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Tender Offers in the European Community: The Playing Field Shrinks

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ABSTRACT

This Article discusses the Proposal in the European Community to standardize the tender offer process in the Single European Market of 1992. The Proposal promotes equal treatment of shareholders and contains substantive measures to achieve this goal. Mr. Greenbaum compares the Proposal to its United States counterpart, the 1968 Williams Act, notes the different approach taken by the Williams Act, with its emphasis on disclosure rather than substantive regulation, and examines these different approaches primarily in the context of hostile tender offers. Mr. Greenbaum shows that the Proposal's procedural requirements for the bidder and restrictions on target management defenses leave both with a smaller tender offer playing field within which to maneuver. In addition, Mr. Greenbaum suggests that the Proposal may not be able to provide the type of shareholder protection it envisions unless there is stringent Community control of Member State anti-takeover regulation.

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I. INTRODUCTION

A. *Securities Markets in the Single Europe*

As 1992 and the near-mythic goal of a single European market approaches, the European Community (the Community) has moved toward achieving market integration by promulgating numerous regulations that remove many physical, technical, and fiscal barriers among its Member States. The basis for these regulations is the European Community White Paper of 1985,[1] which fixed December 31, 1992,[2] as the deadline for creating a "Europe without frontiers."[3] As part of the continuing development of the single market, the securities markets of the Community are also evolving toward more uniform regulation.[4] One facet of this transition is the recent *Proposal for a Thirteenth Council Directive on Company Law Concerning Takeover and Other General Bids* (the

1. COMMISSION OF THE EUR. COMM., COMPLETING THE INTERNAL MARKET, COM(85) 310 final (June 14, 1985). *The Single European Act, of February 17, 1986*, 30 O.J. EUR. COMM. (No. L 169) 1 (1987) [hereinafter *Single European Act*], contained the first major amendments to the treaty establishing the Community. The Treaty of Rome Treaty Establishing the European Economic Community, Mar. 25, 1967, 298 U.N.T.S. 11 [hereinafter Treaty of Rome]. It also provided a stronger base for effecting these changes. For a recent publication on the Single European Act, see Schildhaus, *1992 and the Single European Act*, 23 Int'l Law. 549 (1989).

2. Although December 31, 1992, is the stated deadline for integration, this ongoing process will indeed continue into the future. For a summary of the Community's progress toward achieving the Single Market, see, COMMISSION OF THE EUR. COMM., FOURTH REPORT OF THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT, COM (89) 311 final (June 20, 1989).

3. *See, e.g.*, OFFICE FOR OFFICIAL PUBL. OF THE EUR. COMM, EUROPE WITHOUT FRONTIERS—COMPLETING THE INTERNAL MARKET (1988).

4. As of November 1, 1989, the Proposal, *infra* note 5, is still before the European Parliament for its first reading but has not yet been put on the agenda. It has been referred to the Legal Affairs Committee, of which Mrs. Nicole Fontainer is rapporteur. Under the amendment to the article 149 of the Treaty of Rome, *supra* note 1, by the *Single European Act*, it is likely that the Proposal will have to be presented twice to the Parliament before the European Council will approve the final version of the Proposal. *Single European Act, supra* note 1, at 5.

Proposal).[5]

The purpose of the Proposal is to harmonize the law of the Member States[6] with respect to takeovers and to "afford shareholders and other interested parties equivalent standards of protection" throughout the Community.[7] The Proposal would provide the European equivalent to the Williams Act[8] regulation of tender offers in the United States.[9] This area will become increasingly important to United States companies, whether they seek to enter the Community before "Fortress Europe" raises its drawbridge (by erecting barriers against outside competition)[10] or wish merely to take greater advantage of the strengthened European

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5. 32 O.J. EUR. COMM. (No. C 64) 8 (1989) [hereinafter Proposal]. The text of the Proposal is attached as an Appendix to this Article.

6. The present laws of the Member States are quite disparate concerning their encouragement or discouragement of tender offers. See, MacLachlan & MacKesy, *Acquisitions of Companies in Europe—Practicability, Disclosure, and Regulation: An Overview*, 23 INT'L LAW. 373 (1989). By far, the United Kingdom has been the site of the greatest number of hostile tender offers in the Community. For example, in 1986, 195 such offers occurred in the United Kingdom, 12 in France, 10 in Spain, and 8 in Belgium. Tender offer activity, however, is expected to increase in the other Member States. *See* 1459 Eur. Rep., Dec. 24, 1988, at 4. Thus, the Proposal would regulate acquisitions in countries whose business cultures have not before promoted hostile acquisitions and whose existing company practices, such as cross ownership of stock, might provide additional barriers.

7. *See* EEC COMMISSION, EXPLANATORY MEMORANDUM COM(88) 823 final-SYN 186, at 2 (Feb. 16, 1989) [hereinafter EXPLANATORY MEMORANDUM]. Note that the Proposal is not directed toward asset mergers. *Id.*

8. 15 U.S.C. §§ 78 m(d)-(e), n(d)-(f) (1988). The Williams Act was a 1968 amendment to the Securities and Exchange Act of 1934, ch. 409, 48 Stat. 881, made in response to the great increase in the use of the cash tender offer.

9. The Williams Act, however, applies at a slightly lower threshold than does the Proposal. Unless a company has 500 or more record shareholders and total assets of $5 million, it is free from the disclosure requirements of the Williams Act. 17 C.F.R. § 240.12g-1 (1988). The Proposal covers takeover bids for companies having assets of more than ECU 6.2 million, total sales of more than ECU 12.8 million, and a yearly average of more than 250 employees. (This corresponds to $7.0 million and $14.5 million according to the ECU-dollar conversion rate quoted in Wall Street J., Nov. 27, 1989, § C, at 10, col. 4). *See* Proposal, *supra* note 5, art. 5(b), at 10; *Fourth Council Directive of 25 July 1978, (78/660/EEC)*, 21 O. J. EUR. COMM. (No. L. 222) 11, 21 (1978), *amended by Council Directive of 27 Nov. 1989 (84/569)*, 27 O.J. EUR. COMM. (No. L 314) 28 (1984).

10. *See, e.g.*, H.R. REP. No. 290, 101st Cong., 1st Sess. 1 (1988) (report submitted by Sen. Rostenkowski on Oct. 17, 1988, denouncing the restrictive Community broadcasting directive); *Impregnable Fortress Brussels*, J. Com., July 17, 1989, § A, at 8, col. 3; *The Growing Fear of Fortress Europe*, N.Y. Times, Oct. 23, 1988, § 3, at 1, col. 1; *Resistance Grows to European Community Plan to End Trade Barriers*, J. Com., Oct. 25, 1988, § A, at 1, col. 2.

market[11] and the "cornucopia of undervalued corporations" existing in Europe.[12] In either case, the European regulation of tender offers will figure prominently.

The globalization of national securities markets will also magnify the import of the Proposal beyond its Community scope.[13] Securities markets are becoming more international for a number of reasons: technological innovations facilitating the exchange of information; lessened regulatory restrictions, including the removal of foreign exchange controls; greater access to financial information for investors; and greater shareholder desire to diversify risks and earn higher returns.[14] Acquisitions in the securities markets are occurring to an ever-increasing extent on an international level.[15] Foreign companies are now making significant tender offers for United States companies as part of their worldwide strategies.[16] United States companies are already or will be taking similar steps.[17] Thus, international tender offers are quickly becoming a global reality. Though much of this globalization is directly attributable to concerns for 1992, not all such offers arise from those considerations. Rather, many companies now view global investment as an economic necessity.[18] As the wave of international mergers and acquisitions gath-

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11. For a detailed study on the effect of 1992 on the United States, see U.S. INT'L TRADE COMMISSION, PUB. NO. 2204, THE EFFECTS OF GREATER ECONOMIC INTEGRATION WITHIN THE EUROPEAN COMMUNITY ON THE UNITED STATES (1989); *see also* INTERNATIONAL DIVISION, U.S. CHAMBER OF COM., EUROPE 1992: A PRACTICAL GUIDE FOR AMERICAN BUSINESSES (1989) (available from: (202) 463-5460).

12. Lublin & Forman, *Battle of Britain: Europe's Merger Boom Triggers an Invasion by U.S. Deal Makers*, Wall St. J., Aug. 23, 1989, § A, at 1, col. 6.

13. In its report to members of Congress in April 1989, the United States General Accounting Office stated that "[t]he internationalization of securities markets is inevitable." GENERAL ACCOUNTING OFFICE, GAO/NSIAD-89-115, NATIONAL SECURITY AND INTERNATIONAL AFFAIRS DIVISION, INTERNATIONAL FINANCE: REGULATION OF INTERNATIONAL SECURITIES MARKETS 2 (1989) [hereinafter GAO REPORT]. *See also* INTERNATIONAL SECURITIES ENFORCEMENT COOPERATION ACT OF 1989, H.R. REP. No. 240, 101st Cong., 1st Sess. (1989), *reprinted in* 135 CONG. REC. H5870 (daily ed. Sept. 25, 1989).

14. GAO REPORT, *supra* note 13, at 9.

15. For an analysis of the growth of foreign investment in United States stocks over the last seven years, see *id.* at 9; *see also* Berger, *The European Markets Try to Coordinate, Unify Conflicting Merger Law*, 12 Nat'l L.J., Nov. 6, 1989, § S, at 14, col. 1.

16. *See, e.g., Grand Met's Grand Design*, Fortune, Nov. 7, 1988, at 12, col. 1.

17. For the growth of United States purchases of foreign stocks, see GAO REPORT, *supra* note 13, at 10.

18. For the increasing importance of international tender offers, see Goelzer, Mills, Gresham & Sullivan, *The Role of the U.S. Securities and Exchange Commission in Transnational Acquisitions*, 22 INT'L LAW. 615, 616 (1988).

ers force, changes in the European regulation of tender offers should be of obvious import to all securities lawyers.

The Proposal and the resulting legislation within the Community are also likely to lead to increased United States legal participation in European tender offers in the future. In the past, businesspeople have often been able to negotiate European mergers without intensive legal assistance because national regulations or customary practice were not comprehensive enough to require such legal participation. The Proposal and other sophisticated Community-wide legislation on tender offers will cause a fundamental change. The complexity of the legislation will require that lawyers take an increasingly more prominent role. United States companies seeking European acquisitions will have to rely more heavily on their legal counsel to lead them through the ever more complicated legislation. United States lawyers should prepare for these possibilities now.

B. *Overview of the Proposal and the Williams Act*

In the United States, the Williams Act governs the tender offer process on the national level.[19] For the most part, the Williams Act regulates the flow of information rather than the substantive rights of management or bidders. It generally requires that bidders[20] make full and fair disclosure to investors of the terms and conditions of their tender offers.[21] An important aspect of the Williams Act is the manner in which it treats the participants in a tender offer. As noted by the Supreme Court in *Edgar v. MITE Corp.*,[22] Congress took care in structuring the Williams Act to "avoid tipping the scales either in favor of management or in favor of the person making the takeover bids."[23] Thus, in some respects, the federal law creates a level playing field from which the shareholders can benefit. The vast majority of states, however, have enacted anti-takeover statutes

19. The Act regulates both tender offers and the taking of significant equity positions by shareholders. This Article will concentrate on the Act's tender offer provisions, 15 U.S.C. §§ 78n(d)-(e) (1988).

20. Article 2 of the Proposal uses the term "offeror" to refer to the tender offer bidder. Proposal, *supra* note 5, art. 2(2), at 10. In order to simplify the linguistic differences between the Williams Act and the Proposal, this Article identifies the definitions of the Proposal but uses the Williams Act equivalents where there is a significant difference.

21. 15 U.S.C. § 78n(e) (1988). Article 2(1) of the Proposal uses the term "bid" for the tender offer. Proposal, *supra* note 5, art. 2(1), at 10.

22. 457 U.S. 624 (1982).

23. *Id.* at 633 (quoting 113 CONG. REC. S24664 (1967) (Remarks of Sen. Williams)).

erecting substantive obstacles against hostile bids.[24] In fact, these statutes have shifted the emphasis away from the protection of shareholders.[25] But the Williams Act still remains the primary regulatory focus for national tender offers.[26]

Like the Williams Act, the Proposal regulates all aspects of the bidding process, ranging from the time the offer must be made[27] to the contents[28] and filing[29] of the tender offer document, the publication of the

24. States have enacted various types of anti-takeover legislation. At the present time, the most visible type of anti-takeover legislation is the "business combination" statute. These statutes typically prevent mergers between a target and another entity for a period of three to five years after a bidder has made what management considers to be an unacceptable acquisition of a certain percentage of the target's stock. *See, e.g.*, DEL. CODE ANN. tit. 8, § 203 (Supp. 1988), 15 PA. CONS. STAT. ANN. §§ 2251-56 (Purdon 1989), WIS. STAT. ANN. § 180.76 (West 1989); N.Y. BUS. CORP. LAW § 912 (McKinney 1988).

In addition to the business combination statutes, states have also enacted other types of anti-takeover legislation. For a discussion of the "fair value appraisal" statutes, see *infra* note 41. For examples of "share acquisition statues" that specifically allow the board of directors to consider constitutencies other than shareholders for corporate decisions, including the evaluation of hostile bids, see *infra* note 96. For examples of share acquisition statutes, which make the right of a shareholder to vote his shares contingent on the vote of the majority of the other shareholders, see IND. CODE ANN. §§ 23-1-42-1—23-1-42-11 (Burns Supp. 1989); FLA. STAT. ANN., § 607.109 (West 1989); *see also* S.1310, 1989 Sess., §§ 2571-75 (Pa. Oct. 20, 1989). *See* Booth, *The Promise of State Takeover Statutes*, 86 MICH. L. REV. 1635 (1988) (suggesting that share acquisition statutes may be the most appropriate form of anti-takeover legislation in respect to the protection of shareholders). For examples of statutes that prohibit the payment of "greenmail," see *infra* note 85. Finally, for examples of statutes sanctioning the adoption of "poison pills," see 15 PA. CONS. STAT. ANN., §§ 1525(b), 2513 (Purdon 1989); COLO. REV. STAT. § 7-4-106 (1986); HAW. REV. STAT. §§ 415-20 (1988); UTAH CODE ANN. § 16-10-16.1 (Supp. 1989). The momentum toward the adoption of increasingly burdensome anti-takeover legislation may be accelerated by the Supreme Court's recent refusal to hear a challenge to Wisconsin's business combination statute in Amada Acquisition Corp. v. Universal Foods Corp., 877 F.2d 496 (7th Cir. 1989), *cert. denied*, No. 89-372, 1989 WESTLAW 113708, (1989); *see Supreme Court Declines to Review Law in Wisconsin Curbing Hostile Takeovers*, Wall St. J., Nov. 7, 1989, § B, at 17, col. 1.

25. *See* Johnson & Millon, *Missing the Point About State Takeover Statutes*, 87 MICH. L. REV. 846 (1989) (correspondence).

26. Section 28(a) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78bb(a) (1988), allows a state to regulate securities transactions "insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder."

27. *Compare* Proposal, *supra* note 5, art. 4, at 10 *with* 15 U.S.C. § 78n(d)(1) (1988).

28. *Compare* Proposal, *supra* note 5, art. 10, at 11-12 *with* Schedule 14D-1, 17 C.F.R. § 240.14d-100 (1989).

29. *Compare* Proposal, *supra* note 5, art. 11, at 12 *with* Rule 14d-3, 17 C.F.R. §

document,[30] the period for acceptance[31] of the bid, and the response by the target's[32] board of directors.[33]

As mentioned, the Williams Act focuses mainly on disclosure by the bidder as the means of achieving its regulatory goals of protecting shareholders. The Proposal, in contrast, seeks to regulate more of the conduct of the bidding process. In examining how the Proposal operates, the practitioner should keep in mind that its guiding principle is the equal treatment[34] of shareholders.

In going beyond disclosure requirements, the Proposal seeks to regulate tender offers in a more substantive manner. Two rules in particular are noteworthy from a United States perspective. Once a bidder "aim[s] to acquire" more than thirty-three and one-third percent of the shares of a company, the Proposal would require it to bid for all of the shares of the company.[35] Even more dramatic, the Proposal would proscribe target management defensive tactics during the pendency of a tender offer.[36] Viewed on the whole, the Proposal's more substantive regulation shrinks the playing field between the hostile bidder and incumbent management. The Proposal operates to deter a number of tender offers, but at the same time restricts the actions that target management may take while a hostile tender offer is pending.[37] This shrinking of the playing field, moreover, occurs at all stages of the tender offer process. The smaller field, however, may be tilted in favor of the hostile bidder. Although the bidder has less room to maneuver and may have difficulty entering the game because of the regulatory obstacles,[38] the target, without the ability

240.14d-3 (1989).

30. *Compare* Proposal, *supra* note 5, art. 11 (1), at 12 *with* Rule 14d-2, 17 C.F.R. § 240.14d-2 (1989) *and* Rule 14d-4, *id.* § 240.14d-4.

31. *Compare* Proposal, *supra* note 5, art. 12, at 12 *with* Rule 14e-1(a), 17 C.F.R. § 240.14e-1(a) (1989).

32. The proposal identifies the target corporation as the "offeree" company. Proposal, *supra* note 5, art. 2 (1), at 10.

33. *Compare* Proposal, *supra* note 5, art. 14, at 13 *with* 15 U.S.C. § 78n(d)(4) (1988) *and* Rule 14d-9, 17 C.F.R. § 240.14d-9 (1989) *and* Schedule 14D-9, *id.* § 14d-101.

34. Article 3 reads in full: "Shareholders who are in the same position shall be treated equally." *See* Proposal, *supra* note 5, art. 3, at 10; *see* text accompanying note 58.

35. *See* Proposal, *supra* note 5, art. 4, at 10.

36. *Id.* art. 8, at 11.

37. *See infra* part II, sections A, B.

38. For a description of relevant procedural obstacles concerning pre-merger notification, see Greenbaum, *An American Perspective on the European Commission's "Amended Proposal for a Council Regulation on the Control of Concentrations Be-*

to adopt extraordinary defensive tactics, may be chained to the goal post.

Unlike the Second Banking Directive, which aims to establish an internal framework for banking in the Community,[39] the Proposal does not contain a reciprocity clause aimed at hindering bidders from third countries that themselves discourage bidders from Member States. The Proposal does recognize, though, that Member States may introduce such a clause into their own national law.[40] A United States bidder wishing to enter the Community market in a significant manner and facing such a clause may have to acquire a European company or form a European subsidiary in order to enter the playing field at all.

This Article will analyze the Proposal in comparison with the Williams Act, with special emphasis on those aspects of the Proposal that find no counterpart in the rules and regulations promulgated under the Williams Act. In addition, the Article will discuss the framework and provisions of the Proposal in relation to their Williams Act equivalents in order to illustrate their significant differences and to present a general approach to the Proposal itself. The information here will interest not only present and future practitioners of Community law, but also United States lawyers working in the tender offer area—for the Proposal presents interesting European responses to diverse problems existing in the United States scheme of regulation.

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tween Undertakings" and its Impact on Hostile Tender Offers, 7 DICK. J. INT'L L. 195 (1989).

39. *See Proposal for a Second Council Directive on the Coordination of Laws, Regulations, and Administrative Provisions Relating to the Taking Up and Pursuit of the Business of Credit Institutions and Amending Directive 77/780/EEC: COM (87) 715 Final*, 31 O.J. EUR. COMM. (No. C 84) 1 (1988). The original article 7 of the Second Banking Directive was problematic because it would have prevented United States banks from opening branches in the Community unless United States banking regulations were altered to provide reciprocal treatment for European banks. *Id.* art. 7(5), at 4. The Revised Article 7 of April 13, 1989, however, is unlikely to generate so much concern, for it only requires that European banks receive national treatment, not reciprocal treatment. *Amended Proposal for a Second Council Directive on the Coordination of Laws, Regulations and Administrative Provisions Relating to the Trading-Up and Pursuit of the Business of Credit Institutions and Amending Directive 77/780/EEC Com (89) 190 Final SYN 120*, 32 O.J. EUR. COMM. (No. C. 167) (1989).

40. *See supra* note 6. *See also*, Proposal, *supra* note 5, art. 21(1)(b), at 14, which grants the Contact Committee (discussed *infra*, text accompanying note 50) the power to "ensure concerted action . . . by the Member States in order to obtain reciprocal treatment" by third countries. *Id.*

II. Analysis of the Proposal

A. *The Bid Obligation*

Perhaps the most striking aspect of the Proposal is its requirement on the extent of a bid. Article 4 mandates that any person "aiming to acquire" the voting rights to more than one-third of the securities of a company (including shares that person already owns) must bid for all the securities of that company.[41] This provision helps ensure against depriving minority shareholders of their economic and voting rights in the corporation.[42] These shareholders would be able to sell all of their shares and avoid the situation in which the hostile bidder, after gaining control, can squeeze them out in a subsequent merger at a price lower than that offered for the majority shares.[43] Article 4 in this way acts to discourage partial bids made solely for speculative purposes.[44] A bidder is less likely to launch a speculative bid if it will be required to purchase all the shares of the target company.

If adopted, this provision, when exercised, will likely require either judicial refinement or intensive and costly factual investigation. The time

41. Proposal, *supra* note 5, at art. 4(1), at 10. This provision is analogous to the "fair value appraisal" statutes enacted by states of the United States as anti-takeover measures to ensure that minority shareholders are not treated unfairly by controlling shareholders. For a recently-enacted provision of this type, see, e.g., 15 PA. CONS. STAT. ANN. §§ 2541-48 (Purdon 1988) (effective Oct. 1, 1989), which provides shareholders with the absolute right to obtain from a bidder who holds more than 20% of the voting shares of a target corporation the highest price that bidder has paid for shares of the company within the 90 day period ending on and including the date the bidder acquires 20% ownership. Moreover, the provision also allows shareholders the right to demand an appraisal if the shareholders are unable to agree with the bidder on the value of the shares. *See also* ME. REV. STAT. ANN. tit. 13-A, § 910(9) (Supp. 1989).

On the federal level, although there are no directly comparable securities regulations in force, the Tender Offer Reform Act of 1987, H.R. 2172, 100th Cong., 1st Sess. § 13 (1987), would have created a duty to make a tender offer if bidders sought to acquire more than 10% of the target company's stock.

42. *See* Proposal, *supra* note 5, art. 3, at 10, which provides that shareholders in the same position "shall be treated equally." For an earlier Community version of this principle, see, *Council Directive of 5 March 1979, Coordinating the Conditions for the Admission of Securities to Official Stock Exchange Listing (19/279/EEC)*, 22 O.J. EUR. COMM. (No. L 66) sched. C(2)(a), at 21 (1979). The schedule states that "The Company shall ensure equal treatment for all shareholders who are in the same position." *Id.*

43. *See also* Proposal, *supra* note 5, art. 16, at 13, which provides for an automatic revision of a bid where a price is offered that is higher than the one stated in the offer document. Thus, the consideration would be increased for those shareholders who had already accepted the bid. *Compare* 15 U.S.C. § 78n(d)(7) (1988).

44. *See* Eur. Rep., *supra* note 6, at 3.

at which a buyer "aims" to acquire more than one-third of a company will undoubtedly be an issue of heated dispute. A bidder's self-serving declaration may not be acceptable to establish the time at which it decided to acquire the requisite shares. Targets will argue that the trigger occurred prior to the time announced by the bidder, leading to charges of a violation of the bidding requirement. Resolution of this issue is likely to become central to any hostile tender offer.

Even if a bidder is found in violation of the bidding requirement, the nature and scope of the resulting remedies is unclear. Article 6 of the Proposal provides for the creation of a supervisory authority by each Member State.[45] The supervisory authority would have the power to regulate tender offers for companies maintaining their registered office in that Member State.[46] Article 6 also provides the supervisory authorities with the power to remedy certain disclosure deficiencies.[47] There is, however, no specific reference to remedies that could force an unwilling bidder either to comply with the Proposal or to dispose of the number of shares it holds in excess of the total bid threshold.

Adding another level of complexity is the fact that the Proposal has not engraved the thirty-three and one-third percent figure in white marble. Each of the Member States is free to set the trigger at a lower level. The Proposal gives the supervisory authority of each Member State the power to set the triggering percentage for the total bid obligation or to grant exemptions from the bid obligation altogether.[48] Because these supervisory authorities would probably be protective of domestic companies, they would be likely to set low trigger thresholds and unlikely to grant exemptions favorable to hostile outside bidders. In the United States, where individual states have regulated tender offers, these states have acted to protect local interests, i.e. the target corporation.[49] The supervisory authorities, however, would not be entirely autonomous. The Proposal would create a "Contact Committee" to oversee and resolve problems arising from differences in each Member State's implementation of the Proposal.[50] The actions of the Contact Committee, discussed below,[51] may serve to curtail, at least to some extent, any wide variation

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45. Proposal, *supra* note 5, art. 6(1), at 10. The supervisory authority, however, may delegate this power to other authorities, associations, or private bodies. *Id.*

46. *Id.* art. 6(3), at 11.

47. *Id.* art. 6(2), at 10.

48. Such an exemption might be warranted where a bidder reaches the required threshold unintentionally. *See* Explanatory Memorandum, *supra* note 7.

49. *See supra* notes 24, 41; *infra* notes 85, 96.

50. Proposal, *supra* note 5, art. 21, at 14.

51. *See* text accompanying notes 153-58.

in the triggering level.

In contrast to the Proposal, the Williams Act imposes no obligation at any time to bid for all the securities of a company.[52] The Williams Act does have certain disclosure requirements that take effect once a bidder has acquired five percent of the equity securities of a company[53] or makes a tender offer for at least that amount.[54] The bidder must then reveal its future intentions concerning that company, including its intention to make a tender offer, and must report any material increase or decrease in the amount of any class of shares it beneficially owns.[55] In this last respect, the Williams Act is far less onerous than the Proposal. Indeed, article 17 of the Proposal would require that not only the bidder, but also any holder of one percent or more of the voting rights of the bidder, the target company, or "any other company whose securities are offered by way of consideration" must declare "all acquisitions" of the target company to the competent supervisory authority after the bid is announced.[56] In this way, the Proposal presents a much more intrusive requirement. Not only must persons other than the bidder make such disclosure, but also no threshold of materiality exists for such disclosure obligations. The bidder or holder must report all acquisitions, and, thus, on the European field, all the players become known.

The purpose of the Proposal's disclosure requirement in this regard is to ensure that some shareholders do not receive a higher price than other shareholders for their shares during the course of a tender offer.[57] When

52. Various states, however, have enacted statutes of similar effect. *See supra* note 41.

53. 15 U.S.C. § 78m(d)(1) (1988). This provision requires that a public announcement be made within 10 days after such acquisition. Commentators have suggested that the length of this window period has in some cases given rise to harmful securities conduct, for bidders have sometimes acquired a significant amount of stock during the 10 days prior to the public announcement of acquisition. For a recent legislative response to this difficulty, see The Investor Equality Act of 1989, S. 1658, 101st Cong., 1st Sess. (1989), § 3, 135 CONG. REC. S11,689, S11,690 (daily ed. Sept. 22, 1989) (introduced by Senator Shelby), which would decrease the window period from 10 days to 5 days.

54. 15 U.S.C. § 78n(d)(1) (1988).

55. 15 U.S.C. § 78m(d)(2) (1988); 17 C.F.R. § 240.13 d-2(a) (1988). This provision of the Williams Act is similar to the recently passed *Council Directive of 12 December 1988, On the Information to be Published when a Major Holding in a Listed Company is Acquired or Disposed of (88/627/EEC)*, 31 O.J. EUR. COM. (No. L 348) 62 (1988). In this directive the Community Council mandates that each entity or natural person will have to notify the competent authority upon reaching a 10% ownership position of companies listed on a stock exchange. Moreover, the shareholder must report changes in ownership surpassing certain specified thresholds. *See id.* art. 4, at 63.

56. Proposal, *supra* note 5, art. 17(2), at 13-14.

57. *See* Explanatory Memorandum, *supra* note 7.

a one percent holder acquires shares of the target at a price higher than that of the published tender offer, the public offer becomes automatically revised so as to offer the same terms to all shareholders. Thus, all shareholders would be treated equally[58] by receiving the same price. The Proposal goes to great lengths to achieve its goal of equal treatment.

The Williams Act implicitly allows partial tender offers even though it imposes rigorous fairness safeguards on all tender offers, including those for less than one hundred percent of the equity securities of a target company. An offer must be open to all holders of a class of equity securities.[59] The highest price offered to an individual shareholder must be offered to all other shareholders to whom the offer is made.[60] In addition, if fewer than all shares are tendered, shares must be purchased on a pro rata basis.[61]

The Williams Act's willingness to permit partial tender offers is not entirely advantageous to shareholders. In the past, both target management and hostile bidders have made partial tender offers, which may have led to certain abuses,[62] including coercive effects on shareholders. Because partial offers are for fewer than all the shares, a bidder would be able to offer a higher price per share than it could offer for all the target's stock.[63] Shares not bought pursuant to the offer are, therefore, often left with a market value far below the tender price.[64] These shares are sometimes bought in a subsequent merger at a lower price or bought in exchange for securities of lesser value than the tender price. Thus, shareholders who do not tender at the initial price of the so-called two-tiered offer risk being frozen out at the lower price at the backend merger.[65]

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58. *See* Proposal, *supra* note 5, art. 3, at 10.
59. Rule 14d-10, 17 C.F.R. § 240.14d-10 (1988).
60. *Id.*; 15 U.S.C. § 78n(d)(7) (1988).
61. 15 U.S.C. § 78n(d)(6) (1988); *see also* Rule 14d-8, 17 C.F.R. § 240.14d-8 (1988).
62. *See* Gilson & Kraakman, *Delaware's Intermediate Standard for Defensive Tactics: Is there Substance to Proportionality Review?*, 44 BUS. LAW. 247, 254-55 (1989). These authors identify abuses in three areas: the partial bid deprives shareholders of a better offer from target management; the disparate treatment distorts shareholders' perception of the offer; and mistrust of management causes shareholders mistakenly to accept an underpriced hostile bid. *Id.* at 267. *See also* Bebchuk, *Toward Undistorted Choice and Equal Treatment in Corporate Takeovers*, 98 HARV. L. REV. 1695, 1717-35 (1985).
63. *See*, Bradley & Rosenzweig, *Defensive Stock Repurchases*, 99 HARV. L. REV. 1378 (1986).
64. Gilson & Kraakman, *supra* note 62, at 255.
65. *Id.*

Hostile bidders are often not the only participants in a takeover battle. In certain cases, a management-led self-tender may be more coercive of shareholders than a hostile tender offer. When target management makes a self-tender for a percentage of the target's own shares in response to a hostile offer, not only might management's higher partial bid appear more attractive to the shareholders, but it also may seem more secure, and shareholders may feel coerced into accepting it. The market price for the remaining shares may drop notably after a self-tender,[66] and the shareholders will not want to risk being left with shares of lesser value.

The Delaware Chancery Court found an example of such coercion in *AC-Acquisitions Care v. Anderson, Clayton & Co.*[67] In that case, in response to a hostile tender offer launched at fifty-six dollars per share, management launched a self-tender for sixty-five percent of the target's stock at sixty dollars per share. The court found the self-tender coercive because it effectively precluded acceptance of any and all other hostile tender offers.[68]

Hostile bidders in the United States, however, are far less likely to make a two-tiered offer now than five to ten years ago.[69] Judicial decisions have often favored management's actions to combat such offers. Moreover, the availability of junk bond financing has until recently loosened the financial constrictions on bidders, thus reducing the economic impetus for paying less to the holdout shareholders.[70] The present difficulty with junk bonds is, however, likely to have a certain impact on the availability of funds for bidders. Without any contrary regulation by the European Community, two-tiered tender offers could once again become a significant part of tender offer activity. The Community has no judicial precedent condemning such practice. In addition, if it were more difficult for a bidder to raise funds, the bidder might have a greater economic need to make such a bid.

Article 4 of the Proposal would eliminate concern about abusive two-tiered tender offers by its requirement of a total tender offer if the bidder wishes to acquire more than thirty-three and one-third percent of a company. Of course, the effect of the Proposal's requirement will depend to some extent on judicial interpretation. Besides the "aim to acquire" lan-

66. *See id.*
67. 519 A.2d 103 (Del. Ch. 1986).
68. *Id.* at 114.
69. Gilson & Kraakman, *supra* note 62, at 254 n.29.
70. Gilson & Kraakman also attribute the demise of the two-tiered offer to the creation of an informal auction period under section 14d-8 of the Williams Act which in 1982 lengthened the minimum offering period of a partial tender offer (including a two-tiered offer) from 10 to 20 days. *Id.*

guage, another area of the Proposal requiring interpretation is the provision that the accumulation of voting rights necessary to trigger the total offer obligation may be met by entities "acting in concert,"[71] a concept also addressed under the Williams Act.[72] The interpretation of this language may be quite significant[73] in arriving at the provision's eventual scope.

Irrespective of the interpretation of this provision, the acquisition of thirty-three percent (that is, just less than the threshold) of a company's securities may enable the bidder to obtain enough effective control of the company so that no further acquisitions would be needed. At that level, the bidder might be able to effect certain actions that may be coercive of a substantial minority of shareholders and, thereby, to some extent circumvent the Proposal's safeguards. In Community law, however, numerous company decisions (such as mergers, splits, and capital write-offs) require acceptance by sixty-six and two-thirds percent of the shareholders,[74] making control through a minority position quite difficult.

There is little doubt that the Proposal's requirement would severely limit the financial and strategic flexibility of the bidder. Neither hostile bidders nor management will be able to make significant partial tender offers. These regulations can even prohibit beneficial management self-tenders.[75] In eliminating some of the abuses that partial tender offers generate, article 4 of the Proposal also may have eliminated some important benefits. Moreover, to some extent, article 4 would remove the

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71. Proposal, *supra* note 5, art. 4(2)(c), at 10. This provision includes the "voting rights of persons acting in concert with the offeree" in calculating the total of the voting rights held by the offeree.

72. *See, e.g.*, 15 U.S.C. § 78n(d)(2) (1988).

73. Article 2(5) defines "persons acting in concert" as "persons who, pursuant to an agreement, cooperate with one another with the aim of acquiring the securities of a company." Proposal, *supra* note 5, art. 2(5), at 10. It is uncertain whether this definition will provide concrete guidance or whether courts will interpret this language broadly or narrowly. This language is central to the Proposal and appears in articles 10(1)(e)(dd), 10(2)(c), 16, 17(2), and 20(3). For a United States case broadly construing acting in concert language in the context of state anti-takeover statute principles, see, Pennwalt Corp. v. Centaur Partners, 1989 WESTLAW 11263 (E.D. Pa. 1989); *see also* Citizens First Bancorp, Inc. v. Harreld, 559 F.Supp. 867 (W.D. Ky. 1982). Other courts, however, have read the acting in concert concept more restrictively. *See, e.g.*, Camelot Indus. v. Vista Resources, Inc., 535 F. Supp. 1174 (S.D.N.Y. 1982); Pantry Pride, Inc. v. Rooney, 598 F. Supp. 891 (S.D.N.Y. 1984); Nat'l Home Prod. v. Gray, 416 F. Supp, 1293, 1324 (D.C. Del. 1976).

74. *See* Explanatory Memorandum, *supra* note 7, at 9.

75. For example, a pro rata buy-back of shares by management, when not in competition with a bid from a hostile bidder, may be beneficial to all shareholders by giving them a fair price for some shares and a higher return on equity for the others.

weapon of surprise from the bidder's arsenal. As soon as the bidder "aims" to acquire more than one-third of a company, it must meet all the disclosure obligations of article 10.[76] There is no window period. Targets will thereby receive the strategic advantage of obtaining earlier information concerning the bidder's plans. The determination of the time when the bidder "aims" to acquire more than one-third of the target will thus likewise be important in this regard.

B. *Restrictions on Target Company Defensive Actions*

The Proposal, unlike the Williams Act, puts significant restrictions on target management during the pendency of a tender offer.[77] After target management receives notice of a bidder's intention to make an offer, article 8 of the Proposal imposes two prohibitions: management may not issue securities carrying voting rights[78] ("poison pills");[79] and more broadly, the target may not "engage in transactions which do not have the character of current operations concluded under normal conditions."[80] Thus, under the Proposal, target management would have greater difficulty adopting the panoply of tender offer defenses so com-

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76. *See supra* note 28.

77. This provision is similar to, and to some extent may rely on, The City Code on Take-overs and Mergers; *see* 7 HALSBURY'S LAWS OF ENGLAND paras. 790-95 (4th ed. 1974) (the code is in fact "a code of business ethnics, not a code of law" and is administered by the London Panel on Take-overs and Mergers); *see, e.g.*, MacLachlan & Mackesy, *supra* note 6, at 386-88. Continental Codes are, in general, less restrictive of target management. *Id.* at 376-77.

78. *See* Proposal, *supra* note 5, art. 8(a), at 11.

79. In general, courts have allowed poison pills for a certain period of time as a means of allowing management to obtain a higher price for the target company. Poison pills, however, cannot remain in place indefinitely and sometimes may not be adopted at all. For recent cases in which Delaware courts have ordered the removal of poison pills, see City Capital Assocs. v. Interco, Inc., 551 A.2d 787 (1988); Grand Metropolitan PLC v. Pillsbury Co., 558 A.2d 1049 (Del. Ch. 1988); *In re* Holly Farms Corp., 564 A.2d 342 (Del. Ch. 1989). *See also*, Note, *Poison Pills as a Negotiating Tool: Seeking a Cease-Fire in the Corporate Takeover Wars*, 1987 COLUM. BUS. L. REV. 459, 463-64 (describing poison pills); Helman & Junewicz, *A Fresh Look at Poison Pills*, 42 BUS. LAW. 771 (1987). *See also* Corporate Take-over Reform Act of 1989, S. 1244, 101st Cong., 1st Sess., § 5 (1989), 135 CONG. REC. S7327, S7329 (daily ed. June 23, 1989) (would prohibit poison pills unless approved by the majority of the outstanding shares of the company); *Metzenbaum, Armstrong Propose Bill to Reform Shareholders Rights*, Proxies, 21 Sec. Reg. L. Rep. (BNA) 944 (June 30, 1989). 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 poison pill plans. 21 Sec. Reg. & L. Rep. (BNA) 1630 (Nov. 3, 1989).

80. Proposal, *supra* note 5, art. 8(b), at 11.

mon in the United States:[81] selling attractive company assets ("crown jewels");[82] attracting bidders it views more favorably ("white knights");[83] repurchasing its own stock;[84] providing premium payments in reacquiring stock from the acquirors ("greenmail");[85] and engaging in agreements by which a white knight may receive an option to buy a large block of target shares ("lock up").[86]

Removing the great bulk of management defensive options would have the obvious effect of eliminating the hostile bidder's most burdensome obstacles. As such, it would be far more difficult for management to delay the tender offer solely for purposes of its own entrenchment.[87] This

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81. This type of proscription has similarly been suggested in respect to the Community proposal on pre-merger notification in order to promote its announced goal of increasing the international competitive ability of European companies. *See* Greenbaum, *supra* note 38.

82. HOUSE COMM. ON ENERGY AND COMMERCE, EQUITY IN FOREIGN AND DOMESTIC CREDIT AND TENDER OFFER REFORM, H.R. REP. NO. 1028, 98th Cong., 2d Sess. 7 n.8 (1984) (defining the term "sale of crown jewels"); Mills Acquisition Co. v. MacMillan, Inc., 559 A.2d 1261, 1286 n.37 (Del. 1988); Cottle v. Storer Communication, 849 F.2d 570 (11th Cir. 1988).

83. Gillette Co. v. RB Partners, 693 F. Supp. 1266, 1271 (D. Mass. 1988); Mobil Corp. v. Marathon Oil Co., 669 F.2d 366, 367-68 (6th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982).

84. This may be accomplished through a "Dutch Auction," where management tries to buy out the bidder. *See, e.g.*, Pennwalt Corp. v. Centaur Partners, 1989 WESTLAW 11263 (E.D. Pa. 1989).

85. *See* Comment, *Greenmail: Can the Abuses be Stopped*, 80 NW. U.L. REV. 1271 (1986); Note, *Greenmail: Targeted Stock Repurchases and the Management Entrenchment Hypothesis*, 98 HARV. L. REV. 1045 (1988). To a certain extent, however, the use of greenmail may be ebbing. The Internal Revenue Code has recently been amended to provide for harsh treatment of greenmail payments. *See* I.R.C. § 5881 (1989). Moreover, section 4 of Senate Bill 1244, *supra* note 79, 135 CONG. REC., at S7329, would prohibit greenmail unless approved by the majority vote of all the shareholders of the company. On the state level, see S.1310, 1989 Sess., §§ 2571-75 (Pa. 1989) (would provide a private right of action to recover greenmail profits and also allow recovery for all costs, including attorney's fees, in obtaining such disgorgement). *See also* TENN. CODE ANN. § 48-35-501—505 (1988) (held unconstitutional to the extent applicable to out-of-state corporations in Tyson Foods, Inc. v. McReynolds, 865 F.2d 89 (6th Cir. 1989)); *Michigan Business Corporation Act*, § 21.200 (368) 4 Corp. Statutes (BNA) (1989). *See also* S. 1658, *supra* note 53, § 7, 135 CONG. REC. at 11,691 (would provide a private right of action to enforce greenmail provision).

86. *See, e.g.*, Mills Acquisition Co. v. MacMillan, Inc., 559 A.2d 1261; *In re* Holly Farms, 57 U.S.L.W. 2403 (Del. Ch. Dec. 30, 1988). Revlon, Inc. v. MacAndrews & Forbes Holdings, 506 A.2d 173 (Del. Super. Ct. 1986); Hanson Trust PLC v. ML SCM Acquisition, Inc., 781 F.2d 264 (2d Cir. 1986).

87. In discussing the relationship between the Williams Act and the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. §§ 15c-15h, 16, 18a (1976),

proscription gains reinforcement from the Proposal's unlimited requirement that shareholders in the same position be treated equally.[88] This provision may be similar in effect to the Securities and Exchange Commission's recently adopted Rule 19c-4,[89] which prevents a company from taking action that would reduce the voting power of existing common stock shareholders. Thus, under the Proposal, directors will not be able to distort the rights of certain shareholders by creating new classes of stock with disparate voting rights.

The result of the Proposal's general proscriptions could be that management may attempt to accelerate the adoption of these defensive mechanisms. But, although in the United States management does enact numerous anti-takeover devices prior to the appearance of an actual hostile bid, it would seem unlikely that management would expend the effort to enact all of its potential defenses prior to the appearance of an actual hostile offer. In fact, many of these devices, for example, seeking a white knight or selling the crown jewels, would be senseless without the presence or threat of a hostile bid.

Management's hands are not completely tied, however. Under the Proposal, management may adopt defenses with the authorization of the shareholders.[90] In the presence of a tangible hostile bid, though, shareholders are probably unlikely to grant management such authorization and risk losing the premium offered in a hostile tender offer. As soon as a hostile bid appears on the horizon in the United States, arbitrageurs quickly move to buy the target's stock. These arbitrageurs can aid the efforts of a hostile bidder and frequently outnumber shareholders who

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Representative Rodino stated:

> In the case of cash tender offers, more so than in other mergers, the equities include time and the danger of undue delay. This bill in no way intends to repeal or reverse the congressional purpose underlying the 1968 Williams Act, or the 1970 amendments to that act. . . . Lengthier delays will give the target firm plenty of time to defeat the offer, by abolishing cumulative voting, arranging a speedy defensive merger, quickly . . . negotiating costly lifetime employment contracts for incumbent management. And the longer the waiting period, the more the target's stock may be bid up in the market, making the offer more costly—and less successful. Should this happen, it will mean that shareholders of the target firm will be effectively deprived of the choice that cash tenders give to them: Either accept the offer and thereby gain the tendered premium, or reject the offer.

122 CONG. REC. 30,877 (1976).

88. *See* Proposal, *supra* note 5, art. 3, 10, at 10-12.

89. Rule 19c-4 provides that no stock may be listed on a securities exchange if securities are issued that nullify, restrict, or disparately reduce the per share voting rights of an outstanding class of common stock. 17 C.F.R. §240.19c-4(a) (1989).

90. Proposal, *supra* note 5, art. 8, at 11.

might have approved a management-devised anti-takeover measure in normal circumstances. Although the risk arbitrage community in Europe may not yet be as well-developed or as active as that in the United States, there will likely be sufficient growth in this area to ensure some resistance to blatantly protectionist measures proposed by management during a pending hostile offer.

Moreover, the Proposal does not prohibit a corporation from having outstanding two classes of stock with unequal voting rights.[91] A minority holding the stronger voting stock, and thus the bulk of the voting power, may be able to grant management defensive powers over the will of the majority of the shareholders, who hold weaker voting power.

In any case, the judicial interpretation of the "character of current operations" will determine much of article 8's effect. If a company is already negotiating a potential large-scale merger with one company and another group launches a hostile tender offer, will article 8 forbid the first transaction? The United States provided an example in the recent *Paramount v. Time, Inc.* decision; Judge Allen of the Delaware Chancery Court allowed Time to continue with its merger with Warner Communications, in part because it was pursuant to a long-term plan.[92] Should more leeway be given to mergers that are almost complete, or should all merger activity be immediately stopped notwithstanding the tremendous costs? This type of situation may lead to an exercise of the discretionary powers of the supervisory authorities.

In addition, the Proposal's explicit regard for the interests of employees[93] may also indicate a willingness to allow management to consider factors other than shareholder wealth and democracy in reaching a decision when faced with a hostile tender offer. These considerations may also enter into the decisionmaking process of the supervisory authorities.

The uncertainty inherent in these provisions is rendered more problematic by the discretion given the supervisory authorities to authorize certain defensive actions.[94] But the Proposal does explicitly limit the defensive capability of the target management. The question is not whether management will have the last word, but rather whether the Proposal will leave management totally defenseless or only in a greatly weakened

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91. The Proposal applies to takeovers or bids on "all holders of the securities, or the securities of a particular class or classes . . . ." *Id.* art. 1, at 9.

92. Paramount Communications v. Time, Inc., 58 U.S.L.W. 2070 (Del. Ch. July 14, 1989).

93. Target management must inform the employees about both the bid and management's assessment of it. *See* Proposal, *supra* note 5, art. 19, at 14. *See also infra* note 139 and accompanying text.

94. *See* Proposal, *supra* note 5, art. 8(b), at 11.

state.

In the United States, there are few legislative restrictions on the actions of target management facing a hostile tender offer.[95] Some states, such as Pennsylvania,[96] provide expansive definitions of fiduciary duty that allow, and sometimes compel, management to consider a wide variety of interests beyond shareholder wealth and democracy, even in the face of a hostile tender offer.[97] Moreover, some commentators feel that

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95. *But see* S. 1244, *supra* note 79, which would, in part, restrict management's ability to adopt poison pills, pay greenmail, or grant themselves golden parachutes. Other bills have been presented to restrict such activities. *See, e.g.*, S. 1658, *supra* note 53, Tender Offer Disclosure and Fairness Act of 1987, S. 1323, 100th Cong., 1st Sess. (1987), 134 CONG. REC. S7924 (daily ed. June 16, 1987); Tender Offer Reform Act of 1987, H.R. 2172, *supra* note 41. Congress, however, has not enacted any such measures.

Courts, though, have placed restrictions on directors during the tender offer process by imposing on directors fiduciary duties of care and loyalty to the corporation and to the shareholders. *See, e.g.*, Mills Acquisition Co. v. MacMillan, Inc., 559 A.2d 1261, 1250 (Del. 1988); Weinberger v. UOP, Inc., 457 A.2d 701, 710 (Del. 1983); Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984); Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939). These duties are especially vigorous where a sale of corporate control occurs. Smith v. Van Gorkom, 488 A.2d 858, 873 (Del. 1985). However, absent a showing of bad faith, recklessness, or self-dealing, the business judgment rule often protects directors. *See, e.g.*, DEL. CODE ANN. tit. 8, § 141(e) (1983); 42 PA. CON. STAT. ANN. §§ 511, 1721 (Purdon Supp. 1989); *In re* RJR Nabisco, Inc. Shareholders Litigation, 57 U.S.L.W. 2482 (Del. Ch. Jan. 31, 1989); *In re* J.P. Stevens & Co., 542 A.2d 770, 780 (Del. Ch. 1988); AC Acquisitions Corp. v. Anderson, Clayton & Co., 519 A.2d 103, 111 (Del. Ch. 1986). But when corporate control is at stake, directors must fulfill an enhanced duty before they can receive the protection of the rule. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954-55 (Del. Super. 1985). Moreover, where the management of a target company determines that an auction of the target is necessary to obtain its full value for the shareholders, an enhanced duty is still mandated. Revlon Inc. v. MacAndrews & Forbes Holdings, 506 A.2d 173, 182 (Del. Super. Ct. 1986).

96. 42 PA. CON. STAT. ANN. § 8363 (Purdon 1982), reenacted as 15 PA. CONG. STAT. ANN. §§ 511, 1721 (Purdon 1989) (reenactment effective October 1, 1989). Sections 511 and 1721 of Pennsylvania Senate Bill 1310 would even more greatly reduce management's fiduciary duty to shareholders by statutorily providing that shareholder interests are not controlling, S. 1310, 1989 Sess., §§ 511(b)(4), 1721(c)(4) (Pa. 1989). Moreover, these sections would almost completely remove fiduciary duty constraints from management during a corporate control contest. *See also* OHIO REV. CODE ANN. § 1701.59 (Anderson 1983); MO. REV. STAT. §351.347 (Supp. 1989); FLA. STAT. ANN. § 607.11 (4) (1977); CONN. GEN. STAT. ANN § 33-313(e) (Supp. 1989); IND. CODE ANN. § 23-1-35-1(d) (Burns 1989).

97. On a related note, see The Community and Jobs Protection Act of 1989, H.R. 679, 101st Cong., 1st Sess. (1989), 135 CONG. REC. H109 (daily ed. Jan. 27, 1989) which would require community impact statements on certain mergers reducing employment in any community by at least 100 persons and, under certain circumstances, would allow the Federal Trade Commission to recommend the taking of legal action against

retaining broad defensive mechanisms for management may actually maximize competition for the target corporation.[98] In this way, one might argue that restrictions on target management could harm shareholders by preventing management from taking actions that might result in an active auction and thus higher premiums for the shareholders. Thus, it would not be surprising if the present resistance in Europe to hostile tender offers begins to manifest itself in the form of greater defensive flexibility for target management. As the Proposal now stands, however, target management will be stripped to a significant degree of much of its protective armor. This does not mean that article 8 would render target management powerless; it does mean that management would have much less room to maneuver. Accordingly, management reactions to a hostile bid may become a less significant factor in Europe than in the United States.

C. *Tender Offer Disclosure and Documentation*

The Proposal provides for disclosure of specific terms of the offer in article 10 and for broad public disclosure of the tender offer in article 11. The bidder must file a tender offer document for publication in one or more national or mass circulation newspapers,[99] or otherwise make it available to the target's shareholders.[100] In either case, the bidder must file at least the offer document with the competent supervisory authority.[101] In contrast to the Williams Act, which allows the bidder to surprise the target both with the contents of the tender offer document and the timing of its release, the Proposal requires that the bidder disclose the offer document to the target's board of directors before it becomes public.[102]

Article 10 provides a list of specifics for the contents of an offer. The bid must, of course, state the name of the target company[103] and the bidder.[104] It must identify the securities for which the bid is made,[105] the

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such mergers.

98. *See* Herzel & Shepro, *Negotiated Acquisitions: The Impact of Competition in the United States*, 44 BUS. LAW. 301 (1989).

99. Proposal, *supra* note 5, art. 11(1)(a), at 12.

100. *Id.* art. 11(1)(b), (c), at 12.

101. *Id.* art. 11(2), at 12; *see supra* note 29.

102. *See* Proposal, *supra* note 5, art. 7(3), at 11. (note, however, that no lead time is specified).

103. *Compare* Proposal, *supra* note 5, art. 10(1)(a), at 11 *with* 17 C.F.R. § 240.14d-100 (Item 1) (1989).

104. *Compare* Proposal, *supra* note 5, art. 10(1)(b), at 11 *with* 17 C.F.R. § 240.14d-100 (Item 2) (1989).

consideration offered for those securities,[106] the basis for evaluation thereof, and, where appropriate, the future indebtedness that the captured target will bear in financing the bid.[107] In addition, the offer must list the conditions imposed by the bidder that were accepted by the supervisory authority,[108] the closing date for acceptances,[109] the explicit intentions of the bidder in regard to continued operation of the target,[110] and the special advantages it intends to grant target management.[111] If an offer includes the issue of new securities, the bidder must also provide certain evaluative information to allow those considering the offer to make an informed judgment.[112]

There are significant differences between the Proposal and the Williams Act in the substance of the financial information a bidder must disclose. The Proposal would require less rigorous disclosure concerning the funds used for making the offer. In regard to cash consideration, article 10(g) merely provides that the bidder must disclose "guarantees provided by the offerer regarding payment, and, *where appropriate*, a statement concerning any future indebtedness of the offeree company to finance the bid."[113] The Williams Act, on the other hand, specifically mandates detailed disclosure of the source and amount of funds or other consideration for the tender offer.[114] Moreover, the Williams Act requires disclosure of the financial statements of bidders who are not natural persons or who are controlled by a non-natural person.[115] The Wil-

105. *Compare* Proposal, *supra* note 5, art. 10(1)(d), at 11 *with* 17 C.F.R. § 240.14d-100 (Item 1) (1989).

106. *Compare* Proposal, *supra* note 5, art. 10(1)(g), at 11 *with* 17 C.F.R. § 240.14d-100 (Item 1) (1989).

107. Proposal, *supra* note 5, art. 10(1)(g), at 11. The requirements as to disclosure of future plans of indebtedness are geared toward preventing leveraged buyouts where management skims off all the profits. Eur. Rep., *supra* note 6, at 3; *compare* 17 C.F.R. § 240.14d-100 (Item 4) (1989).

108. Proposal, *supra* note 5, art. 10(1)(i), at 12.

109. *Id.* art. 10(1)(j), at 12.

110. *Compare id.* art. 10(1)(l), at 12 *with* 17 C.F.R. § 240.14d-100 (Item 5) (1989).

111. *Compare* Proposal, *supra* note 5, art. 10(1)(m), at 12 *with* 17 C.F.R. § 240.14d-100 (Item 8) (1989).

112. Proposal, *supra* note 5, art. 10(3), (4), at 12.

113. *Id.* art. 1(g), at 12 (emphasis added).

114. 17 C.F.R. § 240.14d-100, (Item 4) (1989). Thus, the offeror must disclose the source and total amount of funds for the purchase of the maximum number of securities sought by the tender, *id.* (Item 4(a)); provide a summary of each loan agreement or arrangement including all their material terms, *id.* (Item 4(b)(1)); and describe plans to finance or repay such borrowings, *id.* (Item 4(c)).

115. *Id.* (Item 9). Bidders who are not natural persons must furnish material current financial information. If the bidder is controlled by an entity that is not a natural person,

liams Act further calls for the attachment of a copy of any loan agreements for the purchase of shares pursuant to the tender offer.[116]

It is somewhat incongruent that with its emphasis on protecting shareholders,[117] the Proposal does not require greater disclosure to the shareholders of the viability of the offer by requiring disclosure of details as to the source of funds. The reasons may be both cultural and political. The Community may be hesitant to encroach too much on what has traditionally been considered national regulatory territory. The local supervisory authorities will have some leeway to enact stricter national disclosure standards.[118] Thus, they may potentially give greater effect to the goal of shareholder protection embodied in the Proposal. But supervisory authorities will likely find motivation for imposing harsher disclosure requirements because such measures may to some extent diminish the number of tender offers for companies registered in that Member State. By discouraging foreign offers, domestic companies will remain better protected. At present, though, there can be only speculation in this regard.

D. *Duration and Withdrawal of Bids*

Under the Proposal, a bid must remain open for a period of not less than four weeks nor more than ten weeks from the date of publication of the actual tender offer.[119] This open period is consistent with the limitations imposed by other provisions of the Proposal in that it reduces the amount of time within which a tender offer must take place.[120] Under the Williams Act, an offer must remain open for a period of at least twenty business days from the date of the offer's publication,[121] but the offer can in essence remain open indefinitely as long as the bidder ex-

current adequate financial information regarding the parent must also be furnished. *Id.*

116. *Id.* (Item 11).

117. *See, e.g.*, Proposal, *supra* note 5, arts. 3, 4, at 10.

118. *See id.* art. 6, at 10.

119. *See id.* art. 12(1), at 12.

120. Note, however, that under article 15 of the Proposal, the offeror may revise the terms of the bid at any time before the last week of the period of acceptance announced under article 10. Whenever a bid is revised, the period for acceptance is automatically extended by one week. *Id.* arts. 15, 10, at 11-13.

121. Rule 14e-1(a), 17 C.F.R. § 240.14e-1(a) (1989). Under S. 1658, *supra* note 53, any person making a tender offer would be required to keep the offer open for a period of at least 35 business days from its date of publication. If, during that period, a qualified employee stock option plan notified the offeror or issuer of securities that it wished to acquire additional securities of the issuer on terms substantially equivalent to other offers, the offer would be required to remain open for 95 business days.

tends the offer.[122] Legislative proposals have been introduced in Congress to lengthen this open period.[123] Practice in the United States has shown that a tender offer is often likely to remain open for more than ten weeks, especially when management is opposed to the offer. The hostile bidder may often find extensions of time necessary in order to overcome the various defensive tactics target management has adopted.

As previously noted, although article 8 proscribes defensive actions after the commencement of the offer, it does permit target management to adopt these tactics in advance. Thus some danger remains that incumbent management may enact delaying tactics. Though the supervisory authority might extend the offer period,[124] a supervisory authority trying to protect a domestic corporation will not likely grant a hostile bidder any advantages not mandated by the Proposal. It is important to note, though, that in contrast with United States practice, article 8 of the Proposal prevents the target company from carrying out certain activities during the pendency of the tender offer.[125] Because the Williams Act does not impose this corporate paralysis, allowing the offer to remain open poses less risk of damage to the target. Thus, the greater intrusion the Proposal brings into the target company while a bid is outstanding gives greater reason to keep the offer period short.

The Proposal does provide for extensions if a bid is entered in competition with the original bid. If the first bid is not withdrawn,[126] the time period for the first bid is extended until the end of the period of the competing, or later, bid.[127] This situation may give the first bidder more time, but the obstacles faced by the hostile bidder are likely to increase in number, if not in difficulty, the longer it must wait to consummate its offer.[128]

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122. *See* Rule 14e-1(a), 17 C.F.R. § 240.14e-1(a) (1989).

123. *See, e.g.*, S. 1244, *supra* note 79, § 3, which would require that the tender offer be kept open 60 days from the date it is first published or sent to shareholders if such offer is made in anticipation of or response to another person's offer.

124. *See* Proposal, *supra* note 5, art. 12(2), at 12.

125. *Id.* art. 3, at 11.

126. Article 13(1)(a) allows a bidder to withdraw its bid if a later competing bid is launched. *Id.* art. 13(1)(a), at 12.

127. *See id.* art. 20(4), at 14; *see supra* note 121 for action in the United States seeking to lengthen the bid period.

128. One economic ramification of an extended period can be seen in the United States, where arbitrageurs often purchase the stock of what they perceive to be potential target corporations. Arbitrageurs typically purchase their stocks on margin and incur significant borrowing costs in the process. Increasing the duration of the tender offer process also increases the costs for holding on to a target's stock. Thus, because of the greater costs of carrying the stock, existing arbitrageurs may be less likely to contribute

Another of the more controversial aspects of the Proposal arises in relation to the article 4 requirement of making a full tender offer after reaching a set ownership level. Article 13 allows the withdrawal of a tender offer only in limited circumstances: when there is a competing bid;[129] when the bidder has been unable to obtain authorization for the issuance of new securities it needs to finance the tender offer;[130] when the stock the bidder wishes to exchange cannot obtain an official stock exchange listing;[131] when the bidder fails to obtain the necessary judicial or administrative authorization;[132] when a condition for the bid approved by the supervisory authority is not fulfilled;[133] and, when other exceptional circumstances occur, as determined by the supervisory authority.[134]

Under the Williams Act, a bidder may withdraw a tender offer at any time before purchasing shares pursuant to the bid. A bidder under the Proposal, however, is not free simply to withdraw its bid and avoid the requirements of article 4. The Proposal demands a commitment from those who would step onto the European field. Once a bidder begins the play, it is required to remain and withstand the potentially ruinous risk of greatly increased costs. Bidders are more likely either to leave the field as victors, or to be badly bloodied.

E. *Report of the Target's Board of Directors*

Both the Proposal and the Williams Act impose on the board of directors of the target corporation reporting duties in response to a tender offer. The Proposal, however, in a controversial provision, demands a more comprehensive response by target management. Whereas at present a minimal response by management may satisfy the informational requirements of the Williams Act, the Proposal requires that the board draw up a detailed report setting forth its assessment of the bid and stating its recommendation.[135] It is likely that this would furnish shareholders with greater and more accurate information concerning management's views of the bid. The United States experience shows the lack of

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such a great proportion of their resources to merger activity.

129. Proposal, *supra* note 5, art. 13(1)(a), at 12.

130. *Id.* art. 13(1)(b), at 12.

131. *Id.* art. 13(1)(c), at 12-13.

132. *Id.* art. 13(1)(d), at 13.

133. *Id.* art. 13(1)(e), at 13.

134. *Id.* art. 13(1)(f), at 13.

135. *Compare id.* art. 14(1), at 13 *with* Schedule 14D-9, 17 C.F.R. § 240 14d-101, (Item 4) (1989).

enthusiasm with which management responds to such requirements; it is indeed rare when shareholders receive worthwhile guidance from the minimal information and analysis that United States companies provide. On the other hand, the extensive disclosure envisaged by the Proposal may result in justifiable concerns about the disclosure of confidential information and may actually and inadvertently put a target "into play." This provision would also limit the playing field to some extent by forcing foreign management to present a *justifiable* opposition to a hostile bid. Consequently, it would favor the bidder. In the United States, such information may become available only after extensive discovery during litigation.

If the offer includes securities for which no stock exchange listing or application for such listing exists, the Board must include an independent evaluation by an expert approved by the competent supervisory authority.[136] The valuation must state the expert's basis for valuation and whether the expert believes the consideration offered is "fair and reasonable."[137] The board must make public its report in the manner discussed above in respect to tender offer documentation.[138]

This expert opinion on fairness, however, is required only where securities are part of the consideration. It is not required for cash tender offers.[139] Without this opinion, a shareholder may find determining the proper premium for a tender offer transaction difficult. Thus, the board's opinion may receive undue weight in respect to such an offer and may not be subject to such rigorous scrutiny as in the United States.[140] A European preference seems prevalent for tender offers involving securities as part of the consideration;[141] therefore, the problem of insufficient guidance in respect to all-cash offers may be of lesser importance than

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136. Proposal, *supra* note 5, art. 14(2), at 13. In the United States, neither the Williams Act nor mandates of fiduciary duty specifically require that the directors obtain a fairness opinion. *See, e.g.*, Cottle v. Store, 849 F.2d 570, 578 (11th Cir. 1988); Litton Indus. v. Lehman Bros. Kuhn Loeb, Inc., 709 F. Supp. 438 (S.D.N.Y. 1989); Smith v. Van Gorkom, 498 A.2d 858, 876 (Del. 1980). The general practice, however, is to include such an opinion even where the offer is solely for cash. In this manner, directors are partially protected from claims of breach of fiduciary duty.

137. Proposal, *supra* note 5, art. 14(2), at 13.

138. *Id.* art. 14(3), at 13.

139. *Id.* art. 14(2), at 13 (requiring an expert opinion "[w]here the consideration offered comprises securities").

140. *See, e.g.*, Joseph v. Shell Oil Co., 482 A.2d 335 (Del. Ch. 1984); *In re* Fort Howard Corp. Shareholders Litigation, Civ. No. 9991, Del. Ch. Aug. 8, 1988, 1988 WESTLAW 83,147; Herskowitz v. Nutri/System, Inc., 1857 F.2d 179 (3d Cir. 1988), *cert. denied*, 109 S.Ct. 1315 (1989).

141. *See* Lublin & Forman, *supra* note 12.

expected from the United States experience.

In addition, the Proposal manifests a concern for employees as well as stockholders in respect to its disclosure requirements. The board of directors of a target company must inform its employees of any bids made for the company. Workers' representatives must receive a copy of the tender offer document, any required evaluative filings, the report by the board of directors on the bid, and, where appropriate, the expert's valuation and opinion.[142] The tension between worker protection and participation and the promotion of shareholder wealth and democracy is developed to a greater extent within the Community than within the United States. Both aspects of this dichotomy will be evident and will provide support for decisions of the target's board of directors and even the supervisory authorities.

F. *The Community Nature of the Proposal*

The Proposal carries with it certain difficulties often inherent in Community legislation. The Proposal grants a great deal of autonomy to the newly-created supervisory authorities of the Member States. The threshold at which the bidder becomes obligated to bid for all the equity securities of a company may be set at different levels by each of the supervisory authorities.[143] Moreover, supervisory authorities could conceivably subvert the purpose of the Proposal by granting on a general basis permission to the management of target companies to adopt defensive measures.[144] As supervisory authorities would most likely favor target companies, there is some reasonable basis for anticipating such a tendency.[145] Even assuming no general trend of this nature on the part of all supervisory authorities, difficulties may still arise. The supervisory authority of one Member State, for example, might authorize defensive tactics by target management on a more general basis, whereas in the Member State of the bidder, the supervisory authority may have promulgated contrary regulations favoring the bidder. Although the supervisory authority of the Member State in which the target company is located is the regulatory body overseeing the offer,[146] confusion may arise when bidders are subject to differing rules depending on the decision of a foreign regula-

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142. Proposal, *supra* note 5, art. 19, at 14.

143. *See id.* art. 4(3), at 10.

144. *See id.* art. 8(b), at 11.

145. The United States experience could suggest that these Member States with only a few large companies are likely candidates for this type of enactment. Romana, *The Political Economy of Takeovers Statutes*, 73 VA. L. REV. 111 (1987).

146. *See* Proposal, *supra* note 5, art. 6(4), (3), at 11.

tory body.

Other less problematic possibilities for variations lie within the Proposal.[147] These differences may be politically necessary in order to achieve some type of Community-wide tender offer regulation. Nevertheless, unexpected complexities and confusion could arise from tender offers reaching across Member State boundaries. Moreover, these variations may also create costs and raise uncertainties in respect to takeovers in which the target spans more than one Member State.

Few states in the United States have failed to enact anti-takeover legislation. A growing number of states have enacted legislation that has amplified management's arsenal of defenses; each new statute provides management with another layer of defensive armor. The experience of the United States attests to the dangers of allowing unfettered local regulation of tender offers. The effect of nearly all these regulations has been to favor the target company as the states have acted to protect local interests.[148] Questions of national good or national policy have not necessarily guided state regulation. In addition, differing and sometimes inconsistent regulations[149] are arising throughout the United States. Continued development in this direction could potentially interfere severely with the national securities markets. In fact, the Williams Act may in certain cases be the principal obstacle to total state prohibition of such offers and to a corresponding disruption of the federal securities system. As the web of state anti-takeover legislation grows more intricate, however, local interests will exert a greater influence on and may actually threaten the Williams Act's preeminence in respect to national tender offers.

Various authors have attempted to justify state anti-takeover laws as a means of protecting stakeholders (i.e., managers, creditors, employees, and certain suppliers) rather than the stockholders of the company.[150] But to the extent the Proposal maintains shareholder protection as a primary goal, it is difficult to accept as consistent legislation that would

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147. *See, e.g., id.* art. 12(2), at 12 (modification of period of acceptance); *id.* art. 13(1)(f), at 13 (withdrawal of bid in exceptional circumstances); *id.* art. 15(5), at 13 (modification of bids).

148. *See supra* note 24.

149. *See, e.g.,* CTS Corp. v. Dynamics Corp., 481 U.S. 69, 88-89 (1987) (discussing this danger). For an example of a state anti-takeover statute that could subject a corporation to inconsistent regulations, see 15 PA. CONS. STAT. ANN. § 2551(d) (Purdon 1989) (subjects a corporation to Pennsylvania law even after it reincorporates in another state). *See also* N.Y. BUS. CORP. LAW § 912(a)(13) (McKinney Supp. 1989).

150. *See* Coffee, *The Uncertain Case for Takeover Reform: An Essay on Stockholders, Stakeholders and Bust-ups,* 1988 WIS. L. REV. 435; *see also* Davis, *Epilogue: The Role of the Hostile Takeover and the Role of the States,* 1988 WIS. L. REV. 491.

promote stakeholder interests[151]—at the possible expense of shareholders.[152]

The Proposal has tried to minimize such dangers by utilizing the Contact Committee[153] to facilitate the "uniform application of this Directive through regular consultations on . . . problems arising in its implementation"[154] and to ensure that the Member States take concerted action with respect to reciprocal treatment of foreign tender offers.[155] In order for the Proposal to succeed, the Contact Committee will need to play a central role. Otherwise, the supervisory authorities may be left with too much individual discretion. The Community could profit from United States mistakes by strongly supervising through the Committee the exercise of discretion by the supervisory authorities. A failure to curtail abuses of discretion could diminish any real possibility of establishing a functionally integrated European securities market.

Though the Proposal does provide the Contact Committee with some powers to curb erring supervisory authorities, the Contact Committee may not provide the rigorous and continuous supervision necessary to give effect to the Proposal. The Committee is not an ever-functioning watchdog mechanism; it would be convened by its chairman on his own initiative or upon request of one of the Committee members.[156] If the Proposal is to be effective, it may be necessary for the Committee to intervene more actively than perhaps envisaged by the Proposal itself. Otherwise, one must hope that the mere existence of the Contact Committee will be enough to discourage the bulk of potential abuses by the individual supervisory authorities, if not to resolve all the conflicts between them.

The Contact Committee's reciprocity provision[157] may also have im-

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151. It is also questionable whether state anti-takeover statutes actually achieve the stated goals for which they are promulgated. Often, target management will use the state legislative defenses to remain in power, but, as a result of the battle for corporate control and after all the costs associated therewith, management will take the same type of actions it publicly fears from the hostile bidder, i.e., loading the company with debt, restructuring, and laying off employees.

152. *See* Macey, *State Anti-Takeover Legislation and the National Economy*, 1988 WIS. L. REV. 467; *see also* Note, *Sword or Shield: The Impact of Third-Generation State Takeover Statutes on Shareholder Wealth*, 57 GEO. L. REV. 958 (1989).

153. Proposal, *supra* note 5, art. 21, at 14. The Contact Committee was officially created by *Council Directive of 5 March 1979 Coordinating Securities to Official Stock Exchange Listing (79/279/EEC)*, 22 O.J. EUR. COMM. (No. C 66) 21 (1979).

154. Proposal, *supra* note 5, art. 21(1)(a), at 14.

155. *Id.* art. 21(1)(b), at 14.

156. *Id.* art. 21(3), at 14.

157. *Id.*

portant implications for United States corporations wishing to commence a tender offer in the Community. This provision implicitly recognizes the right of a Member State to impose reciprocity requirements on bidders from outside the Community.[158] The extent of such provisions is as yet uncertain but could loom large for United States bidders.

The United States often provides a less than cordial reception toward foreign bidders. For example, the Omnibus Trade and Competitiveness Act of 1988[159] provides that certain acquisitions by foreign persons may be subject to special regulation and perhaps prohibition if they pose a threat to national security. According to the proposed regulations, the term "national security" should be interpreted broadly.[160] In addition, foreign bidders have at times discontinued their offers for United States companies because they find the imposed reporting requirements unacceptable. For example, the Banca Commerciale Italiana, S.p.A. desisted in its offer for Irving Bank in part because of its fear of prospective disclosure requirements.[161]

Protectionist measures in the United States do not go unnoticed. Reciprocity provisions enacted by the European supervisory authorities could become problematic for United States corporations attempting to make tender offers in Europe.[162] Under these circumstances, a United States

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158. *Id.* art. 21(1)(b), at 14.

159. Pub. L. No. 100-418, § 5021, 102 Stat. 1107 (1988). For the proposed rules, see Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons, 54 Fed. Reg. 29,744-755 (1989) [hereinafter Exon-Florio Amendment]. For a brief analysis of this section, known as the Exon-Florio Amendment, see, D.E. BIRENBAUM & C. THORNTON, FEDERAL REGULATIONS OF FOREIGN ACQUISITIONS OF U.S. COMPANIES: AN ANALYSIS OF THE EXON-FLORIO AMENDMENT (1989); Bello & Holmer, *Exon-Florio Regs Give President Authority to Block Takeovers*, Nat'l L.J., Aug. 28, 1989, at 22, col. 2.

160. Exon-Florio Amendment, *supra* note 159, at 29,746; *see also*, Eizenstat & Fullerton, *Crying Wolf on Takeovers*, Nat'l L.J. July 24, 1989, at 13, col. 1.

161. *See* Letter from W. Wiles, Secretary of the Board of Governors of the Federal Reserve System, to Patricia S. Skigen & John B. Cairns (discussing prospective requirements in regard to the acquisition of Irving Bank) (Aug. 19, 1988) (available from author). There has even been some attempt to extend the Williams Act to tender offers occurring entirely in Europe. In September 1989 Senator Alan Dixon voiced his concerns over the Securities and Exchange Commission's refusal to interfere in the foreign B.A.T. Industries takeover battle. He thus placed the August 9, 1989, letter of Representative Dan Rostenkowski into the Congressional Record. This letter questioned "whether the use of U.S. assets of a foreign target as the principal source of funds for repayment of the acquisition debt would constitute a sufficient diversion from corporate purposes to require the imposition of U.S. income tax on any built-in gains in such assets." 135 CONG. REC. S10,838, S10,839 (daily ed. Sept. 8, 1989).

162. *See supra* notes 39, 40, and accompanying text.

corporation might need to form a subsidiary in Europe or otherwise establish a European presence to avoid potentially onerous reciprocal enactments. Likely targets for such acquisitions may be found in Italy, where numerous markets, such as insurance, are less competitive and sophisticated than in the other major Member States.[163] Spain may also present possibilities for such investment, though with obstacles that need be overcome.[164] And though an investment in these states may evoke fears of language difficulties, it also presents a beckoning opportunity.

III. CONCLUSION

The Proposal is of interest to United States business people and lawyers for two reasons. First, the Proposal presents bold solutions to abuses existing in the United States tender offer process. The Proposal circumscribes much of the action that now takes place on the United States battlefield of hostile tender offers. Tender offers would be subject to more complete regulation and less likely to be coercive of shareholders. The Proposal would probably eradicate two-tiered tender offers. The defensive options of target management, including "abusive" tactics, would also be curtailed to a great extent during the offer's pendency.

Those seeking legislative reform on the United States field can seek inspiration from the European approach. Heightened regulation does not, however, always result in greater benefit to shareholders, if indeed the Proposal still considers the benefit of shareholders to be the primary concern of management. The Proposal's comparatively more burdensome regulatory requirements will discourage even tender offers that are advantageous to shareholders. It is questionable whether this type of intrusive regulation would presently be acceptable, at least on the federal level, in the United States. The recent developments in state law and the proliferation of legislative proposals on the federal level, however, may be indicative of a general trend toward more substantial regulation in this area. Moreover, there is a pronounced movement in state law away from the promotion of shareholders' rights. Accordingly, the United States legislative climate may be warming to the type of regulatory obstacles presented by the Proposal.

Second and more important, the Proposal is significant to practitioners

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163. *See* Glisenti & Rabb, *Italy: Land of New Opportunity*, FORBES, Nov. 22, 1982, at 75; Lane, *Impatient for Change*, THE BANKER, May 1989, at 21(1); *Takeover Frenzy Jolts EC Insurance Industry*, J. Com., Nov. 28, 1989, § A, at 1, col. 2.

164. *See* BUSINESS AMERICA, May 25, 1987, at 19 (prepared by officials of the United States Consulate General in Barcelona); Schreiber, *Nonresidents' Investment Rights: The Spanish Experience Recent Reforms*, 22 INT'L LAW. 207 (1988).

advising United States companies that wish to enter the European market. By providing a federal, preponderantly uniform regulation of tender offers, the Proposal would facilitate to some extent United States mergers and acquisitions in Europe on a Community-wide basis even though it does create several procedural difficulties. The Proposal would appear to favor hostile bidders once they succeed in launching a tender offer, as the Proposal's greater impact may be its prohibition of many target defensive tactics. The prohibitions of article 8 may so hinder target management that hostile bidders will benefit even if supervisory authorities exercise their discretion in favor of the target. Moreover, the Contact Committee may effectively remove the spectre of potential supervisory authority abuse. Given this advantage to bidders, the Proposal may provide an impetus for United States companies to achieve a secure niche within post-1992 Europe. On the other hand, if the supervisory authorities begin to enact the European equivalent to state anti-takeover statutes and also troublesome reciprocity provisions, the playing field would be open in name only to a United States bidder. Fears of this nature, however, are as of yet merely speculative.

At present, the Single European Market presents a tremendous opportunity to United States companies prepared to meet its challenges and take advantage of its benefits. The longer United States companies wait to accomplish these goals, however, the less attractive their prospects will be.

APPENDIX

COMMISSION

Proposal for a Thirteenth Council Directive on Company Law Concerning Takeover and Other General Bids

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;
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 fulfill 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 to reduce the scope of insider dealing offerers 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;
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 en-

gage in operations of an exceptional nature;

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

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;

Whereas the offerer 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 offerer, the supervisory authority should be able either to forbid the publication of the offer document or to make the offerer publish a revised document;

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

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 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 offerers are entitled to revise their bids; whereas limits should be placed on the 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 offerer 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, any acquisition by the offerer, 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 offerer, 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 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;
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 offerer should be entitled to withdraw his bid in such a case;
Whereas this Directive does not until subsequent coordination affect the capacity of Member States to forbid a takeover or other general bid where the offerer 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;
HAS ADOPTED THIS DIRECTIVE:

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 socieété en commandite par actions/de commanditaire venootschap 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:
η ανωνυμη εταιρειά, η ετερόρρυθμη κατά μετοχές εταιρειά,

- in Ireland:
the public company, limited by shares,
- Italy:
la società per azioni, la società in accomandita per azioni,
- in Luxembourg:
in socieété anonyme, la société en commandite par actions,
- in the Netherlands:
de naamloze vennootschap,
- in Portugal:
sociedade anònima, sociedade em comandita por acçöes,
- 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 takeover or other general bid (hereinafter referred to as 'a bid').
2. For the purposes of this Directive, 'offerer' 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 purpose of this Directive, 'parties to the bid' shall mean the offerer, the representative of the offerer within the meaning of Article 9, the directors of the offerer, if the latter is a company, the addressees of the bid and the directors of the offeree company.
5. For the purpose 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 3

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 ⅓%, 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 offerer:
   (a) voting rights held by persons acting in their own name but on behalf of the offerer;
   (b) where appropriate, voting rights held by companies belonging with the offerer to the same group of undertakings within the meaning of Article 1 of Council Directive 83/349/EEC[1];
   (c) voting rights held by persons acting in concert with the offerer;
   (d) where appropriate, voting rights held by directors of the offerer company.
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.

Article 5

Exemptions on the basis of size of the offeree company

Article 4 shall not apply:

1.(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 with the meaning of Article 1 of Directive 83/349/

1. OJ No L 193, 18. 7. 1983, p. 1.

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.[2]

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 offerer to correct an inadequate offer document and to make it public by the means set out in Article 11(1).
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.
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.
6. This Directive shall not affect the legislation of Member States con-

2. OJ No L 222, 14. 8. 1978, p. 11.

cerning the liability of competent authorities.

Article 7

Procedure prior to publication of the offer document

1. As soon as it decides to make a bid, the offerer 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 offerer 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 offerer shall communicate it to the competent supervisory authority 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 reason for such authorization.

Article 9

Representative of the offerer

The offerer 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 10

Offer document

1. The offerer 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 offerer or, where the offerer 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 offerer 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 offerer,
(bb) other persons for the account of the offerer,
(cc) companies belonging with the offerer to the same group of undertakings within the meaning of Article 1 of Directive 83/349/EEC,
(dd) persons acting in concert with the offerer,
(ee) where the offerer is a company, its directors, and the voting rights attached to those securities and the date and the price at which they acquired;
(f) where the offerer is a company, the securities, or the securities of a particular class or classes, of the offerer held by the offeree company, and 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 offerer 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;
(i) any condition authorized by the competent supervisory authority which the offerer 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 offerer;
(l) the intentions of the offerer, explicitly expressed, regarding the con-

tinuation of the business of the offeree company, including the use of its assets, the composition of its board and its employees;

(m) any special advantages which the offerer 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 offerer is acting;

(b) any companies belonging with the offerer 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 offerer.

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.[3]

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.

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,[4] 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.

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

3. OJ No L 100, 17. 4. 1980, p. 1.
4. OJ No L 65, 14. 3. 1968, p. 8.

pervisory authority.

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 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 offerer 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 offerer 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 offerer 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.
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.

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 offerer 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.
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 offerer, 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.

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 offerer may revise the terms of the bid. Article 7(1) shall apply as regards the public announcement of the offer'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 offerer 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 offerer 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 16

Automatic revision

The acquisition of the officer, by persons acting in concert with him or by persons acting in their own name but on behalf of the offerer, 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 17

Provision of information to the supervisory authority

1. Throughout the period for acceptance of the bid the offerer 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 offerer or any holder of 1% or more of the voting rights of the offeree company, of the offerer company if the offerer 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 offerer 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 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 offerer.

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 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 offerer 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 offerer or acting in their own name but for the account of the offerer may not make a bid competing with the initial bid.
4. Where there are competing bids and the initial offerer does not withdraw its bid, the period for acceptance of the initial bid shall be extended automatically to the date of expiry of the period of 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 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 committee shall be convened by the chairman either on his own initiative or at the request of one of its members.

Article 22

Transposition of the Directive

1. Member States shall adopt before . . . the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith inform the Commission thereof.
2. Member States shall fix the date of entry into force of these provisions in any case at the latest by . . . .
3. Member States shall communicate to the Commission the texts of the main provisions of national law which they adopt in the field covered by this Directive.

Article 23

Addressees of the Directive

This Directive is addressed to the Member States.