themselves to the risk, after a successful offer, of possessing shares for which there is no market. The additional acceptance period does not, however, apply if the minimum acceptance rate was not reached.

Chapter 9
Greece

No

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1900 **Takeover law before implementation of the Directive** Before the implementation of the Takeover Directive into Greek law takeovers were not regulated in Greece by law but instead through Hellenic Capital Market Commission decisions. The Hellenic Capital Market Commission (*Epitropi Kefalaiagoras*) is the regulatory authority for capital markets in Greece[1]. Where major changes were carried out as a result of the implementation of the Takeover Directive, special reference is made in the text that follows. Nevertheless the main characteristics of the Takeover Regulations such as the mandatory bid rule, equality of treatment, and the prohibition of defensive measures were included in the pre-implementation regime one way or another.

A. Applicability

1910 **Securities** Art 1 of L 3461/2006 which transposes the Directive into Greek law limits the applicability of takeover law to securities that **carry voting rights** and that are listed or admitted to trading in a regulated market. Listed or admitted to trading **non-voting securities** are not primarily caught by the definition or therefore by the application of the law. However, art 6 para 2 provides that a **voluntary offer** can be submitted for non-voting securities listed or admitted to trading in a regulated market operating in Greece. In such a case the provisions of the law will apply.

1911 Accordingly, the interaction of the two provisions leads to the following **practical consequences**:

a. The acquisition of **non-voting securities** does not give rise to the need to post a mandatory offer, even if the thresholds prescribed by the law are reached.

[1] In this chapter, the following specific **abbreviations** are used: CSD (Central Securities Depository), HCMC (Hellenic Capital Market Commission), L (law).

b. The posting of an offer for **voting securities** does not immediately give rise to a requirement to extend the offer to holders of non-voting securities.

c. If, however, an **offeror wishes to make an** offer to the public to acquire **non-voting securities**, such an offer will be governed by the provisions of L 3461/2006, and, hence, both the offeror and the offeree company will be bound by the provisions of the law.

1912 **Applicability on funds** Following the provisions of the Directive (art 1 para 2), L 3461/2006 does not apply in the case of listed open-ended funds, such as exchange traded funds (art 3 para 2). In contrast the law applies in the case of takeover bids for the shares of listed close-ended funds. In Greece listed close-ended funds operate in the form of listed investment companies (AEEX). Although such listed companies have, as their object, the collective investment of capital provided by the public, and pursuant to L 3371/2005 they operate on the principle of risk-spreading, with similar rules on investments, structure and risk management to UCITS III funds, their shares are not repurchased out of their assets, whether directly or indirectly, at the holders' request. Consequently, takeover bids for such shares are governed by the provisions of the Takeover Law.

1913 **Applicability on securities issued by the Central Bank** Finally, as already provided by the Directive (art 1 para 3), L 3461 does not apply to takeover bids for securities issued by the Central Bank of Greece (art 3 para 3).

1916 **Partial bids** **Allowance of partial voluntary offers** L 3461/2006 completely allows partial voluntary offers by permitting the offeror to set

a. a **maximum level** of tendered shares that the offeror is bound to accept and

b. a **minimum level** of shares that need to be tendered for the offer to be declared fully unconditional as to acceptances.

1917 **Allowance of non-control-seeking bids** In doing so, it even permits partial bids for a percentage of the share capital that does not confer control to the offeror.

This means that whilst the Directive, by definition, seeks to regulate only control-seeking bids, Greek law, taking advantage of the option that the Directive provides, covers with the same rules non-control-seeking bids as well and actually in a mandatory way. In other words, L 3461/2006 by definition covers as voluntary offers not only control-seeking offers but any public offer for the acquisition of any percentage of listed shares.

Comments: Although this approach is permitted as such by the Directive, it may lead to an **implementation conflict** with the latter in a competitive situation.

1. Leaving aside any practical problems, and the uncomfortable situation the Hellenic Capital Market Commission may find itself in, when having no power to prohibit a competitive bid for only a small fraction of the target shares at a very high price which is, essentially, made only as interference, there is an additional major problem when such a **bid is made with the solicitation of the target's board.** According to L 3461/2006 and the Directive the target board should refrain, during the offer, from any defensive measure except for soliciting alternative offers. However, according to the Directive, by definition such alternative offers can only be control-seeking offers (white knights), according to Greek law alternative offers can also be non-control-seeking offers (white squires as they are called). This therefore extends the arsenal of defensive measures which the target board has in their hands, especially because such bids have a strong coercive element. For example, when a hostile offeror wishes to acquire 90% of the target's shares, the target board may effectively block such an offer by making a competitive offer for 11% or even less of the target's share capital at an extremely high price. The target shareholders will tender as many shares as they can to be able to participate to as great an extent as possible on a pro-rata basis, and thus the hostile takeover offer will be successfully defeated.

2. The same unfavourable situation may also arise in competitive situations where this **second coercive bid is not solicited by the target board.** Nevertheless, this is a situation not covered by the Directive, unless one argues that such a second bid, due to its strong coercive element, does not meet the requirement of equal treatment of the target shareholders. However, this is not a straightforward argument. In contrast, when such a bid is solicited by the target board, it can be safely argued that this is not in line with the Directive, which by definition allows the solicitation of only control-seeking-bids. The Greek rule, in this respect, must therefore be interpreted narrowly in line with the Directive.

1918 **Penalisation of successful control-seeking voluntary bids** Whilst Greek law seems entirely to allow voluntary partial bids, which is a clear policy choice, at the same time it penalises partial bids, as a result of the relevant provision of the Directive, therefore making the regulatory treatment of partial bids less clear from a policy point of view. As will be analysed in the relevant part of this chapter, L 3461/2006, in line with the Directive, provides for an **exemption from the requirement to make a mandatory offer**, if the relevant percentage is reached as a result of a previous voluntary offer (No 1968+). However, this **exemption does not cover partial bids.** In other words, what the law effectively says is that one is allowed to make a partial bid but, if successful, then the same person is obliged to make a mandatory bid, which is irrational and highly discouraging if one takes into account the effects that the voluntary offer and the prospect of the mandatory bid will have on the target's share price. This contradictory position results in part form the relevant wording of the Directive exemption for the mandatory bid rule. Nevertheless, once Greek law chose to allow partial bids, it could have made use of the derogation permission of para 5 of art 4 of the Directive. According to para 5 of art 4 of the Directive, Greece could have provided, in relation to the mandatory bid rule, (as it has done with other derogations), for a derogation in the case of partial bids, by granting HCMC powers to waive the mandatory bid requirement in

specific circumstances, where partial bids would meet specific qualitative characteristics.

Comment: To that effect, a clearer and more effective policy choice would be for the law to determine certain qualitative characteristics which will allow those partial bids which maximise value to be carried forward, and this would permit planning flexibility without unnecessary costs. For example **Italian law**, at least before the implementation of the takeover Directive, permitted partial offers subject to the approval of the majority of the remaining target shareholders[2]. Similarly, in the **United Kingdom**, partial offers are subject to the approval of the Panel. In addition, the Takeover Code provides a number of additional safeguards for the target's shareholders: First, an offer for 30% or more of the target's shares requires approval by 50% of the target's shareholders, normally signified by means of a separate box on the form of acceptance[3], whilst any shares tendered should be accepted on a pro rata basis[4].

1919 **Summary** One can therefore summarise the treatment of partial bids in Greece in the following way:

a. **Control-seeking partial bids** are initially allowed but essentially discouraged since, if successful, the offeror needs to make a mandatory offer.

b. **Non controlling partial bids** are allowed. In particular, in a competitive situation this may cause quite a headache for the regulatory authorities, and clearly widens the arsenal of defensive measures which can be implemented beyond the limits imposed by the Directive.

c. The **situation is unsatisfactory** both from a regulatory and policy perspective, and calls for corrective measures that focus on qualitative characteristics of partial offers which are appropriate to be allowed.

[2] Decree 58 of 24 February 1998, art 107.
[3] Rule 36.5.
[4] Rule 36.7.

B. Competent authorities and applicable law

Authority designated by national law The Hellenic Capital Market Commission (HCMC, *Epitropi Kefalaiagoras*) is the designated authority for the supervision of takeover offers made pursuant to L 3461/2006. 1930

Competency and applicable law It follows that any offer for a company which has its registered office in Greece and has any of its securities admitted to trading on a Greek regulated market will be covered by L 3461/2006 and supervised by the HCMC. 1931

Registered office and place of trading in different Member States In accordance with art 4 para 2 of the Directive, HCMC will **share the regulation of an offer** with an authority in another EU Member State when the offeree company is: 1932

a. a **Greek registered company** whose securities are not admitted to trading on a Greek regulated market, but are admitted to trading on **a regulated market in one or more other EU Member States**;

b. **a company registered in another EU Member State** whose securities are admitted to trading **only on a Greek regulated market**; or

c. a **company registered in another EU Member State** whose securities are admitted to trading on regulated markets in **more than one EU Member State including Greece** if:
– the company's securities were **first** admitted to trading on a **Greek** regulated market;
– the company's securities were **first** admitted to trading simultaneously on **several markets** before 30 May 2006, if the relevant **regulatory authorities** agree that HCMC is to regulate the company or, failing that, the company chooses to be regulated by HCMC; or
– the company's securities are **first** admitted to trading simultaneously on **several** regulated **markets** on or after 30 May 2006 and the **company chooses** to be regulated by HCMC.

1933 **Under b. and c.** above, the HCMC has responsibility for regulating matters relating to the consideration offered in the case of a bid, in particular the price, and matters relating to the bid procedure, in particular the information on the offeror's decision to make a bid, the contents of the offer document, and the disclosure of the bid, in accordance with L 3461/2006.

Under a. HCMC has responsibility for matters relating to company law (in particular the percentage of voting rights which confers control and any derogation from the obligation to launch a bid), as well as the conditions under which the board of the offeree company may undertake any action which might result in the frustration of the bid, and matters relating to the information to be provided to the employees of the offeree company, in accordance with L 3461/2006. The law does not provide any additional guidance or definition of the subject matters related to company law or bid procedure. In that respect it is not yet clear how these shared jurisdiction provisions will operate in practice. At any rate, it is more likely that this will be a matter for discussion with authorities in other EU Member States

1935 **Powers of the authorities** **General powers** In general, HCMC is responsible for monitoring compliance with the provisions of capital market law. It is a public entity, whose exclusive task is to protect the public interest, enjoying operational and administrative independence. The objectives of the HCMC are to ensure the integrity of the market, to mitigate systemic risks and to protect investors by increasing transparency.

Note: Amongst other powers and responsibilities, HCMC also oversees the compliance of ATHEX-listed companies with **capital market legislation**, concerning legitimacy issues related to investor protection. HCMC is also responsible for the **approval of prospectuses** related to public offerings and the listing of securities in organised markets. The Commission is endowed with the authority to **impose administrative sanctions** (suspension and revocation of trading, trading halts, imposition of fines) on any supervised legal entities or natural persons that violate capital market law.

1936 **Takeover procedure** In the context of L 3461/2006 HCMC exercises all powers related to the supervision of takeover offers made pursuant to L 3461/2006. In practical terms, this means that the Commission has **four main sets of powers**:

1937 **a. monitoring the application of law** and compliance with it by listed companies and supervised professionals – entities or physical persons. In this respect, the HCMC can request from the offeror, or the offeree company, their respective boards of directors, their shareholders or persons acting in concert with them, any information required to exercise its powers according to law[5]. In addition all documents or announcements published in the context of an offer must be submitted to the HCMC.

1938 b. providing its **authorisation or approval** in all instances where the law requires such approval. In this context HCMC has the powers to:
– approve (or not) the offer document and request additional information to be included (or grant exemption from the inclusion of required information)[6].
– approve (or not) a withdrawal of a posted offer in accordance with the provisions of L 3461/2006[7].
– approve (or not) the posting of a revised offer[8].
– approve (or not) conditions attached to the offer[9].

1939 **c. Imposing sanctions** for breaches of L 3461/2006. More precisely the HCMC can impose an administrative fine of up to €3 million for any breach. In particular, in the case of a person's failure to comply with the requirement to make a mandatory offer, the HCMC can, further to a fine, impose as a penalty the suspension of the exercise

[5] Art 24 para 1 of law 3461/2006.
[6] Art 11 of law 3461/2006.
[7] Art 20 of law 3461/2006.
[8] Art 21 of law 3461/2006.
[9] Art 22 of law 3461/2006.

of all voting rights exceeding the mandatory bid threshold on both the person required to make the mandatory offer and all persons acting on his behalf or in concert with him[10]. In contrast, the HCMC cannot force a person or an entity, by virtue of a declaration of will or action, to submit a mandatory offer.

Note: In addition, the breach of the relevant provision of the law provides all **target shareholders** with a direct **right** in tort **to claim compensation** for the loss they suffer from the breach. This would probably be the difference between the current market price (provide that the investor could realise its investment at such a price) of the target's securities for which the offer should be made, and the price at which the mandatory offer would have been made.

1940 d. Actively **cooperating with other regulating authorities** especially in the case of intra-community takeovers. In this respect HCMC, in accordance with art 4 para 4 of the Directive may assist in serving the legal documents necessary to enforce measures taken by foreign competent authorities in connection with bids, as well as providing such other assistance as may reasonably be requested by the supervisory authorities concerned, for the purpose of investigating any actual or alleged breaches of the rules relating to takeover offers[11].

1942 **Exceptions from the rules of the Takeover Directive** Art 4 para 5 of the **Directive** allows Member States, provided that the general principles laid down in art 3 para 1 are respected, to introduce, in the rules which they implement pursuant to this Directive, derogations from those rules:

1. by including such derogations in their national rules, in order to take account of circumstances determined at national level
and/or

[10] Art 29 of law 3461/2006.
[11] Art 4 para 4 of law 3461/2006.

2. by granting their supervisory authorities, where they are competent, powers to waive such national rules, to take account of the circumstances referred to in 1. or in other specific circumstances, in which case a reasoned decision must be given.

Greek law did not introduce any additional exemptions from the application of rules introduced as a result of the transposition of the Takeover Directive, apart from the ones already included in art 1 para 2 and 3 of the Directive. As far as particular derogations from specific rules are concerned, L 3461/2006 introduces a number of specific exemptions from the requirement to make a mandatory bid offer and the power of the HCMC to waive certain requirements as to the content of the offer document. Both cases are further analysed below, under the relevant headings (No 1968+).

Judicial authorities or other authorities dealing with disputes **1944**

The **Directive** does not affect the power of the Member States to designate judicial or other authorities responsible for dealing with disputes and for deciding on irregularities committed in the course of bids. Nor does it affect the power of Member States to regulate whether, and under which circumstances, parties to a bid are entitled to bring administrative or judicial proceedings.

1945 **Application of the general rules** L 3461/2006 does not introduce any special rule to that effect, except for the case of squeeze-outs, regarding the effect that judicial intervention may have on the timetable of the bid. Hence the general rules apply.

Litigation in the context of a bid may either relate to proceedings which seek to **annul a HCMC decision** made in the context of a takeover offer, or filing **claims of civil nature** before civil courts against any of the parties in the takeover (e.g. liability regarding information included in the prospectus, unlawful defensive measures etc). Whilst seeking a final judicial ruling is unlikely to contravene the bid procedure, this is not precluded in the case of **interim measures**. All HCMC decisions, including decisions issued in accordance

with L 3461/2006, except for decisions relating to market abuse rules (L 3340/2005 transposing Market Abuse Directive[12]), are challenged in the following manner[13].

1946 **HCMC decisions** HCMC decisions **imposing a fine** are challenged before the Administrative Court of Appeal by virtue of an administrative lawsuit, whilst **all other HCMC decisions** are challenged before the Administrative Court of Appeal again by virtue of an application for annulment.

Whilst such cases are unlikely to be heard during the offer procedure, administrative procedure rules also provide for interim relief or other **interim measures**. A judge hearing an application for interim relief may order suspension of the operation of an act or other interim measures only if it is established, inter alia, that such an order is urgent (in order to avoid serious and irreparable harm to the applicant's interests) that it must be made and take effect before a decision is reached in the main action. To that effect, a person required by the HCMC to post a mandatory offer, or a competitive offeror whose offer document was not approved, or whose revised offer was not approved, may, in addition to filing for a judicial annulment of the relevant HCMC decision, also seek interim measures which may affect the bid procedure.

Note: Whilst there is still to be a case where, in practice, judicial intervention by Greek courts affected the bid procedure, there is one case with intra-community interest. In the case of **cross bids between Piraeus Bank and Marfin Popular Bank**, the HCMC refrained from approving the latter's offer document for the former until the authority responsible for corporate matters (the Cypriot securities and exchange commission) under the Directive and L 3461/2006 issued a final decision on the eligibility of such action in the face of Piraeus' prior bid for Marfin Popular. The Cypriot Authority's decision was strongly challenged in a series of

[12] See art 25 of law 3340/2005.
[13] See art 25 of law 3371/2005.

interim, final and appeal cases in Cypriot courts resulting in HCMC issuing a decision well beyond the timetable established by L 3461/2006[14].

1947 **Breach of the duty of care** Civil courts are also competent to rule on cases based on alleged breaches of the duty of care required by the offeror or the offeree company, or their financial advisors in the conduct of the offer. In this respect, the general provisions of the law will apply both in terms of establishing claims and procedural matters. In addition, L 3461/2006 on art 13, as it will be analysed below, specifically regulates liability resulting from misstatements in the offer document (No 2025+).

1948 **Squeeze-out** L 3461/2006 does make a specific reference, in the case of squeeze-outs, permitting target shareholders that are squeezed out, as covered below (No 2138+), to challenge, before the court of first instance, the **price** offered to them for the mandatory acquisition of their shares, within 6 months from the mandatory acquisition of their shares under the squeeze-out procedure. Nevertheless, art 27 of L 3461/2006 specifically provides that target shareholders cannot intervene in the squeeze-out procedure or the mandatory transfer of their shares by any means of interim measures. This is the only example where L 3461/2006 **limits judicial intervention during the bid procedure**, protecting the operation of the squeeze-out procedure, which, however, is more coercive than the offer procedure itself. At the same time it leaves the core bid procedure unprotected from delays and intervention by courts, which can substantially affect the bid and the market for the target shares.

[14] For more details on the offer timetable see No 2000 ff.+ below where the offer document details are discussed.

C. Mandatory bid

1960 Under the **regime in place prior** to the implementation of the Directive, Greek law provided for a threshold as high as half of the total voting rights of the company plus one vote, L 3461/2006 sets the **mandatory bid threshold** at 1/3 of the total voting rights of the company.
Another issue relates to the range of behaviours caught by the rule. The scope and application of the rule clearly depend on the answers to two questions:
a. what constitutes an **acquisition of securities**, according to the mandatory bid rule; and
b. who can be a **person acting in concert** with the acquirer.
Both will be analysed below.

1961 **Threshold** Any person acquiring securities in a situation where, as a result of such acquisition, the **percentage of the corresponding voting rights held exceeds 1/3** of the offeree company's total voting rights, must, within 20 days, submit a takeover offer for the acquisition of the total number of the offeree company's securities. This applies whether the securities were acquired directly or indirectly, and whether the person acted in his own name or through other persons who were acting in the acquirer's name (or in concert with the acquirer). The same obligation binds any person who is **in possession of 1/3 of the company's voting rights (but not more than** half), and who, within a 12 month period, acquires (using the above attributions where appropriate) securities that represent more than 3% of the target's total voting rights, **unless** the acquirer reached its initial shareholding by virtue of another mandatory offer.

1962 **Calculation** To calculate the thresholds stipulated above, the total of voting rights is calculated on the basis of those voting rights whose exercise is not restricted by art 16 of Company Law 2190/1920 or other legal provisions. This means that in determining the total voting rights of the offeree company, no securities held by the offeree company will be taken into account.

1963 **Forms of behaviour caught** The mandatory bid rule seeks mainly to catch three forms of behaviour:

a. **Accumulation of control** by a single person either directly, or through middlemen, or with the cooperation of persons acting in concert.

b. **Transfer of control** from one shareholder to another.

c. **Increase of control percentage** by acquiring 3% of the total voting rights within 12 months period after the 1/3 threshold is reached.

Comment: Making no distinction between accumulation of control and transfer of control, which is a distinction that is also lacking in the Directive, may not, however, be entirely justified.
In the absence of any regulatory intervention, an **investor in a company with dispersed shareholdings** buys shares, on the basis of the rational expectation that the shares he buys can be combined with others to affect control in the offeree company. Hence, such shares carry a control premium. This makes the company more susceptible to the operation of the market of corporate control, and that is reflected on the value of the shares.
In contrast, in a **company with concentrated shareholdings**, where control rests in the hands of a majority owner, an investor knows in advance that the shares he acquires cannot affect control in the offeree company. Accordingly, minority shares are not expected to carry a control premium, since the market discounts them to reflect exactly the fact that they cannot change control in the offeree company. In addition, due to the existence of a majority block in the company, hostile takeovers are effectively prevented, thus the investor can only rely on the company law protection of minorities to avoid majority oppression or self-dealing.
As a result, **when an offeror acquires control in an offeree company with previously dispersed shareholdings**, the minority shareholder suffers a loss in his investment. Such a loss equals the loss of the control premium

expectation, plus the increase in the investment vulnerability to managerial conflicts of interests, since the company is now less susceptible to the operation of the market of corporate control. Assuming that capital markets are efficient, such an increase in agency risk is also expected to be reflected in the market price of the remaining publicly traded shares.
In contrast, when **majority control just shifts from one owner to another**, the position of the minority shareholder does not suffer any structural change[15].

1965 **Mandatory bid in case of mergers (delisting)** One notable measure provided for in Greek law which goes beyond the Takeover Directive is the requirement for a mandatory offer to be made to the holders of securities of a listed company, if, pursuant to a proposed merger, split or transformation the holders of listed securities will end up with non-listed ones. This rule seeks to catch practices known as "**cold delisting**", some of which made headlines in the Greek press.
According to Greek law, a voluntary delisting can only be achieved with an **extraordinary resolution** of the general meeting taken by a majority of 95% of the company's voting share capital. Even in such cases the **HCMC's approval** is required, and the HCMC may impose any additional condition or requirement to grant delisting.

Note: **In the past**, in the absence of sell-out rights, HCMC required a mandatory offer to be made to all holders of the "to be delisted securities" to grant its approval. However, an **alternative mechanism** was developed to achieve delisting, mainly through a reverse merger in which an unlisted vehicle absorbs the listed company. A merger of a listed

[15] For a more analytical account see Kouloridas A., 2008, The Law and Economics of Takeovers; and acquirer's perspective, Oxford: Hart Publishing.

company does not require any approval from the HCMC, so HCMC had no direct way to prevent such a merger[16].

1966 **Obligation to make a mandatory bid** The mandatory offer **must be made prior** to the carrying out of the proposed corporate reconstruction. One notable feature of the rule is that it does not identify the **person** obliged to make the mandatory offer. This can either be the absorbing company, or a major shareholder who advocates and promotes the proposed reconstruction, but not the company itself, unless the conditions for the acquisition of own shares are met.
The requirement is **waived** if the reconstruction is to be approved by virtue of a resolution taken by a majority of 95% of the company's voting share capital.
By virtue of a HCMC decision the **nature of consideration and price** required to be offered are determined. Both these aspects will be further analysed below, under the relevant heading.

1968 **Dispensations from the mandatory bid rule** The mandatory bid provision in art 5 para 1 of the **Directive** is worded in such a way that the person making the bid is required to do so 'as a means of protecting the minority shareholders of the company'. Art 3 para 1(a) of the Directive also requires that "if a person acquires control of a company, the other holders of securities must be protected". To that effect, dispensations from the mandatory bid rule must respect the Directive's general principles and must therefore ensure that other shareholders are protected.

1969 **L 3461/2006** recognises **a number of cases** exempted from the application of the mandatory rule. These are as follows:

a. A **third party** is in possession of a higher percentage of the company's voting rights.

[16] Where approval was required, for example in mergers of listed investment companies the HCMC refused to grant approval, even in cases where the absorbing company was an unlisted credit institution.

b. The threshold is reached as a result of a **voluntary offer made** to all holders of securities **for 100% of the voting share capital**. This is an exemption provided by the Directive[17]. L 3556/2007 introduced an additional requirement in order for the exemption to apply. This is that the voluntary offer must comply with the price determination requirements applicable in the case of mandatory offers. Consequently, as further analysed below, in practice, there is no difference (other than the obligatory cash alternative in mandatory offers) between voluntary and mandatory offers in Greece.

c. The acquisition of the securities is a result of an **inheritance** by way of a parental transfer.

d. The acquirer has acquired voting rights whose percentage exceeds the 1/3 threshold, but by no more than 3% of the total voting rights, and **undertakes** in writing, **the following obligations;**

– **to auction the number of securities** deemed necessary for complying with the 1/3 threshold, no later than a year after the acquisition through which he exceeded the 1/3 threshold, and

– **to refrain,** during that period, **from exercising the voting rights** corresponding to the percentage which exceeds the 1/3 limit.

The relevant commitment is **submitted** to the Hellenic Capital Market Commission, and **published,** as are all takeover-related documents in accordance with art 16 of L 3461/2006[18].

e. Securities have been obtained through the exercise of pre-emption rights during a **share capital increase**, provided that the exercise of pre-emption rights is not accompanied by the abolition of the pre-emption rights of other security holders.

f. The threshold was reached due to a **merger between companies** of **the same group**[19]. Nevertheless, this exemption does not cover situations where, for example, company A acquires company B and as a

[17] See No 1916+ above about the discussion made regarding partial bids.
[18] See No 2023 below.
[19] As such connection is defined in arts 42e and 96 of Law 2190/20.

result the aggregate shareholdings of A and B in company C exceed the 1/3 threshold. In fact, this situation is covered by the "acting in concert" rule, further analysed below.

g. A process of **privatisation** of the offeree company is under way. This exemption does not necessarily fit into the principle described above regarding the protection of the remaining shareholders. It is more likely to occur where a state "golden share" exists, permitting the state to transfer control to a buyer without the latter being required to extend the offer to other shareholders. However, state golden shares are entirely excluded from the application of the Directive[20].

Note: Nevertheless this exemption was put under a great deal of scrutiny in the recent **case of OTE** (the Telecommunication Organisation of Greece), where Deutsche Telecom (DT), after having bought 20% from MIG (Marfin Investment Group), entered into an agreement with the Greek state by which the latter would confer control of OTE to DT. In order to make sure that the mandatory bid rule would not kick in, since the Greek State and DT were presumably acting in concert, the Greek state decided to transfer 3% of its shares to DT under the privatisation procedure. The result was that DT obtained control of OTE, through a shareholder's agreement with the Greek State, by acquiring 20% from MIG and 3 % from the Greek State at prices much higher than OTE's market price, without any takeover regulation applying in these transactions. Despite the golden shares exemption, this seems not to be in line with the spirit of the Takeover Directive, and special attention should be given by the Commission to the uniform application of the mandatory bid rule all across Europe, leaving aside of course threshold requirements, so as to ensure that no additional exemptions, other than the ones explicitly permitted by the Directive, are introduced by the Member States.

[20] See Maul S. / Kouloridas A., 2004 'The Takeover Bids Directive', German Law Journal 5: 355-366.

h. The securities acquisition is part of a process of **financial revitalisation** of the company, pursuant to art 44 of L 1892/1990.

> **Note:** Under the **regime which applied prior to the implementation of the Directive**, an exemption was also included with regard to cases where the threshold was reached as a result of the provision of underwriting services. This exemption was abolished, and it remains to be seen how this will affect the provisions of underwriting services, taking into account that the threshold was also reduced from half to 1/3 of the voting share capital.

1971 **Persons acting in concert** **Definition of L 3461/2006** L 3461/2006, mirroring the definition of the Directive, defines "persons acting in concert" as "natural or legal persons who co-operate with the offeror or the offeree company on the basis of an agreement, either express or tacit, either oral or written, aimed either at acquiring control of the offeree company or at frustrating the successful outcome of a bid."

1972 **Presumption for undertakings controlled by another person** Undertakings controlled by another person within the meaning of art 2 of the Transparency Directive (as transposed into Greek law by L 3556/2007) shall be **deemed to be persons acting in concert** with that other person and with each other. That would be any undertaking where:

1. a natural person or legal entity has a **majority of the voting rights**; or

2. a natural person or legal entity has the **right to appoint or remove a majority of the members of the administrative, management or supervisory body** (and is at the same time a shareholder in, or member of, the undertaking in question); or

3. a natural person or legal entity is a shareholder or member and alone controls a majority of the shareholders' or members' voting

rights, pursuant, respectively, to an **agreement** entered into with other shareholders or members of the undertaking in question; or

4. a natural person or legal entity has the power to exercise, or actually exercises, **dominant influence or control**.

For the purposes of the definition of "controlled undertaking", the holder's rights in relation to voting, appointment and removal **include the rights of any other undertaking controlled by the shareholder**, and those of any natural person or legal entity acting (albeit in its own name) on behalf of the shareholder, or of any other undertaking controlled by the shareholder.

1973 **Key characteristics of the definition of cooperation** In view of the above, the definition includes three key characteristics:
- it does **not necessarily require 'active'** cooperation between parties;
- it is **not limited** to parties co-operating only through the **acquisition of shares** by any of them; and
- it includes persons who co-operate with the offeree company with a view to **frustrating** the successful outcome of a **bid**.

1975 **Interpretation of the acting in concert rule** **Comparison: cooperation – indirect acquisition** Other than controlled undertakings, L 3461/2006 does not provide any other presumptions of persons acting in concert. This leads to an interpretation of the **definition of cooperation** which eventually leads to a comparison with the definition of the term "acquisition in any manner directly or indirectly" (see No 1961 above, threshold for mandatory bid).
In other words: Does the **coming together of two or more persons (who already hold in total more than 1/3 of the offeree company's voting rights)** simply amount to behaviour which falls into the definition of acting in concert, or does it imply the indirect acquisition, by any of the parties, of more than 1/3 of the target shares? If the latter case applies, then that would immediately mean that a mandatory offer must be made to the public, even if the same persons had

not acquired any voting rights after they made their concert agreement.

1976 **Notifiable interests (L 3556/2007) as instances of acting in concert?** The definitions/requirements of "acting in concert" in art 10(a) of the **Transparency Directive** (L 3556/2007) and in arts 2 para 1(d) and 5 of the **Takeover Directive** (L 3461/2006) are not identical. The **goals pursued by the two directives**, though complementary, are different:
– art 10 of the Transparency Directive aims, inter alia, to provide transparency as to who has the power to exercise voting rights when voting right holders agree on pooling their votes.
– art 5 of the Takeover Directive aims at protecting minority shareholders by requesting the launch of mandatory bids at equitable prices when shareholders act in concert to acquire control.

1977 All types of **behaviour described in the Transparency Directive as indirect holdings** (art 10 of L 3556/2007), which trigger an obligation to make an announcement if certain shareholding thresholds are reached or to aggregate interest in voting rights, are most likely to be caught as instances of acting in concert.
Art 10 of L 3556/2007 mirrors art 10 of the Transparency Directive. Such instances **include**:
a. voting rights held by a third party with whom that person or entity has concluded an agreement, which obliges them to adopt, by concerted exercise of the voting rights they hold, an enduring common policy towards the management of the issuer in question;
b. voting rights held by a third party under an agreement concluded with that person or entity providing for the temporary transfer, for consideration, of the voting rights in question;
c. voting rights attaching to shares which are lodged as collateral with that person or entity, provided that the person or entity controls the voting rights and declares its intention of exercising them;
d. voting rights attaching to shares in which that person or entity has the life interest;

e. voting rights which are held, or may be exercised within the meaning of points (a) to (d), by an undertaking controlled by that person or entity;
f. voting rights attaching to shares, deposited with that person or entity, which the person or entity can exercise at its discretion in the absence of specific instructions from the shareholders;
g. voting rights held by a third party in its own name on behalf of that person or entity;
h. voting rights which that person or entity may exercise as a proxy where the person or entity can exercise the voting rights at its discretion in the absence of specific instructions from the shareholders.

Whilst one could argue that the purpose of the two rules is different, in the sense that L 3556/2007 deals with interests in voting rights as notifiable events, while L 3461/2006 deals with concert agreements which may give rise to considerable obligations of economic nature (mandatory bid rule), and hence their interpretation should not coincide, there are **also strong arguments as to the opposite**. Firstly, the definition of acting in concert in the mandatory bid rule is very wide, seeking to cover all sorts of agreements whether explicit or implicit. In addition, notification of the public requirements should not be considered as standalone requirements, but must instead be viewed as enforcements and signal tools for the operation of other securities law provisions, which are triggered when specific thresholds are reached. In this respect, the implementation of the Transparency Directive into Greek law, and L 3556/2007 accordingly can be used as an interpretation tool for the meaning of acting in concert under the mandatory bid rule of L 3461/2006. In practice this means that a number of interpretation issues are clarified, and the application of the mandatory bid rule is expected to be stricter and more straightforward.

1978 **Notifiable interests in shares as instances of acquisition of shares?** However, the question that arises is whether such notifiable interests in shares will be also considered as acquisitions in any manner di-

rectly or indirectly, either in the acquirer's name or in the name of middlemen.

The wide interpretation of the term "acquisition in any manner, directly or indirectly" could catch behaviour where the **exercise of voting rights** is conferred to another party to an agreement, by a form of **agreement** that the holder of the securities will **follow guidelines** of the other party to the agreement. If both parties to the agreement have such rights, then both parties will carry a joint and several duty to make a mandatory bid. If only one party has such a right, then he will be considered, under such an interpretation, to have acquired the relevant voting rights. To that effect, if such behaviour is considered, apart from a concert agreement, an indirect acquisition for the purposes of L 3461/2006, a **mandatory bid requirement** will immediately arise if the agreement leads to aggregate shareholdings of more than 1/3 of the target's voting share capital. Therefore, **no further acquisition** of additional securities will be **required** for the mandatory bid rule to apply.

Comments: 1. An additional argument in favour of such an approach derives from para 2 of art 7 of L 3461/2006 which provides that, in order to determine the voting rights owned by the bound person or persons acting in concert, it is also necessary to take into account voting rights held or obtained by virtue of an agreement, collateral, usufruct, custody or management agreement (provided that no special instructions are made available by security owners). In other words, such instances will not be considered as acting in concert cases but as presumptions of indirect acquisitions of voting rights, if they lead to exceeding the 1/3 threshold. Mirroring the definitions of acting in concert and indirect acquisition of target shares for the purpose of the mandatory bid rule, substantially widens the instances where the mandatory bid rule kicks in. This is most likely to be the interpretation given to the rule by the HCMC.

2. However this view is **not without criticism** and is subject to debate. Acting in concert does not immediately trigger the mandatory bid rule, even though the parties to a concert agreement may hold, in aggregate, more than 1/3 of the company's voting share capital. However, the consequences of such a rule bite when any of the relevant parties do acquire shares within a year after their coming together, which amount to more than 3% of the target's voting share capital. This is how the Directive definition is drafted, with the mandatory bid obligation in art 5 being triggered as a result of an acquisition of securities in a company by any member of a concert party.

In other words, when a party has acquired an interest in shares (without the knowledge of other persons with whom he subsequently comes together to co-operate as a group to obtain or consolidate control of a company), and the shares in which they are interested at the time of coming together carry 1/3 or more of the voting rights in that company, the mandatory bid rule does not immediately apply. Once such parties have come together, however, the provisions of the mandatory bid rule will apply so that, if the shares in which they are interested together carry less than 1/3 of the voting rights in that company, an obligation to make an offer will arise if any member of that group acquires any further shares, so that the shares in which they are interested together now carry 1/3 or more of such voting rights. In contrast, if the shares in which they are interested together carry 1/3 or more of the voting rights in that company, an obligation to make an offer will arise if any member of that group acquires shares representing 3% or more of the target's voting shares capital within a year. That seems to be the correct interpretation, since it differentiates between acting in concert and indirect acquisition. Otherwise there would be no need for the acting in concert rule as a separate rule, since it would be covered by the indirect acquisition term.

Shareholder collective actions as instances of acting in concert? Another area where the operation of the acting in concert rule may give rise to considerable interpretation problems is that of shareholder collective actions. Would an action of shareholders voting together on a particular resolution be regarded as action which of itself indicates

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that such parties are acting in concert? This would not normally be the case since control is most likely to include an element of duration and repetition. For example, such parties will be considered as having come into concert once an agreement or understanding is reached between them in respect of a broader board control-seeking proposal.

1981 **Price** An important aspect of takeover regulation is a concern for horizontal equity[21].
In line with the Directive, L 3461/2006 includes provisions which link pre-bid acquisitions of target shares and extra-offer acquisitions of target shares during the offer to the price that needs to be offered within the takeover offer itself. In the first case a minimum price offered is set, while in the latter case an offer price increase is required.

1982 **Voluntary takeover bids** As far as voluntary takeover bids are concerned, the law does not impose any minimum offer price requirements, at first glance.
Nevertheless, HCMC is not likely to approve the posting of an offer, in exercising its powers to approve the offer document, unless the offer price equals or exceeds the target's current **market price.**
In addition, the mandatory bid exemption (when the 1/3 threshold is reached as a result of a voluntary offer) only applies when the price offered in the voluntary offer is not lower than the price that would have been determined if the offer was a mandatory one. This means that, when an offeror makes a voluntary offer, **to secure exemption from a consequent mandatory bid** he must
a. make an offer for all the target's securities which carry voting rights and
b. offer the price that he should offer if it was for a mandatory bid[22].

[21] Ibid.

Therefore, voluntary offers in Greece do not really differ in practical terms from mandatory ones, except for the cash alternative requirement which is applicable to mandatory offers.

1983 **Mandatory takeover bids** In the case of a mandatory takeover bid, the law imposes a number of quantitative characteristics as to the price offered. More precisely the price offered in a mandatory bid may **not be less than the higher of the following** prices:
– the **average market price** of the shares during the 6 months preceding the date on which the offeror became obliged to launch the mandatory takeover bid; and
– the price that the **offeror** (or the persons acting in concert with the offeror) has/have **paid** to acquire shares during the 12 months preceding the date on which the offeror became obliged to launch the mandatory takeover bid.

Notes: 1. When the offer is made pursuant to a requirement to make a mandatory bid in cases of **corporate reconstructions which result in the holders of listed securities receiving unlisted ones** (No 1965), an additional price determination factor is added. More precisely the price of the mandatory offer must be the higher of the above two criteria, plus the valuation of an independent valuer appointed by the HCMC. The valuer can either be a banking institution or a supervised company providing investment services (and especially underwriting services) or an audit firm, and is paid by the offeree company. When performing its valuation, the valuer can freely assess all financial or non-financial data provided by the offeree company, and must use only internationally recognised methods. If the valuer ends up with more than one acceptable value, then the mean of the alternatives is taken to determine the offer price (if higher than the price determined by using the other two crite-

[22] This requirement was further imposed by virtue of a change of law 3461/2006, implemented with a new provision introduced in law 3556/2007, which transposed the Transparency Directive into Greek Law.

ria). The valuer submits its valuation to the offeree company and the HCMC.

2. According to art 4 para 5 of the Directive, provided that the general principles laid down in art 3 para 1 are respected, **Member States may authorise their supervisory authorities to adjust the price** referred to in the first subparagraph, in circumstances and in accordance with criteria that are clearly determined. To that end, they may draw up a list of circumstances in which the highest price may be adjusted (either upwards or downwards). These may include instances where, for example, the highest price was set by agreement between the purchaser and a seller, where the market prices of the securities in question have been manipulated, where market prices in general (or certain market prices in particular) have been affected by exceptional occurrences, or in order to enable a firm in difficulty to be rescued. They may also determine the criteria to be applied in such cases, for example the average market value over a particular period, the break-up value of the company, or other objective valuation criteria generally used in financial analysis. Nevertheless Greek **law did not take advantage of this derogation permission** and therefore the HCMC cannot adjust the equitable price in mandatory offers, which is quite unfortunate.

1984 **Acquisition of shares by the offeror during the acceptance period** If the offeror acquires, during the acceptance period, shares of the offeree company at a price higher than the price offered through the bid, then the offeror is obliged to increase the price offered to at least the price at which he acquired such shares of the offeree company. This requirement applies both to mandatory and voluntary offers, and covers both acquisitions made in the market and off the market (over the counter).

1985 **Form** An offeror in a takeover bid may offer, as a consideration, cash or securities (listed or not), or a combination of the two. In the case of a mandatory takeover bid, a cash alternative must be always granted.

Note: Cash offers require a **statement from a credit institution** established in Greece or in another EU Member State, confirming that the offeror has access to the necessary funds for the payment of the total amount of the consideration likely to be paid in cash. Securities offers also require a statement by an investment services firm, confirming that the offeror owns, or has access to, the securities offered as consideration.

D. Bid procedure

2000 **Information of the supervisory authority** Any person or persons, who have decided to submit a voluntary takeover bid or who have to submit a mandatory bid pursuant to art 7 of L 3461, must **notify**, in writing, the **Hellenic Capital Market Commission** and the **board of directors of the offeree company**, before any relevant announcement is made to the public.

The **notification is submitted** as soon as the decision is made to proceed with the bid, or, in the case of a mandatory bid, no later than the final day of the deadline period (as provided in para 1 of art 7) within which one needs to proceed with the mandatory offer (20 days).

In addition, the written notification submitted to the HCMC and the board of the offeree company must be accompanied by a **draft version of the offer document.**

Comments: 1. One could find some merit in this **additional requirement**, in the sense that it requires a higher level of commitment on the part of anyone who is announcing an offer, before doing so. Nevertheless, such an additional requirement does not necessarily sit comfortably with the **pressing timeframe** within which such announcements are usually made (and are required to be made). Whilst the same rule provides for no delay between the point at which the decision to post the offer is made and the announcement of such intention to the HCMC, it also requires the drafting of a document that usually demands a number of details to be

clarified and clearly a certain amount of time. It also involves a greater number of people, meaning greater efforts will be needed to protect the confidentiality of the information before any announcement.

2. This additional requirement to ensure that the offer notification to the HCMC and the target board is accompanied by a draft offer document has been tested **in the case of the cross bids of Marfin Popular Bank (MRB)** (being a Cypriot company) **for Piraeus Bank** (being a Greek company) and vice versa. Whereas MRB was first to notify the offeree company's board of directors and the HCMC, it did not submit the draft offer document until later the next day. Meanwhile,,Piraeus Bank, being aware of MRB's intention, submitted, to the Cypriot authorities and the target board, its intention to proceed with an offer under Cypriot law. However, under Cypriot law it was not necessary for a draft offer document to be submitted simultaneously with the offeror's intentions. Consequently, Piraeus Bank had properly notified its firm intention to post an offer before MRB, making MRB's rival bid a prohibited defence measure requiring the prior approval of the shareholders.

2002 **Announcement** The offeror announces its intention to proceed with the offer on the day after notification is submitted to the HCMC and the target board, but no later than when trading in the target securities commences. All announcements related to a takeover bid are made simultaneously on the **Athens Exchange website,** in its **Daily Price Bulletin** and on the **offeror's website,** provided that the announcement at the Athens Exchange website always takes precedence. If the securities to which the offer relates are dual-listed or traded in another foreign exchange, all announcements must be accompanied by a **translation** in English.

2003 **Content** The notification is submitted to the HCMC and the target board, and the announcement of the offeror's intention to post an offer must include at least the following details[23]:

[23] Art 10 of law 3461/2006.

a. The **name** and headquarters location of the **offeree company.**

b. The **name** and address of the **offeror** or, when the offeror is a legal entity, the legal status, the name, and the address of the entity's representative.

c. The **name** and address of the offeror's **advisor** for the purposes of the proposed offer.

d. The **securities** constituting the object of the takeover bid.

e. The **maximum number of securities** the offeror is committed to or obliged to acquire, the percentage of such securities in comparison to the total number of securities of the offeree company, as well as to the total number of securities in the same class.

f. The **price** offered for each security.

g. **In the case of voluntary offers,** the minimum number of securities which have to be accepted in order for the tender offer to be declared fully unconditional as to acceptances.

h. The **number of securities** of the offeree company **already controlled,** directly or indirectly, by the offeror.

i. Any **intention** of the offeror to acquire in the market, during the offer period, securities to which the offer relates

Note: The initial requirement of prior notification to the HCMC does **not apply to other offer-related announcements,** which, contrary to the announcement of firm intention, only have to be submitted to the HCMC without delay after - and not prior to - their dissemination to the public.

Disclosures to HCMC and Athens Exchange From the date of the announcement until the end of the acceptance period the following disclosures must also be made to the HCMC and the Athens Exchange: 2005

The offeror and natural persons or legal entities owning at least 5% of the voting rights of the offeree company, as well as the offeror's directors and the directors of the company whose securities are of-

fered as consideration, are obliged to disclose to the HCMC (and publish in the Daily Price Bulletin) details of any **acquisition of shares or consideration securities**, whether made on or off the market, as well as the acquisition price, within the next business day after such an acquisition[24]. The same obligation applies to any person(s) acting in their name but on behalf of the persons mentioned above, or any person(s) controlled by them or acting in concert with them.
The same obligation applies to **any natural person or legal entity who acquires at least 0.5% of the voting rights** in the offeree company, or in the offeror, (or in the company issuing the securities to be provided as consideration if different from the offeror[25]).

2007 **Content of the offer document** According to art 11 of L 3461/2006 the offer document must state at least:

a. the **terms** of the bid;

b. the **identity** of the **offeror** and, where the offeror is a company, the type, name and registered office of that company;

c. the identity of the offeror's **advisor** such as its name, registered office and address;

2008 d. information on the **persons responsible for drafting the offer document**, such as their name and relationship to the offeror, as well as their confirmation that the information in the Prospectus is full and accurate, and without omissions which could modify its content and the essence of the takeover offer;

e. the **securities** or, where appropriate, the class or classes of securities for which the bid is made;

f. the maximum number of securities the offeror is committed to or obliged to acquire, the corresponding percentage of such securities in proportion to the total number of securities of the offeree company

[24] Art 24 of law 3461/2006.
[25] Ibid.

as well as in relation to the total number of securities in the same class;

g. in the case of voluntary offers, the minimum number of securities that have to be accepted in order for the takeover offer to be declared fully unconditional as to acceptances;

h. details of any existing holdings of the offeror, and of persons acting in concert with him/her, in the offeree company;

2009 i. any **intention** of the offeror to acquire in the market, during the offer period, securities to which the offer relates, other than securities tendered within the context of the offer;

j. the **consideration offered** for each security or class of securities and, in the case of a mandatory bid, the method employed in determining it, with particulars of the way in which that consideration is to be paid;

k. where the consideration offered by the offeror **includes securities** of any kind, information concerning those securities, with special reference to all rights attached to the offered securities;

l. conditions imposed by the HCMC in relation to the bid;

m. the **time allowed for acceptance** of the bid, including the start and end dates of the acceptance period;

2010 **n. actions** that the target shareholders accepting the offer must undertake in order to declare their acceptance, the procedure adopted for the fulfilment of all obligations assumed with the declaration of acceptance or the withdrawal of such an acceptance, as well as details of the payment of the offer price;

o. the offeror's **intentions** with regard to the future business of the offeree company and, in so far as it is affected by the bid, the offeror company; this should have regard to the safeguarding of the jobs of their employees and management, including any material change in the conditions of employment, and in particular the offeror's strategic plans for the two companies and the likely repercussions on em-

ployment and the locations of the places of business of the offeree company and its subsidiaries;

p. special agreements related to the takeover offer or the exercise of rights of the target securities, which the offeror (or persons acting in concert with him) holds whether directly or indirectly;

q. conditions attached to the offer;

2011 r. any **transactions** in the target securities, executed either through a regulated market or over-the-counter, which the offeror and the parties acting in concert with him have realised during the 12 month period preceding the publication of the takeover offer, specifying the type of transaction and the volume, price and date of execution;

s. information concerning the **financing** of the bid;

t. the **identity of persons acting in concert** with the offeror or with the offeree company and, in the case of companies, their types, names, registered offices and relationships with the offeror and, where possible, with the offeree company;

u. detailed description of the **shareholding structure** and the offeror's holdings in other companies of the same group in accordance with art 42e of L 2190/1920;

2012 **v.** the **national** law which will govern contracts concluded between the offeror and the holders of the offeree company's securities as a result of the bid and the competent courts;

w. the **compensation offered** for the rights which might be removed as a result of the breakthrough rule laid down in art 17 of L 3461/2006 (where a company opts in to the application of the rule), with particulars of the way in which that compensation is to be paid, and the method employed in determining it.

Notes: **1.** When the offer is structured in the form of a **share for share exchange offer**, where **transferable securities listed** in a regulated market are to be offered as a consideration, the offer document must indicate the **place where the public can have access to the most recent prospectus** published in relation to the securities offered, and any other financial information periodically published by the offeror, being the offered securities issuer[26].

2. When, in a **share for share exchange offer**, the consideration also consists of **unlisted transferable securities**, the offer document shall contain information on those securities equivalent to the information included in a **prospectus** published pursuant to the provisions of L 3401/2005 (transposing the Prospectus Directive into Greek law) which make possible the formation of opinion by the target shareholders of the takeover offer regarding the assets, financial condition, financial results and business prospects of the issuer.

2013 **Signature by the offeror's financial adviser** The initial offer document (or any revised offer document) is signed and certified as to its accuracy by the offeror's financial advisor, who can be either a credit institution or an investment company licensed to provide underwriting services in Greece or in another Member State[27].The offeror's advisor presents, in a separate chapter of the offer document, its opinion as to the methods utilised and the verification procedures introduced to secure that the offeror will fulfil all obligations assumed in respect of the offer and the worthiness of the offer. In particular, the financial advisor must announce its opinion as to the measures taken to satisfy itself that the offeror is financially in the position to be able to implement the offer. The offeror's advisor is also required to state its opinion as to the possibility of any revision to the offer[28].

Note: In cases where the offer is made pursuant to a requirement to make a mandatory bid because of a planned **corporate reconstruction**, which results in the **holders of listed securities receiving unlisted ones** (No 1965), the document offer must also include a clear notice that if

[26] Art 11(2) of law 3461/2006.
[27] Art 12(1) of law 3461/2006.
[28] Art 12(2) of law 3461/2006.

the addressees of the offer do not accept it they may end up holding unlisted securities.

2. Furthermore, in the situation where the **offer price is determined by an independent valuer**, the offer document must include reference to the main assumptions and methods on which the valuation was based[29].

2015 **Approval of the offer document by HCMC** The offer document is granted approval by the Hellenic Capital Market Commission provided that its content complies with relevant law, within 10 days following the submission to the Commission of a complete draft by the offeror. This period is extended to 20 days if unlisted securities are offered as part of the consideration. Where a revised offer is posted, the revised offer document is approved (or not) within 2 business days after submission. Finally, where there is a competitive offer the 10 day period is reduced to 4 business days.

2016 **Exemption from obligation to publish** If any piece of information which is required to be included in the offer document as described above, is not at that time available, or cannot be acquired without incurring excessive cost, or if such information is not considered necessary for the protection of investors or the employees of the offeree company, the Hellenic Capital Market Commission may, by virtue of a justified decision, waive the offeror's obligation to publish such information[30].

2017 **Request for additional information** In addition, the Hellenic Capital Market Commission may request the offeror to include additional information in the offer document, provided that such information is deemed necessary in order for the target shareholders to be better informed about the offer which is on the table[31]. The Hellenic Capital Market Commission may also request the offeror to make modi-

[29] Art 30 of law 3461/2006.
[30] Art 11(5).
[31] Art 11(6).

fications or adjustments in the offer document submitted for approval, provided that this is deemed necessary for the improvement of information disseminated and the safeguarding of investor interests, or the smooth and normal functioning of the market[32]. The offeror must comply with the modifications/adjustments requested by the Commission, making reference to such requests in the offer document if he so wishes.

2018 **Recognition of offer documents of other Member States** Where, in the case of transnational bids, the offer document is subject to the prior approval of the supervisory authority of another EU Member State and has been approved, it is recognised by the HCMC subject to translation into Greek, without it being necessary to obtain the HCMC approval. Nevertheless, HCMC may request the **inclusion of additional information** in the offer document which relates to the Greek market on which the offeree company's securities are admitted to trading, to the formalities to be complied with to accept the bid (and to receive the consideration due at the close of the bid) as well as to the tax arrangements which will apply to the consideration offered to the holders of the securities[33].

2020 **Time allowed for acceptances** The acceptance period starts on the day that the offer document is published and can be set from 4 to 8 weeks. HCMC may, by virtue of a reasoned decision, extend the offer timetable at the offeror's request for 2 more weeks. Such a request must be submitted to the HCMC at least 2 weeks before the expiry of the acceptance period. The HCMC's decision granting approval for the extension of the acceptance period is published by the offeror through the means provided in art 16 of L 3461/2006[34].
The posting of a **revised offer** according to art 21 of L 3461 does not automatically extend the acceptance period. By contrast, if a com-

[32] Art 11(7).
[33] Art 11(10).
[34] See under next heading, No 2023.

petitive offer is posted in accordance with art 26, the acceptance period is automatically extended until the end of the new offer's acceptance period.

2021 **Acceptance of the offer** Acceptance of the offer takes place in the form of a written declaration submitted to those entities authorised by the offeror to accept such declarations (typically banking institutions and investment companies, provided that they are authorised to provide underwriting services[35]). Acceptance of the offer can alternatively be submitted through the central depository by virtue of a written declaration submitted by the authorised operators of the Dematerialised Securities System.

Unless otherwise stated in the offer document, acceptances are freely **revocable**[36]. Nevertheless, acceptance of another offer is not, however, considered as an automatic withdrawal of the acceptance of a previous offer. In this situation, the acceptance of a competitive offer requires the prior withdrawal of any acceptance statement submitted with regard to any other competing offer[37].

On the other hand, in the case of the **revision of an offer**, the acceptance of an initial offer is deemed to be considered as acceptance of the revised offer as well, unless the initial acceptance is specifically withdrawn[38].

2023 **Publication of the offer document** The offer document is published within 3 working days following its approval by the Hellenic Capital Market Commission in paper and electronic form available from the websites of the offeror and the offeror's advisor[39]. Hard copies of the offer document must be available at the offeror's and

[35] Art 18 of law 3461/2006.
[36] Ibid.
[37] Art 26.3 of law 3461/2006.
[38] Art 21.4 of law 3461/2006.
[39] Art 16 of law 3461/2006.

the financial advisor's headquarters, or at credit institutions authorised for this purpose by the offeror.

Simultaneously with its publication, the offer document is submitted to the **board of directors of the offeree company**. The posting of the offer must be accompanied by an announcement regarding the availability of the offer document[40].

All announcements related to a takeover bid are announced simultaneously on the **Athens Exchange website**, in its **Daily Price Bulletin** and on the **offeror's website**, provided that the announcement at the Athens Exchange website always takes precedence.

If the securities to which the offer relates are dual-listed, or traded in another foreign exchange, all announcements must be accompanied by a **translation** in English.

All announcements must also be submitted without delay to the HCMC.

A **revised offer document** must be published on the next business day following its approval by the Hellenic Capital Market Commission[41], whilst a **competitive** offer document is published within 2 working days following its approval by the Hellenic Capital Market Commission[42].

Except for the publication of the offer document, **no other advertisements** with respect to a posted offer are allowed during the acceptance period[43].

2025 **Liability regarding the offer document** L 3461/2006 in art 13 specifically regulates liability resulting from misstatements in the offer document. The provisions mirror the rules applicable in the case of a Prospectus for a public offer or admission to trading under L 3401/2005. According to art 13, the offeror, its financial advisor, and the persons responsible for the preparation of the offer docu-

[40] Ibid para 4.
[41] Art 21 of law 3461/2006.
[42] Art 27 of law 3461/2006.
[43] Art 25 of law 3461/2006.

ment, can be found responsible for any positive damage suffered due to their misconduct regarding the accuracy and the completeness of the offer document. The person who suffered the damage is responsible for **proving** the damage, and the causal relation between the damage and the actions or omissions of the persons responsible. The persons responsible are responsible for proving the absence of misconduct.

Notes: 1. What should be noted with regard to this rule is that art 13 establishes a **basis of liability which is over and above the general rules** for the offeror, its advisor, and the persons responsible for the preparation of the offer document. This provision does not affect any other legal bases on which the parties who have suffered a damage may base their potential claims.
2. One of the notable **advantages** in seeking protection by way of this clause is that the **onus of proof** for the existence or absence of misconduct lies with the culpable party, meaning that the damaged party only needs to prove damage and causal relation. A braver step would be if the rule did not require the damaged party to prove reliance on the offer document, as is, for example, the case with prospectus liability under UK law.

2026 **Limitations** Reliance on art 13 liability is not without its limitations. First of all, it covers only actual **damage** and not loss of profit. Secondly, it is limited to a specific set of **persons** and covers only misstatements or omissions in the offer document and **not in any other announcements** made within the context of a takeover. A shorter **prescription period** also applies, limiting the period in which claims can be lawfully brought before the court to 3 years from the end of the acceptance period. Any **clause** included in the offer document **limiting or excluding liability** of the persons responsible for its preparation, the offeror, and its advisor, is void against those offeree shareholders who accept the offer.

Note: The clause covers only misstatements or omissions **included in the offer document**, and does not initially cover other announcements made in the context of a takeover. To that effect, art 13 specifically clarifies that no party to an offer shall be found liable under art 13 just for announcements made pursuant to art 16.1, except in the case where announcements are misleading, inaccurate, or contradict the content of the offer document.

Report of the board of the offeree company Once the takeover has been announced, the board of the offeree company must, as required by art 9 of the Directive, draw up and make public a document setting out its opinion about the takeover offer at hand. Such a document must at least **contain**: 2027

a. the **number of shares** held or controlled, directly or indirectly, by the directors of the offeree company;

b. the board's **actions**, whether completed or intended, with regard to the takeover bid;

c. any **agreements** between the target's board of directors (or individual directors) and the offeror; and

d. the target management's justified **views** in relation to the takeover bid, referring specifically to the consequences of a successful takeover bid on the target's interests and those of its employees, as well as its views about the offeror's strategic plans for the offeree company, as set out in the offer document.

The opinion of the target board is followed by a detailed report by the target's **financial advisor**. The target board must also compile and publish such an opinion where there are also competitive bids or revised offers. 2028

The target board's opinion is **submitted to the HCMC** and the **offeror** within 10 calendar days from the date of publication of the offer document. Where there are revised offers, the target board's

opinion must be submitted within one day from the approval of the revised offer by the HCMC[44].
The opinion is promptly **published** under the terms of responsibility of the target's board, in the same way that all other takeover-related documents are published[45].

2029 Within the above deadline, the target board's opinion is also **communicated** to the **employee representatives**. If the board of directors of the offeree company receives, within an appropriate timescale, a separate **opinion from the employee representatives** regarding the effect of the takeover offer on employment, it attaches this opinion to the opinion document.

E. Disclosure requirements of the companies

2040 L 3461/2006 provides, in accordance with the Takeover Directive, for the publication of detailed information on certain matters, as listed by law, in the company's **annual report,** and the presentation by the company's board of directors of an **explanatory report to the annual general meeting** of shareholders covering the same matters.

> **Comments: 1.** This rule seeks to cover pre-takeover defensive measures. Such measures, when fully implemented, are not covered by the neutrality rule, as analysed below (No 2090+), and their legality and enforceability rests with the company law provisions of each Member State. The breakthrough rule seeks to regulate (when opting in), their enforceability once a takeover offer has been made. However, if no offer has been announced or communicated to the target's board at the point when such measures or structures are implemented, they are outside the scope of the Directive.

[44] Art 15(3) of law 3461/2006.
[45] See No 2023 above about the offer document and other takeover announcements.

> **2. Such structures or measures** may either be implemented with the purpose of making a takeover offer more costly for a potential offeror, or may just have the same impact, even though that was not the prime and only purpose of their implementation. They may **result from** the normal operation of company law in each Member State, or may constitute permitted derogations from the law included in the articles of association. In this kind of situation L 3461/2006, in accordance with the Directive, limits its intervention to an annual disclosure requirement.

2042 **Capital** Share capital may consist of either common or preference shares.
In Greece, listed companies cannot have **classes of shares** which are not listed. It is also common for companies to have only one class of common shares. Preference shares may constitute different classes, depending on the preferential rights attached to them.
Common shares always carry a voting right, a right to receive a dividend, and a right to participate in the proceeds of a liquidation. By contrast, **preference shares** may not carry voting rights, or may carry limited voting rights[46], and carry a preferential right which usually relates to a preferential dividend payment or a preferential participation in the proceeds of a liquidation. Nevertheless, the preferential rights attached to preference shares may take any form possible, provided that they are economic in nature, and provided that the type of right is explicitly indicated in the company's articles of association.

2044 **Barriers to transfer of securities** Free transferability of listed shares is a cornerstone of the operation of capital markets and the market of corporate control. To that effect, a listed company **cannot include, in its articles,** provisions which restrict a shareholder's right freely to transfer shares, since this would affect the transfer of such shares in the market. Such restrictions may be valid under company

[46] For example the right to vote only with regards to specific items of the agenda or in specific major decisions (merger, dissolution capital increases etc).

law, provided that the right to transfer shares is not entirely abolished. Nevertheless, HCMC and the Athens Exchange, when granting a listing, will not accept such provisions.
In contrast, restrictions on the transfer of shares **may be provided for in shareholder agreements**, in which case such restrictions contractually bind the parties to the shareholder agreement. Nevertheless, a failure to comply with such restrictions does not affect proprietary rights on securities obtained by third parties. **Control rights**, however, may be conferred through a shareholder agreement. Such rights take usually the form of voting agreements by which one party either agrees to vote in accordance with the guidelines of the other party, or best effort clauses. In the former case, such agreements may trigger announcements to the public since any such rights are aggregated with the direct shareholdings of the party exercising the voting rights in accordance with L 3556/2007, which transposed the Transparency Directive.

2046 **Shareholdings** L 3556/2007 transposed the Transparency Directive into Greek law. According to art 9 the **thresholds for notification of shareholdings** are set at 5%, 10%, 15%, 20%, 25%, 33.3%, 50% and 66.6%. This effectively means that any shareholding over 5% is considered as significant.

2048 **Special control rights** There are no special control rights, other than those which arise from the normal operation of company law. This can be the case where a **shareholder has the right to appoint** a member (or **members**) **of the board** of the company, if such a right is recognised in the articles, or where the percentage of share capital held by a specific shareholder confers to him a **de facto veto right** due to the application of the majority requirements imposed by law (or the articles) with regard to certain decisions. Special control rights may be included in **shareholder agreements** but are only contractual in nature, not affecting the legality of any board of directors

or general meeting decisions taken in breach of such contractual requirements.

2049 However, this is no longer the case with **state-owned listed companies**. The fear of a hostile acquisition of OTE by MIG forced Greek officials to introduce anti-takeover measures in the form of legal rules. Art 11 of L 3631/2008 introduces two types of anti-takeover measure in the case of state listed companies with great national importance, which enjoy (or used to enjoy) a monopoly and own or manage public infrastructure networks, Firstly, no shareholder or persons acting in concert (except the Greek State) may acquire more than 20% of the total share capital of such companies without the prior approval of the Privatisation Bi-ministerial Committee of L 3049/2002. Secondly, no major resolutions regarding the future of such companies (including dissolution, amalgamation, merger, split, or any other reorganisation, provision of indemnity, or any strategic change in business plans) are binding and legal unless approved by virtue of a decision of the Ministry of Economy and Finance. The first of these anti-takeover measures greatly resembles the German "Volkswagen law" whilst the second has similarities with the UK regime. Both measures, along with other similar anti-takeover regimes were found by the ECJ (with the exception of Belgian law) to conflict with the EU's guarantee of the free movement of capital as laid down in art 56 EC[47]. As a result, there is little to be argued in favour of the legality of the Greek example, under EU law.

[47] See ECJ's judgments of 4 June 2002 concerning the 'golden shares' under Belgian [C 503/99], Portuguese [C-367/98] and French company law [C-483/99]); see subsequently the Court's ruling on golden share provisions under English company law, C-98/01, handed down on 13 May 2003, and Commission vs. Italy, C-174/04 as well as Commission vs. The Netherlands, C-282/04 and C-283/04, 28 September 2006 and finally Case C-112/2005, dated 23 October 2007, Commission v. Federal Republic of Germany "Volkswagen". For a concise review of some of these cases see Johannes Adolff, Turn of the Tide? The 'Golden Share' Judgments of the European Court of Justice and the European Capital Markets, 3 GERMAN L.J. No. 8 (2002); Peer Zumbansen & Daniel Saam The ECJ, Volkswagen and European

2050 **Limitations on voting rights** It is a paramount rule of company law in Greece that **each common share carries one vote.** Except for **preference shares** (which may not carry voting rights) there can be no separate class of common shares which does not carry one vote. In the same way there can be no common or preference shares carrying more than one vote. Voting restrictions may be provided for in **shareholder agreements**, in which case such restrictions contractually bind the parties to the shareholder agreement. Nevertheless, a failure to comply with such restrictions does not affect the legality of decisions taken on the basis of such voting.

2052 **Shareholder agreements** Any type of shareholder agreement which imposes restrictions or impediments on the **transfer of the** shares held by the parties to the agreement or **restrictions in the exercising of voting rights** is covered by the clause. Such agreements, if known to the company, may also constitute price-sensitive information which must be announced in accordance with L 3340/2005. In order for such agreements to be notified in the annual report of the board of directors, they must be **known to the company.**

Note: The rule does not provide any guidance as to when such agreements are **deemed to be known** to the company, hence, knowledge is an question of actual fact. The company will be deemed to have knowledge of the agreement if it is a **party to the agreement,** as may be the case in certain joint venture agreements or shareholder agreements. The company may also be deemed to have knowledge of the agreement if the **majority of its board of directors has knowledge** of the agreement or are parties to the agreement. The same could be the case where a director, being a party to such an agreement, **discloses** it to the board if this puts him in a conflict of interest situation with the company which needs to be disclosed under L 2190/1920 and L 3016/2002. Similarly, there is a

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Corporate Law: Reshaping the European Varieties of Capitalism 8 GERMAN L.J. No. 11 (2007). See also Nikos Vervessos: *To sxedio Nomou "sistasi ethnikou tameiou koinonikis sinoxis kai alles diatakseis" kai I provlimatiki tis eidikis metoxis. Epitheorisi emporikou dikaiou* 2007, p. 940.

strong likelihood that the agreement will be deemed to be known to the company if the **executive members** of the board of directors are **parties** to, or have **knowledge** of, the agreement.

2054 **Appointment and replacement of board members** L 2190/1920, as recently amended provides that board of director members are elected **by the general meeting.** For the election of directors a ballot system may apply as long as the articles provide so. Any shareholder (or any shareholder who is permitted by the articles) may submit a list of candidate directors. Directors will be elected in accordance to the percentage each receives by way of ballot.

2055 By way of derogation from the general rule that the board is elected by the general meeting, the articles of association may give **specific shareholders the right directly to appoint** a member (or members) to the board, provided that the number of the members so appointed cannot exceed 1/3 of the total number of the board members. The shareholder who has the right to make a direct appointment of a board member (or members) cannot exercise, in the general meeting which elects the rest of the board, any voting rights attached to the shares to which the direct appointment right is related. Board members appointed in this way can be revoked or replaced at any time by the person appointing them.

2056 In the case of the **resignation** of any member of the board, L 2190 provides the following options:

a. Provided that the articles of association make specific reference, the **board may continue until the end of its term** with a smaller number of members as a result of the resignation.

b. Provided that the articles so allow, **substitute members** may already have been elected.

c. Alternatively, the board is convened and its members **appoint a substitute member,** and the board is again set up as a body. Such an appointment must be announced at the very next general meeting.

d. In any case, provided that the remaining number of directors exceeds 3 persons, the board can **convene a general meeting** with the sole agenda item being the election of a new board.

2058 **Power of board members** This clause simply covers the power of the board of directors to issue new shares by virtue of a capital increase, or to acquire own shares.

2059 **Increase of share capital** During the first 5 years of the company's term, the **board** of directors may, by way of a decision **approved** by (2/3) of its total number of members, increase the company's share capital, wholly or partially, through the issue of new shares, (which may not, however, exceed the original share capital). Such powers may also be conferred to the board of directors by an extraordinary **resolution** of the **general meeting** which is subject to the **publication provisions** referred to in art 7b of Consolidated L 2190/1920. In this case, the share capital may be increased up to the amount of the paid-up share capital as on the date on which such power was conferred to the board of directors. Such a board power may be **renewed** by the general meeting (for a maximum period of 5 years each time it is renewed) and its validity will commence upon the termination of each 5 year period. This power of the general meeting is also subject to the **publication provisions** referred to in art 7b of Consolidated L 2190/1920[48].

2060 **Own share purchase** As far as the acquisition of own shares is concerned, art 16 of L 2190 does not give the board the power to initiate a buy back programme without the prior approval of the **general meeting** which will determine, in the same resolution, the terms of such a buy back programme. In practice, however, such terms are structured in broad terms, thereby giving the board considerable flexibility in executing the buy back program. Nevertheless, such flexibility is considerably limited in listed companies due to the market abuse regime, especially when the board wishes to take advantage of the safe harbour exemption in cases of buy backs.

[48] Art 13 of law 2190/1920.

2062 **Change of control clauses** The clause covers all agreements signed by the company which may cease to exist if control of the company changes. Such clauses may exist in **financing agreements, debenture issues** or **major distribution agreements.** In any case, such clauses must be disclosed unless the disclosure of the agreement could damage the company. The determination of the existence of such conditions permitting non-disclosure is more likely to be made in line with those rules applicable in relation to the notification of price-sensitive information under the market abuse regime (art 10 of L 3340/2005). This is because, under the explicit wording of the law, non-disclosure is not permitted if disclosure is required by some other provision.

2064 **Golden and tin parachutes** Golden and tin parachutes paid to executives of the company as severance in case of dismissal will, in most cases, be caught under the provisions of arts 23a and 24 of L 2190/1920. Golden parachutes which are made available to board members or other executives of the company, (if provided for in the articles), require the prior **approval of the general meeting.** The approval can also be given after the signing of the agreement as long as 1/20 of the share capital does not oppose the approval. In addition art 24 requires the special approval of any payment made to any board member unless such payment derives as a contractual obligation for a different reason. This might be the case with regard to executive members of the board who provide their services on the basis of employment or agency agreements. In this latter case, art 23a above will still, however, apply.

F. Restriction on takeover barriers

1. Barriers to takeovers

2080 Takeover defences may either occur **before the announcement** of an offer as a deterrence mechanism against any potential offeror, or **after an offer is announced** as counter measures to a specific offer. In the former case, defensive measures normally seek to make a potential bid more expensive to an offeror, or the company a less attractive target, whilst in the latter case defensive measures usually seek to defeat the offer in question.

2081 **Pre-bid defensive measures** Pre-offer defensive measures (broadly referred to as "poison pills") cover any device by which a target is rendered bid-proof or unattractive to a offeror, **for example**, by transfer restrictions which entrench the control of the target board or otherwise prevent control passing, or by causing a major asset of the offeree company to become valueless on a change of control, or by making the bid more expensive for the offeror (shark repellents). Such devices may be included in the articles of association, although this is not common for Greek listed companies, or derive from key contracts (such as joint venture agreements or debt facilities).

> **Note:** These types of device are **not covered by the neutrality rule**, if fully implemented before an offer is announced, and therefore their operation and legality are subject to normal company law provisions. Nevertheless, they are still **covered by the annual report disclosure requirement** and the **breakthrough rule**, if the company decides to opt in, and both situations will be further analysed below (No 2094+).

2082 Pursuant to Greek company law, the adoption of a poison pill will **not necessarily be unlawful** in all circumstances. For example, contractual change of control clauses may be lawful, when viewed as part of the overall package agreed with the other party in an important agreement. In addition, poison pill devices which derive from

general meeting decisions, such as changes in the articles of association, clearly remain unaffected by the constraints on directors' duties imposed by company law. Such devices are discussed further above, in relation to the disclosure details included in the annual report (No 2040+).

In any event, the **experience in Greece** has been that these types of devices are rarely implemented and do not provide an insuperable obstacle to a hostile bid. By contrast, concentrated shareholdings have traditionally been the main obstacle to hostile bids in Greece. Closer inspection of the market of corporate control reveals considerably more mergers than hostile takeovers, which is indicative of the role of major shareholders in permitting only friendly reconstructions and amalgamations.

2084 **Post-bid defences** Contrary to pre-bid takeover defences, post-bid defences target the offer at hand. Such defences are covered by the neutrality rule discussed below (No 2090+). They may include such actions as the disclosure of new information regarding the target (such as new profit forecasts or preliminary results), the declaration and payment of increased dividends, tactical litigation, the acquisition or disposal of substantial assets, application to competent regulating authorities (especially where approval is required such as in the case of banking institutions or with regards to competition related matters), tactical capital increases, divestments and other corporate reconstructions, buy backs, and the search for friendly offerors (white knights or white squires).

The appropriateness of such devices under Greek law will be examined below where the operation of the neutrality rule will be examined.

2. Optional arrangements of the Directive

a. Board neutrality

2090 **Application by law in Greece** **Measures covered** The neutrality rule (to which Greece opted in) requires the prior approval of all defensive measures implemented by the target board once the offer is announced (except for seeking alternative bids).
Greek law **did not use the option,** provided by the Takeover Directive, **to extend the period** caught by the neutrality rule to cover the time before the formal announcement of the bid and after an offer is imminent. To that effect, informal communication of the offer to the target board (or rumours) do not trigger the application of the neutrality rule, and any defensive measures which are implemented are subject to the normal operation of company law or the market abuse provisions. The neutrality rule, as stipulated by the Directive, covers only actions and board decisions which **do not form part of the normal course** of the company's **business** and the implementation of which may result in the frustration of the bid. The general meeting must also approve and confirm any **decision** taken before the posting of the offer but which is **not yet partly or fully implemented.**

2091 **Convening the general meeting** L 3461/2006 provides that, for the purpose of obtaining the prior authorisation, approval or confirmation of the general meeting, the general meeting can be convened within 14 days of notification being given.

2092 **Measures not covered** This leads to the obvious question: what are the actions which the board can lawfully perform after the posting of the offer without seeking the approval of the general meeting? The wide wording of the rule leaves little room for tactical deviations from it. **Seeking alternative bids** is an action which the rule specifically allows. Seeking also includes soliciting, and so the target board is free to actively initiate a bid by using a friendly bidder.

However, to what extent may the target board **disclose information to the friendly bidder,** giving him the option to come up with (probably) a better offer? Unfortunately, Greek law does not provide an equal treatment principle in the case of competitive offers, and protection can only be sought through the indirect application of general takeover principles and company law duties, to the extent that not providing the same information to the initial offeror could potentially prevent target shareholders from receiving a higher offer.
In addition does the term "seeking alternative bids" **only cover control-seeking bids** (white knights) or can the target board solicit the **acquisition of substantial shareholdings** which do not confer control but can prevent the offeror from acquiring control (white squires)? The former seem most likely to be the intention of the Directive, whilst the latter cannot be precluded by the operation of the definitions of L 3461 for the reasons already explained above.

2093 **Announcement of new information** Another issue which arises relates to the announcement of additional new information which may effectively frustrate the bid. **For example,** the target board may issue a revised profit forecast supporting the prospects of the company as independent, or revise asset valuations making the offer look less attractive. It may also attack the worth of the offeror itself, especially in cases of share for share exchange offers, where the status of the offeror is relevant. The offeree company may be in a position to publish its interim or preliminary results during the offer period (because the timing of the offer coincides with the target's normal results announcement timetable). In addition, it may also disclose additional new information at a point where the offeror may not be able to answer by, for example, revising its offer.
Traditionally, **HCMC has been very strict** with regard to the provision of information and announcements made by the target board. The position of the HCMC has been that L 3461/2006 specifically regulates the means by which the target board may communicate its views regarding the offer. To that effect, it has historically regarded

defensive announcements (made before the board's formal opinion about the offer) as prohibited frustrating actions.

2094 **Approval by general meeting** The prior approval of the general meeting does not need to be specific, and can be wide enough to permit the target board to implement various defensive measures which it finds fit and appropriate. Nevertheless, in such a case the directors' actions are subject to **general company law duties,** whereas when a specific authorisation is provided by the general meeting for a specific measure, the directors' duties are likely to be limited by reference to the disclosure of all appropriate information to the general meeting approving the specific measure.

b. Breakthrough

2100 The breakthrough rule is probably one of the most controversial aspects of the Takeover Directive.

2101 **Opt-out by Greece** In any case, Greece decided not to opt in to the breakthrough rule.

2102 **Opt-in by the company** However, as required by the Directive, L 3461 gave companies which have their seat in Greece the possibility to opt in to the breakthrough rule, by virtue of an extraordinary resolution of the general meeting passed by a 2/3 majority of the voting share capital represented in the meeting.

Such a decision must be **notified** without delay to the HCMC and all other competent authorities, if the company in question has its shares listed in other Member States as well. No restrictions exist as to the **time** that such a decision can be taken, and no specific rules have been set regarding **compensation** in case of the application of the breakthrough rule. This is because, as already analysed above,

no such special voting or control rights exist, either by law or by common practice in the articles of listed companies (No 2048+).

Art 17, in accordance with the Directive, provides for a complete exception from its application for the so-called **golden shares** (shares owned by the state in privatised listed companies). Nevertheless the extent of such an exemption is very small in Greece due to the introduction of L 3429/2005, which abolished a great number of provisions related to listed privatised companies, and left them to operate in accordance with normal company law and corporate governance provisions. However, recent developments have again brought much attention to state-owned companies through the implementation of anti-takeover provisions for state-owned listed companies (No 2048).

c. Reciprocity rule

2110 Both the operation of neutrality and the breakthrough rule are subject to a reciprocity option provided to companies, in accordance with the Directive.

2111 **Board neutrality** As far as the neutrality rule is concerned, law L 3461 provides Greek listed companies with the option to opt out of the rule by virtue of an extraordinary **resolution** of the **general meeting** with a majority of 2/3 of the share capital represented in the meeting. This vote must be taken no earlier than 18 months before the occurrence of the takeover offer, provided that the offer is launched by a company which does not itself apply the neutrality rule, (or by a company controlled, directly or indirectly, by such a company). This may be the case when the Member State where the company has its seat decided not to opt in to the neutrality rule, and the offeror has not used the option granted to it to opt in at an individual level. Art 14 of L 3461 does not make a distinction

between EU companies and foreign companies. In that respect, one should expect that the reciprocity clause is also applicable to takeover offers made by **non-EU companies**, where the law applicable to the offeror (or the offeror's articles) does not include provisions which are equivalent to the neutrality rule.

2113 **Breakthrough** As far as the breakthrough rule is concerned, where a Greek company, which has opted into the application of the breakthrough rule, becomes the target of a company that does not apply this rule, then that company may not apply the breakthrough rule in such circumstances. This can be done by virtue of an extraordinary **resolution** of the **general meeting** with a majority of 2/3 of the share capital represented in the meeting. Such a vote must be taken no earlier than 18 months before the occurrence of the takeover offer provided that the offer is launched by a company which does not itself apply the breakthrough rule, (or by a company controlled, directly or indirectly, by such a company). This may be the case when the Member State where the company has its seat decided not to opt in to the breakthrough rule, and the offeror has not used the option granted to it to opt in at an individual level. Art 17 of L 3461, as with the reciprocity aspect of the neutrality rule, does not make a distinction between EU companies and foreign companies. With that in mind, one should expect that the reciprocity clause is also applicable to takeover offers made by **non-EU companies**, where the law applicable to the offeror (or the offeror's articles) does not include provisions which are equivalent to the breakthrough rule.

G. Minority shareholders

1. Squeeze-out

2130 Even when the offer has been declared unconditional as regards acceptances, and voting control has been passed to the offeror, there may still be a minority of shareholders who have not accepted the offer. Some may have made a positive decision not to accept the offer, and others may simply have overlooked or ignored the documents sent to them, or been untraceable. This minority may provide a problem to the offeror who may wish to obtain 100% of the offeree company. To that effect the Takeover Directive, and consequently L 3461, recognise the offeror's right to a compulsory acquisition of any remaining voting securities in the offeree company which were not tendered during the offer period. The rationale behind such a rule is that when the offer is endorsed by a considerable number of the target shareholders, the offeror should have the right to proceed "all the way" if this makes economic sense to him. In particular, untraceable shares may be a considerable nuisance for the offeror.

2132 **Threshold** In cases where the offeror, pursuant to an offer made for all the target's voting share capital, is in possession of at least **90% of the target's voting rights**, he may buy out the remaining minority shareholders in the target. This means that the compulsory acquisition procedure is only available where there is a takeover offer. In addition, in order for the offeror to have this option, the offer must have been made for the entire voting share capital of the target . Hence, **partial bids** do not confer such a right.

Notes: **1.** The 90% threshold need not have been entirely acquired under the bid process. **Pre-offer holdings** by the offeror and **extra-offer acquisitions** will also be taken into account. However, **acquisitions made after the offer period ends** will not be taken into account, and the offeror cannot, in

such cases, benefit from the squeeze-out procedure of art 27 of L 3461/2007.

2. In contrast, as will be analysed below (No 2138+), the offeror may still be able to **buy out minorities under the company law compulsory acquisition procedure.**

3. An additional **prerequisite** in order for the offeror to be able to use the squeeze-out procedure is **to have reserved the right to do so,** by making specific reference to it in the offer document.

2134 **Squeeze-out by classes** Since an offer for the entire voting share capital of the target, and the possession of at least 90% of the total voting rights are the prerequisites for granting, to the offeror, the right to a compulsory acquisition of any minority holdings, it follows that **squeeze-out by classes is not permitted** under Greek law. This means that reaching the 90% threshold in one of the company's share classes (whether preference or common) does not confer on the offeror the right to acquire the remaining shares of that class. In addition, **no dual test** is required. This means that as long as the offeror is in possession of at least 90% of the total voting rights, he can compulsorily acquire all shares of any class, regardless of whether he reached the 90% threshold in each and every class of voting shares.

2136 **Compensation** The compensation provided to those shareholders whose holdings have been acquired via a squeeze-out must be equivalent in form and value to the consideration offered during the offer. If shares were offered as a consideration in the offer, a **cash alternative** must also be provided to the squeezed-out shareholders. The **price** of the cash alternative will be determined in accordance with the minimum price rules applicable in mandatory bids.

2138 **Procedure Period** The offeror's squeeze-out right must be exercised within 3 months from the end of the acceptance period, provided that the offeror reserved such a right in the offer document[49].

2139 **Notification to HCMC** The offeror informs HCMC and the offeree company of his intention to acquire minority interests in this way. The notification needs to include the type and amount of the consideration offered. The offeree company publishes the offeror's notification on the day after receipt, using all the appropriate methods required for all offer- related publications as discussed above[50]. The offeror's squeeze-out application must also be accompanied by certification, provided by a credit institution, that the offeror is in a position to provide the cash alternative.

2140 **Decision of HCMC** Once HCMC verifies that the offeror holds 90% of the total voting rights in the offeree company, it issues a decision which allows the offeror to acquire the remaining voting rights by **depositing the compensation** for the compulsory acquisition with the central depository system accounts of the beneficiaries (or through a public deposit in cases where, for example, the shareholders entitled to the compensation are untraceable or their identity cannot be verified). The decision also indicates the last day of trading in the target securities. Such a date must be set no earlier than 15 business days after the date on which the HCMC decision is issued.

2141 **Payment of the compensation** The payment of the compensation is made 3 business days after the clearing and settlement of all transactions performed on the last day of trading in the target securities. To achieve this, the **operators of the accounts** of those securities holders whose shares are to be acquired via the squeeze-out **inform** their clients about the procedure, **request a proxy** to receive the compensation on their behalf, and **transfer** (one day after settlement and

[49] See No 2007+ above.
[50] See No 2023 above and art 16.1 of law 3461/2006.

clearing) all securities which are free of charges or other encumbrances to a special account in the securities central depository system.

In parallel, they **notify**, again one day after clearing and settlement, the Securities Central Depository about the following matters[51]:

a. The total **amount** of securities in respect of which they **received a proxy** from their client to receive the compensation;

b. The total **amount** of securities for which **no proxy was provided,** the personal details of the shareholders who did not provide a proxy, and the number of shares each one holds;

c. The total **number** of securities **burdened with** any type of **security, usufruct,** or **distraint,** and the personal details of the owners of such securities.

2142 **Completion of the acquisition** The Securities Central Depository gives notification to the offeror 2 business days after the clearing and settlement of all transactions which occurred on the last trading day. The notification comprises the details received by the operators of the accounts of the remaining target shareholders, and, more specifically, the total number of securities for which the operators **obtained the relevant proxies** for receiving the compensation, and the total number of securities for which **no proxies were provided** (along with the personal details of such shareholders). In the former case, the compensation is deposited the next day in the accounts of the shareholders, whilst in the latter case a public deposit of the compensation is performed in the name of the shareholder who did not provide the required proxy. Following the deposit of the compensation, the central securities depository records the offeror as the owner of the compulsorily acquired remaining securities. The completion of the acquisition is made public by the offeree company.

[51] See HCMC decision 4/403/8.11.2006.

Securities with charges The securities acquired by way of the squeeze-out are, by law,[52] transferred to the offeror free of any charges, liens, third party rights or other encumbrances. Where the securities transferred are charged with any security, lien, usufruct or compulsory distraint proceedings, the offeror must make a **public deposit** of the compensation offered. In cases where the **security** over the transferred securities relates to a claim that has not expired, the creditor and the debtor, must act in common to receive the publicly deposited compensation. If the **secured obligation** has expired, then only the secured creditor is entitled to receive the compensation, to the extent required to cover the remaining unpaid part of the owner's obligation. In cases where a **usufruct** right is granted over compulsorily acquired securities, the usufruct right is by law extended over the compensation offered. In cases where compulsory **distraint proceedings** have been initiated regarding the compulsorily acquired securities, the proceedings extend to the compensation received. 2143

Judicial intervention The shareholders whose holdings are acquired via the squeeze-out can seek judicial intervention if they disagree with the calculation of the compensation provided, by filing a complaint with the court of first instance where the company has its seat within 6 months from the announcement of the compulsory acquisition. However, no interim measures are allowed in order to prevent or postpone the compulsory acquisition. 2144

Relation to national rules Before the implementation of the Takeover Directive, there was no other statutory rule providing for either a squeeze-out or a sell-out right. However, L 3604/2007 which amended L 2190/1920 (which provides the general framework for the operation of limited companies in Greece) introduced two new statutory rights (squeeze-out right and sell-out right) simi- 2146

[52] Art 27a of law 3461/2006.

lar to those introduced by the Takeover Directive, but broader in nature.

According to the statutory compulsory acquisition procedure, a major shareholder **reaching 95% of the total share capital** may compulsorily acquire minority shareholdings at an equitable price reflecting the real value of the company. What constitutes an **equitable price** and real value will be **determined by the court,** to whom the offeror must apply in order to initiate the statutory compulsory acquisition procedure. At any rate, the clause is broad enough not only to cover market value, but the court also has the power to consider any value, including intrinsic or accounting value. The applicant may submit to the court a valuation performed by a certified auditor in accordance with art 9 of L 2190/1920, but the court is not bound by it.

2147 To **exercise the compulsory acquisition right,** the major shareholder must apply to the court of first instance where the company has its seat within 5 years from the date on which the 95% is reached.

It should also be noted that in order for the compulsory acquisition right to be triggered, the major shareholder must have in possession **95% of the total share capital not only the voting share capital.** To that effect, non-voting preference shares must also be taken into account in determining the 95% threshold. The court will examine the existence of all conditions for the exercise of the compulsory acquisition right. L 2190 also provides for the procedure to be followed for the **completion** of the compulsory acquisition. As in the case of the squeeze-out via the rules of L 3461, the acquisition of the remaining shares cannot be prevented or postponed by any legal proceedings.

2. Sell-out

2160 The sell-out right constitutes the other side of the same coin with regard to the squeeze-out right analysed above.

2161 **Threshold** There is no difference in the threshold which triggers the sell-out and squeeze-out rights.

Any minority holder has the right to require the offeror to buy his shares, at the offer price, if the offeror has obtained **90% of the issued voting shares** pursuant to an offer made for all the target's share capital. As in the case of a squeeze-out, the grammatical interpretation of the clause seems to require an offer to have been extended to non-voting shares as well in order for the provisions to be applicable. However, a closer inspection reveals that when the law refers to an offer for shares or securities, by definition it explicitly refers only to voting shares or securities.

2163 **Sell-out by classes** No sell-out by classes is recognized by law for the same reasons given above regarding squeeze-out by classes (see No 2134).

2165 **Compensation** The minority shareholders in the offeree company have the right either to request to be bought at the offer price, or, where the offer was made as a share for share exchange offer, the law provides them with the option to request to receive the same type of consideration proposed during the offer.

2167 Where the target shareholders request to be bought for **cash**, the compensation must equal the offer price, if the offer was made in cash or provided for a cash alternative.

2168 If the offer was structured as a **share for share** exchange offer without a cash alternative then the amount of the compensation is calculated as follows[53]:

[53] See CMC decision 1/409/29.12.2006.

a. If the shares offered as consideration are **listed,** or admitted to trading in a regulated market, the compensation may not be less than the highest of the following prices:
- the volume-weighted average market price of the offered securities during the offer period;
- the average market price of the shares during the 6 months preceding the date on which the offeror became obliged to launch the mandatory takeover bid; and
- the price that the offeror (or the persons acting in concert with the offeror) has/have paid to acquire the shares during the 12 months preceding the date on which the offeror became obliged to launch the mandatory takeover bid.

b. if the offered securities are **not listed,** then the sell-out compensation is determined by an independent expert valuation. The independent expert must be a certified auditor, and is appointed by the HCMC at the expense of the offeror.

2169 If the consideration offered during the offer consists of a **share element and a cash element,** the sell-out compensation consists of the cash element of the offer plus the valuation, in cash, of the share element in accordance with the valuation rules outlined above.

Instead of cash, dissenting shareholders may elect to receive compensation in kind. This would be the securities offered as consideration during the offer, if appropriate.

2171 **Procedure** A right to sell-out must be exercised within 3 months from the announcement of the outcome of the offer. To facilitate this, the offeror, as part of the announcement detailing the outcome of the offer, informs the remaining shareholders of their sell-out right. It should be noted that only securities free of any charges, third party rights or other encumbrances can be tendered to the offeror during the sell-out procedure.

2172 The transfer of securities **tendered for cash** is made on the market during the sell-out right period. Those dissenting shareholders who

elect to receive compensation in kind must do so by submitting the relevant written request to operators of their accounts where their securities are recorded, along with a declaration that they authorise the Securities Central Depository to perform the share for share transfer required to effect the transaction. After the end of the sell-out period, the operators of the dematerialised securities system **transfer** (on the day after clearing all those transactions performed on the last day of the sell-out period) the target shares **to the special account** which each shareholder holds in the dematerialised securities system. The operators also **communicate,** to the central securities depository, the details of those of their clients who wish to receive compensation in kind[54]. The central securities depository **informs** the offeror on the next business day, providing him with a detailed list of the shareholders who wish to receive compensation in kind. The offeror must, within 3 days, **return the list completed with the details of the shares which each shareholder will receive** in compensation. The total amount of the securities which need to be provided as compensation, if listed, must have been credited to the offeror's special account in the dematerialised securities system in order that the Central Securities Depository may perform the transfers to the relevant beneficiaries. The share for share exchange is performed off the market. If the securities offered are not listed, the offeror must provide confirmation (signed by his financial advisor) that he holds the securities required to be paid as compensation, and that he assumes the responsibility to transfer the securities to the appropriate beneficiaries. Once the Central Securities Depository receives this confirmation, it transfers the target shares which have been tendered to the special account of the offeror, and informs him

[54] For each investor a Special Account exists which records securities for which the investor hasn't appointed an operator. For these securities the operator is considered to be the CSD. In order to sell the securities entered in the Special Account, the investor must first refer to the CSD so that the securities are transferred to the Special Account under the management of the operator.

so that he can proceed with the payment of the compensation in kind.

All **expenses**, CSD fees and **taxes** related to the transfer of the target securities, as a result of the exercise of the sell-out right, are borne by the offeror, and must be paid before carrying out the relevant transfers.

2174 **Relation to national rules** Art 49b of L 2190/1920 provides for a sell-out right to all minority shareholders when a major shareholder acquires and retains possession of **more than 95%** of the total share capital of the company. In order to **determine** the percentage of the share capital held by the shareholder, and to see whether the 95% threshold is met, it is necessary to aggregate all the shareholdings of companies which belong to the same group as the shareholder, and also shareholdings belonging to his spouse or certain close relatives (many European countries would use the term "to the third degree"). The sell-out right is **exercised** by way of an application to the court of first instance, where the company has its seat, within 5 years from the date on which the 95% threshold is reached. The court is free to determine the **equitable price**, which must reflect the real value of the acquired shares. For this purpose, the court may order a valuation of the company to be performed. The dissenting shareholders may not proceed with the transfer of the shares if they are not satisfied with the value determined by the court.

2175 **Differences** In view of the above, the company law sell-out right has considerable differences to the sell-out right provided for by L 3461/2006. Firstly, the **threshold** required to be reached to trigger the application of the right amounts to 95% and not 90%. Secondly, the **threshold relates to the share capital whether voting or not**, whilst in the case of the takeover related sell-out right the threshold is reached by reference to voting rights. The application of each set of rules is independent and the circumstances where the company law rules apply are broader. In addition, the **determination of price** paid when the right is exercised is different in each set of rules. Finally, the company law sell-out procedure relies heavily on **judicial intervention**.

2176 **Consequences of the existence of two different procedures** The application of two different procedures in listed companies may lead to unnecessary and burdensome procedures. If, for example, both thresholds are reached simultaneously, which of the procedures will have priority? What if some shareholders elect to initiate the sell-out procedure of L 3461/2006, and others the court proceedings under L 2190/1920? The application of each right may be subject to different prescription periods, with the takeover sell-out right having a very short prescription period, but the procedures may still lead to different outcomes.

An **interpretation** of the rule, which could lead to greater legal safety, would be that the company law rule does not apply in cases where the takeover related sell-out right is triggered, as the latter, being a special rule, should supersede the more general one. In general, company law provisions should at least have provided for special reference to valuation rules, similar to the rules applicable in relation to the sell-out rule of L 3461/2006. At any rate, extending the application of the sell-out rule of L 3461/2006 to all cases where a shareholder reached the 90% threshold (instead of confining its application to takeovers), would probably have been a more efficient rule for listed companies.