sanction. The legislature broadened the scope of schemes to cover solvent companies. Courts have allowed bidders to effect takeovers by way of schemes, bypassing the Panel, a body that is "steeped in knowledge of their particular market."

It is one thing for the courts to interfere with the Panel in judicial review, which is right given that the Panel performs state function, but it is another thing for the courts to interfere in day-to-day supervision of takeovers effected by way of schemes. The courts in accepting and assuming wider supervisory role of takeovers by schemes, is retrograde step in becoming appellant body substituting the Panel, a thing historically courts had refused to do. In *Datafin*, the court said, "an application for judicial review is not an appeal. The Panel and not the court is the body charged with the duty of evaluating the evidence and finding the facts. The role of the court is wholly different."[101] "The approach in *Datafin* enables the courts to assert [judicial review] jurisdiction while not interfering with the central benefits of takeover regulation through the Code and the Panel."[102] Courts have historically restrained themselves from intervening in respect to the "combined experience and expertise" of the Panel.[103] The popularity of schemes has removed that restraint and made of non-effect the experience and expertise of the Panel. As the two-track jurisdiction of schemes and offers is provided for in the law, only the legislature can rightly step in to resolve the conflict, which takes us to the next section below to discuss reconciling supervision of UK takeovers.

Need for reconciling offers and schemes in takeovers

The foregoing reveals a need to reconcile the law governing offers and schemes to preserve the jurisdiction of the Panel, which Panel (and the rules in the Code that it administers) is best placed to provide effective protection to minority shareholders in takeovers. This need is twofold. First, the need to reconcile the threshold for squeezing out minority shareholders under offers with the threshold that binds dissenting minority shareholders under schemes. Second, the need to reconcile the jurisdiction of the Penal in the decreasing use of offers with the jurisdiction of the court in the increasing use of schemes. These are discussed in turns.

It is here argued that the legislature could not have intended that the 90% high threshold for dealing with residual minority shareholders under offers would be circumvented

[97] Companies Act 2006 ss.895-899.
[98] Introduction to the City Code on Takeovers and Mergers.
[99] Section 5 of Appendix 7 to the City Code on Takeovers and Mergers.
[100] *R v International Stock Exchange of the United Kingdom and the Republic of Ireland Ex parte Else* [1993] Q.B. 534 at 552 per Sir Thomas Bingham MR.
[101] *R v Panel on Takeovers and Mergers ex p Datafin plc* [1987] Q.B. 815 at 842 per Sir Donaldson MR.
[102] D. Kershaw, above n 52, p 108.
[103] *R v Panel on Takeovers and Mergers ex parte Guinness* [1989] 1 All E.R. 509, 544.

by using the 75% low threshold for binding dissenting minority shareholder. According to the legislature, the provisions of "squeeze-out and sell-out are designed to address the problems of, and for, residual minority shareholders following a successful takeover bid."[104] It is to the squeeze-out and sell-out that we look for the appropriate threshold for dealing with residual minority shareholders. The Government's intention for asking the legislature to set threshold for both squeeze-out and sell-out rights at the 90% level, was "because they involve the compulsory purchase or acquisition of shares against the will of the holder of the shares or the acquirer, high thresholds apply to the exercising of such rights."[105] It is here argued that the legislature did not foresee the popularity of using schemes in effecting takeovers and circumventing the 90% threshold intended to protect in the "acquisition of shares against the will of the holder of the shares." Whilst the negative effect of using the scheme's 75% low threshold to compulsorily acquire shares may not be appreciated, the legislature, since 2015, is aware that "the use of schemes of arrangement to facilitate company takeovers is not new but is becoming increasingly common."[106] It behoves the legislature to reconcile the matter.

One way the legislature may reconcile the low threshold of 75% for schemes with the high threshold of 90% for offers, is to amend Part 26 of the Companies Act 2006 to limit the use of schemes of arrangement to anything but takeovers. It would suffice to insert, for example, a new subsection to section 895 of the Companies Act 2006 to read: 'The provisions of this Part shall not apply to a compromise or arrangement intended to effect a takeover.' That way, acquirers would use offers and be subject to the 90% squeeze out threshold. This would be justified on the basis that the legislature never intended a low threshold for the "acquisition of shares against the will of the holder of the shares."

Arguably, the legislature could not have intended that the court would become the *de facto* supervisor of takeovers. The legislature did not foresee the popularity of using schemes to effect takeovers, and the circumventing of the jurisdiction of the Panel. The intention of the legislature was stated in the Notes. First, it was broadly stated: "the Panel will supervise takeover activity and similar types of transactions."[107] Second, it was specifically stated: "the Bill does not affect the availability of judicial review by the courts. In the takeovers field, in the *Datafin* case (*R v Panel on Takeovers, ex parte Datafin plc* [1987] Q.B. 815) the Court of Appeal concluded that generally the courts should limit themselves only to reviewing the Panel's decision-making processes after the bid has been concluded."[108] The language of "similar types of transactions" is broad enough to cover schemes used to effect takeovers. Arguably, the reference to the decision in *Datafin* is indicative of the legislature having not envisioned the jurisdiction of the courts extending to takeover supervision in the manner seen in the statistics showing the increasing popularity of using schemes in effecting takeovers.

That the Panel is competent to have supervisory jurisdiction for takeovers, has long been noted by the legislature. Back in 2006, the legislature stated: "the Takeover Panel has been one of the great regulatory successes of the last 30 years and has played an important role in the continuing prominence of London as a world class financial centre."[109] The legislature would build upon this success to let the Panel have unrivalled jurisdiction for takeovers. Amending section 895 suggested above would suffice for jurisdictional issue.

Conclusion

[104] HL deb 2 November 2006, vol 686, at 4pm.
[105] Explanatory Notes to the Companies Act 2006, para 1242.
[106] HL deb 26 February 2015, vol 759, col 434.
[107] Explanatory Notes to the Companies Act 2006, para 1175.
[108] Explanatory Notes to the Companies Act 2006, para 1178.
[109] HL deb 11 January 2006, col 193.

An examination of the popularity of schemes of arrangement as the alternative to contractual offers in UK takeovers have revealed the negative effects that the use of schemes has on the jurisdiction of the Panel and in turn on the protection of minority shareholders. It has been shown that circumvention the Panel's jurisdiction through the use of schemes disarranges the role of the rules that are normally administered by the Panel for the protection of minority shareholders, including the law on squeeze thresholds, mandatory bids, and prohibition on financial assistance. Three ways in which the very law that governs takeovers allows potential acquirers to circumvent the same law, have been observed. Frist, whilst the law on offers protects minority shareholders by requiring a 90% threshold before the squeezing out right can be applied, the law on schemes allows a 75% threshold to be used to in effect squeeze out the minority shareholders. Second, whilst the law on offers prevents inefficient takeovers via the mandatory bid rule, reinforced by the prohibition on financial assistance by public companies, the use of schemes circumvents both the mandatory bid rule and the financial assistance prohibition. Third, whilst the law designates the Panel as the takeover supervisor, the popularity of schemes to effect takeovers has made the courts the *de facto* supervisor of takeovers. To the extent that the Panel administering the laws that are circumvented by use of schemes would have been best placed than the courts to protect minority shareholders, is good enough reason for preserving the Panel's jurisdiction.

It has been argued that the legislature never intended that a lower threshold would apply to effect a compulsory takeover or the courts would become the *de facto* supervisor. A twofold approach has been suggested in reconciling the negative supervisory implications brought about by the popularity of the use of schemes to effect takeovers. One, to reconcile the thresholds under schemes and offers for squeezing out minority shareholders. Two, to reconcile the jurisdiction of the Penal and of the courts to ensure efficient supervision of UK takeovers. It has been suggested that a simple amendment to section 895 of the Companies Act 2006 would in effect suffice to reconcile both the thresholds and the jurisdictional issue.