HOSTILE TAKEOVERS

An overview based on the U.S legislation and the Directive 2004/25/EC on Takeover Bids

ELENI I. GKOUNTAKOU

SCHOOL OF ECONOMICS, BUSINESS ADMINISTRATION & LEGAL STUDIES

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Student Name: Eleni I. Gkountakou
SID: 1104150016
Supervisor: Prof. Thomas Gr. Papadopoulos

I hereby declare that the work submitted is mine and that where I have made use of another’s work, I have attributed the source(s) according to the Regulations set in the Student’s Handbook.

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Abstract

Since the boom of hostile activity in the US and the UK during the 1980s, hostile takeovers, as a form of M&A transactions, constitute an integral part of contemporary global business practice and a field of rapid development in the market for corporate control. The purpose of this thesis is to offer a comprehensive analysis of the phenomenon of hostile takeovers, from its creation until its recent developments.

The study begins by presenting the theoretical background which is important for the understanding of the subject. This includes a concrete definition of the notion of hostile takeovers, as well as an analysis of its core elements and the various hostile tactics which may be used, with hostile tender offers being the prominent. Furthermore, the historical background and the rationale of the phenomenon are also presented. The thesis, furthermore, proceeds with the examination of the basic anti-takeover mechanisms, which can be implemented either before or after a hostile tender offer, and discusses their level of effectiveness. The focus, however, of this study is found in the presentation of a comparative analysis of the applicable legal framework on hostile tender offers in the United States and in the European Union, based on the examination of the applicable legal instruments and on the development of case law. In its final chapter, the thesis examines, also, how hostile activity emerged and is regulated in Greece, whereas it concludes by presenting information on the recent takeover activity, along with the final remarks.

Keywords: hostile takeovers, tender offers, Williams Act, EU Takeover Regulation, Greek Takeover Law

Eleni I. Gkountakou

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Preface

Before you lies the dissertation “Hostile takeovers- An overview of the U.S legislation and the Directive 2004/25/EC on Takeover Bids”, which constitutes a study of the phenomenon of hostile takeovers as emerged and regulated in the United States and in the European Union. This dissertation was written to fulfill the graduation requirements of the LLM Program in Transnational and European Commercial Law, Mediation, Arbitration and Energy Law at the International Hellenic University of Thessaloniki. I decided to work on this subject after having attended the class of “Mergers and Acquisitions”, taught by Pr. Thomas Papadopoulos, which intrigued me to deepen my knowledge on the M&A field of study.

During the research process, I came across various interesting books and articles, each one of which, however, used its own jargon and approach, even on the basic elements of the phenomenon. Nevertheless, that has also been the challenge for me, namely to compare and contrast the miscellaneous theories and studies in order to reach my own conclusions.

I would first like to thank my thesis supervisor Prof. Thomas Papadopoulos for his useful comments, suggestions and engagement through the research and writing process of this thesis. Furthermore, I would also like to thank Prof. Dr. em. Athanassios Kaissis for the excellent organization of the program, as well as acknowledge all the members of the academic staff for their support during my post-graduate studies. Finally, I would like to express my deep gratitude to my beloved family for immensely supporting and encouraging me throughout my years of study.

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Introduction

Mergers and Acquisitions (M&A) are corporate governance mechanisms, enabling companies to grow, maximize their profits, alter or expand their object of business activity and improve their competitive position. Stemming from the basic principle that “one plus one equals three,” they both constitute means of selling and acquiring companies, in whole or in part. Although the above terms are considered as interchangeable, in fact they are substantially different.

A merger is an amalgamation of two or more companies, in which “all but one legally cease to exist, and the combined organization continues under the original name of the surviving firm”\(^1\). From a legal perspective\(^3\) mergers are divided into various subcategories, such as “statutory” or “direct” mergers\(^4\), subsidiary mergers\(^5\) and reverse subsidiary mergers\(^6\), whereas from an economic perspective\(^7\), they are classified as horizontal, vertical and conglomerate\(^8\). Furthermore, the term merger is often confused with the one of consolidation, from which, however, it differs significantly, as consolidation exists when two companies combine to form a completely new entity. Consequently, in consolidations there is no “surviving” company, as both are dissolved and only the new company remains in operation\(^9\).

On the other hand, an acquisition or a takeover\(^10\) is a transaction or a series of transactions, through which a natural or legal person or a group of persons takes a

\(^3\) The term refers to the legal structure used to complete the transaction and it is used in DePamphilis p.5
\(^4\) In which all the assets and liabilities of the merged company (“target”) are assumed by the “surviving” firm, as stated in Gaughan Patrick A. (2011), “Mergers, acquisitions and corporate restructurings”, 5th edition, John Wiley and Sons Inc, p.12
\(^5\) also referred to as “forward triangular merger”, in which a subsidiary of the purchasing company (not the purchasing company itself) absorbs the target company, as stated in Gaughan p.13
\(^6\) also referred to as “reverse triangular merger” in which the target company absorbs a subsidiary of the parent company
\(^7\) namely, depending on the position of the merging firms in the corporate value chain, as stated in DePamphilis, p.6
\(^8\) According to DePanphilis, pp.6-7 and Gaughan pp.13-14, horizontal mergers occur between companies within the same industry, whereas vertical mergers occur between corporations having a buyer-seller relationship. If the merging companies operate in different industries and do not have a buyer-seller relationship, then the merger is characterized as conglomerate.
\(^9\) Gaughan, p.13
\(^10\) Although the terms “acquisition” and “takeover” are used interchangeably, they carry slightly different connotations. Concretely, the term “takeover” implies that the target company opposes to being bought, whereas “acquisition” usually describes more amicable transactions, as stated in: http://www.investopedia.com/terms/a/acquisition.asp. According to another definition (DePamphilis p.5) “takeover” is a generic term which refers to a change in the controlling interest of a corporation.
controlling interest in another firm\textsuperscript{11} (“target company”), by purchasing its assets or a voting majority of its shares. After the acquisition, the acquired corporation continues to exist as a subsidiary of the purchasing company\textsuperscript{12}. Unlike mergers, which are normally “friendly”, takeovers are classified as “friendly” and “hostile”.

Friendly takeovers are negotiated settlements, in which the purchasing company offers to acquire another firm and this proposal is welcomed by the board of directors or the management of the target. On the other hand, in hostile takeovers, the potential acquirer makes an unsolicited takeover offer to the target company, which is resisted by the latter’s management and board of directors\textsuperscript{13}.

The purpose of this thesis is to provide an in-depth analysis of the phenomenon of hostile takeovers. The first chapter presents the theoretical background of hostile takeovers, namely it proceeds to the analytical definition of the term and describes the possible hostile takeover tactics, as well as it presents the historical background of the phenomenon and its rationale. The second chapter introduces the most common anti-takeover mechanisms, both proactive and reactive, and discusses the level of their effectiveness. Chapter three offers a comparative analysis of the legal framework of tender offers in the United States and in Europe and decides upon which of the two systems facilitates hostile takeovers. Finally, the fourth and last chapter examines how hostile activity is presented and regulated in Greece.

\textsuperscript{11} or in a legal subsidiary of another firm or in selected assets of another firm, such as a manufacturing facility, as stated in Depamphilis, p.5
\textsuperscript{12} Depamphilis, p.5
\textsuperscript{13} Ibid
THE THEORETICAL BACKGROUND OF HOSTILE TAKEOVERS

THE DEFINITION OF HOSTILE TAKEOVERS

Hostile takeovers constitute a mechanism, by which a company (“the bidder”) seeks to gain control over another corporation (“the target”), without the consent of the latter’s board of directors or of its management\(^\text{14}\). The reasons behind such an opposition may stem either from the valuation of the transaction as unprofitable or detrimental for the target company and its shareholders, or from the managers’ and directors’ personal interests, namely the fear of being replaced. The term “hostile takeover” is also applicable in cases where the bidder addresses solely the shareholders, without previous informing the board or the management of the target company\(^\text{15}\).

Even though the theory does not distinguish based on the company’s legal status, in practice, hostile takeovers only occur in publicly listed corporations. This is, firstly, due to their dispersed ownership, which entails to the exercise of the corporate control by the company’s board of directors. Hence, even though the final decision is taken by the shareholders, the board is responsible to negotiate the terms of the potential transaction. On the contrary, shares in private companies are held by a limited number of shareholders, therefore, the bidder usually negotiates directly with them. Another factor is the legal obligation of the publicly listed companies to publish information on their corporate performance, an obligation which does not apply to private firms. A potential bidder is, thus, able to proceed to a better assessment of the performance and strategy of the first, than of the latter.\(^\text{16}\) Consequently, dispersed ownership and “information asymmetry” are the two characteristics leading to the existence of hostile takeovers only in the public arena\(^\text{17}\).


\(^{15}\) Ibid p.11


\(^{17}\) Ibid
An additional characteristic of hostile takeovers is that they are normally disclosed to the press. Therefore, under another definition, hostile takeovers occur when it is publicly announced that the target company “aggressively” rejects the offer made by the bidder. Consequently, the concept of hostility is inextricably linked to negotiations which are “far from completion”. However, in contemporary business practice, takeover negotiations usually commence long before the public disclosure of the bid or of the intention to bid. Furthermore, in most cases, only successfully completed negotiations are announced. Consequently, the final transaction may, at the end of the day, seem “friendly”, even though the private negotiations would have been regarded as “hostile”, had they been publicly revealed. On the other hand, in case confidential negotiations break down, it is also possible for one of the parties to disclose information about the bid, in order to enhance its bargaining position.

Public announcements of takeover attempts constitute part of the negotiation process, therefore the distinction between hostile and friendly takeovers is often a difficult task. Moreover, as in every negotiation, the intentions and attitudes of the parties are volatile, since circumstances may easily change. Thus, even though a takeover may seem initially as “hostile”, it may eventually result in a “friendly” settlement.

**HOSTILE TAKEOVER TACTICS**

Every takeover process comprises of a series of operations, performed sequentially to lead to a specific result, namely to the completion of the acquisition. After the determination of the bidder’s acquisition criteria and goals and the identification of the target company, the bidder approaches the target to assess its interest in a potential takeover or to proceed to a takeover offer. In hostile takeovers, the target company’s board or incumbent management opposes to this initial approach or offer,
however the deal is eventually made\textsuperscript{24}, as the bidder may implement a series of “aggressive tactics”, such as the bear hug, the Saturday night offer, the proxy contest, the toehold position, the tender offer (takeover bid) and the two-tier tender offer (two-tier bid).

The bear hug is a tactic adopted when the initial approach of the target is considered unsuccessful or when the intentions of the target’s management towards a potential takeover are unclear. In this tactic, the bidder makes a formal acquisition proposal, which may be followed by a public announcement\textsuperscript{25}, to the target’s board of directors\textsuperscript{26}. The proposal frequently concerns the acquisition of the target’s shares at a substantial premium to their current stock value and demands a rapid decision\textsuperscript{27}. A similar tactic is the Saturday night special, which is a surprising acquisition offer made to the board on the Friday or Saturday night\textsuperscript{28} and it is open for only a brief period.

By using these methods, the bidder aims to achieve a negotiated settlement, which is possible due to the fiduciary duties of the board towards the target’s shareholders. In particular, directors who vote against a generous proposal which greatly exceeds the current market value of the target company, may be subject to lawsuits, due to the breach of their duty to act in the best interest of the target’s shareholders. Thus, the bear hug and the Saturday night special put the target “into play” and force the target’s board to accept the takeover proposal.\textsuperscript{29}

Another famous tactic is the proxy contest or proxy fight\textsuperscript{30}. In its simplest form, the proxy fight occurs when a group of “dissident” or “insurgent” shareholders, which is typically a non-controlling group, seeks to obtain representation on the board of directors or to bring other changes in the company by obtaining the right to vote on


\textsuperscript{25} In these cases, the tactic is called “strong bear hug”, as simple “bear hugs” are made without a concurrent public announcement, as stated in Bruner Robert F., “Applied Mergers and Acquisitions”, John Wiley & Sons Inc, 2004, p.831

\textsuperscript{26} DePamphilis, pp.101-102

\textsuperscript{27} Ibid, p.99. If the bidder threatens to reduce the offering price in case of an opposition or delay, then the tactic is called “super-strong bear hug”, as stated in Bruner (2004) p.831

\textsuperscript{28} Namely on the last working day of the week, when only few investors pay attention

\textsuperscript{29} DePamphilis, p.102

\textsuperscript{30} Proxy fights in the US are regulated by the Securities and Exchange Commission (SEC). In Europe, the Takeover Directive (Directive 2004/25/EC) is generally silent on the issue of proxies, which are regulated differently among Member States. The great divergence of proxy legislation renders its regulation at European level necessary.
behalf of other shareholders (proxy vote)\textsuperscript{31}. In hostile takeovers, the bidding company attempts to persuade the shareholders to use their proxy votes in favor of the takeover or to replace the “incumbent” board\textsuperscript{32} with directors who support the takeover.

The proxy fight mechanism, though expensive\textsuperscript{33}, it can be effective, especially in combination with the establishment of a toehold position. Under this method, the bidder, after purchasing a small fraction of the target’s shares in the open market, becomes a minority shareholder of the target company. This “toehold position” entails voting power for the bidder, which is of great importance in a proxy contest, as it enables him to influence the target’s board and shareholders in certain decisions\textsuperscript{34}. Furthermore, it decreases the cost of the acquisition, allowing the bidder to acquire a part of the target’s stock anonymously, without paying the premium required in a formal bid\textsuperscript{35}. However, under most takeover regulations, if the purchase exceeds a certain percentage of the target’s stock, the bidder is obliged to publicly disclose its position and intentions\textsuperscript{36}.

The most common hostile takeover mechanism is, however, the hostile tender offer or takeover bid\textsuperscript{37}. This method enables the bidder to circumvent the target’s board and management and address directly the shareholders, by publicly offering, for a specific period, to purchase all or a fraction of their outstanding shares at a specific price, which is often at a substantial premium of their fair market value\textsuperscript{38}. To decrease the cost of the takeover effected by this method, the bidder may attempt to establish a


\textsuperscript{33} The fees of the proxy solicitors, investment bankers and attorneys, the advertisement expenses and the litigation costs in contentious proxy contests, render them an expensive takeover tactic. However, tender offers are regarded far more expensive, as it may require the purchase of a controlling interest at the target at a substantial premium, as stated in DePamphilis, p.102

\textsuperscript{34} Möhlmann, p.22

\textsuperscript{35} Ibid and DePamphilis p.103

\textsuperscript{36} In the US, the acquirer that exceeds the threshold of 5% of the target’s equity stake is obliged to file a Schedule 13D with the SEC, explaining the reason for the acquisition and its intentions regarding the target company and the target company must be simultaneously informed (Möhlmann p. 22). In European level, article 9 of the European Transparency Directive (Directive 2004/109/EC, as amended by Directives 2008/22/EC, 2010/73/EU, 2010/78/EU,2013/50/EU) obliges the acquirer of 5% (or lower, depending on national law) of the target’s equity stake to notify the target company, as stated by Matthijs Nelemans and Michael Schouten in Bainbridge Stephen M. (2013), “ Research Handbook on Insider Trading”, Edward Elgar, p.464

\textsuperscript{37} Both terms are used to describe the public offer made from the bidder to the shareholders of the target company for the purchase of all or of a fraction of their shares. However, the term “tender offer” is used in US legislation and theory, whereas the term “takeover bid” is used in European statutes

\textsuperscript{38} DePamhilis p.104, Möhlmann p.22
“toehold position” before launching an offer. Thus, the bidder would be able to acquire a fraction of the target’s shares without paying a premium\textsuperscript{39}.

Another relative practice is the two-tier tender offer /bid, under which the bidder purchases a certain number of shares which are required to gain the target’s control, whereas at a later date the bidder acquires the remaining shares at a lower price\textsuperscript{40}. Even though the two-tier bids/tender offers are not per se illegal in the US, many state statutes require equal treatment for all shareholders or provide appraisal rights to shareholders owning the remaining shares, such as the determination of the “fair value” of those shares by the court\textsuperscript{41}. At the European level, the Takeover Directive, by setting forth the principal of equivalent treatment of all shareholders of the same class\textsuperscript{42} and the mandatory bid rule\textsuperscript{43}, prohibits the implementation of this tactic.

As the tender offer is the most commonly used method to achieve a hostile acquisition, this thesis focuses on examining its regulatory scope at US and EU level, with special reference to the Greek law, in the following chapters 3 and 4.

**THE HISTORICAL BACKGROUND OF HOSTILE TAKEOVERS**

It has been widely accepted, that M&A come in waves, which “reflect the pattern of the number and the total value of takeover deals over time”\textsuperscript{44}. Many countries experienced intense takeover activity, followed by periods of downturns during the past decades.\textsuperscript{45} USA is the country with the longest history in M&A, as it has so far experienced six merger waves, with the first going back to 1983, after the Depression, and lasting until 1904\textsuperscript{46,47}. Takeover activity was also witnessed in the UK, due to the

\textsuperscript{39} Möhlmann, p.22
\textsuperscript{40} DePamphilis p.105
\textsuperscript{41} Ibid
\textsuperscript{42} Council Directive 2004/25, 2004, O.J. (L 142) 12(EC), art. 3§1. (a)
\textsuperscript{43} Id. art. 5
\textsuperscript{44} Martynova Marina and Renneboog Luc (2008), “A Century of Corporate Takeovers: What Have We Learned and Where Do We Stand?” Journal of Banking and Finance, Volume 32, Issue 10, p. 2.150
\textsuperscript{46} Gorzala p.5.
\textsuperscript{47} Surprisingly enough, commentators use different criteria to determine the exact periods, during which merger waves emerged. According to Lipton Martin (2006), in “ Merger Waves in the 19th, 20th and 21st Centuries”, The Davies Lecture Osgood Hall Law School York University, p.3, retrieved from: http://cornerstone-business.com/MergerWavesTorontoLipton.pdf “ The starting date and duration of each of these waves are not specific, although the ending dates for those that ended in wars or financial disasters, like the 1929 crash or the bursting of the Millennium Bubble, are more definite”. Consequently, there has been a great divergence regarding the time frames of the below analyzed merger waves in USA, UK and Continental Europe. Therefore, it should be stated, that the time frames presented in this thesis derived from a comparative analysis of those proposed in theory.
emergence of the three major merger waves\textsuperscript{48}, the first of which was traced in 1960s. In Continental Europe, M&A existed in smaller scale during the 1960s\textsuperscript{49}, however, the first substantive merger wave occurred in the 1980s\textsuperscript{50}.

Hostile takeovers, as a part of M&A activity, constitute, mainly, a phenomenon of the Anglo-Saxon economic sphere\textsuperscript{51}. Even though they made their first appearance in the UK in the early 1950s\textsuperscript{52} and in the US in the 1960s\textsuperscript{53}, the boom of hostile activity occurred for both countries during the 1980s. Concretely, in the US, hostile takeovers flourished during the fourth merger wave (1984-1989)\textsuperscript{54}. During this period the so-called corporate raiders or “predators”\textsuperscript{55}, proceeded to hostile takeovers towards under-performing corporations\textsuperscript{56}, aiming to achieve the highest return in the shortest time. At the time, hostile takeovers were considered as a highly profitable activity and an effective form of corporate re-organization. The end of the fourth wave came in 1989, after economy had entered a period of recession, followed by the crash of the stock market in 1987\textsuperscript{57} and the collapse of the junk bonds market\textsuperscript{58,59}.

In the UK, the history of hostile takeovers began in the early 1950s, when economic turmoil of the postwar period encouraged asset arbitrage\textsuperscript{60,61}. The advent of hostile takeovers shocked the British business community, which considered the phenomenon


\textsuperscript{49} In particular, in Germany and France, as stated in Vancea Mariana (2013), “Merger and Acquisition Waves from the European Perspective”, Department of Economics, Faculty of Economic Sciences, University of Oradea, Oradea, Romania, p.2, retrieved from: https://ideas.repec.org/a/ora/journl/v1y2013i2p272-283.html

\textsuperscript{50} Ibid


\textsuperscript{52} Armour, John and Skeel David A. Jr, p.1756


\textsuperscript{54} For a complete analysis of the US merger waves see Gorzala pp.4-7, Sudarsanam, pp.14-34, Gaughan pp.36-73

\textsuperscript{55} after being financed mainly by junk bonds

\textsuperscript{56} Sudarsanam, p.17, where it is also stated that he target was often a diversified firm, whose parts were sold-off after the acquisition was completed

\textsuperscript{57} on the so called “Black Monday”

\textsuperscript{58} Gaughan p.63

\textsuperscript{59} The collapse of the Drexel Burnham Lambert investment bank, which specialized in financing takeovers through the issuance of junk bonds, was decisive for the demise of the junk bonds market, as stated in Seretakis Alexandros (2013), “Hostile Takeovers and Defensive Mechanisms in the United Kingdom and the United States: A Case Against the United States Regime”, the Ohio State Entrepreneurial Business Law Journal, Volume 8, Issue 2, p. 3

\textsuperscript{60} Armour and Skeel, p.1756

\textsuperscript{61} A famous example is the takeover of shoe retailer J. Sears in early 1953 by Charles Clore’s, as described in Armour and Skeel pp. 1756-1757
as harmful for the industry. Prejudice against hostile takeovers was overcome in 1959. At that time the “Notes on Amalgamation of British Businesses” were adopted, which were latter (in 1968) replaced by the “Takeover Code”. Hostile takeover activity can be also found 1970s, with a new generation of “predators” taking action. Nevertheless, as in the US, takeovers reached extreme levels of hostility in the 1980s, during the third (for the UK) merger wave which ended in 1989.

In Continental Europe, a combination of historical, cultural, structural and legal factors impeded the vast expansion of hostile takeovers. However, continental European countries did not remain immune from hostile takeovers, through their history of M&A activity. Takeover of the German company “Mannesman” by the British “Vodafone AirTouch” (1999) and the acquisition of Telecom Italia by Olivetty (1999) are two well-known examples of successful hostile bids. In recent years, hostile bids in EU increased significantly since 2006. The acrimonious, but successful, takeover of “Arcelor” by “Mittal” (2006), the “E.On’s” bid for “Endesa” (2006), and the takeover attempt towards “Suez” by “Enel”, are only a few examples of the vibrant takeover activity of this period.

This brief historical review of the development of hostile takeovers proves, that they constitute an integral part of contemporary business practice. Over the years, the phenomenon has evolved increasingly, leading, inevitably, to the formulation of

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62 According to Pazarskis, Eleftheriadis, Drogalas and Christodoulou P, p. 10, the Bank of England advised the English banks and other financial institutions against financing the “predators” of this period
63 shortly before the emergence of the first substantial merger wave
64 after the notorious battle for “British Aluminium Ltd”, conducted between the US Reynolds Metal Company, in partnership with U.K.-based Tube Investments (“TI-Reynolds”), and the Aluminium Company of America (“Alcoa”). The analysis of the case can be found in Armour and Skeel, p.1758
65 Ibid, pp.1759-1760
66 namely during the second merger wave
67 Such as Jim Slater and James Goldsmith, as stated in Pazarskis, Eleftheriadis, Drogalas, and Christodoulou, p.10
68 This wave was characterized by the abolition of exchange controls and the privatization of state-owned companies, measures taken by M. Thatcher’s government
69 In particular, “differential voting rights, managements’ ability to limit voting rights, pyramid corporate ownership structures, absence of one share-one vote, two-tier boards that cannot be easily changed by the acquirer, the presence of employee representatives on supervisory boards, resistance from trade unions, the obligation to negotiate with the target boards before launching an offer and the low disclosure threshold for target shares acquisitions”, are only a few of the reasons hindering hostile takeovers in EU level, according to Sudarsanam, p. 500
70 However, unsolicited bids were also witnessed in the French banking sector, as stated in Sudarsanam, p. 500
71 Bruner Robert (2006)
72 Ibid. However, the hostile takeover was note completed, due to the withdrawal of the bid in 2007
73 See Bösecke Kathrin (2009), “Value Creation in Mergers, Acquisitions, and Alliances”, Gabler, p. 128, in which it is stated that the takeover was, at last, prevented, after the intervention of the French government
theories focusing on hostile takeover’s rationale, as they will be further analyzed below.

**RATIONALE OF HOSTILE TAKEOVERS**

In the absence of a comprehensive theory of all subsets of takeovers and taking into consideration empirical evidence\(^{74}\), both “friendly” and “hostile” takeovers, are mainly considered as effective tools to increase corporate value and shareholders’ wealth, as well as ensure efficient capital markets and managerial discipline\(^{75}\). Therefore, despite the various theories, the motives behind hostile takeovers can be generally segmented into three basic categories: strategic, operational and managerial.

Regarding the first category, hostile takeovers, as well as “friendly” ones, enable the bidding company to achieve market entry or exit, business divestitures and development or promotion of new products. The improvement of the bidder’s market position\(^{76}\) through the efficient exploitation of the target company’s capabilities\(^{77}\), such as the innovative technology or experienced workforce, is also a possibility. Hostile takeovers, can, therefore, enhance the competitiveness of the bidding company by ensuring the effective allocation of resources and its economic growth.

Operational motives refer mainly to the synergy gains achieved through a hostile takeover. In particular, synergy is the notion under which the value and performance of two companies exceeds the sum of the separate individual parts\(^{78}\). Synergies are, moreover, divided into operating and financial. In operating synergies, the “combined” firms “increase their operating income and achieve higher growth”\(^{79}\), as they reduce their costs in administration, production and logistics, whereas they increase their revenues through cross-selling and complementarity of their “strengths and

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\(^{74}\) Romano Roberta (1992), “A Guide to Takeovers: Theory, Evidence and Regulation”, The Yale Journal on Regulation, Volume9, Issue 1, p. 120

\(^{75}\) According to Schwert, p.2599, this last aim, namely the intention of the bidder to replace the inefficient management of the under-performing target, is deemed to be the only element which distinguishes “friendly” from “hostile” takeovers

\(^{76}\) Gorzala, p.9


\(^{78}\) As clearly defined in Romano pp 125-126

\(^{79}\) As stated in [https://www.divestopedia.com/definition/5010/operating-synergy](https://www.divestopedia.com/definition/5010/operating-synergy)
weaknesses”\textsuperscript{80}. On the other hand, financial synergies refer to the optimization of the “financial metric” of the combined corporations, such as revenue, debt capacity, cost of capital, profitability, tax benefits etc. \textsuperscript{81}

Hostile takeovers may also serve as a method to achieve managerial discipline. In the fear of losing its job, the management of the target company will improve its performance, to prove the takeover unnecessary. It will, therefore, seek to minimize inefficiencies and raise the share price, a fact which will discourage possible bidders\textsuperscript{82}. It must be noted, that the replacement of the target company’s management is deemed to be the only motive which differentiates “friendly” from “hostile” takeovers\textsuperscript{83}.

Such a replacement seems, though, essential in cases of under-performing companies, as well as in cases where the interests of the management collide with the ones of the shareholders, leading to conflicts regarding the best corporate strategy \textsuperscript{84}. In such an occasion, the threat of a hostile takeover may not only enhance the managers’ efficiency, but also lead to the alignment of their incentives with the shareholders’ interests\textsuperscript{85}.

Taking all the above into consideration, we shall conclude that hostile takeovers are efficient mechanisms to improve the company’s strategic position, exploit synergy gains and exercise corporate control. Finally, both friendly and hostile takeovers increase market efficiency, by allowing the buyout of underpriced corporations. Under
the theory of marketing myopia\textsuperscript{86}, a corporation’s shares may be mispriced, as investors may overvalue short term profits and undervalue long term gains. The acquirer of such company benefits, therefore, from the difference between the real and the market value of the acquired company. Such takeovers are obviously disadvantageous for the shareholders of the target company, however, shareholders, in general, gain better market information\textsuperscript{87}.

\textsuperscript{86} The theory of marketing myopia was initially expressed in Levitt Theodore (1960), "Marketing Myopia", Harvard Business Review, July-August, pp.45-56. For a complete explanation of the relation between the marketing myopia theory and takeovers see Romano pp.144-145

\textsuperscript{87} Magnuson, pp.209-210
DEFENSIVE MEASURES AGAINST HOSTILE TAKEOVERS

The vast expansion of hostile takeovers gave rise to the development of defensive measures, which seek to protect the interests of the target company, secure the target’s board independence or achieve a more profitable offer. These measures can be either proactive or reactive, depending on whether they aim to prevent or rebut a hostile takeover.

PROACTIVE DEFENSIVE MEASURES

Proactive defensive measures are implemented before the occurrence of any “aggressive” takeover tactic, mainly of a tender offer, aiming to prevent a hostile takeover. The most commonly known proactive defensive measures are “the staggered board”, “the super majority amendment” the “poison pill” and the “golden parachutes”, as briefly discussed below.

THE STAGGERED BOARD DEFENSE

This measure\(^{88}\) is one of the most common preventative defensive strategies in the US\(^{89}\), seeking to incommode the change of the corporate control of the target company. By amending the articles of association, the target’s board may be divided into separate classes, whose term in office concludes at a different interval\(^{90}\). Consequently, directors cannot be replaced instantly, namely at a single shareholders’ meeting, a fact which delays the acquirer from gaining the corporate control\(^{91}\). Such a delay is often accompanied by extra expenditures, which make the target company less “attractive”\(^{92}\).

\(^{88}\) Also known as the classified board defense
\(^{89}\) The measure does not apply in the UK, as the UK corporate Governance Code provides that the directors of FTSE-350 companies should be re-elected annually, as stated in Gullifer Louise and Payne Jennifer (2015), “Corporate Finance Law-Principles and Policy”, Second Edition, Hart Publishing, pp.530-531. Furthermore, the measure is also almost unknown in the Continental Europe, where “a shareholder or group of shareholders can convene a meeting and then dismiss all directors by a mere majority vote, as stated in Cools Sofie (2005), “The Real Difference in Corporate Law Between the United States and Continental Europe: Distribution of Powers” Delaware Journal of Corporate Law, Volume 30, Issue 3, p.750
\(^{91}\) Gaughan p.198-199, where it is also stated that “under most state laws the maximum classes of directors are three”, consequently, “in a proxy contest staggered boards require insurgents to win more than one proxy fight at two successive shareholder meetings to gain control of the target”
\(^{92}\) Zarin Samim and Yang Erik, p.15
The “staggered board” is considered a weak defensive strategy, as it does not hinder the acquisition of a controlling block of the target’s shares, but only delays the acquirer from exercising its voting rights. Furthermore, in cases where the bidder has obtained the majority of the target company’s shares, he may be able to gain control of the board instantly, as the remaining board members would be expected to resign, since they would have little legitimacy and would be unable to accomplish much against the will of the controlling shareholder. Consequently, this tactic shall be implemented in combination with other defensive measures, such as the poison pill, in order to be effective.

Except from the dubious effectiveness, there has also been an on-going debate regarding the impact of the staggered board on shareholder wealth, with the most recent of the conducted researches concluding that the implementation of the measure decreases the firm’s value. These findings support the contemporary policies of leading institutional investors and corporate governance activists, who are in favor of board de-staggering.

THE SUPER-MAJORITY AMENDMENT

The “super-majority amendment”, seeks also to delay the hostile bidder from gaining control over the target company, as well as to protect the interests of the minority shareholders. Under this measure, the articles of association of the target company are amended to specify that takeovers must be approved by an extra-large majority (typically of 80%) of votes. Such a provision is usually accompanied by a “board-
out” clause, allowing the target’s board to waive the requirement, mainly, in cases of friendly bids103.

The super-majority amendment is considered a mild defense, as the bidder may respond by making a tender offer for the whole firm104. Consequently, the defense is effective only in partial bids105. Alternatively the bidder may acquire a simple majority of the outstanding shares, and use its voting rights to rescind the super-majority provision106, unless such a rescission is also subject to a supermajority vote107. Furthermore, as this provision only delays the consummation of the bid108, it shall be used in conjunction with other defenses to hinder a hostile takeover109. Finally, regarding the impact on shareholders’ wealth, it has been found that the announcement of the measure may slightly reduce shareholders’ wealth110, however, in a long-term assessment, its implication does not have adverse consequences for the firm or its shareholders111.

THE POISON PILL DEFENSE
Invented in 1982 by Martin Lipton112, the poison pill113 was “proven to be the most powerful and effective of all defensive measures”114. Under this strategy, a new class of securities or rights is issued as dividend115 by the target company to its shareholders upon the occurrence of a triggering event, namely of a hostile takeover attempted by a

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103 Depamphilis p.117; see also Bruner (2004) p.835
105 Gaughan, p.200. However, in Europe, under the mandatory bid rule (art.5) of the European Takeover Directive, the bids are uniform.
107 Bragg (2009), p.37
108 Bruner (004) p.835
112 To defend El Paso Electric from General American Oil (Gaughan, p.186)
113 also referred to as “Shareholder Rights Plans”
tender offer for a large fraction of the target’s shares\textsuperscript{116} or by an acquisition\textsuperscript{117} which exceeds a threshold percentage of the target’s voting capital\textsuperscript{118}. Even though the measure is characterized as proactive, it can be also implemented after the onset of the hostile bid\textsuperscript{119}.

The poison pill has multiple variations, as it has gone through three generations of development, establishing the preferred stock plans\textsuperscript{120}, the flip-in\textsuperscript{121} and the flip-over\textsuperscript{122} poison pills. Additional variations constitute the back-end plans\textsuperscript{123}, the poison puts\textsuperscript{124} and the chewable poison pills\textsuperscript{125}. In general, the poison pill provisions define that the measure is effective for a specific period\textsuperscript{126}, whereas they also contain an “escape clause”, under which it can be redeemed at the board’s discretion and within a short period\textsuperscript{127} after the occurrence of the triggering event\textsuperscript{128}.

The proponents of this defense argue, that it hinders a hostile takeover, preserving time and flexibility to the target’s board to negotiate a better offer\textsuperscript{129}. However, the measure has been criticized for leading often to litigation and for facilitating management entrenchment\textsuperscript{130}. Regarding its effect on shareholders’ wealth, the findings of the researchers vary, leading to a controversy as to whether the adoption of the measure benefits or not the target’s shareholders\textsuperscript{131}.

\begin{itemize}
\item \textsuperscript{116} Ruback Richard S. in Auerbach Alan J., p.58
\item \textsuperscript{117} The acquirer is often referred to as an “interested person”
\item \textsuperscript{118} Bruner (2004), p.838
\item \textsuperscript{119} DePamphilis, p.110.Consequently, the measure may be also regarded as reactive
\item \textsuperscript{120} DePamphilis, p.110. Consequently, the measure may be also regarded as reactive
\item \textsuperscript{121} It is the third generation of poison pills and it is implemented only in case the bidder, after having acquired the voting majority of the target’s shares, attempts to merge the target with the purchasing firm. In this case, the flip-over provision entitles the target’s shareholders to purchase common shares of the surviving firm at nominal value, as defined in Bruner (2004), p.842
\item \textsuperscript{122} According to this measure, the shareholders receive a dividend of rights enabling them to exchange these rights for cash or senior debt securities at a specific price set by the target’s board, as defined in DePamphilis , p.112
\item \textsuperscript{123} The poison-puts provisions trigger the repayment of debt at or above par value in the event of a hostile takeover, as defined in Bruner (2004), p.842
\item \textsuperscript{124} This is a type of poison pill which is void in the face of a certain event, namely when a fully financed offer at a substantial premium to the target’s current share price is made, a defined in DePamphilis , p.112
\item \textsuperscript{125} Usually for 10 years, unless extended by the target’s board, as set in Bruner (2004), p.838
\item \textsuperscript{126} Usually within 10 days
\item \textsuperscript{127} Bruner (2004), p.839
\item \textsuperscript{128} Ibid, p.838; see also DePamphilis p.112
\item \textsuperscript{129} Bruner (2004), p.838
\end{itemize}
THE GOLDEN PARACHUTE DEFENSE

Another well-known measure is the “golden parachute”, aiming at discouraging an unwanted takeover by contractually binding the target company to offer lucrative benefits, to its top executives, who may lose their jobs in case of a hostile takeover. The requirements which cumulatively enable the triggering of the golden parachute clause are usually the change of control over the company and the subsequent dismissal of the executive by the bidder, if this dismissal is outside the executive’s control. The golden parachute defense is primarily characterized as a pro-active measure; however, it may be also implemented during a takeover battle.

The aim of this tactic is to increase the acquisition costs, to render the target company less attractive. However, its effectiveness has been disputed, especially in large takeovers, as the cost of golden parachutes is a small percentage of the total purchase price. Nevertheless, golden parachutes, by ensuring the retention of the target’s board, reduce the conflict of interests between directors and shareholders during a takeover, encouraging the first to negotiate higher takeover premiums with the bidder. Finally, regarding the evaluation of the measure on its impact on shareholders’ wealth, there is a great divergence among the various researches, while some of them distinguish based on the timing of the measure’s adoption.

132 such as stock options, bonuses, heavy severance pay
134 According to DePamphilis p.118 the change in control exists when an acquirer accumulates more than a certain percentage of the target’s voting shares
135 Ibid
136 Gaughan, p.487
137 Ibid
138 Jensen Michael C. (1988), “Takeovers: Their Causes and Consequences”, The Journal of Economic Perspectives, Volume 2, Issue 1., p.39. The writer, however, states that the “benefits” offered to the target’s top executives after the implementation of the measure shall not be excessive, as it will lead the managers to sell the target at a very low price.
REACTIVE DEFENSIVE MEASURES

Apart from the above measures, the target company can implement a variety of tactics to rebuff the hostile takeover, the so-called reactive defensive measures. The most common measures of this category are the “Greenmail”, “the Crown Jewel”, the “Pacman”, the “White Knight”, “White Squire” and the “Lock-up” defenses, as they are further discussed below.

THE GREENMAIL DEFENSE

Constituting a neologism deriving from the words blackmail and greenbacks (i.e. dollar bills)\textsuperscript{141}, the greenmail defense is a strategy\textsuperscript{142}, under which the target company offers to repurchase a block of shares held by the acquirer at a premium\textsuperscript{143} over the stock price, in return for the acquirer’s agreement not to proceed to a hostile takeover. This agreement is often accompanied by a standstill agreement\textsuperscript{144}, in which it is stated that the bidder will not be able to buy more shares for a specific period, usually for up to five years\textsuperscript{145}. The measure is successful usually with bidders with short-term interests, whereas those who seek at a long-term corporate control would probably proceed to a hostile bid.

Even though the greenmail defense succeeds in buying time for the management to proceed to corporate restructuring, it has received sharp criticism for being mainly contrary to the business ethics\textsuperscript{146}. Concretely, it constitutes a discriminatory payment and a violation of the implied duty of fairness to all shareholders, as the latter do not have the right to sell their shares to the company at premium\textsuperscript{147}, a fact which often results to legal disputes\textsuperscript{148}. Furthermore, it facilitates “management entrenchment”, enabling the target’s managers to pay the greenmailer and preserve their jobs,

\textsuperscript{142} also known as the “targeted share repurchase” strategy, as stated in Bruner (2004), p. 849
\textsuperscript{143} The amount paid is colloquially called a “bon voyage bonus” or “goodbye kiss”, as stated in McSweeney Brendan in Faulkner David, Teerikangas Satu and Joseph Richard J., p. 297
\textsuperscript{144} The standstill agreement may be also used by the management which offered inside information to the bidder during the negotiation stage, to prevent the latter from addressing the shareholders with an offer which is detrimental for the interests of the incumbent management (McSweeney Brendan in Faulkner David, Teerikangas Satu and Joseph Richard J., p. 298). This method, however, raises the issue of the principal-agent conflict, as it is contrary to the fiduciary duties of the management.
\textsuperscript{145} Zarin and Yang, p.21
\textsuperscript{146} Bruner (2004), p.23
\textsuperscript{147} Ibid
\textsuperscript{148} Ibid, p.849
whereas it results to the transfer of wealth from the remaining shareholders, a fact which is also contrary to the target’s economic interests. Moreover, this tactic might pave the way for further takeover attempts, as it is a sign that the target is vulnerable. Consequently, due to the above problems greenmail in some jurisdictions is debarred, discouraged or subject to shareholders’ authorization.

THE CROWN JEWEL DEFENSE

The “crown jewel” can be defined as the most profitable asset of the target company, such as a highly profitable division, a revolutionary product, a subsidiary, or a large tax-loss carryover, therefore it constitutes the basic incentive for a takeover. Under the crown jewel defense, the target company decides to sell-off the entire or part of its most valuable assets in the event of a hostile takeover. By doing so, it becomes less “attractive” and forces the withdrawal of the bid. Usually, the “crown jewels” are sold to a friendly third party, also referred to as a “white knight”, which agrees to resell them to the target company at a fixed price after the acquiring company has withdrawn the bid.

Although the “crown jewel” defense seems prima facie effective, it might be proven risky in some respects, as the sale of the most valuable assets of a company jeopardizes its whole operation. Furthermore, in case of a sale to a “white knight”, the later needs to guarantee the resale to the target company at a fixed price. Finally, it has been argued that the effectiveness of this defense depends on the sum of money received from the sale of the assets. Concretely, if the target company has managed to

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149 Ibid
153 According to Underhill William and Austmann Andreas in Payne Jennifer (2002), “Takeovers in English and German Law”, Hart Publishing, p.106, the crown jewel defense involves the sale of that part of the target of which the bidder is seeking to acquire control.
155 Ibid
sale its assets at a high price and therefore received a large sum of money, it would potentially become even more “attractive” to the acquirer\textsuperscript{156}.

THE “PAC-MAN” DEFENSE

Named after the famous videogame, the “Pac-Man” defense may be defined as a counter-purchase attempted by the target company against its hostile bidder\textsuperscript{157}. Concretely, to rebut the hostile bid, the target company starts to purchase large amounts of the bidder’s shares. However, in some cases, it will suffice for the target company to buy even a small fraction of shares of the potential acquirer, which will enable it to initiate legal claims against the latter in the capacity of minority shareholder\textsuperscript{158}.

The main advantages of this measure are that it demonstrates aggressive resistance, raises the target’s possibility of success, as well as it constitutes one bargaining chip in negotiating with the bidder\textsuperscript{159}. However, this tactic has three main disadvantages\textsuperscript{160}: first, its implementation is a sign that the target acknowledges the desirability of the combination of the two firms, consequently, claims and defenses that the target would otherwise make are eliminated; secondly, due to the role reversal, the target/counter-bidder becomes subject to the various defensive measures that the other part may implement; finally, there is uncertainty on how the defense concludes, as, at the end of the contest, both, target/counter-bidder and bidder own the majority of the other, without being clear who is in control\textsuperscript{161}.

“Pac-Man” constitutes an extreme defense\textsuperscript{162} which is often threatened but is rarely used\textsuperscript{163}. Consequently, due to the aforementioned problems and its rare use, the

\textsuperscript{156} Ibid
\textsuperscript{157} Kokot, p.20
\textsuperscript{158} Ibid
\textsuperscript{159} Bruner (2004) p.846
\textsuperscript{160} Ibid
\textsuperscript{162} According to Gaughan p.238 it is a “doomsday machine”
\textsuperscript{163} The measure first appeared in 1980, in the hostile takeover attempt of Midway Manufacturing Company. In 1982 it was used in the following cases: American General/NLT, Mesa Petroleum/ Cities Service, Pabst/ Olympia Brewing, General Cinema/ Heublein, and Bendix/Martin-Marietta. Other famous cases in which the measure was used are E-II/American Brands (1988), Elf Aquitaine/Totalfina (1999) and Shorewood Corporation /Chesapeake (1999).
measure alone is not always effective, therefore, it shall be used in conjunction with other defenses.

THE WHITE KNIGHT, THE WHITE SQUIRE AND THE LOCK-UP DEFENSES
These measures require the involvement of third parties for the repulse of the hostile bidder. Under the “white knight” defense, a friendly firm agrees to acquire the majority stake in the target company to “save” the latter from a hostile acquisition\textsuperscript{164}. If the friendly company does not acquire the majority stake of the target company, but a smaller portion of its shares, without taking control of the target, it is characterized as a “white squire”\textsuperscript{165}. Similar to the above defenses is the “Lock-up” defense, under which the “white knight” is granted options to purchase either a significant amount of stock, often at a bargain price, or certain valuable assets, even the crown-jewels, of the target company, as an attempt of the latter to deter the hostile bidder\textsuperscript{166}.

The criteria under which a company is regarded as a “white knight” are its friendly intentions, the historical good relationships and the belief of better synergies between the two companies. Furthermore, a “white knight” is expected not to proceed to the dismissal of the employees of the target company\textsuperscript{167}, including the members of the board\textsuperscript{168}. Moreover, especially the lock-up defense has been found to have a positive impact on shareholders’ wealth\textsuperscript{169}.

The common outcome of the aforementioned measures, is that the target company is partly or in whole acquired by the “white knight”, therefore it loses its independence. It manages, however, to escape from a hostile takeover, which would lead to a greater restructuring\textsuperscript{170}. Consequently, the above advantages render these methods effective,

\textsuperscript{164} According to Bruner (2004), p.848, the reasons behind the acquisition of the target company by a “white knight” may stem from the latter’s desire to acquire synergistic gains or maintain a strategic relationship with the target, or from purely financial considerations, as indicated in the acquisition of Berkshire Hathaway’s by Scott & Fetzer
\textsuperscript{165} Bruner(2004), p.848
\textsuperscript{166} Mick, p.712; see also Gaughan, p.219 and DePamphilis p.120, who states that the lockup serves as a protection to the white knight in case a bidding war ensues
\textsuperscript{167} Zarin and Yang, p.20
\textsuperscript{168} a fact which leads to the conclusion that the above defenses may facilitate management entrenchment, as stated in Gaughan (2011), p.219, with regard to the lockup defense
\textsuperscript{170} Zarin and Yang, p.20
if, however, a “white knight” is found, a procedure which is more complicated than it may look.

Concluding this chapter, it should be underlined that the above measures constitute only a fraction of the various mechanisms applicable by the target company in the event of a hostile takeover. Due to the various deficiencies, the above measures are usually adopted in combination to be effective. However, it shall be underlined that their enactment depends on the applicable national law.
COMPARATIVE ANALYSIS OF THE US AND EU TAKEOVER LAW ON TENDER OFFERS

Even though hostile takeovers are a global phenomenon, their regulation varies among nations. This lack of convergence becomes apparent after the examination of the two model systems applied in the United States and in Europe, which follow diametrically opposed approaches on the regulation of hostile takeovers attempted by means of a tender offer.

THE US FRAMEWORK

Due to the system of federalism, takeovers in the United States are regulated both at federal and state level, each of which focuses on different aspects of takeovers. Concretely, securities regulation, tender offers and antitrust law fall within the scope of federal law, whereas issues of corporate law, such as corporate charters and bylaws, directors’ duties and takeover defense, are governed by state law. Consequently, for the issues falling in the second category, there are 50 different sources of US corporate law. In cases of directors’ fiduciary duties, however, corporate law in the US has been heavily influenced by Delaware case law, not only because Delaware is the state where most of US public listed corporations are incorporated in, but also due to the expertise and flexibility of the Delaware Court of Chancery.

The following analysis will focus on the core elements of Williams Act, which regulates tender offers at federal level, whereas regarding state level regulations, the Delaware’s case law on directors’ fiduciary duties and the three generations of State Anti-Takeover Statutes will be analyzed.

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172 In the official website of the State of Delaware http://www.corp.delaware.gov/aboutagency.shtml it is stated that “more than 50% of all publicly-traded companies in the United States including 64% of the Fortune 500 have chosen Delaware as their legal home”

173 Magnuson, p. 214
THE WILLIAMS ACT (1968)
Constituting an amendment of the Securities Exchange Act of 1934\textsuperscript{174}, the Williams Act, (1968), marks the modern era of federal regulation of tender offers\textsuperscript{175}, by establishing the mandatory disclosure of information and the procedural requirements of tender offers. Even though it applies to all types of tender offers, including friendly, hostile and self-tender offers\textsuperscript{176}, it does not provide a concrete definition of the term “tender offer”, leaving its determination to case law\textsuperscript{177}.

Section 13(d) of the Act and SEC Regulation 13D aim to provide an early warning for the target company regarding a pending bid, even if the bid is not eventually made\textsuperscript{178}. Under them, if the acquisition of shares exceeds the threshold of 5% or more, the acquirer is obliged to disclose certain information by filing a Schedule 13D with the SEC within 10 days after reaching this threshold\textsuperscript{179}. This information includes: the acquirer’s background and identity; its source of funds; the purpose of the acquisition and any further plans, such as a possible liquidation of the target or major business changes; the acquirer’s holdings in the target company and any past contracts with the target\textsuperscript{180}.

Furthermore, Section 14(d) and SEC Regulation 14D set the basic procedural rules for tender offers, “so long as upon consummation of the tender offer the bidder would beneficially own more than five percent of the class of securities subject to the offer”\textsuperscript{181}. To make a tender offer, the acquirer must file with the SEC a “Tender Offer

\textsuperscript{174} Adding new §§13(d)-(f) and 14(d)-(f)
\textsuperscript{175} Magnuson, pp.213 et sec
\textsuperscript{176} According to DePamphilis, p.54, self-tender offers are those “undertaken by a firm to repurchase its own stock”
\textsuperscript{177} In Wellman v. Dickinson (475 F Supp 783 (SDNY 1979), aff’d d 632 F 2d 355 (2d Cir 1982)), the court set out the eight factors (the so called Wellman factors) constituting a tender offer, which are the following: 1. there is an active and widespread solicitation of public shareholders for shares of the target company; 2. the solicitation is made for a substantial percentage of the target company’s shares; 3. the offer to purchase is made at a premium over the existing market price; 4. the terms of the offer are firm rather than negotiated; 5. the offer is contingent on the tender of a fixed number of shares and possibly specifying a maximum number of shares; 6. the offer is open for only a limited time period; 7. the offeree is subject to pressure to sell shares; 8. there are public announcements of a purchasing program that precede or are coincident with a rapid accumulation of large amounts of shares of the target company. It shall be noted that the last factor was added after the decision on Wellman v. Dickinson case. It is argued, however, that not all these factors have to be met to implement the Williams Act, whereas the courts have added more tests to define the existence of a tender offer.
\textsuperscript{178} DePamphilis, p.54
\textsuperscript{179} See Section 13(d)(1) of Williams Act (15 U.S.C §78m (d)(1)) and Rule 13d(1) of SEC Regulation 13D (17 C.F.R §240.13d-1)
\textsuperscript{180} See Section 13(d)(1)(A)-(E) of Williams Act (U.S.C §78m (d)(1) (A)-(E)) and Schedule 13D (17 C.F.R §240.13d-101)
Statement on Schedule TO"\(^{182}\), in which it discloses similar information requested under Schedule 13D\(^{183}\). From its part, the target board is obliged to fill with the SEC a Schedule 14D-9\(^{184}\), also called solicitation/recommendation statement, in which it discloses its recommendation about the bid\(^{185}\), in agreement with the below analyzed Rule 14e-2 of SEC Regulation.

Section 14(d) of the Act and SEC Regulation 14 D set also the shareholder rights, under which the acquiring firm must purchase all the shares tendered at the offer price or at least on a pro rata basis\(^{186}\), unless the number of the tendered shares is smaller than the one requested in the tender offer\(^{187}\). Shareholders are also entitled to withdraw their shares at any time, if the tender offer is still open\(^{188}\). Furthermore, under the “best price rule”\(^{189}\), all the tendering shareholders are paid the same per share price. However, in cases where the acquirer makes a tender offer for all the outstanding shares aiming to reach at least a certain threshold, once the threshold is met, the acquirer can purchase the remaining shares at any price\(^{190}\).

Moreover, in line with Section 14(e) of the Act\(^{191}\), Regulation 14E provides the basic procedural protections, applicable to all tender offers, including those in which the threshold of 5% is not met (mini tender offers). Under Rule 14e-1 of the Regulation, the tender offer must remain open for 20 days\(^{192}\), with a possibility of extension of 10 days, following an increase or decrease by more than 2% either in the class of securities being sought or in the consideration offered\(^{193}\). Regarding the target’s obligations, Rule 14e-2 obliges the board to state its position about the offer within 10 business days after the offer begins\(^{194}\).

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\(^{182}\) Rule 14d-3(a)(1) of SEC Regulation 14D [17 CFR §240.14d-3(a)(1)] and Schedule TO (17 CFR 240.14d-100)

\(^{183}\) See 17 CFR 240.14d-100, namely the bidder’s background information, source of funds, business plans regarding the target, extent of ownership in the target, past contracts with the target, antitrust problems and other relevant information.

\(^{184}\) Rule 14(d)-9 of Regulation 14D (17 CFR 240.14d-9) and Schedule 14D-9 (17 CFR 240.14d-101)

\(^{185}\) required under Rule 14e-2, which will be analyzed below

\(^{186}\) Section 14(d)-6 of the Act (15 U.S.C 78n(d)(6)) and Rule 14d-8 of SEC Regulation 14D [17 CFR 240.14d-8]

\(^{187}\) DePamphilis, p. 55

\(^{188}\) Section 14(d)-5 of the Act (15 U.S.C 78n(d)(5)) and Rule 14d-7 of SEC Regulation 14D [17 CFR 240.14d-7]

\(^{189}\) Rule 14d-10 of SEC Regulation 14D (17 CFR 240.14d-10)

\(^{190}\) unless it is evidenced that information regarding the tender offer has been withheld or misrepresented, as stated in DePamphilis, p. 55; see also case In re Siliconix Inc. Shareholders Litigation (Consolidated C.A No.18700 Court of Chancery, Delaware)

\(^{191}\) 15 U.S.C 78n(e), which prohibits fraudulent, deceptive, and manipulative acts during a tender offer,

\(^{192}\) 17 CFR 240.14e-1(a)

\(^{193}\) 17 CFR 240.14e-1(b)

\(^{194}\) See also Rule 14d-9 of SEC Regulation 14D
Despite the importance of the above rules, Williams Act, as well as federal regulation in general, covers only a small part of takeover legal framework. The fiduciary duties of the target’s board and the permitted defensive measures are governed by the corporate law and the judicial decisions of the state in which the target is incorporated. However, the foundations of the target directors’ response in a hostile takeover have been defined by a series of cases in the State of Delaware, which “carry influence beyond the state’s borders” and therefore constitute an inextricable part of American tender offer regulation.

DELAWARE’S CASE LAW ON FIDUCIARY DUTIES AND DEFENSIVE MEASURES

The review of the board’s efforts to deter a hostile takeover had been for a long time a difficult task, as the application of the usual standards, namely the business judgement rule and the intrinsic fairness test, did not seem quite appropriate. To achieve a middle ground between these theories, the Delaware courts developed the so called “intermediate standard”, through a series of rulings beginning in the 1985.

The first case addressing the “intermediate standard” was the Unocal Corp v Mesa Petroleum Co, in which the Delaware Supreme Court recognized that directors of the target company are “of necessity confronted with a conflict of interest”, as they face the possibility of replacement after the completion of the takeover. Therefore, in order to decide upon the legitimacy of the defensive measures, the court applied a

195 Magnuson, p.214
196 Originated in case Otis & Co. v. Pennsylvania R. Co., 61 F. Supp. 905 (D.C. Pa. 1945), this doctrine states that the decisions made by the company’s directors are protected as long as they are made (1) in good faith, (2) with the care that a reasonably prudent person would use, and (3) with the reasonable belief that they are acting in the best interests of the corporation (as stated in https://www.law.cornell.edu/wex/business_judgment_rule), even though, in retrospect, these decisions were proven unsound or erroneous, as set in McMillan Lori, " The Business Judgement Rule as an Immunity Doctrine", William and Mary Business Law Review, Volume 4, Issue 2, 2013, p.526
197 Originated in case Weinberger v. UOP Inc., Supreme Court of Delaware, 457 A.2d 701, (1983), this doctrine states that the directors of the target are obliged to prove that the challenged action was entirely fair to the corporation and its shareholders: fair in terms of fair dealing and fair price, as stated in Bruner (2004), p.718
199 Or “proportionality test” Ibid p.248. It shall be noted, that in 1964, before the boom of hostile activity in the 1980s, the Delaware Supreme Court addressed the issue in Cheff v. Mathes case (Cheff v. Mathes, 41 Del. Ch. 494, 199 A.2d 548 (1964)), setting the policy conflict/ primary purpose test, under which the standard of review for defensive tactics was defined by the motives of the directors. If the management could demonstrate an argument regarding corporate policy with the possible acquirer, it was presumed to act from business considerations rather than self-interest. As the management was always able to prove policy conflict with the acqui
two-tier test: first the directors had to show that they “had reasonable grounds for believing that a danger to corporate policy and effectiveness existed” and they needed to satisfy that burden "by showing good faith and reasonable investigation"; secondly, the defensive measure should have been “reasonable in relation to the threat posed”. Once these two requirements were met, the defensive measures adopted by the board were considered as valid. The Unocal test modified the classic business judgement rule and since its formulation, it has been frequently applied by Delaware courts in assessing the board’s behavior in cases the latter aims at preserving the target’s independence.

Soon after the adoption of the Unocal test, the Supreme Court of Delaware restricted the directors’ freedom of action through its decision on Revlon Inc v MacAndrews and Forbes Holdings Inc case. At the first instance, the Delaware Court of Chancery held that “once the breakup of Revlon became inevitable... the board [had] to view its primary role as the promoter of bids, with price the dominant consideration”. In line with this view, the Delaware Supreme Court ruled that “[t]he directors’ role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company”. Under the Revlon duties, which apply in case of an inevitable sale of the target company, directors shall use defensive measures only to promote the “auction process” and achieve the highest price by favoring one bidder over another. However, in its ruling on Paramount Commc’ns Inc. v. Time Inc., the Delaware Supreme Court gave more leeway to the board, by stating that even in cases where the target would be inevitably sold, the consideration of factors other from the offer price, such as the amount of information available to shareholders or the conditions and the timing of the offer, may justify the implementation of defensive measures.

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202 Ibid
203 Ibid
204 Therefore, is also known as the “enhanced business judgment rule”
205 See Wang, p. 104 and 106. Under this test, the Delaware Supreme Court accepted the validity of the poison pill defense in case Moran v. Household Int'l, Inc. (500 A.2d 1346, at 1357 (Del. 1985))
207 MacAndrews & Forbes Holdings Inc v Revlon Inc, 501 A 2d 1239 (Del Ch 1985), 1250-1251
208 Revlon Inc v MacAndrews & Forbes Holdings Inc, 506 A 2d 173 (Del. 1986), 182
209 Paramount Commc’ns Inc. v. Time Inc,571 A.2d 1140 (Del.1989)
The directors’ duties and the availability of defensive measures have been further clarified in two more decisions of the Delaware Supreme Court in the 1990s\(^\text{210}\). In Paramount Communications Inc v QVC Network Inc\(^\text{211}\), the Court stated that directorial defensive measures are subject to enhanced scrutiny, only when the Revlon duties apply, namely, once the sale of the target corporation is inevitable\(^\text{212}\). Moreover, in Unitrin Inc v. American General Corporation\(^\text{213}\), the Court expanded the directors’ margin of discretion, as it recognized the validity of the defensive tactics, if the latter meet two requirements: they are not “draconian”\(^\text{214}\) and they are within a “range of reasonableness”\(^\text{215}\).

These cases lead to the conclusion, that the target’s directors enjoy a large margin of discretion in the application of defensive measures against a hostile takeover, if they act “in good faith”, after “reasonable investigation” and the adopted measures are not “draconian”. In case of the inevitable sale of the target company, the board is more restricted under the Revlon duties, however, this restriction does not hinder absolutely the implementation of takeover defenses. The above stated requirements constitute the “intermediate standard” between the business judgement rule and the intrinsic fairness test, however, this standard is closer to judicial deference than to judicial scrutiny\(^\text{216}\).

In addition to state law fiduciary duties, a substantive part of takeover legislation at state level is covered by state anti-takeover statutes, the analysis of which follows.

STATE ANTI-TAKEOVER STATUTES

Resulting from intense lobbying and political pressure, state anti-takeover statutes aim at protecting in-state corporations from being taken over, especially by out-of-state acquirers\(^\text{217}\). These statutes were first adopted in the late 1960s and early 1970s\(^\text{218}\).

\(^{210}\) Magnuson, p. 216
\(^{211}\) Paramount Communications Inc v QVC Network Inc 637 A 2d 34 (Del 1994)
\(^{212}\) 637 A 2d at 45. It should be noted that the Revlon duties apply in case of (a) a change in corporate control; or (b)of a breakup of the corporate entity (637 A 2d at 48)
\(^{213}\) Unitrin Inc v. American General Corporation 651 A.2d 1361 (Del. 1995)
\(^{214}\) According to this case, the defensive measures are “draconian”, if they are coercive or preclusive (651 A.2d at 1387)
\(^{215}\) 651 A.2d at 1388
\(^{216}\) Magnuson, p.216
\(^{217}\) Ibid
\(^{218}\) Gaughan, p. 97
and, since then, they have gone through three generations of development. Despite their major differences, their key characteristics remain similar across the states.

The first generation of state anti-takeover laws emerged shortly after the enactment of the Williams Act and its main objective was to enhance the protection of target companies against hostile bids by imposing procedural and substantive requirements on the bidders. However, these statutes were proven problematic, as they enabled state administrators to review offers on various grounds, such as substantive fairness and adequacy of disclosures, hold a hearing to review the offers, and impose waiting periods. Moreover, as they attempted to regulate tender offers made for firms incorporated in other states, they were considered as unfair to bidding companies. After their judicial review, many of the provisions of these statutes had been invalidated by federal courts, culminating in the decision on Edgar v. MITE Corp.

The second generation of anti-takeover statutes presents a narrower scope of protection, focusing on issues of corporate governance of in-state corporations. The primary form of these statutes was the “Fair Price Statute”, which required takeovers to be approved by a supermajority of shareholders, unless they all received the best price paid by the offeror. The next form was the “Control Share Acquisition Statute”, which denied voting rights to a bidder that acquired more than a specified percentage of a target's shares, unless these rights were approved by the majority of the target's shareholders that were unaffiliated with the bidder. These statutes had been approved by the federal Courts, as it is evidenced by the famous case CTS Corps v. Dynamics Corps of America. Moreover, the last example of second generation statutes is the “Stakeholder Statutes” or “Constituency Statutes”, which permit management to consider the interests of related groups (such as employees,
customers, suppliers and communities served by the company) in addition to the interests of the shareholders.\(^{226}\)

Finally, the third generation of state anti-takeover statutes, as adopted in the late 1980s, seek to expand their scope of protection of in-state corporations, by prohibiting certain post-bid transactions. Concretely, these statutes, generally known as “Business Combination or Moratorium Statutes”\(^{227}\) prohibit, often for a limited period and subject to certain “fair price” exceptions, a bidder that acquires more than a specified percentage of a target’s stock from engaging in a post-acquisition business combination transactions, such as a merger\(^{228}\), unless such transactions are approved by the target’s board or by the super majority of the “disinterested shareholders”\(^{229}\). Even though they differ in severity between states\(^{230}\), third generation statutes have so far withheld the various constitutional challenges before federal courts, as it is evidenced in the decisions upon BNS INC. v. Koppers Co.Inc.\(^{231}\), Amanda Acquisition Corp. v. Universal Foods Corp.\(^{232}\) and West Point-Pepperell Inc v. Farley Inc.\(^{233}\)

To summarize, anti-takeover statutes broadened effectively the scope of protection of target companies against hostile takeovers, by enabling directors to consider a wider range of factors in decision-making and by strengthening the role of shareholders during the takeover process\(^{234}\).

Anti-takeover statutes, state law on fiduciary duties and federal legislation regulate takeover law in the US. However, this system stands in stark contrast with EU takeover law, as formed after the adoption of the E.U Directive on Takeover Bids.

\(^{226}\) As stated in Magnuson, p. 218; examples of these statutes can be found in CAL. CORP. CODE §309 and in IND. CODE ANN. §23-1-35-1

\(^{227}\) Examples of these statutes can be found in N.Y. BUS. CORP. LAW §912 and in DEL. GEN. CORP. LAWS § 203

\(^{228}\) This type of merger is called a “two-step merger”. In the first step, the purchasing company acquires control of the target company usually by means of a tender offer, whereas in the second step, the purchaser uses its control to proceed to a merger with the target and freeze out minority shareholders for either cash or securities, as defined in Toms Bate C.(1978), “Compensating Shareholders Frozen out in Two-Step Mergers”, Columbia Law Review Volume 78, Issue 3, p. 548

\(^{229}\) Wang, p. 99


\(^{232}\) Amanda Acquisition Corp. v. Universal Foods Corp., 877 F.2d 496 (7th Cir.1989), cert. denied, 493 US 955 (1989)


\(^{234}\) Magnuson, p. 218
THE EU FRAMEWORK

Unlike the United States, where takeover regulation varies significantly among states, the European Union has established, a comprehensive legal framework regulating the basic elements of tender offers (or takeover bids under EU law) conducted in EU level. Adopted in 2004, after years of controversy and unsuccessful attempts, the Directive on takeover bids constitutes a legal instrument which seeks to harmonize the different takeover systems among EU member states.

In some basic aspects, the Takeover Directive emulates the Williams Act. Typical examples of convergence can be found in its provisions requiring the following:

a) that bidders announce their bids without delay, inform the supervisory authorities and make public an offer document that states the basic information regarding the bid, such as the terms and conditions, the identity of the offeror and its business plans for the target, the consideration and compensation offered e.t.c. b) that all shareholders must be treated equally in takeover bids and be offered the highest offer price, c) that bids remain open for a certain time, enabling shareholders to reach a decision after being sufficiently informed and d) that the bid’s public disclosure ensures the transparency and integrity of markets.

However, despite the above similarities, the Takeover Directive contains five innovative provisions which are absent from American Regulation, namely the mandatory bid rule, the squeeze-out and sell-out rights, the board neutrality and the breakthrough rule, as they will be in short discussed below.

THE MANDATORY BID RULE

In accordance with the pre-existing law in most member states, Article 5 of the Directive sets forth the so-called mandatory bid rule, under which the acquirer of a
threshold percentage of a target company’s voting rights is obliged to make a bid for all the outstanding shares of the target at an equitable price. The threshold percentage is specified by each Member State, whereas the equitable price is defined as “the highest price paid for the same securities by the offeror” over a period also determined by each Member State.

The mandatory bid rule seeks to resolve the principal-principal agency conflict first by hindering controlling shareholders from selling the private benefits of control to another party at the expense of the minority shareholders; furthermore, it protects the minority shareholders by offering an escape hatch after the completion of the takeover. This provision exceeds the “best price rule” of SEC Regulation, as it requires an “any and all” bid after the bidder reaches a certain threshold of the target’s shares, a requirement which is not found under US law.

Despite its protective scope, the mandatory bid rule has been heavily criticized, mainly due to the wide leeway given to the Member states to derogate from its minimum safeguards, or even waive its enforcement, a fact with proves inconsistency with the minimum harmonization technique of article 3§2. Concretely, article 5§4 in conjunction with article 4§5 state that Member States may allow their supervisory authorities to decide, on a case-by-case basis, either to adjust the equitable price or waive the application of mandatory bid rule, regardless of whether the latter is specified by national rules or not. Furthermore, some critics argue that the mandatory bid rule increases the price of takeovers, whereas, in general, it fails to became fully comprehensive.

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243 Id. Article 5§4
244 Namely, the conflict between majority and minority shareholders
246 Ferrarini and Miller, p.312
247 Ibid
248 Rule 14(d)-10 of SEC Regulation 14 (C.F.R 17 §240.14d-10)
251 Ferrarini and Miller, p.312
THE SQUEEZE-OUT AND SELL-OUT RIGHTS

The protection of minority shareholders is completed through articles 15 and 16, which provide the squeeze-out and sell-out rights. Under article 15§2, Member States shall ensure that the successful bidder holding at least 90% of the target’s securities is entitled to require the holder of the remaining securities to sell him those securities at a fair price (squeeze-out right). The Member States shall increase this threshold up to 95%. Conversely, the minority shareholders are entitled, under article 16 to require from the acquirer of 90%-95% of the target’s stock to purchase their securities at a fair price (sell-out right). As above stated, both provisions aim to safeguard the minority shareholders. The squeeze-out right offers a second chance to sell their shares after the completion of the first bid, whereas the sell-out right facilitates their exit from the company, protecting them from being oppressed by the acquirer to sell their shares at a low price.

However, both provisions may be proven inefficient under certain circumstances. Concretely, article 15 does not prohibit statutory mergers, which can serve as a technique of de facto squeeze-out at higher costs, but at lower valuations than the takeover bid. Statutory mergers require a lower threshold and do not contain strict fair pricing provisions, therefore, their implementation dilutes the efficiency of the squeeze-out right. Furthermore, the protection offered by the sell-out right may be also proven weak, as in most cases, its exercise depends on the prior launch of a mandatory bid. However, as the implementation of the mandatory bid rule remains at the discretion of the Member States and their national supervisory authorities, the sell-out rule is inapplicable in a possible waiver of a mandatory bid rule. Moreover, the real value of the sell-out right is also questioned due to the absence of any obligation on the offeror to notify the minority shareholders when the right has arisen.

THE BOARD NEUTRALITY RULE

The Takeover Directive addresses also the issue of permissibility of the defensive measures in the event of a hostile takeover. Contrary to the US legal framework, in

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253 Ibid, p.530, which refers to the example of the Deutsche Telecom and T-Online case
254 The case is different if the sell-out right is triggered after a voluntary bid for all the outstanding shares
which the implementation of the defensive measures is permitted if these are not “draconian” and the board acts in “good faith” and after “reasonable investigation”, the Takeover Directive provides the strict rule of the board’s neutrality.\textsuperscript{256}

Under article 9 of the Directive, once the board of the target company is informed of a pending bid,\textsuperscript{257} it is prevented from taking “any action, other than seeking alternative bids, which may result in the frustration of the bid”. Defensive measures are by their nature aimed at frustrating the bid, therefore, almost all of them constitute a violation of the neutrality rule.\textsuperscript{258} However, as the article is modeled on the UK City Code on Takeovers and Mergers,\textsuperscript{259} it states, that the board may implement defensive measures in case such implementation is authorized by the general shareholders’ meeting.

It should be underlined, that the Directive specifically refers to two defensive measures by approving the one and rejecting the other. First, it states that the board is free to seek alternative bids, even without the shareholders’ approval, consequently, it allows the white knight defense. On the other hand, it explicitly prohibits the board from “issuing any shares which may result in lasting impediment to the offeror’s acquiring control of the offeree company”,\textsuperscript{260} namely it forbids the poison pill defense.

The board neutrality rule remains, in general, in sharp contrast with the US law, which offers in most of states a high degree of protection against a hostile takeover. The Takeover Directive is not so protective.\textsuperscript{261} It addresses the principal-agency problem by requiring the target’s board to act in the best interest of the company and refrain from acts which would deprive from the shareholders the right to decide upon the merits of a pending bid. In a nutshell, the rule aims to protect shareholders, facilitate corporate restructuring, even in the case of hostile takeovers, and encourage investors, however

\textsuperscript{256} also known as the passivity rule. The rule is also found in US literature, namely in Easterbrook, Frank H. and Fischel, Daniel R. (1981), “The Proper Role of a Target’s Management in Responding to a Tender Offer”, 94 Harvard Law Review, p. 1161 et seq, in which the scholars uphold the “managerial passivity”\textsuperscript{257} Under the rules of article 6 of the Directive\textsuperscript{258} Magnuson, p.221\textsuperscript{259} Ferrarini and Miller, p.313; see also Panel on Takeovers and Mergers, The City Code on Takeovers and Mergers and the Rules Governing Substantial Acquisitions of Shares, General Principle 7\textsuperscript{260} Unless such measure is authorized by the shareholders, as above stated\textsuperscript{261} Ferrarini and Miller, p.313
it is questioned whether such aims are fulfilled, as under article 12, the implementation of the board neutrality rule is left at the discretion of the Member States and individual companies.

THE BREAKTHROUGH RULE
Another major difference between US law and the Takeover Directive is found in article 11 of the latter, which establishes the breakthrough rule. This provision facilitates hostile takeovers, as it invalidates a series of corporate strategies or arrangements which might be used to hinder or defeat unwanted bids. The breakthrough rule establishes the “one-share-one vote” principal and has been characterized as “one of the most controversial and complicated” provisions of the Directive.

Concretely, article 11§2 states that when the bid is made public, any restrictions on the transfer of securities shall not apply vis-à-vis the offeror during the time allowed for the acceptance of the bid. Furthermore in §3 the article continues by prohibiting the application of restrictions on voting rights during the shareholders’ general meeting which decides upon the implementation of any defensive measures. Moreover, under §4, if, after the completion of the offer, the offeror holds at least 75% of the target’s voting rights, the application of any restrictions on the transfer of securities or on voting rights as well as any extraordinary rights of shareholders regarding the appointment or removal directors, namely any pre-bid defenses, remain inapplicable. Furthermore, under this provision multiple-vote securities shall carry only one vote at the first general meeting called by the offeror after the closure of the bid.

The breakthrough rule neutralizes some of the anti-takeover mechanisms used against a hostile takeover. The provision has a two-fold purpose: on the one hand, it seeks to limit the ability of the board to entrench its position and fend off efficient bids, whereas, on the other hand, it purports to create a leveled-playing field across

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262 Magnuson, p.222
263 Article 7 of the Takeover Directive
Europe. However, it has been characterized as “controversial”, as it preempts prior contractual and legal arrangements, even though their effect is mitigated under §5, which establishes the requirement of “equitable compensation”, paid to shareholders whose rights have been broken through. Finally, among the various deficiencies of the article being highlighted in theory, the most important is again found in article 12 of the Directive, as the ability of the Member States to opt-out of the breakthrough rule, renders the latter a simple recommendation.

Despite its deficiencies, the Takeover Directive constitutes a comprehensive mechanism aiming to achieve a minimum harmonization of takeover regulation among EU Member States. Its core differences with the US legal framework raise the question regarding which of the two systems facilitates hostile takeovers, an issue briefly outlined below.

THE IDEAL SYSTEM FOR HOSTILE TAKEOVERS

Since the adoption of the Takeover Directive, many commentators attempted to compare the effectiveness of the US and EU legal systems on takeovers by focusing on the advantages and disadvantages of their key provisions in light of the main goals of an ideal takeover regulation: “encouraging value and maximizing takeovers while protecting the interests of shareholders”. This study focuses on indicating which system favors specifically hostile takeovers.

The overview of the US and EU legal framework on takeovers leads undoubtedly to the conclusion that the launch of a tender offer is easier, from an economic perspective, under the US legal system, as the mandatory bid rule of the Takeover Directive, obliges the bidder, upon reaching a certain threshold of the target’s voting rights, to make an offer for all the outstanding shares of the target company. Furthermore, the sell-out right empowers the minority shareholders to demand from the offeror to purchase

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265 Ibid
266 Ferrarini and Miller, p.313
267 However, as the Directive fails to determine how such compensation is calculated, this task falls under the responsibility of the Member States, which have long struggled with the problem, (Magnuson, p. 222)
268 For a complete analysis of the deficiencies of the breakthrough rule see Papadopoulos Thomas Gr. (2010) p.129 et sec
269 Ventoruzzo, p.211
270 Magnuson, p.235
their shares at a fair price. These provisions, established to protect minority shareholders, make takeovers, included the hostile ones, more expensive under EU law and possibly, less frequent. On the contrary, under US law, corporate raiders are free to launch a tender offer for as many shares as they desire, however, in practice, they nearly always make full takeover bids for all the voting securities. Consequently, in effect, the two systems do not differ in this aspect.

However, once the bid is launched, the US takeover system offers wide discretion to the target’s board to apply any defensive measures, without requiring prior shareholders’ authorization, provided that they are not “draconian” in comparison to the threat posed and the board acted in good faith and after reasonable investigation. On the contrary, the Takeover Directive establishes the strict neutrality rule, which forbids the adoption of most post-bid defenses, unless the shareholders’ board authorizes this adoption. Regarding the pre-bid defenses, these are overridden by the breakthrough rule. Furthermore, the squeeze-out right facilitates and encourages the bidders who make an offer for all the outstanding shares, as they know in advance that, upon reaching the threshold of 90%-95%, they will be able to exercise it to gain 100% of the target’s equity and apply a more efficient management.

Before reaching a conclusion, it must be remembered, that the board neutrality and the breakthrough rule are optional provisions in the EU Takeover Directive and subject to the discretion of the Member States and the various corporations. Under the Commission’s report of the operation of the Takeover Directive, 19 Member States have transposed the board neutrality rule, while only the Baltic States adopted the breakthrough rule, namely only 1% of the listed companies in the EU is mandatorily subject to it. Furthermore, “in accordance with article 12 (3) of the

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271 Ventoruzzo, p.219
272 Magnuson, p.236
274 Article 12§2-3 of the Takeover Directive
276 Namely, Austria, Bulgaria, Cyprus, the Czech Republic, Estonia, Finland, France, Greece, Ireland, Italy, Latvia, Lithuania, Malta, Portugal, Romania, Slovenia, the Slovak Republic, Spain and the United Kingdom
277 Namely, Estonia, Latvia and Lithuania
278 Johnston Andrew, EC Regulation of Corporate Governance, Cambridge University Pres, 2009, p.284
Directive, about half of the Member States allow companies who are subject to the board neutrality rule and/or breakthrough rule (by law or based on the articles of association of the company) not to apply the rule when they are confronted with a takeover bid by an offeror who is not subject to the same rule (reciprocity). Consequently, from a theoretical point of view, due to the board neutrality rule, the breakthrough rule and the sell-out right, the EU Takeover Directive seems to further facilitate hostile takeovers in comparison to the US legislation. However, the optional and, therefore, uneven transposition of the first two rules in Member States leads to the conclusion that whether hostile takeovers are favored or fended off depends on the national law applied in each case.

\[279\text{Namely, Belgium, Denmark, France, Germany, Greece, Hungary, Italy, Luxembourg, the Netherlands, Poland, Portugal, Slovenia and Spain}\]

HOSTILE TAKEOVERS IN GREECE

Even though the Takeover Directive sets a common ground, each Member State proceeded to its transposition considering its national needs and idiosyncrasies. Therefore, before reaching the final conclusions, it is useful to present an overview of the Greek Law on takeovers and its position towards the hostile activity.

THE HISTORICAL BACKGROUND

The economic and synergistic advantages of Mergers and Acquisitions became apparent in the Greek economy at the early 1990s, almost ten years after the accession of Greece to the European Community (EEC) in 1981. The establishment of the internal market as a mean to achieve economic integration among the members of the EEC, led the various small and, mainly, family-run Greek companies to enter into synergies in order to strengthen their economic position\(^281\). The first merger wave emerged at the late 1990s, due to the unprecedented growth of the Greek capital market at this period, which enabled Greek corporations to obtain huge investment funds and use them to conduct mergers and acquisitions at a national and international level.

During this period emerged also in Greece the phenomenon of hostile takeovers. The first of them was conducted in 1998, when “METKA S.A”, a company which is active in the energy, infrastructure and defense sectors\(^282\), was taken over by “Mytilinaios Holdings Group”\(^283\). In 1999, Greek economy witnessed also various examples of hostile activity, however, two were the most interesting cases: the first occurred in the milling industry, when “St. George Mills S.A” was acquired by its biggest competitor, the “Loulis Mills S.A” corporation\(^284\); the second, and most important one, hit the banking sector, when the “EFG EUROBANK S.A” acquired the “ERGASIAS BANK

\(^{281}\) Theodorou Euaggelia (Θεοδώρου Ευαγγέλια)(2009), «Συγχωνεύσεις και Εξαγορές» ("Mergers and Acquisitions"), Technological Educational Institute of Crete (Τεχνολογικό Εκπαιδευτικό Ίδρυμα Κρήτης), Bachelor’s Thesis, p.24


\(^{283}\) The case is further described in Kasimatis Alexandros and Mantikidis Tasos (Κασιμάτης Αλέξανδρος και Μαντικίδης Τάσος) (1999), "Η στρατηγική των επιθετικών εξαγορών: Τα 4 μεγάλα επιχειρηματικά «κόλπα»" (" The strategy of hostile takeovers: The 4 major business "tricks" " ),To Vima (To Βήμα), retrieved from: [http://www.tovima.gr/finance/article/?aid=109763](http://www.tovima.gr/finance/article/?aid=109763)

\(^{284}\) Ibid
Furthermore, another example of hostile activity can be found in the Greek food industry, when in 2001 Goody’s S.A was taken over by “DELTA HOLDINGS S.A”. All these cases lead to the conclusion that, the phenomenon of hostile takeovers is not completely unknown to the Greek economy, although it was introduced relatively recently and occurs at a low level.

THE LEGAL FRAMEWORK


Greek Takeover Law regulates takeover bids for the acquisition of securities of public listed companies with a registered seat in Greece. Bids made either for targets whose object is the collective investment of capital provided by the public or for securities issued by the Bank of Greece are, however, excluded from its regulatory scope. Furthermore, article 4 of the Law renders the Hellenic Capital Market Commission competent for supervising the compliance with the Law’s provisions and the bid procedure in general, whereas article 5 sets the basic principles of the

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285 For more information about the various mergers and acquisitions during this period in Greek banking sector, see Pasiouras Fotios (2012), "Greek Banking: From the Pre-Euro Reforms to the Financial Crisis and Beyond", Palgrave McMillan, p.8
286 Government Gazette A 106/30.05.2006
287 Government Gazette A 53/31.03.2009
288 Government Gazette A 66/31.03.2011
289 Government Gazette A 204/15.9.2011
291 Government Gazette A 87/23.7.2015
292 Government Gazette B 19/16.01.2003
293 Government Gazette B 1030/22.08.2003
294 According to article 2§1(a) of the Takeover Law, a “takeover bid” or “bid” is a public offer made to the holders of the securities of a company to acquire all or some of those securities. A takeover bid shall be either voluntary, pursuant to article 6, or mandatory, pursuant to article 7. This provision is more or less a repetition of article 2§1(a) of the Takeover Directive.
295 Law 3461/2006 (Government Gazette A 106/30.05.2006), article 3§1
297 Law 3461/2006 (Government Gazette A 106/30.05.2006), article 3§2(a)
298 Id. Article 3§2(b)
procedure, among which is the equal treatment of all shareholders\textsuperscript{299} and the obligation of the board of directors to act in the best interest of the target\textsuperscript{300}.

The provisions governing the voluntary and mandatory bids are specified in articles 6 and 7 respectively. Under article 6§1, the person proceeding to a voluntary bid is obliged to acquire all the securities offered, unless it has set a maximum number of securities that it is bound to accept. It is also possible for the bidder to define a minimum number of securities that must be offered for the bid to have effect. Moreover, in case the bid is made for shares which do not carry voting rights, the above provision applies mutatis mutandis\textsuperscript{301}. On the other hand, article 7 states that if the acquisition of a target company’s voting rights exceeds the threshold of the 1/3 of the total, the acquirer is obliged, within 20 days from the acquisition, to launch a mandatory bid for all the outstanding shares of the target company, paying fair and reasonable consideration, as set out in article 9. The same obligation applies also in case a person holding more than 1/3 but less than 1/2 of the target’s voting shares, acquires within six months another 3% of the target’s total voting shares, unless it has already launched a mandatory bid\textsuperscript{302}. However, even if these requirements are met, there is still a series of exemptions from the mandatory bid rule, as set out in article 8 of the Law.

Moreover, Greek Takeover Law has adopted the board neutrality rule along with the reciprocity exemption, as article 14 defines. On the contrary, as indicated in article 17, Greece has opted-out from the breakthrough rule, leaving its adoption upon the discretion of the target’s shareholders, who decide on its implementation in their general meeting with increased majority. The provisions of this article have similar wording to the ones of article 11 of the Directive and contain also the reciprocity exemption\textsuperscript{303}.

\textsuperscript{299} Id. Article 5(a)
\textsuperscript{300} Id. Article 5(c)
\textsuperscript{301} Id. article 6§2
\textsuperscript{302} Id. article 7§1 subparagraph 2, as amended by article 9§14 of Law 3756/2009 (Government Gazette A 53/31.03.2009)
\textsuperscript{303} Id. article 17§7
Squeeze-out and sell-out rights are provided in articles 27 and 28. Concretely, article 27 states that if, after launching a bid for the total of the outstanding shares, the acquirer holds 90% of the target’s voting capital, he can require, within three months after the end of the bid acceptance period, the transfer of the remaining securities to him, provided that he pays consideration at least equal to the one provided in article 9. Conversely, article 28 provides the right of the remaining shareholders to sell their shares to the acquirer who has made a bid for all the outstanding shares and acquired at least 90% of the target’s voting capital. The sale must be made within three months after the publication of the bid’s results and at a price equal to the consideration offered in the bid, whereas the acquirer is obliged to make public the shareholders’ sell-out rights together with the disclosure of the bid’s results 304.

Apart from the above analyzed core articles, the Greek Takeover Law provides also a variety of provisions which complete its regulatory framework, such as those which regulate the disclosure of the takeover bid and the bidder’s information duty towards the HCMC 305, the disclosure of the Fact Sheet 306, the duties of the bidder’s advisor 307, the civil liability of the bidder and its advisor 308, disclosure of the opinion of the target’s board 309, the acceptance 310, withdrawal 311 or review 312 of the bid, the disclosure of the results of the bid 313 etc.

Finally, it becomes apparent that the Greek Takeover Law constitutes an effective legal instrument which is neutral towards hostile takeovers. Even though it adopts the board neutrality rule, it opts-out from the breakthrough rule, leaving its implementation on the companies’ discretion. The overview of its provisions, leads us to the conclusion that the Greek Takeover Law seeks to compromise the interests of the various parts involved and ensure a smooth takeover process.
Conclusion

In recent years, Mergers and Acquisitions constitute a field of rapid economic growth. The 2015 was a record year for M&A activity, as the Global M&A value was over $5 trillion, surpassing the previous record of $4.6 trillion set in 2007\textsuperscript{314}. Furthermore during 2016 a variety of multi-billion dollar deals were witnessed, such as the acquisitions of LinkedIn Corp. by Microsoft Corp, of Time Warner by AT&T, of the Dutch NXP Semi-conductors by its rival Qualcomm Inc and of St. Jude Medical Inc by Abbott Laboratories\textsuperscript{315}. Hostile activity was also present during this year, as indicated by the hostile takeover of Baxalta Inc from the Ireland-headquartered Shire PLC, as well as from the hostile, though unsuccessful, bids of Gannet Company Inc for Tribune Publishing, of Sanofy for Medivation and of Bayer for Monsato\textsuperscript{316}.

The vast and constant expansion of the takeover activity, even in small economies, such as the Greek economy, has rendered the study of its rationale necessary, leading to the conclusion that the strong strategic, financial and synergistic advantages of a takeover encourage the bidder to pursue the completion of the deal, even without the consent of the board of directors of the target company. The development of hostile activity led on the one hand to the evolution of the hostile technics available to possible bidders, with hostile tender offers being the prominent. On the other hand, it provoked the creation of complex takeover defenses, able to neutralize a hostile bid, the most effective of which is the “poison pill”.

The legitimacy of takeover defenses and the general legal framework on (hostile) takeovers differs among nations, a fact which became apparent in the study of the two model systems of US and EU on tender offers. The EU Takeover Directive, despite

\begin{footnotesize}
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\item For more information on those deals see http://www.investopedia.com/articles/stock-analysis/081516/most-important-mergers-and-acquisitions-2016-shpg-abt.asp; more examples of takeover activity during 2016 can be found in Shen Lucinda (2016), “These are the 12 Biggest Mergers and Acquisitions of 2016”, retrieved from http://fortune.com/2016/06/13/12-biggest-mergers-and-acquisitions-of-2016/.
\end{enumerate}
\end{footnotesize}
resulting from lobbying and political compromise, it manages to achieve a minimum harmonization among Member States, as well as facilitate hostile takeovers at a greater extent than the US law, even though the latter is based on a long-term judicial practice.

This minimum legal harmonization is, however, not enough, as it exists only among EU Member States. The rapid evolution of hostile takeovers increases their complexity, therefore underlines the need of convergence at international level. This aim could be achieved through the establishment of an international legal model on hostile takeovers which would ensure the equilibrium between the interests of all parties involved. Nevertheless, a proposal for such a model has not yet been placed on the table. Consequently, the question of whether the two systems will continue to grow apart is still open, as their further development remains to be seen.
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