MASTERARBEIT / MASTER'S THESIS

Titel der Masterarbeit / Title of the Master's Thesis

„Corporate Governance Practices in M&As – Comparison Between the U.S. and the Continental European Takeover Legislation and Patterns"

verfasst von / submitted by

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angestrebter akademischer Grad / in partial fulfilment of the requirements for the degree of

Master of Science (MSc)

Wien, 2016 / Vienna 2016

Studienkennzahl lt. Studienblatt / degree programme code as it appears on the student record sheet:	A 066 914
Studienrichtung lt. Studienblatt / degree programme as it appears on the student record sheet:	Masterstudium Internationale Betriebswirtschaft / Master's degree programme Internatilonal Business Administration
Betreut von / Supervisor:	Univ.-Prof. Dipl.-Vw. Thomas Gehrig, PhD

Statutory Declaration

I confirm that this paper is my own work except the citations and the referred literature. I confirm that I diligently quoted all authors whose articles and books I used for the purpose of this thesis. I am aware of the fact that I could be charged with an offence in case of plagiarism.

Vienna, 15.05.2016 Liliya Penkova, BA

Acknowledgements

I would like to express my gratitude to Univ.-Prof. Dipl.-Vw. Thomas Gehrig, PhD for agreeing to supervise me. I would like to thank for all his valuable ideas which helped me to organize my work, to really go into detail of the topic and to understand the essence of the regulatory frameworks I analyzed. I appreciate his help and the time he spent on discussing various details when I needed some guidelines.

I would also like to thank my family who supported me during my entire studies. I am extremely grateful for the time, attention and understanding they granted to me, especially when I did not expect it but needed it. Thank you very much!

I am happy to express my gratitude to my sister, Snezhana Penkova, Bsc., for taking from her own time to read my paper and to contribute with her knowledge for any improvement ideas.

I am grateful to my friends, who have always shown special interest to my thesis and who cheered me up with their positivism, love and patience when I was stuck in the books.

ABSTRACT

Mergers and acquisitions have always been a common way of corporate restructuring. How to impede the incentives of managers to involve in value-destroying takeovers while encouraging value-enhancing and improving the post-merger corporate performance M&As, it is often questioned and analyzed by economists. Hence, in order to go into detail in such a complex issue, the thesis analyzes the current takeover regulation of the United States and Continental Europe by concentrating on the corporate governance mechanisms and their role in the M&A process. The thesis answers the question whether the takeover legislation of Continental Europe is efficient enough to deal effectively with M&As and whether the implementation of U.S. patterns would be beneficial and desirable for EU corporations. In fact, a conclusion is drawn that, although there are fields for improvement in the Continental European takeover regulation, the current legislation provides a clear, predictable and relatively stable way of restructuring, which encourages value-enhancing takeovers. In addition, since the core of the U.S. takeover market, the financial system and the ownership structure of U.S. corporations are quite dissimilar when comparing them with Continental Europe and EU companies, the implementation of U.S. patterns would not improve the current EU takeover legislation. However, an efficient way of improving the current Continental European takeover regulation would be to work on eliminating the current gaps in the regulation and to improve the harmonization between the Member States' regulations.

ZUSAMMENFASSUNG

Fusionen und Akquisitionen sind eine häufige korporative Restrukturierungsmethode. Auf der einen Seite war es schon immer eine relevante Frage, wie man Manager davon abhält wertmindernde Investitionen zu tätigen. Auf der anderen Seite analysieren Wirtschafter Gründe, die Manager dazu motivieren wertsteigernde Investitionen zu machen, welche die unternehmerische Leistung nach der Fusion positiv beeinflussen. Aus diesem Grund beschäftigt sich diese Masterarbeit mit der Analyse der derzeitigen Gesetzgebung von den USA und Kontinentaleuropa, welche die Fusionen und Akquisitionen regelt. Die Arbeit konzentriert sich auf die Unternehmensführungsmechanismen und deren Rolle für den gesamten Restrukturierungsprozess. Es wird der Frage nachgegangen, ob die derzeit in Kontinentaleuropa geltenden Fusionsgesetze effizient genug sind und ob die Implementierung von U.S. Regelungen in die europäische Gesetzgebung vorteilhaft und somit wünschenswert sein könnte. Das Ergebnis der Analyse ist, dass die europäische Gesetzgebung weitgehend einen klaren, vorhersehbaren und einigermaßen stabilen Restrukturierungsprozess anbietet, der Unternehmensmanager zu wertsteigernden Fusionen und Akquisitionen motiviert. Der Kern des U.S. Fusionsmarktes, das Finanzsystem sowie die Eigentumsstruktur der U.S. Unternehmen unterscheiden sich wesentlich von jenen in Kontinentaleuropa. Aus diesem Grund wäre eine potenziell vollständige Implementierung von U.S. Regelungen in die derzeitige Fusionsgesetzgebung in Kontinentaleuropa nicht sinnvoll. Jedoch könnte die europäische Gesetzgebung sowohl durch die Beseitigung von Lücken in der Fusionsregelung, als auch durch die Harmonisierung der Gesetzgebung der einzelnen EU-Mitgliedsstaaten verbessert werden.

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List of Abbreviations

EC	European Commission
EU	European Union
FTC	Federal Trade Commission
HSR	Hart-Scott-Rodino (Act)
M&As	Mergers and Acquisitions
MS	Member States
NCA	National Competition Authority
SEC	Securities and Exchange Commission
TO	Tender Offer
U.S.	United States

I. Introduction

The economy in the 21th Century is a result of complex decision-making of politicians, economists, corporations and investors which set the structure and growth of national economies as well as the paths for their future development. Taking advantage of the liberalization of the terms and conditions of trade and the increased access to economical, multicultural, technological and political knowledge, corporations engage themselves in M&As in order to stay competitive on the market.

Apparently, M&As have special contribution to the world economic development. In this sense, corporate governance influences to a superior extend the M&A process of corporations as well as their short-term and long-term performance after takeovers. In general, the role of corporate governance is to balance the interests of all stakeholders and to determine the way of achieving the corporate goals. However, depending on the financial system the impact of certain corporate governance mechanisms differ significantly. Hence, the market-oriented financial system of the United States contrasts significantly to the Continental European bank-oriented system.

Since the United States and Continental Europe are observed as "polar extremes" (Allen and Gale, 2000) in the sense of financial systems, the thesis limits its analysis on them. Although the United Kingdom has more market elements (like the United States) together with more developed banking system (like Continental Europe) and, hence, its financial system lies in between, it will not be considered in details. However, comparing two extreme systems with their implications on the corporate governance practices in M&As, the thesis discusses whether moving the takeover legislation towards the model of the United States will be beneficial tactics for Continental Europe. Since the European Union has the greatest power in sense of economic development, active markets and superior banking system in Continental Europe, the thesis limits its considerations to the corporate governance practices and takeover legislature in the EU countries in Continental Europe. Therefore, the United Kingdom, Ireland, other European islands and the non-EU countries in Europe are excluded from the overall analysis.[1] The thesis analyses only M&As of listed corporations since the major

[1] Later in the thesis, in cases of discussing Continental Europe, the EU countries from Continental Europe will be meant (the United Kingdom, Ireland and other European islands as well as the non-EU countries are excluded from the analysis).

legislative acts limit their power on them and do not consider companies which shares are not traded on any regulated market.

Taking into consideration the differences between the takeover legislations, the financial systems and the M&A practices in both the United States and Continental Europe, the thesis answers some major questions. Since U.S. corporations focus on the maximization of shareholders' wealth when undertaking M&As while Continental European companies focus on the interests of its stakeholders, a question arises – what is the difference for corporations in both cases? Is shareholder wealth maximization directly linked to superior corporate performance? In this sense, why are European corporations more concerned about stakeholders' interests? Let's suppose that European takeover law implements more market elements. Does this mean that the short-term performance of the corporations will improve? What about their corporate performance in the long run? Can the European markets really be efficient monitors over the merging corporations? Will they replace the banks in their monitoring role? If so, what is the possibility that such change in the takeover laws in the European Union would result in clash of interests and in breakdown after all? The thesis aims at responding to these questions through exploring the financial, economic and legal literature provided so far and analyzing the current legislative environment. Thus, the thesis tries to describe plausible trends for future development in the takeover legislation in Continental Europe which are in accordance with greater corporate performance in cases of takeovers.

In order to answer the research questions, the thesis is structured as follows: Section II presents the M&A motives, the variety of takeover types as well as the M&A trends over the years. The section ends with discussion of the corporate governance mechanisms. Section III analyzes the takeover legislation in Continental Europe based on the bank-oriented financial system. Afterwards, Section IV presents the market-oriented system of the United States and their legislative patterns related to regulating M&As. Section V analyzes whether moving the Continental European takeover legislation and practices toward the American model would be beneficial for listed European corporations. The thesis concludes with generalizing the results from the comprehensive analysis and raising some additional questions for further research.

II. The Heart of Corporate Takeovers

> *"We're seeing an increased number of companies that are stable and confident now – and poised to move the needle in a significant way… There's a strong convergence of conditions, a slow but steady economy, increasing confidence, strong corporate balance sheets, and available financing, setting the table for bold, transformational deals."*
>
> -Steve Joiner
> Partner, Deloitte &Touche LLP.

M&As are neither recent nor continuing process. Economists argue that takeovers come rather in "waves of concentrated intensity" (Megginson, Lucey and Smart, 2008). Normally, "industry shocks" or changes in the economic environment are followed by intense merger activity. As Rossi and Volpin (2007) state, the takeover trends differ across industries and are mostly concentrated in those ones which "need more external capital and face greater agency problems" (Rossi and Volpin, 2007). In this sense, the first merger wave occurred in the period 1890-1903 when a plenty of horizontal mergers took place in particular industries such as mining, transportation and metals. As a result, those industries became highly concentrated and monopolized.[2]

Going back to more recent years, the M&A activity in 2014 and 2015 is reaching its peak for the first time after the global financial crisis from 2007-2008. The M&A Trends Report 2015 of Deloitte states that "a strong M&A environment is expected across the board, in private and public businesses, in multiple industry sectors, in companies and private equity firms large, small, and in between" (Deloitte &Touche LLP, 2015). According to the Mergers & Acquisitions Review of Thomson Reuters (2015), the first three quarters of 2015 are the strongest nine months concerning the takeover activity worldwide for the past nine years. Globally considered, M&A transactions count for US$3.2 trillion which is a 32%-increase compared to the same period in 2014 (Rietschel, 2015). In this sense, some major questions should be raised – Why do corporations engage themselves in M&As? What stays behind all the statistics and statements about the current takeover market? Do M&As create value and

[2]For instance, in the United States the steel production at the beginning of the 20th Century was controlled by only one mega-corporation called U.S. Steel. Although it was told that the reason for its formation was reaching greater efficiency, the reality was obtaining of monopoly power and overpricing the company's stock. For details see Reback (2007).

enhance the corporate performance? Or do they just contribute for inflating the economic bubble?

This section of the thesis will answer these and further questions regarding the reasoning for takeovers, the M&A trends and, in general, what is the role of the corporate governance mechanisms in the M&A process.

1. Why Do Companies Engage Themselves in M&As?

According to Forbes Magazine, Bloomberg and The Wall Street Journal, 2015 is the strongest year for M&As since the global financial crisis from 2008.[3] For instance, the announcement for the acquisition of BG Group PLC by Royal Dutch Shell PLC is not only the biggest takeover in Europe for 2015 but also in global terms. Shell agreed to pay 47 billion pounds in cash and stock in order to acquire BG Group.[4] What does it stay behind the offer of Shell? Generally, why do corporations get involved in M&As?[5]

For decades companies use the M&A investments as part of their expansion strategies in order to pursue their corporate goals for the near future as well as in the long run. Especially when companies operate in slow growth advanced markets and in industries with “little room for capacity expansion” (Brouthers and Brouthers, 2000), M&As are a frequent way of increasing market share. In general, several groups of factors stay behind the corporation’s choice for M&As – there are strategic, economic, market and personal motives (Hopkins, 1999).[6]

Through M&As companies benefit not only from greater market power but also from economies of scale and scope. Takeovers are often followed by efficiency enhancements due to removing inefficient managers or by changing the business strategy (Scherer, 1988). Of course, part of the expansion strategies of corporations is to penetrate new markets as well. Thus, through cross-border M&As companies have the opportunity to adapt better in new cultural, economic and political environments, to benefit from the existing customer database of the target, its distribution channels, supplier chains and local resources and to acquire the target’s experience, specific knowledge and skilled labour (Georgopoulos and Preusse,

[3] For details, please look at Baigorri, (2015); Mattioli and Strumpf, (2015); Porzio, (2015).
[4] For more information about the offer, see the official reports in http://www.bg-group.com/677/
[5] Auerbach (1991) presents a comprehensive research about what reasoning stays behind the M&As.
[6] Other classifications of the M&A motives are presented by Cantwell and Santangelo (2002) and by Eccles, Lanes and Wilson (1999).

2009).[7] In other cases the corporation can target an undervalued firm due to great potential gains after the target restructuring.[8] Of course, behind some acquisitions stays the incentive of managers for empire building due to the potential private benefits they might gain at a post-merger level (Masulis, Wang and Xie, 2006). Unfortunately, often such investments occur to be value-destroying and unsuccessful.[9] Therefore, it can be stated that involving personal motives in the M&A process should be avoided.

2. Types of Takeovers

Although there are many differentiations of types of M&As, for the purpose of the thesis only the friendly and the hostile takeovers are considered in this section.[10]

Friendly M&As occur when transactions are made with the approval of the target's management and its shareholders. According to empirical studies (e.g. Ghauri and Buckley, 2003), most M&As are friendly. Friendly takeovers are undertaken by corporations because of the possibility of achieving "strategic synergies" (Schwert, 2000).[11] Companies access greater information about the true value of the deal which the target's management might provide to the acquirer if the target's managers agree on the transaction. Unfortunately, the managers' interests are often not fully in accordance with the interests of the shareholders. This conflict might lead to difficulties for the friendly acquirer to convince both the managers and the shareholders to agree on the deal (Schnitzer, 1996). If the target's management rejects the offer, the acquirer still has the possibility for a hostile bid directly to the target's shareholders. In this case the target can still be acquired in a friendly way by a third party – the white knight.[12] This process is graphically explained in *Figure I.*[13]

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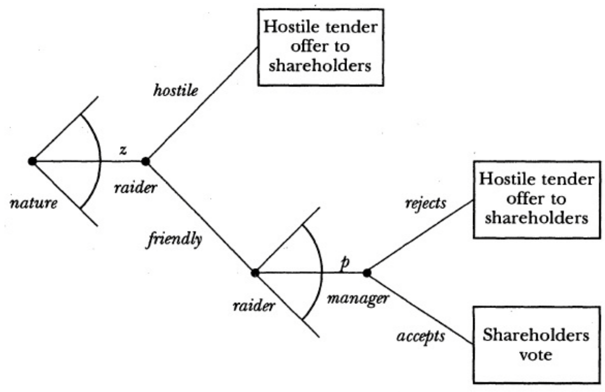
[7] Further details are presented from Marinescu and Constantin (2008).
[8] Additional benefits occur if any board interconnectedness is present. For details see Cai and Sevilir (2012).
[9] For details see, for example, Hopkins (1999).
[10] Figure 1 in the Appendix presents a summary of the major types of M&As. For details about those types of M&As see, for instance, Ghauri and Buckley (2003); Buckley and Ghauri (2002); Healy, Palepu and Ruback (1997).
[11] For more information see Schwert (2000).
[12] For details please look at Sudarsanam and Mahate (2006).
[13] ***Z*** is a symbol for the private information of the target's management and ***p*** represents the total payment for all shares of the target company.

Figure I. Time Structure of the Takeover Process



Source: Schnitzer (1996)

However, companies can decide to go directly for a hostile tender offer to the target's shareholders instead of negotiating with the incumbent management of the target company. Hostile M&As are mainly driven by their disciplining force in cases of poor management of the target. In addition, Franks and Mayer (1996) imply that hostile M&As are followed by "a greater degree of restructuring via asset sales" as well. However, corporations, which decide for the hostile M&As, carry some additional costs. They often pay higher premiums and spend a plenty of money for "expensive advertisements", "mailings to shareholders" andovercoming "costly takeover defenses, such as poison pills" (Schnitzer, 1996). Nonetheless, some literature casts doubt on the disciplining role of hostile takeovers.[14] Franks and Mayer (1996) provide evidence that hostile M&As are in fact not driven by the underperformance of the target but they might be driven by "poor expected underperformance" based on "the refusal of target management to re-deploy assets into the best use in the future" (Franks and Mayer, 1996).[15] However, many M&A transactions contain both hostile and friendly elements during negotiations. Therefore, in some cases it might be complex to differentiate between hostile and friendly M&As.[16]

[14] For details about what drives these concerns see Sudarsanam and Mahate (2006).
[15] For more details about the characteristics of hostile and friendly takeovers see, for example, Morck, Shleifer and Vishny (1991) and Shleifer and Summers (1991).
[16] For more details see Schwert (2000).

3. The M&A Trends and Activity Over the Years

Mergers and acquisitions occur as a result of the changing regulatory, business and technological global environment and play an incremental role in every country's economy. Such transactions try to deal with the enhanced complexity of the recent business world and the great number of strong competitors. It is a corporate strategy for many companies to deal with the "new global conditions" (Cantwell and Santangelo, 2002).

3.1. The U.S. Market

As it was stated earlier in the thesis, M&As are not continuing process but rather occur in waves resulting from economic, regulatory and other changes. Until the 1990s M&A waves are assumed to be mainly a U.S. phenomenon.[17] Although there have been other waves before the 1980s, due to their smaller scope in comparison to the 1980s merger wave, they are not a subject of the thesis.[18]

The merger wave from the 1980s differentiates from the others mostly with its hostility, high leverage and shortened managerial horizons related to their decision-making process.[19] Some economists call that period "a renaissance of interest in the theory of takeovers" (Scherer, 1988) since the number of M&As reached immense levels compared to previous waves. The hostility of takeovers in the 1980s was mainly a result of "the failure in the internal governance mechanisms of U.S. corporations" (Jensen, 1993).[20] In that period capital markets developed significantly and thus they helped by reducing excess capacity (Holmstrom and Kaplan, 2001). Moreover, the number of institutional shareholders increased in the 1980s which led to increased power of shareholders and decreasing importance of the stakeholders' interests (Holmstrom and Kaplan, 2001). The number of dispersed shareholders increased as well.[21]

[17] In the 1980s, for example, M&A transactions involving U.S. companies, accounted for around 85% of the overall value of M&As. For details see Sundaram (2004). Table 1 in the Appendix presents a summary of the M&A activity over the years.
[18] Figure 2 in the Appendix presents the scope of all merger waves in the period 1895-1985.
[19] Almost 50% of the major corporations in the United States were a target of a hostile takeover in that period. Source: Holmstrom and Kaplan (2001).
[20] For more details see Holmstrom and Kaplan (2001), Shleifer and Vishny (1990) and Berger and Ofek (1996).
[21] Individual ownership decreased significantly – in the 1970s it was approximately 70 percent and in the 1980s it declined to 60 percent. More details at Poterba and Samwick (1995). Further details about this merger wave are presented from Golbe and White (1991).

In the 1990s the cross-border M&A activity was far greater in scope and this was mainly due to the mega deals made in that period.[22] Compared to the wave in 1980s, the merger wave in the 1990s was not a U.S. phenomenon, but had a global scope.[23] The lower transportation and communication costs, which were present at that time, offered the opportunity for companies to engage in M&As easier and at a lower cost.[24] Hence, leverage and cash-financing of M&As decreased while stock-financing became a common practice for merging corporations (Sundaram, 2004). In the 1990s there were changes in corporate governance because the anti-takeover legislation changed[25], the role of the shareholders and the board of directors became incremental as well as the executive pay was more incentive- and stock-based than before (Holmstrom and Kaplan, 2001). The number of hostile takeovers declined significantly since they became quite costly.[26] As a result, the role of the market for corporate control was pushed into the background.[27] Unfortunately, M&A decisions in the 1990s were often a consequence of incomplete information or even corrupted one due to "questionable accounting practices, poorly-informed media, and the myth of a recession- and inflation-free, technology-driven "new-economy"" (Sundaram, 2004).

However, the sixth merger wave was quite different relative to the previous ones. In the United States acquiring companies were less overvalued compared to their targets than before and thus they offered more often cash than stock in M&As. According to Alexandridis, Mavrovitis and Travlos (2012), the market for corporate control was far less competitive in the period 2003-2007 and premiums were smaller in general.[28] In addition, less takeovers were a result of the managerial hubris.[29]

According to Marino (2015) and Mattioli and Strumpf (2015), 2015 was the strongest M&A year (according to value and number of M&As) since the financial crisis from 2007-2008. The volume and number of M&As not only were the highest since 2007 but, according to Fortune Magazine, the first quarter has been set as the "best first quarter for U.S. mergers" (Primack, 2015) for the past 15 years! In 2015 there was a great number of mega-M&As such

[22] Figure 3 and Figure 4 in the Appendix provide information about the levels of deal value and the number of M&As in the 1990s.
[23] Extensive analysis of the M&A activity across industries can be found in the paper of Cantwell and Santangelo (2002).
[24] For more details look at Cantwell and Santangelo (2002).
[25] Holmstrom and Kaplan (2001) discuss the anti-takeover legislation in more details.
[26] For details see Holmstrom and Kaplan (2001).
[27] For more information see Sundaram (2004).
[28] Average premiums paid (for public targets) in the period 2003-2007 is 37,9% compared to 45% during the 1990s merger wave. For details see Alexandridis, Mavrovitis and Travlos (2012).
[29] Managerial hubris means that managers might make mistakes when they value their targets.

as that one between the pharmaceutical company Allergan and the biopharmaceutical company Pfizer (a deal for around $160B) (Street Insider, 2015). Taking these numbers and specifications into account, some economists make concerns about what follows after such a great year for M&As.[30] Is it the peak of the seventh M&A wave? Will the world face another financial crisis soon?[31]

3.2. The Continental European Market

The number of M&As in Continental Europe enjoyed significant increase in the 1990s. Although takeovers were not a new event on the continent, since their number was quite small for the period until the 1990s, the thesis limits its analysis on the past 25 years.[32]

In the 1990s the importance of takeovers rapidly increased for non-U.S. corporations (Sundaram, 2004). Continental European companies not only undertook acquisitions more often that before but frequently they were also potential targets for U.S. and other non-U.S. corporations. However, the 1990s M&A wave in Continental Europe was quite different from the U.S. wave in that period. At first, Continental European companies were quite more often involved in hostile takeovers while hostility was not a topic for U.S. corporations anymore (Martynova and Renneboog, 2008). The reason why Continental European companies did not face many hostile takeovers in the 1980s (and hostility increased no sooner than the 1990s) was that in the 1980s most companies had "concentrated ownership structure" (Martynova and Renneboog, 2008). The market for corporate control was not so developed in comparison to the U.S. one (Franks and Mayer, 1996). One of the reasons lied in the fact that a far smaller number of European companies were quoted compared to U.S. companies (Franks and Mayer, 1996). Hereby, large shareholders were responsible for the efficient monitoring in Continental Europe. However, due to changes in the politics, regulation and the business environment in general, concentrated ownership was replaced by more dispersed ownership structure, which offered a field for hostility. Furthermore, Continental European companies were highly involved in cross-border M&As. Many European companies acquired U.S. telecommunications firms since the U.S. technology was seen as attractive and innovative which would increase their competitiveness (Cantwell and Sangangelo, 2002). Among the

[30] Figure 5 and Figure 6 in the Appendix display the global M&A activity in the period 2010-2015 (the 1st Quarter) and, specifically, in 2015.
[31] For details look at Richter (2015).
[32] For details about the merger waves before the 1990s and for the period 1990-1999 see Goergen and Renneboog (2004).

Continental European companies the German and French ones were most frequently involved in M&As (both as acquirers and targets), followed by companies from the Netherlands (Cantwell and Santangelo, 2002). Interestingly, in Continental Europe, as Martynova and Renneboog (2006) state, shareholders of the acquired companies were able to capture greater abnormal returns when the companies were involved in conglomerate takeovers instead of horizontal ones. Moreover, there were significant differences between the way Continental European and U.S. companies acted in the M&A process. Unlike U.S. corporations, which relied more on informal way of cooperation, French companies, for instance, relied heavily on formal control and strategies (Ghauri and Buckley, 2003).

Naturally, in the 1990s the M&A activity in Continental Europe was highly influenced by the EU regulation and policies. At first, the European Commission tried to decrease the tendency of cross-border M&As and to encourage the “optimal allocation of resources, technical progress and the flexibility to adjust to a changing environment” (Cantwell and Santangelo, 2002) in Continental Europe. However, not only the introduction of the Euro but also the liberalization of both services and telecommunications stimulated further the cross-border transactions (Cantwell and Santangelo, 2002). In the CEE countries there were also great takeover opportunities due to the privatization process that was present at that moment (Cantwell and Santangelo, 2002).

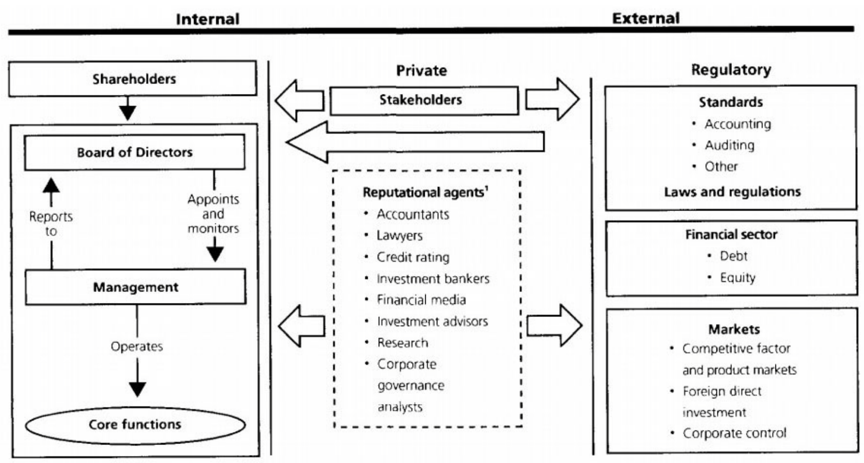
4. The Role of Corporate Governance in the M&A Process

Corporate governance deals with the agency problem (the separation of ownership and control) and scrambles to enhance firm value. Efficient corporate governance affects not only shareholder wealth but also the outcome of takeovers in general. Therefore, it is often viewed as one of the essential firm resources.[33] According to Liu and Wang (2013), corporate governance represents a key element which “improves a firm’s performance, and the fluctuation of capital markets, stimulating the innovative activity and development of enterprises” (Liu and Wang, 2013). Moreover, it should stimulate managers to make their decisions in accordance with the shareholders interests (Afza and Nazir, 2012).[34]

[33] There is a comprehensive research made on the corporate governance effects on firm profitability by Masulis, Wang and Xie (2007).
[34] The agency problem is presented in details by Shleifer and Vishny (1997). They provide not only an adequate definition of the term, but also a deep and extensive analysis of the major issues related to managerial incentives and contracts, management discretion and agency costs.

There are various corporate governance structures related to different systems. This variety is a result not only of the historical development, economic, political and other factors, but also of the legislation and regulatory constraints (Maher and Andersson, 2002; Allen and Gale, 2000; Kay, 1996; Gilson, 1992). This thesis limits its analysis on the legal issues. Efficient and successful corporate governance means that there is sufficient legal protection of at least some of the firm investors (Shleifer and Vishny, 1997). However, even in superior and advanced corporate governance structures appear questions regarding whether the existing corporate governance mechanisms are the most effective and efficient ones for the current environment as well as in the future development perspective. Fortunately, when one of the corporate governance mechanisms does not fulfill its role, the importance of other mechanisms increases in their goal to deal with agency and other problems. *Figure II* presents a major differentiation of the corporate governance mechanisms (internal vs. external ones). However, the bundle of effective corporate governance mechanisms depend on the industry as well (Maher and Andersson, 2002).

Figure II. Corporate Governance Framework



1 *Reputational agents* refer to the private sector agents, self-regulating bodies, the media, and civic society that reduce information assymetry, improve the monitoring of firms, and shed light on opportunistic behavior.

Source: Iskander and Chamlou, 2000

4.1. Internal Corporate Governance Mechanisms

Internal corporate governance mechanisms play a central role for corporations. If they are efficient in accomplishing their goals, external mechanisms stay in the background. Many economists analyze the role and the importance of internal corporate governance mechanisms and research the influence of those on firm value and performance.

For instance, broad research (e.g. Afza and Nazir, 2012) implies that companies which boards have more outside directors enjoy greater abnormal returns around the M&A announcement due to a positive market reaction as well as better post-merger performance (Cotter, Shivdasani and Zenner, 1997; Brickley, Coles and Terry, 1994; Byrd and Hickman, 1992). Outside directors are efficient monitors (Byrd and Hickman, 1992) and cope with the agency problem – they reduce the incentives of managers to act in a self-interest manner and, hence, they better "promote shareholder interests" (Brickley, Coles and Terry, 1994). On the other hand, board connections can enhance firm value and performance after M&As as well (Cai and Sevilir, 2012). This is due to better communication, information advantages, negotiating lower premiums etc.[35] In addition, a common way of enhancing the incentives of managers to avoid undertaking value-decreasing investments is the performance-based remuneration policy.[36] However, multiple directorships influence firm performance in cases of M&As as well. On the one hand, directors' time is scarce and therefore the impact on firm performance is negative. On the other hand, multiple directorships could mean that the person has greater experience, know-how and thus firm performance in cases of M&As might increase (Ahn, Jiraporn and Kim, 2010). Another essential part of the internal corporate governance mechanisms is related to the Chairman-CEO duality. Liu and Wang (2013) state that, in general, the effects of the Chairman-CEO duality depend on the industry.[37]

Large blockholders and institutional investors play a key role as internal corporate governance mechanisms as well. Afza and Nazir (2012) find positive relationships between them and firm performance in cases of M&As since large blockholders, for instance, have the power to make managers act in accordance with the shareholders' interests. However, in some cases internal corporate governance mechanisms do not cope with the agency problem in the most efficient way. Therefore, their effectiveness is combined with the efficiency of the external mechanisms.

4.2. External Corporate Governance Mechanisms

Some of the major external mechanisms are the product markets, the capital markets, the managerial labor markets and, of course, the market for corporate control (Sundaram, 2004).

[35] For further details look at Cai and Sevilir (2012).
[36] For more details look at Custodio and Metzger (2013).
[37] For more details see Liu and Wang (2013), Afza and Nazir (2012) and Masulis, Wang and Xie (2007).

The product market has a strong disciplinary effect. Corporations which are not enough competitive on the market are easily being eliminated by their competitors. According to Masulis, Wang and Xie (2007), companies which operate in more competitive industries with an active product market are more prone to involve themselves in value-enhancing M&As since managers use firm resources more efficiently and their incentives are aligned with shareholders' interests. Capital and managerial labour markets also play a vital role in disciplining bad managers. As Sundaram (2004) states, these markets are responsible for rewarding good managers and penalizing those of poor-performing corporations.

Although all of the above markets are vital in their disciplinary effect, the most important external corporate governance mechanism is the market for corporate control. Masulis, Wang and Xie (2007) imply that in an active market for corporate control managers facing more pressure are more prone to make good decisions related to better takeovers and, hence, to align their incentives with shareholders' interests. At the same time, if managers are protected due to various anti-takeover provisions like poison pills and staggered boards, they will more likely make value-destroying acquisition decisions.[38] As Sundaram (2004) states, when an active market for corporate control is present, poorly governed companies' shares are often sold from the current shareholders which leads to increased firm restructuring possibilities. In other words, poorly governed companies are threatened by hostile takeovers. Some economists determine the market for corporate control as "double-edged sword" (Sundaram, 2004) because together with increasing the managerial efficiency in decision-making, it could lead to opposite results as well. Of course, the market for corporate control is influenced by the regulatory environment which can limit the strength and free functioning of the market. More extensive and deep analysis of the role of the regulation on the market for corporate control is presented later in the thesis.

[38] Research on the impact of anti-takeover provisions of managers' incentives is made by Masulis, Wang and Xie (2007).

III. The Takeover Legislation in Continental Europe and Corporate Governance

"Merger control at EU level should be equipped with a modern toolkit to protect businesses and consumers against transactions that may harm competition."

-Joaquín Almunia
Commission Vice-President

The changing economic environment influences the M&A trends. What kind of acquisition techniques and takeover defenses are used, is a decision made by corporations taking into account both their business motivations and the "conditions in the corporate governance environment" (Gilson, 1992). Corporate governance mechanisms, on the other hand, depend on the legal environment. Whether the internal or the external mechanisms play a major role in the takeover process, is an issue which is directly linked to the legislation patterns. The financial system is essential with respect to legal environment, corporate governance and, hence, their impact on M&As. In diverse financial systems the ways of transforming "deposits into investments" (Wang and Ma, 2009) is different, so does the corporate governance structure as well. In this sense, there is a major distinction between two opposite financial systems – the market- and the bank-oriented systems.

This section goes into detail of the takeover legislation in Continental Europe taking into account the influence of the bank-oriented financial system. The section presents the major Directives from the European Company Law and the Regulations and Recommendations related to Corporate Governance which directly influence the M&A process and applies them to the current Continental European economic environment.

5. The Bank-Oriented System

As Wang and Ma (2009) and Allen and Gale (2000) claim, the financial systems are "vital" for the way of allocation of resources. In general, the financial sector is from great importance for corporate governance because "it allocates control rights and assists in the design of the securities that are used… it also provides information on company performance that guides managers and investors" (Allen and Gale, 2000). In this sense, the bank-oriented financial system is essential for the M&A trends in Continental Europe. This system is linked to the relationship-based financing (Rajan and Zingales, 2003). Unlike the arm's-length one, the relationship-based financing is self-governing, banks are closely tied to corporations and little attention is paid "to market or price signals" (Rajan and Zingales, 2003). This leads to illiquidity of financial assets and dependence from the government.[39]

A leading factor which makes the bank-oriented financial system unique are the long-term relationships between banks and companies.[40] Thus, information-related problems are reduced (Amable, 2003), cost savings are present in sense of information gathering (Wang and Ma, 2009), "intertemporal risk-smoothing is much better provided" (Amable, 2003) due to the accumulation of reserves in the long run and the free-rider problem is avoided (Wang and Ma, 2009). In fact, Allen and Gale (2000) state that banks have better incentives for information gathering due to the elimination of the free-rider problem, which implies better monitoring and efficient external control. At the same time the European financial markets are not as developed as the U.S. capital markets. Therefore, Continental European companies do not have much direct access to such financing (Amable, 2003). Hence, the banks play the major role of allocating resources instead of the markets. One reason about the lack of importance of the markets is that the number of publicly traded companies in Continental Europe is far less than in the United States. Moreover, blockholding and concentrated stock ownership are present which means that corporations are rarely threatened by hostile takeovers (thus, the market for corporate control is less active than in the United States) (Amable, 2003). In fact, in Continental Europe the internal corporate governance mechanisms play the major role in coping with the agency problem. In the end of the 20th Century the European Union removed the "barriers across banking markets in order to have a completely integrated banking market" (Allen and Gale, 2000). This is one of the major steps of Continental Europe towards the desired integration and harmonization, which the European Union has already reached.[41]

In recent years there is a tendency of moving the financial system of Continental Europe towards the market-oriented system of the United States (Allen and Gale, 2000; Amable, 2003). A major example is France where banks are relatively unregulated (compared to

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[39] Rajan and Zingales (2003) provide extensive analysis of the relationship-based financing. They compare it with the arm's-length system as well.

[40] A historical overview about the reasons which led to this financial system in Continental Europe is presented by Allen and Gale (2000). See, for example, the second chapter of the book "Comparing Financial Systems".

[41] More information about the harmonization and integration in the European Union is presented in the following part of the thesis.

previous years) and markets play a greater role in the financial and corporate sectors.[42] Amable (2003) implies that liberalization of financial markets was initiated in the 1980s and in the 1990s but the initial purpose was "to allow public debt to find a wider market" (Amable, 2003) in order to "decrease the cost of public borrowing" (Amable, 2003).[43] Moreover, the number of publicly traded corporations increased over the years and the state ownership decreased. Together with that, financial markets have become more important due to the "increase in stock market capitalization" (Amable, 2003).[44] Hence, the relationships between corporations and banks are not so strong nowadays. In addition, investor bases have become more diversified and internationalized as well. Of course, there are many trade-offs between the bank- and the market-oriented systems. Both deal with similar issues but in different ways. Whether there is a superior system, it is a complex topic with no certain answer. However, this issue is analyzed later in the thesis.

6. European Company Law and Takeover Regulation

The creation of the European Union was inspired by the consequences of the Second World War. The aim was to liberalize political and economic conditions in Europe, to stabilize the countries and to reach better interconnectedness and economic growth of the EU members.[45] Some of the major goals were to increase the transparency of the markets, to protect market players such as investors, entrepreneurs, creditors and employees, to offer more investment opportunities and to provide greater cooperation, economic integration and harmonization.

As Allen and Gale (2000) state, all stakeholders play an essential role for corporations. They have various interests but all groups cooperate in their common concern about the corporate prosperity and growth (Allen and Gale, 2000). In this sense, unlike the U.S., the Continental European regulation implies companies to act in accordance with the interests of stakeholders when involved in M&As.[46] Moreover, labor organizations are essential part of the M&A

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[42] For further details look, for example, at Allen and Gale (2000). Rajan and Zingales (2003) present the development of the Continental European financial system.
[43] Amable (2003) states that public bonds are a great portion of all bonds, which are traded on the market.
[44] Further details about the increased importance of financial markets in countries such as France and Germany are presented by Amable (2003). Reiniger, Schardax and Summer (2002) analyze the development of the European financial system in terms of banking, capital markets, financing and legislation patterns.
[45] Interesting facts about the historical development of the European Union and what stays behind its creation can be found on the official website of the European Union.
[46] Vinten (2001) reveals more details about the stakeholders' economy and its characteristics. Kay (1996) presents an extensive analysis of the stakeholders' economy in the third part of his book "The Business of Economics".

process in Europe. They contribute to the "dialogue between management and workers … in an attempt to minimize the negative effects" (Ghauri and Buckley, 2003). The takeover process in Continental Europe is regulated in a way that M&As are possible only when they do not impede competition. Of course, the introduction of the Single Market and a single currency has led to further motivations for corporate takeovers (Cantwell and Santangelo, 2002).[47] Going into detail of the harmonization process of the European Union, it can be stated that the governance moved from state-centric to multi-level governance model. Hence, since the supranational institutions took the power of decision-making, policy making has led to "mutual dependence, complementary functions and overlapping competencies" (Marks, Hooghe and Blank, 1996).[48] Such a model might easily lead to mutual mistrust. As Marks, Hooghe and Blank (1996) imply, in order to avoid this, the European Union applies detailed regulations in a transparent way.

Therefore, in order to efficiently regulate the M&A process in the European Union, the European Commission, the European Parliament and the European Council actively work on directives and regulations, concerning domestic and cross-border M&As. The goal is further harmonization of the European takeover legislation and the Company Law in general. However, in the 21th Century the digitalization has become a key issue. Therefore, in October 2015 the Commission organized a conference which aim was to consider the possibility of digitalization in the EU company law and in corporate governance. Through such digitalization stakeholders will benefit from faster, less costly, broadly accessible and more efficiently provided information from the companies as well as they will be better protected even in cases of cross-border M&As. According to the Commission, this process cannot be avoided and it is a matter of time when the European Community will start to benefit from the digitalization.[49] The Commission is currently proceeding to work on its proposals for Directive amendments taking into consideration the digitalization of company law and corporate governance.

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[47] Isard (2005) presents an extensive analysis of the integration process and the evolution of the financial system in the European Union.

[48] State-centric governance is characterized by state sovereignty of EU members. Countries decide jointly but are not forced to apply policies which they do not accept as important. Multi-level governance, on the other hand, provides power to supranational institutions and national authorities lose power of control and decision-making. For more details see Marks, Hooghe and Blank (1996).

[49] On the official website of the European Commission there is a summary of the presentations and discussions from the conference. Details about the proposed amendments are provided.

6.1. Merger Control – The Council Regulation No 139/2004

One of the major goals of the merger control in the European Union is to sustain reasonable levels of competition in the common market, to raise the living standard in the community, to protect consumers and to maintain certain economic growth levels (Levy, 2004). The first attempt of the European Union to control takeovers is the introduction of the Council Regulation 4064/89. It has drawn the framework for reviews of M&As. However, after several proposals for amendments of the regulation including the Green Paper of 2001, the Council Regulation (EC) No 139/2004 came into force in 2004.[50] The merger control in the European Union is aligned to some extent with third authorities such as the US Federal Trade Commission and the Department of Justice in the United States (European Commission, 2013). The application scope of the Merger Regulation has also been broadened since according to the current Regulation conglomerate and vertical M&As are reviewed by the Commission as well.[51] Currently, the Regulation is applied efficiently by Member States and it is working satisfactory (European Commission, 2014). The Council Regulation No 139/2004 applies rules of M&A control which correspond to the new environment full of global mergers, complex jurisdictions and market integration issues (Levy, 2004). Some of the major changes of the regulation concern the introduction of the "one-stop" review possibility, the attempt "to capture horizontal mergers in oligopolistic markets" (Levy, 2004) and application of many rules contributing to greater flexibility, reduced costs, less time-consuming procedures, greater transparency and fostered international convergence.

M&As are reviewed either by the European Commission or by the MS authorities. Normally larger M&As (Article 1(2); Article 1(3)) are reviewed and examined by the Commission (exceptions are stated in Article 4 and Article 9). However, in certain situations the NCAs and the Commission can delegate the power of examination to each other (relevant cases stated by Article 4; Article 9; Article 22). Such decisions are led by reasoned motivations – on the one hand, in cases that a Member State (Article 9(2); Article 9(3)b) or a company (Article 4(4)) believes that the concentration could harm competition in a certain internal market, this Member State is allowed to review the concentration. On the other hand, if it is believed that concrete M&As could harm the market with Community dimension, the Commission examines those M&As (Article 4(5); Article 9(3)a).

[50] For details about the historical development of the Merger Regulation see, for instance, Levy (2004).
[51] Further details about the changes introduced with the Council Regulation (EC) No. 139/2004 are presented by Levy (2004). For details about the implementation of the Council Regulation see the Competition Handbook of the European Commission (2010) "EU Competition Law – Rules Applicable to Merger Control".

However, no matter which authority examines the concentration, the Commission and the Member States act in constant connection. All relevant information is shared between the Commission and the NCAs (Article 19, Article 23(2), Article 24(1)). Further, in order to make a detailed and adequate decision, the Commission has the competence and the exclusive right to require all kinds of reports and further information from the NCAs, the corporations involved in the M&As and third parties (Article 11). If necessary, inspections by the Member States might be initiated (Article 12). According to Article 12(8), only the Court of Justice has the power to oppose such decisions about inspections made by the Commission.

As already stated, the major goal of the Council Regulation No. 139/2004 is to prohibit M&As which impede competition and might violate consumers' rights due to the increased monopoly power. However, not all M&As which might impede competition are prohibited. According to Article 6(2), Article 8(2) and Article 8(4), such M&As might proceed under certain conditions imposed by the Commission. For instance, if after the corporations meet the conditions and any additional commitments, the concentration no longer impedes competition. Further, Article 14 and Article 15 provide details about possible fines and penalties in cases that the corporations do not act according to the commitments or if they provide incomplete or false information during the M&A review by the authorized authorities. Furthermore, according to the Council Regulation, third parties in the face of customers, employees etc. have the right to be informed about the M&As, their opinion and comments are heard and taken into account (Article 18). As Levy (2004) reports, "the Commission encourages customers, competitors, suppliers, and other interested parties to play an active role in EU merger control" (Levy, 2004). All relevant information, reports and decisions are published and made available to third parties on the Commission's website and in the Official Journal of the European Union (Article 20).[52]

However, although the Regulation "has contributed to more efficient merger control within the EU" (European Commission, 2009), several concerns regarding the functioning of the Council Regulation No. 139/2004 arise. At first, the referral procedures are quite time-consuming which makes corporations to avoid them. The Commission Report from 2009 and the White Paper from 2014 state that further work in direction towards greater convergence of national laws, which govern M&A control, is necessary. Major concerns affect the non-controlling minority shareholdings and the referral systems. The current Regulation takes into

[52] For further details see the Council Regulation (EC) No 139/2004.

account only the "change of control on a lasting basis" (Article 3(1), Council Regulation No. 139/2004). However, taking control over non-controlling minority shareholdings might impede competition and harm consumers' interests as well (European Commission, 2014). Until now, Member States such as Austria and Germany have jurisdiction, which copes with this issue. However, the White Paper proposes M&As which do not erase specific complex issues to be able to proceed easily and fast with the approval of the Commission.[53] The referral systems, on the other hand, should be made less complex and less time-consuming in order to be more efficient and effective. Therefore, Article 4(5) and Article 22 have to be changed. For instance, it is proposed that, interested parties should be able to "notify the transaction directly to the Commission" (European Commission, 2014).[54]

6.2. Directive 2011/35/EU on Mergers

This directive replaces the Third Council Directive 78/855/EEC which originally came into force in 1978. Directive 2011/35/EU is applicable in cases of M&As, taking place in one Member State, of limited liability corporations, which are publicly traded (Article 1). According to the takeover legislation of the European Union, the interests of stakeholders have to be protected. Therefore, the Directive 2011/35/EU sets concrete rules for domestic M&As. All relevant information regarding the involved companies has to be provided to stakeholders, since they have to be adequately and well informed about M&A details.

Directive 2011/35/EU deals with the documents that have to be made public and provided to shareholders and other stakeholders. Further, the Directive sets the conditions which have to be met in order M&As to be approved. Shareholders must have free access to the draft terms of the acquisition (details about these terms are set in Article 5(2)), all the annual reports and the reports of the management bodies (Article 11(1)). Moreover, shareholders are allowed to receive copies of the documents in order to inspect them (Article 11(3)). If questions arise, shareholders have the right to be further consulted (Article 11(4)). In order acquisitions to be approved, certain conditions have to be met. For instance, according to Article 6, draft terms have to be made public at least one month prior the general meeting. In addition, this information could stay public for a certain period after the general meeting, if the Member

[53] Table 2 and Table 3 (see the Appendix) present the options which are proposed in the White Paper. The tables provide details about these options as well as qualitative comparison between them.
[54] Table 4 in the Appendix presents the influence of the proposed amendments and the extent of their positive effects.

State decides so (Article 6). After the acquisition is approved (Article 7 and Article 8 provide details about the approval process), the management has to draw up an extensive report (Article 9) and external experts have to "examine the draft terms of merger and draw up a written report to the shareholders" (Article 10). However, in case that all shareholders agree, such reports are not obligatory to be drawn up (Article 9(3) and Article 10(4)). Chapter III takes into consideration the rights of employees and creditors as well. It refers to Directive 2001/23/EC when taking into account the employees' rights (this Directive is presented later in the thesis). According to Article 13(3) creditors' protection is different in the case of acquirers and targets. However, as Article 13(1) and Article 13(2) imply, creditors' rights have to be protected by the national law of Member States. After an acquisition is approved, the contract has to be drawn up, certified and made public (Article 16 and Article 18(1)). However, if at least one of the conditions in Article 22 is met, the acquisition is nullified (for instance, if the nullity is ordered by the court or if there was no legal supervision during the acquisition process).

6.3. The European Directive 2005/56/EC on Cross-Border Mergers

Until 2005 there was no framework for European limited liability companies to involve in cross-border M&As in a clear and regulated way on a Community level. According to a study of Bech-Bruun and Lexidale (2013), the Directive on cross-border M&As "has brought about a new age of cross-border mergers activity" (Biermeyer, 2013). Since it introduced certain, predictable and clear framework for cross-border M&As, the number of such transactions increased rapidly after the Directive was implemented by the national authorities of the Member States (between 2008 and 2012 the M&A activity in the European Community doubled its size, although it lasted longer for some countries to implement the Directive) (Biermeyer, 2013).[55] According to a press release of the European Commission (2005), the Directive provides great opportunities for SMEs to operate in more than one Member States in order to improve their efficiency, to decrease costs and, hence, to be more competitive.

According to Directive 2005/56/EC, companies, which are involved in cross-border M&As, remain subject to national laws of the Member States (Article 1 and Article 4(1)a). Thus, national authorities, which have "jurisdiction over the company resulting from the cross-

[55] Biermeyer (2013) provides further empirical evidence about the increase in cross-border M&A activity after Directive 2005/56/EC on cross-border mergers comes in force.

border merger" (Directive 2005/56/EC, 2005), are authorized to monitor the process and to control for its legality. In order to provide efficient protection of stakeholders' rights, the draft terms of the M&As are approved by independent experts (Article 8) and can be found in the public registers (Article 6). On the general meeting these draft terms have to be approved in order the M&A process to proceed (Article 9). In addition, all arrangements relevant for minority members' and creditors' protection have to be published (Article 6(2)c). However, the major emphasis is put on employee participation. All relevant information concerning employees' rights has to be provided by the draft terms (Article 5(d) and 5(j)). The company resulting from the M&A is obliged to accept without any objections the rights of employees for a period of at least three years after the takeover, which are a result of the employment contracts which have been in force prior the M&A (Article 14(4) and Article 16(7)).

However, there are certain gaps in the current Directive. At first, lack of harmonization is present in certain areas. For instance, there are different waiting periods due to the diversity in the legal deadlines. Biermeyer (2013) proposes the "fixed menu" as a preferred approach to deal with this issue. The fixed menu will provide the Member States with the opportunity to choose from several standardized sets of rules.[56] Further, the lack of appropriate interagency communications and the presence of cumbersome and costly formal requirements are issues that the Commission should consider in its eventual proposal for amendments.[57] However, according to the extensive research of Biermeyer (2013) on the functionality of Directive 2005/56/EC, it has made possible a great number of cross-border M&As. Furthermore, it has led to significant cost reductions (related to consulting services, regulatory costs, operational costs etc.) and the process has become far more predictable, regulated and simplified.[58] In order to check the functionality of the Directive, the Commission organized public consultation in the period September 2014 – January 2015. The collected information allows the Commission to assess the Directive and, hence, based on empirical evidence, to propose further improvements of the legal framework.

[56] More details about the options are presented by Biermeyer (2013).
[57] Until now Directive 2012/17/EU and Directive 2014/59/EU added tiny amendments to Directive 2005/56/EC. Article 3(4) and Article 17(a) are inserted. Article 13 is changed as well. For details see the relevant Directives.
[58] Figure 7 presents the major groups of cost savings and further benefits resulting from the implementation of Directive 2005/56/EC. Figure 8 maps the influence of the directive in the European Community after its implementation.

7. Corporate Governance

As Allen and Gale (2000) imply, compared to any theoretical statements, "in practice, the issue of corporate governance is more complex" (Allen and Gale, 2000). Since all stakeholders provide their contribution in the corporation, in comparison to the United States in Continental Europe the EU takeover legislation protects not only the interests of shareholders, but also those of employees and creditors as well (Hopt, 2002). Therefore, as Vinten (2001) states, in the governance dilemma all stakeholders are vital for Continental European takeover legislation because corporations are seen as "a social institution" (Vinten, 2001). Furthermore, according to Allen and Gale (2000), in Continental Europe financial institutions are more important than those in the United States. At the same time the market for corporate control is not as developed as in the United States. Therefore, the internal corporate governance mechanisms are more active in the M&A process in Continental Europe. However, since "a company exists for the interest of all stakeholders" (Allen and Gale, 2000), the EU legislation takes into consideration aspects related to corporate governance in the face of the role of the board of directors, their duties and responsibilities, the shareholders' and the employees' rights. Hence, in such an environment M&As are regulated in a way that stakeholders' interests and rights are clearly protected.

7.1. The Board of Directors

The board of directors is "the core of internal corporate governance" (Hopt, 2002). They "serve as a source of advice and counsel, serve as some sort of discipline, and act in crisis situations" (Mace, 1971). In Continental Europe the one-tier as well as the two-tier boards are present. However, no matter of the board structure, the European Union is currently working in direction of harmonizing the rules related to the board of directors in order to provide a clear framework about their role, duties and liabilities. Harmonization in this area is expected to lead to superior protection of stakeholders' rights, as well as efficient corporate decision-making. Managers will be given a strong incentive to involve only in positive NPV projects and to invest wisely instead of involving in value-destroying M&As due to empire building incentives. The European Union is currently hardly working in order to provide the right incentives for managers to work in direction higher efficiency and thus to increase market stability. "Convergence of the national corporate governance codes" (European Commission, 2007) is another current key task of the European Union.

7.1.1. Non-Executive Directors

In 2003 the European Commission presented an Action Plan, which goal was to "strengthen shareholders' rights and protection for employees, creditors and the other parties with which companies deal" (European Commission, 2005). In order to achieve these objectives, the Recommendation 2005/162/EC considers the role of non-executive directors in publicly traded corporations and the role of the directors' independence. It further proposes that independent committees have to be set up in order to cope with key issues such as remuneration, audit and directors' nomination (Official Website of the EC, 2016).

The goal of the high level of corporate governance and the convergence of national corporate governance codes is to make sure that investors are provided with adequate information, protection and transparency irrespective of the Member State where the corporation is located and operates in. Since dependency on the board (due to close links with controlling shareholders or the management, for instance) limits the efficiency of monitoring, independent directors are vital for the efficient monitoring and control. They help aligning the interests of managers with those of shareholders. Especially in cases of M&As, when conflicts of interests due to the agency problem arise, independent directors play a crucial role. Therefore, the Commission Recommendation 2005/162/EEC, which came into force in 2005, has significantly improved corporate governance standards in the Community (European Commission, 2007). The provisions are either fully or to a great extent implemented by the Member States. Annually listed corporations are required to disclose a corporate governance statement in respect to the "comply or explain" principle.[59]

A high percentage of Member States already have provisions regarding a certain percentage of independent directors on the supervisory board. The goal is to avoid any direct and high influence of controlling shareholders over the managers' decisions (Recommendation 2005/162/EC, Section II, Point 4; Section III, Point 13). However, there are various perceptions and definitions of "board independence" among Member States. Thus, the Recommendation states only the most important and widespread ones as a basis for further interpretations (Recommendation 2005/162/EC, Annex II). In their attempt to ensure the protection of shareholders' rights and their wealth maximization (for instance, in cases when the corporation is involved in M&As), some Member States recommend quite high

[59] According to the "comply or explain" principle companies have the right to fully comply with the rules of the corporate governance code or to explain why they do not apply certain provisions.

percentage of independent directors on the board. For example, in Slovakia and in the Netherlands all board members of the supervisory board have to be independent (in the Netherlands only one of them is allowed not to be independent) (European Commission, 2007).

Furthermore, in order to avoid the direct influence of directors over their remuneration and nomination, the Recommendation 2005/162/EC proposes that three committees should be present in the supervisory board in order to deal with issues such as remuneration, nomination of directors and audit (Recommendation 2005/162/EC, Section II, Point 5.). However, if the company decides to create less than three committees, it should invoke the "comply or explain" approach (Recommendation 2005/162/EC, Section II, Point 7). According to the Recommendation, all committees have to be independent (this means that over 50% of the members have to be independent) (Recommendation 2005/162/EC, Annex I, Point 2 (2.1.), Point 3 (3.1.), Point 4 (4.1.)). In addition, the Recommendation recommends committees to disclose reports regarding the fulfilled tasks, their specific knowledge and commitment at least annually in order to prove their efficient and independent monitoring as well as their expertise (Recommendation 2005/162/EC, Annex I, Point 1.6.,). Almost all Member States have implemented provisions which require the creation of all three committees. However, a number of Member States have not required independence in the committees, which is a significant gap with field for potential improvement.[60] Thus, in several Member States managers still have the power to set their own pay. On the other hand, where a remuneration committee is present, the incentive of managers to avoid risky projects is greater. At the same time, managers are more prone to involve in positive NPV projects and to undertake successful M&As. This is possible due to the performance-related pay approach. However, Recommendation 2009/385/EC adds some improved provisions regarding the role of the remuneration committee (Recommendation 2009/385/EC, Section III, Point 7. – 9.). It should exercise all its duties independently and these should be reported to shareholders.

In addition, separation of the functions of the CEO and the chairman is required as well, because the ties with the corporation could be harmful for the future corporate success. However, in cases where there is a CEO-Chairman duality, the company is required to follow safeguards which guarantee the efficient discharge of the duties (Recommendation 2005/162/EC, Section II, Point 3.2.). In general, the separation of these functions ensures that

[60] Table 5 in the Appendix presents details about the number of committees and their independence in the Member States.

the supervisory board's monitoring is efficient. In order to perform his duties adequately, the chairman is required either not to have been the previous CEO of the company or not to have been a CEO of the company at all. Unfortunately, this provision is implemented only in a few Member States. Until 2007, in Continental Europe only countries such as the Netherlands, Lithuania and Sweden have implemented it (European Commission, 2007).[61] Normally, the separation of the functions of the CEO and the chairman is a good sign for the market. Therefore, in cases of M&As when the CEO-Chairman duality is absent, shareholders' wealth is maximized. Many economists prove this statement through extensive empirical research (Afza and Nazir, 2012; Masulis, Wang and Xie, 2007).

In order investors on the market to have full and adequate information about the company's business, corporate goals and risks, according to the Recommendation corporations are obliged to disclose all relevant information on an annual basis (Recommendation 2005/162/EC, Section II, Point 8 and Point 9; Section III, Point 11.4.). Especially in cases where the company is involved in M&As, such disclosure is essential for the market reaction (whether positive or negative after the M&A announcement) and, hence, for shareholders' wealth.

7.1.2. Duties and Liabilities of Directors

Until now the duties and liabilities of the directors on the board are regulated by the national laws of Member States. However, the European Commission has published an external study (2013) in order to find a way to harmonize the regulation concerning directors' duties among the European Community.

According to this study, currently the company laws of Member States have significant differences despite the attempt of the European Union to smooth such variation.[62] On the one hand, one-tier as well as two-tier boards exist among Member States.[63] This distinction is significant for setting the directors' duties and responsibilities in the decision-making process. On the other hand, among Member States the employee participation is diverse as well.[64]

[61] For details about the presence/absence of CEO-Chairman duality in the Member States, as well as details about the committees' independence, see Table 6 in the Appendix.
[62] There are extensive country reports made by Gerner-Beuerle, Paech and Schuster (2013) regarding the current legislation patterns among Member States concerning the duties and liabilities of directors.
[63] For details about the board structure among Member States see Figure 9 and Figure 10 in the Appendix.
[64] For further details about the employee participation on the board in the Community see Table 7 in the Appendix.

Employees have different level of influence when it comes to issues regarding the board composition, management supervision and strategic planning (Gerner-Beuerle, Paech and Schuster, 2013). Furthermore, according to the study, "directors' duties are owed primarily to the company, i.e. to the legal entity and not to its shareholders" (Gerner-Beuerle, Paech and Schuster, 2013). Nevertheless, in specific cases directors' responsibilities are aligned directly to the company's stakeholders. Such is the case when the corporation is involved in M&As. Often managers tend to be risk-averse when deciding whether to go for a certain investment, if the liability risk is quite high. At the same time, if such risks are low, managers may involve in value-destroying M&As due to empire-building incentives. Therefore, directors' duties and their enforcement have to be appropriately defined and regulated in the Community.

Enforcement of directors' duties is essential in order to ensure investors' and stakeholders' rights protection. Unfortunately, in cases of claims of certain shareholders, they bear all arising costs while the other shareholders passively benefit from the result of the claims. Therefore, the incentive of such actions is relatively low in Continental Europe. According to the study of Gerner-Beuerle, Paech and Schuster (2013), enforcement of directors' duties is "lengthy, expensive, and fraught with uncertainties" (Gerner-Beuerle, Paech and Schuster, 2013). Therefore, shareholders often replace the current directors with new ones instead of relying on the courts (Gerner-Beuerle, Paech and Schuster, 2013). In addition, since the ownership structure of Continental European companies is mainly concentrated (in comparison with American corporations with dispersed ownership structure), enforcement of the duties of directors is further reduced. In companies with concentrated ownership structure, such as most companies in Continental Europe, managerial insulation has low levels. Thus, controlling shareholders have significant control over managers and, hence, over the corporation. If managers act according to their self-interest and undertake value-destroying M&As due to empire-building motivations, controlling shareholders have the power to dismiss them. Therefore, managers of Continental European companies have the high incentive to make their investment decisions in accordance with shareholders' interests. However, there are still several gaps (especially in cases of cross-border activity) concerning the disqualification proceedings, as the report of Gerner-Beuerle, Paech and Schuster (2013) implies. The Commission is currently working on improving the enforcement rules and conditions in order these to become more efficient in the future.

7.1.3. Remuneration

Executive pay is a key aspect in corporate governance having strong impact on the incentives of managers in their decision-making process. The structure of remuneration policies influences the level of alignment of managers' incentives with shareholders' interests. Hence, if a company is involved in M&As, shareholders' wealth and interests are directly linked to and influenced by the executives' remuneration policy. Inappropriate structures might lead to value transfer from shareholders to managers. Thus, companies' resources are not used efficiently and the long-term competitiveness, economic growth and investor confidence, in general, are neglected. In this sense, a major problem is the "mismatch between pay and performance" (European Commission, 2009). Therefore, during the years remuneration has become more performance-based.[65] Since investor confidence is affected by the executives' remuneration structure, the European Commission applies common standards regarding executive pay on a Community level. By doing this, the Commission aims not only at strengthening investor confidence, but also at providing appropriate and efficient governance.

Two major Recommendations (Recommendation 2004/913/EC and Recommendation 2009/385/EC) regulate the remuneration of directors in the European Community. The Recommendation 2004/913/EC aims at strengthening the control over executives and at improving transparency on executive pay in order to increase the alignment of management's decisions with shareholders' interests (European Commission, 2004). In addition, shareholders are involved in the remuneration process by keeping them informed, asking for their opinion on the policy and giving them the right to vote on the general meeting regarding the executives' remuneration policy (Recommendation 2004/193/EC, Section II, Point 4 and Point 7). In addition, shareholders are given the right to "hold individual directors accountable for the remuneration they earn or have earned" (Recommendation 2004/913/EC, 2004).[66] However, in some cases share-based remuneration might lead to short-term incentives of managers. In order to avoid such short-termism and to stress the long-term efficiency, value creation and competitiveness of the company, the company has to approve remuneration policies which are long-term performance-based. Unfortunately, the provisions regarding shareholders' right to express their opinion about the remuneration policy, appear not to have

[65] According to the European Commission (2009), for the last over 20 years the levels of executive pay have significantly increased. The reason about this is mainly due to the performance-based elements implemented in the remuneration policies.
[66] Section II, Point 5 of the Recommendation presents the provisions regarding the remuneration of individual executives.

been efficiently implemented by Member States by 2007. Therefore, the Recommendation 2009/385/EC adds more provisions in this area stressing the role of institutional shareholders (Recommendation 2009/385/EC, Section II, Point 6). Further, the Recommendation 2009/385/EC puts constraints to the maximal value of the executive pay based on various performance criteria (Recommendation 2009/385/EC, Section II, Point 3.). From significant importance when deciding about the executive pay policy is keeping "the long-term sustainability of the company" (Recommendation 2009/385/EC, 2009).

The majority of Member States have implemented a greater part of the recommendations made by the Commission through the Recommendation 2004/193/EC. Provisions regarding higher remuneration policy standards have immediately met high support.[67] However, although the Recommendation implied companies to disclose information about their remuneration policies, this provision has been avoided by the majority of Member States. In general, due to enhanced transparency regarding executive pay, investors could be better informed and more confident on the market. However, benefits such as receiving positive market reactions after M&A announcements due to greater transparency are minimized. In 2013 the Commission proceeded discussing the efficiency of the disclosure of information regarding the remuneration of directors. The current Recommendations do not seem to be implemented in some of the Member States (mainly the Southern countries) (European Commission, 2013). This situation implies inequality of transparency and disclosure among the Community. Therefore, in 2014 the Commission provided a proposal for a Directive regulating the remuneration policy disclosure and transparency. This proposal further aligns executive pay not only with various performance criteria but also with employee pay. Thus, employees' rights are linked to a certain extent to directors' ones. The European Union is currently working on this proposal in order to apply it soon on Community level.

7.2. Shareholders

Shareholders represent a significant portion of the corporate governance framework in Continental Europe. More efficient engagement of shareholders would improve that framework and would contribute for better control over managers' decision-making. Shareholders are interested in how the corporation is run and whether the decision-making

[67] According to a report of the European Commission (2007), the majority of Member States have implemented these provisions by 2007.

process of managers is efficient enough for the competitiveness and success of the company as well as whether the shareholders' interests are taken into consideration and fulfilled. Naturally, shareholders' wealth is directly linked to corporate investments such as M&As. In order to smooth the agency problems and the conflicts of interests between managers and shareholders, the European Company Law sets standards in favor of higher and sufficient shareholder engagement. At the same time, in order to protect interests of shareholders and other stakeholders, such as the employees, the European Union has implemented rules regulating the takeover bids concerning European companies.

7.2.1. Shareholders' Rights

Since shareholders oversight over managers' decisions had not been efficient enough, the Council and the European Parliament have adopted the Directive 2007/36/EC in order to strengthen shareholders' rights, to enhance their incentives of control over management and, thus, to encourage "sound corporate governance" (European Parliament and Council, 2007).

The Directive 2007/36/EC stresses several key issues regarding shareholders' rights and their role in the company. Shareholder engagement should be significantly enhanced and encouraged. In order to contribute sufficiently on the general meetings, shareholders have to be provided with all relevant information and the agenda prior to the meetings as well as to get consulted if necessary (Article 9). Furthermore, shareholders have the right to put additional topics on the general meeting's agenda (Article 6) and also to call general meetings if they consider necessary (Article 6(1)). In cases of M&A announcements, these rules are from significant importance, since shareholders are provided with enough time and information in order to decide wisely how to use their voting rights in cases of potential M&As. The Directive provides further rules ensuring that all shareholders are treated equally – thus, minority shareholders have the same rights as the controlling ones (Article 4).

However, several concerns exist when analyzing the Directive. On the Commission Discussion in 2013 the Commission presented its concerns about the long-term shareholder engagement. Since there is a great possibility of short-termism, according to the Commission's opinion the current Directive should be revised in order to promote long-term engagement.[68] This might decrease the incentives of engagement in M&A transactions which

[68] According to the European Commission (2014), shareholders tend to be supportive and risk loving when managers pursue incentives which are related to short-term wealth maximization at the expense of high risks.

maximize shareholders' wealth in the short run but are damaging in the long run. At the same time, companies would proceed to involve in takeovers which maximize the profits in the long run and which lead to greater long-term corporate performance and competitiveness. On the other hand, shareholders would have power to put pressure (in certain cases also pressure with negative impact on long-term sustainability of the company) on the management in order to align their interests with those of shareholders by disclosing information about the shareholder engagement and past discussions with the company.

As a result, an official Proposal for amendment of the Directive appeared in 2014. The Proposal for revision aims at achieving greater competitiveness on the EU market by providing higher shareholder engagement which implies long-term sustainability of companies. In order to achieve this, the Commission focuses on issues such as the performance-based remuneration of directors, greater transparency and efficient control over management. In the Proposal institutional investors and asset managers are a key topic. Since institutional investors tend to put pressure on management due to their short-termism, their incentives have to be better aligned to the long-term sustainability of the company. Thus, institutional investors will be obliged to prove the alignment between their interests and the long-term corporate performance. Asset managers, at the same time, will be required to show to institutional investors how their interests are being taken into account in the decision-making process. Hence, value-destroying M&A can be avoided, since managers have the incentive to engage only in M&As which enhance the long-term performance of the company and which do not focus mostly on the short-term value maximization.

Another key problem in the current Directive is that the execution of voting rights might be costly when there are not only domestic investors but also cross-border ones. Therefore, the Commission (2014) proposes to harmonize the disclosure obligations on Community level in order to facilitate shareholders' voting and to enhance shareholder engagement. The common rules will make the internal market to function more efficiently and smoothly. At the same time shareholders will be given the right to decide on transactions which involve more than 5% of the assets of the corporation. Often such transactions are classified as takeover attempts. According to the proposal, such transactions cannot proceed without the shareholders' approval.

7.2.2. Directive 2004/25/EC on Takeover Bids

The Takeover Directive (Thirteenth Directive) aims at regulating and harmonizing the M&A process in the European Community in order to provide fair, transparent and adequate framework for corporate takeover transactions and, hence, to increase the protection of stakeholders, the investor protection and confidence on the European Market and to decrease costs for cross-border M&As (Papadopoulos, 2007).[69] In this way the European Market would become more attractive to investors which in turn would make it more competitive to the U.S. M&A Market (Papadopoulos, 2007). The Directive presents general regulatory rules regarding both voluntary and mandatory tender offers, defensive tactics against hostile takeovers, squeeze-out and sell-out rules, the disclosure standards and the litigation process. According to the Directive, Member States have to appoint the authorities who are responsible for controlling and monitoring the M&A process (Article 4).[70] Their decisions can be reviewed by independent courts if necessary. In general, the Directive provides the basis regulatory frames for takeovers while leaving playing field and flexibility for Member States to be active in the M&A process as well (Article 3(2)).

Tender Offers

Since shareholders' rights had been protected to a different extent among Member States before the Directive has come into force, the aim of the harmonization is to provide better and equal protection, especially of minority shareholders of the target (Article 5(1)), on Community level. However, since Member States are allowed to apply further protection provisions, unfortunately there is still field for unequal shareholders' protection among Member States. According to the Directive, shareholders have to be given enough time and information (Article 6(2)) in order to vote wisely and adequately in cases of any potential takeover opportunities. Hence, the target board is required to disclose its opinion and arguments regarding the offer as well as the effects of a possible M&A on the long-term sustainability of the company (Article 6(1) and Article 9(5)).

In cases that a company is willing to engage in M&As, it has to make either a voluntary or a mandatory bid. According to the Directive, if the corporation makes a voluntary bid, it is no

[69] Table 8 in the Appendix provides an overview of the impact of various provisions of the Directive over the M&A in the European Union, as well as the effects over the level of shareholders' protection.
[70] How exactly are relevant authorities chosen, it is presented by Figure 11 in the Appendix.

longer obliged to make a mandatory one as well (Article 5(2)).[71] Therefore, since mandatory bids are costly for acquirers, they often search for ways of avoiding them when undertaking any takeovers. However, the Directive's provisions cover only voluntary bids for 100% of the target's shares but do not regulate the price range of such bids (European Commission, 2012). Every Member State determines the threshold which is linked to the obligation of making mandatory offers (Article 5(3)) (mostly the threshold is the acquisition of around 30-33,33% of the target's shares) (Cascante and Tyrolt, 2014). All target's shareholders whose shares are the same class are subject to the same benefits. When making a mandatory offer, the bidder has to offer the highest price which was already paid for the same class of shares in the period 6 to 12 months prior the bid (Article 5(4)). Hence, there is a possibility of avoiding some value-increasing takeovers due to the mandatory rule provision which turns the provision into kind of "hidden" defense (Papadopoulos, 2007). At the same time, since the acquirer is required to offer the same price only to shareholders from the same class, other shareholders cannot benefit from the offer which is contradictory to the incentive of minority shareholders' protection (Papadopoulos, 2007). According to an empirical analysis of Wang and Lahr (2015), the mandatory bid rule positively contributes to greater benefits for the post-M&A corporation. However, a significant gap in the Directive occurs in cases when companies acquire the maximum percentage of shares so that they do not go beyond the threshold for a mandatory bid. When reaching that percentage, they often offer voluntary bids on low prices since acquiring control on that stage of the M&A would be relatively easy and less costly (European Commission, 2012; Papadopoulos, 2007). In addition, since non-voting securities are not included in the provisions of the Directive, the offeror company can easily take advantage of them in order to obtain control over its target (Papadopoulos, 2007). The provisions allowing the existence of "concerted parties" (Papadopoulos, 2007) in the M&A process, further contribute to avoiding any mandatory bids.[72]

Hostile Anti-Takeover Defenses

According to Cascante and Tyrolt (2014), the Report of the European Commission (2012) and Papadopoulos (2007), most Member States have applied Article 9 (Board neutrality) and only

[71] Table 9 in the Appendix provides an overview of the M&A process in cases of voluntary bids.
[72] For further details about the role of concerted parties in the M&A process see Papadopoulos (2007) and the Report of the European Commission (2012).

a few of the Member States have applied Article 11 (the Breakthrough rule).[73] In addition, companies are allowed not to apply these provisions if they become a target of a company which does not apply them (Article 12(3)). Thus, these provisions turn from mandatory into optional (Reciprocity Rule). Based on Article 9, the Directive focuses primarily on facilitating the pre-bid defensive measures while prohibiting the post-bid defensive actions of the target (Papadopoulos, 2007). Hence, once a bid is announced, the M&A process is facilitated due to the limitation of any post-bid defenses. Article 11, on the other hand, states that no matter of the voting rights of each class of securities, each security has one vote on the general meeting when deciding issues regarding any defensive actions (Article 11(3)). Thus, even if the potential acquirer has acquired a high percentage of non-voting securities and a certain percentage of voting ones, the acquirer has the power to limit any defense.

Squeeze-out & Sell-out

Two of the mandatory rules in the Directive are those ensuring the rights of squeeze-out and sell-out on a post-merger stage. If the acquirers already hold between 90% and 95% of the target's shares, they are allowed to acquire the rest of the target's shares "at a fair price" (Article 15(2)). As Papadopoulos (2007) states, this provision increases the incentive of potential bidders to acquire their target due to the possibility of obtaining greater control over the target. However, according to Article 15(3) in cases more than one class of shares exist, Article 15(2) applies only for the class of shares where the 90%-threshold is exceeded. Unfortunately, this implies unequal shareholders' protection because other shareholders cannot benefit from the squeeze-out rule. As Wang and Lahr (2015) state, the squeeze-out provision might turn the M&As into costly investments which might further reduce the wealth both for the offeror and the offeree companies. According to the sell-out provision, on the other hand, the target's shareholders are allowed to require from the acquirer to buy their shares at a reasonable price (Article 16). Unfortunately, this rule does not provide the appropriate shareholders' protection as well because the provision might easily be avoided following the avoidance of the mandatory bid rule (Papadopoulos, 2007).

[73] For further information regarding the way of functioning of the Breakthrough Rule see Figure 12 in the Appendix.

7.3. Employees

Protection of employees' interests is a key topic in the Continental European M&A process. According to Gugler and Yurtoglu (2004), Continental European M&As lead to significant reduction (approximately 10%) of the levels of labour demand. The Directive 2004/25/EC ensures the level of protection of employees of merging companies. The target's and the acquirer's boards are required to disclose their opinion about the M&A effects on the employees. In addition, the employee representatives are encouraged to provide their opinion on the M&A offer. However, according to the Report of the European Commission (2012), in practice employees' rights are not regulated appropriately since employees often do not receive the required information on time. In addition, there are no provisions regulating whether the bidder's promises stated in the documents are fulfilled after the M&A. According to a report of the European Commission (2012), the employees and their representatives are not satisfied with the protection that they receive especially in cases of cross-border M&As since the level of employee protection depends on the Member States' applied provisions which implies inequality among Member States.

However, the European Union is currently working on improving the level of employee protection. A specific area of consideration is the so called EFP (employee financial participation). Based on the EU Action Plan from 2012, the European Union is working on promoting the employee share ownership at Community level and, hence, on introducing Community-wide provisions which will regulate it. The aim is strengthening the competitiveness of European companies, their profitability, productivity and growth by solving problems related to employee retention. According to an EU survey, such provisions might discourage hostile M&As (European Commission, 2014). The considered regulations include plans such as "individual employee share ownership", "profit sharing" (European Commission, 2014) and stock-based employee pay. Until now employee share ownership is not a common practice of European companies (around 68% of EU companies do not have such practice) (European Commission, 2014). Since there is great potential for the EU economy in case of introducing the EFP plan, the European Union is hardly working on creating a legal framework and provisions on Community level (Guersent, 2014).[74]

[74] Until now the provisions are considered to be implemented through a Directive (or eventually through a Regulation) since it is more binding. Thus, the harmonization will be better provided and efficient on Community level.

IV. The U.S. Takeover Regulation and Corporate Governance

"Many factors contributed to 2015 being one of the best M&A years on record in the U.S., including, an improving economy, strong stock market and cash-heavy balance sheets. Looking ahead, what will 2016 be like for deal-makers?"

-Daniel Tiemann
U.S. Group Leader, Deal Advisory and Strategy
KPMG LLP

The United States have the largest economy in the world (CNN, 2016).[75] They are also considered to be the most important target for domestic, as well as cross-border, M&As. (KPMG LLP, 2016; Cantwell and Santangelo, 2002). Hereof, in this section the thesis discusses the market-oriented financial system of the United States as framework for the development of the takeover regulation and the importance of corporate governance in terms of the M&A process.

The U.S. takeover regulation implies merging companies to direct their attention mainly towards the shareholder wealth maximization and the shareholders' rights protection while Continental European companies take into consideration the rights of other stakeholders (such as the employees) as well. However, whether shareholders' rights are adequately protected by the U.S. takeover legislation, is one of the research areas of the following section. Why do the priorities of merging companies in the United States, their M&A practices and the presence of anti-takeover defenses differentiate from those of Continental European companies? How is the M&A process regulated in the United States in general? This section answers these and further questions regarding the U.S. takeover regulation and corporate governance.

8. The Market-Oriented System

The market-oriented financial system provides great incentives for the smooth functioning of the market for corporate control. In the United States, listed companies have quite dispersed ownership structure which facilitates the monitoring and control over the management because bad managers are easily disciplined by the active market for corporate control

[75] For concrete numbers and comparison with other economies look in the Appendix – Figure 13 and Figure 14.

through the threat of hostile takeovers (Armour and Skeel Jr., 2007; Allen and Gale, 2000). Not the banks but the financial markets are vital for the resource allocation and the "high corporate performance" (Allen and Gale, 2000).[76] They ensure access to dispersed information, risk spreading and asset pricing in order to provide adequate signals to investors. In addition, investors have higher incentives for information gathering and monitoring. Unfortunately, there is a possibility of free-riding if the market provides all relevant information. In order to avoid this, markets are familiar with their "underinvestment in information" (Allen and Gale, 2000). Another characteristic of the U.S. financial system is that institutional shareholders do not own as high portion of the company's shares as the share ownership of institutional shareholders in Continental Europe (Armour and Skeel Jr., 2007). Hence, self-regulation is not inherent for U.S. institutional shareholders. However, according to Allen and Gale (2000), the share ownership of individual investors has a falling tendency.

Furthermore, the role of the banks in the United States is not as incremental as the role of banks in the bank-oriented systems. The reason about such distinction lies in the different political and banking history.[77] In the United States the banking system is quite "less concentrated" (Allen and Gale, 2000) than the Continental European one because the United States promote and support higher competition in the banking sector. However, due to the incompleteness of markets, institutions are required for risk sharing and smoothing (Allen and Gale, 2000). This role is played by the large number of small banks.

9. The U.S. Takeover Regulation

In the United States the takeover regulation and the relevant controlling authorities differentiate in terms of the type of M&A. There is a significant distinction between single-step mergers (which are always made with the target board's approval) and tender offers (which might be friendly as well as hostile). Which way of takeover the acquirer chooses, depends not only on its incentives but also on factors such as the potential arising costs, the synergy benefits and the current market situation. As Offenberg and Pirinsky (2015) imply, tender offers often provide good signals to the market about the target which increases the price of its shares. At the same time the target's shareholders receive higher premiums

[76] Table 10 in the Appendix provides further details about the role of the U.S. markets and the U.S. institutions. Kaufman (1992) goes into detail of this topic in his book "The U.S. Financial System".
[77] For details about the historical development of the banking sector in the United States see Allen and Gale (2000).

following tender offers. Single-step mergers, on the other hand, are quite more time-consuming but more profitable for the acquirer due to lower premiums paid to the target's shareholders (Hall, 2014). As a result, according to Hall (2014), tender offers are mostly used in cases of hostile M&As and those including cash-financing while single-step mergers are related to stock-financing and friendly transactions.

These two types of M&As are regulated by different authorities. Single-step mergers are made under the state laws (and secondarily under the federal ones) while tender offers are regulated by the relevant federal laws (Hall, 2014). No matter of the type of M&As, under the U.S. takeover regulation target's shareholders have to be given enough time and information which will help them to decide wisely on the potential transaction. Managers of U.S. corporations are required to act explicitly in accordance with shareholders' interests due to their fiduciary duty to them (Allen and Gale, 2000). However, any preliminary discussions between the acquirer and the target are not required to be disclosed. In addition, the acquirer might purchase a certain percentage (up to 5%) of the target's shares on a lower price before it announces its real incentives (Hall, 2014). The major authorities which are responsible for regulating the M&A process in the United States are the SEC, the Antitrust Commission, the Antitrust Division of the Justice Department and the state courts (especially the Delaware's court). Some of the major Acts related to the takeover regulation are the Williams Act of 1968 (which replaced the Securities Exchange Act of 1934), the Hart-Scott-Rodino Antritrust Improvements Act of 1976, the Securities Act of 1933 and the Exon-Florio-Act of 1988.

A major problem related to the M&A process is hostility. The United States cope with it on a quite dissimilar way in comparison to Continental Europe – the United States provide greater flexibility both to the acquirers (since they have more freedom related to the purchase of target's shares) and the targets (they are free to implement various anti-takeover provisions) (Magnuson, 2009). What is the role of the U.S. authorities in regulating hostility? This section discusses the role of the aforementioned authorities and Acts and relates them to the U.S. takeover regulation.

9.1. The Securities and Exchange Commission

The SEC is a major legislative player in the U.S. takeover regulation. It has the power to review TO statements but its preliminary approval is not necessary for the acquirer to proceed with the M&A transaction (Hall, 2014). However, the SEC is responsible for controlling whether corporations disclose misleading information regarding any incentives for M&A transactions and making such corporations liable for false statements (Magnuson, 2009). The SEC is a key figure in cases of both single-step mergers and tender offers.

Once a corporation decides to involve in a certain M&A transaction through a tender offer, it has to disclose a statement together with the SEC (Schedule 13D and Schedule TO) (Hall, 2014). This could happen when the bidding company acquires more than 5% of the target's shares. If the acquirer goes for an all-cash offer, it does not need to wait for any comments from the SEC regarding the tender offer. However, if stock is involved in the offer, the corporation should wait for the SEC agreement on the tender offer. Interestingly, in cases of amendments of the Schedule TO, the acquiring company is not obliged to provide additional information regarding such changes to the target's shareholders (Hall, 2014) which impedes the degree of shareholder protection. Furthermore, tender offers might be quite time-demanding since there are no limitations on the duration of such offers. There are also no requirements regarding the number of shares included in the tender offer. In this sense, partial bids are free to be made in the United States while the Continental European legislation does not permit partial bids. Another major difference between both legislations is that the United States does not restrict any pre-tender offer arrangements between the acquirer and the controlling shareholders of the target. Hence, through such arrangements the acquirer can more easily take control over its target at lower cost since it can avoid the interests of the minority shareholders.

In cases of single-step mergers, the target company is required to file a statement together with the SEC regarding the transaction. In the statement the target's board has to provide its opinion, reasoning and decision regarding the potential takeover. Once the SEC has reviewed the statement, the target's shareholders can approve or refuse the transaction. In single-step mergers there are often additional restrictions which limit the ability of the acquirer to change its offer (regarding the price, for instance) once the statement has been reviewed by the SEC.

9.1.1. The Williams Act of 1968

The major goal of the Williams Act[78] is to regulate M&A offers by implementing information disclosure requirements and requirements concerning tender offers in general (Magnuson,

[78] The Williams Act replaced the Securities and Exchange Act of 1934. For more information, look at Armour and Skeel Jr. (2007).

2009). According to the Act, SEC is empowered to represent the rights and the interests of target's shareholders (Armour and Skeel Jr., 2007). In addition, as Ferrarini and Miller (2009) state, the Williams Act's core is the "policy of neutrality" (Ferrarini and Miller, 2009) between bidders and targets. Thus, companies make their takeover decisions based on comprehensive information. The provisions of the Act aim at protecting target shareholders' rights. At first, shareholders have the right to change their decision and to decide not to tender their shares until the bid is still open (Ferrarini and Miller, 2009). A bid has to remain open for a period of at least 20 days (Magnuson, 2009). At the same time, the acquiring company is prohibited to favor a certain group of the target shareholders while neglecting other shareholders in case that more shares are tendered for a partial bid. In this case the bidder has to buy the shares on a pro rata basis (Ferrarini and Miller, 2009; Magnuson, 2009). In addition, in order to protect target's shareholders, the Williams Act limits the power of the bidder to put pressure on the target's shareholders. As Armour and Skeel Jr. (2009) imply, since the offer remains open for a certain period of time, target shareholders are not obliged to make their decision "on a first come, first serve basis" (Armour and Skeel Jr., 2009). However, hostility is not prohibited if the bid is reasonable and if it is in favor of target shareholders (Ferrarini and Miller, 2009).

9.1.2. The Securities Act of 1933

In case a takeover involves stock-financing, the Securities Act[79] imposes specific requirements. The acquirer is required to file a statement together with the SEC which is clarifying the use of shares as part of the bid. Such kind of disclosure includes the reasoning of the bidder for the use of stock-financing as well as any financial statements of the bidder (Hall, 2014; Armour and Skeel Jr., 2007). Logically, in case the acquirer decides to use its stock for financing an acquisition offer, the process becomes more time-consuming due to the complementary disclosure requirements of the Securities Act and due to the review of the offer from the SEC.

9.1.3. The Exon-Florio Act of 1988

The Exon-Florio Act deals with cross-border M&As. Since there are no general principles coping with foreign investors under the U.S. takeover regulation, the Exon-Florio Act

[79] The Securities Act was amended in 2012. For the new version of the Act, see the official website of the SEC.

provides exclusive rights to the President to review and, if necessary, to prohibit cross-border M&As if such are considered as threatening "the national security" (Hall, 2014). In addition, SEC has introduced general provisions that define which M&As are considered as cross-border takeovers. Namely, if more than 40% of the target's shares are held by U.S. companies or U.S. natural persons, the M&A process is made under the U.S. legislation. However, if 10% to 40% of the target's shares are held by U.S. corporations, only the U.S. shareholders are subject to the U.S. takeover regulation. Logically, if less than 10% of the target's shares are held in the United States, the takeover is not made under the U.S. regulation (Hall, 2014).

9.2. Federal Trade Commission, Antitrust Division of the Justice Department and the Hart-Scott-Rodino Antitrust Improvements Act

The Federal Trade Commission and the Antitrust Division of the Justice Department are responsible for dealing with M&As which might impede the normal functioning of the U.S. market. According to the Hart-Scott-Rodino Antitrust Act of 1976, for all transactions which exceed the threshold of $70 mln the acquiring companies are required to file their takeover incentives together with the relevant antitrust authorities, namely the Federal Trade Commission and the Antitrust Division of the Justice Department (Hall, 2014). This filing is required to be made at a pre-merger stage. In addition, the acquiring company has to wait for the expiration of either the 15-days period (for cash-financed M&As) or the 30-days-period (for stock-financed takeovers) before it continues the M&A process (Hall, 2014). In practice these periods can be extended if the antitrust authority requires additional information regarding the potential transaction. Therefore, transactions from such scale are quite time-demanding. In addition, if the antitrust authorities consider as necessary, a court order is involved in the process (Hall, 2014).

9.3. The State Courts

The courts play a vital role in the U.S. takeover regulation. According to Armour and Skeel Jr. (2007), M&As are "primarily judge-made" (Armour and Skeel Jr., 2007).[80] Although under certain circumstances the federal authorities might nullify the state protection incentives, the state courts stay a crucial part of the takeover process while federal regulation

[80] The U.S. M&A legislation is called "the domain of courts and regulators" (Armour and Skeel Jr., 2007).

stays at the background (Magnuson, 2009).[81] Of course, the state courts have found a way of avoiding such interference. Therefore, they, especially the Delaware's courts, have shaped the current U.S. M&A legislation (Armour and Skeel Jr., 2007). As James Cox states, takeovers are "similar to snowflakes – if you think you have found identical ones, you are probably not looking closely enough" (Magnuson, 2009). Therefore, the U.S. takeover regulation continues to be shaped by the state courts when corporations file relevant suits. In general, the role of state courts is to protect domestic targets from hostile takeovers. The management of the target is (in most states) free to impose various takeover defenses using corporate funds (Armour and Skeel Jr., 2007). Anti-takeover provisions such as staggered boards, business combination statutes, "fair price" clauses, poison pills and many others are frequently used by U.S. targets.[82] They are regulated by the anti-takeover statutes of the U.S. states.

The major part of corporate takeovers in the United States is influenced by the Delaware's courts because this state is the "home to a majority of publicly traded firms" (Ferrarini and Miller, 2009).[83] As Armour and Skeel Jr. (2007) imply, the state laws of Delaware are more manager-friendly than shareholder-friendly since the courts emphasize the role of managers in the corporate decision-making process. Although the courts of Delaware permit a variety of defensive tactics, it provides some limitations. For instance, although poison pills are generally free to be used, they are not allowed in cases when the target tries to avoid the real and well-grounded market pressure (Ferrarini and Miller, 2009). In addition, under the laws of the state of Delaware the avoidance of fair auction by corporations in their attempt to sell the company is prohibited (Ferrarini and Miller, 2009). As Magnuson (2009) implies, under the state laws of Delaware target corporations are allowed to adopt defensive tactics only if a reasonable belief is present that a potential takeover might impede the corporate effectiveness. Any "draconian" defenses are prohibited (Magnuson, 2009). Therefore, if the bidder believes that its potential target is adopting inappropriate anti-takeover defenses, it has the right to file a suit in the state courts (Armour and Skeel Jr., 2007). However, in case that any takeover is awaited, the target has to act in the best interests of its shareholders, namely it has to provide the highest premiums. Unfortunately, the courts cannot regulate the takeover process if one of the partners in the transactions has not filed a suit. In sum, the state of Delaware provides

[81] For examples of such nullifications see, for instance, Armour and Skeel Jr. (2007).

[82] More details about these and other anti-takeover provisions follow in the section concerning Corporate Governance in the United States.

[83] According to Armour and Skeel Jr. (2007), until 2007 about 60% of the large U.S. corporations had their headquarters in the state of Delaware.

"intermediate protections" (Ferrarini and Miller, 2009) to the target corporations while smoothing the takeover process when it does not impede the free functioning of the market.

10. Corporate Governance

In the United States the financial system is shareholder-based. Hence, shareholders' interests are crucial for the managers' decision-making process. Since the financial markets are far more developed than those of Continental Europe, for instance, the market for corporate control has a vital regulating role for potential U.S. takeovers. Thus, the external corporate governance mechanisms are the major instrument included in the M&A process of U.S. corporations. The U.S. regulation provides freedom to bidders to acquire companies on a hostile way but, at the same time, the targets have the right to adopt a variety of anti-takeover provisions. In this sense, M&As occur freely on the active U.S. financial market while the relevant U.S. institutions regulate the M&A process only in terms of whether any rights are neglected by the other parties and whether the relevant information is appropriately disclosed.

The Sarbanes-Oxley Act, which came into force in 2002, aims at improving the U.S. corporate governance. It has introduced many changes related to enhanced information disclosure, improved auditing standards, accounting practices and corporate responsibility.[84] Although there has been much criticism about its effects on the U.S. companies and on the U.S. economy in general due to concerns about inappropriate political motivations for its introduction, it is widely believed that the Act is beneficial in terms of enhanced predictability, greater investor confidence on the financial markets and better corporate governance.[85] According to the Sarbanes-Oxley Act, external auditors have to be included in the financial reporting. Hence, the markets can assess corporations more accurately based on greater information (Hanna, 2014).

10.1. The Board of Directors

Unlike Continental European companies, the U.S. corporations have a one-tier board of directors. According to their fiduciary duties, directors are required to act in the best interests

[84] The Act is available on the official website of the Securities and Exchange Commission of the United States.
[85] Concerns such as the increase of implementation costs, the going private process, the lower risk-taking levels and other "negative" consequences are not subject to this thesis since it is believed (and supported by many studies) that the Act has primarily positive effects on the U.S. corporate governance.

of the company's shareholders. Hence, in cases of M&As, the board has to ensure the highest premiums to the shareholders. However, managers' decisions are often driven by other incentives such as empire building and ensuring their own job security. As a result, in their attempt to benefit from undertaking risky projects or to avoid positive NPV projects which threaten their future career in the company, managers are prone to neglect the shareholders' interests. Therefore, the famous agency problem is a key figure for corporate governance to be coped with.

10.1.1. Duties and Liabilities of Directors

One way of smoothing the agency problem is due to the fiduciary duties of managers, as above mentioned. In addition, in some U.S. states such as Delaware directors are obliged to maximize shareholders' value in cases of M&As. If there are several potential bidders, the target's managers are required to agree on the deal which provides the highest premiums to the shareholders regardless the benefits managers might get from other deals (Hall, 2014). Since the United States are quite manager-friendly, the M&A regulation provides great flexibility and power to directors to undertake any actions which are believed to be appropriate and beneficial for the corporation and its shareholders. According to the U.S. takeover legislation, directors are required to provide extensive information about the potential acquisition, as well as "candid" recommendations and expertise (Hall, 2014). Hence, after the company receives a tender offer, the managers have ten business days to disclosure their expertise (Hall, 2014). In case that the board changes its position on the offer, it has to report those changes. Although there are no obligations that such recommendations are directly provided to the shareholders, in practice they are often given to them after they have been disclosed together with the SEC (Hall, 2014).

Independent directors play a crucial role on the boards of American corporations. Especially in cases of M&As the presence of such directors significantly influences the positive market reaction to the takeover announcement. Independent directors as one of the crucial internal corporate governance mechanisms protect the interests of shareholders (Brewer III, Jackson III and Jagtiani, 2010). Therefore, a majority of outsiders on the board often brings positive market reactions to M&A announcements. As Brickley, Coles and Terry (1994) imply, independent directors smooth the agency problem by representing the shareholders and thus aligning the decision-making process of managers with the shareholders' interests.[86] Hence, outsiders would go only for takeovers which would be beneficial for shareholders and would avoid those which might provide benefits only to managers but which do not provide greater shareholder wealth. In addition, Cotter, Shivdasani and Zenner (1997) prove that if the board is independent, shareholders gain higher premiums in cases of M&As.[87]

A vital part of the board of directors is represented by the CEO and the Chairman as well. Therefore, a major question for many economists remains the CEO-Chairman duality. Although some economists believe that the duality would be beneficial for the company, it is more widespread that separating these positions leads to improved decision-making and better corporate performance. As Masulis, Wang and Xie imply (2007), in the M&A process shareholders of companies where there is no CEO-Chairman duality get higher premiums due to separation of the experience of the CEO from that one of the Chairman. But how shareholders can be ensured that the directors act in their best interest and do not engage in value-destroying M&As? The U.S. regulation offers several remuneration practices.

10.1.2. Remuneration

In the United States one of the most common ways of aligning the decision-making incentives of managers with the interests of shareholders is due to performance-based pay, or the so called stock-based remuneration. This includes stock options, companies' shares and restricted stock as part of the pay package (Conyon and Murphy, 2002). Unfortunately, the inclusion of stock options might lead to short-termism when deciding on M&As. Such takeovers are often not beneficial in the long run (Armour and Skeel Jr., 2007). According to a study of Conyon and Murphy (2002), by 1999 approximately 1/3 of the salary of directors was stock-based while in Continental Europe only about eight percent of the directors' remuneration package was stock-based. During the years this clear tendency has not changed a lot. Of course, smoothing the agency problem is not the only reason for the high percentage of stock-based remuneration in the United States. The United States are quite friendly towards

[86] This view is supported by many economists such as Cotter, Shivdasani and Zenner (1997) and Byrd and Hickman (1991).
[87] For additional factors which in practice often contribute for higher premiums, but which are not a subject of this thesis, since they are not linked to the takeover regulation, see Custodio and Metzger (2013), Cai and Sevilir (2012) and Ahn, Jiraporn and Kim (2010).

such remuneration when it comes to taxes and accounting practices (Conyon and Murphy, 2002).[88]

10.1.3. Anti-Takeover Defenses

Whether the use of anti-takeover provisions is harmful or beneficial for merging companies, it is a quite discussed question with controversial results. On the one hand, it might harm the incentives for long-term investment (Mahoney, Sundaramurthy and Mahoney, 1997). In addition, Masulis, Wang and Xie, (2007) argue, that managers who are shielded from the market for corporate control are more prone to undertake value-destroying investments while those managers who face the real pressure of the market have the incentive to engage only in positive NPV projects. On the other hand, the anti-takeover defenses seem to be beneficial for some U.S. companies due to their greater bargaining power during negotiations (Straska and Waller, 2010). However, according to the U.S. takeover regulation (unlike the Continental European legislation), corporations are free to adopt a variety of anti-takeover provisions in order to protect themselves from undesirable transactions and to deal with hostility in general.

Some of the mainly adopted provisions by U.S. corporations, which concern the board of directors, are the staggered boards, the golden parachutes and the compensation plans.[89] The board also has the power to give the right for constituency to stakeholders such as employees as well in their attempt to impede a potential change of control. However, according to a recent research of Sokolyk (2011), the most efficient anti-takeover provision implemented by the board is the staggered board (especially if combined with a poison pill). Since taking control over a company with a staggered board is quite time-consuming and complex, acquirers are often more prone to choose another target than to focus their efforts on acquiring the corporation with such anti-takeover provisions (Ferrarini and Miller, 2009).

[88] Since taxes are not a subject of this thesis, they are not discusses in detail. However, for more information regarding taxes and accounting practices in the United States see, for instance, Conyon and Murphy, 2002.

[89] Further anti-takeover provisions, which are adopted by the board, are, for instance, the "scorched earth" defense, the white knight, the "freeze" clauses and the "stakeholder" statutes. However, they are excluded from the analysis since they are not so widely used by U.S. corporations. For more details look at Magnuson (2009) and Ferrarini and Miller (2009).

10.2. Shareholders

In the United States shareholders' interests are the major factor which has a great impact on managers' decision-making, especially in cases of M&As. According to their fiduciary duties, managers have to act in the best interests of shareholders in order to ensure the highest abnormal returns. Unfortunately, managers' incentives might be quite different in practice. In order to smooth the agency problem, the U.S. takeover regulation tries to provide more rights to shareholders in order to improve their monitoring capabilities. In general, shareholders are divided into several groups – controlling, institutional and minority shareholders. In practice, in the United States if the target's controlling shareholders tender their shares and the acquirer obtain control over the company, the rights of minority shareholders are often neglected because the acquirer is not required to buy their shares as well. Thus, the U.S. legislation develops in direction of protecting minority shareholders in the M&A process. In general, in the United States shareholders' interests are represented by the SEC (Armour and Skeel Jr, 2007).

10.2.1. Shareholders' Rights

In 2009 Senator Schumer introduced the Shareholder Bill of Rights Act aiming at reaching greater control over publicly traded corporation in the United States.[90] One year later the Shareholder Protection Act was introduced by the U.S. Senate. Unfortunately, these Acts are not officially into force yet, but many states have already adopted many of their provisions. The major goal of these Acts is to provide greater transparency and to impede the risky decisions which managers make in their attempt to get private benefits (Browning and Check, 2009). In addition, shareholders are given the power to express their opinion about questions such as executive pay and change of control (including nomination and election of directors). According to the Shareholder Bill of Rights Act, shareholders have to vote on the implementation of any anti-takeover provisions such as golden parachutes and other compensation packages (Browning and Check, 2009).

Furthermore, as already mentioned, minority shareholders represent a special part of the shareholders. In practice, according to the U.S. legislation, their rights can easily be "squeezed out". Only if the acquirer is willing to acquire 100% of the target's shares, it is free

[90] This Act is designed in a way so that it will improve the Securities Exchange Act of 1934.

to apply a short-form merger by buying all shares once it has acquired the required percentage of shares at a threshold of 85-90% (depending on the state) (Hall, 2014). Unfortunately, if the acquire obtains control with the majority of shares but does not apply a short-term merger, the target's minority shareholders are stuck with their shares. In Continental Europe, for instance, minority shareholders' interests are better represented in such situations due to their sell-out rights. However, minority shareholders in the United States have quite different rights. As Hall (2014) states, if minority shareholders believe that they are offered unfair price for their shares during the short-form merger, they have to sell their shares but have the right for litigation at a later stage. However, if a short-term merger is not possible, the acquirer can undertake a long-form merger. In this case, the acquirer is required to file the merger together with SEC. If minority shareholders do not want to tender their shares during the long-term merger, they have to sell them but they have the appraisal rights, which are similar to those in case of short-form mergers (Hall, 2014). Taking the rights of shareholders of U.S. corporations and Continental European companies into account, it can be concluded that although the U.S. takeovers are shareholder-oriented, Continental Europe provides quite clear and more predictable rights to shareholders of merging companies.

The role of institutional investors in the firm's corporate governance, on the other hand, has become quite greater in the United States in the past several decades.[91] At the beginning of the 20th century the U.S. government restricted the equity ownership of institutions in public corporations so that they were disabled to be active players in the corporate governance (Gillan and Starks, 2003). However, after the adoption of the Glass-Stegall Act in 1999, banks have been enabled to own firms' stakes. Pension funds have been encouraged to become institutional investors as well. Economists and extensive empirical research prove the significant role of institutional investors for improved monitoring over managers and greater corporate governance levels. Those investors also contribute to providing information signals to the markets and smoothing the agency problems (Schleifer and Vishny, 1986; Kaplan and Minton, 1994; Gillan and Starks, 2003). While owning a great firm's stake, institutional investors have the incentives and the power to monitor and control the management (unlike the minority shareholders who do not have much monitoring incentives), as well as to represent the shareholders' interests in the M&A process. However, Gillan and Starks (2003) concern that institutional investors might not have the long-term goals of other shareholders

[91] According to a study of Gillan and Starks (2003), in the period 1950 -2002 in the United States the percentage of institutional investors, who were having a firm's stake, has grown from 6.1% to 50%.

since their interests might be, in some cases, debt-oriented. Hence, it is questionable whether institutional investors always contribute to the alignment of managers' decision-making incentives with the shareholders' interests.

10.2.2. Anti-Takeover Defenses

In the United States the U.S. takeover regulation provides shareholders of target corporations the freedom to be protected from hostility by many anti-takeover provisions. The most widely used and most effective one is the poison pill (Sokolyk, 2011). [92] Since it provides target's shareholders the right to purchase the firm's shares at a discount in case of M&As, for potential bidders it is quite costly to acquire such companies because the target's shareholders get most of the benefit of the takeover at a high cost for the acquirer (Ferrarini and Miller, 2009). Hence, such transactions are financially unfavorable for bidders. On the other hand, if a corporation adopts anti-takeover provisions such as the poison pills, its shareholders are threatened by not receiving the premiums of a potential takeover since the acquirer would rather choose another target than negotiating with the firm adopting poison pills. Therefore, it can be stated that anti-takeover provisions can be not only beneficial but also harmful under certain circumstances. Another provision which U.S. corporations use is the "control share acquisition" statute (Magnuson, 2009; Ferrarini and Miller, 2009). According to that statute, if the potential acquirer already has more than 20 percent of the target's shares, it loses the voting rights of its shares above that threshold unless the current target's shareholders do not extraordinarily permit the acquirer to keep the voting rights.

10.3. Employees

Unlike the Continental European takeover legislation, in the United States the laws regulating the M&As do not stress the employee protection (Gugler and Yurtoglu, 2004). However, according to Gugler and Yurtoglu (2004), the U.S. labour market is easily adjustable to various shocks, for instance after M&As. The reason about such quick adjustment lies in the nature of the labour market of the United States. The liquidity of employees at low costs is greater and takeovers are not required for labour restructuring, which is the case in

[92] Further anti-takeover statutes are, for instance, the "fair price" clauses, the greenmail provisions and the disgorgement statute. However, they are not a subject to the thesis since they are not so widely used as the relevant for the topic anti-takeover provisions. For more information regarding the excluded from the analysis provisions see, for example, Ferrarini and Miller (2009).

Continental Europe (Gugler and Yurtoglu, 2004). At a post-acquisition stage, in the United States the labour demand is not significantly lower unlike the labour demand by Continental European merging companies. Therefore, any strict employee protection when U.S. corporations are involved in M&As is not necessary so that the labour market functions well and stays efficient.

V. Analysis

As Rowoldt and Starke (2016) claim, corporate governance is greatly influenced by the takeover legislation and laws. Hence, in order to provide good corporate governance, the relevant authorities have to implement M&A regulation which matches the current economic situation, the corporate goals, the financial system and the market in general. The "right" regulation should be efficiently adaptable to the development of the market structure and conditions as well. According to Maher and Andersson (2002) and Gilson (1992), unfortunately there is no optimal takeover regulation. It is a matter of various conditions such as the essence of the agency problems that corporations face, the level of development of the financial markets or the role of the financial institutions in the corporate world.

In this sense, the goal of Section V is to analyze the current takeover regulation and corporate governance practices in Continental Europe and in the United States in order to discover whether the current framework of the M&As regulation on the European market is efficient enough. If not, would it be pragmatic to implement some practices from the U.S. takeover regulation? Could they be effectively adopted by Continental Europe and what could be the reasoning behind such incentives? This section also tries to answer the question whether and to what extent the Continental European takeover regulation is converging with the U.S. model of M&A legislation.

11. Continental European versus U.S. Takeover Regulation

The takeover regulation has several major goals. Firstly, it aims at providing greater transparency, reduced costs of M&As, efficient competition and equal conditions for all players. Hence, the regulation's goal is to protect interests of stakeholders and to make the duties and liabilities of directors, as well as other players, clear, predictable and enforceable. This section goes through the takeover regulation in Continental Europe and in the United States, pointing out the similarities as well as the controversial statutes which form the current M&A markets and, hence, it analyzes the problematic issues in the Continental European takeover regulation, focusing mainly on the Takeover Directive and its provisions.

However, when analyzing both types of regulation, it should be taken into account that two polar financial systems are compared, where the ownership structure, the level of development of financial markets and the role of financial institutions, as well as the major agency problems are pretty divergent. At first, in the United States corporations have quite dispersed ownership while in Continental Europe companies are owned by controlling shareholders and a little percentage of minority shareholders. Hence, in the United States the major agency problem is between managers and shareholders while in Continental Europe there is a conflict of interests between controlling and minority shareholders. In this sense, the regulations are designed in a way that they smooth these agency problems. Besides, the market for corporate control is quite more developed in the United States than in Continental Europe which provides greater opportunities for the managers of U.S. corporations to be "punished" from the market by being threatened from hostile M&As if they undertake bad investments and do not act in the best interest of shareholders. In Continental Europe, on the other hand, internal corporate governance mechanisms ensure that managers' decision-making is in accordance with the maximization of shareholder value. At the same time, financial institutions have limited power in the United States (unlike those in Continental Europe) which undermines their role on the M&A market.

To some extent, the differences in the U.S. and the EU approaches come from the nature of the takeover regulation history. While in the United States the courts play a major role in the process, in Europe the takeover regulation is a result of a plenty of discussions and political decisions. In this context, how do the different legislations provide efficient monitoring, transparency, equal protection of interests and lack of complexity in the M&A process, with domestic as well as with cross-border dimensions? In order to find an answer of this question, there are several major points that will be compared and analyzed in this section – the information disclosure statutes, the legal duration of the M&A process, including any time frames, the role and enforcement of the anti-takeover provisions as a way to deal with hostility, as well as the Mandatory Bid rule.

As Kay (1996) implies, the U.S. model has become quite popular and increasingly important worldwide since its concept is clear – managers should act in the best interests of the shareholders while other jurisdictions include the protection of interests of stakeholders such as the employees as well (like Continental Europe does). However, is such a strategy beneficial for Continental European corporations? At first, in the last decades the number of publicly traded corporations on the Continent has been significantly increased which provides more incentives for an efficient market for corporate control to take place in the takeover regulation. At the same time, the relationships between the financial institutions and the European companies have become relatively weaker. As Rowoldt and Starke (2016) claim, the role of the governments is to control and monitor the takeover process either through intervention or through regulation. In this sense, the European Union provides a clear and relatively strict framework with general principles (some of them obligatory, others just optional) which Member States (MS) apply in their jurisdictions. However, since MS have the power not to apply some of the provisions or to apply additional restrictions related to the takeover regulation, the protection of the interests of stakeholders is unequal among the Community. The takeover process in the EU is more predictable and less time-consuming. In contrast, the United States provide liberal judge-made regulation under which corporations are enabled to adopt various anti-takeover defenses (unlike in the EU) but also to litigate in case they believe that their interests are neglected in the M&A process. Logically, this makes the M&A process in the United States quite expensive. In addition, in the United States every state has the power to monitor the takeover process differently because no uniform rules exist. Furthermore, the U.S. takeover regulation is more quickly adjustable to any new market conditions since the SEC has rule-making power. At the same time, any amendments of the EU takeover regulation are "clumsy" and time-consuming which makes it hardly adjustable to the new environment. Besides, when looking at cross-border M&As, while Continental European regulation has certain provisions which regulate the process, in the United States such rules are scarce. No monitoring rules are adopted but, according to the Exon-Florio Act, the President has the power to prohibit takeovers in cases he believes that the transactions might be harmful for the national security and the U.S. market. However, although in Continental Europe the cross-border M&A process is regulated, there are still problematic fields concerning the unequal protection of stakeholders or the lack of communication between Member States due to unclear standards and procedures.

Furthermore, when looking at the information disclosure statutes in both jurisdictions, there are several significant distinctions as well. While in the United States the SEC is the major authority to review the M&A process, in Continental Europe the choice of a relevant authority to monitor the takeover is more complex. Hence, in the United States corporations disclose their intentions and all relevant offer documents together with the SEC. According to the EU provisions, the European Commission normally reviews only large M&As with Community-wide influence. Otherwise, the national authorities of the MS are responsible for monitoring and supervising the takeovers (however, the regulation allows several exemptions from this practice). Apparently, unlike in the United States, in Continental Europe such complexity provides uncertainty regarding the determination of the most appropriate authority to review any potential M&As.

Other key differentiations of both types of takeover legislation are linked to the official time frames and the overall duration of the takeover process. Compared to the U.S. takeovers, where the courts play a central role, the M&A process in Continental Europe is more strictly structured and, hence, less time-consuming. Each procedure has certain time limitations which makes the whole process more predictable, clear and simple. However, the major difference between the takeover regulations of the United States and Continental Europe remains the way both jurisdictions cope with hostility. On the one hand, the U.S. M&A regulation provides a great level of freedom to U.S. corporations to adopt any type of anti-takeover provisions, which is believed to be in the best interests of the target's shareholders and the corporate performance, in general. Hence, there is a tendency that acquirers are more likely to engage in friendly M&As in order to avoid paying the price of a hostile takeover. On the other hand, according to the EU takeover Directive, targets are not allowed to implement any defensive tactics once a bid is present. An exception makes the use of white knights which are not prohibited by the Continental European takeover regulation. However, the Board Neutrality rule remains optional for Member States which provides unequal treatment among the Community but a possibility of EU corporations to oppose non-EU hostility.

12. Corporate Governance Practices

When comparing and analyzing the contrast between the U.S. and the Continental European corporate governance practices, it is essential to take into account the stakeholder versus the shareholder approaches which both legislations have. While for U.S. corporations, according to the U.S. regulation, the major goal for managers is to act in the best interest of the shareholders, in Continental Europe the takeover regulation includes provisions which provide security not only for the shareholders, but also for other stakeholders such as the employees and the creditors. The agency problems are divergent as well – while U.S. corporations deal with smoothing the agency problem arising from the different interests of managers and diversified shareholders, in Continental Europe the major agency problem includes the quarrelling of interests of controlling and minority shareholders. Hence, corporate governance looks quite dissimilar for the United States and for Continental Europe. Although the financial system in Continental Europe has implemented some market elements in the last several decades, it remains quite dissimilar with the U.S. financial system. Due to the lack of dispersed ownership in Continental Europe, the EU market for corporate control is still not working efficiently enough, especially when compared to the U.S. market for corporate control. Therefore, until now the leading corporate governance mechanisms in Continental Europe remain the internal ones.

12.1. The Board of Directors

The major differences between the boards of directors in the United States and in Continental Europe come from their structure – while the U.S. companies have one-tier board, the Continental European ones have one-tier as well as two-tier boards. Hence, the duties, liabilities and their role in the corporate governance are not uniform.

In the United States the fiduciary duties make directors directly responsible for the shareholder value maximization while the decision-making of directors in Continental Europe is linked to quite wider perception for superior corporate performance. However, a major problem for managers' decision-making incentives is the short-term pressure which is often put on them. For instance, institutional investors have the power to exert such pressure on managers. Therefore, the Continental European takeover regulation tries to cope with this issue by ensuring the long-term incentives of institutional investors, as well as of managers (unlike the United States which do not regulate such motivations). In this way, managers are encouraged to engage only in positive NPV projects and investments while avoiding M&As which might maximize shareholder value in the short run but which will be harmful for the corporate performance in the long run. Another essential part of the corporate governance issues is the separation of the CEO-Chairman position. Although there have been mixed empirical research regarding this topic, recent evidence proves that the separation of these positions is beneficial for the corporate performance. Hence, the provisions and the regulation, in general, which the European Union imposes in this direction ensures that these positions remain separate and independent. In addition, the takeover regulation in Continental Europe provides certain requirements which require a certain percentage of the board to be formed by independent directors. Unfortunately, there are no uniform requirements since Member States have the power to set the threshold for independence of the board. Hence, there is further evidence about the unequal treatment of publicly traded companies among the European community.

Another major difference between the corporate governance practices in the United States and in Continental Europe concerns the Board Neutrality provision adopted by the European Union. The Board Neutrality rule prohibits EU corporations to undertake any defense in the form of staggered boards and poison pills, for instance. At the same time, such provisions are often used by U.S. corporations, and, what is more, very efficient against hostility. Therefore, it can be stated that the Continental European regulation is quite more bidder-friendly than the U.S. takeover regulation. On the one hand, such Board Neutrality policy might make acquisitions less costly which limits the target's shareholders' gains. But, on the other hand, if the anti-takeover provisions were allowed, European acquisitions would be more expensive which might lead to fewer successful M&As in general. Hence, the possibility that target's shareholders would not benefit from the potential M&A might be much greater. However, the Board Neutrality rule is just an optional provision. This provides a great field of freedom to Member States to decide whether to adopt the statute or not. This, in addition, is another indication for the unequal treatment of merging companies among the Continental European Community. Moreover, if Continental European companies are allowed to adopt anti-takeover provisions, the cross-border bids and the incentives of hostile cross-border M&As would be significantly lower. To a certain extent, France has eliminated the Board Neutrality statute due to similar reasons. In comparison, the United States have no such regulatory statute. In fact, if managers believe that implementing defensive tactics is in accordance with the best interests of the corporation, they are free to adopt any anti-takeover provisions such as control-share provisions, "fair price" clauses or the most widespread and efficient statute – the staggered board.

Further quite significant issue regarding the board of directors is the remuneration policy. While in the United States the performance-based pay is quite widespread, in Continental Europe such linkage between performance and directors' remuneration is a relatively new topic. In general, the performance-based remuneration policy is already adopted by the majority of Member States. This implies better linkage between performance and pay which increases the incentives of managers to act in the best interest of the company, to increase shareholder value as well as to undertake only M&As which are beneficial in the long run. The efforts of the EU legislation in that direction continue since the European Commission proposed further improvements of the Recommendation in 2014. Unfortunately, in cases of bad management, the EU regulation still has several gaps regarding the director disqualification, especially in cases of cross-border activity. Although the legislation provides great incentives for efficient decision-making, there is no community-wide provision regulating the disqualification of directors. Hence, inadequate provisions with no community-wide dimensions in that direction would not lead to efficient results.

12.2. Shareholders' Interests and Rights

Shareholders play a vital and central role in the M&A process. Hence, good corporate governance protects their interests and rights as well as secures their benefits linked to the outcome from any takeovers. While in the United States this issue is less strictly regulated, in the European Union there are concrete provisions which are implemented by Member States. Thus, shareholders' role in Continental Europe is strictly determined, especially in cases of hostile M&As which implies greater protection of their interests. In the United States, in comparison, due to the limited power of shareholders to impact managers' decisions, managers are to some extent "benefited" by the U.S. legislation.

At first, in Continental Europe the legislation provides certain statutes regulating the role of shareholders in the remuneration policy of directors. They have the right to vote on that policy in order to have control and direct influence over the incentives of managers. In this way, the agency problem is smoothed due to the alignment of managers' decision-making with shareholders' interests. In addition, the EU Directives require that the remuneration policy of directors is performance and share-based which links the incentives of managers with the corporate performance. Therefore, managers are motivated to undertake only positive NPV projects and to engage in M&As which are beneficial for the corporation in the long run. In the United States, on the other hand, although the remuneration of directors is performance-based as well, shareholders do not have any control over its determination. However, the U.S. authorities try to implement a policy (The Bill of Rights) which will give the right of shareholders to vote on the directors' remuneration in the near future. However, a frequent problem occurs regarding the long-term engagement of the corporation's shareholders. In order to smooth it, the European Commission offered in 2014 a way of linking the shareholders' long-term interests with the corporate investments. In other words, shareholders will have the power to vote against or in favor of any projects concerning more than 5% of the company's assets after the board discloses all relevant information if the amendment of the Directive gets approved.

In order shareholders to decide wisely whether to tender or not to tender their shares in cases of potential M&As, the United States and Continental Europe have divergent approaches although both legislations provide enough time to shareholders in order to "answer" on the bid. The differences come from the information disclosure. While in the United States there are no disclosure requirements regarding any changes of the offer, in Continental Europe the target's shareholders have to be provided with all relevant information about any amendments of the bid and with the opinion of the target's board on the offer. Hence, target's shareholders in Continental Europe are given more accurate and up-to-date information which implies greater transparency and security. Additionally, before deciding on the bid, shareholders in the European Union are provided the opportunity to comment and clarify the information regarding the M&A offer with the relevant authorities. In comparison, in the United States there is a possibility for bidders to neglect minority shareholders by negotiating the takeover only with the controlling shareholders of the target.

Another essential difference in the U.S. and the Continental European approaches is linked to the Mandatory Bid Rule. While the European Union requires that bidders have to make a mandatory bid once they reach a certain threshold for share ownership, in the United States there are no provisions requiring mandatory bids. Hence, M&As are quite costly for European corporations which might limit the number of successful takeovers on the Continent. As a result, in case of successful takeovers, the target's shareholders' benefits would be maximized and much greater than the shareholder value of U.S. targets while the European bidders will receive lower gains due to the transmission of the takeover benefits from bidders to targets. In cases of failed M&As due to the Mandatory Bid Rule, on the other hand, target's shareholders would fail to receive the benefits of the potential takeover. However, this rule is designed to impede cross-border M&As since Continental European companies are protected by making them more expensive than non-European targets. Additionally, this provision protects the rights of controlling shareholders since the bidder cannot obtain control over its target without a mandatory bid which guarantees a certain level of benefits for the target's controlling shareholders. Unfortunately, although there is a certain framework on Community level which regulates such bids, each Member State applies different thresholds for the Mandatory Bids which implies lack of equality among the Community. In general, the Mandatory Bid Rule is a hidden defensive tactic which makes Continental European companies less desirable targets. This, in turn, is harmful for the efficient functioning of the European market for corporate control. Hostility is, to a certain extent, impeded since the provision eliminates the gains from the hostile takeovers. Moreover, when looking at the ways of dealing with hostility, a major topic remain the anti-takeover provisions. Unlike in the United States, where the takeover legislation allows the use of variety of defensive measures (which makes hostile takeovers more costly and less desirable), in Continental Europe the regulation prohibits any use of post-bid defensive tactics. Additionally, once control over the target is obtained, any multiples voting rights of current shareholders disappear. Hence, the M&A process is smoothed and the percentage of completed takeovers is higher which, in turn, leads to more benefits to the target's shareholders.

Unlike in the United States where dispersed ownership is present, in Continental Europe controlling shareholders are a frequent event. Although it is believed that large shareholders are directly linked to the perception for improved supervision due to their increased incentives to monitor the management, they often tend to take advantage of their power in order to earn the benefits at the expense of minority shareholders. Therefore, the Continental European takeover regulation deals with the agency problem arising from the conflict of interest between controlling and minority shareholders. The acquisition of non-controlling shareholdings, on the other hand, is not so strictly regulated by the EU legislation. This implies a possibility for bidders to obtain control while neglecting the interests of the other shareholders. However, the European Commission has already proposed (in 2014) amendments of the Takeover Directive in direction elimination of such gaps in the regulation, which are expected to be applied soon. Institutional investors are another essential part for corporations. In the last decades their role in the United States has rapidly been increased while in Continental Europe they have always represented a significant part of the companies' shareholders. As Maher and Andersson (2002) state, institutional investors play the role of large shareholders. Hence, they have a central monitoring role and power over the management. However, institutional shareholders may under certain circumstances concentrate on short-term goals while neglecting the long-term corporate performance. Therefore, unlike the U.S. regulation, the Continental European legislation provides strict provisions which link the incentives of institutional investors and managers to the long-term corporate performance of publicly traded companies. In this way, any pressure over the management to make decisions which maximize the short-term value of shares is avoided. In fact, managers are motivated to engage in M&A investments which lead not only to value maximization in the short run but also to superior long-term performance.

Nevertheless, the takeover regulation directs its attention especially to minority shareholders since their rights tend to be neglected in the M&A process. Both legislations provide the squeeze-out provision[93] which gives the bidder the right to purchase the remaining shares from the minority shareholders on equitable price. Unfortunately, it only applies to the class of shares where a certain threshold is exceeded which implies unequal minority shareholders' protection. However, the major difference between the U.S. and the Continental European provisions concerns the rights of minority shareholders to sell out their shares once the bidder obtains control over its target. Unlike in U.S. legislation, the Continental European regulation provides clear provisions regarding the sell-out rights of minority shareholders. Thus, it offers greater protection of their rights and guarantees them the freedom to sell their shares. In the United States, minority shareholders do not have such rights. They only have appraisal rights in case they believe that the bidder has bought their shares on an unfair price when using its squeeze-out rights. However, this process remains costly, time-consuming and cumbersome.

12.3. Employees' Protection

One of the significant differences in the U.S. and in the Continental European corporate governances lies in the role of employees in the M&A process. Unlike the U.S. regulation which does not exclusively consider employees' rights in takeovers, the Continental European regulation provides strict provisions which aim at protecting employees, even in cross-border M&As. In addition, the employees' representatives and labor organizations have significant power in Continental Europe. To a certain extent, the reason for such distinction in regulation is the difference between the effects of M&A on labor in general.

In the United States successful takeovers do not lead to significant decrease in the labor demand unlike M&As in Continental Europe. In this sense, employees of EU companies are more prone to risks regarding their future place in the corporation in cases of M&As. In its attempt to protect employees' interests, the Continental European regulation provides them the right to get exclusive information regarding the takeover offer, as well as the expertise of the board regarding any effects of the M&A on labor. However, until now employees' representatives are to some point dissatisfied with the regulation concerning employees' rights since the information is often incomplete or given quite late. This automatically limits the possibility and the right of employees to provide their opinion about the potential takeover

[93] This statute provides investors' protection.

although such rights are foreseen according to the directives. In addition, there are some gaps in the regulation concerning the duties of the corporations to keep the provisions in their previous statements during the negotiations regarding the employees' future in the company. Since no control at a post-merger stage is envisaged in the regulation, employees' interests can be freely neglected although taken into account and protected at the pre-merger stage.

In addition, in order to provide higher protection to employees of Continental European listed companies, in 2014 the European Commission proposed the introduction of more rights of employees. Namely, employees should be given the power to be represented on the boards. However, in some Member States such employee participation is already existent. According to another provision, executive remuneration should be aligned with the pay of employees. Nevertheless, this proposal is still not officially implemented in any directive.

VI. Conclusion

In the past 20 years the legislation of many countries worldwide has begun to implement various U.S. legislative patterns. Hence, a question arises – is the U.S. regulation superior over other ones so that it has served as a model for other countries? Is it possible one system to be superior over all other types of legislation at all? If so, would it be beneficial for Continental Europe to implement some of the U.S. takeover provisions in order to improve its M&A legislative patterns?

At first, the thesis has separately analyzed the U.S. and the Continental European takeover regulation concentrating on the corporate governance in order to point out the level of efficiency of the various provisions and to find out their potential fields for improvement. In practice the U.S. and the EU corporate governance have several points of contact because they are converging as a result of the globalization and the strengthened economic ties. However, since the U.S. and the Continental European financial systems remain quite divergent, it is inappropriate to speak about direct implementation of the U.S. provisions into the EU takeover laws without taking into account the differences in the financial markets, the role of the financial institutions and the corporations' ownership structure. Nevertheless, combining and perfectly balancing the internal corporate governance mechanisms with the efficiency of the external ones would lead to superior corporate performance. A question arises – would such perfect balance be possible and reachable in practice?

In general, the current takeover legislation in Continental Europe provides clear, predictable and efficient way of regulating the M&A process on Community level. Aiming at harmonizing the takeover market among Member States, the European Union is hardly working on providing simple and less costly paths for effective restructuring which would not impede the free functioning of the market and the optimal level of competitiveness. Hence, according to the provided evidence in this thesis, great changes towards the U.S. takeover regulation model would not really improve the current M&A legislation of Continental Europe. In fact, the EU takeover regulation should work on eliminating the current gaps in the provisions concerning inequality of shareholders' and employees' rights among the Community in order to reach superior levels of harmonization. Some of the fields for improvement in the EU takeover legislation concern the statutes which define the relevant authorities that monitor the M&A process and, namely, the case allocation should be improved. Furthermore, it might be beneficial if the takeover regulation provisions do not leave such a big room for translation and implementation of the various provisions on MS's level so that the protection of employees and shareholders remains equal among the Community, especially in cross-border transactions. Further fields for improvement might be reaching greater transparency and, mostly important, making the EU takeover regulation more easily adjustable to the changing economic environment.

Although the thesis tries to provide comprehensive and extensive information regarding the takeover regulation and the corporate governance practices in the United States and Continental Europe, this topic remains capable to be further analyzed and reviewed. At first, the thesis concentrates only on the regulatory environment when analyzing the corporate governance practices. However, factors such as the labor markets and the capital markets have also an impact on corporate governance. It would be interesting to analyze how these factors influence corporate governance as well. When turning back to the legal issues, further research areas might be the "acting in concert" concept when considering the M&A process. Until now there are significant gaps in the EU takeover regulation when talking about "acting in concert". It is worth to examine the next steps of the European Commission in trying to remove those gaps. In addition, the employees' rights represent another significant part of the EU takeover provisions. In 2014 the European Commission offered its plan about increasing the employees' participation in the corporate decision-making by providing them the right to own a particular percentage of shares. Further research could observe whether this plan has really been adopted among the Community and what its impact on the corporate performance is, especially when observing merging companies.

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Appendix

Figures

Figure 1. Types of M&As

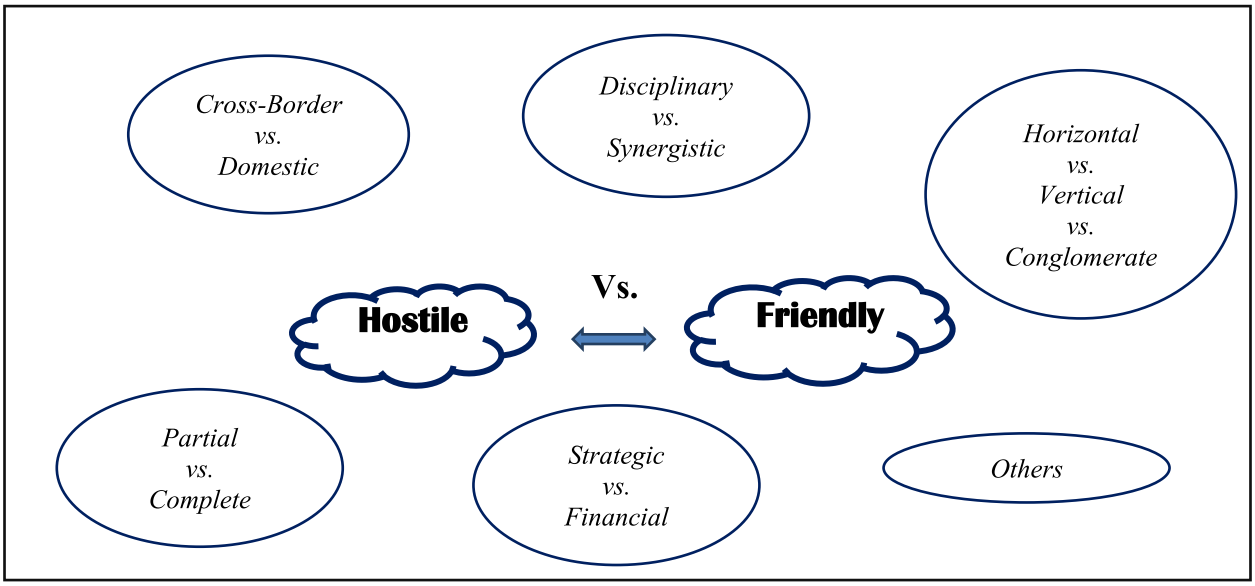
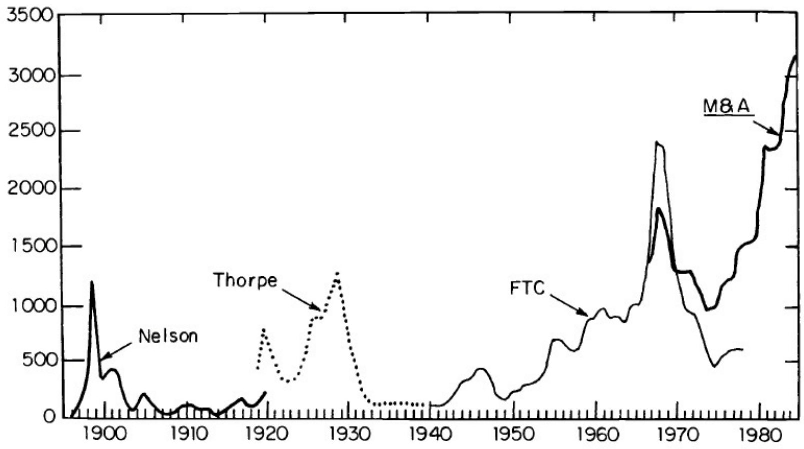


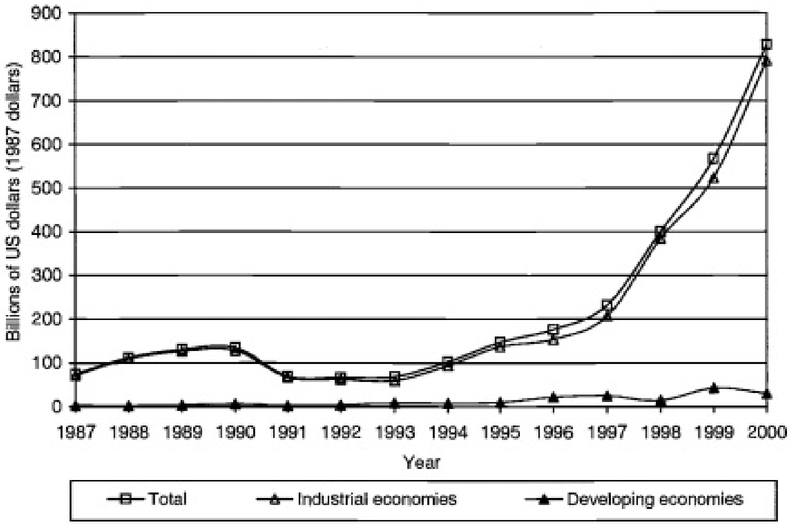
Figure 2. Overview of the number of M&As in the United States in the period 1895-1985



Annual Number of Mergers and Acquisitions: Nelson Series, Thorpe Series, FTC "Broad" Series, and *M&A* "Domestic" Series

Source: Golbe and White (1987)

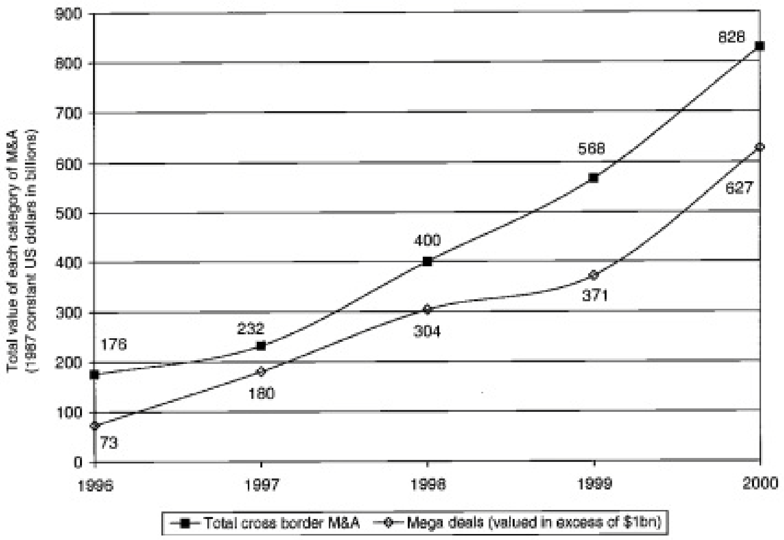
Figure 3. Cross-border M&A Activity in the Period 1987-2000



The latest wave of cross-border M&A (1997–2000) is much larger than its predecessor (1987–1990)

Source: Evenett (2004)

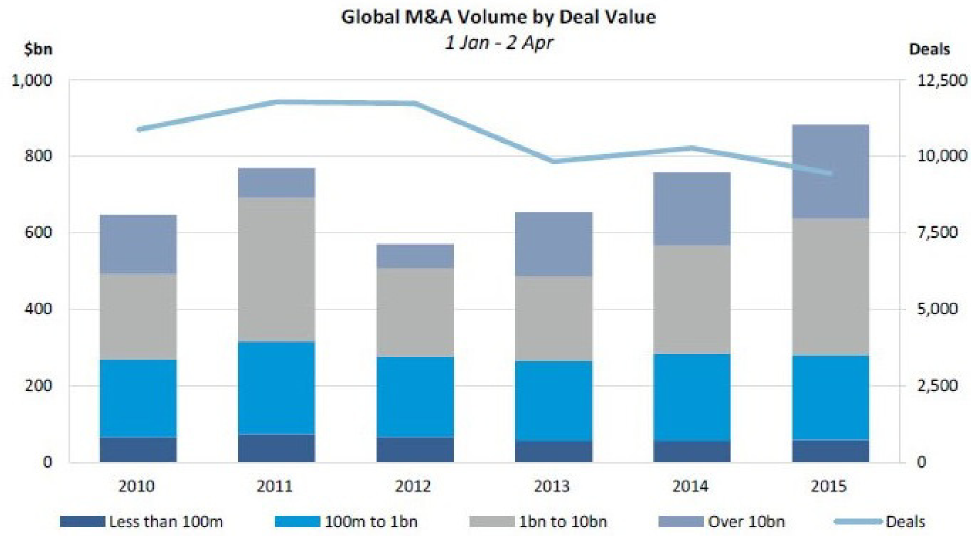
Figure 4. Cross-border M&As: Mega Deals in the Period 1996-2000



Mega deals drove the latest wave of cross-border M&A

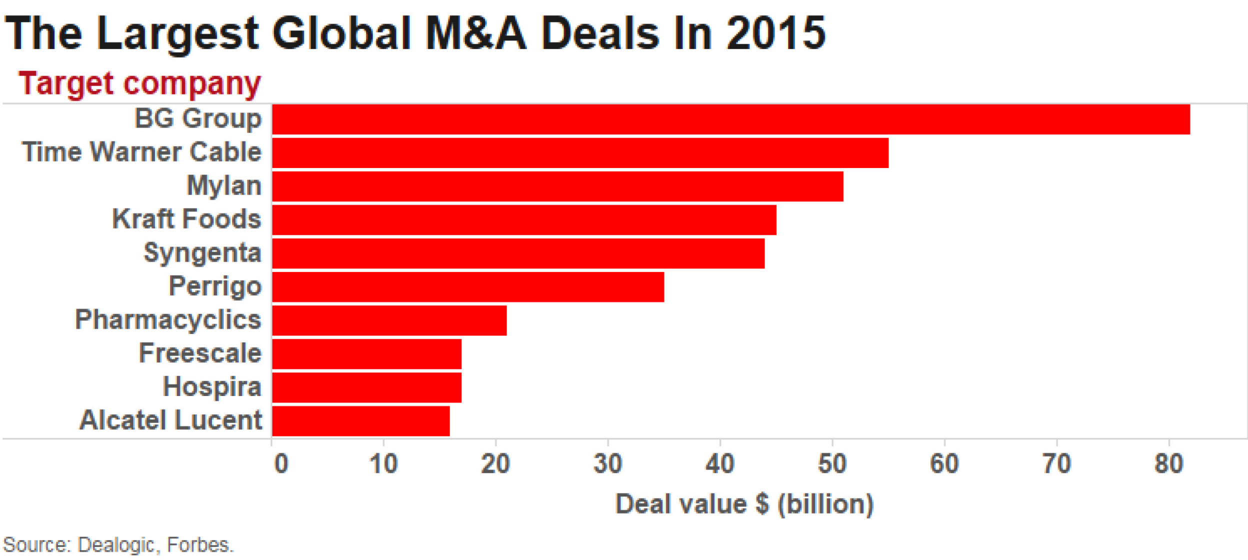
Source: Evenett (2004)

Figure 5. Global M&A Volume by Deal Value



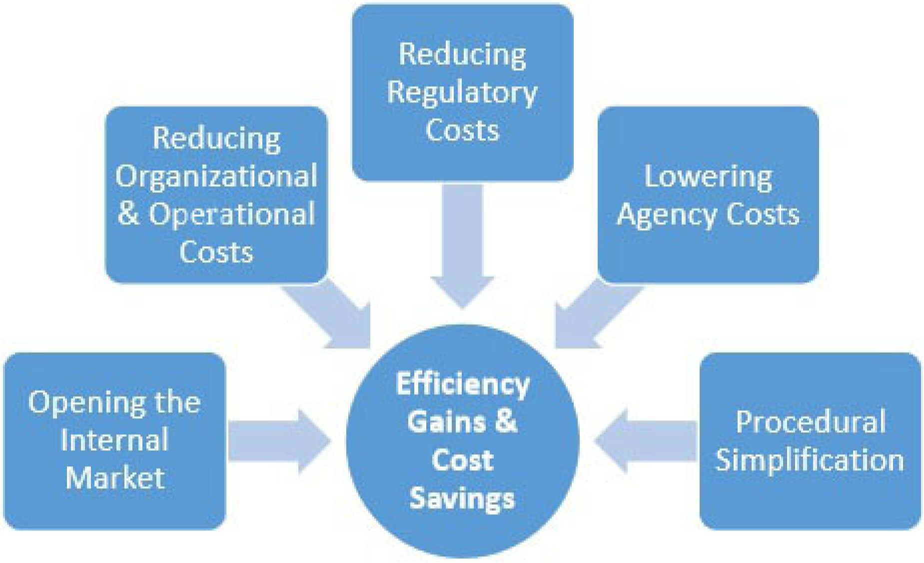
Source: Marino (2015)

Figure 6. M&A Activity Worldwide (2015)



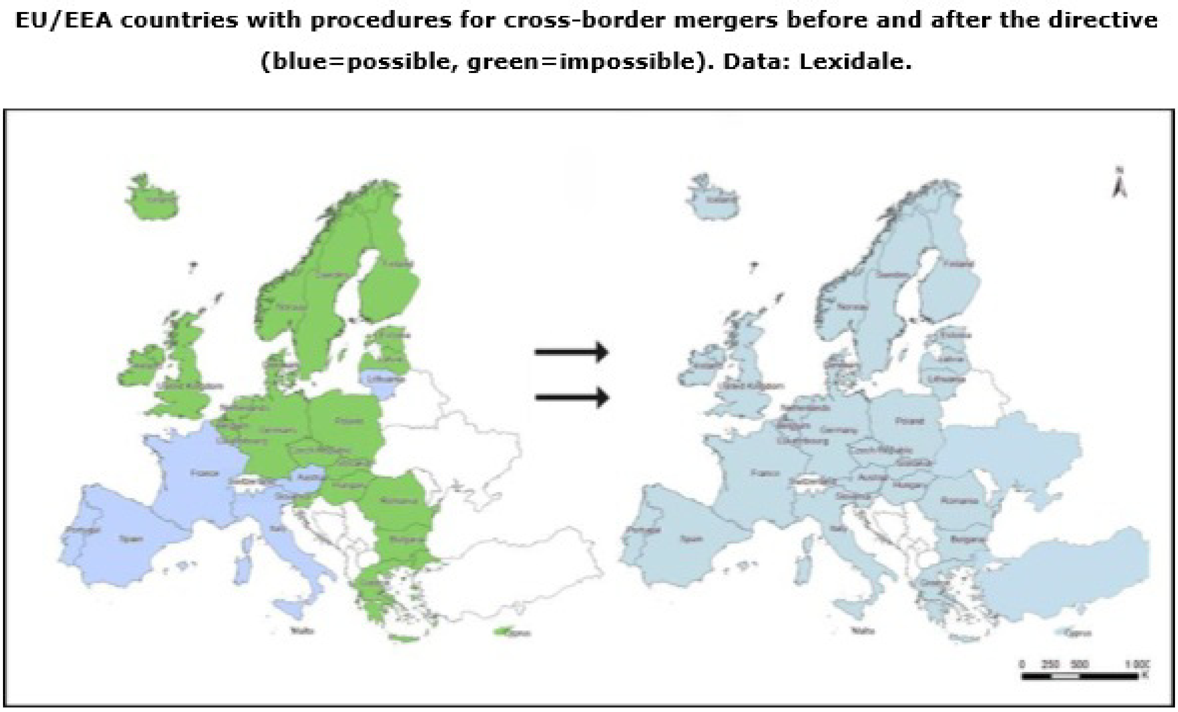
Source: Chen (2015); Forbes, 26.05.2015

Figure 7. Benefits resulting from the implementation of Directive 2005/56/EC



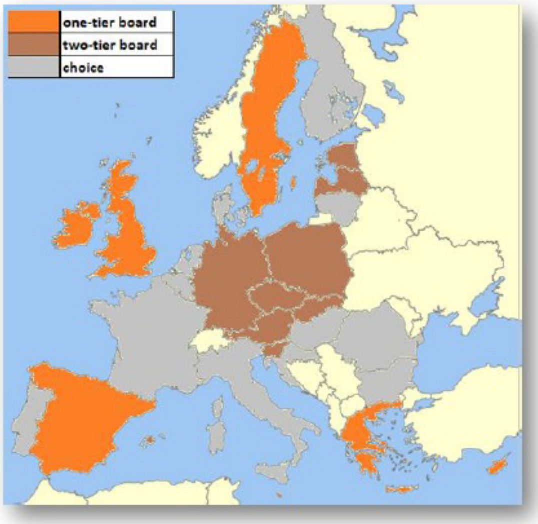
Source: Biermeyer (2013)

Figure 8. Rise of cross-border M&As in the European Union after the implementation of Directive 2005/56/EC



Source: Biermeyer (2013)

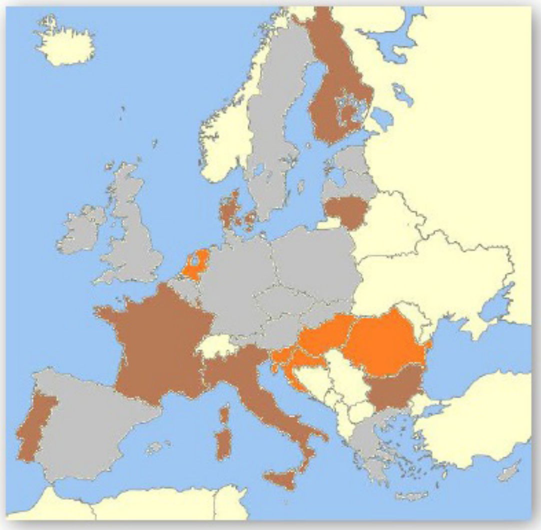
Figure 9. One-Tier vs. Two-Tier Boards in the European Union



Legend	Countries
Mandatory two-tier board	AT, CZ, EE, DE, LV, PL, SK
One-tier board	CY, EL, IE, MT, ES, SE, UK
Choice	BE, BG, HR, DK, FI, FR, HU, IT, LT, LU, NL, PT, RO, SI

Source: Gerner-Beuerle, Paech and Schuster (2013)

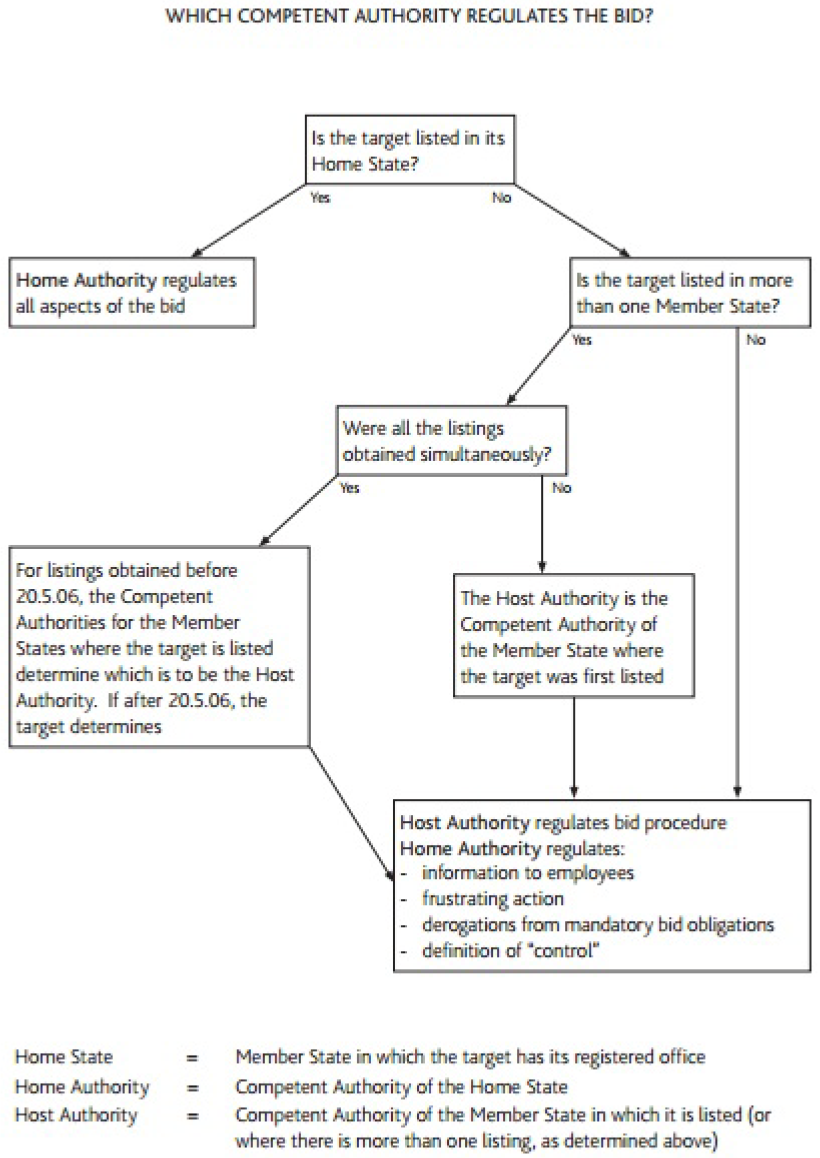
Figure 10. Board Structure of the EU Countries with Choice



Legend	Countries
Predominant structure: one-tier	BG, DK, FI, FR, IT, LT, LU, PT
Predominant structure: two-tier	HR, HU, NL, RO, SI

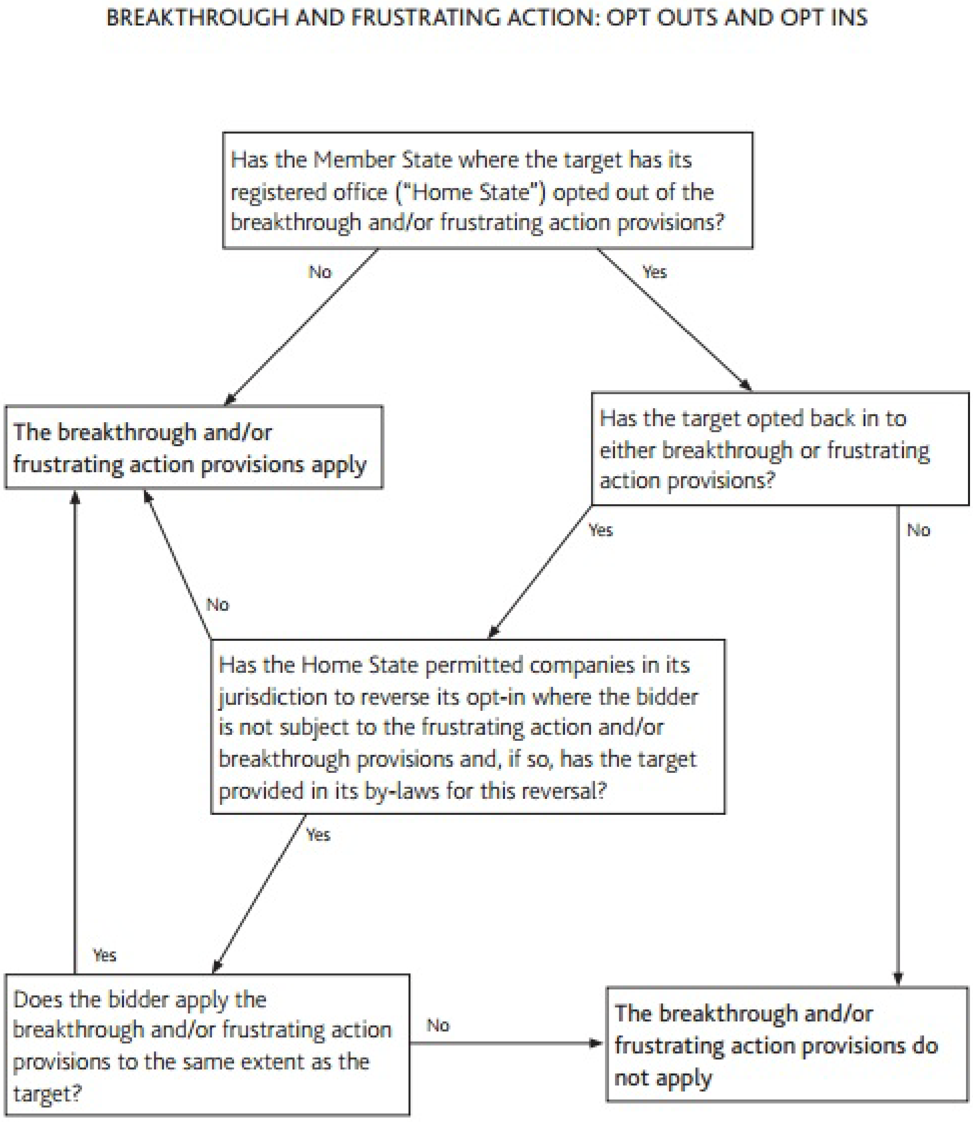
Source: Gerner-Beuerle, Paech and Schuster (2013)

Figure 11. Bid Regulating Relevant Authorities



Source: Slaughter and May (2006)

Figure 12. The Breakthrough Rule



Source: Slaughter and May (2006)

Figure 13. The Greatest Economies Worldwide for 2015

Source: CNN (2016)

Figure 14. The Greatest Economies Worldwide for 2016 (Expected Values)

Source: CNN (2016)

Tables

Table 1. Summary of the M&A Activity Over the Years (until 2008)

	Wave 1	Wave 2	Wave 3	Wave 4	Wave 5	New wave (6?)
Period	1890s–1903	1910s–1929	1950s–1973	1981–1989	1993–2001	2003-present
Geographical scope	US	US	US, UK, Europe	US, UK, Europe, Asia	US, UK, Europe, Asia	US, UK, Europe, Asia
M&A outcome	Formation of monopolies	Formation of oligopolies	Growth through diversification	Elimination of inefficiencies	Adjustment to globalization processes	Global expansion
Industry-relatedness	Focus	Focus	Diversification	Focus	Focus	Focus
Industries	Hydraulic power, textiles industry, iron industry	Steam engines, steel, railways	Electricity, chemicals, combustion engines	Petrochemicals, aviation, electronics, communications technology	Communications/ information technology	n.a.
Dominant sources of financing/ means of payment	Cash	Equity	Equity	Debt financed/Cash paid	Equity	Debt and Cash financed/ Cash paid
Hostile takeover activity	n.a.	n.a.	None (US&UK)	High (US&UK)	Some (US&UK)	Some (US&UK)
			None (Europe)	None (Europe)	High (Europe)	Some (Europe)
			None (Asia)	None (Asia)	None (Asia)	Some (Asia)
Cross-border M&A activity	n.a.	n.a.	n.a.	Some	Medium	High
Other specifics				LBOs, MBOs, going-private deals, and divestitures	Mega-deals, divestitures	Deals by private equity funds
Events coinciding with beginning of wave	Economic expansion; industrialisation processes; introduction of new state legislations on incorporations; development of trading on NYSE; radical changes in technology	Economic recovery after the market crash and the First World War; strengthen enforcement of antimonopoly law	Economic recovery after the Second World War; tightening of anti-trust regime in 1950	Economic recovery after recession; changes in anti-trust policy; deregulation of fin. services sector; new financial instruments and markets (e.g. junk bonds); technological progress in electronics	Economic and financial markets boom; globalization processes; technological innovation, deregulation and privatisation	Economic recovery after the downturn in 2000–2001
Events coinciding with end of wave	Stock market crash; economic stagnation; beginning of First World War	Stock market crash; beginning of Great Depression	Stock market crash; oil crisis; economic slowdown	Stock market crash	Stock market crash; 9/11 terrorist attack	n.a.

This table summarizes the main characteristics of takeover waves most frequently mentioned in the academic literature.

Source:Martynova and Renneboog (2008)

Table 2. Minority Shareholdings – Overview of the Proposed Options

Overview of the options on minority shareholdings			
Parameter	Option 1 Self-assessment	Option 2 Targeted notification	Option 3 Targeted transparency system
Scope of the Commission's jurisdiction	Any acquisition of a minority shareholding above safe harbour of 5%	Acquisition of a minority shareholding in a competitor / vertically related company above 20% or 5% with rights	Acquisition of a minority shareholding in a competitor / vertically related company above 20% or 5% with rights
Obligation to submit a full notification	no	yes	No
Obligation to submit an information notice	no	n/a	yes
Voluntary notification available	n/a	n/a	yes
Stand-still obligation	no	yes	no
Waiting period	no	n/a	yes
Obligation of the Commission to issue a decision	No, only in the event that the Commission initiates an investigation	yes	No, only in the event that the Commission initiates an investigation
Possibility for Member States to request a referral	yes	yes	yes

Source: European Commission (2014)

Table 3. Qualitative Comparison between the Options for the Issue "Minority Shareholdings"

Comparison of minority shareholding options			
Criteria	Impact compared to baseline scenario (- - - to +++)		
	Option 1	Option 2	Option 3
	Self-assessment system	Targeted notification system	Targeted transparency system
1. Preventing harm to competition and consumers	+	+ + +	+ + +
2. Legal certainty	+ +	+ +	+ +
3. Administrative burden on businesses	-	- -	-
4. Public enforcement costs	- - -	- -	-
5. Consistency with the existing merger control system on an EU and Member State level and allocation to the more appropriate authority	-	+ +	+

Source: European Commission (2014)

Table 4. Overview of the Impact of the Proposed Changes over the Current Situation

Criteria	Impact against baseline scenario (- - - to + + +)	Explanation of rating and aspects of the policy option most relevant
Article 4(5) referrals		
1. Preventing harm to competition and consumers	+ +	The proposal encourages the use of Article 4(5) where the Commission is the more appropriate authority.
2. Legal certainty	+ +	The proposal is clear and precise. Any uncertainty arising from the possibility of a Member State veto following notification to the Commission is outweighed by the time and cost-savings achieved by the proposal.
3. Administrative burden on businesses	+ + +	Abolition of the two-step procedure significantly reduces the administrative burden on business.
4. Public enforcement costs	+ + +	Abolition of the two-step procedure will reduce public enforcement costs. A potential increase could occur if parties opt for a referral request more often. However, this would be off-set by a reduction of workload at national level.
5. Compatibility with the principles of the Merger Regulation	+ +	The proposal encourages the use of Article 4(5) where the Commission is the more appropriate authority. It is also in line with the one-stop principle as the Commission would be competent for the entire EEA territory.
Article 22 referral		
1. Preventing harm to competition and consumers	+ +	The proposal enables the Commission to review referred mergers for the entire EEA territory.
2. Legal certainty	+ + +	The option is clear and precise. Limiting referral requests to competent Member States increases legal certainty for parties.
3. Administrative burden on businesses	+ + +	Upon referral, the Commission would obtain EEA-wide jurisdiction, thereby avoiding a patchwork of competences. Further, an investigation can no longer be triggered by referral requests from Member States that are not competent.
4. Public enforcement costs	+ +	The proposal avoids parallel investigations by multiple authorities. No increase in the Commission's workload is foreseen as the number of cases with cross-border effects is not expected to increase.
5. Compatibility with the principles of the Merger Regulation	+ + +	Upon referral, the Commission would obtain EEA-wide jurisdiction, in line with the one-stop-shop principle.

Source: European Commission (2014)

Table 5. Committees in the Supervisory Board

Country	Presence of committees	Presence of independent directors in committees	Role of committees
AT	Y	partly (AC, RC, NC)	partly (AC, RC)
BE	Y	Y	Y
DE	partly (NC,RC)	N	partly(NC, RC)
DK	Y	Y	Y
EE	N	N	N
EL	partly (NC, RC)	N (AC, RC, NC)	N
FI	Y	N (NC, RC)	Y
FR	Y	Y	Y
HU	partly (NC, RC)	N (NC, RC)	partly (NC, RC)
IE	Y	Y	Y
IT	Y	Y	Y
NL	Y	Y	Y
MT	partly (NC)	N (NC)	partly (NC)
LV	Y	N(AC, RC, NC)	N
LT	Y	Y	Y
LU	Y	partly (AC, RC, NC)	partly(RC)
PL	partly (NC)	N(NC,RC) partly (AC)	N
SI	Y	Y	Y
SK	Y	Y	N
SE	Y	Y	Y
UK	Y	Y	Y

Evaluation criteria:

Presence of (supervisory) board committees

Y: all committees are in place

Partly: at least one committee is missing, the missing committee is specified in brackets

N: none of the committees is recommended

Presence of independent directors in committees

Y: all the requirements of the Recommendation are fulfilled regarding the presence and number of independent directors in the committees

Partly: the requirement of presence is fulfilled, the requirement on the number of independent directors is not

N: the requirement of presence of independent directors is not fulfilled in all the committees

Role of committees

Y: all the key functions of the committees are in place

Partly: one or some key functions are missing, the Committee exercising the missing function is specified in brackets

N: there are no requirements on committee functions

Key functions are defined as follows: (1) Nomination committee: recommendation of candidates to fill board vacancies; (2) Remuneration committee: a) making proposals on the individual remuneration to be attributed to executive or managing directors, b) making proposals on the granting of stock options and other share based incentives. (3) Audit committee: a)

Source: European Commission (2007)

Table 6. Separation of CEO-Chairman in the European Union

Country	Separation CEO/Chair	Sufficient number of independent board members	Independence criteria	Independence from controlling shareholder
AT	Y(partly)	Y	partly	partly
BE	Y(partly)	Y	Y	Y
DE	Dual, separation of current functions based on law, separation of past function C/E, reasons to be presented to the general meeting	Y	N	N
DK	Y	Y	Y	Y
EE	Dual, there is a separation of current functions but no separation of past functions	Y	Y	Y
EL	N	Y	partly	Y
FI	Y(partly)	Y	Y	Y
FR	N	Y	Y	Y
HU	In the two-tier model, present functions are separated, in the one-tier model N	Y	Y	Y
IE	Y	Y	Y	Y
IT	Y	Y	Y	Y
NL	Y(partly)	Y	Y	Y
MT	Y (partly)	Y	partly	Y
LV	N	Y	Y	Y
LT	Y	Y	Y	Y
LU	Y(partly)	Y	Y	Y
PL	Dual, there is a separation of current functions but no separation of past functions	Y	Y	Y
SK	Dual, there is a separation of current functions but no separation of past functions	Y	N	Y
SI	Y	Y	Y	Y
SE	Y(partly)	Y	Y	Y
UK	Y	Y	Y	Y

Evaluation criteria:

Separation of the role of the (supervisory) board's chairman and the chief executive

Y: Separation of present and/or past CEO and chairmanship functions is required on a comply or explain basis and disclosure on safeguards is required in case of combination of the two functions.

Y(partly): Separation is required but there is no requirement of disclosure of additional safeguards.

N: Separation is not required or there is no recommendation on transparency

Independence criteria

Y: all or almost all of the requirements of the Recommendation are in place

Partly: the criteria of independence of the controlling shareholder or more than two other independence criteria referred to in the Recommendation are missing

N: there are no detailed independence criteria

Source: European Commission (2007)

Table 7. Employee Participation on the Board in the European Union

Country	employee participation (if mandatory, board-level and independent of current/former state ownership)	Details
Austria	Yes	employees appoint one third of the members of the supervisory board
Belgium	No	Only applies in certain state-controlled companies
Bulgaria	No	-
Croatia	Yes	One member of the supervisory board
Cyprus	No	-
Czech Republic	Yes	In companies with at least 50 employees, employees appoint one third of the members of the supervisory board
Denmark	Yes	Two members of the board when adopting the "Nordic Model" of corporate governance Up to a third of the members of the supervisory board in companies adopting the two-tier model
Estonia	No	-
Finland	Yes	Employee participation subject to negotiation between company and employees
France	No	Only in state-owned or certain privatised companies For all other companies, employee participation is voluntary and depends on agreement with employees
Germany	Yes	Between one third and half of the supervisory board seats are allocated to employees (one third for companies with more than 500 and up to 2,000 employees; one half for companies with more than 2,000 employees) In companies with more than 2,000 employees, trade unions may also nominate representatives to the board
Greece	No	Only in state-owned companies
Hungary	Yes	one third of members of supervisory board, provided that company has more than 200 employees
Ireland	No	-
Italy	No	-
Latvia	No	-
Lithuania	No	-
Luxembourg	Yes	In companies with more than 1000 employees, one third of the board members are employee representatives
Malta	No	-
Netherlands	Nomination only	Works council has nomination rights for up to a third of the board seats, but may not nominate employees of the company. The board members nominated by the employees still have to be elected by the shareholders.

Country	employee participation (if mandatory, board-level and independent of current/former state ownership)	Details
Poland	No	Only for (formerly) state-owned companies
Portugal	No	-
Romania	No	-
Slovakia	Yes	One third of supervisory board members in companies with more than 50 employees
Slovenia	Yes	One third of supervisory board members (two-tier structure) One to three members, depending on board size (one-tier structure)
Spain	No	Only in state-owned companies
Sweden	Yes	Two to three members of the board
United Kingdom	No	-

Source: Gerner-Beuerle, Paech and Schuster (2013)

Table 8. The Impact of Directive 2004/25/EC on Takeovers

	Volume of takeovers		Protection of (minority) shareholders		Disproportionality between ownership and control	
	CONCENTRATED OWNERSHIP	DISPERSED OWNERSHIP	CONCENTRATED OWNERSHIP	DISPERSED OWNERSHIP	CONCENTRATED OWNERSHIP	DISPERSED OWNERSHIP
Mandatory bid rule	–	– –	+ +	+	+	+ +
Ownership transparency	+	+ +	+	+ +	–	–
	–	– –				
Squeeze-out rule	+ +	+	–	–	+	+
Sell-out rule	– –	–	+ +	+	– –	–
Breakthrough rule	+ +	+	+ +	+	+ +	+
Board neutrality rule	+ +	+	+	–	+	+ +

Source: European Commission (External Study) (2012)

Table 9. Voluntary Offer Procedure in the European Union

SIMPLIFIED OFFER TIMETABLE OF VOLUNTARY OFFER

Event	Time
Discussions with target company and/or shareholders	When the bidder chooses
Decision of bidder to launch an offer	When the bidder chooses
Publication of decision	Without undue delay after decision is taken
Supervisory authority is informed of the decision	EU member states may require information also before decision is made public
Boards of target company and of bidder inform their respective employee representatives	As soon as decision is public
Offer document to be submitted to supervisory authority	Before offer document is published. EU member states may provide that supervisory authority has to approve offer document prior to its publication.
Publication of offer document	"In good time" (according to the directive), which means in a certain time after publication of the decision to be determined by the respective EU member state.
Boards of target company and of bidder inform their respective employee representatives	As soon as offer document is public
Offer period, i.e. time allowed for acceptance of the offer	No less than two weeks and no more than 10 weeks after publication of the offer document. EU member states may provide ▪ for a right of the bidder to extend the offer period, if the bidder gives at least two week's notice, ▪ for rules deviating from the general period in specific cases, ▪ for authorisation of the supervisory authority to amend the offer period in order to allow for a general meeting of the target company.
Reasoned opinion of the board of the target company	During offer period

Source: Cascante and Tyrolt (2014)

Table 10. The Role of U.S. Markets and U.S. Institutions

Institutions and markets in the United States

Banking system	
Commercial banks	Provide short-term lending to firms, residential real estate loans, agricultural loans, and loans to other financial institutions. The Glass-Steagall Act prohibited commercial banks from undertaking investment banking activities but prohibitions have relaxed in recent years.
Savings and loans and thrifts	Traditionally have provided mortgages and other consumer loans. Many have a mutual structure, so depositors are shareholders.
Pensions	
Public	All workers are covered. Pensions are linked to average earnings. Low replacement ratio.
Private	Primarily cover largely defined benefit based on final salary. Indexation provisions rare (5 percent of private schemes); discretionary increases common. Defined-contribution plans growing in importance.
Insurance	Life insurance companies provide tax-advantaged savings vehicles with an insurance component. Property and casualty companies primarily provide insurance, and assets for investment are a by-product. Many insurance companies have a mutual structure.
Financial markets	
Stock markets	There are three major exchanges: the NYSE, AMEX, and NASDAQ. They have traditionally been a significant source of primary funds through initial public offerings (IPOs).
Debt markets	These are an important source of funds for the federal, state, and local governments, as well as for firms.
Derivative markets	Commodity futures markets date from the late nineteenth century. Financial options and futures markets were founded in the early 1970s and have become very liquid. Over-the-counter markets for swaps and other derivatives have significant volume.

Source: Allen and Gale (2000)