‘Baby, it’s cold outside ...’ – A Comparative and Economic Analysis of Freeze-outs of Minority Shareholders

by

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Because minority shareholders can be a nuisance for a company, a majority shareholder may want to freeze them out. In general, the approach in the United States towards freeze-outs is more flexible than in the European Union. Law and economics scholarship suggests that a flexible regime for freeze-outs may be beneficial for society, as it addresses a free rider problem and a holdout problem in the market for corporate control. However, these insights are rarely integrated into European legal scholarship. This article endeavours to determine what constitutes an efficient legal framework on freeze-outs through a comparative law and economics approach. First, the legal regime on freeze-outs in the United States is compared with the regime of the Takeover Directive in the European Union and with Dutch law. Then, these legal systems are evaluated on their efficiency. Finally, some suggestions of reform are made for the European Union.

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I. Introduction

“A minority is only thought of as one when it constitutes some kind of threat to the majority”¹

1. **“But baby, you’ll freeze out there!”²** One of the main reasons for listing a company on a stock exchange is the possibility to attract capital from a multitude of investors. However, at a certain moment in the lifecycle of a company, having many shareholders and a listing may no longer make sense. For example, a listed company may have a controlling shareholder that wants to take the company private with a view of restructuring it away from the short-term pressure of the market. Another example is the situation where a third party has launched a successful takeover bid on the shares of the target company and wants to integrate it into its group, but cannot do so because there are still minority shareholders present in the company. The problem in both cases is that the minority shareholders may not be willing to sell their shares to the majority shareholder. It is in such situations that the majority shareholder may want to force the minority out of the company (a “freeze-out”).

2. **Freeze-outs: definition.** For the purposes of this article, I propose a functional definition of freeze-outs: *“any legal technique that allows a controlling shareholder³ to take full control of the business of a listed target company without having the burden of minority shareholders”⁴*. The consequence of a freeze-out is that the target company can be delisted. This article restricts the concept

1 From the movie ‘A Single Man’ (2009), directed by Tom Ford.

2 Lyrics from the song ‘Baby, it’s cold outside’ (1944), written by Frank Loesser.

3 ‘Control’ is considered to imply a decisive influence on the policy of the company and the nomination of the board of directors. This does not necessarily imply that the controlling shareholder owns a majority of the shares.

4 This definition is inspired by the definition of Ventruruzzo, which is slightly narrower: *‘transactions in which the controlling shareholder exercises a legal right to buy out the shares of the minority, consequently delisting the corporation and bringing it private’*. See M Ventruruzzo, ‘Freeze-outs: transcontinental analysis and reform proposals’ [2010] Virginia Journal of International Law 841, 842. See also CA Krebs, ‘Freeze-out transactions in Germany and the U.S.: a comparative analysis’ [2012] German Law Journal 941:

of freeze-outs to listed companies, even though similar techniques to eliminate (minority) shareholders exist in closely held companies. These rules follow another logic, however, and fall outside the scope of the present article. A freeze-out is distinguished in this article from a “squeeze-out”, which term is used only to refer to the statutory squeeze-out provisions in the European Union, excluding techniques such as the freeze-out merger (which will be called “alternative freeze-out techniques” in this article – see further in paragraph 5).

3. The benefits of owning 100% of the shares. A majority shareholder may want to freeze out the minority shareholders because the latter have a certain “nuisance value”, and getting rid of them has several advantages.⁵ First, if a majority shareholder acquires all shares, certain formalities concerning the shareholders’ meeting are no longer necessary, which can save a substantial amount of time and money. Second, the target company can be delisted and no longer needs to comply with the various obligations and ensuing costs of a stock exchange listing, such as the disclosure duties and the rules on insider trading. A delisting also allows the company to pursue long-term projects, rather than being pressured towards achieving short-term results. Third, the majority shareholder will have more freedom in setting out the company’s policy, such as the dividend policy or intra-group transactions, as he will no longer need to take into account the interests of a minority shareholder. This also eliminates a major litigation risk and allows the majority shareholder to fully integrate the company into its group. Finally, some tax and accounting rules are only applicable if the controlling shareholder owns a certain percentage of the shares of the subsidiary company.⁶

‘a transaction in which a controlling shareholder forces out the minority shareholders and compensates them in cash or stock’.

- 5 For an overview of the various reasons, please refer to: C Van der Elst and L Van den Steen, ‘Opportunities in the M&A Aftermarket: Squeezing Out and Selling Out’ (2006) Universiteit Gent Financial Law Institute Working Paper No. 2006-12, 9 <<https://ssrn.com/abstract=933609>> accessed 5 May 2017; M Ventrizzo, ‘Freeze-outs: transcontinental analysis and reform proposals’ [2010] Virginia Journal of International Law 841, 847–850; Marccus Partners (eds), ‘The Takeover Bids Directive Assessment Report’ (2011) 315, <http://ec.europa.eu/internal_market/company/docs/takeoverbids/study/study_en.pdf> accessed 5 May 2017 (hereinafter ‘Takeover Directive Assessment Report’); The High Level Group of Company Law Experts, ‘Report on issues related to takeover bids’ (10 January 2012) 60–61, <http://ec.europa.eu/internal_market/company/docs/takeoverbids/2002-01-hlg-report_en.pdf>, accessed 5 May 2017 (hereinafter ‘Winter Report’); CA Krebs, ‘Freeze-out transactions in Germany and the U.S.: a comparative analysis’ [2012] German Law Journal 941, 943–944.
- 6 For example, in the Netherlands, a parent company can only form a ‘fiscal unit’ (*‘fiscale eenheid’*) if it holds 95% of the shares. See article 15 of the Corporate Taxation Act of

4. Economic analysis of freeze-outs. These costs of minority shareholders may prevent a controlling shareholder from implementing his entrepreneurial vision for the company.⁷ Therefore, allowing the controlling shareholder to freeze out the minority can lead to more value-increasing entrepreneurial projects and to more efficiently managed companies, thus increasing welfare for society. However, freeze-outs also present a risk of expropriation, *i.e.* a transfer of value from the minority shareholders to the controlling shareholders. Therefore, the law on freeze-outs has to strike a balance between the interests of the controlling shareholder in reducing the costs of running the company and the interests of minority shareholders (the second agency problem⁸).

In addition, (mainly American) law and economics scholarship suggests that a flexible regime for freeze-outs can create value for society in another way, *i.e.* by solving a free rider problem and a holdout problem in the market for corporate control (see further in paragraph 8 and 9). However, most economic studies remain rather abstract when discussing the legal aspects of freeze-outs and are not adapted to a European legal context.⁹ This article aims at both analysing the legal regime for freeze-outs in all its complexity and integrating these insights from the economic analysis of law.

5. Comparative research on freeze-outs. The question to what extent the law should allow freeze-outs and under which conditions is answered differently in different countries. In general, the approach in the United States is much more flexible than in the European Union. Cash mergers can be used in the United States to freeze out minority shareholders at a threshold of 50% of the shares (see further in paragraph 14), while the main freeze-out technique in the

8 October 1969 ('*Wet van 8 oktober 1969, houdende vervanging van het Besluit op de Vennootschapsbelasting 1942 door een nieuwe wettelijke regeling*'), nr. BWBR0002672.

7 Z Goshen and A Hamdani, 'Corporate control and idiosyncratic vision' [2016] *Yale Law Journal* 560, 612.

8 J Armour, H Hansmann and R Kraakman, 'Agency problems and legal strategies' in R Kraakman and others (eds), *The anatomy of corporate law. A comparative and functional approach* (3rd edn, OUP 2017) 29–30.

9 There are some exceptions, see: M Burkart and F Panunzi, 'Mandatory Bids, Squeeze-out, Sell-out and the Dynamics of the Tender Offer Process' (2003) ECGI Working Paper Series in Law nr. 10/2003 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=420940> accessed 5 May 2017; C Van der Elst and L Van den Steen, 'Opportunities in the M&A Aftermarket: Squeezing Out and Selling Out' (2006) Universiteit Gent Financial Law Institute Working Paper No. 2006-12 <<https://ssrn.com/abstract=933609>> accessed 5 May 2017. Nevertheless, these articles are more limited in scope than the present article and do not engage in a thorough comparison of freeze-out regimes in the European Union and the United States.

European Union, the statutory squeeze-out, is only available at a threshold of 90–95% (see further in paragraph 26).

This high threshold for statutory squeeze-outs in the European Union has prompted practitioners to look for “alternative freeze-out techniques” that are available at a lower threshold, such as schemes of arrangement in the United Kingdom¹⁰, and the de facto merger (“*übertragende Auflösung*”) under German law¹¹, which are both available at a threshold of 75% of the shares. Likewise, case law in the Netherlands has upheld the use of a merger or de facto merger to freeze out minority shareholders under certain conditions (see further in part V.2). In France, on the other hand, minority shareholders cannot be frozen out through alternative freeze-out techniques¹², except if this is stipulated in the articles of association.¹³ Finally, in Belgium, case law and legal scholarship suggest that the use of alternative freeze-out techniques could constitute an abuse of majority.¹⁴ While these different regimes on alternative freeze-out techniques have been discussed to some extent in each legal system, there is little literature comparing the different regimes on freeze-outs.¹⁵

6. Research objective and research method. Considering these gaps in the research on freeze-outs, this article will try to establish an efficient legal frame-

10 See for a discussion: M Ventruruzzo, ‘Freeze-outs: transcontinental analysis and reform proposals’ [2010] *Virginia Journal of International Law* 841, 901; G O’Dea, J Long and A. Smyth, *Schemes of arrangement. Law and Practice* (OUP 2012).

11 The validity of this was confirmed by *Bundesverfassungsgericht* 23 August 2000, 1 BvR 68/95 and 1 BvR 147/97 (‘Moto Meter case’). See also: K Küting, ‘Der Ausschluss von Minderheiten nach altem und neuem Recht – unter besonderer Berücksichtigung des ‘Squeeze Out’ [2003] *Deutsches Steuerrecht* 838; CA Krebs, ‘Freeze-out transactions in Germany and the U.S.: a comparative analysis’ [2012] *German Law Journal* 941, 975–976; M Roth, ‘Die übertragende Auflösung nach Einführung des Squeeze-out’ [2013] *Neue Zeitschrift für Gesellschaftsrecht* 998.

12 *Cour de Cassation Commerciale* 12 March 1996, *Revue des Sociétés* 1996, 554.

13 M Cozian, A Viandier and F Deboissy, *Droit des sociétés* (28th edn, LexisNexis 2015) para 374–380.

14 See *Court of Commerce Brussels* 5 March 1929, *RPS* 1929, 186; *Court of Commerce Namur* 2 February 1950, *RPS* 1951, 15, note P Coppens; *Court of Commerce Brussels* 7 July 1955, *RW* 1955–1956, 251; *Court of Commerce Brussels* 31 May 1991, *TBH* 1991, 927, note JM Nelissen Grade. See also T Tilquin, *Traité des fusions et scissions* (Kluwer 1993); B Tillemans, *De geldigheid van besluiten van de algemene vergadering. Het nieuwe artikel 190bis W.Venn.* (Biblo 1994).

15 The excellent studies of Ventruruzzo and of Krebs compare the legal regime on freeze-outs in the United States and the European Union, but they do not study in great depth the alternative freeze-out techniques available in the member states. See: M Ventruruzzo, ‘Freeze-outs: transcontinental analysis and reform proposals’ [2010] *Virginia Journal of International Law* 841; CA Krebs, ‘Freeze-out transactions in Germany and the U.S.: a comparative analysis’ [2012] *German Law Journal* 941.

work for freeze-outs in listed companies in the European Union, using a comparative law and economics approach.¹⁶ First, the legal regime on freeze-outs in the United States is compared to the European approach to statutory squeeze-outs. The United States have a very sophisticated regime on freeze-outs that is very different to the European one. This article only studies Delaware law, considering that more than half of the listed companies in the United States are incorporated there.¹⁷ For the European Union, the (partly) harmonised regime for post-takeover squeeze-outs under the Takeover Directive¹⁸ is studied, as well as the Dutch regime on squeeze-outs. In addition, the general characteristics of the approach in other European countries are briefly discussed, based on secondary sources¹⁹.

Second, this article also compares the regime in the United States to the Dutch regime on alternative freeze-out techniques. The Dutch legal system was selected because there has been a relatively large amount of literature and case law on alternative freeze-out techniques, as well as a well-developed legal practice. The alternative freeze-out technique of the scheme of arrangements is specific to the United Kingdom and the German alternative freeze-out techniques are not considered to be very popular²⁰, and both are therefore not included in the analysis.²¹ Finally, after the comparative analysis, these legal systems are evaluated against the criterion of economic efficiency (as defined in

- 16 The method of comparative law and economics uses the method of (functional) comparative law to describe and compare different solutions to legal problems, and then uses the tools from the economic analysis of law to explain and evaluate these solutions. For a discussion of this method, see: U Mattei, *Comparative law and economics* (University of Michigan Press 1997); F Faust, 'Comparative law and economic analysis of law' in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006); R Michaels, 'The second wave of comparative law and economics?' [2009] University of Toronto Law Journal 197. This method is also very similar to the 'comparative and functional approach' used in: R Kraakman and others (eds), *The anatomy of corporate law. A comparative and functional approach* (3rd edn, OUP 2017).
- 17 L Pinta, 'The U.S. and Italy: controlling shareholders' fiduciary duties in freeze out mergers and tender offers' [2011] NYU Journal of Law & Business 931, footnote 1.
- 18 Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids [2004] OJ L142/12 (hereinafter 'Takeover Directive').
- 19 These secondary sources are: C Van der Elst and L Van den Steen, 'Balancing the interests of minority and majority shareholders: a comparative analysis of squeeze-out and sell-out rights' [2009] European Company and Financial Law Review 391; Winter Report; Takeover Directive Assessment Report.
- 20 CA Krebs, 'Freeze-out transactions in Germany and the U.S.: a comparative analysis' [2012] German Law Journal 941, 954.
- 21 Nevertheless, alternative freeze-out techniques in other jurisdictions certainly deserve further attention in legal scholarship.

part II on the normative framework). This evaluation leads to some suggestions for reform to come to a more efficient legal framework on freeze-outs, taking into account the differences in legal, societal and political context between the United States and the European Union.

II. Normative framework

7. Efficiency of freeze-outs. As will become clear below, freeze-outs can enhance the efficiency²² of the market for corporate control by facilitating takeovers. With regard to takeovers, the “sole owner standard” is often used as a normative criterion: all takeovers that are value increasing must succeed and only takeovers that are value increasing may succeed.²³ In other words, a takeover should succeed when a sole owner would sell his asset, i.e. if the buyer is willing to pay more (and hence values the asset more) than the owner values his asset.²⁴ This ensures that the market for corporate control can play its role in monitoring management and that assets are allocated where they are most productive. However, several collective action problems, such as the free rider problem and the holdout problem, prevent the market for corporate control from functioning according to the sole owner standard. The task of freeze-out law is then to eliminate these collective action problems and to mimic the outcome suggested by the sole owner standard.

8. Free rider problem. The first collective action problem that prevents the market for corporate control from functioning efficiently is the free rider

22 Efficiency is defined here as Kaldor-Hicks efficiency, which means that wealth for society as a whole is maximised and that the losses suffered by the ‘losers’ can be (not: will be) compensated by the benefits of the ‘winners’. See: RA Posner, *Economic analysis of law* (Aspen Publishers 2003) 13.

23 See for example: LA Bebchuk, ‘Toward undistorted choice and equal treatment in corporate takeovers’ [1985] *Harvard Law Review* 1693, 1700-1701. Schwarz has argued against the use of the sole owner standard and in favour of a ‘market standard’, which exclusively relies on the market price to determine whether a takeover or a freeze-out should succeed. See: A Schwarz, ‘The fairness of tender offer prices in utilitarian theory’ [1988] *The Journal of Legal Studies* 165; A Schwarz, ‘The sole owner standard reviewed’ [1988] *The Journal of Legal Studies* 231. However, in my opinion, Bebchuk has convincingly argued why the sole owner standard is superior to the market standard: LA Bebchuk, ‘The sole owner standard for takeover policy’ [1988] *The Journal of Legal Studies* 197.

24 In the case of a company, the ‘sole owner’ is equated with a certain percentage of the shareholders, for example a simple majority. See: LA Bebchuk, ‘Toward undistorted choice and equal treatment in corporate takeovers’ [1985] *Harvard Law Review* 1693, 1702. However, see further in paragraph 45 and following for a more nuanced discussion of the majority threshold.

problem. It was first identified by Grossman and Hart,²⁵ whose model has been expanded and refined by other authors.²⁶ The free rider problem results from the fact that the shareholders of a company which is the target of a takeover bid assume that the bidder will make the company more profitable, as otherwise he would not have made the bid.²⁷ Therefore, rather than accepting the bid, the shareholders hold on to their shares, in order to free ride on the profits that they assume the bidder will make. However, if too many shareholders would do so, this will cause the bid to fail, even though the shareholders collectively want it to succeed. Hence, the free rider problem can prevent value increasing takeovers from taking place.

To solve the free rider problem, Amihud, Kahan and Sundaram have proposed a freeze-out mechanism in which the freeze-out price is set at the maximum of two variables, the pre-bid market price and the bid price.²⁸ With this solution, value increasing takeovers can succeed: minority shareholders can no longer

25 SJ Grossman and OD Hart, 'Takeover bids, the free-rider problem and the theory of the corporation' [1980] *The Bell Journal of Economics* 42.

26 See, *inter alia*: GK Yarrow, 'Shareholder protection, compulsory acquisition and the efficiency of the takeover process' [1985] *The Journal of Industrial Economics* 3; M Bagnoli and BL Lipman, 'Successful takeovers without exclusion' [1988] *The Review of Financial Studies* 89; AR Gomes, 'Takeovers, freezeouts and risk arbitrage' (March 2001) PIER Working Paper nr. 01-027 and University of Pennsylvania Law School ILE Research Paper 01-10, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=277109> accessed 5 May 2017; LA Bebchuk and OD Hart, 'Takeover bids vs. proxy fights in contests for corporate control' (2001) *The Harvard John M. Olin Discussion Paper Series* nr. 336 10/2001 <http://www.law.harvard.edu/programs/olin_center/papers/pdf/336.pdf> accessed 5 May 2017; M Burkart and F Panunzi, 'Mandatory Bids, Squeeze-out, Sell-out and the Dynamics of the Tender Offer Process' (2003) *ECGI Working Paper Series in Law* nr. 10/2003 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=420940> accessed 5 May 2017; Y Amihud, M Kahan and RK Sundaram, 'The foundation of freeze-out laws in takeovers' [2004] *The Journal of Finance* 1325.

27 Some authors have also made the opposite assumption, that the post-acquisition value of the shares will actually be lower, due to reduced liquidity and the possibility of expropriation, which causes the "pressure to tender problem". See: LA Bebchuk, 'Toward undistorted choice and equal treatment in corporate takeovers' [1985] *Harvard Law Review* 1693; LA Bebchuk, 'The pressure to tender: an analysis and a proposed remedy' [1987] *Delaware Journal of Corporate Law* 911. The free rider problem and the pressure to tender problem are two symptoms of an underlying problem: the fact that shareholders have to take into account the post-bid value of their shares, rather than comparing only their valuation of the shares and the bid price. See: LA Bebchuk and OD Hart, 'Takeover bids vs. proxy fights in contests for corporate control' (2001) *The Harvard John M. Olin Discussion Paper Series* nr. 336 10/2001 <http://www.law.harvard.edu/programs/olin_center/papers/pdf/336.pdf> accessed 5 May 2017.

28 Y Amihud, M Kahan and RK Sundaram, 'The foundation of freeze-out laws in takeovers' [2004] *The Journal of Finance* 1325.

free ride on the value increase that the bidder will make, as they can be excluded after the takeover at the bid price. Indeed, shareholders will only compare the bid price to their own valuation of the shares, excluding the post-bid value of the shares, which is in line with the sole owner standard. The lower bound of the pre-bid market price, on the other hand, prevents certain value-decreasing takeovers from taking place.²⁹

9. Holdout problem. The second collective action problem in the market for corporate control is the holdout problem: shareholders consider the takeover bid sufficiently high, but still hold on to their shares in order to extract a higher portion of the value created by the bidder.³⁰ They can do this because they know that they have a certain nuisance value to the bidder, which strengthens their negotiation position.

The holdout problem is similar but not equal to the free rider problem.³¹ While the holdout problem is based on the assumption that the bidder gains economies of scale from acquiring all shares and the minority shareholders try to capture part of this gain (even though they actually prefer selling their shares), the free rider problems involves shareholders that do not want to sell their shares, but want to free ride on the positive externalities (increased profits) that are generated by the bidder. The similarity between both problems is that both holdouts and free riders want the bid to succeed, but have an incentive not to tender their shares. In both cases, the solution is the same: the possibility of a freeze-out at a sufficiently low threshold.³² What this precise threshold should be is discussed further in paragraph 45.

10. “Post-acquisition freeze-outs”. So far this article has mainly discussed what this article refers to as “post-acquisition freeze-out”: a freeze-out by an independent bidder who has just acquired a controlling interest through an at arm’s length takeover bid and subsequently wants to freeze out the remaining minority shareholders as a second step. A key element of the post-acquisition freeze-out is that the bidder did not hold a controlling interest prior to the takeover bid. Authors have argued that additional procedural safeguards are

29 Y Amihud, M Kahan and RK Sundaram, ‘The foundation of freeze-out laws in takeovers’ [2004] *The Journal of Finance* 1325, 1335.

30 L Cohen, ‘Holdouts and free riders’ [1991] *The Journal of Legal Studies* 351.

31 See for a comparison of both: L Cohen, ‘Holdouts and free riders’ [1991] *The Journal of Legal Studies* 351; L Cohen, ‘Why Tender Offers? The Efficient Market Hypothesis, the Supply of Stock, and Signaling’ [1990] *The Journal of Legal Studies* 113, 120–125; Z Goshen, ‘Controlling strategic voting: property rule or liability rule’ [1997] *California Law Review* 741, 751–758.

32 L Cohen, ‘Why Tender Offers? The Efficient Market Hypothesis, the Supply of Stock, and Signaling’ [1990] *The Journal of Legal Studies* 113, 123–124 and especially footnote 23.

unnecessary in this type of freeze-outs, as a post-acquisition freeze-out is in fact nothing more than the second step of an at arm's length transaction, provided that certain conditions are met (see further in paragraph 23).³³ Minority shareholders are guaranteed a fair price in the post-acquisition freeze-out because the price of the takeover bid (and hence of the post-acquisition freeze-out) was negotiated at arm's length by the board of directors of the target company, which was at that time still independent, and was accepted by a sufficiently high number of shareholders as fair.

11. Versus “going-private freeze-outs”. A post-acquisition freeze-out should be distinguished from what is commonly called a “going-private freeze-out”: a freeze-out by a controlling shareholder who has had control over the listed company for some time, but now wants to take it private by freezing out the minority. In contrast to post-acquisition freeze-outs, going-private freeze-outs are in fact a form of self-dealing³⁴: the controlling shareholder has an interest in reducing the freeze-out price as much as possible, and because the board of the target company is controlled by the controlling shareholder, it will not be able to bargain at arm's length with the controlling shareholder to increase the freeze-out price. This self-dealing aspect is not removed if the controlling shareholder launches a takeover bid prior to the freeze-out (a so-called two-step going-private freeze-out), because such a takeover bid does not guarantee that the bid price will be fair, due to the lack of competition by potential third-party buyers.³⁵

12. Additional procedural safeguards for going-private freeze-outs. Brudney & Chirelstein and Greene have convincingly argued that going-private freeze-out should be subject to a more stringent legal regime than post-acquisition freeze-outs, because of the increased risk of self-dealing. These authors even pleaded for a straight prohibition for going private freeze-outs.³⁶ Indeed, going-private freeze-outs are not directly necessary for the market for corporate control, as the controlling shareholder already has control and enlarges his control with the going-private freeze-outs.

33 EF Greene, 'Corporate Freeze-out Mergers: A Proposed Analysis' [1976] *Stanford Law Review* 487, 509–510; V Brudney and MA Chirelstein, 'A restatement of corporate freezeouts' [1978] *The Yale Law Journal* 1354, 1359–1365.

34 EF Greene, 'Corporate Freeze-out Mergers: A Proposed Analysis' [1976] *Stanford Law Review* 487, 512; V Brudney and MA Chirelstein, 'A restatement of corporate freezeouts' [1978] *The Yale Law Journal* 1354, 1365–1370.

35 See also the conclusion under Delaware law in paragraph 20.

36 V Brudney and MA Chirelstein, 'A restatement of corporate freezeouts' [1978] *The Yale Law Journal* 1354, 1367 and 1370.

Nevertheless, going-private freeze-outs are currently allowed in both the United States and in the European Union (see further), indicating that these freeze-outs are also considered to be valuable. The main argument here is that going-private freeze-outs allow a company to be run more efficiently and avoid the costs associated with a listing (see above in paragraph 3).³⁷ In addition, there is also a risk of a holdout problem in a going-private situation: a minority shareholder may not want to approve a going-private freeze-out, even if the freeze-out price is higher than his valuation of his shares, because he wants to extract a higher price from the majority shareholder.³⁸ Finally, the distinction between post-acquisition freeze-outs and going-private freeze-outs is not always easy to make. For example, is shareholder with 20% or 30% of the shares a controlling shareholder or not?³⁹ Therefore, this article argues that going-private freeze-outs should also be possible at the same threshold as for post-acquisition freeze-outs, but with additional procedural safeguards.⁴⁰ Deciding otherwise would also lead to the strange situation where a freeze-out is possible only immediately after a takeover bid, but no longer if some time has passed, which could create an undue pressure on a bidder to immediately engage in a post-acquisition freeze-out.

13. The “at arm’s length standard”. The question then arises how these additional procedural safeguards should look like. A hypothesis of this article is that the procedural safeguards should aim to replicate the level of protection offered in an at arm’s length takeover transaction (the “at arm’s length standard”).⁴¹ In general, an at arm’s length merger includes approval by a majority of the shareholders and by the board of directors, as well as a competitive

37 FA Gevurtz, *Corporation law* (West 2000) 764–765; L Pinta, ‘The U.S. and Italy: controlling shareholders’ fiduciary duties in freeze out mergers and tender offers’ [2011] NYU Journal of Law & Business 931, 974–975.

38 L Pinta, ‘The U.S. and Italy: controlling shareholders’ fiduciary duties in freeze out mergers and tender offers’ [2011] NYU Journal of Law & Business 931, 974–975.

39 It becomes even more complicated when the company is controlled by a group of shareholders. Indeed, the question then arises at which point cooperation or communication between shareholders becomes sufficient to speak of ‘acting in concert’ (cfr. article 2(1)(d) Takeover Directive).

40 The problem of deciding whether the bidder is a controlling shareholder then remains, but is limited to the applicability of the additional procedural safeguards. In such a case, the bidder can opt for the safe way and adopt the procedural safeguards, or take a risk.

41 This also an approach that Subramanian has taken in multiple papers: G Subramanian, ‘Fixing Freezeouts’ [2005] Yale Law Journal 2; G Subramanian, ‘Deal process design in management buyouts’ [2016] Harvard Law Review 590; G Subramanian, ‘Using the Deal Price for Determining “Fair Value” in Appraisal Proceedings’ (6 February 2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2911880> accessed 5 May 2017; G Subramanian, ‘Appraisal after Dell’ (2 January 2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3095164> accessed 6 April 2018

bidding process to guarantee that the price is fair. The comparative analysis will show that the law can try to replicate this protection either through an approach relying on internal actors (approval by independent directors and/or by a majority of the minority shareholders) or through an approach relying on external actors (such as a court or an independent expert). Both approaches will be evaluated in a qualitative manner on the basis of their effectiveness in protecting minority shareholders and on their costs. However, first the legal regime in the United States, the European Union and the Netherlands are discussed and compared.

III. Freeze-outs in the United States

14. Cash mergers as a freeze-out technique. The United States have a very flexible regime for freeze-outs. The most popular freeze-out technique is the cash merger. With this technique, the controlling shareholder or his subsidiary merges with the target company, while the minority shareholders receive cash in consideration for their shares, effectively eliminating them from the company. In principle, the merger must be approved by the boards of directors of both companies and by a majority of the outstanding shares (section 251 Delaware General Corporation Law).

15. Protection of minority shareholders. Minority shareholders enjoy two main protections in case of a freeze-out merger under Delaware law: appraisal rights and fiduciary duties. Appraisal rights grant shareholders who voted against the merger the right to give up their shares and to request the company to pay them the fair value of their shares in cash, as determined by the court and regardless of any illegality of the merger (see article 262 Delaware General Corporation Law). Alternatively, minority shareholders can file a claim on the basis that the controlling shareholder and/or the directors of the target company have breached their fiduciary duty towards the shareholders. The advantage of this route is that this claim can be filed as a class action.⁴² Both types of protection follow a different regime for going-private freeze-outs and for post-acquisition freeze-outs.

42 FA Gevurtz, *Corporation law* (West 2000) 773–774; M Ventrizzo, ‘Freeze-outs: trans-continental analysis and reform proposals’ [2010] *Virginia Journal of International Law* 841, 858.

III.1. Going-private freeze-outs

16. *Singer* and the business purpose test. As going-private freeze-outs are essentially self-dealing transactions (see above in paragraph 11), the Delaware courts originally stepped in to protect minority shareholders in these transactions. In *Singer v Magnavox Co.*⁴³, the Delaware Supreme Court held that a freeze-out merger violates the fiduciary duty of the controlling shareholder towards the minority shareholders if the merger does not serve a legitimate business purpose, other than eliminating minority shareholders, the so called “business purpose test”⁴⁴ The problem with the business purpose test was that it was difficult to establish what exactly it required.⁴⁵ In addition, commentators have argued that it was a purely formalistic test that could be easily circumvented by transaction planners inventing business reasons for the merger and creating a paper trail to support these reasons.⁴⁶ Subsequent case law⁴⁷ also “interpreted out of existence” the business purpose test by allowing the interests of the controlling shareholder to count as a valid business purpose.⁴⁸

17. *Weinberger* and the entire fairness test. It was therefore not surprising then that the Delaware Supreme Court abolished the business purpose test in *Weinberger v UOP, Inc.*⁴⁹ Instead, the court introduced an “entire fairness test”: going-private freeze-outs must meet the requirements of “fair dealing” (a procedural element) and “fair price” (a substantive element) to be valid.⁵⁰ In *Weinberger*, the court ruled that the freeze-out merger failed this test, as the absence of bargaining by an independent and fully informed board violated the fair dealing requirement. However, the court in *Weinberger* already hinted to controlling shareholders how to validly structure a freeze-out merger: “*The result here could have been entirely different if UOP had appointed an independent negotiating committee of its outside directors to deal with Signal [the controlling shareholder] at arm’s length.*”⁵¹

43 *Singer v Magnavox Co.*, 380 A.2d 969 (Del. 1977).

44 ‘A § 251 merger, made for the sole purpose of freezing out minority shareholders, is an abuse of the corporate process’ (Singer, at 980).

45 E.J. Weiss, ‘The law of take out mergers: a historical perspective’ [1981] New York University Law Review 624, 667–670.

46 SM Bainbridge, *Mergers and acquisitions* (Foundation Press 2003) 225.

47 Most importantly: *Tanzer v International General Industries, Inc.*, 379 A.2d 1121 (Del. 1977).

48 E.J. Weiss, ‘The law of take out mergers: a historical perspective’ [1981] New York University Law Review 624, 667; FA Gevurtz, *Corporation law* (West 2000) 775.

49 *Weinberger v UOP, Inc.*, 457 A.2d 701 (Del. 1983).

50 *Weinberger*, at 711.

51 *Weinberger*, at 709.

18. **MFW and the conditional business judgment rule.** Later case law of the Delaware Supreme Court has nuanced the *Weinberger* case.⁵² In the important case of *Kahn v M & F Worldwide Corp.* (“MFW”)⁵³, the Delaware Supreme Court held that a going-private freeze-out is subject to entire fairness review, unless there is an approval by both a majority of the minority shareholders and by a special committee of independent directors with veto power, in which case the more flexible business judgment rule applies. More precisely, the Delaware Supreme Court held that the business judgment rule applies if: “(i) the controller conditions the procession of the transaction on the approval of both a Special Committee and a majority of the minority stockholders; (ii) the Special Committee is independent; (iii) the Special Committee is empowered to freely select its own advisors and to say no definitively; (iv) the Special Committee meets its duty of care in negotiating a fair price; (v) the vote of the minority is informed; and (vi) there is no coercion of the minority.”⁵⁴ Discussing all these conditions in detail falls outside the scope of this article, which aims to take a more high-level approach.⁵⁵

19. **The relevance of the standard of review.** The applicable standard of review (entire fairness or business judgment rule) is an extremely important question that often determines the outcome of a case.⁵⁶ Under the business judgment rule, a motion to dismiss the case will normally be granted, except when the plaintiff can provide elements that point to an abuse, which is a very high standard to meet. In contrast, under the entire fairness test, a motion to dismiss will almost always be denied. This means that entire fairness cases are much more likely to effectively proceed to trial (and go through the costly discovery process), which increases their settlement value.

52 For a discussion of the different cases that led to the current regime, see: RJ Gilson and JN Gordon, ‘Controlling Controlling Shareholders’ [2003] University of Pennsylvania Law Review 785, 796–803 and 817–840; G Subramanian, ‘Fixing Freezeouts’ [2005] Yale Law Journal 2, 11–22; M Ventoruzzo, ‘Freeze-outs: transcontinental analysis and reform proposals’ [2010] Virginia Journal of International Law 841, 859–871; M Bitton and O Minnes, ‘Exploring the standard of review of transactions with controlling shareholders after *In Re MFW Shareholders litigation* (decided May 29th, 2013)’ [2014] Business, Entrepreneurship & the Law 447; F Restrepo and G Subramanian, ‘The effect of Delaware doctrine on freeze-out structure and outcomes: evidence on the unified approach’ [2015] Harvard Business Law Review 205, 208–214.

53 88 A.3d 635 (Del. 2014).

54 MFW, at 645.

55 These conditions are explained more in depth in the decision of the Delaware Supreme Court in the MFW case.

56 LH Lazarus, ‘Standards of review in conflict transactions: an examination of decisions rendered on motions to dismiss’ [2001] Delaware Journal of Corporate Law 911, 913–914.

20. ***MFW* applicable to both one-step and two-step freeze-outs.** It is now accepted that the regime of *MFW* applies to both one-step and two-step going private freeze-outs.⁵⁷ In a one-step going-private freeze-out the controlling shareholder directly freezes out the minority shareholders in a long-form merger (section 251 Delaware General Corporation Law), while in a two-step freeze-out the controlling shareholders first makes a voluntary tender offer for all the shares, typically followed by a short-form cash-out merger. The short-form merger is a faster form of the merger that is available if the majority shareholder owns more than 90% of the shares (section 253 Delaware General Corporation Law) and which can be adopted by a unilateral resolution of the controlling shareholder.⁵⁸

21. **Rationale behind *MFW*.** The rationale behind the *MFW* case law is that the procedural safeguards help to replicate an at arm's length merger, which must also be approved by the board and the shareholders. In a freeze-out, the special committee of independent directors is supposed to function as a bargaining agent for the minority shareholders, while approval by the majority of the minority shareholders functions as a market check against disloyal behavior of the board.⁵⁹ The flexible standard of the business judgment rule provides transaction planners with the right incentives to adopt these procedural safeguards to protect minority shareholder.⁶⁰ The controlling shareholder can still choose to ignore these procedural safeguards, but then the freeze-out will be

57 The decision of *MFW* by the Delaware Supreme Court concerned a one-step freeze-out. The same approach has been accepted for two-step freeze-outs by the Delaware Chancery Court in *In re CNX Gas Corp. Shareholder Litigation*, 4 A.3d 397 (Del. Ch. 2010). The Delaware Supreme Court, however, refused the appeal against this ruling, because it was not yet a final judgment: *In re CNX Gas Corp.*, 2010 WL 2690402 (Del. 2010). Because the case was soon settled afterwards, the Delaware Supreme Court did not get the chance to express its opinion on this case. However, the applicability of the standard in *MFW* to two-step freeze-outs is generally accepted: F Restrepo and G Subramanian, 'The effect of Delaware doctrine on freeze-out structure and outcomes: evidence on the unified approach' [2015] *Harvard Business Law Review* 205. This case law has therefore overturned the earlier case law that held that two-step going-private freeze-outs were subject to the business judgment rule. See the cases of: *Solomon v Pathe Communications Corp.*, 672 A.2d 35 (Del. 1996); *In re Siliconix Inc. Shareholders Litigation*, 2001 WL 716787 (Del. Ch. 2001); *Glassman v Unocal Exploration Corp.*, 777 A.2d 242 (Del. 2001); *In re Pure Resources*, 808 A.2d 421 (Del. Ch. 2002).

58 See for a more elaborate discussion: S Kenyon-Slade, *Mergers and takeovers in the US and UK. Law and practice* (OUP 2004) 11–13 and 61–63.

59 RJ Gilson and JN Gordon, 'Controlling Controlling Shareholders' [2003] *University of Pennsylvania Law Review* 785, 818 and 837–838; G Subramanian, 'Fixing Freezeouts' [2005] *Yale Law Journal* 2, 49–51.

60 Restrepo and Subramanian have provided empirical evidence that practice has already implemented the new transaction structure: F Restrepo and G Subramanian, 'The effect

reviewed under the more stringent entire fairness test. This provides the special committee with the necessary leverage in the negotiations to negotiate for a fair freeze-out price.

22. Appraisal rights. A class action for breach of fiduciary duty is not the only remedy against going-private freeze-outs, however. Minority shareholder can use their appraisal rights to receive the fair value of their shares, as determined by the court. Traditionally, the appraisal remedy was not very popular due to many procedural obstacles.⁶¹ Indeed, shareholders must prove that the shares were not voted in favour of the merger (section 262(a) DGCL) and must notify the company of their demand for appraisal in advance of the shareholders' meeting deciding on the freeze-out merger (section 262(d) DGCL). In addition, class actions are not possible for appraisal rights, unlike as is the case for breach of fiduciary duties.⁶² Recently, however, the appraisal remedy has become much more popular,⁶³ most likely due to the emergence of "appraisal arbitration"⁶⁴ by specialized hedge funds.

The question is whether the appraisal remedy can still result in a higher price than the price of a freeze-out that complied with the procedural safeguards in *MFW*. The answer seems to be positive. In a fiduciary duty case, the Delaware Chancery Court stated that "*appraisal acts as a further check on expropriation*"⁶⁵, even if the procedural safeguards of *MFW* are met. This is consistent with the argument of Subramanian that courts in appraisal cases should only consider the merger price as "fair value" if the deal process is good, i.e. if the process includes an at arm's length negotiation and a market canvass for the

of Delaware doctrine on freeze-out structure and outcomes: evidence on the unified approach' [2015] Harvard Business Law Review 205.

61 See for example: J Seligman, 'Reappraising the Appraisal Remedy' [1984] The George Washington Law Review 829, 829–830; RB Thompson, 'Exit, majority and liquidity rule: appraisal's role in corporate law' [1995] The Georgetown Law Journal 1, 40–42; BM Wertheimer, 'The Shareholders' Appraisal Remedy and How Courts Determine Fair Value' [1998] Duke Law Journal 613; M Ventoruzzo, 'Freeze-outs: transcontinental analysis and reform proposals' [2010] Virginia Journal of International Law 841, 855–858; SM Bainbridge, *Mergers and acquisitions* (Foundation Press 2003) 222–223.

62 FA Gevurtz, *Corporation law* (West 2000) 772.

63 Empirical evidence for this is given by: CR Korsmo and M Myers, 'Appraisal arbitration and the future of public company M&A' [2015] Washington University Law Review 1551; W Jiang, T Li, D Mei and RS Thomas, 'Appraisal: Shareholder Remedy or Litigation Arbitrage?' (20 April 2016) <<https://ssrn.com/abstract=2766776>> accessed 5 May 2017; G Subramanian, 'Appraisal after Dell' (2 January 2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3095164> accessed 6 April 2018.

64 The possibility of appraisal arbitration was confirmed in *In re Appraisal of Transkaryotic Therapies*, 2007 WL 1378345 (Del. Ch. 2007).

65 Books-A-Million, Inc. Stockholders Litigation, 2016 WL 5874974 (Del. Ch. 2016), 17.

sale of the company.⁶⁶ In a going-private freeze-out, a market canvass is normally not possible, as the controlling shareholder is often not willing to sell his shares to another party⁶⁷, which means that the freeze-out price is not necessarily a “fair price”. As a result, commentators have speculated that the Delaware courts’ deference to the merger price for post-acquisition freeze-outs (see further in paragraph 24) may not be extended to transactions with a controlling shareholder, such as a going private freeze-out.⁶⁸ Thus, the appraisal remedy functions as an additional procedural safeguard, in addition to the fiduciary duty requirements in *MFV*.

III.2. Post-acquisition freeze-outs

23. Flexible treatment: business judgment rule. In contrast to going-private freeze-outs, the legal regime for post-acquisition freeze-outs is much more simple and flexible, because a post-acquisition freeze-out is merely the second step of an at arm’s length transaction (see above in paragraph 10).⁶⁹ In such

66 G Subramanian, ‘Appraisal after Dell’ (2 January 2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3095164> accessed 6 April 2018.

67 The Delaware Chancery Court has ruled that a controlling shareholder cannot be obliged to sell its shares, and that even the fact that a third party offered a higher price than the controlling shareholder does not make a going-private freeze-out in breach of the entire fairness standard. See: Books-A-Million, Inc. Stockholders Litigation, 2016 WL 5874974 (Del. Ch. 2016),

68 G Weinstein, P Richter and SB Luftglass, ‘The Appraisal Landscape: Key Points, Open Issues, and Practice Points’ (*HLS Forum on Corporate Governance and Financial Regulation*, 23 January 2018) <<https://corpgov.law.harvard.edu/2018/01/23/the-appraisal-landscape-key-points-open-issues-and-practice-points/>> accessed 6 April 2018; V Lewkow and ME Kotler, ‘Analysis of Delaware Supreme Court’s Dell Appraisal Decision’ (*HLS Forum on Corporate Governance and Financial Regulation*, 19 December 2017) <<https://corpgov.law.harvard.edu/2017/12/19/analysis-of-delaware-supreme-courts-dell-appraisal-decision/#13b>> accessed 6 April 2018; G Subramanian, ‘Appraisal after Dell’, footnote 9 (2 January 2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3095164> accessed 6 April 2018. Subramanian would allow for an exception if the controlling shareholder commits to sell in case of a higher bid and if the special committee organizes a market canvass.

69 V Brudney and MA Chirelstein, ‘A restatement of corporate freezeouts’ [1978] *The Yale Law Journal* 1354, 1359; EF Greene, ‘Corporate Freeze-out Mergers: A Proposed Analysis’ [1976] *Stanford Law Review* 487. Post-acquisition freeze-outs are often not even referred as ‘freeze-outs’ but as the ‘back-end merger’ of a ‘two-step transaction’. See for example, SM Haas, ‘The *Corwin* Effect: Stockholder Approval of M&A Transactions’ (*HLS Forum on Corporate Governance and Financial Regulation*, 21 February 2017) <<https://corpgov.law.harvard.edu/2017/02/21/the-corwin-effect-stockholder-approval-of-ma-transactions/>> accessed 1 April 2017.

case, the Delaware Supreme Court has held in *Corwin*⁷⁰ and in *Volcano*⁷¹ that the business judgment rule irrebuttably applies, provided that (1) the counterparty in the transaction is not a controlling shareholder⁷²; and (2) the transaction is approved by a fully informed and uncoerced vote of a majority of the disinterested shareholders.⁷³ Instead of the shareholder vote, acceptance of the preceding tender offer by a majority of the disinterested shareholders can also count.⁷⁴ To be considered as a two-step transaction (rather than a going-private freeze-out), the back-end merger must also be implemented promptly after the tender offer and at the same price.⁷⁵

24. Appraisal rights. Minority shareholder also have appraisal rights in case of a post-acquisition freeze-out. However, several recent court decisions in appraisal cases have deferred to the merger price as fair value when the sale process of the company was reliable, indicating that appraisal rights do not offer additional protection compared to fiduciary duty litigation.⁷⁶ In the *Dell*⁷⁷ case and the *DFC Global*⁷⁸ case, the Delaware Supreme Court declined to

70 *Corwin v KKR Financial Holdings LLC*, 125 A.3d 304 (Del. 2015).

71 *In re Volcano Corporation Stockholder Litigation*, 2017 WL 563187 (Del. 2017). This decision was a one-sentence ruling that affirmed the whole reasoning of the Delaware Chancery Court in *In re Volcano Corporation Stockholder Litigation*, 143 A.3d 727 (Del. Ch. 2016).

72 Under Delaware law, a shareholder is a controlling shareholder if he owns more than 50% of the shares, or if he exercises control over the business and affairs of the company. See: *Ivanhoe Partners v Newmont Min. Corp.*, 535 A.2d 1334, 1344 (Del. 1987).

73 SM Haas, 'The *Corwin* Effect: Stockholder Approval of M&A Transactions' (*HLS Forum on Corporate Governance and Financial Regulation*, 21 February 2017) <<http://corpgov.law.harvard.edu/2017/02/21/the-corwin-effect-stockholder-approval-of-m-a-transactions/>> accessed 1 April 2017; SB Luftglass and P Richter, 'Delaware Supreme Court Confirms BJR Application After Disinterested Shareholder Approval' (*HLS Forum on Corporate Governance and Financial Regulation*, 22 February 2017) <<http://corpgov.law.harvard.edu/2017/02/22/delaware-supreme-court-confirms-bjr-application-after-disinterested-shareholder-approval/>> accessed 1 April 2017.

74 *In re Volcano Corporation Stockholder Litigation*, 143 A.3d 727, 747 (Del. Ch. 2016). A shareholder vote is not always required for a merger under Delaware law. See for example the "short-form merger" if the absorbing company owns more than 90% of the shares (section 253 Delaware General Corporation Law) and the back-end merger after a tender offer if certain conditions are met (section 251(h) Delaware General Corporation Law).

75 G Subramanian, 'Post-*Siliconix* Freeze-Outs: Theory and Evidence' [2007] *The Journal of Legal Studies* 1, 9 (footnote 6).

76 Giving an overview of these cases: G Subramanian, 'Appraisal after *Dell*' (2 January 2018) 3 (especially footnote 1) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3095164> accessed 6 April 2018.

77 *Dell, Inc. v Magnetar Global Event Driven Master Fund Ltd.*, nr 565, 2016 (Del. 2017)

78 *DFC Global Corporation v Muirfield*, nr 518, 2016 (Del. 2017).

adopt a formal presumption in favour of the merger price, but did rule that the Delaware Chancery Court should have given more weight to the deal price, as it is normally the most reliable evidence of fair value in an appraisal procedure if there was a robust sale process and adequate market check.⁷⁹ The court noted as a justification the particular difficulties for judges in valuing a company.⁸⁰ In later cases⁸¹, the Delaware courts have even awarded fair value significantly below the merger price, which they attributed in part to the presence of synergies for the acquiror, which should be excluded from the appraisal price according to section 262(h) DGCL. In another case⁸², the Delaware Chancery Court used the pre-merger stock market price, which was significantly below the merger price, as the best evidence of fair value.⁸³

These developments in Delaware case law suggest that the Delaware courts have become very reluctant to accept higher prices than the merger prices in

- 79 G Subramanian, 'Appraisal after Dell' (2 January 2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3095164> accessed 6 April 2018; G Weinstein, P Richter and SB Luftglass, 'The Appraisal Landscape: Key Points, Open Issues, and Practice Points' (*HLS Forum on Corporate Governance and Financial Regulation*, 23 January 2018) <<https://corpgov.law.harvard.edu/2018/01/23/the-appraisal-landscape-key-points-open-issues-and-practice-points/>> accessed 6 April 2018; V Lewkow and ME Kotler, 'Analysis of Delaware Supreme Court's Dell Appraisal Decision' (*HLS Forum on Corporate Governance and Financial Regulation*, 19 December 2017) <<https://corpgov.law.harvard.edu/2017/12/19/analysis-of-delaware-supreme-courts-dell-appraisal-decision/#13b>> accessed 6 April 2018; G Weinstein and SB Luftglass, 'DFC Global: Delaware Supreme Court Strongly Endorses Reliance on Merger Price' (*HLS Forum on Corporate Governance and Financial Regulation*, 4 August 2017) <<https://corpgov.law.harvard.edu/2017/08/04/dfc-global-delaware-supreme-court-strongly-endorses-reliance-on-merger-price/>> accessed 6 April 2018. As these commentators point out, it is currently not entirely clear exactly what constitutes a "robust sale process". Commentators agree that even though there is no express presumption in favour of the merger price, such presumption seems to be operative in practice.
- 80 See, for example: "*the Court of Chancery should be chary about imposing the hazards that always come when a law-trained judge is forced to make a point estimate of fair value based on widely divergent partisan expert testimony.*" (*Dell*, 61).
- 81 *In re Appraisal of AOL Inc.*, C.A. nr 11204-VCG (Del. Ch. 2018); *Merlin Partners, LP v. SWS Group, Inc.*, nr 295, 2017 (Del. 2018), which confirmed the decision of the Delaware Chancery Court in: *In re Appraisal of SWS Group, Inc.*, C.A. nr 10554-VCG (Del. Ch. 2017).
- 82 *Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.*, C.A. nr 11448-VCL (Del. Ch. 2018).
- 83 For a discussion of these cases, see: TN Mirvis, W Savitt, RA McLeod and N Walter, 'Wachtell Lipton Discusses the New New Regime in Delaware Appraisal Law' (*CLS Blue Sky Blog*, 2 March 2018) <<http://clsbluesky.law.columbia.edu/2018/03/02/wachtell-lipton-discusses-the-new-new-regime-in-delaware-appraisal-law/>> accessed 6 April 2018.

post-acquisition freeze-outs and are even willing to award lower prices. This makes appraisal remedy not very attractive as a remedy against post-acquisition freeze-outs.⁸⁴ As can be expected, there seems to be a decline in appraisal litigation since these developments⁸⁵, although it is too early to tell whether this will sustain and whether this is related to this case law.

25. Conclusion. To discuss whether these fine points of Delaware law on freeze-outs are a good or a bad thing falls outside the scope of this article, which takes a more high-level and comparative approach. In general, however, it seems that the law is largely consistent with the normative framework established above. Freeze-outs are allowed at a low threshold of 50%, which eliminates the free rider and holdout problem, but with an elaborate system of protection of minority shareholders. This protection is designed to replicate the level of protection offered in transactions negotiated at arm's length. Consistent with what was recommended in paragraph 10 and 11, Delaware freeze-out law differentiates between going-private freeze-outs and post-acquisition freeze-outs for this. Post-acquisition freeze-outs are generally reviewed very flexibly under Delaware law: if certain procedural safeguards are respected, such as approval by the shareholders and an adequate sales process run by an independent board, the freeze-out will be regarded as part of an at arm's length transaction and will not be questioned by the courts, neither in fiduciary duty suits nor in appraisal cases.

Going-private freeze-outs, on the other hand, are treated more strictly, which is justified because of the increased risk of self-dealing (see above in paragraph 12). The *MFW* case law tries to replicate the level of protection offered in an at arm's length transaction, by only granting review under the business judgment rule if the freeze-out is approved by a special committee of independent directors and a majority of the minority shareholders. In addition, the freeze-out price can be reviewed by the courts in an appraisal procedure.

84 Again, this situation must be distinguished from a going-private freeze-outs, where a "robust sales process" is not possible due to the presence of a controlling shareholder that cannot be forced to sell. As has been noted above in paragraph 22, it is still unclear whether courts will award appraisal prices above the merger price in such situations if the transaction complied with the *MFW* fiduciary duty case law.

85 M Schoenfeld, 'From Corwin to Dell: The Cost of Delaware Turning a Blind Eye', 4 (12 February 2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3122511> accessed 6 April 2018.

IV. Squeeze-outs in the European Union

IV.1. European legislation

26. No cash mergers but “squeeze-outs”. Compared with the United States, freeze-outs are subject to a much less flexible regime in the European Union. In general, member states of the European Union have not allowed cash mergers,⁸⁶ despite the fact that this is explicitly allowed by the article 30 of the Merger Directive^{87, 88}. In any event, mergers are not the “normal” freeze-out technique in Europe. Article 15 of the Takeover Directive provides that member states must introduce the possibility of a squeeze-out procedure after a takeover bid (a “post-takeover squeeze-out”⁸⁹). This procedure allows bidders to force minority shareholders to transfer their shares to them within three months after a takeover bid if they reach a certain threshold of shares. Member states can opt to set a single threshold between 90 and 95% of the capital carrying voting rights and the securities with voting rights. Alternatively, member states can set an acceptance rate threshold of 90% of the capital with voting rights and the securities with voting rights, meaning that

86 M Ventoruzzo, ‘Freeze-outs: transcontinental analysis and reform proposals’ [2010] Virginia Journal of International Law 841, 877; L Pinta, ‘The U. S. and Italy: controlling shareholders’ fiduciary duties in freeze out mergers and tender offers’ [2011] NYU Journal of Law & Business 931, 932; Takeover Directive Assessment Report, 44 and 227–228.

87 Directive 2011/35/EU of the European Parliament and of the Council of 5 April 2011 concerning mergers of public limited liability companies [2011] OJ L110/1 (hereinafter ‘Merger Directive’). For a discussion of the Merger Directive, see: S Grundmann, *European company law: organization, finance and capital markets* (Intersentia 2012) 667–697.

88 Articles 3 and 4 of the Merger Directive provide that cash payments in a merger may not exceed 10% of the nominal value or the accounting par value of the shares. Nevertheless, member states can opt to allow operations that are equivalent to mergers, but with cash payments of more than 10%, in which case the same safeguards of the Merger Directive apply (article 30 Merger Directive). Unlike the mergers that fall under the scope of article 3 and 4 of the Merger Directive, however, member states are not obliged to introduce these operations.

89 It must be kept in mind that this term does not correspond to what is called in this article a ‘post-acquisition freeze-out’. The latter is reserved for freeze-outs after a takeover bid by an independent bidder, while the European post-takeover squeeze-out is also possible after a takeover bid by a controlling shareholder. Most European countries have some rules that offer extra protection if the takeover bid is launched by a controlling shareholder, but discussing these rules here would lead us too far outside the scope of the present article.

90% of the shares included in the bid must have been tendered (article 15(2) Takeover Directive).⁹⁰

Squeeze-outs must be exercised at a fair price and with the same type of consideration as in the preceding bid, or in cash (article 15(5) Takeover Directive). The bid price is presumed to be fair in case of a mandatory bid, because then article 5(4) of the Takeover Directive determines how a fair price should be set for the bid. The bid price is also presumed to be fair in case of a voluntary bid if more than 90% of the shares included in the bid have been tendered (article 15(5) Takeover Directive). Outside these situations, member states are free to set rules governing the determination of the squeeze-out price. Often, member states stipulate that the price is determined or reviewed by the financial supervisor, a court or an independent expert.⁹¹

27. No full harmonization. From the paragraph above follows that squeeze-outs are not fully harmonised in the European Union and that member states enjoy some discretion. Indeed, the thresholds for squeeze-outs and the determination of the fair price still leave some room for differences between member states.⁹² In addition, it should be noted that many member states also have squeeze-out provisions outside the situation of takeover bids, which are not covered by the Takeover Directive. These “stand-alone” squeeze-outs are usually available at a threshold that is similar to the threshold for post-takeover squeeze-outs (90–95%), and the consideration offered is usually subject to the supervision of an independent expert, the financial supervisor or a court.⁹³

90 T Kaisanlahti, ‘When is a tender price fair in a squeeze-out?’ [2007] *European Business Organization Law Review* 497, 498; C Van der Elst and L Van den Steen, ‘Balancing the interests of minority and majority shareholders: a comparative analysis of squeeze-out and sell-out rights’ [2009] *European Company and Financial Law Review* 391, 404–408; M Ventrizzo, ‘Freeze-outs: transcontinental analysis and reform proposals’ [2010] *Virginia Journal of International Law* 841, 888–889; Takeover Directive Assessment Report, 221–222.

91 C Van der Elst and L Van den Steen, ‘Balancing the interests of minority and majority shareholders: a comparative analysis of squeeze-out and sell-out rights’ [2009] *European Company and Financial Law Review* 391, 421; M Ventrizzo, ‘Freeze-outs: transcontinental analysis and reform proposals’ [2010] *Virginia Journal of International Law* 841, 892; Takeover Directive Assessment Report, 223.

92 This has been subject to some critique in the literature: C Van der Elst and L Van den Steen, ‘Balancing the interests of minority and majority shareholders: a comparative analysis of squeeze-out and sell-out rights’ [2009] *European Company and Financial Law Review* 391, 391 and 393 and 438–439; M Ventrizzo, ‘Freeze-outs: transcontinental analysis and reform proposals’ [2010] *Virginia Journal of International Law* 841, 914.

93 For an overview of the national rules on the determination of a fair freeze-out price, see: C Van der Elst and L Van den Steen, ‘Balancing the interests of minority and majority

IV.2. Squeeze-outs in the Netherlands

28. The Netherlands: stand-alone squeeze-outs. As squeeze-outs are not fully harmonized in the European Union, it is interesting to discuss national law as well. In this article, Dutch law on squeeze-outs is discussed, as the article also studies alternative freeze-out techniques in the Netherlands. Like most European countries, the Netherlands have two basic types of squeeze-outs: the stand-alone squeeze-out and the post-takeover squeeze-out.⁹⁴ The stand-alone squeeze-out can be used outside the situation of a takeover bid and is governed by article 2:92a of the Dutch Civil Code. It is available when a shareholder (or a group of shareholders) owns at least 95% of the issued capital (article 2:92a § 1 Dutch Civil Code). Squeeze-outs have to be approved by the Enterprise Chamber of the Amsterdam Court, which also determines the price of the squeeze-out. The judge is free to decide on the method of valuation and can take into account evidence presented by the bidder.⁹⁵ The court can also appoint one or three independent experts to value the shares (article 2:92a § 5 Dutch Civil Code). Finally, minority shareholders who do not agree with the price set by the judge can appeal to the Dutch Supreme Court.⁹⁶

29. The Netherlands: post-takeover squeeze-out. The Netherlands implemented the post-takeover squeeze-out required by the Takeover Directive in article 2:359c Dutch Civil Code. This squeeze-out must be requested by the bidder within three months of the end of the acceptance period of the takeover

shareholders: a comparative analysis of squeeze-out and sell-out rights' [2009] European Company and Financial Law Review 391; Takeover Directive Assessment Report, 219–237. For example, in the Belgian stand-alone squeeze-out, the bidder determines the price, but an independent expert must provide his opinion on the price. In addition, the Belgian financial supervisor, the FSMA, can review this price when approving the prospectus (article 10–11 Royal Decree of 27 April 2007 on public squeeze-outs, *Belgian Official Journal* 23 May 2007). This price can also be challenged in the Court of Appeal in Brussels.

94 For an overview of the Dutch law on squeeze-outs, see: M Raaijmakers, 'Uitstoting minderheid na gestanddoening van een openbaar overnamebod: inspiratie uit Nederland?' in H De Wulf and C Van der Elst (eds), *De Belgische overnamewetgeving na de hervorming van 2007* (Intersentia 2008) 386–387 and 393–394; C Van der Elst and L Van den Steen, 'Balancing the interests of minority and majority shareholders: a comparative analysis of squeeze-out and sell-out rights' [2009] European Company and Financial Law Review 391, 398;

95 C Van der Elst and L Van den Steen, 'Balancing the interests of minority and majority shareholders: a comparative analysis of squeeze-out and sell-out rights' [2009] European Company and Financial Law Review 391, 429.

96 C Van der Elst and L Van den Steen, 'Balancing the interests of minority and majority shareholders: a comparative analysis of squeeze-out and sell-out rights' [2009] European Company and Financial Law Review 391, 429.

bid (article 2:359c § 3 Dutch Civil Code). The bidder must have acquired through the bid at least 95% of the issued capital and 95% of the issued voting rights (article 2:359c § 1 Dutch Civil Code). As is the case for the stand-alone squeeze-out, the Enterprise Chamber of the Amsterdam Court must approve the squeeze-out and must determine its price (article 2:359c § 4 and § 6 Dutch Civil Code). However, as prescribed by the Takeover Directive, there is a presumption of a fair price if there is an acceptance rate of at least 90% in case of a voluntary bid, or in case of a mandatory bid (article 2:359c, § 6 Dutch Civil Code).

30. Preliminary evaluation. The squeeze-out procedure in the Takeover Directive and in Dutch law seem to offer a beginning of an answer to the free rider problem and the holdout problem discussed in the normative framework (see above in paragraph 8 and following). Indeed, these problems were taken into account when designing and evaluating the squeeze-out rules in the Takeover Directive.⁹⁷ However, some authors have suggested that the threshold of 90–95% for squeeze-outs in the European Union may be too high to eliminate these problems completely (see further in paragraph 44 for a detailed discussion and evaluation).⁹⁸ Alternative freeze-out techniques, which are discussed in the next part, could provide a solution to this.

V. *Alternative freeze-out techniques in the Netherlands*

V.1. *Freeze-out mergers as an alternative freeze-out technique*

31. Avoiding the high threshold. The high threshold for statutory squeeze-outs in the European Union can be a nuisance for controlling shareholders wanting to take a company private. Indeed, a minority stake as small as 5% or 10% suffices to block a squeeze-out. For this reason, transaction planners have looked for alternative freeze-out techniques to avoid this high threshold (see above in paragraph 5).

32. The merger as a freeze-out technique. In the Netherlands, the two main alternative freeze-out techniques that have been used to accomplish a freeze-

97 Winter Report, 60; TOBD Assessment Report, 275 and 314.

98 M Burkart and F Panunzi, 'Mandatory Bids, Squeeze-out, Sell-out and the Dynamics of the Tender Offer Process' (2003) ECGI Working Paper Series in Law nr. 10/2003, 19 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=420940> accessed 5 May 2017; C Van der Elst and L Van den Steen, 'Opportunities in the M&A Aftermarket: Squeezing Out and Selling Out' (2006) Universiteit Gent Financial Law Institute Working Paper No. 2006-12, 12 <<https://ssrn.com/abstract=933609>> accessed 5 May 2017.

out are the (triangular) merger and the asset sale or “de facto merger”.⁹⁹ In case a regular merger is used as a freeze-out technique, the target company is merged into the controlling shareholder or his subsidiary, while the minority shareholders of the target company become shareholders in the absorbing company (the company of the controlling shareholder). The minority shareholders can also become a shareholder in a group company of the absorbing company, the so-called “*drieboeksfusie*” (“triangular merger” – article 2:333a Dutch Civil Code). The advantage of the triangular merger is that it is easier to “transfer” the minority shareholders to a company where they are less of a nuisance, which is why this technique is often used as an alternative freeze-out technique. Mergers and triangular mergers must be approved by two thirds of the shareholders at the shareholders’ meeting (article 2:43 *iuncto* articles 2:317 and 2:330 Dutch Civil Code).

A cash merger is not allowed under Dutch law (article 2:325 Dutch Civil Code), so that the minority shareholders are not immediately cashed out. Nevertheless, a stock merger still has the advantage of simplifying the structure and putting an end to the costs of a separate listing for the target company and of organizing separate shareholders’ meetings.¹⁰⁰ In addition, the transaction can be structured in such a way that the merger dilutes the minority shareholders below 5%, so that they can be squeezed out.¹⁰¹

33. The asset sale as a freeze-out technique. A second alternative freeze-out technique is the “de facto merger” or asset sale.¹⁰² Under this technique, the target company sells all of its assets (and liabilities) to the majority shareholder for cash. After this, the target company only owns the cash that was paid as

99 For a discussion of these techniques, as well as some other less commonly used alternative freeze-out techniques, see: M Raaijmakers, ‘Uitstoting minderheid na gestanddoening van een openbaar overnamebod: inspiratie uit Nederland?’ in H De Wulf and C Van der Elst (eds), *De Belgische overnamewetgeving na de hervorming van 2007* (Intersentia 2008).

100 M Raaijmakers, ‘Uitstoting minderheid na gestanddoening van een openbaar overnamebod: inspiratie uit Nederland?’ in H De Wulf and C Van der Elst (eds), *De Belgische overnamewetgeving na de hervorming van 2007* (Intersentia 2008) 397.

101 PHC Van Leeuwen, ‘De activa/passiva-transactie als uitstotingsmethode’ [2011] *Vennootschap & Onderneming* 137; WB Kuijpers and A van der Krans, ‘De positie van minderheidsaandeelhouders en het openbaar bod’ [2014] *Onderneming & Financiering* 19, 24.

102 See for a discussion of this technique: M Raaijmakers, ‘Uitstoting minderheid na gestanddoening van een openbaar overnamebod: inspiratie uit Nederland?’ in H De Wulf and C Van der Elst (eds), *De Belgische overnamewetgeving na de hervorming van 2007* (Intersentia 2008) 407; PHC Van Leeuwen, ‘De activa/passiva-transactie als uitstotingsmethode’ [2011] *Vennootschap & Onderneming* 137, 140.

consideration and can then enter into a liquidation to cash out the minority shareholders. Both steps must be approved by the shareholders' meeting of the target company with an ordinary majority (article 2:107a and article 2:19 Dutch Civil Code), except if the articles of association require a qualified majority. Disadvantages of this technique are the more complex transaction structure, the need for additional formalities and approvals, and the possible unfavourable tax consequences.¹⁰³

34. Remedies. Minority shareholders have often challenged alternative freeze-out techniques.¹⁰⁴ A first remedy is to claim annulment of the merger decision by the shareholders' meeting, alleging that it violates the principle of "reasonableness and fairness" (article 2:323 *in* article 2:15 and article 2:8 Dutch Civil Code). Alternatively, minority shareholders can file for an investigation procedure with the Enterprise Chamber of the Court of Amsterdam (*enquête-procedure* – article 344 and following Dutch Civil Code). If the court decides to investigate, it will determine whether there is mismanagement of the company ("*wanbeleid*" – article 355 Dutch Civil Code), using the same criterion of "reasonableness and fairness".¹⁰⁵ If this is the case, it can order one of the far-reaching measures of article 2:356 of the Dutch Civil Code, such as the annulment of decisions, firing or appointing one or more directors, or an injunction. The Enterprise Chamber also has a wide discretion to take immediate measures during this procedure (article 349(a)(2) Dutch Civil Code).

V.2. Dutch case law and practice on alternative freeze-out techniques

35. Versatel case. There has been a growing body of case law on the use of mergers as a freeze-out technique. In general, the Dutch courts have allowed them, although somewhat reluctantly. In the important *Versatel* case¹⁰⁶, Tele2

103 CJC de Brauw and MF Noome, 'Vijf jaar pre-wired asset sale bij openbare biedingen' [2015] 591 (7) *Tijdschrift Ondernemingsrecht* 35, 36.

104 For an overview of the different remedies of minority shareholders, see: M Raaijmakers, 'Uitstoting minderheid na gestanddoening van een openbaar overnamebod: inspiratie uit Nederland?' in H De Wulf and C Van der Elst (eds), *De Belgische overnamewetgeving na de hervorming van 2007* (Intersentia 2008) 390–392 and 399–400.

105 M Raaijmakers, 'Uitstoting minderheid na gestanddoening van een openbaar overnamebod: inspiratie uit Nederland?' in H De Wulf and C Van der Elst (eds), *De Belgische overnamewetgeving na de hervorming van 2007* (Intersentia 2008) 391–392.

106 For a discussion of this case, see: M Raaijmakers, 'Uitstoting minderheid na gestanddoening van een openbaar overnamebod: inspiratie uit Nederland?' in H De Wulf and C Van der Elst (eds), *De Belgische overnamewetgeving na de hervorming van 2007* (Intersentia 2008) 400–405; MWH van den Heuvel, 'De driehoeksfusie, tracking stock en beperking van voorkeursrechten als mogelijk uitstootmiddel in de Versatel-juris-

launched a takeover bid on Versatel and acquired 83% of the shares, not enough to proceed with a squeeze-out. However, as was announced in the offer documents, Tele2 wanted to freeze out the remaining minority shareholders through a triangular merger that would dilute them below the 5% threshold. The minority shareholders filed a request for an investigation procedure with the Enterprise Chamber in order to have the post-bid freeze-out technique prohibited. However, the Enterprise Chamber ruled that the triangular merger did not violate the law.¹⁰⁷ It considered the desire of the majority shareholder to eliminate the minority shareholders a legitimate one, especially since it was also announced in the offer documents for the bid, which was accepted by many of the shareholders. In addition, the Enterprise Chamber accepted that the triangular merger was justified for other reasons, *in casu* a tax advantage for the Tele2 group.

This decision was confirmed by the Dutch Supreme Court.¹⁰⁸ The Supreme Court ruled that a merger can be used to dilute the minority shareholders below the threshold for squeeze-outs and that minority shareholders should take into account this possibility of dilution when buying a minority stake in a company. Nevertheless, the Supreme Court also ruled that a merger that only serves to freeze out minority shareholders can be contrary to the principle of reasonableness and fairness, depending on the circumstances.¹⁰⁹ It is up to the court in a concrete case to balance the interests of the majority and the minority.¹¹⁰ In the *Shell* case¹¹¹, for example, the Enterprise Chamber decided that the merger was used with the sole intention of freezing out the minority

prudentie' [2007] Vennootschap & Onderneming 154; C de Groot, 'De drie Versatel-uitspraken' [2008] Onderneming & Financiering 16; RH Hermans, 'De Ondernemingskamer geeft richtlijnen voor de behandeling van minderheidsaandeelhouders die niet op een openbaar bod zijn ingegaan' [2006] Ondernemingsrecht 110; M Raaijmakers, 'Versatel: werkt Code Tabaksblat nog na gestanddoening openbaar bod?' [2006] *Ars Aequi* 198.

107 Enterprise Chamber 27 September 2005, ECLI:NL:GHAMS:2005:AU3472, *JOR* 2005, 272; ARO 2005, 182 (*Centaurus/Versatel I*).

108 Supreme Court 14 September 2007, ECLI:NL:HR:2007:BA4117, *JOR* 2007/237, note BF Assink (*Centaurus/Versatel I*).

109 Supreme Court 14 September 2007, ECLI:NL:HR:2007:BA4117, nr 4.3, *JOR* 2007/237, note BF Assink (*Centaurus/Versatel I*). See for a similar decision: Tribunal of Amsterdam 6 February 2002, *JOR* 2002/61 (*Leyinvest/Vendex/KBB*).

110 Cfr. Conclusions L Timmerman to Supreme Court 14 September 2007, ECLI:NL:PHR:2007:BA4117, nr 4.16, *JOR* 2007/237 (*Centaurus/Versatel*).

111 Enterprise Chamber 20 December 2007, ECLI:NL:GHAMS:2007:BC0800, *JOR* 2008/36 (*Trafalgar/Shell*).

shareholders.¹¹² It ruled that this was an illegitimate use of the merger procedure and violated the principle of reasonableness and fairness.¹¹³

36. Criticism on the *Versatel* case law. Raaijmakers has criticised the decision of the Supreme Court in *Versatel*, because it creates uncertainty by leaving the merger open for annulment.¹¹⁴ He argued that the court should focus on the fairness of the freeze-out price, and not on the intentions behind the freeze-outs. The case law of the Dutch courts seems to require that there are other business reasons for the merger, which is similar to the business purpose test of *Singer* that used to exist in the United States (see above in paragraph 11). The same criticism that was formulated against this test applies for the Netherlands: it creates uncertainty and it can easily be circumvented by “inventing” other business reasons (see further in paragraph 50).

37. *Versatel II and III*. The question remains how minority shareholders are protected and how a fair price is guaranteed. In two other decisions in the *Versatel* case (“*Versatel I*”¹¹⁵ and “*Versatel II*”¹¹⁶), the Dutch Supreme Court confirmed a decision of the Enterprise Chamber¹¹⁷, which ruled that independent directors should remain on the supervisory board of the target company after the takeover in order to negotiate the freeze-out merger and protect the interests of the minority shareholders. These decisions have been criticised in legal scholarship for unnecessarily slowing down the process.¹¹⁸

38. Pre-wired freeze-outs. However, Dutch legal practice has avoided this requirement by using “pre-wired” or “pre-cooked” freeze-out techni-

112 The merger was structured in such a way that the minority shareholders received only cash. This was due to the exchange ratio of the merger and due to the fact that the value per share was set extremely high after a change in the articles of association of Shell Petroleum just before the merger.

113 Enterprise Chamber 20 December 2007, ECLI:NL:GHAMS:2007:BC0800, nr. 3.27, *JOR* 2008/36 (*Trafalgar/Shell*).

114 M Raaijmakers, ‘Uitstoting minderheid na gestanddoening van een openbaar overnamebod: inspiratie uit Nederland?’ in H De Wulf and C Van der Elst (eds), *De Belgische overnamewetgeving na de hervorming van 2007* (Intersentia 2008) 399, 404 and 410.

115 Supreme Court 14 September 2007, ECLI:NL:HR:2007:BA4888, *JOR* 2007/232 (*Centaurus/Versatel II*);

116 Supreme Court 14 September 2007, ECLI:NL:HR:2007:BA4887, *JOR* 2007/239, note JMM Macijer (*Centaurus/Versatel III*).

117 Enterprise Chamber 14 December 2005, ECLI:NL:GHAMS:2005:AU8151, *JOR* 2006; AA 2006, 201, note M Raaijmakers; *Ondernemingsrecht* 2006, 111, note RM Hermans (*Centaurus/Versatel II*).

118 M Raaijmakers, ‘Versatel: werkt Code Tabaksblat nog na gestanddoening openbaar bod?’ [2006] *Ars Aequi* 198, 203–206.

ques.¹¹⁹ In a pre-wired freeze-out, the post-acquisition freeze-out¹²⁰ is negotiated between the bidder and the board of the target company up front, which allows for faster implementation of the freeze-out and more deal certainty. The post-acquisition freeze-out is announced to the shareholders in the offer documents and approved by the shareholders' meeting before the takeover bid is closed. Often, shareholders are asked to grant a proxy to the bidder to vote in favour of the post-acquisition freeze-out when they tender their shares.¹²¹ The pre-wired techniques makes the requirement of *Versatel III/III* moot, as the freeze-out was already negotiated by a board that was at the moment of the bid still independent of the bidder. This solution is in conformity with the normative framework: the pre-wired structure makes clear that the post-acquisition freeze-out is just the second step of an at arm's length takeover, which implies that additional procedural safeguards are unnecessary.

39. Other conditions. In addition to the requirement "other business reasons" of *Versatel I* (which should be abolished) and the requirement of independent directors of *Versatel III/III* (which can be avoided through a pre-wired structure), legal doctrine and case law has added the following conditions for alternative freeze-out techniques:¹²²

- 1) The intention to proceed with a freeze-out should be announced in the offer documents.
- 2) The price in the post-acquisition freeze-out should be equal or as close as possible (taking into account the tax consequences) to the bid price.

119 PHC Van Leeuwen, 'De activa/passiva-transactie als uitstotingsmethode' [2011] *Vennootschap & Onderneming* 137, 141–142; PD Olden, 'Pre-wired asset sale' [2014] 145 *Weekblad voor Privaatrecht, Notariaat en Registratie* 1055; CJC de Brauw and MF Noome, 'Vijf jaar pre-wired asset sale bij openbare biedingen' [2015] 591 (7) *Tijdschrift Ondernemingsrechtpraktijk* 35, 35–40; RH Kleipool and CR Nagtegaal, 'De grensoverschrijdende fusie als pre-wired herstructurering' [2016] 510 (5) *Tijdschrift Ondernemingsrechtpraktijk* 30.

120 This can be an asset sale or a merger, although an asset sale seems to be more common recently: CJC de Brauw and MF Noome, 'Vijf jaar pre-wired asset sale bij openbare biedingen' [2015] 591 (7) *Tijdschrift Ondernemingsrechtpraktijk* 35, 36–37.

121 PHC Van Leeuwen, 'De activa/passiva-transactie als uitstotingsmethode' [2011] *Vennootschap & Onderneming* 137, 141.

122 PHC Van Leeuwen, 'De activa/passiva-transactie als uitstotingsmethode' [2011] *Vennootschap & Onderneming* 137, 138–139 and 141–142; PD Olden, 'Pre-wired asset sale' [2014] 145 *Weekblad voor Privaatrecht, Notariaat en Registratie* 1055, para 25–26; CJC de Brauw and MF Noome, 'Vijf jaar pre-wired asset sale bij openbare biedingen' [2015] 591 (7) *Tijdschrift Ondernemingsrechtpraktijk* 35, 37–39; RH Kleipool and CR Nagtegaal, 'De grensoverschrijdende fusie als pre-wired herstructurering' [2016] 510 (5) *Tijdschrift Ondernemingsrechtpraktijk* 30, 30 and 32.

- 3) It is common practice to provide the minority shareholders with a fairness opinion of an investment bank that the freeze-out price is fair.
- 4) In case of a pre-wired freeze-out, the takeover bid usually contains a condition that the post-acquisition freeze-out is only implemented if a certain percentage of shares is tendered. The market practice seems to be 80%, but lower percentages have also been used in practice.¹²³

40. Going-private freeze-outs and the EVC case. The Dutch case law discussed above related to post-acquisition freeze-outs. So far, and to my best knowledge, only one published case dealt with a going-private freeze-out, the EVC case¹²⁴. In this case, Ineos owned a controlling interest of 86,4% in EVC. It announced that it wanted to acquire all shares in EVC through a takeover bid, if necessary followed by a squeeze-out or an asset sale. After raising its price, Ineos succeeded in acquiring 92,8% of the shares. In other words, only a minority (6,4%) of the shares included in the bid (13,6%) accepted the takeover bid. Nevertheless, EVC proceeded with an asset sale to freeze out the remaining minority shareholders at the same price as the bid price. Both the bid price and the price in the asset sale were cleared by a fairness opinion by Ernst & Young Transaction Advisory Services stating that the consideration was fair. Both transactions were also approved by the independent director of EVC, who had a veto right for transactions with the controlling shareholder.

Trafalgar, a hedge fund, requested the Enterprise Chamber to investigate the takeover and the asset deal in an investigation procedure. The Enterprise Chamber rejected this request. It ruled that the fact that the majority of the directors in the supervisory board were conflicted is not a sufficient reason alone to “doubt the adequate management of the company” (which is the standard of review in an investigation procedure). The relevant question is how the actors dealt with the conflict of interest. The Enterprise Chamber considered that the independent director showed signs of real independence and ruled that this was sufficient, taking into account his veto right. It also saw no reason to doubt the fairness opinion of Ernst & Young.

123 PD Olden, ‘Pre-wired asset sale’ [2014] 145 Weekblad voor Privaatrecht, Notariaat en Registratie 1055, para 25; RH Kleipool and CR Nagtegaal, ‘De grensoverschrijdende fusie als pre-wired herstructurering’ [2016] 510 (5) Tijdschrift Ondernemingsrecht-praktijk 30, 32; CJC de Brauw and MF Noome, ‘Vijf jaar pre-wired asset sale bij openbare biedingen’ [2015] 591 (7) Tijdschrift Ondernemingsrechtpraktijk 35, 37. For example, in the recent bid of NN Group on Delta Lloyd, the acceptance threshold percentage for the post-acquisition freeze-out was only 67%.

124 Enterprise Chamber 21 December 2005, ECLI:NL:GHAMS:2005:AV1585, ARO 2006, 6 (*Trafalgar/EVC*).

41. Criticism on the EVC case. The procedural safeguards required by the Enterprise Chamber in the *EVC* case seem to be much less stringent than required in the United States under the *MFW* case law (see above in paragraph 18) and than suggested by the at arm's length standard discussed in the normative framework (see above in paragraph 13).¹²⁵ The level of protection offered is also lower than in a Dutch stand-alone squeeze-out, where the squeeze-out price is determined by the court and not by the controlling shareholder.

The Enterprise Chamber did not question the freeze-out price, despite the fact that a preceding takeover bid at the same price was not accepted by a majority of the minority shareholders (as required under the *MFW* case law in Delaware). The Enterprise Chamber also deferred to the fairness opinion and did not perform its own valuation of the shares. This contrasts with what is possible under the American appraisal remedy. It is also at odds with the criticism against fairness opinions in legal scholarship (see further in paragraph 59).¹²⁶ Finally, the independent director of EVC, while having a veto right, was the only independent director, and the conflicted directors were not excluded from the negotiations on the transaction. In other words, no "special committee of independent directors" was formed, as is customary in the United States for freeze-outs. The court decision also does not give evidence that the independent director could hire his own financial and legal advisors (as required under Delaware law). In conclusion, the risk of self-dealing in the going-private freeze-out of EVC was not taken away through an approval by a majority of the minority shareholders or by (truly) independent directors, nor through a review of the freeze-out by an external actor such as the court.

42. Conclusion. The conclusion of the case law on alternative freeze-out techniques discussed above is that these techniques are allowed in the Netherlands, but only under certain conditions.¹²⁷ For post-acquisition freeze-outs,

125 To be fair, the limited protection may be explained by the limited nature of the proceedings before the Enterprise Chamber and by the mere fact that this was possibly not argued by the parties.

126 LA Bebchuk and M Kahan, 'Fairness Opinions: How Fair Are They and What Can Be Done about It?' [1989] *Duke Law Journal* 27; SM Davidoff, 'Fairness opinions' [2006] *American University Law Review* 1557; L Enriques, 'Related Party Transactions: Policy Options and Real-World Challenges (With a Critique of the European Commission Proposal)' (3 October 2014) 25 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2505188> accessed 5 May 2017.

127 The Dutch Supreme Court has ruled in the *Versatel* case that alternative freeze-out techniques do not violate the right to property protected in article 1 of the First Protocol to the European Convention of Human Rights. See: Supreme Court 14 September 2007, ECLI:NL:HR:2007:BA4117, nr 4.4, *JOR* 2007/237, note BF Assink (*Centaurus/Versatel I*). I believe that this is correct. I also do not believe that the Dutch

there seems to be an evolution towards the regime of the United States, but some notable differences remain, such as the Dutch version of the business purpose test. Nevertheless, it is largely consistent with what was suggested in the normative framework. For going-private freeze-outs, however, case law is limited to the *EVC* case, which can be criticised because it fails to offer minority shareholders a similar level of protection as in an at arm's length transaction.

VI. Comparative and economic analysis of freeze-outs

VI.1. Post-acquisition freeze-outs

43. Introduction. The previous parts described the regime on freeze-outs in the United States (Delaware), the European Union (the harmonised regime of the Takeover Directive and some of the general characteristics of European countries) and the Netherlands. It is clear that the possibility of freeze-outs as such is widely accepted. However, there are some notable differences in the approach to freeze-outs in the United States as compared to the one in the European Union. In this part, these different legal systems are compared and evaluated, relying on the normative framework established in part II.

44. Threshold: 50% (US) vs. 90–95% (EU) vs. 80% (NL). The most important difference is the different threshold of shares at which freeze-outs are available. In the United States, cash mergers are available at a threshold of 50% of the shares, while the European statutory squeeze-out procedure is only available at a threshold of 90–95%. In the Netherlands, the threshold for freeze-outs has in practice been lowered by allowing alternative freeze-out techniques. A merger only needs a supermajority of two thirds of the shares, while a simple majority is enough for a *de facto* merger. However, it seems to be market practice in pre-wired freeze-outs to require that the bidder acquires at least 80% of the shares through the takeover bid (see above in paragraph 25). This puts the threshold in the Netherlands lower than for the European squeeze-out, but not yet quite as low as in the United States.

45. The right threshold for freeze-outs: arguments in favour of a majority threshold. Relying on the normative framework, this article now analyses the efficiency of the different thresholds in the United States and the European Union. Amihud, Kahan and Sundaram assumed a threshold of 50% of the

regime violates the Takeover Directive. However, I leave both questions to further research, for reasons of brevity of this article.

shares in their model for freeze-outs (see above in paragraph 8),¹²⁸ which is also the threshold under Delaware law (see above in paragraph 14). The reasoning behind this is that the majority is assumed to be more likely to be right than the minority on the value of the company, provided that the shareholders are disinterested.¹²⁹ Or, as Gilson puts it: “*A majority requirement [is] based on the simple assumption that if more shareholders favor a transaction than oppose it, the gains to those favoring it will exceed the losses to those opposing it and, therefore, the transaction will result in a net gain.*”¹³⁰ Bebchuk has argued that a simple majority decision best approximates the decision that a sole owner would make.¹³¹ Another argument for a simple majority threshold is that supermajority requirements lead to a possibility of strategic voting, such as holdout behavior.¹³²

However, insights from behavioral law and economics seem to suggest that the majority of shareholders may not be right, because shareholders do not always act rationally when deciding to tender or not, but are subject to systematic biases.¹³³ In addition, law and economics scholars also indicate that the 50% threshold is not per se required to solve the free rider and holdout problem¹³⁴, although the threshold must be sufficiently low.

128 Y Amihud, M Kahan and RK Sundaram, ‘The foundation of freeze-out laws in takeovers’ [2004] *The Journal of Finance* 1325, 1328 and 1340.

129 LA Bebchuk, ‘Toward undistorted choice and equal treatment in corporate takeovers’ [1985] *Harvard Law Review* 1693, 1702 and 1759-1761; Z Goshen, ‘Controlling strategic voting: property rule or liability rule’ [1997] *California Law Review* 741, 744–745; Z Goshen, ‘The efficiency of controlling corporate self-dealing: theory meets reality’ [2003] *California Law Review* 393, 399–400 and especially footnote 11.

130 RJ Gilson, *The law and finance of corporate acquisitions* (Foundation Press 1986) 506–507. Gilson immediately nuances this statement, however, by admitting that it is possible that the minority attaches more importance to the issue than the majority, resulting in a net loss for society.

131 LA Bebchuk, ‘The sole owner standard for takeover policy’ [1988] *The Journal of Legal Studies* 197, 198 and especially footnote 2.

132 Z Goshen, ‘Controlling strategic voting: property rule or liability rule’ [1997] *California Law Review* 741, 758 and 794. Strategic voting is the phenomenon where shareholders adapt their voting behavior to how they think other shareholders will vote, such as for example in case of the free rider problem and the holdout problem (see paragraphs 8 and 9).

133 For an overview of these biases, see: D Kahneman, *Thinking fast and slow* (Farrar, Straus and Giroux 2013). See the more detailed discussion in paragraph 53.

134 LA Bebchuk, ‘Toward undistorted choice and equal treatment in corporate takeovers’ [1985] *Harvard Law Review* 1693, 1702 and especially footnote 20; Y Amihud, M Kahan and RK Sundaram, ‘The foundation of freeze-out laws in takeovers’ [2004] *The Journal of Finance* 1325, 1340.

On the other hand, some authors have pointed out that if we take into account the fact that shareholders differ in their valuation of the company, the high threshold of 90–95% in the European Union may prevent some value increasing takeovers from taking place.¹³⁵ Indeed, in such case, the bidder must offer a higher takeover premium to attract enough shareholders in order to reach the threshold, which may cause some efficient takeovers to be no longer profitable for the bidder. In addition, if the threshold is set too high, for example at 95% as in the Netherlands, a minority shareholder only needs to acquire slightly more than 5% of the shares to become a holdout.¹³⁶ The case law in the Netherlands indicates that institutional investors in the Netherlands frequently succeed in this strategy.¹³⁷

46. Reasons that could justify a higher threshold: property rights of shareholders. Several factors could justify the difference in threshold between the United States and Europe.¹³⁸ Ventruruzzo has explained the difference in threshold through the different views on shareholders: in the United States, a shareholder is regarded as an investor with only a financial interest in the company, while the law in the European Union views a shareholder as a holder of property rights.¹³⁹ In the first view, freeze-outs can be allowed as long as shareholders are compensated for the fair value of their investment.¹⁴⁰ In the

135 M Burkart and F Panunzi, 'Mandatory Bids, Squeeze-out, Sell-out and the Dynamics of the Tender Offer Process' (2003) ECGI Working Paper Series in Law nr. 10/2003, 19 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=420940> accessed 5 May 2017. See also (more implicitly): C Van der Elst and L Van den Steen, 'Opportunities in the M&A Aftermarket: Squeezing Out and Selling Out' (2006) Universiteit Gent Financial Law Institute Working Paper No. 2006-12, 11–12 <<https://ssrn.com/abstract=933609>> accessed 5 May 2017.

136 This point is also noted by Z Goshen, 'Controlling strategic voting: property rule or liability rule' [1997] *California Law Review* 741, 756.

137 Similarly, a group of shareholders in the Belgian company Spadel, represented by Deminor, gathered just above 5% of the shares, which is enough to block a squeeze-out by the controlling shareholder and prevent a delisting. Consequently, Spadel remains listed on Euronext Brussels. See: Deminor, 'Deminor represents 5% of the capital of Spadel' (2 December 2015) <<http://www.deminor.be/sgs/en/news/6807/deminor-represents-5-of-the-capital-of-spadel>>.

138 For an overview of these factors, see M Ventruruzzo, 'Freeze-outs: transcontinental analysis and reform proposals' [2010] *Virginia Journal of International Law* 841, 908–912.

139 M Ventruruzzo, 'Freeze-outs: transcontinental analysis and reform proposals' [2010] *Virginia Journal of International Law* 841, 911–912. See also: L Pinta, 'The U.S. and Italy: controlling shareholders' fiduciary duties in freeze out mergers and tender offers' [2011] *NYU Journal of Law & Business* 931, 936 and 977.

140 See for example the quote: '*shareholders are investors, not sentimental collectors*' in: FA Gevurtz, *Corporation law* (West 2000) 771.

second view, freeze-outs are a restriction property rights, which are protected *inter alia* by article 1 of the First Protocol to the ECHR.¹⁴¹

The question is whether the property rights of shareholders justify a threshold of 90–95% for freeze-outs. In my opinion, they do not, because it is very logical that a small shareholder in a listed company without any meaningful influence on the company policy is mainly an investor and not a co-proprietor of the company.¹⁴² Even larger institutional investors, with for example 5–10% of the shares, are normally only interested in the financial returns of their investment. They may legitimately believe that the freeze-out price under-values the shares of the company from a long-term perspective, but this is then an issue of what constitutes a fair price in the freeze-out (see further in paragraph 51) and should not concern the possibility of a freeze-out as such. Some larger shareholders could be considered more than simple “investors” and more like “owners”, such as for example the family shareholders that founded the company. These shareholders may not necessarily own a majority of shares, but rather something like 20–30% of the shares, which can still be a controlling interest. Protecting such shareholders against being frozen out could justify increasing the threshold for freeze-outs, but a threshold as high as 90–95% seems excessive. In addition, such shareholders could agree to exclude the possibility of a freeze-out at a lower threshold in the articles of association or a shareholders’ agreement if they consider this desirable.

47. Supermajority requirements for fundamental changes. Another argument that justifies a higher threshold for freeze-outs in the European Union relates to the shareholder structure: while the shareholder structure in the United States is dispersed, the shareholder structure in (continental) Europe is mainly concentrated.¹⁴³ As a consequence, protection of minority shareholders against the controlling shareholder is more important in Europe. For this reason, fundamental changes to the company, including freeze-outs, are typi-

141 See for example the quote: ‘*L’actionnaire est membre de la société; il ne peut pas être privé de cette qualité parce qu’il y aurait là une véritable expropriation. C’est seulement avec son consentement que son droit peut disparaître.*’ See: M. GERMAIN (G. RIPERT en R.ROBLOT, eds.), *Traité de droit commercial*, I.2 (les sociétés commerciales), Paris, L.G.D.J., 2002, 376.

142 Some shareholders, for example employees of the company, may hold shares in a company for sentimental reasons. These shareholders are indeed interested in more than the financial value of their investment. Nevertheless, I believe that the interests of the controlling shareholder in performing the freeze-out and making the company more efficient should take precedence over those of a few sentimental shareholders.

143 J Armour, H Hansmann, R Kraakman and M Pargendler, ‘What is corporate law?’ in R Kraakman and others (eds), *The anatomy of corporate law. A comparative and functional approach* (3rd edn, OUP 2017) 25–26.

cally subject to supermajority requirements in order to give the larger minority shareholders a veto right.¹⁴⁴ This can be called a “property rule” type of protection: if a minority shareholder owns a certain percentage of shares, he can prevent that his rights are taken away without his consent, even if the transaction would be fair.¹⁴⁵ A simple majority threshold for freeze-outs in Europe may make it too easy for the controlling shareholder to eliminate even the larger minority shareholders, while in the United States, a threshold of 50% is already quite high due to the dispersed shareholder structure.

48. The right threshold: conclusion. In conclusion, the threshold of 90–95% for freeze-outs in the European Union seems excessively high¹⁴⁶, as it increases takeover premia to inefficiently high levels and fails to eliminate the free rider problem and the holdout problem completely. Setting a lower threshold for freeze-outs would facilitate (efficient) control shifts, as acquiring complete control becomes easier.¹⁴⁷ On the other hand, there are sound policy reasons, based on the property rights of shareholders and the concentrated shareholder structure in the European Union, that could justify a supermajority requirement.

144 E Rock, P Davies, H Kanda, R Kraakman and WG Ringe, ‘Fundamental changes’ in R Kraakman and others (eds), *The anatomy of corporate law. A comparative and functional approach* (3rd edn, OUP 2017) 175. However, it is unclear whether a certain shareholder structure has led to a particular legal regime, or vice versa.

145 Goshen defines a ‘property rule’ in the context of self-dealing as: ‘A *property rule* prevents any contemplated transaction tainted with self-dealing from proceeding without the minority owners’ consent.’ A property rule should be distinguished from a liability rule: ‘A *liability rule* allows transactions tainted with self-dealing to be imposed on an unwilling minority but ensures that the minority is adequately compensated in objective market-value terms.’ See Z Goshen, ‘The efficiency of controlling corporate self-dealing: theory meets reality’ [2003] *California Law Review* 393, 398. This distinction is based on the seminal article G Calabresi and AD Melamed, ‘Property Rules, Liability Rules, and Inalienability: One View of the Cathedral’ [1972] *Harvard Law Review* 1089. From the perspective of an individual shareholder, a freeze-out is like a liability rule, because their shares can be taken without their consent in exchange for a fair price. Looking at a freeze-out from the perspective of the group of shareholders, it becomes more like a property rule: the shareholders as a group need to give their consent to the freeze-out. The higher the threshold for freeze-outs is set, the more important the property rule element becomes. However, this also increases the risk of holdout behavior.

146 For a similar stance: CA Krebs, ‘Freeze-out transactions in Germany and the U.S.: a comparative analysis’ [2012] *German Law Journal* 941, 975 (also arguing that the threshold should be reduced to 75%).

147 P Davies and K Hopt, ‘Control transactions’ in R Kraakman and others (eds), *The anatomy of corporate law. A comparative and functional approach* (2nd edn, OUP 2009) 265.

In my view, it would make sense in a European context to put the threshold for freeze-outs at an equal level as for other fundamental changes, i.e. two thirds or three quarters of the shares in most European countries.¹⁴⁸ Indeed, if a legal system gives the right to a certain minority to oppose a change to the articles of association, it is logical to give them a similar right to oppose a freeze-out, which is an even more drastic change because it cashes out the minority shareholders. A threshold of two thirds or three quarters of the shares should be high enough to protect the larger minority shareholders, but also low enough to eliminate the free rider problem and the holdout problem. Indeed, it seems relatively unlikely under such a rule that a minority shareholder in a listed company would acquire 25% or more of the shares to block a freeze-out if he simply intends to free ride or hold out.¹⁴⁹ This solution would not lead to a radical departure from the European view of shareholders as property rights holders, but to a more nuanced view, and it also corresponds to what is currently already possible in the Netherlands.

49. Implementation of a lower threshold in the European Union. The lower threshold proposed in the previous paragraph could be implemented in two ways: either the threshold for squeeze-outs in the Takeover Directive and in national law can be lowered, or national member states can decide to allow alternative freeze-out techniques, such as mergers and asset sales. The first option would require an agreement at the European level, which may prove politically difficult and time-consuming, considering that the topic is complex and relates to the core of how we view shareholders in company law. In addition, since the topic is not yet much discussed in European legal scholarship, it seems that the time is not yet ripe for EU harmonization. Therefore, it seems better to opt for the second option and allow member states to experiment with their national law, as is already occurring in several member states (see above in paragraph 5).

50. Transplanting Dutch law on alternative freeze-out techniques. Due to the lower threshold for freeze-outs, the Dutch regime on alternative freeze-out techniques is already more efficient than the European regime on squeeze-outs. The analysis above in part V also revealed that Dutch law on alternative

148 Even Goshen, who argues strongly in favour of a simple majority rule to eliminate the holdout problem (see above in paragraph 45), admits that there may be various policy reasons for a supermajority requirement for mergers and that in such case the freeze-out decision also needs the same supermajority approval. Z Goshen, 'Controlling strategic voting: property rule or liability rule' [1997] *California Law Review* 741, 769 and 800.

149 Nevertheless, a shareholder that is large enough could still try to hold out. Cfr. by analogy the example concerning a merger in: Z Goshen, 'Controlling strategic voting: property rule or liability rule' [1997] *California Law Review* 741, 768–769.

freeze-out techniques is well-developed and largely consistent with the normative framework, at least concerning post-acquisition freeze-outs. Hence, the Dutch regime can serve as model for alternative freeze-out techniques in other European countries.

However, several improvements can be made. Most importantly, the requirement of a valid “business purpose” should be abandoned (see the criticism above in paragraph 36). Indeed, it is economically efficient to allow mergers to be used for the mere purpose of freezing out minority shareholders. In addition, the business purpose test creates uncertainty, can be easily circumvented¹⁵⁰ and does not offer meaningful protection to shareholders, who are investors that are mainly interested in the fair value of their shares.¹⁵¹ Second, the unavailability of cash mergers, while not making freeze-out mergers impossible, complicates the transaction structure. Therefore, this article proposes to introduce the possibility of cash mergers (at least for listed companies¹⁵²), as some of the Dutch authors have already proposed.¹⁵³ Finally, this article supports the Dutch authors who plead in favour of an appraisal remedy.¹⁵⁴ Instead of blocking the freeze-out through an annulment claim or a request for

150 See paragraph 39: in the Netherlands, courts are very flexible in accepting various reasons as a valid business purpose. Therefore, it seems better to completely abolish this requirement.

151 See paragraph 46 for a nuanced discussion of the ‘shareholder as investor’ assumption. The fact that some shareholders can also be considered as ‘owners’ is already reflected in the higher threshold for freeze-outs.

152 This article confined itself to the study of freeze-outs in listed companies. Further research would be needed to determine whether cash mergers are also desirable in closely held companies.

153 M Raaijmakers, ‘Uitstoting minderheid na gestanddoening van een openbaar overnamebod: inspiratie uit Nederland?’ in H De Wulf and C Van der Elst (eds), *De Belgische overnamewetgeving na de hervorming van 2007* (Intersentia 2008) 410; M Raaijmakers and PA van der Schee, ‘Regulering en handhaving van overnamebiedingen in perspectief’ in MP Nieuwe Weme and others (eds), *Handboek openbaar bod* (Kluwer 2008) 1174.

154 See for example: M Raaijmakers, ‘Uitstoting minderheid na gestanddoening van een openbaar overnamebod: inspiratie uit Nederland?’ in H De Wulf and C Van der Elst (eds), *De Belgische overnamewetgeving na de hervorming van 2007* (Intersentia 2008) 405 and 410; M Raaijmakers and PA van der Schee, ‘Regulering en handhaving van overnamebiedingen in perspectief’ in MP Nieuwe Weme and others (eds), *Handboek openbaar bod* (Kluwer 2008) 1172 and 1174; EH Rebers and RH Maatman, ‘De rol van aandeelhouders bij een openbaar bod’ in MP Nieuwe Weme and others (eds), *Handboek openbaar bod* (Kluwer 2008) 396–397; PJ van der Korst, ‘Minderheidsaandeelhouders na een geslaagd bod’ in MP Nieuwe Weme and others (eds), *Handboek openbaar bod* (Kluwer 2008) 867; WB Kuijpers and A van der Krans, ‘De positie van minderheidsaandeelhouders en het openbaar bod’ [2014] *Onderneming & Financiering* 19, 28–30. In the Netherlands, some form of appraisal remedy (called ‘*uittree-*

an investigation procedure, minority shareholder should (only) receive the right to the fair value of their shares. These proposals fit with the idea of the shareholders as investor (see above in paragraph 46).

51. Fair price (post-acquisition freeze-outs). Both under the view of the shareholder as investor and the view of the shareholder as a property rights holder, minority shareholders should be frozen out at a “fair price”. However, the exact implementation of the fair price requirement is very different in the United States and the European Union.¹⁵⁵ This paragraph focuses on the fair price in post-acquisition freeze-outs. The fair price requirement in going-private freeze-outs is discussed further in part VI.2.

In the United States, acceptance by a simple majority of the tendering shareholders is sufficient to establish a presumption of a fair price (see above in paragraph 23). The Takeover Directive in the European Union, on the other hand, requires an acceptance by 90% of the tendering shareholders to establish a presumption of fair price (article 15(5) – see above in paragraph 26). If this threshold is not reached, most member states rely on external actors, such as a court, financial supervisor and/or an independent expert, to establish a fair price (see above in paragraph 26). Dutch law on alternative freeze-out techniques does not mention a requirement that the takeover bid is accepted by a certain percentage of shares in order for the bid price to be fair. However, the freeze-out price must be equal to the bid price and it is common practice to provide a fairness opinion by an investment bank (see above in paragraph 25). In addition, the fact that the threshold for the post-acquisition freeze-out is commonly set at 80% in practice already implies that the takeover bid is accepted by most of the shareholders.¹⁵⁶

52. Evaluation of the fair price presumption: *pro* a 50% threshold. Kaisanlahti has criticised the European threshold of 90% for the fair price presumption and argued in favour of a simple majority threshold.¹⁵⁷ Ventruruzzo and Pinta, on the other hand, have argued for increasing the American threshold of

drecht’) is already possible for cross-border mergers (see article 2:333 Dutch Civil Code).

155 M Ventruruzzo, ‘Freeze-outs: transcontinental analysis and reform proposals’ [2010] *Virginia Journal of International Law* 841, 906; T Kaisanlahti, ‘When is a tender price fair in a squeeze-out?’ [2007] *European Business Organization Law Review* 497, 505–507.

156 Again, it must be stressed that this reasoning only applies to post-acquisition freeze-outs as defined in this article: freeze-outs that are preceded by a takeover bid by an *independent* bidder. If this not the case, the more stringent regime for post-going private freeze-outs should apply.

157 T Kaisanlahti, ‘When is a tender price fair in a squeeze-out?’ [2007] *European Business Organization Law Review* 497, 507–509.

50%.¹⁵⁸ I agree with Kaisanlahti that a threshold of 50% for the fair price presumption makes more sense, if one assumes that shareholders are rational.¹⁵⁹ In such case, the majority of the tendering shareholders is more likely to be right than the minority about the valuation of the shares.¹⁶⁰ Since in principle all shareholders have access to the same information on the company due to the disclosure obligations for listed companies, there seems to be no reason why a minority of the shareholders would be more likely to value the shares better than a majority of the shareholders. In addition, if the high threshold of 90% is not reached in the European Union, the valuation is done by external actors, which is very costly. These valuations are also often imprecise and often only result in a rough price fork for the value of shares¹⁶¹, and are therefore unlikely to produce a fairer price than the estimation of a majority of the shareholders. In addition, in Dutch court decisions on squeeze-outs, courts have often deferred to the bid price as a fair price if the bid was “widely accepted”, even outside the situation of the legal presumption of 90% acceptance.¹⁶²

53. Some nuances to the 50% threshold. The argument from the paragraph above should be nuanced. First, as Kaisanlahti has argued, minority shareholders should be able to rebut the presumption of a fair price if special circumstances are present.¹⁶³ Such circumstances can include, for example, the presence of material undisclosed information on the company or a significant lapse of time between the freeze-out and the takeover bid. In addition, the presumption could be rebutted by the presence of a shareholder with a controlling interest, which can be as low as 20 to 30% of the shares.¹⁶⁴ In that

158 M Ventoruzzo, ‘Freeze-outs: transcontinental analysis and reform proposals’ [2010] Virginia Journal of International Law 841, 913–914; L Pinta, ‘The U.S. and Italy: controlling shareholders’ fiduciary duties in freeze out mergers and tender offers’ [2011] NYU Journal of Law & Business 931, 965. These proposals were made in the context of going-private freeze-outs, however.

159 It should be kept in mind that this paragraph discusses the threshold for the fair price presumption here, and not the threshold for freeze-outs as such. In the latter case, arguments can be made in favour of giving the right to larger minority shareholders not to be frozen out (see above in paragraphs 46 and following).

160 T Kaisanlahti, ‘When is a tender price fair in a squeeze-out?’ [2007] European Business Organization Law Review 497, 507–509. Cfr. also above in paragraph 45 on the simple majority requirement.

161 This is also argued by T Kaisanlahti, ‘When is a tender price fair in a squeeze-out?’ [2007] European Business Organization Law Review 497, 504.

162 T Saleminck, *Uitkoop van minderheidsaandeelhouders* (Kluwer 2014) 209–212.

163 T Kaisanlahti, ‘When is a tender price fair in a squeeze-out?’ [2007] European Business Organization Law Review 497, 510–517.

164 T Kaisanlahti, ‘When is a tender price fair in a squeeze-out?’ [2007] European Business Organization Law Review 497, 513.

case, the stricter regime for going-private freeze-outs should apply (see further in part VI.2).

Second, the shares included in the calculation of the threshold should only include shares owned by *disinterested* shareholders.¹⁶⁵ This means that the shares of the bidder and its affiliates are excluded from the threshold calculation. In addition, shares of shareholders who have interests in the success of the takeover bid that differ from those of the other shareholders, such as management or shareholders who are or will become a shareholder in the bidder, should be watched closely and possibly excluded as well. Such a rule may not always be easy to apply for a court, but it will probably be easier than to come up with an independent valuation of the target company.

Third, the rationality assumption for shareholders can be relaxed and we can accept that they may be subject to systematic biases when deciding whether to tender or not. To my best knowledge, there is no literature in behavioral economics or behavioral finance that indicates that shareholders' decisions to tender are biased either in favour or against tendering their shares. Awaiting further research on this point, it may be best to set the threshold at a neutral level, *i.e.* 50%. On the other hand, existing behavioral literature indicates that people in general are subject to a risk aversion bias when choosing between a certain gain and a probabilistic larger gain.¹⁶⁶ In addition, previous research also shows that people hyperbolically discount future gains.¹⁶⁷ If we consider that rejecting a certain profit in an actual takeover bid in favour of a merely potential future takeover bid at a higher price is a riskier strategy that also involves future long-term gains instead of short-term gains, there may be a bias in favour of accepting a takeover bid. This bias may be stronger for retail investors than for institutional investors, who are more sophisticated and typically have a more long-term investment horizon.¹⁶⁸ This fact could exacerbate this bias in continental European countries, which typically have less

165 Cfr. the idea of the 'majority of the minority' in the United States, discussed above in paragraph 18.

166 Most people prefer to receive \$900 for sure, rather than having a 90% chance to receive \$1000. See: D Kahneman, *Thinking fast and slow* (Farrar, Straux and Giroux 2013) 279–280.

167 C Jolls, CR Sunstein and R Thaler, 'A Behavioral Approach to Law and Economics' [1998] *Stanford Law Review* 1471, 1539; referring to: D Laibson, 'Golden Eggs and Hyperbolic Discounting' [1997] *Quarterly Journal of Economics* 443. These authors note that people prefer a smaller reward in the present to a larger reward in the future.

168 Kahneman notes '*professional risk takers in the financial markets are more tolerant of losses, probably because they do not respond emotionally to every fluctuation.*' See: D Kahneman, *Thinking fast and slow* (Farrar, Straux and Giroux 2013) 284.

institutional investors.¹⁶⁹ The presence of such a bias, which remains speculative until further (empirical) research is conducted on this point, may justify putting the acceptance threshold at a higher level to offset the bias, for example at two thirds of the shares. Setting the threshold at 90%, however, seems excessively high.

54. Interim conclusion: post-acquisition freeze-outs. So far, the comparative and economic analysis in this article has focused on post-acquisition freeze-outs. The conclusion is that the regime in the United States is largely in compliance with the normative framework. The harmonised regime of the Takeover Directive, on the other hand, has some serious shortcomings, especially the excessively high threshold for freeze-outs and for the fair price presumption. The Dutch regime for alternative freeze-out techniques is considerably more efficient in this regard: (1) it lowers the threshold for freeze-outs to a level that can be considered efficient in a European context; (2) it relies on the bid price for the determination of the fair price; and (3) taking into account the recent market practice of pre-wired freeze-outs, no unnecessary procedural safeguards are imposed on post-acquisition freeze-outs. Hence, the Dutch regime, together with the regime in the United States, can serve as a model for post-acquisition freeze-outs that can be transplanted to other European countries, taking into account the changes proposed above in paragraph 50.

VI.2. *Going-private freeze-outs*

55. Going-private freeze-outs in the United States. This article now evaluates the legal regimes for going-private freeze-outs. The Delaware regime seems to be largely in compliance with the normative framework (see paragraph 12): it allows going-private freeze-outs, but it relies on additional procedural safeguards replicate the level of protection offered in an at arm's length transaction (see paragraph 21). Under the *MFW* case law, going-private freeze-outs must be approved by a special committee of independent directors and by a majority of the minority shareholders, which can both be considered "internal actors".

169 This is not true for all countries, however. The Netherlands has a relatively large presence of institutional investors. See: E Gonnard, EJ Kim and I Ynesta, 'Recent trends in institutional investors statistics' [2008] *OECD Journal: Financial Market Trends* 299; OECD, 'OECD Institutional Investors Statistics 2015' (30 May 2016) <http://www.oecd-ilibrary.org/finance-and-investment/oecd-institutional-investors-statistics-2015_instinv-2015-en> accessed 5 May 2017.

56. Going-private freeze-outs in the European Union. For going-private freeze-outs in the European Union, the same critique as for post-acquisition squeeze-outs can be made: the threshold for squeeze-outs is too high (see paragraph 44 and following). This discussion is not repeated here. The approach to the protection of minority shareholders is very different in the European Union, as compared to the United States: external actors (such as courts, the financial supervisor or independent experts) play a larger role for squeeze-outs in the European Union, while internal actors (independent directors and minority shareholders) hardly play any role at all.

57. Evaluation of procedural safeguards. Which system is more efficient, internal actors or external actors? In the normative framework (paragraph 13), this article stated that the law on going-private freeze-out should establish procedural safeguards that aim to eliminate the element of self-dealing and replicate the protection offered in an at arm's length takeover transaction (the "at arm's length standard"). At first sight, the at arm's length standard can best be fulfilled by requiring an intervention by the same internal actors as for an at arm's length transaction, *i.e.* directors and shareholders, but excluding the conflicted persons. This way, the combination of an approval by a special committee of independent directors and a majority of the minority shareholders, as required under *MFW* seems to replicate an at arm's length transaction.

However, it is somewhat questionable whether this approach can fully replicate an at arm's length transaction. The special committee in a going-private freeze-out has little alternatives in the negotiation with the controlling shareholders. It can look for another potential buyer, but if the controlling shareholder refuses to sell his shares, this is unlikely to succeed. Case law in both Delaware¹⁷⁰ and the Netherlands¹⁷¹ has held that the controlling shareholder is under no obligation to sell his shares, nor to match the price offered by a third party. Therefore, the negotiation process with the special committee does not necessarily guarantee a fair price, unlike as in an at arm's length transaction. This may justify the intervention of an external actor to ensure a fair price,

170 *In re Books-A-Million, Inc. Stockholders Litigation*, 2016 WL 5874974 (Del. Ch. 2016). For a discussion see: S Epstein and G Weinstein, 'Books-A-Million Demonstrates the Power of MFW' (*HLS Forum on Corporate Governance and Financial Regulation*, 17 November 2017) <<https://corpgov.law.harvard.edu/2016/11/17/book-s-a-million-demonstrates-the-power-of-mfw/>> accessed 7 April 2017.

171 *Enterprise Chamber 21 March 2017, ECLI:NL:GHAMS:2017:930 (Talpa/Telegraaf Media Groep)*, For a discussion see: T Vos, "'Nee is nee' – lessen uit de zaak Telegraaf Media Groep (TMG)" (*Corporate Finance Lab*, 22 March 2017) <<https://corporatelifnancelab.org/2017/03/22/nee-is-nee-lessen-uit-de-zaak-telegraaf-media-groep-tmg/>> accessed 7 April 2017.

such as the courts in the Delaware appraisal procedure or in the Dutch squeeze-out procedure. Nevertheless, external actors also have disadvantages. Below, the advantages and disadvantages of each approach are analyzed.

58. External actors: courts or financial supervisor. The main advantage of an approach that relies on external actors (especially courts or the financial supervisor) is that these are per definition most likely to be independent and unconflicted in the freeze-out. On the other hand, the intervention of external actors is very costly, in comparison to protection provided by internal actors.¹⁷² In addition, courts often lack the necessary means and expertise to engage in a valuation of the shares. Indeed, the valuation of a company is very complex and requires courts with financial knowledge and practical experience that function efficiently.¹⁷³ Therefore, the intervention of external actors should be avoided as much as possible, to the extent that internal actors are an effective way of protecting minority shareholders.

59. External actors: fairness opinions by independent experts. Another type of protection by external actors is a “fairness opinion” on the freeze-out price by an independent expert, such as an investment bank or another corporate finance professional. However, legal scholarship has questioned the value of such fairness opinions.¹⁷⁴ First, the determination of the transaction price often leaves substantial discretion to the investment bank, which leads to a large degree of subjectivity. Second, the investment bank often has a conflict of interest: it has an incentive to deliver a board-friendly opinion, because of the way its fees are calculated by the bidder, because it does not want to lose its clients, and because of the feeling of loyalty towards those people who appointed the investment bank. Bebchuk and Kahan argue that this is not fully remedied by reputational concerns, liability of the investment bank or internal procedures that guarantee the independence of the investment bank.¹⁷⁵

Therefore, it can be argued that, while fairness opinions can be useful if certain conditions are fulfilled, courts should not rely too much on them, as they are a

172 See in general: B Black and R Kraakman, ‘A Self-Enforcing Model of Corporate Law’ [1996] *Harvard Law Review* 1911.

173 Z Goshen, ‘The efficiency of controlling corporate self-dealing: theory meets reality’ [2003] *California Law Review* 393, 419–420.

174 LA Bebchuk and M Kahan, ‘Fairness Opinions: How Fair Are They and What Can Be Done about It?’ [1989] *Duke Law Journal* 27; SM Davidoff, ‘Fairness opinions’ [2006] *American University Law Review* 1557; L Enriques, ‘Related Party Transactions: Policy Options and Real-World Challenges (With a Critique of the European Commission Proposal)’ (3 October 2014) 25 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2505188> accessed 5 May 2017.

175 LA Bebchuk and M Kahan, ‘Fairness Opinions: How Fair Are They and What Can Be Done about It?’ [1989] *Duke Law Journal* 27, 43–46.

rather weak procedural safeguard for minority shareholders. This seems to suggest that the Dutch *EVC* case, where the court relied almost exclusively on a fairness opinion, should not be followed (see above in paragraph 40 and 41).

60. Internal actors: independent directors. When we look at the protection of minority shareholders by internal actors, it has been argued that directors who are independent from the controlling shareholder can provide effective protection of minority shareholders in going-private freeze-outs (cfr. above in paragraph 21). The question is, however, whether independent directors can be truly independent. Several authors have argued that independent directors have been primarily designed to protect shareholders against the management of the company (first agency problem), but that they fail to protect minority shareholders against the controlling shareholder (second agency problem).¹⁷⁶ Because independent directors are still appointed and dismissed by the shareholders' meeting (i.e. the controlling shareholder), they may fear for their position if they oppose the controlling shareholder too vehemently in the freeze-out negotiations.

Nevertheless, solutions to this problem are possible, such as giving minority shareholders the exclusive right to appoint and dismiss (some of) the independent directors ("minority directors") or giving them a veto right in these decisions.¹⁷⁷ These solutions ensure that the independent directors are also truly independent from the controlling shareholder. On the other hand, this desire to ensure the independence of directors from the controlling shareholder must be balanced with the ability for the controlling shareholder to manage the company according to his own vision.¹⁷⁸ Legal scholarship has not yet come to a conclusive answer in this debate, but the discussion above shows that rules can be designed to ensure the independence of the directors from the

176 M Gutiérrez and M Sáez, 'Deconstructing independent directors' [2013] *Journal of Corporate Law Studies* 63; LA Bebchuk and A Hamdani, 'Independent directors and controlling shareholders' [2017] *University of Pennsylvania Law Review* 1271.

177 M Gutiérrez and M Sáez, 'Deconstructing independent directors' [2013] *Journal of Corporate Law Studies* 63, 86 and 91; WG Ringe, 'Independent directors: after the crisis' [2013] *European Business Organization Law Review* 401, 421–423; N Hallemeesch, 'Belangenconflicten van meerderheidsaandeelhouders. Zoektocht naar betere minderheidsbescherming vanuit rechtseconomisch en rechtsvergelijkend perspectief' [2017] *TRV-RPS* 5, 35–36; LA Bebchuk and A Hamdani, 'Independent directors and controlling shareholders' [2017] *University of Pennsylvania Law Review* 1271, 1295–1298.

178 LA Bebchuk and A Hamdani, 'Independent directors and controlling shareholders' [2017] *University of Pennsylvania Law Review* 1271, 1307 and 1311. See for a discussion of why it is important that the controlling shareholders is allowed to manage the company according to its own vision: Z Goshen and A Hamdani, 'Corporate control and idiosyncratic vision' [2016] *Yale Law Journal* 560.

controlling shareholder, so that minority shareholders can be protected effectively.

61. Internal actors: majority of the minority shareholders. Another form of protection of minority shareholders by internal actors is the approval of the freeze-out by a majority of the minority shareholders, as under Delaware law. This is supposed to function as a market check on the behavior of the independent directors (cfr. above in paragraph 21). This concept is relatively unknown in a European context.¹⁷⁹ Some authors have pointed out that the quality of a shareholder vote is enhanced by the presence of institutional investors in the ownership of the company, as these investors are generally better informed and can enter into informal negotiations with the board.¹⁸⁰ However, some continental European countries, such as for example Germany and Belgium, have a relatively small ownership percentage of institutional investors, in contrast to the United Kingdom, the Netherlands and the United States.¹⁸¹ This can reduce the effectiveness of the majority of the minority approval as a means of protecting minority shareholders in those countries. This is especially problematic if retail investors are also more susceptible to behavioral biases, as was suggested above in paragraph 53.

A possible solution for the absence of institutional shareholders is raising the threshold for the majority of the minority approval, for example to two thirds of the shares or even to 90% as in the European squeeze-out. The argument in favour of a higher threshold for majority of the minority approval is stronger here than for post-acquisition freeze-outs (cfr. above in paragraph 51 and following), due to the increased risk of self-dealing in going-private freeze-outs. Theoretically, raising the threshold may cause some of the larger shareholders to act as a holdout¹⁸², but this seems unlikely as the minority shareholder would need a very high ownership of shares to do so. Another counter-

179 However, France and the United Kingdom do know the concept of 'majority of the minority approval' in related party transactions (respectively article L.225-40 Code de commerce and Listing Rule 11.1.7).

180 Z Goshen, 'The efficiency of controlling corporate self-dealing: theory meets reality' [2003] *California Law Review* 393, 415–416 and 423–424; N Hallemeesch, 'Belangenconflicten van meerderheidsaandeelhouders. Zoektocht naar betere minderheidsbescherming vanuit rechtseconomisch en rechtsvergelijkend perspectief' [2017] *TRV-RPS* 5, 49.

181 E Gonnard, EJ Kim and I Ynesta, 'Recent trends in institutional investors statistics' [2008] *OECD Journal: Financial Market Trends* 299; OECD, 'OECD Institutional Investors Statistics 2015' (30 May 2016) <http://www.oecd-ilibrary.org/finance-and-investment/oecd-institutional-investors-statistics-2015_instinv-2015-en> accessed 5 May 2017.

182 Cfr. by analogy the example concerning a merger in: Z Goshen, 'Controlling strategic voting: property rule or liability rule' [1997] *California Law Review* 741, 768–769.

argument is that such a high threshold may drive up the price to inefficiently high levels and that it necessitates the intervention of costly external actors if the high threshold is not reached.

These opposing considerations can be balanced by a legal rule with a high threshold for the fair price presumption, coupled with the possibility of a court-determined price below that threshold. The court can then still give some weight to a freeze-out price that is accepted by a substantial majority of the minority shareholders if the high threshold is not reached¹⁸³, but should not attach importance to a freeze-out price that is approved by only a small minority of the shareholders. The European legal regime for the post-takeover squeeze-out, with the 90% fair price presumption, fits quite well within this framework, although the precise threshold can be debated. To be clear, this does not change the fact that a different solution should apply for post-acquisition freeze-outs.¹⁸⁴

62. Conclusion – procedural safeguards. The conclusion concerning the procedural safeguards is that there is no single right answer to the question which approach is most efficient. Both internal actors and external actors have their advantages and disadvantages. In addition, the advice from comparative law scholarship should be kept in mind: legal transplants do not always function as expected, and should be adapted to fit the societal and legal context¹⁸⁵, in this case the shareholder structure (concentrated or dispersed), the presence of institutional investors, and the effectiveness of the court system.

Nevertheless, some lessons can be learned from the comparative and economic analysis. Both in the United States and in the European Union, the law relies on both internal actors and external actors to protect minority shareholders. Indeed, a combination of both approaches seems necessary to replicate the level of protection offered in an at arm's length transaction. The Delaware approach can be inspiring here: protection is offered in the first place by internal actors (independent directors and a majority of the minority share-

183 This also happens also commonly in Dutch court decisions on squeeze-outs: T Salemink, *Uitkoop van minderheidsaandeelhouders* (Kluwer 2014) 209–212.

184 In a going-private freeze-out, the controlling shareholder is the only viable candidate for buying the minority shares, so that there is no competition between bidders to guarantee the fairness of the price. Therefore, stronger protection is necessary than for post-acquisition freeze-outs.

185 See for example: D Berkowitz, K Pistor and JF Richard, 'The transplant effect' [2003] *The American Journal of Comparative Law* 163. Legrand defends an even stronger view that legal transplants are not possible at all: P Legrand, 'The impossibility of legal transplants' [1997] *Maastricht Journal of Comparative Law* 111. I believe that the latter view goes too far, however.

holders), but the courts step in to review whether the procedure was fair and act as a final check on a fair price in the appraisal remedy.

The regime of the European Union relies more heavily on external actors: independent directors play no role and the majority of the minority presumption of a fair price comes with a threshold of 90%. Below this threshold, external actors determine a fair freeze-out price. However, based on the analysis above, I would suggest that below the 90% threshold, courts should also give some weight (although possibly less than when the 90% presumption applies) to the freeze-out price set by the bidder, if it is approved by a simple majority of the minority shareholders and by the independent directors. The advantage of this approach is that parties are still incentivised to seek approval of the freeze-out by internal actors.

VII. Conclusion

63. The value of freeze-outs. This article analyzed freeze-outs in the United States (Delaware), the European Union and the Netherlands, using a comparative law and economics approach. It argued that freeze-outs are valuable for society because they eliminate a free rider problem and a holdout problem in the market for corporate control, and because they allow a company to perform a delisting, which can lead to more efficiently managed companies.

64. Comparison of the threshold. The regime for freeze-outs in the United States is significantly different from the one in the European Union. While cash merger freeze-outs in the United States are available at a low threshold of 50%, statutory squeeze-outs in the European Union are generally only available at a threshold of 90–95%. However, some countries, such as the Netherlands, have allowed alternative freeze-out techniques at a significantly lower threshold. This article has argued that a lower threshold for freeze-outs is more efficient. However, the concentrated shareholder structure and the wish to give (larger) minority shareholders a veto right in fundamental changes to the company justify that the threshold for freeze-outs is not set at 50%, but at the same supermajority as for other fundamental changes. This proposal is consistent with current law and practice in the Netherlands, which should be transplanted to other European countries (with some changes).

65. Procedural safeguards – post-acquisition freeze-outs. This article argued that minority shareholders should receive a similar level of protection in freeze-outs as in at arm's length transactions. For this, a distinction should be made between post-acquisition freeze-outs, which follow after a takeover bid by a third-party bidder, and going-private freeze-outs, which are performed by a controlling shareholder. Post-acquisition freeze-outs are in fact nothing

more than the second step of an at arm's length transaction, indicating that only limited procedural safeguards are necessary here. The regime in Delaware seems well-balanced in this respect: post-acquisition freeze-outs that are performed at the same price as and promptly after a tender offer by an independent bidder are not questioned by the courts if the offer is accepted by a majority of the disinterested shareholders and if it is approved by an independent board that negotiated at arm's length. A similar regime seems to be emerging in the Netherlands, with the practice of pre-wired freeze-outs. Squeeze-outs in the European Union under the Takeover Directive, on the other hand, still impose a 90% threshold for the presumption to apply that the takeover price is a fair price in a squeeze-out. This article has argued that this is too high for post-acquisition freeze-outs.

66. Procedural safeguards – going-private freeze-outs. Going-private freeze-outs, on the other hand, always present a risk of self-dealing, which freeze-out law should try to eliminate through procedural safeguards. In the European Union, external actors (such as a court, the financial supervisor or an independent expert) play a more important role, while in the United States this is the case for internal actors (such as independent directors or a majority of the minority shareholders). Each approach has its advantages and disadvantages. Hence, a combination of both approaches, where independent directors and a majority of the minority shareholders play a primary role and the courts intervene only to perform a limited check on the fairness of the price, would be preferable.

67. Academic debate and legislative change. This article has aimed to reopen the academic debate on the topic of freeze-outs. It drew from existing scholarship to establish a normative framework and made some specific recommendations to amend freeze-out law. These recommendations are primarily targeted at the European and national legislators, but the Dutch experience shows that many changes can be implemented through legal practice as well.