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# The Myth of Tactical Litigation in UK Takeovers

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The implementation of the Takeover Directive in the UK has resulted in ending the so-called self-regulation of takeovers. This change of regulatory framework was always feared for having the potential to create a culture of tactical litigation that would be detrimental to takeovers. In this article, these fears are assessed against the measures that prevailed at common law before the implementation of the Directive and against the measures in the Directive as implemented by the Companies Act 2006. This article concludes that it is unlikely that the implementation of the Directive will cause a litigation culture to arise in the regulation of UK takeovers.

## A. INTRODUCTION

This article is concerned with the regulation of takeovers in the UK under the European Community Directive on Takeover Bids (the “Directive”),<sup>1</sup> as implemented by the Companies Act 2006 (the “CA 2006”).<sup>2</sup> In particular, the article examines the question of whether implementation of the Directive creates the potential for a culture of tactical litigation in takeover bids to arise. Tactical litigation may broadly be described as “legal proceedings taken by parties to a bid with a view to frustrating or hampering the bid or the defence of a bid”.<sup>3</sup> The implementation of the Directive in the UK has resulted in ending the so-called self-regulation of takeovers. This change

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<sup>1</sup> Directive 2004/25/EC OJ L 142/12.

<sup>2</sup> Part 28 of the CA 2006 which implements the Directive came into force on 6th April 2007, replacing The Takeovers Directive (Interim Implementation) Regulations 2006 (SI 1183/2006) that had come into force on 20 May 2006 to coincide with the deadline required of Member States to implement the Directive.

<sup>3</sup> *Company Law Implementation of The European Directive on Takeover Bids: A Consultative Document* (London, DTI, January 2005), 15, para.2.32.

of regulatory framework was always feared for having the potential to create a culture of tactical litigation that would be detrimental to takeovers.

This article begins by putting self-regulation in its historical context, and then examines the basis of the perceived fear of litigation. It then examines the approach taken at common law to restrict tactical litigation, it analyses the provisions in the Directive designed to prevent tactical litigation, and examines the implementation of those provisions under the CA 2006. The article then highlights a few examples showing the extent to which the Takeover Panel is able to maintain its self-regulation qualities even after the change to statutory-regulation. It then assesses whether the split jurisdiction provided by the Directive is likely to cause regulatory difficulties. In assessing the perceived fear of tactical litigation, this article concludes that it is very unlikely that the Directive, as implemented by the CA 2006, will cause a litigation culture in UK takeovers.

## **B. HISTORICAL CONTEXT OF TAKEOVER REGULATION**

The regulation of takeovers in the UK can be traced from the 1960s, and its history is well documented.<sup>4</sup> Since 1968, takeovers have been regulated by the Takeover Panel on Takeovers and Mergers (the “Panel”), a regulatory body set up in response to mounting concern about unfair practices in the conduct of takeover offers.<sup>5</sup> These unfair practices were mainly characterised by defensive measures adopted by offeree boards and aimed at frustrating takeover bids. The real losers in these practices were the shareholders, as often shareholders were not consulted or given the opportunity to decide on the bids.

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<sup>4</sup> See R Falkner, “Judicial review of the takeover Panel and self-regulatory organisations” (1987) 2 *Journal of International Banking Law* 103, 104-105.

<sup>5</sup> The history of takeover regulation in the UK is briefly documented in various publications of the Panel on their website <<http://www.thetakeoverpanel.org.uk>> accessed on 20 April 2006.

By 1959, a solution to these unfair practices was found through the requirements of the Notes on Amalgamation of British Businesses, a measure introduced by the Governor of the Bank of England. The rules in these Notes, established in 1959, were revised in 1963 to cater for equal treatment in requiring the offeror to make equivalent offers to other classes of shareholders whose shares had not been purchased after a certain controlling stake had been obtained. When these measures under the Notes proved inadequate to protect shareholders, the Panel was set up in March 1968, and a body of rules contained in the City Code on Takeovers and mergers (the “Code”) thereafter drawn up in 1985.

The Panel’s function has always been that of ensuring the fair conduct of a takeover bid from the point of view of the shareholders. The principal objective of the Code is to give shareholders a fair opportunity of considering an offer on its merits. The structure of the Panel and the Code is designed to allow the necessary degree of flexibility of application and interpretation of takeover rules. It has rightly been stated that “untrammelled by the procedural and precedential niceties of the courtroom, the Panel responds in a flexible and well-informed fashion to disputes and governs their resolution in ‘real time’”.<sup>6</sup> The importance and meaning of the Panel’s ‘flexible’ approach has been explained by Amour and Skeel as follows:

“[T]he flexibility of the Panel’s approach means that it is able to adjust its regulatory responses both to the particular parties before it, and to the changing dynamics of business within the City of London. Takeover participants are expected to comply with the ‘spirit’ as well as the letter of the Code, on which they are expected to seek guidance from the Panel. Because they are actively engaged with the parties, the Panel’s Executive are able to tailor the regulatory requirements (outlining compliance conditions or waiving rules, as appropriate) to the circumstances of a particular case. Moreover, the Panel’s Code Committee is charged with regular and proactive updating of the Code’s provisions to reflect changes in the marketplace”.<sup>7</sup>

Flexibility of approach to regulation of takeovers, and speed and certainty of decision-making of the Panel are said to have “been the hallmark of the Panel’s takeover

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<sup>6</sup> J Amour and DA Skeel, “Who Writes the Rules for Hostile Takeovers, and Why? – The Peculiar Divergence of US and UK Takeover Regulation” (2007) 95 *Georgetown Law Journal* 1727, 1729.

<sup>7</sup> J Amour and DA Skeel, *supra* n 6, 1745.

regulation”,<sup>8</sup> which the Panel has been keen to retain in the transition from self-regulation to statutory regulation as envisaged by the implementation of the Directive as of 20 May 2006.<sup>9</sup>

The implementing of the Directive has placed takeover regulation and the Panel on a statutory footing for the first time. The change from self-regulation to statutory regulation is hardly noticeable, given that the CA 2006 has replicated, to the greatest extent possible, the Panel’s previous jurisdiction, practices and procedures within a statutory framework, including giving the Panel the power to make statutory rules. As such, the hallmark of the Panel’s takeover regulation is likely to remain unchanged. Further, particular care has been taken to ensure that new legal rights or opportunities for tactical litigation are not inadvertently created as a consequence of the process of putting takeover regulation on statutory footing. The CA 2006 provides for the Panel to act as the competent authority to supervise bids with statutory power to make and amend rules in relation to takeover regulation – effectively on the basis of the existing Code and the previous mechanisms for amending the Code.

A number of specific statutory powers designed to ensure that parties to a bid comply with the rulings of the Panel and to facilitate the Panel in the exercise of its supervisory functions have been included in the CA 2006. Given that no noticeable change has been created since the Panel and the Code was put on statutory footing, it is very unlikely that the change from self-regulation to statutory regulation will cause a culture of tactical litigation. There are suggestions that “while the implementation of the Takeovers Directive by the Companies Act 2006 has not significantly enhanced the scope for tactical litigation, there is much more scope for public law litigation than had previously been considered to be the case”.<sup>10</sup> Whether the change from self-regulation to statutory regulation makes the Panel more susceptible to judicial review, litigants are unlikely to seek judicial review, as the courts are likely to continue

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<sup>8</sup> The Takeover Panel, *The European Directive on Takeover Bids, Explanatory Paper (The Panel on Takeovers and Mergers, London 20 January 2005)*.

<sup>9</sup> Article 21 of the Directive requires Member States to bring into force laws implementing the Directive by 20 May 2006. In the UK, the Directive was first implemented by the Interim Regulations 2006, which were subsequently replaced by the Companies Act 2006 on 6th April 2007; Part 28 of the CA 2006 deals with takeovers.

<sup>10</sup> See T Ogowewo, “Tactical litigation in takeover contests” (2007) *Journal of Business Law* 589, 619.

applying the non-intervention principle derived from *Datafin*,<sup>11</sup> making litigation less attractive. Moreover, the Government indicated that the provisions in the CA 2006 would neither undermine nor be inconsistent with the restrictive approach in *Datafin*.<sup>12</sup> Indeed, as discussed below, the provisions of the CA 2006 take a restrictive approach to litigation in takeovers, making it very unlikely that the change from self-regulation to statutory regulation will create a culture of tactical litigation.

### C. PERCEIVED FEAR OF TACTICAL LITIGATION

The Code has always operated in a non-legal context, and been hailed as providing “a quicker, cheaper and more flexible method of regulation, which could not be matched by a system based on legal rulings”.<sup>13</sup> Indeed, a system of self-regulation has been hailed for having advantages ranging from commanding a greater degree of expertise and technical knowledge in the relevant area to offering low regulatory costs.<sup>14</sup> The fear has always been that a change from self-regulation to statutory-regulation of takeovers, whereby the Code and its enforcement are put on a statutory footing, was likely to create “a litigation culture and [cause] delays in the takeover process”.<sup>15</sup>

The Panel was keen to maintain a regulatory environment where tactical litigation is not prevalent. An empirical study by Deakin taken over a five-year period found that tactical litigation and the use of poison pills and other defences in takeovers is very rare in the UK.<sup>16</sup> The question is whether replacing self-regulation

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<sup>11</sup> *R v Panel on Takeovers and Mergers, ex parte Datafin plc* [1987] QB 815 – discussed below.

<sup>12</sup> *Company Law Implementation of The European Directive on Takeover Bids: A Consultative Document* (London, DTI, January 2005), Para. 2.38.

<sup>13</sup> M O’Neill, “When European integration meets corporate harmonisation” (2000) 21 *Company Lawyer* 173, 176.

<sup>14</sup> A Ogus, “Rethinking Self-Regulation” (1995) 15 *Oxford Journal of Legal Studies* 87, 97.

<sup>15</sup> G Stedman, *Takeovers* (Harlow, Longman, 1993), 55.

<sup>16</sup> S Deakin and Others, “Implicit contracts, takeovers, and corporate governance: in the shadow of the City Code” (2002) Centre for Business Research, University of Cambridge,

with statutory regulation will have the effect of creating in the regulatory environment a culture of tactical litigation. To the Panel, a statutory framework of takeover regulation was likely to result in “opportunities for legal challenges and a risk that litigation, tactical or otherwise, would increase, thereby causing regulatory difficulties – delays, expenses, and a loss of certainty that the Panel’s rulings were final”.<sup>17</sup>

In resisting the statutory regulation of takeovers, the Panel seem to have been mindful that it would lose its well-developed strength. These include flexibility, speed and certainty in decision-making. The Panel prefers to be flexible in its decision making to suit a particular circumstance. For example in *Hyder plc*, the Panel decided, without specific rule in the Code dealing with sealed bids outside offer timetable, that offers should be submitted by way of sealed bid.<sup>18</sup> The purpose here was to swart the risk of destabilising the market in the growing speculative share prices that were soaring as a result of continued negotiations of the takeover in question. In relation to the perceived fear of litigation, arguably the Panel would lose this flexibility if there were to be statutory rules, that tend to be rigid and that may require courts’ intervention if a rule is relaxed without legal basis.

As a result and as early as 1987, the idea of statutory regulation by way of a Directive did not find favour with the Panel. The Panel argued “if we had a

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*Working Paper 254*, 7-14 <<http://www.cbr.cam.ac.uk/pdf/WP254.pdf>> accessed on 28 December 2007.

<sup>17</sup> Panel on Takeovers and Mergers, Report on the Year ended 31 March 1989, 10.

<sup>18</sup> See Panel Statement 2000/10 and Panel Statement 2000/13 on offers by *St David Capital plc* and *WPD Ltd* for *Hyder plc*; see also Panel Statement 1983/13 on offers by *Allianz Versicherungs AG* and *BAT Industries plc* for *Eagle Star Holdings plc*; Panel Statement 1998 on offers by *Texas Utilities Company* and *Pacificcorp* for *The Energy Group plc*; Statements 2000/10 of the Panel on Takeovers and mergers, 18 August 2000; for a further discussion on the above, see G Morse, “Assessing the impact of the Takeover Panel’s Code Committee - Code reform institutionalised?” (2003) *Journal of Business Law* 314-333; T Ogowewo, “New Takeover Code rules on exchange offers and auctions” (2002) 23(6) *Company Lawyer* 186-191; D Thomas, “Hyder: the rise and fall of a multi-utility” (2000) 9 *Utilities Policy* 181-192.

legislative system, the rules would have to be less strict, so giving less protection to shareholders, or they would be wide-ranging as at present but without the ability to mitigate their potential harshness in appropriate cases”.<sup>19</sup> The Panel’s resistance to the Directive has always been due to the fear that “the directive may inadvertently create a system which increases the risk of litigation during a takeover and lacks the general flexibility that the Panel finds essential in its day to day operations”.<sup>20</sup> Given that the majority of takeover activities have historically taken place in the UK compared to any other European state, it was vital to the success of the Directive that the UK was persuaded to go along with the need for a Directive.

As such, the way forward was to allow the first official proposal, the draft Directive of 1989, to reflect the UK aspirations and in particular, to have provisions that mirrored the Code. Indeed, as Johnston says, “those early discussions, with their insistence that the Directive should be based on the City Code, exercised a strong influence over all subsequent proposals, a policy choice that has been one of the impediments to the Directive’s adoption”.<sup>21</sup> However, once the 1989 draft Directive was subjected to the wide and varied corporate culture in Europe, the grapes soon become sour and the UK sought to abandon the whole idea of the Directive altogether, but to no avail.

The Commission revised the draft Directive and produced a second draft in 1996. The Panel feared that the wording of the 1996 draft Directive was still bound to result in litigation, with shareholders seeking the intervention of the courts to obtain adequate remedies and compensation, which would frustrate takeover bids. The

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<sup>19</sup> Panel on Takeovers and Mergers, Report on the Year ended 31 March 1987.

<sup>20</sup> Panel on Takeovers and Mergers, Report on the Year ended 31 March 1989, 10.

<sup>21</sup> A Johnston, “The European Takeover Directive: Ruined by protectionism or respecting diversity” (2004) 25 *Company Lawyer* 270, 270.



House of Lords Select Committee on the European Communities agreed with the Panel and rejected the 1996 proposal by recommending that it should not be adopted.<sup>22</sup> But the Commission needed the UK's involvement for any European measure to work, and the UK also needed some kind of European rules in place to facilitate cross-border takeovers. The way forward was to make compromises, which also had to take account of the interests of other states. Edwards explained the basis for the process of compromises as an acceptance that "any gain by way of harmonisation and improvement in the regulatory systems of other Member States would be outweighed by the risk of damage to United Kingdom system".<sup>23</sup> Notwithstanding the revised 1996 draft Directive, which was designed to minimise tactical litigation feared by the Panel, the Panel was of the view that "the risk of increased litigation [could] only be eliminated by having no Directive at all".<sup>24</sup>

The softening of the Panel's hostility to the idea of the Directive began in 2000, when for the first time in its annual reports the Panel acknowledged that the Directive contained "damage-limitation provisions which should, subject to the manner of implementation of the Directive by the UK Government, help to maintain the benefits of the Panel's non-statutory system of regulation" and "minimise the scope for litigation".<sup>25</sup> By 2003, the Panel felt that many of its concerns had been resolved, which to the Panel's credit was due to the "persistent efforts of the Executive working closely and constructively with the Department of Trade and Industry and the Commission".<sup>26</sup> By 2005, the Panel was satisfied that the law

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<sup>22</sup> The 13th Report of the House of Lords 1995-1996 (Paper 100).

<sup>23</sup> V Edwards, *EC Company Law* (Oxford, OUP, 1999), 397.

<sup>24</sup> Panel on Takeovers and Mergers, Report on the Year ended 31 March 1999.

<sup>25</sup> Panel on Takeovers and Mergers, Report on the Year ended 31 March 2000, 8.

<sup>26</sup> Panel on Takeovers and Mergers, Report on the Year ended 31 March 2003, 8.

implementing the Directive would be favourable to the extent that it contained “measures to ensure that the orderly conduct of bids will not be disrupted by tactical litigation”.<sup>27</sup>

Throughout the resistance period, the Panel had the UK Government on board. A central plank in the negotiating position taken by the Government on the Directive was to minimise the risks associated with the possible increase in tactical litigation.<sup>28</sup> The Directive was finally adopted in 2004 by Member States, and implemented in the UK by the CA 2006. As stated by Morse, “many of the substantive provisions of the Directive, which are minimum standards only, are derived from the Code and the impact of the Directive on the actual rules will, on the whole, be fairly minimal”.<sup>29</sup> Indeed, both the Directive and the CA 2006 are worded carefully to minimise or limit any tactical litigation.<sup>30</sup> With the CA 2006 replicating the Panel’s rules in the Code, tactical litigation is unlikely to increase.

In implementing the Directive, Part 28 of the CA 2006 in part aims at preventing tactical litigation. Introducing the Bill (that led to the CA 2006) in Parliament, Lord Sainsbury of Turville said “the Bill’s provisions aim to ensure that tactical litigation seeking to delay or frustrate a takeover bid will not become a feature

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<sup>27</sup> Panel on Takeovers and Mergers, Report on the Year ended 31 March 2005, 13.

<sup>28</sup> *Company Law Implementation of The European Directive on Takeover Bids: A Consultative Document* (London, DTI, January 2005), para. 2.34.

<sup>29</sup> G Morse, *Charlesworth’s Company Law* (London, Sweet & Maxwell, 17th edn, 2005), 676.

<sup>30</sup> Article 4.6 provides that the ‘Directive shall not affect the power which courts may have in a Member State to decline to hear legal proceedings and to decide whether or not such proceedings affect the outcome of a bid. This Directive shall not affect the power of the Member States to determine the legal position concerning the liability of supervisory authorities or concerning litigation between the parties to a bid’. Section 961 CA 2006 exempts the Panel and its individual members from liability in damages for anything done (or omitted to be done) in, or in connection with, the discharge or purported discharge of the regulatory functions of the Panel.

of our takeover markets”.<sup>31</sup> Indeed, the CA 2006 contains clear provisions that are intended to limit litigation and make recourse to the courts a matter of last resort.

Arguably the Panel’s fear of perceived tactical litigation was not so much based on any evidence of such risk but merely on the Panel’s perceived likelihood of loosing its developed policies that underpin takeover regulation in the UK. Arguably, there are four policies that underpin the Panel’s regulatory framework of takeovers. These include equal treatment for all shareholders; adequate and timely advice and information; no false markets; and no unapproved frustrating actions. The question to ask is whether the implementation of the Directive changes these policies or in any way makes them unworkable. A close scrutiny of Part 28 CA 2006 reveals that the implementation of the Directive does not raise any likelihood of change in these underlying policies in the regulation of takeovers in the UK.

First, the Panel requires that all shareholders must be treated equally during a takeover. A number of rules under the Code demonstrate the Panel’s commitment to treating all shareholders equally during a takeover bid. For example, Rules 6, 9, 11, 16, and 20 guarantees equal terms of offer to all shareholders. In comparison, Article 3 of the Directive requires the same level of equality. In implementing the Directive, section 943 CA 2006 reverts the matter to the Panel and simply endorses the Code. Article 3 of the Directive is now restated in the General Principles of the Code.

Secondly, the Panel’s policy is that shareholders should receive adequate and timely advice and information. A number of rules under the Code require that shareholders must be given sufficient information to decide on the merits of a takeover bid. For example, Rules 3, 23, 24 and 25 requires that shareholders be given

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<sup>31</sup> The Parliamentary Under-Secretary of State, Department of Trade and Industry, “Company Law Reform Bill”, HL Col 186 11 January 2006  
<<http://www.publications.parliament.uk/pa/ld199900/ldhansrd/pdvn/lds06/text/60111-08.htm>> accessed on 22 March 2006.

advice and information to enable them reach a decision on whether or not to accept a takeover offer. Articles 6 and 9 of the Directive partly deal with the question of providing shareholders with adequate information. Again, section 943 CA 2006 simply endorses the Code on this matter.

Thirdly, the Panel requires that companies should not create false markets of their shares. Rules 2 and 8 of the Code regulate the announcement and disclosure of offers. Article 3 of the Directive partly deals with the issue of false market. This Article is implemented by section 943 CA 2006. The policy against false markets is now restated in General Principles 4 and 5 of the Code.

Fourthly, the Code's centrepiece policy is a rule against unauthorised frustrating action. Rule 21 of the Code requires that the offeree board must not without the approval of the shareholders take actions that may frustrate a takeover bid. Article 9 of the Directive is a replica of Rule 21 of the Code, and section 943 CA 2006 simply endorses the Code on this matter.

The implementation of the Directive does not change the policies developed by the Panel nor does it make them unworkable. The regulatory environment continues to be governed by the Code. In implementing the Directive, the CA 2006 has simply endorsed the Code, thereby retaining all the Panel's policies that underpin takeover regulation in the UK. The Code might have changed in the sense of gaining legal force but the spirit of the Code is likely to remain. Whatever might have been perceived of the likely effect of the Code acquiring a legal status, increasing tactical litigation is unlikely to be one of such effects. The Panel has power to make rules similar to those contained in the Code prior to the implementation of the Directive (s 943(3) CA 2006), the Panel may make rulings on the interpretation, application or effect of the rules (s 945(1) CA 2006), and the Panel's ruling on the rules has binding

effect (s 945(2) CA 2006). The Directive is implemented in manner that enables the Panel to retain its self-regulation advantages – making its own rules, interpreting the rules, applying the rules and enforcing them on its subjects.

### C. COMMON LAW APPROACH RESTRICTING LITIGATION

It is difficult to understand the basis of fears of litigation in takeovers, as the UK courts have been at the forefront of discouraging tactical litigation, and have always accepted the Panel's interpretation of the Code and have only been prepared to intervene in exceptional circumstances, leaving the Panel to be the judge and the jury in takeover matters. In some cases, the courts have resisted intervening in takeovers, to the extent that where an injunction has been sought, "the very moving for an injunction" has in itself been seen as "an action designed to frustrate the making of the bid".<sup>32</sup> In other cases, the courts, in the words of Millett J, have been dismayed at the "regrettable tendency for the contestants in modern takeover battles to try to enlist the aid of the court".<sup>33</sup>

In his judgment in *Datafin*,<sup>34</sup> Sir Donaldson MR made it clear:

"[B]eyond a peradventure that in the light of the special nature of the panel, its functions, the market in which it is operating, the time scales which are inherent in that market and the need to safeguard the position of third parties, who may be numbered in thousands, all of whom are entitled to continue to trade upon an assumption of the validity of the panel's rules and decisions, unless and until they are quashed by the court, I should expect the relationship between the panel and the court to be historic rather than contemporaneous. ... court to allow contemporary decisions to take their course, considering the complaint and intervening, if at all, later and in

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<sup>32</sup> *Dunford & Elliot Ltd v Johnson & Firth Brown Ltd* [1977] Lloyd's L Rep 505, 510 (per Lord Denning MR).

<sup>33</sup> *Re Piccadilly Radio plc* (1989) 5 BCC 692, 706 where Millett J refused an injunction to a rival bidder who alleged that target shares had been transferred in breach of articles of association.

<sup>34</sup> *R v Panel on Takeovers and Mergers, ex parte Datafin plc* [1987] QB 815.

retrospect by declaratory orders which would enable the panel not to repeat any error and would relieve individuals of the disciplinary consequences of any erroneous finding of breach of the rules”.<sup>35</sup>

One of the principles derived from the ruling in *Datafin* is the non-interventionist principle – the relationship between the Panel and the court is to be historic rather than contemporaneous. This principle has two limbs: the courts will not intervene in an ongoing takeover case; and the courts will only give guidance to the Panel as to how a similar case should be dealt with in the future.

Taking the non-interventionist principle into account, there would be zero incentive for a person to bring judicial review challenging Panel’s procedure because it would not help his case. It is very likely that the courts will continue to adopt the *Datafin* principle post CA 2006. That being the case, judicial review would prove unhelpful to a litigant. What would help a litigant is an injunction or a ruling of the court in relation to an ongoing takeover case. The non-intervention principle does not interfere with an ongoing takeover case but rather makes declaratory ruling designed to advise the Panel on how to deal with future cases. This partly explains why takeover litigation has been rare. However, the non-interventionist principle has never been strictly a legal principle but a practical one. According to Sir Donaldson MR, “when the takeover is in progress the time scales involved are so short and the need of the markets and those dealing in them to be able to rely on the rulings of the panel is so great that contemporary intervention by the court will usually either be impossible or contrary to the public interest”.<sup>36</sup>

It is the impracticability of intervention, given the highly fluid nature of the takeover market, which makes the courts very reluctant to intervene, not a fetter on

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<sup>35</sup> *ibid*, 842.

<sup>36</sup> *R v Panel on Takeovers and Mergers ex parte Guinness* [1989] 1 All ER 509, 512 (per Sir Donaldson MR).

their discretion. Although the courts have been reluctant to intervene in takeovers, access to the courts has never been curtailed. Indeed, the courts have always maintained that the Panel's rulings are subject to judicial review,<sup>37</sup> albeit that such review is rarely granted. In appropriate circumstances, the courts would intervene to give relief to a litigant, albeit very rarely. If that is the correct understanding of the principle in *Datafin*, it should explain why, after the ruling in *Datafin*, the Panel continued to fear that tactical litigation would increase.

In *Datafin*,<sup>38</sup> the Panel clearly held the view that if it derived its authority from legislation, it would be susceptible to judicial review otherwise not. The Panel, submitted that supervisory jurisdictions of the courts by way of judicial review only extended to bodies whose power is derived from legislation or the exercise of the prerogative. Sir John Donaldson MR concluded that the courts has jurisdiction to entertain applications for the judicial review of decisions of the Panel. Although the Panel's argument failed, its understanding, that is statutory regulation would cause judicial review, seems to have lingered on. However, since *Datafin*, the courts have been reluctant to intervene by way of judicial review or at all in the decisions of the Panel. In *Guinness*,<sup>39</sup> although the court condemned the Panel's decision as "insensitive and unwise", the Court of Appeal declined to intervene. In *Fayed*,<sup>40</sup> again the courts had the opportunity to intervene but the Court of Appeal declined.

*Datafin* partly acerbates and partly abrogates the concerns underlying the Panel's perceived fear of tactical litigation. First, *Datafin* applauded the Panel immensely. For instance, it was said in *Datafin* that the Panel's "respectability is beyond question.

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<sup>37</sup> *ibid.*

<sup>38</sup> *R v Panel on Takeovers and mergers ex parte Datafin plc* [1987] QB 815 (CA).

<sup>39</sup> *R v Panel on Takeovers and Mergers ex p Guinness plc* [1990] 1 QB 146.

<sup>40</sup> *R v Panel on Takeovers and Mergers ex p Fayed* [1992] BCLC 938.

[It] operates in the public interest and [its] enormously wide discretion it arrogates to itself is necessary if it is to function efficiently and effectively. [O]n the relative merits of self-regulation and statutory regulation, self-regulation is preferable in the public interest".<sup>41</sup> Arguably, describing the Panel in these words must have had the effect of acerbating the Panel's concerns that it would lose its respectability and efficiency if it were to become a statutory body. As such, *Datafin* must have given the Panel, albeit unwittingly, reason to resist all attempts from Brussels to meddle in the Panel's remarkable regulatory qualities. Secondly, *Datafin* abrogates the perceived fears by making it clear that the courts will allow the Panel's contemporary decisions to take their course, considering the complaint and intervening, if at all, later and in retrospect by declaratory orders which would enable the Panel not to repeat any error.

The position at common law is to restrict and discourage tactical litigation. This is applied through the principle of non-intervention developed in *Datafin*. Although the Panel is subject to judicial review, the courts are reluctant to review the Panel's decisions. The question then is whether statutory provisions that implement the Directive affect this common law position.

#### **E. STATUTORY PROVISIONS RESTRICTING TACTICAL LITIGATION**

Article 4.6 of the Directive makes provision for certain Member States' powers to be unaffected by the Directive. These include designation of judicial or other authorities responsible for dealing with disputes, the circumstances in which parties may bring administrative or judicial proceedings, any capacity of the courts to decline to hear

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<sup>41</sup> *R v Panel on Takeovers and mergers ex parte Datafin plc* [1987] QB 815, 827 (Sir John Donaldson).



legal proceedings and the liability of supervisory authorities. Section 945(2) CA 2006 provides that a ruling of the Takeover Panel is to have binding effect (subject to provisions in the Panel's rules and any review or appeal). Section 951 CA 2006 provides for matters relating to reviews of and appeals from the decisions of the Panel to be contained in the Panel's own rules (the Code). Section 961 CA 2006 provides for exemption of the Takeover Panel (and those involved in its functions) from liability in damages in certain circumstances related to the regulatory activities of the Panel. Section 956 CA 2006 provides that there shall be no action for breach of statutory duty, or any voidness or unenforceability of transactions, as a result of breach of rules made by the Panel.

The UK Government having averred that there might be some potential for increased tactical litigation as a result of the new legal framework created by the Takeovers Directive,<sup>42</sup> set out in the CA 2006 to disable any possibility of tactical litigation by confining the business of takeovers to the Panel and its rules. There are seven provisions in the CA 2006 that makes it very difficult for a litigation culture to develop in takeovers.

The CA 2006 provides that:

- (1) The Panel has a statutory mandate to supervise and make rules on takeovers, including similar rules in the Code.<sup>43</sup>
- (2) The Panel's ruling has binding effect, and the Panel can make directions that must be complied with.<sup>44</sup>

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<sup>42</sup> *Company Law Implementation of The European Directive on Takeover Bids: A Consultative Document* (London, DTI, January 2005), Para. 2.33.

<sup>43</sup> See Companies Act 2006, s 942 and s 943.

<sup>44</sup> Companies Act 2006, s 945 and s 946.

(3) A party affected by the Panel's decision must first go through a review process by the Panel's Hearings Committee.<sup>45</sup>

(4) A party who is still dissatisfied must appeal to the Panel's independent tribunal, the Takeover Appeal Board.<sup>46</sup>

(5) The Panel has the right to take a party to court.<sup>47</sup>

(6) An affected party has no right of action against the Panel for breach of statutory duty.<sup>48</sup>

(7) Unless an affected party can prove bad faith against the Panel, neither the Panel, nor its member, officer or staff of the Panel, is to be liable in damages for anything done (or omitted to be done) in, or in connection with, the discharge or purported discharge of the Panel's functions.<sup>49</sup>

The seventh restriction on litigation should end all fears the Panel might have perceived in the past. The Panel is immune from prosecution, unless bad faith on the part of the Panel can be proved. This provision helps the Panel avert litigation of the kind seen in *Three Rivers DC v Bank of England (No 3) (Summary Judgment)*,<sup>50</sup> where depositors blamed the supervisor of UK banking, by then the Bank of England, for allegedly failing, in bad faith, to prevent their financial losses resulting from the

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<sup>45</sup> Companies Act 2006, s 951(1).

<sup>46</sup> Companies Act 2006, s 951(3).

<sup>47</sup> Companies Act 2006, s 955.

<sup>48</sup> Companies Act 2006, s 956.

<sup>49</sup> Companies Act 2006, s 961.

<sup>50</sup> [2001] 2 All ER 513 – in the case, on 22 March 2001, the House of Lords by a 3-2 majority refused to strike-out the depositors' claim. In other words, the House decided that the depositors could sue the Bank of England, leaving the matter for trial; for a detailed discussion and implications of this case, see also M Andenas, "Misfeasance in public office, governmental liability, and European influences" (2002) 51 *International and Comparative Law Quarterly* 757.

operations of the BCCI back in 1980. With all these restrictive provisions of the CA 2006, it is very unlikely that tactical litigation in respect of takeovers will increase.

Prior to the implementation of the Directive, the Panel, under the rules contained in the Code, has supervised takeover regulation in the UK. In implementing the Directive, the CA 2006 places both the Panel and the Code on a statutory footing. The regulatory framework of takeovers in the UK may have changed from a self-regulation to statutory regulation, in theory, but in practice, the regulatory framework remains a non-statutory one. Since 1968 and since the implementation of the Directive, takeovers have very rarely, if at all, been the subject of litigation.

The implementation of the Directive maintains the status quo. In effect, the CA 2006 simply makes provisions that reinforce the Panel's rule making and quasi-judicial role in regulation of takeovers. Nothing in the CA 2006 suggests that the Panel will not be subject to judicial review by the courts. However, the CA 2006 has to be read in the context of common law position. In *Datafin*, the Court of Appeal took the view that judicial review of the Panel's decisions takes a retrospective effect. The courts will not intervene in an on going takeover process but review the Panel's decision after the takeover in question is concluded. This position is very unlikely to change. As such, a culture of litigation is unlikely to develop.

The provisions in the CA 2006 do not alter the position in *Datafin*. Prior to coming in force of the CA 2006, the Government indicated its desire to maintain the restrictive approach to judicial review under *Datafin*. Article 4.6 of the Directive allows for such restriction. Specifically, the Government indicated that the provisions in the CA 2006 will neither undermine nor be inconsistent with the restrictive approach in *Datafin* (para 2.38 Consultative Document 2005). Although case law

shows that the decisions of the Panel are subject to judicial review, the CA 2006 itself remains silent in this regard. This is possibly because the Government intended that judicial review of the Panel's decisions should continued to be governed by *Datafin*.

As to general tactical litigation, the CA 2006 clearly makes it very unlikely. First, section 951 precludes the possibility of action on ground of breach of statutory duty. Secondly, section 954 provides that takeover transaction cannot be put aside on grounds breach of takeover rules. Thirdly, section 956 provides that parties not satisfied with the Panel's decisions can only challenge the decisions before the Panel's own Appeal Tribunal and not in court. Accordingly, the position in *Datafin* remains unaltered by the CA 2006, and implementation of the Directive leaves the Panel's status quo unchanged.

Pursuant to the rules in the Code, since the implementation of the Directive the Panel has so far continued to make decisions that have yet been respected by the parties concerned. One of these decisions was in relation to the BAA plc takeover process. Following an announcement by Goldman Sachs Infrastructure Group (the "Consortium") that it was continuing to review its options after its offer proposal had been rejected, the Panel ruled on 2 June 2006 that the Consortium should make its statement clear. For the purpose of Note 1 on Rule 19.3 of the Code, the Panel ruled that the statement by the Consortium be clarified, and that either by the Consortium announcing a firm intention to make an offer under Rule 2.5 of the Code or by announcing that it will not proceed with an offer for BAA. Further, the Panel ruled that if the Consortium were not to proceed with the offer, it would be bound by the restrictions in Rule 2.8 of the Code for six months from the announcement date. A similar ruling was made on 3 July 2006 against *Middleby* and *Manitowoc* in respect of the takeover process of *Enodis*. All these rulings were respected.

The foregoing goes to show that the Panel still maintain its powers of decision-making, and that parties involved in takeovers are accustomed to obeying takeover rules without resorting to lawsuits. It is unlikely that the Panel will find it necessary to apply to the courts for compliance, but it is too early to rule out the possibility of the Panel calling upon the courts to enforce its powers.

## **F. SPLIT JURISDICTION AND TACTICAL LITIGATION**

The Directive provides for split jurisdiction under Article 4(2). The basic rule under Article 4(2) is that a bid will be subject to control by the supervisory authority in the Member State where the offeree company has its registered office if the company's shares are traded on a regulated market in that Member State. If that is not the case, then the supervisory authority is that of the Member State on whose regulated market the shares are traded, while the company law obligations would remain to be governed by the law of the State of incorporation. Before the Directive, the Panel had jurisdiction where the offeree company was incorporated within the UK with its place of central management within the UK, and it was irrelevant where the company's shares were traded.<sup>51</sup> In implementing the Directive, the Code provides for the Panel to supervise companies that are listed and trading on the London Stock Exchange, but are not incorporated in the UK and have their place of central management elsewhere.<sup>52</sup>

As European integration progresses with the increase in freedom of establishment and free movement of labour, companies that are incorporated in other Member States and get their securities listed and traded only in the UK, are likely to

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<sup>51</sup> Introduction to the City Code, 7th edition, 2002.

<sup>52</sup> Introduction to the City Code, 8th edition, 2006.

increase. In those situations, Article 4(2)(e) provides that the Panel will supervise “matters relating to the bid procedure” while a supervisor in the state where the company is incorporated supervises “matters relating to company law”. This split jurisdiction is common at European Union level, where in banking regulation, supervisory jurisdiction is determined by principles of home-country control and host-country control in European law.<sup>53</sup> The question here is whether this split jurisdiction will become a source of litigation.

As it would not be in the interest of other regulators or foreign companies not to cooperate with the Panel, it is unlikely that the split jurisdiction will cause any practical problem. All regulators have a duty to cooperate with one another.<sup>54</sup> Nothing in the Directive prevents intervention by the Commission if cooperation between regulators fails.<sup>55</sup> Companies that engage in takeovers in the UK have a vested economic interest that they will not wish to jeopardise by not cooperating with the Panel. Overall, takeovers are but financial transactions, the financial City in the UK is accustomed to listening to the Panel, companies that become subject to the Panel’s jurisdiction, be it that they are registered in other Member States, will either cooperate with the Panel or find that they have to comply reluctantly with City norms. Moreover, “the sanctions that the Panel can employ in response to non-UK investors that flout its advice are likely to counteract any erosion of the Panel’s authority”.<sup>56</sup> To this extent, it is unlikely that the split jurisdiction will cause litigation.

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<sup>53</sup> See generally R Cranston, *Principles of Banking Law* (Oxford: OUP, 2nd edn, 2002).

<sup>54</sup> Recital 5 of the Directive.

<sup>55</sup> Recital 29 of the Directive suggests a monitoring role for the Commission; alternatively, the Commission may, if necessary, take steps under Article 226 of the EC Treaty, as a last resort – which is unlikely.

<sup>56</sup> J Amour and DA Skeel, “Who Writes the Rules for Hostile Takeovers, and Why? – The Peculiar Divergence of US and UK Takeover Regulation” (2007) 95 *Georgetown Law Journal* 1727, 1732.

## G. CONCLUSION

The implementation of the Takeover Directive placed the Panel and the Code on a statutory footing, resulting in an end to self-regulation of takeovers in the UK. This change of regulatory framework was always feared for having the potential to create a culture of litigation in takeovers. Article 4(6) of the Directive allows courts of Member States to decline to hear legal proceedings. In implementing this provision, the CA 2006 replicates, to the greatest extent possible, the Panel's previous jurisdiction, practices and procedures, including giving the Panel power to make statutory rules, and only allowing courts a limited intervention by way of judicial review. Thus, in implementing the Directive, the CA 2006 has made it difficult for a litigation culture to develop in UK takeovers.

Under section 951 of the CA 2006, an aggrieved party has a number of layers to go through before resorting to the courts, which include seeking redress from a Hearing Committee of the Panel, and then appealing to an Appeal Board of the Panel. Court's intervention is limited depending on what the party's grounds for redress are. For example, section 956 of the CA 2006 does not allow a party to challenge a transaction in court on grounds of breach of the Panel's rules, and section 961 of the CA 2006 exempts the Panel from liability for anything it has done or omitted to do in connection with its functions. With the Panel operating as it has always done under self-regulation albeit with legal force, market participants being accustomed to resolving matters without resorting to the courts, and given that the CA 2006 limits such possibility, a notorious litigation culture is very unlikely to develop in the UK. To that extent, the fear that the implementation of the Directive would create a culture of tactical litigation remains a myth.