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# The Second Common Market: Development of a Unified Standard for Reviewing the Actions of Target Directors in the United States and the European Community

by  
David J. Berger\*

## I. INTRODUCTION

This article proposes the adoption of a common standard between the United States and the European Economic Community (the "European Community" or the "EC")<sup>1</sup> for reviewing a director's conduct when confronted with an unsolicited takeover proposal. The rules governing a director's response to a potential change in control can determine whether a takeover occurs and are frequently the subject of litigation and scholarly commentary in the United States.<sup>2</sup> However, comparative studies of corporate governance issues have traditionally focused upon the structure of a board of directors rather than particular board actions.<sup>3</sup>

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1. The European Economic Community, established over 30 years ago by the Treaty of Rome, is a confederation of 12 European nations formed for the express purpose of creating a single market that is free of all obstacles to freedom of movement for goods, capital, persons, and services. See Treaty of Rome, Mar. 25, 1957, 298 U.N.T.S. 11. The 12 member states of the EC are Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom. See generally D. WYATT & A. DASHWOOD, THE SUBSTANTIVE LAW OF THE EEC (2d ed. 1987).

2. Compare, e.g., Lipton, *Corporate Governance in the Age of Finance Corporatism*, 136 U. PA. L. REV. 1, 28-35 (1987) (arguing that courts should grant corporate directors wide discretion to oppose tender offers) with Easterbrook & Fischel, *The Proper Role of a Target's Management in Responding To a Tender Offer*, 94 HARV. L. REV. 1161 (1981) (using economic analysis to show that shareholders benefit when directors take a "passive" role when confronted with a tender offer).

3. A particularly interesting, if slightly dated, discussion of the corporate governance issues of interest to European practitioners and academics may be found in the transcript from the colloquium organized by the International Faculty for Corporate Control and Capital Market

The choice of an appropriate standard for reviewing director conduct has become an increasingly important issue in the European Community as the drive to a single European market becomes a reality.<sup>4</sup> The European Community's 1992 program to establish a uniform regulatory system will allow companies operating in Europe to achieve substantial economies of scale by broadening operations and market coverage within a single regulatory system. Both European and U.S. corporate leaders are planning to use cross-border acquisitions to create and restructure their operations and increase their ability to compete on a global basis. Transnational mergers of European companies have already experienced substantial growth in recent years, with the number of such deals surpassing even the number of merger and acquisition transactions in the United States.<sup>5</sup> This trend is expected to continue,

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Law. See *Paris Colloquium on Corporate Governance*, 6 J. COMP. BUS. & CAP. MARKET L. 199 (1984); see also Meier-Schatz, *Corporate Governance and Legal Rules: A Transnational Look at Concepts and Problems of Internal Management Control*, 13 J. CORP. L. 431 (1988); Conrad, *The Supervision of Corporate Management: A Comparison of Developments in the European Community and the United States*, 82 MICH. L. REV. 1459 (1984). I have previously noted this relative lack of comparative analysis on the role of a director in a takeover context. See Berger, *Exporting the Twin Towers: The Development of a Transnational Business Judgment Rule*, 9 ST. LOUIS U. PUB. L. REV. 169 (1990).

4. The Treaty of Rome anticipated that the single market would be completed within 12 years. See Treaty of Rome, *supra* note 1, art. 8. However, unification was effectively prevented by a lack of political will and it was not until the EC Commission's "White Paper" in 1985, which set forth an ambitious program to achieve a "Europe without frontiers" by 1992, that European unification again became the primary goal. See *Completing the Internal Market, White Paper from the Commission to the European Council* (COM. No. 85) 310 (June 14, 1985). A major reason for the 1992 program was the fear within the European Community that European countries and companies were falling behind their international competition because of the heavy costs resulting from national boundaries. See generally M. CALINGAERT, *THE 1992 CHALLENGE FROM EUROPE: DEVELOPMENT OF THE EUROPEAN COMMUNITY'S INTERNAL MARKET* (1988). The push by European businesspersons for unification has continued. For example, the leader of Italy's Fiat industrial group recently noted that "it is the entrepreneurs and corporations who are keeping the pressure on politicians to transcend considerations of local and national interest. We believe that European unity is our best hope of stimulating growth and technological innovation, and for remaining an influential presence in the world." Agnelli, *The Europe of 1992*, 68 FOREIGN AFF. 61, 62 (1989).

5. See Dickson, *Europe's M & A Activity Outnumbers U.S. Total*, Fin. Times, June 14, 1990, at 31, col. 1. A record 1,300 cross-border deals, with a total value of more than \$51 billion, were made in the European Community in 1990. See Berger, *EC to Lower Takeover Hurdles*, The Recorder, Apr. 16, 1990, at 6, col. 1. Overall takeover activity in the European Community has also grown substantially over the last few years, tripling in the United Kingdom from 1985 to 1988 and increasing sevenfold in France during the same period. See BOOZ-ALLEN ACQUISITION SERVICES, *STUDY ON OBSTACLES TO TAKEOVER BIDS IN THE EUROPEAN COMMUNITY 13-20* (1989) [hereinafter *OBSTACLES TO TAKEOVERS*]. However, industry concentration in the European Community remains significantly below that in the United States for a large number of sectors, a fact which indicates that further industry restructuring and takeovers are likely to occur. *Id.* at 5-12; see also Berger, *Buying Up Europe in New Buyout Regime*, Legal Times, Feb. 4, 1991, at 26, col. 1 [hereinafter *Buying Up Europe*] (discussing reasons for expected continued growth in the European takeover market).

particularly with the globalization of national securities markets, which has led shareholders to look beyond national markets for investments.<sup>6</sup>

However, the barriers to acquisitions in the European Community, and particularly to hostile takeovers, remain significant. Recent studies by the consulting firms Booz-Allen and Coopers & Lybrand have demonstrated substantial structural and legal obstacles to cross-border mergers and acquisitions.<sup>7</sup> In particular, the traditional limited authority of shareholders over corporate governance issues in many EC countries, combined with philosophical opposition to the idea that directors should give primacy to shareholder interests when considering whether to sell the company, has led European courts and investors to grant a target board wide discretion to reject unwanted offers or create barriers to prevent potential bids.<sup>8</sup> Simply stated, the traditional hostility to takeovers in many EC countries, combined with a lack of director accountability, has made many European companies virtually takeover proof.<sup>9</sup>

The European Community has recognized the inefficiencies these barriers create and is attempting to reduce, if not eliminate them. Perhaps the most notable attempt in this drive is the proposal for a European Takeover Code, officially known as the Thirteenth Company Directive, submitted in draft form to the European Community's member states in January 1989 (the "Draft Thirteenth Directive").<sup>10</sup> The stated goal of the Draft Thirteenth

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6. For a discussion of some technological and financial factors leading to increasing international securities, see Warren, *Global Harmonization of Securities Laws: The Achievements of the European Communities*, 31 HARV. INT'L L.J. 185, 186 (1990).

7. See OBSTACLES TO TAKEOVERS, *supra* note 5, at 21-52 (reviewing structural and regulatory impediments to cross-border acquisitions); COOPERS & LYBRAND, BARRIERS TO TAKEOVERS IN THE EUROPEAN COMMUNITY 17-38 (1989) (discussing barriers in individual EC countries). "Structural" factors are defined as cultural and market factors affecting an acquisition such as cross-ownership of shares, the ability to place and vote shares held by a subsidiary or affiliated company, and more traditional business factors such as the public availability of reliable financial information. All of these factors can make the difference in whether an acquisition or takeover offer can be made. See Berger, *Guidelines for Mergers and Acquisitions in France*, 11 NW. J. INT'L L. & BUS. 484 (1991) (reviewing structural factors affecting the acquisition process in France); OBSTACLES TO TAKEOVERS, *supra* note 5, at 21. In contrast, "legal factors" are the actual regulations that are directly or indirectly relevant to the takeover process. *Id.*

8. The structural and legal barriers inhibiting acquisitions in a particular country are discussed in detail in L. SONSINI & D. BERGER, *EUROPEAN MERGERS & ACQUISITIONS: A PRACTITIONER'S GUIDE* (1991) (forthcoming).

9. See, e.g., COOPERS & LYBRAND, *supra* note 7, at 22-23, 45 (noting that in some EC countries "contested bids may be effectively barred" by various structural and technical barriers); OBSTACLES TO TAKEOVERS, *supra* note 5, at 17 ("EC companies who wish to remain independent often have set up a broad range of preventive defenses to deter offers"). For an example of how a court reviewed Carlo de Benedetti's bid for Societe Generale de Belgique, Belgium's oldest and largest company, see Berger, *supra* note 3, at 170, 177, 184-86. For a discussion of how shareholders of Germany's Continental Tyre are responding to the merger proposal of Italy's Pirelli, see Fisher, *Continental Calls EGM over Pirelli Proposal*, Fin. Times, Dec. 19, 1990, at 19, col. 1. See also *Buying Up Europe*, *supra* note 5, at —.

10. *Proposal for a Thirteenth Council Directive on Company Law Concerning Takeover and Other General Bids*, 32 O.J. EUR. COMM. (No. C 64) 8 (1989) [hereinafter *Draft Thirteenth*

Directive is to provide shareholders in all EC countries with equivalent standards of protection in the event of a takeover bid. In particular, the Draft Thirteenth Directive adopts a philosophy of takeover regulation similar in many respects to that underlying the regulation of takeovers in the United States. This similarity is most notable in the Directive's support for the primacy of shareholder interests once a bid is made.

In the European Community, the historical attitudes against shareholder activism are beginning to give way to new views on the rights of shareholders as owners of the corporation. By contrast, the widely-perceived abuses in the U.S. takeover market in the 1980s have spurred regulation providing directors in the United States with greater authority to defeat an unwanted offer, as well as the latitude to consider nonshareholder constituencies when responding to a bid. This confluence towards the center is creating a "second common market" between the United States and the European Community, whereby public companies in both markets will be subject to a well-regulated, efficient market for corporate control. This second common market will provide protection to all western shareholders from incumbent managers seeking to entrench their positions, while also granting broad discretion to a target board, acting in good faith, to consider the interests of all corporate constituencies when responding to an acquisition proposal.

A common standard for U.S. and European directors would have an immense practical impact upon international trade. Capital market integration is already leading issuers and investors in the United States and Europe to demand unified standards for securities not only within the European Community, but also between the European Community and the United States.<sup>11</sup> This article argues that unifying the rules governing a director's duties to shareholders and other corporate constituencies when confronted with an offer that presents shareholders with a significant premium, but

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*Directive*]. Directives are legislative mandates to EC member states requiring them to enact domestic legislation within a specified amount of time to make the results or purpose of the directive part of the country's national law. The country is allowed to choose the form and method for achieving this result. See Treaty of Rome, *supra* note 1, art. 10. See generally T. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW 200-11 (2d ed. 1988).

The Draft Thirteenth Directive has recently been revised by the EC Commission and is expected to be adopted in its revised form by the end of 1991. For a discussion of the revisions and the progress of the Draft Thirteenth Directive, see Berger, *Looking East for Buy-Outs*, *The Recorder*, Jan. 4, 1991, at 4, col. 2. See also Kellaway, *Commission Tosses the Freer British Line on Takeovers*, *Fin. Times*, May 10, 1990, at 3, col. 1. A copy of the Draft Thirteenth Directive, as amended and marked to show the differences from the original Draft Thirteenth Directive, is attached as an appendix.

11. The increasing integration of capital markets and the reasons for such integration have been the topic of much scholarly commentary. See, e.g., D. AYLING, THE INTERNATIONALISATION OF STOCKMARKETS: THE TREND TOWARDS GREATER FOREIGN BORROWING AND INVESTMENT (1986); Warren, *supra* note 6 (reviewing the development of an international securities market and European regulation of supranational securities); see also SEC Staff Report to Senate Comm. on Banking, Housing and Urban Affairs and House Comm. on Energy and Commerce, *Internationalization of the Securities Markets*, at II-51 to II-62 (1987) (discussing creation and effect of international capital market).

whose effect on others may be uncertain would be an important next step to capital market integration.<sup>12</sup> Because many EC members have not yet enacted significant legal barriers to takeovers, this is an opportune time to set unified standards.<sup>13</sup>

Part II of this article describes the current standards for director conduct in the European Community and the United States, with particular emphasis on the substantial similarities between the European Community's Draft Thirteenth Directive and the applicable federal and state law in the United States governing director conduct. Part III examines some of the basic underlying assumptions for restrictions on a director's actions when confronted with a hostile offer in the European Community and the United States and the policy goals reflected in these assumptions. The section demonstrates that each system has reached substantially similar conclusions about the proper role of a target director responding to a takeover offer and that these similarities will facilitate the development of a "common market" for corporate control between the European Community and the United States. This article concludes that the philosophical agreement as to the relative merits of takeovers will, in combination with financial and technological factors supporting capital market integration, result in an increasingly similar system of takeover regulation between the United States and the European Community.

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12. The economic benefits to a target company's shareholders from a hostile tender offer have been well established. See, e.g., Macey, *State Anti-Takeover Legislation and the National Economy*, 1988 WIS. L. REV. 467, 471-75; Bebchuk, *The Case for Facilitating Competing Tender Offers*, 95 HARV. L. REV. 1028, 1030-46 (1982); Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110 (1965).

The critics of this analysis have now largely given up disputing that shareholders benefit from takeovers; rather, they argue that the economy as a whole, as well as "stakeholders" in the corporate enterprise (e.g., employees, suppliers, and customers), are harmed by takeover activity. See, e.g., Lipton, *supra* note 2, at 20-28; Lipton, *Takeover Bids in the Target's Boardroom: An Update After One Year*, 36 BUS. LAW. 1017, 1025-26 (1981). See generally *Impact of Corporate Takeovers: Hearings on the Effect of Mergers on Management Practices, Cost, Availability of Credit and the Long-Term Viability of American Industry Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs*, 99th Cong., 1st Sess. (1985).

13. That now is the ideal time to influence the development of uniform takeover regulation in the European Community has been widely noted by practitioners and observers of EC law. See, e.g., COOPERS & LYBRAND, *supra* note 7, at 48 ("Assuming that the balance of advantage does lie in seeking to reduce barriers to takeovers in the European Community, this is now an opportune time to influence the European Commission to act on this. In many countries, the structure of the markets has been such that the use of 'technical barriers' by companies has been unnecessary. In our view, it would be advisable to introduce measures to bar the use of 'technical barriers' while they remain rare in these countries, in advance of any changes in the markets that might open the 'structural' barriers to takeovers."). Numerous EC countries, including Germany, Italy, Spain, and Greece, are in the process of developing national takeover legislation, but are delaying finalizing any such legislation, at least in part, because of the Draft Thirteenth Directive.

## II.

### TAKEOVER REGULATION IN THE UNITED STATES AND EUROPE

#### A. A Survey of U.S. Regulation

There are two levels of regulation generally applicable to takeovers in the United States. The key regulations governing disclosure to shareholders by a bidder and the target board, as well as a few basic regulations concerning how tender offers may proceed, are governed by Federal law, in particular the Williams Act.<sup>14</sup> However, the substantive tactics of both a bidder and a target board have generally been regulated under the corporate laws of a company's state of incorporation. Thus, whereas rules governing an offer and the disclosure of information to shareholders are regulated by Federal law, the target board's response to the offer is governed principally by state law. Set forth below is a brief summary of the most significant state and federal regulations governing takeovers in the United States.

#### 1. Tender Offer Regulation Under the Williams Act

The overriding purpose of the Williams Act is to protect a target company's shareholders by providing "full and fair disclosure for the benefit of investors" regarding all potential changes in corporate control.<sup>15</sup> The Williams Act, originally titled "Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids," was passed in response to congressional concern that target shareholders were being forced to decide whether to sell their shares in a tender offer without adequate information. The Williams Act makes cash tender offers, as well as exchange offers, subject to the disclosure and reporting requirements set forth in the Securities Exchange Act of 1934.<sup>16</sup>

Section 14(d) requires any person making a tender offer for registered securities that would result in the person acquiring or controlling five percent or more of the outstanding stock of a publicly listed company to make disclosures generally similar to those under section 13(d).<sup>17</sup> In contrast to section 13(d), which requires disclosure only after the acquisition of a five percent interest, section 14(d) requires disclosure when the acquisition proposal is announced.<sup>18</sup>

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14. The Williams Act was originally enacted by Congress in 1968 as a series of amendments to the Securities Exchange Act of 1934 (the "Exchange Act"), adding sections 13(d)-(f) and 14(d)-(f) to the Exchange Act. 15 U.S.C. §§ 78m(d)-(f), 78n(d)-(f) (1988).

15. 113 CONG. REC. 24,664 (1967) (remarks of Sen. Harrison Williams); see also *Piper Aircraft Corp. v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 26-35 (1977) (discussing statutory purpose of the Williams Act); *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58-60 (1975) (reviewing purpose of section 13(d)).

16. An exchange offer is a tender offer in which equity securities are included as part of the consideration offered by the bidder.

17. See 15 U.S.C. § 78n(d)(1) (1988).

18. *Id.*

Section 14(d) and the Securities and Exchange Commission (the "SEC") regulations promulgated thereunder also set forth rules governing how a tender offer may be conducted and what information must be provided to shareholders.<sup>19</sup> For example, the Williams Act mandates that an offer must remain open for at least twenty business days, that tendered shares be withdrawable for a specified period, that shares be purchased on a pro rata basis when more shares are tendered than the offeror has agreed to accept, and that the same price be paid to all shareholders when the price is raised during the pendency of the offer. Section 14(e) is a broad antifraud prohibition that requires complete and accurate disclosure of all material information by any person making or opposing a tender offer.<sup>20</sup>

The Williams Act also requires disclosure of significant ownership of a company's equity securities. Section 13(d) of the Williams Act requires that any "person" who has acquired control of five percent or more of the outstanding stock of a publicly listed company inform the company, the SEC, and the exchanges where the issuer's shares are traded, of certain specified information within ten days of reaching the five percent level.<sup>21</sup> Section 13(d) requires disclosure of the acquiror's identity, the number of shares beneficially owned, the source of funds used in the acquisition, any plans the acquiror may have to seek control of the issuer, and, if so, whether it intends to liquidate, merge, or sell the assets of the issuer.<sup>22</sup>

## 2. *State Law Regulations Concerning a Target Director's Response to a Bid*

The basic law governing the formation and governance of corporations in the United States is state law. Accordingly, most of the legal issues raised

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19. *See id.* § 78n(d)(1)-(7).

20. For a few years after the Williams Act was passed it was unclear whether it prohibited certain defensive measures. Shareholders occasionally brought suit in Federal court alleging that defensive measures violated various provisions of the Williams Act, in particular section 14(e)'s prohibition against manipulative conduct. *See, e.g., Mobil Corp. v. Marathon Oil Co.*, 669 F.2d 366 (6th Cir. 1981) (seeking to enjoin lock-up option under Williams Act), *cert. denied*, 455 U.S. 982 (1982). This view did not win general acceptance among the lower Federal courts. *See, e.g., Data Probe Acquisition Corp. v. Datatab, Inc.*, 722 F.2d 1, 5 (2d Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984); *Panther v. Marshall Field & Co.*, 646 F.2d 271, 285-86 (7th Cir.), *cert. denied*, 454 U.S. 1092 (1981). The Supreme Court decisively rejected this position in *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 7-8 (1985), where the Court held that the term "manipulation" under section 14(e) required a showing of misrepresentation or nondisclosure.

21. Because the 10-day window has presented a substantial opportunity for abuse, several legislative proposals that would have closed or narrowed the 10-day window have been debated in Congress, but none have been able to win passage in even one House of Congress.

22. 15 U.S.C. § 78m(d) (1988). The definition of "person" includes two or more persons acting together for the purpose of acquiring, holding, or disposing of shares. *See* 15 U.S.C. § 78m(d)(3) (1988); 17 C.F.R. § 240.13d-5 (1990); *Wellman v. Dickinson*, 682 F.2d 355, 365-66 (2d Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983). Persons who agree to pool their interests in the issuer's securities cannot thereby evade the disclosure requirements. *See* S. REP. NO. 550, 90th Cong., 1st Sess. 8 (1967); H.R. REP. NO. 1711, 90th Cong., 2d Sess. 8-9 (1968). *See generally* Block, Hoff & Berger, *Considerations in Stock Accumulation Programs*, reprinted in *HOSTILE BATTLES FOR CORPORATE CONTROL: THE NEW MARKET ENVIRONMENT* (1988).

by a director's actions in the takeover context, including his ability to issue new shares and the extent of his fiduciary obligations to shareholders and/or other corporate constituencies, are governed by the state law of the company's state of incorporation. Although there can be significant differences between the laws of the states,<sup>23</sup> the dominant state law governing corporations in the United States is the law of Delaware, which is the state of incorporation for approximately fifty-six percent of the Fortune 500 and forty-five percent of the New York Stock Exchange's listed companies.<sup>24</sup>

Under Delaware law, a corporate director owes fiduciary duties of care and loyalty to the corporation and its shareholders. To meet the duty of care, a director must exercise the degree of skill, diligence, and care that an ordinary prudent person would exercise in similar circumstances; to meet the duty of loyalty, a director must avoid "faithlessness and self-dealing."<sup>25</sup> Under the business judgment rule, as long as these duties of care and loyalty are satisfied, courts will not review the substantive wisdom of a director's decision or hold the director liable for losses resulting from an honest error in judgment. Therefore, providing that each of the rule's elements has been satisfied, a plaintiff challenging a board's decision must rebut a "presumption of regularity."<sup>26</sup>

When responding to a takeover proposal, a board's actions under Delaware law are governed by the standards set forth in *Unocal Corp. v. Mesa Petroleum Co.*<sup>27</sup> Under the *Unocal* test, a board adopting defensive measures must show that (i) it "had reasonable grounds for believing that a danger to corporate policy and effectiveness existed" and (ii) that any defensive action

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23. The differences can be particularly significant in the area of hostile takeovers where a number of states have attempted to pass legislation to protect local companies from unwanted offers. See generally Garfield, *Evaluating State Anti-Takeover Legislation: A Broadminded New Approach to Corporation Law or a "Race to the Bottom,"* 1990 COLUM. BUS. L. REV. 119 (reviewing statutes and purposes of various state antitakeover legislation); Pinto, *The Constitution and the Market for Corporate Control: State Takeover Statutes After CTS Corp.*, 29 WM. & MARY L. REV. 699 (1988).

24. Because of its reputation as the most sophisticated state for corporate regulation, many states follow Delaware law in adopting their own corporate legislation. See, e.g., *Dynamics Corp. of Am. v. CTS Corp.*, 794 F.2d 250, 253 (7th Cir. 1986) (Posner, J.); see also Pinto, *The Internationalization of the Hostile Takeover Market: Its Implications for Choice of Law in Corporate and Securities Law*, 16 BROOKLYN J. INT'L L. 55, 59 n.8 (1990). For a discussion of the rise of Delaware as the preferred state of incorporation for large businesses and the implications for shareholders of this choice, see Fischel, "The Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law, 76 NW. U.L. REV. 913, 915 (1982); Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 665 (1974).

25. D. BLOCK, N. BARTON & S. RADIN, *THE BUSINESS JUDGMENT RULE* 73 (3d ed. 1990) [hereinafter *THE BUSINESS JUDGMENT RULE*]. See generally *id.* at 27-110 (discussing the origins of these concepts and their applicability under Delaware law).

26. *Id.* at 8. A plaintiff can overcome this burden by showing that the board acted without adequate information or in bad faith. See, e.g., *Hanson Trust PLC v. ML SCM Acquisition, Inc.*, 781 F.2d 264, 274-75 (2d Cir. 1986) (invalidating board decision for lack of due care under New York law); *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182-83 (Del. 1986) (granting injunction preventing board from entering into merger agreement after finding breach of duty of loyalty).

27. 493 A.2d 946 (Del. 1985).

taken was "reasonable in relation to the threat posed."<sup>28</sup> The two-pronged *Unocal* burden may be satisfied "by showing good faith and reasonable investigation" by the directors.<sup>29</sup> Once the board satisfies its burden, the traditional business judgment rule applies.<sup>30</sup>

The *Unocal* test allows directors in the United States to adopt a panoply of defensive devices to defeat an unwanted takeover. However, a target board is generally required to show that it is well-informed, is considering only the best interests of the company and its shareholders when adopting such devices, and is not acting solely to maintain its position or for other improper purposes.<sup>31</sup>

### B. *A Survey of European Regulation*

There is increasingly a dual system for regulating director conduct in Europe that is similar to that of the United States. Just as the basic law governing corporations in the United States is that of the state of incorporation, the basic law governing European corporations is that of the country of incorporation.<sup>32</sup> However, the regulation of director conduct in many EC member states, including states with large economies such as Italy and Germany, as well as many of the smaller EC states, such as Spain and Greece, is considerably less developed than in many U.S. states, particularly Delaware. For example, Italy is still in the process of developing its first takeover law, while the first comprehensive takeover law in France was only recently adopted.<sup>33</sup> This relative lack of regulation is due, at least in part, to the fact that hostile takeovers have until recently been quite rare in most EC countries.<sup>34</sup>

#### 1. *Regulations by the EC Member States*

Historically, there have been several structural barriers to takeovers in many EC countries. These barriers differ depending upon a particular country's history and culture, but have acted to substantially prohibit acquisitions.

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28. *Id.* at 955.

29. *Id.*

30. *Id.* See generally THE BUSINESS JUDGMENT RULE, *supra* note 25, at 118-77.

31. See generally THE BUSINESS JUDGMENT RULE, *supra* note 25, at 118-429 (discussing cases and acceptance of particular defensive actions).

32. See Berger, *supra* note 3, at 172-78 (discussing regulations governing director conduct in some EC member states); see also Berger, *The European Markets Try to Coordinate, Unify Conflicting Merger Law*, Nat'l L.J., Nov. 6, 1989, at S14, col. 1.

33. For a discussion of French regulations governing merger and acquisition activity, see Berger, *Guidelines for Mergers and Acquisitions in France*, 11 NW. J. INT'L L. & BUS. 484 (1991) (forthcoming). For a recent review of Italian legislation and the current status of the draft tender offer statute, see *International Mergers and Acquisitions*, 10 INT'L FIN. L. REV. — (1991).

34. One recent study claims that the first successful hostile takeover in West Germany was the Flick Brothers' acquisition of Fedlmuehle-Nobel in 1989. See Franks & Mayer, *Capital Markets and Corporate Control: A Study of France, Germany and the UK*, — ECON. POLICY — (1990) (forthcoming).

For example, perhaps the determinative factor in whether a hostile takeover is possible is whether a company is publicly or privately held. As a result of historical or cultural development, in many EC countries only a fraction of the largest companies have their shares listed on a public stock exchange. According to one recent study, only fifty-four percent of the top 400 EC companies are publicly traded, as opposed to ninety-nine percent in the United States.<sup>35</sup>

Similarly, control over shareholders may be exercised by a dominant group even when a company's shares are publicly traded. For example, German banks have traditionally exercised substantial influence over German companies through the tradition of the "Hausbank," whereby a company would rely on one bank for all its needs, rather than establishing relationships with several banks. The Hausbank frequently is represented on the company's supervisory board, holds a large equity position in the company, and also represents a large percentage of shareholders through its hold of proxies.<sup>36</sup> In Italy, the tradition of family-owned businesses has led to a high concentration of share ownership, where it is estimated that nearly two-thirds of the Italian stock market is ultimately controlled by five groups: Generali, Fiat, IRI, Ferruzzi, and de Benedetti.<sup>37</sup>

In addition to the structural barriers, EC countries such as Germany and the Netherlands have developed a number of regulations that have the effect of discouraging or defeating an unwanted bid. In general, the view that management is accountable primarily to shareholders and should be judged essentially by the value it returns to shareholders has not been widely held in EC countries other than the United Kingdom.<sup>38</sup> To the contrary, regulators and corporate leaders in countries such as Germany and the Netherlands have tended to regard the possibility of a "hostile raider" acquiring control without regard to the interest of the "company" as unethical, leading legislators and policymakers to adopt or allow a wide variety of devices that allow a target board to defeat an unwanted acquisition.<sup>39</sup>

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35. OBSTACLES TO TAKEOVERS, *supra* note 5, at 22. Of the 100 largest domestic companies in each of the EC's largest countries, 67 are quoted in the United Kingdom, 56 in France, 45 in Germany, and less than a third in all other EC countries. *Id.*

36. However, there are increasing signs that the German system is not as impregnable to takeovers as many believed. See, e.g., Otto, *Obstacles to Foreigners Are Nothing but a Myth*, *Fin. Times*, Feb. 20, 1991, at 15, col. 6 (claiming that the German mergers and acquisitions market "remains one of the most liberal and least regulated of the western world").

37. OBSTACLES TO TAKEOVERS, *supra* note 5, at 30-31. The Coopers & Lybrand study noted that it is estimated that of the approximately 200 publicly listed Italian companies, only seven have over 50% of their shares in public hands, and five of these seven are understood to be effectively controlled by family groupings. COOPERS & LYBRAND, *supra* note 7, at 22.

38. See generally COOPERS & LYBRAND, *supra* note 7, at 22-27; OBSTACLES TO TAKEOVERS, *supra* note 5, at 21-34.

39. The major structures in Germany and the Netherlands include the "two-tier" board (Germany); no power to change either board (the Netherlands, if a Structuur Vennootschaps company); as well as powers to a board to issue nonvoting or priority shares or to limit the voting rights of any single shareholder. COOPERS & LYBRAND, *supra* note 7, at 23-24; see also *id.* at app. E (Germany), app. H (the Netherlands).

However, corporate attitudes are beginning to change in these EC countries and many of the barriers to acquisitions are now being closely scrutinized. Market forces are leading EC companies to increase cross-border acquisitions and the ability of a target company to frustrate a bid that appears to benefit both the target and its shareholders is being questioned.<sup>40</sup> Moreover, many EC countries, including Italy, Spain, and Germany, still lack comprehensive takeover regulations and are awaiting passage of EC regulations before adopting national legislation. Accordingly, as economic forces lower structural barriers to takeovers, EC regulation may block many member states from adopting technical barriers to bids.

## 2. *The Draft Thirteenth Directive*

As discussed above, while EC member states generally have some regulations relating to acquisition of stock and takeovers, these vary from the highly sophisticated, as in the United Kingdom, to the almost nonexistent, as in Spain. Moreover, as takeover activity has increased in recent years in most member states, the need for greater shareholder protection and more detailed rules has become clear. To meet the perceived need for a more uniform system of takeover regulation throughout the European Community, the European Community promulgated the Draft Thirteenth Directive.

In general, the Draft Thirteenth Directive establishes a statutory framework for the regulation of takeover bids by a "supervisory authority" designated in each member state. The current Draft Thirteenth Directive adopts many of the criticisms made by UK lobbyists and other proponents of takeovers, particularly the views of EC Commissioner Martin Bangemann who believes that takeover bids "should be viewed in a positive light, in that they encourage the selection by market forces of the most competitive companies . . . which [are] indispensable [in meeting] international competition."<sup>41</sup>

The expressed purpose of the Draft Thirteenth Directive is to harmonize the law governing takeovers in the EC's member states, thereby "afford[ing] shareholders and other interested parties equivalent standards of protection" throughout the European Community.<sup>42</sup> The Directive would combine disclosure requirements similar to those in the Williams Act with substantive provisions of the kind regulated in the United States by state governments.

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40. For example, the Veba/Fekldmuhle purchase in Germany, the Hedlloyd affair in the Netherlands, as well as Pirelli's recent bid for Continental Tyre, all demonstrate the increasing pressure under which these barriers are coming as a result of cross-border bids.

41. Commissioner Bangemann's comments are quoted in Grieves, *The EC Merger Regulation and the Draft Thirteenth EC Directive on Takeovers: Implications for Targets and Purchasers*, reprinted in 1 TAKEOVERS: OPERATING IN THE NEW ENVIRONMENT 265 (1990). A copy of the current draft, marked to show differences from the original draft, is attached as an appendix. The draft is not expected to be passed before July 1991.

42. See EEC Commission, *Explanatory Memorandum*, (88) 823, at 2 (Feb. 16, 1989).

This section focuses on the substantive provisions because it is these regulations that will have the most significant impact upon a director's conduct.<sup>43</sup>

The two substantive rules that will have the most significant impact upon director conduct are the requirement in article 4 that a bidder who "aim[s] to acquire" more than 33 1/3% of a target's voting securities "shall be obliged to make a bid to acquire all the securities of that company";<sup>44</sup> and article 8's prohibition against a target board issuing new securities or engaging in any transactions that "do not have the character of current operations" during the pendency of an offer unless the board obtains approval of the target's shareholders.<sup>45</sup> The guiding principles supporting these two regulations are the equal treatment of shareholders and the view that "it is necessary to limit the powers of the board of directors of the [target] company to engage in operations of an exceptional nature" after a bid is made.<sup>46</sup>

The obligation to bid contained in article 4 would prevent the partial or "two-tiered" bids that have been hotly debated in the United States.<sup>47</sup> The elimination of such bids would remove one of the strongest arguments for allowing target directors wide discretion to defend against takeovers.<sup>48</sup> This provision would enable minority shareholders to be paid the same price for their shares as majority shareholders; minority shareholders would, in essence, receive a share of the control premium normally available only to holders of large interests.<sup>49</sup>

Article 8 prohibits a target board from using, while a bid is pending, two important types of defensive maneuvers without shareholder approval. First, the provision prohibits a target board from issuing new voting securities while

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43. For a more detailed discussion of the disclosure provisions of the Draft Thirteenth Directive, see Greenbaum, *Tender Offers in the European Community: The Playing Field Shrinks*, 22 VAND. J. TRANSNAT'L L. 923, 942-48 (1989).

44. *Draft Thirteenth Directive*, *supra* note 10, art. 4. This 33 1/3% level may be reduced or waived by the regulatory authority in each member state. See *id.* art. 6; see also EEC Commission, *supra* note 42, at 4-5 (describing circumstances where such an exemption may be warranted).

45. *Draft Thirteenth Directive*, *supra* note 10, at art. 8. This proposal is substantially similar to, and is largely based upon, the City Code on Take-Overs and Mergers that governs takeovers in the United Kingdom.

46. See *id.* art. 3.

47. See, e.g., Securities and Exchange Commission Advisory Committee on Tender Offers, Report of Recommendations 22-23 (1983) (arguing that shareholders should have equal opportunities to share in premiums paid in tender offers); *id.* at 122-31 (separate statement of Arthur J. Goldberg) (proposing substantial expansion of Federal regulation to eliminate inequalities resulting from two-tiered bids); *id.* at 76-84 (separate statement of Frank H. Easterbrook & Gregg A. Jarrell) (advocating decrease of regulation).

48. See, e.g., Lipton, *supra* note 2, at 25-40 (arguing that the elimination of abusive takeover tactics removes much of the justification for defensive actions by the target board).

49. See *Draft Thirteenth Directive*, *supra* note 10, art. 4; see also *id.* art. 16 (providing for automatic increase in bid price where a bidder pays more for certain shares during the pendency of an offer). The Williams Act has a similar requirement during the pendency of an offer, but does not forbid two-tiered offers. See 15 U.S.C. § 78n(d)(7) (1988) (requiring that the highest price offered to an individual shareholder during a tender offer be offered to all shareholders during the offer).

a tender offer is open. This prohibition prevents, in effect, the "poison pill" stock plan popular in the United States.<sup>50</sup> Second, the article prohibits a board from "engag[ing] in transactions which do not have the character of current operations concluded under normal conditions" while an offer is outstanding. A board, therefore, cannot engage in a "white knight" or "white squire" arrangement in which stock or assets are sold to a favored bidder.<sup>51</sup> However, such measures may be taken prior to an offer being made (often without shareholder approval) or even during the pendency of an offer if the transaction is approved by shareholders.

### III. LIMITS ON DIRECTOR DISCRETION—A COMPARATIVE ANALYSIS

This section examines some of the philosophical assumptions underlying takeover regulation in both the European Community and the United States. What is particularly noteworthy in these assumptions is the remarkable similarity of views between the EC position, as set forth in the Draft Thirteenth Directive, and policies supporting U.S. regulations. Most importantly, there appears to be a growing consensus about (a) the relative benefits of an active and open takeover market; (b) the discretion of a particular target board to take defensive action to defeat an unwanted offer; and (c) the amount of consideration the target board should have for shareholders and nonshareholder constituencies when considering or responding to an offer. This consensus is leading to a form of takeover regulation in both the European Community and the United States where a board is given considerable discretion in the development of pre-offer defensive measures, while actions taken to defeat a bid after it is made are reviewed with much closer scrutiny.

#### *A. The Philosophy of Takeover Regulation in the United States and the European Community*

On one level, the European and U.S. standards concerning a target board's ability to defeat a hostile bid appear to differ fundamentally: after a bid is made the Draft Thirteenth Directive forbids almost any significant defensive tactic by a target board absent shareholder approval, whereas Delaware law permits directors to take a wide variety of action to defeat an

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50. For a description of poison pills, see Note, *Poison Pills as a Negotiating Tool: Seeking a Cease-Fire in the Corporate Takeover Wars*, 1987 COLUM. BUS. L. REV. 459, 463-64. The Investor Responsibility Research Center reports that as of mid-June 1989, 616 of the 1440 largest public companies in the United States had adopted some type of poison pill. 21 Sec. Reg. & L. Rep. (BNA) No. 43, at 1627, 1630 (Nov. 3, 1989).

51. For a description of these and other defensive devices popular in the United States, see THE BUSINESS JUDGMENT RULE, *supra* note 25, at 206-42 (discussing white knight transactions), 178-200 (reviewing white squire stock deals). See generally *id.* at 118-429 (reviewing the business judgment rule as it relates to defensive maneuvers and transactions involving corporate control).

unwanted offer.<sup>52</sup> The U.S. view assumes that directors have the ultimate authority to determine major corporate policy and that the board has the unilateral power to decide whether to accept a merger proposal.<sup>53</sup> In contrast, the European view, as expressed in the Draft Thirteenth Directive (apparently based on the British model of shareholder rights), appears to regard the tender offer premium as a shareholder prerogative, similar to the fundamental right of a shareholder to sell his stock.<sup>54</sup> According to this view, it is the shareholder, not the board, who has the right to choose whether to accept an offer. Therefore, looking only at the right of a target board to defeat an unwanted bid after such an offer is made, it appears that the European system places more limitations upon a target director's conduct than the system in the United States.

This view is deceptive. Although the range for defensive tactics available to a target board in the United States is substantial, the conduct of public offers is highly regulated and the scope for spoiling tactics has clear limits.<sup>55</sup> In particular, an overriding principle remains that director action, even to defeat an offer, must be made in good faith and not "dominated by motives of either entrenchment or self-interest."<sup>56</sup> Further, the availability of accurate and reasonably detailed information on public companies in the United States, as well as the ability to make an offer without having firm financing commitments or to make an offer for less than all the target's shares, allows bids in the United States to be made with significantly greater ease than in most EC member states.<sup>57</sup>

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52. Compare *Draft Thirteenth Directive*, *supra* note 10, art. 8 with *Paramount Communications, Inc. v. Time, Inc.*, 571 A.2d 1140, 1154-55 (Del. 1989) (affirming board decision to issue new shares and significantly increase debt to defeat an all-cash offer at a substantial premium to target's pre-offer share price).

53. See *Paramount Communications*, 571 A.2d at 1147-50 (board, not shareholders, has responsibility to decide whether to accept merger proposal).

54. For a more detailed view of the British philosophy of takeover regulation, see Shea, *Regulation of Takeovers in the United Kingdom*, 16 BROOKLYN J. INT'L L. 89 (1990); Karmel, *The Duty of Directors to Non-Shareholder Constituencies in Control Transactions—A Comparison of U.S. and U.K. Law*, 25 WAKE FOREST L. REV. 61, 75-83 (1990).

55. See, e.g., *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1264 (Del. 1988) (enjoining merger agreement with favored bidder; "an auction for the sale of corporate control" requires "the most scrupulous adherence to ordinary standards of fairness [by the target board] in the interest of promoting the highest values reasonably attainable for the stockholders' benefit"); *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 184 (Del. 1986) (enjoining sale of assets to a favored bidder where "principal benefit" from sale "went to directors" rather than shareholders); *In re Holly Farms Corp. Shareholders Litigation*, [1988-1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,181 at 91,645 (Del. Ch. Dec. 30, 1988) (preliminarily enjoining enforcement of an asset option granting a favored bidder the right to purchase a key corporate division).

56. *Paramount Communications*, 571 A.2d at 1150; see also *Macmillan*, 559 A.2d at 1269-72 (describing management self-interest as constituting a breach of fiduciary duty).

57. For a discussion of the use of partial or "two-tier" tender offers in the United States and the financing techniques available with such offers, see Gilson & Kraakman, *Delaware's Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review?*, 44 BUS. LAW. 247, 252-56 (1989); Bebchuk, *Toward Undistorted Choice and Equal Treatment in Corporate Takeovers*, 98 HARV. L. REV. 1695, 1717-33 (1985). For an analysis of a bidder's ability to

In contrast, the scope of publicly available information on companies in most EC countries is far more limited than in the United States. In addition, many EC countries allow directors substantial authority to prevent or deter a hostile bid from ever occurring. Moreover, because hostile offers have rarely occurred in most of continental Europe, legal or regulatory control over defensive measures by target directors remains limited. For example, in Germany, Italy, and the Netherlands, a target board has broad authority to act in the best interests of the company and basically no statutory or substantive provisions limiting a target board's actions exist.<sup>58</sup> Similarly, a target board in Belgium has substantial ability to take action that would frustrate an unwanted bidder and directors of Spanish companies may take virtually any action within the parameters of the general civil or company laws to defeat an offer.<sup>59</sup>

Thus, the EC regulations must be considered in the broader context of the regulations (or lack thereof) upon director conduct currently existing in the EC member states. Although adoption of the Draft Thirteenth Directive would remove a substantial barrier to takeovers in the European Community—a target board would no longer have the ability to defeat an offer during its pendency—it would not result in a barrier-free market for corporate control. Rather, it would simply create an incentive for a board feeling vulnerable to a potential takeover to take preventive action before an offer occurs. Such an incentive already exists under Delaware law, where pre-offer defensive actions are subject to a less rigorous scrutiny than steps taken during the pendency of a bid.<sup>60</sup>

### *B. The Growing Consensus on the Importance of Shareholder Rights*

Adoption of the Draft Thirteenth Directive would entail a new commitment to shareholder rights among many EC countries. As discussed above, shareholder rights in EC countries, such as Germany and the Netherlands, have traditionally been subordinated to those of other corporate constituencies, such as employees, suppliers, creditors, and customers. Because the board's primary obligation has been to these other nonshareholder constituencies, directors and management have typically been given wide latitude to

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make a tender offer without financing in place, see *Newmont Mining Corp. v. Pickens*, 831 F.2d 1448, 1453 (9th Cir. 1987) (Williams Act does not require that firm financing be in place at time tender offer commences).

58. See MacLachlan & Mackesy, *Acquisitions of Companies in Europe—Practicability, Disclosure and Regulation: An Overview*, 23 INT'L LAW. 373, 376-80 (1989); COOPERS & LYBRAND, *supra* note 7 (statistical analysis of barriers to acquisitions in EC member states and an analysis by country of barriers to takeovers).

59. See generally Berger, *supra* note 3, at 177 (discussing regulations in Belgium); MacLachlan & Mackesy, *supra* note 58, at 377 (reviewing Spanish guidelines).

60. See, e.g., *Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1355-56 (Del. 1985) (affirming right of board to take defensive action to deter an unwanted offer; "pre-planning for the contingency of a hostile takeover might reduce the risk that, under the pressure of a takeover bid, management will fail to exercise reasonable judgment").

reject and defeat takeover offers. Adoption of the Draft Thirteenth Directive would establish that, at least once an offer has been made, the target board's primary responsibility is to shareholders and the company, not the corporate constituencies.

The Directive's focus on shareholder rights after a bid is made is consistent with the fiduciary obligations of directors in most U.S. states. For example, under Delaware law it is well established that "[w]hen a board addresses a pending takeover bid it has an obligation to determine whether the offer is in the best interests of the corporation and its shareholders."<sup>61</sup> At the same time, Delaware law, as well as many newly-enacted state statutes, expressly permit a board to consider the impact of a takeover on nonshareholder constituencies, including in some cases the local and national economies and society as a whole.<sup>62</sup>

In short, there is a growing consensus in the United States and the European Community about the relative rights of shareholders against other corporate constituencies. Although the traditional objective for corporate directors in the United States has been to maximize shareholder value,<sup>63</sup> recent Delaware cases<sup>64</sup> and state statutes<sup>65</sup> have obligated directors to consider broader constituencies such as employees and their communities when responding to a takeover bid. Alternatively, whereas the dominant view among EC member states has been to make directors responsible to a broad corporate constituency, the trend, as evidenced by the Draft Thirteenth Directive, is to make directors more responsive to shareholders. The likely result of the shift in both the United States and the European Community is a

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61. *Id.* at 1350 (quoting *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985)). Jurisdictions outside of Delaware have adopted similar views. *See, e.g.*, *Hanson Trust PLC v. ML SCM Acquisition, Inc.*, 781 F.2d 264, 274 (2d Cir. 1986) (under New York law directors must consider effect of defensive actions on target shareholders).

62. For a Delaware case discussing a board's right to consider nonshareholder constituencies, see *Unocal*, 493 A.2d at 955. *See also* *TW Services, Inc. Shareholders Litigation* [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,173, at 92,179 (Del. Ch. Mar. 2, 1989) (discussing the rationale for board consideration of non-shareholder constituencies in the takeover context). The state statutes are addressed in *THE BUSINESS JUDGMENT RULE*, *supra* note 25, at 171-73.

63. A classic statement of the U.S. theory of corporate purpose is found in *Dodge v. Ford Motor Co.*:

A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.

204 Mich. 459, 507, 170 N.W. 668, 684 (1919).

64. *See, e.g.*, *Paramount Communications*, 571 A.2d at 1150 (in responding to a takeover bid "[d]irectors are not obliged to abandon a deliberately conceived corporate plan for a short-term shareholder profit unless there is clearly no basis to sustain the corporate strategy").

65. *See, e.g.*, *Amanda Acquisition Corp. v. Universal Foods Corp.*, 877 F.2d 496, 498 (7th Cir.) (reviewing Wisconsin antitakeover statute), *cert. denied*, 110 S.Ct. 367 (1989). *See generally* Johnson & Millon, *Missing the Point About State Takeover Statutes*, 87 MICH. L. REV. 846 (1989) (arguing that recent state antitakeover statutes reject the primacy of shareholders in corporate law).

confluence to the center; directors on both sides of the Atlantic will have the maximization of shareholder value as their primary responsibility, while also having authority to make decisions, including taking defensive action to defeat or prevent an unwanted offer, to protect nonshareholder constituencies even at a short-term cost to shareholder interests.

#### IV. CONCLUSION

The globalization of national securities markets, defined as capital investment beyond national boundaries, has increased dramatically in recent years. The value of equity-related securities offered to investors in markets outside the issuers' home state grew from \$200 million in 1983 to \$20.3 billion in 1987,<sup>66</sup> while the market in cross-border portfolio investments by private sector pension plans increased from \$20.7 billion in 1980 to \$193.7 billion in 1987 and is expected to reach \$465 billion by 1992.<sup>67</sup> Simply stated, the historical fragmentation of the world's capital markets is being overrun by the demands of investors for international unity.

The internationalization of capital markets has also created a global market for corporate control. Foreign companies are now making more and larger tender offers for U.S. companies as part of their worldwide strategy and U.S. companies are rapidly preparing to take similar action in Europe prior to 1992. International tender offers have become a global reality.

To meet this reality, it is both timely and necessary to understand the rules governing the actions of corporate directors when confronted with a potential change of control. Traditionally, these rules have been as fragmented as local securities markets, with each state creating its own rules based upon its unique historical and economic needs.

Now, however, these local standards are being overrun by demands for international unity. The Draft Thirteenth Directive, if adopted, would establish substantially uniform rules within the European Community governing both the tender offer process and the regulation of target directors confronted with a potential change of control. To a large degree, unity on these issues already exists in the United States. The next step is to unify the standards between the United States and the European Community. Full development of a global market for corporate control may be frustrated unless the United States and the European Community develop unified standards.

This article has demonstrated that steps toward unifying U.S. and European rules governing a target board's responsibilities and duties are already occurring. Courts and policymakers on both sides of the Atlantic have reached quite similar conclusions about allowing target directors to (a) take

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66. T. CHUPPE, H. HAWORTH & M. WATKINS, *THE SECURITIES MARKETS IN THE 1980S: A GLOBAL PERSPECTIVE* 58-59 (1989).

67. *Id.* at 88.

actions that have the (intended) effect of defeating or deterring an offer; (b) consider the impact upon nonshareholder constituencies of a change in control; and (c) adopt policies to ensure the equal treatment of shareholders in any offer made.

More broadly, a consensus is developing on the philosophical issue concerning the wisdom of takeovers. Although they are to be generally encouraged, a target board shall be allowed to take action to deter or prevent a specific bid and to consider the effect of any offer on all parties with a stake in the corporation's continuing success. This consensus is increasingly creating a single market for corporate control between the United States and the European Community and will lead to an easing of the barriers to transnational takeovers in the coming years as well as a corresponding increase in international trade and investment.

APPENDIX

ORIGINAL PROPOSAL

THE COUNCIL OF THE  
EUROPEAN COMMUNITIES,

Having regard to the Treaty  
establishing the European Economic  
Community, and in particular  
Article 54 thereof,

Having regard to the proposal from  
the Commission.

In cooperation with the European  
Parliament,

Having regard to the opinion of the  
Economic and Social Committee,

Whereas it is necessary to  
coordinate certain safeguards which  
Member States require of companies  
and firms within the meaning of the  
second paragraph of Article 58 of  
the Treaty for the protection of  
members and others, in order to  
make such safeguards equivalent  
throughout the Community;

Whereas it is necessary to protect  
the interests of the shareholders of  
public companies limited by shares  
when these are the subject of a  
takeover or other general bid;

Whereas shareholders who are in  
the same position should be treated  
equally;

AMENDED PROPOSAL

THE COUNCIL OF THE  
EUROPEAN COMMUNITIES,

unchanged

Having regard to the proposal from  
the Commission,<sup>1</sup>

In cooperation with the European  
Parliament,<sup>2</sup>

Having regard to the opinion of the  
Economic and Social Committee,<sup>3</sup>

unchanged

Whereas it is necessary to protect  
the interests of the holders of the  
securities of companies governed by  
the law of a Member State when the  
securities of these companies,  
*admitted to trading on a regulated  
market within the scope of this  
Directive*, are the subject of a  
takeover or other general bid;

deleted

<sup>1</sup> OJ No C 64, 14.3.1989, p. 8.

<sup>2</sup> OJ No C 38, 19.2.1990, p. 41.

<sup>3</sup> OJ No C 298, 27.11.1989, p. 56.

Whereas this equality of treatment requires that the obligation to make a bid is imposed on persons wishing to attain a certain level of participation in a company and in order to ensure the protection of minority shareholders and to avoid purely speculative partial bids, it is necessary to require that these persons make a bid for all the shares of that company;

Whereas each Member State should designate a supervisory authority or authorities to ensure that parties to a takeover or other general bid fulfil their obligations; and whereas it is necessary to determine which authority has territorial jurisdiction in the case of cross-frontier bids and to provide for the mutual recognition of offer documents within the Community; whereas the different authorities must cooperate with one another and their present or former officers and servants should be bound to preserve confidentiality;

Whereas equality of treatment of holders of securities requires that persons wishing to attain a certain level of holdings in a company be obliged to make a bid; whereas in order to protect persons having minority holdings and avoid purely speculative partial bids, it is necessary to require that *persons who have acquired a considerable holding* make a bid for all the securities of the company; *whereas, in order to attain greater flexibility in the application of this provision, the Member States may provide for a series of exemptions from this obligation;*

unchanged

*Whereas in taking decisions applying the requirements of this Directive the supervisory authority should be guided by a set of principles directing it to seek to ensure that;*

*(a) all holders of securities of an offeree company who are in the same position are treated equally;*

*(b) the addressees of a bid have sufficient time and information to enable them to reach a properly informed decision on the bid;*

*(c) the board of an offeree company acts in the interests of all the shareholders, and cannot frustrate the bid;*

*(d) false markets are not created in the securities of the offeree company, of the offeror company, or of any other company concerned by the bid;*

*(e) offeree companies are not hindered in the conduct of their affairs beyond a reasonable time by an offer for their securities;*

Whereas to reduce the scope for insider dealing offerors should be required to announce their intention of launching a bid as soon as possible and to inform the supervisory authority and the offeree company's board of the precise terms of the bid before they are made public;

unchanged

Whereas to avoid operations which frustrate the bid it is necessary to limit the powers of the board of directors of the offeree company to engage in operations of an exceptional nature;

unchanged

Whereas to help ensure compliance with the obligations resulting from the Directive it should be compulsory for offerors to be represented by a person or credit institution licensed to deal on financial markets;

unchanged

Whereas the addressees of a takeover or other general bid should be properly informed of the terms of the bid by means of an offer document and, where the consideration offered includes securities, should be provided with certain additional information about the company issuing those securities;

unchanged

Whereas the offeror should be required to bring the offer document to the attention of all addressees of the bid and where the offer document contains insufficient information to clarify the real intentions of the offeror, the supervisory authority should be able either to forbid the publication of the offer document or to make the offeror publish a revised document;

unchanged

Whereas it is necessary to set a time limit for takeover bids;

unchanged

Whereas, in the interests of the offeree company and the addressees of the bid, it should be provided that once an offer document has been made public the bid may not be withdrawn except in certain specified circumstances;

Whereas, in the interests of the offeree company and the addressees of the bid, it should be provided that once an offer document has been made public the bid may not be withdrawn *or declared void* except in certain limited cases;

Whereas the board of the offeree company should be required to report in writing to its shareholders its view of the bid, and whereas, where the consideration offered in the bid includes securities for which at the time the bid is made no official stock exchange listing has been applied for, it should also be required to obtain and make available to all addressees of the bid an additional report by an independent expert;

Whereas the board of the offeree company should be required to make public a written *opinion* addressed to holders of its securities, setting out its view of the bid;

Whereas offerors are entitled to revise their bids; whereas limits should be placed on that right in order to maintain an orderly market in the shares and it should be ensured that the addressees of the bid are informed in time; whereas it is necessary that the offeror draw up and make public a fresh document setting out the amendments to the original bid and whereas addressees who have already accepted the bid should be entitled to accept the revised bid;

Whereas in order to ensure equal treatment of addressees of the bid, an acquisition by the offeror, or by certain persons associated with him, of shares which are the subject of the bid at a higher price than that laid down in the offer document or one of its revisions, must itself be considered as a revision;

Whereas to be able to perform their functions satisfactorily, supervisory authorities need to be able to find out at any time how many acceptances have been received to date and whereas, from the time the intention to make a bid is announced by the offeror, any dealing in the securities concerned must be made public by any person already having a significant shareholding;

Whereas the result of the bid must be made public and notified to the supervisory authority;

Whereas offerors are entitled to revise their bids; whereas *it may be necessary* to limit that right with a view to *the proper operation of the offeree company and the maintenance of an orderly market* and it should be ensured that the addressees of the bid are informed in time; whereas it is necessary that the offeror draw up and make public a fresh document setting out any amendments to the original bid; and whereas addressees who have already accepted the bid should be entitled to accept the revised bid;

unchanged

Whereas to be able to perform their functions satisfactorily, supervisory authorities must at all times be able *to require the parties to the bid to provide information on it*; whereas after the offeror has announced his intention to make a bid *certain transactions concerning the securities of the companies concerned by the bid must be notified to the supervisory authorities*;

unchanged

Whereas taking into account the social policy of the Community, it is necessary that representatives of the employees of the offeree company be informed with regard to the bid and that they should receive all the documents concerning that bid;

unchanged

Whereas competing bids for the securities of a company are necessarily to the advantage of its shareholders; whereas all such bids should be subject to the same rules as the original bid and the original offeror should be entitled to withdraw his bid in such a case;

Whereas competing bids for the securities of a company are necessarily to the advantage of the holders of its securities; whereas all such bids should be subject to the same rules as the original bid and the original offeror should be entitled to withdraw his bid in such a case; *whereas addressees who have already accepted the initial bid must be able to accept the competing bid;*

Whereas this Directive does not until subsequent coordination affect the capacity of Member States to forbid a takeover or other general bid where the offeror is either a national or a company from a third country, in particular where Community nationals and companies do not benefit from reciprocal treatment as regards the acquisition of shares by means of such a bid in a company governed by the law of that third country,

unchanged

**HAS ADOPTED THIS  
DIRECTIVE:**

unchanged

Article 1

**Scope**

The coordination measures prescribed by this Directive shall apply to the laws, regulations and administrative provisions of the Member States relating to takeover and other general bids addressed, on the same terms, to all holders of the securities, or the securities of a particular class or classes, of any of the following types of company:

— in Germany:

die Aktiengesellschaft, die Kommanditgesellschaft auf Aktien,

— in Belgium:

la société anonyme / de naamloze vennootschap, la société en commandite par actions / de commanditaire vennootschap op aandelen,

— in Denmark:

aktieselskaber, kommanditaktieselskaber,

— in Spain:

la sociedad anónima, la sociedad en comandita por acciones,

— in France:

la société anonyme, la société en commandite par actions,

— in Greece:

— in Ireland:

the public company, limited by shares,

— in Italy:

la società per azioni, la società in accomandita per azioni,

Article 1

**Scope**

1. The coordination measures prescribed by this Directive shall apply to the laws, regulations and administrative provisions of the Member States relating to takeover and other general bids *for the securities of a company governed by the law of a Member State where these securities are admitted to trading on a market in one or more Member States which is regulated and supervised by authorities recognized by public bodies, operates regularly and is accessible, directly or indirectly, to the public.*

2. *After a period of five years following the date referred to in Article 22(2), the Commission shall submit to the Council a report on the extension of the scope of this Directive to some or to all companies governed by the law of a Member State whose securities are not accepted for trading on one of the markets referred to in paragraph*

*1 and, if appropriate, shall put forward a proposal to the Council to that end.*

- in **Luxembourg**:  
la société anonyme, la société en  
commandite par actions,
- in the **Netherlands**:  
de naamloze vennootschap,
- in **Portugal**:  
sociedade anónima, sociedade  
em comandita por accoes,
- in the **United Kingdom**:  
the public company, limited by  
shares,

Article 2

Definitions

1. For the purposes of this Directive, 'offeree company' shall mean a company whose securities are the subject of a takeover or other general bid (hereinafter referred to as 'a bid').

2. For the purposes of this Directive, 'offeror' shall mean any person or company including, where appropriate, the directors of the offeree company, who launches a bid in accordance with the obligation set out in Article 4 or on a voluntary basis.

3. For the purposes of this Directive, 'securities' shall mean securities carrying voting rights in a company or which can be converted into securities carrying such rights.

4. For the purposes of this Directive, 'parties to the bid' shall mean the offeror, the representative of the offeror within the meaning of Article 9, the directors of the offeror, if the latter is a company, the addressees of the bid and the directors of the offeree company.

5. For the purposes of this Directive, 'persons acting in concert' shall mean persons who, pursuant to an agreement, cooperate with one another with the aim of acquiring the securities of a company.

Article 2

Definitions

For the purposes of this Directive:

- *"takeover or other general bid" ("bid") shall mean an offer made to the holders of the securities of a company to acquire all or part of these securities by payment in cash or in exchange for other securities;*
- 'offeree company' shall mean a company whose securities are the subject of a bid;
- *'offeror' shall mean any natural person or legal entity in public or private law making a bid;*
- *"securities" shall mean transferable securities carrying voting rights in a company or conferring entitlement to obtain transferable securities carrying such rights;*
- *"parties to the bid" shall mean the offeror, the representative of the offeror within the meaning of Article 9, the directors of the offeror, if the latter is a company, the addressees of the bid and the directors of the offeree company.*
- 'persons acting in concert' shall mean persons who, *through concerted practices* or pursuant to an agreement, cooperate with one another *in connection with a bid.*

**Article 3**

**deleted**

**Equal treatment**

**Shareholders who are in the same position shall be treated equally.**

Article 4

Obligation to make a bid

1. Any person aiming to acquire a number or percentage of securities, which, added to any existing holdings, gives him a percentage of the voting rights in a company which may not be fixed at more than 33 1/3%, shall be obliged to make a bid to acquire all the securities of that company.

2. To calculate the threshold referred to in paragraph 1, the following must be added to the voting rights held by the offeror:

(a) voting rights held by persons acting in their own name but on behalf of the offeror;

(b) where appropriate, voting rights held by companies belonging with the offeror to the same group of undertakings within the meaning of Article 1 of Council Directive 83/349/EEC;<sup>1</sup>

(c) voting rights held by persons acting in concert with the offeror;

(d) where appropriate voting rights by directors of the offeror company

Article 4

Obligation to make a bid

1. *Any person ("the acquirer") who as a result of acquisition by himself or by a person referred to in paragraph 2 holds securities which added to any existing holding give him a percentage of the voting rights in a company which may not be fixed at more than one-third of the voting rights existing at the date of acquisition shall be obliged to make a bid to acquire all the securities of the company.*

2. To calculate the threshold referred to in paragraph 1, the following shall be added to the voting rights held by the acquirer:

(a) voting rights held by other persons or entities in their own names but on behalf of the acquirer;

(b) voting rights held by undertakings controlled by the acquirer within the meaning of Article 8 of Council Directive 88/627/EEC of 12 December 1988 on the information to be published when a major holding in a listed company is acquired or disposed of;<sup>1</sup>

(c) voting rights held by any other person acting in concert with the acquirer;

(d) *voting rights attached to securities held by the acquirer which are lodged by way of security, except where the holder of the security controls the voting rights and declares his intention of exercising them, in which case they shall be regarded as his voting rights.*

<sup>1</sup> OJ No L 193, 18.7.1983, p. 1.

<sup>1</sup> OJ No L 348, 17.12.1988, p. 62.

*2a. To calculate the threshold referred to in paragraph 1, the voting rights held by the acquirer or by any of the other persons or entities referred to in subparagraphs (a) to (d) of paragraph 2 shall be deemed to include the voting rights attached to the following securities:*

- (a) securities in which they have the life interest;*
- (b) securities which they are entitled to acquire, on their own initiative alone, under a formal agreement;*
- (c) securities deposited with them carrying voting rights which they can exercise at their discretion in the absence of specific instructions from the holders.*

*2b. Voting rights whose exercise is prevented by Article 22 of Council Directive 77/91/EEC of 13 December 1976 on the formation of public limited liability companies and the maintenance and alteration of their capital<sup>1</sup> shall not be taken into account in calculating the threshold referred to in paragraph 1.*

*2c. Member States may make provision for exemption from the obligation laid down in paragraph 1 where:*

- (a) the securities have been acquired by transmission without consideration;*
- (b) the acquirer has undertaken to carry out a merger within the scope of Article 3 of Council Directive 78/855/EEC of 9 October 1978 concerning mergers of public limited liability companies<sup>2</sup> with the company whose securities have been acquired;*

<sup>1</sup> OJ No L 26, 31.1.1977, p. 1.

<sup>2</sup> OJ No L 295, 20.10.1978, p. 36.

*(c) the acquisition results from a division within the scope of Article 2 of Council Directive 82/891/EEC of 17 December 1982 concerning the division of public limited liability companies;<sup>3</sup>*

*(d) the acquirer acquires a percentage of the voting rights which exceeds the threshold referred to in paragraph 1, but not by more than 3% of the total of these rights, and gives a written undertaking to transfer the securities necessary to come within the threshold within a period which may not exceed one year;*

*(e) the company whose securities have been acquired is already controlled within the meaning of Article 8 of Council Directive 88/627/EEC by the acquirer or by another undertaking controlling the acquirer or controlled by him within the meaning of that Article;*

*(f) the company whose securities have been acquired is already controlled within the meaning of Article 8 of Council Directive 88/627/EEC by a shareholder or jointly by a number of shareholders who give a written undertaking not to transfer their securities to the acquirer on the conditions he offers;*

*(g) the securities have been acquired following an increase in the subscribed capital and the acquirer has exercised his right of pre-emption in accordance with Article 29 of Council Directive 77/91/EEC.*

<sup>3</sup> OJ No L 378, 31.12.1982, p. 47.

3. The supervisory authority may grant exemptions to the rule laid down in paragraph 1, giving reasons for its decision and adopting all measures necessary to ensure equal treatment of all shareholders.

3. The supervisory authority may grant exemption from the obligation laid down in paragraph 1, giving reasons, *in cases other than those specified in the foregoing paragraph.*

Article 5

deleted

Exemptions on the basis of size of the offeree company

Article 4 shall not apply:

(a) where the securities of the offeree company have not been admitted to official stock exchange listing or have not been the subject of a request for such admission at the moment when the bid is announced in accordance with Article 7, and

(b) where the offeree company, or, where appropriate, the group of undertakings within the meaning of Article 1 of Directive 83/349/EEC to which the company belongs, do not exceed, at the balance-sheet date, the amounts of two of the three criteria laid down in Article 27 of Council Directive 78/660/EEC.<sup>1</sup>

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<sup>1</sup> OJ No L 222, 14.8.1978, p. 11.

**Article 6**

**Supervisory authority**

1. Member States shall designate the authority or authorities which must discharge the functions specified in this Directive. The authorities thus designated may delegate all or part of their powers to other authorities or to associations or private bodies. Member States shall inform the Commission of these designations and of any delegation of powers and shall specify all divisions of functions that may be made.

2. The authorities and, where appropriate, the associations or private bodies referred to in paragraph 1 must have all the necessary powers to ensure that this Directive is put into effect and, in any case, either the power to forbid the publication of an offer document which is incomplete by reference to the requirements of this Directive or the power to oblige the offeror to correct an inadequate offer document and to make it public by the means set out in Article 11(1).

**Article 6**

**Supervisory authority**

1. unchanged

2. *The supervisory authorities, and, where appropriate, the associations or private bodies referred to in paragraph 1, shall have all the powers necessary for the exercise of their functions, which shall include responsibility for ensuring that the parties to a bid comply with their obligations under this Directive. The authorities' power shall include either the power to forbid the publication of an offer document which is incomplete by reference to the requirements of this Directive or the power to oblige the offeror to correct an inadequate offer document and to make it public in accordance with Article 11(1).*

*2a. If a Member State requires the offer document to be approved by the supervisory authority prior to publication, the authority shall have a maximum period of three working days from lodging of the document within which to grant or withhold approval. If the authority fails to take a decision within that period approval shall be deemed to be granted.*

3. The authority competent for supervising the drawing-up and publication of the offer document shall be that of the Member State in which the offeree company has its registered office. Where the bid is made in several Member States simultaneously, the offer document as prepared under the supervision of the national authority responsible shall be accepted in the other Member States, without their supervisory authorities having the right to require the inclusion of any additional particulars in the document.

4. After an offer document has been made public in accordance with Article 11(1), the competent authorities of the Member States shall give each other any cooperation required for the performance of their duties and for this purpose shall supply each other with any information that may be necessary.

3. The authority competent for supervising the drawing-up and publication of the offer document shall be that of the Member State in which the offeree company has its registered office *if the securities of the company are admitted to trading on a regulated market in that Member State. Otherwise the competent authority shall be that of the Member State on whose regulated market the securities of the company were first admitted to trading. If the document so drawn up has received prior approval it shall be accepted by the other Member States whose supervisory authorities may not require the inclusion of any additional particulars.*

4. The competent authorities of the Member States shall cooperate, *notwithstanding paragraph 5*, in so far as necessary for the performance of their duties and for this purpose shall supply each other with any information that may be necessary.

5. All present or former officers or servants of supervisory authorities shall be bound by the rules of professional secrecy. Information that has come to their knowledge in the course of performing their professional duties shall not be disclosed to any person or body not legally entitled to receive it.

5a. *Each Member State shall provide that all present or former officers or servants of supervisory authorities shall be bound by the rules of professional secrecy. Information covered by professional secrecy shall not be disclosed to any person or authority not legally entitled to receive it.*

*(b) Without prejudice to their obligations in judicial proceedings in criminal matters, the supervisory authorities in receipt of the information referred to in paragraph 4 may use such information only for the discharge of their functions under paragraph 1 and in connection with administrative or legal proceedings specifically relating to the discharge of their functions.*

*Nevertheless, if the supervisory authority which has supplied information consents, the recipient supervisory authority may make use of the information for other purposes or transmit it to the supervisory authorities of other states.*

6. This Directive shall not affect the legislation of Member States concerning the liability of competent authorities.

6. unchanged

**Article 6a**

***Principles applicable to the discharge of the functions of the supervisory authority***

***In discharging the functions referred to in Article 6(2) and in granting exemptions pursuant to Article 4(3). Article 8(1)(b). Article 10(5). Article 11(1). Article 12(2). Article 13(1)(e) and (f). Article 15(5) and Article 20(3), the supervisory authority shall seek to ensure that:***

***(a) all holders of securities of an offeree company who are in the same position are treated equally;***

***(b) the addressees of a bid have sufficient time and information to enable them to reach a properly informed decision on the bid;***

***(c) the board of an offeree company acts in the interests of all the shareholders, and cannot frustrate the bid;***

***(d) false markets are not created in the securities of the offeree company, of the offeror company, or of any other company concerned by the bid;***

***(e) offeree companies are not hindered in the conduct of their affairs beyond a reasonable time by a bid for their securities.***

Article 7

Procedure prior to publication of the offer document

1. As soon as it decides to make a bid, the offeror shall make public its intention of doing so by one of the means provided for in Article 11(1). It shall inform the competent supervisory authority accordingly.
2. The offeror shall then immediately draw up an offer document in accordance with Article 10 and make it public in accordance with Article 11(1).
3. Before the offer document is made public, the offeror shall communicate it to the competent supervisory authority and to the board of the offeree company.

Article 7

Procedure prior to publication of the offer document

1. As soon as he decides to make a bid, *the offeror shall inform the competent supervisory authority and the board of the offeree company and then make his decision public* in accordance with Article 11(1)(a).
2. The offeror shall then immediately draw up an offer document in accordance with Article 10 and make it public, *accompanied where appropriate by the other documents referred to in that Article*, in accordance with Article 11(1).
3. Before the offer document is made public, the offeror shall communicate it to the supervisory authority, *which shall exercise the powers referred to in Article 6(2) where appropriate*, and to the board of the offeree company.

Article 8

Restriction of the powers of the board of the offeree company

After receiving the information referred to in Article 7(1) and until the expiry of the period for accepting the bid, the board of the offeree company shall not, without the authorization of the general meeting of shareholders, decide:

- (a) to issue securities carrying voting rights or which may be converted into such securities;
- (b) to engage in transactions which do not have the character of current operations concluded under normal conditions unless the competent supervisory authority has authorized them, giving its reasons for such authorization.

Article 8

Restriction of the powers of the board of the offeree company

1. After receiving the information referred to in Article 7(1) and until *the result of the bid is made public*, the board of the offeree company shall not, without obtaining the authorization of the general meeting of shareholders within the period for acceptance, decide:

- (a) to issue securities *within the meaning of the fourth indent in Article 2*;
  - (b) to engage in transactions *which would have the effect of altering significantly the assets or liabilities of the company or resulting in the company entering into commitments without consideration*, unless the supervisory authority authorizes such transactions, giving reasons;
  - (c) *to have the company acquire its own shares, as provided for in Article 19(1)(a) and (2) of Council Directive 77/91/EEC.*
2. *The board of the offeree company may call a general meeting of shareholders before the expiry of the period for acceptance referred to in the foregoing paragraph.*

**Article 9**

**Representative of the offeror**

**The offeror shall be represented either by a qualified person authorized to deal on the Community financial markets or by a credit institution authorized within the Community.**

**Article 9**

**Representative of the offeror**

**unchanged**

**Article 10**

**Offer document**

1. The offeror shall draw up an offer document in respect of the bid stating at least:

- (a) the type, name and registered office of the offeree company;
- (b) the name and address of the offeror or, where the offeror is a company, the type, name and registered office of that company;
- (c) the name and address or, where appropriate, name and registered office of the representative of the offeror referred to in Article 9;

(d) the securities or class or classes of securities for which the bid is made;

(e) the securities, or the securities of the relevant class or classes, already held by:

(aa) the offeror

(bb) other persons for the account of the offeror,

**Article 10**

**Offer document**

1. The offeror shall draw up an offer document *containing the information necessary to enable the addressees to reach a properly informed decision on the bid and* stating at least:

(a) unchanged

(b) unchanged

(c) unchanged

*(ca) the persons responsible for the offer document, and their names and positions, together with a declaration that to the best of their knowledge and belief the particulars contained in the offer document are correct and that no material fact has been omitted from the document;*

(d) unchanged

*(da) the maximum and minimum percentages or quantities of securities which the offeror undertakes to acquire;*

(e) the securities, or the securities of the relevant class or classes, already held by:

(aa) the offeror;

(bb) other persons *or entities acting in their own name but on behalf of the offeror;*

- (cc) companies belonging with the offeror to the same group of undertakings within the meaning of Article 1 of Directive 83/349/EEC,
- (cc) *undertakings controlled by the offeror within the meaning of Article 8 of Council Directive 88/627/EEC;*
- (dd) persons acting in concert with the offeror,
- (dd) *any other person acting in concert with the offeror;*
- (ee) where the offeror is a company, its directors;
- (ee) *the offeror or one of the other persons or entities referred to in points (bb) to (dd) if the securities have been lodged by way of security, except where the holder of the security controls the voting rights and declares his intention of exercising them, in which case the securities shall be regarded as his securities;*

and the voting rights attached to those securities and the date and the price at which they were acquired;

*and the voting rights attached to those securities, and the date and price of any acquisition or disposal of such securities within the twelve months preceding the public announcement required by Article 7(1) and until the offer document is made public;*

*the securities held by the offeror or by any of the other persons or entities referred to in points (bb) to (dd) shall be deemed to include:*

- *securities in which they have the life interest,*
- *securities which they are entitled to acquire, on their own initiative alone, under a formal agreement,*

- (f) where the offeror is a company, the securities, or the securities of a particular class or classes, of the offeror held by the offeree company, and the voting rights attached to them and the date and the price at which they were acquired;
- (g) the consideration offered for each security and the basis of the valuation used in determining it and, in the case of a cash consideration, the guarantees provided by the offeror regarding payment of that consideration, and, where appropriate, a statement concerning any future indebtedness of the offeree company to finance the bid;
- (h) where the consideration comprises securities, the date from which those securities will entitle their holders to a share in the profits and any special conditions affecting that entitlement;
- *securities deposited with them carrying voting rights which they can exercise at their discretion in the absence of specific instructions from the holders;*
- (f) where the offeror is a company, the securities or the securities of a particular class or classes of the offeror held by the offeree company or by other persons on behalf of the offeree company and the voting rights attached to them so far as the offeror is aware of them;
- (g) the consideration offered for each security or class of securities and the basis of the valuation used in determining it, with particulars of the way in which that consideration is to be given, and
- *where the consideration comprises cash, the steps that have been or will be taken with a view to payment,*
- *where the consideration comprises securities, particulars establishing that the offeror has these securities at his disposal or, where appropriate, an undertaking to call a general meeting of the offeror's shareholders in order that they may authorize the issue of the securities in question;*
- (ga) a statement concerning any future indebtedness of the offeror and, where appropriate, of the offeree, to finance the bid;
- (h) where the consideration comprises securities, the date from which they will entitle their holders to a share in dividends or interest and any special conditions affecting that entitlement;

(i) any conditions authorized by the competent supervisory authority which the offeror places on the bid;

(j) the latest date on which the bid may be accepted;

(k) the steps to be taken by the addressees of the bid in order to signify their acceptance and to receive the consideration for the securities which they transfer to the offeror;

(l) the intentions of the offeror, explicitly expressed, regarding the continuation of the business of the offeree company, including the use of its assets, the composition of its board and its employees;

(i) any condition *beyond the offeror's control* and authorized by the supervisory authority, on which the bid is dependent;

(ia) *the cases in which the bid may be withdrawn or declared void in accordance with Article 13;*

(j) *the beginning and the end of the period during which the bid may validly be accepted;*

(k) unchanged

(l) *the objectives of the offeror in making the bid and his intentions towards the offeree company if the bid succeeds, in particular regarding the use of its assets, the continuation of its business, the location where the offeror will establish the registered office of the offeree company, any restructuring of the offeree company and of companies controlled by it within the meaning of Article 8 of Council Directive 88/627/EEC, the continuation in office of members of the board of the offeree company, employment policy in the offeree company and companies controlled by it within the meaning of the said Article 8; and any special arrangements concerning employees' rights of participation which the offeror intends to maintain or to introduce, any amendments to the statutes or instrument of incorporation of the offeree company, any measures concerning the listing of the securities of the offeree company and any policy on return on capital;*

(m) any special advantages which the offeror intends to grant to the directors of the offeree company;

(n) all agreements concerning the exercise of the voting rights attached to the securities of the offeree company.

2. In addition, the offer document shall identify;

(a) any person for whose account the offeror is acting;

(b) any companies belonging with the offeror to the same group of undertakings within the meaning of Article 1 of Directive 83/349/EEC;

(c) any person acting in concert with the offeror.

3. Where the consideration offered includes newly-issued securities for which at the time of the bid an official stock exchange listing has been applied for, the offer document shall be accompanied by the listing particulars required by Council Directive 80/390/EEC.<sup>1</sup>

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<sup>1</sup> OJ No L 100, 17.4.1980, p. 1.

(m) unchanged

(n) all agreements *to which the offeror is a party or of which he is aware concerning the bid or the exercise of the voting rights attached to the securities of the offeree company.*

2. In addition, the offer document shall identify *the persons or entities referred to in paragraph 1(e)(bb) to (ee).*

*2a. If the offeror is acting in his own name but on behalf of another person or entity, the information referred to in paragraphs 1 and 2 shall relate to that person or entity and not to the offeror.*

3. Where the consideration comprises securities *which have been admitted to official listing on a stock exchange situated or operating within a Member State in the twelve months preceding the public announcement required by Article 7(1) the offer document shall be accompanied by listing particulars drawn up in accordance with Council Directive 80/390/EEC of 17 March 1980 on the listing particulars to be published for the admission of securities to official stock exchange listing;*<sup>1</sup>

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<sup>1</sup> OJ No L 100, 17.4.1980, p. 1.

4. Where the consideration offered includes securities for which at the time of the bid no official stock exchange listing has been applied for, the offer document shall contain all the facts necessary to enable the addressees of the bid to form an informed judgment as to the assets and liabilities, financial position, record and prospects of the issuer.

4. Where the consideration comprises securities *other than those referred to in paragraph 3*, the offer document shall contain all the information *equivalent to that contained in the listing particulars referred to in paragraph 3* enabling the offerees to form an informed judgment as to the assets and liabilities, financial position, record and prospects of the issuer.

*5. The supervisory authority may require the inclusion in the offer document of additional information. Where an item of information cannot be obtained in time or without excessive cost, or is not considered necessary for the protection of the shareholders or employees of the offeree company, the supervisory authority may exempt the offeror from the obligation to make it public giving reasons.*

**Article 11**

**Publication of the offer document**

1. The offer document and, where appropriate, the documents required by Article 10(3) or (4) shall be either:

(a) published in full in one or more national or mass-circulation newspapers and in the national gazette designated under Article 3(4) of Council Directive 68/151/EEC,<sup>1</sup> or

(b) made available to the addressees of the bid at addresses announced in notices in the newspapers and the gazette referred to at (a) or by equivalent means approved by the competent supervisory authority, or

(c) where all the securities comprised in the bid are registered, circulated to all addressees of the bid.

**Article 11**

**Forms of disclosure**

1. *Without prejudice to Article 7(1), where this Directive requires that a document or information be made public, the Member States shall select not less than one of the forms of disclosure set out below:*

(a) publication in one or more national or mass-circulation newspapers or in the national gazette designated under Article 3(4) of Council Directive 68/151/EEC of 9 March 1968 on disclosure requirements,<sup>1</sup> or by other means affording wide circulation of the information and approved by the supervisory authority;

(b) *making available* to the addressees of the bid at addresses announced in notices in the newspapers and the gazette referred to at (a) or by equivalent means approved by the supervisory authority;

(c) *circulation* to all the addressees of the bid, where all the securities which are the subject of the bid are registered.

*1a. Where the securities of the offeree company are admitted to trading on the market of Member States other than the state in which the company has its registered office, disclosure shall take place in each Member State in accordance with the law in force in that state. In that case, the offer document may be made public at a later date in these Member States than in the Member State where the offeree company has its registered office, provided that, taking account of the period for acceptance fixed in the offer document, the addressees of the bid in these Member States have sufficient time to reach a properly informed decision on the bid.*

2. The offer document and, where appropriate, the documents referred to in Article 10(3) and (4) shall also be filed with the competent supervisory authority.

*2. The Member States shall take appropriate measures to ensure that documents and information made public in accordance with paragraph 1 are communicated to the supervisory authority.*

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<sup>1</sup> OJ No L 65, 14.3.1968, p. 8.

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<sup>1</sup> OJ No L 65, 14.3.1968, p. 8.

**Article 12**

**Period for acceptance**

- 1. The period for accepting the bid indicated in the offer document in accordance with Article 10(1)(j) may not be less than four weeks or more than ten weeks from the date of publication of the document in accordance with Article 11(1).**
- 2. The period may not be modified without the authorization of the supervisory authority, giving its reasons, without prejudice to Article 20.**

**Article 12**

**Period for acceptance**

- 1. *Member States shall provide that the period for acceptance of the bid to be specified by the offeror in the offer document in accordance with Article 10(1)(j) may not be less than four weeks or more than ten weeks from the date on which the document is made public in accordance with Article 11(1).***
- 2. Without prejudice to *Article 15(2) and Article 20(4)*, the period may not be modified without the authorization of the supervisory authority, giving its reasons.**

**Article 13**

**Withdrawal of bids**

1. Once a bid has been made public by the means provided for in Article 11(1), it may be withdrawn only in the following circumstances:

- (a) where there are competing bids and the offeror decides to withdraw his bid in accordance with Article 20(4);
- (b) in a bid in which new securities are offered in exchange for the securities bid for, where the approval of the general meeting of the offeror company is not obtained for the issue of the new securities;
- (c) in a bid in which securities are offered in exchange for the securities bid for, where the securities fail to obtain an official stock exchange listing as the offeror intended;
- (d) where the necessary judicial or administrative authorization is not obtained for the acquisition of the securities for which the bid is made, and in particular in the event of lack of authorization of the acquisition by the merger control authorities;
- (e) where a condition of the bid announced in the offer document in accordance with Article 10(1)(i) and approved by the competent supervisory authority is not fulfilled;
- (f) in exceptional circumstances and with the authorization of the supervisory authority, giving reasons, where the bid cannot be put into effect for reasons beyond the control of the parties to the bid

**Article 13**

**Withdrawal or nullity of the bid**

1. When a bid has been made public in accordance with Article 11(1), it may be withdrawn or declared void only in the following circumstances:

- (a) unchanged
- (b) unchanged
- (c) unchanged
- (d) where the necessary judicial or administrative authorization for the acquisition of the securities for which the bid is made *is refused or* is not obtained, in particular if the operation is not authorized by the merger control authorities;
- (e) unchanged
- (f) unchanged

**2. The withdrawal of the bid shall be made public by the means provided for in Article 11(1) and communicated to the competent supervisory authority.**

**2. The fact that the bid has been *withdrawn or declared void* shall be *made public* in accordance with Article 11(1).**

Article 14

**Report of board of offeree company**

1. The board of the offeree company shall draw up a detailed report giving its views on the bid and setting out the arguments for and against acceptance. The report shall state whether the board is in agreement with the offeror on the bid and specify any agreements on the exercise of the voting rights attached to the securities of the offeree company.

2. Where the consideration offered comprises securities for which at the time of the bid no official stock exchange listing has been applied for, the board's report shall be accompanied by the report of an expert independent of the parties to the bid appointed or approved by the competent supervisory authority. This report shall in all cases state whether, in the expert's opinion, the consideration offered is fair and reasonable and shall give the expert's views on the basis of valuation used to determine the consideration

Article 14

**Opinion of board of offeree company**

1. *The board of the offeree company shall draw up a document setting out its opinion, together with the reasons on which it is based, on the bid and on any revisions of it. The document shall specify as a minimum:*

(a) whether the board of the offeree company is in agreement with the offeror on the bid and any agreements on the exercise of the voting rights attached to the securities of the offeree company, so far as the board is aware of them;

(b) whether the members of the board of the offeree company who hold securities in it themselves intend to accept the bid.

2. deleted

3. The reports shall, in good time before the expiry of the period for acceptance, be made public by the means provided for in Article 11(1) and filed with the competent supervisory authority.

4. Where the board of the offeree company is in agreement with the offeror, the board's report, accompanied, where appropriate, by the expert's report as referred to in paragraph 2, may be attached to the offer document provided for in Article 10.

5. The provisions of this Article shall also apply to revisions of the bid and to competing bids.

3. In good time before the expiry of the period for acceptance of the bid, *the document referred to in paragraph 1* shall be made public in accordance with Article 11(1). *The failure of the board of the offeree company to fulfil its obligation to draw up the document referred to in paragraph 1 in good time shall not have any suspensory effect concerning the bid.*

4. deleted

5. deleted

Article 15

Revision of bids

1. At any time before the last week of the period for acceptance announced in accordance with Article 10(1)(j), the offeror may revise the terms of the bid. Article 7(1) shall apply as regards the public announcement of the offeror's intention to revise the bid.

2. Where a bid is revised, the previous period for acceptance shall be automatically extended by one week.

3. The offeror shall draw up a document setting out the amendments to the offer document and making it public by the means provided for in Article 11(1).

4. Member States shall ensure that persons who have already accepted the previous bid by the offeror may accept the revised bid.

5. The periods provided for in paragraphs 1 and 2 may be modified with the authorization of the competent supervisory authority, which must set out the reasons on which it is based.

Article 15

Revision of bids

1. At any time before the last week of the period for acceptance announced in accordance with Article 10(1)(j), the offeror may revise the terms of the bid. Article 7(1) and (3) shall apply to the public announcement of the offeror's intention to revise the bid.

2. unchanged

*2a. The Member States may take appropriate steps to ensure that any successive revisions of the bid do not improperly impede the operation of the offeree company and of the market.*

3. The offeror shall draw up a document setting out the amendments to the offer document and make it public in accordance with Article 11(1) *in good time before the expiry of the period for acceptance of the bid.*

4. unchanged.

5. unchanged

**Article 16**

**Automatic revision**

The acquisition by the offeror, by persons acting in concert with him or by persons acting in their own name but on behalf of the offeror, during the acceptance period, of securities in respect of which the bid is made at a price higher than that established in the offer document or one of its revisions, will itself be considered as a revision of the bid and have the effect of increasing the consideration offered to those who have accepted previously.

**Article 16**

**Automatic revision**

*Where after the public announcement required by Article 7(1), until the end of the period for acceptance, the offeror, other persons or entities acting in their own name but on behalf of the offeror, undertakings controlled by the offeror within the meaning of Council Directive 88/627/EEC, or any other person acting in concert with the offeror, acquires securities which are the subject of the bid on more favourable conditions than those in the offer document, or any revisions thereof, the Member States shall ensure that the addressees of the bid qualify for the more favourable conditions.*

Article 17

Provision of information to the supervisory authority

1. Throughout the period for acceptance of the bid the offeror shall provide the competent supervisory authority at any time on request with information as to the number of acceptances received to date.

2. From the time a bid is publicly announced in accordance with Article 7(1), the offeror or any holder of 1% or more of the voting rights of the offeree company, of the offeror company if the offeror is a company, or of any other company whose securities are offered by way of consideration, shall declare to the competent supervisory authority all acquisitions of securities of the said companies by the offeror or the holder, persons acting in concert with them or persons acting in their own name but for their account, and the purchase price of such securities.

Article 17

Provision of information to the supervisory authority

1. Throughout the period for acceptance of the bid, *all parties to the bid* shall provide the supervisory authority at any time on request with *all information in their possession concerning the bid and necessary to the discharge of the functions of the authority.*

2. From the time a bid is publicly announced in accordance with Article 7(1) *until the end of the period for acceptance of the bid:*

— the offeror or any person or entity holding 5% or more of the voting rights of the offeree company, or where appropriate the offeror company, or any other company whose securities are offered as consideration, shall *immediately* inform the supervisory authority of all acquisitions of securities of these companies by the offeror or the holder, other persons or entities acting in their own name but on behalf of the offeror or the holder, *undertakings controlled by them within the meaning of Article 8 of Council Directive 88/627/EEC*, or any other person acting in concert with them, and of the price of these securities, *and of any voting rights already held in the company in question;*

- *any person or entity acquiring 0.5% or more of the voting rights of the offeree company, or where appropriate, the offeror, or where appropriate any other company whose securities are offered as consideration, shall immediately inform the competent supervisory authority of that acquisition and of any subsequent acquisitions of the securities of these companies by him, other persons or entities acting in their own name but on his behalf, companies controlled by him within the meaning of Article 8 of Council Directive 88/627/EEC, or any other person acting in concert with him, of the price of these securities, and of any voting rights he already holds in the company in question.*

**Article 18**

**Publication of result of bid**

**Once the period for acceptance has expired, the result of the bid shall be made public by the means provided for in Article 11(1) and shall be communicated to the competent supervisory authority by the offeror.**

**Article 18**

***Disclosure of result of bid***

***On the expiry of the period for acceptance, the result of the bid shall be made public immediately in accordance with Article 11(1).***

**Article 19**

**Information for representatives of employees of the target company**

**The board of the offeree company shall communicate to its workers' representatives, as designated by national legislation or customary practice in Member States, the offer document and, where appropriate, the documents referred to in Article 10(3) and (4), as well as its own report as referred to in Article 14 and, if appropriate, the expert's report as referred to in Article 14(2).**

**Article 19**

**Information for representatives of employees of the offeree company**

**The board of the offeree company shall communicate to its employees' representatives, as designated by national legislation or customary practice in the Member States, the offer document and, where appropriate, the documents referred to in Article 10(3) and (4), the *opinion required by Article 14(1) and all documents or information made public in accordance with Article 11(1) concerning the revision, withdrawal and result of the bid.***

***2. Such documents or information shall be communicated immediately after they are made public in accordance with Article 11(1).***

**Article 20**

**Competing bids**

1. Where competing bids are made for the securities of the offeree company, this Directive shall apply to each such bid.
2. Competing bids shall be publicly announced in accordance with Article 7(1). The offeror shall draw up an offer document in accordance with Article 10 and shall make it public by the means provided for in Article 11(1) before the period for acceptance of the initial bid expires.
3. Except with the authorization of the competent supervisory authority, which must set out the reasons on which it is based, persons acting in concert with the offeror or acting in their own name but for the account of the offeror may not make a bid competing with the initial bid.
4. Where there are competing bids and the initial offeror does not withdraw his bid, the period for acceptance of the initial bid shall be extended automatically to the date of expiry of the period for acceptance of the competing bid. The extension shall be made public by the means provided for in Article 11(1) and communicated to the competent supervisory authority.

**Article 20**

**Competing bids**

1. unchanged
2. deleted
3. unchanged
4. unchanged
5. *The Member States shall ensure that the addressees of a competing bid who have already accepted a prior bid qualify for the competing bid.*

*6. The Member States may take appropriate steps to ensure that the existence of competing bids does not improperly impede the operation of the offeree company and of the market.*

*7. Member States may refrain from applying paragraph 5 to irrevocable acceptances in cases of competing bids if such acceptances are permitted under their legislation.*

**Article 21**

**Contact committee**

**1. A contact committee shall be set up under the auspices of the Commission. Its function shall be:**

**(a) without prejudice to the provisions of Articles 169 and 170 of the Treaty, to facilitate the uniform application of this Directive through regular consultations on, in particular, practical problems arising in its implementation;**

**(b) 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;**

**(c) to advise the Commission, if necessary, on additions or amendments to this Directive.**

**2. The contact committee shall be composed of representatives of the Member States and representatives of the Commission. The chairman shall be a representative of the Commission. Secretarial services shall be provided by the Commission.**

**3. The Commission shall be convened by the chairman either on his own initiative or at the request of one of its members.**

**Article 21**

**Contact committee**

**unchanged**

**Article 23**

**Addressees of the Directive**

**This Directive is addressed to the  
Member States.**

**Article 23**

**Addressees of the Directive**

**unchanged**