ARTICLE

Reflecting on the Value of Socially Responsible Practices Post the Takeover of Cadbury PLC by Kraft Foods Inc: Implications for the Revision of the EU Takeover Directive

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1. INTRODUCTION

One of the less discussed proposals in the overall debate on the potential revision of the EU Takeover Directive[1] is the inclusion of provisions that would safeguard firms' socially responsible behaviour from a change in corporate control. A turnover in corporate control may equate a vast and vicious change in the corporate strategies previously observed by the target firm, including a shift away from preceding Corporate Social Responsibility (CSR) policies and commitments towards various stakeholders.[2] Whether firms should engage in socially responsible activities and whether it is the role of the market or the state to correct the externalities that corporations create has been the subject of a much broader debate focusing on CSR.[3] Building a strong case for or against CSR has proven hard, as the economic benefits or detriments that may stem from CSR, respectively, are often difficult to quantify.[4] CSR practices are, however, adopted by various corporations worldwide more so today than ever in the past.[5] The takeover of certain socially responsible companies by multinational companies validates arguments purporting that business ethics are important in today's business world and may complement financial performance rather than undermine it.[6]

The paper will discuss whether the law should 'step in' to safeguard CSR practices previously set in place by the target firm post a successful takeover and if so, whether alterations should be made to the Takeover Directive's current provisions. Section 2 begins by addressing the European Commission's 2011 definition of the term CSR. Following, in section 3, reference will be made to the stakeholder focused provisions found in the EU Takeover Directive. Legal gaps and ambiguous concepts will be identified. The takeover of *Cadbury PLC* by US multinational *Kraft Foods Inc.* in 2010 led to the questioning of the UK's open market for corporate control and brought stakeholders' interests, corporations' long-term growth, and CSR practices into the spotlight. Reference to the Cadbury's takeover as a paradigm in section 4 will suggest that the reform of the UK Takeover Rules in September 2011[7] in favour of a more long-term, stakeholder-friendly interpretation of the rules is likely to have an impact on the potential revision of the equivalent EU rules in time to come. Section 5 of the paper will analyse the impediments to the

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1 Directive 2004/25/EC of the European Parliament and the Council of 21 Apr. 2004 on Takeover Bids.

2 A. Shleifer & L.H. Summers, 'Breach of Trust in Hostile Takeovers', in *Corporate Takeovers: Causes and Consequences*, ed. A.J. Auerbach (Chicago: The University of Chicago Press, 1988), 37–42.

3 R. Benabou & J. Tirole, 'Individual and Corporate Social Responsibility', IZA Discussion Paper No. 4570, available at SSRN: <http://ssrn.com/abstract=1515117>, 1.

4 A white paper from the Economist Intelligence Unit, sponsored by Oracle, 'The Importance of Corporate Responsibility' (January 2005), 22, available at <http://graphics.eiu.com/files/ad_pdfs/eiuOracle_CorporateResponsibility_WP.pdf>.

5 O. Ralph, 'All Change: Long-Term Success Requires Flexibility and Co-operation', *The Financial Times*, 10 Oct. 2011; The Economist, 'The Next Question: Does CSR Work?', 17 Jan. 2008; Benabou and Tirole, *supra* n. 3, 1–2; J.L. Campbell, 'Why Would Corporations Behave in Socially Responsible Ways? An Institutional Theory of Corporate Social Responsibility', *Academy of Management Review* 32, no. 3 (2007): 947.

6 D. Veljković & D. Petrović, 'The Role of Corporate Image in the Process of Company Takeovers', *Megatrend Review* 8, no. 1 (2011): 77–94, 88; For characteristic examples of such acquisitions, see L'Oreal's acquisition of Body Shop in 2000 and Cadbury's acquisition of Green & Blacks in 2005; note that from an opposite standpoint, however, it can be perceived that socially responsible companies are, by definition, underperforming and are taken over because they have a financial potential for being managed much better.

7 The City Code on Takeovers and Mergers, 10th edn, available at <www.thetakeoverpanel.org.uk/wp-content/uploads/2009/01/Code_190911.pdf>, 19 Sep. 2011.

Tsagas, Georgina. 'Reflecting on the Value of Socially Responsible Practices Post the Takeover of Cadbury PLC by Kraft Foods Inc: Implications for the Revision of the EU Takeover Directive'. *European Company Law* 9, no. 2 (2012): 70–80.

symbiosis of CSR and takeovers and discuss whether both objectives of promoting CSR and facilitating takeovers can co-exist. The final part of the paper, section 6, will consider whether a claim to revise the EU Takeover Directive encompassing safeguards towards socially responsible practices and firm-specific investments merits value and discuss how such a proposal can be achieved.

2. CSR AND LONG-TERM GROWTH

The Commission in its 2011 Report provides a generic definition of CSR by redefining it as *the responsibility of enterprises for their impacts on society*.[8] On 25 October 2011, the European Commission approved a new[9] European strategy on corporate social responsibility, finding that it was vital to renew its efforts in promoting CSR in light of the social consequences stemming from the 2008 financial crisis.[10] Arguments put forward by the Commission in favour of enterprises adopting CSR polices are that CSR benefits the enterprises as such, as well as society as a whole.[11] According to the Commission's Report, the corporation's aim should be to maximize the creation of shared value for shareholders, as well as other stakeholders and society at large, and to identify, prevent, and mitigate possible adverse impacts on society.[12] In its Report, the European Commission acknowledges that in promoting the adoption of CSR practises, it is important to enhance market rewards for CSR in view of the fact that those in charge of corporate decisions are often faced with the dilemma of behaving socially responsibly when such an undertaking would not necessarily be the most financially beneficial option in the short term.[13] In relation to investment in particular, the Commission stresses its commitment to support 'capacity-building for investors on how to integrate non-financial information into investment decisions', as it is considered that were investors take into account relevant non-financial information this would likely contribute to 'a more efficient allocation of capital and better achieve longer-term investment goals'.[14]

In its 2011 Report, the European Commission purports that in order to achieve the maximization of shareholder value, enterprises need to adopt a long-term, strategic approach towards CSR.[15] In the Report, the Commission further recognizes that in order to further develop its CSR policy, there is a need to adopt a balanced multi-stakeholder approach, to clarify what is expected of enterprises, to promote market reward for responsible business conduct, to address company transparency on social and environmental issues from the point of view of all stakeholders, and to acknowledge the role of complementary regulation in creating an environment that prompts corporations to voluntarily assume social responsibility.[16]

3. THE VALUE OF THE TAKEOVER DIRECTIVE'S STAKEHOLDER-ORIENTED PROVISIONS

The Takeover Directive contains provisions that aim first and foremost to provide shareholders with enough information on the bid so as to make an informed decision when exercising their right to exit the company by tendering their shares. This is realized by information on the bid being effectively transmitted to the shareholders of the offeree company. The provisions are not a guarantee that shareholders are to be protected from bids that may be improper or opportunistic or from bids that would negatively impact on the company's socially responsible behaviour towards employees, consumers, and/or the environment. A closer look at the provisions will give an insight of the minimal value that the said provisions have in safeguarding shareholders', as well as stakeholders' interests.

Recital 17, Article 3(1)(b), Article 3(1)(c), and Article 9(5) of the EU Takeover Directive are all provisions that stipulate the duties that the offeree board of directors owes to the shareholders of the offeree company. The board is under a duty to give its opinion on the bid and the reasons on which that opinion is based, including its views on the effects of implementation on all the company's interests, with particular reference made to the effects of the bid on employment, conditions of employment, and the locations of the company's places of business.[17] This information will then be communicated to the representatives of the company's employees or, where there are no such representatives, to the employees themselves.[18] Article 3(1)(c), in particular, stipulates that:

> the board of an offeree company must act in the interests of the company as a whole and must not deny the holders of securities the opportunity to decide on the merits of the bid.

Article 6 stipulates the duties that need be observed by the offeror with regard to the information provided to the offeree company's shareholders. An offeror is required to

8 Communication from the Commission: A Renewed EU Strategy 2011–2014 for Corporate Social Responsibility (2011), available at <http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/index_en.htm>, 4.

9 For former definition of Corporate Social Responsibility (CSR) provided by the European Commission, see European Commission, 'Promoting a European Framework for Corporate Social Responsibility', Green Paper, 2001, COM(2001) 366 final; for the acknowledgment of the social dimension of the firm at EU level, see I.L. Fannon, 'Working within Two Kinds of Capitalism: Corporate Governance and Employee Stakeholding, US and EC Perspectives', Contemporary Studies in Corporate Law (Oxford: Hart Publishing, 2003), 36.

10 Communication from the Commission: A Renewed EU Strategy 2011–2014 for Corporate Social Responsibility (2011), available at <http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/index_en.htm>, 4.

11 *Ibid.*, 3.

12 *Ibid.*, 6.

13 *Ibid.*, 10–11.

14 *Ibid.*, 10–11.

15 *Ibid.*, 6.

16 *Ibid.*, 5.

17 Art. 3(1)(b) General Principles; also see Art. 9(5) of the Directive and Recital 17 of the Directive.

18 Article 9(5) of the EU Takeover Directive.

draw up and make public in good time an offer document containing the information necessary to enable the holders of the offeree company's securities to reach a properly informed decision on the bid . . . When it is made public, the boards of the offeree company and of the offeror shall communicate it to the representatives of their respective employees or, where there are no such representatives, to the employees themselves.

According to paragraph three of the same article, the offer document should contain information that includes:

the offeror's intentions with regard to the future business of the offeree company and, in so far as it is affected by the bid, the offeror company and with regard to the safeguarding of the jobs of their employees and management, including any material change in the conditions of employment, and in particular the offeror's strategic plans for the two companies and the likely repercussions on employment and the locations of the companies' places of business;[19]

Finally, Article 14 affords particular attention to the information for and consultation of employees' representatives by providing that the Directive applies without prejudice to the rules relating to information and to consultation of representatives governed by the relevant national provisions and, in particular, those adopted pursuant to Directives 94/45/EC, 98/59/EC, 2001/86/EC, and 2002/14/EC.

An attempt was made by the European Parliament to analyse the concept of 'company as a whole' as meaning 'the interest of corporate policy and its continuation, shareholders and staff, and with a view to safeguarding jobs'.[20] This term was not however endorsed by the Commission on the basis that defining the concept fell outside of the takeover regulation's objectives, which resulted in an undefined and arguably vague expression of 'company as a whole' to form part of the article as found in the Directive's provisions at present.[21] The intentional vagueness attached to this provision in its current form is also reaffirmed by the fact that in earlier drafts of the Directive, there existed a General Principle 3(2)(c) whereby a duty was imposed on target directors to 'act in all the interest of the company, including employment'. This also, however, did not manage to form part of the current text.[22] One of the assumptions found in the *Winter Report*, of course, is that the discipline of management and relocation of company resources through the takeover process is 'in the long term in the bests interests of all stakeholders and society at large'.[23] The existing diversity of key concepts within the company laws of various EU Member States will not be easily overcome through any attempts to harmonize takeover regulation on an EU level.[24] The 'role of the company', for example, is a concept that varies significantly across EU countries.[25] The definition of 'shareholders interests' as such is also hard to define from a practical point of view, as shareholders are not always seen as a homogenous group.[26]

The legal consequences that flow from the application of the articles in the Takeover Directive, which provide for information being transmitted by the bidding company to the employees of the target company, are arguably of minimal value, as they do not form part of a more all-inclusive framework protecting firm-specific investments. Considering that there is no legal duty, in company and securities law, or beyond, on shareholders to consider such issues, any obligation imposed on the offeree and the offeror boards in transmitting information regarding the impact of the bid on employees or on the business of the company in general, is considered useless, unless complemented by a broader framework that takes into account the value of firm-specific investments. Within the present legal framework, the likelihood of shareholders acting in their individual capacity to consider the impact of the acquisition on employees when making their decision about accepting or rejecting a bid is also arguably significantly low.[27] The Winter Report reaffirms this position explaining that regulating the obligations towards employees' rights during a takeover bid was not the focus of the Takeover Directive.[28] On this point, *Vos* and *Heynen* conclude that despite the Takeover Directive's provisions that allow for communication of information from both the offeror and offeree company to employees, it is evident to those familiar with the community's labour laws that the information communicated is, overall, of minimal value.[29] In this respect, they advocate that the application of complementary to the Directive legislation for the safeguard of employees is essential.[30]

19 Article 6(3) (i) of the EU Takeover Directive.

20 Amendment 5 of the European Parliament voted 13 Dec. 2000, after second reading.

21 J. Wouters, P.V. Hooghten, & M. Bruyneel, 'The European Takeover Directive: A Commentary', in *The European Takeover Directive and Its Implementation*, ed. P.V. Hooghten (New York: Oxford University Press, 2009), 3–76.

22 B. Clarke, 'Takeover Regulation: Through the Regulatory Looking Glass' CLPE Research Paper 18/2007, vol. 03, No. 05 (2007), Issue: EU Governance, 15, available at <http://ssrn.com/abstractid=1002675>.

23 J. Winter et al., 'Report of the High Level Group of Company Law Experts on Issues Related to Takeover Bids in the European Union' (2002), 19, available at <http://ec.europa.eu/internal_market/company/docs/takeoverbids/2002-01-hlg-report_en.pdf>; also see B. Sjåfjell, *Towards a Sustainable European Company Law:A Normative Analysis of the Objectives of EU Law, with the Takeover Directive as a Test Case* (Kluwer Law International, 2009), 326–336, who questions the validity of such an assumption.

24 T. Jenkinson & C. Mayer, *Hostile Takeovers: Defence, Attack and Corporate Governance* (UK: McGraw-Hill International Limited, 1994), 26.

25 See Sjåfjell, 2009, *supra* n. 23, 21–35, 103–110.

26 *Ibid.*, 85.

27 *Ibid.*, 357.

28 See Winter et al., 2002, *supra* n. 23, 16.

29 M.D.Vos & J. Heynen, 'Employee Participation and Takeovers under EC Law', in *The European Takeover Directive and Its Implementation*, ed. P.V. Hooghten (New York: Oxford University Press, 2009), 102.

30 *Ibid.*, 101–102.

4. A BRITISH PARADIGM: CSR IN THE SPOTLIGHT POST THE CADBURY VERSUS KRAFT TAKEOVER

Kraft acquired Cadbury on 2 February 2010 with an aim of increasing its global presence and revenue. The deal qualifies as an important case study for the purposes of our discussion of the possible revision of the EU Takeover Directive, as it prompted the reform of the UK Takeover Rules arguably towards a more stakeholder-oriented model.[31] In view of the fact that most of the default rules encompassed in the Takeover Directive are a reflection of the rules found in the UK City Code on Takeovers and Mergers, it is worth examining whether the discussions focusing on the Code's reform in 2011 are likely to have any impact on proposals of the revision of the equivalent EU rules. The takeover of *Cadbury PLC* by the US multinational *Kraft Foods Inc.* in 2010 highlighted the importance of the bidder's undertakings towards the target's workforce and the target company's commitments to CSR.[32]

During the takeover process, the media had exemplified *Cadbury PLC* as a highly ethical company committed to CSR practices through its commitment to its employees and customers, as well as to producers of third world countries through the use of *Fairtrade* cocoa in the production of two of its most popular brands.[33] In its attempt to restore its damaged reputation after the reported use of cocoa from slave farms located in West Africa in 2000, Cadbury began to assume a more ethical approach towards its business practices in 2002.[34] In 2005, Cadbury made an important step towards increasing its CSR by taking over Green & Blacks, a chocolate manufacturing company known for its production of organic and fair trade labelled products.[35] Particularly prior to the takeover bid launched by Kraft in 2009, Cadbury exemplified a significantly active approach towards CSR through its launch of a GBP 44 million Cocoa Partnership in 2008 'to secure the economic, social and environmental sustainability of around a million cocoa farmers and their communities in Ghana, India, Indonesia, and the Caribbean' and its commitment in 2009 to use Fairtrade cocoa in its top-selling Dairy Milk brand.[36]

Following Cadbury's commitments to CSR policies, it was not unwarranted that the launch of a takeover for Cadbury PLC in 2009 by multinational Kraft Food Inc. created fury among the British community. The bid by Kraft gave rise to fears that in the absence of legal requirements compelling successful bidders to respect Cadbury's commitments to its workforce, research and development, and overall CSR policies, Kraft Foods would divest itself of Cadbury's good business practices in the event of a successful bid and carry on business with a less committed approach towards social values.[37] Post the acquisition, Kraft did in fact commit to continue Cadbury's support for the Cocoa Partnership and its undertaking to extend Cadbury's use of Fairtrade possibly due to the fury generated by the media, trade unions, and the House of Commons.[38] Despite Kraft's overall commitment to continuing Cadbury's CSR practices, certain evidence of a CSR change to the worse months after the successful acquisition did in fact follow. As reported in January 2011, one of Cadbury's most popular brands with a strong business ethics agenda, Green & Blacks, was struggling to maintain its fundamental CSR as part of Kraft and was awaiting a management buyout to salvage its CSR-friendly business at that time.[39] Kraft, however, rejected such a proposal and declared its commitment to keep Green & Blacks as a part of its group.[40] The alignment of Cadbury's and Green & Black's CSR values had been managed successfully, as both companies were, prior to their integration, already strongly committed to using fair trade commodities in their manufacturing.[41] Whether Kraft will successfully align its CSR values with those of Cadbury in general and particularly those of Green & Blacks remains to be seen.

A major undertaking that Kraft had not complied with post its successful acquisition of Cadbury was its commitment to keep the Cadbury Somerdale factory open, which Cadbury had previously

31 G. Fairfield & H. Smith, 'The UK Takeover Regime: Significant Changes to the Takeover Code' (London: September 2011), available at <www.iflr1000.com/LegislationGuide/662/The-UK-takeover-regime-significant-changes-to-the-Takeover-Code.html>, last visited January 2012.

32 A.S. Kalirai, Partner at Field Fisher Waterhouse, 'Post Cadbury-Kraft Takeover Changes Force Advisers to Rethink Strategies', Commentary, 15 Sep. 2011, available at <www.legalweek.com/legal-week/analysis/2108920/post-cadbury-kraft-takeover-changes-force-advisers-rethink-strategies>, last visited January 2012.

33 S. Carrell, 'Cadbury Takeover Raises Doubts over Kraft's Business Ethics', *The Guardian*, 20 Jan. 2010, available at <www.guardian.co.uk/business/2010/jan/20/cadbury-kraft-takeover-fair-trade>, last visited January 2012.

34 M. Blowfield & A. Murray, *Corporate Responsibility*, 2nd edn (Oxford: Oxford University Press, 2011), 51–52, who report on Cadbury's support of a study by the International Institute of Tropical Agriculture investigating the extent of child labour and forced labour in 2002, as well as Cadbury's joining the international cocoa initiative, which aimed at abolishing unacceptable labour practices in cocoa production; Cadbury's acquisition of Green & Blacks, a company producing organic chocolate and observing high-standard business practices towards its consumers, in 2005, also added value to Cadbury's efforts to qualify as an 'ethical company'.

35 C. Muspratt, 'Cadbury Gobbles Up Green & Black's', *The Telegraph*, 13 May 2005, available at <www.telegraph.co.uk/finance/2915574/Cadbury-gobbles-up-Green-and-Blacks.html>, last visited January 2012.

36 Blowfield & Murray, 2011, *supra* n. 34, 51–52.

37 R. Wachman, 'Kraft Takeover Could Be Bitter Experience for Cadbury', *The Guardian*, 20 Sep. 2009, available at <www.guardian.co.uk/business/2009/sep/20/kraft-cadbury-takeover-fears>; House of Commons, 'Business, Innovation and Skills Committee Mergers, Acquisitions and Takeovers: The Takeover of Cadbury by Kraft', Ninth Report of Session 2009–2010, Report together with formal minutes, oral and written evidence (The Stationary Office Limited: London, 30 Mar. 2010), 12–20.

38 See House of Commons Ninth Report of Session 2009-2010, *supra* n. 37, 29–30.

39 L. Lucas, 'Green & Black's Executives Eye Buy-Out', *The Financial Times*, 16 Jan. 2011, available at <www.ft.com/cms/s/0/c1428cf6-21a2-11e0-9e3b-00144feab49a.html#axzz1jHXai4Rr>, last visited January 2012; also see A. Vijayaraghavan, 'Corporate Takeovers: How to Align CSR Values?', available at <www.justmeans.com/Corporate-Takeovers-How-Align-CSR-Values/42846.html>, last visited January 2012.

40 L. Lucas & A. Rappeport, 'Mergers and Acquisitions: A Bitter Taste', *The Financial Times*, 23 May 2011, available at <www.ft.com/cms/s/0/03559624-8571-11e0-ae32-00144feabdc0.html#axzz1jHXai4Rr>, last visited January 2012.

41 D. Bailey, 'Green and Blacks Try to Escape Kraft', 17 Jan. 2011, available at <http://blogs.birminghampost.net/business/2011/01/green-blacks-try-to-escape-kra.html>, last visited January 2012.

earmarked for closure. In its original statement, Kraft had committed to keep the Cadbury *Somerdale* factory open, but after the successfully completed takeover, Kraft announced that it was no longer able to comply with its undertaking.[42] Its withdrawal from that particular commitment resulted in distrust not only towards Kraft but also towards takeovers and their social implications in general. Kraft's non-compliance with keeping the Somerdale factory open was condemned by the House of Commons, which found that Kraft's actions had undoubtedly damaged its reputation in the UK and its relationship with Cadbury's employees.[43] In legal terms, however, what was of importance was not the closure of the said facility as such but rather Kraft's failure to comply with the particular undertaking.[44] According to the Panel, Kraft backing out of its prior commitment was the result of Kraft not having observed high standards of care and accuracy in the information communicated to the target shareholders in its offer regarding its prospective business plans for Cadbury, which thus held Kraft in breach of Rule 19.1 of the Takeover Code.[45]

The call for a reform of the UK takeover rules followed. Preceding the reform of the UK takeover rules, Lord Mandelson, the Secretary of State for Business, Innovation and Skills in the UK in 2010, proclaimed the need for reform of UK rules on takeover bids and directors' duties in order to promote long-term engagement and ownership among shareholders and boards.[46] The takeover highlighted, among others, the fact that target boards in general fail to consider the company's long-term interests and the long-term implications of the takeover bid in their advice of the bid to shareholders.[47] The Department for Business Innovation and Skills proceeded by issuing a policy document entitled *A Long-Term Focus for Corporate Britain: A Call for Evidence*' in October 2010 with an aim of understanding whether and to what extent the UK system fosters the long-term growth of corporations or whether it undermines it.[48] The consultation sought to specifically explore, among others, whether boards understand the long-term implications of takeovers and if so, whether they communicate the long-term implications of bids effectively.[49] A summary of responses to the review document was published in March 2011.[50] There were mixed responses about whether boards understand the long-term implications of takeovers, and it was overall found that there was a difficulty for target boards: 'in not recommending an offer to shareholders if it offered a high (and often excessive) price', as 'boards would find it difficult to explain why such a bid should not be accepted'.[51] Other key observations made were that investors are often driven by short-term returns and that boards are often guided by the strict dictum of 'Shareholder value'.[52] Certain respondents recommended that the Takeover Code should be better linked to section 172 of the Companies Act 2006 with regard to directors duties, although on this point other responses questioned whether the said section would be effective in guiding the decision-making process amidst a takeover, and recommended a further study of its efficacy within this context.[53] Certain respondents were in favour of more disclosure on the long-term implications of a bid, while others considered the information that boards provide to be, as stated: 'too backward-looking and focused on historical information'.[54] In March 2011, the Takeover Panel Code Committee proposed that it would make amendments so as to provide greater recognition of the interests of offeree company employees.[55] The House of Commons also recommended that target directors take into consideration the rights of employees when deciding on the merits of a bid.[56]

The Takeover Panel Code Committee had also considered the proposal of outlining the factors that target boards should take into account when constructing their recommendation of a bid to target

42 See House of Commons, Ninth Report of Session 2009–2010, *supra* n. 37, 5.
43 *Ibid.*, 10–11.
44 Note that the closure of the Somerdale facility was already on Cadbury's agenda, so it would have been realized even in the event that Cadbury had remained independent.
45 Panel Statement, Kraft Foods Inc. Offer for Cadbury Plc 2010/14, available at <www.thetakeoverpanel.org.uk/wp-content/uploads/2009/12/2010-14.pdf>, whereby the Panel applied an objective and subjective test to Kraft's statement, thus holding the company accountable for breach of Rule 19.1 of the Code.
46 Lord Mandelson, Speech 1 Mar. 2010, Manor House, available at <www.totalpolitics.com/speeches/economics/economic-policy/35208/lord-mandelson-mansion-house-speech.thtml>, last visited January 2012.
47 T. Webb, 'Lord Mandelson Calls for Overhaul of Takeover Rules', *The Guardian*, 1 Mar. 2010; Panel Statement 2010/22, 'Code Committee: Review of Certain Aspects of the Regulation of Takeover Bids', section 2.5, 3, available at <www.thetakeoverpanel.org.uk/wp-content/uploads/2009/12/2010-221.pdf>.
48 Department for Business Innovation and Skills, 'A Long-Term Focus for Corporate Britain: A Call for Evidence', available at <www.bis.gov.uk/assets/biscore/business-law/docs/l/10-1225-long-term-focus-corporate-britain.pdf>, October 2010, 33, issued by the Department for Business Innovation and Skills with an aim of understanding whether and to what extent the UK system fosters the long-term growth of corporations or whether it undermines it (see aims, 4–5).
49 *Ibid.*
50 Department for Business, Innovation and Skills, Summary of Responses, 'A Long-Term Focus for Corporate Britain', March 2011, available at <www.bis.gov.uk/assets/biscore/business-law/docs/s/11-797-summary-responses-long-term-focus-corporate-britain.pdf>; also see briefing on Consultation at <www.bis.gov.uk/Consultations/a-long-term-focus-for-corporate-britain>, which reports that following the responses to the call for evidence that identified a number of issues with short termism, the Secretary of State commissioned an independent review to examine investment in UK equity markets and its impact on the long-term performance and governance of UK quoted companies to Professor John Kay, who is to deliver his findings in February 2012.
51 *Ibid.*, 21.
52 *Ibid.*
53 *Ibid.*, 22.
54 *Ibid.*
55 Panel Statement 2011/08, 'The Takeover Panel Code Committee: Review of Certain Aspects of the Regulation of Takeover Bids: Proposed Amendments to the Takeover Code', points (d)(i) and (ii), 2, available at <www.thetakeoverpanel.org.uk/wp-content/uploads/2010/12/2011-8.pdf>.
56 See House of Commons, Ninth Report of Session 2009–2010, *supra* n. 37, 3.

shareholders, but the motion of outlining these factors in the Code by amending its current provisions failed, as the majority of the Committee considered that the takeover rules should not be too prescriptive within this context.[57] The Panel did, however, recognize that market participants are under the misconception that the determining factor when considering whether to recommend a bid or not is the offer price, so it committed itself to exclude the offer price as the sole determining factor in recommending a bid.[58]
In relation to the recommendation provided by target directors to shareholders on the merits of the bid, the new edition of the Takeover Code published in September 2011 has added an extra interpretive text, which now reads:

> The provisions of the Code do not limit the factors that the board of the offeree company may take into account in giving its opinion on the offer in accordance with Rule 25.2(a). In particular, when giving its opinion, the board of the offeree company is not required by the Code to consider the offer price as the determining factor and is not precluded by the Code from taking into account any other factors which it considers relevant.[59]

The concerns brought forward by Cadbury's takeover by Kraft in the UK in relation to the protection of employees, target board recommendations, and CSR practices may prove to have an impact on discussions relating to the revision of the EU Takeover Directive's stakeholder-oriented provisions.[60]

5. THE SYMBIOSIS OF TAKEOVERS AND CSR

The theoretical function of takeovers is to correct managerial failure and oust underperforming companies from the market.[61] Whether the objectives of the promotion of CSR and the facilitation of takeovers can co-exist is highly dependant on the evaluation of the company, that is, whether the share price does in fact also encompass available information on CSR. Key to the proper function of an open market for corporate control is that stock markets behave rationally, so that share prices reflect the company's performance and future prospects.[62] Not all relevant information on CSR practices is publically available however, as companies do not yet systematically report on their People and Planet achievements.[63] The reporting is also not yet comparable per industry, nor in time, nor is it fully verified by independent authorities. Thus, if markets cannot 'value' CSR, then it is fair to assert that a prioritization in research and development, for example, would not allow for a high share price, making a company more susceptible to the threat of a takeover.[64]

The symbiosis of takeover activity and CSR is also highly dependant on the time horizon observed by directors in maximizing shareholder value. The debate of short-term versus long-term attitudes observed in investments and corporate strategies have been a focal point in discussions on corporate governance ever since the 2008 financial crisis emerged.[65] Financial institutions have been particularly concerned with reporting on CSR and sustainable business practices post the 2008 financial crisis, in light of banks' damaged reputations preceding state bank bail-outs.[66] Strine finds

57 Panel Statement 2010/22, 'The Takeover Panel Code Committee: Review of Certain Aspects of the Regulation of Takeover Bids', point (ii) section 5.2.1., 16, available at <www.thetakeoverpanel.org.uk/wp-content/uploads/2009/12/2010-221.pdf>.

58 *Ibid.*, point (ii) s. 5.2.2.

59 See The City Code, 10th edn, *supra* n. 7; notes on Rule 25.2 point 1 on *Factors which may be taken into account.*

60 B. Clarke, 'Directors' Duties During an Offer Period: Lessons from the Cadbury PLC Takeover', UCD Working Papers in Law, Criminology & Socio-Legal Studies Research Paper No. 44/2011 (11 Feb. 2011), 12, available at <ssrn.com/abstract=1759953>, last visited January 2012.

61 H.G. Manne, 'Mergers and the Market for Corporate Control', *The Journal of Political Economy* (1965): 73; J.E. Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company Law* (Oxford: Clarendon Press, 1993), 156; R. Romano, 'A Guide to Takeovers: Theory, Evidence and Regulation', *Yale Journal on Regulation* 9 (1992): 119–179; on the last point, however, see Sjåfjell, 2009, *supra* n. 23, 326–336, whereby it is explained that the assumption of takeovers functioning as purported in theory may be questioned, as empirical evidence is inconclusive.

62 M. Wachter, 'Takeover Defense When Financial Markets Are (Only) Relatively Efficient', Institute for Law & Economics Research Paper No. 02-19 (2002), 15, available at <http://ssrn.com/abstract=330620>, last visited January 2012; also see M. Martynova & L. Renneboog, 'A Century of Corporate Takeovers: What Have We Learned and Where Do We Stand?' (2005), 15, available at <http://ssrn.com/abstract=820984>, last vsited January 2012, who report on the overall wealth effects assumed to be created by takeovers, finding that the stark difference between the decrease of wealth effects in the long run as opposed to the increased wealth effects at and around the announcement period of the bid is attributed to methodological problems and problems related to the market efficiency assumption, namely that short-term studies based on this theory may overestimate the gains during the announcement period, while studies that take place in the aftermath of the acquisition have obtained more information about the takeovers, subsequently reassessing the expectations on returns from positive to negative.

63 K. Greenfield, 'New Principles for Corporate Law', Boston College Law School Faculty Papers, Paper (2005), 56, 90, available at <http://lawdigitalcommons.bc.edu/lsfp/56>, last visited January 2012, who reports on the problematic way in which financial reporting is conducted; also see R.I. Tricker, *Corporate Governance: Principles, Policies, and Practices* (Oxford/New York: Oxford University Press, 2009), 350, whereby it is explained that companies are still first and foremost concerned in reporting on their economic responsibility, showing that that they are 'profit orientated and market driven'; also see M. Wembridge, 'Without Uniform, Reliable Rules, CSR Reports Will be Read with a Grain of Salt', *The Financial Times*, 15 Jun. 2011, available at <www.ft.com/cms/s/0/5a5366c4-8088-11e0-adca-00144feabdc0.html>, last visited January 2012, where it is explained that CSR reviews, unlike annual reports, lack a standardized formula and that companies report on their CSR by using voluntary sustainability reporting guidelines, such as those developed by the Global Reporting Initiative (GRI) or 'the Equator Principles'.

64 See Sjåfjell, 2009, *supra* n. 23, 339; also see J.A. McCahery et al., *The Economics of the Proposed European Takeover Directive*, Research Report in Finance and Banking (Centre for European Policy Studies, 2003), on the importance of the social costs factor in the construction of takeover regulation, as takeovers as such give priority to the financial sustainability of corporations within the market, aiming to increase efficiency by relocating assets to more effective management.

65 S.C.Y. Wong, 'Long-Term versus Short-Term Distinction in UK Takeover Review Misses the Point' (2010), 2, available at <www.ssrn.com/abstract=1662610>; also see Department for Business Innovation and Skills, 'A Long-Term Focus for Corporate Britain: A Call for Evidence', *supra* n. 48.

66 See Wembridge, 2011, *supra* n. 63.

that the problem can be narrowly identified in the fact that present scholarship has failed to address new market phenomena, namely:

> 1) separation of ownership from ownership'[67] and '2) the emergence of reaggregated forms of aggressive capital, largely unconstrained by legal or equitable duties to other stockholders or society as a whole.[68]

As Strine explains, following such phenomena, with the board of directors having become highly sensitive to serving stockholders' unconstrained short-term interests, it is subsequent that there has been underinvestment in future growth.[69] Actors, such as hedge funds, which only emerged in significant numbers in recent years, have made the need to address short termism in corporate investments imminent.[70] The short time horizon in realizing profits is one of the reasons takeovers work as an impediment to the creation or preservation of implicit contracts that aim to secure profits in the long term.[71] For the purposes of progressing with restructuring freely, the corporate raider is normally not obligated by corporate law to continue any implicit contracts formed with stakeholders of the company during previous management.[72] If, however, it is the company's purpose to maintain 'a long-term sustainable vision' despite investors coming in and out of the company on a frequent basis, then it should be important for directors' to be aware of the company's exact strategy and disclose it to investors in the interim,[73] as well as to a prospective acquirer.

The quality and accuracy of the information on the corporations' business exchanged between the target and the acquiring company also play a crucial role in the development of CSR strategies, parallel to takeover activity occurring. Due diligence assessments, that is, the evaluation process to determine the value of a company before a bid is launched, are considered to constitute semi-legal frameworks through which the development and implementation of CSR can be realized.[74] In this respect, the rules related to the type of information that target shareholders are provided with are of significant importance.[75]

The analysis above has signalled that there are sub-issues that should be taken into account when discussing the European Commission's parallel objectives of promoting CSR, as well as facilitating takeovers. Encompassing information on CSR practices in the share price, keeping directors' corporate strategies distinct from stockholders' short-term interests, as well as protecting the value already invested in CSR post a change in corporate control by promoting the exchange of accurate and complete information between target and acquirer, are all issues that one need to bear in mind when considering proposals for the revision of the Takeover Directive further on in section 6.

5.2. Practical Issues: Building the Case for CSR

Irrespective of arguments in favour or against the adoption of CSR provisions in the Takeover Directive,[76] the need for legal certainty and the need to address temporal market failures are both arguments that would support a 'stakeholder friendly' reform of the Directive. Such proposals are in line with the Commission's goals, both its aim to promote CSR and secure certain objectives of the EU Takeover Directive itself.[77]

67 L.E. Strine, 'One Fundamental Corporate Governance Question We Face: Can Corporations Be Managed for the Long Term unless Their Powerful Electorates also Act and Think Long Term?', *The Business Lawyer* 66 (November 2011), whereby Strine explains earlier on in his article what he means by the separation of 'ownership from ownership' by stating that '*individual Americans don't wield control over who sits on the boards of public companies. The financial intermediaries who invest their capital do. These intermediaries have powerful incentives – in important instances, not of their own making – to push corporate boards to engage in risky activities that may be adverse to the interest of long-term investors and society. That is, there is now a separation of "ownership from ownership" that creates conflicts of its own that are analogous to those of the paradigmatic, but increasingly outdated, Berle-Means model for separation of ownership from control*'.

68 *Ibid.*, 9.

69 *Ibid.*, 16.

70 A. Wells, 'Takeovers and Mergers. Are You a Cadbury's Fruit and Nut Case?', *Business Law Review* (May 2011), 114.

71 See Jenkinson & Mayer, 1994, *supra* n. 24, 15, who find that a company's vulnerability to hostile takeovers is what undermines the 'long-term operation of firms', as managers and employees become averse to developing specialized skills, as well as training; with reference to employees in particular, see Jenkinson & Mayer, 1994, *supra* n. 24, 16–17, whereby authors make a distinction between implicit and explicit contracts formed under the company umbrella. Implicit contracts are understandings based on *trust* and cannot be enforced through the application of law and litigation in courts; also see Fannon, 2003, *supra* n. 9. 83–84, whereby the protection of firm-specific investments is assumed to encourage commitment on the part of employees, productivity, and competitiveness, but it is argued that human-specific investments that deserve protection should be assessed on a case-by-case basis.

72 J. Mukwiri, *Takeovers and the European Legal Framework: A British Perspective* (London and New York: Routledge-Cavendish, 2009), 88.

73 M. Scott, 'Short-Termism Requires Long-Term Vision', *The Financial Times*, 16 Jan. 2011.

74 T. Lambooy, *Corporate Social Responsibility: Legal and Semi-Legal Frameworks Supporting CSR Developments 2000–2010 and Cases Studies* (Kluwer, 2010), Phd Thesis Universiteit Leiden, 29–30 and 39.

75 See Art. 3(b), Art. 6 and Art. 8 of the European Takeover Directive with regard to the information that needs to be provided to target shareholders for them in order to reach a properly informed decision on the bid.

76 For arguments against the revision of EU Takeover Directive with reference to the inclusion of more stakeholder-friendly provisions, see Winter et al., 2002, *supra* n. 23; main arguments are that the EU Takeover Directive only needs to provide that during a takeover bid, a fair process shall be observed for investors in order for them to make an informed decision on the merits of the bid and that other areas of law can properly deal with externalities that the firms may create (the inclusion of rules on socially responsible behaviour being observed and continued by the target firm is not necessary to the effective facilitation of takeovers); also see Blowfield & Murray, 2011, *supra* n. 34, 323, whereby an additional argument against the inclusion of provisions of CSR is that such provisions will over-regulate the market, not allowing it to operate freely; for arguments not in favour of the strict shareholder focused provisions in the corpus of the Directive, see A. Johnston, 'The European Takeover Directive: Ruined by Protectionism or Respecting Diversity', *Co Law* 25 (2004): 270, and see Sjåfjell, 2009, *supra* n. 23; arguments on latter view are, in general, that 'fair process' during a takeover bid needs be observed for other stakeholders in the corporation and other areas of law cannot properly deal with externalities that the firms may create during a takeover, whereby special factual circumstances will arise.

77 The author participated at the Convention on Takeover and Mergers, which was hosted by the Austrian Takeover Commission Convention in Vienna on 9 Sep. 2011, at which Convention the law firm *Marcuus Partners*, represented by C. Clerc & F. Demarigny, presented a preliminary brief overview of their research on the Study of the application of the EU Takeover Directive in Power Point format, which is on file with the current author; on this point, see Preliminary Briefing of the proposed Study, Power Point Slide 18, whereby

The provisions identified in section 3 are problematic insofar as they broadly reflect the need to safeguard a company's socially responsible behaviour but are of minimal practical value in terms of safeguarding it. The need for legal certainty should prompt regulators to redefine key concepts in the Takeover Directive and elaborate on target directors' advisory role during a takeover bid.[78] The significance attached to target board recommendations is supported by empirical studies that find such recommendations as being the most important variable in determining takeover outcomes.[79] Defining the target directors' advisory role[80] in the EU Takeover Directive may thus well help secure fairer outcomes not only for investors but also ultimately for all parties affected by a change in corporate control.

Recent market failures indicate a dysfunctional market for corporate control, and this in turn has led policymakers to question whether the present legal framework does in fact threaten long-term growth. Non-available information on social costs or, in general, the long-term value of investments in the share price, which is used as an indicator of managerial efficiency for the purposes of a takeover, may be the cause of a dysfunctional market for corporate control, and in this respect CSR as a notion can be viewed as a way of addressing the imperfections and failures of markets.[81] As explained:

> efficient resource allocation depends on markets yielding prices that reflect true social costs; when they fail to do so, such as when polluters fail to pay the cost, then the invisible hand can lead one in the wrong direction . . . Therefore instead of seeing corporate social responsibility as an assault on free markets, it can be argued that it will ultimately make markets, or at least companies more efficient.[82]

In considering all such factors, it is appreciated that the Takeover Directive is not an all-encompassing regulatory tool with an aim of addressing all legitimate concerns that may arise from a change in corporate control.[83] What falls within the ambit of the Takeover Directive, however, is to identify key concepts and prescribe what the directors of the offeree company should report on when recommending a bid to the company's shareholders, as well what type of information the bidding and target companies are under a duty to disclose about its own CSR policy, strategy, programmes, and their implementation.

6. CSR AND THE REFORM OF THE EU TAKEOVER DIRECTIVE[84]

6.1. Data on the Takeover Directive's Revision

Article 20 of the Takeover Directive stipulates that five years after the deadline of the implementation of the Directive, the European Commission shall review the Directive: 'in light of the experience acquired in applying it and, if necessary, propose its revision'. Thus following Article 20 of the Takeover Directive, the Commission commissioned a study on the application of the Directive in autumn 2010[85] to the French law firm Marcuus Partners.[86] General issues to be addressed are, according to the preliminary brief overview of their research on the Takeover Directive: 'clarity of the obligations imposed by the legislation, appropriateness of the legislation, disclosure and takeover bid procedure', as well as 'employee protection'.[87] Social and environmental concerns were also referenced.[88]

In their economic analysis of the application of the Takeover Directive, the preliminary briefing of Marcuus Partners refers to the *community control gap*, which, as explained, increases the risk of negative externalities imposed by shareholders. The possible solutions outlined to mitigate such a risk are to restrict the free market for corporate control, to enhance community protection through increased regulation of company activities and increased accountability of shareholders, or finally to call upon management to act in

it is outlined that the protection of different constituencies constitutes one of the objectives of the EU Takeover Directive, namely, see second point, which states: *protection of the interests of shareholders, in particular minority shareholder, employees and other stakeholders, when a company is subject to a takeover bid for control.*

78 *Ibid.*, namely, see first point, whereby the need for legal certainty was also emphasized, as it was in particular stated that *legal certainty on the handling of takeover bids and Community-wide clarity and transparency in respect of takeover bids.*

79 P. Holl & D. Kyriazis, 'The Detriments of Outcome in UK Take-Over Bids', *International Journal of Economic Business* 3, no. 2 (1996): 165, 168; P. Wong & N. O'Sullivan, 'The Determinants and Consequences of Abandoned Takeovers', *Journal of Economic Surveys* 15, no. 2 (2001): 145–186, 156; H. Eddy & R.S. Casey, 'Director's Recommendations in Response to Takeover Bids: Do They Act in Their Own Interests?', *Australian Journal of Management* (1989): 26.

80 See Lord Hoffman, 'Directors' Duties', in *Developments in European Company Law, V.3/1999: Directors' Conflicts of Interest: Legal, Socio-Legal and Economic Analyses*, eds Andrenas & Sugarman, 1st edn (London: Kluwer International Law, 2000), whereby it is explained that within a takeover context, the board of an offeree company will not only be subject to the provisions of the EU Takeover Directive, as transposed into national law, but will also be subject to a combination of national case law, statutory and self-regulation rules.

81 Blowfield & Murray, 2011, *supra* n. 34, 358.

82 *Ibid.*, 358.

83 Socially Responsible Investment (SRI) is also of importance to the facilitation of CSR practices but is a matter that falls outside the ambit of the revision of the Takeover Directive and needs to be addressed via other regulatory means and policy choices that can encourage more socially responsible investment; on how SRI can allow for CSR to develop side by side with the facilitation of the benefits that takeover as an external corporate governance mechanism is assumed to offer, see Sjåfjell, 2009, *supra* n. 23, 476.

84 'Reform of EU Takeover Directive and of German Takeover Law', Survey Report, Freshfields Bruckhaus Deringer LLP (November 2011), 14, available at <www.freshfields.com/publications/pdfs/2011/nov11/31663.pdf>, according to which most respondents were of the view that in order to create the desired level playing field, amendments of the EU Takeover Directive itself would be preferred to rulemaking by private codices, European Commission recommendations, or other soft law instruments.

85 European Commission Minutes of the meeting of 11 Feb. 2011 (Brussels, European Corporate Governance Forum, 7 Mar. 2011), available at <http://ec.europa.eu/internal_market/company/docs/ecgforum/minutes-20110211_en.pdf>.

86 See The City Code, 10th edn, *supra* n. 7; also see 'Reform of EU Takeover Directive and of German Takeover Law', Survey Report, *supra* n. 84, 1.

87 *Supra* n. 77, Power Point Slide 6.

88 *Supra* n. 77, Power Point Slide 15, whereby reference was made to the social and environmental concerns that have been laid down in the EU Company Law Action Plan 2003, as well as the Commission's vision for the single market in the twenty-first century, dated February 2007.

the interests of the company as a whole.[89] From all three options, the present author proposes that the last option referred to need to be the subject of reform in the Takeover Directive for the purposes of safeguarding CSR practices parallel to the occurrence of takeover activity.[90]

Also important to our discussion of the revision of the takeover Directive with reference to CSR are the findings of Freshfields Bruckhaus Deringer LLP Expert Survey Report on the 'Reform of EU Takeover Directive and of German Takeover Law', dated November 2011.[91] With regard to the role of the board of the offeree company, the Survey reports that a clear majority of the respondents supported a proposal to 'grant the target company's management a relatively broad discretion in a takeover process by applying the so-called business judgment rule'.[92] The Survey Report also provides respondents' views on whether takeover law in the respondents' jurisdiction achieves the right balance between bidder, target management, target shareholders, and other target stakeholders.[93] From the respondents who saw a misbalance between the different stakeholders' interests and who were asked about the balance that was struck by the takeover laws in their home jurisdiction, the majority thought that the takeover laws should better protect the interests of target shareholders – an opinion strongly supported by representatives of academic research, investment banks, and corporates – or better protect other stakeholders – an opinion supported by institutional investors.[94]

6.2. Proposals for Additional Clauses in the EU Takeover Directive

In the UK, the reform of the UK takeover rules prompted by the takeover of Cadbury by Kraft in 2010 led to a revised 10th edition of the Code, which came into effect on 19 September 2011.[95] The Panel's commitment to exclude the offer price as the sole determining factor in recommending a bid has now made clear that target directors are not to provide advice that is merely affixed to the financial merits of the bid.[96] In light of the proposed 2011 change, the new interpretation of the section arguably gives target directors greater leeway in referring to the interests of various constituencies in their recommendation of a bid to target shareholders.[97] In an attempt to achieve a less arbitrary approach towards CSR on an EU level, the first proposal for reform suggested by the present author is to refer to the factors that need to be taken into account by the target board of directors when giving advice to the target shareholders[98] by making similarly to the UK amendment clear that:

> The provisions of the EU Takeover Directive do not limit the factors that the board of the offeree company may take into account in giving its opinion on the offer pursuant to their obligation outlined in Article 9(5) of the Directive. In particular, when giving its opinion, the board of the offeree company should not be required to consider the offer price as the determining factor and should not be precluded by national laws from taking into account any other factors which it considers relevant.[99]

A provision as such would guide target directors in drafting their statements towards shareholders and prompt target directors to refer to the implicit versus explicit contracts set in place for employees or the capital that has been invested in research and development plans and that is not reflected in the share price but will nevertheless be realized in the long term. Allowing directors to take other factors into account, besides the share price, may well offer certain of the benefits that the *business judgment rule* is perceived to offer in the US.[100] Lipton and Rowe have found that the Delaware model 'has protected corporations and directors from pressure to respond to short-term dislocations in the stock market'.[101] Delaware managers have been empowered with such a role during takeovers due to knowledge of

89 *Supra* n. 77, Power Point Slide 30.

90 *Supra* n. 77, Power Point Slide 22, whereby it is stated that the rules related to the protection of the target company are *General Principle regarding the need to take into account the interest of the target company taken as a whole, Publicity of the offeror's intentions (future business of the offeree company and likely repercussions on employment), Opinion of the board of the offeree company, Maximum Duration of a bid.*

91 See 'Reform of EU Takeover Directive and of German Takeover Law', Survey Report, *supra* n. 84, 2.

92 *Ibid.*, 5.

93 *Ibid.*, 17, according to which the majority of all respondents thought that German takeover law achieves the right balance between the interests of all stakeholders involved in public takeovers, although it was also noted that *this general assessment varies significantly depending on the specific role and the political agenda of the respondent.*

94 See 'Reform of EU Takeover Directive and of German Takeover Law', Survey Report, *supra* n. 84, 18.

95 See The City Code, 10th edn, *supra* n. 7.

96 S. Deakin & A. Singh, 'The Stock Market, the Market for Corporate Control and the Theory of the Firm: Legal and Economic Perspectives and Implications for Public Policy', Working Paper No. 365 (Centre for Business Research, University of Cambridge, June 2008), 11, whereby it is explained that in the UK and prior to the 2011 amendment referred to, target boards were not precluded from advising against a hostile bid on the grounds that the bid would be 'contrary to a long-term strategy of building up the company's business in a particular way' – however, as the authors further explain, the board had to nevertheless be cautious in stating such an opinion in light of the fact that it was still under the duty by law to objectively and clearly report on the financial merits of the bid in question.

97 See Lambooy, 2010, *supra* n. 74, 117–118, who reports on the tension that exists between management's responsibility towards the company's interests, including CSR policies and those of shareholders, an issue that was referred to but not addressed by the 'Corporate Governance Code Monitoring Committee' (Monitoring Committee) employed to evaluate compliance with the 'Tabaksblat Code' (the Dutch Corporate Governance Code of December 2003 for listed companies).

98 For arguments against the general *Multi-Fiduciary Approach*, including problems with enforcement of the duties, see Fannon, 2003, *supra* n. 9, 71.

99 Present author's note on proposal: a step forward would be to provide an outline of the factors to be taken into account and formulate a 'minimum standard' for recommendations, allowing for the national legislator to provide for more expansive standards on reporting.

100 The business judgment rule is the main standard by which the target board's actions are measured in Delaware and ultimately excludes directors from liability for any losses incurred as a consequence of their decisions. Conditions for the rule to apply are that the board must have acted in good faith, in the benefit of the company, and within its powers; for 'Stakeholder Statutes' in the US, see Fannon, 2003, *supra* n. 9, 69–70.

101 M. Lipton & P.K. Rowe, 'Pills, Polls and Professors: A Reply to Professor Gilson', *Del. J. Corp. L.* 27 (2002): 26.

the company's value and ability to respond to third parties in a way that cannot be achieved by shareholders. Lipton and Rowe find that in *Time Warner*[102] and *Unitrin*[103] cases, 'the court's acknowledgment that directors can respond to the threat of "substantive coercion"' is essentially a recognition that shareholders may 'get it wrong' because information about a company's value may either not be fully available or fully understood by all shareholders'.[104] The present author does however acknowledge the importance of the first principle outlined in the Winter Report, that is, shareholder decision-making, which allows the takeover to function as a disciplinary tool for management, specifically with regard to companies with dispersed ownership structures.[105] However, in consideration of the fact that target directors hold an indirect power to defend against an unwanted bid by using their 'recommendation' to possibly steer target shareholders in one direction or another,[106] it remains important to allow for directors to construct a more 'all stakeholder inclusive' opinion of a bid to shareholders.

The positive aspect of the vague term 'company as a whole' lies in the fact that it encompasses the interests of the company both in its broadest and narrowest sense, that is, the all encompassing approach of stakeholders' interests and the restricted approach of shareholders' interests, respectively,[107] allowing thus Member States to interpret the section with reference to their conception of what constitutes 'corporate interests'.[108] However, in order to complement the first proposal made with regard to not limiting the factors that target directors can take into account in their recommendations, a second amendment is proposed by the present author, that is, to elaborate on the term 'in the interests of the company as a whole', as found in Article 3(1)(c), and 'the company's interests', as found in Article 9(5) of the Directive, providing for an autonomous interpretation of the term.[109] The proposal is to incorporate the following text after the phrase 'in the interests of the company as a whole', meaning 'the interest of corporate policy and its continuation in the long-term, with a view of safeguarding firm-specific investments and CSR policies relevant to the firm'.[110] Sjåfjell supports the view that the term should be given an autonomous interpretation, especially in light of the fact that there is no pan-European consensus on the term.[111] By referring to certain provisions of the Directive that may assist in providing a community-inspired interpretation of the phrase, she arrives at the conclusion that the term must in fact include 'the company's business (the interests of the enterprise), its employees, (possibly) the local communities and the shareholders', which, as further explained: 'is also in line with the legal basis of the Directive, Article 44(2)(g) EC, which expressly refers to the "protection of the interests of members and others"'.[112]

Following the implementation of the EU Takeover Directive in the UK, the UK Takeover Code in General Principle 3 now also reads: 'in the interests of the company as a whole', which may arguably allow for broader corporate interests to be taken into account.[113] Whether the marked change of terms in the UK Code from 'the shareholders interests taken as a whole', together with those of employees and creditors'[114] to the phrase 'the company as a whole' makes any difference in safeguarding the company's interests, including stakeholders' interests and CSR practices, is open to discussion.[115] The recent reform of the Takeover Rules that allow target boards to take other corporate interests into account in their recommendation of a bid to shareholders, and the proclamations made by the Department of Business Innovation and Skills in promoting long-term growth for UK firms, may allow for the term to be interpreted in its broadest sense.[116]

The 10th edition of the UK Code now requires greater disclosure on the bidder's part with regard to the impact of the offer on the business of the offeree and offeror company.[117] Prior to the

102 *Paramount Communications Inc v. Time Inc* 571 A.2d 1140 (Del., 1990).

103 *Unitrin Inc v. America Gen. Corp.* 651 A.2d 1361.

104 Lipton & Rowe, 2002, *supra* n. 101, 26.

105 See Winter et al., 2002, *supra* n. 23, 20; also see P. Davies et al., 'The Takeover Directive as a Protectionist Tool?', Law Working Paper No. 141/2010 (2010), available at <http://ssrn.com/abstract=1554616>, on positive aspects of the Board Neutrality Rule encompassed in Article 9 of the Takeover Directive.

106 B. Clarke, 'Corporate Governance Regulation and Board Decision Making', in *Corporate Governance and Development: Reform Financial Systems and Legal Frameworks*, eds T. Gopinath Arun & J. Turner (UK: Edward Elgar Publishing Limited, 2009), 127–210, 131; P. Davies & K. Hopt, 'Control Transactions', in *The Anatomy of Corporate Law: A Comparative and Functional Approach*, eds R.H. Kraakman et al., 2nd edn (UK: Oxford University Press, 2009), 235.

107 See Sjåfjell, 2009, *supra* n. 23, 346.

108 D. Kershaw, 'Web Chapter A: The Market for Corporate Control', in *Company Law in Context: Text and Materials*, ed. D. Kershaw (Oxford: Oxford University Press, 2010), available at <www.oup.com/uk/orc/bin/9780199215942/resources/chapters/Web_Chapter_A.pdf>, 46–47.

109 Clarke, 2011, *supra* n. 60, 12, who also argues in favour of reconsidering the duty of the board of directors to act in the interests of the company as a whole, on an EU level, post the takeover of Cadbury.

110 Guidance in constructing the proposal was sought in the new Dutch Corporate Governance Code, the 'Frijns Code', which provides that the board of directors should take into consideration 'corporate social responsibility issues that are relevant to the enterprise'; on developments with regard to the inclusion on CSR in the corpus of the Code, refer to T. Lambooy 'A Model Code on Co-determination and CSR, the Netherlands: A Bottom-Up Approach', *European Company Law* 8, no. 2/3 (2011): 74–82, 75.

111 See Sjåfjell, 2009, *supra* n. 23, 348.

112 *Ibid.*, 350.

113 Deakin & Singh, 2008, *supra* n. 96, 11–12.

114 See 7th edition of the Takeover Code on Takeovers and Mergers, published 1 May 2002.

115 Kershaw, 2010, *supra* n. 108, 46–47; also see H. Smith, 'Takeovers in the UK: Review of Topical Issues and Code Changes over the Last 12 Months' (London: Corporate Briefing, November 2005), available at <www.herbertsmith.com/NR/rdonlyres/EE2949E7-B4A6-4969-9185-4E666CA752F5/1672/5373TakeoversintheUKareview2.pdf>, which refers to Manchester United's target board response in not recommending the bid, having in mind the interests of the company, notwithstanding the offer price made by the bidder.

116 See The City Code, 10th edn, *supra* n. 7; Department for Business Innovation and Skills, 'A Long-Term Focus for Corporate Britain: A Call for Evidence', *supra* n. 48, 33.

117 See Kalirai, 2011, *supra* n. 32.

amendment of the Takeover Code in September 2011, Clarke questioned the value of such disclosure requirements with reference to employment by using Kraft's failed commitment to keep the Somerdale facility open post its acquisition of Cadbury as a paradigm. In specific, Clarke explained that the particular information on employees was likely to be of limited value to target directors, since section 172 or the 9th edition of the Code would not have allowed them to take into account employees' interests over those of shareholders.[118] However, through the prism of the new section in the Code offering guidance on the factors that target boards can take into account when drafting their recommendations, the disclosure requirements may assist target directors in formulating a more 'all-inclusive' opinion of a bid to target shareholders. Thus, a final proposal suggested by the present author is to allow for an increase in the information level of the offer document on an EU level as well.[119] Following the proposal of the minority view in the related question in the Freshfields Survey Report, it is proposed that additional information be included in the offer documents and that this obligation be outlined in the current version of the Takeover Directive in Article 6 paragraph 3, numbered '(0)', as one of the matters that the bidder needs to address in the offer document.[120] Specifically, the bidder should disclose '(i) information on its own CSR policies, and in specific its strategy, programmes and results on implementation, (ii) a detailed post-merger integration plan (in particular with respect to management positions, employment matters and CSR policies)'.[121] Such provisions would qualify as minimum standard provisions, allowing for national legislators to impose higher standards on the information provided in the offer document.[122]

The light regulatory touch recommended forms part of a broader framework that would have markets reflect CSR values in the share price, investors assessing the available information on CSR practices, and a single EU supervisory authority administering takeover activity ensuring that the parties involved abide by the rules.[123]

7. CONCLUSION

Detailed provisions exclusively on CSR are highly unlikely to form part of the Takeover Directive's revision. This is due to a dual difficulty in attaining political support on provisions that are likely to be foreign to the legal regimes of certain EU Member States[124] and in empirically supporting the benefits that a provision on CSR would offer when viewed as an attempt to over-regulate the market for corporate control.

What can however be drawn from our analysis of the Cadbury versus Kraft takeover and the Takeover Directive's provisions stakeholder-oriented provisions is that there is a need to redefine key concepts within the EU Takeover Directive if the European Commission truly aspires to promote socially responsible behaviour among EU firms in a harmonized manner as set out in its 2011 objectives on CSR. The grey areas of law reported on imply that the regulator is concerned with more than merely meets the eye, that is, creating an open market for corporate control. Combating short termism in corporate strategy and promoting socially responsible behaviour alongside takeover facilitation are also on the agenda. The takeover of Cadbury by Kraft highlighted that the protection of socially responsible practices post a change in corporate control matters. The implications for the revision of the EU Takeover Directive brought forward by the particular takeover, as well as the growing acceptance of CSR in today's business practices, suggest that the legislator should attempt to define key concepts, guide target directors in formulating their opinion of a bid to shareholders, and enact duties that would oblige the board of the offeree company, as well as the board of the offeror company, to disclose more information on the bid with particular reference to socially responsible practices observed by both parties involved. In section 7, some suggestions have been made for revision in this respect, on which the author welcomes comments.

118 Clarke, 2011, *supra* n. 60, 9.

119 See 'Reform of EU Takeover Directive and of German Takeover Law', Survey Report, *supra* n. 48, 34, whereby a substantial majority of all respondents considered the information level of the offer document sufficient; however, on the point of due diligence and the option of obtaining insider information on the target, see 36, 'Question 12' of the Survey Report, whereby experts' response to the question as to whether bidder should be allowed to receive and use inside information from and on the target company for the purposes of submitting a takeover bid, the majority of all respondents' answers were affirmative (with financial advisers, investment banks, and institutional investors strongly supporting the view and with trade unions and academic researchers being against any easement of insider rules).

120 *Ibid.*, 34.

121 With reference to the UK standards imposed on information contained in the offer document, see Deakin & Singh, 2008, *supra* n. 96, 12, who find the previous detailed provisions that 8th edn of the UK Takeover Code required on the content of the offer document of minimal value in practice.

122 Clarke, 2011, *supra* n. 60, 9.

123 See 'Reform of EU Takeover Directive and of German Takeover Law', Survey Report, *supra* n. 48, 16, whereby a significant minority of respondents referred the European Securities and Markets Authority (ESMA) as the authority that should be given competence for cross-border transactions; see *supra* n. 77, Power Point Slide 50.

124 Problems in reaching a mutual consensus are associated with differences between underlying theories on what the purpose of the corporation is, as well as who qualifies as the owner of the company per se; see the three dominant corporate governance backgrounds, as identified and outlined in Marcuus Partners Preliminary Briefing, *supra* n. 77, Power Point Slide 25, that is, the shareholder-oriented model in the UK, the company oriented model in Continental Europe, and the Management US oriented model in the US.