THE SIGNIFICANCE OF CORPORATE LAW ON FRIENDLY AND HOSTILE ACQUISITIONS

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ABSTRACT

This dissertation was written as part of the LLM in Transnational and European Commercial Law, Banking Law, Arbitration/Mediation at the International Hellenic University.

The growth and development of companies is often based on complex strategies such as mergers and acquisitions (M&As). Through these transactions, companies strengthen and consolidate their position against their competitors, increase their share prices and generate higher returns for their shareholders. They also enable companies to expand both in their normal activities and in new business areas. In addition, mergers and acquisitions create corporate entities that can operate not only on a national but also on an international level. However, the acquisition or the merger plan is not always accepted by both sides. Thus, depending on the agreement or disagreement of the target company's managerial bodies, mergers and acquisitions can be divided into friendly and hostile. This dissertation examines the reasons why companies engage in M&As, the role of corporate law in these transactions, the means and tactics used by the acquiring company in a hostile takeover and the takeover bid methods. Furthermore, the defences of the target company against hostile takeovers are highlighted and, finally, some examples on both friendly and hostile takeovers in Greece and internationally are presented.

At this point, I would first like to thank my supervisor and professor, Dr. Venetia Argyropoulou, whose expertise and knowledge was invaluable in writing the current dissertation. I would also like to thank my family - especially my father - for their support.

Keywords: Company, Takeover, Merger, Acquisition, Defence mechanisms.

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ABBREVIATIONS

Article	Art.
Board of Directors	BoD
European Council Merger Regulation	ECMR
European Commission	Commission
European Union	EU
General Electronic Commercial Registry	GEMI
Law	L.
Limited	Ltd
Mergers & Acquisitions	M&A
Number	No
Presidential Degree	PD
Private Company	P.C.
Société anonyme	SA
Technology, Media and Telecommunications	TMT
United States of America	USA

INTRODUCTION

Businesses, and particularly modern large-scale enterprises, operate and develop in a highly competitive environment, which varies depending on the activity of the enterprise and the legal framework in which it operates. Therefore, they must evolve and expand by implementing growth strategies at the highest possible level, using Mergers and Acquisitions (M&As) to this end, with the aim of gaining or strengthening their control over fields of business activity. In the US, the European Union and Greece, M&As have become an important tool for competitiveness and expansion of business activities.

M&As are generally considered by part of the literature to be a natural consequence of market development that contributes to the modernization of companies and increases their competitiveness and the overall competitiveness of the economy. It is also important to note the opposing view, that M&As often lack transparency and lead to oligopolistic organization of the economy, increase product prices and ultimately burden consumers, and therefore require regulation and supervision to limit the power of monopolies.

Mergers and acquisitions are either the result of negotiations and consensus between the parties involved to reach an amicable agreement, or are the result of arbitrary offers to a company that is either not interested in or opposed to the M&A, which is known as a hostile takeover.

In the past, friendly M&As used to be the norm, but now hostile takeovers, which were initiated for easy profit, have become an essential area of activity, particularly in the new technology sectors and consequently the need to develop defence mechanisms against these actions to prevent the takeover of target companies has developed. Effective tools have now been developed at world level, particularly in America and the United Kingdom, to repel hostile takeovers.

CONCEPT OF MERGERS AND ACQUISITIONS

In principle, the term "**Enterprise**", is used in economics to define an organized economic unit, which produces and offers a final product to consumers for profit. From a legal point of view, there is no specific definition of the concept of an undertaking, but case law considers it to be a set of things, rights, legal relations and intangible assets, which are under a single management and which, through their efficient combination, contribute to the

production of a product or the provision of a service in order to maximise profit[1]. A company is an association of persons formed by the drawing up of a legal instrument for the pursuit of a common purpose, which may, inter alia, be commercial[2]. Only companies, and not enterprises, can engage in corporate transformations.

The terms "merger and acquisition" refer to the way in which companies combine their business activities. The difference between M&A is not always clearly distinct.

A *merger* is the combination of two or more companies that, using common resources, aim to achieve common goals. By the term "merger" it is meant that, as a result, there will be only one corporate entity. Therefore, after the merger, the two companies are brought together into one, which is the combination of the participating companies[3]. Their assets and liabilities are taken over by the new company. In mergers, an equitable exchange relationship arises[4].

An *acquisition* or *takeover* is a transaction in which one company acquires another (wholly or partly) for financial consideration[5]. More specifically, a takeover is the transaction whereby one or more companies, after having been dissolved without going into liquidation, transfer all their assets and liabilities to the acquiring company in exchange for the return to the shareholders of the acquired companies the consideration for their rights. A takeover does not constitute a merger but is in any case regarded as an operation equivalent to a merger[6].

DIFFERENCES BETWEEN MERGERS AND ACQUISITIONS

Whereas in a merger of companies the shareholders receive shares, in a takeover the shareholders of the acquired company receive only a certain monetary consideration. Moreover, in the case of a takeover, the shareholders of the acquired company exit after the sale of their shares and their acquisition by third parties, as opposed to the case of a merger. From an economic point of view, whether it is a merger or a takeover, the parties are

[1] Balis G., "General Principles of Civil Law", P. Sakoulas, 1961, p. 450 et seq.
[2] Rokas N. K., "Commercial Companies", P. Sakoulas SA, Athens, 2019, p. 3 et seq.
[3] Kyriazis D., "Mergers & Acquisitions", 2nd edition, P. Diplographia , Athens, 2016, p. 4
[4] Papadakis V., "Business Strategy: Greek and International Experience", P. Benou, Athens, 2016, p. 589 et seq.
[5] Idem
[6] Pazarskis, M., Pantelidis, P., Alexandrakis, A. and Papadopoulos, K. , "Mergers, Acquisitions and Business Performance of Listed Companies in Greece: The Impact of the Legal Form of the Transaction", 6th International Conference on Management and Economics (ESDO 2013), 08-10 June 2013, Larissa, Greece, Conference Proceedings, pp. 209.

eventually consolidated, but from a legal point of view there are important differences in the procedure followed and its results. In general, it can be said that a merger is a consensual transaction since the parties intend to create a new company, whereas an acquisition is often a non-consensual transaction (cases of hostile takeovers).

THE HISTORICAL CONTEXT

Historically, it has been observed that there are periods of time during which M&As peak, while at certain times they decrease significantly or even disappear. Typically, a sharp decline occurs when there is a severe economic downturn. In general, M&As are influenced by many factors, the most important of which is the development of the global economy and major national events in each country. These factors shape particular quantitative and qualitative elements that favour or, on the contrary, impede M&As.

INTERNATIONAL MERGER WAVES

The term "Merger waves" has prevailed, referring to the peak of M&A activity and so far, 6 major M&A waves have been recorded. These waves are distinguished from each other due to the unique characteristics and effects each one has[7].

A) The first wave took place between 1893 and 1904, when it came to an end. It involved horizontal mergers and acquisitions mainly in the fields of transport, mining and petroleum products. This wave led to the creation of large monopolies and huge companies that still thrive today (e.g. Coca-Cola and General Electric).

B) The second wave took place from 1919 to 1929 and ended with the American market and stock market crash (the Great Recession), which gradually spread to the rest of the world. In this wave it can be observed that, in terms of the legal framework and supervisory authorities, laws were introduced for the first time to prevent the creation of monopolies and provisions were introduced to limit the abuse of the power of multinational companies. The mergers in this wave were more vertical than horizontal[8], with the examples of General Motors and IBM.

[7] Prof Roberts, A., Dr Wallace, W. & Dr Moles, P., 2003. Module I: Introduction. Στο: Mergers and Acquisitions. s.l.:Edinburgh Business School, pp. 1-28

[8] Kyriazis D., "Mergers & Acquisitions", 2nd edition, P. Diplographia, Athens, 2016, p. 12 et seq.

C) The third merger wave began in 1965 and ended in 1975, when the oil crisis in America gradually spread throughout the world. A characteristic of this wave was that legislation in the United States and internationally made vertical or horizontal mergers more difficult, to the point of almost prohibiting them, so that companies with different (unrelated) activities were merged and acquired (conglomerate merger)[9].

D) The fourth wave lasted from 1984 to 1989, when world-changing events occurred in Eastern Europe as well as the collapse of the high-risk bond market[10]. It was characterised by the prevalence of hostile takeovers and even in their most aggressive form (corporate raiders). Importantly, this wave was marked by extremely strong legal defences against hostile takeovers. The most prominent of these is the poison pill defence which was introduced in 1982.

E) The fifth wave started in 1993 and ended in 2000. Many of the largest M&A transactions of all time took place in this period and the total value of the transactions amounted to 3.3 trillion US dollars. A characteristic of this wave was that the financing of the acquisitions was largely provided by the companies' own equity.

F) The sixth wave lasted from 2003 and ended in 2008 when the huge mortgage and bond crisis started in the U.S.[11] and later spread globally. This wave was favoured by corporate law, which became extremely liberal with the prevalence of economic globalisation. During this wave, mega deals emerged i.e. deals that exceeded ten billion U.S. dollars each[12].

After the end of the sixth wave, M&As not only suffered a significant decline but also business risks also increased significantly. However, there are vague indications that a new wave started after 2013, mainly supported by the emerging economies of the developing world, especially Brazil, Russia, India, China, and South Africa (BRICS), which have recently industrialized, are heavily populated and are growing rapidly. Data from 2015 already showed that the global value of M&A transactions amounted to USD 4.9 trillion[13]. However, the Covid-19 pandemic reduced business activities, yet after the recession it seems that the situation is gradually improving.

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[9] Gorzala J., The Art of Hostile Takeover Defence, Hamburg: IGEL Verlag GmbH, 2010, p.. 4 et seq.
[10] Idem
[11] Idem, p. 6 et seq.
[12] Kyriazis D., "Mergers & Acquisitions", 2nd edition, P. Diplographia, Athens, 2016, p. 14 et seq.
[13] Idem, p. 16 et seq.

MERGERS AND ACQUISITIONS IN GREECE

In Greece, until the establishment of the single market in 1986, M&As were rather limited, due to the absence - or extreme inadequacy - of an appropriate institutional framework. The prospects and size of the Greek market acted as a deterrent as did the fact that firms were usually family-owned and did not seek changes in their ownership. Nevertheless, already between 1987 and 1994, a large number of M&As took place involving 9% of the Greek economy's assets, mainly in the food, beverages and services industries. Since 1994, large M&As have taken place in the fields of mobile telephony, casinos and supermarkets. The development of the Athens Stock Exchange, the liberalisation of the banking system and the fact that the legal framework became much more liberal, allowing significant investment moves, played an important role. Between 1997 and 1999, through the Stock Exchange, many Greek companies raised significant amounts of investment capital which they were able to channel into mergers and acquisitions both in Greece and abroad. Particularly in 1999, shortly before the collapse of the Hellenic Stock Exchange, a large wave of M&As took place, mainly in the banking sector, a trend that continues to this day. With the complete collapse of the stock market in 2000, companies could no longer raise any more money. The state then provided legislative incentives for the mergers of small companies mainly in the field of new technologies. In 2003 the total value of these transactions amounted to €3 billion with 169 transactions and in 2004 to €2 billion with 209 transactions. It should be noted that in 2002 the major acquisition of ETBA by Piraeus Bank and of PAPASTRATOS SA by PHILLIP MORRIS took place. In the following period, from 2002 to 2006, COSMOTE acquired GERMANOS, FOLLIE FOLLI acquired the 24.67% held by Germanos SA in the Duty-Free Shops and APAX. TEXAS PACIFIC GROUP acquired TIM HELLAS. In 2007, particularly in Telecommunications, transactions of €6.4 billion took place, as OTE acquired COSMOTE and WIND acquired TELLAS and TIM HELLAS. Between 2013 and 2015, major acquisitions took place and indicatively ALPHA BANK acquired CITIBANK's network in Greece, VODAFONE acquired HELLAS ONLINE, FAIRFAX acquired PRACTIKER HELLAS, etc.

Recently, according to data released by PricewaterhouseCoopers (PwC), Greek businesses attracted a total of €12 billion in 2021, of which €4.3 billion came from Mergers and Acquisitions (M&A), with 76 M&A transactions taking place and the total value of transactions increasing by €200 million. Of these, the five largest transactions reached €1.4

billion. The outlook for 2021 is dominated by strong cross-sectoral M&A activity, with the telecommunications sector (TMT) standing out. The sectors that attracted the highest total transaction value were TMT (26.8%), Food & Beverage (15.5%), Financial Services (15.2%) and Services (14%). The number of M&As increased by 29% in 2021, but the average transaction value decreased by €13 million compared to 2020, reflecting a shift towards smaller transactions. There were seven transactions worth more than €150 million. In 2022, M&A transactions as well as privatisations are likely to exceed €8.6 billion in Greece as a result of already agreed transactions or transactions in their final stages[14].

MERGERS AND ACQUISITIONS IN EUROPE

In Europe, due to the high competition of its businesses with American companies, a series of M&As took place mainly in the former West Germany from the 1960s and in the other EU countries from the 1980s. It is noted that after categorisation of M&As in Europe, there was an increase in the number of M&As in oil, real estate, and clothing companies in 1970, in financial, construction and food companies in 1980, in media, banks and hotels in 1990, and in telecommunications and automotive companies in 2000. The 20 largest M&As carried out in Europe in 2021 amounted to €265.6 billion, of which 22% were in the TMT sector, 19% in Manufacturing, 13% in Retail, Financial Services and Real Estate and 12% in Services[15].

MERGERS AND ACQUISITIONS IN THE US

Thousands of M&As have taken place in the US, some worth tens or even hundreds of billions of dollars. Among the largest are the following[16]:

Date	Acquiror	Target	Value in (bil. USD)
01.10.2000	America Online Inc	Time Warner	164.746856

[14] PwC report, "Mergers and Acquisitions in Greece 2021", May 2022.
[15] Idem
[16] Data extracted from Institute for Mergers, Acquisitions and Alliances (IMAA), https://imaa-institute.org/mergers-and-acquisitions-statistics/united-states-ma-statistics/

09.02.2013	Verizon Communications Inc	Verizon Wireless Inc	130.298324
11.04.1999	Pfizer Inc	Warner-Lambert Co	89.16772
10.22.2016	AT&T Inc	Time Warner Inc	85.407954
12.01.1998	Exxon Corp	Mobil Corp	78.94579
03.05.2006	AT&T Inc	BellSouth Corp	72.670997
04.06.1998	Travelers Group Inc	Citicorp	72.55818
07.08.2001	Comcast Corp	AT&T Broadband & Internet Svcs	72.04115
11.17.2014	Actavis PLC	Allergan Inc	68.445401

INTERNATIONAL MERGERS AND ACQUISITIONS

Data from China, Singapore and Brazil

M&As are spreading rapidly in developing economies as well. In particular, among the major transactions in China are the acquisition of CITIC Ltd by CITIC Pacific Ltd on March 26, 2014 for $42.2 billion and of Hutchison Whampoa Ltd by Cheung Kong (Holdings) Ltd on September 1, 2015 for $23.6 billion[17].

Singaporean company QHG Shares Pte Ltd acquired Russian company Rosneft Oil Co on December 10, 2016 for the amount of $10.8 billion and Petrol Complex Pte Ltd acquired Indian company Essar Oil Ltd on July 9, 2015 for nearly $13 billion[18].

[17] Idem, https://imaa-institute.org/mergers-and-acquisitions-statistics/china-ma-statistics/.
[18] Idem, https://imaa-institute.org/mergers-and-acquisitions-statistics/singapore-ma-statistics/

In Brazil, in July 2021, Magazine Luiza S.A. acquired KaBuM for USD 526.7 million and in September 2021, Sas Shipping Agencies Services completed the acquisition of 67% stake in Log-In Logística Intermodal S.A. for USD 344.3 million[19].

MOTIVES AND GROUNDS FOR MERGERS AND ACQUISITIONS

M&As depend on the strategy developed by each company in the context of competition, but the basic criteria for their execution are, on the one hand, to improve the financial figures of the acquiring company and, on the other hand, to improve the efficiency ratio of the company's operations. Thus, companies have as their immediate objective the expansion of their market (market share, assets) but their ultimate objective is to gain competitive advantages in the business environment and, of course, ultimately to increase their profits as much as possible, since companies operate on the principles of the capitalist economy.

Therefore, the incentives for acquisitions can be summarised as follows[20]:

• The creation of synergies between firms to reduce costs.

• The enhancement of the position of the acquiring firm on the international and national markets and the improvement of its competitive conditions.

• The exploitation of new technologies and human resources.

• The personal aspirations of the senior management of the acquiring company and the replacement of a management that is not effective at the target company.

In a broader analysis, the grounds for a merger or acquisition may be strategic, financial or political.

A) Strategic grounds:

• The entry of the company into new markets so that it can grow dynamically through a company already established there[21].

[19] Data extracted from Global Data, https://www.globaldata.com/data-insights/technology-media-and-telecom/brazil--five-largest-mergers---acquisitions-deals-by-value-in-the-technology--media-and-telecom-sector--ltm-2088617/.

[20] Auerbach Alan J., "Mergers and Acquisitions". National Bureau of Economic Research, 1988.

[21] Black E.L., Carnes T.A., Jandik T., "The long-term success of cross-border mergers and acquisitions", Social Science Research Network Electronic Paper Collection, 2001, p. 5 et seq.

• The need to acquire resources, technology and expertise which a company wishes to acquire and which the target company possesses. We also refer to human resources, i.e. when the company has a highly skilled and efficient personnel.

• The exploitation of certain characteristics of the target company, such as its market reputation and brand recognition.

• To counter competition by controlling the production of certain products.

• A company's desire to expand into new markets or even new products in order to reduce its corporate risk.

• The managers' perception that they can manage the target company more effectively[22].

B) Financial grounds:

They are related to the increase of the company's profits through acquisition and the consequent increase in its value[23] which mainly benefits the shareholders[24], by reducing costs and enhancing its strength against competition[25]. Stock market transactions even large fluctuations, whether upward or downward, can be the cause of mergers and acquisitions, since in a period of stock market upturn immediate profits are expected, whereas in a period of stock market downturn the target company becomes an easier target due to its low price. In addition, acquisitions are also made with a purely speculative objective or even with the aim of breaking up the target company and selling it in pieces, or even selling off the assets of the target company[26]. Even tax reasons can lead to M&A, especially in the case of multinational acquisitions.

C) Political grounds:

These include the impact of decisions, especially those of the public sector, which are usually aimed at reducing the cost of services.

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[22] Lausberg C., Stahl T., "Motives and non-economic reasons for bank M&As", 7th Maryland Finance Symposium on Behavioral Finance, (March 29–31, 2007), 2007, p. 5 et seq.

[23] Halpern P., "Mergers and acquisitions", The Journal of Finance Vol. XXXVIII, No. 2,1983, p. 297 et seq.

[24] Kyriazis D., "Mergers & Acquisitions", 2nd edition, P. Diplographia, Athens, 2016, p. 25.

[25] Öberg C., Holtström J., "Are mergers and acquisitions contagious?", Journal of business research Vol. 59, Issue 12, 2006, p. 1267 et seq.

[26] Prof Roberts, A., Dr Wallace, W. & Dr Moles, P., 2003. Module I: Introduction. At: Mergers and Acquisitions. s.l.:Edinburgh Business School.

DISTINCTIONS ON MERGERS AND ACQUISITIONS

A) MERGER DISTINCTIONS

Depending on how they are conducted, mergers can be divided into:

1) Merger by acquisition, where the acquired company ceases to exist. This transaction takes place after the dissolution of the absorbed companies, without them being liquidated[27].

2) Subsidiary merger, where one company becomes a subsidiary of the other and

3) Merger by formation of a new company, where a completely new company is finally formed. This means that two or more companies transfer all their assets to a new company, which they form from scratch[28].

Mergers can be further divided into:

• Concentric or congeneric, where the companies' operations are active in the same industry without offering the same product.

• Reverse mergers, where an unlisted company purchases shares of a listed company and thus acquires control of it[29].

• Reverse triangular mergers, where the target company merges with a subsidiary of the acquirer's company.

B) ACQUISITION DISTINCTIONS

Acquisition distinctions are categorised on the basis of many criteria, in particular according to the purpose they serve, the way they are executed, the hostile or friendly response of the target company, the percentage of the acquiring company's shareholding and specific categories.

1) Depending on the purpose they serve, acquisitions are divided into:

i. Value creating acquisitions, i.e. when the acquisition is carried out in order to improve the results of the acquired company and to sell it at a profit afterwards.

ii. Consolidating acquisitions,

iii. Acquisitions for the purpose of eliminating competition in the market.

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[27] Panagiotou P., "The law of corporate transformations", P. Sakoulas, 2021, p. 171

[28] Panagiotou P., "The merger of companies in the new law of corporate transformations", NoB, volume 67, issue 6, July - August 2019, p. 1197

[29] Feldman, D. N., 2012. Harvard Business Law Review., Available at: http://www.hblr.org/2012/03/reverse-merger-seasoning/ and Giddy Ian, (2009), „Mergers & Acquisitions: Definitions and Motivations‟, NYU STERN accessed 7 December 2017.

iv. Accelerating acquisitions, with the aim of gaining immediate access to the market of the products of the target company.

v. Resource acquiring acquisitions, with the aim of acquiring the resources, skills, know-how of the target company.

vi. Speculating acquisitions.

2) Depending on how they are executed, acquisitions can be divided into:

i. Acquisition of stock, by acquiring the assets and liabilities of the company,

ii. Acquisition of assets, when the acquiring company chooses which assets to buy and which not. This form is preferred by acquirers[30].

3) Depending on the behavior, acquisitions are divided into:

i. Friendly/amicable takeover, when there is cooperation between the companies involved, which reach a mutual agreement and determine the price without retaliation.

ii. Hostile takeovers, when the target company does not wish to be acquired and takes every possible legal and other measure to avoid such an acquisition.

4) Depending on the percentage of participation desired by the acquiring company, acquisitions are classified into:

i. Full (or total takeover), where the acquiring company gains full control of the acquired company and all of its shares. This is the most common form of takeover and

ii. Partial, where either a majority (50-99 %) or a minority (10-49 %) takeover is involved.

5) There are also special categories of acquisitions, such as:

i. Reverse takeover[31], when a smaller company takes over a larger one, i.e. the opposite of what usually happens,

ii. Backflip takeover, when, contrary to what usually happens, the company after the takeover operates under the name of the acquired company, which usually has a powerful brand name,

iii. Leveraged buy-out, where the takeover is financed by bank loans for the majority of the takeover (which is risky for the acquirer if the takeover fails).

iv. Management buy-out, where a company is bought out by its own managers.

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[30] BIWS, 2016. breakingintowallstreet.com.,: https://samples-breakingintowallstreet-com.s3.amazonaws.com/22- BIWS-Acquisition-Types.pdf

[31] Papadopoulos, Thomas, (2008) The European Union Directive on Takeover Bids: Directive 2004/25/EC (2008). International and Comparative Corporate Law Journal, Vol. 6, No. 3, pp. 13-103

COMMON CATEGORIES OF MERGERS AND ACQUISITIONS

Both Mergers and Acquisitions of companies are distinguished according to the interrelationship of their activities into:

i. Horizontal, where both companies (acquiring/acquired) are active in the same industry within a competitive context. It involves the acquisition of a large market share, with the risk of antitrust issues.
ii. Vertical, where the companies produce different products or offer different services that serve a common ultimate purpose. Under this form, companies are at different levels of the supply chain[32]. They aim to increase efficiency and profit and reduce costs. Vertical acquisitions can be divided into forward integration, when they aim at acquiring product distribution channels, and backward integration, when they aim at acquiring suppliers of raw materials.
iii. Conglomerate, where companies with unrelated activities operating in different sectors are acquired. Conglomerate mergers are divided into pure conglomerate mergers where the companies have nothing in common and mixed mergers where companies aim to expand into the market or develop products. Mixed conglomerates are further subdivided into market extension conglomerates, with the aim of accessing larger markets and new customers, and product extension conglomerates, with the aim of expanding their products.
iv. Domestic, where the parties are based in the same country; and
v. Cross border, if they are based in different countries.

STAGES OF MERGERS AND ACQUISITIONS

A) FRIENDLY M&As

A friendly takeover usually follows a number of stages, i.e. the criteria and objectives of the takeover are defined, a suitable target company is identified and contacted, the company is financially and legally checked, negotiations take place and finally the agreement is signed and the takeover is completed. At these stages, specialized consultants are used to examine all kinds of information on the target company, check any financial and legal issue of

[32] Kyriazis D., "Mergers & Acquisitions", 2nd edition, P. Diplographia , Athens, 2016, p. 5.

the company and analyze the relevant business risks. All these elements are used by the acquiring company to formulate its offer. In a friendly takeover, the target company cooperates with the acquiring company at all levels.

(B) HOSTILE TAKEOVERS

In the event of a takeover bid for which either no communication with the management of the target company exists or no consent is obtained, we refer to a hostile takeover. In contrast to friendly takeovers which are considered beneficial to both parties, in hostile takeovers it is considered highly likely that one or some of the parties involved in the process will suffer a significant loss. In a hostile takeover, the proposed acquirer seeks to obtain majority representation on the board of the target company by acquiring at least 50 % of its share capital. To this end, it makes an offer to purchase part or all of the target company's shares. The target company is usually surprised and threatened by the acquirer's proposed acquisition, and therefore activates all its defences in order to prevent the takeover. The term 'Black Knight' has prevailed for the company initiating the hostile takeover.

There is also the case where a takeover may initially appear as hostile but eventually negotiations between the parties take place and the takeover becomes friendly[33]. In this case the company conducting the initially hostile takeover is called the 'Yellow Knight'. It should be noted that hostile takeovers are usually carried out in the United States and England and are common practice in these countries. In other European countries this practice is quite rare. This is due to the fact that large European companies are often controlled by banks, families or even the government itself, making it very difficult for them to be taken over in a hostile takeover.

STAGES OF HOSTILE TAKEOVERS - COMPARISON WITH STAGES OF FRIENDLY TAKEOVERS

In both cases, i.e. friendly and hostile takeovers, the company intending to carry out the takeover defines the criteria and objectives it is pursuing and identifies the target companies. In the case of a friendly takeover, contacts are then made with the target company, whereas in the case of a hostile takeover, an offer to acquire the target company is

[33] Marcin Puziak, Maciej Martyniuk “Defensive strategies against hostile takeovers. The analysis of selected case studies”, Journal of International Studies, Vol. 5, No 1, 2012, pp. 62.

made immediately after the first contact. Usually, the acquirer buys shares directly from the market or makes an offer to the board of the target company. However, an offer may also be made directly to the shareholders of the target company at a price often sufficiently higher than the current share price so that the offer is considered attractive to the shareholders, and they will proceed to sell their shares. The main difference is that in friendly takeovers the target company cooperates in the examination of its financial and legal pending issues, while in a hostile takeover, due to the apparent lack of cooperation, such examination cannot be carried out and as a result the hostile company has no direct knowledge and the risks arising from the takeover increase due to limited or even non-existent information. At the last stage, a friendly takeover is completed with the consent of the parties, whereas in the case of a hostile takeover two things can happen: Either the acquiring company may increase its offer price so that the target company accepts the deal, or the target company may insist on rejecting the offer and proceed with a series of anti-takeover defences. If these measures fail, the deal is completed and the acquiring company takes control of the target company, as in a friendly takeover.

SUCCESSFUL ACQUISITIONS

A M&A transaction is generally considered successful when profitable objectives are achieved based on the financial results. It provides a new dynamic to the new entity, which in turn leads to greater confidence of investors and hence to a rise in the share price[34]. Thus, profit is maximised and resources are saved[35]. An additional benefit is the publicity[36] of the transformation which ultimately benefits the new company. It is a fact and has been demonstrated in practice in a large number of takeovers that, at least in the first instance, takeovers benefit the shareholders of the acquired company who sell their shares at higher prices than before the takeover bid. On the contrary, shareholders of acquiring companies usually initially suffer a depreciation of the value of their shares, as the company's debt

[34] Black E.L., Carnes T.A., Jandik T., "The long-term success of cross-border mergers and acquisitions", Social Science Research Network Electronic Paper Collection, 2001, p. 5 et seq.
[35] Krugman P. R., Obstfeld M., Melitz M. J., "International Economic Theory and Policy", 4th improved edition, P. Kritiki 2016, p.185 et seq.
[36] Dranove D., Shanley M., "Cost reductions or reputation enhancement as motives for mergers: The logic of multihospital systems", Strategic Management Journal Vol. 16, Issue 1, 1994, p. 55 et seq.

increases. This is why M&As have been shown to be more successful when the deal is executed mainly through a transfer of shares rather than a high cash payment.

UNSUCCESSFUL ACQUISITIONS

The merger or acquisition process can be very time-consuming and costly[37]. It has been observed that a high percentage of M&As fail and there are several reasons behind this. Indicatively: the disagreement of the parties involved, the large time gap between the proposal and the execution of the acquisition, the incorrect valuation of the acquired company due to an overestimation of its financials, the difference in mentality of the boards and executives of the two companies and the difficulty of integrating the acquired company due to its size. In addition to the above, general economic and political issues may arise, which may lead to the failure of the agreements since they alter the circumstances under which the decisions were taken.

According to Kitching's very interesting research in 1967[38], it was shown that 45-50% of the mergers and acquisitions that had taken place up to that time were considered to have failed. In a study by Porter in 1987[39], the percentage of failed acquisitions was 53% and even in the case of conglomerate mergers it was 74%. Also, in a study published by Gomes et al year in 2012[40] it seems that these rates apply over time. A survey conducted by Tohmton in 2004 highlights the fact that about half of the customers of merged companies are disappointed with the services provided to them compared to the past. Finally, according to a survey by Kumar in 2009[41], firms of the developing world defy the high failure rates of M&As because they use them for strategic globalization as a way to acquire technology and knowledge rather than to increase their productivity.

An example of an unsuccessful merger is the largest deal so far (America Online merged with Time Warner), worth $165 billion. Just one year after it was completed, the

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[37] Papadakis V., "Business Strategy: Greek and International Experience", P. Benou, Athens, 2016, p. 622 et seq.
[38] Kitching J. (1967) “Why do mergers miscarry?”, Harvard Business Review. Vol. 45, pp. 84-101
[39] Porter Michael. (1987) “From competitive advantage to corporate strategy”, Harvard Business Review. Vol. 52, pp. 124-136
[40] Gomes, Angwin, Weber and Tarba. (2012). Critical success factors through the mergers and acquisitions process: Revealing pre- and post- M&A connections for improved performance. Thunderbird International Business Review. Vol.44, 1, pp. 13-35
[41] Kumar Nirmalya. (2009), “How emerging giants are rewriting the rules of M&A”, Harvard Business Review

company that was created (AOL Time Warner) suffered a loss of almost $100 billion. Thus, this transaction became known as the "biggest mistake in the history of corporate mergers".

Broadly speaking, the reasons for the failure of mergers and acquisitions are the following:

1) Selection of an inappropriate target,

2) Inadequate information and valuation,

3) Overestimation of the results of the acquisition,

4) Excessive price

5) Insufficient management,

6) Objective and subjective consolidation difficulties,

7) Improper handling of human resources,

8) Incorrect assessment or incompatibility of corporate culture.

ASSESSMENT OF THE SUCCESS OR FAILURE OF MERGERS AND ACQUISITIONS

According to numerous (137 in total) scientific papers[42], the success or failure of a merger or acquisition is assessed according to seven specific approaches-methods:

1) By the method of short-term stock price fluctuation,

2) By the method of comparing the performance of the company that resulted from the takeover with the performance of the original companies before the takeover,

3) By the method of long-term financial performance assessment,

4) By the method of evaluation of the takeover by the executives who carried it out,

5) By the method of the extent of "disinvestment" of the acquired companies,

6) By the degree of successful integration of the companies in the new scheme,

7) By the development of innovation in both the acquiring and the acquired company.

It is likely that some of these criteria may in some cases apply simultaneously.

LEGAL FRAMEWORK

In many Western countries a specific national framework exists that regulates the defence mechanisms. Naturally, in the event of disputes, as is often the case, the courts of each state are responsible for resolving them. In particular:

In the USA: Almost all of the defence mechanisms that can be implemented by the management of the target company and/or its shareholders are allowed, both before and

after the takeover bid. In fact, federal and state laws do not restrict the use of defensive measures at all. Thus, it is only at the last stage that the State Courts and the Federal Court intervene to set the relevant limits and to decide whether the use of certain forms of defence against hostile takeover bids are lawful or not.

In the European Union the situation is quite different, given that the company law approach differs from that in the United States.

On 30/04/2004, Directive 2004/25/EC of the European Parliament and the Council on takeover bids was adopted and transposed into Greek law by Law 3461/2006. The main purpose of this Directive is to ensure a uniform framework for takeovers, the main feature of which is the elimination of national barriers[43]. The basic principles for achieving this objective are that the shareholders have the right to decide on the success or failure of the public offer and that corporate control must be exercised by the person holding the majority of the share capital[44].

The first principle is set out in Art. 3. para 1(c) of the Directive, which states that "the board of an offeree company must act in the interests of the company as a whole and must not deny the holders of securities the opportunity to decide on the merits of the bid[45]". There were significant reactions from many Member States in favour of maintaining the protective provisions of their national laws and a compromise solution was finally adopted by introducing the so-called 'optional model'. Article 5 deals with the issues of protection of minority shareholders, the mandatory bid and the equitable price.

Regarding the provisions on the breakthrough (neutralisation of defensive measures) in case of an imminent hostile takeover, reference was made to the means of prevention and defence that the management of a company can adopt either to prevent the possibility of a takeover bid or to repel a takeover bid that has already been submitted (Article 9 of the Directive). Article 11 refers to the breakthrough. As there were serious objections to the mandatory nature of these provisions in the above articles as well, it was stipulated in Article 12 that these provisions were optional, which practically nullified their purpose. This Directive, which has been transposed into Greek law as mentioned above, contains extensive

[43] Report of the High-Level Group of Company law Experts on Issues Related to Takeover Bids (Winter Report), 10/01/2002, p. 18 et seq.
[44] Idem, pp. 20-21
[45] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32004L0025&from=SV#d1e483-12-1

provisions on takeover bids and is a significant yet timid step due to its non-mandatory nature.

As for cross-border mergers of limited liability companies, Directive 2005/56/EC was issued, which was implemented in Greek law by Law 3777/2009 (Official Goverment Gazette 127/A/28-7-2009). This Directive was codified by the Directive (EU) 2017/1132/EC, which in turn was amended by Directive (EU) 2019/1151 and was implemented in Greek law by Law 4919/2022. The latter Directive, amended by 2019/2121/EC, has not yet been transposed into the Greek legislation.

These Directives regulate issues concerning cross-border mergers of limited liability companies and in particular the conditions relating to cross-border mergers (Article 4 of Directive 2005/56/EC), the common draft terms of cross-border mergers (Article 5), publication (Article 6), the report of the management or administrative organ (Article 7), approval by the general meeting (Article 9).), the scrutiny of the legality of the cross-border merger (Article 11) and the consequences of the cross-border merger (Article 14), while Directive 2019/1151 regulated issues regarding the use of digital tools and procedures in company law.

Finally, Regulation (EC) No 139/2004 of 20 January 2004 regarding the control of concentrations between undertakings (the EC Merger Regulation) applies to concentrations that have a Community dimension (art. 1) and the parties have an obligation for Prior notification of concentration to the Commission (art.4). According to art. 6 the Commission examines the notification. Finally, the Regulation provides for jurisdictional issues and in particular the referral of a merger with community dimension to a NCA (National Competent Authority) if the national markets are considered to be distinct (art.9). This provision was sought by Germany, and it is known as the "German Clause". Moreover, in art. 22 of ECMR provides for the referral of a merger without community dimension to the European Commission if trade between Member states is affected. The provision is nicknamed the 'Dutch clause' because it was introduced into the previous Merger Regulation no. 4064/89 at the request of the Netherlands[46].

The practical consequence of the above is that at EU level many defence mechanisms are completely prohibited, while others are only allowed if shareholders agree before the

[46] "The 'Dutch clause' of EUMR – An Overview", https://competition-forum.com/the-dutch-clause-of-eumr-an-overview/

adoption of measures by the board of directors. In France, golden shares are used as a defensive measure in many takeover cases to prevent French companies from being easily transferred to foreign financial interests. In Germany, on the other hand, golden shares were declared illegal in 1998. In Great Britain there is a Takeover Code which prohibits most defensive tactics.

LEGAL FRAMEWORK FOR M&As IN GREECE

PREVIOUS LEGISLATIVE FRAMEWORK

In Greece, the legal framework for M&As has not been particularly developed, as it is an evolving institution in the domestic market in recent years. Initially, the provisions of L. 2190/1920 were applied, which was replaced by Law no. 4548/2018 (Official Government Gazette A' 104/13-06-2018) " Reformation of the law of Société Anonymes". There were also special regulations for private companies (Law 4072/2012) and for limited liability companies (L. 3190/1955)[47]. There was therefore a lack of sufficient case coverage, jurisdictional inconsistency and a lack of systematic coherence leading to legal uncertainty[48]. This was followed by the enactment of Law no. 4601/2019 (Government Gazette A' 44/09-03-2019) "Corporate transformations and harmonization of the legislative framework with the provisions of Directive 2014/55/EU of the European Parliament and the Council of 16 April 2014 on electronic invoicing in the context of public procurement and other provisions" which effectively regulated corporate transformations. It should be noted that Directive 2004/25/EC of the European Parliament and the Council of 21 April 2004 on takeover bids, which was implemented into national law by Law no. 3461/2006 (Official Goverment Gazette A' 106/30-05-2006).

The provisions in force before the enforcement of Law No. 4601/2019, allowed only specific forms of corporate transformations that were expressly provided for in the law and did not allow mergers between partnerships, demergers of companies other than societe anonymes, partial divisions of companies, spin-offs etc. (numerus clausus of corporate transformations - principle of specification).

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[47] Panagiotou P., "The merger of companies in the new law of corporate transformations", NoB, volume 67, issue 6, July - August 2019, p. 1191

[48] Gregoriadis L., "The law of corporate transformations", P. Sakoulas, 2020, pp. 3 et seq.

Mergers of private companies are governed by Articles 108-115 of Law No. 4072/2012, mergers of limited liability companies are regulated in Articles 54-55 of Law No. 3190/1955 and mergers between société anonymes were covered by Articles 68-80 of Law No. 2190/1920, as amended by PD 498/1987[49].

In general, transformations that were not explicitly regulated by law could not benefit from the provisions of company law[50] and were therefore called "abusive transformations". Compared with genuine transformations, i.e. those covered by company law, abusive transformations were at an obvious disadvantage. It is also significant that the incentives and tax exemptions for company mergers created problems of compatibility of company law at national and EU level. Numerous laws, such as 2166/1993, 4172/2013 and older ones such as 1297/1972 and 1667/1986 referred to tax law issues when corporate transformations, partial divisions of companies, spin-offs, etc. were undertaken.

NEW LEGAL FRAMEWORK UNDER LAW 4601/2019

The aforementioned Law 4601/2019, as codified by Law 4972/2022, systematically regulated corporate transformations and the relevant legal procedures. EU Directive 2017/1132/EC and the relevant provisions on corporate transformations under German law, which successfully resolved the relevant issue, also had an impact on this law. In general, the legal gaps and ambiguities that existed in the area of corporate transformations were filled, the forms and types of legal entities involved in such transformations were supplemented, national law was harmonised with European legislation and the relevant tax framework, incentives, reliefs and exemptions were adjusted.

The current principles of the new regulatory framework are the following:

1) The expansion of the numerous clausus of corporate transformations, since Article 2 of this Law now provides for the number of corporate forms that may undergo or participate in a corporate transformation procedure, which essentially represent the entire range of corporate forms.

2) The uniform approach to the legal procedures of corporate transformations, irrespective of the type and form of the companies participating in them; and

[49] Rokas N. K., "Commercial Companies", P. Nomiki Vivliothiki, 7th updated edition 2012, p. 469.

[50] Diakopoulos D., "Introduction to the law of corporate transformations - A brief presentation of the new law", CJEU 05/2019, p. 682 et seq.

3) The balance between the interests of the company's shareholders (or partners) and creditors on the one hand, and the general interest of the company on the other, with the achievement of the desired outcomes in an orderly manner[51].

It is noted that the provisions of this law do not apply in cases of cross-border mergers and transformations regulated by law 3777/2009 "Cross-border mergers of corporations and other provisions", as codified by 4335/2015.

Law 4601/2019 covers the merger, demerger and transformation of companies and its provisions are mandatory. It applies to domestic and foreign companies established in Greece and its provisions may, under certain conditions, cover even companies that have been dissolved or declared bankrupt[52] and companies subject to special supervision[53] (e.g. investment companies, credit institutions). Corporate forms not regulated by this law continue to be governed by the previous regime (e.g. maritime companies under Law 959/1979).

Articles 7-21 of Law 4601/2019 regulate the procedure of merger by absorption and its stages (common draft merger agreement - art.7), publication of the draft on the website of the G. E. M. I. (art.8)[54], written report of the administrative body of the company and its publication in the G.E.MI. (art. 9), examination of the draft merger agreement by experts (art. 10), their opinion (art. 10 para. 5) and approval of the merger by the general meeting or the partners (art. 14). The merger agreement is then drawn up by the representatives of the companies and is subject to a prior legality review by the G.E.MI (art. 17)[55], while for cross-border mergers, which are subject to Law 3777/2009, a certificate is required from the competent authority of each state where the merging companies have their seat.

Shareholders have the right to be informed and there are also provisions governing the liability of the members of the Board of Directors or the company's managers for any misconduct during the merger process. There is also a special mechanism for the protection of the company's creditors (Article 13 of Law 4601/2019). Finally, once all the above requirements of the law have been met, the merger agreement is registered in the corporate

[51] Avgitidis D., "The new law of corporate transformations", P. Nomiki Vibliothiki, 2019, p. 25 et seq.
[52] Gregoriadis L., "The law of corporate transformations", P. Sakoulas, 2020, p. 12.
[53] Avgitidis D., "The new law of corporate transformations", P. Nomiki Vibliothiki, 2019, p. 33
[54] Panagiotou P., "The merger of companies in the new law of corporate transformations", NoB, volume 67, issue 6, July - August 2019, p. 1199
[55] Avgitidis D., "The new law of corporate transformations", P. Nomiki Vibliothiki, 2019, p. 55

register of the acquiring company and the legal effects of the completion of the merger take place (universal succession of the absorbed company by the acquiring company and transfer of the shareholding or partnership to the acquiring company). It also provides for an objection procedure concerning the validity of the merger.

Finally, under Article 6 of Law 3959/2011 it was established that undertakings have the obligation to notify to the Competition Commission any concentration (M&A) under certain conditions and within certain deadlines. Failure to do so will result in fines for the offenders. Generally, a concentration of undertakings that may lead to the creation or strengthening of a dominant position in the market for goods and services is prohibited. M&A agreements are controlled in Greece by the Competition Commission which, as an independent administrative authority, safeguards and protects the principles of healthy competition. The same applies to Community M&As as well, since according to the EC Regulation 139/2004, parties involved in a forthcoming transaction with an EU dimension, i.e. in case the merging firms reach certain turnover thresholds, are obliged to inform the Commission. It should be noted here that Competition Commissions have existed for decades in the US and in many European countries.

MEANS AND TACTICS USED BY THE ACQUIRING COMPANY IN A HOSTILE TAKEOVER

The company carrying out the hostile takeover intends to acquire a target company that it considers to be valuable in the market but aims to do so at the lowest possible cost. First, it seeks to find out whether the management of the target company will be in favour or against the takeover request. If the target company is listed on the stock exchange, especially when its shares are held by several legal or natural persons, it makes an offer to the shareholders or submits an offer to the board of the target company. If the board is reluctant, the hostile company bypass the board and addresses to the shareholders with the aim of acquiring a large number of shares in order to obtain a majority of votes at the annual general meeting. Of course, the hostile company must have large amounts of money available to pay the price of the share buyback.

It may also use the tactic of contacting shareholders of the target company who are willing to vote against the Board of Directors of their company in order to eventually control

the Board of Directors of the target company. This tactic was performed in the US and is still used today and is successful when shareholders are not happy with the company's Board of Directors. This tactic is called 'proxy fight or proxy contest'. It is also possible for the hostile company to buy shares of the listed target company without paying an above-market price to the shareholders of the target company, but this tactic is time-consuming and legally problematic because the acquirer is obliged, under general law, to inform the competent government authority when it has obtained a certain percentage of the share capital of the target company. In this way, however, the shareholders of the company and the board of directors are aware of the actions of the prospective acquirer and take appropriate measures. If the hostile company wishes to facilitate the proposed takeover it may make an offer to the board of the target company to ascertain its intentions.

TAKEOVER BID METHODS

In general, the offer of the acquiring company is effected in many different ways that have been applied and standardized in numerous acquisitions. More specifically:

A. The acquiring company bids a high price to acquire shares of the target company. This is the so-called Premium Price tactic.

B. The acquiring company may already own shares of the target company, thereby reducing the required price of the acquisition. This method is referred to as Toe Hold[56].

C. The acquiring company makes a takeover bid on the grounds of generic information, without having valid information on the target company's matters. This is a rather risky procedure, since a high price may be paid for a company that has a relatively low worth. For that reason, this procedure is called Blind Bid.

D. The company initiates a bid, which is only valid for a very short period, aiming to force the shareholders of the target company to make an immediate decision. It goes without saying that this is a form of blackmail, since neither the shareholders are able to make a correct decision, nor the management of the target company can adopt any defense mechanisms in such short notice. Therefore, in principle, this method is not permitted, given the fact that the US Securities and Exchange Commission has extended the deadline required to respond to a

[56] S. Abraham Ravid, Matthew Spiegel, "Toehold strategies, takeover laws and rival bidders", Journal of Banking & Finance, Volume 23, Issue 8, 1999, Pages 1219-1242.

tender offer from seven (7) to twenty (20) days[57]. This takeover bid tactic is known as Saturday Night Specials.

E. The hostile company seeks to acquire as many target company's shares as possible from the Stock Exchange, taking the shareholders by surprise as it moves in an orderly manner and purchase orders are placed in bulk at the opening of the Stock Exchange. This method is called Dawn Raid.

F. The acquiring company makes progressive bids to the shareholders of the target company. That is, an initial takeover bid for a certain number of shares and a subsequent lower bid for the remaining shares. Thus, the shareholders of the target company are justifiably panicked, especially if the difference between the bids is very large. This tactic is clearly a form of extortion, but it is allowed in the US. In the EU, the audit authorities require the bid price to be uniform. This practice is referred to as Two-Tier-Tender Offers.

G. Finally, there is also the case that the hostile company, in order to promptly complete the takeover transaction, makes a very attractive offer to the target company's shareholders so that the Board of Directors has no choice but accept it. This is the so-called Bear Hug.

DEFENCE MECHANISMS

There is a variety of mechanisms that can be used by the target company to counter a takeover. In some cases, the measures are of low intensity and are intended to force the hostile acquirer to proceed with a better offer. However, if the aim is to completely deter the acquirer, harsher measures, i.e. high-intensity measures, may be used. The target company will generally either try to prevent the hostile company's offer or take appropriate defensive measures. Frustrate of a bid is defined as that situation which eliminates or impedes the likelihood of success of an aggressive takeover, while defensive measures are defined as any action which alters the financial and partnership relations of the target company so that the decision of the attacking company to make a public offer for the acquisition of the target company's shares is effectively nullified.

Defence mechanisms have developed particularly since 1980, when the majority of takeovers at the international level and particularly in the USA were hostile. Large companies have legal and accounting departments, and cooperation with bankers to be able to prevent

[57] U.S. Securities and Exchange Commission. "Tender Offer FAQs", https://www.sec.gov/Archives/edgar/data/802481/000119312506199094/dex996.htm

a hostile takeover. The target company usually defends itself because it expects the shareholders' interests to be harmed by the takeover, but a further reason is that its executives wish to remain in place and receive their usually high remuneration, which would not continue in the event of a takeover. Of course, they may simply feel that the hostile bid is too low because their company has serious prospects in the future. In any case, if it is decided to adopt defensive measures, this is done on the basis of the institutional framework in force in each country, i.e. the measures that may or may not be taken and the bodies that have the power to do so.

EMPLOYEE PARTICIPATION IN COMPANY DECISIONS

In the United States, the legal framework does not provide for employee involvement in the management of companies. In the Netherlands, as in Germany, there is an established legal framework for employee participation in the decision-making of their companies. This was also due to the powerful trade unions that exist in these countries. In Germany in particular, the role of employee councils is very decisive, since employees of large companies form work councils that act on the rights of the company's staff and sometimes even become members of the board of directors and participate in its decisions, especially in matters of labour law. In the Nordic countries, although trade unions are particularly active, company employees participate only to a limited extent in the decision-making of their companies. In the UK, employees have no involvement in company decisions.

FORMS OF DEFENCE

A distinction is made between pre-bid and post-bid defences. Obviously, pre-bid defences are designed to discourage the buyer from bidding, i.e. to repel the buyer. These measures usually increase the value of the target company and reduce the profit or increase the risks for the acquirer. After the bid, defensive measures are triggered as an immediate reaction of the target company aiming both at improving the terms of the takeover and at delaying the process by increasing the costs and risks of the hostile acquirer.

(A) PRE-BID DEFENCE MECHANISMS

A1) STATUTORY PROVISIONS: These are defence mechanisms included in the articles of association of a company.

TYPES OF STATUTORY PROVISIONS

A1.1. STAGGERED BOARD

These are provisions in the articles of association relating to the board of directors of the company and usually its members are elected partially each year. Under this defence mechanism, the prospective acquirer cannot replace all the members of the board of directors at the same time, nor can make major changes to the company it seeks to acquire and thus ultimately moves away from the takeover since it is unable to gain control of the target company as the costs from this delay are extremely high and managers are provided with stronger protection from a hostile takeover[58].

A1.2. SUPERMAJORITY PROVISIONS

These are provisions in the articles of association that require an extremely increased majority of the shareholders in order to adopt a decision on the takeover of the company. In other words, in this case, the required majority is no longer 51% or 2/3 of the voting shares, but 80% or more. This not only delays the takeover process excessively, but also limits the board's room for negotiation with the acquirer. In this case the acquirer has the option to counter by submitting a bid for the whole company[59] or alternatively the bidder may acquire a simple majority of the outstanding shares and use its voting rights to override the super-majority provision[60].

A1.3. FAIR PRICE PROVISION

It obliges the acquirer to pay the same price for all the shares of the target company, i.e. the acquirer cannot bid at different levels. In this case, the acquirer is ultimately forced to offer an average price to all shareholders.

A1.4 DUAL - CLASS RECAPITALIZATION

While the general rule is that each share corresponds to one vote, under this defence mechanism, each vote is granted different rights i.e. some shares may correspond to 10 votes,

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[58] Lucian Arye Bebchuk, John C. Coates IV and Guhan Subramanian, (May, 2002) "The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy" Stanford Law Review, Vol. 54, No. 5, pp. 887-951

[59] Ruback Richard S. in Auerbach Alan J. (1987), "Mergers and Acquisitions", University of Chicago Press, p.57

[60] Bragg Steven M.(2009), "Mergers and Acquisitions-A Condensed Practitioner's Guide", John Wiley & Sons. Inc, p. 36-37.

others to 5 and some to only 1. Usually, the founders of the company and its executives acquire such shares with greater voting rights while ordinary shareholders receive shares with only one vote. The former shares yield lower dividends than the latter but have the capacity to control the company so that eventually the prospective buyer, even if he buys a majority stake in the company, cannot gain full control. Thus, in the end, this defence mechanism turns out to be very effective, even compared to the previous three mechanisms mentioned above which are not considered to be sufficiently effective.

A1.5. RESTRICTIONS ON VOTING RIGHTS

In the event of a takeover, many companies have provisions in their articles of association that restrict voting rights. Thus, shareholders who hold a large percentage of the company, around 20%, may be subject to a provision that forfeits their voting rights (lobster trap). This is a provision in a company's articles of association that prevents certain shareholders who hold more than 10% of the company's shares from converting the bonds or preference shares they hold into voting shares, thus preventing them from influencing and facilitating a takeover. Note that this mechanism is called a lobster trap because these traps, while allowing small lobsters to escape, capture the larger ones.

A2) DEFENCE MECHANISMS NOT COVERED BY STATUTORY PROVISIONS

A2.1 GOLDEN PARACHUTE

In this case, the contracts of company executives provide for their employment to be terminated following a hostile takeover and for them to receive compensation, shares and other rewards that ultimately significantly increase the cost of the takeover to the acquirer. The idea was that a healthy exit package would discourage executives from fighting deals that might potentially bring a big payday to the firm's shareholders[61]. In the U.S. it has been accepted that a legal agreement is not required since it may not even be in writing. If there are shareholders who want to complete a hostile takeover of their company, they can challenge golden parachutes in court. In addition to golden parachutes, there are silver, metal and pension parachutes that are addressed to a large number of the company's employees, not just the top executives. These, if activated, can completely prevent a hostile takeover

[61] Peer Fiss, (2016), "A Short History of Golden Parachutes", Executive Compensation, Harvard Business Review, https://hbr.org/2016/10/a-short-history-of-golden-parachutes

because they raise the cost of the takeover considerably, since they give rights to many employees.

A2.2 POISON PILL

It is a highly effective means of deterring hostile takeovers and is a complex process carried out through specialised law firms and financial advisers. There is a variety of forms of poison pills that are applied depending on the type of hostile attack the target company is facing. Poison pills are also called "shareholder rights plans"[62]. They are only allowed in the US. In other countries they are considered illegal or allowed only in very specific cases. This tactic is called a poison pill because it can literally destroy not only the takeover deal but also the companies involved. It is extremely complicated to enforce, but generally it involves the target company issuing securities that give shareholders special rights that they can exercise over a period of time. This measure can be adopted by a company's board of directors without shareholder[63] approval and its duration is usually between 3 to 10 years. Examples include the "dead hand" pill, which provides that only active members of the board of directors or their approved successors may acquire the shares (once a certain number of shares have been acquired by the unwanted acquirer, new shares are automatically issued to each other existing shareholder, leading the aspiring owner's stock holdings, or percentage of ownership in the company, to become massively diluted). In addition, there is the "slow hand" pill, which prohibits any poison pill acquisition for a predetermined and limited period of time following a change in the composition of the company's board of directors[64].

Two main categories of poison pills are "flip-in" and "flip-over", which can be used simultaneously.

i. A "**Flip-in poison pill**" allows existing shareholders (except the acquirer, if the acquirer is a natural person, or subsidiaries, if it is a legal person) to buy more shares at a discount[65]. The value of the common stock received when the right is exercised equals to two times

[62] Barry, J. & Hatfield, J., 2012. Pills and Partisans, "Understanding Takeover Defenses. University of Pennsylvania Law Review, 02, 160(3), pp. 633-713 and Taran, A., 2015. Corporate Strategies in Mergers and Acquisition. UDGAM VIGYATI, 10, Issue 1.

[63] Sunder, D., 2013. The Controversial "Poison Pill" Takeover Defense, "How valid are the Arguments in Support of it?" NMIMS Management Review, 7 10, Vol. XXIII, pp. 47-66.

[64] McSweeney, B., 2014. Takeover Strategies, Competitive Bidding and Defensive Tactics. At: The Handbook of Mergers and Acquisitions. s.l.:Oxford University Press.

[65] Barry, J. & Hatfield, J., 2012. Pills and Partisans, "Understanding Takeover Defenses. University of Pennsylvania Law Review, 02, 160(3), pp. 633-713

the exercise price of the right[66]. Thus, it becomes extremely expensive for the acquirer to complete the takeover.

ii. A “**Flip over**” allows shareholders to buy the acquirer’s shares at a discounted price after the merger[67]. These categories are useful for companies wishing to prevent a total takeover[68].

Other forms of poison pills are:

iii. The “**Back-end plans**”, which is known as note purchase rights plans. Under a back-end plan, the holder receives a dividend right that gives the shareholder the ability to exchange that right, along with the share, for cash or senior securities equal in value to a specific back-end plan price determined by the issuer's board of directors..

iv. The “**Voting plans”**, under which the company issues dividends or preference shares and if an outside company acquires a significant percentage of the company's shares, holders of preference shares are entitled to super voting rights.

v. The “**Shadow pill**”, under which a bidder cannot simply look at a target company and conclude from the fact such a defense. According to Coates (2000), a “shadow” pill can be as effective as a regular pill because of the fact that it does not require a shareholder vote to be effectively in place[69].

vi. The “**Chewable pill**”, which allows shareholders to request a vote to decide whether or not a takeover bid will trigger the poison pill. In this way, companies won't automatically reject bids that could benefit shareholders[70].

vii. The “**Bank mail pill**”, under which the bank or a target firm refuses financing options to firms with takeover bids thereby having the triple impact of imposing financial restrictions upon the acquirer, increasing transaction costs in locating another financing option and also buying time for the target company to put further defences in place.

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[66] Bainbridge M. Stephen, (2009) Mergers and Acquisitions in Corporate Law, 2nd edition, Concept and Insight Series, Foundation Press, p. 382

[67] Carpenter Wellington. "Poison Pills as a Defensive Tactic Against Hostile Takeovers, https://carpenterwellington.com/post/poison-pills-defensive-tactic-hostile-takeovers/]

[68] Pearce II, J. & Robinson Jr., R., 2004. Hostile takeover defenses that maximize shareholder wealth. Business Horizons, 09-10, pp. 15 - 24.

[69] Coates J., 2000, Takeover defenses in the shadow of the pill: A critique of the scientific evidence, Texas Law Rev., 79 (2) (2000), pp. 271-382, December 2000.

[70] Poison Pill: Everything You Need to Know, https://www.upcounsel.com/poison-pill

A2.3 POISON PUT

The target company offers bonds to investors that can be redeemed before maturity date[71], at a price generally much higher than their nominal value.

A2.4 MACARONI DEFENCE

In this case, a corporation that is a potential takeover target, issues a large number of bonds at an exceptionally high discount on the redemption value[72]. As the name of this mechanism implies, the takeover cost is multiplied, just as it happens with spaghetti when it is cooked. However, because the target company is taking on a very large amount of debt that it may not be able to repay in the future, it also has to be very careful.

A2.5 BLOWFISH

In this defence mechanism, the target company expands rapidly by buying new assets, thereby increasing its value but reducing its available cash. The aim is to prevent the hostile acquirer from making a takeover bid, since it will take over a company that has grown rapidly but has run out of cash. The reduced financial resources of the target company acts as a secondary effect, reducing the acquiring companies' incentives even more for a takeover[73]. The term "blowfish" comes from the puffer fish that when threatened inflates through a defense mechanism and discourages the attacker.

A2.6 EMPLOYEE STOCK OWNERSHIP PLAN (ESOP)

This is a type of pension plan set up by large companies whereby the company buys its own shares on behalf of the employees for an amount equivalent to that which would be contributed to their pension plan. Thus, the employees, do not wish the takeover of the company while the prospective buyer cannot acquire the shares included in the company's ESOP[74].

[71] Jason Gordon, 2022, "What is a Poison Put?", The Business Professor, https://thebusinessprofessor.com/en_US/investments-trading-financial-markets/poison-put-definition

[72] Jason Gordon, 2021, "What is a Macaroni Defense?", The Business Professor, https://thebusinessprofessor.com/en_US/business-governance/macaroni-defense-definition

[73] Arnold, G. (2004). Corporate financial management (3rd edition). Harlow: FT Prentice Hall

[74] Durasinovic, J., 2011. Analysis Of Measures and Tactics of Defense against Hostile Takeovers of Companies in the Strategic Function of Managing a Company. Zrenjanin, University of Novi Sad, pp. 239-244

A2.7 GOLDEN SHARE

This is the veto right of certain shares that do not allow changes to the company's articles of association, i.e. they have special voting rights and can thus defend themselves against a hostile takeover of the company.

(B) POST-BID DEFENCE MECHANISMS

B.1. ATTACK THE LOGIC OF THE BID

The Board argues to the shareholders against the takeover, particularly that the takeover price is low, that their company has growth prospects, that the hostile bidder is not really interested in the target company, etc.

B.2 WHITE KNIGHT - WHITE SQUIRE

When a company is threatened with a hostile takeover, it attempts through the white knight to contact a friendly company in order to spread its share capital and thus prevent the hostile takeover. To this end, the management of the target company cooperates with the white knight and provides him with information about the profits from the potential takeover[75]. The white knight companies then bid and gain control of the target company.

The white squire appears as an ally of the target company and helps it to remain independent by acquiring a large part of its shares but not its control and then votes against the takeover bid, receiving high dividends, discounts on the price of the shares and potentially seats on the company's board. Typically, it receives 20 to 30% of the target company's share capital. The white squire may need to commit in advance that he will remain an ally of the target company and will not turn against it[76]. Thus, the hostile company is forced to withdraw since the acquisition costs are greatly increased.

B.3 CROWN JEWELS

Crown jewels are the jewellery owned by kings and royal families and are highly valuable elements of their dynasty. In this tactic, the target company proceeds with the sale of some of its most important assets. The target company is thus discouraged and withdraws.

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[75] Shleifer Andrei and Vishny Robert W., (1986)," White Knights, and Shareholder‟s Interest", The Rand Journal of Economics, Vol. 17, No 3. Pp. 293-309

[76] Gaughan A. Patrick, (2011), Active Antitakeover Defenses in Mergers, Acquisitions, And Corporate Restructurings, fifth edition, John Wiley&Sons, Inc. Hoboken, New Jersey, p. 218

At the same time, however, two very serious problems may arise for the company that repelled the hostile takeover. On the one hand, it has lost its most important assets, jeopardising its operations[77] and reducing its future value, and on the other hand, by selling these assets has too much cash available, which makes it a potential target for a hostile takeover by another company. Therefore, companies that engage in this tactic usually find a friendly white knight to whom they sell their assets with an agreement to repurchase them at an agreed price.

B.4 RESTRUCTURING OF ASSETS

In this form of defence, the target company proceeds to the acquisition of new assets that are of no interest to the acquirer or may even involve the acquirer in restrictions under the antitrust provisions. Moreover, it may sell assets that the acquirer is interested in. The ultimate aim is to force the hostile acquirer out. However, this tactic can also lead to problems for the target company.

B.5. RESTRUCTURING OF THE CAPITAL STRUCTURE

This is a defensive measure against hostile takeovers with four options. In particular:

B5.1. ISSUANCE OF NEW SHARES

The target company issues new shares and thereby forces the hostile company to allocate larger sums than it originally planned to control it. Legally, of course, the hostile bidder can acquire the new shares through the stock exchange or through agreements. The target company must therefore convince friendly investors to acquire them.

B5.2. BUY BACK EXISTING SHARES

Using this strategy, the number of shares that a hostile buyer can acquire is reduced and, at the same time, the price of the remaining shares is increased. Since the target company uses its own capital to buy back shares, it becomes less attractive to the hostile buyer since it now has reduced liquidity. However, even this tactic has been subject to serious problems in practice, because the potential acquirer ultimately needs a smaller number of shares to gain control of the target company, and this may give it an incentive to go ahead with the takeover. In other words, this strategy may yield the opposite of the intended results.

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[77] Corelli Angelo, (2016), "Analytical Corporate Finance", Springer International Publishing, p. 448

B5.3. LEVERAGED RECAPITALISATION

In this means of defence, the target company borrows large sums of money and provides its shareholders with a substantial dividend. Thus, the hostile acquirer is discouraged since if the acquisition proceeds, it will be burdened with the target company's debt.

B5.4. ASSUMPTION OF ADDITIONAL DEBT

The target company undertakes additional debt by creating significant financial obligations, either by issuing bonds or by borrowing from a willing lender. Legal caution is required as in many countries the issuance of bonds is subject to the approval of the relevant authorities.

B.6 STANDSTILL AGREEMENT

A standstill agreement is a voluntary contract between an issuing company and a major shareholder that limits the shareholder's ownership of voting shares to some maximum (less than controlling) percentage for a fixed number of years[78]. The acquirer either gains a substantial amount of money in return for not acting aggressively or acquires the right to take full control of the target company and to obtain all relevant information in order to determine its future actions with sufficient certainty. The advantage for the target company is that it manages to stop the actions of the hostile acquirer, at least for a period of time, and thus gains time to be able to confront the hostile acquirer in the future by activating other defence mechanisms. This mechanism was also activated in Greece in 2007 and concerned the agreement between Piraeus Bank and Marfin Popular Bank[79].

B.7 GREENMAIL

This is a complex mechanism to implement from an economic and legal perspective. Under this method, the target company pays the hostile bidder to cease and desist, while the latter is bound by strict legal agreements not to acquire any shares in the target company or to seek control of it for a certain period of time. Thus, the hostile acquirer makes a very quick profit while the shareholders of the target are usually suffering a very large loss because they

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[78] Larry Y.Dann, HarryDeAngelo, “Standstill agreements, privately negotiated stock repurchases, and the market for corporate control”, Journal of Financial Economics, Vol. 11, Issues 1–4, April 1983, p. 276.

[79] https://www.piraeusholdings.gr/en/press-office/press-release/2007/03/agreement-between-piraeus-bank-sa-and-marfin-popular-bank-public-co-ltd

do not receive the increased price for their shares which the hostile acquirer received for selling its own shares, as the stock declines[80]. Thus, at least in the United States, many such cases lead to litigation between the shareholders of the target company and its management.

B.8 LITIGATION

As the term itself suggests, in this case we have direct use of a series of legal measures by the target company in order to delay the procedures and actions of the hostile acquirer. Usually, the target company will bring interim measures against the hostile acquirer to prevent the acquisition of further shares until the dispute is finally resolved. If this request is granted, it is clear that the takeover proceedings are delayed and the acquiring company has time to develop its defences. In the U.S. this remedy is very common in practice and specific tactics and arguments are usually followed in litigation. The main argument is the violation of antitrust laws, i.e. the claim that if the hostile takeover process is actually completed, a company will emerge that violates the monopolies laws. It is well known that the laws against the creation of monopolies are extremely strict in the United States and indeed, if there is a suspicion that monopolistic market conditions would be created, the Courts will deny the takeover. Further, the target company may argue that the hostile acquirer is withholding useful information about its company and is therefore seeking to have the acquisition rejected. Another claim of legal challenge by the target company is that the hostile acquirer has committed fraud and has distorted the facts to such an extent that the shareholders ultimately lose their rights. Of course, this is a very serious charge that gives rise to civil and criminal consequences and proving fraud is quite difficult from a legal point of view. However, this method in many cases results in an improvement of the initial bid and and therefore higher chance of a successful takeover[81].

B.9 PAKMAN DEFENCE

This takeover prevention strategy is implemented by the target company turning things around by trying to take over the acquirer[82] through the acquisition of its shares or

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[80] McChesney Fred S., (Mar. - Apr., 1993), Transaction Costs and Corporate Greenmail: Theory, Empirics and a Mickey Mouse Case Study, Wiley, Managerial and Decision Economics, Vol. 14, No. 2, Special Issue: Transactions Costs Economics pp. 131-150

[81] Pearce John A. And Robinson Richard B. ,(2004), Article in “Hostile takeover defences that maximize shareholder wealth”, Business Horizons 47/5

[82] Pac-Man Defense (2022), «The target company "turning the tables" in a hostile takeover situation», https://corporatefinanceinstitute.com/resources/valuation/pac-man-defense-hostile-takeover/

other assets or even the entire company. Even by acquiring just a small part of it, it becomes a minority shareholder and immediately starts litigation against the majority of the hostile company.

B.10 SCORCHED EARTH POLICY

In this defensive tactic, the target company sells its assets or freezes them for a very long period of time in order to discourage discouraging a hostile buyer. If the takeover succeeds, the acquiring company will be left with a nearly worthless stake in the target company[83]. At the same time, however, the shareholders of the target company suffer heavy losses which may even lead to the dissolution of the company. That is why the term used is "scorched earth policy", a military term when a country under attack retreats back but destroys everything that might be useful to the enemy.

B.11 PEOPLE PILL

Under this defence mechanism, all of the managers of the target company and the vast majority of executives and employees declare that they will resign if the hostile takeover proceeds. This mechanism is usually very effective when the target company is active in high-technology or highly specialised fields of activity[84], in which case human resources are the most important asset of the company. Besides, many potential acquirers wish to take over such companies in order to acquire a team of experienced and specialised employees. The first company that used the people poison pill was "Borden Corporation", back in 1989[85].

B.12 JONESTOWN DEFENSE

The "suicide pill" or "Jonestown defence" is a defence mechanism that triggers, as the name suggests, extreme actions by the target company even to the point of dissolution. In other words, it is preferable for the company to cease trading rather than be taken over in a hostile takeover. Thus, the target company is committed either to take on excessive debt or to operate in a sector where there is a high probability that it will be destroyed. This is a measure of last resort.

[83] Gilson, R. J., & Bernard, S. B. (1995). The Law and Finance of Corporate Acquisitions. New York, USA: Foundation Press.

[84] Buono, Anthony F., and James L. Bowditch. The human side of mergers and acquisitions: Managing collisions between people, cultures, and organization's. Beard Books, 2003

[85] The New York Times. "'Poison Pill' Revamped at Borden", https://www.nytimes.com/1989/01/05/business/poison-pill-revamped-at-borden.html

B.13 MANAGEMENT BUY OUT

In this defensive tactic, the managers of the target company increase their stake in the company by borrowing from banks and investment funds, i.e. they eventually increase the company's debt[86]. This discourages a hostile buyer. This measure has been applied with great success in the US and the UK where it is very common.

B.14 PROPAGANDA

In this form of defence, the company that is under hostile attack launches a public relations campaign to influence the general public on their positions and objections to the hostile attack. It refers disparagingly to the hostile buyer and the techniques it uses. The best-known case of such a defence is the case of Thyssen, which was attacked by Krupp-Hoesch in 1997 in Germany. It claimed that thousands of jobs would be lost and the public reacted immediately by abandoning the banks that supported the hostile takeover[87]. Under the weight of these reactions Krupp-Hoesch was forced to withdraw from the process.

GENERAL CONCLUSIONS

As indicated above, while M&As represent a significant tool for business activity and expansion, they also pose a number of risks for the companies involved and have a significant impact not only on the economy but also on society. Six merger waves have already been recorded in the past, each with its own specific characteristics. All of these have contributed to the formation of M&As in their current form. There are strong indications that in the post-Covid era a seventh wave is underway, the main feature of which is the involvement of companies which are based in developing countries. It goes without saying that the frequency and size of mergers and acquisitions is linked to the size and quality of the economy. In the US, for example, M&As have been taking place at a high frequency involving large sums of money for decades. In Europe and Asia, this trend has emerged in recent years as a rationale for expanding business activities. Quite often, corporate transformations are not the outcome of an agreement between the parties but are carried out through unilateral strategies such as hostile takeovers. In order to achieve a favorable outcome, hostile takeovers, should be

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[86] Corporate Finance Institute, "Management Buyout (MBO)", 2022, https://corporatefinanceinstitute.com/resources/valuation/management-buyout-mbo/

[87] https://www.eurofound.europa.eu/et/publications/article/1997/krupp-hoeschthyssen-merger-intensifies-debate-on-future-of-german-stakeholder-capitalism

properly prepared from a legal and economic aspect, and this preparation should include measures to counter the defensive actions of the target company. The target company, in turn, must carefully weigh the pros and cons of a hostile takeover and react with caution and prudence by taking those measures that will lead to the repulsion of the hostile takeover. Depending on whether or not there is a takeover bid, the company's board of directors can adopt various defensive strategies. In particular, it may adopt pre-bid measures in the articles of association or post-bid defence mechanisms. Ideally, the company's management and its shareholders should maintain excellent relations so that they can jointly decide on appropriate measures, otherwise the target company is particularly vulnerable.

The legal framework for the M&A process is constantly evolving at an international level as these processes are vibrant. There is no doubt that mergers and acquisitions need to be regulated effectively and not just left to the economic and technical criteria of the global economy. This is because they affect, and to a decisive degree, the working life and activity of a large number of employees and therefore have a direct impact on society as a whole. The legal framework must be strengthened to ensure that enterprises in developing economies will not become easy targets for the powerful multinational companies of developed countries, since this raises issues of national sovereignty. It is a fact that the institutional legal framework that has been developed over a long period of time in the US and the UK is based mainly on anti-monopoly legislation and much less on sensitive issues such as tackling unemployment.

As for the EU Member States, the framework of M&As is usually defined by general rules of company law without analysing and deepening the new takeover practices and their consequences, while the few relevant decisions of the European Parliament and the Council refer to this issue hesitantly without in any case regulating it adequately. It is clear, however, that in the context of a globalised economy, a complete and effective legal framework needs to be established and implemented immediately so that European businesses do not find themselves behind the curve in this crucial area.

In Greece, the previous legal framework for M&As was extremely incomplete and covered only few corporate transformations. Following the implementation of Law 4601/2019, the situation has improved significantly through the expansion of the numerous clauses of corporate transformations, the uniform approach to the legal procedures of corporate transformations and the balance between the interests of the company's

shareholders and creditors. The existing legislative framework, which is mainly based on the Merger Regulation and the aforementioned provisions of the European Parliament and the Council, is innovative and complements the weaknesses of the past, however, clearly does not fully cover the issue. Proof of this is the fact that the majority of Greek lawyers are not familiar with M&A law, the relevant bibliography is poor and the caselaw is limited. All these factors lead to the final conclusion that an immediate and complete shielding of the institutional framework of M&A is required, which will provide security in transactions and promote the Greek economy.

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