Brexit's Influence on UK's Corporate Takeover Defences

1. Introduction

Takeovers are a type of corporate restructuring,[1] where bidders acquire controlling amounts of a company's shares,[2] in order to ultimately generate synergistic benefits.[3] The economic goals of takeovers are the same as mergers,[4] and thus, the two processes are often confused.[5] Mergers, however, are distinct from takeovers because they seek to achieve those advantages through bilaterally agreed fusion of assets.[6] Although seemingly trivial, their procedural difference is actually pertinent as it enables takeovers to remain viable even when targets are uncooperative and mergers are non-operational. Such takeovers are termed "hostile".[7] However, mere hostility fails to adequately describe the vulnerability of UK companies to those takeovers.[8] This is because, in contrast to their US counterparts, the boards of UK companies cannot enact effective defences,[9] and can neither frustrate,[10] nor redirect the bid into a compromise.[11] Thus, UK companies are almost sitting ducks.[12]

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[1] Chrispas Nyombi, 'A critique of shareholder primacy under UK takeover law and the continued imposition of the board neutrality rule' (2015) 57 Int JLM 235, 236.

[2] Brenda Hannigan, *Company Law* (4th edn, OUP 2016) 716; Paul L Davies and Sarah Worthington, *Gower: Principles of Modern Company Law* (10th edn, Sweet and Maxwell, 2016) 917. There is no codified definition of "takeover" in the UK. The closest is section 943(7) of the Companies Act 2006 which adopts the Takeovers Directive's definition of "takeover bid". Article 2(1)(a) of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids [2004] OJ L142/12 (Takeover Directive) defines "takeover bid" as "a public offer… to the holders of the securities of a company to acquire all or some of those securities… [and] has its objective the acquisition of control of the offeree company". The definition is clearer in the United States (US). Section 94(2) of the Securities Act 2005 defines a "takeover" as "an offer made… to acquire such securities… which will result in the offeror acquiring effective control of the offeree". Additionally, there is no agreed definition of control in the UK. Nyombi (n 1), 235-236 argues that effective control of a company is achieved by holding 75 per cent of its shares. Sarah Worthington, *Sealy and Worthington's Text, Cases, and Materials in Company Law* (11th edn, OUP 2016) 796 argues that control will usually vest in the shareholder with "more than 50% of the voting shares", although that percentage may be lower for public companies. Germany, however, has codified in section 29 of the Securities Acquisition and Takeover Act (*Wertpapiererwerbs- und Übernahmegesetz*) the definition of control to mean anyone holding 30 per cent of a company's voting rights.

[3] Alan Dignam, *Hicks and Goo's Cases and Materials on Company Law* (7th edn, OUP 2011) 566 states that takeovers are undertaken because they allow companies "to grow in size and efficiency, to take control of a profitable competitor, or acquire valuable markets customers, brands, or underexploited corporate assets". See also Hannigan (n 2) 716-717.

[4] John Lowry and Arad Reisberg, *Pettet's Company Law: Company Law & Corporate Finance* (4th edn, Pearson 2012) 530.

[5] Hannigan (n 2) 716. the terminologies "takeover" and "merger" were intentionally muddled because "takeover may appear predatory", see Dignam (n 3) 566.

[6] Nyombi (n 1) 236; Hannigan, (n 2) 716; Davies and Worthington (n 2) 918.

[7] Joseph Lee, 'Striking a Fair Balance in UK Takeover Law: Market Interests, Power of Regulation, and Enforcement' (2017) 28 European Business Law Review 829, 841-842. For the historical development of hostile takeovers, see Andrew Johnston, 'Takeover Regulation: Historical and Theoretical Perspectives on the City Code' (2007) 66 Cambridge Law Journal 422, 423-428.

[8] The Takeover Panel Code Committee, 'Consultation Paper Issued by the Code Committee of the Panel: Review of Certain Aspects of the Regulation of Takeover Bids' (PCP 2010/2, 2010) 4.

[9] John Armour, David A Skeel Jr, 'Who Writes the Rules for Hostile Takeovers, and Why? The Peculiar Divergence of US and UK Takeover Regulation (2007) 95 Georgetown Law Journal 1727, 1735-1737.

[10] Constantinos Pashiardis, 'Entrusting the United Kingdom's Boards of Directors with Takeover Defences: Carrots, Sticks and Executive Remuneration Contracts - Part One' 12 International Corporate Rescue 248, 248.

[11] Albert Saulsbury, 'The Availability of Takeover Defenses and Deal Protection Devices for Anglo-American Target Companies' (2012) 37 Delaware Journal of Corporate Law 115, 117.

[12] UK companies are not completely sitting ducks because their boards may convince shareholders, competition authorities, or friendly "white knights" through their "powers of persuasion" to undertake

UK's prohibition of defences is not a position adopted through formal debate.[13] Instead, it is merely a convenient acceptance of the historical arrangements "City professionals" had installed in accordance to the then prevailing corporate philosophy of shareholder primacy.[14] Such is unfortunate because it entails an irrational rejection of defence's potential advantages. More disappointing, however, is that despite the numerous opportunities UK was presented, it still failed to properly conduct that debate. In 2006, UK had to decide whether to transpose the European Union (EU) Takeover Directive's "optional… prohibition on defensive measures".[15] Although such was a "controversial" issue,[16] no serious deliberation was undertaken,[17] and UK decided "to maintain that broad prohibition".[18] Later in 2010, there was significant public outcry after Kraft "reversed its stance against closing… plants" attained from taking over Cadbury.[19] UK's Takeover Panel responded swiftly and initiated a consultation,[20] which discovered that hostile takeovers are "too easy… to succeed" because "hostile offerors have… a tactical advantage".[21] The Panel concluded that the solution was to hold stakeholders in higher regard.[22] That assertion was similar to UK Parliament's, which opined that "it [was] time to reconsider many aspects of corporate governance".[23] Unfortunately, neither the Panel, nor Parliament had contemplated the value of defences in their enquires.

Following Pfizer's failed attempt to takeover AstraZeneca in 2014, together with the cumulative yearly departure of over 100 British companies to owners abroad,[24] including

measures that may produce defensive impacts, see Davies and Worthington (n 2) 940. Additionally, although never actually accomplished, defences may technically be implemented with the approval of shareholders, see David Kershaw, *Company Law in Context* (OUP 2009), Web Chapter B: The Market for Corporate Control, 116 <http://fdslive.oup.com/www.oup.com/orc/resources/law/company/kershaw2e/resources/chapters/kershaw2e_Web_Chapter_B.pdf> accessed 18 August 2018.

[13] Johnston (n 7) 459; David Kershaw, 'Hostile Takeovers and the Non-Frustration Rule: Time for a Re-Evaluation (2016) LSE Legal Studies Working Paper No 19/2016, 14 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2875772> accessed 18 August 2018.

[14] Armour, Skeel (n 9) 1731, 1758-1760, 1771. See also Pashiardis (n 10) 249-250; Johnston (n 7) 431-437; Jennifer Okotume, 'The Growing Need to Reform the Board Neutrality Rule Under UK Takeover Law (2018) 29 International Company and Commercial Law Review 301, 307.

[15] Johnston (n 7) 447, 457. See also, Article 9 of the Takeover Directive.

[16] Armour, Skeel (n 9) 1788.

[17] The Department of Trade and Industry (DTI) simply concluded that defences should not be adopted because that was what "UK City and business stakeholders… support", see Department of Trade and Industry, 'Company Law Implementation of the European Directive on Takeover Bids: A Consultative Document' (DTI, 2005) 27. The DTI's considerations are insufficient because they "contained no discussion of any of the economic arguments… nor any discussion… for making the prohibition optional", see Johnston (n 7) 458. The lack of a debate defence was uncontroversial then because the Directive was inspired by UK's takeover laws, see Johnston (n 7) 448; Davies and Worthington (n 2) 940.

[18] Johnston (n 7) 447.

[19] Michael R Patrone, 'Sour Chocolate: The U.K, Takeover Panel's Improper Reaction to Kraft's Acquisition of Cadbury' (2011) 8 BYU Intl L & Mgmt R 63, 64-65.

[20] The Takeover Panel Code Committee (n 8).

[21] ibid 3.

[22] ibid.

[23] House of Commons, *Business, Innovation and Skills Committee, Mergers acquisitions and takeovers: the takeover of Cadbury by Kraft* (HC 234) 27.

[24] Okotume (n 14) 303. See also Office for National Statistics, 'Mergers and Acquisitions by foreign companies' (2012) < http://webarchive.nationalarchives.gov.uk/20151014024728tf_/http://www.ons.gov.uk/ons/rel/international-transactions/mergers-and-acquisitions-involving-uk-companies/q3-2012/index.html> accessed 10 August 2018.

numerous “popular British brands”,[25] sentiment that there is a “loss of iconic British brand[s]”,[26] “national pride”,[27] and employment has been rampant.[28] In the face of mounting pressures, the lack of a defences debate can no longer be excused by an absence of appropriate “conditions”.[29] Nevertheless, looming Brexit seems to be the circumstance required for that debate,[30] since “[m]ajor events often cause substantial legal reform”,[31] and especially because Brexit will allow UK to become “sovereign… again with full control of its… laws”.[32]

This essay seeks to show that Brexit will influence UK’s takeover defences, so as to justify it as the impetus for the initiation of a formal defences debate. It will do so by first considering how Brexit alters the availability of defences, before contemplating how Brexit strengthens or weakens the varying arguments for and against them.

2. Brexit’s Influence on the availability of defences

As already established above, there is very limited scope to deploy effective defences against hostile takeovers in the UK. This anti-defences position is maintained by three interconnected pillars of prohibition, namely EU takeover law, specific company laws, and general director duties. The interwoven array of rules is necessary because, as will be observed later, there is neither a fixed nor singular concept of defences. Instead, defences derive function from across all of company law,[33] and for as long as lawyers can innovate, defences can evolve to adopt an infinite amount of forms.

2.1. EU takeover law

Thus, EU’s takeover specific law, the Takeover Directive is genius for it seems capable of holding at bay the limitless array of defences. This, it achieved through broad drafting of the “non-frustration principle”,[34] consisting of Article 3(1)(c), which states that “the board… must not deny the holders of securities the opportunity to decide on the merits of the bid”, and Article 9(2) which provides that “the board… shall obtain… authorisation… before taking any action… which may result in the frustration of the bid”. The non-frustration principle is effective in the UK, for it has correspondingly been integrated wholesale into UK’s law via General Principle 3 and Rule 21.1(a) of the Takeover Code,[35] and functions as simply as it appears, by forbidding all actions which may frustrate takeover bids. Despite its uncomplex mechanism, it is extremely strict, for it “looks to consequences, not to purposes”, and thus, is even able to

[25] Nyombi and Mortimer, ‘Takeover Regulation in the UK and Shareholder Primacy: What, Why and How to Reform?’ (2018) 24 Int TLR 62, 65; The Telegraph, ‘10 foreign takeovers of UK companies in the past decade’ (21 October 2009) <https://www.telegraph.co.uk/finance/6396381/10-foreign-takeovers-of-UK-companies-in-the-past-decade.html> accessed 11 August 2018.

[26] Roger Carr, ‘Cadbury: Hostile bids and takeovers’ (Saiid Business School, 15 February 2010) <https://podcasts.ox.ac.uk/roger-carr-cadbury-hostile-bids-and-takeovers> accessed 5 August 2018.

[27] Nyombi and Mortimer (n 25) 75.

[28] Okotume (n 14) 303.

[29] Kershaw (n 13) 8-10.

[30] Brexit has stimulated a plethora of corporate law debates, see generally Böckli et al, ‘The Consequences of Brexit for Companies and Company Law’ (2017) University of Cambridge Faculty of Law Research Paper No 22/2017 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2926489> accessed 5 August 2018.

[31] Patrone (n 19) 66.

[32] Andrew Gamblem, ‘Taking back control: the political implications of Brexit’ (2018) 25 The Politics and Economics of Brexit 1215, 1221.

[33] Davies, Worthington (n 2) 941; Lee (n 7) 843

[34] David Kershaw, ‘The Illusion of Importance: Reconsidering the UK's Takeover Defence Prohibition’ (2007) 56 ICLQ 267, 267-268. The non-frustration principle is also known as the “board neutrality rule”, see Okotume (n 14) 307. Board neutrality is a concept that has existed since 1959, see Armour and Skeel (n 9) 1759.

[35] Patrone (2011) 68. See also, Kershaw (n 13), 267-268. The Takeover Code’s prohibitions have statutory force because it is section 943(1) of the Companies Act 2006 that required the Panel to “make rules giving effect to Articles 3.1… [and] 9”.

capture pre-bid defences.[36] Because Brexit's primary purpose is to leave the EU and depart from the laws it dictates, it is unavoidable that the Takeover Directive and its non-frustration principle will be impacted.

However, caution must be exercised to avoid exaggerating Brexit's influence upon UK's position towards takeover defences. This is because, the non-frustration principle is a product of UK's bargaining,[37] and is heavily influenced by UK's pre-Takeover Directive rules.[38] More importantly, it is a misconception to assume that UK is compelled by the Directive to accept the non-frustration principle. In fact, although UK was indeed bound to transpose the Directive, it "was not obliged to maintain the prohibition on defensive measures".[39] This is because the "Portuguese compromise" that was reached during the Directive's negotiations made the implementation of Article 9(2) "optional".[40] Furthermore, as can be insinuated from the existence of arguments in favour of defences, UK was never shackled to its initial position. Instead, it was free to equalise the Takeover Directive's uneven "playing field",[41] by amending its stance to favour "non-adherence to the board neutrality rule", similar to Germany or France.[42] Moreover, if UK was even slightly interested in levelling the playing field, it could have at least adopted the Directive's reciprocity principle, which will "exempt companies from applying Article 9(2)… if they become the subject of an offer launched by a company which does not apply the same".[43] Operation of the reciprocity principle would not have compromised UK's no-defences position, but the principle was never adopted anyway.[44] By failing to capitalise on these readily available pre-Brexit opportunities, UK seems to be a champion for "efficient integration of European business… shareholders and… shareholder sovereignty",[45] suggesting that Brexit will not influence the availability of defences.

Unfortunately, that warning to avoid overemphasising Brexit's influence is flawed, for although it is premised on historical truth, history does not dictate future policies. Indeed, regardless of whether UK was truly a champion for unification, Brexit is an unambiguous signal that it now desires change. Additionally, although UK was never legally bound to its initial advocacy for a no-defences takeover regime, perhaps, as primary architect of the non-frustration principle, it found itself morally bound to stay true to its stance, to avoid embarrassment from indecisiveness. No longer a willing champion for EU unification, surely Brexit will have some influence upon UK's position towards the availability of defences. Nevertheless, even if Brexit influences UK to disregard EU takeover law, defences will not necessarily become available.[46] This is because EU law is merely one of the tripartite pillars prohibiting defences, and because the non-frustration rule is only active for the time periods

[36] Davies and Worthington (n 2) 939, 942.
[37] Lee (n 7) 832. See also, Alan Dignam, 'Transplanting UK Takeover Culture: The EU Takeovers Directive and the Australian Experience' 4 International Journal of Disclosure and Governance 148 (2007) 148, 150-151.
[38] Johnston (n 7) 422, 448; Patrone (n 19) 68.
[39] Johnston (n 7) 457.
[40] Blanaid Clarke, 'Articles 9 and 11 of the Takeover Directive and the Market for Corporate Control' (2006) JBL 355, 372. See also, Takeover Directive, article 12(1).
[41] Clarke (n 40) 356. See also, Report of the High Level Group of Company Law Experts on Issues Related to Takeover Bids (The Winter Report) (2002); Frank Wooldridge, 'Some important provisions, and implementation of the Takeover Directive' (2007) 28 Comp Law 293.
[42] Nyombi and Mortimer (n 25) 67-68
[43] Takeover Directive, art 12(3). The reciprocity principle also exists because of the Portuguese compromise, see Clerc et al, *A Legal and Economic Assessment of European Takeover Regulation* (1st edn, CEPS Paperbacks, 2012) 1-2.
[44] Carsten Gerner-Beuerle, David Kershaw, and Matteo Solinas, 'Is the Board Neutrality Rule Trivial? Amnesia about Corporate Law in European Takeover Regulation' (2011) 22 European Business Law Review 559, 569.
[45] Gerner-Beuerle, Kershaw, and Solinas (n 45) 569.
[46] Kershaw (n 34) 271, 306; Gerner-Beuerle, Kershaw, Solinas (n 45) 570; Chrispas Nyombi, Tom Mortimer, Rhidian Lewis, 'Shareholder Primacy and Stakeholders' Interests in the Aftermath of a Takeover: A Review of Empirical Evidence' (2015) 161, 162; Kershaw (n 34) 14.

"[d]uring the course of an offer" or when the "offer might be imminent".[47] Pre-bid defences are instead controlled by "company law".[48]

2.2. Specific company laws

More accurately, pre-bid defences are limited by the second pillar of prohibition, specific company laws. However, complicating matters, specific company laws do not only constrain pre-bid defences, but also work in the background beside EU takeover law to prevent the implementation of certain post-bid defences. That restriction by specific company laws does not receive significant attention because EU takeover law overshadows it. However, in the event where EU takeover law is rendered void by Brexit, specific company laws will swing into action to maintain UK's prohibition on defences.[49] Thus, to fully consider Brexit's influence on specific company laws and the availability of defences, it is crucial to consider both company law's pre and post-bid prohibition. Further complicating matters, it has been observed from US that an endless variety of defences may be formulated,[50] ranging from the "business combination defence", which prohibits post-takeover fusion of bidder and target,[51] to the "Pacman" defence, whereby a turnaround takeover by the target for the bidder is initiated,[52] to direct litigation.[53] It has even been argued that "the mandatory bid requirement is… a mandatory defence".[54] However, unlike EU takeover law's catchall prohibition, specific company law functions by inhibiting each defence according to the way they operate. This near infinite combination of laws makes it impossible to thoroughly contemplate how Brexit will influence the availability of all defences. Fortunately, there is no need to attempt the impractical because the vast majority of defences are not frequently utilised, not sufficiently effective,[55] or are not even true defences because they cannot be installed "without shareholder approval".[56] It is therefore possible to narrow the scope of consideration to three defences, namely pre bid poison pills, post bid-initiation equity restructuring, and post bid-initiation crown jewel defences.[57]

2.2.1. The poison pill

Poison pills are warrants issued and attached to each of a company's shares, that will remain latent until triggered by a bidder's "acquisition of a certain percentage of shares".[58] When activated, poison pills will allow shareholders, less the triggering bidder, to buy company shares at a predetermined discount.[59] That unsymmetrical purchase of shares will create a dilutive effect on the shareholding of hostile bidders, significantly increasing their costs to acquire control, and ultimately deterring them from even attempting.[60] The pill has never been "swallowed",[61] and thus, it is perhaps the most effective form of defence in the US.[62] However, the pill's efficacy is not derived purely from its mechanism, but also from US's prevailing

[47] Rule 21.1(a) of the Takeover Code.
[48] Davies and Worthington (n 2) 941.
[49] Kershaw (n 34) 306.
[50] Gerner-Beuerle, Kershaw, Solinas (n 45) 564. For a list of more common defences, see Jennifer Payne, *Takeovers in English and German Law* (1st edn, Hart 2002) 98-121.
[51] Gerner-Beuerle, Kershaw, and Solinas (n 45) 564
[52] Payne (n 50) 108-109.
[53] Ogowewo - Tactical Litigation in Takeover Contests (2007) 589.
[54] Lee (2017) 843.
[55] "The "poison pill" is the most popular and effective takeover defense used in America today", see Saulsbury (n 11) 137; Geoffrey Miller, 'Political Structure and Corporate Governance: Some Points of Contrast Between the United States and England' (1998) Colum Bus L Rev 51, 55-56
[56] Gerner-Beuerle, Kershaw, and Solinas (n 45) 564.
[57] ibid.
[58] ibid.
[59] ibid 564-565. See also, Blanaid Clarke, 'Regulating poison pill devices' (2004) 4 Journal of Corporate Law 51.
[60] Nyombi (n 1) 242.
[61] Kershaw (n 34) 273.
[62] Gerner-Beuerle, Kershaw, and Solinas (n 45) 619

company law. Poison pills are only competent because directors may adopt them "by issuing an interim dividend" without having to first attain consent from their shareholders,[63] and because proxy fights, the only means through which a pill defence may be breached, are normally unavailable to bidders.[64]

Like the US, directors of UK companies have the necessary "corporate legal tools" to install poison pills,[65] for they to have the power to grant warrants in the form of "interim dividends".[66] However, it has long been established that "difficult technical issues" must be surpassed for poison pills to be properly enacted in the UK.[67] Firstly, UK companies must have adequate "profits available", for only then can directors legally exercise their powers to award dividends.[68] Secondly, directors must ensure that they fulfil the statutory pre-emption rights that belong to shareholders,[69] because warrants involve the "grant of right[s] to subscribe for… shares", and will be considered as "allotment" of shares.[70] Thirdly, directors must reconcile the pill with Premium Listing Principle 5 of UK Listing Authority's (UKLA) Listing Rules, which requires that "holders of the same [shares]… are in the same position",[71] for otherwise "bidder value dilution" cannot occur,[72] and the pill will not have its desired effect. Lastly, and most prohibitively, directors "must not exercise any power" to "allot shares… or… grant rights to subscribe for… shares,[73] unless they are "authorised by the company's articles or by resolution of the company" to do so.[74] However, shareholders, especially institutional ones, believe that it is more advantageous that they retain certain control over the company, and are usually unwilling to provide that required permission.[75]

Nevertheless, those barriers are not unsurmountable. Firstly, the profit threshold requirement is very achievable because the poison pill is an ex-ante defence, and companies that are truly keen to install them will have much time to procure the necessary funds. Secondly, respecting the pre-emption rights of shareholders will not impose any hindrance to enacting poison pills because it is exactly the pill's intention that there be "one warrant… issued for each share".[76] Additionally, although shares are technically allotted when pills are triggered, for the purposes of Chapter 3 of Part 17 of the companies Act 2006, they will not be considered such.[77] Thirdly, despite Premium Listing Principle 5, there is no requirement for directors to treat members equally, but merely "fairly".[78] Moreover, Principle 5 will not be contradicted because poison pills do not prejudice bidders. Instead, bidders only have themselves to blame, for they have "not complied" with the necessary conditions necessary to enforce their warrants.[79] Either way, any favouritism for the other shareholders over the bidder

[63] ibid 565. See also, Delaware General Corporation Law, section 157.
[64] Bidder's frequently have difficulty in initiating a proxy fight in the US because they often do not have the right to call for a shareholder meeting, and because staggered boards, which limits the removal of directors to one-third yearly, is widespread. Additionally, even if bidders have the rights to remove the board, they will have to prove "illegality or breach of duty, see Gerner-Beuerle, Kershaw, and Solinas (n 45) 565; Delaware General Corporation Law, Section 211(d), Section 141(k)(1); *Ralph Campbell v Loews Incorporated* 134 A 2d 565 (del 1957).
[65] Kershaw (n 13) 16.
[66] Gerner-Beuerle, Kershaw, and Solinas (n 45) 570; Kershaw (n 34) 16; Model Articles for Public Companies Article 70(1).
[67] Payne (n 50) 105.
[68] Companies Act 2006, Section 830(1).
[69] Companies Act 2006, Section 561(1)(a).
[70] Companies Act 2006, Section 560(2)(a)
[71] Listing Rule 7.2.1A.
[72] Kershaw (n 34) 274.
[73] Companies Act 2006, Section 549(1)
[74] Companies Act 2006, Section 551(1); Gerner-Beuerle, Kershaw, and Solinas (n 45) 570.
[75] Payne (n 50) 105.
[76] Gerner-Beuerle, Kershaw, and Solinas (n 45) 571.
[77] Companies Act 2006, Section 560(2)(b).
[78] Companies Act 2006, Section 172(1)(f). See also, Gerner-Beuerle, Kershaw, and Solinas (n 45) 571.
[79] Gerner-Beuerle, Kershaw, and Solinas (n 45) 571.

is not the result of "rights attaching to… shares",[80] but rather "separate rights to buy shares".[81] Fourthly, it is not compulsory that directors always seek specific approval before they "grant rights to buy shares",[82] because they may be empowered with an annual authority to "grant rights to subscribe for shares".[83] Thus, it is surely possible to install poison pills.

Unfortunately, even if the above procedure is followed and a poison pill is successfully enacted, it is unlikely that target companies will have an effective defence. This is because, the already infrequent "rolling grants" to issue warrants,[84] are also subject to very limiting caps.[85] That restriction will severely impair the dilution prowess of poison pills and acutely compromise their defensive effect.[86] Additionally, because shareholders of UK companies can effortlessly request for meetings to consider the removal of directors,[87] and need not prove cause to do so,[88] bidders can easily initiate proxy contests, threaten to remove directors, and ultimately force any pills to be redeemed.[89] Such will be possible even if those pills were initially installed with specific shareholder approval. Thus, it is unsurprising that poison pills are almost non-existent amongst UK companies, for directors are unwilling to risk the withdrawal of their rolling authority, or a removal from their office, merely to adopt a half-baked defence.[90]

To mould poison pills into effective defences, section 549 of the Companies Act 2006 must be amended to enable directors to grant rights, without requiring them to first attain the approval of their shareholders. Next, section 168 of the Companies Act must be altered to introduce the "staggered board" mechanism or a functional equivalent, to provide directors and the defences they implement certain entrenchment.[91] This latter amendment is a strong prerequisite to achieving effective director-initiated defences,[92] especially the poison pills.[93] As section 549 is the product of an EU initiative,[94] Brexit will open the doors for it to be discarded. Unfortunately, its dispose will not be high on Brexit's agenda, if at all, for it is not being pressed by any sound arguments. Poison pills must champion for the change it seeks, alone. Brexit will also meet the same difficulties, if not more, whilst attempting to modify section 168 to permit staggered boards. This is because, Brexit must not only convince the UK to shift its corporate takeover philosophy from being shareholder dominant to that of director primacy,[95] an already arduous task considering the unsettled state of that debate,[96] and its

[80] Gerner-Beuerle, Kershaw, and Solinas (n 45) 571.
[81] Kershaw (n 13) 16.
[82] Gerner-Beuerle, Kershaw, and Solinas (n 45) 570.
[83] ibid 571.
[84] As compared to the more frequent "authority to allot shares", see Gerner-Beuerle, Kershaw, and Solinas (n 45) 570;
[85] Directors are usually empowered to allot a maximum of "one third" of their company's shares, see ibid.
[86] ibid.
[87] The meeting may be called by a mere 5 per cent of shareholders, see Companies Act 2006, Section 303(2). Adding to the convenience, two institutional investors will typically hold the required 5 per cent of shares, see D Kershaw, *Company Law in Context: Text and Materials* (1st edn, OUP 2010) 171-175.
[88] Companies Act 2006, Section 168.
[89] Kershaw (n 34) 294
[90] Kershaw (n 13) 15.
[91] Nyombi (n 1) 248.
[92] ibid 248. The perpetual threat of being removed restricts directors "on a psychological level", see Constantinos Pashiardis, 'Entrusting the United Kingdom's Boards of Directors with Takeover Defences: Carrots, Sticks and Executive Remuneration Contracts - Part Two' 12 International Corporate Rescue 328, 329.
[93] Kershaw (n 34) 306.
[94] Second Council Directive 77/91/EC, Article 25; Gerner-Beuerle, Kershaw, and Solinas (n 45) 570. See also Directive (EU) 2017/1132, Article 68.
[95] Janice Dean, 'Directors' Duties in Response to Hostile Takeover Bids' (2003) 14 Intl Company & Com L Rev 370, 370-371. See also Nyombi and Mortimer (n 25).
[96] ibid 71-75.

"cornerstone status",[97] it must also convince amendment to a status that is not within its direct sphere of influence.[98] Quite the contrary, UK had resisted from being swayed by EU's prevailing corporate governance model.[99] Thus, it is unlikely that Brexit will be capable of influencing, through poison pills, the availability of defences in the UK.

2.2.2. Equity restructuring

It should be realised by now that Brexit's influence on the availability of defences, if any, will primarily be enabling and not automatic. Thus, the full extent of its influence is still debatable. Bearing that in mind, Brexit's influence on post bid-initiation equity restructuring will now be considered. Equity restructuring is an umbrella term that encompasses all activities that may be undertaken to alter the share ownership structure of companies. In the US, directors of companies have utilised their powers for restructuring the equity of their company to create effective post bid-initiation defences.[100] They have achieved such primarily through "issue… of shares to a friendly third party",[101] but also through share repurchases from all shareholders less a selected and trusted shareholder.[102] In the worst case scenario, directors may also choose to succumb to the "green mail" of certain hostile bidders, and utilise their powers for repurchasing shares to buy back the shares those hostile bidders have acquired.[103] Thus, equity restructuring is not itself a defence, but a category of at least three defences. However, equity restructuring must be distinguished from "debt restructuring", which is a different creature that instead seeks to adjust the risk and liability of companies by changing their "debt levels".[104] Although debt restructuring may have defensive impacts, they will not be considered in this essay because they are "aimed… to deter… leveraged bidders",[105] and will not serve as an effective generic defence.

In the US, equity restructuring, and more specifically the powers of directors to issue or buy-back shares, can be used to create effective defences because their implementation usually does not require any shareholder consent.[106] However, in the UK, the situation for using equity restructuring as a defence is very similar to that of poison pills. Shares may hypothetically be issued or repurchased to achieve defensive goals, but their effectiveness will, ironically, be compromised by their onerous process. This is largely because under UK's

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[97] ibid 79.

[98] UK's preference for shareholder primacy during takeovers was not adopted as a response to any EU law requirements, and was already established as early as 1959, see Armour and Skeel (n 9) 1759.

[99] The dominant corporate governance model in Europe is the "managerialist approach", see Dean (n 95) 373.

[100] Although equity restructuring is an effective defence, its effectiveness is not comparable to that of poison pills because hostile bidders have still succeeded even after targets have restructured their shares. An example is TI Reynolds' takeover of British Aluminium, even though British Aluminium had already restructured its shares, see Gerner-Beuerle, Kershaw, and Solinas (n 45) 566.

[101] ibid 565.

[102] ibid 566.

[103] ibid. Unsurprisingly, green-mailers often insist on "a premium above the current price", see Jonathan R Macey and Fred S McChesney, 'A Theoretical Analysis of Corporate Greenmail' (1985) 95 The Yale Law Journal 13, 13. However, whether as a threat or defence, greenmail is not common today, see generally, D Manry and D Strangeland, 'Greenmail: A Brief History' (2001) 6 Stanford Journal of Law, Business and Finance 217.

[104] Nyombi (n 1) 243.

[105] Nyombi (n 1) 243-244.

[106] Gerner-Beuerle, Kershaw, and Solinas (n 45) 566. Share buy-backs will never require endorsement from shareholders, see Delaware General Corporation Law, Section 160. However, share issue may require the approval of shareholders if the company lacks, and must acquire, the necessary share capital. Such is rarely an issue because "most Delaware corporations have a significant reservoir of authorised share capital", see Gerner-Beuerle, Kershaw, Solinas (n 45) 566. Nevertheless, there are times when shareholder approval cannot be avoided, such as when share issues totalling more than 20 per cent of all shares, are sought by companies listed on the New York Stock Exchange, see New York Stock Exchange Listing Manual Rule 312.03(c).

company laws directors seeking to issue or buyback shares must first attain the consent of their shareholders.[107]

In relation to share issues, section 551 of the Companies Act 2006 necessitates that directors first attain authorisation by "the company's articles or by resolution" before allotting shares.[108] Additionally, shareholders will have pre-emption rights to those issued shares,[109] and thus, directors must ensure that they are dispensed. They may accomplish this through their companies' "articles or by a special resolution",[110] amounting to 75 per cent of all votes submitted during the meeting.[111] However, these requirements seemingly do not pose any obstruction to issuing shares because directors are frequently provided with a rolling authority that will permit them to allot up to one-third of all shares, and although not sufficient for the creation of effective poison pills, is "large enough to significantly decrease the probability of success for a hostile bid" if used to for the purpose of equity restructuring.[112] Additionally, pre-emption rights of shareholders can very simply be ignored if an element of "non-cash" is part of the payment,[113] or if directors have also been granted a rolling authority, but for the disapplication of pre-emption rights,[114] Unfortunately, because those permissions are ultimately provided by shareholders, they cannot be pushed too far, for otherwise institutional shareholders who are "very fond of their pre-emption rights",[115] may diminish their value, or subject them to the condition that they not be used to propagate defences.[116]

The two means of creating defences through share buybacks are no less restrictive, because whether the repurchase is from the market or off the market and directly from the bidder, authorisation from shareholders will be required.[117] Moreover, those authorisations must respectively "specify the maximum number of shares authorised",[118] or be for the "pursuance of a contract",[119] both of which are very specific authorisation to do very specific things. However, although trivial, off-market purchase of shares and thus greenmail is slightly more rigorous to pull off then market purchase of shares, for they necessitate special resolutions as opposed to mere simple majority.[120]

Similar to poison pills, for equity restructuring to serve as an effective defence through the issue or buy-back of shares, the requirement for directors to seek shareholder approval pre-undertaking must be removed. Alternatively, shareholders must become more willing to increase their rolling grants of that authority. Unfortunately, it does not seem like Brexit will bring those prerequisite changes to positively influence their availability as effective defences. This is because, the requirement for directors to seek shareholder approval before acting under sections 551, 561, 694 and 701 of the Companies Act 2006 is necessary to protect shareholders from the more damning act of abuse by directors, for those governed actions has the potential to destroy the value of the investment of shareholders. The restrictions

[107] Gerner-Beuerle, Kershaw, and Solinas (n 45) 571-573.
[108] Companies Act 2006, Section 551(1).
[109] Companies Act 2006, Section 561
[110] Companies Act 2006, Section 570(1).
[111] Gerner-Beuerle, Kershaw, Solinas (n 45) 571
[112] ibid.
[113] Kershaw (n 13) 15; Companies Act 2006, Section 565. The "non-cash" requirement will be fulfilled however slight it is, see Gerner-Beuerle, Kershaw, and Solinas (n 45) 572.
[114] Kershaw (n 13) 15. It is typical for rolling waivers to be provided up to a maximum of 10 per cent of shares per year, for a maximum of 3 years, totalling 30 per cent, if they are for "acquisition or capital investment", see ibid 15; Pre-Emption Group Statement of Principles (2015) Parts 2A para 3 and 2B para 1.
[115] Gerner-Beuerle, Kershaw, and Solinas (n 45) 572.
[116] Kershaw (n 13) 15; Companies Act 2006, section 551(2).
[117] For market purchase of shares, see Companies Act 2006, section 701(1) 2006. For off-market purchase, see Companies Act 2006, sections 694-695.
[118] Companies Act 2006, Section 701(3)(a).
[119] Companies Act 2006, Section 694(1).
[120] Gerner-Beuerle, Kershaw, and Solinas (2011) 572.

imposed by sections 551, 561, 694 and 701 serve a greater purpose than defending against a change of control, and thus, cannot be removed. Brexit will also be unable to influence the allowance rolling grants provide, because their purpose is merely to "save companies valuable time",[121] and not provide a means for the need to seek authorisation to be circumvented. Brexit's influence upon equity restructuring is at best a means to provoke thought on the aspects of company law that must be altered for it to become an effective defence and is by itself incapable of bringing about any real change.

2.2.3. Crown jewel defence

Also known as "business decisions with a defensive impact",[122] crown jewel defences function by tarnishing the attractiveness of targets through a sale of their most prized asset.[123] In Delaware of the US, the only hindrances that will be met when attempting to apply the crown jewel defence are the practical considerations for the need of a buyer, and the methodology that needs to be used for a clean extraction of the integrated asset.[124] This is because Delaware's laws do not require directors to attain shareholder approval to sell assets, unless "all or substantially all of its property and assets" are being sold.[125]

In the UK, unlike poison pills or equity restructuring, the crown jewel defence is in "some circumstances… adequate to resist a takeover",[126] thus it is perhaps one of the most effective defences. However, it still faces some limiting restrictions. Firstly, like Delaware companies, UK companies will meet the same practical issues of finding buyers, and properly separating their business from the asset they intend to sell. Secondly, because of the strict takeover timetable UK companies must adhere to,[127] properly "carrying out due diligence and negotiating the sale" is almost impossible.[128] Thirdly, because crown jewel defences, like equity restructuring and poison pills, are director-initiated defences, for which "dismissal will loom in the background", directors are implicitly forced to second guess their undertaking of asset sales.[129] Lastly, and most oppressing is the all-too-familiar requirement for shareholder approval. This is because UKLA imposes upon public companies the need to seek shareholder approval for asset sales that are of a value greater than 25 per cent of the company's assets.[130]

Because the crown jewel defence is both accessible and is effective, albeit to a limited extent, it seems truly available in the UK. Thus, Brexit's influence can no longer be enabling, but must instead be widening upon its scope. Unfortunately, the greatest restriction imposed upon the crown jewel defence, the rules requiring shareholder to approve sale of assets amounting above 25 per cent, is not a part of the Companies Act 2006, but UKLA's Listing Rules. Most notably, they are rules and not laws. Thus, it is unlikely that Brexit will hold any sway upon them. Instead, Brexit will have to influence the crown jewel defence by affecting the environment under which, and the purpose for which, UKLA's rules are created. Thus, it is UK's prevailing corporate governance model that Brexit must alter, for greater director powers can only occur be awarded when directors have primacy. However, as already discussed above, UK has a long history in resisting change in that regard. Moreover, companies do not frequently sell assets that are worth more than 25 per cent of their valuation, and such sales are likely to be for purposes relating to the implementation of defences, or ironically, takeovers. Thus, it is unlikely that UKLA's rules will be relaxed, and it seems that

[121] Explanatory note to Companies Act 2006, para 1010.
[122] Kershaw (n 34) 278.
[123] ibid.
[124] Gerner-Beuerle, Kershaw, and Solinas (n 45) 566-567.
[125] Delaware General Corporation Law, Section 271(a).
[126] Pashiardis (n 92) 329.
[127] Gerner-Beuerle, Kershaw, and Solinas (n 45) 573. From initiation to completion, takeovers only require a mere 21 days, see Takeover Code, Rule 31.1.
[128] Gerner-Beuerle, Kershaw, and Solinas (n 45) 573.
[129] Pashiardis (n 92) 329.
[130] Listing Rule 10.5.

Brexit will almost certainly have no influence on furthering the availability of the crown jewel defence. Any influence by Brexit upon UK's corporate governance model must be intentional, after the defences debate is settled.

2.2.4. The combined defence

From the consideration of all three poison pills, equity restructuring, and crown jewel defences, it can be surmised that Brexit's influence upon UK's specific company laws to avail defences will be minimal. However, it will also be realised that the tools to put defences together are in fact available. Once assembled, they merely lack effectiveness. Nevertheless, it seems that they may be combined to produce a greater defensive effect, and perhaps even an effective one. Thus, it is worth considering whether Brexit will be capable of influencing company laws to permit those combinations. The main barrier to effective combined defences is likely to be the same as with any other effective defence in the UK, directors fear of removal by shareholders. Thus, it is this hurdle that Brexit must overcome. However, it seems that such will not be within Brexit's capacity because, as already elaborated earlier, the director primacy corporate governance model must first be introduced, but historical UK had never been keen to adopt any changes in that regard, and things are unlikely to change upon Brexit. Nevertheless, nothing will be lost by Brexit's failure to introduce modification to company laws, for it must be remembered that the whole discussion on Brexit's influence is premised on the assumption that the restrictions imposed by EU takeover laws have been removed. Thus, ranking the importance of the amendment's Brexit must make for defences to become available, EU Takeover Law will take precedence. However, another crucial area of laws must also receive amending, director duties.

2.3. General director duties

The separation of ownership and control of UK companies places corporate decision making upon directors.[131] Although extremely wide,[132] the powers of directors are not limitless, and will be "subject to fiduciary duties".[133] One of those duty is found in the "improper purpose doctrine" of section 171 of the Companies Act 2006,[134], which obliges directors to only use their powers "in accordance with the company's constitution",[135] and for the "purposes… they are conferred" alone.[136] The improper purpose doctrine will hinder directors from implementing defences during takeovers by prohibiting directors from intruding on the privilege of shareholders to decide when they would like to sell their shares.[137] Thus, the improper purpose doctrine seems to impose the same limitations as the Takeover Code's non-frustration rule.[138] However, the improper purpose doctrine seems to be weaker at prohibiting defences than the non-frustration rule, because it may be circumvented if consented to by shareholders prior to the occurrence of any takeover.[139] More importantly, it seems to be less effective because it has been argued that section 171 may be completely overridden by the need to respect other areas of director duties, namely, the "duty of loyalty",[140] under section 172(1) of the Companies Act 2006, to "act… in good faith… to promote the success of the company".[141] Thus, the

[131] See Model Articles for Public Companies, Art 3.
[132] Gower and Davies' *Principles of Modern Company Law*, 8th edn, edited by P L Davies (London: Sweet and Maxwell, 2008) 476.
[133] Pashiardis (n 92) 329; Gerner-Beuerle, Kershaw, and Solinas (n 45) 574. For a wider scope of duties that do not concern us at the moment, see Davies and Worthington (n 2) 806-808.
[134] Kershaw (n 13) 16; Johnston (n 7) 422, 436.
[135] Companies Act 2006, section 171(a).
[136] Companies Act 2006, section 171(b).
[137] Kershaw (n 13) 17.
[138] ibid.
[139] ibid.
[140] Nyombi (n 1) 245.
[141] Kershaw (n 13) 17; Stewart Robinson, 'A Change in the Legal Wind: How a New Direction for Corporate Governance Could Affect Takeover Regulation' (2012) ICCLR 292, 294; Andrew Keay, 'Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's 'Enlightened

availability of defences in the UK will depend on the stringency of section 171. If it is strict, it will capture a wide range of director actions and perceive all of them to be directors exercising their powers without any proper purpose. On the contrary, if they are lax all director actions can be easily justified as proper. The rigor of section 171 will now be analysed in relation to the implementation of takeover defences, before Brexit's influence on them is contemplated.

Although the improper purpose doctrine is today found in section 171, it has its roots in common law.[142] The first case which considered the improper purpose doctrine in relation the implementation of defences is the case of *Hogg v Cramphorn Ltd*,[143] wherein shares were issued to a trust that was set up for the sole purpose of defeating takeover bids. Although the High Court did not find bad faith, it nevertheless held that it cannot "permit directors to exercise powers, which have been delegated to them… in such a way as to interfere with the exercise by the majority of its constitutional rights",[144] even if it promoted the company's interest.[145] Thus, *Hogg v Cramphorn* clarifies that defending against takeover bids is not a proper purpose for which directors may use their powers, and section 171 will be favoured over even section 172. However, from as early as in *Hogg v Cramphorn*, the courts have already suggested that they are only concerned with the "dominant purpose" of the bid.[146] This makes sense for there are a myriad of reasons directors might want to install defences,[147] but such slams wide open the door for directors to claim that their "interference with shareholder's rights was an incidental consequence" of their legitimate actions.[148] That argument was indeed made in the later Canadian case of *Teck Corporation Limited v Miller*,[149] where the British Columbia Supreme Court upheld the exercise of powers by directors to install defences, because it was merely incidental to the primary purpose of saving the company for "they believe that there will be substantial damage to the company if it is taken over".[150] Unfortunately, the approach taken by the British Columbia Supreme Court in *Teck Corporation Limited v Miller* is not binding, and in *Howard Smith v Ampol Petroleum Ltd*,[151] the Privy Council held that it is "unconstitutional for directors to use their fiduciary powers… purely for the purpose of destroying an existing majority".[152] Oddly, the Privy Council chose to retain the ambiguous exception to the improper purpose doctrine.

Nevertheless, and despite *Howard Smith*, cracks later surfaced in the law suggesting that there are indeed some circumstances where defences may be implemented without breaching section 171. In *Cayne v Natural Resources*,[153] the High Court warned that *Hogg v Cramphorn* "must not be carried too far",[154] and hinted that exercise of powers under section 172, including defensive actions, should be permissible "to prevent [a] company… from being

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Shareholder Value Approach' (2007) 29 Syd Law Rev 600. Under section 172 of the Companies Act 2006, "[a] rational explanation is always available for the exercise of board controlled takeover defences, see Gerner-Beuerle, Kershaw, and Solinas (n 45) 574. Additionally, it is the government's ambition for Section 172 was to "drive long-term competitiveness and wealth and welfare for all", and must take precedence over section 171, see Department of Trade and Industry, Company Law Reform (March 2005), Cm 6456, para 3.3; Pashiardis (n 92) 331.

[142] Nyombi (n 1) 246. The improper purpose doctrine was originally used to prohibit directors from abusing their powers to control shareholder voting, see Gerner-Beuerle, Kershaw, Solinas (n 45) 575; *Fraser v Whalley* [1864] 71 ER 361 (Ch D 1864).

[143] [1967] Ch 254.

[144] ibid 268.

[145] Nyombi (n 235) 246.

[146] Robinson (n 141) 298.

[147] D M J Bennett, 'The Ascertainment of Purpose when Bona Fides are in issue – Some Logical Problems' (1989) Sydney Law Review 5, 7.

[148] Pashiardis (n 92) 330.

[149] [1973] DLR (3d) 288.

[150] ibid.

[151] [1974] AC 821.

[152] ibid, 837.

[153] (1982) Unreported.

[154] ibid.

reduced to impotence and beggary".[155] Unfortunately, *Cayne* seems unclear at best, and the standard it has set for the implementation of defences to be classified as a "proper purpose" is certainly very high.[156] The Court of Appeal of appeal had the opportunity to clarify *Cayne* in the case of *Criterion v Stratford Properties LLC*,[157] but it refused to do so. Nevertheless, some commentators insist that section 171 will not entirely prohibit the use of defences.[158] Thus, the debate rages as to whether the use of powers by directors to enact defences or to produce defensive impacts can be classified as proper purposes for the fulfilment of section 171.

It is unlikely that Brexit will influence either side of the debate to clarify the availability of defences in relation to director duties. This is because section 171 was adopted almost wholesale from common law,[159] and was not enacted with any inputs from the EU. Thus, it will very probably remain outside Brexit's sphere of influence. Additionally, it will also be very difficult for Brexit to influence the proper purpose doctrine because, for better or worse, it exists to deal with "delegated powers" and thus, lacks a record that can enlighten a discussion".[160] Even for the courts, "to assess original intent, to impute or to supplement purposive constraints is misdirected and hopeless",[161] much less for Brexit.

In summary, defences will become available via Brexit's influence if EU takeover laws are the sole impediment to their use. However, the prohibition of defences is a tripartite and interlinked one, and because Brexit is unlikely to significantly influence both specific company laws and generic director duties, it is improbable that Brexit will bring about any automatic changes to the availability of defences. Nevertheless, it must be acknowledged that Brexit does have certain influence over the availability of defences for, although Brexit does not bring about momentous reflexive changes, it is certainly an enabler of amendments. Should the debate for the use of defences triumph, UK will have all the necessary powers as well as knowledge to enact the changes necessary to permit the use of defences, and it can do so without delay.

3. Brexit's influence on permitting defences

This part of the essay will attempt to hold the defences debate by classifying together and explaining the various opposing arguments for or against the use of defences. It will first consider the arguments that are in line with UK's stance, that is, against the use of defences, before contemplating the arguments that call for defences to be permitted. This essay will then analyse Brexit's influence over each of those classifications. As throngs of arguments are available on both sides of the debate, this essay limits its consideration to those that are more most popular. This essay will also ignore arguments that are innately weak or have lost their strength. Additionally, this essay acknowledges that many of the issues are interwoven and impossible to isolate from each other, and thus, will categorise them according to what they best represent.

3.1. Historical biasness and fear of excessive foreign takeovers

Although already scrutinised in the introduction to this essay, it bears reemphasising that two of the prime impetus pushing for the takeover debate, historical biasness due to the

[155] ibid.
[156] Kershaw (n 13) 288-289.
[157] [2004] UKHL 28.
[158] Johnston (n 7) 440. It has been argued that the uncertainty of the improper purpose doctrine is what allows them to be ignored, see Keay (n 141). It has even been argued that the greater the uncertainty, the more permissive the improper purpose doctrine, see Robinson (n 141).
[159] Section 171(b) of the Companies Act 2006 is a restatement of Lord Wilberforce's dicta in *Howard Smith v Ampol*, that a "director of a company must only exercise powers for the purposes for which they were conferred".
[160] Kershaw (n 34) 283.
[161] Kershaw (n 34) 283.

lack of a defences debate, and fear of excessive foreign takeovers,[162] are also strong arguments urging for defences. As explained, Brexit will positively influence both assertions because it will permit UK to consider the debate it never had the opportunity to address, and because the entirety of Brexit is based upon the want to regain sovereignty.

3.2. The market for corporate control

Corporate control is the means through which directors can be kept in check.[163] It functions because inefficient companies will have share prices that reflect their underperformance, exposing them to takeovers.[164] Those takeovers will be relatively easy because their low cost will allow attractive premiums that can entice shareholders to be offered.[165] Most importantly, those takeovers will result in the replacement of directors, and thus directors are incentivised to remain disciplined and work towards keeping share prices high.[166] Manne argues that takeovers are necessary for they help facilitate the market for corporate control.[167] Thus, the need for corporate control dictates that defences hindering their functioning cannot be permissible.[168]

However, the argument to disallow defences so as to enable a market for corporate control has been rebutted. Okotume argues that the market for corporate control does not function efficiently because takeovers are costly,[169] and do not occur very frequently.[170] Takeovers are also very uncertain for they will be subject to the cyclical nature of the takeover economy.[171] Additionally, even if successful, corporate control will not provide "compensatory value for the company involved, and [has] very little deterrent effect against future misconduct".[172] Okotume further argued that corporate control is not the effective regulatory tool it theoretically seems.[173] That is because the market for corporate control is limited to arresting misconducts which are "major and longstanding",[174] is unable to deal with all the

[162] It is worth noting the opposing argument to limiting foreign takeovers by enabling defences. That is, "foreign direct investment (FDI) is a key variable in a bid to secure a premier position on the global economic table", and FDI is facilitated by takeovers, see Nyombi, Mortimer (2018) 63-64.
[163] Manne, 'Mergers and the market for corporate control' (1965) 73 Journal of Political Economy 110, 112.
[164] Okotume (n 14) 311.
[165] ibid.
[166] Manne (n 163) 112.
[167] H G Manne, 'Our Two Corporation Systems: Law and Economics' (1967) 53 Virginia Law Review 259, 265–266. The EU was also in favour of enabling the market for corporate control, see The Winter Report (2002), 20-21.
[168] Manne did not account for the possibility of defences in his work but, see R A Heron and E Lie, 'On the Use of Poison Pills and Defensive Payouts by Takeover Targets' (2006) 79 Journal of Business 1783; Johnston (n 7) 450
[169] High costs can be incurred from the need to provide shareholders an appreciation in the value of their shares, see Okotume (n 14) 312, but may also be the result of "empire-building" building by directors, see A. Shleifer and R Vishny, 'A Survey of Corporate Governance' (1997) 52 Journal of Finance 737, 756; Okotume (n 14) 312. Cost may also be incurred by target's as directors who are constantly being pressured with removal "may distort… true value creation… at the expense of corporate wealth", see Steve Letza, Xiuping Sun and James Kirkbride I 'Shareholding Versus Stakeholding' (2004) 12 Corporate Governance 242, 249.
[170] Okotume (n 14) 311.
[171] See W H Mikkelson and M M Partch, 'The Decline of Takeovers and Disciplinary Managerial Turnover' (1997) 44 Journal of Financial Economics 205.
[172] Nyombi, Mortimer, and Lewis (n 46) 173.
[173] See also, Julian Franks and Colin Mayer, 'Hostile Takeovers in the UK and the Correction of Managerial Failure' (1996) 40 Journal of Financial Economics 163.
[174] Okotume (n 14) 311.

different forms of director mismanagement,[175] and is usually only "a remedy of last resort".[176] Kershaw adds there is little need for the market for corporate control anyway because claims of director mischief are often exaggerated,[177] and UK's prevailing laws together with rights available to shareholders are often sufficient to control directors.[178] The market for corporate control is only excessive. Moreover, empirical data shows that takeovers are not solely targeted at underachieving companies,[179] suggesting that the main purpose of takeovers is to generate corporate synergies. These arguments have together led Robinson to outright claim that "the market for corporate control has failed".[180] Enabling the market for corporate control is at best a secondary purpose of takeovers, and thus, it cannot dictate the permissibility of defences.

Upon Brexit, it is unlikely that there will be any observable changes to the level of director discipline. Thus, there will be no need to broaden the market for corporate control by further restricting the already unavailable defences. On the contrary, it seems that the argument against a market for corporate control will grow. This is because, upon Brexit, unless all the current means for free movement of companies is preserved,[181] the number of available bidders will shrink, and along with it, the market for corporate control. Without effectiveness, corporate control cannot be used to justify the prohibition of defences.[182]

3.3. Shareholder short-termism

Short-termism, as its name suggests, is the lack of a long-term outlook for companies.[183] Short-term shareholders ignore "the need to be objective towards the company… to maximise profits".[184] And has been accused to be a "disease" that causes financial scandals.[185] Thus It is almost universally agreed that short-termism should not be encouraged,[186] so much that it has been labelled a "disease" for causing financial scandals.[187] It is claimed that "the current model forces [directors] to abandon long-term strategies and act in a myopic manner",[188] and that such is in part also the result of UK supporting the market for

[175] Clarke (n 40) 355. Notably, it cannot deal with companies that have been so gravely mismanaged that they are effectively destroyed, for it calls for the participation of willing bidders, see Okotume (n 14) 311.
[176] J. Coffee, 'Regulating the Market for Corporate Control: a Critical Assessment of the Tender Offer's Role in Corporate Governance'(1984) 84 Col. L. Rev. 1145, 1153.
[177] Kershaw (n 13) 20. See also, S Taylor, 'The Availability Bias in Social Perception and Interaction' in D Kahneman, P Slovic and T Tversky (eds), *Judgment Under Uncertainty: Heuristics and Biases*, (Cambridge University Press 1982).
[178] Kershaw (n 13) 19. For the laws that may have a controlling effect on directors, see Companies Act 2006, sections 168, 175, 177, 178, 190-195; Listing Rules 10 and 11.
[179] J Franks and C Mayer, 'Hostile Takeovers and the Correction of Managerial Failure' (1996) 40 Journal of Financial Economics 163.
[180] Robinson (n 141) 296.
[181] Although outside this essay's scope of consideration, it must be questioned what Brexit entails if the entirety of the pre-Brexit position is preserved.
[182] It is worth noting that Gerner-Beuerle, Kershaw and Solinas argues that "the availability of takeover defences would also have a trivial impact on… the market for corporate control", see Gerner-Beuerle, Kershaw, and Solinas (n 45) 582. However, this does not affect the analysis of this essay because they are arguing on the assumption that the non-frustration rule is abolished, and that defences are already available.
[183] Robinson (n 141) 292.
[184] Nyombi and Mortimer (n 25) 71.
[185] J E Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company Law* (Oxford University Press 1993) 146.
[186] See generally, Robinson (n 141); Kershaw (n 13); Nyombi, Mortimer and Lewis (n 46)
[187] Parkinson (n 185) 146.
[188] Robinson (2012) 294.

corporate control.[189] That view is supported by empirical evidence which shows that shares are normally held only for a mere 7 to 12 months.[190]

Because defences are not present, "new shareholders irrespective of how sophisticated they are, succumb to an elusive offer".[191] Because many shareholders seem unable to understand the "true value of the company", it is argued that defences must be implemented as "the board has a superior understanding of the value… and [has] confidential information",[192] and can help reduce shareholder naivety. Additionally, many new shareholders only join companies during takeovers with their minds made up that the company's fate is not their concern, for they are only acquiring those shares for the sole purpose of flipping to make some quick earnings.[193] Such is problematic because the only gains that can be made are short-term, and long term, more sustainable shareholder value is foregone.[194] Unless defences are permitted, directors have no impetus to consider more enduring value.[195]

The Takeover Panel reviewed the problem of short-termism,[196] and suggested that the decision pertaining to takeovers is to be made by long-term shareholders.[197] It did not go as far as to even suggest defences, but their proposals were met with significant backlash, and arguments ranging from difficulty to differentiate long and short-term shareholders,[198] to prejudicial treatment of later shareholders,[199] were put forth. Thus, "the Takeover Panel was forced to scale back on their amendments".[200] As the debate for shutting down short-termism has already been considered, but failed, it is unlikely that Brexit will capable of reviving it on the same terms. For now, the answer is fairly clear, although short-termism is a strong incentive for director initiated defences, it is still insufficient to influence UK.

3.4. Shareholder value from bid premium and after bid failure

When companies become takeover targets, their shareholders will desire value and almost always insist that maximum benefit be derived from it.[201] Value may be acquired in varying forms, but shareholders are mostly concerned with "the premium obtained… as well as the subsequent state of the company following defeat.[202] It is almost universally agreed that the use or withhold of defences by directors will impact shareholder value. However, whether defences have positive or negative repercussions on value has not been agreed. Most empirical research conducted suggests that shareholder value will be compromised if directors

[189] Pashiardis (n 10) 252.
[190] I. King, 'Buyout leaves a bad taste', The Times, 1 September 2010.
[191] Pashiardis (n 10) 251; Kershaw (n 34) 298
[192] Kershaw (n 13) 21
[193] Mandelson, Mansion House Speech (1 March 2010) <http://webarchive.nationalarchives.gov.uk/20100304112545/http://www.bis.gov.uk/mansion-house-speech> accessed 15 August 2018.
[194] Marina Martynova and Luc Renneboog, 'A Century of Corporate Takeovers: What Have We Learned and Where Do We Stand?' (2008) 32 Journal of Banking and Finance 2148.
[195] Geoff Stapleton, *Institutional Shareholders and Corporate Governance* (OCP 1996) 236.
[196] See Reviews of Certain Aspects of the Regulation of Takeovers Bids: proposed amendments to the Takeover Code (London, 2011).
[197] Nyombi and Mortimer (n 25) 70-71.
[198] ABI's Response to Takeover Panel consultation paper PCP 2010/12, 4-5.
[199] Association for Financial Markets in Europe's Response to Takeover Panel consultation paper PCP 2010/12.
[200] Nyombi and Mortimer (n 25) 71.
[201] Kershaw (n 13) 27.
[202] Pashiardis (n 10) 251

were to install defences,[203] others are unsure,[204] but few have found an appreciation of shareholder value upon the installation of defences.[205] Further research have found that "returns of the companies who remained independent… were 36 per cent less in the short run (9 months) and 55 per cent less in the long run (30 months)".[206] Thus, a quantitative comparison of research results would suggest that shareholder value is most likely to be maximised if directors were prohibited from implementing any defences.

However, it has been found that the availability of defences helps create friendly bargaining opportunities that give do provide greater shareholder value.[207] Alternatively, it also seems possible for shareholders to attain value if directors use their powers to enact defences for "controlling the sale… to create more time to look for alternative suitors".[208] Thus it seems that the defences do have the potential to provide shareholder value if used correctly. However, in practice it will not be known whether defences generate value for shareholders because, "evidence… does not travel to the UK", and for whatever that is true in the US, the contrary might very well be true in the UK.[209] Brexit will be unable to influence either side of the debate because they are arguments that can only be won by submission of empirical evidence, but unfortunately, there are no means to test either "hypothesis… so long as Rule 21 is in force" in the UK.[210]

3.5. From owners to shareholder primacy to the enlightened shareholder value (ESV) approach

Shareholders, as sovereign "owners", must be provided full authority to decide on the fate of their shares,[211] Moreover, "[s]hares are clearly the shareholders' property",[212] and surely as owners of property, shareholders must be free to deal with shares in whatever manner they deem fit. However, it has long be clarified that a share is not a property per se, but an "interest… consisting of a series of mutual covenants… and made up of various rights and liabilities".[213] Although shareholders no longer have the pure rights of owners, those rights have certainly left a serious impression upon UK's takeover laws, so much such that although directors are ordinarily the controllers of the company, during takeovers shareholders "make the final decision".[214] Thus, during takeovers, the governance model of UK companies is squarely that of "shareholder primacy".[215] However, it was discovered between 1980 and 2000

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[203] L Dann and H DeAngelo, 'Corporate Financial Policy and Corporate Control' (1988) 20 Journal of Financial Economics 87; GA Jarrell, JA Brickley, and JA Netter, 'The Market for Corporate Control: the Empirical Evidence Since 1980' (1988) 2 Journal of Economic Perspectives 49. PA Gompers, JL Ishii, and A Metrick, 'Corporate Governance and Equity Prices' (2001) NBER Working Paper No 8449; Clarke (2006) 355.

[204] John C Coates, 'The Contestability of Corporate Control: A Critique of the Scientific Evidence' (1999) Harvard Centre for Law; Heron and Lie (n 168);

[205] MG Danielson and JM Karpoff, 'Do pills poison operating performance?' (2006) 12 Journal of Corporate Finance 536, 552. Even then, it seems that the value generation will be extremely slow, for it will occur over a "five-year period", see Danielson and Karpoff (n 205) 552.

[206] L Bebchuk, J Coates IV, and G Subramanian, 'The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence and Policy' (2002) 54 Stanford Law Review 887, 930.

[207] M Gordon, 'Takeover Defenses Work. Is That Such a Bad Thing' (2002) 55 Stanford Law Review 819, 823, 837. See also Kershaw (n 13) 27.

[208] ibid 27.

[209] Kershaw (n 34) 306.

[210] ibid.

[211] Pashiardis (n 10) 251; Kershaw (n 34) 298-299; The Winter Report (2002), 21.

[212] Keay (n 141) 586

[213] Borland's Trustee v Steel Bros & Co Ltd [1901] 1 Ch 279, 287-291.

[214] Okotume (n 14) 309.

[215] ibid; Armour and Skeel (n 9) 1735; John Armour, Simon Deakin and Suzanne J Konzelmann, 'Shareholder Primacy and the Trajectory of UK Corporate Governance" (2003) 41(3) British Journal of Industrial Relations 531, 536. Although not within the scope of this essay, it is worth noting that UK's corporate governance model for takeovers is in sharp contrast with US's, see Marc Moore, *Corporate Governance in the Shadow of the State* (2013, Hart Publishing).

that there is "a strong relationship between takeovers and a negative impact on non-shareholding stakeholders",[216] and because companies are effectively community organisations comprising of their stakeholders, it is only right that they dedicate certain "corporate social responsibility" towards their stakeholders.[217] That responsibility eventually came to be known as the ESV approach,[218] and is made relevant to takeovers because General Principle 3 of the Takeover Code requires that directors "act in the interests of the company as a whole".[219] The ESV approach "maintains the primacy of shareholders but requires a long-term approach".[220] However, it has been argued that the ESV approach can only be properly implemented if directors have the power to employ defences.[221]

Using the ESV approach as a justification for defences has been challenged. This is because it seems that even if it is accepted that stakeholders must receive greater attention whilst corporate decisions are made, it must not be from directors using any sort of defences.[222] Allowing directors to caretake stakeholders will merely be providing directors another tool to cloak and "justify almost any action",[223] even if they are blatantly defensive. Moreover, directors are unlikely to be the best champions of the interests belonging to stakeholders because rather ironically, their interests "are more likely to be aligned with those of shareholders". Directors frequently have significant "wealth in… shares… [but] they do not usually have as much of their wealth tied to bondholder or employee wealth".[224]

As already explained when discussing the poison pill defence above, UK is very inclined to hold onto its shareholder primacy corporate governance model and has never been intrigued by what director primacy entails. However, UK seems more receptive to slowly drifting towards the ESV approach that is also supported by the EU. The EU, however, has never required that directors use defences to protect stakeholder interest. Thus, upon Brexit, whether UK decides to gravitate towards EU's approach or further develop its own, neither approaches calls for the use of defences. It is unlikely that UK will detract from either of the abovementioned tracks to permit the use of defences solely to promote the ESV approach. Thus, it is unlikely that Brexit will be capable of influencing the permissibility of defences through the ESV approach.

4. Conclusion

Having contemplated Brexit's influence on both the availability of defences and the debate for permitting defences, it is realised that Brexit's influence, if any, is not automatic but enabling. Upon Brexit, there will be no sudden changes to UK's takeover scene, and any alterations to UK's takeover related laws must be brought about intentionally. It was a pity that UK prohibited the use of defence without a formal debate, but UK no longer needs to endure that anomaly. This essay has created the scaffold for the defences debate to occur. Additionally, this essay has shown that, although Brexit's influence is not as pervasive as one would initially speculate, it is by no means small. Thus, Brexit is a good reason and opportunity

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[216] Okotume (n 14) 310

[217] ibid

[218] The ESV approach was first developed under company law, see Companies Act, section 172(1) which requires directors to "have regard (amongst other matters) to… the interests of the company's employees. The ESV approach is also adopted in Principle A.1 of the Corporate Governance Code, which requires directors to comprehend their "obligations to… shareholders and others".

[219] See also, The Takeover Panel Code Committee: Review of certain aspects of the regulation of takeover bids 1–2 (2010).

[220] Roinson (n 141) 301; D Fisher, 'The Enlightened Shareholder -- Leaving Stakeholders in the Dark: Will Section 172(1) of the Companies Act 2006 make Directors Consider the Impact of Decisions on Third Parties' (2009) ICCLR 10, 10.

[221] Pashiardis (n 10) 253.

[222] Lucian A Bebchuk, 'The Case Against Board Veto in Corporate Takeovers' (2002) 69 U Chi L Rev 973.

[223] ibid 1023.

[224] ibid 1024.

for the long overdue defences debate to be held. Nevertheless, it must be acknowledged that the availability and permissibility of defences are not black and white issues as this essay suggests. Instead, as provided by the Takeover Panel and analysed by Kershaw, there is a variety of other non-defence related reforms available "for altering the current balance of power between bidders mad target boards".[225]

[225] Kershaw (n 13) 32-48.