# Negative Implications of Greater Access to the Courts in the Takeover Process

by

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*Recent judgments of the Court of Justice of the European Union involving Austria and Italy raises the question of whether greater access to the courts makes ineffective the duty of supervisory authorities in enforcing the mandatory bid rule. This question is discussed in the context of provisions in the Takeover Bid Directive that enables Member States to avoid disruptive greater access to the courts. The overarching argument advanced in this article is that a system of takeover regulation that provides parties the ability to challenge regulatory decisions in courts is bound to cause delays and uncertainty in the takeover process. In the UK, the Takeover Bid Directive was implemented in a way that limits greater access to the courts for parties that are required to comply with the ruling of the supervisory authority. The article suggest that the UK approach may provide a benchmark for reform in EU countries.*

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## *I. Introduction*

In dealing with takeover disputes, Article 4(6) of Takeover Bids Directive 2004/25/EC ("TBD")[1], provides that the TBD "shall not affect the power which courts may have in a Member State to decline to hear legal proceedings and to decide whether or not such proceedings affect the outcome of a bid." In Member States where either the courts do not decline to hear takeover disputes, or the regulatory system provides parties the ability to challenge regulatory decisions in national courts, there is bound to be delays and uncertainty in the takeover process. In such Member States, there is also bound to be further delays and uncertainty because of references to the Court of Justice of the European Union ("Court of Justice"). Drawing from two recent judgments of the Court of Justice involving Austria and Italy with respect to enforcing the mandatory bid rule in their takeover system, this article takes a UK perspective to argue that greater access to the courts makes ineffective the duty of supervisory authorities in enforcing the mandatory bid rule. The UK approach may provide a benchmark for reform in EU countries.

Complying with, or enforcing, the mandatory bid rule ("MBR") is one of the potential sources for takeover disputes. The desirability and un-desirability of the MBR in the EU is well rehearsed in the literature and need not be repeated herein.[2] The consensus is that the MBR is desirable. The TBD declares minority protection as one of the key objectives of the MBR.[3] The TBD requires that once a person, together with those persons acting in concert with him/her, has gained a certain threshold of control of a company, such a person must "make a bid as a means of protecting the minority shareholders of that company."[4] An effective system for enforcing the MBR would prevent persons from circumventing the MBR and would also limit the intervention of courts in an ongoing takeover process.

1 Directive of the European Parliament and of the Council of 21 April 2004 on takeover bids (OJ 2004 L 142).

2 See *Luca Enriques*, 'The Mandatory Bid Rule in the Takeover Directive: Harmonization Without Foundation?', ECFR 1 (2004), 453; *Edmund-Philipp Schuster*, 'The mandatory bid rule: efficient, after all?', MLR 76 (2013), 529; *Klaus J Hopt*, 'European Takeover Reform of 2012/2013 – Time to Re-examine the Mandatory Bid', European Business Organization Law Review 15 (2014), 171; *Jesper Lau Hansen*, 'The Mandatory Bid Rule: Unnecessary, Unjustifiable and Inefficient', University of Copenhagen Faculty of Law Research Paper No 2018-54, at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3112100 (last accessed 7 December 2021).

3 *Peter Agstner/Davide Marchesini Mascheroni*, 'Breach of the mandatory bid rule: minority shareholders' protection in the public vs private enforcement debate', ECFR 17 (2020), 726, 759.

4 Article 5(1) of the TBD.

There are several factors that may explain why some persons would circumvent, or litigate against complying with, the MBR. It was suggested that the MBR "inhibits takeovers" and "greatly increases the potential cost of a takeover" if "an acquirer has to be prepared to pay for 100 per cent of the shares when the initial aim was only to buy, say, 35 per cent."[5] It was also suggested that "the mandatory bid may eliminate opportunistic acquirers, as it forces the offeror to pay a premium to gain control."[6] It has been "shown that mandatory bids prevent inefficient control transfers, where minority shareholder protection rules provide inadequate protection."[7] Further, it was suggested that "the corporate control transaction is more burdensome" as a result of "the presence of a mandatory bid rule."[8] It is here suggested that parties who are affected by any or a combination of these factors, may use these factors as reason for either circumventing the MBR by cooperating with others to acquire the desired stake or litigating in courts against complying with the rule.

The best way to protect minority shareholders is to expediate ruling on potential breaches, and enforcement, of the MBR. Shares on the market fluctuate at a rate that delay in deciding on, and enforcing, the MBR may not render effective protection to minority shareholders. When litigation halts an ongoing takeover, the market may react on each stage of the proceedings and price the shares accordingly. If the market does not or is slow to price the shares, sophisticated shareholders may evaluate the proceedings of the case and trade accordingly. Unsophisticated shareholders may lose investment if they are unable to evaluate the proceedings as to whether to sell, or hold on to, their shares. Yet, litigation in courts does not offer expediate outcome that best achieves the key objective of the MBR. In most countries, cases litigated in courts take years to come to conclusion due to the typical procedural stages: pre-commencement of proceedings, commencement of the claim, interim matters, trial, and post-trial. The UK approach, with a specialised body to supervise, regulate takeover matters, without involving courts in an ongoing takeover, provides expediate decisions which meets the key objective of the MBR.

This article proceeds as follows. Section 2 analyses delays and uncertainty in the takeover process due to parties challenging regulatory ruling in courts in two EU countries, Italy and Austria, in *Marco Tronchetti Provera SpA* Case C-

5 *Beate Sjafjell*, 'The core of corporate governance: implications of the Takeover Directive for corporate governance in Europe', EBL Rev 22 (2011), 641, 693.

6 *Jonathan Mukwiri*, 'Takeovers and incidental protection of minority shareholders', ECFR 10 (2013), 432, 442.

7 *Edmund-Philipp Schuster*, 'The mandatory bid rule: efficient, after all?', MLR 76 (2013), 529, 552.

8 *Alessandro Becconi*, 'Purposes and tools of the market for corporate control', ECFR 13 (2016), 55, 68.

206/16 and *FN and Others* Case C-546/18, respectively. Section 3 examines the potential in the EU for enforcing the MBR without involving courts. Section 4 analyses how the UK enforces the mandatory bid in a way that limits greater access to the courts to avoid delays and uncertainty. Section 5 concludes.

## *II. Delays and Uncertainty in the Takeover Process Due to Litigation*

### *1. Austria: FN and Others Case C-546/18*

The intervention, and the judgment, of the European Court of Justice in the Austrian case of *FN and Others v Übernahmekommission*,[9] demonstrates how dealing with takeover disputes through the courts causes delays and uncertainty in the takeover process. To be sure, the analysis herein distinguishes been the unacceptable delay in complying with the mandatory bid due to the intervention of Austrian national court in the ongoing takeover process, and the desirable delay in enforcing sanctions due to the intervention of the European Court of Justice. It is argued below that the former delay was unacceptable because it left minority shareholders uncertain as to whether they would have an exit opportunity, and the latter was desirable to exonerate parties upon whom sanctions had been wrongly imposed. To appreciate the implications of the case, it is worth examining the regulatory background.

Takeovers in Austria are regulated by the Takeover Act (ÜbG – Übernahmegesetz), first enacted in 1998 based on the UK's takeover Code, amended in 2006 to implement the TBD, and at the time of writing last amended in 2022.[10] The supervisory authority in Austria is the Takeover Commission (Übernahmekommission). Section 22 ÜbG requires anyone who directly or indirectly obtains a controlling interest in an offeree company to immediately inform the Takeover Commission, and to make a mandatory bid within twenty trading days of obtaining a controlling interest. Under section 23 ÜbG, the obligation to make a bid as well as all other obligations of an offeror applies to all legal entities acting in concert.

Section 1 ÜbG defines 'acting in concert' as "individuals or legal entities who cooperate with the offeror based on an agreement aimed at acquiring or exercising control over the offeree company, especially by concerting votes, or who

9 ECJ, 9 September 2021, *FN and Others v Übernahmekommission*, C-546/18, ECLI:EU:C:2021:711.

10 The Austrian Takeover Act is available at https://www.takeover.at/en/takeover-commission/legal-basis/ (last accessed 21 May 2023).

cooperate with the offeree company to frustrate the successful outcome of a takeover bid. If a party holds a direct or indirect controlling interest (§ 22 para 2 and 3) in one or more other legal entities, it is assumed that all of these parties are acting in concert; the same applies if several parties reach agreement on the exercise of voting rights when electing the members of the Supervisory Board."

For the background facts and issues in the case of *FN and Others v Übernahmekommission*, we turn to the preliminary decision of the Takeover Commission published on their website.[11] Below are the relevant extracts from the preliminary decision.

The Takeover Commission investigated and found that certain parties had breached the MBR. In 2015, there was an agreement within the meaning of section 1 ÜbG between Adler (a firm) and the Advisers of Petrus (a firm), to which GM (a natural person) was party to that agreement. Through the agreement, Adler, GM and FN (a natural person) attempted to persuade the management of Conwert (a firm) to conclude the transaction. The agreement to conduct the planned transaction was, partly, implemented on 29 September 2015.

The Takeover Commission found that the agreement also related to control within the meaning of section 1 ÜbG: had the management of Conwert consented to the transaction being carried out, the required increase in capital would have entailed a substantial change to the corporate structure, and the interest held by the hitherto largest shareholder would have been significantly increased. The fact that the cooperation between Adler, Petrus Advisers and GM did not result in success — because the management of Conwert did not consent to the conclusion of the transaction — was not a decisive factor in the assessment of whether legal entities acted in concert pursuant to section 1 ÜbG. Adler, Petrus Advisers and GM were therefore acting in concert within the meaning of section 1 ÜbG.

The Takeover Commission observed that Westgrund (a firm) and Mountain Peak (a firm) also belonged to the same group, because the assumption in section 1 para 6 ÜbG applied.

The voting rights of these parties, the Takeover Commission found, became reciprocally attributable pursuant to section 23(1) ÜbG for the first time on 29 September 2015. Adler held via Mountain Peak 25.26% of the voting rights in Conwert, and Petrus Advisers held 6.10% of the voting rights in Conwert, making a total of 31.36%. Thus, upon the reciprocal attribution of voting rights

11 See https://www.takeover.at/uploads/u/pxe/A2_Entscheidungen/Bescheide/GZ_2016-1-2-317_conwert_Veroeffentlichungsversion__22.11.2016.pdf (last accessed 19 October 2021).

pursuant to section 23(1) ÜbG, the parties had acquired a controlling interest within the meaning of section 22 ÜbG, which meant that, in principle, the obligation to make an offer pursuant to section 22a ÜbG also arose on that date.

As such, Adler, Mountain Peak, GM, Westgrund and Petrus Advisers therefore wrongly failed to make a mandatory offer pursuant to para two of section 33(1) ÜbG.[12]

On 22 November 2016, the Takeover Commission made a preliminary decision, that the following parties had acted in concert and in breach of the MBR: Adler (a firm), Mountain Peak (a firm), Westgrund (a firm), Petrus (a firm) and GM (a natural person); that acting in concert, the parties had acquired 31.36% of shares with voting rights in Conwert and had failed to make the required mandatory public takeover bid.

The parties (Adler, Mountain Peak, Westgrund, Petrus and GM) appealed against the preliminary decision. On 1 March 2017, the Oberster Gerichtshof (Supreme Court, Austria) dismissed the appeal.[13] The preliminary decision since then became 'final.' Under Austrian law, a decision that has become 'final' is binding on the authority that made it, and on other administrative and judicial authorities which may have cause to rule, in other proceedings, on the same factual and legal situation, provided that the parties concerned are the same.[14]

Taking a UK perspective on the foregoing, it is argued herein that the intervention of the Supreme Court in an ongoing takeover process, caused unacceptable delay in the takeover process. It does not help to protect minority shareholders to delay compliance with the mandatory bid. As there was already a delay between 29 September 2015 and 22 November 2016, due to investigation by the Takeover Commission, a further delay awaiting the final Supreme Court decision until 1 March 2017, was not in the interest of minority shareholders who are meant to be protected by the MBR. Granted, it took few months for the Supreme Court to confirm as 'final' the ruling of the Takeover Commission, but "however speedily the Courts operate, litigation is bound to

12 *Ibid*., preliminary decision of the Takeover Commission of 22 November 2016, para. 149–152.

13 Oberster Gerichtshof (Supreme Court), 1 March 2017 – 6 Ob 22/17d, available at: https://www.takeover.at/uploads/u/pxe/A2_Entscheidungen/Sonstige_Entscheidungen/6_Ob_17d__OGH__conwert__1.3.2017.pdf (last accessed 20 October 2021).

14 This is based on the interpretation and application of section 38 General Law on administrative proceedings 1991 (Allgemeines Verwaltungsverfahrensgesetz – AVG); ECJ, 9 September 2021, *FN and Others v Übernahmekommission*, C-546/18, ECLI:EU:C:2021:711, para. 22.

dislocate the timetable of a bid, and bring uncertainty."[15] As the dispute was on the breach of the MBR, the delay awaiting the Supreme Court decision dislocated the effecting of the mandatory bid and left minority shareholders uncertain for their protection. A stem that allows access to the courts to halt regulatory rulings in an ongoing takeover process, undermines regulatory authority, as parties may engage in tactical litigation, and causes future rulings to remain uncertain.

The remainder of the case dealt with delays in enforcing sanctions, which litigation was desirable given that the Takeover Commission had, on 29 January 2018, wrongly imposed sanctions on HL (a board member of Adler) and FN (a director of Petrus), who had not been 'parties' to the proceedings for infringement of the MBR, as they had been present only as representatives of their companies, and the preliminary decision of 22 November 2016 had not been directed at them but at their companies. Suffice to say that the parties appealed to the Federal Administrative Court, which made a reference to the Court of Justice under Article 267 of the Treaty on the Functioning of the European Union, and on 9 September 2021 the Court of Justice found in favour of HL and FN.[16] As this further delay was on who should bear liability for administrative sanctions, it did not affect the takeover process.

However, apart from the unusual facts in the case of HL and FN who would have been unjustly penalised had they not appealed against the wrongly imposed sanctions, it is here argued that delays in enforcing sanctions undermines the regulation of takeovers. In a study by Marccus Partners, it was said that "the enforcement of sanctions is a key aspect of the application of the provisions of the Directive. Without effective sanctions, companies are not incentivised to comply with the Directive."[17] The function of sanctions is to deter infringement. For sanctions to be an effective deterrent, they need to be executed speedily. In the words of Jedidiah: "Because sentence against an evil work is not executed speedily, therefore the heart of the sons of men is fully set in them to do evil."[18] A regulatory system that delays the execution of sanctions through the scrutiny of courts, creates uncertainty, disincentivises compliance, incentivises litigation, and undermines regulation of takeovers.

15 *Robert Alexander* (former Chairman of the UK's Panel on Takeovers and Mergers), 'Take-Overs and Self-Regulation', The Denning Lecture 1988 (The Bar Association for Commerce, Finance and Industry), 10.

16 See ECJ, 9 September 2021, *FN and Others v Übernahmekommission*, C-546/18, ECLI:EU:C:2021:711.

17 *Marccus Partners*, The Takeover Bid Directive Assessment Report, 2012, p. 261 (a study conducted on behalf of the European Commission in cooperation with the Centre for European Policy Studies).

18 Ecclesiastes 8:11 (King James Version).

### *2. Italy: Marco Tronchetti Provera SpA Case C-206/16*

The intervention of courts in Italy, and the judgment of the Court of Justice in the case of *Marco Tronchetti Provera SpA v Consob*,[19] demonstrates the difficulties faced by supervisory authorities in enforcing the MBR and how litigation may hinder the process of takeover. It should be noted from the outset that this is not the first time in Italy that enforcement of the MBR is delayed by litigation in the courts. Most notable is the *Fondiaria-SAI* case where minority shareholders waited for 11 years for their protection against concerted parties, starting with the ruling of the CONSOB in August 2001, to the decision of the Milan Tribunal in May 2005, through the decision of the Court of Appeal in January 2007, and finally to the decision of the Supreme Court in August 2012.[20] The drafters of the TBD could not have intended that 10 years would be a reasonable time for Member States to allow for decisions to enforce the MBR to protect minority shareholders. As such, delay in enforcing the MBR renders illusory the TBD's protection of minority shareholders. It seems, lessons were not taken from the *Fondiaria-SAI* case and allowing litigation in *Marco Tronchetti Provera SpA* case demonstrates that the regulatory system undermines the functions of the CONSOB.

Takeover bids in Italy are regulated by certain provisions of (i) Legislative Decree 58 of 24 February 1998 (*Testo unico delle disposizioni in materia di intermediazione finanziaria* – the "TUF"), as amended, and (ii) Regulation 1197 of 14 May 1999 (the "CONSOB Regulation"), as amended and issued by the CONSOB to enforce the TUF.[21] The supervisory authority in Italy is the "CONSOB" (*Commissione Nazionale per le Società e la Borsa*). Article 106 (1) TUF requires anyone who, following acquisitions or increased voting rights, holds a stake greater than 30% threshold, to make a mandatory bid for the totality of the securities admitted for trading on a regulated market in that company. Under Article 106(2) TUF, the price for the shares shall be no less than the highest price paid by the bidder, and by persons acting in concert with the bidder, in the twelve months prior to making the mandatory bid.

19 ECJ, 20 July 2017, *Marco Tronchetti Provera SpA v Consob*, C-206/16, ECLI:EU:C:2017:572.

20 Corte Suprema di Cassazione (Supreme Court of Cassation), 10 August 2012, n. 14400; for further analysis of the case, see *Peter Agstner/Davide Marchesini Mascheroni*, 'Breach of the mandatory bid rule: minority shareholders' protection in the public vs private enforcement debate', ECFR 17 (2020), 726.

21 An English version of the TUF is available at https://www.consob.it/web/consob-and-its-activities/laws-and-regulations/documenti/english/laws/fr_decree58_1998.htm (last accessed 13 December 2021).

Article 106(3)(d)(2) TUF authorises the CONSOB to adjust the price if necessary for investor protection purposes and adjust the price upwards in circumstances including where there is evidence of collusion between the bidder, or persons acting in concert with the bidder, and one or more of the sellers. Article 47 of the CONSOB Regulation provides that "the offer price shall be increased by CONSOB pursuant to Article 106, subsection 3, paragraph d), no. 2 of the Consolidated Law [TUF] if a higher price than that declared by the bidder is paid as a result of verified collusion between the bidder or the persons acting in concert with them and one or more sellers. In this case, the offer price is equal to the verified price."[22]

For the background issues in the case of *Marco Tronchetti Provera SpA v Consob*, we turn to the judgment of the Court of Justice,[23] which are summarised below.

Marco Tronchetti Provera & C SpA ("MTP"), through Pirelli & C SpA ("Pirelli") and other companies, set up a subsidiary, Lauro Sessantuno SpA ("Lauro 61"), for the purpose of acquiring all the shares in Camfin SpA. Camfin held 26.19% of the voting shares in Pirelli.

Lauro 61 made direct acquisitions from major shareholders of Camfin, including Malacalza Investimenti Srl ("MCI"), and acquired 60.99% of the shares in Camfin. As a result, Lauro 61 had an obligation, under Article 106(1) TUF, to make a mandatory bid for all shares in Camfin.

On 5 June 2013, Lauro 61 informed the market that it would announce a bid for all the shares in Camfin at a price of EUR 0.80 per share, which was the highest price paid in previous 12 months in accordance with Article 106(2) TUF.

On 12 September 2013, the CONSOB, at the petition of minority shareholders in Camfin, investigated with a view to adjusting the bid price upwards in accordance with Article 106(3)(d)(2) TUF. There had been a lock-up agreement ("the Pirelli agreement") between MTP and MCI, of which Camfin was a signatory. After MCI sold their shares in Camfin to Lauro 61, MCI acquired 6.98% of the share capital in Pirelli from MTP and Camfin.

On 25 September 2013, the CONSOB found that there was between Lauro 61 and the other persons acting in concert with it, and MCI, a collusion by which

22 An English version of CONSOB Regulation is available at https://www.consob.it/web/consob-and-its-activities/laws-and-regulations/documenti/english/laws/reg11971e.htm (last accessed 13 December 2021).

23 ECJ, 20 July 2017, *Marco Tronchetti Provera SpA v Consob*, C-206/16, ECLI:EU:C:2017:572.

MCI had sold to Lauro 61 shares in Camfin at a price of EUR 0.80 per share and, by way of consideration, had acquired shares in Pirelli from the signatories to the Pirelli pact at a price of EUR 7.80 per share, which was a lower price than the market value of EUR 8 per share. In view of the advantage thus received by MCI, the CONSOB ruled that the price of a share in Camfin must rise to EUR 0.83, applying Article 106(3)(d)(2) and Article 47 CONSOB Regulation.

Lauro 61 and others appealed to the Tribunale amministrativo regionale del Lazio (the Lazio Regional Administrative Court), arguing that Article 106(3)(d)(2) TUF and Article 47 CONSOB Regulation were inapplicable on grounds that they were contrary to Article 5(4) of Directive 2004/25. The Lazio Regional Administrative Court dismissed the appeal.

Lauro 61 and others appealed to the Consiglio di Stato (Council of State, Italy). The Council of State noted that there are, in other fields of Italian law, provisions that classify certain acts of collusion in which that notion has the meaning of a "fraudulent agreement" but concluded that the CONSOB's power to adjust price was regulatory in nature, and therefore unnecessary to apply the 'penal' definition of 'collusion' from other fields of Italian law.

The Council of State made a reference to the Court of Justice under Article 267 of the Treaty on the Functioning of the European Union. The Council of State had doubts as to whether, on account of its vagueness, the notion of 'collusion,' as used in the TUF, was incompatible with the principle of certainty of conditions for the power of national authorities to adjust the price under Article 5(4) TBD. The question for the Court of Justice was whether Article 5(4) TBD precludes a national law, such as Article 106(3)(d)(2) TUF and Article 47 CONSOB Regulation, from authorising a supervisory authority to increase the bid price, on ground of "collusion" without identifying the specific conduct that constitutes "collusion."

The judgment of the Court of Justice was delivered on 20 July 2017. The Court of Justice ruled that, "Article 5(4) of Directive 2004/25 must be interpreted as not precluding a national law, such as that at issue in the main proceedings, which enables a national supervisory authority to adjust upwards the price of a takeover bid in the event of 'collusion' without setting out the specific conduct that characterises that notion, provided that the interpretation of that notion can be deduced in a sufficiently clear, precise and foreseeable manner from that law, using methods of interpretation recognised by the national law."[24]

24 ECJ, 20 July 2017, *Marco Tronchetti Provera SpA v Consob*, C-206/16, ECLI:EU:C:2017:572, para. 48.

It is here argued that the Italian Council of State need not have referred the matter to the Court of Justice. The Lazio Regional Administrative Court had rightly dismissed the appeal by Lauro 61 and others. The CONSOB had rightly adjusted the mandatory bid price on 25 September 2013 to protect minority shareholders under both TBD and Italian law. Lauro 61 and concerting parties resisted, and the takeover process was disrupted by litigation for about four years, with parties tactically or wrongly litigating against the decision of the CONSOB. If intervention of courts in an ongoing takeover process was not available in Italy, this delay in discharging the mandatory bid obligation could have arisen.

Further, in giving in to doubts as to whether the notion of 'collusion' as used in the TUF was compatible with Article 5(4), the Council of State in effect indulged parties to pursue tactical litigation. Italian law was noticeably clear in providing the CONSOB with an option to increase the price of a takeover bid in the event of collusion between the offeror or the persons acting in concert with it and one or more sellers. Parties sought to circumvent the MBR on pricing by arguing that 'collusion' as used in the TUF required "fraudulent agreement" of which their agreement was not fraudulent. The Council of State accepted that the CONSOB's power to adjust price was regulatory in nature, and that the 'fraudulent' definition of 'collusion' used in other fields of Italian law was inapplicable in takeovers. This would have been sufficient for the Council of State to issue a decision without reference to the Court of Justice.

But in entertaining the view that 'collusion' in the TUF was 'vague' and doubts as to whether the application by the CONSOB meets the principle of "certainty" in EU law, the Council of State in effect gave credence to the parties to pursue tactical ligation. Parties who wish to circumvent the MBR are likely to find all sorts of legal arguments. For parties seeking to circumvent the MBR by tactical litigation, it did not matter that the Council of State referred the matter to the Court of Justice on grounds of the definition of 'collusion' or 'certainty' of EU law given the supposedly 'vagueness' of 'collusion' in the TUF, it suited the parties well that litigation was allowed to continue. The Council of State ought not to have indulged the parties in their tactical litigation, as this litigation only served to delay the takeover process.

It is worth noting that the negative effects of involving courts are the same as seen in the previous case. The negative effect of this litigation on the duties of the CONSOB are (a) its ruling was final with court confirmation, (b) this caused delay in the takeover process, and (c) the effectiveness of its future rulings remains uncertain, if greater access to courts remains.

### *III. Mandatory Bid Rule and Preventing Need for Involving the Courts*

Member States faced with delays and uncertainty in the takeover process due to the intervention of courts, could, even without overhauling the system, amend the MBR to provide clarity to prevent the need for involving courts. Clarity of the MBR could especially be provided on the concept of 'acting in concert,' as this tends to be the most unclear part of the rule. Arguably, given the lack of harmonisation in the EU, parties might benefit from litigation with a reference to the Court of Justice, "which can be helpful to institutional investors wanting to know what type of cooperation is not covered by acting in concert."[25] However, such litigation causes delays and uncertainty in the takeover process, as parties wait for the judgment of the court. It is suggested that amending the definition of, and providing presumptions on, 'acting in concert,' and having a mechanism for parties to consult the supervisory authority on their proposed share transaction, would prevent the need for involving the courts and avoid delays and uncertainty in the takeover process.

The MBR obligation is laid out in Article 5(1) of the TBD, which obliges a natural or legal person, together with persons acting in concert with him/her, who acquires or holds securities of a company, which securities directly or indirectly give him/her a specified percentage of voting rights in that company, giving him/her control of that company, to make a bid as a means of protecting the minority shareholders of that company. The threshold triggering the MBR obligation is a matter for national law of Member States.

The MBR is a powerful 'tool' for 'policing' the market for corporate control. The power of this 'tool' lies in calculating the triggering threshold to not only include shares of a single shareholder but also the shares of others 'acting in concert' with that single shareholder. The shares of an investor and the shares of other investors deemed to be 'acting in concert' are aggregated for the purpose of triggering the MBR. The matter turns on the definition of persons 'acting in concert,' and on the presumptions for 'acting in concert.'

Article 2(1)(d) of the TBD defines 'persons acting in concert' to mean "natural or legal persons who cooperate with the offeror or the offeree company on the basis of an agreement, either express or tacit, either oral or written, aimed either at acquiring control of the offeree company or at frustrating the successful outcome of a bid."

According to this TBD definition, any sort of agreement, whether binding or a mere a gentlemen's agreement, may lead to acting in concert if its purpose is

25 *Martin Winner*, 'Active shareholders and European takeover regulation', ECFR 11 (2014), 364, 368.

acquiring control of the company.[26] This TBD definition specifically focuses on two limbs: making control acquisitions, or frustrating such control acquisitions. The first limb captures persons who cooperate with each other with a view to acquiring control of the company, but the consequences of that cooperation only bite when threshold shares are acquired. The second limb captures persons who cooperate with the offeree company with a view to frustrating the bid, but the consequences of that cooperation only bite when threshold shares are acquired. Any cooperation where the parties do not acquire threshold shares does not trigger a mandatory bid and should therefore cause no problem. It is partly due to some EU Member States going beyond this specific definition that problems tend to arise.

The definition of concerted action has varying breadth among EU Member States. In the two countries that are used as examples of analysis in this paper, Italy adopted the TBD definition only, while Austria adopted the TBD definition plus the concept of concerted exercise of voting rights (or similar).[27] The challenge is to have a definition that sufficiently deters circumvention of the MBR, without stifling corporate governance activities.

But the varied definitions have in the past caused concerns for shareholder engagement, where shareholders cooperate with each other without seeking control of the company. This led to the European Securities and Markets Authority issuing a public statement providing a "white list" of activities that would not be regarded as acting in concert, such as parties exercising "their votes in the same way in order to support the appointment of one or more board members," among other activities.[28] But the "white list" was criticised for lacking binding force and not reconciling existing varied notions of acting in concert.[29]

Most EU Member States provide, albeit at varying level of clarity, presumptions for acting in concert. For example, in Romania, the following persons are presumed to act in concert if there is no evidence to the contrary: (i) involved persons;[30] (ii) the parent company together with its subsidiaries; (iii) a firm with its board members and with the involved persons; and (iv) a firm with its

26 *Martin Winner* (fn. 25), 367.

27 European Securities and Markets Authority, 'Public Statement', 20 June 2014, ESMA/2014/677-REV, p. 16–17.

28 European Securities and Markets Authority, 'Public Statement', 20 June 2014, ESMA/2014/677-REV, p. 6.

29 Riccardo Ghetti, 'Acting in Concert in EU Company Law: How Safe Harbours can Reduce Interference with the Exercise of Shareholder Rights', ECFR 11 (2014), 594.

30 In Romania, Article 2(1)(22) of the Law on Capital Markets (Law No 297/2004), 'involved persons' are defined as: "(a) persons who control or are controlled by an issuer or who are subject to joint control; ... (c) natural persons within the issuing company who perform management or supervisory functions."

pension funds and with the management company of these funds.[31] In countries where there is lack of clarity on the presumptions of acting in concert, such lack is likely to encourage litigation in courts, where the rules provide for court interventions.

The UK Code defines "acting in concert" as when persons, pursuant to an agreement or understanding (whether formal or informal), co-operate to obtain or consolidate control of a company or to frustrate the successful outcome of an offer for a company. The Code makes presumptions of acting in concert. The presumptions are published in the Code. The ruling of the supervisory authority, the Panel on Takeovers and Mergers ("the Panel"), follows the published presumptions. These presumptions provide the parties and their advisers clarity on what the rules are and certainty on what the decision is likely to be.

In the UK, if persons acquire shares in a company without knowledge of each other, then they would not be held to have acted in concert. But in acquisitions of shares by a company together with its directors, it would be difficult for them to negate that they had knowledge of each other's acquisitions, but the Panel would normally look closely at the circumstances.

But even when EU Member States stay within the definition provided by the TBD, and have clear presumptions for acting in concert, litigations may still be prevalent if there are regulatory deficiencies. A regulatory approach that requires parties and advisers to consult the supervisory authority is likely to prevent litigation. Consultation beforehand avoids speculation and uncertainty about whether a given action would trigger a mandatory bid. Consultation disincentivises the need for litigation. At EU level, there has been an emphasis on the importance of early consultation with national competent authorities by parties concerned, in accordance with national procedures, where there is any uncertainty.[32]

In the UK, parties and their advisers are required by the Code to consult the Panel as to whether their agreements or cooperation would amount to acting in concert. In cases of doubt, parties must consult the Panel.[33] At the outset, the Code lays out the general requirement to consult: "When a person or its advisers are in any doubt whatsoever ..., that person or its advisers must consult the Executive in advance. ... To take legal or other professional advice on the inter-

31 *Diana E Ispaf*, Romania, in: Dirk van Gerven (ed.), Common Legal Framework for Takeover Bids in Europe, vol. II, 2008, p. 186–187.

32 European Securities and Markets Authority, Public Statement, 20 June 2014, ESMA/2014/677-REV, para. 1.7.

33 This is a phrase used throughout the Code for all cases where there is potential for breach of the Code.

pretation, application or effect of the Code is not an appropriate alternative to obtaining a ruling from the Executive."[34] EU Member States who do not already have a consultation mechanism, may benefit in amending their takeover laws to include a requirement for parties to consult the supervisory authorities. This would prevent the need for involving the courts. Besides amending takeover laws, the supervisory authorities may need to arrange their resources to provide effective and timely advice.

In the UK, consulting the Panel in advance minimises the risk of breaching the MBR and mitigates the need for litigation. As detecting concerted action is mainly a factual issue, the action of an independent body which can promptly interact with shareholders may help to solve problems of interpretation.[35] In most jurisdictions, parties are not used to a friendly interaction with their regulator, or the regulatory approach keeps parties at arm's length, and the importance of early consultation is not appreciated. The consultation approach in the UK may well represent a benchmark model for EU Member States to follow.

## *IV. UK as Benchmark Model in Avoiding Greater Access to Courts?*

EU member states where greater access to courts cause delays in the takeover process and makes of none effect the duty of supervisory authorities in enforcing the MBR effectively, may benefit from reforming their takeover laws. As the MBR originated from the UK, the UK has a wealth of experience in enforcing the MBR.

The MBR in the UK is the same as in the EU. This is because, having originated from the UK, the MBR that was enacted in the TBD was afterwards implemented in the UK in 2006 when the UK was still a Member State of the EU. After leaving the EU at the end of 31 January 2020 (and after the transition period that ended on 31 December 2020), the MBR has since remained unchanged in the UK. Although the UK is a third country, having the exact MBR as it is in the TBD, EU Member States may still benefit from the UK's experience.

In the run up to the TBD, the Panel was concerned that implementation of the TBD would "inevitably lead to an increased risk of litigation, whether tactical or otherwise, during takeovers. This would mean not only delay and expense, but also the loss of certainty that the Panel's rulings were final."[36] These con-

34 Introduction to the Code, 'Interpreting the Code' para. 6(b).

35 *Riccardo Ghetti* (fn. 29), 617.

36 Takeover Panel, Report on the Year ended 31 March 1989, p. 10 <https://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/report1989.pdf>, accessed 16 Febru-

cerns were allayed when the TBD was implemented in a way that avoids litigation in courts. Litigation in courts does not accord real protection to the unsophisticated shareholders. Where the market is slow to react on every stage of the court proceedings and price shares accordingly, sophisticated investors may take advantage of the situation to the detriment of unsophisticated investors.

Studies have shown this happening in US insolvency proceedings. Despite the minuscule chances that debtors' shareholders will recover their investment in insolvency, debtors' shares continues to trade in large volume during insolvency litigation, as unsophisticated investors, who know little about the small chance of shareholder recovery, buy insolvent company shares, especially that of well-known public companies trading at low prices from sophisticated institutional investors, and consequently, unsophisticated investors see huge losses during insolvency proceedings, while institutional investors are able to hedge some of their losses from the now insolvent company.[37] Real protection of minority shareholders is best under a system that expediates decisions, which litigation in courts does not provide.

The situation that the CONSOB in Italy and the Takeover Commission in Austria found themselves was a situation that the Panel in the UK feared and sought to avoid by design of regulatory system. The situation that the supervisory authorities in Italy and Austria found themselves was threefold: (a) their preliminary rulings were challenged in courts, (b) this caused delay in the takeover process, and (c) the effectiveness of their future preliminary rulings remains uncertain. Due to the way the UK implemented the TBD, the Panel would succeed in avoiding the said situation.

The hallmarks of the Panel's takeover regulation are said to be flexibility of approach, and the speed and certainty of decision-making of the Panel.[38] This is hard to achieve if the Panel must go through the courts, given that court processes are bound to cause delays in delivering binding rulings. Even the UK courts system that prides in fast-tracking cases, with the quarterly mean time taken for fast-track claims to go to trial being 60.9 weeks in 2019,[39] does not

ary 2022; for further analysis, see *Jonathan Mukwiri*, 'The myth of tactical litigation in UK takeovers', Journal of Corporate Law Studies 8 (2008), 373.

37 *Yona Kornsgold*, 'Oh, that Hertz: Protecting Unsophisticated Investors from Buying Stock in Bankrupt Companies', Columbia Business Law Review 2021, 914.

38 Peter Scott, Chairman Takeover Panel, quoted in *Takeover Panel*, Explanatory Paper: Implementation of the Takeover Directive on Takeover Bids, 2005, available at https://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/12/2005-10.pdf (accessed 17 January 2022).

39 UK Ministry of Justice, 'Civil Justice Statistics Quarterly, England and Wales, October to December 2019', <https://assets.publishing.service.gov.uk/government/uploads/

match the speed needed in takeovers. Appreciating the speed and certainty of decision-making needed in takeovers, and the need to minimise the risk of tactical litigation during takeover bids, the UK Government designed the implementation of the TBD in a way that retained the hallmarks of the Panel's takeover regulation. The continuity of these hallmarks would "maintain the constructive working relationship between the Panel and its regulated community in the interests of shareholders and markets."[40]

The right for Member States to minimise the risk of tactical litigation is provided in Article 4(6) of the TBD, which provision is claimed to have been negotiated and secured by the UK Government to ensure that the speed and certainty of decision making of the UK system of takeover regulation could be preserved.[41] Under Article 4(6), Member States can designate a non-judicial authority to deal with takeover disputes, and courts in Member States may decline to hear takeover legal proceedings and to decide whether or not such proceedings affect the outcome of an ongoing takeover bid. The UK made full use of Article 4(6). EU Member States, where litigation in takeovers is disruptive, as seen in Italy and Austria, may still reform their takeover regulations, benchmarking on the UK, to make use of Article 4(6).

There are several features in the UK takeover regulatory framework that help the Panel to avoid the situations seen in some EU countries. These features include the following: (a) having a specialised body to supervise, regulate and adjudicate on takeover matters; (b) the experience of the supervisory authority; (c) having a system that prevents parties to an ongoing takeover bid from litigating matters in courts; (d) courts normally intervening only upon the solicitation of the supervisory authority to enforce the rules; and (e) having clear and published substantive rules and guidance on the rules. We discuss these in turn.

First, in the implementation of the TBD, the UK Government was convinced that a specialised body needs to supervise, regulate, and adjudicate takeover matters. By analogy and in general terms, the benefits often advanced for specialised courts, apply to the need for a specialised body to decide takeovers disputes. Three of the primary benefits associated with the creation of specialised courts are (i) fostering improved decision-making by having experts decide complex cases; (ii) reducing pending case backlogs in generalist courts by shifting select categories of factually and/or legally complex cases to specialised courts more capable of dealing with them, thus generating fewer appeals; and (iii) decreasing the number of judge hours required to process complex cases

system/uploads/attachment_data/file/870184/civil-justice-statistics-quarterly-Oct-Dec.pdf> (accessed 27 January 2022).

40 Peter Scott, quoted in *Takeover Panel* (fn. 38).

41 Peter Scott, quoted in *Takeover Panel* (fn. 38).

by having legal and subject-matter experts adjudicate them.[42] The speed at which a specialised body can resolve MBR disputes, as does the Panel, gives real protection to minority shareholders.

In countries where generalist courts decide on takeover disputes, as in the case studies discussed herein, the case backlogs leave minority shareholders with a period of uncertainty waiting for a court decision. In Austria, it took some months in *FN and Others*, and in Italy, it took some years in *Marco Tronchetti Provera SpA* and in *Fondiaria-SAI*, for the minority shareholders to obtain a decision. The economic benefit of speed in rulings on takeover disputes can be assumed from studies that have considered speed in general court cases. For example, one empirical study by Chemin found that judicial reforms in India that simplified procedural handling of court cases, decreased the number of cases pending per judge by 676 in the Lower Courts, which decrease represented half of a workload for a judge and indicated that the reform was successful in reducing case backlog.[43] The speed needed for takeover decisions is hard to achieve by reforming the courts. However reformed, court processes tend to take long, and delay in resolving takeover disputes negatively affects the protection the TBD accords to minority shareholders. Moreover, even if the courts be reformed to act speedily, the adversarial litigation in courts is not conducive for takeovers. "However speedily the Courts operate, litigation is bound to dislocate the timetable of a bid and bring uncertainty."[44] If the dispute is on the breach of the MBR, a delay in resolving that dispute puts back the mandatory bid aimed at protecting minority shareholders.

In the UK, the Panel as a specialised adjudicatory body, addresses takeover disputes with exceptional speed. A few examples will suffice. On 4 December 2008, the Executive refused OVL's request to extend time in the acquisition of shares in Imperial Energy; on 5 December 2008, OVL sought a review by the Hearings Committee, which on 8 December 2008 affirmed the Executive's ruling.[45] On 30 April 2010, the Hearing Committee affirmed the Executive's ruling against parties acting in concert, parties appealed and finalised papers on 24 June 2010, the Appeal Board announced its decision on 13 July 2010.[46] On 14 February 2013, the Executive reissued its ruling in the acquisition of shares

42 *Markus Bernhard Zimmer*, 'Overview of specialised courts', International Journal for Court Administration 2 (2009), 46.

43 *Matthieu Chemin*, 'Does Court Speed Shape Economic Activity', Journal of Law, Economics, & Organization 28 (2012), 460, 462.

44 *Alexander* (fn. 15), p. 10.

45 Hearing Committee's reasoned decision 2008/46 < https://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/12/2008-46.pdf >, accessed 19 January 2022.

46 Decision by the Hearings Committee to cold-shoulder Mr Brian Myerson, Mr Brian Padgett and Mr Daniel Posen for three years affirmed, <https://www.thetakeover

in Bumi Plc, parties sought a review by the Hearing Committee, which met on 18 February 2013, and affirmed the Executive's ruling on 19 February 2013.[47] The Hearing Committee met on 27 July 2018 to consider the ruling of the Executive regarding the price payable by Disney for shares in Sky, affirmed the Executive's ruling on 3 August 2018,[48] the Appeal Board received appeal papers on 8 August 2018 and arranged for a hearing on 15 August 2018,[49] and announced its decision to uphold the Executive's ruling on 16 August 2018.[50] This speed of decision-making by the Panel and the Takeover Appeal Board is unmatched by the courts. Bidders and minority shareholders benefit from speed of decision-making, which only a specialised bodies can best provide.

It is not enough to have a specialised body to supervise, regulate and decide takeover matters, such body should also function effectively. The regulatory system should not undermine the work of the specialised body. Jurisdictions with supervisory authorities for takeovers, but with a regulatory system that allows courts to intervene in an ongoing takeover bid, taking long to provide a decision, causing delays in the takeover process, essentially hinders and undermines the functions of such a specialised body. This is partly the problem faced by the CONSOB in Italy and the Takeover Commission in Austria. If the legislators in Italy and Austria desire to reform the system, Article 4 of the TBD gives a broad latitude to Member States. The UK made full use of this broad latitude. EU Member States may reform their takeover regulation in a way that takes full use of this broad latitude.

Second, in the implementation of the TBD, the UK Government designated a supervisory body that was already in existence and experienced in supervising takeovers. The Panel had been in existence since 1968, had experience, and well respected by the market, and it was reasonable to allow the Panel to continue the status quo that had been working well. At the time of the implementation of the TBD, the Panel was, as it is today, viewed as one of the City of London's

appealboard.org.uk/wp-content/uploads/2016/12/2010-01.pdf>, accessed 19 January 2022.

47 Decision of the Hearing Committee < https://www.thetakeoverpanel.org.uk/wp-content/uploads/2013/01/2013-2.pdf >, accessed 19 January 2022.

48 Decision of Hearing Committee, 'Disney, Fox, Sky' 2018/13 <https://www.thetakeoverpanel.org.uk/wp-content/uploads/2018/08/2018.13-SKY-3Aug18.pdf>, accessed 19 January 2022.

49 Date of Appeal, 'Disney, Fox, Sky' 2018/2 <https://www.thetakeoverappealboard.org.uk/wp-content/uploads/2018/08/SKY2.TAB-release.pdf>, accessed 19 January 2022.

50 Result of Appeal, 'Disney, Fox, Sky' 2018/3 <https://www.thetakeoverappealboard.org.uk/wp-content/uploads/2018/09/Takeover-Appeal-Board.2018.3.pdf>, accessed 19 January 2022.

most respected institutions that is admired around the world.[51] The Panel draws from the wider expertise of its "members appointed by the various bodies that represent the business, investor, banking, and advisory constituencies in the market place".[52] Other EU Member States might not have experienced regulator, but it would be possible to appoint a specialist panel, and have such panel structured after the UK model.

Third, in the implementation of the TBD, the UK Government opted for a regulatory system that prevents parties to an ongoing takeover bid from litigating matters in courts. Takeover disputes are decided by two branches of the Panel (Executive and Hearing Committee) and appealed to an independent body (the Appeal Board). The Executive makes the preliminary ruling. The Hearing Committee reviews the ruling. The Appeal Board hears appeals and makes the final decision. A brief discussion of each of these bodies would suffice.

The Executive is available both for consultation and giving of rulings on the interpretation, application or effect of the Code before, during and, where appropriate, after takeovers or other relevant transactions.[53] The Executive is headed by the Director General who is usually an investment bank on secondment, and assisted by Deputy Directors General who are permanent staff, Secretaries who are either seconded from law firms or/and permanent staff, and other members. The Executive conducts the day-to-day supervision and regulation of takeovers, and in case of breach of the Code, they conduct investigation and make the preliminary ruling.

The principal function of the Hearings Committee is to review rulings of the Executive; it also hears disciplinary proceedings instituted by the Executive when the Executive considers that there has been a breach of the Code.[54] The Hearing Committee is headed by the Chairman of the Panel, assisted by the Deputy Chairmen of the Panel, and other members designated or/and appointed by the Panel. Whilst the core function of the Hearing Committee is to review the rulings of the Executive, this review is only upon application by the parties.

As both the Executive and the Hearing Committee are bodies drawn within the wider Takeover Panel, they are unlikely to meet the requirements of an "independent and impartial tribunal" under both the UK's Human Rights

51 *David Kershaw*, Principles of Takeover Regulation, 2016, p. 114.

52 *Kershaw* (fn. 51), p. 122.

53 Panel Executive < https://www.thetakeoverpanel.org.uk/structure/executive>, accessed 20 January 2022.

54 The Hearing Committee <https://www.thetakeoverpanel.org.uk/structure/committees/hearings-committee>, accessed 20 January 2022.

Act 1998 and the EU's Charter of Fundamental Rights of the European Union 2016. However, the decisions of the Hearing Committee are appealable to the Takeover Appeal Board, which is "independent and impartial tribunal." In the appeal against the ruling of the Executive, as affirmed by the Hearing Committee, by the parties found to have acted in concert in acquiring shares in PCIT in 2009, on the issue that the Hearing Committee was not an "independent and impartial tribunal," the Appeal Board dismissed the issue by saying, "it is unnecessary to consider whether the Hearings Committee is an Article 6 compliant tribunal. It is sufficient to observe that the Takeover Appeal Board is constitutionally an independent public body."[55] Access to the Takeover Appeal Board gives parties access to an "independent and impartial tribunal."

The Takeover Appeal Board is an independent body which hears appeals against rulings of the Hearings Committee of the Takeover Panel.[56] The Takeover Appeal Board is headed by the Chairman and assisted by the Deputy Chairmen, all of whom will usually have held high judicial office and are pointed by the Master of the Rolls. The other members of the Board usually have the relevant knowledge and experience of takeovers and the Code.

For the parties' right to a fair trial before an independent and impartial tribunal, the composition and function of the Takeover Appeal Board fulfils the legal requirements. In the UK, Article 6 provides that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."[57] In the EU, Article 47 provides the same right ("Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law").[58] In *Panel v King*, the court acknowledged the status of the Takeover Appeal Board: from the Hearings Committee there is a right of appeal to the Takeover Appeal Board in accordance with section 951(3) of the Companies Act 2006; the Board is independent of the Panel, and its Chairman and Deputy Chairman have usually held high judicial office, and are appointed by the Master of the Rolls; appeals in respect of rulings, on the interpretation, application or effect of the Code are conducted according to law, and such hearings take the form of re-hearings; thus there is an opportunity for full review of the

55 Takeover Appeal Board, 13 July 2010, *PCIT*, Decision No. 2010/1 < https://www.thetakeoverappealboard.org.uk/wp-content/uploads/2016/12/2010-01.pdf>, accessed 20 January 2022.

56 The Appeal Board < https://www.thetakeoverappealboard.org.uk>, accessed 20 January 2022.

57 Article 6 of the Human Rights Act 1998.

58 Article 47 of the Charter of Fundamental Rights of the European Union (7. June 2016, OJ C 202/403).

decisions of the Panel and the Hearings Committee on questions of both law and fact.[59]

Appeals to the Takeover Appeal Board are exceedingly rare and there is no history of their success. At the time of writing, there has been seven appeals to the Takeover Appeal Board since the implementation of the TBD in 2006: one, dismissing an appeal in the Eurotunnel plc case;[60] two, confirming the decision of the Hearing Committee in the Principle Capital Investment Trust plc case;[61] three, dismissing an appeal in the Meldex International plc case;[62] four, dismissing an appeal in the Xchanging plc case;[63] five, dismissing an appeal in the Ladbrokes plc case;[64] six, dismissing an appeal in the Rangers International Football Club plc case;[65] and seven, confirming the decision of the Hearing Committee in the Sky plc case.[66] All the seven appeals were unsuccessful. The unsuccess rate is a disincentive to disruptive litigation.

Fourth, in implementing the TBD, the UK Government provided a mechanism of settling takeover disputes, without the intervention of the Courts. First, the Executive is required by law to make binding rulings;[67] second, the Executive's rulings can be reviewed by the Hearing Committee;[68] third, there is a right of appeal from the Hearing Committee to the Takeover Appeal Board;[69] and fourth, the Panel may ask the courts to enforce the Code.[70] Courts only intervene if the Panel seeks help with enforcement of the Code, or in very rare cases when parties seek judicial review. But even this limited access to the courts is very rare. A brief discussion of enforcement and judicial review would suffice.

59 *Panel v King*, 12 April 2018, [2018] CSIH 30, [13].
60 Decision of the Takeover Appeal Board 2007/2 < https://www.thetakeoverappealboard.org.uk/wp-content/uploads/2016/12/2007-02.pdf>, accessed 20 January 2022.
61 Decision of the Takeover Appeal Board 2010/1 < https://www.thetakeoverappealboard.org.uk/wp-content/uploads/2016/12/2010-01.pdf>, accessed 20 January 2022.
62 Decision of the Takeover Appeal Board 2015/1 < https://www.thetakeoverappealboard.org.uk/wp-content/uploads/2016/12/2015-01.pdf>, accessed 20 January 2022.
63 Decision of the Takeover Appeal Board 2016/1 < https://www.thetakeoverappealboard.org.uk/wp-content/uploads/2016/12/2016-01.pdf>, accessed 20 January 2022.
64 Decision of the Takeover Appeal Board 2016/3 < https://www.thetakeoverappealboard.org.uk/wp-content/uploads/2016/12/2016-03.pdf>, accessed 20 January 2022.
65 Decision of the Takeover Appeal Board 2017/1 < https://www.thetakeoverappealboard.org.uk/wp-content/uploads/2017/04/2017-01.pdf>, accessed 20 January 2022.
66 Decision of the Takeover Appeal Board 2018/4 < https://www.thetakeoverappealboard.org.uk/wp-content/uploads/2018/09/TAB-201804.pdf>, accessed 20 January 2022.
67 Section 946 of the Companies Act 2006.
68 Section 951(1) of the Companies Act 2006.
69 Section 951(3) of the Companies Act 2006.
70 Section 955 of the Companies Act 2006.

Historically, the Panel has always sought to ensure compliance with the Code through a consensual approach with parties engaged in takeover activity and it has done so successfully.[71] In the implementation of the TBD, section 955 of the Companies Act 2006 gave the Panel powers to ask the courts to enforce the Code. It is exceedingly rare that the Panel will seek the enforcement of the Code through the courts. At the time of writing, there has been one case, *Panel v King*,[72] where the Panel has exercised its powers of enforcement.

In *Panel v King* we may have the reason the Panel would rather avoid litigation in courts even for the purpose of enforcing the Code. Paul Davies summarises the situation very well, adapted here as follows: the King case was, and continues to be, frustrating for the Panel; the time-line says it all; the share acquisitions were completed by 2 January 2015; not until 7 June 2016 had the Panel found out about the acquisitions, investigated them and concluded that the acquirers were acting in concert; Mr King disputed acting in concert at the Hearing Committee which upheld the Executive in December 2016; Mr King appealed to the Takeover Appeal Board which on 30 March 2017 upheld the Executive's ruling; Mr King still did not comply with the direction to make an offer and so the Panel went to the courts; The Outer House rendered its decision on 22 December 2017 and the Inner House its decision on 28 February 2018, both deciding to enforce the Panel's ruling.[73]

It was not until 20 January 2019 that Mr King finally complied with the MBR through a trust company, but the offer lapsed on 15 February 2019, as it fell short of the 50% acceptance condition set out in Rule 9.3 of the Code.[74] It should be remembered that in the UK, the system does not allow parties to contest the Panel's ruling in courts, and so the kind of litigation seen in Italy and Austria is prevented in the UK. The King case is an example of the rare times when the Panel seeks the help of the court to enforce compliance with its ruling.

Turning to judicial review, it helps to first note that in implementing the TBD, the Companies Act 2006 does not provide for judicial review of the rulings of the Panel. However, judicial review is provided for at common law, and noth-

71 *Takeover Panel*, Explanatory Paper: Implementation of the Takeover Directive on Takeover Bids, 2005 <https://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/12/2005-10.pdf>, accessed 17 January 2022.

72 *Panel v King*, 12 April 2018, [2018] CSIH 30.

73 *Paul L Davies*, 'Enforcing the Takeover Panel's Decisions: Panel v King [2018] CSIH 30' Oxford Business Law Blog < https://www.law.ox.ac.uk/business-law-blog/blog/2018/06/enforcing-takeover-panels-decisions-panel-v-king-2018-csih-30>, accessed 20 January 2022.

74 Ruling of the Hearing Committee 2019/16 < https://www.thetakeoverpanel.org.uk/wp-content/uploads/2019/10/Panel-Statement-2019.16.pdf>, accessed 15 February 2022.

ing in the Companies Act 2006 restricts in any way the courts' discretion to judicially review the Panel's rulings. At common law, in *R v Panel on Takeovers and Mergers Ex parte Datafin Plc*,[75] the Court of Appeal affirmed the availability of judicial review of the Panel's rulings.

The preliminary issue in *Datafin* was about persons acting in concert. Norton Opax (a firm) made a takeover offer for shares in McCorquodale (a firm). Soon after, Datafin (a firm), also made an offer for shares in McCorquodale. As it became clear to Datafin that their bid would be unsuccessful, Datafin alleged that KIO (a firm) and Norton Opax were concert parties and that KIO had acted in breach of the Code in buying some McCorquodale shares immediately after Datafin had made a final offer and in assenting those shares to Norton Opax's offer. Datafin complained to the Panel. The Executive found no evidence of acting in concert. Datafin sought a review, and the Hearing Committee affirmed the ruling of the Executive that Norton Opax and KIO were not acting in concert. Datafin took to the courts and litigation ensued. The High Court did not think the courts had jurisdiction. Datafin appealed to the Court of Appeal. On the issue of acting in concert, the Court of Appeal dismissed the application, upholding the Executive's ruling. The Court of Appeal then took the opportunity to expound on the availability of judicial review of the Panel's rulings.

In theory, all rulings of the Panel are subject to judicial review. In practice, judicial review is very rare and courts in the UK do not intervene in an ongoing takeover, but rather follow a "non-interventionist principle" with the relationship between the Panel and the court being "historic rather than contemporaneous."[76] The non-interventionist principle is derived from the Court of Appeal decision in *R v Panel on Takeovers and Mergers Ex parte Datafin Plc*, in the judgment of by then the Master of the Rolls, Sir John Donaldson, stating as follows:

"Nothing that I have said can fetter or is intended to or should be construed as fettering the discretion of any court to which application is made for leave to apply for judicial review of a decision of the panel or which, leave having been granted, is charged with the duty of considering such an application. Nevertheless, I wish to make it clear beyond a peradventure that in the light of the special nature of the panel, its functions, the market in which it is operating, the time scales which are inherent in that market and the need to safeguard the position of third parties, who may be numbered in thousands, all of whom are entitled to continue to trade upon an assumption of the validity of the panel's

75 *R v Panel on Takeovers and Mergers Ex parte Datafin plc*, 5 December 1986, [1987] QB 815.

76 *Mukwiri* (fn. 36), 373.

rules and decisions, unless and until they are quashed by the court, I should expect the relationship between the panel and the court to be historic rather than contemporaneous. I should expect the court to allow contemporary decisions to take their course, considering the complaint and intervening, if at all, later and in retrospect by declaratory orders which would enable the panel not to repeat any error and would relieve individuals of the disciplinary consequences of any erroneous finding of breach of the rules."[77]

In ordinary cases of application for judicial review if leave to apply is granted the status quo must be preserved, but this is not so if an application for leave to apply is made against the Panel – all concerned must treat the Panel's decisions as valid and binding, unless and until they are set aside.[78] From the standpoint of the Panel entrusted with monitoring takeovers, where it is critical that decisions should be given speedily and not interrupted by the processes of litigation, the Court of Appeal decision in *Datafin* demonstrated the operation of judicial review at its most sensible and valuable, especially considering that judicial review is not an appeal from the Panel, but a limited supervisory process, and it does not involve the Courts substituting their judgment for the commercial experience of the Panel.[79]

The implication of the *Datafin* case is that the limited availability of judicial view would discourage litigation, tactical or otherwise, in takeovers in the UK. If at all there were judicial review in an ongoing takeover in the UK, it would require noticeably unmistakable evidence of, for example, the Executive and the Hearing Committee and the Takeover Appeal Board having acted illegally or irrationally or un-procedurally in their rulings.

Fifth, in implementing the TBD, the UK Government required the Panel to have clear and published substantive rules. Companies Act 2006 provides that, (1) the Panel must make rules;[80] those rules must be made by an instrument in writing;[81] the text must be made available to the public immediately after the instrument containing the rules is made;[82] and a person is not to be taken to have contravened a rule if he shows that at the time of the alleged contravention the text of the rule had not been made available to the public.[83]

77 *R v Panel on Takeovers and Mergers Ex parte Datafin plc*, 5 December 1986, [1987] QB 815, 842.
78 *Geoffrey Morse* (ed.), Palmer's Company Law, Volume 3, 1992, para. 12.294.
79 *Alexander* (fn. 15), p. 10.
80 Section 943(1).
81 Section 944(2).
82 Section 944(3).
83 Section 944(4).

The requirement to make rules public enables parties and their advisers to know and have access to the rules. The rules are contained in the Code, which is made public. The Code also provides Guidance in form of Notes for each rule, on the meaning of the rules. Further, on the issue of acting in concert, the Code provides presumptions. In deciding whether parties have acted in concert, the Panel follows the presumptions published in the Code.

In general, the Panel operates in favour of minimising complexity and maximising accessibility of the rules. The presumptions on 'acting in concert' increases certainty in knowing when parties can be held to have acted in concert. Further, presumptions enable potential investors to decide on how to cooperate with each other within the rules. The clarity of the rules and presumptions, renders the need for litigation unnecessary. Besides, the Code requires that if parties are in any doubt, they must consult the Panel. Consulting the Executive helps in avoiding problems of interpretation and the need for litigation.

## *V. Conclusion*

A detailed analysis of two judgments of the Court of Justice, involving Austria and Italy with respect to enforcing the mandatory bid rule in their takeover systems, have shown the negative effects that greater access to the courts has on the functions of the supervisory authority, including halting preliminary rulings, causing delay in the takeover process, and rendering uncertain the effectiveness of future rulings. The need for litigation in respect to the mandatory bid rule tends to revolve around whether parties have 'acted in concert' to reach the threshold that triggers the obligation to make a mandatory offer. It is suggested that EU Member States could prevent the need for involving the courts and therefore avoid delays and uncertainty in the takeover process, by amending their laws on the definition of, and providing presumptions on, 'acting in concert', and by also having a mechanism for parties to consult the supervisory authorities on their proposed share transaction.

This article has suggested that EU Members that are faced with the negative implications that greater access to the courts has on the effective enforcement of the mandatory bid rule, could amend their regulatory system considering Article 4(6) of the TBD. Turning to the UK, a former EU country, it has been observed that the UK made full use of Article 4(6) of the TBD in minimising the risk of litigation in takeovers that would otherwise hinder or delay the enforcement of the MBR and the protection due to minority shareholders. The key features in the UK are (a) having the Panel to supervise, regulate and adjudicate; (b) the experience of the Panel; (c) having a system that prevents parties to an ongoing takeover bid from litigating matters in courts; (d) courts

intervening only upon request of the Panel to enforce the rules or rarely on judicial review; and (e) having clear and published rules and guidance on the rules. To avoid disruptive litigation, EU Member States may reform their takeover regulations, benchmarking on the UK approach, to make use of Article 4(6) of TBD.