Penn State International Law Review

Volume 7
Number 2 *Dickinson Journal of International Law*

Article 5

1989

An American Perspective on the European Commission's "Amended Proposal for a Council Regulation on the Control of Concentrations Between Undertakings" and its Impact on Hostile Tender Offers

Jeffrey P. Greenbaum

Follow this and additional works at: http://elibrary.law.psu.edu/psilr

Part of the Antitrust and Trade Regulation Commons, Business Organizations Law Commons, and the International Law Commons

Recommended Citation

Greenbaum, Jeffrey P. (1989) "An American Perspective on the European Commission's "Amended Proposal for a Council Regulation on the Control of Concentrations Between Undertakings" and its Impact on Hostile Tender Offers," *Penn State International Law Review*: Vol. 7: No. 2, Article 5.
Available at: http://elibrary.law.psu.edu/psilr/vol7/iss2/5

This Article is brought to you for free and open access by Penn State Law eLibrary. It has been accepted for inclusion in Penn State International Law Review by an authorized administrator of Penn State Law eLibrary. For more information, please contact ram6023@psu.edu.

An American Perspective on the European Commission's "Amended Proposal for a Council Regulation on the Control of Concentrations Between Undertakings" and its Impact on Hostile Tender Offers

Jeffrey P. Greenbaum*

I. Introduction

In preparation for the unified internal market of 1992,[1] the European Community is taking steps to regulate the anticipated onslaught of corporate reorganizations, mergers and acquisitions that the additional competitive pressures of the unified market are likely to produce. One aspect of this preparation is the Amended Proposal for a Council Regulation on the Control of Concentrations[2] between

* Jeffrey P. Greenbaum, A.B. Brown University, 1981, J.D. University of Michigan, LL.M. European University Institute, 1987, Associate, Dilworth, Paxson, Kalish & Kauffman. The author would like to thank J. Bart DeLone, Alessandra Gianelli, Justin Klein and Harriet Koren for their assistance in writing this article.

[1] For various studies and perspectives on 1992 and the European Community, *see, e.g.*, the following publications of the Commission of the European Communities: *The Economics of 1992, European Economy No. 35*, Brussels, 1988; *Creation of a European Financial Area, European Economy No. 36*, Brussels, 1988; *Research on the "Cost of Non-Europe"*, Brussels, 1988: Vol. 1, *Basic Studies: Executive Summaries*; Vol. 2, *Studies on the Economics of Integration*; Vol. 3, *The Completion of the Internal Market: A Survey of European Industry's Perception of the Likely Effects*; Vol. 4, *The "Cost of Non-Europe": Border-Related Controls and Administrative Formalities — An Illustration in the Road Haulage Sector*; Vol. 5, *The "Cost of Non-Europe" in Public Sector Procurement*; Vol. 6, *Technical Barriers in the EC: An Illustration by Six Industries*; Vol. 7, *The "Cost of Non-Europe": Obstacles to Transborder Business Activity*; Vol. 8, *The "Cost of Non-Europe" for Business Services*; Vol. 9, *The "Cost of Non-Europe" in Financial Services*; Vol. 10, *The Benefits of Completing the Internal Market for Telecommunication Equipment, Services in the Community*; Vol. 11, *The EC 92 Automobile Sector*; Vol. 12, *The "Cost of Non-Europe" in the Foodstuffs Industry*; Vol. 13, *Le "count de la non-Europe": des produits de construction*; Vol. 14, *The "Cost of Non-Europe" in the Textile-Clothing Industry*; Vol. 15, *The "Cost of non-Europe" in the Pharmaceutical Industry.*

[2] A Concentration shall be deemed to occur where:

(a) two or more undertakings merge; or

(b) - one or more persons already controlling at least one undertaking, or

- one or more undertakings acquire, whether by purchase of shares or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more undertakings.

See infra note 4, at Art. 3 § 1(a) and (b).

Undertakings[3] ("the Proposal").[4] The Proposal was submitted by the European Commission ("Commission") to the European Council on April 25, 1988. A Revised Edition was recently submitted on December 19, 1988. The Proposal provides, in part, that in the event that an undertaking merges with or acquires one or more undertakings, prior notification must be given to the Commission. Notification gives the Commission the opportunity to assess the anticompetitive aspects of the concentration during a lengthened period of evaluation. Thus, the Commission will have the information necessary to decide before the effective date whether the proposed combination is compatible with the "common market" (compatibility is defined by the Proposal in terms of typical antitrust concerns) or whether it might weaken the international competitiveness of European industry.[5]

The American Hart-Scott-Rodino Antitrust Improvements Act of 1976[6] ("Act"), in its premerger notification sections, is quite similar to the parallel provisions of the Proposal.[7] Like the proposal, the Act provides for the prior notification of mergers and acquisitions to the Premerger Notification Department of the Federal Trade Commission and the Antitrust Division of the Justice Department. The purpose of the Act's premerger notification provisions is to allow the analysis of possible anti-competitive effects of proposed combinations. The Act contains no explicit goal of promoting competition.

The implications of both the Act and the Proposal extend beyond anti-trust regulations; they affect numerous aspects of the complex world of corporate interaction, including the hostile tender offer — a most dramatic form of corporate transfer.[8] Both can purpose-

[3] The term "undertaking" in this context encompasses all forms of corporate organization.

[4] O.J. EUR. COMM. (No. C 130) 4 (1988) (February version); O.J. EUR. COMM. (No. C. 6407) (1989) (Final Revised Version).

[5] The Proposal, unlike its American counterpart, provides that combinations may become acceptable taking into account "the competitiveness of the sectors concerned with regard to international competition." The Proposal states in Article 2, § 3:

> Concentrations which create or strengthen a position as a result of which the maintenance or development of effective competition is impeded in the common market or in a substantial part thereof shall be declared incompatible with the common market unless authorized on the ground that their contribution to improving production and distribution, to promoting technical or economic progress or to improving the competitive structure within the common market outweighs the damage to competition. *In this respect, the competitiveness of the sectors concerned with regard to international competition and the interests of consumers shall be taken into account.* (emphasis added)

[6] 15 U.S.C. §§ 15c-15h, 16, 18a (1976).

[7] A comparison between the investigative capabilities provided by the Civil Investigative Demand of the Act (15 U.S.C. §§ 1311-14 (1976)) and the Proposal's Requests for information (Art. 10) are beyond the scope of this article.

[8] The hostile tender offer is becoming an increasingly important form of corporate interaction in the international context. *See, e.g.*, Goelzer, Mills, Gersham and Sullivan, *The Role of the U.S. Securities and Exchange Commission in Transnational Acquisitions*, 22 INT.

fully or inadvertently (and perhaps disproportionately) favor either the tender offeror or incumbent management in the battle for control of a corporation. Regulation in this area necessarily implicates the ultimate (American) goal of shareholder protection. This article, therefore, will discuss the scope of the Proposal and its American counterpart and will analyze their impact on hostile tender offers.

II. Scopes of Application

The Proposal's scope of application is far more restricted than the scope of the Act. The tests and criteria under the Proposal and its American counterpart create this difference.

A. Proposal Criteria

A combination must meet the monetary threshold of the Proposal before the combination is subject to its regulation.[9] A concentration does not have a Community dimension unless the worldwide gross sales are at least 1 billion ECU[10] and the aggregate communitywide gross sales of at least two of the undertakings is more than 100 million ECU.[11]

B. Act Criteria: 3 Part Test

In contrast, the Act has a three-part test, each part of which must be met before the Act applies.[12] The first prong, the "Com-

LAW. 615, 616 (1988).

[9]

> (1) This Regulation shall apply to all concentrations having a Community dimension as defined in paragraph 2, whether or not they fall within the scope of Article 85 or Article 86.
>
> (2) For the purposes of this Regulation, a concentration has a Community dimension where:
>
> (a) the aggregate worldwide turnover of all the undertakings concerned is more than one thousand million ECU, and
>
> (b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than one hundred million ECU,
>
> unless each of the undertakings concerned achieves more than three quarters of its aggregate Community-wide turnover within one and the same Member State.

The corresponding provision in the February proposal required that concentrations have a supranational Community dimension as defined in geographical terms; i.e., where at least two of the undertakings involved had their principal field of community activities in a different Member State of the European Community or at least one undertaking had substantial operations in other Member States.

[10] As of February 17, 1989, the ECU was worth $1.136, N.Y. Times, Feb. 19, 1989, § F, at 20.

[11] Where more than 75% of the community-wide turnover occurs within one Member State, the concentration is not within the scope of coverage of the Proposal. Article 1, § 2.

[12] Except as exempted pursuant to subsection (c) of this section, no person shall acquire, directly or indirectly, any voting securities or assets of any other person, unless both persons (or in the case of a tender offer, the acquiring person) file notification pursuant to rules under subsection (d)(1) of this section and the waiting period described in subsection (b)(1) of this section has expired, if —

merce Test," is met if either the acquiring person or the acquired person is engaged in commerce or in any activity affecting commerce.[13] The administrative rules promulgated pursuant to the Act define "commerce" as trade or commerce among the several states, with foreign nations or between the District of Columbia or any territory of the United States.[14] This standard is extremely broad; few transactions meeting the other threshold requirements will fail to meet this test.

The second jurisdictional test is based on the size of the person. This test considers the size of both the acquiror[15] and acquiree. Essentially, this test is met when the manufacturer-acquiree has assets or annual net sales[16] of $10,000,000 and the acquiror has assets or annual net sales of $100,000,000 or more, when a non-manufacturing acquiror has total assets or annual net sales of $100,000,000 or more. Alternatively, the test is met when the securities of a company

> (1) the acquiring person, or the person whose voting securities or assets are being acquired, is engaged in commerce or in any activity affecting commerce;
>
> (2) (A) any voting securities or assets of a person engaged in manufacturing which has annual net sales or total assets of $10,000,000 or more are being acquired by any person which has total assets or annual net sales of $100,000,000 or more;
>
> (B) any voting securities or assets of a person not engaged in manufacturing which has total assets of $10,000,000 or more are being acquired by any person which has total assets or annual net sales of $100,000,000 or more; or
>
> (C) any voting securities or assets of a person with annual net sales or total assets of $100,000,000 or more are being acquired by any person with total assets or net sales of $10,000,000 or more; and
>
> (3) as a result of such acquisition, the acquiring person would hold —
>
> (A) 15 per centum or more of the voting securities or assets of the acquired person, or
>
> (B) an aggregate total amount of the voting securities and assets of the acquired person in excess of $15,000,000.

15 U.S.C. § 18a(a) (1984).

[13] 15 U.S.C. § 18(a)1 (1984).

[14] 16 C.F.R. § 801.1(1); 15 U.S.C. § 12; 15 U.S.C. § 44.

[15] The acquiring person is the "ultimate parent entity" (i.e., entity not controlled by any other entity. 16 C.F.R. § 801.1(a)(3) (1978)), including all the entities it directly or indirectly owns or controls, that will have beneficial ownership of the assets or voting securities to be acquired. The term "control" (as used in the terms "control(s)," "controlling," "controlled by," and "under common control with") means:

> (1) Either:
>
> (i) Holding 50 percent or more of the outstanding voting securities of an issuer or
>
> (ii) in the case of an entity that has no outstanding voting securities, having the right to 50 percent or more of the profits of the entity, or having the right in the event of dissolution to 50 percent or more of the assets of the entity; or
>
> (2) Having the contractual power presently to designate 50 percent or more of the directors of a corporation, or in the case of unincorporated entities, of individuals exercising similar functions.

16 C.F.R. § 801.1(b) (1978).

[16] The Proposal does not differentiate between manufacturing and non-manufacturing entities. Under the Act, for non-manufacturing acquirees, the $10 million figures is based only on total assets. For manufacturing acquirees, either total assets or annual net sales are considered.

with annual net sales or total assets of $100,000,000 are acquired by persons with total assets or annual net sales of $10,000,000.

The third and final test relates to the size of acquisition. Thus, the Act applies where the acquiring person either acquires 15%[17] of the voting securities or assets or (b) the aggregate amount of voting securities and assets of the acquired person exceeds $15 million.[18] Even though all three tests must be met to invoke the provisions of the Act, it has applicability to a tremendous number of transactions.

C. *Comparison of Scopes of Application*

While the Act has been criticized because too many transactions are subject to its notification requirements,[19] the Proposal

[17] In addition the notification requirements are also triggered by incremental acquisitions to 25% and 50% of the voting securities. 16 C.F.R. § 801.1(h) (1978).

[18] There is, however, a "minimum dollar value exemption" which alters the prior thresholds. If the acquiror received 15% of the voting securities or assets and as a result of the acquisition holds assets valued at less than $15 million or voting securities controlling directly or indirectly entities having annual net sales or total assets of less than $25 million, the acquisition is exempt from the Act's notification requirements.

[19] Note that the Act, unlike the Proposal, excludes a number of transactions from its coverage. Although, for example, the exclusion for acquisition of goods or realty is rather broad, on the whole, the Act's coverage is still generally much more limited in its scope of application. For a discussion of the goods exemption, *see* Hayman, *The Goods or Realty Exemption to Premerger Notification Under the Hart-Scott-Rodino Antitrust Improvements Act*, 17 U. SAN FRANCISCO L. REV. 477 (1983). The Act enumerates eleven categories of exempt persons and acquisitions. Moreover, under the Act, the Federal Trade Commission, with the concurrence of the Assistant Attorney General, may promulgate regulations that exempt other classes of persons, acquisitions, transfers, or transactions "not likely to violate the anti-trust laws." The rationale for these exemptions is that they are either considered to pose no substantive antitrust problems or are already regulated under advanced antitrust review. In addition, the inclusion of some of these categories might have wreaked havoc with the national economy. AXINN FOGG & STOLL, ACQUISITIONS UNDER THE HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT 201 (1984).
15 U.S.C. § 18a(c) states:

> The following classes of transactions are exempt from the requirements of this section —
>
> (1) acquisitions of goods or realty transferred in the ordinary course of business;
>
> (2) acquisitions of bonds, mortgages, deeds of trust, or other obligations which are not securities;
>
> (3) acquisitions of voting securities of an issuer at least 50 per centum of the voting securities of which are owned by the acquiring person prior to such acquisition;
>
> (4) transfers to or from a Federal agency or a State or political subdivision thereof;
>
> (5) transactions specifically exempted from the antitrust laws by Federal statute;
>
> (6) transactions specifically exempted from the antitrust laws by Federal statute if approved by a Federal agency, if copies of all information and documentary material filed with such agency are contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General;
>
> (7) transactions which require agency approval . . .;
>
> (8) transactions which require agency approval . . . if copies of all information and documentary material filed with any such agency are contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General at least 30 days prior to the consummation of

leaves numerous transactions unregulated. The sheer minimum size necessary to trigger coverage is somewhat daunting. In the United States, antitrust concerns could arise within certain markets or market segments at far lower economic levels. In addition, if an American company with no prior Community exports were trying to enter the Community Market by acquiring a primarily national product, even though the combined value of this acquisition could be worth billions of dollars, it would not be subject to regulation. Furthermore, transactions that are more likely to involve primarily a single Member State or a major company of only one Member State, are left unregulated at the community level.

By contrast, the Act's Commerce Test is far broader. The Proposal, by its *de facto* exclusion of primarily national activities, leaves open the possibility of additional Member State regulation of concentrations. Thus, the Proposal may promote Member State autonomy but possibly at the expense of uniformity in regulation, lower administrative costs and greater security on the part of corporations; in the vacuum left by the Proposal, various conflicting national enactments may be promulgated.[20]

> the proposed transaction;
>
> (9) acquisitions, solely for the purpose of investment, of voting securities, if, as a result of such acquisition, the securities acquired or held do not exceed 10 per centum of the outstanding voting securities of the issuer;
>
> (10) acquisitions of voting securities, if, as a result of such acquisition, the voting securities acquired do not increase, directly or indirectly, the acquiring person's per centum share of outstanding voting securities of the issuer;
>
> (11) acquisitions, solely for the purpose of investment, by any bank, banking association, trust company, investment company, or insurance company, of (A) voting securities pursuant to a plan of reorganization or dissolution; or (B) assets in the ordinary course of its business; and
>
> (12) such other acquisitions, transfers, or transactions, as may be exempted [by the Federal Trade Commission].

[20] Note, however, the Member States of the European Community retain far more power than their American counterparts. Any legislation at all in this area may be with the understanding of significant national control and the corresponding differences in national legislation. Thus, Article 20, § 3 provides, "[M]ember States may take appropriate measures where necessary to protect legitimate interests other than those pursued by this Regulation, provided that such interests are sufficiently defined and protected in domestic law and that such measures are compatible with other provisions of Community Law." The ability of Member States to enact such measures was not made explicit in the February Proposal.

Moreover, Article 18, § 2 states:

> 2. The Commission shall carry out the procedures set out in this Regulation in close and constant liaison with the competent authorities of the Member States, which may express their views upon those procedures. It shall obtain the views of the competent authorities of the Member States which show that they are directly concerned by the concentration, in particular with a view to the application of Article 8(2).

The Revised Version of the Proposal also strenthened the position of the Member States in this regard by requiring the Commission to obtain the views of the competent authorities of the Member States where the Commission finds that the concentration is compatible with the Common Market. Accordingly, the Revised version also provides in Article 8, § 2 that "[I]n such a case, the Commission may also empower Member States which are directly concerned

III. Treatment of Hostile Tender Offers

A more profound difference occurs in the treatment of hostile tender offers. Tender offers have a number of valuable effects; they allow the reallocation of resources to their highest valued use, improve efficiency and competition, scales of production, technical capacities, permit redeployment of assets to more profitable uses (all synergistic-gains),[21] provide economic gains to shareholders,[22] allow inefficient management to be replaced, and provide incentives to incumbent management to perform well enough to keep stock prices high.[23] Target management, however, may adopt tactics which in some cases do not impact negatively on shareholders.[24] The possibility remains that management may be acting primarily to entrench itself. Moreover, the difficulties of proving such entrenchment (on account of, *inter alia*, the protection afforded by the "Business Judgment Rule")[25] may actually encourage management in this regard.

A. Treatment Under the Act

The Act was drafted in recognition of the importance of not "tipping the balance of regulation either in favor of management or in favor of the persons making the takeover bid." The Act's mandatory acquisition waiting period (time after which an acquisition or merger has been notified but is forbidden to take effect) was

by the concentration to apply their national legislation on competition in order to ensure conditions of effective competition in local markets within their respective territories."

[21] *See, e.g.*, Mitchell and Lehn, "*Do Bad Bidders Become Good Targets*," Office of Economic Analysis, Securities and Exchange Commission, 28-29 (August 25, 1988); Antitrust Guidelines for International Operations, 58 Fed. Reg. 21588 (1988); Note, *The Constitutionality of Second Generation Takeover Statutes*, 73 VA. L. REV. 203, 232 (1987); Bradley, Desai & Kim, *The Rationale Behind Interfirm Tender Offers: Information or Synergy?*, 11 J. FIN. ECON. 183, 184 (1983); Bebchuk, *The Case for Facilitating Competing Tender Offers*, 95 HARV. L. REV. 1028, 1031-32 (1982). *But see*, Lipton, *Corporate Governance in the Age of Finance Corporatism*, 136 U. PA. L. REV. 1, 24 (1987) ("The current wave of takeover activity has caused both raider and target to expend enormous resources on inherently non-productive activity.").

[22] *See, e.g.*, Black & Grundfest, *Shareholder Gains from Takeovers and Restructurings Between 1981 and 1986*, 1 J. APPLIED CORP. FIN. 5, 6 (1988); Jarrell, Brickley, & Netter, *The Market for Corporate Control: The Empirical Evidence Since 1980*, 2 J. OF ECONOMIC PERSPECTIVES 49 (1988).

[23] *See, e.g.*, Antitrust Guidelines, 58 Fed. Reg. 21588 (1988); Gilson, *A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers*, 33 STAN. L. REV. 819, 841-42 (1983); Easterbrook & Fischel, *The Proper Role of Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1173-74 (1981); Fischel, *Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers*, 57 TEXAS L. REV. 1, 5 (1978).

[24] *See, e.g.*, Bradley & Rosenzweig, *Defensive Stock Repurchases*, 99 HARV. L. REV. 1377, 1414-17 (1986); Macey & McChesney, *A Theoretical Analysis of Corporate Greenmail*, 95 YALE L.J. 13, 47-48 (1985).

[25] *See, for example*, Shamrock Holding Inc. v. Polaroid Corporation, 1989 WL 1156 (Del. Ch. 1989); Unocal Corporation v. Mesa Petroleum Co., 493 A.2d 946, 954-55 (Del. Ch. 1985).

promulgated with this goal of neutrality in mind.[26]

Under the Act, an acquiring corporation making a cash tender offer must wait only fifteen days after notification before the acquisition can take place.[27] This short period of time is essential to the success of hostile tender offers. Otherwise, with a prolonged period of notice, management is given so much advanced warning that takeovers cannot succeed. Delay[28] is a potent weapon of management in a tender offer fight. Delay allows management to devise various counter-measures with varying impacts on the transaction; i.e., these include management's ability to develop special voting plans unfavorable to potential acquirors ("poison pills")[29] sell attractive company assets (the "crown jewels");[30] find bidders it views more favorably ("white knights");[31] repurchase its own stock;[32] provide premium payments in reacquiring stock from the acquirors ("greenmail");[33] announce dividend increases; stock splits; issue additional shares; acquire other companies to create an antitrust violation for the acquiror; create Employee Stock Option Plans to put votes in the hands of friendly shareholders;[34] and bring litigation to challenge the offer.[35] Furthermore, delay allows target management the time to

[26] *Supra* note 19, AXINN, FOGG & STOLL, ACQUISITIONS, at 51.

[27] The process may, however, be delayed 10 days (in the case of a cash tender offer) by an information request to the target corporation. 15 U.S.C. § 18a(e)2 (1984).

[28] Bebchuk, *supra* note 19, at 1054, sustains that there may be some benefits from delay because it allows competing offers that are desirable for both shareholders and society. Bebchuk, however, recognizes that in order for a delay to produce these competitive benefits, management must be prevented from adopting obstructionist tactics or using a competitive offer to avoid a takeover altogether or keeping itself entrenched.

[29] For recent cases in which the Supreme Court of Delaware ordered the removal of poison pills, *see* City Capital Associates Limited Partnership v. Interco Inc., 551 A.2d 787 (1988); Grand Metropolitan Public Limited Co. v. Pillsbury Co., Nos. 10319, 10323 (Del. Ch. Dec. 16, 1988) (WESTLAW Allstate Library, Del. file); Mills Acquisition v. MacMillan Inc., Nos. 415-16 (Del. Super. Nov. 2, 1988) (WESTLAW Allstates library, Del. file). *See also, Poison Pills as Negatiating Tool: Seeking a Cease-Fire in the Corporate Takeover Wars,* 1987 COLUM. BUS. LAW 459, 463-64 (1987); Helman & Junewicz, *A Fresh Look at Poison Pills,* 42 BUS. LAW 771 (1987).

[30] House Comm. on Energy and Commerce, Equity in Foreign and Domestic Credit, Credit and Tender Offer Reform, H.R. Rep. 1028, 98th Cong. 2d Sess. 7 n.8 (1984); Cottle v. Storer Communication, 849 F.2d 570 (11th Cir. 1988).

[31] Gillette Co. v. RB Partners, 693 F. Supp. 1266, 1271 (D. Mass. 1988); Mobil Corporation v. Marathon Oil Company, 669 F.2d 366, 367-68 (6th Cir. 1981), 455 U.S. 982 (1982).

[32] This may be accomplished through a "Dutch Auction" where management tries to buy out the bidder, *e.g.*, Pennwalt Corporation v. Centaur Partners, Civ. Act. No. 88-5146, slip. op. at 3-4 (Feb. 10, 1989, J. Gawthrop).

[33] Hartnett, *Greenmail: Can the Abuses be Stopped,* 80 NW. U. L. REV. 1271 (1986); Note, *Greenmail: Targeted Stock Repurchases and the Management Entrenchment Hypothesis,* 98 HARV. L. REV. 1045 (1988).

[34] *See* Brecher, Lazarus & Gray, *The Function of Employee Retirement Plans as an Impediment to Takeovers,* 38 BUS. LAW. 503, 510 (1983). *See also* Shamrock Holding Inc. v. Polaroid Corporation, Nos. 10075, 10079 (Del. Ch. Jan. 6, 1989) (WESTLAW, All States Library, Del. file).

[35] For an analysis critical of target litigation, *see* Rosenzweig, *Target Litigation,* 85 MICH. L. REV. 110 (1986); *but see* Jarrell, *The Wealth Effects of Litigation by Targets: Do Interests Diverge in a Merge?,* 28 J. L. & ECON., 151, 174-75 (April 1985).

attempt to persuade local legislators to promulgate or accelerate applicable anti-takeover laws.

B. Coordination with the Williams Act

The Act and its timing provisions are, to a large extent, coordinated with the Williams Act, 15 U.S.C. §§ 78m(d)(e), 78 n(d)(f)[36] which regulates the tender offer process in the United States.[37] Congress intended to protect investors by promulgating the Williams Act regulations.[38] The Williams Act requires that bidders make full and fair disclosure to investors of the terms and conditions of their offers and imposes several requirements.[39] The Securities and Exchange Commission, the American agency charged with administering the Williams Act, has also adopted a number of requirements to insure the equal treatment of all investors in tender offers.[40]

[36] LIPTON & STEINBERG, TAKEOVERS AND FREEZEOUTS, PRACTICAL IMPACT OF THE ANTITRUST LAWS ON TAKEOVERS, § 7.02(5)(b)(ii) (1988).

[37] In 1968 Congress passed the Williams Act in response to the increased use of cash tender offers in corporate acquisitions. Prior to that time, the Federal securities laws did not cover these transactions.

[38] As stated in Edgar v. MITE, 457 U.S. 624 (1982):

> [i]t is also crystal clear that a major aspect of the effort to protect the investors was to avoid favoring either management or the takeover bidder . . . . [t]he disclosure provisions originally embodied [in the Senate Bill] "were avowedly pro-management in the target company's efforts to defeat takeover bids." . . . But Congress became convinced "that takeover bids should not be discouraged because they serve a useful purpose in providing a check on entrenched but inefficient management." . . . It also became apparent that entrenched management was often successful in defeating takeover attempts. As the legislation evolved, therefore, Congress disclaimed any "intention to provide a weapon for management to discourage takeover bids . . . and expressly embraced a policy of neutrality." As Senator Williams explained: "We have taken extreme care to avoid tipping the scales either in favor of management or in favor of the person making the takeover bids." . . . This policy of "evenhandedness," . . . represented a conviction that neither side in the contest should be extended additional advantages vis-á-vis the investor, who if furnished with adequate information would be in a position to make his own informed choice.

457 U.S. at 633-34.

[39] The Williams Act, *inter alia*, requires that a tender offeror, for more than 5% of a class of equity securities registered under the Securities and Exchange Commission Act of 1934, upon the commencement of the offer, file with the Securities and Exchange Commission and provide to investors information about the offer. 15 U.S.C. § 78n(d)(1) (1983). The offeror must disclose information about its background and identity; the source and amount of the funds to be used in making the purchase; the purpose of making the purchase, including plans to acquire control, liquidate the company or make major changes in its corporate structure; the extent of the offeror's beneficial or direct holdings in the target company; and contracts, arrangements or understandings concerning the acquisition and financial statements of certain bidders. 17 C.F.R. § 240.14d-100 (1982). Stockholders who tender their shares may withdraw them at any time as long as the tender offer remains open. 17 C.F.R. § 240.14d-7(a) (1982). The bidder must hold the offer open at least 20 business days so that shareholders can adequately consider the disclosures he may have made. 17 C.F.R. § 240.14e-1(a) (1982). Finally, all shares tendered must be offered for the same price; if an offering price is increased, those who have already tendered must receive the benefit of the increase. If the offeror does not buy all the shares tendered, his purchase must be on a pro rata basis. 15 U.S.C. §78n(d)(6)(7) (1983).

[40] *E.g.*, an offer must be made to all holders of the class of securities at which the offer is directed and all security holders must receive the same price. 17 C.F.R. § 240.14d-100

In describing the relationship between the Hart-Scott-Rodino Act and the Williams Act, Representative Rodino discussed the concerns over undue delay that were central to both legislative enactments:

> In the case of cash tender offers, more so than in other mergers, the equities include time and the danger of undue delay. This bill in no way intends to repeal or reverse the congressional purpose underlying the 1968 Williams Act, or the 1970 amendments to that act . . . . Lengthier delays will give the target firm plenty of time to defeat the offer, by abolishing cumulative voting, arranging a speedy defensive merger, quickly . . . negotiating costly lifetime employment contracts for incumbent management. And the longer the waiting period, the more the target's stock may be bid up in the market, making the offer more costly — and less successful. Should this happen, it will mean that shareholders of the target firm will be effectively deprived of the choice that cash tenders give to them: either accept the offer and thereby gain the tendered premium, or reject the offer. Generally, the courts have construed the Williams Act so as to maintain these two options for the target company's shareholders, and the House conferees contemplate that the courts will continue to do so.[41]

C. *Treatment Under the Proposal*

Under the Proposal, however, the Commission normally may commence proceedings one month after the receipt of notification.[42] This period may be even longer if the information is incomplete. The Proposal does not specify the notification duties of a target corporation, but one wonders to what extent incomplete filing can further delay the procedure. In recognition of the special circumstances of hostile tender offers, a special provision has been proposed that allows the merger to go through provided that the acquirer does not exercise the voting rights attached to the shares in question. This is a remarkable provision from an American federal perspective in light of the timing requirements imposed by the United States federal system — primarily the Act and the Williams Act along with the regulations promulgated thereunder — and the previously discussed policies therefor. Such restrictions on the voting rights of an acquiror are incompatible with existing federal legislation.

(1982).

[41] 122 CONG. REC. 30877 (1976).

[42] 457 U.S. at 631 n.6.

D. *State Anti-takeover Statutes*

State anti-takeover statutes have often conflicted with the aforementioned federal policy. In the late 1970s, individual states began to pass laws to hinder hostile tender offers. The state legislation arose from the belief that a successful tender offer often results in a reorganization of the target company which, in turn, leads to plant closings and relocations, reduces local employment and diminishes the local tax base. States moved to protect their local economies. By the time of the Supreme Court's decision in *Edgar v. MITE*[43] in 1982, thirty-seven states had enacted such laws.

In *Edgar v. MITE*, the United States Supreme Court held the Illinois Business Takeover Act unconstitutional, *inter alia*, because it violated the Supremacy Clause. The Illinois Act required a tender offeror to notify the Illinois Secretary of State and the target company of its intent to make a tender offer twenty days before the offer became effective. A target company was defined to include a corporation with Illinois shareholders owning 10% of the class of securities subject to the bid, or two of the following three conditions: (1) either its principal office in Illinois; (2) organized under Illinois law; or (3) 10% of its paid surplus represented within the state. Moreover, the Secretary of State could call a hearing to adjudicate the fairness of the offer. MITE, the tender offeror, did not comply with this law and challenged its constitutionality in federal court. The Supreme Court, in a plurality opinion found preemption by the Williams Act and stated:

> [A] major aspect of the effort to protect the investor was to avoid favoring either management or the takeover bidder . . . . As the legislation evolved, therefore, Congress disclaimed any "intention to provide a weapon for management to discourage takeover bids" . . . and expressly embraced a policy of neutrality. As Senator Williams explained: "We have taken extreme care to avoid tipping the scales either in favor of management or in favor of the persons represented making the takeover bids" . . . . This policy of "evenhandedness" . . . represented a conviction that neither side in the contest should be extended additional advantages vis-a-vis the investor, who if furnished with adequate information would be in a position to make his own informed choice. We, therefore, agree with the Court of Appeals that Congress sought to protect the investor not only by furnishing him with the necessary information but also by withholding from management or the bidder any undue advantage that could frustrate the exercise of an informed choice.[44]

[43] 457 U.S. at 624 (1984).

[44] 457 U.S. at 633-34.

In *CTS v. Dynamics Corp. of America,*[45] the United States Supreme Court faced another state law which appeared to present a far more oblique conflict with the Williams Act. The Indiana law in question applied to any corporation incorporated in Indiana and with: (1) one hundred or more shareholders; (2) its principal place of business, its principal office, or substantial assets within Indiana; and (3) either (a) more than 10% of its shareholders resident in Indiana, (b) more than 10% of its shares owned by Indiana residents, or (c) 10,000 shareholders resident in Indiana. Under the Indiana statute, an entity acquiring control shares did not necessarily receive voting rights. A majority vote of all disinterested shareholders at a special meeting within 50 days was necessary to pass such rights. Management could not enact such a provision. The acquiring party had to convince the disinterested shareholders of his own merits. The acquiring party challenged the constitutionality of this law.

In *CTS*, the Court found that the Williams Act did not preempt the Indiana statute. The Court distinguished the facts of *MITE* and its plurality preemption rationale, but noted that, even applying its rationale, no preemption would have been found:

> [T]he overriding concern of the MITE plurality was that the Illinois statute considered in that case operated to favor management against offerors, to the detriment of shareholders. By contrast, the statute now before the Court protects the independent shareholder against both of the contending parties. Thus, the Act furthers a basic purpose of the Williams Act, "plac[ing] investors on an equal footing with the takeover bidder" . . . .
>
> The desire of the Indiana Legislature to protect shareholders of Indiana corporations from [two tier] coercive offers does not conflict with the Williams Act. Rather, it furthers the federal policy of investor protection.
>
> In implementing its goal, the Indiana Act avoids the problems the plurality discussed in MITE. Unlike the MITE statute, the Indiana Act does not give either management or the offeror an advantage in communicating with the shareholders about the impending offer . . . ."[46]

As long as the basic goal of shareholder protection was still intact, the Indiana Act was allowed to promote its own legitimate interests, such as internal corporate regulation. When the state tilts the playing field too drastically, however, the result may be unconstitutional.[47] Although in *CTS* the Supreme Court implicitly accepted

[45] 107 S. Ct. 1637 (1987).

[46] Note, however, there is support for the proposition that this type of statute does not promote shareholder wealth. *See* Hackl & Testani, *Second Generation Takeover Statutes and Shareholder Wealth: An Empirical Study*, 97 YALE L.J. 1193, 1228 (1988).

[47] For a recent case holding a state statute unconstitutional because of its adverse im-

that hostile tender offers are not a pure benefit, its announced policy of shareholder protection assumes certain benefits inherent in hostile tender offers and the Court did not relinquish control over the offeror/management playing field, nor did it deny the economic benefits of all hostile tender offers.[48] Individual states are not given free reign to distort the federal policies of evenhanded regulation and investor protection.

IV. Theoretical Effects of the Proposal

The goals of the Proposal include improving production and distribution, promoting technical or economic progress, and correspondingly the Commission is requested to analyze the transaction with a view to promoting the ability to compete internationally. Objections to hostile tender offers, however, arise from different concerns, i.e., protection of local interests such as avoiding cultural or social dislocation from plant closings, corporate restructurings, layoffs, etc. In Europe, management is also often seen as a more stable community force than shareholders who are thought to consider only their own pecuniary gains. These concerns, however, conflict to some extent with the stated purposes of the Proposal. Moreover, it is even possible that the long term competitive benefits of takeovers will actually promote these goals. If companies outside the Community act continually to strengthen their competitive capacities, advanced in part by hostile takeovers, with Community companies protected from these synergistic combinations, then the increased competitive abilities of extra-community companies may begin to take jobs away from Community companies as they compete in the same markets.

A. Management Advantages

The Proposal greatly benefits management during the period it takes the Commission to make its decision and the Proposal provides no significant investor protection. The acquiror cannot exercise the voting rights of the stock it acquires until the end of the more lengthy Commission decision period.[49] Even actions which the Commission might approve and that have no anti-competitive effects will be necessarily delayed, e.g., retooling to meet the increased competition of 1992. Accordingly, hostile tender offers may be dramatically discouraged. The shareholders can be prevented from deciding

pact on tender offers, *see* RTE v. Mark IV, Fed. Sec. L. Rep. (CCH) ¶ 93789, 722 (May 6, 1988).

[48] For a discussion of the ramifications of this decision on takeover legislation, *see* Langevoort, *The Supreme Court and the Politics of Corporate Takeovers: A Comment on CTS Corp. v. Dynamics Corp. of America*, 101 HARV. L. REV. 96 (1987).

[49] 15 U.S.C. § 18a(b)(1) (1984).

whether they wish to accept a tender offer. Management, with the possibility of considering only its own interest, is given the luxury of time to defend itself in whatever way it chooses. There may be little consideration for the best interest of the company and shareholders as a whole. Moreover, although the Proposal protects national autonomy by setting threshold limits high enough so that the bulk of national transactions are not subject to community-wide reporting requirements, in these really important acquisitions it potentially precludes Members States from reaping the competitive advantages of beneficial tender offers; hostile acquisitions are discouraged throughout the Community.

Furthermore, the advantage to management is compounded by a second feature of the Proposal. Under the Act, the waiting period begins to run on the date the tender offeror has filed with the Federal Trade Commission and the Justice Department;[50] according to the regulations promulgated pursuant to the Act, the target corporation must file within ten days thereafter.[51] Under the Proposal, the one month period within which the Commission begins its proceedings may run from the day following the receipt of complete information, so that the waiting period does not automatically run from the initial filing. If all the necessary information is not provided by the offeror, the Commission may not be able fully to evaluate the concentration until the target corporation has also filed. There is no requirement that the target corporation file its information within a specific time. Although the acquiring entity may often be able to provide the necessary information, in certain cases the target may be able to delay the completion of a takeover for an undefined, and possibly lengthy amount of time.[52] The acquiror cannot acquire full vot-

[50] 16 C.F.R. § 801.30(b)(2) (1978).

[51] Article 6, § 3 provides:

> As regards notified concentrations, decisions pursuant to paragraphs 1 and 2 shall be taken within a period not exceeding one month, unless the undertakings concerned agree to extend that period. The period of one month shall commence on the day following the date of receipt of the notification, or if the information to be supplied with the notification is incomplete, on the day following the date of receipt of the complete information.

[52] Article 7, § 3 provides: "3. The provisions of paragraphs 1 and 2 shall not impede the implementation of a public takeover or exchange bid which has been notified to the Commission by the date of its announcement, provided that the acquirer does not exercise the voting rights attached to the shares in question." Article 7, § 4 does, however, provide some somewhat uncertain relief in this regard. It states:

> The Commission may, on request, waive the provisions of paragraphs 1 and 2 or the proviso contained in paragraph 3 in order to prevent serious damage to one or more undertakings concerned by a concentration; the waiver may be made subject to conditions and obligations in order to ensure conditions of effective competition."

Moreover, the full scope of the term "voting rights" may not yet be determined. For example, is the call of a special meeting of shareholders an action by written consent or the petition to amend the Bylaws of a corporation the exercise of a voting right?

ing rights until this waiting period is over.

B. Proposal's Silver Lining

The Proposal, however, may solve one former aberration of the hostile tender offer process in the United States. Previously, hostile tender offerors often formed special partnerships in order to avoid the notification and waiting requirements of the Act. Such avoidance was possible, in part, because a partnership was considered its own "ultimate parent entity." Ownership of the partnership was not traced back to the controlling partners. Accordingly, the assets of the partners were not considered in arriving at the Act's threshold requirements. Moreover, accounting principles embodied within the Act's regulation, did not consider assets contributed to the partnership solely for the purpose of making an acquisition as assets of the partnership.[53] Thus, even though huge conglomerates may have formed the partnership and contributed large sums of money for an acquisition, the partnerships might not have been considered to meet the threshold requirements for compliance with the Act. These partnerships, therefore, would have special advantages in certain takeover contests; they would be the only ones not subject to the waiting periods imposed by the Act where the Act's requirements differed from those of the Williams Act. In the Spring of 1987, the definition of control[54] provided by the Regulations was changed to regulate these transactions. Partnerships were no longer considered to be independent entities and controlling partners were required to fulfill the reporting requirements.[55] A hostile corporation, therefore, is not permitted to form a shell partnership for an acquisition to avoid reporting requirements.

The terms employed by the Proposal will also apply to these situations so that a person will not be able to avoid its application through adopting a particular form of corporate organization. The Proposal applies to undertakings which acquire direct or indirect control of the whole or parts of one or more undertakings.[56] The partnership loopholes that previously flourished in the United States

[53] Note, the Act had made a trade-off in this regard. Under the Act, there is an absolute bar on effecting a hostile tender offer until the waiting period is over; the Proposal allows the merger to proceed, subject to the voting rights limitation. The effect of the Act's absolute bar, however, is minimal because the waiting period's duration for the most part lies within the waiting period mandated by the Williams Act itself.

[54] 52 Fed. Reg. 20060-61 (1987).

[55] *See* 16 C.F.R. § 801.1(b), *supra* note 14.

[56] 52 Fed. Reg. 20060-61 (1987). Note also that transactions which appear to be devices effective to avoid reporting requirements are examined for their substantive effects. 16 C.F.R. § 801.90 states: "Any transaction(s) or other devise(s) entered into or employed for the purpose of avoiding the obligation to comply with the requirements of the act shall be disregarded, and the obligation to comply shall be determined by applying the act and these rules to the substance of the transaction."

are closed. The Proposal arrives at its threshold requirements by totalling the turnover of all the undertakings concerned.[57] Thus, the annual net sales of the controlling partners of partnerships is included in the calculations for the threshold figures for triggering notification.[58] Of course, the rather substantial requirements must be met before "control" can be attributed in this manner.

V. Alternative Measures Outside the Proposal

There are several less restrictive measures which the Proposal might adopt in order to avoid favoring management. The first alternative would be to adopt an accelerated decision-making process for hostile tender offers, or perhaps to allow them to go through pending a preliminary answer by the Commission. The Act has favored this first alternative. The disadvantage to this approach is that the Commission loses the ability to evaluate as thoroughly as possible the anti-competitive aspects of the acquisition. A tentative decision which is later reversed may also have significant negative consequences to the companies involved. Moreover, it may take the Commission more time to reach a decision because it must also evaluate if the acquisition helps attain the basic objectives of the Community. Further, the Revised Version of the Proposal is a significant improvement in this regard, as it shortened the Commission's original decisional time period from two months to one month.

A second possibility is to place a freeze on the defensive tactics that management can enact during this waiting period.[59] Management might be prohibited from adopting poison pills, selling the crown jewels, granting greenmail, etc. It may be difficult to legislate against all possible defensive activities since innovative tactics develop quite rapidly in this area. This suggestion, however, would at least reduce management's tremendous advantages; it would not necessarily guarantee the success of a hostile tender offer. While such measures may distort to some extent the terrain of the battle between the offeror and management, neither side would be favored so dramatically.

These two alternatives represent the manner in which the Proposal could be adapted to be consistent with the American policy in this field. Both alternatives promote the ultimate American goal of shareholder protection. Although there are several major negative aspects to hostile tender offers, opposition to these offers by govern-

[57] Article 3, *supra* note 2.

[58] Article 1, *supra* note 9.

[59] In Article VII of its "13th Council Directive On Companies Concerning Takeovers and General Bids," (Jan. 9, 1989), The Commission places several restrictions by the target corporation's board of directors during their tender offer. O.J. EUR. COMM. (No. 64) (1989).

ment entities is more often seen in the United States where states believe they are acting to protect their local interests.[60] Hostile tender offers are not generally attacked because they all interfere with shareholder interests. Thus, a certain balance has been maintained between the tender offerors and target management.

VI. Conclusion

The ultimate stated purpose of the Proposal is not to protect shareholders, but to promote competition. Yet, as with promoting shareholder interests, hostile tender offers are also viewed as a means of reaching this latter aim because of their synergistic possibilities. It is indeed curious that with the avowed goals of increased efficiency and preparing for international competition, the Proposal so significantly disfavors a device whose greatest benefits may lie in this area. The efficiency aspects of takeovers are the very goals the Proposal sets for itself in preparing for 1992. The Proposal contains an inherent conflict between the explicit goal of increased competitive ability and the tacit goal of continued corporate stability. Discouraging all hostile tender offers may promote short term corporate and social stability. It is arguable, however, whether these benefits outweigh the long term potential advantages of increased competitive capacity.

[60] This is explainable, in part, because the management of local corporations may be best able to defend itself through the auspices of local political powers.