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Acquisitions of Companies in Europe - Practicability, Disclosure, and Regulation: An Overview

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It may be tempting to assume that the conduct of takeover activity in Europe will automatically follow the pattern that has evolved in the United States where the ability to manage a campaign against the background of the interplay between the laws and courts of some fifty states and those of federal application is the clue to success. There are, however, important differences. There is no common consensus on the virtues of capitalism or the free market economy. Litigation is usually seen as a sign of failure rather than a badge of courage. The basic laws of each country stem from widely divergent political and historical roots, and despite the increasing presence of English as a second language, the vast bulk of the population of each of the fifteen countries of Western Europe speak different languages. England and Ireland, and France and parts of Belgium are the only ones that share their native tongue with another; the culture, character, and aspirations of the people of each country are dramatically different, as evidenced by their history and their literature.

It must be remembered therefore that the European Economic Community (EEC) is still very much a grouping of countries each with its own idiosyncratic legal system developed over centuries of history, although now increasingly the subject of and modified to accord with EEC law. Some harmonization of the laws of these countries will have taken place as the 1992 program for the single EEC

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TABLE 1
PUBLIC AVAILABILITY OF CORPORATE INFORMATION

	Shareholders	Corporate Structure	Accounts
Belgium	No*	Yes	Yes
France	Some**	Yes	Yes
Germany	Some**	Yes	Yes
Italy	Some**	Yes	Yes
Netherlands	No*	Yes	Yes
Spain	No*	Yes	Yes (Quoted)
United Kingdom	Yes	Yes	Yes

*shares usually in bearer form
**shareholdings over specified thresholds

market is implemented. When it comes to the acquisition of companies based in them, however, it is unlikely that a "level playing field"[1] between the countries will be in place by the deadline for the implementation of the single market.

This article reviews acquisitions of "public" or quoted companies in the major countries of the EEC.[2] It examines three areas, detailed knowledge of which is crucial in planning an acquisition in the EEC: the public availability of information about the target and its business; the scope for directors, shareholders, and employees of the target to frustrate or delay the acquirer's objectives; and the nature of governmental or regulatory controls that may prevent or affect the course of an acquisition. Relevant EEC controls and the impact of the 1992 program are then discussed.

It will become clear that the contested takeover bid in its United States or United Kingdom form is by no means a universal phenomenon in the EEC. In many jurisdictions, acquisition of an identified target may be possible only with the agreement of various relevant parties.

I. Public Availability of Information About a Target and Its Business

Accurate and detailed information is essential to the assessment and planning of an acquisition. The public availability of information as to the identity of the shareholders of a company, its corporate structure, and finances varies from country to country. (Table 1 sets out the situation in each major country.) The United Kingdom is the only country in which full information as to the identity of shareholders can be obtained. Limited information as to major shareholders

1. Lord Cockfield, Vice President of the European Commission (with special responsibility for the Internal Markets), June 9, 1988.
2. Belgium, France, West Germany, Italy, the Netherlands, Spain and the United Kingdom.

with holdings over specified thresholds is available in France and Italy. In other countries, such information is not publicly available at all. This lack of public information obviously inhibits the hostile bidder in assessing the nature and distribution of a company's shareholding or in communicating its offer.

Information as to corporate structure is available in all countries. This information consists in all cases of details of the amount of a company's share capital, its constitutional documents (stated objects, articles of association, statutes, or by-laws), and its directors. It may also cover matters such as further information on share capital, resolutions of the company or its directors, and charges or restrictions on its property or business.

Company accounts are publicly available in all cases, although only the accounts of quoted companies are available in Spain. Wide differences exist between countries as to the type, quality, and detail of information contained in company accounts. The interpretation of these accounts and the assessment of information revealed would require detailed accounting knowledge in the relevant country. The EEC has currently adopted two directives[3] on accounting matters that, when implemented by all countries, will raise and harmonize the level of information publicly available. The issuance of further directives on this topic is anticipated.

II. Scope for Frustrating Action

Readers in the United States will be all too familiar with the range of defensive measures available to the directors of a company subject to an unwelcome bid and the resulting antics. That said, the conduct of public offers is highly regulated in the United States, and the scope for spoiling tactics has clear limits. The situation in the United Kingdom is further loaded against a beleaguered board. Once a public offer has been announced, or even when the board of the target company has reason to believe that a bona fide offer might be imminent, the board is prohibited under the City Code on Take-overs and Mergers from taking frustrating action (such as issuing new shares or acquiring or disposing of material assets) without shareholder approval.

In strong contrast is the position in mainland Europe, where directors, shareholders, or employees are often in a position to prevent an unwelcome bid. The reason is largely historical. Until recently contested bids have generally been rare in continental Europe and as a result the extent of legal or regulatory control over the way in which bids (and the defense of target companies against unwelcome bids) are conducted is relatively limited. The scope for defensive measures is circumscribed in all cases by local company law.

3. Fourth Directive No. 78/660, O.J. Eur. Comm. (No. L 222) 11 (1978) (harmonization of annual accounts of public limited liability companies); Seventh Directive No. 83/349, O.J. Eur. Comm. (No. L 193) 1 (1983) (harmonization of annual accounts of groups of companies).

As a result, hostile bids in several of the major EEC countries are either effectively not feasible or accompanied by substantial potential problems. Careful groundwork is essential, and an agreed deal may be the only available option.

A. By the Target or Its Directors

The recent bid by Carlo de Benedetti for Société Generale highlighted the rudimentary nature of the system for regulating takeovers in Belgium. Although the Belgian Banking Commission, which is responsible for overseeing public offers, applies a guiding principle that all shareholders should be treated equally and given adequate information to make any decisions required of them, there are few detailed rules governing bids and few specific restrictions on defense tactics. The board must, however, act in the best interests of its shareholders as a whole. The scope for frustrating action by the management is accordingly very wide and would include the issue of new shares to chosen allies of the board in most situations. Such an issue was made in the Société Generale case.

French companies are more open to hostile bids than their Belgian counterparts, as the management of a target has limited scope to adopt defensive spoiling tactics once a bid has been announced. Prebid defensive moves, however, are common and legal. These include issuing shares with double voting rights, issuing convertible securities or options, buying in the company's own shares, and placing shares in the hands of loyal groups of shareholders that may be expected to resist an unwelcome bid.

In Germany, contested bids are virtually unheard of. The consequence is only limited regulation of takeovers, and accordingly, considerable scope for the management of a target to take defensive action. Such action requires compliance with the numerous relevant provisions of the Stock Corporation Act and the provisions of the company's articles and by-laws. The issue of new shares and substantial assets disposals, for instance, will be subject to approval by the company's supervisory board or shareholders.

The scope in Italy for defensive action is very wide. No statutory provisions restrict the right of the target company to defend itself from a hostile offer, although its directors must act in the interests of the company. The Code of Conduct of the Milan Stock Exchange, which applies to all tender offers made on the Milan Stock Exchange, however, prohibits a target company from taking any action during the course of an offer that could substantially alter its assets and liabilities.

In the Netherlands, the directors of a company must act in the interests of the enterprise (which is interpreted to include responsibility not just to the shareholders but also, depending on the circumstances, to the company's employees, customers, and creditors). Management thus has considerable latitude in employing defensive measures. Nevertheless, the recent abortive bid by Elsevier

for Kluwer, during which the Kluwer board employed a wide range of tactics, including the issue of preferred shares to a board-controlled "foundation," has stirred considerable discussion as to the desirability of such defensive tactics. The Stock Exchange Association recently published a report on the use of such defensive tactics.[4] It concluded that no company should be allowed to implement more than two defensive measures, and that the implementation of certain defensive measures should be banned altogether after the announcement of a bid. The report was not received with enthusiasm by all parties. Representative organizations of employees, Dutch industry, and many listed companies have expressed their strong opposition to a dismantling of takeover defenses. Understandably, organizations representing noninstitutional shareholders are positive about The Stock Exchange's proposals. It remains to be seen whether any part of The Stock Exchange Association's proposals will be implemented in the near future.

Directors of Spanish companies desiring to frustrate a bid are free to take any desired action within the parameters of general civil, company, and labor laws. The relatively recent Royal Decree governing public bids[5] does not circumscribe the range of options open to the directors. (The position in each country is summarized in the first column of Table 2.)

B. By the Target's Shareholders

In some European countries, it is common for companies to be immune from unwanted takeovers due to the composition of their shareholders. In France, for instance, numerous listed companies have arranged carefully structured "stable groups" of loyal shareholders. The French Government formed such groups in connection with the privatization of various state-owned companies, and other quoted companies have adopted a similar pattern. In Germany, the majority of businesses are either family-owned or owned by commercial banks that have large equity stakes and board representation. Hostile bids are, accordingly, impracticable in these cases, unless the terms are such as to turn the loyalties of the shareholders in question.

Problems occur in countries, mainly Belgium and the Netherlands, where bearer shares are common. It is then difficult to assess the composition of a company's shareholders (essential in evaluating the likelihood of a bid succeeding) and to be sure that details of the bid have been successfully communicated to shareholders.

Most countries have rules providing for the equal treatment of shareholders during the course of a bid. There is, however, no requirement for an offer to be

4. Rapport van de Vereniging voor de effectenhandel inzake de toepassing van beschermingsconstructies 4 maart 1988.

5. Royal Decree, January 25, 1984, No. 279/84.

TABLE 2
SCOPE FOR FRUSTRATING ACTION

	By target/ its directors	By shareholders: Formal approval needed?	By shareholders: Can compulsorily acquire dissenting minority?	By employees
Belgium	Virtually free	No	No	Prior notice
France	Wide scope prebid; restrictions apply during bid	No	No	Prior consultation (offeror and target)*
Germany	Fairly wide; Stock Corporation Act restrictions	No	No (can if a "merger")	No (certain influence if codetermined supervisory board)
Italy	Some restrictions by Milan Stock Exchange	No	Yes—90% or over, mandatory under Code of Milan Stock Exchange	Possible requirements under collective bargaining arrangements
Netherlands	Free	Dutch Merger Code requires shareholders meeting (but not necessarily approval)	95%	Prior consultation and right of appeal*
Spain	Free	No	No	Prior consultation in some cases*
United Kingdom	None	No	Yes—if over 90%	No

*Agreed bid only

approved in general meeting. In the case of companies whose securities are listed on the Amsterdam Stock Exchange or the parallel market, or that are regularly traded on the over-the-counter market, and that are the subject of public offers by Dutch or foreign companies, the Dutch Merger Code requires the target's management to convene a general meeting of shareholders after publication of the offering memorandum, but no later than eight days before the end of the period during which shareholders can accept the offer. At least four days prior to that meeting, the target's management has to make available to shareholders a report including information on the management's opinion of the proposed offer and the financial effect on the target. The purpose of the meeting is to enable shareholders to find out the directors' view of the acquisition, but it remains up to each shareholder whether or not to accept the offer.

Dissenting minorities can be a thorn in the flesh of a successful bidder. Three of the jurisdictions under discussion provide a mechanism that enables the bidder to acquire compulsorily the remaining shares in the target. (These are summarized in the third column of Table 2.) United Kingdom law[6] enables a successful offerer that has offered to acquire all of a class of shares of a target and has, within four months of the date of the offer, received valid acceptances from holders of at least 90 percent in value of the shares in question, to acquire the outstanding shares in the target on the same terms and conditions as applied to the bid.

The Netherlands has recently enacted legislation[7] that makes it possible for a shareholder holding 95 percent or more of the issued share capital of the target in many cases, not just post-bid, to buy out the outstanding minority. The Amsterdam Court of Appeal must approve these actions and the minority may oppose them. The consideration payable is determined by independent experts.

The Code of Conduct of the Milan Stock Exchange,[8] on the other hand, actually requires an offerer that has acquired 90 percent of the shares of the target to acquire the remaining 10 percent on the same terms and conditions as applied to the last public offer.

C. By the Target's Employees

Most of the EEC jurisdictions under consideration (apart from Germany and the United Kingdom) require employees to be notified or consulted in certain circumstances about a proposed takeover of their company. With the exception of the Netherlands, however, the employees' right is merely to be consulted; they have no power to block the takeover or impose conditions. (The fourth column of Table 2 summarizes the position in each country.) The management of a Dutch company that has more than 100 employees and a works council has to seek the

6. Companies Act 1985, §§ 428-430.
7. Act on the Buy-out of Minority Shareholders of Mar. 3, 1988.
8. Code of Conduct of the Milan Stock Exchange art. 2, para. 4.

advice of the works council prior to control of the company being transferred by agreement. If negative advice is forthcoming, and the management chooses to ignore that advice, the works council must be informed and the proposed change of control must be suspended for one month. During this period the works council has a right of appeal to the court on the ground that, had a reasonable balancing of interests taken place, the management could not have reached its decision. The court may issue an order preventing the implementation of the agreement and in a handful of cases courts have made such orders.

In Germany, employees of codetermined stock corporations may have supervisory board representation equal to that of equity owners, with a neutral chairman. Protracted supervisory board meetings may ensue.

It is worth noting that, where the acquisition is of business assets, all the major EEC countries except Italy have enacted legislation giving effect to an EEC Council Directive[9] and providing that all employees of the business and their terms and conditions of employment (with some exceptions) automatically transfer to the purchaser.

III. Governmental and Other Control and Regulation

The only unifying theme that can be extracted from the range of forms of existing governmental and other control and regulation of takeovers is its disparity. These forms of control and regulation can be broken down into four main categories, which are discussed below.

A. Competition and Monopolies Control

Competition and monopolies regulation vary markedly between the EEC Member States. These domestic controls (set out in Table 3) need to be complied with in addition to the relevant provisions of EEC law discussed in section IV.A below.

At one end of the spectrum, Italy has no such regulation. Spanish law does permit the government to intervene to control agreements or practices that restrict free competition within Spain; however, the relevant law[10] was passed in 1963 in response to the particular climate prevailing at the time and would not necessarily be used today. In Belgium, there are laws controlling the abuse of economic power.[11] These laws are, however, merely concerned with preventing the abuse of a dominant position to increase prices and are, therefore, primarily concerned with consumer protection and not aimed specifically at controlling takeover or merger activity.

9. Council Directive No. 77/187, O.J. Eur. Comm. (No. L 61) 26 (1977).
10. Law of July 20, 1963 (Repression of Practices Restrictive of Competition).
11. Law of May 27, 1960.

In the Netherlands, cartels and dominant positions are regulated.[12] Dominant positions are not of themselves illegal and there is no requirement to clear in advance an acquisition that will result in the acquirer having a dominant position. If, however, such a dominant position would conflict with the general public interest, the Minister of Economic Affairs can impose certain obligations on the parties involved, often related to pricing of goods or services. On the other hand, cartels must be notified to the Minister. If the Minister considers that a cartel is detrimental to the public interest, the Minister can publish information on it or even declare the relevant agreement inoperative. Such a declaration, however, has been made on one occasion only.

In France, an acquisition may be subject to competition regulation[13] if the entities concerned either monopolize between them over 25 percent of any French market or a substantial part of it, or if their turnovers exceed certain amounts. Acquisitions may be made without the prior approval of the Ministry of the Economy, but the Ministry may require the parties to take certain action after the event, ranging from not completing the transaction to modifying its terms or taking action necessary to establish competition. A clearance procedure exists, and transactions are deemed cleared in the absence of any objection within two months of notification to the Ministry (which may extend to six months if a reference is made by the Ministry to the Competition Council).

The most developed systems of monopoly control are in Germany and the United Kingdom. Germany has a complex apparatus of notifications and approvals[14] that may be triggered in a number of ways. A postmerger notification has to be submitted to the Federal Cartel Office if the acquiring company or the target company has a market share in any German market of at least 20 percent, or if the companies have an aggregate worldwide turnover in excess of a specified amount or a worldwide workforce of 10,000 or more employees. Pre-merger notification and approval are needed in all cases where certain turnover limits are exceeded.

In the United Kingdom,[15] in order for the relevant authority, the Monopolies and Mergers Commission (MMC), to investigate corporate acquisitions, either the gross value of the worldwide assets taken over must exceed £30 million or, as a result of the merger, the enterprises that thereafter cease to be distinct (which includes share acquisitions) would together supply or consume at least 25 percent of any goods or services of the same description supplied in the United Kingdom or a substantial part of it. Relevant transactions are referred to the MMC by the relevant Government Minister after a report by the Office of Fair Trading (OFT). Recently references have been made (notably of the Kuwait Investment Office

12. Act on Economic Competition of 1958.
13. Ordinance No. 86-1243, Dec. 1, 1986, arts. 38 *et seq.*
14. Act Against Restraints of Competition, Sept. 24, 1980.
15. Fair Trading Act of 1973.

holding in British Petroleum) for "public interest" rather than pure competition reasons.

There is no requirement for prior notification to the OFT of a proposed acquisition, although it is possible to seek confidential guidance from the Director-General of the OFT as to whether the proposed transaction would likely be referred to the MMC. To obtain such guidance, which can be heavily qualified, usually takes two or three weeks.

If a transaction is referred to the MMC, either as a result of a prior approach or after the deal becomes public, the MMC makes an investigation as to whether it is contrary to the public interest. If the MMC finds the transaction contrary to the public interest, the Secretary of State for Trade and Industry has power to make orders, including orders for the sale of shares or assets, so as to remedy the effects that the MMC concluded were contrary to the public interest.

B. Foreign Investment/Exchange Control

A number of European countries control foreign investment. As with competition law, a great disparity exists between countries as to the scope and extent of such controls. (These controls are summarized, together with relevant exchange controls, in Table 3.)

In Spain, prior clearance based on detailed information to be submitted in advance is required for an acquisition of a 50 percent or more stake in a Spanish company.[16] An acquisition is deemed cleared unless a notification is received from the relevant authority within thirty days of the submission.

In France the purchase by a non-EEC investor of more than 20 percent of the shares in a French company requires a prior declaration to, or the prior authorization of, the "Direction du Trésor," depending on whether the investment is over ten million francs and also whether the target is already under foreign control.[17] If the investor is under the control of an EEC resident or Member State, a prior declaration to the Direction du Trésor is required in the case of the purchase of more than 20 percent of the shares in a French company. The transaction is deemed cleared after the expiration of a specified waiting period.

Belgium imposes no restrictions on foreign investments generally; however, any public offer for a company's listed shares made by a non-EEC offerer needs prior approval of the Ministry of Finance.[18] This requirement can be avoided if the offer is made through an EEC-based company.

It is often forgotten that in the United Kingdom wide discretionary governmental powers exist under the Industry Act 1975 for the control of "transfers of

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16. Royal Legislative Decree, June 27, 1986, No. 1265/1986 (Foreign Investment in Spain).

17. Decree No. 67-78, Jan. 27, 1987, and Circular of May 21, 1967, *as amended by* Circular of Sept. 24, 1988.

18. Law of July 11, 1972.

control of important manufacturing undertakings to non-residents." "Important" means any undertaking that appears to the Secretary of State to be of special importance to the United Kingdom or any substantial part of it. This power has never been used, but one can speculate that a full bid by the Kuwaiti Government for British Petroleum would have sent civil servants scurrying for this Act.

Linked to foreign investment control is exchange control. Although generally diminishing in importance, it is still necessary to ascertain the position in the country of acquisition. In Italy, for instance, a foreigner can freely acquire shares in a local company, provided certain requirements are satisfied.[19] In Spain, any movement of funds between residents and nonresidents must be made through a Spanish bank, which is required to report the transaction to the Bank of Spain.

C. Control of Sensitive Industries

In addition to the control of foreign investments per se, the governments of the EEC countries exercise control over the conduct of certain industries regarded as sensitive (which often include banking, insurance, newspaper publishing, broadcasting, and air transport), and the acquisition of companies or businesses engaged in them, irrespective of the nationality of the relevant parties. In most cases, the government in question has the right to block or impose conditions on an acquisition, regardless of whether the acquirer is foreign.

The form and extent of the relevant controls in each country are too detailed and varied to be examined at length in this article. (The relevant industries are identified in Table 3.)

D. Regulation of Takeover Activity

Contested takeover bids have historically been relatively unusual in Europe, with the exception of the United Kingdom. In the United Kingdom, takeover bids have formed a significant part of securities activity. As a result, the extent of control over takeover activity is generally limited in comparison to the position in the United States or the United Kingdom and, once again, the national systems of regulation are widely disparate. The system in the United Kingdom, as Europe's most developed, is discussed in detail below and comparison is then made with the systems in the other EEC countries. (Various features often considered to be key are summarized in relation to each country in Table 4.)

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19. These requirements relate primarily to the transfer of the necessary funds through an appropriately authorized bank and to the terms of the transaction. In the case of a quoted company, the bank in charge of the transaction will require an independent valuation when the price offered by the foreign offerer is different from the price quoted on the stock exchange. In the case of an unquoted company, an independent valuation will be required in any event.

TABLE 3
GOVERNMENTAL/REGULATORY CONTROLS

	Belgium	France	West Germany	Italy	Netherlands	Spain	United Kingdom
Competition/ monopoly regulation	Based on consumer protection	Yes	Yes	None	Cartels and dominant positions	Yes	Yes
Foreign Investment/ Exchange Control	Public offer for listed company by non-EEC offeror requires approval	Yes (20%). Always if defense, health or matters of public policy	None in force (reporting requirements)	Exchange requirements. Banking Aviation Shipping	None (except defense-related industries)	Yes (acquisition of majority stake) (reporting requirements)	Industry Act 1975
Sensitive industries (all investors domestic or foreign)	Banking Insurance Stockbroking	Banking Insurance Newspapers Television Aviation Telecommunications	Banking Insurance Investment Funds Newspaper Shipping Aviation Telecommunications	Banking Insurance Aviation Newspapers Shipping	Banking Insurance	Gambling Defense Television Radio Air Transport	Banking Insurance Financial Services Aviation Gambling

NB: See Table 4 for specific regulation of takeover activity.

TABLE 4
NATIONAL REGULATION OF TAKEOVER ACTIVITY

	Belgium	France	Germany	Italy	Netherlands	Spain	United Kingdom
Principal Regulation—Statutory or Self-Regulatory	Statutory	Semi-statutory	Self-Reg.	Semi-statutory	Self-Reg.	Statutory	Self-Reg.
Document subject to review/approval	Yes	Yes	No	Yes	Yes	Yes	Yes
Obligation to offer to all shareholders	Yes	Yes	Yes	Yes	Yes	Yes (if offer for 50%)	Yes
Mailing to shareholders required	Yes if not bearer	Yes	No	No	No	No	Yes
Demonstration of funds required	Yes	Yes	No	Yes	No	Yes	Yes
Disclosure threshold (shareholdings)	25%	5% or less (min. 0.5%)	25%	2%	No	25%	5%
Purchase during offer permitted	Yes	Yes	No	Not "suggested"	Yes	Yes (after publication of document)	Yes
Purchase affects offer price	No	Yes	Yes	Yes	No	No	Yes
Restraint on 10% acquisition (pre-offer)	No	No	No	No	No	No	Yes
Irrevocable acceptances	Yes*	Only during last 10 days	No	Yes*	Yes	Yes*	Yes until 42 days
Offer period (days) (min./max.)	No legal periods	30 (min.)	21/60	25/45	20/30 (min.)	Timetable approved	21/60

*unless increased/competing offer

Proposals are under discussion for a new EEC Directive[20] to harmonize and regulate takeover bid procedure. These proposals are in their infancy, but it is clear that, once such a Directive has been implemented, the situation will alter radically. Accordingly, the wide variations between the countries as to the style and level of controls will be reduced.

1. *In the United Kingdom*

The City Code on Take-overs and Mergers (the Code), which is supervised by the Panel on Take-overs and Mergers (the Panel), was established in 1968. The fundamental principle underlying all the rules of the Code is to ensure that all shareholders affected by a takeover bid or merger proposal are treated fairly. The Code enunciates general principles of conduct to be observed and lays down rules based on those principles. An executive appointed by the Panel is available for consultation at any stage before a formal offer document is dispatched as well as during the course of any transaction. The most important feature of the Code is that it constitutes self-regulation by the securities industry and there is no direct legislation in support. It is intended to be a code of good business practice for the protection of shareholders.

Although breach of the Code carries no specified legal sanction, the joint cooperation of the institutions that, by their acceptance and support, give authority to the Code and the support that the Panel receives from the Bank of England and the Department of Trade and Industry, provide together an effective range of sanctions. The sanctions available to the Panel, although most of them are operated "in terrorem," are recourse to private or public censure;[21] the ability to ensure that financial advisers are deprived temporarily or permanently of their ability to practice in the field of takeovers and mergers;[22] the ability to request the Council of The Stock Exchange to suspend the listing of any security in order to prevent dealings taking place;[23] the ability to prevent a listing being granted for new securities to be issued in connection with an acquisition when a breach of the Code has occurred;[24] and reference of the facts of any case to the Department of Trade and Industry,[25] which is likely to be influenced in exercising any discretions it may have (for instance, as to the making of a statutory investigation of a Company's affairs).

The perceived advantages of the nonstatutory basis of the Code and the Panel are that it constitutes regulation by professionals who have considerable direct

20. This will be the 13th Company Law Directive. For detailed discussion, see *infra* notes 81-82 and accompanying text.

21. THE CITY CODE ON TAKE-OVERS AND MERGERS 1968, Introduction, para. 3(d) *revised on* Apr. 19, 1985 (consisting of ten principles and thirty-seven rules) [hereinafter THE CITY CODE].

22. *Id.* para. 1(c).

23. *Id.*

24. *E.g.*, by reporting the relevant facts to The Stock Exchange.

25. THE CITY CODE, *supra* note 20, Introduction, para. 3(d).

experience in their field, and that it is a flexible and informal means of controlling what are usually rapidly moving transactions. Were it more legalistic, and therefore, encumbered with stricter procedural rules and greater bureaucratic controls, the effective regulation of these transactions would be impaired. Opponents of self-regulation by the securities industry claim that the system is too cozy, that it lacks teeth, and that effective regulation of such a complex area needs to be legally based and governmentally administered. The Code and the Panel came under heavy attack in the wake of the Guinness scandal; they remain, as yet, intact.

Any ruling by the Panel, which comprises a representative from most of its sponsoring bodies, is subject to appeal. Such an appeal may be made to an Appeal Committee chaired by a former judge. The Panel will postpone any public reprimand or censure until the Appeal Committee has heard the appeal.[26] No appeal, however, will lie to this Committee on a finding of fact by the Panel. In a recent case[27] the courts were asked to rule whether the decisions of the Panel were subject to judicial review and to overturn a particular decision. The Court of Appeal decided, against the vigorous pleading of the Panel, that as a semipublic body the Panel's ruling should not be exempt from judicial review, but that in normal circumstances the court would not overturn its decisions, preferring only to lay down guidelines for the future. It remains to be seen whether the court, the next time it has to consider the matter, will become more interventionist.

A separate set of nonstatutory rules, the "Substantial Acquisition Rules" (SARs), which are administered by the Panel in common with the Code, regulate purchases of blocks of shares otherwise than in takeover situations. Typically the SARs apply where a potential bidder is attempting to build up a stake prior to making a bid.

a. General Principles of the Code

Two main interrelated threads run through the provisions of the Code:

- *First*, the shareholders of an offeree company are to decide whether or not an offer should succeed, and to this end the Code requires the provision of adequate information and time. It requires the offerer company to acquire voting control of a company before it can declare its offer unconditional.[28] It prohibits actions designed to frustrate a bid being undertaken without the approval of the shareholders of the offeree company.[29] It has stringent requirements for the disclosure of share dealing during an offer,[30] and it requires information disclosed to one prospective offerer to be disclosed to all other prospective offerers.[31]

26. *Id.* para. 3(f).
27. R. v. the Panel on Takeovers and Mergers, *Ex Parte* Datafin PLC, 2 W.L.R. 699 (U.K. 1987).
28. THE CITY CODE, *supra* note 20, R. 10.
29. *Id.* R. 21.
30. *Id.* R. 8.
31. *Id.* R. 19.4.

- *Second*, the various investors in the offeree company must receive equitable treatment. To this end, the rules require that the highest price paid over a reasonable period of time preceding the offer must be given to all shareholders to whom the offer is made.[32] Insider trading is prohibited,[33] and partial bids[34] and the sale of controlling blocks of shares in companies are carefully regulated.[35] The rules require the Board of an offeree company to seek independent outside financial advice.[36] The Code requires that, where an offer is made for equity share capital, appropriate arrangements must be made for the holders of any convertible securities, warrants, options, or subscription rights outstanding in the offeree company.[37] The Code provides that no special deals with favorable conditions may be entered into unless available to all shareholders.[38]

b. Change of Control—Requirement for a Bid

The Code operates from the premise that, where there is a change of control of a public company, the new controllers should offer all shareholders the opportunity to dispose of their shares at the same price at which the controllers acquired their controlling interest. Accordingly, all shareholders, large and small alike, are given the opportunity to realize their holdings.

The Code determines that control is deemed to mean a holding, or aggregate holdings, of shares carrying 30 percent or more of the voting rights of the company irrespective of whether that holding or holdings gives de facto control. In order to identify a controlling holding of shares, the Code looks beyond legal or beneficial ownership to whether any group of persons "acting in concert" may have acquired or be exercising control.[39]

i. *The Mandatory Bid.* The Code requires that, unless the Panel otherwise agrees, any person or "concert party" that acquires 30 percent or more of the voting rights of a company must offer to acquire all the outstanding equity shares of the target at the highest price paid by that person or concert party within the twelve months preceding the acquisition that triggered the requirement to make an offer.[40] Furthermore, if any person, together with others acting in concert with that person, holds 30 percent or more (but not more than 50 percent) of the voting shares of a company, and such person acquires more than 2 percent of the voting rights of that company in any twelve-month period, then again that person

32. *Id.* R. 9.5; R. 11.1.
33. *Id.* R. 4.1. Company Securities (Insider Dealings) Act 1985.
34. The City Code, *supra* note 20, R. 36.
35. *Id.* R. 5.
36. *Id.* R. 3.
37. *Id.* R. 15.
38. *Id.* R. 16.
39. *Id.* Definitions section.
40. *Id.* R. 9.

is required to extend an offer to all outstanding shareholders at the highest price that such person has paid in the preceding twelve months.[41]

The Code further safeguards the interests of the outside shareholders in instances such as when an offerer might put itself in the position where it was obligated to make an offer but was in fact unable to fulfill its obligations because, for example, it did not have the necessary funds. The Code requires that when an announcement of an offer is made, the financial adviser to the offerer or some other appropriate independent party must confirm, in the press announcement of the offer, that resources are available to the offerer to enable it to satisfy full acceptance of the offer. If the offerer itself is then unable to comply with its obligations, the Panel could call upon the financial adviser to do so.[42]

ii. *Cash Alternative.* The Code has provisions to prevent an offerer company from acquiring a significant holding of shares in a potential offeree company, say 29 percent, for cash, and then offering to acquire the outstanding shares by means of a share-for-share offer or by means of an offer involving some other security of the offerer. Where an offerer, and any person acting in concert with it prior to the closing of the offer and within twelve months prior to the announcement of the offer, has acquired for cash 15 percent or more of the voting rights of the class of shares in the offeree in question, then the offerer must accompany the offer with a cash alternative at not less than the highest price that it has paid for shares in the twelve-month period.[43] If the Panel believes that other circumstances render it necessary to require a cash alternative in order to give effect to General Principle 1, then it may require the offerer to make a cash alternative in any event.[44]

iii. *Partial Bids.* An offer must usually be conditional upon the offerer's resulting holding in the company carrying over 50 percent of the voting rights. Partial bids are allowed only in rare circumstances, upon compliance by the offerer with various strict requirements of the Code.[45]

c. Disclosure of Information

The status of the announcement of a firm intention to make an offer is very important in terms of the Code. The Code provides that no announcement may be made unless the offerer has every reason to believe that it can and will continue to be able to implement the offer, and responsibility for ensuring that this is the case rests on the financial adviser to the offerer.[46] Once a firm announcement has been issued, the offerer must proceed with the offer except with the consent of the Panel; a simple change in general, economic, industrial,

41. *Id.*
42. *Id.* R. 2.5(c).
43. *Id.* R. 11.1(a).
44. *Id.* R. 11.1(b).
45. *Id.* R. 36.
46. *Id.* R. 2.5(a).

or political circumstances will not justify failure to proceed with an announced offer.[47] Announcements are positively required in a range of circumstances, primarily to ensure that information is made public when public interest requires that it should be.

The Code also provides that shareholders must be given sufficient information and advice to enable them to reach a properly informed judgment as to the merits or demerits of an offer.[48] The obligation of the offerer in these respects towards the shareholders of the offeree company is not less than the offerer's obligation towards its own shareholders. Accordingly, the Code and Stock Exchange Rules require a wide range of specified information to be set out in a formal offer document and in circulars by the target.

d. Restrictions on Dealings

Acquisitions of blocks of shares, prior to a bid, are governed in the United Kingdom by the Substantial Acquisition Rules, which were introduced in the light of the disquiet caused by "dawn raids" where blocks of shares representing up to 30 percent of companies were acquired in the market in a matter of minutes. Broadly, a purchaser may not increase its holding to over 15 percent but less than 30 percent (at which point the provisions of the Code become applicable) by market purchases of 10 percent or more in any period of seven days, but must proceed by way of a tender offer available to all shareholders. The object of these rules is to ensure that effective control of a company does not pass without the board having the opportunity to advise shareholders and to give all shareholders an equal chance to sell shares.

Once a company has determined that it will make an offer, it is free, in contrast to the position in the United States, to purchase shares and continue to make purchases in general throughout the offer period albeit that it may have to disclose these purchases. This freedom, however, is limited in two particular respects.

First, unless the board of the target recommends the bid or the purchases are made from a single shareholder, a bidder is not entitled to purchase shares that when aggregated with its existing holding will take it beyond 30 percent during the first twenty-one days of its offer.[49] The object of this rule is to ensure that if there is another offer or the board wishes to resist the offer and explain why, it has time to explain its reasons to shareholders before the transaction becomes a fait accompli. The second restriction is that the cash price paid by an offerer must be offered to all other shareholders if a purchase is made prior to the offer in certain circumstances.[50]

47. *Id.* R. 2.7.
48. *Id.* R. 23.2.
49. *Id.* R. 5.
50. *Id.* R. 6.1.

e. Disclosure of Dealings

By the Companies Act 1985[51] any acquirer of more than 5 percent of the issued equity capital of a public company must declare its interest within five days, and complex rules exist whereby interests of interconnected parties are aggregated. In addition, companies are given the power to investigate the beneficial ownership of shares, and insofar as any nominee refuses to answer as to the beneficial owner it represents, then the company is entitled to disenfranchise those shares.[52] This power is increasingly being used and thus makes it much more difficult for a bidder to build up an interest in a company secretly even below the 5 percent threshold.

The means adopted for ensuring that no improper dealings occur during an offer is a regulation requiring disclosure of holdings and dealings in the offer document or by announcement. The offer document must disclose the shareholdings in the target of a wide range of specified people and bodies and relevant dealings in the last twelve months.[53] If the offerer is offering its own equity securities as consideration or part of the consideration, then the offer document must also give details of various specified shareholdings and dealings in such securities.[54] Details of various specified shareholdings in the target and the offerer must also be given in the document circulated by the directors of the target.[55] The directors must state if they intend to accept the offer in respect of their own shareholdings.

Once the offer has been announced, any dealings by the parties to the offer, including concert parties and "associates" (which is widely defined and includes the relevant company's pension fund), in either the offerer or offeree company's shares must be disclosed daily by way of announcement to The Stock Exchange, the Panel, and the press.[56] Any such announcement of dealings must contain details of any arrangement in relation to the securities in question that exists for the offerer, or any person acting in concert with it, or for the offeree company, to bear any associated liability (e.g., indemnity or option arrangements).

A recently introduced rule also requires disclosure of dealings whereby the holder has or will have more than 1 percent of the share capital of either party. This rule is designed to ensure that market support operations are known to the market at an early stage—a sensitive issue in the light of the Guinness scandal.

f. Timings

Once the terms of an offer have been announced, the offer document should normally be posted within twenty-eight days of the announcement of the terms

51. Companies Act 1985, §§ 198-204.
52. *Id.* § 212.
53. THE CITY CODE, *supra* note 20, R. 24.3.
54. *Id.*
55. *Id.* R. 25.3.
56. *Id.* R. 8.

of the offer,[57] and at the same time, or as soon as possible thereafter, the board of the target should circulate its view on the offer.[58]

An offer must remain open for at least twenty-one days but may not remain conditional for more than sixty days.[59] Except when there are competitive bids, the Code attempts to limit the period during which the company is under siege to sixty days from the date of posting of the document, and a number of rules effectively lay down a timetable to ensure this is achieved.[60] Furthermore, if an offer has not been declared unconditional as regards the level of acceptances within twenty-one days from the first closing date (i.e., forty-two days into the offer period), an accepting shareholder has the right to withdraw its acceptance.[61] Any revised offer must be kept open for at least fourteen days from the date of posting the revised offer document.[62]

g. Provision of Information to Other Bidders

It may be a surprise to overseas investors that the Code mandates that if information is provided to one bidder, equal information has to be provided to any other bona fide bidder, however unwelcome.[63] The result of this rule is that boards of companies are very reluctant to provide detailed information to a bidder, however friendly, unless they are certain that its bid will succeed. The ability of even a friendly bidder to carry out due diligence will often, therefore, be extremely limited. This inability often deters bidders from proceeding.

2. *Continental Europe*

a. Systems of Regulation

The systems of regulation of takeover bids in the major countries of continental Europe are diverse both as to their method and their extent. Two are statutory, two semistatutory, and two voluntary. Germany, the least regulated country, has no regulatory authority responsible for takeovers. The only rules governing public offers are voluntary guidelines[64] promulgated in 1979 by the Stock Exchange Committee of Experts, which is affiliated with the Federal Minister of Finance. There is, therefore, no system for policing and enforcing the guidelines; accordingly, the conduct of a bid is virtually untrammelled.

Similar problems exist in respect to the other nonstatutory jurisdiction, the Netherlands, which has a merger code supervised by the Merger Committee

57. *Id.* R. 30.1.
58. *Id.* R. 30.2.
59. *Id.* R. 31.1; R. 31.6.
60. *Id.* R. 31.
61. *Id.* R. 34.
62. *Id.* R. 32.1.
63. *Id.* R. 19.4.
64. Guidelines for public, voluntary purchase and conversion offers and/or invitations to make such offers for officially listed shares or transfer rights or for those sold on the regulated unofficial market. INTERNATIONAL SECURITIES LAW AND PRACTICE 119 (J. M. Robinson ed. 1985).

instituted by the Social and Economic Council (an advisory body to the government). The rules of the Merger Code do not have the force of law and are backed by twofold sanctions: public statements by the Merger Committee concerning nonobservance of the Merger Code; or public statements of censure.[65] In addition, injunctions and damages may be available, although no such claim has yet been instituted. The member of the Netherlands Stock Exchange Association through which the bid is made has the duty to procure observance of the Merger Code.[66] This array of sanctions is relatively toothless and would not operate to restrict undesirable activities by unscrupulous parties to a bid.

In France, regulation of takeovers is entrusted to bodies of both statutory and nonstatutory nature.[67] These bodies have approval powers and control over the terms of a bid and over the necessary documentation, and accordingly can prevent the making of a bid at all. These powers ensure the enforceability of requirements both as to the terms of an offer and their fairness, and the appropriate level and form of information to be disseminated.

Takeovers in Italy are not specifically dealt with by an Italian law or regulation. They are, however, usually deemed to be "solicitations of savings" and accordingly subject to the control of the Commission for Companies and Stock Exchange (CONSOB). The nature and extent of this control is, however, unclear and currently a subject of debate. Its powers extend more to the dissemination of appropriate information than to the merits of a transaction; in particular, the necessary prospectus must receive CONSOB approval before issue.[68] The Milan Stock Exchange Code of Conduct contains rules as to the conduct of bids, but has no binding force. The sanctions for breach are public announcements as to the violation and requirements as to whether the offer proceeds, backed up by fines and criminal sanctions.

In Belgium, supervision of takeovers is the responsibility of a statutory body, the Banking Commission, which is charged with overseeing public offers.[69] In theory, the powers of the Banking Commission are very limited. It cannot

65. Merger Code, ch. IV, art. 32.

66. AMSTERDAM STOCK EXCHANGE ASSOC. CIRCULAR NO. 339 (July 17, 1970).

67. *E.g.*, the Stock Exchanges Council (Conseil des Bourses de Valeurs), an independent professional body which controls dealings on The Stock Exchange and is responsible for the analysis and approval of the price of a cash offer and the terms and conditions of a share exchange offer (which has delegated some of its power to the company of the French Stock Exchange (Société des Bourses Françaises); the Stock Exchange Commission (Commission des Opérations de Bourse or "C.O.B."), an independent administrative authority which is responsible for the proper disclosure of information and the approval of relevant "prospectuses"; and the Ministry of the Economy, Finance and Budget, which coordinates the creation of regulations applicable to takeovers. Representatives of the above authorities meet within the framework of the Supervisory Board of Takeovers (Comité de Surveillances des Offices Publiques) which harmonizes the activities of the Stock Exchange authorities which are involved in takeover procedures.

68. Law No. 216 of June 7, 1974, art. 18, Official Gazette, June 8, 1974, No. 149, *as amended by* Law No. 77 of Mar. 23, 1983, Official Gazette, Mar. 28, 1983, No. 83.

69. Royal Decree No. 185 of July 9, 1935, Moniteur Belge (July 10, 1935).

prohibit an offer, restrict its terms, or impose legal requirements as to how it is made. It can only veto the making of an offer for a period of up to three months and make public its decision. Its informal persuasive powers are, by virtue of its broad powers of supervision over Belgian banks, considerably wider than its formal mandate, but by no means sufficient to enforce the orderly conduct of takeover activity, as the recent Société Generale bid demonstrated.

The Syndic Councils of Spain's four official Stock Exchanges are empowered by law to control takeover activity.[70] They exert control over wide areas of procedure, practice, documentation, and disclosure. The terms of the offer and the formal offer document both need the approval of the relevant Syndic Council, without which the bid cannot proceed.[71] Syndic Councils can, and do, reject the terms of a bid, although such a rejection must be reasoned and is subject to appeal.[72] It is likely that the extent of regulatory control of the terms of an offer, other than to ensure dual treatment of shareholders and procedural fairness, will be reduced in the future as EEC harmonization progresses. The powers of veto of the Syndic Councils are currently wider than in other EEC member countries.

Clearly, the regulatory systems of these countries have little in common as to their structure and application. They have been shaped by the environment in which they have evolved. Some of the systems are statutory, some voluntary, and some hybrid. Their effectiveness and the strength of available sanctions seem to have little relationship to their origins.

b. Underlying Principles

Although it is difficult to extract distinctive common themes from the different systems, they all have investor protection as an underlying principle. Its manifestation varies from country to country. In Belgium, for instance, the Banking Commission seeks to ensure the equal treatment of, and the adequacy of information supplied to, the target's shareholders.[73] The German voluntary guidelines seek to prevent preferences of some shareholders over others.[74] In Italy, CONSOB's duties are to ensure that sufficient and not misleading information is made available by the offerer to the public.[75] The Milan Stock Exchange's Code of Conduct seeks to ensure that the terms of the offer are fair and that there is no discrimination between shareholders.[76]

The aims of the different systems are not limited to protection of the shareholders of the target. In Belgium, the Banking Commission is concerned

70. Royal Decree No. 279/84 of Jan. 25, 1984, Official Bulletin 16 (Feb. 16, 1984).

71. *Id.*

72. *Id.*

73. Law of June 10, 1964, Moniteur Belge (June 20, 1964); Royal Decree No. 185 of July 9, 1935, *supra* note 69.

74. General Principle 1 of the voluntary guidelines, *supra* note 63 and accompanying text.

75. Law No. 216 of June 7, 1974, arts. 3, 4, 5 and 18, Official Gazette, June 8, 1974, No. 149, *as amended by* Law No. 77 of Mar. 23, 1983, Official Gazette, Mar. 28, 1983, No. 83.

76. MILAN STOCK EXCHANGE CODE OF CONDUCT art. 3, REVISTA DELLA SOCIETA 1169 (1971).

with maintaining an orderly market.[77] In the Netherlands, a whole chapter of the Merger Code deals with the protection of employees' rights in a merger.[78]

c. Detailed Provisions

All the regulatory systems provide for regulation of the terms and conduct of the offer. As mentioned above, the extent to which the terms can actually be controlled by the relevant body vary from country to country. All systems deal with issues such as price and the form of consideration offered, timing, and to whom the offer must be made. How the relevant rules are expressed, and the extent of regulation they impose, are entirely idiosyncratic to each country. A wide range of other matters are also requirements of or controlled by some or all of the countries. The extent to which the different countries regulate or constrict the ability of the target's board to frustrate an unwanted bid varies widely.

All the systems aim to ensure that adequate information is disseminated to the appropriate parties. They require a formal offer document to be published, with various fairly standard basic contents, although no two countries have the same detailed requirements. Requirements as to the publication and circulation of the offer document vary both as to whether mailing to individual shareholders is required and as to the extent of other publicity such as advertisements or official filings.

Rules as to dealings in shares of the offerer or target also vary. Unlike in the United States, acquisitions during the offer period are not generally prevented. Nevertheless, such acquisitions, as well as holdings at various specified levels, are in some cases disclosable in the offer document or to the relevant authorities.

d. Comparison with the United Kingdom

Profound differences exist between all the major EEC countries as to the style, scope, and effectiveness of their regulation of takeover activity. That none provides the same depth and effectiveness of regulation as the system in the United Kingdom is generally accepted. The Panel is a watchdog with real teeth, run by professionals with detailed relevant experience who are in a position to respond promptly and effectively to changing situations. In most other European countries, the regulation of takeover activity is backed by inadequate sanctions and administered by bodies inappropriately equipped for their task. The City Code is more detailed and sophisticated than any of its equivalents and provides an environment in which the interests of the offerer, the management of the target, and most important of all, the shareholders of the target are carefully balanced. The City Code has formed the basis of the codes of conduct of bids in various countries, and in particular France and Italy. In France, the methods of the SEC have also been influential.

77. *Supra* note 11.
78. Merger Code, ch. II. SER—besluit Fusiegedragsregels (1975).

IV. EEC Control of Acquisitions

A. Merger Controls

1. *Current Controls*

The European Commission's powers to evaluate mergers pursuant to articles 85 and 86 of the 1957 Treaty of Rome currently exist alongside national ones. The scope of these powers is uncertain. The decision of the European Court of Justice (ECJ) in the recent *Philip Morris/Rothmans* case[79] has potentially greatly widened the scope for control of acquisitions by the Commission, although the nature of this extended scope is far from clear. The ECJ decided in this case that article 85 of the Treaty of Rome, which prohibits "agreements which . . . are able to affect trade between Member States and which . . . restrict competition within the Common Market," can apply to certain types of share acquisition. This decision reverses the position as previously understood, which was that article 85 had no such application.

The *Philip Morris* case shows that the ECJ is now prepared to apply article 85 where company *A* acquires a minority stake in company *B* (the two remaining distinct entities) and the holding is used as a means of coordinating behavior between the two companies or where company *A* acquires an interest in company *B*, the controlling shareholder of company *B* being a competitor of company *A* or carrying on business in a related field to that in which company *A* carries on business. While the judgment clearly extends the scope of article 85, it does not, on its face, extend the application of article 85 to outright acquisitions or indeed to the acquisition of a controlling interest.

Acquisitions of control may, however, be caught by article 86 of the Treaty of Rome, which prohibits the abuse of a dominant position in the EEC or a substantial part of the EEC. The ECJ's interpretation of article 86 in the *Continental Can* case[80] demonstrates that the mere acquisition of the company by a competitor could of itself constitute an abuse of a dominant position. The practical difficulties faced by the Commission in applying article 86 to merger control are evident from the fact that the *Continental Can* case remains its only formal merger decision to date. Nevertheless, the Commission's powers under article 86 have had a critical influence on a number of mergers, not least the British Airways/British Caledonian merger, where British Airways was obliged to give certain additional undertakings to the Commission as to the future conduct of the business of the merged entity, after the merger had already been cleared by the United Kingdom Monopolies and Mergers Commission.

The recent consortium bid for Irish Distillers Group was halted when the Commission objected to it on the grounds that it would constitute an abuse of a

79. British Am. Tobacco Co. v. E.C. Comm. (Philip Morris Inc. and Rembrand Group Ltd. intervening) (Cases 142/84 G 156/84) [1988] 4 COMM. MKT. L.R. 24.

80. Europemballage v. Comm. 1973 E. Comm. Ct. J. Rep. 215, 12 COMM. MKT. L.R. 199.

dominant position by the consortium. This controversial use of article 86 clearly demonstrates the willingness of the Commission to go beyond the previously generally accepted ambit of article 86.

Articles 85 and 86 present practical problems in that neither article provides for prior notification of a proposed acquisition or merger, or for a formal grant of approval. In practice, parties may discuss a proposed transaction and sound out the Commission's likely reaction to a share acquisition or merger and discuss changes that might render it acceptable to the Commission. Even then, persons with a "legitimate interest" (which could include an unwilling target or a third-party competitor) may make a complaint to the Commission. If the Commission decides that an acquisition or merger does infringe article 85 or article 86, it has the power to impose a substantial fine (up to 10 percent of turnover) or, in an extreme case, to order divestment.

2. *Proposals for Reform*

The European Commission has for many years sought to institute a more formal system of Community-wide merger control. Indeed, a draft regulation was first proposed as far back as 1973. Certain Member States have, however, been reluctant to cede control in this area. Little progress was made until recently when the Commission of the EEC, led by Mr. Peter Sutherland, the Commissioner responsible for competition, threatened to make extensive future use of its perceived powers under articles 85 and 86. The Irish Distillers case is an example of this new attitude. The Commission is now proposing formalized regulations governing "concentrations," in parallel with the 1992 program, with a greater likelihood of success. It is thought that the regulations would, in their current form, catch approximately 150 transactions each year.

Under the current draft of the proposed Merger Regulation,[81] a "concentration" exists where a merger or acquisition of control takes place. The Merger Regulation will only apply to a concentration having a "Community dimension." This definition is complex; whether or not a concentration has a "Community dimension" will turn on the countries in which the relevant enterprises carry on their activities and the size of their aggregate turnover.

Concentrations with a "Community dimension" will be prohibited if they are not compatible with the Common Market: where they give rise to or strengthen a dominant position in the Common Market or in a substantial part of it. Concentrations are presumed to be compatible with the Common Market where the market share of the undertakings concerned in the Common Market, or a substantial part of it, is less than 25 percent.

The draft Merger Regulation requires that a concentration with a "Community dimension" must be notified in advance. A concentration cannot be put into

81. COM (88) 734, O.J. EUR. COMM. (No. C 22) 14 (1989).

effect until the Commission informs the parties that there are no grounds for action under the Merger Regulation, or two months elapse without the Commission initiating proceedings under the Merger Regulation. The Commission may make one of several decisions, which are either that the concentration does not give rise to any substantial change in the competitive structure within the Community, or that the concentration gives rise to or strengthens a dominant position in the Common Market (or in a substantial part of it) and either is, or is not, eligible for authorization.

If this regulation is adopted, it will be important to consider any sizeable proposed European acquisition in the light of it. Bear in mind, however, that local competition and merger laws will continue in force even after any new Merger Regulation is adopted. The future interrelationship of national and EEC rules is at the moment entirely unclear, as the draft Merger Regulation contains no provisions relevant to this issue.

B. Regulation of Takeover Activity

A European Commission working group of experts has been considering a proposal for a draft Directive[82] on takeovers. Although the detailed provisions are at an early stage, it is clear that the Directive, when adopted, will have profound implications on the conduct of takeovers in the EEC. First, it is likely to provide for the establishment in each country of a statutory body with the task of overseeing all takeover activity. This move would be very beneficial in countries such as Germany, the Netherlands, or Belgium, where a lack of strong control has contributed to the creation of environments in which the portfolio investor is liable to miss the opportunity to reap the full benefits of its investment. An official statutory body backed by statutory sanctions would be expected to be in a better position to impose effective controls. In countries where regulation is more sophisticated, such a move is viewed with suspicion. In the United Kingdom, in particular, it is seen as having "major implications for the Panel's non-statutory system for regulating takeovers."[83] A statutory system would be expected to increase bureaucracy and decrease the flexibility that is a feature, and perceived as one of the great benefits, of the self-regulatory system currently overseen by the Panel.

The new Directive would impose requirements as to the conduct of takeover activity. These would be likely to include: notification and publicity requirements at the outset of the bid; restrictions on frustrating action by the target; an offer document to be circulated containing various specified minimum contents; a document to be circulated by the board of the target setting out comments in the bid and a recommendation as to acceptance; provisions as to timings (including

82. EEC Directorate General XV Doc. No. 63-87 (First Revision).
83. Ann. Rep. of the Panel (Mar. 31, 1988).

where there are competing bids); and reporting of holdings and acquisitions of shares in the target. These requirements are to be welcomed to the extent that they will raise the general standards of conduct imposed throughout the EEC on parties to takeover bids, thus ensuring improved investor protection. The harmonization that the Directive would ensure would reduce the current disparities between the countries.

The proposals would have the effect of imposing common minimum requirements that would be considerably less demanding than those imposed by the City Code, which would be amended to reflect the Directive but would continue to impose higher standards. This same effect would be the case, to varying extents, in some other EEC countries. The result would still be disparities between the EEC countries in their regulation of takeover activity, although all countries would be required to impose common minimum requirements.

V. The 1992 Program

The 1992 program derives essentially from the Single European Act,[84] which added a new article[85] to the Treaty of Rome of 1957. The new article requires the Community to adopt measures with the aim of establishing the internal market over a period expiring on December 31, 1992. The internal market is defined in the same article as "an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured in accordance with the provisions of this Treaty."[86]

It should be appreciated that nothing is new about these aims, which were all set out in articles 2 and 3 and later chapters of the original treaty. In effect, the 1992 program is a crash program to complete the structure devised. Much of the publicity surrounding the 1992 program is successful hype. What is significant is the increased pace of implementation of the necessary changes. Every company that does business in the EEC needs to consider its implications. Currently, a flurry of mergers and acquisitions is taking place in the EEC as companies attempt to position themselves for the single market. Only time will tell which companies are buying wisely with defined aims and which are reacting without a clear strategy to a program the long-term effects of which are still largely unknown.

The European Commission has to date made some 286 proposals for the single market. Those of most direct significance to merger and acquisition activity will be: the lifting of restrictions on capital movements within Member States, subject to certain emergency safeguards;[87] the harmonization of the structure and

84. European Communities (No. 12), Command 9758 (1986) (English version), O.J. Eur. Comm. (No. L 169) 1 (1987).

85. Treaty of Rome of 1957, art. 8(A), 298 U.N.T.S. 11.

86. *Id.*

87. 31 O.J. Eur. Comm. (No. L 178) 5 (1988).

management of public companies, including directors' duties, shareholders' rights, and worker participation;[88] a proposed new Directive that would regulate cross-border mergers;[89] the proposed new Directive for regulation of takeover bid procedures;[90] and a Directive likely to be approved soon that will require information to be published when major shareholdings in listed companies are acquired or disposed of. The relevant Rules will be triggered upon acquisition of 10 percent, 20 percent, 33.33 percent, 50 percent or 66.66 percent of voting stock of such a company.[91]

In addition, the proposed merger control regulation[92] would give the Commission power to block inter-Community company mergers. This is not strictly part of the 1992 program but is closely related.

VI. Conclusion

This article is intended to highlight the current disparity between major EEC countries as to the practicability of making acquisitions of public companies, the scope for interference with or control of such acquisitions by relevant authorities, and the extent of regulation of takeover activity. In some countries hostile takeover bids are very difficult, if not impossible, to make. In others, they can be made, but the extent of practical and procedural difficulties should be assessed before a bid is attempted. In all cases, great care in planning and execution will be essential. The larger a transaction is, and the more countries it straddles, the wider the range of possible obstacles becomes.

Considerable progress has already been made within the EEC to harmonize legislation relating to the listing of securities on Stock Exchanges, accounting issues, and the establishment of businesses. When the various reforms discussed above are adopted and implemented, the current imbalances between the different countries should be substantially alleviated. The importance of the EEC in this field is increasing significantly, and EEC-originated laws can be expected to supplant over the years many of the existing national controls and requirements. Nevertheless, it would be a foolish corporate predator who underestimates the extent to which language and cultural diversity, let alone the wide historic differences in investment patterns, will continue to throw up roadblocks to his activities.

88. 5th Company Law Directive (proposed), 26 O.J. EUR. COMM. (No. C 240) 2 (1983).
89. 10th Company Law Directive, 26 O.J. EUR. COMM. (No. C 23) 11 (1985).
90. *See supra* note 81 and accompanying text.
91. COM (85) 791 and COM (87) 422.
92. *See supra* note 80 and accompanying text.