NYLS Journal of International and Comparative Law

Volume 12
Number 3 *FOURTH ANNUAL ERNST C. STIEFEL SYMPOSIUM: THE PRIVATIZATION OF EASTERN EUROPE*

Article 9

1991

THE PROPOSED REGULATION OF CORPORATE TENDER OFFERS IN THE EUROPEAN COMMUNITY

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I. INTRODUCTION

Today, no uniform regulatory system exists within the European Community (the "EC") to govern corporate tender offers. With the establishment of a truly unified market, the creation of a comprehensive and uniform system for the regulation of European corporate tender offers is becoming increasingly important. Recently, European companies have been engaging in mergers and acquisitions at a scale and a pace never before experienced.[1] A driving force behind the recent activity is the desire of many European corporate leaders to better position their companies for the barrier-free market envisioned for Europe.[2]

As the number of corporate takeovers within the EC increases, the need for uniform tender offer regulation has become increasingly necessary. The variations in regulatory schemes among EC member states concerning tender offers are significant. Some member states, such as the United Kingdom, have a highly sophisticated and very satisfactory regulatory system currently in place[3] while other members, such as Denmark and Greece, have very limited tender-offer regulation. Present regulation within the EC varies dramatically with regard to the rights and obligations of both the offeror and the target company: such variations

1. Steven Greenhouse, *Merger Mania Strikes Europe as Barrier-Free Market Nears*, N.Y. TIMES, Aug. 26, 1988, at A1, [hereinafter Greenhouse, *Merger Mania*]. Major mergers involving EC-based companies increased from 117 in 1983 to 303 in 1987. *Id.* For fiscal year 1988 the figure was 450. *Id.* In 1988, there were nearly 500 mergers and acquisitions within Europe which had a total value of $81.5 billion as compared with a total value of only $11.1 billion in 1985. Steven Greenhouse, *Europe's Buyout Bulge*, N.Y. TIMES, Nov. 5, 1989, at F1 [hereinafter Greenhouse, *Buyout Bulge*]. Cross-border mergers and acquisitions amounted to 42.4% of all intra-European deals in 1988 as compared to only 13.8% in 1985. *Id.* at F6.

2. Greenhouse, *Merger Mania, supra* note 1, at A1.

3. In the United Kingdom, corporate takeovers are regulated by stante and administered by the Panel on Takeovers and Mergers. CITY CODE ON TAKE-OVERS AND MERGERS (Release 35:10—vii—89), at 4513 [hereinafter CITY CODE].

include mandatory disclosure requirements; the rights granted to shareholders; the procedure for launching an offer; the rights of the target company's employees; and the defensive action permitted by the target company's management and its board of directors to frustrate a tender offer. Additionally, differences exist as to the formal requirements of an offer document and the amount of flexibility permitted for revising, withdrawing, or responding to a competing takeover bid. Of particular concern are the various defenses against hostile takeovers permitted by a number of member countries. There is also a very basic difference as to the rights of corporate shareholders that must be addressed. The Anglo-Saxon tradition emphasizes the capital market and shareholder value, while in Continental Europe an institutional view of companies with share-capital predominates. In the latter system, the interests of the company do not necessarily correspond to the interests of the shareholders.[4]

Against this background, the Commission for the European Communities (the "Commission") has drafted a Proposal for a Thirteenth Council Directive on Company Law Concerning Takeover and Other General Bids (the "Proposed Directive").[5] This Note will briefly discuss the history of the company law harmonization program in the EC and briefly review aspects of takeover regulation currently in place in some of the larger member states, particularly the United Kingdom.[6] This Note will then examine the Proposed Directive and comment on its possible effectiveness.

II. A BRIEF EC COMPANY LAW HISTORY

The Treaty of Rome established the EC in order to create a common economic bloc.[7] To achieve this goal the Treaty of Rome proposed four basic freedoms that were to form the cornerstone of the economic union within the Community: the freedom of movement of goods, people,

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4. *See generally* J.M.M. MAEIJER & K. GEENS, DEFENSIVE MEASURES AGAINST HOSTILE TAKEOVERS IN THE COMMON MARKET (1990) [hereinafter HOSTILE TAKEOVERS].

5. Proposal for a Thirteenth Council Directive on Company Law Concerning Takeover and Other General Bids, COM(88) 823 final at 2 [hereinafter *Proposed Directive*].

6. The United Kingdom is of particular importance because it has by far the largest corporate takeover market in Europe. Britain has the biggest stock market, half of the continent's publicly held companies, and the largest collection of industrial giants. Joann S. Lublin & Craig Forman, *Battle of Britain: Europe's Merger Boom Triggers an Invasion by U.S. Deal Makers*, WALL ST. J., Aug. 23, 1989, at 1.

7. Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 3 [hereinafter Treaty of Rome]. *See* Christopher Cruickshank, *Insider Trading and the EEC*, 10 INT'L BUS. LAW. 345 (1982).

services, and capital.[8] An important idea behind the "four freedoms" was the "right of establishment."[9] The right of establishment provides that companies from one member state should be able to conduct their business in another member state and enjoy the same privileges and treatment as a local company.[10] To further this goal, the Treaty of Rome grants the World Commission the authority to establish regulations for the protection of members, with an eye towards establishing uniform standards for companies throughout the EC.[11]

The "company law harmonization program," the name given to the process of creating uniform company laws throughout the EC, is a large-scale attempt by the EC to safeguard workers, shareholders, and the public against certain kinds of corporate wrongdoing.[12] To achieve this end, the Treaty of Rome grants the Council of Ministers power to harmonize the legal framework of the various member states and to use "directives" to attain that objective.[13] A directive is the characteristic method of integrating EC policy into the national law of the member states. Directives reconcile national, legislative, and administrative provisions, which have a primary impact on the well-being of the EC.[14] Under the Treaty of Rome, each member state is required to fulfill the purpose of the directive. The specific provisions of the national law that implements the goal of the directive and how the desired result is to be achieved, however, are left to the legislatures of the respective member states' national governments.[15] This arrangement makes it necessary to examine a directive in a particular country to ascertain whether or not it has been adopted and implemented successfully.[16]

The Commission is responsible for introducing a directive proposal.[17] When the Commission focuses on a particular area of concern, it assembles a working group of experts from the member states. This group of experts

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8. Treaty of Rome, *supra* note 7, art. 3.

9. *Id.* arts. 52-58.

10. *See* James R. Silkenat, *Efforts Toward Harmonization of Business Laws Within the European Economic Community*, 12 INT'L LAW. 835, 836 (1978).

11. *See* Steven M. Schneebaum, *The Company Law Harmonization Program of the European Community*, 14 LAW & POL'Y INT'L BUS. 293, 296 (1982).

12. ANTHONY PARRY & JAMES DINNAGE, EEC LAW 22 (1973).

13. Cruickshank, *supra* note 7, at 345.

14. *Id.*

15. Treaty of Rome, *supra* note 7, art. 193.

16. Cruickshank, *supra* note 7, at 345.

17. PARRY & DINNAGE, *supra* note 12, at 22.

then confers with parties outside the EC.[18] After studying the problem, the Commission adopts a draft text of the proposal and submits it for acceptance to the Council.[19] The Treaty of Rome requires that the Council consult the Assembly and the Economic and Social Committee[20] prior to commencing an examination of the Commission's proposal. After these two bodies give their advice, the Council sets up another working group with representatives from the member states. This group's objective is to achieve a general concurrence on the proposal from experts in the field.[21] If problems are unresolved after this review, ambassadors from each member state assemble to discuss the problems. After the remaining problems have been mediated, the Council discusses the proposal and usually adopts it as a Council directive.[22] Member states then have a certain period of time, usually two years, in which to conform their national laws to the directive.[23]

The EC securities law directives are premised primarily on the goal of the free movement of capital—the policy that was espoused by the Treaty of Rome.[24] The creation of a common-capital market for the EC is considered a precondition to the goal's success.[25] The Commission's policy is to establish the common capital market by encouraging greater investor penetration of the different national-capital markets while at the same time guaranteeing that all member states maintain effective standards of investor protection throughout the EC.[26]

18. Cruickshank, *supra* note 7, at 345.

19. *Id.*

20. Treaty of Rome, *supra* note 7, art. 189.

21. *See* Cruickshank, *supra* note 7, at 345.

22. *Id.*

23. *Id.* Under article 169 of the Treaty of Rome, the Commission can enforce the directive by suing the noncomplying country in the Court of Justice. According to article 171, however, a judgment is merely declaratory. *Id.* Therefore, the success of any harmonization program is entirely dependent on the good faith effort of the member states. *See* Manuel Lorenz, *EEC Law and Other Problems in Applying the SEC Proposal on Multinational Offerings to the U.K.*, 21 INT'L LAW. 795, 811 (1987).

24. Treaty of Rome, *supra* note 7, arts. 67-73.

25. Cruickshank, *supra* note 7, at 346.

26. *Id.* "The process of interpenetration cannot . . . take place if some markets are functioning well and efficiently and others not." *Id.*

III. The Need for Takeover Regulation in the EC

Until the 1950s, most corporations in Western Europe were predominantly family owned or closely held.[27] Large, publicly held corporations, requiring mandatory disclosure of financial information, played a small part in most national economies.[28] Additionally, most corporations heavily relied on debt rather than equity financing, and they typically relied on banks to meet those needs.[29] Furthermore, the role of large institutional investment traditionally has been small in Western Europe.[30] As a result, laws affecting corporations were largely void of securities regulation.[31] While mergers have been taking place in most European countries since the 1930s, takeover bids have been a more recent phenomenon.[32] This historical background helps explain the diversity in takeover regulation within the EC today.

A takeover bid or "tender offer" typically refers to an offer of money or new securities in exchange for securities or instruments that carry voting rights in the target company.[33] A tender offer has been defined as "a public announcement by a company or individual, indicating that it will pay a price above the current market price for the shares tendered of a company it wishes to acquire or take control of."[34] The purpose of the tender offer typically is to acquire control of the company or to increase the offeror's existing control. Thus, the tender offer is conditioned on the offeror acquiring a sufficient number of shares to accomplish her goal.[35]

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27. Manuel F. Cohen, *International Securities Markets: Their Regulation*, 46 ST. JOHNS L. REV. 264, 271 (1971).

28. *Id.*

29. *Id.*

30. *Id.* at 264 n.8.

31. *Id.*

32. *See Proposed Directive, supra* note 5, at 3.

33. *See* BLOOMENTHAL, SECURITIES LAW HANDBOOK 481 (1989-90). The term "tender offer" is defined as:

> [A] means of buying a substantial portion of the outstanding stock of a company by making an offer to purchase all shares, up to a specified number, tendered by shareholders within a specified period at a fixed price, usually at a premium above the market price. In one sense, it is an alternative to a proxy contest for control and is usually a more effective (but also more costly) one. At the same time, it is also the first step in acquiring a company, since the company making the tender offer may follow the tender offer with a merger proposal.

Id.

34. BLACK'S LAW DICTIONARY 1468 (6th ed. 1990).

35. It should be noted that takeovers are not technically considered mergers because they

Takeovers in the United States, both mergers and acquisitions, have been an accepted part of American corporate life for some time.[36] Europe, however, has only recently experienced a wave of merger and acquisition activity.[37] Takeovers in Europe are expected to rise dramatically in the coming years as European companies attempt to position themselves to compete better in the barrier-free market envisioned for the future.[38] Many leading European industrialists are now realizing the benefits of takeovers, even hostile ones, that until recently would not have been welcomed.[39] The difficult problem now facing the EC is how to harmonize a diverse body of tender-offer legislation within the EC while at the same time ensuring fairness to all member states and their corporations and shareholders.

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are legally quite different. Takeovers do not involve the dissolution of one of the companies or the transfer of its assets or liabilities to the acquiring company. The company whose shares are acquired remains in existence. *See generally*, BRUDNEY & CHIRELSTEIN, CORPORATE FINANCE, CASES AND MATERIALS (3rd ed., 1987). The law regulating mergers within the EC is extensive and is beyond the scope of this note.

36. The total value of American mergers and acquisitions in 1988 was more than $300 billion. Richard I. Kirkland Jr., *Merger Mania Is Sweeping Europe*, FORTUNE, Dec. 19, 1988, at 157.

37. *Id.*; *see* Greenhouse, *Merger Mania, supra* note 1, at A1.

38. *See* Greenhouse, *Merger Mania, supra* note 1, at A1. "To seize opportunities presented by the EC's push for a truly unified market by 1992, and to avoid getting clobbered by new competitors, companies must redouble efforts to build pan-European manufacturing and marketing muscle." *Id.* Robert E. Rubin, a vice-chairman with Goldman, Sachs & Company, stated in 1989 that "I think it is possible, even likely, that what you are going to see in Europe is the same kind of environment you have seen in the United States in the last few years." Kurk Eichenwald, *A Mania for British Mergers*, N.Y. TIMES, July 23, 1989, § 3, at 1. *But see* Thomas Kamm & Philip Revzin, *Takeovers Aren't Likely to Sweep Europe*, WALL ST. J., Aug. 7, 1989, at A14 (stating that, as compared to the United States "there are different systems of raising liquidity, market funding and corporate controls." Also, despite the fact that merger and acquisition activity has increased, much of the future restructuring "is likely to take the form of alliances, joint ventures or friendly takeovers rather than aggressive, debt financed raids."). *See also* Greenhouse, *Buyout Bulge, supra* note 1, at A1 (stating that while hostile takeovers are a way of life in America, they may not appeal to European gentility and animosity toward junk bond financing).

39. *See* Kamm & Revzin, *supra* note 38, at A14. Some in upper management realize that hostile tender offers could have a positive effect on European business by pressuring management to take the notion of shareholder value into account. *Id.* By raising the takeover stakes, raiders such as Britain's Sir James Goldsmith and Italy's Carlo Di Benedetti are forcing European businessmen to think about refocusing their businesses and improving returns to shareholders. *Id.*

IV. An Overview of EC Member States' Takeover Regulation

The feasibility of a hostile tender offer in the EC is, in large part, a function of patterns of share ownership in that country, voting rights allocated to publicly held shares, the defensive tactics permitted, and the ability of shareholders' to transfer their shares easily.[40] Broad restriction on the transferability of shares is permitted by corporate statute in many countries in continental Europe.[41] EC member legislation concerning tender offers differs widely with regard to the scope of application, the various disclosure requirements, the duty to initiate an offer, the techniques used for commencing an offer, the availability of defensive action and "poison pills" used by the target company to frustrate a bidder, and the various consequences of the offer itself. Many member states regulate only those transactions involving companies listed on their own stock exchanges. In contrast, the United Kingdom governs takeovers encompassing both listed and unlisted public companies and even some private companies that were connected to the stock exchange in the ten years prior to their acquisition.[42] In some member states, mandatory bids are required when an offeror's share ownership reaches certain levels, while such measures are not required in other states.[43]

Among the considerations to be addressed when proposing tender offer regulation in the EC are the various systems of regulation currently used. For example, in the United Kingdom, where the majority of European takeovers occur,[44] a comprehensive regulatory system is currently in place. Regulation in the United Kingdom is usually described as "self-regulatory," as contrasted with the statutory scheme in the United States.[45] The guiding

40. Deborah A. Demott, *Comparative Dimensions of Takeover Regulation*, 65 WASH. U. L.Q. 69, 73 (1987).

41. *Id.* at 77; *see generally* MAEIJER & GEENS, *supra* note 4.

42. Nathalie Basaldua, *Towards the Harmonization of EC-Member States' Regulations on Takeover Bids: The Proposal for a Thirteenth Council Directive on Company Law*, 9 NW. J. INT'L L. & BUS. 487, 490 (1989).

43. *Id.* For example, in Portugal, Spain, and the United Kingdom, mandatory bids are required when 20%, 25%, and 30% are acquired respectively. *Id.*

44. *See* Robert J. Cole, *Takeover Fever is High in Britain*, N.Y. TIMES, Apr. 11, 1989, at D2. "Figures compiled by Goldman, Sachs & Company show there were 154 large deals in Britain last year [1988] with a total value of $72 billion. This was up 56% from 1987 when there were 94 deals worth a total of $46 billion." *Id.*

45. It has been said that the contrast between the British and American systems can be reduced to a pair of observations: "It is better to be a shareholder in Britain. It is better to be a lawyer in America." *Takeovers: The Right Way to Regulate the Market*, ECONOMIST, Sept. 23, 1989, at 22.

force behind the United Kingdom's system is the City Code on Takeovers and Mergers (the "City Code").[46] The City Code, which was enacted in 1968, is issued by the City Working Party[47] and is administered by the Panel.[48] The City Code does not have the force of law.[49] However, the Takeover Panel, as a private organization run by the securities industry, can enforce the City Code. The Panel exercises real power over the financial community through its ability to ban investment advisors who violate its Code.[50] The Code requires extensive disclosure by bidders,[51] sets a minimum duration for offers,[52] and requires prorated acceptance for oversubscribed partial bids.[53] The City Code regulates the conditions a bidder is likely to impose on offers[54] and permits bidders to purchase shares outside the offer itself after the tender offer has been announced.[55]

46. *See* CITY CODE, *supra* note 3, at 4513. The City Code consists of ten general principals and thirty-eight rules. *Id.* There are five rules addressing the issue of substantial share acquisition.

> The [General Principals or GP's] are a codification of 'good standards of commercial behavior' intended to have an obvious and universal application, while the Rules are intended to be examples of the application of the [GP's], or are rules of procedure to govern takeovers and mergers. As such, the Rules are to be interpreted in the light of the [GP's] and the broad expression of intention in the [GP's]. Furthermore, the City Code imposes the spirit as well as the precise wording of the [GP's] and Rules to be observed, extending to areas and circumstances not explicitly covered by any rule.

Sappideen, *Takeover Bids and Target Shareholder Protection: The Regulatory Framework in the United Kingdom, United States and Australia*, 8 J. COMP. BUS. & CAP. MKT. L. 281, 305 n.25 (1986).

47. "The City Working Party is an ad hoc group of individuals representing various sectional interests such as the accepting houses, investment trust companies, the insurance industry and the Issuing Houses Association." Sappideen, *supra* note 46, at 305 n.26.

48. The Panel consists of

> [t]he chairmen of the various sponsoring organizations. It also includes the President of the Institute of Chartered Accountants, a representative of the Confederation of British Industry, and a representative of the Governor of the Bank of England who is Deputy Chairman of the Panel. The Chairman is an independent outsider.

Id. at 305 n.27.

49. *See* CITY CODE, *supra* note 3, at 4513.

50. *See* Cole, *supra* note 44, at D2.

51. *See* CITY CODE, *supra* note 3, at 4555-58.

52. *Id.* "An offer must initially be open for at least 21 days following the date on which the offer document is posted." *Id.* at 4568.

53. *Id.* at 4575.

54. *Id.* at 4545.

55. *Id.* at 4561.

The City Code also requires that any person (or those acting in concert with him) who acquires a thirty-percent stake in a company must make an offer for all the remaining shares at the highest price paid during the preceding twelve months.[56]

In Germany, a country where hostile takeovers are rare,[57] there is no existing regulatory authority to oversee takeovers.[58] There are a number of reasons that account for the lack of tender offer activity in Germany. First, shares of stock in German companies typically are not widely held, making share acquisition by a raider on the open market difficult.[59] Second, despite the fact that German companies may lack anti-takeover defenses—the so called "poison pills" that have become commonplace in America—many large German banks have significant holdings in these companies. This can often effectively protect them from hostile takeovers.[60] Third, many companies have rules that limit the voting power of

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56. *Id.*

> The City Code's imposition of a buyout requirement accomplishes a number of separate goals. First, it insures that all shareholders, non-controlling as well as controlling, will share equally in any premium paid by a buyer so long as at least thirty percent of the company's shares are sold. Second, it protects non-selling shareholders against the risk that the new controlling shareholder will exploit its position to their disadvantage. Third, it eliminates the possibility that non-selling shareholders (especially those in the wake of a successful partial bid) will be bought out in a freeze-out merger for a lesser consideration than that of the tender offer.

Demott, *supra* note 40, at 94-95.

57. *See* Kirkland, *supra* note 36, at 166. Reasons for the lack of takeover activity in Germany include a relatively underdeveloped stock market, closely held public companies, and laws allowing the transfer of stock to "friendly hands." Basaldua, *supra* note 42, at 493-94. Also, Germany has only 474 publicly traded companies, and German banks often own large blocks of these shares, so the chances for successful hostile tender offers are diminished. *Id.* Historically, Germany's powerful Cartel Office also has created obstacles for foreign purchasers. Blanca Riemer, *On the Continent, Raiders Still Have a Long Way to Go*, BUS. WK., Mar. 7, 1988, at 46. *See generally* HOSTILE TAKEOVERS, *supra* note 4, at 113-14.

58. Simon MacLachlan & William Mackesy, *Acquisitions of Companies in Europe—Practicability, Disclosure, and Regulation: An Overview*, 23 INT'L LAW. 373, 392 (1989).

59. Lawrence J. DeMaria, *Ideas for Picking Stocks in Europe*, N.Y. TIMES, Mar. 3, 1988, at D1. "The West Germans are not a stockholding people. Only about 3.5 million of them own stocks, compared with 47 million Americans — roughly one of every 20 Germans and one of every five Americans. German stocks typically trade at low price/earnings multiples and offer high dividends." *Id.*

60. For example, Deutsche Bank A.G. owns more than 25% of Daimler-Benz and more than 12.5% of the Hapag-Lloyd shipping Company. The daunting power of Germany's banks, which usually have key positions on most corporate boards, discourages most takeovers. Several German stock analysts said that when the Flick brothers tried to take over Feldmuehle Nobel A.G. last spring, Deutsche Bank quickly bid up the stock price so high that the target became unappetizing. Steven Greenhouse, *Swiss and Germans use "National Poison Pill,"* N.Y. TIMES,

shareholders, regardless of the extent of their equity holdings.[61] Many German firms have a statute clause that effectively prevents a single shareholder from controlling a majority of the voting rights of the corporation.[62] A hostile bid can not ultimately be successful unless the shares available for acquisition possess sufficient voting rights to entitle their owner to control the board, and, therefore, control the corporation. Finally, many German companies have extensive cross-holdings that frustrate hostile takeovers.[63] German officials are quick to point out however, that their companies have been able to grow steadily, partly because management does not have to focus on short term goals, as is often the case in America.[64] Still, some predict that it is only a matter of time before hostile tender offers become a fact of corporate life in Germany.[65] The end result is that in Germany significant regulatory enforcement mechanisms do not currently exist to protect investors from potential corporate misconduct.

In the Netherlands, regulatory takeover legislation has not been enacted. Takeovers are regulated by the Merger Committee established by the Social and Economic Council, but its enforcement mechanisms lack

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Aug. 26, 1988, at D3.

61. *Id.*

62.
> The clause—used by Deutsche Bank, tire-maker Continental AG, utility Veba A.G. and chemical concern Bayer AG to name a few—restricts a shareholder's voting rights to five percent even if he holds a larger stake of the share capital . . . . This gives the management of a company a great deal of power and security against any hostile attack. . . . [T]he dual West German system of a supervisory and a management board is another deterrent against hostile takeovers. The shareholders appoint the supervisory board, made up of administrators for the major shareholders and by employee representatives, which in turn appoints the management board. To change the supervisory board, and gain control of the company, the takeover bidder must call a shareholders' meeting and win more than half of the votes. This all takes time and is very costly for a takeover bidder who is financing his bid with a loan . . . . In the United States, you can kick out the management from one day to the next. Here, you can't.

Old-Boy Network, Legal Traps Shield German Firms from Attack, Reuter Bus. Rep., Mar. 9, 1988, *available in* Lexis, Nexis Library, Omni file.

63. Terence Roth, *New Takeover Wave Sets Tone in European Markets,* WALL ST. J., Jan. 3, 1989, at 8.

64. *See* Greenhouse, *Buyout Bulge, supra* note 1, at F6. "We should remember that some of the countries most hostile to unfriendly takeovers have some of the most efficient economies in the world." *Id.*

65. "Some bankers and businessmen think Germany could be ripe for hostile takeovers and even LBOs because its cozy protection system has spared many companies the restructuring other European concerns have had to undertake." Kamm & Revzin, *supra* note 38, at A14.

substance.[66] In addition, the government of the Netherlands permits extensive anti-takeover measures.[67]

In France, continental Europe's leader in takeover activity,[68] regulation is a fairly complex combination of statutory and non-statutory authority. The Stock Exchange Council, the French Stock Exchange, the Stock Exchange Commission, and the Ministry of the Economy, Finance and Budget all act in combination to regulate both the terms of the bid and the proper disclosure documentation required.[69] In France, the *Code des Societes* allows a French corporation's charter to require that transfers to "a third party whomever he may be," be subject to the corporation's consent.[70] If the corporation does not consent to the transfer it may repurchase the shares itself or cause them to be purchased by a friendly shareholder or some other third party.[71]

Italy does not address takeover regulation in its laws specifically, but the Commission for Companies and Stock Exchange ("CONSOB") exercises some control in this area.[72] The character and dimension of this control, however, is currently unclear and under discussion.[73]

In Belgium, the Banking Commission supervises public takeovers. Its sole power is to veto the making of an offer for up to three months and to publicize its decision.[74] The recent case involving Carlo Di Benedetti's unsuccessful takeover bid for the huge Belgian holding company Societe Generale illustrates the ineffectiveness of the Belgian regulatory system. In its present form, it is ineffective in both maintaining fairness between the target corporation and the offeror and in protecting the shareholders of the target corporation.[75]

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66. *See* HOSTILE TAKEOVERS, *supra* note 4, at 173; *see also* Basaldua, *supra* note 42, at 490.

67. Greenhouse, *Buyout Bulge*, *supra* note 1, at F6.

68. *See* Roth, *supra* note 63, at 30. "The dominant fact on the Paris market this year [1988] was the wave of takeovers .... The number of takeover transactions more than tripled from 1987." *Id.* Only one-hundred takeovers took place between 1965 and 1975 and nearly all of these were friendly. HOSTILE TAKEOVERS, *supra* note 4, at 92. By 1988 over forty a year were taking place and many of these were hostile. *Id.*

69. *See* Basaldua, *supra* note 42, at 493.

70. CODE DES SOCIETES ART. 274 (Generale Dalloz 8th ed., 1985).

71. *Id.* art. 275.

72. *See* Basaldua, *supra* note 42, at 493; HOSTILE TAKEOVERS, *supra* note 4, at 161-71.

73. *See* Basaldua, *supra* note 42, at 493.

74. *Id.*

75. *See* Jonathan Kapstein et al., *How Di Benedetti Botched the "Battle of Belgium"*, BUS. WK., Mar. 7, 1988, at 44-46. Carlo Di Benedetti, an Italian takeover specialist, launched a hostile tender offer for Societe Generale de Belgique, a large, poorly run Belgian holding

Takeover regulation in Spain is governed by the four Syndic Councils of the official Stock Exchanges.[76] They possess the greatest power among member states to control the terms of the offer, including procedure, practice, documentation, and disclosure.[77]

V. THE PROPOSED DIRECTIVE

In its White Paper program for removing all remaining internal barriers in the Common Market by 1992,[78] the Commission saw a need for harmonizing member states' laws regarding tender offers[79] and announced that it would bring forward a proposal for a directive on this subject. Tender offers are one of the areas not yet covered in the program of company law coordination directives under article 54 of the Treaty of

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company. *Id.* His strategy was to intimidate Societe with a hostile offer, then placate them with a compromise offer. *Id.* De Benedetti, however, did not count on the tenacious defensive action that was waiting for him. *Id.* The company fought back by repurchasing large blocks of its own shares and also by issuing new shares to friendly parties. *Id.*

In France, executives and officials alike, stung by the Italians brash entry into French business in the past two years, eagerly joined forces with the Belgians. *Id.* It was the strongest signal yet that Europe's much-vaunted financial and commercial integration, planned for 1992, could fall victim to tenacious national interests. *Id.*

As a result of the defensive action taken by Societe General and its allies, Di Benedetti eventually was forced to concede defeat. *Id.* Bankers have estimated that among them, the parties spent some $3 billion in a bid to acquire a company with a fair market value of less than $1.5 billion. *See* Thomas Kaum & Mark M. Nelson, *Everyone May Lose Belgian Bidding War*, WALL ST. J., Mar. 17, 1988, at 20.

76. MacLachlan & Mackesy, *supra* note 58, at 394.

77. *Id.*

78. Completing the Internal Market: White Paper from the Commission to the European Council, COM(85) 310 final.

79. The Commission's interest in the subject of tender offers within the EC actually predates the 1986 White Paper.

> The Commission's interest in the regulation of takeovers started many years ago with the formation of a working party to examine and come forward with proposals for regulation in this field. Although discussions at that time proceeded quite a long way, the concept of a system of control for these activities proved unacceptable to Member States and the matter went into abeyance. Proposals for an initiative in this area attracted little prominence in the Commission's White Paper on Completing the Internal Market (Com(85) 310 final), although it was recognized as one of the areas to be addressed in the context of completion of the Internal Market and the European Parliament had requested an initiative in this area. . . .

Peter C. Peddie, *EEC Securities Regulation in the Making: Emerging Common Minimum Standards for the Issuance of and Trading in Securities; and Take-over Bid Procedures and Defenses*, *in* 1992: The Changing Legal Landscape for Doing Business in Europe, Practicing Law Institute no. 493 at 205, 219 (Feb. 13, 1989).

Rome.[80] The stated aim of the Proposed Directive is "to afford shareholders and other interested parties equivalent standards of protection before the law in all member states."[81] This creation of a "level playing field" within the EC is the ultimate goal of the proposal.

The proposal only applies to bids made for public companies limited by shares, but these shares need not be quoted on any stock exchange. It was felt that restricting the Proposal's rules only to "quoted" companies would discriminate between shareholders of "quoted" and "unquoted" companies by affording shareholders of "quoted" companies greater protection.[82] The primary goal of the Proposed Directive is to provide that tender offers be made on the same terms to all the holders of voting stock of the target company.[83]

The fundamental principal behind the Directive is set forth in article 3, which states that "[s]hareholders who are in the same position shall be treated equally."[84] Article 4 details the obligation to launch a bid. So that shareholders are treated equally, article 4 requires that an offer be launched for the shares of the target company when a group wishing to acquire shares, which, when added to any existing holdings or holdings of others acting in concert with the offeror, reaches one-third of the total voting shares of the company.[85] Additionally, "speculative" bids are prohibited because the offeror, upon reaching the one-third threshold, must make a bid for all the voting shares of the company.[86] The aim of the thirty-

80. *Proposed Directive*, *supra* note 5, at 2.

81. *Id.*

82. *Id.* at 7. "The public companies need not be quoted; to restrict the rules to quoted companies would discriminate between the shareholders of quoted and unquoted companies by according a higher standard of protection to the former." *Id.*

83. *See id.*

84. *Id.* at 8.

85. *Id.* at 9. Member states can set the threshold at lower than one-third but may not set it above this level. This regulation has essentially been borrowed from the City Code, where the obligation exists at 30%. In France, the obligation to make a public offer commences at 33 1/3%, but unlike the Proposed Directive, an offer in France need only be for 2/3 of the securities not for all of them. In Belgium, a public offer must be for all the securities, but there is no threshold limit which mandates an obligatory public offer. *See* HOSTILE TAKEOVERS *supra* note 4, at 12. Also, a non-quoted company that is "small" or "medium" sized may be exempt from the Directive if it does not exceed the limits of two of the three following criteria: a balance sheet total of 6.2 million ECU; net turnover of 12.8 million ECU and average number of employees during the fiscal year of 250. Fourth Company Law Directive, 1968 O.J. (L65) 8, 21; *Proposed Directive*, *supra* note 5, at 10.

86. *See Proposed Directive*, *supra* note 5, at 9. "The threshold of one-third is that from which the offeror may exercise a blocking minority. Indeed, numerous important decisions which, within a company, must be taken by the general meeting of shareholders, require at least

percent rule is to prevent a person with a "blocking position" from adversely affecting the operation of the company, and the 100% requirement is to ensure that all shareholders are treated alike.[87]

Article 6 addresses the need for a regulatory framework and lays down the requirement that all member states establish a supervisory authority to carry out the aims of the directive. The directive allows the member states a great deal of flexibility in this area, provided that the supervisory powers have effective authority to police the system.[88] The supervisory power must, however, have the authority to either forbid the publication of an offer document that is defective with reference to the directive or to force the offeror to revise such a document at a later date.[89] The question of which supervisory authority shall enforce the directive in a cross-border takeover also is addressed in article 6. This responsibility is given to the supervisory body in the member state where the target company has its registered office.[90] The supervisory authorities of the various member states concerned with a particular tender offer "are required to assist one another in performing their duties and for this purpose to supply one another with all necessary information."[91]

Article 8 addresses the issue of defensive measures that may be taken by the target company and its board to frustrate a hostile tender offer. To promote the goal of equal treatment of shareholders, the management of the target company "must at all times act in the interests of the company."[92] This goal is achieved by forbidding the target company from issuing new voting shares,[93] which would make it more difficult and more

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a majority of two-thirds of the votes attached to the securities represented." *Id.* This is the level used in community legislation to limit or suppress the right of preferential subscription for cases of increase of capital, for the reduction of capital, for the total or partial writing-off of capital and for operations such as mergers or scissions.

The supervisory authority, however, has the flexibility to exempt a person or group from this provision if the shares were acquired in an accidental manner, such as by inheritance or donations. *See id.* at 10. A mandatory bid in these situations could be incompatible with shareholder interests or the interests of this Directive. *See id.*

87. *See* HOSTILE TAKEOVERS, *supra* note 4, at 12.

88. *Proposed Directive*, *supra* note 5, at 10.

89. *Id.*

90. *Id.* at 11.

91. *Id.*

92. *Id.* at 12.

93. *Id.* Article 8 is similar to article 21 of the City Code. Both are designed to prevent members of the board of directors from putting their own self-interest in protecting their management positions above the interests of the shareholders.

expensive for the offeror to acquire control. In addition, the board of the target company may not "engage in operations of an exceptional nature which might cause a substantial loss of the company's assets."[94] Operations of an exceptional nature are defined as "those which are not carried out in the normal course of the company's business or not in conformity with normal market practice."[95]

The minimum content of the offer document is set out in article 10. To start, the document must name the offeree company, its registered agent, and the offeror. It also must state the particular securities for which the bid is made and the holdings of such securities already controlled by the offeror and persons acting in concert with the offeror and the voting rights of those securities already held.[96] The offer document must detail the consideration to be offered for each security and the standard used for calculating it, and where the offer is for cash or partial cash, the offeror must provide assurance of the offeror's capability to meet the financial responsibility resulting from the bid.[97] An important feature of the offer document deals with the duty to disclose any debt that may be incurred as a result of financing the bid. The offeror must state clearly in his offer whether his financing of the takeover will burden the target company with debt, and he must specify the importance of this future indebtedness.[98] The offer also must state the intentions of the offeror regarding the continuation

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> The main aim of the provisions is to protect the shareholders against an egotistical reaction by the board of directors; the conflict in interests with which the board of directors is confronted is ferocious, if they can hold on to their own positions by setting up a means of defense after publication of an offer.

HOSTILE TAKEOVERS, *supra* note 4, at 10. New voting shares can be issued if, at a general meeting of the shareholders, the measure is approved. *See also Proposed Directive, supra* note 5, at 12.

94. *Proposed Directive, supra* note 5, at 8. These abnormal business practices could include such things as selling off parts of the business to reduce the worth of the company (the so-called "crown jewel" defense) or burdening the company with an inordinate level of debt to make it less attractive to the offerer. *Id.*

95. *Id.*

96. *Id.* at 12-13.

97. *Id.* at 13. This measure is designed to disclose the use of "junk bond" financing and the potential valuation problems associated with this type of financing.

98. *Id.* The commentary to Article 10 states in part:

> In the interest of all parties to the bid and taking into account the social policy of the Commission, it seems indispensable to make clear in the offer document the intentions of the offeror concerning the future of the offeree company, especially as regards its activities, including the use of its assets but also as regards its management and staff.

Id.

of the business of the offeree company,[99] including the future use of its assets[100] and the composition of its board and employees.[101] Where the offer is for securities in exchange for the voting shares of the target company, the Directive requires that "the recipients of the offer will receive full disclosure concerning the shares which are being offered to them."[102]

Article 11 regulates the publication of the offer document. Shareholders must be given the opportunity to evaluate the offer for their shares and be given time to determine whether or not to sell. Under article 11 this may be accomplished either by full publication of the offer document in one of the national mass-circulation newspapers and in the official gazette,[103] or the offeror may "announce . . . in some other medium approved by the supervisory authority, that the documents are available at stated addresses."[104] Where all the securities that the offeror is attempting to acquire are registered, the offeror also may circulate the offer document to all the shareholders individually.[105] The offeror is required to file a copy of all documents with the supervisory authority so that it may oversee the implementation of the takeover rules.[106]

Article 12 establishes the time limits within which the offeror must get acceptance of the offer.[107] This time "may not be less than four weeks or more than ten, from the date of publication of the offer document."[108] There were two primary concerns of the Commission regarding the timing of the offer. The first was that the period should be sufficiently long for

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99. *Id.*

100. *Id.* This requirement would make it potentially more difficult for a leveraged buyout group to buy the company and sell off its assets to pay back their debt.

101. *Id.* This provision could provide some protection for workers who might otherwise loose their jobs as a result of the restructuring. *See* Greenhouse, *Merger Mania, supra* note 1, at A1. "In what has become a political issue in some areas, a few mergers have produced layoffs . . . . In other deals, like Nestle's takeover of Rowntree, the purchaser has promised to protect employees." *Id.*

102. *Proposed Directive, supra* note 5, at 14. The Directive "seeks to guarantee offerees adequate information by requiring that the offer document must put the offerees in possession of all the facts necessary to make an informed judgment of the issuer's assets and liabilities, financial position, record and prospects." *Id.*

103. *Id.* at 15.

104. *Id.*

105. *Id.* This technique, however, could be prohibitively expensive in a large publicly traded company. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

the target company's shareholders to make an intelligent, informed decision whether or not to tender their shares.[109] The second concern was that if the period for acceptance was too long, the target company might be prevented from carrying out its normal activities and suffer economic loss.[110] Throughout the period of acceptance, the offeror is required to inform the supervisory authority of the number of acceptances it has received to date.[111] The acceptance date may only be changed if a rival bid is launched,[112] unless authorization is given by the shareholder.

To allow the offeror to withdraw the bid once the shareholders have been notified would foster abuse of the tender offer process. Therefore, the Directive only permits the offeror to withdraw the offer in certain limited circumstances,[113] the most important being the introduction of a rival bid.[114] The withdrawal of the bid must be communicated to the shareholders by the same means as the offer document and to the supervisory authority.[115] The board of the target company is also required to give its opinion of the bid and must detail the arguments both for and against acceptance.[116]

Potential abuse by the board of the target corporation often occurs prior to acceptance of a tender offer. Management, who often control the board, will frequently fail to disclose important information that the

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109. *Id.*

110. *Id.* Another reason for not wanting the acceptance period to remain open too long could be that a longer period for acceptance might allow the target company to engage in defensive measures which would frustrate the goal of fairness to all the shareholders. *Id.*

111. *Id.* at 19.

112. *Id.* at 15.

113. *Id.* at 13.

114. *Id.* There are certain limited circumstances where an offeror will be allowed to withdraw a bid. The most common is when there has been a competing bid for greater value and the original tender offeror does not want to increase his bid. *Id.* Another ground for withdrawal is "if the approval of the general meeting of the offeror company is not obtained for the issue of new securities offered in exchange for the securities bid for or if the securities offered in exchange fail to obtain an official stock exchange listing as the offeror intended." *Id.* Another case is where "the requisite judicial or administrative authorization for acquisition of the shareholding is refused. A typical example would be the prohibition of the operation by the merger control authorities." *Id.* The offer may also be withdrawn if "a condition of the bid approved by the supervisory authority is not met." *Id.* at 16.

115. *Id.*

116. *Id.* at 16-17. Potential abuse by target management often occurs prior to acceptance of a tender offer. *Id.* Frequently, management will fail to disclose important information that the shareholders need in order to make an informed decision as to whether to tender their shares. *Id.* Article 14 addresses this problem by stressing full disclosure to the shareholders by the target company's management. *Id.*

shareholders need in order to make an informed decision as to whether to tender their shares. The commentary to article 14 addresses this problem by stressing the requirement of full disclosure.[117]

Takeover bids are not always contested by management; indeed in many cases the latter has negotiated the takeover and its terms with the offeror. In the case of friendly takeovers of this kind, such matters should not be concealed from shareholders, but should be made clear in the report by the target company's board. The report should also specify any agreements between the offeree company's management and the offeror regarding the exercise of voting rights that are part of the sale of target company's shares.[118] Additionally, in making its report to its shareholders, the target company has the duty and obligation to act in the best interest of the company.[119]

Revisions to the offer may be made up to one week before the expiration period for acceptance with proper and immediate notification to shareholders.[120] This provision ensures that shareholders are informed of revised terms on time. The opinion of the target company's board regarding the new terms also must be publicized, and the revised-bid-terms and the board's report must be filed with the supervisory authority.[121] The "equality of treatment" principal that is central to the entire Directive is reinforced by the provision in article 15, which requires that "all shareholders who have already accepted the previous offer may accept the revised bid instead."[122] Similarly, if the offeror, or persons acting in concert with him or on his behalf, purchases shares during the offer period at a higher price than that contained in the original offer or one of its revisions, the offeror is obligated to pay the higher price to those shareholders who have already accepted the offer at the original price.[123] So that the system functions smoothly, the supervisory authority must be notified of the progress of the tender offer.[124] At the conclusion of the bidding process,

117. *Id.*

118. *Id.*

119. *Id.* at 17.

120. *Id.* "The offeror may not revise the offer during the last week of the acceptance period unless he is authorized to do so by the supervisory authority on the basis of a reasoned opinion." *Id.*

121. *Id.* at 18.

122. *Id.* This provision enables a shareholder who has tendered shares at a lower price, to realize the true value of the shares.

123. *Id.* at 18. "The effect of these acquisitions is the increase of the consideration for offers already accepted. In this way, once again, the principal of equality of treatment is respected." *Id.*

124. "Throughout the period for acceptance of the bid the offeror should be required to

the offeror must disclose the outcome to the shareholders by the same means used for publication of the bid.[125] The offeror also must notify the supervisory authority of the outcome.[126]

The Directive also addresses concerns about the welfare of the workers of the target company. Because a takeover may have drastic consequences that directly bear on the lives of the target company's employees, the Directive mandates that the management of the target company disclose all takeover bid documents to the employee's representatives.[127]

Competing bids are dealt with in article 20. First, all competing bids must comply with the same rules as the initial bid in terms of procedure, timing, content, and notification to the target shareholders as well as the recommendation report of the target company's board.[128] In addition, the competing bidder is required to notify the shareholders of its offer document before the period for acceptance of the initial bid expires.[129] The original offeror may withdraw its offer in the face of a competing bid.[130] The extension then must be communicated to both the shareholders and the supervisory authority in the usual way.[131]

One of the greatest potential problems the Proposed Directive faces is enforcement. The directive authorizes each member state to create its own supervisory body in order to implement the goals of the Directive.[132] A major concern is that these various national bodies may not apply the

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inform the supervisory authority at any time, on request, of the number of acceptances received to date." *Id.* at 19.

125. *Id.*

126. *Id.*

127. *Id.* at 19-20.

128. *Id.* at 20.

129. *Id.*

130. *Id.*

131. *Id.*

132. *See id.* at 10. The commentary to Article 6 states:

> Member States are required to designate a supervisory authority or authorities to monitor compliance with the rules by all bid parties and must inform the Commission of their arrangements, including the division of responsibilities between the authorities if several bodies have regulatory functions in the area. The Directive leaves it to member states to decide whether a public or private or a nationally or regionally organized body is designated and how the authority operates, provided it has the necessary powers to effectively police the system and to see that the Directive is respected. In this respect, the authority (or authorities) must have in every case either the power to forbid the publication of an offer document that is incomplete by reference to the requirements of the directive, or the power to oblige the offeror to revise such document at a later date.

Id.

Directive uniformly throughout the EC or may let national interests impede fair implementation of the Directive.[133]

The Directive addresses these enforcement considerations by proposing that a "Contact Committee" be established under the auspices of the Commission to address three goals.[134] The first goal is "to facilitate the uniform application of this Directive through regular consultations on . . . practical problems arising in its implementation."[135] The second is to bring together member states to "ensure concerted action upon the policies followed by the Member States in order to obtain reciprocal treatment for Community nationals and companies as regards the acquisition of securities of a company by means of a takeover bid."[136] And third, to provide a forum "to advise the Commission, if necessary, on additions or amendments to this Directive."[137]

Because the chances of completing a successful takeover vary dramatically, a key issue, the matter of reciprocity, is raised, but not resolved, in the preamble of the Proposed Directive.[138] The Proposed Directive states in its introduction:

> The situation within the Community is not as open as one may think. Indeed, company law in several Member States also allows companies to adopt a range of defensive measures to ensure that control of the company remains in the hands of friendly shareholders . . . . Against this background, and given the lacunae which exists within the Community, it would be premature to introduce a reciprocity clause now at the community level. For the time being, and until subsequent harmonization, Member States may introduce such a clause into their national law, bearing in mind their national commitments.[139]

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133. *See* Riemer, *supra* note 57, at 46 (suggesting that old-fashioned nationalism plays a key role in determining whether a government will allow a foreigner, even an EC-national, to mount a takeover of a domestic company that is believed to hold some "national interest," and doubting that this practice will change in the near future).

134. "The 'Contract Committee' shall be made up of representatives of the Member States and representatives of the Commission. The Chairman shall be a representative of the Commission." *Proposed Directive*, *supra* note 5 at, 40.

135. *Id.* at 41.

136. *Id.*

137. *Id.*

138. *Id.* at 5.

139. *Id.* at 5-6.

The difficulty caused by not adopting a reciprocity clause is that unfairness is created within the EC. For example, by allowing companies in a country where hostile tender offers are difficult, such as Germany, to launch successful tender offers of companies in member states where extensive defensive action by the target company is not permitted, such as Great Britain, the principal of the "level playing field" is circumvented.[140] It seems inequitable to permit a German company to successfully takeover a British company but to not allow a British company the same opportunity in Germany. This concern was voiced recently when Siemens, a large German electronics concern, was able to complete a successful hostile bid for Plessy, a British firm.[141]

In late November 1989, the Commission met and discussed a proposal to "attack barriers used in some European Community countries to thwart hostile corporate takeovers."[142] While not directly addressing the issue of reciprocity, the Commission was concerned that a "level playing field" could not exist if all countries had equal barriers to takeovers. In response to complaints and pressure[143] from Great Britain about regulatory obstacles that "make it difficult or impossible for one company to take over another,"[144] Commissioner Martin Bangemann announced that in addition to the Proposed Directive on takeovers, additional steps must be taken to ensure fairness. He said that the Commission planned to put forward measures to address defensive practices, such as share repurchasing by the target company, the limitation of share voting rights, defensive cross-holdings between a parent company and its subsidiary, "poison pill" defenses, and massive issuing of new shares to friendly shareholders to dilute the stake in the target held by the hostile bidder.[145]

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140. *See* Greenhouse, *Buyout Bulge, supra* note 1, at F6.

141. *Id.* One author has said:

> At the moment, the differences in attitudes among the European nations are creating friction. For example, many in Brit[ain] complain that Siemens, the electronics concem, could make a successful hostile bid for Plessy, the British electronics company, but a British concem would almost certainly fail in a hostile offer for a West German entity.

Id.

142. *See* Tony Carritt, *EC Commission Pledges Attack on Barriers to Company Takeovers,* Reuters Bus. Rep., Nov. 23, 1989, *available in* Lexis, Nexis Library, Omni file.

143. *Id.* "London has said it will not sign up to a key EC plan to establish common rules for investigating big company mergers unless other govemments agree to take down [takeover] barriers." *Id.*

144. *Id.*

145. Commissioner Bangemann stated that:

The influence of the British City Code on the proposal is obvious. The effect of the new proposal would be to create a structure similar to the British position under the City Code, such that target management may not institute defensive measures to frustrate a hostile takeover attempt unless the target shareholders have approved such measures.[146] By drastically limiting anti-takeover defenses available to target management, the Commission would be taking a large step to correct the present imbalance in shareholder protection within the Community, something not addressed in the Proposed Directive.

The Proposed Directive thus attempts to establish a uniform system of regulation within the EC while allowing for necessary flexibility among differently situated member states.[147] At the same time, the Contact Committee will be in place to monitor the uniform application of the Directive and to provide continuing guidance in the area of takeover regulation.

VI. CONCLUSION

The Single European Act,[148] which created institutional procedures to eliminate barriers between member states by 1992, began the process that

> [A] study by outside consultants for the Commission, the EC's executive body, had shown that a host of legal and administrative obstacles made hostile takeover bids 'practically impossible' in several member states . . . he said the commission planned to put forward measures by the end of March [1990] to ensure that companies threatened by takeovers could not buy their own shares to defend themselves without obtaining the approval of their shareholders first. The measures would also ensure that only a simple majority of shareholders would be required to appoint or dismiss directors of a target company. The study found this was impossible in some member states.

Id.

146. *See* CITY CODE, *supra* note 3.

147. Although the Proposed Directive would be a flexible system with a minimum of burdensome technical regulations, it would still represent a significant change for the U.K. Britain is most concerned with the Proposed Directive because it has the most at stake. It has the largest and most dynamic financial system within the EC, and Britain already has its own complex regulatory system in place (City Code). This system is primarily a "code of conduct," rather than statutory or rule-based regulation. *Id.* In the U.K., regulation is based as much on the spirit of the rules as it is on the rules themselves. Although the Proposed Directive was in some respects modeled on the U.K. Take-Over Code, its adoption as a Directive in the manner proposed would represent a significant departure from a "self-regulatory" system of regulation to a statutory one. *See* Peddie, *supra* note 79, at 220. "This . . . would be likely to result in a serious loss of flexibility, and increase the risk of recourse to the courts in the course of a bid, creating uncertainty for the parties to takeovers, their shareholders and the market." *Id.*

148. Single European Act, 1987 O.J. (L169) 29 (Feb. 17, 1986).

has led the European Commission to draft the Proposal for a Thirteenth Council Directive on Company Law Concerning Takeover and Other General Bids. This Draft Proposal is a much needed piece of EC legislation. The Proposal addresses an area of company law badly in need of direction. The current uneven patchwork of laws regulating takeover activity within the EC presents a hindrance to the principal of the free movement of capital, which is espoused in the Treaty of Rome.[149] If the harmonization of tender offer legislation is to succeed, it will be necessary to take into consideration the various member states' traditions and economic concerns. Harmonization will, in many instances, involve a major transformation in the accepted way of transacting business. This process of change necessarily will take time to be implemented and administered. It should not be forced.[150] The proposal accomplishes its goal of tender offer regulation with a minimum of regulatory burdens, and with centralized control, it maintains enough flexibility to adapt to twelve very different national economies and pre-existing regulatory systems. If the Proposal can be implemented uniformly and administered throughout the EC states' authorities, it will contribute greatly to a truly unified market in 1992 and beyond.

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149. Treaty of Rome, *supra* note 7, at 3.

150. *See* MAEIJER & GEENS, *supra* note 4, at 6.