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NOTE: CROSS-BORDER MERGERS AND ACQUISITIONS IN EUROPE: REFORMING BARRIERS TO TAKEOVERS

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I. Introduction

One of the most dramatic changes in European markets in recent years has been the increased frequency and ferocity of takeover battles. The Washington Post reported in March 1999 that "the change in corporate culture and behavior here in the past few years has been nothing short of radical. The government-coddled climate in France, the cozy shareholder relationships in Germany, the secretive empires of the Italians - are all giving way to American-style cowboy capitalism." n1 While the substance of the claim is debatable, its spirit has been evident, particularly in the cross-border context. Hostile takeovers, the hallmark of 1980s U.S. capitalism, have become a strategic alternative in the European quest to expand into historically distinct markets.

Consider the British telecom giant Vodafone's hostile acquisition of its German rival Mannesmann in 1999. The $ 180 billion deal was the first foreign hostile acquisition of a German firm since World War II. n2 It took nearly six months to convince German shareholders to tender their holdings, and in the end they walked away with a premium of nearly 150 percent. n3 Next consider the unsuccessful bid by French luxury giant LVMH Moet Hennessy Louis Vuitton SA ("LVMH") to acquire Gucci, the Italian fashion house that trades on the Amsterdam Exchange. LVMH had quietly bought shares, amounting to 34 percent of Gucci, on the open market. At that point, LVMH attempted to gain representation on the board of directors, but Gucci resisted. n4 Gucci then rebuffed overtures for a friendly acquisition, instead finding an alternative in white knight Pinault Printemps Redoute ("PPR"), another French firm. [*685] Without shareholder approval, Gucci's board issued stock equal to 42 percent of the company's existing share capital, and sold it to PPR in conjunction with a five-year standstill agreement. n5 The validity of that transaction has been upheld in the first wave of litigation, but appeals are pending.

The experiences of Vodafone and LVMH are particularly interesting in the context of the creation of the European Union in 1992 and monetary unification in 1999. As European officials have attempted to create a single European financial market, they have struggled to develop a response to the patchwork takeover and financial market regulations that led to radically divergent takeover activity throughout the E.U. Germany, France, and the U.K., the three largest European markets, were responsible for 28 percent, 18 percent, and 13 percent, respectively, of G.D.P. in the E.U. during the 1990s, but they also accounted for 17 percent, 14 percent, and 30 percent of M&A activity. n6 The difference between the size of the economies and the development of their control markets is astonishing. Germany, with double the G.D.P. of the U.K., had only half as many M&A transactions during the past decade.

In part, these differences can be attributed to different methods of financing corporate activity. The U.K. relies on highly developed capital markets, while Germany relies on a sophisticated network of bank relationships; but, the differences extend beyond the characteristics of their financial markets. The legal framework for takeovers in Europe is as varied as the languages and cultural traditions. The United Kingdom has traditionally [*686] tolerated, if not encouraged, takeover activity, going so far as to develop a takeover code that establishes the rules for bidding and response, and integrates a broad conception of shareholder protections. Germany, in contrast, has little explicit takeover regulation. n7 The company law integrates the bank-dominated financial system with corporate governance mechanisms n8 that make hostile takeovers nearly impossible. Italy had no takeover law until 1998, n9 and in the Netherlands, directors have free reign to accept or rebuff bids even though shares are widely held. n10

The aggregate effect of European financial and legal integration on M&A activity has been mixed. Mergers and acquisitions have increased nearly 50 percent since 1991. n11 Throughout the 1990s, the percentage of gross M&A activity involving a European firm acquiring outside the common market rose from 8 percent to 17 percent, n12 reflecting the impact of globalization on the European mindset. However, the percentage of cross-border activity aimed at E.U. states has remained fairly constant, at roughly 14 percent. n13 The most likely explanation for this dichotomy is that while cross-border investment has [*687] become increasingly popular, the legal and structural impediments to the takeover of European firms have posed consistent barriers.

The "Thirteenth European Parliament and Council Directive on Company Law Concerning Takeover Bids," n14 was proposed twelve years ago in order to remove many of the legal and structural barriers to takeovers in the E.U. It has been the subject of fierce debate ever since. The stated objective of the Thirteenth Directive is to "protect the interest of holders of securities of companies governed by the law of a Member State when these companies are subject to a takeover bid and their securities are admitted to trading on a regulated market." n15 The most recent version of the directive creates a framework that member countries would then apply to domestic takeover laws. Since the first proposal in 1989, the Commission has consistently communicated its intent to establish a base level of shareholder protection by promoting disclosure, restricting the size and price of purchases, limiting the defensive measures by a target company, and establishing formal regulatory bodies in each state. n16 In 1990, the Commission further stated that:

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takeover bids may be viewed in a positive light in that they encourage the selection by market forces of the most competitive companies and the restructuring of European companies which is indispensable to meet international competition. n17

Thus, while the directive is intended to address threats to the welfare of shareholders during a change of control, particularly in the cross-border context, it was understood that such an endeavor would contribute to European integration by stimulating takeovers.

The mechanism through which a seemingly innocuous proposal to protect minority shareholders could substantially impact the level of takeover activity lies in two provisions of the Thirteenth Directive. Specifically, Article 5 requires member states to adopt a mandatory bid [*689] provision, n18 and Article 9 prohibits the adoption of defensive measures. The combination of these provisions has the potential to revolutionize corporate governance in continental Europe by incubating a unified pan-European market for corporate control.

This note combines an empirical examination of the cross-border market for corporate control in Europe with a theoretical inquiry into the effects of adopting a mandatory bid rule and a prohibition on defensive measures, as found in the Thirteenth Directive. Incorporated into this discussion is consideration of the following issues: (a) whether it is possible to achieve financial integration of the control markets in countries with radically different market structures; (b) whether adoption of a system that emphasizes cross-border allocational efficiency is consistent with the diverse structural and technical foundations of national corporate law; (c) the conflict between efficient resource allocation and distribution of wealth among shareholders; n19 (d) the tension between the British/American system of shareholder primacy with the Continental emphasis on stakeholders; and (e) the effects of harmonizing takeover laws on financial market development.

The remainder of this paper will be organized as follows: Part II will present a brief history of the Thirteenth Directive; Parts III and IV will summarize the function of a market for corporate control; Part V will provide an overview of the structural and technical features of the takeover markets in the United Kingdom and Germany (polar extremes in the takeover context); Part VI will provide an analysis of the mandatory bid rule; and Part VII will explore the prohibition on defensive measures; finally, Part VIII will reconcile the empirical findings on the [*690] takeover market with an analysis of the European regulatory regimes.

II. The Rise and Fall of the Thirteenth Directive

The long history of the Thirteenth Directive demonstrates the potential for the proposal to have a major impact on the internal markets of member states. The first proposal for a Takeover Directive

(January 19, 1989) was a detailed document, containing explicit reporting, timing and conduct limitations, intended to function as the primary takeover law for all member states. It faced fierce opposition throughout Europe, as states felt it to be an overly detailed and unwanted intrusion into their domestic policy. Takeover activity subsequently decreased during the recession in the early 1990s, and support for the directive evaporated. The directive was shelved in 1994.

The Internal Markets Commission revived the directive in 1996, changing it to a framework modeled on the British "City Code on Takeovers and Mergers." The Commission intended to sow the seed of shareholder protection, while permitting minor variations for implementation. At the crux of the new directive were the mandatory bid rule and the prohibition against frustrating actions, two provisions believed to be responsible for the success of the British model. Initially the framework faced significant opposition by E.U. member states, though most opposition centered on provisions relating to timing and enforcement. Opposition was essentially eliminated by the end of 1999 when the U.K. and Spain reached an agreement over the regulation of Gibraltar. The proposal passed the European Council on June 19, 2000, appearing to have the support necessary to carry it through Parliament.

Under fierce lobbying from German corporate interests, which perceived increased vulnerability after Vodafone's hostile takeover of Mannesmann, Germany withdrew its [*691] support of the directive in late 2000. n20 The directive, adopted by the Council, had already been submitted to the Parliament for consideration. The directive suffered significant setbacks when a coalition led by MEP Lehne, from Germany, proposed amendments that effectively gutted the directive. Among the amendments were provisions that allowed directors to enact defensive measures and a requirement to safeguard workforce levels after a change of control. n21 The amendments would have allowed directors to adopt poison pills, and also would have reduced the incentive for foreign firms to undertake a corporate combination. The directive was thrown into a conciliation process, where members of the Council and the Parliament attempted to negotiate an acceptable solution.

Ultimately, over German objections, the two sides approved a version of the directive that was substantially similar to before, and again the directive was submitted to the Parliament for a vote. In the meantime, opposition to the directive increased. A number of Italian and Spanish MEPs, motivated by recent attempts by the French state-owned utility company, Electricite de France, to purchase stakes in foreign utilities, joined Germany in opposing the prohibition against frustrating action. n22 Specifically, MEPs objected to the possibility of domestic utilities being owned and controlled by a foreign government. On July 4, 2001, the European Parliament voted 273 for and 273 against the directive. Under Parliamentary rules, a tied vote means failure. Nevertheless, the defeat in the Parliament does not necessarily mean the end of the Thirteenth Directive. It still has broad appeal throughout Europe. The Internal [*692] Market Commission has stated that it will consider reintroducing the directive at a later point in time. The ideas embodied in the Thirteenth Directive are considered essential to the success of the current European Financial Action Plan, which strives for financial integration by year 2005. It would not be surprising to see the reintroduction of the directive in the future when the political and economic climate has changed and M&A activity again explodes.

III. Overview of the Market for Control

Before delving into the specifics of European takeover legislation, it is first necessary to understand the function of the market for corporate control. The control market allows non-controlling parties (outside investors, minority shareholders, LBO firms, or even existing management) to enter into transactions whereby they gain control of a corporation and its productive assets. This means that both existing shareholders and outside investors will have an incentive to monitor management, constantly comparing a firm's performance with an optimal production level. In theory, when investors perceive that the actual value of a firm is below its potential value, they will attempt to gain control of those assets in order to capture the excess value. The market for corporate control thus functions to enforce allocative efficiency, putting productive assets in the hands of the highest value user. n23

There are three mechanisms through which the market for control of public corporations functions: n24 (1) corporations can enter into a friendly transaction (merger or sale of substantially all assets); (2) an acquirer can [*693] launch a tender offer aimed at acquiring all or a controlling block of the company's voting stock; and (3) a corporation or individual can buy a controlling block in the private market. It is important to distinguish the role of management in each of these transactions. In the friendly transaction, the target management is the primary point of contact with the acquirer. Shareholders may be asked to approve the transaction (depending on the law of the jurisdiction), but it is the management that is responsible for assessing the comparative value of independence and a change in control. In the tender offer and the private acquisition, the acquirer appeals directly to shareholders rather than to management, n25 allowing shareholders to overcome agency costs. However, many jurisdictions retain a role for management by allowing it to deploy defensive measures designed to impede the acquisition of control.

Managerial control over defensive measures exemplifies the agency problems caused by the separation of ownership and control in the modern corporation. Depending on the motivation for their adoption, defensive measures can function either to the benefit or to the detriment of shareholders. Shareholders benefit if management uses such tactics as leverage to maximize the price paid. This may explain why target shareholders frequently receive high premiums. On the other hand, shareholders are injured if directors use this power to entrench themselves or to secure private benefits from control. In fact, the ability of management to use defensive tactics, regardless of their motivation, may impose an additional cost upon the firm. A company's share price includes the probability-weighted value of a takeover. Since defensive measures reduce the likelihood of a takeover (either by raising the cost of acquisition or by blocking acquisition altogether), then the deterrence of potential bidders should also lower shareholder value by reducing the likelihood of a takeover. [*694] The significance of this observation is not limited to hostile takeovers, but should also apply to friendly transactions, as the distinction between friendly and hostile transactions may only be a question of when the deal was announced. n26 Robert Comment and William Schwert studied this phenomenon and found little evidence of deterrence in the U.S. from 1975-1991, but increased premiums. n27

While management may control the mechanisms for transfer of control, factors such as the ownership structure of the firm, the internal rules of corporate governance, and regulation of takeovers all influence the development and fluidity of the control market. n28 The first factor, ownership structure of the firm, determines the voting power, influence, and monitoring characteristics of shareholders. As shareholder concentration rises, the free-riding problem surrounding monitoring decreases, but the ability of shareholders to capture private benefits increases. n29 As the rules of corporate governance become more restrictive, the ability of shareholders to influence the decisions/strategy of management decreases; yet an overly liberal corporate governance regime could interfere with management's ability to utilize its expertise. Lastly, takeover regulation influences the costs of undertaking a change of control. These three factors interact, affecting the balance of power between shareholders and stakeholders, and among shareholders. Distortions in the takeover market radiate [*695] into the capital markets, influencing the ability of shareholders to monitor the management and even their willingness to invest. n30

The variance in financial and regulatory institutions in Europe has a number of important consequences for the development of a unified control market. All E.U. member states allow managers to negotiate friendly transactions. Such reorganizations are considered essential to the efficient use of national assets. However, European nations tend to fall into one of the two categories depending on whether they allow transfers of control without the participation of management. Efforts to integrate European financial markets highlight the tension between these policies. Adoption of a permissive corporate control regime at the European level would accelerate integration by encouraging cross-border transactions (for example, a French corporation may feel that it can better utilize the brand and assets of an Italian designer). But, cross-border transactions would also result in foreign control over productive assets and the lives of workers. Thus, although the Thirteenth Directive may be aimed at protection of minority shareholders, changes that affect the control market are bound to influence the development of capital, labor and product markets. Consequently, it is not surprising that the greatest resistance to the Thirteenth Directive came from Germany, where the influence of labor is the greatest.

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IV. Motivations For European Cross-Border Activity

Takeover activity in Europe has been increasing steadily since 1985. As integration in Europe continues, it is likely that we will increasingly see firms engage in takeovers by appealing directly to shareholders, either through private negotiations for controlling blocks or through tender offers. The magnitude of takeover growth is staggering. In 1999, the combined value of the takeover bids for

Gucci, Telecom Italia and Paribas was worth more than all previous European hostile bids from 1990 to 1998. n31 It is therefore important to understand the impetus for the takeover in order to understand the effects of the Thirteenth Directive.

The motivations for M&A activity are well documented. n32 It is not within the scope of this paper to discuss them all; however, a number of the motivations are worth mentioning in the context of a European market for control. One theory, based on the idea of market inefficiency, contends that target firms are "underpriced." Control entrepreneurs can gain simply by acquiring the target firm and recognizing the cash flows associated with its business. n33 If European markets are at different stages of capital market development, then it is possible that the price discovery mechanisms in thinner markets may not have fully developed. This explanation would not be inconsistent with the efficient market hypothesis. One would expect the market for corporate control to develop as [*697] acquirers with expertise and access to capital recognize cross-border opportunities.

The reduction of agency costs by bonding the payout of cash flow or replacing inefficient management is also likely to play a part in cross-border control battles. Continental corporations tend to have a few shareholders with large controlling stakes; in some cases, those shareholders are members of the same family. Such shareholders may be willing to tolerate a certain degree of managerial inefficiency if they receive large private benefits in return. One recent study of the Milan Stock Exchange estimated the value of control to be 82 percent of the value of the right to receive dividends. n34 Takeover battles are likely to increase efficiency so long as the acquiring party reduces the share of private benefits and/or increases efficiency of management.

Expropriation is also likely to be a motivating factor in the cross-border context. Varying levels of shareholder protection in the E.U. permit two-tier bids or squeeze out mergers in some states. However, these are precisely the evils that the Thirteenth Directive and many recent state takeover laws aim to address. Expropriation of stakeholders, particularly labor and creditors, is likely to become a stronger motivation for takeovers. Continental Europe is known for the close relationships between management and labor, and between corporations and their creditors. Andrei Shliefer and Lawrence Summers have hypothesized that "implicit contracts" exist where strong relationships allow parties to decrease contracting costs of long time periods. n35 However, such relationships may also create particularly high levels of inefficiency. For example, where labor has been able to extract wages in excess of European competitive levels or creditors have become lax in enforcing covenants, resources may be employed in sub-optimal combinations. In such situations, it is likely that [*698] integration of control markets will result in battles aimed to capture the value contained in implicit contracts.

Assuming for now that provisions similar to those of the Thirteenth Directive would increase the number of cross-border takeovers, it is not surprising that significant debate has centered on expropriation from stakeholders. In part this debate represents a longstanding policy difference between the U.K. and the Continent over the nature of the firm. If the firm operates to the benefit of its shareholders then expropriation of excess contract value would be both rational and justified. However, if the firm should be managed for the benefit of stakeholders - labor, contracting parties, and creditors - then "the threat of hostile takeovers acts as an unfavourable [sic] externality on an economy and results in welfare losses to society." n36 Since the European labor force is not particularly mobile, n37 the effects of expropriation from labor are likely to be concentrated in Continental states, where implicit contracts are most common. Shliefer and Summers argue that the incentive to invest human capital in a firm decreases as implicit contracting is minimized. Chancellor Schroeder supported this contention in November 1999 when he said, "hostile takeovers were 'never helpful' because they destroyed corporate cultures and undermined employees' commitment to their companies." n38 Similarly, fear of losing French factors of production prompted Francois Mitterand to say, in 1989, that:

if these takeovers continue like this, there will not be one French company capable of resisting the weight from overseas. These companies can count on me to put in place a [*699] system which will prevent the ruin of the French economy, prevent its pillage, especially within the Europe of 1993. n39

His fear may have been justified. In 1995, the U.K. acquired 103 firms on the Continent, but their continental counterparts acquired only thirty-six British firms. n40 However, such statistics may alternatively indicate that the opportunity for gain does not exist to the same extent in the U.K. where the market for corporate control operates with less friction.

Cross-border takeover activity is likely to continue as E.U. firms reposition themselves for a European market. Entry into new markets, economies of scale, economies of scope, financial synergy and cheaper factors of production will all create opportunities for gain that may not have existed by remaining in domestic markets. As long as the benefits accruing to an acquirer are greater than the premiums paid to shareholders, battles for control will continue to occur. By altering the transaction costs associated with the acquisition of control, legislation can either widen or narrow this spread.

V. Existing Takeover Barriers in Europe

"[The diversity of corporate law in the E.U.] forms altogether a cocktail of unnecessary, useless and costly complexity -- Kafka plus the Tower of Babel, shaken and stirred." n41

[*700] -- Frits Bolkestein, Internal Market Commissioner

Impediments to takeovers in European countries can be divided into structural barriers (relating to the structure of the capital market or the structure of share ownership within a corporation) and technical barriers (relating to corporate governance practices or takeover regulation). Each type of barrier influences the development of the other, and in the context of the control market, each can lead to devastating disruptions.

A large body of literature has developed relating corporate governance to the structure and legal framework of financial markets. These theories can be divided into three general categories. n42 First, many scholars feel that the development of market structure is path dependent, developing and organizing itself in response to the legal barriers. The wide shareholder distribution in the United States has been said to be a response to the legal barriers imposed by Glass-Steagal, creating an impediment to bank monitoring of public corporations. n43 Another school of thought claims that due to the global quest for efficiency, a single system of best corporate governance and market structure will arise - this theory is called "strong convergence." n44 Professor Coffee proposes a third intermediate category that incorporates the interdependence of technical and structural market features. Shareholder investment decisions are guided by the need for liquidity, so regimes without meaningful protections for minority shareholders will result in concentrated markets with internal monitoring. n45 In [*701] essence, he proposes a dynamic equilibrium consisting of market pressures and the legal framework.

As described above, legal barriers, efficiency concerns and capital market developments can all influence the nature of corporate governance and the market for control. In assessing proposals for reform, we are ill-advised to ignore the influence of any of these factors. The different patterns of share ownership in European nations implicate the diversity of underlying legal and financial institutions. In 1999, individuals owned 11 percent of shares in France, while the mean size of the largest stake was 52 percent; in Germany, individuals owned 15 percent and the average largest shareholder held 45 percent; in the U.K., individual shareholders owned 35 percent of the market and the largest shareholder on average held only 36 percent. n46 As market concentration decreases, so does holding size. Therefore, the evidence on market segmentation and the theories on corporate governance raise the question: "Will efforts to harmonize shareholder protection induce changes in control mechanisms as predicted under the three previous theories?" I contend that they will. In the following section, I briefly describe the technical and structural features of the control markets in the U.K. and Germany so that the effects of a mandatory bid rule and prohibition on defensive measures can be understood.

The United Kingdom

Capital markets in the U.K. are highly sophisticated. Share ownership is widely dispersed, market mechanisms are highly transparent, and market capitalization/G.D.P. is very high. In fact, market capitalization in the U.K. is the third largest in the world. n47 The takeover market in the U.K. is also the most active in all of Europe. In part, this is because the high distribution of shareholders lends itself [*702] to market monitoring. However, the takeover market in the U.K. has also developed under very permissive regulations.

The City Code on Takeovers and Mergers is the governing code for acquisitions of controlling positions in public companies. Enacted in 1968, n48 the Code ensures fair and equal treatment for all shareholders n49 by establishing rules for the conduct bids and the acquisition of controlling blocks. n50 In particular, the Code requires: equality of treatment of shareholders of the same class, limitation on actions by the target board, and disclosure requirements. n51 The success of the Code is particularly interesting considering the fact that it does not have the force of law. The Takeover Panel, a self-regulatory body consisting of representatives from the Bank of England and of the financial industry, administers it. n52 Penalties include public censure, and violations may influence access to public securities markets. n53 The provisions for conduct have been very successful at maintaining orderly markets and shareholder protections.

Two significant features of the Code - the mandatory bid rule and the prohibition against defensive measures - provide the model for the Thirteenth Directive and for domestic takeover laws adopted by European nations [*703] during the last five years. The mandatory bid provision, laid out in Rule 9, requires a partial acquirer to launch a bid for all remaining shares at a price equivalent to the highest price paid in the previous twelve months. The mandatory bid rule is triggered when voting power (a) crosses 30 percent, n54 or (b) if acquirer holds 30 to 50 percent of voting power and acquires an additional 1 percent in twelve months. n55 This means that when control of a firm is acquired through tender offer, private transaction, or on the open market, the remaining shareholders will be allowed to exit the corporation at the best price offered.

The second major provision of the City Code, found in Rule 21, prohibits management from taking actions that might "frustrate" a bid. This prohibition on frustrating actions precludes most defensive measures. Additionally, the rule becomes effective upon a bid or "even before the offer if the board of the offeree company has reason to believe that a bona fide offer is imminent." n56 Falling within the prohibited actions are issuance of shares (authorized or unauthorized), options or convertible securities, selling assets, or entering into contracts outside the ordinary course of business. n57 As a result, it is very difficult for the board to adopt defensive measures that would deter a bid (the prohibition focuses on effect not intent n58). Rule 21 embodies the philosophy that shareholders own the company and the board manages it; consequently, it is the shareholders that should decide on whether or not to sell [*704] the company. n59 However, the Code does allow management to search for subsequent bidders, white knights, on the view that such attempts do not frustrate the change of control - they simply provide options for shareholders.

The Code encouraged the development of a liquid control market. Hostile takeovers tend to be successful - with nearly 65 percent of bids resulting in a change of control. n60 Moreover, nearly 25 percent of bids are contested, resulting in auction settings that maximize shareholder value. n61 It is also worth noting that the Code has not completely eviscerated management's ability to defend against bidders. It has simply shifted the implementation of defensive measures from ex post to ex ante (though they must also have legitimate business purposes). Common tactics include placing a block of shares in friendly hands or placing assets outside a bidder's reach. n62 The key to using a pre-planned defensive measure is that it must not be "triggered" by the bid. n63 Moreover, management has been allowed to disclose financial information, such as a proposed increase in dividends or increased earnings, in response to a bid. n64

Germany

The structure of the control market in Germany bears little resemblance to that of the U.K. Prior to the takeover of Mannesmann, there had been only three hostile takeovers in Germany since World War II. n65 In part, this is [*705] because German companies tend to issue less equity, relying instead on long-term relationships with "universal" banks. In practice, the network or internal market means that equity represents only one-fifth of the asset value for listed companies, n66 and the average free float is 32 percent. n67 High levels of shareholder concentration further impede change of control. For example, in 1991, 90 percent of listed companies had a shareholder controlling one quarter of the stock. n68 By 1999 that level had dropped to 76 percent; however, 50 percent of listed companies still had a shareholder with a voting majority. n69 Thus, in order to gain control of a German corporation, one must negotiate directly with controlling shareholders.

Banks play many roles in German capital markets. They lend, they hold equity, they vote the shares of individual investors who deposit their holdings at the bank, and they may even have seats on a corporation's supervisory board. n70 The reach of the German bank is so pervasive that some estimate that the three largest German banks "control over one third of all shares in the seventy-five largest corporations." n71 Professor Jeffrey Gordon reports that banks now want to decrease their monitoring activities and change the shareholding pattern in Germany. n72 This change is not totally surprising. Many [*706] commentators have demonstrated the conflict of interests that banks face by playing so many roles. n73

The technical barriers to a change of control in Germany are formidable. One practitioner stated, "the German stock corporate law is the biggest poison pill of all." n74 To begin with, German corporations have a two-tier board. The management board is responsible for the day-to-day operations of the firm; directors are appointed to five-year terms, removable only for good cause. n75 The supervisory board is responsible for appointing and monitoring the management board. Under the

German Codetermination law of 1976 ("Mitbestimmungsgesetz"), n76 labor is allowed to appoint one-half of the directors of the supervisory board. Moreover, labor's representatives are not removable by shareholders, and shareholder representatives may only be removed by a 75 percent vote. n77 Thus, without management's approval, an acquirer may be unable to effect a change of control for five years (assuming the board is not classified and a simple change of control is not considered "good cause"). The structure of the supervisory board is one of the biggest impediments to shareholder primacy in Germany. n78

Since 1995, German takeover regulation has consisted of a voluntary takeover code, incorporating a mandatory bid [*707] at the 50 percent threshold, n79 and equal price treatment. n80 However, companies can opt in or out of the code; n81 therefore, it has little practical impact. On the other hand, Article 134 of the Stock Corporation Act provides that companies may adopt provisions that limit the maximum voting power of any shareholder n82 - popular levels are at 5 percent and 10 percent. n83 The result of these provisions is to limit the effect of a change of control by insulating management from shareholders.

VI. The Mandatory Bid Rule

As previously described, the Thirteenth Directive is intended to regulate the conduct of takeover bids by harmonizing disclosure requirements and regulating the conduct of interested parties. An instrumental provision in achieving those goals is the mandatory bid rule. In this section, I will explore the rule's effect on minority shareholders, as well as collateral implications for the market for corporate control.

The mandatory bid provision, found in Article 5, "Protection of minority shareholders; mandatory bid," of the 2000 Common Position, is intended to remedy problems of minority shareholder oppression and conflicts of interest arising from a change of control. Article 5(1) establishes the general rule:

Where a natural person or legal entity who, as a result of his own acquisition or the [*708] acquisition by person acting in concert with him, holds [publicly traded securities]... which, added to any existing holdings and the holdings of persons acting in concert with him, directly or indirectly give him a specified percentage of voting rights in that company, conferring on him the control of that company, Member States shall ensure that rules are in force which oblige this person to make a bid as a means to protect the minority shareholders of that company. This bid shall be addressed to all holders of securities for all of their holdings at an equitable price. n84

Article 5(1) obligates a purchaser to bid, at a fair price, for the remainder of the company when an acquisition brings his aggregate voting power beyond a specified threshold. Paragraph Five of the same article further specifies that the "percentage of voting rights which confers control...and the method of its calculation shall be determined by the rules of the Member State in which the company has its registered office." n85 Thus, the framework allows for significant variation in the application of the rule through different application of the control definition. Most European states, however, define control as the beneficial ownership of one-third of voting power. The Thirteenth Directive's wording is instructive because the framework is consistent with the formulation proposed throughout Europe.

At first glance, a mandatory bid rule seems out of place in an attempt to harmonize takeover laws. Not only would the Thirteenth Directive have established rules for the conduct of public takeover bids, but it also would have established rules for any change of control, whether publicly or privately negotiated. In order to be properly [*709] understood, the mandatory bid rule must be placed in the context of the classic European market for control. The transfer of control in Europe has traditionally taken the form of privately negotiated sale of large holdings. When changes of control occur, minority shareholders usually have little knowledge or influence over the transaction. Moreover, there are significant private benefits associated with the control of a corporation, n86 not the least of which is expropriation from minority shareholders. The mandatory bid rule protects shareholders from abusive tactics by involving them in the sale of control. It functionally prohibits the use of two-tier discriminatory offers during the acquisition of control and it prevents expropriation from minority shareholders by allowing them to sell.

The effectiveness of the mandatory bid rule in preventing expropriation from minority shareholders lies in the creation of an implicit exit right. Some scholars have questioned the need for such a right, theorizing that individuals purchase shares of a company in order to participate in the distribution of income. Since there is no reason to believe that dividend policy of a company will change because a new shareholder is in control, this protection is uncalled for. n87 In contrast, others call for protection, pointing to the ease with which controlling shareholders expropriate by "allocating synergistic benefits." n88 A comparison of expropriation from minority shareholders under different legal regimes is difficult, if not impossible, to perform. Yet one can still justify the protection of minority shareholders during a change of control by considering the results of such a transition. [*710] Transfers of control are accompanied by high turnover of directors and senior executives. The change in the identity of management is likely to be accompanied by a shift in corporate strategy that aims to capture previously unrealized value. Whether the increase in corporate value after the change of control will be apportioned pro rata among shareholders is impossible to determine ex ante. In the U.S. and the U.K., minority shareholders are protected from ex post expropriation by well-defined fiduciary duties; however, fiduciary duties differ throughout Europe. In Germany, there is no real tradition of fiduciary duties, n89 and little opportunity for shareholders to enforce them through litigation. n90 Without protection similar to that of a mandatory bid rule, the value of non-controlling shares should decrease upon a change of control, reflecting the risk of expropriation by the new controlling shareholder. In fact, earlier versions of the proposal provided that states must ensure minority shareholder protection by implementing the mandatory bid rule or other "equivalent means." n91 In 1999, however, the commission dropped this language and embraced the British rule because it felt that no other mechanism assured the same level of protection. The mandatory bid rule allows shareholders to avoid the costs associated with expropriation by tendering directly to the new controlling group, presumably at full price. n92

The mandatory bid rule also eliminates the ability of acquirers to affect a two-tier discriminatory transaction by ensuring minority shareholders an equitable price. In fact, [*711] the mandatory bid rule can be seen as giving minority shareholders a "costless [put] option." n93 Upon the change of control, it is the minority shareholders, not the acquirer, who determine the size of the acquisition. Minority shareholders compare the value of the offer with the expected value of the company under new management, discounted by the risk of expropriation, and choose the larger present value. Thus, minority shareholders (in aggregate) are assured the highest value during a change of control by reducing the pressure-to-tender problem.

By giving minority shareholders the power to force a second-step merger upon the acquirer, the mandatory bid rule redistributes wealth from controlling shareholders to minority shareholders.

Prior to the adoption of the rule, an acquirer would purchase the smallest stake necessary to achieve the strategic benefits of the transaction (whether synergistic or private). The acquirer would negotiate a private transaction, paying a control premium but also minimizing larger expenditures. After the adoption of the mandatory bid rule, controlling shareholders can no longer sell their stakes at the same premium because the acquirer may also be forced to purchase the rest of the company (at a significant cost). n94 The fraction of the control premium that minority shareholders receive would depend on the pricing formula adopted in member states. In the U.K., acquirers must offer minorities the highest price paid in the previous 12 months, ensuring that they receive the same price as control blocks acquired during that period. In contrast, minority shares in France may be bought for less than controlling shares (though the price usually still includes some premium). Since controlling shareholders will only sell if they are compensated for the private benefits they previously received, under a mandatory bid regime acquirers will not be able to distribute the ex ante control premium among shareholders pro rata. Adoption of a [*712] mandatory bid rule will therefore raise the price of such transactions by forcing acquirers to pay all shareholders a uniform premium, similar in size to that which previously would have been paid only to the controlling shareholders. The effect is to substantially raise the level of synergy or efficiency gains that an acquirer contemplates.

The net effect of a mandatory bid rule on the welfare of minority shareholders is difficult to ascertain. By allowing minority shareholders to share the control premium, the mandatory bid rule increases the minority's stake in an individual transaction. However, by raising the cost of the transaction, the provision may actually decrease the number of transactions. Professor Eddy Wymeersch hypothesizes that the rule may further injure minority shareholders by reducing the probability of an auction. Assuming that the mandatory bid rule will only be triggered by the private acquisition of a controlling interest, Professor Wymeersch concludes that a potential third party bidder would choose not to compete with a shareholder that had already secured a large block. n95 Consider the case where a private transaction results in the transfer of 30 to 50 percent of the voting stock (not implausible in Continental Europe). Acquisition of such a massive position prior to the public tender must signal potential competitors that the probability of success is low. However, the large stockholder's position can also be likened to a stock lock-up, rather than a toe-hold. Stock lock-ups may actually reduce the reservation price of the initial bidder by providing an offsetting source of gain (the sale of target stock at a premium, similar to green-mail). n96 It is, therefore, unclear whether the characteristics of the event triggering the mandatory bid will reduce the likelihood of an auction. Minority shareholder wealth and third party [*713] participation will depend on the size of takeover gains and the size of the marginal cost associated with purchasing minority shares.

In the long-run, the exit option afforded by the mandatory bid rule may be to drastically change the concentrated structure of Continental markets. Large shareholders will likely only be able to sell smaller blocks, as purchasers attempt to avoid the mandatory bid threshold and acquire the minimum number of shares necessary. Since the control premium received in the sale of smaller blocks will be reduced or eliminated, the willingness of large shareholders to engage in these transactions will depend on: (1) the size of the premium associated with smaller blocks, (2) the extent to which the sale affects the shareholder's ability to receive private benefits, and (3) the increased share value caused by a reduction in the liquidity discount. It is far from certain, but adoption of the mandatory bid rule may therefore encourage wider distribution of shares and promote greater development of capital markets along the Anglo-Saxon model.

VII. The Prohibition on Frustrating Actions

European countries have diverse structural and technical underpinnings of their capital markets, as well as very different ideas about the nature of the corporation. The British and German conceptions are polar extremes. In Britain, as institutionalized by the takeover code and hundreds of years of common law development, shareholders are viewed as owners, and managers as their agents. The case is not so in Germany, where labor representatives control 50 percent of senior managerial positions; the German model focuses on the role of stakeholders in addition to shareholders. Consistent with the different conceptions of the corporation, different mechanisms for monitoring and influencing the corporation [*714] developed. Article 9 of the Thirteenth Directive, entitled "Obligations of the Board of the Offeree Company," n97 challenges those conceptions by adopting the British view of the duties of target management when confronted with a change of control.

In all European countries, the board is directly responsible for the management of the business, and to varying degrees has the ability to affect corporate combinations. Defensive measures can be used to maximize the price that shareholders receive or to raise the price of acquisition so that takeover becomes impossible. In the United States, fiduciary duties constrain the actions that management may take in response to a takeover bid. n98 In the Netherlands, directors can take almost any defensive measure they choose, as evidenced by the dilution of Gucci shareholders. The Thirteenth Directive takes a different approach, relying on the British prohibition of "frustrating" action. Article 9(1) of the Thirteenth Directive reads:

The board of the offeree company shall abstain from completing any action other than seeking alternative bids which may result in the frustration of the bid, and notably from the issuing of shares which may result in a lasting impediment to the offeror obtaining control over the offeree company, unless it has the prior authorisation [sic] of the general meeting of the shareholders given for the purpose during the period of acceptance of the bid n99

[*715] The obligation to refrain from frustrating action is triggered as soon as the target board is informed of the acquirer's intent to make a bid. n100 Thus, target management is limited to acting in the shareholders' interests.

While the language of the rule is strong, it does not amount to complete passivity. Management is explicitly permitted to seek alternative bids. Excluding the search for "white knights" from the prohibition has two distinct results. First, it reinforces the idea that the company belongs to the shareholders, with management acting as their agents. Second, by allowing management to search for more attractive bidders, they are able to maximize shareholder value while also considering the welfare of stakeholders. The imposition of shareholder primacy into Continental control transactions would not limit management's ability to consider the welfare of the company as a whole when proposing alternative bidders; it only means that shareholders must ultimately make the decision. It is completely permissible for management to provide shareholders with a range of options.

The prohibition of frustrating actions, as contemplated under the Thirteenth Directive, is not absolute. Article 9(1) specifically contemplates the adoption of defensive measures in order to maintain independence. However, such defensive measures cannot be used to entrench management. Defensive tactics are permitted as long as shareholders, at a general meeting, authorize them after the announcement of the bid, n101 ensuring that shareholders receive and consider the offer. The Thirteenth Directive recognizes that the greatest risk of self-serving behavior by management is during the transfer of control, but also that [*716] corporate independence is not ipso facto incongruent with shareholder interests. In contrast to the City Code, which prohibits defensive measures absolutely, under this formulation of the rule, adoption of defensive measures would be a function of (1) the distribution of shareholders and (2) the amount of time until the bid expires. n102 The more diffuse shareholders are, the more difficult it would be to utilize this option in the limited time until the offer expires (assuming there is enough time to call a shareholder meeting as per the target country's law).

One effect of the prohibition against frustrating action will be to move implementation of defensive tactics to the pre-offer period, avoiding the problems associated with calling a shareholder meeting after announcement of a bid. In the U.K., defensive measures triggered by the change of control have been prohibited. Using the British construction as a guide, three major forms of pre-bid defensive actions -- placing blocks in friendly hands, structuring the rights of founders, and placing assets outside a bidder's reach -- are likely to occur. n103 In contrast, adoption of poison pills or conversion rights are prohibited in the U.K. under Rule 21 of the City Code; n104 and while the Thirteenth Directive permits the use of such mechanisms, deterrent effects of the shadow pill will be minimal. n105 From a functional standpoint, most European nations require a supermajority vote in order to issue capital [*717] without the preemption right attached, n106 so adoption of rights plans might not even be effective. n107

In general, the prohibition against frustrating action will serve to enhance the development of a European market for corporate control. The prohibition on defensive measures immediately serves to make takeovers more likely by reducing the cost of acquisition. Increasing vulnerability to takeovers has two beneficial effects on shareholder wealth: (1) it increases the probability of receiving a premium over market value for holdings, and (2) it induces managerial efficiency. n108 In both instances, shareholders win. By reducing the cost of acquisition and placing the choice to tender in the hands of shareholders, management is forced to increase operational efficiency, eliminating the potential for outside gain or risk replacement. Thus, shareholder wealth should increase as the takeover premium and firm efficiency both rise. Moreover, the incentive to monitor performance increases, causing security prices to more accurately reflect true value.

The ramifications of a lower cost of acquisition are twofold. At its most basic level, it will lead to a greater number of contested bids. Whether because multiple outside parties decide to compete for control or because management seeks out a white knight, the neutrality rule [*718] will increase the frequency with which corporations are put in play. Auctions in the market for control are beneficial to the shareholder and to society because productive assets are placed in the hands of the highest value user. n109 Second, in order to reduce competition for the merger gains, acquirers may try to purchase a block, similar to a stock lock-up. The analysis is identical to that of the mandatory bid rule: the lock-up either increases the cost to a second bidder or provides an offsetting source of gain for the holder (depending on the size of the position). n110 Thus, the lower cost of acquisition encourages corporate assets to move to the hands of the highest value user.

A number of commentators in the European Union have bemoaned the structural changes implicated by adoption of Article 9. The imposition of monitors upon the traditionally secretive strategic and economic planning of Continental corporations may create a sense of greater accountability, but it will also change the priorities of senior management. Continental managers have been consistent in their claim that the British system fosters myopia, forcing managers to gear production and strategy towards short-term share price movements rather than long-term value. n111 The merit to this claim is somewhat dubious. An entire industry of analysts, skilled in the study of corporate management, has arisen. If markets are efficient, then it is reasonable to believe that market participants are sophisticated enough to value long-term, as well as short-term plans. As companies announce new productive capabilities, new processes or technological innovations, the markets should adjust to reflect the discounted present value of expected cash flows. There may, however, be some support for the idea that an overly liquid market for corporate control could [*719] interfere with the ability of management to maximize value. Management may have a disincentive to notify the market about long-term contracts (implicit or explicit) or investments (financial, R&D, or physical), for fear that such disclosures may influence competitors or be misunderstood by analysts. In such situations, managers have conflicting interests - to invest for the long term, risking a negative market reaction and takeover vulnerability, or to seize short run opportunities that may have lower net present value, but will also garner a positive market reaction. The fear of losing their jobs may compel management to follow the short-term strategy. The empirical evidence of capital market development in the U.K. is not consistent with this story. Either the conflict of interests is not as important as claimed, or British efforts to foster disclosure and align incentives with shareholders have been successful.

Social Welfare Considerations

Removing takeover barriers will reduce agency costs and promote allocational efficiency. It is also likely to stimulate integration of control markets in Europe. The question remains whether this is desirable from a social welfare standpoint. Critics of the Thirteenth Directive have argued that, from a distributional standpoint, takeovers are neither pareto nor Kaldor-Hicks efficient. n112 Shareholders will benefit from the reduction in barriers, but stakeholders, especially labor, may be injured to a greater extent. n113 If implicit contracting is common in Continental Europe, then by restraining management during the bid, stakeholders will be particularly vulnerable (structural barriers, such as the high degree of cross-holdings in [*720] Europe, and technical barriers, such as co-determinism, guarantee some friction in the control market). However, in equilibrium, restraint of managers should not render such transactions Kaldor-Hicks inefficient. Stakeholders would be able to protect themselves from injury by impounding such risks into contract payments, either ex ante (essentially a risk premium) or ex post (similar to the change of control clauses common in officers' contracts). These payments would compensate labor for taking the risk of investing in firm-specific human capital. The gains from economy of scale and scope would then be divided between shareholders and stakeholders.

Promotion of control and financial efficiencies will likely lead to operational and productive efficiencies that may even render the transition pareto efficient. An explosion of product and capital market integration would likely occur, benefiting labor as well as shareholders. Control entrepreneurs would facilitate huge economies of scale. In addition, supply and demand considerations would occur within a pan-European economic framework. Of course, such thorough economic integration would require constant guidance from European authorities. A unitary control market would create positive tension, providing an impetus for further change; although fostering labor mobility and sacrificing local economic interests will depend on the removal of far greater legal and social barriers.

VIII. Empirical Examination of the Market for Corporate Control

Cross-border transactions demonstrate both the attractiveness of foreign acquisitions and the effect of barriers to takeovers. In this section of the paper, I present evidence describing the nature of the cross-border market for control in Europe. By examining the evolution of control markets in the European Union, we gain insight into the possible effects of the Thirteenth Directive. The evidence generally shows increasing levels of integration throughout the period studied. However, structural and legal barriers [*721] in the market for corporate control have been persistent, as indicated by the irregular distribution of cross-border investment.

Methodology

Using data from the Securities Data Corp. M&A Database ["SDC"], n114 I aggregated cross-border transactions between Germany, France, the United Kingdom, Italy, and the Netherlands from 1985 to 1999. For purposes of this discussion, references to Europe should be interpreted to include only those countries. I used the SDC "Cross-border flag" to screen out relevant transactions. Cross-border transactions are defined as having different nationalities for the "Acquirer's Ultimate Parent" and the "Target." This definition accounts for the practice of establishing foreign subsidiaries in order to affect a merger. n115

The SDC data consists of all reported mergers, tender offers and partial purchases that occurred during the time period. It therefore allows for effective investigation of control markets consisting of full acquisitions as well as the purchase of controlling stakes. Unfortunately, data on the value of transactions is not uniformly available. n116 Therefore, for the purposes of this exercise, I will focus on the quantity of M&A transactions rather than the value. Absent from this discussion is evidence of asset sales.

[*722]

Trends in Integration

The cross-border market for corporate control has developed rapidly throughout the period examined. From a relatively meager nineteen cross-border transactions reported in 1985, the cross-border market increased to 928 transactions in 1999 [See Table 1]. Not surprisingly, growth was particularly rapid in the late 1980s, nearly doubling between 1988 and 1992, as firms presumably began to position themselves for the development of a single European Union. Growth was particularly rapid again, in advance of monetary unification, rising by 31 percent between 1997 and 1999. It is evident that even without official harmonization of takeover practices, integration of product and financial markets led to increasing levels of cross-border activity. Such evidence implies that the economies of scale and scope are dominant motivations in the cross-border takeover market, as firms prepare for an integrated market, rather than waiting for subsequent liberalization as an opportunity to expropriate stakeholder wealth.

Varied Control Markets

The geographic distribution of cross-border investment activity underscores the importance of market integration to European firms. Levels of investment activity in France, Germany, and the U.K. are similar, while Italy and the Netherlands trail behind [See Table 2]. In part, these statistics demonstrate the attractiveness of new markets and the opportunity for strategic alliances/synergy. However, the level of investment in public companies is considerably higher in the U.K., nearly double that of most Continental nations and triple that of Germany. The attraction of the British public markets most likely stems from a combination of high liquidity and financial market regulation emphasizing transparency and shareholder protection.

The statistics revealing geographic dispersion are particularly informative when considered in the context of [*723] the larger European economic condition. The E.U. reported that Germany, France, and the U.K. were responsible for 28, 18, and 13 percent, respectively, of E.U. G.D.P. during the 1990s. n117 Without barriers to takeovers, one would expect the proportion of takeovers to be similar to the proportion of G.D.P. However, in 2000, the United Nations reported that the value of all cross-border M&A transactions flowing into these countries was $ 114B, $ 123B, and $ 395B, respectively. n118 Although the U.N. data does not limit the nationality of the acquiring company, it suggests that the dollar value of M&A transactions is consistent with my findings. The openness of the U.K. to foreign acquisitions, and the increased propensity to purchase public firms, leads to far greater value of the investment into the U.K. relative to the size of its economy.

While takeover activity increased throughout the period, it is interesting to note that Europeans have consistently preferred investing in private corporations. Over the entire period, 87 percent of all cross-border transactions involved a privately held target [See Table 1]. Two factors explain this phenomenon. First, structural and technical barriers combine to make acquisition of private companies significantly less expensive. Second, private companies far outnumber public companies, particularly on the Continent. n119 It is also interesting to note that the percentage of transactions involving private targets rose as high as 93 percent in 1997. This annual increase in the number of private acquisitions may also represent a shift towards expansion on the Continent.

[*724]

Geographic Distribution of Barriers and Takeovers

Reasons for cross-border investments and the methods of affecting them are varied. As previously described, the market for corporate control operates by allowing outside investors to purchase assets, merge, launch a tender offer, or buy a controlling block of shares. Even in nations with established takeover regulations (Britain and France), the lion's share of investments is made in private companies. When all investment activity (purchase of stakes in public and private companies) is aggregated, a pattern is clearly visible: countries with sophisticated capital markets tend to be acquirers, either because the cost of capital is lower in such markets or because they are able to use stock as consideration. Chart 1 demonstrates that the U.K. was a net purchaser of foreign assets, measured by the number of investments made. In fact, the U.K. was responsible for 34 percent of all acquisitions made during this period. However, the U.K., Germany, and France are relatively similar in terms of their attractiveness as target nations. Therefore, one of the greatest differences between these nations is their propensity to acquire. The technical and structural barriers that dominate the market for public corporations are obviously not as influential in the private market.

It is also interesting to note that the Netherlands is the only other net purchaser during this period. Possible explanations for this fact are twofold. First, the security markets and legal system of the Netherlands are similar to that of the U.K.. Consistent with the conditions for capital market growth found by La Porta, this may imply that Dutch firms more easily obtain financing for such acquisitions. Dutch G.D.P. n120 and the value of Dutch targets n121 are also consistent with those of the U.K., implying that capital market development may be a strong determinant of takeover activity. Alternatively, the [*725] disparity between the number of acquirers and the number of targets based in the Netherlands may be caused by the nearly insurmountable discretion afforded to Dutch managers. The Netherlands would become a net purchaser if, as anecdotal evidence suggests, the managers have the power to "just say no." Resolution of this matter deserves further study, but the answer is likely a combination of both reasons.

Not surprisingly, the market in control of public corporations reflects the impact of concentrated share ownership and legal barriers to takeovers to a far greater degree. Table 3 and Chart 2 present the number of acquisitions (full or partial) of public corporations, beginning in 1985. Large blocks of British shares moved into foreign possession in nearly 40 percent of all cross-border investments during the period. French companies followed closely, accounting for 26 percent of public targets during the duration of the study, even surpassing the U.K. from 1995-1999. In stark contrast, the level of takeover activity in Germany, Italy, and the Netherlands remained relatively constant and low. Since shares of public firms are readily liquid, takeover regulations dominate the decision to sell control in a single transaction. Thus, the unparalleled growth of M&A activity in France and the U.K. are attributed to financial liberalization. This divergence in target nationality is particularly striking considering the relatively equal distribution of acquirers. Even countries with high barriers to takeovers have actively engaged in international control transactions regardless of whether such transactions are permitted domestically.

Differences in the takeover environment of Member States are most strongly portrayed by the variance of successful tender offers. Tender offers accounted for nearly 33 percent of cross-border investments in British public [*726] firms, and 30 percent of French public companies, n122 but only 14 percent of investment in similar German corporations. While it is impossible to draw conclusions about the rates of success, clearly the greater percentage of British tender offers demonstrates the combined influence of capital market development and regulation. That continental firms, relatively secure from the threat of tender offers themselves, have adopted the tender offer as a technique for acquisition of control in Britain, indicates that adoption of the Thirteenth Directive will have considerable impact on the way control is exercised. The City Code ensures a relatively high probability of success n123 by promoting shareholder choice. Already, European firms have utilized the tender offer extensively in France, although stakes tend to be much smaller [See Table 4]. It should be assumed that tender offers will become increasingly prominent as a control mechanism as countries embrace shareholder choice and greater protection for minority shareholders, either through the convergence of corporate governance practices or by adopting the Thirteenth Directive.

Impact of Takeover Regulations: Comparison of European Public and Private Markets

Earlier findings demonstrated (1) increasing levels of integration in the European Union, even in the absence of uniform takeover regulation, but (2) European acquirers favor the investments into private companies. Data on the value of private transactions is nearly nonexistent and it is incomplete for public transactions; nevertheless, the most likely explanation for the divergence relates to the costs [*727] associated with both types of transactions. If the cost of engaging in a cross-border control transaction were simply a function of the size of the company, then we would expect to see similar investment patterns in public and private companies. n124 In contrast, if costs associated with takeover regulation and the structural features of European capital markets impose additional transaction costs, then the pattern of investment into public companies will reflect that distortion.

In Table 4, I report the size of European acquisitions for private companies, public companies and public tender offers. n125 For all nations except Italy, full acquisitions constitute over 70 percent of investment into private companies. The remainder of acquisitions is relatively evenly distributed, with a slightly higher number of purchases of majority stakes. The market for private companies demonstrates the desire of acquirers to capture the entire potential gain and reduce interference of minority owners (even though they are not affected by agency problems). The pattern does not seem to implicate any significant transaction costs unique to individual nations.

In contrast, the market for corporate control in public corporations depicts the influence of regulatory and structural barriers. The control market in Continental nations is dominated by acquisitions in the range of 0 to 10 percent. The size of acquisitions drops off quickly. Full acquisitions do occur, indicating that takeover costs are not a complete barrier to the exercise of control; however, the [*728] number of such acquisitions is dwarfed by smaller investments.

The U.K. demonstrates a similar pattern with one significant exception. British targets are significantly more likely to be entirely acquired (100 percent) in a single transaction than any other nation's. Moreover, full acquisition of public targets in the U.K. is equally as frequent as the smaller investments. The increased likelihood of full acquisition in the U.K. implies that the return on British targets must be considerably greater than that of any other country. Since it is unlikely that British corporate governance is more permissive of abuse by controlling shareholders, and the increased competition for control in Britain should decrease the size of available gains, the increased number of full acquisitions must be caused by lower transaction costs.

The greater return on British acquisitions caused by a comparative reduction in transaction costs is attributable to the City Code and the structure of capital markets. Even if the mandatory bid rule has the effect of increasing the cost of acquisitions, its effect appears to be countered by the prohibition on defensive measures; effectively, the decision between a full acquisition and the purchase of a stake is determined by the acquirer to a far greater extent in the U.K. than in any other country [See Table 4]. Additionally, the price of private benefits that controlling shareholders extract may be lower, as the diffuse share ownership creates a risk that controlling shareholders will themselves be squeezed out pursuant to a tender offer. n126 The impact of the City Code on the control market is particularly clear in the context of tender offers. Sixty-six percent of tender offers in the U.K. resulted in the acquisition of the entire corporation. n127 It is true that some of these tender offers [*729] were triggered by the mandatory bid rule, but the costs of the subsequent mandatory bid are known ex ante. Thus, it appears that the provisions of the Thirteenth Directive herein discussed have led to a dramatically different corporate control market in the U.K. than in the rest of Europe.

IX. Conclusion

The market for corporate control in Europe is highly segmented and notable for paradigm shifts that coincide with borders. The degree to which takeovers function to enhance productive and allocative efficiency clearly varies with the regulatory structure of European markets, influenced both by the promotion of minority shareholder protections and the relationship between shareholders and management. However, these barriers function as distortions only in the market for control of public companies. Integration in Europe has naturally gravitated to the private market where such regulatory distortions have little or no impact on the investment yield. In countries with higher levels of shareholder protection and facilitating legislation, notably Britain and to a lesser extent France, the transfer of controlling stakes in public companies has increased, as have economic and financial ties. The history of the City Code and analysis of the mandatory bid rule and the prohibition against frustrating action are consistent with the contention that adoption of such rules will accelerate European integration.

As demonstrated in the case of Britain, direct regulation of takeovers has not prohibitively increased the price of acquisition. It may have even lowered it, thereby promoting changes of control and benefiting minority shareholders, but the U.K. also has a long history of highly developed fiduciary duties that have influenced the development of capital markets. In contrast, the legal structure of Continental markets has not developed under the same standard of shareholder primacy. The imposition of British style control parameters will not immediately [*730] effect such a change. However, it is clear that both mechanisms discussed in this paper will increase the relative importance of minority shareholders and accelerate the distribution of capital among smaller investors.

The Thirteenth Directive, as most recently conceived, established a framework, leaving implementation to member states. Its failure in the European Parliament will allow countries to continue to isolate their domestic corporations from international monitoring and shareholder influence. At the crossroads of integration, European policies are confronting the tension between domestic policies and European aspirations. Whether nations embrace proposals such as the Thirteenth Directive will be a question of politics, played out in Brussels, in corporate boardrooms, in negotiations between labor and management, and ultimately in the voting booths. Nevertheless, if European integration is to succeed, it seems inevitable that a unified market for corporate control must develop, allowing capital and ideas to move fluidly across European borders.

Adoption of a takeover framework at the European level is not actually a prerequisite to the desired reform. In response to the resurgence of hostile takeovers during the 1990s, many member states have proposed or adopted their own takeover legislation based on the proposed Thirteenth Directive. Italy adopted legislation in 1998 and Germany proposed legislation in 2000. France has long had its own takeover law, partly based on the British law. One theme common to most of these efforts is inclusion of a mandatory bid rule. The problem is that without harmonization, such particularized reform efforts are bound to yield varied results. A mandatory bid rule is a positive step in the direction of shareholder protection, but it is functionally irrelevant if corporate directors can adopt a poison pill. It seems that European nations must choose whether they prefer to protect domestic interests or to foster the development of a pan-European control market. The former benefits traditional European interests, the latter strives for long-term integration.

[*731]

Table 1.

Cross-Border Transactions Among European Nations

Annual Number of M&A Operations

By Target Nationality

[SEE TABLE IN ORIGINAL] [*732]

Table 2.

Cross-Border Transactions Among European Nations

Characteristics of All Targets

1985-1999

[SEE TABLE IN ORIGINAL]

Table 2A.

Cross-Border Transactions Among European Nations

Characteristics of Public Targets

1985-1999

[SEE TABLE IN ORIGINAL] [*733]

Table 3. Acquisition of Public Corporations:

Breakdown by Nationality

1985-1999

[SEE TABLE IN ORIGINAL] [*734]

Table 4.

Size of Stake Purchased in Cross-Border Transactions

As a Percentage of the Target Corporation

1985-1999

[SEE TABLE IN ORIGINAL]   [*735]

Chart 1. Net Takeovers (All Targets)

(Frequency Acquisition - Frequency Target)

[SEE TABLE IN ORIGINAL]

Chart 2. Net Takeovers (Public Targets)

(Frequency Acquisition - Frequency Target)

[SEE TABLE IN ORIGINAL]

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawCorporationsShareholdersGeneral OverviewMergers & Acquisitions LawTakeovers & Tender OffersDuties & Liabilities of ShareholdersReal Property LawFinancing-Workouts

FOOTNOTES:

n1. Anne Swardson, In Europe, An Urge To Conquer; Hostile Takeovers Set New Standard, Wash. Post, Mar. 11, 1999, at E01.

n2. John Morris, Mannesmann OKs $ 180B Vodafone Bid, The Daily Deal, Feb. 4, 2000, at 1.

n3. Id.

n4. Swardson, supra note 1, at E01.

n5. Id.; see also John E. Morris, Gucci, LVMH Brace for Fresh Court Ruling, The Daily Deal, Mar. 7, 2001, at 1.

n6. European Commission, Directorate-General For Economic and Financial Affairs, Supp. A, Economic Trends, 5/6 Eur. Econ. 4 (2000), at http://europa.eu.int/comm/economy_finance/publications/european_economy/2000/a2000_0506_en.pdf. M&A activity was measured by the number of M&A transactions, both public and private. Cross-border transactions were double counted, once for the bidder country and once for the target country.

n7. In 1979 Germany adopted a voluntary takeover code, but it has little or no effect as companies can opt-in or out of the regulations as it fits their needs. However, takeover legislation has been proposed in the wake of the Mannesmann bid. The most recent version, expected to pass the legislature and take effect in 2002, will allow managers to adopt defensive measures subject to consent from shareholders, effective for eighteen months.

n8. Co-determinism, cross-shareholding, and the two-tier board will all be discussed in Part V.

n9. Company Law: EU Delays Takeover Laws For Minority Shareholders, Eur. Rep. 2447, Oct. 30, 1999.

n10. See generally Peter Wakkie & H. Tom van der Meer, Mergers and Acquisition in the Netherlands: Legal and Tax Aspects 1 (1992); Albert Corhay & Alireza Rad, International Acquisitions and Shareholder Wealth Evidence From The Netherlands, 9 Int'l Rev. Fin. Analysis 163 (2000).

n11. European Commission, supra note 6, at 4.

n12. Id. at 7.

n13. Id. (fluctuating between 12.9 percent and 15.0 percent).

n14. European Council, Common Position (EC) No 1/2001 of 19 June 2000 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting a Directive of the European

Parliament and of the Council on company law concerning takeover bids, 2001 O.J. (C 23) 1 [hereinafter Common Position].

n15. Id. at 9.

n16. The latest version of the Thirteenth Directive contains six general principles:

(a) all holders of securities of an offeree company of the same class are to be given equivalent treatment; in particular, if a person acquires control of a company, the other holders of securities are to be protected; (b) holders of securities of an offeree company are to have sufficient time and information to enable them to reach a properly informed decision on the bid; (c) the board of an offeree company is to act in the interest of the company as a whole, and must not deny the holders of securities the opportunity to decide on the merits of the bid; (d) false markets must not be created in the securities of the offeree company, of the offeror company, or of any other company concerned by the bid in such a way that the rise or fall in the prices of the securities becomes artificial and the normal functioning of the markets is distorted; (e) an offeror shall announce a bid only after ensuring that it can fulfill in full any cash consideration, if so offered, and after having taken all reasonable measures to secure the implementation of any other type of consideration; (f) an offeree company must not be hindered in the conduct of its affairs for longer than is reasonable by a bid for its securities.

Id. at 3-4.

n17. Garrick Holmes & Elizabeth De Bony, EC Commission Trains Its Guns on Corporate Takeover Defenses, M&A Europe, May 1990/June 1990, at 35.

n18. A "mandatory bid rule" requires the bidder or acquirer to launch a bid for the remainder of the outstanding shares once a specified control threshold has been reached.

n19. See generally Clas Bergstr<um o>m et al., The Optimality of the Mandatory Bid Rule, 13 J.L. Econ. & Org. 433 (1997).

n20. Paul Betts & Deborah Hargreaves, No Way In: Germany's Rejection of a Key Provision of an European Union Takeover Code Throws Another Obstacle in the Way of Dynamic Cross-Border Capitalism in Europe, Fin. Times, May 3, 2001, at 18.

n21. See Paul Meller, EU Parliament's Vote on a Merger Law Brings Dismay, Int'l Herald Trib., Dec 15, 2000, at 24; see also Victorya Hong, EU Takeover Changes Approved, The Daily Deal, Dec. 14, 2000, at 1.

n22. See Victorya Hong, EU Takeover Code Rejected, The Daily Deal, July 5, 2001, at 1.

n23. Professor Gilson remarked, "the control market allows a final constraint on management inefficiency short of business failure." Ronald Gilson, A Structural Approach to

Corporations: The Case Against Defensive Tactics in Tender Offers, 33 Stan. L. Rev. 819 (1981), reprinted in Ronald Gilson & Bernard Black, The Law And Finance Of Corporate Acquisitions 819 (2d ed. 1995).

n24. See Jesse H. Choper, Et Al., Cases and Materials on Corporations 915, 915-17 (5[su'th'] ed. 2000).

n25. "The tender offer provides a self-executing check on management's discharge of its responsibility as holder of primary control over the acquisition process." Gilson & Black, supra note 23, at 727.

n26. "The stage at which hostility is measured...determines whether transactions are classified as hostile. Moreover, these negotiations typically are confidential. When they are revealed before settlement, it is often because one of the negotiating parties sees its bargaining position enhanced by presettlement publicity." Robert Comment & G. William Schwert, Poison or Placebo? Evidence on the Deterrence and Wealth Effects of Modern Antitakeover Measures, 39 J. Fin. Econ. 3, 33 (1995).

n27. Id. at 37.

n28. Clas Bergstr<um o>m et al., The Regulation of Corporate Acquisitions: A Law and Economics Analysis of European Proposals for Reform, 1995 Colum. Bus. L. Rev. 495, 505 (1995).

n29. See Luigi Zingales, The Value of the Voting Right: A Study of the Milan Stock Exchange Experience, 7 Rev. Fin. Stud. 125 (1994).

n30. La Porta et al., found that, "a good legal environment protects the potential financiers against expropriation by entrepreneurs, it raises their willingness to surrender funds in exchange for securities, and hence expands the scope of capital markets... . civil law ... countries have both the weakest investor protections and the least developed capital markets, especially as compared to common law countries." Rafael La Porta, et al. Legal Determinants of External Finance, 52 J. Fin. 1131, 1149 (1997).

n31. Anita Raghavan & Steven Lipin, Europeans Are Learning Mergers the American Way, WALL ST. J., Apr. 23, 1999, at A12.

n32. For a good summary, see generally Roberta Romano, A Guide to Takeovers: Theory, Evidence and Regulation, 9 Yale J. on Reg. 119 (1992).

n33. Professor Romano states that studies of the takeover market have not found evidence of underpricing. Id. However, most studies to this effect have studied takeovers in the U.S. where market information tends to be impounded quickly. This assertion is not necessarily true in the cross-border context.

n34. Zingales, supra note 29, at 125-26.

n35. Andrei Shleifer & Lawrence Summers, Breach of Trust in Hostile Takeovers, in Corporate Takeovers 33, 37-40 (Alan Auerbach ed., 1988).

n36. Tim Jenkinson & Colin Mayer, Hostile Takeovers 16 (1994).

n37. John Coffee, The Future as History: Prospects for Global Convergence in Corporate Governance and Its Implications, 93 Nw. U.L. Rev. 641, 655 (1999).

n38. Jonathan Braude, German Leader Cools Blasting of Vodafone, The Daily Deal, Feb. 23, 2000, available at http://www.thedeal.com.

n39. David Berger, The European Markets Try to Coordinate, Unify Conflicting Merger Law, Nat'l L.J., Nov. 6, 1989, at 514.

n40. The reason for this disparity is unclear. Structural and technical barriers to takeovers in the U.K. are considerably less onerous. It is possible that the difference is a function of the ability of acquirers to use stock as consideration. Julie Wolf & Julia Finch, EC Rebuffs Advice from City and Presses on with Takeover Law, The Guardian, Nov. 21, 1997, at 1.

n41. Frits Bolkestein, Europe's Tangled Web of Rules, The Daily Deal, Jan. 31, 2001, at 22.

n42. Coffee, supra note 37, at 646-47.

n43. See Mark Roe, Chaos and Evolution in Law and Economics, 109 Harv. L. Rev. 641 (1996).

n44. Coffee, supra note 37, at 646.

n45. Id. at 647-48.

n46. European Commission, supra note 6, at 5.

n47. Investment Performance Digest 540 (Jennifer Sanford ed., 2000 ed.).

n48. Id. at 549.

n49. KPMG, Acquiring Public Companies An International Survey of the Rules and Regulations 261 (2d ed. 1999). See also Peter Lee, Takeover Regulation in the United Kingdom, in European Takeovers Law and Practice 133, 135 (Klaus Hopt et al. eds., 1992); Eddy Wymeersch, Problems of the Regulation of Takeover Bids in Western Europe: A Comparative Survey, in European Takeovers Law and Practice 95, 106 (Klaus Hopt et al. eds., 1992).

n50. A.C.R. Roberts & R.M. Wiseman, Possible Defensive Measures Against Stock Exchange Raids in the UK, in Defensive Measures Against Hostile Takeovers in the Common Market 213, 549 (Maeijer & Greens eds., 1990).

n51. Lee, supra note 49, at 135.

n52. See KPMG, supra note 49, at 262 (listing the members).

n53. For example, compliance with the City Code is a de facto prerequisite to listing on the London Stock Exchange. Roberts &. Wiseman, supra note 50, at 215-16.

n54. Eric Tomsett, Mergers and Acquisitions United Kingdom, in The International Guide To Mergers and Acquisitions 1.7.2.5.1 (1996).

n55. Investment Performance Digest, supra note 47, at 549. Prior to 1998 controlling shareholders in this position were allowed to acquire 2 percent per year. This tactic was frequently referred to as a "creeping takeover."

n56. Wymeersch, supra note 49, at 122.

n57. Lee, supra note 49, at 141.

n58. Paul Davies, Defensive Measures: The Anglo-American Approach, in European Takeovers Law and Practice 195, 200 (Klaus Hopt et. al. eds., 1992).

n59. Noel P. Hinton, The Role of the Takeover Panel in the UK, in Protection of Minority Shareholders 319, 322 (Matthias Stecher ed., 1997).

n60. Jenkinson & Mayer, supra note 36, at 10.

n61. Id. at 8.

n62. Davies, supra note 58, at 206.

n63. Id. at 210.

n64. This tactic was utilized in 81 percent of bids from 1984-1989. Jenkinson & Mayer, supra note 36, at 40.

n65. Don Goldstein, Hostile Takeovers As Corporate Governance? Evidence from the 1980s, 12 Rev. Pol. Econ. 381 (2000).

n66. The Solomon Smith Barney Guide To World Equity Markets 141 (Brian M. Anderson et al., 1999).

n67. Christopher Swann, Survey - International Mergers and Acquisitions, Hostile Takeovers, Fin. Times, June 30, 2000, at 4.

n68. Jeffrey N. Gordon, Poison Pills and the European Case, 54 U. Miami L. Rev. 839, 844 n.16 (2000).

n69. European Commission, supra note 6, at 5.

n70. Georg Maier-Reimer, Protection Against Hostile Takeovers in Germany: Banks and Limitations on Voting Rights, in EUROPEAN TAKEOVERS LAW AND PRACTICE 242, 243-45 (Klaus Hopt et al. eds., 1992).

n71. The Solomon Smith Barney Guide To World Equity Markets., supra note 66, at 141.

n72. Jeffrey N. Gordon, Pathways To Corporate Convergence? Two Steps On The Road To Shareholder Capitalism In Germany, 5 Colum. J. Eur. L. 219, 221 (1999).

n73. Professor Clas Bergstr<um o>m states that the conflict arises in part from the fact that equity positions tend to be smaller than creditor positions. As a result the Banks limit monitoring to a veto power, preferring less than optimal levels of risk. Bergstr<um o>m, supra note 28, at 503-04.

n74. Maier-Reimer, supra note 70, at 242.

n75. Arthur Pinto, The Legal Basis of Corporate Governance in Publicly Held Corporations: A Comparative Approach 59 (1998).

n76. Id.

n77. This is a threshold that poses even more of an obstacle when voting restrictions are considered. German firms are allowed to adopt maximum voting power, frequently capped at 5 percent.

n78. See Gordon, supra note 72, at 232; see also Mark J. Roe, German Codetermination and German Securities Markets, 5 Colum. J. Eur. L. 199 (1999).

n79. Edward F. Greene et al., Toward a Cohesive International Approach to Cross-Border Takeover Regulation, 51 U. Miami L. Rev. 823, 839 (1997).

n80. Milton L. Rock et al., The Mergers & Acquisitions Handbook 133 (2d ed. 1994).

n81. Anita Raghavan, In Europe, a New Storm Over Takeover Rules - Draft Law Faces Changes That Some Argue Make Mergers More Difficult, Wall St. J., Dec. 5, 2000, at A21.

n82. Maier-Reimer, supra note 70, at 242.

n83. Bergstr<um o>m et al., supra note 28, at 509.

n84. Common Position, supra note 14, at Article 5(1), (C 23) at 5 (emphasis added).

n85. Id. at Article 5(5), (C 23) at 5.

n86. Michael J. Barclay & Clifford G. Holderness, Private Benefits From Control of Public Corporations, 25 J. Fin. Econ. 371 (1989).

n87. See Eddy Wymeersch, The Mandatory Bid: A Critical View, in EUROPEAN TAKEOVERS LAW AND PRACTICE 351, 357 (Klaus Hopt et al. eds., 1992).

n88. Ronald J. Gilson, The Case Against Shark Repellant Amendments: Structural Limitations On The Enabling Concept, 34 Stan. L. Rev. 775, 798 (1982).

n89. Gordon, supra note 72, at 222; see generally La Porta, supra note 30.

n90. Interview with Jeffrey Gordon, Professor, Columbia University Law School, in New York, NY (May 2001). (Derivative law suits are rare and individual shareholder suits are hampered by the lack of contingency fees in Germany.)

n91. Proposal for a 13[su'th'] European Parliament and Council Directive on Company Law Concerning Takeoever Bids, Article 3(1), 1996 O.J. (C 162) 5 [hereinafter 1996 Proposal].

n92. Although the Thirteenth Directive may allow for expropriation if, after factoring in expropriation, the offering price is still "equitable."

n93. Bergstr<um o>m et al., supra note 28, at 517.

n94. Id. at 513.

n95. Wymeersch, supra note 87, at 361.

n96. See Ian Ayres, Analyzing Stock Lock-ups: Do Target Treasury Sales Foreclose or Facilitate Takeover Auctions?, 90 Colum. L. Rev. 682 (1990); Stephen Fraidin & Jon D. Hanson, Toward Unlocking Lockups, 103 Yale L.J. 1739 (1994).

n97. See Common Position, supra note 14, at (C 23) at 7.

n98. See, e.g. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985); see also City Capital Assoc. v. Interco Inc., 551 A.2d 787, 798 (Del. Ch. 1988).

n99. Common Position, supra note 14, at Article 9(1), 2001 O.J. (C 23) at 7 (emphasis added).

n100. Id.; see also 1996 Proposal, supra note 91, at Article 8(a), 1996 O.J. (C 162) at 8.

n101. 1996 Proposal, supra note 91, at Article 8(a), 1996 O.J. (C 162) at 8 (This provision represents one of the most significant changes since publication of the original framework in 1996, which originally required "prior authorization" of defensive measures, but did not specify the timing of such authorization).

n102. Article 7(1) mandates that Member States may establish rules for the period of acceptance where such period is between two and ten weeks. Common Position, supra note 14, at (C 162) at 6.

n103. See generally Davies, supra note 58.

n104. See Lee, supra note 49, at 145.

n105. The academic literature refers to the ability of a target corporation to adopt a poison pill on short notice, even after an offer, as a "shadow pill." For example, in Delaware, since management may adopt a poison pill at any time, even after the offer has been received, a prospective acquirer still must negotiate with the target's management as if a poison pill already was in place.

n106. A preemption right gives all existing shareholders the right to buy stock from the corporation on a pro rata basis before such stock is issued to the public. As a result, the dilution of such issuance is minimized, neutralizing the poison pill.

n107. To the extent that definition of "frustration" is left to member states, there is great potential for abuse. Protectionist or nationalistic impulses could easily degenerate into a European "race-to-the-bottom." While such regulatory competition is not a problem per se, it clearly interferes with the desired integration of European markets. See generally Lucian Bebchuk & Allen Ferrel, Federalism and Corporate Law: The Race to Protect Managers From Takeovers, 99 Colum. L. Rev. 1168 (1999).

n108. Lucian Arye Bebchuk, The Case for Facilitating Competing Tender Offers, 95 Harv. L. Rev. 1028, 1034 (1982).

n109. Ronald J. Gilson, Seeking Competitive Bids Versus Pure Passivity in Tender Offer Defense, 35 Stan. L. Rev. 51, 62 (1982).

n110. See Ayres, supra note 96, at 682-718; see generally Fraidin & Hanson, supra note 96.

n111. See Francois Feuillat, European Commission Levels the Battlefield, 139 Corp. Fin. 46 (1996).

n112. See EU Merger Control: Proposed Reforms, 16 Int'l. Fin. L. Rev. 25 (1997) (arguing that the impact of takeovers will be unequal throughout the European Union and among interested parties).

n113. The mandatory bid rule found in Article 5 ensures that the distribution of wealth among shareholders is roughly equal during a change of control. There is no such provision with respect to shareholders and stakeholders.

n114. Downloaded in January 2001.

n115. I further limited the data to transactions that already have been completed or still are pending, where the target company was listed as public, private or as a subsidiary. For the purposes of calculations, I truncated the latter two categories into a single group, denoted "Private." This categorization reflects the similarity in regulation for such acquisitions.

n116. Data on the value of transactions involving private targets is nearly uniformly absent. Data on the value of transactions involving public targets is not consistently available, either across years (ranging from 47 to 80 percent of annual transactions) or across countries (ranging from 53 to 72 percent). The variance is compounded when individual countries are examined on an annual basis.

n117. See European Commission, supra note 6, at 4. M&A activity was measured by the number of M&A transactions, both public and private. Cross-border transactions were double counted, once for the bidder country and once for the target country.

n118. 2000 World Investment Report, 240, U.N. Sales No. 70.E.00.II.D.20 (2000).

n119. This is consistent with the findings of La Porta, et al., supra note 30.

n120. See European Commission, supra note 6, at 4.

n121. 2000 World Investment Report, supra note 118, at 240.

n122. Tender offers in France are dominated by acquisition of stakes under 30 percent, but the remainder of tender offers are evenly distributed from 30 to 100 percent. It is possible that a significant portion of these offers were triggered by the mandatory bid rule, though no such data is available.

n123. See Jenkinson & Mayer, supra note 36, at 10.

n124. Assuming that on average, public companies are larger than private companies.

n125. Data is divided, based on the percentage of the company acquired, in the case of private companies, and the percentage of voting stock acquired, in the case of public companies. For calculation of this table, I required observations to include data for both the "percent acquired" and the "percent held after completion." This constraint reduced the sample size by roughly 20 percent, though the distribution of the deleted observations was roughly equal for all countries.

n126. See Wymeersch, supra note 87, at 363.

n127. This statistic understates the British experience relative to other European nations. In the U.K., fifty-six tender offers resulted in acquisition of full control in the U.K. No other nation had more than six successful tender offers in the same category.