Takeover bids are operations that change the ownership of a business, usually resulting in a change in the management and strategy of the latter. The acquisition of giant companies destabilizes the functioning of targets and frequently affects its employees. It undermines the authorities and poses the problem of the role and rights of shareholders. Statutory and regulatory measures are put into place by financial market authorities to enable the smooth running of these transactions and to ensure the protection of rights of shareholders involved in this process.

The practice of takeover bids has been developed in Europe since the mid-1980s and had increased by the end of this period. Thus, after relative stability in the mid-1990s, a new rebound was observed at the end of this decade. The Internet bubble burst in 2000 resulted in a relative stagnation of the phenomenon before being revived over the course of 2003. However, mergers between giants can also have consequences, in terms of consumer interest, because of monopoly. Are M&A controlled in Europe? What about national regulations and their harmonization?

Before giving answers to these questions, we present in the first section a general approach to the term “takeover”. In the second section, we will present the economic impact of takeover bids in the global economy, while stating the importance of the phenomenon in Europe and the United States. The third section shall analyze the degree of control of such operations by competition authorities in Europe.
1.1. Corporate takeover: general description

The reflections given by Berle and Means in the 1930s [BER 32] focused on the separation of ownership and control in business: shareholders entrust the management of the company to managers who do not necessarily have common objectives with those of their constituents. Managers can, for example, take advantage of their position to pay people who are close to them beyond their expertise, or to engage in investments enabling them to increase their social position and not to maximize shareholder wealth. For companies that are controlled by such managers and in which ownership is dispersed, the “the market for corporate control” is the means of disciplining managers by floating the threat of a market sanction over their authority. The market of corporate control provides a protective function to shareholders with regards to the authority of managing bodies.

Before defining the term takeover, we propose to revisit the concept of takeover within the company. Insofar as the control of a company involves the provision and management of its assets by the management team in place, a management that does not improve the wealth of the owners creates an agency problem between shareholders and prepares the ground for a possible corporate takeover.

1.1.1. The control

The historical evolution of the financial structure of companies brings about shareholding, which has progressively become the centre of interest within companies. The separation of ownership and control reflects a situation where the divergence of interests between owners and managers is problematic.

1.1.1.1. General approach to the term

The development of shareholding has been one of the major advancements of companies since the late nineteenth century. The management of affairs and ownership of share capital have become two independent functions: the shareholder is the legal owner of the company and has the right to make profits, a right to a portion of the assets, and a right to vote; the control group is the economic owner, it participates in strategic decisions and in the allocation of corporate resources.
For [FAM 83], “the control of a company is the right to manage the company’s resources (right to hire, dismiss, and determine the remuneration of company managers)”. It is therefore defined as an organization that enables the management of another person’s property as if they were the owner. This control function has raised several issues, specifically on the added value of the managing team. [ADA 76] talks about the inefficiency of companies managed by non-owners: “The directors of this type of company (joint stock companies), being the managers rather of other people’s money than of theirs, it cannot be expected, that they should watch over it well with the same anxious vigilance as the owners. They are led to believe that attention to little things would not be suitable to honor their masters and they pay little or no attention to such. Negligence and profusion, therefore, must always prevail, more or less, in the management of the affairs of such a company”. This thought was echoed by [BER 32], who showed that the separation of ownership and control creates a situation where the divergence of interests between stakeholders, owners, and managers, is problematic.

1.1.1.2. The separation of ownership and control

The traditional separation of ownership rights identifies three categories: usus, which is the right to use property; fructus, which relates to the right to enjoy fruits and, abusus, which is the right to dispose of the property [PAR 03]. Thus, exercising power within the company without being its owner, poses the issue of ownership and control. [BER 32], who interpreted the managerial theory of company (where the owner has fructus and abusus, while the manager has the usus right of the company), were the first to study and stress on this distinction regarding the company. Their research proved that most often managers at the head of a company pursue their own objectives and not the interests of shareholders. The work of [BAU 59, GAL 67] later analyzed the impact of the will of company managers to maximize their usefulness in the company’s investment decisions. Improving business performance and shareholders’ profit come after the primary objective of managers, which is to increase the company size to justify the demand for a more attractive remuneration.

[BER 32] provide a very pragmatic definition of control: “to exercise control requires ownership of a majority of the capital; in reality, due to the constant absence of small shareholders at general meetings and the possibility to gather shares, through shares with double voting rights or shares without voting rights, and through the successive shareholding
systems, it is common that a minority shareholding is sufficient to establish control”. Their main idea is that of a deep separation between the ownership and control; and they evoke ownership without control.

According to the theory of ownership rights, the company is a form of team production organization. [ALC 72, JEN 76] extended this concept by taking into account in their analysis, all contracts entered between the organization and its environment and not only contracts related to the production function. The agency theory completes the economic theory of ownership rights and is considered the primary framework for analysis of the company [JEN 76]. “Company is seen here as a set of contracts which, in an imperfect information world, manages individual conflicts and contains behaviors by setting up appropriate incentives” [COH 99]. Following the same trend, organization is considered as a nexus of contracts. Contractual relations (employees, suppliers, and customers) are the driving force of the company the conflicting goals of shareholders are managed through a set of contractual relations where the starting point is the analysis of agency relationships.

Thus, the shareholder–manager relationship is considered a special case of agency relationship where companies should be run by managers who have no reason to have the same objectives as the capital owners. The expected consequence of this divergence of interest is low performance and destruction of shareholder value. Takeover is, in this case, considered as a solution to the agency problem. Through this observation, one can ascertain that the agency problem is the first justification of the takeover phenomenon.

1.1.2. The takeover concept

Takeover is a general term which could be defined as the transfer of control of a company of a group of shareholders to another (having a majority of voting rights on the Board of Directors, for example). The acquirer pays, in cash or securities, to purchase the shares or assets of another company. When an acquiring company takes over a target company, the right to control all operational activities of the target is transferred to the newly elected Board of Directors in the acquiring company: this is referred to as takeover.
This restructuring process occurs in waves during which companies of various sizes combine according to their field of activity [AND 01]. Takeover may also take different forms within M&A including proxy battles and other more specific operations such as delisting [ROS 90], which usually concern buyback operations with high debt leverage (*Leverage Buy-Out* and *Leveraged Buy-In*).

The proxy battle is not considered a real “takeover”, it occurs when a group of shareholders try to control a number of seats on the Board of Directors through the appointment of new directors in order to vote at shareholders’ meetings on all strategic decisions. Shareholders who do not depend on any group are, in this case, sought by another group of shareholders, “the insurgents”, with the aim of taking control. As for delisting operations, a small group of investors, basically composed of members of the management team in place and a few outside investors proposes to purchase the listed company’s shares which will be delisted and shall no longer be subject to a purchase on the financial market. An example includes the withdrawal of a subsidiary by a parent company.

### 1.1.3. Techniques and classification of M&A

The M&A are at the confluence of several fields: finance, law, industrial economy, strategy, and management. Their interdisciplinary nature contributes to their diversity. [MEI 03] classify M&A on many economic, financial, strategic, and legal criteria:

- legal framework of the relationship is the equity investment level (100%, 70%, and 51%) and control nature of the company purchased (the shareholding structure);
- merger objectives: a buyer’s motivations to purchase another company;
- the degree of merger before the acquisition transaction (hostile or friendly takeover);
- the size, sector, and degree of internationalization of the operation in order to measure the scope and consequences of the transaction.

Thus, the choice made by acquiring companies differs according to takeover procedures, which do not have the same comparative advantages.
Thus, there is a difference between operation realized in stock exchange and over-the-counter transaction.

1.1.3.1. **Stock exchange transaction**

The purchase of a company involves two instances depending on whether it is listed or not. If the targets not listed on the stock exchange, the acquisition will almost always be friendly, except for acquisition of ailing companies. In the case of listed companies, the transaction may be friendly or hostile. Acquisition of all or part of the listed shares corresponds to regulated procedures which include: stock accumulation, the disposal of blockholdings (or significant blocks), and finally tender offers:

- stock accumulation corresponds to the successive purchase of securities of target, offered for sale on the market. This method is simpler and less subject to regulatory constraints;

- acquisition of blockholdings is the most common procedure for the takeover of listed companies. This involves the purchase of a quantity of shares which enables the purchaser to take control. Practically, this procedure is faster and more discreet than public bids.

These strategies of purchasing significant blocks and stock accumulation ensure equity investments that initially facilitate the establishment of wealth relationships between the companies involved in M&A. It should be noted that in the case of blockholdings purchase, the securities purchase price can be higher than the market price, unlike stock accumulation, because of the greater control power that it provides immediately. However, such operations do not allow a takeover of all company securities because they are limited by legislation, which first of all, imposes declaration relating to the crossing of certain thresholds and the launch of takeover bids in some cases. Finally, it should be noted that this lack of discretion when crossing certain thresholds leads to a little loss of interest in these techniques, often used by purchasers in the “crawling” approach phase.

Public takeover offers is an operation whereby a company informs the shareholders of another company publicly that it is willing to buy their securities at a specified price, higher than the stock market price. There are two types of public offer: tender offers for which payment is made in cash and exchange offers for which payment is made in securities. It is worth mentioning here
that there is also an alternative bid which gives an opportunity to pay in cash and securities (mixed operation). Thus, takeover may be unfriendly or friendly as they occur before or after negotiations between managerial staffs of the two companies concerned.

There is a normal procedure and simplified procedure for the management of takeover. The takeover procedure is limited in time and accompanied by a resolutory condition: it defines the minimum number of securities to be offered by the shareholders of the target, for the purchase to be complete, this minimum corresponds to what the offer or considers necessary to possess in order to exercise its control.

The takeover of a listed company may also be achieved over-the-counter through the special merger procedure.

1.1.3.2. Over-the-counter transaction

A merger is a transaction whereby two or more companies combine their assets to form a single company. This operation is carried out over-the-counter, because it depends on the willingness of the general board meetings of the merging companies. These mergers may be carried out in different forms: merger-absorption, partial offer of assets, and then contribution of securities [MOR 91]. The common characteristic of these operations is the irreversible transfer of assets taking place between partners and payment of target shareholders or partners in securities and not in cash.

During a merger, the merging of the companies concerned results either in the case of “pure merger or the creation of a new company whose shareholders are those of the two extinct groups (Aventis was as a result of the merging of Hoechst and Rhône-Poulenc that disappeared after the transaction) or, in the case of “merger-absorption”, upon the disappearance of the acquiree, whose shareholders are paid in shares of the acquirer (the merger between Carrefour and Mammoth led to the disappearance of the acquired company). In both cases, these operations have a dual characteristic: this is the most complete method of merging two companies; all the active as well as passive assets are disposed. Mergers are also voluntary acts where both companies agree to come together.

In the case of “contribution of securities”, shareholders of target company exchange their shares for the acquirer’s shares, both companies continue to
maintain a corporate relationship after the transaction. Regarding the “partial offer of assets” the target company disposes of only part of its assets (transfer some of its activities) to the acquirer against the payment made in securities by the latter. Thus, Total-Fina-Elf had to transfer part of its motorway filling stations to Carrefour and Leclerc centers.

Based on studies, the framework of the takeover process is quite broad and the term M&A brings together several heterogeneous concepts. The distinction between M&A transactions is also made according to the economic logic on which these transactions are based, a distinction which depends on the level of sector proximity between the companies involved and the desired position in this union. This finding is used to classify M&A in different categories.

1.1.3.3. M&A classifications

Generally, the various definitions or classifications are initially based on the theoretical foundations from economy and finance. In the United States, the Federal Trade Commission classifies M&A into four categories. Thus, there are four types of mergers [COU 03].

1.1.3.3.1. Horizontal M&A

These are transactions between competing companies that are at the same stage of the production chain (Air France and KLM, Mercedes and Chrysler, Carrefour and Promodès, and so on). This type of merger is the most frequent of takeover cases in the United States and Europe. Its main objective is specialization in order to ensure a significant market share and achieve economies of scale. Thus, horizontal mergers are homogeneous when companies produce the same type of goods (merger between Peugeot and Citroen in France), heterogeneous when they produce different but related goods (merger between Evian and Kronenbourg). Horizontal transactions are supervised by the merger regulatory authorities since they restrict competition within the industry. This can be detrimental to consumers.

1.1.3.3.2. Vertical M&A

Vertical M&A relates to companies of the same industry, but at different stages. This type of merger may take the form of an upstream integration
policy in the industry (purchase by suppliers) and also downstream through the acquisition of distribution networks. The oil industry reflects this form of integration since refiners control their own gas distribution network; another example is the *Hachette* group which is at the same time publisher, distributor, and broadcaster through the *Relais H* network. This option was equally adopted by the *Walt Disney* group which carried out a downstream integration by buying *ABC* television, in order to increase the broadcasting of *Disney* shows on *ABC*. The advantages of this type of merger vary according to context: streamlining activities, improving coordination between businesses, control of supply and quality, ownership of margins previously reached by the acquired company, and achievement of economies of scale. This strategy controls the entire economic chain, right from the raw materials to finished products.

### 1.1.3.3.3. Concentric M&A

It is the combination of companies with complementary businesses. The objective is to expand the product range as well as customer base (the logic of complementarity of resources used and skills required). The combined companies have interrelated technological activities.

### 1.1.3.3.4. Conglomerate M&A

Conglomerate M&A deals with the merger of companies from different sectors with activities that do not have any apparent relation with each other (acquisition of *Gymnase Club* (fitness) by *Club Med* in France). For example, before being purchased by *Vivendi*, the *Seagram* group was present in the market for wines and spirits as well as the cultural industries. This conglomerate diversification is based on the acquirer’s will to better diversify risk and limit expected synergies for purely financial reasons. Several types of conglomerate acquisitions can be distinguished: concentric conglomerate transactions consist of taking over a company in order to expand the activities of the acquirer, since their activities are close; other transactions are described as pure conglomerate. The *Vivendi* group is a typical case: the company was founded in 1953 under the name *Compagnie Générale des Eaux* (General Water Company) and its activity was to distribute water all over Lyon in France. In the 1980s, it began a process of conglomerate diversification (transport, energy, real estate, etc.). It changed
its name in 1998 to *Vivendi Universal*. In 2006, *Vivendi Universal* again changed name and became *Vivendi*, activity refocused on telecoms and media. The conglomerate lasted.

Although these merger operations do not involve financial market transactions, they continue to be subject to companies listed for review by the stock market authorities, who ensure that exchange parities are not prejudicial to any party. Thus, the mergers that lead to the creation or reinforcement of a dominant position are prohibited in order to prevent possible excesses. A company is dominant when it is able to act in the market without taking into account competitors’, suppliers’, or customers’ reaction. All market operators and especially consumers, have to dread the emergence of these dominant structures which may result in higher prices, reduced product supply, or scarcity of innovation. Controlling mergers is necessary in order to prevent a deregulation of the market.

### 1.1.4. Conclusion

Although M&A transactions could be justified by the achievement of economies of scale, search for synergies, increase market share, and better price control, the fact remains that they may have undesirable consequences such as changing competition conditions by increasing the company’s market power, which may lead to anti-competitive agreements and practices. Studies on this type of transactions note an alternation between periods of intense activity and relative stability: a wave phenomenon. In the United States, four peak periods (see graph below) were observed during the twentieth century. From 1895 to 1904, there were horizontal transactions of monopolistic nature, “merger for monopoly”; this wave corresponded to the creation of huge corporations that resulted from the industrial revolution, this also gave rise to the first antitrust legislation. From 1916 to 1929, an oligopolistic wave occurred, “merger to oligopoly”. These first two waves led to the creation of larger companies, with vertical integration, resulting in an increase in industrial concentration. From 1955 to 1970, a third wave of merger is characterized by a general combination of various conglomerates. The last wave, that of the 1980s, has more financial meaning than the previous three, affecting all sectors and becoming international, with lots of debt financing; it is characterized by mostly hostile acquisitions.
In 1999, more than two thirds of international M&A (estimated in number) were horizontal, less than 30% conglomerate, and 2% vertical (56%, 38%, and 6% respectively in value) [OEC 01]. In 1998 and 1999, the number of horizontal mergers increased significantly, reflecting the general trend of companies refocusing on their core business. The last wave is characterized by its magnitude: it increasingly covered a large number of companies, of more significant size, and brought together companies of various nationalities. The ten most significant transactions in 2000 were all international transactions, reflecting the importance of the economic impact of business combination operations in the global economy.

1.2. The economic impact of takeover bids

By the early 1990s, the takeover bid and exchange offer fever ruled over the world’s leading companies.

It has increased since 1997 with more and more important transactions involving large companies. These operations are most often the result of a
strategic process in a given sector other than a company’s individual action. This behavior explains why takeover bid waves may emerge in some areas. They also differ depending on countries.

After many operations in the late 1990s, takeover bids became extremely rare at the onset of the new millennium. Three years after the burst of the Internet bubble, the time for major operations seemed to return. 2005 was the busiest year for company mergers since 2000 and takeover bids soared globally during the fourth quarter. Transactions performed in the United States reached a value of 1,100 billion Euros. In Europe, the figures also increased by 49% as compared to 2004.

The wave observed in Europe in the 1990s (a growth of 50% of the value of cross-border acquisitions in 2000) was favored by globalization and deregulation, as well as the dismantling of public service monopolies. The main actors include Germany, France, and the United Kingdom. The wave involved several sectors, including telecommunications, media, and finance as well as computer and electronics.

In 2005, European markets were concerned about the beginning of a new cycle of merger in Europe. Since a sustainable economic recovery was not guaranteed, companies focused, in 2003 and 2004, on the shareholder remuneration logic and remained reluctant to embark on large-scale merger operations in the Old Continent, preferring to consider investing in the new Asian Eldorados.

The following section initially aims at showing the international evolution of M&A phenomenon by mentioning the involvement of European companies in cross-border operations, and this since the 1990s, as the most significant increase of the external growth movement is observed from 1990 to 2000. Subsequently, the resumption of these operations is analyzed three years after the burst of the Internet bubble, through the latest wave observed on market of corporate control in Europe.

1.2.1. Global development over the period 1990–2000

For analysis purposes, M&A are classified into two major categories: cross-border and national transactions. The term inbound M&A below, is
used for the acquisition of local businesses and outbound M&A for the acquisition of foreign companies:

- cross-border transactions: these transactions involve companies operating in at least two different countries. This category includes community and international transactions;

- community transactions involve only European Union companies. Such transactions have, by definition, effects that are beyond the borders of a member state and are particularly important from a community perspective, since they influence European market’s integration;

- international transactions involve at least one non-community company, and may be further divided into two sub-categories depending on whether the community company is the target or acquirer;

- domestic transactions: companies involved (target and acquirer) originate from one and the same member state.

1.2.1.1. Cross-border M&A from 1990 to 2000

The cross-border M&A wave of the 90s has several specific characteristics, which mainly involve the scope and rate of these transactions1. During this period, these transactions increase rate (almost 50% per year, especially between 1995 and 1999) led to a more than fivefold increase of M&A value worldwide. It rose from 153 billion dollars in 1990 to 792 billion dollars in 1999; the highest increase was recorded in 1998 with a growth rate that reached 86%.

This growth rate slowed down in 1999, but the phenomenon remained significant with an amount that was 36% higher than that of 1998, and more than twice the amount of 1997. The number of multinational M&A increased by threefold during the period 1990–1999, moving from 2,572 billion dollars in 1990 to 7,242 billion dollars in 1992.

It should also be noted that these multinational M&A activities practically doubled during this period rising from 59 million to 109 million dollars. Figure 1.2 shows the progress in number and value of transactions during the period.

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1 Following are the statistics of Thomson Financial.
2 See Figure 1.2.
Most of multinational M&A transactions bring together the major OECD regions (Europe, North America, and Asia-Pacific). As for the value of these transactions during the 1990s, Europe and North America accounted for 46% and 36% respectively of all inbound cross-border M&A (target companies are of European or North American origin). The Asia Pacific region accounted for only 9% of all takeover bids and exchange offers worldwide during the same period, with almost 15% points in the mid-1990s. In order to analyze these cross-border operations, a distribution of inbound and outbound M&A is studied according to region (Europe, America, and Asia) and country.

1.2.1.1.1. The distribution of inbound M&A

Figure 1.3 below shows the distribution of M&A international transactions in Europe, America and Asia. The transactions are expressed in billions of dollars.

Figure 1.3 shows that in the 1990s, OECD countries benefited most from inbound M&A. They attracted 87% (USD 2,302 billion) of the total value of these transactions (2,641 billion dollars). Europe and North America were stakeholders in the majority of inbound M&A transactions. The United States, the United Kingdom, France, Germany, and the Netherlands are the countries that attracted the greatest volumes of inbound M&A, with
respectively 32%, 16%, 5%, 5%, and 4%. Japan and Australia attracted 7% of inbound M&A. Table 1.1 shows the distribution of inbound M&A in terms of value between the different OECD member and non-member states.

![Inbound M&A by region](image)

**Figure 1.3. Inbound M&A by region**

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<td>4.7</td>
<td>1.4</td>
<td>3.0</td>
<td>4.1</td>
<td>3.1</td>
<td>3.3</td>
<td>7.0</td>
<td>14.8</td>
<td>22.3</td>
<td>10.7</td>
</tr>
<tr>
<td>Global overall</td>
<td>152.7</td>
<td>83.3</td>
<td>81.1</td>
<td>82.0</td>
<td>131.7</td>
<td>189.4</td>
<td>232.2</td>
<td>314.0</td>
<td>583.2</td>
<td>791.6</td>
</tr>
</tbody>
</table>

Source: Thomson Financial.

**Table 1.1. The distribution of inbound M&A by region and by country (billions of USD)**
1.2.1.1.2. The distribution of outbound M&A

Regarding outbound M&A (corporate acquisitions), Europe globally represented 60% of overall outbound cross-border M&A in the 1990s, while the rate of operations carried out by North America and Asia-Pacific were 27% and 8% of this total respectively.

OECD countries also played a predominant role in outbound M&A. Regarding the value of these transactions, these countries shared 92% (2,424 billion dollars) of the overall outbound M&A (2,641 billion dollars) during this period. Thus, almost 60% of all the outbound transactions were conducted by European acquirers, against 27% for North America. Five countries accounted for almost 55% (1,746 billion dollars) of outbound M&A between 1990 and 1999, divided between the United States (22%), the UK (10%), France (9%), Germany (9%), and the Netherlands (5%). Other industrialized countries, such as Japan and Australia, participated with a rate of 5% of the overall outbound M&A between 1990 and 1999. Table 1.2 illustrates the value breakdown between different OECD member and non-Member States.

Source: Thomson Financial.

**Figure 1.4. Outbound M&A by region**
The liberalization and deregulation of markets in all OECD countries accelerated the process of globalization as seen in particular in cross-border M&A. These cross-border acquisitions do not evolve in the same manner across countries and regions, and there are outstanding differences between OECD member countries and non-member developing countries. European countries like the United Kingdom, France, Germany, and the Netherlands played a leading role in international transactions as acquirers and/or targets. The origin of the acquiring companies in the United States and Europe is analyzed as follows:

### 1.2.1.2. The origin of cross-borders M&A

European companies seem to be more active in terms of acquisition of US companies. In Europe, community acquisitions are predominant: the acquiring and target companies are in most cases European.

### 1.2.1.2.1. Origin of acquiring companies in the United States

Globally, the United States acquired 32% (852 billion dollars) of inbound M&A (2,641 billion dollars) in terms of transactions value, and European
companies played very active role in the acquisition of US companies. They were responsible for nearly 74% of inbound M&A in the United States in the 1990s. In 1999, European acquisitions accounted for 80% of inbound M&A value in the United States. United Kingdom, German, and French companies accounted for the increase in such transactions in the United States in the 1990s; Canadian companies also played a very significant role. By contrast, the share of Asian and particularly Japanese companies declined from 42% in 1991 to 2.2% in 1999. During the first half of the 1990s, US companies subject to acquisitions were active in the pharmaceutical, insurance, chemical, electronic, and electricity industries. The tendency was subsequently tilted towards the telecommunications, oil, gas, and transport equipment industry.

1.2.1.2.2. Origin of acquiring companies in Europe

From 1990 to 1999, European countries absorbed 46% (1,202 billion dollars) of overall inbound M&A operations (2,641 billion dollars) in terms of transaction value. Most of these M&A transactions are attributable to other European countries. European countries accounted for 65% of these inbound European M&A during the 1990s and 72% in 1999. France, the United Kingdom, and Germany are the most active acquirers with nearly two-thirds of the transactions during this period. North American companies accounted for 28% of these operations and the share of Asian countries, including Japan, declined from 13% in 1990 to 4% in 1999. Corporate acquisitions in Europe concerned (telecommunications, insurance, and banking) industries, high-tech (chemical and pharmaceutical industry), gas and electricity, food, and transport equipment industries.

After describing the origins of acquiring companies in both regions, we can now develop a comparative study, between Europe and the United States, on the progress of this activity during the 1990s.

1.2.1.3. A comparison of the progress of M&A in Europe and the United States

The progress of M&A transactions is compared between the two regions in terms of the number and value of transactions carried out. Figure 1.5 presents this progress.
M&A transactions carried out by companies between 1993 and 1998 increased both in the United States and the EU. During this period, US companies remained more active than their European counterparts; we also note that the gap between the two regions widened till 1998. The M&A trend began to slow down in the United States from 1999 only to decline between 2000 and 2001. By contrast, European companies’ transactions increased in 2000 before experiencing a similar decline in 2001.

The explanation for this progress in the number of M&A is connected with the economy. The low economic growth rates recorded in the EU in 1992-1993, 1996 and 2001 is reflected in the decline in M&A activity during these periods. Regarding the distribution of these transactions in Europe, the United Kingdom is at the top, followed by Germany, France, the Netherlands, and Italy. These transactions are poorly correlated with the GDP share of each country. Thus, other factors play a key role, such as the extent to which companies resort to the stock market for self-financing. The European Monetary Union had an effect on the number of M&A transactions: Euro countries witnessed the progression of such operations in 1999 and 2000 faster than other countries. Figure 1.6 describes the overall amount of M&A transaction involving an American or European Union company.

Thus, by comparing Figures 1.5 and 1.6, we see that the decline in M&A transactions recorded in the United States since 1998 is not reflected in the transaction value, which continued to increase in 2000, before declining in 2001. By comparison, in the EU this overall amount peaked in 1999, while the
number of transactions continued to grow until 2000. This indicates the effect of a small number of mega-M&A transactions on the aggregated amounts. This higher level of M&A activity in the United States, particularly in terms of transactions value, is explained by the difference in size of economies.

![Graph showing total amount of M&A transactions involving US and EU companies](image1)

**Figure 1.6. Total amount of M&A transactions involving US and EU companies**

However, the relative size of GDP does not, in itself, explain this difference in activity level between the two regions. Until 1999, the difference between the intensity of M&A activity in the United States and EU was significantly greater than that between their GDP, and this difference kept increasing as shown in Figure 1.7 below.

![Graph showing total amount of M&A transactions in GDP percentage](image2)

**Figure 1.7. Total amount of M&A transactions in GDP percentage**
From 2000 to 2001, the ratio between the overall amounts of M&A to GDP remained higher in the United States despite an increase in the number of transactions in the EU and a sharp decline in the United States, because of the higher amounts of such transactions in this country. This was due to the total stock market capitalization which has always been higher in the United States than in EU countries. Other factors also led to the promotion of M&A activity in the United States, for example the regulatory climate (less restrictive than in the EU, despite the major changes it brought), corporate governance (shareholding is widely practiced in the United States and markets play a greater role of arbitrator in the struggles for the control of companies) as well as some cultural aspects (confidence in the capital markets, risk aversion, etc.).

The regulatory environment greatly influences M&A activities. In effect, the slowdown in these activities in Europe over the year 2000 was due to the fact that such operations were subject to a particularly in-depth examination by the regulatory authorities (for example, the three-way merger between Canadian Alcan Aluminium Ltd, French Péchiney SA, and Swiss ALgroup, or the transaction between Warner Inc and EMI group).

The favorable M&A modalities make it a fast and efficient method of entering a foreign market. The progress of these cross-border acquisition operations during the past decade has been supported by the economic and regulatory policies between countries (free trade agreements, privatization programs, etc.) and also by the economic and political regional integration (creation of a single market). The European Union has played a crucial role since European companies have achieved half of global acquisitions of foreign companies, against a quarter for US companies. During this period, the increase of M&A transactions gave corporate leaders the impetus to increase their accounting leverage effect. This logic was marked by the resort to public exchange offers (PEO) and without any liability to debt or cash payment to the shareholders of the target company. The transactions of the late 1990s were further motivated by financial aspects than by an industrial or economic logic [KHA 04]. Other research studies have equally attempted to explain the phenomenon beyond the economic and financial logic and show that the wave phenomenon appears to be the result of an imitation effect [CAB 02].

Following the outburst of new technologies in 2000, the international market of M&A collapsed. It took three years for it to be restored. In 2003,
the increasingly accelerating number and value of transactions, led practitioners and researchers in this field to start reflecting about the beginning of a new cycle of merger. In late summer 2007, the first credit crisis signs brought doubts about the global economy. The M&A market was stagnant and companies saw their profits prediction scaling down. Availability of liquidity became scarce and project financing through bank loans became difficult. The year 2007 was the peak year in view of the slowdown of transactions observed in 2008. From January to December 2008, the total value of M&A dropped by 27%, to 2,860 billion compared to 2007.

Prior to the study of the impact of the subprime crisis on M&A dynamics, the specificities of this recent wave are analyzed below.

1.2.2. Characteristics of the recent M&A wave: 2001–2007

The year 2004 was marked by a substantial recovery in the M&A market, with highest volumes since 2000, gaining 40% worldwide and 37% in Europe. The big “deals” accounted for most of the increase. The mega-takeover bids were back, especially on the other side of the Atlantic, with large scale transactions and in different sectors: telecommunications, software, pharmaceutical, and banking industries.

1.2.2.1. A strong recovery confirmed by the figures

Takeover bids kept multiplying. The fact that several multinational companies assimilated their austerity plans and rigorous policy armed them with “war chests” likely to finance acquisitions. Other indicators came to add to this, including favorable financial factors such as the continued decline in interest rates.

According to Thomson Financial data, the aggregate transactions amount announced worldwide in 2004 was around 2 billion dollars, of which, December alone accounted for 300 billion (this increase was the most significant since 1998, when the amounts increased by 80%). Four mergers\(^3\) occurred in just three days, thus totaling nearly 90 billion dollars: for 36 billion, Sprint and Nextel merged to become the new third telecom giant in the United States; Johnson & Johnson laboratory acquired Guidant,\(^3\) L’Expansion of 16 December 2004.
specializing in cardiovascular equipment, for 25 billion. Finally, regarding software and software packages, Symantec and Veritas merged for 13.5 billion while at the same time and for the same amount, Oracle succeeded in taking over its rival PeopleSoft after eighteen months of relentless struggle.

Before the announcement of this quadruple merger, some transactions had set the tone. Cingular had distinguished itself in February 2004 by launching its bid for AT&T Wireless for 41 billion dollars. Some months later, the banking industry stood out in turn by reporting spectacular mergers, like the duo JP Morgan Chase and Bank One for 58 billion dollars, then the tandem Abbey National and Santander for 16 billion dollars. The Mexican cement manufacturer Cemex took over British RMC for 5.8 billion dollars and the steelmaker Mittal Steel stood at the top globally by acquiring US International Steel Group for 4.4 billion dollars.

This trend was not limited to the Anglo-Saxon world. In Europe, although the increase was less significant, volumes were also at their best since 2000: the cumulative announced transactions amount increased by 37% to 693.8 billion dollars, accounting for nearly a third of the world market. We also note that the biggest takeover of the year was done by the French Sanofi-Synthelabo which acquired its competitor Aventis for 73 billion dollars, and this propelled France to the rank of third most active country of the year.

The balance sheet for 2005 was positive both in terms of economic growth and stock market performance. Takeover bids were popular in the United States (+30%) and Europe (+49%), driven in particular by a bubbling fourth quarter. This year was more active and prolific in terms of corporate mergers4, and was equally same for initial public offerings. This was thanks to the stock market recovery, interest rates, which remained affordable and also to investors who no longer talked only of cash flow but also of growth.

Transactions performed that year, about 28,000 according to the research firm Dealogic, totaled 2,900 billion dollars that was 38% more than in 2004. According to figures from this research company specializing in the monitoring of investment banks activities, transactions carried out in the United States focused on 1,100 billion Euros, and as in Europe, the increase compared to the previous year was 30% and 49% respectively, with a

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comeback in many areas. For example, they include the sale of *Gillette* to *Procter & Gamble* and the acquisition of *ATT* by *SBC Communications Group* for 16 billion dollars, the acquisition of the operator *MCI* (formerly *WorldCom*, who went bankrupt in 2002) by *Verizon* for 5.3 billion dollars, *Nextel* by *Spring, Johnson & Johnson* which got hold of *Guidant*, and the acquisition of *Sears* by the department store chain *Kmart*. This movement followed the two logical years of “purge”, after the 1999–2000 boom favored by the Internet bubble.

Concerning Europe, there was, in France, the acquisition of *Marionnaud* by the Chinese group *Watson*. The historic French operator *France Telecom* resumed external growth by acquiring the Spanish mobile network *Amena* and tried to get hold of the Belgian *Telindus*. In the United Kingdom, there was the raid of the Spanish *Telefónica* on *O2* for an amount of 26 billion Euros as well as its takeover of *Ceski Telecom* for 2.74 billion. Among the latest major operations in Europe, one can also cite the bid of Swiss cement manufacturer *Holcim*, the second world cement manufacturer after *Lafarge*, for the acquisition of British *Aggregate Industries*, which represents a valuation of 3.6 billion Euros. That of the British bank, *Standard Chartered* for the acquisition of the number seven bank in South Korea, *Korean First Bank*, valued at 2.5 billion Euros.

In addition to the United States and Europe, the M&A phenomenon was also striking in Australia and very active in Asia thanks to favorable borrowing conditions and a net economic recovery after the recent crises. In Asia, the Japanese market, which confirmed its recovery, was the most active, and many transactions took place in India, Indonesia, and China. China which has become the fourth world power, beating Britain and France, witnessed the highest increase in M&A in the region in 2005 according to *Standard and Poor’s*. Markets seem convinced that this activity will continue to grow and that a resurgence of business combinations would gain grounds in the United States and Europe in the coming quarters.

While industry consolidation in the United States and Europe was the engine for business combinations in 2005, a study by the rating agency *Standard and Poor’s* predicted an increase in these transactions number and value in 2006 due to the constant flow of money from investment funds. Even if interest rates rose, they remained at historic lows and continued to

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5 Asia moved from 1% in global activity in 1985 to nearly 6% in 1999 [BLA 00].
push investors to inject capital into private equity and hedge funds, allowing them to be competitive with rivals when a share buyback opportunity occurred. This influx of capital from private investors particularly covered the aeronautics and defense, building, retail, and health care materials industries in the United States.

Figure 1.8 illustrates the progress of this wave in Europe and the United States since early 2003.

![Figure 1.8. Progress of M&A transactions in the world, the United States and Europe](image)

Although European markets questioned the beginning of a new cycle of merger, European companies, reluctant to engage in large-scale transactions on the continent, opted to invest in new Asian el dorados, especially in China, driven by the overvaluation of the Euro, and the fixed parity between the dollar and the Chinese Yuan. In 2003 and 2004, European companies focused their strategies towards shareholder remuneration logic through share buyback and generous dividend distribution programs. In 2005, CAC 40 companies bought back their own shares for 6.3 billion Euros (net of disposal of shares), representing 0.7% of their average market capitalization in 2005, and distributed 24 billion Euros in dividends.

The argument in favor of this mechanism is known: takeover bids guarantee economies of scale and increase market shares. Yet these transactions continue to raise many questions about their economic
efficiency, because reality shows the difficulty for companies to improve the performance of the new entity: about two thirds of these transactions end in failure and 30% in success [WES 99, AND 01]. However, empirical studies may be contradictory, raising issues that this or that researcher may have undervalued, some of which are significant, like the historical period for example. The real long-term added value of these acquisitions still arouses debates. This raises questions, as is the case for each major M&A wave, on the bases of this new wave of corporate takeovers and the effects on the companies involved, and on the economy as a whole.

1.2.2.2. Economic and strategic motivations for the recent M&A wave

Achieving economies of scale, refocusing on the core business and the need to restructure in order to strengthen competitiveness, among others, motivated the recent wave observed on the takeover market. Furthermore, this occurred in a macro- and microeconomic recovery-friendly environment, especially in terms of financial conditions.

1.2.2.2.1. Explanatory factors to the acquisitions

Current companies’ acquisitions are characterized by the accelerated globalization of economies, financial deregulation, and ongoing technological innovations. They support important industries restructuring needs in a context where companies tend to lose their competitiveness. Most of these current acquisitions are horizontal type (they bring together companies whose activities are located at the same stage of the production process). These horizontal agreements have different purposes. Besides achieving economies of scale (cost reduction due to the increase in the quantities produced), the company that emerges from the takeover process has other motivations: increase of market power by the deliberate exclusion of actual and/or potential competitors, refocusing on the core business and skills, acquiring new technologies, and distribution of investment risk (particularly in research and development), aim at giving the newly created company a competitive advantage.

1.2.2.2.2. Economic and financial contexts favorable to acquisition

Macro- and microeconomic environments were favorable during the recent wave of acquisitions. The relatively low interest rate level in the United States portrays this context. The increase in return on equity, high expected profits, restoring funding capabilities, and also improving equity
valuations, inherent in the companies themselves, indicated a continued recovery of takeover bids, at least for the years 2006 and 2007.

**Debt financing**

Interest rates remained very low in the United States and France. Since late 2000, the rates have not exceeded the 5.5% mark. During the period December 2004 – March 2006, these rates hovered between 3% and 4% in France and 4% to 5% in the United States. They reached a low level in September 2005 (see Figure 1.9). From early 2006, central banks continued their gradual monetary tightening policy. In the United States, the Fed Funds were increased by 50 basis points compared to late 2005, while in Europe the increase was low (25 basis points). In this context, the “spreads” of credit remained stable throughout the first quarter, as credit quality, in Europe and the United States, remained strong since the start of the year. This implies that companies were able to find more favorable financing conditions.

![Figure 1.9. Changes in interest rates in the United States and France](source: www.amf-france.org)

**Stock market conditions**

US and European stock indexes started rising in 2003 and continued to rise thanks to the good performance of activity indicators (see Figure 1.10). The late 2005 rally thus continued until early 2006. European stocks displayed the best performance since early 2006 (see Figure 1.11). In the first quarter, CAC 40 and Dax rose by over 10%
against 6% for Nikkei, and 3.7% for Dow Jones and S&P 500. The good results of companies, with profits often higher than expected, played a fundamental role in this upward trend of stock markets. In a global context that remained favorable in terms of volume growth, the equity markets had to continue reflecting the upward trend in profits.

![Graph of Long-term progress in stock market indexes](source: www.amf-france.org)

**Figure 1.10.** Developments in long term stock market indexes in the United States and Europe

![Graph of Changes in stock indexes in Europe over one year](source: www.amf-france.org)

**Figure 1.11.** Changes in stock indexes in Europe over one year
Four years after the low point recorded in 2000-2001, corporate profitability returned to historically high levels, both in terms of margins, return on equity, and the national added value share. Companies now had the means to undertake external growth transactions especially in a period where undervalued businesses could be acquired cheaply. We also notice that the average level of *Price Earning Ratio* in the euro area appears slightly lower than that of the United States, 17 against 18.5 respectively. Figure 1.12 reflects changes in this ratio over 5 years.

![Price Earning Ratio - Europe and United States](image)

**Figure 1.12. Evolution of the PER in the United States and Europe**

However, this wave took place under different circumstances compared to the past decades. Due to the increase in the cash available, including and especially the persistence of risk aversion associated with equity and acquisitions made were primarily funded by cash, even as cases of disposal of assets persisted. The constant increase in the number and value of these transactions was the sign of a *sixth wave* according to some experts, who saw these as a period of predominantly horizontal transactions with more than financial justifications [KHA 04]. While for others, the wave phenomenon was only an imitation effect [CAB 02].

Fifteen transactions announced in the first quarter of 2006 alone involved amounts exceeding 10 billion dollars, against some thirty transactions only for all of 2005. Among the most outstanding transactions, there was, in particular, the merger between telecom operators *Bellsouth* and *AT&T,*
which was worth 83 billion dollars. In the European energy sector, there was a comparable struggle for the acquisition of *Endesa* and *Suez*, transactions evaluated respectively at 56.6 and 54.2 billion dollars, or the hostile bid launched by *Mittal Steel* for *Arcelor* for almost 22 billion dollars. These transactions thus confirmed the return of mega-takeovers, whose international momentum would be slowed by the *subprime* financial crisis from summer 2007.

### 1.3. Regulation and control of takeover bids in Europe

One of the pillars of European Union’s competition policy is merger control. Whether by merger, acquisition, or creation of joint venture, these business combinations usually result in beneficial effects for the market: companies become more efficient in the interest of final consumers who benefit from better products at more reasonable prices. It is completely legal that a company has a dominant market position if that position is the result of its competitive power, whereas acquiring this position by taking over its competitors is contrary to European competition law. However, the prohibitions are, fortunately, very rare because these companies often manage to resolve the competition issues through the sale of part of their business (the case of *Total-Fina-Elf* which sold to *Carrefour* and *Leclerc* centers part of its motorway filling stations). It was from 1990 that the Commission was asked to examine the validity of large scale M&A transactions.

M&A operations are analyzed in order to rule on their compatibility with the common market (the primary criterion of compatibility with the common market is represented by the effects of the merger on competition on the markets in which the merged companies are present). Merger operations that may create or strengthen a dominant position significantly preventing effective competition are declared incompatible. The same goes for the creation of a joint venture involving a merger operation in view of coordinating the competitive behavior of companies that remain independent.

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6 A merger occurs when two or more previously independent companies merge, or one or more persons (already controlling at least one company), or one or more companies, acquire control of one or more other businesses.

7 The European Commission authorized, under the EC Merger Regulation, the proposed acquisition of joint takeover of Thales by Dassault Aviation and TSA, all three of which are French. After examination, the Commission concluded that no significant impediment to effective competition will result in the European Economic Area (EEA) or in any substantial part of the latter.
Firstly, the control of M&A transactions within the European Union is discussed. Then, the role of local and national public authorities is presented, and finally the regulation on takeover bids within the European Union is examined.

### 1.3.1. Merger and acquisition control in Europe

There is a separation of competencies between the European Commission and member states regarding M&A control as defined in Article 3 (1) of the EC Merger Regulation\(^8\). The Commission has exclusive competence to examine mergers when the turnover of the companies involved exceeds the thresholds referred to in Article 1(2) or 1(3) of the Regulation. Member states have jurisdiction over operations involving companies whose turnover exceeds the thresholds in accordance with their respective national laws on merger control. However, in some situations, a referral system enables the Commission to know the mergers with amounts below the thresholds set by the EC Merger Regulation, and vice versa.

#### 1.3.1.1. The adoption of M&A regulation

Until the late 1980s, the European Union still did not have, at its disposal, an appropriate instrument for the systematic control of M&A that affected markets beyond national borders. After discussions that lasted 16 years, the Council adopted the Regulation on the control of concentrations between undertakings – Council Regulation (EEC) No. 4064/89 of 21 December 1989 – in view of controlling large scale mergers. A one-stop shop was created for the entire European Union, and the new rules became operational on 21 September 1990.

This regulation is a unique control system for the entire European Union and applicable to all M&A which have a community dimension\(^9\), that is which meet the thresholds under Article 1 of the M&A Regulation. It was initially planned that the turnover thresholds set in Article 1 of the M&A Regulation would be revised in 1993, but on this date, the legislature

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\(^8\) See footnote 9

\(^9\) The Merger Regulation defines the “community dimension” of a concentration from thresholds based on the turnover of the companies concerned. The main thresholds are the global thresholds (5 billion Euros) and the community threshold (250 million Euros). Below these thresholds, control is exercised by national authorities in the member states, in accordance with their own legislation.
considered that the experience acquired was not enough and decided to postpone the revision. In 1998, after an in-depth examination of the experience acquired, the M&A Regulation was amended by Council Regulation No. 1310/97 of 30 June 1997. The community legislation (Regulation No. 4064/89 amended by Regulation No. 1310/97 and Regulation No. 447/98) provides that the European Commission must approve merger operations having a community dimension. To this effect, the Commission verifies whether the proposed merger operations fulfill certain criteria relating to competition. It can thus prohibit those that create or strengthen a dominant position in the common market.

With this regulation, companies are no longer obliged to request, regarding some large-scale M&A, for authorization under several different national regulatory regimes, and such merger operations now receive a guaranteed fair treatment. These main objectives are, firstly, to block anti-competitive transactions before they damage the structure of markets in Europe and secondly, to simplify the administrative control of transactions that do not affect competition.

Regulations (EEC) No. 4064/89 and (EC) No. 1310/97 were repealed with effect from 1 May 2004, following the introduction of Regulation (EC) No. 139/2004 of 20 January 2004 on the control of M&A between companies. This is the most comprehensive reform on the control of mergers ever since the entry into force in 1990 of Regulation (EEC) No. 4064/89. Regulation 139/2004 completely changed the situation in the field, within the ECA (European Competition Authorities Association), and member states laid down the principles that guide their requests or acceptances of referral to the Commission.

1.3.1.2. Revision of the regulation on M&A control

Insofar as Article 1 of section 3 of the regulation on M&A control provides that “the thresholds defined in section 2 shall be reviewed before the end of the fourth year following the adoption of this Regulation, by the Council acting by a qualified majority on the Commission’s proposal”, the Commission therefore had a legal obligation to carry out this review of the thresholds. On 31 January 1996, the Commission adopted a Green Paper relating to the revision of Regulation (EEC) No. 4064/89 on M&A control. This is a document which examines M&A control in the Community and provides a number of options to improve its operation.
Thus, during the revision of the Regulation, it was realized that a significant number of transactions that were not meeting the turnover as defined in Article 1, section 2, had to be notified to several member states (resulting in “multiple filings”). Therefore, on 10 July 1996, a year after consultation with member states, the Commission adopted a proposal to amend the Merger Regulation which counted two projects, one on the lowering of the thresholds, including the mechanism for pre-notifications, and the other relating to other changes, comprising the new scheme for joint ventures. The following amendments were the major aspects of the new Regulation No. 1310/97:

– after consulting the Commission and observing the two-thirds rule, the controllability thresholds of mergers, which were set at 5 billion (total turnover achieved globally by all the companies concerned) and ECU 250 million (total turnover individually achieved in the Community by at least two of the companies concerned), were reduced to ECU 3 billion and ECU 150 million respectively. The main reason for this lowering of thresholds was due to the fact that a large number of transactions with significant cross-border effects in the Community could not be controlled by it;

– the Commission also proposed that all full-function joint ventures should be subject to the procedure of the Merger Regulation, regardless of whether they could lead to a coordination of businesses that remained independent. The situation remained unchanged for partial-function cooperative joint ventures;

– the Commission proposed to amend Articles 9 and 22 section 3 of the Merger Regulation. In the first Article, the member state shall limit its request for referral to demonstrate that the transaction affects such a market without having to prove the existence of a threat of creating a dominant position. The second Article shall concern the opening to several member states of the possibility of a joint referral request in cases where a dominant position would be created or strengthened in a geographical area extended to their territories;

– on the basis of calculation of turnover of financial institutions and other credit institutions, and as defined by the banking product, the Commission proposed to take one-tenth of the assets, thus reflecting the activity of the entire banking sector more accurately.

Another reform program was adopted by the Commission in December 2002 with the aim to build on the results achieved, generally considered
satisfactory, and also to increase the firmness of decisions on mergers. The reform must also improve the balance of power within the system and increase the rights of the merging parties to be heard during the procedure. Other amendments designed to improve the functioning of the rules in practice came into force on 1 May 2004 under the new Regulation (EC) No. 139/2004: this concerned internal organizational changes regarding the merger control regime\textsuperscript{10}. This new regulation offers the possibility to notify projects before the conclusion of a binding agreement and removes the obligation to notify operations within a week following the conclusion of such agreement. These provisions aim at greater flexibility; and should promote coordination of merger-related investigations with competent authorities of other jurisdictions. The Commission’s proposal concerning the establishment of a new rule providing its jurisdiction to any merger operation which must be notified to at least three national competition authorities within the European Union, was abandoned; and the new provisions rather aim at simplifying the Commission’s mechanisms for referral of merger operations to the national authorities and vice versa. The aim is to ensure that the best-placed authorities examine the operations and reduce the number of multiple notifications. Other legal provisions strengthen the Commission’s investigative powers which may seriously provide amendments in cases where requests for information are not acted upon or if the information provided is inaccurate or inadequate.

\subsection*{1.3.2. The role of public authorities}

This concerns the role of local and national public authorities. They, first of all, have a role of possible opposition to a merger operation, and a second role within the framework of the obligation of employers to inform employees if layoffs are planned.

\subsubsection*{1.3.2.1. Opposing a merger or acquisition, not compatible with the common market}

Generally, public authorities oppose transactions for competitive or public interest reasons, but this varies from country to country. Luxembourg has established no specific legislation on this subject. In Greece, there is no legal framework for the private sector, against greater importance attached to

\footnotetext[10]{“Towards a Reform of Community Merger Control” Working Paper, Freshfields Bruckhaus Deringer, January 2003.}
takeovers by private groups of public companies undergoing privatization. Public authorities in Denmark have passed legislations to control these transactions.

As for the other countries (Austria, Belgium, Finland, France, Germany, Ireland, Italy, the Netherlands, Norway, Portugal, Spain, Sweden, and the United Kingdom), they now have legislation and/or specific regulatory bodies. However, it appears that the right to prohibit certain M&A transactions or to request changes is applied seldom in countries like Austria, the Netherlands, and Sweden. In Denmark, Spain, and the United Kingdom, this right is limited and depends on the size or turnover of companies concerned, in countries such as Germany, Denmark, Ireland, and Sweden.

In Germany, the German Federal Cartels Office (Bundeskartellamt) examines mergers of a certain size regularly. A concentration between companies expected to create or strengthen a dominant position may be prohibited by the Federal Cartels Office, the companies involved must then prove that the merger will also lead to improvements in competition that would compensate dominant position-related disadvantages. The government also appoints a committee of experts, the Monopolies Commission (Monopolkommission), whose mission is to control mergers regularly and publish comprehensive reports on M&A processes in every two years.

Other cases of intervention by public authorities, aimed at preventing mergers or acquisitions or requiring changes, have occurred in France, Ireland, Italy, the Netherlands, Spain, and the United Kingdom:

– in France, public authorities in 2000, prevented the US giant Coca Cola from acquiring Orangina (owned by Pernod Ricard), due to the negative impact on free competition. Similarly, in order to safeguard consumers’ freedom of choice, these bodies demanded the sale of a number of points of sale before authorizing the merger between distribution chains Carrefour and Promodès in 1998;

– in Ireland, the government prohibited, following the competition protection authority’s opinion, the acquisition of the Northern Ireland sawmill Balcas by the public forestry company Coillte, because the acquisition was deemed to be against public interest and competition principles;
– in Italy the competition protection authorities in the year 2000, imposed specific measures to prevent possible anti-competitive effects before authorizing the acquisition of Seat Pagine Gialle by Telecom Italia;

– the Dutch competition protection authorities authorized, under certain conditions, the merger of the shipping and storage companies Van Ommeren and Pakhoed, who first cancelled the merger before finally deciding to comply with the requirements of authorities and then merged;

– in Spain the government in 1999 imposed, for the acquisition of Pryca by the retail group Continent, the sale of a number of shops.

1.3.2.2. The obligation to inform public authorities on redundancies

Public authorities also play a key role, in case of collective redundancies following M&A operations. The European Directive on collective redundancies requires employers to notify the competent public authorities in writing, all planned redundancies which may take effect not earlier than 30 days after this notification. These provisions are outlined in the regulations of all countries concerned, with national differences in some aspects such as the content of the information notified. However, in most cases, these provisions on informing public authorities apply only to companies of a certain size (over 20 employees) and redundancies of substantial magnitude.

In addition to recording the information provided by the employer, the role of public authorities extends to the organization of mediation and debates on alternatives, and also the extension of the termination notice period. Thus, only Greece and the Netherlands require the approval of public authorities for any redundancy, while the agreement is required in Spain only in the absence of a consensus between employers’ and workers’ representatives. However, some countries have amended the merger transactions regulatory code.

1.3.2.3. Some legislative amendments

In the late 1990s, some member states set up the regulatory framework of M&A (sometimes reflecting the content of the EU Directive proposal). The law was amended in Spain (Royal Decree-Law 6/1999), reflecting fundamental changes in M&A control of certain transactions, for reasons of competition and adaptation of national legislations based on EU provisions. Denmark set up a committee with employers’ and workers’ organizations for
a thorough review of the legislation on these transactions. In Ireland, the Department of Trade and Employment provided for the amendment of current M&A legislation. In the United Kingdom, the government published a consultation document, with a view to amending the regulatory system of M&A, although these projects are not related directly to considerations on industrial relations.

Potential legislative amendments reflect in some cases explicit implications on the role of trade union representatives. In Germany, the Federal Government established a bill presenting the statutory framework for M&A following the controversial takeover in early 2000 of Mannesmann by Vodafone based in the United Kingdom. It mentioned, among other things new information rights for employees and their representatives. This legislation came into force in early 2001. In France, the bill on “New Economic Regulations” of May 15, 2001, law entered into enforcement after the publication of the Decree of 30 April 2002, was the subject of several discussions in the Parliament. This bill strengthened the competence of the works council regarding information rights on M&A. In the Netherlands, the aim of the new Mergers Code (see “Information and Consultation Rights on M&A”) was to allow the extension of this code to the nonprofit sector and make it easier for unions to file complaints if management violated the obligations regarding information and consultation. The amendment of rules on takeovers could affect the system in place, which strived for the consultation of the target company’s management and unions, prior to takeovers (unusual situation in the EU and contrary to the proposed EU Directive on acquisitions). Moreover, the law on hostile acquisitions protection measures reduced the relatively high level of protection enjoyed by Dutch companies against hostile takeovers and weakened the position of trade unions and workers’ councils in the target company.

The regulations of the various member states relating to companies acquisition remain very diverse. Until early 2006, European countries had not yet adopted specific rules on public bids and did not actually practice this procedure in the same way: takeover bids are more common in Britain than in Germany or France. The harmonization of regulations on European takeover bids has proven, over time, to be a difficult task.

1.3.3. Harmonization of regulations on takeover bids within the European Union

The Takeover Bids Regulation has been subject to many reforms in the late 1990s: in the United States with reform projects initiated by the Securities and Exchange Commission (SEC), in France with the new Regulation of the French Financial Markets on public bids, and the European Union attempts to harmonize national rules on takeover bids, under a new company law directive. The first proposal of the Thirteenth Company Law Directive relating to takeover bids was presented by the Commission in January 1989. Despite the changes it has undergone, the proceedings relating to this law was not immediately successful.

1.3.3.1. Diverse regulations across countries

These regulations are often very different from one country to another. For example, in Britain, the rules of the supervisory authority, Take-over Panel, are very specific in relation to other member states’ supervisory authorities. In particular, individual appeals against its decisions are not subject to admissibility and the Take-over Panel does not approve the disclosure documents that fall within the competence of the market operator, the London Stock Exchange. It should be noted equally that the control thresholds that trigger a mandatory bid differ from one member state to another: 30% in Britain, 50% in Germany, and the “dominant influence” concept in Italy. France, which holds a median position, maintained, in its legislation, one third of the capital or voting rights.

The Europeanization of financial law would increase the competitiveness of market places which can be measured, in addition to its technical assets, to its legislation. The emergence of community financial law, by bringing together the different legislations in place, must ensure the protection of minority shareholders and ensure legal certainty.

1.3.3.2. Legal certainty and the protection of minority shareholders

Conflict over competences between supervisory authorities and regulation overlap may occur due to the proliferation of cross-border takeovers and the emergence of private companies in the member state where they have their headquarters. This finding is contrary to the principles of legal certainty and transparency of stock markets in the European Union, it is therefore important to ensure a trustworthy and effective legal
environment for companies so that they can take part in global competition. In addition, it is necessary to define a minimum level of protection for minority shareholders across the European Union. This protection occurs during the change of control of a target established in one of the European Union member states and whose shares are listed on one or several regulated markets within the Union. It is obvious and necessary to adopt a directive on the regulation of takeover bids, a project that has proven difficult to implement.

1.3.3.3. Difficulties in harmonizing European legislation

The harmonization of national regulations has proven to be a difficult task. In relation to the 1985 publication of “White Paper on the completion of the internal market” in which the Commission announced a project to harmonize regulations on takeover bids, a first company law draft directive, elaborated in the late 1980s, was presented to the Council by the Commission on 19 January 1989\(^\text{12}\). The law aimed at unifying all national legislations relating to takeover bids. But, because of its provisions that members states deem too detailed and binding, negotiations on this law were blocked in the Council as early as 1991. Consequently, the project was abandoned. Two years later, the Commission resumed discussions on a second proposal that was presented on 8 February 1996\(^\text{13}\). This proposal was an outline-directive, with a law that had a limited number of general requirements to coordinate, rather than unify the actions of member states, thus, placing a great deal of importance on subsidiarity (the Commission recognized that outline-directive provided a structure that enabled the preservation of national differences and also that they are not such as to question the common principles and objectives defined by the Directive at the level of the community) and more focus on minimum guidelines. Beyond these minimum harmonization provisions, member states had the freedom to provide for means to regulate these bids in their national legislation\(^\text{14}\). Thus, it was incumbent on member states to determine how transparency was to be ensured in the course of the bid. This law, amended in 1997, was blocked because of the Anglo-Spanish differences over Gibraltar.

\(^{13}\) Official Journal C 162 of 6 June 1996, p. 5, COM (95) 655 final - 1995/0341 COD.
In June 2000, the unanimous adoption of a common position by the Council of Ministers and its acceptance by the Commission made people believe that there was going to be a speedy conclusion of the proposal. But the European Parliament voted at second reading, amendments that went directly against the Council’s law, consequently, council refused to approve them in March 2001. The proposal was once more blocked. A few months after negotiations, the Council/Parliament Conciliation Committee relaunched the legislative process and the law was once more tabled to Parliament. But in the meantime, Germany (still under the “shock” of the hostile takeover of Mannesmann by Vodafone and determined to preserve the practice of securities with multiple voting rights) suddenly changed and manifested its discontentment relating to the Article of the Directive that prohibits any company subject to a hostile takeover to take defensive measures without the approval of its shareholders.

On 4 July 2001, the European Parliament considered at third reading of the Thirteenth Company Law Directive relating to takeover bids. 273 European parliamentarians aligned themselves with the German rapporteur and opposed the latest version of the proposal, 273 voted for and 22 abstained: the law was rejected under the rules of procedure. This vote came in at the final stage of the legislative procedure, the draft directive was considered obsolete. [BEA 01] sees in this failure a complexity of the European decision-making process, a place of conflict between an Anglo-Saxon concepts (where the company is considered an economic good, shareholders are the owners who can freely become sellers or buyers) and a Germanic concept (where the company is a social institution that imposes solidarity among the shareholders and provides a protective legal framework for managers and an association of employees involved in decision making). [LAB 03] also supports this critical analysis and highlights that other measures included in this directive poses a problem. If this new proposal has advanced in terms of transparency and protection of minority shareholders, it still, however, has a very high financial vision and narrow concept of corporate governance. Oppositions within the member states was based on the lack of (level playing field) with the United States, that is, inequality relating to the defense measures, likely to be incurred by targets and the obligation for managers to obtain authorization from the General Assembly to adopt such measures. This debate on the level playing field greatly influenced the very principle of regulation of takeover bids in the European Union.
Despite its shortcomings and chaotic journey, the Directive on takeover bids has the merit to exist and make progress towards the harmonization of national laws on takeover bids. The law was the subject of controversy and suffered several avatars after the rejection of the proposal in July 2001. The Commission set up an expert group to readdress the issue of takeover bids, hoping that it might result in the drafting of a bill that could be adopted quickly by the member states. On 2 October 2002, a new version of the Thirteenth Draft Directive on takeover bids was submitted by the European Commission, a proposal that requires sound transparency rules and provides mechanisms that better protect minority shareholders. It was finally adopted on 21 April 2004, as part of the action plan for financial services, although everyone did not agree on the issue of satisfaction relating to the level playing field [BEA 03]. Two requirements are mentioned in the law: transparency obligation for takeover bids procedures relating to corporate securities and the need to inform, or at least consult, the employees of the two companies involved in the buyback offer. The rule imposing that corporate managers request shareholder’s approval before opposing a takeover became optional.

1.3.3.4. How effective is the new takeover bids mechanism?

Adopted in April 2004, the objective of the Takeover Bids’ Directive was to facilitate these operations in Europe. However, transposition of the law by countries leaves no doubts about the effectiveness of this new mechanism. More importantly, it did not succeed to establish consolidated practices. The Directive has the merit of setting a general framework and takeover bids rules for all European countries. Practically speaking, the objective has not been reached because the application of key issues of the Directive remains optional. This includes Article 9, which is the clue to the liberally-minded mechanism as it increases the power of shareholders by requiring company managers to seek the approval of the ordinary general assembly to take anti-takeover actions.

Another source of disparity in practice is the double option principle which stipulates that, in states that have not opted for the implementation of Article 9, companies can still opt for its application and incorporate the necessary rules in their statutes. Finally, the diversity of practices is

15 Consult the Senate’s legislative report No. 20 on www.senat.fr, “Draft law on public bids relating to acquisition”.

supported by Article 12 of the Directive which provides a reciprocity exception for companies subject to Article 9: the governing bodies of the target company shall decide for themselves as concerns anti-takeover measures if the acquirer itself does not abide by the “virtuous” rules equivalent to Article 9. Furthermore, France has added provisions to the implementing measures of the Directive that are sometimes rather more protective for targets. The “Danone” amendment authorizing the AMF (the French stock exchange authority) in case of takeover bid rumors, requiring a potential predator company to make itself known in the name of equal access to information, can also be an obstacle to takeover bid operations. Other measures seem more clearly intended to reassure the proponents of a more social approach to buyouts: consultation of the works council in the event of a hostile takeover bid falls within these measures, as well as “Bons Breton”. This ability to issue bonds in case of takeover, in order to increase the cost of a takeover bid, aims at reassuring proponents of a certain “economic patriotism”. Finally, the application of the adjective “hostile” in the French law to characterize certain bids is not also liberally-minded. This term rather adopts the position of management, but does not correspond to that of shareholders for whom a bid can only be good or not well paid.

1.4. Conclusion

After the adoption of the Thirteenth Directive, many countries have not yet changed their legislative corpus, such as Belgium, Italy, and Spain, unlike France and Luxembourg, where the laws have been adapted to integrate provisions of the European Union. Several member states in key sectors, like energy, encourage “national champions” in order to deal with the incursions of foreign companies. However, this takeover bid directive does not provide a clear answer to the question of state intervention to counter a hostile takeover of a national company. By giving states a wide margin of discretion, it automatically promotes ‘economic patriotism’ aspirations by national authorities. [COH 06] concludes in his study on economic nationalism that this concept reflects the risks and opportunities of a world where corporate takeover is at stake. The author presents the case of France (a country that is open economically) which has become obsessed with company nationality. This is justified by the idea that the nationality of the capital held by management and the location of corporate headquarters would have positive effects in terms of staff or place of activities. However, the European Commission’s capacity to act is limited. As a matter of fact, it
cannot take action against a member state which is taking measures to protect its domestic companies, except if the procedure directly affects the Community’s internal market rules. The complexity of rules governing the definition of competent control authorities demonstrates the need to move towards a greater cooperation of supervision system at the European level and later consider common institutions. A minimum harmonization of European financial rights is a prerequisite for the emergence of a European regulator. After about 15 years of difficult gestation, the Thirteenth Directive which took effect in May 2004, for which the transposition deadline was 20 May 2006, has not fulfilled its promises; the report of the European Commission based on a survey of member countries revealed an unsuccessful enforcement of this directive.